Palisades Tickets, Inc. v Daffner
2015 NY Slip Op 32055(U)
April 17, 2015
Supreme Court, New York County
Docket Number: 101690/12
Judge: Doris Ling-Cohan

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

IAS 115
4/21/15

PRESENT: Hon. Doris Ling-Cohan PART 36
Justice

Index Number : 101690/2012
PALISADES TICKETS
vs
DAFFNER, GERALD
Sequence Number : 002
DISMISS

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INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to ____, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits ____ | No(s). 4

Replying Affidavits ____ | No(s). 5

Upon the foregoing papers, it is ordered that this motion (Pre-answer) to dismiss is denied in accordance with the attached memorandum decision.

FILED
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COUNTY CLERK'S OFFICE

It is further ordered that the Clerk of Trial Support shall restore this case to "active" status, in accordance with the Appellate Division decision dated June 24, 2014. See Palisades Tickets, Inc. v. Daffner, 118 AD3d 619 (1st Dept 2014).

Dated: 4/17/15

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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PALISADES TICKETS, INC.,

Index No. 101690/12

Plaintiff

- against -

Motion Seq. No.: 002

GERALD DAFFNER,

Defendant.

DORIS LING-COHAN, J.:

Defendant Gerald Daffner moves, pursuant to CPLR 3211 (a) (5) and (a) (7), for dismissal of the amended complaint.

Background

The original complaint (now dismissed) alleged as follows: plaintiff, Palisades Tickets, Inc., is a corporation licensed to do business in the State of New York (complaint, ¶ 1). Plaintiff is a judgment creditor in a related lawsuit in this Court, entitled *Palisades Tickets, Inc. v Michael Petrillo*, Index Number 604228/06 (Related Action) (*id.*, ¶ 2).

A judgment (Judgment) was entered in the Related Action on May 17, 2007, in favor of plaintiff and against Michael Petrillo, Helane Karon David, Trinity Ticket Tours Travel, Ltd, Triple Crown Entertainment LLC, Mainline Consultants Ltd, and Event Corporation (collectively, Judgment Debtors), in the amount of $448,644.45. The Judgment was amended on April 4, 2008, *nunc pro tunc,* as of May 17, 2007, reducing the amount to $390,830 with interest (*id.*, ¶ 4). This amount, less $20,623.38 paid on the account, remains outstanding (*id.*, ¶ 5).

The original complaint contained two causes of action. The first cause of action alleges that defendant became the attorney of record for the Judgment Debtors in the Related Action on

June 25, 2007, after entry of the Judgment (*id.*, ¶ 6). The following is also alleged: defendant, with knowledge of the Judgment and in conspiracy with the Judgment Debtors, improperly used his escrow account to conceal their assets. The Judgment Debtors treated the escrow account as though it was their personal bank account, depositing funds into, and paying bills from, the account (*id.*, ¶¶ 7-8). Shortly after the settlement of the Related Action, on or about February 27, 2007, defendant opened a new escrow account with Citibank, NA. Between February 27, 2007 and March 17, 2008, at least $238,518.07 was deposited into the escrow account by, or for the benefit of, the Judgment Debtors, and for no legitimate business or escrow purpose. During the same period of time, $244,724.78 was returned from defendant's escrow account to, or for the benefit of, Judgment Debtors. These sums include $183,747.84 in deposits and $190,515.81 in disbursements since the Judgment was entered, that were made by, returned to, and paid for the Judgment Debtors' benefit, including checks to "cash" in amounts that were kept small to allegedly avoid detection (*id.*, ¶ 12).

The second cause of action alleges that, between at least May 17, 2007 (the date of the original Judgment) and July 18, 2008, defendant conspired with the Judgment Debtors to accept $183,747.84 of their money into his escrow account to conceal their assets (*id.*, ¶¶ 22-23). It is alleged that the funds would have been subject to the lien of, and the collection on, plaintiff's Judgment (*id.*, ¶ 24). It is claimed that defendant is, therefore, accountable to plaintiff to the extent of the value of the funds deposited (*id.*, ¶ 27).

By order dated July 15, 2013, this court dismissed the original complaint pursuant to Business Corporation Law § 1312 (b), on the ground that plaintiff was a foreign (New Jersey) corporation, not authorized to do business in this State. (Motion Seq. No.: 001). The Appellate

Division modified the decision, and granted plaintiff leave to replead (*Palisades Tickets, Inc. v Daffner,* 118 AD3d 619 [1st Dept 2014]). According to the Appellate Division decision, plaintiff alleged that defendant "conspired with his clients, judgment debtors on an underlying judgment rendered in favor of plaintiff, to use his escrow accounts to conceal the debtors' assets so as to impede plaintiff from collecting on the judgment" (*id.* at 620). The Appellate Division determined that defendant was not entitled to dismissal of the action pursuant to Business Corporation Law § 1312 (a). It also determined that the doctrine of collateral estoppel does not bar the action, because the issue of whether defendant engaged in fraudulent conduct or other improprieties was not necessarily decided in a prior action. It affirmed the dismissal of the fraud and fraudulent concealment claims. Finally, the Appellate Division granted leave to replead, to the extent that the complaint alleged that defendant knowingly assisted his clients' fraudulent concealment or conveyance of assets to allege with greater specificity the elements of this cause of action (*id.*).

Plaintiff availed itself of the granting of leave to replead. The amended complaint is based on the same underlying allegations. However, whereas the original complaint contained causes of action sounding in fraud, fraudulent concealment, and conspiracy (118 AD3d at 620), the amended complaint contains five causes of action, and now expressly alleges violations of the Debtor and Creditor Law.

The first cause of action alleges that defendant conspired with the Judgment Debtors to use his bank account to conceal the Judgment Debtors' assets and to make them unavailable for attachment. The second cause of action alleges that defendant conspired with the Judgment Debtors to conceal their assets and hinder and delay plaintiff from collecting any money, and to

make the Judgment Debtors insolvent. The third through fifth causes of action are based on the Debtor and Creditor Law. The third is based on section 276, alleging that the transfers were made with defendant's assistance, but without fair consideration. Plaintiff seeks to recover the value of the transferred assets as well as its reasonable legal fees. The fourth cause of action alleges that defendant's actions constitute constructive fraudulent conveyances. The fifth cause of action alleges that defendant knowingly assisted the Judgment Debtor's fraudulent concealment of assets.

Defendant now seeks dismissal of the amended complaint, pursuant to CPLR 3211 (a) (5) and (a) (7). For the reasons discussed below, the motion is denied.

DISCUSSION

In support of its motion for dismissal of the amended complaint, defendant argues that plaintiff is not a corporation authorized to do business in New York. Further, due to plaintiff's lack of compliance with Business Corporation Law § 1312 (a), the amended complaint should be dismissed. This issue was disposed of by the Appellate Division in its decision discussed above, wherein the Court stated:

> "While it is undisputed that plaintiff is a foreign corporation and is unauthorized to do business in New York State, defendant has not established entitlement to dismissal of the action pursuant to Business Corporation Law § 1312 (a), which bars suits by foreign corporations that do business in New York without authorization. Even if the underlying judgment arose from a business transaction with the judgment debtors, who are New York residents and corporations, evidence of a single transaction is insufficient to sustain defendant's burden of showing that the corporation engaged in 'systematic and regular' business activities in this state."

(118 AD3d at 620). Here, again, defendant failed to sustain its burden, on this pre-answer motion to dismiss, of showing that plaintiff "corporation engaged in 'systematic and regular' business activities in this state...", which must be established, as indicated by the Appellate

Division. *Id.*

Defendant further argues, unpersuasively, that the doctrines of collateral estoppel and res judicata bar plaintiff from pleading fraud or misrepresentation. These doctrines, however, do not apply, because they are meant to preclude "a party from relitigating in a subsequent action or proceeding on an issue clearly raised in a prior action or proceeding and decided against that party" (*Pinnacle Consultants v Leucadia Natl. Corp.*, 94 NY2d 426, 431- 432 [2000] [internal quotation marks and citation omitted]) or where "there is a judgment on the merits rendered by a court of competent jurisdiction . . . and the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was" (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008] [internal quotation marks and citations omitted], *cert denied sub nom. Cross County Bank, Inc. v New York*, 555 US 1136 [2009]). "Res judicata requires a final judgment in a prior action" (*Hudson-Spring Partnership, L.P. v P+M Design Consultants, Inc.*, 112 AD3d 419, 419 [1st Dept 2013]). Here, there is no applicable final judgment in a prior action, nor it is there a "final conclusion on the merits" (*U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 105 AD3d 639, 640 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]).

The appropriate doctrine is law of the case. As distinguished from issue preclusion (collateral estoppel) and claim preclusion (res judicata), "law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation *before* final judgment" (*People v Evans*, 94 NY2d 499, 502 [2000], *rearg denied* 96 NY2d 755 [2001]). Nevertheless, law of the case is also not dispositive, because the Appellate Division considered only the original complaint (*see Peters v Peters*, 118 AD3d 593, 594 [1st Dept 2014] ["Because

the original complaint was superseded by the amended complaint, the sufficiency of the allegations in the earlier complaint is rendered academic"]). Law of the case does not require the court to grant the motion to dismiss the amended complaint because of differences between the two complaints (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 39 [1st Dept 2012]). However, the Appellate Division's ruling regarding the sufficiency of a portion of the original complaint's fraud claim "remains controlling to the extent the issues raised in the original complaint and addressed by [the Court's] . . . decision are presented in the amended complaint" (*Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept 2012]).

As stated in the Appellate Division's decision in this action, the complaint should be dismissed to the extent that it alleges fraud, because it does not allege a misrepresentation, or that any such misrepresentation induced plaintiff's justifiable reliance, or that defendant owed a duty to disclose information to plaintiff (118 AD3d at 620). The amended complaint does not cure these defects. The fraudulent concealment claims fail, because the amended complaint does not plead that plaintiff and defendant had a fiduciary relationship (*Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005]).

In granting leave to replead "to the extent the complaint alleges that defendant knowingly assisted his clients' fraudulent concealment or conveyance of assets," the Appellate Division directed that plaintiff "allege with greater specificity the elements of this cause of action" (*Palisades Tickets, Inc. v Daffner,* 118 AD3d at 620) and cited *Syllman v Calleo 2 Dev. Corp.* (290 AD2d 209 [1st Dept 2002]). As described in *Syllman*, a fraudulent conveyance claim must: (1) identify the particular transaction to avoid; (2) identify any transaction alleged to be fraudulent; and (3) state any basis for the claim of damages, such as transfers resulting in

defendants becoming judgment proof (*id.* at 210).

As for a claim for fraudulent conveyance (as opposed to fraudulent concealment), the amended complaint satisfies the requirements set forth in *Syllman*. It alleges that, on February 27, 2007, soon after the Related Action was settled, defendant opened a new bank account with Citibank, NA (account number 9970161113), by receiving or transferring $14,000 on behalf of Helane David, one of the Judgment Creditors (amended complaint, ¶¶ 24-25). Between February 27, 2007 and March 17, 2008, at least $238,518.07 was deposited into the account without consideration. During this time, $244,724.78 was returned from the account to or for the benefit of the Judgment Creditors, including $183,747.84 in deposits and $190,515.81 in disbursements since the Judgment was entered (*id.*, ¶ 27). Helane David testified that, during a post-judgment deposition, she gave money to defendant to be held for her benefit (*id.*, ¶ 29). Michael Petrillo testified that defendant held funds for him and that he would ask defendant for money whenever needed (*id.*, ¶ 29). Several days prior to, and several days after the April 4, 2008 entry of judgment, while defendant was the attorney of record for the Judgment Debtors, on three days, defendant wrote 22 checks to Helane David, each in the amount of $1,500, totaling $33,900 (*id.*, ¶ 31). Between February 27, 2007 and March 17, 2008, defendant wrote 100 checks from his escrow account to, or for the benefit of, the Judgment Debtors, totaling $244,724.78 (*id.*, ¶ 33). The amended complaint also alleges that, as a result of the fraudulent transfers, the Judgment Debtors were rendered insolvent (*id.*, ¶¶ 17, 38).

Defendant also argues that the fraudulent conveyance claims are time-barred, because the alleged fraudulent transfers began in May 2007 and, therefore, the six-year statute of limitations period within which to bring an action expired in May 2013. He argues, that, although the

original complaint was timely filed in 2012, it did not contain fraudulent conveyance claims under the Debtor and Creditor Law. Although the amended complaint now includes such claims, it was filed in 2014, beyond the six-year period. This argument is unavailing.

"An action for an actual fraudulent conveyance under Debtor and Creditor Law § 276 must, like other actions based on fraud, be commenced within six years from the date of the fraud, or within two years after the plaintiff discovered the fraud, or could with reasonable diligence have discovered it, whichever is longer (CPLR 203[g]; CPLR 213[8]" (*Miller v Polow*, 14 AD3d 368, 368 [1st Dept 2005]). Here, the additional causes of action are "merely new theories of recovery arising out of transactions and occurrences already in litigation," and, therefore, they are not time barred (*Curiale v Ardra Ins. Co., Ltd.*, 223 AD2d 445, 446 [1st Dept 1996]; *see also Kandell v Saunders*, 224 AD2d 185, 186 [1st Dept 1996]).

Defendant also argues that the fraudulent conveyance claim is not applicable to him, because he did not receive anything of benefit for the alleged transfers. This argument is in error in that, as a transferee, defendant could be liable. "A conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration" (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 302 [1st Dept 2006]). Fair consideration under Debtor and Creditor Law requires that the transaction be made "in good faith," which is "an obligation that is imposed on both the transferor and the transferee" (*Sardis v Frankel*, 113 AD3d 135, 141-143 [1st Dept 2014]). "[W]here the transferee is aware of an impending enforceable judgment against the transferor, the conveyance does not meet the statutory good faith requirement and generally will be set aside as constructively fraudulent" (*id.* at 142). Moreover, implied in the Appellate

Division decision in this action is the finding that a claim against defendant could be viable, because it granted plaintiff leave to replead "to the extent the complaint alleges that defendant knowingly assisted his clients' fraudulent concealment or conveyance of assets" (118 AD3d at 620).

Accordingly, it is

ORDERED that the motion by defendant Gerald Daffner to dismiss the amended complaint is denied; and it is further

ORDERED that defendant Gerald Daffner is directed to serve an answer to the amended complaint within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendant, with notice of entry.

Dated: April 17, 2015

Doris Ling-Cohan, J.S.C.

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