McMahan v Law Off. of Yonatan S. Levoritz, P.C.

2015 NY Slip Op 32988(U)

December 31, 2015

Supreme Court, Westchester County

Docket Number: Index No. 54904/2015

Judge: Sam D. Walker

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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

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DAVID BRUCE McMAHAN

Plaintiff,

Index No. 54904/2015
Decision and Order
Seq. # 1 & 2

-against-

LAW OFFICE OF YONATAN S. LEVORITZ, P.C.
AND ELENA MCMAHAN,

Defendants.

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The following papers were read on Defendant Elena McMahan's motion seeking dismissal of Plaintiff's causes of action pursuant to CPLR 5015, CPLR 3016, Judiciary Law § 475, and CPLR 3211(a)(7); and on the defendant Law Office of Yonatan S. Levoritz, P.C.'s ("Levoritz") motion seeking dismissal of Plaintiff's causes of action pursuant to CPLR 3211(a)(2), CPLR 5015(a), CPLR 3016, Judiciary Law § 475, CPLR 3211(a)(7), CPLR 3211(a)(1), summary judgment pursuant to CPLR 3212, and cancelling and discharging the notice of pendency dated March 30, 2015, pursuant to CPLR 6501,6513 and 6514:

PAPERS	NUMBERED
Amended Notice of Motion/Affidavit(2)/Affirmation/Exhibits A-FF	1-36
Affirmation in Opposition/Exhibit A	37-38
Notice of Cross-Motion/Affirmation/Exhibits A-G	39-47
Affirmation in Opposition to Cross-Motion/Exhibits A-B	48-50
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Plaintiff and Defendant were married on July 27, 2002 and had two children during

the course of the marriage. On or about January 10, 2005, Defendant commenced a divorce action. Subsequent to such filing, the parties resolved the divorce action by entering into a Stipulation of Settlement As To Financial Issues Post-Nuptial Property Settlement Agreement ("the agreement"), which was "So Ordered" by the Court. The divorce action was discontinued, pursuant to the agreement and then restored on June 19, 2007, upon Plaintiff's application to enforce the custody provisions of the agreement.

On August 2, 2007, Plaintiff commenced an action ('the contract action") against Defendant Elena McMahan, seeking money damages, attorney's fees, costs and disbursements due to an alleged material breach of the confidentiality provisions of the agreement, which states in pertinent part that:

> The parties respect each other's rights to privacy and agree to protect each other from adverse or unwanted publicity concerning their marriage and their respective personal, financial and business affairs....
>
> Without obtaining the other party's written consent in advance, neither party shall directly or indirectly publish, or cause to be published, any diary, memoir, letter, story, photograph, interview, article, essay, account or description or depiction of any kind whatsoever, whether fictionalized or not, concerning the parties' marriage or any other aspect of their respective personal, business or financial affairs, or assist or provide information to others in connection with the publication or dissemination of any such material or excerpts thereof....

Plaintiff alleges that in June 2007, an article, entitled "Daddy's Dog: Saying She's Treated No Better Than a Stray Cur, the Fifth Wife of 'Daddy's Girl' Millionaire Bruce McMahan Breaks Her Silence" containing information about the relationship between Plaintiff and Defendant and his business and financial affairs, was published by The Village Voice and that Plaintiff caused such story to be published. That action is still pending before this Court.

In or around May 2009, the McMahans were in dispute as to where the children would reside. On July 20, 2009, during a hearing on the divorce action before this Court, counsel for the parties stipulated in open court, that Plaintiff would pay Ms. McMahan up to $1,000,000.00 for the purchase of a home and that Plaintiff in turn would be granted a lien on such home in the amount of the purchase price, as security for any judgment entered against Ms. McMahan in the contract action. In or around October 2009, Ms. McMahan entered into a contract to purchase the premises for an agreed upon price of $950,000.00 and she acquired title to the property on October 19, 2009. This Court then so-ordered an agreement directing Plaintiff's counsel to submit a lien in the amount and sum of $950,000.00 to attach to the premises pending the conclusion of the contract action.

Plaintiff alleges that despite this Court's directive and Order, Ms. McMahan refused to sign any documents or otherwise cooperate with Plaintiff to effectuate the imposition of a lien in favor of Plaintiff and against Ms. McMahan. Plaintiff alleges that as a result of such failure on the part of Ms. McMahan, Plaintiff's counsel filed a notice of pendency against the premises in connection with the 2007 contract action, on October 23, 2009.

In 2015, Plaintiff filed a motion seeking partial summary judgment in the contract action. In opposition to such motion, Ms. McMahan filed an affidavit, in which she averred that the house belonged to her attorney, who has a lien on the property and that the process for transferring the property over to her attorney, was already on the way. Plaintiff subsequently learned that on or about August 21, 2013, Levoritz had commenced a Kings County action against Ms. McMahan for breach of a 2013 retainer agreement between Levortiz and Ms. McMahan. On September 19, 2013, Levoritz then filed an order to show

cause in that action, seeking a money judgment against Ms. McMahan in the amount of $725,000.00 and in support of such motion, submitted an affidvit signed by Ms. McMahan acknowledging certain debt to Levoritz and authorizing the entry of judgment against her in the amount of $725,000.00 in favor of Levoritz. On September 20, 2013, the parties appeared before the Kings County Justice, and upon hearing from the parties, that court signed Levoritz's order to show cause and issued a Short Form Order granting the relief requested, awarding a money judgment against Ms. McMahan in the amount of $725,000.00 and in connection with such judgment, Levortiz was further awarded a security interest in Ms. McMahan's equitable ownership of her property located at 8 Belle Fair Boulevard, Rye Brook, NY, and could immediately be recorded as a lien on that property. Plaintiff contends that the judgment and lien obtained by Defendant Levoritz against Ms. McMahan, is a sham transaction, designed to render Ms. McMahan judgment proof and that they must be declared void, as to Plaintiff.

Plaintiff then commenced this action by filing a summons and complaint on March 30, 2015, alleging three causes of action and seeking to declare void, the judgment and lien filed against the premises and vacate such; attorney's fees, costs and expenses incurred in connection with the action; and the imposition of an equitable lien against the premises in favor of Plaintiff. Defendants now file the instant motions seeking dismissal of Plaintiff's causes of action.

Cancellation and Discharge of Notice of Pendency

CPLR 6501 states in pertinent part that, "[a] notice of pendency may be filed in any action in a court of the state of the United States in which the judgment demanded would affect the title to, or the possession, use of enjoyment of, real property...." McKinney's

CPLR 6501. Further, CPLR 6513, states that the notice of pendency "shall be effective for a period of three years from the date of filing..." McKinney's CPLR 6513 and CPLR 6516(c) states that, "a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective. McKinney's CPLR 6516(c).

Levoritz argues that the notice of pendency filed by Plaintiff on March 30, 2015, should be cancelled and discharged on the grounds that it seeks to revive a prior notice of pendency filed on October 23, 2009, by Plaintiff in the 2007 contract action, which upon information and belief, expired on October 23, 2012. Levoritz argues that, given the lapse and nullification of the prior notice of pendency, as a matter of law, an attempt by the same plaintiff to revive it to secure the same potential obligation over two and one half years later, is improper.

Plaintiff argues in opposition, that the 2009 notice of pendency has nothing to do with the 2015 notice of pendency and the 2015 notice of pendency does not seek to revive the expired one. This Court concurs with Plaintiff's argument. As states previously, "a notice of pendency may not be filed in any action in which a previously filed notice of pendency affecting the same property had been cancelled or vacated or had expired or become ineffective. McKinney's CPLR 6516(c) *see also Deutsch v. Grunwald*, 63 A.D.3d 872, 873, 882 N.Y.S.2d 167 (2d Dept. 2009). Further, "[s]uccessive notices of pendency may not be filed in the same action *Deutsch v. Grunwald* @ 873. However, here the 2009 notice of pendency was filed in the 2007 action and the 2015 notice of pendency was filed in this different action seeking different relief. The statute does not preclude the filing of a second notice of pendency in a different action. *Id*. Therefore, the request to cancel and

discharge the 2015 notice of pendency, is denied.

Judiciary Law § 475

Judiciary Law § 475 states that:

> From the commencement of an action, special or other proceeding in any court..., the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination.... McKinney's Judiciary Law § 475.

Defendants argue that, pursuant to Judiciary Law § 475, Levoritz had a lien upon Ms. McMahan's cause of action, which attached to the economic provisions of the parties' 2005 agreement. Therefore, the charging lien, with the approval of the Kings Coutny Court, grants Levoritz a valid and superior interest in the premises, to any alleged rights that Plaintiff may have. Defendants argue that Levoritz properly enforced his charging lien pursuant to Judiciary Law § 475 and the Kings County Supreme Court, was apprised of all relevant facts concerning the retainer agreement between Ms. McMahan and Levoritz. Defendants argue that Plaintiff was on notice of Levoritz's legal services to Ms. McMahan with regard to the purchase of the premises and the $950,000.00 payment at the closing. Therefore, there is nothing fraudulent about the formalization of a charging lien by the Judgment in Kings County and such must be deemed superior to any interest of Plaintiff.

Levoritz's assertions that his judgment is simply the formalization of his charging lien and thus is superior to that of Plaintiff, even if meritorious, is not a basis to dismiss Plaintiff's causes of action. However, it is this Court's determination that Levoritz's

assertions are without merit. Since the enactment of Judiciary Law § 475, the statutory provision has limited the rights of the lien to outcomes where proceeds have been obtained in a client's favor. *Banque Indosuez v. Sopwith Holdings Corp.*, 98 N.Y.2d 34, 772 N.E.2d 1112, 745 N.Y.S.2d 754 (2002). Therefore, "there must be proceeds from the litigation upon which the lien can affix". *Id.* This reasoning supports the notion that the charging lien is applicable to the action or proceeding in which he appeared and represented the client. Here, that is the divorce action and the 2007 action. Levoritz did not seek the charging lien and judgment in any of those actions, but instead sought judgment in an entirely new action. Therefore, such judgment cannot be deemed the formalization of the charging lien due to Levoritz. Therefore, the motion to dismiss pursuant to Judiciary Law § 475, is denied.

Dismissal Pursuant to CPLR 5015

CPLR 5015 states in pertinent part, that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct...." McKinney's Civil Practice Law and Rules 5015(a).

Defendants argue that since the Kings County Supreme Court granted the judgment and lien, Plaintiff must return to that court to vacate the judgment and lien and cannot seek an Order to vacate in this Court. Here, however, Plaintiff is not himself seeking to vacate the judgment pursuant to CPLR 5015 and did not so plead. Instead, he is seeking a finding or declaration, that the conveyance made by Defendants, was fraudulent. Plaintiff need not pursue such a claim only in the Court that granted the judgment and lien. In fact,

Plaintiff may well be able to pursue these claims in this Court and also a CPLR 5015 claim in Kings County. Therefore, the motion to dismiss pursuant to CPLR 5015, is denied.

Dismissal pursuant to CPLR 3016

CPLR § 3016(b) requires that "[w]here a cause of action is based upon misrepresentation, fraud, mistake, willful deceit, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail."

Defendants argue that Plaintiff fails to give any specific facts regarding his claim for fraudulent conveyance and only offers conclusory allegations which are insufficient under the law. Plaintiff contends that New York Debtor and Creditor Law ("DCL") § 276, requires that Plaintiff prove that a defendant acted with actual intent to hinder, delay, or defraud creditors. Further, Defendants assert that the actual intent must be based on fact and cannot rest on mere suspicion. Therefore, Defendants assert that violation of DCL § 276 and 276-a, must be pleaded with sufficient particularity pursuant to CPLR 3016(b). *Gaetano Dev. Corp. v. Lee*, 121 A.D.3d 838, 840, 994 N.Y.S.2d 641, 643 (2d Dept. 2014).

The Court finds that Plaintiff has pleaded the specifics of the alleged fraudulent transactions with sufficient particularity to satisfy CPLR 3016 and DCL §§ 275, 276-a[1], and 279.

DCL § 275 provides that:

> 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

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[1]DCL § 276-a provides for the fixing of reasonable attorney's fees upon a finding that a conveyance by a debtor was made with actual intent to hinder, delay or defraud either present or future creditors.

"A claim under this provision requires, in addition to the conveyance and unfair consideration elements..., an element of intent or belief that insolvency will result" *Wall Street Associates v. Brodsky*, 257 A.D.2d 526, 528, 684 N.y.S.2d 244, 247 (1 Dept. 1999).

Plaintiff alleges that Defendant consented to a $725,000.00 money judgment against her, even though she allegedly only owed Levoritz $200,000.00 in legal fees and that when the 2013 money judgment was entered, Defendant believed that she would incur debts beyond her ability to pay, in that, the 2007 contract action was still pending and she could be held liable for attorney's fees and damages . Plaintiff pleads the details of his allegations with great detail.

DCL § 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"

"DCL § 276, unlike DCL § 275, addresses actual fraud, as opposed to constructive fraud, and does not required proof of unfair consideration or insolvency" *Wall Street Associates v. Brodsky* @ 247. 'Due to the difficulty of proving actual intent to hinder, delay, or defraud..., the pleader is allowed to rely on "badges of fraud" to support his case, i.e., circumstances so commonly associated with fraudulent transfers "that their presence gives rise to an inference of intent"', *Id. quoting Pen Pak Corp. v. LaSalle National Bank of Chicago*, 240 A.D.2d 384, 386, 658 N.Y.S.2d 407. "Among such circumstances are: a close relationship between the parties to the alleged fraudulent transaction; a questionable

transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance." *Id.*

Here, the cause of action claiming DCL § 276, clearly alleges sufficient badges of fraud to support such a cause of action. Plaintiff alleges a longstanding relationship between Defendant and her attorney, Defendant's awareness of Plaintiff's 2007 contract action against her, the inability to pay a judgment if entered against her in that action, and the insufficiency of consideration for the 2013 judgment. Therefore, Defendant's motion to dismiss, pursuant to CPLR 3016(b), is denied.

Dismissal pursuant to CPLR 3211

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that,

"[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that:
(1) A defense is founded upon documentary evidence; or
(2) the court has not jurisdiction of the subject matter of the cause of action; or
(7) the pleading fails to state a cause of action..."
N.Y. Civ. Prac. L. & R. 3211(a)(1), (a)(2) and (a)(7) (McKinney's).

In such motions, the facts alleged in the complaint are accepted as true, and the only determination is whether the facts alleged fit within any recognizable legal theory of recovery. However, this rule does not apply to legal conclusions lacking factual support, or to factual claims that are contradicted by documentary evidence. See, *Doria v. Masucci*, 230 A.D.2d 764 (2d Dept.1996).

With regard to the motions pursuant to CPLR 3211(a)(1), "[a] motion to dismiss pursuant to CPLR 3211(a)(1) may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a

defense as a matter of law". *730 J & J LLC v. Fillmore Agency, Inc.*, 303 A.D.2d 486, 755 N.Y.S.2d 887 (2d Dept., 2003). Under CPLR 3211(a)(2), this Court may be deprived of jurisdiction to vacate another court's judgment. Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...". *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182 (1977). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory. *Brevtman v Olinville Realty*, LLC, 54 AD3d 703 (2d Dept. 2008).See, also, *EBC 1, Inc. v Goldman, Sachs & Co.,* 5 NY3d 11, (2005); *Leon v Martinez,* 84 NY2d 83 (1994).

Thus, a motion to dismiss pursuant to CPLR 3211 (a) (7) will not succeed if, taking all facts alleged as true and affording them every possible inference favorable to the nonmoving party, the complaint states in some recognizable form any cause of action known to law (see *Leon v Martinez*, supra; *Fisher v DiPietro.* 54 AD3d 892 (2d Dept 2008); *Shava B. Pac., LLC v Wilson. Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, (2d Dept. 2006). "Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it'". *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683, 941 N.Y.S.2d 675, 677 (2d Dept. 2012).

Levoritz's motion pursuant to CPLR 3211(a)(1) is untimely, since such motion is to

be made before service of a responsive pleading is required. Levoritz was served with the summons and complaint on April 1, 2015 and did not file his cross-motion to dismiss until May 20, 2015. In addition, Levoritz filed an answer prior to filing the motion. Therefore, such motion on CPLR 3211(a)(1) is untimely. Furthermore, the documentary evidence submitted by Levortiz does not utterly refute Plaintiff's factual allegations, conclusively establishing a defense as a matter of law. Therefore, dismissal on CPLR 3211(a)(1) grounds, is denied.

The Court has already addressed the issue raised by CPLR 3211(a)(2) in its CPLR 5015 discussion, and Levoritz did not expound on an argument under this statute, for this Court to further address the issue.

With regard to dismissal pursuant to CPLR 3211(a)(7), as previously stated, "a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied 'unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it'". *Bokhour v. GTI Retail Holdings, Inc.*, 94 A.D.3d 682, 683, 941 N.Y.S.2d 675, 677 (2d Dept. 2012). Here, Defendants have not shown that a material fact as claimed is not a fact at all. Further, the Court has already addressed the arguments made with regard to dismissal under this statute and at this juncture, Defendants have not established that Plaintiff has waived his right to encumber the premises with a lien because he did not place a lien on the premises immediately after this Court granted such. Therefore, dismissal pursuant to CPLR (a)(7) is denied.

Dismissal pursuant to CPLR 3212

It is well established that summary judgment may be granted only when it is clear

that no triable issue of fact exists, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325, 508 N.Y.S.2d 923, 501 N.E.2d 572 (1986). The burden is upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 (1980); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067, 416 N.Y.S.2d 790, 390 N.E.2d 298 (1979). A failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio,* 81 N.Y.2d 1062, 1063, 601 N.Y.S.2d 463, 619 N.E.2d 400 (1993). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez*, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718.

Bestowing the benefit of every reasonable inference to the party opposing the motion (*Boyce v. Vasquez*, 249 A.D.2d 724, 726 [3d Dept., 1998]), the Court finds that there are material issues of fact that preclude summary judgment. "[A] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" *Pavane v. Marte*, 109 A.D.3d 970, 972, 971 N.Y.S.2d 562, 564 (2d Dept. 2013). Here, there are clearly issues of fact that are not appropriate for this Court to determine. Therefore, the motion for summary judgment pursuant to CPLR 3212, is denied.

Any relief requested in motion sequences 1 & 2 not addressed by this Court, is deemed denied. The foregoing shall constitute the decision and order of this court.

Dated: White Plains, New York
December 31, 2015

HON. SAM D. WALKER , J.S.C.