

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

EDGEWATER GROWTH CAPITAL)
PARTNERS, L.P. and EDGEWATER)
PRIVATE EQUITY FUND III, L.P.,)

Plaintiffs,)

v.)

C.A. No. 3601-VCS

H.I.G. CAPITAL, INC., BAYSIDE CAPITAL)
LLC, PALOMA VALUE HOLDING, LLC,)
COLORADO COMMERCIAL FINANCE)
LLC, MIDWEST ATM FUNDING LLC,)
PENDUM ACQUISITION, INC., PENDUM)
LLC, JOHN BOLDUC, SEAN OZBOLT,)
DENNIS SIMON, ALEXANDER)
STEVENSON, CHRISTOPHER)
DAVINO, J.G. BALL, and MARK HOPPE,)

Defendants.)

MEMORANDUM OPINION

Date Submitted: December 10, 2010

Date Decided: March 3, 2010

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STRINE, Vice Chancellor.

The plaintiffs, Edgewater Growth Capital Partner, L.P. and Edgewater Private Equity Fund III, L.P. (collectively, “Edgewater”), seek to hold former directors (the “Director Defendants”) of ATM Acquisition Corporation (“ATM Acquisition”) liable for fraudulent transfer. But the complaint does not allege that any of the Director Defendants are transferors or transferees — the only classes of defendants against whom plaintiffs are expressly granted a cause of action under the Delaware Uniform Fraudulent Transfer Act. In this decision, I conclude that the Delaware Uniform Fraudulent Transfer Act does not implicitly create a cause of action for aiding and abetting a fraudulent transfer. Therefore, I grant the Director Defendants’ motion to dismiss the fraudulent transfer claims.

I. Background

The following facts are drawn from the complaint, and the documents the complaint incorporates.

This case arises from a so-called foreclosure sale of ATM Acquisition’s assets by its senior lenders, HIG Capital, Inc. and its affiliated entities (the “HIG Entities”), which had nominated four of the Director Defendants to the ATM Acquisition board. ATM Acquisition is alleged to have sold its assets for \$41 million to Pendum Acquisition Corporation (“Pendum”), an affiliate of the HIG Entities.¹ As of the time of the transfers to Pendum, ATM Acquisition was in default to the HIG Entities, which had the right to foreclose on ATM Acquisition’s

¹ Compl. ¶ 13.

assets. Instead, a Foreclosure Sale Agreement was entered providing for a specific sales process.²

Edgewater, which owns a sizeable minority interest in ATM Acquisition d/b/a Pendum, alleges that the sale of ATM Acquisition to Pendum amounted to a fraudulent transfer.³ Edgewater seeks to hold not just the HIG Entities liable as transferees, but also the Director Defendants. Edgewater alleges that the Director Defendants conspired with the HIG Entities to cause ATM Acquisition to run an unfair, tainted sales process that resulted in ATM Acquisition's assets passing to Pendum, the only bidder for the company. Edgewater is especially upset because, if the sale survives judicial challenge, Edgewater owes \$4 million on a guaranty it entered into in favor of a senior lending agent of ATM Acquisition.

The Director Defendants moved to dismiss the entirety of Edgewater's Second Amended Verified Complaint (the "Complaint"). After argument on December 10, 2009, I largely denied the Director Defendants' motion to dismiss in a bench opinion, with the exception of Edgewater's fraudulent transfer claims (Counts IV and V), because the Director Defendants had relied upon a great deal of evidence outside of the pleadings in pressing their motion to dismiss. I therefore reserved decision on the limited claims in Counts IV and V, and otherwise granted the parties limited discovery so that the issues could be properly considered in a Rule 56 motion or at trial. This is my opinion on the Director

² *Id.* Ex. B (Foreclosure Sale Agreement (Dec. 21, 2007)).

³ *Id.* ¶¶ 140-160.

Defendants' motion to dismiss Counts IV and V for fraudulent transfer. I apply the traditional procedural test.⁴

II. Legal Analysis

Counts IV and V are both brought under the Delaware Uniform Fraudulent Transfer Act (the "Delaware Fraudulent Transfer Act").⁵ Although the Complaint fails to state what sections of the Delaware Fraudulent Transfer Act its claims are brought under, Count IV for "subjective" fraudulent transfer alleges that the defendants caused the transfer of ATM Acquisition's assets "with actual intent to hinder, delay or defraud Edgewater, a creditor of [ATM Acquisition]," and is presumably brought under 6 *Del. C.* § 1304(a)(1).⁶ Count V, on the other hand, is for "constructive" fraudulent transfer, and alleges that the defendants caused a transfer of ATM Acquisition's assets for which ATM Acquisition will fail to

⁴ See *In re Primedia, Inc. Deriv. Litig.*, 910 A.2d 248, 256 (Del. Ch. 2006) (explaining that a motion to dismiss under Court of Chancery Rule 12(b)(6) will not be granted "unless it can be determined with reasonable certainty that the [non-moving] party could not prevail on any set of facts reasonably inferable" from the pleadings (quoting *Superwire.com, Inc., v. Hampton*, 805 A.2d 904, 908 (Del. Ch. 2002))); see also *Smith v. Mattia*, 2010 WL 412030, at *3 (Del. Ch. Feb. 1, 2010) ("[T]he Court must accept the factual allegations stated in the complaint as true, and draw all reasonable inferences from those facts in favor of the plaintiff."); *Julian v. Julian*, 2009 WL 2937121, at *3 (Del. Ch. Sept. 9, 2009) ("The court must assume the truthfulness of the well-pleaded allegations and must afford the non-moving party 'the benefit of all reasonable inferences.'" (quoting *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996))).

⁵ 6 *Del. C.* § 1301 *et seq.*

⁶ Section 1304(a)(1) of the Delaware Fraudulent Transfer Act explains that a transfer by a debtor is fraudulent as to a creditor if the debtor made the transfer or incurred the obligation "with actual intent to hinder, delay or defraud any creditor of the debtor."

receive a reasonably equivalent value in exchange, and is presumably brought under 6 *Del. C.* § 1305.⁷

The Director Defendants argue that Edgewater’s fraudulent transfer claims must be dismissed, because the only proper defendants in a fraudulent transfer action under the Delaware Fraudulent Transfer Act are the transferor or transferee of the assets at issue. At argument and in its briefs, Edgewater argues that the Director Defendants are persons whom a transfer was intended to benefit and, thus, are proper defendants to its fraudulent conveyance claims under § 1308(b) of the Delaware Fraudulent Transfer Act, which provides that damages may be recovered from “the person for whose benefit the transfer was made.”⁸ But nowhere in the Complaint is it alleged that the Director Defendants were beneficiaries of the transfer of ATM Acquisition’s assets. In fact, the Complaint does not even imply that the Director Defendants received any portion of the assets transferred to Pendum. Instead, the Complaint only alleges that the Director Defendants conspired with the HIG Entities to cause the transfer to occur.⁹

But the Delaware Fraudulent Transfer Act does not create a cause of action for aiding and abetting, or conspiring to commit, a fraudulent transfer. By its own terms, the Delaware Fraudulent Transfer Act only provides for a cause of action

⁷ Section 1305 of the Delaware Fraudulent Transfer Act explains that a transfer by a debtor is fraudulent as to a creditor if “the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer.”

⁸ 6 *Del. C.* § 1308(b).

⁹ See Compl. ¶ 150, 160 (“[T]he Director Defendants, the HIG Entities, [and other defendants] agreed to engage in the scheme to sell all or substantially all of [ATM Acquisition’s] assets at a substantially reduced price Accordingly, the Director Defendants, the HIG Entities, [and other defendants] are co-conspirators . . .”).

by a creditor against debtor-transferors or transferees, including actions seeking an injunction against the debtor-transferor or transferee to prevent “further disposition” of assets,¹⁰ or for damages against “[t]he [first] transferee of the asset or the person for whose benefit the transfer was made”¹¹ or “[a]ny subsequent transferee other than a good-faith transferee or obligee”¹² In explicitly providing a cause of action only against the transferors and transferees, the Uniform Fraudulent Transfer Act is identical to the Delaware Fraudulent Transfer Act.¹³ The General Assembly obviously could have explicitly provided for liability for aiding and abetting a fraudulent transfer, but it did not.

In *Trenwick America Litigation Trust v. Ernst & Young, LLP*, this court addressed the general state of the law regarding the question of whether an aiding and abetting claim was available under the Delaware Fraudulent Transfer Act.¹⁴ In *Trenwick*, a litigation trust, which had been formed during the reorganization of the subsidiary of a publicly listed company after bankruptcy proceedings, brought claims against the former directors of the subsidiary for taking actions that had rendered the subsidiary less valuable.¹⁵ This court found that a fraudulent

¹⁰ 6 Del. C. § 1307(b).

¹¹ *Id.* § 1308(b).

¹² *Id.*

¹³ See Unif. Fraudulent Trans. Act § 7(a) (1984) (“In an action for relief against a transfer or obligation under this [Act], a creditor . . . may obtain . . . an injunction against further disposition by the debtor or a transferee, or both”); § 8 (“[T]he creditor may recover judgment for the value of the asset transferred . . . against . . . the first transferee of the asset or the person for whose benefit the transfer was made; or any subsequent transferee other than a good faith transferee”).

¹⁴ 906 A.2d 168 (Del. Ch. 2006), *aff’d*, 931 A.2d 438 (Del. 2007).

¹⁵ *Id.* at 200-01.

conveyance claim had not been pled against any of the defendants and, thus, did not need to determine whether a cause of action for aiding and abetting a fraudulent transfer existed under Delaware law. But, the court noted that “[d]espite the breadth of remedies available under state and federal fraudulent conveyance statutes, those laws have not been interpreted as creating a cause of action for ‘aiding and abetting.’ Rather . . . the only proper defendants in a fraudulent conveyance action under federal bankruptcy law or Delaware law are the transferor and any transferees.”¹⁶ *Trenwick* based that observation on the great weight of authority interpreting the Uniform Fraudulent Transfer Act, which holds that the Act does not provide for an aiding and abetting cause of action.¹⁷ The Delaware Fraudulent Transfer Act is based on the Uniform Fraudulent Transfer Act.

¹⁶ *Id.* at 203.

¹⁷ *See id.* at 203 n.97 (“[T]he general rule under the Bankruptcy Act is that one who did not actually receive any of the property fraudulently transferred . . . will not be liable for its value, even though he may have participated or conspired in the making of the fraudulent transfer . . .” (citing *Mack v. Newton*, 737 F.2d 1343, 1357-58 (5th Cir. 1984))); *see also In re Parmalat Sec. Litig.*, 377 F. Supp. 2d 390, 417 (S.D.N.Y. 2005) (“Fraudulent transfer is a creature of statute. Consequently, many courts have resisted claims of aiding and abetting where they are not recognized by the UFTA or another statute. Those courts have recognized that aiding and abetting generally have limited such claims to defendants who were transferees of the assets or beneficiaries of the conveyance.” (citations omitted)); *Baker O’Neal Holdings, Inc. v. Ernst & Young LLP*, 2004 WL 771230, at *14 (S.D. Ind. 2004) (noting that a “multitude of other courts” had found that “there is no accessory for fraudulent transfers under the Uniform Fraudulent Transfer Act” (citing *Freeman v. First Union Nat’l Bank*, 865 So.2d 1272, 1275077 (Fla. 2004))); *FDIC v. White*, 1998 WL 120298, at *2 (N.D. Tex. Mar. 5, 1998) (finding that the Uniform Fraudulent Transfer Act, as adopted by Texas, did not create “personal liability on the part of a co-conspirator for fraudulent conveyances”).

Given that the text of the Delaware Fraudulent Transfer Act does not provide for an aiding and abetting claim, and that the Delaware Act's text is indistinct from the Uniform Fraudulent Transfer Act which has been held not to create an aiding and abetting claim, I perceive no legitimate basis for me to create such an implied *statutory* cause of action by judicial innovation when the General Assembly is free to do so itself,¹⁸ and when such an innovation would thereby render Delaware's Uniform Fraudulent Transfer Act *non-uniform*. And, contrary to Edgewater's argument, the United States Bankruptcy Court for the District of Delaware recently relied upon *Trenwick* in deciding that no claim for aiding and abetting under the Delaware Fraudulent Transfer Act and the Bankruptcy Code exists.¹⁹

III. Conclusion

Therefore, because Edgewater has not pled facts that support a rational inference that the Director Defendants were beneficiaries of the transfer of ATM Acquisition's assets (*i.e.*, within the statutory class of transferees), and because a claim for aiding and abetting a fraudulent transfer is not available under the

¹⁸ Corporate directors already face liability to the corporation for breach of fiduciary duty if they knowingly cause the corporation to sell its assets for less than fair value. Thus, the need for an additional cause of action is dubious and best left, in this context, to the General Assembly, the authors of the relevant Act, not the judiciary.

¹⁹ *In re the Brown Schools*, 386 B.R. 37, 58 (Bankr. D. Del. 2008) (dismissing a claim for aiding and abetting fraudulent transfers, because such a claim was not permitted under Delaware law (citing *Trenwick*, 906 A.2d at 203) or the Bankruptcy Code (citing federal decisions such as *Jackson v. Star Sprinkler Corp. of Fl.*, 575 F.2d 1223, 1234 (8th Cir. 1978) and *Elliott v. Glushon*, 390 F.2d 514, 516 (9th Cir. 1967))).

Delaware Fraudulent Transfer Act, Counts IV and V are dismissed against the Director Defendants. IT IS SO ORDERED.