

Hamilton Equity Group, LLC v Ebony Mktg. Research, Inc.
2016 NY Slip Op 30237(U)
January 21, 2016
Supreme Court, Queens County
Docket Number: 708390/14
Judge: Allan B. Weiss
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MEMORANDUM

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

HAMILTON EQUITY GROUP, LLC as Assignee
HSBC BANK USA, NATIONAL ASSOCIATION,

Plaintiff,

-against-

EBONY MARKETING RESEARCH, INC., et al.

Defendants.

HON. ALLAN B. WEISS

Index No: 708390/14

Motion Date: 9/8/15

Motion Seq. No.: 1

FILED
JAN 22 2016
COUNTY CLERK
QUEENS COUNTY

On April 7, 2003, Ebony Marketing Research, Inc. (Research) executed a business line of credit, pursuant to which HSBC Bank USA, National Association (HSBC) agreed to extend to Research a business line of credit in the amount of \$95,000.00. Research, pursuant to said agreement agreed to repay said amount in accordance with the terms of the Line of Credit Agreement. In connection with said Line of Credit Agreement, Ebony Kirkland executed an unlimited guaranty and security agreement on April 7, 2003, whereby she unconditionally guaranteed full and timely payment when due of any and all indebtedness owed to HSBC. Research also executed a continuing general security agreement on April 7, 2003, whereby it agreed to give HSBC a collateral security interest in certain personal property in order to secure payment of any and all debt owed by Research to HSBC. HSBC approved Research's application for a line of credit on April 7, 2003.

Research made payments in connection with the line of credit until October 1, 2010, when it defaulted in making payment. Ebony Kirkland, as guarantor, and Research thereafter failed to cure the default and make the required payments.

Plaintiff alleges that on January 28, 2011, Ebony Marketing Systems Inc.(Systems) acquired all of Research's property, liabilities, personnel and general business operations.

On February 23, 2011, Ebony Kirkland and Bruce Kirkland conveyed the residential properties located at 173-14 Warwick Crescent, Jamaica, New York, and 147-19 130th Avenue, Jamaica, New York to the Kirkland Irrevocable Trust, for no consideration. The Kirkland daughters, Shaline Kirkland Alston and Kaiela Kirkland Fuentes, were named as Trustees for the administration of said trust.

On July 13, 2011, HSBC executed a limited power of attorney appointing Daniel E. Sarzynski, Vice President of Hamilton in connection with a master asset sale agreement dated September 5, 2008., HSBC assigned the business line of credit agreement dated April 7, 2003 to Hamilton on July 13, 2011, pursuant to an allonge executed by Mr. Sarzynski as attorney in fact for HSBC.

Hamilton commenced an action on May 14, 2012 against Research and Ebony Kirkland in the Supreme Court, Erie County for breach of contract. On January 15, 2013, a judgment was filed against Research and Ebony Kirkland in favor of Hamilton in the sum of \$76,692.02. Said judgment was recorded in the Queens County Clerk's office on February 13, 2013 and in the Bronx County clerk's office on February 15, 2013.

Hamilton commenced the within action by e-filing on November 10, 2014. The first cause of action alleges that Research fraudulently entered into a transaction whereby Systems assumed or purchased all, or a majority of, its assets and liabilities, in order that Research escape its obligations under the line of credit and security agreement; that Systems is the successor in interest to Research; and that Research and Systems therefore are liable for the obligations of Research under the line of credit and Security Agreement and are indebted to Hamilton in the amount of \$76,692.02.

The second cause of action for fraudulent conveyance is based upon violations of the Debtor and Creditor Law. Plaintiff alleges that Ebony Kirkland and Bruce Kirkland became the deed owners of the real property located on 173-14 Warwick Crescent, Jamaica, New York on July 12, 1988, and that on May 21, 1974, these defendants became the deed owners of the real property located at 147-19 30th Avenue, Jamaica, New York. It is alleged that on February 23, 2011, Ebony Kirkland and Bruce Kirkland with the actual intent and purpose of hindering, delaying and defrauding Ebony Kirkland's creditors, conveyed said real properties to the Kirkland Irrevocable Trust, for zero consideration; and that at the time of said assignment Ebony Kirkland was insolvent or was rendered insolvent. It is further alleged that the properties conveyed to said trust could have been used to satisfy, in whole or in part, Ebony Kirkland's indebtedness to the plaintiff. Plaintiff seeks to have these transfers set aside, declared null and void, and to compel the re-transfer of said properties to Ebony Kirkland and Bruce Kirkland.

The third cause of action seeks to recover attorney's fees, pursuant to Debtor and Creditor Law §276-a.

The plaintiff now moves for an order granting summary judgment against the defendants Ebony G. Kirkland, a/k/a Ebony Green Kirkland, Bruce G. Kirkland, a/k/a Bruce Garfield Kirkland, Bruce Kirkland and Ebony G. Kirkland Irrevocable Trust a/ka/ Kirkland

Family Trust, a/k/a Irrevocable Trust Agreement of Bruce Kirkland and Ebony G. Kirkland under an Agreement dated February 23, 2011, Shaline Kirkland Alston and Kaiela Kirkland Fuentes as Trustees, setting aside and declaring null and void the transfer by defendants Ebony Kirkland and Bruce Kirkland to defendant Kirkland Irrevocable Trust the residential real properties located at 173-14 Warwick Crescent, Jamaica, New York and 147-19 130th Avenue, Jamaica, New York; enjoining defendant Kirkland Irrevocable Trust from transferring, conveying or otherwise encumbering said transferred parcels; compelling defendant Kirkland Irrevocable Trust to transfer said parcels to Ebony Kirkland and Bruce Kirkland, and enjoining it from transferring or conveying said parcels to others; and granting plaintiff a default money judgment against Systems and granting a default judgment against defendants Research and Systems .

All of the defendants have been served with process in December 2014. Defendants Bruce Kirkland, Ebony Kirkland, the Kirkland Irrevocable Trust, Shaline Kirkland Alston and Kaiela Kirkland Fuentes have served a verified answer and interposed the affirmative defense of lack of standing. It is noted that these defendants did not opt out of e-filing and their opposition to the within motion was not e-filed.

Defendants Systems and Research were each served with process on December 4, 2014, pursuant to Business Corporation Law §306. These defendants have neither appeared nor answered and their time in which to do so expired on January 5, 2015 (CPLR 320, General Construction Law §20).

It is well established that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562[1980]). The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to warrant the denial of summary judgment (*Alvord & Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]).

A party moving for a default judgment is required to submit proof of service of the summons and complaint, proof of the facts constituting the cause of action, and proof of the defaulting party's default in answering or appearing (see CPLR 3215[f]; *Oak Hollow Nursing Center v. Stumbo*, 117 AD3d 698, 699 [2014]). A verified complaint may be used as the affidavit of the facts constituting the claim and the amount due, and the affidavit of the default shall be made by the party or the party's attorney (CPLR 3215[f]).

With respect to the first cause of action against Research and Systems, plaintiff has submitted proof of service of the summons and complaint upon the defendants and the defendants failure to answer or otherwise appear and that their time to do so has long expired. As neither Systems nor Research have moved to vacate their default in answering the complaint, counsel for the answering defendants cannot raise any objections to the request for a default judgment.

The plaintiff has established its entitlement to a default judgment as against Systems submitting, inter alia, the complaint verified by the plaintiff, the attorney's affirmation and the affidavit of Matthew J. Szczepanski, plaintiff's loan administrator, and various documents which demonstrate that Systems, the successor in interest of Research, is liable for the debt of Research by an asset transfer, that Systems is a mere a continuation of Research and that the transaction was entered into fraudulently for the purpose of escaping liability for the debt of Research (see *Nationwide Mut. Fire Ins. Co. v. Long Island Air Conditioning, Inc.*, 78 AD3d 801 [2010]). The court notes that although plaintiff seeks a default judgment against Research, the complaint does not allege any claim against this defendant.

Accordingly, the plaintiff's motion for a default judgment as against the defendant Systems is granted. That branch of the plaintiff's motion which seeks a default judgment against Research is denied. It is noted that a judgment as against Research has previously been entered for the amount due under the line of credit.

Debtor Creditor Law § 272 provides that: "Fair consideration is given for property, or obligation.

"a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

" b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained."

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 ."

Debtor and Creditor Law § 275 provides that: "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.”

“Pursuant to Debtor and Creditor Law § 276, ‘[every 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]’” (*Matter of U.S. Bancorp Equip. Fin., Inc. v Rubashkin*, 98 AD3d 1057, 1060 [2d Dept 2012]; *see 5706 Fifth Ave., LLC v Louzieh*, 108 AD3d 589 [2d Dept 2013]; *Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386, 658 NYS2d 407 [2d Dept 1997]). “Direct evidence of fraudulent intent is often elusive. Therefore, courts will consider ‘badges of fraud,’ which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent” (*Pen Pak Corp. v LaSalle Nat'l Bank*, 240 AD2d at 386, *quoting MFS/Sun Life Trust-High Yield Series v Van Dusen Airport Servs. Co.*, 910 F Supp 913, 935 [SD NY 1995]). “Badges of fraud” from which fraudulent intent may be inferred include: (1) a close relationship between the parties to the transaction, (2) secrecy and haste in making the transfer, (3) the inadequacy of consideration, (4) the transferor’s knowledge of the creditor’s claim, or a claim so likely to arise as to be certain, and the transferor’s inability to pay it, and (5) the retention of control of property by the transferor after the conveyance (*see Matter of Steinberg v Levine*, 6 AD3d 620, 621 [2d Dept 2004]; *Dempster v Overview Equities*, 4 AD3d 495, 498 [2d Dept 2004]).

Pursuant to Debtor and Creditor Law § 278, “[w]here a conveyance or obligation is fraudulent as to a creditor,” such a creditor, may “[h]ave the conveyance set aside or obligation annulled to the extent necessary to satisfy [its] claim.

Turning now to plaintiff’s request for summary judgment on its second cause of action, plaintiff obtained a judgment against defendants Ebony Kirkland and Research., and the documentary evidence submitted herein demonstrates that Ebony Kirkland and Bruce Kirkland transferred their interest in the subject properties to the Kirkland Irrevocable Trust, with the intent to defraud plaintiff’s assignor HBSC, to hinder the collection of the debt, and to render Ebony Kirkland insolvent. Plaintiff has presented evidence of badges of fraud, including, a close relationship between the parties to the transaction, the absence of consideration, the retention of the benefit of the property in the guise of a trust, the debtor’s knowledge of its debt to the plaintiff’s assignor and its failure to pay it (*see 5706 Fifth Ave., LLC v Louzieh*, 108 AD3d at 589; *NPR, LLC v Met Fin Mgt. Inc.*, 63 AD3d 1128, 1129 [2d Dept 2009]; *Dempster v Overview Equities*, 4 AD3d at 498). This evidence establishes plaintiff’s prima facie entitlement to judgment as a matter of law on its second cause of action to set aside the subject conveyances pursuant to Debtor and Creditor Law §§272, 273, 275, 276 and 278.

Although plaintiff has also established its entitlement to judgment on its third cause

of action for an award of reasonable attorney's fee pursuant to Debtor and Creditor Law § 276-a (*see 5706 Fifth Ave., LLC v Louzieh*, 108 AD3d at 589), it has not moved for such relief at this time.

In opposition, defendants have failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *5706 Fifth Ave., LLC v Louzieh*, 108 AD3d at 589; *Gihon, LLC v 501 Second St., LLC*, 77 AD3d 708, 709 [2d Dept 2010]; *NPR, LLC v Met Fin Mgt., Inc.*, 63 AD3d at 1129). With respect to the issue of consideration, defendants' counsel asserts that defendants Shaline Kirkland Alston and Kaeila Kirkland Fuentes "worked for Ebony Marketing Research, Inc. and/or Ebony Marketing Systems, Inc. under an implied contract and gave quantum valebant given [sic] constitutes the consideration for the transfer hence there is no fraudulent conveyance because the transfer was given for an antecedent debt". Ms. Alston and Ms. Fuentes in their respective affidavits assert that they each performed various services on behalf of Research and Systems; that their agreements were not reduced to writing due to the informal operating system; and that "[b]ecause can't remember the services as they were rendered, it would take time for me to recall exactly which services were performed".

Quantum valebant, is a count or claim in an action of assumpsit for goods sold and delivered, founded on an implied assumpsit or promise, on the part of the defendant, to pay the plaintiff as much as the goods were reasonably worth (*see Black's Law Dictionary* 1276, 8th Ed 2004). The doctrine of quantum valebant, is not applicable here, as it is not a defense to a claim for fraudulent conveyance, and plaintiff has not alleged a cause of action for the return or value of goods sold and delivered.

To the extent that defendants assert that the subject real properties were transferred to the Kirkland Irrevocable Trust in exchange for valuable services allegedly rendered by Ms. Alston and Ms. Fuentes, this conclusory assertion does not establish the existence of an antecedent debt owed by Ebony Kirkland to the Kirkland Irrevocable Trust. The real properties were transferred into the Kirkland Irrevocable Trust for the benefit of the transferors. Ms. Alston and Ms. Fuentes were nominated as trustees and defendants do not claim that any ownership rights in the subject real properties vested in these individuals. Any services rendered by Ms. Alston and Ms. Fuentes to Research and Systems does not constitute an antecedent debt owed to them by the transferors. The copies of the deeds and the recording pages submitted herein clearly reflect that no consideration was paid, and that no real property transfer tax was paid.

Accordingly, that branch of the plaintiff's motion which seeks leave to enter a default money judgment against Systems in the amount of \$76,692.02 plus interest at the statutory rate from January 15, 2013 is granted.

That branch of the plaintiff's motion which seeks summary judgment on the second cause of action vacating, setting aside and declaring null and void the deeds conveying the real property known as 173-14 Warwick Crescent, Jamaica, NY and the deed conveying the real property known as 147-19 30th Avenue, Jamaica, NY, as having been made with intent to defraud is granted.

That branch of the plaintiff's motion which seeks to enjoin defendant Kirkland Irrevocable Trust from transferring, conveying or otherwise encumbering the real property known as 173-14 Warwick Crescent, Jamaica, NY and the real property known as 147-19 30th Avenue, Jamaica, NY is granted.

That branch of plaintiff's motion which seeks an order compelling Kirkland Irrevocable Trust to reconvey the subject real properties to Ebony Kirkland and Bruce Kirkland, is denied as academic.

That branch of the plaintiff's motion which seeks summary judgment against defendants Shaline Kirkland Alston and Kaiela Kirkland Fuentes as Trustees is denied, as the complaint does not state a claim against these defendants.

The foregoing constitutes the Decision and the Order of the court.

Plaintiff may enter judgment in accordance with this Memorandum Decision and Order together with costs and disbursements in this action to the extent allowed by CPLR 8101.

Dated: January 2, 2016

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J.S.C.

FILED
JAN 22 2016
COUNTY CLERK
QUEENS COUNTY