

Chung Tai Print. (China) Co. Ltd. v Florence Paper Corp.

2022 NY Slip Op 31815(U)

June 3, 2022

Supreme Court, New York County

Docket Number: Index No. 651101/2019

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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CHUNG TAI PRINTING (CHINA) CO LTD.,

Plaintiff,

- v -

FLORENCE PAPER CORP., STEVEN SHAMAH, VIVIAN SHAMAH, RONALD SHAMAH, SARI SHAMAH, DAVID SHAMAH, ALAN SHAMAH, MICHAEL HARARY, JERRY HARARY, ZVI BEN-HAIM, LEON HARARY, EDGE 2 EDGE PACKAGING, LLC

Defendant.

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INDEX NO. 651101/2019

MOTION DATE 11/05/2021,
11/12/2021

MOTION SEQ. NO. 007 008

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 253, 254, 255, 256, 257, 258, 259, 260, 262, 285, 286, 287, 288

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 008) 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 261, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 289, 290, 291, 292, 293, 294, 295, 296

were read on this motion to/for DISMISS

Upon the foregoing documents, Florence Paper Corp. (**FPC**), Steven, Vivian, Ronald and Sari Shamah’s (collectively, the **FPC Defendants**) motion to dismiss (Motion Seq. No. 007) the Second Amended Complaint (**SAC**) is granted solely to the extent that the fraud (second) cause of action is dismissed as to Steven and David Shamah.

Edge 2 Edge Packaging, LLC (**E2E**), David Shamah, Alan Shamah, Michael Harary, Jerry Harary, Leon Harary, and Zvi Ben-Haim’s (collectively, the **E2E Defendants**) motion (Mtn. Seq. No. 008) to dismiss the SAC are granted to the extent that (i) the civil conspiracy (twelfth)

and aiding and abetting fraud (thirteenth) causes of action are dismissed as to Michael Harary, Jerry Harary and Zvi Ben-Haim (collectively, the **Ben Hur Defendants**) solely as they relate to the common law fraud cause of action asserted against Steven and David Shamah (*i.e.*, but not as they relate to Chung Tai's fraudulent conveyance claim), (ii) the civil conspiracy (twelfth) and aiding and abetting fraud (thirteenth) causes of action are dismissed as against Leon Harary, and (iii) the claims based on alter-ego and mere continuation are dismissed as against the Ben Hur Defendants and Leon Harary.

The cross-motion by Chung Tai Printing (China) Co, Ltd (**Chung Tai**) seeking (x) to deem service of the SAC on the E2E Defendants as timely or, (y) in the alternative, to permit an extension of time to serve the E2E Defendants is granted. Service was proper and timely. Additionally, even if it was not (which it was), in the interests of justice, pursuant to CPLR § 308(5), an extension of time to serve the E2E Defendants would be appropriate.

THE RELEVANT FACTS

Reference is made to this Court's (i) Decision and Order, dated February 4, 2020 (the **2020 Decision**; NYSCEF Doc. No. 58), and (ii) Decision and Order, dated July 28, 2021 (the **2021 Decision**; NYSCEF Doc. No. 160). The 2020 Decision and the 2021 Decision are hereinafter collectively referred to as the **Prior Decisions**. The facts are set forth in the Prior Decisions. Familiarity is presumed. Terms used but not otherwise defined herein shall have the meaning ascribed thereto in the Prior Decisions.

As relevant, pursuant to the Prior Decisions, this Court dismissed Chung Tai's causes of action sounding in breach of fiduciary duty and breach of constructive trust. This Court also dismissed the fraud cause of action without prejudice as to Vivian, Ronald and Sari Shamah because of the lack of allegations that these Individual Defendants had made material facts or omissions upon which a fraud claim could be predicated.

Additionally, pursuant to the Prior Decisions, this Court granted partial summary judgment to Chung Tai as to its breach of contract and account stated causes of action and gave leave to Chung Tai to file a SAC against the E2E Defendants (NYSCEF Doc. No. 160 at 4).

Subsequently, on August 11, 2021, Chung Tai filed the SAC (NYSCEF Doc. No. 168) asserting causes of action for (i) breach of contract (first) against the FPC Defendants, (ii) fraud (second) as against Steven and David Shamah, (iii) conversion (third) against the FPC Defendants, (iv) unjust enrichment (fourth) against Steven, Ronald, Vivian, Sari, and the E2E Defendants, (v) alter ego liability (fifth) against Steven, Ronald, Vivian, Sari, and the E2E Defendants, (vi) violations of the Debtor and Creditor Law §§ 273-276, 278 (sixth through tenth, fourteenth) against Steven, Ronald, Vivian and Sari Shamah and E2E, (vii) account stated (eleventh) against FPC, (viii) civil conspiracy (twelfth) against David and Alan Shamah, Leon Harary, and the Ben Hur Defendants, and (ix) aiding and abetting fraud (thirteenth) against David and Alan Shamah, Leon Harary, and the Ben Hur Defendants.

In sum and substance, the allegations against the E2E Defendants as set forth in the SAC are that E2E was created by David and Alan Shamah, and the Ben Hur Defendants to strip FPC of any

remaining assets before it became completely insolvent and to defraud FPC's creditors. Chung Tai alleges that the Ben Hur Defendants assisted in the fraudulent scheme set in place by the Shamah family in that they were partners in setting up E2E to be a continuation of FPC when FPC became insolvent at the end of 2018, and accepted FPC's assets for little or no consideration (i.e., five cents on the dollar).

Reference is made to the Amended and Restated Operating Agreement dated April 1, 2021 (NYSCEF Doc. No. 241; the **Operating Agreement**), by and among Ben Hur E2E LLC (the **Managing Member**) and Dash Brothers, LLC. Pursuant to the Operating Agreement, E2E is owned equally by the Managing Member and Dash Brothers, LLC. The Managing Member's members are the Ben Hur Defendants. Dash Brothers, LLC's members are David and Alan Shamah, (NYSCEF Doc. No. 241, § 3.1(b)). E2E's principal place of business is 463 Seventh Avenue, 21st Floor, New York, New York (*id.* at §2.3).

The Operating Agreement provides that the Managing Member is the sole managing member and only voting member and that Dash Brothers LLC merely has economic rights to allocations and distributions and does not have voting rights (*id.* at 3.1(a)). Only the Managing Member is permitted to make distributions to members in its discretion, and only the Managing Member is permitted to file tax returns on behalf of E2E (*id.* at §§ 6.2(a), 8.1). Significantly, the Managing Member delegated the responsibility to manage the day-to-day affairs of E2E to Steven and Ronald Shamah's sons, David and Alan Shamah, as President and Vice-President of E2E, respectively. David received an annual base salary of \$200,000. Alan received an annual base

salary of \$100,000. Each also received 2% of eligible gross sales above \$15,000,000 as additional compensation (*id.* at §4.4(b)).

By letter agreement, dated March 19, 2019 (the **PO Agreement**; NYSCEF Doc. No. 245), by and between FPC and E2E, FPC assigned all of its purchase orders, factory orders, deposits and inventory to E2E in exchange for **a mere 5%** of the value of the Purchase Orders plus reimbursement for any deposits held by the factories fulfilling the orders. Additionally, FPC represented that it was the owner and had good and marketable title to all of the purchase orders, deposits and inventory:

You represent and warrant that you are the sole and exclusive owner of, and have good and marketable title to all of the Purchase Orders, Factory Orders, Deposits and Inventory (herein, collectively, the “Purchased Assets”) free and clear of all liens and encumbrances, and that the assignment and sale of the Purchased Assets, does not require the consent of any third parties, other than the consent of the customers under the Purchase Orders.

(*id.* at ¶ 4). A one-page schedule of the Purchase Assets was attached to the PO Agreement, which listed the purchase orders, deposits and inventory subject to the agreement. Purchase Orders were identified by customer, description, purchase order number and issue date, but not by the factory or company that was filling the purchase order (*id.* at Schedule A).

DISCUSSION

On a motion to dismiss, the pleading is to be afforded a liberal construction and the court must accept the facts as alleged as true, according plaintiffs the benefit of every possible inference, to determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d, 87-88 [1994]). The Court must determine “whether the pleader has a cause of action

rather than on whether he has properly stated one” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Breach of Contract (first) and Account Stated (eleventh) causes of action are not dismissed

The branch of FPC’s motion seeking dismissal of the breach of contract (first) and account stated (eleventh) claims is denied as moot. Summary Judgment has already been granted as to these causes of action in the Prior Decisions.

Unjust Enrichment (fourth) cause of action is withdrawn without prejudice

Chung Tai withdrew this claim against all parties without prejudice (NYSCEF Doc. No. 260 at ftnt 1; NYSCEF Doc. No. 280 at ftnt 1). Accordingly, the branch of the motion to dismiss this cause of action is denied as moot.

Conversion (third) cause of action is not dismissed

The SAC asserts a claim for conversion (third) against FPC, Steven, Ronald, Vivian and Sari Shamah. As previously discussed in the 2020 Decision, the defendants are not entitled to dismissal of the cause of action against the FPC defendants sounding in conversion. For the reasons set forth therein, it is not duplicative of the breach of contract claim (NYSCEF Doc. No. 58 at 12-13). For the avoidance of doubt, the claim is based on the acceptance of the goods, the sale of the goods at a pittance to monetize them and to use the proceeds to fund their lifestyle or otherwise pay family members on the payroll that were not real employees. It does not matter that they never received the goods directly and the goods were directed to their customers. The

claim is not one for replevin and lack of physical possession of the goods is not a bar to this claim. Put another way, constructive possession is not a defense.

Fraud (second) cause of action must be dismissed against Steven and David Shamah

Steven and David Shamah both argue that Chung Tai's fraud claims fail because (i) neither made misstatements of present material facts, (ii) Chung Tai's reliance on their statements was unreasonable given FPC's history of outstanding payments for various purchase orders, and (iii) Chung Tai does not allege damages separate and apart from those awarded by the Court for its judgment on the breach of contract claim.

In its opposition papers, Chung Tai argues that Steven and David made material misrepresentations to Kelvin Wong about FPC's (i) intention to pay for goods received, (ii) ability to pay for goods received, and (iii) general financial strength, security and solvency, all of which they knew to be false when made to induce Chung Tai to ship goods to FPC (NYSCEF Doc. No. 168, ¶56) so that they could be fraudulently converted to pay for family expenses for various Shamah family members instead of paying their obligations to Chung Tai.

More specifically, Chung Tai alleges that at an in-person meeting at the Shangri-La Hotel on May 27, 2018, Steven told Mr. Wong that (x) all outstanding FPC balances would be paid by June 2018 and (y) payment on future purchase orders would be due within 45 days of delivery of the goods (NYSCEF Doc. No. 168, ¶ 20, 21). One month later, Mr. Wong's confirmed his understanding based on Steven's material misrepresentations in an email of June 4, 2018:

Dear Steve & Cecilia,

Below are the confirmed items from the meeting with Steve and Larry on 27 May 2018 at hotel Shangri-La Shenzhen.

...

4. Steve agreed to settle all outstanding balance by end June 2018.
5. We re-confirm the payment terms as due 45 days after delivery.

(*id.* at Exhibit D).

According to the well pled SAC, Steven knew that this statement was not true when made and with the intent to defraud Chung Tai because FPC had already defaulted on a loan (*id.* at Ex. F, G) and was done solely to induce Chung Tai to ship more goods so that Steven and his family could convert the goods to pay for non-business related expenses. It can not be said at this stage of the pleadings taking the allegations as true which the Court must that, given the long standing relationship, that reliance was unreasonable particularly because payments had been made on some of the past due balances at that time (*See High Value Trading LLC v Shaoul*, 168 AD3d 641, 642 [1st Dept 2019] citing *Universe Antiques v Vareika*, 510 FedAppx 74, 76 [2d Cir 2013] (“the fact that one party is sophisticated does not end the fact-intensive question of what constitutes reasonable reliance, because [courts] consider the entire context of the transaction”)).

However, the common law fraud cause of action as to Steven must nonetheless be dismissed without prejudice. As pled, the damages claimed are not articulated as separate and apart from the damages which this Court has already granted to Chung Tai. Stated differently, dismissal without prejudice as to this claim is mandated based of the lack of damages alleged relating *specifically* to the alleged fraud and not based on the breach of contract (*Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 15 NY3d 264, 271 [2010] citing *Reno v Bull*, 226 NY 546

[1919] (“In a fraud action, a plaintiff may recover only the actual pecuniary loss sustained as a direct result of the wrong”); *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]).

As to David, dismissal of the fraud claim without prejudice is also appropriate. Chung Tai alleges that David sent an email to Kelvin Wong on April 18, 2018 (*i.e.*, one month prior to the meeting at the Shangri-La Hotel) to falsely give Mr. Wong comfort that his family would get current on old invoices and would otherwise not defraud Chung Tai:

We are also growing and handling our cashflow concerns. It will alittle time to see however won't always been this way.

(NYSCEF Doc. No. 212). The chain of these emails indicates that this was not what David was trying to induce. Instead, this appears to be an attempt by David to negotiate better pricing -- not additional shipments. Thus, the claim as to David must be dismissed without prejudice as well because the fraud claim is not based on the defendants' attempt to negotiate better pricing and the nexus between this statement and the shipment of goods is not adequately explained.

For the avoidance of doubt, although the common law fraud claims against Steven and David must be dismissed, Chung Tai has also asserted a claim for fraudulent conveyance against Steven, Ronald, Vivian, Sari and E2E (sixth cause of action).¹ For the reasons set below, this claim is not dismissed.

The Aiding and Abetting Fraud (thirteenth) and Civil Conspiracy (twelfth) causes of action are dismissed with respect to the fraud cause of action but not the fraudulent conveyance cause of action

¹ DCL § 273, amended as of April 4, 2020, provides that a transfer made by a debtor is voidable as to a creditor if the debtor made the transfer with actual intent to hinder, delay or defraud. The well plead SAC unquestionably asserts a claim for fraudulent conveyance.

Relying on *Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 841-42 [1990] and *BBCN Bank v 12th Ave. Rest. Group*, 150 AD3d 623, 624 [1st Dept 2017], the E2E Defendants argue that an aiding and abetting claim can not be ground against someone who merely assists in the transfer of assets. Their reliance on these cases is misplaced because, as alleged, the Ben Hur Defendants did not merely assist in the transfer of the assets. They benefitted from the transfer as well.

In *Federal Deposit*, bank officials allegedly assisted in fraudulently transferring funds to a Swiss account held by a director of the bank. The bank official defendants did not in any way benefit from the transfer. The Court held that under those circumstances merely assisting or participating in the transfer of the assets was insufficient to maintain a claim for aiding and abetting the fraudulent transfer (75 NY2d at 841-2).

In *BBCN Bank*, the plaintiff brought a cause of action for aiding and abetting a fraudulent conveyance against Robert Swednick, an attorney representing some of the other named defendants in a separate action. The *BBCN Bank* court held that the claim against Mr. Swednick must be dismissed because merely assisting in the transfer of assets without being a transferee of the assets or benefitting from the transaction in any way, was insufficient to maintain a claim for aiding and abetting a fraudulent conveyance (150 AD3d at 623-624).

Neither the doctrine announced in *Federal Deposit*, nor *BBCN Bank* is implicated in the case at *nisi prius*. In the case before this Court, the E2E Defendants participated in **and directly benefited from** the fraudulent conveyance of FPC's assets by beneficially receiving FPC's assets for a mere 5% of their value.

To the extent that the fraud claims against Steven and David Shamah are dismissed, the conspiracy claim and the aiding and abetting fraud claims as to David and Alan Shamah, the Ben-Hur Defendants and Leon Harary must also nonetheless be dismissed (*Abacus Federal Savings Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metro Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009]).

However, for the avoidance of doubt, claims for conspiracy and aiding and abetting fraudulent conveyance (NYSCEF Doc. No. 168, ¶ 113, 120) are not dismissed except as to Leon Harary. As discussed below, the well pled SAC states a claim for fraudulent conveyance pursuant to DCL § 273.

To ground a claim for civil conspiracy, one must demonstrate the primary tort plus an agreement between two or more parties, an overt act in furtherance of the agreement, the parties' intentional participation in the furtherance of a plan or purpose and resulting damage or injury (*Abacus*, 75 AD3d at 474 citing *World Wrestling Fedn. Entertainment v Bozell*, 142 FSupp2d 514, 532 [SDNY 2001]). To ground a claim for aiding and abetting fraud, the plaintiff must allege the existence of the underlying fraud, actual knowledge and substantial assistance, and an intent to commit fraud is to be derived from the surrounding circumstances (*Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010]).

The SAC alleges David Shamah, Alan Shamah and the Ben Hur Defendants worked in concert to assist the Shamah family in defrauding FPC's creditors by having E2E purchase FPC's assets for

a immaterial fraction of their value – *i.e.*, FPC essentially gave its assets to E2E without regard for FPC’s obligations to pay for some Shamah family non-business related expenses. This is more than sufficient at this stage of the litigation to maintain the claims for conspiracy and aiding and abetting the fraudulent conveyance as to those defendants. As to Leon Harary, on the other hand, who had no ownership interest or involvement in E2E (NYSCEF Doc. No. 231, ¶ 14), the aiding and abetting claims must be dismissed without prejudice because at most he assisted in the transfer of assets. *Cf. Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 841-42 [1990] and *BBCN Bank v 12th Ave. Rest. Group*, 150 AD3d 623, 624 [1st Dept 2017]. The civil conspiracy claim must also be dismissed as to Leon Harary because the SAC does not adequately alleged how he was involved in the transfer of assets.

Alter Ego/De Facto Merger (fifth) cause of action is partially dismissed

To maintain a claim for alter-ego liability, the plaintiff must allege complete domination of the corporation with respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff, resulting in injury (*47 East 34th Street (NY), L.P. v Bridgestreet Worldwide, Inc.*, 2019 WL 5788065 at *10 [Sup Ct, NY County 2019] citing *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]).

Alter Ego Liability is not dismissed as to Steven, Ronald, Vivian and Sari Shamah

The FPC Defendants argue that neither Vivian nor Sari Shamah can be held liable under an alter ego theory because neither was an owner, officer or shareholder of FPC (*Old Republic Nat. Title Ins. Co. v Moskowitz*, 297 AD2d 724, 726 [2d Dept 2002]). They also argue that the individual FPC defendants should not be held liable as alter egos of FPC because the SAC does not contain

allegations that they dominated and controlled FPC or committed any wrong that “specifically caused Chung Tai’s alleged injury” [NYSCEF Doc. No. 229 at 20]. Finally, the FPC defendants assert that, because Chung Tai has already recovered via breach of contract for any wrongs with regard to the purchase orders, it has an adequate and complete remedy at law and cannot claim the equitable remedy of alter-ego liability. The arguments fail.

In the Prior Decisions, this Court held that the allegations of abuse of the corporate form are sufficient at this stage of the pleadings to warrant veil piercing claims. For the avoidance of doubt, the claims can not be dismissed against either Sari or Vivian because the SAC adequately alleges their involvement as equitable owners. (*M&A Oasis, Inc. v MTM Associates, L.P.*, 307 AD2d 872, 874 [1st Dept 2003]; *Guilder v Corinth Constr. Corp.*, 235 AD2d 619, 619-20 [3d Dept 1997]). As discussed in the Prior Decisions, among other things, Sari and Vivian personally guaranteed loan obligations with various financial institutions on behalf of FPC (NYSCEF Doc. No. 58 at 9). This is not something typically required of a mere employee or someone who has no participation in the business. Thus, dismissal at this stage is simply not appropriate.

Alter Ego/De Facto Merger Liability is also not dismissed as to David and Alan Shamah

The E2E Defendants argue that dismissal is required because (i) there is no continuity of ownership (*i.e.*, neither the Ben Hur Defendants, Leon Harary nor David and Alan Shamah were owners of FPC), (ii) E2E did not assume liability for FPC’s debts and/or tort claims, (iii) FPC was already insolvent at the time it entered the asset purchase agreement with E2E, and (iv) E2E

is a separate and distinct business with different personnel, physical location, assets and management.

The general rule is that “a corporation that acquires another’s assets is not liable for the other’s torts.” (*47 East 34th Street (NY) v Bridgestreet Worldwide, Inc.*, 2019 WL 5788065 at *12 [Sup Ct, NY County 2019] citing *Fitzgerald v Fahnestock & Co., Inc.*, 286 AD2d 573, 574 [1st Dept 2001]). The de facto merger and mere continuation doctrines are exceptions to this rule.

