

<b>Patsy E. Lomangino Revocable Trust Dated 10/1/2006 v McClintock</b>
2011 NY Slip Op 33660(U)
August 10, 2011
Supreme Court, 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**

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**PATSY E. LOMANGINO REVOCABLE  
TRUST DATED 10/1/2006,**

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

**Plaintiff,**

**Index No: 014210-10**

**-against-**

**Motion Seq. No: 2  
Submission Date: 6/21/11**

**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, Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition and Exhibit.....X**

This matter is before the Court for decision on the motion filed by Defendant Metropolitan Paper Recycling, Inc. ("Metropolitan") on February 16, 2011 and submitted on June 21, 2011, following oral argument before the Court. For the reasons set forth below, the Court grants Metropolitan's motion for reargument and, upon that reargument, grants Metropolitan's motion to dismiss the Complaint against it.

## BACKGROUND

### A. Relief Sought

Defendant Metropolitan moves for an Order, pursuant to CPLR § 2221(d), granting partial reargument of the Court's decision dated January 26, 2011 ("Prior Decision")<sup>1</sup> and, upon reargument, granting dismissal of the claims against Metropolitan, pursuant to CPLR § 3211(a)(1).

Plaintiff Patsy E. Lomangino Revocable Trust Dated 10/1/2006 ("Plaintiff") opposes Metropolitan's motion for reargument.

### B. The Parties' History

The Prior Decision sets forth the parties' history at length, and the Court incorporates the Prior Decision herein by reference.

As noted in the Prior Decision, the Complaint 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 ("Note"). 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 participated in 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 with the intent to defraud Plaintiff, a creditor with respect to the Note.

In the Prior Decision, the Court granted Defendants' motion ("Prior Motion") to the extent that the Court dismissed the second cause of action as asserted against Defendant McClintock, based on its conclusion that Plaintiff had not demonstrated that McClintock was either a transferee of the assets or a beneficiary of the conveyance. The Court, however, declined to dismiss the second cause of action as asserted against Defendant Metropolitan, based on its conclusion that there existed a triable issue of fact as to whether Delta received fair consideration for transferring the assets to Metropolitan to secure the antecedent debt of

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<sup>1</sup> The Prior Decision states that it was decided on January 26, 2010, but it was in fact decided on January 26, 2011.

Metropolitan, which could not be determined based on the documentary evidence before the Court.

C. The Parties' Positions

Defendant Metropolitan notes, preliminarily, that the Complaint does not set forth the legal theory for Plaintiff's second cause of action against Metropolitan, except for a "vague reference" (Metropolitan Memorandum of Law at p. 1) to the transaction having violated the rules of the New York City Business Integrity Commission ("Integrity Commission"). Metropolitan proceeds, however, to analyze the sufficiency of the Complaint based on violations of §§ 273 and 276 of the Debtor and Creditor Law ("DCL"), as articulated by Plaintiff in opposition to the Prior Motion.

Metropolitan submits that, with respect to the sufficiency of allegations under DCL § 273, if a defendant provides documentary proof demonstrating fair consideration for the debt, the burden shifts to the plaintiff to raise a triable issue. Moreover, if plaintiff fails to plead any of the traditional "badges of fraud" that would give rise to an inference of actual fraudulent intent, a conclusory assertion of fraud is insufficient, and the DCL § 276 claim must be dismissed.

Metropolitan contends that, in its Prior Motion, it established that the assets of Delta were transferred to Metropolitan in satisfaction of a \$1,526,660 antecedent debt owed by Delta to Metropolitan. Metropolitan provided documentary evidence including 1) a lease between Metropolitan as landlord and Delta as tenant, 2) a tabulation of every charge and invoice, 3) the UCC-1 filing securing Metropolitan's interest in Delta's assets, 4) the Forbearance Agreement between Delta and Metropolitan, and 5) the Collateral Retention Agreement pursuant to which Metropolitan accepted a surrender of the collateral in return for marking Delta's debt as satisfied. Metropolitan also submits that it established that, because Delta and Metropolitan were separate and independent companies, the "badges of fraud" necessary to sustain Plaintiff's cause of action did not exist.

Plaintiff opposes Metropolitan's argument, submitting that Plaintiff has alleged the necessary badges of fraud, including allegations that 1) vehicles and other assets of Delta were transferred to Metropolitan; 2) customer routes and payments were diverted from Delta to Metropolitan, for little or no consideration and in violation of the Integrity Commission rules; and 3) these transfers occurred when Plaintiff had threatened litigation against Delta, and caused

[\* 4]

Delta to become insolvent at or about the time of the transfers. At oral argument before the Court, Metropolitan's counsel noted that, as demonstrated by documentation previously provided by Defendants, the Integrity Commission declined to take any action in response to Plaintiff's complaint (Oral Arg. Transcript at pp. 10 -11).

#### RULING OF THE COURT

It is well settled that a motion for reargument is addressed to the sound discretion of the Court, and may be granted upon a showing that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issues previously decided or to present arguments different from those originally presented. *Id.*; *Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992). *Accord Matter of Carter*, 916 N.Y.S.2d 821 (2d Dept. 2011).

The Court is persuaded that, in light of the holdings in *Ultramar Energy Limited v. Chase Manhattan Bank, N.A.*, 191 A.D.2d 86 (1<sup>st</sup> Dept. 1993), and other cases cited by Metropolitan, the Court misapplied a controlling principle of law in denying Metropolitan's prior motion to dismiss. As noted in the Prior Decision, 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. *See Macdraw, Inc. v. The CIT Group Equipment Financing, Inc.*, 157 F.3d 956, 964 (2d Cir. 1997), quoting *Ultramar, supra*, at 91.

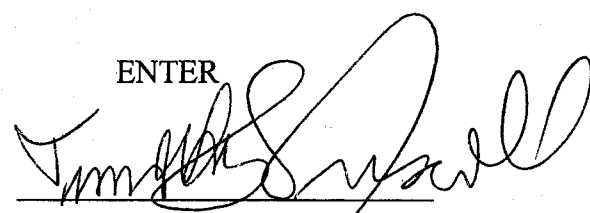
Upon reargument, the Court grants Metropolitan's motion to dismiss the Complaint as asserted against it. The Court now concludes that, in light of Metropolitan having demonstrated that Delta received fair consideration for transferring the assets to Metropolitan to secure the antecedent debt of Metropolitan, and given Plaintiff's failure to raise a triable issue of fact that the transfer was made without fair consideration, Plaintiff's claim against Metropolitan pursuant to DCL § 273 is not viable. Moreover, Plaintiff's claim against Metropolitan pursuant to DCL § 276 cannot survive, in light of Plaintiff's failure adequately to plead "badges of fraud" that would permit the inference of fraud.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

In light of the dismissal of the action against Metropolitan, and the fact that there is no pending motion before the Court with respect to Defendant Delta, counsel shall not be required to appear before the Court on September 8, 2011 as previously directed.

DATED: Mineola, NY  
August 10, 2011

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

**ENTERED**  
AUG 18 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE