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| <b>Shefner v Jacques de la Beraudiere</b>                                                                                                                                                                                                                        |
| 2013 NY Slip Op 32934(U)                                                                                                                                                                                                                                         |
| November 12, 2013                                                                                                                                                                                                                                                |
| Sup Ct, New York County                                                                                                                                                                                                                                          |
| Docket Number: 112525/2011                                                                                                                                                                                                                                       |
| Judge: Donna M. Mills                                                                                                                                                                                                                                            |
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS

*Justice*

PART 58

ESTATE OF LORETTE JOLLES SHEFNER, et al.,

Plaintiffs,

-against-

GALERIE JACQUES de la BERAUDIERE, et al.,  
Defendants.

INDEX NO. 112525/11

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 007

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....

1-5

Answering Affidavits- Exhibits \_\_\_\_\_

6

Replying Affidavits \_\_\_\_\_

7-8

CROSS-MOTION: \_\_\_\_\_ YES ☒ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 11/12/13

Check one: \_\_\_\_\_ FINAL DISPOSITION

  
**DONNA M. MILLS, J.S.C.**

☒ 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,

Index  
Number:

-against-

112525/2011

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

Defendants.

-----X  
**Donna M. Mills, J.:**

Yves Bouvier (Bouvier) moves, pursuant to CPLR 3211 (a) to dismiss plaintiffs' complaint against him, or alternatively, to strike paragraphs 84 through 94 of the amended complaint, pursuant to CPLR 3024 (b). Jacques de la Béraudière (Jacques) and Galerie Jacques de la Béraudière (Galerie Jacques) move, pursuant to CPLR 3024 (b) to strike paragraphs 84 through 94 of the amended complaint. The motions are consolidated for disposition and decided as noted below.

**Parties and Underlying Background**

The underlying facts are set forth in the court's order dated May 31, 2012 (the May 2012 Order) at pages 1 through 8 and, therefore, need not be repeated in detail. In essence,

plaintiffs allege that the defendants acted to fraudulently induce Lorette Jolles Shefner (Jolles) to sell a Chaim Soutine painting for an artificially low price (amended complaint, ¶ 1). They further contend that Jacques, Galerie Jacques and Bouvier were acting in concert to disguise the true ownership of paintings exhibited by, and offered for sale, by Galerie Jacques for the purpose of avoiding successor liability of the alleged predecessor entity, Galerie Cazeau-Béraudière (Galerie Cazeau) (*id.*, ¶¶ 3-5, 7, 12-14). They also contend that Bouvier's claim of ownership of the de Kooning Painting was part of the overall fraudulent scheme (*id.*, ¶ 83). The court granted plaintiffs' motion to confirm the attachment of the de Kooning Painting, finding that they had shown a likely success on the merits on the claims of fraudulent conveyance and successor liability (May 2012 Order at 15).

Bouvier previously asserted that he was the true owner of the painting by the artist Willem de Kooning entitled *Woman in the Garden, II, 1967* (the de Kooning Painting) (May 2012 Order at 2). His motion to dismiss contends that, since the second and fourth causes of action allege that liability against him is based upon his assistance in the conveyance of the de Kooning Painting, these causes of action do not state a valid claim.

Bouvier interposed his answer on or about September 20, 2012. The amended complaint was served on or about October 1,

2012 and the action was stayed by stipulation dated January 15, 2013. Bouvier moved on August 9, 2013 to dismiss or, alternatively, to strike and Jacques and Galerie Jacques moved to strike on August 9, 2013. No explanation for the delay in seeking relief was presented.

### **Dismissal Standard**

In determining a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord them every possible favorable inference and determine whether the facts as alleged fit within any cognizable legal theory (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d

11, 19 [2005])).

**CPLR 3024 (b)**

CPLR 3024 (b) provides as follows:

"A party may move to strike any scandalous or prejudicial material unnecessarily inserted in a pleading."

CPLR 3024 (c) provides that "[a] notice of motion under this rule shall be served within twenty days after service of the challenged pleading."

"In reviewing a motion pursuant to CPLR 3024 [b] the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action" (*Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]; see also *New York City Health & Hosps. Corp. v St. Barnabas Community Health Plan*, 22 AD3d 391, 391 [1st Dept 2005]; *Rice v St. Luke's-Roosevelt Hosp. Ctr.*, 293 AD2d 258, 259 [1st Dept 2002])). Also, such a motion should be denied, if it is not made on a timely basis (*Cooper v Van Cortlandt Assoc.*, 54 AD2d 545, 546 [1st Dept 1976]; *Albemarle Theatre v Bayberry Realty Corp.*, 27 AD2d 172, 177-178 [1st Dept 1967])).

**Fraudulent Conveyance**

Debtor and Creditor Law (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 [2d 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]). Also, DCL § 273-a "cannot fairly be read as creating a remedy against nontransferees who ... are not alleged to have dominion or control over [the] assets or to have benefitted in any way from the conveyance" (*Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]; see also *Cahen-Vorburger v Vorburger*, 41 AD3d 281, 282 [1st Dept 2007]).

## Discussion

Bouvier contends that since the second and fourth causes of action base their claim against him on his allegedly aiding and abetting the conduct of the other defendants, plaintiffs have not stated a claim against him. He notes that DCL §§ 273-a and 276 do not "[create] a remedy against nontransferees" (*Federal Deposit*, 75 NY2d at 842; see also *Symbax, Inc. v Bingaman*, 219 AD2d 552, 553-554 [1st Dept 1995]). However, Bouvier has asserted that he is the true owner of the de Kooning Painting and plaintiffs claim that the "false claim of ownership is a part of [Jacques and Galerie Jacques's] scheme" (amended complaint, ¶ 83).

Accepting plaintiffs' allegations as true for the purpose of deciding the motion and giving them the appropriate favorable inferences proper on a motion directed at the pleadings, (*Goldman*, 5 NY3d at 570-571; *Goshen*, 98 NY2d at 326), plaintiffs have set forth a cognizable claim against Bouvier for his purported involvement in the alleged fraud since there is a claim that he had "dominion or control over [the asset] and [he] derived benefit from [the] conveyance" (*Blakeslee v Rabinor*, 182 AD2d 390, 391 [1st Dept 1992]). Plaintiffs will have a heavy burden since "the standard of proof as to a showing of fraudulent intent under the statute is that of clear and convincing evidence" (*Micalden Invs. S.A. v Guerrand-Hermes*, 30 AD3d 341,

343 [1st Dept 2006])). However, "[w]hether [the plaintiffs] can ultimately establish [their] allegations is not part of the calculus in determining a motion to dismiss" (*EBC, I*, 5 NY3d at 19). Accordingly, the portion of Bouvier's motion that seeks dismissal of the second and fourth causes of action is denied.

As to the purportedly scandalous and prejudicial material in paragraphs 84 through 94 of the amended complaint, plaintiffs' claim of fraudulent activity implicates conduct by Galerie Cazeau, the alleged predecessor entity, and by Diva BVI, allegedly an entity controlled by Bouvier and used by him to conceal the true ownership of paintings including the de Kooning Painting. The alleged conduct relates to whether art works were transferred for fair value or instead were transferred as part of a deceptive practice and consequently were fraudulent under DCL §§ 273-a and 276. Accordingly, the allegations in paragraphs 84 through 94 of the amended complaint are "relevant to a cause of action" (*Soumayah*, 41 AD3d at 392; *Rice*, 293 AD2d at 259). Also, the delay in seeking this relief warrants denial of the motion to strike (*Cooper*, 54 AD2d at 546). Consequently, the portion of Bouvier's motion to strike pursuant to CPLR 3024 (b) and Jacques and Galerie Jacques' motion to strike pursuant to CPLR 3024 (b) are denied.

**Order**

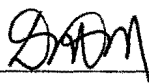
It is, therefore,

ORDERED that the motion of Yves Bouvier to dismiss the second and fourth causes of action or, alternatively, pursuant to CPLR 3024 (b), to strike paragraphs 84 through 94 of the amended complaint is denied; and it is further

ORDERED that the motion of Galerie Jacques de la Béraudière and Jacques de la Béraudière, pursuant to CPLR 3024 (b), to strike paragraphs 84 through 94 of the amended complaint is denied.

Dated: 11 / 12 , 2013

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.