

Bloem v Bergenti

2018 NY Slip Op 34232(U)

February 15, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 606621/2017

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

INDEX No. 606621/2017
CAL No. _____

ORIGINAL

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 12-19-17
SUBMIT DATE 1-18-18
Mot. Seq. # 02 - MD
X Mot. Seq. # 03 - MD

-----X
KRISTINA BLOEM,

Plaintiff,

-against-

JOHN D. BERGENTI, LILLY BERGENTI,
and CAINE BERGENTI,

Defendants.
-----X

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 24; Answering Affidavits and supporting papers 25 - 30; Replying Affidavits and supporting papers; Other; (and after hearing counsel in support and opposed to the motion) it is,

In this action to recover damages for personal injuries the plaintiff moves for an order pursuant to CPLR 3212 and Debtor Creditor Law 273-a and 275: (1) granting summary judgment and ordering that the transfer of title to 3 Little Neck Road, Southampton, NY and 5 Little Neck Road, Southampton, NY, be vacated; (2) directing that title to 3 Little Neck Road, Southampton, NY be re-recorded in the name of defendants John D. Bergenti and Lilly Bergenti, and 5 Little Neck Road, Southampton, NY, be re-recorded in the name of defendant John D. Bergenti; (3) preventing the defendants from conveying or otherwise compromising title to 3 Little Neck Road, Southampton, NY and 5 Little Neck Road, Southampton, NY until the conclusion of the case and/or the satisfaction of any judgment in favor of the plaintiff; and (4) granting the plaintiff costs of this motion. Defendants John D. Bergenti and Lilly Bergenti oppose this motion in all respects and cross move for an order directing the plaintiff and/or her attorney to pay costs and/or sanctions for frivolous conduct in civil litigation.

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The plaintiff commenced this personal injury action on April 10, 2017 seeking damages related to an accident that occurred on March 21, 2016 at 9 Little Neck Road, Southampton, NY when she fell through a floor that was rotted. The plaintiff alleges that the house leaked and the defendants were aware of the pre-existing dangerous condition and had knowledge that the floor was in danger of collapse. The plaintiff was trapped and had to be extracted by the police and fire department. The property was not insured on the date of the injury and has since been lost to foreclosure. Subsequent to the commencement of this action defendant John Bergenti transferred title to the two adjacent properties from his name to Lilly Bergenti and Bergenti Holding Company. Those transfers were done after the plaintiff previously filed a motion for a default judgment in this action. The plaintiff claims that those transfers were done "in an obvious attempt to transfer the assets so that Kristina Bloem would not be able to collect against John Bergenti."

NY CLS Dr & Cr § 273-a states "Every 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".

The Court in *Neshewat v Salem*, 365 F Supp 2d 508, 518-519 [SDNY 2005], held that

"The purpose of 273-a is to provide a remedy for a creditor who has brought an action for money damages against a party who, after being named a defendant in that action, conveys assets to a third party for less than fair consideration leaving the ultimate judgment unpaid." *Cadle Co. v. Newhouse*, 2002 U.S. Dist. LEXIS 15173, No. 01 Civ. 1777, 2002 WL 1888716, at *8 (S.D.N.Y. Aug. 16, 2002) (quoting *Sklaroff v. Rosenberg*, 125 F. Supp. 2d 67, 74 (S.D.N.Y.2000)). To prevail on a § 273-a fraudulent conveyance claim, plaintiff must establish three elements: (1) the conveyance was made without fair consideration; (2) at the time of transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and (3) a final judgment has been rendered against the transferor that remains unsatisfied. *Sklaroff*, 125 F. Supp. 2d at 73 (citing *Lippe v. Bairnco Corp.*, 229 B.R. 598, 603 (S.D.N.Y. 1999) (citations omitted); *Dixie Yarns, Inc. v. Forman*, 906 F. Supp. 929, 935 (S.D.N.Y. 1995)).

In *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960, 963 [2d Dept 2015], the Court reiterated that "the record demonstrates that the conveyance was made without fair consideration, that at the time of the transfer, a judgment in an action for money damages had been entered against Albert Rabizadeh, and that the judgment remained unsatisfied".

CPLR §3212(b) states 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 admission."

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If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985)); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice* Sec. 3212.09)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer, supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

Based upon a review of the motion papers the Court concludes that the plaintiff has failed to establish entitlement to judgment as a matter of law. The plaintiff's complaint does not allege a cause of action for fraudulent conveyance. In addition, the plaintiff has not been granted a judgment against defendants John D. Bergenti and Lilly Bergenti and therefore the third element under NY CLS Dr & Cr § 273-a, which requires that a final judgment remain unsatisfied has not been met. Therefore the motion for summary judgment is denied. The plaintiff's remaining applications are similarly denied.

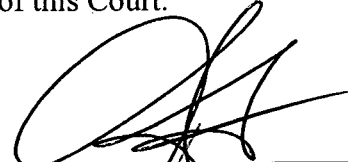
The defendants' motion for sanctions and costs is denied.

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A compliance conference is presently scheduled for July 12, 2018. All unrepresented parties and attorneys shall appear on **July 12, 2018 at 9:30 a.m.** in Courtroom A361 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York, as part of the above-referenced action. Attorneys appearing must have knowledge of the case and be authorized to discuss details regarding this action. A failure to appear may result in a default being granted.

The foregoing constitutes the decision and Order of this Court.

Dated: February 15, 2018



HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION