Weinheimer v Lower Brule Community Dev. Enter., LLC
2015 NY Slip Op 32168(U)
November 16, 2015
Supreme Court, New York County
Docket Number: 162379/2014
Judge: Saliann Scarpulla

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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SARA WEINHEIMER,

Plaintiff,

-against-

Index No.
162379/2014

LOWER BRULE COMMUNITY DEVELOPMENT ENTERPRISE, LLC and LBC WESTERN HOLDINGS, LLC,

Defendants.

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Scarpulla, J.:

Defendants Lower Brule Community Development Enterprise, LLC (LBCDE) and LBC Western Holdings, LLC (Western Holdings) move to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), for failure to state a claim and based upon documentary evidence.

In this action, plaintiff is seeking to recover on two promissory notes issued by nonparties, Westrock Group, Inc. (Westrock) and LBC Western Inc., which was a subsidiary of defendant Western Holdings, on alter ego and successor liability theories. Defendants urge that plaintiff fails to allege any basis for such liability, and that the

fraudulent conveyance claims fail to allege that there was an improper transfer, and actual fraudulent intent.

FACTS

Plaintiff is the former executor of the estate of her late husband, Thomas R. Pura, and succeeded to his interest under the two promissory notes at issue in this action (complaint, ¶ 21). Defendant LBCDE, a Delaware limited liability corporation, is a wholly-owned subsidiary of the Lower Brule Corporation (LBC), which is wholly-owned by the Lower Brule Sioux Tribe, a federally recognized tribe in South Dakota (the Tribe). Defendant Western Holdings, a closely-related affiliate of LBCDE, LBC and the Tribe, also is a Delaware limited liability corporation, and is the parent company of Westrock and LBC Western Inc. (*id.*, ¶¶ 24-25). Westrock is a wholly-owned subsidiary of LBC Western Inc., which is a wholly-owned subsidiary of Western Holdings (*id.*, ¶ 26).

On December 18, 2007, Westrock issued a promissory note in favor of Mr. Pura in the principal amount of $500,000 which required all payments on the first anniversary of the note (Westrock Note) (*id.*, ¶ 30). Principal payments in the amount of $410,000 were made in 2009 on the Westrock Note, but $90,000 in principal and interest remain outstanding (*id.*, ¶¶ 33-35). The Westrock Note contained a New York choice of law provision (exhibit B to affirmation of Robert A Giacovas, dated Feb 26, 2015).

In August 2009, defendant Western Holdings acquired Westrock (complaint, ¶ 37). On that same day, LBC formed defendant LBCDE (*id.*, ¶ 38).

In order to raise money, Western Holdings had its subsidiary, LBC Western Inc., issue a number of promissory notes, one of which was issued, on August 4, 2009, in favor of Mr. Pura in the principal amount of $287,500 (LBC Western Note) (*id.*, ¶ 42). This note contained a Delaware choice of law provision (exhibit C to Giacovas affirmation). No payments were made under the LBC Western Note (complaint, ¶ 45).

On October 20, 2010, LBCDE loaned Western Holdings $22,519,638 (the Loan), 90% of which was guaranteed by the United States Department of the Interior (DOI). The Loan was not a cash disbursement, but rather was a restructuring of Westrock's and LBC Western Inc.'s debt, with LBCDE issuing three classes of its own notes, Classes A, B, and C, totaling $22,678,625, in exchange for certain of Western Holdings' debt (*id.*, ¶ 54). Allegedly, because 90% of the Loan's principal and interest was guaranteed by the DOI, the Loan was worth $20 million in cash and, thus, was a "valuable asset" (*id.*, ¶¶ 54-56).

In March 2012, LBCDE sold the Loan to Great American Insurance Group for $20 million, and used the proceeds to pay more recent lenders, i.e., the holders of Class A notes, not plaintiff, and to pay fees and commissions to senior management and insiders (*id.*, ¶¶ 56-60).

On September 6, 2012, Westrock and LBC Western Inc. filed for bankruptcy (*id.*, ¶ 61).

Plaintiff alleges that LBCDE and Holdings are successors-in-interest or, alternatively, alter egos of Westrock and LBC Western Inc. She alleges that these

defendants have "held themselves out as having the right and power to 'exchange' the Westrock Note and the LBC Western Inc. Note for other debt instruments to be issued by LBCDE (containing terms drastically less favorable to the noteholder)" (*id.*, ¶ 63), and that they "ha[d] in fact exercised control over debt instruments issued by Westrock and LBC Western [Inc.]" by exchanging them with debt instruments issued by LBCDE (*id.*, ¶ 64). Defendants used these entities to put into effect their "strategy of leveraging the Tribe's unique, tax-exempt status to realize outsized investment returns for private investors" (*id.*, ¶ 66). The complaint asserts that LBCDE, Western Holdings, Westrock and LBC Western Inc. were "controlled by the same key personnel," and defendants had "exercised such dominion and control over the operations of Westrock and LBC Western [Inc.], wholly disregarding their separate form" (*id.*, ¶¶ 67-68). The complaint alleges that defendants caused the "assets and opportunities" of Westrock and LBC Western Inc. to be transferred to defendants and their affiliates to render the entities judgment proof (*id.*, ¶¶ 70-72).

On December 15, 2014, plaintiff commenced this action seeking recovery for breach of the Westrock Note (first claim), breach of the LBC Western Inc. Note (second claim), constructive fraudulent conveyance (New York Debtor and Creditor Law [DCL] §§ 273, 274, 275), and actual fraudulent conveyance (DCL § 276) (third and fourth claims, respectively).

Defendants seeks dismissal for failure to state a claim and based on documentary evidence, urging that plaintiff makes only conclusory allegations to support liability

under either the successor-in-interest or alter ego theories of liability. They further urge that the fraudulent conveyance claims also are insufficient, because they fail to allege that there was an improper transfer of an asset, and that there was actual intent to defraud.

DISCUSSION

The defendants' motion to dismiss is granted, and the complaint is dismissed.

On a motion to dismiss brought pursuant to CPLR 3211, the court must afford the pleading a liberal construction, accept the facts as alleged as true, and accord a plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87–88 [1994]). The merits of the complaint, or any of its factual allegations, are not assessed, and the court will determine if, assuming the truth of the alleged facts, and the inferences that can be drawn therefrom, the complaint states a legally cognizable claim (*Skillgames, LLC v Brody*, 1AD3d 247, 250 [1st Dept 2003]). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames, LLC v Brody*, 1 AD3d at 250 [citation omitted]). Where the defendant seeks dismissal based upon documentary evidence (CPLR 3211 [a] [1]), it must establish that the evidence utterly refutes the factual allegations, and establish a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Defendants are not parties to the contracts, the notes, upon which plaintiff is suing in the first and second claims. Thus, plaintiff asserts two legal theories to hold them liable for Westrock's and LBC Western Inc.'s obligations on the notes—alter ego and successor liability.

Alter Ego Theory

Plaintiff claims that the corporate veil should be pierced with regard to both LBCDE and Western Holdings. "Those seeking to pierce a corporate veil of course bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998], citing *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135 [1993] and *Walkovszky v Carlton*, 18 NY2d 414 [1966]). Domination alone is not sufficient "without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d at 339; *Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 141–142 ["some showing of a wrongful or unjust act toward plaintiff is required"] [citations omitted]). The plaintiff must state that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d at 141 [citations omitted]; *TIAA Global Invs.*,

LLC v One Astoria Sq. LLC, 127 AD3d 75, 90 [1st Dept 2015], citing *Shisgal v Brown*, 21 AD3d 845, 848 [1st Dept 2005] [internal quotation marks omitted]).

Courts have examined various indicia of a veil-piercing situation, including:

> "(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arms length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own "

(*Shisgal v Brown*, 21 AD3d at 848 [quotation marks and citation omitted]; *see Peery v United Capital Corp.*, 84 AD3d 1201, 1202 [2d Dept 2011]).[1]

Applying the alter ego test here, plaintiff offers no allegations—factual or otherwise—suggesting that Westrock and LBC Western Inc. existed solely as sham

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[1] Both parties agree that courts considering whether New York or Delaware applies regarding the application of an alter ego liability theory have observed that "the standard is not materially different under Delaware law, which has been interpreted as providing that no single factor could justify a decision to disregard the corporate entity, [rather,] some combination of them [i]s required, and . . . an overall element of injustice or unfairness must always be present, as well" (*Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174-175 [1st Dept 2013] [quotation marks and citation omitted]; *Dover Ltd. v A.B. Watley, Inc.*, 2006 WL 2987054, * 9, 2006 US Dist LEXIS 76004 [SD NY Oct 18, 2006, No. 04 Civ. 7366 (FM)] ["there is . . . relatively little difference between the applicable standards under both states' laws"] [citation omitted]).

corporations, and that defendants wholly disregarded their separate form. There are no allegations that there was an absence of corporate formalities, any commingling of funds, undercapitalization, or any other indicia that LBCDE and Western Holdings exercised complete dominion over Westrock and LBC Western Inc. such that they all operated as a single economic entity. The fact that Western Holdings and LBCDE formed subsidiary corporations, as plaintiff alleges in her affidavit (Weinheimer aff, ¶ 10), does not support a disregard of the corporate form. "[M]ere ownership of a subsidiary does not justify the imposition of liability on the parent" (*Pearson v Component Tech. Corp.*, 247 F3d 471, 484 [3d Cir], *cert denied* 534 US 950 [2001], citing *United States v Bestfoods*, 524 US 51, 69 [1998] [other citation omitted]; *see Shostack v Diller*, 2015 WL 5535808, *6, 2015 US Dist LEXIS 123777 [SD NY Sept. 16, 2015, No. 15-CV-2255 (GBD) (JLC)], citing *New York Elec. & Gas Corp. v FirstEnergy Corp.*, 766 F3d 212, 224 [2d Cir 2014] [other citation omitted]; *Weston v Progressive Commercial Holdings, Inc.* 2011 WL 231709, *2-3, 2011 US Dist LEXIS 6275 [D Del Jan. 24, 2011, No. 10-980] [parent or sister corporation not liable for acts of subsidiary or sister absent showing was alter ego or agent]; *F & M Precise Metals v Goodman*, 4 Misc 3d 1023 [A], *3-4, 2004 NY Slip Op 51004 [U] [Sup Ct, Nassau County Aug. 25, 2004]), nor is the fact that the directors of the parent also serve as directors for the subsidiary (*United States v Bestfoods*, 524 US at 69; *Pearson v Component Tech. Corp.*, 247 F3d at 484).

Here, Westrock and LBC Western Inc. are not even LBCDE's direct subsidiary. Plaintiff's conclusory allegation that they are "controlled by the same key personnel"

(complaint, ¶ 67) also is insufficient. She identifies only two individuals, Tony Fenton and Don Hunter, who overlap with management of Westrock and LBC Western Inc. The fact that these companies may have shared some of their key personnel, or offices, or had common owners, does not provide a basis to ignore the corporate form (*see Etex Apparel, Inc. v Tractor Intl. Corp.*, 83 AD3d 587, 587-588 [1st Dept 2011] [shared office and common ownership is insufficient to meet heavy burden]; *Capmark Fin. Group Inc. v Goldman Sachs Credit Partners L.P.*, 491 BR 335, 350 [SD NY 2013] [corporate form not disregarded where subsidiary shares officers, directors and employees with parent]). "Under New York and Delaware law, the separate corporate existences of parent and subsidiary will not be set aside merely on a showing of common management of the two entities, nor on a showing that the parent owned all the stock of the subsidiary" (*Capmark Fin. Group Inc. v Goldman Sachs Credit Partners L.P.*, 491 BR at 350 [quotation marks and citation omitted]).

In addition, there is no overlap of management with LBCDE, which has an eight member board of directors, six of whom are Tribe members, and the remaining two are Gavin Clarkson and Walter Hillabrant (*see Seaport Loan Prods., LLC v Lower Brule Community Dev. Enter., LLC*, 41 Misc 3d 1218 [A], 2013 NY Slip Op 51765 [U], * 5 [Sup Ct, NY County Oct. 22, 2013] [Bransten, J.]). None of these eight board members ever served on the board of either Westrock or LBC Western Inc. (defendants' reply memorandum at 11). Moreover, LBCDE's principal office, as evidenced in plaintiff's own exhibit (exhibit D to affidavit of Sara Weinheimer dated April 8, 2015) is at 8609

Second Avenue, Ste. 506B, Silver Spring, Maryland, not at the Tribe's Oyate Circle address in South Dakota (*see Seaport Loan Prods., LLC v Lower Brule Community Dev. Enter., LLC*, 41 Misc 3d 1218 [A], 2013 NY Slip Op 51765 [U], *5 [LBCDE "has no dedicated office space on the Tribe's reservation [in South Dakota]"). Plaintiff has simply failed to allege any facts that there was a complete domination by LBCDE and Western Holdings over Westrock and LBC Western Inc. The complaint fails to allege facts beyond relationships typical of a parent corporation, with regard to Western Holdings, which courts have found to be insufficient to veil piercing as a matter of law (*Capmark Fin. Group Inc. v Goldman Sachs Credit Partners L.P.*, 491 BR at 350).[2]

Further, plaintiff fails to allege the second independent element for veil piercing--that the control resulted in some fraud or wrong, or an overall element of injustice or unfairness, mandating disregard of the corporate form in this action (*see TNS Holdings v MKI Sec. Corp.*, 92 NY2d at 339-340). Westrock and LBC Western Inc. were insolvent and unable to pay their debts to note holders, like plaintiff, and other creditors, and LBCDE made a private offering, pursuant to a confidential private placement memorandum (PPM), to restructure Westrock's and LBC Western Inc.'s debt. Under this PPM, note holders were given the opportunity to exchange their notes for one of three different classes of LBCDE notes, and these new notes were under a $20 million federal

[2] The court notes that, in support of the complaint, plaintiff has submitted her own affidavit, which is primarily a recitation of statements contained in a Human Rights Watch report on the Lower Brule Sioux Tribe (HRW Report), and the HRW Report itself. This report, however, which is being offered for the truth of the matters asserted, is inadmissible hearsay.

loan guaranty, all of which was fully disclosed and legitimate. Plaintiff, however, chose to keep her investment in Westrock and LBC Western Inc. in her original notes, and not exchange those notes. Plaintiff fails to allege how this was fraudulent. The fact that the Class A notes, one of the classes exchanged for through the PPM transaction, were paid off, along with certain fees and expenses, from the sale of the loan guaranty to Great American Insurance Group, and plaintiff's notes were not, is not fraudulent. It fails to show that Westrock's and LBC Western Inc.'s corporate forms were being used as sham entities, or that they existed as vehicles for a fraud on plaintiff. Plaintiff cannot and does not deny that the note exchange was fully disclosed. Her complaint is silent with respect to fraudulent use of the corporate form itself (*see Mobil Oil Corp. v Linear Films, Inc.*, 718 F Supp 260, 268-269 [D Del 1989] [the underlying claims cannot supply the necessary second element of fraud or injustice, otherwise would be bootstrapping that prong of alter ego]). The court also notes that LBCDE had no legal obligation to treat all note holders the same. Rather, a "mere preference between creditors does not constitute bad faith" (*In re Sharp Intl. Corp.*, 403 F3d 43, 54 [2d Cir 2005], citing among others *Ultramar Energy Ltd. v Chase Manhattan Bank, N.A.*, 191 AD2d 86, 90-91 [1st Dept 1993]).

Plaintiff's reliance on *Shisgal v Brown* (21 AD3d 845) and *TIAA Global Investments, LLC v One Astoria Sq., LLC* (127 AD3d 75), is unpersuasive. In *TIAA Global Investments, LLC v One Astoria Sq. LLC*, the complaint alleged that the defendants failed "to follow any and all New York requisite corporate formalities in the

governance and management of" the seller company, and they managed and transferred all proceeds of the sale of the property out of its accounts (*id.* at 90). The plaintiffs, the buyers of the property, further alleged that the defendants entered into the contracts for seller, managed the property, and made the decision to conceal from the plaintiffs tenant complaints and latent defects on the property to induce them to purchase it, and that the individual defendant was integral to all of the events as the managing member of both corporate defendants (*id.*).

Here, plaintiff simply recasts the piercing criteria and frames them as complaint allegations. The complaint sets forth purely conclusory statements that defendants "exercised such dominion and control over the operations of Westrock and LBC Western [Inc.], wholly disregarding their separate form" and that Westrock and LBC Western Inc. were "mere instrumentalities of Defendants" (complaint, ¶ 68). This, without more, does not sufficiently plead alter ego liability.

Likewise, in *Tap Holdings, LLC v Orix Fin. Corp.* (109 AD3d at 175), relied upon by plaintiff, the plaintiff note holder specifically alleged that the lenders established a new company "in order to siphon off the funds belonging" to the original corporation, which transaction had no legitimate business purpose, "in a scheme engineered for the sole purpose of extinguishing the note holders' claims," and aided by the fact that the lenders held all of the corporation's voting rights. There are no such allegations here. Again, the transaction was fully disclosed and offered to plaintiff, and had the legitimate purpose of restructuring Westrock's and LBC Western Inc.'s debt.

Similarly, *Shisgal v Brown* is factually distinguishable. The plaintiffs there presented facts that the defendants made false representations regarding the use of the monies the plaintiffs loaned them -- using the corporation's funds to pay personal expenses, including plastic surgery, household bills, and parking tickets; regularly commingled corporate and personal funds; and ran the companies without regard for corporate or bookkeeping formalities (21 AD3d at 849). There are no such factual allegations in this complaint.

In addition, plaintiff's reliance on an arbitration award in an arbitration between Gregory Martino against Westrock, Monarch Financial Corporation of America Inc., a subsidiary of Westrock, and Western Holdings (as respondents), for breach of contract (exhibit J to affirmation of David M. Pohl, dated April 10, 2015), as support for her alter ego theory, is misplaced. Martino, a stockholder and employee of Westrock, brought his claim against those respondents for violating a June 2010 settlement agreement between the parties, and for terminating his employment. While the arbitration tribunal found that Monarch and Western Holdings were liable under an alter ego theory for damages owed by Westrock on that settlement agreement, as defendants here aptly point out, alter ego liability involves a fact intensive inquiry. That arbitration award does not set forth the actual facts presented to and considered by the tribunal; it involved a claimant and a settlement agreement not present in this action; and it did not consider LBCDE at all. Therefore, its determination on the issue of alter ego liability was, at the least, ambiguous. An arbitration award does not have a preclusive effect on a subsequent

litigation where it is ambiguous as to the issues and facts decided (*Brownko Intl., Inc. v Ogden Steel Co.*, 585 F Supp 1432, 1435 [SD NY 1983], citing *Ufheil Constr. Co. v Town of New Windsor*, 478 F Supp 766 [SD NY 1979], *affd mem* 636 F2d 1204 [2d Cir 1980]; *see also Murray v Dominick Corp. of Canada, Ltd.*, 631 F Supp 534, 538 [SD NY 1986]), particularly where it does not involve the same parties or the same transactions.

Successor Liability Theory

Plaintiff's successor liability theory also fails to provide a basis for defendants' liability. Generally, a corporation that acquires another's assets is not liable for the predecessor's contractual obligations, except where: (i) the purchaser expressly or impliedly assumed such liability; (ii) the transaction was a de facto consolidation or merger; (iii) the purchaser operates as a mere continuation of the seller; or (iv) fraud (*Broadway 26 Waterview, LLC v Bainton, McCarthy & Siegel, LLC*, 94 AD3d 506, 507 [1st Dept 2012] [amendment of complaint to add alter ego and successor liability theories denied]; *Furnari v Wallpang, Inc.*, 2014 WL 1678419, *11-12, 2014 Del Super LEXIS 199 [Del Super Apr. 16, 2014, C.A. No. 13C-04-287 (JRJ) (CCLD)] [identical successor liability requirements under Delaware law]; *Magnolia's at Bethany, LLC v Artesian Consulting Engineers, Inc.*, 2011 WL 4826106, *2-4, 2011 Del Super LEXIS 435 [Del Super Sept. 19, 2011, C.A. No. S11 C-04-013-ESB]). Plaintiff, here, fails to indicate which exception she is asking this court to apply, and she fails to assert any allegations of defendants' assumption of Westrock's or LBC Western Inc's liabilities, consolidation or merger, mere continuation, or that the transaction was used to fraudulently escape these

companies' obligations. The complaint only alleges that defendants held themselves out to have the power to "exchange' the Westrock Note and the LBC Western [Inc.] Note for other debt instruments to be issued by LBCDE," and that they "exercised control over debt instruments issued by Westrock and LBC Western [Inc.] . . . by exchanging them with (in effect, converting them to) debt instruments issued by LBCDE" (complaint, ¶¶ 63-64). This is clearly insufficient for the transfer of liability to LBCDE and Western Holdings under a successor theory of liability. In light of these pleading failures, plaintiff fails to assert a basis for liability by these defendants on plaintiff's claims for breach of contract with respect to both the Westrock and the LBC Western Inc. Notes (the first and second causes of action).

Debtor Creditor Law Claims

Plaintiff's fraudulent conveyance claims (the third and fourth causes of action) also are dismissed, because they do not allege any improper conveyances, or actual intent to defraud.

New York Debtor and Creditor Law § 273 provides as follows:

> "Every conveyance made and every obligation incurred by a person who is or will be thereby 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"

(*see Fisher v Zaks*, 48 AD3d 251, 251 [1st Dept 2008] [complaint dismissed where plaintiff failed to present sufficient evidence to pierce corporate veil, or that there was

insolvency or any improper conveyances]). A plaintiff must plead a lack of fair consideration, and the transferee's lack of good faith (DCL § 272, defining fair consideration).

Here, plaintiff alleges that LBCDE made a loan to Western Holdings which was a restructuring of Westrock's and LBC Western Inc.'s debt (complaint, ¶ 54). When LBCDE made the offer to all note holders, including plaintiff, to exchange Westrock's debt for new notes issued by LBCDE, the character of the obligations did not change—that is, Westrock's debt remained debt. This transaction was fully disclosed in the PPM. Plaintiff's claim that LBCDE then acted in bad faith by paying some, but not all note holders in full, is unavailing. A transfer made to satisfy an antecedent debt while the debtor is insolvent is not improper or fraudulent, even if it effectively permits the preference of one creditor over another (DCL §§ 272, 273; *see Ultramar Energy Ltd. v Chase Manhattan Bank, N.A.*, 191 AD2d at 90-91). LBCDE was not obligated to treat all note holders equally, and had given plaintiff the opportunity to participate in that note exchange with full disclosure. Plaintiff fails to plead with sufficient particularity a fraudulent conveyance (*see RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 477-478 [1st Dept 2015]), or that one was made without fair consideration, and this claim is dismissed.

Finally, the fourth claim under New York DCL § 276 for an intentional fraudulent conveyance similarly fails to state a claim. DCL § 276 provides that "[e]very 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" (*see also RTN Networks, LLC v. Telco Group, Inc.*, 126 AD3d at 478). The claim must be pled with particularity (*RTN Networks, LLC v. Telco Group, Inc.*, 126 AD3d at 478; *see also Marine Midland Bank v Zurich Ins. Co.*, 263 AD2d 382, 383 [1st Dept 1999] ["plaintiff alleged the overall fraudulent scheme in detail . . ., and fraudulent intent is fairly inferred from such details"]). To prove actual fraud, a creditor must show the transferor's intent to defraud (*HBE Leasing Corp. v Frank*, 61 F3d 1054, 1059 n 5 [2d Cir 1995]). Because direct evidence of fraudulent intent by the debtor/transferor is difficult to prove, the plaintiff may rely on "badges of fraud" to support her case, that is, "circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [quotation marks and citations omitted]). These "badges of fraud" include "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance." *(id.*; *see also Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386 [2d Dept 1997]; *Gray & Assoc., LLC v Speltz & Weis LLC*, 22 Misc 3d 1124(A), *13, 2009 NY Slip Op 50275[U] [Sup Ct, NY County Feb. 2, 2009] [Fried, J] [the only "badges of fraud" pled are inadequacy of consideration and awareness of dismal financial situation, which was insufficient to allege any actual intent to defraud]). Where there was fair consideration, where the transfer was not questionable or

suspicious, the transfer was made openly, or the transferor did not retain control "would constitute evidence that there was no intent to defraud" (*SungChang Interfashion Co., Ltd. v Stone Mountain Accessories, Inc.*, 2013 WL 5366373, *8, 2013 US Dist LEXIS 137868 [SD NY Sept. 25, 2013, No. 12 Civ. 7280 (ALC) (DCF)] [citation omitted]). As discussed above, the transfer, here, was not suspicious, was made openly and fully disclosed in the PPM, and plaintiff was given the opportunity to participate in it. Further, Westrock and LBC Western Inc. did not retain control over the notes. Therefore, plaintiff fails to allege actual intent to defraud, and this claim is insufficient as well.

Accordingly, it is

ORDERED that the motion of defendants to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

Dated: November 16, 2015

ENTER:

J.S.C.

HON. SALIANN SCARPULLA