

**Interasian Resources Group, LLC v Shakedown  
St. - NYC, LLC**

2009 NY Slip Op 31080(U)

April 20, 2009

Supreme Court, New York County

Docket Number: 105682/08

Judge: Barbara R. Kapnick

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **BARBARA R. KAPNICK**

PART 39

*Justice*

Index Number : 105682/2008

INTERASIAN RESOURCES GR., LLC

vs

SHAKEDOWN STREET-NYC, LLC

Sequence Number : 001

DISMISS ACTION

C

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

s motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
APR 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 4/20/09

[Signature]  
**BARBARA R. KAPNICK** S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

THIS MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IA PART 39

-----X

INTERASIAN RESOURCES GROUP, LLC,

Plaintiff,

- against -

SHAKEDOWN STREET - NYC, LLC, BAGZNYC CORPORATION n/k/a ZONE 88 CORPORATION, CAPITAL BUSINESS CREDIT LLC, SML BRANDS, LLC and AIMEE LYNN ACCESSORIES CORPORATION

Defendant.

-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER  
Index No. 105682/08  
Motion Seq. Nos.  
001, 002 and 003

**FILED**  
APR 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Motion sequence nos. 001, 002, and 003 are consolidated herein for disposition.

In this action, plaintiff Interasian Resources Group, LLC ("Interasian") seeks to recover against defendants Zone 88 Corporation n/k/a BAGZNYC Corporation ("Zone") s/h/a BAGZNYC Corporation n/k/a Zone 88 Corporation and Shakedown Street-NYC LLC ("Shakedown") for: (i) payment of past due invoices on goods allegedly bought and sold (first cause of action); (ii) an account stated in the amount of \$578,014.15 (second cause of action); and (iii) breach of contract (third cause of action).<sup>1</sup>

---

<sup>1</sup> Interasian designs and produces customized accessories and promotional and packaging needs. Shakedown designs, distributes, markets and sells accessories. Zone is a designer and distributor of handbags, backpacks, and small leather goods and at least until the Conveyance Transactions discussed infra, held a license with Paris Hilton.

Plaintiff also seeks to recover monetary damages arising from the alleged fraudulent conveyance of assets by Shakedown and Zone to defendant Capital Business Credit LLC ("Capital") and to defendant SML Brands, LLC ("SML,"), a wholly-owned subsidiary of defendant Aimee Lynn Accessories Corporation ("Aimee Lynn"), which plaintiff claims was done for the purpose of defrauding Zone's and Shakedown's creditors, including Interasian, in violation of Debtor and Creditor Law § 273 (fourth cause of action) and Debtor and Creditor Law § 276 (fifth cause of action).

In addition, plaintiff seeks: (i) to recover attorney's fees pursuant to Debtor and Creditor Law § 276-a (sixth cause of action); and (ii) a judgment declaring that the transfers are void and of no effect, and the assets should be made available to satisfy the obligations of Zone and Shakedown, including the indebtedness of said defendants to plaintiff (seventh cause of action).

Finally, plaintiff seeks: (i) to hold SML and Aimee Lynn liable to Interasian for the invoiced debt amount on the grounds that SML is the successor of Zone and Shakedown, and that Aimee Lynn is the alter ego of SML (eighth cause of action); and (ii) to recover damages against Capital based on its participation in and engineering of the alleged fraudulent conveyances under the guise of a peaceful surrender of Zone's and Shakedown's assets and their conveyances to SML and Aimee Lynn as a secured party foreclosure sale (ninth cause of action).

The Complaint alleges, *inter alia*, as follows:

2. On or about February 11, 2008, Zone and Shakedown voluntarily and peacefully surrendered all or virtually all of their assets to Capital as a creditor who purportedly provided them secured factor financing, and Capital simultaneously conveyed those assets to SML and Amiee Lynn for an assumption of Zone's and Shakedown's claimed debt to Capital (the February 11 transactions are hereinafter referred to as the "Conveyance Transactions")...

3. Zone and Shakedown claimed to be parties to two factoring agreements with Capital, and each claimed to have guaranteed the other's liability thereunder. Shakedown, Zone, Capital, Amiee Lynn and SML styled the Conveyance Transactions as Shakedown's and Zone's acquiescence and consent to the possession and disposition of assets by Capital as their secured creditor and the conveyance of those assets to SML and Amiee Lynn as a secured party conveyance. However, the Conveyance Transactions were in reality and substance a knowingly fraudulent conveyance of the assets of Zone and Shakedown to Amiee Lynn and SML, effected and engineered deliberately and in bad faith by Zone, Shakedown and Capital.

4. Zone and Shakedown conveyed far more assets than could have been arguably included in any collateral in which Capital could have had a perfected security interest and worth more than the debt that Zone and Shakedown are claimed to have owed to Capital, for consideration consisting of little more than the assumption by SML and Amiee Lynn of the alleged debt of Zone and Shakedown to Capital. The end result - intended and known by all Defendants - was that SML and Amiee Lynn would take over and succeed to the business of Zone and Shakedown, and that Capital would continue to act as the factor for that business.

5. Capital, SML and Amiee Lynn had actual and constructive knowledge of the fraudulent nature of the Conveyance Transactions.

6. Each of the Defendants was further aware that the Conveyance Transactions were accomplished for disproportionately small capital and consideration, and for less than any fair consideration. This is so because Interasian, a proposed strategic purchaser, had offered to acquire the same assets and assume the factoring debt for a total value to Zone and Shakedown that would have been nearly \$3 million more than the consideration realized from the Conveyance Transactions. Zone,

Shakedown and Interasian worked towards a strategic transaction for months, and were weeks away from the closing when Zone and Shakedown abruptly told Interasian, just three days before the Conveyance Transactions, that the deal was terminated.

7. The value reflected in the assets and in the enterprise of Zone and Shakedown by the Interasian offer would have been available from other potential purchasers as well. The value of the assets and the enterprise as a going concern was much greater than the consideration received from Amiee Lynn and SML. Accordingly, other transactions would have been achievable by Zone and Shakedown which would have provided considerably more consideration to Zone and Shakedown than the Conveyance Transactions yielded, and in any case further consideration would have provided a payment of all or part of the Invoiced Debt Amount.

8. The bad faith by each and all Defendants is further manifested by executive positions that the two controlling principals and owners of Shakedown and Zone, Jeffrey Goldstein ("Goldstein") and Larry Zakarin ("Zakarin"), obtained with SML (or Amiee Lynn) at the same time as the Conveyance Transactions. Thus, while Plaintiff Interasian was not paid its long-outstanding debt, Goldstein and Zakarin obtained on-going employment in management positions.

Defendants dispute plaintiff's allegation that any of the conveyances were fraudulent. They contend that Capital was granted a security interest in the assets of Zone and Shakedown in exchange for financial accommodations given by Capital under the factoring agreements. They further contend that Zone and Shakedown defaulted under the factoring agreements and peacefully surrendered their assets so that a secured party foreclosure sale could be held.

Defendants also claim that SML legitimately purchased the assets of Zone and Shakedown at the foreclosure sale and, as consideration, agreed to assume secured debts owed by Zone and Shakedown under the factoring agreement. Finally, defendants

dispute any suggestion that it was fraudulent for SML and its parent company, Aimee Lynn, to retain Capital to act as a factor.

Defendant Capital now moves, under motion sequence number 001, for an order pursuant to CPLR § 3211(a)(7) dismissing the fourth through ninth causes of action.

Defendants SML and Aimee Lynn move, under motion sequence number 002, and defendants Shakedown and Zone move, under motion sequence number 003, for the same relief.

Fourth Cause of Action - Debtor and Creditor Law § 273 (Constructive Fraud)

Debtor and Creditor Law § 273 provides as follows:

Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

The fourth cause of action of the Complaint alleges, in relevant part, that

132. The conveyances of assets by the Conveyance Transactions were made in bad faith, without fair consideration and for below market consideration.

133. Alternatively, Zone and Shakedown were insolvent at the time of the Conveyance Transactions.

Defendants argue that the fourth cause of action must be dismissed on the grounds that the Complaint does not sufficiently

allege (i) that the debtors were insolvent, and (ii) the absence of fair consideration.

Defendants further contend that the Complaint merely contains conclusory allegations and does not cite to hard figures or other financial particulars.

In addition, defendants argue that there is nothing wrong with a secured party foreclosure sale that leaves an unsecured creditor without recourse. *See, HBE Leasing Corp. v Frank*, 48 F3d 623, 634 (2<sup>nd</sup> Cir. 1995) which held that

even the preferential repayment of preexisting debts to some creditors does not constitute a fraudulent conveyance, whether or not it prejudices other creditors, because "[t]he basic object of fraudulent conveyance law is to see that the debtor uses his limited assets to satisfy *some* of his creditors; it normally does not try to choose among them." (citations omitted).

Defendants also rely on the case of *Nolan Miller v Forge Mench Partnership Ltd*, 2005 WL 267551 at \*4 (S.D.N.Y.) in which the Court held that

a complaining creditor must first demonstrate that it had an equity stake in the debtor's assets - that is, that some portion of the debtor's assets would have been available to satisfy the unsecured creditor's claims had there been no conveyance. *See [Hamilton National Bank v] Halstead*, 134 N.Y. [520] at 523-24, 526-27 [1892]. Absent any such equity in the assets conveyed, an unsecured creditor lacks standing to challenge the conveyance as fraudulent.

Plaintiff, however, claims that the conveyances were undertaken for far less consideration than the value of the companies' assets because, as alleged in the Complaint, (i) Zone and Shakedown were ongoing business concerns, and (ii) plaintiff had previously offered to purchase Zone and Shakedown for approximately \$3,000,000 more than the debt they owed to Capital.

The Complaint also alleges that Zone and Shakedown were indebted to plaintiff in a sum greater than \$578,000 at the time that those companies conveyed all, or virtually all, of their assets to SML, and that the business that was formerly operated by Zone and Shakedown is now being operated by SML. Accordingly, the Complaint plainly alleges that Zone and Shakedown were rendered insolvent by that conveyance.

Whether the assumption by SML of Zone's and Shakedown's debts to Capital constituted fair consideration for Zone's and Shakedown's assets is a question of fact which cannot be resolved on a pre-answer motion to dismiss. *See, Joslin v Lopez*, 309 AD2d 837 (2d Dept 2003); *Wall St. Assoc. v Brodsky*, 257 AD2d 526 (1st Dept 1999). The allegation in the Complaint that plaintiff had offered Zone and Shakedown, as going concerns, a total package worth approximately \$3 million more than those companies' debts to Capital, suffices to raise at least an issue of fact that Zone and Shakedown did not receive fair consideration for their assets and business.

Fifth Cause of Action -  
Debtor and Creditor Law § 276 (Actual Fraud)

Debtor and Creditor Law § 276 provides as follows:

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.

The fifth cause of action of the Complaint alleges, in relevant part, that

137. The conveyances of assets by the Conveyance Transactions were made in bad faith, without fair consideration and for below market consideration.

138. The conveyance of the assets by the Conveyance Transactions were made with the intent to hinder, delay and/or defraud the creditors of Zone and Shakedown, including Interasian.

139. Upon information and belief, Defendants were aware that the Conveyance Transactions would result in the inability of Zone and Shakedown to satisfy their debts as they became due.

140. By reason of the foregoing, Defendants acted in bad faith and with the intent to hinder, delay and/or defraud the creditors of Zone and Shakedown, including Interasian.

Defendants argue that the fifth cause of action must be dismissed on the ground that it merely parrots the statutory text and fails to plead the alleged fraud with sufficient particularity as required pursuant to CPLR § 3016(b). See, e.g., *Menaker v Alstaedter*, 134 AD2d 412, 413 (2nd Dep't 1987).

Plaintiff, however, argues that these allegations must be read in conjunction with the "Facts" section of the Complaint, and contends that the Complaint gives more than ample notice to the defendants of plaintiff's claim.

Where, as is often the case, intent cannot readily be proven directly, a plaintiff may adduce circumstances from which an intent may be inferred. See generally *Northpark Assoc., L.P. v Westcon, Inc.*, 34 AD3d 773 (2d Dept 2006).

Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on "badges of fraud" to support his case, i.e., circumstances so commonly associated with fraudulent transfers "that their presence gives rise to an inference of intent" (citations omitted). Among such circumstances are: a "close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance.

*Wall St. Assoc. v Brodsky, supra* at 529.

Here, the Complaint alleges, inter alia, that defendants entered into an arrangement pursuant to which SML took over the business of Zone and Shakedown while paying \$3 million less than those businesses were worth as going concerns; the principals of Zone and of Shakedown became executives of SML, thereby retaining a measure of control over the business and assets that had been Zone's and Shakedown's; Capital assumed, with regard to SML, the

position of factor that it had enjoyed with Zone and Shakedown; Capital received payment of the sums that it was owed by Zone and Shakedown; Zone and Shakedown entered into that arrangement with full knowledge that they would thereby become unable to pay their debts to plaintiff and in full knowledge that plaintiff had offered them more than they were getting from their transaction with Capital, and that SML would receive more than the debt that Zone and Shakedown owed to Capital.

These circumstances are alleged in sufficient detail, and suffice to allow an inference that Zone and Shakedown entered into the arrangement with the actual intent of hindering any payment of their debts to plaintiff, and of maximizing the assets that would remain available to Zakarin and Goldstein, as executives of SML. Accordingly, they suffice to withstand defendants' motions to dismiss the fifth cause of action. See *Shisgal v Brown*, 21 AD3d 845 (1st Dept 2005).

Sixth Cause of Action - Debtor and Creditor Law § 276-a; Seventh Cause of Action - Declaratory Judgment; and Ninth Cause of Action - Damages from Secured Party Sale

Defendants' sole argument with regard to the sixth, seventh, and ninth causes of action is to note, correctly, that the viability of those causes of action depends upon the viability of the fourth and fifth causes of action. Since this Court has not dismissed the fourth and fifth causes of action, the sixth, seventh and ninth causes of action also survive.

Eighth Cause of Action - Successor Liability

The eighth cause of action alleges, in relevant part, as follows:

150. The Conveyance Transactions were entered into fraudulently to, *inter alia*, allow Zone and Shakedown to evade their outstanding obligations, including their debt to Interasian.

151. By participating in the fraudulent transactions, SML and Amiee Lynn impliedly agreed to assume the debts and liabilities of Zone and Shakedown.

152. SML and Amiee Lynn are mere continuations of Defendants Zone and Shakedown.

153. The Conveyance Transactions were used to accomplish a de facto merger. This is so because the transaction was in substance a consolidation or merger of sellers Zone and Shakedown and purchaser SML.

154. After the transfer, Zone and Shakedown ceased to operate as ordinary businesses.

155. SML assumed Zone's and Shakedown's liabilities and business relationships, which are necessary for the continuation of Zone's and Shakedown's business.

156. The management, personnel, physical location, assets and general business operation of Zone and Shakedown have not changed despite the transfer to SML.

157. SML conducts the same business and sell [sic] the same products, uses the same trade names and sells under the same licenses as did Zone and Shakedown prior to the Conveyance Transactions.

158. By participating in the Conveyance Transactions, SML and Amiee Lynn intended to absorb and continue, and did absorb and continue, the operations of Zone and Shakedown. After the Conveyance Transactions, the outstanding purchase orders of Zone and Shakedown were undertaken by SML and Amiee Lynn. The former owners of Zone and Shakedown became employees and managers of SML.

159. Except for Interasian, SML maintains the same supplier relationships as previously held by Zone and Shakedown.

160. SML has assumed the management of Zone and Shakedown, including by employing Zakarin and Goldstein in high level executive positions with Defendant SML.

Defendants argue that the eighth cause of action must be dismissed because defendants SML and Aimee Lynn did not in the context of the foreclosure sale formally assume the debt of Zone and Shakedown.

Plaintiff disputes that a formal assumption of the debt is a necessary element and argues that there was an 'implied' assumption of debt. (§ 151 of Complaint).

The general rule is that a corporation that purchases the assets of another corporation does not thereby become liable for the tort or the breach of contract of the seller corporation. *Schumacher v Richards Shear Co.*, 59 NY2d 239 (1983). There are exceptions to this general rule, such as, where "there was a consolidation or merger of seller and purchaser, ..." *Schumacher v Richards Shear Co.*, *supra* at 245. Even absent a formal merger, where one corporation buys the assets of another, a "de facto" merger will be found

if the following factors are present: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical

location, assets and general business operation (citation omitted).

*In re New York City Asbestos Litig.*, 15 AD3d 254, 256 (1st Dep't 2005).

The Court, however, also noted that "the first factor (continuity of ownership) has recently been held to be essential to a de facto merger finding" *Id* at 258, citing *Cargo Partner AG v Albantrans, Inc.* 352 F3d 41, 46-47 (2nd Cir 2003); *see also, Kretzmer v Firesale Prods. Corp.*, 24 AD3d 158 (1st Dep't 2005). Although plaintiff has alleged in a conclusory fashion that "SML and Aimee Lynn are mere continuations of Defendants Zone and Shakedown" (§ 152 of the Complaint) and that "[t]he former owners of Zone and Shakedown became employees and managers of SML" (§ 158 of the Complaint), there is no specific allegation of continuity of ownership. Without that showing which is the "essence" of a de facto merger (*see, Cargo Partner AG v Albantrans, Inc., supra* at 46; *Nolan Miller v Forge Mench Partnership, Ltd., supra* at \*7), there can be no finding of a de facto merger.

Accordingly, the motions are granted only to the extent of dismissing the eighth cause of action alleging successor liability as to SML and alter ego liability as to defendant Aimee Lynn.

The motions are otherwise denied.

The defendants shall serve their answers to the Verified Complaint (except the eight cause of action) within 20 days of service upon them of a copy of this order with notice of entry.

All counsel are directed to appear for a conference in IA Part 39, 60 Centre Street, Room 208 on June 10, 2009 at 10:00 a.m. in order to schedule discovery.

This constitutes the decision and order of this Court.

Dated: April 20, 2009

  
\_\_\_\_\_  
BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.

**FILED**  
APR 22 2009  
COUNTY CLERK'S OFFICE  
NEW YORK