

Englander Capital Corp. v Zises
2018 NY Slip Op 31246(U)
June 19, 2018
Supreme Court, New York County
Docket Number: 156927/12
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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ENGLANDER CAPITAL CORP.,

Index No. 156927/12

Plaintiff,

DECISION & ORDER

-against-

SELIG ZISES, JAY ZISES, LAWCASH STRUCTURED SETTLEMENTS LLC n/k/a STRUCTURED SETTLEMENTS, LLC, STRUCTURED SETTLEMENT INVESTMENTS, LP, ASPYRE SETTLEMENT FUNDING, INC., STRUCTURED SETTLEMENTS LLC 2009, SSI-GP LLC a/k/a SSI-GP LLC a/k/a SSI-GP HOLDING LLC, MANGO CAPITAL, INC. f/k/a MANGOSOFT, INC., PLAINTIFF FUNDING CORP. a/k/a PLAINTIFF FUNDING HOLDING, INC. d/b/a LAWCASH, and "JOHN DOE 1" through "JOHN DOE 10," defendants being unknown to plaintiff and having or claiming an interest in or lien upon the subject assets,

Defendants.

-----x
JENNIFER G. SCHECTER, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

In October 2010, plaintiff Englander Capital Corp. (Englander) obtained a judgment against LawCash Structured Settlement LLC (LawCash) for \$1,030,502.85. After the judgment remained unsatisfied, Englander commenced this action against, among others, defendants Selig Zises, Jay Zises, Structured Settlements, LLC, Structured Settlement Investments, LP, Structured Settlements 2009, LLC, SSI-GP Holding, LLC and Plaintiff Funding Holding, Inc. (collectively Defendants), alleging that transfers made to them by LawCash rendered LawCash insolvent, were fraudulent and were made in violation of New York's Debtor and Creditor Law.¹

¹ The action was settled with and discontinued against Mango Capital Corp. (Mango) (Plaintiff's Memorandum in Support 04 [Sup Memo 04] n 1).

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Pursuant to CPLR 3212, the parties move for summary judgment against one another. Defendants' motion is granted.

Background

Englander wanted to sell Structured Settlements LP (Structured Settlements) to LawCash for \$1.8 million (Memorandum in Support of Motion 004 [Sup Memo 04] at 2). Jay and Selig Zises (the Zises) were two of the six owners of LawCash (*id.*).

In September 2006, the Zises loaned LawCash \$1.5 million to facilitate the transaction with Englander (Memorandum in Support of Motion 003 [Sup Memo 03] at 1, 5). On September 6, 2006, LawCash and the Zises executed a promissory note memorializing the loan (Secured Note), which was secured by a Pledge and Security Agreement dated the same day (Security Agreement) (Sup Memo 03 at 1; Affirmation in Support 003 [Sup 03], Exs 3, 4).

The Secured Note provided:

"[t]he principal and all accrued unpaid interest under the Note shall mature and be due and payable on the date . . . that is the earliest to occur of: (i) three (3) year anniversary of the date hereof, and (ii) the maturity of the Note upon acceleration of maturity following an Event of Default" (Sup Memo 03 at 5).

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Pursuant to the Security Agreement, LawCash granted the Zises "a security interest and continuing lien on all of its right, title and interest" in certain collateral, including all of LawCash's interests in Structured Settlements (Sup 03, Ex 4). The Zises filed a UCC financing statement giving notice of their secured interest two days later (Sup Aff, Ex 16).

LawCash proceeded with the purchase of Structured Settlements on September 6, 2006, paying Englander \$800,000 in cash and executing a \$1.0 million note (Unsecured Englander Note) for the balance of the purchase price. Significantly, Englander did not take any security interest on its note (Sup Memo 03 at 1, 6-7).

LawCash made two payments on the Unsecured Englander Note but by late 2007 or early 2008, it defaulted on its obligations to Englander. Although LawCash made regular monthly payments to the Zises beginning in early 2007, by September 2009, when the Zises' loan matured, LawCash defaulted on the Secured Note as well (Opposition Memorandum [Opp Memo] 04 at 9).²

² Payments to the Zises between 2007 and 2010 totaled nearly \$1.4 million (Sup Memo 04 at 6-7).

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On October 20, 2009, Englander commenced an action against LawCash and moved for summary judgment pursuant to CPLR 3213 based on LawCash's default on the Unsecured Englander Note (LawCash Action) (Sup Memo 04 at 2).

On November 2, 2009, the Zises sent a notice of default to LawCash demanding payment on the Secured Note (Sup 03, Ex 6). LawCash did not cure and the Zises' debt remained. On December 4, 2009, a few months after the Secured Note matured, the Zises informed LawCash that "the Event of Default was continuing" and advised that the amount that was outstanding was \$495,333.26 (Sup 03, Exs 7, 39; Sup Memo 03 at 10). The Zises proposed "to accept the Collateral, including [LawCash's interest in Structured Settlements in full satisfaction of LawCash's] obligations under the Secured Note, as permitted by the terms of the [Security Agreement]" (Sup Memo 03 at 10; Sup 03, Exs 39, 40). The Zises sent a copy of the proposal to Englander as a courtesy (Sup 03, Ex 38). LawCash accepted the proposal and the Zises informed Englander on December 8, 2009 (Sup Memo 03 at 11; Sup 03, Ex 10).

Once the Zises foreclosed on their security interest in December 2009, LawCash became, for all intents and purposes, insolvent (Sup Memo 04 at 3). Defendants assert that the value of LawCash at the time was "de minimus because of the

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lack of anything going forward on an operational basis. By that point in time, [LawCash] had lost its line of credit, the CEO had been let go, and [LawCash] had lost its business to other structured settlement buy-out companies" (Sup Memo 03 at 11).

Ten months later, in October 2010, Englander was awarded a \$1,030,502.85 judgment against LawCash (LawCash Judgment) (Sup Memo 04 at 2; Affirmation in Support 004 [Sup 04], Ex 1). The LawCash Judgment went unpaid.

In 2012, Englander commenced this action against Defendants seeking to collect the amount of the LawCash Judgment and alleging that conveyances between LawCash and Defendants were fraudulent and violated the New York Debtor and Creditor Law. Englander points out that from the very outset--even before the LawCash Action was commenced--LawCash insisted that it should not be required to satisfy its obligations under the Unsecured Englander Note because it believed that Structured Settlements was not worth the \$1.8 million purchase price (Sup Memo 04 at 3-5). Englander alleges that to avoid payment, the Zises, who together had a controlling interest in LawCash, purposefully foreclosed on their security interest before Englander could obtain a judgment, leaving Englander ultimately unable to collect from

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LawCash (*id.* at 5-7). Englander maintains that the Zises used the Secured Note and alleged default as part of a deliberate sham "as a pretext for intentionally stripping LawCash of its assets and making sure that Englander never got paid" (*id.* at 6-7). Given the interconnecting relationships between LawCash and the Zises and the Zises' insider status, Englander asserts that it is entitled to summary judgment and a damages award sufficient to satisfy the LawCash Judgment as well as attorneys' fees.

Defendants, in contrast, contend that the Zises secured their loan in 2006 and were entitled to priority in being repaid (Sup Memo 03 at 15). They explain that Englander, as an unsecured second-line creditor, could not avail itself of any right to pursue LawCash assets prior to obtaining a judgment against LawCash and, by then, LawCash had no assets (*id.* at 16, 18). Defendants urge that they are entitled to a judgment because (1) a conveyance that satisfies a secured antecedent debt is not fraudulent, (2) there was no prejudice to Englander because, as secured parties, the Zises were entitled to be repaid first though they were insiders, (3) the consideration for the transfers was fair and (4) there was no actual intent to defraud Englander because the transfers

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satisfied a legitimate preexisting secured debt (Sup Memo 03 at 14-22).

Analysis

Plaintiff and Defendants agree that summary judgment is appropriate; they disagree on which party prevails. Because Defendants made a prima facie showing of entitlement to judgment as a matter of law and, in response, Englander did not establish that there is a triable issue, judgment is awarded to Defendants (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Defendants demonstrated that the transfers from LawCash were for fair consideration to satisfy a pre-existing secured debt and that there was no actual intent to defraud Englander.

Constructive Fraud

New York's Debtor and Creditor Law deems certain conveyances made "without fair consideration" to be fraudulent "irrespective of moral guilt and intent" because of the tendency of these transactions to deceive, violate a confidence or injure interests that the law deems worthy of special protection (*Southern Indus. v Jeremias*, 66 AD2d 178, 182 [1st Dept 1978]; see also Debtor and Creditor Law [DCL] §§ 273 [conveyances by insolvent]; 273-a [conveyances by

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defendants in an action for money damages]; 274 [conveyances by party engaged in business]; 275 [conveyances by party about to incur debts]).

"Fair consideration" is provided when property is given "in good faith" to satisfy a pre-existing debt "as a fair equivalent therefor" (DCL § 272[a]). Whether "fair consideration" has been exchanged must be determined based on the particular facts of each case (*Commodity Futures Trading Commn. v Walsh*, 17 NY3d 162, 175 [2011]). Good faith is always essential.

Generally, an insolvent's transfer of property to an insider to satisfy an antecedent debt is presumed to lack good faith because it allows those aware of the insolvency to prefer themselves over others by devoting "the property of the corporation to the payment of their own debts" leaving nothing for other creditors (*Southern Indus.*, 66 AD2d at 183-184; *Farm Stores v School Feeding Corp.*, 102 AD2d 249, 254 [2d Dept 1984], *affd* 64 NY2d 1065 [1985]).³ The exception to that rule is when the transfer is to an insider who is legitimately a secured creditor. Under those circumstances, "no preference occurs . . . [because the] satisfaction of a secured debt

³ It is undisputed that LawCash was insolvent.

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causes no improvement of position" (*In re Northstar Dev. Corp.*, 465 BR 6, 14 [WDNY 2012]; see also *Korea Trade Ins. Corp. v Neema Clothing, Ltd.*, 2015 WL 363569 [SDNY 2015]; *Rebh v Rotterdam Ventures, Inc.*, 277 AD2d 659 [3d Dept 2000] [net effect of transfers was not to prefer any creditor over judgment debtor], *lv denied* 96 NY2d 705 [2001]). Indeed, plaintiff has not cited any precedent holding that a conveyance to repay a legitimately secured creditor, who happened to be an insider, was deemed fraudulent.

Here, there is no evidence that the Zises' security interest for their loan to LawCash, which partially funded the purchase of Structured Settlements, was a sham or was otherwise invalid. There is no indication that in making the secured loan and later in partially satisfying it, Defendants and LawCash did not act honestly, fairly and openly. In fact, plaintiff was on notice of the Secured Note by virtue of the UCC Financing Statement filed on September 8, 2006 and it could have secured itself but did not do so (Sup 03, Exs 16, 36, 38, 41). As holders of a legitimate secured obligation, Defendants were entitled to the assets that they received to satisfy their outstanding secured debt. Because plaintiff failed to show that LawCash's bona fide transfers--many of which were made before Englander even commenced the LawCash

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Action--were anything other than value being exchanged for the discharge of a secured debt, the conveyances were made in good faith and for fair consideration (see *In re Northstar Dev. Corp.*, 465 BR 6; contrast *Korea Trade Ins. Corp.*, 2015 WL 363569 [genuine issue of fact about status as a secured creditor precluded judgment as a matter of law]; *Priestly v Panmedix Inc.*, 18 F Supp 3d 486 [SDNY 2014] [inadequate consideration and lack of good faith justified summary judgment in judgment creditor's favor]).

Actual Fraud

New York Debtor and Creditor Law § 276 provides that every "conveyance made . . . with actual intent . . . to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors." Because intent, by its nature, can rarely be established through direct proof, the law recognizes certain "badges of fraud" giving rise to an inference of intent (*Wall St. Assocs. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). These "badges" include a close relationship between the parties to the alleged fraudulent transaction, inadequacy of consideration, the transferor's knowledge of the creditor's claim and

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inability to pay it as well as the transferor's retention of control over the property after the conveyance (*id.*).

Though there was a close relationship between LawCash and Defendants and other "badges" may be present, under the circumstances, plaintiff failed to meet its burden of establishing that Defendants engaged in "deception intentionally practiced to frustrate [Englander's] legal rights" (*Southern Industries, Inc.*, 66 AD2d at 181). To the contrary, Defendants proved that (1) the Zises loaned money to LawCash for the purchase of Structured Settlements from Englander, (2) the Zises contemporaneously took a valid security interest in LawCash's property, (3) LawCash made payments to the Zises consistently even before the LawCash Action was commenced, (4) the Zises notified LawCash of its default (and even informed plaintiff) soon after the Secured Note matured and (5) the consideration was adequate. LawCash and Defendants, moreover, were always candid about the existence of the loan and the obligation to repay it (*contrast Priestly*, 18 F Supp 3d at 503-504 [security agreement that post dated creditor's judgment was not bona fide and there were "overwhelming" indicia of fraud]).

In the end, Defendants established that the transfers were not fraudulent.

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Accordingly, it is

ORDERED that the motion for summary judgment (sequence 003) by defendants Selig Zises, Jay Zises, Structured Settlements, LLC, Structured Settlement Investments, LP, Structured Settlements 2009, LLC, SSI-GP Holding, LLC and Plaintiff Funding Holding, Inc. is GRANTED and the complaint is dismissed with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; it is further

ORDERED that plaintiff's motion for summary judgment (sequence 004) is DENIED; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 19, 2018



HON. JENNIFER G. SCHECTER