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As of: Dec 05, 2012

Constitution Realty, LLC, Appellant, v. David E. Oltarsh et al., Respondents.

2048

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

309 A.D.2d 714*; *766 N.Y.S.2d 425*; *2003 N.Y. App. Div. LEXIS 11264

October 30, 2003, Decided
October 30, 2003, Entered

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff creditor appealed the denial of its motion for summary judgment by the Supreme Court, New York County (New York) in its action to enforce a judgment against defendant lawyers under *N.Y. Debt. & Cred. Law § 273-a*.

OVERVIEW: The creditor obtained a judgment against defendant law firm for unpaid rent. The firm ceased doing business and referred its clients to a professional corporation comprised of the same lawyers. The appellate court held that while the creditor established that the conveyance of the law firm's goodwill to the new corporation without consideration was fraudulent within the meaning of *§ 273-a*, a hearing was necessary to determine its value in accordance with *N.Y. C.P.L.R. 3212(c)*. The request to set aside the conveyance and for a remedy of attachment were unavailing under *N.Y. Debt. & Cred. Law § 278(1)(a), (b)*. With respect to the transfer of personal property, however, there were numerous questions of fact that precluded summary disposition. The record was insufficient to warrant piercing the corporate veil.

OUTCOME: The judgment was modified and remanded to grant summary judgment as to the existence of goodwill and the fraudulent conveyance thereof; the judgment was otherwise affirmed.

CORE TERMS: goodwill, conveyance, fraudulent, summary judgment, lv denied, personal judgment, partial

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Relief From Judgment > General Overview
Real Property Law > Purchase & Sale > Fraudulent Transfers
[HN1] A court of equity may award a personal judgment against a party in lieu of setting aside a fraudulent transfer.

Real Property Law > Purchase & Sale > Fraudulent Transfers

[HN2] Liability is imposed on parties who participate in the fraudulent transfer of a debtor's property and are transferees of the assets and beneficiaries of the conveyance.

COUNSEL: [*1]** For Plaintiff-Appellant: Thomas C. Lambert.

For Defendants-Respondents: Marc T. Danon, Jennifer M. Oltarsh.

JUDGES: Concur--Tom, J.P., Andrias, Saxe and Williams, JJ.

OPINION

[*714] [426]** Order, Supreme **[*715]** Court, New York County (Joan Madden, J.), entered April 15, 2003, which, in this action pursuant to *Debtor and Creditor Law § 273-a*, denied plaintiff's motion for partial summary judgment, unanimously modified, on the law, to grant the motion as to the issues of the existence of goodwill and the fraudulent conveyance of goodwill from defendant **[**427]** Oltarsh & Oltarsh to defendant Oltarsh & Associates, P.C. and to remand the matter to Supreme Court for a determination of the value of the judgment debtor's goodwill, and otherwise affirmed, without costs.

Plaintiff obtained a judgment against defendant Oltarsh & Oltarsh (the firm) for unpaid rent in the amount of $108,000, which the firm has failed to satisfy (*Debtor and Creditor Law § 273-a*). In March 2001, the firm, whose lawyers were defendants David, William and Jennifer Oltarsh, ceased doing **[***2]** business and referred its clients to Oltarsh & Associates, a professional corporation comprised of the same three individuals and contemporaneously incorporated. Defendants' own affidavits establish that William and David Oltarsh had developed professional reputations during more than 40 years of practice and that many of their clients followed them to Oltarsh & Associates.

Plaintiff has established that the firm had goodwill (*see Dawson v White & Case, 88 N.Y.2d 666, 670, 649 N.Y.S.2d 364, 672 N.E.2d 589 [1996]*) and that its goodwill was transferred to the professional corporation without consideration (*see Blakeslee v Rabinor, 182 A.D.2d 390, 582 N.Y.S.2d 132 [1992], lv denied 82 N.Y.2d 655, 622 N.E.2d 305, 602 N.Y.S.2d 804 [1993]*). Defendants' bald conclusory assertion that the firm had no assets to convey in March 2001 is insufficient to defeat plaintiff's motion (*Poluliah v Fidelity High Income Fund, 102 A.D.2d 720, 722, 476 N.Y.S.2d 859 [1984]*), and is contradicted by the firm's tax return (*see Leo v Mount St. Michael Academy, 272 A.D.2d 145, 146, 708 N.Y.S.2d 372 [2000]*). While plaintiff has established that the conveyance of goodwill was fraudulent within the **[***3]** meaning of *Debtor and Creditor Law § 273-a*, a hearing is necessary to determine its value (*CPLR 3212 [c]*).

The setting aside of the conveyance and the remedy of attachment are unavailing (*Debtor and Creditor Law §§ 278 [1] [a], [b]*). As we have stated, [HN1] "A court of equity * * * may award a personal judgment against a party in lieu of setting aside a transfer" (*Halsey v Winant, 233 App. Div. 103, 114-15, 251 N.Y.S. 81 [1931], revd on other grounds 258 N.Y. 512, 180 N.E. 253 [1932], cert denied 287 U.S. 620, 77 L. Ed. 539, 53 S. Ct. 20 [1932]*; *see also Debtor and Creditor Law § 280*; *Baily v Hornthal, 154 N.Y. 648, 660-661, 49 N.E. 56 [1898]* ["a court of equity may adapt its relief to the exigencies of the case, and, when nothing more is required, may order a sum of money to be paid to the **[*716]** plaintiff, or give him a personal judgment therefor, to be enforced by execution"]; *Rich v New York White Line Tours, 266 App. Div. 752, 41 N.Y.S.2d 283 [1943]*). [HN2] Liability is imposed on "parties who participate in the fraudulent transfer of a debtor's **[***4]** property and are transferees of the assets and beneficiaries of the conveyance" (*Stochastic Decisions, Inc. v DiDomenico, 995 F.2d 1158, 1172 [1993]*, citing *Federal Deposit Ins. Corp. v Porco, 75 N.Y.2d 840, 842, 552 N.Y.S.2d 910, 552 N.E.2d 158 [1990]*), in this instance David and William Oltarsh and Oltarsh & Associates, against which parties plaintiff sought partial summary judgment. With respect to the transfer of personal property, however, there are numerous questions of fact that preclude summary disposition. Finally, we agree that the record as developed thus far is insufficient to warrant piercing the corporate veil (*see Rotella v Derner, 283 A.D.2d 1026, 723 N.Y.S.2d 801 [2001], lv denied 96 N.Y.2d 720, 759 N.E.2d 371, 733 N.Y.S.2d 372 [2001]*; *First Bank of Ams. v Motor Car Funding, 257 A.D.2d 287, 294, 690 N.Y.S.2d 17 [1999]*).

Concur--Tom, J.P., Andrias, Saxe and Williams, JJ.