To allege de facto merge, one must allege “(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 liabilities ordinarily necessary for the uninterrupted continuation of the seller’s business and (iv) continuity of management, personnel, physical location, assets and general business operations.” (*In re: New York City Asbestos Litigation*, 15 AD3d 254, 256 [1st Dept 2005]). Continuity of ownership requires proof that the parties to the transaction “become owners together of what formerly belonged to each” (*id.* at 256, citing *Cargo Partner AG v Albatrans, Inc.*, 352 F3d 41, 47 [2d Cir 2003]). Although continuity of ownership is a necessary element, it alone is not sufficient to establish a de facto merger, and other elements must also be considered (*Bridgestreet*, 2019 WL 5788065 at *6).

In its opposition papers, Chung Tai argues that they are entitled to assert claims against the E2E Defendants because FPC entered into this transaction to fraudulently escape its obligations and that issues of fact prevent the Court from dismissing the claim their veil piercing theories at this

stage of the litigation (*Eastern Concrete Materials, Inc./NYC Concrete Materials v DeRosa Tennis Contrs., Inc.* 139 AD3d 510, 512 [1st Dept 2016]).

As to David and Alan, more specifically, Chung Tai's allegations are in sum and substance that David and Alan are Stephen and Ronald's avatars. Stephen and Ronald sold the assets of FPC to E2E for five cents on the dollar and put their sons (David and Alan), who were employees of FPC, in business as their avatars with a new partner, the Ben Hur Defendants, in the newly formed venture, E2E. Given the specific allegations here, including that the Shamah family used FPC as a cash register for family non-business related expenses and that these family members have an ownership interest in and substantial financial stake in E2E (they receive \$300,000 of cash compensation and are awarded additional compensation based on E2E receiving more than \$15,000,000 in sales) that they run the day to day business of E2E as President and Vice-President (NYSCEF Doc. No. 241 at §4.4(b)), the allegations that David and Alan should be viewed as Stephen and Ronald are sufficient at this stage of the pleadings. Stated differently, taking on a new partner under the specific circumstances of this case does not destroy continuity of ownership.

Chung Tai has also alleged facts sufficient to show that FPC was in the process of dissolving while E2E was in the process of forming and on or about the time when the transfer took place. Specifically, E2E's was formed at or near the end of 2018 (NYSCEF Doc. No. 236; NYSCEF Doc. No. 239) which is on or about the same time that FPC allegedly became insolvent. The subsequent transfer of FPC's assets to E2E occurred a mere few months later.

To allege mere continuation, a plaintiff must establish that the acquiring corporation has obtained the business location, employees, management and good will of the acquired corporation (*Bridgestreet*, 2019 WL 5788065 at *7 citing *NTL Capital, LLC v Right Track Recording, LLC*, 73 AD3d 410, 411 [1st Dept 2010]). As discussed above, David and Alan, were employees of FPC and are now the President and Vice President of E2E. Chung Tai also alleges that E2E is operating and marketed based on the good will of FPC and the Shamah family name. This is enough at this stage of the pleadings.

Dismissal of these claims without prejudice against the Ben Hur Defendants and Leon Harary however is mandated. The Ben Hur Defendants are not alleged to have had involvement in FPC except to the extent of their beneficial ownership interest in a partner of E2E that participated in the fraudulent transfer. This is not sufficient. Further, as discussed above, Leon Harary was not involved in the transaction between FPC and E2E and did not otherwise benefit from the transaction directly or indirectly (NYSCEF Doc. No. 231, ¶ 14).

Debtor and Creditor Law § 276 (ninth) cause of action is not dismissed

DCL § 276 Remedies of creditor provides:

- (a) In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations in section two hundred seventy-seven of this article, may obtain:
- (1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
 - (2) an attachment or other provisional remedy against the asset transferred or other property of the transferee if available under applicable law; and

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds

In the Prior Decisions, the Court held that (i) Chung Tai constitutes a “creditor” pursuant to DCL § 270 and (ii) Chung Tai’s claim for a violation of DCL § 276 was plead with sufficient particularity of fraudulent intent as against Steven and Ronald Shamah (NYSCEF Doc. No. 58 at 16-18). To wit, the Court held that the allegations “that Steven and Ronald Shamah caused FPC to transfer assets to E2E and members of the Shamah family while FPC was insolvent with the intent to defraud its creditors, including Chung Tai” and that “E2E is affiliated with and controlled by the Shamah family” (*id.* at 18) was sufficient to state a claim for fraudulent conveyance. Thus, the Court held that dismissal was inappropriate.²

Service of Second Amended Complaint on the E2E Defendants is valid

² The Court notes that DCL § 276 was amended after the 2020 Decision to permit plaintiffs to obtain equitable relief against fraudulent transactions (*See* DCL § 276). Prior to April 4, 2020, the statutory language of DCL § 276 provided that “Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors” (NYSCEF Doc. No. 58 at 18). Now, DCL § 276 provides that “In an action for relief against a transfer or obligation under this article, a creditor... may obtain (1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor’s claim; (2) and attachment or other provisional remedy against the asset transferred or other property of the transferee if available under law” and other equitable relief in accordance with applicable rules of civil procedure (DCL § 276). This does not however change the result.

Service on the E2E Defendants was proper. The process server's affidavits create a presumption that service was valid. The process server served a summons and complaint at 463 Seventh Avenue, the principal place of business of the E2E Defendants. The E2E Defendants fail to rebut this presumption and under the circumstances, service on the Security Guard was proper. He was a person of suitable age and discretion for personal service (*Costine v St. Vincent's Hosp. & Medical Center*, 173 AD2d 422 [1st Dept 1991]; *Board of Managers of Le Trianon Condominium v 1439 Realty Corp.*, 186 AD2d 437 [1st Dept 1992]). Accordingly, Chung Tai's cross motion to deem service on the E2E Defendants as valid is granted.

Even if this were not the case, which it is, given the substantial allegations sounding in fraudulent conveyance and the legitimate attempts at personal service at E2E's place of business, Chung Tai would be entitled to an extension of time to serve the E2E Defendants properly. Additionally, the E2E Defendants can not claim any prejudice resulting from the delay as they have full knowledge of the lawsuit and, as alleged, actively participated in this fraudulent transfer.

Accordingly, it is

ORDERED that the FPC Defendants' motion to dismiss (Motion 007) is granted solely to the extent set forth above; and it is further

ORDERED that the E2E's Defendants' motion to dismiss (Motion 008) is granted solely to the extent set forth above; and it is further

ORDERED that the fraud (second) cause of action is dismissed as to Steven and David Shamah, and it is further

ORDERED that the civil conspiracy (twelfth) and aiding and abetting fraud (thirteenth) causes of action are dismissed as to Michael Harary, Jerry Harary and Zvi Ben-Haim (the **Ben Hur Defendants**) solely as they relate to the fraud claims against Steven and David Shamah, not as they relate to Chung Tai’s fraudulent conveyance claims; and it is further

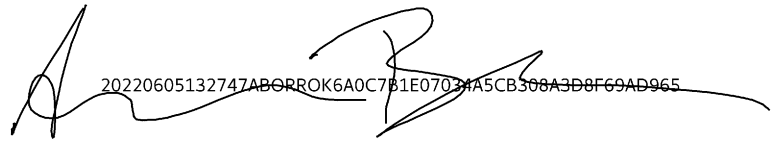
ORDERED that the civil conspiracy (twelfth) and aiding and abetting fraud (thirteenth) causes of action are dismissed in full as against Leon Harary; and it is further

ORDERED that the claims based on alter-ego and mere continuation (fifth) are dismissed as against the Ben Hur Defendants and Leon Harary; and it is further

ORDERED that Chung Tai’s cross motion deeming service of the SAC on the E2E Defendants valid is granted; and it is further

ORDERED that the parties appear for a status conference on July 21, 2022 at 12:30 p.m.

6/3/2022
DATE



20220605132747ABORROK6A0C7B1E0703AA5CB308A3D8F69AD965

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER

APPLICATION:

CHECK IF APPROPRIATE:

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE