

Sarfati v Palazzolo

2020 NY Slip Op 30432(U)

February 7, 2020

Supreme Court, New York County

Docket Number: 653758/16

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X
MARK SARFATI

Plaintiff

Index No. 653758/16

v

DECISION AND ORDER

FRANK PALAZZOLO and MARY PALAZZOLO

Defendants.

MOT SEQ 001

-----X
NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to enforce a \$1,786,100.17 judgment entered against the defendant Frank Palazzolo (Frank), the plaintiff creditor, Mark Sarfati, alleges, *inter alia*, that Frank fraudulently conveyed his interest in two parcels of real property and various companies to his wife, defendant Mary Palazzolo (Mary), to evade creditors. The plaintiff now moves for summary judgment on the complaint. The defendants oppose the motion. The motion is granted in part.

II. BACKGROUND

On February 11, 2015, in a prior breach of contract action entitled *Sarfati v Palazzolo*, Index No. 650183/2013, this court (Scarpulla, J.) entered a judgment against defendant Frank Palazzolo in the sum of \$1,786,100.17 plus interest. Frank

unsuccessfully appealed the judgment. See Sarfati v Palazzolo, 142 AD3d 877 (1st Dept. 2016). The plaintiff then commenced judgment enforcement proceedings. At Frank's April 7, 2016 deposition, he testified that he signed a document in 2009, entitled "Assignment of Notes, Loans, Collateral, and/or Ownership Interests" (the assignment). In the assignment, Frank conveyed to his wife, defendant Mary Palazzolo, for "\$10 consideration," all of his interest in two New York real properties, one at 69 Little Pine Lane, East Quogue, New York and one at 7 Kingdom Ridge Road, Bedford, New York (the properties) and his ownership interest in six companies enumerated in the assignment: (i) F&M Funding LLC, (ii) Ridgeview Holdings LLC, (iii) Palazzolo Plaza Corp.; (iv) Millie Holdings LLC; (v) BAB Group I, LLC and (vi) BAB Group II, LLC (the companies). Frank testified that, in executing the assignment, he "made a conscious effort" to "put everything in [his] wife's name" so that he would not have to "worry about [his] assets" if a judgment were entered against him. Frank also testified that he annually updates the "schedule of assets" attached the assignment. The schedule of assets attached to the assignment merely sets forth the names of the properties and the companies in which Frank had some interest that he subsequently conveyed to Mary but the assignment does not specify the exact percentage interests Frank conveyed to her,

when any specific conveyance was made, or the value of the assets conveyed.

On July 8, 2016, shortly after Frank's deposition, the plaintiff commenced this fraudulent conveyance action against both defendants under Debtor Creditor Law (DCL) §§ 273, 273-a, 274, 275, and 276. The complaint asserts eight causes of action. In the first cause of action, the plaintiff seeks a money judgment directly against Mary in the amount of \$1,786,100.17, plus statutory interest from February 11, 2015. The second cause of action seeks a declaration that Frank is "the owner" of the properties, the companies, and a certain condominium located at 10 City Place, PH5D, White Plains, New York (the condominium) "and that those assets are subject to execution" to satisfy the judgment. The third, fourth, fifth, sixth, and seventh causes of action all seek to set aside "any transfer to Mary of Frank's interest" in the properties, the companies, and the condominium under DCL §273 (third), § 273-a (fourth), § 274 (fifth), § 275 (sixth), and § 276 (seventh). The eighth cause of action seeks an award of attorney's fees under DCL § 276-a in an amount to be determined at a hearing.

III. DISCUSSION

It is well settled that the movant on 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." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 (1980), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

The motion is denied as to the first and second causes of action. The first cause of action seeks a money judgment directly against Mary in the amount of the judgment. "[A]s a general rule a creditor's remedy in a fraudulent conveyance action is limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance." Schwartz v Boom Batta, Inc., 137 AD3d 512, 521 (1st Dept. 2016) quoting Manufacturers & Traders Trust Co v Lauer's Furniture Acquisition, 226 AD2d 1056 (4th Dept. 1996). However, "a Court of equity may award a personal judgment against a party in lieu of setting aside a transfer." Schwartz v Boom Batta, Inc.,

supra. The alternative remedy of awarding a money judgment against the transferee in lieu of clawing back any assets conveyed is used where the plaintiff demonstrates that the transferee has sold and commingled the transferred assets with its own. See Manufacturers & Traders Trust Co., supra. The amount of the judgment must be "limited to the value of the transferred property." Manufacturers & Traders Trust Co., supra.

Here, the plaintiff has not established the value of the assets fraudulently conveyed to Mary or that Mary sold and comingled assets with her own as is required to obtain a money judgment directly against her. Schwartz v Boom Batta, Inc., supra; Manufacturers & Traders Trust Co., supra. The plaintiff submits only an attorney's affirmation and memorandum of law asserting that various tax documents show that Mary received cash disbursements from the interests in some of the companies that Frank fraudulently conveyed to her and contends that she allegedly comingled those assets with her own. Since the plaintiff's counsel claims no personal knowledge of these underlying facts, the contents of his affirmation are without probative value or evidentiary significance on this motion. See Zuckerman v City of New York supra; Trawally v East Clarke Realty Corp., 92 AD3d 471 (1st Dept. 2012); Thelen LLP v Omni Contracting Co. Inc., 79 AD3d 605 (1st Dept. 2010).

Moreover, in opposition, the defendants have submitted an

affidavit from their own accountant and tax preparer, Kevin Fay, who claims to have personal knowledge that these tax documents do not reflect cash disbursements to Mary from the companies. Fay states that the distribution on the "Final K-1" for F&M Funding LLC reflects the distribution of a loan receivable to Mary resulting from the winding down of F&M rather than a cash disbursement that was comingled with her own assets. Fay also states that the entries for income recorded on Mary's K-1s for Palazzo Plaza Corp. and Millie Holdings, LLC represents her share of the profit generated by those entities but that the "profit was not distributed to her" in cash. Thus, inasmuch as the submissions raise issues of fact as to whether Mary received cash disbursements from interests in the companies that were fraudulently conveyed by Frank and then comingled with her own assets, plaintiff's motion for summary judgment on the first cause of action for a money judgment against Mary is denied.

The second cause of action seeks a declaration that Frank is "the owner" of the properties, the companies, and the condominium "and that those assets are subject to execution" in order to satisfy the judgment. However, since the subject assignment does not quantify the specific percentage interests in the properties and the companies that Frank conveyed to Mary, the plaintiff has not met its burden of demonstrating that the setting aside of any conveyances by Frank would make Frank "the owner" of the

properties or the companies.

The plaintiff has also failed to submit proof in admissible form to establish in the first instance that Frank owned an interest in the condominium at any time which he could convey to Mary, fraudulently or otherwise. Even if the plaintiff had met his burden, the defendants nonetheless have raised triable issues of fact as to Frank's interest in the condominium. Defendants have submitted a deed purporting to reflect that the condominium's prior owner conveyed it directly to Mary and Frank testified at his deposition that he never owned any interest in the condominium. Thus, summary judgment on the second cause of action is denied.

The plaintiff's motion for summary judgment on the third, fourth, fifth and sixth causes of action seek to set aside "any conveyance" by Frank to Mary under DCL §§ 273, 273-a, 274 and 275 is also denied. Under the plain language of these statutes, to successfully prove entitlement to set aside a claim under any of these statutes, the plaintiff must establish a common element, which is that the conveyances he is challenging were made without "fair consideration," as that term is defined in DCL § 272. "'Fair consideration under [DCL] 272 is not only a matter of whether the amount given for the transferred property was a 'fair equivalent' or not 'disproportionately small...but whether the transaction is made in good faith.'" Sardis v. Frankel, 113 AD3D

135 (1st Dept. 2014). Through Frank's admissions under oath at his deposition and his affidavit in opposition to this motion admitting that he transferred the assets set forth in the assignment to his wife for \$10 in order to evade future creditors, plaintiff has established that those transfers were in bad faith and thus not for "fair consideration." Sardis v. Frankel, supra; See also Wall St. Assocs. v Brodsky, 257 AD2d 526 (1st Dept. 1999).

However, each of these statutes also contains other elements that have not been proven by the plaintiff on this record. DCL §273 requires proof that the conveyance occurred when the transferor was insolvent or that the conveyance rendered the transferor insolvent. DCL §273-a requires proof that the person making the conveyance was a defendant in an action for money damages or a judgment in such an action had been docketed against him when the conveyance was made. DCL § 274 requires proof that the transferor "is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital." Lastly, DCL § 275 requires proof that the person making the conveyance "intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." Despite the fact that the plaintiff has proven a bad faith scheme by defendants to evade creditors and satisfied the

element that the conveyances set forth in the assignment were without fair consideration, the plaintiff has not proven that Frank made any specific conveyance to Mary (i) while insolvent or that the conveyance complained of rendered him insolvent, (ii) while Frank was a party to a litigation with the plaintiff or after the judgment was docketed against him, (iii) while Frank engaged in or was about to engage in a business transaction for which his remaining property would constitute unreasonably small capital or (iv) at a time Frank "intended or believed" he would incur debts beyond his ability to pay as they matured. Thus, the plaintiff's motion is denied as to the third, fourth, fifth and sixth causes of action under DCL 273, 273-a, 274 and 275.

The plaintiff's motion for summary judgment on the seventh cause of action seek to set aside "any conveyance" by Frank to Mary under DCL § 276 is granted to the extent of setting aside the assets conveyed in the assignment. DCL § 276 provides that "[e]very conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." See Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. P'ship, 25 AD3d 301 (1st Dept. 2006). The plaintiff has adduced sufficient evidence in admissible form to establish that Frank conveyed to Mary with the actual intent to defraud future creditors ownership interest in the properties

and the companies listed in the assignment. Frank admitted under oath at his deposition and in his affidavit in opposition to this motion that he conveyed these assets to Mary specifically so that future creditors could not enforce any judgments. Mary does not submit any affidavit in opposition to this motion, and thus fails to dispute that this was the intent of the assignment. Frank's admissions under oath are sufficient to establish the defendants' "actual intent to defraud" creditors as to the assets conveyed in the assignment. See Wall Street Assocs. v Brodsky, supra. Thus, the plaintiff has established his entitlement to summary judgment motion on the seventh cause of action to the extent of setting aside the conveyances contained in the assignment under DCL § 276.

While the assignment itself and Frank's deposition testimony establish that Frank owned at least some percentage interest in the properties and the companies prior to conveying them to Mary, the assignment does not specify the value or precise percentage ownership interests Frank conveyed to Mary via the assignment that is to be set aside in accordance with DCL § 276. The plaintiff does not submit evidentiary proof sufficient in admissible form in that regard. As such, summary judgment on the seventh cause of action is granted as to liability only, and the plaintiff may establish at trial what specific percentage interests in the assets contained in the assignment were

fraudulently conveyed by Frank to Mary and the value thereof.

However, the portion of the plaintiff's motion for summary judgment on the seventh cause of action seeking to set aside any purported transfer to Mary of Frank's alleged interests in any asset not enumerated in the assignment must be denied. The assignment purports to transfer only interests in the properties and the companies and no other assets. Thus, it is plaintiff's burden at trial to establish his right to set aside alleged conveyances of assets not enumerated in the assignment, including any interest the plaintiff contends Frank may have had in the condominium.

As to the eight cause of action, the plaintiff, "[h]aving established actual intent to defraud... is entitled to attorneys' fees under DCL §276-a." Matter of Setters v AI Props. Devs. (USA) Corp., 139 AD3d 492, 494 (1st Dept. 2016). Therefore, plaintiff's summary judgment motion on the eighth cause of action under DCL §276-a is granted and the amount of attorneys' fees shall be fixed at trial as is required by that statute.

The court has considered the parties' remaining contentions and finds them to be unavailing.

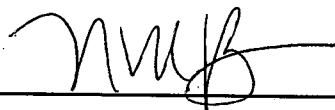
IV. CONCLUSION

Accordingly, for the reasons set forth herein, it is hereby

ORDERED that the plaintiff's motion for summary judgment is granted (1) as to liability only on the seventh cause of action, the transfers contained in the subject assignment are hereby set aside pursuant to Debtor Creditor Law § 276, the value of the assets conveyed under the assignment to be determined at trial, and (2) as to the eighth cause of action for attorneys' fees under DCL § 276-a, the amount to determined at trial; and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: February 7, 2020



Nancy M. Bannon, J.S.C.

HON. NANCY M. BANNON