STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: AUGUST 7, 2012)

M2 MULTIHULL, LLC	:	
	:	
Vs.	:	**C.A. No.: KC 10-1530**
	:	
JOCK WEST, CHRISTINA WEST, THE ANTIQUE BOAT MUSEUM, JOHN MACLEAN, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE ANTIQUE BOAT MUSEUM, and JOHN MACLEAN	:	

DECISION

K. RODGERS, J. This matter comes before the Court on Defendant Christina West's response to Plaintiff M2 Multihull, LLC's (M2M's) latest attempt to hold her personally liable for the debts and actions of her husband, Jock West. After the initial Complaint in this case was filed, Jock West filed a Chapter 7 petition with the United States Bankruptcy Court and remains protected by the automatic stay imposed therein. M2M now alleges that Christina West is jointly and severally liable for Jock West's debts due to M2M as Jock West's "alter ego," that she was unjustly enriched, and that she is liable for various acts of fraud, including fraudulent conveyance in violation of the Rhode Island Uniform Fraudulent Transfer Act, codified at G.L. 1956 § 6-16-1 et seq. Christina West moves to dismiss the Third Amended Complaint pursuant to Rule 12(b)(6) of the Superior Court Rules of Civil Procedure. For the reasons that follow, the Motion to Dismiss is granted.

I

Facts and Travel

The facts set forth herein have been gleaned from M2M's allegations in its Third Amended Complaint and exhibits thereto. Jock and Christina West are married and live in a condominium at 43 Lawton Brook Lane, Portsmouth, RI. (3d. Am. Compl. at ¶8.) Jock West has transferred title of the condominium to Christina West alone for no consideration, yet he continues to contribute to the mortgage which remains unsatisfied. (3d. Am. Compl. at ¶¶9, 10.) Both Jock and Christina West are named beneficiaries of the West Cape Trust (the Trust). (3d. Am. Compl. at ¶13.) Jock West is the sole owner of two limited liability companies: Showtime, LLC (Showtime), a Rhode Island limited liability company which lists its principal business address as the Wests' Portsmouth condominium; and Showtime of Newport, LLC (Showtime of Newport), a Massachusetts limited liability company. (3d. Am. Compl. at ¶¶12, 15.) In the past, Showtime of Newport has transferred funds to the Trust. (3d. Am. Compl. at ¶13.) Neither Showtime nor Showtime of Newport is a named defendant in this action. Jock West drives a car that is owned by Christina West and, at all material times, he has been employed by an unidentified company in which Christina West has a significant ownership interest. (3d. Am. Compl. at ¶¶16-18.)

The crux of Jock West's alleged indebtedness to M2M arises from two separate loans made by M2M to Jock West to rehabilitate a particular sea-going vessel, Showtime (the Vessel). In July 2008, as alleged, Jock West made statements and forwarded documents to M2M's manager, Paul Mihailides (Mihailides), representing that the value of the Vessel was between $950,000 and $4.25 million. (3d. Am. Compl. at ¶19 & Ex. A.) Plaintiff alleges that Jock West made such communications knowing that the Vessel was actually worth $350,000, and with the

intent to deceive M2M and to induce M2M to rely on such communications so that M2M would loan funds to Jock and Showtime of Newport. (3d. Am. Compl. at ¶23 & Ex. B.) For her part, M2M alleges that not only did Christina West know of these communications, but also that she knew of the Vessel's actual value and Jock West's underlying intent. (3d. Am. Compl. at ¶¶20, 22.)

Based on the statements made to M2M, Plaintiff made two loans to Jock West and Showtime of Newport. (3d. Am. Compl. at ¶28.) On August 21, 2008, Jock West, in his capacity as a manager of Showtime of Newport, executed a promissory note that obligated Showtime of Newport to repay a loan of $125,000 to M2M, and which was payable on demand. (3d. Am. Compl. at ¶¶29-30 & Ex. C.) On the same day and in connection therewith, Jock West executed a guaranty in his individual capacity in favor of Plaintiff. (3d. Am. Compl. at ¶31 & Ex. D.) On November 3, 2008, Jock West executed a second promissory note in favor of M2M in the amount of $15,000, which likewise obligated Showtime of Newport to make payment on demand. (3d. Am. Compl. at ¶¶37-38 & Ex. F.)[1]

On September 18, 2009, M2M advised Jock West and Showtime that both notes were in default and demanded repayment of $140,000, with accrued interest and default interest. (3d. Am. Compl. at ¶¶33, 39 & Ex. E.) Suit was thereafter filed on October 18, 2010 against Jock West, alleging three counts: enforcement of guaranty; breach of contract; and unjust enrichment. On November 8, 2010, counsel for Jock West filed a Suggestion of Bankruptcy in this Court, stating therein that Jock West filed a Chapter 7 petition with the United States Bankruptcy Court on November 4, 2010.

[1] There is no allegation that Jock West executed a guaranty in connection with the November 2008 promissory note.

After many months of engaging in adversarial proceedings in the Bankruptcy Court in which M2M sought money damages against Christina West, the Trust and others,[2] M2M filed an Amended Complaint in this action, continuing to allege three counts against Jock West for guaranty, breach of contract, and unjust enrichment, and adding Christina West as a defendant, alleging that she is the "alter ego" of Jock West. The factual allegations in the Amended Complaint as they related to Christina West merely stated that Christina West received all or a substantial portion of the funds lent by M2M to Jock West and to Showtime of Newport, and that Jock West and his corporations have commingled funds with Christina West and/or transferred funds to the extent that Jock and Christina West are the alter egos of each other. Christina West duly filed a Motion to Dismiss the Amended Complaint. Before that dispositive motion was heard by the Court, M2M sought leave to file a Second Amended Complaint, which was granted on December 12, 2011.

The Second Amended Complaint alleged that, under the alter ego theory, Christina West is jointly and severally liable to M2M on all counts that have been asserted against Jock West. More specifically, Count I of the Second Amended Complaint alleged that Christina West and Jock West are alter egos of one another; Count II alleged that both defendants are liable for enforcement of the guaranty signed by Jock West; Count III alleged breach of contract against both Jock and Christina West; and Count IV alleged unjust enrichment against both Jock and Christina West. The Second Amended Complaint set forth additional factual allegations as against Christina West, including, for example: that she received all or a substantial portion of

[2] By Decision entered on January 20, 2012, the counts brought by M2M against Christina West, the Trust and others seeking money damages were dismissed for lack of jurisdiction in the Bankruptcy Court. The Bankruptcy Court stated, "Even if [Christina] West and the Trust could be liable to M2M under state law [as Jock West's alter ego], neither one is a debtor in this Court. Therefore, the Court is powerless to render a decision adjudicating either the dischargeability of, or the amount of a debt owed by either defendant to M2M." M2M Multihull, LLC v. Christina West et al. (In re West), No. A.P. 11-1021, at 3-4 (Bankr. D.R.I. Jan. 20, 2012).

the funds lent by M2M to Jock, as evidenced by an email, dated August 6, 2008, between Jock West and a manager of M2M in which Jock West states that a loan of $25,000 would "bring [him] even" with his wife; that her accounting ledger and checks evidence transfers of funds from her personal account to Showtime, and from Jock West to Christina West between August 2008 and September 2009; that checks issued by Showtime to Christina West allegedly total over $110,000, including a $4000 check cashed three days before Jock West filed for bankruptcy protection; and that she paid the insurance premiums for the Vessel. See 2d. Am. Compl. at ¶¶ 31-32, 34-37.

On April 9, 2012, after full briefing by the parties, this Court entertained Christina West's Motion to Dismiss the Second Amended Complaint. After oral argument and by Order dated April 10, 2012, this Court granted Christina West's Motion to Dismiss, finding that the Plaintiff's claims against Christina West all fail because an individual cannot be an alter ego of another individual, and that such theory of liability is reserved to reach the assets of a corporation when the corporate veil should be pierced and not to hold one spouse liable for the individual debts of the other spouse. On that same day, M2M moved for leave to file a Third Amended Complaint which, in light of Super. R. Civ. P. R. 15, this Court granted.

