

**Merchants T&F, Inc. v Fisher**

2004 NY Slip Op 30105(U)

July 6, 2004

Supreme Court, New York County

Docket Number: 0011342/1999

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
*Justices*

..... x

MERCHANTS T&F, INC.,  
Plaintiff,

INDEX NO. 113424/1999

-against-

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

IVAN FISHER, KASE & DRUKER, PARK AVENUE  
MANAGEMENT CORP., SHANTANU MOHIAN and  
FIFTY SEVENTH STREET CONSULTANTS,

MOTION SEQ. NO. 010

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

Defendants.  
.....x

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

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

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

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Decision and Order.

FILED  
JUL 9 2004

Dated: July 6, 2004

KARLA MOSKOWITZ J.S.C.  
*Kar*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: JAS PART 3

-----X  
MERCHANTS T&F, INC.,

Plaintiff,

Index No. 113424/1999

-against-

IVAN FISHER, KASE & DRUKER, PARK AVENUE  
MANAGEMENT CORP., SHANTANU MOHAN and  
FIFTY SEVENTH STREET CONSULTANTS.

**DECISION & ORDER**

Defendants.

-----X  
**KARLA MOSKOWITZ, J.:**

Motions with sequence numbers 010 and 011 are consolidated for disposition. Motion 010 includes the motion of co-defendant Shantanu Mohan and the cross motion of co-defendant Kase & Druker, both of which seek summary judgment dismissing the complaint against them. Motion 011 consists of the separate motion of co-defendant Ivan Fisher, who also seeks summary judgment dismissing the complaint against him. For the following reasons, all three motions are denied.

**RACKGROUND**

This action arises out of the tenancy of plaintiff Merchants T&F, Inc. (Merchants) at a commercial space located at 475 Park Avenue in the County and State of New York, where Merchants formerly maintained a restaurant called "Akbar." (See Wilson Affidavit in Opposition [motion sequence number 010], ¶ 6). Pursuant to the master lease between Merchants and the property's landlord<sup>1</sup> (the Lease), Merchants had authority to license the management and operation of its restaurant to a third party for a monthly fee equal to the amounts of rent and other charges that the Master Lease required Merchants to pay to the

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<sup>1</sup> The landlord of 475 Park Avenue is not a party to this action.

landlord. (Id.; Rabinowitz Affirmation in Opposition, Exhibit A). The Master Lease required Merchants to make total monthly payments of \$16,000.00 in rent, a variable amount for items designated as “additional rent” (e.g., utilities, taxes, etc.), and periodic supplements to the security deposit. (See Wilson Affidavit in Opposition [motion sequence number 010], ¶¶ 5-6).

Merchants alleges that, prior to 1995, it entered into an arrangement with a party it designates as “Consultants” to manage and operate Akbar. (Id.) Merchants also alleges that, in addition to its other monthly payments, Consultants agreed to pay a \$4,000.00 monthly “management fee” to Merchants as part of this arrangement. (Id., ¶ 8). Merchants claims that, at some point, Consultants assigned its duties to manage and operate Akbar to co-defendant Fifty Seventh Street Consultants (57th) and to non-party Monish Mohan (Monish), jointly. Although the Amended Complaint is unclear, the subsequent Licensing Agreement recites that Monish and 57<sup>th</sup> were, in fact, Consultants. (See Notice of Motion [motion sequence number 010], Exhibit B). The Amended Complaint does allege that Monish is the brother of co-defendant Shantanu Mohan and that 57<sup>th</sup> was Monish’s corporate alter ego. (Id., Exhibit A [Amended Complaint], ¶ 12). On September 11, 1995, Merchants executed an agreement with 57<sup>th</sup> and Monish recognizing 57<sup>th</sup> and Monish as the parties responsible for managing and operating Akbar (the Licensing Agreement).<sup>2</sup> (See Notice of Motion [motion sequence number 010], Exhibit B). The relevant portions of the Licensing Agreement provide as follows:

WHEREAS Merchants and [57<sup>th</sup> and Monish] have previously entered into a Management Contract ... regarding the Akbar Restaurant ..., wherein [57<sup>th</sup> and Monish] are obligated to pay to Merchants an amount of \$4,000.00 per month, ...

IT IS HEREBY AGREED TO BY ALL PARTIES AS FOLLOWS

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<sup>2</sup> The Licensing Agreement, thus, merely formalized the already existing relationship between Merchants, Monish and 57th.

\* \* \*

2. [57<sup>th</sup> and Monish] hereby agree[] that they have no claim to the security deposits currently held by the Landlord of the ... premises.

3. Merchants hereby declare [sic] that it accepts such acknowledgment as full satisfaction of any and all future payments payable to Merchants in the amount of \$4,000.00 per month in the above mentioned [Management] Contract.

4a. [57<sup>th</sup> and Monish] will continue to remit the monthly rent payments as per the present lease ... no later than the 15<sup>th</sup> of every month. As long as these payments are current, [57<sup>th</sup> and Monish] will not be responsible for any other charges or legal fees incurred by Merchants due to the non-payment of the rent.

4b. In the event [57<sup>th</sup> and Monish] fail[] to make the payments stipulated in paragraph 4a above, [57<sup>th</sup> and Monish] will have five (5) business days to cure this default. The penalty for such a default will be \$4,000.00, which must be paid along with the rent for that period.

(Id).

Merchants claims that, without informing it, 57<sup>th</sup> and Monish subsequently assigned their duties to manage and operate Akbar to co-defendants Park Avenue Management Corp. (PAMC) and Shantanu Mohan (Shantanu), jointly. (See Wilson Affidavit in Opposition [motion sequence number 010], ¶ 8). Merchants states that it learned of this assignment at some point after November 14, 1997. (Id). Merchants alleges that PAMC was Shantanu's corporate alter ego. (See Notice of Motion [motion sequence number 010], Exhibit A [Amended Complaint], ¶ 11). Merchants also claims that PAMC and Shantanu later agreed to assume all of 57<sup>th</sup>'s and Monish's obligations under the Licensing Agreement. (See Notice of Motion [motion sequence number 010], Exhibit A [Amended Complaint], ¶ 11)

Merchants next asserts that, on May 20, 1999, PAMC and Shantanu vacated the space Akbar occupied and converted all of the restaurant's property and fixtures. (Id., ¶ 14). Merchants further asserts that PAMC and Shantanu were in arrears at the time of their departure, that they made no payments during the following month of June 1999 either and that PAMC is

now insolvent. (Id., ¶¶ 15-20). Merchants finally claim that Shantanu wrongfully dissipated PAMC's assets by causing it to advance monies to co-defendants Ivan Fisher (Fisher) and Kase & Druker (K&D) in order to render PAMC insolvent and, thus, unable to meet its obligations to Merchants. (Id., ¶¶ 21-45).

Fisher is an attorney and K&D is a law firm. (Id.). Both are licensed to practice in New York State. (Id.). Merchants claim that these co-defendants violated New York's Debtor and Creditor Law by engaging in a money laundering scheme on behalf of PAMC and Siantaiu. (Id.). More specifically, Merchants claims that Fisher and K&D received payments, that were purportedly compensation for legal services that they rendered, but that were, in fact, fraudulent, without consideration and unrelated to PAMC's normal business. (Id.). Fisher and K&D deny these allegations.

When Merchants commenced this action in late 1999, its original complaint named only Fisher and K&D as defendants. On April 7, 2000, this court (Shainswit, J.) granted Merchants' motion for leave to amend its complaint to add PAMC, Shantanu, and 57<sup>th</sup> as defendants, as well. (See Rabinowitz Affirmation in Opposition, Exhibit A). The amended Complaint now asserts causes of action for violations of Debtor and Creditor Law §§ 273, 276, and 278 against Fisher, K&D and the new co-defendants. (See Notice of Motion [motion sequence number 010], Exhibit A). On November 8, 2000, this court (Shainswit, J.) also denied K&D's motion, pursuant to CPLR 3211, to dismiss the Amended Complaint. (See Rabinowitz Affirmation in Opposition, Exhibit B). An attenuated and contentious discovery period then ensued that concluded with the court's granting K&D's motion for a preclusion order against Merchants on July 31, 2003. (See Notice of Cross Motion [motion sequence number 010], Exhibit D). After the parties completed discovery, the co-defendants served these summary judgment motions.

## DISCUSSION

The court's function, on a motion for summary judgment, is issue identification, not issue determination. (See e.g. Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395; Grullon v City of New York, 297 AD2d 261). The moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. (See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851; Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64). However, conclusory assertions that are unsupported by evidence are insufficient to sustain a motion for summary judgment. (See e.g. Mason v Dupont Direct Financial Holdings, Inc., 302 AD2d 260).

Shantanu asserts that Merchant's claim against him is based upon a transaction or debt that falls afoul of three of New York's usury statutes. (See Defendant's Memorandum of Law in Support of Motion [motion sequence number 010], at 1-2 [pages not numbered]). K&D and Fisher both join in this argument. (See Frome Affidavit in Support of Cross Motion [motion sequence number 010], ¶ 2; Siegel Affirmation in Support of Motion [motion sequence number 011], ¶ 2). Shantanu specifically states that "to the extent that a month's rent of \$16,000.00 was paid late, a \$4,000.00 charge was added after five business days," and argues that "[t]he rate of interest is thus 25% for five days or, converted to an annual rate, astronomical." (See Defendant's Memorandum of Law in Support of Motion [motion sequence number 010], at 2 [pages not numbered]). The court rejects this argument, however, because it is conclusory and because it misconceives the nature of the Licensing Agreement. Shantanu presents no evidence that Merchants ever loaned any money to 57<sup>th</sup> and Monish, or to him and PAMC. "It is well established that there can be no usury in the absence of a loan or forbearance of money," and that "[i]n order for a transaction to constitute a loan, there must be a borrower and a lender; and it

must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender [emphasis added].” (Donatelli v Siskind, 170 AD2d 433, 434). Because both 57<sup>th</sup> and Monish **and**, later, Shantanu and PAMC, did, in fact, manage and operate the **Akbar** restaurant for a period of several years, it is clear that the “real purpose” of the Licensing Agreement was to set forth their obligations with respect to that management and operation, not to disguise a loan. Further, because the \$4,000.00 “penalty” late payment provision of the Licensing Agreement does not refer to a preexisting money debt, it does not constitute a “forbearance,” as that term is defined in the usury statutes. (See e.g. Eikenberry v Adirondack Spring Water Co., Inc., 65 NY2d 125; Matias v Arango, 289 AD2d 459; Solomon v Van De Maelc, 21 AD2d 396). The court notes that Shantanu does not dispute that the Licensing Agreement was validly assigned from 57<sup>th</sup> and Monish to himself and PAMC. Accordingly, in light of the foregoing, the court rejects Shantanu’s usury argument,<sup>3</sup> and denies his motion in full, along with those portions of K&D’s *and* Fisher’s motions premised upon the same ground.

In its cross motion, K&D raises the additional argument that it “was retained to render services to and for the benefit of the entity that paid its bills [i.e., PAMC], and, therefore, the payment does not constitute a fraud upon creditors ... .” (See Frome Affidavit in Support of Cross Motion [motion sequence number 010], ¶ 2). K&D supports this argument with affidavits from partner James O. Druker (Druker) and from Shantanu, wherein they attempt to explain the

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<sup>3</sup> Plaintiff also correctly pointed out that Shantanu’s answer did not include an affirmative defense based upon a claim of usury. (See Rabinowitz Affirmation in Opposition [motion sequence number 010], ¶ 9). However, because the court finds that usury has no application to the facts at bar, it does not address plaintiff’s argument that Shantanu failed to follow proper rules of pleading.

purpose of a \$25,000.00 payment PAMC made to K&D on behalf of a third party who was seeking to foreclose a mortgage on a property in Nassau County. (See Notice of Cross Motion, Mohan Affidavit; Druker Affidavit in Reply). However, plaintiff correctly points out that K&D has already sought and been denied, dismissal of plaintiff's claim against it on the ground that documentary evidence bars the claim pursuant to CPLR 3211(a)(1). (See Rabinowitz Affirmation in Opposition to Motion [motion sequence number 010], ¶ 14[b]). Indeed, in her decision of November 8, 2000, Justice Beatrice Shainswit specifically found that "[n]umerous questions of fact exist as to, among other things, the nature of the payment, the nature of the services rendered and the relationship of the parties." (Id., Exhibit B, at 4). K&D has not submitted any evidence to dispel these questions. Indeed, Shantanu's affidavit has only copies of pleadings annexed to it and Druker's does not include any evidentiary exhibits at all. These affidavits are, thus, inadequate because conclusory assertions unsupported by evidence are insufficient to sustain a motion for summary judgment. (See e.g. Mason v Dupont Direct Financial Holdings, Inc., 302 AD2d 260, supra). Accordingly, the court rejects K&D's second argument for dismissal.

K&D's final argument is that the court's order of July 31, 2003, that precluded plaintiff from offering certain documents into evidence, prevents plaintiff from proving all of the elements of its Debtor & Creditor Law claims against K&D. (See Defendant's Memorandum of Law in Support of Cross Motion [motion sequence number 010], at 4-6). That order specifically states that:

[K&D's] motion is granted to [the] extent [that] plaintiff is precluded at trial from introducing evidence against [K&D] on [the] items enumerated in paragraph 45 (a) through (f) [of K&D's motion]. Plaintiff has failed to provide a meaningful response to these demands that were made at the deposition of the plaintiff. Preclusion is as to documents [and] related causes of action to which documents

are needed to defend [emphasis added].

(See Notice of Cross Motion [motion sequence number 011], Exhibit D). The items referred to in the court's July 31, 2003 order included:

- a. Promissory notes relevant to the claim that plaintiff was a "matured creditor" of [PAMC];
- b. Documents showing payments made by [PAMC] for Adsum interests, which directly bear on [K&D]'s defense;
- c. Ledgers regarding all payments from [PAMC] from May, 1998 to May, 1999, the period after the check was given to K&D;
- d. All rental payments made for the space occupied by Akbar restaurant from May, 1995 to May, 1999;
- e. All monies received by plaintiff from Akbar;
- f. Tax returns and balance sheets of [Merchants].

(Id., Exhibit C, ¶ 45). Merchants responds that the foregoing documents "are not essential to proving plaintiff's case." (See Rabinowitz Affirmation in Opposition, ¶ 41). Without addressing the substance of that case, the court agrees.

Merchants' first cause of action alleges that PAMC's payment of \$25,000.00 to K&D violated Debtor and Creditor Law §§ 273 and 276, and seeks to set aside that payment pursuant to Debtor and Creditor Law §§ 278. (See Notice of Cross Motion [motion sequence number 010], Exhibit A, ¶¶ 36-45). To prove a cause of action under Debtor and Creditor Law § 273, a plaintiff must establish that the debtor made a conveyance, that the debtor was insolvent prior to the conveyance or was rendered insolvent thereby and that the conveyance was made without fair consideration. (See e.g. Wall Street Associates v Brodsky, 257 AD2d 526, 528). To prove a cause of action under Debtor and Creditor Law § 276, a plaintiff must establish that the debtor made a conveyance with the actual intent to defraud either present or future creditors. Because of the inherent difficulty of proving "actual intent to defraud," the plaintiff is allowed to rely on "badges of fraud" to support its case, i.e., "circumstances so commonly associated with

fraudulent transfers “that their presence gives rise to an inference of intent.” (Id. at 528-529). K&D argues that, without the precluded documentary elements, ‘Merchants will be unable to establish any of the component elements of these two statutory violations. (See Defendant’s Memorandum of Law in Support of Cross Motion [motion sequence number 010], at 4-6). In light of the above-quoted preclusion order, the court certainly agrees that Merchants’ intransigence during the discovery phase of this action has unnecessarily complicated its ability to present its claims at trial. However, the July 31, 2003 order only precluded Merchants’ evidence and not the claims themselves. The court is reluctant to find, as a matter of law, that Merchants will be unable to prove its claims under any theory, and, therefore, believes that it would be improvident to dismiss Merchants’ claims at this juncture. Accordingly, the court rejects K&D’s final dismissal argument and denies its motion for summary judgment. Merchants shall have the opportunity to litigate its cause of action against K&D at trial, subject to the court’s July 31, 2003 preclusion order.

Fisher also argues that Merchants will be unable to establish any of the component elements of its claims that PAMC’s payment of a total of \$169,000.00 in legal fees to him, between January and June of 1999, constituted violations of Debtor and Creditor Law §§ 273 and 276.<sup>4</sup> (See Memorandum of Law in Support of Motion [motion sequence number 011], at 4-7). Merchants responds that the available evidence indicates issues of fact as to the elements of both claims. (See Memorandum of Law in Opposition to Motion [motion sequence number 011], at 3-8). The court agrees.

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<sup>4</sup> This is the only argument that the court need address. As previously mentioned, that portion of Fisher’s motion relying on a usury argument is denied. Because the court’s July 31, 2003 preclusion order applies only to K&D, it affords Fisher no relief.

With respect to Debtor and Creditor Law § 273, Fisher argues first that “plaintiff cannot prove that [PAMC] conveyed [its] own assets to Fisher,” because “[i]t is not disputed that the funds used to pay Fisher’s fee for representing [Monish] belonged to Shiv Mohan, Monish’s father, and were deposited in PAMC’s account for that specific purpose.” (See Memorandum of Law in Support of Motion [motion sequence number 011], at 5). Fisher presents no evidence of this, however, and Merchants certainly disputes the contention that PAMC did not use its own funds to pay Monish’s legal fees to Fisher. (See Wilson Affidavit in Opposition [motion sequence number 011], ¶¶ 12-14). The court, therefore, finds that there is a factual issue here for trial.

Fisher next claims that Merchants cannot prove that PAMC became insolvent by its payments to Fisher. (See Memorandum of Law in Support of Motion (motion sequence number 011), at 5). Merchants responds by producing copies of tax liens, UCC filings, bills and correspondence that, it argues, support a finding that PAMC was insolvent before the end of 1999. Because Fisher’s conclusory statement does not constitute sufficient proof to overcome this evidence, the court also finds that there is a factual issue here as to how PAMC was rendered insolvent that is more appropriate for a trial of fact to resolve. Finally, Fisher claims that Merchants cannot prove that PAMC’s payments to Fisher lacked consideration, because the payments were for the benefit of Monish, and so, conferred an “indirect benefit” on PAMC. (See Memorandum of Law in Support of Motion [motion sequence number 011], at 6). However, because the evidence shows that these payments were for Fisher’s future representation of Monish in a criminal action that did not involve PAMC and not to satisfy any “antecedent debt,” there is a triable issue as to Fisher’s good faith. (See e.g. Joel v Weber, 107 AD2d 396). Accordingly, the court rejects all of Fisher’s dismissal arguments directed at Debtor and Creditor

Law § 273.

With respect to Debtor and Creditor Law § 276, Fisher argues that Merchants has “conceded” that he did not act with the statute’s requisite intent to defraud. (See Memorandum of Law in Support of Motion [motion sequence number 011], at 7). Merchants denies making that concession, however. (See Wilson Affidavit in Opposition [motion sequence number 011], ¶ 83). A plaintiff may certainly rely upon “badges of fraud” when attempting to prove actual intent to defraud. (See Wall Street Associates v Brodsky, 257 AD2d at 528, supra). Merchants indicates here that it intends to do so to support its claim against Fisher. (See Memorandum of Law in Opposition to Motion [motion sequence number 011], at 7). The court acknowledges that intent to defraud is both difficult to prove and to disprove, and believes that the question of Fisher’s intent is, therefore, an issue best for a jury to determine. Accordingly, the court rejects Fisher’s dismissal arguments that are directed at Debtor and Creditor Law § 276 and denies his motion for summary judgment.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of co-defendant Shantanu Mohan, seeking summary judgment dismissing the complaint as against him, is, in all respects, denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of co-defendant Kasc & Drukcr, seeking summary judgment dismissing the complaint as against it is, in all respects, denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of co-defendant Ivan Fisher seeking summary judgment dismissing the complaint as against him is, in all respects, denied; and it is

further

ORDERED that the parties shall appear for a pre-trial conference on Thursday, July 29, 2004, at courtroom 248, 60 Centre Street, New York, NY, to select a fall date for trial. The part clerk is directed to notify attorneys accordingly.

Dated: July 06, 2004

ENTER



J.S.C.

FILED

JUL 29 2004

COURT CLERK