[*1] SCANNED ON 6/8/2012

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

D

PRESENT : DONNA M. MILLS **PART** 58

Justice

Estate of Lorette Jolles Shefner by and through its executors Mr. Barry Shefner, Ms. Ariela Braun, and Mr. Leon Miller and the Ariela Braun 2002 Family Trust,

Plaintiffs,

-v-

Galeric Jacques de la Beraudiere, Jacques de la Beraudiere, and John Does 1-10,

Defendants.

INDEX NO. 112525/11

MOTION DATE _____

MOTION SEQ. NO. 001, 002, 003

MOTION CAL NO. _____

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

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2, 7, 8, 13
Answering Affidavits-- Exhibits	3, 4, 9, 10, 14, 15
Replying Affidavits	5, 6, 11, 12, 16

CROSS-MOTION: _____ YES ✓ NO

Upon the foregoing papers, it is ordered that this motion is:

FILED

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION. JUN 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/31/12

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

----------X

Estate of Lorette Jolles Shefner by and through its executors Mr. Barry Shefner, Ms. Ariela Braun, and Mr. Leon Miller and the Ariela Braun 2002 Family Trust,

Plaintiffs,

-against-

Galerie Jacques de la Béraudière, Jacques de la Béraudière, and John Does 1-10,

Defendants.

----------X

Index Number:

112525/2011

Donna Mills, J.:

Plaintiffs move, pursuant to CPLR 6211, to confirm an ex-parte order of attachment dated November 14, 2001 (the Attachment Order). Defendants move, pursuant to CPLR 327, to dismiss the complaint. Yves Bouvier (Bouvier) moves, pursuant to CPLR 1012 (a), or alternatively, CPLR 1013, for leave to intervene as a party defendant, based upon his alleged ownership interest in a painting by the artist Willem de Kooning entitled *Woman in the Garden, II, 1967* (the de Kooning Painting). The de Kooning Painting was attached pursuant to the Attachment Order. The motions are consolidated for disposition and decided as noted below.

Parties and Procedural Background

Plaintiffs are the Estate of Lorette Jolles Shefner (Jolles)

by its executors, Jolles's son Barry Shefner (Barry), Jolles's daughter Ariela Braun (Ariela), Leon Miller, and a trust set up for Ariela's benefit. Galerie Jacques de la Béraudière (Galerie Jacques) is an art gallery located in Geneva, Switzerland that had the de Kooning Painting in an art show at the Park Avenue Armory, located at 643 Park Avenue, New York, New York on November 10 and 11, 2011 (complaint, ¶¶ 46-47; Susan Shefner [Susan] affidavit dated November 11, 2011, ¶¶ 3-4). Jacques de la Béraudière (Jacques) is the owner of Galerie Jacques and he is an art dealer and a French citizen, residing in Geneva, Switzerland (Jacques affidavit, ¶¶ 2-4).

Yves Bouvier (Bouvier) has an allegedly nominal one-share interest in Galerie Jacques and has a business relationship with Jacques (*id.*, ¶ 3). He asserts that he is the owner of the de Kooning Painting and that, through an entity known as Diva Fine Arts, S. A. (Diva) of which he was the sole director and beneficial owner, he placed the de Kooning Painting, along with other artworks, with the Galerie Jacques on a consignment basis for showing for potential sale (Bouvier affidavit dated December 22, 2011, ¶¶ 2, 6-7, 9).

Galerie Cazeau-Béraudière (Galerie Cazeau) was an art gallery located in Paris, France that was allegedly involved in a scheme that induced Jolles to sell a painting by the artist Chaim Soutine entitled *Piece of Beef* (the Soutine Painting) for an

artificially low price (complaint, ¶ 12). Jacques was a one-third minority shareholder and co-founder of Galerie Cazeau with Phillipe Cazeau (Cazeau), the two-thirds shareholder, and plaintiffs allege that, after Cazeau's death on August 29, 2007, Jacques continued its business as Galerie Jacques by fraudulent transfers of various artworks including the de Kooning Painting (*id.*, ¶¶ 13, 61-63; Jacques affidavit, ¶¶ 9-10).

On May 12, 2008, plaintiffs commenced an action in the United States District Court for the Southern District of New York entitled *The Estate of Lorette Jolles Shefner by and through its executors Mr. Barry Shefner, Ms. Ariela Braun, and Mr. Leon Miller, Barry Shefner and the Ariela Braun 2002 Family Trust against Maurice Tuchman, Esti Dunow, the Galerie Cazeau-Béraudière, the National Gallery of Art, Lontrel Trading, and John Does 1-10*, index number 08 CIV 04443 (the Federal Action). In the Federal Action, plaintiffs alleged that Maurice Tuchman (Tuchman) and Esti Dunow (Dunow), experts in the works of Chaim Soutine, in association with Galerie Cazeau and Lontrel Trading, induced Jolles to sell the Soutine Painting in May 2004 for $1 million when it was allegedly worth between $4 million and $6 million (Federal Action complaint ¶¶ 1, 16, 27 78, 90). Tuchman and Dunow resold the Soutine Painting to the National Gallery of Art (the National Gallery) for $2 million in November 2004 and plaintiffs also sought its return from the National Gallery (*id.*,

[* 5]

¶¶ 101-102, 153). The Federal Action was settled in part by the National Gallery, Tuchman and Dunow, by a stipulation so-ordered by Judge Laura Taylor Swain on May 13, 2009. United States Magistrate Judge Douglas Eaton had previously noted in his order of November 14, 2008 that Lontrel Trading and Galerie Cazeau had defaulted and noted that Cazeau's widow had sent a letter to the court on October 24, 2008 stating that she was the liquidator of Cazeau's estate and that Galerie Cazeau would not defend itself in the Federal Action due to its "financial situation".

After the partial settlement, plaintiffs moved for default judgment against the non-settling defendants and Judge Swain, by order dated December 10, 2009 (the Default Order), granted plaintiffs default judgement in the principal amount of $975,000 (Default Order, at 3-4), finding that this amount was the difference between the $1 million that Jolles received for the Soutine Painting and the $1,975,000 that plaintiffs agreed to pay the National Gallery to recover title to the Soutine Painting and that, consequently, this amount would "restore Plaintiffs to their pre-sale position" (*id.* at 3). Pursuant to the Default Order, a default judgement (the Default Judgement) was entered on December 14, 2009.

On November 3, 2011, plaintiffs filed a summons with notice with the County Clerk, commencing this action and the Attachment Order was signed on November 14, 2011. On November 23, 2011,

plaintiffs filed their motion to confirm the Attachment Order, together with the complaint. On December 22, 2011, Bouvier served his motion for leave to intervene, contending that he was the true owner of the de Kooning Painting, and that, therefore, he had an interest in the outcome of this action. On February 10, 2012, defendants moved to dismiss this action based upon forum non conveniens.

Parties' Allegations

Plaintiffs allege that, in the Default Order in the Federal Action and the Default Judgement, they established that Galerie Cazeau was involved in Tuchman and Dunow's scheme to sell the Soutine Painting at an artificially low price and that, after the Federal Action was commenced in May 2008, Jacques established the Galerie Jacques in July 2008 as a successor to Galerie Cazeau (complaint, ¶¶ 22-24, 61-63). They assert that various artworks that had been previously displayed by Galerie Cazeau were immediately thereafter displayed by Galerie Jacques and note Jacques's prior significant ownership interest in Galerie Cazeau (*id.*, ¶ 24; Susan affidavit dated November 11, 2011, ¶¶ 4-5). The complaint alleges successor liability and violation of Debtor Creditor Law (DCL) §§ 273-a and 276 for transfer without fair consideration and fraudulent transfer.

Susan states that she went to the Park Avenue Armory on November 10 and 11, 2011, where she saw the de Kooning Painting

and that Paula Rey (Rey), Galerie Jacques's assistant director, told her that, despite the written provenance indicating that the de Kooning Painting was owned by a private collection and on consignment, it was actually owned by the Galerie Jacques (Susan affidavit dated January 31, 2012, ¶¶ 3-6). Plaintiffs state that the de Kooning Painting was in the process of being flown out of the jurisdiction to Geneva, Switzerland when the Attachment Order was served and that the Attachment Order should be confirmed, so that this asset is available to secure a favorable judgement in this action.

Bouvier asserts that he is the true owner of the de Kooning Painting, that it was only given to Galerie Jacques on consignment for potential sale and that, accordingly, it should not be attached and that he should be permitted to intervene to defend his interest in the de Kooning Painting (Bouvier affidavit dated December 22, 2011, ¶¶ 6-7). He alleges that the de Kooning Painting was purchased by Diva from Vivian Horan Fine Art, LLC on March 22, 2006 and that, when Diva was liquidated on November 28, 2011, he took over all Diva's assets (*id.*, ¶¶ 6-7).

Jacques and Galerie Jacques contend that Bouvier has only a nominal interest in Galerie Jacques, that Jacques worked with Cazeau as an art dealer from 1991 until Cazeau's death on August 29, 2007 and that Jacques had an approximate one-third interest in Galerie Cazeau (Jacques affidavit, ¶¶ 3, 5, 8). They state

that Cazeau had all the decision-making authority since he was the owner of approximately two-thirds of the shares and that, after Cazeau's death, Jacques formed the Galerie Jacques and relocated to Geneva, Switzerland (*id.*, ¶¶ 8-11). They further state that much of the artwork shown by both Galerie Cazeau and Galerie Jacques was shown on consignment, that this is common in the art world and that the de Kooning Painting was never owned by either Galerie Cazeau or Galerie Jacques, but by Diva, and it was on consignment for potential sale on November 10 and 11, 2011 when it was exhibited at the Park Avenue Armory (*id.*, ¶¶ 16-17, 22, 25). They also state that the de Kooning Painting was being shipped back to Switzerland in the ordinary course of business and not to remove it from this court's jurisdiction (*id.*, ¶ 31).

Defendants also note that Jolles lived in Montreal, Canada, that Barry and Leon Miller live in Montreal, Canada and that Jacques lives in, and Galerie Jacques is located, in Geneva, Switzerland. They state the purported wrongdoing of fraudulent transfer of Galerie Cazeau's assets would have occurred in Paris, France and that, accordingly, there is no real connection to New York State and that the action should be dismissed pursuant to CPLR 327.

Plaintiffs assert that Bouvier's ownership interest in the de Kooning Painting is dubious, noting his relationship with Galerie Jacques and that the papers Bouvier submitted on Diva's

dissolution indicated that it had no assets and no liabilities as of October 25, 2011, in contrast to the claim that Diva owned the de Kooning Painting.

Similarly, Jacques and Galerie Jacques note that plaintiffs' evidence of a purported admission by Rey that Galerie Jacques owned the de Kooning Painting is an affidavit by Susan, who is the wife of Barry and, therefore, this statement may be affected by her interest in this action.

Attachment

CPLR 6211 (b) provides that on a motion to confirm an attachment, the provisions of CPLR 6223 (b) shall apply and, consequently, "the plaintiff shall have the burden of establishing the grounds for the attachment, the need for continuing the levy and the probability that he will succeed on the merits" (CPLR 6223 [b]).

CPLR 6201 provides that the grounds for an attachment include an action when "the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or ... the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, ... or secreted property, or removed it from the state or is about to do [so]."

"Attachment is considered a harsh remedy and the statute is

strictly construed in favor of those against whom it may be employed" (*Glazer & Gottlieb v Nachman*, 234 AD2d 105, 105 [1st Dept 1996]; *Michaels Elec. Supply Corp. v Trott Elec.*, 231 AD2d 695 [2d Dept 1996]). This is so because, while attachment secures property that can be used to pay a judgment, it also "keeps the debtor away from his property or, at least, the free use [of it]" (*Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 538 [2009]). Allegations merely "'raising a suspicion of an intent to defraud'" are insufficient to sustain an attachment (*Mitchell v Fidelity Borrowing LLC*, 34 AD3d 366, 366 [1st Dept 2006] [internal citation omitted]). Rather, plaintiff must present "evidentiary facts, as opposed to conclusions" (*Benedict v Browne*, 289 AD2d 433, 433 [2d Dept 2001]). However, in establishing the grounds for an attachment and the likelihood of success on the merits, "plaintiff must be given the benefit of all legitimate inferences and deductions that can be made from the facts stated" (*Considar, Inc. v Redi Corp. Establishment*, 238 AD2d 111, 111 [1st Dept 1997]; *see also Olbi USA v Agapov*, 283 AD2d 227 [1st Dept 2001]).

Successor Liability

"'A corporation may be held liable for the torts of its predecessor if ... the purchasing corporation was a mere continuation of the selling corporation, or ... the transaction [was] entered into fraudulently to escape such obligations'"

(*Grant-Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984] [internal citation omitted]).

Fraudulent Conveyance

DCL § 273-a provides:

> "Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."

A party claiming fraudulent conveyance under DCL § 273-a must allege insolvency and lack of fair consideration for the transfer (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]). Whether the conveyance renders a debtor insolvent and whether fair consideration was paid are "generally questions of fact which must be determined under the circumstances of the particular case" (*Joslin v Lopez*, 309 AD2d 837, 838 [2nd Dept 2003]).

DCL § 276 provides:

> "Every 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."

A plaintiff seeking "to establish actual fraud under [DCL § 276] ... [may seek] to have the conveyance set aside ... and the standard for such proof is clear and convincing evidence" (*Marine Midland Bank v Murkoff*, 120 AD2d 122, 126 [2d Dept 1986], *appeal dismissed* 69 NY2d 875 [1987]).

Intervention

CPLR 1012 (a) provides that a party may intervene as of right "[w]hen the action involves the disposition or distribution of, ... or a claim for damages for injury to, property, and the person may be affected adversely by the judgment." CPLR 1013 provides that "any person may be permitted to intervene in any action ... in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact."

"Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action" (*Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]). Moreover, "[w]hether intervention is sought as a matter of right under CPLR 1012 [a], or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted 'where the intervenor has a real and substantial interest in the outcome of the proceedings'" (*Global Team Vernon, LLC v Vernon Realty Holding, LLC*, 93 AD3d

819, 820 [2d Dept 2012] [internal citations omitted]).

Forum Non Conveniens

CPLR 327 provides that the court may dismiss an action "[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum."

"The burden rests upon the defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). The court must consider and balance the various factors including "the burden on the New York courts, the potential hardship to the defendant, ... the unavailability of an alternative forum ... [the parties' residence] and that the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction. ... [But,] [n]o one factor is controlling" (*id.*). Where there is "no substantial connection to this State", dismissal based upon forum non conveniens is warranted (*Blueye Nav. v Den Norske Bank*, 239 AD2d 192, 192 [1st Dept 1997]). However, "'[g]enerally, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'" (*OrthoTec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702, 702 [1st Dept 2011] [internal citation omitted]).

Analysis

Turning first to defendants' motion to dismiss based upon forum non conveniens, the court notes that Ariela is a New York resident (complaint, ¶ 16). While the other plaintiffs reside in Montreal, Canada and defendants reside in Geneva, Switzerland and defendants assert that the purportedly wrongful conduct of fraudulent transfer of Galerie Cazeau's assets to Galere Jacques would have occurred in Paris, France, plaintiffs have alleged that Galerie Cazeau was involved in wrongful conduct leading to the artificially low purchase price of the Soutine Painting by arranging for its viewing at the Hotel Plaza Athenée in New York, New York and that this conduct is attributable to Galerie Jacques as its successor (*id.*, ¶¶ 15, 84). Balancing all the factors and considering that no one factor is controlling (*Islamic Republic*, 62 NY2d at 479), defendants have not shown that "the balance [of factors] is strongly in [their] favor" and, therefore, their motion to dismiss the complaint pursuant to CPLR 327 is denied (*OrthoTec*, 84 AD3d at 702; *American BankNote Corp. v Daniele*, 45 AD3d 338, 339 [1st Dept 2007]).

On Bouvier's application for leave to intervene, plaintiffs contend that he has no bona fide interest in the de Kooning Painting and, consequently, no interest in the litigation. However, he asserts that he is its true owner and, if plaintiffs prevail in this action, they could seek to sell it to satisfy a favorable judgment. While they raise questions as to his

relationship to Galerie Jacques, he should have the opportunity to establish his ownership interest and, therefore, to intervene in this action, since his alleged ownership interest in the de Kooning Painting would constitute a "real, substantial interest in the outcome of this litigation" (*Yuppie Puppy*, 77 AD3d at 201). Accordingly, Bouvier's motion for leave to intervene as a party defendant is granted.

Finally, the court turns to the issue of plaintiffs' motion to confirm the Attachment Order. Plaintiffs have presented evidence that the de Kooning Painting is owned by Galerie Jacques, through the purported admission of Rey to Susan (Susan affidavit dated January 31, 2012, ¶¶ 3-6). They have also presented evidence of the relationship between Galerie Jacques and Galerie Cazeau, the relationship between Bouvier and Galerie Jacques, the fact that Diva's dissolution papers indicated that it had no assets when it filed for dissolution on October 25, 2011, the fact that Galerie Jacques was only established in July 2008, shortly after the Federal Action was commenced and the fact that the de Kooning Painting was in the process of being shipped out of this court's jurisdiction to Geneva, Switzerland when the Attachment Order was served and the de Koonong painting was attached.

Defendants in opposition assert that Bouvier, and prior to its dissolution Diva, owned the de Kooning Painting. They

further point out that it is common practice in the art world for art galleries to exhibit works for potential sale on a consignment basis. They also note that the fact that Susan is the wife of Barry renders her testimony self-interested and undermines its credibility.

"Affidavits raising mere suspicions of an intent to defraud" (*Shisgal v Brown*, 3 AD3d 434, 434 [1st Dept 2004]) or "conclusory allegations" (*P.T. Wanderer Assoc. v Talcott Communications Corp.*, 111 AD2d 55, 56 [1st Dept 1985]) are insufficient to warrant confirmation of an attachment. However, in this case, plaintiffs have shown more than mere suspicions. Rather, they have presented strands of evidence that, woven together into a tapestry with "all legitimate inferences and deductions" leads to a pattern of intercorporate dealings and relationships between Galerie Cazeau, Galerie Jacques, Jacques and Bouvier that together meet the standard of likely success on the merits on plaintiffs' claims for successor liability and fraudulent conveyances and that, absent attachment of the de Kooning Painting, might leave plaintiffs without any assets against which to recover in the event of a favorable judgement (*Considar*, 238 AD2d at 111; *Bogoni v Friedlander*, 176 AD2d 527 [1st Dept 1991]). Therefore, plaintiffs' motion to confirm the Attachment Order is granted.

Settle order accordingly.

Dated: May 31 , 2012

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.