SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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FRED GOODSTEIN and MICHELLE GOODSTEIN,

Plaintiff,

-against-

ADAM ENBAR, LINDA ENBAR, MAGNUM REALTY HOLDINGS, LLC and MAGNUM REAL ESTATE SERVICES, INC.,

Defendants.

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DECISION AND ORDER
Index №.: 654114/16
Motion Seq. Nos.
001 and 002

KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN REVIEW OF THIS MOTION

PAPERS	NUMBERED
SEQ. 001	
ORDER TO SHOW CAUSE AND ANNEXED AFFIRMATION	1-2 (Exs 1-3)
ANSWERING AFFIDAVITS	2-4 (Exs A-E)
MEMORANDUM OF LAW IN OPPOSITION	5
SEQ. 002	
ORDER TO SHOW CAUSE AND AFFIRMATIONS IN SUPPORT	1-3 (Exs A-B)
AFFIRMATION IN OPPOSITION	4 (Exs A-E)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In a fraudulent conveyance action, plaintiffs Fred and Michelle Goodstein (the Goodsteins) move, by order to show cause (Mot. Seq. 001), for an order of attachment, pursuant to CPLR 6201 (3), for a sum of $281,375.09 on defendant Magnum Realty Holdings LLC's (Magnum Holdings)

bank account, as well as a preliminary injunction, pursuant to article 63 of the CPLR, preventing Magnum Holdings from: (1) withdrawing money from the subject bank account, or any other, as well as any safety deposit boxes; (2) assigning any assets, including stock certificates, bonds or other certificates; (3) creating -- through its members, partners, agents, or employees -- a new entity or entities to operate its business. Defendant Magnum Holdings moves (Mot. Seq. 002) to remove any restraint on its escrow account (acct. no. 4267053232). After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motions are decided as follows.

BACKGROUND

In December 2008, the Goodsteins loaned $150,000 to nonparty 2457 8th LLC. The promissory note memorializing this loan was executed on December 10, 2008, and it was signed for 2457 8th LLC by Maurice Enbar and nonpartry Steven Kamhi (Kamhi), who were each identified as managing members of the entity. In addition to the promissory note, Kamhi personally guaranteed the loan to the Goodsteins in a separate guarantee executed on December 10, 2008.

The promissory note structured repayment to the Goodsteins in eighteen payments: seventeen interest only monthly installments of $1,500 and a balloon payment of $166,500, a figure comprised of the principal and the remaining interest (*see* Mallin Aff, Ex 1[C]). The promissory note also provided that, in the case of default, interest would accrue at the lower of 24% per annum or the highest rate allowable by law (*id.*). 2457 8th LLC made the first fifteen payments, then defaulted by failing to make the last two interest-only payments, as well as the balloon payment.

The Goodsteins, in an effort to redress the default, brought two actions in Nassau County: *Goodstein v Kamhi*, index No. 20279/10 and *Goodstein v Enbar*, index No. 16224/2011. In the first action, *Goodstein v Kamhi*, the Goodsteins sued Kamhi as well as 2457 8th LLC. In the second

action, *Goodstein v Enbar*, index No. 16224/11, the Goodsteins sued Maurice Enbar, as well as nonparties Flatiron Equities, LLC (Flatiron Equities) and Magnum Real Estate Services, Inc. (MRES). In both actions, the Goodsteins obtained default judgments against all defendants for the amount outstanding under the promissory note, as well as interest (*see* Mallin Aff, Exs 1[K] and 1[L]). In the case involving Maurice Enbar, the Nassau County court found that Enbar and his co-defendants owed the Goodsteins $212,637.75 (*see* Mallin Aff, Ex 1 [K]).

Meanwhile, the Goodsteins allege that nonparty Maurice Enbar and his wife and son, defendants Linda Enbar and Adam Enbar, were shifting money between various entities that are all within their control and that resemble the business version of Russian nesting dolls. First, the Goodsteins allege that, on December 12, 2008, two days after the Goodsteins check for $150,000 was issued, Maurice and Linda Enbar opened a bank account, for the purpose of processing the check, in the name of 2457 8th LLC. The Goodsteins submit bank documents that substantiate this allegation (Mallin aff, Ex 1 [F]). The Goodsteins allege that, a week later, on December 19, 2008, Maurice Enbar and Linda Enbar defunded 2457 8th LLC, by transferring $145,000 from its freshly opened bank account into an account for nonparty Flatiron Equities, which is owned and operated by Maurice and Adam Enbar. This allegation is also substantiated by bank records submitted with the Goodsteins' moving papers (*id.*).

The Goodsteins allege that the Enbars next, on December 22, 2008, shifted $135,000 from the Flatiron Equities account to an account for nonparty 23-123rd Street LLC (Street LLC), an entity owned and operated by Maurice Enbar. This alleged transaction, like the others, is substantiated by bank records submitted by the Goodsteins (Mallin aff, Ex 1 [G]). Later the same day, Maurice Enbar then transferred $135,000 from the Street LLC account into his and his wife's joint account (*see id.*,

Ex 1 [I]). Next, the Goodsteins allege that $135,000 was transferred from Maurice and Linda Enbars' joint account to an account for MRES, another company owned and operated by Maurice Enbar, in a series of transactions taking place between December 23, 2008 and December 24, 2008 (*see id.*, Ex 1 [J]).

The Goodsteins allege that the outcome of all of these transfers was to render 2457 8th LLC, Maurice Enbar, and Steven Kamhi insolvent and unable to pay the money due under the promissory note. On March 13, 2012 -- after the Goodsteins had commenced both actions for breach of the promissory note, and after they had been granted a default judgment in *Goodstein v Kamhi*, but before they had been granted a default judgment in *Goodstein v Enbar* -- Magnum Holdings registered with New York's Department of State as a domestic limited liability company. The Goodsteins allege that MRES then transferred all of its assets to Magnum Holdings.

The Goodsteins submit a LexisNexis public records search that shows that MRES and Magnum Holdings share a business address (*id.*, Ex 1 [P]). Moreover, the Goodsteins allege that the transfers between MRES and Magnum Holdings were made without consideration, and for the purpose of frustrating the Goodsteins' attempts to recover the money owed to them under the promissory note. The Goodsteins note that, in addition to their own claims, MRES has 16 other outstanding judgments and/or liens against it (*id.*, Ex 1 [R]), while Maurice Enbar, personally, has 19 outstanding judgments and/or liens against him (*id.*, Ex 1 [A]).

The Goodsteins filed the complaint in this action on August 4, 2016, alleging eight causes of action, all of them for fraudulent conveyance. The Goodsteins brought this motion as an order to show cause (OTSC), which Judge Jaffe signed on August 25, 2016. The OTSC directed "that, pending a hearing of this motion, Defendant Magnum Holding and its members, agents, employees,

attorneys, or other professionals, acting on behalf of Magnum Holding are temporarily restrained and enjoined from:

> (1) withdrawing any monies from the TD Bank Account No.: 426-7053240 or any other bank account belonging to Magnum Holdings or any safe deposit boxes belonging to Magnum Holdings; (2) assigning any assets of Magnum Holdings, including stock certificates, bonds or other securities; and (3) creating or forming any new entity or entities so as to operate the business of Magnum Holdings to the extent of $281,375.09"

(OTSC at 3).

In her affidavit opposing this motion, Linda Enbar states that, as a result of the OTSC, "Magnum Holding's escrow account, TD Bank Account No. 4267053232 has been frozen" (L. Enbar aff, ¶ 5). Thus, from a pragmatic view, a temporary restraining order (TRO) is already in place and the court's role here, aside from deciding the appropriateness of an order of attachment, is to determine whether the TRO should be converted into a preliminary injunction.

DISCUSSION

I. Order of Attachment

"An order of attachment directs the sheriff to take constructive and sometimes actual hold of a defendant's property, so that it can be applied to the plaintiff's judgment in the action, should the plaintiff prevail" (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 59 [1st Dept 2013] [internal citation omitted]). This provisional remedy, "which is governed by CPLR article 62, operates only against the property of the defendant, not on his/her person" (*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 310).

CPLR 6201, "Grounds for attachment," provides, at its fourth subparagraph, that:

> "An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or part, or in the alternative to a money judgment against one or more of the defendants, when . . . the defendant, with intent to defraud his creditors or frustrate enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts"

(CPLR 6201 [3]).

As to the technical requirements faced by a party moving for an order of attachment, CPLR 6212 provides that:

> "On a motion for an order of attachment, or for an order to confirm an order of attachment, the plaintiff shall show, by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more of grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims know to the plaintiff"

(CPLR 6212 [a]).

