

SCAN

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN**  
**Acting Supreme Court Justice**

**TRIAL/IAS, PART 39**  
**NASSAU COUNTY**

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**A.S.L. ENTERPRISES, INC. and VICTOR WINIK.**

**Plaintiffs.**

*- against -*

**Sequence No.: 008**  
**Index No.: 008770/91**

**VENUS LABORATORIES, INC. and E. VAN VLAHAKIS.**

**Defendants.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motion and Affidavits Annexed</b>	
<b>Order to Show Cause and Affidavits Annexed</b>	<b>X</b>
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	

Upon reading the papers submitted and due deliberation having been had herein, defendants' motion to amend its answer pursuant to CPLR 3025(b) is hereby denied.

This is an action wherein plaintiffs seek monies allegedly due them under two contracts. The first contract was for the sale of plaintiff ASL Enterprises, Inc.'s assets and liabilities to defendant Venus Laboratories, Inc. The second contract was an employment contract between defendant Venus and plaintiff Victor Winik.

Defendants seek leave to amend their answer to include affirmative defenses for 1) bankruptcy fraud on the part of plaintiffs for their alleged post-dating of the bill of sale of the business so as to enable plaintiffs to divert the down payment from defendant ASL to defendant Winik and not be collectable by ASL's creditors as provided in ASL's Chapter 11 plan of reorganization (the proposed eleventh affirmative defense); 2) fraudulent conveyance of ASL's assets in order to avoid payments to creditors under the provisions of the bankruptcy code (the proposed twelfth affirmative defense); 3) plaintiff Winik's violation of 11 U.S.C. §1129(b)(2)(C)(ii) prohibition against a sole shareholder's retention of any such payments

prior to the satisfaction of ASL's obligations to its creditors (the proposed thirteenth affirmative defense); 4) plaintiffs' violation of the bulk transfer laws due to their failure to disclose such transfers to ASL's creditors (the proposed fourteenth affirmative defense); and 5) plaintiffs' violation of the debtor-creditor law due to their alleged fraudulent conveyance of ASL's assets without making payment to its creditors (the proposed fifteenth affirmative defense). Defendants assert that as a result of such actions on the part of plaintiffs that the entire transaction should be deemed void.

Generally, leave to amend pleadings should be "freely given." CPLR 3025(b); Edenwald Contracting Co., Inc. v. City of New York, 60 N.Y.2d 957 (1983). The merits of a proposed pleading will not be reviewed "...unless the insufficiency or lack of merit is clear and free from doubt." Norman v. Ferrara, 107 A.D.2d 739, 740 (2<sup>nd</sup> Dep't 1985). "In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied." Norman v. Ferrara, supra. at 740.

Defendants' proposed eleventh, twelfth and thirteenth affirmative defenses are all based upon plaintiffs' alleged bankruptcy fraud. In essence, defendants allege that plaintiffs transferred or diverted assets of ASL that should have been paid to ASL's creditors under its Chapter 11 plan of reorganization. Plaintiffs have demonstrated to the court, however, that ASL was discharged in bankruptcy by order of the United States Bankruptcy Court, Eastern District of New York (Hon. Robert John Hall, U.S.B.J.) dated December 27, 1985. The contracts which are the subject of the instant action were executed in 1988. Plaintiff ASL was therefore discharged in bankruptcy prior to the sale of the subject business. (See, plaintiff's exhibit 2 attached to their affirmation in opposition.)

Defendants assert in their proposed fourteenth affirmative defense that the underlying contracts are null and void due to plaintiffs' violation of the bulk transfer law. See, New York State Uniform Commercial Code-Bulk Transfers §6-104. UCC §6-104 provides that bulk transfers of a business's assets are ineffective against a creditor where the transferee requires a list of the transferor's creditors, a schedule of the transferred property is agreed to by the parties and certain requirements pertaining to the maintenance and affirmation of the list of creditors are met. The transferee is thereafter required to give notice to all creditors ten days prior to the transfer. UCC §6-105. It has been held, however, that the requirements of the UCC's bulk transfer provisions are inapplicable to, as here, the sale of a business. Mercantile Financial Corporation v. P&F Industries, Inc., 63 A.D.2d 1014 (2<sup>nd</sup> Dep't 1978).

Defendants assert in their fifteenth affirmative defense that plaintiffs violated the debtor-creditor law and that the underlying contracts are therefore void. Plaintiff asserts this affirmative defense pursuant to the Debtor and Creditor Law §§270-276. "[E]ven if a transfer is made with actual intent to defraud creditors, one must be a creditor in order to complain." Martes v. USLife Corporation, 927 F. Supp. 146, (S.D.N.Y. 1996).

For the foregoing reasons, the court concludes that plaintiffs' proposed amendments are without merit. Accordingly, plaintiffs' application to amend their answer pursuant to CPLR

3025(b) is hereby denied.

So Ordered.

Dated: November 8, 2000

  
A.J.S.C.

