

**CDR Creances S.A.S. v First Hotels & Resorts Invs.,  
Inc.**

2009 NY Slip Op 31837(U)

August 11, 2009

Supreme Court, New York County

Docket Number: 650084/09

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 650084/2009

CDR CREANCES S.A.S

vs.

FIRST HOTELS & RESORTS

SEQUENCE NUMBER : 002

DISMISS

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

**FILED**  
AUG 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/16/09

**WALTER B. TOLUB** J.S.C.

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: IAS PART 15

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CDR CREANCES S.A.S.,

Plaintiff,

**Index No.** 650084/09  
**Mtn Seq.** 002

-against-

FIRST HOTELS & RESORTS INVESTMENTS, INC.,  
(a/k/a LES PREMIERS INVESTMENTS HOTELIERS  
& VILLEGIATURE, INC.) HSBC BANK, USA N.A.,  
BOARD OF MANAGERS OF THE TRUMP WORLD TOWER  
RESORTS CONDOMINIUM, STATE OF NEW YORK, CITY  
OF NEW YORK, "JOHN DOES #1" though "JOHN DOES  
#2", the last ten names being fictitious and  
unknown to plaintiff. The persons or parties  
intended being the tenants, occupants, persons  
or corporations, if any, having or claiming an  
interest in lien or upon the Premises described  
in the complaint,

Defendants.

**FILED**  
AUG 17 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

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**WALTER B. TOLUB, J.:**

This is defendant First Hotels and Resorts Investment's motion to dismiss the complaint pursuant to CPLR §3211(a)(1) and §3211(a)(7).

Facts

Plaintiff, a French corporation, commenced the underlying action to obtain a judgment directing the sale of apartment 86-B at the Trump Tower Condominium, located at 845 United Nations Plaza, New York, New York (Property) in partial satisfaction of Plaintiff's judgment against, *inter alia*, two foreign corporations Blue Ocean Finance, Ltd. (Blue Ocean), and Summerson International Establishment and three French individuals Leon

Cohen, Maurice Cohen and Sonia Cohen (the Cohens) in the amount of \$265,865,120.81. None of the parties against whom there is a judgment are parties to this action.

Plaintiff is the successor in interest to Societe de Banque Occidentale, a French banking institution. Plaintiff claims that Societe de Banque Occidentale loaned approximately \$92 million to Euro American Lodging Corporation (EALC), a company controlled by the Cohens, for the purpose of purchasing and renovating a building in New York City. Plaintiff claims that an additional \$200 million is owed in interest and expenses involved in attempting to recover amounts due and owing.

Plaintiff commenced the related underlying actions (*CDR Creances SAS et. al. v. Cohen* Index 109565/03 ; *CDR Creances, SAS v. Leon Cohen, et. al.* Index 600448/06) arguing that Defendants in those actions conducted a massive complex conspiracy to defraud Plaintiff herein, and that the conspiracy was perpetrated by the Cohens and the judgment debtors. Plaintiff claimed that the Cohens and their corporations [i.e. Blue Ocean and Summerson International Establishment] defrauded Plaintiff out of hundreds of millions of dollars using a web of domestic and off shore shell corporations to conceal assets and not pay creditors.

Two judgments were entered in favor of Plaintiff in the amount of \$265,865,120.81. The first judgment was against

Summerson and Blue Ocean as judgment debtors in the action bearing Index Number 109565/03. The second judgment was against Blue Ocean, Robert Maraboef, Allegría Aich and Patricia Petetin as judgment debtors in the action bearing Index Number 600448/06. The Appellate Division, First Department vacated the judgments against, *inter alia*, Maraboef, Aich, Petetin, the Cohens and World Business Center but not as to Blue Ocean and Summerson. Accordingly, the underlying actions have been restored to the Court's calendar and discovery is currently ongoing with the depositions of Maurice and Sonia Cohen taking place recently.

As it pertains to this action, Plaintiff claims that Maurice Cohen formed and controls the defendant herein, First Hotels and Resort Investments, Inc., which is also known as Les Premiers Investments Hoteliers & Villegiature, Inc., a Quebec corporation (First Hotels). First Hotels was formed for the express purpose as being the fee owner of Unit 86-B at the Trump World Condominium (Property).

On March 18, 2004, Defendant HSBC Bank USA, N.A. (HSBC) obtained a mortgagee of the Property in the amount of \$7.2 million. A British Virgin Island Cohen company, Whitebury Shipping Time Sharing, Ltd., allegedly funded this purchase with "proceeds of the fraudulent and criminal diversions" from Blue Ocean and Summerson (Complaint ¶87).

Plaintiff commenced this action to obtain a judgment

directing the sale of the Property in partial satisfaction of Plaintiff's judgment against Blue Ocean, Summerson. Plaintiff argues that (1) The Cohen's interest in First Hotels and the Property were obtained with funds and other assets transferred from Blue Ocean and Summerson without adequate compensation and with the intent to defraud creditors. Plaintiff seeks to have the Property sold and to apply the proceeds to partial satisfaction of the judgments; (2) That the judgment debtors knew about Plaintiff's security interest and still used the profits to acquire the Property [unjust enrichment]; (3) Defendants joined the conspiracy to defraud Plaintiff by transferring assets belonging to the Plaintiff to the Cohens and concealing such transaction from the Plaintiff; (4) That this court should pierce the corporate veil because the Cohens' exercised dominion and control over the entities in the Complaint.

By this motion, Defendants seeks to dismiss the Complaint pursuant to CPLR §3211(a)(1) and (I) arguing that the pleading fails to set forth a cause of action.

#### Discussion

On a motion to dismiss for failure to state a cause of action, the court accepts all the allegations of the complaint as true and affords the plaintiff all favorable inferences to be drawn from them (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §36:290). In

ruling on the motion, the court decides whether the plaintiff can succeed on any reasonable view of the facts as stated and inferred (Id. citing Campaign for Fiscal Equity, inc v. State, 86 NY2d 307[1995]).

Therefore, the issues presently before this Court are whether Plaintiff has met the minimum pleading standard and whether discovery be permitted to proceed.

First Cause of Action: Fraudulent Transfer

The Complaint generally states that the Cohens' interest in First Hotels and the Property was obtained with funds and other assets transferred from Blue Ocean to Summerson without adequate compensation and with actual intent to defraud Plaintiff. Plaintiff points to the many transactions fully detailed in the Complaint to show that Defendants are owned and controlled by the Cohens and that the Cohens have a pattern of making company transfers to render judgment debtor companies insolvent.

Plaintiff argues that although not specifically denominated in the Complaint, that the Complaint alleges both intentional and fraudulent conveyances pursuant to Debtor Creditor Law §§ 276, 273, 273-a, 274 and 275.

Due to the difficulty in proving actual intent to hinder, delay or defraud creditors, the creditor in a fraudulent conveyance action under Debtor and Creditor Law is allowed to rely on "badges of fraud" to support a claim for actual fraud

[i.e. circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent] (Wall Street Associates v. Brodsky, 257 AD2d 526 [1<sup>st</sup> Dept 1999] citing Pen Pak Corp v. LaSalle National Bank of Chicago, 240 AD2d 384). Factors that are considered "badges of fraud" for the purposes of a claim for actual fraud under the fraudulent conveyance provision of Debtor Creditor Law are: (1) a close relationship between the parties to an alleged fraudulent transaction; (2) a questionable transfer in the non-usual course of business; (3) inadequacy of consideration; (4) transferor's knowledge of a creditor's claim and the inability to pay it; (5) retention of control of property by transferor after conveyance (Id.).

Here, Plaintiff's fraudulent conveyance claims are sufficient to support its contentions. The Complaint alleges that Blue Ocean, Summerson and First Hotels were each single purpose entities formed as part of an elaborate web of off shore corporations to divert and then secrete funds that should have been used to repay to Plaintiff. Plaintiff claims that EALC's insolvency, the Cohens' knowledge of CDR's security interest, the concealment of transactions from CDR, and the irregular nature and structuring of transactions constitute "badges of fraud" and are sufficient to sustain a cause of action for fraudulent conveyance.

Plaintiff also sufficiently states a cause of action for constructive fraud. In order to state a cause of action for constructive fraud, there must be a transfer made without fair consideration at a time when the transferor (1) is insolvent or was thereby rendered insolvent (DCL §273); (2) is a defendant in an action for money damages or is unable to satisfy a judgment that a plaintiff finally obtains (DCL §273-a); (3) has unreasonably small capital to operate its business (DCL §274); or (5) intends or believes that he or she would incur debt beyond the ability to pay as the debt matured (DCL §375).

Here Plaintiff claims that First Hotels was created after CDR commenced the related underlying actions, that funds were transferred between many Cohen companies and that single purpose companies, such as First Hotels, were used regularly to avoid paying debts.

Although at this juncture, while discovery is in its early stages, it is unclear whether Plaintiff will be able to prove its claims, it is clear that Plaintiff has sufficiently plead a cause of action for fraudulent transfer.

#### Second Cause of Action: Unjust Enrichment

Under New York law, a claim for unjust enrichment will lie only if the plaintiff can show that (1) defendant was enriched (2) the enrichment was at plaintiff's expense, and (3) the circumstances were such that equity and good conscience require

defendant to make restitution. Miller v. Schloss, 218 N.Y. 400, [1916]; Bank of New York v. Asati, Inc., 15 U.C.C. Rep. Serv. 2d 555 (N.Y. Sup 1990), *order aff'd*, 184 A.D.2d 443 [1st Dep't 1992]).

Here, Plaintiff claims that Defendant was (1) enriched through acquiring the Property; (2) that the enrichment was at Plaintiff's expense because funds which were owed to CDR were purposefully transferred by the Cohens and their corporations to First Hotels; and (3) that equity and good conscience require defendant to make restitution because the transfers were fraudulent and done to purposefully deprive Plaintiff of amounts due and owing.

As such, plaintiff has stated a cause of action for unjust enrichment.

Third Cause of Action: Conspiracy to Defraud

Plaintiff's third cause of action for conspiracy to defraud must be dismissed. "New York does not recognize an independent cause of action for civil conspiracy to commit a tort."

(Kopelowitz & Co., Inc. v. Mann, 23 Misc.3d 111(A) at 7, 2009 WL 1037734 (NY Sup) *citing* Roche v. Claverack Co-op Ins. Co., 59 AD3d 914 [3d Dept 2009]). "[A] mere conspiracy to commit a fraud is never of itself a cause of action." (Kopelowitz & Co., Inc. v. Mann, 23 Misc.3d 111(A) at 7, 2009 WL 1037734 (NY Sup) *citing* Brackett v Griswold, 112 NY 454, 467 [1889]). However,

"allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." (Kopelowitz & Co., Inc. v. Mann, 23 Misc.3d 111(A), 2009 WL 1037734 (NY Sup) citing Alexander & Alexander of New York, Inc. v Fritzen, 68 NY2d 968, 969 [1986]).

It follows that the allegations regarding the Cohens and their corporations, go to the Plaintiff's Fraud cause of action but are incapable of stating a claim for conspiracy to defraud.

#### Fourth Cause of Action: Piercing the Corporate Veil

Plaintiff's fourth cause of action seeks to pierce the corporate veil and hold First Hotels liable for fraud. However, under New York Law, a separate cause of action to pierce the corporate veil does not exist independent from the claims asserted against the corporation (9 East 38<sup>th</sup> Street Assoc v. George Feher Assoc., 226 AD2d 167 [1<sup>st</sup> Dept 1996] citing Morris v. New York State Dept of Taxation and Finance, 82 NY2d 135 [1993]). Piercing the corporate veil is a theory which may be relied upon in an effort to impose liability of a company against its owners (Morris v. New York State Dept of Taxation and Finance, 82 NY2d 135 [1993]). As such, Plaintiff's fourth cause of action is must be and is dismissed.

#### Fifth Cause of Action: Attorneys' Fees

Plaintiff's fifth cause of action seeks Attorney's Fees pursuant to Debtor and Creditor Law §276-a. Debtor and Creditor

Law allows for the recovery of attorneys' fees in an action to set aside a fraudulent conveyance. Since Plaintiff's cause of action for fraudulent conveyance is sustainable, so too is the cause of action for attorneys' fees.

Accordingly, it is

ORDERED that Defendant's motion to dismiss is granted with respect to Plaintiff's third and fourth causes of action and denied with respect to Plaintiff's first and second and fifth causes of action with leave to renew.

Counsel for the parties are directed to appear for a discovery conference on September 18, 2009 at 11:00AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/11/09

HON. WALTER B. TOLUB, J.S.C.

**FILED**

AUG 17 2009

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