

Maddock v Stanza

2023 NY Slip Op 33147(U)

August 30, 2023

Supreme Court, Suffolk County

Docket Number: Index No. 609231/2023

Judge: Carmen Victoria St. George

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.

**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

**BARBARA MADDOCK as PERSONAL
REPRESENTATIVE OF THE ESTATE OF RICHARD
MADDOCK, and BARBARA MADDOCK,**

**Index No.
609231/2023**

Plaintiffs,

**Motion Seq:
001 MG**

-against-

DONNA STANZA and EUGENE SANTA CATTARINA,

Defendants.

x

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	4-12
Answering Papers.....	14-21
Reply.....	22-23

The defendants seek dismissal of the seventh cause of action for fraudulent conveyance brought pursuant to former Debtor and Creditor Law §§ 273, 274, 275, 276, and 276-a and against SCDS, Stanza and Cattarina. Plaintiffs oppose the requested relief.

The seventh cause of action in the second amended complaint was severed from the action identified by Suffolk County Supreme Court Index No. 601995/2017 by Order of this Court granted on March 21, 2023. This action grows out of the 2017 action that arises from a fire that occurred at the residential real property known as 62 North Captains Neck Lane, Southampton, New York, on January 5, 2017. Stanza and Cattarina’s company, SCDS, developed the property and built the residence located thereon, and SCDS sold it to the plaintiffs. The plaintiffs closed on this property on January 4, 2017. It is further undisputed that the plaintiffs did not have homeowners’ insurance on the subject Captains Neck Lane residence/property at the time that the fire occurred on January 5, 2017.

When deciding a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must afford the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiffs the benefit of every favorable inference (*see Marcantonio v Picozzi III*,

70 AD3d 655 [2d Dept 2010]). The sole criterion on a motion to dismiss is “whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cognizable action at law a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Miglino v. Bally Total Fitness of Greater New York, Inc.*, 20 NY3d, 342, 351 [2013]; *Leon v Martinez*, 84 NY2d 83, 87-88, [1994]; *Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; *Gershon v Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]).

“A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a)(7) [citation omitted]” (*Sokol, supra* at 1181). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it...dismissal should not eventuate” (*Guggenheimer, supra* at 275; see also *Vertical Progression, Inc. v. Canyon Johnson Urban Funds*, 126 AD3d 784 [2d Dept 2015]; *YDRA, LLC v. Mitchell*, 123 AD3d 1113 [2d Dept 2014]; *Korsinsky v. Rose*, 120 AD3d 1307 [2d Dept 2014]). Here, in opposition, the plaintiffs submit the “affidavit” of Barbara Maddock, an e-mail from Donna Stanza, a few excerpts from Donna Stanza’s deposition transcript taken in connection with the 2017 action, a single bank statement for SCDS from 2017, an SCDS bank statement from 2023, a negotiated check and SCDS’ Schedule K-1’s.

The seventh cause of action alleges constructive and actual fraudulent conveyance. Violations of Debtor and Creditor Law former §§ 273 and 275 need not be pleaded with heightened particularity pursuant to CPLR 3016(b) (*JDI Display Am., Inc. v Jaco Electronics, Inc.*, 188 AD3d 844, 845 [2d Dept 2020]). “A finding of constructive fraud pursuant to section 273 may thus be predicated upon proof of insolvency and lack of fair consideration, without a showing of actual motive or intent to defraud” (*American Panel Tec v. Hyrise, Inc.*, 31 AD3d 586, 587 [2d Dept 2006]). Section 276 provides that “every conveyance made with actual intent to hinder, delay or defraud either present or future creditors is fraudulent;” however, intent need not be proven by direct evidence, but may be inferred from the surrounding circumstances that may constitute “badges of fraud” giving rise to an inference of intent (*Id.*).

Here, the seventh cause of action pleads a number of undisputed allegations, namely that Stanza and Cattarina are co-equal (50%) members of SCDS, the company that purchased the land and developed it with the residence where the fire occurred, that SCDS’s asset was the land and improvements at the subject property on North Captains Lane, that the defendants each made an initial capital contribution of \$551,000.00 to purchase the vacant land and that they made additional capital contributions to build the residence/develop the land, that defendants knew about the fire on the night that it happened, that the plaintiffs’ counsel sent SCDS a preservation letter fifteen days after the fire, that the local fire marshal was investigating the fire as of January 28, 2017, and that SCDS was served with the complaint in the 2017 action on February 8, 2017. It is further alleged that “on some undisclosed date after the fire,” certain conveyances of monies from SCDS were made to Stanza and Cattarina as “profit distributions” of \$375,000.00 each. The complaint cites to the SCDS Operating Agreement that calls for distribution of capital contributions to the members until repaid in full and “thereafter any remaining balance shall be

distributed [as profit]. . .” According to the complaint that relies on the Operating Agreement and defendant Stanza’s deposition testimony provided in the 2017 action, the total cost of purchasing the land and constructing the house (\$1,102,000.00 plus \$1,600,000.00) and the total profit distribution of \$750,000.00 means that “at a minimum, Stanza and Cattarina received transfers or conveyances from SCDS of no less than \$3,370,000.00, and likely substantially more.” The factual basis for the conclusory claim that the defendants received “likely substantially more” is not alleged in the second amended complaint.

Inasmuch as the house was sold to the plaintiffs on January 4, 2017 for the total purchase price of \$3,750,000.00 and SCDS/Stanza/Cattarina no longer held title to the subject property, SCDS is apparently accused of acting in accordance with its own Operating Agreement as cited to by plaintiffs in the second amended complaint. Moreover, the second amended complaint alleges that SCDS was a “single-asset real estate company whose sole asset was [the subject property and premises];” therefore, once the sale was consummated, SCDS would be expected to act in accord with its Operating Agreement and distribute monies to Stanza and Cattarina.

The complaint further alleges that the plaintiffs are creditors of SCDS, but there is no liability imposed upon SCDS to date in the 2017 action on the claims of negligence and breach of warranty contained therein, making the claim against Stanza and Cattarina unliquidated and not a probable liability for purposes of DCL § 273. Furthermore, in the 2017 action, SCDS initially had seven co-defendants that eventually swelled to ten co-defendants. Moreover, the claims in the 2017 action have been discontinued against a few of those defendants as the result of settlements, thereby rendering the amount of any potential debt wholly speculative as against the Stanza and Cattarina defendants since SCDS would not be solely liable for any recovery in the 2017 action.

In an attempt to supplement their pleading, as noted, plaintiffs submit the “affidavit” of Barbara Maddock. Apparently, Barbara Maddock no longer resides in New York, but in the State of Florida. The affidavit was sworn to in Florida although the notary has failed to indicate whether Barbara Maddock was personally known to him or whether Maddock provided satisfactory evidence of her identity; therefore, the purported affidavit does not even comply with Florida law requiring the notary to certify the type of identification, either based on personal knowledge or other form of identification, upon which he or she relies (*Title X, Chapter 117, § 117.05*).

In addition, Maddock’s purported out-of-state affidavit is not accompanied by a certificate of conformity as required by CPLR § 2309 (c). Accordingly, it is inadmissible, as are the annexed documents to which it refers (*PRA III, LLC v. Gonzalez*, 54 AD3d 917 [2d Dept 2008]; *Katz v Eastern Constr. Dev. & Custom Homes, Inc.*, 2011 NY Slip Op 31440 [U], *aff’d* 100 AD3d 830 [2d Dept 2012]).

The dual deficiencies in the purported affidavit of Barbara Maddock renders it entirely inadmissible, and it will not be considered by this Court, leaving only the affirmation of counsel, which is not evidence, nor can counsel’s affirmation serve to cure any defects in the second amended complaint.

Even if this Court were to consider the document purporting to be an affidavit from Barbara Maddock, there is no foundation laid for her sweeping conclusions that the assets of SCDS were drained by Stanza and Cattarina as Maddock does not attest to any type of financial training or expertise. Mainly, Maddock's "affidavit" reiterates the allegations made in the second amended complaint, stringing together the chronology of the fire and the negotiating of the \$1,748,544.96 check by Cattarina on or about January 9, 2017, four days after the fire, the preservation letter, and the commencement of the 2017 action. Maddock also claims to have reviewed the Schedule K-1's issued to Stanza and Cattarina confirming the distributions they received from SCDS in 2017 "of \$1,748,769 each, resulting in a profit of \$377,227 each." Maddock offers her "analysis" apparently in an effort to supplement the seventh cause of action alleging constructive and actual fraudulent conveyance, but in effect, her submissions serve only to underscore that SCDS, a single-asset real estate company, acted in accordance with its own Operating Agreement after title passed to the plaintiffs. In fact, the K-1 statements reflect that the partnership in SCDS remained continued through 2022, meaning that the operations of SCDS continued for at least five years after the conveyances in 2017. Maddock fails to allege any factual support for her allegation made in the second amended complaint that Stanza and Cattarina left SCDS with unreasonably small capital/insolvent.

By attempting to supplement their allegations made pursuant to DCL 273, 274 and 275 with a single bank statement from January 2017, the plaintiffs' allegation that the transfers left SCDS without the ability to pay a current or future debt is nothing more than a conclusory statement. The plaintiffs have clearly been provided the opportunity to engage in discovery in the context of the 2017 action, obtain SCDS financial records, and take the deposition of Donna Stanza and yet, what is annexed to the purported affidavit of Barbara Maddock is the sum total of the proof that plaintiffs want this Court to consider as supplementing the seventh cause of action alleged in the second amended complaint. The plaintiffs have not pled adequate facts concerning SCDS' financial condition before and after the fire, and so the claim that the transfers left SCDS unable to pay a current or future debt is wholly conclusory. Likewise, the allegation that the defendants "made the conveyances intending or believing that SCDS had or would incur debts beyond its ability to pay as they mature" is nothing other than a conclusion without any facts alleged related to defendants' intent (*In Re Operations NY, LLC*, 490 BR 84, 99 [Bankr, SDNY 2013]).

Furthermore, Maddock's conclusory statement that "these documents demonstrate beyond a shadow of a doubt, that within four days of learning of the fire, Stanza and Cattarina took every step to drain SCDS's bank account to avoid satisfying the potentially enormous liability faced from this litigation" is utterly insufficient to plead violations of the DCL. Her affidavit fails to constitute evidence as to the probability, at the time of the challenged conveyance, that a contingent liability will be imposed and, if so, in what amount (*Staten Island Savings Bank v. Reddington*, 260 AD2d 365, 366 [2d Dept 1999]). Notably, the seventh cause of action was not asserted against Stanza and Cattarina until late 2022, and so it could not have been a consideration in their minds/subjective belief/intent at the time of the conveyances in January 2017.

The claims of actual fraudulent conveyances asserted in the seventh cause of action also fail since they are not adequately pled, even if this Court were to consider the purported affidavit

of Barbara Maddock. The DCL §§ 276 and 276-a claims must be pled with sufficient particularity as required by CPLR § 3016 (b) (*Gaetano Dev. Corp. v. Lee*, 121 AD3d 838, 840 [2d Dept 2014]). Presumably, the plaintiffs rely upon the recitation of the five “bullet points” as “badges of fraud,” but there are no facts alleged in the second amended complaint supporting an actual fraudulent transfer since the seventh cause of action itself concedes that the distributions to Stanza and Cattarina were profit distributions from the sale of the home to plaintiffs. There are no facts alleged indicating that the transfers were anything other than made in the usual course of SCDS’ business, pursuant to its own Operating Agreement also cited to in the seventh cause of action.

Further as noted herein above, the plaintiffs have failed to adequately plead their assertion that these defendants had actual knowledge of the Maddocks’ claims and that they knew they were being sued by plaintiff or that plaintiffs were imminently going to sue SCDS since the transfers occurred before any preservation letter was sent, and before any suit was commenced and served on SCDS, not to mention the fact that the plaintiffs’ claims against SCDS are unliquidated and not a probable liability for purposes of DCL. The remaining “badges of fraud” asserted by plaintiffs are insufficient to sustain the DCL 276 claim.

The defendants’ motion to dismiss the seventh cause of action as asserted against them pursuant to CPLR § 3211 (a)(7) is granted.

The foregoing constitutes the Decision and Order of this Court.

Dated: August 30, 2023
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [X] NON-FINAL DISPOSITION []