

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 650029/2008
 BPLY INC.
 vs.
 WINDER INC.
 SEQUENCE NUMBER : 010
 DISMISS

PART 53

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____
 Is motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

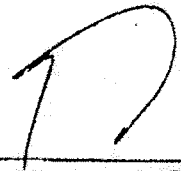
PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Is decided in accordance with accompanying memorandum decision and order.

Dated: 12/1/2010


 CHARLES E. RAMOS J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----x
BPLY, LLC,

Plaintiffs,

-against-

Index No. 650029/08

WINDER, INC., INDIVIDUALLY and D/B/A ROBERT
CALIBER CLOTHING COMPANY, WINDER INC. CORP.,
DIHERA, ROBERT SCHMIDT, MIA KIM a/k/a MEIAE
KIM and POINT A SHOWROOM,

Defendants.
-----x

Charles Edward Ramos, J.S.C.:

Motion sequence numbers 010 and 011 are consolidated for disposition.

In motion sequence 010, defendant Meiae Kim moves to dismiss the second amended complaint (Complaint) of plaintiff BPLY, LLC (BPLY) on grounds that closure of related bankruptcy proceedings mandates dismissal of the third cause of action asserted against her, and in the alternative, that this Court lacks personal jurisdiction over her.

In motion sequence 011, defendant Robert Schmidt moves to dismiss the third cause of action of the Complaint pursuant to CPLR 3211 (a) (1), (2), and (7).

Background¹

BPLY, headquartered in New York, is a sales agent for fashion designers. In March 2007, defendant Winder, Inc. (Winder) entered into a sales agreement (Agreement) with BPLY,

¹ The facts set forth herein are taken from the Complaint unless otherwise noted, and are assumed to be true for the purpose of disposition.

pursuant to which BPLY became Wlnder's exclusive sales agent for buyers worldwide for the term April 2007 through June 2008. Defendant Kim purportedly signed the Agreement in her capacity as director and principal of Wlnder. Defendant Schmidt was also a principal and/or officer of the entities.

Pursuant to that Agreement, BPLY sold Wlnder's products under a brand name and purportedly generated \$1.2 million in sales for Wlnder in approximately ten months. In January 2008, BPLY prematurely terminated the Agreement, and began selling the clothing line through its alter ego, defendant DIHera (together with Wlnder, the entities).

Initially, Wlnder commenced a breach of contract action against BPLY in California. In March 2008, that court granted BPLY's motion to dismiss on the ground of a forum selection clause contained in the Agreement that called for disputes to be resolved in the State of New York. Thereafter, BPLY commenced this action.

According to BPLY, after the entities had been named in the action, Schmidt and Kim (together, Defendants) allegedly undertook to dissolve the entities and to transfer all of their assets to themselves and their designees without fair consideration. On the basis of these allegations, BPLY asserts a claim against them for fraudulent conveyance.

In February 2010, the entities filed voluntary bankruptcy petitions in the District of Nevada, pursuant to chapter 7 of the United States Bankruptcy Code (the Code) (Exhibits A-B, annexed

to the Katz Reply Aff.).

Each of the entities' bankruptcy petitions listed BPLY as a creditor in addition to its claims in this action, and identified the entities' assets and other liabilities in schedules attached thereto (Exhibits A-B, annexed to the Rakower Aff.).

In March 2010, the bankruptcy trustee examined Kim under oath at a Code § 341 meeting regarding the entities' assets and liabilities and as to creditors listed in their bankruptcy petitions, including BPLY (Katz Reply Aff., ¶¶ 7-8). BPLY was notified of the meeting, but did not attend (*Id.*).

In June 2010, the bankruptcy trustee concluded that there is no property belonging to the estates of the entities, no property available for distribution, and that the estates have been fully administered (Exhibits E-F, annexed to the Katz Reply Aff., ¶ 9). Thereafter, final decrees were issued and the Chapter 7 trustee discharged (Exhibits C-D, annexed to the Rakower Aff.).

Discussion

Defendants move to dismiss the claim for fraudulent conveyance insofar as no conveyance occurred as a matter of law, by operation of the Bankruptcy Code. According to Defendants, all the assets that are the subject of BPLY's fraudulent conveyance claim reverted back to the entities' bankruptcy estates upon the filing of their bankruptcy petitions, and thus, there could be no conveyance to Defendants.

Moreover, Defendants assert that the Chapter 7 trustee made a finding that all of the entities' assets disclosed in the

schedules filed in the bankruptcy proceedings were worth less than \$1,000, and thus, were abandoned. On this basis, Defendants argue that there was no conveyance that was detrimental to the creditors inasmuch as the trustee disclaimed any ownership of these assets as being of inconsequential value.

In addition, Defendants assert that this Court lacks the authority to adjudicate the disposition of the entities' assets because any claim relating to those assets was required to be brought in the bankruptcy court, and BPLY declined to pursue this claim even though it was on notice of the proceedings.

Finally, Kim argues that this Court lacks personal jurisdiction over her.

In opposition, BPLY disputes that assets of the entities' that Defendants allegedly fraudulently conveyed prior to the commencement of the bankruptcy proceedings reverted to their bankruptcy estates. In addition, BPLY contends that this Court has long-arm jurisdiction over Kim under CPLR § 302 (a) (3) (I) and (ii).

Section 541 (a) (1) and (a) (3) of the Code defines the assets of a bankruptcy estate in a Chapter 7 proceeding to include "all legal and equitable interests of the debtor in property as of the commencement of the case," and any interest in property that the [bankruptcy] trustee recovers" under other provisions of the Code, including section 550.

Section 550 of the Code authorizes a trustee to recover transferred property for the benefit of the estate to the extent

that a transfer is, inter alia, fraudulent under sections 544 and 548 of the Code.

Thus, fraudulent conveyance claims based upon allegations of pre-bankruptcy petition transfers by the debtor are property of the bankruptcy estate or are claims against the debtor; in either case, the bankruptcy estate has exclusive authority to maintain such actions (*United Feature Syndicate, Inc. v Miller Features Syndicate, Inc.*, 216 F Supp 2d 198, 222 [SD NY 2002]; *In re MortgageAmerica Corp.*, 714 F 2d 1266, 1275-1276 [C TX 1983]).

Because a claim for fraudulent conveyance is essentially one for property that properly belongs to the debtor which the debtor has fraudulently transferred, although the transferee may have colorable title to the property, the equitable interest, as far as creditors are concerned, remains in the debtor (*Id.*).

Therefore, when a debtor files for bankruptcy, the debtor still has a "legal or equitable interest" in the fraudulently transferred property under the definition of the "property of the debtor," set forth in section 541 (a) (1) of the Code (*Id.*; see also *In re Colonial Realty Co.*, 980 F 2d 125, 131-33 [2d Cir 1992]; *St. Paul Fire and Marine Ins. Co. v PepsiCo, Inc.*, 884 F 2d 688, 701 [2d Cir 1989]).

In fact, the Supreme Court has expressly held that under the broad definition of "property of the debtor" set forth in section 541 (a) (1) of the Code, any property made available to the bankrupt estate by other provisions of the Code are included in the estate (*U.S. v Whiting Pools, Inc.*, 462 US 198, 204-05

[1983]). Thus, property of the debtor under section 451 (a) (1) of the Code includes fraudulently transferred under section 544 of the Code.

To this extent, when a bankruptcy trustee steps into the shoes of a creditor for the purpose of asserting state fraudulent conveyance claims under section 544 of the Code, it does so for the benefit of all creditors (*Seinfeld v Allen*, 2005 WL 1231644, *3 [SD NY 2005], *affirmed* 169 Fed Appx 47 [2d Cir 2006]; *In re O.P.M. Leasing Services, Inc.*, 28 BR 740, 760 [SD NY 1983]).

Consequently, a bankruptcy estate has exclusive authority to maintain fraudulent conveyance claims brought by a creditor of the debtor against the principal of a debtor involving pre-bankruptcy petition transfers by the debtor. Therefore, at the time that the entities' bankruptcy petitions were filed, any assets allegedly conveyed to Defendants fraudulently reverted to their bankruptcy estates, and the bankruptcy trustee has exclusive authority to pursue state fraudulent conveyance claims under sections 544 of the Code for the benefit of creditors, including BPLY.

A bankruptcy trustee's duties include collecting and reducing to money the property of the estate, investigating the financial affairs of the debtor, examining proofs of claims, and making a final report and account of the administration of the estate (11 USC § 704 (a)). Any property listed on the schedule of assets and liabilities that is not administered at the closing of the case is abandoned to the debtor (11 USC 554 (c)).

At the conclusion of the entities' bankruptcy proceedings, the trustee issued his report and conclusions which are set forth in the docket text of the bankruptcy court, and which the Court takes judicial notice of (*RGH Liquidating Trust v Deloitte & Touche LLP*, 71 AD3d 198, 207-208 [1st Dept 2009]).

The trustee stated that he "made a diligent inquiry into the financial affairs of the debtor(s) [the entities] and the location of the property belonging to the estate" (Exhibit F, annexed to the Schmidt Aff.). The trustee determined that all of the property disclosed in the schedules, including the entities' clothing inventories which was the subject of BPLY's fraudulent conveyance claim (9/29/09 Tr 8-9), were deemed abandoned because the property was of inconsequential value (Exhibit F, annexed to the Schmidt Aff.).

BPLY argues that its claim for fraudulent conveyance is not merely based upon the clothing inventory that the trustee deemed abandoned. Rather, it asserts that the entities' fraudulently conveyed other assets to Defendants which the bankruptcy trustee did not know about, and thus, could not have abandoned.

However, even after the close of bankruptcy proceedings, property that is not abandoned under section 554 (c) of the Code and is not administered, including property that was never scheduled, remains property of the bankrupt estate (11 USC § 554 (d)). Under these circumstances, where a debtor fails to schedule an asset and it is later discovered, the trustee may reopen the bankruptcy case to administer the asset on behalf of

creditors (11 USC § 350).

BPLY disputes that the exclusive remedy to address a creditor's claim to an asset that was never scheduled lies in reopening a bankruptcy proceeding, under section 350 of the Code. However, the Code is clear that, to the extent that property of the debtor was not included in the schedule, it is still part of the bankrupt estate under section 554 (d) of the Code. Thus, claims involving that property must be brought by the bankruptcy trustee on behalf of the bankrupt estate (*Kane v National Union Fire Ins. Co.*, 535 F 3d 380 [5th Cir 2008]; see also *DeLarco v DeWitt*, 136 AD2d 406, 408 [3d Dept 1988]).

Here, BPLY's status as creditor and its fraudulent conveyance claims were identified in the bankruptcy proceedings. Although BPLY does not dispute that it had notice of the proceedings, it elected not to challenge the bankruptcy trustee's findings that he had made a diligent inquiry as to the location of the property belonging to the estates, that other property existed that was not scheduled, and did not seek to reopen the proceedings under section 350 of the Code. Therefore, BPLY lacks the capacity to bring a claim for fraudulent conveyance against the Defendants, which is the purview of the entities' bankruptcy trustee.

In light of the Court's disposition, to the extent that Kim alternatively sought dismissal on the ground of lack of personal jurisdiction, that portion of the motion is denied as moot.

Accordingly, it is

ORDERED that defendant Meiae Kim's motion (010) to dismiss the third cause of action is granted to the extent set forth herein, and is otherwise denied as moot; and it is further

ORDERED that defendant Robert Schmidt's motion (011) to dismiss the third cause of action is granted; the complaint is dismissed in its entirety as against defendants Meiae Kim and Robert Schmidt, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

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

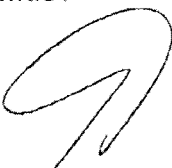
ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records to reflect the change in the caption herein.

The remainder of the action shall continue.

Dated: December 1, 2010

ENTER:



U.S.C.

CHARLES E. RAMOS