Cohen v Cohen
2024 NY Slip Op 34126(U)
November 20, 2024
Supreme Court, New York County
Docket Number: Index No. 655036/2022
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** ***Justice*** **PART** **38M**

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JERI COHEN,

Plaintiff,

- v -

JEFFREY COHEN, CRED PARTNERS LLC D/B/A CORPORATE BAILOUT PARTNERS, CRED HOLDINGS LLC, JOSEPH VOLPE, RECET LLC, CAPITAL AND CASH PARTNERS LLC, f/k/a GOLDEN PEAR MERCHANT CAPITAL LLC, d/b/a OQUITY, and ORCHARD STREET FUNDING LLC,

Defendants.

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INDEX NO. 655036/2022

MOTION DATE 04/14/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, and 103

were read on this motion to DISMISS.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, defendant Jeffrey Cohen's motion to dismiss the complaint against him or, in the alternative, to treat the motion as one for summary judgment pursuant to CPLR 3221 (c), is granted to the extent of dismissing the action against him, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 13-14, 47, 97, 100) and the exhibits attached thereto, in which the court concurs, as summarized herein. Plaintiff's cross-motion to convert the motion to one for summary judgment in her favor pursuant to CPLR 3211 (c) is denied.

In this action brought pursuant to Debtor and Creditor Law ("DCL") sections 273, 276, and 276-a, plaintiff had previously obtained a judgment against defendants Capital and Cash

Partners LLC, formerly known as Golden Pear Merchant Capital LLC, doing business as Oquity ("CCP"), and Orchard Street Funding LLC ("OSF") (the "judgment debtors"). After taking extensive post-judgment enforcement discovery, plaintiff commenced this action, alleging that defendant Cohen, as managing member of the judgment debtors, orchestrated a series of fraudulent conveyances by which the judgment debtors transferred almost $2 million, first to defendant Cred Partners LLC, doing business as Corporate Bailout Partners ("Cred P"), and then to defendant Recet LLC to carry on Cred P's business after Cred P failed (verified complaint, NYSCEF Doc. No. 2, ¶¶ 1-8). Through various means, plaintiff alleges that defendant Cohen was the managing member of both Cred P and Recet, as well as defendant Cred Holdings LLC ("Cred H"), one of the two equal members of Cred P (*id.*, ¶¶ 15-26).

Plaintiff alleges four causes of action against defendant Cohen: the first cause of action for fraudulent conveyance pursuant to DCL § 273; the fifth cause of action for fraudulent conveyance pursuant to DCL §§ 276 and 276-a; the sixth cause of action for alter ego liability; and the seventh cause of action for breach of contract. Defendant moves to dismiss the complaint based on documentary evidence (CPLR 3211 [a] [1]) and failure to state a cause of action (CPLR 3211 [a] [7]).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together

manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

DCL § 273 provides that

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Prior to April of 2020, DCL § 276 provided that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors (DCL former § 276, now § 273 [a] [1]). Thus, both the first and the fifth causes of action arise out of DCL § 273. DCL § 276-a merely provides for attorneys' fees to the successful plaintiff in a fraudulent conveyance action.

It is settled law that a cause of action under the DCL does not arise as to anyone not a transferor, transferee, or beneficiary of the alleged fraudulent conveyance (*Berisha v 4042 E.*

Tremont Café Corp., 220 AD3d 608, 610 [1st Dept 2023]). A beneficiary of a conveyance is one who receives and has "dominion over the transferred funds" (*YH Lex Estates LLC v Bartolacci*, 222 AD3d 545 [1st Dept 2023]). The complaint is devoid of allegations that defendant Cohen ever received any monies from Cred P or Recet, let alone any of the transferred funds specifically. The transfer parties were the judgment debtors, Cred P, and Recet alone (*Farm Stores, Inc. v School Feeding Corp.*, 102 AD2d 249, 256 [2d Dept 1984], *affd in part, appeal dismissed in part*, 64 NY2d 1065 [1985] ["Rather, the liability of each SFC shareholder must be limited to the amount he wrongfully received"]).

Plaintiff effectively concedes in her opposition to the motion that defendant Cohen was neither the transferor nor the transferee of the alleged fraudulent conveyances. She argues, however, that defendant Cohen should be considered a beneficiary of the transfers due to a variety of related benefits he allegedly received as a result of the transfers, including: accounting entries and a bad debt write-off relating to the transfers to Cred P; a settlement of an antecedent debt; and the receipt by Cred P of certain payments from other entities. None of these allegations are sufficient.

An accounting write-off that did not affect the judgment debtor's ability to pursue Cred P, and other associated accounting entries, are not a conveyance within the meaning of the DCL (*White Plains Plaza Realty, LLC v Cappelli*, 188 AD3d 898, 900 [2d Dept 2020]). There is no allegation in the complaint or in the record on this motion that the judgment debtors released Cred P from its obligations. Likewise, settlement of an antecedent debt is not a voidable conveyance pursuant to the DCL when made in good faith (*Eagle Eye Collection Corp. v Shariff*, 190 AD3d 600 [1st Dept 2021] ["a conveyance which satisfies an antecedent debt made while the debtor is insolvent is neither fraudulent nor otherwise improper"] [internal citations and

quotation marks omitted]). The judgment debtors' decision to settle a prior action brought by a different investor, years prior to the instant action, is not a violation of the DCL (*Ultramar Energy Ltd. v Chase Manhattan Bank, N.A.*, 191 AD2d 86, 91 [1st Dept 1993] ["Even though insolvent, a debtor may properly assign assets to a creditor as security for an antecedent debt although the effect of the transfer will be to prefer that creditor"]). Finally, plaintiff's allegations that defendant Cohen was a member of Cred P and Recet, which either made payments to or received funds from other entities in which he was also involved is simply too attenuated to be a voidable conveyance under the DCL (*4042 E. Tremont Café Corp v Sodono*, 177 AD3d 456, 458 [1st Dept 2019] [receipt of payments by LLC not a voidable conveyance as against LLC member]).

Turning to the sixth cause of action for alter ego liability, New York law does not recognize a stand-alone cause of action for such a claim (*Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.*, 127 AD3d 479, 480 [1st Dept 2015]). Further, in order to pierce the veil of an entity to reach its individual owners requires allegations that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). "[D]omination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required" (*id.* at 141-42). Here, plaintiff alleges that the judgment debtors' assets were given to other creditors and to defendant Cohen's other businesses to pay operating expenses. Nowhere in the complaint, however, does allege any wrongful conduct by defendants directed specifically at her. Accordingly, veil piercing to hold defendant Cohen personally liable is not warranted on the allegations of the complaint (*Aspire Music Group, LLC v Cash Money*

Records, Inc., 169 AD3d 441, 441-42 [1st Dept 2019] ["These allegations describe legitimate business conduct; there is no indication that Universal engaged in this conduct for the purpose of harming plaintiff"]).

Finally, the seventh cause of action alleges a breach of the judgment debtors' operating agreements. Plaintiff is undisputedly not a party to the agreements or a member of the judgment debtors. Generally, only the parties to a contract may sue for its breach (*Parker & Waichman v Napoli*, 29 AD3d 396, 399 [1st Dept 2006]). Plaintiff argues, based on some language in the operating agreements, that she is a third-party beneficiary of the operating agreements. Such a claim requires allegations of "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (*State of California Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-35 [2000]). There are no allegations in the complaint to support the idea that the operating agreements were intended for plaintiff's benefit. The language relied on by plaintiff is that "Third Parties dealing with the Company shall be entitled to rely conclusively upon the power and authority of the Managing Member to manage and operate the business affairs of the Company" (NYSCEF Doc. Nos. 18, 19, § 5.1.2). The court reads such language to provide that the managing member shall have authority to bind the judgment debtors, and that third-parties may rely on such authority, not that third parties are entitled to any substantive benefit thereby. The court is not empowered to creatively interpret these unambiguous words otherwise (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] ["courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"]).

As the motion to dismiss is granted, so much of the motion as seeks conversion of the motion to one for summary judgment pursuant to CPLR 3211 (c) is dismissed as moot, as is plaintiff's cross-motion. Moreover, the court notes that plaintiff may not avail itself of a motion for summary judgment prior to issue being joined by way of CPLR 3211(c) conversion (*City of Rochester v Chiarella*, 65 NY2d 92, 102 [1985] ["The motion is available to a party attacking a pleading who has not pleaded yet, a defendant moving against a complaint before answering, for example, but it may not be used by a pleader . . . to foreclose a responsive pleading before an opponent has had the chance to answer the claim"]).

Accordingly, it is hereby

ORDERED that defendant Jeffrey Cohen's motion to dismiss the complaint against him is granted, and plaintiff's cross-motion to convert the motion to one for summary judgment in her favor is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of said defendant dismissing the action against him; and it is further

ORDERED that the action is severed and continued as to the remaining defendants.

This constitutes the decision and order of the court.

ENTER:

11/20/2024					
DATE				LOUIS L. NOCK, J.S.C.	
CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION		
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER	
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER		
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