Rozen v Russ & Russ, P.C.

2012 NY Slip Op 30343(U)

January 30, 2012

Sup Ct, Suffolk County

Docket Number: 23620-08

Judge: Peter Fox Cohalan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX # 23620-08
RETURN DATE: **6-01-11 (004)**
6-29-11 (005)
MOT. SEQ. # **004 & 005**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

----------x

MAREK ROZEN, CHRISTINE ROZEN, and GABRIELLE ROZEN,

Plaintiffs,

-against-

RUSS&RUSS, P.C., JAY EDMOND RUSS, LINDA EILEEN RUSS, DANIEL P. ROSENTHAL, KENNETH J. LAURI, IRA LEVINE, PORTABELLA ASSOCIATES, LLC, JONNAT MANAGEMENT CORP., MOHAMED SH. OMAR and SALLY OMAR,

Defendants.

----------x

CALENDAR DATE: August 24, 2011
MNEMONIC: MD; Mot D.

PLTF'S/PET'S ATTORNEY:
Thaler & Gertler, LLP
90 Merrick Avenue, Suite 400
East Meadow, New York 11554

DEFT'S/RESP ATTORNEY:
Gordon & Gordon, PC
108-18 Queens Boulevard
Forest Hills, New York 11375-4748

L'Abbate, Balkan, Colavita & Contini, LLP
1001 Franklin Avenue
Garden City, New York 11530

Nesenoff & Miltenberg, LLP
363 Seventh Avenue, 5th Floor
New York, New York 10001

Upon the following papers numbered 1 to 56 read on these motions for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1-18 ; Notice of Cross-Motion and supporting papers 19-37 ; Answering Affidavits and supporting papers 38-45 ; Replying Affidavits and supporting papers 46-53; 54-56 ; Other ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the plaintiffs, Mark Rozen, Christine Rozen and Gabrielle Rozen (hereinafter Rozens), seeking partial summary judgment pursuant to CPLR §3212 on the fourth (4th) and fifth (5th) causes of action in their complaint alleging a fraudulent transfer of the interest of Mohamed SH. Omar and Sally Omar (hereinafter Omars) in certain property without consideration and with intent to hinder and/or defraud creditors is denied as there are factual issues which preclude summary judgment. The cross-motion by the defendants, Russ & Russ PC (hereinafter Russ & Russ), Jay Edmond Russ, Linda Eileen Russ, Daniel P. Rosenthal, Kenneth J. Lauri and Ira Levine (hereinafter Rosenthal, Lauri and Levine) seeking summary judgment pursuant to CPLR §3212 and dismissal of the plaintiffs' fourth (4th), fifth (5th) and sixth (6th) causes of action is granted as to the individual defendants Rosenthal, Lauri and Levine and denied as to Russ & Russ, Jay Edmond Russ and Linda Eileen Russ for the reasons outlined hereinafter.

This action arises from a real property transaction originally between the Omars and the Rozens for certain undeveloped property in Mattituck, Suffolk County on Long Island, New York (hereinafter Mattituck property). In November 1989 the Omars acquired the Mattituck property and in November 1999 the Omars executed a mortgage and note in the principal sum of $200,000.00 in favor of the Rozens on the property which mortgage was

recorded in the Suffolk County (New York) Clerk's office on November 22, 1999. The Omars defaulted on the note and mortgage by failing to make the payments and a new agreement was executed on March 9, 2001 between the Omars and Rozens in which the Omars and the Rozens consented to quitclaim title and interest in the Mattituck property to the Rozens in lieu of foreclosure. However, Sally Omar reserved the right of first refusal to buy the property at the price offered by any prospective buyer. If the right of first refusal was not exercised, then Sally Omar was entitled to share in the net profits from the sale of the Mattituck property pursuant to certain calculations contained within the agreement.

The agreement further provided that in the event Sally Omar decided to erect a house within five years of the agreement and prior to the sale of the property, the agreement afforded her the option to purchase that property at the then fair market value (purchase option), said purchase to be financed by a mortgage and loan from the Rozens to Sally Omar for 95% of the purchase price. By letter, dated February 23, 2006, Sally Omar notified the Rozens that she was exercising the purchase option pursuant to the terms of the agreement. On March 13, 2006, the Rozens' counsel rejected the notice as defective and untimely and sought additional information from Sally Omar.

Other Related Actions

In ***Omar v Rozen,*** (Index #06-04685), commenced on February 14, 2006, in the Supreme Court of the State of New York in and for the County of Suffolk (hereinafter Suffolk County), the Omars claimed they exercised their option pursuant to the March 9, 2001 agreement but that the Rozens repudiated and breached the agreement, and thus the Omars sought, *inter alia*, specific performance directing the Rozens to reconvey the property pursuant to the terms of the agreement. This Court, in a decision in that action, dated June 26, 2007, found the agreement was valid under the common-law rule prohibiting unreasonable restrictions on the alienation of property.

The Rozens had also made several loans to the Omars from 2001 to 2004 for the Omars' taxi and livery business. The Omars signed promissory notes for repayment of the loans. In 2005, the Rozens commenced two separate actions in the Supreme Court of the State of New York in and for the County of Nassau (hereinafter Nassau County) against the Omars and two businesses owned by the Omars, Nite Riders Group, Inc. (hereinafter Nite Riders) and Cairo Business Enterprises, Ltd. (hereinafter Cairo) based upon the Omars' nonpayment of those promissory notes. ***Rozen v The Nite Riders Group, Inc. et al***, (Index #05-01148). The two Nassau County actions against the Omars, Jonnat Management Corp. (hereinafter Jonnat) and Nite Riders were jointly tried on August 10, 2007 with a verdict in the Rozens' favor and a judgment was entered against the defendants in the sum of $800,000.00 plus interest.

On or about January 2006, the Omars, by written agreement, retained the law firm of Russ & Russ to represent them, the Nite Riders and Cairo, in the Nassau County actions. They paid a retainer of $10,000.00 (billing was at $530/$385 per hour), and the parties made a security interest in the Mattituck property and rights under the March 9, 2001 agreement, contingent upon the legal expenses exceeding the Omars' ability to pay. On May 12, 2006, by written agreement, Russ & Russ and the Omars amended their retainer agreements pursuant to which Russ & Russ reduced its fee by $10,000.00 from $24,000.00 to $14,000.00. Under the agreement, the fee for the services of Russ & Russ would also be

40% of Sally Omar's interest in the Mattituck property which would be transferred to Portabella Associates LLC (hereinafter Portabella), and a promise to pay 40% of the net recovery in the Suffolk County action. Further, the Omars agreed that Portabella would provide the financing for the purchase and development of the Mattituck property. Sally Omar further agreed to receive a cash payment equal to 20% of the recovery from the Suffolk County action.

Portabella is a New York limited liability company wholly owned by Jonnat, which is wholly owned by Jay Edmond Russ. The defendants in this action Rosenthal, Lauri and Levine are not shareholders or officers of Russ & Russ but are of counsel to it. This Court, in a decision and order, dated February 17, 2009, denied the defendants' motion to dismiss the plaintiffs' fourth (4th) and fifth (5th) causes of action pursuant to CPLR §3211(a)(1) on documentary evidence grounds and CPLR §3211(a)(7) for failure to state a cause of action, stating in pertinent part the law with regard to a fraudulent transfer that:

> "In the fourth cause of action the plaintiffs claim a fraudulent transfer occurred under Debtor and Creditor Law §273 when Russ & Russ took action in transferring the interest of the Omars in the March 9, 2001 agreement without fair consideration in violation of Debtor and Creditor Law §272, and that the plaintiffs seek to set aside the transfer of these interests and the value of the alleged fraudulent transfer as violating Debtor & Creditor Law §§§273, 273-a, and 275.
>
> In the fifth cause of action, the plaintiffs claim a fraudulent transfer occurred under Debtor and Creditor Law §§276 and 276-a when Russ & Russ, acting in conspiracy to defraud creditors, transferred the Omars interests in the March 9, 2001 agreement with the intent to delay or defraud creditors and the plaintiffs seek to set aside the transfer of these interests and the value of the alleged fraudulent transfer.
>
> The Debtor & Creditor Law §273 provides that every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration. It further provides in Debtor & Creditor Law §276 provides that every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors (***Gruenebaum v Meno Lissauer et al,*** 185 Misc 718, 57 NYS2D 137 [Supreme Court of New York, Special Term, New York County 1945]).
>
> '... Debt(or) & Cred(itor) Law §§273, 273-a, 274, 275, prohibit conveyances made without fair consideration by a person or entity who is or will be thereby rendered insolvent, ... §273: who is a defendant in an action for money damages, ... §273-a; who is

