52 W. Assoc., LLC v Louladakis
2020 NY Slip Op 32249(U)
July 8, 2020
Supreme Court, New York County
Docket Number: 653386/2019
Judge: Andrew Borrok

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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52 WEST ASSOCIATES, LLC,75TH REALTY CO., LLC,1313 REALTY CO., LLC,

Plaintiff,

- v -

CHRISTINA LOULADAKIS, NICOLE BOUTSIKAKIS, TRIFONIA LOULADAKIS, YARON SHAYER, YARON GOLDSTEIN, ALEXANDER LOULADAKIS, JOHN AND JANE DOE'S 1-10

Defendant.

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INDEX NO. 653386/2019

MOTION DATE 07/06/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 32, 39

were read on this motion to/for DISMISS.

Upon the foregoing documents, and for the reasons set forth below, Christina Louladakis (**Christina**), Nicole Boutsakis (**Nicole**), Trifonia Louladakis (**Trifonia**), Yaron Shayer (**Shayer**), Yaron Goldstein (**Goldstein**), and Alexander Louladakis' (**Alexander**, and together with Christina, Nicole, Trifonia, Shayer, and Goldstein, collectively, the **Defendants**) motion to dismiss the third (fraud), fourth (fraudulent conveyance), sixth (Penal Law § 156.05 against Shayer), seventh (Penal Law § 156.10 against Shayer), tenth (fraud against Alexander), and eleventh (fraudulent conveyance against Alexander) causes of action in 52 West Associates, LLC, 75th Realty Co., LLC, and 1313 Realty Co., LLC's (the **Companies**) verified complaint pursuant to CPLR §§ 301(b) and 3211 (a)(7) and for a stay of the remaining causes of action pending arbitration pursuant to CPLR § 2201 is granted in part as set forth below.

I. The Facts Relevant to the Motion

This case is the result of a dispute between non-parties Steve Silverberg and his sister, Penny Silberberg,[1] in which each accuses the other of misappropriating funds from the Companies, which they jointly own. Penny commenced an arbitration proceeding against Steve in the matter captioned *Penny Silberberg, et al. v Steve Silverberg, et al.*, Case No. 01-19-0000-4413, which is pending before the American Arbitration Association (the **Arbitration**). Penny alleges that Steve diverted substantial amounts of money out of the Companies for his personal use, including making payments of hundreds of thousands of dollars to his personal caretaker, and that when she confronted him about his misconduct, he drained the Companies' bank accounts, cut off Penny's access to the Companies' books and records, and stopped making payments to Nicole and Christina, who had worked with Penny for nearly two decades. Penny asserted claims for breach of fiduciary duty and conversion, among other claims.

Steve and the Companies asserted counterclaims in the Arbitration, alleging that it was Penny who was siphoning money from the Companies' accounts for her own personal use and making large, unearned payments to the Defendants, not Steve. Steve asserted counterclaims including conversion, fraud, and breach of fiduciary duty. Steve subsequently filed this action, asserting claims against the Defendants, who are Penny's family members and employees, for, among other claims, conversion, aiding and abetting conversion, fraud, fraudulent conveyance, and violations of Penal Law §§ 156.05 and 156.10.

[1] Penny and Steve are siblings but they spell their last names differently.

II. 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. The third and tenth causes of action are dismissed without prejudice

To state 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 pled with particularity pursuant to CPLR § 3016 (b).

The Defendants argue that the fraud causes of action must be dismissed because the Companies fail to allege any material misrepresentations of fact by the Defendants and any alleged omissions cannot support a fraud cause of action because they did not owe fiduciary duties to the Companies. The Companies argue that the motion should be denied because they have sufficiently alleged that the Defendants misrepresented that they were employees of the

Companies and received payments and other benefits without actually performing any work for the Companies, and that documents evidencing the fraud are in the sole custody of the Defendants.

The Companies' arguments are unavailing. The Companies fail to allege any material misrepresentations of fact with the requisite particularity to satisfy CPLR § 3016 and there are no allegations concerning justifiable reliance. In addition, the Companies fail to allege a fiduciary relationship that would give rise to liability for any alleged omissions, which in any event, are not described in sufficient detail. Accordingly, the third and tenth causes of action are dismissed without prejudice.

B. Dismissal of the fourth and eleventh causes of action is denied

Although the Companies do not specify under which statute they assert their fraudulent conveyance claims, in their opposition papers, they cite to Debtor and Creditor Law §§ 273-a and 276.[2] Debtor and Creditor Law § 273-a provides:

> 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 Defendants argue that the claim fails because there is no enforceable judgment. The Companies argue that they have stated a cause of action under § 273-a because they allege that

[2] On December 6, 2019, New York State enacted the "Uniform Voidable Transactions Act," which repealed and replaced certain provisions relating to fraudulent conveyances, including Debtor and Creditor Law §§ 273, 273-a, and 276 (L 2019, ch 580, eff. Apr. 4, 2020). The new provisions, however, do "not apply to a transfer made or obligation incurred before" the effective date (*id.*, § 7).

Penny conveyed the Companies' funds to the Defendants in order to avoid paying a judgment and the Defendants, as transferees, participated in the conveyance and may be held liable.

The Companies' arguments are without merit. The existence of an unsatisfied judgment is an essential element of a claim under Debtor and Creditor Law § 273-a (*Robes v Patel*, 165 AD2d 858, 860 [2d Dept 2018]). Because the Companies fail to allege the existence of an unsatisfied, enforceable judgment against Penny, the claim must be dismissed.

Additionally, Debtor and Creditor Law § 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 cause of action for fraudulent conveyance under § 276 is subject to CPLR § 3016(b)'s heightened pleading standard (*Board of Mgrs. Of the Lore Condominium v Gateway IV LLC*, 169 AD3d 617, 618 [1st Dept 2019]). Therefore, to state a cause of action under § 276, the circumstances constituting the alleged fraud must be pled with particularity (CPLR § 3016 [b]). At the pleading stage, however, a plaintiff may rely on "badges of fraud" to state a cause of action due to the difficulty of proving actual intent to hinder, delay, or defraud creditors (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). These 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.

(*id.*).

The Defendants argue, among other things, that the claim must be dismissed because, as a 50% owner of the Companies, Penny was entitled to make payments to the Defendants and such payments cannot be the basis for a fraudulent conveyance claim. In their opposition papers, the Companies argue they have sufficiently alleged that the Defendants received payments and benefits from the Companies for work that they did not perform and that Penny made such payments with the intent to defraud the Companies.

Here, the Companies have alleged sufficient "badges of fraud" at this stage of the pleadings to survive a motion to dismiss. Specifically, they allege in the complaint that the Defendants are family members or long-time employees of Penny (i.e., alleging a close personal relationship), and that each of the Defendants received payments of large sums of money and benefits, including premium health insurance and vehicles—benefits that other employees did not receive—without performing any work and with the intent to defraud the Companies. Because the Companies and Steve asserted counterclaims in the Arbitration, they would become creditors of Penny if they were to prevail. The Companies sufficiently allege that the payments and benefits were made and received with the intent "to hinder, delay, defraud, and/or render ineffectual and uncollectible, any claims [the Companies] might have as to such assets" (NYSCEF Doc. No. 2, Compl., ¶ 83). Therefore, the motion to dismiss is denied with respect to the fourth and eleventh causes of action pursuant to Debtor and Creditor Law § 276.

C. The sixth and seventh causes of action (violation of Penal Law §§ 156.05 and 156.10) are dismissed

Penal Law § 156.05 provides: "[a] person is guilty of unauthorized use of a computer when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization." In addition, Penal Law § 156.10 provides:

> [a] person is guilty of computer trespass when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization and: 1. he or she does so with an intent to commit or attempt to commit or further the commission of any felony; or 2. he or she thereby knowingly gains access to computer material.

The Defendants argue that the sixth and seventh causes of action must be dismissed because there is no private right of action under Penal Law §§ 156.05 and 156.10. In their opposition papers, and relying on *Blissworld, LLC v Kovak* (2001 NY Slip Op 40084[U] [Sup Ct, NY County 2001]), the Companies argue that the legislature intended to provide a private right of action under Penal Law §§ 156.05 and 156.10.

The Companies' argument, however, is unpersuasive. Criminal statutes rarely provide a private right of action (*Casey Sys., Inc. v Firecom, Inc.*, 1995 US Dist LEXIS 17761, *8 [SD NY, Nov. 29, 1995, 94 Civ. 9327 (KTD)]) and in determining whether a private right of action may be implied under a criminal statute, courts generally consider:

> (1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted;
> (2) whether recognition of a private right of action would promote the legislative purpose; and
> (3) whether creation of such a right would be consistent with the legislative scheme.

(*Hammer v American Kennel Club*, 1 NY3d 294, 299 [2003], quoting *Carrier v Salvation Army*, 88 NY2d 298, 302 [1996]).

The United States Supreme Court and the New York State Court of Appeals have clarified, however, that although these factors are relevant, the critical inquiry is whether the legislature "intended to create, either expressly or by implication, a private cause of action" (*Touche Ross & Co. v Redington*, 442 US 560, 575 [1979]; *Sheehy v Big Flats Community Day*, 73 NY2d 629, 634-635 [1989]).

Courts considering this issue have consistently held that the legislature did not intend to create a private right of action under Penal Law §§ 156.05 and 156.10 (*Krauter & Co. v Ross*, 2019 NY Slip Op 30030[U], at *20 [Sup Ct, NY County 2019], citing *Casey Sys.*, 1995 US Dist LEXIS 17761, at *3), and have expressly declined to follow *Blissword*, the sole case relied on by the Companies (*Snyder v Fantasy Interactive, Inc.*, 2012 US Dist Lexis 23087, *10 [SD NY, Feb. 9, 2012, 11 Civ. 3593 (WHP)]).

In *Snyder*, for example, the United States District Court for the Southern District of New York rejected the court's decision in *Blissworld*, reasoning that "[t]he court in *Blissworld* did not address whether the legislature intended to create a private right of action, as required by the Supreme Court," and concluded that, "[b]ecause there is no indication that the legislature intended to create a private right of action, this Court declines to adopt the reasoning in *Blissworld* and dismisses these claims" (*Snyder*, 2012 US Dist Lexis 23087, at *10; *see also Alarmex Holdings, LLC v Pianin*, 2005 NY Slip Op 30139[U], at *2 [Sup Ct, NY County 2005] ["To the extent that Blissworld . . . is to the contrary, this Court declines to follow it."]). The court agrees that there is no indication that the legislature intended to create a private right of

action under Penal Law §§ 156.05 and 156.10. Therefore, the sixth and seventh causes of action are dismissed.

D. The remaining causes of action are stayed pending the resolution of the arbitration

Courts are authorized to grant a stay of litigation "in a proper case, upon such terms as may be just" (CPLR § 2201). A stay should be granted in the interest of judicial economy where there are overlapping factual issues and common questions of fact in an arbitration that began prior to the commencement of an action (*NAMA Holdings, LLC v Greenberg Traurig, LLP*, 62 AD3d 578, 579 [1st Dept 2009] [modifying trial court order and staying action pending arbitral determination]).

The Defendants argue that a stay is appropriate because the pending arbitration involves substantially similar factual allegations and damages and may dispose of or limit the issues to be determined in this case, and because the issues to be decided in the arbitration would have a preclusive effect here. In their opposition papers, the Companies argue that the court should not grant a stay in this case because the arbitration involves claims between Steve and Penny whereas this action also includes the additional Defendants and the resolution of the arbitration will not necessarily adjudicate the claims in this action.

In this case, a stay is appropriate. The First Department's decision in *NAMA Holdings* is instructive. In *NAMA Holdings*, the First Department modified the order of the trial court, holding that the trial court should have granted a stay in the interest of judicial economy pursuant to CPLR § 2201 where there were overlapping issues and common questions of fact and the

arbitration proceeding began a year before the commencement of the lawsuit (*id.* at 579). Similarly, the Arbitration in this case began more than four months before the commencement of this lawsuit and the Companies and Steve have asserted counterclaims in the Arbitration that are based on the same factual allegations. Consequently, it is likely that the resolution of the Arbitration will dispose of or limit the claims in this action. Therefore, a stay of the remaining claims would serve the interest of judicial economy and the motion for a stay pursuant to CPLR § 2201 is granted.

Accordingly, it is

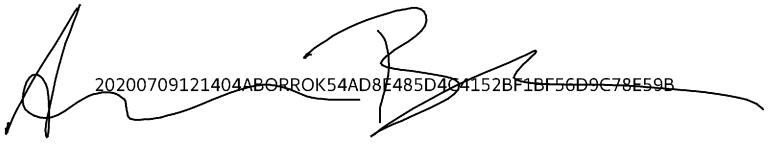
ORDERED that the motion to dismiss is granted in part to the extent that the third (fraud), sixth (Penal Law § 156.05 against Shayer), seventh (Penal Law § 156.10 against Shayer), and tenth causes of action (fraud against Alexander) are dismissed and is otherwise denied; and it is further

ORDERED that the motion to stay further proceedings in this action with respect to the remaining claims, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the action/proceeding known as *Penny Silberberg, et al. v Steve Silverberg, et al.*, Case No. 01-19-0000-4413, pending before the American Arbitration Association; and it is further

ORDERED that the movant is directed to serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119) within ten days from entry and the Clerk shall mark this matter stayed as herein provided; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).



7/8/2020
DATE

ANDREW BORROK, 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