

Aldoro, Inc. v Gold Force Intl. Ltd.

2007 NY Slip Op 33821(U)

November 15, 2007

Supreme Court, New York County

Docket Number: 0604044/2006

Judge: Richard B. Lowe

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

PRESENT: HON. RICHARD B. LOVE, III
Justice

PART 54

Index Number : 604044/2006

ALDORO

vs

GOLD FORCE INTERNATIONAL

Sequence Number : 004

DISMISS

INDEX NO. _____

MOTION DATE 4/30/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his 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

FILED

NOV 28 2007

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 11/15/07

HON. RICHARD B. LOVE, III
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

----- X
ALDORO, INC.,

Plaintiff,

- against-

Index No. 604044-06

GOLD FORCE INTERNATIONAL LTD. n/k/a GF
INT'L HOLDINGS, INC., ABN AMBRO BANK,
N.V., GARY JACOBS, HOWARD SLOCHOWSKY,
MICHAEL ANTHONY JEWELERS LLC, BEL-ORO
GROUP OF COMPANIES, and "JOHN DOE NO.
1-100" (True names of "John Doe No.
1-100" defendants are unknown to
plaintiff at present),

Defendants.

----- X

RICHARD B. LOWE III:

In motion sequence 004, defendant ABN Ambro Bank (ABN) moves to dismiss the complaint as against it, and to stay discovery. The motion for a stay of discovery was denied at oral argument. By stipulation dated June 28, 2007, plaintiff Aldoro, Inc. (Aldoro) agreed that its cross-motion in motion sequence 004 for leave to serve an amended complaint is withdrawn and superceded by its motion in motion sequence 005 for leave to file a second amended complaint.

In motion sequence 005, Aldoro seeks leave to file a second amended complaint asserting claims against defendant Gold Force International Ltd (Gold Force) , along with three of its officers and directors, against ABN and one of its officers, and against defendant Michael Anthony Jewelers LLC (Michael Anthony), and one of its officers. Aldoro also moves to certify this action as a class action on behalf of all unsecured creditors of defendant Gold Force. Gary M. Jacobs (Jacobs), and Howard Slochowsky (Slochowsky) cross-move to dismiss the initial

complaint as against them, individually.

BACKGROUND

This action arises from two separate transactions. The first occurred on August 1, 2006, when Aldoro allegedly sold and delivered jewelry to Gold Force, taking as payment five post-dated checks totaling \$201,000. The checks were dated between August 22, and September 13, 2006. At the time of the sale, Gold Force owed Aldoro \$37,500 from a previous transaction. The \$201,000 represented payment for the indebtedness and the present transaction. The checks were returned either unpaid or with the notation "payment stopped."

The second transaction is the sale, on September 6, 2006, of substantially all of the assets of Gold Force to defendant Michael Anthony. At the closing, the entire cash consideration then due, approximately \$6 million, was paid to ABN, which held a first security interest in all of Gold Force's assets to secure loans totaling over \$24 million as of August 30, 2006. The total value of the consideration under the asset purchase agreement cannot be determined from the face of the document.

Defendant Slochowsky, and proposed defendant David Neuberg (Neuberg), entered consulting agreements, dated September 8, 2006, with Michael Anthony. The second proposed amended complaint seeks to add Neuberg as a defendant, along with two officers of ABN.

Gold Force then changed its name to GFI, Inc. For purposes of clarity, this decision will refer only to Gold Force.

DISCUSSION

ABN's Motion to Dismiss the Complaint

ABN's motion (motion sequence 004) to dismiss the complaint as against it is

granted. In the initial complaint, the only mention of ABN, other than the caption, is in paragraph 3, which states that ABN is a foreign corporation doing business in the State of New York. Indeed, it does not even demand judgment against ABN. Nor does the affidavit of Yako Ahale, an officer of plaintiff, submitted in opposition to ABN's motion and in support of plaintiff's cross-motion, contain sufficient factual allegations to sustain the complaint, as against ABN. The only reference in that affidavit to ABN is a quote from the December 13, 2006 Gold Force letter to plaintiff that the transaction was executed with the consent of ABN.

Clearly, no cause of action is sufficiently stated in the initial complaint against ABN even to meet the minimal standard of notice pleading, much less the elevated standard of pleading with particularity required for a cause of action charging aiding and abetting a fraudulent conveyance (see CPLR 3016 [b]); Wildman & Bernhardt Const., Inc. v BPM Associates, LP, 273 AD2d 38 [1st Dept 2000]; IDC (Queens) Corp. v Illuminating Experiences, Inc., 220 AD2d 337 [1st Dept 1995]).

Jacob's and Slochowsky's Cross Motion to Dismiss the Complaint

The cross-motion of Jacobs and Slochowsky to dismiss the complaint as against them is granted. The complaint does not contain sufficient allegations to state a cause of action for fraud against any defendant. Specifically, it plainly does not contain sufficient allegations that Jacobs and Slochowsky participated in a fraud to such an extent that they may be held personally liable (see Pludeman v Northern Leasing Systems, Inc. (40 AD3d 366 [1st Dept 2007]); Retropolis, Inc. v 14th Street Development LLC, 17 AD3d 209 [1st Dept 2005]). Therefore, the complaint is dismissed to these defendants.

Motion for Class Certification

The motion to certify this as a class action on behalf of all unsecured creditors of Gold Force is denied. Plaintiff has not met its burden to establish the five requirements for class certification under CPLR 902 (a) (1)-(5) (see Beller v William Penn Life Ins. Co. of New York, 37 AD3d 747 [2d Dept 2007]; Casey v Prudential Securities, Inc., 268 AD2d 833 [3d Dept 2000]). Indeed plaintiff provides no support for his motion in the affidavit submitted nor the memorandum brief.

Aldoro's Motion to File a Second Amended Complaint

In motion sequence 005, leave to file the proposed second amended complaint is denied in its entirety. The second proposed amended complaint is unverified, and the motion for leave is supported only by an attorney's affirmation, which has no evidentiary value and cannot be used to provide factual allegations for an otherwise deficient complaint (see Rovello v Orofino Realty Co., 40 NY2d 633 [1976]; Panaccione v Acher, 30 AD3d 989 [4th Dept 2006]).

In Panaccione, the court, held that a motion for leave to serve and file an amended complaint must be denied where the moving party fails to "establish the merit of that cause of action by 'evidentiary proof that could be considered upon a motion for summary judgment [citation omitted]'" (*id.* at 991).

The deficiencies of the proposed second amended complaint are not merely as to form. Resubmitting the allegations in evidentiary form would not cure the pervasive failure to plead with particularity as required for the fraud, fraudulent conveyance, and breach of fiduciary duty causes of action. To meet the standard of pleading with particularity, factual allegations must be made in support of each element of each cause of action (see Monaco v New York Univ. Med.

Ctr., 213 AD2d 167, 169 [1st Dept 1995]).

The proposed second amended complaint contains five causes of action.

The proposed first cause of action is against Gold Force for goods sold and delivered.

This is identical to the first cause of action in the initial complaint.

The proposed second cause of action charges that Jacobs, Slochowsky, and Neuberg, as officers and/or trustees of Gold Force breached their fiduciary duty to Aldoro, as an unsecured creditor of Gold Force, by selling substantially all of Gold Force's assets without consideration. Yet counsel for Aldoro states in paragraph 9 of his affirmation in support that ABN received \$6 million dollars at the closing. Plainly, payment of Gold Force's indebtedness to ABN is consideration to Gold Force for the sale. Thus, counsel's own statement contradicts an essential allegation of the second cause of action in the second proposed amended complaint.

The proposed third cause of action charges that all defendants violated unspecified provisions of Article 10 of the New York Debtor and Creditor Law, and that the individual defendants aided and abetted such violation. Again, the standard of pleading with particularity pursuant to CPLR 3016 (b) is not met.

The proposed fourth cause of action, alleged against all defendants, charges that the September 6, 2006 transaction operated as a de facto dissolution of Gold Force, obligating Gold Force's officers and directors to give notice to unsecured creditors, and that no such notice was given. The individual defendants allegedly aided and abetted this alleged violation.

With respect to the proposed fourth cause of action, the claim for aiding and abetting is not pleaded with sufficient particularity. Neither Aldoro nor the Gold Force defendants has briefed the principal claim, that Jacobs and Slochowsky, as officers and directors of Gold Force,

breached their fiduciary duty to give notice of the impending sale to its unsecured creditors. In his affirmation, plaintiff's counsel argues that Darcy v The Brooklyn and New York Ferry Co. (196 NY 99 [1909]), which requires a corporation that is informally dissolving as the result of a transfer of assets to give notice to unsecured creditors of the impending transfer, applies.

Aldoro also relies on Parent v Amity Autoworld, Ltd., (15 Misc 3d 633 [Dist Ct Suffolk County 2007]). Parent holds that a corporation may informally dissolve without giving notice to creditors, but its directors may not avoid liability to the corporation's creditors. Parent involved a small claims court judgment creditor's claim against an auto dealership. The assets of the dealership were sold, without notice to creditors, and the court held that the judgment creditor was authorized to amend her judgment to include the sole shareholder of the auto dealer as a defendant.

While the holding of Parent is not applicable here because it involves application of Uniform District Court Act §§ 1813 and 1814, which permit entry of judgment against a corporation and its principal, it contains a pertinent discussion both of the court-supervised dissolution procedures of BCL §§ 1006 and 1007, and the effect of the repeal of the bulk sales provisions of the UCC.

In Parent, the court concluded that a corporation may informally dissolve without resort to court intervention pursuant to BCL § 1007, but

the cost of an informal dissolution is that directors cannot shield themselves against corporate creditor liability. Directors who undertake to divest a corporation of all its property without taking the proceedings for a voluntary dissolution do so at their peril. The Darcy Court was unequivocal in its determination that "it is the neglect to afford [creditors] an opportunity for [Court review of their claims that] constitutes a violation of the directors' duties, and it matters not that they may have supposed they were not required to do any more

than they did for the protection of creditors

(id. at 640).

Whether such notice is required here must be considered in the wake of the repeal of the bulk sales provisions of the former Article 6 of the UCC, effective July 31, 2001 (2001 Session Laws of N.Y., Ch. 84 § 20). Former sections 6-104 (1) (d) and 6-105, required notice to creditors of a sale of substantially all of a corporation's assets.

Following such repeal, there is no statutory mandate for a corporation that informally dissolves or transfers substantially all of its assets to give notice to creditors. The effect of the repeal of Article 6 of the UCC is thoroughly discussed in Parent. There, the court concluded that the effect of the repeal is to restore the applicability of the common law as it existed before UCC Article 6 was enacted.

The issue here, upon a proper evidentiary submission, would have been whether common law principles require notice to be given to unsecured creditors of an impending sale in satisfaction of a prior indebtedness secured by all of the seller's assets. It is undisputed that ABN held a perfected security interest in all of the assets of Gold Force pursuant to Article 9 of the UCC.

Such notice could only be based on the "trust fund doctrine," which provides that "[t]he assets of a corporation are a trust fund for the payment of its debts, upon which the creditors have an equitable lien, both as against stockholders and all transferees, except those purchasing in good faith and for value [emphasis supplied]" (Hurd v New York & Commercial Steam Laundry Co., 167 NY 89, 95 [1901]; see also Credit Agricole Indosuez v Rossiyskiy Kredit Bank, 94 NY2d 541 [2000]) Matter of Baldwin Trading Corp., 8 NY2d 144 (1960); New York Credit

Men's Adjustment Bureau v Weiss, 305 NY 1, 7 [1953]).

In Credit Agricole Indosuez, the Court of Appeals again recognized the fiduciary duty owed by a corporate officer of a corporation in the zone of insolvency "to hold the remaining corporate assets in trust for the benefit of its general creditors [citations omitted]" (id. at 549), and also stated the rule that an unsecured creditor may not invoke the trust fund doctrine to reach transferred assets by asserting a lien or seeking equitable relief "before exhausting legal remedies by obtaining judgment on the debt and having execution returned unsatisfied (id.). This is consistent with BCL § 720 (b), which authorizes an action under section 720 by "a corporation, or a receiver, trustee in bankruptcy, officer, director or judgment creditor thereof [emphasis supplied]." BCL § 720 is the successor to General Corporation Law § 60, which, in turn, is the successor to §§ 1781 & 1782 of the Code of Civil Procedure, upon which Darcy is grounded. Section 60 did not contain the provision limiting actions to judgment creditors.

"This 'trust fund' theory envisions situations where a corporation attempts to divest itself of all or a substantial part of its property without affording an opportunity to its creditors to present and enforce their claims" [citation omitted] (Roos v Aloï, 127 Misc 2d 864, 868 [Sup Ct Nassau County 1985]). Here, there were no remaining assets to divest. The rights of the unsecured creditors were subordinate to those of the secured creditor, ABN. The directors and officers of Gold Force simply owed no duty to unsecured creditors with respect to disposition of property that was subject to a valid, perfected security interest. Therefore, the trust fund doctrine does not apply.

The fifth cause of action charges Neuberger, Jacobs, and Slochowsky with actual fraud in connection with the purchase of the jewelry from Aldoro, because they knew or should have

known that Gold Force was insolvent and would be unable to pay the checks delivered to induce Aldoro to deliver the merchandise, and that they fraudulently induced Aldoro to deliver the merchandise in exchange for checks that they knew would not be paid on presentation.

Leave is granted to file a third amended complaint with respect to the proposed fifth cause of action only, under the authority of Pludeman v Northern Leasing Systems, Inc., *supra*.

In Pludeman, the Appellate Division, First Department, held that the plaintiff was entitled to the favorable inference that the individual defendants, named officers of the corporation, "actually operate the day-to-day business of corporate defendant, and consequently were involved in or knew about the alleged fraudulent concealment" (*id.* at 368). The specific titles and known actions in participating in the purchase of Aldoro's merchandise should be stated, as far as known, in such amended complaint, by a person with personal knowledge.

The effect of the foregoing is to leave in effect the first cause of action for goods sold and delivered in the initial complaint, and to grant leave to file an amended complaint containing only the first cause of action and a revised cause of action for fraud against Jacobs, Slochowsky, and Neuberg. Accordingly, it is

ORDERED, that ABN's motion to dismiss the complaint as against it is granted; and it is

ORDERED, that the cross-motion of Jacobs and Slochowsky to dismiss the complaint as against them is granted; and it is

ORDERED, that the cross-motion of Aldoro for leave to file a second amended complaint, and to certify the action as a class action is denied; and it is

ORDERED, that leave is granted to serve a third amended complaint with respect to the cause of action for fraud against Jacobs, Slochowsky, and Neuberg, only with respect to the

August 1, 2006 transaction; and it is further

ORDERED, that the Clerk shall enter judgment accordingly.

Dated: November 15, 2007

ENTER



J. S. C.

FILED

NOV 28 2007

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