

Commissioners of the State Ins. Fund v Amir

2020 NY Slip Op 32611(U)

August 7, 2020

Supreme Court, New York County

Docket Number: 450671/2019

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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INDEX NO. 450671/2019

THE COMMISSIONERS OF THE STATE INSURANCE FUND,

MOTION DATE 12/17/2019

Petitioner,

MOTION SEQ. NO. 001

- v -

MEIR AMIR, ORLY AMIR

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 26, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for

JUDGMENT - MONEY

ORDER

Upon the foregoing documents, it is

ORDERED and ADJUDGED that the notice of petition is granted to the extent that a judgment in favor of petitioner and against respondent Meir Amir in the amount of \$67,000, with interest at the statutory rate from December 31, 2013 until the date of the judgment, in the amount of \$ _____, to be calculated by the Clerk, for a total of \$ _____ shall be entered by the Clerk of New York County; and it is further

ORDERED and ADJUDGED that the transfer from judgment debtor Six Stars of New York, Inc. of \$67,000 to respondent Meir Amir are hereby vacated and annulled and such funds shall be returned and remitted to petitioner; and it is further

ORDERED that the claim of SIF that the \$10,000 in personal expenses and loan repayment of \$23,187 should be set aside as fraudulent conveyances is severed and continued; and it is further

ORDERED that counsel shall appear for a preliminary conference on September 15, 2020, 11 AM, by submission only (59nyef@nycourts.gov) of a completed standard preliminary conference order setting forth limited discovery on the question of the foregoing monetary transfers.

DECISION

Petitioner the Commissioners of the State Insurance Fund (SIF) brings this special proceeding to recover a judgment awarded to petitioner in a previous action (The Commissioners of the State Ins. Fund v Six Stars of New York, Inc. Sup Court, NY County, Dec. 6, 2017, Reed, J., index No. 402822/10 [the underlying action]). By notice of petition, SIF seeks judgment in the amount of allegedly fraudulent transfers made by the judgment debtor and for disclosure of other illegal transfers.

In the underlying action, SIF obtained judgment against judgment debtor Six Stars of New York, Inc. (Six Stars).

SIF alleges that Six Stars fraudulently conveyed assets to avoid paying the judgment, seeks to annul transfers from Six Stars to respondents Meir Amir (Meir) and Orly Amir (Orly), each

half owner of Six Stars and, respectively, its president and vice-president. Meir and Orly divorced in 2017.

In March 2007, SIF issued a policy of workers' compensation and employer's liability insurance to Six Stars. The policy was cancelled in March 2010 for non-payment of premiums. In October 2010, SIF commenced the underlying action, for money damages, to recover the workers' compensation insurance premiums. The December 2017 judgment against Six Stars was in the amount of \$54,657.15, raised to \$102,701.91 by the addition of interest, collection costs, and costs and disbursements (NY St Cts Elec Filing [NYSCEF] Doc No. 2).

SIF submits documents that show transfers to respondents in 2013 and 2016 during the time that the underlying action was pending. Six Stars' 2013 and 2016 federal income tax returns show that each respondent owned 50% of Six Stars' stock. The Schedule K-1 forms (K-1) included with the 2013 return show that Six Stars distributed \$38,500 to each respondent, totaling \$77,000 (NYSCEF Doc No. 9). Six Stars' general ledger for 2013 records those distributions (NYSCEF Doc No. 10). The company's 2016 federal income tax return shows that it repaid a shareholder loan that was made by one or both respondents for \$23,187 (NYSCEF Doc No. 8). The 2016 return also shows that, at the beginning of 2016, Six Stars had \$30,834 in assets and, that at the end of year, it had zero assets (id.). According to SIF,

although the New York Department of State website shows that the company has not been legally dissolved, the 2016 return shows that it is defunct and has ceased operations (id.).

The petition asserts causes of action based on Debtor and Creditor Law § 273-a (repealed and replaced on December 6, 2019 as to transfers made after the effective date [L 2019, ch 580, eff. Apr. 4, 2020]), pursuant to which, every conveyance without fair consideration made by a person who at the time is a defendant in an action for money damages is fraudulent regardless of the intent of the person making the conveyance if, after final judgment for the plaintiff in the action, the defendant does not satisfy the judgment.

SIF shows that Six Stars made transfers to respondents without receiving fair consideration in return during the time that SIF was a defendant in the underlying action for money damages, and that SIF has not paid the judgment.

A transaction will be deemed to lack fair consideration if it was not made in good faith (American Panel Tec v Hyrise, Inc., 31 AD3d 586, 587 [2d Dept 2006]). The good faith of both the transferor and transferee is an indispensable component of fair consideration (Matter of Mega Personal Lines, Inc. v Halton, 9 AD3d 553, 555 [3d Dept 2004]; Studley, Inc. v Lefrak, 66 AD2d 208, 213-214 [2d Dept], affd 48 NY2d 954 [1979]). The transfer of corporate assets to an insider establishes a lack of

good faith as a matter of law (*id.*; see also American Federated Title Corp. v GFI Mgt., Inc., 126 F Supp 3d 388, 401 [SD NY 2015], *affd* 716 F Appx 23 [2d Cir 2017]). Where the transferee is an officer, director, or major shareholder of the transferor, repayment of an antecedent debt does not constitute fair consideration (Atlanta Shipping Corp. v Chemical Bank, 818 F2d 240, 249 [2d Cir 1987]). Six Stars' transfer of money to its sole shareholders who were also its executives shows the lack of fair consideration.

In addition, where 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 (Sardis v Frankel, 113 AD3d 135, 142 [1st Dept 2014]). Respondents must have been aware of the impending judgment against Six Stars in the underlying action.

The same test that is applied to a motion for summary judgment is used to determine a special proceeding (Matter of Port of N.Y. Auth. [62 Cortlandt St. Realty Co.], 18 NY2d 250, 255 [1966]). On a summary judgment motion, the role of the court is to decide whether the case presents bona fide issues of fact and not to resolve issues of credibility (Vega v Restani Constr. Corp., 18 NY3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists or can reasonably conclude that the existence

of fact is arguable, the motion must be denied (Bush v Saint Claire's Hosp., 82 NY2d 738 [1993]).

SIF has carried its burden of establishing a prima facie showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see West 157th St. Assoc. v Sassoonian, 156 AD2d 137, 139 [1st Dept 1989]).

As the respondents oppose a summary determination, the evidence in the record must be viewed in the light most favorable to them (see Sosa v 46th St. Dev., LLC, 101 AD3d 490, 493 [1st Dept 2012]).

Respondents state that neither received the distributions from Six Stars. In her opposing affidavit, Orly states that, although the K-1 shows that she received \$38,500, she never received the money. Orly states that she did not receive repayment of a loan from Six Stars and that Meir was the shareholder who received this distribution.

Orly alleges that, when Six Stars was started over 30 years ago, she was allotted a 50 percent share. Shortly afterward, Meir removed her from the company. He ran the company completely by himself. In 2011, Meir formed another company named HTP. In 2016, he transferred all of Six Stars' assets to HTP and then emptied HTP. Meir completely controlled the finances of Six Stars and HTP and would sign all checks and tax

returns for those companies. Orly states that she was a vice president in name only at Six Stars and was never an officer at HTP, and that she was never involved in the finances of either company. Orly further alleges that the only money that she received from Six Stars was a salary of \$400 per week, which was actually child support. She alleges that Meir insisted on paying child support through Six Stars. Orly learned about the debt to SIF for the first time during the divorce mediation. She says that Amir had the money to pay SIF but refused to do so (NYSCEF Doc No. 26).

Six Stars' accountant submits an affidavit (NYSCEF Doc No. 33), in which he explains that (i) in 2013, Six Stars was neither insolvent nor on the verge of becoming insolvent; (ii) Six Stars continued to operate until 2016; (iii) while the K-1s indicate that each respondent received \$38,500, neither in fact did, (iv) in 2013, those funds were transferred to another company, Limos Unlimited (Limos) to pay for insurance; (v) the transfer to Limos was made in the amounts of \$37,000, \$20,000, and \$10,000 (totaling \$67,000).

In the affidavit, the accountant further states:

"It was determined to issue the 2013 K-1 as money distributed from Six Stars and as a loan contribution to Limos Unlimited as opposed to an expense for Six Stars and income to Limos Unlimited. The additional \$10,000.00 was an accounting entry for an estimated amount for personal expense paid by Six Stars in 2013" (id., ¶ 5).

He continues that the 2016 transfer shown on Six Stars' books as a loan repayment in the amount of \$23,187 was not an actual repayment, but only a general journal entry to bring the balance down to zero, as 2016 was Six Stars' final year of operation and the balance sheet had to be adjusted to zero on the final 2016 tax return. He asserts that Six Stars did not repay any money to any party in 2016.

In reply, SIF argues that the accountant's affidavit is an admission that Meir received the money from Six Stars. SIF presents a record of the New York Department of State that shows the existence of a company called Limos Unlimited, Inc. that is doing business in New York and that has Meir as the chief executive officer, and but whose shareholders are not listed. SIF argues that when Six Stars transferred money to Limos, it transferred money to Meir Amir and that, in essence, Meir transferred money to himself, as he controls both companies. SIF seeks judgment against Meir for \$77,000 (the amount of the transfers to Meir and Orly, according to the tax return), and to be allowed to take the depositions of both respondents on the issue of Orly's participation in, and compensation from, Six Stars and whether the \$23,187 shareholder loan was repaid or written-off.

The accountant's evidence shows that the transfer of \$67,000 from Six Stars to Limos constituted a transfer to Meir,

as he was an insider in both companies. The statement by the accountant that the remaining \$10,000 was a "personal expense" is vague. SIF is entitled to judgment against Meir in the amount of the \$67,000.

SIF has not prima facie established its claim that the \$10,000 "personal expense" and loan repayment of \$23,187 should be set aside as fraudulent transfers, and thus there are issues of fact with respect to such transfers. Though a party to a special proceeding is not entitled to discovery as of right, it may seek leave of court pursuant to CPLR 408 upon a showing of need (Matter of Town of Pleasant Val. v New York State Bd. of Real Prop. Servs., 253 AD2d 8, 15-16 [2d Dept 1999]). Where the need for disclosure does exist, a court should permit it (Plaza Operating Partners v IRM [U.S.A.] Inc., 143 Misc 2d 22, 24-25 [Civ Ct, New York County 1989]). Evidence establishing whether or not such transfers were fraudulent is necessary, and as the knowledge is within possession of the respondents, SIF is entitled to conduct limited disclosure on such issues.

8/7/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE