Bank Leumi USA v GM Diamonds, Inc.
2020 NY Slip Op 32809(U)
August 26, 2020
Supreme Court, New York County
Docket Number: 150474/2015
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY **PART** **IAS MOTION 48EFM**

Justice

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INDEX NO. 150474/2015

BANK LEUMI USA,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 010, 011

- v -

GM DIAMONDS, INC., GM IDEAL, INC., BARUCH MESICA, AMI MESIKA, GEULA MESICA, NERED MESIKA, and JEREMY MEDDING,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 526, 584, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 609, 610, 611

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

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were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

Masley, J.:

In motion sequence 010, plaintiff Bank Leumi USA (Bank Leumi) moves, pursuant to CPLR 3212, for summary judgment against GM Ideal, Inc. (GM Ideal) and Jeremy Medding (together, the GM Ideal Defendants) on its fifth, sixth, and seventh causes of action. Bank Leumi also seeks a determination of attorneys' fees and dismissal of the GM Ideal Defendants' affirmative defenses. In motion sequence 011, the GM Ideal Defendants move, pursuant to CPLR 3212, for summary judgment dismissing the complaint against them.

Background

Unless stated otherwise, all facts are taken from the parties' Joint Statement of Undisputed Facts (NYSCEF Doc. No. [NYSCEF] 467, Joint Statement).

On April 30, 2008, defendant GM Diamonds, Inc. (GMD) and Bank Leumi entered into a Security Agreement, which provides that GMD "may not sell, lease, assign, or otherwise dispose of any of the Security without the prior written consent of the Bank." (*Id.* ¶¶ 1-2.) The Security Agreement also provides that GMD "shall keep all of the Non-Possessory Security ... at [GMD's] premises ... and shall not remove any of the Non-Possessory Security therefrom without the Bank's prior written consent." (*Id.* ¶ 3.) The Security Agreement gave Bank Leumi a security interest in all of GMD's tangible and intangible assets. (*Id.* ¶ 4.) Defendant Baruch Gilad Mesica (Gilad), the founder and President of GMD (NYSCEF 1, Complaint ¶ 6), was a guarantor of the Security Agreement, as were defendants Guela Mesica, Vered Mesika, and Ami Mesika. (NYSCEF 467, Joint Statement ¶ 7.)

On August 17, 2012, GMD obtained a $2.5 million line of credit with Bank Leumi (the Credit Facility Agreement). (*Id.* ¶ 8.) On August 21, 2013, GMD borrowed $2.5 million via a Promissory Note, and then failed to repay such amount on February 3, 2014, placing GMD in default of the Promissory Note and the Security Agreement. (*Id.* ¶¶ 10-12.) On March 24, 2014, GMD and Bank Leumi entered into a Forbearance Agreement, by which GMD acknowledged its indebtedness and Bank Leumi agreed not to enforce its rights and remedies until December 31, 2014. (*Id.* ¶¶ 14-17, 20.) The parties further agreed to a repayment schedule memorialized in March 24, 2014 installment promissory note. (*Id.* ¶¶ 20-21.) GMD failed to make the agreed-upon

payments beginning June 13, 2014, placing it in default of the Forbearance Agreement and Security Agreement. (*Id.* ¶¶ 22-23.) GMD also violated the Forbearance Agreement by opening a prohibited bank account outside Bank Leumi. (*Id.* ¶ 24.)

At a November 19, 2014 lunch meeting, defendant Medding (from GM Ideal) and defendant Gilad (from GMD) met with two representatives of Bank Leumi, nonparties Shlomo Mosseri and David Selove. (*Id.* ¶ 58.) Medding is the sole shareholder, owner and principal of GM Ideal, which was incorporated on September 8, 2014. (*Id.* ¶¶ 77-82.) At the time of this meeting, Medding was aware that GMD had defaulted on the terms of its loan and Forbearance Agreement, but told Bank Leumi's representatives that he "merely intended to purchase some of GMD's inventory," and that he had no intention of helping to recapitalize or refinance GMD. (*Id.* ¶¶ 59-61, 63.)

On January 15, 2015, Bank Leumi filed this lawsuit, stating seven causes of action and seeking the balance of the money borrowed by GMD. (NYSCEF 1, Summons and Complaint.) On February 25, 2015, following a stipulation by the parties, the court (Oing, J.) ordered all collateral held by GMD to be turned over to Bank Leumi. (NYSCEF 44, Order.) Such collateral included assets already within GMD's possession, and as relevant here, inventory that had been transferred or consigned by GMD to GM Ideal. (*Id.*) GM Ideal ultimately returned inventory with a face value of $336,527.26. (NYSCEF 467, Joint Statement ¶ 32.) Bank Leumi bundled the inventory reclaimed from GM Ideal, along with other merchandise seized from GMD, and sold the combined lot for $318,600. (*Id.* ¶ 50.)

On February 8, 2016, the court (Oing, J.) awarded plaintiff summary judgment on its first, second, and fourth causes of action against GMD, Gilad, Ami Mesika, Geula

Mesica, and Vered Mesika (together, the GMD Defendants). (NYSCEF 103, Order and Decision.) On April 27, 2017, the Appellate Division, First Department affirmed that decision. (*Bank Leumi v GM Diamond, Inc., et al.,* 149 AD3d 662 [1st Dept 2017]; NYSCEF 467, Joint Statement ¶ 57.)

Bank Leumi now seeks summary judgment on its fifth cause of action (successor liability against GM Ideal), sixth cause of action (fraudulent conveyance against GM Ideal Defendants), and seventh cause of action (intentional interference with contract against Medding). The GMD Ideal Defendants have moved for summary judgment dismissing the same causes of action.

Discussion

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. (CPLR 3212 [b].) This standard requires the movant to "make a prima facie showing of entitlement to judgment as a matter of law," by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) The court views this evidence in the light most favorable to the non-moving party opposing summary judgment and draws all reasonable inferences in that party's favor. (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009].) Should the movant make a prima facie showing of entitlement to summary judgment, the burden shifts to the non-moving party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986].)

Fifth Cause of Action (Successor Liability)

In its fifth cause of action, Bank Leumi alleges that there is a "continuity of ownership, management, personnel, physical location, assets, and general business operation" between GMD and GM Ideal. (NYSCEF 398, Summons and Complaint ¶ 46.) Bank Leumi further alleges that there was a de facto merger between GMD and GM Ideal, subjecting GM Ideal to liability for GMD's obligations. (*Id.* ¶ 47.)

"While the general rule is that, absent a merger or consolidation, an entity purchasing the assets of another entity does not thereby acquire liabilities of the seller not expressly transferred in the sale, a purchase-of-assets transaction may be deemed to constitute a de facto merger between seller and buyer, even if not formally structured as such, under certain conditions." (*Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 209 [1st Dept 2015] [citations omitted].) The court may regard the transaction as a de facto merger when certain factors are present. (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005].) Those factors are

> "(1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (4) continuity of management, personnel, physical location, assets and general business operation."

(*Id.* [citation omitted].) A finding of de facto merger "does not necessarily require the presence of each of these factors." (*Id.*) Despite that flexibility, however, the "continuity of ownership" factor "is a necessary element of any de facto merger finding." (*Id.*; *but see Ring v Elizabeth Found. for the Arts*, 136 AD3d 525, 526-527 [1st Dept 2016] [holding that, while continuity of ownership is a "necessary element" of de facto merger

in the ordinary case, it was not a necessary element where not-for-profit corporations (which lack owners) are involved].)

Continuity of ownership "exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets. Stated otherwise, continuity of ownership describes a situation where the parties to the transaction become owners together of what formerly belonged to each." (*TBA Global*, 132 AD3d at 209 [internal quotation marks and citation omitted].)

Bank Leumi argues that continuity of ownership exists between GMD and GM Ideal. Specifically, Bank Leumi directs the court to the Joint Statement of Undisputed Facts ¶ 70, in which the parties to these motions agreed that Medding testified that, "in 2014, GM Ideal hired GMD employees Gilad Mesica, Samuel Heber, and Su Su." (NYSCEF 467, Joint Statement ¶ 70; *see also* NYSCEF 439, Medding depo tr at 24:3-6, 36:16-37:12.) Further, Meddling also testified at his deposition that "Gilad Mesica does handle some matters in the [GM Ideal]." (NYSCEF 439, Medding depo tr at 72:16-17.) The GM Ideal website also purportedly identified Gilad as a "Partner" of GM Ideal.[1] (NYSCEF 457, Website Printout.)

However, this evidence is insufficient to demonstrate continuity of ownership; it only demonstrates that GM Ideal, the alleged successor of GMD, employed personnel from GMD. Bank Leumi fails to make a showing that "the parties to the transaction

[1] The GM Ideal Defendants have challenged the admissibility of NYSCEF 457, an alleged printout of the "Brand Heritage" page of the GM Ideal website.

bec[a]me owners together of what formerly belonged to each," as they must. (*TBA Global*, 132 AD3d at 209.)

If the court were to accept Bank Leumi's position that the evidence presented supports a finding of continuity of ownership, it would obliterate the distinction between the first de facto merger factor (continuity of ownership) and the fourth factor (continuity of management, personnel, physical location, assets and general business operation). Continuity of ownership would cease to be a separate factor and necessary element of de facto merger. Evidence of management and personnel continuity is not proof of ownership continuity. (*See Employee Relations Assoc. v Xperius, Inc.*, 196 Misc 2d 485, 487-488 [Sup Ct, Monroe County 2003] ["Plaintiff states that both the president and Chief Financial Officer of Personic are now occupying identical positions at Xperius. This says nothing about ownership."].)

Finally, even considering the print out of GM Ideal's alleged website, which identifies Gilad as "Partner"[2], the parties here have stipulated that it is an undisputed fact that Medding is the "sole owner, shareholder, officer, and/or principal of GM Ideal." (NYSCEF 467, Joint Statement ¶ 75.)

On the other hand, the GM Ideal Defendants, on their motion, have made a prima facie showing that there was no continuity of ownership, and thus, no de facto merger.[3] (NYSCEF 472, Joint Statement [motion 011] ¶¶ 75, 77-78; NYSCEF 495,

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[2] The website contains a quote by Gilad and after that quote identifies him as simply "Partner."

[3] On their motion, the GM Ideal Defendants also raise alternative theories to support a claim of successor liability and address why those theories should also be dismissed. It is puzzling to the court why the GM Ideal Defendants would raise theories that were not plead in the complaint or even raised by Bank Leumi in its motion to dismiss. It is not a

Medding depo tr [motion 011] at 57:8-10, 58:21-59:4.) In response, Bank Leumi fails to introduce evidence that raises an issue of fact as to whether there is continuity of ownership. Bank Leumi fails to contradict Medding's testimony that he is, and always has been, the sole owner of GM Ideal. In fact, as stated above, Bank Leumi stipulated that Medding is the "sole owner, shareholder, officer, and/or principal of GM Ideal." (NYSCEF 472, Joint Statement ¶ 75.)

Sixth Cause of Action (Fraudulent Conveyance)

Bank Leumi alleges claims for both constructive fraudulent conveyance and actual fraudulent conveyance.

The court notes that New York has recently amended portions of its Debtor and Creditor Law (DCL) to bring it into conformity with the Uniform Voidable Transactions Act. However, the prior (now repealed) provisions of the DCL control in this case as the New York State Legislature's Bill specifically provides that

> "[t]his act shall take effect one hundred twenty days after it shall have become a law, and shall apply to a transfer made or obligation incurred on or after such effective date, but shall not apply to a transfer made or obligation incurred before such effective date, nor shall it apply to a right of action that has accrued before such effective date." (2019 NY Senate-Assembly Bill S4236, A5622.)

The Bill was signed into law on December 6, 2019, and thus, became effective on April 4, 2020. The transfer at issue here occurred before that effective date. As such, the transfer at issue is governed by the prior provisions of the DCL and those prior provisions will be relied on by the court here.

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defendant's burden to raise potential theories for a plaintiff. Therefore, the court will not address these alternative theories to support this cause of action which were never raised by Bank Leumi or supported by the allegations in the complaint.

Constructive Fraudulence

DCL § 273 provides that a conveyance is constructively fraudulent if, "without regard to [...] actual intent," two conditions are met: (1) the transfer is made by one "who is or will thereby rendered insolvent," and (2) the transfer is made "without a fair consideration." (DCL § 273.) The burden of establishing that both conditions are met is placed on the party challenging the conveyance. (*See Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999].)

As to the first condition, DCL § 271 provides that a corporation becomes insolvent when "the present fair salable value of [its] assets is less than the amount that will be required to pay [its] probable liability on [its] existing debts as they become absolute and matured." (DCL § 271.) Bank Leumi has met its burden by showing that the transferor, defendant GMD, was insolvent at the time that GMD's inventory was transferred from GMD to GM Ideal. Specifically, the parties agree that Medding testified that, as of 2014, GMD was "functionally dead" as it was "unable to procure supplies, unable to buy any diamonds, no supplier would give it anything, lost all its clients and stopped functioning." (NYSCEF 467, Joint Statement ¶ 69.) The GM Ideal Defendants do not otherwise dispute that GMD was insolvent at the relevant time.

As to the second condition, DCL § 272 defines "fair consideration" as (1) "[w]hen 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 (2) "[w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained." (DCL § 272.) An evaluation of whether fair

consideration is given for property under Debtor and Creditor Law § 272 must 'be determined upon the facts and circumstances of each particular case.'" (*Commodity Futures Trading Commn. v Walsh*, 17 NY3d 162, 175 [2011], quoting *Halsey v Winant*, 258 NY 512, 523 [1932].)

The lynchpin of Bank Leumi's argument here is that, as documented by Bank Leumi's auditor, GM Ideal purchased merchandise from GMD "at cost" (NYSCEF 463, Litvak's Past Due Analysis), and therefore, not for fair consideration. There is no dispute that a transfer of certain GMD inventory took place. This court ordered the return of inventory in GM Ideal's possession that transferred or consigned to GM Ideal from GMD back to Bank Leumi (NYSCEF 44, Order); merchandise with a total purported book value of $333,527.26 was returned. (NYSCEF 467, Joint Statement ¶ 32.)

However, Bank Leumi fails to support its proposition that selling GMD's inventory "at cost" demonstrates a lack of fair consideration. There is no conclusive proof submitted showing that the sale of the inventory for cost was not fair consideration at the time of the sale.

Further, there are too many issues of fact to grant summary judgment to either side. Although GMD represented that the merchandise—a portion of which was allegedly sold to GM Ideal, but subsequently returned— had a book value of $789,467,[4]

[4] In his deposition, David Bucks testified that "there was never any indication or paperwork to substantiate cost ever." (NYSCEF 500, Bucks Tr. at 70:9-10.) Moreover, Bucks attests that the purported $789,467 book value was, in his professional opinion, "grossly overstated." (NYSCEF 604, Bucks aff. ¶¶ 24-25.)

David Bucks[5] testified that its market value was approximately $275,000 to $310,000. (NYSCEF 467, Joint Statement ¶¶ 37-38; *see also* NYSCEF 501, Bucks Inventory Report June 2015 [identifying the inventory collected from GM Ideal and appraising the market value low of $270,000 and high of $315,000].) Following the logic of Bucks' opinion and the discrepancy between book and market value he observed, it is possible that a sale of the merchandise (or a portion thereof) "at cost" would represent a fair consideration at the time GM Ideal purchased the inventory. The court is unable to find on this motion that the "at cost" arrangement allegedly struck between GM Ideal and GMD evidences a lack of fair consideration. Viewing the evidence before it in the light most favorable to the non-movants, the court concludes that summary judgment cannot be granted.

Bank Leumi further contends that fair consideration was lacking because GM Ideal allegedly failed to make actual payments to GMD in exchange for the inventory. Here too, The GM Ideal Defendants have raised a triable issue of fact. Medding attests that GM Ideal made payments in the amount of $158,317.04[6] to GMD between November 4, 2014 and January 5, 2015 (NYSCEF 476, Medding aff. ¶ 30), and admissible business records purporting to prove those payments was submitted. (NYSCEF 488.) Further, Gilad attests that GMD received these payments from GM Ideal during the same period (NYSCEF 490, Gilad sff. ¶ 16-17), and admissible business records purporting to prove receipt and deposit of those payments were

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[5] David Bucks was retained by Bank Leumi "to pick up, sort, value and determine the process for disposing of the inventory seized from GM Diamonds." (NYSCEF 599, Bucks aff ¶ 3.)

[6] It is not clear to the court if this amount is the total "at cost" purchase price.

submitted. (NYSCEF 492; NYSCEF 493.) Independent of any legally binding obligation of payment that GM Ideal owed to GMD, a reasonable factfinder could find that actual payments were made between GM Ideal and GMD.

DCL § 273 also requires consideration as to "whether the transaction is made 'in good faith,' an obligation that is imposed on both the transferor and the transferee." (*Sardis v Frankel*, 113 AD3d 135, 141-142 [1st Dept 2014].) The parties dispute whether the transfer of inventory from GMD to GM Ideal was made in good faith. Medding attests that he told representatives from Bank Leumi (nonparties Mosseri and Selove) at a November 19, 2014 meeting that he[7] might be interested in purchasing merchandise from GMD, and that Mosseri and Selove "did not object to" Medding's plan, nor did they "indicate that [GM Ideal] required approval from Bank Leumi in order to purchase merchandise from [GMD]." (NYSCEF 476, Medding aff. ¶¶ 27-28.) Moreover, Medding attests that, as GM Ideal began purchasing inventory from GMD, he was unaware that GMD's deposit of such payments would violate GMD's agreement with Bank Leumi. (*Id.* ¶ 31.) By contrast, Bank Leumi argues that Medding admits to having prior knowledge of GMD's debt to Bank Leumi (NYSCEF 467, Joint Statement ¶ 63), and therefore the purchase plan that the GM Ideal Defendants subsequently conducted demonstrates a lack of good faith on their part.

[7] Medding's Affidavit describes the prospective purchaser discussed at the November 19, 2014 meeting as: "I (i.e. GMI)." (NYSCEF 476, Medding aff. ¶ 27). Thus, it is unclear whether Medding declared himself as the purchaser or GM Ideal. Mosseri, who attended the lunch meeting on behalf of Bank Leumi, attests that Medding did not reveal the existence of GM Ideal. (*See* NYSCEF 605, Mosseri aff. ¶¶ 17-18.)

Based on the evidence before it, the court cannot resolve the factual question of whether the GM Ideal Defendants acted "honestly, fairly, and openly." (*Sardis*, 113 AD3d at 143.)

In view of the triable factual issues surrounding "fair consideration" and "good faith," granting summary judgment in favor of either party would be inappropriate. The court denies both motions for summary judgment as to constructive fraudulent conveyance.

Actual Fraudulence

DCL § 276 holds that "every conveyance made and every obligation incurred with actual intent [...] to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." (DCL § 276.) DCL § 276 "address actual fraud" ... "and does not require proof of unfair consideration or insolvency." (*Wall St. Assoc.*, 257 AD2d at 529.) Recognizing that proof of actual fraudulent intent may be difficult to obtain, courts allow proof of "badges of fraud" instead, which includes:

> (1) a close relationship between the parties to the alleged fraudulent transaction; (2) a questionable transfer not in the usual course of business; (3) inadequacy of the consideration; (4) the transferor's knowledge of the creditor's claim and the inability to pay it; and (5) retention of control of the property by the transferor after the conveyance.

(*Id.*) Such badges, if present, will give rise to an inference of actual intent to defraud. (*Id.*)

Regarding the first badge of fraud, Bank Leumi claims that a close relationship existed between Gilad (principal of defendant GMD) and Medding (sole owner of defendant GM Ideal). Medding testified that he and his prior company, EMA Diamonds, became a supplier of diamonds to GMD in 2005 (NYSCEF 439, Medding Tr. at 184:5-

21) and that such supplier relationship continued at least until 2013. (*Id.* at 186:2-14.) On its face, the transfer of assets between parties in a supplier relationship is different than a transfer of assets between parties in an intra-family relationship. (*See Eshman Holdings Ltd. v United States Philips Corp.*, 2005 NY Slip Op 30585[U], *6-7 [Sup Ct, NY County 2005] ["Intra - family transfers made without any signs of tangible consideration considered to be presumptively fraudulent."] [internal quotation marks and citation omitted].)

Medding's sworn affidavit states that there was no additional relationship, beyond supplier-purchaser, between GMD and GM Ideal, and no personal relationship between him and Gilad prior to 2014—although Medding admits that he "might have had a meeting with Gilad over a meal" prior to 2014. (NYSCEF 596, Medding aff. ¶¶ 3-6.) Gilad attests to the same, though he attests that it was certainly "not more than one meal together, prior to 2014." (NYSCEF 597, Gilad aff. ¶¶ 2-6.) Such statements have gone uncontradicted by Bank Leumi. Evidence that parties to the transfer had an arm's length supplier relationship, without something more, does not qualify as a sufficiently close relationship for the purposes of this badge of fraud.

Regarding the second badge of fraud, Bank Leumi argues that the GM Ideal Defendants' purchase of inventory from GMD had a "secret, hasty or otherwise irregular nature." (NYSCEF 469, Plaintiff's Memo In Support of Its Motion for Summary Judgment, at 12.) Bank Leumi's argument hinges on its allegation that Medding was aware of Bank Leumi's security interest in GMD's inventory. Moreover, Mosseri, as a representative of Bank Leumi, attests that Medding "never mentioned at the November 19 lunch meeting or at any other time that he had already incorporated GM Ideal at the

time of our meeting, or had taken any steps to advertise or represent to the public that GM Ideal and GMD were affiliated." (NYSCEF 605, Mosseri aff. ¶ 17.) By contrast, Medding attests that he gave Bank Leumi's representatives prior notice of GM Ideal's[8] intended purchase plan (NYSCEF 594, Medding aff. ¶27), and that it was not until this lawsuit was filed that he "learned that Bank Leumi had any objection to GMI's purchase of inventory from GM Diamonds." (*Id.* ¶ 32.) Based on the evidence before it, the court is unable to resolve the factual issue of whether the transfer here was a "questionable transfer not in the usual course of business." (*Wall St. Assoc.*, 257 AD2d at 529.)

Regarding the third badge of fraud, the "inadequacy of consideration," the court follows its analysis of "fair consideration" (*supra*) in the context of constructively fraudulent conveyance. Because of the triable factual issues that remain around the agreed-upon price that GM Ideal and GMD reached for the merchandise, and the question of how much payment was actually made by GM Ideal to GMD, the court is unable to resolve whether or not there was "an inadequacy of consideration."

Regarding the fourth badge of fraud, it appears uncontested that GMD, the transferor, had "knowledge of the creditor's claim and inability to pay it" at the time merchandise was conveyed to GM Ideal. (*Wall St. Assoc.*, 257 AD2d at 529.)

Regarding the fifth badge of fraud, Bank Leumi argues that GM Ideal obtained GMD's inventory to sell to GM Ideal's customers and retain a presence in New York's jewelry business in violation of the Security Agreement. This inverts the fifth badge—the focus is on the *transferor*'s retention of control post-conveyance, not on the

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[8] Again, It is unclear whether Medding announced that he personally would acquire merchandise from GMD, or whether such purchases would be made through GM Ideal. See n 5, *supra*.

motivations of the *transferee*. Bank Leumi presents no evidence showing that GMD, the transferor, retained control of the merchandise once it was transferred to GM Ideal. Therefore, the court finds that the fifth badge of fraud is not present.

In sum, the court finds that the following badges of fraud were absent: a "close relationship" between the involved parties and post-conveyance "retention of control" over the property by the transferor. However, triable issues surrounding the "questionable transfer" and "inadequacy of consideration" badges preclude the court from granting summary judgment. Accordingly, the court denies both motions for summary judgment as to actual fraudulent conveyance.

Seventh Cause of Action (Tortious Interference with Contract)

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] [citations omitted.) Here, there is an issue of fact as to whether the GM Ideal Defendants knew of the Promissory Notes and Forbearance Agreement at issue. While Medding testified that he was aware of the debt GMD owed Bank Leumi (NYSCEF 439, Medding tr. at 195-197; NYSCEF 467, Joint Statement ¶ 63), it is unclear whether he was aware of the actual agreements. Further, there is also an issue of fact as to whether the GM Ideal Defendants intentionally procured GMD's breach that cannot be resolved on this motion.

GM Ideal Defendants' Affirmative Defenses

Bank Leumi also moves for summary judgment dismissing the GM Ideal Defendants' affirmative defenses of failure to state a claim, waiver, estoppel, unclean hands, mitigation of damages, and unconscionability. The GM Ideal Defendants only address the defenses of failure to state a claim and waiver. Thus, the defenses of estoppel, unclean hands, mitigation of damages, and unconscionability are dismissed.

Failure to State a Claim

> "[T]he defense of failure to state a cause of action may be inserted in an answer as an affirmative defense. The pleading of that defense is, however, surplusage, as it may be asserted at any time even if not pleaded. Nevertheless, inclusion of such defense in an answer is not prejudicial. It serves to give notice to the other side that the pleader may at some future time move to assert it. The choice whether or when to so move should remain with the pleader; the affirmative pleading of such defense is not a motion. Since a defendant might not want to move under CPLR Rule 3211, preferring a later motion for summary judgment, there is no reason why he should not be permitted to allege in his answer that a particular cause of action is substantively deficient, especially when it is recalled that this defect is unwaivable."

(*Riland v Frederick S. Todman & Co.*, 56 AD2d 350, 352-353 [1st Dept 1977] [internal quotation marks and citations omitted].) Thus, the court finds no reason to dismiss it as it is mere surplusage.

Waiver

Waiver "is an intentional relinquishment of a known right and should not be lightly presumed." (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988].) The GM Ideal Defendants fail to raise any issue of fact that Bank Leumi unequivocally waived a known right. Thus, this affirmative defense is dismissed.

All remaining arguments on both motions have been considered by the court and are without merit or do not yield an alternative result.

Accordingly, it is

ORDERED that Bank Leumi's motion for summary judgment is granted, in part, to the extent that the affirmative defenses of waiver, estoppel, unclean hands, mitigation of damages, and unconscionability are dismissed; and it is further

ORDERED that the GM Ideal Defendants' motion for summary judgment is granted, in part, to the extent that the fifth cause action for successor liability is dismissed; and it is further

ORDERED that motions in limine shall be filed by October 16, 2020. No cross motions. After motions in limine are decided, a trial date will be selected. However, the court is not scheduling jury trials to begin until January 2021.

Motion Seq. No. 010

August 26, 2020
DATE

ANDREA MASLEY, J.S.C.

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

Motion Seq. No. 011

August 26, 2020
DATE

ANDREA MASLEY, J.S.C.

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