

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT:

HON. IRA B. WARSHAWSKY

Justice.

TRIAL/IAS PART 25

JAMIE PINTO,

Plaintiff,

NASSAU COUNTY
INDEX NO. 000750/00
MOTION DATE: 8/17/00
MOTION SEQUENCE: 002, 003

-against-

NESIM PINTO and AVRAM (AVI) PINTO,
d/b/a IJN CO., INC.,

Defendants.

The following papers read on this motion:

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| Notice of Motion/Order to Show Cause | X |
| Notice of Cross Motion | X |
| Answering Affidavits | |
| Replying Affidavits | X |
| Memoranda of Law: Plaintiff's/Petitioner's | X |
| Defendant's/Respondent's | X |

This motion by plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment against defendant, Avram Pinto, d/b/a/ IJN Co., Inc., in the amount of \$230,000.00, plus interest and attorney fees, and the cross motion by defendant, Avram Pinto d/b/a/ IJN Co. Inc., for an order dismissing the complaint is determined as follows.

Plaintiff commenced this action to recover the sum of \$875,000.00, plus interest and attorney fees against defendants, Avram (Avi) Pinto and Nesim Pinto. Plaintiff moves for summary judgment on the first cause of action asserted in the complaint which is based

upon section 276 of the Debtor & Creditor Law. The second cause of action is premised upon section 273-a of the Debtor & Creditor Law, the third cause of action is premised upon section 273 of the Debtor & Creditor Law and the fourth cause of action is premised on section 276-a of the Debtor & Creditor Law. The fifth cause of action alleges: "The Transfer constituted wrongful exercise of dominion and control by defendants over plaintiff's property."

In determining plaintiff's application for judgment on the first cause of action against Avi Pinto the court is required to determine whether plaintiff has established, without any question of fact, the elements of a claim under Debtor & Creditor L § 276.

Section 276 provides: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." To pursue relief under Debtor and Creditor Law § 273, the creditor-debtor relationship must exist. Shelly v Doe, 761 N.Y.S. 2d 803 (3d Dept 1998); JR & J Holding Co., v Rabinowitz, 201 A.D. 2d 535 (2d Dept 1994). As between a judgment creditor and judgment debtor, or "creditor" within the meaning of Debtor and Creditor Law § 270, issues of actual intent, conveyance or transfer, consideration, and/or insolvency arise which must be resolved before relief can be granted. See, e.g. Spencer v Hylton-Spencer, 709 N.Y.S. 2d 207 (2d Dept 2000). A plaintiff, in such a fraudulent conveyance suit, may make application pursuant to section 278 or 279 to set the conveyance aside.

Here, the plaintiff seeks recovery of \$ 230,000.00, from Avi Pinto, doing business as IJN Co., Inc. Neither Avi Pinto nor IJN Co. Inc., are judgment debtors or debtors of plaintiff.

Plaintiff was formerly married to Nesim Pinto, and Avi Pinto is one of the parties five children. Avi Pinto has apparently, since 1994, been active in his father's business, a partnership, operating under the name of Imperial Jewelry and Novelty Co. However, in August of 1998, in response to a restraining order issued by the Honorable Roy S. Mahon, J.S.C., upon the bank accounts of Imperial Jewelry and Novelty Co., Avi Pinto used a bank account titled to IJN Co., Inc., for the receipts and financial obligations of Imperial Jewelry

and Novelty Co.

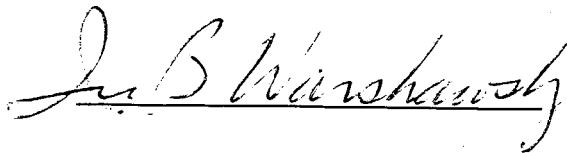
Avi Pinto says that nothing has changed with his father's business and that he only saved it by developing another bank account. He acknowledges a 40% ownership interest in the company. Conversely, Nesim Pinto testified in a hearing in Family Court that his business is no longer a functioning business. Plaintiff contends that the operation of Imperial Jewelry and Novelty Co., under the bank account of IJN Co., Inc., is a fraudulent transfer within the meaning of the Debtor and Creditor Law.

Defendant, Nesim Pinto, is a judgment debtor of the plaintiff in an undisclosed aggregate sum resulting in arrears of maintenance, child support and distribution of marital assets arising out of the parties divorce. Part of the debt to plaintiff emanates from Nesim Pinto's failure to either give plaintiff a "Get" or half of the value of marital property, i.e., Imperial Jewelry and Novelty Co.

In short, it is plain that Avi Pinto is not a debtor to his mother for sums due under the judgment of divorce and there is no judgment entered against the corporation which allegedly has received the assets of Imperial Jewelry and Novelty Co. Since this pivotal element has not been established a money judgment cannot be granted in favor of plaintiff against Avi Pinto, or the corporation. Plaintiff's proper remedy is to seek to have the conveyance or transfer set aside pursuant to section 278 of the Debtor and Creditor Law, as a fraudulent conveyance.

The motion by plaintiff for summary judgment is accordingly denied without prejudice to a renewed motion for summary judgment against the judgment debtor or upon an amended pleading. The cross-motion by defendant, Avram Pinto, for an order dismissing the complaint is granted as to the first, second, third and fourth causes of action.

Dated: September 8, 2000



J.S.C.