Gliklad v Chernaya
2016 NY Slip Op 31300(U)
July 7, 2016
Supreme Court, New York County
Docket Number: 653254/2014
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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ALEXANDER GLIKLAD,

Plaintiff,

-against-

RINA CHERNAYA, DIANA CHERNAYA, MC HOLDINGS CORP., and MCANNA L.P.,

Defendants.

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DECISION AND ORDER

Index No. 653254/2014

HON. ANIL C. SINGH, J.:

Plaintiff Alexander Gliklad ("Gliklad") moves pursuant to CPLR 3212 for partial summary judgment against defendants Rina Chernaya, Diana Chernaya, and MC Holdings Corp., on the first, third, and fifth causes of action of the second amended complaint, to compel defendants to pay judgment creditor Gliklad amounts owed under certain promissory notes pursuant to a turnover order. Defendants oppose the motion.

Defendants Rina Chernaya and Diana Chernaya are the daughters of Michael Cherney ("Cherney"), the judgment debtor in the underlying action.

On July 29, 2009, plaintiff Alexander Gliklad commenced an action against Michael Cherney to enforce a $270 million promissory note signed by Cherney in

2003. On April 15, 2014, a final judgment was entered in favor of plaintiff and against Cherney in the amount of $505,093,442.18.

Subsequently, plaintiff commenced a special proceeding to compel the turnover of the ownership interest held by Cherney in ERIP LLC ("ERIP"). In a memorandum opinion dated October 3, 2014, this Court granted the petition for turnover and ordered that all assets owned by ERIP, all debts owed by ERIP, and all debts owed to ERIP be turned over to plaintiff to partially satisfy the judgment against Cherney. The First Department affirmed the turnover order unanimously in a decision and order entered on June 25, 2015 (Gliklad v. Chernoi, 129 A.D.3d 604 [1st Dept., 2015]).

Plaintiff commenced the instant action by filing a summons and complaint on October 24, 2014. The second amended complaint asserts eight causes of action.

The first cause of action is against Michael Cherney's daughter Rina Chernaya. The complaint alleges that monies were transferred from ERIP to Rina Chernaya and, as a result, Rina Chernaya currently owes a debt to ERIP; Rina Chernaya admitted that she received monies from ERIP and currently owes at least $12,935,494.45 to ERIP, which has not been repaid; and plaintiff is entitled to repayment of this debt under the turnover order. The first cause of action alleges

further that Rina Chernaya executed a promissory note dated August 29, 2008, in favor of ERIP in the principal amount of $5,000,000 and, to the extent any part of the debt owed to ERIP by Rina Chernaya is covered by the promissory note, plaintiff is entitled to enforce the note.

The second cause of action alleges that transfers made by ERIP to Rina Chernaya without fair consideration are fraudulent conveyances and should be set aside pursuant to New York Debtor and Creditor Law sections 273-a and 278.

The third cause of action is against Michael Cherney's other daughter Diana Chernaya. The cause of action alleges that Diana Chernaya owes $7,168,193.06 to ERIP, and plaintiff is entitled to repayment of this debt under the turnover orders. The third cause of action alleges further that Diana Chernaya executed a promissory note dated August 29, 2008, in favor of ERIP in the amount of $5,000,000 and, to the extent any part of the debt owed to ERIP by Diana Chernaya is covered by the note, plaintiff is entitled to enforce the note.

The fourth cause of action alleges that all transfers made by ERIP and/or Cherney to Diana Chernaya without fair consideration are fraudulent conveyances.

The fifth cause of action alleges that MC Holdings Corp., owes a debt of $2,510,640.42 to ERIP, and plaintiff is entitled to this debt under the turnover orders.

The sixth cause of action alleges that all transfers made by ERIP to MC Holdings Corp.,without fair consideration are fraudulent conveyances.

The seventh cause of action alleges that McAnna, L.P., owes a debt in the amount of $381,009.40 to ERIP, and plaintiff is entitled to repayment of this debt under the turnover orders.

The eighth cause of action alleges that all transfers made by ERIP to McAnna, L.P., without fair consideration are fraudulent conveyances.

The second amended complaint seeks: 1) judgment pursuant to the turnover orders in the amount of all debts due and owing from each of the defendants to ERIP, including the amounts set forth in any promissory notes executed by each defendant in favor of ERIP; 2) judgment pursuant to New York Debtor and Creditor Law sections 273-a and 278 in the amount of the alleged fraudulent conveyances; and 3) judgment pursuant to New York Debtor and Creditor Law section 273-a and 278 in the amount of $14 million against Diana Chernaya which she allegedly received directly from Cherney in or about April 2010.

Discussion

The standards for summary judgment are well settled. “The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any

material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1st Dept., 1992]). The court's role is issue-finding, rather than issue-determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957]).

As the Court of Appeals stated recently in Red Zone LLC v. Cadwalader, Wickersham & Taft LLP, 2016 WL 3080303 [2016], a party may not create a feigned issue of fact to defeat summary judgment (see also, Gliklad v. Chernoi, 129 A.D.3d 604 [1st Dept., 2015] (holding that a feigned issue of fact did not merit denial of the turnover petition in the instant matter); DeLeon v. New York City

Housing Auth., 65 A.D.3d 930 [1st Dept., 2009] (offering a new theory of liability that contradicts a previous position was a "feigned issue of fact"); Schwartz v. JP Morgan Chase Bank, N.A., 84 A.D.3d 575, 576 [1st Dept., 2011] ("assertion, in papers submitted in opposition to defendant's motion,... [that] contradicts his deposition testimony [] raises only a feigned issue of fact...."); Karwowski v. New York City Transit Auth., 44 A.D.3d 826 [2nd Dept., 2007] (an affidavit submitted that contradicted prior testimony in a deposition was a "feigned issue of fact designed to avoid the consequences of [that deposition testimony]"); Telfeyan v. City of New York, 40 A.D.3d 372, 373 [1st Dept., 2007] ("Affidavit testimony that is obviously prepared in support of ongoing litigation that directly contradicts deposition testimony previously given by the same witness, without any explanation accounting for the disparity, 'creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment'").

Plaintiff moves for summary judgment based primarily on documentary evidence in the form of three promissory notes executed by the defendants and defendants' written responses to information subpoenas, as corroborated by defendants' deposition testimony.

Plaintiff exhibits a promissory note executed by defendant Diana Chernaya, as borrower, and ERIP LLC, as lender (Motion, exhibit 15). The note states that

borrower promises to pay "the principal amount equal to the lesser of (i) five million dollars ($5,000,000) and (ii) the sum of all loans made by lender to borrower." It is undisputed that Diana Chernaya executed the note on August 29, 2008; the due date specified in the note is December 31, 2015; and Diana Chernaya has not repaid the note.

Next, plaintiff exhibits a promissory note executed by defendant Rina Chernaya, as borrower, and ERIP LLC, as lender (Motion, exhibit 14). The terms of the note are identical to the terms of the note executed by her sister Diana. Likewise, it is undisputed that Rina Chernaya has not repaid the note.

Next, plaintiff exhibits a promissory note executed by defendant MC Holdings Corp., as borrower, and ERIP LLC, as lender. The terms of this note are identical to the notes executed by defendants Diana and Rina Chernaya. Again, it is undisputed that MC Holdings has not repaid the note.

All of the promissory notes contain the following default provision:

> Upon the occurrence of an event of default, borrower agrees to pay all reasonable collection and enforcement fees, charges, costs and expenses, including, without limitation, reasonable attorneys' fees, whether or not suit has been filed or any other action has been instituted or taken to enforce or collect under this note.

The promissory notes define an "event of default" as any failure of borrower to make any required payment which has not been cured within ten days after

written notice to borrower of such failure.

Plaintiff's counsel provided written notice of default and demanded repayment in a letter to defendants' counsel dated January 11, 2016 (Motion, exhibit 24). Plaintiff contends that defendants have not repaid any debts they owe under the promissory notes, so an "event of default" has occurred with respect to each of the defendants.

In addition to the promissory notes, plaintiff exhibits Rina and Diana Chernaya's written responses to information subpoenas. In her response, Rina Chernaya stated that, as of the date of the response – May 29, 2014 – she owed the sum of $12,935,494.45 to ERIP (Motion, exhibit 16). In her response dated July 10, 2014, Diana Chernaya admitted that she owed the sum of $7,168,193.06 to ERIP (Motion, exhibit 17, at p. 5).

Plaintiff exhibits the transcript of Rina Chernaya's deposition on December 9, 2014 (Motion, exhibit 21). At her deposition, Rina Chernaya stated that all of the money that she and her sister, Diana Chernaya, received from ERIP was covered under the promissory notes they executed (id., at p. 85, lines 7-8). She stated that this included a sum of $7.3 million Rina and Diana Chernaya received ($3.65 million each) from judgment debtor Michael Cherney to purchase a house in Florida (id., at p. 89, lines 9-16).

After careful consideration, the Court finds that the documentary evidence, as corroborated by the deposition testimony, makes a prima facie case in favor of plaintiff that defendant Rina Chernaya borrowed from and owes ERIP the sum of $12,935,494,45; defendant Diana Chernaya borrowed from and owes ERIP the sum of $7,168,193.06; and MC Holdings borrowed from and owes ERIP the sum of $2,510,640.42. The Court finds further that plaintiff has made a prima facie showing that the defendants owe the above sums to the plaintiff based upon the unambiguous language of the turnover order. Additionally, the Court finds that plaintiff has made a prima facie showing of entitlement to an award of reasonable attorneys' fees based on the unambiguous default provision in the promissory notes.

As plaintiff has met his initial burden as movant, the burden shifts to defendants to produce evidence demonstrating that there is a material issue of fact.

Defendants' first contention is that plaintiff's recovery based on the promissory notes is limited by the express terms of the notes. On their face, the notes at issue provide for the repayment of "the lesser of (1) five million dollars ($5,000,000) and (ii) the sum of all loans made by lender to borrower during the period beginning as of the date hereof, and ending on the due date." Defendants assert that plaintiff is asking the court to "rewrite" the notes, remove the word

"lesser," and award him summary judgment based on notes in the amount of the sum of all loans made by ERIP to Rina, Diana and MC Holdings. Defendants point out that plaintiff is seeking such relief regardless of the fact that such sums, according to plaintiff, exceeds $5 million as to both Rina and Diana.

At her deposition on December 9, 2014, Rina Chernaya admitted that all of the money that she and her sister Diana took from ERIP was to be repaid pursuant to their respective promissory notes (Motion, exhibit 21, at 84:21 - 85:8). Any sums in excess of the $5 million not covered by the notes would constitute a loan owed to ERIP or, alternatively, a fraudulent transfer as there is no assertion that the monies were received for fair consideration. Accordingly, defendants' contention has no merit.

Defendants' second contention is that issues of fact exist as to the amounts that may be due under the notes.

In 2008, Rina and Diana purchased a house at 1261 Spanish River Road in Boca Raton, Florida. To purchase the home, Michael Cherney loaned $3,650,000 to Diana and $3,650,000 to Rina. Subsequently, ERIP paid $7,300,000 to Michael Cherney to pay back the money he lent to Rina and Diana. Defendants contend that there is an issue of fact regarding whether the $7.3 million that was used to purchase the house was a loan from Michael Cherney, a loan from ERIP, a

distribution of capital from ERIP, or a return of capital from ERIP.

Defendants exhibits the transcript of the second deposition of Rina Chernaya, which was conducted on November 3, 2015 (Motion, exhibit 23). Rina stated that she wanted to make a correction from her prior deposition. Specifically, she stated that $7.3 million was a distribution from ERIP as a shareholder, not a loan (id., p. 19, lines 6-16; p. 21, lines 20-24).

Although Rina and Diana initially included the $7.3 million in the amount they believed to be due ERIP in their information subpoenas, and Rina did not dispute that amount when she was initially deposed, Rina changed her testimony in the subsequent deposition. At her second deposition on November 3, 2015, Rina claimed that the $7.3 million she and Diana Chernaya took from ERIP was not a loan; rather, it was a "distribution" that did not need to be repaid (Motion, exhibit 23 at 19:9 - 21:24). Defendants offer the explanation that, following the submission of the information subpoenas and her initial deposition, Rina became concerned that her testimony might not have been accurate. Accordingly, she consulted Robert Kessler, a business advisor to Michael Cherney, and reviewed documents relevant to the amount of her and Diana's debt.

Defendants contend that Rina Chernaya's original deposition testimony, as well as Rina and Diana's information subpoenas, are unreliable because they are

errroneous. Defendants assert that, at the time of her original deposition, Rina had no recollection of the pre-existing tax document showing that the funds Diana and Rina received from ERIP to purchase the house were not loans from ERIP; rather, the funds were distributions. In other words, defendants contend that Rina and Diana committed an earlier misstatement regarding the $7.3 million distribution. Defendants assert that, while Rina stated in her information subpoena and the first deposition that she borrowed $12,935,494.45 from ERIP, the actual amount due from Rina is the sum of $9,642,260.79. Likewise, in her information subpoena, Diana admitted that she borrowed the sum of $7,168,273.06; however, she contends the amount due to ERIP is really the sum of $3,523,388,77.

As evidence that the $7.3 million Diana and Rina received was not a loan, defendants rely on two documents. First, defendants point out that ERIP's balance sheet of December 31, 2015, does not include a $7.3 million distribution. Second, defendants state that a K-1 form submitted to the Internal Revenue Service for 2008 reflects a $7.3 million distribution of capital.

It is undisputed that Rina and Diana Chernaya did not report the $7.3 million ($3.65 million each) as a "distribution" on their 2008 and 2009 tax returns. Because they failed to report that amount as income of their tax returns, defendants are precluded by the doctrine of tax estoppel from claiming that the

monies were a distribution from ERIP.

If a $7.3 million distribution was made directly by Michael Cherney – which Rina and Diana were required to pay to ERIP – there is still a debt to ERIP. After $7.3 million was loaned by Cherney to his daughters to purchase a house in Florida, a few weeks later, Cherney was paid back by taking money from ERIP (EBT of Rina at p. 87 and 88).

In order to establish a prima facie case under the doctrine of tax estoppel, it must be shown that the party had an obligation to report the income on her tax return. The Court of Appeals explained the concept of tax estoppel, a form of quasi-estoppel akin to issue preclusion or collateral estoppel, in Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415 [2009]. The Court wrote:

> A party to litigation may not take a position contrary to a position taken in an income tax return. Here, husband does not dispute that, in accordance with his settlement agreement, he reported the $1,800,000 in settlement proceeds as business income on his federal income tax return, in which he swore that the representations contained within it were true. We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under penalty of perjury on income tax returns.

(Mahoney-Buntzman, 12 N.Y.3d at 422 (internal citations omitted)).

The doctrine of tax estoppel has been applied consistently in the commercial litigation arena. For example, in Livathinos v. Vaughn, 121 A.D.3d 485 [1st Dept.,

2014], the First Department wrote:

> Having declared on the income tax returns filed for Trinity from 2001 through 2008 that she owned 100% of the company's stock, Vaughn may not assert in this litigation that defendant James S. Vaughn owned 50% of the company's stock.

Likewise, in Walsh v. Blaggards III Restaurant Corp., 131 A.D.3d 854 [1st Dept., 2015], the First Department approved the use of tax estoppel as a basis for awarding summary judgment. The Court wrote:

> Defendant stated in its tax returns that the $50,000 paid by plaintiff was a loan and that the outstanding balance was $44,500; those statements are binding on defendant. Thus, contrary to defendant's argument otherwise, that amount is a loan, not an investment and summary judgment in plaintiff's favor on the single cause of action in his complaint is warranted.

(Walsh, 131 A.D.3d at 845; see also, for example, Zemel v. Horowitz, 11 Misc.3d 1058(A) [Sup. Ct., N.Y. Cty., 2006]).

The holdings set forth in these cases are dispositive and compel estoppel against the defendants.

At oral argument, counsel for the defendants argued that the $7.3 million distribution was not reported on defendants' income tax returns because it was "a return of capital" (Transcript of Oral Argument, May 5, 2016, p. 9, lines 22-23). Counsel acknowledged that this argument was not raised in defendants' opposition papers (id., p. 29, lines 11-19). This argument fails to raise an issue of fact. Even

overlooking the fact that this assertion was raised for the first time at oral argument, it is not made on personal knowledge. An attorney's affirmation without personal knowledge of the pertinent facts lacks probative value (Thelen LLP v. Omni Contracting Co., Inc., 79 A.D.3d 605, 606 [1st Dept., 2010]). Nor is there evidentiary support that the distribution was a return of capital sufficient to defeat summary judgment.

Defendants' final contention is that plaintiff has not alleged facts establishing that he has standing to obtain summary judgment on the notes as he does not assert that: a) he is in possession of the original promissory notes; or b) the notes have been assigned by him. In support of their contention, defendants cite U.S. Bank N.A. v. Faruque, 120 A.D.3d 575 [2nd Dept., 2014], and Deutsche Bank Natl. Trust Co. v. Haller, 100 A.D.3d 680 [2nd Dept., 2012].

In short, defendants' reliance on the cases is misplaced, for they are distinguishable in a most fundamental respect. Unlike the present matter, the cases are mortgage foreclosure actions.

Here, the turnover order contains no language that would require plaintiff to be the holder of the notes, or be assigned the notes, as a condition for him to collect the debts evidenced by the notes. By operation of law, the order confers on Gliklad the right to turnover of all notes, loans, or debts owed to ERIP. In this

regard, it is important to note that a court has the authority to order delivery of documents, including promissory notes, in a turnover action pursuant to CPLR 5225(c) (Muhl v. Ardra Ins. Co., Ltd., 246 A.D.2d 413 [1st Dept., 1998]). Accordingly, as the prevailing party in the turnover proceeding, Gliklad has standing now to enforce the promissory notes.

For the above reasons, we find that defendants have failed to show the existence of any genuine issue of material fact or otherwise rebutted plaintiff's prima facie case. Accordingly, it is

ORDERED plaintiff's motion for partial summary judgment against defendants Rina Chernaya, Diana Chernaya, and MC Holdings Corp., on the first, third, and fifth causes of action of the second amended complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant Rina Chernaya in the amount of $12,935,494.45, together with interest at the statutory rate from January 1, 2016, as calculated by the Clerk, together with costs and disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant Diana Chernaya in the amount of $7,168,193.06, together with interest at the statutory rate from January 1, 2016, as calculated by the Clerk,

together with costs and disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiff and against defendant MC Holdings Corp., in the amount of $2,510,640.42, together with interest at the statutory rate from January 1, 2016, as calculated by the Clerk, together with costs and disbursements; and it is further

ORDERED that the issue of the amount of reasonable attorneys' fees plaintiff may recover against the defendants for the fees incurred in enforcing the promissory notes is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

The foregoing constitutes the decision and order of the court.

Date: July 7, 2016
New York, New York

Anil C. Singh