

Savings Deposit Ins. Fund of Turkey v SeaRock Holdings LLC

2019 NY Slip Op 30167(U)

January 14, 2019

Supreme Court, New York Court

Docket Number: 157793/18

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

SAVINGS DEPOSIT INSURANCE FUND OF TURKEY
(TASARRUF MEDHUATI SIGORTA FONU)

INDEX NO. 157793/18

- v -

MOT. DATE

SEAROCK HOLDINGS LLC et al.

MOT. SEQ. NO. 001 and 002

The following papers were read on this motion to/for turnover (001) and pro hac vice (002)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). _____
Replying Affidavits	NYSCEF DOC No(s). _____

This is a turnover proceeding, whereby petitioner seeks an order directing respondent SeaRock Holdings LLC (“Searock”) to turnover to the Sheriff of the City of New York the share certificate and proprietary lease for Apartment 9C of 130 East 63rd Street, New York, New York 10065 (the “Apartment”) to be sold in partial satisfaction of the judgment against respondent judgment debtor Erol Aksoy (the “judgment debtor”) that was entered on July 12, 2005 in the Supreme Court, County of New York in the action Savings Deposit Insurance Fund of Turkey (Tasarruf Medvuati Sigorta Fonu) v. Erol Aksoy, Index No. 601721/2004 in the amount of \$11,661,681.09, plus interest from July 12, 2005.

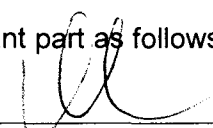
Respondents Searock and 130 East 63rd Owners Corporation (the “Co-op”) have answered the petition and oppose the relief sought. In motion sequence number 002, petitioner moves to have Edward J. Davis, Esq. and Juan Mendoza, Esq. admitted *pro hac vice* to the Supreme Court of the State of New York, New York County, in connection with this action, so that they may represent petitioner. Motion sequence number 002 is not opposed.

At the outset, the motion for admission *pro hac vice* is granted on default. Petitioner has provided proof of Attorneys Davis and Mendoza’s good standing with the Florida bar and the motion is supported by the affidavit of petitioner’s counsel, Attorney Kellner, who is himself admitted to the New York State bar. The court’s decision on the petition follows.

Petitioner alleges that Searock is a transferee of a total of \$1,900,000 that was gifted from the judgment debtor on or about 2012 and 2013 for the cash purchase of the Apartment on or about February 14, 2013. The judgment debtor’s children, Kerim and Eda Aksoy, each have a 50% interest in Searock and reside and/or have resided in the Apartment. The Co-op is the apartment corporation which owns the co-op building located at 130 East 63rd Street, New York, New York and is the lessor of the proprietary lease and the issuer of the shares for the Apartment.

Petitioner deposed Kerim Aksoy on July 26, 2018. He testified in relevant part as follows. He

Dated: 1/14/19



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

moved into the apartment after he graduated from college in June 2013 at which time he was financially dependent upon the judgment debtor. Kerim could not remember how much he paid for the Apartment or the source of funds used to acquire the Apartment. Kerim did recall that the Apartment was paid for in cash and that his sister was involved in finding the property.

In support of Searock's application to the board of the Co-op for approval of the purchase of the Apartment, the judgment-debtor submitted a "gift letter" which he signed and acknowledged before a French notary on October 25, 2012. The gift letter provides in relevant part as follows:

[Erol Aksoy] has gifted the down payment amount of \$190,000 and will gift the balance of the purchase price of \$1,710,000 to be paid at the closing for their acquisition of the above-referenced cooperative unit [Unit 9C-130 East 63rd Street, New York, New York] to his two children Eda Aksoy and Kerim Kaya Aksoy, and that in addition, the undersigned hereby gifts and shall be responsible for payment of the monthly maintenance charges for which the undersigned shall gift a monthly allowance of \$4,000 per month plus any increases thereon and any other charges incurred for the unit during their ownership of the unit.

Petitioner argues that it is entitled to turnover because Searock's purchase of the Apartment was a fraudulent conveyance pursuant to Debtor and Creditor Law § 273-a. Petitioner has also filed notice of pendency in connection with the Apartment.

Both the Co-op and Searock's answers largely contain general denials of the allegations. Further, the Co-op maintains that the restraining notice against it is frivolous because it is not in possession of any property in which the Debtor has an interest. The Co-op has asserted a counterclaim against petitioner based upon the "frivolous" notice of pendency, seeking monies for damages including attorneys fees.

In its answer, Searock denies that the judgment debtor "followed through on the terms of his gift letter." Searock also asserts two affirmative defenses, essentially arguing that petitioner failed to demonstrate the fraudulent conveyance and that "[t]he underlying judgment sought to be enforced was based upon a non-money foreign judgment and thus, is not enforceable against [Searock]."

Searock's counsel has submitted an affirmation in opposition to the petition by Marc S. Gottlieb, Esq. Attorney Gottlieb's affirmation is based upon his review of "applicable documents associated with this matter coupled with [his] conversations with Eda Aksoy... as well as with ... the judgment debtor." Petitioner's counsel admits that the judgment debtor gifted \$190,000 to Searock but denies that any further funds were transferred by the judgment debtor. Attorney Gottlieb explains that "the funds used to cover the large balance of the apartment's acquisition costs came from Ada Aksol" and "[m]ore specifically, the funds came from the sale of an expensive painting Ms. Aksoy owned." Attorney Gottlieb represents that the judgment debtor gifted said painting to Ada Aksol "long before the New York Judgment came into existence."

Lastly, Attorney Gottlieb states that "[a]t best, to the extent this Court determines that the \$190,000 gifted by [the judgment debtor] to Searock constitutes a fraudulent conveyance, Petitioner would only be entitled to a judgment for that amount and not the entirety of the shares to th[e A]partment."

On reply, petitioner has submitted what it claims is proof that the judgment debtor has used a non-party entity called Monlast, Inc. ("Monlast"), to transfer funds to Searock in order to purchase the apartment. Petitioner has provided to the court documents produced from respondents, Kerim Aksoy as well as JPMorgan Chase Bank, N.A. and Bank of America, N.A. Petitioner highlights specific records which show that the funds used to pay the down payment and purchase price of the Apartment passed from Monlast's bank account to Eda Aksoy's bank account and then, lastly, to Searock's bank account only to be disbursed to Jolex Properties LLC, the seller of the Apartment. Further, petitioner represents

based upon the subject records that at the time of the purchase, neither Eda nor Kerim Aksoy had the means to purchase the Apartment.

Discussion

CPLR § 5225[b] provides in pertinent part as follows:

Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

At the outset, the court rejects the Co-op's contention that the restraining notice against it is frivolous because it is not in possession of property belonging to the judgment debtor. CPLR 5225(b) specifically authorizes a special proceeding against a person who is a transferee of money or other personal property from the debtor either where the debtor is entitled to the money or where the judgment creditor's rights are superior to those of the transferee (*Siemens and Halske GmbH v. Gres*, 32 AD2d 624 [1st Dept 1969]). Therefore, petitioner was entitled to commence this proceeding against Searock, and properly named the Co-op as a respondent since it is an interested party; the Co-op issued shares to Searock in the corporation and is the lessor of the Apartment.

The court finds that on this record, petitioner has made a sufficient showing to warrant a trial on the fact issue of whether the judgment debtor fraudulently transferred funds to Searock which Searock then used to purchase the Apartment. Although Searock has not made a sufficient showing to warrant denial of the petition, the court finds that its claims through counsel warrant a factfinding hearing. Indeed, much of petitioner's proof was submitted on reply. Therefore, petitioner is directed to file note of issue on or before March 29, 2019. The parties are directed to appear for a status conference on February 21, 2019 at 9:30am.

The court next considers the Co-op's counterclaim. The Co-op argues that the shares are not subject to a notice of pendency pursuant to CPLR § 6501. CPLR § 6501 provides, in part, that "a notice of pendency may be filed in any action ... in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property". Petitioner contends that the notice of pendency is proper because this proceeding affects Searock's "use or enjoyment of, real property". Further, in its reply to the Co-op's counterclaim, petitioner maintains that it is not asserting a claim with respect to the Co-op's title to the property, nor the rights of its shareholders to any apartments other than Apartment 9C. Petitioner represents that it would voluntarily withdraw the notice of pendency if the Co-op would agree not to authorize any transfer of ownership of the Apartment while this proceeding is pending.

A notice of pendency in connection with the Apartment is improper, because shares in a cooperative apartment are personal property (see i.e. *Savasta v. Duffy*, 257 AD2d 435 [1st Dept 1999]) and the judgment which petitioner seeks would not affect real property as that term is defined under CPLR § 6501. Therefore, the Co-op is entitled to judgment on its counterclaim vacating the notice of pendency. The court cannot, however, find on this record that the Co-op is entitled to damages in connection with the improperly filed notice of pendency.

The balance of the Co-op's counterclaim seeks damages, including costs and attorneys' fees, as well as sanctions pursuant to 22 NYCRR 130-1.1. However, the Co-op has not demonstrated any basis for an award of damages stemming from the improperly filed notice of pendency. Further, the court does not find petitioner's acts to be frivolous within the meaning of the court rules. 22 NYCRR 130-1.1[c] defines conduct as frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

Although the notice of pendency was improperly filed, it was not done so without merit in law and petitioner has otherwise demonstrated a reasoning for doing so separate and apart from some improper motive. Accordingly, the balance of the counterclaim is severed and dismissed.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that Attorneys Edward J. Davis, Esq. and Juan Mendoza, Esq. motion for admission *pro hac vice* is hereby granted (motion sequence number 002); and it is further

ORDERED that Attorney(s) Edward J. Davis, Esq. and Juan Mendoza, Esq. are hereby admitted *pro hac vice* for all purposes in connection with the above-captioned action, and they shall be familiar with and shall comply with the standards of professional conduct imposed upon members of the New York bar, and other rules governing the conduct of attorneys (New York Court Rules § 520.11[d]); and it is further

ORDERED that the petition is restored to the active calendar for trial as outlined herein; and it is further

ORDERED that the parties are directed to appear for a status conference on February 21, 2019 at 9:30am in Part 8, 80 Centre Street, room 278 and petitioner is directed to file note of issue on or before March 29, 2019; and it is further

ORDERED and ADJUDGED that the notice of pendency filed in this action dated and filed August 30, 2018 (NYSCEF Doc # 8) is vacated; and it is further

ORDERED that the balance of the Co-op's counterclaim is severed and dismissed.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 1/14/19
New York, New York

So Ordered: [Signature]
Hon. Lynn R. Kotler, J.S.C.