Jefferies Fin. LLC v BGC Partners, Inc.
2016 NY Slip Op 32391(U)
December 5, 2016
Supreme Court, New York County
Docket Number: 651507/2016
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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JEFFERIES FINANCE LLC,

Plaintiff,

-against-

BGC PARTNERS, INC. et al.,

Defendants.

---x

Index No. 651507/2016

DECISION AND ORDER

Mot. Seq. 001 & 002

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, breach of contract, actual and constructive fraudulent conveyance, and unjust enrichment, Jefferies Finance LLC ("plaintiff" or "Jefferies") alleges that the named defendants unlawfully received assets that rightfully belongs to plaintiff, which arise out of an agreement by and among Jefferies, GFI Holdco, Inc., and JPI.

Defendants' Michael Gooch ("Gooch"), Colin Heffron ("Heffron"), Jersey Partners, Inc. ("JPI"), JPI Holdings LLC ("JPI Holdings"), and New JP LLC ("JPI LLC" collectively and together with Gooch, Heffron, JPI and JPI Holdings, the "JPI Defendants") move to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a claim (mot. seq. 001). Defendants' BGC Partners, Inc. ("BGC") and GFI Group Inc. ("GFI") move separately to dismiss the complaint pursuant to CPLR

3211(a)(7) for failure to state a claim (mot. seq. 002). Plaintiff opposes. The motions have been consolidated for purposes of this decision.

Facts

The root of the underlying action arises out of a $4 million fee in connection with an alleged breach of an agreement entered into on January 15, 2015 by and among Jefferies, GFI Holdco, Inc. ("GFI") and JPI (the "Side Fee Letter"). Prior to the Side Fee Letter, Jefferies agreed to provide $347 million in loan financing to GFI, formed by Gooch and Heffron to support a merger between GFI Holdco, Inc. and CME Group, Inc., an options and future exchange. Although the merger never occurred, Jefferies alleges it is still owed the commitment termination fee as outlined in the Side Fee Letter.

After the failure of the GFI-CME merger, BGC acquired GFI in a multi-stage hostile bid takeover. In February 2015, a majority of shareholders of GFI tendered their shares to BGC in exchange of $6.10 per share. Second, BGC acquired the remaining portion of GFI's common stock in January 2016 through a back-end merger. The result of this takeover is that GFI is now the wholly owned subsidiary of BGC.

Pursuant to this take-over, JPI merged into JPI LLC, which took on all of JPI's assets and liabilities, including the GFI shares and the commitment termination fee

as it pertains to the Side Fee Letter. Common stock of the now disbanded JPI became common stock in New JP, Inc. JPI LLC transferred the GFI Shares to JPI Holdings, which subsequently transferred them to New JP, Inc. The result of these transactions is that the liabilities of JPI remained with JPI LLC.

New JP, Inc. then merged with and into a BGC subsidiary, JPI Merger Sub 1, Inc. Next, New JP, Inc., which was the remaining entity after the merger with JPI Merger Sub 1, merged with and into Merger Sub 2, LLC, with the result being that Merger Sub 2, LLC is the surviving entity. Merger Sub 2, LLC subsequently merged with and into GFI, with GFI as the surviving entity.[1]

In its complaint, plaintiff alleges a cause of action for breach of contract against GFI, JPI, JPI Holdings and JPI LLC (count 1). See Compl. ¶¶51-57. Plaintiff also alleges a cause of action for actual and constructive fraudulent conveyance under N.Y. Debtor and Credit Law §§270-81 as against all defendants other than JPI (count 2 and count 3). See Compl. ¶¶58-65; 66-69 Under count 4, plaintiff alleges a cause of action for unjust enrichment against all named defendants. See Compl. ¶¶70-73.

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[1] Plaintiff agrees that New JPI Inc., JPI Merger Sub 1 and JPI Merger Sub 2, LLC no longer exist and that plaintiff "does not intend to pursue its claims against these three entities." Opp. At 9, fn. 6. Therefore, New JPI Inc., JPI Merger Sub 1 and JPI Merger Sub 2, LLC are dismissed from the action. Similarly, plaintiff's causes of action against BGC for unjust enrichment and constructive fraudulent conveyance and against JPI LLC for actual fraudulent conveyance are also dismissed as plaintiff has abandoned these claims.

Analysis

Legal Standard

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's 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 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

GFI's Motion to Dismiss Plaintiff's Claim for Breach of Contract

GFI's motion to dismiss plaintiff's claim for breach of contract is denied. In order to plead a breach of contract cause of action under New York law, a party must assert that the plaintiff and defendant made a contract, that consideration existed,

that the plaintiff performed, that the defendant breached the contract and that the plaintiff suffered damages as a consequence. See Cobble Hill Nursing Home, Inc. v. Henry and Warren Corp, 74 N.Y.2d 475, 483 (1989); Noise in the Noise in Attic Productions, Inc. v. London Records, 10 A.D.3d 303, 307 (1st Dept 2004). Plaintiff does not dispute that the Side Fee Letter was signed by Jefferies and JPI. Instead, plaintiff alleges that it has a valid cause of action against GFI for breach of contract because GFI is an indirect successor-in-interest to JPI's liabilities. See Opp. At 9.

Ordinarily "a corporation that purchases the assets of another corporation is not responsible for the liabilities of the seller corporation." Kretzmer v. Firesafe Prods. Corp., 24 A.D.3d 158, 158 (1st Dept 2005). However, the Court of Appeals has recognized four exceptions to this rule and a successor corporation may be held liable where "(1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations." Schumacher v. Richards Shear Co., Inc., 59 N.Y.2d 239, 245 (1983).

Plaintiff alleges that GFI entered into a "de facto" merger under the third prong outlined, *supra*. A de facto merger "occurs when a transaction, although not in form a merger, is in substance a consolidation or merger of seller and purchaser." Miller v. Forge Mench P'ship Ltd., 2005 WL 267551, at *7 (S.D.N.Y. Feb. 2, 2005).

Multiple factors may be considered in determining whether a de facto merger has occurred including continuity of ownership, cessation or ordinary business and dissolution of the acquired corporation, assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the acquired corporation and continuity of management, personnel, physical location, assets and general business operation. See Matter of New York City Asbestos Litig., 15 A.D.3d 254 (1st Dept 2005); Fitzgerald v. Fahnestock & Co., 286 A.D.2d 573 (1st Dept 2001).

However, the "doctrine of de facto merger in New York does not make a corporation that purchases assets liable for the seller's contract debts absent continuity of ownership." TBA Global, LLC v. Fidus Partners, LLC, 132 A.D.3d 195, 209 (1st Dept 2015) quoting Cargo Partner AG v. Albatrans, Inc., 352 F.3d 41, 46 (2d Cir. 2003). In other words, continuity of ownership must be present in order for the court to rule that there is a de facto merger. Continuity of ownership exists where

> The shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction. Stated otherwise, continuity of ownership describes a situation where the parties to the transaction 'become owners together of what formerly belonged to each.'

Matter of New York City Asbestos Litig., 15 A.D.3d at 256 quoting Cargo Partner, 352 F.3d at 46.

However, continuity of ownership is absent where the buyer "paid for the seller's assets with cash, not with its own stock." Id. at 256. Here, the hostile takeover occurred in two phases. In the first phase, nearly two-thirds of the GFI's shareholders tendered their share to BGC in exchange for $6.10 per share in cash. Compl. ¶30. Afterwards, multiple subsidiaries of BGC acquired the remaining GFI shares through multiple back-end mergers. Compl. ¶32-42. These back-end mergers were governed by the Agreement and Plan of Merger, dated December 22, 2015. This agreement states that

> (i) each share of New JPI Common Stock beneficially owned directly or indirectly by Mr. Gooch or Mr. Heffron shall be converted into a number of shares of BGCP Common Stock…and (ii) each other share of New JPI Common Stock issued and outstanding…shall be converted into…(B) a number of shares of BGCP Common Stock…

§1.7(b).

GFI's allegation that the owners of JPI did not become owners of GFI and were instead divested of their interests in GFI is misguided. Plaintiff adequately alleges that through a complicated series of mergers, the owners of JPI became stockholders in BGC with GFI becoming the wholly owned subsidiary of BGC.

As a result, there is a question of fact, particularly at this preliminary pleading stage as to whether this asset transfer was accomplished through a cash transaction, which precludes a de facto merger, or whether it was a transfer of stock, which is evidence of a de facto merger. In such instances, where it is unclear, courts have

denied motions to dismiss. See State Farm Fire & Cas. Co. v. Main Bros. Oil Co., 101 A.D.3d 1575 (3d Dept 2012); Lumbard v. Maglia, Inc., 621 F.Supp. 1529 (S.D.N.Y. 1985).

Additionally, at this preliminary stage, the complaint adequately alleges facts sufficient to support a theory of successor liability, against GFI under the fraud exception. "By raising issues of fact as to its claims under the Debtor and Creditor Law, plaintiff raised an issue of fact as to the fraud exception to successor liability." E. Concrete Materials, Inc. v. DeRosa Tennis Contractors, Inc., 129 A.D.3d 510, 513 (1st Dept 2016). As the complaint adequately states a claim for actual fraudulent conveyance against GFI, *infra*, and alleges facts sufficient to support a theory of successor liability against GFI under the de facto merger and the fraud exceptions, GFI's motion to dismiss is denied.

Defendants' motion to dismiss plaintiff's claim for Actual Fraudulent Conveyance

Under CPLR 3016(b), "where a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." In an action for fraud, the "plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Lama Holding Co. v. Smith Barney, 88 N.Y.2d

413, 421 (1996). Under CPLR 3016(b), the "circumstances constituting a [fraud claim] shall be stated in detail." Barnes v. Hodge, 118 A.D.3d 633 (1st Dept 2014), quoting Godfrey v. Spano, 13 N.Y.3d 358, 373 (2009); see also Eurycleia Partners, LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 559 (a "claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b).").

Under Section 276 of the Debtor and Creditor Law ("DCL"), "[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." The burden of proof to establish actual fraud under §276 is upon the creditor who seeks to have the conveyance set aside. Marine Midland Bank v. Murkoff, 120 A.D.2d 122, 126 (2d Dept 1986). The standard of proof necessary to prove actual fraud is clear and convincing evidence. Id. However, "fraudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act." Setter v. AI Properties and Developments (USA) Corp., 139 A.D.3d 492, 493 (1st Dept 2016) quoting Marine Midland Bank, 120 A.D.2d at 128.

In order to support its cause of action for fraudulent conveyance under §276, a party may show "badges of fraud." These are "circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of

intent." Wall St. Associates v. Brodsky, 257 A.D.2d 526, 529 (1st Dept 1999); see also 172 Van Duzer Realty Corp. v. 878 Education, LLC, 2016 WL 4690040 (1st Dept, Sep. 8, 2016) Badges of fraud include "(1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor's knowledge of the creditor's claims or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of property by the transferor after the conveyance." Dempster v. Overview Equities, 4 A.D.3d 495, 498; see also Wall St. Associates, 257 A.D.2d at 247-48; Pen Pak Corp. v. LaSalle Natl Bank of Chicago, 240 A.D.2d 384, 386 (2d Dept 1997).

JPI Holdings, GFI, and Gooch and Heffron's Motion to Dismiss

JPI Holdings, GFI, and Gooch and Heffron's motions to dismiss are denied. The specificity requirement under CPLR 3016(b) "requires only that a claim of fraud be pleaded in sufficient detail to give adequate notice." DaPuzzo v. Reznick Fedder & Silverman, 14 A.D.3d 302 (1st Dept 2005). The purpose of this specificity requirement is to "inform a defendant with respect to the incidents complained of." Pludeman v. Northern Leasing Sys., 10 N.Y.3d 486, 491 (2009). The basis of plaintiff's claim against JPI Holdings and GFI is the fraudulent transfer between JPI LLC and JPI Holdings and then from JPI Holdings to New JP, Inc., for no consideration. This alleged fraudulent transfer rendered JPI Holdings insolvent and unable to pay the commitment termination fee owed under the Side Fee Letter. See

Compl. ¶ 36. At this preliminary juncture of the proceedings, this adequately puts both JPI Holdings and GFI on notice as to the claim of fraud as required under CPLR 3016(b).

Additionally, the alleged badges of fraud claimed here arise to an inference of intent for purposes of defeating a motion to dismiss. Plaintiff alleges that the convoluted structure of the mergers, the transfer of all of JPI's assets, the insolvency of JPI, Gooch and Heffron's close relationship between the defendants', and knowledge of plaintiff's contractual claim adequately shows badges of fraud to infer intent. See Compl. ¶64. Even where a plaintiff's allegation as to intent is conclusory, "such intent, is ordinarily a question of fact which cannot be resolved on a motion for summary judgment or...a motion to dismiss." Shisgal v. Brown, 21 A.D.3d 845, 847 (1st Dept 2005) quoting Grumman Aerospace Corp. v. Rice, 199 A.D.2d 365, 366 (2d Dept 1993). Similarly, allegations in which a party conveys assets from the corporation without fair consideration and leaving the corporation unable to pay a judgment will satisfy an allegation of actual fraudulent conveyance. See Matter of Uni-Rty Corp. v. New York Guangdong Fin., Inc., 117 A.D.3d 427 (1st Dept 2014).

Therefore, JPI Holdings, GFI, and Gooch and Heffron's motions to dismiss are denied.

BGC's Motion to Dismiss

BGC's motion to dismiss plaintiff's claim for actual fraudulent conveyance is

granted. In order to prevail on a claim for actual fraudulent conveyance, plaintiff must allege that the transaction was made "with actual intent…to hinder, delay or defraud either present or future creditors." New York Debtor and Creditor Law, §276. Unlike its claims against JPI Holdings and GFI, plaintiff does not adequately show actual intent as it relates to BGC.

Plaintiff contends that the complaint adequately alleges that BGC received value through the JPI Merger and that the transaction bore multiple badges of fraud. See Opp. At 21. Plaintiff points to the purchase of GFI shares for $250 million to be paid to a subsidiary of BGC in the form of a promissory note. Plaintiff then contends that this note was extinguished as a result of the JPI Merger. See Compl., Ex. F. According to plaintiff, this is evidence that BGC was the transferee of some value in connection with the JPI Merger.

However, this is not enough to allege a claim against BGC for actual fraudulent conveyance. Plaintiff has not alleged any facts that show that there was any intent on the part of BGC to hinder, delay or defraud Jefferies. GFI is not alleged to be insolvent or unable to pay its debts. Plaintiff alleges that the cancelled promissory note issued by BGC, its parent company adequately shows an intent to defraud Jefferies. However, this transaction does not infringe in any way on plaintiff's rights as a creditor of JPI Holdings. Furthermore, plaintiff argues that BGC's acquisition of JPI sufficiently shows that BGC was the transferee in the

merger transaction. Plaintiff's own description of the merger transactions fails to show that any assets were transferred to BGC. See Opp., Ex. A. Plaintiff's argument that it is not obligated to identify a specific transaction implicating BGC is a misstatement of the law.

Finally, plaintiff alleges that relevant case law states that transactions "may under appropriate circumstances be 'collapsed' and treated as phases of a single transaction" for purposes of analyzing *fraudulent conveyance claims*. HBE Leasing Corp. v. Frank, 48 F.3d 623, 635 (2d Cir. 1995). However, the court in HBE, allowed the district court to collapse the transaction for purposes of "determining whether [plaintiff] received fair consideration." Id. at 638. There is no indication, that a court may collapse the transaction in order to analyze the fraudulent conveyance claims as a whole. As there is no claim by plaintiff that there is unfair consideration between GFI and BGC, this court declines to engage in a collapse argument. Accordingly, BGC's motion to dismiss is granted.

Defendants' Motion to Dismiss Plaintiff's Claim for Constructive Fraudulent Conveyance

Plaintiff bases its constructive fraudulent conveyance claim on DCL §273, which states "[e]very 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 fair consideration." N.Y. Debtor & Creditor Law §273. Similarly, DCL §274

states,

> [e]very 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 it [its] 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 [its] actual intent.

N.Y. Debtor & Creditor Law §274. Fair consideration is given "when in exchange for [a conveyance], as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied." DCL, § 272.

When assessing the fairness of consideration for purposes of a claim of constructive fraudulent transfer, the court must look to the good faith of both the transferor and the transferee. See CIT Grp./Commercial Servs., Inc. v. 160-09 Jamaica Ave. Ltd. P'ship, 25 A.D.3d 301, 303 (1st Dept 2006); Mega Pers. Lines, Inc. v. Halton, 9 A.D.3d 553, 555 (3d Dept 2004). However, "good faith is a somewhat elusive concept when dealing with claims of constructive fraud, for which the DCL expressly deems intent to be irrelevant." Chen v. New Trend Apparel, Inc, 8 F.Supp.3d 406, 448 (S.D.N.Y. 2014). Good faith "is lacking where there is a failure to deal honestly, fairly, and openly." Sardis v. Frankel, 113 A.D.3d 135, 143 (1st Dept 2014) quoting Berner Trucking v. Brown, 281 A.D.2d 924, 925 (4th Dept 2001). The determination of whether such "obligation has been met is one that rests on the circumstances of the individual matter." Id. Good faith may be deemed to be lacking if "there is no honest belief in the propriety of the activities in question…[or

if there is] knowledge of the fact that the activities in question will hinder, delay or defraud others." S. Indus., Inc. v. Jeremias, 66 A.D.2d 178, 183 (2d Dept 1978).

As stated, *supra*, on a motion to dismiss, the court must take all of the facts as pleaded as true and determine only whether the facts as alleged fit within any cognizable legal theory. Leon, 84 N.Y.2d at 87-88.

JPI Holdings and GFI

JPI Holdings and GFI's motions to dismiss plaintiff's claim for constructive fraudulent conveyance is denied. Plaintiff adequately pleads that that there was a lack of good faith in parts of the merger transaction based upon the lack of consideration when JPI LLC distributed the transferred shares to JPI Holdings. See Compl. ¶36. Additionally, this distribution left JPI LLC unable to pay the $4 million commitment termination fee. Similarly, according to Plaintiff, JPI Holdings did not receive any consideration when it distributed the transferred shares to New JPI Inc. (with GFI as the successor-in-interest), which left JPI Holdings unable to pay the contract termination fee. These pleadings adequately state a cause of action for constructive fraudulent conveyance.

GFI's argument that this court should rely on the court's ruling in Waite v. Schoenbach, 2010 WL 4456955 (S.D.N.Y. Oct. 29, 2010) and find that plaintiff's allegations are conclusory and not specific enough, are unfounded. Although GFI is correct that the court found in Waite that the plaintiff's claims were conclusory, fatal

to GFI's claim is that under the federal rules of civil procedure, a party "must plead an actual intent to defraud with particularity sufficient to meet the heightened standard of Fed.R.Civ.P. 9(b)." Waite, at *5. Here, under the N.Y. pleading standards, plaintiff has adequately stated a cause of action.

Gooch and Heffron

Gooch and Heffron's motion to dismiss plaintiff's cause of action for constructive fraudulent conveyance is granted. In order to state a claim under either DCL §§273 and 274, "the plaintiff must establish that the defendant (1) made a conveyance, (2) without fair consideration, (3) by a person who is insolvent or who becomes insolvent as a consequence of the transfer." Loreley Fin. (Jersey) No. 4 Ltd v. UBS Ltd., 963 N.Y.S.2d 566 (Sup. Ct. N.Y. Cnty. 2013); see also N.Y. Debtor & Creditor Law §273 ("[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors...").

Plaintiff first alleges that the transfers made to Gooch or Heffron were effected without the exchange of fair consideration. The complaint states that both Gooch and Heffron "entered into an Agreement and Plan of Merger...pursuant to which BGC acquired JPI and its successors in interest as a wholly owned subsidiary." Compl. ¶34. Regarding consideration contained in the Merger Agreement, "Gooch and Heffron received BGC common stock, based on the number of GFI shares held by JPI." Id. at ¶41. "[W]hether fair consideration was paid, [is] generally a question

of fact which must be determined under the circumstances of the particular case" and, generally, "the burden of proving [this] element is upon the party challenging the conveyance." Joslin v. Lopez, 309 A.D.2d 837, 838 (2d Dept 2003).

When assessing the fairness of consideration, the court looks to the good faith of both the transferor and the transferee. See CIT Grp./Commercial Servs., Inc. v. 160-09 Jamaica Ave. Ltd. P'ship, 25 A.D.3d 301, 303 (1st Dept 2006). In determining whether fair value has been given, "§272(a), governing a conveyance made in exchange for the property, provides for the receipt of something that is a fair equivalent therefor..." Sardis v. Frankel, 113 A.D.3d 135 (1st Dept 2014). However, "fair consideration does not require dollar-for-dollar equivalence; consideration can be fair even if it is less than the value of the transferred property, as long as it is an amount that is not 'disproportionately small' as compared to the value of the transferred property." Lippe v. Bairnco Corp., 249 F.Supp.2d 357, 377 (S.D.N.Y. 2003). Ultimately, "whether fair consideration is given for the property under Debtor and Creditor Law §272 must 'be determined upon the facts and circumstances of each particular case.'" Commodity Futures Trading Comm'n v. Walsh, 17 N.Y.3d 162, 175 (2011) quoting Halsey v. Winant, 258 N.Y.512, 523 (1932).

Here, plaintiff misstates the parties the court must focus their attention upon. Plaintiff alleges that the analysis must focus not upon whether Gooch and Heffron

conveyed an asset without receiving fair consideration, but rather whether they "stripped an asset – the Transferred Shares – from their company without giving fair consideration to their company in exchange." Opp. Memo, p. 21. However, as between Gooch, Heffron, and BGC, plaintiff has not adequately pled that there was unfair consideration as between these parties. Gooch and Heffron received consideration in exchange for their JPI shares pursuant to a set formula, in which they were "paid 100 percent in shares of BGC Class A common stock," that was "valued at a price of $9.46 per share." See Compl., Ex. F at 2. Plaintiff has not adequately alleged how this consideration was unfair, other than the fact that Gooch and Heffron did not give back consideration to their company. This does not satisfy the requirement under the Debtor and Creditor Law.

Even if this court were to find that plaintiff adequately pled unfair consideration, the constructive fraudulent conveyance claim would still be dismissed based upon plaintiff's failure to allege that Gooch, Heffron or BGC were insolvent or rendered insolvent by the transfer of their JPI shares as required under DCL §273-74. Plaintiff has not alleged any facts that Gooch, Heffron or BGC were rendered insolvent by the transfer of shares. See Loreley Fin. (Jersey) No. 4 Ltd., 963 N.Y.S.2d 566 ("the plaintiff must establish that the defendant (1) made a conveyance, (2) without fair consideration, (3) by a person who is insolvent or who becomes insolvent as a consequence of the transfer.") As plaintiff cannot establish

these facts Gooch and Heffron's motion to dismiss as to plaintiff's claim for constructive fraudulent conveyance is granted.

Accordingly, it is hereby

ORDERED that GFI's motion to dismiss plaintiff's claim for breach of contract is denied; and it is further

ORDERED that JPI Holdings motion to dismiss for actual fraudulent conveyance is denied; and it is further

ORDERED that GFI's motion to dismiss for actual fraudulent conveyance is denied; and it is further

ORDERED that Gooch's motion to dismiss for actual fraudulent conveyance is denied; and it is further

ORDERED that Heffron's motion to dismiss for actual fraudulent conveyance is denied; and it is further

ORDERED that BGC's motion to dismiss plaintiff's claim for actual fraudulent conveyance is granted; and it is further

ORDERED that JPI Holdings motion to dismiss plaintiff's claim for constructive fraudulent conveyance is denied; and it is further

ORDERED that GFI's motion to dismiss plaintiff's claim for constructive fraudulent conveyance is denied; and it is further

ORDERED that Gooch's motion to dismiss plaintiff's claim for constructive

fraudulent conveyance is granted; and it is further

ORDERED that Heffron's motion to dismiss plaintiff's claim for constructive fraudulent conveyance is granted; and it is further

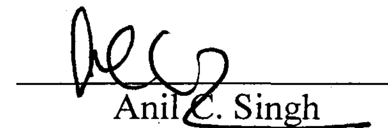
ORDERED that JPI Defendants' and GFI's motion to dismiss plaintiff's claim for unjust enrichment is granted; and it is further[2]

ORDERED that defendants shall answer the complaint within 20 days of today; and it is further

ORDERED that the parties shall proceed to the commercial division ADR Program and shall within three business days of the date of this order, contact a Coordinator by phone or email (Simone Abrams (SAbrams@nycourts.gov) or 212-256-7986) or fax (212-952-3772) and submit to the Coordinator a fully executed ADR Initiation Form, in counterparts if necessary; and it is further[3]

ORDERED that the parties are directed to appear for a status conference on February 14, 2017 at 2:30 PM at 60 Centre Street, room 218.

Dated: December 5, 2016
New York, New York


Anil C. Singh

[2] During oral argument, plaintiff agreed with the court that there is no viable action for unjust enrichment and therefore decided to no longer pursue that cause of action. See Oral Argument, p. 6-7.
[3] Alternatively, the parties may engage in private mediation.