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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54
Justice

501 5TH AVE CO

- v -

YOGA SUTRA LLC

INDEX NO. 110536/10
MOTION DATE 3/8/11
MOTION SEQ. NO. 001
MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

E-Filed

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	PAPERS NUMBERED 5-10, 5-19,
Answering Affidavits — Exhibits	21-23, 25-35,
Replying Affidavits	38

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/20/12

JUSTICE SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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501 FIFTH AVENUE COMPANY, LLC,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 110536/2010

YOGA SUTRA, LLC, ANDY M. SCHWARTZ, LISA BRIDGE, GORDON BRIDGE, DAVID KELMAN, and YOGA SUTRA NYC, LLC a/k/a ABC, LLC,

Defendants.

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SHIRLEY WERNER KORNREICH, J.

Motion Sequences 001, 002 and 003 are consolidated for disposition.

Background

As this is a motion to dismiss, the facts in the verified complaint and plaintiff's affidavits are accepted as true and given the benefit of every favorable inference. *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 (1976); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005); *Cron v Hargro Fabrics*, 91 NY2d 362, 366 (1998); *R.H. Sanbar Projects, Inc. v. Gruzen Partnership*, 148 A.D.2d 316 (1st Dept. 1989). The facts below are drawn from those sources.

This action involves the lease for the second floor of premises owned by plaintiff, which are located at 501 Fifth Avenue in Manhattan (Premises). The lease, dated May 20, 2004, originally was between plaintiff, 501 Fifth Avenue, LLC, as landlord (Landlord) and Skillful Living, Inc., as tenant, for a term ending February 28, 2015 (Lease). Skillful Living merged with defendant Yoga Sutra, LLC (Tenant) in 2006. In 2009, defendant Andy M. Schwartz (Schwartz) became the

Tenant's principal. Upon the assignment of the Lease, Schwartz guaranteed the Tenant's obligations under the Lease pursuant to a limited guaranty executed on July 28, 2009 (Schwartz Guarantee). The Tenant, which operated a yoga studio, vacated the space on June 30, 2010. Defendant Lisa Bridge was the Tenant's manager.

Section 11 of the Lease provides:

> Tenant for itself, ...its successors and assigns expressly covenants that it shall not assign ... this agreement, nor underlet, or suffer or permit the demised premises or any part thereof to be used by others, without the prior written consent of Owner in each instance. Transfer of the majority of the stock of a corporate tenant ... shall be deemed an assignment. If this lease be assigned, or if the demised premises or any part thereof be underlet or occupied by anybody other than Tenant, Owner may, after default by Tenant, collect rent from the assignee, under-tenant or occupant ....

Section 3 of the Lease provides that:

> All fixtures ... installed in the demised premises at any time, either by Tenant or by Owner on Tenant's behalf, shall upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises....

The Schwartz Guarantee provides that he will not be liable for rent or other charges accruing under the Lease after surrender of the Premises upon written notice, if the Tenant vacated and surrendered the Premises:

> free of all subleases or licenses and in broom clean condition and as otherwise required by the lease and with all monetary obligations paid in full through the vacate date.

In October 2009, the defendants Lisa Bridge and her father, Gordon Bridge (collectively, Bridge Defendants), attempted to renegotiate the Lease with the Landlord. Gordon Bridge said he wanted to purchase the yoga studio for Lisa to operate. The Landlord declined to renegotiate. Nonetheless, in November 2009, Gordon Bridge and Schwartz, the principal of Tenant, executed three agreements on behalf of themselves and entities in which they were interested.

Tenant entered into an Asset Purchase Agreement (APA) with Bridge Enterprises, LLC, a New Jersey limited liability company (Bridge Enterprises), pursuant to which Bridge Enterprises promised to buy Tenant's assets, but not to assume its Lease. The purchase price was $50,000. The APA provided that from November 1, 2009 through the closing, Bridge Enterprises would pay all of the expenses of Tenant's business, including the rent under the Lease, so long as the yoga studio occupied the Premises. The APA further provided that Lisa Bridge had been an employee of Tenant, had been responsible for the administration of the business, had been responsible in part for keeping its accounting records and was fully familiar with its operations and liabilities. Tenant also entered into an Interim Funding Agreement with Bridge Enterprises, under which Bridge Enterprises took over all operations of Tenant's business from November 1, 2009 until the closing of the APA. The Interim Funding Agreement provided that Bridge Enterprises would not communicate with the Landlord about the termination of Tenant's business.

The third agreement was a consulting agreement with Schwartz (Consulting Agr), which provided that he would be paid $150,000 for consulting services for 31 months after Bridge Enterprises closed on its purchase of Tenant. The services consisted of providing "advice, judgment and knowledge with respect to [Bridge Enterprises'] operations, finances, systems management, team building, marketing and motivational techniques." Pursuant to the Consulting Agr, Schwartz did not have to be physically present or render services exclusively to Bridge Enterprises. Schwartz signed the APA and Interim Funding Agreement on behalf of Tenant and the Consulting Agr for himself, individually. Gordon Bridge signed all three contracts for Bridge Enterprises.

In May 2010, Schwartz notified the Landlord that Tenant would vacate the Premises by

June 30, 2010. The Bridge Defendants told the Landlord that Yoga Sutra NYC, LLC (New Entity) had purchased Tenant's assets and would operate a yoga studio at 6 East 39th Street (New Location), near the Premises.[1] Days thereafter, Lisa Brown notified Tenant's clients by e-mail that she and her father were acquiring Tenant's assets and would do business starting July 1, 2010 as Yoga Sutra NYC at the New Location. The announcement promised that the Yoga Sutra NYC would be staffed with Tenant's former staff and that Tenant's class packages, memberships, teacher training agreements and teacher agreements would be honored.

As of June 30, 2010, Tenant and Bridge Yoga, entered into an Amended Asset Purchase Agreement, dated June 30, 2010 (Amended APA), which substituted Bridge Yoga for Bridge Enterprises as the Purchaser and lowered the purchase price to $18,750. The Amended APA, like the APA, provided that Bridge Yoga would purchase Tenant's assets, but not assume the Lease obligations.[2] It also provided that upon execution of the Amended APA, the Interim Funding Agreement would be terminated. An Amended Consulting Agreement with Schwartz also was signed on June 30, 2010. It reduced Schwartz's compensation to $56,250. Lisa Bridge signed the Amended APA and Amended Consulting Agreement for Bridge Yoga; Schwartz signed for Tenant and himself individually.

The Amended APA, §4.5, recites that Bridge Yoga had been the manager and operator of Tenant since November 1, 2009. The same section provides that Bridge Yoga agreed to cooperate

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[1]Plaintiff states that there is no record on file with the New York Secretary of State that reflects the formation of the New Entity. An Amended APA, dated as of June 30, 2010, reflects that Bridge & Bridge Yoga, Inc. (Bridge Yoga), purchased Tenant's assets. Page 1 of the Amended APA says Bridge Yoga is a New York corporation, but page 5 says it is a New Jersey limited liability company validly existing in good standing under the laws of the State of New York.

[2]There is an exception, a 2008 rent obligation, for which Bridge Yoga agreed to pay a part.

with Tenant to terminate the Lease prior to closing and to minimize the potential liability of Tenant upon termination, "including any potential claim pursuant to the "good guy" clause" against the Tenant's principal.

The cross-claim filed by Schwartz and Tenant in this action alleges that Bridge Yoga, the New Entity and the Bridge Defendants failed to leave the Premises in broom clean condition, removed fixtures that damaged the space, and failed to take photos or let Tenant inspect the Premises prior to leaving. Gordon Bridge's affidavit in support of the Bridge Defendants' motion states that "neither the Tenant nor its representative have any ownership interest or ongoing relationship with our new business." He adds that the Bridge Defendants "had no interest in how Tenant handled its relationship with Plaintiff [Landlord], other than to leave the Leased Space in good, clean condition at the time we had the assets moved from that location, which we did."

The complaint contains the following causes of action: 1) breach of the Lease by Tenant; 2) tortious interference with contract against the Bridge Defendants; 3) fraudulent conveyance, pursuant to Debtor and Creditor Law (DCL) §§ 273 and 274, against Defendant Schwartz and the Bridge Defendants; 4) fraudulent conveyance, pursuant to DCL §278, against Schwartz, the Bridge Defendants, Tenant and the New Entity, a/k/a, the fictitiously named entity; and 5) recovery under the Schwartz Guaranty.

The parties agree that Tenant paid rent through the time it vacated the Premises and that the premises have been relet. Tr. 3/8/11. The annual rent in June 2010 was $233,971.71, payable monthly in installments of $19,497.64. The Landlord's remaining alleged damages include the cost of repairs caused by removal of fixtures and putting the Premises in broom clean condition. *Id.*

Motions Before the Court

The Bridge Defendants (Seq. 001) and Schwartz (Seq. 002) move to dismiss the complaint for failure to state a cause of action. CPLR 3211 (a)(7). The Landlord opposes both motions and states that it needs disclosure of facts to support its claims. Defendant David Kelman had moved (Seq. 003) to dismiss the complaint, but that motion is moot as the Landlord discontinued its claims against him.

Discussion

I. Bridge Defendants' Motion

The Bridge Defendants move to dismiss the tortious interference with contract claim for failure to allege intentional, tortious or criminal actions and failure to allege but/for causation. They move to dismiss the claims under the DCL §§ 273, 274 and 278 on the ground that the Landlord's allegations that the Tenant was rendered insolvent and that its assets were purchased for less than fair consideration are legal conclusions without factual support.

A. Tortious Interference with Contract

The elements of a claim for tortious interference with contract are: 1) the existence of a valid contract with a third party; 2) defendant's knowledge of the contract; 3) defendant's intentional and improper procuring of a breach; and 4) damages. *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 (2007). Breach of a binding agreement and interfering with a nonbinding "economic relation" can both be torts, but the elements of the two torts are not the same. *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 189 (2004). Where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. *Id.* at 189-190. Where a suit is based on interference with a non-

binding economic relationship, the plaintiff must show that defendant's conduct was not "lawful" but "more culpable," such as a crime or an independent tort, or conduct intended to inflict harm on the plaintiff. *Id.* at 190; *see also*, *Havana Central NY2 LLC v Lunney's Pub, Inc.*, 49 AD3d 70 (1st Dept 2007). As noted by the Court in *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 425-426:

> While New York law recognizes the tort of interference with both prospective and existing contracts, "greater protection is accorded an interest in an existing contract (as to which respect for individual contract rights outweighs the public benefit to be derived from unfettered competition) than to the less substantive, more speculative interest in a prospective relationship (as to which liability will be imposed only on proof of more culpable conduct on the part of the interferer)."

In a contract interference case, a defendant may raise as a defense that it acted to protect its own legal or financial stake in the breaching party's business. *White Plains Coat & Apron*, 426. Examples of a financial stake are where: defendant is a significant stockholder in the breaching party's business; defendant and the breaching party have a parent-subsidiary relationship; defendant is the breaching party's creditor; and defendant has a managerial contract with the breaching party at the time defendant induced the breach. *Id.* Where the defendant has an economic interest to protect, in order to recover for tortious interference with contract, the plaintiff must show malice, fraud, illegal conduct, or some degrees of economic pressure, but not persuasion alone. *Foster v Churchill*, 87 NY2d 744 (1996)(even where defendants acted in bad faith, actions taken for economic health of company were defense to tortious interference with contract absent malice or illegal conduct); *Felsen v Sol Café Mfg. Corp.*, 24 NY2d 682 (1969)(defense of economic interest defeats tortious interference with contract absent proof of malice or fraudulent or illegal conduct).

Here, plaintiff has stated a claim against Gordon Bridge for interference with the Lease.

The Bridge Defendants clearly were aware of the Lease. Moreover, Gordon Bridge expressly agreed in the Amended APA that Bridge Yoga would attempt to break the Lease and minimize the liability of Tenant and Schwartz to the Landlord. The Landlord does not need to prove intentional, tortious or criminal actions to recover for Gordon Bridge's tortious interference with the Lease because he had no interest in Tenant's business. However, malice, fraudulent or illegal conduct would be required to maintain the cause of action against Lisa Bridge, if she had a management contract with Tenant. There is no management contract with Lisa Bridge in the record. The Interim Funding Agreement is with Bridge Enterprises, not Lisa Bridge. Therefore, the motion is denied as to Lisa Bridge as well.

With respect to but/for causation, the Landlord's opposing affidavit states that the Bridge Defendants conspired with Schwartz and tortiously interfered with the Lease when they purchased Tenant's assets and good will, instead of its shares, and did not assume Tenant's obligations under the Lease. The contracts in the record are sufficient to raise an issue of fact as to whether the Bridge Defendants conspired with Schwartz to orchestrate breaches of the Lease, including the operation of the yoga studio by Bridge Enterprises beginning in November 2009 without the Landlord's consent, the removal of fixtures from the Premises, the agreement to try to limit the liability of Tenant and Schwartz to the Landlord, and the agreement to purchase assets instead of stock and pay Schwartz a consulting fee in order to avoid the assignment clause in the Lease.

