

**Aviv v Brainard**

2019 NY Slip Op 33363(U)

November 8, 2019

Supreme Court, New York County

Docket Number: 652287/2018

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 652287/2018

ROBIN AVIV,

MOTION DATE 01/10/2019

Plaintiff,

MOTION SEQ. NO. 005

- v -

CHRISTOPHER BRAINARD, DONALD BRAINARD, PAUL BERGMAN, LMB HOLDINGS LLC, FOUR SEASONS TOWER LLC, CJB CAPITOL LLC (WYOMING), CJB CAPITOL LLC (DELAWARE), CB FUNDING LLC, JOHN DOES, JOHN DOE LLC 1 THROUGH 10

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 93, 94, 95, 96, 97, 98, 105, 106, 108, 112, 113, 114, 115, 116, 117, 118, 120, 121, 122, 123

were read on this motion to/for DISMISSAL

The motion to dismiss by Donald Brainard is denied in part as follows. Movant advances two reasons why this case should be dismissed as to him. The first is lack of personal jurisdiction as movant resides in Florida and the second is because the complaint fails to state a cause of action against him for fraudulent conveyance. The motion also seeks the dismissal of the alter ego and civil conspiracy causes of action. As plaintiff does not dispute that the alter ego cause of action does not apply to Donald Brainard, that portion of the motion is granted.

The motion to dismiss based upon is lack of personal jurisdiction is denied on the grounds of law of the case. This action was initially filed in New York Supreme Court and removed to Federal Court. During the pendency of this action in Federal Court, plaintiff brought an Order to Show Cause seeking contempt against movant. In opposition to that motion, Donald Brainard argued that there was no jurisdiction in New York over movant as he was a Florida

resident and none of the CPLR long-arm statutes were applicable. Judge Kevin Castel of the United States District Court – Southern District of New York disagreed and ruled

I have reviewed the complaint in its entirety and my basis for concluding that there is a prima facie case made out of in personam jurisdiction against Donald Brainard is based on the allegations of commission of tortious acts by CB Funding, LLC, which is not a corporation. It is a limited liability company of which he is a member and his actions through CB Funding, LLC, in New York would appear to be sufficient to prima facie subject him to in personam jurisdiction.

This order was not appealed and remains law of this case. Specifically, the issue of whether there is a prima facie basis for personal jurisdiction over movant has already been decided and may not be relitigated. Movant's argument that Judge Castel did not rule on New York personal jurisdiction but rather found jurisdiction based upon RICO is without merit. It is true that Judge Castel did find jurisdiction based upon RICO but that finding was in addition to his finding above and a secondary reason why jurisdiction was proper. Accordingly, the portion of the motion seeking to dismiss based upon a lack of personal jurisdiction is denied.

Similarly, the portion of the motion seeking dismissal of the fraudulent conveyance cause of action is also denied. While movant argues that plaintiff does not state with specificity the actions taken or transactions performed by Donald Brainard that were allegedly a fraudulent conveyance, dismissal at this pre-discovery stage would be inappropriate. First, a reading of the Amended Complaint sufficiently alleges that Donald, through his alleged control, dealings and ownership of CB Funding LLC may have participated in wrongful conveyances by engaging in financial transactions, including the transfer of assets out of entities where plaintiff's judgment may have been partially satisfied. In addition, pleading intentional fraudulent conveyance under Debtor and Creditor Law § 276, a plaintiff must allege the overall fraudulent scheme in detail and fraudulent intent may be fairly inferred from such details (*Mar. Midland Bank v Zurich Ins.*

Co., 263 AD2d 382, 382-83 [1st Dept 1999]). Here, there is a reasonable inference from the allegations of an overall scheme that supports the allegation that movant participated in moving assets fraudulently. Further, claims for fraudulent conveyances under Debtor and Creditor Law §§ 273, 274, and 275 “are not subject to the particularity requirement, because they are based on constructive fraud” (*Ridinger v West Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]; *Matter of Application of City of Syracuse Indus. Dev. Agency*, 156 AD3d 1329 [4th Dept 2017], *rearg denied sub nom. Matter of City of Syracuse Indus. Dev. Agency*, 160 AD3d 1506 [4th Dept 2018], and *lv to appeal* dismissed, 2018 NY Slip Op 83088 [NY Sept. 13, 2018]; *see also Wall St. Assocs. v. Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141 [2d Dept 2009]). Therefore, movant’s motion to dismiss the fraudulent conveyance cause of action is denied.

The motion to dismiss the third cause of action for civil conspiracy against Donald Brainard is granted. New York does not recognize an independent cause of action for conspiracy to commit fraud (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457 [1st Dept 2011]). “While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud or tort is not, of itself, a cause of action” (*see MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1995], citing *Brackett v Griswold*, 112 NY 454 [1889]). Given that civil conspiracy is not an independent tort, it cannot have its own independent measure of damages; any damages attributable to plaintiff’s conspiracy claim exists only *within* those damages that may be assessed for fraud” (*id.*). Rather, the “allegations in the complaint herein charging conspiracy are deemed part of the remaining causes of action to which they are relevant” (*Errant Gene Therapeutics, LLC v Sloan-Kettering Inst. for Cancer Research*, 174

AD3d 473, 474 [1st Dept 2019]). Here, the conspiracy charge remains a part of the fraudulent conveyance cause of action. Accordingly, it is hereby

ORDERED that the cause of action for alter-ego theory is dismissed as to Donald Brainard; and it is further

ORDERED that the cause of action for civil conspiracy is dismissed as a separate and distinct cause of action from the fraudulent conveyance cause of action; and it further

ORDERED that the motion to dismiss is otherwise denied.

This constitutes the decision and order of the Court.

11/8/2019  
DATE

  
DAVID BENJAMIN COHEN, J.S.C.

|                       |                          |                            |                          |        |                                     |                       |                                     |                 |                          |           |
|-----------------------|--------------------------|----------------------------|--------------------------|--------|-------------------------------------|-----------------------|-------------------------------------|-----------------|--------------------------|-----------|
| CHECK ONE:            | <input type="checkbox"/> | CASE DISPOSED              | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | <input checked="" type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER     |
| APPLICATION:          | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/> | DENIED | <input checked="" type="checkbox"/> | GRANTED IN PART       | <input type="checkbox"/>            | OTHER           | <input type="checkbox"/> | OTHER     |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | SETTLE ORDER               | <input type="checkbox"/> | DENIED | <input type="checkbox"/>            | SUBMIT ORDER          | <input type="checkbox"/>            | OTHER           | <input type="checkbox"/> | OTHER     |
|                       | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | DENIED | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT | <input type="checkbox"/>            | OTHER           | <input type="checkbox"/> | REFERENCE |

**HON. DAVID B. COHEN**  
**J.S.C.**