

Ilan Props., Inc. v Hendler

2023 NY Slip Op 34398(U)

December 14, 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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ILAN PROPERTIES, INC.,

Petitioner,

- v -

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

Respondent.

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INDEX NO. 158016/2022

MOTION DATE 09/19/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for TURNOVER PROCEEDING.

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 seeking an order 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 moved to dismiss the Petition, which was denied. Respondent subsequently answered the Petition and asserted 51 affirmative defenses, and Petitioner filed a reply.

This proceeding follows 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, Schechter, 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.

CPLR § 5225(b) provides that a judgment creditor may commence a special proceeding against “a person who is a transferee of money or other personal property from the judgment debtor,” and where it is shown 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.”

Article 10 of the DCL, which includes § 273-a, was repealed effective April 4, 2020 and replaced with a new Article 10. The legislation provides that the new Article 10 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]). The former DCL § 273-a, which applies here, 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 if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

(*See 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]).

In her Amended Answer (NYSCEF Doc. No. 42), Respondent does not dispute that Benishai was a defendant in an action for money judgment for damages at the time of the transfer, and that the resulting judgment has not been satisfied. In a section of the Amended Answer titled “Statement of Additional Facts,” Respondent maintains that Benishai had various health problems in the years prior to his death in January 2021, dating back at least as far as the time of the transfer in May 2017, and that she managed payment of the resulting expenses. She claims: “to facilitate Respondent’s assistance, including with his bills for medical and living expenses, any such alleged monies transferred to Respondent by [Benishai] were used by Respondent to pay [Benishai]’s obligations” or were to used reimburse her for such expenses already paid (Amended Answer § 87-88). She claims that this constitutes fair consideration within the meaning of DCL § 237-a or at a minimum that the transferred funds “would be gone regardless because they were necessary to pay the legitimate obligations of [Benishai] for his medical and related personal care whether or not Respondent served as a conduit for them” (*id.* § 93). She annexes documents she states are samples of medical bills and records which purportedly support her position (NYSCEF Doc. Nos. 44, 45). She further asserts 51 boiler plate affirmative defenses without any specific evidentiary support.

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.”]).

In support of Respondent’s position that no fraud can be found because the transferred funds were used to pay for Benishai’s medical costs, she annexes what she states are “sample” medical bills (NYSCEF Doc. No. 44). These documents are in Hebrew and are not accompanied by an English translation as required by CPLR 2101(b). The documents appear to be dated years after the funds were transferred, with the earliest being September 2019 and continuing until February 2021, after Benishai had died. Respondent also annexes what she states are medical records (NYSCEF Doc. No. 45). These records appear to be from the Tel Aviv Sourasky Medical Center, but again are not accompanied by a certified translation. The only other evidence Respondent attaches is the Surrogates’ Court Petition (NYSCEF Doc. No. 46) and two doctors’ letters from 2018 (NYSCEF Doc. No. 43). These letters describe their treatment of Benishai, however nothing in either of those letters explicitly relates to the time period around when the transfer was made, or to Respondent’s contention that the funds were used to pay Benishai’s medical bills.

The Court finds that Respondent has failed to meet her burden of demonstrating that fair consideration was given in exchange for the 2017 transfer. 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 (former DCL § 272).

Nothing in the documentation included with Respondent’s Amended Answer demonstrates that Benishai received anything in exchange for the \$200,000 transfer, let alone something that could be considered a fair equivalent of what was conveyed. Even if the Court could find that the use of the transferred funds for medical expenses is sufficient to defeat the Petition, Respondent fails to adequately support that contention, and her affirmative defenses are likewise unsupported.

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

ORDERED and ADJUDGED that the Petition is granted to the extent that Respondent is directed to turn over to Petitioner as much as is necessary to satisfy Petitioner’s outstanding judgment up to the amount of \$200,000; and it is further

ORDERED that Petitioner is awarded costs.

Settle turnover order and judgment.

This constitutes the Decision & Order of the Court.

12/14/2023
DATE


LORI S. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
 REFERENCE