

200/210 E. 65 LLC v Bristol 65 Parking LLC

2023 NY Slip Op 33066(U)

August 29, 2023

Supreme Court, New York County

Docket Number: Index No. 152519/2021

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC

PART 36

Justice

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INDEX NO. 152519/2021

200/210 EAST 65 LLC,
Plaintiff,

MOTION SEQ. NO. 002

- v -

BRISTOL 65 PARKING LLC d/b/a ICON PARKING a/k/a ICON
PARKING SYSTEMS a/k/a ICON PARKING SYSTEMS, LLC,
TMO PARENT LLC, TMO II LLC, TMO III LLC, TMO IV LLC,
TMO V, LLC a/k/a TMO V LLC, TMO VI, LLC a/k/a TMO VI
LLC, ICON PARKING HOLDINGS, LLC, HPS INVESTMENT
PARTNERS, LLC, "XYZ CORP.", AND "JOHN DOES" #1-20,
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 30, 31, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for

DISMISSAL

The facts of this case are set forth in the decision and order resolving motion sequence 001 and, thus, shall not be repeated here. Defendant HPS Investment Partners, LLC ("HPS") moves, pursuant to CPLR 3211(a)(7), for dismissal of the amended complaint against it for failure to state a cause of action.

Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3025(b), for leave to amend the amended complaint and serve a proposed second amended complaint. The proposed second amended complaint seeks to add claims against HPS for constructive fraudulent transfer (seventh cause of action) and actual fraudulent transfer (eighth cause of action). Plaintiff also seeks to add allegations about newly discovered liens as a new basis for its existing claims for unjust enrichment (fourth cause of action) and for an injunction (ninth cause of action) (NYSCEF Doc. No. 38, *proposed second amended complaint*).

As relevant to this motion, in its amended complaint, plaintiff asserts, *inter alia*, that tenant and the guarantors, under the direction and control of Icon Holdings, were engaged in a fraudulent scheme to funnel all or substantially all the funds received by Icon parking garages to Icon Holdings and then to HPS and other subsequent transferees, to defraud Icon's creditors, including plaintiff. The basis for this allegation stems from a sworn filing in a bankruptcy proceeding for an Icon affiliate (*In re Newbury Operating LLC*, Case No. 20-12976 [JLG] [Bankr. SDNY], wherein John D. Smith ("Smith"), Icon Holding's Chief Executive Officer, allegedly averred that Icon Holdings and its affiliated parking garage entities utilize a "centralized and integrated cash management system" ("CMS") whereby funds deposited into each parking garage entity's separate bank account or accounts are transferred to a master

account maintained by Icon Holdings and then subsequently transferred to HPS, who owns and controls Icon Holdings and other transferees.

Plaintiff asserts claims against HPS based on constructive fraudulent transfer, actual fraudulent transfer, and unjust enrichment, which HPS now seeks to dismiss.

In support of its motion, HPS submits the affidavit of Smith, who denies plaintiff's claims that Icon has diverted any cash to HPS that could have been used to pay rent due and owing to them. Smith explains that Icon is indirectly owned by several investment funds, including funds controlled by HPS who collectively hold a minority of indirect equity interests in Icon.

Icon, as paymaster, operates a CMS, which is frequently deployed in multi-unit businesses, where parking revenues are transferred into a concentration account from where direct operating costs and administrative costs are paid by Icon. Smith affirms that the CMS is not designed to, and was not used to, funnel funds to enrich HPS or Icon. Smith states: "[t]o the extent that some but not all expenses were paid with respect to a particular parking garage during the COVID-19 global pandemic, as is the case with the Garages, it was because those funds were conserved while individual lease-by-lease negotiations and restructurings or lease terminations were undertaken." Additionally, RealPro Parking LLC and 22nd and Sixth Parking, LLC are not insolvent nor were they rendered insolvent by the transfers into Icon's paymaster account. (NYSCEF Doc. No. 23, *Smith's affidavit*).

In opposition to the motion, plaintiff argues that the constructive fraudulent transfer claim should not be dismissed because it has been adequately pleaded in the complaint that HPS is a subsequent transferee of assets fraudulently transferred from tenant and guarantors to Icon. Contrary to HPS' argument, the fact that certain allegations are made upon information and belief does not render the complaint insufficient. Plaintiff also contends that it has set forth allegations based, in part, on Smith's declaration in the bankruptcy proceeding, supporting its claim that some amount of funds, including those fraudulently transferred from tenant to Icon, would have been transferred to HPS. Furthermore, recently discovered evidence showing that HPS took a security interest on all assets of tenant, guarantors, and Icon Holdings around the time that tenant's revenues stopped being used to pay rent, support its constructive fraudulent transfer claim against HPS. The specifics regarding the transfers would be in the exclusive control of Icon and HPS. According to plaintiff, it is of no moment that the cash management system was in place for years prior to tenant's default. Rather, the relevant inquiry is whether the CMS creates a voidable system when it is used to transfer funds from an insolvent entity to its parent company without reasonably equivalent value for the transfer, and whether HPS subsequently received all or a portion of those funds from Icon. It cannot be ascertained, absent discovery, whether any value tenant received from Icon was reasonably equivalent to the amount of revenue transferred from tenant to Icon. (NYSCEF Doc. No. 51, *memorandum of law*).

Plaintiff argues that it has adequately alleged that tenant has been rendered insolvent and that, such a determination of insolvency and what constitutes fair consideration is a question of fact reserved for trial.

As for the actual fraudulent conveyance claim, plaintiff claims it has alleged sufficient “badges of fraud” to lead to an inference of intent, to wit, “that (a) it is owed money as a result of the breach of the lease and is, thus, a creditor (Ex A ¶¶ 2, 9); (b) the Transfers were made to Icon, an insider of Tenant (Ex A ¶¶ 12, 52) -- a claim which HPS admits (HPS Memo p. 11); (c) the Transfers comprised substantially all of Tenant’s assets (Id.); (d) Tenant did not receive reasonably equivalent value for the Transfers (Id.); (e) Tenant was insolvent at the time of the Transfers or became insolvent shortly thereafter (Id.); and (f) Icon made Subsequent Transfers of all or a portion of the funds initially transferred by Tenant to the Subsequent Transferees.”

Addressing the unjust enrichment claim, plaintiff argues that HPS benefited through the receipt of the subsequent transfers consisting of assets that could and should have been used by tenant to pay rent and use and occupancy owed to plaintiff, which were fraudulently conveyed to Icon and then to HPS. The existence of a contract, claims plaintiff, does not warrant dismissal of its unjust enrichment claim because HPS is a non-signatory to those contracts and, thus, cannot be held liable. There is also an adequate connection between plaintiff and HPS to maintain an unjust enrichment claim, argues plaintiff.

Plaintiff seeks leave to amend its amended complaint, which removes the claim for ejectment, and adds additional causes of action for constructive fraudulent transfer of liens, and actual fraudulent transfer of liens, and which corrects minor deficiencies in the original pleadings. They argue, in relevant part, that the HPS liens constitute a fraudulent conveyance. (NYSCEF Doc. No. 51, *HPS’ memorandum of law*).¹

Andrew Berkman, the authorized signatory and in-house counsel for 200/210 East 65 LLC, affirms that, based on the recent submission of Smith’s supplemental affidavit, plaintiff first learned of the existence of certain UCC-1 liens recorded by HPS against Icon and Icon’s individual parking garages. Upon further investigation, plaintiff discovered that in June 2020, Icon Holdings, tenant, and all of the guarantors granted security interests to HPS who filed UCC-1 financial statements against Icon Holdings, tenant and substantially all of the guarantors to record security interests in “[a]ll assets of the Debtor whether now owned or hereafter acquired or in which Debtor otherwise has rights and all Proceeds thereof.” Berkman attaches a copy of the liens. (NYSCEF Doc. No. 40, *Berkman’s affidavit*).

In opposition to the cross-motion, defendants Bristol 65 Parking LLC, TMO PARENT LLC, TMO II LLC, TMO III LLC, TMO IV LLC, TMO V, LLC a/k/a TMO V LLC, TMO VI, LLC a/k/a TMO VI LLC, and Icon Parking Holdings, LLC argue that the amended complaint is insufficient as a matter of law because it seeks relief already provided in the November 12, 2021, decision and order in the first-filed action. They further contend that the new allegations regarding HPS’ purported lien fraud are woefully insufficient and must be denied. (NYSCEF Doc. No. 55, *memorandum of law in opposition to cross-motion*).

HPS submits separate opposition wherein it argues that HPS had a private transaction in June 2020 in which certain Icon entities granted it a security interest in their assets. The liens, which were publicly disclosed, are unrelated to this matter. HPS further argues that there is

¹ Plaintiff amended its memorandum of law after HPS filed a notice rejecting the original memorandum of law due to its noncompliance with Rule 202.8-b(b) and (c).

nothing unusual or improper about the liens and that this court should reject plaintiff's assertion, without basis, that the liens must be fraudulent transfers. As such, the mere fact that the liens exist do not provide plaintiff grounds to assert either actual or constructive fraudulent transfer.

HPS contends additionally, that the mere fact that Icon had a CMS did not imply that it would use that CMS to transfer funds to its equity owners.

Finally, HPS argues that plaintiff's constructive fraudulent transfer claim fails because plaintiff does not allege any transfers to HPS, fails to plead lack of reasonably equivalent value; and it fails to plead that tenant is insolvent. The actual fraudulent transfer claim, premised on allegations of fraudulent transfers based on the CMS, also fail to state a claim because plaintiff fails to allege this claim with any particularity and none of the "badges of fraud" plaintiff relies on show that the CMS was meant to defraud, hinder, or delay anyone. HPS also denies that it was unjustly enriched and asserts that plaintiff cannot assert a claim for unjust enrichment against it because it cannot show that plaintiff had any relationship with HPS. The unjust enrichment claim is also precluded by the existence of the contracts between plaintiff and tenant. Therefore, HPS argues that the amended complaint should be dismissed (NYSCEF Doc. No. 59, *memorandum of law of HPS*).

Addressing the motion to amend, HPS argues that plaintiff's fraudulent transfer claims based on the liens cannot survive a motion to dismiss because plaintiff cannot plausibly allege that the liens are fraudulent. HPS maintains that plaintiff fails to allege insolvency; plaintiff fails to allege lack of equivalent value.

As for the unjust enrichment claim, HPS argues that it has not been enriched by the liens because it has never actually held any secured claims on Icon's assets and that any benefit HPS might hypothetically receive in the future is too speculative to support a claim for unjust enrichment. Furthermore, the new injunction claim cannot survive a motion to dismiss because it is premised on the liens being fraudulent transfers, which plaintiff has failed to establish. HPS also argues that the injunction claim fails because plaintiff has no irreparable injury and has failed to show that the equities weigh in its favor. Additionally, HPS argues that plaintiff's prayer for relief, seeking to avoid the liens, is overbroad. Lastly, it asserts that allegations about the liens do not support plaintiff's claims based on the CMS (NYSCEF Doc. No. 56, *HPS' memorandum of law*).

Although plaintiff files a reply to defendants' opposition papers (NYSCEF Doc. Nos. 60-67), the same is an improper sur-reply, and thus, shall not be considered (see *Dewitt Nursing & Rehabilitation Ctr., Inc. v Halpin*, 2023 NY Slip Op 32261(U), *4 [Sup Ct, NY County 2023]; *Matter of Gottlieb v Izsak*, 2018 NY Slip Op 32843(U), **8 n [Sup Ct, Kings County 2018].)

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs 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] [internal citations omitted].) A pleading may be dismissed, pursuant to CPLR 3211(a)(7) if plaintiff fails to identify a claim cognizable at law or where the plaintiff has

identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (See CPLR 3211[a][7]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].)

“To state a cause of action for constructive fraudulent conveyance under Debtor and Creditor Law §§ 273, 274, and 275, the complaint must allege that the transferor transferred assets without receiving fair consideration in exchange” (*McCormack Family Charitable Found. v Fid. Brokerage Services, LLC*, 195 AD3d 420, 421-22 [1st Dept 2021], *lv to appeal denied*, 37 NY3d 912 [2021]). Claims for constructive fraudulent conveyance “are not subject to the particularity requirement of CPLR 3016, because they are based on constructive fraud” (*Ridinger v W. Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017].) Here, this court finds that plaintiff has failed to allege facts establishing that Icon, upon receiving assets from tenant through the CMS system, transferred assets to HPS. The allegations that HPS received assets without fair consideration are based upon information and belief, which are insufficient to state a claim for constructive fraudulent conveyance (*In re Sharp Intl. Corp.*, 403 F3d 43, 53-54 [2d Cir 2005], [“plaintiffs’ mere belief that [the debtor] transferred assets to Investment Banking without fair consideration does not suffice”]; *Riback v Margulis*, 43 AD3d 1023, 1023 [2d Dept 2007] [“finding that ‘speculative and conclusory allegations’” did not state a claim for constructive fraud under the Debtor and Creditor Law]; see *L&M 353 Franklyn Ave. LLC v Steinman*, 202 AD3d 440, 440 [1st Dept 2023]; *Eagle Eye Collection Corp. v Shariff*, 190 AD3d 600, 601 [1st Dept 2021]; *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]; *RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015].) Therefore, it is dismissed.

To state a claim for actual fraudulent conveyance, a plaintiff must plead with particularity defendant’s intent to hinder, delay, or defraud present or future creditors (see *RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 [1st Dept 2015]; CPLR 3016[b]; Debtor and Creditor Law § 273[a][1]). To prove his or her case, a plaintiff may rely on “badges of fraud”, which “are circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent.” (*Ray v Ray*, 108 AD3d 449, 451 [1st Dept 2013].) This court finds that plaintiff fails to allege sufficient facts to establish that HPS received assets from Icon under a scheme to hinder, delay or defraud plaintiff. This court notes that, although Icon is alleged to have received payment from tenant under the CMS system, allegations that HPS received any such assets are based purely upon conjecture and speculation. Plaintiff alleges, upon information and belief, that Icon made transfers to HPS of all or a portion of the funds initially transferred by tenant (see *Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d at 477). It relies on conclusory claims that the transfers were concealed from plaintiff, that tenant did not receive reasonably equivalent value for the transfers, and that tenant was insolvent or became insolvent because of every transfer. Furthermore, the fact that HPS holds equity in Icon, standing alone, does not support an inference that funds were fraudulently transferred to HPS from Icon. Plaintiff’s reliance on the existence of the CMS system to argue “badges of fraud” is also unavailing. Plaintiff concedes that “that use of a cash management system alone is [not] inherently improper” but argues that “[t]he relevant inquiry is whether its use creates a voidable transfer when used, as here, to transfer funds from an insolvent entity to its parent company without reasonably equivalent value, and whether HPS subsequently received all or a portion of

those funds.” However, insofar as there are no specific allegations that, *inter alia*, transfers were made to HPS, plaintiff fails to state a claim for actual fraudulent conveyance.

Plaintiff also fails to state a claim against HPS for unjust enrichment. This action, which concerns the payment of rent, is governed by the agreement executed between plaintiff and tenant. Thus, no unjust enrichment claim can lie as against HPS relating to tenant’s failure to pay rent under said agreement (see *Pappas v Tzolis*, 20 NY3d 228, 234 [2012]; *Rashid v B. Taxi Mgt. Inc.*, 107 AD3d 555, 556 [1st Dept 2013]). Furthermore, plaintiff has failed to allege facts establishing that HPS received any such funds from Icon to establish that it was unjustly enriched. Therefore, the claim for unjust enrichment against HPS is dismissed.

Turning next to the motion to amend, although it is well-settled that “[l]eave to amend a pleading should be freely given as a matter of discretion in the absence of prejudice or surprise” (*Cafe Lughnasa Inc. v A & R Kalimian LLC*, 176 AD3d 523, 523 [1st Dept 2019] [internal quotation marks and citations omitted]), “[a] proposed amendment that cannot survive a motion to dismiss should not be permitted” (*Scott v Bell Atl. Corp.*, 282 A.D.2d 180, 185 [1st Dept 2001], citing *Glenn Partition v Trustees of Columbia Univ.*, 169 AD2d 488, 489 [1st Dept 1991]; see also *Yu Tian Li v Louie & Chan Rest.*, 170 AD3d 424, 425 [1st Dept 2019].) Here, the infirmities in the amended complaint cannot be cured by the proposed second amended complaint. The mere existence of liens from June 2020 do not establish plaintiff’s claims for actual and constructive fraudulent transfers. Plaintiff fails to allege facts sufficient to establish that the liens were fraudulent and intended to defraud, delay and hinder plaintiff from collecting rent; that no benefit was received in exchange for the conveying of the liens to HPS; and that tenant and guarantors were insolvent. Furthermore, to the extent plaintiff seeks to assert a claim for injunctive relief premised on the HPS liens, that request is denied. Plaintiff fails to allege irreparable harm since “monetary harm which can be compensated by damages does not constitute irreparable injury” (see *OraSure Tech., Inc. v Prestige Brands Holdings, Inc.*, 42 AD3d 348, 348 [1st Dept 2007] [internal quotation marks and citation omitted].) Therefore, to the extent plaintiff seeks to assert claims and additional allegations as against HPS, that request is denied. However, plaintiff is granted leave to amend the complaint to correct the minor deficiencies in the amended pleadings, including the removal of pleadings that are no longer applicable. Accordingly, it is hereby

ORDERED that the motion of defendant HPS INVESTMENT PARTNERS, LLC to dismiss the amended complaint herein is granted and the amended complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

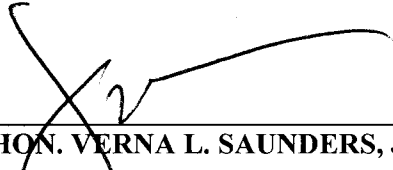
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website)]; and it is further

ORDERED that plaintiff’s cross-motion is denied in part, in accordance with this decision and order; and it is further

ORDERED that plaintiff shall file a second amended complaint within twenty (20) days after service of this decision and order with notice of entry.

This constitutes the decision and order of this court.

August 29, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER