Eagle Eye Collection Corp. v Shariff
2019 NY Slip Op 32726(U)
September 13, 2019
Supreme Court, New York County
Docket Number: 160277/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 32**

Justice

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EAGLE EYE COLLECTION CORP.,

Plaintiff,

- v -

RASUL SHARIFF, GIULIA LOMBARDO

Defendants.

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INDEX NO. 160277/2018

MOTION DATE _____

MOTION SEQ. NO. 002, 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 52, 53, 54, 55, 56, 57, 58, 70, 71, 72

were read on this motion to/for QUASH SUBPOENA, FIX CONDITIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 73

were read on this motion to/for DISMISS.

Motion sequence 002 and 003 are consolidated for disposition. In motion sequence 003, defendants' pre-answer motion to dismiss the complaint for failure to state a cause of action is granted. In motion sequence 002, plaintiff's motion for a protective order is rendered moot in light of the Court's determination that plaintiff failed to state a cause of action.

Background

Defendants Rasul Shariff and Giulia Lombardo were tenants at 525 East 80th Street, Penthouse A in Manhattan. Their landlords and the owners of penthouse A were Susan and Frank Odery. The Oderys had financial difficulties and sold the unit to non-party NYC REO LLC in October 2016. The transfer of the property was recorded and filed with the City Register

(NYSCEF Doc. No. 47). After REO bought the property (in October), plaintiff started a collection action against Susan Odery (in December).

Defendants bought the unit from their landlord, NYC REO LLC on April 28, 2017 and the deed was recorded and filed on May 3, 2017 (NYSCEF Doc. No. 50). A few months later, on September 11, 2017, plaintiff's collection action against Susan Odery resulted in a judgment in favor of plaintiff.

Plaintiff commenced the instant action against defendants, alleging that defendants violated the Debtor-Creditor Law and committed fraud. The crux of plaintiff's argument is that defendants knew about the collection lawsuit plaintiff had commenced against Susan Odery while defendants were in the process of buying the penthouse. Because they allegedly knew about the lawsuit, defendants knew or should have known that they did not have clean title to the property and therefore, committed fraud. Defendants insist that they did not know about the collection against Susan Odery and could not have known about it because they were not parties to that suit. Plaintiff on the other hand, maintains that defendants knew about the collection action because they were allegedly served with documents regarding the lawsuit. Defendants deny receiving service.

Defendants now bring this pre-answer motion to dismiss, alleging that plaintiff's complaint should be dismissed for failure to state a cause of action and based on defendants' defense of documentary evidence.

Discussion

"When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true

and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint" (*Chanko v American Broadcasting Companies Inc.,* 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

Debtor-Creditor Law

Plaintiff alleges that defendants acted fraudulently pursuant to Debtor-Creditor Law § 273 and § 273-a and claims that the transfer of property to defendants should be set aside pursuant to Debtor-Creditor Law § 278 and §279.

Debtor-Creditor Law § 273 states, "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." This statute applies to constructive fraud, not actual fraud (*see Jaliman v D.H. Blair & Co. Inc.,* 105 AD3d 646, 647, 964 NYS2d 112 [1st Dept 2013]). Debtor-Creditor Law § 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."

"'Fair consideration under Debtor and Creditor Law § 272 is not only a matter of whether the amount given for the transferred property was a 'fair equivalent' or 'not disproportionately small,' which the parties vigorously dispute, but whether the transaction is made 'in good faith,' an obligation that is imposed on both the transferor and the transferee (*Sardis v Frankel*, 113 AD3d 135, 141–42, NYS2d 135 1st Dept 2014]). "[W]here the transferee is aware of an impending enforceable judgment against the transferor, the conveyance does not meet the statutory good faith requirement and generally will be set aside as constructively fraudulent" (*id.* at 142).

Plaintiff's allegation that defendants acted fraudulently in obtaining the penthouse is without merit. Plaintiff's lawsuit was started after Odery sold the premises to REO. The lawsuit was not even commenced until after REO owned it. There is absolutely no basis for plaintiff to claim that defendants owe it money; defendants did not buy the unit from Odery and there was no judgment against Odery when defendants bought from REO. Even if defendants knew that their former landlord was being sued, they did not buy from their former landlord. And the judgment against Susan Odery was entered on September 11, 2017, which is months after the defendants purchased the property from NYC REO LLC in April 2017.

Fraud

Plaintiff also pleads in the alternative that defendants committed fraud.[1] "The elements of a cause of action for fraud are a representation concerning a material fact, falsity of that representation, scienter, reliance and damages" (*Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245

[1] It should be noted that the complaint does not state the elements of a cause of action for fraud, nor does it allege specific facts relevant to that cause of action.

AD2d 96, 98, 665 NYS2d 415 [1st Dept 1997]). There is simply no possibility of fraud here, where there was a pending collection action against Odery (no judgment) when defendants bought from REO.

Accordingly, it is hereby

ORDERED in motion sequence 003, the branch of the motion to dismiss and the branch of the motion to cancel the notice of pendency is granted and the clerk is directed to enter judgment accordingly and the branch of the motion for attorneys' fees is denied; and it is further

ORDERED that in motion sequence 002, the motion to quash the subpoena is rendered moot in light of this decision.

Case dismissed.

9/13/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION	
	X	GRANTED		DENIED	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	REFERENCE