

Amsterdam Nursing Home Corp. v Walkin
2019 NY Slip Op 33742(U)
December 20, 2019
Supreme Court, New York County
Docket Number: 654813/2018
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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INDEX NO. 654813/2018

AMSTERDAM NURSING HOME CORP.,

**MOTION DATE 05/28/2019,
05/28/2019**

Plaintiff,

MOTION SEQ. NO. 001 002

- v -

KAROLINA WALKIN, SLAVKO CHAKOVAN

**DECISION + ORDER ON
MOTION**

Defendant.

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LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 43, 47, 48, 49

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 33, 38, 39, 40, 41, 42, 44, 46

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion of defendant Karolina Walkin to dismiss the complaint (Mot. Seq. 001) is granted and the motion of defendant Slavko Chakovan to dismiss the complaint (Mot. Seq. 002) is denied, in accord with the following memorandum decision. The cross-motion of plaintiff Amsterdam Nursing Home Corp. for an extension of time to serve and file the complaint is denied as moot, due to plaintiff's service and filing of the complaint on December 18, 2018, which this court accepts. The motions are consolidated for disposition.

Background

Plaintiff Amsterdam Nursing Home Corp. ("Plaintiff") is a nursing home located on the Upper West Side of Manhattan that provides residential health care and related services. Non-party Slavna Walkin ("Slavna") was a patient at the nursing home from December 2016 until she

died in January 2018 (Compl. ¶¶ 9, 12).¹ Defendants Karolina Walkin (“Karolina”) and Slavko Chakovan (“Chakovan”) (together, “Defendants”) are, respectively, the daughter and son of Slavna. Plaintiff alleges that Slavna owed the nursing home \$176,264.47 at the time of her death in January 2018, and that prior to her death Slavna transferred substantial sums of money from her New York bank account to Defendants in order to prevent Plaintiff from receiving payment for her debt (*id.* ¶¶ 13-14, 16, 29, 32).

Plaintiff commenced this action against Karolina on or about September 28, 2018, by filing a Summons with Notice, seeking to recover \$176,264.47, based on claims of breach of implied contract and unjust enrichment. Chakovan was added as a defendant on November 15, 2018, and the verified complaint (the “Complaint”) was filed on December 18, 2018. The Complaint alleges that Slavna fraudulently conveyed \$60,000 to Karolina and \$67,969.23 to Chakovan without fair consideration, and that the transfers rendered Slavna insolvent, ineligible for Medicaid, without insurance sufficient to cover the costs of the nursing home’s services, and otherwise unable to pay Plaintiff (Compl. ¶¶ 14-16, 29-32). The Complaint further alleges that defendants accepted the conveyances with wrongful and fraudulent intent to prevent plaintiff from recovering the debt owed by Slavna, and seeks to recover \$127,969.23, the amount transferred to defendants (*Id.* ¶¶ 20, 21, 35, 38). Karolina now moves to dismiss the action pursuant to CPLR 3211 for lack of personal jurisdiction, failure to serve an adequate summons with notice, and for failure to serve a timely complaint. Chakovan moves to dismiss for lack of personal jurisdiction.

¹At oral argument on the motion, counsel for defendant Slavko Chakovan asserted his belief that Slavna is not deceased (NYSCEF Doc. No. 47 at 4-5). Although this point remains unresolved, is not germane to the motions currently before the court.

Discussion

In New York, personal jurisdiction may be based on general jurisdiction, or specific, or long-arm, jurisdiction (*see* CPLR 301, 302). Plaintiff relies on the long-arm statute to assert that the court has personal jurisdiction over the Defendants (Compl. ¶¶ 3, 5). Pursuant to CPLR 302 (a) (1), a court may exercise long-arm jurisdiction over any non-domiciliary defendant who transacts any business within the state or contracts anywhere to supply goods or services in the state, “if the cause of action asserted arises out of that transaction” (*Ehrenfeld v Bin Mahfouz*, 9 NY3d 501, 508 [2007]). “The CPLR 302 (a) (1) jurisdictional inquiry is twofold: under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions” (*Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016]). “If either prong of the statute is not met, jurisdiction cannot be conferred” (*Johnson v Ward*, 4 NY3d 516, 519 [2005]).

To satisfy the “transacting business” prong, “the defendant must have purposely availed itself of the privilege of conducting activities within the forum State” (*D&R Global Selections*, 29 NY3d at 297 [internal quotation marks and citation omitted]). Purposeful availment occurs when the non-domiciliary “seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship” (*D&R Global Selections*, 29 NY3d at 298). Courts must look at the “totality of circumstances concerning the party’s interactions with, and activities within, the state” (*Scheuer v Schwartz*, 42 AD3d 314, 316 [1st Dept 2007] [internal quotation marks and citation omitted]). Although generally, “[m]ore than limited contacts are required for purposeful activities sufficient to establish that the non-domiciliary transacted business in New York” (*Paterno*, 24 NY3d at 376), in some circumstances, “proof of one transaction in New York is sufficient to invoke jurisdiction” (*Kreutter v McFadden Oil Corp.*, 71

NY2d 460, 467 [1988]). “It is not the number of contacts that is determinative of whether a defendant purposely availed itself of the benefits and privileges of conducting business in New York, but rather the ‘quality of the contacts’” (*American/Intl. 1994 Venture v Mau*, 146 AD3d 40, 52 [2nd Dept 2016], quoting *Paterno*, 24 NY3d at 378). For the second prong of the jurisdictional inquiry, the cause of action must have an “articulable nexus” or “substantial relationship” with the defendant’s transaction of business in the state (*D&R Global Selections*, 29 NY3d at 298-299 [citation omitted]). Although “[t]he inquiry is ‘relatively permissive’ . . . [t]he nexus is insufficient where the relationship between the claim and transaction is ‘too attenuated’” (*Id.*, quoting *Johnson*, 4 NY3d at 520).

In support of her motion, Karolina submits an affidavit attesting that she resides in Virginia and has never lived in New York, does not own real property in New York, never visited the nursing home, and never travelled to New York for anything related to this case (Karolina Aff., *generally*). She states that her only connection to this matter is that, while at her Virginia residence, she signed and returned by mail an admission agreement for her mother, sent by Plaintiff for her to sign. She also attests that she has never transacted any business in New York or contracted anywhere to supply goods or services in the state. In support of his motion, Chakovan attests in an affidavit that he attended school and resided in Buffalo, New York, from 1965 until 1976, but has lived in Georgia since 1976. He states that he does not own and has never owned real property in New York, never contracted with plaintiff on his own or his mother’s behalf, and otherwise has not transacted business in New York.

Plaintiff does not dispute that Karolina resides in Virginia and was served there, and that Chakovan resides in Georgia and was served there. There are no allegations that either defendant owns property in New York or visited or conducted any business in the state. Plaintiff instead

alleges that, for purposes of obtaining personal jurisdiction under CPLR 302 (a) (1), defendants transacted business in New York when they “received uncompensated transfers from Slavna Walkin’s . . . assets drawn from accounts maintained within the State of New York” (Compl. ¶¶ 3, 5). Plaintiff contends that defendants wrongfully received such funds, knowing that Plaintiff would consequently be unable to collect on a debt owed by their mother to the nursing home, and thus were involved in alleged fraudulent conveyances of funds pursuant to New York Debtor and Creditor Law §§ 275 and 276 (Sivak Affs., NYSCEF Doc. No. 28 ¶ 24 and NYSCEF Doc. No. 33 ¶ 19).

Citing *Catauro v Goldome Bank for Sav.* (189 AD2d 747 [2d Dept 1993]) and *Mulford v Fitzpatrick* (68 AD3d 634 [1st Dept 2009]), Plaintiff argues that its allegations are sufficient to show purposeful activity in New York and a substantial nexus with its fraudulent conveyance claims, so as to confer personal jurisdiction over defendants. In *Mulford* (68 AD3d at 636), the court found purposeful activity in New York where a New Jersey defendant fraudulently obtained a power of attorney and used it to write out checks to herself from the New York bank account of her stepfather and deceased mother. Similarly, in *Catauro* (189 AD2d at 422-423), the court found purposeful activity where a Missouri defendant used a power of attorney to remove all funds from a New York bank account jointly held by plaintiff and defendant’s late father, and defendant’s conduct included calling the bank to inquire how to withdraw funds, corresponding with the bank and mailing letters enclosing the bank book and power of attorney. Both *Catauro* and *Mulford* involved volitional, affirmative acts on the part of the defendants—obtaining powers of attorney, in one case by false representations, contacting the banks, and using the power of attorney to direct the removal of funds to defendants. That kind of purposeful activity is not alleged in this case. There are no allegations that defendants communicated with

the bank, instructed the bank or took any actions to effectuate the transfers, or otherwise used electronic or telephonic means to project themselves into New York to conduct business transactions. Plaintiff's arguments, and the cases on which it relies, do not support a finding of personal jurisdiction under CPLR 302 (a) (1) over either defendant. While "[t]he lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York" (*Paterno*, 24 NY3d at 376), jurisdiction requires a showing of some purposeful activity, and plaintiff's conclusory allegations that defendants "participated" in Slavna's alleged wrongful transfers by receiving them are not enough.

Relying on *Morgenthau v A.J. Travis Ltd.* (184 Misc 2d 835 [Sup Ct, NY County 2000]) and *Banco Nacional Ultramarino, S.A. v Chan* (169 Misc 2d 182 [Sup Ct, NY County 1996], *affd sub nom. Banco Nacional Ultramarino, S.A. v Moneycenter Tr. Co. Ltd.*, 240 AD2d 253 [1st Dept 1997]), Plaintiff further argues that defendants are subject to personal jurisdiction based on tortious conduct. These cases were decided under CPLR 302 (a) (2), which provides that a non-domiciliary who "commits a tortious act within the state" is subject to personal jurisdiction in New York. Whereas, a "cause of action for fraudulent conveyance is a species of tort" under New York law (*Morgenthau*, 184 Misc 2d at 843), a non-domiciliary who receives funds fraudulently transferred from New York may be subject to personal jurisdiction under New York's long-arm statute, even if they were not within the state at the time of the transfer (*Corpuel v Galassa*, 268 AD2d 202 [1st Dept 2000]; *Morgenthau*, 184 Misc 2d at 843; *see also State Farm Mut. Auto Ins. Co.*, 2017 WL 9482093 at *8 ["an out-of-state recipient of funds fraudulently transferred from New York may be subject to personal jurisdiction under New York's long-arm statute, regardless of whether she was in New York either at the time of the transfer or when the creditor's action was commenced"]).

Here, plaintiff claims that the money transfers to defendants were voidable fraudulent conveyances under Debtor and Creditor Law §§ 275 and 276 (Sivak Aff., NYSCEF Doc. No. 28, ¶ 24). Under Debtor and Creditor Law § 275, a transfer will be deemed constructively fraudulent if it is made “without fair consideration” and the transferor “believes that he [or she] will incur debts beyond his [or her] ability to pay.” “Pursuant to this constructive fraud provision, a conveyance made by a person who has a ‘good indication of oncoming insolvency’ is deemed to be fraudulent” (*Grace Plaza of Great Neck, Inc. v Heitzler*, 2 AD3d 780, 781 [2d Dept 2003][citation omitted]). A claim under this provision also requires “an element of intent or belief that insolvency will result” (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]).

Debtor and Creditor Law § 276 provides that “[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” Intent to defraud or hinder present or future creditors may be established by the presence of “badges of fraud” (*Matter of Uni-Rty Corp. v New York Guangdong fin., Inc.*, 117 AD3d 427, 428 [1st Dept 2014]) or “circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent” (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]), such as a close relationship between the parties to an alleged fraudulent transaction, the financial condition of the transferor before and after the transfer, the timing of the transfer, the transferor’s knowledge of the debt and the inability to pay it, and a pattern or series of transactions after the debt was incurred suggesting the transfer was done to shield assets from creditors (*Wall Street*, 257 AD2d at 529; *Steinberg v Levine*, 6 AD3d 620, 621 [2d Dept 2004]).

With respect to Karolina, the complaint and Plaintiff's submissions show that the transfers to her occurred in 2012, more than four years before her mother entered the nursing home and before she received any services or incurred any debt to Plaintiff. There are no allegations that Slavna anticipated that she would need to go into a nursing home or that she would be unable to pay future debts when she made the \$60,000 transfer to Karolina, and there are no allegations to suggest an effort to put assets beyond Plaintiff's reach. The connection between the 2012 transfers and Plaintiff's claim that the transfers were made to prevent it from recovering a debt for services provided in 2016 and 2017 is too attenuated to warrant a finding of jurisdiction under CPLR 302 (a)(2) (*see Bay Park Ctr. for Nursing & Rehabilitation, LLC v Plummer*, 2016 NY Slip Op 32449 [U] [Sup Ct, Bronx County 2016]).

As against Slavko, the complaint alleges specific transfers were made to Slavko for no consideration, near and during the time that Slavna was in the nursing home, and when she had a good indication that the transfers would result in insolvency and leave her unable to pay current and future creditors. Plaintiff further alleges that Slavko received the funds in question with knowledge that Plaintiff would consequently be unable to collect the debt owed by the transferor, Slavna, and thus was involved in the alleged fraudulent conveyance (Sivak Affs., NYSCEF Doc. No. 28 ¶ 24 and NYSCEF Doc. No. 33 ¶ 19). Accepting these allegations as true and according the Plaintiff the benefit of every possible favorable inference, as the court must do on a pre-answer motion to dismiss (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), Plaintiff adequately states a claim for fraudulent conveyance under the Debtor and Creditor Law, and these allegations of tortious conduct, which are the nexus of Slavko's relationship to the jurisdiction, are sufficient to make a prima facie showing that long-arm jurisdiction is warranted under CPLR 302 (a)(2)

(*Corpuel v Galassa*, 268 AD2d at 203; *Ed Moore Advertising Agency, Inc. v I.H.R., Inc.*, 114 AD2d 484, 486 [2d Dept 1985]).

Accordingly, it is

ORDERED that defendant Karolina Walkin's motion to dismiss the complaint is granted and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that defendant Slavko Chakovan's motion to dismiss is denied; and it is further

ORDERED that plaintiff Amsterdam Nursing Home Corp.'s cross motion is denied as moot; and it is further

ORDERED that counsel for plaintiff and defendant Slavko Chakovan will appear for a preliminary conference on January 16, 2020, at 2:15 p.m., at 111 Centre Street, Room 1166, New York, New York.

This shall constitute the decision and order of the court.

Louis L. Nock

<u>12/20/2019</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>	
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE
					<input type="checkbox"/>	FIDUCIARY APPOINTMENT