SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN Justice

PART 3

James W. Holme,

-v-

Global Minerals and Metals Corp., et al.

INDEX NO. 600232/08

MOTION DATE 3/25/12

MOTION SEQ. NO. 011

The following papers, numbered 1 to ____, were read on this motion to/for Summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1

Answering Affidavits — Exhibits ____ | No(s). 2

Replying Affidavits ____ | No(s). 3,4

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Scanned to New York EF on 07/31/12

Dated: 7-30-12

Eileen Branston J.S.C.
HON. EILEEN BRANSTEN

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☒ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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JAMES W. HOLME,

Plaintiff,

-against-

Index No. 600232/08
Motion Date: 3/25/12
Motion Seq. No.: 011

GLOBAL MINERALS AND METALS CORP., GMMC ENTERPRISE CORP., GMMC, INC., GLOBAL MINERALS AND METALS CORP. (LONDON), GMMC, LLC, R. DAVID CAMPBELL, B. H. SHAH, "JOHN DOES" 1 THROUGH 20, AND "JOHN DOE ENTITIES" 1 THROUGH 20,

Defendants.

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PRESENT: HON. EILEEN BRANSTEN:

Under this motion sequence number 011, plaintiff James W. Holme seeks partial summary judgment. Holme moves for payment from the defendants, jointly and severally, of a prior judgment (the "Judgment"[1]) against the defendant Global Minerals and Metals Corp. ("Global") in the amount of $3,000,000, plus interest on $1,500,000 of that amount

[1] It is uncontroverted that Holme and Global entered into an agreement under which Global was to make three $1.5 million payments to Holme. Global did not make the second and third payments, but commenced an action against Holme in New York County, *Global Minerals and Metals Corp. v. James W. Holme et al.*, Index No. 605084/00. In that action, Holme counterclaimed seeking money damages for the unpaid amounts. On or about May 3, 2006, a final judgment in the amount of $5,105,135.40 was entered by the County Clerk, New York County, in favor of Holme and against Global. The decision was affirmed by *Global Mins. and Metals Corp. v. Holme*, 35 A.D.3d 93 (1st Dep't 2006), *lv. denied* 8 N.Y.3d 804 (2007).

commencing January 17, 1998, and interest on the remaining $1,500,000 commencing on January 17, 1999. According to defendants, Global is no longer actively conducting business.

BACKGROUND

In June 2007, a New York County deputy sheriff attempted to serve an execution of the Judgment on Global's offices at 712 Fifth Avenue, New York, New York. The deputy was advised that Global was no longer doing business in those offices. The deputy thus returned the unsatisfied execution of the Judgment to Holme's attorneys on August 22, 2007.

This complaint was filed as of January 25, 2008. Defendants GMMC Enterprise Corp. ("Enterprise"), GMMC, Inc. ("Old GMMC"), Global Minerals and Metals Corp. (London) ("Global London"), and GMMC, LLC ("New GMMC") (these defendants, together with Global, collectively the "Corporate Defendants"), are alleged to be alter egos of Global. The complaint also states that defendants R. David Campbell and B. H. Shah (the "Individual Defendants") allegedly controlled, dominated and/or used Global and the Corporate Defendants as alter egos.

In support of these allegations, the complaint states that New GMMC is engaged in essentially the same business, with the same owners, officers and employees, at the same location as Global and Old GMMC. While the Individual Defendants do not refute that New GMMC may be have the same owners, officers and some same employees, at the same

location as Global and Old GMMC, they maintain that Global was in a completely different business. Defendants claim that Global was primarily a commodity merchant that traded commodity futures contracts and options to hedge its price risks under its purchase and supply contracts.[2] Defendants assert that New GMMC did not operate as a commodity merchant, but only as a trader of commodity futures contracts and options.

The complaint also states that Global monies were used to pay excessive salaries and the personal legal expenses of the Individual Defendants, that New GMMC acquired fixtures and assets of Global for no consideration and that Global paid the debts of itself and the Individual Defendants, while Holme received no payments. In addition, the complaint alleges that Global's assets were intentionally depleted in 1999-2000 and that Global claimed large business expenses from 2000-2003, despite reporting no revenues for the five-year period starting November 1, 2000.

Holme brings this action against the Corporate and Individual Defendants for the Judgment. The first three causes of action rely upon Debtor and Creditor Law ("DCL") §§ 273, 273-a, and 276, respectively. The fourth cause of action seeks to establish the liability of New GMMC for the Judgment on the basis of de facto merger. The fifth cause of action seeks to hold the Individual Defendants liable for the Judgment based on alter-ego theory.

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[2] The court notes that the financial statements of Global also indicate that it "enters into various commodity futures contracts which are not intended to be hedges." *See* Callahan Aff., Ex. 2, at 8, n.11. Also, after ceasing physical trading in 2000, "Global continued to manage its ongoing futures positions . . . ." Shah Aff., ¶ 31.

ANALYSIS

Holme moves for partial summary judgment, pursuant to CPLR 3212 granting him: (1) judgment and attorneys' fees as against all defendants but for Global London[3]; (2) $5,105,135, plus 9% per annum commencing May 3, 2006, as against Global, New GMMC, Campbell and Shah; (3) $1,190,564, plus 9% per annum commencing June 30, 2003, as against Global, Enterprise, Old GMMC and Campbell; (4) $2,291,986, plus 9% per annum commencing on a date between June 30, 2003 and December 31, 2009, in the court's discretion, as against Global, New GMMC and Campbell; (5) $577,500, plus 9% per annum commencing on a date between January 1, 2000 and June 30, 2003, in the court's discretion, as against Global, Campbell, and Shah; (6) attorney's fees; and (7) costs and disbursements.

The Corporate Defendants, together with Campbell, cross-move for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's causes of action that seek to pierce the corporate veils of the Corporate Defendants and for fraudulent conveyances.[4]

Shah cross-moves, pursuant to CPLR 2215 and 3212, to dismiss the complaint in its entirety.

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[3] Upon a prior decision and order of this court the matter of whether there was long-arm jurisdiction over Global London was referred to a Special Referee. *See* Decision and Order, Index No. 600232/08, J. Lowe III, January 12, 2009. Special Referee Lowenstein, by report of November 5, 2008, opined that there was no personal jurisdiction over Global London, and that the matter should be dismissed as to that defendant without prejudice to institution of proceedings in the appropriate overseas courts.

[4] It would appear to the court that this motion for "partial summary judgment" encompasses all aspects of the complaint.

I. Standard of Law

Summary judgment is a drastic remedy that should only be granted if there are no triable issues of fact remaining in the matter. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978). In order for the court to grant summary judgment, the moving party must demonstrate that there is no defense to its asserted causes of action. Movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *see also Creighton v. Milbauer*, 191 A.D.2d 162, 166 (1st Dep't 1993).

Likewise, upon the cross motions for summary judgment dismissing the complaint, the Corporate and Individual Defendants must also establish entitlement to judgment as a matter of law. *Alvarez v, Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Importantly, the Corporate and Individual Defendants cannot meet this burden in moving for summary judgment by simply pointing to gaps in Holme's proofs, but must affirmatively demonstrate the merit of any claim or defense. *Bryan v. 250 Church Assoc., LLC*, 60 A.D.3d 578, 578 (1st Dep't 2009).

If the movant has demonstrated a *prima facie* entitlement to summary judgment, the burden then shifts to the nonmoving party to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *Zuckerman*, 49 N.Y.2d at 562. The

non-movant is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties. *Myers v. Fir Cab Corp.*, 64 N.Y.2d 806, 808 (1985). In order to successfully oppose a motion for summary judgment, "a party must assemble and lay bare sufficient affirmative proof to demonstrate the existence of a genuine triable issue of fact." *Forray v. New York Hosp.*, 101 A.D.2d 740, 741 (1st Dep't 1984)(internal citations omitted).

II. Statute of Limitations

As a threshold issue, the Corporate and Individual Defendants argue upon their cross motion for partial summary judgment that plaintiff's claims pursuant to DCL §§ 273 and 273-a are precluded by the statute of limitations. The Corporate and Individual Defendants assert that the claims governed by a six-year statute of limitations pursuant to CPLR § 213 (1), and a claim accrues at the time of an alleged fraudulent transfer. The defendants, noting that Holme filed his complaint on January 24, 2008, conclude that all payments prior to January 24, 2002, are time-barred.

The Corporate and Individual Defendants further maintain that a claim for fraudulent conveyance under DCL § 276, alleging actual fraud, must be commenced within six years of the date of the conveyance, or within two years of the date that the fraud or conveyance is discovered or should have been discovered. Defendants argue that Holme has not

proffered any evidence that plaintiff could not have discovered the alleged fraudulent conveyances prior to the time he did so.

Plaintiff has alleged two classes of fraudulent conveyance: 1) conveyances under DCL §§ 273 and 273-a, based upon constructive fraud; and 2) conveyances based upon DCL § 276, based upon actual fraud. Conveyances that are based upon alleged *constructive fraud* have a statute of limitations as set forth in CPLR § 213 (1), and arise at the time the alleged fraudulent conveyance is made. *See Citicorp Trust Bank, FSB v. Makkas*, 67 A.D.3d 950, 952-953 (2nd Dep't 2009). Alternatively, conveyances that are based upon alleged *actual fraud* have a statute of limitations as set forth in CPLR § 213 (8), and arise at the time the alleged fraudulent conveyance is made or two years from the date of discovery of the fraud. *See Leone v. Sabbatino*, 235 A.D.2d 460, 461 (2nd Dep't 1997).

Thus, the causes of action under DCL §§ 273 and 273-a must be based solely on conveyances that occurred after January 24, 2002. The causes of action under DCL § 276, based upon actual fraud, are all timely. As of June 2007, upon service of an execution of the Judgment at Global's offices, Holme first discovered that New GMMC had allegedly replaced Global by conducting essentially the same business, with the same owners, officers and employees, at the same location. The Judgment was returned unsatisfied August 22, 2007, and this action commenced in 2008. *See, e.g., Scola v. Morgan*, 66 A.D.2d 228, 233-234 (1st Dep't), *appeal dismissed* 47 N.Y.2d 799 (1979). Thus, this action was commenced within two years of the discovery of the alleged fraud and is therefore timely.

"[DCL] § 276, unlike sections 273 and 275, addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency. Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on 'badges of fraud' to support his case, i.e., circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent.'" *Wall St. Assoc. v. Brodsky*, 257 A.D.2d 526, 529 (1st Dep't 1999) (citations omitted).

As noted by the prior decision in this court, and as affirmed by the First Department:

> [t]he references to the fraudulent conveyances in the complaint are part of Holme's claim to pierce the corporate veil, and if the alter ego claim is proved, the normal statute of limitations period applicable to fraud would be supplanted by the period given by CPLR 211 (b), which provides for a twenty-year limitations period to enforce a judgment."

Holme v. Global Mins. & Metals Corp., 22 Misc. 3d 1123(A), 2009 NY Slip Op 50252(U), *7 (Sup. Ct., N.Y. County), *aff'd* 63 A.D.3d 417 (1st Dep't 2009). Claims made under DCL § 276 are not time-barred.

III. Holme's Motion for Summary Judgment as to Fraudulent Conveyances

Holme's motion for summary judgment encompasses three classes of conveyance. First, plaintiff claims that Campbell and Global allegedly transferred the physical assets of Global, including Global's security deposit on its office, to New GMMC. Second, plaintiff alleges that the Individual Defendants paid or caused to be paid salaries to themselves from Global. Holme challenges these salaries as an intentional dissipation of assets. Third,

plaintiff contends that checks payable to Global were deposited into the accounts of New GMMC when they should have been retained to pay the debts that Global owed to Holme.

A. DCL § 273

It is well established that in order for a conveyance to be fraudulent within the meaning of DCL § 273, a debtor must have been solvent before the transfer, must have been rendered insolvent by reason of having made the transfer and the transfer must have been made without fair consideration. *See Stokes Coal Co. v. Garguilo*, 255 App. Div. 281, 282-83 (1st Dep't 1938), *aff'd* 280 N.Y. 616 (1939). Correspondingly, for a conveyance to be fraudulent within the meaning of DCL § 273-a, there must be a final judgment against a debtor, that the debtor fails to satisfy, having made any conveyance without fair consideration when the debtor was a defendant in the action for money damages. *See Federal Deposit Ins. Corp. v. Porco*, 75 N.Y.2d 840, 842 (1990).

With regard to DCL § 273, it is undisputed that Global's business suffered a very significant downturn in 2000, when it was "left unhedged and lost many millions of dollars due to price declines. This loss depleted Global's capital . . . [and i]n late 2000, Global reduced the number of its employees, and it did so again in late 2001 . . . ." Campbell Aff., ¶¶ 68, 71; *see also* Global's Mem. In Opp., at 5. Nonetheless, being "unhedged" does not necessarily mean being "insolvent." With that, the conveyances made during this time period do not necessarily implicate DCL § 273, especially ones made before January 24, 2002,

which largely relate to payment of salaries. Salary payments may be a normal business function from which it would be improper upon summary judgment (*see Myers*, 64 N.Y.2d at 806), to infer malicious intent without detailed analysis. *See Cilco Cement Corp. v. White*, 55 A.D.2d 668, 668-69 (2nd Dep't 1976); *but see In re Le Café Creme, Ltd. v. Le Roux*, 244 B.R. 221, 241 (S.D.N.Y. 2000) ("[g]ood faith may be lacking because of a transferee's knowledge of a transferor's unfavorable financial condition at the time of the transfer, . . . or because of a transferee's position as an insider with control over the corporation's finances") (citation omitted).

