Pine Val. Ctr., LLC v Jacobs
2020 NY Slip Op 35811(U)
May 19, 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.
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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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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.

Index No. 32676/2016

DECISION AND ORDER

Motion Sequence ## 4-5
Motion Date: Mar. 18, 2020

The following papers were read on: (1) Defendants' motion for summary judgment (Motion # 4); and (2) Plaintiff's cross motion for summary judgment (Motion # 5):

Defendants' Motion for Summary Judgment and supporting papers ....Doc ## 109-151
Plaintiff's Cross Motion and supporting papers ....Doc ## 152-171
Reply Affirmation of Ronald V. De Caprio, Esq. ……………………............................Doc #173[1]

BACKGROUND

Plaintiff Pine Valley Center, LLC d/b/a Pine Valley Center for Rehabilitation and Nursing sued Defendants Jeffrey Jacobs, Country Service, Inc.[2] and Henry Jacobs, seeking to set aside a series of allegedly fraudulent transfers made to Defendants by Jeffrey Jacobs' wife, Francene, of assets belonging to her aunt, decedent Gail Sherman, to avoid paying Plaintiff for the services it provided to Ms. Sherman. Plaintiff seeks a judgment in the amount of $100,630.20, plus interest at the rate of 16% from January 21, 2014 pursuant to Debtor and Creditor Law. Plaintiff does not specify which provision of Debtor and Creditor Law it brings its claim. However, Plaintiff

[1] Plaintiff submitted a sur-reply in response to Defendants' reply, which the Court denied permission to file, as sur-reply papers are not allowed by the Part's Rules or the CPLR. Therefore, the sur-reply will not be considered.

[2] Defense counsel notes in his papers that Country Service is improperly named in the caption as Country Services.

specifically alleged that it seeks reasonable attorney's fee pursuant to Section 276-a of Debtor and Creditor Law.

On May 6, 2013, Francene admitted Gail Sherman to Pine Valley. Francene signed the Admission Agreement in her individual capacity. She did not note that she was attorney-in-fact for Ms. Sherman, who did not sign the Agreement.[3] On May 10, 2013, acting as Ms. Sherman's attorney-in-fact, Francene transferred all her aunt's assets held in a bank account at Apple Bank for Savings into a joint account Francene opened in both their names. Thereafter, Francene transferred the funds into her individual account and later into an account held by Country Service, a transportation company owned by her husband, Defendant Jeffrey Jacobs. Francene and Jeffrey claimed that the money was owed to Country Service by Ms. Sherman for transportation services which had been provided to her over the course of five years, dating from 2008 to 2012. A large portion of the funds were ultimately transferred to Jeffrey's father, Henry Jacobs.

Plaintiff filed an action against Francene and Gail Sherman in this court, *Pine Valley Center, LLC dba Pine Valley Center for Rehabilitation and Nursing v Gail Sherman and Francene Jacobs*, Index No. 030554/2014, which was assigned to Hon. Rolf M. Thorsen, AJSC. Plaintiff asserted causes of action for breach of contract, account stated, unjust enrichment and fraudulent conveyance against Francene and Ms. Sherman. Plaintiff settled its claims against Francene for the sum of $25,000. The terms of the settlement included a provision that if Francene paid the $25,000, Plaintiff would vacate the default judgments it had obtained against Defendants in this action. The settlement was placed on the record before Judge Thorsen on February 13, 2018. Although Jeffrey was not a party to that action and this action was assigned to the undersigned, Plaintiff requested that Jeffrey participate in the allocution as to the provision regarding vacatur of the default judgments herein.

Pursuant to the terms of the settlement, Plaintiff thereafter vacated the judgments it had obtained against Defendants in this action and Defendants filed their Answer herein. Defendants then moved for summary judgment, contending that Plaintiff's claims against them in this action are barred by res judicata because they are based upon the same facts and circumstances Plaintiff litigated against Francene Jacobs and Gail Sherman in the prior action. Defendants contend that

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[3] Ms. Sherman was suffering from a mental incapacity which rendered her unable to care for herself or her affairs.

Francene paid Plaintiff the settlement amount and, as a result, Plaintiff has no damages that it can recover against Defendants in this action.

Plaintiff cross moved for summary judgment, asserting that it established a fraudulent conveyance under Debtor and Creditor Law. Plaintiff contends that Defendants are estopped from claiming that Ms. Sherman's purported debt to Country Service was valid, because the validity of the debt was litigated adversely to Defendants in an administrative hearing before the Department of Social Services, which was upheld in a subsequent Article 78 proceeding.

DISCUSSION

Defendants' Motion for Summary Judgment

Defendants seek to utilize the settlement of Plaintiff's earlier action against Gail Sherman and Francene Jacobs, invoking res judicata as the basis for requesting summary judgment and dismissal of this action against them. Defendants contend that Plaintiff settled its claims in that action. Francene was allocuted on the terms of the settlement. Jeffrey Jacobs participated in the allocution because the terms of the settlement with Francene impacted this action. A stipulation of discontinuance with prejudice of the prior action was subsequently filed. Defendants attempt to invoke the general rule that "a stipulation of discontinuance 'with prejudice' is afforded res judicata effect and will bar litigation of the discontinued causes of action." *Van Hof v Town of Warwick*, 249 AD2d 382 [2nd Dept 1998] (citing *Rossi v Twinbogo Co.*, 193 AD2d 481).

The doctrine of res judicata, or claim preclusion, is invoked when a party, or those in privity with that party, seek to relitigate a disposition on the merits of claims or causes of action arising out of the same transaction or series of transactions that were raised, or could have been raised, in a prior litigation. Critical to applying the doctrine of res judicata to a subsequent action is the requirement that the original action must have been between the same parties or a party in privity.

This action and the prior action against Francene share a common cause of action under Debtor and Creditor Law, which seeks to set aside an allegedly fraudulent conveyance of Ms. Sherman's assets by Francene Jacobs to Jeffrey Jacobs and Country Service. Neither Jeffrey Jacobs, Country Service nor Henry Jacobs were parties to the prior action. Therefore, in order to claim the benefit of the settlement of the prior action, Defendants must establish privity with Francene Jacobs.

While Jeffrey and Francene are spouses, privity does not exist merely by virtue of a marital relationship. *Birnbaum v Birnbaum*, 182 AD2d 382, 384 [1st Dept 1992]. Moreover, and ironically considering Defendants' argument here, Jeffrey's participation in the other action was limited to putting on the record that Plaintiff could proceed with this action against him and Country Service.[4] The settlement between Plaintiff and Francene included a provision that if Francene paid the $25,000, Plaintiff would vacate the default judgments against Defendants in this action. Although Judge Thorsen stated that Jeffrey was not a party to the action before him and the two actions were separate, he included Jeffrey in the allocution. *Id*. at 4-6:20. Jeffrey specifically acknowledged that the payment made by Francene to settle Plaintiff's action against her would dispose of that action, but this action against him, Country Service and Henry Jacobs would continue. Doc # 113, Transcript - Stipulation of Settlement, Index No. 32676/2016, at 7:22 – 8:4.

Jeffrey's limited participation in the prior action was more a matter of expedience and an effort to fully allocute the terms of the settlement between Plaintiff and Francene. Jeffrey's participation in the allocution did not provide a basis for finding the requisite privity, as there was no determination of the merits of the claims against him and Country Service. It is obvious from the transcript of the allocution that the issues in this case were never determined in the prior action. Jeffrey's participation in the settlement and discontinuance of the action against Francene can in no way be construed to be the kind of determination after a full and fair opportunity to litigate the issue that would be necessary in order to estop Plaintiff from trying to establish the fraudulent conveyance of Ms. Sherman's assets to Defendants. Indeed, the provision of the settlement which involved Jeffrey and County Service was intended to give them the opportunity to litigate the fraudulent conveyance claim against them in this action by vacating the default judgments Plaintiff had obtained against them. Notwithstanding Jeffrey's participation in the allocution, the settlement has no estoppel effect on this action.

The connection between Francene and Jeffrey does not support finding that his interests were represented in the action against her since it was limited to their marital relationship. *See Birnbaum*, 182 AD2d at 384 (citing *Green v Santa Fe Indus., Inc.*, 70 NY2d 244, 253–54 [1987] (enumerating examples where the interests of the nonparty can be said to have been represented in

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[4] Jeffrey expressly acknowledged to the court that the conditions he agreed to on the record would bind himself and his company. However, he stated that he could not speak for his father, who is a defendant herein. Doc # 113, Transcript - Stipulation of Settlement, Index No. 32676/2016, at 11:10-19 and 13:3-19.

the prior proceeding); *see also* Restatement [Second] of Judgments §§ 41, 42; 5 Weinstein-Korn-Miller, NY Civ Prac ¶ 5011.32. Although Francene was a signatory on the Country Services bank account, she was not an officer or employee of the company. As it is obvious that privity of the traditional sort is not involved, Plaintiff's action against Defendants is not barred by either collateral estoppel or the doctrine of res judicata. The only impact of the settlement on this action is, as Plaintiff admits, to prevent a double recovery by reducing any damages that may be recovered in this action by the amount of the settlement in the prior action. *Singleton Mgmt., Inc. v Compere*, 243 AD2d 213, 217–18 [1st Dept 1998] (citations omitted).

Accordingly, Defendants' motion for summary judgment is denied.

Plaintiff's Motion for Summary Judgment

Plaintiff moves for summary judgment, seeking a determination that it has established that Ms. Sherman's assets were fraudulently conveyed to Defendants under Debtor and Creditor Law.

Plaintiff's complaint does not allege which provision of Debtor and Creditor Law it is proceeding under; however, it seems to be seeking to establish a claim under Section 273 and 276. The operative provisions of Section 273[5] provided that:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

Similarly, Section 276 provided 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.

Section 273 required a showing that the conveyance was made without fair consideration, regardless of the actual intent of the person making the conveyance. By contrast, Section 276 required showing the transferor's actual fraudulent intent, which a creditor had to establish by presenting clear and convincing evidence that a defendant actually intended to hinder, delay or defraud creditors.

[5] Sections 273 and 276 were amended, effective April 4, 2020. This action is governed by the prior version of the statute.

Section 273 – Lack of Fair Consideration

Pursuant to Section 273, Plaintiff seeks to show that the debt which Ms. Sherman owed to Country Service was not a "veritable antecedent debt". Plaintiff invokes the doctrine of collateral estoppel, asserting that Defendants' debt was determined to be invalid by the DSS and the Kings County Supreme Court which denied their Article 78 challenge to the DSS's determination. Plaintiff asserts that Defendants fully and fairly litigated the legitimacy of their debt when they presented evidence of their debt at a hearing before the DSS.

Defendants argue that the DSS ruling did not find that Country Service's debt was not legitimate. They contend that the agency merely determined that Ms. Sherman "was not entitled to Medicaid benefits at a period of time when her assets exceeded applicable standards." Reply Affirmation at ¶ 41.

Collateral estoppel precludes a party from seeking to litigate in a subsequent action or proceeding an issue which was clearly raised and decided against the party, or those in privity, in a prior action or proceeding. *Comprehensive Med. Care of New York, P.C. v Hausknecht*, 55 AD3d 777, 777–78 [2nd Dept 2008] (citing *Buechel v Bain*, 97 NY2d 295, 303 [2001], *cert denied* 535 US 1096 [2002]; *Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 N.Y.2d 343 [1999]; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). The doctrine applies when the identical issue was decided in the prior action and is decisive of the present action. The party against whom it is applied must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.*; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985].

The DSS decision did not determine the validity of Defendants' debt. The DSS decision simply stated that at the time it denied Ms. Sherman's application for Medicaid benefits, her financial resources exceeded the applicable level to qualify for benefits. The decision recited that Francene advanced the argument that those resources should not have been counted because the monies were owed to Country Service. The decision recited the evidence submitted to prove the debt to Country Service, specifically naming an invoice dated December 18, 2012 and a judgment dated January 22, 2015, which Defendants obtained against Ms. Sherman for the amount owed them for transportation services. The decision continued by referencing the regulations which enumerate which resources can be disregarded and then stated that "[t]he record fails to establish that the resources at issue should have been disregarded when [Ms. Sherman's] eligibility for Medical Assistance was determined." Plaintiff's Exhibit 15 at 9-10. Based upon the "resource disregards" provided in the regulations, which are enumerated in the decision, the debt to Country Service was not the type of obligation which was recognized as a "resource disregard". The decision does not explicitly state that, nor does it state that the debt to Country Service was not valid. As a result, it appears that the validity of the debt was irrelevant to the agency's determination of Ms. Sherman's Medicaid eligibility.

The court's decision on the subsequent Article 78 challenging the DSS decision was even more inconclusive. The Supreme Court Kings County stated in sum and substance that "upon Petitioner's failure to comply with terms of this court's order dated August 2, 2016 it is hereby ordered and adjudged that the cross motion filed by State and City Respondents are granted in their entirety, the relief requested in the Article 78 petition is denied, and this proceeding is dismissed." Plaintiff's Exhibit 14. The court did not explain what its August 2, 2016 order provided. The decision does not mention any of the issues raised in the petition. The court did not elaborate further on its rationale for denying the petition. The brief decision contained no discussion of Defendants' debt.

Plaintiff cannot claim the benefit of collateral estoppel to establish the invalidity of Defendants' debt based upon the agency decision and the subsequent disposition of the Article 78 petition. Consequently, Plaintiff has not established its prima facie entitlement to summary judgment pursuant to Section 273 of the Debtor and Creditor Law.[6]

Section 276 – Actual Fraudulent Intent

Plaintiff argues that it has established actual fraud, as required under Section 276, by providing evidence of "badges of fraud".

Recognizing that "[d]irect evidence of fraudulent intent is often elusive …, courts … consider 'badges of fraud' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent". *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*

[6] To the extent that Plaintiff makes a claim under Section 275 -- "[e]very 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" – it suffers from the same deficiency of proof as its claim under Section 273.

Servs. Co., 910 F Supp 913, 935 [1995]). Badges of fraud generally include "(1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance." *Dempster, supra* at 498 (citing *Pen Pak Corp. v LaSalle Natl. Bank of Chicago, supra*); *see also NPR, LLC v Met Fin Mgmt., Inc.*, 63 AD3d 1128, 1129 [2nd Dept 2009].

In this case, Plaintiff established that it was a creditor of Ms. Sherman and that the transfer of her funds to pay Country Service for transportation services purportedly supplied to her rendered her insolvent. In addition, the 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. *NPR, LLC v Met Fin, supra* at 1129 (citing *Cadle Co. v Organes Enters., Inc.*, 29 AD3d 927 [2006]; *Dempster v Overview Equities, supra*). "As several courts have found, transfers among family members raise special concerns, and receive different scrutiny." *In re Jacobs*, 394 BR 646, 660–61 [Bankr EDNY 2008].

In response to these showings, Defendants failed to tender evidence in admissible form sufficient to raise a triable issue of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. Defendants argue that Francene, not Ms. Sherman, is the relevant debtor for purposes of evaluating Plaintiff's Debtor and Creditor Law claims, because she signed the Admission Agreement which obligated her to pay Plaintiff for the services it provided to Ms. Sherman. This argument is unpersuasive. Ms. Sherman was not competent to sign the Admission Agreement. Francene had been declared her attorney-in-fact and had assumed the responsibility for Ms. Sherman's affairs and had taken control of her assets. Although Francene neglected to sign as attorney-in-fact, her relationship with Ms. Sherman was such that they could in some sense be viewed as a single unit for purposes of constructive fraudulent transfer analysis. *In re Michel*, 573 BR 46 [Bankr EDNY 2017] ("Parents and the minor children dependent on them for support must be viewed as single economic unit for constructive fraudulent transfer avoidance purposes, such that goods and services purchased by debtor-parents for their minor children should generally be treated, for purposes of constructive fraudulent transfer analysis, as though they had been purchased by the parents for themselves"). Francene was Ms. Sherman's niece. Ms. Sherman was not competent to care for herself or to sign the Admission Agreement, so Francene signed it in order to admit her aunt to the facility. Francene then sought to avoid paying the amounts owed to Plaintiff with Ms. Sherman's assets and sought to hide those assets so that Ms. Sherman could obtain Medicaid benefits.

Accordingly, Plaintiff's motion for summary judgment is granted on its Section 276 claim.

SUMMARY

It is ORDERED, that Defendants' motion for summary judgment is denied; and it is further

ORDERED, that Plaintiff's cross-motion for summary judgment is denied as to its claim under Section 273 of Debtor and Creditor Law and granted as to its Section 276 claim.[7]

The parties are directed to appear for a pre-trial conference on June 23, 2020 at 9:15 a.m.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 19, 2020
New City, New York

ENTER

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

[7] Plaintiff states that "reasonable attorneys' fees should also be granted pursuant to DCL-276a. Plaintiff did not provide a copy of its retainer agreement or its counsel's invoices.