Tappan Golf Drive Range, Inc. v Tappan Prop., Inc.
2014 NY Slip Op 33196(U)
December 4, 2014
Supreme Court, New York County
Docket Number: 651368/2010
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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TAPPAN GOLF DRIVE RANGE, INC.,

Index No. 651368/2010

Plaintiff,

DECISION AND JUDGMENT AFTER TRIAL

-against-

TAPPAN PROPERTY, INC., NALUCO, INC., d/b/a AMERICAN FLYER, J&G REALTY GROUP, LLC, AMERICAN ELITE, INC., JOSEPH LIANG and GRACE LIANG,

Defendants.

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BARBARA JAFFE, JSC:

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On November 18, 2014, a bench trial was held before me on plaintiff's action seeking to hold the defendants jointly and severally liable for an amended judgment obtained in *Tappan Golf Drive Range, Inc., v Tappan Property, Inc.*, Index No. 603134/02, and to void as fraudulent, conveyances of security deposited by plaintiff with Tappan Property, Inc., to the extent necessary to satisfy the judgment. The sole witnesses were all called by plaintiff. They were plaintiff's president, Myung S. Koh, defendants' accountant David Lion, defendant Joseph Liang, and defendant Grace Liang.

I. PERTINENT PROCEDURAL BACKGROUND

On February 24, 2009, a money judgment was entered in favor of plaintiff against defendant Tappan Property, Inc., (Tappan Property) in the amount of $659,928.28, arising from

defendant's commingling of plaintiff's security deposit with its own funds in contravention of General Obligations Law § 7-103(1).

Having had no success in recovering from the defendant, on or about August 25, 2009, plaintiff commenced this action by which it seeks to hold the defendants Liang personally liable for the judgment, and for alleged fraudulent conveyances of the assets of Tappan Property. By decision and order dated December 3, 2009, the Appellate Division, First Department, modified the February 2009 judgment. (*Tappan Golf Range, Inc. v Tappan Prop.. Inc.*, 68 AD3d 440 [1st Dept 2009], Index No. 603134/2002). (P's Exh. 10).

The sole issue before me is whether Joseph Liang and/or Grace Liang are personally liable for the underlying judgment by virtue of having participated in the conversion of the security deposit (*see Hinkle Iron Co. v Kohn*, 229 NY 179 [1920] [violation by trustee of trust relation subjects trustee to personal liability by way of compensation or indemnification; defendant, with knowledge of all facts, participated in and accomplished conversion and misappropriation, thus liable to plaintiff for amount converted]; *Jeffrey v J.I.M Mgmt Co., Inc.*, 31 Misc 3d 141[A], *2, 2011 NY Slip Op 50822[U] [App Term, 9th & 10th Jud. Dists 2011] [same; applied to conversion of security deposit]), and by having fraudulently conveyed assets to other family-owned entities in order to avoid returning the security deposit to plaintiff.

II. FACTS

In 1980 or 1981, defendant Joseph Liang formed Naluco, Inc. and owned it with his wife, defendant Grace Liang. He made the business decisions for Naluco, which distributed travel luggage.

On August 15, 1986, American Flyer Travelware, Inc. was formed, with Joseph as

President and sole shareholder.

Defendant Tappan Property was incorporated in 1990. Its sole shareholder was Naluco, and its business was the ownership and leasing of a golf driving range. By letter dated August 8, 1996 and signed on behalf of Joseph as President of Tappan Property, Joseph advised plaintiff that "pursuant to the terms of General Obligations Law Article 7," the $350,000 security deposit was deposited into a certificate of deposit. (Pl. Exh. 5). When the certificate matured on September 6, 1996, Joseph deposited the proceeds into one of his company accounts, after having obtained a possessory judgment for the driving range. (P's Exh. 10). He never returned the security deposit to plaintiff.

In 2001, Tappan Property sold the golf driving range for $8 million. Joseph wrapped up its business by paying outstanding bills from the Tappan Property business account, leaving $463,000 after the payment of $936,751 due in taxes.

Naluco's 2002 tax return reflects assets of $2.5 million, gross sales of $4.3 million, a gross profit of $1.3 million, and a net operating loss of $359,312. (Pl. Exh. 9D).

American Flyer became inactive on December 31, 2004. Its liabilities consisted of a $303,000 debt to its sole shareholder, Joseph. In 2005, it loaned $6,541 to Naluco. (Pl. Exh. 9C).

J & G Realty, Inc., was formed on May 16, 2005. Joseph and Grace are its sole shareholders.

Naluco ceased operations in 2005, when American Elite Inc. was formed and took over Naluco's travel luggage business. The Liangs's son Parkson is President of American Elite, which he owns with his two siblings. (Pl. Exh. 9D). American Elite's 2006 tax return reflects a gross income of $6.4 million, of which $5.3 million constituted the cost of goods, $751,820

business expenses such as payroll and rent, and other costs totaling $1.6 million, yielding a loss for that year. Naluco had given American Elite a loan of $421,592. (P's Exh. 9A).

Tappan Property was dissolved on April 29, 2009. (Pl. Exh. 4A). Joseph is now retired, living on social security and a small amount of savings which he uses to travel.

III. CONTENTIONS

Plaintiff maintains that in commingling its security deposit, Joseph and Grace personally converted it, thereby rendering them personally liable to plaintiff for it. It also argues that Joseph and Grace are personally liable for the additional reason that all of Tappan Property's corporate assets were fraudulently conveyed with the intent of avoiding the return of the security deposit, thereby entitling it to levy an execution on Joseph and Grace Liang's property in an amount sufficient to satisfy the judgment.

Defendants generally deny that the Liangs are personally liable or that any conveyances were fraudulent.

IV. ANALYSIS

At a bench trial, the "plaintiff has the burden of proving his case by a fair preponderance of the credible evidence." (*Rinaldi & Sons v Wells Fargo Alarm Serv.*, 39 NY2d 191, 196 [1976]; *see also Michaels v Agricultural Ins. Co.*, 38 NY2d 793, 794 [1975]). Accordingly, plaintiff here bears the burden of proof, except as to defendants' affirmative defenses and counterclaims. (*See* CPLR 3018 [b], 3211[a][5]).

A. Security deposit

Pursuant to GOL § 7-103(1), a landlord is prohibited from commingling security deposit monies with its own funds. (*Tappan Golf Range, Inc. v Tappan Prop.. Inc.*, 68 AD3d 440 [1st

Dept 2009]). The commingling constitutes a conversion. (*LeRoy v Sayers*, 217 AD2d 63, 68 [1st Dept 1995]; *Jeffrey*, 31 Misc 3d 141[A]). A landlord owes its tenant a fiduciary duty not to commingle a security deposit, and any corporate officer "who knowingly participate[s] with a fiduciary in a breach of the corporation's fiduciary duties" is personally liable for the resulting damages. (*23 East 39th St. Mgt. Corp. v 23 East 39th St. Developer, LLC*, 32 Misc 3d 1222[A], 2011 NY Slip Op 51390[U] [Sup Ct, New York County 2011], and authority cited therein).

Here, I find that plaintiff proved, by a preponderance of the credible evidence, namely, Joseph's admission that the security funds were deposited into an account held by another of his companies, that the security deposit was converted. (*See Jeffrey*, 31 Misc 3d at 2 [complaint improperly dismissed where plaintiff's security deposit commingled, permitting finding that it was converted]; *23 East 39th St. Mgt.*, 32 Misc 3d 1222[A] [defendant's concession that it failed to segregate security deposit established violation of GOL § 7-103 and conversion]). The evidence also established that Joseph personally participated in the commingling. I thus find that Joseph may be held personally liable for the conversion. No evidence was presented, however, that Grace participated in depositing the check.

B. Debtor & Creditor Law § 275

Although plaintiff offered evidence of the Liang's formation of several companies, it failed to offer sufficient evidence establishing that the transfers among the companies were fraudulent.

Accordingly, it is hereby

ADJUDGED, that judgment on the first cause of action is granted in favor of plaintiff as against defendants Tappan Property, Inc., and Joseph Liang, jointly and severally in the amount

of $659,928.28, with interest at the statutory rate from September 6, 1996 until entry of judgment as calculated by the Clerk plus costs and disbursements as taxed by the Clerk upon the submission of a proper bill of costs, and that the plaintiff have execution therefor; it is further

ORDERED, that judgment on the second cause of action is denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Enter:

Barbara Jaffe, JSC

DATED: December 4, 2014
New York, New York