M E M OR A N D U M

SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS IA PART 11

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In the Matter of the Petition of
TERESA SILVA and ARTURO S. SILVA,

Petitioners,

For a Judgment Pursuant to CPLR 5225 and/or CPLR 5227,

-against-

LESTER SCANLON and MARGARET SCANLON, Shareholders of LST PROPERTIES, INC.,
A Judgment Debtor of Petitioners,

Respondents.

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BY: STRAUSS, J.
Index No.: 19006/2012

Petition Date: December 21, 2012

Seq. No.: 1

The following papers numbered 1 to 7 were read on this petition for turnover pursuant to CPLR §§ 5225(b) and CPLR 5227, setting aside all transfers made by defendant LST PROPERTIES, INC. ("LST") to the extent necessary to satisfy petitioners' judgment; awarding petitioners damages of $383,033.69, against the respondents, jointly and severally, plus interest thereon from May 10, 2011, and permitting petitioners to disregard the transfers and attach or levy execution upon the property transferred to respondents as set forth in Debtor and Creditor Law § 278; awarding petitioners reasonable attorneys' fees pursuant to Debtor and Creditor Law § 276-a and granting petitioners such other and further relief as this court deems proper.

	PAPERS NUMBERED
Notice of Petition-Petition-Exhibits	1 - 3
Opposition Affirmation - Exhibits.....	4 - 5

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The underlying suit between petitioners and defendant LST arose from an incident that occurred on or about February 2, 2007, when petitioner Teresa Silva tripped and fell on a stairway located in the apartment building owned, operated and managed by LST. Petitioners were awarded at an inquest $300,000.00 plus interest at the rate of nine percent per annum from April 29, 2008. Judgment was entered on May 10, 2011.

In their moving papers, the petitioners assert that LST "deliberately" and "fraudulently" conveyed assets to respondents Lester Scanlon and Margaret Scanlon, the sole shareholders of LST, with the intent of preventing the Petitioners from satisfying any potential money judgment against LST. In support of this claim the petitioners assert that in July, 2009, LST attempted, by order to show cause, to vacate the judgment and obtain leave to file a late answer. A traverse hearing was held and by order dated July 16, 2010, it was determined that LST had been properly served and the application to vacate the judgment was denied. To date, no portion of the judgment has been paid. During the pendency of this underlying action, LST sold its sole asset on August 29, 2008, the subject premises identified in the underlying action. At a pre-trial deposition respondents' son, a former officer of LST, admitted that LST no longer possessed any assets, and furthermore, at the time of the closing, after taxes and other costs of the sale were deducted, the balance of the proceeds of said sale were remitted at the direction of LST, to Margaret Scanlon and Lestor Scanlon, personally.

In order to have a transfer set aside in a turnover proceeding, the petitioner must prove either that: one, the judgment debtor's transfer was fraudulent as to creditor without regard to actual intent as it lacked "fair consideration," pursuant to DCL §§ 273, 274, or 275; or two, the

judgment debtor actually intended to defraud the judgment creditor by the transfer, pursuant to DCL § 276.

Pursuant to CPLR §5225[b], a judgment creditor may commence a special proceeding against any person who is a "transferee of money from the judgment debtor . . . where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee". A petitioner relying on this provision to obtain assets from a transferee of a judgment debtor must, therefore, establish an independent legal justification for nullifying the transfer (See e.g., *Matter of WBP Cent. Assoc., LLC v DeCola*, 50 AD3d 693 [2d Dept. 2008]; *Steinberg v Levine*, 6 AD3d 620). Petitioners allege that although LST may have sold its sole asset for fair market value, it received nothing, since the respondents used their total control over LST to divert to themselves the proceeds from that sale that, in part, LST ultimately owed to the petitioners. LST carried out this conveyance, moreover, after petitioners had commenced their action against it.

Sections 5225 and 5227 of the CPLR allow a judgment creditor to seek an order requiring a third party to turn over money to satisfy a judgment. Specifically, under section 5225(b) the court may order a third party in possession of property or money of the judgment debtor to give it to the creditor where the creditor has a superior right of possession. Motions made pursuant to these sections are special proceedings treated by the court “in the nature of a motion for summary judgment.” (*Aluminum Co. Of America v Moskovitz*, 1991 WL 177246 [S.D.N.Y. 1991]; see *Triangle Pac. Bldg. Products Corp v National Bank of North America*, 62 AD2d 1017 [2d Dept. 1978]; *General Motors Acceptance Corp. v Norstar Bank of Hudson Valley*, 156 AD2d 876 [3d Dept. 1989]; *A.FL. Falck v E.A. Karray Co.*, 722 F. Supp. 12, 15 [S.D.N.Y. 1989].)

The court may decide such motions on the submissions of the parties unless there are"disputed issue[s] of material fact." (*Aluminum Co. Of America v Moskovitz,* supra.) The court's job is "not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." (*Knight v U.S. Fire Insurance Co.*, 804 F.3d 9, 11 [2d Cir. 1986], cert denied, 480 U.S. 107 [1987].) The court must also determine whether issues in dispute are "material to the outcome of the litigation." *Id*. An issue that is unresolved but not material to the outcome of the case will not defeat the motion. *Id*. at 11-12 (citing *Quarles v General Motors Corp*., 758 F.2d 839, 840 [2d Cir. 1985].)

Special proceedings against the shareholders of closely held corporations seeking to find such shareholders personally liable for the corporation's debts are customarily founded on either Article 10 of the Debtor and Creditor Law or alternatively from a piercing of the corporate veil theory. With respect to any potential claims pursuant to Article 10 of the Debtor and Creditor Law, the evidence adduced in the moving papers establish the petitioners' entitlement to summary determination on this issue and, respondents' papers are insufficient to rebut petitioners' prima facie showing. (See, CPLR §409[b]; *Matter of WBP Cent. Assoc., LLC v DeCola*, supra).

"Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment."(DCL § 273) Claims pursuant to DCL §§ 273 and 273-a do not require pleading or

proof of actual intent to defraud the creditor. (See, *Matter of Steele*, 85 AD3d 1375 [3d Dept. 2011]; *Fischer v Sadov Realty Corp.*, 34 A.D.3d 632 [2d Dept. 2006]*; Atsco Ltd. v Swanson*, 29 AD3d 465 [1st Dept. 2006]; *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept.1999].)

Courts have found that a successful claim under DCL section 273-a requires that 1) the conveyance was made without fair consideration; 2) the conveyor is a defendant in a money judgment action or a judgment has already been docketed against him; and 3) the defendant has not satisfied the judgment. (See, *Grace v Bank Leumi Trust Company of New York*, 443 F.3d 180, 188 [2d Cir. 2006].) Here, 2 and 3 are not at issue. Respondent became a defendant in a personal injury action in August of 2007 and was a defendant on with a default judgment entered against it on August 29, 2008, when it sold the subject premises, satisfying the second element of this section. In addition, Respondents have presented no evidence, and in fact do not deny, that the judgment remains outstanding. Therefore, whether the transfer of the subject premises belonging to LST and thus attachable by the Petitioners was fraudulent rests on whether the transfer was made without fair consideration.

Consideration for purposes of this law is defined in DCL section 272. This section requires that "the recipient of the debtor's property must either convey property or discharge an antecedent debt in exchange; ... the exchange must be for a fair equivalent; and... the exchange must be 'in good faith.' " *Neshewat v. Salem*, 365 F.Supp.2d 508, 519 [S.D.N.Y. 2005][citations omitted].) No evidence has been presented that the respondents gave anything of value to LST for the direct distribution of the proceeds from the sale of the subject premises, or further, that such distribution was consideration for any debt respondents may have owed to LST.

In order to have a transfer set aside in a turnover proceeding, the petitioner must prove

either that: one, the judgment debtor's transfer was fraudulent as to creditor without regard to actual intent as it lacked "fair consideration," pursuant to DCL §§ 273, 274, or 275; or two, the judgment debtor actually intended to defraud the judgment creditor by the transfer, pursuant to DCL § 276. Notably, "fair consideration requires that the exchange not only be for equivalent value, but also that the conveyance be made in good faith." [*Ede v Ede*, 193 AD2d 940 (3d Dept. 1993].) Furthermore, petitioners have the burden of proving, by clear and convincing evidence, that the transfer was fraudulent as defined under DCL § 273. (See, *Farkas v D'Oca*, 305 AD2d 237 [1st Dept. 2003]; but see, *In re Borriello*, 329 BR 367 [Bankr. ED NY 2005][bankruptcy trustee seeking to set aside a conveyance as fraudulent under DCL § 273 has the burden of proof by a preponderance of the evidence].)

Also fraudulent are transfers made without fair consideration which would leave the transferor with an unreasonably small amount of capital with which to operate the business [DCL § 274]; or the transfer was made when the transferor knew that debts would be incurred beyond its ability to pay [DCL § 275]. Petitioner alleges that the transfer made by LST lacked "fair consideration" since it was made for the sole benefit of its only shareholders, of the insolvent transferor in derogation of the interests of other creditors. (See, *P.A. Building Company v Silverman*, 298 AD2d 327 [1st Dept 2002][preferential transfers to directors, officers and shareholders of insolvent corporation in derogation of rights of other creditors are not made in good faith].)

"A determination of insolvency and what constitutes fair consideration are generally questions of fact." (*Epstein v Nieves*, 258 AD2d 436 [2d Dept 1999]; see also, *Quality Jewelry Co. v Genevit Creations, Inc*., 248 AD2d 103 [1st Dept 1998]; *49-50 Associates v Free-Tan*

Corp., 248 AD2d 128 [1st Dept. 1998]; but see, *CIT Group/Commercial Services, Inc. v 160-09 Jamaica Avenue Limited Partnership*, 25 AD3d 301 [1st Dept. 2006].) However, in this instance, there is no dispute that the subject premises was the sole asset of LST; therefore, its sale necessarily left the entity insolvent, and further, the respondents do not dispute that no consideration was paid at closing to LST in exchange for their receipt of the sale proceeds.

However, issues of fact exist as to whether the transfer was fraudulent under DCL § 276, which 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." (DCL § 276) "DCL § 276 addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency," and the pleader is permitted to rely on "badges of fraud" such as a close relationship between the parties involved in the transfer, to show actual intent to defraud or hinder present or future creditors. (*Wall Street Associates v Brodsky*, 257 AD2d 526 [1st Dept. 1999].) At the same time, however, such "badge[s]" of fraud "merely permit[] an inference of fraudulent intent [and].. [are] not conclusive," and to set aside a conveyance as fraudulent it must be shown by clear and convincing evidence that there was an actual intent to defraud. (*Sybax, Inc. v Bingaman*, 219 AD2d 552 [1st Dept. 1995];*CIT Group/Commercial Services, Inc. v 160-09 Jamaica Avenue Limited Partnership*, supra; see also, *Guerrand-Hermes v Guerrand-Hermes*, 30 AD3d 339 [1st Dept. 2006][fact question as to whether borrower-son had "honest purpose" in making a judgment by confession in favor of lender-father warranted a hearing on motion by borrower's ex-wife to vacate judgment by confession as a fraudulent conveyance under DCL § 276].)

Accordingly, petitioners' petition is granted as to their claims pursuant to DCL § 273-a. However, as to that branch of petitioners' petition seeking relief pursuant to DCL § 276 and 276-a, the motion is denied. Summary judgment relative to that claim, and the associated claim for attorneys' fees pursuant to DCL § 276-a, is unwarranted. (see *Cadle Co. v Organes Enterprises, Inc*., 29 AD3d 927[2d Dept. 2006]; *Manufacturers & Traders Trust Co. v Lauer's Furniture Acquisition* [appeal No. 2], 226 AD2d 1056 [4th Dept. 1996], lv dismissed 88 NY2d 962 [1996]; *Furlong v Storch*, 132 AD2d 866 [3d Dept. 1987].)

Settle Judgment.

Dated: January 18, 2013

SIDNEY F. STRAUSS, J.S.C.