

RH39 Realty, L.P. v Parigi Intl., Inc.

2010 NY Slip Op 33694(U)

December 27, 2010

Sup Ct, NY County

Docket Number: 601682/2007

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN

Justice

PART 7

RH39 REALTY, L.P.,

Plaintiff,

- against -

PARIGI INTERNATIONAL, INC., LE ARC CORPORATION, L & L INVESTMENTS, LLC and LYN YU

Defendants.

INDEX NO.

601882/2007

604107/2007

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion by defendants(s) motion for summary Judgement.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) _____

2

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

In this action, plaintiff seeks compensation, and other relief, based on the alleged fraudulent conveyance of the money in defendant Parigi International, Inc.'s (Parigi) bank and other accounts. Defendants move for summary judgment, pursuant to CPLR 3212, dismissing the complaint.¹

FILED

JAN 20 2011

Background

It is undisputed that plaintiff leased space to Parigi, in which Parigi ran its business, pursuant to a lease with a durational term of December 1, 2003 through November 30, 2008 (the Lease). It is also undisputed that Parigi vacated the premises on November 30, 2005, after

NEW YORK COUNTY CLERK'S OFFICE

¹In a related action, commenced under index number 604107/07, plaintiff alleges that Parigi improperly conveyed a condominium unit held by Parigi's wholly owned subsidiary. Defendants have also moved for summary judgment in that action and many of the arguments made in that motion are identical to those made here.

plaintiff commenced a nonpayment summary proceeding in the New York City Civil Court. In early December 2005, plaintiff commenced an action, based on the Lease, in this court (index No. 604298/2005 [the 2005 Action]), and, after inquest, was awarded judgment of \$340,730.68 in September 2006 [the 2006 Judgment]).

Defendant Lyn Yu, in her answer, states that she was a principal of Parigi. She also testified that she was an owner of Parigi (Pl. Op. Aff. [Vol. 3], Exh. J, at 68 [Lyn Yu deposition (August 25, 2009)]). The parties agree that Parigi was dissolved by the Secretary of State, with defendants contending that Parigi made a request to the State, on November 15, 2005, for dissolution effective November 30, 2005.² Defendant Jamie Yu has submitted an affidavit stating that he has been domiciled in the Dominican Republic for 10 years and was not served with a summons and complaint in this case, and that he has not appeared in this action and was not represented by the attorney who was former counsel to the other defendants.³

In the complaint, plaintiff alleges that prior to its commencement of the 2005 Action, Parigi was the owner of certain bank and other accounts, that are described in the complaint, and that during the period between September 14, 2005 and November 17, 2005, Lyn Yu caused Parigi to transfer various sums of money from its accounts to her. Plaintiff further alleges that the transfers were made without consideration, and with the intent on the part of Parigi to hinder, delay and defraud plaintiff in its claim against Parigi. Plaintiff claims that after these transfers, Parigi retained little or no assets with which to meet its obligation and was rendered insolvent. Plaintiff contends that Parigi, acting through Lyn Yu, transferred money to Lyn Yu, and makes similar allegations concerning a \$142,725 transfer that it alleges was made by Parigi, acting through Jamie Yu as its agent, to a specific company, Nuuanu S.A. Plaintiff

² There is no showing on the moving papers that Parigi was dissolved by the Secretary of State on November 30, 2005.

³ In light of Jamie Yu's averments, the word "defendants," used here for convenience, does not include Jamie Yu.

claims that Jamie Yu also acted as an agent in receiving the assets, and that there was no consideration for the transfer.

Plaintiff claims that these transfers were a fraud on Parigi's creditors, and that it sustained damages in the amount of its 2006 Judgment, \$340,730.68, plus interest. Plaintiff further claims that Jamie Yu, Lyn Yu and Parigi conspired to defraud creditors with the previously discussed transfers, which disposed of all of Parigi's assets so as to render it insolvent. Plaintiff demands a money judgment in this action in the amount of the 2006 Judgment, with interest from September 29, 2006, or a declaration that the transfers made were fraudulent and void as to plaintiff, as well as punitive damages, costs and, pursuant to section 276-a of the Debtor and Creditor Law (DCL), attorneys' fees.

On June 17, 2010, by order to show cause, Lyn Yu moved to vacate the 2006 Judgment. In her papers on that motion, Lyn Yu stated that Parigi defaulted in payment of rent for the month of October 2005, and by letter dated September 28, 2005, advised plaintiff that it was going out of business, offering, on October 7, 2005, to surrender the premises at the end of December 2005. The motion was denied, by order of the Honorable Marilyn Diamond, J.S.C., dated October 5, 2010, and Parigi, the only defendant in the 2005 Action, was unable to interpose an answer or counterclaims.

Discussion

Defendants argue that the complaint should be dismissed because: (1) when the money transfers were made, Parigi was not a defendant in an action for money damages and the transfers were made for fair consideration and in good faith; (2) plaintiff failed to detail factual allegations of actual fraud in the complaint, which does not meet the requirements of CPLR 3016; (3) the 2006 Judgment is void and likely to be vacated; (4) plaintiff received more than \$225,331.40 from re-letting the premises and may not seek double compensation for the same injury. Defendants also argue that plaintiff is not entitled to punitive damages and attorneys'

fees.

In opposition to the motion, plaintiff argues that defendants have not met the requirements of CPLR 3212 (a), because they failed to file their motion within 120 days of the filing of the note of issue, and CPLR 3212 (b), because they have not provided a complete copy of the pleadings. Plaintiff also argues that the motion should be denied because defendants have not provided competent evidence in support of their motion. Plaintiff contends that Lyn Yu looted Parigi, prior to Parigi vacating the premises it leased from plaintiff, and made transfers to herself or Parigi's other owner, non-party John Ling, without fair consideration, rendering Parigi insolvent. Plaintiff also challenges the evidence defendants have submitted concerning certain transfers of Parigi's funds to others.⁴

"The proponent of a summary judgment motion [pursuant to CPLR 3212] 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 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]). If there is any doubt as to the existence of a triable fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Plaintiff argues that the motion may not be granted because defendants failed to meet the 120-day deadline set forth in CPLR 3212 (a). There is no question that in the absence of good cause, which generally does not include a perfunctory claim of law office failure, the 120-day deadline of CPLR 3212 (a) must be enforced (*Fofana v 41 W. 34th St., LLC*, 71 AD3d 445, 447-448 [1st Dept 2010]). Defendants did not serve their summary judgment motion within 120

⁴ Plaintiffs also argue that Lyn Yu's defense of improper service is waived, pursuant to CPLR 3211, because she did not move for dismissal on this ground within 60 days after service of her answer. Defendants counter that Lyn Yu is not moving for dismissal on this ground, and this issue is thus moot.

days after the note of issue was filed on March 26, 2001. During this period, however, on June 18, 2010, defendants' former counsel was suspended from the practice of law (*Matter of Emengo*, 75 AD3d 193, 198 [2d Dept 2010]), which resulted in an automatic stay of the action in defendants' favor (CPLR 321 [c]; see Vincent, Practice Commentary, McKinney's Cons Laws of NY, CPLR C321:3 [Death, Removal or Disability of Attorney]). This suspension of counsel during the 120-day period is good cause for failing to meet the 120-day deadline; alternatively, considering the 30-day period of the stay, the motion was timely made.

Plaintiff argues that the motion must be denied because defendants have not attached a copy of the complaint (CPLR 3212 [b]), but only a copy of the answer and the complaint from the 2005 Action. As plaintiff has submitted a copy of the complaint, the record is sufficiently complete and the motion need not be denied for this reason (*Greene v Wood*, 6 AD3d 976, 976 [3d Dept 2004] ["such a procedural defect may be overlooked if the record is sufficiently complete (citation and quotation marks omitted)"]).

Defendants contend that they are entitled to summary judgment dismissing the action because Parigi was not a defendant in the 2005 Action when the transfers were made. This argument presumes that plaintiff's claims are predicated on DCL 273-a, which applies when a defendant in a law suit transfers assets without fair consideration. In opposition, plaintiff points to DCL § 273, which provides that: "[e]very 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 his actual intent if the conveyance is made or the obligation is incurred without fair consideration." "A finding of constructive fraud pursuant to section 273 may . . . be predicated upon proof of insolvency and lack of fair consideration, without a showing of actual motive or intent to defraud (*American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 [2d Dept 2006]).⁵ DCL

⁵Although in reply, defendants argue that plaintiff has not demonstrated that Parigi was not insolvent, defendants did not in, moving, demonstrate the solvency of Parigi, and arguments raised for the first time in reply may not be entertained (see *Schulte Roth & Zabel, LLP v Kassover*, 28 AD3d 404, 405 [1st Dept 2006]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560 [1st Dept

§ 270 defines a "creditor" as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." While plaintiff was not yet a defendant in a lawsuit when the alleged transfers were allegedly made, defendants do not demonstrate that plaintiff is precluded from recovering as a creditor, under the DCL (*see also* DCL §§ 274, 275). Therefore, defendants' argument for summary judgment based on the DCL is unpersuasive.

Defendants argue that there is no issue as to fair consideration because Parigi received goods in exchange for some of the money transfers it made as payments for invoices and that others transfers were used to pay off a note held by John Ling. DCL § 272 (a) provides that fair consideration is given "[w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied."

Specifically, defendants contend that the \$321,053.24 that Parigi transferred to Lyn Yu went toward liquidating an antecedent debt as evidenced by a promissory note, or notes, in favor of nonparty John Ling, submitted here (the Note). To support their contention, defendants submit Lyn Yu's testimony that John Ling was a creditor of Parigi because, as investor, or owner, he made a loan to the company years before.⁶ Assuming, *arguendo*, that defendants have established that transfers that Lyn Yu made to John Ling with Parigi's funds were a fair equivalent for the value of the Note, "preferential transfers of corporate funds to directors, officers, and shareholders of insolvent corporations in derogation of the rights of general creditors do not fulfill the requirement of good faith" (*American Panel Tec*, 31 AD3d at 587). Consequently, defendants have not established that transfers to John Ling were made in good

1992)).

⁶In defendants' moving papers they state that John Ling was a shareholder of Parigi (*see* Def. Mov. Aff., ¶ 44).

faith, "an indispensable element of fair consideration" (*id.*).⁷

As to the other alleged transfers, that defendants claim were used to pay off Parigi's debts for goods purchased, defendants do not point to admissible evidence supporting their counsel's averment that the checks provided in the record were for payments made by Lyn Yu on Parigi's behalf to legitimate creditors (*see* Def. Mov. Aff., Exh. 30, 31, 32). While, as defendants argue, a motion for summary judgment may be adequately supported by an attorneys' affirmation (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Eldon Group Am. v Equiptex Indus. Prods. Corp.*, 236 AD2d 329, 329 [1st Dept 1997]), this is only the case when the attorney affidavit is supported by documentary evidence sufficient to establish the movants' prima facie right to summary judgment. Defendants do not demonstrate that the evidence they submit, alone, is sufficient to sustain their burden, and defendants' counsel does not state that he has personal knowledge concerning the checks, or any issues in the underlying matter.

In addition, while defendants submit Lyn Yu's testimony that money transfers were made from Parigi to vendors, she also testified that Parigi ceased business operations in early 2005 (Pl. Op. Aff., [Vol. 3], Exh. 1, at 82]). In his affidavit, Jamie Yu indicates that the now-defunct Nuuanu S.A. accepted orders from Parigi, upon receipt of which he would generate a commercial invoice that was forwarded to Parigi, with goods to be supplied to Parigi later. If, as Lyn Yu testified, Parigi ceased operations in early 2005, there is a fact question as to why it placed an order for goods in August 2005, as evidenced by defendants' submission of an invoice dated in August 2005.⁸ In addition, the record contains an unverified answer, in which

⁷John Ling's relationship to Parigi has not been established, on the record submitted here, as a matter of law, but a fact issue as to Ling's relationship to Parigi has been raised.

⁸Defendants did not offer an explanation to explain the payments but, in their reply papers, provide only argument that, among other things, Parigi's conduct in informing plaintiff that it was going out of business evidences a lack of intent to delay, hinder or defraud. This merely raises a fact issue.

Lyn Yu states that Jamie Yu is her brother. While Lyn Yu testified that Jamie Yu is not her brother, she also testified that he shares common ancestry. Plaintiff raises other challenges to the evidence submitted by defendants, but it is unnecessary to address them, as the record reveals fact issues concerning whether or not there was fair consideration for Parigi's money transfers.

Defendants contend that DCL § 276 requires that the plaintiff present evidence of actual fraud, that it has not done so, and that the complaint does not comply with CPLR 3016. This argument is unpersuasive. Contrary to defendants' contention, plaintiffs had no duty to offer evidence on these subjects in order to avoid summary judgment where defendants failed to meet their moving burden to eliminate material issues of fact on this record (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Furthermore, while the complaint is not artfully drafted, it is sufficient to put defendants on notice of plaintiff's allegations that defendants had purposely transferred assets from Parigi, rendering it insolvent, when plaintiff possessed a claim under the Lease (*see Lanzi v Brooks*, 43 NY2d 778 [1977]). Defendants' assertion that the complaint does not adequately state how plaintiff claims that it was defrauded by each of the individual defendants is unpersuasive.⁹

Defendants cite to *Abrahami v UPC Constr. Co.* (224 AD2d 231, 234 [1st Dept 1996]), to support their contention that Lyn Yu is not liable because "corporate officers and directors are personally liable for fraud only where they personally participated in the misrepresentation or had actual knowledge of it" (*id.*). This ignores that the complaint's allegations that Lyn Yu transferred money from Parigi's accounts to her own, from which the inference may be reasonably drawn that she participated in and had knowledge of the alleged transfers.

⁹To the extent that the defendants argue that the complaint did not meet the requirements of CPLR 3016 as to a DCL § 273 claim, CPLR 3016 does not apply to a claim of this nature (*Menaker v Alstaedter*, 134 AD2d 412, 413, 521 [2 Dept 1987] [unnecessary to plead with particularity violations of Debtor and Creditor Law §§ 273, 273-a, 274 and 275]).

Defendants do not point to Lyn Yu's testimony or affidavit that she was unaware that plaintiff had a claim or a potential claim on the Lease after Parigi's default.

Defendants argue that they are entitled to summary judgment because a motion, made in the 2005 Action, to vacate the 2006 Judgment, that was pending when this motion was made, was likely to be granted. This argument was made prior to the denial of that motion, and is now moot.

Defendants argue that after entry of the 2006 Judgment, but prior to the expiration of the Lease term, plaintiff re-let the premises to a new tenant, thereby entitling them to partial summary judgment of a reduction of plaintiff's damages claim by the amount plaintiff received from re-letting, \$225,331.40. Defendants also argue that plaintiff did not return Parigi's security deposit, and that there is a fact issue as to whether or not plaintiff re-let the premises immediately after Parigi's departure.¹⁰ These issues concern reduction of damages, and are premature where liability has not been established. In addition, defendants' argument that they are entitled to partial summary judgment is conclusory and wholly insufficient to grant relief. Furthermore, while defendants point to a name on a directory or doorbell for the floor previously let by Parigi, in order to demonstrate that the premises were re-let immediately after Parigi's departure, the record contains an affidavit from plaintiff that the tenant whose name was on the directory did not occupy that space (Pl. Op. Aff. [Vol. 2], Hoppenstein Aff., ¶ 10).

Defendants contend that, having failed to make a prima facie showing of entitlement to bring an action under DCL, plaintiff's claim for attorneys' fees must be dismissed because there is no other basis for attorneys' fees. Until the issue of liability is resolved, it is premature to

¹⁰Plaintiff argues that this issue was dealt with in its opposition to the order to show cause in the 2005 Action, but does not demonstrate, on this record, as a matter of law, that Parigi is precluded from interposing a counterclaim concerning setoff after the re-letting, and plaintiff's arguments on that motion do not sufficiently address the issues here. As the judgment in the 2005 Action was not vacated, Parigi did not submit a counterclaim in that action. Assuming arguendo that Parigi has a valid claim for the amounts of the re-letting (*see eg Nicholas A. Cutata, Inc. v Buyer's Bazaar*, 224 AD2d 952 [4th Dept 1996]), an issue that neither party has adequately briefed, and is not reached here, Lyn Yu has not demonstrated, on this record, that she may assert a claim on behalf of Parigi.

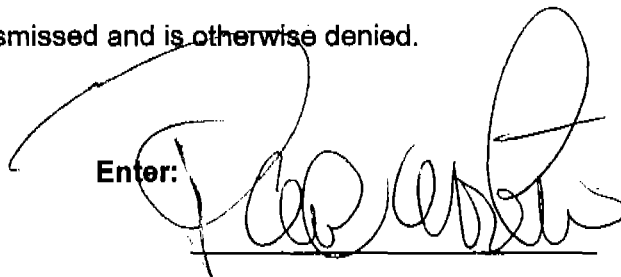
address the question of attorneys' fees under DCL § 276-a. However, punitive damages are not warranted here as the "the alleged fraud was not so gross and wanton as to justify an award of punitive damages" (*Murphy v RMTS Assoc., LLC*, 71 AD3d 582, 583 [1st Dept 2010]; see *Blakeslee v Rabinor*, 182 AD2d 390, 391-92 [1st Dept 1992], *lv denied* 82 NY2d 655 [1993]). Plaintiff does not oppose the portion of defendants' motion that seeks to dismiss its demand for punitive damages.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiff's demand for punitive damages is dismissed and is otherwise denied.

Dated: December 27, 2010

Enter:



PAUL WOOTEN J.S.C.

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