

Red Pine Hospitality Partners LLC v Shtromandel
2021 NY Slip Op 32730(U)
December 20, 2021
Supreme Court, Kings County
Docket Number: Index No. 522968/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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RED PINE HOSPITALITY PARTNERS LLC,
Petitioner, Decision and order

- against -

Index No. 522968/21

ALEC SHTROMANDEL, 611 DEGRAW LLC, 611
DEGRAW INVESTOR INC., GREENWICH STREET
EQUITIES, LTD., and YAKOV SHTROMANDEL,
a/k/a JACOB SHTROMANDEL,
Respondents, December 20, 2021

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PRESENT: HON. LEON RUCHELSMAN

The petitioner has moved pursuant to CPLR §5225 seeking the turnover of certain assets held by the respondent Alec Shtromandel. The respondents oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On April 9, 2021 this court granted the petitioner's motion seeking summary judgement in lieu of a complaint regarding a promissory note executed by the respondent Alec Shtromandel. On July 12, 2021 the court denied the respondent's motion seeking to void enforcement of the judgement on the grounds the note was usurious. Thereafter, the petitioner instituted this special proceeding seeking the turnover of money or property to the petitioner or the sheriff. The first cause of action seeks the turnover of funds held by 611 Degraw Investor Inc., and Greenwich Street Equities, Ltd., which are both wholly owned by Alec Shtromandel. The second cause of action seeks the turnover of pledged collateral to the sheriff, such collateral being the

shares in entities called 611 Degraw Investor Inc., and 611 Degraw LLC pledged as part of the loan the respondent obtained from the petitioner. The third cause of action seeks the turnover of such collateral to the petitioner. The fourth cause of action seeks the turnover of money to the petitioner. The fifth cause of action seeks to void the transfer of property located at 424 Dorchester Way, Manalapan, New Jersey on the grounds such transfer was fraudulent. The petition was amended on November 9, 2021 adding a cause of action to vacate transfers as violations of DCJ §276. Specifically, the amended petition asserts that in March 2018 the respondent Shtromandel assigned his interests in 611 Degraw Investor Inc., and 611 Degraw LLC to Victor Yenyk whereby Yenyk became the 100% owner of 611 Degraw Investor Inc., and a 44.1% owner of 611 Degraw LLC. The amended petition alleges the assignment was fraudulent. The amended petition also seeks a declaratory judgment that any transfers to Yenyk were void. Lastly, the amended petition seeks an injunction preventing the respondents from further transferring the property.

The respondents oppose the petition and presented four arguments. First, the respondents argue the relief must be denied because it is not supported by any affidavit of a party. Next, the respondents argue the plaintiff has failed to present any evidence of a perfected security interest in 611 Degraw LLC.

Next, the respondents argue the purported sale of the respondent's interest on August 12, 2021 was a nullity. Lastly, concerning the transfer of 424 Dorchester, the respondents argue such transfer was proper.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021]).

Preliminarily, an attorney affirmation that is not based upon personal knowledge is insufficient to meet a prima facie burden establishing an entitlement to summary judgement as a matter of law (United Specialty Insurance v. Columbia Casualty Company, 186 AD3d 650, 129 NYS3d 510 [2d Dept., 2020]). The motion seeking the turnover is based solely on the petition itself as well as various accompanying documents. In Danford v. City of Syracuse, 2012 WL 4006240 [N.D.N.Y. 2012] the court held that an attorney verification utilized for purposes of CPLR §3020(d)(3) does not thereby transform the pleading into an affirmation sufficient to satisfy summary judgement. This is

particularly true, the court noted, where the attorney does not have personal knowledge of the facts of the case but rather second hand knowledge. The verification of the attorney in this case accompanying the verified amended petition dated November 9, 2021 states that "the basis of my knowledge is the file maintained by my office in connection with this matter" (see, Attorney Verification, ¶ 3). Indeed, plaintiff's counsel cannot have personal knowledge of the fact unless such counsel was present when the events giving rise to the petition occurred (Danford v. City of Syracuse, supra, Footnote 5).

Turning to the substantive issues raised, for the sake of completeness and to provide a full record of the arguments raised, there is no question the respondent Alec pledged his ownership of shares in 611 Degraw LLC. The petitioner argues that pursuant to the pledge agreement the pledged collateral would be delivered to the petitioner upon an event of default and this does not involve the Uniform Commercial Code at all, thus, there can be no analysis whether the closing date was commercially reasonable. However, Section 3(d) of the Pledge Agreement states that "upon the filing of all appropriate financing statements under the Code, all steps necessary to create and perfect the security interest created by this Pledge as a valid and continuing first lien on and first perfected security interest in the Pledged Collateral in favor of Lender,

prior to all other liens, security interests and other claims of any sort whatsoever will have been taken. This Pledge and the security interest created hereby are enforceable as such against creditors of and purchasers from Grantor except with respect to liens or other interests accorded a superior priority as a matter of law" (id). Thus, notwithstanding the argument no such UCC sale was scheduled or is even necessary there are questions whether, as petitioner argues, that "the UCC is not implicated at all" (see, Reply Affirmation, ¶ 44).

In order to succeed upon a cause of action pursuant to Debtor Creditor Law §276 it must be alleged the transferor made a transfer with actual intent to hinder, delay or defraud either present or future creditors (Piccarreto v. Mura, 51 Misc3d 1230(A), 2016 WL 3201863 [Supreme Court Monroe County 2016]). The petition has failed to establish there are no questions of fact whether the transfer that occurred prior to the date of the loan was done with the intent to defraud future creditors. The petition alleges the respondent Alec made false statements concerning his ownership of 611 Degraw LLC. In the pledge agreement he asserted he owned 47% of that company and in this action has presented evidence those ownership interests were assigned to Yenyk previously. While those assertions if true could support a fraud claim they cannot standing alone establish the intent to defraud future creditors such as the petitioner and

thus constitute a fraudulent transfer. There are surely questions of fact whether at the time the ownership interests were assigned there was the requisite intent to defraud any future creditor or whether any fraudulent representations in the pledge agreement and other documents were the result of new schemes. The petitioner also asserts the assignment never even occurred and was contrived merely to avoid the turnover efforts of this lawsuit. If that is true then that fact surely undermines the entire claim for a fraudulent transfer since while asserting the respondent is lying about the transfer is surely improper behavior, it concedes that no such transfer occurred and that consequently, there can be no cause of action pursuant to Debtor Creditor Law §276.


Lastly, the petitioner has conceded the transfer of the Dorchester property may not have been fraudulent and that further discovery is necessary.

Therefore, at this juncture the court cannot entertain the motion seeking summary judgement, both for procedural and substantive grounds and such motion is denied without prejudice at this time

So ordered.

ENTER:

DATED: December 20, 2021
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC