

Eastern Concrete Materials, Inc. v Allstar Ready Mix Corp.

2018 NY Slip Op 31755(U)

March 26, 2018

Supreme Court, Kings County

Docket Number: 512900/2015

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 512900/2015

SEW # 003

Part 91

EASTERN CONCRETE MATERIALS, INC.,

Petitioner,

against

ALLSTAR READY MIX CORP. A/K/A ALL STAR READY
MIX CORP. D/B/A TRANSIT MIX CORP., ANTHONY
FRANTELLIZZI A/K/A ANTHONY L. FRANTELLIZZI,
DOMINICK P. FRANTELLIZZI A/K/A DOMINICK
FRANTELLIZZI, JR., DOMENICO S. FRANTELLIZZI A/KA/A
DOMINICK FRANTELLIZZI, SR., GLENDA I. MUNIZ, DF,
LLC, AND CITY VIEW CONTRACTING CORP.,

Respondents.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers

Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	
Other.....	

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KINGS COUNTY CLERK
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Upon review of the foregoing papers, petitioner’s motion for summary judgment against certain respondents and default judgment against other respondents is decided as follows:¹

As set forth more fully, below, petitioner seeks to collect on an underlying judgment against Allstar Ready Mix Corp. (“Allstar”), one of the respondents in this proceeding. Petitioner obtained documentation showing that, at a time when Allstar was no longer doing business, Allstar transferred nearly \$70,000 to various other companies for no consideration and no apparent business purpose. For the appearing corporate respondents, those transactions are deemed null and void, and the money shall be returned to Allstar. Furthermore, because the corporate respondents did not respect their corporate integrity, and because certain individual

¹ Although respondents attempted to file a cross-motion for summary judgment, the clerk rejected the cross-motion because it did not use the same return date as the motion. Respondents did not correct the error. Accordingly, the cross-motion is not before this court.

respondents asserted control over the companies that committed the fraudulent transfers, they are liable for the underlying judgment up to the amount of the fraudulent transfers. In addition, petitioner has sufficiently established that the conveyances were fraudulent, and is therefore also entitled to attorney fees and costs. Finally, petitioner is not presently entitled to default judgment against certain respondents because petitioner did not show that it mailed to the defaulting respondents an additional copy of the notice of petition and petition, in accordance with CPLR 3215(g).

Factual Background

Petitioner commenced a prior action against Allstar in Rockland County Supreme Court (the "Underlying Action"). Petitioner obtained default judgment against Allstar, dated September 18, 2014, in the amount of \$82,739.40 (the "Underlying Judgment"). Petitioner states that the Underlying Judgment has been partially paid, with a remaining balance of \$38,988.48.

In response to a subpoenas, petitioner obtained statements from Allstar's financial account with JP Morgan Chase Bank, N.A. ("Chase"), together with an affidavits from Chase. These documents showed that Allstar's account, ending in -2103, had a zero balance in November 2015. The documents also showed that Allstar transferred funds from its -2103 account, to accounts with account numbers ending in -7352, -2290, -7810 and -3561, in September 2014, the month that the Underlying Judgment was issued. The documents further showed that DF, LLC owned the -8710 and -2290 accounts, City View Contracting Corp. ("City View") owned the -7352 account, and Transit Mix Corp. ("Transit Mix")² owned the -3561

² Petitioner describes Transit Mix as a business name for Allstar. However, petitioner does not include a formal filing that shows Allstar does business under the name of Transit Mix. Although the court treats them as different entities, as explained below, the corporate

account. According to the statements, Allstar transferred \$82,850 to these companies. Petitioner states that the total amount transferred to these accounts during this month was \$69,250.00. However, the court's review of the bank statement shows a transfer of \$20,400 to City View, \$47,750 to DF, LLC, and \$14,700 to Transit Mix. Finally, the documents state that Dominick P. Frantellizzi and Glenda Muniz were signatories on the -2103, -2290, -8710, -3561 and -7352 accounts. Dominick Frantellizzi, Sr. was a signatory on the -2290 and -8710 accounts. Dominick Michael Frantellizzi was a signatory on the -3561 account.

Dominick P. Frantellizzi testified during his deposition that he is 50% owner of AllStar and also owns City View. He also testified that Allstar ceased doing business in September 2014, when the Underlying Judgment was issued, and that City View ceased to do business in 2015, although neither company ever formally dissolved. According to records petitioner obtained from the New York Department of State, Allstar, City View and DF, LLC are all located at the same address. Dominick Frantellizzi, Sr. testified during his deposition that he was the managing member of a limited liability company that owned this property, and that Allstar never paid rent to the property owner. Records from the New York Department of State show that Transit Mix was formed in October 2014, just following the Underlying Judgment, and after Allstar stopped doing business, and is also located at the same address. Dominick P. Frantellizzi testified during his deposition that Transit Mix is owned by Dominick M. Frantellizzi, who is Dominick P. Frantellizzi's son, and not a named respondent in this action. He further testified that his son took, apparently without payment, a "couple of the trucks" for Transit Mix that Allstar had owned, but left on the premises, and sold them for scrap.

respondents did not respect their separate identities.

Analysis

Petitioner brought this action against respondents Allstar, DF, LLC, City View, Transit Mix, Dominick P. Frantellizzi, Glenda Muniz, Dominick Frantellizzi, Sr., and Anthony Frantellizzi for fraudulent conveyance, in violation of New York Debtor and Creditor Law §§ 276 and 273-a.³ All respondents except for DF, LLC and City View opposed the petition. Petitioner now seeks summary judgment against Allstar, Transit Mix, Dominick P. Frantellizzi, Glenda Muniz, Dominick Frantellizzi, Sr., and Anthony Frantellizzi, and default judgment against DF, LLC and City View.

1. Petitioner's Motion for Summary Judgment

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

Debtor and Creditor Law § 276 states that “[e]very conveyance made ... with actual intent ... to hinder, delay, or defraud either present or future creditors, is fraudulent.” A conveyance is fraudulent if it is accompanied by “badges of fraud,” or circumstances that commonly accompany fraudulent transfers such that “their presence gives rise to an inference of intent” (*Stout St. Fund*

³ Petitioner also asserts a claim for contempt against certain respondents for failing to appear for a deposition, but that cause of action was severed and ultimately resolved by stipulation.

I, L.P. v Halifax Group, LLC, 148 AD3d 744, 748–49 [2d Dept 2017]). These “badges” include “(1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor’s knowledge of the creditor’s claims, or claims so likely to arise as to be certain, and the transferor’s inability to pay them, and (4) the retention of control of property by the transferor after the conveyance” (*Dempster v Overview Equities, Inc.*, 4 AD3d 495, 498 [2d Dept 2004]).

Similarly, Debtor and Creditor Law § 273–a states that “[e]very 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” (*see also William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960, 962 [2d Dept 2015]).

Petitioner’s evidence shows that it asserted claims for money damages against, and eventually was a judgment creditor of, Allstar, in September 2014. The evidence also shows that, in September 2014, when it was not doing business, Allstar transferred \$82,850 to financial accounts controlled by City View, DF, LLC and Transit Mix, for no apparent business purpose and no consideration. The corporate recipients of this money were, in part, controlled by the same persons and located at the same address as Allstar.

Moreover, because of the overlapping control over the corporate respondents by the individual respondents, the transfer of money between the corporate respondents without respect for their separate identities, and their existence at the same address, there is sufficient evidence to

pierce the corporate veil of respondents Allstar, City View, DF, LLC and Transit Mix (*Last Time Beverage Corp. v F & V Distrib. Co., LLC*, 98 AD3d 947, 950-51 [2d Dept 2012]).

Additionally, the evidence petitioner amassed shows that respondent Dominick P. Frantelizzi was a 50% owner of Allstar, a signatory on the -2103 Chase account for Allstar, from which the fraudulent transfers were made, and asserted such control over Allstar's assets that he was able to unilaterally gift a "couple of trucks" from Allstar to Transit Mix, which is owned by his son, Dominick M. Frantelizzi. Accordingly, there is sufficient evidence to hold Dominick P. Frantelizzi personally liable for the fraudulent transfers (*Rajeev Sindhwani, M.D., PLLC v Coe Bus. Serv., Inc.*, 52 AD3d 674, 677 [2d Dept 2008] [holding corporate representatives personally liable for a tort]; *Agai v Diontech Consulting, Inc.*, 138 AD3d 736, 737 [2d Dept 2016] [piercing the corporate veil between corporation and individuals]).

In opposition, respondents argue that there is no action against the respondents, other than Allstar, because the Underlying Judgment is against Allstar only. However, having found a fraudulent conveyance, both the transferor and the recipient of the money are proper defendants (*Machado v A. Canterpass, LLC*, 115 AD3d 652, 654 [2d Dept 2014] [granting summary judgment on fraudulent conveyance claim against transferor and recipient of transferred funds]). Respondents also argue that the transfers cannot be fraudulent if they occurred prior to the issuance of the Underlying Judgment. However, as petitioner correctly argues, Debtor Creditor Law § 276 bars transfers that hinder or defraud "future creditors" (*see also Kreidler Borg Florman Gen. Const. Co., Inc. v Tower 56, LLC*, 58 AD3d 694, 696 [2d Dept 2009]).

Respondents also argue that certain individual respondents, such as Dominick P. Frantelizzi and Glenda Muniz should be dismissed from this action. However, respondents'

cross-motion was rejected by the clerk as defective, and so respondents may not seek affirmative relief.

Accordingly, the transfers of the funds from Allstar to Transit Mix identified in petitioner's motion, in the amount of \$14,700, are declared null and void. Transit Mix is further responsible for up to \$14,700 of the Underlying Judgment, plus interest, costs, and attorneys fees. Additionally, Domenick P. Frantelizzi is responsible for the unpaid amount of the Underlying Judgment, in the amount of \$38,988.48, plus interest, costs, and attorneys fees.

Although City View and DF, LLC have not yet appeared, as explained below, the court is unable to grant default judgment against them at this time. Accordingly, Allstar's transfers of funds to them cannot be adjudicated in this order.

2. Petitioner's Request for Fees and Costs

Petitioner seeks attorneys' fees and costs pursuant to Debtor and Creditor Law § 276-a, which awards attorneys fees and costs if the fraudulent conveyance was committed with "actual intent" and not merely intent presumed as a matter of law.

In two separate cases, the Second Department held that "actual intent" was established by proof of: (1) a close relationship between the parties to the transaction; and (2) inadequate consideration for the transaction (*5706 Fifth Ave., LLC v Louzieh*, 108 AD3d 589, 590 [2d Dept 2013]; *Kreiser Borg Florman Gen. Const. Co., Inc. v Tower 56, LLC*, 58 AD3d 694, 696 [2d Dept 2009]).

Here, the money transfers occurred within days of the Underlying Judgment, from a business that had recently ceased operating, to other businesses owned by the same persons and located at the same address. Furthermore, respondents have failed to suggest, let alone prove,

any legitimate purposes for these transfers. Under the circumstances, the court finds there is actual intent here.

Petitioner submits its hourly billing statements for the work it performed in this action related to its fraudulent conveyance claims. Based on these statements, petitioner requests the sum of \$41,615.91 in fees and expenses already billed, plus an additional \$1,260 in time spent preparing the motion, for a total amount \$42,875.91.⁴ Petitioner's application is granted.

3. Petitioner's Motion for Default Judgment

Petitioner also seeks default judgment against DF, LLC and City View. To obtain default judgment, petitioner must establish that respondents were properly served with process, that respondents failed to appear or answer the petition, and that petitioner has a viable cause of action (*Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]). In order to establish that it has a viable cause of action, petitioner must submit prima facie proof of its claim by someone with personal knowledge of the facts underlying that claim (*Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 843 [2d Dept 2015]; *Triangle Properties 2*, 73 AD3d at 1032).

In its moving papers, petitioner submits the affidavit of its process server, who states that he served the amended petition upon the DF, LLC and City View by delivering it, on January 29, 2016, to the Secretary of State. This is proper service on limited liability companies and corporations pursuant to CPLR § 311-a, Limited Liability Company Law § 303(a), and Business

⁴ Petitioner requests the total sum of \$45,666.82, which is \$42,875.91 plus \$2,790.91 in costs and disbursements. However, earlier in counsel's affirmation in support of the motion, petitioner states that \$2,790.91 in costs and disbursements was included in the sum of \$42,875.91. It appears that petitioner inadvertently made a duplicate request for costs and disbursements.

Corporation Law § 306. Counsel for petitioner states in her moving affirmation that these respondents have not responded to the amended petition, and so they are in default. Finally, as set forth above, petitioner has established the proof of the facts of its claim.

Because petitioner served respondents DF, LLC and City View pursuant to Limited Liability Company Law § 303(a) and Business Corporation Law § 306, CPLR 3215(g)(4) requires that petitioner also send to these respondents, via first class mail, a copy of the notice of petition and amended petition twenty days before entry of judgment (*Burlington Ins. Co. v Aisyrc Co., Inc.*, 153 AD3d 777, 778 [2d Dept 2017]; *Bank of New York v Willis*, 150 AD3d 652, 654 [2d Dept 2017]). Petitioner makes no such showing. Accordingly, petitioner's motion for default judgment is denied without prejudice.

Conclusion

For the foregoing reasons, petitioner's motion for summary judgment is granted to the extent that the transfers of funds from Allstar to Transit Mix identified in petitioner's motion, in the amount of \$14,700, are declared null and void. Additionally, Transit Mix is liable for up to \$14,700 of the Underlying Judgment, plus interest, costs and attorneys fees. Domenick P. Fratelizzi is likewise liable for the unpaid amount of the Underlying Judgment, in the amount of \$38,988.48, plus interest, costs and attorneys fees. Additionally, petitioner is awarded \$42,875.91 in attorneys fees and costs as against Allstar, Transit Mix and Domenick P. Fratelizzi jointly and severally. Petitioner's motion for default judgment is denied without prejudice.

This constitutes the decision and order of the court.

March 26, 2018
DATE



DEVIN P. COHEN
Acting Justice, Supreme Court

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