UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

TOUGHER INDUSTRIES, INC., — Case No. 06-12960, Chapter 11(Main Case)

Debtor.

Jointly Administered

In re:

TOUGHER MECHANICAL, INC., — Case No. 07-10022, Chapter 11

Debtor.

LEE E. WOODARD, CHAPTER 11 TRUSTEE,

Plaintiff,

-against- — Adv. No. 08-90161

PSEG ENERGY TECHNOLOGIES ASSET MANAGEMENT COMPANY, LLC, successor-in-interest to PSEG Energy Technologies, Inc., and PSEG ENERGY HOLDINGS, LLC.,

Defendants.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., Chief United States Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The §1104 trustee commenced this adversary proceeding to avoid fraudulent conveyances and to recover transferred property pursuant to §§ 544, 548, and 550 and §§ 273–276 of the New York Debtor and Creditor Law ("NYDCL").[1] Before the court is a motion to dismiss the Second Amended Complaint (the "Motion") filed by PSEG Energy Technologies Asset Management Company, LLC and PSEG Energy Holdings, LLC ("Defendants"). The Defendants seek the dismissal of all causes of action for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding by Rule 7012, and for failure to comply with the pleading requirements set forth in Federal Rules of Civil Procedure 8(a) and 9(b), made applicable to this proceeding by Rules 7008 and 7009. For the reasons set forth below, the court will grant in part and deny in part the Motion.

JURISDICTION

The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 151, 157(a), 157(b)(1), 157(b)(2)(H), and 1334(b).

PROCEDURAL AND FACTUAL HISTORY[2]

On November 3, 2006, Tougher Industries, Inc. ("Industries") filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. By order dated November 22, 2006, the court appointed Lee E. Woodard, Esq. as trustee pursuant to § 1104 (the "Trustee"). On January 3, 2007, the Trustee caused Tougher Mechanical, Inc. ("Mechanical") to file a voluntary chapter

[1] Unless otherwise noted, all statutory references are to Title 11 of the United States Code (11 U.S.C. §§ 101-1532), and all rule references are to the Federal Rules of Bankruptcy Procedure.

[2] For purposes of this motion, the court accepts as true all of the material factual allegations in the Second Amended Complaint. Thus, the majority of the facts are derived from the Second Amended Complaint.

11 petition. The cases of Industries and Mechanical (collectively, "Debtor" or "Tougher") are being jointly administered in accordance with Rule 1015(b).

This adversary proceeding originates from the prepetition sale of the stock of the Debtor's predecessor in interest. The sale was structured as a leveraged buyout ("LBO"). In a LBO, a company goes deep into debt and pledges its assets as collateral to finance the purchase of itself. The terms of the sale were set forth in a Stock Purchase and Sale Agreement dated August 15, 2003, amended as of September 22, 2003 and as of October 31, 2003 ("PSA"), between PSEG Energy Technologies, Inc. ("PSEG ET"), as Seller, and the Debtor and Jacob George Acquisition, Inc. ("JGA"),[3] as Purchaser (the "Transaction"). (Second Am. Compl. ("Compl.") ¶¶ 16, 18, ECF No. 45). PSEG ET was a New Jersey limited liability corporation that held operating companies which provided heating, ventilation, and air-conditioning ("HVAC") systems and services. (Compl. ¶¶ 10, 14.) JGA was a New Jersey corporation owned by Steven Shaw (Compl. ¶¶ 12, 13) and, after the stock purchase, the purported parent company of the Debtor and sole shareholder of the Debtor's stock (Compl. ¶ 9).

Prior to the sale, PSEG ET provided Shaw the opportunity to review documents related to the business of the Debtor at its headquarters, but he was not given the opportunity to make copies of certain documents. (Compl. ¶¶ 38-39.) The Trustee also claims Shaw was never provided with audited financial statements as promised. (Compl. ¶ 46.) Nonetheless, the sale occurred. In December 2003, subsequent to the sale, Shaw allegedly learned that general contractors and construction managers in the Debtor's market area had decided not to provide Debtor with the opportunity to bid on HVAC sub-contracts. (Compl. ¶ 48.) Additionally, PSEG ET allegedly represented that the gross profit margins for various projects were fourteen to

[3] The record is unclear as to JGA's name and corporate form. While the Second Amended cCmplaint refers to both a "Jacob George Acquisition Company, LLC" and a "Jacob George Acquisition, Inc.," the distinction is immaterial for purposes of the motion before the court.

sixteen percent; it was later discovered that the profits were significantly less. (Compl. ¶¶ 55-56.) It was also discovered that the schedule of work in progress was inflated, inaccurate and/or misleading. (Compl. ¶¶ 52-53.) All of this information was in the unique control of the Defendants who allegedly failed to make accurate and truthful representations to the Debtors. (Compl. ¶ 57.)

The purchase price for the Debtor's stock under the PSA was $4.1 million, structured as follows: $500,000 in cash at the closing and a $3.6 million promissory note. (Compl. ¶¶ 19-20.) The note was to be paid as follows: $200,000 by November 3, 2003, a second installment of $2.1 million by November 30, 2003, and the balance over thirty-eight months. (Compl. ¶ 21.) The promissory note was secured by an unconditional guaranty from the Debtor and a security interest in essentially all of the assets of the Debtor, as well as a personal guarantee from Shaw. (Compl. ¶ 22.) The Trustee claims that PSEG ET was aware that the purchase was to be financed by using the Debtor's assets as security and from ongoing operations. (Compl. ¶ 23.)

The total amount received by PSEG ET from the Debtor under the PSA was $3,604,701. (Compl. ¶ 25.) All but $804,701 was paid as followed: $500,000 at closing; $200,000 in early November 2003; and $2.1 million towards the end of November 2003. (Compl. ¶ 25.) PSEG ET received the final payment of $804,701 in June 2006. (Compl. ¶ 25.) The Trustee asserts that the total purchase price was funded directly or indirectly by the Debtor.[4] (Compl. ¶26.) Tougher allegedly utilized funds from ongoing operations to pay the $200,000 installment due November 3, 2003. (Compl. ¶ 28.) Tougher then obtained a $2.3 million term loan and a $3 million revolving line of credit from Hudson River Bank & Trust Company ("Hudson Loan") to make the payment due November 30, 2003. (Compl. ¶ 29.) PSEG ET facilitated Tougher's

[4] The Defendants allege that Mr. Shaw paid a portion of the purchase price from his funds; however, for purposes of this motion, the allegations of the Plaintiff are taken as true.

acquisition of the financing by agreeing to subordinate its priority lien position. (Compl. ¶ 31.) The subordination agreement provided for a direct payment of $2.1 million to PSEG ET upon funding of the Hudson Loan. (Compl. ¶ 32.) As of November 25, 2003, the Debtor was indebted to secured creditors in excess of $5.3 million. (Compl. ¶ 33.)

Tougher was unable to pay the final installment due under the terms of the PSA. (Compl. ¶ 73.) Tougher and PSEG ET eventually reached a settlement agreement whereby Tougher agreed to make a final payment of $804,701 in June 2006. (Compl. ¶ 73.) The final payment was financed through a loan from Berkshire Bank ("Berkshire Loan"), consisting of a $3.1 million term loan and a $4 million revolving line of credit. (Compl. ¶¶ 74-75.) A portion of the Berkshire Loan was used to pay off the Hudson Loan. (Compl. ¶ 76.)

According to the Trustee, upon closing, the Debtor received less than fair consideration from the Transaction as the Debtor's previously unencumbered assets were encumbered by secured loans in excess of $5.3 million. (Compl. ¶ 58, 60.) Additionally, the Trustee asserts that upon closing and following the closing, the Debtor was insolvent or rendered insolvent as its total liabilities exceeded its assets by anywhere from $137,000 to $510,000. (Compl. ¶¶ 62-66.) The Transaction also left the Debtor undercapitalized, (Compl. ¶¶ 68-77), and unable to pay its debts as they became due, (Compl. ¶¶ 78-81). Tougher had to draw against its line of credit to meet its financial obligations. (Compl. ¶ 78.) Ultimately, the Debtor filed for bankruptcy relief under chapter 11 on November 6, 2006.

On October 21, 2008, the Trustee commenced this adversary proceeding with the filing of a complaint seeking to recover the $3,604,701 paid by the Debtor to the Defendants in connection with the Transaction as fraudulent transfers avoidable under New York law and the Bankruptcy Code. The initial complaint sought relief against Public Service Enterprise Group,

Inc. ("PSEG") and its two subsidiaries: PSEG Energy Technologies Asset Management Company, LLC ("PSEG ETAMC"), successor-in-interest to PSEG ET, and PSEG Energy Holdings, LLC ("PSEG EH"). All three defendants filed an answer on December 11, 2008, and a scheduling order was issued on February 6, 2009, setting discovery deadlines. On March 11, 2009, the defendants moved to dismiss the first, second, third, fourth and fifth causes of action in the initial complaint and to dismiss all causes of action against defendant PSEG. That motion was resolved with an order on consent, which dismissed the causes of action against PSEG with prejudice, dismissed the cause of action based on fraudulent inducement with prejudice, and gave the Trustee leave to amend the adversary complaint.

The Trustee filed an amended complaint on May 27, 2009, against PSEG ETAMC and PSEG EH. The Defendants filed an answer on June 8, 2009. On November 24, 2009, the Defendants filed a second motion to dismiss, on the basis that the amended complaint failed to comply with Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure. The court granted the second motion to dismiss on February 24, 2010, with leave to file a second amended adversary complaint within thirty days. While the parties engaged in motion practice and the amendment of the pleadings, discovery proceeded.

The Trustee timely filed the Second Amended Complaint against PSEG ETAMC and PSEG EH. The Defendants filed the instant motion to dismiss in lieu of an answer.

DISCUSSION

I. Motion to Dismiss

The Defendants have moved to dismiss the Second Amended Complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim

to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Once the plausibility-standard is met, the complaint will survive even if the identified facts seem improbable or recovery is thought to be remote or unlikely. *Twombly*, 550 U.S. at 556. A plaintiff need only allege sufficient facts to survive a motion to dismiss, not prove them. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999). There must be a "reasonably founded hope" that the discovery process will uncover relevant evidence. *Twombly*, 550 U.S. at 559, 563 n. 8.

The Supreme Court has outlined a two-part analysis in deciding a motion to dismiss:

> First, the court should begin by identifying pleadings that, because they are no more than [legal] conclusions, are not entitled to the assumption of truth. Threadbare recitals of the elements of a cause of action supported by conclusory statements are not factual. Second, the court should give all well-pleaded factual allegations an assumption of veracity and determine whether, together, they plausibly give rise to an entitlement of relief. Plausibility requires more than a sheer possibility of wrongdoing—the plaintiff must plead sufficient factual content to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Determining whether a claim is plausible is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

Gowan v. Westford Asset Mgmt LLC (In re Dreier LLP), 462 B.R. 474, 483 (Bankr. S.D.N.Y. 2011) (quoting *Iqbal*, at 678-79) (internal quotation marks and citations omitted).

When deciding a motion brought under Rule 12(b)(6), the court draws all reasonable inferences in the plaintiff's favor and accepts as true all well-pleaded factual allegations in the complaint. *Cruz v. TD Bank, N.A.*, 855 F.Supp.2d 157, 165 (S.D.N.Y. 2012) (citing *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007)). The court may also consider exhibits incorporated in the complaint by reference, matters of public record, and documents integral to or explicitly relied upon in the complaint. *Id.* (citations omitted). With these standards in mind, the court turns to the Trustee's causes of action.

A. Fraudulent Conveyances

The Trustee alleges that the conveyances made by the Debtor to the Defendants as part of the LBO were fraudulent conveyances. Fraudulent conveyance laws apply to LBO. *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1073 (3d Cir. 1992); *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Services Co.*, 910 F.Supp. 913, 933 (S.D.N.Y. 1995). Section 544 permits a trustee to "avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim. 11 U.S.C. § 544(b)(1). In this case, the "applicable law" is NYDCL, more particularly §§ 273, 274, 275, and 276. The NYDCL, and its corresponding provisions in the Bankruptcy Code, protect against two kinds of fraudulent transfers: (1) transfers made with an actual intent to hinder, delay, or defraud; and (2) transfers that the law considers to be fraudulent, i.e., constructively fraudulent transfers. *Bruno Mach. Corp. v. Troy Die Cutting Co. (In re Bruno Mach. Corp.)*, 435 B.R. 819, 852 (Bankr. N.D.N.Y. 2010).

The first through fourth causes of action seek to recover the entirety of the funds transferred by the Debtor under the PSA as fraudulent conveyances pursuant to § 544(b) and NYDCL §§ 273, 274, 275, and 276, respectively. The fifth through eighth causes of action seek to recover the final installment paid by the Debtor under the PSA as a fraudulent transfer under § 548(a)(1)(A), § 548(a)(1)(B)(i) and (ii)(I), § 548(a)(1)(B)(i) and (ii)(II), and § 548(a)(1)(B)(i) and (ii)(III), respectively.

1. Actual Fraudulent Transfers

Section 548(a)(1)(A) allows a trustee to avoid a transfer made by the debtor if (1) the debtor had an interest in the property transferred; (2) the transfer occurred within two years of the filing of the bankruptcy petition; and (3) the transfer was made with actual intent to hinder,

delay, or defraud a creditor. 11 U.S.C. § 548(a)(1)(A). Likewise, under NYDCL §276 "[e]very conveyance made . . . with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." N.Y. Debt. & Cred. Law § 276. Under Federal Rule of Civil Procedure 9(b), a plaintiff alleging fraud must state with "particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *see Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 351 F.Supp.2d 79, 106-07 (S.D.N.Y. 2004) (pleading requirements of Rule 9(b) apply to actual fraud claims under both the Bankruptcy Code and NYDCL). "The purpose of Rule 9(b) is to protect the defending party's reputation, to discourage meritless accusations, and to provide detailed notice of fraud claims to defending parties." *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994).

Under § 548(a)(1)(A) and NYDCL § 276, a plaintiff must plead facts showing that the fraudulent transfer was made by the debtor-transferor with the intent to hinder, delay or defraud creditors of the transferor. It is the intent of the debtor-transferor that is relevant for purposes of pleading a claim for actual fraudulent conveyance under § 548(1)(1)(A); the transferee's state of mind is irrelevant. *In re Bayou Group, Inc.*, 439 B.R. 284, 304 (S.D.N.Y. 2010) (citations omitted); *In re Image Masters, Inc. v. Chase Home Fin. (In re Image Masters, Inc.)*, 421 B.R. 164, 183 (Bankr. E.D.Pa. 2009) ("To state a claim against a defendant for the avoidance of a transfer based on actual fraud . . . a plaintiff must allege with particularity that the debtor made the transfer with actual intent to hinder, delay or defraud a creditor."). Similarly, "'[t]o prove actual fraud under [NYDCL] § 276, a creditor must show intent to defraud on the part of the transferor.'" *Sharp Int'l Corp. v. State Street Bank (In re Sharp Int'l Corp.)*, 403 F.3d 43, 56 (2d Cir. 2005) (quoting *HBE Leasing II*, 61 F.3d at 1059 n.5); *Gowan v. Wachovia Bank, N.A.* (*In re*

Dreier LLP), 453 B.R. 499, 511 (Bankr. S.D.N.Y. 2011). There is an exception; under the domination and control theory, the intent of the transferee is imputed to the transferor where the transferee is in a position to dominate or control the debtor's disposition of his property. *Jackson v. Mishkin (In re Adler, Coleman Clearing Corp.)*, 263 B.R. 406, 445 (S.D.N.Y. 2001). While the Second Amended Complaint sets forth that the Defendants owned the stock of Tougher prior to the sale, there are no allegations that after the transfer the Defendants retained an ownership interest in the Debtor's stock, assets or management, or shared any common officers or directors. The allegations in the Second Amended Complaint simply do not establish a relationship between the Defendants and the Debtor that would permit the application of the dominion and control theory.

The Trustee has not alleged that it was the Debtor's intent to hinder, delay or defraud present or future creditors by making the conveyances required under the PSA to the Defendants. Because proving actual intent is difficult, "[a]ctual fraudulent intent . . . may be inferred from the circumstances surrounding the transaction, including the relationship among the parties and secrecy, haste, or unusualness of the transaction." *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 639 (2d Cir. 1995) (citation omitted). While the court recognizes that the Trustee "is entitled to some leeway in the areas of scienter and particularity because he has no personal knowledge of the facts," (*Nisselson v. Ford Motor Co.* (*In re Monahan Ford Corp. of Flushing*), 340 B.R. 1, 37 (Bankr. E.D.N.Y. 2006) (citations omitted)), the facts must "give rise to a strong inference of fraudulent intent," (*Musicland Holding Corp v. Best Buy Co. (In re Musicland Holding Corp.)*, 398 B.R. 761, 773 (Bankr. S.D.N.Y. 2008) (citations omitted)).

The fraud alleged in the Second Amended Complaint is on the part of the Defendants. Presumably, the Defendants' fraud resulted in the Debtor entering into the PSA and

consummating the sale. "Fraudulent conveyance law is basically concerned with transfers that 'hinder, delay or defraud' creditors; it is not ordinarily concerned with how such debts were created." *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1510 (3d Cir. 1987). In the present case, the Debtor's inability to photocopy certain documents or have others provided as promised prior to the stock purchase are not indicia of the Debtor's fraud, but more likely a basis for the Debtor to have refused to complete the Transaction. While the allegations that the Defendants failed to disclose that contractors and construction managers had agreed not to accept bids from Tougher prior to the sale and that Defendants inflated projected profits may give rise to an inference of fraudulent intent, § 548(a)(1)(A) and NYDCL § 276 require the Debtor to be the one intending the fraud. As the Trustee has failed to make a particularized showing of the alleged fraud on the part of the Debtor or to provide a factual basis that creates a plausible inference of fraudulent intent on the part of the Debtor, the dismissal of the fourth and fifth causes of action is required.

2. Constructive Fraudulent Transfers

While a heightened pleading requirement applies to allegations of intentional fraudulent transfers, (*Adelphia Recovery Trust v. Bank of America, N.A.*, 624 F. Supp. 2d 292, 335-36 (S.D.N.Y. 2009)), allegations of constructive fraudulent transfers, under either the Bankruptcy Code or NYDCL, may be pleaded under the more liberal requirements of Federal Rule of Civil Procedure 8(a), (*Picard v. Madoff,* (*In re Bernard L. Madoff Inv. Sec. LLC)*, 458 B.R. 87, 110 (Bankr. S.D.N.Y. 2011)). Pursuant to Federal Rule of Civil Procedure 8(a), a plaintiff need only set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This pleading requirement is to ensure that a defendant receives

adequate notice of what the claim is and the grounds upon which it rests. *In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. at 111 (citation omitted).

(a) Reasonably Equivalent Value and Fair Consideration

To establish a claim under § 548(a)(1)(B), the Trustee needs to show the Debtor did not receive "reasonably equivalent value" for the transfers alleged to be constructively fraudulent. Each of the causes of action under § 544(b) and NYDCL §§ 273, 274, and 275 requires the plaintiff to allege a lack of "fair consideration." Under NYDCL, a transfer is constructively fraudulent if it is made without fair consideration and either (1) the transferor was insolvent or became insolvent as a result, (N.Y. Debt. & Cred. Law § 273), (2) the transferor will be left with unreasonably small capital (N.Y. Debt. & Cred. Law § 274), or (3) the transferor intends or believes that it will incur debts beyond its ability to pay as they mature (N.Y. Debt. & Cred. Law § 275). "'Reasonably equivalent value' in Section 548(a)(1)(B), [and] 'fair consideration' in the [NYDCL] . . . have the same fundamental meaning." *In re Bernard L. Madoff Inv. Sec. LLC*, 458 B.R. at 110 (citation omitted). Fair consideration is given for property

> [w]hen in exchange for such property, . . . , as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or [w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, . . . obtained.

NY DCL § 272(a), (b); *Silverman v. Sound Around, Inc. (In re Allou Distrib.),* 404 B.R. 710, 716 (Bankr. E.D.N.Y. 2009) ("'[F]air consideration has two components—the exchange of fair value and good faith—both are required.'" (citations omitted)) Thus, lack of fair consideration can be shown by establishing either a lack of fair value or a lack of good faith on the part of the transferee.

In the instant case, the Trustee asserts that upon closing the Debtor received less than fair consideration from the Transaction. In support of this conclusion, the Trustee alleges that the purchase proceeds were conveyed to the Defendants and the Debtor was left with all of its previously unencumbered assets pledged as collateral for secured debt in excess of $5.3 million. The Defendants argue that the Debtor did receive fair consideration because the Debtor's guaranty that was given as part of the Transaction was satisfied when the purchase proceeds were paid to the Defendants. While the Defendants may succeed on this argument, at this stage of the proceeding, the court would have to look beyond the Second Amended Complaint to rule on this question of law as the guaranty and its terms are not before the court, nor is whether the guaranty was in fact satisfied.

In further support of their position that fair consideration was given, the Defendants point out that the Transaction was arms-length. The question of whether the Debtor received reasonably equivalent value is fact intensive and usually cannot be determined on the pleadings. *In re Actrade Fin. Techs. Ltd.*, 337 B.R. 791, 804 (Bankr. S.D.N.Y. 2005). In the case of a LBO, the question of whether fair consideration was given is usually not a simple mathematical calculation, but multifaceted. Thus, although the fact that the Transaction was arms-length is relevant, it would be premature to dismiss the proceeding at this stage in the pleadings. *See Global Crossing Estate Rep. v. Winnick*, No.04-Civ.-2558, 2006 WL 2212776, at *9 (S.D.N.Y. Aug. 3, 2006) ("[T]he question whether 'fair consideration' was received is a factual one, and thus even where on the surface it would appear that such is the case (for example, the [defendants] point out that during the period, [the debtor] managed to raise billions of dollars in capital, precisely what it had asked the [defendants] to accomplish), it would be premature to dismiss these claims.").

(b) Insolvency

The first and sixth causes of action under NYDCL § 273 and § 548(a)(1)(B)(i) and (ii)(I), respectively, require a conveyance or obligation that renders the Debtor insolvent. An entity is insolvent "when the present fair salable value of [its] assets is less than the amount that will be required to pay [its] probable liability on [its] existing debts as they become absolute and matured." N.Y. Debt. & Cred. Law § 271. "[I]nsolvency is determined by the 'balance sheet test,' in other words whether the debtor's assets were exceeded by [its] liabilities at the time of the transfer." *Universal Church v. Geltzer*, 463 F.3d 218, 226 (2d Cir. 2006) (citations omitted), *cert. denied*, 549 U.S. 1113 (2007). The Defendants assert that the Trustee has not alleged that the Debtor was insolvent at the time of the LBO. According to the Trustee, the conveyances made by the Debtor to the Defendants left the Debtor insolvent. The Trustee sets forth in the Second Amended Complaint that Tougher's total equity was negative $500,000 as of September 30, 2003, negative $137,000 in November 2003, and negative $510,000 in December 2003. (Compl. ¶ ¶ 63-65.) Thus, at the closing of the Transaction, the fair value of the Debtor' assets was less than its liabilities. Accepting the Trustee's allegations as true, as the court must at this juncture, what the Trustee has provided is sufficient for the court to find the Debtor was or became insolvent based on the conveyances made to the Defendants in connection with the LBO. The court disagrees with the Defendants' contention that the Trustee has put forth naked assertions without supplying or referencing a document to support his values. The Trustee has alleged specific values as of specific dates. The basis for and the accuracy of the Trustee's numbers will, presumably, come out in the discovery process. Thus, the portion of the Defendants' motion seeking dismissal of the § 548(a)(1)(B)(i) and (ii)(I) and NYDCL § 273 causes of action is denied.

(c) Unreasonably Small Capital

The Trustee's second and seventh causes of action seek relief under NYDCL § 274 and § 548(a)(1)(B)(i) and (ii)(II), respectively. Both the state law and the Bankruptcy Code causes of action require a showing that the person making the conveyance was engaged in or is about to engage in a business or a transaction, for which the property remaining with the debtor is an unreasonably small capital. N.Y. Debt. & Cred. Law § 274; 11 U.S.C. § 548(a)(1)(B)(i) and (ii)(II). A "debtor lacks adequate capitalization whenever it cannot reasonably anticipate resources needed to effect the timely payment of its trade obligations." *CNB Int'l, Inc. v. Kelleher (In re CNB Int'l, Inc.)*, 393 B.R. 306, 327 (Bankr. W.D.N.Y. 2008). The Second Amended Complaint alleges that, within close proximity of the closing of the Transaction, the Debtor had to obtain the Hudson Loan because it was unable to make the payment due in late November 2003 under the PSA. It is also alleged that within eighteen months of the closing the gross margins and revenues of the Debtor had declined or not met targeted objectives, while costs and overhead increased. As a result, it became necessary for the Debtor to obtain a $3 million revolving line of credit as part of the Hudson Loan to fund operations. The Defendants counter that obtaining loans does not necessarily support an inference that the Debtor was insolvent or lacked sufficient capital. While, the Defendants may ultimately prevail, at this stage of the proceeding, the court's review is limited. To survive a motion to dismiss, a plaintiff need only allege plausible facts, not prove them. Therefore, the Defendants' motion to dismiss is denied as to NYDCL § 274 and § 548(a)(1)(B)(i) and (ii)(II) causes of action.

(d) Intention or Belief That Debts Will Be Incurred Beyond Ability to Pay

The third and eighth causes of action under NYDCL § 275 and § 548(a)(1)(B)(i) and (ii)(III), respectively, require that the Debtor intended or believed that it would incur debts

beyond its ability to pay as they matured. The Defendants argue that the Trustee has not made any allegations concerning the Debtor's intent when it made the transfers. The court agrees. The relevant sections of the Bankruptcy Code and the NYDCL concern the intention or belief of the debtor, not the transferee. The Second Amended Complaint is silent as to any intention or belief of the Debtor at the time of transfer. Instead, the Plaintiff has alleged that "the Debtors, **via the Defendant**, intended to incur, or believed that the Debtors would incur, debts that would be beyond the Debtors' ability to pay such debts as they matured." (Compl. ¶ 101(emphasis added).) This conclusory allegation is not sufficient. There are no facts averred that make it plausible to impute the Defendants intent or belief to the Debtor. As indicated previously, there are no allegations that after the transfer the Defendants retained an ownership interest in the Debtor's stock, assets or management, or shared any common officers or directors.

Plaintiff attempts to bolster these two causes of action by asserting that the Debtor struggled to pay its debts as they matured following the consummation of the Transaction, and that for the majority of the time after the closing, the Debtor performed poorly and filed to meet its targeted goals. That the Debtor could not pay its debts as they came due, however, is not the standard. There are simply no facts or circumstances alleged from which the court can infer that that at the time of the conveyances, the Debtor intended to incur or believed that it would incur debts beyond its ability to pay. Thus, that portion of the Defendants' motion seeking dismissal of the NYDCL § 275 and 548(a)(1)(B)(i) and (ii)(III) causes of action is granted.

In support of their motion to dismiss, the Defendants also contend that the Trustee cannot meet the pleading requirements for constructive fraudulent conveyances because he has overlooked that the Debtor was able to obtain bank loans in amounts that far exceeded the purchase price, had working capital in the form of a line of credit, and operated for three years

after the LBO before filing for bankruptcy protection. The purpose of a motion to dismiss, however, is for court to weigh the legal feasibility of the complaint, not to weigh the evidence that might ultimately be offered to support the causes of action. The evidence may, as the Defendants contend, ultimately lead to a different conclusion. Allegations are by no means proof; they lend support to the plausibility of a plaintiff's claims. In the end, the Trustee may not be able to prove all the elements of his constructively fraudulent conveyances causes of action, but for now, the court finds that he has satisfied the burden he faces at the early stages of this litigation as to the first, second, sixth, and seventh causes of action.

II. Motion to Amend

The Trustee has argued, in the alternative, that if any of his causes of action are dismissed, he should be given the opportunity to file a Third Amended Complaint. Rule 15 of the Federal Rules of Civil Procedure, applicable to this proceeding by Rule 7015, provides that leave to amend a pleading should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). Generally, a plaintiff should be freely afforded leave to amend a complaint. *Forman v. Davis*, 371 U.S. 178, 182 (1962). Leave may be denied, however, "when there has been 'repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment.'" *Liquidation Trust v. Daimler AG (In re Old Carco LLC)*, 11 Civ. 5039(DLC), 2011 WL 5865193, at *15 (S.D.N.Y. Nov. 22, 2011) (quoting *Williams v. Citigroup*, 659 F.3d 208, 213-14 (2d Cir. 2011). The deficiencies in the Second Amended Complaint with respect to the § 548(a)(1)(A) and § 548(a)(1)(B)(i) and (ii)(III), and NYDCL §§ 275 and 276 causes of action are fundamental. The Trustee has filed three complaints in this proceeding, the most recent after

having had the benefit of discovery. A third amendment to the complaint to cure the deficiencies would appear futile. Thus, the Trustee's request to further amend the complaint is denied.

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED, that the Defendants' motion to dismiss the Second Amended Complaint is granted, with prejudice, as to causes of action three, four, five, and eight; and it is further

ORDERED, that the Defendants' motion to dismiss the Second Amended Complaint is denied as to causes of action one, two, six, and seven.

Dated: December 26, 2012

/s/ Robert E. Littlefield, Jr.
Robert E. Littlefield, Jr.
Chief United States Bankruptcy Judge