

Lyons v Straightfellow Farms, Ltd.

2018 NY Slip Op 31549(U)

February 7, 2018

Supreme Court, New York County

Docket Number: 153591/2016

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32
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NILSA LYONS RIOS AND LEON LYONS REJNCOS,

DECISION & ORDER
Index No. 153591/2016

Motion Seq: 002
ARLENE P. BLUTH, JSC

Plaintiffs,

-against-

STRAIGHTFELLOW FARMS, LTD., DANIEL ROLING AND
TAMARA LYONS CONCEPTION,

Defendants.

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The motion to dismiss is granted in part and denied in part.

Background

This familial dispute arises out of prior litigation in Puerto Rico between plaintiff Nilsa and her half-sister defendant Tamara. In 2003, plaintiffs started an action in Puerto Rico against Tamara and others in connection with the estate of their deceased father. Plaintiffs are brother and sister. Plaintiffs alleged in the Puerto Rico action that Tamara (and others) had embezzled millions of dollars from their father’s account before he died. Plaintiffs won a judgment against Tamara for over \$3 million in 2010. The judgment was affirmed on appeal in 2012 and a petition for writ of certiorari (made to Puerto Rico’s Supreme Court) was denied in 2013. Plaintiffs claim that they domesticated the judgment in 2015.

During discovery in the Puerto Rico action, plaintiffs discovered at Tamara’s deposition

(held in June 2007) that she had acquired an apartment on West 56th Street in Manhattan and that she later transferred ownership in this property to defendant Straightfellow Farms, Ltd. (“Straightfellow”) in 2006 for \$915,000. Straightfellow was a close corporation owned by both Tamara and her then-husband, defendant Daniel Roling (“Daniel”).

Plaintiffs maintain that Tamara testified falsely at her deposition because she never received any cash proceeds from Straightfellow in the apartment transfer. Plaintiffs allege that they learned this during a 2015 deposition of Tamara. Plaintiffs also claim that they were not aware that Tamara had transferred her stock interest in Straightfellow to Daniel in 2008 until Tamara’s 2015 deposition. Plaintiffs stress that these transaction were completed during the pendency of the Puerto Rico action.

This Court held this motion in abeyance while a traverse hearing was conducted relating to the service of Tamara. The Judicial Hearing Officer found that service on defendant Tamara was effective (NYSCEF Doc. No. 149). This Court now addresses the remaining portions of the motion.

Defendants move to dismiss on the ground that the statute of limitations bars the instant complaint. Defendants claim that plaintiffs knew about the alleged fraudulent acts- the real estate transfer from Tamara to Straightfellow and the transfer of Tamara’s ownership interest- almost 10 years before the instant complaint was filed. Defendants contend that plaintiffs did not do any further investigation until commencing the instant lawsuit.

Defendants also maintain that Straightfellow is a legitimate corporation- it has real estate holdings in New York and Puerto Rico. Defendants claim that Tamara needed the apartment transfer because she was having difficulty paying her mortgage. Defendants acknowledge that

Tamara surrendered her equity ownership in Straightfellow, but insist that it was to satisfy her obligations as a guarantor of certain loans from Daniel to Straightfellow.

Defendants insist that if plaintiffs had conducted proper discovery in the Puerto Rico action, then they would have discovered the stock transfer. Defendants claim that the trial in the Puerto Rico action took place in May 2010, well after the stock transfer took place.

Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]).

A motion to dismiss based on documentary evidence “may be appropriately granted only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

“[A] fraud -based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it. The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was possessed of knowledge of facts from which the fraud could be reasonably inferred” (*Sargiss v Magarelli*, 12 NY3d 527, 532, 881 NYS2d 651 [2009] [internal quotations and citations omitted]).

Apartment Transfer

The Court finds that allegations relating to the apartment transfer are time barred. Accordingly, the first cause of action and the portions of the fourth cause of action that relate to the apartment transfer are severed and dismissed.

Plaintiffs knew all of the relevant facts about the apartment transfer when Tamara disclosed it during a deposition held in June 2007 (*see* NYSCEF Doc. No. 56, ¶¶ 11-12 [Amended Verified Complaint]). At that point, the parties were involved in a contentious litigation in Puerto Rico where Tamara was accused of improperly taking millions of dollars from their father's estate. Clearly, plaintiffs were on notice that transferring ownership interest in an apartment worth nearly a million dollars might affect their ability to collect if Tamara was found liable. Plaintiffs failed to allege what other facts they needed to find out to begin questioning the legitimacy of this transaction.

Plaintiffs' insistence that they were not on inquiry notice fails. From the facts alleged in the amended complaint about the 2007 deposition, it could be reasonably inferred that the motive for the apartment transfer may have been to shield Tamara's assets. Plaintiffs' contention that Tamara may have invested the proceeds from the sale back into Straightfellow could have easily been discovered by asking Tamara (in 2007) what she did with the money made from the sale or asking to see the documents associated with the apartment transfer. Plaintiffs appear to admit this fact— paragraph 13 of the amended complaint states that “The clear inference from Tamara's testimony with respect to the Apartment Transfer was that she had sold the Apartment for a small profit and no longer had the net proceeds.” If that was plaintiffs' understanding in 2007, then why didn't they investigate that “inference” in 2007? Simply because plaintiffs now have a

different view about the apartment transfer (or are now interested in the details surrounding it) does not change the fact that they knew about it in 2007. These claims are barred by the statute of limitations.

Stock Transfer

With respect to the stock transfer, the Court finds that the statute of limitations does not bar these claims because plaintiffs allege that they did not know the material and relevant facts. Critically, although plaintiffs admit that they asked Tamara about her ownership stake in Straightfellow, that question was posed in 2007 when Tamara had shares in the corporation. Tamara responded accurately that she had shares in Straightfellow— it was not until 2008 that Tamara sold her ownership interest.

The purpose of plaintiffs' questioning in 2007 was, in part, to explore Tamara's assets. Once plaintiffs discovered that Tamara had an ownership interest in Straightfellow, there was no need to ask for more information because plaintiffs had identified an asset that might be used to satisfy a potential judgment. Plaintiffs allege that it was not until 2015 that they learned about the stock transfer. This Court cannot dismiss the causes of action relating to this transaction based on the statute of limitations because to do so would punish plaintiffs for not assuming that Tamara would get rid of her stock ownership. The Court cannot create a burden on plaintiffs to make repetitive discovery requests on the notion that Tamara would try to shield her assets. That is why, for example, under New York law, parties must amend or supplement discovery as new responsive material information becomes available (*see e.g.*, CPLR 3101[h]).

In 2007, when the parties were engaged in the Puerto Rico litigation in which plaintiffs

claimed Tamara owed them millions of dollars, plaintiffs learned about Straightfellow and that Tamara had an ownership interest in that corporation. Even though, in hindsight, it might have been prudent for plaintiffs to ask about Tamara's assets again during the pendency of the Puerto Rico litigation, the failure to do so does not mean plaintiffs were ever on inquiry notice about potential fraud. Disclosing ownership in a close corporation does not signal fraud.

Defendants also move to dismiss on the grounds that plaintiffs failed to state a cause of action and that the documentary evidence provided utterly refutes plaintiffs' claims.

Debtor and Creditor Law § 276/ Fraudulent Conveyance Claim

Debtor and Creditor Law § 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."

Debtor and Creditor Law § 276, "unlike sections 273 and 275, addressed actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency. Due to the difficulty of providing actual intent to hinder, delay, or defraud creditors, 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. 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" (*Wall St. Assocs. v Brodsky*, 257 AD2d 526, 529, 684 NYS2d 244 [1st Dept 1999] [internal quotations

and citations omitted}).

Here, plaintiffs identified 'badges of fraud' in the complaint sufficient to defeat the motion to dismiss. The stock transfer involved defendant Tamara, her then-husband (defendant Daniel) and Straightfellow—a close corporation with shares owned by only Daniel and Tamara (see e.g., NYSCEF Doc. No. 86 [Straightfellow board minutes from September 17, 2008]). Plaintiffs claim that Straightfellow is a shell entity, that the stock transfer was done to hide Tamara's assets from plaintiffs and that plaintiffs have been unable to satisfy their judgment against Tamara.

Although defendants insist that Tamara received market value in the stock transfer, that does not utterly refute the allegations in the complaint. Simply pointing to paperwork (such as the promissory notes making Tamara a guarantor of certain debt) fails to demonstrate, at the motion to dismiss stage, that there was no fraudulent conveyance. Otherwise, the production of these types of documents (such as the September 2008 minutes) would foreclose any claim about fraudulent conveyance. Under defendants' argument, they could disprove all claims based on a transaction that, facially, had some legitimate basis regardless of the surrounding circumstances. To embrace that logic here would require this Court to ignore the close relationship between Tamara, Daniel and Straightfellow as well as the fact that the stock transfer took place during the pendency of the Puerto Rico litigation. The Court would also have to ignore that the defendants created this paper trail themselves.¹ Plaintiffs have stated a cognizable cause of action under Debtor and Creditor Law § 276 with respect to the stock transfer.

¹Of course, that does not mean that Tamara did not have a legitimate purpose for the stock transfer. The Court raises this point merely to highlight that, on a motion to dismiss, the Court cannot view the documents submitted by defendants in isolation.

Debtor and Creditor Law § 273-a/Fair Consideration

Debtor and Creditor Law § 273-a provides that: “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.”

Here, plaintiffs have stated a cognizable cause of action with respect to the stock transfer. Despite the fact that defendants insist that there are no substantive allegations, plaintiffs need not prove their case at the pleadings stage. Plaintiffs allege that Tamara did not receive fair consideration in the stock transfer in 2008. Although defendants submit documentation purportedly showing that her debt obligations (Tamara was allegedly a guarantor for loans made by Daniel to Straightfellow) were released in exchange for her remaining shares in Straightfellow, that does not utterly refute plaintiffs’ claim about the lack of fair consideration.

As plaintiffs point out in opposition, there are questions about how Straightfellow used these loans from Daniel and why he made these loans in the first place. Underlying these queries is the fact that this was a close corporation with two shareholders: Tamara and Daniel, then husband and wife. Certainly, defendants were entitled to use Straightfellow to help them purchase real estate properties in New York and Puerto Rico. But simply observing corporate formalities does not eliminate the possibility that the stock transfer was done to make Tamara judgment proof. Discovery is needed to explore Straightfellow’s business transactions at that time and Daniel’s reasoning for forgiving Tamara’s debt obligations. Here, the Court only has snippets of the way in which Tamara and Daniel used Straightfellow to manage properties; the

Court does not have a full picture of why the stock transfer was done, especially given that it occurred during the Puerto Rico litigation.

Fraud

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, L.P. v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]).

The motion to dismiss is granted with respect to this claim, and the fifth cause of action is severed and dismissed. Plaintiffs failed to allege a material misrepresentation of fact relied upon by plaintiffs. Instead, the allegations suggest that Tamara and Daniel engaged in the apartment and stock transfer to conceal Tamara’s assets. But there is no allegation that Tamara ever lied about her ownership stake. In 2007, she had an ownership stake (and she disclosed it when asked) and she admitted to relinquishing her ownership in Straightfellow when asked about it in 2015 (*see* NYSCEF Doc. No. 56, ¶ 17).

Plaintiffs’ suggestion that Tamara’s alleged fraudulent scheme is exactly the type of act covered by a claim for common law fraud does not compel a different outcome. Plaintiffs do not allege that Tamara misrepresented her ownership stake in Straightfellow or that she lied about the stock transfer. Plaintiffs simply did not ask her about it between 2007 and 2015.

Summary

As stated above, the first and fifth causes of action are severed and dismissed. All

allegations relating to the apartment transfer are dismissed because plaintiffs knew about the transaction in 2007 and the instant action was not commenced until 2016. Plaintiffs cannot look at the same set of facts years later and decide that it now constitutes fraud. The facts here were known to plaintiffs in 2007: Plaintiffs knew that the apartment was sold by Tamara to Straightfellow while the Puerto Rico action was pending.

But the stock transfer is different. Plaintiffs knew in 2007 that Tamara had an ownership interest in Straightfellow— that fact no longer accurately represents reality and, therefore, claims based on the stock transfer are not time barred.

The Court emphasizes that it has not made a finding about the legitimacy of Straightfellow or the key transactions at issue here. Defendants have submitted documents showing that, at least on paper, they observed the corporate formalities. But those documents do not support a motion to dismiss based on documentary evidence because they were created by the defendants at some point in time. This is not a case where, for example, an independent non-party submits documents allegedly demonstrating legitimate transactions. The Court cannot discern motives, for purposes of a motion to dismiss, based on documents generated by parties to this action.

The Court also declines to turn the instant motion into one for summary judgment. The parties should engage in discovery relating to the stock transfer.

The third cause of action (for attorney's fees under the Debtor and Creditor Law) remains because the Court declined to dismiss the fraudulent transfer claim (*see CDR Creances S.A.S. v First Hotels & Resorts Inv., Inc.*, 153 AD3d 1208, 1209, 62 NYS3d 52 [1st Dept 2017]).

The Court also observes that although the initial complaint contained serious errors

(characterized by plaintiffs as inadvertent), the Court does not find sanctions appropriate. While those errors were glaring (plaintiff claimed that she did not know about the apartment transfer until 2015 and then changed her story in the amended complaint), they were simply mistakes contained in a complaint, and that complaint was subsequently amended. A mistake, even an egregious one, is not automatically sanctionable.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted only to the extent that the first and fifth causes of action as well as the portions of the fourth cause of action that relate to the apartment transfer are severed and dismissed; and it is further

ORDERED that the motion to dismiss is denied as to the remaining branches of the motion and defendants shall e-file an answer to the amended complaint pursuant to the CPLR.

This is the Decision and Order of the Court.

The parties are directed to appear for a status conference on June 19, 2018. By that time, the parties must have completed the paper discovery detailed in the preliminary conference order (*see* NYSCEF Doc. No. 153) and have either completed or have firm dates for the depositions.

Dated: February 7, 2018
New York, New York



ARLENE P. BLUTH, JSC
HON. ARLENE P. BLUTH