

DAE Assoc., LLC v Frederick D. Dorfman Family Trust

2020 NY Slip Op 33792(U)

November 10, 2020

Supreme Court, New York County

Docket Number: 152565/2019

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 48EFM

-----X
DAE ASSOCIATES, LLC D/B/A DANESE GALLERY,
INDIVIDUALLY, AND AS ASSIGNEE OF PERRY GOLKIN
and DONNA GOLKIN,

Plaintiff,

- v -

FREDERICK D. DORFMAN FAMILY TRUST, SUSAN R.
SPAGNA FAMILY TRUST, DORFMAN PROJECTS, LLC,
2707 PROJECTS, LLC D/B/A DORFMAN PLUS, LLC,
SUSAN SPAGNA, BLAKE DORFMAN,

Defendants.
-----X

INDEX NO. 152565/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47

were read on this motion to/for

DISMISS

Upon the foregoing documents, it is

Defendants move pursuant to CPLR 3211(a)(1), (5), and (7) to dismiss this fraudulent conveyance action as time-barred. Defendants also assert that defendant Frederick D. Dorfman, the debtor, had no property interest in his residence, one of the properties at issue here, and that plaintiff has failed to allege that Dorfman conveyed anything of value to the LLC defendants. Plaintiff challenges the documentary evidence as inappropriate for dismissal and insists that Dorfman is an owner of the marital residence under Domestic Relations Law regardless of the documentary evidence.

The decision on the record on November 6, 2020 is supplemented by the following decision. Defendants are directed to submit the transcript to the court to be so ordered.

According to the complaint, this action arises from the sale of art by the American artist Jasper Johns that was allegedly stolen by James Meyer, a long-time studio assistant to the artist, and sold through defendant, Frederick D. Dorfman, an art dealer, defrauding plaintiff, an art dealer, and others of \$13.5 million. (NYSCEF 16, Complaint ¶¶4, 18, 36, 37).¹ Plaintiff alleges that in early 2012, the artist learned of Meyer's unauthorized sales. (*Id.* ¶72). Dorfman learned of the FBI investigation soon thereafter, and defendants allegedly "took steps on advice of counsel to shield their assets from creditors," which supports plaintiff's theory that Dorfman was aware of his financial exposure to plaintiff and others rendering him insolvent (*Id.* ¶¶77, 2, 73). Meyer was indicted in August 2013. (*Id.* ¶74). Art purchasers sued plaintiff for fraud and negligent misrepresentation, seeking a refund from one such sale.²

On May 4, 2015, plaintiff initiated an action against defendants for breach of warranty, unjust enrichment, mutual and unilateral mistake, fraudulent concealment, GBL §349, and declaratory judgment.³

In this action, plaintiff seeks to invalidate the December 2012 conveyances of (a) 45 East End Avenue, cooperative units 2J and 2K (EEA Units)⁴ from defendant Spagna, Dorfman' to defendant Susan R. Spagna Family Trust (Spagna Trust) and (b) 2699 Deerfield Road in Noyack, New York (Deerfield) from Dorfman to defendant Frederick D. Dorfman Family Trust (Family Trust) and Spagna. (*Id.* ¶¶9, 15). Plaintiff also alleges

¹ The court reminds the parties, again, to use citations to NYSCEF or see Commercial Division Rule 6.

² *Golkin v DAE Associates LLC*, Index No. 653079/2015 (Sup Ct, NY County).

³ *DAE Associates LLC v Meyer*, Index No. 651500/2015 (Sup Ct, NY County).

⁴ Plaintiff alleges three combined cooperative apartments, but only 2J and 2K are identified in the complaint. (*Id.* ¶29).

fraudulent conveyances based on the formation of defendant Dorfman Projects, LLC and 2707 Projects, LLC (collectively, LLCs). Plaintiff challenges all three transfers as constructive fraud under Debtor Creditor Law §§273-275 and actual fraud under Debtor Creditor Law §276.

In a deposition under oath in another similar action,⁵ Spagna testified that she and Dorfman transferred their assets to trusts with their son as beneficiary as an estate planning measure and that the mortgages were paid in full prior to the transfers. (*Id.* ¶¶14, 30, 90; NYSCEF 18, Spagna Depo Tr. at 25-28, 19-35). Plaintiff asserts that Spagna's deposition testimony represents an admission of improper transfers for the illegitimate reason to avoid creditors. (*Id.* ¶16). Plaintiff challenges the legal advice upon which Spagna relies since it was allegedly given by Dorfman's criminal defense attorney. (*Id.* ¶102(f)).

Plaintiffs cannot reach the EEA Units. Dorfman, not Spagna, is the alleged debtor. (*Id.* ¶6). The EEA Units were in Spagna's name since their purchases in 1984 and 1994 until December 27, 2012 when Spagna transferred the EEA Units to the Spagna Trust; Dorfman never had a documented ownership interest in the EEA Units even though they were purchased after Spagna and Dorfman married in 1983. (NYSCEF 21, Proprietary Lease Unit 2K; NYSCEF 22, 1994 documents related to 1994 transfer of 2J; NYSCEF 23, 2012 assignment of proprietary lease for apartments 2J and K; NYSCEF 24, Acceptance of Assignment and Stock certificate; NYSCEF 25, 2012 Consent to Assignment of Proprietary Lease; NYSCEF 16, Complaint ¶13). Dorfman does not become an owner by virtue his residence in the EEA Units. (*Berlin v Herbert,*

48 Misc 2d 393, 395 [District Court, Nassau County 1965][wife could invite husband as guest after sale of his interest in a tenancy by the entirety pursuant to execution of a judgment against him only without destroying her ownership interest in the family home]).⁶ Plaintiff cannot rely on Dorfman's inchoate interest in his wife's ownership of the EEA Units. (*Darling v Darling*, 22 Misc 3d 343, 355 [Sup Ct, Kings County 2008] (husband's judgment creditor could not reach ex-wife's coop as a fraudulent transfer, rejecting *Musso v Ostashko*, 468 F3d 99, 105-06 [2d Cir 2006], a case heavily relied upon by defendants, to the extent that it yields disparate treatment between owners of real property and coops). Likewise, plaintiff fails to provide any legal basis to establish that Dorfman's appointment as trustee of the Spagna trust somehow converts his inchoate marital interest into ownership. (NYSCEF 16, Complaint ¶14).

(f) However, the court cannot address the theory, raised at argument, that paying off Spagna's mortgages on the EEA Units with proceeds of the fraud may constitute a fraudulent conveyance from which she benefitted personally since such a claim is not stated in the complaint.

Dorfman owned Deerfield when he conveyed it to the Family Trust without any consideration, by deed dated December 12, 2012, which Spagna received in her capacity as trustee and recorded on March 11, 2013. (NYSCEF 26, Deerfield Deed; NYCEF 27, Spagna Letter forwarding Deed; NYCEF 28, Webpage for Suffolk County

⁶ At argument, the court was concerned that Dorfman's residence in the apartment, possible contribution to the purchase of the EEA Units, and appointment as trustee affected his interest or lack thereof in ownership of the EEA Units, regardless of the documentary evidence. Based on further research, the court is dismissing plaintiff's claim based on the EEA Units. Accordingly, defendants' withdrawal of their motion to dismiss as to plaintiff's Debtor Creditor Law §276 claim concerning the East End Avenue units as time-barred is moot. (NYSCEF 46, Defendants' Reply, footnote 6).

Real Property Tax Service Agency on Verification). A debtor cannot use a transfer to a trust to avoid his creditors. In addition, for the reasons discussed on the record, defendants' motion is denied as to Deerfield.

Plaintiff alleges that, in May 2013, Dorfman formed Dorfman Projects, LLC as a "vehicle" and "shield" for Dorfman to "continue functioning as an art dealer after he became aware of potentially dozens of claims against him," and was "intended to, and did in fact, place [Mr. Dorfman's assets] beyond the reach of his creditors." (NYSCEF 16, Complaint, ¶¶18, 27). Plaintiff further alleges that Spagna and Blake Dorfman formed defendant 2707 Projects, LLC as a "shield to protect [Fred Dorfman's assets]" and was "intended to, and did in fact, place [Mr. Dorfman's assets] beyond the reach of his creditors." (*Id.* at ¶¶ 23, 27-28.) Plaintiff alleges that Dorfman used the proceeds of his fraud to fund the pension plan for Dorfman through the LLCs. (*Id.* at ¶91). This allegation is sufficient to preserve plaintiff's claims challenging defendants' creation of the LLCs.⁷

As discussed on the record, plaintiff's first cause of action for constructive fraud is dismissed as barred by the statute of limitations.

Accordingly, it is

ORDERED that defendants shall submit the transcript to be so ordered; and it is further

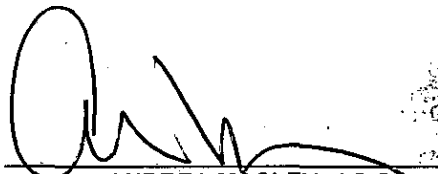
⁷This is a change from the court's decision on the record which was made based on the absence of such allegation.

ORDERED that defendants' motion to dismiss is granted, in part, to the extent that the first cause of action is dismissed in its entirety and the second cause of action is dismissed as to the EEA Units; and it is further

ORDERED that defendants shall file an answer within 20 days of this decision being uploaded onto NYSCEF; and it is further

ORDERED that parties shall submit by email a PC Order with dates to which the parties agree, if any.

Motion Seq. No. 01 :
11/10/2020
 DATE


 ANDREA MASLEY, J.S.C.

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