

Woods v IHTT, Inc.

2018 NY Slip Op 30299(U)

January 16, 2018

Supreme Court, New York County

Docket Number: 656678/2016

Judge: Gerald Lebovits

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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

ERIC WOODS,

Plaintiff,

-against-

IHTT, INC., THE MICHAEL BASS GROUP, INC.,
TODD BROCKMAN and WACO HOOVER,

Defendants.

Index No.: 656675/2016
DECISION/ORDER
Motion Sequence No. 01

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants IHTT, Inc. and The Michael Bass Group, Inc.'s pre-answer motion to dismiss under 3211 (a) (7), and 3211 (a) (10).

Papers	Numbered
Defendants' Notice of Motion	1
Defendants' Memorandum of Law in Support	2
Plaintiff's Affirmation in Opposition.....	3
Plaintiff's Memorandum of Law in Opposition.....	4
Defendants' Affirmation in Further Support of Motion to Dismiss	5

Schilliinger & Finsterwald, LLP, New York (Peter Schilliinger of counsel), for plaintiff.
Reich Reich & Reich, P.C., New York (Jeffery A. Reich, Esq of counsel), for defendants IHTT, Inc. and The Michael Bass Group, Inc.

Gerald Lebovits, J.

Plaintiff Eric Woods commenced this action asserting six causes of action against defendants: (1) conveyances by insolvent under New York Debtor & Creditor Law (DCL) § 273; (2) conveyances made in an action under DCL § 273-a; (3) conveyance by persons in business under DCL § 274; (4) conveyances by a person about to incur debts under DCL § 275; (5) conveyances made with intent to defraud under DCL § 276; and (6) piercing the corporate veil as against defendants Todd Brockman and Waco Hoover. Defendants IHTT, Inc. (IHTT) and The Michael Bass Group, Inc. (Bass Group) now move pre-answer to dismiss the complaint under CPLR 3211 (a) (10) for plaintiff's failure to join a necessary party, or in the alternative, under CPLR 3211 (a) (7) for plaintiff's failure to state a cause of action.

According to the complaint, plaintiff sued IHTT, his former employer, in Colorado (the Colorado litigation) for lost wages and obtained several judgments (the Colorado Judgments) against IHTT. The Colorado Judgments were domesticated and a New York Judgment was entered in New York County Supreme Court. During the Colorado litigation, defendant IHTT sold its assets to Vendome Group, LLC (Vendome), in exchange for cash and stock. After

defendant IHTT's asset transfer to Vendome, the owners of IHTT — defendants Todd Brockman and Waco Hoover — distributed all of the cash and stock to themselves or another business they owned, defendant Bass Group. Defendants Brockman, Hoover, and Bass Group gave defendant IHTT nothing in return. These actions rendered defendant IHTT insolvent and unable to pay plaintiff Woods, a creditor. Defendants' actions were intended to defraud, delay, and hinder plaintiff Woods. In this action, plaintiff Woods seeks to recover damages for defendants' fraudulent conveyances. (Notice of Motion, Exhibit 1, Amended Complaint, at ¶ 1; Exhibit A.)

I. Defendants' Motion to Dismiss under CPLR 3211 (a) (10)

Defendants' CPLR 3211 (a) (10) motion is denied. A court may dismiss a case if a necessary party is absent from the case. (CPLR 3211 [a] [10].) And “[t]he only time a court should dismiss the case for non-joinder of a person is where a series of factors all coincide: 1. The person is not subject to jurisdiction and will not appear voluntarily; 2. No CPLR 1001 (b) alternative is available; and 3. Such person is so essential to the litigation that it cannot justly proceed in his absence.” (*926 Port Chester Mgt. Group LLC v Slabakis*, 52 Misc 3d 1203 [A], *7, 2016 WL 3546169, at *7, 2016 NY Slip Op 50982 [U], *7 [Sup Ct, Kings County 2016], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, 3211:34.) Defendants argue that Vendome is an essential party and that this litigation cannot proceed in its absence. Defendants further explain that “plaintiff specifically pleads that certain asset transfers from IHTT to Vendome should be set aside pursuant to DCL § 273-A, § 274, and § 275. If the action were to proceed without Vendome, defendants' rights may be materially and adversely affected by the litigation as it involves alleged fraudulent asset transfers from IHTT to Vendome.” (Memorandum of Law in Support, Exhibit 2.)

On May 10, 2017, plaintiff amended its complaint¹ clarifying that “Woods is not seeking to avoid Vendome's original purchase of IHTT's assets for cash and stock. Wood's amended complaint only seeks avoidance of subsequent transfers for the cash and stock to Brockman, Hoover, and Bass Group for no consideration.” Because plaintiff does not seek to set aside assets transferred from IHTT to Vendome, Vendome would not be adversely impacted by this lawsuit. Vendome is not “so essential to the litigation that it cannot justly proceed in [its] absence.” (*See 926 Port Chester Mgt. Group LLC*, 52 Misc 3d 1203 [A], *7, 2016 WL 3546169, at *7, 2016 NY Slip Op 50982 [U], *7.) Accordingly, Vendome is not a necessary party. Defendants' CPLR 3211 (a) (10) motion is denied.

II. Defendants' Motion to Dismiss under CPLR 3211 (a) (7)

The court considers defendants' alternative argument under CPLR 3211 (a) (7).

¹ Plaintiff may amend its complaint as of right under CPLR 3025 (a) and 3211 (f) as long as defendants' motion to dismiss is still pending. (*Perez v Wegman Cos., Inc.*, 162 AD2d 959, 959 [4th Dept 1990]; *accord Empire Blue Cross and Blue Shield v Various Underwriters*, 5 Misc 3d 1024 [A], *1-2, 2004 NY Slip Op 51528 [U], *1-2, 2004 WL 2813184, at *1-2 [Sup Ct, NY County 2004].)

On a CPLR 3211 (a) (7) motion to dismiss, the court determines only whether the facts a plaintiff alleges fit within any cognizable legal theory. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *accord Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014] [“When documentary evidence is submitted by a defendant, the standard morphs from whether the plaintiff has stated a cause of action to whether he or she has one.”].) A court must accept as true the facts alleged in a complaint and give a plaintiff the benefit of every possible favorable inference. (*Nonnon*, 9 NY3d at 827; *accord Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006].)

Plaintiff's First Four Causes of Action

Plaintiff's first four causes of action are respectively based on the DCL §§ 273, 273-a, 274 and 275.

DCL § 273 provides that “[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 a fair consideration.”

DCL § 273-a 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.”

DCL § 274 provides that “[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 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 § 275 provides that “[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.”

To demonstrate the above four causes of action, a party must show that the conveyance was made “without fair consideration.” Plaintiff has adequately alleged that the day after defendant IHTT received the cash and Vendome Associates stock, defendants Brockman and Hoover caused IHTT to transfer the Vendome Associates stock for no consideration to defendant Bass Group. (Affirmation in Opposition, Exhibit 1, Amended Complaint.)

Defendants argue that plaintiff fails to claim Bass Group's misconduct in these four causes of action and therefore should be dismissed. It may be inferred from DCL §§ 273, 273-a, 274 and 275 that as long as the transferee receives benefit under certain circumstances without fair consideration, the transferee is regarded as a necessary party to a fraudulent claim; and no

need exists to specify the misconduct of the transferee. Plaintiff has stated causes of action. Defendants' motion to dismiss the first four causes of action under CPLR 3211 (a) (7) is accordingly denied.

Plaintiff's Fifth Cause of Action

Plaintiff's fifth cause of action is based on the DCL § 276 that provides that "[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 parties agree that to satisfy this cause of action, plaintiff must adequately allege the element of scienter. But defendant argues that plaintiff has not adequately alleged scienter.

Defendants argue that the complaint alleges that defendants acted with "actual intent to hinder, delay or defraud" and that this bare allegation is insufficient as a matter; DCL requires that a pleading contain a particularized factual assertion about knowledge. (Memorandum of Law in Support, Exhibit 2.)

Plaintiff argues that "prevailing New York law provides that where a plaintiff has pled badges of fraud, his complaint should not be dismissed." Here, the amended complaint sufficiently alleges "badges of fraud" to defeat Bass Group's motion to dismiss. (Plaintiff's Memorandum of Law in Opposition, Exhibit 4.)

Defendants' motion to dismiss plaintiff's fifth cause of action is denied. The intent to defraud may be presumed: "Because of the difficulty of proving actual intent to defraud creditors, the pleader is allowed to rely on badges of fraud' to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent." (*B&N Roofing & Sheet Metal, Inc. v BFC Partners*, 22 Misc3d 1133 [A], 1135, 881 NYS2d 361 [Sup Ct Kings Co 2009] [internal citations omitted].) These "'badges of fraud' may include 'a close relationship between the parties to 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 claims and the inability to pay it; and retention of control of the property by the transferor after the conveyance.'" (*Id.*)

Plaintiff's amended complaint sufficiently alleges "badges of fraud": (1) that the judgment creditor, IHTT, and defendants to whom IHTT's assets were funneled were all closely related and that IHTT and Bass Group operate out of the same business address and are owned and/or controlled by the same people, namely co-defendants Brockman and Hoover (Amended Complaint ¶¶ 4, 5, 7, 8, 9, 11, 13, 14, 37); (2) that plaintiff has alleged that more than \$1.5 Million in cash and stock was depleted from IHTT and transferred to Bass Group, Brockman or Hoover for no consideration (Amended Complaint ¶¶ 39, 43); (3) that Brockman and Hoover own both companies, the transferor and recipient of the assets had the same knowledge: They knew about plaintiff's lawsuit and claims (Amended Complaint ¶¶ 4, 5, 7, 8, 9, 11, 13, 14, 37) and (4) because the money and stock was "shuffled from IHTT into a different company controlled by the same people, Bass Group, or put directly into Brockman's and Hoover's pockets, the same parties retained control of the assets after the transfer."

Plaintiff satisfies the element of scienter; therefore, defendants' motion to dismiss the fifth cause of action under CPLR 3211 (a) (7) is denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss is denied; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on all parties; and it is further

ORDERED that defendants must serve and file its answer within 20 days of service with notice of entry; and it is further

ORDERED that the parties appear for a preliminary conference on April 28, 2018, at 11:00 a.m. in Part 7, room 345, at 60 Centre Street.

Dated: January 16, 2018



J.S.C.