

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil No. 21-1989-BLS1

SHS ACK, LLC

Plaintiff

vs.

AJAX 5CAP NESV, LLC, & others¹

Defendants

MEMORANDUM AND ORDER
ON JOSEPH FITZPATRICK'S MOTION TO DISMISS

Plaintiff SHS ACK, LLC, as assignee of HarborOne Bank (“HarborOne”), seeks to recover on various loans made to limited liability companies of which Ajax 4Cap NESV, LLC (“Ajax”) is the sole member. Plaintiff also seeks to void transfers of, and recover, monies Ajax paid to defendants Stuart Silberberg and Joseph Fitzpatrick (“Fitzpatrick”) at a time when, plaintiff contends, Ajax was insolvent. Before me is Fitzpatrick’s motion to dismiss the claims against him under Mass. R. Civ. P. 12(b)(6). After hearing, for the following reasons the motion must be denied.

BACKGROUND

The following facts are alleged, or may be reasonably inferred from the facts alleged, in plaintiff’s First Amended Complaint (“FAC”):

In June 2016, HarborOne made a construction loan and term loan totaling more than \$11 million to various limited liability companies (“the LLCs”) to finance the construction and development of approximately 139 acres of land in Attleboro. Ajax, the sole member of the

¹ Stewart Silberberg and Joseph Fitzpatrick.

LLCs, supplied loan guarantees. Events of default occurred under the loan documents by April 2017 and thereafter. Plaintiff alleges that upwards of \$19 million is now owed.

Fitzpatrick “is a former indirect member of Ajax,” and “was, until on or about February 9, 2018, a majority owner of Five Capital Management, LLC, which in turn owns membership interests in Ajax.”² FAC ¶ 6. Fitzpatrick “was an insider of Ajax” within the meaning of the fraudulent conveyance statute, G.L. c. 109A, § 2.³ Id. ¶ 121.

Plaintiff contends that “Ajax’s sole assets are merely its membership interests in the” various borrowers, id. ¶ 66, and that “[b]y at least January 2018 the Loans were in default, Ajax was insolvent and was not paying its debts as they became due.” Id. ¶ 64. “Specifically, in addition to the millions of dollars that Ajax owed to HarborOne on account of its Guarantees, by January 2018 Ajax also owed millions of dollars to Ashcroft Sullivan Sports Village Lender, LLC, amongst other creditors.” Id. ¶ 65. Plaintiff alleges that Fitzpatrick, as a “member[], directly or indirectly, of Ajax, knew that Ajax was insolvent and/or not paying its debts as they became due.” Id. ¶ 67.

Notwithstanding its insolvency, and Fitzpatrick’s knowledge of Ajax’s insolvency, Ajax transferred at least \$350,000 to Fitzpatrick without receiving adequate consideration. Specifically, it transferred \$250,000 to a lawyer’s IOLTA account on or about February 14,

² According to a Settlement Agreement to which both parties refer, which is referenced in the First Amended Complaint and attached to plaintiff’s opposition, Five Capital Management, LLC’s ownership or interest in Ajax exceeded 20%.

³ “[I]f the debtor is a corporation,” section 2 defines “[i]nsider,” in relevant part, to include “a director . . . officer . . . [or] person in control of the debtor.” G.L. c. 109A, § 2. “Insider” also includes “an affiliate, or an insider of an affiliate as if the affiliate were the debtor.” Id. With certain exceptions, an “[a]ffiliate” is generally defined as “a person who directly or indirectly owns, controls, or holds with power to vote, twenty percent or more of the outstanding voting securities of the debtor.” Id.

2018, pursuant to a settlement agreement for the benefit of Fitzpatrick;⁴ \$50,000 to Fitzpatrick’s personal bank account on or about October 10, 2018; and \$50,000 to Fitzpatrick’s personal bank account on or about December 7, 2018. *Id.* ¶¶ 70, 71, 73, 74, 77. See also *Id.* at 3 (Introduction: “since May 4, 2018 defendant Fitzpatrick received transfers totaling approximately \$460,000 from Ajax”); ¶ 122 (each transfer “was made without Ajax receiving reasonably equivalent value in exchange for such transfers”). Plaintiff also alleges that Ajax transferred these funds to Fitzpatrick “with actual intent to hinder delay or defraud [plaintiff’s] predecessor in interest HarborOne as a creditor of Ajax.” *Id.* ¶ 120.

In the First Amended Complaint, plaintiff asserts claims against Fitzpatrick to void the transfers to Fitzpatrick and recover at least \$350,000 under G.L. c. 109A, § 5 (Count VI) and § 6 (Count VII). Plaintiff also seeks to reach and apply the funds transferred to Fitzpatrick (Count VIII). Fitzpatrick moves to dismiss all three counts against him.

DISCUSSION

I. The Rule 12(b)(6) Standard

On a motion to dismiss under Mass. R. Civ. P. 12(b)(6), I must accept as true the factual allegations in the complaint and draw “all reasonable inferences” from those allegations in favor of plaintiff. *Dunn v. Genzyme Corp.*, 486 Mass. 713, 717 (2021). To survive a motion to dismiss, a complaint must set forth the basis for the plaintiff’s entitlement to relief with “more than labels and conclusions.” *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although factual allegations need not be detailed, they “must be enough to raise a right to relief above the speculative level . . . [based] on the

⁴ The First Amended Complaint does not set forth the underlying dispute giving rise to the settlement agreement or the nature of the settlement itself. But see, *supra*, at 2 n.2.

assumption that all the allegations in the complaint are true (even if doubtful in fact).’ What is required at the pleading stage are factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief.” Iannacchino, 451 Mass. at 636 (internal citations omitted), quoting Bell Atl. Corp., 550 U.S. at 555, 557.

II. Fraudulent Conveyance

The Massachusetts fraudulent transfer statute “confers jurisdiction to set aside conveyances made without fair consideration, or with actual intent ‘to hinder, delay, or defraud either present or future creditors.’” Yankee Microwave, Inc. v. Petricca Commc'ns Sys., Inc., 53 Mass. App. Ct. 497, 514 (2002), quoting G.L. c. 109A, § 5. See Jorden v. Ball, 357 Mass. 468, 470 (1970). Generally, “a transfer is fraudulent if a debtor makes a transfer either ‘(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer . . . , and the debtor . . . (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.’” Alford v. Thibault, 83 Mass. App. Ct. 822, 827-28 (2013), quoting G.L. c. 109A, § 5(a).

G.L. c. 109A, § 5, applies to transfers that are made regardless of whether the creditor’s claim arose before or after the transfer. To state a claim under section 5 (Count VI), plaintiff must allege (a) the debtor made a transfer; (b) (1) “with actual intent to hinder, delay, or defraud any creditor of the debtor,” or (2) “without receiving a reasonably equivalent value in exchange for the transfer;” and (c) the debtor (1) “was engaged . . . in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction,” or (2) “intended to incur . . . debts beyond his ability to pay as they became due.” G.L. c. 109A, § 5.

G.L. c. 109A, § 6, applies to transfers that were made after the creditor's claim arose. Plaintiff may state a claim under section 6 in either of two ways. First, plaintiff may allege (a) the debtor made a transfer; (b) the debtor did not receive "a reasonably equivalent value in exchange for the transfer;" and (c) "the debtor was insolvent" at the time or as a result of the transfer. G.L. c. 109A, § 6(a). Alternatively, plaintiff may allege (a) the debtor made a transfer; (b) the transfer was to "an insider for an antecedent debt;"⁵ (c) the debtor was insolvent at the time the transfer was made; and (d) "the insider had reasonable cause to believe that the debtor was insolvent." G.L. c. 109A, § 6(b).

Plaintiff alleges that Ajax made certain transfers to Fitzpatrick and asserts the dates and manner in which those transfers were made. It alleges that at the time of the transfers Ajax was insolvent or significantly overextended financially given the nature of its indebtedness, and that the transfers were not exchanged for reasonably equivalent value. The Settlement Agreement to which Fitzpatrick points does not reflect that Ajax itself received anything of value in exchange for the payments by Ajax to Fitzpatrick. Cf. United States v. Watts, 786 F.3d 152, 164 (2d Cir. 2015) (for transfer to be for reasonably equivalent value, "recipient of the debtor's property must either . . . convey property in exchange or . . . discharge an antecedent debt in exchange," for "a fair equivalent of the property received," and "must be in good faith") (quoting In re Sharp Int'l Corp., 403 F.3d 43, 53 (2d Cir. 2005)). Even if the payment to Fitzpatrick was in consideration of Five Capital Management, LLC reducing its share in Ajax from 30% to just over 22%, as indicated in the Settlement Agreement, this would not have been a benefit to Ajax, but to Ajax's

⁵ The relevant definition of "insider" is set out in the margin above. See, supra, at 2 n.3.

other owners. From all appearances, when Ajax made the transfers to Fitzpatrick, it received nothing in return.

Plaintiff has also adequately alleged that Fitzpatrick was an “insider” as that term is defined in G.L. c. 109A, § 2, because he was a director, officer, or person in control of an “affiliate.” See, supra, at 2 n.3.

Where plaintiff has stated valid statutory claims for fraudulent transfer, his reach and apply remedy may also stand, at least at the pleading stage. See Cavadi v. DeYeso, 458 Mass. 615, 630 (2011) (“there are circumstances in which both [Uniform Fraudulent Transfer Act] and the nonstatutory action to reach and apply will be applicable”). A determination of whether the reach and apply remedy is preempted by plaintiff’s fraudulent conveyance claims will have to await a later stage of these proceedings.

ORDER

Defendant Joseph Fitzpatrick’s Motion to Dismiss Plaintiff SHS ACK, LLC’s First Amended Complaint (Docket #34) is **DENIED**.

Dated: January 12, 2023

Peter B. Krupp
Justice of the Superior Court