SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY

Trial/IAS:	**Part 42**
Motion Date:	**10/22/01**
Index No.:	**18787/00**
Mtn. Seq. No.:	**001**

Present: Honorable Jerald S. Carter

---x

WILLIAM J. O'REILLY and MAUREEN O'REILLY,

Plaintiffs,

-against-

JOHN F. KENNEDY and JOSEPHINE C. KENNEDY,

Defendants.

---x

The following papers were read on this motion:

Notice of Motion and annexed Affirmation w/ Exhibits	1
Memorandum of Law in Support	2
Affidavit in Opposition to Motion w/ Exhibits	3
Memorandum of Law in Opposition	4
Reply Affidavit	5

Defendant, Josephine C. Kennedy, (hereinafter Mrs. Kennedy) moves this court for an order, pursuant to CPLR 6501 and 6514, cancelling the notice of pendency filed in conjunction with Plaintiffs'(hereinafter Mr. and Mrs. O'Reilly) summons and complaint, as well as for associated costs and expenses. The plaintiffs oppose the motion and ask that they be granted costs and attorneys fees.

The action was commenced on November 20, 2000. The complaint sought monetary damages based upon certain acts and conduct which allegedly constituted trespass, nuisance, assault, intentional infliction of emotional harm and prima facie tort. In conjunction with said complaint, on November 30, 2000, the plaintiffs filed a Notice of Pendency relating to the Kennedy premises at 414 Park Avenue, Manhasset, New York (hereinafter, the premises). Subsequently, on January 8, 2001, Mrs. Kennedy commenced an action against her son, Defendant John F. Kennedy, (hereinafter Mr. Kennedy), seeking to rescind a March 1999 deed transferring the remainder fee title interest to the premises. In February, 2001, the plaintiffs moved to and were granted permission to intervene in that action. That law suit was eventually settled. Additionally, in March 2001, the plaintiffs filed an amended complaint, pursuant to Debtor and Creditor Law 276 and 279, invalidating the transfer of the premises and restraining either or both defendants from selling or otherwise disposing of any property interest in said property during the pendency of this action.

This court must now decide whether or not the plaintiffs, under the facts in this case, are entitled to a notice of pendency on the defendants' property. CPLR 6501 provides, "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."

Because a notice of pendency is procedurally easy to file and because the consequences of its filing can be profound and far-reaching, courts require strict compliance with the procedural prerequisites, as well as, a narrow interpretation in reviewing whether or not the action is one which falls under CPLR 6501 (*5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313 [1984]). The court is limited to reviewing the pleading in order to determine if the action comes within the scope of the statute and should not investigate the underlying action nor its likelihood of success on its merits. (*Interboro Operating Corp.v. Commonwealth Security & Mortgage Corp.*, 269 N.Y.56 [1935]). Generally, the relief requested in the action must be directly related to the statutory terms. It must seek to directly affect title to or possession of the real property and must do more than merely relate or refer to the land (*5303 Realty Corp. v. O & Y Equity Corp., supra*). It has been held that a notice of pendency cannot stand where the filing party claims no right, title or interest in the property against which it is filed and where the underlying suit involves merely some encroachment or wrong committed by the defendants on the plaintiffs' land (*Braunston v. Anchorage Woods, Inc.*, 10 N.Y.2d 302 [1961].

In applying the law to the facts of this case, it appears that, under CPLR 6501, the plaintiffs are not entitled to a notice of pendency on the property, 414 Park Ave., Manhasset. Their action does not directly affect title or possession of that particular property. Their suit is one primarily for monetary damages, based upon alleged tortious conduct by the defendants. The fact that they requested equitable relief in the form of an injunction against Mr. Kennedy does not alter the result. Such injunction could be effectuated regardless of who owns the property.

However, in addition to asking for a notice of pendency under the CPLR, the plaintiffs move pursuant to the Debtor and Creditor Law, sections 276 and 279. The first section states as follows:

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed by law, to hinder, delay. or defraud either present creditors or future creditors, is fraudulent as to both present and future creditors.

The other section cited, 279, reads as follows:

> Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded has his claim matured, and the court may,
>
> a. Restrain the defendant from disposing of his property,
>
> b. Appoint a receiver to take charge of the property,
>
> c. Set aside the conveyance or annul the obligation, or
>
> d. Make any order which the circumstances of the case may require.

Pursuant to Debtor and Creditor Law, 276, the burden of proving actual fraudulent intent is on the party seeking to set aside the transfer. The standard of proof is that of clear and convincing evidence. (*In re Kovler,* 249 B.R. 238 [2000]. The party can rely upon "badges of fraud" in order to make its case. (*Pen Pak Corp., LaSalle National Bank of Chicago*, 240 A.D. 384 [2nd Dept 1997]). Once the party seeking to set aside the transfer establishes a prima facie case of actual intent, the burden then shifts to the other side to offer an innocent explanation for its conduct. (*In re Kovler, supra*).

In the instant case, the O'Reillys have indicated various badges of fraud tending to prove that there was actual intent to hinder, delay or defraud creditors. However, Mrs. Kennedy has offered an innocent explanation for her conduct. It is therefore impossible, at this juncture, to determine the issue of actual intent to defraud creditors. Further probing into the facts asserted by each party is necessary.

The same can be said even if Mr. and Mrs. O'Reilly proceed upon Debtor and Creditor Law 273, which although not specifically quoted, is mentioned and relied upon is their papers. New York Jurisprudence, 2nd , volume 30, section 339 states, in part, "Thus, it has been held that a transfer made without consideration by a transferor who is insolvent, or who is thereby rendered insolvent, is fraudulent as to creditors without regard to any actual intent to defraud. To come within the purview of the statute, the conveyance must have been made without fair consideration, but even where there is no such consideration the conveyance is fraudulent only if: at the time of the conveyance, the transferor was insolvent or the conveyance rendered him insolvent."

As stated in the Debtor and Creditor Law 273, a conveyance under the circumstances described in the statute is fraudulent as a matter of law. In this instance, however, the attacking creditor bears the initial burden of proving that the transferor was insolvent or rendered insolvent by the transfer and that the transfer was made without fair consideration. (*American Investment Bank, N.A. v. Marine Midland Bank, N.A.*, 191 AD2d 690 [2nd Dept., 1993]). Both these issues are questions of fact that must be determined for each individual case. (*Atlantic Bank of New York v. Toscanini*, 145 AD2d 590 [2nd Dept., 1988]. This point, regarding Mr. Kennedy's insolvency, is not addressed in any detail by the papers submitted, by either side.

Clearly, issues remain as to whether or not the transfer of the Kennedy property by Mr. Kennedy to his mother was, in fact a fraudulent conveyance. Was Mrs. Kennedy's original transfer to her son the result of duress, as alleged by Mrs. Kennedy? Was the re-transfer back to Mrs. Kennedy actually a ploy to avoid satisfying a potential judgment against her son, as asserted by the plaintiffs? It may be necessary also to determine whether Mr. Kennedy insolvent or rendered in solvent at the time of the transfer. These questions, among others, cannot be answered at this time, based upon the papers submitted. A plenary hearing must be held in order to decide whether the essentially equitable relief requested by the plaintiffs should be granted. However, in the interests of judicial economy, such hearing will be held in abeyance until the conclusion of the underlying matter. A plenary hearing will then be conducted if the plaintiffs are successful in their action and there is a money judgment in their favor, which Mr. Kennedy is unable to satisfy. At this hearing, the issue of costs and attorneys' fees will be determined, as well.

Dated: Mineola, NY
December 10, 2001

ENTER,

A.J.S.C.

ENTERED

MAR 05 2002

NASSAU COUNTY
COUNTY CLERK'S OFFICE