

Echtman & Etkind, LLP v Mignano
2017 NY Slip Op 30893(U)
April 17, 2017
Supreme Court, New York County
Docket Number: 150057/2017
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ECHTMAN & ETKIND, LLP,

Index No.: 150057/2017

Plaintiffs,

-against-

Motion Seq. No. 001

ROSALIA MIGNANO AND BY THE RIVER, LLC,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this fraudulent conveyance action, defendant, Rosalia Mignano ("Mignano") moves pursuant to CPLR 510 and 511 changing the place of trial (venue) from New York County to Queens County, on the ground that New York County, as designated by the plaintiff Echtman & Etkind, LLP ("plaintiff"), is not a proper county.

According to the complaint, prior to this action, in 2010, plaintiff, *inter alia*, sued Rubyanne Development, LLC ("Rubyanne"), Ozzalap Properties, LLC ("Ozzalap") and 37-31 10th Street, to recover monies owed for legal services performed and fraudulent conveyance (the "2010 action").¹ In May 2016, after a jury trial, a \$602,270.78 judgment was entered against Rubyanne, and companies Ozzalap and 37-31 10th Street, LLC to which certain property was fraudulently conveyed. Information subpoenas were served upon Mignano and Frances Mazzurco ("Mazzurco"), another alleged principal of the three judgment debtors, to recover on the judgment.

Thereafter, plaintiff commenced this action against defendant Mignano, as principal of

¹ The action is entitled *Echtman & Etkind, LLP, Easton & Echtman, P.C., Wiss, Janney, Elstner, Associates, Inc., and Howard Jackson, vs. Rubyanne Development, LLC, Ozzalap Properties, LLC, and 37-31 10th Street, LLC* (Index Number 101815/10) (Justice Jeffrey Oing) .

Rubyanne and By The River, LLC (“By The River”), a dissolved company also owned by Mignano. Plaintiff alleges that Mignano, Rubyanne and Ozzalap, as alter egos of each other, committed fraud, in that after the judgment was obtained, on February 8, 2011, Ozzalap (of which plaintiff alleges Mignano was the sole member (§17)) transferred its then only asset to a third-party for \$700,000.00, and paid \$630,000 to a non-party Filippo Giordano as repayment on two interest-only notes issued to Ozzalap and By The River, concerning a property located in Queens. Thereafter, By The River (*via* Mignano) sold the Queens property for \$1,900,000. Mignano benefitted from Ozzalap’s pay off of By The River’s note, which was made without fair consideration, and thus requests that the Judgment against Ozzalap be deemed a judgment against both defendants Mignano and By The River. In the alternative, plaintiff seeks \$330,000 in damages against defendants, plus attorneys fees, pursuant to N.Y. Debtor & Creditor Law.

In support of the motion, Mignano contends that venue in New York County is improper because plaintiff is not a resident of or maintains an office in New York County, she resides in Queens, and co-defendant By The River is dissolved.

In response, plaintiff cross moves to amend its complaint to add N.Y. Debtor & Creditor Law fraudulent conveyance claims against Frances Mazzurco (“Frances”), Salvatore Mazzurco, Rosamaria Mazzurco, and Joseph Mazzurco (collectively the “Mazzurco parties”), and to consolidate this action with the 2010 Action, in which the supplemental proceeding is continuing. Plaintiff recently discovered that Mazzurco disbursed over \$700,000 from the sale of Rubyanne’s property to pay herself (over \$300,000), various family members (\$100,639), and pay-off a mortgage that is unrelated to the Rubyanne property (\$210,000). Further, caselaw has held that a consolidation of proceedings to collect a judgment with the plenary action and

maintaining venue in New York County where the plenary action was heard, is appropriate.

Thus, the instant case should be consolidated with the 2010 plenary in order to avoid the “tremendous waste of the time, effort and resources of the courts.”

In reply and opposition to the cross-motion, Mignano argues that Ozzalap (in the 2010 Action) is not a named defendant in this action, and neither Mignano nor By The River LLC (in this action) are defendants in the 2010 Action. Thus, the caselaw cited by defendant is distinguishable in that in such caselaw, all parties were the same in the cases to be consolidated and issues of priority in enforcement by various creditors against the same assets of the judgment debtors were present. Further, leave to amend should be denied as there are insufficient allegations to support claims against the Mazzurco parties.

Discussion

While it is undisputed that none of the parties in this action “reside” in New York County or have a place of business in New York County,² a change of venue is unwarranted in light of the cross-motion to consolidate.

Though not expressly cited by plaintiff, “CPLR 602(a) permits the consolidation of actions which involve common questions of law or fact, and generally vests discretion with the trial judge to determine whether to order consolidation. Where consolidation is sought, the party opposing consolidation bears the burden of demonstrating prejudice to a substantial right” (*National Arbitration & Mediation v. Feinstein & Nisnewitz, P.C.*, 38 Misc.3d 10, 956 N.Y.S.2d 789 [Supreme Court, Appellate Term, 2nd, 11th and 13th Judicial Districts 2012]).

² It is undisputed that Mignano is a resident of Queens County, By The River is dissolved, and that according to the Secretary of State of New York State filing, plaintiff's office is located in White Plains, New York.

DLJ Mortgage Capital, Inc. v. Kontogiannis, 110 A.D.3d 522, 973 N.Y.S.2d 160 [1st Dept 2013]), cited by plaintiff, is highly instructive. In *DLJ Mortgage Capital, Inc.*, petitioner, a mortgage company, sued Thomas Kontogiannis and various other defendants in April 2010, alleging fraud and fraudulent conveyances, and later added “New Kontogiannis Entity-Defendants” to the action (the “plenary action”). In 2011, two plaintiffs (the “Siegel”) commenced separate Article 52 proceedings in Kings County to enforce a judgment in their favor against Thomas Kontogiannis. In 2012, petitioner commenced a special proceeding under Articles 52 and 62 against, *inter alia*, Thomas Kontogiannis and the New Kontogiannis Entity Defendants, and the plaintiffs in the 2011 Kings County action, and moved to consolidate its 2012 special proceeding and the Siegel’s 2011 special proceedings in Kings County with its 2010 plenary action. In affirming the lower court’s consolidation of the actions and finding venue in New York County appropriate, the Court reasoned:

Although the Siegel’s consolidated enforcement action does not raise specific questions about the mortgage fraud scheme alleged in petitioner’s plenary action, the matters at issue all arise out of the fraudulent activities of the same defendants, and concern petitioner’s and the Siegel’s efforts to secure their rights and enforce judgments against the same assets. Indeed, the plenary action gave rise, directly, to petitioner’s enforcement action and thus to the priority dispute among the judgment creditors. Accordingly, “the interests of justice and judicial economy will best be served by a joint trial” Given that these very parties and assets have been at the epicenter of the plenary action since 2010, separate adjudication of the special proceedings in Kings County would be a tremendous waste of the time, effort and resources of the courts of both New York and Kings Counties.

Venue in New York County is appropriate, because, of the three actions at issue, the plenary action was the first filed.
(110 A.D.3d at 523).

The rationale in *DLJ Mortgage Capital, Inc. (supra)* applies herein.

Both actions arise out of a purported fraudulent scheme of fraudulent conveyances to

deprive plaintiff from recovering on its judgment. And, the consolidated action should be heard in New York County, where the underlying action giving rise to the judgment is located.

Mignano's claims in opposition to consolidation are insufficient. Mignano concedes that plaintiff herein is seeking to enforce the Judgment against her and By The River. (See Affirmation in Reply and in Opposition to Cross Motion, ¶11). The record indicates that By The River is dissolved, and that Mignano is the alleged owner or alter ego of the judgment debtors in the 2010 Action- Rubyanne and Ozzalap, respectively. Therefore, that By The River was not a defendant in the 2010 Action is inconsequential, and that Mignano was not named in the 2010 Action is immaterial in light of her alleged alter ego status of Rubyanne and Ozzalap. Contrary to Mignano's contention, the circumstances herein do not differ "greatly" from *DLJ Mortgage Capital, Inc. (supra)* (id., ¶14). Thus, consolidation is warranted under the circumstances.

However, leave to amend the complaint is unwarranted. "It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011] citing CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 A.D.3d 507, 868 N.Y.S.2d 612 [2008]). However, a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.*, 60 AD3d 404 [1st Dept 2009]; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]). Thus, when a party seeks not only to amend the pleadings, but also to assert claims

against persons sought to be joined as additional parties in the action (CPLR 1003), the court may also consider the prejudice to the other defendants and the extent of the delay in moving to add the new parties and the reasons therefor (*Haughton v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 305 AD2d 214 [1st Dept 2003]; *Konrad v 136 East 64th Street Corp.*, 246 AD2d 324 [1st Dept 1998]).

To state a claim under N.Y. Debtor & Creditor Law §§ 273 & 274, the plaintiff must allege that the defendant (1) made a conveyance; (2) without fair consideration; (3) by a person who is insolvent or who becomes insolvent as a consequence of the transfer (*Loreley Financing (Jersey) No. 4 Ltd. v. UBS Ltd.*, 40 Misc 3d 323, 963 N.Y.S.2d 566 [Supreme Court, New York County 2013] citing *Zanani v. Meisels*, 78 A.D.3d 823, 824, 910 N.Y.S.2d 533 [2d Dept 2010]). A conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration (*CIT Group/Commercial Services, Inc. v. 160-09 Jamaica Ave. Ltd. Partnership*, 25 A.D.3d 301, 808 N.Y.S.2d 187 [1st Dept 2006] citing Debtor and Creditor Law § 273). An antecedent debt can constitute fair consideration ((*CIT Group/Commercial Services, Inc. v. 160-09 Jamaica Ave. Ltd. Partnership*, *supra* citing *Matter of American Inv. Bank v. Marine Midland Bank*, 191 A.D.2d 690, 692, 595 N.Y.S.2d 537 [1993])).

The submissions, including the cross-motion papers and proposed amended complaint assert sufficient allegations to support the claims in the fifth through eighth new causes of action against Mazzurco and the remaining Mazzurco parties. Plaintiff claims that Mazzurco was a principal of the debtor companies, that sold real property of Rubyanne and disbursed monies from the sale to pay herself and her family members without fair consideration, such that

Rubyanne was rendered insolvent (§§5, 53-55, 61) (*320 West 13th Street, LLC v. Wolf Shevack, Inc.*, 85 A.D.3d 629, 926 N.Y.S.2d 77 [1st 2011])). Mignano's opposition to the amendment is insufficient.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant's motion pursuant to CPLR 510 and 511 to change the place of trial (venue) from New York County to Queens County is denied; and it is further

ORDERED that plaintiff's cross-motion to amend the Complaint and consolidate the pending action with the plenary action entitled *Echtman & Etkind, LLP, et al., vs. Rubyanne Development, LLC, Ozzalap Properties, LLC, and 37-31 10th Street, LLC*, Supreme Court, New York County, Index No. 101815/2010 (Justice Jeffrey Oing) is granted, and this action shall be consolidated for joint discovery and joint trial before Justice Jeffrey Oing; and it is further

ORDERED that the Clerk is directed to transfer this matter to Justice Jeffrey Oing, who is presiding over the earlier filed related proceeding entitled *Echtman & Etkind, LLP, Easton & Echtman, P.C., Wiss, Janney, Elstner, Associates, Inc., and Howard Jackson, vs. Rubyanne Development, LLC, Ozzalap Properties, LLC, and 37-31 10th Street, LLC*, Supreme Court, New York County, Index No. 101815/2010; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 17, 2017



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMOAD
J.S.C.