

PJSC Natl. Bank Trust v Pirogova
2022 NY Slip Op 30367(U)
February 10, 2022
Supreme Court, New York County
Docket Number: Index No. 160130/2020
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 54

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PJSC NATIONAL BANK TRUST,

Plaintiff,

- v -

NATALIA PIROGOVA, NMP-GROUP LLC, MADISON 33
OWNER, LLC, LUIZA DUBROVSKY, 172 MADISON NP
HOLDING LLC, 172 MADISON NP MEMBER LLC,
MADISON 33 PARTNERS, LLC, FGP 1, LLC, SERHII
YEFIMTSEV, M INVESTMENT CAPITAL, LLC, MARK
SHVARTSBURD, ALEXANDER FORKOSH,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 50, 52, 90, 91, 92, 93, 94, 95, 96, 113

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 51, 53, 114

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 97, 117, 156

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 98, 99, 111, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 148, 154, 155

were read on this motion to/for

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 101, 102, 103, 104, 105, 106, 107, 108, 109, 115, 116, 153

were read on this motion to/for

JUDGMENT - DEFAULT

The following e-filed documents, listed by NYSCEF document number (Motion 007) 166, 167, 168, 169, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182

were read on this motion to/for

PARTIES - ADD/SUBSTITUTE/INTERVENE

The following e-filed documents, listed by NYSCEF document number (Motion 008) 184, 185, 186, 187, 188, 189, 190, 196, 197, 198, 199

were read on this motion to/for

PARTIES - ADD/SUBSTITUTE/INTERVENE

Plaintiff has not sufficiently pleaded a claim for constructive fraudulent conveyance due to "the absence of any specific allegation concerning the value of the transferred property or otherwise showing why the consideration given therefor was inadequate" (*IDC [Queens] Corp. v Illuminating Experiences, Inc.*, 220 AD2d 337 [1st Dept 1995]; *see SH575 Holdings LLC v Reliable Abstract Co.*, 195 AD3d 429 [1st Dept 2021]). Critically, plaintiff does not plead the value of the property, so even assuming the truth of plaintiff's factual allegations, there is no way to assess from the complaint whether the amounts paid by FGP and MIC were disproportionately small as compared with the value of the transferred interests (setting aside any applicable discounts, such as for lack of control, or with respect to MIC based on the then-cloud on FGP's membership status). To be sure, while plaintiff has alleged that the value conferred by FGP was less than \$20 million, there is no allegation related to the value of the transferred property--a 49% interest in an LLC that has a 40% stake in the property--or any basis from which to conclude that the conveyance was made "without fair consideration" (*cf. Stillwater Liquidating LLC v CL Recovery Trading Fund III, L.P.*, 2019 WL 5266843, at *4 [Sup Ct, NY County Oct. 17, 2019] [lack of fair consideration alleged where 22% paid for the Notes was materially below the allegedly appraised 70% face value], citing *Stillwater Liquidating LLC v Partner Reinsurance Co.*, 151 AD3d 585, 586 [1st Dept 2017] ["the allegations that Stillwater Funding transferred its interests in the collateral, allegedly worth over \$200 million, to defendants to satisfy a debt worth less than \$40 million, thereby leaving Stillwater Funding unable to pay other creditors, states a cause of action for fraudulent conveyance"])). Plaintiff's "mere belief that [the debtor] transferred assets ... without fair consideration does not suffice" because "speculative and conclusory allegations do not state a claim for constructive fraud under the Debtor and Creditor Law" (*Eagle Eye Collection Corp. v Shariff*, 190 AD3d 600 [1st Dept 2021], citing *Jaliman v D.H. Blair & Co.*, 105 AD3d 646, 647 [1st Dept 2013]; *see also RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015]). This pleading deficiency may well be curable so the DCL § 273 constructive-fraudulent-conveyance claim is dismissed without prejudice.

An opportunity to correct this insufficiency is warranted. There may be a basis to set aside the conveyances even though plaintiff is not a creditor of Dubrovsky since DCL claims may be asserted against alter egos (*2406-12 Amsterdam Assoc. LLC v Alianza LLC*, 136 AD3d 512, 513 [1st Dept 2016]; *see Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 166 AD3d 496, 497 [1st Dept 2018]; *see also South College Street, LLC v Ares Capital Corp.*, 2020 WL 3201790, at *2 [Sup Ct, NY County June 15, 2020], *affd* 199 AD3d 431 [1st Dept 2021]). Given the allegations that Pirogova tried to hold assets through Dubrovsky in a scheme to defraud Pirogova's creditors, that the assignments were made by Dubrovsky is not determinative at this juncture.

