Mauray Realty Co. v Advantage Wholesale Supply LLC
2021 NY Slip Op 32733(U)
December 21, 2021
Supreme Court, New York County
Docket Number: Index No. 156371/2020
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART IV

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MAURAY REALTY CO., et al

Plaintiffs,

-against-

ADVANTAGE WHOLESALE SUPPLY LLC, et al

Defendants.

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DECISION AND ORDER

Index No. 156371/2020

Mot. Seq. 001

FRANK P. NERVO, J.S.C.

Defendants move to dismiss the complaint against them as untimely, improperly brought as against the individual defendants, and pled without requisite particularity. Plaintiffs oppose contending that the action is timely, is properly brought against the individual defendants, and is pled with sufficient particularity.

As with all motions to dismiss under CPLR § 3211, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*see e.g. Leon v. Martinez*, 84 NY2d 83 [1994]). "Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the

asserted claims as a matter of law" (*id.*; citing *Heaney v. Purdy*, 29 NY2d 157 [1971]). To the extent that the motion seeks dismissal under § 3211(a)(7), it is likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable inference (*id.*; *Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). The motion must be denied if from the four corners of the pleadings "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists," and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

As relevant to this motion, plaintiffs are judgment creditors, having previously successfully sued Advantage Plastics, a company created and controlled by defendant Dovid Smetana, for unpaid rent and damage resulting

from Advantage Plastics' unauthorized modifications to the rented space. In this action, plaintiffs allege, inter alia, that defendants engaged in a fraudulent scheme to transfer assets of Advantage Plastics to defendants, including Advantage Wholesale, so as to make Advantage Plastics judgment proof. Before turning to the merits, the Court is constrained to note defendants' papers place significant reliance on federal caselaw for matters sounding squarely in state law. It is beyond cavil that such reliance on nonbinding authority is unilluminating.

To the extent that defendants contend documentary evidence establishes their entitlement to dismissal of the action as a matter of law, this Court does not so find. Defendants have not submitted any affidavits by persons with knowledge sufficient to defeat plaintiff's claims, when such claims are provided the benefit of favorable inferences.[1] Furthermore, to the extent that defendants contend documentary evidence demonstrates Malkie Smetana was not an owner of Advantage Plastics, and thus the action must be dismissed against her, such contention is not dispositive on the claims raised in this action, that the individual defendants were transferees or beneficiaries of the alleged fraudulent

[1] Defendant Advantage Plastics identified itself as "Advantage Plastics, Inc. d/b/a Advantage Wholesale Supply" in an action to enforce mechanic's liens (*Advantage Plastics, Inc. d/b/a Advantage Wholesale Supply v. St. Nicholas 184 Holding*, NY Index No. 114204/2010)

transfers (*see FDIC v. Porco*, 75 NY2d 840 [1990]).[2] Put simply, the individual Smetana defendants are owners of Advantage Wholesale, and indisputably would benefit from any transfer of Advantage Plastics' assets to Advantage Wholesale; consequently, plaintiffs' complaint alleging fraudulent transfers of same sufficiently pleads a cause of action against the individual defendants.

Defendants erroneously contend that plaintiffs' complaint fails to meet the heightend pleading requirements of CPLR § 3016, and therefore must be dismissed. "Plaintiff's claims for fraudulent conveyance under Debtor and Creditor Law §§ 273 and 274 are not subject to the particularity requirement of CPLR 3016, because they are based on constructive fraud" (*Ridinger v. West Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]).

Turning to timeliness and the statute of limitations, a six-year statute of limitations applies to claims for constructive-fraud, pursuant to DCL § 273, and runs from the date of entry of the judgment (*Settlers v. Al Properties & Developments (USA) Corp.*, 139 AD3d 492 [1st Dept 2016]). Likewise, claims for actual fraud must be brought within six years of the accrual date, or two years

[2] Defendants do not dispute that Dovid Smetana is an owner of Advantage Plastics and Advantage Wholesale.

from the date a plaintiff could reasonably have discovered same (CPLR § 213[8]; *Aozora Bank Ltd. v. Credit Suisse Group*, 144 AD3d 437 [1st Dept 2016]). Here, plaintiffs' action is timely, judgment having been entered in April 2020 and details of the transfers at issue having been adduced in post-judgment enforcement in August 2020.

This matter is at its earliest stage, and where, as here, reasonable inferences of insolvency, inadequate consideration, and bad faith can be drawn from the facts alleged in the complaint, dismissal of same should be denied (*Ridinger v. West Chelsea Development Partners, LLC*, 150 AD3d 559 [1st Dept 2017]). Furthermore, to the extent that plaintiffs contend discovery of specific facts, related to the alleged fraudulent transfers, is necessary to oppose dismissal and that defendants are in possession of same, this Court agrees (*Kornfeld v. Chen Hua Zheng*, 185 AD3d 420 [1st Dept 2020]; *Englert v. Schaffer*, 61 AD3d 1362 [4th Dept 2009]).

Accordingly, it is

ORDERED that the motion is denied; and it is further

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RECEIVED NYSCEF: 12/21/2021

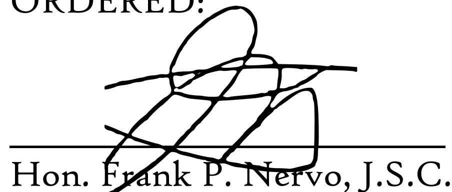
ORDERED that counsel shall confer and submit a single joint proposed preliminary conference order via NYSCEF and first-class mail to chambers, in accordance with the Part Rules, by January 28, 2022. To the extent that agreement cannot be reached, counsel shall, contemporaneously with the proposed order, submit a single joint letter outlining the dispute. Failure to timely submit a proposed order shall constitute waiver of any arguments related to material in the preliminary conference order, may result in sanctions, and may result in the issuance of a sua sponte discovery order. Preliminary conference orders are available at: https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Genl.pdf; and it is further

ORDERED that any arguments raised and not addressed herein have nevertheless been considered and are hereby denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: December 21, 2021

ORDERED:



Hon. Frank P. Nervo, J.S.C.