

Grinshpun v Borokhovich

2017 NY Slip Op 31127(U)

May 22, 2017

Supreme Court, New York County

Docket Number: 651846/2012

Judge: Kelly A. O'Neill Levy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X
ARON GRINSHPUN, SAM ZELTSER, ZELIG
ZELTSER, and THREE STAR CAPITAL, LLC,

Plaintiffs,

-against-

GENNADY (a/k/a Eugene) BOROKHOVICH, ELENA
BOROKHOVICH, BOROKHOVICH & SONS MANAGEMENT
GROUP LLC, 2824 EMMONS LLC, LAVANDA & BLUES
LLC, 2814 EMMONS LLC and 2814-2824 EMMONS
ACQUISITION, LLC,

Defendants.
-----X

DECISION/ORDER

Index No.:
651846/2012

Mot. Seq. 016

Kelly O'Neill Levy, J.:

In the underlying complaint, plaintiffs Aron Grinshpun (Grinshpun), Sam Zeltser, Zelig Zeltser, and Three Star Capital, LLC seek to set aside the transfers and conveyances of two properties and the transfer of money to satisfy a judgment they obtained against defendant Gennady (a/k/a Eugene) Borokhovich (Gennady). In this motion, motion sequence number 016, defendant 2814-2824 Emmons Acquisition, LLC (Emmons Acquisition) moves, pursuant to CPLR 3212, for an order granting it summary judgment dismissing the four causes of action alleged against it. Gennady and Elena Borokhovich (Elena) submit affidavits in support of Emmons Acquisition's motion.

BACKGROUND AND FACTUAL ALLEGATIONS

In a previous action, on November 9, 2011, a default judgment was entered in plaintiffs' favor as against Gennady in

the amount of \$2,348,696.54. See Grinshpun aff in opposition, exhibit B, *Grinshpun v Borokhovich*, Sup Ct, NY County, Nov 9, 2011, Oing, J., Index No. 115376/2010, *affd Grinshpun v Borokhovich*, 100 AD3d 551, 551 (1st Dept 2012). This amount, along with interest, remains unpaid. Plaintiffs had alleged that Gennady defrauded plaintiffs in a "land scam," and caused them to transfer over \$2,000,000.00 to various entities that Gennady controlled. Emmons Acquisition's exhibit 40, amended complaint, ¶ 22. "In addition [Gennady] forged individual plaintiffs' names onto loan guarantee documents and usurped the loan proceeds for his personal gain." *Id.*

Subsequently, on May 30, 2012, in an attempt to recover the underlying judgment against Gennady, plaintiffs commenced the instant action, seeking to unwind the transfers of certain properties. They claim that, in 2008, Gennady began the process of liquidating and transferring assets to his wife Elena, and to shell entities and overseas bank accounts. According to plaintiffs, Gennady, Elena, and their alleged alter ego entities either were or appeared to be insolvent, as a way to shield Gennady's assets from creditors.

In relevant part, the amended complaint alleges that, on January 27, 2006, Gennady, through his 100% membership interest in Borokhovich & Sons Management Group LLC (Borokhovich & Sons LLC), purchased one of the two subject properties, located at

2824 Emmons Avenue in Brooklyn, New York. The purchase price was \$1,400,000.00.

On June 2, 2008, Gennady allegedly transferred 100% of the membership interests in Borokhovich & Sons LLC to Elena. The corresponding purchase and subscription agreement states that the sales price is \$100,000 and indicates that, subject to the terms of the agreement, the buyer, Elena, would assume the mortgage loan with Flushing Savings Bank in the amount of \$810,000. Plaintiffs' exhibit M at 2. This mortgage was being held for 2824 Emmons Avenue. Plaintiffs allege that there was no consideration because no money was ever paid.

On August 28, 2009, Borokhovich & Sons LLC transferred its ownership interest in 2824 Emmons Avenue to defendant 2824 Emmons LLC, an LLC controlled by Elena. 2824 Emmons LLC was formed on August 27, 2009. After this transfer, on September 13, 2010, 2824 Emmons LLC transferred the property to Emmons Acquisition.

Plaintiffs claim that the property was transferred to Emmons Acquisition without fair consideration and that, although the purchase price was listed for \$350,000.00, that amount was never paid. 2824 Emmons Avenue was vacant land, consisting of 5,000 square feet and sixty feet of waterfront area on Sheepshead Bay. Even if the full purchase price was paid, plaintiffs contend it was inadequate, as the property had an estimated fair market value of \$2,000,000.00.

Similarly, Gennady, through his 100% ownership interest in Lavanda & Blues LLC, purchased a property located at 2814 Emmons Avenue, Brooklyn, New York. As was done above, on June 2, 2008, Gennady allegedly transferred 100% of the membership interests in Lavanda & Blues LLC to 2814 Emmons LLC, an LLC solely owned by Elena. Although the corresponding purchase agreement states that the sales price was \$100,000, plaintiffs allege that again there was no consideration because no money was ever paid. Again, the purchase and subscription agreement indicates that, subject to the terms of the agreement, the buyer, Elena, assumes a mortgage loan of \$3,500,000 that was held with the Northeast Savings Bank. This mortgage was being held for 2814 Emmons Avenue.

On September 13, 2010, 2814 Emmons LLC transferred 2814 Emmons Avenue to Emmons Acquisition. Plaintiffs claim that the transfer documents list the purchase price as \$1,400,000.00 but that this amount was not paid. According to plaintiffs, even if the full price was paid, the amount was inadequate, as the estimated market value is \$5,000,000.00. 2814 Emmons Avenue measures 10,000 square feet, with 80 feet of waterfront area on Sheepshead Bay.

Plaintiffs allege that Gennady fraudulently conveyed properties and assets to multiple defendants, including Emmons Acquisition, as a way to defraud his creditors and render himself insolvent. Plaintiffs believe that Emmons Acquisition is an

"alter ego of [Gennady] that was used to perpetrate a scheme of fraudulent conveyances with the sole purposes of shielding [Gennady's] assets from his creditors." Amended complaint, ¶ 48. They claim that Emmons Acquisition is under the dominion and control of Gennady. As a result, the corporate veil of Emmons Acquisition should be pierced.

According to plaintiffs, Steven V. Maksin, Esq., (Maksin) the named attorney for Emmons Acquisition when it purchased 2814 and 2824 Emmons Avenue, also previously represented Gennady and had a personal relationship with Gennady and Elena. They allege that Maksin knew of Gennady's liabilities arising from the land scheme in Texas, and that "Maksin used his dual representation of [Gennady] and [Emmons Acquisition] to facilitate the transfer of the 2814 and 2824 Emmons Properties out of the reach of [Gennady's] creditors." *Id.*, ¶ 44. In addition, plaintiffs maintain that Gennady and Emmons Acquisition share the same office, and that Maksin also "represented 2148 Ocean Ave LLC, a Borokhovich entity which upon information and belief diverted over \$1,600,000.00 in cash out of the country." *Id.*, ¶ 41.

The amended complaint contends, among other things, that because the transfer and conveyances of the properties located at 2814 and 2824 Emmons Avenue were fraudulent, plaintiffs are entitled to a judgment setting aside those transfers and conveyances, to the extent necessary to satisfy the judgment owed

to plaintiffs.

As relevant for this motion, in their second and fourth causes of action, plaintiffs allege that the transfers and conveyances of 2824 Emmons Avenue and 2814 Emmons Avenue from 2824 Emmons LLC and 2814 Emmons LLC to Emmons Acquisition, without adequate consideration, constituted fraudulent conveyances, pursuant to Debtor Creditor Law (DCL) § 273. Plaintiffs claim that, pursuant to DCL § 278, they are entitled to set aside these transfers and conveyances, to the extent necessary to satisfy plaintiffs' judgment from November 9, 2011. Plaintiffs direct every defendant in the action to "immediately deliver to plaintiffs the entire amount required to satisfy the judgment as aforesaid." *Id.*, ¶ 110.

In their sixth and eighth causes of action, plaintiffs allege that the transfers and conveyances of 2824 Emmons Avenue and 2814 Emmons Avenue from 2824 Emmons LLC and 2814 Emmons LLC to Emmons Acquisition, without adequate consideration, constituted actual fraudulent conveyances, pursuant to DCL § 276. Plaintiffs claim that, pursuant to DCL § 278, they are entitled to set aside these transfers and conveyances, to the extent necessary to satisfy plaintiffs' judgment from November 9, 2011. They argue that the transfers and conveyances of the properties were received by Emmons Acquisition, "with intent to hinder Plaintiffs' rights as a creditor and judgment creditor and to

defraud plaintiffs in that regard in concert with the transferor[s]..." *Id.*, ¶ 120.

Emmons Acquisition argues that it is entitled to summary judgment dismissing the claims asserted against it, because it is a bona fide purchaser for value. It maintains that it had no intention to defraud plaintiffs and that it was not acting on behalf of Gennady. As set forth below, it explains, in relevant part, how it negotiated and purchased the properties from Elena for good and valuable consideration.

According to Emmons Acquisition, by the summer of 2010, Paradise Garden, a restaurant that was the tenant of 2814 Emmons Avenue, was in arrears, and Elena was unable to stay current on the mortgage payments. 2814 Emmons Acquisition allegedly then negotiated with 2814 Emmons LLC and 2824 Emmons LLC, the entities that are owned by Elena, concerning the arrears. The parties agreed that the principal of the mortgage would be reduced in exchange for a higher interest rate.

Emmons Acquisition explains that, prior to acquiring ownership in the two properties from Elena in September 2010, in June 2010, nonparty 2814 Emmons Acquisition LLC, an affiliate of Emmons Acquisition, closed on its purchase of the mortgages covering the two properties owned by 2814 Emmons LLC and 2824 Emmons LLC. Since June 14, 2007, Northeast Community Bank had held a mortgage in the amount of \$3,500,000 for 2814 Emmons

Avenue. On May 27, 2010, 2814 Emmons Acquisition LLC, purchased the mortgage from Northeast Community Bank for \$2,850,000.

