

Ilan Props., Inc. v Benishai

2023 NY Slip Op 32752(U)

August 8, 2023

Supreme Court, New York County

Docket Number: Index No. 653404/2022

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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ILAN PROPERTIES, INC.,

Plaintiff,

- v -

DANIELLE BENISHAI, ITZIK AVIEZER, HANNA HENDLER
AS THE ADMINISTRATOR OF THE ESTATE OF DAVID
BENISHAI

Defendant.

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INDEX NO. 653404/2022
MOTION DATE 12/15/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion to/for DISMISSAL.

Plaintiff Ilan Properties, Inc. ("Plaintiff") commenced this action alleging violations of Debtor and Creditor Law ("DCL") sections 273 and 274 against Defendants Danielle Benishai, Itzik Aviezer, and Hanna Hendler ("Hendler"), both individually and in her capacity as Administrator of the Estate of David Benishai ("David") (collectively, "Defendants"). Defendants, who are David's daughter, son-in-law, and wife respectively, move, pre-answer, to dismiss the Complaint for failure to state claim or in the alternative to transfer the proceeding to the New York County Surrogate's Court. Plaintiff opposes the motion.

The action stems from litigation commenced in 2014 between Plaintiff and David. On January 16, 2020, summary judgment was granted in Plaintiff's favor and the Court directed entry of judgment against David 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. Of that sum, Plaintiff has recovered \$10,621.66. David died in 2021 and Hendler was appointed administrator of his estate.

The Complaint (NYSCEF Doc. No. 12) alleges that in the months following entry of the judgment against David, he transferred \$900,000 from an account in his name to his daughter and son-in-law. Three wire transfer confirmations annexed to the Complaint evidence a \$300,000 transfer on April 16, 2020, a \$500,000 transfer on June 1, 2020, and a \$100,000 transfer on June 2, 2020 (NYSCEF Doc. Nos. 2-4). The Complaint alleges that these transfers are voidable under DCL §§ 273 and 274. Defendants move to dismiss, or in the alternative to transfer the action to New York County Surrogate's Court where David'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 complaint, accord the plaintiff 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]). “[F]actual allegations which fail to state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

DCL § 273, the current version of which became effective several days before the first transfer, provides:

A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay or defraud any creditor of the debtor; or

- (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(DCL § 273[a]). The section lists 11 factors which courts may consider in determining actual intent, including whether the transfer was to an “insider,” whether the transfer was made after the debtor had been sued, whether the debtor removed assets, and whether the transfer occurred shortly before or after a substantial debt was incurred (DCL § 273[b]). A family member is an insider within the meaning of the statute (DCL § 270[h][1][i]).

Pursuant to DCL § 274(a), a transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the debtor did not receive “a reasonably equivalent value in exchange” and the debtor was insolvent as a result of the transfer. Under the prior version of the DCL, courts held that “[f]airness of consideration is a question of fact and 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.”]). Courts have further held that there is a rebuttable presumption of insolvency where there is a lack of adequate consideration (*Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496, 497 [1st Dept 2018]).

In their motion to dismiss, Defendants do not dispute that the transfers were made. Their papers argue that the Complaint is conclusory and lacks factual support for the remaining elements of the claims. Hendler's seventeen-page affidavit in support of the motion recites a history of the disputes surrounding Plaintiff and the Benishai family but does not mention the

transfers, let alone address the context in which they were made or whether David received a reasonably equivalent value in exchange for them.

The Court finds that the Complaint states a claim under both DCL § 273 and § 274. The Complaint alleges that David began transferring sums totaling \$900,000 to his daughter and son-in-law one month after judgment was entered against him for the sum of \$1,485,574.85. More than three years later, the judgment remains largely unsatisfied. These factual allegations alone are sufficient to state claims under DCL §§ 273 and 274 at this pre-answer motion to dismiss stage.

Defendants further move to transfer the action to New York County Surrogate's Court. Defendants characterize the instant action as involving questions of debts between Plaintiff and David and argues that it "inextricably involve[s] the property and funds of a decedent's estate." They therefore maintain that transfer is appropriate. Plaintiff contends that the funds are outside of David'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 David.

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]). This action is one brought by a creditor of David to recover funds he allegedly transferred to family members during his lifetime. Because the funds are outside the estate and because Plaintiff's entitlement to judgment against David has been fully litigated, the Court finds that this action does not affect the administration of decedent's estate. Therefore, Defendants' motion to transfer the proceeding to Surrogate's Court is denied.

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

ORDERED that Defendants' motion is denied in its entirety; and it is further

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

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

ORDERED that the parties shall appear for a Preliminary Conference 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

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: