SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 153301/2013
3 WEST 16TH STREET, LLC
vs
ANCONA, STEVEN
Sequence Number : 001
SUMMARY JUDGMENT

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PART 61

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 9/27/13

_____, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

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 61

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3 WEST 16TH STREET, LLC,

Plaintiff,

Index No. 153301/13

- against -

STEVEN ANCONA, 31 BETHUNE STREET LLC, and 20 WARREN STREET LLC,

Defendants.

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HON. ANIL C. SINGH, J.:

Defendants move for summary judgment, pursuant to CPLR 3212, dismissing all or parts of the complaint in this fraudulent conveyance action. Plaintiff cross-moves, pursuant to CPLR 3212 (f), to hold defendants' motion in abeyance pending disclosure and, pursuant to CPLR 602 (a), to consolidate this action with another action.

Plaintiff 3 West 16th Street, LLC alleges that defendant Steven Ancona (Ancona) acted with fraudulent intent when he conveyed real property to defendants 31 Bethune Street LLC (Bethune LLC) and 20 Warren Street LLC (Warren LLC). Allegedly, Ancona transferred the properties to insulate himself from the judgment that plaintiff obtained against him in another action, which will be referred to as the Magen action (*see Magen David of Union Sq. v 3 W. 16th St., LLC*, 2010 WL 8367581 [Sup Ct, NY County, July 22, 2010], *affd* 89 AD3d 24 [1st Dept 2011]).

Ancona is the sole owner of nonparty 3 West Development, LLC (West), which became plaintiff's tenant pursuant to a 2006 lease. West is one of the plaintiffs in the Magen action.

Ancona signed a guaranty unconditionally guaranteeing to pay plaintiff 45% of West's obligations under the lease and 45% of all monetary losses incurred by plaintiff. West defaulted on payments and otherwise breached the lease. West and its subtenants brought the Magen action against plaintiff in 2008, and plaintiff brought a third-party action on the guaranty against Ancona. In 2010, Justice Debra James granted plaintiff's motion for summary judgment on liability on its counterclaims for breach of the lease and on its third-party action against Ancona. The First Department affirmed this decision on September 29, 2011. According to plaintiff, the dollar amounts due from West and from Ancona are to be determined at trial, for which no date has been set.

On October 15, 2011, Ancona and the other owners of the transferred real properties formed and became members of defendants Bethune LLC and Warren LLC, and transferred real property at 31 Bethune Street to Bethune LLC and real property at 20 Warren Street to Warren LLC. The records show a consideration of $1 for each transfer. Allegedly, at the time of these conveyances, Ancona owed plaintiff about $3.65 million, 45% of what West owes plaintiff.

In his moving affidavit, Ancona states that he and four other persons owned the Bethune Street and Warren Street properties as tenants-in-common. All of the owners are named Ancona; their relationship to Ancona is not defined. Ancona owned 70.68% of the Bethune Street property and 20% of the Warren Street property. In return for transferring his or her interest in the property to defendant limited liability companies, each tenant-in-common received the same interest in the transferee company as he or she had owned in the property that was transferred. Thus, Ancona now owns a 70.68% membership interest in Bethune LLC and a 20% membership interest in Warren LLC. Plaintiff alleges that Ancona's interest in each transferred property was

worth at least $1 million and that the transfers rendered him insolvent. The complaint sets forth causes of action for fraudulent conveyance and constructive fraud.

The party moving for summary judgment must show prima facie entitlement to judgment as a matter of law by producing sufficient admissible evidence demonstrating the absence of any material factual issues (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of any opposition (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). On a motion for summary judgment, the court determines whether material factual issues exist and does not resolve any such issues (*Ruiz v Griffin,* 71 AD3d 1112, 1115 [2d Dept 2010]). Evidence is viewed in the light most favorable to the opponent of the motion (*Vega,* 18 NY3d at 503).

To be entitled to summary judgment, defendants must show that the conveyances were not fraudulent, and that there is no issue of fact concerning whether they were fraudulent. Pursuant to Debtor and Creditor Law (DCL) § 276, a conveyance made "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." Because of the difficulty of proving actual fraudulent intent, the pleader is allowed to rely on so-called "badges of fraud" (*Wall St. Assoc. v Brodsky,* 257 AD2d 526, 529 [1st Dept 1999]). Badges of fraud are circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent (*id.*; *see also Atsco Ltd. v Swanson,* 29 AD3d 465, 465–466 [1st Dept 2006]). Badges of fraud include a close relationship between the transferor and transferee, a transfer not in the usual course of business, inadequate consideration paid to the transferor, the transferor's knowledge of the creditor's claim and his or her inability to pay it, and the

transferor's retention of control of the property after it is transferred (*Wall St.*, 257 at 529). While DCL § 276 does not require proof of unfair consideration or insolvency, those factors may be considered in determining the existence of fraudulent intent (*United States v Carlin*, 948 F Supp 271, 277 [SD NY 1996]). The transferor's failure to receive fair consideration for the transfer creates a rebuttable presumption of fraudulent intent (*id.* at 278). Fair consideration exists when the property given in exchange for a conveyance is the fair equivalent of the conveyed property (DCL § 272 [a]). Good faith, consisting of honesty, fairness, and openness, on the part of both transferor and transferee is an indispensable component of fair consideration (*id.*; *Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership,* 25 AD3d 301, 303 [1st Dept 2006]). A transaction not made in good faith is deemed to lack fair consideration (*American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 [2d Dept 2006]).

Badges of fraud exist in this case, presenting an issue of fact as to whether defendants acted with fraudulent intent. No explanation is given for Ancona's apparent sudden desire to transfer the properties to limited liability companies apparently under his or a family member's control. Although Ancona did not transfer properties to family members, he and persons to whom he appears to be related transferred their properties to entities owned by themselves. Ancona is the manager of Bethune LLC, and Jack Ancona, one of the transferees and members, is the manager of Warren LLC.

Ancona argues that, since he owns the same percentage in the transferees as he owned in the real property before the transfers, the transfers were for fair consideration. He argues that he merely exchanged one type of asset for another of equivalent value, and that plaintiff's interest as a creditor was not thereby injured. The fraudulent conveyance law serves to prevent a debtor

from unfairly diminishing its property in order to take it out of the reach of a creditor (*AMP Servs., Ltd. v Walanpatrias Found.*, 34 AD3d 231, 232 [1st Dept 2006]). Ancona argues that since he still owns as much of the properties as before the transfers, albeit in another form, his assets were not unfairly diminished. Hence, it is argued, the transfers were not fraudulent.

Defendants cite to *Cabrera v Ferranti* (89 AD2d 546 [1st Dept 1982]), in which, in return for transferring real property to corporations, each transferor received shares in the transferee corporation. The *Cabrera* court determined that the creditor had made a prima facie showing that the amount of stock received by each transferor was not a fair equivalent for the transferred property. The transferors' interest in the property transferred was reduced. For instance, a transferor who had a 100% interest in the property, was, upon transfer, issued shares equivalent to a 12% beneficial interest in the property. The court did not remark on the fact that the transferors and their family members owned the transferee corporations or discuss the question of the transferors retaining control over the properties. Accordingly, defendants contend that Ancona's ownership in the transferees is irrelevant, and that what matters is whether he received a fair equivalent for the conveyance, which allegedly he did.

Stock received in consideration of a transfer represents property and may be reached by the creditors of the transferor. A creditor may enforce a money judgment by attaching a debtor's shares (CPLR 5201 [c] [4]; *Gallant v Kanterman,* 249 AD2d 59, 62 [1st Dept 1998]). The creditor can become owner of the shares and thus, owner of the corporation that issued the shares. The *Cabrera* court's decision was probably informed by the creditors' ability to take the debtors' places in the corporations and obtain all of the rights attendant upon share ownership, such as voting.

Nonetheless, as noted by one authority, transfers where property is exchanged for shares in the transferee corporation "have been condemned in many cases where, from the surrounding circumstances and facts, it was evident that the transaction was with the intent of hindering, delaying, or defrauding creditors" (P. H. Vartanian, *Transfer of property by debtor to corporation, in consideration of its stock, as a fraud on creditors*, 85 ALR 133, ¶ II [a]). In the same vein, "[t]he transfer . . . of all their tangible property to a corporation formed by the members of the partnership for the purpose of acquiring such firm assets, without giving any consideration save the issue of stock therefor . . . is about as suspicious a circumstance, and as indicative of an intent to hinder the firm creditors as anything that can readily be imagined" (*Buell v Rope,* 6 AD 113, 116 [2d Dept 1896]). Thus, the exchange of property for corporate stock may indicate fraudulent intent. In the case of limited liability companies, where property is exchanged for membership interests, the circumstances can be just as or even more indicative of intent to hinder or defraud. This is because a creditor does not have as much access to membership interests as it does to stock.

No creditor of a member in a limited liability company has a right to obtain possession of, or otherwise exercise legal or equitable remedies, with respect to the company's property (Limited Liability Company Law [LLC] § 607 [b]). A judgment creditor of a member may apply to a court to charge the member's membership interest with payment of the unsatisfied amount of the judgment. To the extent so charged, the judgment creditor is afforded only the rights of an assignee (LLC § 607 [a]). Assignment of the membership interest vests the assignee solely with the right to receive the distributions and allocations of profits and losses to which the assignor would be entitled (LLC § 603 [a] [3]). Assignment does not entitle the assignee to engage in the

management and business of the limited liability company or to exercise any powers or rights of members, except with the consent of at least a majority-in-interest of the members other than the member-assignor (LLC §§ 603 [a] [2], 604 [a]). The rights of a judgment creditor do not deprive any member of the benefit of any exemption laws applicable to his or her membership interest (LLC § 607).

A creditor with a charging order cannot directly attach the interests of the limited liability company, but receives any payments made from that member's distributional interest. If the company makes no distributions, the creditor will not receive any payments. Both operating agreements in this case provide that the determination to make distributions to the members is within the manager's sole discretion.

New York's LLC law does not provide that a charging order is a creditor's exclusive remedy against a member. That means that a creditor may be able to foreclose on the member's interest in the limited liability company and become owner of its financial rights in the company, and thus, obtain more authority than a mere assignee. However, that appears to be a rare event. Under the present state of the law, there exists good reason to posit that transferring property to a limited liability company puts it more out of the creditor's reach than transferring it to a corporation. In this case, the exchanges between Ancona and the limited liability defendants raise an issue of fact as to intent to hinder and delay the creditor's access. Ancona retains his property, in a certain form, while at the same time placing it beyond the reach of execution by his creditors.

In addition, a transfer may be fraudulent even if the transferor receives fair consideration, as long as the transfer was made with the requisite intent to defraud, hinder, or delay (*HBE*

Leasing Corp. v Frank, 48 F3d 623, 639 [2d Cir 1995]). Assuming that Ancona received fair consideration, a factual issue remains as to intent. Whether the transaction was attended by good faith is also a question. Where a corporate insider participates in both sides of the transfer and the insider controls the transferee, the transfer will be deemed to have been made in bad faith if made to a creditor's detriment (*Matter of Mega Personal Lines, Inc. v Halton*, 9 AD3d 553, 555 [3d Dept 2004]; *Matter of Superior Leather Co. v Lipman Split Co.,* 116 AD2d 796, 797 [3d Dept 1986]), even if the transaction involved the exchange of fair equivalents (*Matter of Sharp Intl. Corp. v State St. Bank & Trust Co.,* 302 BR 760, 779 [Bankr ED NY 2003], *affd* 403 F3d 43 [2d Cir 2005]). Ancona transferred the property to entities in which he apparently exercises control. It appears that the transfers were made to reduce the chances of plaintiff's collecting the debt. Even if the exchanges were for fair equivalents, there is a question of fact as to bad faith.

Another factor permitting an inference of intent to defraud is the amount of time that elapses between an event alerting the debtor that the creditor may claim the property and the subsequent, allegedly fraudulent conveyance of the property (*see Matter of Zabkar,* 133 BR 3, 4 [Bankr WD NY 1991] [transfer was made 21 days after debtor received bank loan]; *Kreisler Borg Florman Gen. Constr. Co., Inc. v Tower 56, LLC*, 58 AD3d 694, 696 [2d Dept 2009] [transfer was made "only days before the plaintiff entered its default judgment for money damages"]; *Barnett v Bell,* 213 AD2d 276, 276 [1st Dept 1995] [transfer of property occurred four days after adverse verdict was rendered against transferor]). In this case, the transfers were made less than a month after the First Department affirmation of the judgment against Ancona.

Debtor and Creditor Law §§ 273 and 273–a are based on constructive fraud. Liability pursuant to those sections does not require proof of actual intent to defraud (*see American Panel,*

31 AD3d at 587). Section 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Under section 273-a, a conveyance made without fair consideration by a person who is a defendant in an action for money damages or against whom a judgment in such an action has been docketed, is fraudulent if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

Insolvency is presumed if fair consideration is lacking (*First Keystone Consultants, Inc. v Schlesinger Elec. Contrs., Inc.*, 871 F Supp 2d 103, 120 [ED NY 2012]; *United States v Alfano*, 34 F Supp 2d 827, 845 [ED NY 1999]). In this case, the evidence of lack of fair consideration leads to a presumption of insolvency, which defendants do not rebut. The conveyances were made when Ancona was a defendant in the Magen action and there is evidence that the conveyances were not made for fair consideration. Therefore, the claim for constructive fraud cannot be dismissed.

Plaintiff's claim for a money judgment is not dismissed. As a general rule, the creditor's remedy in a fraudulent conveyance action is "limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance" (*Marine Midland Bank v Murkoff,* 120 AD2d 122, 133 [2d Dept 1986]). Nonetheless, a money judgment may properly be granted where the conveyed property cannot be recovered from the transferee (*id.* at 133; *see also Lending Textile, Inc. v All Purpose Accessories, Ltd.,* 174 Misc 2d 318, 320-321 [App Term, 1st Dept 1997]). Dismissing the demand for a money judgment would be premature, since it is not known whether the conveyances may be set aside.

Regarding plaintiff's cross motion to consolidate this action with the Magen action, the reason given is that cost and delay will be avoided. Plaintiff states that Justice James, having presided over the Magen action since 2008, is in the best position to adjudicate the issues in this case. When there are common questions of law and fact between two cases, consolidation is favored in the interest of judicial economy, ease of decision making, and uniform resolution, unless the party opposing consolidation shows that a substantial right will be prejudiced (*Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept 1993]). Consolidation is appropriate where the cases involve the same issues and will require the same witnesses (*Chinatown Apts., Inc. v New York City Tr. Auth.*, 100 AD2d 824, 825 [1st Dept 1984]). A motion to consolidate is directed to the sound discretion of the court (*Inspiration Enters. v Inland Credit Corp.*, 54 AD2d 839, 840 [1st Dept 1976]).

Ancona and the plaintiff in this action are parties in the Magen action. Ancona owns one of the plaintiffs in the Magen action. That action resulted in a determination that Ancona and the those plaintiffs are liable towards plaintiff in this action. The next step in the Magen action is to have a trial to determine the amount that the plaintiffs in the Magen action owe to the plaintiff in this action. That, in turn, will determine how much Ancona owes the plaintiff in this action. Once that amount is established, the question becomes whether Ancona fraudulently conveyed his properties. That is the issue in this action. It is appropriate for both actions to be handled by the same judge, given the identity of parties and probably evidence and witnesses. On the other hand, militating against consolidation is the fact that the plaintiffs in the Magen action are almost finished with that case. No reason is given that they should be involved in this case. The motion to consolidate will be denied without prejudice until after the trial in the Magen action. Then

plaintiff may, if it chooses, move to consolidate or for joint trial of the part of the two cases that involve Ancona's liability. Also, the cross motion to hold Ancona's motion in abeyance so that disclosure may be conducted is denied.

To conclude, it is

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion is denied, except for the part seeking consolidation which is denied without prejudice; and it is futher

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on November 20, 2013, at 9:30 AM.

Dated: 9/27/13

ENTER:

J.S.C. HON. ANIL C. SINGH SUPREME COURT JUSTICE