

Chung Tai Print. (China) Co Ltd. v Florence Paper Corp.

2020 NY Slip Op 30295(U)

February 4, 2020

Supreme Court, New York County

Docket Number: 651101/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

CHUNG TAI PRINTING (CHINA) CO LTD.,

Plaintiff,

- v -

FLORENCE PAPER CORP., STEVEN SHAMAH, VIVIAN SHAMAH, RONALD SHAMAH, SHARI SHAMAH, ISAAC SHAMAH

Defendant.

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INDEX NO. 651101/2019
MOTION DATE 07/12/2019
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52

were read on this motion to/for DISMISS

Upon the foregoing documents and for the reasons set forth on the record (2.3.20), Florence Paper Corp. (FPC), Steven Shamah, Vivian Shamah, Ronald Shamah, and Sari Shamah's (Steven, Vivian, Ronald, and Sari Shamah, together with FPC, hereinafter, collectively, the Moving Defendants) motion to dismiss the Verified Amended Complaint (the Complaint) of Chung Tai Printing (China) Co. Ltd. (Chung Tai) pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) is granted solely to the extent that (i) the fifth cause of action (breach of fiduciary duty) and sixth cause of action (breach of constructive trust) are dismissed in their entirety without prejudice and (ii) the second cause of action (fraud) is dismissed without prejudice as against Vivian Shamah, Ronald Shamah, and Sari Shamah, and is otherwise denied.

For the purposes of this motion, Steven, Vivian, Ronald, Sari and Isaac Shamah hereinafter shall collectively be referred to as the **Individual Defendants**, and the Individual Defendants together with FPC, hereinafter, shall collectively be referred to as the **Defendants**.

THE RELEVANT FACTS AND CIRCUMSTANCES

Chung Tai alleges that the Individual Defendants who control FPC, (i) abused corporate formalities to strip FPC of FPC's assets to pay for their personal cars, health insurance, vacations and other expenses rather than paying FPC's legitimate bills which caused FPC to become insolvent and (ii) intentionally misled and defrauded Chung Tai into shipping more goods when Chung Tai refused to make any future deliveries when they promised to pay certain prior unpaid invoices and all future invoices within 45 days of receipt knowing full well that FPC was insolvent and could not pay what it then owed and had no intention of paying for any future deliveries.

More specifically, Chung Tai alleges that Chung Tai refused to take any new orders from FPC because FPC had not made payments for various paper goods that FPC had ordered and received amounting to over \$700,000 for more than 8 months (NYSCEF Doc. 30, Paragraph 16, Affidavit of Kelvin Wong referring to NYSCEF Doc. 34, Exhibit C). Chung Tai further alleges that, on or about May 27, 2018, Steven Shamah and other FPC representatives met with Kelvin Wong of Chung Tai at the Shangri-La Hotel in Shenzhen, China, and induced Chung Tai to resume shipping goods to FPC by promising to pay its outstanding balance by June 30, 2018 (*i.e.*, within approximately 30 days) and to pay all future invoices in full within 45 days of delivery (Complaint ¶ 12) and assured Chung Tai "that FPC was solvent, financially secure, and able to

timely make the promised payment of its past due debts and amounts due for future orders” (*id.* ¶ 13).

Chung Tai alleges that these promises and representations were, however, known to be false when made and were made with the intent of defrauding Chung Tai by inducing it to ship more goods so that FPC could sell those goods and the Individual Defendants could use the proceeds from such sales to pay their personal bills (*id.* ¶ 15). Indeed, Chung Tai alleges that the Defendants used FPC’s payroll to pay family members who did not even work for FPC, put them on the FPC health insurance plan, and otherwise paid for their cars, personal vacations, and other personal expenses (*id.* ¶ 16). As a result, as of June 2018, FPC was insolvent, unable to pay its debts (*id.* ¶ 17) and owes Chung Tai \$1,787,662.40 for goods that it received and accepted (*id.* ¶ 19).

Chung Tai claims that FPC knew that it was insolvent and would be unable to pay the amounts that it owed to Chung Tai when it induced Chung Tai to make additional shipments of goods. Significantly, on May 22, 2019, immediately after it sent its last shipment to FPC based on the promises and representations allegedly made by the Individual Defendants, FPC entered a judgment by consent in the amount of \$3,480,129.97 (*id.* ¶ 17; Schutzer Aff., Ex. N). Chung Tai also alleges that on or about March 19, 2019, after this lawsuit was filed, the Individual Defendants caused FPC to “sell” for less than fair value (Complaint ¶¶ 70, 73, 76, 80, 85) some or all of its purchase orders, factory orders, deposits, and inventory to Edge 2 Edge Packaging, LLC (**E2E**), an entity formed and controlled by members of the Shamah family, who not only worked for FPC, but also induced Chung Tai to continue ship goods to FPC and represented that

FPC was solvent, as part of a scheme to defraud Chung Tai and other creditors (Complaint ¶ 21; NYSCEF Doc. No. 40-44).

To wit, emails submitted by Chung Tai show a series of promises of future payments by FPC and statements that Chung Tai alleges amount to assurances of solvency. In an email dated April 7, 2017, from Mr. Wong of Chung Tai to David Shamah and other representatives of FPC, Mr. Wong inquired as to the status of outstanding payments (NYSCEF Doc. No. 33 at 2). On April 11, 2017, David Shamah replied:

Hi Kelvin,

First I just let you know that you are at the top of our list in regards to payments. I'm sorry to Larry as I know he's upset. You, Larry and the CTC treated us like special customer and now we haven't paid in 200 days.

Yes we had BR issue but this isn't the reason for non-payment. ***My family won't do that to you guys.*** Even though we dispute we don't want to hurt.

Please I ask humbly to you and Larry not to hold up an[y] documents or shipments. It will make the situation worse.

We have planned to Pay 100k to you tomorrow or Wednesday – we did advise Friday 4/7 originally however we are waiting for some deliveries to be made ***so our financial lender can wire us the funds.***

This is the honest truth. No games. We want to pay you and as fast as possible.

Thank you,

David Shamah (*id.* at 1-2 [emphasis added]).

A follow-up email from Mr. Wong dated April 13, 2017 asks: “WHY we still have not receive[d] your payment yet?” (*id.* at 1).

Subsequently, in an email dated February 3, 2018, Mr. Wong inquired:

[p]lease confirm you will arrange the 50k USD every month payment and outstanding payment today (NYSCEF Doc. No. 34 at 4 [emphasis added]).

On February 6, 2018, Lee Lockley of FPC responded:

[s]orry for the delay ***we will definitely do it this week***, got backed up with some different issues that needed to be addressed regarding some shipments. ***All looks good and we should be back on track this week***. Once again sorry for the delay (*id.* at 3 [emphasis added]).

An email from Mr. Wong sent on February 9, 2018 indicates that Chung Tai still had not received payment, noting that “I do not think it is reasonable for us to accept delay of 8 months in payment” and providing a list of outstanding invoices with invoice numbers, codes, dates, and balances owed (*id.* at 1).

Importantly, Chung Tai alleges that emails from April 2018 show continuing representations that FPC was solvent, pursuing new business, and was able to pay its debts, with the goal of inducing Chung Tai to continue making shipments of goods to FPC. For example, in an email from David Shamah on behalf of FPC to Mr. Wong dated April 18, 2018, David Shamah indicated that, following a conference call with Banana Republic, he was worried that FPC’s prices were too high compared to its competitors and expressed concern that FPC would be priced out of the market:

I’m not sure if our payments have [led] to an inflated price on this program. If so, I understand but we’re pricing us out of the market. ***We are growing and handling our cashflow concerns. It will [take a] little time to see however won’t always be this way*** (NYSCEF Doc. No. 35 at 4 [emphasis added]).

Emails from June 2018 show that invoices remained outstanding and FPC continued to make assurances that payment was forthcoming.

In response to an email sent by Mr. Wong to FPC representatives on June 11, 2018 indicating that two payments of \$42,757 and \$51,906.80 had not been received, Steven Shamah replied later that morning, stating:

I am not in the office today but *I promise you I will get to the bottom of this and make sure we get all cleared up this week.* If I have to do it myself I will[.] And *payment coming soon . . . don't worry* (NYSCEF Doc. No. 36 at 1 [emphasis added]).

Pursuant to the Verified Amended Complaint, dated May 21, 2019, Chung Tai sued the Defendants for (i) breach of contract (first cause of action) (ii) fraud (second cause of action), (iii) conversion (third cause of action), (iv) unjust enrichment (fourth cause of action), (v) breach of fiduciary duty (fifth cause of action), (vi) breach of constructive trust (sixth cause of action), (vii) violation of section 273 of the Debtor and Creditor Law (**DCL**) (seventh cause of action), (viii) violation of section 274 of the DCL (eighth cause of action), (ix) violation of section 275 of the DCL (ninth cause of action), (x) violation of section 276 of the DCL (tenth cause of action), (xi) violation of section 278 of the DCL (eleventh cause of action) and Account Stated (twelfth cause of action). And, now, pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), the Moving Defendants have moved to have this court dismiss (I) the Complaint in its entirety against Vivian Shamah, Ronald Shamah, and Sari Shamah, (II) the Complaint against Steven Shamah except for Fraud (second cause of action) and (III) the Complaint as against FPC except for Breach of Contract (first cause of action), Fraud (second cause of action), and Account Stated (twelfth cause of action). In his Attorney Affirmation in Opposition to Motion (NYSCEF Doc. No. 31),

counsel for Chung Tai withdrew the fifth cause of action (breach of fiduciary duty) without prejudice.

DISCUSSION

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Piercing the Corporate Veil

A plaintiff seeking to pierce the corporate veil to hold the owners of a corporation liable for the corporation's debts bears a heavy burden of showing: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Conason v Megan Holding, LLC* 25 NY3d 1, 18 [2015]; *TNS Holdings, Inc. v MKI Securities*

Corp., 92 NY2d 335, 339 [1998]). At the pleading stage, mere conclusory statements that the owners dominated and controlled the corporation are insufficient (*Andejo Corp. v South Street Seaport Ltd. Partnership*, 40 AD3d 407, 407 [1st Dept 2007]). The complaint must allege particularized facts showing that piercing the corporate veil is warranted in order to survive a motion to dismiss (*id.*).

The Moving Defendants argue that to the extent that Chung Tai seeks to pierce the corporate veil of FPC to hold Vivian Shamah, Ronald Shamah and Sari Shamah liable for the debts of FPC, the lawsuit must be dismissed because the allegations are merely conclusory and are insufficient as a matter of law to establish that they are in fact owners of, equitable owners of, otherwise exert control over FPC, or that they used such control to perpetrate a fraud or other wrong against Chung Tai. The argument fails.

In its opposition papers, Chung Tai argues that the Complaint alleges that at all relevant times, Vivian, Ronald, and Sari (and, prior to September 24, 2012, Isaac) Shamah owned and controlled FPC (Complaint ¶¶ 6, 8). Chung Tai further alleges that Isaac Shamah transferred his interest in FPC to Steven and Ronald Shamah on September 14, 2012 (*id.* ¶ 7), and that pursuant to a certain Unanimous Written Consent of the Shareholders and Directors of Florence Paper Corp., dated as of September 14, 2012, and signed by Steven Shamah **and Ronald Shamah** as the shareholders and directors, Steven Shamah was elected President and Secretary **and Ronald Shamah** was elected Vice President and Treasurer (NYSCEF Doc. No. 28, Shamah Aff., Exhibit 2). The tax returns for FPC for the calendar years 2016 and 2017 conclusively establish that Steven Shamah owned 56.25% **and Ronald Shamah** owned 43.75% of FPC (NYSCEF Doc. No.

51, 52). And, the Florence Paper Corp. website home page (NYSCEF Doc. No. 32, Schutzer Aff., Exhibit A) indicates that when David Shamah's reputation "as an expert in the industry continu[ed] to grow ... he [brought] his sons, Steve & Ron, into the company... The two develop crucial, life-long relationships in the import business, which carry though to today."

In addition, the Complaint alleges that when FPC entered into various loan and/or financing (factoring) agreements with various financial institutions including Sterling National Bank, Rosenthal & Rosenthal, Inc., and Merchant Business Credit, Inc., those loans were secured by personal guarantees of the Individual Defendants (Complaint ¶ 9). Although the Moving Defendants make much of the fact that the Complaint uses the language "upon information and belief," it is of no legal moment as attached to the Complaint are specific examples of Vivian, Sari, and Ronald Shamah's personal guarantees of FPC's debts, which guarantees are typically only obtained from persons who control (and are not merely married to someone who controls) an obligor in connection with a financing. For example, Chung Tai includes a certain Seventh Amendment, dated January 31, 2017 to the Loan and Security Agreement by and between FPC, as borrower and Sterling National Bank, which was guaranteed personally by **Ronald Shamah, Sari Shamah, Steven Shamah, and Vivian Shamah, guaranteeing the obligations of FPC** (Complaint, Exhibit C).

For the avoidance of doubt, and as Section 13 of a certain Global Settlement Agreement, dated September 12, 2014, by and among Isaac Shamah, Steven Shamah, Ronald Shamah, FPC, Florence Investment Group, LLC, Florence Enterprises, Abraham Shamah, Sourceco Limited, David I. Shamah, and David I. Shamah & Sons Foundation (Complaint, Exhibit A) makes clear,

previously Isaac had guaranteed certain obligations of FPC and simultaneously with the transfer of his interest, “Steven *and Ronald* jointly and severally assume[d] and agree[d] to pay, perform and discharge, as and when due, the Company Loans.”

And, finally, attached as Exhibit O, to the Affidavit of Eric Schutzer (NYSCEF Doc. No. 31), is a transcript of a portion of a motion argued in front of New York State Supreme Court Justice Barbara Kapnick in the matter of Isaac Shamah v. Steven Shamah, Ronald Shamah and FPC, Index No. 650215-2011, dated March 1, 2012, where it is alleged and not denied that “six of Steven and *Ronald’s children who are not employees of the company, are getting company cars*” (Transcript Pg. 28, lines 9-11). Although not conclusive, and taken as a whole and with the other allegations set forth in the Complaint, it is certainly sufficient at this stage of the pleadings to survive a motion to dismiss. Therefore, the Complaint alleges sufficient facts to warrant piercing the corporate veil of FPC to hold the Individual Defendants liable for FPC’s obligations.

Breach of Contract

To prevail on a breach of contract claim, a plaintiff must establish “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, the Complaint alleges that Chung Tai delivered goods to FPC pursuant to certain purchase orders and invoices, which purchase orders and invoices were valid and enforceable contracts, FPC received the goods but failed to pay for them in violation of its obligations under the purchase orders and invoices, and Chung Tai was damaged as a result of FPC’s breach (Complaint ¶¶ 25-33). These

allegations, taken as true for the purposes of this motion to dismiss, sufficiently state a cause of action for breach of contract against FPC. And, because the Complaint sufficiently pleads facts warranting piercing the corporate veil of FPC to hold Steven Shamah, and Ronald Shamah, Vivian Shamah, and Sari Shamah liable for FPC's obligations, the motion to dismiss the first cause of action is denied as it relates to the Individual Defendants.

Fraud

To establish a cause of action for fraud, a plaintiff must allege that (i) the defendant made a material misrepresentation of fact, (ii) with knowledge of its falsity, (iii) an intent to induce reliance, (iv) justifiable reliance by the plaintiff, and (v) damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). A fraud cause of action must be pleaded with particularity pursuant to CPLR § 3016 (b). Here, the Complaint fails to plead any specific misrepresentations of fact attributable to Ronald Shamah, Vivian Shamah, or Sari Shamah. Therefore, the complaint fails to state a fraud cause of action for fraud as against them.

Chung Tai argues that the Complaint states a cause of action for fraud against Ronald Shamah, Vivian Shamah, and Sari Shamah because it alleges that Steven Shamah and other unidentified "FPC representatives" met with Kelvin Wong at the meeting and made false misrepresentations to induce Chung Tai to continue making shipments to FPC. But the argument that the court should infer from the pleadings that Ronald Shamah, Vivian Shamah, and Sari Shamah were at the meeting and made any false misrepresentations is not supported by the pleadings and is not supported by Chung Tai's own evidence. The email from Kelvin Wong to Steven Shamah and Cecilia Cheng dated June 4, 2018, submitted by Chung Tai as Exhibit D to the Complaint,

indicates that the meeting at the Hotel Shangri-La in Shenzhen, China during which the allegedly false representations were made was attended by Steven Shamah, a third party identified as “Larry,” and Kelvin Wong. There are simply no allegations in the Complaint that Ronald Shamah, Vivian Shamah, or Sari Shamah attended the meeting with Kelvin Wong or otherwise made any false misrepresentations upon which Chung Tai relied. Accordingly, the fraud cause of action is dismissed without prejudice as against these defendants.

Conversion

The tort of conversion occurs “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, 50-51 [2006]). To state a cause of action for conversion, a plaintiff must allege (i) that the plaintiff has a possessory right or interest in the subject property, and (ii) the defendant has exercised dominion and control over the property or otherwise interfered with it, in contravention of the plaintiff’s right of possession (*id.* at 50).

Here, the Complaint alleges that (1) Chung Tai had legal ownership of the goods ordered by FPC, (2) FPC and the Individual Defendants, maliciously and through fraud and deceit, exercised unauthorized dominion over the property to the exclusion of Chung Tai’s rights by failing to pay for them, reselling them, and keeping the proceeds for themselves, (3) resulting in damages to Chung Tai (Complaint ¶¶ 46-50). These allegations are sufficient to sustain a cause of action grounded in conversion.

To the extent that the Defendants argue that the conversion claim is merely duplicative of the breach of contract claim, the argument fails. The allegations on which the conversion claim is based are “not a mere restatement of the claims for breach of contract,” but are based on alleged misconduct separate from any contractual obligations (*Wildenstein v 5H & Co., Inc.*, 97 AD3d 488, 492 [1st Dept 2012]; *Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 447-48 [1st Dept 2010]).

Unjust Enrichment

The theory of unjust enrichment is based on “an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned” (*ITD Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). To prevail on a cause of action for unjust enrichment, a plaintiff must establish that “(1) the other party was enriched, (2) at that party’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, 516 [2012]).

In this case, the Complaint sufficiently pleads an unjust enrichment cause of action against the Individual Defendants. The Complaint alleges that the Individual Defendants stripped FPC of all of its assets (Complaint ¶¶ 37, 48), transferred assets to themselves for their own personal benefit (*id.* ¶ 70), retained the proceeds from the sale of goods shipped by Chung Tai for themselves to pay their personal debts (*id.* ¶ 20), and received money, cars, personal vacations, and healthcare, among other benefits, at Chung Tai’s expense (*id.* ¶ 16). Taking the allegations in the Complaint as true and affording them every favorable inference, the Complaint sufficiently pleads that the

Individual Defendants received substantial benefits at Chung Tai's expense and were unjustly enriched as a result. Therefore, the motion to dismiss the unjust enrichment cause of action is denied as against Steven Shamah, Ronald Shamah, Vivian Shamah, and Sari Shamah.

In addition, the allegations state a cause of action for unjust enrichment as against FPC as the Complaint alleges that FPC accepted goods shipped by Chung Tai, received payments from customers from the sale of the goods and otherwise received funds from finance companies relating to the goods, and that FPC failed to pay Chung Tai but nevertheless repaid its own loans and the loans of its principals and retained the profits (Complaint ¶ 10, 19).

To the extent that the Defendants argue that the unjust enrichment cause of action should be dismissed as duplicative of the breach of contract action, the argument fails. A plaintiff asserting causes of action for breach of contract and unjust enrichment is not required to elect his or her remedies where there is a *bona fide* dispute as to the existence of an express contract (*DePasquale v Estate of DePasquale*, 44 AD3d 606, 607 [2d Dept 2007]). On this pre-answer motion to dismiss, it is not yet known whether there is a dispute regarding the existence and validity of an express contract. Therefore, the motion to dismiss the cause of action for unjust enrichment as against FPC is denied.

Breach of Constructive Trust

The imposition of a constructive trust is “the formula through which the conscience of equity finds expression” and is an appropriate remedy “[w]hen property has been acquired in such

circumstances that the holder of legal title may not in good conscience retain the beneficial interest” (*Beatty v Guggenheim Exploration Co.*, 225 NY 380, 386 [1919] [Cardozo, J.]).

Generally, four requirements must be satisfied to warrant a constructive trust: (1) a confidential or fiduciary relationship, (2) a promise, (3) a transfer made in reliance on the promise, and (4) unjust enrichment (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

The claim grounded in breach of constructive trust fails because Chung Tai does not adequately plead a confidential or fiduciary relationship. Chung Tai argues that it had legal rights to FPC’s assets as a result of FPC’s insolvency, and that the Defendants owed Chung Tai a fiduciary duty as a creditor. This argument, however, is unavailing.

Pursuant to the “trust fund doctrine,” the “officers and directors of an insolvent corporation are said to hold the remaining corporate assets in trust for the benefit of its creditors” (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 549 [2000]). But, as the Court of Appeals observed, New York courts

have never deviated from the prevailing majority rule that the trust fund doctrine does not automatically create an actual lien or other equitable interest as such in corporate assets upon insolvency (*id.* at 549-50).

And, significantly, the general rule as stated by the Court of Appeals is that

a simple contract creditor may not invoke the doctrine to reach transferred assets before exhausting legal remedies by obtaining a judgment on the debt and having execution returned unsatisfied (*id.* at 550).

Accordingly, the cause of action for breach of constructive trust is dismissed (*Evans v Rosen*, 111 AD3d 459, 459 [1st Dept 2013] [“In the absence of a confidential or fiduciary relationship, plaintiffs have no cause of action for imposition of a constructive trust against them”]).

DCL §§ 273-276 and 278

The threshold issue for the court to determine is whether the Complaint sufficiently pleads that Chung Tai is a creditor for the purposes of the DCL. DCL § 270 defines “creditor” as “a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.” As alleged in the Complaint, Chung Tai was a creditor at the time of the alleged transfers of assets.

DCL § 273, 274 and 275

The Complaint asserts causes of action for constructive fraudulent conveyance under DCL §§ 273, 274, and 275. Pursuant to DCL § 273:

Every 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.

To state a cause of action for constructive fraudulent conveyance pursuant to DCL § 273, a plaintiff must allege that (1) the defendant transferred assets, (2) without fair consideration, (3) rendering it insolvent (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 228 [2011]).

Similarly, DCL § 274 provides:

Every 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.

To state a cause of action under DCL § 274, a plaintiff must allege that (1) the defendant made conveyances, (2) without fair consideration, (3) leaving it with unreasonably small capital (*ABN AMRO Bank, N.V.*, 17 NY3d at 228).

Further, pursuant to DCL § 275:

Every 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

Chung Tai alleges that it is a creditor under DCL § 270 (Complaint ¶ 69), and that the Individual Defendants stripped the assets of FPC for their personal benefit and transferred the assets without fair consideration, leaving FPC insolvent and unable to pay its debts to Chung Tai as the debts matured (Complaint ¶¶ 69-71). These allegations taken as true for the purposes of this motion are sufficient to state a cause of action under DCL § 273. Chung Tai further alleges that as a result of the transfer of assets for less than fair consideration, the Defendants left FPC with unreasonably small capital (Complaint ¶ 73). The Complaint therefore sufficiently states a cause of action under DCL § 274. Chung Tai also alleges that the Defendants knew that Chung Tai was entitled to a judgment against FPC when they caused FPC to transfer its assets to E2E for less than fair consideration and that they did so with the intent to hinder, delay, or defraud Chung Tai as a future creditor (Complaint ¶ 76). Accordingly, the Complaint sufficiently pleads a cause of action under DCL § 275. Finally, the forgoing allegations also sufficiently state a cause of action under DCL § 278, which allows a creditor to set aside a fraudulent conveyance, or disregard it and attach a levy execution upon the property conveyed, or retain the property or obligation as security for repayment by the debtor.

DCL § 276

DCL § 276 provides:

Every 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.

A fraudulent conveyance cause of action pursuant to DCL § 276 must allege fraudulent intent with particularity pursuant to CPLR § 3016 (b) (*Carlyle, LLC v Quick Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]). Here, the allegations in the Complaint as amplified by the exhibits annexed thereto to support the inference of fraudulent intent.

Chung Tai alleges (i) a close relationship between FPC, the Individual Defendants, and E2E, an entity allegedly controlled by non-defendant members of the Shamah family who were employed by FPC and who induced Chung Tai to ship goods to FPC, (ii) that assets were transferred from FPC to E2E for less than fair consideration or no consideration (Complaint ¶¶ 21, 80), (iii) that the Individual Defendants knew of Chung Tai and other creditors' future claims and lawsuits prior to making the transfers (*id.* ¶¶ 22, 23, 80), and (iv) that the Shamah family retained and controlled FPC's assets through E2E after the conveyance (*id.* ¶ 21). The Complaint alleges with sufficient particularity that Steven and Ronald Shamah caused FPC to transfer assets to E2E and to members of the Shamah family while FPC was insolvent with the intent to defraud its creditors, including Chung Tai. In addition, Chung Tai alleges that E2E is affiliated with and controlled by the Shamah family. Therefore, the motion to dismiss the cause of action for violation of DCL § 276 is denied.

Account Stated

A plaintiff may state a cause of action for account stated by alleging that it sent invoices to the defendant, and that the defendant received and retained the invoices without properly objecting within a reasonable time, particularly where the defendant made partial payments (*Cook & Assocs. Realty, Inc. v Chestnutt*, 65 AD3d 937, 938 [1st Dept 2009]). A party who remains silent and fails to dispute the correctness of an invoice is deemed to have acquiesced and shall be bound by it absent a showing of fraud, mistake, or other equitable considerations (*Shaw v Silver*, 95 AD3d 416, 416 [1st Dept 2012]). In this case, the Chung Tai alleges that Chung Tai sent invoices and goods to FPC setting forth full and true accounts of the indebtedness owed by FPC, which invoices and goods were accepted and retained by FPC without objection (Complaint ¶ 89). These allegations sufficiently plead a cause of action for account stated.

Accordingly, it is

ORDERED that the Moving Defendants' motion to dismiss is granted in part solely to the extent that the fifth cause of action (breach of fiduciary duty) and sixth cause of action (breach of constructive trust) are dismissed and is otherwise denied; and it is further

ORDERED that the Clerk is directed to amend the caption to include the correct name of defendant from "Shari Shamah" to "Sari Shamah"; and it is further

ORDERED that the Moving Defendants are directed to serve a copy of the decision and order herein on the Clerk with notice of entry.


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2/4/2020
DATE

ANDREW BORROK, J.S.C.

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