

**Israel Discount Bank of N.Y. v Jacobs**

2009 NY Slip Op 31367(U)

June 16, 2009

Supreme Court, Nassau County

Docket Number: 018414-08

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**ISRAEL DISCOUNT BANK OF NEW YORK,  
IDB FACTORS DIVISION,**

**TRIAL/IAS PART: 25  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 018414-08**

**IRWIN JACOBS and SUSAN JACOBS,**

**Motion Seq. No: 1  
Submission Date: 5/8/09**

**Defendants.**

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**Papers Read on this Motion:**

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Affirmation dated February 18, 2009.....X**
- Affirmation in Opposition and Exhibits.....X**
- Plaintiff's Memorandum of Law.....X**
- Reply Affirmation in Further Support and Exhibit.....X**

This matter is before the court on the motion by Defendants Irwin Jacobs and Susan Jacobs to dismiss Plaintiff's verified complaint ("Complaint"), filed on February 18, 2009 and submitted May 8, 2009. <sup>1</sup> For the reasons set forth below, the Court denies Defendants' motion to dismiss.

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<sup>1</sup> This Court assumed responsibility for this case, and this motion, on May 8, 2009.

## BACKGROUND

### A. Relief Sought

Defendants move for an Order, pursuant to CPLR §§ 3211(a)(7) and 3016, to dismiss the Complaint, for failure to state a claim upon which relief may be granted, and for failure to plead fraud with particularity. Plaintiff opposes Defendants' motion.

### B. The Parties' History

This is an action to set aside an allegedly fraudulent conveyance. Defendant Irwin Jacobs ("Irwin") is a member of Timing Group, LLC, which is engaged in the business of importing and selling IZOD brand footwear. On July 15, 2005, Plaintiff Israel Discount Bank ("IDB" or "Plaintiff") entered into a factoring agreement ("Agreement") with Timing Group ("Timing") and, pursuant to the Agreement, purchased all of Timing's current and future accounts receivable.

The Agreement provided that IDB could, at its discretion, advance to Timing up to 80% of the purchase price of the receivables, less certain charges and reserves. Timing granted IDB a continuing security interest in "all of the now existing and future collateral" as security for repayment of obligations arising under the Agreement. The Agreement further provided that "after the occurrence of an event of default," IDB could terminate the Agreement without notice.

Irwin and the other members of Timing executed individual guarantees, pursuant to which members of Timing personally guaranteed financing that IDB provided. Irwin affirms that he agreed to guaranty personally the IDB loans based on his beliefs that 1) IDB would account for funds expended and received in a "commercially reasonable manner;" and 2) all monies that IDB expended were "within formula," meaning that all loans were collateralized by Timing's accounts receivables. Irwin executed the individual guaranty ("Guaranty") on or about July 15, 2005. Pursuant to the Guaranty, Irwin's liability was limited to the principal amount of \$1,000,000, plus interest at the default rate.

Allegedly as a result of the deterioration in the relationship between Irwin and the other operating owners of Timing, Irwin revoked his obligations pursuant to the Guaranty on or about March 30, 2006, and thereby purported to limit his liability to indebtedness arising prior to April 9, 2006. Irwin affirms that he effected this revocation pursuant to the applicable provisions in the Guaranty, providing notice to IDB by letter dated March 30, 2006. Language on page 3 of

the Guaranty provides that a signator may terminate the Guaranty by written notice, and the termination becomes effective ten (10) days after receipt of that notice. Pursuant to the Guaranty, a signator remains responsible for his obligations arising prior to the effective date of the termination.

IDB subsequently declared Timing to be in default under the Agreement, based on its failure to repay advances made to Transatlantic Shoe, LLC, Timing's wholly owned subsidiary. IDB then called Timing's loans, and Irwin affirms that he paid IDB \$350,000 pursuant to the Guaranty.

As of January 9, 2007, Timing owed IDB approximately \$1,779,412.00 pursuant to the Agreement. On January 23, 2007, IDB Factors, a division of IDB, commenced an action against Timing in Supreme Court, New York County (Index Number 600230-07), for breach of the Agreement ("Breach Action"). By Order dated January 7, 2008, the Court (Ramos, J.) granted IDB's motion for summary judgment but stayed entry of judgment pending resolution of Timing's counterclaims. The Court further directed the parties to complete discovery by June 30, 2008.

On January 29, 2007, IDB commenced an action against Irwin, and the other guarantors, in Supreme Court, New York County (Index Number 101357-07), to recover on their guaranty, ("Guarantee Action"). By Order dated July 10, 2008, the Court (Kornreich, J.) granted partial summary judgment to IDB on the issue of liability, but determined that a hearing was required "to determine proportional damages under the guarantees and plaintiff's claim of attorney's fees and costs." With respect to the defenses and counterclaims in the Guarantee Action, Justice Kornreich held:

Here defendants, under the explicit terms of the guarantees, agreed to pay Timing's debts to plaintiff on demand "regardless of the validity, regularity or enforceability of any of the Obligations...[and not] to assert...any set-off or counterclaim which the Client [Timing] may have." Exh. 8, pg. 2, Motion. The plain language of the operative documents preclude[s] the asserted defenses and counterclaims.

IDB moved for reargument of its motion for summary judgment on the ground that no hearing was required to determine the issue of proportional damages, because defendants (the Timing signators to the Guarantee) were each jointly and severally liable up to \$1 million under the Guarantee. Irwin filed a cross motion to reargue on the ground that the Order in the Breach

Action constituted new evidence that compelled a different result in the Guarantee Action. By decision dated January 13, 2009, Justice Kornreich 1) granted IDB's motion for reargument and for entry of judgment in the sum of \$1 million against defendants jointly and severally; 2) referred to a hearing only the limited issue of IDB's claim for attorney's fees and costs; and 3) denied Irwin's motion. In her decision, Justice Kornreich states that "Plaintiff is correct that the issue of contribution is between the guarantors after judgment has been entered for plaintiff, the lender," and concluded that she improperly referred to a hearing the issue of proportional damages under the guarantee.

Plaintiff filed the instant action on or about October 6, 2008. Plaintiff moves to set aside Irwin's conveyance of real property from Irwin and his wife, Susan Jacobs ("Susan") (collectively "Defendants"), to Susan as sole owner. That real property ("Property") is located at 820 Barberry Lane, Woodmere, New York. Plaintiff alleges that, on or about November 15, 2006, Irwin conveyed his interest in the Property to Susan without fair consideration, and with the intent to defraud IDB by depriving IDB of access to the Property to satisfy Irwin's debts to IDB.

The Complaint contains five (5) causes of action:

First Cause of Action - Plaintiff alleges that Irwin fraudulently conveyed the Property to Susan, and seeks a judgment against Defendants in the sum of \$1 million, representing Irwin's liability pursuant to the Guaranty;

Second Cause of Action - Plaintiff alleges, pursuant to New York Debtor and Creditor Law ("DCL") § 273, that Irwin's transfer of the Property was fraudulent, and asks the Court to restore the Property to Irwin;

Third Cause of Action - Plaintiff alleges, pursuant to DCL § 276, that Irwin conveyed the Property with intent to defraud IDB, a creditor, and asks the Court to restore the Property to Irwin;

Fourth Cause of Action - Pursuant to DCL § 276-a, Plaintiff seeks counsel fees that it incurred as a result of Irwin's allegedly fraudulent transfer of the Property;

Fifth Cause of Action - Plaintiff, pursuant to DCL § 278, asks the Court to permit Plaintiff to proceed against Susan to set aside the conveyance to the extent necessary to satisfy Plaintiff's claim against Irwin.

Plaintiff also seeks to 1) restrain Susan from selling or otherwise encumbering the Property; and 2) require Susan to reconvey the Property to Irwin.

### C. The Parties' Positions

Defendants move to dismiss the Complaint for failure to state a cause of action pursuant to CPLR § 3211(a)(7). Defendants argue that Timing is not indebted to IDB because IDB breached the implied covenant of good faith with respect to the Agreement, by refusing to finance an order from J.C. Penney in the amount of \$1,500,000. Alternatively, Defendants argue that Timing is not liable because IDB “over-extended credit” to maximize its “loan base.”<sup>2</sup> Defendants argue that, because Timing is not liable to IDB, Irwin is not liable on the Guaranty, and Irwin is not a “debtor” within the meaning of §§ 273 and 275 of the DCL. Additionally, Defendants argue that IDB’s application to set aside the allegedly fraudulent conveyance is premature, because IDB has failed to allege that the loans to Timing have matured, as required by DCL § 278. Finally, Defendants move to dismiss the Complaint for failure to plead the alleged fraud with particularity, pursuant to CPLR § 3016(b).

Plaintiff opposes Defendants’ motion. Preliminarily, Plaintiff submits that the Order in the Breach Action granting partial summary judgment conclusively established that Timing owes IDB \$1,618,361.86. Plaintiff submits, further, that the Court’s granting of summary judgment to Plaintiff in the Guarantee Action conclusively established that Irwin is liable to IDB for up to \$1 million.<sup>3</sup>

Plaintiff submits, further that the sole issue before this Court is whether Irwin’s conveyance of the Property to Susan was fraudulent, and that the other issues that Defendants raise, including objections to the Agreement, are irrelevant. Plaintiff argues, further, that Defendants’ application to dismiss pursuant to CPLR § 3211(a)(7) relies on arguments that Defendants propounded, unsuccessfully, in prior actions. Additionally, Plaintiff submits that

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<sup>2</sup> Defendants arguments are similar to those propounded by Timing in the Breach Action.

<sup>3</sup> Defendants, in their Reply Affirmation, make reference to comments that, they claim, Justice Kornreich made during a conference on February 11, 2009 in the Guarantee Action. Defendants affirm that, during that conference, Justice Kornreich “made it clear to all the parties that until such time as the principal obligor, Timing was held liable and a judgment was entered against it, no judgment could be entered against the guarantors.” This Court concludes that it would be inappropriate to rely on comments, allegedly made during a conference, that are not memorialized in a transcript or document that is so-ordered by the Court.

IDB is, in fact, a “creditor” of Irwin, who may properly bring this action pursuant to the DCL. Finally, Plaintiff submits that it has properly pled the elements of a fraudulent conveyance.

#### RULING OF THE COURT

Article 10 of the Debtor and Creditor Law (DCL) defines several different transactions that qualify as “fraudulent conveyances.” DCL § 273 provides that 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 actual intent if the conveyance is made, or the obligation is incurred, without a fair consideration. DCL § 275 provides that a conveyance made without fair consideration is similarly fraudulent as to creditors when the person making the conveyance intends to incur debts beyond his ability to pay as they mature. Finally, DCL § 276 provides that every conveyance made with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud present or future creditors, is fraudulent as to both present and future creditors. Pursuant to DCL § 278, where a conveyance is fraudulent as to a creditor whose claim has matured, the creditor, except as to a bona fide purchaser for value, may have the conveyance set aside to the extent necessary to satisfy his claim or disregard the conveyance and levy upon the property.

A motion to dismiss pursuant to CPLR § 3211 requires the Court to construe liberally the underlying pleading. The Court must accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference. *AG Capital Funding Partners v. State Street Bank and Trust Co.*, 5 N.Y.3d 582, 591 (2005). Thus, with respect to the instant motion, the Court must assume that Timing is liable to IDB on the Agreement, and that Irwin is liable to IDB on his Guaranty. The Court must, further, assume that IDB has a “matured claim,” entitling it to bring an action to set aside the allegedly fraudulent conveyance. The rulings by Justices Ramos and Kornreich, while perhaps not dispositive as to the instant motion, clearly articulate a basis for this Court to conclude that Timing is liable on the Agreement and Irwin is liable on his Guaranty.

The Court must also assume that Irwin was insolvent at the time the deed was executed. Indeed, there is a presumption of insolvency when a conveyance is made without consideration. *Miner v. Edwards*, 221 A.D.2d 934 (4<sup>th</sup> Dept. 1995). The Court concludes that Plaintiff has sufficiently alleged a constructively fraudulent conveyance, pursuant to DCL § 273, and,

therefore, denies Defendants' motion to dismiss that claim for failure to state a cause of action.

The Court further concludes that Plaintiff has sufficiently alleged an actual intent on Irwin's part to hinder, delay, or defraud creditors. An actual intent to defraud creditors need not be proven by direct evidence and may be inferred from the circumstances surrounding the allegedly fraudulent transfer. *Steinberg v. Levine*, 6 A.D.3d 620 (2d Dept. 2004). In determining whether a conveyance was fraudulent, the court will consider "badges of fraud," which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of fraudulent intent. *Id.* These badges of fraud include a) lack or inadequacy of consideration, b) family, friendship, or close associate relationship between transferor and transferee, c) the debtor's retention of possession, benefit, or use of the property, d) the existence of a pattern or series of transactions or course of conduct after the incurring of debt, and e) the transferor's knowledge of the creditor's claim and the inability to pay it. *Id.*

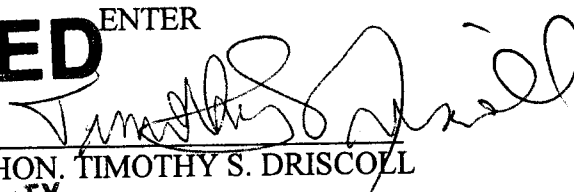
Plaintiff alleges that Irwin transferred the property to Susan without fair consideration. Moreover, Irwin transferred the Property to a close family member, his wife, and Plaintiff alleges that Irwin remained in possession of the property after the transfer. Clearly, Irwin had knowledge of IDB's claim on his guaranty. Under these circumstances, Plaintiff has sufficiently alleged an actual intent to hinder, delay, or defraud creditors. Accordingly, the Court denies Defendants' motion to dismiss Plaintiff's claim to set aside the transfer based upon an actual intent to defraud creditors. Moreover, the Court concludes that Plaintiff has alleged the fraud in sufficient detail and, therefore, also denies Defendants' motion to dismiss the Complaint pursuant to CPLR § 3016(b).

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear for a Preliminary Conference before the Court on July 16, 2009 at 9:30 a.m.

DATED: Mineola, NY  
June 16, 2009

**ENTERED** ENTER  
  
JUN 17 2009  
HON. TIMOTHY S. DRISCOLL  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE S.C.