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| Bashian & Farber, LLP v Syms |
| 2017 NY Slip Op 32963(U) |
| May 18, 2017 |
| Supreme Court, Westchester County |
| Docket Number: 60595/2014 |
| Judge: Charles D. Wood |
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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**BASHIAN & FARBER, LLP and
GARY E. BASHIAN, P.C.,**

Plaintiffs,

DECISION & ORDER

Index No.: 60595/2014
Sequence Nos. 13,14 &15

-against-

**RICHARD SYMS, RICHARD SYMS AS
TRUSTEE OF THE SYMS FAMILY REVOCABLE
TRUST DATED MARCH 11, 2014;
INEVA SYMS aka I. EVE SYMS aka EVE SYMS;
INVEVA SYMS aka I, EVE SYMS as
TRUSTEE OF THE SYMS FAMILY REVOCABLE
TRUST DATED MARCH 11, 2014;
THE SYMS FAMILY REVOCABLE TRUST DATED
MARCH 11, 2014; RUTH MERNS,
MICHAEL D. LYNCH, ESQ. and John Does #1-10,**

Defendants.

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WOOD, J.

The following papers were read in connection with moving defendants Michael D. Lynch, Esq, ("Lynch") motion to dismiss (Seq 13); Ruth Merns ("Merns") motion to dismiss (Seq 14), and plaintiffs' cross- motion to amend complaint (Seq 15):

- Lynch Notice of Motion, Counsel's Affirmation, Exhibits, Memorandum of Law.
- Merns Notice of Motion, Counsel's Affirmation, Exhibits. Merns Affidavit, Exhibits, Memorandum of Law,
- Plaintiffs' Opposition to Merns' Motion, Exhibits.
- Plaintiffs' Notice of Cross-Motion, Counsel's Affirmation, Exhibits.
- Mern's Reply Memorandum of Law.

Lynch Affidavit, Exhibits.
Plaintiff's Reply Affirmation.

Plaintiffs commenced this proceeding by filing the summons and verified complaint dated July 10, 2014, defendant Richard Syms retained plaintiffs for legal representation in challenging his father's will. Richard Syms executed an Engagement Agreement with plaintiffs on February 19, 2010, which memorialized the terms of payment for legal services rendered by plaintiffs. On February 22, 2010, Richard Syms provided an initial \$12,500 retainer to plaintiffs, and plaintiffs began their legal representation of him. The opposing party's legal fees ran to \$2.7 million, and plaintiff's fees were \$418,423.76. Richard Syms partially paid the legal fees. Plaintiffs claim that Richard Syms misrepresented his inability to pay the fees due to financial constraints.

According to Plaintiffs, Richard Syms engaged in seven real estate transfers and an attempted eighth transfer to make himself judgment proof from known creditors, such as plaintiffs. They claim that title to at least seven properties belonging to Richard Syms have been transferred completely or in part to defendant Ineva Syms, his wife, and some later into a family trust.

After defendants did not pay the outstanding legal fees owed to plaintiffs, plaintiffs filed a motion to withdraw as counsel in the New York County Surrogate's Court, which was granted on April 8, 2014. On July 14, 2014, this court executed an order that restrained and enjoined defendants during the pendency of this action, from transferring or otherwise encumbering any real property owned by defendants, and making any financial transfers, gifts, loans or other transactions of funds held by defendants except to the extent needed for shelter, food, clothing, and regular living expenses.

In the current round of motions, Lynch seeks to dismiss plaintiff's fourth cause of action for fraudulent conveyance as against him (Seq 13); Merns seeks to dismiss plaintiff's complaint as against her (Seq 14); and plaintiffs seek to amend the complaint, adding causes of action against Lynch (Seq 15).

Based upon the foregoing, the motions are decided as follows:

It is well settled that pursuant to CPLR(a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v. Leader, 74 A.D.3d 1180, [2d Dept 2010]); (Bua v Purcell & Ingrao P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857, 984 NE2d 324 [2013]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]). If the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a)(7), a court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928, 930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Affidavits and other

evidentiary material may also be considered to “establish conclusively that plaintiff has no cause of action” (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]), or where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]).

More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes “whether the proponent of the pleading has a cause of action” (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Env'tl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

Addressing Lynch's motion to dismiss (Seq 13), in or about August 2015, defendants Richard and Eve Syms (“Syms Defendants”) retained Lynch to provide legal services in connection with the transfer of their property located at 199 N. Salem Road, in Lewisboro from the Syms Family Revocable Trust to Merns, who is Richard Syms' 90 year old mother. Lynch charged Syms Defendants \$800 for his legal services for this transfer. When the \$250,000 payment for the property did not arrive in Lynch's escrow account on the date of closing, Lynch prepared a deed for no consideration to Merns. However, according to documents and affidavits in the record, Syms defendants received a \$250,000 check from Merns for payment for the property.

Syms Defendants contend that the transfer of the property to Merns was for consideration of \$250,000 as evidenced by the cashier's check issued by Merns dated August 27, 2015. Other indicia of a sale was the purchase of title insurance.

Through his affidavit, Lynch attests that during his representation of Syms Defendants, Lynch was unaware that they were involved in a lawsuit over legal fees with plaintiffs. Lynch's counsel

argues that plaintiffs have brought a conclusory claim of fraudulent conveyance under the Debtor and Creditors Law (“DCL”) as against Lynch. Moreover, Lynch points out that plaintiffs have not offered proof that Lynch played any role other than as attorney in the transfer of the property. Lynch is not a debtor, and even giving every favorable inference to plaintiff’s conclusory allegations that Lynch participated in, and assisted the Syms Defendants in carrying out the alleged fraudulent transfer, the allegations are not pled with sufficient particularity to satisfy the elements for a cause of action for fraudulent conveyance as against Lynch. Plaintiffs have not pled any facts with any particularity establishing the existence of a conspiracy. Instead, plaintiffs have made unsupported allegations that the conveyance by the Syms of the property was part of a common plan, scheme or conspiracy participate in by defendants Syms and Merns and Lynch with the particular intention to defraud plaintiff. Thus, Lynch argues that plaintiff’s fraudulent conveyance claim should be dismissed as against Lynch for failure to state a claim pursuant to CPLR 3211(a)(7).

In opposition to the motion, plaintiffs argue that Lynch aided and abetted defendants in their fraudulent enterprise to deny plaintiffs’ recovery of legal fees, and he participated in the transfers by the Syms Defendants of their interest in real property as part of a common plan, scheme or conspiracy with the particular intention to defraud plaintiffs.

Pursuant to Debtor and Creditor Law §276, “[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 Debtor and Creditor Law §276 is upon the creditor who seeks to have the conveyance set aside and the standard for such proof is clear and convincing evidence (see Marine Midland Bank v Murkoff, 120 AD2d 122, 126 [1986]). A conveyance that renders the

conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration” (U.S. Bancorp Equip. Fin., Inc. v Rubashkin, 98 A.D.3d 1057, 1060 [2d Dept 2012]).

Here, plaintiffs have failed to plead a fraudulent conveyance claim, as their allegations are merely conclusory, insofar there is no evidence to show that Lynch participated in a common scheme, or that he was aware that Syms Defendants owed legal fees to plaintiffs. Lynch is not a transferee or a beneficiary, and there is no evidence that he benefitted from or took control of the property. Nothing in the record supports a finding that Lynch possessed any intent to defraud plaintiffs. Moreover, there is evidence in the record that suggests that fair consideration was given by Merns to the Syms Defendants in her payment of \$250,000. The court finds that plaintiffs have not pled any facts to support that Lynch was either a debtor or conspired with a debtor to deprive the Syms Defendants of funds to pay plaintiffs. Accordingly, even in the light most favorable to the nonmoving party plaintiffs, and according that party the benefit of every possible favorable inference, Lynch’s motion to dismiss for failure to state a cause of action is granted.

Likewise, the court grants Merns’ motion to dismiss. Through her affidavit, Merns attests that she paid fair consideration (\$250,000) for the property. Merns notes that plaintiffs’ complaint states that in 2011 the property was valued at \$200,000, so it is unclear to her how a sum of 25% higher in 2015 could be reasonable said to be less than fair consideration. Merns’ counsel cites that the only proof of anything that plaintiffs have concerning the conveyance to Merns is that sellers (not Merns) failed at the time to pay \$1000 in state transfer tax.

In opposition, plaintiffs allege that Merns conspired with others, or had complicit assistance to defraud plaintiffs and had actual intent and purpose to hinder delay and defraud.

In light of the foregoing, the complaint fails to state a cause of action as against Merns that she conspired with others to defraud plaintiffs and had actual intent and purpose to hinder delay and defraud, or demonstrate that Merns payment of \$250,000 for the property makes her a conspirator in a plot to defraud.

Next the court has considered plaintiff's motion to amend the complaint to name Lynch as a John Doe under the Third Cause of action sounding in Fraud; to add a cause of action sounding in Aiding & Abetting Fraud against Lynch; and to add a Cause of Action sounding in violation of Judiciary Law 487 against Lynch. Initially, in the exercise of its discretion, the court denies plaintiff's motion for leave to serve an amended complaint since it did not provide a copy of the proposed amended complaint, and the proposed amendment is palpably insufficient for the reasons stated above (Chang v. First Am. Title Ins. Co. of N.Y., 20 AD3d 502 [2d Dept 2005]). Nonetheless, even if the court were to consider the proposed amendment, for the reasons stated herein and in consideration of the elements of the proposed causes of action, that motion would be denied.

THEREFORE, based upon the foregoing, it is hereby:

ORDERED, that defendant Michael D. Lynch's motion to dismiss (Seq 13) the Fourth Cause of Action as against him is **granted**; and it is further

ORDERED, that defendant Ruth Merns' motion to dismiss the Fourth Cause of Action as against her (Seq 14) is **granted**; and it is further

ORDERED, that plaintiff's motion to amend the complaint (Seq 15) is **denied**; and it is further

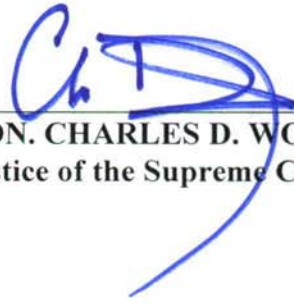
ORDERED, that moving defendants shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service within five (5) days of service, pursuant to the NYSCEF protocols; and it is further

ORDERED, that the parties are directed to appear on June 5, 2017, at 10:30 A.M., in Courtroom 800, the Compliance Conference Part of the Westchester County Courthouse.

The Clerk shall mark his records accordingly.

The arguments by the parties not explicitly addressed herein have been reviewed and deemed to be devoid of merit. This constitutes the Decision and Order of the Court.

**Dated: May 18, 2017
White Plains, New York**



**HON. CHARLES D. WOOD
Justice of the Supreme Court**

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