

**Uni-Rty Corp. v New York Guangdon Fin., Inc.**

2013 NY Slip Op 31608(U)

July 19, 2013

Sup Ct, New York County

Docket Number: 157621/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: HON. ELLEN M. COIN  
A.J.S.C. PART 63

Uni-Rty Corporation and Golden Plaza  
Limited Partnership

INDEX NO. 157621/2012  
MOTION DATE 2/28/2013  
MOTION SEQ. NO. 001, 002 and 003  
E-FILED

-v-

New York Guangdong Finance, Inc.  
et al.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for.

<u>Papers</u>	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	<u>1</u>
Answering Affidavits - Exhibits	<u>2</u>
Reply Affidavits	<u>3</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

In this Article 52 proceeding (motion sequence 001) petitioners seek to enforce a judgment issued against respondent New York Guangdong Finance, Inc. ("NYGFI") on May 25, 2012<sup>1</sup> ("the Judgment") by the United States District Court for the Southern District of New York in the action entitled *Uni-Rty Corp. et al. v Guangdong Building, Inc. et al.*, Case No. 95 Civil 9432 ("Uni-Rty Litigation"). Respondents Guangdong Building, Inc., the Estate of Joseph Chu, Alexander Chu, Centre Plaza, L.L.C. and Eastbank, N.A. seek dismissal of the petition pursuant to CPLR §3211(a)(1), (3), (4), (5) and (7) (motion sequence 002). Respondents China Construction

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<sup>1</sup>The Judgment was thereafter amended on January 16, 2013 to reflect accrued interest in addition to principal, for the total amount of \$20,547,020.55

Bank and Agricultural Bank of China separately move to dismiss the petition (motion sequence 003). The court consolidates the three motion sequences for disposition.

**Petitioners' Order to Show Cause**

Petitioners commenced a plenary action in this Court, Index No. 650361/2012, prior to the entry of the Judgment. However, they are not precluded from enforcing the judgment by means of the instant turn-over proceeding, as a judgment creditor may chart its enforcement attempt through either a plenary action or a special proceeding pursuant to CPLR Article 52 . (See *Matter of WBP Central Assocs., LLC v DeCola*, 50 AD3d 693, 694 [2<sup>nd</sup> Dept 2008]). At any rate, during the pendency of this motion, petitioners withdrew without prejudice the claims remaining in the plenary action, thereby rendering moot objections under CPLR §3211(a)(4).

The parties' submissions demonstrate the existence of numerous factual disputes as to the identity of relevant assets, rights that NYGFI might have had in certain assets, release of liens, transfers of property and funds, and waiver of claims to assets previously transferred, all occurring as part of the October 24, 2005 settlement agreement among the shareholders of NYGFI. Given the complexity of the alleged financial transactions, any resolution of the outstanding issues will require post-judgment enforcement disclosure under CPLR §§5223 and 5224 and ultimately a summary determination pursuant to CPLR 409 or trial pursuant to CPLR §410 if

any issues of fact persist.

### **Motions to Dismiss**

On the motions to dismiss, the Court need not address the issues of petitioners' standing and capacity to commence an action or a proceeding in the dissolved corporation's name, as the identical arguments were previously rejected by the Court in the plenary action.

Petitioners cannot maintain this proceeding under Sections 273, 274 and 275 of the Debtor and Creditor Law, since the constructive fraud claims under these provisions are governed by the six-year statute of limitations set forth in CPLR 213(1) and accrue at the time the alleged fraudulent conveyances are made, here October 24, 2005.<sup>2</sup> (*Jaliman v D.H. Blair & Co. Inc.*, 105 AD3d 646, 647 [1<sup>st</sup> Dept 2013], citing *Wall Street Assocs. v Brodsky*, 257 AD2d 526, 530 [1<sup>st</sup> Dept 1999]).

