Pine Val. Ctr., LLC v Jacobs
2020 NY Slip Op 35810(U)
August 21, 2020
Supreme Court, Rockland County
Docket Number: Index No. 032676/2016
Judge: Paul I. Marx
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. PAUL I. MARX, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry upon all parties.

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PINE VALLEY CENTER, LLC D/B/A PINE VALLEY CENTER FOR REHABILITATION AND NURSING,

Plaintiff,

-against-

JEFFREY JACOBS, COUNTRY SERVICES, INC. AND HENRY JACOBS,

Defendants.

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Index No. 32676/2016

DECISION AND ORDER

Motion Sequence ## 5-6
Motion Date: July 22, 2020

The following papers were read on: (1) Plaintiff's application for attorney's fees (Motion # 5); [1] and (2) Defendants' motion to reargue (Motion # 6):

Motion # 5:
Plaintiff's Application for Attorney's Fees ....Doc ## 183-190
Defendants' Opposition to Application for Attorney's Fees ....Doc ## 208-214
Affirmation of Harvey D. Mervis, Esq. in Support of Plaintiff's Application for Attorney's Fees ....Doc # 217

Motion #6:
Defendants' Motion to Reargue and supporting papers ....Doc ## 191-203
Plaintiff's Opposition and supporting papers ....Doc ## 206-207
Reply Affirmation of Ronald V. De Caprio, Esq. ....Doc # 216

BACKGROUND

By Decision and Order dated May 19, 2020, the Court denied Defendants' motion for summary judgment and denied Plaintiff's cross motion for summary judgment as to its cause of

[1] Plaintiff efiled its application for attorney's fees as Motion #5, which was the motion sequence number of its cross motion for summary judgment. The Court did not rule on Plaintiff's request for attorney's fees because it was not supported by a retainer agreement or invoices.

action under Section 273 (and 275)[2] of the Debtor and Creditor Law ("DCL") and granted it as to the Section 276 cause of action. The Court did not address Plaintiff's claim for attorney's fees under Section 276-a, because Plaintiff did not provide documents to support its request for attorney's fees. Decision and Order dated May 19, 2020 n 7.

On June 16, 2020, Plaintiff filed its application for attorney's fees.

On June 19, 2020, Defendants moved to reargue the Court's May 19, 2020 Decision and Order.

The Court will address Defendants' motion to reargue first, as the disposition of that motion may impact Plaintiff's attorney's fee application.

Motion to Reargue

Defendants Jeffrey Jacobs, Country Service, Inc.[3] and Henry Jacobs, move to reargue the portion of the Court's Decision and Order which granted Plaintiff's cross motion for summary judgment as to Plaintiff's cause of action under DCL § 276. Defendants contend that the Court overlooked the evidence they presented in opposition to Plaintiff's cross motion, specifically, the Promissory Notes and Acknowledgments of Debt signed by Gail Sherman on December 18, 2012 and Country Service's invoices, which substantiate the debt purportedly owed to Country Service. Defendants assert that, as a result, the Court erroneously granted summary judgment to Plaintiff on that cause of action. Defendants request that the Court reverse and modify to grant full summary judgment in their favor.[4]

Plaintiff opposes Defendants' motion to reargue, contending that Defendants conflated the Court's analysis under Section 273 with its analysis under Section 276 of the DCL. Relying on *Wall Street Assocs. v Brodsky*, 257 AD2d 526 [1st Dept 1999], Plaintiff asserts that a cause of action under Section 276 differs from a cause of action under either Section 273 or 275 of the

2 Plaintiff's pleading was vague as to which sections of the Debtor and Creditor Law it was asserting claims. In its cross motion, Plaintiff discussed claims under Sections 273 and 276 and mentioned Section 275.

3 Country Service is improperly named in the caption as Country Services.

4 Defendants' motion to reargue would not result in summary judgment in their favor, as the Court denied their motion for summary judgment in its May 19, 2020 Decision and Order. The effect of Defendants' motion to reargue, if granted and the Decision and Order modified as requested, would result in a denial of Plaintiff's cross motion for summary judgment in its entirety. The Court previously denied Plaintiff's motion as to its Sections 273 and 275 claims and granted the motion as to Plaintiff's Section 276 claim.

DCL, because it "addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency". *Id.* at 529 (citing *United States v Carlin*, 948 F Supp 271, 277 [SDNY 1996]). Plaintiff continued, arguing that the Court considered the badges of fraud applicable to a Section 276 cause of action, where fraudulent intent is elusive. Plaintiff asserts that not all of the factors which courts consider as badges of fraud need be found to determine whether a fraudulent conveyance occurred. Plaintiff's Opposition to Motion to Reargue at 6 (citing *Gafco, Inc. v H.D.S. Mercantile Corp.*, 47 Misc 2d 661, 664-665 [Civ Ct, New York County 1965]).

The Court grants reargument for the purpose of clarifying its disposition of Plaintiff's motion for summary judgment. As stated in the Decision and Order, the Court found that Plaintiff "established the following indicia of the fraudulent intent of Francene and Defendants: (1) a close relationship between the parties to the transaction, (2) Francene's knowledge of Ms. Sherman's debt to the plaintiff and her inability to pay it, (3) the fact that the bank account was the only asset that Ms. Sherman owned sufficient to pay her obligation to the plaintiff, (4) the existence of a pattern or series of transactions or course of conduct by Francene's transfer of Ms. Sherman's funds to different bank accounts immediately after Ms. Sherman incurred her obligation to the plaintiff which showed Francene's intent to avoid the obligation, and (5) Francene retained control of Ms. Sherman's assets following the transfers." Decision and Order at 8. Defendants assert that the Court overlooked the Promissory Note and Acknowledgment of Debt in favor of Country Service, which Ms. Sherman signed. Defendants contend that Ms. Sherman's debt to Country Service for transportation services was "substantiated by business statements, invoices, promissory notes and acknowledgment of debt instruments that pre-exist Plaintiff's relationship with [Ms. Sherman]." Reply at 5.

As set forth in the Decision and Order, "the inadequacy of the consideration" is one of the badges of fraud which is considered in determining a Section 276 claim. Decision and Order at 8 (*Dempster v Overview Equities, Inc.*, 4 AD3d 495, 498 [2nd Dept 2004] (quoting *Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386 [1997], quoting *MFS/Sun Life Trust-High Yield Series v Van Dusen Airport Servs. Co.*, 910 F Supp 913, 935 [1995]).

Francene testified that she was not aware that Ms. Sherman had a contract with Country Service, her husband's company,[5] but she knew about the Promissory Note. After obtaining a Power of Attorney in February 2013, Francene acquired access to Ms. Sherman's Apple Bank account.

On May 10, 2013, immediately after Ms. Sherman was placed in Plaintiff's facility on May 6, 2013, Francene withdrew $117,959.46 from Ms. Sherman's account and closed the account. Francene explained that Ms. Sherman's account stated that it was "in trust for Christopher E. Lewis, as fiancé". Francene did not want Mr. Lewis to access the account. On the same date, Francene opened a joint account in her name and Ms. Sherman's name at Valley National Bank, using some of her own money and all of the money she withdrew from Ms. Sherman's account. On August 6, 2013, Francene withdrew $900 from the account to repay herself for a loan she claimed to have made to Ms. Sherman more than five years earlier, although she could not recall what the loan was for.

In September 2013, Francene decided to pay a portion of the $120,000 debt Ms. Sherman purportedly owed to Country Service by transferring $14,000 from the Valley National Bank account to Country Service's account at the same bank. Francene was not an employee or officer of Country Service, but her husband gave her access to the business account so she could sign checks when he was not around. Francene testified that she arbitrarily chose $14,000 and was not paying a Country Service invoice or invoices.

In December 2014, Francene made a subsequent transfer of $161,962.63 from her Valley National Bank account to Country Service's account. She testified that she made the transfer not to pay Ms. Sherman's debt, but because she wanted to reduce the amount of money in the account while submitting an application for financial aid for her child to attend college. The amount Francene transferred to Country Service was $41,962.63 more than the $120,000 allegedly owed by Ms. Sherman and it did not account for the $14,000 that Francene previously transferred to Country Service ostensibly to reduce Ms. Sherman's debt. Approximately two months later, Francene transferred $161,962.63 from Country Service's account back to her account, because

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[5] Jeffrey Jacobs testified that Country Service entered into a written contract with Ms. Sherman. Deposition of Jeffrey Jacobs at 57:10-22; 58:14-24; 59:3-60:24. Mr. Jacobs stated that he was unable to find the contract.

she had argued with her husband. Sometime later, she again transferred the same amount back to Country Service's account.

The manner of payment of the purported debt and the transfers in and out of the Country Service account shows inadequate consideration and a shell game. Moreover, the testimony by Francene Jacobs that Ms. Sherman had psychological issues, specifically "schizophrenia" and "some dementia", called into question the validity of the Promissory Notes.[6] Ms. Sherman entered Pine Valley from the mental ward of Gracie Square Hospital, where she had been sent for evaluation by Sutton Park Adult Home, the previous facility where she was placed in January 2013. The familial relationship among the parties was a key factor. Francene did not deal with Country Service in an arms-length manner and other than the $14,000 transfer, she made no effort to pay off the debt. Country Service made no real effort to obtain payment prior to Plaintiff's lawsuit against Francene. When Plaintiff obtained an Order of Attachment in that action, which was extended to also prohibit Jeffrey from removing the funds from the Country Service account, Ms. Sherman's funds were transferred to Jeffrey's father, Henry Jacobs.[7] *Pine Valley Center, LLC v Sherman, et al.*, Rockland Index No. 030554/2014 (Hon. Victor J. Alfieri, Jr., AJSC). Jeffrey Jacobs and Country Service instituted a separate action against Ms. Sherman and obtained a default judgment against her on January 22, 2015, although Jeffrey Jacobs admitted that he was aware that Ms. Sherman's purported debt to Country Service had been paid in full by that time. The badges of fraud overwhelmed Defendants' claim of a valid debt.

Accordingly, Defendant's motion to reargue is granted and the Court adheres to its grant of Plaintiff's motion for summary judgment on its Section 276 claim.[8]

Plaintiff's Application for Attorney's Fees

Having prevailed on its cause of action under DCL § 276, Plaintiff seeks an award of attorney's fees pursuant to DCL § 276-a.

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6 In addition to the Promissory Note payable to Country Service, Jeffrey obtained a Promissory Note payable to him personally for the same amount purportedly owed to Country Service.

7 As a result of that transfer, Henry Jacobs was sued in this action.

8 Plaintiff's claim under Section 273 (and possibly Section 275) remains extant. The Court denied Plaintiff's motion for summary judgment on the Section 273 claim.

Defendants contend that the Court did not sufficiently find that they acted separate and independent of Francene with "actual intent" to hinder, delay or defraud Plaintiff. Relying upon *Carey v Crescenzi*, 923 F2d 18, 21 [2d Cir 1991] and *Key Bank of New York v Morris Diamond*, 203 AD2d 896, 898 [4th Dept 1994], Defendants argue that the Plaintiff must show that they acted with actual intent of their own.

As in *Carey v Crescenzi, supra*, "the constructive fraud established by this record is sufficient to set aside the conveyance under § [276, but] it is not sufficient to award attorneys' fees against [Defendants, in particular, Henry Jacobs]." 923 F2d at 21; *Key Bank, supra*. Plaintiff's contention that "Jeffrey Jacobs orchestrated the transfers" of money from Ms. Sherman's account to Country Service's account is not supported by either Francene or Jeffrey's testimony. Francene testified that she made the transfers between the various accounts and she determined the amounts of the transfers. The only transfer which Francene connected directly to the debt to Country Service was her transfer of $14,000, which she stated was intended to pay a portion of the debt but was arbitrarily determined by her. She did not testify that either the $14,000 transfer, the subsequent $161,962.63 transfer, or any of the transfers she made into or out of the Country Service account, were made at Jeffrey's behest. The connections Plaintiff seeks to make in an effort to establish Jeffrey's actual intent, individually, or as principal for Country Service, are not supported by the record. Accordingly, Plaintiff's request for attorney's fees against Defendants is denied.

SUMMARY

It is ORDERED, that Defendants' motion to reargue is granted and the Court adheres to its grant of Plaintiff's motion for summary judgment on Plaintiff's claim under Section 276 of the Debtor and Creditor Law; and it is further

ORDERED, that Plaintiff's application for attorney's fees is denied; and it is further

ORDERED, that the parties are directed to appear for a pre-trial conference on October 6, 2020 at 9:15 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: August 21, 2020
New City, New York

ENTER

HON. PAUL I. MARX, J.S.C.