

SRW Equities LLC v Nussen
2023 NY Slip Op 30088(U)
January 4, 2023
Supreme Court, Kings County
Docket Number: Index No. 519966/2019
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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SRW EQUITIES LLC, 63RD STREET
REALTY II LLC and SAMUEL WIESNER,

Plaintiffs, Decision and order

-against-

Index No. 519966/2019

MICHAEL NUSSEN, and WILLIAM NUSSEN,
Defendants,

January 4, 2023

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PRESENT: HON. LEON RUCHELSMAN

The plaintiffs have moved seeking summary judgement pursuant to CPLR §3212 concerning all the allegations of the complaint. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On March 20, 2017 the defendant Michael Nussen acquired property located at 1536 59th Street in Kings County. The purchase price was \$1,275,000 and a mortgage was obtained by Michael Nussen in the amount \$800,000.00 from MB Financial Bank, NA. Further, on April 23, the plaintiffs obtained an arbitration award for \$454,429.90. That award was confirmed by this court and on September 6, 2019 judgement was entered in the amount of \$470,836.69. On April 30, 2019, a week after the arbitration award the defendant Michael Nussen deeded the property to his father, defendant William Nussen. The plaintiffs instituted this action and have asserted allegations the transfer of the property

violated debtor creditor law §§273-a, 274, 275, 276 and 276-a. The plaintiffs have now moved seeking summary judgement arguing there are no questions of fact the transfer of the property was a fraudulent transfer pursuant to the debtor creditor law.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

It is well settled that pursuant to §273 of the Debtor Creditor Law every conveyance made by a party which then renders the party insolvent is fraudulent without regard to intent if the conveyance is made without fair consideration (Paragon v. Paragon, 164 AD3d 1460, 84 NYS3d 582 [2d Dept., 2018]). Further, such transfers are fraudulent if the transferor had unreasonable small capital to operate the business (Debtor Creditor Law §274) or intended or believed the transferor would incur debts beyond his or her ability to pay them when they matured (Debtor Creditor

Law §275) or even if fair consideration was present the transfer was made with the intent to defraud (Debtor Creditor Law §276). Debtor Creditor Law §276(a) provides that where a plaintiff successfully establishes actual intent to defraud then such plaintiff may be entitled to reasonable attorney's fees (5706 Fifth Avenue LLC v. Louzieh, 108 AD3d 589, 969 NYS2d 141 [2d Dept., 2013]). Thus, the statutes require a two pronged inquiry namely, whether the conveyance rendered the party insolvent and whether the conveyance was accompanied with fair consideration (Epstein v. Nieves, 258 AD2d 436, 682 NYS2d 917 [2d Dept., 1999]).

The defendants argue that an agreement between William and Michael his son demonstrates the property was owned by William who rented it to his son Michael. Indeed, Article 1 of that agreement provides that "Party A [William] delivered to Party B [Michael] the sum of four hundred seventy five dollars (\$475,000) for which he shall buy the aforementioned apartment, and Party A names Party B to be involved and to carry out all matters of purchasing the house, and is his agent on all matters including signing documents (in the name of Party B)." (id., [NYSCEF Doc. No. 53]). Thus, pursuant to that agreement Michael was not intended to be the owner of the property at all and was merely purchasing the property as an agent of his father. Further,

Article 3 provides that "due to the reason described below, the deed shall be recorded in the name of Party B; however, Party B fully acknowledges that the house belongs to party A alone, and that Party B has no right thereto, neither in whole nor in part, and that he has no permission or right to utilize the house for any benefit, such as to put it up as collateral or to encumber it in order to obtain a loan etc., in any shape whatsoever, including but not limited to refinance without written permission by Party A" (id). That provision further supports the argument the property never belonged to Michael. Moreover, Michael Nussen provided an affidavit wherein he states that his father purchased the property in March 2017 and intended to rent an apartment to him (see, Affidavit of Michael Nussen, ¶3 [NYSCEF Doc. No. 41]). Michael thus insists that he never owned the property and while the deed was in his name the return of the deed back to William was not a fraudulent transfer (see, Affidavit of Michael Nussen, ¶17).

However, Michael obtained a mortgage wherein he confirmed that he "lawfully own the property" (see, Mortgage, page 4 of 16 [NYSCEF Doc. No. 49]). Michael executed the mortgage in his individual capacity and not as an agent of William. Thus, it cannot be asserted that "Michael Nussen was only the nominal owner of this Property which was purchased completely by his

father" (Affirmation in Opposition, ¶ 3 [NYSCEF Doc. No. 35]). Michael can hardly be termed a nominal owner and it can hardly be asserted that William is the true owner considering the note and mortgage executed by Michael. Therefore, the inescapable conclusion that must be drawn is that Michael owned the property and the transfer from Michael to William amounted to a fraudulent conveyance. Further, there has been no evidence of any consideration regarding the transfer and a presumption exists, which has not been overcome, that the transfer rendered Michael insolvent. Therefore, based on the foregoing, the motion seeking summary judgment regarding DCL §273-a and DCL §274, DCL §275, DCL §276 and DCL §276(a) is granted.

So ordered.

ENTER:

DATED: January 4, 2023
Brooklyn N.Y.

Hon. Leon Buchelsman
JSC