

Garcia v Estate of Scott
2015 NY Slip Op 30567(U)
March 2, 2015
Sup Ct, Bronx County
Docket Number: 301087/2012
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

TERESA GARCIA,

Plaintiff,

-against-

Estate of COLIN SCOTT, WINSTON J. SCOTT
as Administrator of the Estate of COLIN SCOTT
and WINSTON J. SCOTT, Individually and
Personally,

Defendants.

INDEX NUMBER: 301087/2012

Present:

HON. ALISON Y. TUITT

Justice

The following papers numbered 1-3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of 4/28/14

Notice of Motion-Exhibits, Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, plaintiff's motion for summary judgment, attachment of property, attorney's fees and punitive damages is denied for the reasons set forth herein.

The within action was commenced by plaintiff seeking to avoid an alleged fraudulent transfer of the real property located at 834 East 222 Street, Bronx, New York from Colin Scott, deceased, to defendant Winston J. Scott, his son. On March 31, 2007, plaintiff was struck by a motor vehicle owned and operated by Colin Scott while she was a pedestrian crossing a street. Colin Scott was 92 years old at the time of the accident. Plaintiff sustained severe personal injuries as a result of the accident and she instituted a personal injury action against Colin Scott. The case proceeded to trial and plaintiff was awarded a verdict on April 21,

2010. At the time of the verdict, Colin Scott was still alive. Shortly after the verdict, he died and no administrator was appointed for his estate, frustrating plaintiff's ability to obtain judgment. On July 13, 2011, Winston J. Scott, became the voluntary administrator of the estate. A judgment against the Estate of Colin Scott was signed on December 15, 2011 in the amount of \$1,729,450.00. Plaintiff alleges that shortly after being served with the Summons and Complaint in the underlying action, Colin Scott fraudulently transferred his interest in his property to Winston Scott to avoid plaintiff accessing his assets.

Plaintiff brought this action on February 2, 2012 against the Estate of Colin Scott and Winston J. Scott, individually and personally, to reform a 2007 deed which plaintiff alleges was a fraudulent conveyance pursuant to New York Debtor and Creditor Law (hereinafter "DCL") §§276, 275 and 273, to attach the property, the only asset of the Estate, pursuant to C.P.L.R. §6212 (a) for damages based upon the fraud, for punitive damages and attorney's fees based upon DCL§276-a. DCL §276 provides that "[e]very conveyance made and every obligation incurred with actual intent... to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." "Even prior to the adoption of Section 276, the existence of an actual intent to defraud present or future creditors made a conveyance of property with that intent void as to such creditors." Altman v. Finkel, 52 N.Y.S.2d 634 (1st Dept. 1945), *aff'd*, 295 N.Y.651 (1945). "Section 276 of the Debtor and Creditor Law provides that every conveyance made with the Actual intent to hinder, delay or defraud creditors is fraudulent and void. In this connection the actual intent to defraud consists of deception intentionally practiced to frustrate the legal rights of another. A prime example of this type of fraud is where a debtor transfers his property to another while retaining the use thereof so as to continue in business free from the claims of creditors." Southern Industries, Inc. v. Jeremias, 411 N.Y.S.2d 945 (2d Dept. 1978). The requisite intent required by §276 need not be proven by direct evidence, but may be inferred from the circumstances surrounding the fraudulent transfer. Steinberg v. Levine, 774 N.Y.S.2d 810 (2d Dept. 2004); Marine Midland Bank v. Murkoff, 508 N.Y.S.2d 17 (2d Dept. 1986). In determining whether a conveyance was fraudulent, the Courts will consider "badges of fraud", which are circumstances that accompany fraudulent transfers so commonly that their presence give rise to an inference of actual intent to defraud. Steinberg, supra; Pen Pak Corp. v. LaSalle National Bank of Chicago, 658 N.Y.S.2d 407 (2d Dept. 1997). "Badges of fraud" include lack or inadequacy of consideration, family, friendship, or close associate relationship between transferor and transferee, the debtor's retention of possession, benefit, or use of the property in question, the existence of a

pattern or series of transactions or course of conduct after the incurring of debt, and the transferor's knowledge of the creditor's claim and the inability to pay it. Steinberg, supra; Pen Pak Corp., supra.

Plaintiff alleges that on June 13, 2007, "shortly after being served with the Summons and Complaint" in an attempt to defraud future creditors, namely the plaintiff Teresa Garcia, defendant Colin Scott fraudulently transferred his entire ownership of his residence known as 834 East 222nd Street, Bronx, New York to his son Winston J. Scott. However, the Summons and Complaint in the underlying personal injury action was not filed with the Court until July 20, 2007. Furthermore, the affidavit of service shows that Colin Scott was served on July 26, 2007 by affixing a copy of the Summons and Complaint to his door and mailing a copy to his address on July 27, 2007. Therefore, plaintiff's contention that Colin Scott fraudulently transferred title to his son *after* being served is inaccurate. It is true that the deed was not filed until August 7, 2007, and by that time defendant had been served with the Summons and Complaint. While it is true that the decedent and his son, knowing that he had been involved in a motor vehicle accident in which someone was injured, could have conjured up the scenario that Colin Scott could be sued for negligence, given that he struck a pedestrian and his advanced age of 92 years old, and could have anticipated not having enough automobile insurance coverage to pay for the damages, and could have decided to transfer the property even before a lawsuit was commenced, just in case. While this scenario could very well be true, there is also much speculation and surmise which prevents the grant of summary judgment. Plaintiff argues Colin Scott's illicit transfer of his interest in real property less than three months after he ran over the plaintiff was obviously calculated to deplete his assets and was part of his overall effort to defraud his future creditors, specifically the plaintiff herein. However, there is no evidence to show that defendants knew that a lawsuit would be filed where the plaintiff could go after Colin Scott's personal assets.

The Court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film

Corp., supra.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the “burden of production” (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

As argued by plaintiff, there are legitimate “badges of fraud” here. Colin Scott owned the property, but transferred ownership while still living and using the property for his own benefit after the transfer of title. There was no change in his use of the property after the transfer and he continued to reside at the premises until his death. His daughter who lived at the premises before the transfer, continued to live at the premises after the transfer. Winston J. Scott admits that post-transfer, his father continued to collect the rent generated by a tenant on the property. As a result of the 2007 deed, Winston J. Scott did not transfer any money to his father and there was no consideration for the transfer. Prior to the signing of the deed, Winston J. Scott was aware that his father had struck a pedestrian. He was also aware that his father only had insurance on his vehicle in the amount of \$50,000/\$100,000.

Notwithstanding these legitimate arguments, plaintiff is unable to show with evidentiary proof in admissible form “the transferor’s knowledge of the creditor’s claim and the inability to pay it”, i.e, that Colin Scott knew of Teresa Garcia’s claim at the time of the transfer. At the time the deed was prepared, plaintiff had not yet filed her underlying personal injury action and defendant had not been served. Therefore, it cannot be said, as a matter of law, that Colin Scott knew of plaintiff’s claim at the time of the transfer. While a reasonable person may have predicted that a lawsuit was a likely event, it cannot be said here that is the reason that Colin Scott transferred titled of his property to his son.

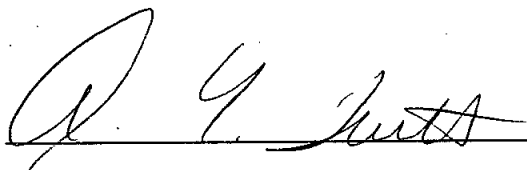
The Court notes the inadequacies in defendant’s opposition; Winston J. Scott’s statements that he gave money to his father for the upkeep of the property and that he and his father opened joint checking and savings accounts to make it easier for him to help his father with the properties expenses are not supported by

any documentary evidence. He offers no bank statements, deposit slips, cancelled checks or any other corroborating documentary evidence to support his self-serving statements

When the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Accordingly, plaintiff's motion for summary judgment and the related reliefs must be denied.

This constitutes the decision and Order of this Court.

Dated: 3/2/15

A handwritten signature in cursive script, appearing to read "A. Y. Tuitt", written over a horizontal line.

Hon. Alison Y. Tuitt