SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2864-16T1

TONY BARADHI,

Plaintiff-Appellant,

v.

JEHAD DAHER,

Defendant,

and

LATIFE A. NASSER and LOUAY ASSOCIATES, LLC,

Defendants-Respondents.

Submitted February 6, 2018 – Decided February 28, 2018

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey, Chancery Division, Passaic County, Docket No. C-000055-16.

De Marco & De Marco, attorneys for appellant (Patrick C. De Marco, on the brief).

Michael S. Doran, attorney for respondents.

PER CURIAM

Plaintiff Tony Baradhi (plaintiff) appeals from a January 31, 2017 order denying his motion to reconsider an October 6, 2016 order dismissing with prejudice plaintiff's complaint against defendants Latife A. Nasser and Louay Associates, LLC. We conclude that the complaint states a cause of action, and plaintiff's certification filed in opposition to the motion to dismiss further demonstrates a colorable claim. Moreover, even if the complaint did not state a claim, it was error for the trial court to dismiss the complaint with prejudice. Accordingly, we vacate the October 6, 2016 and January 31, 2017 orders and remand this matter to the trial court.

I

Viewed in the light most favorable to plaintiff, his complaint states the following facts. Jehad Daher was the sole member of Louay Associates, LLC (the company), which owned a valuable piece of commercial property in Clifton. In 2014, Daher sold plaintiff a one-third interest in the company for $235,000, plus $50,000 in sweat equity. Plaintiff paid the money and performed $50,000 worth of work on the property. In 2015, Daher agreed to buy back plaintiff's one-third share in the company for $350,000, to be paid as follows: $30,000 payable immediately, and the balance to be raised by having the company refinance the property. In other words, Daher committed the company to refinance the property and

promised that $320,000 worth of the proceeds would be paid to plaintiff.

On July 7, 2015, without first paying plaintiff what he was owed, Daher transferred ownership of the company to Latife A. Nasser. Nasser was aware of the buy-out arrangement when she obtained ownership of the company. Viewing the complaint favorably to plaintiff, Nasser was aware that Daher had committed company funds to plaintiff, because only the company could refinance the property and, once the refinancing was accomplished, the funds would belong to the company.

On November 18, 2015, Nasser caused the company to refinance the property for $1.7 million. However, neither the company, nor Nasser, nor Daher, paid plaintiff the $320,000 he was owed, and they also excluded him from any ownership interest in the company. According to the complaint, Nasser and Daher both acknowledged "a liability" to plaintiff but neither was willing to pay it. Plaintiff sought imposition of a "resulting trust" on the company's property in order to prevent the company, Nasser and Daher from being unjustly enriched. Plaintiff did not specifically ask the court to re-convey to him his one-third interest in the company or to impress a trust on the company itself, as a remedy. However, he did request that defendants account to him.

About two months after the complaint was filed, Nasser and the company filed a motion to dismiss in lieu of an answer under Rule 4:6-2(e). The gist of the motion was that plaintiff had no legal or equitable claim to the property, and had no contractual relationship with Nasser or with the company.

In opposition, plaintiff filed a certification, setting forth his factual allegations in greater detail. In his certification, plaintiff attested that Daher paid him $30,000 for his shares of stock, and also gave him a $20,000 check that bounced. According to plaintiff, Nasser's son, Hussain Nasser (Hussain[1]), was planning to marry Daher's daughter and buy the company. Daher and Hussain both promised plaintiff that they would pay him the remaining sum owed to him when Hussain bought the company and refinanced the property. Then, suddenly and inexplicably, the company was transferred to Hussain's mother, Latife Nasser. Plaintiff believed that Daher transferred the property to Nasser in order to "circumvent the understanding I had with Hussain Nasser, coupled with the fact that his mother was not residing in this Country." In other words, Daher was attempting to render himself judgment-proof.

[1] Meaning no disrespect, we use his first name to avoid confusion.

Attached to plaintiff's certification was the "stock purchase loan agreement and repayment plan" pursuant to which he bought one-third of the company's stock in exchange for cash, plus work to be done on the company's property. Significantly, the agreement was signed by Daher on behalf of "Louay Associates, LLC." Thus, contrary to defendant's assertion, there is at least some evidence that plaintiff had a contract with the company. Also attached to the certification were three checks signed by Daher, but drawn on the company's account, in partial payment for the re-purchase of plaintiff's stock. There were two $15,000 checks, plus one $20,000 check which, according to plaintiff, was declined by the bank for insufficient funds. Defendants did not file a responding certification.

In dismissing the complaint, the trial court reasoned that plaintiff had no contractual or other rights against the company or Nasser and had no right to the company's property.

II

"In considering a motion to dismiss under Rule 4:6-2(e), courts search the allegations of the pleading in depth and with liberality to determine whether a cause of action is 'suggested by the facts.'" Rezam Family Assoc., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011) (citation omitted). A court "must 'ascertain whether the fundament of a cause of action

may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Ibid. (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)). "A pleading should be dismissed if it states no basis for relief and discovery would not provide one." Ibid. "The motion to dismiss should be granted only in rare instances and ordinarily without prejudice." Smith v. SBC Communs., Inc., 178 N.J. 265, 282 (2004). On appeal, our review is de novo. Rezem Family Assocs., 423 N.J. Super. at 114.

Viewing the complaint, together with the motion papers, in light of the applicable law, we are able to perceive at least the outline of causes of action for fraudulent transfer, and for a constructive trust over the one-third share of the company's stock that plaintiff sold to Daher but for which Daher did not pay him. Moreover, taking the facts pled as true, the $1.7 million in mortgage proceeds belongs to the company, because the company's property was refinanced. Plaintiff may have a claim against the company to preclude the transfer of its funds to Nasser until the company pays the debt which, according to plaintiff, Daher inferentially agreed the company would pay.

In this case, although it was not explicitly pled, the complaint, together with plaintiff's certification, implies a civil conspiracy claim against Nasser and Daher under the Uniform

Fraudulent Transfer Act (UFTA). Under the UFTA "[a] transfer made or obligation incurred by a debtor is fraudulent," regardless of whether the claim arose before or after the transfer was made, if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." N.J.S.A. 25:2-25(a). In determining whether the debtor had "actual intent to hinder, delay, or defraud any creditor of the debtor," courts consider a host of factors, including whether the transfer was of "substantially all the debtor's assets" and whether the transferee paid reasonably equivalent value for the asset. N.J.S.A. 25:2-26(e), (h).

Further, creditors "in New Jersey may bring a claim against one who assists another in executing a fraudulent transfer. Such an action would require the creditor to prove that the conspirator agreed to perform the fraudulent transfer, 'which, absent the conspiracy, would give a right of action' under the UFTA." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 178 (2005) (quoting Morgan v. Union Cty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364 (App. Div. 1993)).

If plaintiff can show that Hussain, Daher and Nasser intentionally acted together to hinder his claim by transferring ownership of the company to Nasser without reasonable compensation, then he may be able to succeed on a UFTA claim

against Nasser. He may also be entitled to the remedy of a constructive trust. "Generally all that is required to impose a constructive trust is a finding that there was some wrongful act, usually, though not limited to, fraud, mistake, undue influence . . . which has resulted in a transfer of property." Stewart v. Harris Structural Steel Co., 198 N.J. Super. 255, 266 (App. Div. 1984) (citation omitted). In this case, the wrongfully transferred property would be the shares of the company, and possibly the $1.7 million if Nasser has transferred it to herself without first paying the company's debts. Id. at 267.

In articulating these legal and equitable theories, we are in no way opining that plaintiff has a meritorious claim against any of the defendants. That is not the issue on a motion to dismiss. The only issue is whether there is the germ of a cause of action and a possible basis for legal or equitable relief. There has been no discovery in this case, and it is premature to speculate as to what discovery will reveal.

Motions to dismiss should "ordinarily [be granted] without prejudice." Smith, 178 N.J. at 282. Moreover, if the court intends to depart from that rule, it should specifically state its reasons for dismissing the complaint with prejudice. Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2009). We appreciate that in this case, plaintiff's pleading was obscure;

however, favorably viewed, the facts pled raise a distinct suspicion of wrongdoing even if the legal theories could have been more clearly articulated. On remand, plaintiff should have an opportunity to amend his pleading before defendants file an answer and discovery begins.

Remanded. We do not retain jurisdiction.