

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**DIME, LLC,
Plaintiff,**

v.

**Case No. 13-137129-CZ
Hon. James M. Alexander**

**WAAD NADHIR, ET AL,
Defendants.**

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OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on three motions for summary disposition filed by (1) Defendant Najwa Nadhir, (2) Defendant Waad Nadhir, and (3) the corporate Defendants (collectively “Defendants”). In a prior case filed in December 2009, Plaintiff sued Defendant Waad Nadhir and others on claims of breach of notes and breach of guarantees related to the financing of a commercial office building and parking structures. On November 21, 2012, the Hon. Edward Sosnick entered a Final Judgment following a bench trial that included a money judgment in Plaintiff’s favor.

On December 30, 2013, Plaintiff then filed the its present Complaint – essentially on claims that Defendant Waad Nadhir fraudulently transferred assets to and with the help of his wife, Co-Defendant Najwa Nadhir, and the corporate Defendants. The Court will note that Najwa Nadhir and the corporate Defendants were not defendants in the prior litigation.

Defendants now claim that they are entitled to summary disposition of Plaintiff’s claims because, at the time that Plaintiff commenced the prior case, it knew or should have known about the alleged fraudulent transfers. As a result, Defendants argue that Plaintiff’s present suit is

barred by the doctrine of res judicata. To their end, Defendants now move for summary disposition under MCR 2.116(C)(7) or (C)(8).¹

A motion under (C)(7) determines whether a claim is barred, among other grounds, by a “prior judgment” or “other disposition of a claim before commencement of the action.” MCR 2.116(C)(7). The Court accepts the plaintiff’s well-pleaded allegations as true and construes them in the plaintiff’s favor unless the allegations are contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Huron Tool & Eng’g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-77; 532 NW2d 541 (1995).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Wade v Dept of Corrections*, 439 Mich 158 (1992). A motion under this subrule may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* When deciding such a motion, the court considers only the pleadings. MCR 2.116(C)(G)(5).

As stated, Defendants argue that they are entitled to summary disposition of Plaintiff’s fraudulent transfer claims under the doctrine of res judicata. Additionally, once said claims are dismissed, Defendants argue that Plaintiff’s civil conspiracy and concert of action claims must be dismissed because there is no viable underlying tort on which to base the same.

In response, Plaintiff argues that MCR 2.621(A) controls and provides:

When a party to a civil action obtains a money judgment, that party may, by motion in that action or by a separate civil action:

- (1) obtain the relief formerly obtainable by a creditor’s bill;
 - (2) obtain relief supplementary to judgment under MCL 600.6101-600.6143;
- and
- (3) obtain other relief in aid of execution authorized by statute or court rule.

¹ The corporate Defendants concur in Defendants Waad Nadhir’s and Najwa Nadhir’s motions for summary disposition.

Plaintiff argues that this court rule “explicitly permits Plaintiff, as a judgment creditor, to bring a ‘separate civil action’ to collect on a judgment” obtained in the prior case. As a result, to any extent that the Court Rule can be read to conflict with the doctrine of res judicata, the Court Rule prevails. The Court tends to agree.

But, as Defendants point out in their Reply Brief, Plaintiff has another problem. Despite its insistence that MCR 2.621 controls and supports the present action, Plaintiff ignores subsection (G) of the same Court Rule, which provides: “New Proceeding. If there has been a prior supplementary proceeding with respect to the same judgment against the party, whether the judgment debtor or another person, further proceedings may be commenced against that party **only by leave of court.**” MCR 2.621(G) (emphasis added).

Indeed, on February 28, 2013 and in the prior action, Plaintiff filed its “Motion for Injunction Supplementary to Judgment” and obtained a March 20, 2013 “Stipulated Order Resolving Motion for Injunction Supplementary to Judgment.”

Because Plaintiff initiated “a prior supplementary proceeding with respect to the same judgment against the party,” Plaintiff was barred by Court Rule from filing a new lawsuit without the Court’s permission.

For the foregoing reason, the Court finds that Plaintiff’s Complaint must be dismissed. Plaintiff chose its path by filing a supplemental proceeding in the prior action. The Court finds that, for the efficient administration of justice, Plaintiff’s allegations under the Uniform Fraudulent Transfers Act are appropriately brought in a supplementary proceeding in the prior action. Plaintiff’s present Complaint, however, is DISMISSED without prejudice.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

March 19, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge