

**Tudor & Son Gen. Contr., Inc. v Kandov**

2016 NY Slip Op 30439(U)

February 10, 2016

Supreme Court, Queens County

Docket Number: 707951/2015

Judge: Marguerite A. Grays

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4 Justice

FILED FEB 26 2016 COUNTY CLERK QUEENS COUNTY

TUDOR & SON GENERAL CONTRACTING, INC.,

Index Number 707951 2015

Plaintiff(s)

-against-

Motion Date November 16, 2015

VIOLETA KANDOV and ALBERT Y. DAYAN,

Motion Cal No.: 162

Defendant(s)

x

Motion Seq. No. 1

The following papers numbered 1 to 10 read on this motion by defendants to dismiss plaintiff's complaint, pursuant to CPLR §3211 (a) (1), (4), (5) and (7).

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits .....	1-4
Answering Memorandum of Law - Affirmation - Exhibits .....	5-8
Reply Affirmation .....	9-10

Upon the foregoing papers, it is ordered that defendants' motion is determined as follows:

This action was brought to set aside and annul an allegedly fraudulently conveyed deed, and to recover damages for legal fees. Defendants now move to dismiss plaintiff's complaint, pursuant to CPLR §3211 (a) (1), based on a defense founded upon documentary evidence; CPLR §3211(a) (4), based upon another action pending; CPLR §3211(a) (5), based on the statute of limitations; and CPLR §3211(a) (7), for failure of plaintiff to state a cause of action. Plaintiff opposes.

The branch of defendants' motion seeking to dismiss the complaint pursuant to CPLR §3211 (a)(1), is denied. Contrary to defendants' contention, the evidence submitted in support of this motion was not "documentary" within the meaning of CPLR §3211 (a) (1),

and failed to conclusively establish a defense to the plaintiff's claims as a matter of law, in that such evidence did not utterly refute the factual allegations of the complaint (*see Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Comprehensive Mental Assessment & Medical Care, P.C. v Gusrae Kaplan Nussbaum, PLLC*, 130 AD3d 670 [2015]; *DiMauro v United, LLC*, 122 AD3d 568 [2014]; *Neckles Bldrs., Inc. v Turner*, 117 AD3d 923 [2014]). For the evidence to be considered "documentary" under that statute, such evidence must be of undisputed authenticity, unambiguous and undeniable (*see Pasquaretto v Long Island University*, 106 AD3d 794 [2013]; *Kopelowitz & Co., Inc. v Mann*, 83 AD3d 793 [2011]). Defendants have failed to proffer any argument that the exhibits attached to their motion satisfied this standard.

The branch of defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(4) is denied. Although defendants seek dismissal upon these grounds, defendants' papers fail to set forth any argument for dismissal.

Defendants also move to dismiss the complaint pursuant to CPLR §3211(a)(7). It is well settled that the sole criterion to dismiss a complaint, or part thereof, is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v. Guardian Life Ins. Co. Of America*, 94 NY2d 330 [1999]). "To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR §3013; *Dolphin Holdings, Inc. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2014]).

Additionally, on a motion to dismiss the complaint pursuant to CPLR §3211 (a) (7) for failure to state a cause of action, the Court must afford the pleadings a liberal construction, accept as true all the facts alleged, give the non-moving plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal theory, and not whether plaintiff can ultimately prove such facts (*see J.P.Morgan Securities, Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]; *E & D Group, LLC v Violet*, — AD3d —, 2015 N.Y. Slip Op. 09400 (2015); *Silberstang v Biderman-Gross*, — AD3d —, 2015 N.Y. Slip Op. 08822 [2015]).

As for the branch of defendants motion seeking to dismiss the plaintiff's cause of action pursuant to §273-a of the Debtor and Creditor Law for failing to state a cause of action, construing the pleadings liberally, plaintiff has failed to adequately set forth the factual basis for, and necessary elements of a cause of action for fraudulent conveyance brought under Debtor and Creditor Law § 273-a, (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Hampshire Properties v BTA Building & Developing, Inc.*, 122 AD3d 573 [2014]; *Carillo v Stony Brook Univ.*, 119 AD3d 508 [2014]).

A cause of action based upon constructive fraud is governed by Debtor and Creditor Law (DCL) § 273-a, which states as follows:

“Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in 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.

Thus, an essential element of a cause of action pursuant to Debtor and Creditor Law § 273-a, is the existence of an unsatisfied judgment (*see Felshman v Yamali*, 106 AD3d 948 [2013]; *Coyle v Lefkowitz*, 59 AD3d 1054 [2011]). While plaintiff in the case at bar has alleged that the 2008 conveyance by defendant, Kandov, to include her husband, Dayan, as an owner, was made during the pendency of a prior action (*Kandov v. Kats*, *NYS Supreme Court, Queens Index No. 15433/2006*), and without fair consideration, plaintiff has failed to set forth a cognizable cause of action under DCL 273-a, as it did not, and could not, allege or demonstrate that a final monetary judgment in the prior action was entered against defendants at the time this suit was commenced, and remained unsatisfied (*see William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960 [2015]). Further, plaintiff in the *Kandov v Kats* action was not awarded a monetary judgment against Violeta Kandov at the time this motion was submitted for this Court’s consideration. Consequently, the Court finds that the plaintiff’s complaint has failed to set forth a cause of action based on DCL §273-a and said branch of the motion is granted and the cause of action is dismissed.

The branch of the defendant’s motion which seeks dismissal of plaintiff’s claims pursuant to Debtor and Creditor Law §276, is denied. Debtor and Creditor Law §276, states as follows:

“Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed by law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.”

Upon review of the pleadings submitted, the plaintiff has pled with sufficient specificity to comply with CPLR §3016 (b), in that the complaint contains allegations of “badges of fraud”, including the close relationship between the defendants, the lack of consideration for the transaction, and the retention of benefit of the property by Kandov

(*Machado v A. Canterpass, LLC*, 115 AD3d 652, 654 [2014]; *see 5706 Fifth Ave., LLC v Louzieh*, 108 AD3d 589 [2013]).

The branch of defendants' motion which seeks to dismiss the branch of plaintiff's action pursuant to CPLR §3211(a)(5), is denied. A cause of action alleging actual fraud must be commenced within six years from the date of the fraud, or within two years from the time plaintiff either "discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213 [8]; *see Sargiss v Magarelli*, 12 NY3d 527 [2009]; *Coombs v Jervier*, 74 AD3d 724 [2010]). A plaintiff will be held to have discovered the fraud when it is established that he or she was possessed of knowledge of the facts from which [the fraud] could be reasonably inferred" (*Vilsack v Meyer*, 96 AD3d 827, 828 [2012]; *see Williams-Guillaume v Bank of America, N.A.*, 130 AD3d 1016 [2015]). In the case at bar, it is undisputed that the complaint did not allege any fraudulent conveyance occurring within six years prior to the commencement of this action. Notwithstanding, as no evidence has been presented with regard to when plaintiff should have initially been aware of the alleged fraudulent conveyance, defendants have failed to demonstrate that the Debtor and Creditor Law § 276 causes of action should be dismissed as time-barred (*see Williams-Guillaume v Bank of America, N.A.*, 130 AD3d 1016; *Shalik v Hewlett Associates, L.P.*, 93 AD3d 777 [2012]).

The branch of defendants' motion seeking to dismiss plaintiff's fourth cause of action, for attorney's fees pursuant to Debtor and Creditor Law §276-a, is accordingly denied.

The branch of defendants' motion which seeks to dismiss plaintiff's request to nullify the 2008 deed pursuant to Debtor and Creditor Law § 279, is denied. Such remedy is permissible as a cause of action herein (*see Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840 [1990]).

Finally, the branch of defendants' motion seeking to dismiss plaintiff's sixth cause of action for a judgment against defendant, Kandov, is denied.

Accordingly, the branch of defendants' motion seeking dismissal of any and all causes of action in the complaint based, solely, on Debtor and Creditor Law § 273-a, is granted. All other branches of defendants' motion are denied.

Dated: February 10, 2016

  
J.S.C.

**FILED**  
FEB 26 2016  
COUNTY CLERK  
QUEENS COUNTY