

Eastern Consol. Props., Inc. v Lynbrook Sunrise Realty LLC

2016 NY Slip Op 30711(U)

April 13, 2016

Supreme Court, New York County

Docket Number: 653531/2015

Judge: Shirley Werner Kornreich

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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EASTERN CONSOLIDATED PROPERTIES, INC.,

Index No.: 653531/2015

Plaintiff,

DECISION & ORDER

-against-

LYNBROOK SUNRISE REALTY LLC, 5 EAST 59
REALTY HOLDING COMPANY, LLC, and WORLD
PROPERTIES LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Plaintiff Eastern Consolidated Properties, Inc. (ECP) moves, pursuant to CPLR 3212, for summary judgment against defendants Lynbrook Sunrise Realty LLC (Lynbrook), 5 East 59 Realty Holding Company, LLC (5 East Realty), and World Properties, LLC (World Properties). Plaintiff's motion is granted, on default, for the reasons that follow.

This in an enforcement proceeding in which ECP seeks to set aside conveyances made by its judgment-debtor, defendant 5 East Realty. In 2013, ECP commenced an action in this court to recover an unpaid real estate commission from 5 East Realty. *See Eastern Consolidated Props., Inc. v 5 East 59 Realty Holding Co.*, Index No. 650503/2013 (Sup Ct, NY County) (Oing, J.). ECP prevailed in that action. On September 24, 2015, judgment in the amount of \$820,013.62 was entered in favor of ECP and against 5 East Realty (the Judgment). *See* Dkt. 1 at 18-19.¹ No portion of the Judgment has been paid.

¹ References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

5 East Realty's sole asset was a building located at 5 East 59th Street in Manhattan (the Property). 5 East Realty sold the Property as part of numerous like-kind exchanges, which resulted in net proceeds of \$19,382,091.20. However, the sole owner of 5 East Realty, non-party Alexander Demetriades, caused the proceeds to be paid to another of his companies, non-party Exchange Solutions, Inc. (Exchange), without any consideration being paid to 5 East Realty. Demetriades also is the sole owner of the purchaser of the Property, defendant World Properties. A portion of the net proceeds, \$3,783,390.79, was used to purchase the equity of defendant Lynbrook, title to which was placed in the name of World Properties. 5 East Realty is now judgment proof. ECP contends these transfers were fraudulent because they were made without consideration and rendered 5 East insolvent.

ECP commenced this action on October 23, 2015, by filing a complaint that asserts causes of action under Article CPLR 52 of the CPLR and New York Debtor and Creditor Law (DCL). ECP seeks the following relief:

(i) the conveyance by [5 East Realty] of the funds for the benefit of the purchase of a 100% interest in [Lynbrook] by [World Properties] should be set aside; (ii) this 100% interest in [Lynbrook] should be levied upon and attached by [ECP]; (iii) attorney's fees should be awarded to [ECP]; (iv) the 100% membership interest in [Lynbrook] should be sold at public auction by the Sheriff of New York County; and (v) the net proceeds of sale should be used, to the extent available, to satisfy the [Judgment] and to pay [ECP] for its reasonable attorney's fees incurred in this action.

See Dkt. 8 at 10.

On December 23, 2015, defendants, who are represented by counsel in this action, filed an answer to the complaint. *See* Dkt. 6. The answer contains boilerplate denials and affirmative defenses. On January 29, 2016, ECP filed the instant motion for summary judgment. Defendants did not oppose the motion. The motion, therefore, is granted.

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

ECP made the requisite *prima facie* showing. ECP submitted proof that the subject transfers violate DCL § 273 (constructive fraudulent conveyance) because they were made without any consideration to 5 East Realty and rendered it insolvent. *See CIT Group/Comm. Servs., Inc. v 160-09 Jamaica Ave. Ltd. P'ship*, 25 AD3d 301, 302 (1st Dept 2006) (“[a] conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration.”). Moreover, Demetriades

was on both sides of the transactions, which were accompanied by myriad badges of fraud, rendering the transfers intentionally fraudulent under DCL § 276. *See Wall St. Assocs. v Brodsky*, 257 AD2d 526, 529 (1st Dept 1999) (badges of fraud include “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.”); *see generally Amalgamated Bank v Schneider & Schneider, Inc.*, 2016 WL 740313, at *1-2 (Sup Ct, NY County 2016) (discussing DCL § 276 and badges of fraud). Defendants’ failure to oppose ECP’s summary judgment motion constitutes an admission of all material facts and a failure to meet its burden shifting obligations. *See Square Mile Structured Debt (ONE) LLC v Swig*, 2013 WL 6409967, at *4 (Sup Ct, NY County 2013) (“After a prima facie showing is made that a debtor transferred property with fraudulent intent, the burden shifts to the transferee to establish its receipt of the property for fair consideration and in good faith or without knowledge of the fraud”). Finally, since ECP prevails on its claim under DCL § 276, ECP also is entitled to its reasonable attorneys’ fees under DCL § 276-a. *See Apparel Corp. (Far E.) v Sheermax LLC*, 126 AD3d 413, 414 (1st Dept 2015). Accordingly, it is

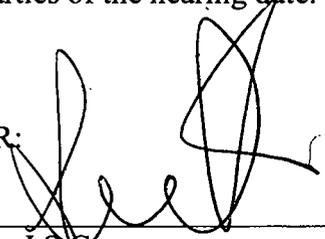
ORDERED that the motion by plaintiff Eastern Consolidated Properties, Inc. for summary judgment against defendants Lynbrook Sunrise Realty LLC, 5 East 59 Realty Holding Company, LLC, and World Properties, LLC is granted on default; and it is further

ORDERED that within 14 days of the entry of this order on the NYSCEF system, plaintiffs shall submit a proposed judgment on notice by e-filing and faxing a copy to Chambers; and it is further

ORDERED that plaintiff's claim for attorneys' fees is hereby severed and shall continue, and an inquest to compute such amounts is referred to a Special Referee to hear and report; and it is further

ORDERED that within 14 days of the entry of this order on the NYSCEF system, plaintiff shall file a Note of Issue, pay the appropriate fees, and serve a copy of this order with notice of entry, as well as a completed information sheet, on the Special Referee Clerk at sprefnyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referee's part for the earliest convenient date and notify all parties of the hearing date.

Dated: April 13, 2016

ENTER: 

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C