Sokolowsky v Droege
2020 NY Slip Op 33186(U)
September 28, 2020
Supreme Court, New York County
Docket Number: 655294/2017
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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ROBERT SOKOLOWSKY and GREEN CITY MEDIA a/k/a GREEN CITY MEDIA.COM,

DECISION AND ORDER

Plaintiffs,

Index No. 655294/2017

- v -

MOT SEQ 005

MADELINE DROEGE, individually and as trustee to MADELINE C DROEGE FAMILY REVOCABLE TRUST, EARTHALA INC. and MADELINE D'ANTHONY ENTERPRISES, INC.

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

The plaintiffs in this action, Robert Sokolowsky and Green City Media a/k/a Green City Media.com (collectively the plaintiffs), are judgment creditors of defendant Madeline D'Anthony Enterprises, Inc. (MDE), and claim that MDE fraudulently conveyed property to evade collection of a $118,754.72 judgment entered in favor of the plaintiffs for attorney's fees in connection with a prior ejectment action and a related holdover proceeding. The plaintiffs now move for summary judgment on the complaint and summary judgment dismissing the defendants' affirmative defenses and counterclaims. The defendants were precluded from presenting

evidence in their defense for failure to provide discovery (CPLR 3126), and have not submitted opposition to the motion. The motion is granted in its entirety.

II. BACKGROUND

Between May 2, 1998 and September 15, 2011, MDE was the owner of the building located at 279 Church Street in Manhattan. Defendant Madeline Droege (Droege) was the sole shareholder, officer, and director of MDE. On September 1, 2007, the plaintiffs became tenants in the building pursuant to a standard form loft lease with a one-year term that expired on August 31, 2008, and thereafter converted to a month-to-month lease.

In 2010, MDE commenced the summary holdover proceeding against the plaintiffs in the Housing Part of the Civil Court, New York County, Madeline D 'Anthony Enterprises, Inc. v Green City Media a/k/a Green City Media.com and Robert Sokolowsky a/k/a Robbie Sokolowsky, Index No. 052310/2010 (the holdover proceeding). The holdover proceeding was dismissed in favor of the plaintiffs pursuant to CPLR 409(b).

On July 21, 2010, MDE commenced the prior action for ejectment in the Supreme Court, New York County, seeking access to the plaintiff's apartment and a judgment of possession, Madeline D'Anthony Enterprises, Inc. v Robert (Robbie) Sokolowsky and Green City Media a/k/a Green City Media.com,

Index No. 109605/2010 (the prior action). On August 23, 2010, the plaintiffs answered that complaint and counterclaimed for a judgment declaring that the building was an interim multiple dwelling (IMD) under the Loft Law, entitling Sokolowsy to continued occupancy and attorneys' fees.

By order dated May 19, 2011, the court (Edmead, J.) granted the plaintiffs summary judgment on their counterclaim for a declaratory judgment and declared that the building was an IMD and that the plaintiffs were protected occupants under the Loft Law. Following that order, on September 15, 2011, Droege sold the building to non-party ZCAM, LLC (ZCAM) for $4,500,000. Simultaneously with the execution of the deed ZCAM paid Droege, individually, $703,000 and entered into a mortgage agreement wherein ZCAM agreed to pay $3,410,000 plus interest to MDE.

The plaintiffs allege that in June 2014, Droege became aware that the plaintiffs intended to move for summary judgment dismissing her complaint in the prior action and for attorneys' fees. On June 10, 2014, MDE liquidated the note by assigning it to Signature Bank for $3,417,567.30. On June 27, 2014, the plaintiffs moved for summary judgment dismissing MDE's complaint and on their counterclaim for attorney's' fees. The motion was returnable on July 18, 2014. However, the plaintiffs allege that, prior to the return date, Droege stripped MDE of its

assets in anticipation of an adverse judgment. Specifically, on July 9, 2014, Droege, on behalf of MDE, (i) withdrew $3,538,056.54 from MDE's bank account and deposited it in defendant Earthala Inc.'s (Earthala), of which Droege is the sole shareholder, bank account, (ii) withdrew $248,794.22 from MDE's bank account and deposited it into the Madeline C. Droege Family Revocable Trust's (the Trust) bank account, (iii) paid herself a $500,000 dividend as the sole shareholder of MDE, and (iv) closed all of MDE's bank accounts.

By order dated December 17, 2014, the court granted the plaintiffs' motion for summary judgment dismissing MDE's complaint and granting the plaintiffs summary judgment on their counterclaim for attorney's fees. On November 24, 2015, an inquest for attorneys' fees was held. Thereafter, on September 29, 2016, the plaintiffs were granted a money judgment against MDE in the amount of $118,754.72. The plaintiffs allege that no payments have been made toward the money judgment, as Droege's actions have rendered MDE judgment-proof.

On August 1, 2017, prior to the plaintiffs' alleged discovery of MDE's transfers to Earthala and the Trust, the plaintiff commenced the instant action as against Droege in her individual capacity seeking to recover on the judgment, the original complaint alleged violations of Debtor and Creditor Law

§§272, 274, 276 and attorney's fees pursuant to §276-a, and argued that, in light of the court should pierce the corporate veil and hold Droege individually liable.

On February 9, 2018, Droege answered the complaint, offering general denials and asserting affirmative defenses based upon, *inter alia*, the fact that Droege did not deal with the plaintiffs in her individual capacity, and counterclaims for damages and attorney's fees based upon the plaintiffs' bad faith attempt to collect from her individually.

By order dated December 6, 2018, sanctions were imposed against Droege pursuant to CPLR 3126 and 22 NYCRR 202.27 based upon her failure to participate in discovery and failure to appear. Pursuant to the order, Droege was precluded from offering evidence in support of her defenses at trial or in support of any dispositive motion.

On June 13, 2019, after discovery revealed the transfers by Droege and MDE to Earthala and the Trust, the plaintiffs moved for leave to amend the verified complaint to add MDE, Earthala, and the Trust as defendants and assert additional causes of action under the New York Debtor and Creditor Law (DCL). The court granted the motion.

On May 28, 2019, the plaintiffs filed their amended verified complaint alleging violations of DCL §§ 272, 273, 273-

a, 274, and 276, and asserting their right to recover attorney's fees under §276-a, as against all defendants. On August 18, 2019 the defendants answered the amended complaint offering a general denial and asserting 18 affirmative defenses, including, *inter alia*, that they are not a proper party to this action. The answers also each assert two counterclaims – one seeking attorney's fees incurred in defending this action and the second seeking unspecified damages arising from the plaintiffs' unspecified "bad faith."

Discovery in this action was completed and the Note of Issue was filed on October 28, 2019. This motion ensued.

III. DISCUSSION

A. Summary Judgment Standard

It is well settled that the movant on 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." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form, see Zuckerman v City of New York, 49 NY2d 557 (1980), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in

the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

B. Plaintiffs' Claims Under Debtor Creditor Law

To prevail on a motion for summary judgment on a cause of action under **DCL § 273**, a party must establish (i) that the debtors made a conveyance, (ii) that they were insolvent prior to the conveyance or rendered insolvent thereby, and (iii) that the conveyance was made without fair consideration. See Wall St. Assocs. v Brodsky, 257 AD2d 526 (1st Dept. 1999).

A plaintiff may satisfy the element that a transfer lacked fair consideration by proving that the transfer was not made in good faith. See **DCL § 272**. It is well settled that "preferential transfers to directors, officers and shareholders of insolvent corporations in derogation of the rights of general creditors do not fulfill the requirement of good faith." Matter of P.A. Bldg. Co. v Silverman, 298 AD2d 327, 328 (1st Dept. 2002).

Alternatively, under **DCL § 273-a** a plaintiff must establish (i) a transfer was made without fair consideration, (ii) at the time of the transfer, the conveyor was a defendant in an action

for money damages or had a judgment in such an action docketed against him; and (iii) a final judgment has been rendered against the conveyor that remains unsatisfied. See DCL § 273-a.

DCL § 274 further provides that conveyances are made without fair consideration when the person making it is engaged in 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 amount of capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent. See Bd. of Managers of Park Slope Views Condo. v Park Slope Views, LLC, 39 Misc. 3d 1221(A) (Sup Ct, NY County 2013).

DCL § 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. DCL § 276, unlike DCL §§ 273, addresses *actual* fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency. Id. Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, a plaintiff may 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." Pen Pak Corp. v LaSalle National Bank of Chicago, 240 AD2d 384, 386 (2nd Dept. 1997) quoting MFS/Sun Life Trust-High Yield Series v Van Dusen Airport Servs. Co., 910 F. Supp. 913 (SDNY 1995). 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; and retention of control of the property by the transferor after the conveyance." Wall St. Assocs. v Brodsky, supra.

DCL §276-a allows for the award of attorney's fees upon successfully voiding a transfer pursuant to DCL §§ 270-278.

Here, the plaintiffs submit, *inter alia*, the December 17, 2016 order granting summary judgment on the plaintiffs' counterclaim against MDE for attorney's fees in the prior action, the money judgment of $118,754.72 that was entered against MDE, the contract of sale, deed, note, mortgage, and mortgage agreement between MDE and ZCAM for the sale of the building, and the assignment of the mortgage agreement to Signature Bank for $3,410,000.

The plaintiffs also submit bank statements showing that MDE transferred $3,538,056.54 into Earthala's bank account and

$1,953,029.61 to the Trust on July 9, 2014, days before the return date for the plaintiffs' motion for summary judgment in the prior action. The plaintiffs further submit tax documents reflecting that Droege caused herself to be paid a $500,000 dividend in 2014, and bank records showing that MDE's bank accounts were reduced to zero and closed on July 9, 2014.

The plaintiff also submits Droege's deposition testimony, wherein she claims that she formed Earthala as a holding company to keep track on loans she personally made to MDE, and that in total she had personally made loans of $308,920 to pay MDE's real estate taxes, water bills, and other expenses, and $308,034 to buy out tenants in the building, equaling $616,954 in total. Droege also testified that she transferred the amounts from MDE to repay these loans, and that her $500,000 dividend was made without any consideration.

These submissions establish, *prima facie*, causes of action for violations of DCL §§ 272 and 273. Specifically, these submissions establish entitlement to relief under DCL § 273 to the extent (i) that MDE transferred approximately $6 million to its owner or owner-related entities, (ii) that it was rendered insolvent by the transfers, as its accounts were depleted and its bank accounts were closed thereafter, and (iii) that the transfers were not made for fair consideration inasmuch as the

transfers were purportedly made to repay approximately $600,000 in personal loans made by Droege. The submissions also demonstrate, at least with regard to the $500,000 dividend paid by MDE to Droege, entitlement to relief under DCL § 272 as the payment was a "preferential transfer[] to directors, officers, or shareholders of [an] insolvent corporation[] in derogation of the rights of general creditors." Matter of P.A. Bldg. Co. v Silverman, supra.

To the extent that the plaintiffs' submissions further show that MDE was about to engage in a business or transaction, *i.e.* repaying its debts, and the remaining property following the transfers to the owners or owner-related entities was insufficient to fully repay those debts, the plaintiff has also established entitlement to relief under DCL § 274.

The plaintiffs' submissions also establish their entitlement to summary judgment pursuant to DCL § 273-a. Specifically, the plaintiffs have demonstrated (i) that the transfers were made without fair consideration, for the reasons previously discussed herein, (ii) that transfers took place while an outstanding counterclaim for attorneys' fees was pending, and (iii) that a final judgment against MDE was rendered, and that it remains unsatisfied.

Furthermore, the plaintiffs' submissions are sufficient to establish, *prima facie*, that the conveyances were made with an actual intent to defraud the plaintiff, such that the plaintiff is entitled to relief pursuant to DCL § 276. The plaintiffs' submissions demonstrate that Droege transferred all of MDE's assets, totaling approximately $6 million, on July 9, 2014, (i) outside of the usual course of business, (ii) for inadequate consideration, as the transfers were purportedly to repay loans totaling $600,000, (iii) with the transferor knowing that the plaintiffs' motion for summary judgment on its counterclaim for attorneys' fees was returnable a week later, (iv) that MDE's transfers would render MDE unable to pay any claim against it, and, (v) Droege had full retention of control of the transferred monies, as they were transferred to her, her holding company Earthala, and her Trust. See Wall St. Assocs. v Brodsky, supra.

As none of the defendants opposed the instant motion, they fail to raise a triable issue of fact. Therefore, summary judgment is granted.

Furthermore, as the plaintiffs have established their entitlement to summary judgment on its claims under DCL §§272, 273, 273-a, 274, and 276, the plaintiffs are also entitled to an award of attorneys' fees pursuant to DCL § 276-a. The proper amount shall be determined by a referee.

C. Damages

With regard to remedy, the plaintiffs request that a money judgment in the amount of $118,754.72 be granted jointly and severally against the defendants, with statutory interest from September 29, 2016, the day the previous judgment was entered. "While, as a general rule, the creditor's remedy in a fraudulent conveyance action is 'limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance', a money judgment may properly be granted as a substitute for those assets in circumstances where, as here, the debtor's assets 'have been sold and commingled with those of [a transferee].'" Lending Textile, Inc. v All Purpose Accessories Ltd., 174 Misc. 2d 318, 320-21, (1st Dept. 1997) (internal citations omitted); see also Schwartz v Boom Batta, Inc., 137 AD3d (1st Dept. 2016). The plaintiffs' submissions demonstrate that the funds that defendants received have been comingled with their respective funds. Moreover, they have shown that MDE does not have any assets to pay the judgment. As such, a money judgment against Earthala and Droege, individually and as Trustee to the Trust, as transferees of MDE's assets, is proper.

D. Dismissal of Affirmative Defenses

The plaintiffs have demonstrated entitlement to summary judgment dismissing the defendants' affirmative defenses. The second, fourth, fifth, sixth, seventh, eighth, ninth, tenth,

eleventh, thirteenth, fourteenth, sixteenth, and seventeenth affirmative defenses are conclusory and unsubstantiated by any factual allegations or detail, warranting summary dismissal. See CPLR 3013; Scholastic Inc. v Pace Plumbing Corp., 129 AD3d 75 (1st Dept. 2015); Cohen Fashion Optical, Inc. v V & M Optical, Inc., 51 AD3d 619 (2nd Dept. 2008); Manufactures Hanover Trust Co. v Restivo, 169 AD2d 413 (1st Dept. 1991).

Additionally, of the defendants' remaining affirmative defenses, the first affirmative defense for lack of personal jurisdiction was waived as the defendants did not move to dismiss the complaint until more than 60 days after they served their answer. See Aretakis v Tarantino, 300 AD2d 160 (1st Dept. 2002); CPLR 3211(e). The defendants' twelfth and eighteenth affirmative defenses for assumption of risk and reduction of judgment pursuant to CPLR 4545(c) are improper as those defenses apply only to actions seeking to recover damages for personal injury, injury to property, or wrongful death. The fifteenth affirmative defense, for failure to join ZCAM as a necessary party is also without merit as ZCAM is not necessary to determine whether Droege attempted to avoid judgment by transferring MDE's funds. See Joanne S. v Carey, 115 AD2d 4 (1st Dept. 1986).

Therefore, the portion of the plaintiffs' motion seeking summary judgment dismissing the defendants' affirmative defenses is granted in its entirety.

E. Dismiss of Counterclaims

The plaintiffs establish their entitlement to summary judgment on the defendants' first and second counterclaims.

The first counterclaim seeks attorneys' fees incurred in defending this action. Generally, attorney's fees are merely incidents of litigation and are not recoverable absent a specific contractual provision or statutory authority. See Flemming v Barnwell Nursing Home and Health Facilities, Inc., 15 NY3d 375 (2010); Coopers & Lybrand v Levitt, 52 AD2d 493 (1st Dept. 1976). Here, clearly there is no agreement or contract provision between the plaintiffs and any of the defendants allowing for the defendants to recover attorneys' fees. Nor is there any applicable statutory authority providing for recovery of attorney's fees by the defendants. Thus, the defendants' first counterclaim is dismissed.

The defendants' second counterclaim, seeking damages arising from the plaintiffs' alleged "bad faith" states nothing more than that and, therefore, is subject to dismissal on that ground alone. In any event, the plaintiffs have demonstrated that Droege and the other defendants engaged in fraudulent

conveyances in violation of several provisions of the Debtor and Creditor Law, warranting summary judgment in the plaintiffs' favor on the complaint. As such, it cannot be reasonably argued that the plaintiffs' attempts to enforce a valid judgment against Droege or the other defendants were in bad faith.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the plaintiffs' motion for summary judgment is granted in its entirety; and it is further,

ORDERED that the Clerk shall enter judgment in favor of the plaintiffs and against the defendants, jointly and severally, in the sum of $118,754.72 plus costs and statutory interest from September 29, 2016; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount due to the plaintiff for an award of attorneys' fees pursuant to Debtor and Creditor Law §276-a; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel shall immediately consult one another and counsel for plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the plaintiffs shall serve a proposed accounting of the costs and attorneys' fees he incurred within 24 days from the date of this order and the defendants shall serve objections to the proposed accounting within 20 days from

service of plaintiffs' papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and, upon disposition of that motion, the plaintiffs may enter an amended judgment adding

the award of attorneys' fees and costs to the amount recovered, if any; and it is further,

ORDERED that the plaintiffs shall serve a copy of this order upon the defendants within 15 days of the entry of this order.

This constitutes the Decision, Order, and Judgment of the court.

Dated: September 28, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON