

Vlahakis v Vlahakis

2023 NY Slip Op 33632(U)

October 12, 2023

Supreme Court, Kings County

Docket Number: Index No. 505293/2023

Judge: Karen B. Rothenberg

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 X
DONNA VLAHAKIS,

Plaintiff,

Index No. 505293/2023

-against-

DECISION AND ORDER

PAUL VLAHAKIS, 414 PATRICIA AVE., LLC,
404 PATRICIA AVE., LLC, and DIMITRI
VLAHAKIS,

Defendants,

X

Recitation as required by CPLR 2219(a), of the papers considered in defendants’ pre-answer motion to dismiss:

Papers	Motion papers.
Order to Show Cause/Motion and Affidavits Annexed.	11-16
Cross-motion and Affidavits annexed.....	
Answering Affidavits.....	17-20
Reply Papers.....	21-27

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

In this action to avoid certain conveyances pursuant to the newly enacted New York Debtor & Creditor Law (“DCL”),¹ defendants jointly move (in seq. no. 1) for an order: (i) dismissing the verified complaint, dated February 10, 2023, as against defendants 414 Patricia Ave., LLC and 404 Patricia Ave., LLC (collectively, the “LLCs”), as well as defendant Paul Vlahakis (“Paul”), pursuant to CPLR 3211 (a) (8), and (ii) dismissing the complaint as against the LLCs, Paul, and the remaining defendant Dimitri Vlahakis (“Dimitri” and, collectively with the LLCs and Paul, “defendants”), pursuant to CPLR 3211 (a) (7).

¹ “On December 6, 2019, then-Governor Andrew Cuomo signed a bill repealing Article 10 of the [former Debtor Creditor Law], replacing it with the Uniform Voidable Transactions Act (UVTA). (2019 NY Ch 580, 2019 NY AB 5622; NY Dr & Cr Law, Art 10 [2023]). The UVTA took effect on April 4, 2020 and applies to transfers made or obligations incurred on or after that date (2019 NY Ch 580, § 7). It does not apply to transfers made or obligations incurred prior to April 4, 2020, nor to a right of action that has accrued before that effective date. (Id.)” (*Board of Managers of 11 Beach St. Condominium v HFZ 11 Beach St. LLC*, 2023 NY Slip Op 33419[U] [Sup Ct, NY County 2023]).

Plaintiff Donna Vlahakis (“Donna”) alleges that on or about October 11, 2022, and while her separate action for embezzlement against Dimitri has been pending in this County under Index No. 506913/20, Dimitri contracted to transfer (and subsequently did transfer) his ownership interests in two commercial properties located in Florida to the Florida-formed LLCs. Paul, a resident of Michigan and the first-cousin of Dimitri and Donna, is the sole member of both LLCs.

On February 17, 2023, Donna commenced this action against defendants alleging that the transfers were fraudulent and voidable under, inter alia, DCL §§ 271, 273 (a) (1), 273 (a) (2), and 274. Donna seeks compensatory damages, as well as equitable remedies in the form of accounting, together with “the avoidance and revocation of the transfer of the properties located at 414 Patricia Avenue and 404 Patricia Avenue [in] Florida” (Verified Complaint, wherefore clause, ¶¶ [a], [b], [e], and [f]).

As noted, the initial branch of defendants’ motion seeks dismissal of the complaint *as against the LLCs and Paul* for lack of personal jurisdiction, pursuant to CPLR 3211 (a) (8). “When a motion is made to dismiss an action for lack of personal jurisdiction, the plaintiff bears the ultimate burden of proving a basis for such jurisdiction over a defendant” (*Carrs v Avco Corp.*, 124 AD3d 710, 710 [2d Dept 2015]). “However, to defeat a CPLR 3211 (a) (8) motion to dismiss, a plaintiff need only establish, prima facie, that the defendant was subject to the personal jurisdiction of the Supreme Court” (*id.*). Here, plaintiff has failed to demonstrate, prima facie, that Paul and the LLCs are subject to the personal jurisdiction of this court.

“Jurisdiction under CPLR 301 may be acquired over a foreign corporation [or other business entity] only if that corporation [or entity] does business here ‘not occasionally or casually, but with a fair measure of permanence and continuity’ so as to warrant a finding of its ‘presence’ in this jurisdiction” (*Daniel B. Katz & Assocs. Corp. v Midland Rushmore, LLC*, 90 AD3d 977, 978 [2d Dept 2011] [internal quotation marks and citations omitted]). “Moreover, an individual cannot be subject to jurisdiction under CPLR 301 unless he is doing business in New York as an individual rather than on behalf of a corporation [or other business entity]” (*id.* [internal citations and alterations omitted]). Here, the complaint fails to allege either that the LLCs were conducting business in New York, or that Paul individually was conducting business in New York, in each instance, within the scope of CPLR 301.

Under CPLR 302 (a) (3), personal jurisdiction over a non-domiciliary may be separately acquired over a defendant who, inter alia, “commits a tortious act without the state causing injury to a person or property within the state.” However, “the situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff” (*Vaichunas v Tonyes*, 61 AD3d 850, 851 [2d Dept 2009]). Inasmuch as the alleged transfers occurred in

Florida, CPLR 302 (a) (3) cannot serve as a basis for the imposition of personal jurisdiction over the LLCs and Paul in New York.

The remaining branch of defendants' motion seeks dismissal of the complaint as against all defendants for failure to state a cause of action, pursuant to CPLR 3211 (a) (7). Considering that, as discussed above, the Court has dismissed the complaint as against the LLCs and Paul pursuant to CPLR 3211 (a) (8), the Court will only consider the remaining branch of defendants' motion which is under CPLR 3211 (a) (7) as being applicable to defendants' request for dismissal of claims *as against Dimitri*.

As a general matter, when entertaining a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Aviaev v Nissan Infiniti LT*, 150 AD3d 807, 807-808 [2d Dept 2017]).

A claim under DCL § 273 (a) (1) requires "actual intent to hinder, delay or defraud any creditor of the debtor." Under DCL § 273 (a) (1), "[t]here is no requirement that a transaction involve common law deceit or fraudulent misrepresentation to be voidable for 'actual intent.' Actual intent to hinder or delay creditors suffices" (James Gadsden and Alan Kolod, Supplementary Practice Commentaries, McKinney's Debtor and Creditor Law § 273). Because of the difficulty of proving "actual intent," it is often inferred from circumstantial evidence, and consideration may be given to the enumerated factors under DCL § 273 (b) in determining "actual intent." (DCL § 273 [b] [1] - [11]).

Here, the complaint as amplified by the plaintiff's affidavit in opposition to the motion contains sufficient allegations to support a claim *as against Dimitri* under DCL § 273 (a) (1), including that the transfers were consummated between relatives, were made for inadequate consideration, and were timed after Donna had commenced her action for embezzlement against Dimitri (*see generally Milin v Pak*, 189 AD3d 1211 [2d Dept 2020]). Because a claim under the newly enacted DCL § 273 is not a species of common-law fraud, the heightened pleading requirements of CPLR 3016 (b) are inapplicable.

In contrast, a claim for constructive fraud under DCL § 273 (a) (2) does not require proof of the debtor's actual intent. Rather, the "voidability of [the constructive-fraud] transactions . . . turns on [the] objective facts concerning the debtor's distressed financial condition and the inadequate consideration received" (James Gadsden and Alan Kolod, Supplementary Practice Commentaries, McKinney's Debtor and Creditor Law § 273). Thus, under DCL § 273 (a) (2), a transaction is voidable if the debtor did not receive reasonably equivalent value in exchange for the transfer, and the debtor either: (i) was engaged or was about to engage in a business or 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 he/she would incur) debts beyond the debtor's ability to pay as they came due. Here, the complaint as amplified by the plaintiff's affidavit in opposition to the motion sufficiently pleads a claim *as against Dimitri* under DCL § 273 (a) (2), as it alleges that the transfers were made for less than adequate consideration, and that Dimitri, at the time of such transfers, was in debt beyond his ability to repay.


DCL § 274 is another statutory provision that permits for the avoidance of transfers made with "constructive intent." DCL § 274 (a) permits a creditor whose claim arose prior to the transfer to avoid a transfer made for less than reasonably equivalent value by a debtor who is insolvent or became insolvent as a result of the transfer. Pursuant to DCL§ 271 (b), there is a presumption of insolvency if a debtor is generally not paying his/her debts as they become due other than as a result of a bona-fide dispute. Here, the complaint likewise sufficiently pleads a constructive fraud claim *as against Dimitri* under DCL § 274, as it alleges that Donna is a creditor whose claim as against Dimitri arose prior to the transfers and that such transfers were made to the LLCs (and indirectly to Paul) for less than their market value by an insolvent debtor (*i.e.*, Dimitri).

Accordingly, defendants' pre-answer motion is *granted to the extent* of dismissing Donna's verified complaint, dated February 10, 2023, *as against the LLCs and Paul* pursuant to CPLR 3211 (a) (8) only, and the remainder of their motion is denied. Dimitri is directed to interpose his answer to Donna's verified complaint within ten days after service of this decision/order with notice of entry on defendants' counsel.

This constitutes the decision/order of the Court

Dated: October 12, 2023

Enter,



Karen B. Rothenberg, J.S.C.