

**Weitz v Weitz**

2010 NY Slip Op 30274(U)

January 1, 2010

Supreme Court, Nassau County

Docket Number: 016811-08

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**

-----x  
**SYLVIA WEITZ,**

**TRIAL/IAS PART: 22  
NASSAU COUNTY**

**Plaintiff,**

**-against-**

**Index No: 016811-08  
Motion Seq. Nos. 1, 2 & 3  
Submission Date: 12/9/09**

**MELVIN WEITZ, ELLEN WEITZ,  
THE MELEN TRUST,  
MELVIN WEITZ, as Grantor and Trustee of  
the Melen Trust,  
THE LASALLE TRUST, ELLEN WEITZ as  
Grantor and Trustee of The LaSalle Trust,  
LANNIE LIPSON individually and as  
Trustee of the LaSalle Trust,  
SAGE AUGELLO, individually and as Trustee  
of The LaSalle Trust, THE AMENDED AND  
RESTATED LASALLE TRUST, SOUTHPAC  
TRUST INTERNATIONAL, INC., a/k/a Southpac  
Trust Limited as trustee of The Amended and  
Restated LaSalle Trust and John Does 1-10,**

**Defendants.**

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**The following papers having been read on these motions:**

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Notice of Motion, Affirmation in Support,  
Affidavits in Support (3) and Exhibits.....X**
- Notice of Motion, Affirmation in Support, Affidavit of M. Weitz**
- Memorandum of Law and Exhibits.....X**
- Affirmation in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affirmation in Support of Motion of Trust Defendants.....X**

**Motion Papers (cont.)**

**Reply Memorandum of Law.....x**  
**Reply Affirmation in Support of M. Weitz Motion.....x**  
**E. Weitz Reply Affirmation, Reply Memorandum of Law and Exhibits.....x**

This matter is before the Court for decision on 1) the motion by Defendants Ellen Weitz, Ellen Weitz as Grantor and Trustee of the Melen Trust and Ellen Weitz as Grantor and Trustee of the LaSalle Trust, filed January 21, 2009, 2) the motion by Defendants The Melen Trust, The LaSalle Trust, Lannie Lipson Individually and as Trustee of the LaSalle Trust, Sage Augello Individually and as Trustee of the LaSalle Trust, The Amended and Restated LaSalle Trust, and Southpac Trust International, Inc. a/k/a Southpac Trust Limited as trustee of the Amended and Restated LaSalle Trust, filed January 27, 2009, and 3) the motion by Defendant Melvin Weitz, filed March 13, 2009, all of which were submitted on December 9, 2009. For the reasons set forth below, the Court denies the three motions.

**BACKGROUND**

**A. Relief Sought**

In their motion (motion sequence # 1), Defendants Ellen Weitz (“Ellen”), Ellen Weitz as Grantor and Trustee of the Melen Trust (“Ellen as Melen Trustee”) and Ellen Weitz as Grantor and Trustee of the LaSalle Trust (“Ellen as LaSalle Trustee”), move for an Order 1) pursuant to CPLR §3211, dismissing this action; or, in the alternative, 2) pursuant to CPLR § 327(a), transferring this action to the State of Florida.

In their motion (motion sequence # 2), Defendants The Melen Trust (“Melen Trust”), The LaSalle Trust (“LaSalle Trust”), Lannie Lipson Individually and as Trustee of the LaSalle Trust (“Lannie” and “Lannie as Trustee” respectively), Sage Augello Individually and as Trustee of the LaSalle Trust (“Sage” and “Sage as Trustee” respectively), The Amended and Restated LaSalle Trust (“Amended LaSalle Trust”) and Southpac Trust International, Inc. a/k/a Southpac Trust Limited as trustee of the Amended and Restated LaSalle Trust (“Southpac”) (collectively “Trust Defendants”) move for an Order, pursuant to CPLR §§ 3211(a)(1), (2), (7) and (8), and 3016(b), dismissing the Verified Complaint (“Complaint”) against the moving Defendants.

In his motion (motion sequence # 3), Defendant Melvin Weitz (“Melvin”) moves for an

Order 1) pursuant to CPLR § 3211, dismissing the Complaint against Weitz; or, in the alternative, 2) transferring this action to Florida, based on the doctrine of *forum non conveniens* and CPLR § 327(a).

Plaintiff Sylvia Weitz (“Sylvia”) opposes the three motions.

#### B. The Parties’ History

This is an action to set aside certain allegedly fraudulent conveyances pursuant to Article 10 of the Debtor and Creditor Law (“DCL”). Sylvia was married to Melvin for many years. During their marriage, Melvin developed a chain of supermarkets known as Foodtown. In 1992, Melvin commenced a divorce action against Sylvia in Nassau County (Index No. 17019/92) (“Divorce Action”). Sylvia and Melvin subsequently executed a fifty-three (53) page Settlement Agreement dated October 6, 1995 (“Divorce Agreement”). At the time of the execution of the Divorce Agreement, Sylvia and Melvin were Florida residents, but the Divorce Agreement was apparently executed in New York, as the parties’ signatures were notarized by a Nassau County Notary Public and the cover sheet contains the name and office address of a Nassau County, New York attorney.

Article XII, Paragraph 2 of the Divorce Agreement addresses the pending negotiations between Foodtown and Stop & Shop Corporation (“Stop & Shop”) for the sale of Foodtown to Shop & Shop (“Sale”). That provision reflects the agreement of Melvin and Sylvia that 1) the approximate purchase price of the Sale was \$87,500,000; and 2) Sylvia would receive 55.7%, and Melvin would receive 44.3% of the “gross proceeds” upon the Sale. Article VIII of the Divorce Agreement reflects the parties’ agreement to waive maintenance, alimony or support in view of the impending Sale.

Sylvia subsequently commenced a plenary action against Melvin in the Supreme Court of Nassau County, titled *Sylvia Weitz v. Melvin Weitz*, Index Number 18798-97 (“Plenary Action”) in which she alleged that Melvin failed to pay all the money due her pursuant to the Divorce Agreement. In connection with the Plenary Action, Justice Austin issued a Decision After Trial dated June 6, 2005 (“Trial Decision”). In the Trial Decision, Justice Austin made reference to a prior Order (the “Prior Order”) that he had issued in the Plenary Action dated September 4, 2003, in which he granted Sylvia’s motion for summary judgment and set the matter down for an evidentiary hearing to determine the amount due to her. In the Prior Order,

Justice Austin held that phrases in the Divorce Agreement, including “gross proceeds,” related to the Sale were ambiguous, and ordered a hearing as to what, if any, deductions from the Sale price of the business was appropriate. Justice Austin held that hearing on December 3 and December 17, 2004 and subsequently issued the Trial Decision.

In the Trial Decision, Justice Austin outlined the background of Sylvia and Melvin. That background included the following:

Pursuant to Article XII (3)(a) of the Divorce Agreement, the Sales price could be adjusted if Foodtown’s net worth changed prior to the closing. The Sales price recited in the Purchase Agreement was reduced to \$85 million as a result of Melvin’s decision to pay a \$2 million finder’s fee to his son from a prior marriage, and to another individual. To ensure that Sylvia’s distributive share from the Sale was not reduced by this finder’s fee, Melvin and Sylvia entered into an amendment of the Divorce Agreement that increased Sylvia’s share of the proceeds from the Sale to 57% and reduced Melvin’s share to 43%.

Justice Austin rejected Melvin’s argument that certain adjustments should be taken against Sylvia’s interest in Foodtown that would reduce her share of the Sale proceeds. Specifically, Justice Austin held that “[Melvin] has failed to meet his burden with regard to establishing the contested adjustments should properly be taken from the gross to reduce Sylvia’s distribution” (Trial Decision at p. 10). Justice Austin concluded that Sylvia was due the sum of \$4,246,859.00, plus interest at the statutory rate from January 11, 1996, which was thirty (30) days after the closing on the Sale. Justice Austin also held that Sylvia was entitled to legal fees she incurred in enforcing the Divorce Agreement, and referred that issue to a Special Referee.

Justice Austin signed a judgment in the Plenary Action dated June 1, 2005, which was entered on June 11, 2005 (“Judgment”). The Judgment directed that Sylvia was entitled to recover from Melvin the sum of \$7,964,893.80 (Ex. B to Aff. In Opp.).

On January 5, 1996, Melvin married Ellen. Ellen affirms that, following her marriage to Melvin, 1) Melvin added her to his NationsBank account (“Joint Account”); and 2) the Joint Account contained \$30 million, representing proceeds of the Sale that had been wired into the Joint Account. A statement from the Joint Account dated January 23, 1996 (Ex. A-1 to Ellen Reply Aff.) reflects that there was a deposit of \$31,386,750.00 into the Joint Account on

January 5, 1996, via wire transfer.

At his deposition on September 17, 2007 (Ex. D to Aff. in Opp.), Melvin admitted giving \$7 million to Ellen eight years earlier (Tr. at p. 44), during which time he was involved in litigation with Sylvia (Tr. at pp. 44-45). Melvin also admitted that he never advised the court, or Sylvia, of this transfer of money (Tr. at pp. 44-46).

On March 29, 2000, Ellen established the Melen Trust. The trust agreement designated Ellen as the trustee, and gave her the right to receive the income during her lifetime and the power to invade the principal for her support and maintenance.

On December 6, 2004, Ellen amended the Melen Trust and renamed it the LaSalle Trust, which is also named as a defendant. The LaSalle trust agreement provided that the co-trustees were Ellen and her daughters, Defendants Lannie and Sage. The trust provided that Ellen was entitled to the income for her lifetime, and the trustees were permitted to use the principal for her support and maintenance.

Lannie was removed as a trustee of the LaSalle Trust on December 17, 2004, and Sage was removed as a trustee on September 20, 2005. On the latter date, the LaSalle Trust agreement was amended and restated to provide that the trustees may in their sole discretion pay the income to Ellen, Melvin, and Ellen's issue. The Amended and Restated LaSalle Trust Agreement provides that the trustee is Defendant Southpac Trust International, Inc. ("Southpac"), which is located in the Cook Islands off the coast of New Zealand.

On November 28, 2006, Sylvia recorded the Judgment in Palm Beach County, Florida, where Melvin and Ellen reside. Sylvia also commenced an action in Palm Beach County Circuit Court against Melvin seeking to enforce the Judgment. That matter is captioned *Sylvia Weitz v. Melvin Weitz*, Case Number 50 2007 CA 000399XXXX NB AJ ("Related Florida Action").

Sylvia commenced the instant action on September 9, 2008. She seeks to set aside certain fraudulent conveyances that Melvin allegedly made while the Plenary Action was pending. Sylvia alleges that Melvin transferred his assets to Ellen and/or the trusts with the intent to defraud Sylvia and without fair consideration. Ellen is named as a defendant both individually and as a trustee of the LaSalle Trust and the Amended and Restated LaSalle Trust. Lannie and Sage are named defendants, both as trustees of the LaSalle Trust and beneficiaries of the Amended and Restated Trust.

The method of service upon each Defendant is significant. Sylvia effected service of process on Ellen by delivering the Summons and Complaint to a person of suitable age and discretion, Melvin Weitz, at Ellen's Florida residence. On July 31, 2009, the Court signed a Request for International Judicial Assistance to the appropriate judicial authority in New Zealand to effect service upon Southpac. Lannie and Sage are New York residents, and have been properly served.

In support of her motion to dismiss, Ellen provides an Affidavit dated January 15, 2009. In that Affidavit (Ex. D to Ellen Motion), Ellen affirms, *inter alia*, that 1) she has lived in Florida for the last thirteen (13) years; 2) she has owned a home in Florida for the last twelve (12) years, which is her permanent address ("Ellen Residence"); 3) she pays property taxes on the Ellen Residence; 4) she does not own real estate or personal property in New York; 5) she pays income taxes to Florida; 6) she is registered to vote in Florida; 7) she has a Florida driver's license and does not have a New York driver's license; and 8) she has no bank accounts in New York.

Sage and Lannie provide Affidavits in Support dated January 14 and 15, 2009, respectively, in which they affirm, *inter alia*, that 1) they had no involvement in the prior litigation between Sylvia and Melvin; 2) they have received no compensation from the Melen Trust, LaSalle Trust or Amended and Restated LaSalle Trust; 3) they are women of independent financial means who are not in need of financial assistance from Ellen or Melvin; and 4) they have not received, either directly or indirectly, any of the funds that Melvin allegedly transferred to Ellen.

### C. The Parties' Positions

Ellen, both individually and in her capacity as Trustee, moves to dismiss the Complaint for lack of personal jurisdiction pursuant to CPLR § 3211(a)(8), or to transfer the action to Florida on the ground that New York is an inconvenient forum. Ellen submits that Sylvia has failed to allege facts supporting the court's jurisdiction over Ellen in either her individual or trustee capacity. Ellen notes, specifically, that the Complaint does not allege that 1) any fraudulent conveyance by Melvin to Ellen took place in New York; 2) Ellen is doing business in New York; 3) any business transactions that the moving Defendants conducted in New York bore a substantial relationship to the subject matter of this action; 4) the moving Defendants

committed a tort in New York; if Ellen committed a tort, the situs of the injury is Florida, where the transfer of money occurred; or 5) Ellen owns, uses or possesses any real property situated in New York. Moving Defendants also argue that Sylvia has not established that Ellen has sufficient minimum contacts with New York to warrant the exercise of personal jurisdiction over Ellen in New York.

Ellen also submits that, if the Court were to conclude that New York has personal jurisdiction over Ellen in her individual and trustee capacities, the Court should transfer this action to Florida, pursuant to CPLR § 327 and the doctrine of *forum non conveniens*. Moving Defendants submit that factors including 1) Ellen's residence in Florida, 2) Ellen's lack of connection to New York, and 3) the pendency of the Related Florida Action militate in favor of this Court transferring this action to Florida.

The Trust Defendants submit that the Court should dismiss the Complaint against them because 1) as the Melen and LaSalle Trusts no longer exist, in light of their restatements and renamings, they are not proper defendants; 2) even if the Melen and LaSalle Trusts exist, Plaintiff did not properly effect service on them by serving Melvin; and 3) even if Plaintiff properly effected service on the Trust Defendants, there is no basis for this court's jurisdiction over them. In support of their argument that there is no basis for this court's jurisdiction, the Trust Defendants argue that 1) the Trust Defendants were not parties in the Divorce or Plenary Actions; 2) the Complaint does not allege that the Trust Defendants are located, hold assets or conduct business in new York; and 3) any allegedly improper transfer of assets by Melvin occurred in Florida.

The Trust Defendants also argue that any action against them is not ripe because Sylvia has not yet established the wrongfulness of Melvin's transfer of money, and/or her entitlement to funds from Ellen. They submit that the court should not scrutinize the validity of any transfer to the Trust Defendants until Sylvia has demonstrated her right to collect from Ellen.

The Trust Defendants contend, further, that the claims against Lannie and Sage, who are Ellen's daughters, fail to state a cause of action, and lack merit. They submit that Sylvia has failed to establish any connection between Lannie and Sage, and any alleged wrongdoing, and that their role as co-trustees of the pertinent Trusts does not demonstrate that connection. Moving Defendants note, *inter alia*, that neither Lannie nor Sage performed duties for, or

received compensation from the Trusts. They also argue that Sylvia's allegation that Lannie and Sage may have received money from the Trusts is speculation based, in part, simply on their being listed as beneficiaries on certain Trust documents. The Trust Defendants also argue that the issues of the legality of the Trusts, and whether they may be invaded, are separate issues governed by the law of Cook Island, where the Trusts are located.

Melvin moves to dismiss the Complaint against him or, alternatively, to transfer this action to Florida. In support thereof, he submits, *inter alia*, that 1) there has been extensive discovery in the Related Florida Action, which is still pending; 2) Melvin has been domiciled in Florida since 1995; 3) Sylvia has not alleged that Melvin has assets remaining in New York that could be used to satisfy the Judgment; 4) Sylvia has not alleged that Melvin is doing business in New York; 5) Sylvia cannot establish a nexus between any business that Melvin may have done in New York, and the subject matter of this lawsuit; and 6) any tortious conduct occurred in Florida, rather than New York.

Sylvia opposes the motions submitting, *inter alia*, that 1) this court has personal jurisdiction over the Defendants by virtue of their alleged commission of the tort of fraudulent conveyance in New York by fraudulently transferring funds from New York bank accounts; 2) even assuming, *arguendo*, that the tort occurred outside the State, New York has jurisdiction because an injury occurred in New York by virtue of Sylvia's reliance on Melvin's representations in New York; 3) the requisite minimum contacts to justify asserting jurisdiction over the Defendants in New York exist by virtue of Defendants' use of bank accounts in New York to perpetrate a fraud on a New York resident; 4) the Complaint adequately pleads a cause of action for fraud as to all Defendants; and 5) removal to Florida is inappropriate in light of facts including a) the banks from which Defendants conveyed their assets are located in New York; b) Melvin defended the Plenary Action in New York between 1999 and 2005 while he was domiciled in Florida; and c) the Related Florida Action, which involves Sylvia's efforts to enforce the Judgment, is different from this action, in which Sylvia seeks to set aside certain allegedly fraudulent conveyances.

## RULING OF THE COURT

### A. Dismissal Against Southpac is Inappropriate

In an action against an express trust, the trustee is the real party in interest and the proper defendant. David Siegel, *New York Practice*, 3d Ed. § 69(e). Here, the Amended and Restated LaSalle Trust is the successor to both the Melen and the LaSalle Trusts. As Southpac is the trustee of the Amended and Restated Trust, it is the real party in interest and the entity to be served in order to acquire personal jurisdiction over the express trust.

Service on Southpac is governed by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which is a multilateral treaty designed to simplify the methods for serving process abroad. It is designed to assure that defendants sued in foreign jurisdictions receive actual and timely notice of suit and to facilitate proof of service abroad. *Fernandez v. Univan Leasing*, 15 A.D.3d 343 (2d Dept. 2005). New Zealand is a party to the Hague Convention. *Paz v. De Paz*, 169 F. Supp.2d 254 (S.D.N.Y. 2001). To facilitate service on Southpac under the Hague Convention, this Court issued the Request for International Judicial Assistance to the judicial authority of New Zealand. In so doing, the Court requested that the Summons and Complaint be served upon an officer or director of Southpac.

There is no question that the Court's protocol was proper. Rather, Southpac moves for dismissal because service has not been completed. The Court rejects this argument. CPLR § 306-b provides that service of the summons and complaint shall be made within 120 days after the filing of the summons and complaint. If service is not made upon a defendant within the time provided, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service. Given the difficulty in serving a defendant located in New Zealand, and the Court's issuance of the Request for International Judicial Assistance after the time for service had expired, the Court finds that there is good cause for extending the time for service on Southpac for another 120 days from the date Defendants serve Plaintiff with this Order. In light of the facts that 1) Plaintiff has effected service of process on the "domestically-based parties" (Aff. in Opp. at p. 8); 2) the Court has signed the Request for Judicial Assistance in connection with service on the Cook Islands Trust; and 3) while challenging the manner of service, the Trusts do not dispute that they received actual notice of the action, the Court denies the Trust Defendants' motion to

dismiss the Complaint on the grounds of insufficient service of process, subject to renewal if service is not timely completed as set forth above.

B. The Court has Jurisdiction over the Personal Defendants

CPLR § 302 provides, in pertinent part:

As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary...who in person or through an agent: 1) transacts any business within the state...; or 2) commits a tortious act within the state...; or 3) commits a tortious act without the state causing injury to a person or property within the state...if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

Personal jurisdiction over a defendant that engages in purposeful activity is proper because the defendant has invoked the benefits and protections of our laws. *Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 508 (2007). Thus, a defendant may transact business in New York and be subject to personal jurisdiction even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 380 (2007). Not all purposeful activity, however, constitutes a transaction of business within the meaning of CPLR § 302(a)(1). Although it is impossible to precisely fix those acts that constitute a transaction of business, it is the quality of the defendant's New York contacts that is the primary consideration. *Id.* at 380.

Where jurisdiction is predicated upon the commission of a tortious act within the state, plaintiff must make a showing that at least part of the misconduct charged took place in New York. *Roddy v. Schmidt*, 57 N.Y.2d 979, 982 (1982). To commit a tortious act within New York, defendant must be "physically present" in the state either personally or through an agent. *Maranga v. Taj Maran Intn'l*, 386 F. Supp.2d 299, 310 (S.D.N.Y. 2005).

Where jurisdiction is predicated upon the commission of a tortious act without the state causing injury within the state, plaintiff must make a showing that defendant had "sufficient economic contact" with the state. *McGowan v Smith*, 52 N.Y.2d 268, 273 (1981). The term "tortious act without the state" is broadly defined to encompass types of injury not recognized in

New York, provided our public policy and notions of fairness are not offended. *Sung Hwan Co. v. Rite Aid Corp.*, 7 N.Y.3d 78, 85 (2006).

In fraudulent conveyance actions, personal jurisdiction over nonresidents may be predicated upon either a transaction of business or a tortious act within the state. *See Atwal v. Atwal*, 24 A.D.3d 1297 (4<sup>th</sup> Dept. 2005) (transaction of business by fraudulent grantee); *AMP Services v. Walanpatrias Foundation*, 34 A.D.3d 231 (1<sup>st</sup> Dept. 2006) (tortious act by fraudulent grantor); *Ed Moore Advertising Agency v. I.H.R., Inc.*, 114 A.D.2d 484 (2d Dept. 1985) (tortious act by fraudulent grantee); *see also CIBC Mellon Trust v. HSBC Guyerzeller Bank*, 56 A.D.3d 307 (1<sup>st</sup> Dept. 2008) (transaction of business and tortious act). In all of these cases, admittedly, the property that was fraudulently conveyed was originally located in New York.

Here, the purposeful nature of Melvin's activity in New York and the quality of the other Defendants' contacts with the state establish that the Defendants transacted business in New York and are subject to personal jurisdiction in this Court. The Court thus rejects Defendants' argument that they did not transact business or commit a tortious act in New York because the transfer of Melvin's funds to Ellen occurred in Florida.

First, Melvin, acting through his attorneys, negotiated a substantial asset sale transaction in New York, specifically the Sale of Foodtown. Second, Melvin, as plaintiff, commenced the Divorce Action in New York, and, pursuant to the Divorce Agreement, the proceeds of the Sale were equitably distributed. By negotiating a substantial business transaction and commencing a matrimonial action here, Melvin invoked the benefits and protections of New York law. *See Abbate v. Abbate*, 82 A.D.2d 368 (2d Dept. 1981) (negotiation and execution in New York of separation agreement between resident wife and nondomiciliary husband constitutes transaction of business by husband within meaning of CPLR § 302). Thus, the Court concludes that Melvin engaged in purposeful activity in New York. Moreover, there is undoubtedly a substantial relationship between Melvin's transaction of business in New York and this fraudulent conveyance action. Because Plaintiff's cause of action arises from Melvin's transaction of business in New York, the Court denies the motion of Defendant Melvin Weitz to dismiss the Complaint for lack of personal jurisdiction.

As alleged fraudulent grantees of the proceeds of the Sale, which proceeds were

distributed in the New York Divorce Action, the other Defendants have significant contacts with this jurisdiction that justify this court's exercise of jurisdiction over them. Ellen Weitz, and the self-settled trusts that she created, apparently received funds after the commencement of the Plenary Action, as demonstrated by Melvin's deposition testimony in 2007 that he gave \$7 million to Ellen eight years earlier, at a time that he was involved in litigation with Sylvia. Melvin's testimony that he never advised the court, or Sylvia, of this transfer of money supports the inference that he was aware that this transfer may have been improper.

In sum, the Court concludes that Ellen, the trusts, and Southpac, the current trustee, transacted business in New York by receiving the funds that were the subject of the Plenary Action in New York. There is clearly a substantial relationship between Defendants' receipt of those funds and this fraudulent conveyance action. Accordingly, the Court denies the motion of Ellen and the Trust Defendants to dismiss the Complaint for lack of personal jurisdiction.

C. Removal of this Action to Florida is not Warranted

The doctrine of *forum non conveniens* permits a court that has jurisdiction over the parties and the claim nevertheless to dismiss the action when the court believes that, in the interest of substantial justice, the action should be heard in another forum. *Sarfaty v. Rainbow Helicopters*, 221 A.D.2d 618, 618-619 (2d Dept. 1995), CPLR § 327(a). The burden rests on the defendant challenging the forum to demonstrate that private or public interests militate against litigation going forward in this State. *Sarfaty*, 221 A.D.2d at 619, quoting *Stamm v. Deloitte & Touche*, 202 A.D.2d 413 (2d Dept. 1994). Among the factors that the court must weigh are the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden that will be imposed on the New York courts, with no one single factor controlling. *Sarfaty*, 221 A.D.2d at 619. This determination is within the discretion of the trial court. *Koutras v. Lacorazza*, 248 A.D.2d 514 (2d Dept. 1998).

In this action, all of the parties, with the exception of Lannie and Sage, are nonresidents. Defendant Melvin Weitz is 85 years of age and asserts that he is under continuing medical care for a number of chronic illnesses and, therefore, this action should proceed in Florida where he lives. The Court notes, however, that there is authority permitting the taking of Melvin's deposition by electronic means, as was done in the Related Florida Action. See CPLR §

3113(d). Thus, litigation in New York will not pose an undue hardship upon Melvin.

Although the fraudulent conveyances that form the basis of this action occurred in Florida, the fundamental dispute in this action relates to the enforcement of the Divorce Agreement that the parties executed in connection with the Divorce Action, which the parties litigated in New York. Thus, the transaction out of which the cause of action arose did not occur primarily in a foreign jurisdiction. Moreover, the present action does not pose a burden on New York courts, but rather is appropriately litigated in New York because of this state's interest in ensuring the enforceability of the Judgment.

In light of the foregoing, the Court denies the motions to dismiss the action or transfer it to Florida on the ground that New York is an inconvenient forum.

#### D. The Complaint States a Cause of Action

On a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, the Court must deny the motion if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez, supra*. On such a motion, the Court will not, however, presume as true bare legal conclusions, inherently incredible assertions and factual claims that are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002); *Daub v. Future Tech Enterprise, Inc.*, 885 N.Y.S.2d 115, 116-117 (2d Dept. 2009), quoting *Well v. Yeshiva Rambam*, 300 A.D.2d 580, 581 (2d Dept. 2002); see also *Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91-92 (1999); *Kaisman v. Hernandez*, 61 A.D.3d 565, 566 (1<sup>st</sup> Dept. 2009).

Debtor and Creditor Law § 273 provides that every conveyance made and every obligation incurred by a person who is or who will be thereby rendered insolvent is fraudulent as to creditors without regard to actual intent if the conveyance is made or the obligation incurred without a fair consideration. Debtor and Creditor Law § 273-a renders conveyances without fair consideration fraudulent if made by a person who is a defendant in an action for money damages and who fails to satisfy the judgment. Debtor and Creditor Law § 275 renders conveyances

without fair consideration fraudulent if made by a person intending to incur debts beyond his ability to pay. Finally, Debtor and Creditor Law § 276 renders conveyances made with actual intent to defraud fraudulent as to both present and future creditors. Although an action may be maintained against the fraudulent grantee and the fraudulent grantor, there is no claim against a non-transferee who merely assists in transferring assets. *Cahen-Vorburger v. Vorburger*, 41 A.D.3d 281 (1<sup>st</sup> Dept. 2007).

The Complaint here provides a basis to infer that Lannie and Sage have, in fact, received distributions from the trust and were not merely nominal trustees. The Complaint further provides a basis to infer that Melvin was insolvent when he transferred the proceeds of the asset sale to Ellen and that Ellen was insolvent when she transferred the funds to the Amended and Restated Trust. According to the Plaintiff the benefit of every favorable inference, the Court concludes that the Complaint alleges the elements of a fraudulent conveyance action. *See Loblaw, Inc. v Wylie*, 50 A.D.2d 4 (4<sup>th</sup> Dept. 1975) (dismissal of complaint not appropriate where complaint asserted basic elements of fraudulent conveyance with factual allegations supporting relief).

Lannie and Sage's affidavits that they have not yet received any distributions are insufficient to warrant dismissal without any discovery. Accordingly, the Court denies the motion of Lannie and Sage to dismiss the Complaint for failure to state a cause of action. The Court's denial of the motion is, however, without prejudice to a motion by these Defendants for summary judgment at the conclusion of discovery on the ground that they have not received any distributions from the Defendant Trusts.

#### F. Defendants' Choice of Law Argument is Without Merit

Defendants argue that the validity of the transfers to the Amended and Restated Trust must be determined by Cook Islands law. This is not true. Traditionally, the validity of a conveyance of a property interest is governed by the law of the place where the property is located. *James v. Powell*, 19 N.Y.2d 249, 256 (1967). At the time of the transfers, the funds were apparently located in Florida. Florida law, however, is not in conflict with the law of New York with respect to fraudulent conveyances. *See Eurovest, Ltd. v. Segall*, 528 So. 2d 482 (Fla. Ct. of Ap. 3d Dept. 1988) (fraudulent conveyance requires proof of creditor to be defrauded, debtor intending fraud and conveyance of property applicable by law to payment of debt due).

As there is no actual conflict between the law of the jurisdictions involved, there is no occasion for the court to rule on a choice of law issue in this case. *Allstate v. Stolarz*, 81 N.Y.2d 219, 223 (1993).

All matters not decided herein are hereby denied.

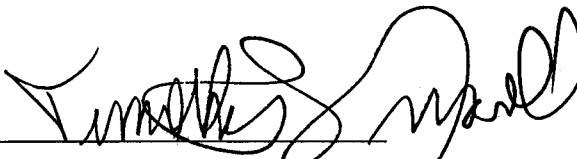
This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a Preliminary Conference on March 30, 2010.

ENTER

DATED: Mineola, NY

February 1, 2010

  
\_\_\_\_\_  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
FEB 09 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE