Singind Life Sciences (HK) Ltd. v Versailles Indus. LLC
2021 NY Slip Op 30584(U)
February 25, 2021
Supreme Court, New York County
Docket Number: 651091/2020
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

SINGIND LIFE SCIENCES (HK) LIMITED and B K REKHATEK (HK) LIMITED,

Plaintiffs,

-against-

VERSAILLES INDUSTRIES LLC, SIMON INTERNATIONAL TRADING CORP., B & H APPAREL LLC, FOUAD HAMRA aka FREDDY HAMRA, JIMMY HAMRA, MAY'S TFJ REALTY, LLC and XYZ CORPS. 1-10, THOSE COMPANIES AND INDIVIDUALS WHOSE NAMES ARE PRESENTLY UNKNOWN TO PLAINTIFFS AND BEING THE ENTITIES THAT ACQUIRED AN OWNERSHIP INTEREST IN, OR ASSETS OF, VERSAILLES INDUSTRIES LLC and SIMON INTERNATIONAL TRADING CORP.,

Defendants.

INDEX No.: 651091/2020

MOT. DATE: 10/13/2020

MOT. SEQ. No.: 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27
were read on this motion to/for DISMISS

Defendants Versailles Industries LLC, Simon International Trading Corp., B & H Apparel LLC, Fouad Hamra, Jimmy Hamra, and May's TFJ Realty, LLC move to dismiss the plaintiffs' complaint pursuant to CPLR 3211(a)(7). For the following reasons, defendants' motion is granted as to plaintiffs' second cause of action and otherwise denied.

I. BACKGROUND

As this is a motion to dismiss, the following facts is taken from the complaint and are assumed true (Doc. No. 1). Plaintiffs bring this action to enforce judgments previously entered in this court against two judgment-debtor-defendants, Versailles Industries LLC and Simon International Trading Corp. (the "judgment-debtor defendants"), in two prior actions ("Singind Prior Action" and "Rekhatek Prior Action") (collectively, the "Prior Actions") (Compl. ¶ 1). In July 2019, plaintiffs obtained judgments against Simon and Versailles in the amounts of $389,584.99 and $806,343.87 respectively (*id.* ¶ 29). Throughout, the judgment-debtor defendants operated as a single entity with commingled assets from a single location under

common ownership of the Hamra defendants who used both judgment-debtor defendants interchangeably as a single entity (*id.* ¶¶ 30-31). From September 7, 2016 through September 19, 2017, Versailles transferred $1,462,000.00 to Simon in twelve smaller payments (*id.* ¶ 32). Between September 3, 2016 and May 4, 2017, Simon transferred $100,000.00 to Versailles in two smaller payments (*id.* ¶ 33). In substance, the transfers were made by both judgment-debtor defendants acting as a single commingled entity (*id.* ¶ 34).

Between September 14, 2016 and May 17, 2017, Versailles transferred to $1,462,000.00 to Simon and between August 17, 2016 and December 5, 2016, Simon transferred $1,254,500 to defendant May's TFJ and its owners, the Hamra defendants, in eight smaller payments (*id.* ¶ 36). Payments totaling $1,254,500.00 were fraudulent transfers made by judgment-debtor defendants to May's TFJ, the Hamra defendants, and unnamed defendants, some or all of whom operated from the same business address of 724 Kathleen Court, Brooklyn, New York 11235 (*id.* ¶ 37). The fraudulent transfers were made without fair consideration to hinder plaintiffs' collection of their respective judgments in the Prior Actions (*id.* ¶ 38). The Hamra defendants used May's TFJ as a holding company for various trademarks used by judgment-debtor defendants and defendant B&H while, in actuality, it was a shell company used to divert money and drain corporate assets from the judgment-debtor defendants (*id.* ¶ 39). At the same time these transfers were made, Versailles owed Singind $648,800.30 and Simon owed Rekhatek $324,090.80 (*id.* ¶¶ 40-41). To further hinder Singind from collecting on the moneys owed, the Hamra defendants sent multiple emails to plaintiffs acknowledging the judgment-debtor defendants' debt and promising payment (*id.*). These payments were never made, and the fraudulent transfers were ultimately paid to individual principals of defendant entities, the Hamra defendants, defendant B&H, and other unnamed party defendants (*id.* ¶ 42).

Between June 30, 2017 and November 7, 2017, judgment-debtor defendants transferred $625,833.82 to R.E.L. International, Inc. through fifteen smaller payments (*id.* ¶ 45). These fraudulent transfers were made to hinder plaintiffs in collecting their respective judgments (*id.* ¶ 47). REL and its relationship to the Hamra defendants is presently unknown however the suspicious nature of these transfers appears to relate to the Hamra defendants' scheme to divert assets away from the judgment-debtor defendants (*id.* ¶ 48). Between December 16, 2016 and September 19, 2017, judgment-debtor defendants jointly and severally transferred $1,157,000 to the Hamra defendants through six smaller payments (*id.* ¶ 51). These transfers were made to

hinder plaintiffs from collecting their judgments (*id.* ¶ 52). At approximately the same time the transfers were made, Versailles and Simon owed plaintiffs $648,800.30 and $324,090.80 respectively (*id.* ¶¶ 53-54). Again, plaintiffs received correspondence from the Hamra defendants assuring that payment would be made soon (*id.*). Plaintiffs allege eight causes of action including: (i) constructive fraud pursuant to NYSCL § 273, (ii) constructive fraud pursuant to NYSCL § 273-a, (iii) constructive fraud pursuant to NYSCL § 274, (iv) constructive fraud pursuant to NYSCL § 275, (v) constructive fraud pursuant to NYSCL § 276, (vi) merger-in-fact among judgment-debtor defendants and defendant B&H, (vii) joint and several liability among judgment-debtor defendants for judgments from the Prior Actions, and (viii) piercing the corporate veil against the Hamra defendants.

II. ARGUMENTS

A. Defendants' Memorandum in Support

Defendants move to dismiss plaintiffs' complaint pursuant to CPLR 3211(a)(7) for failure to state a claim and CPLR 3016(b) for failure to allege fraud with requisite specificity (Def. Br. at 6-7 [Doc. No. 14]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Defendants begin by arguing that plaintiffs have failed to state a fraudulent conveyance claim under NYDCL 273 which provides that "every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without fair consideration" (NYDCL § 273). To allege a constructive fraud claim under DCL 273, a plaintiff must allege: (i) the conveyance was made while the transferor was insolvent or was rendered insolvent by the conveyance, (ii) the conveyance was made without fair consideration, and (iii) the plaintiff was a creditor at the time of transfer (*see e.g. Joslin v Lopez*, 309 AD2d 837, 837-838 [2d Dept 2003]; *In re 50 Pine Co*, 317 B.R. 276 [Bankr. SD NY 2004]).

Defendants argue plaintiffs have failed to adequately plead insolvency (Def. Br. at 8). "A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probably liability on his existing debts as they become absolute and matured" (NYDCL § 271). "The operative reference point for determining insolvency is the time at which the transfer took place" (*Kim v Ji Song Yoo*, 311 F Supp 3d 598, 612 [SD NY 2018]; *Lippe v Bairnco Corp.*, 249 F Supp 2d 357, 379-380 [SD NY 2003]). Transferor's insolvency,

for purposes of the statute, cannot be presumed from insolvency at a later time (*see O'Toole v Karnani (In re Trinsum Group, Inc.)*, 460 B.R. 379, 392 [Bankr. SD NY 2011]; *Hopfan v Knauth*, 156 Misc 545, 549 [Municipal Court New York County [1935]). A prime facie case cannot be made absent allegations of the fair salable value of the transferor's assets (*see Kenyon & Kenyon LLP v SightSound Tech., LLC*, 151 AD3d 530, 531 [1st Dept 2017]).

Defendants argue that, in assessing a CPLR 3211(a)(7) motion, the court need not consider legal and factual conclusions flatly contradicted by the record (Def. Br. at 9; *see Riback v Margulis*, 43 AD3d 1023, 1023 [2d Dept 2007]; *Avilon Automotive Grp. v Leontiev*, No. 656007/2016, 2020 WL 1318510, at *8 [Sup Ct New York County 2020]) ("Avilon"). Here, the complaint does not allege a single transfer that occurred after November 7, 2017 and, apart from a single alleged $8,000 transfer in September 2017, the complaint does not allege any transfer made to a defendant occurring after May 17, 2017 (Def. Br. at 9). Defendants argue that the complaint also does not allege insolvency at any time prior to January 2019, over a year after the last transfer was made to REL or to any defendant (*id.* at 9-10; Compl. ¶¶ 5, 9, 14). Therefore, plaintiffs have failed to plead defendant-debtors insolvency.

Defendants argue plaintiffs have also failed to allege consideration with sufficient particularity (Def. Br. at 10). Fair consideration is provided where property is given "in good faith" to satisfy a pre-existing debt "as a fair equivalent therefor" (NYDCL §y 272; *Englander Capital Corp. v Zises*, 60 Misc3d 659, 664 [Sup Ct New York County 2018]; *Sardis v Frankel*, 113 AD3d 135, 141-142 [1st Dept 2014]). New York courts will dismiss claims under NYDCL 272, 274, and 275 where the complaint fails to "plead with sufficient particularity any facts alleging that the conveyance at issue was made without fair consideration" (*RTN Networks, LLC v Telco Grp., Inc.*, 126 AD3d 477, 478 [1st Dept 2015]). Here, as in *Avilon*, plaintiffs use the phrase "fair consideration" throughout the complaint without alleging any facts concerning the lack of consideration or value exchanged (Def. Br. at 10-11; *Avilon*, 2020 WL 1318510, at *6). Further, defendants argue the complaint alleges no facts supporting the conclusory allegation that May's TFJ was a "shell company" used by Hamra defendants (Compl. ¶¶ 10, 29-34, 36-43). The complaint does not allege the consideration or value exchanged with respect to the TFJ or Hamra transfers or that the value exchanged was lacking (Compl. ¶¶ 36-43, 51-54).

Defendants assert that plaintiffs were not creditors and have no claims with respect to the bulk of the alleged transfers (Def. Br. at 12). New York courts only permit NYDCL 273 claims

to be made by creditors at the time of the challenged transfers, not future creditors (*see In re Direct Access Partners, LLC*, 602 B.R. 495, 513-514 [Bankr. SD NY 2019]; *Official Comm. Of Asbestos Claimants of G-I Holding, Inc. v Heyman*, 277 B.R. 20, 35 [SD NY 2002]). The complaint fails to allege that Singind was a creditor prior to October 20, 2016 or that Rekhatek was a creditor prior to April 5, 2017 (Compl. ¶¶ 2, 6). All that came before those dates must fail on the ground that defendants were not alleged creditors at those times.

Defendants maintain that plaintiffs cannot state any cognizable harm regarding transfers between the judgment-debtor defendants (Def. Br. at 12). If the complaint's "single entity" allegations are true then, by definition, no fraudulent conveyance could have occurred among them (*id.*; Compl. ¶¶ 30, 31).

Defendants next argue that plaintiffs have not stated a claim for constructive fraudulent conveyance under NYDCL 273-a, which provides "every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment" (Def. Br. at 13; NYDCL § 273-a). Defendants argue plaintiffs' sole argument in support of this claim is that the alleged transfers were made "without fair consideration before, during, and after the September 12, 2018 commencement" of the Prior Actions (Compl. ¶ 59). Defendants argue that NYDCL 273-a makes no reference to future creditors, to whom the statute is inapplicable (*see e.g. North Fork Bank v Schmidt*, 265 AD2d 466, 468 [2d Dept 1999]; *William J. Jenack Estate Apraisers and Auctioneers, Inc. v Rabizadeh*, 131 AD3d 960, 962 [2d Dept 2015]). Here, defendants argue, plaintiffs have not alleged a single transfer that occurred after commencement of the Prior Actions' as the last transfer alleged was made on November 7, 2017, nearly a year before the Prior Actions began (Def. Br. at 13; Compl. ¶¶ 7, 45, 59). Further, plaintiffs fail to plead the requisite elements shared with NYDCL 273 of fair consideration and demonstration that plaintiffs were creditors at the time of the transfers (Def. Br. at 13-14).

Defendants next argue that plaintiffs have not stated a claim for constructive fraudulent conveyance under either NYDCL 274 or 275 (*id.* at 14). NYDCL 274 provides that every conveyance made without fair consideration, at a time when the person making it "is engaged or is about to engage in a business or transaction for which the property remaining in his hands after

the conveyance is an unreasonably small capital," is fraudulent as to creditors "and as to other persons who become creditors during the continuance of such business or transaction," without regard to actual intent (NYDCL § 274; *see In re Direct Access Partners, LLC*, 602 B.R. 495, 514 [Bankr. SD NY 2019]). First, defendants argue plaintiffs have failed to adequately plead unreasonably small capital or that the judgment-debtors believed they would incur debts beyond ability to pay as they mature; both are measured as of the time of the transfer (*Battlefield Freedom Wash, LLC v Song Yan Zhuo*, 148 AD3d 969, 971 [2d Dept 2017]; *Kendzia v Gregian*, 222 AD2d 1008, 1009 [4th Dept 1995]). Plaintiffs have failed to address the relevant timeline, instead alleging that shortly after making the transfers, judgment-debtor defendants were dissolved or ceased operations and failed to pay the judgments owed (Def. Br. at 15; Compl. ¶¶ 62, 65). Defendants note that "shortly after" here means over a year after the final alleged transfer which occurred on November 30, 2017 (Compl. ¶ 45). Defendants argue the only allegations concerning dissolution are the allegations that the judgment-debtors dissolved in January 2019 (*id.* ¶¶ 4, 9). Defendants further argue none of these allegations say anything about the capital or the companies' ability to pay debts as dissolution does not automatically translate to unreasonably small capital or inability to pay debts. Second, plaintiffs have again failed to plead lack of fair consideration, referring back to their earlier arguments (*see e.g. In re Direct Access Partners, LLC*, 602 BR at 547). Third, plaintiffs were not creditors and have no claims with respect to most of the alleged transfers, similarly referring back to their prior arguments (Def. Br. at 16; *see In re USA United Fleet, Inc.*, 559 B.R. 41, 87 [Bankr ED NY 2016]).

Defendants next argue that plaintiffs have failed to state a claim for constructive fraudulent conveyance under NYDCL 276 (Def. Br. at 16). To properly plead a claim for such, "the claimant must allege that (i) the thing transferred has value of which the creditor could have realized a portion of its claim; (ii) that the thing was transferred or disposed of by the debtor; and (iii) that the transfer was done with actual intent to defraud" (NYDCL § 276; *Chambers v Weinstein*, 44 Misc3d 1224(A), at *7 [Sup Ct New York County 2014]). These allegations must meet New York's heightened pleading standard for fraud (*see Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]; *Wildman & Berngardt Constr., Inc. v BPM Assoc.*, 273 AD2d 38, 39 [1st Dept 2000]; *A&M Glob. Mgmt. Corp. v Northtown Urology Assocs., P.C.*, 115 AD3d 1283, 1288-1289 [4th Dept 2014]). Conclusory allegations regarding fraudulent intent and those made on information and belief do not meet the CPLR 3016(b)

particularity requirement (*Avilon*, 2020 WL 1318510, at *8). The complaint here should be dismissed for failure to state a claim under NYDCL § 276 because plaintiffs fail to allege fraudulent intent with particularity (Def. Br. at 17). First, defendants argue there is no allegation of fraud at the time of the transfers, only conclusory allegations that judgment-debtors were dissolved "shortly after making the transfers" (Compl. ¶ 68). Second, the complaint makes only barebones allegations of insider relationships and a "scheme" to not pay back the judgments after the alleged transfers (Def. Br. at 17; Compl. ¶ 48). The complaint uses words "scheme" and "shell" without any support, complaining of defendants exercising complete control over the transactions without sufficiently specific allegations (Compl. ¶¶ 16-17; 38). Defendants argue the rest of the complaint consists of vague allegations with no factual support, including that defendants transferred the money "knowing and intending the transfers would hinder, delay or defraud plaintiffs" (Def. Br. at 18; Compl. ¶¶ 40, 41, 54).

Defendants next argue plaintiffs have failed to state claim for merger-in-fact (Def. Br. at 18). "It is the general rule that a corporation which acquires the assets of another is not liable for the torts of its predecessor"; an exception exists in cases in which there has been "a consolidation or merger of seller and purchaser" (*Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 244-245 [1983]). A transaction structured as a purchase-of-assets may be deemed to fall within this exception as a "de facto" merger, even if the parties chose not to effect a formal merger, if the following factors are present: (i) continuity of ownership; (ii) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (iii) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business; and (iv) continuity of management, personnel, physical location, assets and general business operation (*see Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]; *In re New York City Asbestos Litig.*, 15 AD3d 254, 255-256 [2005]). The complaint only makes conclusory allegations of merger-in-fact, stating that the judgment-debtor defendants and B&H have "common financing, common personnel, a common address, a common telephone number," and "common trademarks on wearing apparel" (Def. Br. at 19; Compl. ¶ 74). Defendants argue the complaint's only two other allegations regarding B&H, that it is a New York State limited liability company distributing wearing apparel and that it is a "shell company," are contradictory (Compl. ¶¶ 24, 39).

Defendants next argue plaintiffs have failed to state a claim for joint and several liability as New York does not recognize joint and several liability as a stand-alone cause of action and the compliant fails to state any adjoining claim (Def. Br. at 19-20; *see Alquijay by Alquijay v St. Luke's-Roosevelt Hosp. Center*, 63 NY2d 978, 979 [1984]; *Orlin v Torf*, 126 AD2d 252 [3d Dept 1987]).

Finally, defendants argue plaintiffs have failed to state a claim for piercing the corporate veil (Def. Br. at 20). Defendants argue that owners are not liable for claims against their subsidiary absent proof that the subsidiary is merely an alter ego of the owners (*see Billy v Consol. Mach. Tool Corp.*, 51 NY2d 152, 163 [1980]). To establish alter ego liability, plaintiffs must not only allege that Hamra defendants exercised complete dominion of the judgment-debtor defendants with respect to the transaction, but also that such domination was used to commit a fraud or wrong against plaintiffs which resulted in their injury (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 23-24 [2d Dept 2019]). Conclusory claims of domination and control are insufficient (*see Art Capital Bermuda Ltd. v Bank of N.T. Butterfield & Son Ltd.*, 169 AD3d 426, 427 [1st Dept 2019]; *Pine St. Homeowners Ass'n v 20 Pine St. LLC*, 109 AD3d 733, 735 [1st Dept 2013]; *Albstein v Elany Contracting Corp.*, 30 AD3d 210, 210 [2006]; *Sky-Track Tech. Co. Ltd. v HSS Dev., Inc.*, 167 AD3d 964, 965 [2d Dept 2018]). Defendants argue the complaint's allegations are insufficient and conclusory with regards to this claim, and courts have consistently dismissed alter ego claims based on vague allegations such as these (Def. Br. at 21; Compl. ¶¶ 79-81; *see Brainstorms Internet Mktg., Inc. v USA Networks, Inc.*, 6 AD3d 318, 318 [1st Dept 2004]; *Abelman v Shoratlantic Dev. Co.*, 153 AD2d 821, 823 [2d Dept 1989]). Even if the court finds that plaintiffs adequately plead dominion and control, this claim should still be dismissed because the complaint fails to allege with particularity that the control was used to commit fraud (Def. Br. at 21-22; *E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 126 [2d Dept 2009]). Defendants argue the court should reject plaintiffs' bare allegations as an improper fishing expedition (Def. Br. at 22-23; *see Cheng v Danjonro, Inc.*, 81 AD3d 510, 511 [1st Dept 2011]; *Albstein v Elany Contracting Corp.*, 30 AD3d 210, 210 [1st Dept 2006]; *Brainstorms Internet Marketins, Inc. v USA Networks, Inc.*, 6 AD3d 318, 318 [1st Dept 2004]).

B. Plaintiffs' Memorandum in Opposition

Plaintiffs begin by arguing that they have adequately stated each of the causes of action alleged in the complaint (Pl. Br. at 20). The first five causes of action under NYDCL are sufficiently pleaded as they are not typical fraud claims subject to CPLR 3016(b) pleading requirements and, further, the claims exist "independent of their statutory anchors" (*id.*). Plaintiffs argue that, following amendment of Debtor & Creditor Law in 2019, the complaint can easily sustain the first five causes of action as "a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation" (Pl. Br. 20-22; NYDCL § 273(a)). Plaintiffs argue the known transfers were all made to insiders who retained control of the assets after the transfers were made (Pl. Br. at 22).

Plaintiffs next argue they have established badges of fraud (*id.*). Defendants' argument that the complaint fails to meet CPLR 3016(b) pleading standards is without merit as controlling case law states "due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader [of a claim under former NYDCL 276] is allowed to rely on 'badges of fraud to support his case'" (*Wall Street Associates v Brodsky*, 257 AD2d 526 [1st Dept 1999]; *Englander Capital Corp. v Zises*, 60 Misc3d 659, 665 [Sup Ct New York County 2018] ["badges include a close relationship between the parties to the alleged fraudulent transaction, inadequacy of consideration, the transferor's knowledge of the creditor's claim and inability to pay it as well as the transferor's retention of control over the property after the conveyance"]). Plaintiffs argue they have alleged sufficiently alleged such badges and the complaint sufficiently pleads both constructive and actual fraud (Pl. Br. at 23). Whether defendants were insolvent at the time the transfers were made by judgment-debtor defendants is an issue of fact, and judgment-debtor-defendants repeatedly rendered themselves insolvent through each of the transfers they made. Under NYDCL 13, a person is deemed insolvent whenever the aggregate of his property, exclusive of any property conveyed with the intent to defraud, hinder or delay his creditors, shall not, at fair valuation, be sufficient in amount to pay his debts (NYDCL § 13). Under this definition, defendants were likely rendered insolvent during every transfer (Pl. Br. at 23). Plaintiffs further argue the definition of insolvency under NYDCL 271 is also fatal to defendants, stating "a debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets" and "a debtor that is generally not paying the

debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent" (NYDCL § 271(a)-(b)). Further, "the presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probably than its existence" (*id.*).

Plaintiffs next argue that its merger-in-fact claim should be sustained as defendants have misstated the language and meaning of 39th paragraph of the complaint (Pl. Br. at 17, 24). The allegations regarding B&H are not contradictory as the complaint also alleges "Mays's TFH was used by the Hamra Defendants, purportedly as a holding company for the various trademarks used by judgment-debtor defendants and defendant B&H, while in actuality, it was a shell company, used to divert money and drain the corporate assets for the judgment-debtor defendants" (Compl. ¶ 39). Plaintiffs argue that under the new and expanded language of NYDCL 273, there is a presumption of merger based on the "insider" relationship of the parties (Pl. Br. at 24).

Regarding the seventh claim for joint and several liability plaintiffs maintain it should be sustained as neither case cited by defendants addresses a joint and several liability cause of action (*id.* at 25). Conversely, plaintiffs argue that the Appellate Division has previously reinstated such causes of action on their own (*id.*; *De La Cruz v Caddell Dry Dock & Repair Co., Inc.*, 95 AD3d 297 [1st Dept 2012]).

Finally, plaintiffs argue their claim to pierce the corporate veil must be sustained as the claims advanced in the complaint evince tortious conduct by defendants (Pl. Br. at 25-27; *Olivieri Const. Corp. v WNWeaver St., LLC*, 144 AD3d 765, 766-767 [2d Dept 2016]). Plaintiffs argue they have adequately pleaded this claim (Pl. Br. at 27).

C. Defendants' Reply Memorandum

In reply, defendants reiterate that plaintiffs' complaint has failed to state any viable claim and re-state arguments made in their opening brief (Def. Reply at 2-3 [Doc. No. 27]). Defendants also address the recent amendments to the NYDCL and assert that plaintiffs having alleged only pre-amendment claims, the new law does not apply (*id.* at 3). On December 6, 2019, New York enacted the model Uniform Voidable Transactions Act ("UVTA") which prospectively replaced the fraudulent conveyance sections of the NYDCL (*see* NY LEGIS 580 (2019), 2019 Sess. Law News of NY Ch 580 [A 5622]). Defendants argue the UVTA is not retroactive and does not apply to the alleged transfers, all of which predate 2018. The statute expressly provides that the

section does "not apply to a transfer made or obligation incurred before such effective date [of April 4, 2020], nor shall it apply to a right of action that has accrued before such effective date" (*id.*; Def. Reply at 4). In their initial brief, defendants discussed the Uniform Fraudulent Conveyance Act ("UFCA") whereas plaintiffs improperly rely on the UVTA despite its inapplicability and asymmetry with the UFCA statutes (Def. Reply at 4). For example, defendants note that plaintiffs' fifth claim for actual fraudulent conveyance under the UFCA, pursuant to NYDCL 276, is not congruent with NYDCL 276 under the UVTA which addresses "Remedies of Creditors" and does not create a cause of action (NYDCL § 276). Defendants argue the opposition cherry picks the two versions of the statute to create a "Frankenstein" law that the Legislature could never have intended (Def. Reply at 4). Defendants note that plaintiffs' brief simultaneously refers to their first five causes of action as claims under former NYDCL 273, 273-a, 274, 275, and 276 but later attempt to apply the UVTA insolvency standards to these UFCA claims (*id.*; Pl. Br. at 20-22). Defendants argue this is not possible. Whether the amendments went into effect in 2019 or 2020 is of no effect as the amendments only impact transfers post-dating April 4, 2020 and, here, all alleged transfers pre-date 2018 (Def. Reply at 5). Consequently, plaintiffs' reliance on the amended NYDCL is improper and the first five causes of action should be dismissed.

III. DISCUSSION

On a motion to dismiss pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

First, plaintiffs' constructive fraud claim under NYDCL § 273 cannot be dismissed. To allege a constructive fraud claim under NYDCL 273, a plaintiff must allege: (i) the conveyance

was made while the transferor was insolvent or was rendered insolvent by the conveyance, (ii) the conveyance was made without fair consideration, and (iii) the plaintiff was a creditor at the time of transfer (*see e.g. Joslin*, 309 AD2d at 837-838; *In re 50 Pine Co*, 317 BR 276). The complaint successfully alleges each element of this claim. It alleges that judgment-debtor defendants Versailles and Simon were insolvent when the alleged cash transfers were made (Compl. ¶ 56). The complaint also alleges that the transfers were made without fair consideration (*id.* ¶ 38, 42, 47, 52, 56) and that Singind became a creditor to Versailles as of October 20, 2016 and Rekhatek became a creditor to Simon as of April 5, 2017 (Compl. ¶¶ 2, 6).

Contrary to defendants' assertion that plaintiffs failed to adequately plead insolvency, based on the allegation that judgment-debtors' dissolved in 2019, plaintiffs correctly note that their complaint never alleges that the judgment-debtor defendants rendered themselves insolvent only in or after January 2019 (Pl. Br. at 15-16). Further, plaintiffs have sufficiently alleged "badges of fraud" which could give rise to an inference of intent including a close relationship between the parties to the alleged fraudulent transaction, transferor's knowledge of the creditor's claim, and inadequacy of consideration (Compl. ¶¶ 14, 16, 30, 31, 38, 42, 70; *Englander Capital Corp.*, 60 Misc3d at 665). Finally, although defendants correctly note that some of the alleged transfers occurred prior to the date in which they became creditors (October 20, 2016 and April 5, 2017), the complaint alleges transfers were made by both judgment-debtor defendants after each of these dates. Thus, defendants cannot argue that plaintiffs were not creditors at the time of some of the alleged transfers. Consequently, the motion to dismiss plaintiffs' first claim is denied.

Plaintiffs' NYDCL § 273-a claim must be dismissed. NYDCL 273-a provides that "every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment" (Def. Br. at 13; NYDCL § 273-a). Here, defendants correctly note that the latest transfer alleged is November 7, 2017, whereas the Prior Actions were not commenced until September 12, 2018. Accordingly, the judgment-debtor defendants were not defendants in an action for money damages at any time that the transfers were alleged to have been made. The motion to dismiss plaintiffs' second claim shall be granted.

Next, plaintiffs' NYDCL § 274 and NYDCL § 275 claims will not be dismissed. NYDCL § 274 provides that every conveyance made without fair consideration, at a time when the person making it "is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital," is fraudulent as to creditors "and as to other persons who become creditors during the continuance of such business or transaction," without regard to actual intent (*see also In re Direct Access Partners, LLC*, 602 BR at 514). NYDCL 275 states that "every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors (NYDCL § 275). Here, the complaint alleges that judgment-debtor defendants made the alleged transfers without fair consideration, while engaged in a business transaction and entering a debt obligation, and both were left with an unreasonably small capital (Compl. ¶¶ 2, 6 38, 42, 61-66). Again, defendants confuse the allegation that the judgment-debtors wire left with unreasonably small capital with the allegation that both were dissolved in 2019. Defendants' reference to their previous arguments as to the lack of fair consideration allegations and plaintiffs' status as creditors also fail for the reasons addressed above. Defendants' requests to dismiss the third and fourth claims are denied.

Plaintiffs' NYDCL § 276 claim should not be dismissed. To plead a constructive fraudulent conveyance claim under NYDCL 276, "the claimant must allege that (i) the thing transferred has value of which the creditor could have realized a portion of its claim; (ii) that this thing was transferred or disposed of by the debtor; and (iii) that the transfer was done with actual intent to defraud" (*see also Chambers*, 44 Misc3d 1224(A), at *7). Defendants' argument as to this claim primarily revolves around the heightened pleading standards for fraud under CPLR 3016(b). However, as stated above, a plaintiff may rely on "badges of fraud" to support its case due to the difficulty of proving actual intent to hinder, delay, or defraud creditors. As enumerated earlier, plaintiffs have sufficiently alleged such "badges of fraud" which might give rise to an inference of intent (Compl. ¶¶ 14, 16, 30, 31, 38, 42, 70; *Englander Capital Corp.*, 60 Misc3d at 665). The request to dismiss the fifth claim is denied.

Next, plaintiffs' merger-in-fact claim survives. "New York law recognizes de facto merger when a transaction, although not in form a merger, is in substance a consolidation or merger of seller and purchaser" (*MBI Ins. Corp. v Countrywide Home Loans, Inc.*, 40 Misc3d

643, 657 [Sup Ct New York County 2013]). "The four hallmarks of de facto merger under New York law include: (i) continuity of ownership (ii) cessation of ordinary business and dissolution of the acquired corporation as soon as possible; (iii) assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation and (iv) continuity of management, personnel, physical location, assets and general business operation" (*id.*). Here, the complaint alleges at least three of these factors: (i) continuity of ownership between the judgment-debtors and B&H via the Hamra defendants, (ii) cessation of the judgment-debtor's businesses, and (iii) continuity of personnel, location, and financing (Compl. ¶ 5, 14, 40, 42, 54, 71-74). Defendants' argument that these allegations are conclusory is insufficient for dismissal at this stage. Defendants' motion to dismiss the sixth claim is denied.

Plaintiffs' claim for joint and several liability among the judgment-debtor defendants also survives. Defendants' two cited cases in favor of dismissing this cause of action do not directly deal with an independent joint and several liability claim but, instead, with a wrongful life claim and a wrongful disinterment claim respectively (*see Alquijay by Alquijay*, 63 NY2d at 979; *Orlin*, 126 AD2d at 252). Consequently, defendants have failed to meet their burden to show that plaintiffs do not state a cognizable cause of action and their motion to dismiss this claim is denied.

Finally, plaintiffs' claim for piercing the corporate veil may not be dismissed at this time. A claim based on piercing the corporate veil is not a separate claim as the "attempt of a third party to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). New York law disfavors disregard of the corporate form. "Generally, . . . piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*id.*) "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (*TNS Holdings v MKL Sec. Corp.*, 92 NY2d 335, 339 [1998]). New York courts also reject veil-piercing allegations that are "unaccompanied by allegations of consequent wrongs" (*Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 40 [1st Dept 2012]). Here, the complaint repeatedly pleads that the Hamra defendants exercised

complete control of the judgment-debtor defendants and that such domination was used to commit fraud through the alleged transfers (Compl. ¶¶ 13-14, 17, 30-31, 51-54, 78-81). Defendants' argument that plaintiffs' allegations are so vague as to be conclusory is insufficient as plaintiffs repeatedly allege the Hamra defendants' control of the judgment-debtors and how the alleged transfers ultimately injured plaintiffs in their attempt to recover the judgments from the Prior Actions. Consequently, defendants' motion to dismiss plaintiffs' eighth claim must be denied.

For the foregoing reasons, it is hereby

ORDERED that defendants' motion is granted as to plaintiff's second cause of action and is otherwise denied and it is further

ORDERED that the second cause of action is hereby DISMISSED.

2/25/2021
DATE

O. PETER SHERWOOD, J.S.C.

CHECK ONE: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [ ] DENIED [X] GRANTED IN PART [ ] OTHER
[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE