IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

BARRY J. EPSTEIN

v.

RICHARD GALUSKA and
JOY LYNN GALUSKA

0412134096

Doc#: 0412134096 Fee: $50.50
Eugene "Gene" Moore
Cook County Recorder of Deeds
Date: 04/30/2004 04:51 PM Pg: 1 of 14

(The above space for Recorder's Use Only)

No. **2000-L-008996**

MEMORANDUM OF JUDGMENT

On **APRIL 28, 2004,** judgment was entered in this court in favor of the plaintiff **BARRY J. EPSTEIN** and against defendants **RICHARD GALUSKA and JOY LYNN GALUSKA**, whose address is **643 N. PARK ROAD, LaGRANGE PARK, IL**. The judgment voided the conveyances dated September 30, 1998, Document No. 98778584 in Cook County, Illinois, and March 1, 1999, Document No. 99169689 in Cook County, Illinois, pursuant to 740 ILCS 160/5.

ENTERED
APR 30 2004
JUDGE
LILIA M. NOWICKI - 293

Judge Judge's No.

Atty No. 36732
Vanasco Genelly & Miller
Atty For Plaintiff
33 N. LaSalle St., Suite 2200
Chicago IL 60602
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LEGAL DESCRIPTION

LOT 2 AND THE NORTH ½ OF LOT 3 IN BLOCK "C" IN NORTH EDGEWOOD PARK, BEING A SUBDIVISION IN THE EAST ½ OF THE SOUTH EAST 1/4 OF SECTION 32, TOWNSHIP 39 NORTH, RANGE 12 EAST OF THE THIRD PRINCIPAL MERIDIAN REFERENCE BEING HAD TO PLAT RECORDED ON THE 21ST DAY OF JULY 1926 AS DOCUMENT 9347007 IN COOK COUNTY, ILLINOIS

PERMANENT TAX NO (P.I.N.) **15-32-403-015-0000**

Commonly known as: 643 N. Park Rd., La Grange Park, Illinois

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BARRY EPSTEIN, Plaintiff, v. RICHARD GALUSKA, and JOY LYNN GALUSKA, Defendants.	)	No. 00 L 8996

Memorandum Order and Opinion

This matter comes before the Court on the parties' cross Motions for Summary Judgment as to the Amended Complaint, Motion of Barry Epstein ("Epstein") for Summary Judgment as to Galuska's Counterclaims, and Motion of Epstein to Strike Affidavits of Richard and Joy Lynn Galuska.

Background

This case involves Epstein's attempts to collect on two judgments he obtained against Richard Galuska ("Galuska") in 1994 and 1998 pursuant to a prior lawsuit. Galuska asserts that he made a series of conveyances of his home at 643 N. Park in LaGrange Park, Illinois (the "Property") beginning in 1990. These conveyances and how they affect Epstein's ability to collect on the judgments have become the subject of this litigation. Epstein filed a five count complaint against Galuska and his wife Joy Lynn Galuska ("Joy") alleging fraud in fact and law under the Uniform Fraudulent Transfer Act as to Galuska's Declaration of Trust conveying the property to Joy in trust (Counts I and II), fraud in fact and law under the Uniform Fraudulent Transfer Act as to Galuska's Quitclaim Deed conveying the property to Joy (Counts III and IV),

and in the alternative, for sale pursuant to 735 ILCS 5/12-112 for conveying the property into tenancy by the entirety (Count V). The parties have filed cross motions for summary judgment as to Epstein's Amended Complaint. Epstein also filed a motion for summary judgment as to the remaining portions of Galuska's Counterclaim and a motion to strike Galuska's and Joy's Affidavits.

Discussion

Cross Motions for Summary Judgment as to the Amended Complaint

The following is a timeline of events with respect to the LaGrange Park, Illinois Property at issue:

- The Property was originally held by Galuska and Joy in joint tenancy.
- On October 25, 1990, Galuska and Joy executed a Warranty Deed conveying the Property into a tenancy by the entirety.
- On July 26, 1991, Galuska executed a Declaration of Trust conveying the Property to Joy in trust.
- On September 1, 1998, Galuska recorded the Declaration of Trust that he executed on July 26, 1991. Galuska also recorded the Warranty Deed conveying the Property into a tenancy by the entirety executed on October 25, 1990.
- On February 22, 1999, Galuska and Joy executed a Quit Claim Deed conveying the Property to Joy.
- On March 2, 1999, Galuska recorded the Quit Claim Deed conveying the Property to Joy executed on February 22, 1999.

Counts I and II are brought pursuant to the Uniform Fraudulent Transfer Act ("Act"), 740 ILCS 160/5, with respect to the Declaration of Trust executed on July 26, 1991 and recorded in September 1998. At the outset, Galuska makes three responses to these two Counts. First, Galuska argues that the Declaration of Trust was not executed by Joy such that the conveyance was never in effect. However, since the property was held in joint tenancy prior to execution of the Declaration of Trust, Galuska could unilaterally sever the joint tenancy by transferring the property. Ennis v. Johnson, 3 Ill. 2d 383, 387, 121 N.E.2d 480 (1954) ("A joint tenancy, even though the joint tenants are husband and wife, is severed when one joint tenant conveys his or

her interest to a stranger."). Second, Galuska argues that this transaction occurred in 1991 and not 1998 and Epstein was not a creditor in 1991. However, the Declaration of Trust was not recorded until 1998 and thus was not effective as to creditors until 1998. "All deeds...shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record." 765 ILCS 5/30. Third, Galuska argues that since this transfer was made from a tenancy by the entirety, it could not have been made with the sole intent to avoid a creditor as no creditor can have any rights against a property held in tenancy by the entirety. However, Galuska's and Roy's interest in the Property remained a joint tenancy until the 1998 recording of the Declaration of Trust and the Warranty Deed conveying the Property into a tenancy in the entirety.

Epstein alleges in Counts I and II that the Declaration of Trust was fraudulent in fact (Count I) and fraudulent in law (Count II) pursuant to 740 ILCS 160/5(a)(1) and (2). Fraudulent conveyances are those "made with the intent to disturb, delay, hinder or defraud creditors." Anderson v. Ferris, 128 Ill. App. 3d 149, 152, 470 N.E.2d 518 (2d Dist. 1984). "In fraud in fact cases, actual consideration has been given for the transfer and a specific intent to defraud must be proved. In contrast, when a conveyance is made for no or inadequate consideration, it is fraudulent in law: fraud is presumed and intent is immaterial." Id. at 153.

Epstein alleges that the trust conveyance was made for no consideration, calling for a fraudulent in law analysis (Count II). Section 160/5(a)(2) of the Act provides that "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor

made the transfer or incurred the obligation: (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) intended to incur or believed or reasonably should have believed that he would incur debts beyond his ability to pay as they became due."

"In order to establish that a conveyance is fraudulent in law, three elements must be present: (1) there must be a transfer made for no or inadequate consideration; (2) there must be existing or contemplated indebtedness against the transferor; and (3) it must appear that the transferor did not retain sufficient property to pay his indebtedness." Gendron v. Chicago & N.W. Transp. Co., 139 Ill. 2d 422, 438, 564 N.E.2d 1207 (1990). Actual intent is immaterial as fraud is presumed in these circumstances. Liquidation of MedCare HMO, Inc., 294 Ill. App. 3d 42, 50, 689 N.E.2d 374 (1st Dist. 1997).

In this case, as to the first element, Galuska relies upon his satisfaction of a loan he obtained from Joy based on an interest held by Joy in a second property located in LaGrange as consideration for the conveyance. However, the Declaration of Trust makes no reference to any interest in this second property or any reference to consideration at all. There are no other documents referencing this second property or any change in the respective interests of Galuska and Joy in this second property. Thus, this Court finds that the trust conveyance was made for no or inadequate consideration. As to the second element, the Declaration of Trust was recorded, and therefore made effective as to creditors, in 1998, four years after a judgment was entered against Galuska and a month before a second judgment was entered against Galuska. Finally, as to the third element, Galuska did not retain sufficient property to pay his indebtedness. He has no liquid assets and the only asset he claims is a default judgment against Geoquest, Inc. which is uncollectible.

This case is similar to Anderson, where a husband, with pending litigation, had transferred his entire interest in his family home to his wife. 128 Ill.App.3d 149. That court held that such an interspousal transfer would be presumed fraudulent and that presumption must be overcome by clear and convincing evidence. Id. Accordingly, this Court finds that the Declaration of Trust was fraudulent in law and grants summary judgment in favor of Epstein.

Even if this Court were to assume that consideration was given for the trust conveyance and utilized the fraud in fact analysis (Count I), the result would be the same. Section 160/5(a)(1) provides that "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor." The Act lists several actions to consider in determining the actual intent requirement, including: (1) the transfer or obligation was to an insider; (2) the debtor retained possession or control of the property transferred after the transfer; (3) the transfer or obligation was concealed; (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; and (5) the transfer was of substantially all the debtor's assets. 740 ILCS 160/5(b). Where there is considerable evidence demonstrating fraudulent intent, a debtor's testimony alone that the transfers were made for another purpose does not establish that the trial court's finding of fraud was against the manifest weight of the evidence. Casey Nat'l Bank v. Roan, 282 Ill. App. 3d 55, 60, 668 N.E.2d 608 (4th Dist. 1996).

In this case, Galuska transferred the Property to an insider, his wife. Transfers to an insider include transfers to a "relative of the debtor." 740 ILCS 160/2(g)(1)(a). In addition, although Galuska transferred the property to his wife, he effectively remained in possession of

the Property by virtue of his marriage. Further, the transfer was recorded, and therefore made effective as to creditors, in 1998, four years after a judgment was entered against Galuska and a month before a second judgment was entered against him. Finally, Galuska was left with substantially no assets after the transfer. Although Galuska relies upon the judgment he effected against Geoquest, Inc., that debt is uncollectible. Thus, this Court finds that Galuska's intent to defraud is evident from the circumstances surrounding the conveyance and summary judgment is appropriate under either the fraudulent in law or fraudulent in fact analysis.

Furthermore, Counts III and IV allege that the Quitclaim Deed executed on February 22, 1999 and recorded on March 2, 1999 was fraudulent in fact (Count III) and fraudulent in law (Count IV) pursuant to 740 ILCS 160/5(a)(1) and (2). The fraudulent nature of this 1999 conveyance follows the same fraudulent in law analysis discussed above. First, the Quitclaim deed specifically provides that the consideration given for the conveyance was a mere $10, a nominal amount given that the Property at issue includes the family home of Galuska and Joy. In addition, prior to the 1999 conveyance, Epstein had obtained two judgments against Galuska. Finally, execution of the 1999 conveyance left Galuska with substantially no assets. This Court finds that the 1999 Quit Claim Deed was fraudulent in law.

Galuska's only argument against summary judgment on these two counts is a reliance on this Court's April 2, 2001 statement that "if the Court were to void, under the Fraudulent Conveyance Act here, this quitclaim, that the property would return, if it started off in a tenancy in entirety to the tenancy in the entirety." As discussed, the Property started off as a joint tenancy and remained a joint tenancy until the trust conveyance and the 1990 conveyance into tenancy by the entirety were recorded in September 1998. This Court has already found the Declaration of Trust to be fraudulent. This Court also finds the 1990 conveyance into tenancy by

the entirety, recorded in 1998, to be fraudulent in law following the same analysis. Once again, the Warranty Deed specifically provides that the consideration given for the conveyance was nominal, a mere $10. In addition, prior to the 1998 recording of the 1990 Warranty Deed, Epstein had obtained a judgment against Galuska and a second judgment against Galuska was entered just one month later. Finally, the 1998 recording of the Warranty Deed left Galuska with substantially no assets, as outlined above. Thus, the Warranty Deed conveying the Property into tenancy by the entirety is also set aside. As a result, Galuska and Joy held the Property as joint tenants at the time of the 1999 Quitclaim Deed and setting aside the 1999 Quitclaim Deed causes the Property to return to joint tenancy. Accordingly, summary judgment is entered in favor of Epstein.

Count V of the Amended Complaint is alleged in the alternative "should the property have been conveyed by the entirety either by conveyance recorded September 2, 1998 or March 1999" ¶ 42. However, as discussed above, the transfers attempted by Galuska through the September 1998 and March 1999 recordings are void under the Uniform Fraudulent Transfer Act. Since this Court has granted summary judgment as to the 1998 and 1999 conveyances, this Court need not address Count V.

The Affirmative Defenses raised by Galuska do not preclude this Court's entry of summary judgment. First, Galuska alleges that the release contained in the 1993 Settlement Agreement precludes the current action. Galuska argues that Epstein moved to enforce the settlement agreement pursuant to a right specifically provided for in that agreement. Even if that were true, two judgments were entered against Galuska subsequent to that settlement agreement. Galuska failed to make payment on either judgment and instead made fraudulent transfers of his

property to avoid payment. Thus, this Court finds that the settlement agreement does not bar the present action.

Second, Galuska alleges that pursuant to the Judgment Lien Act, Epstein did not file his judgment lien memorandums until June 21, 2000 and November 23, 2001, more than a year after the last transaction complained of in the Amended Complaint. However, the Judgment Lien Act does not apply to fraudulent conveyance actions. De Martini v. De Martini, 385 Ill. 128, 52 N.E.2d 138 (1943).

Third, Galuska alleges several defenses on the basis that the property was held in tenancy by the entireties. However, as discussed above, the Warranty Deed conveying the Property into tenancy by the entireties was not recorded, and therefore not effective as to creditors, until September 1998. Further, this Court has found the Warranty Deed attempting to convey the Property into a tenancy by the entirety is fraudulent and void such that the Property is currently held by Galuska and Joy in joint tenancy.

Fourth, Galuska alleges that the Property was subject to a mortgage such that he had no actual net equity in the residence. However, Galuska's defense relies upon the transfer of the property into trust in 1991. As discussed above, that transfer was not recorded, and therefore not effective as to creditors, until September 1998. There is no evidence of a mortgage on the property in September 1998.

Fifth, Galuska alleges the existence of an equitable mortgage. The existence of a debt is the essential element of a construct or equitable mortgage. Metcalf v. Altenritter, 53 Ill. App. 3d 904, 369 N.E.2d 498 (5th Dist. 1977). An equitable mortgage is found only where clear and convincing evidence demonstrates that an absolute deed was given solely as security for repayment of a debt. Beelman v. Beelman, 121 Ill. App. 3d 684, 460 N.E.2d 55 (5th Dist. 1984).

In this case, Galuska maintains that he intended to transfer the Property to Joy in satisfaction of a debt, not as security for repayment of one.

Sixth, Galuska alleges that the doctrine of laches bars Epstein's claims because Epstein could have learned of the 1990 tenancy years before 2000. However, Epstein was precluded from conducting a citation examination of Galuska until 2000 pursuant to a court order.

Seventh, Galuska alleges that Epstein is not entitled to equity because he did not assist Galuska in obtaining payment of Galuska's judgment against Geoquest, Inc. However, Galuska has not demonstrated an obligation of Epstein to assist in obtaining such payment.

Accordingly, the affirmative defenses do not preclude this Court's entry of summary judgment in favor of Epstein.

Epstein's Motion for Summary Judgment as to Galuska's Counterclaims

The allegations that remain in Galuska's counterclaim include his Rule 135(a) Counterclaim and Count III for breach of fiduciary duty and Count VII for abuse of process in Galuska's Rule 135(b) Counterclaim. Epstein moves for summary judgment on all three of these claims.

In his Rule 135(a) Counterclaim, Galuska alleges that his cross motion for enforcement was not heard by Judge Casciato in case 92 L 8439 and that Judge Casciato ruled that such motion should be brought in a separate lawsuit. Galuska believes that the matters were not fully adjudicated in the prior lawsuit. In effect, Galuska is asking this Court to reconsider Judge Casciato's ruling in the prior lawsuit. Galuska has not asserted or demonstrated that Judge Casciato's ruling in the prior lawsuit is void. Thus, this Court finds that Galuska's claim is an impermissible collateral attack on the prior judgment. City of Des Plaines v. Boeckenhauer, 383

Ill. 475, 50 N.E.2d 483 (1943); 735 ILCS 5/2-1401. Summary Judgment is granted in favor of Epstein on Galuska's Rule 135(a) Counterclaim.

In his Rule 135(b) Counterclaim, Galuska alleges in Count III that Epstein breached his fiduciary duty with respect to the parties' partnership and/or joint venture enterprise under the name ELC Financial Group, their investment of funds in National Gas Associates and how Epstein's actions precluded Galuska from proceeding on his claims against Geoquest. However, these issues were all raised in the prior lawsuit, 92 L 8439, specifically in response to Epstein's Motion to Reinstate for Purposes of Enforcement of the Settlement Agreement and again in Galuska's Motion to Reconsider Judge Casciato's October 20, 1998 Order. Nevertheless, any issues regarding the alleged conduct between Epstein and Galuska with respect to their business relationship should have been raised in the prior lawsuit. The prior lawsuit involved the settlement agreement and monies transferred between the parties, which necessarily included as the operative facts the relationship of the parties prior to the execution of the settlement agreement.

Res judicata prevents the relitigation of issues that were or could have been raised in a prior lawsuit between the same parties. Smith Trust & Savings Bank v. Young, 312 Ill. App. 3d 853, 858, 727 N.E.2d 1042 (3d Dist. 2000). Claims are precluded where there is (1) a final judgment on the merits by a court of competent jurisdiction, (2) an identity of the causes of action, and (3) identity of the parties. Id. Where the parties are identical, the judgment of the prior court acts as an absolute bar to any subsequent action involving the same claim, demand or cause of action as was asserted in the prior suit. Wendell v. Qazi, 254 Ill. App. 3d 97, 626 N.E.2d 280 (2d Dist. 1994). Even if different kinds or theories of relief are asserted, there is a single cause of action if a single group of operative facts gives rise to the claims. Rein v. David

A. Noyes & Co., 172 Ill. 2d 325, 665 N.E.2d 119 (1996). Since Judge Casciato reached a final judgment in the prior lawsuit, the parties are identical, and the issues raised in this matter either were or should have been addressed in the prior lawsuit, this Court finds that Galuska's breach of fiduciary duty claim is barred by res judicata and summary judgment is granted in favor of Epstein on Count III of Galuska's Counterclaim.

In Count VII of his Rule 135(b) Counterclaim, Galuska alleges that Epstein abused process in the prior lawsuit by sending a letter to Chief Judge O'Connell complaining of the rulings of the law division judge and requesting that Judge O'Connell intervene. Once again, Galuska raised this issue of abuse of process in his response to Epstein's motion to reinstate and again in Galuska's motion to reconsider in the prior lawsuit. Since Judge Casciato reached a final judgment in that matter, the parties are identical, and the issues were addressed by Judge Casciato in the prior lawsuit, this Court finds that Galuska's Count VII is also barred by res judicata. *See* Young, 312 Ill.App.3d at 858, 727 N.E.2d 1042. Accordingly, summary judgment is granted in favor of Epstein.

Epstein's Motion to Strike Affidavits

Epstein's Motion to Strike the Affidavits of Galuska and Joy is moot because the motions for summary judgment can be decided without the benefit of the affidavits of Galuska and Joy.

Conclusion

Accordingly, this Court finds that the 1990 Warranty Deed conveying the Property into a tenancy by the entirety, the 1991 Declaration of Trust, and the 1999 Quit Claim Deed were fraudulent conveyances and are therefore void. Summary Judgment is granted in favor of Epstein on Epstein's Amended Complaint. Epstein's Motion for Summary Judgment as to

Galuska's Counterclaims is also granted. The Court will hear Epstein's motion for foreclosure upon proper notice.

ENTERED
Entered:
APR 28 2004
JUDGE
JULIA M. NOWICKI - 293

Julia M. Nowicki
Circuit Judge
Dated: April 28, 2004