Moreover, there are questions of fact about whether the constructive fraudulent conveyance claims are timely under Russian law (CPLR 202). Since the claims appear to accrue when plaintiff knew or should have known about them, that factual issue cannot be resolved on a pre-discovery motion to dismiss (*see* Dkt. 118 at 2).

The rest of plaintiff's claims--that is, all claims other than for constructive fraudulent conveyance against FGP, MIC, Dubrovsky and Pirogova--are baseless.

Regarding actual fraudulent conveyance under DCL § 276, plaintiff has not alleged facts or nonconclusory badges of fraud permitting a reasonable inference that either FGP or MIC engaged in a scheme to defraud Pirogova's creditors (*Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]; *see Brennan v 3250 Rawlins Ave. Partners, LLC*, 171 AD3d 603, 604 [1st Dept 2019] ["unlike the allegations supporting the constructive fraud claim, the allegations supporting the actual fraud claim are subject to the heightened pleading standard of CPLR 3016(b)"]). While plaintiff has certainly pleaded that Dubrovsky and Pirogova engaged in such a scheme--the same allegations supporting a § 273 claim based on an alter-ego theory--absent factual (rather than conclusory) allegations that FGP and MIC were aware of and participated in that conspiracy, there is no basis to set aside the assignments as actual fraudulent conveyances (*Rubin v Sabharwal*, 171 AD3d 580, 581 [1st Dept 2019]; *see Cantor Fitzgerald & Co. v 8an Capital Partners Master Fund, L.P.*, 132 AD3d 402 [1st Dept 2015]). Indeed, in a related action, FGP and MIC are adverse to Dubrovsky and Pirogova.

Additionally, there is no basis to possibly hold anyone liable other than FGP, MIC, Dubrovsky and Pirogova. None of the other defendants were transferors, transferees or their alleged alter egos; thus, they cannot be held liable under the DCL (*Stillwater*, 2019 WL 5266843, at *5 ["DCL claims are only properly asserted against the transferor and transferee"], citing *Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]). *Priestley*, of course, is not contrary to *Federal Deposit*, which rejected the viability of an aiding and abetting fraudulent conveyance claim (*id.* at *6) and the complaint does not allege a possible exception to this rule (*Ninth Space LLC v Goldman*, 192 AD3d 594 [1st Dept 2021]; *see BBCN Bank v 12th Ave. Rest. Grp. Inc.*, 150 AD3d 623, 624 [1st Dept 2017]). For instance, unlike with Dubrovsky and Pirogova, there is no alleged basis for any alter-ego finding based on piercing the corporate veils of FGP and MIC (*D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 452 [1st Dept 2013]; *see Cantor Fitzgerald*, 132 AD3d at 402; *see also South College*, 199 AD3d 431-32). A default judgment therefore must be denied and intervention is unnecessary (*see Sontag v American Intl. Group, Inc.*, 178 AD3d 528, 529 [1st Dept 2019]).

Plaintiff's other arguments are unavailing.

Finally, dismissal of the complaint--and most significantly the with-prejudice dismissal of the DCL § 276 claim--obviates the need to consider the cross-claim for contribution.

Accordingly, it is ORDERED that the motions to dismiss the complaint are GRANTED to the extent that all claims other than constructive fraudulent conveyance against FGP, MIC, Dubrovsky and Pirogova are severed and dismissed with prejudice, the Clerk is directed to enter judgment accordingly, the constructive fraudulent conveyance claims against FGP, MIC, Dubrovsky and Pirogova are dismissed without prejudice, and plaintiff may move for leave to amend these claims (and only these claims) within 30 days and if it does not the claims will be dismissed with prejudice; and it is further

ORDERED that the motion for a default judgment and the motions for leave to intervene are DENIED.

2/10/2022

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

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DENIED

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☐

NON-FINAL DISPOSITION

GRANTED IN PART

☒

OTHER

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JENNIFER SCHECTER, J.S.C.