

Pearl Cash, LLC v EMD Produce Corp.

2013 NY Slip Op 31451(U)

July 2, 2013

Supreme Court, New York County

Docket Number: 653046/201

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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PEARL CASH, LLC

Plaintiff,

Index Number: 653046/2011
Submission Date: June 20, 2013
Motion Sequence: 001
DECISION AND ORDER

-against-

EMD PRODUCE CORP. d/b/a BANANA KINGS,
BANANA KINGS II CORPORATION d/b/a
BANANA KINGS, MUSTAFA DAGDELEN and
MEHMET SALMAN,

Defendants

-----X

For Plaintiff

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For Defendants:

Banana Kings II Corp. and Mehmet Salman:
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EMD Produce Corp. and Mustafa Dagdelen:
No appearance

Papers considered in review of this motion:

Papers	Numbered
Notice of Motion with Attached Exhibits.....	1
Affirmation in Opposition.....	2
Affirmation in Reply.....	3

Ellen M. Coin, J.:

Plaintiff moves pursuant to CPLR rule 2221(d) for leave to reargue the Court’s decision and order of October 10, 2012, dismissing the 6th and 7th causes of action. In the alternative, plaintiff moves for leave to amend the complaint to add causes of action for violation of Debtor and Creditor Law §§ 273, 274 and 276.

The complaint alleges that EMD PRODUCE CORP. d/b/a BANANA KINGS (“Banana Kings”) agreed to sell \$26,100.00 of its future credit-card receivables in exchange for an up-front

payment of \$18,000.00 to PEARL CASH, LLC and pledged to use an approved credit-card processor, directing a percentage of its daily credit-card receivables to plaintiff. (Compl. para. 24-25). Plaintiff's sixth and seventh causes of action allege that defendants fraudulently conveyed Banana Kings' assets to prevent Pearl Cash from recovering under the agreement, knowing it would render Banana Kings insolvent. (Compl. para. 52-54, 59).

The October 10, 2012 Order dismissed these claims for failing to state with particularity the factual circumstances of the alleged fraudulent conveyance under Debtor and Creditor Law § 276. Specifically, the Court found that a cause of action for fraudulent conveyance lies if a conveyance is made with the intent to hinder, delay or defraud creditors. (Debtor and Creditor Law § 276). The cause of action must establish a "particularized factual assertion which supports the inference of scienter" [internal quotation marks and citation omitted]. (*Ford v. Sivilli*, 2 AD3d 773, 775 [2d Dept 2003]). The Court found that plaintiff alleged in an insufficiently conclusory manner that Banana Kings was sold or transferred without fair consideration to avoid the obligations under the agreement and to cause insolvency.

Plaintiff requests that the Court reconsider its decision on the ground that it overlooked the different pleading requirements of §§ 273 and 274. Plaintiff argues that unlike § 276, which requires the element of intent, §§ 273 and 274 do not, and further argues that the intent element of § 276 can be inferred from circumstantial rather than direct evidence by looking to "badges of fraud" that suggest intent. (*Shelly v. Doe*, 249 AD2d 756, 758 [3rd Dept 1998]).

Motion for Leave to Reargue:

A motion for leave to reargue will generally be granted when it is "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." (CPLR 2221(d)).

Here plaintiff's complaint did not specify sections of Debtor and Creditor Law on which the 6th and 7th claims were based. The Court, therefore, did not consider Debtor and Creditor Law §§ 273 and 274, and thus grants plaintiffs' motion. However, upon review of plaintiff's reargument, the Court maintains its dismissal of the 6th and 7th claims for fraudulent conveyance.

To support its argument that consideration of §§ 273 and 274 serves to salvage their 6th and 7th claims, plaintiff cites *ABN AMRO Bank, N.V. v. MBIA Inc.* (17 NY3d 208, 228 [2011]). While Plaintiff is correct in asserting that §§ 273 and 274 do not require the element of scienter, as does § 276, the claims of fraudulent conveyances are still required to be alleged with sufficient particularity. A complaint that fails to identify any particular transaction alleged to be fraudulent or that results in defendants becoming judgment proof lacks the requisite specificity. (*See Syllman v. Calleo Dev. Corp.*, 290 A.D.2d 209, 210 [1st Dept 2002]).

Plaintiff fails to sufficiently support the 6th and 7th claims with factual circumstances other than "bare allegation[s]." (*Jaliman v. Blair & Co. Inc.*, 105 AD3d 646, 647 [1st Dept 2013]). Plaintiff alleges in a conclusory manner that generalized assets of Banana Kings were conveyed and/or transferred without fair consideration in order to prevent plaintiff from recovering moneys allegedly due under the subject business agreement. The vague and ambiguous language of the claims by itself indicates a lack of solid foundation. Plaintiff's frequent use of inexact disjunctive and conjunctive phraseology, "Banana Kings *and/or* Banana Kings II," "just prior to [] and/or immediately after," "took possession *of some or all*," "wrongfully conveyed *and/or* transferred," "without fair consideration *or* for no consideration," does not communicate any specific factual transaction or occurrence. Rather, such language suggests nebulous possibilities of fraudulent transfers without requisite foundation. As in *Syllman*, the complaint does not identify any particular transaction that it seeks to avoid. It is not

clear that plaintiffs' claims for fraudulent transfers are "any more than a restatement of [their] claim for contract damages." (*Syllman*, 290 AD2d at 211).

Although plaintiff relies on the *ABN AMRO* decision for support, there the Court of Appeals found that the plaintiffs' claims *described* "a series of allegedly fraudulent transactions...in which they ultimately assert defendants stripped approximately \$5 billion in cash and securities out of MBIA Insurance," which supported causes of action under §§ 273 and 274. (*ABN AMRO Bank N.V.*, 17 NY3d at 228). In this case, the complaint contains no such allegations, but instead lumps together a claim of general transfers. Nor does the complaint point to any specific facts regarding the lack of fair consideration for the transfer of assets. (*Dempster v. Overview Equities, Inc.*, 4 AD3d 495, 497 [2d Dept 2004]; *see also Wall St Associates v. Brodsky*, 257 AD2d 526, 528 [1st Dept 1999] [spousal purchases of shares at a favorable price]).

Plaintiff's "badges of fraud" argument is also unavailing. Badges of fraud are "circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent.'" (*Wall St.*, 257 AD2d at 529). Such circumstances include "a close relationship between the parties of the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance." In *Wall St.* the complaint was found to clearly allege sufficient badges of fraud, since it stated that the defendant issued the company stock to his spouse for a questionably favorable price, that the defendant had testified that he did so with the express intent of removing the assets from the reach of his creditors, and that the transfer rendered him judgment proof. (257 AD2d at 529) Similarly, in *Shelly*, the court found that the record showed

a “hurried, nonbusiness transaction between brothers” (*Shelly*, 249 AD2d at 758) sufficient to support a claim based on §276.

Plaintiff assumes an intentional fraudulent transfer, but does not allege any facts that there was a close relationship between Banana Kings I and II, that the assets were conveyed for unfair consideration, that the transaction itself was questionable, or that Banana Kings I is judgment proof. Rather, an intentional fraudulent transaction is merely concluded.¹

Motion for Leave to Amend

Motions for leave to amend should be freely granted unless the proposed amendment would be palpably insufficient or without merit. (CPLR 3025(b); *U.S. Bank, Nat. Ass'n v. Sharif*, 89 AD3d 723, 724 [2d Dept 2011]). If the proposed amended complaint contains the same defects as the original complaint, leave should be denied as futile. (*Gin v. Bank of America*, 2013 WL 2391863 [Sup Ct, New York County 2013]).

The proposed new 10th, 11th and 12th causes of action merely track the language of Debtor and Creditor Law §§ 273, 274, and 276 respectively, making conclusions rather than allegations. They are unsupported by any particular factual circumstances, and as such suffer from the same defects as the 6th and 7th claims in the original complaint.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff's motion for leave to reargue the Court's decision and order of October 10, 2012 to dismiss the 6th and 7th causes of action pursuant to CPLR 2221(d) is granted, and upon reargument the court adheres to the Court's decision and order of October 10, 2012; and it is further

¹ It is also noteworthy that although plaintiff includes “employees” as assets under § 270, employees are humans, and humans have not been considered property since 1865. Therefore, to the extent that plaintiff alleges that defendants fraudulently conveyed employees, the claim is unfounded.

ORDERED that pursuant to CPLR 3025(b), the remainder of plaintiff's motion for leave to amend the complaint to add the proposed tenth, eleventh, and twelfth causes of action for fraudulent conveyance under Debtor and Creditor Law §§ 273, 274, and 276, is denied.

This constitutes the decision and order of the Court.

Dated: July 2, 2013
New York, New York

ENTER:


Ellen M. Coin, A.J.S.C.