"The limitation period for actual fraud [under DCL §276], on the other hand, is either six years from when the fraud took place (CPLR 213) or two years from the date of discovery (CPLR 203[g])." (*Avalon LLC*, 306 AD2d at 62). Because the parties' submissions fail to clearly establish when petitioners' duty of inquiry arose, the Court denies so much of the motion to dismiss as it relates to

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<sup>2</sup>Although at least some of the relevant transfers may have been finalized after the date of the execution of the settlement agreement, the accrual date is when the obligation to transfer vested. (*Avalon LLC v Coronet Co.*, 306 AD2d 62, 62 [1<sup>st</sup> Dept 2003]).

Section 276. (Cf. *Jaliman*, 105 AD3d at 647 [citation omitted]).<sup>3</sup>

Petitioners' claim of constructive fraud under Section 273-a is timely.<sup>4</sup> To prevail on that claim, plaintiff must establish three elements: that the transferor was a defendant in an action for money damages at the time of the transfer, that the transferor has not satisfied the resulting judgment and that the transfer was made without fair consideration. The existence of an unsatisfied judgment is an 'essential element' of this claim. (*Coyle v Lefkowitz*, 89 AD3d 1054, 1056 [2<sup>nd</sup> Dept 2011]). "Thus, [t]he six-year limitations period for such a claim [b]egins to run on the date of entry of the judgment" (*id.* [citations omitted]). Petitioners' time to bring their DCL §273-a claim began to run on May 25, 2012, the date of entry of the Judgment, well within the statute of limitations.

It is undisputed that NYGFI was a defendant in the underlying federal action for money damages when NYGFI's shareholders instituted and settled among themselves two actions regarding their own interests in NYGFI's assets, one in Harris County District Court in the State of Texas, entitled *China Construction Bank et al. v New York Guangdong Finance, Inc. et al.*, Cause No. 2001-43718, and another in this Court, entitled *China Construction Bank-Guangdong*

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<sup>3</sup> Further, the Court need not presently address the sufficiency of the allegations of actual fraud under DCL §276 in light of the discovery proceedings required for its determination.

<sup>4</sup> The petition did not expressly reference Section 273-a. However, in the interest of justice and in light of the fact that petitioners did cite Section 273-a in their opposition to respondents' motions, the Court deems this omission cured (CPLR §2001).

*Branch et al v New York Guangdong Finance, Inc. et al.*, Index No. 602811/2002. It is also undisputed that petitioners' May 25, 2012 judgment is final and enforceable; the judgment was not satisfied; no stay of the judgment was issued; and no bond was posted pending an appeal to the Second Circuit.

Further, although NYGFI's shareholders might have had a genuine dispute as to their claims against one another, the nature of the alleged conveyances remain preferential assignments among insiders, unduly prejudicial to general creditors. (*Pascal v Nova Casualty Co.*, 226 AD2d 688, 691 [2<sup>nd</sup> Dept 1996]; *Farm Stores, Inc. v School Feeding Corp.*, 102 AD2d 249, 255-56 [2<sup>nd</sup> Dept], appeal dismissed 623 NY2d 741 [1984]).

"[P]referential transfers to directors, officers and shareholders of insolvent corporations in derogation of the rights of general creditors do not fulfill the requirement of good faith." (*Matter of P.A. Bldg. Co. v Silverman*, 298 AD2d 327, 328 [1<sup>st</sup> Dept 2002][citations omitted]; see also *American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 [2<sup>nd</sup> Dept 2006]; *Freeman v D'ull*, 2008 NY Slip Op 33311(U), \*7 [Sup Ct, New York County 2008][citations omitted]).<sup>5</sup> Even assuming, *arguendo*, that the assignments of

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<sup>5</sup> Respondents China Construction Bank and Agricultural Bank of China argue that this rule does not apply to them, because they were not controlling shareholders. Their argument, however, presents an unduly narrow reading of the law. The status of a controlling shareholder is more relevant to claims brought by minority shareholders fearing a freeze out or dissipation of corporate assets than to claims made by general creditors challenging preferential payments to shareholders. Even if the respondent banks did not receive distribution of capital, but were only repaid loans they had

NYGFI's assets to shareholders were made in satisfaction of valid antecedent debts and for "fair equivalent" value, respondents, nonetheless, may be unable to show that the transfers were made "in good faith", a separate and independent requirement of fair consideration. (*Freeman, supra*; DCL §272(a)).

Respondents' reliance on the approval by New York and Texas courts of the shareholders' settlement is unavailing. The settlement resolved claims among NYGFI's shareholders. The court approval was a function of the derivative nature of the suits (BCL §626(d); Tex. Business Organizations Code §21.560) and cannot bind petitioners, which were not parties to those actions. Indeed, the settling shareholders made no provision for payment of petitioners' claims in the event of a judgment against NYGFI, and respondents fail to claim that they apprised either court of the settlement's utter disregard of the Uni-Rty Litigation.

Respondents China Construction Bank and Agricultural Bank of China ("the banks") contend that as foreign banks, they are shielded by the "separate entity" rule from application of Article 52 CPLR. The "separate entity" rule provides that "each branch of a bank is treated as a separate entity, in no way concerned with accounts maintained by depositors in other branches or at a home office." (*Cronan v Schilling*, 100 NYS2d 474, 476 [Sup Ct, New York County

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previously made to NYGFI, NYGFI's preference in repayment of creditor claims given to shareholder creditors over non-insider creditors is also suspect, as the subject conveyances rendered NYGFI insolvent.

1950; *Parbulk II AS v Heritage Mar., SA*, 35 Misc3d 235, 238 [Sup Ct, New York County 2011]; *Samsun Logix Corp. v Bank of China*, 31 Misc3d 1226[A] at \*3 [Sup Ct, New York County 2011]). This rule does not apply where, as here, the foreign banking institutions are not merely garnishees of their client's accounts, but direct recipients of alleged constructive fraudulent conveyances as NYGFI's shareholders. While the banks dispute receipt of any of NYGFI's assets from NYGFI, the fact that the NYGFI shareholders' settlement agreement expressly provides for certain asset transfers, albeit indirect, provides sufficient basis for petitioners' claim of fraudulent transfer. To the extent that respondents have argued that the Court in the plenary action dismissed without prejudice certain claims premised on indirect transfers of NYGFI's assets, petitioners are not precluded from reasserting them in this proceeding, as the prior claims were dismissed without prejudice at a preliminary stage, and the action was entirely discontinued without prejudice.

Finally, to the extent that instant petition may be viewed to contain claims to pierce NYGFI's corporate veil and for breach of fiduciary duties, those portions of the petition are dismissed for insufficiency of pleading.

In accordance with the foregoing, it is hereby

ORDERED that petitioners' motion brought by order to show cause, motion sequence 001, is denied; and it is further




ORDERED that the motion of respondents Guangdong Building, Inc., the Estate of Joseph Chu, Alexander Chu, Centre Plaza, L.L.C. and Eastbank, N.A. to dismiss the petition pursuant to CPLR §3211(a)(1), (3), (4), (5) and (7), motion sequence 002, is granted to the extent of the claims pursuant to DCL §§ 273, 274 and 275; a cause of action to pierce corporate veil; and a cause of action for breach of fiduciary duties, and is denied to the extent the petition is based on DCL §§ 273-a and 276; and it is further

ORDERED that the motion of respondents China Construction Bank and Agricultural Bank of China to dismiss the petition pursuant to CPLR §§404(a) and 3211(a)(3), (4) and (7), motion sequence 003, is granted to the extent of the claims pursuant to DCL §§ 273, 274 and 275; a cause of action to pierce corporate veil; and a cause of action for breach of fiduciary duties, and is denied to the extent the petition is based on DCL §§ 273-a and 276; and it is further

ORDERED that respondents shall answer the petition within 20 days of the docketing of this order.

This constitutes the decision and order of the Court.

Dated: 7/19/13

  
 Ellen M. Coin, A.J.S.C.

Check One:

CASE DISPOSED

NON-FINAL DISPOSITION