

Forest Ave. Commons LLC v Circa Inc.

2023 NY Slip Op 32881(U)

August 17, 2023

Supreme Court, New York County

Docket Number: Index No. 656140/2020

Judge: Debra A. James

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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. DEBRA A. JAMES

PART 59

Justice

-----X

INDEX NO. 656140/2020

FOREST AVENUE COMMONS LLC,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 001

- v -

CIRCA INC. and LAURENCE R. GRUNSTEIN,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 17

were read on this motion to/for DISMISSAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR 3211(a)(8), of defendant Grunstein to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against such defendant, with costs and disbursements to such defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of such defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website]; and it is further

ORDERED that the motion, pursuant to CPLR 3211(a)(8), of defendant Circa Inc. to dismiss the second cause of action is granted; and it is further

ORDERED that the second cause of action of the complaint is dismissed, without prejudice; and it is further

ORDERED that within thirty (30) day of entry of this Order, the remaining defendant shall serve an answer to the complaint; and it is further

ORDERED that counsel are directed to post on NYSCEF a proposed preliminary discovery conference order or competing proposed preliminary conference order(s) no later than October 3, 2023, on which date counsel shall appear via Microsoft Teams, unless such appearance be waived by the court.

DECISION

Plaintiff concedes that process was never served upon individual defendant Grunstein. Therefore, the action against him must be dismissed for lack of personal jurisdiction.

With respect to the second cause of action alleging that defendant Circa Inc violated Debtor & Creditor Law § 273, even assuming the factual allegations of the complaint and affidavit of plaintiff's principal that assert that such corporate defendant moved assets from the leased premises to another physical site are sufficient to state an essential element of a claim for fraudulent conveyance¹, plaintiff does not allege, even in a conclusory manner, that such transfer rendered defendant Circa Inc insolvent. See Swartz v Swartz, 145 AD3d 818, 828 (2nd Dept 2016):

Further, the Supreme Court should have granted that branch of the Swartz defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the third cause of action, which alleged violations of Debtor and Creditor Law §§ 273 and 275 insofar as asserted against the Swartz daughters. The amended complaint merely alleged in a conclusory manner that Jerome Swartz was rendered insolvent as a result of the transfers that he made; the facts alleged in the complaint do not support any inference that Jerome Swartz was insolvent or that he intended or believed that he would incur debts beyond his ability to pay as a result of the transfers (see

¹But see Debtor & Creditor Law § 270(p) "'Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of **disposing or parting with** an asset or an interest in an asset, and includes payment of money, release, license, and creation of a lien or other encumbrance.'" (Bold added.)

Wildman & Bernhardt Constr. v. BPM Assoc., 273 A.D.2d 38, 39, 708 N.Y.S.2d 400; Debtor and Creditor Law §§ 271[1]; 273, 275; see also Zanani v. Meisels, 78 A.D.3d 823, 825, 910 N.Y.S.2d 533; Grace Plaza of Great Neck v. Heitzler, 2 A.D.3d 780, 781, 770 N.Y.S.2d 421). For the same reasons, the court properly granted that branch of the Swartz defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the causes of action under Debtor and Creditor Law §§ 273 and 275 insofar as asserted against the corporate defendants.

Debra A. James

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8/17/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE