

**Trinity Centre LLC v Gen Media Partners LLC**

2023 NY Slip Op 31978(U)

June 7, 2023

Supreme Court, New York County

Docket Number: Index No. 656215/2021

Judge: Verna L. Saunders

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interest and attorney's fees ("judgment") (NYSCEF Doc. No. 3, *judgment*). It is undisputed that the judgment is fully unsatisfied.

Plaintiff alleges that amid the legal proceedings, Old Sun transferred all cash and cash-equivalents to New Sun, rendering Old Sun unable to pay the judgment. Moreover, the business itself was also transferred to New Sun, with the staff, phone numbers, email addresses and website remaining identical. Plaintiff further claims that Old Sun's principals, including its founder and President, Jason Bailey, and its Chief Operating Officer, Julio Aponte Jr., retained ownership interests in New Sun.

On August 27, 2018, an Asset Purchase Agreement ("APA") was entered into between Gen Media Partners LLC and New Sun as buyers, and Old Sun and Jason R. Bailey as sellers (NYSCEF Doc. No. 16, *APA*). Old Sun's assets were sold for \$3.5 million (*id.* at 1). The APA excluded certain liabilities and Old Sun retained its "cash on hand or on deposit and any cash equivalents" and "any accounts receivable and billings" (*id.* at 4-6).

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]). The court must deny a motion to dismiss, "if, from the pleadings' four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks and citation omitted]).

CPLR 3211(a)(1) provides, in part, that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence . . ." "In order to prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]). Such a motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009] [internal quotation marks and citation omitted]; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Plaintiff claims that defendants perpetrated a scheme to gut the business of Old Sun in order to evade the debt owed to Trinity. Plaintiff alleges that pursuant to New York Debtor and Creditor Law (DCL) §§ 273, 274 and 275, the conveyance from Old Sun to New Sun is constructively fraudulent and was made without fair consideration.

Defendants move to dismiss the complaint on the grounds that the documentary evidence in the form of the APA between Gen Media Partners LLC and New Sun as buyers, and Old Sun and Jason R. Bailey as sellers, refutes the allegations in the complaint (NYSCEF Doc. No. 16). Defendants contend that the APA establishes that Old Sun was not gutted but was paid \$3.5 million for the purchase of its assets.

“Under the DCL, a conveyance by a debtor is deemed constructively fraudulent if it is made without ‘fair consideration,’ and (inter alia) if one of the following conditions is met: (i) the transferor is insolvent or will be rendered insolvent by the transfer in question, DCL § 273; (ii) the transferor is engaged in or is about to engage in a business transaction for which its remaining property constitutes unreasonably small capital, DCL § 274; or (iii) the transferor believes that it will incur debt beyond its ability to pay, DCL § 275” (*In re Sharp Intern. Corp.*, 403 F3d 43, 53 [2d Cir 2005]; *see also Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 302 [1st Dept 2006]).

Good faith and the payment of a fair equivalent value for the property interest are the two necessary elements of fair consideration (*see* DCL 272; *In re Sharp Intern. Corp.*, 403 F3d at 53-54). The burden of proving a lack of consideration is upon the party challenging the conveyance (*Matter of American Inv. Bank v Marine Midland Bank*, 191 AD2d 690, 692 [2d Dept 1993]).

For purposes of the DCL, “[a] debtor is insolvent if, at a fair valuation, the sum of the debtor’s debts is greater than the sum of the debtor’s assets” (DCL § 271 [a]; *see Zanani v Meisels*, 78 AD3d 823, 824 [2d Dept 2010] [dismissing claim under DCL § 273 because documentary evidence showed that transfer did not render debtor insolvent]). Here, the documentary evidence establishes that Old Sun was not insolvent at the time of the APA. Old Sun’s assets were sold for far more than its debt to plaintiff. Without an allegation of insolvency, plaintiff’s claim pursuant to DCL § 273 must be dismissed.

Plaintiff’s allegations with respect to DCL §§ 274 and 275 are also lacking. Conclusory assertions or “mere recitation[s] of the statutory language” that Old Sun was left with “unreasonable[ly] small capital” or that it would “incur debts beyond its ability to pay,” without more, is insufficient (*see Ray v Ray*, 2019 WL 1649981, at \*6, 2019 US Dist LEXIS 56647 [SD NY Mar. 28, 2019, 18 CIV 7035 (GBD)]).

Here, the APA refutes plaintiff’s allegations that Old Sun was rendered insolvent, inadequately capitalized or unable to meet its debt obligation to Trinity. Accordingly, plaintiff’s first cause of action sounding in constructive fraudulent conveyance must be dismissed.

A conveyance is “actually” fraudulent if it is made “with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors” (DCL § 276). The burden of proof to establish actual fraud under DCL § 276 is upon the creditor who seeks to have the conveyance set aside (*Marine Midland Bank v Murkoff*, 120 AD2d 122, 126 [2d Dept 1986]). The standard of proof necessary to prove actual fraud is clear and convincing evidence (*id.*).

“Due to the difficulty of proving actual intent . . . the pleader is allowed to rely on ‘badges of fraud’ to support his case, i.e., circumstances so commonly associated with fraudulent transfers that ‘their presence give rise to an inference of intent’” (*Wall Street Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [citation omitted]). They include

“(1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor’s knowledge of the creditor’s claims or

claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance”

(*Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386 [2d Dept 1997]).

To adequately plead a cause of action based upon DCL § 276, which involves an intent to defraud, plaintiff is required to comply with the pleading requirements of CPLR 3016(b) (*see Matter of Uni-Rty Corp. v New York Guangdong Fin., Inc.* 117 AD3d 427, 428 [1st Dept 2014]). Thus, to satisfy the pleading requirements of CPLR 3016(b), the allegations in the complaint must be “set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of” (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977]).

Plaintiff relies on numerous badges of fraud to establish the requisite intent pursuant to DCL 276. Plaintiff alleges that there was a close relationship between the parties of the fraudulent transfer, that the transfer was not made in the usual course of business because Old Sun had already defaulted on its payment obligations to Trinity, that New Sun knew of the default and that Bailey, Old Sun’s founder and President, retained ownership and control of the business. Moreover, Trinity contends that “Bailey owned, controlled and managed both “buyer” and “seller,” and that “seller” was dissolved immediately following the conveyance of all its assets and the cessation of its business, more than raises questions as to if, and if so, what was paid and to whom; i.e., whether consideration was paid directly to Old Sun, or if Bailey, in effect, moved money from one of his pockets to the other...” (NYSCEF Doc. No. 32 at 12, *opposition to motion to dismiss*).

Defendants, however, point out that New Sun was not the purchaser of Old Sun’s assets, Gen Media was the actual purchaser, thus eliminating the element of a “close relationship between buyer and seller.” Moreover, mere retention of the same employees does not establish a close relationship. Defendants contend that there was no secret or hasty transfer of assets as evidenced by media releases regarding the sale and other documents publicly announcing the transaction. Defendants also argue that plaintiff’s complaint does not allege that Old Sun was unable to pay the debt or that Bailey retained control of the assets — these are only mentioned in plaintiff’s opposition papers. Furthermore, plaintiff’s allegations are based only upon information and belief and are contradicted by the APA.

Here, Trinity has sufficiently pleaded allegations that, if true, would amount to a fraudulent conveyance with intent to hinder or delay creditors. First, while defendants claim that it was Gen Media who actually purchased the assets of Old Sun, New Sun was also listed as a buyer in the APA (NYSCEF Doc. No. 16). The pleadings claim that Bailey obtained ownership in New Sun after selling off Old Sun, thus fulfilling the elements of retention, a close relationship between buyer and seller and the buyer’s knowledge of a creditor’s claim. If true, the press surrounding New Sun’s name change suggests that Bailey had some control over New Sun until 2020 (NYSCEF Doc. No. 36). Contrary to defendants’ contentions, not only are these allegations raised in Trinity’s brief, but they are also pleaded within its complaint. Accordingly, at this early stage of litigation, and considering all inferences in favor of the plaintiff, Trinity’s claim for actual fraudulent conveyance is permitted to proceed (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

Generally, a “corporation which acquires the assets of another is not liable for the torts of its predecessor” (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 255 [1st Dept 2005] [internal quotation marks and citation omitted]). There are four exceptions to this general rule. A buyer may be liable for the liabilities of the seller if: “(1) the buyer expressly or impliedly assumed [the seller’s] tort liability; (2) there was a consolidation or merger of seller and purchaser; (3) the purchasing corporation was a mere continuation of the selling corporation; or (4) the transaction is entered into fraudulently to escape such obligations” (*Matter of AT&S Transp. LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 752 [2d Dept 2005] [internal citations and quotations omitted]).

“The *de facto* merger doctrine creates an exception to the general principle that an acquiring corporation does not become responsible for the pre-existing liabilities of the acquired corporation” (*Fitzgerald v Fahnstock & Co.*, 286 AD2d 573, 574 [1st Dept 2001]). However, “a successor that effectively takes over a company in its entirety should carry the predecessor’s liabilities as a concomitant to the benefits it derives from the good will purchased” (*Grant–Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]). Thus, under New York law,

“[t]he hallmarks of a *de facto* merger claim between an asset seller and an asset buyer are [1] continuity of ownership; [2] cessation of ordinary business and dissolution of the acquired corporation as soon as possible; [3] assumption by the successor of liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation; and, [4] continuity of management, personnel, physical location, assets and general business operations” (*Fitzgerald*, 286 AD2d at 574).

The element of “continuity of ownership is ‘the essence of a merger,’ [and] it is a necessary element of any *de facto* merger finding, although not sufficient to warrant such a finding by itself” (*Matter of New York City Asbestos Litig.*, 15 AD3d at 256 [citation omitted]). “Continuity of ownership describes a situation where the parties to the transaction ‘become owners together of what formerly belonged to each’” (*id.* [citation omitted]).

In this case, plaintiff alleges continuity of ownership on the ground that Bailey retained ownership interest in and remained in control of the day-to-day operations of New Sun. Plaintiff also adequately pleads elements of continuity of management, personnel, physical location, and general business operations that support the claim of *de facto* merger. New Sun continued operating the same business as Old Sun, at the same offices, with lease checks paid by Old Sun until 2021 (NYSCEF Doc. No. 4, *lease and rent checks*). Moreover, the almost immediate cessation of Old Sun’s business on September 2, 2018, only days after the APA, supports the need for discovery to determine whether the transaction constitutes a *de facto* merger. The merits of the plaintiff’s claim cannot be addressed in the context of this motion to dismiss without further disclosure from the defendants on these issues (*Sweatland v Park Corp.*, 181 AD2d 243, 245 [1st Dept 1992] [requiring further discovery into whether a transaction constituted a *de facto* merger where the successor “acquired all of [the predecessor’s] fixed assets and many of its intangible assets such as good will, engineering, patents, copyrights, and customer lists, as well as its right to use the trade name”]; *cf. City of New York v Pfizer & Co.*,

260 AD2d 174, 175-176 [1st Dept 1999] [finding no showing of a de facto merger where “[the predecessor] sold [the successor] only a small part of its business [and], continues to do business”]).

Attorney’s fees under DCL § 276-a are recoverable by a creditor that has demonstrated actual fraud (DCL § 276-a). Because the viability of the claims under DCL § 276-a depends on the viability of the other fraudulent conveyance claims, these claims remain (*Carlyle, LLC v. Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]). Based upon the foregoing, it is


**ORDERED** that defendants Gen Media Partners LLC d/b/a Sun Broadcast Group and G Networks’ motion to dismiss (Mot. Seq. 002) is granted to the extent of dismissing the portion of the first cause of action sounding in constructive fraudulent conveyance and it is otherwise denied, and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendants Gen Media Partners LLC d/b/a Sun Broadcast Group and G Networks shall serve a copy of this decision and order, with notice of entry, upon plaintiff; and it is further

**ORDERED** that the parties in this action are hereby directed to appear for a remote conference on August 2, 2023, details which shall be provided by the court no later than July 31, 2023.

This constitutes the decision and order of the court.

June 7, 2023

  
HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

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<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
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		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
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APPLICATION:

CHECK IF APPROPRIATE: