

**Putien New Power Intl. Trade Co., Ltd. v Esquire
Footwear Brands, LLC**

2024 NY Slip Op 30189(U)

January 15, 2024

Supreme Court, New York County

Docket Number: Index No. 157819/2022

Judge: Nancy M. Bannon

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

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

PUTIEN NEW POWER INTERNATIONAL TRADE CO.,
LTD.,

Plaintiff,

- v -

ESQUIRE FOOTWEAR BRANDS, LLC, ISAAC SAADA,
WHITE OAK COMMERCIAL FINANCE, LLC,

Defendants.

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INDEX NO. 157819/2022

MOTION DATE 11/16/2022
12/09/2022

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 30, 31, 32, 34, 36, 37, 38, 39, 41, 43, 45

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 33, 35, 40, 42, 44, 46

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this fraudulent conveyance action, the plaintiff, Putien New Power International Trade Co., Ltd., seeks to recover on trade debt incurred by non-party Esquire Footwear LLC (“Esquire Footwear”), alleging that the defendants engaged in a scheme to evade Esquire Footwear’s creditors, including the plaintiff, by fraudulently transferring its assets to defendant Esquire Footwear Brands, LLC (“Esquire Brands”). The plaintiff asserts claims of successor liability against Esquire Brands; fraudulent transfer under the New York Debtor & Creditor Law (“DCL”) against Esquire Brands and defendant Isaac Saada (“Saada”, and together with Esquire Brands, the “Esquire Defendants”), the former CEO of Esquire Footwear and current CEO of Esquire Brands; breach of fiduciary duty against Saada pursuant to the trust fund doctrine; and aiding and abetting the alleged breach of fiduciary duty and fraudulent transfer against defendant White Oak Commercial Finance, LLC (“White Oak”), Esquire Footwear’s first-priority secured creditor.

The Esquire Defendants now move, pre-answer, pursuant to CPLR 3211(a)(7), to dismiss all claims against Saada, that part of the first cause of action for successor liability premised on the “mere continuation” doctrine, and the second and third causes of action in their entirety (MOT SEQ 001). Additionally, White Oak moves pursuant to CPLR 3212 for summary

judgment dismissing all claims asserted against it (the fifth, sixth, and seventh causes of action) (MOT SEQ 002). The plaintiff opposes both motions. The Esquire Defendants' motion is granted in part and White Oak's motion is granted.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a cause of action is adequately stated, the court must "liberally construe" the pleading, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference, and determine only whether the facts, as alleged, fit within any cognizable legal theory. Id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 (2013); Simkin v Blank, 19 NY3d 46 (2012); Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). "The motion must be denied if from the pleading's 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., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 (1977).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York Univ. Med. Ctr., supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1st Dept. 2010).

The branch of the Esquire Defendants' motion that seeks the dismissal of so much of the first cause of action for successor liability as is premised on the "mere continuation" doctrine is denied. The plaintiff's allegations that Esquire Footwear transferred its assets, goodwill, client relationships, vendor numbers, offices, warehouse, management, and employees to Esquire Brands, and that there was continuity of ownership, suffice to state a successor liability claim under the mere continuation doctrine. See Tap Holdings, LLC v Orix Fin. Corp., 109 AD3d 167, 176 (1st Dept. 2013); NTL Cap., LLC v Right Track Recording, LLC, 73 AD3d 410, 411 (1st Dept. 2010). The Esquire Defendants argue that no mere continuation claim may lie because Esquire Footwear has not been extinguished and still technically exists, albeit in some lesser form. However, the plaintiff's allegations support a reasonable inference, for purposes of the present motion, that Esquire Footwear, even if not formally dissolved, has been effectively extinguished. See Tap Holdings, LLC v Orix Fin. Corp., supra.

The plaintiff's allegations also suffice to state a claim for breach of fiduciary duty against Saada based on the trust fund doctrine, and the Esquire Defendants' motion is likewise denied insofar as it seeks dismissal of that claim.

However, the Esquire Defendants' motion is granted as to the second and third causes of action for fraudulent conveyance under DCL §§ 273(a) and 274(a). The complaint fails to plead with sufficient particularity the facts constituting these claims. The plaintiff pleads no facts regarding the specific circumstances and details of the allegedly fraudulent transfer. And the allegations that this transfer was made without fair consideration, and that the Esquire Defendants acted with the intent to defraud their creditors, are conclusory, and thus insufficient to state a claim under the DCL. See RTN Networks, LLC v Telco Grp., Inc., 126 AD3d 477, 478 (1st Dept. 2015). Accordingly, the second and third causes of action are dismissed.

The gaps in the plaintiff's allegations concerning the transfer at issue are substantially, if not entirely, filled in by White Oak's submissions in support of its motion for summary judgment. These submissions demonstrate, as relevant here, that, on January 8, 2019, White Oak and Esquire Footwear entered into a Factoring Agreement and Security Agreement Supplement – Inventory (the “Financing Documents”), which granted White Oak a security interest and general lien on all of Esquire Footwear's assets (the “Collateral”), including its accounts receivable and inventory. White Oak properly perfected its security interest by filing a UCC-1 financing statement and became Esquire Footwear's perfected, first-priority secured creditor.

By January 2020, Esquire Footwear, having become insolvent, had committed multiple defaults under the Financing Documents and owed White Oak nearly \$4,000,000, which it could not pay. To protect its interest in the remaining Collateral, which was valued at less than \$1 million, in September 2020, White Oak provided Esquire Footwear with a letter notifying it and other lien creditors—which did not include the plaintiff—that it would dispose of the Collateral in one or more private foreclosure sales under Article 9 of the Uniform Commercial Code (“UCC”). On September 30, 2020, White Oak, as Esquire Footwear's first-priority secured creditor, and exercising its rights under the Financing Documents and Article 9 of the UCC, took possession of the Collateral and sold it to Esquire Brands. In exchange for the sale of the Collateral, Esquire Brands provided White Oak with \$750,000 in cash and assumption of Esquire Footwear's total indebtedness to White Oak. Additionally, as part of this foreclosure sale, Saada was required to transfer 55% of his ownership interest in Esquire Brands to new investors who agreed to recapitalize the company and who would control the company going forward. Notably, at the time of the foreclosure sale, Esquire Footwear's outstanding debt to White Oak stood at approximately \$3.5 million, which dwarfed the value of its assets—it had no inventory remaining and total accounts receivable of approximately \$590,000.

White Oak's submissions demonstrate its entitlement to judgment as a matter of law. It is well-established that "[a] creditor's remedy in a fraudulent conveyance action is limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance[.]" Marine Midland Bank v Murkoff, 120 AD2d 122, 133 (2nd Dept. 1986). "Therefore, a complaining creditor must first plead and then demonstrate that it had an equity stake in the debtor's assets—that is, that some portion of the debtor's assets would have been available to satisfy the unsecured creditor's claims had there been no conveyance." Chemtex, LLC v St. Anthony Enterprises, Inc., 490 F Supp 2d 536, 542 (S.D.N.Y. 2007), *citing* Hamilton Nat'l Bank v Halstead, 134 NY 520, 523-24, 526-27 (1892). "Absent any such equity in the assets conveyed, an unsecured creditor lacks standing to challenge the conveyance as fraudulent." *Id.*; see NTL Cap., LLC v Right Track Recording, LLC, 73 AD3d 410, 412 (1st Dept. 2010) (DCL fraudulent transfer claims refuted by evidence that claim of first-priority, secured creditor far exceeded value of defendant debtor's foreclosed-upon assets and dwarfed plaintiff's unsecured claim, such that "there would have been no property available to satisfy plaintiff's claims even if there had been no fraudulent conveyance").

Here, White Oak's submissions establish that its approximately \$3.5 million claim far exceeded the roughly \$590,000 value of Esquire Footwear's foreclosed-upon assets, as well as the plaintiff's \$1.45 million unsecured claim. The plaintiff thus lacked any equity in Esquire Footwear's foreclosed-upon assets because there would have been no property available to satisfy the plaintiff's claims even if there had been no allegedly fraudulent foreclosure sale. Accordingly, the plaintiff lacks standing to challenge the foreclosure sale as a fraudulent conveyance, vitiating its claims against White Oak in the sixth and seventh causes of action for aiding and abetting a fraudulent transfer. See Chemtex, LLC v St. Anthony Enterprises, Inc., *supra*; NTL Cap., LLC v Right Track Recording, LLC, *supra*.

For the same reason, White Oak is entitled to summary judgment dismissing the fifth cause of action for aiding and abetting breach of fiduciary duty. To establish a claim for aiding and abetting breach of fiduciary duty, the plaintiff must plead and later prove, *inter alia*, that it suffered damage as a result of the breach. Kaufman v Cohen, 307 AD2d 113, 125 (1st Dept. 2003). Here, the alleged breach is Saada's purportedly fraudulent dissipation of Esquire Footwear's assets by transferring those assets to Esquire Brands. Leaving aside that the disputed transfer was in fact a foreclosure sale initiated by White Oak, the evidence submitted demonstrates that the plaintiff did not suffer damage as a result of the alleged breach because Esquire Footwear was woefully insolvent at the time of the foreclosure sale. As already discussed above, even if the foreclosure sale were reversed, there would be no equity available to satisfy the plaintiff's unsecured claim.

Accordingly, it is


ORDERED that the motion of defendants Esquire Footwear Brands, LLC and Isaac Saada to dismiss, pursuant to CPLR 3211(a)(7), the second, third, fourth, and a portion of the first cause of action (MOT SEQ 001) is granted in part, to the extent that the second and third causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that defendants Esquire Footwear Brands, LLC and Isaac Saada shall file an answer to the remaining causes of action within 20 days, and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendant White Oak Commercial Finance, LLC for summary judgment in its favor dismissing the fifth, sixth, and seventh causes of action (MOT SEQ 002) is granted and those claims are hereby dismissed; and it is further

ORDERED that the parties shall appear for a preliminary conference on January 18, 2024, at 12:30 pm., as previously scheduled.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/15/2024
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			DENIED		OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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