

<b>Matter of Hearst Mag. v Sacks</b>
2015 NY Slip Op 31854(U)
October 6, 2015
Supreme Court, New York County
Docket Number: 154586/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
Justice

PART 13

In the Matter of the Petition of,  
  
HEARST MAGAZINES: A Division of  
HEARST COMMUNICATIONS, INC.,  
  
Petitioner,

INDEX NO. 154586/2015  
MOTION DATE 09-30-2015  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

For a Judgment Pursuant to CPLR 5225  
and/or CPLR 5227,

-against-

EDWARD SACKS, LESLIE GREENBERG,  
and ROBIN B. SACKS,  
  
Respondents.

The following papers, numbered 1 to 8 were read on this motion confirming a Referee's report directing defendant turnover assets.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3,</u>
Answering Affidavits — Exhibits _____	<u>4-5, 6-7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion brought by Petition is held in abeyance pending limited discovery in this special proceeding as discussed herein, the cross-motion seeking a declaration that the January 11, 2013 judgment has been paid in full will be held in abeyance pending the conclusion of the limited discovery ordered herein, the portion of the cross-motion seeking dismissal of the Petition is denied.

Hearst Magazines - A division of Hearst Communications, Inc. (herein "Petitioner") commenced an action to recover damages for advertisements placed by Leslie Greene, LLC with Petitioner. A judgment in favor of Petitioner and against Leslie Greene, LLC was granted, on default, in the amount of \$42,952.26 and entered on January 11, 2013 (see Petition, Exhibit A, Ind. No. 154021/2012).

In the subsequent collection proceedings, Petitioner subpoenaed Leslie Greenberg as principal of Leslie Greene, LLC seeking financial records. Petitioner moved for a contempt order after Greenberg failed to comply with the subpoenas. The contempt order was granted on default. In May 2014, Greenberg moved by Order to Show Cause for an Order vacating the contempt order. Petitioner cross-moved for a hearing pursuant to Judiciary Law SECTION 773 to determine damages from the contempt by Greenberg, including attorneys' fees, on account of her contempt.

In an Order dated October 27, 2014, Justice Debra A. James granted Greenberg the relief sought in her Order to Show Cause to the extent of vacating the contempt order, and granted Petitioner's cross-motion pursuant to Judiciary Law § 773. Justice James referred the matter to Special Referee Jeremy R. Feinberg to hear and determine the reasonable value of Petitioner's attorney's fees and damages incurred on its application for compliance with the subpoena and restraining order dated May 21, 2013 (see Ind. No. 154021/2012, NYSCEF Doc. No. 126). On March 10, 2015, Special Referee Feinberg issued a determination granting Petitioner \$15,632.92 in reasonable attorney's fees and \$883.42 in disbursements (see Ind. No. 154021/2012, NYSCEF Doc. No. 137).

Petitioner commenced the instant special proceeding seeking to compel third-parties Edward Sacks and Robin B. Sacks along with Greenberg (collectively known herein as "Respondents") to turn over money and/or property of the judgment-debtor Leslie Greene, LLC, believed to be fraudulently transferred to Respondents, post-judgment in the underlying action. Petitioner asserts causes of action for violations of New York Debtor & Creditor Law §§ 273, 273-a, 274, 275, 276, and 276-a, and seeks to set aside the alleged fraudulent transfers made by Leslie Greene, LLC to Respondents pursuant to New York Debtor & Creditor Law § 278.

Respondents served and filed an answer to the petition on July 15, 2015. On that same day, Respondents sent Petitioner a check in the amount of \$43,595.01 allegedly satisfying the January 11, 2013 judgment entered against Leslie Greene, LLC. Respondents also cross-moved for a declaration that the January 11, 2013 judgment and post-judgment interest has been paid in full, and that this special proceeding should be dismissed as moot due to Leslie Greene, LLC's July 15, 2015 payment.

In support of the Petition and in opposition to the cross-motion, Petitioner annexes checks issued by Leslie Greene, LLC to Respondents (see Petition, Exhibit L). All of the checks were issued after the commencement of the underlying action, and a majority of the checks were issued after the January 11, 2013 judgment was entered. Leslie Greenberg received a total of \$268,717.00; Edward Sacks received a total of \$183,247.00; and Robin Sacks received a total amount of \$200,541.66. Petitioner contends that these conveyances were made with the actual intent to defraud and delay Petitioner from collecting on its debt.

In opposition to the cross-motion and in further support of the Petition, Petitioner argues that Leslie Greene, LLC's July 15, 2015 payment does not fully satisfy all of the accrued post-judgment interest on the January 11, 2013 judgment, and that the second judgment dated March 10, 2015 and issued by Special Referee Feinberg in the amount of \$16,849.74 remains outstanding. Petitioner also contends that even if the July 15, 2015 check paid by Respondents to Petitioner was the correct amount, this Petition is not moot. Specifically, the Fifth Cause of Action seeking attorney's fees for this special proceeding due to Respondents violations of the DCL § § 276 and 276-a for alleged transfers made by Leslie Greene, LLC to Respondents with the actual intent to hinder, delay, or defraud Petitioner, remains a viable claim.

In reply to its cross-motion, Respondents argue that they are not liable for any of the subsequent \$16,849.74 judgment because those claims leading to the judgment were brought post-judgment and were new claims. As such, there was no "pending action" as required by DCL § 273-a in relation to the transfers of money from Leslie Greene, LLC to Respondents.

DCL § 273 states 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." To prove a DCL § 273 claim, the plaintiff must establish that "the debtors made a conveyance, that they were insolvent prior to the conveyance or rendered insolvent thereby, and that the conveyance was made without fair consideration" (Wall Street Associates v. Brodsky, 257 A.D.2d 526, 528, 684 N.Y.S.2d 244 [1<sup>st</sup> Dept., 1999]).

DCL § 276 states that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors. "The burden of proof to establish actual fraud under Debtor and Creditor Law § 276 is upon the creditor who seeks to have the conveyance set aside and the standard for such proof is clear and convincing evidence ((U.S. Bancorp Equipment Finance, Inc. v. Rubashkin, 98 A.D.3d 1057, 950 N.Y.S.2d 767, 770 [2<sup>nd</sup> Dept., 2012]).

Petitioner has not established by clear and convincing evidence that Leslie Greene, LLC was insolvent prior to the conveyance or was rendered insolvent after the conveyances, and that the conveyances were made without fair consideration.

DCL § 276-a allows the judgment creditor to receive reasonable attorney's fees in an action or special proceeding brought to set aside a conveyance by the debtor "where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors."

Respondents contend that almost \$650,000.00 paid by Leslie Greene, LLC to Respondents after the commencement of the underlying action were for back-salaries owed, payback loans, interest, and loan repayments owed by Leslie Greene, LLC to Respondents (see Cross-Motion, PP 7-8). However, the Respondents do not offer any proof to support their contention.

The burden of proving that the conveyances in question were fraudulent and made with actual intent to defraud is on Petitioner. The checks submitted in support of the Petition do not definitively prove that the conveyances were made with the actual intent to defraud.

Limited discovery is needed to uncover reasons for the payments made by Leslie Greene, LLC to the Respondents after the underlying action was commenced, and to learn whether these payments were made in exchange for fair consideration, or with actual intent to defraud. Without a finding as to these issues, the court cannot determine whether the conveyance made by Leslie Greene, LLC to Respondents should be set aside pursuant to CPLR § 5225, § 5227, DCL § 273 and § 276 in satisfaction of the \$16,849.74 second judgment. Without the limited discovery, the Court cannot also determine whether Petitioner is entitled to legal fees from Respondents pursuant to DCL § § 273-a and/or 276-a.

Accordingly, it is ORDERED that the decision under Motion Sequence 001 made by Petition is held in abeyance pending the conclusion of the limited discovery ordered herein, and it is further,

ORDERED, that the portion of the cross-motion seeking a declaration that the January 11, 2013 judgment has been paid in full will be held in abeyance pending the conclusion of the limited discovery ordered herein, at which time the matter will be referred to a Special Referee to hear and report the actual amount of the January 11, 2013 judgment including all appropriate post-judgment interest, and it is further,

ORDERED, that the remainder of the cross-motion dismissing the Petition is denied, and it is further,

ORDERED, that the parties appear for a Conference in IAS Part 13 located at 71 Thomas St., Room 210, New York, N.Y. on November 25, 2015 at 9:30 am.

ENTER: MANUEL J. MENDEZ  
J.S.C.

Dated: October 6, 2015

MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION      X NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST       REFERENCE