Gliklad v Kessler
2016 NY Slip Op 31301(U)
July 7, 2016
Supreme Court, New York County
Docket Number: 653281/2014
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45
---X
ALEXANDER GLIKLAD,

Plaintiff,

-against-

ROBERT KESSLER,

Defendant.
---X

DECISION AND ORDER

Index No. 653281/2014

HON. ANIL C. SINGH, J.:

Plaintiff Alexander Gliklad moves for summary judgment pursuant to CPLR 3212, contending that a conveyance defendant Robert Kessler received from judgment debtor Michael Cherney should be set aside as fraudulent. Defendant Robert Kessler opposes the motion.

The material facts are as follows.

Robert Kessler acts as the New York agent for Michael Cherney, a Russian businessman. Kessler performs services and manages various business entities which are affiliated with Cherney.

Kessler executed two promissory notes in favor of McAnna, L.P., which plaintiff contends is affiliated with Cherney and his family. The first note, dated May 14, 2007, was in the amount of $1,000,000. The second note, dated

September 2, 2008, was in the amount of $500,000. Cherney purchased the notes from McAnna, L.P., for the sum of $1,800,000. Subsequently, he sent Kessler a letter dated July 27, 2013, stating, "On this day as your belated birthday present! I hereby forgive the principal amount outstanding of $1,511,800 plus all accrued interest under notes dated on May 14, 2007 & September 2, 2008" (Alioto Aff., exhibit 10).

On October 9, 2014, Kessler signed Internal Revenue Service Form 3520, reporting his receipt of $1.8 million on July 27, 2013, as a gift from a foreign person.

Gliklad commenced the instant action against Kessler by filing a summons and complaint on October 27, 2014. The complaint alleges that plaintiff is the judgment creditor in a case filed on July 29, 2009, captioned Gliklad v. Chernoi, Index No. 602335/2009 (Sup. Ct., N.Y. Co.), which sought money damages against Michael Cherney for nonpayment on a $270 million promissory note. On April 15, 2014, judgment was entered against Michael Cherney in the amount of $505,093,442.18. The Appellate Division affirmed the grant of summary judgment against Cherney in a decision and order entered October 29, 2015 (Gliklad v. Cherney, 132 A.D.3d 601 [1st Dept., 2015]). On November 4, 2015, the Clerk of the Court entered an amended judgment against Cherney in the

amount of $385,469,699.49, with statutory interest from April 15, 2014.

Plaintiff alleges that the judgment remains unsatisfied; while a defendant in the promissory note action, Cherney transferred $1.8 million to Kessler, without fair consideration; and the transfer is fraudulent as to Gliklad and should be set aside pursuant to New York Debtor and Creditor Law sections 273-a and 278.

Discussion

The standards for summary judgment are well settled. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (id.) Summary judgment is a drastic remedy and should be granted only if the moving party has sufficiently established that it is warranted as a matter of law (Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, a summary judgment motion should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in

favor of the nonmoving party and should not pass on issues of credibility (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1st Dept., 1992]. The court's role is issue-finding, rather than issue-determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957]).

Debtor and Creditor Law section 273-a states as follows:

> Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

To prevail on such a claim, the movant must establish three elements: 1) the conveyance was made without fair consideration; 2) at the time of the transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and 3) a final judgment has been rendered against the transferor that remains unsatisfied (Fischer v. Sadov Realty Corp., 34 A.D.3d 632, 633 [2nd Dept., 2006]).

Section 272 of the Debtor and Creditor Law states:

> Fair consideration is given for property, or obligation,
>
> a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

Plaintiff exhibits a copy of IRS Form 3520 dated October 9, 2014. The form, which defendant filed with the Internal Revenue Service, states that on July 27, 2013, defendant received a gift valued at $1,800,000.

Plaintiff exhibits a transcript of the deposition of defendant on October 22, 2015. It states in pertinent part:

Q. First, Mr. Kessler, are you familiar generally with what an IRS Form 3520 is used for?

A. This is the first time I ever had to fill one out.

Q. And are you aware that an IRS Form 3520 is used to report a gift from a foreign – either an alien or a foreign entity? Foreign I mean not a U.S. citizen.

A. Yes.

Q. Okay. If I can refer you to the second to last page of the document, the ones Bates stamped ending in 145. Do you see that?

A. Um-hmm. Yes.

Q. After paragraph 56, it says, "Sign here"?

A. Yes.

Q. It says, "Robert Kessler." It look like 10/9 or 10/19/14. Is that your signature?

A. It is.

* * *

Q. And if I could move up that page under "Part IV U.S. Recipients of Gifts Or [B]equest Received During the Current Tax Year From Foreign Persons." Do you see that?

A. Yes.

Q. Paragraph 54 states, "During the current tax year, did you receive more than $100,000 that you treated as gifts or bequest from a non-resident alien or foreign estate?"

A. Yes.

Q. And you checked yes, right?

A. Yes.

Q. The box is checked yes?

A. Yes.

Q. And this is a – part of the tax returns that you submitted to the Internal Revenue Service for the year 2013; is that correct?

A. Yes.

* * *

Q. Is the $1,800,000 referred to on your 2013 Form 3520 that we marked as Exhibit 4, does that reflect the debt forgiveness from Michael Cherney that is referenced in Exhibit 3?

A. Yes.

(Transcript dated October 22, 2015, at 28:11 - 29:8, 29:17 - 30:12, 31:15 - 19).

By definition, a gift is a voluntary transfer of property without consideration or compensation (Wilcox v. Wilcox, 233 A.D.2d 565, 566 [3rd Dept., 1996], citing 62 N.Y.Jur.2d, Gifts, section 1, at 182-183).

Plaintiff has established that: 1) the conveyance from Cherney to Kessler was made without consideration; 2) at the time of the transfer, Cherney was a defendant in an action for money damages or a judgment had been docketed against him; and 3) a final judgment was rendered against Cherney that remains unsatisfied.

The Court finds that the deposition of Robert Kessler, as corroborated by the documentary evidence, is sufficient to make out a prima facie case in favor of plaintiff that Michael Cherney's $1.8 million gift to defendant was a fraudulent conveyance.

In opposition, Kessler contends that whether the notes were forgiven for fair consideration is a question of fact. Defendant asserts that the conveyance on February 27, 2013, was not a gift; on the contrary, it was compensation for work/services performed between 2006 and 2012. Defendant maintains that the gift tax return was executed on the advice of counsel as Kessler's assets were tied up in a divorce. Kessler's decision to report the debt forgiveness for tax purposes as a gift was to take advantage of the ambiguities of the transaction pursuant to

federal income tax law. Defendant's tax attorney states that tax treatment is more favorable if the forgiveness is treated as a gift. In addition, defendant asserts that no proof shows that sums are due under the notes or that demand for payment has been made.

Defendant's contention that the conveyance from Cherney was not a gift, but compensation for services, is precluded by the doctrine of tax estoppel.

At his deposition, defendant acknowledged that on October 9, 2014, he signed IRS Form 3520. Just above his signature, the form contains the following language:

> Under penalties of perjury, I declare that I have examined this return, including any accompanying reports, schedules, or statements, and to the best of my knowledge and belief, it is true, correct, and complete.

This unambiguous declaration in the IRS form is the foundation of the doctrine of tax estoppel.

The Court of Appeals explained the concept of tax estoppel, which is akin to issue preclusion or collateral estoppel, in Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415 [2009]. The Court wrote:

> A party to litigation may not take a position contrary to a position taken in an income tax return. Here, husband does not dispute that, in accordance with his settlement agreement, he reported the $1,800,000 in settlement proceeds as business income on his federal income tax return, in which he swore that the representations contained within it

> were true. We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under penalty of perjury on income tax returns.

(Mahoney-Buntzman, 12 N.Y.3d at 422 (internal citations omitted)).

The doctrine of tax estoppel has been applied consistently in the commercial litigation arena. For example, in Livathinos v. Vaughn, 121 A.D.3d 485 [1st Dept., 2014], the First Department wrote:

> Having declared on the income tax returns filed for Trinity from 2001 through 2008 that she owned 100% of the company's stock, Vaughn may not assert in this litigation that defendant James S. Vaughn owned 50% of the company's stock.

Likewise, in Walsh v. Blaggards III Restaurant Corp., 131 A.D.3d 854 [1st Dept., 2015], the First Department approved the use of tax estoppel as a basis for awarding summary judgment. The Court wrote:

> Defendant stated in its tax returns that the $50,000 paid by plaintiff was a loan and that the outstanding balance was $44,500; those statements are binding on defendant. Thus, contrary to defendant's argument otherwise, that amount is a loan, not an investment and summary judgment in plaintiff's favor on the single cause of action in his complaint is warranted.

(Walsh, 131 A.D.3d at 845; see also, for example, Zemel v. Horowitz, 11 Misc.3d 1058(A) [Sup. Ct., N.Y. Cty., 2006]).

The holdings set forth in these cases are dispositive, and compel estoppel against defendant in the present action. Kessler is estopped from claiming to this

Court that the conveyance from Cherney to defendant was compensation when defendant, under penalty of perjury, asserted to the IRS that the conveyance was something entirely different. Although defendant contends that the gift was really compensation, he proffers no W2 forms, 1099 forms, bank statements, or evidence that he has amended his 2014 tax returns to reflect such fact.

Accordingly, Kessler is estopped from recasting the gift from Cherney as compensation to defendant, and defendant has failed to show the existence of a genuine issue of material fact rebutting plaintiff's prima facie case.

Accordingly, it is

ORDERED that the motion for summary judgment on the complaint herein is granted, and the Clerk is directed to enter judgment in favor of plaintiff against defendant in the amount of $1,800,000.00, together with interest at the statutory rate from July 27, 2013, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

The foregoing constitutes the decision and order of the court.

Date: July 7, 2016
New York, New York

Anil C. Singh