SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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PENNY HART,

Plaintiff,

-against-

SEBASTIAN RAMETTA, ARNOLD CASALE, ROBERT BERTRAND AND JOHN DOES "1" through "10" said names being fictitious and unknown to Plaintiff, the person or parties intended being the person or parties if any, who have received property of non-party The Original Soupman, Inc. in violation of Sections 273, 274 and/or 276 of the New York State Debtor and Creditor Law,

Defendants.

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DECISION AND ORDER

Index No.: 114521/2011
Mot. Seq. No. 002

O. PETER SHERWOOD, J.:

Defendants Sebastian Rametta, Arnold Casale, and Robert Bertrand move, pursuant to CPLR 3211 (a) (7), to dismiss the second amended complaint (complaint).

The complaint, which asserts three causes of action for violation of, respectively, Debtor and Creditor Law (DCL) §§ 273, 274, and 276, alleges that: on or about April 11, 2007, plaintiff extended a $1 million loan, with a maturity date of April 17, 2008, to nonparty Soup Kitchen International, Inc. (SKII), and that, on or about June 17, 2008, she extended an additional loan to SKII, in the amount of $538,000 with a maturity date of June 17, 2009; at all relevant times, the named defendants were shareholders, officers, or directors of SKII; on or about December 30, 2009, at which time the two loans were in default, SKII entered into an "Assignment and Assumption Agreement" (Assignment Agreement") with nonparty The Original Soupman, Inc. (TOSI), pursuant to which SKII assigned and transferred substantially all of its assets and obligations to TOSI; at the time of that transfer, the named defendants were also the shareholders, officers, or directors of TOSI; and, on or about December 15, 2010, TOSI became a wholly owned subsidiary of nonparty Soupman, Inc. (Soupman). Soupman's 2011 10-K report (plaintiff's aff, exhibit D) notes that TOSI merged into OSM Merge, a Soupman subsidiary, and that all outstanding shares of OSM Merge were converted into Soupman stock. Subsequently, TOSI and its affiliate nonparty International Gourmet

Soups, Inc. (IGS) extended to plaintiff a "Secured Guaranty," dated May 20, 2011, guaranteeing payment of "all amounts when due to Lender under all indebtedness owed to Lender by SKII . . . ." Hart aff, exhibit A at 1. Plaintiff also entered into a "Forbearance Agreement" with TOSI, IGS, and Soupman, dated May 20 2011, pursuant to which, among other things, plaintiff agreed to forbear for a certain time from exercising against TOSI, IGS, or Soupman her rights under the loans to SKII, in exchange for 500,000 shares of Soupman common stock. Finally, in a "Keepwell Agreement," also dated May 20, 2011, Soupman and plaintiff agreed that, if TOSI and IGS proved unable to fulfill their obligations under the Secured Guaranty and the Forbearance Agreement, Soupman would use its best efforts to provide funding to those entities to enable them to comply with their obligations. Hart aff, exhibit C. Both the Forbearance Agreement and the Keepwell Agreement recite that, pursuant to the Assignment Agreement, TOSI agreed to be responsible for SKII's obligations to plaintiff.

The complaint further alleges that: (1) on or about November 1, 2011, defendants arranged a loan of $662,141 to themselves and other individuals from TOSI, without fair consideration, and that, subsequently, that loan was forgiven without consideration, at a time when "the Soupman entities" were operating with a substantial deficit and little, if any, capital; and (2) on or about November 18, 2011, defendants arranged for a TOSI franchise to be sold to a relative of defendant Rametta for $143,482 in cash and the extension of a loan by TOSI in the amount of $73,333, the price paid for the franchise was below fair market price, and, the outstanding balance of the loan was subsequently forgiven at the direction of defendants.

DCL § 273 provides:

> "Every conveyance made and every obligation incurred by a person who is or will be rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

DCL § 274 provides:

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

DCL § 276 provides:

> "Every conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

Plaintiff contends that she became a creditor of TOSI at the time of the Assignment Agreement. Defendants argue that, at the times of the transfers that are the basis of her claims, plaintiff was not a creditor of TOSI, but only of SKII. It is settled that, on a motion to dismiss a complaint for failure to state a cause of action, the allegations of the complaint are deemed to be true. *Sheila C. v Povich*, 11 AD3d 120, 122 (1st Dept 2004), citing *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Here, plaintiff's allegation is supported by the recitals in the Forbearance Agreement and the Keepwell Agreement. However, for the reason discussed below, the date upon which plaintiff became a creditor of TOSI is irrelevant to the disposition of the instant motion.

When a plaintiff submits an affidavit contradicting the essential allegations in his or her complaint, the complaint will be dismissed. *Schuit v Tree Line Mgt. Corp.*, 46 AD3d 405, 406 (1st Dept 2007), citing *LeBreton v Weiss*, 256 AD2d 47, 48 (1st Dept 1998). Here, plaintiff's affidavit in opposition to defendants' motion repeatedly states, citing Soupman's 2011 and 2012 10-K reports (exhibits D and E to plaintiff's aff), that Soupman, not TOSI, extended, and forgave, the loans about which plaintiff complains. *See* plaintiff's aff, ¶¶ 34, 38, 39, 41, 43, and 46. As noted above, plaintiff became a shareholder of Soupman pursuant to the Forbearance Agreement. She does not allege in the complaint, or state in her affidavit, that she has ever been a creditor of Soupman. Generally, a corporation is treated separately from its parent or subsidiary. *See Alexander & Alexander of New York, Inc. v Fritzen*, 114 AD2d 814 (1st Dept 1985), *affd* 68 NY2d 968 (1986). Because DCL §§ 273, 274, and 276 protect only creditors, or future creditors, of persons making certain conveyances, any transfers made by Soupman do not support plaintiff's claims under the DCL.

Accordingly, it is hereby

ORDERED that the motion of defendants Sebastian Rametta, Arnold Casale, and Robert Bertrand is granted and the complaint is dismissed with costs as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: March 31, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.