

<b>Sterling Natl. Bank v Poel, Inc.</b>
2013 NY Slip Op 32727(U)
October 16, 2013
Supreme Court, Queens County
Docket Number: 24965/2012
Judge: Bernice D. Siegal
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL

IA PART 19

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Sterling National Bank, x

Plaintiff,

- against -

Poel, Inc., Ephraim Pizante, Old Properties  
NY LLC, Siamak John, Inc., Robert Horowitz,  
Jeffrey Homapour, Jonathan J. Benjamin,  
Wilhelm M. Thomas, and

JOHN DOE "1"- "10" and XYZ Corporations  
"1"- "10", said names being fictitious parties  
intended to be possible transferees of certain  
real estate herein,

Defendants.

\_\_\_\_\_ x

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Number 24965 2012

Motion Date June 18, 2013

Motion Seq. No. 1

The following papers numbered 1 to 20 read on this motion by defendants Robert Horowitz, Jeffrey Homapour and Siamak John Inc., for an order granting summary judgment dismissing the fifth, sixth and seventh causes of action against these defendants on the grounds of lack of capacity to sue and failure to state a cause of action, pursuant to CPLR 3211 (a) (3) and (7); dismissing the first and second cross claims of defendants Benjamin and Thomas to the extent that they are asserted against Horowitz, Homapour and Siamak John, Inc.; and awarding sanctions and legal fees against plaintiff and its counsel, pursuant to 22 NYCCR 130.1-1. Plaintiff cross moves for an order disqualifying Jeffery Homapour, Esq. and the firm of Cutler Minikes & Adelman, LLP as counsel for defendants Siamak John, Inc., Robert Horowitz and Jeffery Homapour, pursuant to Rule 3.7 of the Rules for Professional Conduct.

Papers  
Numbered

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Upon the foregoing papers the motion and cross motion are determined as follows:

Plaintiff Sterling National Bank (Sterling) alleges that on January 17, 2006, it entered into a business line of credit agreement, commercial security agreement and commercial guaranty with Poel Inc., and granted Poel Inc. (Poel) a line of credit in the amount of \$75,000.00. It is also alleged that on January 17, 2006, Ephraim Pizante (“Pizante”) executed a guaranty in favor of Sterling in connection with said line of credit. In July 2009, Poel and Pizante defaulted under the terms of the line of credit agreement and guaranty. Sterling commenced an action entitled *Sterling National Bank v Poel Inc. and Ephraim Pizante, individually* (Index No.23861/2009) and obtained a default judgment in the sum of \$53,143.46, which was entered on March 3, 2010. On April 19, 2010, Sterling served a notice of entry of said judgment on Poel. and Ephraim Pizante Said judgment has not been satisfied.

Prior to the July 2009 default, Poel was the owner of real property known as 172-11 Baisley Boulevard, St. Albans, New York (“the Baisley Boulevard property” or “subject property”). Poel, by its vice president Pizante, pursuant to a deed dated August 4, 2006, conveyed the subject property to Pizante, for the recited consideration of \$10.00. The August 4, 2006 deed was not recorded until May 7, 2010. Pizante pursuant to a deed dated March 17, 2010, conveyed the Baisley Boulevard property to Old Properties NY LLC, (Old Properties) for the recited consideration of \$10.00. Said deed was recorded on May 7, 2010.

On September 10, 2010, Pizante as the managing member of Old Properties executed a mortgage to the Baisley Boulevard property in favor of Robert Horowitz and Jeffrey Homapour, in connection with a personal loan in the sum of \$150,000.00. Said loan required the payment of interest only commencing on November 1, 2010, and ending on September 12, 2011, at which time the balance of the loan and any interest due became due and payable. Said mortgage was filed on September 22, 2010 with the Office of the Register of the City of New York.

Old Properties conveyed its interest in the Baisley Boulevard property to Siamak John, Inc., subject to the mortgage and note held by Horowitz and Homapour, pursuant to a deed dated January 11, 2012. Said deed was filed on January 31, 2012. On June 29, 2012, Siamak John Inc. sold Baisley Boulevard to Jonathan J. Benjamin and Wilhelm M. Thomas for the sum of \$403, 500.00, and the deed of the same date was filed on July 17, 2012.

Sterling commenced the within action on December 17, 2012 against Poel, Pizante, Old Properties, Siamak John Inc., Mr. Horowitz, Mr. Homapour, Mr. Benjamin and Mr. Thomas. Plaintiff alleges that as of the date of the entry of the March 3, 2010 judgment against Poel and Pizante the Baisley Boulevard property was owned by Poel and no mortgages were recorded against said property, and that a letter was sent to all of the defendants on August 3, 2012 demanding that the property be reconveyed to Poel.

Plaintiff alleges seven causes of action for violations of the Debtor and Creditor Law. The eighth cause of action for declaratory judgment against Benjamin and Thomas seeks to impose a constructive trust upon the Baisely Boulevard property.

All of the defendants have appeared in this action. Defendants Benjamin and Thomas have served an answer and interposed 12 affirmative defenses and a cross claim for contribution and indemnification and for unjust enrichment.

Defendants Horowitz, Homapour, and Siamak John Inc., in this pre-answer motion seek to dismiss the fifth, sixth and seventh causes of action on the grounds of lack of standing to sue and the failure to state a cause of action; to dismiss the cross claims of co-defendants Benjamin and Thomas; and to impose sanctions against plaintiff and its counsel.

Plaintiff cross moves in opposition and seeks an order disqualifying defendant Homapour and the law firm of Culter, Minkes & Adelman, LLP from representing defendants Homapour, Horowitz and Siamak John Inc., on the grounds that Mr. Homapour is likely to be fact witness.

On a motion to dismiss, the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory (*EBC I, Inc. v Goldman, Sacks & Co.*, 5 NY3d 11, 19 [2005]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). When a party seeks dismissal under CPLR 3211(a)(7) based on the failure to state a cause of action, the initial test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]). “However, bare legal conclusions are not presumed to be true, nor are they accorded every favorable inference” (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 704 [2d Dept 2008]). Even under the liberal “notice pleading” requirements of CPLR 3013, a complaint still must allege, inter alia, “the material elements of each cause of action” asserted (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d

122, 127 [2d Dept 2009]).

Further, in assessing whether a complaint can withstand a motion under CPLR 3211 (a)(7), a court may consider affidavits submitted to remedy pleading defects, thereby preserving “inartfully pleaded, but potentially meritorious, claims” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Where evidence is submitted by the movant in support of the CPLR 3211 (a)(7) motion, the court must determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*see Simos v Vic-Armen Realty, LLC*, 92 AD3d 760 [2d Dept. 2012]; *Fishberger v Voss*, 51 AD3d 627 [2d Dept. 2008]; *Columbo v Chase Manhattan Automotive Fin. Corp.*, 297 AD2d 327 [2002]). “Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d at 19; *see Rovello v Orofino Realty Co.*, 40 NY2d 633[*supra*]).

Plaintiff, in opposition, incorrectly states that defendants are seeking to dismiss the complaint on the grounds of documentary evidence. In addition, plaintiff asserts that issues of fact exists, and that facts are unavailable to the plaintiff in the absence of discovery and, therefore, defendants’ motion should be denied, pursuant to CPLR 3211(d).

At the outset, the court notes that plaintiff in its complaint alleges that at the time the March 3, 2010 judgment was docketed against Poel and Pizante, the Baisley Boulevard property was owned by Poel. Plaintiff attaches to and incorporates into its complaint a copy of the August 4, 2006 deed whereby Poel conveyed the subject property to Pizante, as well as evidence that said deed was recorded on May 7, 2010. Plaintiff’s counsel, in opposition to the within motion, asserts that the August 4, 2006 deed conveying the property to Pizante was not effective until it was filed. Counsel’s statement in this regard is incorrect, as a matter of law. Title to property vests upon the delivery of a properly executed deed. The fact that a deed may not be recorded until a later date does not affect the validity of the conveyance (*see Crossland Sav., FSB v Patton*, 182 AD2d 496 [1st Dept 1992], *lv denied* 80 NY2d 755 [1992]; *James v Lewis*, 135 AD2d 785, 786 [2d Dept 1987]; *see also* Real Property Law 244). Plaintiff does not allege that the 2006 deed was not properly executed or that it was not properly delivered. Moreover, the Recording Act (RPL§291) was enacted to protect the rights of innocent purchasers. (See *Andy Asso. V. Bankers Trust Co.*, 49 NY2d 13 [1979].) Failure to record does not effect ownership interests nor Plaintiff’s interest as more fully set forth below.

Plaintiff’s fifth cause of action against Old Properties, Horowitz and Homapour for a violation of Debtor and Creditor Law §276 alleges that the September 13, 2010 mortgage was executed by Pizante on behalf of Old Properties in favor of Robert Horowitz and Jeffrey

Homapour encumbering the subject real property in the amount of \$150,000.00; that the terms of the mortgage indicate that it was an interest only mortgage maturing on September 12, 2011; that said notwithstanding the maturity date, the mortgage “continues to be a recorded lien against the property”; that “[u]pon information and belief, the Mortgage was executed by Pizante [on behalf of Old Properties] and recorded against the property as an intentional subterfuge to insulate the Property from the reach of Pizante’s creditors, including Plaintiff”, and that “[t]he Mortgage held by Horowitz and Homapour constitutes a fraudulent conveyance.” Plaintiff seeks a judgment against Horowitz and Homapour in the sum of \$53,143.46, plus interest, attorney’s fees, additional late fees, costs and expenses.

The seventh cause of action against Siamak John Inc. alleges a violation of Debtor and Creditor Law §276, and seeks to void the conveyance of the Baisley Boulevard property from Old Properties to John Siamak Inc., and to recover monetary damages. Plaintiff alleges that on January 31, 2012, Pizante as a member of Old Properties, executed a deed conveying title to the subject real property to Siamak John Inc.; that on information and belief “based upon a review of the deed”, said deed was “also executed by Homapour (a purported mortgagee) on behalf of Siamak”; that the deed by its terms is expressly subject to the mortgage; that “Old Properties transferred the Property to Siamak with the intent to further insulate the Property from the reach of creditors of Pizante, including Plaintiff ” and that the “transfer of the Property from Old Properties to Siamak constitutes a fraudulent conveyance” under Debtor and Creditor Law §276.

A copy of the deed which conveyed the property from Old Properties to Siamak John Inc. attached to and incorporated into the complaint. However, contrary to plaintiff’s allegations defendant Jeffrey Homapour’s signature does not appear on said deed.

The court notes that Mr. Horowitz and Mr. Homapour state in their affidavits that they were unaware of Sterling’s judgment against Poel and Pizante at the time they entered into the loan and mortgage agreement with Old Properties. Defendants have submitted a copy of the title report and title insurance which they obtained in September 2010,, which demonstrates that the only judgments the title company found were three ECB judgments against Poel. Defendants have also submitted a copy of a satisfaction of the mortgage, dated June 30, 2012, and assert that they no longer have any interest in the Baisley Boulevard property. Defendants state that although a copy of the satisfaction of the mortgage was sent to Benjamin and Thomas’ title company for recording, it has not been recorded to date.

Shahriar Homapour, the president of Siamak John Inc. states in his affidavit that

neither he nor any other officer of Siamak had any knowledge of any liens or judgments against Poel or Pizante until receipt of a letter from plaintiff's counsel in August 2012. He states that the title report he received did not indicate any such liens or judgments. Defendants have submitted a copy of the title report and title insurance which was obtained on behalf of Siamak John Inc. Said title report does not indicate that Sterling had obtained a judgment against Poel and Pizante.

Debtor and Creditor Law §276 provides that “[e]very 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.” As Section 276 requires actual intent to defraud, plaintiff is required to plead the circumstances of the alleged fraud with particularity (CPLR 3016). The fifth and sixth causes of action are deficient, as the complaint fails to allege that defendants Horowitz and Homapour, or that defendant Siamak John Inc., participated or acquiesced in Pizante or Old Properties’ fraudulent design. (*see generally* 30 NY Jur Creditors' Rights and Remedies § 352).

In addition, the complaint fails to allege with particularity how the mortgage held by Horowitz and Homapour “insulated” the subject real property from the reach of Pizante’s creditors, or how the January 31, 2012 deed, which was made subject to said mortgage “insulated” the subject real property from the reach of Pizante’s creditors. CPLR 5203 (a) provides that a judgment becomes a lien against real property as soon as it is docketed (*see* CPLR 5203 [a]; *Cadle Co. v Calcador*, 85 AD3d 700, 702 [2d Dept 2011]; *Ptaszynski v Flack*, 263 App Div 831 [2d Dept 1941]). It attaches to any property in which the debtor has an interest at that time (*see* CPLR 5201 [b]), and remains effective against such property for a period of 10 years (*see* CPLR 5203 [a]). Any transfer of the judgment debtor’s interest in the property after the judgment is docketed is ineffective against the judgment creditor (*see* CPLR 5203 [a]; *Phillip v Zanani*, 67 AD3d 877, 878 [2d Dept 2009]; *Matter of Jones v Knowlton*, 199 AD2d 871, 872 [3d Dept 1993]; *Greenhouse Realty v St. George*, 151 AD2d 7, 9 [3d Dept 1989]).

Sterling has incorporated into its complaint a copy of the March 3, 2010 judgment against Poel and Pizante, which also states that was docketed on March 3, 2010. Therefore, Sterling has a valid lien against the subject real property regardless of the subsequent conveyances of the property. Plaintiff in its complaint does not allege that the mortgage granted to Horowitz and Homapour was superior to its judgment lien. Nor does plaintiff allege that the January 31, 2012 deed conveying the property to Siamak John Inc., subject to said mortgage, created a lien that was superior to the judgment lien.



This court notes that on May 6, 2013, Sterling commenced a proceeding in this court on May 6, 2013 entitled *Sterling National Bank v Poel Inc., Ephraim Pizante, Jonathan J. Benjamin and Wilhelm M. Thomas*, (Index No. 8776/13) to enforce its lien against the Baisley Boulevard property.

Finally, even if plaintiff's complaint properly alleged a claim for a violation of Debtor and Creditor Law §296 against Horowitz and Homapour, or against Siamak John Inc., it has failed to state a claim for a money judgment. An action for fraudulent conveyance in New York does not create an independent remedy of money damages against third parties who assist the debtor (*see Federal Deposit Insurance Corp. v Porco*, 75 NY2d 840, 842 [1990]; *Marine Midland Bank v Murkoff*, 120 AD2d 122, 132-134 [2d Dept 1986]; *see also Hassett v Goetzmann*, 10 F Supp 2d 181, 193[ NDNY 1998]). A creditor's remedy in a fraudulent conveyance action is limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance (*see Marine Midland Bank v Murkoff*, 120 AD2d at 132-134; Debtor and Creditor Law §278). A creditor, thus, may seek to have the conveyance set aside or disregard the conveyance and attach or levy execution upon the property conveyed, but may not seek to recover damages, where as here, the debtor's property has not been destroyed or impaired (*see Marine Midland Bank v Murkoff* 120 AD2d at 132-134; Debtor and Creditor Law § 278; CPLR Article 52). Therefore, that branch of the defendants' motion which seeks to dismiss the fifth and seventh causes of action, is granted.

Plaintiff's sixth cause of action against Homapour and Horowitz seeks to set aside the mortgage, based upon a violation of Debtor and Creditor Law §273-a. In order to prevail under Debtor and Creditor Law § 273-a , plaintiff is required to establish that the transferor was a defendant in an action for money damages at the time of the transfer, that the transferor has not satisfied the resulting judgment and the transfer was made without fair consideration (*see Mega Pers. Lines, Inc. v Halton*, 9 AD3d 553, 555 [3d Dept 2004]; *Berner Trucking v Brown*, 281 AD2d 924, 925 [4th Dept 2001]). Here, the complaint is deficient, as it does not allege that the mortgage was not given for fair consideration. Furthermore, as the evidence submitted establishes that the defendants Horowitz and Homapour executed a satisfaction of the mortgage and as the mortgagees state that they do not have any interest in the Baisley Boulevard property, no claim exists under the Debtor and Creditor Law to set aside a previously satisfied mortgage. Therefore, that branch of the defendants' motion which seeks to dismiss the sixth cause of action, is granted.

Defendants Thomas and Benjamin have interposed a cross claim for indemnification



and contribution, and a cross claim for unjust enrichment. As these claims merely set forth conclusions of law and fail to plead the elements of these claims they must be dismissed (CPLR 3013; *East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d at 127).

Accordingly, defendants' motion to dismiss the fifth, sixth and seventh causes of action is granted. That branch of defendants' motion which seeks to dismiss defendants Thomas and Benjamin's cross claims is granted. That branch of defendants' motion which seeks the imposition of sanctions is denied. Plaintiff's cross motion to disqualify counsel is denied as moot.

Dated: October 16, 2013

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Bernice D. Siegal, J.S.C.