In September 2010, when Elena's LLC continued to default on the mortgage payments, 2814 Emmons LLC sold 2814 Emmons Avenue to Emmons Acquisition for "a purchase price of the mortgage, \$1,400,000.00. . . . At the time of the transactions, the payoff amount of the mortgage was \$4,302,414.02, and pursuant to the transaction, this obligation was released." Emmons Acquisition's MOL at 11.

As was done with 2814 Emmons Avenue, in June 2010, 2814 Emmons Acquisition LLC purchased the 2824 Emmons Avenue mortgage from Flushing Savings Bank for the amount of \$653,500. This mortgage, in the amount of \$810,000, had been held by Flushing Savings Bank since February 13, 2006. The closing statement for the mortgage sets forth that 2814 Emmons Acquisition LLC purchased the loan from Flushing Savings Bank that was originally loaned to Borokhovich & Sons LLC. "In reward [Emmons Acquisition] satisfied Borokhovich & Sons LLC mortgage in the amount of \$350,000." Geercken affirmation, exhibit 38 at 5.

In September 2010, after Elena defaulted on the new mortgage terms, 2824 Emmons LLC sold this property to Emmons Acquisition for a reduced mortgage amount on the property of \$350,000. Emmons Acquisition states, "[a]t the time of this transaction, the payoff amount of the mortgage was \$1,012,672.55 and pursuant

to the transaction, this obligation was released." *Id.*, ¶ 37.

Elena submits an affidavit in support of Emmons Acquisition's motion. She states that there was nothing fraudulent about the transfer of the two properties to Emmons Acquisition. Elena contends that she knew that the premises were encumbered by mortgages. Elena claims, in pertinent part:

"I asked Steven Maksin, Esq., a trusted family friend and my husband's former business partner, to guide me through the process I surely could not read let alone understand the documents he asked me to sign on several occasions. I signed what he asked me to sign."

Elena aff, ¶ ¶ 8, 9.

In support of Emmons Acquisition's motion, Gennady states that he was not insolvent on June 2, 2008, the date he transferred his interests in Borokhovich & Sons LLC and Lavanda & Blues LLC to Elena. Gennady does not provide any documentation in support of his assertions, but claims that, at the time, his "assets were greater than my liabilities and I paid my debts as they came due." Gennady aff, ¶ 2. In his response to interrogatories, Gennady provides some information from his W-2 forms, and states what his liabilities were for the 2007-2010 years.¹

¹ Although neither addressed nor explained by Emmons Acquisition on this motion, some of Gennady's tax forms are attached as an exhibit to Emmons Acquisition's motion. Geercken affirmation, exhibit 27.

Maksin, the attorney who represented Emmons Acquisition in the purchase of the two properties, testified that he has known Gennady for at least ten years. In addition, Maksin testified that he has provided legal representation for Gennady, and also has prepared tax returns and formed LLCs for him.

Maksin testified that Emmons Acquisition did its due diligence when it reviewed the files. However, Maksin testified that the purchasing of the notes was done quickly, because "[t]ypically, the deals in New York are done where you come in, they give you a file for an hour, you make an offer and that's it." Emmons Acquisition's exhibit 4, Maksin tr at 15.

Emmons Acquisition provides an appraisal of the 2814 Emmons Avenue property that was given to Emmons Acquisition on August 15, 2010. The appraisal was performed by Maximillion Realty, Inc. (Maximillion), and states that the market value for the property, as of that date, was \$1,400,000.00. 2824 Emmons Avenue was appraised at \$350,000.00.

Emmons Acquisition argues that there is no evidence that it deliberately intended to hinder plaintiffs' rights as creditors against Gennady. In support, it alleges that plaintiffs were not yet creditors of Gennady when the transfers to Emmons Acquisitions were done in September 2010 as plaintiffs did not commence an action against Gennady until November 2010. According to Emmons Acquisition, at the time of the transfers, it

was unaware of Gennady's liabilities under the Texas land scheme, and was not in any way connected to Gennady.

Emmons Acquisition further argues that there is nothing to indicate that it is the alter ego of Gennady, as Gennady has never had any connection to the members of Emmons Acquisition or to the entities which provided funding to Emmons Acquisition. Emmons Acquisition argues that although Maksin and Gennady are members of the same social community and have had business relationships in the past, this cannot establish that Emmons Acquisition had actual intent to defraud plaintiffs.

Further, Emmons Acquisition claims that it is entitled to summary judgment dismissing the constructive fraud claims, because plaintiffs cannot establish that Gennady was insolvent at the time he transferred the properties to Elena, or at the time that she transferred them to Emmons Acquisition. It argues that although plaintiffs seek to enforce the judgment they obtained against Gennady, Gennady was not the owner of the properties at the time they were sold to Emmons Acquisition. Elena, who was the owner, is not a party to the judgment. Further, it maintains that Gennady did not have an interest in the transfers and conveyances to Emmons Acquisition.

In opposition to Emmons Acquisition's motion, plaintiffs contend that the transfers of the two properties from Gennady to

Elena and then to Emmons Acquisition were fraudulent.² They claim that there was no consideration for the transfer of Gennady's 100% membership interests in his LLCs to Elena, or for the transfer of the ownership interests in 2814 and 2824 Emmons Avenue to entities owned by Elena.

Grinshpun alleges that the appraisals made in connection with the transactions were fabricated. Maximillion's appraisal of the total value of the two properties, made in August 2010, was for \$1,750,000.00. Emmons Acquisition's appraisal, submitted in connection to this litigation, is for \$3,840,000.00. However, plaintiffs have submitted a retroactive appraisal indicating that the fair market value of 2814 and 2824 Emmons Avenue, as of September 13, 2010, was \$7,150,000.00. Guzowski aff, ¶ 5.

In addition, Grinshpun contends that Gennady "sequestered his money overseas and brought it back through an arrangement with Steven Maksin and Emmons Acquisition to discount his mortgages and shield his assets from creditors." Grinshpun aff, ¶ 3 (L). Plaintiffs attach copies of bank statements and wire transfers, allegedly documenting Gennady's withdrawals and overseas transfers in the amount of \$5,083,691.00, which appear to render him insolvent.

Plaintiffs allege that, also starting in June 2008, Gennady

² Plaintiffs also argue that Emmons Acquisition's papers in support of this motion are procedurally defective, but these arguments are without merit.

started fraudulently conveying other interests to Elena, such as his one-half ownership interest in their home. Among other transactions, one of Gennady's other LLCs sold property in June 2008, and Gennady allegedly withdrew close to \$1,690,000.00 from this account and transferred it to Elena and others.

Plaintiffs maintain that Gennady has been trying to hide from creditors since at least March 2008, when an involuntary bankruptcy petition was filed in Texas against J & T Development LP. In plaintiffs' initial complaint against Gennady, J & T Development was alleged to be the entity, directly or indirectly controlled by Gennady, that was used to purchase property in Texas. Plaintiffs claim that Gennady was aware of potential claims against him, and state that, in April 2009, another disgruntled investor in the Texas land scheme commenced an action against Gennady in this court.

Plaintiffs maintain that Elena is not an "innocent spouse," but an equal partner in Gennady's scheme. They argue that Elena is a highly-qualified licensed real estate professional who worked for Maximillion, the same agency that performed the appraisals, from 2003 through 2010. They note that she has several advanced graduate degrees, as well as certificates from schools in the Ukraine and New York City.

Plaintiffs maintain that Gennady, Elena and Maksin contradict each other regarding the catalyst for the sale of the

properties. For instance, Gennady testified that he asked Maksin to help Elena sell the properties, and that Maksin told him that he would find a buyer. He stated that he met Maksin at a restaurant, and that Maksin was there with Alexander Levin (Levin) and another man named "Yakov." Gennady said to Maksin, "[t]here is this property. And I told them the situation and everything. He introduced me to his friends there." Plaintiffs' exhibit Z, Gennady tr at 191. Gennady continued that, as evidenced by the sales, Maksin helped him sell the properties.³

Elena also testified that Maksin advised her to stop paying the delinquent mortgage payments that she owed to the bank for a while, because "he had a prospective buyer, and as a result of the transaction, my debts would be able to be paid back." Emmons Acquisition's exhibit 20, Elena tr at 95.

However, Maksin testified that he was unaware when 2814 and 2824 Emmons Avenue became available for purchase, and that he found out about them only when he and Levin had decided to approach banks for mortgages and loans on various properties. When questioned about speaking to Gennady about 2814 Emmons

³ The court further notes that, in Gennady's supplemental responses to interrogatories, when asked which person, on behalf of 2814 Emmons LLC and 2824 Emmons LLC, negotiated the terms and the transfer of the title of 2814 and 2824 Emmons Avenue to Emmons Acquisition; Gennady only responded that it was Gennady Borokhovich. Geercken reply aff, exhibit 4 at 4, 5. In addition, Gennady responded that he spoke to Maksin regarding these transactions. *Id.* at 2.

Avenue, Maksin testified that, after he bought the notes, he "realized that the next step is the foreclosure and that's when I think we approached Gennady - Elena, because she received the deed from him." Maksin tr at 17.

Plaintiffs claim that defendants created a "fake contract of sale" for both the sale of 2814 and 2824 Emmons Avenue properties, as they fail to mention the discharges of mortgages received as consideration of the conveyances or conditions of the sale. In addition, among other things, they claim that the New York State Transfer Tax Returns are inaccurate. Grinshpun aff, ¶ 21.

On reply, Emmons Acquisition submits the affirmation of Chrysostomos Sofocleous (Sofocleous), an attorney based in Cyprus, who represents both Yakubov CY Trust and Proteas Trustees Ltd. Sofocleous maintains that Yakubov CY Trust and its beneficiaries are the owners of the two properties at issue. He states that Gennady and Elena are not connected to Emmons Acquisition or its affiliate, 2814 Emmons Acquisitions LLC; rather, the members of Emmons Acquisition and 2814 Emmons Acquisitions LLC are Y & T Associates, LLC, MYTY L Plaza LLC and L Plaza Holding, Inc. L Plaza Holding, Inc. provided the funds for the transactions.⁴ Emmons Acquisition, 2814 Emmons

⁴ Plaintiffs note that L Plaza Holding, Inc. maintains an office at the same Brooklyn address that Lavanda & Blues LLC had its office.

Acquisition, LLC and L Plaza Holding, Inc. all have the same manager and director, Alexander Levin.⁵

According to Emmons Acquisition, plaintiffs have been unable to present evidence that it had knowledge of Gennady's debts to plaintiffs at the time of the transactions, or otherwise acted in bad faith. It argues that, as plaintiffs previously testified that they did not even know who the members of Emmons Acquisition were, they cannot possibly establish that Gennady was connected to Emmons Acquisition.

Even if there is a dispute about the appraised value of the properties, Emmons Acquisition alleges that the amount of antecedent debt, which was extinguished as a result of the purchases, establishes that fair consideration was paid. The amounts due under the mortgages for the two properties at the time totaled \$5,479,702.82, and this amount is not disproportionately small in relation to the \$7.15 million valuation provided by plaintiffs' appraiser.

As set forth below, the court notes other relevant items in the record for purposes of this motion.

Plaintiffs have alleged that Emmons Acquisitions created

⁵ During oral argument, by the use of a flow-chart, plaintiffs had alleged that one of the many individuals who make up the corporate owners of Emmons Acquisition is a Russian citizen who is Maksin's neighbor.

"fake" contracts of sale, among other documents. While the legitimacy of the documents submitted cannot be ascertained on the face of the record, the court agrees that the record is replete with irregularities. For example, there are two recorded deeds provided in the record for the August 2009 sale of 2814 Emmons Avenue to Elena's company. One of the deeds states that the sale was from Gennady, as Seller, to Elena, as Buyer. The other recorded deed, dated one day later, states that the seller is Lavanda & Blues LLC, and that the Buyer is 2814 Emmons LLC, the company in which Elena has a 100% membership interest. Elena also signed the deed on behalf of the seller, Lavanda & Blues LLC, as its managing member.

Previously, in motion sequence 014, Emmons Acquisition sought to cancel the notices of pendency for the two properties located at 2814 and 2824 Emmons Avenue. In opposition to Emmons Acquisition's motion, as the court noted in its decision, the Borokhovich defendants claimed that, although they did not believe the conveyances were fraudulent, what happened after 2814 Emmons Acquisition LLC acquired the mortgages and discharged such mortgages, "remain[ed] murky." Elena submitted an affidavit wherein she stated, in pertinent part, "I have never negotiated with [the lawyer] or anyone else to reduce the principal amount of these mortgages [held by Northeast Community Bank and Flushing Savings Bank]." Elena aff, ¶ 7.

The record indicates that, in December 2009, Flushing Savings Bank initiated foreclosure proceedings against 2824 Emmons LLC as a result of its default on the mortgage. The court records state that Maksin represented Elena in these proceedings. The plaintiff was Flushing Savings Bank and the defendants were 2824 Emmons LLC, Borokhovich & Sons LLC and Gennady.

Shortly thereafter, on June 30, 2010, Maksin represented Levin as purchaser of the 2824 Emmons Avenue mortgage. 2814 Emmons Acquisition LLC was listed as the purchaser of the mortgage. This resulted in the assignment of the rights of Flushing Savings Bank to 2814 Emmons Acquisition LLC. The transaction summary indicates that 2814 Emmons Acquisitions LLC was able purchase the mortgage at a reduced price. Emmons Acquisition's exhibit 34.

Evidently, on August 15, 2010, in connection with the conveyances from 2824 Emmons LLC to Emmons Acquisition, both Gennady and Elena signed a promissory note in the amount of \$350,000.00. Gennady, as "sole member" of Borokhovich & Sons LLC, and Elena, as "sole member of 2824 Emmons LLC (hereinafter designated as 'Maker' or 'Borrower')", promised jointly and severally to pay 2814 Emmons Acquisitions LLC, on or before August 15, 2022, the principal sum of \$350,000.00. Geercken aff, exhibit 37.

In its interrogatory responses, Emmons Acquisition states

that 2814 Emmons Acquisition LLC paid \$653,000 to acquire the mortgage that Flushing Savings Bank held on the 2824 Emmons Property. Thereafter, "2814 Emmons Acquisition LLC negotiated a new mortgage with Gennady and Elena Borokhovich personally, Borokhovich & Sons Management Group LLC and 2824 Emmons LLC, reducing the principal amount to \$350,000, increasing the interest rate and adding the Borokhoviches' personal residence as collateral." Geercken affirmation, exhibit 6 at 13.

As noted in the facts, the closing statement states that 2814 Emmons Acquisition LLC purchased from Flushing Savings Bank, the loan that was originally made to Borokhovich & Sons LLC. "In reward [Emmons Acquisition] satisfied Borokhovich & Sons LLC mortgage in the amount of \$350,000." Geercken aff, exhibit 38 at 5.

In the appearances section of the September 7, 2010 closing statement, memorializing the transfer of 2814 Emmons Avenue to Emmons Acquisition, Gennady and Elena are listed under both 2814 Emmons LLC and Lavanda & Blues LLC as "sellers." Sofocleous aff, exhibit 9 at 2. Yakov Yakubov is listed as the purchaser for Emmons Acquisition, with Levin being listed as the director of Emmons Acquisition. The closing statement is similar for the sale of 2824 Emmons Avenue.

DISCUSSION

I. Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law."

Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1st Dept 2007).

The failure by the movant to make a prima facie case "requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *Id.* at 544 (citation omitted).

DCL § 273, 276 and 278

Pursuant to DCL § 273, "[a] conveyance that renders the conveyor insolvent is fraudulent as to creditors without regard to actual intent, if the conveyance was made without fair consideration." *Matter of CIT Group/Commercial Servs., Inc. v*

160-09 Jamaica Ave. Ltd. Partnership, 25 AD3d 301, 302 (1st Dept 2006). DCL § 271 defines insolvency to mean the present fair salable value of the assets is less than the amount that will be required to pay the probable liability on existing debts as they become absolute and matured. It is well settled that the DCL "extends protection against fraudulent transfers to debts not in existence at the time of the transfer." 48-48 Assoc. v Piccoli, 243 AD2d 291, 291 (1st Dept 1997).

DCL § 278, which affords a creditor the right to set aside a fraudulent conveyance, states the following, in relevant part:

"Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,
a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim."

DCL § 278 (1) (a).

Emmons Acquisition claims that plaintiffs have produced no evidence that Gennady was insolvent at the time of the transactions, or became insolvent as a result thereof. To support this contention, it provides an affidavit from Gennady and his responses to interrogatories, whereby he states that he was not insolvent when he transferred his ownership interests in his two companies to Elena on June 2, 2008.

Plaintiffs have the burden of proving insolvency and lack of consideration for a determination of constructive fraud under DCL § 273. *Joslin v Lopez*, 309 AD2d 837, 838 (2d Dept 2003). The determination of insolvency is generally a "question[] of fact." *Serota v Power House Realty Corp.*, 274 AD2d 427, 427 (2d Dept 2000).

Emmons Acquisition maintains that, at the time of the conveyances to Emmons Acquisition, both 2814 and 2824 Emmons LLC were owned by Elena, who is not the debtor. However, the discrepancies in the record raise an issue of Gennady's financial involvement in the conveyances from Elena's alleged LLCs to Emmons Acquisition. As noted in the facts, on August 15, 2010, Gennady and others individually, signed a promissory note, to pay \$350,000.00 to Emmons Acquisition's affiliate, in connection with the sale. Emmons Acquisition further stated, in its interrogatory responses, that its affiliate negotiated a new mortgage with Gennady and others individually, in connection to the transfer of title from 2814 and 2824 Emmons LLC to Emmons Acquisition.

Plaintiffs submit bank statements demonstrating that, during the 2008-2010 time period, Gennady made multiple withdrawals and international wire transfers. Therefore, at this point, plaintiffs have raised a triable issue of fact because the court is unable to ascertain the date when Gennady became insolvent,

thereby possibly rendering some of the conveyances to Elena, and subsequently to Emmons Acquisition, fraudulent under DCL § 273.

Fair consideration is given when, in exchange for property or an obligation, "as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied." DCL § 272 (a). With respect to fair consideration for the first conveyance of the properties, the record indicates that Gennady transferred 100% of his interests in the two LLCs, Lavanda & Blues LLC and Borokhovich & Sons LLC, to Elena for \$100,000 each. As part of the agreement, the buyer was also responsible for taking over the mortgages on the two properties. When Lavanda & Blues LLC and Borokhovich and Sons LLC transferred their 100% ownership interests in the properties to 2814 Emmons LLC and 2824 Emmons LLC, there was no consideration for these transfers.

In general, the determination of what constitutes fair consideration is a question of fact. *Serota v Power House Realty Corp.*, 274 AD2d at 427. "A conveyance between family members is subject to enhanced scrutiny. . . . [A]n intra-family transaction places a heavier burden on defendant to demonstrate fairness." *Sardis v Frankel*, 113 AD3d 135, 145 (1st Dept 2014) (internal quotation marks and citation omitted). Here, the initial conveyances were made between family members, at a time when Gennady was, concurrently, transferring his interest in the marital home to Elena, and transferring millions of dollars to

his wife and other entities. Accordingly, Emmons Acquisition has not met its burden to demonstrate fair consideration.

Emmons Acquisition states that it provided fair consideration for the two properties, because its purchases caused the antecedent debt of \$5.4 million due on the mortgages to be released. As set forth in the facts, Emmons Acquisition negotiated for a reduced mortgage rate and then paid a total purchase price of \$1,750,000.00 for the two properties. This amount matched the appraisal value provided by Maximillion in 2010.

In connection to this motion, both parties have provided appraisals regarding the fairness of the consideration involved in the subsequent transfer of the properties between Elena's LLCs and Emmons Acquisition. Plaintiffs' retroactive appraisal is for \$7,150,000 and Emmons Acquisition's is for \$3,840,000.

In order for Emmons Acquisition to establish that it is a bona fide purchaser, Emmons Acquisition has the burden to prove that it "purchased the property for valuable consideration and that [it] did not purchase with knowledge of facts that would lead a reasonably prudent purchaser to make inquiry." *Berger v Polizzotto*, 148 AD2d 651, 651-652 (2d Dept 1989) (internal quotation marks and citation omitted). See Real Property Law § 266; see also *Maiorano v Garson*, 65 AD3d 1300, 1303 (2d Dept 2009) (internal quotation marks and citation omitted) ("Where a

purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed . . . to have made the inquiry, and ascertained the extent of such prior right").

Emmons Acquisition argues that it paid fair consideration for the properties in view of the market value and its satisfaction of an antecedent debt. However, fair consideration "is not only a matter of whether the amount given for the transferred property was a fair equivalent or not disproportionately small, which the parties vigorously dispute, but whether the transaction is made in good faith, an obligation that is imposed on both the transferor and the transferee." *Sardis v Frankel*, 113 AD3d at 141-142 (internal quotation marks and citations omitted).

"Good faith is . . . an essential element of fair consideration. A lack of good faith is not equivalent to actual intent to defraud; instead, it imports a failure to deal honestly, fairly and openly." *Furlong v Storch*, 132 AD2d 866, 868 (3d Dept 1987) (internal quotation marks and citation omitted). The determination of good faith is a question of fact and depends on the circumstances of the case. *Atlantic Bank of N.Y. v Toscanini*, 145 AD2d 590, 591 (2d Dept 1988). Here, as set forth below, there is a question of fact as to whether the

conveyances to Emmons Acquisition met the statutory good faith requirement.

Emmons Acquisitions contends that it acted in good faith, reiterates that it negotiated with Elena, and submits affidavits stating that Emmons Acquisition was unaware of Gennady's liabilities to creditors. However, there are multiple instances in the record where Gennady is alleged to have participated in the negotiations and is listed in the financial documents.

In addition, Elena's prior affidavit, submitted in connection to motion sequence 014, states that she never negotiated with anyone to reduce the mortgages held by Flushing Savings Bank and Northeast Community Bank. These seeming inconsistencies raise issues of credibility that cannot be resolved on a motion for summary judgment. It is well settled that credibility issues are "properly left for the trier of fact." *Yaziciyan v Blancato*, 267 AD2d 152, 152 (1st Dept 1999).

Although plaintiffs did not commence their action until November 2010, plaintiffs have alleged that Gennady was potentially aware of possible litigation as early as March 2008, when the involuntary bankruptcy petition was filed against J & T Development LP. "[W]here the transferee is aware of an impending enforceable judgment against the transferor, the conveyance does not meet the statutory good faith requirement and generally will be set aside as constructively fraudulent." *Sardis v Frankel*,

113 AD3d at 142. In light of the close relationships between the entities involved in the transfers and the conflicting affidavits, issues of credibility exist concerning whether Emmons Acquisition took the property as a good-faith purchaser for value without knowledge of any fraud.

Plaintiffs have alleged, and questions remain, as to whether Maksin, acting as Emmons Acquisition's agent, was aware of plaintiffs' claims against Gennady under the Texas land scheme. Maksin testified that he did not know about Gennady's liabilities in Texas. However, it is undisputed that Maksin has provided Gennady with legal representation and has prepared his tax returns. In addition, Elena testified that Maksin advised her to stop making payments on the mortgages, and that her debts would be paid off by the prospective buyer.

Shortly after representing Elena in the foreclosure proceedings, Maksin represented Levin, as purchaser of the 2824 Emmons Avenue mortgage. 2814 Emmons Acquisition was listed as the purchaser of the mortgage and was able to purchase the mortgage at a reduced price. Emmons Acquisition states that these transactions took place quickly, and that there was not much time to look extensively at the previous transfers. While Gennady and Elena testified that they approached Maksin about selling the properties, Maksin stated that he first contacted Elena after already buying the notes.

The Court in *Skiff-Murray v Murray*, 17 AD3d 807, 810 (3d Dept 2005), addressing a similar situation, denied summary judgment where there was an issue as to whether the transferee's attorney had constructive knowledge of a defendant's fraudulent transfers. The Court held the following, in relevant part:

Even though [the attorney] may have obtained some information in confidence when defendant was his client, there are questions of fact as to what nonconfidential information he obtained and whether he had it in mind when acting on First Pioneer's behalf If [the attorney] obtained sufficient nonconfidential information to require further inquiry on his part, and reasonable inquiry would have produced actual knowledge that defendant's transfers were fraudulent, then--as a matter of law--the evidence would support a finding of constructive knowledge imputable to First Pioneer."

Id. at 810.

Further, Emmons Acquisition states that it reviewed the bank files and performed its due diligence. The title search showed that Elena received the deed from Gennady. After reviewing the files, Emmons Acquisition would have been alerted to transfers between the husband and wife, and to the LLCs that were formed in connection with these transfers.

As a result, plaintiffs have raised a triable issue of fact as to whether Emmons Acquisition had notice of facts "that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue and that should have alerted them to the fraud allegedly being perpetrated by the

[other] defendants". *Mathurin v Lost & Found Recovery, LLC*, 65 AD3d 617, 618 (2d Dept 2009) (internal quotation marks and citations omitted).

In addition to the other allegations, as set forth above, courts have found that a "large discrepancy between the price paid . . . and the market value of [the property] . . . create[s] a jury question on the issue of bad faith." *Matter of King v Carlesimo*, 243 AD2d 479, 479 (2d Dept 1997).

For a conveyance to be fraudulent under DCL § 276, it must be made with actual intent to hinder, delay or defraud. This applies to both present and future creditors. Actual fraud, as opposed to constructive fraud under DCL § 273, "does not require proof of unfair consideration or insolvency. Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors," the court will consider "badges of fraud" to determine whether a conveyance was fraudulent. *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 (1st Dept 2009) (internal quotation marks and citations omitted). Courts have explained "badges of fraud" as the following:

"[C]ircumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent. These badges of fraud include lack or inadequacy of consideration, family, friendship, or close associate relationship between transferor and transferee, the debtor's retention of possession, benefit, or use of the property in question, the existence of a pattern or series of transactions or course of conduct

after the incurring of debt, and the transferor's knowledge of the creditor's claim and the inability to pay it."

Matter of Steinberg v Levine, 6 AD3d 620, 621 (2d Dept 2004)

(internal citation omitted).

In the present situation, plaintiffs have sufficiently alleged such "badges of fraud" in support of their claim that the conveyances to Emmons Acquisition were made with the intent to hinder plaintiffs' ability to collect on their claim against Gennady. See e.g. *White Rose Food v Mustafa*, 251 AD2d 653, 654-655 (2d Dept 1998) ("The record contains ample proof of the 'badges of fraud' which generally support a cause of action pursuant to [DCL] § 276").

As previously mentioned, plaintiffs have alleged the lack of consideration for the conveyances to Emmons Acquisition. Further, the record indicates that Maksin, although he did not represent Elena at the closing, was on both sides of the transaction. In addition, although Emmons Acquisition alleges that Gennady did not have any interest in the two properties, the documentation submitted suggests otherwise. Moreover, a similar course of conduct of transfers from Gennady to Elena and others has been alleged to have concurrently taken place.

Emmons Acquisition argues that it could not have intentionally frustrated plaintiffs' attempt to collect on a judgment, because Emmons Acquisition acquired the properties two

months prior to plaintiffs' action giving rise to a judgment. However, plaintiffs have alleged that Gennady was aware of their potential claims, and that an action already had been commenced against him in April 2009, in connection with the Texas land scheme.

Emmons Acquisition further claims that plaintiffs' allegations stem solely from the fact that Gennady and Maksin are a part of the same community, and that plaintiffs cannot demonstrate that Maksin or Emmons Acquisition had knowledge of Gennady's liabilities under the Texas land scheme. Plaintiffs have provided more than conclusory allegations and have also sufficiently demonstrated contradictions in the parties' accounts of the circumstances surrounding the sale of the properties to Emmons Acquisition. Regardless, even where "plaintiffs' allegation as to actual intent to defraud was conclusory, such intent is ordinarily a question of fact which cannot be resolved on a motion for summary judgment." *Shisgal v Brown*, 21 AD3d 845, 847 (1st Dept 2005) (internal quotation marks and citation omitted).

Accordingly, as questions of fact remain as to whether plaintiffs can set aside the conveyances as fraudulent under DCL § 276, Emmons Acquisition's motion for summary judgment is denied.

CONCLUSION, ORDER, AND JUDGMENT

ORDERED that defendant 2814-2824 Emmons Acquisition, LLC's motion for summary judgment dismissing the complaint, as against it, is denied in its entirety; and it is further

ORDERED that all remaining claims shall continue.

This constitutes the decision and order of the court.

Dated: May 22, 2017

Kelly O'Neill Levy
HON. KELLY O'NEILL LEVY

JSC