In any event, the Corporate Defendants admit that there were a number of transfers made after that date which cannot be avoided by a favorable inference. To wit, $1,494,449.10 in checks made out to Global were transferred to New GMMC from 2005 through 2007 . *See* Holme Aff., Exs. 18 and 37. The Corporate Defendants assert that these transfers were made to repay loans or payments that Campbell made on behalf of Global that totaled $2,797,991.89. The Corporate Defendants thus claim that these deposits of Global funds into the accounts of New GMMC are not fraudulent. *See* Cahalan Aff., Exs. 4 (at 133-136) and 27; Campbell Aff., ¶¶ 114-15.

The Corporate Defendants cite to *Newfield v. Ettlinger,* 22 Misc. 2d 769, 775 (Sup. Ct., NY County 1959) in support of their argument. In *Newfield*, the court dismissed the fraudulent conveyance causes of action against the defendants because "during the time

period in question [the defendants] loaned more to the bankrupt corporation than was paid out to [them]." However, in that matter the defendants in question were the elderly mother of the director, who was a director "in name only," and the wife of the director, who was not an officer of the corporation at all. Quite differently, here, Campbell was not an outsider to Global, but was a controlling director.

What is more, the loans that Campbell claims to have been receiving repayment for were not antecedent to the debt Global owed to Holme. Global's debt to Holme accrued as of January of 1998, and increased as of January of 1999, when payments were due under his severance contract. Both these debts precede, or, at worse, coincide with the first loans made by Campbell and Shah to Global. *See* Campbell Aff., ¶ 86 (January 1999 – Campbell and wife made loan of $10,000,000); Shah Aff., ¶¶ 23-25 (November 1998 – Shah and wife made loan of $5,000,000; all subsequent loans were made after July 2000). Thus, repayment of loans made by the Individual Defendants to Global do not enjoy the protections or presumptions of "fair consideration" that may normally be afforded to an "antecedent debt."[5]

Importantly, for purposes of a constructive fraudulent transfer claim under New York law, "repayment of an antecedent debt . . . is considered to be in good faith and for

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[5] *Compare* 11 USC § 547 (b) (2), where only a transfer made "for or on account of an antecedent debt owed by the debtor before the transfer was made" is avoidable as a preference. "Although 'antecedent debt' is not defined in the [Bankruptcy] Code, it may be described as a preexisting or prior debt, so as to preclude the avoidance of a transfer made *simultaneously with or prior to* an extension of credit or transfer of value to the debtor." *In re Western World Funding v. Allred*, 54 B.R. 470, 476 (Bankr. D. Nev. 1985) (emphasis added).

reasonably equivalent value when made to a *non-insider*. *The same presumptions of good faith and reasonably equivalent value do not apply if the transfer is made to an insider.*" *In re Old Carco LLC v. Daimler AG*, 435 B.R. 169 (S.D.N.Y. 2010) (emphasis added), citing *In re Sharp Intl. Corp. v. State St. Bank and Trust Co.*, 403 F.3d 43, 54 (2nd Cir. 2005); *see also* DCL § 272; *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 634 (2nd Cir. 1995) ("New York courts have carved out one exception to the rule that preferential payments of pre-existing obligations are not fraudulent conveyances: preferences to a debtor corporation's shareholders, officers, or directors are deemed not to be transfers for fair consideration").

Alternatively, even if the loan repayments to Campbell were considered antecedent debts, they may still be considered fraudulent. A corporate debtor-transferor's antecedent debts to transferees for repayment of alleged loans do not constitute "fair consideration" for payments that debtor-transferor made to transferees in anticipation of an entry of a substantial money judgment against it, or where, as here, the transferees were all officers, directors or major shareholders of corporate debtor. *See, e.g., Dixie Yarns v. Forman*, 906 F. Supp. 929 (S.D.N.Y. 1995).

For the above reasons, plaintiff's motion seeking summary judgment challenging the salaries paid to Campbell and Shah is denied. The part of the motion for summary judgment challenging the the deposits of the checks made out to Global, and the transfers made from

New GMMC to Campbell and Shah, that were purportedly to repay loans,[6] is granted, as those transfers, as a matter of law, were fraudulent within the meaning of DCL § 273.

B. DCL § 273-a

With regard to transfers made in alleged violation of DCL § 273-a, Holme filed his counterclaim in the action leading to the Judgment on February 27, 2001. The Judgment remains unsatisfied, and therefore any conveyances made after February 27, 2001 are fraudulent as a matter of law under DCL § 273-a. *See, e.g., Cabrera v. Ferranti*, 89 A.D.2d 546, 546 (1st Dep't 1982).

The Corporate Defendants offer no cognizable defense to this claim; they simply assert the equitable claim that Campbell was a net lender to Global, and that some amounts challenged are time-barred. As noted above, Campbell's status as a net lender, if unfortunate, is, nonetheless, legally meaningless.

Although Global London transferred its stock to Campbell after February 27, 2001, Global London is no longer a party to this action. Therefore, that transfer cannot be successfully challenged herein.

The motion of Holme for summary judgment under DCL § 273-a is granted to the extent that any non-salary amounts transferred out of Global (not including Global London)

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[6] More specifically, on July 31, 1999, Global repaid $2,750,000 of principal on a loan from Campbell, and in 2001, Global made two payments of principal to Campbell totaling $800,000. *See* Campbell Aff., ¶¶ 87, 90. In addition, in January of 1999, Global repaid $1,375,000 of principal on a loan from Shah, and in 2001, Global made a payment of principal to Shah of $100,000.

to New GMMC or the Individual Defendants after February 27, 2001 are, as a matter of law, fraudulent as to him under DCL § 273-a.[7]

C. DCL § 276

Plaintiff's third cause of action is based upon DCL § 276. Section 276 of the DCL provides that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

The defendants correctly note that the burden of proof to establish fraud and actual intent under DCL § 276 is upon the creditor who seeks to have the conveyance set aside. *See Brody v. Pecoraro*, 250 N.Y. 56 (1928). Fraud and actual intent must be established by clear and convincing evidence. *Kreisler Borg Florman Gen. Constr. Co. v. Tower 56, LLC*, 58 A.D.3d 694, 696 (2nd Dep't 2009).

In support of the motion for summary judgment, Holme notes the animus the defendants held against him (*see* Holmes Aff., Ex. 8, memo to Mr. Hamanaka); misrepresentations made in the prior action that Global was an active company, when it was not; payment of salaries to the Individual Defendants when Global was in clear financial

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[7] Partial summary judgment is not granted with regard to the transfer to Dale Campbell, as the transfer made to him was, purportedly, a salary payment, and such a payment cannot be properly challenged without an inquiry into the value of services actually provided. In addition, as noted by defendants, any claim for fraudulent conveyance must be against him directly. *See Paradigm BioDevices v. Viscogliosi Bros., LLC*, 2012 WL 360414, *4 (S.D.N.Y. 2012) ("[u]nder New York law a fraudulent conveyance claim is actionable only against the transferee . . .").

difficulty; and that the Individual Defendants were the subject of criminal investigations involving the Commodities Futures Trading Commission.

Although the court recognizes that "fraudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act," *Marine Midland Bank v. Murkoff*, 120 A.D.2d 122, 128 (2nd Dep't 1986), the court cannot draw the conclusion that the requisite level of actual intent was present in each instance, or as a comprehensive pattern, to establish, as a matter of law, a cause of action for fraudulent conveyance under DCL § 276.

The memo written to Mr. Hamanaka, Holmes Aff., Ex. 8, while disturbing in its content, does not have any particular bearing on the intent of Global to pay Holme under his severance contract some four years later, especially as at least one payment was made. The defendants' alleged misrepresentations in the prior action may or may not indicate actual intent to defraud. However, such a conclusion is unwarranted upon summary judgment, where the defendants are entitled to the benefit of every favorable inference. Similarly, as noted above, payment of salaries is arguably a normal business function, protected from automatic inference of malicious intent without detailed analysis of the work involved. *See Cilco Cement Corp.*, 55 A.D.2d at 668-69 (inference of intent to defraud should not be assumed where compensation paid to corporate officers is in proportion to ability, services time devoted, corporate earnings, and other relevant facts); *see also Shotwell v. Dixon*, 163 N.Y. 43 (1900).

Finally, that fact that investigations were effected does not equate to guilt. It may result in charges, or no charges. But even upon indictment, one of the cornerstones of our jurisprudence is that of the presumption of innocence until guilt is proven. *See, e.g., People ex rel. McManus v. Horn*, 18 N.Y.3d 660, 665 (2012); *People v. Gluck*, 188 N.Y. 167, 171-72 (1907). This court will not use the mere existence of an investigation to conclude, as a matter of law, that there was actual intent to defraud Holme.

The court has taken notice of the prior observations of Judge Lowe in this matter, and specifically his statement that defendants offer "a plethora of internal inconsistencies, blatant prevarications, and hopelessly illogical positions . . . ." *See Holme v. Global Minerals and Metals Corp.*, Decision and Order of March 4, 2011, J. Lowe, Index No. 600232/08. Despite that, actual intent, as required under DCL § 276, as opposed to constructive intent, as required under DCL §§ 273 and 273-a, "is generally a question of fact which precludes summary judgment." *Farmers Prod. Credit Assn. of Middletown v. Taub*, 121 A.D.2d 681, 682 (2nd Dep't 1986) (citation omitted). Thus, the court finds that the question of whether defendants acted in good faith, or whether they actually intended to hinder, delay or defraud the plaintiff, presents a triable issue of fact. *See, e.g., Ochs v. Washington Heights Fed. Sav. & Loan Assn.*, 17 N.Y.2d 82, 89 (1966).

Moreover, the absence of good faith is not the same as the presence of an actual intent to defraud, even where it appears that there is a general failure to deal honestly, fairly and

openly. As such, the question of here of whether a person has acted with actual intent to defraud, presents a question of fact. Summary judgment is therefore not warranted. *See Furlong v. Storch*, 132 A.D.2d 866, 868 (3rd Dep't 1987); *see also Farmers Prod. Credit Assn. of Middletown,* 121 A.D.2d at 681.

A motion for summary judgment is a drastic remedy which should be granted only when there is no doubt as to the absence of a triable issue of fact. *Phillips v. Kantor & Co.*, 31 N.Y.2d 307, 311 (1972). Holme's motion for partial summary judgment on the third cause of action, alleging fraudulent conveyances in violation of DCL § 276, is denied.

IV. Holme's Motion for Summary Judgment on De Facto Merger Claim

Generally, a corporation that acquires the assets of another is not liable for the torts of its predecessor. *See, e.g., Hartford Acc. & Indem. Co. v. Canron*, 43 N.Y.2d 823, 825 (1977). Nonetheless, a

> corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations.

Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 244-45 (1983). The basis of the de facto merger claim is that Global, Old GMMC, Global London and Enterprise were all merged into New GMMC, and, thus, New GMMC is liable for the Judgment.

The de facto merger doctrine is an exception to the general rule against becoming responsible for the pre-existing liabilities of an acquired corporation. The factors indicating a de facto merger are: (i) continuity of ownership; (ii) cessation of ordinary business and dissolution of the acquired corporation; (iii) assumption by the successor of the liabilities for the continuation of the business of the acquired corporation; and (iv) continuity of management, personnel, physical location, assets and general business operation. *Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 574 (1st Dep't 2001).

These factors are not rigorous, but are to be analyzed in a flexible manner that disregards mere questions of form, and asks whether it was the subjective intent of the successor to absorb and continue the operation of the predecessor. *See Sweatland v. Park Corp.*, 181 A.D.2d 243, 246 (4th Dep't 1992); *see also Washington Mut. Bank, F.A. v. SIB Mtge. Corp.*, 21 A.D.3d 953, 954 (2nd Dep't 2005); *Morales v. City of New York*, 18 Misc. 3d 686, 690-91 (Sup. Ct., Kings County 2 007).

Despite a need for flexibility, continuity of ownership has been deemed essential to a de facto merger finding. *See Matter of New York City Asbestos Litig.*, 15 A.D.3d 254, 256 (1st Dep't 2005); *see also Cargo Partner AG v. Albatrans*, 352 F.3d 41, 47 (2nd Cir. 2003), citing 26 USC §§ 354 (a), 361 (a), and 368 (a) (1) ("continuity of ownership is the essence of a merger"). "[C]ontinuity of ownership[] exists where the shareholders of the predecessor

corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets [or] where the parties to the transaction become owners together of what formerly belonged to each." *Matter of New York City Asbestos Litig.*, 15 A.D.3d at 256 (internal quotation marks and citation omitted). Here, there is no dispute that Campbell became New GMMC's member and manager. Continuity of ownership therefore exists.

In addition, Campbell has testified that as of 2003, he caused Global to close its bank accounts and transfer its shares of Global London to himself. He then made payments from his Member Equity account with New GMMC, all of which were noted on New GMMC's general ledger, to meet Global's ongoing obligations, including "legal fees and expenses." *See* Campbell Aff., ¶¶ 107-110; Cahalan Aff., Ex. 26.

Although defendants maintain that Global was in a completely different business than New GMMC,[8] it is essentially undisputed that New GMMC had the same owners, the same officers and employees, at the same location as Global and Old GMMC. Campbell referred to Global as GMMC, and the logo GMMC was used as early as 1995. *See* Holmes Aff. , Ex. 8, Memo to Hamanaka. Moreover, Global engaged in transactions as late as June 2001

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[8] The court does not readily accept this characterization of the businesses of Global and New GMMC. As noted above, the financial statements of Global indicate that it entered into commodity futures contracts, *see* Callahan Aff., Ex. 2, at 8, n.11, and that it managed these positions after ceasing physical trading in 2000. *See* Shah Aff., ¶ 31. Thus, the *general business* was likely the same. *See Fitzgerald*, 286 A.D.2d at 575. However, such a characterization is not critical, nor should it be relied upon, in finding that a de facto merger ensued.

and October 2005, transferring its lease for 712 Fifth Avenue, and carrying over its security deposit to New GMMC. *See* Notice of Motion, Exs. 53 and 54.

Critically, ample, undisputed, evidence exists showing that from 2005 to 2009, Global received some 15 checks payable to it that were deposited into New GMMC's bank account. Among those checks was a May 2005 check made payable to Global for $1,484,609.18, which was received in connection with a federal tax refund for Global's fiscal year 1999. *See* Campbell Aff., ¶¶ 112-13. Thus, Global, with notice as of 2001 that Holme was suing under his severance agreement, redirected those funds to New GMMC in 2005. While Campbell claims that he was only redirecting funds to New GMMC that he had expended on behalf of Global, it is indisputable that any moneys he advanced on behalf of Global were subsequent, and not antecedent, to the amounts owed to Holme.

Moreover, for the purposes of determining whether there was a de facto merger between Global and New GMMC, it is not highly relevant what the intention of Campbell was; once Global was "shorn of its assets and [became], in essence, a shell," *Fitzgerald*, 286 A.D.2d at 575; *see also In re New York City Asbestos Litig.*, 15 A.D.3d at 257, the merger was complete.

The de facto merger doctrine is rooted in equity. The doctrine attempts to avoid "patent injustice which might befall a party simply because a merger has been called something else." *Cargo Partner AG*, 352 F.3d at 46 (internal quotation marks and citation

omitted); *see also In re Matter of New York City Asbestos Litig.*, 15 A.D.3d at 258 (stating that the purpose of doctrine is "to ensure that a source remains to pay for the victim's injuries"). Thus, although a determination that a de facto merger has occurred is a fact-laden inquiry, where, as here, there is an admitted diversion of assets from the original entity, to a new entity with the same address, phone and personnel, and the companies are so intertwined that checks from one, can, and are, simply deposited in the account of the other, there can be no question that summary judgment is appropriate.

Holme's motion for partial summary judgment on his fourth cause of action sounding in de facto merger is granted.

V. Holme's Motion for Summary Judgment Piercing the Corporate Veil

Plaintiff's fifth cause of action seeks to pierce the corporate veil of the Corporate Defendants to impose liability on the Individual Defendants.

New York law does not favor disregarding the corporate form. It has long been held that courts will pierce the corporate veil only when necessary to prevent fraud or to achieve equity. *See, e.g., International Aircraft Trading Co. v. Manufacturers Trust Co.*, 297 N.Y. 285, 292 (1948); *see also Matter of Morris v. New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135, 140 (1993).

A decision on whether to pierce the corporate veil in a given instance will necessarily depend on the attendant facts and equities. Thus, there are no:

> definitive rules governing the varying circumstances when the power may be exercised [citation omitted]. Generally, however, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.

Morris, 82 N.Y.2d at 141.

It is undisputable on the evidence that, at the very least, Campbell exercised complete domination of the corporation in respect to the transaction attacked. There are no indications that there were any other decision-makers, or that any other person influenced or contributed to any of the transactions related to the depositing of the checks payable to Global into the accounts of New GMMC, or that there were any other parties that acknowledged and elected to repay Campbell for his loans to New GMMC.

Indeed, Campbell himself states that "[o]ne day we were one, I was one and the next day I was the other, but I have continued I believe to this day as the president of Global Minerals and Metals Corporation. I am simply trying to make a distinction for your benefit between when Global ceased doing its business. If you would like to know when I moved out of 712 Fifth Avenue." Campbell Deposition, at 777:11-18. Notably, Campbell's reference to each corporation in the first person singular somewhat vitiates his assurance that both Global and New GMMC were independent corporate entities.

"The stripping of corporate assets by shareholders to render the corporation judgment proof constitutes a fraud or wrong justifying piercing the corporate veil." *Godwin Realty*

Assoc. v. CATV Enters., 275 A.D.2d 269, 270 (1st Dep't 2000); *see also Matter of Holborn Oil Trading (Interpetrol Bermuda)*, 774 F. Supp. 840, 847 (S.D.N.Y. 1991). However, the question of whether Campbell's actual purpose in taking money out of Global was to render Global judgment proof, or part of his conduct of the business, is a fact-laden inquiry. *Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 A.D.2d 341, 342 (1st Dep't 1996) ("fact-laden claim to pierce the corporate veil is particularly unsuited for resolution on summary judgment"); *see also Toroy Realty Corp. v. Ronka Realty Corp.*, 113 A.D.2d 882, 883-84 (2nd Dep't 1985) (triable issues concerning conduct of corporation's business renders summary judgment inappropriate). Nor does our jurisprudence require the Corporate and Individual Defendants to prove a negative on an issue on which they do not bear the burden of proof. *Martinez v. Hunts Point Co-op. Mkt.*, 79 A.D.3d 569, 570-71 (1st Dep't 2010); *see also Bryan v. 250 Church Assoc., LLC*, 60 A.D.3d at 578 (movant cannot meet burden of proof on summary judgment by pointing to gaps in non-movant's proofs). Holme's motion for summary judgment on his fifth cause of action to pierce the corporate veil is denied.

VI. Holme's Motion for Summary Judgment on Attorneys' Fees

Under DCL § 276-a, "[i]n an action or special proceeding brought by a creditor . . . to set aside a conveyance by a debtor, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors . . . the justice

or surrogate presiding at the trial shall fix the reasonable attorney's fees of the creditor . . . [and grant] judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment." Here, however, there has been no finding of actual intent. As such, plaintiff's motion for summary judgment granting reasonable attorneys' fees is denied as premature.

VI. Cross Motions of Defendants for Summary Judgment

The Corporate and Individual Defendants cross-move for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's claims that (1) seek to pierce the corporate veils of the Corporate Defendants and (2) for fraudulent conveyances.

With regard to the part of the motion seeking to dismiss causes of action under DCL §§ 273, and 273-a, the motion is denied. Corporate Defendants and Campbell have failed to offer any legal justification for the challenged transfers made after 2005. *See supra.*

The next issue concerns the salaries Campbell and Shah received from Global. Although the salaries paid are presumptively not subject to summary judgment in favor of Holme, the Individual Defendants have offered no proofs that the salaries paid were commensurate with the work the two completed. Moreover, as noted above, the loans made to Global were not antecedent to the debt owed to Holme. The defendants have, therefore, failed to demonstrate entitlement to judgment as a matter of law. Thus, that part of defendant's motion that seeks to dismiss the classification of such salaries and loans as fraudulent conveyances is also denied.

Defendant's motion to dismiss plaintiff's cause of action declaring a de facto merger is denied. The court has found that the merger has occurred as a matter of law. *See supra.*

Defendant's motion to dismiss plaintiff's cause of action to pierce the corporate veil is also denied. If such an inquiry is difficult to establish upon summary judgment, it is even more difficult to disprove upon summary judgment, where the fact-laden inquiry suffers the additional pressure of being a negative proof. *Reed v. State of New York,* 78 N.Y.2d 1, 10 (1991) (burden of proof may place one in the difficult position of proving a negative).

ORDER

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff James W. Holme on plaintiff's first cause of action for fraudulent conveyances in violation of Debtor and Creditor Law § 273 is granted to the extent that all transactions designated as loan repayments for loans made by any of the defendants after January 17, 1998 are fraudulent as to him, and it is otherwise denied; and it is further

ORDERED that the motion for summary judgment by plaintiff James W. Holme on plaintiff's second cause of action for fraudulent conveyances in violation of Debtor and Creditor Law § 273-a is granted to the extent that all transactions designated as loan repayments for loans made by any of the defendants, or any other payments, excluding

salaries, after February 27, 2001, are fraudulent as to him, and it is otherwise denied; and it is further

ORDERED that the motion for summary judgment by plaintiff James W. Holme on plaintiff's third cause of action for fraudulent conveyances in violation of Debtor and Creditor Law § 276 is denied; and it is further

ORDERED that the motion for summary judgment by plaintiff James W. Holme on plaintiff's fourth cause of action for de facto merger is granted; and it is further

ORDERED that the motion for summary judgment by plaintiff James W. Holme on plaintiff's fifth cause of action to pierce the corporate veil and impose liability on defendants David Campbell and B. H. Shah is denied, without prejudice; and it is further

ORDERED that that part of plaintiff James W. Holme's motion for summary judgment under Debtor and Creditor Law § 276-a is denied; and it is further

ORDERED that each cross motions of the defendants is denied.

This constitutes the decision and order of the court.

Settle order.

Dated: New York, New York
July 30, 2012

ENTER

Hon. Eileen Bransten, J.S.C.