B. Debtor & Creditor Law Claims

The Bridge Defendants move to dismiss the DCL claims against them on the ground that plaintiff: 1) does not allege that the Bridge Defendants knew Tenant was committing a fraud, and 2) alleges only legal conclusions that Tenant sold its assets for less than fair consideration, and that the

transaction left it insolvent or with little capital, which is pled with insufficient particularity under CPLR 3016.

DCL §273 provides that:

> Every conveyance made and every obligation incurred 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 or the obligation is incurred without a fair consideration.

DCL §274 provides that:

> Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent.

DCL § 278 provides that:

> 1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,
>
> a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or
>
> b. Disregard the conveyance and attach or levy execution upon the property conveyed.
>
> 2. A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

The Landlord states that it needs disclosure in order to support its DCL claims and that there are sufficient facts alleged to infer a fraudulent conveyance.

The motion to dismiss the DCL claims against the Bridge Defendants is denied. Whether the consideration paid for the Tenant's assets was fair and whether the transaction rendered it

insolvent or with insufficient assets are essential to opposition, the facts are exclusively in the control of the moving parties, and there is some factual support for the claims. The record reflects that the Tenant conveyed all of its assets for $75,000 (most of which went to Schwartz as a consulting fee), when the rent reserved in the Lease was $20,000 per month. This is sufficient factual support for the inference that the conveyance left the Tenant with little or no money to satisfy its creditor, the Landlord. *Sargiss v Magarelli*, 12 NY3d 527 (2009)(allegations sufficiently particular to comply with CPLR 3016 if they apprise defendant of claim and fraud can be inferred reasonably from facts); *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492 (2008)(where concrete facts peculiarly within the knowledge moving party it is unjust to dismiss at early stage where pleading deficiency might be cured later). Finally, the question of fraudulent intent is almost always a question of fact.

II. Schwartz' Motion

Schwartz moves to dismiss the DCL causes of action against him (3rd and 4th) and the cause of action against him based on the Schwartz Guarantee (5th). He argues the DCL causes of action are insufficiently pleaded because they are conclusory and because Schwartz did not make or receive a transfer from Tenant. Schwartz moves to dismiss the 5th cause of action on the ground that, under the Schwartz Guarantee, he cannot be liable for rent through the remainder of the Lease term. Schwartz urges that if the Premises were not left broom clean, his liability would be limited to the cost of clean-up and rent for the time necessary to clean space.

Schwartz's motion is denied. There is sufficient factual particularity in the complaint. *See I(B), supra.* Schwartz is a proper defendant because liability for a fraudulent transfer is imposed on parties who are transferees of assets and beneficiaries of a conveyance. *Constitution Realty, LLC v*

Oltarsh, 309 AD2d 714, 716 (1st Dept 2003). Further, the Schwartz Guarantee states that Schwartz will not be held responsible if the Premises are vacated in a broom clean condition and as otherwise required by the Lease, with all monetary obligations paid in full through the date of surrender. The Lease, §3, required Tenant to leave the fixtures. The parties dispute whether the Premises were left broom clean and damaged by the removal of fixtures. Therefore, the 5th cause of action cannot be dismissed. Accordingly, it is

ORDERED that the motions by Lisa Bridge and Gordon Bridge (Seq 001) and Andy M. Schwartz (Seq 002) to dismiss the complaint's causes of action against them are denied; and it is further

ORDERED that the motion by David Kelman (Seq 003) to dismiss the complaint's causes of action against him is denied as moot; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 14, 2012 at 9:30 a.m. in Part 54, Room 228 of the courthouse located at 60 Centre St., New York, NY 10007.

Dated: January 20, 2012

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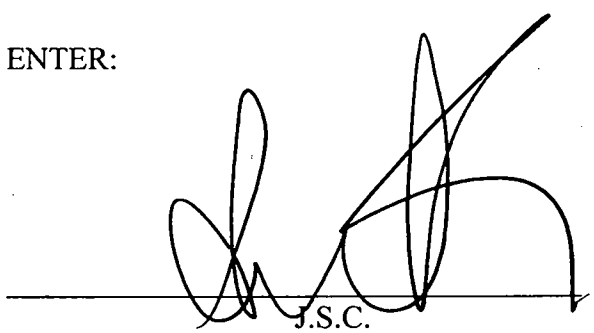

J.S.C.