SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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MULTIBANK, INC., Index No.: 652290/2017

Petitioner, **DECISION & ORDER**

-against-

ACCESS GLOBAL CAPITAL LLC,

Respondent.

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SHIRLEY WERNER KORNREICH, J.:

Multibank, Inc. (Multibank) moves for summary judgment on its petition against Access Global Capital LLC (Access), seeking turnover of funds allegedly fraudulently transferred by Novel Commodities, S.A. (Novel) to Access to satisfy a judgment against Novel.[1] Access opposes, contending there are issues of fact that require a hearing. Multibank's motion is granted in part and denied in part for the reasons that follow.

I. Background

In a plenary action before this court,[2] on January 30, 2017, a default judgment in excess of $6 million was entered in favor of Multibank and against Novel. *See* Dkt. 17 (the Judgment).[3] On April 27, 2017, Multibank commenced this special proceeding by filing a petition alleging

[1] "CPLR 5225(b) permits a special proceeding to be brought against, and recovery to be had from, 'a transferee of money or other personal property 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.'" *Hotel 71 Mezz Lender, LLC v Rosenblatt*, 64 AD3d 431, 432 (1st Dept 2009).

[2] The underlying action is *Multibank, Inc. v Access Global Capital LLC*, Index No. 650637/2016 (the Underlying Action). Since the facts pertinent to the Underlying Action are irrelevant to this special proceeding, the court assumes familiarity with the Underlying Action without further discussion.

[3] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

that Novel transferred certain assets to Access for no consideration. Dkt. 1 (the Petition). The Petition seeks to set aside these conveyances as both constructively and intentionally fraudulent under sections 273, 273-a, 274, and 276 of the New York Debtor and Creditor Law (the DCL). Rather than respond to the Petition, on May 9, 2017, Access removed the action to the United States District Court for the Southern District of New York. Dkt. 42; *see Multibank, Inc. v Access Global Capital LLC*, No. 17-cv-3467 (SDNY).

After Access filed an answer to the petition in the district court, on May 26, 2017, Multibank moved to remand for lack of subject matter jurisdiction. *See* Dkt. 60. By order dated December 4, 2017, the district court (Failla, J.) granted Multibank's motion. *See* Dkt. 45 (the Remand Decision). While it is undisputed that the holdings of a federal court without subject matter jurisdiction over the matter are not binding on this court,[4] since Judge Failla, in ascertaining her jurisdiction, necessarily had to consider certain aspects of the case's merits by virtue of arguments proffered by Access, this court would be remiss if it omitted Judge Failla's well-reasoned analysis bearing on issues currently before this court. To be sure, while the procedural posture of this motion differs from that before Judge Failla (summary judgment vs. motion to dismiss), the threshold issue on Multibank's motion – whether it has made out a prima case on its DCL claims sufficient to shift the burden to Access to raise a material question of fact – was squarely presented to Judge Failla, who ruled on this very issue.[5] Hence, in setting forth

[4] *See Medisys Health Network, Inc. v Local 348-S United Food & Commercial Workers, AFL-CIO, CLC*, 337 F3d 119, 124 (2d Cir 2003) ("Under contemporary principles of collateral estoppel, the unavailability of appellate review of remand orders under § 1447(d) strongly militates against giving a judgment preclusive effect, and thus any issues that the district court decided incident to remand may be relitigated in state court.") (internal citation and quotation marks omitted).

[5] *See* Remand Decision at 2 ("As detailed in the remainder of this Opinion, the Court finds that

the facts pertinent to this case, the court includes Judge Failla's analysis and rulings. While this court must, and does, independently rule, it largely agrees with her analysis.

Upon remand, Multibank filed the instant summary judgment motion on December 15, 2017. The court reserved on the motion after oral argument. *See* Dkt. 96 (2/15/18 Tr.).

II. Transfers from Novel to Access

On November 27, 2013, Access filed an action against Novel in the Southern District of New York. *Access Global Capital LLC v Novel Commodities, S.A.*, No. 13-cv-8492 (SDNY) (the Federal Action). In the Federal Action, Access alleged that, pursuant to an oral agreement and a 2010 written agreement, Novel agreed to reimburse it for certain expenses paid by it in its capacity as Novel's agent. Specifically, Access sought $101,608.75 in legal fees and expenses incurred in the arbitration with AIG (the one that gave rise to the Underlying Action) and $720,000 in premium payments made on two credit insurance policies (one of which was at issue in the Underlying Action).[6] There was de minimis discovery in the Federal Action.[7] In 2015,

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Multibank has met its burden of pleading that Novel fraudulently conveyed assets to Access; that the turnover proceeding against Access is ancillary to the underlying litigation; and that the turnover proceeding is not removable to federal court."). Ordinarily, Judge Failla's analysis simply would have been confined to the fact that federal courts lack of subject matter jurisdiction over ancillary proceedings, such as a turnover petition brought under CPLR 5225(b). *See id.* at 15. However, Access insisted on arguing the merits before Judge Failla, arguing "that the transfer of assets from Novel to Access was not a fraudulent conveyance, but instead part of a bona fide settlement agreement." *See id.* Judge Failla rejected Access' argument on the merits. *See id.* While Access takes issue with Judge Failla's rulings, that such rulings were necessary at all was purely a product of Access' gamesmanship – first, by baselessly removing the action, and then by refusing to simply concede that remand was necessary under the ancillary claim rule. Given the waste of judicial resources and the delay and cost to Multibank, the court will not ignore Judge Failla's thorough opinion.

[6] $420,000 was paid for the AIG policy at issue in the Underlying Action, while the remaining $300,000 was paid for another policy issued by QBE.

[7] "There is no evidentiary basis supporting Access' assertion that the [Federal Action] was 'hard fought' and 'contentious.' The [Federal Action] was barely litigated. As Novel's lawyer stated at

Access and Novel cross-moved for summary judgment. While those motions were pending, on February 8, 2016, the Underlying Action was commenced by Multibank in which, among others, Access and Novel were named as defendants. Novel defaulted in the Underlying Action in March 2016.[8] By order dated March 21, 2016, in the Federal Action, the district court (Gardephe, J.) denied the parties' summary judgment motions and set a trial date of June 27, 2016. *See* Dkt. 25. On April 22, 2016, Access and Novel notified the district court that they had settled, and the Federal Action was discontinued on April 25, 2016.

Access and Novel (which was, and apparently still is, involved in bankruptcy proceedings in Switzerland) executed a Settlement Agreement and an Assignment of Claims and Choses in Action, both dated April 22, 2016. *See* Dkt. 74 at 2 (the Settlement Agreement), 5 (the Assignment Agreement).[9] The Settlement Agreement had three key components: (1) an agreement by Novel to permit an allowed claim in Novel's bankruptcy proceedings in the amount of $85,000; (2) an assignment – to be governed by the contemporaneously executed Assignment Agreement – by Novel of its claims (the Concurso Claims)[10] in the Mexican

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a [conference during coverage litigation with QBE] in late October 2014, '[t]here's minimal witness disclosure in this case. There were no depositions taken' [and 'there hasn't been any discovery really taken in this case.']. After the first $50,000 settlement agreement fell apart in the first quarter of 2015, there was no activity in the case other than the parties' filing cross motions for summary judgment." Dkt. 95 at 15-16 n.9. (internal citations omitted).

[8] While Novel defaulted in March 2016, the court did not decide Multibank's motion for a default judgment until January 9, 2017, along with its decision on the defendants' motion to dismiss. Thus, as discussed above and as noted by Judge Failla, when Novel settled with Access in April 2016, it faced the impending prospect of a default judgment. *See* Remand Decision at 5.

[9] Both agreements contain integration clauses and prohibit oral modifications.

[10] Concurso proceedings, as they are colloquially known, are insolvency proceedings akin to bankruptcy. They are governed by the Mexican Business Reorganization Act (*Ley de Concursos Mercantiles*). *CT Inv. Mgmt. Co., LLC v Chartis Specialty Ins. Co.*, 40 Misc3d 415, 419 (Sup Ct,

bankruptcy proceedings of Cia Arrocera Covadonga S.A. de C.V. (Covadonga);[11] and (3) mutual releases, including the discontinuance of the Federal Action. *See id.* at 2-3. A recital in the Settlement Agreement – but not any of the substantive provisions – provides that the above terms were made "in consideration" for the settlement of all of the parties' claims against each other. *See id.* at 2. The Settlement Agreement is governed by New York law. *See id.* at 3.

The Assignment Agreement, as noted above, provides for the transfer of the Concurso Claims from Novel to Access. *See id.* at 6.[12] Clause One of the Assignment Agreement expressly provides that the assignment of the Concurso Claims was made "without valuable consideration." *Id.* This is repeated in Clause Four:

> Assignment **Without Valuable Consideration**. The Assignor hereby assigns. and the Assignee hereby accepts, the claims and related choses in action **without valuable consideration** in favor of the Assignee. Therefore, the Assignor **may not demand any consideration whatsoever** from the Assignee in connection with the assignment of claims hereunder.

Id. at 6-7 (emphasis added). It is clear the "without consideration" clauses were the product of deliberate drafting decisions by the parties' counsel; it is implausible that repeated mentions of the transfer being without consideration were inadvertent. Access does not dispute this. Indeed, while Access' New York counsel professes not to know the exact reason for the "without

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NY County 2013), *mod.* 130 AD3d 1 (1st Dept 2015); *see In re Cozumel Caribe, S.A. de C.V.*, 508 BR 330, 333-34 (Bankr SDNY 2014).

[11] Covadonga is the Mexican agricultural company whose default on a forfeiting contract gave rise to Multibank's claims in the Underlying Action.

[12] Clause Thirteen of the Assignment Agreement purports to set the "Governing Law and Jurisdiction." See Dkt. 74 at 8. However, that clause only contains a Mexican forum selection clause and submission to jurisdiction, but does not state what substantive law applies. The parties do not expressly address this issue in their briefs, but both they and Judge Failla appear to assume that New York law should govern how to ascertain the parties' intentions under the Assignment Agreement. This court follows suit. *See TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014) (New York law may be applied where parties do not contend there is conflict between New York and possibly applicable foreign law).

consideration" clauses (surely, he could have asked his client or his Mexican counsel), even he does not claim this was a scrivener's error. *See* Dkt. 75 at 7.

Based on this written, unambiguous manifestation of the parties' intent, and relying on well-settled New York law, Judge Failla held that Access was bound by the "without consideration" clauses in the Assignment Agreement:

> Access seeks to persuade the Court that the asset transfer was not a fraudulent conveyance, but instead was part of a settlement agreement that disposed of Access's breach of contract action against Novel in [the Federal Action]. Access claims that the language in the Assignment Agreement indicating that Novel transferred assets for no consideration does not reflect the parties' intent and was only included to ensure that the agreement "would be accepted by the Mexican bankruptcy court." In other words, Access asks this Court to look beyond the plain language of the transfer agreement and to conclude - in contravention of that language and with no supporting documentation - that the transfer of assets constituted part of a settlement agreement.
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> This the Court cannot do. Under New York law, "[t]he cardinal principle for the construction and interpretation of []contracts ... is that the intentions of the parties should control." *SR Intern. Bus. Ins. Co. v. World Trade Ctr. Props., LLC*, 467 F.3d 107, 125 (2d Cir. 2006) (internal quotation marks omitted). The parties' intent, in turn, is ascertained according to the plain language of the parties' agreement. *See, e.g., Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002) ("The best evidence of what parties to a written agreement intend is what they say in their writing." (internal quotation marks omitted)). A court will only look beyond the four corners of the agreement if it must do so to resolve ambiguities. *See, e.g., Muze, Inc. v. Digital On-Demand, Inc.*, 123 F. Supp. 2d 118, 128 n.9 (S.D.N.Y. 2000). **Here, the plain language of the contract is unambiguous: It repeatedly states, in no uncertain terms, that Novel transferred assets to Access for no consideration**. For this reason, the Court declines Access's suggestion that it should look beyond the four corners of the agreement. Even if the Court did, it would not credit Access's suggestion that the assets were transferred as part of a settlement agreement, **where Access has provided no documentary evidence to support that claim**.

Remand Decision at 17-18 (emphasis added).

As the last bolded portion indicates, the Settlement Agreement was inexplicably not provided to Judge Failla. Access only submitted the Assignment Agreement. Multibank

explains that the purpose of this omission was to minimize the import of the "without consideration" clauses by arguing the Assignment Agreement was merely "a perfunctory Mexican Form." *See id.* at 23. It was only after Judge Failla squarely rejected Access' argument that it changed course by submitting and relying on the Settlement Agreement (which it always had in its possession). Multibank takes issue with this cynical litigation strategy. So too does the court.[13]

In any event, Multibank not only claims the assignment of the Concurso Claims was violative of the DCL due to the admission of no consideration in the Assignment Agreement, but also because their value was allegedly much greater than Novel's potential liability in the Federal Action. Multibank contends that the "Concurso Claims pertain to over thirty unpaid promissory notes" on which Covadonga owed Novel approximately $13 million. *See* Petition ¶ 69. Multibank further contends that even after accounting for the fact that Novel "agreed to 'a haircut of 90%' as well as a '[7-year] payment period'" [*see* ¶ 70], the Concurso Claims would still be expected to yield "at least $1.2 to $1.3 million after the creditor haircut."[14] Dkt. 66 at 25; *see* Remand Decision at 6 ("As part of Covadonga's restructuring process, Covadonga's creditors – of which Novel was one - agreed to collect just 10 percent of their claims over a 7-year payment period. For this reason, Novel owned claims for future payments of approximately

[13] Likewise, the court is concerned with the sufficiency of the responses Multibank received to its information subpoenas, which are detailed in the petition and Multibank's briefs. *See* Remand Decision at 16 (noting Access was "less than forthcoming in answering questions about the litigation between Access and Novel and any settlement claims relating thereto."). That said, there is no motion to compel before this court (which is more properly brought in the Underlying Action).

[14] Multibank additionally notes that after accounting for Access' own Concurso claims, as well as those of a corporate affiliate (both wholly owned and controlled, as discussed in the Underlying Action, by James Besch), Besch's companies are by far Covadonga's largest creditors. *See* Petition ¶¶ 71-72.

$1.2 million to $1.3 million. Through the Assignment, Novel transferred its right to those claims to Access.").

Multibank argues that even if one assumes a complete likelihood of success in the Federal Action, ignores Novel's Swiss bankruptcy (which renders doubtful the prospect of Access collecting on a judgment without taking a significant haircut), and assumes recovery of the $85,000 claim in the Swiss court (that Access has not and may never recover) – Access gave up the right to recover, at most, $820,000 in exchange for Concurso Claims worth more than 12 times that amount. *See Stillwater Liqudating LLC v Partner ReIns. Co., Ltd.*, 151 AD3d 585, 586 (1st Dept 2017) (*Stillwater II*) ("the allegations that Stillwater Funding transferred its interests in the collateral, allegedly worth over $200 million, to defendants to satisfy a debt worth less than $40 million, thereby leaving Stillwater Funding unable to pay other creditors, states a cause of action for fraudulent conveyance."). Alternatively, and more realistically, if the solvency of (i.e., likelihood of collection from) Novel and Covadonga and the expected value of Access' claims in the Federal Action are taken into account, there also is (as discussed in more detail herein) a significant gulf between the value of these assets. In either event, Multibank argues, since Novel was indisputably insolvent at the time and the subject transfers were made without fair consideration, and the transfers are fraudulent under the DCL.

III. Governing Law & Standard of Review

It is undisputed that Multibank, by virtue of the Judgment issued in the Underlying Action, is a creditor of Novel. DCL § 278(1) provides:

> 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, or
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> b. **Disregard the conveyance** and attach or levy execution upon the property conveyed.

(emphasis added).

Here, Multibank asserts constructive fraudulent conveyance claims under DCL §§ 273-a, 273, and 274, and an intentional fraudulent conveyance claim under DCL § 276. Under the DCL, to establish a fraudulent conveyance, the petitioner must prove either intentional or constructive fraud. *See Wall St. Assocs. v Brodsky*, 257 AD2d 526, 529 (1st Dept 1999). Section 273-a provides:

> 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.

(emphasis added). A claim under section 273-a may be brought against "both a transferee of a debtor's assets and beneficiary of the conveyance who participated in the fraudulent transfer." *Schwartz v Boom Batta, Inc.*, 137 AD3d 512, 513 (1st Dept 2016), citing *Constitution Realty, LLC v Oltarsh*, 309 AD2d 714, 716 (1st Dept 2003). Section 273-a is implicated in the instant case. At the time of the subject transfers, Novel was a defendant (who had defaulted) in the Underlying Action, and Access was the party that allegedly participated in and received the transfers from Novel.

Section 273 also is implicated. It 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.**" DCL § 273 (emphasis added). In other words, "[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." *CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. P'ship*, 25 AD3d 301, 302 (1st Dept 2006). Similarly, DCL § 274 provides:

> Every conveyance made **without fair consideration** when the person making it is **engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital**, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction **without regard to his actual intent**.

(emphasis added). Here, it is alleged that the subject transfers were made without fair consideration at a time when Novel was insolvent.[15]

By contrast, a claim for intentional fraudulent conveyance under DCL § 276, as its name suggests, requires proof of intent to defraud creditors. *See id.* ("Every 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."). While a claim under section 276 is subject to the heighted pleading standard

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[15] "Fair consideration" is defined in DCL § 272:

> Fair consideration is given for property, or obligation,
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> a. When in exchange for such property, or obligation, **as a fair equivalent therefor, and in good faith**, property is conveyed or an antecedent debt is satisfied, or
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> b. When such property, or obligation is received **in good faith** to secure a present advance or antecedent debt in amount **not disproportionately small as compared with the value of the property**, or obligation obtained.

(emphasis added). It should be noted that even if there is fair consideration, a transfer is nonetheless constructively fraudulent if it was not made in good faith. *CIT Group*, 25 AD3d at 303 ("Good faith is required of both the transferor and the transferee, and it is lacking when there is a failure to deal honestly, fairly, and openly"), quoting *Berner Trucking, Inc. v Brown*, 281 AD2d 924, 925 (1st Dept 2001); *see Sardis v Frankel*, 113 AD3d 135, 142 (1st Dept 2014).

of CPLR 3016(b),[16] intent may be pleaded and proven with the "badges of fraud", such as "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance." *Wall St. Assocs.*, 257 AD2d at 529. That said, even if badges of fraud are present, a claim under DCL § 276 cannot stand where "creditors are not foreseeably or actually harmed" by the subject transfers. *See Amalgamated Bank v Schneider & Schneider, Inc.*, 2016 WL 355505, at *7 (Sup Ct, NY County 2016). That is, the transfers must make it more difficult for the creditor to be able to collect on its judgment. *See id.* (transfer not actionable under DCL § 276 because it had net positive effect on debtor's balance sheet). A significant import of prevailing on a claim under section 276, unlike under the sections of the DCL governing constructive fraudulent conveyance, is that a prevailing petitioner is entitled to its reasonable attorneys' fees under DCL § 276-a. *Apparel Corp. (Far E.) v Sheermax LLC*, 126 AD3d 413, 414 (1st Dept 2015).[17]

In terms of the procedural posture of the instant motion, this special proceeding is governed by CPLR 409, which dictates that "[t]he court shall make a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised" and "[t]he court may make any orders permitted on a motion for summary judgment." On a motion for summary judgment in a special proceeding, the familiar standards applicable in a plenary action under CPLR 3212 apply. *Gonzalez v City of New York*, 127 AD3d 632, 633 (1st Dept 2015). Ergo, summary judgment may be granted only when it is clear that no triable issue

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[16] *RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 (1st Dept 2015).

[17] Were this not a consideration, the court would decline to reach the merits of Multibank's intentional fraudulent conveyance claim.

of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

IV. Discussion

At the outset, like Judge Failla, this court rejects Access' contention that consideration paid as part of a settlement agreement is categorically immune from being challenged as a fraudulent transfer under the DCL.[18]

[18] "Access argues - without citing any cases or other authority on point - that settlement funds may not be targeted in turnover proceedings under CPLR § 5225(b). New York courts have, in fact, held to the contrary. [*See, e.g., Centerpointe Corp. Park P'ship 350 v MONY*, [96 AD3d 1401, 1402 (4th Dept 2012) (judgment creditor entitled to turnover of proceeds of judgment debtor's settlement with respondent); *Bartels & Feureisen, LLP v GeicoIns. Agency, Inc.*, 131 AD3d 610 (2d Dept 2015) (same)]. This Court sees no reason to depart from the New York

Turning now to the merits, an analysis of Multibank's constructive fraudulent transfer claim must begin with the incontrovertible fact that the parties to the Assignment Agreement – Access and Novel – "expressly state[ed in that agreement] that the transfer of [the Concurso Claims] from Novel to Access was made without fair consideration." Remand Decision at 15. Coupled with the undisputed fact that Novel was insolvent, Multibank has made out a prima facie case that the Assignment Agreement was a constructive fraudulent transfer.

Likewise, the badges of fraud attendant to the Assignment Agreement also make out a prima facie case for intentional fraudulent transfer. "Here, as Multibank alleges, the asset transfer was not conducted in the usual course of business and instead came at a time when Novel was under financial distress. In addition, Novel was aware both of Multibank's claim against it and that Novel would be unable to satisfy a potential judgment against it." Remand Decision at 16. Moreover, "Novel and Access shared a close business relationship, with Access serving as a financial advisor and agent to Novel." *Id.* at 17.[19] "Under New York law, these 'badges of fraud' militate strongly in favor of a finding of fraudulent conveyance. That is particularly true when - as in the instant action – the express terms of the [A]ssignment [A]greement indicate that assets were transferred for no consideration." *Id.*

Having made out a prima facie case, the burden shifts to Access to raise a material question of fact. In attempting to do so, Access first proffers the very same arguments rejected by Judge Failla. Here, too:

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courts' rulings, particularly where Access has produced no support for its assertion that settlement funds are not subject to turnover proceedings." Remand Decision at 20 n.4

[19] The notion that their relationship ended at the end of 2010 and that, subsequently, they have exclusively been in an adversarial posture is implausible for reasons explained by Multibank. *See* Dkt. 95 at 13-16. Regardless, this issue is not determinative.

> Access seeks to persuade the Court that the asset transfer was not a fraudulent conveyance, but instead was part of a settlement agreement that disposed of Access's breach of contract action against Novel in [the Federal Action]. Access claims that the language in the Assignment Agreement indicating that Novel transferred assets for no consideration does not reflect the parties' intent and was only included to ensure that the agreement "would be accepted by the Mexican bankruptcy court." In other words, Access asks this Court to look beyond the plain language of the transfer agreement and to conclude - in contravention of that language and with no supporting documentation - that the transfer of assets constituted part of a settlement agreement.

Remand Decision at 17-18 (citation omitted). As explained earlier, Judge Failla rejected Access' position as contrary to settled New York law. *See id.*

But even assuming the plain meaning of the Assignment Agreement does not control due to a recital in the Settlement Agreement generally acknowledging the existence of consideration,[20] Access still has not raised a question of fact regarding the fairness of consideration. Viewing the evidence in the light most favorable to Access by assuming that the present value of the Concurso Claims is only $1.2 million (instead of their face value of more than $12 million), Access has not proffered any explanation for why giving up its claim to, at most, approximately $820,000 against Novel, is a fair exchange. If Novel's $12 million of

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[20] This is a dubious assumption because "[w]here there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls." *Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 61 (1st Dept 2017), citing *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 (1956) ("Even if there was an inconsistency between a specific provision and a general provision of a contract [], the specific provision controls."). To hold that the Concorso Claims were transferred for valuable consideration would "render nugatory the provisions" of the Assignment Agreement that are expressly to the contrary. *See TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 204 (1st Dept 2015). The court is not permitted to interpret a contract in a manner that renders "contractual clauses meaningless." *Id.*, quoting *Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assocs.*, 63 NY2d 396, 403 (1984); *see In re Viking Pump, Inc.*, 27 NY3d 244, 257 (2016), citing *Westview Assocs. v Guar. Nat'l Ins. Co.*, 95 NY2d 334, 339 (2000) ("surplusage" is "a result to be avoided"). Moreover, a recital of consideration, at most, merely permits the court to probe whether there is extrinsic evidence of consideration. *See* Dkt. at 9-10 (collecting cases). Here, as discussed, both the terms of the Assignment Agreement and any plausible valuation of the Concurso Claims relative to Access' claims against Novel refute the suggestion in the Settlement Agreement's recital that there was any "valuable" (let alone fair) consideration paid for the Concurso Claims.

claims against Covadonga required a haircut due to the Mexican bankruptcy proceedings, a similar haircut on Access' claims against Novel is warranted in light of the Swiss bankruptcy proceedings. It is unreasonable to assume that the settlement value of Access' claims was not affected by Novel's insolvency. Simply put, a $820,000 judgment against an insolvent Swiss company is not worth $820,000.

Further, had Access gone to trial in the Federal Action, its likelihood of success was certainly not 100% given the uncertainties raised in Judge Gardephe's summary judgment decision (e.g., the parties' dispute over the existence and enforceability of a pre-2010 oral agreement). As Access explains:

> In the [Federal Action], the Court denied Access' motion for summary judgment because of serious deficiencies in proof, making it highly unlikely that Access would have recovered most of the $862,000 had it gone to trial. The Court found that 'Access ha[d] not come close to' demonstrating it was entitled to recovery of the QBE premium payments valued at $300,000. It similarly noted serious proof issues with respect to the $420,000 AIG premium. Absent indemnification for these premium payments, all Access would have been left with in the [Federal Action] was reimbursement for attorneys' fees. As Novel's lawyer told Yeskoo in March 2015, 'I would expect that you will win re the legal fees in the amount of about $50,000 but lose on the insurance premiums issue.'"
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> Indeed, in 2015, Access and Novel assessed the settlement value in the [Federal Action] at $50,000. Yeskoo drafted a settlement agreement that had only one payment term pursuant to which Novel would seek approval of a $50,000 claim on Access' behalf in Novel's Swiss bankruptcy proceedings. Novel's lawyer wrote to the Court about this proposed settlement that "Access takes no issue with the payment terms." A settlement value at $50,000 is nowhere near the $1.3 million in Concurso Claims Access obtained through the Assignment [Agreement]."

Dkt. 95 at 11 (internal citations omitted), citing Dkt. 58 at 55 (3/13/15 email from Novel's counsel to Access' counsel, indicating an expectation that Access's claims are worth only $50,000 and noting that "even if Access wins a judgment, I'm not sure that that gets you very far" because of Novel's bankruptcy).

Even if one were to generously assume a 60% chance of success at trial, the expected value of Access' claim would have been less than $500,000. After an insolvency haircut, Novel's $50,000 valuation seems quite plausible. After all, the creditors of similarly insolvent Covadonga took a 90% haircut. A 90% haircut on the maximum value of the claim ($820,000) is still only about $30,000 more than Novel's valuation. Consequently, while reasonable minds could disagree over whether Novel's estimate was too low, no reasonable finder of fact could conclude that this estimate was off by a magnitude of ten. Giving up the right to a $1.2 million income stream to settle a claim worth ten times less cannot be considered an exchange of equivalent value under DCL § 272.

Access does not meaningfully account for these issues.[21] Access, therefore, has not raised a triable question of fact. Viewing the record in the light most favorable to Access, the court cannot plausibly conclude that, after Access admitted that it could not even recover its $85,000 allowed claim in Novel's bankruptcy proceedings,[22] it could have recovered nearly ten times than amount if it procured and sought to enforce a Judgment against Novel. Assuming a 90% creditor discount on the Concurso Claims, the most Access-favorable inference that may be drawn from this record is that the Concurso Claims were worth approximately $1 million more than the claims Access gave up in the Federal Action. To be sure, while Access correctly avers that "[t]o show 'fair consideration,' it is not necessary to establish equivalency with

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[21] Not only does Access assume the full value of its $820,000 claim without accounting for the likelihood of success at trial and an insolvency discount, it also assumes it could have recovered $400,000 in pre-judgment interest, contending that its claim was really worth $1.2 million. *See* Dkt. 68 at 12. This argument presupposes Novel's ability to pay $820,000, let alone $1.2 million. In any event, assuming pre-judgment interest should be considered in an expected value calculation, it should only apply to the expected value of the claim, which as noted, was less than $820,000.

[22] *See* Dkt. 68 at 13 ("Novel's bankruptcy estate has not been able to even pay Access the additional $85,000 payment.").

mathematical precision" [*see* Dkt. 68 at 13], where, as here, there is such a large disparity between the value of what was exchanged, the consideration is not considered fair. *See Stillwater II*, 151 AD3d at 586.[23]

In sum, where, as here, both the plain meaning of the contract evidences (i.e., admits) a lack of consideration, and the extrinsic evince further supports that notion, a reasonable finder of fact cannot conclude otherwise. Summary judgment, therefore, is warranted in Multibank's favor on its constructive fraudulent conveyance claim.

The court, however, departs from Judge Failla's analysis in regard to Multibank's intentional fraudulent conveyance claim. To be sure, the court agrees with Judge Failla that the badges of fraud are present here. Nonetheless, the court agrees with Access that, on this record, it is implausible to believe that the intent of the Assignment Agreement was to defraud Novel's creditors or that it had the effect of making it harder for Multibank to collect on its judgment. Access is across the Hudson River; Novel is across the Atlantic Ocean. It is axiomatic that those seeking to keep assets away from domestic creditors do not move assets into the United States. They do the opposite. Thus, Access persuasively contends that:

> [I]t would have made no sense for Novel to "hide" its Concurso claims by transferring them to a U.S. entity in litigation with Multibank in New York. At the time of the transfer, the claims existing under Mexican law and owned by a Swiss entity-were likely beyond Multibank's reach. **The assignment only exposed them to collection here.** If Novel's goal was to frustrate creditors, transferring assets to a U.S. entity is probably the last thing that it would have done.

Dkt. 68 at 7 (emphasis added). In other words, if Access' goal was to make it harder for Multibank to ultimately recover its losses on the subject forfeiting contract, it would not have

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[23] Contrary to Access' suggestion, the uncertain value of the Concorso Claims does not mean they can be transferred on the assumption that they had no value. *See Stillwater Liqudating LLC v Partner ReIns. Co., Ltd.*, 2017 WL 318658, at *9 (Sup Ct, NY County 2017), *aff'd*, *Stillwater II*, 151 AD3d at 586.

domesticated assets held overseas by an insolvent company. Furthermore, Multibank has strong claims against Access in the Underlying Action. While Novel, and not Access, is the judgment creditor at this time, the court cannot ignore the broader context of Multibank's litigation against both of them. The Assignment Agreement made it *more* likely that Multibank can recover its forfeiting contract losses, as a judgment against Access will be easier to enforce.

Under these circumstances, the court finds that a reasonable finder of fact could not conclude that the intent of the Assignment Agreement was to defraud Novel's creditors.[24] While only Multibank moves for summary judgment, the court, in searching the record,[25] finds no evidence or argument proffered by Multibank could overcome this issue at trial. The court, therefore, *sua sponte* grants summary judgment to Access on Multibank's claim under section 276. Accordingly, it is

ORDERED that Multibank is granted summary judgment against Access on its constructive fraudulent conveyance claim, and Access is granted summary judgment on Multibank's intentional fraudulent conveyance claim; and it is further

ORDERED that within one week of the entry of this order on NYSCEF, Multibank shall e-file and fax a proposed judgment, to which Access may submit a counter-proposed judgment along with a redline within one week thereafter; and it is further

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[24] The court reiterates that the lack of intent has no bearing on the viability of Mulitbank's constructive fraud claims. The only import of the court's conclusion on the section 276 claim is that Multibank cannot recover its attorneys' fees in this action.

[25] CPLR 3212(b) ("If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."); *see* Dkt. 68 at 15 ("we invite the Court to search the record, which the Court may do under CPLR 409(b), and dismiss the actual fraud claim.").

ORDERED that the parties shall promptly meet and confer after Access makes its submission and then jointly call to the court to resolve any disputes over the parties' competing submissions.

Dated: April 20, 2018

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.