CDR Creances S.A.S. v First Hotels & Resorts Invs., Inc.
2017 NY Slip Op 30252(U)
February 6, 2017
Supreme Court, New York County
Docket Number: 650084/2009
Judge: Lawrence K. Marks

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

CDR CREANCES S.A.S.,

Plaintiff,

-against-

Index No. 650084/2009

FIRST HOTELS & RESORTS INVESTMENTS, INC., et al.,

Defendants.

LAWRENCE K. MARKS, J.

Defendant First Hotels & Resorts Investments, Inc. ("First Hotels") moves, pursuant to CPLR 3212, for summary judgment dismissing the remaining causes of action. These are claims alleging: fraudulent transfer, the first cause of action; unjust enrichment, the second cause of action; and attorneys' fees, the fifth cause of action. Mov Br at 1. *See also* Mov Tannenbaum Aff, Exh A (hereinafter "Compl"), ¶¶ 104-13, 120-22.

BACKGROUND

Plaintiff CDR Creances S.A.S. ("CDR") is an instrumentality of France, charged with obtaining value for the assets of insolvent French financial institutions. Compl, ¶ 4. CDR is the successor-in-interest of Societe de Banque Occidentale, which loaned approximately $92 million to Euro-American Lodging Corporation, a company controlled by Maurice Cohen. The loan was for the purpose of purchasing and renovating a building in New York City. *Id.*

In this action, CDR has consistently alleged that it was defrauded by Leon Cohen, Maurice Cohen and Sonia Cohen, among others, of all the loaned money, using domestic and offshore shell corporations. *Id.* at ¶ 2.[1] At the time this action was commenced, CDR had already obtained two judgments in New York County Supreme Court, in the amount of $265,865,120.81, with interest accruing. Compl, ¶ 11 (referencing judgments in cases bearing Index ## 109565/2003 and 600448/2006).

CDR sought to have the only asset of First Hotels known at the time the complaint was filed, a New York condominium, sold for partial satisfaction of the existing outstanding judgments against entities dominated and controlled by Maurice Cohen. Opp Br at 3. These entities are Blue Ocean Finance, Ltd. ("Blue Ocean") and Summerson International Establishment ("Summerson"). *Id. See also* Compl, ¶ 11 (regarding the breakdown of the two judgments at issue). That condominium unit was apartment 86-B at the Trump World Tower Condominium, located at 845 United Nations Plaza, New York, New York. Compl, ¶ 3; Mov Tannenbaum Aff, ¶ 3. The apartment was ultimately sold, and the net proceeds, $2,995,120.71, have been held by Steward Title Insurance Company. Mov Tannenbaum Aff, ¶ 4; Opp Br at 3.

[1] As the Court of Appeals stated, in one of the separate, but related, cases, there "is an extensive history of legal actions that is the backdrop . . . involving numerous individuals and businesses, claims of unlawful money and stock transfers, and charges of manipulation of offshore business entities in furtherance of a conspiracy to conceal funds from plaintiff." *CDR Creances S.A.S. v. Cohen*, 23 N.Y.3d 307, 311 (2014).

CDR has always contended in this action that First Hotels is an offshore corporation controlled by the Cohens, and is part of their web of shell corporations used to conceal the true ownership of assets that should be applied toward the satisfaction of the judgments. Compl, ¶ 3. CDR asserts that First Hotels is nothing more than an alter ego of the Cohens, and their companies, "to hinder, delay, or defraud their creditors." Opp Br at 1. CDR contends that the proceeds of the stolen loan collateral were laundered through First Hotels, and that First Hotels is only a shell entity whose corporate veil should be pierced to satisfy outstanding judgments. *Id.*

Among the issues in this motion is First Hotels' argument that $4 million was transferred by Blue Ocean to First Hotels, through Whitebury Shipping, Ltd. ("Whitebury") on January 15, 2004, to fund part of the purchase of the condominium unit, but that loan was repaid when First Hotels reimbursed Whitebury on March 23, 2004. Mov Br at 2, 11; Reply Br at 1.[2] First Hotels argues that this transfer, on January 15, 2004, was the sole basis for CDR's claim. First Hotels argues that the return of the loaned money "is the dispositive fact that entitles First Hotels to summary judgment." Reply Br at 1. CDR, however, argues that although First Hotels repaid Whitebury on

[2] In fact, First Hotels argues that the $4 million that was transferred by Whitebury to First Hotels was returned with an additional $2 million, for a total of $6 million. Mov Br at 2, 13; Reply Br at 1. *See also* Mov Tannenbaum Aff, Exhs I, J (regarding the transfer and the loan reimbursement).

March 23, 2004, it has not offered any evidence of repayment of the other funds First Hotels received. Opp Br at 6.[3]

Further, there have already been several decisions in this and the related cases. Of particular import, the Appellate Division has stated that First Hotels was created in 2004 to buy the condominium unit, and by the time the unit was sold, Maurice Cohen's wrongdoing had already occurred, decades before. *In re CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc.*, 140 A.D.3d 558, 563 (1st Dep't 2016) (Index # 150583/2014); *CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc.*, 101 A.D.3d 485 (1st Dep't 2012).

DISCUSSION

The standard on a motion for summary judgment is well established:

> On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action.

Sosa v. 46th Street Devel LLC, 101 A.D.3d 490, 492-93 (1st Dep't 2012).

[3] There is no question that CDR, prior to the completion of discovery, took the position that First Hotels had not repaid the money. Mov Br at n2 (citing plaintiff's responses and objections to interrogatories, dated April 27, 2010). Mov Tannenbaum Aff, Exh K at 12 (CDR's first interrogatory responses).

First Hotels argues that it has established its entitlement to summary judgment, which shifted the burden to CDR to demonstrate by admissible evidence the existence of a factual issue requiring a trial, and that CDR has not meet this burden. Reply Br at 2.

Fraudulent Transfer

Under Debtor and Creditor Law § 276, which addresses a conveyance made with intent to defraud, a conveyance made with actual intent to hinder, delay, or defraud either present or future creditors is fraudulent as to both present and future creditors.[4] Due "to the difficulty of proving actual intent ... the pleader is allowed to rely on 'badges of fraud' to support his case, i.e., circumstances so commonly associated with fraudulent transfers 'that their presence give rise to an inference of intent.'" *Wall St. Assoc. v. Broadsky*, 257 A.D.3d 526, 529 (1st Dep't 1999) (internal citations omitted).

The first of the trial judges to hear this case[5] found, in a Decision and Order dated August 11, 2009, that the complaint alleges that First Hotels was among the "single purpose entities formed as part of an elaborate web of offshore corporations to divert and then secrete funds that should have been used to repay Plaintiff" and that there were sufficient claims to constitute "badges of fraud" to sustain a cause of action for fraudulent

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[4] Debtor and Creditor Law ("DCL") provides:

> § 276. Conveyance made with intent to defraud
> 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.

[5] This case was previously assigned to Justice Tolub, Justice Yates and Justice Sherwood.

conveyance against First Hotels. 2009 NY Slip Op 31837(U), **7 (*see* same also at Mov Tannenbaum Aff, Exh E, at 6).

First Hotels argues in this motion that the return of the money means that there is no conveyance for the Court to set aside. Reply Br at 1. Indeed, it argues that the conveyance was *already* set aside when First Hotels reimbursed Whitebury for the full amount of the loan. *Id.* at 4. It argues that CDR's contention, that First Hotels' repayment of the loan is not dispositive, "is just silly and defies not only the law, but all common sense and logic." *Id.* at 5-6 (referencing Opp Br at 7).

CDR argues that First Hotels was used by the Cohens to launder and conceal the proceeds of the loan collateral that the Cohens stole. Opp Br at 5. It asserts that it is erroneous that repayment to Whitebury means there was no fraudulent transfer. CDR argues that *intent*, not lack of consideration, is the element required to establish fraudulent transfer pursuant to DCL § 276. *Id.* at 6-7. Moreover, CDR contends that First Hotels is urging the Court to look only at a single transaction, rather than "the whole forest" and see that it is "replete with numerous badges of fraud that establish an intent to hinder, delay, or defraud CDR from recovering the proceeds of the loan collateral stolen by the Cohens." *Id.* at 8. *See also id.* at 10-12. CDR contends that First Hotels offers no evidence that its transactions were not part of a scheme intended to "hinder, delay or defraud either present or future creditors." *Id.* at 12. CDR claims that First Hotels has ignored the discovery revealing other transfers that were used to fund First Hotels. *Id.* at

5. CDR points to other transfers that were used to fund First Hotels, occurring on: February 15, 2000; February 16, 2000; March 1, 2000; December 2002; and November 18, 2003. *Id.* at 5-6.

These other transfers are not inconsequential. Although it is true that CDR's original interrogatory responses identified only the transfer that First Hotels now focuses on, that response was dated April 27, 2010 and amended on June 17, 2013. Mov Tannenbaum Aff, Exh K at 12; Reply Tannenbaum Aff, Exh C. The Note of Issue, however, was not filed in this case until May 17, 2016. *See* edoc 342. That more information was obtained in the course of discovery is not a minor point. Indeed, it is unclear to this Court why it should consider, as First Hotels argues, evidence of the repayment of one loan on March 23, 2004 as dispositive new evidence, but should not consider the other transactions that were also revealed in discovery and are now before the Court.[6]

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[6] First Hotels argues that citing new transactions is prohibited. Reply Br at 11. It cites, *inter alia*, *Farris v. Dupret*, 138 A.D.3d 565, 566 (1st Dep't 2016), *Keilany B. v. City of New York*, 122 A.D.3d 424, 425 (1st Dep't 2014), and *Abalola v. Flower Hosp.*, 44 A.D.3d 522, 522 (1st Dep't 2007). These cases are easily distinguished, as each, correctly, notes that a new theory of the case is not appropriate or admissible in an opposition to a motion for summary judgment. However, as addressed above, CDR has not asserted a new theory of the case, but is citing facts that it found in the course of discovery - - just as First Hotels has done in its own moving papers by citing to the repayment. The Court also notes that all the First Department cases cited by First Hotels for this point are further distinguishable as cases that involve medical malpractice, and perhaps may have had discovery paths more similar to each other than to the instant commercial case. Here, not only did discovery take place under the four different judges who have been assigned this case, but from March 18, 2013 discovery proceeded under a Special Master, J. Herman Cahn, Ret. *See* edoc # 241 (order appointing the Special Master to hear and determine discovery disputes).

Moreover, the Court notes that the language of the first cause of action, alleging fraudulent transfer, does not address or specify any one particular transfer of funds. Compl, ¶¶ 104-09. Rather, the transfer that is alleged to be fraudulent is the Cohen's interest in First Hotels and the condominium unit. In fact, although there was only a single condominium unit at issue, the cause of action contains assertions that "transactions" (plural) were carried out to effectuate the alleged fraudulent transfer. *Id.* at ¶¶ 106-07.

Both parties cite to *Wall Street Assocs. v. Brodsky*, 257 A.D.2d 526 (1st Dep't 1999). *See* Mov Br at 12; Opp Br at 7. There, the Appellate Division found:

> Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on badges of fraud to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. Among such circumstances are: 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.*

257 A.D.2d at 529 (internal citations omitted) (emphasis added). *See also Board of Mgrs. of Loft Space Condominium v. SDS Leonard*, LLC, 142 A.D.3d 881, 883 (1st Dep't 2016). Although the above is not an exhaustive list, it is the last of the "badges of fraud" -- regarding retention -- that First Hotels focuses upon. First Hotels also notes that that

the cases cited by CDR do not involve the transferee returning the property, and are therefore distinguishable. Reply Br at 7.

However, First Hotels has not established that all funds at issue in CDR's cause of action for fraudulent transfer were returned.[7] CDR sufficiently responded to First Hotels' assertion of repayment with evidence of other funds transferred, and those remain as non-resolved questions. Further, although First Hotels is correct that CDR has not presented any controlling cases where property was returned but a fraudulent transfer claim was nonetheless sustained, First Hotels has not established that full resolution of that sole issue would be dispositive.[8] In addition, in this motion, First Hotels treats a single loan as synonymous with the asset specified in the first cause of action. However, it has not met its burden that this question can be resolved in its favor at this time. These are among the open questions of fact that preclude summary judgment in First Hotels' favor.

[7] If it was clear that all funds were returned, First Hotels might be in a very different situation, as the "statutory remedies available for the conveyance of property to remove it from the reach of a potential judgment creditor are limited to placing the parties in status quo *ante*." *Blakeslee v. Rabinor*, 182 A.D.2d 390, 393 (1st Dep't 1992). If every relevant transfer was repaid, this would have already been done.

[8] Pleadings based upon "badges of fraud" do "not require allegations that the transfer at issue had rendered the subject assets totally and permanently unavailable or diminished. CDR's allegations of a 'deliberate attempt to stave off creditors by putting property in such a form and place that creditors cannot reach it' sufficed in support of their claim." *AMP Services Ltd. v. Walanpatrias Foundation*, 34 A.D.3d 231, 232 (1st Dep't 2006) (internal citations omitted). Further, DCL § 276 does not require proof of unfair consideration or insolvency. *Wall St. Assoc. v. Brodsky*, 257 A.D.3d 526, 529 (1st Dep't 1999).

Piercing the Corporate Veil

First Hotels also argues that CDR is attempting "once again to improperly expand this case," and that the First Department has ruled on two separate occasions that CDR's claims against First Hotels are not about any fraud by the Cohens decades ago, and that ownership of the condominium unit is unrelated to the 2011 judgment or the wrongdoing that resulted in that judgment. Reply Br at 2 (referencing *CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc.*, 101 A.D.3d 485 (1st Dep't 2012); *In re CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc.*, 140 A.D.3d 558 (1st Dep't 2016) (Index # 150583/2014).

First Hotels also contends that nowhere in the complaint does CDR allege that First Hotels is the alter ego of the Cohens and their companies. Reply Br at 13. This is misleading, however, given the procedural history of this action.

There is no question that CDR's motion to amend the complaint in this action was denied by Justice Sherwood in a Decision and Order dated April 10, 2012. Edoc # 188 (*see* same also at Mov Tannenbaum Aff, Exh F). That decision was affirmed by the Appellate Division. *CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc.*, 101 A.D.3d 485 (1st Dep't 2012). Although the trial court decision focused primarily on the portion of the motion that sought to add a claim against HSBC Bank USA, N.A., for aiding and abetting the Cohens' conspiracy to defraud CDR, the First Department explicitly addressed CDR's efforts to add new allegations against First Hotels, including

a claim of fraud and conspiracy to defraud. Strong language was included in the First Department's decision, including:

> To the extent First Hotels can be deemed liable for amounts owed pursuant to the aforementioned judgments obtained by plaintiff, plaintiff's appropriate course is to seek amendment of those judgments, not to seek relief via this completely unrelated action. Indeed, plaintiff's counsel stated at oral argument that if the court denied amendment, plaintiff would bring a special proceeding pursuant to CPLR 5225. Moreover, no allegation in the proposed amended complaint suffices to connect First Hotels, an entity that did not even exist until 2004, when it was created to purchase the property, with a fraud by the Cohens that occurred decades ago, regardless of any use the Cohens may ultimately have made of it.

CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc., 101 A.D.3d 485, 487 (1st Dep't 2012). However, although CDR was not permitted to amend its claims, the original claims against First Hotels that were not dismissed by Justice Tolub remain and were not addressed by the Appellate Division.

CDR did commence the special proceeding cited by the First Department, and First Hotels moved to dismiss the proceeding. That motion was denied by this Court, and the denial was reversed by the First Department. *In re CDR Creances S.A.S. v. First Hotels & Resorts Investments, Inc.*, 140 A.D.3d 558, 563 (1st Dep't 2016) (unanimously reversing the decision entered December 11, 2014 in the related case, Index # 150583/2014). In that decision, the First Department held, *inter alia*, that when CDR commenced the 2009 action -- the instant action -- First Hotels still owned real property within the state. *Id.* at 562. Perhaps most significant, the Appellate Division stated, in

the 2014 special proceeding, as "we have already held in the 2012 CDR Creances decision [in the instant action], ownership of the condominium unit is unrelated to the 2011 judgment or the wrongdoing that resulted in that judgment." *Id.* at 563. This, again, is strong language.

However, the complaint in this case, unamended and as it remains, asserts that Maurice Cohen, Sonia Lea Cohen and Habib Levy, as beneficial owners of First Hotels, exercised complete dominion and control over other entities enumerated in the complaint and used that domination or control to commit a fraud on CDR by preventing it from recovering funds. Compl ¶ 119. This was the crux of CDR's fourth cause of action, for piercing the corporate veil. Although that cause of action was dismissed, it was dismissed as a *separate* cause of action. Justice Tolub found that the claim for piercing the corporate veil should be dismissed because it is not a separate cause of action, but that it was a theory that may be relied upon to impose liability of a company against its owners. 2009 NY Slip Op 31837(U), **10 (*see* same also at Mov Tannenbaum Aff, Exh E, at 9).[9] Nothing in that dismissal prevents CDR from asserting veil piercing in an effort

[9] Although not dispositive, particularly given the passage of time and the further discovery that has occurred since, it is worth noting that the same trial judge, in a decision in this action, prior to the motion to dismiss, stated that:

> HSBC documents reveal that First Hotels was a 'special purpose vehicle' established by Mauricio Cohen for the sole purpose of purchasing a condominium in New York City... First Hotels is 100% owned by Mauricio Cohen, and the primary source of repayment is cash flow from Mr. Cohen's investments. Other than that, First Hotels has no assets. *It should be noted that at no time, and despite a flurry of documents, has there ever been a denial by a*

to prove liability against First Hotels for a remaining cause of action, such as fraudulent transfer. Therefore, CDR is not expanding its remaining claims when it asserts "that First Hotels is nothing more than an alter ego of the Cohens and their companies set up and used solely to [] hinder, delay, or defraud their creditors." Opp Br at 1.[10]

CDR argues that veil piercing -- or more precisely, reverse veil piercing -- may be utilized to find liability in this action. CDR argues that the Court should pierce the corporate veil to find that First Hotels is the alter ego of the judgment debtors. *Id.* at 12.

"Broadly speaking, the courts will disregard the corporate form, or, to use accepted terminology, pierce the corporate veil, whenever necessary to prevent fraud or achieve equity." *Morris v. N.Y.S. Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140 (1993) (internal citations omitted). However, CDR also argues that New York courts have applied "reverse piercing of the corporate veil" to hold corporations liable for the debts of the corporation's principals. Opp Br at 14. "While piercing the corporate veil allows a creditor to disregard the corporation and hold the controlling shareholders personally liable for the corporate debt, reverse piercing flows in the opposite direction and makes

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party or by counsel that First Hotels is anything other than the alter ego of Mr. Cohen.

Kellner Aff, Exh 7, at 3 (April 24, 2009 Decision and Order, J. Tolub, on a motion to cancel the notice of pendency) (internal citations omitted) (emphasis added); *see* same also at edoc #370.

[10] CDR further argues that it should be permitted to put forth evidence that shows that the Cohens have directly and indirectly dominated and controlled the judgment debtors Blue Ocean and Summerson, and defendant First Hotels, and that each was a "sham entity with no separate business purpose and moved funds without regard to corporate formalities." Opp Br at 16- 17.

the corporation liable for the debt of the shareholder." *Spinnell v. JP Morgan Chase Bank, N.A.*, 2007 NY Slip Op 31500(U), *aff'd* 59 A.D.3d 361 (1st Dep't 2009).

In *Solow v. Domestic Stone Erectors, Inc.*, 269 A.D.2d 199 (1st Dep't 2000), the Appellate Division unanimously affirmed denial of the defendants' motion for summary judgment. The Court found that the record sufficiently demonstrated that an individual dominated and controlled the judgment debtor and the corporate defendants, and that a factual issue existed as to whether the decision was based on a legitimate business judgment or was designed to achieve the fraudulent purpose of preventing plaintiffs from satisfying their judgment. *Id.* at 200 (the issue was the timing and circumstances of winding down the judgment debtor's business). The First Department noted that, if proven, plaintiffs would have established the requisite grounds for treating all the defendants as a single personality, for the purpose of enforcing the judgment. *Id.* Significantly, in the instant motion, although First Hotels argues that CDR should be prevented from arguing and attempting to support the remaining claims through veil piercing, no legitimate business judgment or purpose for the transactions and structures at issue is even advanced, much less resolved in First Hotels' favor.

This Court is mindful of the many decisions in this and the related cases, issued by the multiple prior trial court judges, the Appellate Division and even the Court of Appeals. However, nothing in the opposition to this motion is a true attempt to expand

the claims in this case. Indeed, CDR is addressing the claims that remained in this case, following Justice Tolub's decision on the motion to dismiss in 2009.

In the 2009 motion to dismiss, the trial court found that "at this juncture, while discovery is still in its early stages, it is unclear whether Plaintiff will be able to prove its claims, it is clear that Plaintiff has sufficiently pled a cause of action for fraudulent transfer." Exh E, at 7. 2009 NY Slip Op 31837(U), **8 (*see* same also at Mov Tannenbaum Aff, Exh E, at 7). It is this Court's view that, although much has changed since then, much remains the same. At this time, discovery is now complete. At least as important, the Appellate Division has, in multiple decisions, made statements that should give CDR great pause. However, CDR is correct when it notes that the determination of the sufficiency of its remaining claims is undisturbed and remains the law of the case. Opp Br at 5. These remaining claims have, to the best of this Court's knowledge, never been before the Appellate Division. Accordingly, this Court must look to what remains of the original pleadings and the papers in this motion. In doing so, the Court concludes that while CDR's attempt to raise veil piercing may, in the end, not succeed, it is clearly not an improper attempt to expand its surviving remaining claims.[11]

[11] This Court is aware that the Appellate Division may disagree with this conclusion. Or the First Department might determine that part and parcel of its affirmation of the denial of the motion to amend was a view that what remained of the original complaint following the motion to dismiss was sufficient. None of that is for this Court to predict or opine upon. What this Court will reiterate, as it has numerous times, is that settlement may well be appropriate in this case. However, that choice is for the parties themselves to consider.

Unjust Enrichment

> [T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties. An unjust enrichment claim is rooted in the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. Thus, in order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.

Georgia Malone & Co., Inc. v. Rieder, 19 N.Y.3d 511, 516 (2012) (internal citations omitted). Unjust enrichment "requires a showing that it would be contrary to equity and good conscience to permit defendant to retain what is sought to be recovered." *Insur. Co. of State of Penn. v. HSBC Bank*, 37 A.D.3d 251, 255 (1st Dep't 2007). Further, to sustain a cause for unjust enrichment, plaintiff must plead a prior relationship with defendant sufficient for reliance or inducement. *Joseph P. Carroll Ltd. v. Ping-Shin*, 140 A.D.3d 544, 544 (1st Dep't 2016); *Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406, 409 (1st Dep't 2011).

First Hotels argues that CDR did not plead a prior relationship, and that it (First Hotels) could not be enriched by money it returned to Whitebury. Mov Br at 15; Reply Br 1-2.

However, the sufficiency of the pleadings has already been established. In denying the motion to dismiss, as to the unjust enrichment claim, Justice Tolub found that the pleadings sufficiently asserted

> that Defendant was (1) enriched through acquiring the Property; (2) that the enrichment was at Plaintiff's expense because funds which were owed to CDR were purposefully transferred by the Cohens and their corporations to First Hotels; and (3) that equity and good conscience require defendant to make restitution because the transfers were fraudulent and done to purposefully deprive Plaintiff of amounts due and owing.

2009 NY Slip Op 31837(U), **8-9 (*see* same also at Mov Tannenbaum Aff, Exh E, at 8).[12]

At bottom, First Hotels is arguing that this claim must fail because CDR has not pled or asserted that First Hotels ever had a relationship with CDR, or CDR's predecessor. Reply Br at 7. First Hotels acknowledges, however, that CDR attempts to establish the required relationship though "the use of its impermissible 'alter ego' theory." *Id.* at n.5. As this Court has found herein, however, CDR's intention to attempt to pierce the corporate veil has been known to the Court and all parties since the inception of this case. Further, as is also noted herein, the Appellate Division's decisions on the motion to amend the complaint and in a related proceeding are highly relevant but

[12] In the context of this motion, CDR argues that First Hotels was the beneficiary of several fraudulent conveyances, of the proceeds of the stolen loan collateral, and retained that benefit to the detriment of creditor CDR. Opp Br at 17-18. It contends that the evidence supports the allegations that First Hotels acquired the condominium in question with the proceeds of collateral that should have been used to repay CDR. It avers that it would, therefore, be against equity and good conscience for First Hotels to retain the increase in value of the property unit, "generated by those funds stolen from CDR." *Id.* at 18. CDR argues that the court can find that a constructive trust is established, to prevent unjust enrichment. *Id.*

not dispositive, particularly as these claims and the evidence in support of them have not been presented to that court.

Additionally, the question of whether First Hotels could be enriched by funds it repaid is not resolved dispositively in its favor. As addressed above, there remain open questions regarding whether all funds were returned and the role, if any, of consideration and diminution of assets.

As movant on a motion for summary judgment, a drastic remedy, First Hotels has the burden to demonstrate the absence of any material issues of fact. As to the claim for unjust enrichment, it has not met that burden. [13]

Attorneys' Fees

CDR's fifth cause of action seeks attorneys' fees. First Hotels argues that this cause of action must be dismissed because it is dependent on CDR prevailing on its fraudulent transfer cause of action. Mov Br at 16. CDR argues that, if there is a finding that a fraudulent transfer occurred with "actual intent ... to hinder, delay, or defraud either present or future creditors" as provided under DCL § 276, then DCL § 276-a

[13] This Court notes that it has found no argument in the papers on the instant motion as to whether, now that discovery is complete, the remaining claims are seeking distinct or identical damages. Since no party has addressed this, the Court need not do so now. However, the Court does note that if both claims were to proceed to trial, and if CDR was able to establish its entitlement to both fraudulent transfer and unjust enrichment by a preponderance of the evidence, duplicative recovery will surely not be permitted.

provides for an award of attorneys' fees. Opp Br at 19. As such, both parties take the position that the fifth cause of action has the same fate as the first cause of action.

Inasmuch as the Court determined above that First Hotels has not meet its burden for summary judgment on the first cause of action, this cause of action also survives summary judgment.

The Court has considered the parties' other arguments, and finds them to be unavailing.

Accordingly, it is

ORDERED that the motion for summary judgment is denied.

Dated: February 6, 2017

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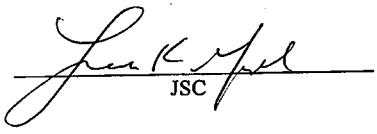

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HON. LAWRENCE K. MARKS