

<b>Harding v Czmielowski</b>
2018 NY Slip Op 33947(U)
July 6, 2018
Supreme Court, Kings County
Docket Number: 500105/2017
Judge: Genine D. Edwards
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At Part 80 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Brooklyn, New York, on the 6th day of July, 2018.

PRESENT:

Hon. Genine D. Edwards  
Justice, Supreme Court

-----X  
Charles Scott Harding,

Plaintiff,

Index No. 500105/2017

-against-

DECISION/ORDER

Wojciech Czmielowski, Malgorzata Czmielowski,  
Adrian Czmielowski and Christian Czmielowski,

Defendants.

-----X  
Recitation as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavit/Affirmation Annexed.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

In an action alleging, *inter alia*, fraudulent conveyance, plaintiff seeks clarification and, if necessary, to re-argue the Court’s Decision/Order to dismiss the cause of action for punitive damages. The defendants oppose the motion.

On February 16, 2008, plaintiff sustained serious personal injuries, including paralysis, due to a car accident that occurred while plaintiff was a passenger in a vehicle that was struck by a vehicle owned by defendant Wojchiech Czmielowski. At the time of the accident, the driver of defendant Wojchiech Czmielowski’s vehicle fled the scene and thereafter, defendant Wojchiech Czmielowski reported the car stolen. On April 1, 2008, plaintiff commenced a lawsuit against defendant Wojciech

Czmielewski and “John Doe”, the driver of defendant Wojciech Czmielewski’s vehicle. On November 17, 2016, a jury determined that defendant Wojciech Czmielewski was 100 percent at fault for plaintiff’s injuries and that it was his son, defendant Adrian Czmielewski, that fled the scene. On November 22, 2016, a jury awarded plaintiff \$23.3 million in damages.

When the personal injury action commenced, defendants Wojciech and Malgorzata Czmielewski co-owned three properties: (1) 6809 54<sup>th</sup> Avenue in Maspeth, New York (“Maspeth 1”); (2) 68-10 53<sup>rd</sup> Drive in Maspeth, New York (“Maspeth 2”); and (3) 291 Eckford Street in Brooklyn, New York (“Brooklyn 1”). On or about June 1, 2012, defendants Wojciech and Malgorzata Czmielewski transferred ownership of Maspeth 1 to defendants Adrian and Christian Czmielewski. On or about October 19, 2015, defendants Wojciech and Malgorzata Czmielewski sold Maspeth 2 to a third-party purchaser. And finally, on the same date as the jury’s damages verdict, November 22, 2016, defendants Wojciech and Malgorzata Czmielewski, transferred ownership of Brooklyn 1 to defendant Malgorzata Czmielewski. All properties were allegedly transferred for less than fair or reasonable consideration. Further, the transfers allegedly stripped defendant Wojciech Czmielewski of his significant assets, leaving him unable to satisfy the \$23.3 million judgment.

Plaintiff perceived the defendants’ transfers as a scheme to help defendant Wojciech Czmielewski defraud plaintiff and avoid the \$23.3 million judgment. Consequently, on January 4, 2017, plaintiff filed a complaint containing eight causes of action against the defendants. They filed a pre-answer motion to dismiss, *inter alia*, the cause of action for punitive damages. Ultimately, this Court granted defendants’ pre-answer motion to dismiss the claim for punitive damages.

Following the dismissal, plaintiff filed this motion seeking clarification and, if necessary, to re-argue the punitive damages issue. Specifically, plaintiff sought clarification as to the basis of the Court’s decision for dismissing the punitive damages action. Contingent on the clarification, plaintiff also

moved to re-argue the punitive damages issue. Defendants contend that plaintiff's motion should be denied as it: (1) seeks an improper advisory opinion; and (2) does not satisfy the re-argument standard.

Plaintiff disagreed.

The law surrounding re-argument and clarification is well-stated. A motion for leave to re-argue is permissible upon a showing that the Court misapplied or misapprehended the law or facts. CPLR §2221(d)(2); *Deutsche Bank Natl. Trust Co. v. Ramirez*, 117 A.D.3d 674, 985 N.Y.S.2d 616 (2d Dept. 2014). It is not an opportunity for an unsuccessful party to re-argue issues previously decided. *McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept. 1999). On occasion movants request clarification under the guise of re-argument. Hence, Courts have treated motions to re-argue as motions for clarification and vice versa. *See Orr v. Continental Casualty Company*, 205 A.D.2d 599, 613 N.Y.S.2d 234 (2d Dept. 1994); *Sence v. Atoynatan*, 142 A.D.3d 603, 36 N.Y.S.3d 498 (2d Dept. 2016). A motion for clarification is appropriate when the petitioner is unsure of the impact that the Court's decision has on its rights. *Denn v. Hardwick*, 97 A.D.3d 629, 948 N.Y.S.2d 367 (2d Dept. 2012).

Unlike a clarification, an advisory opinion has no impact. As such, the Courts of New York do not issue advisory opinions. *Self-Insurer's Assn. v State Indus. Commn.*, 224 N.Y. 13, 119 N.E. 1027 (1918); *Simon v. Nortrax N.E., LLC*, 44 A.D.3d 1027, 845 N.Y.S.2d 85 (2d Dept. 2007). An advisory opinion is a judicial decision with no immediate affect and may never resolve anything. *Hirschfield v. Hogan*, 60 A.D.3d 728, 874 N.Y.S.2d 585 (2d Dept. 2009).

On the matter of clarification, it is well established that punitive damages are a societal remedy that is penal in nature. *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976); *Diker v. Cathray Const. Corp.*, 158 A.D.2d. 657, 552 N.Y.S.2d 37 (2d Dept. 1990); *Macy's Inc. v. Martha Stewart Living*, 127 A.D.3d 48, 6 N.Y.S.3d 7 (1st Dept. 2015). Originally, punitive damages were permitted in fraud cases where the fraud was aimed at the public. *Walker v. Sheldon*, 10 N.Y.2d 401,

223 N.Y.S.2d 488 (1961). Thereafter, the Court of Appeals held that punitive damages were not available in cases of a fraudulent conveyance. *James v. Powell*, 19 N.Y.2d 249, 279 N.Y.S.2d 10 (1967). More recently, however, the Court of Appeals held that punitive damages may be awarded in a fraudulent conveyance case where the defendant's conduct was gross and wanton and involved high moral culpability. *Borkowski v. Borkowski*, 39 N.Y.2d 982, 387 N.Y.S.2d 233 (1976); *Fioramonti v. McGrath*, 83 A.D.3d 658, 919 N.Y.S.2d 907 (2d Dept. 2011). Nonetheless, a conveyance effected with the intent to avoid creditors is not conduct that would give rise to punitive damages. *Cadle Co. v. Organes Enterprises, Inc.*, 29 A.D.3d 927, 815 N.Y.S.2d 732 (2d Dept. 2006). Moreover, New York does not recognize an independent cause of action for punitive damages. *Rocanova v. Equitable Life Assur. Socy. of U.S.*, 83 N.Y.2d 603, 612 N.Y.S.2d 339 (1994); *Williams v. Williams*, 149 A.D.3d 1145, 53 N.Y.S.3d 152 (2d Dept. 2017).

Regarding issues of fraudulent conveyance, the Court of Appeals held that the remedy for the transfer of assets during the pendency of a trial is to obtain nullification of the conveyance, and for conveyance after a trial the remedy is to secure those assets in satisfaction of debt. *Federal Deposit Ins. Corp. v. Porco*, 75 N.Y.2d 840, 552 N.Y.S.2d 910 (1990); *Committee of Unsecured Creditors of Interstate Cigar Co. v. Interstate Distrib.*, 210 A.D.2d 283, 620 N.Y.S.2d 78, (2d Dept. 1994). Simply put, punitive damages are not a proper basis for granting relief in a fraudulent conveyance where property was transferred without fair consideration and left the judgment debtor unable to satisfy a judgment. See e.g. *Marine Midland Bank v. Murkoff*, 120 A.D.2d 122, 508 N.Y.S.2d 17 (2d Dept. 1986); *Cadle Co. v. Organes Enterprises, Inc.*, 29 A.D.3d 927, 815 N.Y.S.2d 732 (2d Dept. 2006).


Notwithstanding defendants' contentions, plaintiff is not seeking an advisory opinion. Instead, plaintiff seeks a judicial decision that would have an impact on the course of this litigation. In this matter, plaintiff is unsure of his right to pursue punitive damages. A judicial decision, by way of

clarification, would provide immediate clarity to plaintiff's right to seek punitive damages. As such, plaintiff's request for clarification is not a request for an advisory opinion since the clarification affects issues regarding plaintiff's rights. Thus, defendants' argument that plaintiff is seeking an advisory opinion is ineffective; plaintiff's motion for clarification is appropriate.

In clarifying whether the cause of action was dismissed on substantive or procedural grounds, it is worth noting that an independent cause of action for punitive damages does not exist in New York State. As such, the cause of action was procedurally dismissed. Substantively, defendants transferred property away from defendant Wojciech Czmielewski in an alleged effort to diminish his assets and preclude plaintiff from recovering his judgment. Accordingly, the harm was personal and not aimed at the public generally. What is more, this conveyance, as a matter of law, was not so gross and wanton and of high moral culpability that punitive damages are warranted. As such, the cause of action for punitive damages was dismissed, both, substantively and procedurally.

A substantive dismissal triggers plaintiff's motion for re-argument. Though plaintiff avers that this Court misapprehended the facts and/or law in this action, that argument is unavailing.

Considering the foregoing, the plaintiff's motion for leave to re-argue is denied. The Court adheres to its original Decision/Order dated June 16, 2017.



Genine D. Edwards  
J.S.C.

**FILED**

JUL 17 2018 

**KINGS COUNTY CLERK'S OFFICE**