

<b>Essex Global Trading, Inc. v Perla</b>
2022 NY Slip Op 33289(U)
September 29, 2022
Supreme Court, New York County
Docket Number: Index No. 158215/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAVID B. COHEN**

**PART 58**

*Justice*

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**INDEX NO. 158215/2021**

ESSEX GLOBAL TRADING, INC.,

Plaintiff,

**MOTION SEQ. NO. 001**

- v -

ESTE PERLA,

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISS.

This action for fraudulent conveyance is brought by plaintiff, Essex Global Trading, Inc. (“Essex”), against defendant Este Perla a/k/a Ester Perla (“Perla”). Plaintiff alleges that certain transfers by Perla’s husband, Nissan Perla (“Nissan”), from his company, Olympic Diamond Asia Limited (“ODAL”), to a bank account in her name were made fraudulently so as to avoid payment on debts owed to plaintiff. Defendant now moves (motion sequence number 001), pursuant to CPLR 3211 (a) (7), to dismiss all claims pleaded against her. Plaintiff cross-moves, pursuant to CPLR 3212, for summary judgment on the first cause of action in the complaint. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

On September 7, 2018, plaintiff commenced an action against ODAL and Nissan to recover the balance due on the sale of a diamond (summons and complaint, New York St Cts Electronic Filing System [NYSCEF] Doc No. 1 ¶ 7). Pursuant to the terms of the sale, ODAL was obligated to pay for the diamond on or before September 13, 2015 (*id.* ¶10). On August 17,

2020, plaintiff obtained a judgment against ODAL and Nissan, jointly and severally, in the amount of \$1,372,348.84 (*id.* ¶ 15). Plaintiff seeks to satisfy its judgment against ODAL through the funds that ODAL wired to Perla. In its complaint, plaintiff alleges that all of ODAL's conveyances to Perla, totaling \$2,102,500, were fraudulent under New York Debtor and Creditor Law ("DCL") § 276 because they were made with the intent to hinder ODAL's creditors. Plaintiff further alleges that the 84 transfers made to Perla during the pendency of its lawsuit against ODAL, totaling \$411,050, were also constructively fraudulent under DCL § 273-a without regard to fraudulent intent because they were made without any exchange of consideration while ODAL was a defendant in a lawsuit which resulted in an unsatisfied judgment against it.

Defendant now moves to dismiss the complaint, arguing that the payments from ODAL to Perla were made for spousal support and constituted fair consideration as defined by DCL § 272. Perla explains that, although her marriage remains intact, her husband is in another country and has been financially supporting her through his company's transfers into her bank account. She contends that, pursuant to Family Court Act § 412, marital support is deemed fair consideration. Moreover, defendant argues that plaintiff cannot sustain a claim pursuant to DCL § 276 because it fails to plead particularized facts with respect to Perla's fraudulent intent and, thus, her motion to dismiss the complaint should be granted.

In opposition, plaintiff asserts that Perla, although married to Nissan, is not married to ODAL, and, thus, none of the 82 conveyances made to Perla were made to her by her spouse. Further, plaintiff argues that, although case law holds that the relinquishment of spousal rights constitutes fair consideration, Perla's contention that there is ongoing, perpetual consideration between married spouses in an intact marriage is without merit. In response to defendant's

argument that Perla was an innocent recipient of the transfers, plaintiff contends that the transferee's fraudulent intent is irrelevant with respect to a claim of actual fraud under DCL § 276. Instead, plaintiff argues that the complaint alleges badges of fraud sufficient to establish an inference that ODAL undertook these conveyances with intent to defraud plaintiff.

Plaintiff cross-moves for summary judgment on its first cause of action pursuant to DCL § 273-a.

## LEGAL CONCLUSIONS

### Defendant's Motion To Dismiss

On a motion to dismiss a complaint pursuant to CPLR 3211, all factual allegations must be accepted as true, the complaint must be construed in the light most favorable to plaintiff, and plaintiff must be given the benefit of all reasonable inferences (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). In considering a CPLR 3211 (a) (7) motion, the test is whether the challenged cause of action has been sufficiently stated within the four corners of the pleading (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The court is not permitted "to assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]).

DCL § 273-a<sup>1</sup> states that:

[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages ... is fraudulent as to the plaintiff in

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<sup>1</sup> Article 10 of the Debtor and Creditor Law was repealed and a new Article 10 was added, entitled the Uniform Voidable Transactions Act, effective April 4, 2020 (2019 Sess. Law of N.Y. 580 [A. 5622]). The new Article 10 applies only to transfers made on or after April 4, 2020. The transfers at issue herein were made prior to April 4, 2020, and thus are governed by the old version of Article 10 of the Debtor and Creditor Law.

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.

In order to prevail on a claim under DCL § 273-a, a plaintiff must establish three elements: (1) the transferor was a defendant in an action for money damages at the time of the transfer; (2) the transferor has not satisfied the resulting judgment; and (3) the transfer was made “without fair consideration” (*Grace v Bank Leumi Tr. Co. of NY*, 443 F3d 180, 188 [2d Cir 2006] *cert denied* 549 US 1114 [2007]). DCL § 272 (a) provides that “fair consideration is given for property or obligation” when “in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied.” Ultimately, whether fair consideration is given must “be determined upon the facts and circumstances of each particular case” (*Commodity Futures Trading Commn. v Walsh*, 17 NY3d 162, 175 [2011], quoting *Halsey v Winant*, 258 NY 512, 523 [1932]).

Here, the crux of defendant’s argument is that Nissan’s “moral and legal duty” to support his wife is sufficient consideration (defendant’s memorandum of law in support of motion to dismiss, NYSCEF Doc No. 9 at 3). This very argument was raised and rejected in *Cadle Co. v Newhouse* (20 Fed Appx 69, 72 [2d Cir 2001]), where Cadle, after obtaining a money judgment against Mr. Newhouse, sought to satisfy the judgment by filing suit against Mrs. Newhouse. Cadle claimed that Mr. Newhouse transferred large sums of money into a bank account held solely in his wife’s name to evade his creditors. These transfers were made for no consideration. Mrs. Newhouse, like Perla here, also cited to Family Court Act § 412 for the premise that Mr. Newhouse’s standing statutory obligations to support his wife and family are sufficient consideration (2000 WL 1721131, at \*5, 2000 US Dist LEXIS 16739, \*14 [SD NY Nov. 16, 2000, No. 98 CIV. 5945 NRB]). The Second Circuit explicitly rejected “Mrs. Newhouse’s argument that the ongoing support obligation between a husband and wife creates a debtor-

creditor relationship absent a separation or divorce proceeding” (*Cadle Co.*, 20 F Appx at 72). Barring evidence that a support petition was filed by Perla prior to the conveyances, FCA § 412 is likewise inapplicable here (Practice Commentaries, McKinney’s Family Court Act § 412 [“Section 412 ... limit[s] its application to individuals who are married on the date a support petition is filed”]).

Thus, plaintiff’s complaint properly alleges each of the elements of DCL § 273-a, including lack of fair consideration. It alleges that a final judgment was entered against ODAL, and in favor of plaintiff, on August 17, 2020, and that it remains unsatisfied. Additionally, it alleges that, after the suit was commenced against ODAL, ODAL conveyed \$411,050 to defendant Perla and that ODAL received nothing in return for these conveyances. Accordingly, the complaint adequately alleges facts sufficient to support a theory of constructive fraudulent conveyance pursuant to DCL § 273-a.

Actual fraudulent conveyance is governed by DCL § 276, which provides that every conveyance made with actual intent to hinder, delay or defraud present or future creditors is fraudulent, even where the transferee gives fair consideration. A claim under DCL § 276 must be pleaded with sufficient particularity under the heightened standards of CPLR 3016 [b] (*see Marine Midland Bank v Zurich Ins. Co.*, 263 AD2d 382, 383 [1st Dept 1999]). “Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on ‘badges of fraud’ to support [its] case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent” (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [internal quotation marks and citation omitted]). “These ‘badges of fraud’ include a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of

the consideration; . . . and retention of control of the property by the transferor after the conveyance” (*Tommy Lee Handbags Mfg., Ltd. v 1948 Corp.*, 971 F Supp 2d 368, 382 [SD NY 2013]).

Here, defendant argues that plaintiff has failed to plead particularized facts with respect to her fraudulent intent. In response, plaintiff cites to *Gowan v Patriot Group, LLC (In re Dreier LLP)* (452 BR 391, 433 [SD NY 2011]), which holds that the intent of the transferee is irrelevant on a motion to dismiss. As noted recently in *The McCormack Family Charitable Found. v Fidelity Brokerage Serv., LLC*, (2020 WL 2542089, at \*5 [Sup Ct, NY County 2020]), “[f]ederal cases have noted that New York law is not clear regarding whether it is the intent of the transferor or the transferee that is relevant for intentional fraud” (collecting cases). *In re Drier LLP* (452 BR 391 [SDNY 2011]) traces the case law the lower federal courts followed when deciding that, in addition to the transferor’s fraudulent intent, the transferee’s fraudulent intent must also be claimed under DCL 276 (*In re Drier LLP*, 452 BR at 428-433). The court noted that “[t]he New York State cases that have considered the issue whether the transferee’s intent must be proved under NYDCL § 276 do not clearly support a conclusion one way or another” (*id.* at 432 n 33 [*citations omitted*]). The ultimate determination reached is that “the proposition that both parties’ fraudulent intent must be established to state a claim for actual fraud under the NYDCL has been unwittingly transformed into an often cited, and blindly accepted, misstatement of the law” (*Picard v Cohmad Sec. Corp. (In re Bernard L. Madoff Inv. Sec. LLC)*, 454 BR 317, 331 [SD NY 2011]). Although this Court is heavily persuaded by the analysis above and finds that the transferor’s fraudulent intent has been properly pleaded, it must await a binding authority to clarify this split of authority.

Defendant further argues that plaintiff has failed to fulfill its burden pursuant to CPLR 3016 (b). However, the heightened standard of CPLR 3016 (b) does not necessarily mean it should be so strictly interpreted “as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud” (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008] [internal quotation marks and citations omitted]). “Although under section 3016 (b) the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud” (*Pludeman*, 10 NY3d at 492). The plaintiff is only required to plead facts “sufficient to permit a reasonable inference of the alleged conduct” (*id.*).

Indeed, claims under DCL § 276 may be pleaded based on the badges of fraud. Here, plaintiff has pleaded multiple badges of fraud relevant to the inquiry: (1) Nissan and Perla had a close relationship since they were husband and wife; (2) Nissan and ODAL were indebted at the time the transfers were made and were aware of their indebtedness; and (3) there is a question whether fair consideration was given in return for the transfers from ODAL to Perla (*see United States v Alfano*, 34 F Supp 2d 827, 845 [ED NY 1999] [applying New York law and finding that “(c)ourts view intrafamily transfers made without any signs of tangible consideration as presumptively fraudulent”]). Although plaintiff will require evidence to prevail on this claim, pleading these badges of fraud is enough to survive a motion to dismiss (*see Wall St. Assoc.*, 257 AD2d at 526-527; *MFS/Sun Life Tr.-High Yield Series v Van Dusen Airport Servs. Co.*, 910 F Supp 913, 935 [SD NY 1995] [“Depending on the context, badges of fraud will vary in significance, though the presence of multiple indicia will increase the strength of the inference”]). As such, defendant’s motion to dismiss the claim for actual fraudulent conveyance is denied.

Finally, until the issue of actual fraudulent intent is resolved, it is premature to address the question of attorneys' fees pursuant to DCL § 276-a.

### **Plaintiff's Cross Motion For Summary Judgment**

Plaintiff's cross motion for summary judgment is denied. In correspondence to this Court dated January 25, 2022, plaintiff's counsel acknowledged that a summary judgment motion could not be filed before the joinder of issue. Doc. 21. Counsel also asserted that, pursuant to CPLR 3211(c), a court could entertain a pre-answer motion for summary judgment in response to a motion to dismiss made pursuant to CPLR 3211(a), provided that the court gave notice to the parties of its intention to do so, and asked this Court for such permission. Doc. 21. However, by email correspondence dated January 28, 2022, this Court specifically advised the parties that it would not consider the plaintiff's cross motion pursuant to CPLR 3211(c). Doc. 23.

Accordingly, it is hereby:

ORDERED that the motion by defendant Este Perla a/k/a Ester Perla to dismiss the complaint is denied in all respects; and it is hereby

ORDERED that the cross motion by plaintiff Essex Global Trading, Inc. seeking summary judgment on its first cause of action is denied without prejudice; and it is further

ORDERED that the defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference via Microsoft Teams on November 29, 2022 at 4 p.m. (an invitation will be sent to the parties by the Part 58 Clerk) unless they jointly complete a preliminary conference form (also to be provided by the

