Berkeley Research Group, LLC v 220 Laundry LLC
2017 NY Slip Op 30569(U)
March 17, 2017
Supreme Court, New York County
Docket Number: 654369/15
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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BERKELEY RESEARCH GROUP, LLC,

Plaintiff,

-against-

220 LAUNDRY LLC, ELIOT SPITZER, ADAM J. TELLER, ALAN AZI CUTTER, ZALMAN SCHOCHET, JAMIE NAGLER, TONY H. BERGER, ALISA ADLER, EVERYDAY LOGISTICS LLC, AAO RESORT MANAGEMENT LLC,

Defendants

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DECISION/ORDER
Index No. 654369/15
Motion sequence No. 1

Gerald Lebovits, J.

This is an action alleging various violations of the New York Debtor and Creditor Law and a violation of the New York Limited Liability Company Act (LLC Act), specifically, fraudulent conveyances.

The complaint alleges the following: Plaintiff is an LLC. Defendants are individuals who are owners and investors of LLCs. Plaintiff was hired by one of the LLCs, 220 Laundry LLC (220 Laundry), to provide expert consulting services pursuant to a letter agreement between the parties. The letter agreement provides the terms on which 220 Laundry would compensate plaintiff for its services.

220 Laundry retained plaintiff to prepare an expert report and to serve potentially as 220 Laundry's expert witness in an adversarial proceeding in Bankruptcy Court, *Spitzer v Miron Markus,* Index No. 12-01885-ALG (Bankr SD NY 2012). Although plaintiff prepared a draft expert report and revised it in response to 220 Laundry's comments, the report was never submitted in the proceeding, because 220 Laundry settled the matter before trial, receiving $3 million in proceeds.

After 220 Laundry failed to pay an invoice for $52,214.38 for services sent by plaintiff, plaintiff filed a demand for arbitration with Judicial Arbitration & Mediation Services, Inc. (JAMS), on January 16, 2014, to recover its payment from 220 Laundry. After 220 Laundry filed its response to the demand for arbitration, JAMS notified the parties that the arbitration proceeding would begin on February 11, 2014. A few weeks after this proceeding started, 220 Laundry made a series of payments to defendants Eliot Spitzer and AAO Resort Management LLC (AAO). Plaintiff asserts that payments made by 220 Laundry to these defendants totaled $161,240.00, all transferred after February 11, 2014.

On March 11, 2015, JAMS issued a final award in plaintiff's favor for $157,955.57. This

award consisted of (i) $52,214.38 for the unpaid invoice fees; (ii) $7227.04 in interest charges on the fees; (iii) $80,533.00 in attorney fees; and (iv) $17961.15 for costs in enforcing the letter agreement through arbitration.

On March 11, 2015, plaintiff filed in Supreme Court, New York County, a petition for an order to confirm the award. On May 1, 2015, the court granted the petition. On May 21, 2015, the County Clerk's Office filed an order and judgment in plaintiff's favor. The judgment permitted plaintiff to recover from 220 Laundry the full amount of the award, plus interest in the amount of $914.11.

On May 27, 2015, plaintiff's counsel sent a letter to 220 Laundry's counsel, demanding full payment of the judgment. 220 Laundry sent plaintiff a check for $9685.55, which plaintiff considered a partial payment. Plaintiff notified 220 Laundry that it accepted the payment but reserved a right to secure full enforcement of the judgment. After failing to recover any further payment from 220 Laundry, plaintiff commenced its action as of December 22, 2015.

In the complaint, plaintiff is suing all the defendants for violating the following Debtor and Creditor statutes: section 273 ("Every 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 and the obligation is incurred without fair consideration"); section 273-a ("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"); section 274 ("Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to the creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent"); section 275 ("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"); and section 276 ("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 creditors"). Section 276-a provides for the recovery of attorney fees in an action or special proceeding to set aside a conveyance made under section 276. Section 508 of the LLC Act concerns the improper distribution of limited liability company property.

Plaintiff moves for partial summary judgment against Spitzer and AAO for receiving fraudulent conveyances pursuant to section 273-a of the Debtor and Creditor Law. Plaintiff seeks an order setting aside the conveyances and returning the payments to plaintiff to enforce its judgment against 220 Laundry, the transferor of the conveyances. The individual defendants, except Spitzer, cross-move for partial summary judgment, dismissing them from the complaint.

Standard for Summary Judgment Motions

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues" (*Birnbaum v Hyman,* 43 AD3d 374, 375 [1st Dept 2007]). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [citation omitted]'" (*People v Grasso,* 50 AD3d 535, 545 [1st Dept 2008]). "To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor [citation omitted]" (*Kershaw v Hospital for Special Surgery,* 114 AD3d 75, 81 [1st Dept 2013]). "Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial [citation omitted]" (*id.* at 82).

Plaintiff's Motion for Partial Summary Judgment

In moving for partial summary judgment, plaintiff argues that the conveyances to Spitzer and AAO were fraudulent because they lacked fair consideration; were made in bad faith, as they were made while the arbitration proceedings were occurring; and were meant to deprive plaintiff of its compensation for services rendered to the transferor. Plaintiff specifically contends that 220 Laundry deliberately transferred money to insiders, those who had a financial interest in 220 Laundry. AAO and Spitzer, who testified before the arbitration proceeding that he controlled AAO as its sole member while these payments were being transferred, are allegedly recipients of funds intended for plaintiff (*see* Arbitration testimony of Eliot Spitzer, exhibit 7).

In opposition to this motion, Spitzer affirms that he is not an insider of 220 Laundry, that he is neither a director nor officer, and that he had served as a consultant for a number of years without receiving compensation. He states that the subject conveyances are not violations of the Debtor and Creditor Act and that the payments were for past services he rendered for 220 Laundry (*see* affirmation of Eliot Spitzer in Opposition, exhibit 16).

In reply, plaintiff disputes Spitzer's affirmation, contending that he formed 220 Laundry in 2011 to purchase a commercial laundry. According to plaintiff, Spitzer also guaranteed money for 220 Laundry's payment obligations and executed agreements on behalf of 220 Laundry, including the letter agreement with plaintiff. Many of the documents executed by him allegedly identify him as a member. Plaintiff claims that this is adequate proof of the insider status of Spitzer within 220 Laundry.

When suing under section 273-a, plaintiff must show that a transferor-debtor is subject to a judgment that has not been satisfied. Plaintiff has an order and judgment against 220 Laundry, signed by Justice Alice Schlesinger of the Supreme Court, New York County, confirming a debt amounting to $159,419 owed by 220 Laundry. This followed the confirmation of an arbitration award regarding 220 Laundry's failure to pay plaintiff for its services (*see* Order granting

Plaintiff's Petition to Confirm Final Award, exhibit 9; Order and Judgment to Plaintiff, exhibit 10). There is evidence of a $9685.55 check sent to plaintiff by 220 Laundry, which plaintiff claims is a partial payment of the debt (*see* Check from 220 Laundry, exhibit 12). This indicates that plaintiff has demonstrated that it has a judgment for money damages that has not been satisfied at this time. No party disputes this.

The only issues raised here is whether Spitzer is a member of 220 Laundry or just an outside consultant, and whether the conveyances were payments for his previous consultant work. This involves the concept of fair consideration, a factor considered in section 273-a conveyances. Fair consideration for purposes of a fraudulent conveyance claim is not only a matter of whether the amount given for the transferred property was a fair equivalent or not proportionately small, but whether the transaction is made in good faith, an obligation imposed on both the transferor and the transferee (*see Sardis v Frankel,* 113 AD3d 135, 141-142 [1st Dept 2014]). An antecedent debt constitutes fair consideration (*see Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership,* 25 AD3d 301, 302 [1st Dept 2006]).

The court finds that Spitzer's claim for the conveyances, if proven true, would constitute an antecedent debt owed to him by 220 Laundry, qualifying as fair consideration. If he were an "insider," the reason for the transfers would be less than honorable, considering that they occurred during the arbitration proceedings. The motion for partial summary judgment is denied, as a trier of fact must decide whether the conveyances to Spitzer and AAO were made in good faith and were a fair equivalent of the past services Spitzer rendered on behalf of 220 Laundry, the transferor.

The Cross-Motion for Partial Summary Judgment

Defendants Adam Teller, Alan Cutter, Zalman Schochet, Jamie Nagler, Tony Berger, and Alisa Adler (hereinafter, the moving defendants) cross-move for partial summary judgment dismissing the complaint. The complaint alleges that the moving defendants were, upon information and belief, investors and members of 220 Laundry. The fraudulent conveyances they received from 220 Laundry occurred after December 5, 2013, the date when 220 Laundry failed or refused to pay plaintiff's invoice. The complaint alleges that from December 9, 2013 to December 18, 2013, Schochet and Nagler received conveyances from 220 Laundry totaling $600,000. Moreover, on and after December 23, 2013, the date plaintiff notified 220 Laundry that, upon failure of payment, plaintiff would seek legal action, 220 Laundry made more allegedly fraudulent conveyances to Schochet, Cutter, Berger, Teller, and Adler which totaling $671,091. These conveyances were made between December 23, 2013 and December 31, 2013.

In their cross-motion, the moving defendants state that none of them was an insider of 220 Laundry, except Teller. Although they made investments in 220 Laundry, they were not managers or officers. They deny that the conveyances they received from 220 Laundry were lacking in fair consideration or rendered 220 Laundry insolvent. They also deny that these conveyances were made to hinder or defraud plaintiff's attempt to recover from 220 Laundry its compensation. According to the moving defendants, plaintiff is not entitled to attorney fees

absent proof on their part of actual fraud that plaintiff has failed to demonstrate. They argue that the LLC Act is not applicable here because the law applies only to members of LLCs, not creditors of LLCs.

In opposition to the cross-motion, plaintiff states the following: (i) despite the moving defendants' argument, the conveyances made to them rendered 220 Laundry insolvent and unable to pay its future debts. There is adequate evidence that 220 Laundry's total liabilities exceeded its total assets. Although it continued to operate at the time it transferred conveyances to the moving defendants, 220 Laundry was aware of incurring future debts beyond its ability to pay; (ii) the moving defendants failed to establish that the conveyances were for fair consideration and done in good faith; (iii) the moving defendants failed to show that the conveyances were not made with the intent to hinder or delay a creditor like plaintiff; while the conveyances occurred before the start of the arbitration proceeding, plaintiff claims that they were first transferred after 220 Laundry notified plaintiff that it would not pay plaintiff's invoice; plaintiff states that it is reasonable that the moving defendants knew about disputed fees between plaintiff and 220 Laundry and the possibility of litigation or some other legal procedure. Plaintiff infers that these parties knew of the debt and sought to extract money from 220 Laundry in anticipation of a legal dispute; and (iv) section 508 of the LLC Act does not preclude recovery of an LLC's creditor like plaintiff.

In reply, the moving defendants contend that the conveyances to them were for antecedent debts, money they had invested in 220 Laundry, which constitute fair consideration. They claim that there was no indication that, at the time of the conveyances, 220 Laundry was obligated to pay plaintiff's invoice because the debt was not absolute and had not matured. They dispute plaintiff's argument that their receipt of the funds were intended to prevent the payment of plaintiff's invoice. Finally, they aver that section 508 applies only to creditors who are members of LLCs, like 220 Laundry, which is not plaintiff's circumstance.

With respect to section 508, the court agrees with the moving defendants. This statute grants creditor status to members of LLCs who are entitled to receive distributions from LLCs. Here, plaintiff is not a member of 220 Laundry and is not covered under this statute. Plaintiff's claim in the complaint regarding section 508 of the LLC Act is therefore dismissed.

The parties dispute the issues of fair consideration, insolvency, and actual fraud. In reviewing the issue of fair consideration, the court finds that the moving defendants had previously invested in 220 Laundry before the Bankruptcy proceeding and that Teller is admittedly a member and manager of 220 Laundry. Plaintiff contends that the money transferred to them was not done in good faith and did not constitute a fair equivalent of what they invested, the moving defendants allegedly receiving more than they were entitled to.

An issue of fact arises about fair consideration. Although the moving defendants have made a case for antecedent debts, there is no conclusive proof that the value of the conveyances was the equivalent of the amount of the investments made. Moreover, plaintiff has raised the point about a possible preferential transfer to investors in insolvent companies in derogation to

general creditors like itself (*see Farm Stores v School Feeding Corp.*, 102 AD2d 249, 254 [2d Dept 1984], *affd in part, appeal dismissed in part,* 64 NY2d 1065 [1985]).

Regarding insolvency, plaintiff argues that the moving defendants' assessment that 220 Laundry was not rendered insolvent is a conclusory evaluation. Plaintiff contends that as a result of 220 Laundry's acquiring the proceeds from its Bankruptcy settlement and transferring its funds to all the defendants in this action, 220 Laundry lacked an adequate capital base to pay off its present and future debts.

Plaintiff examined 220 Laundry's financial records and states that 220 Laundry made approximately $416,515 in conveyances. The moving defendants allege in their motion papers that almost a half million dollars was in 220 Laundry's bank account, enough to satisfy plaintiff's invoice. Plaintiff argues that after the conveyances were made, its invoice cannot be satisfied and that 220 Laundry is insolvent (*see* Bank Statements of 220 Laundry LLC, exhibit 14).

The court finds that there is no conclusive proof that, upon transferring the funds to the moving defendants, 220 Laundry was in a position that it could manage its future obligations or expenses. Therefore, the cross-motion to dismiss the claims relating to sections 273, 273-a, 274, and 275 of the Debtor and Creditor Act is denied.

The remaining claims in the complaint involve an alleged intent on defendants' part to hinder or defraud plaintiff's attempt to recover its funds from 220 Laundry. Here, plaintiff must demonstrate that defendants were acting in a traditionally fraudulent manner. Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, a creditor in a fraudulent-conveyance action is allowed to rely on "badges of fraud" to support its claim for actual fraud, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent (*see Wall St. Assoc. v Brodsky,* 257 AD2d 526, 529 [1st Dept 1999]). Factors constituting "badges of fraud" include (1) a close relationship between parties to an alleged fraudulent transaction; (2) a questionable transfer not in the usual course of business; (3) inadequacy of consideration; (4) the transferor's knowledge of the creditor's claim and the inability to pay it; and (5) retention of control of the property by the transferor after the conveyance (*id.* at 529).

In its opposition, plaintiff discusses the close relationship between the moving defendants and 220 Laundry, 220 Laundry's awareness of plaintiff's intention to arbitrate its claim, and the transfers' occurrence before the arbitration proceeding. The court finds that plaintiff has specified with sufficiency certain "badges of fraud" for an inference of intent to hinder its recovery pursuant to section 276 of the Debtor and Creditor Law. The court denies that part of the cross-motion seeking dismissal of the claim alleging violation of this statute. The court also denies the dismissal of the claim seeking attorney fees pursuant to section 276-a of the Debtor and Creditor Law. These fees would be properly awarded were plaintiff able to prove an intent to hinder, delay, or defraud.

Accordingly, it is

ORDERED that plaintiff Berkeley Research Group, LLC's motion for partial summary judgment is denied; and it is further

ORDERED that defendants Adam J. Teller, Alan Azi Cutter, Zalman Schochet, Jamie Nagler, Tony H. Berger, and Alisa Adler's cross-motion for partial summary judgment is granted to the extent of dismissing the fifth cause of action of the complaint and the cross-motion is otherwise denied; and it is further

ORDERED that the action shall continue as to the remainder of the complaint; and it is further

ORDERED that counsel for defendants serve a copy of this decision and order with notice of entry on plaintiff and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: March 17, 2017

J.S.C.
HON. GERALD LEBOVITS
J.S.C.