Ezra v Wilton Group Inc.
2018 NY Slip Op 32491(U)
October 2, 2018
Supreme Court, New York County
Docket Number: 655277/2017
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** IAS MOTION 39EFM

Justice

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INDEX NO. 655277/2017

MOTION DATE 06/13/2018

MOTION SEQ. NO. 001

JOSEPH EZRA, JAMIL EZRA, KAMIL SHASHOUA, KAMIL SHASHOUA AND JAMIL EZRA, AS TRUSTEES OF THE KS 2005 GRAT AGREEMENT, JOSEPH S. EZRA AND JAMIL EZRA, AS TRUSTEES OF THE JSE 2005 GRAT AGREEMENT, JAMIL EZRA AND ARLETTE SHASHOUA AS TRUSTEES OF THE JE 2005 GRAT AGREEMEN,

Plaintiff,

- v -

WILTON GROUP INC.,CUPCAKE HOLDINGS, LLC,WILTON HOLDINGS INC.,WILTON BRANDS INC.,WILTON PROPERTIES INC.,E K SUCCESS LTD., DIMENSIONS CRAFTS LLC,WILTON INDUSTRIES, INC.,E K DESIGNS, LLC,K & COMPANY LLC,WILTON INDUSTRIES CANADA COMPANY, WILTON GLOBAL SOURCING LLC,XZY CORPS. 1-10, THOSE COMPANIES WHOSE NAMES ARE PRESENTLY UNKNOWN TO PLAINTIFFS AND BEING THE ENTITIES THAT ACQUIRED AN OWNERSHIP INTEREST IN, OR ASSETS OF, E K SUCCESS LTD.

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 20

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In this action, *inter alia*, to recover damages for fraudulent conveyance, defendants Cupcake Holdings, LLC, Wilton Brands Inc., Wilton Properties Inc., E K Success Ltd., Dimensions Crafts LLC, Wilton Industries, Inc., K & Company LLC, Wilton Industries Canada Company, Wilton Global Sourcing LLC, and XYZ Corps. 1-10

(collectively, "Movants")[1], move to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211 (a) (5), (a) (7) and (a) (8). Plaintiffs oppose the motion.

Background

On or about February 17, 2006, plaintiffs and non-party UCG Paper Crafts Group, Inc. ("UCG") entered into an agreement for the purchase and sale of plaintiffs' company, defendant E K Success Ltd ("Company"). Under the terms of the agreement, UCG paid $120 million upon closing and entered six promissory notes in favor of plaintiffs totaling $15 million ("Notes"). The Notes are virtually identical, except for the principal amount owed and the payee. The Notes were due in full together with applicable interest on February 17, 2014.

UCG defaulted on the Notes, and plaintiffs commenced an action against UCG in New York Supreme Court, captioned *Ezra v UCG Paper Crafts Group, Inc.*, Index No. 162355/2014. In that action, the court awarded plaintiffs summary judgment in lieu of complaint, and judgment was entered against UCG in the total sum of $23,118,129.87 on December 23, 2015 ("Underlying Judgment"). UCG has failed to pay the Underlying Judgment, and the parties are engaged in post-judgment discovery.

On or about August 9, 2017, plaintiffs commenced this action against defendants, alleging that defendants engaged in a series of transactions and restructuring tactics to thwart plaintiffs from collecting on the Notes from UCG. According to the complaint, immediately after acquiring the Company in 2006, UCG transferred the Company and/or

[1] According to Movants, the complaint misidentifies defendants Wilton Group Inc., Wilton Holdings Inc., and E K Designs, LLC and therefore, those defendants do not move for dismissal.

its assets to one or more of the defendants for no consideration. Plaintiffs allege that defendants are UCG's subsidiaries and/or affiliates, and that UCG is unable to repay the Notes because of UCG's and defendants' conduct.

Plaintiffs further allege that when the Notes matured in 2014, UCG engaged in additional conduct that eliminated value from UCG to prospectively render UCG judgment proof. Specifically, in the beginning of the 2014 tax year, plaintiffs allege that UCG owned $19,918,327.00 in "other assets." Additionally, UCG owned direct interests in two subsidiaries, defendants Wilton Brands, Inc. and Wilton Holdings Inc., which plaintiffs allege had respective values of $82,398,225.00 and $124,553,343.00. However, according to the complaint, by the end of the 2014 tax year, none of those assets existed. Plaintiffs allege that defendants engaged in fraudulent conduct so that UCG could avoid paying the Notes and to render itself judgment proof.

The complaint sets forth seven causes of action, five of which allege that defendants conduct was fraudulent pursuant to sections 273, 274, 275, 276, and 276-a of the Debtor and Creditor Law. The sixth cause of action asserts a claim for successor liability, alleging that defendants are responsible for UCG's obligations as a *de facto* merger and/or a mere continuation. The seventh cause of action asserts a claim for piercing the corporate veil, alleging that UCG exercises complete dominion over defendants.

Movants move to dismiss the complaint insofar as asserted against them on the following grounds: (1) pursuant to CPLR 3211 (a) (8) for lack of personal jurisdiction; (2) pursuant to CPLR 3211 (a) (5) on the ground that the fraudulent conveyance claims

are barred by the statute of limitations; and (3) pursuant to CPLR 3211 (a) (7) for failure to state a cause of action.

Discussion

I. Personal Jurisdiction

"On a motion to dismiss pursuant to CPLR 3211 (a) (8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction[.]" *Coast to Coast Energy, Inc. v Gasarch*, 149 A.D.3d 485, 486-487 (1st Dep't 2017). "However, to defeat a pre-answer motion to dismiss the complaint pursuant to CPLR 3211 (a) (8), the plaintiff need only make a prima facie showing that the defendant was subject to the personal jurisdiction of the court[.]" *Leuthner v Homewood Suites by Hilton*, 151 A.D.3d 1042, 1043 (2d Dep't 2017). "[I]n deciding whether the plaintiffs have met their burden, the court must construe the pleadings and affidavits in the light most favorable to them and resolve all doubts in their favor[.]" *Brandt v Toraby,* 273 A.D.2d 429, 430 (2d Dep't 2000).

The Company is incorporated in New York and therefore, subject to this Court's jurisdiction as a domiciliary. However, the parties dispute whether personal jurisdiction exists over the remaining Movants. According to Movants, none of the remaining Movants are New York domiciliaries, and New York's long-arm statute does not apply to render them subject to specific jurisdiction.

Putting aside the parties dispute regarding general jurisdiction,[2] I find that plaintiffs have sufficiently pleaded specific jurisdiction over Movants. Under CPLR 302(a)(3)(ii) New York may exercise jurisdiction over a non-domiciliary who commits "a tortious act without the state causing injury to person or property within the state . . . if he . . . (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce[.]"

Here, the complaint alleges that the Movants' receipt of fraudulent conveyances from UCG frustrated plaintiffs' ability to collect on a judgment in New York. "Rendering a creditor unable to recover on a defaulted debt in New York through a fraudulent conveyance constitutes injury in New York that is reasonably foreseeable." *Universitas Educ., LLC v Nova Group, Inc.*, 2014 WL 3883371 at 6 (SDNY Aug. 7, 2014). Movants argue, however, that defendants could not have reasonably expected consequences in New York from transfers that long preceded any New York lawsuit or the Underlying Judgment.

Although the alleged fraudulent transfers preceded the lawsuit against UCG in New York, plaintiffs allege that, near the time that the Notes became due, UCG engaged in conduct with Movants to avoid repayment. For example, plaintiffs allege that, at the time UCG transferred approximately $226 million of assets to Movants in 2014, the sole payment on the Notes became due on February 17, 2014. Accepting these allegations as

[2] Except for the Company, the complaint alleges that Movants are organized and exist under the laws of other jurisdictions. The parties' do not sufficiently address whether Movants' principal place of business is New York.

true, Movants reasonably should have expected that their actions would create an injury in New York.

For this reason, I find that plaintiffs' allegations are sufficient to support personal jurisdiction over the Movants, and that dismissal of the complaint for lack of personal jurisdiction is not warranted at this time.

II. Statute of Limitations

The Movants next contend that plaintiffs' fraudulent conveyance claims are time barred.

"On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired." *Norddeutsche Landesbank Girozentrale v Tilton,* 149 A.D.3d 152, 158 (1st Dep't 2017). Because the claims asserted under Debtor and Creditor Law §§ 273, 274, and 275 are based upon constructive fraud, such claims must be commenced within six years after the date that the fraud occurred. *See Wall St. Assoc. v Brodsky*, 257 A.D.2d 526, 529 (1st Dep't 1999).

Here, plaintiffs allege that Movants engaged in fraudulent conduct (1) sometime after acquiring the Company in 2006 and (2) again in 2014 when the Notes matured. Plaintiffs initiated this action on August 9, 2017. To the extent the Debtor and Creditor Law §§ 273, 274, and 275 claims are based upon conveyances made before August 9, 2011, the claims are time barred.

The fourth and fifth causes of action, which are asserted under Debtor and Creditor Law §§ 276 and 276-a respectively, are based upon actual fraud. "In cases of actual fraud . . . the claim is timely if brought either within six years of the date that the fraud or conveyance occurs or within two years of the date that the fraud or conveyance is discovered or should have been discovered, whichever is longer" *Wall St. Assoc. v Brodsky*, 257 A.D.2d 526, 529 (1st Dep't 1999). Because there is an issue of fact as to when the plaintiffs should have first been aware of the alleged fraud, Movants failed to establish as a matter of law that the allegations related to conduct prior to August 9, 2011 are time-barred as to its claims under Debtor and Credit Law §§ 276 and 276-a. *See Felshman v Yamali*, 106 A.D.3d 948, 949 (2d Dep't 2013).

III. Failure to State a Cause of Action

"On a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true[.]" *Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 A.D.3d 618, 621-622 (1st Dep't 2018). "However, factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration" *Mamoon v Dot Net Inc.*, 135 A.D.3d 656, 658 (1st Dep't 2016).

1. Debtor and Creditor Law Claims

Pursuant to Debtor and Creditor Law § 273, "[e]very conveyance made . . . 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." Under Debtor and Creditor Law § 274, a conveyance is fraudulent without regard to actual intent where it is "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[.]" Pursuant to Debtor and Creditor Law § 275, "[e]very conveyance made . . . 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."

Plaintiffs allege that after it sold the Company, UCG transferred the Company and/or its assets to Movants for no consideration, leaving UCG insolvent and/or with unreasonably small capital. When the Notes later became due, UCG conveyed the remaining additional assets it possessed to Movants. Consequently, UCG was incapable of satisfying its obligations under the Notes. I find that these allegations are sufficient to support plaintiffs' causes of action under sections 273, 274, and 275 of the Debtor and Creditor Law, and to the extent Movants argue otherwise, I note that plaintiffs need not plead violations of sections 273, 274, and 275 with the particularity pursuant to CPLR 3016(b). *See Gateway I Group v Park Ave. Physicians, P.C.*, 62 A.D.3d 141, 149-150 (2d Dep't 2009).

Moreover, contrary to Movants' position, plaintiffs' allegations as to lack of consideration, insolvency, and undercapitalization do not consist of bare legal conclusions. Plaintiffs allege that UCG conveyed assets at the time the Notes matured, and it is undisputed that UCG is unable to pay the Underlying Judgment. Giving plaintiffs every favorable inference, such allegations support an inference that UCG's alleged insolvency arises from UCG's conduct occurring at the time the Notes matured.

Turning to Debtor and Creditor Law § 276, that section provides that "[e]very conveyance made . . .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." To the extent the debtor is found liable under that section, the creditor may recover reasonable attorneys' fees pursuant to Debtor and Creditor Law § 276-a. Causes of action brought under Debtor and Creditor Law §§ 276 and 276-a are subject to CPLR 3016(b)'s heightened pleading requirements. *See Gateway I Group v. Park Ave. Physicians, P.C.*, 62 A.D.3d at 150.

Movants assert that the complaint fails to specify which defendants received which fraudulent transfers and when they received such transfers, and therefore fails to satisfy CPLR 3016(b). However, "it is not unusual in cases involving concealment that a plaintiff will be unable to state the facts constituting fraud in detail since such facts are necessarily 'peculiarly within the knowledge of the [defrauding] party'" *Kaufman v Cohen*, 307 A.D.2d 113, 121 (1st Dep't 2003). Here, the circumstances

involving the wrongful conveyances would be within Movants' knowledge, and it would be impossible for plaintiffs to state the details more concretely at this early of a stage. Plaintiffs may cure any deficiencies after discovery has been conducted, and I find that the allegations are sufficiently set forth to appraise Movants of the alleged wrongs to withstand dismissal at this time. *See Bernstein v Kelso & Co., Inc.*, 231 A.D.2d 314, 320-321 (1st Dep't 1997).

Although Movants also argue that plaintiffs failed to sufficiently allege scienter, "intent . . . may be inferred from the circumstances surrounding the allegedly fraudulent transfer[.]" *Stout St. Fund I, L.P. v Halifax Group, LLC*, 148 A.D.3d 744, 748-749 (1st Dep't 2017). Such circumstances 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 claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance." *Wall St. Assocs. v Brodsky*, 257 A.D.2d at 529.

Here, the complaint alleges badges of fraud, including questionable transfers made to subsidiaries or affiliates and UCG's knowledge of its payment obligations and inability to pay it. Taken together and drawing all reasonable inferences in favor of plaintiffs, the allegations in the complaint sufficiently allege an intent to defraud plaintiffs under sections 276 and 276-a. *See ABN AMRO Bank, N.V. v MBIA Inc.*, 17 N.Y.3d 208, 228

(2011). Therefore, dismissal of the fraudulent conveyance claims is not warranted for failure to state a cause of action.

2. Successor Liability/ De Facto Merger Claim

Plaintiffs assert a cause of action against Movants for successor liability. Although "a corporation which acquires the assets of another is not liable for the torts of its predecessor[,]" one exception to the general rule is where "the purchasing corporation was a mere continuation of the selling corporation[.]" *Schumacher v Richards Shear Co.*, 59 N.Y.2d 239, 244 (1983). "The exception refers to corporate reorganization, . . . where only one corporation survives the transaction; the predecessor corporation must be extinguished" *Schumacher*, 59 N.Y.2d at 244. Because the complaint fails to allege that UCG was dissolved or extinguished, plaintiffs fail to state a claim for successor liability based on "mere continuation."

Another exception to the general rule is the de facto merger exception. "In de facto merger, unlike mere continuation, 'the dissolution criterion . . . may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity is shorn of its assets and has become, in essence, a shell'" *Ring v Elizabeth Found. for the Arts*, 136 A.D.3d 525, 526 (1st Dep't 2016). However, continuity of ownership is "a necessary element of any de facto merger finding." *Ring*, 136 A.D.3d at 526. The complaint only alleges that UCG is now known as a different entity, which is insufficient to support a finding that UCG's ownership or management continues through Movants.

Therefore, I dismiss the sixth cause of action against the Movants for failure to state a claim.

3. Piercing the Corporate Veil Claim

"[A] plaintiff seeking to pierce the corporate veil must demonstrate that a court in equity should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue and, in doing so, abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that resulted in injury to the plaintiff." *JGK Indus., LLC v Hayes NY Bus., LLC*, 145 A.D.3d 979, 980 (2d Dep't 2016). However, plaintiffs' bare allegation that UCG controlled Movants is insufficient to withstand dismissal. Simply because the complaint supports claims for fraudulent conveyance does not alone show that UCG exercised a sufficient degree of control over Movants to proceed with piercing the corporate veil. Without more, I dismiss this cause of action pursuant to CPLR 3211 (a) (7).

In accordance with the foregoing, it is hereby

ORDERED that the motion by defendants Cupcake Holdings, LLC, Wilton Brands Inc., Wilton Properties Inc., E K Success Ltd., Dimensions Crafts LLC, Wilton Industries Canada Company, Wilton Global Sourcing LLC, and XYZ Corps. 1-10 to dismiss the complaint insofar as asserted against them is granted to the extent that the sixth and seventh causes of action are dismissed, and further dismissed as to time-barred allegations as set forth above, and is otherwise denied; and it is further

ORDERED that defendants shall answer the complaint within twenty (20) days of the date of this decision; and it is further

ORDERED that counsel are directed to appear for a conference in Room 208, 60 Centre Street, on November 14, 2018 at 2:15 pm.

This constitutes the decision and order of the Court.

10/2/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE