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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 400255/2009

NATIONAL CONTINENTAL INSURANCE

VS

V&L TRANSPORTATION SERVICE

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE 7/6/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

FILED
JUL 09 2010
COUNTY CLERK'S OFFICE
NEW YORK

Motion sequence 001 and 002 are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that plaintiff's motion for partial summary judgment on the first cause of action (motion sequence number 002) as against defendant Allure Transportation, Inc. is granted as follows:

Plaintiff is granted judgment on the first cause of action in the amount of $128,078.60, together with interest at the rate of 9% per annum from the date of March 21, 2007, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the first cause of action is severed; and it is further

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

Dated: 7/6/10

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of defendants Allure Transportation, Inc.'s, Jacob Gold's and Anzhela Yagudayeva's motion seeking summary judgment dismissing the second, third and fourth causes of action (motion sequence number 001) is granted and the complaint is dismissed as to those causes of action; and it is further

ORDERED that the portion of defendants Allure Transportation, Inc.'s, Jacob Gold's and Anzhela Yagudayeva's motion seeking to dismiss the first cause of action (motion sequence number 001) is denied.

Dated 7/6/10 ENTER: J.S.C.

HON. CAROL EDMEAD

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: PART 35

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NATIONAL CONTINENTAL INSURANCE, a subsidiary of Progressive Insurance Group,

Plaintiff,

Index No.: 400255/09

-against-

DECISION

V&L TRANSPORTATION SERVICE, INC., ALLURE TRANSPORTATION, INC., JACOB GOLD and ANZHELA YAGUDAYEVA,

Defendants.

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CAROL ROBINSON EDMEAD, J.:

FACTUAL BACKGROUND

Motion sequence numbers 001 and 002 are consolidated for disposition.[1]

In motion sequence number 001, defendants Allure Transportation, Inc. (Allure Transportation), Jacob Gold (Gold) and Anzhela Yagudayeva (Yagudayeva) (collectively, the Allure defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them.

In motion sequence number 002, plaintiff moves, pursuant to CPLR 3212, for partial summary judgment on its first cause of

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[1] This action was originally commenced in Westchester County by Progressive Insurance Group, but was transferred to New York County, and National Continental Insurance was substituted as plaintiff, because Progressive Insurance Group was not authorized to do business in New York, and National Continental Insurance did not maintain a principal office in Westchester. In the context of this decision, the term "plaintiff" refers to either of those companies, as appropriate.

action as against Allure Transportation, alleging a fraudulent conveyance of property from defendant V&L Transportation Service, Inc. (V&L) to Allure Transportation, in violation of New York Debtor and Creditor Law (DCL) § 273-a.

According to the complaint, on March 21, 2007, a judgment was entered in the Westchester County Clerk's Office in favor of plaintiff and against V&L in the total amount of $128,078.60, in a matter entitled *Progressive Insurance v V&L Transportation Service, Inc.*, index number 1370/06. Motion sequence number 002, Ex. E. That action was commenced by the filing of a summons and complaint with the Westchester County Clerk on January 25, 2006. *Id.*, Ex. C.

Plaintiff alleges that, between August 11, 2006 and September 15, 2006, while the action was pending in Westchester, V&L transferred property to Allure Transportation without fair consideration, as defined in Article 10 of the DCL. To date, V&L has not fully or partially satisfied the aforementioned judgment. Gold and Yagudayeva are shareholders, directors and officers of Allure Transportation.

The complaint alleges four causes of action: (1) violation of DCL § 273-a as against Allure Transportation; (2) violation of DCL § 276 as against Allure Transportation; (3) reasonable attorney's fees, as against all defendants jointly and severally, pursuant to DCL § 276-a; and (4) violation of New York Business

Corporation Law (BCL) § 720 and Article 10 of the DCL as against Gold and Yagudayeva, as constructive trustees of the transferred property.

The Allure defendants assert that, in December, 2005, Allure Transportation and V&L entered into an agreement whereby Allure Transportation purchased the assets of V&L, an ambulette service, for a total purchase price of $125,000.00, payable in three installments starting after notification and receipt of the New York State Department of Transportation approval of the transfer. The Allure defendants have provided a signed copy of that agreement, which is dated December, 2005, with no specific day identified. Motion sequence 001, Ex. C. The Allure defendants assert that the amount paid for V&L's assets constituted fair market value.

According to Gold's affidavit submitted in support of the Allure defendants' motion, in conjunction with the asset purchase agreement, V&L and Allure Transportation entered into a separate management agreement, signed and dated in exactly the same manner as the asset purchase agreement discussed above. *Id.*, Ex. F. Gold states that this management agreement was necessary because the Department of Health had not approved the transfer of V&L's Medicaid provider number to Allure Transportation. Pursuant to this management agreement, V&L gave Allure Transportation control over the disposition of V&L's Medicaid accounts receivable. *Id.*

Plaintiff avers that the amounts transferred under this management agreement between V&L and Allure Transportation totaled $178,000.00, and such transfers occurred after the Westchester litigation against V&L had been commenced. In addition, the court notes that the only consideration to go to V&L mentioned in the alleged management agreement is "promises and mutual agreements and covenants contained herein, and for other good and valuable consideration." *Id.*

Gold and Yagudayeva each assert that they had no knowledge of any indebtedness of V&L, and that the agreement between Allure Transportation contains, among other things, representations and warranties by the principal of V&L that V&L had no debts, liabilities, or outstanding judgments, and that there was no litigation or claim pending against V&L, except for an action against V&L instituted by Kemper National Insurance Company and a complaint filed against V&L by the Commissioner of the State Insurance Fund. *Id.* The agreement and its attachments do not mention any suit by Progressive Insurance Group, which was filed after December of 2005, the alleged date of the asset purchase agreement between Allure Transportation and V&L.

The Allure defendants further assert that Allure Transportation is a totally separate and distinct entity from V&L, and that it does not exercise any dominion or control over V&L. Finally, the Allure defendants state that the original

action against V&L was instituted by "Progressive Insurance," and there is no indication of the relationship between "Progressive Insurance" and "Progressive Insurance Group."

In motion sequence number 002, and in opposition to the Allure defendants' motion, plaintiff contends that the Allure defendants have failed to provide any proof that payments were actually made to V&L pursuant to the asset purchase agreement. Plaintiff further asserts that the transfers to Allure Transportation of V&L's Medicaid account receivables, totaling $178,000.00, were made during the pendency of the proceeding against V&L, specifically between August 11, 2006 and September 15, 2006, and that V&L received no consideration for such transfers, which is a violation of DCL § 273-a. Motion sequence number 002, Exs. F & G.

The court notes that plaintiff has only argued against the Allure defendants' motion concerning the first cause of action.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to

raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

DCL § 273-a provides as follows:

> "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

For a conveyance to be fraudulent under DCL § 276, actual intent to hinder, delay or defraud must be incurred. DCL § 276-a provides for attorney's fees in the event that a party proves that a

> "conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law [as pursuant to Debtor & Creditor Law § 273-a], to hinder, delay or defraud either present or future creditors, in which action ... the creditor ... shall recover judgment, the justice ... at the trial shall fix the reasonable attorney's fees of the creditor ... ."

In the instant case, two agreements are presented for scrutiny by the court. The first agreement, referred to as the asset purchase agreement, was entered into before V&L was the subject of a lawsuit by plaintiff, and, as a consequence, DCL § 273-a is inapplicable to that contract. The court need not

address the arguments proffered by the parties as to whether V&L received fair consideration for its assets pursuant to the asset purchase agreement, or whether V&L actually received any payment from Allure Transportation for such property. Furthermore, there is no evidence in the record as to when, or if, the property was actually transferred to Allure Transportation.

However, even though the second contract, referred to as the management contract, was executed at the same time as the asset purchase agreement, the subject property transfers, the Medicaid payments, were made after V&L was a defendant in an action seeking money damages. As a consequence, the court must determine whether those transfers constitute a violation of DCL §§ 273-a and 276.

> "In order to prevail under Debtor and Creditor Law § 273-a, [plaintiff is] required to prove that the transferor was a defendant in an action for money damages at the time of the transfer, the transferor has not satisfied the resulting judgment and the transfer was made without fair consideration. ... The third element, fair consideration, exists when, in exchange for property or an obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied [internal quotation marks and citations omitted]."

Matter of Mega Personal Lines, Inc. v Halton, 9 AD3d 553, 555 (3d Dept 2004).

There is no dispute that V&L was a defendant in an action for money damages at the time the Medicaid payments were transferred to Allure Transportation, nor is there any dispute that V&L has failed to satisfy the judgment entered against it.

It is the third element, that of fair consideration for the transfer, that is in dispute.

In the case at bar, there is no evidence whatsoever, except for the recitation of "good and valuable consideration," that V&L received anything in exchange for the transfer of its Medicaid accounts receivable, totaling $178,000.00, to Allure Transportation, and Allure Transportation does not dispute that it received those funds. Further, Allure Transportation bases its position that fair consideration was paid on the asset purchase agreement, which, even if looked at as the consideration for the management agreement, could not be considered fair consideration. Allegedly, Allure Transportation paid $125,000.00 for physical property plus $178,000.00 worth of accounts receivable payable by the government, a risk-free receivable. Since the amount allegedly paid to V&L is disproportionately small as compared to the property received by Allure Transportation, it could not constitute fair consideration. *Joslin v Lopez*, 309 AD2d 837 (2d Dept 2003).

Therefore, based on the foregoing, plaintiff's motion seeking partial summary judgment on the first cause of action, alleging a violation of DCL § 273-a, is granted, and the Allure defendants' motion seeking summary judgment dismissing that same cause of action is denied.

That portion of the Allure defendants' motion seeking

summary judgment dismissing the second and third causes of action is granted.

In order to prevail on a cause of action based on DCL § 276, the plaintiff must evidence actual fraud. *Atsco Ltd. v Swanson*, 29 AD3d 465 (1st Dept 2006). Furthermore, as stated by the Court in *Friedman v Anderson* (23 AD3d 163, 166 [1st Dept 2005]),

> "a plaintiff seeking to recover for fraud and misrepresentation is required 'to set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud' (*Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994])."

In the case at bar, not only has plaintiff failed to address this portion of the Allure defendants' motion, but it has also failed to detail the factual allegations forming the basis of its claim of actual fraud. As a consequence, the Allure defendants' motion is granted to the extent of dismissing the second and third causes of action.

Since plaintiff has failed to establish actual fraud, its fourth cause of action as against Gold and Yagudayeva is similarly dismissed.

> "As a general proposition, corporate officers and directors are not liable for fraud unless they personally participate in the misrepresentation or have actual knowledge of it. Mere negligent failure to acquire knowledge of the falsehood is insufficient."

Marine Midland Bank v John E. Russo Produce Co., Inc., 50 NY2d 31, 44 (1980).

In the instant matter, "we find the evidence insufficient to

establish [individual] defendant[s] possessed the requisite intent [to defraud]." *Abrahami v UPC Construction Co., Inc.*, 224 AD2d 231, 234 (1st Dept 1996).

It is noted that the Allure defendants make an argument that there is no proof that the named plaintiff is the successor in interest to V&L's judgment creditor. However, since they stipulated to the change in venue and substitution, the court finds this argument specious.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on the first cause of action (motion sequence number 002) as against defendant Allure Transportation, Inc. is granted as follows:

Plaintiff is granted judgment on the first cause of action in the amount of $128,078.60, together with interest at the rate of 9% per annum from the date of March 21, 2007, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and the first cause of action is severed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of defendants Allure Transportation, Inc.'s, Jacob Gold's and Anzhela Yagudayeva's motion seeking summary judgment dismissing the second, third and fourth causes of action (motion sequence number 001) is granted and the complaint is dismissed as to those causes of action; and it is further

ORDERED that the portion of defendants Allure Transportation, Inc.'s, Jacob Gold's and Anzhela Yagudayeva's motion seeking to dismiss the first cause of action (motion sequence number 001) is denied.

Dated: July 6, 2010

ENTER:

Carol Robinson Edmead, J.S.C.