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

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172 VAN DUZER REALTY CORP.,

Plaintiff,

-against-

878 EDUCATION, LLC, MARTIN OLINER individually and d/b/a ISO, LLC, ISO LLC, GLOBE INSTITUTE OF TECHNOLOGY, INC., GLOBE ALUMNI STUDENT ASSISTANCE ASSOCIATION, INC., MUIRTA, LLC, OLEG RABINOVICH, LYUBOV RABINOVICH a/k/a LUBA RABINOVICH, MICHAEL RABINOVICH, EDWARD RABINOVICH, JOHN DOES 1-50, and ABC CORPS. 1-50,

Defendants.

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DECISION AND ORDER

Index No. 653767/2013
Mot. Seq. No. 003

O. PETER SHERWOOD, J.:

In motion sequence 003, plaintiff 172 Van Duzer Realty Corp ("172 Van Duzer") moves to transfer this case (the "2013 Action") and the action captioned *172 Van Duzer Realty Corp v. Globe Alumni Student Assistance Association, Inc. and Globe Institute of Technology, Inc.*, index no. 113137/2009 (the "2009 Action"), now pending before Justice Edmead in Part 35, to IAS Trial Ready Part 40 to be consolidated for joint discovery and trial with the action now pending there captioned *Commerce Bank, N.A. v. Globe Institute of Technology, Inc., Oleg Rabinovich and Lyubov Rabinovich a/k/a Luba Rabinovich*, index no. 603917/2007 (the "2007 Action"). 172 Van Duzer is the owner of certain improved real estate which it leased to Globe Alumni Student Assistance Association, Inc. ("Globe Alumni") for use as a student dormitory. In the 2009 and 2013 litigations, it seeks to recover future rent payments pursuant to the accelerated rent clause of the lease triggered by Globe Alumni vacating the premises in February 2008, prior to the end of the lease term. In furtherance of the motion to consolidate, 172 Van Duzer alleges that all three actions either arise out of or relate to an Asset Purchase Agreement (the "APA") executed in October 2007, wherein 878 Education, LLC ("878") acquired all assets of Globe

Institute of Technology, Inc. ("Globe Institute") (the "Transaction"). 172 Van Duzer is a stranger to the APA but in the 2013 Action it seeks to have that agreement set aside as a fraudulent transfer thereby entitling it to collect $1.35 million that Oleg and Luba Rabinovich (shareholders of Globe Institute) claim is owed them by 878 as a result of the Transaction (the "Funds"). Entitlement to the Funds is a subject of the 2007 Action between the Rabinovich's and 878. 178 Van Duzer is not a party to the 2007 Action.

The facts leading up to this, the 2013 Action, are set forth in the decision of the Appellate Division in Globe Alumni's appeal of the 2009 Action and will not be repeated here (*see 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance, Inc.*, 114 AD3d 814 [1st Dept 2016]).

Discovery is completed in the 2007 Action, and the Rabinovich's counterclaim against 878 for payment of the Funds is now scheduled for appearance in IAS Trial Ready Part 40 on October 26, 2017. The 2009 Action is in the post-judgment phase. That case is pending in Part 35 on remand from the Court of Appeals to allow Globe Institute an opportunity to demonstrate that the amount of liquidated damages being awarded is disproportionate to the amount of 172 Van Duzer's actual damages. In January 2017, 172 Van Duzer served a restraining notice on 878 as garnishee of Global Institute, the judgment debtor in that case. Justice Edmead *sua sponte* vacated the restraining notice and struck the accompanying subpoena on grounds that plaintiff can restrain the Funds only in the 2013 Action, which is pre-judgment. Justice Edmead also stayed all discovery in the 2009 Action pending determination of this motion to consolidate. This 2013 Action is in the discovery phase and lags far behind the other cases.

DISCUSSION

For reasons discussed below the motion shall be denied. Many key issues are not shared amongst the various cases, including whether the accounts receivables indicated in the APA were anticipated or guaranteed (unique to the 2007 Action), whether the liquidated damages clause in the lease is disproportionate to 172 Van Duzer's actual losses (unique to the 2009 Action), and the value of the Shareholders' non-competition agreement (which 878 contends is unique to the 2013 Action) (NYSCEF Doc. No. 167 ["878 opp"] at 10-12; NYSCEF Doc. No. 150 ["second opp"] at 7-8). As 878 contends, even if plaintiff were to succeed in the 2013 action, and the APA were set aside to the extent necessary to satisfy the judgment, the Funds would not be made

available to 172 Van Duzer because it was not property to which Globe Institute's creditors would have had access prior to the date of the APA (878 opp at 11, citing *Gasser v Infanti Intern., Inc.*, 353 F Supp 2d 342, 355 [ED NY 2005] [noting that the "purpose of the remedy fashioned by DCL § 278 is to grant the creditor the right 'to be paid out of assets to which he is actually entitled and to set aside the indicia of ownership which apparently contradict that right.'"]). The only issue remaining in the 2009 Action is the amount of 172 Van Duzer's judgment. That question will be determined by evidence concerning plaintiff's actual losses under the lease and has no bearing on the other two actions.

In an effort to demonstrate that there are "dispositive issues of law and fact common to the actions" (reply at 1, NYSCEF Doc. No. 179), 172 Van Duzer makes the implausible assertion that the Rabinovich's are suing 878 in the 2007 Action "for breach of an agreement to make a fraudulent conveyance" (*id.* at 2). The APA is dated October 28, 2007 (NYSCEF Doc. No. 27 in the 2007 Action). In the 2009 Action, 172 Van Duzer alleges that after 878 assumed ownership of the Tenant (*i.e.*, Globe Alumni) in October 2007, the Tenant paid the rent until February 2008. These facts negate 172 Van Duzer's recent claim that the 2007 Action, - brought in November 2007, mere months after the APA closed and two years before the 2009 Action was commenced - - - was somehow for breach of an agreement to make a fraudulent conveyance concerning a claim that is based on events that had yet taken place (*i.e.*, after February, 2008).

CTI Group/Commercial Svs., Inc. v. 160-09 Jamaica Ave. Ltd. Partnership, 25 AD 3d 301 [1st Dept 2006]), cited by 172 Van Duzer for the proposition that 878 can evade liability for the full amount of the Funds only if 878 proves a legitimate purpose for which the Funds are payable to the Rabinovich's is inapposite as that case sought to set aside a transaction that was not arms length and where there was no documentation of the past debt allegedly owed. In this case, there is no claim that the APA was not an arms length. It contains a non-compete provision. Whether the Funds (or any portion of them) should be paid to the Rabinovichs is not before the court on this motion.

The claim of the Globe Defendants against consolidation on the theory that each case involves different standards of law and measure of damages thereby sowing confusion in the minds of the jury and prejudicing the parties, lacks merit because fraudulent conveyance claims

are not eligible for trial by jury (*see Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 260 AD 2d 268 [1st Dept 1999]).

As noted above, the actions are in different stages of the litigation process. This is an additional reason the motion should be denied (*see Halpern v Rodway*, 3 AD 2d 941 [2d Dept 1957] [finding no abuse of discretion in denial of motion to consolidate "in view of the fact that the trial of the Queens County action is imminent, while considerable time must elapse before the Rockland County action could be reached for trial"]).

Accordingly, the motion to consolidate is DENIED. Counsel shall appear for a status conference on October 24, 2017 at 9:30 AM, Part 49 Room 252, 60 Centre Street, New York, New York 10007.

This constitutes the decision and order of the court.

DATED: October 6, 2017

ENTER,

O. PETER SHERWOOD J.S.C.