

**Felshman v Yamali**

2011 NY Slip Op 33110(U)

November 22, 2011

Sup Ct, Nassau County

Docket Number: 9656/11

Judge: Anthony L. Parga

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**SHORT FORM ORDER**

**SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:**

**HON. ANTHONY L. PARGA**  
**JUSTICE**

-----X **PART 8**

MYRNA DAWN FELSHMAN,  
Plaintiff,

-against-

DOROTHY YAMALI, ISAAC YAMALI, and  
JOSEPH YAMALI,  
Defendants.

INDEX NO. 9656/11  
**XXX**  
MOTION DATE: 10/18/11  
SEQUENCE NO. 001, 002

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Upon the foregoing papers, defendants’ motion to dismiss plaintiff’s action, pursuant to CPLR §3211(a)(5) and (7), is granted. Plaintiff’s cross-motion for partial summary judgment, pursuant to CPLR §§3211(c) and 3212(b), is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

On June 21, 2007, plaintiff obtained a judgment in the amount of \$165,809.80 against a non-party, Dover Enterprises, Inc. (hereinafter referred to as “Dover”). Plaintiff alleges that the sole officers of said corporation were defendants Dorothy Yamali, Isaac Yamail, and Joseph Yamali. Plaintiff alleges within her complaint that between January 13, 2004 and February 4, 2005, Dover received payments totaling not less than \$97,500 and conveyed not less than \$96,500 to defendant Dorothy Yamali. Plaintiff annexes cancelled checks, dating from January 13, 2004 to February 4, 2005, to her complaint. In addition, plaintiff alleges that on December

27, 2003, the sum of \$14,210.67 was conveyed to Dorothy Yamali, despite allegedly being owed to Dover. While plaintiff alleges that money due to Dover was conveyed to all three defendants, the plaintiff makes no specific allegations within her complaint regarding transfers of money to defendants Joseph Yamali or Isaac Yamali.

Plaintiff filed her complaint on June 30, 2011, but the latest fraudulent transfer alleged within her complaint dates February 4, 2005. Plaintiff's first, second, third, and fourth causes of action allege that the defendants made constructive fraudulent transfers, or aided and abetted the constructive fraudulent transfers, in violation of Debtor Creditor Law Sections 273 and 273-a. Claims based on constructive fraud are subject to the six year statute of limitations period set forth in CPLR §213(1), which runs from the time of the fraud or conveyance. (*See, Liberty Co. v. Boyle*, 272 A.D.2d 380, 708 N.Y.S.2d 122 (2d Dept. 2000); *Arrathoon v. East N.Y. Savings Bank*, 169 A.D.2d 804 (2d Dept. 1991), *lv to appeal denied* 77 N.Y.2d 808, 573 N.E.2d 576 (1991)). The two-year discovery provisions which can extend the statute of limitations from a six year period to two years from the date of discovery of the fraudulent act does not apply to constructive fraud. (*Monaco v. N.Y. Univ. Med. Ctr.*, 213 A.D.2d 167, 623 N.Y.S.2d 566 (1<sup>st</sup> Dept. 1995), *lv. to appeal dismissed in part, den. in part* 86 N.Y.2d 882, 659 N.E.2d 767 (1995); *Arrathoon v. East N.Y. Savings Bank*, 169 A.D.2d 804 (2d Dept. 1991), *lv to appeal denied* 77 N.Y.2d 808, 573 N.E.2d 576 (1991)). As the transfers alleged in the complaint took place at the latest date of February 4, 2005, the six year statute of limitations has run for plaintiff to bring her first, second, third, and fourth causes of action.

Plaintiff's fifth and sixth causes of action allege that the defendants made actual fraudulent transfers, or aided and abetted the actual fraudulent transfers, in violation of Debtor Creditor Law Section 276. It is well settled that "a cause of action by a judgment creditor to set aside a fraudulent conveyance is governed by the six-year statute of limitations for causes of action alleging fraud, which commences to run at the time the allegedly fraudulent conveyance occurs: where actual fraud is alleged, the statute of limitations is six years from the fraudulent transfer or two years from the time the fraud was discovered or could have been discovered with reasonable diligence." (*Island Holding, LLC v. O'Brien*, 6 A.D.3d 498, 755 N.Y.S.2d 759 (2d Dept. 2004) *lv. to appeal den.* 4 N.Y.3d 701, 824 N.E.2d 48 (2004); *see also, Hillman v. City of New York*, 263 A.D.2d 529, 693 N.Y.S.2d 224 (2d Dept. 1999), *lv to appeal den.*, 94 N.Y.2d 759, 727 N.E.2d 577 (2d Dept. 2000)). As the judgment in this matter was obtained on June 21, 2007, plaintiff could have discovered the alleged fraudulent transfer shortly thereafter through reasonable diligence by the use of post-judgment discovery. Plaintiff served an information

subpoena on or about July 9, 2007, but never sought enforcement of same until two years thereafter. In an order by Justice Marilyn G. Diamond, dated June 24, 2009, Justice Diamond held that “plaintiff has inexplicably taken almost two years after the issuance of these subpoenas to seek their enforcement.” It strains credibility that the plaintiff could not have discovered the alleged fraudulent transfers shortly after the judgment was awarded in June 2007. Accordingly, the plaintiff’s fifth and sixth causes of action sounding in actual fraud were asserted more than six years after the allegedly fraudulent conveyances and more than two years after the plaintiff could have discovered the alleged fraud with reasonable diligence.

Plaintiff’s ninth cause of action seeking a declaratory judgment that plaintiff has a lien on real property owned by defendant Dorothy Yamali is also barred by the statute of limitations. In order to determine the statute of limitations applicable to a particular declaratory judgment action, the court must examine the substance of that action to identify the relationship out of which the claim arises and the relief sought. (*Martin Goldman, LLC v. Yonkers Industrial Development Agency*, 12 A.D.3d 646, 785 N.Y.S.2d 517 (2d Dept. 2004), *lv to appeal dismissed* 4 N.Y.3d 861 (2005)). If the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action. (*Id.*). If there is no other form of proceeding, the six year time period of CPLR §213(1) will apply. (*Id.*). Accordingly, plaintiff’s ninth cause of action is also time barred.

Plaintiff’s tenth cause of action for unjust enrichment is also time barred by the applicable six year statute of limitations. (See, CPLR §213(1); *Congregation Yetev Lev D’Satmar, Inc. v. 26 Adar N.B. Corp.*, 192 A.D.2d 501, 596 N.Y.S.2d 435 (2d Dept. 1993)). A claim for unjust enrichment accrues upon the occurrence of the alleged wrongful act giving rise to a duty of restitution. (*Id.*).

Plaintiff’s seventh cause of action for defendants’ violation of a “trust fund doctrine” alleges that the defendants have breached their duty to hold the assets of Dover in trust to satisfy the note and the judgment. The application of the trust fund doctrine customarily has been for the purpose of imposing liability on corporate directors or transferees for wrongful dissipation of assets of an insolvent corporation, in actions later brought by court-appointed receivers, trustees in bankruptcy or judgment creditors. (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 N.Y.2d 541, 729 N.E.2d 683 (2000)). With respect to the possible application of the trust fund doctrine, the general rule is that a simple contract creditor may not invoke the doctrine to reach transferred assets before exhausting legal remedies by obtaining judgment on the debt and having

execution returned unsatisfied. (*Id.*) As the latest alleged fraudulent transfers took place in 2005, prior to the award of judgment, and as the plaintiff has not had an execution returned, no cause of action lies in a violation of the "trust fund doctrine."

Finally, plaintiff's eighth cause of action which seeks a piercing of the corporate veil to hold the defendants personally liable for the judgment against Dover is dismissed, as piercing the corporate veil is not an independent cause of action. It is an equitable procedural device. (*See, State v. Easton*, 169 Misc.2d 282, 647 N.Y.S.2d 904 (Sup. Ct. Albany Cty. 1995)(citing, *Morris v. Dep't of Taxation and Finance*, 82 N.Y.2d 135, 623 N.E.2d 1157 (1993)). In order to pierce the corporate veil, a party must show that (1) the owners exercised complete domination of the corporation; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury. (*Morris v. Dep't of Taxation and Finance*, 82 N.Y.2d 135, 623 N.E.2d 1157 (1993)). As the plaintiff's causes of action sounding in fraud are barred by the applicable statute of limitations, the plaintiff cannot show that the defendants' alleged domination of Dover was used to commit a fraud, and there can be no basis to pierce the corporate veil.

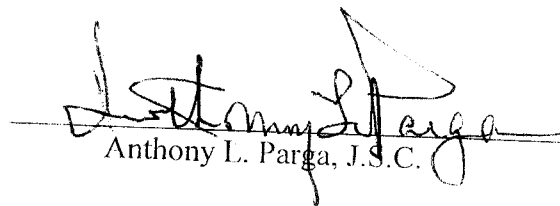
In plaintiff's cross-motion, she contends that there were additional transfers of money to the defendants which were not alleged within her complaint and contends that claims regarding said transfers are not time barred. A fraudulent transfer complaint must identify the alleged transfers at issue and cannot simply allude generally to alleged transfers that may have taken place. (*See, Syllman v. Calleo Dev. Corp.*, 290 A.D.2d 209, 736 N.Y.S.2d 318 (1<sup>st</sup> Dept. 2002)). In addition, plaintiff took virtually no action after being awarded judgment on June 21, 2007 to timely discover the alleged fraudulent transfers through reasonable diligence.

Accordingly, plaintiff's complaint is dismissed and the Court need not address the remainder of the parties' contentions.

Dated: November 22, 2011

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Anthony L. Parga, J.S.C.

**ENTERED**  
NOV 28 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE