New York Law Journal

Eduard Gitlin individually, and on behalf of Kew Apartment Holdings, LLC, Plaintiffs v. Alex Chirinkin, Nellie Chirinkin, Arkady Pavlov, Alex Chirinkin, LLC, Alex Chirinkin Enterprises, LLC, Defendants, 012131/07

Justice Stephen A. Bucaria
012131/07
07-13-2011

Cite as: Gitlin v. Chirinkin, 012131/07, NYLJ 1202500464786, at *1 (Sup., NA, Decided June 29, 2011)

Justice Stephen A. Bucaria

Decided: June 29, 2011

ATTORNEYS

Plaintiffs Attorney: Law Offices of Barbara Lee Ford, Floral Park, NY.

Chirinkin Defenant's Attorney: Law Offices of Alvert Feinstein, New York, NY.

Defendant Pavlov's Attorney: Alston & Bird, New York, NY.

The following papers read on this motion:

Notice of Motion XX

Order to Show Cause X

Affirmation in Opposition XXX

Reply Affirmation XXX

Memorandum of Law XXXX

SHORT FORM ORDER

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Plaintiffs, Eduard Gitlin, individually, and on behalf of Kew Apartment Holdings, LLC,'s motion (seq. # 6) pursuant to CPLR §3212 for summary judgment is granted to the extent of liability as to defendant Alex Chirinkin on plaintiffs' claims for breach of fiduciary duty, fraud, and breach of contract and denied as to defendant Arkady Pavlov.

Defendant Arkady Pavlov's motion (seq. # 7) pursuant to CPLR §3212, granting him summary judgment dismissing all claims against him is denied.

Chirinkin each as having a 50 percent ownership interest (Ford Aff Ex. 14).

Kew was initially formed to buy and sell Coop Apartments in New York and those investments were overseen by Gitlin. Kew no longer has any New York property investments and there are no claims regarding those investments.

Chirinkin was the president and sole member of Alex Chirinkin Enterprises, LLC (hereinafter "ACE") (Ford Aff Ex 25, Chirinkin Depo p. 62, lines 6-25, p. 63 line 2 — p. 64, line 18). Chirinkin was also the owner of a Limited Liability Companies known as VSA LLC and Alex Chirinkin LLC (hereinafter "AC LLC"). Nellie Chirinkin, is the wife of Chirinkin and was a Notary Public who notarized documents on behalf of her husband in connection with his business activities (Ford Aff Ex. 24), and she also worked for Gitlin in his title business.

Arkady Pavlov is a dentist who, in addition to owning his own business, invested in real estate properties, in particular the Pahrump and Lucky Bucks properties.

On June 2, 1998 Kew acquired an undivided 50 percent interest in the Lucky Bucks property, the other owners were Modern Way Business Enterprises, Inc (hereinafter "Modem") and Feldbyn Roman (hereinafter "Roman"), who each held an undivided 25 percent interest in that property. The purchase price of the Lucky Bucks property was $522,900 (Ford Aff. Ex 19). Chirinkin managed Kew's Nevada property interests (Ford Aff Ex 25 Depo of Chirinkin, Giltin Aff ¶12). On August 3, 2001, title to the Lucky Bucks property was transferred to newly recorded owners listed as VSA (50 percent ownership), Modern (25 percent ownership) and Pavlov (25 percent ownership) (Ford Aff. Ex. 21).

Gitlin was not made aware of the transfer of the Lucky Bucks property and no consideration was provided to Kew for its 50 percent undivided ownership interest in the property or to Gitlin regarding his interest in Kew (Gitlin Aff ¶s 16 & 17). Pavlov paid a total of $58,286.74 for his 25 percent interest in the Lucky Bucks property, $40,000.00 as a down payment, the remainder in the form of monthly carrying cost payments from time he acquired his interest until the property was sold (Pavlov Aff. ¶11).

On July 9, 2002 the Lucky Bucks property (as owned by VSA, Modern and Pavlov) was sold to the United States Of America for $1,632,000.00 (Ford Aff. Ex. 22).

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Upon the sale of the Lucky Bucks property, Pavlov received a check for 25 percent of the profits (Geerchen Aff. Ex. E, Pavlov Aff ¶13). None of the proceeds or any consideration received from the transfer and subsequent sale of the Lucky Bucks property was given to Kew or to Gitlin as a member of Kew.

On July 9, 1998, Kew acquired a 20 percent interest in the Nevada Pahrump property and Alex Chirinkin Enterprises, LLC (hereinafter "ACE") acquired an 80 percent interest in the property. The purchase price of the Pahrump property was $1,146,050.00 (Ford Aff Ex. 20). As the only members of Kew, both Chirinkin and Gitlin executed escrow documents with regards to the purchase of the property (Ford Aff. Ex. 16).

On January 21, 2003, Pavlov wrote a check to VSA for a 25 percent interest in the Pahrump property (Pavlov Aff ¶14).

On August 25, 2003 the title to the Pahrump property was conveyed from ACE (80 percent interest) and Kew (20 percent interest) to AC LLC (75 percent interest) and Pavlov (25 percent interest) (Ford

Aff. Ex. 23). The Grant Bargain and Sale Deed, dated August 25, 2003, was signed by Chirinkin, as President of AC LLC and as president of Kew. Gitlin did not execute the deed nor was he listed on it as a member of Kew (Ford Aff Ex 23). Kew was not provided any consideration for its ownership interest in the Pahrump property.

On May 12, 2004, the Pahrump property was sold to BM Pahrump, LLC for $4,000,000.00 (Ford Aff. Ex. 25) and then resold on August 12, 2005, from BM Pahrump, LLC to Celebrate Properties, LLC for $15,800,000.00 (Ford Aff Ex 29).

None of the proceeds or any consideration received from the transfer and subsequent sales of the Pahrump property were provided to Kew for its 20 percent ownership interest in the property or to Gitlin as a member of Kew.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facia showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v. King,10 AD3d 70, 74 [2nd Dept. 2004], aff'd as mod., 4 NY3d 627 [2005], citing Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med Ctr., 64 NY2d851, 853 [1985]. "Failure to make such prima facia showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v. King, supra at 74; Alvarez v. Prospect Hosp., supra; Winegrad v. New York Univ. Med Ctr., supra. Once the movant's burden is met, the burden shifts to

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the opposing party to establish the existence of a material issue of fact. Alvarez v. Prospect Hosp., supra at 324. The evidence presented by the opponent of summary judgment must be accepted as true and must be given the benefit of every reasonable inference. See, Demishick v. Community Housing Management Corp., 34 AD3d 518, 521 [2nd Dept. 2006] citing Secof v. Greens Condominium, 158 AD2d 591 [2nd Dept. 1990].

Initially, the Court notes that in its decision, dated July 6, 2009, on discovery motions in this action, the following was stated.

"More particularly, with respect to the defendants' request for the individual plaintiff's tax return and bank statements in order to possibly prove that he was not a member of Kew at the time when the subject transactions took place, the individual plaintiff has demonstrated his membership in Kew, LLC on March 21, 1997, the date of the execution of the Kew LLC operating agreement. That document identifies Mr. Gitlin as having a 50 percent ownership interest in Kew LLC. That document imposes several obligations on the members, inter alia, a fiduciary obligation and responsibility to the LLC and its members. That document also requires some affirmative action to accomplish the withdrawal of a member and that must be accomplished "either in writing or at a meeting called for such purpose" (Article 1X, 9.1). The defendants have not produced any evidence of such an event, and without such event, there is a clear presumption that such membership continues.

Plaintiffs argue that based upon that decision (affirmed on appeal, see Gitlin v. Chirinkin, 71 AD3d 728 [2nd Dept. 2010]) of this Court, it is the law of the case, that Gitlin had a 50 percent ownership interest in Kew. However, even without that prior decision, the submitted evidence on this motion clearly establishes that Gitlin was a member of Kew with a 50 percent interest. The evidence relied upon includes but is not limited to: the Articles of Organization(Ford Aff Ex 13); Operating Agreement (Ford Aff Ex 14) both dated March 21, 1997; and more particularly with regards to this action, the Installment

false. Additionally, the defendant continued to counsel the plaintiff in connection with the investment property without divulging that the property had been transferred and sold thereby omitting a material fact and deceiving the plaintiff. The plaintiff relied upon this misrepresentation by continuing to believe that the property had not been sold, as a result, the plaintiff was allegedly damaged."

Plaintiffs' proof sufficiently established that Chirinkin had affirmatively told Gitlin that he would manage the Nevada properties on behalf of Kew and Gitlin, However, despite Gitlin's inquiries about the status of the Nevada properties and whether to develop or sell them, Chirinkin continued to respond that a decision had not been made yet. Those representations were false when made as the properties had already been transferred and sold without Gitlin's knowledge and without compensation to Kew or Gitlin.

The plaintiff has also established entitlement to summary judgment against defendant Chirinkin on the claim of unjust enrichment which he has failed to rebut. "To prevail on a claim of unjust enrichment, a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" Cruz v. McAneney, 31 NY3d 54,59 [2006]; Old Republic National Title Ins. Co. v. Luft, 52 AD3d491, 491-492 [2bd Dept. 2008]. The submitted evidence clearly establishes that Chirinkin as a member of Kew transferred Kew's interest, for no consideration, in the two Nevada properties to other entities in which he had an ownership interest, and to Pavlov. The properties were subsequently sold for a significant profit for which Gitlin did not receive his share, to which he was entitled as a member of Kew with a 50 percent ownership interest.

In addition, as Gitlin was a member of Kew with an ownership interest, he was also a creditor of Kew to the extent that he was entitled to a share of Kew's assets.

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When Kew's last asset, the Pahrump property, was transferred without any consideration, it resulted in Kew's insolvency as it was not possessed of any assets with which it could satisfy debts owed to Gitlin. Accordingly, plaintiff have established that Chirinkin fraudulently transferred that property in violation of the Debtor and Creditor Law §273 (see Steinberg v. Levine, 6 AD3d 620,621 [2nd Dept 2004; Capital Contribution Services, Limited, v. Ducor Express Airlines, Inc., 440 F.Supp. 2d 195,203 [E.D.N.Y 2006]; Ford v. Martino, 281 AD2d 587, 588 [2nd Dept. 2001]. Moreover, plaintiffs have established that Chirinkin transferred the property with actual intent to defraud Gitlin in violation of §276 of the Debtor and Creditor Law.

However, Chirinkin has raised an issue of fact as to the profit which Kew made upon the sale of the Nevada properties to the United States of America and to BM Pahrump. Thus, Chrinkin has raised an issue of fact as to the damages which Gitlin suffered based upon the loss of his 50 percent share of the net profits realized by Kew upon the sale of the properties. Issues also exist regarding monies purportedly loaned from Chirinkin and Gitlin to each other and what if any bearing those purported loans have with regards to Gitlin's share of the profits from the sale of the Nevada properties. Accordingly a trial is necessary to determine the issue of damages. The amount of reasonable attorneys fees to be assessed against defendant Chirinkin to plaintiff, Gitlin, pursuant to Debtor and Creditor Law §276-a shall be determined at the damages trial in this matter.

The branch of plaintiffs' motion for summary judgment against defendant Pavlov and Pavlov's motion for summary judgment are both denied as issues of fact exist as to whether Pavlov was unjustly

enriched. The evidence submitted on the plaintiffs' and Pavlov's motions for summary judgment and in opposition to each others motions have raised material issues of fact as to what Pavlov knew or should have known regarding his investments in the subject properties.

Despite the undisputed fact that Pavlov received a significant return on his investments in the properties, issues of fact exist as to whether the amounts he tendered, and risks he undertook, constituted fair consideration at the time of purchase, see N.Y Debtor and Creditor Law §278. Issues also exist as to whether Pavlov was unjustly enriched to the plaintiff's detriment which would be against "equity and good conscience to permit the defendant to retain what is sought to be recovered" Paramount Film Distrib. Corp., v. State of New York, 30 NY2d 415, 421 [1972]; Cruz v. McAneney, supra at 59; Old Republic National Title Ins. Co. v. Luft, supra at 491-492

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[2bd Dept. 2008]. These issues of material fact require a trial for determination.

Motion, Seq. # 8, to cancel the Notice of Pendency

Defendants Alex Chirinkin and Nellie Chirinkin seek an order (motion Seq. # 8), pursuant to CPLR §6501, to cancel the notice of pendency on their private residence and to impose sanctions upon plaintiffs.

On June 25, 2010, plaintiffs filed a notice of pendency dated June 24, 2010 with the Nassau County Clerk's Office on the premises known as 21 The Grasslands, Woodbury, New York (hereinafter referred to as "The Grasslands"), the personal residence of defendants' Alex and Nellie Chirinkin located in Nassau County, New York (Chirinkin Defendants' motion, Seq. # 8, Ex. A). In the notice of pendency, plaintiffs' assert that the proceeds obtained in fraud of the plaintiff were used to purchase The Grasslands property as part of a series of multiple transfers engaged in for the purpose of defrauding Gitlin and the creditors of Kew.

The defendants Alex and Nellie Chirinkin assert that the Notice of Pendency on their personal residence should be cancelled as it was filed in violation of current statutory and case law. They further seek the imposition of sanctions on the plaintiffs for frivolously filing the notice and refusing to remove it when they were requested to do so. The Chirinkin defendants argue that the notice of pendency has no foundation in law and must be cancelled as the plaintiffs' action is for money damages and nothing in the judgment demanded in the complaint would affect the title to, possession of or enjoyment of the subject property, The Grasslands.

In opposition, plaintiffs argue that this is not simply an action to recover their membership interest in Kew but is also a derivative action on behalf of the company. Plaintiffs assert that the Alex Chirinkin transferred to his wife Nellie all or most of the monies realized from the fraudulent transfers of Kew's assets and the proceeds were used to purchase the Chirinkin defendants' personal residence. While plaintiffs appear to argue that their second amended complaint, read as a whole, supports a claim for a constructive trust over defendants' personal residence, such a claim has not actually been plead.

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CPLR§ 6501. Notice of pendency; constructive notice, sets forth the following:

A notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property,

except in a summary proceeding brought to recover the possession of real property. The pendency of such an action is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed. A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party.

"A notice of pendency is authorized to be filed in an action seeking a judgment that would affect the title to, or the possession, use or enjoyment of, real property (CPLR 6501; see 5303 Realty Corp. v. O & Y Equity Corp., 64 NY2d 313, 320-321 [1984]; Nastasi v. Nastasi, 26 AD3d 32, 35 [2nd Dept 2005]" Ewart v. Ewart 78 AD3d 992 [2nd Dept. 2010]). "This includes a shareholder's derivative action 'if the suit is seeking to recover the corporation's real property'" Ali v. Ahmad, 24 AD 3d 475 [2nd Dept. 2005]; quoting (5303 Realty Corp., supra at 324, see also Keen v. Keen; 140 AD2d 311, 312 [2nd Dept 1988)]).

Even a liberal reading of the plaintiffs' complaint fails to establish an action for a constructive trust over Alex and Nellie Chirinkins' New York residence. Accordingly, despite the plaintiffs' attempt to characterize it otherwise, this is an action for money damages and the dissolution of Kew and not one that would affect the title to, or the possession, use or enjoyment of the subject real property. Thus, the Chirinkin defendants have established their right to have the notice of pendency filed against their property cancelled. See CPLR 6501; (5303 Realty Corp., supra; Pizzurro v. Pasquino, 201 AD2d 635 [2nd Dept. 1994]; Shkolnik v. Krutoy, 32 AD3d 536 [2nd Dept. 2006]; Distinctive Custom Homes Bldg. v. Esteves, 12 AD3d 559 [2nd Dept. 2004]). However, the portion of

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the Chirinkin defendants' motion seeking the imposition of sanctions is denied.

Therefore it is hereby

ORDERED, that the plaintiffs' motion for summary judgment (Seq # 6) is granted only against defendant Alex Chirinkin on the issue of liability, a trial is necessary to determine damages, and it is further

ORDERED, that defendant, Arkady Pavlov's motion for summary judgment (Seq # 7) is denied in its entirety, and it is further

ORDERED, that the motion (Seq. # 8), brought by defendants Alex Chirinkin and Nelli Chirinkin, to cancel the notice of pendency filed on their personal residence and for sanctions, is granted to the extent that the notice of pendency shall be cancelled, and it is further

ORDERED, that the Nassau County Clerk is directed to cancel the notice of pendency dated June 24, 2010, filed on June 25, 2010, indexed against the premises located at 21 The Grasslands, Woodbury, New York, known as and by lot 97 on Map of Hunters Run at Woodbury, Section 3 situated at Woodbury, Town of Oyster Bay.

This constitutes the decision and order of the Court.