SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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SSC NY CORP.,

Plaintiff,

- v -

COMPUTERSHARE INC., DAVIDI GILO, RENATA RISTOVA-GILO, GILO VENTURES LLC

Defendants.

INDEX NO. 650979/2022

MOTION DATE N/A, N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 116

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 113, 114, 115, 117, 118, 119

were read on this motion to DISMISS.

Plaintiff SSC NY Corp., formerly known as Sunrise Securities Corp. ("Sunrise" or "Plaintiff") brings this fraudulent conveyance action against Defendant Computershare Inc. ("Computershare") and Defendants Davidi Gilo ("Gilo"), Renata Ristova-Gilo ("Ristova-Gilo"), and Gilo Ventures LLC ("Ventures LLC") (collectively, the "Gilo Defendants") in an attempt to collect a judgment against the now defunct company, Inveshare Inc. ("Inveshare").

According to the Complaint, in 2013 Computershare and Inveshare entered into to a Stock Purchase Agreement pursuant to which Computershare acquired 25% of the equity interests in Inveshare in exchange for $10 million (NYSCEF 2 ¶21 ["Compl."]). Plaintiff invoiced Inveshare seeking payment of placement fees of $1,000,000 allegedly triggered by that investment pursuant to a Placement Agreement entered into by Inveshare and Plaintiff in 2011

(*id.* at ¶¶17–22). Defendant Davidi Gilo, as director and CEO of Inveshare, disputed the invoice that same day (*id.* ¶ 23). Approximately one year later, Computershare made a second investment in Inveshare pursuant to a Stock Purchase Agreement, dated May 30, 2014, under which Computershare acquired an additional 15% of the equity interests in Inveshare in exchange for $10 million (*id.* ¶ 14).

On September 16, 2016, Inveshare consummated a sale of its assets for $90 million with nonparty Broadridge Financial Solutions, Inc. ("Broadridge") (*id.* ¶ 29). In connection with the Broadridge transaction, Inveshare offered each of its shareholders the opportunity to redeem its shares in Inveshare at a stated price (Compl. ¶ 31). All shareholders, including Computershare, elected to redeem, excluding Gilo who attested his shares were exempt from redemption (*id.* ¶ 33). In connection with the redemption, Inveshare made five payments to Computershare totaling $33.1 million on September 16, 2016 (*id.* ¶ 35). On September 16, 2016, Inveshare also made two payments totaling $1.7 million to a joint account of Davidi Gilo and Renata Ristova-Gilo (Compl. ¶ 53) and two payments totaling around $10 million to Gilo Ventures II, L.P. ("Ventures II").

According to documentary evidence submitted by the Gilo Defendants, as a condition to the transaction, Broadridge required that Gilo continue to operate the Company as a going concern after the closing for an indefinite period of time, and to service the Company's current clients (NYSCEF 85, Ex. 1 ["Shareholder Memo"]). That same day, Inveshare also executed an employment contract with Gilo that set the terms of his compensation and entitlement to moving expenses plus $10,000, should he decide to relocate (*see* NYSCEF 89 ["Employment Agreement"]).

On September 22, 2016, Plaintiff commenced an action against Inveshare, seeking fees based on Computershare, Inc.'s two investments in 2013 and 2014 (the "Inveshare Action") (Compl. ¶ 46). Together with its commencement papers, Inveshare moved for "a preliminary injunction enjoining [Inveshare] during the pendency of this action from redeeming its shares unless Defendant reserves and sets aside $2,634,824." In Inveshare's opposition brief, it cites to a letter by Inveshare to its shareholders that stated the company had approximately $4.3 million in reserves (Index No. 655048/2016, NYSCEF 68 at 15). Plaintiff then withdrew its preliminary injunction motion based on "the Affirmation of Davidi Gilo ("Gilo") which states that the share redemption, with the exception of Gilo's shares in Inveshare, has been completed in its entirety" (Index No. 655048/2016, NYSCEF 22).

On October 19, 2016 and October 24, 2016, Inveshare made two payments totaling $19,429 to the Gilo and Ristova-Gilo's joint account (Compl. ¶ 54). On various dates in 2017, Ventures II paid Gilo Ventures LLC ("Ventures LLC") approximately $3,524,500 (*id.* ¶56; NYSCEF 105). Ventures II wired $315,629 to Davidi Gilo on January 4, 2017 (*id.* ¶55) and an additional $105,503 to Renata Ristova-Gilo on August 20, 2017 (*id.* ¶57). Ventures II also paid $804,813 to GV II LP Liquidating Trust (*id.* ¶59).

Inveshare's bank statements reflect that between October 2016 and March 2018, it received total business income of $434,598.44 ($24,144.36/month for the period) (*id.* ¶41). Inveshare stopped funding payroll after December 2017, and dramatically reduced monthly payroll funding during the period from October 2016 to December 2017 (*id.* ¶42). The Georgia Secretary of State issued a Certificate of Withdrawal, revoking Inveshare's authority to do business in state, effective March 2, 2018, on Inveshare's application representing that it no longer transacted business in Georgia" (*id.* ¶39). Inveshare closed two of its four SunTrust Bank

accounts in March 2018, its sole Bank of America account in October 2018, and the other two SunTrust Bank accounts in May 2019. Plaintiff alleges that upon information and belief, Inveshare had no other bank accounts" (*id.* ¶40).

On January 17, 2020, Inveshare's counsel moved to withdraw as counsel in the Inveshare Action (*id.* ¶ 50). No substitute counsel appeared; and on June 15, 2020, the Court held Inveshare to be in default and directed that judgment be entered in favor of Sunrise (*id.* ¶ 51). On July 27, 2020, judgment was entered in favor of Sunrise and against Inveshare in the amount of $3,961,587.25. To date, no portion of the judgment has been paid (*id.* ¶52).

Plaintiff commenced this action against the Gilo Defendants and Computershare on March 2, 2022, alleging two causes of action for actual fraudulent conveyance and constructive fraudulent conveyance against all defendants (NYSCEF 1, 2).

The Gilo Defendants now move to dismiss the Complaint as alleged against them because (a) pursuant to CPLR 3211[a][8], this Court lacks jurisdiction; (b) pursuant to CPLR 3211[a][7], the Complaint fails to state a cause of action under New York's Debtor and Creditor Law ("DCL") §§ 275 and 276; (c) pursuant to CPLR 3211[a][1], any claims under DCL §§ 275 or 276, if stated, are conclusively refuted by documentary evidence; and (d) pursuant to CPLR 3016[b], the claim for actual fraudulent conveyance under DCL § 276 is not pled with the requisite particularity.

Computershare moves to dismiss pursuant to CPLR §§ 3211(a)(1) and (7), as well as CPLR § 3016(b) for failure to plead fraud with the requisite particularity.

The Court held oral argument on these motion on March 6, 2023. For the reasons stated below, both motions are granted.

DISCUSSION

I. Personal Jurisdiction

Under CPLR 302(a)(2), a court may exercise personal jurisdiction over a nondomiciliary who in person or through an agent commits a tortious act, such as a fraudulent conveyance, within the state. Commission of a fraudulent conveyance within New York entails participation in the conveyance and connection between the conveyance and New York (*Morgenthau v A.J. Travis Ltd.*, 184 Misc2d 835, 843 [Sup Ct, NY County 2000] ["Since New York was therefore intimately involved in the conveyance, the alleged tort may be said to have been committed in this State"]). This standard is satisfied as to Gilo. He was the control person of Inveshare responsible for distributing proceeds of the sale of Inveshare's technology assets to Broadridge, a company headquartered in New York, while Gilo worked on behalf of Inveshare at a New York office. Further, Gilo affirmed that he was living in New York from 2011 to mid-October 2016, during the period at issue; and the challenged conveyances to him were made to New York bank accounts whose statements have a Brooklyn address. Thus, when taking Plaintiff's allegations as true, Gilo committed a tortious act—fraudulent conveyance—within New York. These contacts are sufficient to demonstrate that the exercise of jurisdiction comports with due process (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]).

However, Plaintiff fails to demonstrate that the exercise of such jurisdiction over Ristova-Gilo and Ventures comports with due process (*id.*). "Purposeful activities are those with which a defendant, through *volitional acts*, 'avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'" (*Cortlandt St. Recovery Corp. v Bonderman*, 73 Misc 3d 1217(A) [Sup Ct, NY County 2021] [emphasis added]). Ristova-Gilo's only connection to this lawsuit is that Gilo is her husband and that she jointly

owns a bank account with him that received funds from Inveshare. Venture LLC has no contacts with New York, and its only connection to this lawsuit is that it received funds from another company, Gilo Ventures II, which received funds from Inveshare to its New York bank account. This is insufficient. It is well established that "indirect use of the New York banking system does not constitute the transaction of business in New York pursuant to CPLR 302 (a) (1). Nor does it constitute the commission of a tort within New York pursuant to CPLR 302 (a) (2)" (*Bluewaters Communications Holdings, LLC v Ecclestone*, 122 AD3d 426, 427 [1st Dept 2014] [internal citations omitted]; *DirecTV Latin Am., LLC v Pratola*, 94 AD3d 628, 629 [1st Dept 2012] [declining jurisdiction over defendant who allegedly received funds from co-defendant's New York bank account]; *Pramer S.C.A. v Abaplus Intern. Corp.* 76 AD3d 89, 96-97 [1st Dept 2010] ["[t]he principal flaw in this reasoning is that the mere payment into a New York account does not alone provide a basis for New York jurisdiction . . . absent more extensive New York banking relating to the transaction in issue"]; *see also Rushaid v Pictet & Cie* 28 NY3d 316, 330 [2016], and *Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327, 338 [2012], among others, where the court found that the existence of a correspondent bank account in New York was sufficient to establish personal jurisdiction where the use of such bank account was *purposeful*). And unlike the cases relied upon by Plaintiff, Plaintiff does not allege any acts that would indicate Ristova-Gilo or Ventures LLC were part of a criminal enterprise or "co-participants" in tortious acts committed in New York state (*Gulf Coast Dev. Group, LLC v Lebor*, RICO Bus Disp Guide 10595 [SDNY 2003]). Accordingly, the Court finds that it lacks personal jurisdiction over Ristova-Gilo and Ventures, and these parties are dismissed from this action.

II. Fraudulent Conveyance

Plaintiff's actual fraudulent conveyance claims under Debtor and Creditor Law (DCL) § 276 and constructive fraudulent conveyance claim under DCL § 275[1] against Computershare and Gilo are dismissed. Plaintiff alleges that non-party Inveshare's redemption payments to Computershare were made with the intent or belief that they were incurring debts beyond their ability to pay upon maturity, in violation of DCL § 275; and that these conveyances were made with actual intent to defraud creditors, in violation of DCL § 276. Likewise, Plaintiff alleges that payments made to the joint bank account of Gilo and and Ristova-Gilo and Ventures II were fraudulent under DCL § 275 and § 276, as well as subsequent transfers from Ventures II to Gilo and Ventures LLC.

CPLR 3016[b] requires claims based in fraud to be pled with particularity. Unlike section 275, section 276 "addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). However, [s]ince "[d]irect evidence of fraudulent intent is often elusive" courts "will consider 'badges of fraud' which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" on section 276 claims (*Pen Pak Corp. v LaSalle Nat. Bank of Chicago*, 240 AD2d 384, 386 [2d Dept 1997]).

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[1] As of April 4, 2020, the DCL was amended to repeal the Uniform Fraudulent Conveyance Act (UFCA) and replace it with the Uniform Voidable Transactions Act (UVTA), Article 10, §§ 270-281. The UFCA applies to transfers (or conveyances) of property prior to April 4, 2020, the UVTA applies to all transfers of property thereafter. The UVTA eliminates the category of "fraudulent conveyances" from the DCL and replaces them with "voidable transactions" and has amended the burden of proof from "clear and convincing evidence" to a "preponderance of the evidence." (DCL § 273). Because this motion relates to transfers that occurred before April 4, 2020, the UFCA applies to the transactions here (*Bd. of Managers of 11 Beach St. Condominium v HFZ 11 Beach St. LLC*, 2021 WL 4553684 [Sup Ct, NY County 2021]; *see also* § 129:5. Legislative history, 4F N.Y.Prac., Com. Litig. in New York State Courts § 129:5 [5th ed.]).

"Among such circumstances are: 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; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). "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" (*Mar. Midland Bank v Murkoff*, 120 AD2d 122, 126 [2d Dept 1986] [citation omitted]).

Although actual intent "is ordinarily a question of fact" (*Shisgal v Brown*, 21 AD3d 845, 847 [1st Dept 2005]), courts have dismissed fraudulent conveyance claims where the plaintiff's allegations were insufficient on their face because they were pled without particularity or relied solely upon "information and belief" (*see e.g.*, *Avilon Automotive Group v Leontiev*, 194 AD3d 537, 539 [1st Dept 2021]; *Brennan v 3250 Rawlins Ave. Partners, LLC*, 171 AD3d 603, 604 [1st Dept 2019]; *Ray v Ray*, 158 AD3d 578, 579 [1st Dept 2018]; *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]; *RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015]; *Alexander Condominium, by its Bd. of Managers v E. 49th St. Dev. II, LLC*, 60 Misc 3d 1232(A) [Sup Ct, NY County 2018]).

Here, Plaintiff fails to allege how the conveyance to Computershare, Gilo, and Ventures II on September 16, 2016 (the "September 16, 2016 Transfers"), could have been made by Inveshare with the intent to prevent Plaintiff from collecting its judgment, when the conveyances at issue were made well in advance of any efforts by Plaintiff to assert a claim against Inveshare. The Complaint alleges that more than three years prior to the September 16, 2016 Transfers, Sunrise submitted an invoice to Inveshare, which Gilo promptly disputed (Compl. ¶¶22–23).

Plaintiff does not allege that it undertook any efforts to assert a claim based on the rejected invoice prior to the alleged transfer. Moreover, from the face of the Complaint, it appears that following the September 16, 2016 Transfers, Inveshare had more than sufficient funds to satisfy Sunrise's claim (Compl. ¶¶53–62).

Similarly, Plaintiff's submissions of "badges of fraud" are insufficient to support a claim. Although there was a relationship between the parties (as Computershare was a 40 percent owner of Inveshare, and Gilo was a director of Inveshare), Plaintiff has failed to allege with any support that the transfers made to Computershare (and Ventures II) pursuant to the stock redemption plan were not made in the ordinary course of business or that there was inadequacy of consideration. It is true that "a stock redemption by an insolvent company fails to supply reasonably equivalent value to the company" (*State v First Inv'rs Corp.*, 156 Misc 2d 209, 216 [Sup Ct, NY County 1992]; *In re Trace Intern. Holdings, Inc.*, 289 BR 548, 560 [Bankr SDNY 2003] [citations omitted] ["The insolvent corporation cannot make distributions to shareholders, by redemption or dividend"]). Here, though, Plaintiff has not alleged insolvency at the time of the Transfers.[2] That Inveshare ultimately wound down its operations three years *after* the September 16, 2016 Transfers amounts to an allegation of insolvency by hindsight and is insufficient to support Sunrise's claim (*see In re Trinsum Group, Inc.*, 460 BR 379, 392 [Bankr SDNY 2011] [applying

[2] Plaintiff has not alleged that Inveshare was insolvent at the time the redemption payments were made. As Computershare points out, Plaintiff did not even allege this in the underlying litigation. Plaintiffs' attempt to argue that it withdrew its application for preliminary relief (enjoining Inveshare from redeeming its shares unless Defendant reserved and set aside $2,634,824) in the underlying action after (and based on) Inveshare's false representation to the Court that it was reserving $4.3 million, double the amount of any potential judgment on its contract claim" (Opp. at 26) is misleading. There is no evidence in the record that Inveshare or Gilo represented to the Court that they were reserving $4.3 million *for this claim*, or that Plaintiff relied on this alleged representation when withdrawing its motion.

New York law] ["Therefore, insolvency of the transferor for the purposes of the statute cannot be presumed from subsequent insolvency at a later point in time."]); *Bleru Realty Corp. v 158 E. 23rd St. Rest. Corp.*, 200 AD2d 547 [1st Dept 1994] [finding that "any hardship existing at that time does not tend to demonstrate insolvency 8 months earlier"]).

Additionally, the stock redemption plan was approved by Inveshare's board and shareholders before Plaintiff commenced the Inveshare Action (*see* Shareholder Memo). According to the Shareholder Memo, the stock redemption plan set the same per share redemption price for all shareholders (*id.* at 1), and the price was established *after* calculating "applicable taxes, repayment of outstanding debt and liabilities, payment of expenses and establishing appropriate reserves as approved by the Board and holders of more than two-thirds of the Company's Preferred Stock" (*id.*).

Likewise, Plaintiff fails to demonstrate that the payments by Inveshare of $1.7 million and $19,429 to a joint account belonging to Gilo and Ristova-Gilo were made without adequate consideration. Gilo submitted documentary evidence demonstrating that the consideration for the compensation in the Employment Agreement (which was executed *before* the Inveshare Action) is evidenced by Gilo's obligation to continue running Inveshare and to loan Inveshare money if needed to continue its operations (Shareholder Memo at 1). Further, the $19,429 transfer constituted reimbursement for Gilo's moving expenses consistent with the invoice submitted by Gilo and the terms of his Employment Agreement (Employment Agreement at § 3(e); NYSCEF 90 [Invoice]).

Furthermore, the transfers alleged in Paragraphs 61 and 62 of the Complaint are based on "inferences" (*see* NYSCEF 84), which as previously noted, are insufficient as a matter of law

(*see Carlyle*, 160 AD3d at 477). This is particularly deficient here, where Plaintiff obtained discovery in the Inveshare Action, including the deposition of Gilo.

Finally, the facts as set forth in the Complaint illustrate only that Sunrise tendered an invoice in May 2013, which was promptly disputed by Inveshare and on which no further action or communication was taken for over three years. Even if these facts were sufficient to demonstrate Inveshare's knowledge that Plaintiff was still asserting its claim (which seems unlikely), they are not sufficient to demonstrate Inveshare's inability to pay it. Finally, there is no allegation that Inveshare retained control of the payments to Computershare after the transaction.

Turning to Plaintiff's claim under DCL § 275, as already discussed above, Plaintiff fails to allege the payment was without fair consideration. Furthermore, the Complaint fails to plead that Inveshare believed that it would be unable to pay its debts as they came due as a result of the transfers made by Inveshare to Computershare, Gilo, and Ventures II on September 16, 2016, as Sunrise had not even asserted a claim at that time and in any event Inveshare had sufficient case to satisfy the invoice at that time (Compl. ¶¶53–62). The facts alleged in the Complaint do not support a reasonable inference that, after not hearing from Plaintiff for more than three years regarding its rejected invoice, Inveshare's redemption of shares was a constructive fraudulent conveyance. As such, Plaintiff fails to allege facts sufficient to support a claim against Computershare and Gilo under DCL § 275.

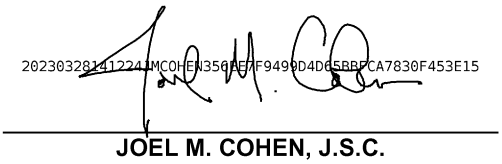
Accordingly, it is

ORDERED that Computershare's motion to dismiss is **GRANTED**; it is further

ORDERED that the Gilo Defendants' motion to dismiss is **GRANTED**; and it is further

ORDERED that the parties upload a copy of the transcript upon receipt.

This constitutes the Decision and Order of the Court. The Clerk is directed to enter judgment, upon submission by Defendants of a proposed judgment in proper form, dismissing the Complaint with prejudice.



3/28/2023
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE