ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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CORNING FEDERAL CREDIT UNION,

Plaintiff,

-against-

Index No.: 710044/16
Motion Date: 2/26/19
Mot. Seq. Nos.: 6

STEVEN GEORGILIS, DIBENEDETTO PROPERTIES, INC., JASON GEORGILIS, and JOHN DOE 1 and 2, the names of the "John Doe" defendants being Fictitious and Unknown to Plaintiff, but intended to be the Parties, if any, Having or Claiming an Interest in the Real Property Described Herein,

Defendants,

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The following numbered papers were read on this motion by plaintiff seeking partial summary judgment on the First, Second, Third, and Fourth Causes of Action in the complaint, pursuant to CPLR 3212, and setting aside, and declaring null and void, the transfer of defendant Steven Georgilis' (Georgilis) interest in the subject property to defendant DiBenedetto Properties, Inc. (DiBenedetto), pursuant to Debtor and Creditor Law § 273-a.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits.....	EF 165 - 188
Answering Affirmations - Exhibits	EF 190 - 221
Reply Affirmation - Exhibits.....	EF 222 - 228

Upon the foregoing papers, it is ordered and adjudged that the motion herein is determined as follows:

In July, 2010, non-party American Made Tire, Inc. (AMT) entered into a Mortgage Term Promissory Note (Mortgage Note) and Commercial Term Loan Note and Security Agreement (Commercial Note) with the plaintiff. Defendant Steven Georgilis guaranteed payment of the Notes. Both Notes were breached by AMT and Georgilis, resulting in an April, 2017, judgment in Chemung County, New York, in favor of the plaintiff, and

against Georgilis, in an amount in excess of $400,000.00, which judgment has not been satisfied.

Prior to the commencement of the Chemung County action, in May 2013, Georgilis owned a one-half interest in the property, located at 37-22 59th Street, Woodside, New York. In December, 2013, during the pendency of the Chemung County action, Georgilis transferred his one-half interest in the Woodside property to defendant DiBenedetto Properties (DiBenedetto) for $30,000.00. In July, 2014, DiBenedetto transferred its one-half share of the Woodside property to Jason Georgilis for $200,000.00. It is alleged that, in 2017, the appraised market value of the Woodside property was $990,000.00.

Plaintiff seeks to overturn, set aside, and have declared null and void, the transfer of the Woodside property from Georgilis to DiBenedetto, allegedly for lack of fair consideration, to satisfy the outstanding judgment it holds against Georgilis. A previous motion by the plaintiff was granted to the extent that the complaint and notice of pendency were amended to add Quontic Bank as a party defendant, which amendment was completed and Quontic Bank has since appeared and answered. The branch of said motion seeking to set aside the transfer of property interest from Georgilis to DiBenedetto was denied, as premature, pending the inclusion and appearance of Quontic Bank. Thereafter, BOKF, N.A. (BOKF), as assignee of Quontic Bank, successfully moved to intervene in this action. Plaintiff now moves again for summary judgment setting aside such transfers of the subject property.

Plaintiff contends that the deed from Georgilis to DiBenedetto should be set aside as a fraudulent conveyance, pursuant to Debtor and Creditor Law § 273-a, as movant alleges it was made without "fair consideration." Defendant Jason Georgilis and intervening-defendant BOKF oppose, contending, among other things, that the transfer between Georgilis and DiBennedetto was intended as security in the nature of a mortgage, and that Georgilis received adequate consideration for the transfer.

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On one party's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the nonmoving party (*see Boulos v Lerner-*

Harrington, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]; *see Parietti-Fogarty v Fogarty*, 141 AD3d 512 [2016]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). "[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Stukas v Streiter*, 83 AD3d 18 2d Dept [2011]; *Dykeman v Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014].)

Debtor and Creditor Law § 272, states that fair consideration exists "when in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or ... [w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property, or obligation obtained" (*see generally, Zelouf Intern. Corp. v Rivercity, LLC*, 123 AD3d

1114 [2d Dept 2014]). Movant argues that the transfer of the subject property "for $30,000.00" was not tantamount to receipt of a "fair equivalent therefor," as there is no argument that the property had a fair market value in excess of ten to twenty-times that amount. Additionally, the plaintiff asserts that such conveyance to DiBennedetto "made without fair consideration when the person making it (was) a defendant in an action for money damages" was, therefore, "fraudulent as to the plaintiff in that action ... if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment" (Debtor and Creditor Law § 273-a; *see Akodes v Pyatetsky*, 127 AD3d 895 [2d Dept 2015]; *Prudential Farms of Nassau County v Morris*, 286 AD2d 323 [2d Dept 2001]).

However, "the good faith of both transferor and transferee is stressed as an indispensable condition in the definition of fair consideration under either branch of the statutory language" (*Stout St. Fund I, L.P. v Halifax Group, LLC*, 148 AD3d 744, 747 [2d Dept 2017], quoting *Julien J. Studley, Inc. v LeFrak*, 66 AD2d 208, 213 [2d Dept 1979].) In the case at bar, although the alleged transfer of the property by Georgilis, made while he was a defendant in an action by the plaintiff for money damages, was "inherently suspect ... if the transfer is a security transfer ... what constitutes fair consideration is a question of fact to be determined upon the facts and circumstances of the particular case (*Gelbard v Esses*, 96 AD2d 573, 575 [2d Dept 1983]; *see Stout St. Fund I, L.P. v Halifax Group, LLC*, 148 AD3d 744.)

While the plaintiff insists that the transfer from Georgilis to DiBenedetto was an unconditional sale lacking fair consideration, opposing defendants characterize such transfer as a "security transfer." Pursuant to Real Property Law § 320, "[a] deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage." "[T]he courts are steadfast in holding that a conveyance, whatever its form, if in fact given to secure a debt, is neither an absolute nor a conditional sale, but a mortgage, and that the grantor and grantee have merely the rights and are subject to only the obligations of mortgagor and mortgagee" (*Mooney v Byrne*, 163 NY 86, 92 [1900]; *see Wohl v Frankel*, 170 AD3d 1088 [2d Dept 2019].) Defendants proffer a written mortgage note from Georgilis to DiBenedetto, bearing the same date as the deed between the parties, which note was, admittedly, unrecorded, contending that it demonstrates that the deed was intended solely as security for a loan. "In determining whether a deed was intended as security, examination may be made not only of the deed and a written instrument executed at the same time, but also of oral testimony bearing on

the intent of the parties and a consideration of the surrounding circumstances and acts of the parties" (*Simmons v Reich*, 171 AD3d 1237, 1238 [2d Dept 2019], quoting *Bouffard v Befese*, 111 AD3d 866, 868 [2d Dept 2013].)

Contrary to the plaintiff's conclusion that the subject transfer was an absolute conveyance, such evidence demonstrates that one could statutorily regard such transfer from Georgilis to DiBenedetto as a mortgage; consider it transnationally in conjunction with the subsequent transfer to Jason Georgilis from DiBenedetto; and arrive at the reasonable conclusion that the total value/amount of money Georgilis received for his share of the subject property may be determined to be the equivalent of "fair consideration," which would remove this matter from any claim of fraudulent conduct.

Consequently, the plaintiff has failed to demonstrate the absence of any material issues of fact as to the questions of whether the transfer from Georgilis to DiBenedetto was a deed or a mortgage; whether there was "fair consideration" for said transfer; and whether fraud was involved in the subject property transfers, thereby failing to establish its *prima facie* entitlement to judgment as a matter of law on its First, Second, Third and Fourth Causes of Action, seeking to, among other things, set aside and declare null and void the transfer of Georgilis' interest in the subject property, thereby warranting denial of its motion for summary judgment herein.

The parties' remaining contentions and arguments are either without merit or need not be addressed in light of the foregoing determination.

Accordingly, it is

ORDERED, that the plaintiff's motion seeking, among other things, partial summary judgment on its First, Second, Third, and Fourth Causes of Action, pursuant to CPLR 3212, is denied.

Dated: July 31, 2019

TIMOTHY J. DUFFICY, J.S.C.

FILED
AUG -7 2019
COUNTY CLERK
QUEENS COUNTY