

Kopicel v Schnaier
2016 NY Slip Op 30733(U)
April 18, 2016
Supreme Court, New York County
Docket Number: 652507/2015
Judge: Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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CHAIM KOPICEL,

Petitioner,

-against-

JOSEPH SCHNAIER, MARK ARZOOMANIAN
AND RESOURCE SEARCH COMPANY, INC,

Respondents.
-----X

DECISION AND
ORDER

Index No.
652507/2015
Mot. Seq. 002 & 003

HON. ANIL C. SINGH, J.:

In this special proceeding, respondent Mark Arzoomanian moves for an order pursuant to CPLR §2221 (e) granting leave to renew this Court’s Decision and Order dated November 4, 2015 (“Decision and Order”). Petitioner Chaim Kopicel opposes (Mot.Seq. 002). Petitioner then moved for an order to clarify, resettle, or modify this Court’s Decision and Order, or in the alternative, for renewal and re-argument on other grounds pursuant to CPLR §2221. Respondents Arzoomanian and Resource Search Company, Inc oppose. (together “respondent Arzoomanian”) (Mot. Seq. 003).

Motion Sequence 002 and 003 are consolidated for disposition.

Petitioner Kopicel has a judgment against respondent Schnaier from a related matter (Schnaier v. Mark Arzoomanian & Resource Search Company, Inc., Index No. 651355/2013). Respondent Schnaier executed the subject gift and release agreement dated October 29, 2009 in favor of respondent Arzoomanian. In this special proceeding, petitioner Kopicel as judgment creditor to judgment debtor Schnaier, seeks to obtain a judgment that the gift and release

agreement is void as fraudulent thus allowing Kopicel to obtain from third-party Arzoomanian, the money that is owed to judgment debtor Schnaier.

Motion for renewal is properly made to motion court to draw its attention to material facts which, although extant at time of original motion, were not then known to party seeking renewal and, consequently, were not placed before the court (Matter of Beiny, 132 AD2d 190, 209-10 [1st Dept 1987]). Nevertheless, a renewal motion is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (Loreley Fin. (Jersey) No. 4 Ltd. v UBS Ltd., 42 Misc 3d 858, 860 [Sup Ct, NY Cty 2013]):

Motion Sequence 002

Respondent Arzoomanian seeks renewal of this Court's Decision and Order which granted petitioner's motion in part in so far as declaring the gift and release agreement as void as fraudulent pursuant to Debtor Creditor Law §273. Respondent Arzoomanian proffers new evidence of a "Statement of Net Worth" ("Statement") dated February 28, 2008 for respondent Schnaier who is the transferor of the gift and release agreement at issue. The gift and release agreement was valued at \$535,000 and the Statement shows that approximately one year before the Gift Agreement was executed, Schnaier had a total net worth of over \$27,000,000.

New Evidence

Respondent Arzoomanian contends that he received the Statement via facsimile on July 22, 2008 however he did not discover the Statement constituting new evidence until after the Order to Show Cause was fully submitted and argued before this Court. Furthermore, Arzoomanian posits that the Statement will affect the disposition of this Court's Decision and Order.

The moving party must demonstrate reasonable justifications for not placing such new facts before the Court on the original application (Am. Audio Serv. Bur. Inc. v AT & T Corp., 33 AD3d 473, 476 [1st Dept 2006]). Respondent Arzoomanian claims he did not have adequate time to respond to the petition in this special proceeding due to the expedited nature of the Order to Show Cause. Petitioner Kopichel, on the other hand, points to the seven years respondent Arzoomanian had the Statement in his possession.

“Although leave to renew should generally be denied where the movant fails to offer a reasonable excuse for the failure to submit the additional facts on the original motion, a court may, in its discretion, grant renewal even upon facts known to the movant at the time of the original motion” (Weisse v Kamhi, 129 AD2d 698 [2d Dept 1987]) (internal citations omitted). Respondent Arzoomanian has submitted a reasonable justification for submitting the newly discovered evidence (see Gordon v Boyd, 96 AD3d 719, 720 [2d Dept 2012] (finding law office failure can be accepted as a reasonable excuse in the exercise of the court's sound discretion). In the interest of justice and the strong public policy in favor of resolving cases on the merits, this Court exercises its discretion is considering the new evidence proffered by respondent Arzoomanian on the solvency of defaulting party respondent Schnaier (Segall v Heyer, 161 AD2d 471, 473 [1st Dept 1990]). Accordingly, the motion to renew is granted.

Conveyances by Insolvent, Debtor Creditor Law-273

The Debtor Creditor Law-273 states in pertinent part that “[e]very 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. (NY DEBT & CRED § 273 [McKinney]). This Court has

held that the gift and release agreement was a conveyance without fair consideration. However, respondent Arzoomanian now disputes the solvency of, the transferor, Schnaier at the time of the execution of the Gift and Release with the new evidence of the Statement.

Respondent Arzoomanian argues that the Statement is evidence that Schnaier was not rendered insolvent by the gift and release agreement thus the gift and release agreement is not void as fraudulent. Conversely, petitioner Kopichel contends that the Statement was self-serving and self-made by Schnaier, who at the time averred he was desperate for funds. Petitioner further contends that the Statement has no bearing on Schnaier's solvency because it was created, (i) a year after Schnaier tendered the gift and release and, (ii) during a turbulent time in the American economy.

Respondent Schnaier did not answer the petition thus all allegations alleged against him were deemed to be true in this Court's Decision and Order. The petition dated July 16, 2015 alleged that Schnaier was rendered insolvent due to the execution of the gift and release agreement thus it is void as fraudulent. After due deliberation, this Court granted petitioner's claim under the conveyance by an insolvent section of Debtor Creditor Law §273. However now, for the first time in this action and almost six months after the petition was filed and duly served, Schnaier appeared by submitting an affidavit in opposition to the instant motion.

Respondent Schnaier hereby attempts to take advantage of this Court's proceeding by defaulting but simultaneously submitting an affidavit which does not go to the extent of clarifying the issue of his solvency but, rather, defers to another party's submission. Specifically Schnaier avers that, "as for my solvency in 2009, one need only to look at the market crash of 2008. As stated by Mr. Fleishman, which is accurate and true, 'the purported Net Worth Stated is dated in 2008 on year prior to the Gift Agreement of 2009- and does not demonstrate that Mr.

Schnaier was solvent in 2009. This is especially true given the market crash of 2008” [para. 9]. Here, Schnaier does not explicitly contest his solvency at the time the Gift and Release agreement was executed.

The Statement in conjunction with Schnaier’s affidavit has raised an issue of fact on the presumption of Schnaier’s insolvency at the time the Gift and Release was executed. If a bona fide question of fact exists, this Court shall not make a summary determination upon the pleadings in a special proceeding (Triangle Pac. Bldg. Products Corp. v Natl. Bank of N. Am., 62 AD2d 1017 [2d Dept 1978]) (finding the same). Therefore, discovery is warranted on this issue.

Respondent Schnaier’s failure to answer the petition has constituted a default and at this juncture he is a non-party. Respondent Arzoomanian is hereby ordered to issue a *subpoena duces tecum* and *subpoena testificandum* on Schnaier as a non-party in order to obtain discovery from him on the issue of his solvency.

Motion Sequence 003

Petitioner seeks to clarify, resettle, or modify or in the alternative, for renewal and reargument this Court’s Decision and Order pursuant to CPLR §2221 insofar as the Order omitted the date for calculation of interest and appeared to limit discovery on the Released Funds to Debtor and Creditor Law 276, but did not discuss or deny discovery of the claims brought pursuant Debtor and Creditor Law 273, 274, and 275.

Petitioner's motion seeking a date for accrual of the interest calculation is denied as moot since this Court granted respondent Arzoomanian's motion for renewal for the judgment

previously granted in the Decision and Order pursuant to Debtor and Creditor Law 273,
Conveyances by an Insolvent.

Petitioner also seeks discovery as it relates to the various Debtor Creditor Sections.

First, no discovery is ordered in this action as it relates to petitioner's claims made under Debtor and Creditor Law 273-a, as this Court, found this section for a conveyance made by a defendant was inapplicable to petitioner's claims.

Second, no discovery is ordered in this action as it relates to petitioner's claims made under Debtor and Creditor Law 274, as this Court, found this section for a conveyance made by a person in business was inapplicable to petitioner's claims.

Finally, discovery is ordered in this action as it relates to petitioner's claims made under Debtor and Creditor Law 275, as this Court found that petitioner had not met its burden for an expedited judgment but had proffered some evidence to create an issue of fact as to whether Schnaier was unable to pay his debts when they became due.

This constitutes the Decision and Order of the Court.

Date: April 18, 2016
New York, New York


Anil C. Singh