

Shanghai Pearls & Gems, Inc. v Paul

2023 NY Slip Op 32784(U)

August 9, 2023

Supreme Court, New York County

Docket Number: Index No. 157224/2022

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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SHANGHAI PEARLS & GEMS, INC. D/B/A ULTIMATE DIAMOND CO., Plaintiff,	INDEX NO. <u>157224/2022</u> MOTION DATE <u>11/09/2022</u> MOTION SEQ. NO. <u>001</u>
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- v -

ALEKS PAUL, ESSEX GLOBAL TRADING, INC.

**DECISION + ORDER ON
 MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 were read on this motion to/for DISMISSAL

Plaintiff, Shanghai Pearls & Gems, Inc. d/b/a Ultimate Diamond Co. (plaintiff), commenced this action for fraudulent conveyance under section 273 of the New York Debtor-Creditor Law (DCL), fraudulent conveyance under sections 276 and 276-a of DCL, conversion unjust enrichment, and tortious interference with contractual relations, against defendants, Aleks Paul (Paul) and Essex Global Trading, Inc. (Essex) (collectively, defendants), stemming from the alleged fraudulent transfer of two precious stones to defendants. Defendants now move pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss the amended complaint. The motion is opposed. For the following reasons, the motion is granted in part.

Plaintiff is a company specializing in buying, selling and trading precious stones and pieces of valuable jewelry. Non-party D&M Capital Group LLC (D&M) also specializes in buying, selling, and trading precious stones and pieces of valuable jewelry. D&M filed a petition for bankruptcy protection pursuant to Chapter 11 of the United States Bankruptcy Code on June 2, 2019. Prior to the bankruptcy, plaintiff and D&M regularly conveyed pieces of inventory to each other for sale. Within the diamond industry, such transactions are referred to as being "on memorandum." Plaintiff and D&M purchased a gem on a partnership basis, the "Pink Diamond," which was purchased by plaintiff, D&M and a third party in late 2015 for the sum of \$2,131,212.00. Plaintiff held a 33% interest in the gem, and D&M and another non-party each held a 33% interest. Prior to D&M's bankruptcy, plaintiff placed the Pink Diamond into D&M's possession on a memorandum basis, thereby retaining title to its share of the gem.

Another gem, the "Kashmir Sapphire," was allegedly purchased by D&M and non-party SB Diamond Corporation (SB) prior to the bankruptcy, with D&M having a two-thirds interest in the gem and SB having a one-third interest. SB allegedly placed the Kashmir Sapphire into

D&M's possession on a memorandum basis, thereby retaining title to its share of the gem.

Essex is a company that is also involved in the diamond business. Paul is the principal owner of Essex. Plaintiff alleges that prior to D&M's bankruptcy proceeding, defendants loaned D&M approximately \$6.5 million. D&M has asserted that Essex received over \$9.5 million in interest payments over the loan transactions between the two entities, a sum disputed by Essex.

Plaintiff alleges that prior to the bankruptcy and within the bankruptcy 90-day preference period, D&M transferred to Essex a number of gems, including the Pink Diamond and the Kashmir Sapphire, worth over \$17 million. Plaintiff alleges that these transfers were fraudulent, made without adequate consideration and with the intent to shield assets from D&M's creditors, including plaintiff. Plaintiff also alleges that the bankruptcy was caused by defendants' refusal to return the gems in their possession, including the Pink Diamond and the Kashmir Sapphire to D&M, causing a cash flow crunch which led to D&M seeking bankruptcy protection. Essex asserted that the gems were held as security for D&M's debt, and that Essex perfected a security interest on this property.

Plaintiff is one of D&M's creditors in the bankruptcy proceeding, which was converted to a Chapter 7 proceeding in August 2020. Plaintiff alleges that the Bankruptcy Court issued a temporary restraining order, and later a preliminary injunction on December 19, 2019, ordering defendants to immediately return the Pink Diamond and the Kashmir Sapphire to the court to be held pending an auction. To date, neither gem has been returned. Plaintiff alleges that defendants were not held in contempt on the ground that they had transferred the gems to their own creditors in Russia.

On June 8, 2022, plaintiff entered into a settlement agreement with the Bankruptcy Trustee (Trustee) who represented D&M's estate. Plaintiff agreed to withdraw its claims in the bankruptcy proceedings for certain considerations. The settlement agreement did not contain a release in favor of defendants. The agreement provided that the Trustee would assign D&M's right, title and interest in the Pink Diamond and Kashmir Sapphire to plaintiff. Due to an earlier settlement involving SB's interest in the Kashmir Sapphire, D&M acquired 100% interest in the Kashmir Sapphire. After plaintiff's settlement agreement with the Trustee was executed, plaintiff had 100% interest in the Pink Diamond and the Kashmir Sapphire.

In its complaint, plaintiff seeks recovery of compensatory and punitive damages against defendants. The first cause of action is fraudulent conveyance under DCL § 273, alleging an illicit transfer of assets from D&M to defendants without due consideration. The second cause of action is fraudulent conveyance under DCL §§ 276 and 276-a, alleging an illicit transfer of assets from D&M to defendants with the actual intent to hinder, delay and defraud plaintiff as a creditor. The third cause of action is conversion, alleging that defendants exercised unauthorized dominion and control over plaintiff's property. The fourth cause of action is unjust enrichment in the alleged possession of the two aforesaid gems. The fifth cause of action is tortious interference with contractual relations, alleging that defendants intentionally and fraudulently interfered with plaintiff's relationship with D&M as a result of the illicit transfer of the aforesaid gems.

DISCUSSION

CPLR 3211(a)(1) and (5)

In support of the branch of their motion to dismiss the complaint on the basis of documentary evidence, defendants submit the following documents: a copy of the Bankruptcy Court docket in the D&M bankruptcy proceeding; the settlement agreement entered into by plaintiff and Trustee; the settlement agreement entered into by defendants and Trustee, dated March 1, 2021; the Trustee's final report; D&M's bankruptcy petition and complaints against defendants; and the Bankruptcy Court's order approving Trustee's settlement agreement with defendants.

Defendants argue that Essex confirmed its right to seize various gems, including the Pink Diamond and the Kashmir Sapphire, as collateral for its \$6.5 million loan to D&M prior to the bankruptcy proceeding. When D&M filed for bankruptcy protection, it demanded that the collateral, which it claimed was worth \$17 million, be returned to its estate. Essex states that the value of the gems was fraudulently inflated for insurance purposes. Through the Trustee, D&M brought a suit against defendants seeking the recovery of the gems and suing for fraud and conversion. After three years of litigation, defendants and Trustee reached a settlement agreement which was subsequently approved by the Bankruptcy Court. Under the agreement, D&M dismissed all claims against defendants, Essex allowed its \$6.5 million claim to be subordinated below the other creditors' claims, and paid Trustee the sum of \$350,000. Under this settlement, defendants contend that the claims brought against them by plaintiff have also been dismissed with prejudice. Defendants further contend that plaintiff should not be allowed to relitigate its claims on the ground of *res judicata*. Defendants claim that plaintiff objected to the terms of their settlement agreement but made no further moves afterwards. Defendants specifically refer to the fraudulent conveyance claims that they argue must be dismissed.

In opposition, plaintiff argues that release and *res judicata* do not apply to its fraudulent conveyance claims. Plaintiff contends that neither plaintiff's nor defendants' settlement agreements in the bankruptcy proceeding releases defendants from any claims brought by plaintiff. Plaintiff avers that it was not a party to defendants' settlement agreement. Moreover, when Trustee moved for an order from the Bankruptcy Court regarding defendants' agreement, Trustee expressly provided that said agreement did not foreclose other creditors from pursuing claims against defendants. Plaintiff submits a copy of the Trustee's motion. Plaintiff argues that as the owner of the Pink Diamond and the Kashmir Sapphire, it can bring this action against defendants now that D&M no longer has any further interest in these gems.

A motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only when the evidence entirely rejects plaintiff's factual allegations and conclusively establishes a defense as a matter of law (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 324 [2002]). Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release (*see Centro Empresarial Cempreso S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]).

CPLR 3211(a)(5) states, in relevant part that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: ... the cause of action may not be maintained because of . . . res judicata.” “Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). Under New York’s transactional analysis approach to *res judicata*, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy” (*O’Brien v City of Syracuse*, 54 NY2d 353, 357 [1981] [internal citations omitted]).

Regarding defendants’ settlement agreement, the court has examined the agreement, the Trustee’s motion before the Bankruptcy Court and the order affirming the agreement. It is clear that the agreement does not release defendants from any claims brought by plaintiff. Plaintiff’s own settlement agreement also provides no such release. Furthermore, the doctrine of *res judicata* is not applicable to this situation in the absence of any specific litigation between the parties prior to the commencement of this lawsuit. Thus, the branch of defendant’s motion to dismiss plaintiff’s claims for fraudulent conveyance on the basis of documentary evidence is denied.

Defendants argue that the conversion claim must be dismissed due to the terms of the settlement agreement, as well as based upon the statute of limitations. Defendants state that the bankruptcy proceeding began on June 2, 2019, and this lawsuit was commenced on August 23, 2022, which exceeded the three-year period. Moreover, the transfer of the gems is alleged to have occurred prior to the bankruptcy proceeding. Thus, defendants argue that plaintiff’s claim for conversion is time barred.

Plaintiff argues that the statute of limitations was tolled once the bankruptcy proceeding commenced and that its tort claims are time-barred as a result. Defendants contend that the toll only effects suits or proceedings brought against the debtor, D&M, not themselves. Plaintiff argues that CPLR 204(a) provides that “where commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time with which the action must be commenced.” Plaintiff argues that the three-year statute of limitations does not preclude its tort claims. According to plaintiff, the filing of a bankruptcy petition provides a stay which tolls the statute. The bankruptcy proceeding has gone on for over three years, and plaintiff’s conversion and tortious interference claims are not time-barred, since the matter of this suit involves debtor’s property which has been under the protection of the Bankruptcy Court. Plaintiff contends that its unfair enrichment claim can be maintained as an alternative claim at this stage of the litigation.

Pursuant to 11 USC 362(a)(3), a petition under Bankruptcy Code 301, 302, or 303 triggers an automatic stay, prohibiting “[a]ny act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” While plaintiff is not suing D&M in this action, plaintiff is attempting to exercise control over its property. Indeed, plaintiff held a partial financial interest in the Pink Diamond prior to the bankruptcy proceeding. Plaintiff was one of the creditors in the proceeding. Plaintiff admittedly had no interest in the other gem, the Kashmir Sapphire until it executed a settlement agreement with

D&M in the context of the bankruptcy proceeding. The settlement agreement gave plaintiff 100% interest in both the Pink Diamond and the Kashmir Sapphire. No party is disputing the validity of this agreement.

The Court finds the tort causes of action timely. The statute of limitations tolled upon the commencement of the bankruptcy proceeding regarding the Pink Diamond. The stay ceased upon the execution of the settlement agreement. As for the Kashmir Sapphire, the statute of limitations only accrued when plaintiff had an interest in this gem, which occurred on June 8, 2020, the date of the settlement agreement. Thus, the claim of conversion of the Pink Diamond and Kashmir Sapphire are timely.

CPLR 3211(a)(7)

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]).

Tortious Interference with Contractual Relations

Defendants argue that the tortious interference claim is inadequately pleaded. As drafted by plaintiff, they assert that plaintiff fails to allege that defendants knew of a contractual relationship between plaintiff and D&M, and that defendants intentionally interfered without justification. Alternatively, defendants argue that this cause of action must be dismissed as time-barred by the three-year statute of limitations.

The elements for a claim sounding in tortious interference with contractual relations are: (1) the existence of a valid contract between plaintiff and a third party; (2) defendant’s knowledge of a contract; (3) defendant’s intentional procurement of a breach of contract without justification; (4) actual breach of the contract; and (5) resulting damages (*see Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999]).

Here, plaintiff alleges that defendants were aware, or knew of contractual relations between plaintiff and D&M and intentionally procured a breach without justification. Plaintiff was referring to the Pink Diamond, and defendants’ interference with contractual relations involved the transfer of the Pink Diamond from D&M to defendants for repayment of allegedly fraudulent loans. Plaintiff alleges that the transfer violated its contract with D&M, as the gem was in memorandum with D&M, as agreed upon. Thus, the Court finds that the complaint alleges a claim for tortious interference with contractual relations.

Unjust Enrichment

Defendants argue that the unjust enrichment cause of action is not available to plaintiff where the allegations related to this cause of action are redundant as a tort, such as conversion. Defendants contend that this is the situation here, where plaintiff has already alleged two tort claims. Defendants seek the dismissal of the unjust enrichment cause of action as duplicative of

the tort claims in the complaint.


Unjust enrichment occurs outside of a contractual relationship where one party holds property under such circumstances that in equity and good conscience should not retain it (see *Alan B. Greenfield, M.D., P.C. v Long Beach Imaging Holdings, LLC*, 114 AD3d 888, 889 [2d Dept 2010]). Such a claim should be dismissed as derivative of a contract or tort claim when based on the same allegations and seeking the same damages as these claims (see *Ullman-Schneider v Lacher & Lovell-Taylor P.C.*, 121 AD3d 415, 416 [1st Dept 2014]). The conversion claim contains allegations nearly identical to those in the unjust enrichment claim. Plaintiff also seeks the same damages in both claims. The Court finds that the unjust enrichment claim is derivative of the conversion, and is thus dismissed.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is granted as to plaintiff's claim for unjust enrichment, and that claim is dismissed; and it is further

ORDERED that defendant shall serve a copy of this decision and order, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



DAKOTA D. RAMSEUR, J.S.C.

8/9/2023
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