

Margaret Tietz Nursing & Rehabilitation Ctr. v Svitlik
2014 NY Slip Op 31744(U)
May 13, 2014
Sup Ct, Queens County
Docket Number: 700326/11
Judge: Howard G. Lane
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ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IA Part 6

MARGARET TIETZ NURSING AND
REHABILITATION CENTER,
Plaintiff,

Index
Number 700326 /11

-against-

Motion
Date January 27, 2014

BARBARA SVITLIK,
Defendant.

Motion Cal. No. 94

Motion Seq. No. 3

The following numbered papers read on this motion by defendant Barbara Svitlik for
leave to file a late motion for summary judgment and, upon granting such leave,
defendant moves for summary judgment in her favor pursuant to CPLR 3212; and cross
motion by plaintiff Margaret Tietz Nursing and Rehabilitation Center (Nursing Home),
for leave to file a late summary judgment motion and, upon granting such leave, plaintiff
moves for summary judgment in its favor pursuant to CPLR 3212.

Table with 2 columns: Description of papers and Papers Numbered. Includes rows for Notice of Motion - Affidavits - Exhibits, Notice of Cross Motion - Affidavits - Exhibits, Answering Affidavits - Exhibits, and Reply Affidavits.

Upon the foregoing papers it is ordered that the motion and cross motion for leave
to file late summary judgment motions are granted. However, the motion is denied and
the cross motion for summary judgment is determined as follows:

This is an action, inter alia, to impose a constructive trust and to set aside an intra-
familial transfer of monies as a fraudulent conveyance. Plaintiff Nursing Home is

attempting to collect on a judgment rendered against Robert Foster and Mary Svitlik on April 6, 2009, in the amount of \$311,017.25 plus interest. Plaintiff alleges that defendant took possession of the assets and income of her mother, Mary Svitlik, rendering her insolvent and concealed Mary Svitlik's income and assets preventing plaintiff from satisfying the judgment. Defendant denies that Mary Svitlik was rendered insolvent by the transfer of \$104,583.92, representing funds which, it is alleged were fraudulently conveyed to defendant. Specifically, this amount was withdrawn from Mary Svitlik's account at North Fork Bank in December 2004. The funds were used to pay off a mortgage on a co-operative apartment owned by defendant. Defendant moves and plaintiff cross-moves for summary judgment in their respective favor. The motion and cross motion are opposed.

Facts

During the time period beginning on March 17, 2005 through September 25, 2007, defendant's mother, Mary Svitlik resided at the Nursing Home during which time she was a recipient of skilled nursing home care and services provided by plaintiff. Plaintiff submits evidence that, notwithstanding Mary Svitlik's Medicaid approval, an unpaid balance remains outstanding in the amount of \$198,819.77. Plaintiff submits that it had attempted to get defendant's cooperation in paying the amount owed to plaintiff via Mary Svitlik's assets, or by applying for Medicaid coverage. Plaintiff submits that defendant refused to cooperate and did not disclose her receipt of Mary Svitlik's funds in the amount of \$104,583.92, in an attempt to hide this fraudulent transfer from discovery.

Thereafter, plaintiff commenced a guardianship proceeding which resulted in, inter alia, the appointment of a guardian. The guardian obtained the Medicaid coverage, allegedly without any help and/or participation from defendant who failed to disclose information about Mary Svitlik's assets.

On or about April 6, 2009, the Court granted judgment in favor of plaintiff and against Mary Svitlik and Robert Foster, jointly and severally, in the amount of \$311,017.25, plus interest for monies due and owing as a result of care and services rendered by plaintiff to Mary Svitlik during her stay at the Nursing Home (Schulman, J.). The action was for breach of contract and for fraudulent conveyance. Plaintiff submits that the residence of Mary Svitlik was sold in or about September, 2005, and the proceeds were to be used to pay for the health care of Mary Svitlik. Instead, the assets disappeared allegedly by actions taken by defendant and her brother, Robert Foster. Mary Svitlik died on or about May 22, 2009.

After many attempts to enforce the judgment, plaintiff learned that defendant had

transferred and received Mary's assets. Specifically, it was discovered in May 2011, from Capital One Bank, f/k/a North Fork Bank and North Fork Bank Mortgage Company that defendant was involved in the fraud as well. Documents produced by these two entities revealed that Barbara transferred and received at least \$104,583.92 of Mary's monies and used the same to satisfy the mortgage held by then-North Fork Bank, secured by defendant's co-op located at 75-05 210th Street, Apartment 2-J, Oakland Gardens, New York 11364. Plaintiff thereafter commenced the instant action.

Discussion

Defendant and plaintiff demonstrated "good cause" for the late filing of the late motion and cross motion, respectively, for summary judgment (*see* CPLR 3212[a]; *Brill v City of New York*, 2 NY3d 648 [2004]) by showing that the note of issue had been filed while there was significant discovery outstanding (*see Kung v Zheng*, 73 AD3d 862 [2010]; *Abdalla v Mazl Taxi, Inc.*, 66 AD3d 803 [2009]; *McArdle v 123 Jackpot, Inc.*, 51 AD3d 743 [2008]; *Sclafani v Washington Mut.*, 36 AD3d 682 [2007]; *Kunz v Gleeson*, 9 AD3d 480 [2004]).

The motion by defendant for summary judgment in her favor, however, is denied. A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see Zayas v Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2d Dept. 1996]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]). Aside from her conclusory statement that the monies received from Mary Svitlik was not a fraudulent conveyance, defendant presents no evidence establishing entitlement to judgment as a matter of law.

As the party seeking summary judgment, defendant has the initial burden of establishing its defense sufficiently to warrant an award of judgment in its favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The burden is not met by a conclusory denial of responsibility (*see Vasquez v City of New York*, 210 AD2d 156 [1994]); nor is the burden met by pointing to gaps in plaintiffs' proof

(see *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615 [1992]). Rather, a defendant must affirmatively demonstrate the merit of its defense “ ‘ * * * by tender of evidentiary proof in admissible form * * * ’ ” (*Zuckerman v City of New York supra*, 49 NY2d at 562, quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067–1068 [1979]). In the case of a defendant who denies that there was a fraudulent conveyance, the burden is met when the defendant supports its summary judgment motion with affirmative evidence that the transfer at issue was made for valuable consideration and did not render the transferor insolvent (see e.g. *Matter of CIT Group/Commercial Servs., Inc. v 160–09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 302 [2006]; *Matter of American Inv. Bank v Marine Midland Bank*, 191 AD2d 690, 691 [1993]).

A claim for fraudulent conveyance pursuant to Debtor and Creditor Law § 273 requires proof that property was transferred without fair consideration and that the conveyance rendered the transferor insolvent (see Debtor and Creditor Law § 272, *et seq.*; *Zanani v Meisels*, 78 AD3d 823 [2d Dept 2010]; *Kreisler Borg Florman General Constr. Co., Inc. v Tower 56, LLC*, 58 AD3d 694, [2d Dept 2009]; *Grace Plaza of Great Neck, Inc. v Heitzler*, 2 AD3d 780 [2d Dept 2003]; *Joslin v Lopez*, 309 AD2d 837 [2d Dept 2003]; *St. Teresa's Nursing Home v Vuksanovich*, 268 AD2d 421 [2d Dept 2000]).

Debtor and Creditor Law § 271 [1] provides that “[a] person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.” Debtor and Creditor Law § 275 provides that, “[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.” In order “[t]o satisfy a claim of fraudulent conveyance under section 275 of the New York Debtor and Creditor law, the [moving party] must establish that (1) the conveyance was made without fair consideration; and (2) that it will thereby render the conveying party insolvent or that the property remaining after the conveyance is insufficient to pay the conveying party's probable liabilities on existing debts as they become mature” (*In Re Flute*, 310 BR 31, 56 [U.S. Bankruptcy Court, SD NY 2004]).

Under the Debtor and Creditor Law, a heavier burden is placed on the defendant to demonstrate fair consideration when the transaction involves family members and was made without any tangible consideration (see *Kitty v Flute*, 310 BR 31, 52-53 [Bank SD NY 2004]; *Wall Street Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]). The burden to demonstrate the giving of fair consideration shifts to the intra-family transferee where there is no tangible consideration (*Gavenda v Orleans County*, 2002 U.S. Dist

LEXIS 25515, [WD NY 2002]). “Courts view intrafamily transfers made without any signs of tangible consideration as presumptively fraudulent” (*United States v Alfano*, 34 F Supp 2d at 845). Moreover, “the element of insolvency is presumed when a conveyance is made without fair consideration and the burden of overcoming such presumption is on the transferee” (*Gavenda* at 5, citing *Alfano* at 845; see also *Capital Distrib. Servs. v Ducor Express Airlines, Inc.*, 440 F Supp 2d 195, 203 [EDNY 2006]).

Plaintiff, in support of the within cross motion for summary judgment, has submitted, inter alia, an affidavit from Yitzy Hollander, the Director of Margaret Tietz Nursing and Rehabilitation Center, the verified complaint and defendant’s answers; the admission agreement; bank records relating to Mary Svitlik’s bank account; a report of a court evaluator dated May 14, 2007; and a determination by the Commissioner of the Department of Health dated July 25, 2007, which granted Mary Svitlik’s application for Medicaid. Plaintiff asserts that in December 2004, \$104,583.92 was transferred out of Mary Svitlik’s account, a mere few months before Mary became a resident of the nursing home in March 2005, and anticipated that she would accrue medical bills for the cost of her nursing home care. In addition, plaintiff asserts that the withdrawn monies were used to pay off defendant’s mortgage at that time, for no consideration.

To the extent that plaintiff relies upon its verified complaint, in order to establish its claims for fraudulent conveyance in violation of the Debtor and Creditor Law, said complaint consists of allegations and does not constitute prima facie evidence of a fraudulent conveyance. Plaintiff submits an invoice for the amount owing to plaintiff for the care and services plaintiff provided to Mary Svitlik in the amount of \$198,819.77. Plaintiff submits that although Mary Svitlik was approved for Medicaid, Medicaid did not pay the entire amount owing and the \$198,819.77 remains outstanding. It is undisputed that no tangible consideration was given for the subject intra-family transfer. Therefore, the element of insolvency is presumed here where the conveyance was made without fair consideration unless the defendant can overcome such presumption with evidence that the conveyor was not thereby rendered insolvent (see *Gavenda supra*; *Capital Distrib, supra*).

Defendant has not submitted bank statements or any financial records with regards to the accounts of Mary Svitlik. Indeed, other than the conclusory statement by defendant that Mary was not rendered insolvent by the transfer, there is no evidence as to the remaining value of Mary Svitlik’s accounts. Interestingly, it appears from the approval of Mary Svitlik for Medicaid shortly thereafter that she was in fact rendered insolvent. In any event, the element of insolvency is presumed here, as the conveyance was made without fair consideration, and defendant has not presented evidence that said conveyance did not render the decedent insolvent. Accordingly, the motion by defendant for summary

judgment in her favor is denied; and the branch of the cross motion by plaintiff which is for summary judgment in its favor on the claims for fraudulent conveyance, is granted.

The branch of the cross motion which is for summary judgment on the claim for an account stated is denied as plaintiff has not asserted such a cause of action in the pleadings.

The branch of the cross motion which is for summary judgment on its claim for unjust enrichment is denied. It is well settled that a claim for unjust enrichment does not lie where it duplicates or replaces a conventional contract claim (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). Thus, damages for unjust enrichment may not be sought “where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties” (*Clark–Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). On the other hand, “where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract” (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012] [internal quotation marks omitted]).

Here, the unjust enrichment claim is precluded by the existence of the contract between plaintiff and Mary Svitlik. It is undisputed that the parties considered the agreement to be an enforceable contract. Moreover, that agreement squarely covers the very subject matter of the unjust enrichment claim, i.e., the fees to which plaintiff is entitled with respect to services provided to Mary Svitlik. It is of no consequence that Barbara Svitlik was not a signatory to the contract (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv. denied* 19 NY3d 804 [2012] [“there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim”]).

The four elements of a constructive trust are: (1) a confidential or fiduciary relationship; (2) a promise; (3) a transfer in reliance on the promise; and (4) unjust enrichment (*see Sharp v Kosmalski*, 40 NY2d 119 [1976]; *Church of God Pentecostal Fountain of Love, MI v Iglesia De Dios Pentecostal, MI*, 27 AD3d 685 [2006]; *Nastasi v. Nastasi*, 26 AD3d 32 [2005]; *Thomas v Thomas*, 70 AD3d 588 [2010] *citing Sharp Kosmalski*, 40 NY2d at 122). Plaintiff failed to meet its burden of showing its entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any triable issue of fact (*see Lowy v Bobker*, 15 AD3d 548 [2005]). Furthermore, the complaint fails to allege any of the elements of a constructive trust cause of action, i.e. a confidential or fiduciary relationship, a promise, and a transfer in reliance on that promise (*see Sharp*, 40

NY2d at 121). Therefore, the branch of the cross motion which seeks summary judgment on the claim for a constructive trust is denied.

The branch of the cross motion which is for the recovery of attorneys fees in accordance with the agreement is granted (*see Debtor and Creditor Law § 276-a; Ford v Martino*, 281 AD2d 587 [2001]; *Apple Bank for Sav. v Contaratos*, 204 AD2d 375 [1994]). The matter is to be submitted to a hearing to determine the amount of an attorney's fee to be awarded to the plaintiff on its causes of action pursuant to Debtor and Creditor Law § 276-a (*see Kreisler Borg Florman Gen. Constr. Co., Inc. v Tower 56, LLC*, 58 AD3d 694, 696-697 [2009]; *Ford v Martino*, 281 AD2d at 588; *Marine Midland Bank v Murkoff*, 120 AD2d 122, 129 [2001]).

Conclusion

The branch of the motion which is for leave to serve a late summary judgment motion is granted. However, the motion by defendant for summary judgment in her favor is denied.

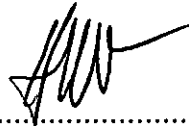
The branch of the cross motion which is for leave to serve a late cross motion for summary judgment is granted. The branch of the cross motion which is for summary judgment in plaintiff's favor on the claims for fraudulent conveyance, is granted.

The branch of the cross motion which is for summary judgment on the claim for an account stated is denied. The branch of the cross motion which is summary judgment on the claim for unjust enrichment is denied. The branch of the cross motion which seeks summary judgment on the claim for a constructive trust is denied.

The branch of the cross motion which is for the recovery of attorney's fees is granted to the extent that a hearing is scheduled for Tuesday, July 15, 2014, 2:15 PM, IAS Part 6, courtroom 24, 88-11 Sutphin Blvd., Jamaica, New York. Counsel are directed to contact the clerk of Part 6 at 718-298-1113 on Monday, July 14, 2014, to ascertain the availability of the court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: May 13, 2014



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Howard G. Lane, J.S.C.

