

Commonwealth of Pa Dept. of Revenue v Kozel

2023 NY Slip Op 31885(U)

June 5, 2023

Supreme Court, New York County

Docket Number: Index No. 154568/2022

Judge: Lyle E. Frank

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK **PART** **11M**

Justice

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COMMONWEALTH OF PENNSYLVANIA DEPARTMENT
OF REVENUE,

Plaintiff,

INDEX NO. 154568/2022

MOTION DATE 01/13/2023

MOTION SEQ. NO. 010

- v -

TODD F. KOZEL, 212 WEST 18 LLC, MARKUS
HUGELSHOFER, INGA KOZEL, INRES INTERNATIONAL
RESOURCES INCORPORATED, JOHN DOE, JANE DOE,
AND ABC CORPORATIONS 1-10

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 87, 88, 89, 90, 91, 92, 93, 96, 99, 100, 105

were read on this motion to/for DISMISS.

This action arises out of plaintiff’s attempt to enforce a judgment based on defendant, Todd F. Kozel’s, tax liability.¹ Defendant, Inres International Resources Incorporated (“Inres”), moves to dismiss the complaint pursuant to pursuant to CPLR §§ 3211(a)(1), 3211(a)(5), 3211(a)(7) and 3211(a)(8). Plaintiff opposes the motion. For the reasons set forth below, Inres’s motion to dismiss is granted in part.

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the Court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v Martinez*, 84 NY2d 83 [1994]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]. “The complaint

¹ The Court would like to thank Craig Supcoff for his assistance in this matter.

must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *Id.*

Preliminarily, based on the pleadings and giving plaintiff all favorable inferences, defendant Inres, has failed to establish that this Court does not have jurisdiction. At this point on a motion to dismiss, the record before this Court and the pleadings establish that Inres has an ownership interest in the entity that owns luxury apartment where Mr. Kozel resided prior to his incarceration, as well as payments made for the subject apartment by Inres. Inres was properly served, thus at this point the Court does not find a lack of jurisdiction as a basis to dismiss the action.

Plaintiff's first cause of action as against Inres, entitled "Alter Ego Liability", alleges that Inres was an "alter ego" of defendant Mr. Kozel. The First Department has consistently held that "alter-ego liability is not an independent cause of action" (*Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480 [1st Dept 2015]). Notwithstanding, as indicated above the Court must discern whether the fact as alleged can be discerned to state a viable cause of action.

Here, the Court finds that there are factual allegations in the amended complaint to support the allegation that Inres was the alter ego of Mr. Kozel. The amended complaint alleges that Mr. Kozel transferred personal funds into various limited liability corporations, Inres included, to avoid his creditors. Further, the amended complaint alleges that Inres has an ownership interest in the apartment and has repeatedly made maintenance payments. Based on the facts alleged in the amended complaint, although not artfully drafted, the amended complaint alleges that a corporate entity exists that is used for the benefit of its member and for a fraudulent purpose. Accordingly, the Court finds that the amended complaint sufficiently states a cause of

action to pierce the corporate veil on Inres based on the theory that it is an alter ego of defendant Mr. Kozel.

Plaintiff's second cause of action is for liability as Mr. Kozel's nominee. As with the first cause of action the Court finds that the amended complaint sufficiently states a claim under the nominee theory. Inres contends, in a conclusory fashion, that there is no nominee cause of action in New York. This argument however is not supported by any legal authority.

In contrast to this Court's determination on this issue as it relates to defendant Inga, here plaintiff has pled and it appears undisputed that Inres maintains partial ownership of the LLC that owns the apartment and as pled has partial ownership of the apartment. Accordingly, at this stage of the litigation the Court finds that dismissal of this cause of action is premature.

Plaintiff's third cause of action alleges interference with plaintiff's enforcement of its judgment against Mr. Kozel. The amended complaint alleges that the alleged interference occurred on December 16, 2013, when Mr. Kozel "caused a luxury condominium located at 212 West 18th Street, Unit 14-C-D, New York, New York 10011 to be purchased in the name of the LLC". Defendant Inres contends that any allegations based on the December 16, 2013, conduct is barred by the 1-year statute of limitations. Further, as alleged in the amended complaint Inres became an indirect owner of the apartment in question in 2016.

In opposition, plaintiff contends that a 3-year statute of limitations applies; this argument, however, does not dictate a different result. Even assuming that a 3-year statute of limitations applies, this cause of action is still time barred as the complaint in this action was filed in 2022. Neither the amended complaint nor the affirmation in opposition to the motion to dismiss allege sufficient facts to support the application of the continuing wrong doctrine. As such the third cause of action as alleged against Inres is dismissed.

Plaintiff’s fourth cause of action alleges violation of the Uniform Voidable Transactions Act §273 (“UVTA”). However, in opposition to defendant’s motion to dismiss this cause of action based on the statute of limitations defense, plaintiff contends that the UVTA does not apply and contends that it relies upon the prior Debtor and Creditor Law. As plaintiff concedes that the UVTA does not apply to the instant action or the transfer in question, this cause of action is dismissed. The Court has reviewed the parties’ remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED that defendant’s motion is granted in part in that plaintiff’s third and fourth causes of action as against Inres International Resources Incorporated are dismissed, and the motion is otherwise denied.

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LYLE E. FRANK, J.S.C.

6/5/2023
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE