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| Sigmatex, Inc. v Gertler |
| 2020 NY Slip Op 31595(U) |
| May 26, 2020 |
| Supreme Court, New York County |
| Docket Number: 155898/2018 |
| Judge: W. Franc Perry |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANCO PERRY PART IAS MOTION 23EFM

Justice

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INDEX NO. 155898/2018

SIGMATEX, INC. D/B/A SIGMATEX-LANIER TEXTILES,

MOTION DATE 04/18/2019

Petitioner,

MOTION SEQ. NO. 001

- v -

RANDI GERTLER, SHERRI KLIPPER, DOMINICK
FERRARA, GIACOMO FERRARA, FRANCINE BOYLE,
JOHN/JANE DOES 1-10, SRDG, LLC

**DECISION + ORDER ON
MOTION**

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

In motion sequence number 001, petitioner Sigmatex, Inc., d/b/a Sigmatex-Lanier Textiles (Sigmatex), brings this special proceeding pursuant to CPLR Sections 5225 and 5227, seeking a payment order, to recover on a judgment it obtained in this court on March 15, 2018 against insolvent debtor Oceanside Institutional Industries, Inc. (Oceanside), from Oceanside’s shareholders, a limited liability company owned by those shareholders and affiliated entities.

Background

Petitioner Sigmatex is a Delaware corporation authorized to do business in the State of New York, which maintains a place of business in New York County (*see* Petition, dated June 22, 2018, ¶ 10 [NYSCEF Doc No. 1]).

Respondents Randi Gertler, Sherri Klipper, Dominick Ferrara, Giacomo Ferrara, Francine Boyle, Walter Hermann Family Trust 12/21/05 and WH Family Trust 12/18/12 are the

current shareholders of Oceanside, a New York business corporation.¹ Respondent SRDG, LLC, a New York limited liability company also formed by Oceanside's founders, the late Walter Hermann and Frank Ferrara, is also wholly owned by Oceanside shareholders. SRDG was created to serve as the owner of the real property that Messrs. Ferrara and Hermann jointly owned at 2525 Long Beach Road, Oceanside, NY 11572, at which Oceanside's business was operated (*id.* ¶¶ 11-22).²

Sigmatex alleges that it sold hospital linen products to Oceanside in several purchase orders it filled between November 13, 2014 and August 11, 2015 (*id.* ¶ 26). Sigmatex further alleges that Oceanside agreed to pay for such linens within 60 days of each delivery at prices previously agreed upon, and that, relying on Oceanside's promises, Sigmatex agreed to extend credit to Oceanside for these sales (*id.*).

Sigmatex claims that, despite its repeated assurances, Oceanside made only part payment for the linens it purchased and left an outstanding principal balance of \$90,184.64, which was more than 120 days past due when Sigmatex issued its final statement of account to Oceanside, dated May 18, 2016 (*id.* exhibit 1 [NYSCEF Doc No. 2]).

On May 20, 2016, Sigmatex commenced an action in this court against Oceanside seeking judgment in the amount of \$90,184.64, plus interest and costs, captioned *Sigmatex, Inc. d/b/a Sigmatex-Lanier Textiles v Oceanside Institutional Industries, Inc.* (Index No. 652727/2016) (Oceanside Litigation).

¹ As explained in paragraph 38 of the affirmation of Richard G. Gertler in opposition, executed on August 6, 2018 (Gertler affirmation [NYSCEF Doc No. 22]), Walter Hermann transferred his entire ownership interest in Oceanside by grants of shares on December 21, 2005 to the Walter Herman Family Trust 12/21/05 and on December 18, 2012 to the WH Family Trust 12/18/12. Sigmatex alleges these Family Trusts are New York Trusts (Petition ¶¶ 16-17).

² In their disclosures to New York State's Department of State, Oceanside lists its Oceanside address as the location of its principal executive offices. SRDG does provide an office location but lists the same Oceanside address as the place to which the DOS should mail process received by the State on its behalf. These DOS records may be accessed through the DOS search portal at https://www.dos.ny.gov/corps/bus_entity_search.html.

On March 15, 2018, after Oceanside filed an untimely answer and Justice Carmen St. George denied Oceanside's motion to excuse its default because of its failure to show a meritorious defense (*see* January 21, 2018 decision and order [NYSECF Doc No. 43 in the Oceanside Litigation]), the court entered a default judgment against Oceanside (Oceanside Judgment) in the amount of \$110,584.49, which included prejudgment interest and costs (NYSCEF Doc No. 47 in the Oceanside Litigation).

In post-judgment discovery, Sigmatex learned that Oceanside lacked assets to satisfy the Oceanside Judgment. Sigmatex contends that discovery also showed that, after Oceanside incurred its debt to Sigmatex and refused to make payment, it made fraudulent transfers of funds (Transfers) by a variety of means, without fair consideration, to individual respondents and their family members, as well as to SRDG and the Gertler Law Group, the law firm run by Randi Gertler's husband (*see* Petition ¶¶ 28, 37-45, 61-113). Sigmatex alleges that the Transfers were intended to frustrate collection efforts by Sigmatex and other unpaid Oceanside creditors (*id.* ¶¶ 45, 65, 82, 90 and 99).

Of particular note, Sigmatex alleges that, in 2009, respondents Randi Gertler, Sherri Klipper, Dominick Ferrara, the Estate of Walter Hermann and the Estate of Frank Ferrara³ (Alleged Secured Creditors) made capital contributions to Oceanside totaling \$600,000. Sigmatex further alleges that, when made, these were shareholder equity contributions but, at some time thereafter, respondents began to mischaracterize them as loans. Sigmatex asserts that the 2009 contributions could not be loans "because they were non-interest bearing, had no specific repayment date and were made by equity shareholders" (*see id.* ¶ 75). Sigmatex further

³ Ms. Gertler, Ms. Klipper and Dominick Ferrara are Oceanside Shareholders. The Hermann and Ferrara Estates are not Oceanside shareholders but are alleged to "have a familial relationship to the shareholders, such that the shareholders would . . . benefit from any funds paid" to the Secured Creditors (*id.* ¶ 73).

contends that it was not until January 2013 that respondents converted the 2009 contributions into demand notes, accruing interest at applicable federal short-term rates (*id.* ¶ 76). Sigmatex further alleges that Randi Gertler and Walter Hermann made additional capital contributions to Oceanside between July 2013 and January 2015 that were also mischaracterized as loans (*id.* ¶ 77).

On December 4, 2015, Richard Gertler of the Gertler Law Group filed UCC-1 financing statements on behalf of Ms. Gertler, Sherri Klipper, Walter Hermann, Dominick Ferrara and the Estate of Frank Ferrara, purporting to make them secured creditors of Oceanside with respect to their purported loans (*id.* ¶ 78 and exhibit 3 [NYSCEF Doc. No 4]).

Sigmatex makes five claims for relief, alleging that respondents, through the Transfers, committed constructive and actual fraud, in violation of New York's Debtor and Creditor Law Sections 273, 273-a, 275, 276 and 276-a.⁴ Sigmatex adds a sixth claim for relief, seeking to pierce Oceanside's corporate veil, alleging that the respondents abused their dominion and control over Oceanside, as its principals, to avoid paying the Oceanside Judgment.⁵

⁴ Article 10 of the Debtor & Creditor Law, comprised of §§ 270-281, were repealed and replaced, effective April 4, 2020 (2019 McKinney's Session Law News of NY Ch. 580 (A.5622) (Dec 2019). The new act has been given the short title of the "uniform voidable transactions act" (*id.* § 1). The prior provisions of the Article 10 govern here, as the new act applies only to transfers made, obligations incurred, or rights of action that accrued, on or after the new act's April 4, 2020 effective date (*id.* § 7).

⁵ In its first claim, Sigmatex alleges that the Transfers were fraudulent as to Oceanside's present and future creditors, and so violated Debtor & Creditor Law § 273, because Oceanside was either then insolvent or rendered insolvent by the Transfers, and Oceanside made these Transfers without fair consideration (Petition ¶¶ 118-23).

As its second claim, Sigmatex alleges that the Transfers were fraudulent, and violated Debtor & Creditor Law § 273-a, inasmuch as they were made without fair consideration during the Oceanside Litigation and Oceanside failed to satisfy the Judgment (*id.* ¶¶ 124-29).

In its third claim, Sigmatex alleges that the Transfers were fraudulent as to both present and future creditors, in violation of Debtor & Creditor Law § 275, because they were made without fair consideration and were entered by Oceanside with the intent or belief that it was "incur[ring] debts beyond [its] ability to pay as they mature" (*id.* ¶¶ 130-34).

In its fourth claim, Sigmatex alleges that the Transfers were fraudulent under Debtor & Creditor Law § 276 because they were made with Oceanside's "actual intent . . . to hinder, delay or defraud either present or future creditors" like Sigmatex (*id.* ¶¶ 135-40).

As its fifth claim, Sigmatex alleges Oceanside's fraudulent Transfers, made with "actual intent . . . to hinder, delay or defraud either present or future creditors," entitles it recover its attorneys' fees incurred in this proceeding, pursuant to Debtor & Creditor Law § 276-a (*id.* ¶¶ 141-43).

In opposition, respondents take issue with Sigmatex's factual allegations, contending, among other things, that the respondents' loans to Oceanside were made in good faith and that their secured creditor status should be recognized because of the filing of their UCC-1 financing statements, months before the sales of Oceanside's accounts and equipment (Gertler affirmation ¶ 55). Respondents also assert that the Transfers involving SRDG (*id.* ¶ 59 *et seq.*) and the Gertler Law Group (*id.* ¶ 72 *et seq.*) were proper, and that other Transfers, purportedly made to reimburse respondents for normal reimbursable business expenses, were returned to Oceanside, to avoid any appearance of impropriety (*id.* ¶ 83). They also suggest that, to the extent that Sigmatex needs additional discovery to aid with its claims, it erred in bringing its claims in a special proceeding, rather than a plenary action (*id.* ¶ 106).

In its reply, Sigmatex asserts that, even if the Transfers were made to respondents for antecedent debts, they are deemed to lack good faith and are constructively fraudulent as to Oceanside's creditors under Sections 273, 273-a and 275 of the Debtor and Creditor Law. Sigmatex argues that respondents' conduct also display certain "badges" which prove that the Transfers were intentionally fraudulent under Debtor and Creditor Law Section 276.

Discussion

CPLR 5225 (b) governs the payment or delivery of property of judgment debtor not in the judgment debtor's possession. It states, in pertinent part:

Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff.

Generally, “the burden of proof in a turnover proceeding rests with the judgment creditor to establish that contested transfers were without adequate consideration or otherwise fraudulent” (*Petrocelli v Petrocelli Elec. Co., Inc.*, 121 AD3d 596, 596 [1st Dept 2014], citing *National Communications Corp. v. Bloch*, 259 AD2d 427 [1st Dept 1999]).

Sigmatex has carried its burden in showing that respondents’ conduct violates two provisions of the Debtor & Creditor Law. The first is Section 273-a, which states:

Every 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.

The second is Section 276, which governs claims for actual fraud, 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.”

Here, respondents’ submissions show that at least one of the contested Transfers relating to loans from principals were constructively fraudulent under Section 273-a. The Oceanside Litigation commenced on May 20, 2016. On November 30, 2016, Randi Gertler received a loan payment of \$155,000 from Oceanside (*see* Gertler affirmation, exhibit C [Oceanside’s 2015 and 2016 General Ledger Detail Reports]).⁶ Thus, this loan payment from Oceanside violates Section 273-a, as this Transfer was made while Oceanside was defending the Oceanside Litigation.

The Transfer to Ms. Gertler is void because, under Section 273-a, “preferential transfers

⁶ This payment is reflected on the second-to-last and last pages of the exhibit. The exhibit also reflects a loan payment of \$100,000 to Walter Hermann on December 31, 2016, which would also violate Section 273-a. Sigmatex named the executors and/or beneficiaries of the Estate of Walter Hermann as respondents in the caption of its notice of petition and the Petition but failed to provide proof of service with respect to the Estate of Walter Hermann. As a result, the Estate of Walter Hermann has not been properly joined in this proceeding, in accordance with CPLR 403, and so will not be bound by this Decision and Order.

to directors, officers and shareholders of insolvent corporations in derogation of the rights of general creditors do not fulfill the requirement of good faith” (*Matter of Uni-Rty Corp. v New York Guangdong Fin.*, 117 AD3d 427, 428-29 [1st Dept 2014], quoting *Matter of P.A. Bldg. Co. v. Silverman*, 298 AD2d 327, 328 [1st Dept 2002]).

Whether it be upon the theory that directors of insolvent corporations are trustees for the benefit of all creditors, or upon the theory that it would be inequitable to allow directors to use inside information and their controlling voice in corporate affairs to benefit themselves over the claims of others, the common law forbids preferences to directors of insolvent corporations as being contrary to principles of fair, honest and open dealing . . . Accordingly, the transfer in this case is void because, although made for a fair consideration, it was not made in good faith.

(*Farm Stores v School Feeding Corp.*, 102 AD2d 249, 254 [2d Dept 1984], *affd in part, appeal dismissed in part*, 64 NY2d 1065 [1985] [citations and internal quotation marks omitted]; *see also Matter of Mogil v Building Essentials, Inc.*, 129 AD3d 1378, 1379-80 [3d Dept 2015] [transfers of corporate assets to “corporate insiders or an entity controlled by a corporate insider . . . were not made in good faith, which is an indispensable component of fair consideration” under Debtor and Creditor Law § 273-a] [citations, internal quotation marks and alteration omitted]).

Debtor and Creditor Law Section 276 addresses actual fraud, unlike Sections 273, 273-a and 275, which relate to constructive fraud. Section 276 “does not require proof of unfair consideration or insolvency” (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [citation omitted]). “Due to the difficulty of proving actual intent to hinder, delay, or 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” (*id.*, citations and internal quotation marks omitted). “Among such circumstances are: 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" (id.).

Several badges of fraud are present here: as a shareholder, Ms. Gertler is closely aligned with Oceanside, she was no doubt aware of the Sigmatex claim, and she took this preferential Transfer at a time when she and the other respondents knew that Oceanside was insolvent (*see* affidavit of Francine Boyle, Oceanside Human Resource Director, sworn to January 16, 2017, ¶¶ 8-11 [section captioned "**Oceanside is Insolvent**"] [Petition exhibit 9] [NYSCEF Doc No. 10]).

Respondents sought to lend credence to their argument that they are entitled to a preference over unsecured creditors for payment on their antecedent loans by filing UCC-1 financing statements. Respondents, however, fail to offer any authority to support this argument. The court sees no reason to depart from the "principles of fair, honest and open dealing" (*Farm Stores, Inc.*, 102 AD2d at 254 [citations and internal quotation marks omitted]), which should have guided respondents' conduct toward Sigmatex as Oceanside's creditor. The Transfer is void as an instance of actual fraud in derogation of Sigmatex's rights (*see Matter of Mogil*, 129 AD3d at 1380 [large payments to insiders after creditor commences action against corporation supports court's determination of actual fraud under Debtor and Creditor Law § 276]).


Having prevailed on its claims under Sections 273-a and 276, Sigmatex is entitled to a judgment directing Randi Gertler to deliver to Sigmatex the principal sum of \$110,584.49, together with interest, disbursements, and fees, including attorneys' fees recoverable under Debtor and Creditor Law Section 276-a.

Accordingly, it is hereby

ORDERED that petitioner's application is granted with respect to respondent Randi Gertler, and is otherwise denied as to the other respondents; and it is further

ORDERED that petitioner Sigmatex settle judgment on notice in accordance with this Decision and Order and Section 202.48 of the Uniform Rules for the Supreme Court and the County Court (22 NYCRR § 202.48).

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

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| <u>5/26/2020</u> DATE | |  W. FRANC PERRY, J.S.C. |
| CHECK ONE: | <input checked="" type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> NON-FINAL DISPOSITION |
| | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |