

Da Mor Imperial, Inc. v Gestetner

2017 NY Slip Op 30993(U)

May 12, 2017

Supreme Court, New York County

Docket Number: 651940/2015

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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DA MOR IMPERIAL, INC. and DAVID MORDECHAEV,

Plaintiffs,

Index No.
651940/2015

**DECISION and
ORDER**

- against -

Mot. Seq. #001

ALAN GESTETNER, MALKA GESTETNER,
COLE DEVELOPMENT PROPERTIES CORP.,
ROUTE 45, LLC, MAX KAHAN, SANDOR GESTETNER,
HYMAN MICHAEL SITKO and NATHAN SCHWARTZ
as Trustee of RAMI FAMILY TRUST,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

On November 16, 2012, Plaintiffs Da Mor Imperial Inc., (“Da Mor”) and David Mordechaev (“Mordechaev”) received a judgment in the amount of \$243,385.48 against Defendants Alan Gestetner (“Alan”), Sandor Gestetner (“Sandor”), and Cole Development Property Co for breach of a promissory note. When Alan, Sandor and Cole Development Property Co. did not satisfy the judgment, Da Mor and Mordechaev commenced the above titled action on June 3, 2015. In their complaint, Da Mor and Mordechaev alleged five causes of action. Their first cause of action alleged that Alan fraudulently conveyed his 50% interest in his family residence located at 18 Bartlett Road, Monsey NY to his wife Malka Gestetner (“Malka”) on April 15, 2008. The second cause of action alleged that Cole Development Properties Corporation owned by Alan fraudulently conveyed a vacant lot located at 116 N. Main Street, Valley Stream, NY to Route 45 LLC, a limited liability company owned by Max Kahan on July 24, 2008. The third cause of action alleged that Sandor fraudulently conveyed his 50% interest in property located at 971 46 street, Brooklyn, NY to Rami Family Trust on December 14, 2009. This fraudulent conveyance was allegedly executed by transferring the property to Nathan Schwartz in his capacity as trustee of Rami Family Trust. The

fourth cause of action alleged that Alan fraudulently conveyed his share of property located at 1763 49th Street Brooklyn, NY to Hyman Michael Sitko (“Sitko”) on September 3, 2008. The fifth cause of action alleged that Alan, Malka, Cole Development Properties Corporation, Route 45 LLC, Kahan, Sandor, Sitko, and Schwartz as Trustee of Rami Family Trust were unjustly enriched.

On May 18, 2016, Da Mor and Mordechaev filed this instant motion for default judgment pursuant to CPLR 3215 against Alan, Malka, Cole Development Properties Corporation, Max Kahan, Route 45 LLC, Sandor, Sitko and Schwartz. Da Mor and Mordechaev move for default judgment because they allege that the defendants did not appear. Da Mor and Mordechaev also seek leave to amend the complaint and add a sixth cause of action alleging that in 2006, Alan fraudulently conveyed gold bars to Max Kahan Inc., a corporation owned by defendant Max Kahan.

Alan, Malka, Sandor, and Schwartz oppose the motion for default judgment and move to dismiss the causes of action against them. Specifically, Alan argues that the first, second and fourth causes of action are time barred because the conveyances allegedly occurred in 2008 and the statute of limitations for fraudulent conveyances is 6 years. Therefore, default judgment should be denied and the first, second and fourth causes of action should be dismissed pursuant to CPLR 3211 (a) (5). Malka avers that she was not properly served process pursuant to CPLR 308 (2) because plaintiffs did not timely file proof of service. Therefore, default judgment on the first cause of action against her is precluded because her time to answer never began to run. Malka further argues that the first cause of action should be dismissed pursuant to CPLR 3211 (a) (5) because the alleged fraudulent conveyance occurred in 2008 and is time barred by the six year statute of limitations. Malka finally argues that the fifth cause of action alleging unjust enrichment against her should be dismissed pursuant to CPLR 3211 (a) (7) because the plaintiffs did not plead that Malka had a direct relationship with them. Schwartz avers that the trust was not properly served process pursuant to CPLR 308 (2) because plaintiffs did not timely file proof of service. Therefore, default judgment on the third and fifth causes of action against him in his capacity as trustee should be denied. Schwartz also argues that because service was not timely, the third cause of action should be dismissed pursuant to CPLR 3211 (a) (8). Schwartz lastly argues that the fifth cause of action against him for unjust enrichment should be dismissed because the plaintiffs did not plead that Schwartz had a direct relationship with them. Sandor also argues that default judgment on the third cause of action against him should be denied because he was not timely served pursuant to CPLR 308 (2). Additionally, he argues that the third

cause of action should be dismissed pursuant to CPLR 3211 (a) (8). Alan, Malka, Sandor and Schwartz seek leave to interpose an answer.

Max Kahan and Route 45 LLC oppose the motion for default judgment. Route 45 LLC moves to dismiss the second cause of action pursuant to CPLR 3212 because the transfer occurred in 2008 and is time barred. Furthermore, they argue that the plaintiff's judgement is not against Cole Development Properties Corporation but rather a similarly named entity, Cole Development Property Co. Additionally Route 45 LLC and Max Kahan move to dismiss the fifth cause of action against them pursuant to CPLR 3211 (a) (7) on the basis that the unjust enrichment claims do not state a cause of action. Max Kahan finally argues that plaintiff's motion to amend the complaint to add the sixth cause of action should be denied because it is barred by the six year statute of limitations. Cole Development Properties Corporation and Sitko did not appear or oppose.

In support, Plaintiffs Da Mor and Mordechaev submit the attorney affirmation of Diana Rubin; the affidavit of David Mordechaev, a memorandum of law; the judgment entered on November 16, 2012 ordering Alan Gestetner, Sandor Gestetner, and "Cole Development Property" to pay Da Mor Imperial; a bill of costs dated October 29, 2012; the Summons dated June 3, 2015; the Complaint; the Complaint Verification; a promissory note dated April 17, 2006 evidencing a promise made by Alan Gestetner, Cole Development Property Corporation, and Sandor Gestetner to pay Da Mor Imperial Inc. and David Mordechaev a sum of \$120,000; Affidavits of Service of Judgment with Notices of Entry; a deed recorded in the Clerk's office for Rockland County on April 17, 2008 bearing instrument number 2008-00017726 and evidencing a conveyance from grantor Alan Gestetner to Malka Gestetner; a deed recorded in the Clerk's office for Rockland County on August 1, 2008 bearing instrument number 2008-00035521 and evidencing a conveyance from grantor Cole Development Properties Corp to Route 45 LLC; an Assignment of Solomon Menche's interest in the Judgment from a previous litigation against Alan Gestetner in exchange for consideration from Max Kahan and Route 45 LLC; the recording of Lot 47 from the Office of the City Register of the City of New York evidencing Sandor Gestetner as grantor and Rami Family Trust as grantee; the recording of Lot 46 from the Office of the City Register of the City of New York evidencing Alan Gestetner as grantor and Hyman Michael Sitko as grantee; a Summons and Complaint dated June 3, 2015; Affidavits of Service of Summons and Complaint; Affidavits of Service of Summons with Endorsed Complaints; an Answer dated June 26, 2015 submitted by Route 45 LLC and Max Kahan; the Status Reports Pursuant to Servicemembers Civil Relief Act of Alan, Malka and Sandor Gestetner; the

Affirmation of Mailing of Summons dated November 11, 2015; the Amended Complaint dated May 18, 2016; and a November 17, 2013 article entitled “Max Kahan Sets The Gold Standard” by Aaron Elstein among other things.

In their cross-motion, Alan, Malka, Sandor and Schwartz submit; the attorney affirmation of Jonathan B. Schloss; the affirmation of Alan Gestetner; and a Verified Answer dated July 18, 2016. Kahan and Route 45 LLC submit; the attorney affirmation of Richard H. Sarajian; a memorandum of law; Affidavits of Service of Summons and Complaint; Affidavits of Service of Summons with Endorsed Complaint; the Answer dated June 26, 2015; an Indenture dated January 21, 1987; Alan Gestetner’s Mortgage dated May 13, 1999 and recorded; an appraisal of property located at 18 Bartlett Road; a Judgment dated May 27, 2014; an Amended Judgment dated June 6 2014; the Summons dated June 3, 2015; the Complaint and Complaint verification dated June 3, 2015 among other things; an Order and Judgment dated September 29, 2014; Malka Gestetner’s land records and Cole Development Properties Corporation entity information from the NYS Department of State Division of Corporations among other things. In opposition to Defendant’s cross-motion and in reply; Da Mor and Mordechaev submit the attorney affirmation of Diana Rubin among other things. In reply, Alan, Malka, Sandor and Schwartz submit the attorney affirmation of Jonathan B. Schloss. In reply, Kahan and Route 45 submit the attorney affirmation of Richard H. Sarajian.

On January 12, 2017, the Court heard oral argument. On the record, the Court denied default judgement with respect to the first cause of action. The Court denied default judgment with respect to the fourth cause of action because it was barred by the statute of limitations. (tr at 11-12) The Court also denied the fifth cause of action against Malka, Cole Development Properties Corporation, Route 45 LLC, Kahan, Sitko, and Schwartz as Trustee of Rami Family Trust. (tr at 12)

The Court granted Alan’s motion for leave to file a late answer and deemed the answer that was attached to Alan’s cross motion to be the answer. The Court denied the motion to amend the complaint to add Max Kahan, Inc. The balance of the motion is addressed below.

CPLR 3211 (a) (5) provides that, “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of . . . statute of limitations . . .”

CPLR 3211 (a) (7) provides that, “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action . . .”

CPLR 3211 (a) (8) provides that, “A party may move for judgment dismissing one or more causes of action asserted against him on the ground that the court has not jurisdiction of the person of the defendant . . .”

CPLR 3212 provides that, “A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.”

CPLR 308 (2) provides that, “Personal service upon a natural person shall be made . . . by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service . . .”

CPLR 308 (4) provides that “where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state

of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns action against the person to be served, such affixing and mailing to be effected within twenty days of each other, proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing . . .”

Where the plaintiff timely serves the summons and complaint, plaintiff’s failure to file proof of service is a nonjurisdictional defect that, absent prejudice, can be cured by the granting of leave to file nunc pro tunc. (*Rahi v Fang*, 245 AD2d 13 [1st Dept 1997]) However, failure to file proof of service precludes the plaintiff from obtaining a default judgment because the defendant’s time to answer never begins to run. (*Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749 [2d Dept 2014])

“A fraudulent conveyance is a transfer made without fair consideration by a debtor when he or she is insolvent or which renders him or her insolvent or by a defendant in an action for money damages who is unable to satisfy a judgment that the plaintiff finally obtains.” (*Palermo Mason Const., Inc. v Aark Holding Corp.*, 300 Ad2d 458, 459 [2d Dept 2002]) The statute of limitations for a fraudulent conveyance claim is 6 years accruing at the time the fraud or conveyance occurred. (*Jaliman v D.H. & Co. Inc.*, 105 AD3d 646, 647 [1st Dept 1998])

To adequately plead a claim for unjust enrichment, “the plaintiff must allege ‘that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.’” (*Georgia Malone & Co., Inc. v Rieder.*, 19 NY3d 511, 516 [2012]) Although the plaintiff does not need to allege privity, it has to assert a connection between the parties that is not too attenuated. (*id.*) “The pleadings merely have to indicate a relationship between the parties that could have caused reliance or inducement.” (*Philips Intern. Investments, LLC v Pektor*, 117 Ad3d 1, 7 [1st Dept 2014]) The cause of action alleging unjust enrichment is governed by the six-year statute of limitations of CPLR 213(1) . . . which begins to run upon the occurrence of the alleged wrongful act giving rise to the duty of restitution. (*Williams-Guillaume v Bank of America, N.A.*, 130 Ad3d 1016, 1017 [2d Dept 2015])

Having reviewed the deed recorded in the Clerk's office for Rockland County on August 1, 2008 bearing instrument number 2008-00035521 and evidencing a conveyance from grantor Cole Development Properties Corporation to Route 45 LLC, default judgment on the second cause of action alleging that Cole Development Properties Corporation conveyed a vacant lot located at 116 N. Main Street, Valley Stream, NY to Route 45 LLC on July 24, 2008 is denied. The alleged fraudulent conveyance occurred on July 24, 2008 and was recorded on August 1, 2008. However this action was commenced more than six years later on June 3, 2015. (*see Jaliman v D.H. & Co. Inc.*, 105 AD3d 646, 647 [1st Dept 1998]) The second cause of action is therefore time barred and Route 45 LLC's cross-motion to dismiss the second cause of action pursuant to CPLR 3212 is granted.

Having reviewed the affidavit of service of summons with endorsed complaint submitted by the plaintiffs, default judgment on the third cause of action alleging that Sandor fraudulently conveyed his 50% interest in property located at 971 46 street, Brooklyn, NY to Rami Family Trust on December 14, 2009 is denied. The affidavit of service of summons with endorsed complaint, signed by Dmitriy Musheev, evidences that the summons and complaint were delivered to a woman claiming to be Sandor's wife on June 8, 2015 at 1368 55th street, 11219. The affidavit also evidences that a copy of the summons and complaint was mailed to Sandor in an envelope marked personal and confidential on June 8, 2015. However, the affidavit of service was sworn before a notary public in Kings County on November 9, 2015. Therefore, the plaintiffs did not timely file proof of service with the clerk of the court within 20 days of the mailing on June 8, 2015. Because the plaintiffs did not timely file proof of service, the time for Sandor to answer never began to run. (*see Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 750 [2d Dept 2014]) Thus default judgment is precluded in this case just as it was precluded in *Pipinias v J. Sackaris & Sons, Inc.* However failure to file proof of service is a nonjurisdictional defect that, absent prejudice, can be cured by the granting of leave to file nunc pro tunc. (*Rahi v Fang*, 245 AD2d 13 [1st Dept 1997]) Therefore, Sandor and Schwartz' cross-motion to dismiss the third cause of action for lack of jurisdiction under CPLR 3211 (a) (8) is denied.

Default judgment on the fifth cause of action alleging unjust enrichment against Alan is denied. In accordance with the oral argument on January 12, 2017, this Court granted Alan's motion for leave to file a late answer and deemed the answer that was attached to Alan's cross-motion to be the answer. Furthermore, Da

Mor and Mordechaev have not alleged in their complaint how Alan was (1) unjustly enriched at (2) the plaintiff's expense. (*see Georgia Malone & Co., Inc. v Rieder.*, 19 NY3d 511, 516 [2012]) Therefore, the fifth cause of action against Alan is dismissed.

Default judgment on the fifth cause of action alleging unjust enrichment against Sandor is denied because the plaintiffs did not timely file proof of service. Sandor's time to respond never began to run and therefore default judgment is precluded. (*see Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 750 [2d Dept 2014]) Furthermore, the fifth cause of action against Sandor is dismissed because Plaintiffs do not allege how Sandor was (1) unjustly enriched at (2) the plaintiff's expense. (*see Georgia Malone & Co., Inc. v Rieder.*, 19 NY3d 511, 516 [2012])

Wherefore, it is hereby,

ORDERED and ADJUDGED that plaintiffs Da Mor Imperial, Inc. and David Mordechaev's motion for default judgment on the first cause of action against Alan and Malka Gestetner is denied and Alan and Malka Gestetner's cross-motion to dismiss the first cause of action pursuant to CPLR 3211 (a) (5) is granted; and it is further

ORDERED and ADJUDGED that plaintiffs Da Mor Imperial, Inc. and David Mordechaev's motion for default judgment on the second cause of action against Cole Development Properties Corp. and Route 45 LLC is denied and Route 45 LLC's cross-motion to dismiss the second cause of action pursuant to CPLR 3212 is granted; and it is further

ORDERED and ADJUDGED that plaintiffs Da Mor Imperial, Inc. and David Mordechaev's motion for default judgment on the third cause of action against Sandor Gestetner and Nathan Schwartz as trustee of Rami Family Trust is denied; and it is further

ORDERED AND ADJUDGED that Sandor Gestetner and Nathan Schwartz as trustee of Rami Family Trust's cross-motion to dismiss the third cause of action is denied; and it is further

ORDERED and ADJUDGED that plaintiffs Da Mor Imperial, Inc. and David Mordechaev's motion for default judgment on the fourth cause of action against Alan Gestetner and Hyman Michael Sitko is denied; and Alan Gestetner's

cross-motion to dismiss the fourth cause of action pursuant to CPLR 3211 (a) (5) is granted; and it is further

ORDERED and ADJDUGED that plaintiffs Da Mor Imperial, Inc. and David Mordechaev's motion for default judgment on the fifth cause of action against Alan Gestetner, Malka Gestetner, Cole Development Properties Corporation, Route 45 LLC, Max Kahan, Sandor Gestetner, Hyman Michael Sitko, and Nathan Schwartz as trustee of Rami Family Trust is denied; and the cross-motions to dismiss the fifth cause of action are granted.

ORDERED and ADJDUGED that plaintiffs Da Mor Imperial, Inc. and David Mordechaev's motion to amend the complaint is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: May 12, 2017


EILEEN A. RAKOWER, J.S.C.