

Ilan Props., Inc. v Hendler

2023 NY Slip Op 32744(U)

August 8, 2023

Supreme Court, New York County

Docket Number: Index No. 158016/2022

Judge: Lori S. Sattler

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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. LORI S. SATTLER PART 02TR

Justice

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INDEX NO. 158016/2022

ILAN PROPERTIES, INC.,

MOTION DATE 12/15/2022

Petitioner,

MOTION SEQ. NO. 002

- v -

HANNA HENDLER, HANNA HENDLER AS THE ADMINISTRATOR OF THE ESTATE OF DAVID BENISHAI

DECISION + ORDER ON MOTION

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISS

Petitioner Ilan Properties, Inc. ("Petitioner") commenced this turnover proceeding by filing a Petition and Notice of Petition (Motion Sequence No. 001) pursuant to CPLR §§ 5225(b) and 5227 directing Respondent Hanna Hendler ("Respondent"), both individually and in her capacity as Administrator of the Estate of her deceased husband David Benishai ("Benishai") to turn over the sum of \$200,000 plus interest from May 11, 2017, plus costs, and/or entering judgment for that amount. Respondent then filed this motion, Motion Sequence No. 002, to dismiss the Petition for failure to state claim or in the alternative to transfer the proceeding to the New York County Surrogate's Court.

This proceeding stems from an action commenced in 2014 between Petitioner and Benishai. On January 16, 2020, summary judgment was granted in Petitioner's favor and the Court directed entry of judgment against Benishai in the amount of \$1,118,249.18 plus interest (Ilan Properties, Inc. v David Benishai, Jack Benishai, Sup Ct, NY County, January 16, 2020, Schecter, J., Index No. 651682/2014, affd 205 AD3d 541 [1st Dept 2022]). A judgment was

entered for the sum of \$1,485,574.85 on March 4, 2020 (NYSCEF Doc. No. 6). Of that sum, Petitioner has recovered \$10,621.66 (NYSCEF Doc. No. 7). Benishai died in 2021 and Respondent was appointed administrator of his estate (NYSCEF Doc. No. 9).

The Petition alleges that on May 11, 2017, while the earlier action was pending, Benishai transferred \$200,000 from an account in his name to Respondent. Petitioner annexes a bank statement which confirms the transfer (NYSCEF Doc. No. 10). The Petition asserts that the transfer of funds to Respondent was a fraudulent conveyance violative of former Debtor and Creditor Law (“DCL”) § 273-a.¹ Respondent now moves to dismiss the Petition, or in the alternative to transfer it to New York County Surrogate’s Court where Benishai’s estate is being administered.

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), “the court is required to accept as true the facts as alleged in the [pleading], accord the [petitioner] the benefit of every favorable inference and strive to determine only whether the facts alleged fit within any cognizable legal theory” (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 144-145 [1st Dept 2009], citing *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). However, “factual allegations which fail to state a viable cause of action” or “that consist of bare legal conclusions . . . are not entitled to such consideration” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

DCL § 273-a provides:

Every 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

¹ Article 10 of the DCL, which includes § 273-a, was repealed effective April 4, 2020 and replaced with a new Article 10, entitled the Uniform Voidable Transactions Act. The relevant legislation provides that the new law does not apply to transfers made prior to the law’s effective date (L 2019, ch 580, § 7; *see also Kocak v Dargin*, 199 AD3d 456, 457 [1st Dept 2021]).

if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

(*Palestine Monetary Auth. v Strachman*, 62 AD3d 213 [1st Dept 2009]). In order to prevail on a claim under DCL § 273-a, a party must establish that the transferor was a defendant in an action for money damages at the time of the transfer, the transferor has not satisfied the resulting judgment, and the transfer was made without fair consideration (*Hudson Spring Partners, L.P. v P+M Design Consultants, Inc.*, 210 AD3d 553 [1st Dept 2022]; see also *Mega Pers. Lines, Inc. v Halton*, 9 AD3d 553, 555 [3d Dept 2004]; *Berner Trucking v Brown*, 281 AD2d 924, 925 [4th Dept 2001]). Fair consideration is given when “a fair equivalent” of property is conveyed or a debt is satisfied in exchange for the transfer, or when the transfer is made in good faith to secure a present advance or debt in an amount “not disproportionately small as compared with the value of the” transfer (DCL § 272).

The ultimate burden of proof in a case alleging fraudulent conveyance lies with the creditor asserting that a transfer was made without fair consideration, however when the facts as to the nature and value of the consideration are within the transferee’s control, the burden of coming forward with evidence as to consideration should fall on the transferee (*Gelbard v Esses*, 96 AD2d 573, 576 [2d Dept 1983]). “An intra-family transaction places a heavier burden on defendant to demonstrate fairness” (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]; see also *Sardis v Frankel*, 113 AD3d 135, 145 [1st Dept 2014] [“A conveyance between family members is subject to enhanced scrutiny.”]).

Respondent does not dispute that Benishai was a defendant in an action for money damages at the time of the transfer or that the judgment against Benishai remains unsatisfied. Rather, her papers argue that the claim that the transfer was made without fair consideration is conclusory and lacks any factual support or allegations. Respondent’s seventeen-page affidavit

in support of her motion recites a history of the disputes surrounding Petitioner and the Benishai family but does not mention the transfer, let alone address whether consideration was given for it. In response, Petitioner argues that the transfer “lacked consideration as a matter of law since Respondent received no consideration in exchange for the transfer” and that “intra-family transfers made without any signs of tangible consideration” are presumptively fraudulent, citing *United States v Alfano*, 35 FSupp2d 827, 845 (EDNY 1999). Petitioner contends that in such cases the parties to the transaction have the burden of raising an issue of fact as to whether the transfers are supported by consideration.

The Court finds that the Petition states a claim under the former DCL § 273-a. It sufficiently alleges that an action for money damages was ongoing between Petitioner and Benishai at the time of the transfer and that the judgment remains unsatisfied. Furthermore, the facts pled with the respect to the timing and circumstances of the transfer, along with the fact that the transfer was made to his wife, are sufficient to support the Petition’s allegation that the transfer was made without fair consideration. Therefore, Respondent’s motion to dismiss is denied.

Respondent further moves to transfer the proceeding to the New York County Surrogate’s Court. Respondent characterizes the instant proceeding as involving questions of debts between Petitioner and Benishai and argues that it “inextricably involve[s] the property and funds of a decedent’s estate.” She therefore maintains that transfer is appropriate. Petitioner contends that the funds are outside of Benishai’s estate as they were transferred during his lifetime, and that the issues pertaining to the debt were resolved by the action which resulted in entry of judgment against Benishai.

CPLR § 325(e) provides that the Supreme Court may remove an action to Surrogate’s Court when the pending action affects the administration of a decedent’s estate which is within the jurisdiction of the Surrogate’s Court. There is a strong preference for removal where the affairs of an estate are involved (*Benjamin v Morgan Guar. Trust Co.*, 173 AD2d 373, 374 [1st Dept 1991]). The instant proceeding is one brought by a creditor of Benishai to recover funds allegedly fraudulently transferred to Respondent by Benishai during his lifetime. Because the funds are outside the estate and because Petitioner’s entitlement to judgment against Benishai has been fully litigated, the Court finds that this proceeding does not affect the administration of decedent’s estate. Therefore, Respondent’s motion to transfer the proceeding to Surrogate’s Court is denied.

Accordingly, for the reasons set forth herein, it is hereby:

ORDERED that Respondent’s motion is denied in its entirety; and it is further

ORDERED that Respondent shall Answer the Petition within twenty days of service of Notice of Entry; and it is further

ORDERED that Petitioner may reply within ten days of service of the Answer; and it is further

ORDERED that Motion Sequence No. 001 shall be returnable on September 13, 2023 at 3:00 PM via Teams.

This constitutes the Decision and Order of the Court.

8/8/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE

INCLUDES TRANSFER/REASSIGN