

Perry v Law Off. of Yonatan S. Levoritz, P.C.
2018 NY Slip Op 34118(U)
June 28, 2018
Supreme Court, Westchester County
Docket Number: Index No. 54904/2015
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
SUSIE McMAHAN PERRY a/k/a LESLIE SUSAN PERRY,
as personal representative of the
ESTATE OF DAVID BRUCE McMAHAN,

Plaintiff,

-against-

DECISION and ORDER
Sequence Nos. 9, 10 and 11
Index No. 54904/2015

LAW OFFICE OF YONATAN S. LEVORITZ, P.C.,
YEL PARTNERS, INC. and ELENA McMAHAN,

Defendants.
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RUDERMAN, J.

The following papers were considered in connection with (1) plaintiff's motion pursuant to CPLR 3212, awarding plaintiff summary judgment, declaring that plaintiff is the holder of an equitable lien in the principal amount of \$950,000 encumbering the real property located at 8 Bellefair Boulevard in Rye Brook, New York; declaring that any interest in those premises claimed by defendants is subordinate to plaintiff's aforesaid equitable lien; further declaring that the transfer of the premises by defendant Elena McMahan ("Ms. McMahan") to defendant YEL Partners, Inc. ("YEL Partners") was void ab initio; and for an award of attorney's fees pursuant to DCL 276-a (sequence 9); (2) the cross-motion of defendant Law Office of Yonatan S. Levoritz, P.C. ("Levoritz") pursuant to CPLR 3212, granting summary judgment dismissing the amended complaint and the notice of pendency filed by David Bruce McMahan ("Mr. McMahan") (sequence 10) ; and plaintiff's motion brought by order to show cause pursuant to CPLR 6513 for an order extending for a period of three years a notice of pendency filed on March 30, 2015 and

amended on August 15, 2015, against certain real property located at 8 Bellefair Boulevard in Rye Brook, New York, 10573 (sequence 11):

<u>Papers - Sequence 9</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - VV and Memorandum of Law	1
Affirmation in Opposition, Affidavit, Exhibits A - GG, and Memorandum of Law	2
Affirmation in Further Support, Exhibits A - H, and Memorandum of Law	3
<u>- Sequence 10</u>	
Notice of Cross-Motion, Affidavit, Exhibits A - AA Affidavit, Exhibits A - B, and Memorandum of Law	4
Affirmation in Opposition, Exhibits A - H, Memorandum of Law	5
<u>- Sequence 11</u>	
Order to Show Cause, Affirmation, Exhibits A - G	6
Affirmation in Opposition, Exhibits A - P	7

This action, asserting claims for fraudulent conveyance under the Debtor and Creditor Law and seeking the imposition of an equitable lien, arises out of an in-court agreement placed on the record before the Hon. Samuel Walker on July 20, 2009, between Mr. McMahan and Ms. McMahan in the context of a post-judgment application in their divorce action (Supreme Court, Westchester County, Index No. 399/05). It was agreed at that time that Mr. McMahan would pay Ms. McMahan up to \$1,000,000.00 for the purchase of a home, and Mr. McMahan would be granted a lien on the home in the amount of the purchase price to secure any judgment he entered against Ms. McMahan in the breach of contract action (Supreme Court, Westchester County, Index No. 14070/07). Additionally, a letter dated October 15, 2009, so-ordered by Justice Walker, further memorialized the parties' agreement that then-counsel for Mr. McMahan, the

Law Office of Robert Wallack, P.C., would submit a lien in the amount of \$950,000.00, to attach to the property Ms. McMahan was purchasing for that amount. However, although on October 19, 2009, Ms. McMahan acquired title to 8 Bellefair Boulevard in Rye Brook, New York (the "Bellefair Boulevard premises") for the sum of \$950,000.00, no such lien was filed.

Mr. McMahan's then-counsel asserted that Ms. McMahan failed to cooperate in filing the lien documents; he therefore filed a notice of pendency instead. Counsel for Ms. McMahan states that counsel for Mr. McMahan improperly submitted to Ms. McMahan a lien with a confession of judgment, which she properly refused to sign. The notice of pendency filed by counsel for Mr. McMahan expired in October 2012 pursuant to CPLR 6513, without Mr. McMahan taking any further steps to file a lien or extend the notice of pendency.

In the context of a separate fee payment dispute between Ms. McMahan and Levoritz, her attorney, on March 23, 2015, Ms. McMahan agreed to Levoritz's entry of a judgment against her in the amount of \$725,000.00, and in satisfaction thereof, to convey the deed to the Bellefair Boulevard premises to Levoritz. A deed dated March 25, 2015 transferred title to the premises from Ms. McMahan to YEL Partners, Inc., a corporate entity created by Levoritz for the purpose of taking title to the Bellefair Boulevard premises. YEL Partners then leased the premises to Ms. McMahan for a five-year term.

Mr. McMahan thereafter commenced this fraudulent conveyance action on March 30, 2015, in connection with which he filed a new notice of pendency on the property.

Subsequently, Levoritz had YEL convey the Bellefair Boulevard premises back to Ms. McMahan, in exchange for the reversal of the credit for his legal fees that she had received for the prior transfer of that property to YEL. A deed recorded Aug 23, 2016 transferred title back to

Ms. McMahan.

Levoritz commenced a separate special proceeding against Ms. McMahan on April 19, 2017, seeking, inter alia, the sale of the Bellefair Boulevard premises to enforce Levoritz's lien against Ms. McMahan. That relief was denied by Hon. Lawrence Ecker on September 20, 2017 (Supreme Court, Westchester County, Index No. 55912/2017 [NYSCEF Doc. No. 100]); however, the court's order granted Mr. McMahan's estate leave to intervene and consolidated the claims of that proceeding into the instant action.

The personal representative of Mr. McMahan's estate, who has been substituted in as plaintiff in this action following Mr. McMahan's death on March 29, 2017, now moves for summary judgment (1) on his claim to an equitable lien in the amount of \$950,000 encumbering the Bellefair Boulevard premises, and declaring that any interest in those premises asserted by defendants is subordinate to that equitable lien; and (2) on his fraudulent conveyance claims under the Debtor and Creditor Law regarding the subsequently unwound transfer of the premises by defendant Ms. McMahan to YEL Partners, including an award of attorney's fees pursuant to Debtor and Creditor Law § 276-a (sequence 9). Defendant Levoritz cross-moves for summary judgment dismissing the amended complaint and the notice of pendency filed in 2015 by Mr. McMahan. By separate order to show cause, Mr. McMahan's estate moves for an order extending the notice of pendency that he filed on March 30, 2015 and later amended on August 15, 2015; a temporary order contained in the order to show cause extended the amended notice of pendency pending hearing and determination of the motion.

Analysis

Equitable Lien

Plaintiff has established entitlement to the imposition of an equitable lien. “New York law allows the imposition of an equitable lien if there is an express or implied agreement ‘that there shall be a lien on specific property’” (*M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 12 NY3d 798, 800 [2009], quoting *Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996]). There is no factual dispute that the parties entered into an express agreement in open court, subsequently so ordered by the Court, that Mr. McMahan would have a lien on the property purchased by Ms. McMahan with the funds provided by him. While there is apparently a dispute regarding the events leading Mr. McMahan’s counsel to give up on filing a lien, and to file a notice of pendency instead, that dispute does not preclude summary judgment on this issue. The failure of Mr. McMahan’s former counsel to effectuate the filing of the intended lien, whatever the reason, did not constitute a knowing and voluntary waiver of Mr. McMahan’s right. A waiver may not be created by “negligence, oversight, or thoughtlessness” (*Barringer v Donahue*, 168 AD2d 406, 407 [2d Dept 1990], and see authorities cited therein). Furthermore, the failure of Mr. McMahan’s estate to continue making \$30,000 monthly maintenance payments to Ms. McMahan following Mr. McMahan’s death does not establish “unclean hands” such as would preclude the sought award of equitable relief to plaintiff.

The intended lien, as understood by all parties and counsel, was to be filed on or about the date of Ms. McMahan’s purchase of the contemplated premises, giving Mr. McMahan a first lien on the property. The transfers of title between YEL Partners and Ms. McMahan occurred after that time. Accordingly, any interest claimed in the property by defendants, must be deemed

subordinate to that equitable lien.

Fraudulent Conveyance

In essence, plaintiff claims that Levoritz and Ms. McMahan purposefully engaged in a plan to circumvent Mr. McMahan's potential claim to an interest in the Bellefair Boulevard property, by orchestrating a claim by Levoritz against Ms. McMahan for attorney's fees well beyond any amount that Ms. McMahan owed in fees at that time, in order to obtain a money judgment that Levoritz could then enforce against the Bellefair Boulevard property, in contravention of Mr. McMahan's rights.

Specifically, after Mr. McMahan's notice of pendency expired in October 2012, when he had no current filed lien or other noticed right or claimed interest in the property, Ms. McMahan and Levoritz began a process that resulted in a judgment that Levoritz used as a basis for enforcement efforts against the Bellefair Boulevard property. First, Ms. McMahan executed a new retainer agreement for Levoritz's services dated June 21, 2013, in which Ms. McMahan agreed that Levoritz would continue to represent her for an "initial retainer" of \$500,000, and acknowledged that she already owed him approximately \$200,000. Then, based upon those acknowledgements and concessions, Levoritz commenced an action against Ms. McMahan in Supreme Court, Kings County, on August 21, 2013, to obtain a judgment for attorney's fees, and on October 29, 2013, Hon. Richard Velasquez so-ordered a money judgment in favor of Levoritz and against Ms. McMahan in the amount of \$725,000. Levoritz then used this money judgment to seek a security interest in the Bellefair Boulevard property, which Ms. McMahan held lien-free at that time. On 2015, Ms. McMahan agreed to transfer title to the property to Levoritz in satisfaction of the judgment. Levoritz created YEL Partners, Inc. to take title, and assigned the

judgment to the new corporate entity.

Initially, the reconveyance from YEL Partners back to Elena McMahan does not render the fraudulent conveyance claim moot, particularly since if the claim was initially valid, plaintiff may be entitled to an award of counsel fees under the Debtor and Creditor Law.

To establish fraudulent conveyance under Debtor and Creditor Law § 275, the conveyance must have been made “without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature” (*id.*). To establish a right to affirmative relief under Debtor and Creditor Law § 276, plaintiff must show that defendants made conveyances and incurred obligations with the intent to hinder, delay, or defraud either present or future creditors (*see ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 228 [2011]). The plaintiff’s showing must be by clear and convincing evidence (*see Matter of U.S. Bancorp Equip. Fin., Inc. v. Rubashkin*, 98 AD3d 1057 [2d Dept 2012]).

Both fraudulent conveyance claims require factual determinations regarding the intentions of the parties to the conveyances. While there may be circumstances in which an inference of intent may be drawn as a matter of law (*see e.g. Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2d Dept 2004]), here, the apparent decision of Mr. McMahan’s former counsel to take different steps to secure Mr. McMahan’s interest in the Bellefair Boulevard premises, other than proceeding with the intended lien is a factor that must be taken into consideration in addressing defendants’ intent here. Given the absence of a filed lien or surviving notice of pendency, the question of whether defendants made the conveyances at issue with the intent to hinder Mr. McMahan’s claims or to defraud him cannot be answered here as a matter of law.

Nor can this Court reach a determination as a matter of law regarding whether there was fair consideration for the consented-to judgment for attorney's fees and the related conveyance of title to the Bellefair Boulevard premises at the time of the conveyance in 2015. This issue, too, is one of fact to be addressed at trial.

Although this Court has already granted Mr. McMahan's estate an equitable lien on the Bellefair Boulevard property, to avoid any confusion, the motion for a three-year extension of the amended notice of pendency is granted. The proffered opposition to the relief, is primarily based on arguments this Court has rejected, namely, that the fraudulent conveyance claims are moot and that Mr. McMahan's estate is not entitled to an equitable lien. The ruling of Justice Velasquez in the Kings County action on March 27, 2017, submitted in opposition to motion sequence 11, does not justify denying the sought extension of the notice of pendency while the fraudulent conveyance claims are extant.

Based on the foregoing, it is hereby

ORDERED that motion sequence 9 is granted only to the extent that this Court holds that plaintiff has an equitable lien against the Bellefair Boulevard premises, and that any interest claimed in the property by defendants is subordinate to that equitable lien, and the remainder of the motion is otherwise denied, and it is further

ORDERED that motion sequence 10 is denied, and it is further

ORDERED that motion sequence 11 is granted, and pursuant to CPLR 6513, the period of the duration of the Amended Notice of Pendency filed in relation to this action on August 18, 2015 and entered against the real property located at 8 Bellefair Boulevard, Rye Brook, New York, 10573, designated as Section 124.73, Block 2, Lot 20, be and the same hereby is extended

for a period of three (3) years from August 18, 2018; and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part on Tuesday, August 21, 2018 at 9:15 a.m. to schedule trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
June 28, 2018


HON. TERRY JANE RUDERMAN, J.S.C.