

**Commissioners of the State Ins. Fund v  
Bartoszek**

2009 NY Slip Op 31023(U)

May 4, 2009

Supreme Court, New York County

Docket Number: 402953/07

Judge: Martin Shulman

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

PRESENT: MARTIN SHULMAN  
J.S.G.

PART 1

Justice

Index Number : 402953/2007  
STATE INSURANCE FUND  
vs  
BARTOSZEK, MARIAN  
Sequence Number : 002  
REARGUMENT/RECONSIDERATION

INDEX NO. 402953/2007  
MOTION DATE 5/7/09  
MOTION SEQ. NO. 002  
MOTION CAT. NO. 1

This motion is for:

REARGUMENT/RECONSIDERATION

Name of Motion / Cross-Motion / Affidavits - Exhibits 1-3  
Answering Affidavits - Exhibits A-B  
Replying Affidavits Exhibit 1

Cross Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is granted  
decided in order same as the motion  
decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS:

**FILED**  
MAY 07 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: May 7, 2009

[Signature]  
MARTIN SHULMAN J.S.G.

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 1

-----X  
THE COMMISSIONERS OF THE STATE INSURANCE  
FUND,

Plaintiff,

-against-

MARIAN BARTOSZEK and RAFAL BARTOSZEK,

Defendants.  
-----X

Index No. 402953/07

Decision & Order

**FILED**  
MAY 07 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**MARTIN SHULMAN, J.:**

Plaintiff The Commissioners of the State Insurance Fund ("SIF" or "plaintiff") moves to reargue this court's decision and order dated June 11, 2008 and entered on June 17, 2008 (the "order") which dismissed plaintiff's complaint in this action alleging fraudulent transfers pursuant to the Debtor and Creditor Law ("DCL"). As more fully set forth in the order, on August 22, 2006 SIF obtained a judgment in the amount of \$377,134.39 (the "Judgment") against non-party Barcel Renovation, Inc. ("Barcel"). The complaint alleges that Barcel was dissolved on or about December 12, 2005 and that defendants Marian Bartoszek and Rafal Bartoszek (the "Bartoszeks" or "defendants") were Barcel's sole shareholders, directors, officers and persons in control thereof. Plaintiff seeks to enforce the Judgment against the Bartoszeks.

Defendants oppose the motion and cross-move, in relevant part, for an order dismissing the complaint in the event the reargument motion is granted, based upon the jurisdictional and claim preclusion issues defendants raised in the prior motion, which were not addressed in the order in light of the dismissal. For the reasons set forth

herein, the motion for reargument is granted, and upon granting reargument, the court adheres to its original decision and order, albeit for different reasons.

### Discussion

CPLR 2221 states as follows:

Motion affecting prior order.

(a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it ...

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. *Foley v. Roche*, 68 A.D.2d 558 (1st Dept. 1979). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. *Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971 (1st Dept. 1984); *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22 (1st Dept. 1992).

In support of this motion, SIF argues the court should grant reargument because:

1) the grounds upon which the motion was granted (failure to comply with CPLR 3016[b]'s pleading requirements for fraud) were improperly raised for the first time in defendants' reply papers; 2) the court misconstrued the complaint in determining that it only alleged actual fraud under DCL §276, ignoring the complaint's constructive fraud claims (DCL §§ 273, 274); and 3) the court misinterpreted the law in not finding that the

details of the fraud were peculiarly within defendants' knowledge and as a result, SIF was not required to plead fraud with particularity.

A conveyance is fraudulent if made with actual intent to hinder, delay or defraud creditors (DCL §276) and is constructively fraudulent, regardless of intent, if made without fair consideration (DCL §272) under the circumstances set forth in the various sections of DCL §§273,273-a, 274, 275, 277. Here, a review of the papers submitted in connection with the underlying motion to dismiss indicates that neither SIF nor defendants attempted to make any distinction between actual and constructive fraud. Indeed, the complaint's first three causes of action contain allegations, albeit conclusory, implicating both actual and constructive fraud. Neither the complaint nor plaintiff's opposition to the underlying motion refers to any specific sections of the DCL.

Analyzing the complaint's allegations under DCL §276 (conveyances made with intent to defraud), the court adheres to its determination that the complaint fails to state a cause of action based upon SIF's failure to plead fraud with particularity as required by CPLR 3016(b). See *Menaker v. Alstaedter*, 134 AD2d 412, 413 (2<sup>nd</sup> Dept. 1987) (allegation of actual intent to defraud under DCL §276 was properly dismissed for failure to comply with CPLR 3016[b]).

The court rejects plaintiff's argument that it should not have considered defendants' CPLR 3016(b) argument because it was raised for the first time in defendants' reply papers. Though the underlying motion to dismiss does not specifically cite CPLR 3016(b), the motion to dismiss argued that the complaint should be dismissed for failure to state a cause of action due to lack of specificity. This is not a new argument or theory to which SIF was not permitted to respond.

The court also rejects SIF's claim that fraud could not be alleged with particularity because the facts of the fraud are peculiarly within defendants' knowledge. As evidenced by plaintiff's opposition to the motion to dismiss, plaintiff apparently obtained Barcel's banking records and identified certain transactions it found to be questionable. Despite having such information, the complaint merely alleges a legal conclusion, viz, that defendants made transactions in bad faith, with no supporting facts whatsoever.

As the court has confirmed its holding that the complaint fails to allege a cause of action under DCL §276, it follows that the court also properly dismissed the fourth cause of action for attorney's fees, which are available in actions to set aside conveyances made with intent to defraud. See DCL §276-a.

Turning to the complaint's allegations of constructive fraud (DCL §§ 273, 274), SIF is correct that CPLR 3016(b)'s pleading requirements are inapplicable to such causes of action. See *Menaker v. Alstaedter, supra*. Nonetheless, despite being exempt from CPLR 3016(b)'s pleading requirements, the complaint here merely tracks DCL §§ 273 and 274's statutory language. Only legal conclusions are alleged with no supporting facts. See *SL v. CD*, 17 Misc3d 1133(A), 851 NYS2d 47, at \*2 (Sup. Ct. Nassau Cty. 2007)(motion to dismiss causes of action under DCL §§ 273, 274 and 275 granted where only legal conclusory statements were alleged). Accordingly, the court adheres to the determination contained in the order and it is hereby

ORDERED that plaintiff's motion for reargument is granted and upon granting reargument, the court adheres to its original decision and order dismissing the complaint; and it is further

ORDERED that defendants' cross-motion is denied as moot.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York  
May 4, 2009



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HON. MARTIN SHULMAN, J.S.C.

**FILED**  
MAY 07 2009  
COUNTY CLERK'S OFFICE  
NEW YORK