

Husband's Claim Against Wife for Actual Fraudulent Conveyance Survives

Justice Arthur M. Diamond

SL v. CD, Decided 11/28/07—

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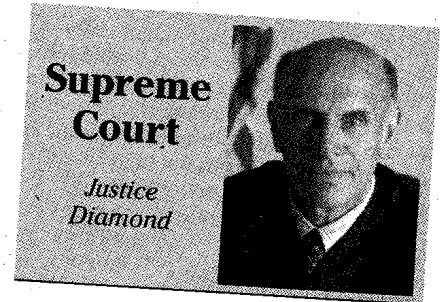
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The plaintiff and defendant PDL were married on December 27, 1996. Defendant's father, co-defendant CD has been the owner of various companies that own and operate successful automobile dealerships in the County of Nassau. On January 2, 2001, CD sold, transferred and conveyed 100 percent of the issued outstanding shares of stock in defendant CD Auto to defendant PDL for a purchase price of \$1,4000,00, with \$150,000 to be paid as

a down payment and the balance in 60 equal monthly installments of \$24,166 secured by 60 promissory notes. Plaintiff claims in the complaint that he provided the funding to defendant PDL to purchase said

company and to make the installment payments. In return, plaintiff claims that defendant, PDL, promised and agreed that her shares of CD Auto, and the other corporate defendants, All Island Motors Corp, and P&C Motors, LLC would be jointly owned by the two of them. Plaintiff claims that he gave a total of \$784,822.00 to the defendant PDL which were paid to CD. Plaintiff claims that defendant PDL and co-defendant CD



entered into similar agreements concerning the stock of All Island Motors, and P&C Motors. According to plaintiff's complaint, on or about June 29, 2004, the defendant-wife, PDL, intentionally defaulted in payments on the promissory notes, and transferred the stocks of the defendant corporations to CD, thereby relinquishing control and ownership without consideration in order to deprive plaintiff of the assets. Defendant-wife, PDL, commenced a matrimonial action against the plaintiff seeking a divorce on January 5, 2005. In the context of that matrimonial action, defendant states that she does not have ownership in the corporate defendants' CD Auto, All Island Motors, and P&C Motors for purposes of determining equitable distribution. Plaintiff has commenced this instant action claiming that he has a constructive trust over the defendant corporations, and has moved to set aside the conveyances alleging that it was fraudulent under Article 10 of the Debtor Creditor Law.

Defendants CD, CD Auto, All Island Motors, and P&C Motors have moved for an order dismissing the complaint in its entirety pursuant to CPLR §3211 (a) (1), a defense based upon documentary evidence, and for failure to state a cause of action under CPLR §3211 (a) (7).

In a defense based upon documentary evidence, the documentary evidence presented by defendants must "utterly refute" the plaintiff's allegations and establish a defense as a matter of law. [*Goshen v. Mutual Life Ins. Co. Of N.Y.*, 98 N.Y.2d 314]. The documentary evidence must be such that it resolves all factual issues as a matter of law and definitively disposes of plaintiff's claim (*Teitler v. Max J. Pollack & Sons*, 288 A.D.2d 302).

In deciding a motion to dismiss for failure to state a cause of action, the complaint is to be liberally construed, and the court is required to view every allegation of the complaint as true, and resolve all inferences in favor of plaintiff regardless of whether plaintiff will ultimately prevail on the merits. Each cause of action set forth in the complaint must contain factual allegations, and not legal conclusions, establishing elements of same. [*Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300; *Grand Realty Co. V. City of White Plains*, 125 A.D.2d 639].

The first cause of action alleging a constructive trust is dismissed as to defendants CD, CD Auto, All Island Motors, and P&C Motors pursuant to CPLR §3211(a) (1).

There are four elements to a constructive trust. In order for a plaintiff to prevail on such a claim, he must show 1) a confidential or fiduciary relationship; 2) a promise; 3) a breach of that promise; and 4) defendants' unjust enrichment as a result of his or her actions. [*Potter v. Davis*, 275 A.D.2d 961]. While the first cause of action clearly sets forth an action for a constructive trust against the defendant-wife, the court finds that plaintiff has failed to allege a cause of action against the moving defendants. Assuming that plaintiff's allegations are true that the transfer of stock and ownership of the corporations by the defendant PDL to her father was without plaintiff's knowledge in order to deprive plaintiff of equitable distribution at the time of divorce, the essential elements for imposing a constructive trust upon that transfer against the moving defendants are not present. Plaintiff does not allege any Facts establishing a confidential or fiduciary relationship with the moving defendants, nor was there any promise made by the moving defendants to plaintiff regarding ownership in the corporations. The plaintiff is not listed as a buyer on the Stock Purchase Agreement. [Notice of Motion, Exhibit B].

In regards to the second cause of action under DCL §273, the third cause of action under DCL §274, and the fourth cause of action under DCL §275; alleging a constructive fraudulent conveyance of the stock of the corporations where the conveyance is made without fair consideration by a person (1) who is insolvent or will be rendered insolvent (DCL §273); or (2) who is engaged in a business for which capital is unreasonably small (DCL §274), or (3) who believes her debts beyond his/her ability to pay (DCL §275); the causes of actions are hereby dismissed pursuant to CPLR §3211 (a) (7).

There are insufficient factual allegations set forth in the three causes of actions to establish the requisite elements of that particular cause of action to establish a constructive fraudulent conveyance.

In the second cause of action, plaintiff has failed to allege any Facts showing that defendant PDL was insolvent or rendered insolvent at the time of the conveyances. (*Galgano v.*

Ortiz, 287 A.D.2d 688). The third cause of action fails to set forth Facts that defendant PDL was engaged in a business for which capital is unreasonably small under DCL §274, other than the legal conclusory statement as to such in the complaint. Also, the fourth cause of action fails to set forth Facts showing that defendant PDL made the conveyances intending or believing that she will incur debts beyond the ability to pay as they mature pursuant to DCL §275.

However, the plaintiff has set forth a sufficient cause of action for an actual fraudulent conveyance pursuant to DCL §276 under the sixth cause of action of the complaint. 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." [*McKinney's Cons. Laws of N.Y.*, Vol. 12, DCL §276, at 352].

The defendants' contention that the plaintiff is not a creditor is without merit. A creditor is defined under section 270 of the Debtor and Creditor Law as "a person having any claim, whether matured, or unmatured, liquidated, or unliquidated, absolute, fixed or contingent." [*McKinney's Cons. Laws of N.Y.*, Vol. 12, DCL §270, at 284] A spouse is a creditor to his/her spouse as to any present or future support payments or equitable distribution of assets in a pending divorce even though the claim may be unmatured and unliquidated at the time of the conveyance. [*Kasinski v. Questel*, 99 A.D.2d 396, where transfer of marital residence by husband to girlfriend in contemplation of divorce was fraudulent under the Debtor and Creditor Law; *Saldano v. Saldano*, 66 A.D.2d 839, whereby husband's transfer of three parcels of real estate to his brothers in contemplation of divorce was fraudulent under the Debtor and Creditor Law since wife was a creditor of necessities and future alimony award]

The factual allegations set forth in the complaint, if true, show an actual intent by the defendants to take part in a scheme to hinder, delay, or defraud plaintiff, as a creditor, pursuant to DCL §276, from receiving his portion of the businesses, or a credit for same, as equitable distribution if defendant-PDL was the actual owner or partial owner of said businesses during the marriage. Debtor and Creditor Law §276, unlike sections DCL §273, §274 and §275, addresses actual fraud, and not constructive fraud, and does not require proof of unfair consideration or insolvency. Due to the difficulty of proving 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. [*Wall Street Associates v. Brodsky*, 257 A.D.2d 526; See, *AMP Services Ltd. v. Walanpatrias Foundation*, 34 A.D.3d 231]. Some of the circumstances to be considered are (1) a close relationship between the parties to the alleged fraudulent transaction, (2) a questionable transfer not in the usual course of business; (3) inadequacy of the consideration; (4) transferor's knowledge of the creditors claim and the inability to pay it; and (5) retention of control of the property by the transferor after the conveyance. [*Wall Street Associates v. Brodsky*, at 529].

Here, if the plaintiff's allegations in the complaint are proven true at trial by clear and convincing evidence: the intentional default of the promissory notes by defendant PDL, the conveyances of ownership of the corporations by the defendant PDL to her father CD, the conveyances were made six months before the commencement of the matrimonial action made in anticipation of filing divorce to prevent plaintiff from recovering his share of the equitable distribution of these alleged marital assets, and defendant PDL has still maintained control of said entities with her co-defendant father, CD, are all circumstances constituting "badges of fraud." [See, *Kasinski*, supra, at 397-398].

The documentation provided by defendants does not "utterly" refute plaintiff's claim as to establish a complete defense to this cause of action.

The defendants motion to dismiss the remaining causes of action pursuant to CPLR §3211 is denied in its entirety.

Accordingly, the first, second, third, and fourth causes of action in the complaint are hereby dismissed as against the defendants CD, CD Auto, All Island Motors, and P&C Motors.

This constitutes the decision and order of this Court. ■