

UNI-RTY Corp. v New York Guangdong Fin., Inc.

2015 NY Slip Op 31026(U)

June 16, 2015

Supreme Court, New York County

Docket Number: 157621/12

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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UNI-RTY CORPORATION and GOLDEN PLAZA
PARTNERSHIP,

Petitioners,

Index No. 157621/12
Motion Date:4/15/15
Mot. Seqs.:008&009

-against-

DECISION AND ORDER

NEW YORK GUANGDONG FINANCE, INC.,
GUANGDONG BUILDING INC., THE ESTATE OF
JOSEPH CHU, ALEXANDER CHU, CENTER
PLAZA, LLC, EASTBANK, N.A., CHINA
CONSTRUCTION BANK, AGRICULTURAL BANK
OF CHINA,

Respondents.

SHERIFF OF NEW YORK CITY,

Additional Respondent.

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Ellen M. Coin, J.:

In this proceeding brought pursuant to CPLR 5225 (b) and Debtor and Creditor Law (DCL) § 273-a, petitioners UNI-RTY Corporation and Golden Plaza Limited Partnership bring two motions. In motion sequence 008, petitioners move pursuant to CPLR 409 (b) for summary judgment directing respondents China Construction Bank and Agricultural Bank of China (together, Banks) to turn over to petitioners monies which petitioners claim the Banks received from respondent New York Guangdong

Finance, Inc. (Guangdong). In motion sequence 009, petitioners move pursuant to CPLR 5225 (b) and DCL § 273-a for summary judgment against respondents Estate of Joseph Chu and Alexander Chu (together, the individual Chu respondents) (1) to compel the public sale of certain common stock of nonparty United Orient Bank (Orient Bank), which was allegedly transferred from Guangdong to the individual Chu respondents, and to turn over the proceeds of that sale to petitioners; (2) to compel the public sale of certain real property (property) which was allegedly transferred to the individual Chu respondents in derogation of DCL § 273-a, and to turn over the proceeds to petitioners; and (3) if the sale of these assets does not satisfy petitioners' judgment, to turn over to petitioners the income and profits of the property, as determined after an accounting. The two motion sequences are consolidated for determination.

Petitioners' Motion for Summary Judgment Against Banks (008)

Petitioners obtained a judgment in the sum of \$20,547,020.55 against Guangdong in a federal action. Petitioners claim that their efforts to collect on the judgment have been thwarted by the Banks, due to what they claim are

fraudulent transfers made by Guangdong to the Banks when Guangdong allegedly repaid antecedent debts to the Banks in the sum of \$7.66 million.

The alleged payments to the Banks followed the settlement of two actions brought by the Banks, acting as shareholders of Guangdong, against Guangdong, and also against the controlling shareholders of Guangdong, identified as the "Chu Group" and the "Wong Group" by the Banks. Memorandum in opposition, at 3. The action against the Wong Group was brought in Texas, and the action against the Chu Group was brought in New York (underlying actions).

The underlying actions sought damages for Guangdong's failure to repay loans made by the Banks to Guangdong, and also alleged specific wrongdoings committed against Guangdong by the Wong and Chu Groups. The underlying actions were brought both derivatively and in the Banks' individual capacities.

In the settlement agreements entered into in each of the underlying actions, the Wong and Chu Groups agreed to pay certain sums directly to the Banks, and not to Guangdong, despite the derivative language in the complaint. Guangdong received nothing in settlement of the underlying actions, and

the only obligations shouldered by Guangdong therein were to execute releases in both actions and, in the Texas action, to execute an assignment of the loans to the Wong Group.

Petitioners maintain that the payments to the Banks, as provided for in the settlement agreements, amounted to fraudulent conveyances under the New York Debtor and Creditor Law (DCL), which have allegedly rendered Guangdong insolvent and unable to satisfy the judgment. In a prior motion, this court dismissed petitioners' claims brought pursuant to DCL § § 273, 274 and 275, leaving petitioners with claims pursuant to DCL § § 273-a and 276.

The present motions are brought pursuant to CPLR 409 (b). A motion brought pursuant to CPLR 409 (b) is to be adjudicated in the same manner as a motion for summary judgment (e.g. *White v Scrofani*, 161 AD2d 398,400 [1st Dept 1990]). Summary judgment is appropriate only when there are no issues of fact for a fact finder to decide (*Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept], *affd* 62 NY2d 938 [1984]). On a summary judgment motion, the papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion (*Barr v County of Albany*, 50

NY2d 247, 254 [1980]; *Byrnes v Scott*, 175 AD2d 786, 786 [1st Dept 1991]). The burden is upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law. A failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The issue for this court to determine is whether petitioners have established the criteria for setting aside transfers allegedly made to the Banks, pursuant to DCL § 273-a.¹ Under DCL § 273-a,

"[e]very conveyance made without fair consideration when that person making it is a defendant in an action for money damages or a judgment is such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

In order to prevail on such a claim, petitioners must establish three elements, as follows: "(1) that the conveyance was made without fair consideration; (2) that at the time of transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and (3)

¹Petitioners are not moving pursuant to DCL § 276.

that a final judgment has been rendered against the transferor that remains unsatisfied" (*Fischer v Sadov Realty Corp.*, 34 AD3d 632, 633 [2d Dept 2006]).

Petitioner has failed to establish the second element in the statute, that the transferor was a defendant in an action for money damages. Here, the transfers were made in settlement of individual and derivative actions the Banks brought against Guangdong and its officers and directors. However, the settlement agreements, on their face, do not provide for Guangdong to make any transfer other than the assignment of loans previously made to it by the Banks. Under the settlement agreements, the Wong and Chu Groups made all payments.

Petitioners have failed to supply evidentiary proof to show that the transfers were actually made by the judgment debtor, Guangdong. Thus, the petitioners have failed to make their prima facie case to show the second element of DCL § 273-a, and summary judgment must be denied.

The first element of DCL § 273-a is that a transfer was made without fair consideration. Fair consideration may exist where an antecedent debt is satisfied (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*,

25 AD3d 301, 302 [1st Dept 2006]). Even assuming that petitioners were able to establish that it was Guangdong's assets that were transferred to the Banks, petitioners have failed to show that the transfers made pursuant to the settlement agreements were not in satisfaction of the Banks' loans to Guangdong or were not made in good faith with respect to non-insider creditors.

Here, the only fact that has been established is the existence of petitioners' federal court judgment against Guangdong. Contrary to petitioners' contention, the Court's prior order did not find that the petitioners had established a prima facie case, but instead, that the papers submitted by both sides demonstrated the existence of numerous factual disputes, requiring post-judgment enforcement discovery and summary determination pursuant to CPLR 409, or trial pursuant to CPLR § 410. The issues of fact have not been resolved.

In addition, insofar as petitioners claim that this court made factual findings which are law of the case, they are reminded that the "doctrine is inapplicable where, as here, a summary judgment motion follows a motion to dismiss, as the scope of review is distinct [internal citation

omitted]" (*Riddick v City of New York*, 4 AD3d 242, 245 [1st Dept 2004]).

To the extent that petitioners base their motion on a claim that the Banks have previously made "admissions" as to liability in their papers on the prior motion, the court notes that the Banks merely argued in the alternative in their briefs. These arguments are not admissions. Accordingly, petitioners' motion for a judgment against the Banks is denied.

Summary Judgment Against the Individual Chu Respondents (009)

Petitioners claim that there is no dispute that the individual Chu respondents obtained an interest in certain shares in Orient Bank from Guangdong, in a fraudulent conveyance under DCL § 273-a. They also claim that there is no dispute that the individual Chu respondents obtained an interest in the property, a building located in Chinatown, in Manhattan, from Guangdong, also as a fraudulent conveyance under DCL § 273-a.

Petitioners cull their arguments from numerous sources, i.e., snippets of documents, testimony and other evidence, some from the underlying actions, in order to establish that no issues of fact preclude judgment against the individual Chu respondents as to their wrongful acquisition of the assets. The

individual Chu respondents respond in kind, claiming that petitioners have "cherry picked" the evidence which they feel will bolster their argument, and, in the effort, have twisted the facts and left out others which do not support summary judgment.

It is impossible at this point to determine the truth as to these matters. The issues are not even remotely conducive to summary determination. The fate of these assets must be left for trial, after discovery, hopefully of a more direct nature.

In accordance with the foregoing, it is hereby

ORDERED that the motion brought by petitioners UNI-RTY Corporation and Golden Plaza Limited for summary judgment against respondents China Construction Bank and Agricultural Bank of China (mot. seq. no. 008) is denied; and it is further

ORDERED that the motion brought by petitioners UNI-RTY Corporation and Golden Plaza Limited for summary judgment against respondents the Estate of Joseph Chu and Alexander Chu (mot. seq. no. 009) is denied.

Dated: June 16, 2015

ENTER:



Ellen M. Coin, A.J.S.C.