

Matter of Estate of Marilyn Monroe LLC v Maleh

2023 NY Slip Op 31926(U)

June 6, 2023

Supreme Court, New York County

Docket Number: Index No. 154543/2022

Judge: Laurence L. Love

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE **PART** **63M**

Justice

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THE ESTATE OF MARILYN MONROE LLC, MUHAMMAD
ALI ENTERPRISES, LLC

Plaintiff,

- v -

ALAN J. MALEH,

Defendant.

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INDEX NO. 154543/2022

MOTION DATE 04/14/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, plaintiffs’ motion seeking leave to reargue this Court’s prior decision dated October 13, 2022 or in the alternative for summary judgment is decided as follows:

Plaintiffs initially commenced the instant action as a Petition on May 26, 2022 seeking to recover monies or other property of judgment-debtor WeePlay Kids LLC (“WeePlay”) that were improperly distributed via fraudulent transfers to respondent Alan J. Maleh during the course of petitioners’ lawsuit against the judgment-debtor, and allowing petitioners to disregard the transfers and levy upon the monies or other property transferred, and awarding petitioners damages as against respondent, all to the extent necessary to satisfy petitioners’ judgment, as set forth in former Debtor and Creditor Law § 278, further seeking attorney’s fees pursuant to former Debtor and Creditor Law § 276-a.

As described in the initial Petition, On June 28, 2018, petitioners filed an action against WeePlay in this Court, captioned *The Estate of Marilyn Monroe LLC and Muhammed Ali Enterprises LLC v. WeePlay Kids LLC*, Index No. 653260/2018. On February 16, 2021, this Court

granted plaintiff's motion for summary judgment and Judgment was entered and filed with the Clerk of the Court on March 2, 2021 for \$188,189.39. Said judgment is now final.

As further described in the Petition, according to Weeplay's K-1 Statements from 2018 and 2019, Alan J. Maleh was the holder of a 99% membership in Weeplay and that Weeplay made distributions of \$436,704 to Maleh in 2018 and \$352,530 to Maleh in 2019, before filing its final federal tax return in 2020 and closing said business, thereby rendering Weeplay insolvent.

Pursuant to Debtor and Creditor Law § 273 “[e]very 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.” Pursuant to Debtor and Creditor Law § 273-a “[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.” Pursuant to Debtor & Creditor Law § 276-a “[i]n an action or special proceeding brought by a creditor . . . to set aside a conveyance by a debtor, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, in which action or special proceeding the creditor . . . shall recover judgment, the justice or surrogate presiding at the trial shall fix the reasonable attorney's fees of the creditor . . . and the creditor . . . shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment. . . .”

In this Court's Order dated, October 13, 2022, this Court converted this action to a plenary action pursuant to CPLR § 103(c). Plaintiff now moves for leave to reargue pursuant to CPLR 2221(d), and upon reargument, granting their Petition for relief under CPLR 5225(b) and/or CPLR 5227, setting aside transfers made to respondent/defendant Alan J. Maleh as fraudulent under the Debtor and Creditor Law and awarding petitioners damages against respondent, including petitioners' reasonable attorneys' fees or in the alternative seeks summary judgment for the same relief.

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, *Schneider v. Solowey*, 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410 [2d Dept 1985]). A "motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor it is designed for litigants to present the same arguments already considered by the court" (see, *Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Simon v. Mehryari*, 16 AD3d 664 [2d Dept 2005]). As discussed in *Matter of TNT Petroleum, Inc. v. Sea Petroleum, Inc.*, 72 A.D.3d 694 (2d. Dept. 2010), it is proper to bring this proceeding pursuant to CPLR 5225 (b), rather than a plenary action pursuant to article 10 of the Debtor and Creditor Law. However, rather than convert the proceeding back to a Petition, the Court elects to evaluate Plaintiff's summary judgment motion.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d

395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

In support of the original petition and incorporated into the instant motion, plaintiff submits a copy of the judgment in the underlying action, together with the relevant pleadings, license agreement, and summary judgment decision. Plaintiff further submits copies of WeePlay's 2018 and 2019 IRS Schedule K-1 and WeePlay's 2020 Tax Return, closing said LLC. Said documents establish that the underlying action was filed on June 28, 2018, that in fiscal year 2018, WeePlay made distributions to Maleh in the amount of \$436,704.00 and thereafter in fiscal year 2019, made distributions to Maleh in the amount of \$352,530.00. At a minimum, all of the distributions from fiscal year 2019 occurred during the pendency of the underlying action.

In order to prevail on a claim of fraudulent conveyance under former Debtor Creditor Law § 273-a, the plaintiff/petitioner must establish that the conveyance was made without fair consideration, while the transferor was a defendant in an action for money damages, and that a final judgment has been rendered against the transferor that remains unsatisfied. However, where

the creditor asserts that the transferee paid insufficient consideration and the evidentiary facts as to the nature and value of the consideration are within the transferees' control, the burden of coming forward with evidence of the character of the disputed transfers shifts to the defendant-transferee, *See, Gelbard v. Esses*, 96 A.D.2d 573, 576 (2d Dept. 1983). As such, plaintiff/petitioner has established a *prima facie* entitlement to judgment.

Plaintiff objects to this Court considering defendant's opposition papers as they were filed approximately a month overdue, however same will be considered by this Court. In opposition, defendant/respondent submits an affirmation arguing that Weeplay did not fraudulently dissipate its assets, but instead paid its liabilities in the ordinary course of business. In support of said argument, Maleh attaches documents purporting to show that Weeplay paid off its factors and that the distributions at issue were repayments of loans that Maleh made to Weeplay. Neither document is in admissible form. Aside from there being no documentation of the alleged loans annexed to defendant's papers, the distributions are characterized as capital withdrawals and distributions on Weeplay's tax documents. As such, defendant has failed to rebut plaintiff's *prima facie* showing. Further, even if defendant had established a valid debt, an insider payment is not in good faith, regardless of whether or not it was paid on account of an antecedent debt (*Am. Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478 [1st Dept 2016]).

ORDERED AND ADJUDGED, that Petitioner's application under Debtor and Creditor Law § 273-a as against respondent/defendant Alan Maleh is hereby GRANTED and the transfers made by Weeplay Kids LLC, to respondent Alan Maleh in the amounts of \$436,704.00 \$352,530.00 are hereby set aside as fraudulent under the statute; and it is further

ORDERED, that pursuant to Debtor and Creditor Law § 278, Petitioner/plaintiff may disregard the transfers and levy upon and enforce his Judgment against Defendant/respondent Alan

Maleh, up to the amount of \$212,722, and against respondent Kineret Hadad, up to the amount of \$188,189.39, together with statutory interest thereon from March 2, 2021, plus costs and disbursements as taxed by the Clerk, to the extent necessary to satisfy Petitioner's Judgment; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the parties are directed to submit briefs on the issue of attorney's fees pursuant to former Debtor & Creditor Law § 276-a and the Court will determine if an award of attorneys' fees in Petitioner's favor is warranted after review and consideration of the further submissions.

6/6/2023
DATE


LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE