

Gatsby Dining, LLC v Geraci
2015 NY Slip Op 31422(U)
July 20, 2015
Supreme Court, Kings County
Docket Number: 502894/15
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

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GATSBY DINING, LLC,

DECISION / ORDER

Plaintiff,

Index No. 502894/15
Motion Seq. No. 1 & 2
Submitted: 6/18/15

-against-

DOROTHY GERACI and SALVATORE GERACI,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Dorothy Geraci's motion to dismiss the complaint or transfer it to Nassau County and plaintiff's cross-motion to dismiss defendant Salvatore Geraci's counterclaim.

Papers	Numbered
Notice of Motion and Exhibits.....	<u>1-5, 6-12</u>
Affirmation in Opposition.....	<u>13</u>
Affirmation in Opposition.....	<u>14</u>
Reply	_____
Other: _____	_____

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendants Dorothy Geraci and Salvator Geraci are sued herein pursuant to §§ 270-276-a of the New York Debtor and Creditor Law. Plaintiff alleges that defendant Dorothy Geraci knew she was about to be sued by plaintiff for business debts in connection with a restaurant in Nassau County, and to avoid her obligations, she fraudulently transferred title on October 10, 2009 to a house in Kings County to her then-husband, defendant Salvatore Geraci, for no consideration. The parties subsequently were divorced. Plaintiff sued both defendants in Suffolk County, but

settled its claims against Salvatore Geraci. Plaintiff obtained a default judgment against defendant Dorothy Geraci in 2012 in the approximate amount of \$651,000.00.

Plaintiff claims in its complaint herein that after the transfer of the house in Brooklyn, Dorothy Geraci had “an unreasonably small capital in her hands,” reflecting the language in NY Debtor and Creditor Law §274. Plaintiff claims defendant Salvatore Geraci was a knowing party to the fraudulent conveyance and was not a bona fide purchaser for value.

The complaint asserts two causes of action. The first is for constructive fraud and seeks to set aside the conveyance as it was made without consideration and to make defendant judgment proof. The second cause of action seems to seek a declaration that the transfer was in violation of the Debtor and Creditor Law, although it is inartfully written, or perhaps a page of the complaint is missing in the motion papers.

It is noted that the law also provides for the possibility of a money judgment against the transferee where the transferee has disposed of the wrongfully conveyed property in some manner which makes it impossible to return. See *Marine Midland Bank v Murkoff*, 120 AD2d122 (2d Dept 1986).

Defendant's Motion

Defendant Dorothy Geraci moves pre-answer to dismiss the complaint, or, in the alternative, to transfer the action to Nassau County.

As regards the venue of this action, defendant made her demand to change venue simultaneously with this pre-answer motion. As such, it is timely. In its opposition papers, plaintiff asserts that the action must remain in Kings County as the action demands a judgment setting aside a conveyance of real property located in

Kings County. Plaintiff has filed a Notice of Pendency against it, citing CPLR § 507.

Plaintiff is correct, and thus this action was properly venued in Kings County.

Defendant next claims the complaint must be dismissed under CPLR §§ 3211(a)(1), (5), (7), (10) and 3015.

CPLR 3211(a)(1) permits dismissal of an action based on documentary evidence. Movant has not annexed anything to her motion which constitutes documentary evidence. She has provided the pleadings in this case and from the Suffolk County Case, a copy of the deed from herself to her husband for the Brooklyn property, a copy of the parties' 2011 Judgment of Divorce and a print-out from the Department of State which demonstrates that plaintiff's principal place of business is in Suffolk County. The affirmation of movant's counsel explains the basis for moving under this section, however, and states that the conveyance of the property was prior to the commencement of the Suffolk action, and that the record from the Suffolk case establishes this prong of the motion by demonstrating this. This argument is not correct. Debtor and Creditor Law § 275 permits an action to set aside as a fraudulent conveyance "every 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." Thus the motion to dismiss on this grounds must be denied.

CPLR 3211(a)(5) permits dismissals of an action barred by, *inter alia*, *res judicata*, collateral estoppel or statute of limitations. None of these bars apply here, and movant thus has not made out a *prima facie* case for this branch of the motion.

Excelsin Capital LLC v Superior Broadcasting Co., 2012 NY Slip Op 30163(u) (Sup Ct Nassau Co 2012). The complaint herein was filed on or about March 15, 2015 and thus was within the six-year statute of limitations. The statute runs from the date of the conveyance, here, October 10, 2009.

CPLR 3211(a)(7) permits a complaint to be dismissed if, considering the allegations in the light most favorable to the plaintiff, it fails to state a cause of action. Movant does not make out a prima facie case for this branch of the motion. Herein, plaintiff claims the conveyance should be set aside as a violation of the NY Debtor and Creditor Law. There is nothing in defendant's motion that supports the conclusion that plaintiff is not entitled to have this issue determined at a trial. In particular, in *Joslin v Lopez*, 309 AD2d 837 (2d Dept 2003), the court explains:

Debtor and Creditor Law § 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Thus, both insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under § 273, and the burden of proving these elements is upon the party challenging the conveyance (see *Matter of American Inv. Bank v Marine Midland Bank*, 191 A.D.2d 690, 595 N.Y.S.2d 537 [1993]; *Marine Midland Bank v Murkoff*, 120 A.D.2d 122, 508 N.Y.S.2d 17 [1986]; *Commercial Trading Co. v Potter Secs. Corp.*, 26 A.D.2d 761, 271 N.Y.S.2d 733 [1966]). Whether the subject conveyance has rendered the debtor insolvent, and whether fair consideration was paid, are generally questions of fact which must be determined under the circumstances of the particular case (see *Matter of American Inv. Bank v Marine Midland Bank*, *supra*; *Wagman v Lagno*, 141 A.D.2d 720, 529 N.Y.S.2d 585 [1988]).

The motion to dismiss on this grounds must be denied:

CPLR 3211(a)(10) permits an action to be stayed from proceeding if the plaintiff failed to name a necessary party. Movant claims plaintiff should have sued a person

named Jack Guarneri, one of the defendants in the Suffolk County case. Movant does not state why this person is a necessary party other than conclusorily saying he is. This prong of the motion must be denied.

Finally, movant claims the complaint must be dismissed under CPLR 3015, as movant erroneously claims “plaintiff has not and cannot plead that the alleged statements upon which plaintiff misplaced [its] reliance were made by or adopted by defendant Dorothy Geraci at any time. This evidences not only the absence of particularity, but also the absence of any factual basis whatsoever for the pleading as required by CPLR 3015.”

It seems movant is claiming that plaintiff has failed to plead its detrimental reliance on defendant’s fraudulent statements with sufficient particularity. However, this is not an action for fraud, and detrimental reliance is not an element of a cause of action for a violation of Debtor and Creditor Law §§ 270 through 276-a. The motion to dismiss on this grounds must be denied.

Plaintiff’s Motion

Plaintiff moves to dismiss defendant Salvatore Geraci’s counterclaim for sanctions for bringing what he claims is a frivolous claim, which is asserted against plaintiff and its principal, as well as to dismiss his affirmative defenses. In opposition, defendant agrees to withdraw his counterclaim as asserted against Mr. Roberto Nicolia individually, without prejudice. As regards the counterclaim asserted against plaintiff, Mr. Geraci’s attorney points out that the court’s decision on the motion in his matrimonial action set the matter down for a hearing due to conflicting affidavits, and that the affidavit he provided in his matrimonial motion referred to his pre-marital

separate property as well. It is unclear how this establishes that his counterclaim has merit. It is also unclear how plaintiff's attorney obtained a copy of an affidavit from a matrimonial court file. Salvatore Geraci argues, in his attorney's affirmation, that the issue of whether Dorothy Geraci's conveyance of the Brooklyn property was fraudulent requires an interpretation of the Management Agreement between plaintiff and Dorothy Geraci. He asserts that Dorothy managed the restaurant for plaintiff, and pursuant to the agreement, the restaurant's bills and taxes were to be paid from sales, not from Dorothy's personal assets. However, Mr. Geraci states in his own affidavit in opposition that in 2010, Dorothy "surrendered operation of the restaurant . . . with a full inventory of food and liquor . . . paid for with Dorothy's personal assets and money loaned to her by myself." This would seem to contradict his attorney's averments. In any event, the default judgment obtained against Dorothy Geraci individually is not subject to dispute herein, as that court found she was personally liable and she has apparently not moved to vacate her default. This action is solely with regard to the conveyance of real property from Dorothy Geraci to Salvatore Geraci.

Defendant Salvatore Geraci's first affirmative defense, that the complaint fails to state a cause of action, is dismissed, for the reasons set forth above, wherein the court concludes the complaint may not be dismissed on this basis.

Defendant's second affirmative defense, that the property was transferred for valuable consideration "due to their marital difficulties" more than a year prior to the commencement of the divorce action, may not be dismissed, as this is the substance of the defendants' defense to the action. As the court points out in *Joslin, supra*, the husband's claim that he conveyed the property in exchange for his wife's promise not to

divorce him "does not constitute 'fair consideration' as defined by Debtor and Creditor Law §272. Herein, whether the divorce judge factored this property into the parties' equitable distribution is an issue for the finder of fact.

Defendant's third affirmative defense, that plaintiff failed to mitigate its damages, is dismissed as not a proper defense in an action to set aside a conveyance so as to permit the plaintiff to enforce a money judgment against the subject real property.

Defendant's fourth affirmative defense, that the action is barred by the statute of limitations, is dismissed for the reasons set forth above.

In conclusion, defendant Dorothy Geraci's motion to dismiss the complaint or transfer it to Nassau County is denied in its entirety and plaintiff's cross-motion to dismiss defendant Salvatore Geraci's counterclaim and his affirmative defenses is granted except as to the defendant's second affirmative defense.

Defendant Dorothy Geraci must answer the complaint within 30 days of service of this order with notice of entry or she will be deemed in default.

This shall constitute the decision and order of the court.

Dated: July 20, 2015

ENTER:



Hon. Debra Silber, A.J.S.C.

Hon. Debra Silber
Justice Supreme Court

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