

**Interasian Digital Tech. Holdings Ltd. v In Jin Moon
Park**

2019 NY Slip Op 31659(U)

June 6, 2019

Supreme Court, New York County

Docket Number: 652787/12

Judge: Tanya R. Kennedy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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INTERASIAN DIGITAL TECHNOLOGY
HOLDINGS LTD.,

Index No. 652787/12
Mot. Seq. No. 007

Plaintiff,

- against -

IN JIN MOON PARK,

Defendant.
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HON. TANYA R. KENNEDY, J.S.C.:

In this action to set aside alleged fraudulent conveyances by non-parties James Park (Park) and Praxton LLC (Praxton) to defendant, defendant now moves to dismiss the amended complaint pursuant to CPLR 3211 (a)(7).

BACKGROUND

Plaintiff, an investment company, and Park entered into a joint venture in 2017 where plaintiff invested \$5.5 million into Praxton, a newly formed entity, and Park would manage those funds for the parties' mutual benefit (amended complaint, ¶¶3, 7-9). The parties then entered into an operating agreement on December 26, 2007 in which the parties each obtained 50% of Praxton's membership interests (*id.*, ¶¶8).

After Park allegedly failed to provide plaintiff with information concerning Praxton's operations, plaintiff commenced a books and records action against Park and Praxton in the Delaware County Court and demanded that Park, as Praxton's manager, schedule an annual meeting of the company's members (the books and records action) (*id.*, ¶13). Plaintiff alleges that the records which Park produced in response to the books and records action revealed,

among other things, that between January 2, 2008 and December 4, 2008, Park caused Praxton to make distributions to himself totaling \$1.9 million, which plaintiff did not authorize (*id.*, ¶14). Plaintiff also contends that the operating agreement did not authorize these distributions (*id.*).

On January 18, 2010, plaintiff also commenced an arbitration proceeding against Park and Praxton before the American Arbitration Association (the AAA), asserting, *inter alia*, claims for breach of contract, breach of fiduciary duty, conversion and fraud (*id.*, ¶20). The arbitration was later converted to a plenary action in 2012 and captioned as *Interasian Digital Tech. Holdings, Ltd v James Park and Praxton, LLC*, Sup Ct, NY County, July 31, 2013, index No. 600006/10 (the 2012 Action) (*id.*, ¶44). A judgment was entered in the 2012 Action in favor of plaintiff and against Park and Praxton in the sum of \$7,283,690 on July 31, 2013, which remains unsatisfied (*id.*, ¶45).

The complaint in this action asserts claims under Debtor and Creditor Law (DCL) §§ 273, 273-a, 274, 275, 276, 276-a, and 278 to set aside the conveyances to the extent necessary to satisfy plaintiff's claims; or to disregard these conveyances and attach or levy execution upon the conveyed property; or for a money judgment against defendant in the amount of the conveyances received, and an award of attorneys' fees (*id.*, ¶¶24-46).

The DCL renders certain conveyances of assets void: a conveyance made without fair consideration rendering the transferor insolvent (§273); a conveyance made without fair consideration by a party that is a defendant in an action for money damages or has a judgment rendered against it, and the judgment remains unsatisfied (§273-a); a conveyance made without fair consideration by a business person who is thereby left with unreasonably small capital (§274); a conveyance made without fair consideration when the conveyor intends or believes that it will incur debts beyond its ability to pay (§275); a conveyance made with actual intent to

defraud (§276); and a conveyance which is fraudulent as to a creditor with a mature claim who may have the conveyance set aside to the extent necessary to satisfy the claim or disregard the conveyance and attach or levy execution upon the conveyed property (§278). DCL § 276-a permits attorneys' fees to be awarded to the party who commences a successful action to set aside a fraudulent conveyance.

In this action, plaintiff alleges that between December 11, 2007 and July 27, 2011, Park and Praxton transferred \$2.1 million to defendant. Plaintiff maintains that Park transferred \$1.9 million from Praxton's account to defendant and that Praxton transferred \$200,000 from its account to defendant (amended complaint, ¶22). Defendant and Park were married at the time of the conveyances and maintained an apartment in Manhattan and an account at JP Morgan Chase Bank (JP Morgan Chase) (*id.*, ¶¶4, 21).

Plaintiff also alleges that Park admitted during the arbitration hearing that he transferred a portion of the funds to a joint account which he and defendant maintained, and that he used such funds to pay their joint obligations (*id.*, ¶21). The complaint lists forty-four transfers by Park and two transfers by Praxton (*id.*, ¶¶22-23).

Further, plaintiff alleges that defendant had knowledge of Park's actions and "actively assisted him in covering them up," and that defendant was a beneficiary of such conveyances, which were made without fair consideration and at a time when Park and Praxton were either insolvent or rendered insolvent because of such transfers (*id.*, ¶¶17, 30).

ARGUMENTS

Defendant now moves to dismiss the amended complaint, pursuant to CPLR 3211(a)(7), arguing that plaintiff has no valid cause of action against her. In support of the motion to dismiss, defendant has submitted her deposition transcript in the 2012 Action where she testified

that she and Park never discussed his finances; that she had no knowledge of Park's assets; that she was not involved with any of Park's accounts, and that Park's secretary handled such accounts. Defendant has also submitted copies of Park's JP Morgan Chase account from December 2007 through June 2011; copies of Praxton's JP Morgan Chase account reflecting a balance of over \$4 million in January 2008; and an Eastern Bank account (Eastern account) from December 2007 to August 2011, listing Park, defendant and his secretary, Mayumi Shiraki (Shiraki) on the account.

Specifically, defendant maintains that she was not the recipient of the funds which Park and Praxton allegedly transferred. According to defendant, Park transferred funds from a JP Morgan Chase account he controlled to an Eastern account in Massachusetts that he also controlled. Defendant also maintains that Park was the recipient of funds which Praxton transferred.

Additionally, defendant argues, *inter alia*, that the amended complaint should be dismissed because she neither participated in the alleged fraudulent transfers; was a beneficiary of the transferred funds; nor used any of the transferred funds. Further, defendant argues that Praxton's bank statements, which set forth a balance over \$4 million in January 2008, refute plaintiff's claims that such transfers rendered Praxton insolvent; subject to insufficient capital to conduct its business; or unable to pay debts that it incurred.

Lastly, defendant argues, among other things, that plaintiff is unable to obtain money damages from her since such damages are only recoverable against parties who are actual participants, transferees or beneficiaries of the fraudulent conveyances.

Plaintiff submitted additional Eastern account statements from January 2010 to November 2011 and argues in opposition that defendant failed to rebut the presumption of her

ownership of at least one-third of the funds in that account. Plaintiff also maintains that the Eastern account statements indicate that defendant received direct deposits of her payroll checks and deposited expense reimbursements, totaling \$1.3 million dollars, and that bills were paid from the account. Plaintiff also argues that the conveyances by Praxton were part of a series of transactions to strip Praxton of its assets, such that Praxton has no assets and failed to satisfy the judgment rendered against it.

Further, plaintiff argues, *inter alia*, that money damages are available as a remedy against a defendant who was either a transferee of the assets or where, as here, the beneficiary of the conveyance. According to plaintiff, a money damages remedy would be available since defendant allegedly received \$2.1 million of fraudulent conveyances from Park and Praxton.

DISCUSSION

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as true, the complaint must be construed in the light most favorable to plaintiff, and plaintiff must be given the benefit of all reasonable inferences (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). The court is only to determine whether the facts as alleged in the complaint fit within any cognizable legal theory (*see Leon v Martinez, supra* at 87-88).

The court must deny a motion to dismiss, “if, from the pleadings’ four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks and citation omitted]).

When evidence produced by the defendant is considered on a motion to dismiss, dismissal is not appropriate unless the evidence shows that “a material fact is not a fact at all and

no significant dispute exists regarding it” (*Fedele v Qualified Personal Residence Trust of Doris Rosen Margett*, 137 AD3d 965, 967 [2d Dept 2016]).

“A joint account establishes a rebuttable presumption that a joint tenancy with right of survivorship exists as to the funds on deposit” (*The New York State Commr. of Taxation and Fin. v Wachovia Bank, N.A.*, 2010 NY Slip Op 32122[U] [Sup Ct, NY County 2010], citing Banking Law § 675). Each joint tenant has a right to half of the funds in the account, and upon the death of the other tenant, the surviving tenant has the legal right to the entire estate (*id.*; *Jacks v D’Ambrosio*, 2008 NY Slip Op 31597[U] [Sup Ct, Nassau County 2008]).

The Eastern account lists defendant, Park and his secretary, Shiraki, on the account. Therefore, it is presumed that the joint Eastern account is a joint tenancy and that defendant is an owner who benefits from such account to the same extent as her former husband, Park (*see Matter of Signature Bank v HSBC Bank USA*, 67 AD3d 917, 918 [2d Dept 2009]; *Matter of Zecca*, 152 AD2d 830, 831 [3d Dept 1989]; *Matter of Celentano*, 41 Misc 3d 1206[A] [Sur Ct, Nassau County 2013]).

However, the presumption that a joint bank account is a joint tenancy can be rebutted by proof that the co-tenants did not intend to create a joint tenancy or that the joint account was only created for convenience (*see Matter of Signature Bank v HSBC Bank USA, supra* at 918). The parties’ motion papers appear to indicate that Park’s secretary, Shiraki, was listed on the Eastern account as a matter of convenience and that defendant and Park were joint owners of the account.

Here, defendant’s evidence fails to rebut the presumption that she and Park were joint owners of the Eastern account. Further, the evidence fails to support defendant’s claim that she neither received nor benefitted from funds allegedly transferred into the Eastern account. Rather,

the Eastern account statements indicate that she deposited her salary and reimbursements of her expenditures into this account. Further, the Eastern account statements indicate that bills were paid from this account. Therefore, this evidence supports plaintiff's allegations that defendant benefitted from the conveyances.

Contrary to defendant's contention, money damages are an available remedy. Such damages, whether based on actual or constructive fraud, are recoverable against parties who participate in the fraudulent conveyance and "are either transferees of the assets or beneficiaries of the conveyance" (*Sullivan v Kodsi*, 373 F Supp 2d 302, 309 [SD NY 2005] [internal quotation marks and citations omitted]; see *Constitution Realty v Oltarsh*, 309 AD2d 714, 716 [1st Dept 2003]). Although defendant maintains that the allegations regarding her participation are conclusory, such participation can be established through the receipt of funds or benefiting from the conveyances (*Federal Natl. Mtge. Assn. v Olympia Mtge. Corp.*, 792 F Supp 2d 645, 655 [ED NY 2011]).

A transferee or beneficiary who meets all the other requirements of DCL §§ 273 or 276 need not have participated in the underlying fraud (*id.* at 655; see also *Stochastic Decisions, Inc. v DiDomenico*, 995 F2d 1158, 1172 [2d Cir 1993]; *Integrity Elecs., Inc. v Garden State Distribs., Inc.*, 2016 WL 3637004, *10 n 7 [ED NY June 30, 2016, No. 14-Civ-3197 (BMC)]; *Fundacion Presidente Allende v Banco de Chile*, 2006 WL 2796793, *3 [SD NY, May 29, 2006, No. 05-CV-9771 (GBD)]; *Piccarreto v Mura*, 51 Misc 3d 1230[A] [Sup Ct, Monroe County 2016], *affd* 158 AD3d 1095 [4th Dept 2018]). Here, the amended complaint alleges that defendant participated in fraudulent conveyances by receiving funds.

Defendant's reliance upon *Sullivan v Kodsi*, *supra*, is misplaced. The court in *Sullivan* determined that the complaint failed to state a claim against subsequent transferees under DCL

§§273 or 276 because it failed to allege that they actively participated in the transfers. The court in *Federal Natl. Mtge. Assn. v Olympia Mtge. Corp.* (2006 WL 2802092 [ED NY, Sept. 28, 2006, No. 04-CV-4971 [NG] [MDG]) distinguished *Sullivan* by noting “in [that case] the subsequent transferees were the beneficiaries of a trust, who received the property at issue passively via the trust as a result of the actions of the transferor and the original trustee, as well as a successor trustee who was appointed after the transfers occurred” (*id.* at *10).

The court in *Federal Natl. Mtge. Assn.* noted that that the transferees in *Sullivan* differed from the transferee therein, who was part owner of a closely held corporation involved in the chain of fraudulent transfers to her, such that her participation could be reasonably inferred (*id.*). In this case, defendant is not a passive transferee as in *Sullivan*. Rather, she is presumed to be a joint owner of an account into which allegedly fraudulent conveyances were made and she received funds. This complaint sufficiently alleges that defendant, rather than being a passive transferee, participated in the transfer. Thus, the possibility of a money judgment is not foreclosed.

Similarly, without merit is defendant’s argument that plaintiff failed to establish that the alleged transfers of \$200,000 by Praxton rendered it insolvent. Although bank records indicate a balance of over \$4 million, the element of insolvency is presumed when a conveyance is made without fair consideration (*First Keystone Consultants, Inc. v Schlesinger Elec. Contrs.*, 871 F Supp 2d 103, 120 [ED NY 2012]). Insolvency is sufficiently alleged in the complaint and the other elements of a fraudulent conveyance can be inferred from the insolvency. The issue of whether Praxton became insolvent is to be determined at a later juncture.

Therefore, it is

ORDERED that defendant’s motion to dismiss is denied; and it is further

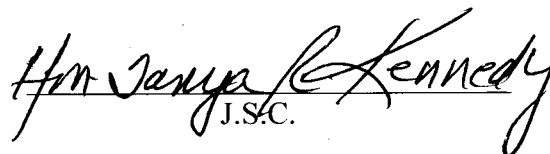
ORDERED that defendant is directed to serve and file an answer to the complaint within twenty (20) days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are to appear for a status conference on July 10, 2019 at 2:15 p.m.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
June 6, 2019

ENTER:


J.S.C.

HON. TANYA R. KENNEDY