2014 IL App (1st) 123313-U

SECOND DIVISION
March 4, 2014

No. 1-12-3313

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

HARRIS, N.A., individually and as senior agent,	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant	
v.	No. 08 L 5561
OLYMPUS PARTNERS, L.P., a Delaware limited partnership, OLYMPUS GROWTH FUND III, L.P., a Delaware limited partnership, OLYMPUS EXECUTIVE FUND, L.P., a Delaware limited partnership, LOUIS J. MISCHIANTI, DAVID CARDENAS, KEITH HEFFERNAN, CJR WORLD ENTERPRISES, INC., a Florida corporation, CHAD J. ROSENBERG, GERALD R. BENJAMIN, EDWARD R. CASAS, and CBW KEY EMPLOYEE CAPTAL II, LLC, a Delaware limited liability company,	Honorable Ronald F. Bartkowicz, Judge Presiding.
Defendants-Appellants.	
(Gary A. Meyer, Clark Christensen, Phillip F. Ousley, and James J. Briles III, Defendants).	

JUSTICE SIMON delivered the judgment of the court.
Justice Pierce and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: Dismissal of four counts of plaintiff creditor's complaint sounding in fraud, unjust enrichment, constructive trust and equitable lien, for lack of standing was proper where plaintiff failed to demonstrate that its injuries were separate and distinct from those of its borrower on these derivative claims. Summary judgment was proper on remaining count for fraudulent transfer under the doctrine of collateral estoppel where borrower successfully pursued that issue in arbitration proceedings against defendants and arbitration panel made a factual determination of the actual value of the company at the time of sale.

¶ 2 Plaintiff Harris N.A. filed a five-count second amended complaint against defendants Olympus Partners, Olympus Growth Fund III, L.P., Olympus Executive Fund, L.P., Louis J. Mischianti, L. David Cardenas, Keith Heffernan, CJR World Enterprises, Inc., Chad J. Rosenberg, Gerald R. Benjamin, Edward R. Casas, M.D., CDW Key Employee Capital II, LLC, Gary A. Meyer, Clark Christensen, Phillip F. Ousley, and James J. Briles III[1]. Plaintiff asserted claims under the Uniform Fraudulent Transfer Act (740 ILCS 160/1 (West 2008)) (IUFTA), for common law fraud and unjust enrichment and two counts seeking a constructive trust and equitable lien. The claims were all related to the June 7, 2006, sale of shipping company Global Link Logistics, Inc. (GLL) to GTCR Gould Rauner, Ltd. (GTCR), through acquisition vehicle Golden Gate Logistics, Inc. (Golden Gate), and the financing partially provided by plaintiff. Plaintiff asserted that the sellers undertook fraudulent business practices to inflate the value of the company for sale leading to the unjust enrichment of sellers and losses to the buyers and plaintiff.

¶ 3 On March 23, 2010, the circuit granted defendants' motion to dismiss plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)) with respect to counts II – V for lack of standing. The court denied the motion to dismiss

[1] On April 5, 2010, defendants Meyer, Christensen, Ousley, and Briles were dismissed by the circuit court pursuant to section 2-301 of the Code of Civil Procedure (735 ILCS 5/2-301 (West 2008)) for lack of personal jurisdiction and plaintiff does not challenge their dismissal from the case.

count I for fraudulent transfer under a collateral estoppel theory. Following the denial of a subsequent motion to dismiss and further discovery, the circuit court granted defendants' motion for summary judgment based on the doctrine of collateral estoppel. This appeal followed.

¶ 4 On appeal, plaintiff argues the circuit court erred in dismissing counts II - V for lack of standing, asserting that the rule allowing for shareholder standing against corporate entities should be expanded to the instant scenario where a creditor is suing for fraudulent inducement against the seller. Plaintiff also asserts various grounds to argue that the circuit court erred in finding it collaterally estopped from advancing its fraud and fraudulent transfer claims. For the following reasons, the judgment of the circuit court is affirmed.

¶ 5 I. BACKGROUND

¶ 6 A. *The Parties and Transaction at Issue*

¶ 7 Global Link Logistics, Inc. (GLL 97), a non-vessel owning common carrier, was founded by defendant Chad Rosenberg in 1997 to engage in international freight forwarding from factory shipment points in Asia to various destinations in the United States. Freight forwarding involves contracting and coordinating with ocean carriers, trucking companies, suppliers and retailers for the overseas shipment of goods. For GLL 97, this predominantly involved freight forwarding from various shipment points in Asia for "door-to-door" shipment of furniture products to GLL 97's warehouse and retail store customers in the United States. Depending on the parties involved, GLL 97 and the ocean carrier would be responsible for various parts of this transaction, with GLL 97 taking over responsibility and contracting from the ocean carrier either at the port, rail yard, container yard, truck transportation, or at the final destination. The most prevalent transactions involved in this case were "door moves," for which the ocean carrier maintained responsibility of all phases of transportation – ocean, rail, and trucking.

¶ 8 Olympus Partners is a Stamford, Connecticut, private equity firm with principals Cardenas, Heffernan, and Mischianti, that manages investment funds Olympus Executive Fund and Olympus Growth Fund III (these defendants collectively referred to as "Olympus"). In 2003, along with other unnamed parties, Olympus and defendants CBW Key Employee Capital II, LLC, and its principals, Benjamin and Casas, purchased the assets of GLL 97. A new operating entity was created retaining the Global Link Logistics, Inc., name (GLL 03), under the ownership of GLL Holdings, Inc. (GLL Holdings). Rosenberg renamed GLL 97 to defendant CJR World Enterprises, Inc., which held 20% of the stock of GLL 03.

¶ 9 Following profit reductions in 2003 and 2004, GLL 03 drastically increased its shipping volume and gross profits in 2005. In late 2005, defendants sought to sell GLL 03 and retained an investment bank to solicit bids for the company. GTCR was identified as an interested party and it negotiated a stock purchase agreement (SPA) for the shares of GLL 03, provided equity, and arranged financing for the purchase under acquisition vehicle Golden Gate. On May 20, 2006, the SPA was entered into between defendants and other owners of GLL 03 and a newly formed company, GLL Sub Acquisition, Inc., which was created and owned by Golden Gate for the purposes of the acquisition.

¶ 10 On June 7, 2006, the sale was finalized with the purchase price of approximately $128.5 million being forwarded to Olympus and other defendants. The sale amount included financing of roughly $50 million from plaintiff to GLL Sub Acquisition. Following the closing and transfer of funds, the new GLL entity (GLL 06) was formed by merging GLL 03 and GLL Sub Acquisition. Golden Gate was sole owner of both GLL 06 and GLL Sub Acquisition.

¶ 11 Soon after the sale was finalized, GLL 06 discovered suspect business and accounting practices that it alleged resulted in a vastly inflated stated value for the company. As addressed below, this included allegedly fraudulent representations, warranties, covenants, and certifications of the value of the company and its business from practices known as "split-routing," "mis-routing," and "re-routing" shipping practices. Because of the deflated value and earnings, GLL 06 was unable to comply with the financial obligations of its loan with plaintiff and it did not make its payments on the loan.

¶ 12 Therefore, plaintiff and GLL 06 entered into a forbearance agreement on June 29, 2007. Plaintiff deferred principal and interest payments on the loan in consideration for, *inter alia*, priority standing on net proceeds from potential claims that GLL 06 could advance arising out of the 2006 transaction. Pursuant to the forbearance agreement, GLL 06 and GLL Sub Acquisition were required to consult with plaintiff "on the prosecution of the Indemnity Claim and Potential Claims and any litigation related thereto."

¶ 13 On February 22, 2008, plaintiff agreed to a "First Amendment to Forbearance Agreement" with GLL 06 and GLL Sub Acquisition. The amended agreement modified several provisions of the forbearance agreement, including an amendment to the entirety of the section concerning proceeds from an indemnification claim or other potential claims. Plaintiff's perfected first priority senior lien was noted and further protections to plaintiff were provided, including a requirement for plaintiff's consultation and approval on the prosecution of these claims and any related litigation or possible settlement.

¶ 14 B. *The Arbitration*

¶ 15 On August 9, 2007, pursuant to the terms of the SPA, GLL 06, GLL Holdings, and Global Link (claimants) submitted a demand for arbitration that was received by the American Arbitration Association (AAA) on or about August 31, 2007. On May 21, 2008, claimants submitted a 31-page, 79-paragraph second amended arbitration claim against defendants Olympus, Heffernan, Cardenas, Mischianti, CBW Key Employee Capital II, Benjamin, Casas, CJR World Enterprises, Inc., and Rosenberg. Claimants advanced detailed allegations in support of its claims of common law fraud and breach of contract and indemnification.

¶ 16 Claimants asserted that defendants' drastic increase in profitability in 2005 can only be attributed to defendants' increase in fraudulently enhanced margins. For the fraud claims, Golden Gate sought actual damages of not less than $61 million as well as punitive damages while GLL 06 and GLL Holdings sought at least $100 million in damages. Pursuant to the SPA cap on liability for breach of representations and warranties, claimants sought $6.425 million in damages for the breach of contract and indemnification claim.

¶ 17 Extensive written and oral discovery were conducted by the parties. An arbitration hearing was held in October and November 2008, with written submissions and oral argument concluding on December 12, 2008. On February 2, 2009, the arbitration panel issued an exhaustive 60-page ruling, providing a thorough overview of the evidence and arguments presented and resolving all of the substantive issues. Claimants were awarded $12 million in damages, but the arbitration panel denied the request for punitive damages.

¶ 18 At the core of this case is the practice known as "split-routing," referred to as the "false booking practice" by plaintiff. The arbitration panel explained the general practice of freight forwarding, and then defendant's manipulation of that process through the allegedly fraudulent split-routing and false-booking. The underlying relationship involved is between freight-forwarding companies such as GLL and ocean carriers. These two parties typically negotiate contracts on an annual basis for space on shipping vessels and include various negotiated destinations with quoted rates for each destination. The ocean carrier would be responsible for either transportation to the port, to an intermediate container yard via rail or truck, or to the end destination via truck.

¶ 19 The evidence presented demonstrated that freight forwarding companies can maximize profits in various ways, some legal and some in violation of the United States Shipping Act. One legal way is through the negotiation of "bullet rates," which are discounted rates that are negotiated based on in-time spare capacity for the ocean carriers. Other ways that are the center of the controversy in this case are the practices of split-routing and "short-stopping," which plaintiff asserted violated the United States Shipping Act and artificially inflated GLL 03's earnings by millions of dollars in 2005, thereby fraudulently inflating its value before its sale. As defendants came to fully understand the ramifications on profits, these practices became more prevalent for GLL 03 whenever bullet rates were unavailable.

¶ 20 Specifically, when GLL 03 was unable to secure bullet rates, it would search for outdated or uncompetitive destination rates for intended destinations. However, on the master bills of lading from the ocean carriers, GLL 03 would select a destination that was cheaper. They would then issue a separate "house bill of lading" that would have the true destination and arrange trucking to that destination. GLL 03 would pay the trucker additional compensation when the ocean carrier's bill of lading was for a destination closer to the actual destination. However, when the actual destination was nearer the port than that listed on the master bill of lading, or short-stopping, GLL 03 would end up realizing a savings.

¶ 21 There was testimony and email correspondence entered as evidence concerning these processes at GLL 03. The company first viewed and entered these differences as debits and credits for the trucking companies. However, counsel for GLL 03 indicated to defendants that he had problems with this system and stated that it may violate the Shipping Act. In response, defendants halted the practice of entering offsetting debits and credits, but continued to maximize the use of bullet rates and split-routing.

¶ 22 The arbitration panel stated that there was competing evidence concerning the prevalence of split-routing in the competitive freight forwarding market and indicated that some ocean carriers actively worked to stop the practice while other carriers "preferred not to be bothered with negotiating a multiplicity of door points." The panel concluded that this practice was in violation of federal law and that defendants heavily utilized the practice to increase profits. Citing the financial documents provided by defendants in support of the sale, the panel found that certain defendants concealed this practice from potential buyers, thereby fraudulently inducing the buyers to overpay for GLL 03. However, it did not conclude that this was carried out with a belief that it was illegal. Accordingly, the panel did not award punitive damages.

¶ 23 The panel reviewed the applicable considerations for assessing a damage award and determined that fraud damages represent the difference between the purchase price of an asset and its true value measured as of the date of the sale. Therefore, the panel examined the evidence presented by the parties in an attempt to measure the "actual" value of GLL 03 at the time of purchase as opposed to the amount paid pursuant to the SPA. In particular, the panel reviewed the testimony of the claimant's two experts and respondents' expert.

¶ 24 Claimants' experts examined the costs and revenues for the 12 and 18-month periods prior to the sale, concluding that roughly 60% of GLL 03's shipments involved split-routing. The impact of split-routing was determined by calculating the difference between the actual cost incurred in the transaction and the cost to GLL 03 if the least expensive routing available was used. An average savings of $175 per container was determined. The experts determined that eliminating this practice resulted in a reduction in EBITDA for the year prior to sale from $13,049,327 to $5,240,458 and a reduction in net income over that time from $6,368,486 to $1,448,898. Utilizing these calculations and increasing the risk premium to accommodate anticipated reductions in the size and profitability of the company without split-routing, claimant's experts arrived at a " 'but-for case' economic value" of $38.7 million, a reduction of $89.8 million from the purchase price. Further reductions were predicted based on a "fraud impact" or loss of reputation and the actual value was estimated as low as $11.9 million under a liquidation scenario.

¶ 25 The panel discounted the experts' conclusions. First, the panel found the valuation of a company such as GLL 03 on a liquidation basis was unsound because its value was not in tangible assets, but its services. Second, it opined the calculation of a “fraud impact” on the value of the company, without cited authority, was improper as the economic impact was admittedly nebulous and malleable. Finally, it discounted the idea that the impact of eliminating split-routing would be permanent.

¶ 26 However, the panel also noted that the respondents' expert opined that the claimants suffered no injury because the split-routing did not decrease costs, increase EBITDA, or increase value. The panel highlighted claimants' experts rebuttal reports showed that these conclusions were flawed and the selective use of rates favorable to respondents' desired conclusion. Furthermore, it pointed to his refusal to include important costs incurred in split-routing that reduced the company's earnings and profits.

¶ 27 Following its discussion of the expert testimony, the panel noted that the process and timing of eliminating GLL 03's split-routing practice and the cost that would incur was a "foolhardy" enterprise because of the complete lack of mathematical certainty. The panel added that "[n]either side has offered us evidence as to what the prudent reduction" in value due to the fraudulent actions and "without substantial assistance from expert witnesses," it was left to its "collective sense of reason, proportionality and fairness, as well as respect for the scant decisional authority" to quantify the reduction in value.

¶ 28 Despite these limitations, the panel opined there were sufficient facts of record to point it to a conclusion for "arriving at an award consistent with the governing legal principles." Following this analysis of the evidence and testimony presented, the panel ultimately determined that a buyer would have paid roughly $116.5 million for GLL 03 with knowledge of the split-routing practice and a plan to eliminate that practice while properly negotiating new contracts. This was $12 million less than the purchase price of $128.5 million. The panel further broke the award down to $5,605,583 for damages for fraud and $6,394,417 for contractual indemnification, the maximum for that claim under the SPA. The $12 million award was subsequently fully satisfied by defendants.

¶ 29 C. *Plaintiff's Complaint At Law*

¶ 30 Plaintiff received Golden Gate's demand for arbitration after it was filed with the AAA in August 2007. However, on March 8, 2008, while arbitration proceedings were on-going, plaintiff filed its complaint against defendants in the Circuit Court of Cook County. Plaintiff sought damages for alleged fraudulent transfers, fraud, and unjust enrichment and also sought equitable remedies of constructive trust and equitable liens. Plaintiff filed its five-count second amended complaint against defendants on February 19, 2010.

¶ 31 In particular, under count I, plaintiff advanced a claim for fraudulent transfer under IUFTA. Plaintiff alleged that defendants completed the sale of GLL 03 with knowledge of a lack of equivalent value because it was a "company rife with fraud, without any significant assets except it [*sic*] sales procedure which was illegal and fraudulent." Plaintiff asserted that sellers breached numerous covenants including those regarding financial reporting, full disclosure, compliance with laws, and earnings before interest, taxes, depreciation and amortization (EBITDA) to funded debt ratio. Plaintiff alleged that, as a result of the fraudulent transactions, the borrowers were rendered insolvent and unable to pay debts.

¶ 32 Under count II, plaintiff advanced a common law fraud claim for compensatory and punitive damages against defendants Olympus, Mischianti, Heffernan, Cardenas, CJR World Enterprises, and Rosenberg, based on defendants' alleged false representations and omissions concerning GLL 03's financials. Count III sounded in unjust enrichment against defendants Olympus, CJR World Enterprises and Rosenberg, asserting that they unjustly and inequitably received funds from the sale of GLL 03 because of their materially false representations and omissions. Counts IV and V were also alleged against Olympus, CJR World Enterprises and Rosenberg, with plaintiff seeking a constructive trust and equitable lien.

¶ 33 D. *Dismissal of Counts II – V*

¶ 34 Defendants moved to dismiss plaintiff's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure. 735 ILCS 5/2-619(a)(9) (West 2008). Defendants argued that plaintiff lacked standing to bring any of its claims. Defendants also asserted that counts I and II were barred by the doctrine of collateral estoppel based on the arbitration award discussed above.

¶ 35 On March 23, 2010, the circuit court entered an order dismissing counts II – V of plaintiff's complaint for lack of standing. The court found that plaintiff failed to differentiate the injuries it suffered from the injury suffered by its borrower, thereby rendering counts II – V derivative. Citing to case law, the court found that, as a creditor, plaintiff lacked standing for such derivative actions. The court rejected plaintiff's argument that the shareholder exceptions should be expanded to apply to the instant circumstances, explaining differences between a lender and a shareholder and the remedies available to each that mitigated against expansion of that exception. Further, the court noted that the United States Court of Appeals for the Seventh Circuit rejected arguments that credit guarantors should be granted independent standing because of concerns over double recoveries and apportionment. *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.3d 1333 (7th Cir. 1989).

¶ 36 With respect to count I, the court found that plaintiff had standing because it was not a derivative claimant. The court explained that count I was based on IUFTA and allegations that defendants' fraud rendered GLL 06 and GLL Sub Acquisition insolvent, thereby causing unique injury to plaintiff because its borrowers could not meet the obligations under the loan. The court concluded that a question of fact remained as to the fair value of GLL 03 at the time of the sale and allowed count I to stand.

¶ 37 In response to defendants' argument that counts I and II should be dismissed pursuant to the doctrine of collateral estoppel, the trial court agreed that count II was barred, but denied the motion as to count I. As to count II, the court found that the issue of alleged fraud against defendants was the same issue of fraud raised in arbitration. The court noted that the arbitration panel decided questions of fact and law on that issue that had collateral estoppel effect and opined that plaintiff was in privity with GLL 06 because they both argued that defendants defrauded them in the sale.

¶ 38 The court opined that the issue asserted in count I under IUFTA was not identical to the issues addressed in the arbitration. Further, it found that plaintiff and GLL 06 were not in privity on this claim because the remedy provided under IUFTA, rescission of the transfers of assets, is a different remedy than that allowed under the arbitration to GLL 06. Accordingly, the court held that count I could stand and denied the motion to dismiss count I.

¶ 39 E. *Summary Judgment on Count I*

¶ 40 Following additional discovery, defendants filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010)) on the remaining count I. Defendants again argued that plaintiff's IUFTA claim was barred by collateral estoppel because the arbitration panel made a final determination of the actual value of GLL 03 at the time of the sale. Defendants maintained that plaintiff was in privity with the arbitration claimants and presented evidence of plaintiff's extensive involvement in the arbitration process, including testimony and written discovery demonstrating its involvement in strategy and settlement discussions.

¶ 41 The trial court granted summary judgment to both defendants on count I. While it did not find privity on the IUFTA claim of count I, it noted that it had found privity between plaintiff and GLL 06 on the fraud claim. Accordingly, the court ruled that plaintiff was bound by the arbitration panel's factual findings on issues that were identical in the fraud and IUFTA claims, namely, the underlying value determination.

¶ 42 The court highlighted that the arbitration panel examined the split-routing issue and its affect on the actual value of GLL 03 at the time of the sale. It determined that the true value at the time of sale was $116.5 million, or $12 million less than the $128.5 million sale price. This was in excess of 90% of the sale value, a threshold that Olympus argued was sufficient to establish the transfer was for reasonably equivalent value, thereby foreclosing plaintiff from bringing an IUFTA claim.

¶ 43 The circuit court noted that, unlike in the prior motions to dismiss, it was not required to take plaintiff's allegations as true in a motion for summary judgment. It agreed with defendants that the arbitration panel determined the value of GLL 03, an essential element of plaintiff's IUFTA claim. The court held that plaintiff had failed to present any new evidence to support its claim that there was incremental overpayment beyond that overpaid for fraud as determined by the arbitration panel. Thus, because a plaintiff cannot simply rest on its pleadings to create a genuine issue of material fact to withstand a motion for summary judgment, summary judgment was granted to defendants on the IUFTA claim. Following the denial of plaintiff's motion for reconsideration, this appeal was filed.

¶ 44 II. ANALYSIS

¶ 45 A. Standard of Review

¶ 46 Plaintiff argues on appeal that the circuit erred in dismissing counts II-V of its second amended complaint and granting summary judgment to defendants as to count I. A motion to dismiss pursuant to section 2-619 admits the legal sufficiency of a pleading, but asserts an affirmative defense or other matter that avoids or defeats the claim. *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011). A section 2-619 dismissal is reviewed *de novo*. *Id*. We may affirm the dismissal of a complaint on any ground that is apparent from the record. *Sherman v. Township High School District 214*, 404 Ill. App. 3d 1101, 1107 (2010).

¶ 47 Summary judgment is proper where the pleadings, depositions, affidavits, admissions, and exhibits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is thus entitled to judgment as a matter of law. *Kajima Construction Services, Inc. v. St. Paul Fire & Marine Insurance Co.*, 227 Ill. 2d 102, 106 (2007). A triable issue of fact exists where there is a dispute as to one of the material facts, or where a reasonable trier of fact might differ in drawing inferences from facts that are not in dispute. *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 162-63 (2007). A defendant may nevertheless succeed on its motion for summary judgment by disproving the plaintiff's case with uncontradicted evidence that would entitle it to judgment as a matter of law or by establishing that the plaintiff lacks sufficient evidence to prove an essential element of its cause of action. *Argueta v. Krivickas*, 2011 IL App. (1st) 102166, ¶ 6. Therefore, when facing a motion for summary judgment, a plaintiff cannot simply rest on conclusory or unsupported allegations, but must present a factual basis that would arguably support a judgment. *Robinson* *v. Village of Oak Park*, 2013 IL App. (1st) 121220, ¶¶ 21-22. For appeals such as this, on the circuit court's grant of defendant's motion for summary judgment, this court will review the motion *de novo*. *Abrams v. City of Chicago*, 211 Ill. 2d 251, 258 (2004).

¶ 48 B. Dismissal of Counts II - V for Lack of Standing

¶ 49 As noted above, the circuit court initially dismissed counts II – V of plaintiff's second amended complaint for lack of standing. Plaintiff argues that the circuit court erred in finding that it lacked standing on counts II - V sounding in fraud, unjust enrichment and equitable remedies. Plaintiff asserts that it has standing to bring these claims as a creditor under the shareholder exception that allows for a derivative claim and that as it suffered a direct harm from defendants' misrepresentations directly to plaintiff and plaintiff's reliance on those misrepresentations made in extending the loan to GLL Sub Acquisition it has standing to bring its fraud claim. Finally, plaintiff asserts that its claims of unjust enrichment and related equitable remedies confer standing.

¶ 50 1. *Shareholder Standing*

¶ 51 Plaintiff first argues that the circuit court erred in finding it lacked standing in dismissing counts II – V. Plaintiff asserts that, consistent with shareholder standing, a creditor should be granted standing to bring a derivative claim if it suffers a direct injury such as the alleged fraud by defendants. Essentially, plaintiff requests this court to extend its holding in *Mann v. Kemper Financial Companies, Inc.*, 247 Ill. App. 3d 966 (1993), to plaintiff as a creditor in this case.

¶ 52 In *Mann*, plaintiffs represented a class of shareholders, alleging that they were harmed by fraudulent representations and breaches of fiduciary duty by the defendant sponsor and manager of two mutual funds. *Id.* at 968-69. The plaintiff shareholders claimed that they were enticed into investing through these misrepresentations and that, as a result of the defendants' violation of internal procedures and misconduct, the mutual funds lost tens of millions of dollars thereby directly harming plaintiffs. *Id.* at 971. The trial court dismissed the plaintiff's complaint, holding that the plaintiffs lacked standing because they did not allege separate and distinct injuries from other shareholders and could not bring individual claims as opposed to derivative claims. *Id.* at 973.

¶ 53 The *Mann* court reversed the dismissal of the plaintiffs' claims for lack of standing, articulating that the general rule for a derivative action is that standing rests with the corporation. *Id.* at 975, citing *Zokoych v. Spalding*, 36 Ill. App. 3d 654, 663 (1975). However, the exception for shareholder standing exists in Illinois when the shareholder's alleged injury is unique and the shareholder suffers individualized harm separate from that which the corporation could allege. *Id.* Because the plaintiffs' allegations involved actions that could not be brought by the mutual funds, but only by the investors as private actions, the *Mann* court reversed the dismissal of the complaint. *Id.* at 979-82.

¶ 54 Plaintiff claims that there is no just reason not to allow creditors standing on the same basis underlying the shareholder exception. Citing to an unpublished case from the Northern District of Illinois of the United States District Court (*eOnline v. Chicago Consulting Partners*, No. 01 C 1918, 2002 WL 484865 (N.D. Ill. March 29, 2002)), the Second Circuit of the federal court of appeals (*GICC Capital Corp. v. Technology Finance Group*, 30 F.3d 289 (2nd Cir. 1994)) and the federal Bankruptcy Court (*In re M&L Business Machines Co.*, 136 B.R. 271, 276 (Bankr. D. Colo. 1992)) granted standing to creditors based on direct misrepresentations. Plaintiff argues that Illinois law supports its claim that this court should extend the holding in *Mann* to creditors like plaintiff. Plaintiff adds that *eOnline* was decided after *Mid-State*

Fertilizer, which the circuit court relied on in its dismissal order, further supporting reversal of the circuit court.

¶ 55 We agree with defendants that the circuit court properly rejected plaintiff's attempt to expand the shareholder exception to the creditors and that plaintiff's reliance on *Mann* is misplaced. As argued by defendants, there is ample authority in Illinois that for a guarantor or creditor to assert an affirmative claim, it must establish that it suffered a direct injury. See *Performance Electric, Inc. v. CIB Bank*, 371 Ill. App. 3d 1037, 1040 (2007). The cases cited by plaintiff do not overcome this precedent or the policy cited by the circuit court of avoiding double recovery when it relied on *Mid-State Fertilizer*. Rather, they are distinguishable on their facts and law as standing was based on a direct injury to the guarantor in *eOnline*, standing under the federal RICO statute in *GICC Capital Corp.*, and interaction of the Bankruptcy Code and the bankruptcy trustee in *In re M&L Business Machines*.

¶ 56 Furthermore, as this court found in *Cashman v. Coopers and Lybrand*, 251 Ill. App. 3d 730 (1993), we agree that this case is distinguishable from *Mann*. Plaintiff's attempt to distinguish *Cashman* is unavailing and, as plaintiff argues, the *Mann* court's holding cannot be used as a basis to expand the shareholder exception to lenders in this case. In *Cashman*, plaintiff shareholders and former directors and officers of a company brought an action against defendant accounting firm alleging breach of contract, negligence, and fraud. *Id.* at 730. The plaintiffs alleged that the defendant issued unqualified opinions that its audits confirmed that the company's financial condition was strong and when the true facts about the company became known, the price of its stock fell to $0 per share and the company declared bankruptcy. *Id.* at 731-32. The plaintiffs' complaint was dismissed for lack of standing.

¶ 57 On appeal, the second district of this court affirmed the dismissal, finding that the shareholder exception did not apply because the company suffered the same alleged fraud and resulting injury. *Id.* at 736. In coming to this conclusion, the court distinguished the holding in *Mann* on two grounds. First, the court found no fiduciary duty between the plaintiffs and the defendant where there was such a duty in *Mann* between the plaintiff investors and the mutual fund managers. The court also found that, unlike *Mann* where the fraud was directed "particularly" at the investors, the *Cashman* defendants made the same fraudulent misrepresentations to both the plaintiffs and the company and either party could bring the fraud claim against the defendants, with the corporation the logical and proper entity to pursue the claim. *Id.* at 735.

¶ 58 The instant case is on point with *Cashman*. In this case, the alleged fraudulent misrepresentations by defendants were made to all prospective purchasers and lenders in the financial statements provided to support the sale. This, of course, included plaintiff's clients, GLL Sub Acquisition, who were merged into the GLL 06 entity and were parties to the arbitration. Accordingly, as in *Cashman* and unlike in *Mann*, both the lender and GLL 06 could bring the claim, but the proper and logical party to bring the cause of action was the party directly harmed, GLL 06, and the exception should not be applied to allow the creditor to bring the action.

¶ 59 2. *Standing for Unjust Enrichment Count*

¶ 60 Plaintiff also argues that an equitable interest grants a party standing. Plaintiff cites to *Corley v. James McHugh Construction Co.*, 266 Ill. App. 3d 618, 620 (1994), citing *Weihl v. Dixon*, 56 Ill. App. 3d 251, 253-54 (1977), which states the general rule that "[s]tanding is present where the person seeking to invoke the court's jurisdiction has some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter or controversy." Plaintiff adds that our supreme court has held that a case for unjust enrichment may be stated where the benefit in question was transferred to the benefit by a third party and equity is meant to overcome the strict legal constraints to do justice. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 161-62 (1989). Plaintiff argues that the fact its funds " ' washed' through Buyers' transaction virtually untouched on their way to the Defendants does not change the alleged facts" of defendants' unjust enrichment.

¶ 61 As stated above, plaintiff's arguments are unavailing and it cannot overcome the fact that its client, GLL Sub Acquisition, was in a better place to advance this argument and actually sought redress via arbitration for the alleged loss of value due to defendants' actions. The cases cited by plaintiff are distinguishable from this case. *Corley* and *Weihl* involved general statements on the issue of standing and standing to bring an appeal. It does not discuss the scenario where a derivative claim in equity is brought by a creditor. Nor do these cases address the situation where the alleged wrongful transaction is the subject of a prior adjudication.

¶ 62 *HPI Health Care* did involve a discussion of a third party unjust enrichment claim. That court indicated that such an action is proper where a benefit is transferred to a third party instead of the plaintiff and retention of that benefit would be wrong because the third party mistakenly gave it to the defendant instead of the plaintiff, the defendant procured the benefit through wrongful conduct, or the plaintiff had a better claim to the benefit. *Id.* However, the *HPI Health Care* court went on to find that the plaintiff failed to specifically allege wrongful actions or unjust retention of funds by the defendant. *Id.* at 162-65.

¶ 63 Plaintiff was the lender for GLL Sub Acquisition and transferred its funds to that entity. The money was subsequently transferred to defendants along with additional funds. As above, any possible harm suffered by plaintiff is derivative and it does not have standing under the equitable theory of unjust enrichment. The same reasoning underpinning the shareholder standing doctrine and its exception apply to this claim in equity. *People ex rel. Hartigan v. E & E Hauling, Inc.*, 153 Ill. 2d 473, 498 (1992). As addressed by all of the courts in these cases, and highlighted by plaintiff, such an action in equity is available to overcome the limitations of certain legal constructs to allow for justice. It is not an avenue for a party to overcome applicable laws and the circuit court correctly found that plaintiff failed to establish standing for this claim.

¶ 64 C. Summary Judgment on Count I as Barred by Collateral Estoppel

¶ 65 On October 4, 2012, the circuit court granted defendants summary judgment on the remaining count for fraudulent transfer as barred by the doctrine of collateral estoppel. Collateral estoppel is an equitable doctrine that operates to bar a controlling fact or question material to the determination of separate and consecutive cases arising in different causes of action against that party in the former suit by a court of competent jurisdiction. *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 389-90 (2001). The minimum requirements to apply the doctrine of collateral estoppel are: "(1) the issue decided in the prior adjudication is *identical* with the one presented in the suit in question, (2) there was a final judgment on the merits in the prior adjudication, and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication." *Id.* at 390.

¶ 66 Generally, an arbitration award entered by an arbitration panel has the same preclusive effect under the collateral estoppel doctrine as a judgment by a circuit court. *Dearborn Maple Venture, LLC v. SCI Illinois Services, Inc.*, 2012 IL App (1st) 103513, ¶ 24. As an equitable doctrine, collateral estoppel is not to be applied unrestrained, rather, it must be narrowly tailored to fit the precise facts and issues that were determined in the prior action. *Nowak*, 197 Ill. 2d at 391. Where its application creates inequitable and unjust conclusions resulting in manifest injustice, a preclusive effect will not be applied. *Benton v. Smith*, 157 Ill. App. 3d 847, 856 (1987), citing *Hansberry v. Lee*, 311 U.S. 32 (1940). This examination of the fairness of applying the doctrine involves weighing the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his or her case. *Bagnola v. SmithKline Beecham Clinical Laboratories*, 333 Ill. App. 3d 711, 725 (2002).

¶ 67 Plaintiff asserts that application of collateral estoppel in this case is inequitable and focuses on the requirement of clarity and certainty in the prior holding as recently addressed by this court in *Dearborn Maple Venture*. Plaintiff argues that the arbitration panel did not make a clear and certain finding of the value of GLL 03 at the time of sale to support application of collateral estoppel against its fraudulent transfer claim pursuant to IUFTA. Plaintiff maintains that the circuit court erred in agreeing that the arbitration panel had fully determined the actual value of GLL 03 in light of the underlying fraud and points to the language in the arbitration award quoted above concerning the "imponderable" effect the fraud had on value and the impossibility of arriving at a certain actual value. Plaintiff argues that by the arbitration panel's very wording, there was no clear or certain factual finding on the value of GLL 03 that is required to apply the doctrine of collateral estoppel to plaintiff's IUFTA claim.

¶ 68 Plaintiff argues that, even if a clear finding of value had been made, privity between plaintiff and the arbitration claimants was not demonstrated. Plaintiff notes that section 8 of the IUFTA grants a creditor the statutory right to bring a claim, but does not grant the same to a debtor. 740 ILCS 106/8(a) (West 2010). Furthermore, plaintiff adds, the arbitration panel could not have jurisdiction over its IUFTA claim and, therefore, applying the transactional analysis, plaintiff's claim could not be barred. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 317-18 (1998).

¶ 69 Plaintiff further argues that the arbitration claimants did not adequately represent plaintiff's interests to support the application of collateral estoppel to its IUFTA claim. Plaintiff asserts that the arbitration panel's discussion of the vagaries of establishing the value of a private company supports this argument. Plaintiff contends that it would have presented expert testimony to establish the true actual value of GLL 03 and recoup its losses due to defendants' fraudulent acts. In addition, plaintiff notes that more than half of the arbitration award went to Golden Gate under the indemnification claim thereby bypassing plaintiff as plaintiff's borrower was GLL Sub Acquisition.

¶ 70 We agree with defendants that the circuit court properly determined collateral estoppel barred plaintiff from advancing its claim that the actual value of GLL 03 was improperly determined by the arbitration panel and that applying the doctrine was not manifestly unjust. As the circuit court and defendants properly conclude, collateral estoppel involves the preclusion of a previously decided issue of fact. Where parties are in privity and there is a final determination of fact, collateral estoppel applies regardless of the different possible theories of relief that might flow from the determination of the decided fact.

¶ 71 The determination of the privity of parties is determined on a case-by-case basis. *In re Liquidation of Legion Indemnity Corporation*, 373 Ill. App. 3d 969, 977 (2007). Privity exists where there is a mutual or successive relationship in property rights that are in dispute and the subject of prior litigation. The focus of a privity determination is on the interests of the parties and whether the party to the prior suit adequately represented the same legal interests of the nonparty such that there was a "virtual representation of the nonparty." *Agolf, LLC v. Village of Arlington Heights*, 409 Ill. App. 3d 211, 220.

¶ 72 In this case, plaintiff is in privity with the arbitration claimants on the fraud claim and the fact of the actual value of GLL 03 was clearly decided by the arbitration panel in resolving the claims of material misrepresentation and fraudulent inducement. Pursuant to the forbearance agreement and amended forbearance agreement, GLL 06 acted as plaintiff's fiduciary during the arbitration. As noted above, plaintiff further held a right to consultation as well as a right to reject any settlement. The lengthy arbitration hearing and extensive record in this case provide ample evidence that this issue was thoroughly litigated and, moreover, plaintiff's representatives were not only aware of the handling of the issue but consulted concerning the case and involved in issues such as strategy, witness presentation and settlement. Furthermore, the payment of portions of the successful arbitration claims inured to plaintiff.

¶ 73 Despite these factors, plaintiff argues that its interests were not adequately represented at arbitration. It argues the arbitration claimants could have brought additional witnesses or presented additional evidence to better ascertain the actual value of GLL 03. Plaintiff points to the split opinion in the arbitration panel on some issues and the majority's language in discussing the valuation as lacking mathematical certainty and without additional expert witnesses it could not be more precise. It concludes that the arbitration award was arbitrary and not a clear and certain finding of value as required under *Dearborn Maple Venture*.

¶ 74 Plaintiff's reliance on this point is misplaced. The discussion in *Dearborn Maple Venture* that plaintiff cites relates to the doctrinal requirement of clarity and certainty that a particular issue is decided. The court found that collateral estoppel was inapplicable in that case because the arbitration panel resolved issues pertaining to a development agreement while the plaintiff's cause of action in the circuit court related to the terms of a separate earnest money contract. *Dearborn Maple Venture,* No. 103513 at ¶ 25. Accordingly, the issue resolved was not clearly the same and the arbitration award did not have preclusive effect in that case. *Id.* at ¶¶ 25-28.

¶ 75 The key factual underpinning to plaintiff's IUFTA claim was defendants' fraudulent activities and the actual value of GLL 03 at the time of the sale. Indeed, an IUFTA claim "directly concerns the assets of the judgment debtor and imposes liability based on the value of the transferred assets." *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 187 (2010). This was the central issue decided in the arbitration claims. Unlike *Dearborn Maple Venture* where there were separate agreements involved, that created an uncertainty on the issue decided, here, the actual value issue remains the same for both causes of action. That plaintiff does not like the arbitration panel's result or that the panel was not unanimous as to every point are not relevant factors. What is relevant is that a final decision was entered. Any perceived lack of clarity or certainty in that regard goes to the weight of that determination in a subsequent challenge to the award, not whether the issue was clearly decided for preclusive effect as involved in collateral estoppel analysis.

¶ 76 Clearly, if a nonparty's disagreement with a prior fact determination could eliminate its preclusive effect, there would never be any application of collateral estoppel. The key factor is that a final determination was made, not if it was correct or incorrect. *Lady v. Montgomery Ward & Co.*, 80 Ill. App. 3d 69 (1980). While the arbitration panel did expressly state that the valuation was without absolute certainty, it explicitly articulated the fact that is it was determining the value of a privately held company and the effect that stopping the split-routing practice would create. Despite its concerns with the expert testimony presented, the panel determined that sufficient evidence was presented for how a buyer would have reduced the purchase price for the required structural adjustments in the company and made a definitive value determination.

¶ 77 Furthermore, the circuit court found that plaintiff did not present additional evidence that the price overpaid for GLL 03 was beyond that as determined by the arbitration panel. As noted above, a party must present a factual basis to overcome a motion for summary judgment and cannot sit merely on its allegations. *Robinson*, 2013 IL App. (1st) 121220. In its reply brief, plaintiff argues that, because the movant bears the initial burden, defendants committed the fatal error of failing to present any additional evidence in support of its claim that the arbitration panel clearly decided the issue. *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 640-41 (2002). But defendants did present the arbitration award as evidence of the actual value. It was plaintiff that did not present evidence to overcome this award and, instead, rested on its unsupported allegations.

¶ 78 Plaintiff's lack of support and attempt to shift the burden to defendants confirm the trial court's decision finding that application of collateral estoppel was not manifestly unjust. In addition, the matter was originally argued with the assistance of two experts by a party in privity with plaintiff, who had a duty to protect plaintiff's interests, and the arbitration panel discussed the evidence presented and came to a reasoned decision. Without evidence to suggest this was in error, it was not error for the circuit court to accept this finding. Accordingly, the circuit court correctly held that plaintiff was collaterally estopped from bringing its IUFTA claim because the central issue had been decided.

¶ 79 III. CONCLUSION

¶ 80 For the reasons stated, we affirm the judgment of the circuit court.

¶ 81 Affirmed.