SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN PART 60
Justice

SQUARE MILE STRUCTURED DEBT (ONE) LLC and
SQUARE MILE STRUCTURED DEBT (THREE) LLC

INDEX NO. 603821/2008

-against-

MOTION DATE

KENT M. SWIG, et al.

MOTION SEQ. NO. 005

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No (s). _____

Replying Affidavits _____ | No (s). _____

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Defendants Y.L. Amsterdam LLC, Amsterdam 656 LLC, Yair Levy, and Charles Dayan's motion for summary judgment is denied and plaintiff Square Mile Structured Debt (One) LLC and Square Mile Structured Debt (Three) LLC's cross-motion for summary judgment is denied in accordance with the accompanying decision/order dated December 6, 2013.

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

Dated: 12-5-13

_____, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

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 – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

SQUARE MILE STRUCTURED DEBT (ONE) LLC and SQUARE MILE STRUCTURED DEBT (THREE) LLC,

Plaintiffs,

- against -

KENT M. SWIG, 25 BROAD MEZZ PREFERRED, LLC, 25 BROAD STREET EQUITY I LLC, KMS HOLDINGS, LLC, Y.L. AMSTERDAM LLC, AMSTERDAM 656 LLC, YAIR LEVY, CHARLES DAYAN and DOES 1 through 50,

Defendants.

Index No.: 603821/2008

DECISION/ORDER

In this action, plaintiffs Square Mile Structured Debt (One) LLC and Square Mile Structured Debt (Three) LLC (collectively Square Mile) sue defendants Kent Swig, a real estate developer, and two companies allegedly owned or controlled by Swig, 25 Broad Mezz Preferred, LLC (Broad Mezz) and 25 Broad Street Equity I LLC (collectively Swig Broad Street entities), for damages based on defaults on a loan that was made by plaintiffs to Broad Mezz and guaranteed by Swig, and on a personal loan made by plaintiffs to Swig. The complaint alleges 11 causes of action against Swig and these entities arising out of the default, including causes of action for rescission of the loan transaction or, in the alternative, specific performance and breach of contract. The complaint also alleges a sole cause of action (the ninth) against Swig, the Swig Broad Street entities, and the other named defendants for fraudulent conveyance. Defendant Levy and defendant Y.L. Amsterdam LLC, his wholly owned corporation (the Levy entity), and

defendant Dayan and defendant Amsterdam 656 LLC, his wholly owned corporation (the Dayan entity) (collectively the Dayan/Levy defendants or defendants), move for summary judgment dismissing the fraudulent conveyance cause of action. Plaintiffs cross-move for summary judgment on this cause of action. Prior to service of the motions, Square Mile and Swig entered into a settlement agreement under which plaintiffs released their claims in this action against Swig and KMS Holdings LLC. In addition, the Swig Broad Street entities failed to appear for a status conference on January 27, 2010 and this court (Fried, J.) authorized a motion for a default judgment. However, plaintiffs have not moved against either entity.

Background

The following material facts are undisputed unless otherwise indicated: SBE West 92 Capital, LLC, an entity partially owned by Swig, SBE West Management, LLC, an entity wholly owned by Swig (collectively the Swig 92 entities), the Dayan entity, and the Levy entity formed 201 West 92, LLC (92 LLC), for the purpose of acquiring properties located at 92nd Street and Amsterdam Avenue in Manhattan and converting them into condominiums (the 92nd Street Project). The Dayan and Levy entities each acquired a 33.33% interest in 92 LLC, Swig's SBE West 92 Capital, LLC also acquired a 33.33% interest, and Swig's SBE West Management, LLC acquired the remaining 0.01% interest. The Operating Agreement for 92 LLC designated SBE West Management, LLC as the Manager responsible for "supervising and undertaking the Business of the LLC and [making] all decisions affecting the day-to-day operations of the LLC . . . ." (Operating Agreement, §§ 6.1, 6.3 [Dayan Aff., Ex. A].) 92 LLC formed a subsidiary, 201 West 92 Owner, LLC (92 Owner), to acquire title to the properties. 92 Owner financed its

purchase of the properties by taking out a mortgage and a mezzanine loan from iStar FM Loans. (See Swig Affidavit, ¶18.) In connection with that financing, Swig executed a personal guaranty dated March 1, 2005. (Id., ¶19.)

The mortgagee commenced a foreclosure action in January 2008. According to the Dayan/Levy defendants, negotiations with Swig subsequently ensued over whether they would consent to a sale of the 92nd Street properties or whether Swig would buy out their interests or they would buy out Swig's interests. (Dayan Aff., ¶¶ 7-13.) The Dayan/Levy defendants claim that by late 2007, they became "deeply concerned that Swig had mismanaged the Project," and refused to contribute any additional capital to the $5 million they had each already contributed. (Dayan Aff., ¶¶ 6-8; Levy Aff., ¶¶ 5-7.) They also claim that they refused to consent to a sale of the 92nd Street Project for the $61 million offer that Swig had secured, because they "believ[ed] that if the Project were properly marketed and not clouded by the foreclosure it could attain a far greater price." (Dayan Aff., ¶ 10; Levy Aff., ¶ 9.) They further claim that they continued to engage in "extensive negotiations" with Swig and ultimately reached a "good faith" resolution of their differences. (Dayan Aff., ¶ 15; Levy Aff., ¶ 14.) This resolution was memorialized in three agreements, signed in June 2008: A "Redemption of LLC Interests Agreement," entered into between 92 LLC, by SBE West 92 Management, LLC by Swig as Managing Member, and by the Dayan/Levy entities, provided for the Dayan/Levy entities to sell their interests in 92 LLC to the LLC, immediately upon the sale of the 92nd Street Project to a third party. (Redemption Agreement at 2 [Dayan Aff., Ex. I].) A separate Letter Agreement authorized Swig, in his capacity as the managing member of SBE West 92 Management, LLC, in its capacity as Manager of 92 LLC, in its capacity as the sole and managing member of 92 Owner, to enter into contracts

for sale of the 92nd Street Project. The Letter Agreement further provided for 92 LLC to pay the Dayan/Levy entities, after the sale of the 92nd Street Project, the total sum of $4.8 million dollars for redemption of their interests in the LLC. (Letter Agreement, §§ [a], [b] [Dayan Aff., Ex. J].) The third agreement was a Mutual Release, entered into in accordance with the contemplated redemption of the Dayan/Levy interests, in which Swig, Dayan, and Levy, as individuals, their respective entities, and 92 LLC released their claims against each other. (Release [Dayan Aff., Ex. K].) It is undisputed that the sale of the 92nd Street Project occurred, that the Dayan and Levy entities each received $2.4 million for redemption of their respective equity interests from the proceeds of the sale, and that the Swig entities received no, or de minimis, distributions from the sale. (See Draft Closing Statement [Solomon Aff., Ex. D], showing payment of $4.8 million for "Buyout Dayan & Levy Interests" and "Net Sale Proceeds to Seller" of $27,707.93.)

In a prior entirely separate transaction in December 2007, involving restructuring of the approximately $40 million in loans made by plaintiffs to Broad Mezz and Swig, Swig pledged to plaintiffs certain distributions from the 92nd Street Project. According to Swig, he pledged "the distributions, if any, to be received by me or each of 92 Capital [SBE West 92 Capital, LLC] or 92 Management [SBE West 92 Management, LLC]." (Swig Aff., ¶¶ 10-11.) The "Pledge and Assignment Agreement" provides that "Pledgor [Swig] irrevocably grants, pledges and assigns to [Square Mile] all of Pledgor's right, title and interest in and to all distributions and other monies receivable or otherwise payable or to which Pledgor is otherwise entitled under the Relevant Documents. . . ." (Pledge Agreement, § 2.1 [Swig Aff., Ex. A].) The "Relevant Documents" included all Operating Agreements and "all other organizational documents" of the Swig 92 entities. (Id., § 1[b], Definitions.)

Swig filed a UCC-1 Financing Statement in connection with the pledge. (Swig Aff., Ex. A.) Swig claims that he notified both Dayan and Levy of this pledge. (Swig Aff., ¶ 13.) Dayan and Levy claim that they "had no notice of any liens or other alleged claims against Swig." (Dayan Aff., ¶ 15; Levy Aff., ¶ 14.)

The issue on these motions is whether the redemption of the Dayan/Levy equity interests upon the sale of the 92nd Street Project, with the distributions from the sale, was a fraudulent conveyance which deprived plaintiffs of their right to the distributions under the Pledge Agreement.

Discussion

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact.' (CPLR 3212, subd. [b]." (Zuckerman, 49 NY2d at 562.)

Although the complaint does not denominate the sections of the Debtor and Creditor Law (DCL) under which plaintiffs seek relief, plaintiffs acknowledged at the oral argument of the motions that this action is brought solely under section 276 of the DCL. (Oral Argument Transcript at 21.) This section provides: "Every 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." Section 276 addresses actual, as opposed to constructive, fraud "and does not require proof of unfair consideration or insolvency." (Wall St. Assocs. v Brodsky, 257 AD2d 526, 529 [1st Dept 1999].) It is well settled that "[d]ue 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." (Id. [internal quotation marks & citations omitted]; accord Ray v Ray, 108 AD3d 449, 451 [1st Dept 2013]; see also Matter of CIT Group/Comm. Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership, 25 AD3d 301, 303 [1st Dept 2006].) The badges of fraud include circumstances such as "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance." (Wall St. Assocs., 257 AD2d at 529.)

The creditor seeking to set aside a conveyance based on actual fraud under Debtor and Creditor Law section 276 has the burden of proof, which must be met by clear and convincing evidence. (Matter of U.S. Bancorp Equip. Fin., Inc. v Rubashkin, 98 AD3d 1057, 1060 [2nd Dept 2012]; see Micalden Invs. S.A. v Guerrand-Hermes, 30 AD3d 341, 343 [1st Dept 2006].)

After a prima facie showing is made that a debtor transferred property with fraudulent intent, the burden shifts to the transferee to establish its receipt of the property for fair consideration and in good faith or without knowledge of the fraud. (See Scola v Morgan, 66

AD2d 228, 232-233 [1st Dept 1979], appeal dismissed 47 NY2d 799, citing Sabatino v Cannizzaro, 243 AD 20, 22 [1st Dept 1934]; DCL § 278 [1] [providing that creditor may have fraudulent conveyance annulled except as against "a purchaser for fair consideration without knowledge of the fraud at the time of purchase"]; see also Matter of Bernard L. Madoff Inv. Secs. LLC, 458 BR 87,106 [SD NY 2011] [reasoning that DCL § 278 imposes an affirmative defense, and that while transferee's intent does not have to be pleaded on a § 276 claim, it must be considered on a full evidentiary record, either on a summary judgment motion or at trial]; 30 NY Jur Creditors' Rights and Remedies § 358 [2d ed] ["The burden of proof is upon a creditor who seeks to set aside a conveyance on the ground of actual fraud to prove that the conveyance was made with actual intent on the part of the debtor to hinder, delay, and defraud his or her creditors. Once the fraudulent intent of the debtor-grantor is established, the burden is then upon the grantee to show his or her innocence of such intent"].)

Dayan/Levy Defendants' Motion

In moving for summary judgment, the Dayan/Levy defendants seek a determination as a matter of law that they did not act with intent to hinder or defraud plaintiffs when they negotiated the redemption of their membership interests in 92 LLC. (Ds.' Memo. In Support at 10.) Plaintiffs assert that the redemption was a "sham transaction." (Ps.' Memo. In Opp. at 11.)

Under the governing law discussed above, plaintiffs will have the ultimate burden of proving that Swig transferred his or the Swig 92 entities' rights to distributions to the Dayan/Levy defendants in the redemption transaction, with actual intent to defraud plaintiffs. However, the Dayan/Levy defendants, as movants, have the burden of going forward on their

motion for summary judgment with proof of lack of fraudulent intent. (See generally Pirrelli v Long Island R.R., 226 AD2d 166 [1st Dept 1996]; Massey v New York City Hous. Auth., 230 AD2d 601 [1st Dept 1996].)

In claiming that they are entitled to summary judgment dismissing the Debtor and Creditor Law section 276 claim, the Dayan/Levy defendants focus on their own intent in the redemption transaction, rather than on the intent of Swig or his entities as transferor. Defendants rely on wholly conclusory allegations, in the affidavits of Dayan and Levy, that they negotiated the Redemption Agreement in good faith and after extensive discussions. (See supra at 3.) Defendants' assertions that the Project could have been sold for more than the $61 million price that Swig negotiated, or that they had no notice of plaintiffs' claim to the distributions are likewise conclusory. (See supra at 3, 5.) With respect to the consideration paid for the redemption of their equity interests, defendants provide no evidentiary support for their assertion that their claim against Swig for mismanagement of the premises had value. Defendants neither detail the alleged acts of mismanagement, nor account for the effect of the provision in the 92 LLC Operating Agreement exculpating Swig from liability except for gross negligence or willful misconduct. (See Operating Agreement, § 6.7.) Significantly, defendants do not point to any provision in the 92 LLC Operating Agreement which sets forth a mechanism, such as an appraisal or an accounting, for valuing the Members' equity interests. In addition, although 92 LLC is a Delaware Company, defendants fail to discuss Delaware statutory or common law regarding valuation rights. There is therefore no basis in this record on which this court can determine whether the Dayan/Levy entities redeemed their equity interests in 92 LLC for fair consideration.

In summary, defendants' claim of their own lack of intent to defraud is based on wholly conclusory affidavits which are insufficient to make a prima facie showing as to this claim. (See generally Sulimanoff v Ash Trans Corp., 259 AD2d 415 [1st Dept 1999] [conclusory assertions insufficient to support motion for summary judgment]; Berchini v Silverite Constr. Co., Inc., 289 AD2d 434 [2d Dept 2001] [same].)

To the extent that defendants purport to submit evidence that Swig or the Swig 92 entities did not have an intent to defraud creditors, they cite Swig's failure to claim, in the affidavit he submits in support of plaintiffs on these motions, that he intended to defraud them. (Ds.' Memo In Reply at 9-10.) Defendants also assert in conclusory terms that Swig negotiated for months with the Dayan/Levy defendants and had no "motive" to prefer Dayan/Levy over Square Mile. (Id.)

The absence of an acknowledgment of intent to defraud on Swig's part does not provide viable support for defendants' claim that the conveyance was not fraudulent, as "[d]irect evidence of fraudulent intent is often elusive." (Pen Pak Corp. v LaSalle Natl. Bank of Chicago, 240 AD2d 384, 386 [2d Dept 1997].) Defendants' claim that Swig had no motive to prefer them is also belied by the fact that the Redemption Agreement enabled Swig to avoid liability on his personal guarantee for the substantial mortgage on the 92nd Street properties.

For the above reasons, the court holds that defendants fail to eliminate triable issues of fact on their claim that the conveyance of Swig's or the Swig 92 entities' rights to distributions was not made with intent to defraud. On their reply, defendants advance additional arguments in support of their motion for summary judgment that are not dependent on their factual showing as

to intent.[1]

First, they argue that plaintiffs are not creditors because plaintiffs did not receive a valid pledge of Swig's or the Swig 92 entities' interests in distributions from the 92nd Street Project. The court rejects this contention. Prior to entering into the Redemption Agreement, Swig's two entities would each have been entitled to receive a distribution upon the sale of the Project. (Operating Agreement, § 5.1, "Waterfall".)[2] On this record, defendants do not demonstrate – or, indeed, claim – that Swig, in his capacity as 100% owner of SBE West Management, LLC, and 27.3973% owner of SBE West 92 Capital, LLC (see Pledge Agreement, § 2.6 [b]) would not have personally received a distribution from his respective companies, albeit in a smaller amount than Square Mile is claiming in this action.

To the extent that the Pledge Agreement is construed as a pledge not only of Swig's right to receive distributions through the Swig 92 entities, but also of the Swig 92 entities' own rights to receive distributions, the court holds that the Pledge Agreement was valid because made in compliance with the 92 LLC Operating Agreement. Under that Agreement, in order for a Member to validly transfer its "LLC Interest or any right to receive distributions therefrom, direct or indirect," the Member was required to obtain the "Consent of the Members," which was, in

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[1]The court considers these arguments, as plaintiffs had a full opportunity to respond to them in the reply to their cross-motion.

[2]Section 5.1 of the 92 LLC Operating Agreement provided that, upon the sale of the entire Project, any "Available Cash Flow" would be distributed in accordance with the "Waterfall," "subject to, in connection with a sale of the entire Project and dissolution of the LLC, the withholding of reserves sufficient, in Manager's reasonable judgment, to pay the costs of dissolution and contingent liabilities." The "Waterfall" provided that after payment of expenses of the LLC, the sale proceeds would flow first to the "Members, parri passu, in accordance and to the extent of each Members [sic] Capital Contributions," and second to the "Members in accordance with their Percentage Interests." (Operating Agreement, "Waterfall" at 13.) It is undisputed that the Swig 92 entities were Members.

turn, defined as "the approval of a majority in interest of the Members of the LLC." (Operating Agreement, § 8.1.1.) "LLC Interest" was defined an "an ownership interest in or interest in the Available Cash Flow, Net Profits and Net Loss of the LLC." (Id., § 1.1, Definitions.) "Available Cash Flow" was defined as "the gross cash revenues and funds received by the LLC . . . from whatever source, reduced by various expenses including "costs and expenses related to (i) the sale or financing (or refinancing) of the Project, or any part thereof."

The Dayan/Levy entities and the Swig 92 entities entered into a "Consent to Transfer Interest," dated July 7, 2005, in which they "consent[ed] to allow each Member to transfer or assign any part of their ownership interests so long as" Swig "retain[ed] a controlling interest" in the Swig 92 entities, and Dayan and Levy "retain[ed] a controlling interest" in their respective entities. (Consent [Swig Aff., Ex. B].)

Under the Pledge Agreement, Swig expressly "pledg[ed] and assign[ed]" his right to receive distributions, but not his equity in the Swig 92 entities. (Pledge Agreement, § 2.1.) By agreeing to give up his distributions, Swig did not automatically relinquish all of his ownership interests in his companies, which may have included other "ownership rights" such as his right to vote. As Swig did not give up his "controlling interest" in the Swig 92 entities, the Pledge Agreement met the requirements of the Consent executed by the Dayan/Levy defendants.

In holding that the Pledge Agreement was valid, the court rejects the Dayan/Levy defendants' argument that they granted consent only to transfer or assign ownership interests, and not to pledge distributions. The Pledge Agreement by its terms pledged and assigned the right of Swig or the Swig 92 entities to receive distributions. While the Consent by its terms authorized

assignment of "ownership interests," such interests, as defined in the Operating Agreement, included interests in revenues from the sale of the Project – i.e., distributions. (See supra at 11.)

The court is unpersuaded by defendants' further claim that plaintiffs may not maintain this action because they are not secured creditors. It is axiomatic that the Debtor and Creditor Law permits fraudulent conveyance claims to be maintained by unsecured as well as secured creditors. In any event, plaintiffs make a prima facie showing, based on their UCC-1 Financing Statement, that they were secured creditors.

Finally, defendants contend that plaintiffs are not creditors of 92 LLC, but are instead creditors of Swig, and that plaintiffs therefore have no interest in its distributions. (Ds.' Memo. In Further Support at 6, 12.) This argument ignores that, at a minimum, Swig validly pledged his own right to distributions from 92 LLC, flowing to him through his Swig 92 entities. It also ignores that SBE West 92 Management LLC, of which Swig was 100% owner, acting on behalf of 92 LLC, then entered into the Redemption Agreement under which any distributions that would have otherwise gone from the LLC to the Swig 92 entities were paid to the Dayan/Levy entities to redeem their equity interests. The Dayan/Levy entities wholly fail to cite any authority that these facts, if proved, will not establish a debtor-creditor relationship sufficient to support a fraudulent conveyance cause of action.[3]

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[3]Plaintiffs cite case law which holds that a debtor-creditor relationship sufficient to permit maintenance of a fraudulent conveyance claim will be found where a parent corporation or a shareholder, acting as the alter ego of the defendant corporation, transfers its assets with intent to defraud a creditor. (See e.g. UBS Secs. LLC v Highland Capital Mgt., L.P., 30 Misc 3d 1230[A] [Sup Ct, New York County 2011], modified on other grounds 93 AD3d 489 [1st Dept 2012]; Holme v Global Minerals & Metals Corp., 63 AD3d 417 [1st Dept 2009].) The applicability or inapplicability of this authority to the facts of the instant case is not, however, demonstrated by either party on this record.

The court has considered defendants' remaining contentions as to the lack of viability of plaintiffs' fraudulent conveyance claim and finds them to be without merit.

Plaintiffs' Cross-Motion for Summary Judgment

Under the governing law discussed above (supra at 6-7), plaintiffs have the burden of going forward on their own motion, and the ultimate burden in this action, of proving that Swig, with actual intent to defraud plaintiffs, transferred his, or the Swig 92 entities', rights to distributions from the 92nd Street Project to the Dayan/Levy defendants in the redemption transaction. In support of their motion, plaintiffs cite Swig's knowing pledge to plaintiffs, in December 2007, of his undisputed right to the distributions, and his transfer of that right to the Dayan/Levy defendants by means of the June 2008 agreements, with knowledge that this transfer "violated Plaintiffs' rights and placed pledged assets beyond their reach when Mr. Swig defaulted." (Ps.' Memo. In Opp. at 9-10.)[4]

The court assumes for purposes of this motion that this evidence suffices to establish plaintiffs' prima facie showing of actual fraudulent intent. The issue thus becomes whether plaintiffs eliminate triable issues of fact as to the Dayan/Levy defendants' affirmative defense that the transfer was received in good faith and for fair consideration. As held above, defendants' claim of lack of knowledge of the pledge was conclusory. However, plaintiffs rely on Swig's equally conclusory contrary assertion that he notified defendants of the pledge. (See supra at 5.) The court is also unpersuaded by plaintiffs' assertion that their filing of the UCC-1 Financing

[4]Plaintiffs also assert, under a badges of fraud analysis, that Swig's transfer was made with actual fraudulent intent. However, they appear to claim that the knowing transfer in the face of the pledge is sufficient to demonstrate actual fraud. (See Ps.' Memo. In Opp. at 9-11.)

Statement gave constructive notice that Swig had pledged all of the Swig 92 entities' rights to distributions, as opposed to whatever rights Swig had to their distributions. Moreover, plaintiffs fail to eliminate triable issues of fact as to the adequacy of the consideration paid by the Dayan/Levy defendants for the redemption of their interests in 92 LLC. As held above, defendants did not demonstrate that the consideration was fair. However, plaintiffs also fail to demonstrate that the consideration was not fair. Like defendants, plaintiffs do not cite provisions in the LLC Operating Agreement or governing law regarding the LLC's Members' appraisal, accounting, or other valuation rights.

The court has considered plaintiffs' remaining claims in support of their motion, and holds that plaintiffs fail to demonstrate entitlement to judgment as a matter of law on their fraudulent conveyance claim.

General Obligations Law § 15-108

Finally, the Dayan/Levy defendants contend that plaintiffs' fraudulent conveyance claim must be dismissed under General Obligations Law (GOL) § 15-108 because plaintiffs previously settled this claim with Swig for damages exceeding those sought against the Dayan/Levy defendants in this action. It is undisputed that plaintiffs and Swig entered into a settlement agreement in this action, dated June 29, 2011, in which Swig confessed judgment to plaintiffs in the amount of $7,500,000 (Settlement Agreement, ¶ 1[Fleming Ex. D]); Swig and plaintiffs released all claims against each other arising out of this action (id., ¶¶ 5, 6); plaintiffs and Swig provided a mutual release to defendant KMS Holdings LLC (id., ¶ 4); and plaintiffs "expressly reserve[d] their rights and preserve[d] their claims against the remaining defendants." (Id., ¶ 3.)

Defendants argue that because the settlement was of all causes of action against Swig, and did not apportion the settlement amount among the various causes of action, the entire amount must be applied to the fraudulent conveyance claim, thereby eliminating any possible damages against the remaining defendants. (Ds.' Memo. In Support at 13-15.) Defendants do not cite, and the court's own research has not located, any authority that applies this GOL section to a fraudulent conveyance claim. Nor do defendants cite analogous authority. Defendants thus do not demonstrate on this inadequately briefed record that GOL § 15-108 is a bar to the fraudulent conveyance cause of action.

It is accordingly hereby ORDERED that the motion of defendants Y.L. Amsterdam LLC, Amsterdam 656 LLC, Yair Levy, and Charles Dayan for summary judgment dismissing the ninth cause of action is denied; and it is further

ORDERED that the motion of Square Mile Structured Debt (One) LLC and Square Mile Structured Debt (Three) LLC for summary judgment on the ninth cause of action is denied; and it is further

ORDERED that the matter is referred for Alternative Dispute Resolution. The parties shall appear in Part 60 on a mutually convenient date on or before December 19, 2013, to arrange for the referral; and it is further

ORDERED that the parties shall appear in Part 60 for a status conference on April 24, 2014 at 2:30 p.m.

This constitutes the decision and order of the court.

Dated: New York, New York
December 6, 2013

MARCY S. FRIEDMAN, J.S.C.