

Medical Prods., Inc. v Goldstein
2012 NY Slip Op 31175(U)
April 19, 2012
Supreme Court, Nassau County
Docket Number: 22530/09
Judge: Robert A. Bruno
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
PRESENT: HON. ROBERT A. BRUNO, J.S.C.**

-----X

MEDICAL PRODUCTS, INC.,

Plaintiff,

-against-

RICHARD GOLDSTEIN, IRA GOLDSTEIN,

Defendants.

-----X

**TRIAL/IAS PART 20
INDEX No.: 22530/09
Motion Date: 02/27/12
Motion Sequence: 001, 002**

DECISION & ORDER

Papers Numbered

<i>Sequence #001</i>	
Notice of Motion, Affidavit, Affirmation & Exhibits	1
<i>Sequence #002</i>	
Notice of Cross Motion	2
Affidavit in Reply and Opposition	3
Reply to Opposition	4

Upon the foregoing papers, it is ordered that this motion is decided as follows:

Defendants request an Order to dismiss complaint in its entirety pursuant to CPLR §3211(a)(7).

Plaintiff opposes said application and requests an Order for this Court to deny the defendants' motion to dismiss the complaint in its entirety and granting plaintiff's cross motion for summary judgment against the defendants in its entirety and awarding judgment against the defendants in the sum of \$93,030.95 with statutory interest thereon from October 19, 2009, plus reasonable attorneys' fees.

Motion by defendants, Richard Goldstein and Ira Goldstein for an Order of this Court, pursuant to CPLR§3211(a)(7) dismissing the complaint of the plaintiff, is denied.

Cross motion by plaintiff, Medical Products, Inc. for an Order of this Court, granting Summary Judgment, pursuant to CPLR §3212, awarding judgment against the defendants, in the amount of \$93,030.95, is denied.

By way of background, a breach of contract action regarding corporate entity, S.A. Medical Products, of which defendant Ira Goldstein was the sole operating officer, director and shareholder, was heard before this Court. Plaintiff was awarded a money judgment against the corporation and such judgment has not been satisfied in that funds are still due and owing to the plaintiff. Plaintiff then commenced, in November 2009, the underlying action seeking a declaratory judgment that the transfers of funds by the subject corporate entity to the defendants,

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are fraudulent conveyances pursuant to the relevant sections of the Debtor and Creditor Law, and seeking judgment against the individual defendants, plus costs and disbursements.

FACTS

S.A. Medical Products, Inc. according to the defendants, contracted with Medical Products to purchase supplies and it received shipment of such supplies during the time period of November, 2005 through September, 2006. According to the defendants, the corporation was unable to continue making payments to Medical Products due to the loss its sole customer. Shortly thereafter, the corporation ceased doing business. There is dispute as to the solvency of the corporation.

Plaintiff brought an action against the corporation before this Court under the caption, *Medical Products, Inc. v. SA Medical Products, Inc.*, Index No. 17000/07, and obtained a money judgment against the corporation in the amount of \$90,222.63. According to defendants, the plaintiffs restrained the corporate bank account and levied the amount of \$12,000.

Plaintiff, through its investigation, uncovered that disbursements were made from the corporation to the defendants, and other parties, and it concluded that the defendants were using corporate funds for their personal use and diverting funds for purposes of avoiding payment of the judgment.

ARGUMENTS

The plaintiff argues that defendants have intermingled the corporate assets with personal assets. Such is evinced by S.A. Medical Products' issuance of checks for payments of personal expenses, and to the defendants themselves. The total amount of such disbursements, based on the documentary evidence of statements from the corporation's Bank of America account, is \$188,569.75. As such, the corporation's insolvency was caused by fraudulent conveyances of its cash assets.

Plaintiff submits as supporting evidence: results of a NYS Department of State, Division of Corporations corporate search indicating plaintiff's and S.A. Medical Products, Inc.'s corporate existence; a copy of this Court's Judgment issued to plaintiffs against SA Medical Products, Inc.; copies of the pleadings; the transcript of Examination Before Trial of Richard Goldstein, and copies of the corporate Bank of America record.

Defendants argue that the plaintiff's allegations are conclusory and are therefore insufficient to sustain its causes of action. It is noted that they did not attach any documentary evidence except the plaintiff's complaint to support its motion to dismiss.

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DISCUSSION

DEFENDANT'S MOTION TO DISMISS

As there is no supporting evidence, defendants' motion is based on the sufficiency of the complaint. When a motion is based on a failure to state a cause of action, the complaint's legal sufficiency is judged solely on the face of the allegations and no consideration of the facts alleged in support of the motion will be permitted.

Said another way, the Court's scope of review is narrow and it is limited to ascertaining as to whether the pleading states any cognizable cause of action (see *Hogan v. New York State Office of Mental Health*, 115 AD2d 638 [2nd Dept 1985]) In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (see *Heffez v. L & G General Const., Inc.*, 56 AD3d 526 [2nd Dept 2008]).

Further, on a motion to dismiss for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiffs and all factual allegations must be accepted as true (see *Holly v. Pennysaver Corp.*, 98 AD2d 570 [2nd Dept 1984], *Wayne S. v County of Nassau, Dept. of Social Servs.*, 83 AD2d 628 [2nd Dept 1981]). The nonmoving party is granted the benefit of every possible favorable inference (see *Kopelowitz & Co., Inc. v. Mann*, 83 AD3d 793 [2nd Dept 2011]).

CPLR §3013, states in relevant part, " statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." According to the commentary following the statute:

"...[t]he basic requirement..is that the pleading be 'sufficiently particular' to give 'notice' to the other side of the 'transactions' or 'occurrences' as seen by the pleader. As long as the pleading may be said to give such 'notice', in whatever terminology it chooses, this aspect of the CPLR 3013 requirement is satisfied...the practitioner need only see to it that the material elements are somewhere verbalized within the four corners of the complaint [citing *Gershon v. Goldberg*, 30 AD3d, 372 (2nd Dept 2006)]...Often today, a pleading is sustained with a mere reminder that the other side can get what further detail is needed from the disclosure devices..Sometimes the bill and the disclosure devices are cited together as covering gaps that the liberalization of pleadings is thought to have opened. [citing *Serio v. Rhulen*, 24 AD3d 1092 (3rd Dept 2005; *Pernet v. Peabody Eng'g Corp.*, 20 AD2d 781 (1st Dept 1964)]..." (see Practice Commentaries, CPLR §3013, Patrick M. Connors, C3013:2, C3013:3, C3013:8)

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Further, as provided in David Siegel's, *New York Practice*:

All pleadings must be liberally construed... Under the CPLR, if a cause of action can be spelled out from the four corners of the pleading, a cause of action is stated and no motion lies under CPLR [§]3211(a)(7) based on a failure to plead one....[the court wants] only to know whether it states a cause of action—any cause of action. If it does, it's an acceptable CPLR pleading...It's not necessary that the claim pleaded be given any particular name. It can even be named wrong... It's sufficient if the pleading alleges any cause of action that the law recognizes and on which it offers relief...*Giving notice is the key*. It has sometimes even been held under the CPLR that if the other party has gotten the requisite notice from some other source in the case, such as statements written on the summons itself, the notice requirement may be deemed satisfied... CPLR [§]3026 says that pleadings shall be liberally construed. Even more significantly, it adds that “[d]efects shall be ignored if a substantial right of a party is not prejudiced” (see N.Y. Prac. § 208 [5th ed.] *New York Practice*, David D. Siegel, Chapter 9. A. Basic Rules of Pleading).

Here, the complaint alleges: that plaintiffs were awarded a judgment against the subject corporation, the balance of which is outstanding; that a special relationship exists between the corporate entity and the two defendants; that S.A. Medical Products Inc.'s corporate business was not conducted in a manner consistent with corporations; and that the corporation conveyed funds to the defendants with intent of frustrating and/or hindering payment of the subject judgment. As stated in the foregoing, the court's inquiry is limited to ascertaining whether the pleading states *any* cause of action, and not whether there is evidentiary support for the complaint (see *Holly v. Pennysaver Corp.* 98 AD2d 570 [2nd Dept1984], *Heffez v. L & G General Const., Inc.*, 56 AD3d 526 [2nd Dept 2008]).

Accordingly, contrary to the defendants' contention, the allegations of the complaint sufficiently set forth causes of action under the Debtor and Creditor Law (see *Prestige Caterers, Inc. v. Siegel*, 88 AD3d 679 [2nd Dept 2011]). Viewing the complaint liberally and in the light most favorable to plaintiff, this Court finds it sufficiently particularized to sustain an action for piercing the corporate veil and assigning personal liability to defendant. Defendant, as sole shareholder, is alleged to have exercised complete dominion and control over the corporation and to have fraudulently conveyed corporate assets to avoid the corporation's obligations to the plaintiff (see *9 East 38th Street Associates, L.P. v. George Feher Associates*, 226 AD2d 167 [1st Dept 1996]). Further, based on the defendants' verified answer, there is no evidence of prejudice in that they tendered specific responses to the allegation as set forth by the plaintiff, and such responses certainly evince notice.

As to the cause of action under DCL §273, “[e]very conveyance made ... by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made ... without a fair consideration.” Plaintiff sets forth that the

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corporation did not follow the formalities and/or requirements of corporate existence, failed to adequately fund the corporation, and whatever funds were disbursed, were paid to the two defendants, one of which was the sole shareholder of the corporation.

Defendants argue that these allegations are merely conclusory as they are not specific. Under the prevalent policy of “notice pleading” embodied in CPLR Article 30, a pleading need only “give notice of the event out of which the grievance arises” (Siegel, N.Y. Prac § 208, at 301 [4th ed]). Under the prior Civil Practice Act, a pleader was required to state “facts,” but was not required to produce “evidence” (see *Pludeman v. Northern Leasing Sys.*, 10 NY3d 486 [2008]).

CPLR §3016(b) provides that an action for fraud must be pled “with particularity, including specific dates and items, if necessary and insofar as practicable. However, the pleading requirements of the statute do not extend to every potential detail, but, rather, have the purpose of informing the defendants of incidents complained of. Furthermore, CPLR §3211(d) allows for latitude in pleading requirements for facts unavailable to the plaintiff (see *Pludeman v. Northern Leasing Sys.*, supra).

The cause of action under DCL §273–a, which provides that “[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment”, has also been sufficiently pleaded. Defendants, by their failure to offer any arguments or proofs related to the fairness of the consideration for the challenged transfers, cannot prevail on a motion to dismiss this cause of action.

Plaintiff also alleges causes of action pursuant to Debtor and Creditor Law §§ 274, 275 and 276, in that defendants acted with intent to defraud it as its creditor. The sections provide that conveyances 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(see *Parsons & Whittemore v. Abady Luttati Kaiser Saurborn & Mair, P.C.*, 309 AD2d 665 [1st Dept 2003]).

Generally, conclusory allegations of fraud will not be sufficient (CPLR §3016[b]); However, it is sufficient to plead facts that would allow a reasonable inference of the alleged fraud. Where concrete facts are within the knowledge of the party charged with fraud, it would work a potentially unnecessary injustice to dismiss a case at an early stage where any pleading deficiency might be cured later in the proceedings (see *Paolucci v. Mauro*, 74 AD3d 1517 [3rd Dept 2010]).

Historically, it was accepted that the general allegation that a conveyance or transfer of

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property was made with the intent to hinder, delay, and defraud creditors is broad and sweeping in its operation and effect. It involves many elements, and may, before it can be deemed established, require proof of many other facts and circumstances, which may be given in evidence under the general charge, without inserting them in the pleading (see *Citizens' Nat. Bank v. Hodges*, 30 NYS at 447 [Sup Ct, Saratoga County, 3rd Dept 1894]). As such, plaintiff is not required to provide any further detail supporting its allegations at this early stage of the litigation.

At this point, the plaintiff generally has no obligation to demonstrate evidentiary facts to support the allegations contained in the complaint—even if those allegations alone, though fitting the general requirements to pierce the corporate veil, are insufficient for judgment (see *Stuart Realty Co. v. Rye Country Store*, 296 AD2d 455, 456 [2nd Dept 2002]).

This Court has considered the defendants' other arguments and has determined that they are unavailing. Accordingly, the motion to dismiss, is denied.

PLAINTIFFS' CROSS MOTION

The standards for summary judgment are well settled. A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626[2nd Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact (*Ayotte v. Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320, *supra*; *Miceli v. Purex*, 84 AD2d 562 [2d Dept. 1981]). Once the this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial.

Piercing the corporate veil is an equitable doctrine which allows courts to disregard the corporate form whenever necessary to prevent fraud and hold corporate owners liable for the corporations' obligations (see *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, *State of New York v. Robin Operating Corp.*, 3 A.D.3d 769, 771,[2004]). This is a fact-based determination which generally requires a showing that the owners exercised complete domination of the corporation with respect to the transaction or matter at issue, and used that control to perpetrate a fraud or wrong against the plaintiff which led to the plaintiff's injury (see

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Old Republic Natl. Tit. Ins. Co. v Moskowitz, 297 AD2d 724, 725 [2nd Dept 2002]; *Hyland Meat Co. v Tsagarakis*, 202 AD2d 552 [2nd Dept 1994]).

The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene (see *Heim v. Tri-Lakes Ford Mercury, Inc.*, 25 A.3d 901 [3rd Dept 2006]). The decision whether to pierce the corporate veil in a given instance depends on the particular facts and circumstances. As already stated herein, veil-piercing is a fact-laden claim that is not well suited for summary judgment resolution (see *Damianos Realty Group, LLC v. Fracchia*, 35 AD3d 344 [2nd Dept 2006]).

Under the doctrine of fraudulent conveyance, courts have noted that direct evidence of fraudulent intent is often elusive. Therefore, intent may be inferred from facts and circumstances that are usually present in fraudulent transfers (see *Steinberg v. Levine*, 6 AD3d 620 [2nd Dept 2004]). Such facts and circumstances include but are not limited to, the close relationship among the parties to the transaction, the inadequacy of the consideration, the transferor's knowledge of the creditor's claims and the transferor's inability to pay them, and the retention of control of property by the transferor after the conveyance (see *O'Brien-Kreitzberg & Associates v. K.P., Inc.*, 218 AD2d 519 [1st Dept 1995]; *Dempster v. Overview Equities, Inc.*, 4 AD3d 495 [2nd Dept 2004]).

Although the record does indicate a close relationship between the corporate entity and the defendants, the record is devoid of evidence that there was any actual conveyance of monetary assets for purposes of rendering S.A. Medical Products, Inc. insolvent or for the purposes of diverting funds to avoid creditors. In order to establish the existence of a constructively fraudulent conveyance, the plaintiff creditor must prove that the conveyances by the subject corporation were made without "fair consideration" (Debtor and Creditor Law § 273-a). The question of what constitutes fair consideration is generally one of fact, to be determined under the circumstances of the particular case (see *Wagman v. Lagno* 141 AD2d 720 [2nd Dept 1988]).

Insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under §273, and the burden of proving these elements is upon the party challenging the conveyance (see *Joslin v. Lopez*, 309 AD2d 837[2nd Dept 2003]). Here, the evidence indicates that there were substantial checks written against the account up until August, 2007; however, it only indicates, at this point, that the defendants elected to issue payment to other parties as opposed to plaintiff.

It is noted that there is pertinent information and/or documentary evidence that was not available to the plaintiffs at that time of the instant motion; the amount Ira Goldstein was paid as income reported to the appropriate state and federal agencies, and the quarterly corporate

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business filings, prepared by its accountant. It is also noted that defendant, Richard Goldstein, maintains that the corporate business records were stored in computers that the defendants "got rid of" (Notice of Motion, Exhibit F, Tr. Richard Goldstein, p. 25, ln. 15-24.)

In sum, the plaintiff has not yet established that the judgment debtor's assets were actually conveyed to another party or conveyed without fair consideration; that a transfer was made while its action against the judgment debtor was still pending; that the transfer rendered the judgment debtor insolvent; that circumstances suggest the judgment debtor acted with actual intent to defraud, or that the assets were secreted, disposed of, commingled or expended for the personal use by the defendants (see *Riback v. Margulis*, 43 AD3d 1023 [2nd Dept 2007], *WBP Cent. Associates, LLC v. DeCola*, 50 AD3d 693 [2nd Dept 2008]).


Accordingly, the defendants' motion to dismiss is denied. The plaintiff's cross motion is denied. The matter is to be set for a conference in this part on May 22, 2012.

All matters not decided herein are DENIED.

This constitutes the decision and order of this Court.

Dated: April 19, 2012
Mineola, New York

ENTER:


Hon. Robert A. Bruno, J.S.C.

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