

**Fairmont Ins. Brokers, Ltd. v Proto Restoration
Constr. Group Corp.**

2021 NY Slip Op 30676(U)

March 5, 2021

Supreme Court, Kings County

Docket Number: 508231/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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FAIRMONT INSURANCE BROKERS, LTD.,

Plaintiff,

-against-

**PROTO RESTORATION CONSTRUCTION GROUP
CORP., PROTO RESTORATION CONSTRUCTION
LLC, PROTO RESTORATION CORP. and
MARY SPANOS,**

Defendants.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Exhibits, and Memoranda	<u>71-82</u>
Answering Affirmations, Exhibits, and Memoranda	<u>84-91</u>
Reply Affidavits	<u>92</u>

Upon the foregoing cited papers, the Decision and Order on this motion is as follows:

This is an action brought under the (subsequently repealed¹) Debtor and Creditor Law (DCL) §§ 273, 273-a, 275, and 276. Plaintiff, an insurance broker, obtained a judgment in New York County in the amount of \$186,000 against non-party Proto Construction & Development Corp. d/b/a Proto Construction Development (PCD) (E-File Doc 75 [Judgment]). According to the complaint in this action, defendant Mary Spanos is the principal of PCD as well as of defendants Proto Restoration Construction Group Corp. (PRC Group), Proto Restoration Construction LLC (PRC LLC), and Proto

¹ The new statute, the Uniform Voidable Transactions Act, went into effect on April 4, 2020 and does not apply to this action.

Restoration Corp. (PRC Corp.) (collectively, PRC Defendants). Plaintiff learned this from Spanos at an EBT held pursuant to an information subpoena issued in connection with plaintiff's efforts to enforce the judgment. Plaintiff alleges that Spanos fraudulently stripped PCD of its assets by conveying them to the PRC Defendants in order to frustrate plaintiff's ability to enforce the money judgment against allegedly now-insolvent PCD. In its complaint, plaintiff seeks an order declaring the conveyances and transfers of assets by non-party PCD to be void, and to recover the amount of the judgment plus interest from defendants by "piercing the corporate veil"² because the defendant entities are all alter egos of each other.

Defendants' amended answer sets forth four affirmative defenses and asserts two counterclaims: [first] abuse of process for allegedly sending improper information subpoenas in connection with the NY County action to defendants' clients and [second] tortious interference with contractual relationships, due to the harm that defendants sustained as a result of the subpoenas which were sent to two of their clients (E-File Doc 80 [Amended Answer]).

Background

PCD, a company in the construction and renovation field of work, purchased insurance for its jobs through plaintiff (as broker), which in turn placed the insurance with Old Republic (as insurance carrier). The initial premium set was subject to an audit by Old Republic based on, *inter alia*, the number of employees to be insured and the types of risks which they would be exposed to (E-File Doc 72 [Aff of Moishe Mishkowitz, plaintiff's principal]). An audit was conducted, and the auditor concluded that PCD

² It is not clear if plaintiff means piercing the veil of the non-party PCD or of the defendants herein.

owed an “audit premium”, presumably more money for the insurance. In 2010, Old Republic sued plaintiff for the additional premium due (NY County, Index No. 601168/2010). Plaintiff brought a third-party action against PCD and other defendants. Plaintiff eventually settled the action with Old Republic and then moved for summary judgment on its third-party action against PCD, Index No. 590736/2012. In 2017, plaintiff obtained a judgment in the amount of \$186,000 against PCD (E-File Doc 75 [entered in July 2017]). None of the defendants named in this action were named in the NY County action.

Defendant Spanos testified that PRC Corp. was formed in 2010 by Spanos and her husband and over the next two years (2010-2012) PCD “dwindle[ed]” down its business and eventually became inactive at some time in 2012 (E-File Doc 78 at 18- [Spanos 2018 EBT]). She testified that PCD assigned one contract (between PCD and Co-op City) to PRC Corp. in late 2011 or early 2012 (E-File Doc 82 at 15, 73-76 [Spanos 2020 EBT]; see *generally* Defendants’ Mem. [conceding that PCD assigned the Coop-City contract to PRC Corp. in December 2011 and that PRC Corp. performed the work under that contract through 2013]). Spanos testified that PRC Corp. paid PCD’s bills (except for the amount owed to plaintiff under the judgment) “[i]n consideration for [the Coop-City] contract” (E-File Doc 82 at 88-90). She explained that PRC Corp. “took over” “a good portion of” PCD’s accounts payables³ and debts, and that Spanos decided which of PCD’s obligations PRC would pay (*id.*).

In Motion Seq. 4, plaintiff moves for summary judgment on all of its causes of action and seeks an order directing the Kings County Clerk to enter judgment against all

³ In opposition to this motion, Spanos avers that she meant that PRC Corp. took over PCD’s recurring expenses in 2012.

of the defendants, jointly and severally, for the unpaid judgment plus interest, and for an order dismissing defendants' counterclaims. Plaintiff argues that it is a creditor entitled to recover from the defendants because Spanos caused PCD to fraudulently transfer its assets, including contracts for future work, to the defendant entities. Plaintiff further argues that it should be permitted to "pierce the corporate veil" to reach the defendants because Spanos controlled all of the entities and dissipated PCD's assets in an intentional scheme to fraudulently prevent plaintiff's from collecting on the judgment. Plaintiff contends that the assignment of the Coop-City contract for little or no consideration establishes that defendants benefited from the fraudulent transfers as contemplated by DCL §§ 273-276. Plaintiff also argues that PCR Corp. is obligated to pay PCD's debts under the theory of de facto merger because both entities were controlled by Spanos, shared offices and employees, and PCR Corp. had obtained control of PCD's assets and receivables. As for the counterclaims, plaintiff argues that the post-judgment subpoenas were lawful and did not tortuously interfere with defendants' contractual relationships.

Defendants respond that there are genuine issues of fact as to whether plaintiff is entitled to pierce the corporate veil, because plaintiff's contentions of fraud are conclusory and that the entities maintained separate bank accounts and ledgers. Defendants also respond that there are issues of fact as to whether the PCD assigned the Coop-City Contract to PRC Corp. for fair consideration, since there is no evidence in plaintiff's motion that the assignment was not an arm's length transaction. Specifically, they respond that plaintiff does not establish constructive fraud by proving that PCD was insolvent at the time of the conveyance in December 2011. Defendants also argue that

there are issues of fact precluding summary judgment under the merger doctrine. Defendants contend that the first counterclaim should not be dismissed because the information subpoenas served in connection with the NY County action were to obtain information pertaining to the PRC Defendants, not PCD, even though the PRC Defendants here were not named parties in the NY County action. Defendants claim the second counterclaim should not be dismissed because Spanos's testimony was sufficient to set forth a tortious interference claim.

Discussion

Summary judgment is a drastic remedy that will be granted only where the movant demonstrates that no genuine triable issue of fact exists (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see generally* CPLR 3212). Initially, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Plaintiff's Claims Under the DCL

Under DCL § 273,

"(a) 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:

- (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
- (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
(ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.”

Under Section 274 (a), a “transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if” the consideration was not of “reasonably equivalent value . . . and the debtor was insolvent at the that time or . . . became insolvent as a result of” such transaction.

“A conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration” (*Matter of U.S. Bancorp Equip. Fin., Inc. v Rubashkin*, 98 AD3d 1057, 1060 [2d Dept 2012]; see DCL § 273). Fraudulent conveyances also include those made without fair consideration when the debtor conveys the asset and “intends or believes that he will incur debts beyond his ability to pay as they mature” (*Matter of U.S. Bancorp Equip. Fin., Inc.*, 98 AD3d 1060; see DCL § 275).

“The burden of proof to establish actual fraud under Debtor and Creditor Law § 276 is upon the creditor who seeks to have the conveyance set aside . . . , and the standard for such proof is *clear and convincing evidence*” (*Marine Midland Bank v Murkoff*, 120 AD2d 122, 126 [2d Dept 1986], citing *Lowendahl v Baltimore & Ohio RR Co.*, 247 App Div 144, *affd* 272 NY 360, *rearg denied* 273 NY 584; *Brody v Pecoraro*, 250 NY 56 [1928]). Under § 276, a “presumption of intentional fraud” cannot be inferred, the fraud must be actual (*id.*).

Here, plaintiff does not even identify which sections of the DCL it arguably has established a prima facie case for in its papers. In any event, plaintiff fails to establish prima facie entitlement to summary judgment on any of its claims under the DCL (Sections 273, 274, 275, and 276) because it has not eliminated all triable issues of fact as to whether any of PCD's transfers (i.e., its assignment of the Coop City contract to PRC Corp. or its "subcontracting" of a project at 120 Dekruif Place in Bronx, New York (E-File Doc 76 [print out of NYC DOB website listing for "Job No: 200940134"])) constitute a fraudulent conveyance under any of the Sections of the DCL referenced in the complaint. There are issues of fact with regard to PCD's assets at the time of the transfers and it is not established that any transaction either rendered PCD insolvent (or was made at a time that PCD was already insolvent), was not made for "reasonably equivalent value" or for fair consideration, or was conveyed without fair consideration where the debtor "intends and believes" that it will incur future debts it cannot pay. Plaintiff also fails to establish with clear and convincing evidence that the conveyances were made with the actual intent to defraud plaintiff. Plaintiff's NYC DOB printout is not in admissible form, and plaintiff's credible evidence (e.g., the affidavit of plaintiff's principal and the EBT of Spanos) are equivocal. Further, there are no records of PCD's assets to show that PCD was or became insolvent as a result of the listed conveyances or intended to avoid paying its future debts as a result of such transactions. It is noted that the NYS Department of State Division of Corporations' website lists PCD as an active corporation, as of this date, and lists defendant Spanos as its CEO.

Plaintiff also fails to eliminate all triable issues of fact with regard to its claim that there was a *de facto* merger of PCD with PRC Corp. "Generally, 'a corporation which

acquires the assets of another is not liable for the torts of its predecessor' ” (*Bonanni v Horizons Inv'rs Corp.*, 179 AD3d 995, 998 [2d Dept 2020], *lv to appeal dismissed*, 35 NY3d 1059 [2020]; citing *Shea v Salvation Army*, 169 AD3d 1081, 1082 [2d Dept 2019]). “However, such liability may arise if the successor corporation expressly or impliedly assumed the predecessor's tort liability, there was a consolidation or merger of seller and purchaser, the purchaser corporation was a mere continuation of the seller corporation, or the transaction was entered into fraudulently to escape such obligations” (*Bonanni*, 179 AD3d at 998). Plaintiff's submissions show that PRC Corp. was formed in 2010, around two years before plaintiff commenced the third-party action against PCD in 2012, and seven years before plaintiff obtained a judgment against PCD (in 2017). Plaintiff speculates that PRC Corp. was created to avoid paying PCD's obligations, but plaintiff's submissions do not eliminate all triable issues with regard to whether a *de facto* merger occurred.

Thus, plaintiff does not satisfy its burden of proof and summary judgment on the four causes of action in the complaint must be denied.

Defendants' Counterclaims

CPLR 5223 permits the following:

“At any time before a judgment is satisfied or vacated, the judgment creditor may compel disclosure of all matter relevant to the satisfaction of the judgment, by serving upon any person a subpoena, which shall specify all of the parties to the action, the date of the judgment, the court in which it was entered, the amount of the judgment and the amount then due thereon, and shall state that false swearing or failure to comply with the subpoena is punishable as a contempt of court.”

The information subpoenas with restraining notices which are the basis for the counterclaims were sent by plaintiff in connection with the NY County action (Index No.

590736/2012) concerning plaintiff's judgment against PCD as a judgment debtor. The first sought, among other things, "All contracts between Equity Residential and Proto Construction & Development Corp. d/b/a Proto Construction Development from 2010 to present; and all contracts between Equity Residential And Proto Restoration Construction LLC from 2010 To Present." The second one sought, among other things, "All contracts between Trump Village Section 3, Inc. and Proto Construction & Development Corp. d/b/a Proto Construction Development from 2010 to present" (E-File Doc 77). The information subpoenas also contain restraining notices that are effective with regard to the judgment against PCD, under CPLR 5222 (b). These information subpoenas do not constitute an "abuse of process" and defendants' first counterclaim is thus dismissed.

Plaintiff does not make a prima facie case for its argument that the second counterclaim, for "malicious interference with contractual relations" – specifically, the business relationships of defendants and the recipients of the two information subpoenas – must be dismissed. To prove a claim for tortious interference with business relations, "a plaintiff must show that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper" (*Qosina Corp. v C & N Packaging, Inc.*, 96 AD3d 1032, 1034 [2d Dept 2012]). While the information subpoenas were not unlawful, plaintiff does not demonstrate that the information was sought from the two businesses for any purpose other than to harm the defendants' business relationships with them, or that the information subpoenas did not cause harm to defendants. The evidence submitted by plaintiff, particularly Spanos' testimony, creates issues of fact with regard to defendants'

claim that they were harmed by the subpoenas (see E-File Doc 82 at 79-84). Even if plaintiff had made a prima facie case to dismiss the second counterclaim, defendants' submissions in opposition raise a triable issue of fact as to whether defendants were harmed by the plaintiff's actions (see *e.g.* E-File Doc 85 [Aff of Dmitri Spanos]).

Accordingly, it is **ORDERED** that plaintiff's motion is granted to the sole extent that defendants' first counterclaim, for abuse of process, is dismissed. The remainder of the relief requested in the motion is denied.

This shall constitute the decision and order of the court.

Dated: March 5, 2021

ENTER :



Hon. Debra Silber, J.S.C.