

214 Knickerbocker LLC v Shou Pan
2022 NY Slip Op 33579(U)
October 17, 2022
Supreme Court, New York County
Docket Number: Index No. 651435/2020
Judge: Melissa Crane
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the Smart Street Property on January 8, 2019, six days after Plaintiff commenced the Underlying Action.

In the Underlying Action, Plaintiff alleges that the Parents sold a building located at 214 Knickerbocker Avenue, Brooklyn, New York 11237 (“Knickerbocker Property”) to purchaser Joel Fried in 2015, who then assigned the building to Plaintiff (Index No. 500007/2019, NYSCEF Doc. No. 1, ¶¶ 1, 5-6). At the time of the purchase, the Knickerbocker Property had tenants. After the closing, tenants asserted that the Knickerbocker Property was “subject to rent stabilization or rent control” and that they could not be evicted (Index No. 500007/2019, NYSCEF Doc. No. 1, ¶¶ 17-18, 58). Plaintiff alleges that the Parents misrepresented that the Knickerbocker Property was “exempt from registration with the Department of Housing Preservation and Development” (NYSCEF Doc. No. 1, ¶ 16). Meanwhile, in the Underlying Action, Plaintiff alleges causes of action for breach of contract, breach of express warranty, fraud, negligent misrepresentation, and contractual indemnification against the Parents (Index No. 500007/2019, NYSCEF Doc. No. 1). The bench trial in the Underlying Action was originally scheduled for September 20, 2022 but was adjourned to December 13, 2022.

In this action, Plaintiff alleges that the Parents transferred the Smart Street Property to the Sons on January 8, 2019 for inadequate consideration after the Underlying Action was filed (NYSCEF Doc. No. 1, ¶ 21). According to the Bargain and Sale Deed, the Parents conveyed the Smart Street Property to the Sons for ten dollars (NYSCEF Doc. No. 84). The four Defendants originally purchased the Smart Street Property together in 2007 as joint tenants for \$688,888.00 (NYSCEF Doc. No. 100).

Here, Plaintiff asserts causes of action pursuant to DCL § 273-a, DCL § 273, DCL § 275, DCL § 276, and DCL § 276-a (*see generally* NYSCEF Doc. No. 1). Plaintiff argues that it is

entitled to summary judgment on all causes of action and also seeks attorneys' fees, pursuant to DCL § 276-a (NYSCEF Doc. No. 86, pp. 10-11), and a permanent injunction enjoining Defendants from "dissipating any of their assets, including the [Smart Street Property], until such time that the judgment [in the Underlying Action] has been satisfied in full" (NYSCEF Doc. No. 1, ¶ 56). In the alternative to an injunction, Plaintiff seeks the imposition of a constructive trust on "all of [Parents'] funds, assets, real property and personal property diverted by [Defendants]" (NYSCEF Doc. No. 86, p. 11; NYSCEF Doc. No. 1).

Initially, Defendants urge the court not to consider the affidavit of Shulem Herman, a member of 214 Knickerbocker LLC. Plaintiff filed Herman's affidavit in support of its motion, but Plaintiff failed to produce Herman as a deponent during discovery (NYSCEF Doc. No. 87, p. 4). Defendants also argue that there are questions of fact precluding summary judgment, that they have rebutted the presumption of insolvency, and that neither an injunction nor a constructive trust is appropriate.

DISCUSSION

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *DeCintio v Lawrence Hosp.*, 33 AD3d 329, 329 [1st Dept 2006]; *Orphan v Pilnik*, 66 AD3d 543, 544 [1st Dept 2009]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form (*see Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]; *Branda v MV Public Transp., Inc.*, 139 AD3d 636, 637 [1st Dept 2016]). If the party seeking summary judgment fails to meet their burden, the court must deny summary judgment "regardless of the sufficiency of the opposition papers" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]).

If the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). The court views the motion in the light most favorable to the opposing party (*see Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]); *Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]).

Despite numerous court orders, Plaintiff did not produce a party witness for deposition by the court's deadlines. Thus, Plaintiff is precluded from introducing Herman's affidavit in support of this motion (*see Brand v Colas*, 188 AD3d 557, 558 [1st Dept 2020]; *Nagi v Mario Broadway Deli Grocery Corp.*, 2016 WL 3950164, *1 [Sup Ct, NY County June 29, 2016]). Plaintiff, however, correctly notes that the court can consider the pertinent documentary evidence, including the Bargain and Sale Deed, that are both public records and attached to Plaintiff's counsel's affirmation (NYSCEF Doc. No. 105, ¶¶ 28-32).

1. DCL § 273-a

Plaintiff's motion for summary judgment is premature regarding Plaintiff's DCL § 273-a claim because there is no final judgment in the Underlying Action. Under the version of DCL § 273-a in effect at the time of the allegedly fraudulent transfer²:

“[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, **after final judgment for the plaintiff**, the defendant fails to satisfy the judgment”

(*see Palestine Monetary Authority v Strachman*, 62 AD3d 213, 224 [1st Dept 2009]).

² The Debtor & Creditor Law was amended as of April 4, 2020 (L. 2019, c. 580 § 2). However, the prior version of the Debtor & Creditor Law continues to apply to actions relating to transactions prior to that date, including the January 8, 2019 transfer of the Smart Street Property here (*see Kocak v Dargin*, 158 NYS3d 13, 16 [1st Dept 2021]).

Plaintiff does not respond to Defendants' argument that this cause of action is premature. Accordingly, Plaintiff's motion for summary judgment is denied as to the DCL § 273-a claim.

2. DCL § 273

Pursuant to DCL § 273, a conveyance “that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration” (*CIT Group/Commercial Services, Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 302 [1st Dept 2006]; *Joslin v Lopez*, 309 AD2d 837, 837-838 [2d Dept 2003]; *D'Mel & Assocs. v Athco, Inc.*, 105 AD3d 451, 453 [1st Dept 2013]). Additionally, there is a rebuttable presumption of insolvency where there is a lack of adequate consideration (*Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496, 497 [1st Dept 2018]; *Pensmore Investments, LLC v. Gruppo, Levey & Co.*, 184 AD3d 468, 469 [1st Dept 2020]).

Here, Plaintiff has established prima facie entitlement to summary judgment on its DCL § 273 claim by demonstrating that the Parents transferred their combined 50% interest in the Smart Street Property to the Sons for inadequate consideration, creating the presumption of insolvency. The October 26, 2007 deed shows that the Parents and Sons together purchased the Smart Street Property for \$688,888.00 (NYSCEF Doc. No. 100). On January 8, 2019, according to the Bargain and Sale Deed, the Parents transferred their interest in the Smart Street Property to the Sons for ten dollars (NYSCEF Doc. No. 84). The enormous difference between the purchase price in 2007 and the transfer price in 2019, and the close familial relationship of the Defendants, establishes that the Parents did not convey the property for “fair consideration” in “good faith” pursuant to DCL § 272 (*see Sardis v Frankel*, 113 AD3d 135, 141-142 [1st Dept 2014]).

In opposition, Defendants have failed to rebut the presumption of insolvency or raise a triable issue of material fact. It is irrelevant that the Sons purportedly paid the Smart Street Property

mortgage and other expenses, and that the Sons allegedly maintained and managed the Smart Street Property before and after the transfer (*e.g.*, NYSCEF Doc. Nos. 97, 99).

“Although the satisfaction of an antecedent debt may constitute fair consideration for a transfer of property, that general principle is subject to certain conditions . . . In order for the satisfaction of the antecedent debt to constitute fair consideration for a transfer of property, there must be a fair equivalency between the value of the antecedent debt deemed to be satisfied and the value of the property transferred, and the transfer must have been made in good faith”

(*PalmOne, Inc. v R.C.S. Computer Experience, L.L.C.*, 15 Misc 3d 1127(A), **5-6 [Sup Ct, NY County 2007]).

Further, past consideration cannot support an agreement unless the past consideration is “explicitly recited in a writing” without any need to refer to extrinsic evidence (*see e.g., Korff v Corbett*, 155 AD3d 405, 408 [1st Dept 2017]).

Defendants’ self-serving assertions in their affidavits are insufficient to raise a triable issue of fact. Specifically, Defendants’ evidence in opposition does not tend to establish either that the Sons were the Parents’ creditors or that the Smart Street conveyance satisfied a legitimate antecedent debt. The Bargain and Sale Deed establishes only that the Parents transferred the Smart Street Property to their children for ten dollars, which is not adequate consideration under these circumstances.

Accordingly, Plaintiff is entitled to summary judgment on its DCL § 273 claim.

3. DCL § 275

Under DCL § 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” (DCL § 275; *CIT Group/Commercial Services, Inc. v 160-09 Jamaica*

Ave. Ltd. Partnership, 25 AD3d 301, 302 [1st Dept 2006]; *Wall Street Assocs. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999] [“A claim under this provision requires, in addition to the conveyance and unfair consideration elements established supra, an element of intent or belief that insolvency will result.”]). A plaintiff can establish constructive fraud for a claim under DCL § 275 where the person who made the conveyance “has a good indication of oncoming insolvency” (*Grace Plaza of Great Neck v Heitzler*, 2 AD3d 780, 781 [2d Dept 2003]).

Plaintiff has not eliminated all issues of fact as to Defendants’ liability under DCL § 275, precluding summary judgment on this claim. Although Plaintiff e-filed the complaint in the Underlying Action on January 2, 2019 (NYSCEF Doc. No. 87, p. 6), the complaint in the Underlying Action was not served on Defendant Shou Hao Pan until January 12, 2019, four days **after** the transfer of the Smart Street Property on January 8, 2019 (NYSCEF Doc. No. 90). Additionally, the Parents state in their affidavit that they were not aware of the Underlying Action at the time of the transfer and that, in any event, Plaintiff attempted service at the wrong address (NYSCEF Doc. No. 97 [alleging that Plaintiff attempted service at the Smart Street Property, but the Parents lived at 136 Eldridge Street in New York, New York]; NYSCEF Doc. No. 98).

Accordingly, Plaintiff is not entitled to summary judgment on its DCL § 275 claim.

4. DCL §§ 276 and 276-a

Under DCL § 276, “[e]very 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” (*CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]; *Eastern Concrete Materials, Inc. v DeRosa Tennis Contrs., Inc.*, 139 AD3d 510, 512 [1st Dept 2016]). Claims under DCL § 276 require proof of “actual fraud” rather than simply “constructive fraud”

(see *Wall Street Assocs. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). However, “[d]ue to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to 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’” (*id.* [internal citations and quotation marks omitted]). These “badges of fraud” include “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” (see *Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496, 497 [1st Dept 2018]).

Plaintiff has established its prima facie entitlement to summary judgment for its DCL § 276 claim. Here, the “badges of fraud” adequately establish Defendants’ actual intent to fraudulently convey their interest in the Smart Street Property. Specifically, the transfer was between close family members; the Sons paid the Parents only ten dollars for the Parents’ 50% interest in the property that all four of them had purchased for \$688,888.00 in 2007; and the transfer was not in the Defendants’ usual course of business. While Plaintiff has failed to show that the Parents retained control of the Smart Street Property following the transfer, Plaintiff “need not establish all of the badges of fraud to give rise to an inference of intent” (*Piccarreto v Mura*, 51 Misc 3d 1230(A), at *5 [Sup Ct, Monroe County 2016]; see also *Board of Managers of Be@William Condominium v 90 William St. Development Group LLC*, 187 AD3d 680, 682 [1st Dept 2020] [awarding summary judgment to plaintiff that established “several” badges of fraud under DCL § 276]). Defendants do not raise a triable issue of fact regarding the badges of fraud. Therefore, Plaintiff’s motion for summary judgment is granted as to its DCL § 276 claim.

Under DCL § 276-a, a plaintiff is entitled to reasonable attorneys' fees where it has established that a transfer was "made and received with actual intent to defraud, i.e[.], in violation of Debtor and Creditor Law § 276" (*Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179 [1st Dept 2004]). Although Plaintiff has adequately established actual intent for the purposes of DCL § 276, the court has no basis to award attorneys' fees. Plaintiff has failed to provide any invoices, time sheets, statements, or other substantiation of the attorneys' fees accrued.

Accordingly, the motion is denied as to Plaintiff's request for fees under DCL § 276-a.

5. Permanent Injunction and Constructive Trust

Plaintiff's motion for summary judgment on its cause of action for a permanent injunction is granted. A permanent injunction is a "drastic remedy" which should only be granted where the plaintiff demonstrates that it will suffer irreparable harm absent the injunction" (*Swartz v Swartz*, 145 AD3d 818, 828 [2d Dept 2016]). However, an injunction against the transfer of property is appropriate where the transfer of the property would "threaten to render ineffectual any judgment which the plaintiff might obtain" (*Winchester Global Trust Co. Ltd. v Donovan*, 58 AD3d 833, 834 [2d Dept 2009]; *Butler v US Bank Nat. Assn.*, 48 Misc 3d 1217(A), *3 [Sup Ct, NY County 2015]). Here, as set forth above, Plaintiff has established the presumption of insolvency based on the Defendants' lack of consideration of the transfer (*see Matter of Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496, 497 [1st Dept 2018]) and Defendants failed to rebut it. Absent an injunction against further transfers of the Smart Street Property, a judgment in the Underlying Action against Defendants could be rendered ineffectual.

Specifically, Plaintiff seeks, in this motion, an injunction "permanently enjoin[ing] [Defendants] from transferring the subject [Smart Street] Fraudulently Transferred Property, whether by virtue of another fraudulent conveyance or otherwise" (NYSCEF Doc. No. 86, p. 11).

The court grants that request. However, the injunction is subject to any subsequent order of the Kings County Supreme Court in the Underlying Action, which has jurisdiction to modify, change, or vacate this injunction enjoining Defendants from transferring, encumbering, or otherwise dissipating the Smart Street Property at issue here.

Having granted the injunction, the court denies Plaintiff's alternative request for a constructive trust as moot (*see Nathanson v Tri-State Const. LLC*, 48 AD3d 373, 374 [1st Dept 2008]). In any event, imposing a constructive trust is inappropriate because Plaintiff has failed to allege that it had a confidential or fiduciary relationship with any of the Defendants (*Krinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332, 333 [1st Dept 2006]).

CONCLUSION

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is granted in part as to Plaintiff's second cause of action under DCL § 273 and fourth cause of action under DCL § 276; and it is further

ORDERED, ADJUDGED, AND DECLARED that the conveyance and purported conveyance of the property located at 45-33 Smart Street, Flushing, New York 11344 (Block 5204, Lot 47) from Defendants Shou Hao Pan, Feng Zhu Chen, Yu Zhao Pan, and Yu Xing Pan to defendants Yu Zhao Pan and Yu Xing Pan, as set forth in the Bargain and Sale Deed dated January 8, 2019, is deemed fraudulent and void, and is set aside; and it is further

ORDERED that Defendants are permanently enjoined from selling, disposing of or in any way encumbering the Smart Street Property, subject to any subsequent order of this court or the

Kings County Supreme Court in Index Number 500007/2019 (the Underlying Action); and it is further

ORDERED that the remainder of Plaintiff's motion is denied in its entirety; and it is further

ORDERED that the parties must appear for a pretrial conference by Microsoft Teams on October ~~21~~³¹, 2022 at 12:30 p.m.

10/17/2022
DATE


MELISSA CRANE, 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 checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE