

Flowers v 73rd Townhouse LLC
2020 NY Slip Op 32947(U)
August 31, 2020
Supreme Court, New York County
Docket Number: 651036/2010
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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J. CHRISTOPHER FLOWERS,

Plaintiff,

DECISION AND ORDER
Index No. 651036/2010
MOT SEQ 010

- against-

73RD TOWNHOUSE LLC, 73rd TOWNHOUSE
MEMBER, LLC, 73rd KR LLC, JAMES K.
RINZLER, BENJAMIN S. RINZLER, BRADLEY
T. RINZLER, The ESTATE of MILTON S
RINZLER, JAMES K. RINZLER, BENJAMIN S.
RINZLER, BRADLEY T. RINZLER, ROBERTA K.
RINZLER, as Executors of the Estate of
MILTON S. RINZLER, The RINZLER FAMILY
LIMITED PARTNERS, DOMINION PROPERTY
GROUP, LLC, DOMINION MANAGEMENT
COMPANY, LLC, DOMINION FINANCIAL CORP.,
and JUDITH KINGSFORD, as executrix of
the Estate of Daniel Kingsford,

Defendants

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NANCY M. BANNON, J. :

I. INTRODUCTION

In this action seeking, *inter alia*, a judgment against the defendants for alleged fraudulent conveyances by defendant-judgment debtor 73rd Townhouse, LLC (73rd Townhouse) to evade collection of a \$500,000 consent judgment entered in favor of the plaintiff-judgment creditor in a prior action Flowers v 73rd Townhouse LLC, Index No. 603768/2004 (the prior action), the plaintiff, J. Christopher Flowers, moves for partial summary

judgment on the 1st through 7th, and the 16th cause of action in the third amended complaint. The defendants oppose the motion. The motion is granted in part, and a hearing is ordered on damages and attorney's fees.

II. BACKGROUND

73rd Townhouse is a sole purpose entity that was formed to hold title to the townhouse located at 12 East 73rd Street in Manhattan. 73rd Townhouse is owned by defendant 73rd Townhouse Member (73rd Member). Thirty-percent of 73rd Member was owned by defendants Daniel Kingsford (Kingsford), now deceased, and his wife and executrix, defendant Judith Kingsford (Judith), who has defaulted in this action. By order dated December 18, 2017, this court struck the answer of Judith, as personal representative, and ordered that an inquest on her liability be conducted simultaneously with the trial of this action.

The remaining 70% of 73rd Townhouse Member is owned by 73rd KR, which, in turn, is owned by various members of the Rinzler family, with brothers Bradley, James, and Benjamin Rinzler each owning 20%, 20% and 5% respectively; and the late Milton Rinzler's (Milton) estate owning 35%. The Rinzler Family Limited Partnership L.P. also owns 20% of 73rd KR. Defendant James K. Rinzler (James) is the manager of 73rd KR.

Milton was a real estate lawyer who was engaged in developing properties, often several at a time, including the premises. Milton provided the funding for the purchase and renovation of the premises using his own funds and bank loans. Milton also allegedly made loans to family members to fund their capital contributions to the projects, although no written loan agreements have been produced or alleged to exist. Nor does there appear to be any documentation of taxes or interest ever being paid or reported to the IRS or any taxing authority on these alleged loans.

Milton used an apparently non-jural entity, defendant Dominion Management (Dominion Management), as a vehicle for processing payments used in his development activities, including the development of the subject premises. Defendant Dominion Management Company LLC was not formed until November 18, 2009. Dominion Management and Consulting Group, Inc. was not incorporated until June 2010. The plaintiff avers in his affidavit that the County Clerk has certified that no "doing business as" certificate was filed at any time after 1944 for Dominion Management.

Pursuant to a real estate contract dated January 17th, 2004, the plaintiff and his then-wife, Dr. Mary White, who is not a party to this action, agreed to purchase the premises from 73rd Townhouse. The contract provided for (i) a purchase price of \$17

million and (ii) the seller agreed to perform renovations on the premises subject to "the plaintiff's right to make 'reasonable adjustments and modifications' (i.e. change orders)". Flowers v 73rd Townhouse, LLC, 52 AD3d 104, 107 (1st Dept. 2008). The contract required the plaintiff to close under certain circumstances even if renovations were not completed, but the contract also required 73rd Townhouse to "deposit into an escrow account 120% of the cost of completing the remaining work." Id. The contract also required 73rd Townhouse to deposit \$500,000.00 into an escrow at closing to be held until delivery of a valid certificate of occupancy with 73rd Townhouse remaining liable for "other penalties for excessive delay." Id. at 108.

73rd Townhouse failed to complete the renovations in accordance with the change orders in time for the closing. After a dispute arose between the parties as to whether the plaintiff was obligated to close, 73rd Townhouse attempted to terminate the contract. As such, the prior action, Flowers v 73rd Townhouse LLC, Index No. 603768/2004, seeking specific performance and abatement of the purchase price, ensued. Flowers moved for summary judgment on the complaint.

By order dated October 12, 2006, the court granted the plaintiff summary judgment awarding specific performance albeit without the price abatement the plaintiff sought. 73rd Townhouse was directed to turn over title to the property upon payment by

the plaintiff of the remaining contract price, but also directed that the plaintiff deposit \$575,000.00 in escrow for possible payment of change orders completed by 73rd Townhouse. The plaintiff appealed the portion of the order declining to order an abatement of the purchase price as a result of the 73rd Townhouse's failure to complete the renovations.

Pursuant to the court's October 12, 2006 order, the closing took place on November 29, 2006. A \$575,000.00 escrow was established as a construction reserve in accordance with the October 12, 2006 order. An additional \$400,000.00 escrow was established pursuant to the terms of the contract. According to the closing statement, 73rd Townhouse received a net amount of \$2,269,556.00, after paying two loans secured by the premises. The first loan was repaid to Flushing National Bank, for \$11,640,922.00, to pay the purchase money mortgage for acquiring the property. The second mortgage repaid from the closing proceeds was \$1,000,000.00, related to a separate Rinzler family entity, 18 East 68th, LLC, which was collateralized by the premises.

By subsequent orders dated February 15, 2007, the court directed the payment to defendant of approximately \$475,000.00 from these escrowed amounts to 73rd Townhouse. The plaintiff appealed the February 15, 2007 order and sought a stay of the release of the escrow pending appeal. By order dated May 7,

2007, the Appellate Division, First Department, denied the plaintiff's motion to stay the court's February 15, 2007 order releasing certain escrowed to the 73rd Townhouse pending appeal of the February 15, 2007 order. The 2007 tax return for 73rd KR LLC also shows \$1,120,000.00 in cash distributions. The K-1s attached to those returns indicate that distributions were received by James Rinzler, Bradley Rinzler, and the Rinzler Family L.P. in the amount of \$224,000.00, Benjamin Rinzler in the amount of \$56,000.00, and Milton Rinzler in the amount of \$392,000.00.

By decision and order dated May 13, 2008, the First Department modified the court's October 12, 2006 order to the extent of remanding the case for a "hearing on the issue of the amount of price abatement to which the [plaintiff was] entitled for the cost of completing the renovation work contemplated by the contract." Flowers v 73rd Townhouse, LLC, supra at 108.

On February 24, 2009, the parties settled the prior action by stipulation made in open court by agreeing to a \$500,000.00 judgment to be entered against 73rd Townhouse. The consent judgment was so-ordered by the court and entered by the County Clerk on March 24, 2009.

Milton died on October 19, 2009, seven months after the judgement was entered. With the judgment unsatisfied, this action ensued on July 10, 2010. According to the plaintiff's

third amended complaint, the settlement on the record in 2009 was nothing more than a "ruse." The plaintiff contends that the defendants conducted their business dealings involving the premises without regard to corporate formalities, or appropriate documentation, or accounting controls, creating layers of "single-purpose LLCs," by which they fraudulently stripped assets for the purpose evading creditors such as the plaintiff.

Milton's estate was closed in 2012, without any provision for paying the judgment. By so-ordered stipulation dated September 11, 2013, defendants agreed that "any knowledge or conduct of James Rinzler related to any aspect of this case is imputed to all other Rinzler family members." James is sued both individually and in his capacity as executor of Milton's estate.

The complaint alleges that transactions involving all three of the 73rd St. LLCs were processed through Dominion Management, using an account at Valley National Bank, without regard to formality of legal ownership. However, this motion is not directed against either defendant Dominion Financial Corp. or defendant Dominion Management Company LLC.

Flowers contends that the payments made and/or directed by 73rd Townhouse and received by various defendants at the closing and subsequent to the closing, including the monies released from the escrow pursuant to the court's February 2017 order were fraudulent conveyances under New York Debtor and Creditor Law.

Specifically, Flowers contends that the transfers made by 73rd Townhouse rendered it insolvent and unable to pay the judgment, and that defendants knew of the potential liability to Flowers at the time of the payments. Moreover, Flowers contends that none of the recipients of payments from 73rd Townhouse to the Rinzler entities and Kingsford were members of 73rd Townhouse, the sole member being 73rd Member.

As such, the complaint contains allegations for fraudulent conveyance under DCL § 273 (first cause of action), DCL § 273-A (second cause of action), DCL § 274 (third cause of action), DCL § 275 (fourth cause of action), DCL § 276 (fifth cause of action), DCL § 276-A (sixth cause of action), DCL § 278 (seventh cause of action), and for breach of fiduciary and trustee duties as an executor as against the Rinzler defendants (sixteenth cause of action). The defendants filed a joint answer asserting several affirmative defenses.

III. DISCUSSION

A. Summary Judgment

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).

To prevail on a motion for summary judgment on a cause of action under DCL § 273, a party must establish (i) that the debtors made a conveyance, (ii) that they were insolvent prior to the conveyance or rendered insolvent thereby, and (iii) that the conveyance was made without fair consideration. See Wall St. Assocs. v Brodsky, 257 AD2d 526 (1st Dept. 1999).

B. Debtor and Creditor Law Claims

A plaintiff may satisfy the element that a transfer lacked fair consideration by proving that the transfer was not made in good faith. See DCL § 272. It is well settled that "preferential transfers to directors, officers and shareholders of insolvent corporations in derogation of the rights of general creditors do

not fulfill the requirement of good faith." Matter of P.A. Bldg. Co. v Silverman, 298 AD2d 327, 328 (1st Dept. 2002).

Alternatively, under **DCL § 273-a** a plaintiff must establish (i) a transfer was made without fair consideration, (ii) at the time of the transfer, the conveyor was a defendant in an action for money damages or had a judgment in such an action docketed against him; and (iii) a final judgment has been rendered against the conveyor that remains unsatisfied. See DCL § 273-a.

DCL § 274 further provides that conveyances made without fair consideration when the person making it is engaged in 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 amount of capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent. See Bd. of Managers of Park Slope Views Condo. v Park Slope Views, LLC, 39 Misc. 3d 1221(A) (Sup Ct, NY County 2013).

DCL § 275 provides that every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation 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. A claim under this provision requires, in addition to the conveyance and unfair consideration elements, an element of intent or belief that insolvency will result. See Wall St. Assocs. v Brodsky, supra.

DCL § 276 provides that every 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. DCL § 276, unlike DCL §§ 273 and 275, addresses *actual* fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency. Id. Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, a plaintiff may rely on "badges of fraud" to support his case, i.e., circumstances so commonly associated with fraudulent transfers "that their presence gives rise to an inference of intent." Pen Pak Corp. v LaSalle National Bank of Chicago, 240 AD2d 384, 386 (2nd Dept. 1997) quoting MFS/Sun Life Trust-High Yield Series v Van Dusen Airport Servs. Co., 910 F. Supp. 913 (SDNY 1995). Among such circumstances are: "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of

the property by the transferor after the conveyance." Wall St. Assocs. v Brodsky, supra.

DCL § 278 "provides that a creditor whose claim has matured may have a fraudulent conveyance set aside against any person other than a good faith purchaser for value, defined as a purchaser for fair consideration without knowledge of the fraud." Commodity Futures Trading Com'n v Walsh, 17 NY3d 162, 174-75 (2011). In addition to setting aside a fraudulent conveyance, it is well settled that the court "may award a personal judgment against a party in lieu of setting aside a transfer." Schwartz v Boom Batta, Inc., 137 AD3d 512, 513 (1st Dept. 2016).

DCL §276-a allows for the award of attorney's fees upon successfully voiding a transfer pursuant to DCL §270-278.

Here, the plaintiff submits, *inter alia*, the pleadings, excerpts from the depositions of James Rinzler, the 2007 tax return of the 73rd KR LLC, the closing statement from the sale to the plaintiff in 2006, an expert report from Roger D. Seifert, CPA, CPF, ABV of Stoneturn Capital LLC, and an expert report from Marc Sznajderman, a real estate capital markets professional and real estate manager from Simon Capital Group, Inc. These submissions establish, *prima facie*, that 73rd Townhouse was insolvent at the time of closing, inasmuch as the

expert report of Roger Seifert details how 73rd Flowers was left with unreasonably small capital at the time of the November 2006 closing, and further transferred \$5.8 million to the various owners of 73rd Townhouse or other owner-related entities, while the company was insolvent.

These submissions establish that the plaintiff is entitled to relief pursuant to DCL §§ 273 and 274. Specifically, these submissions establish entitlement to relief under DCL § 273 to the extent (i) that 73rd Townhouse conveyed over \$5.8 million to its owners or owner-related entities, (ii) that it was insolvent at the time of the transfers, or at least was rendered insolvent by the transfers, and (iii) that the transfers were not made for fair consideration inasmuch as the transfers were "preferential transfers to directors, officers, or shareholders of [an] insolvent corporation[] in derogation of the rights of general creditors." Matter of P.A. Bldg. Co. v Silverman, supra. To the extent that the plaintiff's submissions further show that 73rd Townhouse was about to engage in a business or transaction, *i.e.* repaying its debts, and the remaining property following the transfers to the owners or owner-related entities was insufficient to fully repay those debts, the plaintiff has also established entitlement to relief under DCL § 274.

However, the plaintiff has not demonstrated, as a matter of law, that 73rd Townhouse, after making the \$5.8 million in transfers following closing, "intends or believes that [it] will incur debts beyond his ability to pay as they mature." Thus, summary judgment on the plaintiff's claim pursuant to DCL § 275 (fourth cause of action) is denied.

The plaintiff's submissions also establish his entitlement to summary judgment pursuant to DCL § 273-a. Specifically, the plaintiff's submissions demonstrate (i) that the transfers were made without fair consideration, for the reasons previously discussed herein, (ii) that transfers took place after November 2004, when the prior action took place, and (iii) that a final judgment against 73rd Townhouse was rendered, and that it remains unsatisfied.

Furthermore, the plaintiff's submissions are sufficient to establish, *prima facie*, that the conveyances were made with an actual intent to defraud the plaintiff, such that the plaintiff is entitled to relief pursuant to DCL § 276. The plaintiff's expert reports demonstrate that the owners of 73rd Townhouse withdrew approximately \$800,000.00 from the company prior to closing, keeping no reserves for potential construction liabilities or contingencies, in violation of normal industry practice wherein a company keeps a reserve or 'retainage' of

approximately 130% of the cost of completion against unexpected costs to complete a project, thus the transfers were both questionable and not done in the usual course of business. The expert reports and the plaintiffs other submissions also show that the transfers were made for little to no consideration, while the defendants were aware of the pending litigation between themselves and the plaintiff, and were made between members of a closely held LLC or other LLC's owned by the same members, such that it is evident that the defendants deliberately made 73rd Townhouse's assets unavailable to satisfy the judgment, to which its consent was clearly insincere.

In opposition, the defendants (i) dispute the plaintiff's expert report regarding 73rd Townhouse's insolvency, (ii) claim that the plaintiff lacks standing based upon the absence of Mary White, who was also a party to the \$500,000.00 judgment against 73rd Townhouse, and (iii) argue that the claims in this action are barred by the statute of limitations, as they are more properly governed by Section 508(c) of the New York Limited Liability Company Act, which would impose a three-year period, as opposed to the six-year statute of limitations period afforded DCL claims.

The defendants fail to raise triable issues of fact.

The defendants challenge the plaintiff's expert report on the grounds that he mischaracterized a \$500,000.00 collateral mortgage as indebtedness, and that approximately \$340,000.00 returned on behalf of the Kingsford defendants to 73rd Townhouse was not money should not be considered money that was fraudulently conveyed. However, the defendants' argument, without more, does not raise a factual issue. Nor is the defendant's argument meritorious. Rather, the plaintiff's argument is correct inasmuch as (i) 73rd Townhouse paid taxes on the \$500,000.00 mortgage, and pursuant to NY Tax Law § 255(1)(a)(i) such taxes are only due when a mortgage "creates or secures a new or further indebtedness" and thus the mortgage is properly construed as a debt, (ii) despite the \$340,000.00 being returned, it was still fraudulently conveyed in the first place, and has since been dissipated, and (iii) even were these alleged issues with the plaintiff's expert accounting somehow warranted a change in the date of 73rd Townhouse's insolvency, the defendants continued to make transfers of assets in anticipation of the outcome of the litigation in amounts that would have been sufficient to satisfy the plaintiff's judgment.

The defendants' lack of standing defense is similarly unpersuasive. As correctly argued by the plaintiff, such a defense has been waived as the defendants neither raised it in their answer or a motion responsive to the pleading. See CPLR

3211[e]; Dougherty v City of Rye, 63 NY2d 989 (1984); Wells Fargo Bank Minnesota, Nat. Ass'n v Mastropaolo, 42 AD3d 239 (2nd Dept. 2007). Even were the defense not waived, it is without merit. The defendants claim is that the absence of Mary White, who was also entitled to the \$500,000, somehow prevents this action from going forward. However, it is undisputed that White assigned her interest in the judgment to the plaintiff. Thus, whether the defendants are arguing that the plaintiff lacks standing or Mary White is a necessary party, her absence here is inconsequential.

The court finds no merit in the defendants' argument that the plaintiff's claims are more properly governed by Section 508(c) of the New York Limited Liability Company Act. The plaintiff was granted leave to amend his complaint to assert causes of action under the Debtor and Creditor Law, and has established *prima facie* entitlement to relief thereunder.

C. Breach of Fiduciary Duty Claim

The plaintiff also demonstrates *prima facie* entitlement to summary judgment on the sixteenth cause of action for breach of fiduciary or trustee duties as against the executors of Milton Rinzler's estate, Roberta Rinzler, James Rinzler, Bradley Rinzler, and Benjamin Rinzler. The plaintiff has submitted sufficient evidence to show that, as executors, they were made

aware of the instant litigation and nonetheless refused to address it, and instead divided the estate without attempting to address the potential of a judgment being entered against Milton Rinzler personally. See NY EPTL § 11-4.7(b) ("[a] personal representative is individually liable for obligations arising from ownership or control of the estate ... if he failed to exercise reasonable care, diligence and prudence").

D. Damages

However, to the extent that the plaintiff also seeks, pursuant to DCL § 278, to have the court enter personal judgment against all of the defendants, jointly and severally, for the full value of the judgment, plus statutory interest, in lieu of setting aside the fraudulent transfers, the plaintiff fails to establish entitlement to that relief at this juncture. Although the plaintiff has established that, at least some of the defendants were intentionally transferring 73rd Townhouse's funds to avoid satisfying the plaintiff's judgment, he has not established that all of the defendants were aware that they were receiving money from 73rd Townhouse, and had in fact consented to receiving money, while the judgment remained unpaid. Each such defendant has some liability to the plaintiff, however, which must be limited to the amount such defendant wrongfully

received. See Farm Stores, Inc. v School Feeding Corp., 102 AD2d 249 (2nd Dept. 1984).

As such, an evidentiary hearing shall be held to determine the respective amounts of liability as to each defendant.

Furthermore, inasmuch as the plaintiff has established his entitlement to summary judgment pursuant to DCL §§ 273, 273-a, 274, and 276, the plaintiff is further entitled to reasonable attorneys' fees pursuant to DCL §276-a. The proper amount shall be determined at the evidentiary hearing.

IV. CONCLUSION

Accordingly, it is hereby,


ORDERED that the motion of plaintiff J. Christopher Flowers for partial summary judgment on the first, second, third, fourth, fifth, sixth, seventh, and sixteenth causes of action is granted as to the first, second, third, fifth, sixth, seventh, and sixteenth causes of action those causes of action, with an evidentiary hearing to be held to determine the amounts owed by each defendant, and the amount of attorney's fees to be awarded, and is otherwise denied; and it is further,

ORDERED that the parties shall contact chambers on or before September 30, 2020 to schedule a hearing to be held by the court or a referee.

This constitutes the Decision and Order of the court.

Dated: August 31, 2020

ENTER:



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON