United Comms. of Univ. Heights v New Line Realty V Corp.
2018 NY Slip Op 34000(U)
March 8, 2018
Supreme Court, Bronx County
Docket Number: 22986/2013E
Judge: Ruben Franco
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART IA-26

UNITED COMMITTEES OF UNIVERSITY HEIGHTS and NORTHWEST BRONX COMMUNITY AND CLERGY COALITION,

Plaintiffs,

-against-

NEW LINE REALTY V CORP., et al,

Defendants.

Index No. 22986/2013E

MEMORANDUM DECISION/ORDER

HON. RUBEN FRANCO

Defendant John Pernicone ("Pernicone") moves, pursuant to CPLR §§ 3211(a)(5) and (a)(7), to dismiss the Amended Complaint, as being barred by the statute of limitations, and for failure to state a cause of action. Pernicone also moves to dismiss pursuant to CPLR §§ 3013 and 3016(b), claiming that the Amended Complaint fails to set forth sufficient details of the circumstances constituting the alleged wrongs.

This is an action to enforce and collect two money judgments obtained in the amounts of $618,820.00 ("the first judgment") and $500,976.85 ("the second judgment), against New Line V Realty Corp., New Line Realty VI Corp., New Line Realty VII & VIII Corp. n/k/a New Start Management V & VI Corp. and New Line Realty IX Corp. [the New Line defendants"]. The first judgment was entered in the Bronx County Clerk's Office on April 22, 2010, and the second was entered on October 20, 2011. Plaintiffs allege that during the pendency of the underlying lawsuits, the New Line defendants, operating through their affiliates and members, engaged in a fraudulent scheme, spearheaded by defendant Frank Palazzolo and other defendants, whereby they fraudulently transferred all assets of the judgment debtors, including real estate valued in excess of $10,000,000.00, to themselves and the other defendants for no consideration.

The court will only address the allegations in the Amended Complaint that pertain to defendant Pernicone.

Plaintiffs allege that on or about November 30, 2010, 1055 Blue LLC ("1055 Blue"), which received 1055 Grand Concourse from one of the judgment debtors for no consideration, conveyed it to 1055 Chase C LLC for the sum of $3,352,000.00, and that this conveyance constituted a fraudulent transfer, in that it was made without fair consideration, and rendered 1055 Blue insolvent, and was made with actual intent to hinder, delay and defraud plaintiffs, in violation of the Debtor and Creditor Law. Plaintiffs further allege that the proceeds of this sale were transferred to other defendants without fair consideration.

Plaintiffs also allege that on or about October 30, 2010, 2315 Moon, LLC ("2315 Moon"), which received 2315 Walton Avenue from one of the judgment debtors for no consideration, conveyed it to 2315 Walton LLC for the sum of $3,020,000.00, and that this conveyance constituted a fraudulent transfer, in that it was made without fair consideration, and rendered 2315 Moon insolvent, and was made with actual intent to hinder, delay and defraud plaintiffs, in violation of the Debtor and Creditor Law. Plaintiffs further allege that the proceeds of this sale were transferred to other defendants without fair consideration.

Plaintiffs also claim that on or about September 14, 2010, 2205 River, LLC ("2205 River"), which received 2205 Walton Avenue from one of the judgment debtors for no consideration, conveyed it to 2205 Walton Towers LLC for the sum of $1,550,000.00, which constituted a fraudulent transfer, in that it was made without fair consideration, and rendered 2205 River insolvent, and was made with actual intent to hinder, delay and defraud plaintiffs, in violation of the Debtor and Creditor Law. Plaintiffs further allege that the proceeds of this sale were transferred to other defendants without fair consideration.

Plaintiffs further allege that the New Line defendants were obligated to pay, or adequately provide for, payment of their liabilities prior to any transfer or distribution of their assets, and that the New Line defendants dissolved, transferred and/or distributed their assets to other defendants, rendering them insolvent.

Plaintiffs claim that defendant Pernicone and other defendants conspired with, aided and abetted the New Line defendants, providing substantial assistance to advance the wrongdoing previously asserted.

On a motion to dismiss a complaint pursuant to CPLR§3211(a)(7), a Court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit any cognizable legal theory (see Nonnon v. City of New York, 9 N.Y.3d 825, 827 [2009], citing Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]; Siegmund Strauss, Inc. v. East 149th St. Realty Corp., 104 A.D.3d 401 [1st Dept. 2013]).

In Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553(2009), the Court of Appeals stated:

> We recently explored the pleading requirement of CPLR§3016(b) in *Pludeman v. Northern Leasing Sys., Inc.* (10 NY3d 486 [2008]). In that case, we noted that the purpose underlying the statute is to inform a defendant of the complained-of incidents. We cautioned that the statute 'should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud' (*id.* at 491 [internal quotation marks and citation omitted]). Although there is certainly no requirement of 'unassailable proof' at the pleading stage, the complaint must 'allege the basic facts to establish the elements of the cause of action' (*id.* at 492). We therefore held that CPLR 3016(b) is satisfied when the facts suffice to permit a 'reasonable inference" of the alleged misconduct (*id.*). And, 'in certain cases, less than plainly observable facts may be supplemented by the circumstances surrounding the alleged fraud' (*id.* at 493).

In addition, viable claims for the aiding and abetting of any tort rest upon the allegation of facts

constituting the elements of the underlying tort, knowledge thereof by the aider and abettor, and substantial assistance by the aider and abettor in the achievement of the tortious act (see Winkler v. Battery Trading, Inc., 89 A.D.3d 1016 [2nd Dept. 2011]). Actual knowledge of the fraud may be generally averred (see Stanfield Assets v. Metropolitan Life Ins. Co., 64 A.D.3d 472, 476 [1st Dept. 2009]). Substantial assistance exists "where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated" (*Id.* at 476, citing UniCredito Italiano, 288 F. Supp.2d at 502 [internal quotation marks omitted], quoting McDaniel v. Bear Stearns & Co., Inc., 196 F. Supp.2d 343, 352 [S.D.N.Y. 2002]).

The gist of plaintiffs' Complaint against Pernicone is that he was an officer, shareholder, director, and/or member of the defendants and their affiliates. However, in support of the motion, Pernicone submits his affidavit wherein he denies ever being an officer, shareholder, director and/or member of the defendants and their affiliates. He further contends that he was not aware of any judgments against the New Line defendants until he received and reviewed the Amended Complaint with his attorney in November, 2015, that he had no knowledge of the alleged fraud or alleged fraudulent conveyances, and that he did not conspire to aid or abet in the wrongdoings alleged in the Amended Complaint.

Plaintiffs submit no proof that Pernicone was an officer, shareholder, director and/or member of the defendants and their affiliates, and fail to provide details regarding the specific actions that Pernicone took in furtherance of the alleged fraud or fraudulent conveyances. However, they do submit two documents pertaining to the 2010 transfer of the property located at 1055 Grand Concourse from Blue to Chase C LLC, and the transfer of the property located at

2315 Walton Avenue from 2315 Moon to 2315 Walton. The first document is an Escrow and Indemnity Agreement ("the Escrow Agreement") between the Stewart Title Insurance Company ("Stewart"), as escrow agent, and F & M Funding LLC, Frank Palazzolo and Mary Palazzolo, as depositors ("the Depositors"). This Escrow Agreement acknowledges that the depositors gave Stewart the sum of $620,00.00, as security against a judgment in the amount of $620,000.00 which was docketed against certain defendants herein. Paragraph "3" of the Escrow Agreement provides, in relevant part, as follows:

> Deposit shall be held for a period of time not greater than January 3, 2013 (A period not less than 12 months after the expiration of all statute of limitations on the enforceability of the judgment against the premises.)

Stewart had authority to negotiate and pay the judgment creditor, with either the prior written consent of the depositors, or an appropriate court order.

A second, hand written agreement, dated November 15, 2010, between Pernicone and the depositors ("the Rider"), provides as follows:

> Any monies Stewart Title Insurance Company agrees to release in relation to the $620,000 being held in connection to a judgment docketed against 1055 Grand Concourse, Bronx NY and 2315 Walton Ave entered April 22, 2010 captioned New Line Realty V Corp. et al. v. United Committees of University Heights et al Index No 1021-2004 will be released ½ to John Pernicone and ½ to F & M Funding LLC. Copy of such escrow agreement is annexed hereto. Facsimile of electronic signature shall be deemed originals for the purposes hereof.

No information is provided by any of the parties as to whether Stewart ever released any of the escrow deposit to the judgment creditors or what, if anything, Stewart did with the escrow deposit. However, the court notes that neither Stewart nor the purchasers of the properties subject to the Escrow Agreement are named as parties to this lawsuit.

The branch of Pernicone's motion to dismiss on statute of limitations grounds is denied. As noted in the prior Decision/Order of Justice Julia I. Rodriguez, issued on September 8, 2015

in connection with this case, the alleged fraudulent conveyances or transfer of assets did not occur until 2010, and are thus, not time barred.

The branches of Pernicone's motion to dismiss for failure to state a cause of action and failure to set forth in sufficient detail the transactions, occurrences and material elements constituting the aiding and abetting, is also denied. As stated in Eurycleia Partners, L.P. v. Steward & Kissell, LLP, *supra*, the pleading statutes are not to be so strictly interpreted so as to foreclose an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting the fraud. The Rider to the Escrow Agreement establishes Pernicone's knowledge of an existing unsatisfied judgment in favor of the plaintiffs herein, and Pernicone fails to explain his entitlement to one-half of any escrowed funds released, as the Rider provides. The court finds that the facts pleaded have created a reasonable inference of misconduct. However, the court notes that no discovery has taken place. Information obtained in discovery may shed light on whether there indeed is merit to plaintiffs' allegations, or whether there is a valid explanation for Pernicone's conduct

Accordingly, Pernicone's motion to dismiss the Amended Complaint, is denied in its entirety. Pernicone's time to answer the Amended Complaint is extended, pursuant to CPLR § 3211(f), to ten days after service of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of the Court.

Dated: March 8, 2018

Ruben Franco, J.S.C.

HON. RUBEN FRANCO