

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

WONDER WORKS CONSTRUCTION CORP.,

Plaintiff,

-against-

JAMES SEERY,

Defendant. **FILED**
JAN 05 2011

INDEX NO. 100096/10

MOTION SEQ. NO. 002

The following papers, numbered 1 - 5 were considered on this motion to dismiss:
NEW YORK COUNTY CLERK'S OFFICE

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3, 4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: [] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is denied to the extent set forth below.

In this action, plaintiff seeks to set aside alleged fraudulent conveyances made to defendant from a now-defunct company, J. Seery Construction, of which defendant was sole owner and officer. In a prior litigation, plaintiff sued J. Seery Construction for breach of contract, alleging that plaintiff had overpaid the construction corporation by approximately \$195,000. Although J. Seery Construction initially appeared in that action, subsequently, after numerous defaults, the matter was sent to inquest and plaintiff was awarded a judgment in the amount of \$299,291.03. Plaintiff thereafter commenced this action against defendant James Seery, alleging that during or after the prior action, J. Seery Construction fraudulently transferred its assets to defendant, in violation of Article 10 of the Debtor and Creditor Law.

Defendant James Seery moves to dismiss the amended complaint, pursuant to CPLR 3211(a)(7) and 3016, for failure to state a cause of action and failure to allege the fraud claim with particularity. Defendant contends that plaintiff failed to state a cause of action for fraudulent conveyance by not specifying the alleged fraudulent transaction. Specifically, defendant asserts that plaintiff did not

identify any transaction or conveyance that should be set aside. Further, while plaintiff alleges in its complaint that its counsel was told, during the course of the prior action, that J. Seery Construction had transferred or was transferring all its assets (Am Compl ¶ 12 [Steven J. Moser Aff, Exh H]), defendant argues that plaintiff fails to state who made the statement or when it was made.

Plaintiff opposes the motion, both on substantive and procedural grounds. With regard to the sufficiency of the amended complaint, plaintiff contends that, in light of its allegation that its judgment against J Seery Construction remains unsatisfied and that plaintiff was told that J. Seery Construction had transferred or was in the process of transferring all its assets, the motion should be denied. Plaintiff asserts that discovery is needed, pursuant to CPLR 3211(d), in order to make further allegations in this case, because the facts are in the exclusive control of defendant. On procedural grounds, plaintiff argues that defendant's motion is improper for two reasons: (1) the within motion to dismiss is the second motion to dismiss by defendant, and only one is allowable pursuant to the CPLR; and (2) the motion was not timely made, as it was not served pursuant to the time period specified in CPLR 2214(b) and 2103(b)(2), which requires motion papers to be served 16 days prior to the return date (plus an additional five days if service made by mail) if the notice of motion so states, in order to allow the non-movant to submit answering affidavits and any cross motions.

As for plaintiff's first point, defendant made a prior motion to dismiss, which was denied as moot by this Court, as plaintiff amended its complaint to alter its causes of action against defendant simultaneously with opposing the motion. The court notes that, with regard to the prior motion to dismiss, defendant did not withdraw that motion and re-submit one or seek to have the court apply the pending motion to the amended complaint, either of which would have been proper. Instead, defendant chose to leave the motion as submitted and defendant himself stated in his reply in that motion that it was moot. As for plaintiff's second point, defendant fails to address this argument in his reply.

On a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and

the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88.

Even if the motion was deemed timely made, the motion to dismiss the amended complaint is denied. Article 10 of the New York Debtor and Creditor Law provides that conveyances made that render a corporation insolvent or unable to satisfy a judgment in an action that was ongoing at the time the conveyance was made are fraudulent if made without fair consideration. *See* NY Debtor & Creditor Law §§ 273, 273-a. The amended complaint contains general allegations of violations of Article 10 of the Debtor and Creditor Law. However, plaintiff has demonstrated that additional facts, which are in the exclusive control of defendant, are needed to make further allegations in this case with regard to the specific alleged fraudulent transactions and oppose defendant's motion, pursuant to CPLR 3211(d). The relevant facts as to whether any fraudulent conveyances occurred are within the control of defendant and, thus, discovery is necessary. CPLR 3211(d) provides, with respect to motions to dismiss, that "[s]hould it appear . . . that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion." This subsection "protects the party to whom essential . . . facts are not presently known, especially where those facts are within the exclusive control of the moving party." *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 465-66 (1974).

Plaintiff has alleged, "upon information and belief," that during the pendency of the prior action or after plaintiff was awarded a judgment, fraudulent transfers occurred between defendant's company and defendant himself. Am Compl ¶¶ 17, 19-20 (Moser Aff, Exh H). Although plaintiff has not asserted what specific transactions it seeks to set aside, the court notes that little discovery occurred, if any, in the prior action because J. Seery Construction defaulted numerous times and plaintiff was granted a judgment following an inquest, at which J. Seery Construction did not appear. Thus, there were few opportunities for plaintiff to learn of the finances of J. Seery Construction or of the financial

transactions that may have occurred during the pendency of the prior action and whether any improper transfers were made.

Moreover, while defendant cites to cases for the general proposition that a motion to dismiss should be granted for plaintiff's failure to particularize the alleged fraudulent transactions, differing facts are present in this action. For example, the First Department affirmed a lower court's dismissal of a complaint where any specific allegation concerning the value of the transferred property was absent, but noted that "[n]or was a need for additional disclosure demonstrated." *IDC (Queens) Corp. v Illuminating Experiences, Inc.*, 220 AD2d 337, 337 (1st Dep't 1995). Here, plaintiff has stated, and sufficiently shown, that there is a need for additional disclosure. Thus, in light of the above circumstances, the motion is denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon defendant.

Dated: 12/29/10


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if Appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER/JUDG.

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FILED

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