

Peckar & Abramson, P.C. v Lyford Holdings, Ltd.

2011 NY Slip Op 33008(U)

November 15, 2011

Sup Ct, NY County

Docket Number: 100005/09

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

Peckar & Abramson, P.C.

INDEX NO.: 100005109

Plaintiff,

MOTION DATE: 5-11-11

- v -

Ly Ford Holdings, et al.

MOTION SEQ. NO.: 003

MOTION CAL. NO.:

Defendant.

The following papers, numbered 1 to _____ were read on this motion to/for dismiss.

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: [] Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision & Order.

FILED

NOV 17 2011

Dated: November 15, 2011

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.

Check one: [] FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
PECKAR & ABRAMSON, P.C.,

Plaintiff,

-against-

Index No. 100005/09

LYFORD HOLDINGS, LTD., MITCHELL STERN,
SAVOY MANAGEMENT CORPORATION, SAVOY
SENIOR HOUSING CORP., JACOB FRYDMAN,
WHITE ACRE EQUITIES, LLC, TUSCANY
BUILDERS, LLC, TIVOLI PARTNERS, LLC,
and SAVOY LITTLE NECK ASSOCIATES, L.P.,

FILED

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Defendants.

-----X
JOAN A. MADDEN, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Defendants Savoy Little Neck Associates, L.P. (Savoy Little Neck), Lyford Holdings, Ltd. (Lyford), Savoy Management Corporation (Savoy Management), Savoy Senior Housing Corp. (SSHC), Jacob Frydman ("Frydman"), White Acre Equities, LLC (White Acre), Tuscany Builders, LLC (Tuscany) and Tivoli Partners LLC (Tivoli)(together "the Savoy defendants") move pursuant to CPLR 3211 (a) (5) and (7) to dismiss the Amended Complaint against defendants Lyford and Frydman on statute of limitations grounds and as barred by the court's previous decisions in this action, and as against the remaining Savoy defendants for failure to state a claim (motion seq. no. 003). Defendant Mitchell Stern (Stern) separately moves, pursuant to CPLR 3211 (a) (5) and (7), for an order dismissing the Amended Complaint against him as barred by the law of the case doctrine, on statute of limitations grounds, and for failure to state a cause of action (motion seq. no. 004).¹ Plaintiff Peckar & Abramson, P.C. (P&A) opposes both motions.

¹Motion seq. nos. 003 and 004 are consolidated for disposition.

BACKGROUND

In 2006, P&A obtained a default judgment against Savoy Little Neck for legal services rendered, which judgment remains unsatisfied. In this action, which was commenced on or about January 2, 2009, P&A alleges that Savoy Little Neck wrongfully transferred funds to various entities, including limited partners, and asserts causes of action seeking the recovery of such funds, in order to collect on the judgment. Defendant Stern answered the complaint. However, the Savoy defendants moved to dismiss it on various grounds, including that P&A lacked the capacity to sue with respect to the first cause of action, that the statute of limitations had expired, and that the complaint failed to state a cause of action.

P&A consented to withdraw the first cause of action and conceded that the second cause of action, which alleged that defendants knowingly accepting wrongful distributions in violation of the New York Revised Limited Partnership Act ("the RLPA"), was untimely pursuant to the three-year statute of limitations provided under the RLPA.

However, P&A opposed the motion to the extent that it sought to dismiss the third, fourth, fifth and sixth causes of action which were brought pursuant to the Debtor and Creditor Law (DCL). The Savoy defendants argued that three-year statute of limitations provided under RLPA § 121-607 (c) applied to the claims under the DCL. By decision and order dated December 15, 2009 (the Decision), the court dismissed the DCL claims, finding that the transfers of property by Savoy Little Neck constitute distributions for the purposes of the RLPA and that the three year limitations period under RLPA § 121-607 (c) was therefore applicable.

P&A moved for renewal and reargument of the Decision. By decision and order dated April 21, 2010 (Second Decision) the court granted the motion to reargue and, upon reargument,

permitted P&A to replead the causes of action under the DCL. The court also modified the Decision to indicate that (1) “the term ‘distribution’ is defined under RPLA § 121-101 to mean the transfer of property by a limited partnership to one or more of its partners in his capacity as partner” (Second Decision, at 2), and (2) “ based on the allegations in the complaint, the transfer of the proceeds of the Property Tax Fund constitute distributions at least as to Lyford Holdings, Ltd and Mitchell Stern within the meaning of RLPA.”

On September 27, 2010, P&A filed an Amended Complaint, containing four causes of action based on violations of the DCL. The Savoy defendants and Stern now each move to dismiss the Amended Complaint as untimely and for failure to state a cause of action.

The following allegations are based on the Amended Complaint which, for the purposes of the motion, must be accepted as true. P& A is law firm that was engaged by Savoy Little Neck and non-party Savoy Boro Park Associates, L.P. (Savoy Boro Park), a related entity, which are in the business of running assisted living facilities (Amended Complaint, ¶ 17). Savoy Little Neck operated pursuant to an Agreement of Limited Partnership dated December 23, 1998, and amendments thereto (*id.*, ¶ 10). Savoy Little Neck is one of more than a dozen entities operated by defendant Frydman, an attorney, who is also an owner and/or indirect beneficiary of each related entity (*id.*, ¶ 18).

Defendants Lyford, Frydman and Stern are limited partners of Savoy Little Neck (*id.*, ¶ 19). At a certain point, Savoy Little Neck purchased property located at 55-15 Little Neck Parkway, Little Neck, New York (the Property), which it converted into an assisted living facility (*id.*, ¶ 11).

At all relevant times, defendants SSHC, White Acre, Tuscany and Tivioli and non-party

Frydman & Co. were owned or controlled by Frydman (*id.*, ¶ 20). Defendant SSHC was the managing member of the corporate general partner of Savoy Little Neck, and Frydman was the President of SSHC (*id.*, ¶¶ 22).

Savoy Little Neck and Savoy Boro Park failed to make payments to P&A, and on April 5, 2004, P&A commenced an action entitled *Peckar & Abramson P.C. v Savoy Little Neck Assocs., L.P. and Savoy Boro Park Assocs., L.P.* (Sup Ct, NY County, Index No. 105621/04)(the underlying action) for breach of contract and for work and services provided in 2003 (*id.*, ¶ 12). The Answer in the underlying action was verified by Frydman as President of SSHC and the managing member of the general corporate partner of Savoy Little Neck and Savoy Boro Park (*id.*, ¶ 13). On February 22, 2006, judgment was entered against Savoy Little Neck in the amount of \$237,731.75, which judgment remains unpaid and outstanding (*id.*, ¶¶ 14-15). P&A asserts that, as a result, it is a creditor of Savoy Little Neck pursuant to Article 10 of the New York Debtor and Creditor Law (*id.*, ¶ 16).

P&A contends that, after commencement of the underlying action, Savoy Little Neck sold the Property, and made other payments and transfers to or for the benefit of defendants. According to P&A, these transfers, which occurred over a period of six months, were designed to avoid the P&A judgment, and/or controvert the express terms of the Savoy Little Neck partnership agreement.

Specifically, P&A alleges that, in June 2004, Savoy Little Neck conveyed the Property to an unrelated entity, CRP Little Neck, L.P. (*id.*, ¶ 23). As of the date the Property was sold, Savoy Little Neck was insolvent, and its major remaining asset was a claim for a Property Tax Refund (*id.*, ¶ 24). Before it obtained the Property Tax Refund, Savoy Little Neck made numerous

payments to certain defendants as described below (collectively referred to as “Other Transfers”) (*id.*, ¶ 27; *see id.*, Exh A).²

Prior to the commencement of the underlying action, Savoy Little Neck maintained three checking accounts at North Fork Bank (NFB): an operating account, a payroll account and a checking account (*id.*, ¶ 25). Frydman was a signatory on all NFB checking accounts (*id.*, ¶ 26). In the 10 days before the sale of the Property, Savoy Little Neck depleted several hundred thousand dollars from its NFB checking account, and transferred the cash therein to defendants White Acre, Tivoli, Tuscany, and non-party Frydman & Co., which were affiliates of Savoy Little Neck at the time they received the Other Transfers (*id.*, ¶ 28; *see id.*, Exh A). On September 2, 2004, Savoy Little Neck depleted the NFB payroll account by transferring the remaining balance of \$3,008.97 to White Acre, after which the account was closed (*id.*, ¶ 29).

On or about September 24, 2004, the Department of Finance of the City of New York issued a property tax refund check payable to Savoy Little Neck in the amount of \$722,365.43 (the Property Tax Refund) (*id.*, ¶ 46). On September 30, 2004, the Property Tax Refund check was not properly endorsed by Savoy Little Neck, but was endorsed “Savoy,” and deposited into the “Operating” account of Savoy Management, an entity related to Savoy Little Neck (*id.*, ¶ 47). Within 15 days after deposit, all proceeds of the Property Tax Refund were depleted, leaving the Savoy Management’s operating account with a negative balance (*id.*, ¶ 48).

From the Property Tax Refund, Savoy Management transferred \$425,000 to Stern, and

²According to Schedule A attached to the Amended Complaint, the transfer to White Acre was made on October 1, 2004, the transfer to Lyford was made on October 6, 2004, and the transfer to Mitchell Stern was made on October 15, 2004 and another \$85,000 was transferred to non-party Armstrong Management Corporation on October 15, 2004.

\$65,000 to defendant White Acre (*id.*, ¶ 49) in October 2004.³ The purported consideration for the \$425,000 sent to Stern is the sale of the limited partnership interest in SSHC as of August 1, 2004, as set forth in an Assignment and Assumption of Limited Partnership Interests (*id.*, ¶ 50, *see id.*, Exh 1).

The Amended Complaint contains four causes of action under the DCL. The first cause of action is based on the receipt by Tuscany, White Acre and Trivoli, and non-party Frydman & Co. of the “Other Transfers,” and asserts violations of §§ 273, 273-a, 274, 275, 276, 277, 278 and/or 279 of the DCL. The second cause action is based on Savoy Management’s receipt of the Property Tax Refund, and alleges that any defendants found to be a beneficiary of the transfer should be set aside for violating §§ 273, 273-a, 274, 275, 276, 277, 278 and/or 279 of the DCL. The third cause of action seeks to set aside an alleged transfer of the Property Tax Refund by Savoy Management to Stern and White Acre for violating §§ 273, 273-a, 274, 275, 276, 277, 278 and/or 279 of the DCL. The fourth cause of action seeks reasonable attorneys’ fees under DCL § 273-a

DISCUSSION

On a motion pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the complaint must be terminated liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheim v. Ginzburg, 43 NY2d 268 (1977); Morone v. Morone, 50 NY2d 481 (1980). At the same time, “[i]n those circumstances where the

³According to Exhibit A, \$154,299.14 was transferred to Lyford; however, the Amended Complaint indicates that P&A is not seeking to recover against Lyford in connection with the transfer of these funds (Amended Complaint, at 2, fn.1, at 5, fn 5). In addition, \$85,000 was transferred non-party Armstrong Management Corporation, and these transfers are also not the subject of this action.

legal conclusions and factual allegations are flatly contradicted by documentary evidence they are not presumed to be true or accorded every favorable inference” Morgenthau & Latham v. Bank of New York Company, Inc., 305 AD2d 74, 78 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 AD2d 76, 81 (1st Dept 1999), aff’d, 94 NY2d 659 (2000). In such cases, “the criterion becomes ‘whether the proponent has a cause of action, not whether he has stated one.’” Id., quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275. However, dismissal based on documentary evidence may result “only where ‘it has been shown that a material fact as claimed by the pleader...is not a fact at all and ... no significant dispute exists regarding it.’” Acquista v. New York Life Ins. Co., 285 AD2d 73, 76 (1st Dept 2001), quoting, Guggenheimer v. Ginzburg, 43 NY2d at 275.

The first issue to be addressed by the court is whether Amended Complaint should be dismissed against the limited partner defendants Lyford, Frydman and Stern. The Savoy defendants argue that the claims against Lyford and Frydman must be dismissed based on the doctrines of collateral estoppel and law of the case since the court previously decided that the transfers to the limited partners constitute “distributions” under the RLPA and therefore the claims arising out of such transfers are barred by the three-year statute of limitations provided by RLPA 121-607(c). The Savoy defendants also argue that even if the court were to consider the Amended Complaint, its allegations are insufficient to render the claims timely since the amended pleading still alleges that Lyford and Frydman are limited partners of Savoy Little Neck.

Stern argues that under the doctrine of law of the case, the claims against him must be dismissed as untimely as the court previously found that the transfer of the Property Tax Refund

to limited partners, like himself, constituted a distribution under RLPA and as such any claims arising out of the transfer are governed by the expired three year limitation period. In this connection, Stern notes that the Second Decision specifically stated that the transfers to him constituted distributions within the meaning of the RLPA. Stern also argues that the first and second causes of action contain no allegations sufficient to state a cause of action against him.

In opposition, P&A argues that the Amended Complaint should be reviewed de novo, and argues that since unlike the original complaint, the amended version does not allege that “a distribution” was made to the limited partners but rather that a “transfer” was made, that its allegations are sufficient to state a claim and to avoid the three-year limitation period under RLPA § 121-607(c).

P&A also contends that with respect to Stern, the more specific allegations that he received \$425,000 in October 2004 in exchange for his assignment or sale of his limited partnership interest in August 2004 show that the transfer was not a distribution but a payment of contractual obligation that occurred after Stern was no longer a limited partner. Based on these allegations, P&A argues that the claims against Stern are not governed by the three year statute of limitations provided by RLPA and are timely. See Mann v. Broadwall Management of Antrop LLC, 2009 WL 6318146 (Sup Ct NY Co. 2009)(payment of opportunity fee to member of limited liability company that was unrelated to his percentage ownership did not constitute a distribution); In re 37-02 Plaza LLC, 387 BR 413 (ED NY 2008)(payment of contractual obligation on promissory notes to members did not constitute a distribution for the purposes of

the limited liability law).⁴

In reply, Stern asserts that any claim arising out of the new allegations regarding the \$425,000 payment are either time-barred or insufficient to state a cause of action. Specifically, Stern argues that to the extent the Amended Complaint alleges that SSHC, the entity making the distribution, is controlled by Savoy Little Neck the payment constitutes a distribution to a limited partner and is therefore untimely under the three year limitations period under RLPA § 12-607(c). On the other hand, Stern argues that if, as suggested by P&A in its brief, SSHC is not controlled by Savoy Little Neck, then the amended pleading fails to state a claim under the DCL since the limited partnership interest is the property of Stern and not of the Savoy Little Neck and Stern's sale of this interest to an unrelated entity does not give rise to a fraudulent conveyance claim.

When, as here, an amended complaint is filed it takes the place of the original pleading and thus the courts have held that a ruling on the previous pleading does not constitute the law of the case. See Tillman v Women's Christian Ass'n. Hosp., 272 AD2d 979 (4th Dept 2000); Berne Investors v. Wechsler, 152 AD2d 804, 805 (3d Dept 1989); Kaplan v. K. Ginsburg, Inc., 14 Misc2d 356 (Sup Ct Kings Co. 1958), modified on other grounds, 8 AD2d 726 (1959). Nor does the doctrine of collateral estoppel bar consideration of an amended pleading the issues raised in connection with that pleading were not necessarily decided when the court considered the original pleading. See generally, Sepulveda v. Dayal, 70 AD3d 420 (1st Dept 2010). At the same time, however, to the extent causes of action in an amended complaint are essentially identical to

⁴While these cases address the meaning of the term distribution under § 508 the Limited Liability Company Law, the definition under that law is almost identical to definition of distribution under the RLPA.

those that were previously dismissed, or the prior ruling is related to the pleadings, the law of the case doctrine will bar consideration of the amended pleading. See Callghan v. Curtis, 82 AD3d 816 (2d Dept 2011); Burgundy Basin Inn, Ltd v. Watkins Glen Grand Prix Corp, 51 AD2d 140 (4th Dept 1976).

Here, even assuming *arguendo* that the allegations in the Amended Complaint are sufficiently distinct from those in the original complaint to warrant reconsideration with respect to Lyford⁵ and Frydman, the court finds that Amended Complaint does not assert timely claims against these defendants. In particular, any causes of action against these defendants would be time-barred under RPLA § 121-607(c) which provides a three year statute of limitations for claims arising out of wrongful distributions. A distribution is defined under RPLA §121-101 to mean “the transfer of property by a limited partnership to one or more of its partners in his capacity as a partner.” Here, the Amended Complaint alleges that these defendants are limited partners of Savoy Little Neck, and that any transfers to them occurred between May and October 2004, which is more than four years before the initially complaint was filed. Accordingly, any payments to these defendants by Savoy Little Neck would constitute distributions and therefore any claim based on such distributions would be untimely. In addition, to the extent P&A suggests that its claims against these defendants are timely since the Amended Complaint no longer identifies the transfers as distributions, such re-labeling is insufficient to alter the nature of the transfers. Notably, while P&A argues that payments for contractual obligations are not distributions, there are no allegations in the Amended Complaint that any transfers to Lyford or

⁵Although the caption of the Amended Complaint still names Lyford as a defendant, as indicated above, the Amended Complaint indicates that it is not seeking recovery from Lyford. However, P&A apparently opposes the motion seeking to dismiss any claims against Lyford.

Frydman were made to pay such obligations.

Furthermore, while the Amended Complaint alleges that Frydman owned or controlled certain of the defendants receiving the transfers directly or indirectly from Savoy Little Neck such allegations are insufficient to state a claim against Frydman under the Debtor and Creditor Law. In order to be held liable under the relevant sections of the Debtor and Creditor Law, it must be shown that the defendant is either a transferee or beneficiary of the transfer rendering the debtor insolvent. See Federal Deposit Ins. Co. v. Porco, 75 NY2d 840, 842 (1990). Here, there are no allegations in the Amended Complaint that Frydman was a transferee or beneficiary of any funds transferred directly or indirectly by Savoy Little Neck. Compare CIT Group/Commercial Services, Inc. v. 160-09 Jamaica Ave. Limited Partnership, 25 AD3d 301 (1st Dept 2006)(transfers to controlling shareholder, officer or director of insolvent corporation were presumptively fraudulent under Debtor and Creditor Law).

Moreover, to the extent P&A claims that Frydman can be held individually liable as a beneficiary of the transfers by virtue of allegations relating to his ownership and/or control of other defendants, which are either corporations or limited liability companies, its position is without merit as the Amended Complaint is devoid of any allegations that Frydman completely dominated and controlled these other defendants in furtherance of a wrongful act against P&A which would provide a basis for piercing the corporate veil. See Fisher v. Zaks, 48 AD3d 251 (1st Dept 2008); Shisgal v. Brown, 21 AD3d 845 (1st Dept 2005). Accordingly, the Amended Complaint must be dismissed as against Frydman.

As for Stern, the first and second causes of action do not assert a basis for recovery against him since they do not allege that he received or benefitted from any transfers that are the

subject of those claims. At issue, however, is whether the third cause of action is viable based on allegations that in August 2004, Stern entered into an agreement with SSHC for the assignment or sale of his limited partnership interest to SSHC for \$425,000, and received a payment of \$425,000 from Savoy Little Neck, through Savoy Management, for this interest in October 2004.

At the outset, in light of the new allegations regarding the transfer to Stern, the court's previous decisions finding that the transfer constituted a distribution, does not constitute the law of the case. See Tillman v Women's Christian Assoc. Hospital, 272 AD2d at 980; Berne Invs. v. Wechsler, 152 AD2d at 804. Next, the court finds that since the contract for the assignment or sale of Stern's partnership interest was entered into in August, 2004, it can be inferred from the allegations in the Amended Complaint that the payment of \$425,000 to Stern in October 2004, was made in connection with the assignment or sale of his partnership interest at a time when Stern was no longer a limited partner of Savoy Little Neck, such that the payment does not constitute a wrongful distribution for the purposes of the RLPA. See Mann v. Broadwall Management of Antrop LLC, *supra*; In re 37-02 Plaza LLC, 387 BR at 421. Thus, based on these allegations, the claim is timely under the six year statute of limitations governing fraudulent conveyance claims. Avalon LLC v. Coronet Properties Co., 306 AD2d 62 (1st Dept 2003); CPLR 213(8).

Furthermore, the third cause of action states a claim for fraudulent conveyance based on allegations that Savoy Little Neck, through Savoy Management, made the transfer to Stern without consideration as defined by the DCL as, at the time of the transfer, Savoy Little Neck was insolvent. Moreover, Savoy Little Neck's insolvency raises issues as to whether the transfer was made for fair consideration and in good faith. Ede v Ede, 193 AD2d 940, 941-942 (3d Dept

1993) (noting that under the DCL “fair consideration requires that the exchange not only be for equivalent value, but also that the conveyance be made in good faith”); see also CIT Group/Commercial Services, Inc. Vv. 160-09 Jamaica Ave. Ltd. Partnership, 25 AD3d 301, 303 (1st Dept 2006); DCL § 272. Accordingly, Stern’s motion to dismiss is granted only with respect to the first and second causes of action.

The remaining issue concerns whether the allegations in the Amended Complaint are sufficient to state a claim as to the Savoy defendants who are not alleged to be limited partners of Savoy Little Neck. First, the Savoy defendants argue that the Amended Complaint is insufficient to state a claim against SSHC as it is not named in any of the causes of action and is not alleged to have received any transfers from Savoy Little Neck or any other defendant. As indicated above, to be held liable under the fraudulent conveyance provisions of the DCL, it must be shown that the defendant is either a transferee or beneficiary of the transfer rendering the debtor insolvent. See Federal Deposit Ins. Co. v. Porco, 75 NY2d 840, 842 (1990). Here, as there are no allegations that SSHC received any funds from Savoy Little Neck, the Amended Complaint is insufficient to state a claim against SSHC.

As to the remaining Savoy defendants, the Amended Complaint is sufficient to state a claim for violations of the fraudulent conveyance provisions of the DCL. Under DCL § 273, “a 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 without fair consideration.”⁶ Thus, for a transfer to be fraudulent under DCL § 273, it must

⁶Also fraudulent are transfers made without fair consideration which would leave the transferor with an unreasonably small amount of capital with which to operate the business (DCL § 274); or transfers made when the transferor knew that debts would be incurred beyond its

have been made without fair consideration, and must have be made by a transferor who was insolvent or rendered insolvent by the transfer. As indicated above, however, "fair consideration requires that the exchange not only be for equivalent value, but also that the conveyance be made in good faith." Ede v Ede, 193 AD2d at 941-942 ; see also DCL § 272.

Here, the Amended Complaint contains sufficient allegations that the Other Transfers were made to White Acre, Tuscany and Tivioli without fair consideration and that such transfers rendered Savoy Little Neck insolvent. Moreover, that the judgment in the underlying action brought by P&A was not obtained until two years after such transfers does not deprive P&A of standing to set aside the fraudulent conveyance. See Julien J. Studley, Inc. v. Lefrak, 66 AD2d 208, 214 (2d Dept 1979)(holding that under the fraudulent conveyance statute "a creditor has standing to maintain an action to aside a fraudulent transaction, though his debt may not have been in existence at the time of the transfer"). In addition, contrary to the Savoy defendants' position, the allegations contained in the second cause of action against Savoy Management and the third cause of action against White Acre, which relate to the transfer of the Property Tax Refund to these defendants from Savoy Little Neck, are sufficient to state a claim.

The Amended Complaint is also sufficient to state a basis for recovery under DCL § 275, based on allegations that the transfers at issue were made without fair consideration when Savoy Little Neck intended or believed that it would incur debts beyond its ability to pay.⁷ (Amended

ability to pay (DCL § 275). In addition, 273-a, provides a conveyance made without consideration by a defendant in an action for money damages is fraudulent "without regard to actual intent if after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

⁷DCL § 275 provides that:

a conveyance made without fair consideration at a time

Complaint, ¶¶ 56, 69). Similarly, the complaint sufficiently alleges that the transfers were made without fair consideration when Savoy Little Neck had unreasonably small capital to stay in business.⁸ (Id., ¶¶ 57, 70).

DCL § 276 provides that “[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” “DCL § 276 addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency,” and the pleader is permitted to rely on “badges of fraud” such as a close relationship between the parties involved in the transfer, to show actual intent to defraud or hinder present or future creditors. Wall Street Associates v Brodsky, 257 AD2d 526, 529 (1st Dept 1999). Here, allegations in the Amended Complaint that the transfers were intended to hinder, delay and defraud the creditors of Savoy Little Neck (Amended Complaint, ¶ 41,58, and

when the person making the conveyance intends or believes that he [or she] will incur debts beyond his [or her] ability to pay as they mature, is fraudulent as to both present and future creditors. Pursuant to this constructive fraud provision, a conveyance made by a person who has a good indication of oncoming insolvency is deemed to be fraudulent [internal quotation marks and citation omitted].

⁸DCL § 274 provides that:

Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in the hands after the conveyance is unreasonably small capital, is fraudulent as to the creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to actual intent.

71) are sufficient at this juncture to state a claim under DCL § 276.⁹

Finally, Amended Complaint is sufficient insofar as it seeks to recover based on violations of DCL § 277, relating to conveyance of partnership property rendering the partnership insolvent, DCL § 278, regarding when conveyance is fraudulent with respect to a creditor whose claims have matured.¹⁰

Conclusion

In view of the above, it is

ORDERED that the motion to dismiss by defendants Savoy Little Neck Associates, L.P. Lyford Holdings, Ltd., Savoy Management Corporation, Savoy Senior Housing Corp., Jacob Frydman, White Acre Equities, LLC, Tuscany Builders, LLC, and Tivoli Partners LLC (motion seq. no. 003), is granted to the extent of dismissing the claims against Lyford Holdings, Ltd., Jacob Frydman, and Savoy Senior Housing Corp; and it is further

ORDERED that the motion to dismiss by defendant Mitchell Stern (motion seq. no. 004) is granted only to the extent of dismissing the first and second causes of action against him; and it is further

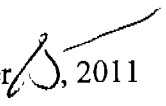
ORDERED that within thirty days of this decision and order, the remaining Savoy defendants and Stern are directed to serve and file an answer to the Amended Complaint; and it is further

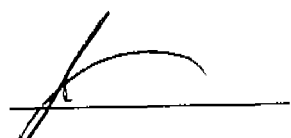
⁹DCL § 276-a permits the recovery of attorneys' fees in the event the plaintiff proves that the conveyance was made with the actual intent to hinder, delay or defraud creditors.

¹⁰While the complaint alleges a violation of DCL § 279 relating to rights of creditors whose claims have not matured to set aside a fraudulent conveyance, it does not appear this section applies since a judgment on P&A's claim has been entered against Savoy Little Neck.

ORDERED that a preliminary conference shall be held on January 12, 2012 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: November , 2011


J.S.C.

FILED
NOV 17 2011
NEW YORK
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