Trinity Centre LLC v Morrison Mahoney LLP
2020 NY Slip Op 31540(U)
April 3, 2020
Supreme Court, New York County
Docket Number: 655335/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

---X

TRINITY CENTRE LLC,

Plaintiff,

- v -

MORRISON MAHONEY LLP, ROBERT STERN, and RICHARD MONTANA,

Defendants.

---X

INDEX NO. 655335/2018

MOTION DATE 09/05/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 34, 36, 38, 40, 43

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 37, 39, 41, 42

were read on this motion to/for DISMISS.

ORDER

Upon the foregoing documents, it is

ORDERED that defendant Morrison Mahoney LLP's motion to dismiss (motion sequence number 001) is granted and the complaint and all cross claims against it are dismissed with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and the Clerk shall is directed to enter judgment in favor of such defendant; and it is further

ORDERED that Morrison Mahoney LLP's request for sanctions is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that defendants Robert A. Stern and Richard Montana's motion to dismiss (motion sequence 002) is granted to the extent of dismissing the first cause of action (successor liability via de facto merger), third cause of action (actual fraudulent conveyance) except as to Robert A. Stern and Richard Montana, and fifth cause of action (attorney's fees under commercial lease), and is otherwise denied; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that defendants shall serve and file an answer to the complaint within sixty (60) days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on June 30, 2020, 9:30 AM, in IAS Part 59, 60 Centre Street, Room 331, New York, New York.

DECISION

In this action, judgment-creditor plaintiff Trinity Centre LLC (Trinity), commenced an action against defendants Morrison Mahoney LLP (MM), Robert A. Stern (Stern), and Richard Montana (Montana) (collectively, defendants), seeking enforcement of a judgment against non-party Stern and Montana LLP (S&M) in the amount of $1,290,038.14 (hereinafter, the judgment).

MM moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss all claims plead against MM, and to sever all claims against MM. Pursuant to 22 NYCRR 130.1-1, MM also seek sanctions. Stern and Montana move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint in its entirety. Plaintiff opposes.

Factual Background

Based on the record before this court, Stern and Montana were former partners of law firm, S&M. On July 10, 2003, S&M entered into a commercial lease (hereinafter, the lease) with plaintiff for office space at 111 Broadway, New York, New York 10006 (lease, New York St Cts Electronic Filing System [NYSCEF]

Doc No. 6). It is undisputed that neither Stern nor Montana personally guaranteed the lease (id. at 45, Stern affidavit, NYSCEF Doc No. 29 ¶ 4, Montana affidavit, NYSCEF Doc No. 26 ¶ 4). By October 2015, S&M owed approximately $1 million in unpaid rent and other charges (complaint, NYSCEF Doc No. 2 ¶ 23). S&M vacated the office space on February 2, 2015 and stopped practicing law as a firm by December 2016 (NYSCEF Doc. No. 29 ¶ 3). According to Stern and Montana, S&M has not been dissolved due to back tax liabilities, but the firm has no assets and there are no remaining receivables anticipated to be collected (id.).

On February 11, 2016, plaintiff commenced an action captioned Trinity Centre LLC v Stern & Montana, LLC, under Index No. 650726/2016 in Supreme Court, New York County against S&M for (1) account stated for unpaid rent, (2) breach of contract, and (3) attorney's fees (complaint in underlying action, NYSCEF Doc No. 5). Plaintiff moved for summary judgment on all three causes of action (notice of motion in underlying action, NYSCEF Doc No. 7). On January 8, 2018, Justice Engoron granted plaintiff's summary judgment motion and awarded damages in the amount of $1,290,038.14, inclusive of interest and attorney's fees (NYSCEF Doc No. 2 ¶ 1). It is undisputed that the judgment is fully unsatisfied.

At some point, before judgment was entered against S&M, Stern and Montana sought employment, eventually entering into employment agreements with MM, effective January 2, 2017 (NYSCEF Doc Nos. 26 ¶ 7, 29 ¶ 7). According to defendants, Stern and Montana are both designated as "Income Partners" but are at-will employees at MM (NYSCEF Doc Nos. 26 ¶¶ 8-9, 29 ¶¶ 8-9). Based upon the employment agreements, MM did not assume any of S&M's liabilities or obligations (Montana employment agreement, NYSCEF Doc No. 27 ¶ 5, Stern employment agreement NYSCEF Doc No. 30 ¶ 5). Lastly, MM hired 11 attorneys from S&M (Burke affidavit, NYSCEF Doc No. 16 ¶ 9).

Procedural History

In this action, defendants Stern and Montana seeks to dismiss the following causes of action: (1) successor liability via de facto merger for breach of commercial lease against MM; (2) constructive fraudulent conveyance against Stern and Montana; (3) actual fraudulent conveyance against defendants; (4) statutory attorney's fees; and (5) attorney's fees pursuant to the lease. Defendant MM seeks to dismiss causes of action (1), (3), (4) and (5). Additionally, MM seeks sanctions pursuant to 22 NYCRR 130.1-1.

DISCUSSION

Standard

On a motion to dismiss a complaint pursuant to CPLR 3211, 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 (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Allianz Underwriters Ins. Co. v Landmark Ins. Co., 13 AD3d 172, 174 [1st Dept 2004]).

CPLR 3211 (a) (1) provides, in part, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence . . . ." "In order to prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitively dispose of plaintiff's claim" (Bronxville Knolls v Webster Town Ctr. Partnership, 221 AD2d 248, 248 [1st Dept 1995]). "Such [a] motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]).

If the court considers evidentiary material, its criterion is measured by whether "'the proponent of the pleading has a cause of action, not whether he has stated one'" (Leon, 84 NY2d at 88, quoting Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). 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]).

De Facto Merger

Plaintiff alleges in its first cause of action, under the theory of successor liability, that S&M effectively merged with MM, making MM liable to plaintiff for the judgment amount of $1,290,038.14 (NYSCEF Doc No. 2 ¶¶ 65-71).

Stern and Montana argue that plaintiff's first cause of action against MM must be dismissed because plaintiff has failed to state a cause of action. They contend that the complaint fails to allege the necessary elements of continuity of ownership: cessation of ordinary business and dissolution of the acquired corporation, assumption of liabilities and continuity of management, personnel, physical location assets and general business operations, as required for a de facto merger claim (Stern and Montana's memorandum of law, NYSCEF Doc No. at 25 at 4). Stern and Montana point to their respective affidavits to establish that (1) MM is separate and has never been associated with S&M, (2) Stern and Montana's compensation is not based on the performance of MM as a firm, (3) Stern and Montana are not equity partners at MM and are at-will employees, (4) S&M has not been dissolved but is not operating, (5) MM assumed no

liabilities from S&M, and (6) MM does not operate at the same physical location as S&M (id. at 5).

MM argues that the first cause of action is insufficient because it is plead entirely upon information and belief, with no supporting documentary evidence, whereas the employment agreements between MM and Stern and Montana show, conclusively, the absence of an assumption of liabilities and purchase agreement (MM's memorandum of law, NYSCEF Doc No. 21 at 13-16). MM contends that the employment agreement is evidence that Stern and Montana are engaged as at-will employees, which would warrant an outright dismissal of the claim (id.).

Plaintiff maintains that S&M merged with MM, and as a result of their de facto merger, MM is legally liable for S&M's debts. Plaintiff argues that Stern and Montana are equity partners at MM, in all but name, that MM assumed S&M's liabilities, and that there was continuity of S&M's business once they were brought over to MM; all of which are hallmarks of a de facto merger. It contends that the employment agreements that defendants rely upon are "not unambiguous proof" of Stern and Montana's at-will employee status at MM. Rather, they are treated as partners but are only called employees to circumvent creditors, since Stern and Montana can only be terminated for cause in narrow circumstances, have supervisory and managerial duties, and their compensation can be freely amended "as agreed

upon" (plaintiff's opposition to MM, NYSCEF Doc No. 38 at 24-25).

"The de facto merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible for the pre-existing liabilities of the acquired corporation" (*Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]). However, "a successor that effectively takes over a company in its entirety should carry the predecessor's liabilities as a concomitant to the benefits it derives from the good will purchased" (Grant-Howard Assoc. v General Housewares Corp., 63 NY2d 291, 296 [1984]). Thus, under New York law,

> "[t]he hallmarks of a de facto merger claim between an asset seller and an asset buyer are [1] continuity of ownership; [2] cessation of ordinary business and dissolution of the acquired corporation as soon as possible; [3] assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, [4] continuity of management, personnel, physical location, assets and general business operations"

(Fitzgerald, 286 AD2d at 574).

The element of "continuity of ownership is 'the essence of a merger,' [and] it is a necessary element of any de facto merger finding, although not sufficient to warrant such a finding by itself" (Matter of New York City Asbestos Litig., 15 AD3d 254, 256 [1st Dept 2005] [citation omitted]). "Continuity of ownership describes a situation where the parties to the

transaction 'become owners together of what formerly belonged to each'" (*id.* at 256 [citation omitted]).

Moreover, in contractual matters like this, the element of continuity of ownership is essential (see Washington Mut. Bank, FA v SIB Mort. Corp., 4 Misc 3d 1001 [A], 87 [Sup Ct Kings County 2004], affd 21 AD3d 953, 953 [2d Dept 2005] ["continuity of ownership is a prerequisite to the imposition of successor liability upon a theory of de facto merger in the context of contractual liability"]; see Employee Relations Assoc., Inc. v Xperius, 196 Misc 2d 485, 487 [Sup Ct Monroe County, 2003] [continuity of ownership remains a "strict requirement" of de facto merger in the context of commercial cases under New York Law, especially since commercial entities can negotiate contracts that mitigate for loss allocation]).

Here, plaintiff attempts to establish continuity of ownership by arguing Stern and Montana are partners in all but name, that the employment agreements are ambiguous as to how they are compensated and how they can be terminated, that the S&M website now redirects to MM's website and that the majority of S&M lawyers are now employed as MM lawyers. Plaintiff relies on Ring v Elizabeth Found. for the Arts (136 AD3d 525, 526 [1st Dept 2016]) and Ambac Assur. Corp. v Countrywide Home Loans, *Inc.* (27 NY3d 616, 620 [2016]), for the premise that continuity of ownership can be established through indirect ownership or a

multi-step transaction. However, the documentary evidence, in the form of employment agreements between Stern and Montana and MM explicitly establish that they are not equity partners and are paid an annual salary with a possible bonus (NYSCEF Doc Nos. 27, 30). Montana's performance bonus is based upon his client billings, while Stern's performance bonus is based upon business he brings into MM (id.). Neither Stern nor Montana have equity ownership, direct or otherwise, in MM.

Plaintiff's reliance *on* ePlus Grp. Inc. v SNR Denton LLP (111 AD3d 494, 495 [1st Dept 2013]) is also misplaced. The ePlus Court held that there was continuity of ownership where equity partners of the predecessor firm became equity partners of the successor firm. Here, however, the employment agreements establish that neither Stern nor Montana are equity partners at MM. The ePlus Court also based its de facto merger analysis on the predecessor firm's cessation of business, coupled with the successor firm's opening at the same location with the same people, clients, management and operations (id. at 495). In contrast, MM was already an established law firm, with its own offices, business operations and clients, prior to Stern and Montana joining MM, and does not operate out of the same space that S&M previously held.

Plaintiff's contention that At Last Sportswear, Inc. v. Newport News (2010 NY Slip Op 32792[U], *6 [Sup Ct, NY County

2010]), holds that a successor liability claim based on a de facto merger can withstand a motion to dismiss even when there is a limitation of liability clause between the predecessor and successor companies is likewise misplaced. The court in At Last Sportswear, Inc., was not analyzing the limitation of liability clause, rather, it denied dismissal of the successor liability cause of action because discovery was necessary to determine if the same shareholders that owned the predecessor company owned the successor company (id.). In other words, the court did not dismiss the cause of action because continuity of ownership was still at issue. In contrast, here, the documentary evidence establishes that Stern and Montana do not have equity in MM and the limitation of liability clause establishes that MM did not assume any of S&M's liabilities.

Thus, without the key element of continuity of ownership, nor the additional element of continuity of management, personnel, physical location, assets and general business operations, there can be no de facto merger in a contractual dispute (see Matter of New York City Asbestos Litig., 15 AD3d at 255). Furthermore, the employment agreement conclusively establishes that MM did not assume any liabilities of S&M when hiring Stern and Montana and required Stern and Montana to indemnify MM against S&M's liabilities (NYSCEF Doc Nos. 16, 27, 30).

Accordingly, Stern and Montana and MM's motion to dismiss the first cause of action must be granted.

Constructive Fraudulent Conveyance

Stern and Montana argue that the second cause of action sounding in constructive fraudulent conveyance must also be dismissed. The second cause of action is interposed solely against Stern and Montana and alleges that S&M, once it realized its business was failing, fraudulently conveyed funds to Stern and Montana, "without fair consideration and without good faith," thereby rendering S&M insolvent (NYSCEF Doc No. 2). The complaint alleges that the conveyance of these funds was fraudulent under Debtor and Creditor Law (hereinafter DCL) §§ 273, 274 and 275 (*id.*). Stern and Montana argue that the cited statutory provisions are inapplicable to limited liability partnerships and, therefore, plaintiff has failed to state a cause of action (NYSCEF Doc No. 25 at 6).

The third cause of action alleges a constructive fraudulent conveyance as against MM. MM argues that plaintiff's allegation that MM violated article 10 of the DCL is too broad to state a cause of action (NYSCEF Doc No. 21 at 5). Further, it contends that according to the Court of Appeals decision in Matter of Thelen LLP (24 NY3d 16, 22 [2014]), plaintiff's allegation that there was a fraudulent transfer of "all of the good will,

including the client book of business," is not considered a conveyance at all (NYSCEF Doc No. 21 at 10).

Plaintiff argues that, pursuant to DCL §§ 273, 274 and 275, it must merely allege that a debtor made a conveyance without fair consideration, and that the debtor was insolvent or undercapitalized or was rendered as such as a result of the conveyance (NYSCEF Doc No. 39 at 13). Plaintiff claims that it has adequately plead that S&M made transfers of over $1 million to Stern and Montana while knowingly owing plaintiff for underpaid rent under the lease agreement, and that these money transfers were not made in good faith or with fair consideration, rendering S&M insolvent (*id.* at 19).

As to MM, plaintiff also contends that it has stated a cause of action for constructive fraudulent conveyance by alleging that S&M was insolvent when it "conveyed all its goodwill and personal property to MM for no consideration and without any good faith" (NYSCEF Doc No. 38 at 10).

In reply, Stern and Montana argue, that while plaintiff in opposition cites to DCL § 277, which properly governs transfers made by partnerships, plaintiff did not allege DCL § 277 in their complaint, nor did they move to amend the complaint (NYSCEF Doc No. 42 at 8). Therefore, they argue, the second cause of action must be dismissed.

MM, in reply, argues that what plaintiff is alleging as a conveyance is not a conveyance at all, since good will, client matters, and future billable hours are not partnership property (NYSCEF Doc No. 43 at 1). MM contends that since S&M did not have property interest in any client matter after it ceased operation, when MM took on incomplete matters from S&M clients, or received new matters from those clients, there was no conveyance from S&M to MM, as a matter of law (NYSCEF Doc No. 43 at 2).

The DCL renders certain conveyances of assets void when made without fair consideration. Pursuant to DCL § 270, a conveyance is "every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property". Fair consideration is considered lacking when a conveyance is made at a time when the transferor is insolvent or when such a conveyance would render it insolvent (DCL § 273); when the conveyance would leave it with an "unreasonably small amount of capital" with which to operate the business (DCL § 274); or a conveyance was made when the transferor knew that debts would be incurred beyond its ability to pay (DCL § 275) (see also Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership, 25 AD3d 301, 302 [1st Dept 2006]).

Here, plaintiff alleges that S&M, Stern, and Montana were aware that S&M was in arrears to plaintiff for $100,000 in unpaid rent by July 2014 (NYSCEF Doc No. 2 ¶¶ 27-33). S&M stopped operating in late 2016 and Stern and Montana signed their employment agreements with MM in early 2017 (NYSCEF Doc Nos. 26, 29). By this time, S&M was in arrears to plaintiff for unpaid rent for approximately $1 million (underlying decision and order, NYSCEF Doc No. 4 at 2). Plaintiff alleges that in the meantime, S&M transferred hundreds of thousands of dollars to S&M's partners, Stern and Montana, causing the firm to become insolvent (NYSCEF Doc No. 2 ¶¶ 27-33). Further, plaintiff alleges that these transfers were made without good faith or fair consideration (*id.* ¶¶ 44-48). Stern and Montana's argument that DCL §§ 273, 274 and 275 are inapplicable to transfers made by a partnership is unavailing and inconsistent with the relevant case law on the matter. New York courts have held that payments made to officers, directors or controlling shareholders, while the transferor is insolvent, are presumptively fraudulent (Matter of CIT Group/Commercial Servs., Inc., 25 AD3d at 303; Farm Stores v School Feeding Corp., 102 AD2d 249, 251 [2d Dept 1984]; Southern Indus. v Jeremias, 66 AD2d 178, 182 [2d Dept 1978]). At this preliminary stage, the complaint adequately alleges facts sufficient to support a

theory of constructive fraudulent conveyance as against Stern and Montana.

As to MM, plaintiff argues that "the good will and book of business" of a law firm can be fraudulently conveyed if transferred for inadequate consideration. Plaintiff relies heavily on Constitution Realty v Oltarsh (309 AD2d 714, 715 [1st Dept 2003]), where a judgment was obtained against a law firm for unpaid rent. The law firm then ceased operating and referred its clients to a contemporaneously formed law firm consisting of the same three partners and with almost the same exact firm name (id.).

MM in reply, relies on Matter of Thelen, (24 NY3d at 22), for the premise that a dissolved law firm's future billable fees are not partnership property and cannot be conveyed. In Matter of Thelen[1], the partners from an insolvent and dissolved law firm transferred their unfinished client matters to another law firm. Numerous partners from the dissolved law firm also joined as partners. The Court held that the dissolving firm was only entitled to fees for work they had already performed on the matters, and that in "New York [there is a] strong public policy encouraging client choice and, concomitantly, attorney mobility"

[1] The Court in Matter of Thelen, 24 NY3d at 27, also addressed Matter of Coudert Bros. LLP, (574 Fed Appx 15, 16 [2d Cir 2014]), which certified identical questions.

(*id.* at 32). The Court noted that there could be "numerous perverse effects" if pending hourly fees were treated as partnership property, such that "attorneys would . . . find it difficult to secure a position in a new law firm because any profits from their work for existing clients would be due their old law firms, not their new employers" (id. at 31, 32).

MM relies on Matter of Thelen (24 NY3d at 22 [2014]), analogizing future billable hours to that of a law firm's goodwill and book of business. More instructive is the case of Spaulding v Benenati (57 NY2d 418, 418 [1982]). In Spaulding, the defendant, after he contracted to purchase a dental practice, argued that the good will of a professional was not a saleable asset, and he therefore did not need to pay the money apportioned as the value of the good will (id. at 418). The Court held that good will is not a saleable asset when it applies to the personal skill, judgment and reputation of a professional person unless it "include[s] *something other* than the personal attributes of a professional, such as the right to establish a practice on the same premises'" (id. at 422 [emphasis added]). Further, the Court quoted Justice Cardozo's formulation that "[t]he chief elements of value upon any sale of a good will are, *first,* continuity of place and, *second,* continuity of name" (id. at 423 quoting Matter of Brown, 242 NY 1, 7 [1926]). Here, unlike in Constitution Realty (309

AD2d at 714) and *Spaulding* (57 NY2d at 423), there is neither continuity of name nor location, since Stern and Montana have relocated and joined MM. This, coupled with the public policy behind In re Thelen LLP (24 NY3d at 22), leads to the conclusion that, under these circumstances, without more, good will was not and could not have been conveyed (Matter of Thelen, 24 NY3d at 22 [citing to an opinion of the New York County Lawyers' Association, "Lawyers are not tradesmen. They have nothing to sell but personal service," and quoted by the Court of Appeals in Cohen v Lord, Day & Lord (75 NY2d 95, 98 [1989])).

As to whether S&M's book of business is considered property that can be fraudulently conveyed, Mitchell v Lyons Professional Services Inc. (109 F Supp 3d 555, 557 [ED NY 2015]), is persuasive. Plaintiff cites to Mitchell, for the premise that a client list or book of business can be fraudulently transferred. In Mitchell, the owner of a security guard company transferred the client list to another security company, in exchange for a personal payment of $300,000.00, to avoid paying a judgment against his now-defunct company (id. at 557). While the court noted that most courts recognized that "a client list is a form of goodwill and goodwill can be fraudulently conveyed like any other interest in property," it explicitly noted that "special considerations [are] attendant to the attorney-client relationship and the policy encouraging clients to have the

ability to select their lawyers [same In re Thelen LLP] inapposite in the context of commercial transactions like the one at issue here" (Mitchell, 109 F Supp 3d at 560 n 1). Thus, plaintiff's reliance on Mitchell is likewise misplaced.

Since plaintiff has failed to plead a "conveyance" as required by DCL §§ 273, 274 and 275, and defined by DCL 270, its cause of action for constructive fraudulent conveyance against MM must be dismissed (see State Farm Ins. Co. v Shanley & Schwartz, Inc., 111 AD3d 918, 919 [2d Dept 2013] ["A necessary element of a cause of action pursuant to Debtor and Creditor Law §§ 273-a and 276 is a 'conveyance'"]).

Accordingly, plaintiff has sufficiently plead a cause of action sounding in constructive fraudulent conveyance only as to Stern and Montana pursuant to DCL §§ 273, 274 and 275.

Actual Fraudulent Conveyance

Plaintiff's fourth cause of action alleges that S&M, Stern, Montana, and MM fraudulently conveyed "all of the good will, including the client book of business" of S&M in order to intentionally evade S&M's creditors.

Stern and Montana argue that the third cause of action sounding in actual fraudulent conveyance against all defendants must be dismissed. Stern and Montana refute the allegation that there was an attempt to avoid plaintiff as S&M's creditor since neither Stern, Montana, nor MM were signatories to the Lease in

a personal capacity, and "had no reason to believe that [p]laintiff would seek to hold them liable for the debts of [S&M]" (NYSCEF Doc No. 25 at 7). Moreover, Stern and Montana maintain that plaintiff's allegation that there was an improper conveyance of "all of the good will, including the client book of business," is insufficient to state of cause of action under DCL § 270. They argue that, because neither tangible nor intangible property was ever conveyed, since "good will and the client book of business" is not considered property, plaintiff has failed to state a cognizable cause of action under article 10 of DCL. MM joins in these arguments and adds that plaintiff has failed to plead actual fraud with particularity, as required pursuant to CPLR 3016 (b).

Plaintiff claims that it has sufficiently stated a cause of action for actual fraudulent conveyance pursuant to DCL § 276-a by alleging that a conveyance was made with the intent to hinder, delay or defraud creditors. Plaintiff, in its opposition papers, points to the close relationship between S&M and Stern and Montana as a "badge of fraud" to show that the payments made by S&M to Stern and Montana, when the firm was in financial distress and in rental arrears, is sufficient to state cause of action pursuant to DCL § 276. As to MM, plaintiff argues that their allegations of "badges of fraud" are

sufficient to satisfy the pleading requirements under CPLR 3016(b).

MM, Stern and Montana, in reply, reassert their moving paper arguments, and contend again, that, "in the absence of a conveyance, there is no claim for fraudulent conveyance," and this cause of action must therefore be dismissed as a matter of law (NYSCEF Doc No. 43 at 2). Stern and Montana rely on the same arguments they made concerning constructive fraudulent conveyance in response to plaintiff's allegation that S&M, with fraudulent intent, transferred money to Stern and Montana.

In order to adequately plead a cause of action based upon DCL § 276, which involves an intent to defraud, plaintiff is required to comply with the pleading requirements of CPLR 3016 (b) (see Matter of Uni-Rty Corp. v New York Guangdong Fin., Inc. 117 AD3d 427, 428 [1st Dept 2014]). Thus, to satisfy the pleading requirements of CPLR 3016 (b), the allegations in the complaint must be "set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of" (Lanzi v Brooks, 43 NY2d 778, 780 [1977]).

While the allegations in the complaint in this case may sufficiently plead fraudulent conduct, i.e. that MM intended to circumvent, hinder and evade creditors, plaintiff has failed to plead any conveyance of tangible or intangible property, as defined by DCL § 270 (State Farm Ins. Co., 111 AD3d at 919).

A conveyance is "actually" fraudulent if it is made "with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors" (DCL § 276). "Due to the difficulty of proving actual intent, the pleader is allowed to rely on so-called '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 Street Assocs v Brodsky, 257 AD2d 526, 529 [1st Dept 1999] [internal quotations omitted]). They include

> "(1) the close relationship among the parties to the transaction, (2) the inadequacy of the 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 Natl. Bank of Chicago, 240 AD2d 384, 386 [2d Dept 1997]).

Here, plaintiff alleges that S&M transferred over $1 million to Stern and Montana between 2014 and 2016, for extraordinary payments that were not conventional wages, at a time when S&M was in debt to plaintiff (NYSCEF Doc No. 39 at 25). The complaint alleges, in sufficient detail, to inform defendants of the substance of plaintiff's claims and to satisfy CPLR 3016 (b) (see Lanzi, 43 NY2d at 780 [CPLR 3016 (b) "is not to be interpreted so strictly as to prevent an otherwise valid

cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud'"] [citation omitted]).

As to the "actual intent" requirement of DCL § 276, plaintiff alleges that badges of fraud are present. Given the close relationships amongst the parties to the transfer, S&M and Stern and Montana's knowledge of plaintiff's claims, and the retention of control of the money by the transferor after the conveyance, plaintiff has sufficiently stated a cause of action for actual fraudulent conveyance as to the money transferred by S&M to Stern and Montana between 2014 and 2016 (see Matter of CIT Group/Commercial Servs., Inc., 25 AD3d at 301; see also Pen Pak Corp. v LaSalle Natl. Bank of Chicago, 240 AD2d at 384).

Thus, plaintiff's third cause of action for actual fraudulent conveyance shall be dismissed as against MM.

Attorney's Fees Pursuant to DCL § 276-a

Defendants argue that plaintiff is not entitled to statutory attorney's fees, pursuant to DCL § 276-a, because plaintiff has failed to first state a cause of action for actual fraudulent conveyance (NYSCEF Doc Nos. 21 at 17, 25 at 10).

Plaintiff maintains that it is entitled to statutory attorney's fees because they have demonstrated defendants' actual intent to defraud, as required by DCL § 276 (NYSCEF Doc No. 39 at 29). According to plaintiff, once a plaintiff has

prevailed on a claim under DCL § 276, statutory attorney's fees are automatic (id.).

Attorney's fees under DCL § 276-a is recoverable by a creditor that has demonstrated actual fraud (DCL § 276-a). Therefore, since plaintiff's cause of action for actual fraudulent conveyance is dismissed as against MM, so too is its claim for attorney's fees pursuant to DCL § 276 (see Brennan v 3250 Rawlins Ave. Partners, LLC, 171 AD3d 603, 605 [1st Dept 2019] ["[b]ecause the complaint fails to state a cause of action for actual fraud under Debtor and Creditor Law § 276, the related claim for attorney's fees under section 276-a must also be dismissed"]). However, because plaintiff has a valid cause of action for actual fraudulent conveyance against Stern and Montana, Stern and Montana's motion to dismiss the fourth cause of action shall be denied.

Thus, only MM's motion to dismiss the fourth cause of action is granted.

Attorney's Fees Pursuant to The Lease

Plaintiff's fifth cause of action alleges that pursuant to the lease, plaintiffs are entitled to recover attorney's fees incurred in enforcing rent obligations. Defendants argue that, MM cannot be liable for attorney's fees incurred in this litigation because MM is not the legal successor in interest to S&M, as required under the lease (NYSCEF Doc Nos. 21 at 16 n 1,

25 at 11). Again, Stern and Montana point to the employment agreements that "explicitly preclude the assumption of any S&M . . . liability" (NYSCEF Doc No. 25 at 11). Finally, Stern and Montana argue that plaintiff has already obtained a judgment against S&M, including attorney's fees, and the instant cause of action would be tantamount to a double recovery of attorney's fees (id. at 12).

Plaintiff, in opposition, contends that, according to the lease, it is entitled to reasonable attorney's fees if it prevails in any action arising from a breach of the lease, including actions against a tenant's successor. It argues that since MM is S&M's legal successor by way of the de facto merger, MM is liable for the obligations of S&M.

Since plaintiff's successor liability via de facto merger claim is dismissed, so too is its claim for attorney's fees under the lease.

Therefore, Stern and Montana, and MM's motion to dismiss the fifth cause of action must be granted.

Sanctions

Lastly, MM seek sanctions for the filing of this suit. Plaintiff is silent on this issue.

Pursuant to Rules of the Chief Administrator of the Courts 22 NYCRR § 130-1.1, the court may award reasonable attorney's fees or costs in the form of reimbursement for actual expenses

reasonably incurred or impose financial sanctions on any party or attorney who engages in frivolous conduct. Frivolous conduct is defined for the purposes of this rule as that which:

> "(1) is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
> (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
> (3) asserts material factual statements that are false"

(22 NYCRR § 130-1.1 [c] [1], [2], [3]).

The court finds that the above elements are not met, and therefore, MM's request for sanctions is denied.

4/3/2020
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	☐ CASE DISPOSED		☒ NON-FINAL DISPOSITION		
APPLICATION:	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART		☐ OTHER
	☐ SETTLE ORDER		☐ SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		☐ FIDUCIARY APPOINTMENT		☐ REFERENCE