

Ryan v Potbotics, Inc.
2021 NY Slip Op 32284(U)
November 12, 2021
Supreme Court, New York County
Docket Number: Index No. 651723/2020
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X	INDEX NO. <u>651723/2020</u>
FINTAN RYAN,	MOTION DATE <u>07/06/2020</u>
Plaintiff,	MOTION SEQ. NO. <u>001</u>

- v -

POTBOTICS, INC., BORIS GOLDSTEIN, DAVID
GOLDSTEIN, and RYAH MEDTECH INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28
were read on this motion to/for DISMISSAL.

LOUIS L. NOCK, J.

Upon the foregoing documents, the motion of defendant David Goldstein (“Goldstein” or “Defendant”), to dismiss the complaint is denied in accord with the following memorandum decision.

Background

Plaintiff Fintan Ryan (“Plaintiff”) commenced this action against Potbotics, Inc. (“Potbotics”), Boris Goldstein, David Goldstein (“Goldstein”), and Ryah Medtech Inc. (collectively the “Defendants”), to recover for the alleged fraudulent conveyance of monies in a conspiracy to defraud Plaintiff, who is a creditor of Potbotics (complaint ¶ 28, NYSCEF Doc No. 1).¹ On or about September 1, 2015, Plaintiff loaned \$200,000.00 to Potbotics, who failed to repay any part of the principal or the interest owed thereon to Plaintiff (*id.* ¶ 12-13). On June 28,

¹ The facts recited here are as alleged in the complaint and, unless otherwise noted herein, are accepted as true for the purposes of this motion, as required on a motion to dismiss.

2018, Plaintiff commenced an action in this court to recover that amount plus interest from defendant Potbotics (*id.* ¶ 14). A judgment in the amount of \$254,560.48 was entered in that action on February 21, 2019 (the “Judgment”) (*id.* ¶¶ 14-15).

According to Plaintiff, \$243,781.30, plus interest, remains unpaid on the Judgment (*id.* ¶ 16). In the eight-month period between the filing of the complaint and the filing of the Judgment, \$1,158,608.20 was deposited in Potbotics’ Wells Fargo bank account (the “Account”), of which \$951,589.31 was withdrawn by defendants Boris Goldstein, David Goldstein, and Ryah Medtech Inc. for their own benefit and without consideration to Potbotics (*id.* ¶¶ 17, 22). During the thirty-day period following the Judgment’s filing, \$20,000 was deposited in Potbotics’ Account, and all funds in Potbotics’ bank account were either spent or withdrawn (*id.* ¶¶ 18-19). Plaintiff claims that the Defendants’ withdrawals from, and relatively small deposits to, the Account were for the purposes of rendering Potbotics insolvent and therefore unable to pay the balance of the Judgment against it (*id.* ¶ 23-24, 26).

Thereafter, Plaintiff commenced this action to recover the remaining balance of the Judgment in the amount of \$243,781.30, plus interest (*id.* ¶ 29). The complaint interposes a single cause of action which claims that the Defendants acted in conspiracy to defraud Plaintiff, a creditor of defendant Potbotics, by rendering the company insolvent and unable to pay the Judgment rendered against it (*id.* ¶ 28). Goldstein now moves pursuant to CPLR § 3211 (a) (7) to dismiss the complaint as to him on the grounds that Plaintiff fails to state a claim under Debtor and Creditor Laws §§ 273-a, 276, and 276-a (NYSCEF Doc No. 15, 3-5). Goldstein argues that Plaintiff fails to state the statute it is suing under and that Plaintiff’s complaint is factually vague and makes conclusory, unsupported, allegations which are insufficient to establish an appropriate claim (*id.*). Goldstein also argues that Plaintiff has not alleged intent to defraud Plaintiff, which

is necessary for an action under Debtor and Creditor Law §§ 276 and 276-a (*id.*). Goldstein also moves to dismiss under CPLR § 3211 (a) (8) on the assertion that Plaintiff has not properly served him pursuant to CPLR § 308 and that, therefore, the court has not obtained personal jurisdiction over him (*id.* at 2-3). Goldstein asserts that service of process on him is deficient because Plaintiff's affidavit of service failed to state his connection to the address indicated in the affidavit, 205 East 42nd Street, 14th Floor, New York, NY 10017 (the "42nd Street address"), and because the affidavit does not state whether the mailing envelope was properly labeled (*id.*). In the alternative to dismissing the action, Goldstein requests that the court order Plaintiff to provide a more definitive statement of its claims (*id.* at 6).

Plaintiff opposes the motion and contends that the allegations asserted in the complaint are sufficiently detailed to state a claim. With respect to service, Plaintiff argues that service on Goldstein at the 42nd Street address was proper because it is the corporate office of Potbotics and, as CEO and co-founder of Potbotics, it is Goldstein's principal place of business. Plaintiff also contends that service of process was made on Goldstein on a second occasion on September 2, 2020, which was timely due to the stay of deadlines imposed by various Executive Orders issued in connection with the COVID-19 pandemic.

Standard of Review

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if the pleadings' four

corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232 Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of “bare legal conclusions” is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts” (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]). Meanwhile, CPLR § 3211 (a) (8) provides for dismissal where the court does not have personal jurisdiction over a defendant (CPLR § 3211 [a] [8]). If a defendant moves to dismiss on the basis of lack of personal jurisdiction, the plaintiff must come forward with sufficient evidence to demonstrate jurisdiction (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). Pursuant to CPLR § 3016 [b], “[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail.”

Discussion

A. The Fraudulent Conveyance Claim

Defendant first moves to dismiss the complaint on the basis that Plaintiff fails to state a claim under New York Debtor and Creditor law, arguing that the complaint contains only vague allegations which fail to support Plaintiff’s conclusions of law. Plaintiff does not cite to a specific statute in his complaint, but the pleadings indicate allegations of fraudulent conveyance on the part of the individual defendants to prevent Plaintiff’s recovery under the Judgment,

which is governed by Article 10 of New York Debtor and Creditor Law.² In particular, Plaintiff's claims fall under DCL §§ 273, 273-a, 276, and 276-a.

a. Debtor and Creditor Law §§ 273 and 273-a

Plaintiff's pleadings indicate claims under fraudulent conveyance statutes of New York's Debtor and Creditor Law, § 273 and § 273-a. "A valid claim under § 273 will allege that: (1) a transfer was made without fair consideration, and (2) the transfer rendered the conveyor insolvent (Debtor and Creditor Law § 273). Section 273 applies to constructive fraud, not actual fraud (*see Jaliman v D.H. Blair & Co. Inc.*, 105 AD3d 646, 647 [1st Dept 2013]). "Fair consideration" is provided when property is given "in good faith" to satisfy a pre-existing debt "as a fair equivalent therefor" (DCL § 272 [a]). "Fair consideration is given for property '[w]hen in exchange for such property, . . . as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied'" (*Commodity Futures Trading Commn.*, 17 NY3d at 175, *quoting* Debtor and Creditor Law § 272 [a]). Whether "fair consideration" has been exchanged must be determined based on the particular facts of each case (*id.*, at 175). An insider payment is not in good faith, regardless of whether or not it was paid on account of an antecedent debt (*Am. Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478 [1st Dept 2016]). Debtor and Creditor Law § 273-a "protects judgment holders from conveyances made by defendants which render them unable to pay. "To prevail on such a fraudulent conveyance claim, the [plaintiff] must "establish three elements: (1) that the conveyance was made without fair consideration; (2) that at the time of transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and (3) that a final

² Certain changes to Article 10 were implemented by the Legislature and went into effect on April 4, 2020. The law herein cited refers to the Debtor Creditor Law as it existed in February 2019, when the events which gave rise to this action occurred.

judgment has been rendered against the transferor that remains unsatisfied (*Fischer v Sadov Realty Corp.*, 34 AD3d 632, 633 [2d Dept 2006]; see *Palestine Monetary Authority v Strachman.*, 62 AD3d 213, 225 [1st Dept 2009] [all three requirements for claim § 273-a proven]). Both a transferee of a debtor's assets and beneficiary of the conveyance who participated in the fraudulent transfer may be found liable under DCL § 273-a (*Schwartz v Boom Batta, Inc.*, 137 AD3d 512, 513) [1st Dept 2016]). Claims for fraudulent conveyance actions under both § 273 and § 273-a are not subject to the heightened pleading standard of CPLR § 3016 [b], because they are based on constructive fraud, not actual fraud (*Ridinger v. W. Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]; see *Gateway I Group, inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149-50 [2d Dept 2009]).

Here, accepting the facts alleged in the complaint as true, and according the plaintiff the benefit of every possible favorable inference, the complaint sufficiently alleges causes of action under both DCL § 273 and § 273-a. According to the complaint, “David Goldstein was and remains and [sic] officer and shareholder of [Potbotics]” (complaint ¶ 6). Further, from the time Plaintiff's complaint in the prior action was filed until the Judgment was rendered, \$951,589.31 was withdrawn from Potbotics' bank account by Goldstein (along with his fellow individual defendants) for his benefit without consideration to Potbotics (*id.* ¶¶ 21-22). The complaint also sets forth specific allegations regarding the amounts and time frame of these transfers and makes specific allegations regarding the amount deposited into the Account post-judgment as compared to pre-judgment (*id.* ¶¶ 17-18). As alleged, the transfers were made neither in good faith nor to satisfy an antecedent debt, thus lacking in consideration (see *Am. Media, Inc.*, 135 AD3d at 478). Following the conveyance, Potbotics was rendered insolvent, rendering the judgment against it uncollectable (complaint ¶¶ 25-26). Therefore, the elements of Plaintiff's DCL § 273 claim –

lack of consideration and subsequent insolvency – are satisfied (Debtor and Creditor Law § 273). Plaintiff’s pleadings are also sufficient on a § 273-a claim, as the complaint states that on “February 21, 2019, [Judgment] was entered and filed in the Office of the Clerk of New York County . . . against [Potbotics] in the amount of \$254,560.54” of which \$243,781.30 remains unpaid, thus establishing the second and third elements necessitating transferor’s status as a Defendant in an action for money damages and the Judgment remaining unsatisfied (*id.* ¶¶ 25-26; *see Palestine Monetary Authority*, 62 AD3d at 225).

b. Debtor and Creditor Law §§ 276 & 276-a

Plaintiff’s claims suggest a claim for fraudulent conveyance under DCL § 276 and its attorneys’ fees provision, DCL § 276-a. Debtor and Creditor Law § 276, unlike § 273, “addresses actual fraud, as opposed to constructive fraud and does not require proof of unfair consideration or insolvency” (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). As such, Plaintiff’s claims must be pleaded with particularity (CPLR § 3016 [b]). Where allegations of fraud are based on information and belief, the source of such information must be revealed (*Avilon Auto. Group v Leoniev*, 194 AD3d 537, 539 [1st Dept 2021]; *DDJ Mgt., LLC v Rhone Group L.L.C.*, 78 AD3d 442, 443 [1st Dept 2010]). Although DCL §§ 276 and 276-a are subject to a heightened pleading standard, the requisite intent to hinder, defraud, or delay required by these sections “may be inferred from the circumstances surrounding the allegedly fraudulent transfer,” and a party pleading a claim under these sections may rely on “badges of fraud” to support its claim (*Matter of Uni-RTY Corp. v New York Guangdong Fin., Inc.*, 117 AD3d 427, 428 [1st Dept 2014]).

Contrary to defendant Goldstein’s contention that “Plaintiff fails to allege intent at all” (NYSCEF Doc No. 15, 3-5), the complaint clearly states that the “transfer and expenditure of the

money in [Potbotics'] bank accounts was done *for the purpose of* rendering [Potbotics] insolvent," 'purpose' being the very meaning of intent (complaint ¶ 22, emphasis added). However, Plaintiff's claims under DCL § 276 do not meet the more stringent threshold of CPLR § 3016 (b), because their allegations of defendants' fraudulent activities are based on information and belief, the source of which has not been disclosed (*Avilon Auto. Group*, 194 AD3d at 539; *DDJ Mgt., LLC*, 78 AD3d at 443; *Belco Petroleum Corp v AIG Oil Rig, Inc.*, 164 AD2d 583, 599 [1st Dept 1991] [fraud action dismissed without prejudice because burden was incumbent on plaintiff, at the pleading stage, to disclose its sources of information and belief]). Therefore, Plaintiff has failed to state a claim for relief under §§ 276 and 276-a. Nevertheless, because the complaint has otherwise stated a claim for relief under DCL §§ 273 and 273-a, the motion to dismiss the complaint in its entirety is denied because the pleadings set forth a cause of action cognizable at law (*511 West 232 Owners Corp.*, 98 NY2d at 152 ["The motion must be denied if the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law"]).

B. Personal Jurisdiction Under CPLR § 308

Goldstein also moves pursuant to CPLR 3211 (a) (8) to dismiss the action as against him for lack of personal jurisdiction due to improper service. Goldstein argues that service upon him was improper because the affidavit of service filed to demonstrate service upon him by substitute service at the 42nd Street address does not indicate that the address is his "actual place of business" and does not state that the subsequent mailing was marked "personal and confidential" and otherwise satisfied the requirements set forth in the statute. In opposition, Plaintiff submits additional evidence that the 42nd Street address is Goldstein's actual place of abode and submits

a second affidavit of service to demonstrate that Goldstein was timely served a second time at the 42nd Street address and the subsequent mailing requirements were met.

CPLR § 308 (2) permits personal service on a natural person “by delivering the summons within the state to a person of suitable age and discretion at the actual place of business” and by mailing the summons by first class mail to the defendant at their “actual place of business in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other” (CPLR 308 [2]). “A person’s ‘actual place of business’ must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location” (*Rosario v NES Medical Services of New York, P.C.*, 105 AD3d 831, 833 [2d Dept 2013]). CPLR 308 (2) “requires strict compliance and the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made” (*id.*).

A process server’s sworn affidavit of service ordinarily constitutes *prima facie* evidence of proper service pursuant to the CPLR and raises a presumption that a proper mailing occurred (*see Strober King Bldg. Supply Centers, Inc v Merkle*, 697 NYS2d 319, [2d Dept 1999]). The affidavit of service upon Goldstein on March 18, 2019, does not state that the 42nd Street address is Goldstein’s actual place of business, dwelling place or usual place of abode and the corresponding affidavit of mailing bears no mention that the summons was mailed in an envelope marked “Personal and Confidential” (NYSCEF Doc No. 2). These affidavits, therefore, do not constitute *prima facie* evidence of proper service.

Nevertheless, Plaintiff asserts that Goldstein was also served a second time on September 1, 2020. The corresponding affidavit of service indicates that Goldstein was served a second time

on September 1, 2020, at the 42nd Street address and, on the same date, Plaintiff mailed a second copy of the summons and complaint to Goldstein in a package that complies with the mailing requirements set forth in CPLR 308 (2) (NYSCEF Doc No. 26).³ The affidavit does not state that the 42nd Street address is Goldstein’s actual place of business; but in opposition to the motion Plaintiff submits an affirmation of its counsel that attaches a copy of the New York Secretary of State entity information for Potbotics, which is current through September 3, 2020, which lists “DAVID GOLDSTEIN, 205 42ND STREET 14TH FLOOR, NEW YORK, NEW YORK, 10017” as the individual to whom the Department of State will mail process if accepted on behalf of the entity (NYSCEF Doc No. 24). Plaintiff also submits a screenshot of Goldstein’s LinkedIn page which indicates he was employed as CEO and co-founder of Potbotics until April 2019 (NYSCEF Doc No. 25). Goldstein does not submit his own affidavit or any evidence in reply, and instead relies on his assertion that jurisdiction was not conferred because the affidavit is facially insufficient.

New York courts clearly distinguish between “proof” of service and “the fact of” proper service, which confers jurisdiction (*see Matter of Savitt*, 161 AD3d 109, 115 [1st Dept 2018]; *Air Conditioner Training Corp. v Pirrote*, 270 AD 391, 393 [1st Dept 1946] [“It is the fact of proper service which confers jurisdiction. Once such service has been made, an insufficient proof thereof will not take away the jurisdiction which has in fact been obtained. The deficiency in the proof may be supplied.”]). Defects to an affidavit of service “do not defeat an otherwise properly commenced action, but are mere nonjurisdictional irregularities” (*Bell v Bell, Kalnick, Klee &*

³ As Plaintiff correctly argues, the 120-day deadline to serve Goldstein was tolled through March 20, 2020 until November 4, 2020 by various Executive Orders issued by Governor Andrew Coumo in the wake of the COVID-19 pandemic (*see, e.g.*, Executive Order No. 202.8 [9 NYCRR 8.202.8]). In any event, an extension of the time to serve is warranted because Plaintiff has made diligent effort to serve Goldstein, the statute of limitations on Plaintiff’s claim has not expired, and Goldstein will suffer no prejudice as a result.

Green, 246 AD2d 442, 443 [1st Dept 1998]). Here, Plaintiff has submitted *prima facie* evidence that Goldstein was timely served with copies of the summons and complaint at the 42nd Street address on September 3, 2020 and copies of the summons and complaint were mailed to Goldstein on the same day, in compliance with the CPLR 308 (2). The Secretary of State information serves as additional evidence that the 42nd Street address is Goldstein's actual place of business. Since Goldstein has submitted no rebuttal evidence, those items are sufficient to demonstrate that the 42nd Street address was his actual place of business on the date of service (see *Rosario v NES Medical*, 105 AD3d at 832 ["Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server affidavits"]). Therefore, the motion to dismiss is denied in its entirety.

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that the parties are directed, within 30 days of the date of this order, to meet and confer regarding discovery and submit a proposed preliminary conference order, in a form that substantially conforms to the court's form Commercial Division Preliminary Conference Order located at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-CD.pdf>, to the Principal Court Attorney of Part 38 at lfurdyna@nycourts.gov.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

<u>11/12/2021</u>			<u>LOUIS NOCK, J.S.C.</u>
DATE			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input 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