

National Auditing Servs. & Consulting, LLC v Assa
2022 NY Slip Op 34358(U)
December 22, 2022
Supreme Court, New York County
Docket Number: Index No. 156862/2022
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 14

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NATIONAL AUDITING SERVICES & CONSULTING, LLC

Plaintiff,

- v -

SALIM ASSA, 511 PROPERTY LLC, 511 PROPERTY II, LLC, 9TH AVE. HOTEL PROPERTY HOLDING LLC, 9TH AVE. RETAIL PROPERTY HOLDING LLC, RETAIL & COMMERCIAL PROPERTY HOLDINGS LLC, NINTH AVENUE TOWER, LLC, 511 PARTNERS, LLC, 515 VENTURES, LLC, 515 NINTH HOLDING, LLC

Defendant.

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INDEX NO. 156862/2022

MOTION DATE 12/08/2022

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for DISMISSAL.

Motion sequence numbers 001 and 002 are consolidated for disposition. Defendants' 511 Property LLC, 511 Property II LLC, 9th Ave. Hotel Property Holding LLC, 9th Ave. Retail Property Holding LLC, and Retail & Commercial Property Holdings LLC, and Salim Assa motions to dismiss are denied.

Background

This action arises out of plaintiff's efforts to enforce a judgment from an underlying action filed in New York. On February 10, 2016, plaintiff commenced a litigation (the underlying action) against defendant 511 Property LLC ("511 Property"), a property manager for the property located at 511 Ninth Ave, New York, New York. Plaintiff alleged that 511 Property

breached a contract after 511 Property failed to pay plaintiff a contractually designated amount for plaintiff's specialized services that reduced 511 Property's utility bills. On December 23, 2021, a judgment was awarded in plaintiff's favor that totaled \$978,282.71 ("the Judgment").

Plaintiff alleges that in March 2016, 511 Property divided the property into 6 condominium lots, and during the course of litigation in the underlying action, plaintiff alleges that defendant Salim Assa, the managing member of 511 Property, engaged in fraudulent transfers of the lots to various entities named as co-defendants in this action. Each co-defendant entity was purportedly controlled by defendant Assa and plaintiff alleges that Assa repeatedly transferred ownership of the lots to similarly-named entities to obscure the fraudulent nature of the conveyances. Each transfer resulted in a purge of 511 Property's assets that effectively rendered the defendants "judgment proof" (NYSCEF Doc. No. 14 at 9). Plaintiff alleges that these transfers occurred for little or no consideration and were meant to render 511 Property insolvent so it would not have to pay the judgment.

Plaintiff filed this complaint alleging that defendants engaged in fraudulent conveyances. Plaintiff alleges seven causes of action pursuant to New York Debtor Creditor Law §§ 273-278 and a cause of action for aiding and abetting fraudulent conveyance against Salim Assa, as well as a cause of action to impose a constructive trust upon the various properties fraudulently conveyed.

Defendants 511 Property LLC, 511 Property II LLC, 9th Ave. Hotel Property Holding LLC, 9th Ave. Retail Property Holding LLC, and Retail & Commercial Property Holdings LLC bring a motion to dismiss plaintiff's entire complaint (MS 001). Additionally, defendant Salim Assa filed a separate motion to dismiss the eighth cause of action for aiding and abetting and the

ninth cause of action (MS 002). The remaining defendants, Ninth Avenue Tower LLC, 511 Partners LLC, 515 Ventures LLC, and 515 Ninth Holding LLC are not movants on this motion.

Defendants contend that plaintiff's claims are governed by Connecticut law. Defendants contend that because plaintiff brings a claim for fraudulent conveyance, the claims should be treated as a tort and the law of the state where the harm accrued should be applied. Because plaintiff is a resident of Connecticut, that state law should be applied here. Additionally, as a fraudulent conveyance, defendants assert that this Court should apply CPLR 202 so that the claims must satisfy both New York and Connecticut statute of limitations.

Defendants also contend that plaintiff's claims are inapplicable because the New York legislature extinguished any claims that could be brought under Debtor Creditor Law by repealing certain sections of DCL in 2020. Because plaintiff is pursuing recovery of a judgment that was issued in 2022, after the repeal of the DCL, plaintiff's claims are barred.

Finally, defendants claim plaintiff is an unauthorized limited liability company as documentation with the Secretary of State (National Auditing Services & Consulting, LLC) does not reflect the same entity name as plaintiff is using in this action. Similarly, defendant Assa brings the same substantive arguments to dismiss the eighth cause of action (MS 002); however, he also claims Delaware law should apply because plaintiff's allegations are based on defendant Assa's conduct as a member of 511 Property (incorporated in Delaware).

In response, plaintiff contends that because the issue is conveyance of real property, the law of the state in which the property is situated should be applied—New York law.

Additionally, because plaintiff seeks to uphold a judgment, the New York courts do not apply CPLR 202 and instead apply the New York statute of limitations for fraudulent conveyance because the judgment was issued in the state of New York. Plaintiff also contends that the New

York legislature did not extinguish plaintiff's claims because the transfers of property occurred in 2016, prior to the 2020 DCL repeal, and the legislature specifically allowed for claims to be brought under repealed versions of DCL if the fraudulent conveyances occurred prior. Plaintiff further states that it is an authorized entity in New York and the difference in plaintiff's name in its registration with the Secretary of State is a typographical error that should not preclude plaintiff from pursuing relief. Plaintiff also contends that dismissal of any of plaintiff's other causes of action for failure to adequately allege facts in the complaint is also inappropriate at the pre-answer stage of litigation. In response to defendant Assa's motion to dismiss, plaintiff maintains the same arguments and states Delaware law is equally irrelevant to this proceeding because defendant Assa's principal place of business is located in New York.

In reply, defendants claim that plaintiff offers no binding case law supporting its claim for applying New York law. Defendants contend that because fraudulent conveyance is a tort, the choice of law must be applied based on the state in which the economic harm occurred. Here, that state is Connecticut as it is the plaintiff's home state, thus the laws of Connecticut apply and the claims are time-barred. Defendants further assert that plaintiff's typographical error is enough to bar recovery for debts occurring in New York as there is no evidence that plaintiff is an authorized foreign limited liability company. Additionally, defendant Assa maintains that because plaintiff's claim for aiding and abetting a fraudulent conveyance is brought against Assa in his capacity as a shareholder of 511 Property, Delaware law should apply as the state in which 511 Property is incorporated.

Discussion

Pursuant to CPLR 202, "when a nonresident...sues based upon a cause of action that accrued outside of New York, the court must apply the shorter limitations period, including all

relevant tolling provisions, of either: (1) New York; or (2) the state where the cause of action accrued,” (*JSC Foreign Econ. Ass’n Technostroyexport v Int’l Dev. & Trade Servs.*, 295 F.Supp2d 366, 374 [S.D.N.Y. 2003]).

For over half a century, New York law has maintained that “the validity of a conveyance of a property interest is governed by the law of the place where the property is located” (*James v Powell*, 19 NY2d 249, 256, 279 NYS2d 10 [1967]). Only where the action involving real estate “does not challenge the title to, or succession or conveyance of, property, the situs of the property is viewed as one in the spectrum of significant contacts” (*Fieger v Pitney Bowes Credit Corp.*, 251 F3d 386, 395 [2d Cir 2001]).

This Court finds that New York law governs plaintiff’s claims. There is clear precedent in New York law to apply *lex situs*, or the law of the location of the property, to matters of fraudulent conveyance of property. Despite recognition of fraudulent conveyance as a tort, the Court of Appeals carved out an exception for fraudulent conveyance of real property. Whereas torts typically use a best-interest analysis, fraudulent conveyance of property must be based on the state the property is located (*James* 19NY2d at 256). Given that the various transfers occurred in New York for property located in New York relating to a litigation and judgment in New York, clearly New York law applies.

For their part, defendants assert that fraudulent conveyance is a tort, necessitating traditional choice-of-law principles that should require this Court to apply the borrowing statute CPLR 202. But defendants are misguided as the highest Court in New York issued a decision whose relevant parts are still good law (*see James* 19NY2d at 256-57). While parts of *James* were overridden by the 2020 DCR repeal, those parts are irrelevant to the instant matter as defendants’ alleged actions took place in 2016 and the heart of this dispute is ascertaining

whether the 2016 transfers were in fact fraudulent and whether those assets may be used to satisfy the underlying judgment.

Plaintiff's First Cause of Action (DCL § 273)

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

Pursuant to DCL § 273, “[e]very 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 a fair consideration.”

Plaintiff adequately alleged that the transactions left defendants insolvent and lacked fair consideration. As plaintiff noted in its response papers, there was no evidence of *any* consideration for the transfer of the properties to the various defendants. At this stage of litigation, the complaint adequately demonstrates that more discovery is needed. And movants did not meet their burden to show that there was valid consideration sufficient to compel the Court to grant the motion.

Plaintiff's Second Cause of Action (DCL § 273-a)

Pursuant to DCL § 273-a, “[e]very 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.”

Defendants contend the second cause of action was extinguished by the New York legislature with the passage of the new DCL in 2020. This contention is misguided, as the legislature expressly preserved claims that predated the 2020 amendments (*see Leumi USA v GM Diamonds*, 2020 NY Slip Op 32809[U] [Sup Ct, New York County 2020]). Moreover, at this stage of litigation, the complaint adequately alleged that there was no evidence of any consideration for the transfer of properties. Discovery is needed to ascertain the validity of plaintiff’s allegations.

Plaintiff’s Third Cause of Action (DCL § 275)

Pursuant to DCL § 275, “[e]very 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.”

At this stage of litigation, the complaint adequately alleged that there was no evidence of any consideration for the transfer of properties. At this stage of litigation, more discovery is needed to ascertain the validity of plaintiff’s allegations.

Plaintiff’s Fourth Cause of Action (DCL § 276)

Pursuant to DCL § 276, “[e]very 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.”

This cause of action is a factual inquiry that cannot be resolved on a pre-answer motion to dismiss. Plaintiff’s complaint adequately alleges its claims, and more discovery is needed to issue a judgment on the merits of those claims.

Plaintiff’s Eighth Cause of Action

New York Law recognizes a claim for aiding and abetting a fraudulent conveyance so long as the defendant is an alleged transferee or “otherwise benefitted from the transactions at issue,” (*Sands Bros. Venture Cap. II, LLC v Metro Paper Recycling, Inc.*, 201 AD3d 421, 422, 156 NYS3d 730 [1st Dept 2022]).

Here, plaintiff’s complaint adequately alleges defendant Assa is a beneficiary of the conveyances. Moreover, plaintiff detailed the alleged fraudulent transfers at the foundation of its claims. Because plaintiff brings this specific cause of action against Assa in his individual capacity, there is no need to engage in the applicability of Delaware law and this Court does not agree that plaintiff’s cause of action for aiding and abetting should be dismissed at this stage of litigation.

Plaintiff’s Ninth Cause of Action

“[A] constructive trust may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest” (*Sharp v Kosmalski*, 40 NY2d 119, 121, 386 NYS2d 72 [1976] [internal citations and

quotations omitted]). The elements for the remedy of a constructive trust are “(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment,” (*Id.*).

Defendant Assa claims plaintiff did not adequately plead all of the elements of a constructive trust; however, plaintiff’s complaint adequately alleged that a fraudulent conveyance occurred. More discovery is needed to dismiss plaintiff’s complaint on the merits.

Summary

Plaintiff’s remaining claims are those which provide a remedy for wrongful transfers. As this Court declines to dismiss plaintiff’s claims for fraudulent conduct, the Court reaches a similar conclusion for those claims which provide a potential remedy for such conduct if and when a judgment is rendered on the merits of plaintiff’s case. Additionally, Defendants asserted a claim that plaintiff is an unauthorized foreign limited liability company because its filings with the New York Department of State have a typographical error. Not only did the court in the underlying action disregard this claim (NYSCEF Doc. No. 62) but plaintiff submitted the affidavit of the founding member of plaintiff’s company who filed the registration with the New York Department of State. This Court will not entertain this gossamer thin defense parading as an issue of false identity.

Accordingly, it is hereby

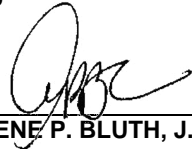
ORDERED that defendants’ motions to dismiss (MS 001 and MS 002) are denied.

ORDERED that 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.

Next conference: February 28, 2023 at 11:30 a.m.

By February 21, 2023, the parties shall upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not be required).

If nothing is uploaded by February 21, 2023, the Court will adjourn the conference.

<p><u>12/22/2022</u> DATE</p>	 <hr/> ARLENE P. BLUTH, J.S.C.	
<p>CHECK ONE:</p>	<p><input type="checkbox"/> CASE DISPOSED</p> <p><input type="checkbox"/> GRANTED <input checked="" type="checkbox"/> DENIED</p>	<p><input checked="" type="checkbox"/> NON-FINAL DISPOSITION</p> <p><input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER</p>
<p>APPLICATION:</p>	<p><input type="checkbox"/> SETTLE ORDER</p> <p><input type="checkbox"/> INCLUDES TRANSFER/REASSIGN</p>	<p><input type="checkbox"/> SUBMIT ORDER</p> <p><input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE</p>
<p>CHECK IF APPROPRIATE:</p>		