

<b>Lomagino v McClintock</b>
2011 NY Slip Op 30324(U)
January 26, 2011
Sup Ct, Nassau County
Docket Number: 014210-10
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  
**PATSY E. LOMANGINO REVOCABLE  
TRUST DATED 10/1/2006,**

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Plaintiff,**

**Index No: 014210-10**

**-against-**

**Motion Seq. No: 1  
Submission Date: 11/5/10**

**PAUL McCLINTOCK, TRES CHIC, LTD.  
d/b/a DELTA WASTE SERVICES AND  
METROPOLITAN PAPERS RECYCLING,  
INC.,**

**Defendants.**

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**The following papers having been read on this motion:**

- Notice of Motion, Affidavit in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply Affidavits in Further Support and Exhibits.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on the motion filed by Defendants Paul McClintock ("McClintock") and Metropolitan Paper Recycling, Inc. ("Metropolitan") on August 17, 2010 and submitted on November 5, 2010. For the reasons set forth below, the Court 1) grants the motion by Defendant McClintock to dismiss the Second Cause of Action in the Complaint as asserted against him; and 2) denies the motion by Defendant Metropolitan to dismiss the Second Cause of Action in the Complaint as asserted against it.

## BACKGROUND

### A. Relief Sought

Defendants McClintock and Metropolitan move for an Order 1) dismissing Plaintiff's Second Cause of Action against McClintock, pursuant to CPLR § 3211(a)(7), on the ground that the Complaint fails to state a cause of action against McClintock; and 2) dismissing Plaintiff's Second Cause of Action against McClintock and Metropolitan, pursuant to CPLR § 3211(a)(1), on the ground that the Defendants have a defense founded on documentary evidence.

Plaintiff Patsy E. Lomangino Revocable Trust Dated 10/1/2006 ("Plaintiff") opposes Defendants' motion.

### B. The Parties' History

The Complaint (Ex. 1 to Ferro Aff. in Supp.) contains two causes of action. Plaintiff asserts the first cause of action against Defendant Tres Chic, Ltd. d/b/a Delta Waste Services ("Delta") for breach of contract based on Delta's default on a Promissory Note. The Complaint alleges that, on May 19, 2003, Frank Lomangino & Sons, Inc. ("FLS") sold its assets to Delta pursuant to an Asset Acquisition Agreement. Delta executed a Promissory Note ("Note") in the sum of \$500,000 to FLS, a corporation owned by Patsy Lomangino. On September 20, 2004, FLS assigned its rights under the Note to Patsy Lomangino. On October 2, 2006, Patsy Lomangino assigned his rights under the Note to the Plaintiff.

The first cause of action alleges that Delta defaulted in paying the Plaintiff pursuant to the terms of the Note and seeks damages in the sum of \$187,305.60, plus interest and counsel fees. Defendants McClintock and Metropolitan are not named in the first cause of action. Delta has neither appeared nor answered in this action.

Plaintiff asserts the second cause of action against McClintock and Metropolitan. The Complaint alleges that Defendant McClintock, as the sole officer and shareholder of Delta, entered into an agreement with Metropolitan designed to avoid payment of the debt to the Plaintiff and to defraud the Plaintiff in its efforts to collect the outstanding balance on the Note. McClintock allegedly "orchestrated a plan designed to transfer assets of [Delta] for little or no consideration to Metropolitan in violation of plaintiff's rights under the Promissory Note" and "to hinder, delay and defraud" Plaintiff, a creditor with respect to the Note (Compl. at ¶ 19). Delta allegedly transferred vehicles and other assets to Metropolitan, and diverted customer

routes and customer payments to Metropolitan, in violation of the Rules of the New York City Business Integrity Commission. Plaintiff alleges that these conveyances by Delta to Metropolitan were orchestrated by McClintock and were completed with fraudulent intent, as demonstrated by the fact that the assets transferred were the only assets that could have been used to satisfy the sums due under the Note. Plaintiff alleges, further, that these transfers were fraudulent in that they were made when Plaintiff advised Delta that it was contemplating a lawsuit to collect on the Note, and they caused Delta to become insolvent at the time, or shortly after the transfers were made. Plaintiff seeks an Order voiding all of the allegedly fraudulent transfers of Delta's assets.

In opposition, Thomas Ferro, the Chief Financial Officer of Metropolitan, affirms that beginning in 2007, Metropolitan made a series of loans to Delta that total \$1,526,660 as of April 30, 2010. The loans were made to fund Delta's continuing operations and were secured by a perfected first lien priority blanket security interest on Delta's personal property. Delta defaulted in its payments to Metropolitan in February 2008.

On or about April 1, 2010, Metropolitan entered into a Forbearance Agreement with Delta pursuant to which Metropolitan agreed to withhold enforcement of Metropolitan's obligations against Delta (Ferro Aff. at Ex. 3). Delta defaulted under the Forbearance Agreement. On or about May 3, 2010, Metropolitan delivered Delta a notice of default requiring that the collateral, *i.e.*, all assets of Delta, be surrendered to Metropolitan on or before May 7, 2010 (*Id.* at Ex. 4). On or about May 10, 2010, Delta and Metropolitan entered into a Collateral Retention Agreement which confirmed Metropolitan's receipt of Delta's assets in satisfaction of the alleged \$1,526,660 antecedent debt owed by Delta Waste to Metropolitan (*Id.* at Ex. 5).

### C. The Parties' Positions

McClintock submits that, as the only allegation as to McClintock is that he was the sole officer and shareholder of the alleged fraudulent transferor corporation, there is no basis upon which to hold him personally responsible for the allegedly fraudulent transfer, citing *Committee of Unsecured Creditors of Interstate Cigar Co., Inc. v. Interstate Distribution, Inc.*, 210 A.D.2d 283 (2d Dept. 1994).

Defendant Metropolitan contends that the Court should dismiss the cause of action against Metropolitan, pursuant to CPLR § 3211(a)(1), based on the following documentary

evidence: 1) the 2009 UCC-1 establishing its security interest in “[a]ll personal property of [Delta Waste], wherever located, now owned or hereafter acquired . . .” (Ferro Aff. at Ex. 2), 2) the April 1, 2010 Forbearance Agreement between Delta Waste and Metropolitan Paper, 3) the May 3, 2010 Notice of Default given to Delta Waste by Metropolitan Paper under the Forbearance Agreement, and 4) the May 10, 2010 Collateral Retention Agreement pursuant to which the assets of Delta Waste were transferred to Metropolitan Paper in satisfaction of Delta Waste’s \$1,526,660 alleged antecedent debt.

Defendant argues that, under New York Law, an insolvent debtor may properly assign assets to a creditor as security for an antecedent debt although the effect of the transfer will be to prefer that creditor. Thus, it is irrelevant whether Metropolitan knew that Delta was insolvent or that the transfer had the effect of preferring Metropolitan over Delta’s other creditors. Metropolitan argues that it had no obligation to satisfy Delta’s debt to the Plaintiff, an unsecured creditor, as a condition to its receipt of a security interest.

In opposition, Plaintiff, *inter alia*, 1) contends that Metropolitan has not provided sufficient documentary proof of the loan; 2) argues that Metropolitan’s withdrawal of its application to purchase the assets of Delta, and subsequent creation of the Forbearance and Collateral Agreements may have been part of a plan to avoid making the payment to Plaintiff; and 3) suggests that McClintock’s current employment by Metropolitan, “following its aborted purchase and after the alleged loan by Metropolitan and its execution of its security interest” (P’s Memorandum of Law in Opp. at p.5) is inconsistent with the assertion that Metropolitan was truly a good faith purchaser and/or creditor Delta.

With respect to the cause of action against McClintock, Plaintiff provides an Affidavit in Opposition of Fayth Lomangino (“Fayth”). Fayth affirms that she learned relevant information regarding McClintock “from inquiring of former employees of [Delta]” (Fayth Aff. in Opp. at ¶ 6); and “from calling the offices of Metropolitan after hearing rumors...from drivers and other employees of [Delta] who are now employees of Metropolitan” (*Id.* at ¶ 12).

Metropolitan argues that Delta was an insolvent company unable to generate enough income to pay its obligations, including its debt to the Plaintiff. Moreover, the assets of Delta were not worth the consideration paid by Metropolitan for those assets. Metropolitan also contends that, had it not funded Delta’s continuing operation, Delta would have defaulted three

years earlier, and Plaintiff would have lost the three years of payment on the Note that Metropolitan funded.

### RULING OF THE COURT

#### A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied 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*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

#### B. Transfers of Assets by Debtor

In the absence of statutory restrictions, an insolvent debtor may sell and transfer the whole or any portion of his property to one or more of his creditors in payment of or to secure the debts, when that is the honest purpose, although the effect of the sale or transfer is to place his property beyond the reach of his other creditors and render their debts uncollectible. *Micalden Investments, S.A. v. Guerrand-Hermes*, 30 A.D.3d 341, 342-343 (1<sup>st</sup> Dept. 2006), quoting *Dodge v. McKechnie*, 156 N.Y. 514, 520 (1898), citing *Tompkins v. Hunter*, 149 N.Y. 117 (1896). Conveyances which satisfy an antecedent debt made while the debtor is insolvent are neither fraudulent nor otherwise improper, even if their effect is to prefer one creditor over another. *Town of Southampton v. Chiodi*, 75 A.D.3d 604, 606 (2d Dept. 2010), quoting *Ultramar Energy v. Chase Manhattan Bank*, 191 A.D.2d 86, 90-91 (1<sup>st</sup> Dept. 1993).

### C. Fraudulent Conveyances

Pursuant to Debtor and Creditor Law § 273, “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 his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.” Both insolvency and inadequacy of consideration are prerequisites to a finding of constructive fraud, and the burden of proving both insolvency and the lack of fair consideration is upon the party challenging the conveyance. *Joslin v. Lopez*, 309 A.D.2d 837, 838 (2d Dept. 2003), citing, *inter alia*, *Marine Midland Bank v. Murkoff*, 120 A.D.2d 122 (2d Dept. 1986), *app. dism.*, 69 N.Y.2d 875 (1987). The question of what constitutes fair consideration is generally one of fact, to be determined under the circumstances of the particular case. *Wagman v. Lagno*, 141 A.D.2d 720, 721 (2d Dept. 1988).

In *Committee of Unsecured Creditors of Interstate Cigar Co., Inc. v. Interstate Distribution, Inc.*, cited *supra*, the Second Department held as follows:

When a conveyance is fraudulent as to a creditor, that creditor may have the conveyance set aside or disregard the conveyance and attach or levy execution upon the property conveyed (*see*, Debtor and Creditor Law §§ 278, 279). These sections of the Debtor and Creditor Law did not, either explicitly or implicitly, create a creditor’s remedy for money damages against parties who were *neither transferees of the assets nor beneficiaries of the conveyance* (emphasis added) (internal citations omitted).

210 A.D.2d at 285.

Applying these principles, the Second Department, *inter alia*, affirmed the trial court’s dismissal of the cause of action to set aside a transfer as fraudulent, as asserted against the individual appellants-respondents who were shareholders, officers and members of the board of directors of the transferor company. *Id.*

### D. Application of these Principles to the Instant Action

The only allegation in the Complaint with respect to Defendant McClintock is that he was the “sole officer and shareholder” of the alleged fraudulent transferor corporation (Compl at ¶ 18). The Affidavit of Fayth, much of which relies on hearsay, does not provide additional evidence from which the Court may conclude that McClintock was either a transferee of the assets or a beneficiary of the conveyance. Accordingly, in light of the holding in *Committee of*

*Unsecured Creditors of Interstate Cigar Co., Inc., Distribution, Inc., supra*, the Court dismisses the second cause of action as asserted against Defendant McClintock.

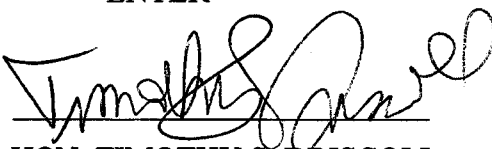
The Court concludes, however, that there exists a triable issue of fact as to whether Delta received fair consideration for transferring the assets to Metropolitan to secure the antecedent debt of Metropolitan, which cannot be determined based on the documentary evidence now before the Court. *See, e.g., Matter of American Investment Bank v. Marine Midland Bank, N.A.*, 191 AD2d 690 (2d Dept. 1993) (reversed trial court's order granting summary judgment in light of triable issues of fact including whether there was fair consideration for transfer).

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 before the Court for a Preliminary Conference on February 28, 2011 at 9:30 a.m.

DATED: Mineola, NY  
January 26, 2010

ENTER  
  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
FEB 01 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE