SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 115328/2010
SARDIS, JEFFREY
vs
FRANKEL, SOFIA
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits _____ | No(s). 3, 4

Replying Affidavits _____ | No(s). 5, 6

Upon the foregoing papers, it is ordered that this motion is

FILED
OCT 12 2012
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE 003

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/10/12

HON. EILEEN A. RAKOWER J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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JEFFREY SARDIS, LAREN SARDIS, AND
JAS HOLDING CORPORATION,

Plaintiffs,

- against -

SOFIA FRANKEL AND MICHAEL FRANKEL,

Defendants.

----------X

Index No.
116328-2010

DECISION and ORDER

Mot. Seq.: 003

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs Jeffrey Sardis, Lauren Sardis and JAS Holding Corporation ("the Sardises") bring this action to void an allegedly fraudulent conveyance of a condominium apartment located at 160 West 66th Street, Apartment 50B ("the condominium"). In 2004, the Sardises filed an arbitration claim against Sofia Frankel (their former broker) and her employers, Goldman Sachs & Co. ("Goldman") and Lehman Brothers, Inc. ("Lehman"). The Sardises claimed loss of approximately $9.6 million from Sofia's fraudulent activities. On October 30, 2008, FINRA issued a $2.5 million award in favor of the Sardises and against Sofia Frankel and Lehman, jointly and severally ("the Award"). The Supreme Court, and Appellate Division, First Department confirmed the Award. Sofia Frankel conveyed the condominium to her son, Michael Frankel, as evidenced by the recorded deed, on February 23, 2009. To date, the unsatisfied portion of the Award judgment with interest exceeds $3,140,738.27.

Plaintiffs rely on debtor creditor law, and seek to void the conveyance of the condominium. In support of their motion, the Sardises provide the pleadings, this Court's prior decisions in the action, the FINRA dispute resolution award dated October 30, 2008, and Supreme Court judgment confirming that award in favor of plaintiffs for $2.5 million, tax returns of Sofia Frankel from 2002-2008, Fidelity investment statements for Sofia Frankel from January through March 2009, an

attorney bill purportedly for estate planning of Sofia Frankel reflecting services in November 2008, a 2009 Limited Liability report for Applied Medicals LLC (Sofia Frankel is the registered agent), tax returns for Applied Medicals LLC, a balloon promissory note for $969,265.56, dated February 23, 2009, and executed by Michael Frankel in favor of Sofia Frankel as Holder, a mortgagee dated February 23, 2009 with Michael Frankel as mortgagor and Sofia Frankel as mortgagee for the condominium at issue, a recorded mortgage dated July 25, 2005 evidencing Sofia Frankel as a borrower and Lehman Brothers Bank, FSB, A Federal Savings Bank as lender for the condominium at issue, the June 2, 2010 affidavit of Sofia Frankel filed in the United States District Court Southern District of Florida, correspondence regarding the FINRA award and related orders finding that Ms. Frankel's husband has no interest in certain assets in dispute.

In opposition, Sofia and Michael Frankel seek to demonstrate a valid conveyance of the condominium unit, and provide a May 10, 2006 agreement between Mike Frankel and a contractor for work done in the unit to closets, a recitation prepared by Michael Frankel for purposes of this litigation listing payments made by Michael Frankel related to the monthly costs of the condominium unit, Citibank statements dating from May 2005 to June 2012 for the checking account of Michael Frankel, a Citi letter explaining that statements before July 2006 are not maintained by Citi, an appraisal report of the condominium unit effective November 26, 2008, the recorded bargain and sale deed for the condominium unit dated February 23, 2009, and a copy of the balloon promissory note and mortgage previously provided by plaintiffs. Sofia Frankel also provides questions and answers in response to an information subpoena sworn to by Sofia Frankel in August 2009.

Among other things, Michael Frankel asserts that he and his parents agreed, shortly after Michael's 20th birthday in 1999, that Sofia would transfer ownership of the condominium to Michael's name on his 30th birthday in 2009. He claims he began taking responsibility for certain of the condominium expenses in anticipation of such transfer. Ultimately, he executed the promissory note and mortgage in exchange for the transfer by bargain and sale deed of the condominium unit as of February 23, 2009. Among his counterclaims, he makes assertions about his father having an interest in the condominium unit, however, there is no evidentiary support for that fact.

New York Debtor Creditor Law § 273-a 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.

New York Debtor and Creditor Law § 275 provides:

> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

New York Debtor and Creditor Law § 276 provides:

> 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.

New York Debtor and Creditor Law § 276-a, in relevant part, provides:

> In an action . . . brought by a creditor . . . to set aside a conveyance by a debtor, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, in which action . . .the creditor . . . shall recover judgment, the justice . . . presiding at the trial shall fix the reasonable attorney's fees of the creditor . . .and the creditor . . . shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment. The fee so fixed shall be without prejudice to any

agreement, express or implied, between the creditor . . . and his attorney with respect to the compensation of such attorney.

New York Debtor and Creditor Law § 278 provides:

1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser, or one who has derived title immediately from such a purchaser,

a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

b. Disregard the conveyance and attach or levy execution upon the property conveyed.

2. A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

Plaintiffs move for summary judgment on their first, second and third causes of action, sounding in fraudulent conveyance under the sections of the New York Debtor and Creditor Law cited above. The relevant inquiry is whether there is an issue of fact as to whether the conveyance of the condominium unit was a conveyance for fair consideration, and whether such conveyance was made with actual intent to hinder, delay, or defraud plaintiffs, judgment creditors.

Fair consideration is defined New York Debtor and Creditor Law §272 as follows:

Fair consideration is given for property, or obligation.

a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

b. When such property, or obligation is received in good faith to

> secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

The appraised value of the condominium unit in November 2008 was $1,175,000, according to the appraisal report provided. The actual sale price of the unit on February 23, 2009, as evidenced by transfer tax forms provided, was $1,175,000. The consideration paid upon the conveyance date of February 23, 2009 included a balloon promissory note and mortgage in the amount of $969,265.56.

The Frankels argue that Michael and his parents negotiated an offset to the sale price or credit for payments he made prior to the conveyance for repairs, maintenance and mortgage payments, and taking into account that Michael paid real estate taxes for which Sofia took the tax deductions. Sofia, by affidavit submitted in opposition to this motion, claims that the credit they agreed upon was $2,930 per month for the 110 months Michael made such payments, or $322,300.

The court notes that according to the original condominium unit deed dated June 8, 1994, Sofia Frankel was the sole Grantee of the unit, and the 1994 mortgage confirms "I lawfully own the Property . . . and there are no outstanding claims or charges against the Property, except for those which are of public record." Sofia Frankel refinanced the unit in 2005, and made a similar representation, that as of July 25, 2005, "there are no outstanding claims or charges against the Property, except for those which are of public record." No contract or written document for the sale of the unit representing the 1999 agreement is alleged to exist. Pursuant to the Statute of Frauds, a contract for the sale of land must be in writing. (*See NY Gen Oblig Law* §5-703[1]). However, the Frankels point to amounts paid by Michael as past consideration pursuant to their agreement, and assert fair consideration was indeed paid for the unit.

The Court notes, further, that no written contract for sale was produced in opposition to the motion for summary judgment. The agreed price for the sale of the unit was derived from the transfer tax documents.

> Section 5-1105 of the General Obligations Law states that '[a] promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground

> that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.'
>
> To be enforceable pursuant to section 5-1105 of the General Obligations Law, the writing must contain an unequivocal promise to pay a sum certain, at a date certain, and must express consideration for the promise (*Delacorte v. Transcontinental Land and Cattle Corp.* Et. Al 127 Misc.2d. 707, 486 NYS2d 811 [NY Sup. Ct. 1985]; *Citibank v London, supra,* p. 803; *Umscheid v Simnacher* 106 AD2d 380 [2nd Dept, 1984]).

Past consideration may be fair consideration, but only if it was bargained for in exchange for a promise to sell buyer the unit, which promise had to have been expressed in writing as payments of a sum certain at a date certain and said to be consideration for the promise. No such writing is produced. Therefore, the payments made by Michael do not constitute fair consideration for the sale of the unit on February 23, 2009.

The undisputed facts show that (i) the transaction at issue was a conveyance from Sofia to Michael Frankel, (ii) the conveyance was made without fair consideration, as there had been no agreement for the sale of the property, (3) Sofia was a defendant in an action for money damages when she made the conveyance to Michael on February 23, 2009, and (iv) after final judgment for the Sardises, Sofia failed to satisfy the judgment in that she still owes the Sardises $3,140,738.27.

While DCL §273(a) does not require a showing of intent, the remaining statutes, DCL 275, DCL 276, and DCL 276-a, do require a showing of intent. The Affidavit of Sofia Frankel is sufficient to raise issues of fact as to her intent in making the conveyance.

Sofia Frankel's third affirmative defense and Michael Frankel's first counter-claim alleges that Yan Frankel, Sofia Frankel's husband, is a necessary party to the action because payments on the condominium's mortgage and common charges were made from Sofia and Yan's "joint and marital funds" and

they considered the condominium to be a "joint marital asset". However, as indicated above, both the original condominium deed dated June 8, 1994, and the July 25, 2005 mortgage, Sofia Frankel was the sole owner. Additionally, the subsequent 2009 deed transferring ownership to Michael named Sofia was the sole grantor.

Likewise, Sofia Frankel's fourth affirmative defense refers to a purported agreement to convey the Condominium to Michael. As discussed previously, a contract for the sale of land must be in writing; therefore, any defense which is premised on a prior contract between Michael and Sofia must be dismissed pursuant to the Statute of Frauds.

Wherefore, it is hereby,

ORDERED that Plaintiff's Jeffrey Sardis, Lauren Sardis and JAS Holding Corporation motion for summary judgment on the first cause of action is granted; and it is further,

ORDERED, ADJUDGED AND DECREED that Defendant Sofia Frankel's conveyance of the condominium located at 160 West 66th Street, Apartment 50B to Defendant Michael Frankel be set aside and shall instead be executed in favor of Plaintiffs Jeffrey Sardis, Lauren Sardis and JAS Holding Corporation; and it is further,

ORDERED that Plaintiffs Jeffrey Sardis, Lauren Sardis and JAS Holding Corporation's motion for summary judgment to dismiss Michael Frankel's first counter-claim and Sofia Frankel's third and fourth affirmative defenses is granted; and it is further,

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Date: October 10, 2012

Eileen A Rakower, J.S.C.