

Tender Touch Health Care Servs. Inc. v Tnuzeg LLC

2023 NY Slip Op 34289(U)

November 30, 2023

Supreme Court, New York County

Docket Number: Index No. 653544/2021

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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TENDER TOUCH HEALTH CARE SERVICES INC., TENDER TOUCH REHAB SERVICES LLC,	INDEX NO.	<u>653544/2021</u>
Petitioners,	MOTION DATE	<u>06/03/2021</u>
- v -	MOTION SEQ. NO.	<u>001</u>
TNUZEG LLC, 300 BROADWAY HEALTHCARE LLC, VISTACARE, LLC,	FINAL DECISION + ORDER ON PETITION	
Respondents.		

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 10, 11, 12, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 51, 53, 54, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this petition to ENFORCE JUDGMENT.

Petitioners Tender Touch Health Care Services, Inc.’s and Tender Touch Rehab Services LLC’s (“Petitioners”) Petition to enforce a February 9, 2021 arbitration award (“Award” [NYSCEF 2]) against Respondent Vistacare, LLC (“Vistacare”) pursuant to CPLR 5225(b) is **granted**. Vistacare’s requests to convert this special proceeding to an action, for leave to conduct discovery, and for leave to submit further briefing are **denied**.

The Award has been confirmed. The only remaining issue, per the First Department’s affirmance (*Tender Touch Health Care Services Inc. v Tnuzeg LLC*, 211 AD3d 447, 447-48 [1st Dept 2022]), is whether the Award is enforceable against Vistacare pursuant to CPLR 5225(b). Based on the record presented in this special proceeding, after each side had an opportunity to take discovery and to brief the relevant issues, Petitioners have clearly and convincingly established that the judgment debtors’ assets, specifically the New Vista healthcare facility, were

fraudulently transferred to Vistacare – shortly after initiation of the arbitration – for the sum of ten dollars. In those circumstances, the Court determines that the Award is enforceable against Vistacare.

BACKGROUND

On December 3, 2021, the Court granted Petitioners’ motion to confirm the Award issued by a Beth Din (rabbinical court) against Respondents Tnuzeg LLC (“Tnuzeg”) and 300 North Broadway Healthcare LLC (“300 North” and with Tnuzeg and Vistacare “Respondents”) (NYSCEF 45). The branch of the Petition seeking to impose liability against Vistacare pursuant to CPLR 5225(b) was severed and Vistacare was enjoined from transferring assets pending a determination on its liability (NYSCEF 67).

On March 4, 2022, the Court entered a Preliminary Conference Order directing that expedited discovery on the issue of Vistacare’s liability be completed by April 13, 2022 (NYSCEF 65). The Court further directed that briefing on the issue of New Vista’s liability be fully submitted on April 29, 2022 (NYSCEF 65). On March 20, 2022, the Court entered an Order of Judgment and Severance in the amount of \$710,000 against Tnuzeg and 300 North (“Judgment” [NYSCEF 70]). Following the completion of discovery, the parties submitted briefing on the issue of Vistacare’s liability (NYSCEF 73-94).

Petitioners contend that Vistacare is liable because, following the issuance of the Beth Din’s “Hazmana” (summons) dated October 26, 2017 (NYSCEF 36), the other Respondents fraudulently transferred the New Vista healthcare facility business valued at \$27,000,000 to Vistacare for ten dollars. According to Petitioners, the transfer to another entity in Tnuzeg’s control was constructively fraudulent because it left the other Respondents insolvent.

Additionally, Petitioners argue that “badges of fraud” exist to establish an intentionally fraudulent transfer from Tnuzeg to Vistacare. For instance, the Bill of Sale “dated as of October 24, 2017” is signed by insider Boruch Kleinman on behalf of both Tnuzeg and Vistacare and reflects *de minimis* consideration as compared to the \$27,000,000 dollar value of New Vista (NYSCEF 4). Further, by letter dated November 1, 2017, the New Jersey Department of Health Licensure was requested by counsel for Tnuzeg and Vistacare, as a result of the alleged transfer, “to issue a new operating license to Vistacare. . .” for New Vista (NYSCEF 4).

The First Department affirmed this Court’s Judgment confirming the Award “and severing the proceeding and continuing it against respondent Vistacare. . .” (*Tender Touch Health Care Services Inc. v Tnuzeg LLC*, 211 AD3d 447, 447-48 [1st Dept 2022]). Relevant here, the First Department held that “the forum selection clause in the arbitration agreement should be enforced against Vistacare” and “jurisdiction is warranted here even though Vistacare is a New Jersey entity” (*id.* [citations omitted]). On February 28, 2023, the Court directed the parties to submit supplemental briefing on the issue of Vistacare’s alleged liability in light of the First Department’s affirmance (NYSCEF 100).

On March 6, 2023, Petitioners submitted supplemental papers in support (NYSCEF 103-105). On March 8, 2023, the Court granted Respondents an extension through March 31, 2023, to submit their supplemental papers (NYSCEF 106). However, on March 30, 2023, Respondents filed a Notice of Bankruptcy (NYSCEF 107) followed by a Notice of Removal to federal court on March 31, 2023 (NYSCEF 108), resulting in an automatic stay of this special proceeding.

On June 23, 2023, the Bankruptcy Court entered a stipulated order remanding this special proceeding to this Court (NYSCEF 109). On June 26, 2023, counsel for Petitioners submitted a

letter to the Court requesting that the Court “rule on its fully briefed request to hold Vistacare liable for the Judgment” (NYSCEF 110).

On October 16, 2023, Vistacare filed a consent to change attorneys (NYSCEF 111). Its new counsel submitted a letter arguing that this proceeding should be converted to an action, and also requested leave to take discovery and for a status conference (NYSCEF 112). Petitioners objected and requested that the Court decide the issue of Vistacare’s liability on submission or schedule oral argument (NYSCEF 113).

The Court convened a hearing on November 27, 2023, during which Vistacare’s new counsel was advised that the parties already had been provided an opportunity for discovery (when Vistacare was represented by different counsel) and that the issue of Vistacare’s liability had already been fully briefed. In the absence of any new arguments relating to the First Department’s decision, which expressly directed the Court to proceed with this special proceeding to determine Vistacare’s liability, the Court informed counsel that it would decide the issue on the papers.

DISCUSSION

CPLR 5225(b) provides, in relevant part:

Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff

CPLR 5225(b) authorizes the Court to direct the turnover of fraudulently transferred assets located out-of-state (*Miller v Doniger*, 28 AD3d 405 [1st Dept 2006]). Petitioners appropriately seek to hold Vistacare liable for the Award and resulting Judgment pursuant to CPLR 5225(b) in this special proceeding (*Gibson, Dunn & Crutcher LLP v World Class Capital Group, LLC*, 194 AD3d 567, 569 [1st Dept 2021], *lv to appeal denied*, 38 NY3d 901 [2022]).

Petitioners argue that the transfer of New Vista to Vistacare was fraudulent under former Sections 273, 273-1, 275, and 276 of the Debtor and Creditor Law.¹ Constructive and actual fraudulent transfer claims may be summarily determined by the Court (*Van de Walle v Van de Walle*, 200 AD3d 1095 [2d Dept 2021], *lv to appeal denied*, 39 NY3d 908 [2023]). Petitioners have established that the transfer of the New Vista business by Tnuzeg to Vistacare was fraudulent under Sections 273 and 275 of the Debtor and Creditor Law because the consideration paid was not fair and the transaction rendered Tnuzeg insolvent (*172 Van Duzer Realty Corp. v 878 Educ., LLC*, 142 AD3d 814, 818 [1st Dept 2016]).

Petitioners have also established that “badges of fraud” exist to establish an intentional fraudulent transfer under Section 276 of the Debtor and Creditor Law (*Flowers v 73rd Townhouse, LLC*, 202 AD3d 403, 405 [1st Dept 2022]). Specifically, the transfer was completed by insiders – members of the Kleinman family – at nearly the same time as the Beth Din’s Hazmana was issued for *de minimis* consideration. Further, the Kleinman family continues to run the New Vista business while Respondents Tnuzeg and 300 North have failed to satisfy the Judgment. The Court finds that there are clear “badges of fraud” to demonstrate that New Vista

¹ New York’s Uniform Voidable Transactions Act (“UVTA”) became effective on April 4, 2020 and does not apply retroactively (New York Laws 2019, ch. 580, Sec. 2).

was transferred to evade liability (*Good Gateway, LLC v Thakkar*, 220 AD3d 570 [1st Dept 2023] citing *Ray v Ray*, 108 AD3d 449, 451 [1st Dept 2013]).

CPLR 5225(b) may be utilized against an “alter ego” of the judgment debtor, which is the appropriate result here (*Rockefeller v Statement Services, Corp.*, 204 AD3d 920, 921 [2d Dept 2022] [collecting cases]). Specifically, Vistacare is liable under the “continuity of business or de facto merger doctrine” as the successor to Tzuneg because it is operating the same New Vista business (*Teachers Ins. Annuity Ass'n of Am. v Cohen's Fashion Opt. of 485 Lexington Ave. Inc.*, 45 AD3d 317, 318 [1st Dept 2007]). In sum, the transfer of New Vista to Vistacare was designed to evade the Award and Vistacare is liable as the recipient of a fraudulent transfer.

Contrary to Vistacare’s contentions, the Court’s severance order does not require that Vistacare’s liability be determined in a separate action (nor did Vistacare ever move for that relief). CPLR 407 expressly authorizes the Court to direct a severance of an issue in a special proceeding and the First Department has affirmed the Judgment directing the severance. Moreover, Respondents admitted in their motion to dismiss that CPLR 5225(b) must be raised in the context of a special proceeding, not an action (NYSCEF 25 at 27) (*Pensmore Investments, LLC v Gruppo, Levey & Co.*, 137 AD3d 558, 559 [1st Dept 2016]).

Finally, Vistacare has not demonstrated that additional discovery is warranted pursuant to CPLR 408 (*People by James v Leasing Expenses Co. LLC*, 73 Misc 3d 1207(A) [Sup Ct New York County 2021] [collecting cases]). The parties were afforded an opportunity to complete discovery on the issue of Vistacare’s liability and to submit briefs arguing their respective positions based on the evidence. Vistacare’s belated attempts, through new counsel, to delay a final resolution are without merit.

* * * *

Accordingly, it is

ORDERED that the Petition to enforce the Judgment against Respondent Vistacare pursuant to CPLR 5225(b) is **GRANTED**; it is further

ORDERED that the parties file the November 27, 2023 transcript on NYSCEF upon receipt; it is further

The Clerk is directed to enter judgment accordingly, upon submission by Petitioner in appropriate form.

This constitutes the decision and order of the Court.

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11/30/2023

DATE

JOEL M. COHEN, 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