On April 18, 2012, M2M filed its Third Amended Complaint. As it relates to Christina West, the Third Amended Complaint reiterated the factual allegations set forth in the Second Amended Complaint and added three more counts. In addition to the same counts for joint and several liability based on the alter ego theory (Count I), enforcement of the guaranty under the alter ego theory (Count II), breach of contract under the alter ego theory (Count III), and unjust enrichment (Count VI), M2M now also alleges fraud (Count IV), fraudulent inducement (V), and fraudulent conveyance under G.L. 1956 § 6-16-1 et seq. (Count VII). The new factual

allegations set forth in the Third Amended Complaint state that "[i]t is Plaintiff's understanding that Christina West was knowledgeable, at material times" (1) that Jock West made statements and forwarded documents to Mihailides, (2) of Jock West's intent to induce M2M to rely on the statements, and (3) of the true value of the vessel. (3d. Am. Compl. at ¶¶20, 22, 24.) Again, Christina West duly filed a Motion to Dismiss the Third Amended Complaint.

II

Standard of Review

"The 'sole function of a motion to dismiss' pursuant to Rule 12(b)(6) is 'to test the sufficiency of the complaint.'" McKenna v. Williams, 874 A.2d 217, 225 (R.I. 2005) (quoting Rhode Island Affiliate, ACLU, Inc. v. Bernasconi, 557 A.2d 1232, 1232 (R.I. 1989)). For purposes of the motion, the Court "assumes the allegations contained in the complaint to be true and views the facts in the light most favorable to the plaintiffs." Giuliano v. Pastina, Jr., 793 A.2d 1035, 1036-37 (R.I. 2002) (quotation omitted). However, "[a]llegations that are more in the nature of legal conclusions rather than factual assertions are not necessarily assumed to be true. Doe v. East Greenwich Sch. Dept., 899 A.2d 1258, 1262 n.2 (R.I. 2006); see Robert B. Kent et al., Rhode Island Civil Procedure § 12:9, III-44 (West 2006) (stating "sweeping legal conclusions are not admitted" for the purposes of reviewing a Super. R. Civ. P. 12(b)(6) motion). The motion "should be granted only when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief under any set of facts that could be proven in support of the claim." Siena, M.D. v. Microsoft Corp., 796 A.2d 461, 463 (R.I. 2002).

Additionally, Superior Court Rule of Civil Procedure 9(b) imposes a heightened pleading standard on all allegations of fraud. According to the rule: "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Super. R. Civ. P. 9(b); see 1 Kent, R.I. Civ. Prac. § 9.2 at 92 (1969) ("What constitutes sufficient particularity necessarily depends upon the nature of the case and should always be determined in the light of the purpose of the rule to give fair notice to the adverse party and to enable him to prepare his responsive pleading."). Federal cases interpret "circumstances" under this rule as a requirement to plead "matters such as the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." Wright & Miller, Federal Practice and Procedure, Civil 2d, Sec. 1297 (1990).

III

Analysis

A

Claims Based on Alter Ego Theory

"The alter ego doctrine permits creditors of a corporation to reach the assets of the individual or individuals that control the corporation." McFarland v. Brier, 769 A.2d 605, 613 (R.I. 2001). A corporation can also be the alter ego of another corporation if, viewing the totality of the circumstances, it is established that one corporation is so organized and controlled as to make it a mere conduit or instrumentality of the other. National Hotel Assocs. v. O. Ahlborg & Sons, Inc., 827 A.2d 646, 652-53 (R.I. 2003) (citing Vucci v. Meyers Bros. Parking Sys., Inc., 494 A.2d 530, 536 (R.I. 1985)). Finally, the alter ego doctrine "permit[s] creditors of an individual shareholder to reach the assets of the corporation when the requirements of the doctrine are satisfied." Heflin v. Koszela, 774 A.2d 25, 30 (R.I. 2001) (quoting Transamerica Cash Reserve, Inc. v. Dixie Power and Water, Inc., 789 P.2d 24, 26 (Utah 1990)). The Heflin Court established what those requirements are:

> "To invoke the equitable alter ego doctrine, 'there must be a concurrence of two circumstances: (1) there must be such a unity

> of interest and ownership that the separate personalities of the corporation and the individual no longer exist, viz., the corporation is, in fact, the alter ego of one or a few individuals; and (2) the observance of the corporate form would sanction a fraud, promote injustice, or an inequitable result would follow.'" Heflin, 774 A.2d at 30 (quoting Transamerica, 789 P.2d at 26).

Whether the second prong of the alter ego test is established "'is addressed to the conscience of the court, and the circumstances under which it will be met will vary with each case.'" Id. (quoting Transamerica, 789 P.2d at 26). In any event, "to satisfy the second prong, 'it must be shown that the corporation itself played a role in the inequitable conduct at issue.'" Id. (quoting Transamerica, 789 P.2d at 26).

M2M cites cases from several foreign jurisdictions for the proposition that the alter ego theory may be applied to join the potential liability of an individual to that of another individual who has neither an ownership nor managing interest in a corporation. See Massachusetts State Carpenters Pension Fund v. Atl. Diving Co., Inc., 635 F. Supp. 9 (D. Mass. 1984) (applying alter ego theory to amend complaint to add three individual defendants in suit against corporate defendant when individual defendants were officers of corporate defendant); Forastieri v. E. Air Lines, Inc., CIV. 79-2544(PG), 1983 WL 364564 (D.P.R. July 5, 1983) (applying alter ego theory to hold individual defendants jointly and personally liable for debts incurred by defendant corporation in which they both served as officers); cf. Oman Int'l Fin. Ltd. v. Hoiyong Gems Corp., 616 F. Supp. 351 (D.R.I. 1985) (holding two corporations and the individual owner of both were not jointly liable as alter egos of one another). M2M also cites two Rhode Island cases in which the courts found that an issue of fact remained as to whether multiple corporate defendants were alter egos of one another. See Heflin, 774 A.2d at 31 (genuine issue of material fact existed as to whether propane business was alter ego of separately incorporated lumber and hardware company); Stanley Weiss Associates, LLC v. Energy Mgmt. Inc., C.A. 02-1794, 2004

WL 877540, at *7 (R.I. Super. Ct. Apr. 7, 2004) (denying summary judgment when issues of fact remain as to whether one corporate entity is alter ego of another corporate entity). However, in each of these cases, the alter ego theory was analyzed for the purpose of joining the identities of a corporate defendant with individuals who had either an ownership or managing interest in the corporation, or with other corporate defendants.

None of the cases cited by Plaintiff stands for the proposition that one individual can be held accountable as an "alter ego" of another individual. To the contrary, a Utah court, following the principles that have been expressly adopted by the Rhode Island Supreme Court, has found that the alter ego doctrine does not apply to relationships between individuals. Werner-Jacobsen v. Bednarik, 946 P.2d 744, 747 (Utah Ct. App. 1997).[3] In that case, the plaintiff was the former wife of the defendant and filed a motion to join the defendant's second wife in an action to increase the defendant's child support payments and obtain a judgment ordering him to make child support payments in arrears. Id. at 745-46. Because of the defendant's troubled financial history, he and his second wife allegedly agreed to keep their property separate. Id. at 746. Consistent with their agreement, the second wife bought a home using money she claimed her brother gave to her. Id. The defendant asserted that he did not contribute financially to the purchase of the home. Id. In addition, since her marriage to the defendant, the second wife began a taxi business that operated a number of vehicles. Id. The defendant alleged that the vehicles were bought solely with his second wife's assets and that he

[3] When the Rhode Island Supreme Court has adopted the law of another jurisdiction, it has also followed subsequent developments and interpretations of the law from that foreign jurisdiction. See e.g. Marchetti v. Parsons, 638 A.2d 1047, 1049 (R.I. 1994) (adopting the California Supreme Court's subsequent limitations on the bystander exception for negligent infliction of emotional distress claims, after having originally adopted the exception from the California Supreme Court twenty-six years prior). Thus, while Werner-Jacobsen is an intermediate appellate decision from a foreign court, its holding is instructive because it is based upon the same requirements for the alter ego doctrine as have been adopted by the Rhode Island Supreme Court from the Utah Supreme Court. See Heflin, 774 A.2d at 30 (citing Transamerica, 789 P.2d at 26).

had no ownership interest in the business or in any of his second wife's bank accounts, property, or other assets. Id.

In reversing the trial court's order joining the second wife in the action, the appellate court held "as a matter of law, that the alter ego doctrine does not apply to relationships between individuals. An individual cannot be the alter ego of another." Id. at 747. The court emphasized that "[a]lter ego is an equitable doctrine which allows courts the discretion to disregard a *corporate* entity and hold individuals responsible for acts done in the name of a *corporation*." Id. (emphasis in original). Consequently, after reiterating the above requirements for application of the alter ego doctrine, the court reasoned that "[t]he relationship between individuals . . . . literally cannot meet the requirements for the alter ego doctrine to apply. Further, the courts lack the discretion to apply the doctrine to circumstances failing to meet these requirements." Id. at 748.

Here, for the second time arguing against a Rule 12(b)(6) Motion to Dismiss, M2M maintains that an alter ego theory may be proven to exist as between Jock and Christina West, as individuals. For the second time, and for the reasons set forth herein as well as for the reasons raised by the Court during oral argument on Christina West's Motion to Dismiss Second Amended Complaint, this Court emphatically disagrees. Rhode Island law does not support an extension of the alter ego theory to relationships between individuals. Indeed, as Justice Selya has so aptly stated, "[t]he alter ego approach is an attempt to puncture, rather than to swell, the defendant's corporate identity." Oman Int'l Fin. Ltd. v. Hoiyong Gems Corp., 616 F. Supp. 351, 360 (D.R.I. 1985). This Court, like that in Werner-Jacobsen, will not further swell an individual's identity to include that of his or her spouse. Accordingly, Counts I, II and III of the

Third Amended Complaint as against Christina West fail because an alter ego theory does not apply as between individuals.

To the extent that M2M relies upon Christina West's relationship with Showtime or Showtime of Newport to establish liability on an alter ego theory, that argument also fails as a matter of law. M2M argued before the Court that an ownership or management interest is not a requirement for application of the alter ego doctrine. However, case law exists that expressly holds that such in interest is a prerequisite of the alter ego doctrine. In S.E.C. v. Hickey, the Securities and Exchange Commission brought a securities fraud enforcement action against the defendant who was involved in a real estate development scheme which he was operating through a brokerage firm owned by his mother. 322 F.3d 1123 (9th Cir. 2003). The Ninth Circuit upheld the district court's granting of summary judgment and imposition of a freeze on the brokerage firm's assets on other grounds, but expressly rejected the district court's reliance on the alter ego doctrine to do so. Id. at 1128-29. After reciting the requirements of the alter ego doctrine under California law, which are nearly identical to those under Rhode Island law, [4] the court stated that "[o]wnership is a prerequisite to alter ego liability, and not a mere factor or guideline." Id. at 1128 (quoting Wood v. Elling Corp., 572 P.2d 755, 761-62 n. 9 (Cal. 1977)). It went on to hold that "because an individual must own at least a portion of a corporation before an alter ego relationship exists under California law, the [b]rokerage [firm] is not [the defendant]'s alter ego. [He] does not own any part of the [b]rokerage [firm], and the SEC has not tried to show otherwise." Id. at 1130. This Court agrees. Thus, M2M's contention that

[4] The Supreme Court of California requires: "First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality or separateness of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice." Wood v. Elling Corp., 572 P.2d 755, 762 (Cal. 1977); cf. Heflin, 774 A.2d at 30.

ownership in a corporation is not a prerequisite to impose liability on the alter ego theory is without merit.

Notably, M2M does not allege that Christina maintains any ownership or managing interest in either Showtime or Showtime of Newport. See 3d. Am. Compl. On the contrary, M2M alleges that Jock West "solely owned" Showtime and Showtime of Newport. (3d. Am. Compl. at ¶¶12, 15.) The closest reference M2M makes that Christina West has ownership in any corporate entity is the allegation that Jock West was an employee of and gets gas money from "a company in which Christina West has a significant ownership interest." (3d. Am. Compl. at ¶¶17-18.) M2M neither alleges that said company is a defendant, Showtime or Showtime of Newport, nor does it identify the company in any manner. Accordingly, as the Third Amended Complaint is wholly bereft of any allegation that Christina West has any ownership interest in a corporation for which it seeks to impose a theory of alter ego and pierce the corporate veil, Counts I, II, and III as against Christina West fail as a matter of law.

B

Breach of Guaranty and Breach of Contract

This Court next considers whether, under any set of facts that could be proven and apart from M2M's contention that Christina West is liable based upon an alter ego theory, M2M has stated a claim against Christina West for enforcement of the guaranty executed by Jock West in August 2008 or for breach of contract on the August 2008 and November 2008 promissory notes. In order to enforce liability on a guaranty and note, a plaintiff must prove that the defendant is the maker or endorser thereof. See e.g. Washington Trust Co. v. Fatone, 106 R.I. 168, 171, 256 A.2d 490, 493 (1969); Gaffin v. Heymann, 428 A.2d 1066, 1069 (R.I. 1981). Additionally, to state a prima facie case for breach of contract, a plaintiff must prove the existence of a contract

with the defendant against whom it seeks to impose liability. Filippi v. Filippi, 818 A.2d 608, 624 (R.I. 2003) (citing Centerville Builders, Inc. v. Wynne, 683 A.2d 1340, 1341 (R.I. 1996)). Here, M2M fails to allege that Christina West was a party to the August 2008 promissory note or guaranty, or that she was a party to the November 2008 promissory note. On the contrary, the Third Amended Complaint and the exhibits attached thereto allege and support only that Jock West signed and executed the August 2008 note and guaranty and the November 2008 note. (3d Am. Compl. at Exs. C, D, F.) Taking all the allegations in the Third Amended Complaint as true, it is clear beyond reasonable doubt that M2M would not be entitled to relief against Christina West under any set of facts that may be proven on the enforcement of guaranty and breach of contract counts. In addition to the reasons set forth in Section III A rejecting the alter ego theory of liability on Counts I, II and III, Counts II and III against Christina West must be dismissed because she was neither a party to nor maker or endorser of any contract or guaranty as it relates to M2M.

C

Unjust Enrichment

Count VI of the Third Amended Complaint alleges that Christina West is jointly and severally liable to M2M based on unjust enrichment. More specifically, M2M alleges that the proceeds received as a result of the two promissory notes constitute a benefit to both Jock and Christina West, that Jock and Christina West have not made payments to M2M due under the notes, and that Jock and Christina have been unjustly enriched to the detriment of M2M in the face amount of the notes, plus interest, costs and attorney's fees. (3d. Am. Compl. at ¶¶89-91.)

"Under Rhode Island law, unjust enrichment is not simply a remedy in contract and tort but can stand alone as a cause of action in its own right." Toupin v. Laverdiere, 729 A.2d 1286

(R.I.1999). An action for unjust enrichment may exist in the absence of an enforceable contract. Doe v. Burkland, 808 A.2d 1090, 1095 (R.I. 2002). Unjust enrichment "rests upon the equitable principle that one shall not be permitted to enrich herself unjustly at the expense of another or to receive property or benefits without making compensation therefore," and neither an actual promise nor privity is required. R & B Elec. Co., Inc. v. Amco Const. Co., Inc., 471 A.2d 1351, 1355 (R.I. 1984). It is well-settled in Rhode Island that to recover under this equitable doctrine, a plaintiff must prove the following: (1) a benefit must be conferred upon the defendant by the plaintiff; (2) there must be an appreciation by the defendant of such benefit; and (3) there must be an acceptance of such benefit under such circumstances that it would be inequitable for the defendant to retain the benefit without paying the value thereof. Id. at 1355-56; see also Narragansett Elec. Co. v. Carbone, 898 A.2d 87, 99 (R.I. 2006); Dellagrotta v. Dellagrotta, 873 A.2d 101, 113 (R.I. 2005); Anthony Corrado, Inc. v. Menard & Co. Bldg. Contractors, Inc., 589 A.2d 1201, 1201-02 (R.I. 1991).

Even taking all the allegations in the Third Amended Complaint as true, M2M fails to satisfy the first element to sustain a cause of action for unjust enrichment. M2M did not confer a benefit to Christina West; M2M merely conferred a benefit to Jock West in accordance with the terms of the promissory notes. The parties have failed to direct the Court to any case law in support of or in opposition to the proposition that a benefit may be conferred upon a defendant by a plaintiff indirectly, rather than directly, in order to support a claim of unjust enrichment. Regardless of the allegations in the Third Amended Complaint which may support the second and third elements for an unjust enrichment claim, Plaintiff's failure to establish the first element is fatal. Accordingly, there is no set of circumstances under which M2M could sustain a cause of

action against Christina West for unjust enrichment, and the Motion to Dismiss Count VI of the Third Amended Complaint is granted.

D

Claims Based on Fraud

Counts IV and V for common law fraud and fraudulent inducement are virtually identical and will be analyzed together. "The word 'fraud' is a generic term which embraces a great variety of actionable wrongs." Halpert v. Rosenthal, 107 R.I. 406, 412, 267 A.2d 730, 733 (1970). To establish a prima facie case of common law fraud in Rhode Island, "the plaintiff must prove that the defendant 'made a false representation intending thereby to induce plaintiff to rely thereon,' and that the plaintiff justifiably relied thereon to his or her damage." Women's Dev. Corp. v. City of Cent. Falls, 764 A.2d 151, 160 (R.I. 2001) (quoting Travers v. Spidell, 682 A.2d 471, 472-73 (R.I. 1996)). Fraud can be grounded on either affirmative acts or concealment. See Holmes v. Bateson, 434 F.Supp. 1365, 1387 (D.R.I. 1977) (reversed on other grounds). However, to establish fraud "the plaintiff must prove that the *defendant* 'made a false representation.'" Stebbins v. Wells, 766 A.2d 369, 372 (R.I. 2001) (emphasis added). In addition, a claim based on concealment will not lie absent a duty to speak. Home Loan and Inv. Assoc. v. Paterra, 105 R.I. 763, 255 A.2d 165, 168 (R.I.1969); see also Guilbeault v. R.J. Reynolds Tobacco Co., 84 F.Supp.2d 263, 269 (D.R.I. 2000).

The allegations against Christina West with respect to the fraud claims are that she had knowledge of Jock West's false statements to M2M, Jock West's underlying intent, and the true value of the Vessel. M2M fails to allege that Christina West herself made a false representation, or that she had a duty to disclose. In the absence of a false representation by or duty to disclose imposed upon Christina West, M2M's claims of fraud and fraudulent inducement cannot survive.

Accordingly, Counts IV and V of the Third Amended Complaint as against Christina West shall be dismissed.

E

Fraudulent Conveyance Pursuant to § 6-16-1 et seq.

The remaining claim against Christina West alleges a fraudulent conveyance, in violation of an unspecified section of the Uniform Fraudulent Transfer Act ("the Act"), codified at G.L. 1956 § 6-16-1 et seq. In the absence of M2M's reliance on any specific section of the Act, the parties direct this Court to three different causes of action under the Act.

Section 6-16-4(a) sets forth two means by which M2M could establish a fraudulent transfer, both of which may exist regardless whether M2M's claim arose before or after the transfer was made or the obligation was incurred. In the first instance, a transfer may be fraudulent as to present and future creditors if the debtor, here Jock West, made the transfer or incurred the obligation with "actual intent to hinder, delay, or defraud any creditor or debtor." Sec. 6-16-4(a)(1). For the purpose of evaluating actual intent in claims under § 6-16-4(a)(1), the Act provides for consideration of several factors:

> "(1) The transfer or obligation was to an insider;
> (2) The debtor retained possession or control of the property transferred after the transfer;
> (3) The transfer or obligation was disclosed or concealed;
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) The transfer was of substantially all the debtor's assets;
> (6) The debtor absconded;
> (7) The debtor removed or concealed assets;
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor." Sec. 6-16-4(b).

Secondly, a transfer may be fraudulent as to present and future creditors if the debtor, Jock West, made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and he either:

> "(i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." Sec. § 6-16-4(a)(2).

A third manner in which M2M, as a present creditor of Jock West, could establish a fraudulent transfer under the Act is set forth in § 6-16-5. That section provides:

> "(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time, or the debtor became insolvent as a result of the transfer or obligation.
> (b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent." Sec. 6-16-5.

Christina West contends that Count VII fails as a matter of law because there are no specific allegations to establish a fraudulent transfer under any of the three possible actions. She further contends that the Act sets forth technical requirements and strictly defined causes of action, thus evidencing the legislature's intent not to create "a catchall basis for any plaintiff claiming a loss to haul into court anyone remotely related to the loss whom the plaintiff believes must possess some assets." (Def.'s Memo., at 11.) M2M responds that M2M is, arguably, a

"creditor" of Christina West through the alter ego doctrine.[5] (Pltf.'s Memo, at 14.) In addition to having already rejected the alter ego theory, see supra Sec. IIIA, M2M misses the mark in several respects. First, a cause of action for fraudulent conveyance may lie against a transferee just as it would as against the debtor who fraudulently transferred assets. See Rohm & Haas Co. v. Capuano, 301 F. Supp. 2d 156, 161 (D.R.I. 2004) ("transferee of assets from [the debtor] . . . is properly named as a party," but rejecting extension of liability on fraudulent conveyance actions to mere participants on fraudulent transfer); see also §§ 6-16-7, -8. Here, Christina West is not alleged to be a mere participant in a fraudulent transfer, but is alleged to be the transferee. (3d. Am. Compl. at ¶97) ("Christina West received all, or a substantial portion, of the funds lent by Plaintiff to Defendant West"). Second, and more importantly, Jock West's petition for bankruptcy protection brings the alleged fraudulent transfer under the auspices of the trustee in bankruptcy to initiate an adversary proceeding against Christina West, or any other alleged transferee of a fraudulent conveyance. See 11 U.S.C. 544(b)(1); see also Richardson v. Preston (In re Antex, Inc.), 397 B.R. 168, 171-72 (B.A.P. 1st Cir. 2008) (affirming summary judgment for trustee in adversary proceeding against wife of debtor-corporation's principal for fraudulent payments under Rhode Island law); see generally Dahar v. Jackson (In re Jackson), 459 F.3d 117 (1st Cir. 2006) (affirming Bankruptcy Court's judgment for trustee on adversary proceeding against debtor's wife alleging constructively fraudulent conveyance under New Hampshire law); Lassman v. Keefe (In re Keefe), 401 B.R. 520 (B.A.P. 1st Cir. 2009) (affirming judgment on merits on trustee's adversarial proceeding against debtor's wife for fraudulent conveyance under Massachusetts law).

[5] Plaintiff presents a legal conclusion in the Third Amended Complaint that Christina West is a debtor within the meaning of the Act, see 3d. Am. Compl. at ¶99. Not only is this legal conclusion erroneous, and but also it is not taken as true for purposes of the within Rule 12(b)(6) Motion to Dismiss. See Doe v. East Greenwich Sch. Dept., 899 A.2d 1258, 1262-63 n.2 (R.I. 2006) (allegations more in nature of legal conclusions than factual assertions need not be assumed as true).

In the absence of Jock West's bankruptcy petition, M2M may have had a viable claim against Christina West under the Act as the transferee. See Rohm & Haas Co., 301 F. Supp. 2d at 161. However, that is not the posture of this case. A cause of action for fraudulent conveyance under Rhode Island law against Christina West as transferee now lies with the trustee in bankruptcy, and not with M2M as a creditor of the debtor, Jock West.[6] Accordingly, Count VI of the Third Amended Complaint against Christina West is dismissed.

CONCLUSION

For the foregoing reasons, this Court grants Christina West's Motion to Dismiss Third Amended Complaint as to Counts I, II, III, IV, V and VI. Counsel for Christina West shall present an Order consistent with this opinion.

[6] That M2M's own adversary proceeding against Christina West, the Trust and others was dismissed for lack of jurisdiction does not alter this Court's finding. Indeed, the Decision makes clear that the cause of action for avoidance of fraudulent conveyance under Rhode Island law rests with the trustee – and not M2M – when the Court found that "Section 544 of the Bankruptcy Code empowers only a trustee to avoid transfers which are fraudulent under State law. Here, M2M, not the trustee, seeks monetary recovery for itself, not for the estate." M2M Multihull, LLC v. Christina West et al. (In re West), No. A.P. 11-1021, at 1 n.3 (Bankr. D.R.I. Jan. 20, 2012) (emphasis added).