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TRIAL DECISION

SUPREME COURT OF THE STATE OF NEW YORK

SCHIFF FOOD PRODUCTS CO., INC.

By: HON. DANIEL MARTIN

Plaintiff.

Dated: January 11, 2002

Index No.: 028992/98

- against -

Calendar No.: 2000N3098

AMERICAN FRIENDS OF OHR SHLOMO,
INC., A NOT FOR PROFIT CORPORATION
and MIMI MOSKOWITZ and ROMA BETEGA.

Defendants.

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Plaintiff asserts causes of action for a declaratory judgment that :1) American Friends of Ohr Schlomo, Inc. is a sham corporation established solely to secret the assets of defendant Mimi Moskowitz and that Ohr Shlomo holds title to the subject premises as a constructive trust in favor of defendant Moskowitz and that the assets of defendant Moskowitz be restrained and held for the payment of the judgment; 2) defendant Roma Betega holds no rights, title or ownership interest in the subject premises; and 3) defendants Betega and Ohr Shlomo have no interest in the subject property and that defendant Moskowitz be adjudged the true owner thereof pursuant to Real Property Actions and Proceedings Law §1501.

With regard to the first cause of action, plaintiff seeks to have the court declare that Ohr Shlomo holds the subject property in constructive trust as a sham corporation for defendant Moskowitz. Plaintiff presumably asserts that with a constructive trust in place in favor of defendant Moskowitz and a judgment declaring that the assets of defendant Moskowitz be restrained, plaintiff can seek to attach against said property in enforcing the original judgment against defendant Moskowitz.

With regard to the first cause of action, the court concludes that Ohr Shlomo holds title to the subject property as a sham corporation for the beneficial interest of defendant Mimi Moskowitz. A judgment debtor may not form a corporation for the purposes of assuming ownership of the debtor's property for less than adequate consideration for the purposes of "hindering, delaying, defeating and impairing the rights of creditors keeping the property beyond their reach." Berkshire Structural Steel Co., Inc.v. Pollock, 225 A.D. 770, 770 (2nd Dep't 1929). See, also, Orr v. Kinderhill Corporation, 991 F.2d 31 (2nd Cir. 1993).

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At the outset, there is no dispute that the property was transferred to Ohr Shlomo at considerably less than fair consideration. The property was originally purchased by defendant Moskowitz at a price of \$187,000.00 and later by defendant Betega at a price of \$110,000.00. The evidence reveals that the property was conveyed by Mr. Betega to Ohr Shlomo for \$10.00. Accordingly, the court concludes that Ohr Shlomo did not receive the property for fair consideration.

Further, Ohr Shlomo is at best a sham corporation. At his pre-trial deposition, the transcript of which has been entered by plaintiff as an exhibit in the instant matter, defendant Betega stated that the purpose of Ohr Sholomo was to be a not-for-profit corporation which was to distribute "charitable checks" to poor Jewish students studying abroad. The purpose of the corporation is further borne out in the certificate of incorporation of Ohr Shlomo.

Having reviewed the testimony of Ms. Moskowitz and Mr. Betega at their respective pre-trial depositions, the court concludes that Ohr Shlomo was never capable of and in fact was never intended to distribute charitable funds to poor Jewish students as indicated in the certificate of incorporation. The corporation never maintained a bank account. It held, as its only asset, the subject property. Further, it was established that only a few rabbinical students came to the United States and stayed at the subject property which was used "as [a] hotel." (See, EBT transcript of Mimi Moskowitz, P. 24, LL 4 to 7; P. 38, L. 3 to P. 41, L. 11; EBT transcript of Roma Betega, P. 58, L. 25 to P. 61, L. 15.) The corporation also neither filed a tax return with the Internal Revenue Service nor requested an employer identification number. (See, EBT transcript of Roma Betega, P. 60, LL. 3 to 9.) Plaintiff also entered into evidence a copy of a notice to defendant Ohr Shlomo from the attorney general's office which states that Ohr Shlomo had failed to submit its financial reports for the years 1996, 1997 and 1998.

Roma Betega took title to the property on August 25, 1995 and conveyed his title to same on March 19, 1996 to Ohr Shlomo. Shmuel Silverman, a certified public accountant testified at trial that Ms. Moskowitz approached Mr. Silverman about forming Ohr Shlomo as a not-for-profit corporation. The certificate of incorporation indicates that Mr. Silverman prepared the certificate in November, 1995. (See, exhibit 4). The foregoing suggests that the transfer happened so soon after Mr. Betega took title to the property and the corporation formed by Ms. Moskowitz was such a sham that the court concludes that Mr. Betega never had any intention to own the property for his own benefit, but instead intended to transfer it to Ohr Shlomo for Ms. Moskowitz's benefit such that creditors could not access Ms. Moskowitz's assets. Even if such were not the case, there is sufficient evidence in the case to support the plaintiff's contentions. The corporation, Ohr Shlomo, was nothing more than a sham for the benefit of the judgment debtor, Mimi Moskowitz. Plaintiff is therefore entitled to a judgment declaring that Ohr Shlomo holds title to the subject property as a sham corporation and holds the property as a constructive trust in favor of defendant Mimi Moskowitz.

The instant matter is unique in that plaintiff does not, as is normally the case, seek to impose a constructive trust in its own favor. Instead, plaintiff seeks to have the constructive trust imposed on an individual who took title to the judgment debtor's property and then allegedly

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conveyed the same property to a purported sham corporation, all in furtherance of a scheme to insulate the judgment debtor's property from plaintiff. It has been held that a constructive trust may be imposed where a third party who is not involved in the underlying litigation gains title to the subject real property. Dean v. Dillon, 234 A.D.2d 256 (2nd Dep't 1996).

It appears that a fiduciary relationship existed between defendant Betega and Ohr Shlomo. At her pretrial deposition defendant Moskowitz testified and the defendants did not dispute that defendant Betega was the treasurer of defendant Ohr Shlomo. Mr. Betega was therefore an officer with Ohr Shlomo and was under a fiduciary duty to the corporation. See, Alexander & Alexander of New York, Inc. v. Fritzen, 147 A.D.2d 241 (1st Dep't 1989); Howard v. Carr, 222 A.D.2d 843 (3rd Dep't 1995).

Plaintiff has further demonstrated unjust enrichment. It is not required that the one enriched, in this case Ohr Shlomo, commit a wrongful act. Simonds v. Simonds, 45 N.Y.2d 233 (1978). "What is required, generally, is that a party hold property 'under such circumstances that in equity and good conscience he ought not to retain it' (citations omitted)." Simonds v. Simonds, supra., 243. While a bonafide purchaser of the property would, a gratuitous donee of the property for which the constructive trust is sought does not take the property free of the constructive trust. Simonds v. Simonds, supra. In the instant matter, the deed from defendant Betega to Ohr Shlomo reflects that Ohr Shlomo paid nothing for the property. There is also ample evidence in this matter that Ohr Shlomo was at most a shell corporation that did not perform any of its intended not-for-profit purposes. The court therefore concludes that by receiving the subject property under these circumstances, defendant Ohr Shlomo was unjustly enriched.

The court therefore declares that defendant Ohr Shlomo is a sham corporation which was established solely for the purpose of secreting the assets of defendant Mimi Moskowitz to the extent of the value of the real property located at 751 Hempstead Avenue, West Hempstead, New York. Plaintiff is also entitled to a declaration of the court that Ohr Shlomo holds title to the subject property in constructive trust in favor of defendant Mimi Moskowitz. Accordingly, the court declares that the assets of Mimi Moskowitz be held and restrained in the amount of the value of the property located at 751 Hempstead Avenue, West Hempstead, New York.

As there is no dispute as to plaintiff's second cause of action, for a declaratory judgment that Roma Betega holds no interest in the subject premises, the relief plaintiff seeks therein is hereby granted, there being no opposition to this position of plaintiff.

Plaintiff's third cause of action, for a declaratory judgment that defendants Betega and Ohr Shlomo have no interest in the subject property and that defendant Moskowitz be adjudged the true owner of the subject property pursuant to Real Property Actions and Proceedings Law §1501, is dismissed. RPAPL §1501(1) provides:

"Where a person claims an estate or interest in real property....such person ...may maintain an action against any other person, known or unknown, including one under

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disability as hereinafter specified, to compel determination of any claim adverse to that of plaintiff which defendant makes, or which it appears from the public records, or from the allegations of the complaint, the defendant might make....”

Plaintiff does not have a sufficient interest in the real property in question to maintain a cause of action pursuant to RPAPL §1501. As plaintiff’s claim is against defendant Moskowitz based on the underlying agreement, and plaintiff holds no lien or any possessory interest in the subject property, the court concludes that plaintiff lacked an interest in the subject property and may not maintain a cause of action pursuant to RPAPL §1501. Accordingly, the third cause of action is dismissed. See, e.g. Bean v. Walker, 95 A.D.2d 70 (4th Dep’t 1983).

Submit judgment on notice.


A.J.S.C.