engaged or about to engage in a business or transaction for which the property remaining his hands after the conveyance is an unreasonably small capital, ... §274; or who intends or believes that he will incur debts beyond his ability to pay as they mature, ... §275... . A transfer is not rendered illegal by the fact that the transferor was insolvent or that the transferee has knowledge of such insolvency. Nor is a transfer subject to attach by reason of knowledge on the part of the transferee that the transferor is preferring him to other creditors, even by virtue of a secret agreement to that effect. The fact that a confidential relation exists between the grantor and the grantee does not affect the validity of the transfer' (***Atlanta Shipping Corporation, Inc. v Chemical Bank,*** 631 F Supp 335, 1986 US Dist. Lexis 27740 [1986]).

In order to state a claim under Debtor & Creditor Law §276, a creditor need only establish an actual intent to hinder and delay. An actual intent to defraud is unnecessary. The requisite intent under §276 need not be proven by direct evidence but may be inferred (a) where the transferor has knowledge of the creditor's claim and knows that he is unable to pay it; (b) where the conveyance is made without fair consideration; or (c) where the transfer is made to a related party. Under Debtor & Creditor Law §276-a, a plaintiff who can establish that a fraudulent conveyance was made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud creditors can recover attorney's fees (***Atlanta Shipping Corporation, Inc. v Chemical Bank,*** 631 F Supp 335, 1986 US Dist. Lexis 27740 [1986]). (***Atlanta Shipping Corporation, Inc. v Chemical Bank,*** supra).

'Fair consideration is given for property, or obligation (1) in exchange for such property, or obligation, as a fair equivalent therefore, and in good faith, property is conveyed or an antecedent debt is satisfied, or (2) when such property, or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property, or obligation obtained, ... §272' (***In re Flutie New York Corp. d/b/a Company Management et al v Flutie New York Corp. , Albert Flutie et al,*** 310 B.R. 31, 2004 Bankr. Lexis 722 (United States Bankruptcy Court for the Southern District of New York 2004).

'For a conveyance to constitute a fraud as a matter of fact, it must be made with actual intent to hinder, delay or defraud present or future creditors. There can be no fraudulent conveyance as a matter of fact where there is not resultant diminution of value of the assets or estate of the debtor which remains available to creditors. The test of a fraudulent

> conveyance is whether, as a result of the debtor's operations the creditor loses by reason of finding less to seize and apply to his claim. An intent in this instance is shown where the proof indicates that at the time of making the transfer the officer or director of the corporation knew it would result in other creditors not being paid their fair pro-rata share of the assets' (***Newfield, as Trustee in Bankruptcy of Max Ettlinger Co., Inc. Bankrupt v Paul Ettlinger et al,*** 22 Misc 2d 769, 194 NYS2d 670 [Supreme Court of New York, Special and Trial Term, New York County 1959]). "

This Court then went on to state that "In the instant action, the documentary evidence does not resolve such factual issues concerning the intent of Russ & Russ in taking an assignment of the option from the Omars or the value of the property at the time the retainer agreement was signed, and the value of the property thereafter."

The plaintiffs now move for summary judgment pursuant to CPLR §3212 on their fourth (4th) and fifth (5th) causes of action sounding in fraudulent transfer for lack of consideration and conspiracy with intent to defraud arguing that "the documentary evidence establishes, and it cannot be disputed, that Sally Omar transferred her interests under the March 9, 2001 agreement to Portabella at a time when she was a defendant in the Nite Riders and Cairo actions, both of which sought money damages against the Omars and their companies." The defendants dispute the plaintiffs claims arguing that there was "fair consideration" for the assignments, no intent to hinder and/or delay, the transfer of property was in good faith and, in any event, Sally Omar retained a 20% interest in the net profit from the Mattituck property and the buyers assumed certain legal liabilities and costs associated with the Omars' multiple lawsuits and legal fees.

For the following reasons, the plaintiffs' motion for summary judgment pursuant to CPLR §3212 is denied as there are sufficient factual issues readily apparent to preclude a finding as a matter of law that the defendants engaged in a fraudulent transfer with intent to defraud creditors.

On a motion for summary judgment pursuant to CPLR §3212 the Court is not to engage in the weighing of evidence. A summary judgment motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues requiring the determinations as to the credibility of witnesses. ***Scott v. Long Island Power Authority***, 294 AD2d 348, 741 NYS2d 708 (2nd Dept. 2002). Here, in the case at bar, questions of fact are raised with regard to the Debtor & Creditor Law precluding summary disposition on the question of both fair consideration and the alleged conveyance in good faith.

In ***Joslin v. Lopez***, 309 AD2d 837, 765 NYS2d 895 (2nd Dept. 2003), the Court noted that in discussing a fraudulent transfer:

> "Debtor and Creditor Law §273 provides that '[e]very conveyance made and obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual

> intent if the conveyance is made or the obligation is incurred without a fair consideration.' Thus both insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under §273, and the burden of proving these elements is upon the party challenging the conveyance"... (citations omitted).. "**Whether the subject conveyance has rendered the debtor insolvent, and whether fair consideration was paid, are generally questions of fact which must be determined under the circumstances of the particular case.**" (emphasis added). See also, ***Murin v. Estate of Schwalen***, 31 AD3d 1031, 1032, 819 NYS2d 341, 343 (3rd Dept. 2006); ***Kantor v. Mesibov, MD***, 8 Misc3d 722, 796 NYS2d 884 (Nass Sup Ct. 2005).

The question of fair consideration is a factual determination to be rendered by the trier of fact. The plaintiffs argue that the facts show that there was not fair consideration for the transfer of the Mattituck property from Omar to Portabella and the defendants argue there was fair consideration because Portabella, in exchange for the property, incurred certain legal debts owed by the Omars, as well as assuming Sally Omar's obligations to complete the purchase obligation to the Rozens and providing Sally Omar with a 20% share of any profits as a result of the assignment to Portabella of the development of the Mattituck property.

The Court is confronted with counsel on both sides arguing facts to support each side's conclusion that the transfer was with or without fair consideration and fraudulent or not. The plaintiffs acknowledge in their citation to ***Fane v Howard***, 13 AD3d 950, 951-952, 788 NYS2d 432, 434 (3rd Dept. 2004) that "the good faith of both the transferor and the transferee is regarded as a 'indispensable component' of fair consideration." Thus the circumstances surrounding the transfer of the Mattituck property and the fair equivalent of what each of the parties received are questions of fact to be resolved by the trier of fact, and not this Court, as a matter of law, especially where the facts are in dispute.

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. ***VanNoy v. Corinth Central School District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). Accordingly, the plaintiffs' motion for partial summary judgment pursuant to CPLR §3212 on their fourth (4th) and fifth (5th) causes of action sounding in a fraudulent transfer of property as provided for in the Debtor & Creditor Law §273, §273-a, §275 and §276 is denied as there are readily identifiable issues of fact which preclude a summary disposition.

The individual defendants, Russ & Russ, Jay Edmond Russ, Linda Eileen Russ, Rosenthal, Lauri and Levine, in a cross-motion for summary judgment pursuant to CPLR §3212 argue that dismissal of the plaintiffs' remaining fourth (4th) fifth (5th) and sixth (6th) causes of action is warranted because the individual attorneys have no interest in the Mattituck property. The plaintiffs oppose such request.

For the following reasons, the cross-motion seeking summary judgment pursuant to CPLR §3212 and dismissal of the plaintiffs' fourth (4th), fifth (5th) and sixth (6th) causes of action is granted as to the individual defendants, Rosenthal, Lauri and Levine and denied as to Russ & Russ, Jay Edmond Russ and Linda Eileen Russ.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the movant fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However, once a showing has been made the burden then shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. ***Romano v. St. Vincent's Medical Center of Richmond***, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); ***Barrett v. General Electric Company***, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); ***McCormack v. Graphic Machinery Services, Inc.***, 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988). In support of their motion for partial summary judgment, the defendants Rosenthal, Lauri and Levine submit, *inter alia*, the individual affidavits of the attorneys stating they had no interest in the Mattituck property, never conspired with anyone with regard to this property and are not shareholders in Russ & Russ. They also maintain that they were of counsel to Russ & Russ and never employees, associates or officers of Russ & Russ. This evidence establishes their prima facie entitlement to summary judgment dismissing the plaintiffs' action as to them.

Rosenthal, Lauri and Levine have all established that they have no economic interest in the Mattituck property or its conveyance, nor are they shareholders or participants in any profit sharing due to the defendants Portabella, Jonnat or Russ & Russ. Rosenthal, Lauri and Levine having established their entitlement to summary disposition, it was incumbent on the Rozens to produce some proof that would raise a factual issue that these individual attorney defendants were involved in, or would economically benefit from, a fraudulent transfer between Portabella and the Omars. The plaintiffs have failed to establish any proof as to how Rosenthal, Lauri and Levine would benefit from the fraudulent transfer or were engaged in some conspiracy that would provide a benefit to them and therefore the cross-motion as to Rosenthal, Lauri and Levine is granted and the plaintiffs' remaining fourth (4th), fifth (5th) and sixth (6th) causes of action as to them are dismissed in their entirety.

Where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge of the party making the motion and the opposing party did not have reasonable opportunity for disclosure prior to the motion for summary judgment, the motion should be denied. ***Stevens v. Grody***, 297 AD2d 372, 746 NYS2d 510 (2nd Dept. 2002); ***Urcan v. Cocarelli***, 234 AD2nd 537, 651 NYS2d 611 (2nd Dept. 1996); ***Campbell v. City of New York***, 220 AD2d 476, 631 NYS2d 932 (2nd Dept. 1995); ***Baron v. Incorporated Village of Freeport***, 143 AD2d 792, 533 NYS2d 143 (2nd Dept. 1988). The plaintiffs argue that they have not had any discovery as to these individual attorneys. However, this action has been pending since 2008 and the plaintiffs have failed to state their attempts at discovery which have been resisted. They only protest claiming "there has been no document discovery from the Attorney Defendants, nor have the plaintiffs had an opportunity to depose the Attorney Defendants" to determine if the attorneys benefitted from the assignment and property transfer.

In fact, Rosenthal, Lauri and Levine argue that the plaintiffs have sought no discovery or depositions as to them in this action prior to their moving for summary judgment. A summary judgment motion may not be defeated on the basis that more discovery is needed where the side advancing the argument for discovery has failed to ascertain the facts due to its own inaction. See, ***Nunez v. Long Island Jewish Med. Center-Schneider Children's Hospital***, 82 AD3d 724, 918 NYS2d 163 (2nd Dept. 2011); ***Heritage Hills Soc., LTD v. Heritage Development Group, Inc.***, 56 AD3d 426, 867 NYS2d 149 (2nd Dept. 2008).

Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a party's request for summary disposition. ***V. Savino Oil and Heating Co. Inc. v. Rana Management Corp.***, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); ***Dabney v. Ayre***, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, ***Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.***, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987). The plaintiffs have advanced no sound reason for the lack of discovery as to Rosenthal, Lauri and Levine or advanced any argument based upon anything but conjecture that these individual attorney defendants benefitted from the Mattituck property conveyance.

While the cross-motion for summary judgment as to Rosenthal, Lauri and Levine is granted in its entirety and the plaintiffs' action against them is dismissed, that portion of the cross-motion seeking summary judgment and dismissal of the plaintiffs' complaint pursuant to CPLR §3212 as to the defendants Russ & Russ, Jay Edmond Russ and Linda Eileen Russ is denied as there are readily identifiable issues of fact as to these defendants' involvement in this complicated real estate transaction which precludes summary disposition as a matter of law.

Russ & Russ and Jay Edmond Russ acknowledge that they are the principals behind both Portabella and Jonnat and were the retained attorneys of record for the Omars in the litigation both in Nassau County and Suffolk County. It was these litigation expenses and attorney's fees which were part and parcel of, and/or may have precipitated, the subsequent negotiations to transfer the Mattituck property and development rights from Sally Omar to these entities controlled by Jay Edmond Russ.

On a motion for summary judgment, the Court must consider all the facts in a light most favorable to the party opposing the motion, ***Thomas v. Drake***, 145 AD2d 687, 535 NYS2d 229 (3rd Dept. 1988) and determine whether there are any material and triable issues of fact presented. The key is issue finding, not issue determination, and the Court should not attempt to determine questions of credibility. ***S.J. Capelin Assoc., v. Globe***, 34 NY2d 338, 357 NYS2d 478 (1974).

After looking at the evidentiary material presented in the light most favorable to the party opposing the cross-motion for summary judgment as required, [***Robinson v.Strong Memorial Hospital***, 98 AD2d 976, 470 NYS2d 239 (4th Dept. 1983)], the Court finds readily identifiable issues of fact as to the individual defendants, Russ & Russ and Jay Edmond Russ in the representation of Sally Omar and the resulting transfer of the Mattituck property to entities controlled by Russ & Russ and Jay Edmond Russ, the principal of all three entities, Russ & Russ, Portabella and Jonnat. Considering the complicated real estate transaction which occurred after the Omars' incurred litigation debt in the Nassau County causes of action and the attorney's fees involved which resulted in a transfer to entities controlled by Jay Edmond Ross, the Court can not find as a matter of law that the defendants Russ & Russ and Jay Edmond Russ are not subject to the plaintiffs claims of a fraudulent transfer under

Debtor & Creditor Law §273, §273-a, §275 and §276. The issue of fair consideration and good faith between the transferor and transferee and badges of fraud are factual issues to be determined by the trier of fact.

As to the individual attorney, Linda Eileen Russ, it appears she is a partner in Russ & Russ and, in any event (unlike Rosenthal, Lauri and Levine), has failed to provide a personal affidavit or some proof in support of her request for summary disposition and therefore has failed to meet her prima facie burden to offer evidence that she will not profit from the conveyance and/or is not a partner and or otherwise involved in the law firm of Russ & Russ, or with the other defendants, Jonnat and/or Portabella. She has the burden to sufficiently establish her defense by tendering evidentiary proof in admissible form to warrant judgment in her favor and until such burden is met, the plaintiffs are not required to make any evidentiary showing to raise a triable issue of fact. ***Hanna v. Alverado***, 16 AD3d 624, 791 NYS2d 440 (2nd Dept. 2005).

Jay Edmond Russ has stated in an affidavit that Linda Eileen Russ was not involved in the transfer of the Mattituck property. This statement fails to satisfy the proof required to shift the burden to the plaintiffs to bare and/or present proof to raise an issue of fact. Therefore, as Linda Eileen Russ has failed to establish her entitlement to summary judgment pursuant to CPLR §3212, the burden of proof never shifted to the plaintiffs and the cross-motion as to Linda Eileen Russ is also denied. See, ***Hughes v. Cai***, 31 AD3d 385, 818 NYS2d 538 (2nd Dept. 2006).

Accordingly, the plaintiffs' motion for partial summary judgment pursuant to CPLR §3212 as to their fourth (4th) and fifth (5th) causes of action is denied; the cross-motion for summary judgment by the individual attorney defendants, Daniel P. Rosenthal, Kenneth J. Lauri and Ira Levine, as to the dismissal of the plaintiffs' fourth (4th) fifth (5th) and sixth (6th) causes of action is granted in its entirety but is denied as to the individual attorney defendants, Russ & Russ PC, Jay Edmond Russ and Linda Eileen Russ.

The foregoing constitutes the decision of the Court.

Dated: January 30, 2012

Peter Fox Colalan

J.S.C.

HON. PETER FOX COLALAN