

<b>Toledo v Sabharwal</b>
2018 NY Slip Op 32657(U)
October 11, 2018
Supreme Court, New York County
Docket Number: 653234/2017
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN
Justice

PART 58

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SONIA TOLEDO,
Plaintiff,

INDEX NO. 653234/2017

MOTION DATE 8/22/2017

MOTION SEQ. NO. 001

- v -

NISHA SABHARWAL, MOHIT SABHARWAL, PADMA
DEOGUN, VASTRA INC., PEACOCK THRONE LLC, OM
VASTRA LLC, OM VASTRA MIAMI LLC

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number 12, 13, 14, 15, 16, 17, 23, 24, 26, 27, 28, 29

were read on this application to/for Dismiss

Upon the foregoing documents, it is

Motion to dismiss is granted in part and denied in part. Defendants Nisha and Mohit Sabharwal (individually "Nisha" and Mohit") are wife and husband. Padma Deogun ("Padma") is the mother of Nisha. The various corporate entities are allegedly controlled by Nisha or Mohit. The crux of this matter is that plaintiff Sonia Toledo alleges that defendants engaged in a long-term fraud by selling her fake jewelry, by taking her real jewelry and returning it with fake pieces and by tricking her into having defendants perform services for plaintiff based on false pretenses. Plaintiff claims that all defendants engaged in duplicity by pretending to care about her, telling her that she was part of the family, inviting her to family functions and having her participate in social gatherings in furtherance of an elaborate fraudulent scheme. Specifically, the Complaint

details that based upon her reliance of defendants' trustworthiness plaintiff either purchased or had work performed on pieces of jewelry and paid defendants in cash and checks over one million dollars for the various pieces over the years. The first cause of action is for fraud against individual defendants Nisha, Mohit and Padma. The second cause of action is for fraudulent concealment against Nisha, Mohit and Padma. The third cause of action is for fraud perpetuated via civil conspiracy against Nisha, Mohit and Padma. The fourth cause of action is for aiding and abetting fraud against Mohit and Padma. The fifth cause of action is for conversion against Nisha, Mohit and Padma. The sixth cause of action is for unjust enrichment against all defendants. The seventh cause of action is for intentional fraudulent conveyance against Nisha, Mohit, Padma, OM Vastra LLC, OM Vastra Miami LLC and Peacock Throne LLC. The eighth cause of action is for constructive fraudulent conveyance against all defendants.

The instant motion is brought on behalf of all defendants and seeks an order (1) dismissing all claims in their entirety against OM Vastra LLC and OM Vastra Miami, LLC; (2) dismissing the first cause of action as against Mohit and Padma; (3) dismissing the second cause of action as against Mohit and Padma; (4) dismissing the third cause of action in its entirety; (5) dismissing the fourth cause of action in its entirety; (6) dismissing the fifth cause of action in its entirety with respect to Mohit and Padma along with claims concerning transactions from the period of on or before June 12, 2014; (7) dismissing the sixth cause of action as against Mohit, OM Vastra LLC, and OM Vastra Miami, LLC; (8) dismissing the seventh cause of action in its entirety; and (9) dismissing the eighth cause of action in its entirety.

When deciding a motion to dismiss pursuant to CPLR §3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v. Kroll Laboratory*

*Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Faison v. Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v. Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]). Under CPLR § 3211(a)(7), the court “accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory” (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013] (quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001])).

As a threshold, defendants incorrectly state that there is no personal jurisdiction over OM Vastra LLC and OM Vastra Miami, LLC under CPLR §3211(a)(8). Although these two businesses are Florida entities with principal addresses in Florida, plaintiff properly states an alter-ego liability claim since “plaintiff is generally required to allege complete domination of the corporation in respect to the transaction attacked and that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff’s injury” (*Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014] [internal quotation marks omitted]). The Complaint properly alleges domination of these entities, and that they are alter-egos of defendant. Moreover, “where personal jurisdiction exists over a defendant, jurisdiction over his alter-ego is proper as well” (*Transasia Commodities Ltd. v Newlead JMEG, LLC*, 45 Misc 3d 1217(A), [NY Sup. 2014]). Therefore, personal jurisdiction does not present an obstacle to this claim. Similarly, the Vastra defendants and Peacock Throne LLC may be held liable for all causes of action for which Nisha, Mohit, and Padma are liable based on their claimed respective alter-ego status.

The first cause of action alleges fraud against all defendants. The motion seeks dismissal of this cause of action as to Mohit and Padma. When a plaintiff brings a cause of action based upon fraud, “the circumstances constituting the wrong shall be stated in detail” (CPLR 3016 [b]). “The purpose of section 3016 (b)'s pleading requirement is to inform a defendant with respect to the incidents complained of.” thus, “[w]e have cautioned that section 3016 (b) should not be so strictly interpreted as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud” (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]). What is “[c]ritical to a fraud claim is that a complaint allege the basic facts to establish the elements of the cause of action,” and although under CPLR 3016 (b) “the complaint must sufficiently detail the allegedly fraudulent conduct, that requirement should not be confused with unassailable proof of fraud” (*id.* at 492). “Necessarily, then, section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct” (*id.*). The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553 [2009]).

Further, “instead of an affirmative misrepresentation, a fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information” (*Kaufman v Cohen*, 307 AD2d 113, 119–20 [1st Dept 2003]). Therefore, to state a claim of fraudulent concealment, a plaintiff must plead all of the elements of fraud and allege that the defendant had a duty to disclose material information and failed to do so (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). Therefore, “concealment with intent to defraud of facts which one is duty-bound in honesty to disclose is of

the same legal effect and significance as affirmative misrepresentations of fact” (*Nasaba Corp. v Harfred Realty Corp.*, 287 NY 290, 295 [1942]). The Complaint alleges that each of the individual defendants affirmatively participated in the fraud by either making statements or by concealing facts for which they had superior knowledge.

With respect to the first cause of action for fraud, there are three components to the claim: 1) the fake jewelry sold by Nisha; 2) “gifts” given to plaintiff for the purpose of having plaintiff pay defendants to work on them; and 3) passing off inferior material as precious material while working on plaintiff’s jewelry and swapping precious stones with fakes. The first cause of action is dismissed as to Mohit. The Complaint often lumps Mohit in with the other defendants, however, none of the facts suggest that Mohit ever made a single representation. While the Complaint states that Mohit attended lunches with plaintiff, falsely professed to consider plaintiff as part of the family, invited plaintiff to his home and for vacation, and generally participated in the alleged scheme, none of these alleged facts are a material representations of fact that gives rise to a claim for fraud.

Further, the Complaint does not contain any statement by Mohit other than that he considered plaintiff part of the family. This statement is unconnected to plaintiff’s claim to have relied on a separate statement by Nisha about the authenticity of the jewelry. Similarly, the Complaint contains no statements by Mohit regarding the gifts that needed work and the other work performed on plaintiff’s own pieces. In fact, with respect to the gifts, the Complaint only alleges instances where plaintiff, Nisha and Padma were having lunch, making no mention of Mohit being at said lunches. The facts addressing the work performed on plaintiff’s own pieces are similarly devoid of any statements made by Mohit. Further, to the extent that plaintiff alleges fraud as part of a conspiracy or arising from Mohit’s failure to tell plaintiff about the scheme, the

fraud cause of action must be dismissed as to Mohit as duplicative of the causes of action for aiding and abetting and fraudulent concealment.

However, the motion to dismiss the first cause of action as to Padma is denied. The Complaint contains sufficient allegations of statements made by Padma, including her involvement in discussions about the authenticity of the jewelry, her statements when making the gifts, and her swapping real precious material with fake material, so that plaintiff has properly stated the elements of fraud against Padma.

The motion to dismiss the second cause of action against Mohit and Padma is denied. A duty to disclose may arise “under the special facts doctrine where one party’s superior knowledge of essential facts renders a transaction without disclosure inherently unfair” (*Jana L. v. W. 129th St. Realty Corp.*, 22 AD3d 274, 277 [1st Dept 2005] [internal quotation marks omitted]). A party is considered to have superior knowledge in a transaction when the material facts were peculiarly within the knowledge of one party and that information could not easily have been discovered by the other party through the exercise of ordinary intelligence (*id.* at 278). For the reasons stated above plaintiff has properly pled that defendants Mohit and Padma improperly concealed facts for which they had superior knowledge relating to the transactions with the jewelry.

The motion to dismiss the third cause of action for civil conspiracy against Nisha, Mohit and Padma is granted. New York does not recognize an independent cause of action for conspiracy to commit fraud (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457 [1st Dept 2011]).

The motion to dismissing the fourth cause of action against Mohit and Padma for aiding and abetting fraud is denied. To properly plead aiding and abetting fraud, a plaintiff must “allege

the existence of the underlying fraud, actual knowledge, and substantial assistance” (*Oster v. Kirschner*, 77 A.D.3d 51, 55 [1<sup>st</sup> Dept 2010]). “Actual knowledge need only be pleaded generally, cognizant, particularly at the pre-discovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind” (*id.*). Plaintiff has met her burden of alleging that Mohit and Padma knew of Nisha’s fraudulent scheme and affirmatively assisted in the fraud.

The motion to dismiss the fifth cause of action for conversion against Nisha, Mohit and Padma is granted in part. A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]). Two key elements of conversion are (1) plaintiff’s possessory right or interest in the property (*Pierpoint v Hoyt*, 260 NY 26 [1932]; *Seventh Regiment Fund*, 98 NY2d at 259), and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff’s rights (*Employers' Fire Ins. Co. v Cotten*, 245 NY 102 [1927]). Conversion in New York is governed by a three-year statute of limitations (CPLR §214(3); *Vigilant Ins. Co. of Am. v Hous. Auth. of City of El Paso, Tex.*, 87 NY2d 36 [1995]). Indeed, plaintiff acknowledges that conversion is subject to a three-year statute of limitations. Therefore, all claims before June 12, 2014 are barred by the applicable statute of limitations.

With respect to the claims after June 12, 2014, plaintiff alleges that defendant Nisha stole plaintiff’s jewelry on several occasions, as well as misappropriated the jewelry by fraudulently convincing plaintiff it was of significant value and replacing valuable jewelry with fake jewelry and has not returned the missing pieces. Accordingly, plaintiff has stated a cause of action for conversion against Nisha. Moreover, to the extent that the Complaint alleges that Mohit and



Padma acted as coconspirators, may have the jewelry, and substantially assisted in furthering the conversion, the Complaint has properly asserted an aiding and abetting conversion claim against them (*see Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010] [reversing court's decision to dismiss the "aiding and abetting conversion" claim]).

The motion to dismiss the sixth cause of action against Mohit, OM Vastra LLC, and OM Vastra Miami, LLC for unjust enrichment is denied. To state a claim of unjust enrichment, the plaintiff must allege "that (1) the defendant was enriched, (2) at plaintiff's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]). Plaintiff alleges that defendant Mohit made a wire transfer to a car dealership in Florida with money taken from plaintiff, and that the entire fraudulent scheme was for all of defendants' benefits. Taking these allegations as true, plaintiff has stated a cause of action for unjust enrichment against Mohit.

Moreover, as stated earlier, OM Vastra LLC and OM Vastra Miami, LLC are potentially liable based upon their alter ego statuses. The Complaint alleges that defendants Nisha and Mohit were the sole owners of the corporations that were used to receive allegedly fraudulent funds, and that all of the defendants allegedly transferred their assets to the corporations in order to avoid liability to their creditors.

The seventh and eighth causes of action related to alleged fraudulent conveyances. The seventh cause of action alleges intentional fraudulent conveyance -- under Debtor and Creditor Law § 276. To properly plead this cause of action, a "claimant must allege that (1) the thing transferred has value of which the creditor could have realized a portion of its claim; (2) that this thing was transferred or disposed of by the debtor and (3) that the transfer was done with actual intent to defraud" (*Chambers v Weinstein*, 44 Misc 3d 1224(A) [NY Sup 2014], *aff'd*, 135 AD3d

450 [1st Dept 2016] [internal quotation marks omitted]). Under Debtor and Creditor Law § 276, a creditor is permitted to rely on “badges of fraud” to infer intent. Circumstances leading to these “badges of fraud” can be the “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” subsequent to the transaction (*Wall St. Assocs. v. Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]).

The eighth cause of action alleges constructive fraudulent conveyance under Debtor and Creditor Laws §§ 273, 274 and 275. “In New York, constructive fraud encompasses any transfer which 1) is made by an insolvent or renders the transferor insolvent (DCL § 273); 2) is made after the docketing of a judgment or during the pendency of an action which results in a money judgment (*id.* at § 273–a); 3) leaves the transferor with unreasonably small capital with which to carry out his business (*id.* at § 274); or 4) is made at a time that the transferor intends to incur other debts beyond his ability to repay (§ 275), as long as such transfer is made “without a fair consideration” (*id.* at §§ 273–75)” (*Taberna Preferred Funding II, Ltd. v Advance Realty Grp. LLC*, 45 Misc 3d 1204(A) [NY Sup. Ct. 2014]). Actual intent to defraud is not necessary for constructive fraud, yet lack of fair consideration is. There are “two indicia of fair consideration for conveyed property: the adequacy of what is given in exchange for it and good faith” (*Sardis v. Frankel*, 113 AD3d 135, 141 [1st Dept 2014]). Moreover, when a conveyance renders property to be significantly undercapitalized or a debtor to become insolvent, there is a reasonable inference of fraud (*ABN AMRO Bank, N.V. v. MBIA Inc.*, 17 NY3d 208 [2011]).

While defendants argue that plaintiff does not state with specificity where the money went that was allegedly obtained through a fraudulent conveyance, dismissal at this stage based

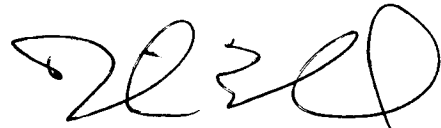
upon CPLR 3016 would be inappropriate. Plaintiff detailed a scheme that alleges that defendants conveyed a significant amount of their assets to corporations with intent to defraud their creditors and avoid obligations; that the conveyances were without fair consideration in return; and that defendants did so with knowledge of plaintiff's claims against them. In pleading intentional fraudulent conveyance under Debtor and Creditor Law § 276, a plaintiff must allege the overall fraudulent scheme in detail and fraudulent intent may be fairly inferred from such details (*Mar. Midland Bank v Zurich Ins. Co.*, 263 AD2d 382, 382-83 [1st Dept 1999]). Here, there is a reasonable inference supporting a claim that defendants transferred their assets fraudulently. Further, claims for fraudulent conveyances under Debtor and Creditor Law §§ 273, 274, and 275 "are not subject to the particularity requirement of CPLR 3016, because they are based on constructive fraud" (*Ridinger v West Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]; *Matter of Application of City of Syracuse Indus. Dev. Agency*, 156 AD3d 1329 [4th Dept 2017], *rearg denied sub nom. Matter of City of Syracuse Indus. Dev. Agency*, 160 AD3d 1506 [4th Dept 2018], and *lv to appeal* dismissed, 2018 NY Slip Op 83088 [NY Sept. 13, 2018]; *see also Wall St. Assocs. v. Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]; *Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141 [2d Dept 2009]). Therefore, defendants' motion to dismiss the seventh and eighth causes of action is denied. It is therefore

ORDERED that the motion to dismiss is granted to the extent that the first cause of action is dismissed as to Mohit; and it is further

ORDERED that the motion to dismiss is granted to the extent that the third cause of action is dismissed as to Nisha, Mohit and Padma; and it is further

ORDERED that the motion to dismiss the fifth cause of action as against Nisha, Mohit and Padma is granted in part and all claims prior to June 12, 2014 are dismissed; and it is further

ORDERED that the motion to dismiss is denied in all other respects.



DAVID BENJAMIN COHEN, J.S.C.

10/11/2018  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE	<input type="checkbox"/>	

**HON. DAVID B. COHEN**  
**J.S.C.**