Patterson Belknap Webb & Tyler LLP v Hoganwillig, PLLC

2023 NY Slip Op 32605(U)

July 27, 2023

Supreme Court, New York County

Docket Number: Index No. 655006/2022

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

---X

PATTERSON BELKNAP WEBB & TYLER LLP

Plaintiff,

- v -

HOGANWILLIG, PLLC,

Defendant.

---X

INDEX NO. 655006/2022

MOTION DATE 7/26/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

were read on this motion to/for DISMISS .

The following e-filed documents, listed by NYSCEF document number (Motion 002) 5, 6

were read on this motion to/for DISMISS .

Defendant's motion to dismiss is denied.

Background

Plaintiff brings this case as part of an effort to collect on a judgment it secured against non-party Barbara Stewart. Plaintiff represented Ms. Stewart and, when she failed to pay legal fees, commenced a separate action to recover these fees. It obtained a judgment in 2013 against Ms. Stewart and alleges that no part of it was ever paid. Plaintiff contends it is now due over $3.5 million.

Plaintiff insists that it then issued various restraining notices to Ms. Stewart and her financial institutions (although plaintiff does not claim it served one on defendant). It claims that it took a deposition of Ms. Stewart in 2016 in which she claimed her only asset that could be used to satisfy plaintiff's judgment was a property in Bermuda. Ms. Stewart apparently asserted

that although she was awarded certain jewelry in connection with her divorce proceeding, her former daughter-in-law had misappropriated these items, including a diamond ring.

It contends that a few months after giving the above testimony (in August 2016), Ms. Stewart sold the diamond ring (with the assistance of her then lawyer, non-party David Marcus) for $2.375 million (it was a 24.79 carat diamond ring). Plaintiff alleges that the proceeds of the sale were deposited into a bank account controlled by Mr. Marcus' firm. It contends that this firm ("M&C") transferred about $630,000 out of the account to pay off debts that Ms. Stewart allegedly owed to M&C and another attorney, and then transferred the remaining portion of the proceeds to three escrow accounts for Ms. Stewart's benefit.

Plaintiff alleges that in December 2017, Ms. Stewart entered into a retainer agreement with defendant which included a retainer fee of $625,000 (this money was transferred by M&C to defendant). Another retainer agreement was entered into between M&C and Ms. Stewart for over $750,000. Taken together, it exhausted the remaining proceeds from the sale of the ring.

Parties' Contentions

Plaintiff argues that defendant has refused to turn over its retainer agreement and argues that defendant was the recipient of the $625,000 without fair consideration. It contends that this was part of a fraudulent scheme to evade plaintiff's efforts to collect its judgment. Plaintiff brings three causes of action against defendant, all arising out of the Debtor and Creditor Law. It asserts that the transfer to defendant was made while Ms. Stewart was insolvent and that there was no fair consideration. Plaintiff argues that the promise of future consideration does not constitute adequate consideration. It emphasizes that the transfer was fraudulent and therefore violates Debtor and Creditor Law §§ 273, 274 and 275.

Plaintiff also seeks relief under Debtor and Creditor Law §273-a relating to the conveyance and that plaintiff's judgment remains unsatisfied. And plaintiff brings a claim under Debtor and Creditor Law § 276 on the ground that the subject conveyance was done with the intent to defraud plaintiff.

Defendant moves to dismiss on the ground that it was not a transferee of the conveyance. It argues that the funds it received were deposited in a firm trust account and then used to pay for the firm's services. Defendant admits it entered into a retainer agreement with Ms. Stewart and that there was fair consideration—legal services provided to Ms. Stewart. Defendant emphasizes that the complaint is devoid of any substantive allegations relating to defendant's actions and only raises inferences about what plaintiff thinks happened.

In opposition, plaintiff emphasizes that Stewart was insolvent (at least according to her deposition testimony) and that she transferred a large amount of money to defendant without receiving adequate value in return. Plaintiff points out that defendant absolutely was a transferee as it received money in an account under defendant's control. It observes that defendant was the beneficiary of this transfer and that there was no fair consideration for the $625,000 retainer. Plaintiff insists that under the Debtor and Creditor Law, defendant need not have fraudulent intent and only Ms. Stewart had to have this intent. It also contends that defendant's arguments about waiver and priority have no bearing on this motion.

In reply, defendant emphasizes that it worked on three matters for Ms. Stewart (a matrimonial case, a missing trust case and a case about the diamond ring itself). It argues that the scope of its work was properly set forth in the retainer agreement and it was not engaged in vague or open-ended legal work. Defendant maintains that it deposited the retainer into an IOLA

trust account and then used that account to pay for legal work. It argues that with each billable hour, it created antecedent debt to be paid under the terms of the retainer agreement.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

"Pursuant to the version of Debtor and Creditor Law § 273 applicable at the time of the subject conveyance[s], 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. Pursuant to the version of Debtor and Creditor Law § 274 applicable at the time of the subject conveyances, a conveyance is fraudulent as to creditors without regard to actual intent when it is made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his or her hands after the conveyance is an unreasonably small capital. To constitute fair consideration, the value given in exchange must be fairly equivalent and proportionate to the value of the property conveyed "(*Palmerone v Staples*, 195 AD3d 736, 737-38, 150 NYS3d 723 [2d Dept 2021] [internal quotations and citations omitted]).

Section 275 "requires, in addition to the conveyance and unfair consideration elements established supra, an element of intent or belief that insolvency will result" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528, 684 NYS2d 244 [1st Dept 1999] "DCL § 276, unlike sections 273

and 275, addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency. Due 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*. at 529).

The Court denies the motion. Preliminarily, defendant is certainly correct to point out the inherent tension between certain Debtor and Creditor Law sections (specifically sections 273 and 273-a), which do not require any fraudulent intent by the party receiving the money, and how attorneys retain clients. Many, many attorneys' retainer agreements are set up so that the client deposits money in the form of a retainer in order to procure legal services and when that money is earned by the attorney, the client replenishes the retainer; that way, the attorneys' fees are effectively prepaid.

As defendant pointed out, it would be quite difficult for a client facing bankruptcy or a debtor action under CPLR Article 52 to hire attorneys if those attorneys thought that the opposing party could seek their fees. In such a situation, the attorney could end up providing legal services for free if the retainer could be seized as part of the judgment recovery efforts against their client. Defendant was correct to cite *Knopf v Meister, Seelig & Fein, LLP* (2017 WL1449511 [SD NY 2017]), in which a federal court noted that "if fair consideration is given for future legal services there is no fraudulent conveyance even where the transferor is insolvent."

But the instant situation is not a straightforward retainer upon which defendant drew down as it incurred fees in connection with the three matters it worked on for Ms. Stewart. Rather, the facts alleged here raise questions about the nature of the retainer and the transfers

from Ms. Stewart's alleged IOLA trust account to defendant's operating account. In its moving papers, defendant included billing ledgers (NYSCEF Doc. Nos. 13-15) for each of the three cases it claims it worked on for Ms. Stewart (a missing trust case, a matrimonial matter and a jewelry case involving Ms. Stewart's former daughter-in-law). In its reply, defendant included a chart (NYSCEF Doc. No. 23) that details that it received the $625,000 retainer and then deposited *the entire amount* to its operating account within two months starting in early December 2017. These transfers included large deposits on consecutive days. For instance, it transferred $56,000 on January 2, 2018, $31,000 on January 3, 2018, $162,000 on January 4, 2018 and $117,000 on January 5, 2018 (NYSCEF Doc. No. 23). And this was all before even a single bill was sent to Ms. Stewart, at least according to the billing ledgers submitted on this record.

Discovery is required to explore whether these transfers constituted fair consideration; that is, whether these transfers were for actual legal work or whether they were part of a scheme to hide or shield the money from plaintiff. This is not a situation in which defendant drew down from Ms. Stewart's IOLA trust account in regular intervals. The record does not show, for instance, that defendant generated monthly bills and then subsequently withdrew a corresponding amount from the retainer. Instead, defendant withdrew $625,000 in less than eight weeks despite the fact that the billing ledgers do not indicate corresponding bills or invoices to justify these withdrawals. In fact, the three billing ledgers (NYSCEF Doc. Nos. 13-15) do not appear to indicate that there were any bills generated for these matters before *all* of the retainer funds were transferred to defendant's operating account by January 30, 2018.

That raises questions about why defendant transferred funds that were still technically in Ms. Stewart's control (in the IOLA trust account) to an account under defendant's control before

bills were generated and fees were incurred. It may be that defendant had a good reason to advance funds to its operating account before it issued any bills. But the Court is unable to find that defendant's submissions constitute documentary evidence sufficient to dismiss this matter. Defendant's evidence does not utterly refute plaintiff's allegations. According to what is presently before this Court, defendant received $625,000 from another firm's escrow account, deposited it into its own escrow account and then quickly, before even the first bill was issued, took all the money into its own operating account.

Plaintiff is entitled to allege that Ms. Stewart was insolvent based upon her deposition testimony and that she had a fraudulent intent to conceal her assets by letting M&C sell her ring as well as handle the proceeds for her purported benefit. The timeline of events, as alleged by plaintiff, suggests that Ms. Stewart testified that she had no assets (except for the Bermuda property) and then promptly facilitated the sale of a multimillion-dollar ring and used the proceeds for her own devices. Plaintiff need not prove these facts as a matter of law at this stage of the case. It merely had to allege facts sufficient to sustain its three causes of action.

The Court also declines to dismiss the complaint on the ground that plaintiff somehow waived its right to seek the instant relief by not intervening in the jewelry case. That plaintiff took the risk of Ms. Stewart's former daughter-in-law prevailing in that case (and taking possession of the ring) is besides the point because plaintiff alleges that Ms. Stewart, at some point, took the ring, had it sold and directed where the proceeds should go. This included $625,000 that was sent to defendant, who quickly deposited all of these funds into its operating account. Plus, defendant failed to cite binding caselaw that compels the Court to find (at least at the motion to dismiss stage) that plaintiff waived its rights—a harsh remedy—by not getting involved in a familial dispute with Ms. Stewart and her former daughter-in-law. If the former

daughter-in-law had actually taken possession of the ring (which did not happen), then plaintiff would simply attempt to find other assets belonging to Ms. Stewart, as any judgment creditor might do.

Moreover, defendant did not sufficiently show why plaintiff's alleged failure to file a lien over the conveyance requires dismissal. Plaintiff's position is that it was a creditor when funds from the judgment debtor were conveyed to defendant as part of scheme to fraudulently conceal these funds from plaintiff.

Summary

The Court recognizes that defendant insists it was merely hired to do work for Ms. Stewart and that it was entitled to receive payments from her, despite the fact that she may have owed money to plaintiff. Defendant is correct to rely on the *Knopf* case, cited above, and *State Farm Mut. Auto. Ins. Co. v Grafman* (04CV2609NGSMG, 2017 WL 4217122, at *3 [ED NY 2017]) for the proposition that funds held in an IOLA account are not in defendant's control and that a retainer agreement for future legal services can constitute fair consideration. But the fact is that, on a motion to dismiss (and *Knopf* was on a motion for summary judgment), the Court is unable to find that defendant's submissions meet the standard for documentary evidence or failure to state a cause of action required to dismiss this case.

As noted above, besides the procedural posture, there are significant factual differences in the facts as alleged here and *Knopf*. The key issue here is still whether or not the transfers to defendant were for fair consideration. The fact is that defendant transferred the entire balance of the retainer to its operating account within two months (as counsel for plaintiff adeptly pointed out at oral argument) and before defendant issued a single bill (according to the ledgers attached to this motion).

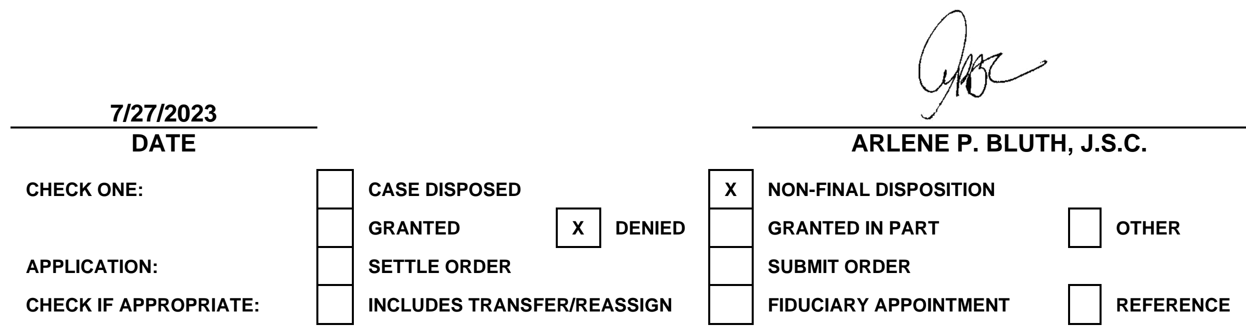
That distinguishes this case from *Knopf* and compels the Court to find that defendant failed to meet its burden on a motion to dismiss. The Court cannot simply credit defendant's assertion (submitted through its affidavit) that there was fair consideration in connection with the money it received from Ms. Stewart (though M&C). That is a factual issue that must be explored in discovery.

Accordingly, it is hereby

ORDERED that defendant's motion (MS001) to dismiss is denied and it is directed to answer pursuant to the CPLR; and it is further

ORDERED that defendant's motion to exceed the word limit (MS002) is academic as the Court considered the papers submitted under MS001.

Conference: October 11, 2023 at 10:30 a.m. By October 4, 2023, the parties are directed to upload an update about the status of discovery (either a discovery stipulation or letters explaining why no agreement about discovery could be reached). Based on these submissions, the Court will assess whether or not an in-person conference is appropriate. The failure to upload anything by October 4, 2023 will result in an adjournment of this conference.



7/27/2023
DATE

ARLENE P. BLUTH, 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