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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Teacher's Insurance Annuity

- v -

COHEN'S FASHION OPTICAL

INDEX NO. 107043/05

MOTION DATE 9/28/06

MOTION SEQ. NO. 002

MOTION CAL. NO. ____

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

	PAPERS NUMBERED
Notice of Motion/ 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the branch of Defendants' motion to dismiss the complaint pursuant to CPLR 3211[a][7] against Cohen's Fashion Optical, Inc. and Cohen's Fashion Optical of 500 Lexington Avenue, Inc. is granted solely to the extent that Plaintiff's first and second causes of action is dismissed as against Cohen 500; and it is further

ORDERED that the fourth cause of action is dismissed in its entirety as against Cohen's Fashion Optical, Inc., and the alter ego claim in the fourth cause of action against Cohen 500 is dismissed; and it is further

ORDERED that the branch of Defendants' motion to dismiss the fifth (fraud) and sixth (constructive trust) causes of action against Cohen's Fashion Optical of 485 Lexington Avenue, Inc. pursuant to CPLR 3211[a][7] is granted and such causes of action are dismissed; and it is further

ORDERED that Defendants' motion for summary judgment dismissing the complaint is denied, at this juncture; and it is further

ORDERED that Plaintiffs' motion to amend the complaint and add additional parties is granted solely to the extent that Plaintiffs may amend the complaint to add the proposed fourth and proposed seventh causes of action; and it is further

ORDERED that the parties shall appear for a status conference on January 30, 2007, 3:00 p.m. in Part 35; and it is further

ORDERED that Defendants shall serve a copy of this order with notice of entry upon all parties within 10 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/3/07

J.S.C.

HON. CAROL EDMEAD

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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TEACHER'S INSURANCE ANNUITY ASSOCIATION OF AMERICA AND 485 LEXINGTON OWNER, LLC,

Index No. 107043/2005

Plaintiffs,

-against-

DECISION/ORDER

COHEN'S FASHION OPTICAL OF 485 LEXINGTON AVENUE, INC., COHEN'S FASHION OPTICAL OF 500 LEXINGTON AVENUE, INC., COHEN FASHION OPTICAL, INC., et. al.,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM OF DECISION

Defendants in the above-captioned action move for dismissal pursuant to CPLR 3211(a)(7) and/or summary judgment pursuant to CPLR 3212(b) of (1) all causes of action against Cohen's Fashion Optical, Inc. ("C-Parent") and Cohen's Fashion Optical of 500 Lexington Avenue, Inc. ("Cohen 500"), and (2) the fifth and sixth causes of action against Cohen's Fashion Optical of 485 Lexington Avenue, Inc. ("Cohen 485").

In response, Plaintiffs Teacher's Insurance Annuity Association of America ("TIAA") and 485 Lexington Owner, LLC ("Owner") cross-move pursuant to CPLR 1002(b), 1003 and/or 3025(b) to join as additional party defendants, and to amend the complaint to allege claims against, Allen Cohen a/k/a Alan Cohen and Cohen Fashion Optical of 47th St., Inc. (the "Franchisee") d/b/a Cohen's Fashion Optical

FACTUAL BACKGROUND

This action arises out of a 1977 commercial lease (the "1977 Lease") between Plaintiffs'

predecessor, C.I. Realty Investors ("C.I. Realty") and Defendant Cohen 485 regarding the premises located at 485 Lexington Avenue (the "Premises"). According to the complaint, the 1977 Lease was modified once in 1978, twice in 1990, and extended in 2002 (the "2002 Lease extension") (collectively, the "Lease"). Plaintiffs allege that defendant Cohen Fashion Optical, Inc. ("C-Parent"), through a member of the Cohen family, Alan Cohen, negotiated the Lease, or at a minimum, the 2002 modification, on behalf of Cohen 485. It is also alleged that the 1978 modification was executed by another member of the Cohen family, Robert Cohen.

Plaintiffs allege that Cohen 485 abandoned the Premises in September 2004 prior to the Lease's termination date of April 25, 2005 and that Defendants are liable for damages resulting therefrom. Plaintiffs allege that in playing its "shell game," and after Cohen 485 abandoned the Premises, C-Parent removed the operating assets of Cohen 485, and placed them in Cohen 500 at a location across the street from the Premises, *to wit*: 500 Lexington Avenue, in a wrongful attempt to render Cohen 485 judgment-proof.

In their first cause of action Plaintiffs allege that Cohen 485 is liable to Plaintiffs for breach of the Lease, and seek to pierce the corporate veil of Cohen 485 and hold C-Parent and/or Cohen 500 liable for Cohen 485's obligations.

In their second cause of action, Plaintiffs seek a declaration that all Defendants are liable for rent and additional rent as of May 1, 2005.

In their fourth cause of action, Plaintiffs seek to hold C-Parent and Cohen 500 liable for Cohen 485's obligations based on an alter ego theory. Plaintiffs allege that "there is common ownership between" Cohen 485 and Cohen 500, that both companies are owned and/or controlled by C-Parent, and that Cohen 485's business assets, employees, good will, customers,

telephone numbers, prescription and records were relocated to a new location, and accordingly, to Cohen 500.

In their fifth cause of action, Plaintiffs allege that the assets of Cohen 485 were fraudulently conveyed in violation of New York Debtor and Creditor Law §§ 273 through 276. Specifically, Plaintiffs allege that such assets were distributed, assigned, or given to Cohen 500 or C-Parent without fair consideration, which left Cohen 485 with unreasonably small capital, at a time when Cohen 485 intended or believed it would incur debts beyond its ability to pay upon maturity, with the actual intent to hinder, delay, or defraud all creditors of Cohen 485.

Finally, in their sixth cause of action, Plaintiffs seek to place the assets of Cohen 485 in a constructive trust, and to hold C-Parent and Cohen 500 liable for Cohen 485's attorneys' fees.[1]

MOTIONS

In support of dismissal pursuant to CPLR 3211(a)(7), Defendants maintain that Plaintiffs' allegations of alter-ego liability against C-Parent and Cohen 500 are legally deficient since, *inter alia*, they failed to allege any factual basis regarding domination and control or that Defendants committed any fraud or wrongdoing at the time the Lease was negotiated, prepared, and executed. Defendants also maintain that Plaintiffs' fraudulent conveyance claim is legally deficient under CPLR 3016(b) because they fail to allege specific facts including, *inter alia*, when the alleged transfer occurred, the amount of money transferred, or the particular assets transferred.

As to dismissal pursuant to CPLR 3212(b), Defendants maintain that Plaintiffs knew or

[1] The third cause of action for attorneys' fees pursuant to the Lease, which is directed solely against Cohen 485, was not made the subject of Defendants' motion to dismiss.

should have known that Cohen 485 was a holding company with no assets at the time the Lease was executed, and point out that Plaintiffs never sought a guaranty or to otherwise safeguard Cohen 485's obligations under the Lease. Defendants also maintain that Plaintiffs' fraudulent conveyance allegations should also be dismissed because they are based on the false assumption that Cohen 485 operated the retail store at the Leased Premises and thereafter fraudulently conveyed its assets to C-Parent and/or Cohen 500 when in fact the Leased Premises was, at all relevant times, operated by a franchisee.

In further support, Robert Cohen, President of C-Parent, attests that in early 1977, during extended negotiations of the 1977 Lease with Plaintiffs' predecessor C.I. Realty, he informed C.I. Realty that C-Parent was not going to be the tenant, and that C-Parent would form a holding company, *to wit*: Cohen 485, to hold the lease as the tenant (Cohen Aff. at ¶ 10). Since the execution of the 1977 Lease, Cohen 485 and plaintiff TIAA entered into several extensions, the last of which was December 31, 2002 (*Id.* at ¶¶ 12-15). Mr. Cohen states that during the course of the negotiations of the Lease, C.I. Realty never objected to Cohen 485 as the tenant, or requested a guaranty or any financial information to verify the assets of Cohen 485 (*Id.* at ¶¶11, 16).

Mr. Cohen further states that Cohen 485 subleased the Premises to the Franchisee, and that the Franchisee operated the retail optical store at the Premises in connection with the Franchisee's franchise agreement with C-Parent, dated September 30, 1988 (*Id.* at ¶ 18-20). Concomitant with the extensions and modifications of the Lease, the Franchisee continued to operate the retail optical store at the Premises until the store relocated to 500 Lexington Avenue. Therefore, Plaintiffs' assumption that Cohen 485 operated the retail store at the Lease Premises is

wrong, and thus, insufficient to sustain the claim that Cohen 485 transferred its assets to either Cohen 500 or C-Parent.

In opposition to the motion, Plaintiffs clarify the three legal doctrines of liability asserted herein: (1) 500 Cohen, the "west-side company" is a continuation of 485 Cohen, the "east-side company" and thus, should be held liable for the contractual obligations of the east-side company; (2) 500 Cohen received value from 485 Cohen, *to wit*: the goodwill or the value of the business as a continuing operation based on clients' records, employees, and telephone numbers, for no consideration, at a time when 485 Cohen had substantial lease liabilities; and (3) the misuse of the corporate form to escape liability justifies the piercing of the corporate veil. Further, since C-Parent orchestrated the stripping of the assets from one of its subsidiaries in favor of a new subsidiary, C-Parent is liable for the contractual obligations of both subsidiaries.

According to Plaintiffs, one day in September 2004, a "Cohen's Fashion Optical" store was operating on the east side of Lexington Avenue in Plaintiffs' building, and that the next day, the east-side store closed and a "Cohen's Fashion Optical" store was operating across the street on the west side of the same avenue, with the same employees, same management, same telephone number, and same customers. In support, Plaintiffs submit a photograph of a sign posted on the Premises, announcing that "WE MOVED ACROSS THE STREET to THE CORNER OF 47th ST. & LEXINGTON AVENUE" with the "same EXPERIENCED staff . . . ." and that it "hope[d] to SEE you at our new location" "Cohen's Fashion Optical of 47 ST 500 Lexington Avenue . . . ." Furthermore, the claims for piercing the corporate veil and fraudulent conveyance are clearly alleged. Plaintiffs maintain that C-Parent took operating assets from one subsidiary, namely 485 Cohen, and "plunk[ed]" them into another subsidiary, *to wit*: 500 Cohen,

so as to avoid making payment owed to the first subsidiary's landlord and that such transfer of assets demonstrates sufficient dominion and control to hold the parent liable. Thus, the 3211 motion to dismiss by C-Parent and Cohen 500 should be denied.

Plaintiffs maintain that Cohen 485's 3211 motion to dismiss the fifth and sixth causes of action for fraudulent conveyance and constructive trust also lacks merit because such claims are sufficiently asserted. Plaintiffs maintain that Mr. Cohen's affidavit reinforces Plaintiffs' claims. Further, a physical review of the Premises did not show the presence of the Franchisee, and nothing in the 1977 Lease or 2002 Extension indicates that there was a Franchisee operating in the Premises. And, there was no indiction in the Lease, the 2002 Extension, or correspondence from C-Parent to Plaintiffs that any entity other than Cohen 485 was conducting the business in the Premises. And, correspondence from C-Parent to Plaintiff regarding Cohen 485 indicates that C-Parent dominated and controlled Cohen 485 as a branch operating in the Premises and paying the rent. Further, the alternate constructive trust claim should proceed pending discovery.

Plaintiffs also cross move pursuant to CPLR 1002(b), 1003 and/or 3025(b), to join Allen Cohen a/k/a Alan Cohen and Cohen Fashion Optical of 47th Street, Inc. d/b/a Cohen's Fashion Optical as additional party defendants and to amend their complaint to add additional claims. Plaintiffs argue that in the event the Lease can be read to anticipate the Franchisee, then the Franchisee should be held liable, as a matter of contractual privity, as an additional party on the Lease. Further, Plaintiffs argue, C-Parent, Cohen 485, Alan Cohen, and Franchisee should all be deemed participants in the fraudulent inducement of the 2002 Extension. Moreover, discovery is necessary to determine whether Cohen 485 never held any assets so as to defeat Plaintiffs' continuity of business and fraudulent conveyance claims.

Defendants oppose Plaintiffs' cross-motion to amend, arguing that the proposed complaint is as legally deficient as the original. Further, Plaintiffs' request for additional discovery in the hopes that such discovery will support their claims should be rejected. And, in further support of their motion to dismiss, Defendants maintain that Plaintiffs failed to adequately address their motion or cure the deficiencies in their complaint, and that Plaintiffs failed to overcome the documentary evidence conclusively establishing summary relief in favor of C-Parent and Cohen 500. Defendants also add that the Franchisee and the Defendants have separate tax identification numbers, file separate tax returns, and operate separate businesses. And, having received the Franchisee's 1995 tax records, Plaintiffs were aware that the Franchisee was the subtenant of the Premises.

DISCUSSION

I. Defendants' 3211 Motion to Dismiss

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v DaimlerChrysler Corp.*, 292 A.D.2d 118 [1st Dept 2002]). The standard on a motion to dismiss a pleading for failure to state a cause of action is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept 1990]; *Leviton Manufacturing Co., Inc. v Blumberg*, 242 A.D.2d 205 [1st Dept 1997]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see*, CPLR 3026) and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts

as alleged fit into any cognizable legal theory" (*Leon v Martinez*, 84 N.Y.2d 83, 87-88 [1994]). Further, on a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], where the parties have submitted evidentiary material, including affidavits, the pertinent issue is whether claimant has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 538 NYS.2d 532 [1st Dept 1989]).

A. First and Second Cause of Action Against C-Parent and Cohen 500

In its first and second causes of action, Plaintiffs seek to hold C-Parent and Cohen 500 liable for Cohen 485's liabilities under the theory of piercing the corporate veil of Cohen 485.

In order to meet the legal threshold for imposing liability upon a corporate parent, such as C-Parent, for the acts of a subsidiary, plaintiff must plead the same elements necessary to pierce a corporate veil; *to wit*: (1) facts which demonstrate that the parent exercised complete domination in respect to the transaction attacked, *i.e.*, that the subsidiary had no separate will of its own; and (2) and that such domination was used to commit a fraud or wrong against the plaintiff *(see, Morris v. New York State Dep't* of *Taxation% and* Finance, 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807, 810, 623 N.E.2d 1157 [1993]; *F & M Precis Metals, Inc. v. Goodman*, 4 Misc. 3d 1023, 798 N.Y.S.2d 344 [Sup. Ct. New York County 2004]).

It is well settled that domination will not be found simply because the same person or entity owned or controlled multiple entities (*see Hamlet on Olde Oster Bay Home Owners Ass'n, Inc. v. Holiday Organization, Inc.*, 2006 WL 1982603, *15 (N.Y.Sup.), *citing Treeline Mineola, LLC v. Berg*, 21 A.D.3d 1028, 801 N.Y.S.2d 407 [2d Dept. 2005]). And, claims "upon information and belief" that there is common ownership between C-Parent and Cohen 500 and

that C-Parent owns Cohen 500 alone, are insufficient. However, the complaint alleges additional facts to support the claim to pierce the corporate veil.

As to the claims against C-Parent, the complaint alleges that C-Parent owns, and is the parent of Cohen 485 (and Cohen 500), and that C-Parent negotiated the subject Lease or the 2002 Extension on behalf of Cohen 485. Further, the 1978 Lease Term Confirmation and the 2002 Extension between Plaintiffs and C-485 were executed by a member of the family which owns and operates C-Parent. It is also alleged that C-Parent removed the operating assets from Cohen 485 and placed them in Cohen 500 in a wrongful effort to render Cohen 485 judgment-proof under the Lease. The submissions also support Plaintiffs' assertion that when the store located at the Premises, though operated by the purported Franchisee, closed, it reopened virtually a day later at 500 Lexington Avenue with the same management, employees, telephone number, and customers (Claman Aff. at ¶ 8). Although the management and employees are that of the Franchisee (Cohen 47), yet another corporation, this Franchisee is a franchisee of C-Parent.

It must be emphasized that complete "domination, standing alone, is not enough; some showing of a wrongful or unjust act toward the plaintiff is required" (*Morris v. New York State Dept. of Tax. and Fin.*, 82 N.Y.2d at 141-42). As such, the second element for piercing the corporate veil requires a showing of a wrongful or unjust act toward the Plaintiffs. An inference of abuse does not arise where a corporation was formed for legal purposes or is engaged in legitimate business (*see TNS Holdings, Inc. v. MKI Securities Corp.*, 92 N.Y.2d 335, 339-40 [1998]). It is alleged that C-Parent played a "shell game" in order to remove the assets from Cohen 485 and place them in Cohen 500 to render Cohen 485 judgment proof in the face of its Lease obligations. Thus, assuming these facts to be true and according them every possible fair

and reasonable inference, it cannot be said that Plaintiffs failed to state a claim to pierce the corporate veil of Cohen 485 and hold C-Parent liable for the Lease (*see Rebh v Rotterdam Ventures Inc.*, 252 A.D.2d 609, 675 N.Y.S.2d 234 [3d Dept 1998]; *Tesoro Petroleum Corp. v Holborn Oil Co., Ltd.*, 118 A.D.2d 506, 500 N.Y.S.2d 118 [1st Dept 1986] [where parent negotiated alleged contract for gasoline of which subsidiary was to take delivery, and parent treated subsidiary as a department rather than as an independent subsidiary, corporate veil between parent and subsidiary should be pierced for purposes of litigation on alleged contract]).

That Cohen 485 and C-Parent have separate tax identification numbers, that the Lease was between Cohen 485 and Defendants, that Plaintiffs never sought financial guarantees for Cohen 485 from C-Parent, and that a subtenant (the Franchisee) had been operating the retail optical store does not establish, as a matter of law, that C-Parent did not dominate and control Cohen 485, in order to commit a fraud or wrong against the Plaintiffs.

Nor does Plaintiffs' failure to address how the corporations failed to observe the formalities of separate corporate procedures for each corporation establish a basis to grant Defendants' 3211 motion.

As to Cohen 500 however, Plaintiffs' complaint is completely devoid of any allegations in support of Plaintiffs' claim that Cohen 500 exercised complete domination and control over Cohen 485, or that any such domination and control over Cohen 485 was performed in order to commit a fraud or wrong against the plaintiff.

Therefore, the first and second causes of action to pierce the corporate veil of Cohen 485 to hold C-Parent liable for Cohen 485's Lease obligations are sufficiently stated. However, Plaintiff's first and second causes of action to hold Cohen 500 liable for Cohen 485's Lease

obligations cannot be maintained as against Cohen 500.

B. Fourth Cause of Action Against C-Parent and Cohen 500

As to the fourth cause of action seeking relief against Cohen 500 and C-Parent under theories of alter ego and continuation of business doctrines, the Plaintiffs' allegations are sufficient to permit this cause of action to proceed to discovery solely on the continuation of business doctrine against Cohen 500.

An alter ego situation exists where a corporation has been so dominated by another corporation that its separate corporate identity is ignored and it primarily transacts the business of its dominator instead of its own (*see Island Seafood*, 303 A.D.2d 892, 893, *citing Austin Powder Co. v McCullough*, 216 A.D.2d 825, 827). In determining whether one corporation is the alter ego of another, courts generally consider factors such as whether there is an "overalap in ownership, officers, directors, and personnel, inadequate capitalization, a commingling of assets, or the absence of separate paraphernalia that are part of the corporate form" (*see Island Seafood v Golub Corp.*, 303 A.D.2d 892, 893-94, *citing Passalacqua Bldrs. v Resnick Dev. South.*, 933 F.2d 131, 138-39 [2d Cir. 1991]). Here, the complaint fails to allege, and the submissions fail indicate, that there was inadequate capitalization, a commingling of assets between Cohen 485 and Cohen 500, or Cohen 485 and C-Parent, or the absence of separate paraphernalia that are part of the corporate form so as to maintain a claim against Cohen 500 or C-Parent under the alter ego theory.

However, Plaintiffs have stated a claim against Cohen 500 under the continuity of business doctrine. In *Lumbard v Maglia* (621 F.Supp. 1529 [SDNY 1985]) the Southern District Court held that although plaintiffs' complaint fails to describe every indicator of a *de facto*

merger,[2] it clearly described the wholesale transformation of one company, into another, in that the amended complaint alleges that "Maglia continued the enterprise of Carla with the same employees, assets, and management. It further states that these transactions reduced Carla to a 'shell.'" The Court held that such allegations were sufficient to state a *de facto* merger claim against Maglia.

The allegations in the complaint and submissions do not allege sufficient facts to support a *de facto* merger or continuation of business claim against C-Parent. However, the allegations in the complaint and submissions, *i.e.*, the "Go Across The Street Sign," (cross-motion ¶9), indicate that even though the optical store located at the Premises may have been operated by the (non-party) Franchisee, Cohen 500 continued the "Cohen Fashion Optical" store after the Premises were vacated. Therefore, although Plaintiffs failed to state a claim against Cohen 500 under the alter ego or corporate veil piercing theories in the first cause of action, Plaintiffs have alleged sufficient facts to state a claim against Cohen 500 under the *de facto* merger, or continuation of business doctrine.

C. Fifth and Sixth Cause of Action Against Cohen 485 for Fraudulent Conveyance and Constructive Trust

Plaintiffs allege that Cohen 485 fraudulently conveyed its assets to C-Parent and/or Cohen 500 in violation of New York Debtor and Creditor Law §§ 273 through 276. According

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[2] The Southern District Court stated that for a *de facto* merger to occur, there must be continuity of the successor and predecessor corporation as evidenced by (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation. Not all of these factors are needed to demonstrate a merger; rather, these factors are only indicators that tend to show a *de facto* merger *(Care Environmental Corp. v. M2 Technologies, Inc.*, 2006 WL 148913 [E.D.N.Y. 2006]).

to Plaintiffs, Cohen 500 received value from Cohen 485 in the form of good will, employee relations, and customer relations without payment (Claman Aff. at ¶14). As such, these assets should be held in a constructive trust (Complaint at ¶ 63). Defendants move for dismissal of these causes of action by arguing that they are legally deficient under CPLR 3016(b) because they do not allege specific facts including, *inter alia*, when the alleged transfer occurred, the amount of money transferred, or the particular assets transferred (D. Memo at p. 1).

The Debtor and Creditor Law renders certain conveyances of assets void, *to wit*: a conveyance made without fair consideration rendering the transferor insolvent (§ 273); a conveyance made without fair consideration by a business person leaving him or her with unreasonably small capital (§ 274); a conveyance made without fair consideration under belief that debts will be beyond conveyors ability to pay is fraudulent as to both present and future creditors (§ 275); and a conveyance made with actual intent to defraud is fraudulent as to both present and future creditors (§ 276) (*see generally*, New York Debtor and Creditor Law §§ 273-276).

The complaint simply alleges the elements of the fraudulent conveyance statutes, and fails to assert any facts underlying each of the elements of fraudulent conveyance. Thus, although the allegedly transferred assets are described as good will, and telephone numbers, the remaining elements lack sufficient factual detail in support thereof (*IDC (Queens) Corp. v. Illuminating Experiences, Inc.*, 220 A.D.2d 337, 633 N.Y.S.2d 18 [1995 1st Dept]). As such, the Plaintiffs' fraudulent conveyance claim is legally insufficient, and dismissed.

As to Plaintiffs' cause of action to impose a constructive trust, the Court notes that the four elements of a constructive trust are (1) a confidential or fiduciary relationship; (2) a promise;

(3) a transfer in reliance on the promise; and (4) unjust enrichment (*Sharp v Kosmalski,* 40 N.Y.2d 119 [1976]; *Church of God Pentecostal Fountain of Love, MI v Iglesia De Dios Pentecostal, MI*, 27 AD3d 685 [2d Dept 2006]; *Nastasi v Nastasi,* 26 AD3d 32 [2d Dept 2005]).

Any claim to impose a constructive trust on the assets of Cohen 485 allegedly transferred to Cohen 500 or C-Parent must fail because the relationship between Plaintiffs and Cohen 485 is not confidential or fiduciary. A fiduciary relationship exists when one party "··· reposes confidence in another and relies on the other's superior expertise or knowledge" *(WIT Holding Corp. v Klein,* 282 A.D.2d 527, 529 [2d Dept 2001]; *see, Doe v Holy See, (State of Vatican City),* 17 AD3d 793 [3d Dept 2005]). Arm's length business transactions do not give rise to fiduciary relationships. *Id.* at 529 (*see also, Cuomo v Mahopac National Bank,* 5 AD3d 621 [2d Dept 2003]; *Wiener v Lazard Freres & Co.*, 241 A.D.2d 114 [1st Dept 1998]).

Therefore, the absence of any allegations to support a constructive trust warrants dismissal of this claim against Cohen 485, as well as Cohen 500 and C-Parent.

II. Defendants' Motion for Summary Judgment

As to those causes of action that survived Defendants' 3211 challenge, summary judgment is premature at this juncture. Discovery, including depositions of the parties, are warranted. Therefore, summary dismissal of the remaining causes of action is denied, without prejudice.

III. Plaintiff's Cross-Motion to Join Additional Parties and to Amend the Complaint

Plaintiffs' cross-motion which, pursuant to CPLR 1002(b), 1003 and/or 3025(b), seeks permission to join Allen Cohen a/k/a Alan Cohen and Cohen Fashion Optical of 47th St., Inc. d/b/a Cohen's Fashion Optical as additional party defendants and to amend their complaint to

add additional claims is granted solely as to the proposed fourth cause of action against Cohen 47.

It is well settled that leave to amend a pleading pursuant to CPLR §3025(b) should be freely granted provided there is no prejudice to the nonmoving party (*Crimmins Contr. Co. v City of New York*, 74 N.Y.2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 N.Y.2d 755 [1983]; *Lambert v Williams*, 218 A.D.2d 618 [1st Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 A.D.3d 178 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York,* 280 A.D.2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe,* 210 A.D.2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano,* 177 A.D.2d 450 [1st Dept 1991], *lv dismissed* 81 N.Y.2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

When a party seeks not only to amend the pleadings, but also to assert claims against persons sought to be joined as additional parties in the action (CPLR 1003), the court may also consider the prejudice to the other defendants and the extent of the delay in moving to add the new parties and the reasons therefor (*Haughton v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 305 A.D.2d 214 [1st Dept 2003]; *Konrad v 136 East 64th Street Corp.*, 246 A.D.2d 324 [1st Dept 1998]).

A. Proposed Fourth Cause of Action

In the proposed fourth cause of action, Plaintiffs add the Franchisee as an additional party allegedly liable for the amounts due under the Lease under the alter-ego and continuity of

business doctrines. As stated above, to determine whether one corporation is the alter ego of another, courts generally consider factors such as whether there is an "overalap in ownership, officers, directors, and personnel, inadequate capitalization, a commingling of assets, or the absence of separate paraphernalia that are part of the corporate form" (*see Island Seafood*, 303 A.D.2d 892, 893-94, *citing Passalacqua Bldrs. v Resnick Dev. South.*, 933 F.2d 131, 138-39 [2d Cir. 1991]).

The proposed complaint fails to allege, and the submissions fail to indicate, that there was inadequate capitalization, a commingling of assets between Cohen 485 and the Franchisee, or the absence of separate paraphernalia that are part of the corporate form so as to maintain a claim against the Franchisee under the alter ego theory.

However, Plaintiffs have stated a claim against the Franchisee under the continuity of business doctrine. The allegations in the complaint and submissions, *i.e.*, the "Go Across The Street Sign," (cross-motion ¶9), indicate that the optical store located at the Premises was operated by the Franchisee, and that Cohen 500 continued the "Cohen Fashion Optical" store after the Premises were vacated. The complaint alleges that Cohen 500 was formed to continue the optical business in which Cohen 485 was engaged at the Lease Premises, and that Cohen 500 is located across from the subject building on Lexington Avenue. The complaint further alleges that Cohen 500 began its business simultaneously with the cessation of business operations at the Premises, with, *inter alia*, the same employees and same telephone number, and appealing to the same customers. It appears that the announcement clearly refers to the Franchisee. Therefore, Plaintiffs' claim against the Franchisee, in addition to Cohen 500, under the continuity of business doctrine is sufficiently alleged, and Plaintiffs' may amend their complaint to add such a

claim.

B. Proposed Fifth Cause of Action

Since the proposed fifth cause of action adds nothing more than the name of the Franchisee to the previously alleged fraudulent conveyance claim, Plaintiffs fail to demonstrate merit to this claim. Thus, leave to amend the complaint to add the fifth cause of action is denied.

C. Proposed Sixth Cause of Action

For the reasons stated above, the proposed sixth cause of action to impose a constructive trust lacks merit, and leave to add this claim is also denied.

D. Proposed Seventh Cause of Action

As to the proposed seventh cause of action alleging fraud, Plaintiffs state a cause of action against C-Parent, Allen Cohen a/k/a Alan Cohen, and the Franchisee.

The elements of fraudulent misrepresentation are: (1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiff reasonably relied upon the representation, and (4) the plaintiff suffered damage as a result of his or her reliance (*Swersky v Dreyer and Traub*, 219 A.D.2d 321, 326 [1st Dept 1996]). Misrepresentation must be pleaded with sufficient particularity, as required by CPLR 3016(b). The language of 3016(b) merely requires that a claim of misrepresentation be pleaded in sufficient detail to give adequate notice (*see Foley v D'Agostino*, 21 A.D.2d 60, 64 [1st Dept. 1964]). Indeed, the Court of Appeals has specifically noted that this rule "is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud'" (*Lanzi v Brooks*, 43 N.Y.2d 778, 780 [1977] [citation omitted]). Further, "a plaintiff . . . need only plead that he relied on

misrepresentations made by the defendant . . . since the reasonableness of his reliance [generally] implicates factual issues whose resolution would be inappropriate at this early stage" (*Guggenheimer v Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc.3d 926, 810 N.Y.S.2d 880 [Sup. Ct. New York County 2006]).

Here, Plaintiffs allege that C-Parent, "the tenant occupying the Premises- with the knowing assistance of Allen a/k/a Alan Cohen and []Franchisee and Steven Borsack, who, upon information and belief is principal of []Franchisee-held Tenant out as the entity actually conducting business at the Premises (the "Representations")." Plaintiffs also allege that the Representations were known to be false when made, and were made with the intent to deceive and defraud Plaintiff TIAA. Further, in reliance upon such Representations, Plaintiff TIAA entered into the 2002 Extension, to their detriment. Plaintiffs assert that because of Defendants' actions, they did not know the true identity of the occupier of the Premises and that their reliance caused them to enter into a lease extension, which Cohen 485 subsequently breached, to their detriment. As such claims are sufficient to allege a fraud cause of action, Plaintiffs may assert the proposed seventh cause of action in the amended complaint.

E. Proposed Eighth Cause of Action

As to the proposed eighth cause of action alleging privity between the Franchisee subtenant and the landlord, Plaintiffs fail to state a cause of action.

It is well settled that a sublease is an agreement between a tenant and subtenant. As such, there is no privity of contract or contractual liability between the landlord-lessor and subtenant (*see Chock Full O'Nuts Corp. v NRP LLC I*, 11 A.D.2d 385 [1st Dept 2004]; *Nineteen New York Properties Ltd. Partnership v 535 5th Operating Inc.*, 211 A.D.2d 411 [1st Dept 1995]; *Tamco*

Enterprises, Inc. v Mitsubishi Elec. America, Inc., 190 A.D.2d 623 [1st Dept 1993], leave to appeal denied, 82 N.Y.2d 659 [1993]; *Ivan Mogull Music Corp. v Madison-59th Street Corp.*, 162 A.D.2d 336 [1st Dept 1990]). Plaintiffs wish the court to adopt the ruling in *Timur On Fifth Avenue, Inc. v Record Explosion, Inc.* (290 A.D.2d 221 [1st Dept 2002]), which held that privity existed between the landlord-lessor and the subtenant where the subtenant was named in the master lease, the master lease permitted landlord to recover from the identified subtenant upon a default by the tenant, and the sublease incorporated the terms of the master lease.

Upon review, *Timur* appears to be limited to its unique situation and does not apply to the instant case, where there is no allegation that the subtenant here, Cohen 47 (or Franchisee) was named in the Lease or that there was any provision permitting the Plaintiffs to recover from Cohen 47 (or Franchisee) upon the event of Cohen 485's default. Therefore, there is no basis to permit Plaintiffs leave to add the proposed eighth cause of action against the Franchisee.

CONCLUSION

Accordingly, it is hereby

ORDERED that the branch of Defendants' motion to dismiss the complaint pursuant to CPLR 3211[a][7] against Cohen's Fashion Optical, Inc. and Cohen's Fashion Optical of 500 Lexington Avenue, Inc. is granted solely to the extent that Plaintiff's first and second causes of action is dismissed as against Cohen 500; and it is further

ORDERED that the fourth cause of action is dismissed in its entirety as against Cohen's Fashion Optical, Inc., and the alter ego claim in the fourth cause of action against Cohen 500 is dismissed; and it is further

ORDERED that the branch of Defendants' motion to dismiss the fifth (fraud) and sixth

(constructive trust) causes of action against Cohen's Fashion Optical of 485 Lexington Avenue, Inc. pursuant to CPLR 3211[a][7] is granted and such causes of action are dismissed; and it is further

ORDERED that Defendants' motion for summary judgment dismissing the complaint is denied, at this juncture; and it is further

ORDERED that Plaintiffs' motion to amend the complaint and add additional parties is granted solely to the extent that Plaintiff may amend the complaint to add the proposed fourth and proposed seventh causes of action; and it is further

ORDERED that the parties shall appear for a status conference on January 30, 2007, 3:00 p.m. in Part 35.

This constitutes the decision and order of the Court.

Dated: January 3, 2006

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD