

Inland Mtge. Capital Corp. v Aslansan

2017 NY Slip Op 33228(U)

November 22, 2017

Supreme Court, Saratoga County

Docket Number: 20152131

Judge: Thomas D. Nolan

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

ORIGINAL

STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

INLAND MORTGAGE CAPITAL CORPORATION,

Plaintiff,

DECISION, ORDER AND JUDGMENT

RJI No. 45-1-2017-0255

Index No. 20152131

-against-

KAAN ASLANSAN and AYSEL ASLANSAN,

Defendants.

**PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice**

**APPEARANCES: CULLEN AND DYKMAN LLP
Attorneys for Plaintiff
Garden City Center
100 Quentin Roosevelt Boulevard
Garden City, New York 11530**

**INGRAM YUZEK GAINEN CARROLL & BERTOLOTTI, LLP
Attorneys for Defendants
250 Park Avenue
New York, New York 10177**

2017 DEC - 1 AM 10:51
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

In its attempt to collect a money judgment, plaintiff, judgment creditor, brings this action to set aside as fraudulent the conveyance of a 12.6 acre parcel of real property in the Town of Greenfield, Saratoga County, owned by judgment debtors Esat Aslansan (Esat) and Aysel Aslansan (Aysel), a husband and wife, to their son, Kaan Aslansan.¹

The background leading to the entry of the underlying money judgment against Esat and Aysel and plaintiff's efforts to enforce the judgment is detailed below.

¹After the action was commenced, Esat Aslansan died. By stipulation, the action against him has been discontinued.

In 2006, defendants Esat and Aysel and others including another son, Murat Aslansan, were investors and/or principals in a commercial real estate development project in the City of Philadelphia financed by a nearly \$9 million loan made to the developers by plaintiff's predecessor. As part of the loan transaction, Murat Aslansan, his wife Amanda, and their corporate development entity guaranteed full repayment of the loan while Esat and Aysel executed a loan guaranty limiting their liability to the lender to \$500,000.00. In 2008, the primary obligors defaulted and the lender sued all of the obligors and the guarantors. In 2010, while the lawsuit was pending in Pennsylvania state court, defendants Esat and Aysel conveyed their Greenfield property, which they apparently owned free and clear and which was assessed at \$433,000.00, to their son Kaan, a Connecticut resident, and reserved to themselves a life estate. In 2011, the lender was granted summary judgment against the obligors and the guarantors and its damages were fixed at \$3,827,069.66 with the court in its judgment specifically limiting the liability of Esat and Aysel to \$500,000.00. The judgment in the lender's favor was affirmed on appeal. In January 2012, final judgment was entered in the Pennsylvania action against Esat and Aysel and their son Murat and his wife, Amanda. Shortly thereafter Esat and Aysel signed a second deed to Kaan extinguishing their life estate in the Greenfield property. In October 2012, as permitted by CPLR 5402, plaintiff, as successor to the original lender, filed the unsatisfied Pennsylvania judgment in the Office of the Saratoga County Clerk and it has not been satisfied.²

Pending Action

In July 2015, plaintiff commenced this action against Esat, Aysel, and Kaan, and in its

²The judgment filed was in the amount of \$3,827,069.66, but it specifies that Esat's and Aysel's joint and several liability to the plaintiff did not exceed \$500,000.00.

complaint, plaintiff asserts four causes of action based on Debtor and Creditor Law § § 273-a, 275, 276, and 276-a and alleges, inter alia, that the two conveyances, the original transfer by Esat and Aysel and the subsequent release of their life estate, were without fair consideration and thus fraudulent as to plaintiff and therefore should be set aside or disregarded and that plaintiff should be permitted to attach or levy execution against the property to satisfy that portion of its judgment which is against Esat and Aysel. In addition, plaintiff seeks to recover its attorney's fees. In their answer, defendants deny that the conveyances were without fair consideration and contend that the transfers reflected a plan not to avoid paying the judgment but rather a plan by which Kaan would provide sufficient income to his parents to fund their living expenses for the balance of their lives. Defendants rely on documents, namely a promissory note, mortgage and loan agreement, prepared at the time of the 2010 conveyance, to support their claim that the property transfer to Kaan was for fair and adequate consideration and not an attempt or effort by Esat and Aysel to frustrate the collection of a judgment anticipated in the Pennsylvania litigation.³

Now, based on the pleadings, a copy of the decisions, orders and judgments made in the Pennsylvania action, a copy of the two deeds and their accompanying RP 5217 forms, and the affidavit of its attorneys and defendants' response to plaintiff's interrogatories and document request, plaintiff moves for an order granting summary judgment. In short, plaintiff contends that Esat and Aysel were defendants in the Pennsylvania action at the time they conveyed the Greenfield property in 2010 to Kaan, and that the RP 5217 form that the grantors and grantee

³In their opposition to the plaintiff's present motion, defendants concede that the January 2012 deed in which Esat and Aysel released their retained life estate was without fair consideration and do not object to an order setting aside the deed.

signed in conjunction with recording that deed specifically stated a consideration of \$0.00 and also that the January 2012 deed in which Esat and Aysel extinguished their life estate was signed and recorded shortly after the final judgment in plaintiff's favor had been affirmed on appeal and had been entered against them.

In opposition, defendants submit affidavits of Kaan and Aysel and a copy of the documents prepared in conjunction with the 2010 conveyance again which they contend reflect, not a judgment avoidance scheme, but a legitimate parent/son retirement funding plan.

In reply, plaintiff submits the affidavit of their attorney and excerpts from the deposition of Kaan taken in 2014 in an action brought by plaintiff in Connecticut against Esat and Aysel.⁴

Plaintiff's principal position is that when the 2010 conveyance was made, it qualified as a creditor of the Aslansans under Debtor and Creditor Law § 270⁵ and that the transaction divesting the Aslansans of the ownership of the Greenfield property, apparently unencumbered and owned free and clear, was made without fair consideration and subject to being set aside under Debtor and Creditor Law § 278. Moreover, plaintiff asserts that under New York State law, a transaction is fraudulent if the transferors intended to defraud the creditor, (Debtor and Creditor Law § 276), and may be fraudulent even if the transferors possessed no actual intent to defraud the creditor, (Debtor and Creditor Law § 273 and 273-a). If actual intent is established, the creditor is entitled to recover attorneys' fees (Debtor and Creditor Law § 276-a).

Again, defendants urge that fair consideration for the transfer to Kaan was paid because

⁴Inland Mortgage Capital Corp. v Aslansan, Supreme Court, Judicial Dist. of Stamford-Norwalk; FST-CV-13-4025267-S.

⁵Debtor and Creditor Law § 270 defines "creditor" as "person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent".

the transfer was structured to provide the Aslansans with an income stream for the rest of their lives and was not designed to avoid creditors like plaintiff. According to Kaan, his parents owned, in addition to the Greenfield property, a single-family residential property in Greenwich, Connecticut which had been rented by them since 1992 when Esat and Aysel moved to New York. According to Kaan, in 2008, that property became vacant and was by then in a deteriorated condition, so finding a new, replacement tenant was difficult. According to Kaan, the Aslansans lost all their savings which they had invested in the failed real estate project and were in need of a reliable income source since the restaurant they operated at the Greenfield property had closed in 2002, and that they had lost the rental income from the Greenwich property and because both were in ill health and could no longer work.

According to Kaan, his parents' attorneys in New York recommended a plan by which the Aslansans would transfer to Kaan and his wife the Greenfield property, and in exchange, Kaan would sign a promissory note agreeing to pay to his parents \$500,000.00 with an annual interest of 3.24% in monthly installments of \$2,611.31 for 24 years, their expected combined life expectancy. The loan was to be secured by a mortgage in their favor against Kaan's and his wife's Connecticut residence. Also as part of the plan, the Aslansans were to sell their now unoccupied Greenwich, Connecticut property and the sales proceeds were to be used to "pay down" the mortgage on Kaan's residence to "provide funds" for Kaan to make the monthly loan payments to his parents.⁶ In his affidavit opposing plaintiff's motion, Kaan admits that in 2010 he knew that his parents had lost their life savings in the Philadelphia investment but disavows

⁶In his affidavit, Kaan states that \$410,000.00 realized from his parents' sale of the Greenwich property was applied to his existing mortgage.

any knowledge that plaintiff had the pending lawsuit against his parents and that they were potentially liable to the plaintiff under their guaranty. Moreover, Kaan states that he played no role in the plan his parents' attorneys developed to provide them with a reliable income stream.

Now, the general principles governing summary judgment motions followed by the specific principles of law that apply to summary judgment motions in fraudulent transfer actions under Debtor and Creditor Law. Since summary judgment is a drastic remedy, it may be granted only when the moving parties, here plaintiff, “tender(s) sufficient evidence to demonstrate the absence of any material issues of fact”. Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012), quoting Alvarez v Prospect Hosp., 68 NY 320, 234 (1986). And, the facts must be viewed “in the light most favorable to the non-moving party”, here defendants. Ortiz v Varsity Holdings LLC, 18 NY3d 335 (2011). “The court’s role on a motion for summary judgment is to determine whether there is a material issue to be tried not to resolve it.” Sommer v Federal Signal Corp., 79 NY2d 540, 554 (1992). And, the moving party’s failure to meet its prima facie showing requires denial regardless of the sufficiency of the opposing party’s submissions. Vega v Restani Constr. Corp., supra. “Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts (citations omitted).” Friends of Thayer Lake, LLC v Brown, 27 NY3d 1039 (2016). And, on such a motion, the court does not make credibility determinations when conflicting evidence is presented. Hall v Queensbury Union Free School Dist., 147 AD3d 1249 (3rd Dept 2017).

Generally to establish a prima facie fraudulent conveyance claim, a plaintiff judgment creditor must prove that a conveyance of property or a transfer of assets was made by a judgment

debtor without fair consideration, that a judgment was docketed or anticipated to be docketed against the transferor and that the transferor subsequently failed to satisfy the judgment.

Dempster v Overview Equities, Inc., 4 AD3d 495, 496 (2nd Dept 2004). A conveyance is deemed fraudulent if the transferor is rendered insolvent without regard to actual intent if the transfer is made without fair consideration. Stout Street Fund I, L.P. v Halifax Group, LLC, 148 AD3d 744, 747 (2nd Dept 2017). To establish actual intent to defraud, direct evidence of fraud is not required; rather, the transferor's fraudulent intent may be inferred from the circumstances surrounding the transfer, that is, by proving so called "badges of fraud", namely circumstances which commonly accompany such transfers so that their existence, if shown, give rise to an inference of intent to defraud. Matter of Steinberg v Levine, 6 AD3d 620, 621 (2nd Dept 2004). The relevant considerations include "(1) the close relationship among the parties to the transaction, (2) the inadequacy of consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance". PenPak Corp. v LaSalle Nat. Bank of Chicago, 240 AD2d 384, 386 (2nd Dept 1997). Fair consideration has two elements: the adequacy of what is given in exchange for the property transferred and the "good faith" of both the transferor and the transferee. Sardis v Frankel, 113 AD3d 135, 141 -142 (1st Dept 2014).

With this backdrop, the court identifies facts which are uncontroverted and proved:

1. Defendants Esat and Aysel were defendants in an action which later resulted in a \$500,000.00 judgment against them when in 2010 they conveyed the Greenfield, New York property to their son, Kaan;

2. Defendants Esat's and Aysel's only significant assets in 2010 were the Greenfield, New York property and a Greenwich, Connecticut property;
3. Defendants Esat and Aysel, when they sold the Greenwich, Connecticut property, used the proceeds (apparently \$410,000.00) to pay down the mortgage encumbering Kaan's and Kaan's wife's Connecticut residence;
4. Defendants Esat and Aysel conveyed the Greenfield, New York property to Kaan and received in exchange, a \$500,000.00 mortgage encumbering Kaan's Connecticut residence and Kaan's (and his wife's) promise memorialized in a note to pay them monthly installments of \$2,611.31 over their combined expected life expectancy of 24 years;
5. Defendants Esat and Aysel continued to reside in the Greenfield, New York property after the 2010 conveyance and defendant Aysel still does;
6. The transfer documents signed by all defendants, included a required RP 5217 form, stating that the transfer was one between family members and that no consideration was paid and included a legend stating as follows:

I certify that all of the items of information on this form are true and correct (to the best of my knowledge and belief) and I understand that the making of any willful false statement of material fact herein will subject me to the provisions of the penal law relative to the making and filing of false instruments.

7. Plaintiff's judgment against Esat and Aysel remains unsatisfied.⁷

Discussion

In considering the above facts and after reviewing the documents memorializing the 2010

⁷The judgment against Esat is now one against his estate.

conveyance and based on the defendant Kaan's affidavit in opposition and deposition testimony given in another action, the court finds plaintiff satisfies its threshold burden to warrant summary judgment in its favor. Several "badges of fraud" are established, specifically that the conveyance was one between close relatives; that the transferors were aware of the plaintiff's claims against them at the time of the property transfer in 2010; and that the transferors retained possession and control of the Greenfield property at all times after the transfer. Although defendants urge that fair consideration was paid or at a minimum, a triable issue on that point exists, close examination of the uncontroverted facts establishes that in exchange for ownership of the Greenfield property, defendant Kaan received, in addition to a property assessed at \$433,000.00, some \$410,000.00 in cash from his parents albeit the funds were applied to reduce the mortgage on his residence. Thus, in exchange for Kaan's promise to pay his parents up to \$500,000.00, he received the equivalent of \$843,000.00. Moreover, Kaan's obligation to pay his parents the full \$500,000.00 over 24 years is not an absolute one in that that obligation terminates and will be forgiven by its own terms upon the death of both parents. In addition, Kaan has not provided evidence which documents the payments that he claims he has made to his parents pursuant to the note. Moreover, Kaan's alleged ignorance at the time of the 2010 transfer of the existence of the plaintiff's then unliquidated claims against his parents and his belief, even if accepted as true, that the arrangement was one created to provide a stable monthly income for his parents in light of their conceded loss of their savings in the failed real estate development, is not dispositive under the established principles which governs Debtor and Creditor Law causes of action. Nor does Aysel's ignorance of her and her late husband's potential liability to the plaintiff's predecessor control the outcome of plaintiff's causes of action. The evidence as outlined above

establishes, as a matter of law that fair consideration was not paid by Kaan in exchange for the transfer to him of the Greenfield, New York property. The conclusion is inescapable that the transfer was a fraudulent one insofar as plaintiff is concerned, the effect of which frustrates its efforts to enforce and collect the judgment it now holds against defendant Aysel Aslansan.

Plaintiff's motion is granted, without costs, and it is adjudged and declared that plaintiff is entitled to attach or levy execution against the property described in a deed from Esat Aslansan and Aysel Aslansan to Kaan K. Aslansan dated September 9, 2010 and recorded on September 23, 2010 in the Saratoga County Clerk's Office as instrument no. 20100030754 to satisfy a judgment entered in its favor against defendant Aysel Aslansan, and the above referenced deed and a deed from Esat Aslansan and Aysel Aslansan to Kaan K. Aslansan dated January 13, 2012 and recorded on January 18, 2012 in the Saratoga County Clerk's Office as instrument no. 2012002133 are set aside and such conveyances are declared void to the extent necessary to satisfy the judgment of the plaintiff filed on October 22, 2012 in the Saratoga County Clerk's Office as instrument no. 2012039416, it is further

Ordered, that plaintiff is entitled to summary judgment on its fourth cause of action against defendants to recover its reasonable attorney's fees from defendants in an amount to be determined.

This constitutes the decision, order and judgment of the court. The original decision, order and judgment is returned to counsel for plaintiff. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for plaintiff is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision, order and judgment.

So Ordered and Adjudged.

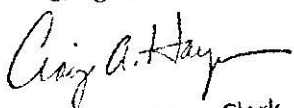
DATED: November 22, 2017
Saratoga Springs, New York



HON. THOMAS D. NOLAN, SR.
Supreme Court Justice

2017 DEC 1 AM 10:51
SARATOGA COUNTY
CLERK'S OFFICE
ALBANY, NY

ENTERED

ENTERED
Craig A. Hayner

Saratoga County Clerk