153 A.D.3d 1208
Supreme Court, Appellate Division,
First Department, New York.

CDR CRÉANCES S.A.S., Plaintiff–Respondent,
v.
FIRST HOTELS & RESORTS INVESTMENTS, INC., also known as Les Premiers Investissements Hoteliers & Villegiature, Inc., Defendant–Appellant.

Sept. 28, 2017.

Synopsis

Background: In judgment creditor's action alleging claims against purchaser of condominium for fraudulent transfer, unjust enrichment, and seeking attorneys' fees, purchaser moved for summary judgment. The Supreme Court, New York County, Lawrence K. Marks, J., 2017 WL 495944, denied motion, and purchaser appealed.

[Holding:] The Supreme Court, Appellate Division, held that there was no relationship between parties that could have caused reliance or inducement on judgment creditor's or its predecessor's part.

Affirmed as modified.

West Headnotes (2)

[1] Judgment
Particular Cases

Genuine issue of material fact existed regarding repayment of debts, precluding summary judgment on judgment creditor's claim of fraudulent transfer.

Cases that cite this headnote

[2] Implied and Constructive Contracts
Unjust enrichment

There was no relationship between parties that could have caused reliance or inducement on judgment creditor's or its predecessor's part, as required for unjust enrichment claim against purchaser of condominium unit.

Cases that cite this headnote

Attorneys and Law Firms

**53 Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for appellant.

Kellner Herlihy Getty & Friedman, LLP, New York (Douglas A. Kellner of counsel), for respondent.

TOM, J.P., MAZZARELLI, ANDRIAS, and OING, JJ.

Opinion

*1208 Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about February 7, 2017, which denied defendant's motion for summary judgment dismissing the claims for fraudulent transfer, unjust enrichment, and attorneys' fees pursuant to Debtor and Creditor Law § 276–a, unanimously modified, on the law, to grant the motion as to the unjust enrichment claims, and otherwise affirmed, without costs.

The motion court correctly found that the transfer into defendant's Union Planters bank account and the pre-January 7, 2004 transfer into its HSBC account did not constitute a new theory of liability. All along, plaintiff's theory of liability has been a fraudulent transfer from nonparty Whitebury Shipping *1209 Time Sharing, Ltd. to defendant; thus, the key is Whitebury's intent to hinder, delay, or defraud plaintiff or its predecessor (*see* Debtor and Creditor Law § 276). Because it is difficult to prove actual intent, plaintiff is permitted to rely on badges of fraud (*see Wall St. Assoc. v. Brodsky,* 257 A.D.2d 526, 529, 684 N.Y.S.2d 244 [1st Dept.1999]). Most of these badges, such as the relationship between Whitebury and defendant, whether the transfers were in the ordinary course of business, whether defendant gave Whitebury any consideration, and whether Whitebury retained any control of the money it transferred to defendant, are within defendant's knowledge; defendant does not need discovery on these points. As for Whitebury's knowledge of plaintiff's (or its predecessor's) claim and Whitebury's inability to pay it, that factor is the same regardless of whether the fraudulent transfer is only the January 15, 2004 transfer mentioned in plaintiff's interrogatory

responses or all three transfers into defendant's bank accounts.

[1] The three transfers amount to $8.55 million; defendant only proved that it had repaid Whitebury $6 million. Therefore, defendant did not entirely disprove plaintiff's claim of a fraudulent transfer.

Because the court correctly declined to dismiss the fraudulent transfer claim, it also correctly declined to dismiss the claim for attorneys' fees under Debtor and Creditor Law § 276–a.

[2] However, the unjust enrichment claim should be dismissed, because there was no relationship between the parties that could have caused reliance or inducement on plaintiff's or its predecessor's part (*see Georgia Malone & Co., Inc. v. Rieder,* 86 A.D.3d 406, 408, 926 N.Y.S.2d 494 [1st Dept.2011], *affd.* 19 N.Y.3d 511 950 N.Y.S.2d 333, 973 N.E.2d 743 [2012]). Plaintiff's predecessor made a one-year ****54** loan to nonparty Euro–American Lodging Corporation (EALC) in 1990 and extended it in 1991. Defendant was not formed until 1999.

The motion court apparently allowed plaintiff to establish the requisite relationship via an alter ego theory. However, in 2011, plaintiff moved to amend its complaint to make it clear that it sought reverse piercing of defendant's corporate veil so that all of defendant's assets could be made available to satisfy plaintiff's judgments against various nonparties. The court (O. Peter Sherwood, J.) denied the motion, and we affirmed (*CDR Créances S.A.S. v. First Hotels & Resorts Invs., Inc.,* 101 A.D.3d 485, 956 N.Y.S.2d 16 [1st Dept.2012]). Furthermore, we have twice rejected a connection between defendant's purchase of the condominium unit at issue in the instant action and plaintiff's predecessor's loan to EALC (*see id.* at 487, 956 N.Y.S.2d 16; *Matter of CDR Créances S.A.S. v.* ***1210** *First Hotels & Resorts Invs., Inc.,* 140 A.D.3d 558, 563 [1st Dept.2016]).

All Citations

153 A.D.3d 1208, 62 N.Y.S.3d 52, 2017 N.Y. Slip Op. 06723

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