Additionally, CPLR 6212 requires that a plaintiff seeking an order of attachment "shall give an undertaking" to provide for the possibility that the defendant obtains a favorable judgment, or it is "finally decided that plaintiff was not entitled to an attachment of the defendant's property" (CPLR 6212 [b]).[1] If either of the two things occur, upending

[1] More specifically, CPLR 6212 (b) provides that the undertaking should be:

> "in a total amount fixed by the court, but not less than five hundred dollars, a specified part thereof conditioned that the plaintiff shall pay to the defendant all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment if the defendant recovers judgment or if it is finally decided that the plaintiff was not entitled to an attachment of the defendant's property, and the balance conditioned that the plaintiff shall pay to the sheriff all of his allowable fees. The attorney for the plaintiff shall not be liable to the sheriff for such fees. The surety on the undertaking shall not be discharged except upon notice to the sheriff."

the order of attachment, CPLR 6212 provides that "[t]he plaintiff shall be liable to the defendant for all costs and damages, including reasonable attorney's fees, which may be sustained by reason of the attachment," and that such liability is "not limited by the amount of the undertaking" (CPLR 6212 [e]). Finally, CPLR 6212 (c) provides that a plaintiff must file an order of attachment within 10 days of its being granted.

Attachment is a "harsh" remedy, and courts have long construed it "strictly in favor of those against whom it may be employed" (*Penoyar v Kelsey*, 150 NY 77, 80 [1896]). Thus, "[t]here must be more than a showing that the attachment would, in essence, be 'helpful'" (*VisionChina Media*, 109 AD3d at 61, quoting *Founders Ins. Co. Ltd. v Everest Natl. Ins. Co.*, 41 AD3d 350, 351 [1st Dept 2007]). Instead, "the party seeking attachment must demonstrate an identifiable risk that the defendant will not be able to satisfy the judgment" (*id.* at 60).

This "risk should be real, whether it is a defendant's financial position or past and present conduct" (*id.* [internal quotation marks and citation omitted]). More specifically, courts "may consider the defendant's history of paying creditors, or a defendant's stated or indicated intent to dispose of assets" (*id.* citation omitted). Courts also consider whether the party against whom the attachment is sought "conducted business in a less than exemplary manner" (*ITC Entertainment, LTD. v Nelson Film Partners*, 714 F2d 217, 219 [2d Cir 1983] [considering an order of attachment under New York law] [internal quotation marks omitted]). Finally, "[w]hether to grant a motion for an order of attachment rests with the discretion of the court" (*Vision China Media*, 109 AD3d at 59, citing *Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 387 [2008]).

The Goodsteins argue that they have a high probability of success in their fraudulent conveyance claims against defendants. More specifically, the Goodsteins argue that Maurice Enbar and MRES transferred funds to Magnum Holdings to avoid paying the judgment they obtained against him in *Goodstein v Enbar*.

Section 276 of New York's Debtor and Creditor Law (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 burden of showing actual intent under this provision of the DC L is on the party alleging a fraudulent transfer (*In re: Sharp International Corp.* [403 F3d 43, 56 [2d Cir 2005] [applying section 276 in the context of a bankruptcy proceeding]).

However, "[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" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [internal quotation marks and citation omitted]). The First Department in *Brodsky* provided an illustrative, non-exhaustive list of such badges of fraud:

> "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"

(*id.*).

Recently, the First Department, applying the principles of *Brodsky*, held that the transfer of a commercial condominium for $0 was a sufficient badge of fraud to sustain a

fraudulent conveyance claim under DCL § 276 (*Board of Mgrs. of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 883 [1st Dept 2016]). Moreover, "in cases where a conveyance has been made from one family member to another and the facts relating to the type of consideration are within their exclusive control, the defendant has the burden of proving the adequacy of the consideration" (*Sardis v Frankel*, 113 AD3d 135, 145 [1st Dept 2014] [internal quotation marks and citation omitted]).

Here, defendants have made no showing that Magnum Holdings paid any consideration for the money MRES conveyed to its bank account. Moreover, both MRES and Magnum Holdings appear to be controlled by Maurice Enbar. Finally, the Goodsteins had filed suit against Maurice Enbar on the promissory note prior to the transfer. Thus, fraudulent intent may be inferred and plaintiffs have shown a likelihood of success on their underlying claim.

Moreover, there is an identifiable risk that Maurice Enbar and Magnum Holdings will not be able to satisfy any judgment against them. The Goodsteins have made an overwhelming showing that Maurice Enbar and companies that he controls have a history of not paying debts or judgments. This is exactly the kind of showing that warrants an order of attachment.

Defendants argue, among other things, that the Goodsteins' application for an order of attachment is defective because it lacks an affidavit. While this application for an order of attachment is meritorious in substance, defendants are correct that it is defective in form, since the Goodsteins fail to submit an affidavit in support of their application, in contravention of CPLR 6212 (a). Thus, the Goodsteins application for an order of

attachment is denied without prejudice and the Goodsteins have leave to bring another, properly supported, application for this relief.

II. Preliminary Injunction

CPLR 6301, "Grounds for preliminary injunction and temporary restraining order" provides that:

> "A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

As noted above, the August 25, 2016 OTSC effectively granted the Goodsteins a TRO. Thus, this Court must determine whether the TRO should be converted into a preliminary injunction. The Court of Appeals has distilled the standard for a preliminary injunction to a showing of: "(1) a likelihood of success on the merits, (2) irreparable injury if provisional relief is not granted, and (3) that the equities" weigh in favor of the moving party (*J.A. Preston Corp. v Fabrication Enters.*, 68 NY2d 397, 406 [1986]).

There is a great deal of overlap in the showing required for an order of attachment and a preliminary injunction under article 63 of the CPLR. The court, for example, has, above -- in its analysis of whether an order of attachment is appropriate -- considered whether the Goodsteins are likely to succeed on their fraudulent conveyance claims and found that they are.

Second, if Magnum Holdings transfers money from its accounts and renders itself insolvent and unable to satisfy an adverse judgment, then the Goodsteins will be irreparably harmed. Typically, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 637 [2d Dept 2009] [internal quotation marks and citations omitted]). That is, if an injury can "be fully compensated by a monetary award" it is not irreparable (*Bashian & Farber, LLP v Syms*, 46 NYS3d 202, 205 [2d Dept 2017]). However, it is self-evident that if a party renders itself insolvent for the purpose of evading judgment, the plaintiff will not be fully compensated by a monetary award. Thus, the Goodsteins have made a showing of irreparable harm.

Finally, the equities favor the granting a preliminary injunction because, as the Goodsteins have shown, Maurice Enbar and the companies he controls have a history of evading judgments. Thus, it is equitable for the court to take steps to ensure that, if the Goodsteins succeed on their fraudulent conveyance claims, Magnum Holdings is solvent and can pay a judgment to them.

In opposition, defendants argue that the court should exercise its discretion to deny the preliminary injunction since Magnum Holdings cannot operate its business without the use of its bank accounts. In support, defendants submit an affidavit from Linda Enbar, in which she describes Magnum Holdings' business as "aiding landlords and property managers, and working with real estate brokers, in finding tenants for vacant apartments" (¶ 3).

Linda Enbar claims that the TRO imposed by Judge Jaffe's OTSC has frozen not only Magnum Holdings' operating account (426-7053240), but also its escrow account (426-7053240), which is "used to deposit collected rents (the first months and security deposit) and remit rents to landlords" (*id.*, ¶ 5). She further maintains that the escrow account has $93,779.30 in it (*id.*, ¶ 7), that Magnum Holdings has written $98,550 in dishonored checks to various landlords (*id.* ¶ 6), and that it owes one particular landlord that same amount, $98,550 (*id.*, ¶ 8). Defendants also submit an affidavit from that landlord, Parvinder Obrhai, who stated that a company he owns, Casa Property Management LLC, is owed $98,550 by Magnum Holdings (Obhrai aff, ¶ 4).

However, neither of these affidavits persuade this Court to exercise its discretion to release the attachment effected by the OTSC. Essentially, defendants are asking this Court to prioritize their debt to Obrhai over their debt to the Goodsteins. If defendants wish to obtain a judicial prioritizing of their debts, a bankruptcy court is the proper venue in which to seek such relief. However, in the present motion, the Goodsteins have made a showing of entitlement to a preliminary injunction and the fact that Magnum Holdings has other creditors does not affect that entitlement.

CONCLUSION

In light of the foregoing, it is therefore:

ORDERED that the plaintiffs' motion for an order of attachment is denied without prejudice, and it is further

ORDERED that plaintiffs' application for preliminary injunction is granted; and it is further

ORDERED that Magnum Holdings, its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of Magnum Holdings, any of the following acts:

> (1) withdrawing any monies from TD Bank Account No.: 426-7053240 or any other bank account belonging to Magnum Holdings or any safe deposit boxes belonging to Magnum Holdings; (2) assigning any assets of Magnum Holdings, including stock certificates, bonds or other securities; and (3) prohibiting Magnum Holdings, its members, partners, agents, employees, attorneys, or other professionals acting on behalf of Magnum Holdings from creating or forming any new entity or other entities so as to operate the business of Magnum Holdings.

and it is further

ORDERED that, in light of the foregoing, defendant Magnum Holdings' motion pursuant to Mot. Seq. 002 is denied as moot; and it is further

ORDERED that counsel are directed to appear for a compliance conference on May 9, 2017, at 2:30 p.m., at 80 Centre Street, Room 280, as directed by the preliminary conference order dated January 31, 2017; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: March 13, 2017

ENTER:

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT