

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH A. DE MARO

Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

HARISH SETHI,

Plaintiff,

MOTION DATE:
October 28, 2002
INDEX No. 15894/02

-against-

SEQUENCE No. 1, 2

NIRMAL BAL and PRUDENTIAL INTERNET
SOLUTIONS CORP.,

Defendants.

The following papers read on this motion:

- Order to Show Cause and Supporting Papers (Plaintiff)
- Notice of Cross-Motion and Supporting Papers (Defendant Prudential Internet Solutions Corp.)
- Memorandum of Law in Support of the Plaintiff's Motion for an Injunction and/or Attachment, Pursuant to New York Debtor and Creditor Law Sections 2728 and/or 279 and/or C.P.L.R. Articles 62 and 62
- Defendant, Prudential Internet Solutions Corp's Memorandum of Law In Opposition to Plaintiff's Motion
- Reply Memorandum of Law in Further Support of the Plaintiff's Motion for an Injunction and/or Attachment, Pursuant to New York Debtor and Creditor Law Sections 278 and/or 279 and/or C.P.L.R. Articles 62 and 63 and in Opposition to the Defendant's Motion for Summary Judgment
- Supplemental Affidavit of Harish Sethi in Support of the Plaintiff's Motion for an Injunction and/or Attachment Pursuant to New York Debtor and Creditor Law Sections 278 and/or 279 and/or C.P.L.R. Articles 62 and 63 and In Opposition to Prudential Internet Solutions Corp's Motion for Summary Judgment

Continued next page

Reply Affidavit of Harish Sethi in Support of the Plaintiff's
Motion for an Injunction and/or Attachment Pursuant to
New York Debtor and Creditor Law Sections 278 and/or 279
and/or C.P.L.R. Articles 62 and 63 and in Opposition to
Prudential Internet Solutions Corp's Motion for Summary
Judgment
Reply Affirmation in Support of Cross-Motion

Motion by plaintiff pursuant to NY Debtor and Creditor Law
Section 278 and/or 279 and/or CPLR Article 62 and 63 granting an
attachment in plaintiffs favor upon the real property located at 40
Middle Lane, Jericho, New York which was transferred by the
defendant, Nirmal Bal to defendant, Prudential Internet Solutions
Corp., including the rents therefrom and the proceeds of the
property and to enjoin Prudential from disposing, encumbering,
alienating, hypothecating or exercising any other right of
ownership in and over the subject property is decided hereinbelow.

Cross-motion by defendant, Prudential Internet Solutions,
Corp. for an order pursuant to CPLR Section 3212 granting it
summary judgment dismissing the complaint is denied without
prejudice.

At the outset it must be stated that conspicuously absent from
this motion practice is ANY response to either the motion or cross-
motion by defendant, Nirmal Bal. On the two occasions that this
matter has been on for conference with this Court, counsel for
defendant Nirmal Bal has not appeared.

The facts underlying this case indicate that defendant, Bal
has a history of different business dealings with both the

plaintiff and defendant, Prudential. On May 29, 2001, defendant, Bal executed a promissory note evidencing a \$50,000.00 personal loan to him from defendant, Prudential. On May 30, 2001, defendant, Bal received a \$360,000.00 mortgage from Maspeth Federal Savings and Loan Association to enable him to purchase the premises of 40 Middle Lane, Jericho, New York. This mortgage was recorded on June 7, 2001. On August 3, 2001, defendant, Bal made a mortgage to defendant, Prudential for \$50,000.00, on the subject property. On August 6, 2001, defendant, Bal gave this second promissory note to defendant, Prudential, allegedly to supercede and replace the note of May 29, 2001. Payment was to be due on demand after October 31, 2001. Defendant, Bal had three days, until August 9, 2001, to recind. Attached to both the plaintiff's and defendant, Prudential's papers are copies of a signed, but undated "Right to Cancel". Under the words "I wish to cancel" is the signature of defendant, Bal. The notice required it to be cancelled no later than midnight of August 9, 2001. Coincidentally, on August 9, 2001, defendant, Bal, by deed, conveyed title to the mortgaged premises to defendant, Prudential. On September 28, 2001, the deed from defendant, Bal, to defendant Prudential, for the premises of 40 Middle Lane, Jericho, New York, was recorded.

Defendant, Prudential claims that it not only had been owed \$50,000.00 from defendant, Bal, on the original loan but also, Bal damaged Prudential in various business dealings equally losses of upwards of \$150,000.00. Since Bal was unable to repay the loan and since litigation on the alleged damages Prudential suffered was

cumbersome, Prudential claims it took the deed to the premises as consideration for a release of all claims against Bal. Defendant, Bal was allegedly permitted to remain as a tenant in the premises and his rent was to be the mortgage payment to Maspeth Federal of approximately \$3,300.00 per month.

From some undisclosed source, defendant, Prudential became aware that defendant, Bal has not been making the mortgage payments. On December 18, 2001, Prudential served a 10 day notice to quit the premises on defendant, Bal pursuant to RPAPL Section 713. Bal remained in possession, so on January 11, 2002, Prudential brought a hold over proceeding against Bal in Nassau County District Court. [As an aside, it is curious to note that in the affidavit of Prudential's Vice President, Eric Deepak Kumar, in opposition to the current motion and in support of the cross-motion, on page 6, he states in paragraph 15, "throughout this time (February 2002 to date), Bal has not made any mortgage or rent payments..." yet Prudential served the 10 days Notice to Quit in December, 2001.] In response to the Hold Over proceeding, defendant, Bal brought an Order to Show Cause into Nassau County Supreme Court for a preliminary injunction to enjoin Prudential from transferring title or taking any action which encumbered the property and to prevent Prudential from continuing the Landlord/Tenant proceeding. Bal acknowledged that he transferred title to Prudential by deed and asked the Court to annul it.

Justice Segal in his decision of March 27, 2002 alludes to the fact that in the papers before him, Bal had asserted and documented

his contentions that he continued making substantial mortgage payments on the property subsequent to the alleged conveyance between Bal and Prudential. Justice Segal does not elaborate as to how long Bal continued paying the mortgage to Maspeth. However, Maspeth initiated a foreclosure action by way of summons dated July 23, 2002 and complaint dated August 8, 2002. The complaint seeks principal and interest from February 1, 2001 which is most likely a typo and perhaps refers to February 1, 2002 as the mortgage was only executed on May 30, 2001. An index number has been purchased in Nassau County Supreme Court. The request for judicial intervention was formally made on November 8, 2002. According to Supreme Court Case Management the matter was on for a preliminary conference on November 12, 2002 and is scheduled for an Order of Reference on November 26, 2002 which has been transferred to this IAS Part.

In his decision of March 27, 2002, Justice Segal ordered plaintiff therein, Bal, to post an undertaking in the amount of \$100,000.00 by April 12, 2002. Bal failed to do so. However, on June 12, 2002, Bal and Prudential entered into a Stipulation of Settlement which provided that Bal was to "pay Prudential \$60,000.00 in full satisfaction of the promissory notes of August 6, 2001 and/or May 29, 2001." The attorney for Prudential was to hold the money in escrow pending receipt by Bal's attorney of a Quit Claim Deed in recordable form. The stipulation further provided that in the event Bal failed to pay the \$60,000.00 or deliver the Stipulation of Discontinuance discontinuing the action,

with prejudice, within 25 days of the date, after 5 days notice to cure default to Bal's attorney, the action was to be deemed dismissed with prejudice upon presentation of the stipulation and an affirmation of non-compliance to the Court. The Default Judgment against Bal was entered on July 30, 2002 and adjudged dismissed with prejudice by the Nassau County Clerk on the same date.

These facts leave Prudential with a deed and title to the premises as well as a viable right to an action against Bal for the alleged business losses he has caused Prudential. Based upon the agreed terms of the Stipulation of Settlement, Bal is forever barred from proceeding against Prudential to annul the deed conveyance and Bal is not permitted to enjoin the Hold Over proceeding as the action seeking this relief was dismissed with prejudice on July 30, 2002.

The Landlord-tenant matter was allegedly calendared to proceed to trial on October 2, 2002. Bal is without means to enjoin it. On September 30, 2002, in walks plaintiff, Sethi, herein, with an Order to Show Cause, to enjoin Prudential from exercising any right of ownership over the property, including but not limited to the prosecution of any actions which could be prosecuted by an owner or user of the property.

Plaintiff Sethi alleges that on September 25, 2001, he wire transferred \$75,000.00 to Amersco Comm. Finance. Plaintiff, Sethi states that Bal needed the funds transferred to Amersco because Bal was engaged in a transaction with Amersco. Plaintiff, Sethi claims

this \$75,000.00 was a loan that was reduced to a note and mortgage dated October 13, 2001 for \$230,000.00 between him and defendant, Bal. Plaintiff, Sethi has attached copies of three checks for varying amounts, drawn from three different bank accounts, all dated October 12, 2001 and each made out to American Title and Trust. No statements of the American Title and Trust account have been submitted. These three checks total \$177,500.00, which is less than the \$230,000.00 note and mortgage. If the Court were to consider the \$75,000.00 wired to Amersco Commercial Finance on September 25, 2001, as part of monies Sethi claims he loaned to Bal, then Sethi would have advanced a total of \$252,500.00 to Bal and taken only a \$230,000.00 note and mortgage in exchange. There is no accounting for Bal's indebtedness to Sethi for the additional \$22,500.00 which Sethi alleges he advanced to Bal. The mortgage states that the \$230,000.00 "has been funded this date"... and would be held in escrow upon receipt satisfactory to Sethi, that Bal's corporation A & B Fuel, Inc., completes the purchase of certain Truck Stops in the State of Oklahoma. No proof of these Truck Stops having been purchased nor proof of the release of escrow funds as a result thereof, has been submitted to this Court. No statement from the alleged "escrow account" with \$230,000.00 earmarked as "held in escrow" has been submitted.

At some point, prior to May 15, 2002, A & B Fuel filed as a Debtor under Chapter 11 of the Bankruptcy Law in the U.S. Bankruptcy Court, Southern District of New York, case number 01-41091 (REG). This is evidenced by an attached copy of the "List of

Equity Security Holders" dated May 15, 2002. Amersco Commercial Finance, In (sic) is listed as a creditor with outstanding claims of at least \$14,529,865.15. It is questionable that the \$75,000.00 wire transferred by Sethi to Amersco on September 25, 2001 was not a loan to Bal but in fact an investment. It is further questionable whether the \$230,000.00 (of which there is no specific evidence) was ever released from escrow to A & B Fuel prior to its filing for bankruptcy protection. Plaintiff had been afforded an opportunity by the Court to submit documentary evidence but has failed to do so.

Plaintiff's entire principal balance and all accrued and unpaid interest on the note from defendant, Bal was due and payable in full on January 15, 2002. Plaintiff made no demand on the note from January 15, 2002 until he served the summons and complaint in conjunction with the instant motion on September 30, 2002. As this Court has not received any papers from defendant, Bal and it is through the submission of exhibits of plaintiff that the Court has evidence of the bankruptcy proceeding, it is uncontroverted that plaintiff had constructive notice of A & B Fuel's bankruptcy filing via the copy of his document of the listed security holders of A & B Fuel, dated back in May, 2002.

Plaintiff's cause of action is based upon allegations of a fraudulent transfer of title to the premises, 40 Middle Lane, Jericho, New York by defendant, Bal to Defendant, Prudential which thereby rendered defendant, Bal insolvent. Sethi alleges that Bal so acted with the intent to incur debts beyond his ability to pay

as they matured. Defendant, Bal admits in his answer to plaintiff's complaint that it was intended he would incur/debts beyond his ability to pay as they matured and that the transfer of title to Prudential did render him insolvent. The specific debt of which plaintiff alleges Bal incurred beyond his ability to pay is the note by defendant, Bal payable to plaintiff for \$230,000.00. Plaintiff has failed to submit proof that he in fact gave the \$230,000.00 to defendant, Bal. All the Court has at this time is a copy of a document in which Bal promises to pay Sethi \$230,000.00 on January 15, 2002 and the consideration for same was to be funds released from escrow upon satisfactory proof of the purchase of Truck Stops by defendant, Bal's corporation, A & B Fuel. There has not been any proof submitted that the funds were ever turned over to Bal and the deal thereby being consummated.

The collateral for the note was a mortgage on the subject premises and was dated October 13, 2001. It is curious to point out that upon taking a mortgage for such a large sum of money, plaintiff failed to conduct a title search which would have revealed that on September 28, 2001, the deed that Bal transferred to Prudential on August 9, 2001, was recorded. The mortgage was a worthless piece of paper. Plaintiff was on constructive notice of the recorded deed.

Separate and apart from whether or not plaintiff even is an actual creditor of defendant, Bal, what underlies all of the claims in his complaint is the question of whether or not defendant, Prudential gave fair consideration for the transfer of title as

that term is defined under the Debtor and Creditor Law Section 272 which states as follows:

Fair consideration is given for property, or obligation.

a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

Defendant, Prudential, as stated herein, asserts that the consideration given was release from the outstanding debt of \$50,000.00 as well as damages Prudential may have been awarded had it asserted its claims against defendant, Bal for business losses and misappropriated commissions totaling an amount upwards of \$150,000.00. Prudential and Bal, as previously stated, entered into a stipulation of settlement whereby Bal would have had an annulment of the deed conveyance had he executed his part of the stipulation. Was this "fair consideration" in the contexts of Debtor and Creditor Section 273, 274, 275 and 278? Was it not fair consideration, but under Debtor and Creditor Section 278(2) Rights of a Creditor whose claim has matured, a purchaser (Prudential), so to speak herein, who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment? Prudential, pursuant to the unexecuted stipulation of settlement

between it and Bal, was willing to take \$60,000.00 in full satisfaction for the \$50,000.00 it loaned to Bal and in consideration of its potential lawsuit against him. Bal's lack of execution did lead to a windfall to Prudential. Are these facts evidence that the taking of the deed was merely meant to be collateral on the \$50,000.00 loan? If this is the case, then at the time Bal took a loan of \$230,000.00 from Sethi with the premises as collateral, there existed that much equity in the premises to cover it, if its value was upwards of \$650,000.00 at that point as Bal allegedly told Sethi, as a means to get him to loan Bal the money. But this flies in the face of Bal's answer to Sethi's complaint wherein he admits to paragraph 33 of the complaint that when he made the transfer to Prudential, it was intended that defendant, Bal would incur debts beyond his ability to pay as they matured. This statement seems to indicate that when he gave Prudential the deed that he, Bal intended to relinquish all claims to the premises and any equity therein. No clear answer to these and other questions of fact raised on the instant motions are ascertainable from the papers submitted.

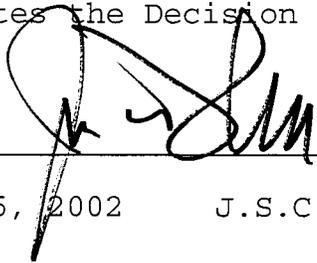
In sum, plaintiff, Sethi has failed to submit proof to substantiate his claim that he in fact gave \$230,000.00 to defendant, Bal. Defendant, Prudential would enjoy a windfall well above his \$50,000.00 loan, should title to the premises ultimately be found to have been legally transferred to Prudential.

Plaintiff's motion for the varying requests for relief is denied without prejudice to renew at some point further along in

the discovery process. Plaintiff has failed to substantiate his ultimate success on the merits of this case which would entitle him to a preliminary injunction or an attachment of the property at this time. Defendant, Prudential has requested an opportunity to sell the property thereby enabling Prudential to satisfy the first mortgage which is held by Maspeth Federal in the amount of approximately \$360,000.00 and to sell the property. This request is conditionally granted. Prudential shall make arrangement with Maspeth Federal to bring the mortgage payments up to date; sell the property and satisfy the first mortgage which Maspeth holds. Prudential is directed to notify the plaintiff, Sethi, herein, of any potential contract of sale for the subject premises prior to executing same. After the sale is complete, Prudential is to pay off Maspeth, take its \$60,000.00 (agreed upon amount in the previous stipulation of settlement) and place the remaining proceeds in escrow pending resolution of the within cause of action.

Accordingly, this matter will proceed with discovery in its normal course. A copy of this order and the copies of the papers submitted as provided by counsel for both plaintiff Sethi and defendant, Prudential are being sent forthwith to the office of the Nassau County District Attorney.

This constitutes the Decision and Order of this Court.



Dated: November 15, 2002 J.S.C.

ENTERED
NOV 20 2002
NASSAU COUNTY
COUNTY CLERKS OFFICE