

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49  
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PALMONE, INC.,

Plaintiff.

- against -

Index No. 600947/2003

R.C.S. COMPUTER EXPERIENCE, L.L.C., FIVE  
PARTNERS ASSET MANAGEMENT, L.L.C.,  
NORTHEAST FINANCIAL GROUP, L.L.C., NYCH,  
L.L.C., NYCH INVESTORS, L.L.C., JOSEPH  
CAYRE and CHARLES TEBELE,

Defendants.  
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**HERMAN CAHN, J.**

In this action to recover payment for goods sold and delivered, defendants move for summary judgment, CPLR 3212, dismissing those causes of action of the complaint which have not previously been dismissed in a prior decision dated February 23, 2004. The motion is denied.

In the prior decision, the court granted defendants' CPLR 3211 motion to dismiss the complaint, in part, to the extent that the second, third, eighth and ninth causes of action were dismissed. Defendants now move for summary judgment dismissing the remaining causes of action, that is, the first, fourth, fifth, sixth and seventh causes of action.

#### **FACTUAL ALLEGATIONS**

Defendant R.C.S. Computer Experience, L.L.C. (RCS) was organized in June 1998, and thereafter operated retail stores at which it sold computers and computer-related equipment. It purchased merchandise from an entity named 3Com, Inc. or 3Com Corporation (3Com). In connection with those purchases, RCS executed an agreement granting 3Com a security interest in "all 3Com Corporation inventory on hand" with RCS (Compl. ¶ 15).

Plaintiff Palmone, Inc. had apparently been acquired by 3Com in 1997, but was "spun off" as an independent entity, between March and July 2000. RCS subsequently purchased various hand-held electronic devices and accessories from plaintiff.

On November 7, 2000, defendant Five Partners Asset Management, L.L.C. (Five

Partners), an entity which is evidently affiliated with RCS, executed a guaranty, pursuant to which Five Partners guaranteed payment of all present and future obligations of RCS to plaintiff.

RCS failed to pay plaintiff \$1,503,538.30, for goods which plaintiff sold to RCS between November 1, 2001 and February 10, 2002. Plaintiff obtained a default judgment against RCS and Five Partners, for \$1,697,582.80, after those two entities failed to appear in an action entitled *Palm, Inc. v R.C.S. Computer Experience, L.L.C. and Five Partners Asset Mgt., L.L.C.* (index no. 601522/2002, Lowe, J.). When that judgment was not satisfied, plaintiff commenced this action.

In May 2000, RCS had entered into a revolving credit agreement with Commercial Bank of New York pursuant to which the bank had agreed to lend RCS up to \$10,000,000.00. RCS subsequently issued promissory notes to the bank (the Notes), which Notes were personally guaranteed by defendants Joseph Cayre and Charles Tebele. Cayre is alleged to be an officer, director, shareholder, and/or principal of RCS, and Tebele is alleged to be the president of RCS.

RCS defaulted in paying the Notes. Thereupon, RCS and Commercial Bank entered into a loan modification agreement, dated October 1, 2001, pursuant to which, among other things, RCS granted the bank a security interest in all of its existing and after-acquired, tangible and intangible, personal property. Thereafter, North Fork Bank apparently succeeded to Commercial Bank's rights and interests in connection with the loan to RCS.

Defendant Northeast Financial Group, L.L.C. (Northeast), a company allegedly owned or controlled by Cayre and Tebele, was formed in late February 2002. North Fork Bank and Northeast entered into an agreement, dated March 1, 2002 (the North Fork Bank/Northeast Agreement), pursuant to which Northeast paid North Fork Bank \$9,464,000.00, in exchange for the RCS Notes and an assignment of the Security Interest. The agreement provided that approximately \$8,127,810.42 of the purchase price was to be paid by North Fork Bank's retention of an account which Commercial Bank held in Cayre's name.

By letter dated March 8, 2002, Northeast advised plaintiff that it would dispose of RCS's property "privately sometime on or after March 18, 2002" (Tebele Aff., Ex. 10).

Defendants NYCH Investors, L.L.C. and NYCH L.L.C. (NYCH), two other companies allegedly owned or controlled by Cayre and Tebele, were formed on March 4, 2002.

On or about March 22, 2002, RCS, Northeast, NYCH Investors and NYCH entered into various agreements. RCS and Northeast executed an agreement (the RCS/Northeast Agreement), pursuant to which RCS conveyed the RCS Property (which is described by the agreement as having a fair market value of \$9,615,000.00) to Northeast, and Northeast deemed the indebtedness evidenced by the Notes to be fully satisfied.

Northeast, which now owned the RCS property, and NYCH Investors executed an agreement, pursuant to which Northeast sold all or part of the RCS Property to NYCH Investors, in exchange for a promissory note in the principal amount of \$9,615,000.00.

NYCH Investors and NYCH executed an agreement, pursuant to which NYCH Investors conveyed all of its right, title and interest in the RCS Property to NYCH, as an initial capital contribution which would be credited to NYCH Investors's account, and used by NYCH in the operation of its business. The law firm of Bryan Cave LLC allegedly represented all of the parties to the March 22, 2002 agreements, and drafted all of the documents executed at that time.

By letter dated April 24, 2002, Northeast advised plaintiff that it had acquired the RCS Property "by foreclosure" (Compl. ¶ 39; Ex. D). Since that time, NYCH has allegedly continued to sell the RCS Property, and done business as "R.C.S. Computer Experience" (*id.* ¶ 40).

Plaintiff alleges that RCS, Cayre and/or Tebele ordered goods from plaintiff, during some portion of the period between November 1, 2001 and February 10, 2002, with full knowledge that RCS would not pay plaintiff for the goods, and in order to utilize the goods to reduce Cayre's and Tebele's obligations under the Guaranties. Plaintiff further alleges that defendants executed the March 22, 2002 agreements wrongfully and illegally, in order to place RCS's assets beyond the reach of RCS's creditors, including plaintiff.

The complaint asserts nine causes of action of which the first, fourth, fifth, sixth and seventh survive. They are as follows: a piercing of RCS's corporate veil, against Cayre and

Tebele; a scheme to defraud, against Five Partners, Northeast, NYCH Investors, NYCH, Cayre and Tebele; fraudulent conveyance, under Debtor Creditor Law (DCL) § 273, against Five Partners, Northeast, NYCH Investors and NYCH; and fraudulent conveyance, under DCL § 275, against the same defendants.

## DISCUSSION

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*id.*). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*).

### Veil-Piercing Claim - First Cause of Action:

The first cause of action asserts that the “corporate veil” of RCS should be pierced, so as to hold Cayre and/or Tebele liable for RCS’s unpaid obligations to plaintiff.

In order to succeed on a veil-piercing claim, a plaintiff must establish that: (1) the defendants “exercised complete domination over the corporation with respect to the transaction attacked;” and (2) “such domination was used to commit a fraud or wrong against the plaintiff, resulting in the plaintiff’s injury” (*First Capital Asset Mgt., Inc. v N.A. Partners, L.P.*, 300 AD2d 112, 116 [1st Dept 2002], citing *Matter of Morris v New York State Dept. of Taxation and Fin.*, 82 NY2d 135, 141 [1993]). Defendants assert that they are entitled to summary judgment dismissing the first cause of action because the record contains no evidence that would support either of the foregoing elements. However, defendants’ assertion is without merit.

First, plaintiff has submitted evidence sufficient to raise an issue of fact at least as to whether Cayre and Tebele exercised complete domination over RCS both generally, and also

with respect to what appears to be the principal “transaction attacked” by plaintiff in this action, i.e., RCS’s transfer of its assets to Northeast pursuant to the RCS/Northeast Agreement, dated March 22, 2002. As regards Cayre, plaintiff has submitted copies of: (1) RCS’s operating agreement, dated June 26, 1998, which indicates that Cayre was the managing member of Rockwell Computer Services LLC (Rockwell Services), the managing member of RCS, and, additionally, that Rockwell Services was charged with managing the business and affairs of RCS, that RCS had only two other members in addition to Rockwell Services and that Rockwell Services held a 62.5% ownership interest in RCS<sup>1</sup>; (2) two documents, a bank signature card and a multimillion dollar loan agreement, which Cayre apparently executed in his capacity as a director of RCS; and (3) two personal net worth statements of Cayre, dated May 1, 2001 and September 30, 2001, each of which lists Rockwell Services as a “closely held entit[y]” in which Cayre held an investment of more than \$12 million (*see* Rosenfarb Aff., Exs. B, C, E).

Plaintiff submitted additional documentary evidence which demonstrates Cayre’s substantial financial involvement in RCS, including copies of: a personal guaranty executed by Cayre in favor of Commercial Bank, pursuant to which he guaranteed RCS’s debt under the Notes; and letter agreements, executed by Cayre, which indicate that he deposited approximately \$7,714,000 with Commercial Bank in order to secure RCS’s debt under the Notes and his obligations under his personal guaranty (*see* Rosenfarb Aff. ¶¶ 12, 13; Exs. G, I, J). Defendants concede that Northeast has at all relevant times been wholly owned by Cayre (*see* Def. Rule 19-a State. ¶ 47). Thus, at the time when RCS transferred its assets to Northeast pursuant to the RCS/Northeast Agreement, it would appear that Cayre was both: (1) the person primarily vested with the power and authority to manage RCS’s business and affairs, and a substantial investor in RCS; and also (2) the sole owner of Northeast.

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<sup>1</sup> In their affidavits, Cayre and Tebele state that Rockwell Services at all times held a 66.5% ownership interest in RCS (*see* Cayre Aff. ¶ 4; Tebele Aff. ¶ 4). The other two members of RCS appear to be entities that were affiliated with RCS and/or Rockwell Services (*see* Rosenfarb Aff., Ex. B).

Tebele concedes that he held a 9.5% ownership interest in RCS, and was its president. Tebele also executed a personal guaranty in favor of Commercial Bank, pursuant to which he personally guaranteed RCS's debt to Commercial Bank under the Notes (*see* Rosenfarb Aff., Ex. H). Finally, Tebele was the individual who, in his capacity as the president of RCS, executed the RCS/Northeast Agreement on RCS's behalf (*see* Tebele Aff., Ex. 4). All of the foregoing, taken together, is sufficient to raise an issue of fact as to whether Cayre and Tebele completely dominated RCS in connection with the transfer of its assets to Northeast.

Defendants argue that plaintiff cannot establish the second element of their veil-piercing claim -- that the domination was used to commit a fraud against plaintiff resulting in injury. Defendants argue that the transfer by RCS of its assets to Northeast was not a fraud or wrong against plaintiff which caused plaintiff injury because: (1) the only wrong alleged is that the asset transfer was a fraudulent conveyance, and the asset transfer was not a fraudulent conveyance; and (2) even if the asset transfer was a fraudulent conveyance, plaintiff cannot show that it was harmed by that fraudulent conveyance.

However, neither of those arguments is persuasive. As will be discussed below, defendants have failed to establish, to the preclusion of any issue of fact, that RCS's transfer of its assets to Northeast did not constitute a fraudulent conveyance under the provisions of the DCL. Defendants have also failed to establish that plaintiff was not harmed by that conveyance. Defendants argue that plaintiff was not harmed by the transfer of the assets to Northeast because, if Northeast had not foreclosed upon the assets, then North Fork Bank (North Fork) would have foreclosed upon those assets, so that, in any event, RCS would have been left without any assets with which to pay plaintiff or any of RCS's other unsecured creditors.

However, that argument assumes that RCS's assets were worth no more than the aggregate amount that RCS owed on the Notes (*see* Def. Mem. of Law at 15), and defendants have failed to submit evidence on this motion, which establishes the truth of that assumed fact. If North Fork had foreclosed on RCS's assets, and if those assets were worth more than the

aggregate amount which RCS owed on the Notes, then it may be that North Fork -- after disposing of RCS's assets in a "commercially reasonable" manner, and after using the proceeds from the disposition to satisfy RCS's obligations under the Notes -- might have had a surplus that could have been recovered by plaintiff (*see* UCC 9-610, 9-615). Accordingly, defendants have failed to establish their entitlement to dismissal of the first cause of action, and the motion is denied as to this cause of action.

**Fraudulent Conveyance Claims - Fifth, Sixth and Seventh Causes of Action:**

The complaint's fifth, sixth and seventh causes of action allege that the transfer of RCS's assets to Northeast should be set aside because it constituted a fraudulent conveyance under, respectively, DCL §§ 273, 275 and 276. Defendants argue, as a preliminary matter, that plaintiff has no standing to assert claims that Northeast's conveyance of the assets formerly owned by RCS, to NYCH Investors, L.L.C. (NYCH Investors), or any subsequent conveyance of those assets, should be set aside as fraudulent. Defendants maintain that, in order to attack a conveyance on the ground that it is fraudulent, a plaintiff must be a creditor of the transferor, and plaintiff was not a creditor of either Northeast or NYCH Investors.

However, that argument is without merit. A plaintiff does not lack standing to assert a fraudulent conveyance claim, and to seek to have a conveyance set aside, merely because the plaintiff is not a creditor of the transferor. Rather, DCL § 278 specifically provides that, where a conveyance is fraudulent as to a creditor, the creditor may, "as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser. . . . [h]ave the conveyance set aside . . . to the extent necessary to satisfy his claim" (DCL § 278 [1] [a]). Thus, for example, if plaintiff is able to establish that the transfer of RCS's assets to Northeast was a fraudulent conveyance, and that NYCH Investors was not a bona fide purchaser of those assets for fair consideration, then plaintiff could presumably have the transfer of the assets by Northeast to NYCH Investors set aside "to the extent necessary to satisfy [plaintiff's] claim."

Defendants argue that the fifth, sixth and seventh causes of action should be dismissed as against all defendants because: (1) in order to establish that there was a fraudulent conveyance under any of the DCL sections upon which those claims are premised -- DCL §§ 273, 275 and 276 -- a plaintiff must demonstrate that the conveyance in question was made without "fair consideration;" and (2) RCS received fair consideration for the transfer of its assets to Northeast inasmuch as, in exchange for the transfer, Northeast deemed RCS's indebtedness under the Notes to be satisfied.

Defendants' argument is incorrect, first, in that a transfer may constitute a fraudulent conveyance under DCL § 276 even if the transfer was made for fair consideration. "DCL § 276, unlike sections 273 and 275. . . . does not require proof of unfair consideration . . ." (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). Even assuming, *arguendo*, that defendants established that there was fair consideration for RCS's transfer of its assets to Northeast, that alone would not warrant dismissal of the seventh cause of action.

In any event, defendants have failed to make a *prima facie* showing, in their moving papers, that the satisfaction of RCS's indebtedness under the Notes constituted fair consideration for RCS's transfer of its assets to Northeast.<sup>2</sup> Although the satisfaction of an antecedent debt may constitute fair consideration for a transfer of property, that general principle is subject to certain conditions. DCL § 272 (a) provides, in relevant part, that "[f]air consideration is given for property . . . [w]hen in exchange for such property . . . , as a fair equivalent therefore, and in

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<sup>2</sup>Ordinarily, the burden of proving the lack of fair consideration rests upon a creditor who seeks to have a conveyance set aside as fraudulent (*see, e.g., Murin v Estate of Brian Schwalen*, 31 AD3d 1031, 1032 [3d Dept 2006]; *Joslin v Lopez*, 309 AD2d 837, 838 [2d Dept 2003]). However, in this action, defendants controlled both RCS and Northeast at the time when RCS transferred its assets to Northeast, and, accordingly, had greater access than plaintiff to evidence of the specific nature and value of the assets transferred (*cf. National Communications Corp. v Bloch*, 259 AD2d 427, 427 [1st Dept 1999]; *Gelbard v Esses*, 96 AD2d 573, 576 [2d Dept 1983]). Given that circumstance, and the fact that defendants are the proponents of the instant motion for summary judgment, defendants bear the burden of making a *prima facie* showing that the satisfaction of RCS's indebtedness under the Notes constituted fair consideration for RCS's transfer of its assets to Northeast.

good faith, . . . an antecedent debt is satisfied.” In order for the satisfaction of the antecedent debt to constitute fair consideration for a transfer of property, there must be a fair equivalency between the value of the antecedent debt deemed to be satisfied and the value of the property transferred, and the transfer must have been made in good faith.

Defendants have failed to make a prima facie showing that there was a fair equivalency between the value of the assets which RCS transferred to Northeast and the amount of RCS’s indebtedness which Northeast deemed to be satisfied in exchange for the transferred assets. Both Cayre and Tebele assert in their affidavits, “[u]pon information and belief,” that at the time of the asset transfer, RCS owed approximately \$9,615,000 in principal and accrued interest under the Notes (Cayre Aff. ¶ 26; Tebele Aff. ¶ 28). Tebele also asserts, “[u]pon information and belief,” that, at the time of the asset transfer, “RCS’s assets, including its trade name and good will, had a fair market value of no more than \$9,615,000” (Tebele Aff. ¶ 27). Cayre asserts, “[u]pon information and belief, and based on the books and records available to Northeast, as of March 22, 2002,” that “RCS’s assets, including its trade name and good will, had a fair market value of not more than \$9,615,000” (Cayre Aff. ¶ 27).

However, Cayre’s and Tebele’s assertions as to the value of the assets which RCS transferred to Northeast -- and as to the fair equivalency of that value with the amount of the antecedent debt deemed to be satisfied -- are vague, conclusory and made only upon information and belief. Summary judgment may not properly be granted on the basis of supporting affidavits which allege material facts only upon information and belief, and fail to adequately allege the source of the information and the grounds for the belief (*see, e.g., Onondaga Soil Testing, Inc. v Barton, Brown, Clyde & Loguidice, P.C.*, 69 AD2d 984, 984 [4th Dept 1979]). Defendants attempt to remedy this defect in their moving papers by including in their reply papers, the affidavit of a purported expert in the valuation of business assets, who opines that the fair market value of RCS’s assets, immediately prior to the conveyance of those assets to Northeast, was only approximately \$8.3 million (*see Aronow Aff. ¶ 4*). However, the proponent of a motion for

summary judgment cannot rely upon evidence which is submitted for the first time in its reply papers to satisfy its prima facie burden, or to remedy basic deficiencies in its prima facie showing (see, e.g., *Rengifo v City of New York*, 7 AD3d 773, 773 [2d Dept 2004]; *Migdol v City of New York*, 291 AD2d 201, 201 [1st Dept 2002]; *Ritt by Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 561-62 [1st Dept 1992]).

Plaintiff has also submitted evidence which raises an issue of fact as to whether the transfer of RCS's assets to Northeast was effected in good faith. "Good faith is required of both the transferor and the transferee, and it is lacking when there is a failure to deal honestly, fairly, and openly" (*CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006] [citation and internal quotation marks omitted]). Good faith may be deemed to be lacking, under the constructive fraud provisions of the fraudulent conveyance law, where a transferee is controlled by a person who is also an insider of, and/or has control over, the transferor (see, e.g., *id.*: *Berner Trucking, Inc. v Brown*, 281 AD2d 924, 925 [4th Dept 2001]; *Julien J. Studley, Inc. v Lefrak*, 66 AD2d 208, 213 [2d Dept 1979], *aff'd* 48 NY2d 954 [1979]). Cayre's apparent control of the parties on both sides of the transaction is sufficient to raise an issue of fact as to whether the transfer of RCS's assets to Northeast was effected in good faith.

Defendants assert that plaintiff's fifth cause of action, predicated on DCL § 273, should be dismissed because, in order to establish a fraudulent conveyance under that section, a creditor must demonstrate that the debtor was insolvent at the time of the conveyance, and because the complaint's allegations effectively allege that RCS was not insolvent at the time when RCS conveyed its assets to Northeast. However, in order to constitute a fraudulent conveyance under DCL § 273, a conveyance which otherwise falls within the section need only be made "by a person who is *or will be thereby* rendered insolvent" (emphasis added). Inasmuch as the complaint adequately alleges facts indicating that the conveyance of RCS's assets to Northeast, by itself, rendered RCS insolvent, dismissal of the fifth cause of action is not warranted on the

ground that the complaint fails to allege that RCS was insolvent at the time of, or prior to, the conveyance.

Accordingly, this branch of the motion is denied.

**Claim of Scheme or Conspiracy to Defraud - Fourth Cause of Action:**

The fourth cause of action alleges that defendants participated in a scheme to defraud RCS's creditors, including plaintiff, by engaging in the various transfers of RCS's assets, in an attempt to place those assets beyond the creditors' reach. Defendants argue that the claim should be dismissed because a claim of a scheme, or civil conspiracy, may be maintained only where there exists a valid underlying and independent tort cause of action, and plaintiff has failed to assert such an underlying, independent tort cause of action. However, defendants have failed to establish their entitlement to dismissal of plaintiff's causes of action premised upon the DCL's fraudulent conveyance provisions, and, accordingly, have also failed to establish their entitlement to dismissal of the fourth cause of action on the ground that plaintiff has no viable underlying, independent tort claim.

**CONCLUSION AND ORDER**

For the foregoing reasons, it is

ORDERED that the motion for summary judgment dismissing the complaint is denied.

Dated: March 29, 2007

ENTER:

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/s/  
J.S.C.