SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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CITY NATIONAL BANK, a NATIONAL BANKING ASSOCIATION, for itself and as Acquirer of certain Assets and Liabilities of IMPERIAL CAPITAL BANK from the FEDERAL DEPOSIT INSURANCE CORPORATION acting as receiver,

Plaintiff,

- against -

MONROE BUS CORP., JOSEPH FREUND, PINCUS FREUND and HERMAN FREUND,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF008692/16

DECISION AND ORDER

Motion Dates: March 3, 2017

The following papers numbered 1 to 10 were read and considered on (1) a motion by the Defendant Herman Freund, pursuant to CPLR §3211(a)(1), (7) and (10), and CPLR §3016(b), to dismiss the complaint insofar as asserted against him; and (2) a motion by the Defendants Monroe Bus Corp., Joseph Freund, and Pincus Freund, pursuant to CPLR §3211(a)(7), to dismiss the complaint insofar as asserted against them.

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Upon the foregoing papers, it is hereby,

ORDERED that the motions are granted in part and denied in part, as set forth herein.

Introduction

The Plaintiff City National Bank (hereinafter "City National Bank") commenced this action to set aside transfers of shares in the Defendant Monroe Bus Company by the Defendant

Herman Freund to his two sons, the Defendants Joseph Freund and Pincus Freund. City National Bank alleges that the transfers were fraudulent as against it because they were intended to, and/or had the effect of, diminishing or negating its ability to collect a $3.6 million judgment against Herman Freund.

The Defendants move to dismiss the complaint on a variety of grounds, including failure to state a cause of action.

The motions are granted in part and denied in part as set forth herein.

Factual Procedural Background

In October of 2015, City National Bank was granted judgment against Herman Freund in the amount of $3,668,947.74.

In 2016, City National Bank commenced a turnover proceeding against, *inter alia*, Herman Freund to compel him to turn over certain assets in satisfaction of the judgment. These assets included, *inter alia,* his 47% ownership interest in a Defendant herein, the Monroe Bus Corp. (hereinafter "MBC").

In motion practice in that proceeding, Herman Freund asserted that he was the 47% owner of MBC, and that his two sons, the Defendants herein Pincus Freund and Joseph Freund, owned the remaining shares. Freund argued that his shares were not subject to turnover because he and his sons had entered into a verbal agreement when MBC was first founded in 1985 that none would alienate his shares without the consent of the others. This was because MBC was a closely-held family corporation, and required close cohesion among the shareholders. Indeed, he asserted, both he and his sons, as well as many employees, spoke and transacted business in Yiddish.

Pincus Freund and Joseph Freund each submitted affirmations in support of the motion in which they declined to consent to the transfer of Herman Freund's shares to City National Bank.

In opposition to the motion, City National Bank opined that Herman Freund's allegations of a verbal contract with his sons since 1985 as to the alienation of shares in MBC was "amazing," given that Herman Freund was sole shareholder of MBC from 1985 until 2011.

In a Decision and Order issued in the proceeding, dated July 18, 2016, the Court held, *inter alia*, that Herman Freund's shares in MBC were subject to turnover, and that giving effect to the alleged verbal agreement concerning the alienation of same would, in effect, permit a fraud upon creditors.

The Action at Bar

City National Bank commenced this action to set aside several transfers of shares in MBC made by Herman Freund to his sons, Pincus Freund and Joseph Freund, as being fraudulent as against it.

City National Bank notes that this case has its genesis in an action it commenced against Herman Freund in 2009 to enforce guarantees he had executed in 2007 (hereinafter "Guaranty Action"). The Guaranty Action resulted in a $3.6 million judgment against Freund. City National Bank alleges, upon information and belief, that Pincus Freund and Joseph Freund were aware of the Guaranty Action.

While the Guaranty Action was pending, City National Bank alleges, Herman Freund made the following transfers of shares he owned in MBC to his sons– In December of 2011, he transferred 10% of his shares to Joseph and Pincus (5% each), either directly or through his wife, Raizel Freund; in December 2012, he transferred 10% of his shares to his sons (5% each); and in

December 2012, January 2013, and January 2014, he transferred 11% of his shares to his sons (5.5% each), either directly or through his wife. In total, City National Bank alleges, Herman Freund transferred 53% of his shares in MBC to his sons. City National Bank alleges that the transfers were made without consideration, and that Herman Freund made the transfers to avoid his obligations under the guarantees, which remain unpaid. Thus, City National Bank argues, the transfers should be set aside as fraudulent within the meaning of Debtor and Creditor Law §§ 273-a, 274, 275 and 276.

The Motion of Herman Freund

Herman Freund moves to dismiss the complaint pursuant to CPLR §3211(a)(1), (7) and (10), and CPLR §3016(b).

Initially, Freund argues, City National Bank failed to join a necessary party- his wife Raizel Freund– who is also alleged that have received shares of MBC from him. If not, he asserts, there might be a finding of fraud as against Raizel Freund in an action in which she is not a party. Indeed, he contends, the allegations do not differentiate between the various transferees, and it is unclear from City National Bank's allegations who was given, and who retained, the various shares of MBC.

In addition, Herman Freund argues, the allegations of the complaint are nothing more than bare legal conclusions, and lack the necessary factual detail needed to adequately plead any of the causes of action alleged.

For example, Freund asserts, City National Bank does not state the basis for its contention that the transfers at issue left him "unreasonably small capital" within the meaning of Debtor and Creditor Law § 274.

Similarly, City National Bank does not state that basis for its contention that he made the transfers without consideration knowing that they would leave him without the ability to pay his debts as they matured, as required by Debtor and Creditor Law § 275.

In addition, Freund argues, City National Bank does not state the basis for its contention that he made the transfers with the actual intent to defraud creditors, as required by Debtor and Creditor Law § 276. Further, he asserts, such a claim must be stated in detail. Indeed, he notes, the judgment that City National Bank seeks to enforce was not issued until 2015, which is after the transfers at issue.

Further, Freund argues, several of the allegations are contradictory, to wit: City National Bank pleads both that the transfers were without consideration, and that they were for inadequate consideration. Concerning such, he notes, City National Bank does not state what would constitute fair consideration.

In addition, Freund argues, the action must be dismissed based on documentary evidence, to wit: On December 27, 2005, he entered into a contract with his sons, Pincus and Joseph, wherein they agreed that, in exchange for their years of work and service to MBC, he would transfer each shares in MBC. Thus, he asserts, the shares at issue were transferred in exchange for past services rendered, which is a valid form of consideration. Moreover, he notes, the contract predates both the execution of the guaranties giving rise to the judgment (*supra*), and the judgment itself.

In opposition to Freund's motion, City National Bank argues that Raizel Freund is not a necessary party because she was only an intermediary for the transfers.

Further, City National Bank notes, Herman Freund did not argue that City National Bank

had failed to properly plead its first cause of action pursuant to Debtor and Creditor Law § 273-a. He merely raised arguments as to the remaining causes of action.

As to the causes of action challenged, City National Bank argues that it adequately pleaded each.

First, it notes, the Guaranty Action was commenced against Freund on October 14, 2009, which is before any of the transfers at issue. At that time, City National Bank notes, Freund was made aware that he might be held liable for a debt in excess of $1.5 million. City National Bank argues that this demonstrates that Freund made the transfers at a time when he knew he would be left with unreasonably small capital to pay his just debts.

Moreover, City National Bank asserts, there are "badges of fraud" throughout, to wit: there is a close relationship between Freund and the transferees (his sons); the transfers were made without consideration and were not in the regular course of business; the transfers were made at a time when Freund was exposed to considerable liability; and Freund transferred 53% of his shares to his sons, leaving him with a non-majority 47% interest in MBC.

In addition, City National Bank argues, the complaint contains the required particularity for fraud claims because it provides notice of the conduct and transactions being challenged.

Finally, City National Bank asserts, the action is not resolved by the alleged verbal contract between the individual Defendants *supra*. Rather, City National Bank argues, the antecedent debt is not described in the contract, and there is no evidence that the work allegedly performed by Pincus Freund and Joseph Freund for MBC constituted fair consideration for the challenged transfers.

In sum, City National Bank asserts, Herman Freund's motion should be denied.

In reply, Freund argues that Raizel Freund in a necessary party, and that the complaint is inadequately pleaded.

The Motion of MBC, Pincus Freund and Joseph Freund

MBC, Joseph Freund and Pincus Freund (hereinafter referred to collectively as the "MBC/Freund Movants") move to dismiss the complaint insofar as asserted against them for failure to state a cause of action.

Initially, they note, MBC was not a party to the transfers being challenged, and is not alleged to have engaged in any actionable conduct. Thus, they argue, the complaint should be dismissed as against MBC.

Similarly, the MBC/Freund Movants note, none of them were party to the underlying guarantees or the Guaranty Action.

Moreover, they note, although City National Bank alleges that the judgment in the Guaranty Action was entered against Herman Freund and "others," it does not state what, if any, efforts were made to collect the judgment as against such "others."

In any event, the MBC/Freund Movants argue, the action must be dismissed as against them because the allegations consist of bare legal conclusions.

In opposition to the motion, City National Bank argues that the MBC/Freund Movants failed to cite any basis to dismiss MBC from the action. Further, City National Bank asserts, given that this action might result in the liquidation of the business, MBC should remain a party.

Otherwise, City National Bank argues, all of the causes of action are adequately pleaded as against the MBC/Freund Movants.

In reply, the MBC/Freund Movants argue that MBC may not be kept in the action merely

because there is some hypothetical chance that it will be affected by the judgment.

In any event, they assert, all causes of action are inadequately pleaded.

Discussion/Legal Analysis

As a threshold issue, that branch of the motion of Herman FREUND which seeks to dismiss the action for failure to join a necessary party (Raizel Freund) is denied.

CPLR § 1001(a) provides that parties who "should be joined" include:

> Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants.

A necessary party is one that must be brought into the action when joinder is necessary to accord complete relief between the parties or when the interest of the might be inequitably affected by a judgment in the action. *Saratoga County Chamber of Commerce v. Pataki,* 100 N.Y.2d 801 (2003); *Fasoldt v. Bugbee*, 65 A.D.3d 806 [3rd Dept. 2009].

Here, the relief sought is the setting aside of the stock transfers from Herman Freund to Pincus Freund and Joseph Freund, not Raizel Freund. Thus, complete relief may be accorded to the parties in the action without the necessity of joining Raizel Freund as a party.

Further, Raizel Freund will not be inequitably affected or prejudiced by any judgment issued herein. City National Bank does not allege that Raizel Freund remains in possession of any of the shares to be returned, and does not allege, and need not prove, that she engaged in any culpable conduct as to the transfers at issue. Indeed, no findings need be made as to her to grant the relief requested. Rather, her alleged role as an intermediary appears merely part of the factual narrative of how the shares came to be owned by Pincus Freund and Joseph Freund and nothing more.

Thus, that branch of Herman Freund's motion which seeks to dismiss the complaint for failure to join a necessary and indispensable party (Raizel Freund) is denied. *Signature Bank v. Faibish*, 142 A.D.3d 1069 [2nd Dept. 2016].

As a further threshold issue, that branch of the motion of the MBC/Freund Movants which seeks to dismiss the action as against MBC is granted. There are no allegations that MBC played any part in the transfers, or is needed to effectuate the setting aside of the same, if granted. Indeed, it is noted, MBC is a closely-held corporation, and the remaining Defendants represent 100% of the shareholders therein.

Thus, the action is dismissed as against MBC.

As to the remaining branches of the motions, in determining the facial sufficiency of a pleading on a motion to dismiss pursuant to CPLR §3211(a)(7), the court must give the pleading a liberal construction, take the facts alleged in the complaint as true, and afford the plaintiff the benefit of every reasonable inference in determining whether the allegations fit within any cognizable legal theory. *Leone v Martinez*, 84 N.Y.2d 83, 87, 638 N.E.2d 511 [1994]; *Uzzle v Nunzie Court Homeowners Association, Inc.*, 70 A.D.3d 928, 895 N.Y.S.2d 203 [2nd Dept.2010]; *Jesmer v. Retail Magic, Inc.*, 55 A.D.3d 171, 863 N.Y.S.2d 737 [2nd Dept.2008]. Bare legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on a motion to dismiss for failure to state a cause of action. Further, when the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not just whether he or she has stated one. *Jesmer v Retail Magic, Inc.*, 55 A.D.3d 171, 863 N.Y.S.2d 737 [2nd Dept.2008].

Here, City National Bank has alleged causes of action pursuant to four provisions of the

Debtor and Creditor Law, to wit: sections 273-a, 274, 275 and 276. They will be addressed *in seriatim*.

Debtor and Creditor Law § 273-a provides:

> Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

Fair consideration exists "when in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied" or "[w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property, or obligation obtained." *Debtor and Creditor Law § 272.* The good faith of both transferor and transferee is stressed as an indispensable condition in the definition of fair consideration under either branch of the statutory language. *Stout Street Fund I, L.P. v. Halifax Group, LLC*, – AD3d – [2nd Dept. March 1, 2017].

Here, as noted, none of the movants expressly seek to dismiss the first cause of action.

In any event, a cause of action pursuant to Debtor and Creditor Law § 273-a is adequately pleaded.

At the time of the challenged transfers, Herman Freund was a defendant in an action for money damages, to wit: Herman Freund was a defendant in the Guaranty Action, which was commenced in October 14, 2009, and the first challenged transfer occurred in December 2011.

Further, City National Bank alleges that the transfers were made without consideration.

Concerning such, Herman Freund's proffer of the December 27, 2005, contract between

him and his sons providing for the transfer of shares (*supra*) does not, as a matter of law, demonstrate that there was consideration for the transfers. Indeed, perhaps ironically, the proffer arguably weakens the Defendants' position, to wit: The contract, and the Defendants' arguments concerning the same, appear to be an implicit admission that no consideration was given for the challenged transfers at the time they were made. Thus, the existence and adequacy of the consideration given for the transfers turns on the value and bona fides of the contract. Concerning such, the Court notes that, although the contract, which is solely between Herman, Pincus and Joseph Freund, and is neither notarized nor witnessed, fortuitously predates the Guaranty Action, it also predates the first challenged transfer by some six years, and the last challenged transfer by some nine years. Further, as noted by City National Bank, the exact terms of the contract are rather vague.

Given such, the Court does not find that the contract constitutes documentary evidence sufficient to warrant dismissal of the complaint.

To succeed on a motion to dismiss based upon documentary evidence pursuant to CPLR §3211(a)(1), the documentary evidence must utterly refute the plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Arnav Industries, Inc. Retirement Trust v. Raysman, Millstein, Felder & Steiner, LLP*, 96 N.Y.2d 300 (2001); *Harris v. Barbera*, 96 A.D.3d 904 [2nd Dept. 2012]; *Wilson v. Poughkeepsie City School Dist.*, – AD3d – [2nd Dept. February 22, 2017]. Here, the contract does not meet this standard.

Finally, the cause of action pursuant to Debtor and Creditor Law § 273-a is likewise pleaded with the requisite particularity.

In relevant part, CPLR §3016(b) provides that, for a cause of action alleging fraud, "the

"circumstances constituting the wrong shall be stated in detail." The purpose of this particularity requirement is to "inform a defendant of the complained-of incidents." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553 (2009); *Pace v. Raisman & Associates, Esqs., LLP*, 95 A.D.3d 1185 [2nd Dept. 2012]. This pleading requirement should not be confused with unassailable proof of fraud, which is not required, and may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553 (2009); *Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486 (2008); *Pace v. Raisman & Associates, Esqs., LLP*, 95 A.D.3d 1185 [2nd Dept. 2012]. Indeed, the courts must be mindful that there may be cases in which the particular facts are within a defendant's possession, and that the strength of the requisite inference of fraud will vary based on the facts and context of each case. *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553 (2009);.

Here, the facts alleged permit a reasonable inference of the alleged fraudulent conduct.

In sum, a cause of action pursuant to Debtor and Creditor Law § 273-a is adequately pleaded.

As to the second cause of action, Debtor and Creditor Law § 274 provides:

> Every conveyance made without fair consideration when the person making it is engaged or is about to engage 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.

Here, this section, which appears aimed at conduct which leaves a corporation or other entity a mere shell, is not a fit with the allegations. *See, e.g., Shore Pharmaceutical Providers, Inc. v. Oakwood Care Center, Inc.*, 65 A.D.3d 623 [2nd Dept. 2009]; *Pen Pak Corp. v. LaSalle*

Nat. Bank of Chicago, 240 A.D.2d 384 [2nd Dept. 1997].

City National Bank is not a creditor of MCB. Rather, it is a creditor of Herman Freund. Further, City National Bank does not allege that Herman Freund engaged in a transaction or transactions which resulted in MCB having unreasonably small capital. *See, e.g.*, *Shore Pharmaceutical Providers, Inc. v. Oakwood Care Center, Inc.*, 65 A.D.3d 623 [2nd Dept. 2009]; *Pen Pak Corp. v. LaSalle Nat. Bank of Chicago*, 240 A.D.2d 384 [2nd Dept. 1997]. Rather, City National Bank alleges that Herman Freund fraudulently attempted to diminish his ownership interest in MCB in order to avoid paying the judgment against him.

Thus, the branches of the motions which seek to dismiss the cause of action pursuant to Debtor and Creditor Law § 274 are granted.

Concerning the third cause of action, Debtor and Creditor Law § 275 provides:

> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

Pursuant to this constructive fraud provision, a conveyance made by a person who has a "good indication of oncoming insolvency" is deemed to be fraudulent. *Grace Plaza of Great Neck, Inc. v. Heitzler*, 2 A.D.3d 780 [2nd Dept. 2003].

Here, for the reasons discussed *supra*, the branches of the motions which seek to dismiss the cause of action pursuant to Debtor and Creditor Law § 275 are denied.

Finally, as to the fourth cause of action, Debtor and Creditor Law § 276 provides:

> 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.

In alleging such a claim, creditors may rely upon circumstantial factors deemed "badges of fraud" to establish an inference of fraudulent intent. *Stout Street Fund I, L.P. v. Halifax Group, LLC*, – AD3d – [2nd Dept. March 1, 2017]; *Grace Plaza of Great Neck, Inc. v. Heitzler*, 2 A.D.3d 780 [2nd Dept. 2003]. These include (1) the close relationship among the parties to the transaction, (2) the inadequacy of consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance. *Pen Pak Corp. v. LaSalle Nat. Bank of Chicago,* 240 A.D.2d 384 [2nd Dept. 1997].

Here, for the reasons discussed ***supra***, the branches of the motions which are to dismiss the cause of action pursuant to Debtor and Creditor Law § 276 are denied.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motions are granted in part and denied in part, as set forth herein.

The foregoing constitutes the decision, order and judgment of the court.

DATED: March 17, 2017
Goshen, New York

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