KELLY O'NEILL LEVY
JSC

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

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NEW GOLD EQUITIES CORP.,

Plaintiff,

- v -

VALOC ENTERPRISES, INC., THE ESTATE OF RHODA MILLER A/K/A RHODA MILLER, BALLON STOLL BADER & NADLER, P.C., and NORMAN R. BERKOWITZ, IN HIS INDIVIDUAL CAPACITY, IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF RHODA MILLER GOLDMAN A/K/A RHODA MILLER AND IN HIS CAPACITY AS AN OFFICER AND DIRECTOR OF VALOC ENTERPRISES, INC.,

Defendants.

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INDEX NO. 652528/2013

MOTION DATE 08/23/2018

MOTION SEQ. NO. 006, 007

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 006) 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 260, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 261, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 292, 315

were read on this motion to/for SUMMARY JUDGMENT.

HON. KELLY O'NEILL LEVY:

Motion sequence nos. 006 and 007 are consolidated for disposition herein.

This dispute arises out an unpaid money judgment entered in plaintiff's favor against defendant Valoc Enterprises, Inc. (Valoc). In motion sequence no. 006, plaintiff New Gold Equities Corp. moves, pursuant to CPLR 3212, for summary judgment on liability on the first, second, third, fifth and ninth causes of action. In motion sequence no. 007, defendants Valoc, Norman R. Berkowitz (Berkowitz), in his individual capacity, in his capacity as the Executor of the Estate of Rhoda Miller Goldman a/k/a Rhoda Miller and in his capacity as an officer and director of Valoc, and the Estate of Rhoda Miller Goldman a/k/a Rhoda Miller (Estate)

(collectively, defendants) move, pursuant to 3212, for summary judgment dismissing the complaint against them.[1] No party has moved for relief against defendant law firm Ballon Stoll Bader & Nadler, P.C. (Ballon), and Ballon did not submit papers in response to either motion.

BACKGROUND

Plaintiff is the owner of real property located at 213-223 East 43rd Street and 214-226 East 44th Street, New York, New York (the Premises) (affirmation of Eric D. Sherman in support [Sherman affirmation in support], exhibit 1 [complaint], ¶ 6). Rhoda Miller (Miller) was Valoc's president, officer, owner and sole shareholder until her death on June 24, 2012 (*id.*, ¶¶ 9-10). Her shares were then transferred to the Estate (Sherman affirmation in support, exhibit 6 [Berkowitz Dec. 10, 2014 deposition transcript] [Berkowitz 12/10/2014 tr] at 27). Berkowitz, the executor of the Estate, serves as Valoc's secretary, treasurer and general counsel pursuant to an employment agreement dated May 1, 2003 (Sherman affirmation in support, exhibit 2 [answer], ¶ 12). Berkowitz is also a partner at Ballon (complaint ¶ 110).

On January 1, 1959, plaintiff's predecessor-in-interest and Valoc's predecessor-in-interest entered into a triple net lease for the Premises that expired on December 31, 2012 (the Lease or the Leasehold) (answer ¶¶ 14-15). Valoc was contractually obligated under the Lease to pay as additional rent all real property taxes, water and sewer charges and other government charges levied against the Premises (*id.*, ¶¶ 17-18). If Valoc wished to challenge the assessments in a legal proceeding, then it was required to furnish plaintiff with a surety bond or cash sufficient to cover

[1] As a threshold matter, defendants' motion is timely (*see Applewhite v Accuhealth, Inc.*, 90 AD3d 501, 502 [1st Dept 2011]). Plaintiff filed the note of issue on December 29, 2017, making April 28, 2018 the last possible day on which to move for summary judgment (*see* CPLR 3212 [a]). April 28, though, fell on a Saturday. Pursuant to General Construction Law § 25-a, defendants had until the next business day to serve the motion, and they served the motion on Monday, April 30.

the contested amount (complaint ¶ 20). The Lease also contained an indemnification and hold harmless clause (*id.*, ¶ 22). Valoc subleased the Premises to several tenants.

It is not disputed that four liens comprised of past-due real property taxes, water and sewer charges, and other fees assessed against the Premises were sold as follows: (1) $419,252.46 sold July 18, 2005 (the 2005 Lien); (2) $517,742.93 sold July 21, 2008 (the 2008 Lien); (3) $4,544.48 sold July 20, 2009; (4) $1,704.07 sold August 4, 2011 (complaint ¶¶ 25, 30, 36 and 40). Plaintiff alleges that Valoc failed to pay the amounts due despite having received notice of the City of New York's (City) intention to sell the liens prior to each sale.

The owners of the 2005 Lien and the 2008 Lien (together, the Foreclosure Plaintiffs) commenced an action to foreclose two of the four tax liens, *NYCTL 2008-A Trust, et ano v IG Greenpoint Corp., et al.*, Sup Ct, NY County, Index No. 108725/2009 (the Foreclosure Action). Plaintiff's predecessor-in-interest, IG Greenpoint Corp. (IG), asserted a cross claim against Valoc for breach of contract seeking damages equal to the charges that were the subject of the Foreclosure Action (complaint ¶ 71). IG had served Valoc with a Notice to Cure in which it demanded that Valoc pay the four liens, but Valoc did not pay (*id.*, ¶¶ 69-70).

Pursuant to a so-ordered stipulation dated May 9, 2012, Miller established a collateral account with Janney Montgomery Scott LLC (the Janney Account) with $1 million of her own funds; the account would be used to satisfy any judgment against Valoc in the Foreclosure Action (Sherman affirmation in support, exhibit 16 at 5). By stipulation dated March 14, 2013, IG and Valoc agreed that IG could pay down the principal on the 2005 Lien and the 2008 Lien (*id.* at 6). On March 15, 2013, plaintiff, as IG's successor-in-interest, paid $1.238 million toward the 2005 Lien and $506,000 toward the 2008 Lien (complaint ¶ 62). Plaintiff paid an additional $1,422,202.41 on April 15, 2014 (*id.*, ¶ 63).

On May 16, 2014, the court signed an Amended Order and Judgment of Foreclosure and Sale in the Foreclosure Action. The court-appointed referee had determined that as of April 30, 2013, there was $517,038.18 due on the 2005 Lien and $578,978.42 due on the 2008 Lien (Sherman affirmation in support, exhibit 15 at 5 and exhibit 17 at 10). In order to avoid a sale of the Premises, on July 23, 2014, plaintiff paid an additional $20,571.27 toward the 2005 Lien and $13,589.83 toward the 2008 Lien (complaint ¶ 64). Plaintiff paid a total of $3,200,363.51 to satisfy the four tax liens (affidavit of Donald J. Olenick [Olenick] [Olenick aff], ¶ 18).

As for plaintiff's cross claim, in a decision and order dated February 11, 2015, the court granted plaintiff summary judgment against Valoc (Sherman affirmation in support, exhibit 18 at 3). On May 24, 2015, a money judgment for $3,609,478.20 was entered against Valoc (the Judgment) (*id.* at 10). Plaintiff alleges that the funds in the Janney Account plus accrued interest have been disbursed in partial satisfaction of the Judgment (complaint ¶ 77 n3; Sherman affirmation in support, ¶ 64). The balance of the Judgment remains unpaid.

Plaintiff commenced this action asserting the following claims: (1) Debtor and Creditor Law §§ 273, 278 and 279 and Business Corporation Law § 720 (a) (2); (2) Debtor and Creditor Law §§ 273-a, 278 and 279; (3) Debtor and Creditor Law §§ 274, 278 and 279; (4) Debtor and Creditor Law §§ 275, 278 and 279; (5) Debtor and Creditor Law §§ 276, 278 and 279; (6) a direct and derivative claim under the common-law trust fund doctrine; (7) a derivative claim for breach of fiduciary duty under CPLR 5201 (a); (8) a direct and derivative claim under Business Corporation Law §§ 719 and 720 (b); (9) breach of contract against the Estate; and (10) unjust enrichment.

CONTENTIONS

Plaintiff now moves for partial summary judgment on the first, second, third, fifth and ninth causes of action. Plaintiff argues that Valoc evaded its obligations under the Lease by fraudulently transferring millions of dollars to Miller, Berkowitz, and Ballon while the Foreclosure Action was pending, thereby rendering Valoc insolvent. It claims that the transfers were made without fair consideration or good faith. Submitted in support of the motion are excerpts from Berkowitz's depositions in the Foreclosure Action and the present action; an affidavit and report from Sharon Locatall (Locatell); an affidavit and report from Vladimir V. Korobov (Korobov); an affidavit from Olenick; Valoc's tax returns from 2007 through 2012; and other exhibits.

Berkowitz testified that Miller, as president, made all executive decisions related to leasing, met with tenants, and approved payments (Sherman affirmation in support, exhibit 6 [Berkowitz 12/10/2014 tr] at 76, 81 and exhibit 7 [Berkowitz Jan. 20, 2016 deposition transcript] [Berkowitz 1/20/2016 tr] at 83). There were only four or five subtenants at any one time, and he could not recall how much time Miller spent on negotiations with the subtenants (Berkowitz 12/10/2014 tr at 81). Ballon or other law firms also worked on leasing issues, including lease negotiations (Sherman affirmation in support, exhibit 4 [Berkowitz June 26, 2014 deposition transcript] [Berkowitz 6/26/2014 tr] at 45; Berkowitz 12/10/2014 tr at 77-78). He could not recall how often Miller visited Valoc's office each week (Berkowitz 12/10/2014 tr at 78), as she spent most of her time in Connecticut or Florida (Sherman affirmation in support, exhibit 8 [Berkowitz Oct. 13, 2017 deposition transcript] [Berkowitz 10/13/2017 tr] at 120-123).

In exchange for her services, Miller received an annual salary of $600,000 or $50,000 a month (Berkowitz 12/10/2014 tr at 84-85). Berkowitz could not recall the exact amount of Miller's total compensation, which would have included fringe benefits and other remuneration, "but the

salary, distributions, dividends – the 600,000 is what her salary was" (Berkowitz aff in support, exhibit H [Berkowitz 10/13/2017 tr] at 67, lines 23-24). Miller determined the salary she paid to herself (Berkowitz aff in opposition, exhibit H [Berkowitz 12/10/2014 tr] at 71). Valoc's tax returns from 2004 through 2012, though, revealed that it paid Miller an annual salary of $720,000 from 2004 to 2011 and $300,000 in 2012 (Berkowitz 12/10/2014 tr at 84). Berkowitz claimed that the salary figures were inaccurate and that he alerted Valoc's accountant to the errors (*id.*). However, he was told that a correction would not have made a difference because as an S corporation, Miller "got a deduction for it on the other end" (*id.*, lines 23-25). The accountant treated the $120,000 difference that accrued every year as a shareholder loan (Berkowitz 1/20/2016 tr at 38). Eventually, the loans were written off (*id.*). Apart from Valoc's tax returns, there are no contemporaneous corporate documents recording these loans (*id.*). Berkowitz "never thought about" whether Miller's salary was reasonable given the services she provided (*id.* at 98), and he maintained that her salary was reasonable even though Valoc's expenses exceeded its income (*id.* at 105). Valoc never distributed dividends to Miller, even though dividends were taxed at a lower rate (*id.* at 74).

Berkowitz, a licensed attorney and a non-practicing certified public accountant, testified that he began performing legal work for Valoc in 1986 (Berkowitz 6/26/2014 tr at 10-12, 37). In or about 2000, he "became an officer [in Valoc] to sign checks" (*id.* at 44, lines 17-19). According to paragraph 3(A) of the employment agreement he, Miller and Valoc executed, Berkowitz agreed to serve as a "director, vice president, treasurer and general counsel" and to report to the "President and Board of Directors of the Corporation" (Sherman affirmation in support, exhibit 20 at 3). In exchange, Valoc agreed to pay Berkowitz "an annualized base salary of $220,000.00, subject to applicable withholding taxes, with respect to the rendition of legal and non legal services" (*id.* at

3). Miller gave Berkowitz the option of taking his compensation as a legal fee or a salary, and he chose the latter so that he could increase his contribution to his firm's pension plan (Berkowitz 6/26/2014 tr at 46-47). In addition, Berkowitz was entitled to compensation even if he performed no legal work (*id.* at 48). He expressed that Valoc was "required to make salary payments before paying creditors" (Berkowitz 1/20/2016 tr at 27, lines 9-10). Pursuant to his agreement with Ballon, Berkowitz was entitled to retain 100% of this fee (Berkowitz 10/13/2017 tr at 17).

Berkowitz also testified that he "actually operated the company, made sure of the collecting of rent, paying of bills, [and] repairs" and that he "had to deal with . . . tenant[s]" (Berkowitz 6/26/2014 tr at 44, lines 22-25). He repeated this claim in an unsigned affidavit prepared in the Foreclosure Action that stated he "personally . . . [ran] Valoc and perform[ed] all management and administrative services for Valoc," and that Miller, who lived in Florida, did "not take an active role in the affairs of Valoc" (Sherman affirmation in support, exhibit 28, ¶ 2). Berkowitz could not recall how much time he spent collecting rent, but he spent more than 10 hours reviewing leases every year (Berkowitz 10/13/2017 tr at 98 and 111). A part-time bookkeeper made out checks and deposits, filed materials, and communicated with Valoc's accountant (*id.* at 104-105).

Berkowitz and Miller also enjoyed certain fringe benefits, such as the use of corporate credit cards for entertainment and car rentals (Berkowitz 10/13/2017 tr at 159, 170-171). Miller approved all payments on those cards (Berkowitz 1/20/2016 tr at 83 and 102). However, he and Miller never discussed his use of Valoc's credit card after Valoc went out of business (*id.* at 101). Berkowitz also claimed that he stopped using the corporate credit card in 2012, when Miller died (*id.* at 84). He later recanted his testimony when he was shown numerous charges for meals, gasoline purchases, and a car rental in Bridgehampton made in 2013 and 2014 (*id.* at 84 and 98).

Berkowitz admitted that his wife, who was not affiliated with Valoc, was present for some of those meals (*id.* at 103).

Other than rental income, Valoc had no other income-generating assets (Berkowitz 1/20/2016 tr at 68). Berkowitz did not believe that Valoc was insolvent because it always had assets in excess of its liabilities and could meet its debts when they became due (*id.* at 27; Berkowitz 12/10/2014 tr at 93-94). He did not know if Miller ever made a capital contribution to Valoc after 2000, and Miller did not subsidize Valoc if there was a cash flow shortage (Berkowitz 1/20/2016 tr at 39 and 41).

Berkowitz admitted that Valoc did not pay off the 2005 Lien or the 2008 Lien "[b]ecause we had paid the taxes already. We just weren't – we felt we should only have to pay the interest for late payment, on late payments" (Sherman affirmation in support, exhibit 5 [Berkowitz Aug. 6, 2014 deposition transcript] [Berkowitz 8/6/2014 tr] at 130, lines 4-7). He stated that "[t[he City got it wrong" with respect to the four liens because "we made the payments" (*id.* at 131, line 17 and 132, line 2). Berkowitz explained that after discussing the matter with Miller, they agreed Valoc would not set aside any funds for the Foreclosure Action because "it was felt by the company that there wasn't going to be a judgment" (Berkowitz 12/10/2014 tr at 115, lines 10-11). Miller elected to personally fund the Janney Account because "Valoc didn't have a million dollars to put aside" (*id.* at 116, lines 13-14).

Valoc ceased conducting business when the Lease expired in December 2012 (Berkowitz 1/20/2016 tr at 12). It began suffering cash flow problems shortly thereafter (Berkowitz 12/10/2014 tr at 22). Valoc still exists as a New York corporation despite having closed its office in 2014 (*id.* at 12 and 20). At present, the Estate owns all of Valoc's shares (*id.* at 27).

Berkowitz testified that Valoc never loaned money to Miller (Berkowitz 1/20/2016 tr at 38), and that Valoc has never transferred funds to Miller's relatives or friends (*id.* at 41). Berkowitz did not know of any corporate bylaws that had been adopted (*id.* at 21), and he was not aware of any corporation resolutions that had been executed other than a resolution to set up a bank account (*id.* at 29). Valoc held no meetings where corporate minutes were taken or where corporate actions or decisions were memorialized in writing (*id.* at 21).

Locatell, the president of real estate appraisal and consulting firm Appraisers and Planners Inc., averred that she conducted a comprehensive analysis of the Premises, which she described as an 11-story office building with 215,000 square feet of rentable space in midtown Manhattan (Locatell aff, exhibit A at 2). Locatell utilized the discounted cash flow or yield capitalization method, which converts future benefits into present value, to determine the fair market value of the Leasehold (Locatell aff, exhibit A at 12-13). Based upon a review of the Lease materials, economic trends, historic office market conditions, and Valoc's rental income and operating expenses, Locatell concluded that the fair market value of the Leasehold in January 2008 was $2.11 million (Locatell aff, ¶ 4[a]). Because the Lease expired in 2012, she applied a discounted rate of return of 8.5% and determined that the fair market value of the Leasehold in January 2010 was $1.28 million (Locatell aff, exhibit A at 21-23).

Korobov, a partner at accounting firm Marcum LLP, averred that his company was hired to analyze Valoc's financial condition. With regards to the financial analysis portion of his report, he observed that Valoc failed to report the four tax liens as liabilities on its balance sheets; that it underreported the fair market value of the Leasehold; that it reported negative shareholder equity each year; and that paying Miller's salary resulted in annual net operating losses.

Korobov employed a balance sheet test, which compares the fair market value of a debtor's assets against the fair market value of a debtor's liabilities, to determine solvency (Korobov aff, exhibit A at 9). After adjusting the fair market value of the Leasehold to $2.1 million, Korobov stated that as of January 2008, Valoc's assets of $2.3 million eclipsed its liabilities of $1.7 million by $620,000 (Korobov aff, exhibit A at 17). From January 2009 through January 2011, Valoc's liabilities were greater than the value of its assets.

Korobov applied the cash flow test, which focuses on a company's operating cash flow against its debts, and the adequate capital test, which concerns a company's capitalization level and its borrowing ability, to determine whether Valoc maintained unreasonably small capital (Korobov aff, exhibit A at 9). He explained that Valoc failed the cash flow tests and the adequate capital tests every year because the corporation could not borrow sufficient funds to pay its liabilities. He concluded that Valoc has had unreasonably small capital since at least January 2008 (Korobov aff, ¶ 3[b]).

Olenick, plaintiff's secretary, averred that over $3.1 million is due and owing on the Judgment (Olenick aff, ¶ 23).

Defendants oppose the application and move separately for summary judgment. They posit that (1) the Debtor and Creditor Law claims fail because plaintiff cannot show the lack of fair consideration and failed to plead actual intent to defraud in detail; (2) the sixth and seventh causes of action fail to state claims for breach of fiduciary duty; (3) relief under Business Corporation §§ 719 and 720 is not available to a creditor such as plaintiff; (4) New York does not recognize a separate cause of action to pierce the corporate veil; and (5) the unjust enrichment claim fails because Valoc had a contractual relationship with Miller and Berkowitz. Defendants rely on two

similarly-worded affidavits from Berkowitz; complete transcripts from three of Berkowitz's five depositions; the deposition transcript for Alice Berkowitz; and other exhibits.

Berkowitz avers that each transfer was authorized or was made for a legitimate purpose and in good faith. As the sole shareholder in an S corporation, Miller was entitled to receive profit from the corporation in the form of a distribution or a salary, and that the form in which she received income was immaterial for tax purposes (Berkowitz aff in opposition, ¶ 4). In 2009, Miller sanctioned bonuses of $65,000 because Valoc had extra money (Berkowitz aff in opposition, exhibit F [Berkowitz 1/20/2016 tr] at 77-80).

Berkowitz avers that he was paid $220,000 for his services pursuant to an employment agreement, but his "fee was dramatically reduced since the work and responsibilities diminished," even though he remained involved in the Foreclosure Action and the present lawsuit (Berkowitz aff in support, ¶ 7). Because his fees were paid under an agreement with Valoc, Ballon would not have issued "ad hoc bills" for his legal fees (*id.*). He maintains that he was "specifically authorized by Valoc and Rhoda Miller to charge to the Valoc credit card [meals and car rentals] as a 'fringe benefit'" (Berkowitz aff in support, ¶ 7). The charges totaled less than $15,000 (*id.*). Berkowitz admitted that Valoc paid for a number of meals where he and his wife, who had a real estate background, discussed general real estate issues (Berkowitz aff in opposition, exhibit F [Berkowitz 1/20/2016 tr] 102-105). Berkowitz's wife Alice, though, testified that she had no background in real estate and that she could not recall discussing matters involving Valoc with her husband (Berkowitz aff in opposition, exhibit B [Alice Berkowitz tr] at 8, 18).

Berkowitz also rejects the discount rate Locatell applied to assess the value of the Leasehold and surmises that she used an erroneous vacancy rate, payroll rate, and grossly exaggerated repair and maintenance costs in her analysis (Berkowitz aff in opposition, ¶ 13). He

claims that the Leasehold value in January 2008 was greater than $3.6 million based on "Rhoda Miller's $720,000 distribution each year for five years" (*id.*). Moreover, Locatell reviewed an incomplete or the inaccurate lease for the Premises.

Berkowitz similarly rejects Korobov's statement that plaintiff's claim should have been included on Valoc's balance sheets because the claim was "no more than a claim (at the time) to a balance sheet analysis" (*id.*, ¶ 14). At most, the claim would have appeared as a note on a balance sheet or other financial statement (*id.*). He further states that the transfers did not leave Valoc insolvent or with unreasonably small capital because the Judgment was wholly speculative.

Berkowitz submits that plaintiff should be precluded from maintaining its position that the tax liens were not paid because it took a contrary position in the Foreclosure Action (Berkowitz aff in support, ¶ 9). He claims that plaintiff failed to remit the tax notices to Valoc as required by the Lease, which in turn caused Valoc to omit the overdue amounts on its balance sheets (*id.*, ¶¶ 8-9 and exhibit A at 1). Berkowitz also disputes plaintiff's claim that Valoc knowingly failed to pay the real estate taxes and other charges as the Foreclosure Plaintiffs could not demonstrate how they had calculated the amount of each lien (*id.*, ¶ 8).

In response, plaintiff repeats its contention that defendants can no longer contest the manner in which the City calculated the tax liens because Valoc never appealed the judgments in the Foreclosure Action. In any event, Berkowitz admitted that Valoc was responsible for paying property taxes and water and sewer charges (affirmation in opposition of Eric D. Sherman [Sherman affirmation in opposition], exhibit B [Berkowitz 8/6/2014 tr] at 133), and that Valoc refused to pay interest that had accrued on the tax liens because "we felt we only owed the portion to the City, which was the lower rate, for late payments" (*id.* at 134, lines 23-25]). Valoc's accountant, L.G. Nadler (Nadler) was unable to determine from his review of Valoc's records if

any real estate taxes were due (Sherman affirmation in opposition, exhibit L [Nadler tr] at 7-8), and the tax lien certificates constituted valid liens (affirmation in reply of Eric D. Sherman [Sherman reply affirmation], exhibit 38).

Plaintiff also addressed the purported deficiencies in its expert reports. First, Olenick states that the Lease at issue reflects the correct address for the Premises (Olenick reply aff, ¶ 6), and that Valoc had no interest in the lease for 212 East 44th Street (*id.*, ¶¶ 8 and 14). Locatell avers that she appraised Valoc's interest using the correct Lease (Locatell reply aff, ¶¶ 7-9). She repeats her assertion that investors use discount rates to calculate the fair market value of a leasehold, and that the discount rates she utilized in her appraisal are within the acceptable ranges from several sources (*id.*, ¶¶ 19-20). In addition, Locatell used a conservative vacancy rate of 10% in her report, but Valoc's actual vacancy and collection rate, based on its 2012 tax returns, was 16% (*id.*, ¶ 26). The 3% annual increase in payroll expenses would have applied if Valoc had sold the Leasehold; thus, Berkowitz's contention that Valoc's payroll expenses, which had been set by contract, is nonsensical (*id.*, ¶ 29). Her assumptions based on the average repair and electric and steam costs were grounded on Valoc's own tax returns (*id.*, ¶ 35). In his reply affidavit, Korobov explains that Berkowitz conflates a solvency analysis and balance sheet test for Debtor and Creditor Law purposes with a corporation's general obligation to prepare balance sheets (Korobov reply aff, ¶ 5). Second, tax lien certificates constitute a "debt" under the Debtor and Creditor Law and should have been recorded on Valoc's balance sheet under generally accepted accounting principles (*id.*, ¶¶ 11 and 15-18). Korobov refutes defendants' assertion that Miller's salary represented net undistributed income because Valoc's liabilities exceeded its income (*id.*, ¶ 24). Plaintiff further argues that defendants presented no evidence to corroborate their claims that Valoc was solvent or that it had ample cash flow.

Lastly, plaintiff submits that the complaint should not be dismissed. The fraudulent conveyance claims should be upheld for lack of fair consideration as Miller performed little to no work and Berkowitz's salary was not fair or reasonable given that he spent between 240 hours and 440 hours a year on matters involving Valoc (Sherman affirmation in opposition, exhibit C [Berkowitz 12/10/2014 tr] at 25-26). Berkowitz's "salary" was funneled through Ballon under the guise of a legal fee, and those transfers are not the subject of plaintiff's motion. Plaintiffs contend that defendants' arguments concerning the fiduciary duty claims have no basis in law. As for the veil piercing claim, defendants' attempt to cast the purported fraud as one that occurred in 1959, when the Lease was executed, lacks merit. In addition, it would be unjust and inequitable to permit defendants to retain the monies transferred to them.

DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the*

sufficiency of the opposing papers" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

A. The First through Fourth Causes of Action under the Debtor and Creditor Law

The first through fourth causes of action assert claims under Debtor and Creditor Law §§ 273, 273-a, 274, 275, 278 and 279 and Business Corporation Law § 720 (a) (2). The court notes that neither plaintiff nor defendants discussed Business Corporation Law § 720 (a) in their papers.

A common element on claims brought under Debtor and Creditor Law §§ 273 through 275 is fair consideration. Fair consideration is comprised of two components: "the adequacy of what is given in exchange for it and 'good faith'" (*Sardis v Frankel*, 113 AD3d 135, 141 [1st Dept 2014]). The consideration given must be "a fair equivalent" of the property transferred or the antecedent debt satisfied (Debtor and Creditor Law § 272 [a]), and the consideration received must not be "in an amount disproportionately small as compared with the value of the property, or the obligation obtained" (Debtor and Creditor Law § 272 [b]). In addition, "[g]ood 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" (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006], *rearg denied* 2006 NY App Div LEXIS 6386 [1st Dept 2006] [internal quotation marks and citation omitted]). "[P]referential transfers to directors, officers and shareholders of insolvent corporations in derogation of the rights of general creditors do not fulfill the requirement of good faith" [*Matter of Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 117 AD3d 427, 428-429 [1st Dept 2014] [internal quotation marks and citation omitted]). Finally, what constitutes fair consideration "must 'be determined upon the facts and circumstances of each particular case'" (*Commodity Futures Trading Commn. v Walsh*, 17 NY3d 162, 175 [2011] [internal quotation marks and citation omitted]).

1. Debtor and Creditor Law § 273

The first cause of action seeks damages of $2.46 million for a violation of Debtor and Creditor Law § 273. Debtor and Creditor Law § 273 states 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." According to Debtor and Creditor Law § 271 (a), "[a] person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." Thus, to prevail on a Debtor and Creditor Law § 273 claim, a party seeking to challenge a conveyance as fraudulent must establish both insolvency and the absence of fair consideration (*Joslin v Lopez*, 309 AD2d 837, 838 [2d Dept 2003] [collecting cases]).

A transferor's "[i]nsolvency is measured at the time of the conveyance" (*Battlefield Freedom Wash, LLC v Song Yan Zhuo*, 148 AD3d 969, 971 [2d Dept 2017]; *A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1288 [4th Dept 2014] [stating that a transferor must be insolvent at the time of the transfer]). To determine insolvency, the court may apply a balance sheet test, which looks at whether a debtor's liabilities exceed its assets (*Kim v Yoo*, 311 F Supp 3d 598, 611-612 [SD NY 2018]). "Only assets with a present salable value are taken into consideration . . . " (*Glenmore Distilleries Co. v Seideman*, 267 F Supp 915, 918 [ED NY 1967]; *see also Morgan Guar. Trust Co. v Hellenic Lines, Ltd.*, 621 F Supp 198, 220 [SD NY 1985] [stating that "[i]t is the fair saleable value of assets, not their book value, that determines insolvency"]). Insolvency, as defined in Debtor and Creditor Law § 271 (1), also includes a debtor's probable liability. Therefore, "contractual contingent liabilities such as guaranties and lease obligations" are included in assessing a debtor's probable liability (*Allen Morris Commercial*

Real Estate Services Co. v Numismatic Collectors Guild, Inc., 1993 WL 183771, *8, 1993 US Dist LEXIS 7052, *24 [SD NY 1993]). If a transfer is made without fair consideration, "a presumption of insolvency and fraudulent transfer arises, and the burden shifts to the transferee to rebut that presumption" (*Battlefield Freedom Wash, LLC*, 148 AD3d at 971).

Generally, a corporate officer's receipt of a salary is not, without more, sufficient to find that a conveyance was fraudulent (*see Holme v Global Mins. & Metals Corp.*, 2012 NY Slip Op 33529[U], *11 [Sup Ct, NY County 2012], *affd* 127 AD3d 540 [1st Dept 2015] [stating that "it would be improper . . . to infer malicious intent [from a salary payment] without detailed analysis"]). "The compensation paid to a corporate officer must be in proportion to his [or her] ability, services and time devoted, corporate earnings and other relevant facts and circumstances" (*Cilco Cement Corp. v White*, 55 AD2d 668, 668 [2d Dept 1976], quoting *Glenmore Distilleries Co.*, 267 F Supp at 919; *Staudinger+Franke GmbH v Casey*, 2015 WL 3561409, *11, 2015 US Dist LEXIS 73912, *28-29 [SD NY 2015] [explaining that there is a presumption a corporate officer's salary is fair consideration unless the salary is excessive in light of that officer's responsibilities]).

Here, Miller's $720,000 salary was excessive and unreasonable and, therefore, it was made without fair consideration. Berkowitz testified that Miller worked on negotiating leases, but the rent roll indicates that since 1982, the five subtenants at the Premises had multi-year sublease terms of 26 to 32 years (Sherman affirmation in support, exhibit 21 at 1; Sherman reply affirmation, exhibit 49 at 5). Miller spent no time at Valoc's office, and Berkowitz essentially ran Valoc. Furthermore, Berkowitz admitted that Valoc suffered from cash flow problems when the Lease expired and the corporation stopped receiving income. Nevertheless, Valoc paid Miller $300,000 when ostensibly, the corporation had ended active operations. While the employment agreement

detailed Berkowitz's duties and compensation, defendants did not produce a similar contract for Miller. Hence, Miller's salary is unreasonable for the amount of work she performed.

Additionally, based on the court's own calculations, Miller's salary represented 30.70% of Valoc's gross rental income of $2,345,437 as reported in its 2008 tax return; 30.70% of gross rental income of $2,345,637 in 2009; 30.89% of gross rental income of $2,330,487 in 2010; and 28.18% of gross rental income of $2,554,422 in 2011. Her salary remained steady irrespective of the decreases in Valoc's gross income. As a result, Miller's salary is grossly disproportionate to the Valoc's annual gross revenues (*Lukoil N. Am., LLC v Shurka*, 2016 NY Slip Op 32431[U], *11 [Sup Ct, Nassau County 2016] [finding that "payment of less than one-half of one percent of [a corporation's] sales revenues, including $15,000 per year annual salary, and health insurance benefits, cannot, under any rational basis, constitute unreasonable payments and fraudulent conveyances"]; *Cilco Cement Corp.*, 55 AD2d at 668 [finding that the salary paid to the corporation's president was not a fraudulent conveyance of assets]; *cf. Glenmore Distilleries Co.*, 267 F Supp at 919 [finding that payments of annual salaries of $25,000 to each respondent were not made with fair consideration]).

As for Berkowitz, he maintains that Miller granted him certain perks as a Valoc employee. However, the credit card charges plaintiff challenges took place after Valoc's source of income had been eliminated. Berkowitz's vague testimony that the expenses were related to Valoc's business is contradicted by his admission that the corporation had ceased conducting business. Remarkably, at the time the charges were made, Berkowitz served as the executor for the Estate, the Estate owned all the shares in Valoc, and Berkowitz was Valoc's sole officer and director. Consequently, Berkowitz effectively exercised total control over Valoc without any oversight.[2]

[2] Other than Miller, Berkowitz never identified the other officers or directors in Valoc, if any, or the members of its board of directors.

Although Berkowitz testified that he personally paid the charges made on Valoc's credit card, he offered no documentary evidence in support of this contention. Thus, it cannot be said that Valoc received fair consideration in exchange for paying Berkowitz's personal expenses.

Furthermore, plaintiff has established that Valoc was insolvent within the meaning of Debtor and Creditor Law § 271 (1). Valoc passed the balance sheet test in 2008 because the fair market value of its assets exceeded the fair market value of its liabilities by $620,000. Valoc, though, failed the balance sheet test from 2009 to 2011. The corporation had maintained a positive cash balance, but "[c]ash flow is not a factor" in determining insolvency (*see Morgan Guaranty Trust Co.*, 621 F Supp at 220). In any event, the amount of cash Valoc kept on hand would have been insufficient to satisfy the tax liens or the Judgment, and Berkowitz acknowledged as much in his testimony.

Instead of offering evidence of Valoc's solvency, defendants attack the sufficiency of the complaint. Defendants, though, ignore plaintiff's proof that the contested transfers rendered the corporation insolvent. Furthermore, other than unsupported speculation and conjecture, they failed to rebut the conclusions of plaintiff's experts with admissible evidence.

Defendants also have not demonstrated that Valoc received fair consideration for Miller's and Berkowitz's services. While Miller could have elected to receive a salary or a distribution for tax purposes, the issue is whether the amount she received was suitable in light of Valoc's liabilities and expenses. Defendants offered no evidence as to whether Miller's salary was comparable to the salaries of other similarly experienced employees in the real estate industry or evidence that her salary was commensurate to the amount of work that she performed (*see Matter of Breslin Realty Dev. Corp. v Smith & De Groat Inc.*, 52 Misc 3d 511, 517 [Sup Ct, Nassau County 2016] [stating that the defendant "took reasonable steps to determine that the salary . . .

represented reasonable compensation for . . . part time work" by making inquiry as to what is customary in other companies in the same industry]). As treasurer, Berkowitz should have been aware of Valoc's financial condition at the time the conveyances were made, yet he testified repeatedly that he did not know if the corporation was insolvent. Berkowitz also charged his personal expenses to Valoc's credit card even though Valoc no longer conducted any business.

Finally, defendants' position that plaintiff was not a creditor until the Judgment was docketed is not supported. Debtor and Creditor Law § 270 defines a creditor as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." The transfers must be made "in anticipation" of a debt (*Galgano v Ortiz*, 287 AD2d 688, 688 [2d Dept 2001]). At the time the transfers were made, property taxes and water and sewer charges had not been paid as required under the Lease, and Valoc had been notified that those charges were outstanding. Plaintiff, who possessed a claim for contractual liability under the Lease is, therefore, a creditor within the meaning of the Debtor and Creditor Law.

Thus, plaintiff is entitled to partial summary judgment on liability against defendants on the first cause of action, and defendants' motion for summary judgment dismissing this cause of action is denied.

2. Debtor and Creditor Law § 273-a

The second cause of action seeks damages of $180,000 under Debtor and Creditor Law § 273-a. Debtor and Creditor Law § 273-a reads:

> "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."

To succeed on a Debtor and Creditor Law § 273-a claim, a plaintiff must establish "(1) that the conveyance was made without fair consideration; (2) that at the time of transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and (3) that a final judgment has been rendered against the transferor that remains unsatisfied" (*Fischer v Sadov Realty Corp.*, 34 AD3d 632, 633 [2d Dept 2006]).

Plaintiff has shown that the transfers were made without fair consideration, that plaintiff had asserted a claim for monetary damages against Valoc in the Foreclosure Action, that Valoc paid Miller a salary and Berkowitz's fringe benefits, and that the Judgment has not been satisfied. Therefore, the conveyances Valoc made after February 12, 2012 "lack 'good faith' as a matter of law" (*Holme*, 127 AD3d at 541 [internal quotation marks and citation omitted]).

Defendants' argument that there was no violation of the statute because it was not a defendant in an action for money damages is unpersuasive. The cross claims in the Foreclosure Action specifically sought damages for breach of contract and for contractual indemnification (Sherman affirmation in support, exhibit 33 at 5). Additionally, "[t]he existence of an unsatisfied judgment is an 'essential element' of a constructive fraud cause of action pursuant to Debtor and Creditor Law § 273-a" (*Coyle v Lefkowitz*, 89 AD3d 1054, 1056 [2d Dept 2011]), and defendants cannot dispute that the Judgment has not been paid in full. Defendants never appealed the judgments entered in the Foreclosure Action, and therefore, they cannot challenge the amount or the propriety of those judgments in this action.

Consequently, plaintiff is entitled to partial summary judgment on liability against defendants on the second cause of action, and defendants' motion for summary judgment dismissing this cause of action is denied.

3. *Debtor and Creditor Law § 274*

The third cause of action seeks damages of $3.8 million for a violation of Debtor and Creditor Law § 274. Debtor and Creditor Law § 274 states:

> "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."

The phrase "unreasonably small capital" is not defined in the Debtor and Creditor Law, but it "has been defined by the courts as 'a financial condition short of equitable insolvency,' where the transferor is 'technically solvent but doomed to fail'" (*Integrity Electronics, Inc. v Garden State Distributors, Inc.*, 2016 WL 3637004, *7, 2016 US Dist LEXIS 86143, *19-20 [ED NY 2016], quoting *Matter of Chin*, 492 BR 117, 129 [Bankr ED NY 2013]). Factors to consider include "the company's debt to equity ratio, its historical capital cushion, and the need for working capital in the specific industry at issue" (*MFS/Sun Life Trust-High Yield Series v Van Dusen Airport Services Co.*, 910 F Supp 913, 944 [SD NY 1995]).

Plaintiff has established that Valoc maintained unreasonably small capital and, as discussed above, each conveyance to Miller and Berkowitz lacked fair consideration. The transfers to Miller resulted in the corporation sustaining negative operating losses each year. In addition, Valoc paid Berkowitz's personal expenses well after Valoc had ceased operations. Even supposing that Miller and Berkowitz believed that the tax lien amounts were inaccurate, Valoc never challenged those amounts under the procedure set forth in the Lease. Furthermore, a "tax lien certificate . . . [is] presumptive evidence of a valid and enforceable lien" [*NYCTL 2009-A Trust v Morris*, 164 AD3d

1249, 1250 [2d Dept 2018], citing Administrative Code of City of NY § 11-336]). Again, Valoc never appealed the judgments in the Foreclosure Action.

Defendants in opposition failed to produce evidence that Valoc was left with any operating capital after each transfer. Its assertion that "Valoc always had ample cash flow and capital" (defendants' memorandum of law in support at 9) is belied by the documentary evidence. Finally, Berkowitz acknowledged that Valoc did not possess the funds necessary to fund the Janney Account and that a lien had been placed on Valoc's bank account.

Accordingly, plaintiff is entitled to summary judgment on liability against defendants on the third cause of action, and defendants' motion for summary judgment dismissing this cause of action is denied.

4. Debtor and Creditor Law § 275

The fourth cause of action alleges a violation of Debtor and Creditor Law § 275. The statute provides that "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." Therefore, "[a] claim under this provision requires, in addition to the conveyance and unfair consideration elements established *supra*, an element of intent or belief that insolvency will result" (*Wall Street Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999] [italics in original]; *Matter of Shelley v Doe*, 249 AD2d 756, 758 [3d Dept 1998] [stating that the conveyance must give the defendant transferor "a good indication of oncoming insolvency"]).

Defendants argue that dismissal is appropriate because the complaint is supported by only self-serving allegations. However, a summary judgment motion brought under CPLR 3212 does not concern the sufficiency of a complaint. Indeed, a party moving for summary judgment must

"establish his [or her] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his [or her] favor" (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979], quoting CPLR 3212 [b]. A movant cannot meet its prima facie burden on summary judgment "merely by pointing to gaps in plaintiff's proof" (*McCullough v One Bryant Park*, 132 AD3d 491, 492 [1st Dept 2015]). Here, defendants have not dispelled all questions of material fact as to the adequacy or fairness of the consideration. Likewise, an issue of fact exists as to whether defendants believed it would incur debts beyond its ability to pay as the evidence demonstrates that Miller personally funded the Janney Account because Valoc lacked the requisite capital.

Thus, defendants' motion for summary judgment dismissing this cause of action is denied.

B. The Fifth Cause of Action under the Debtor and Creditor Law § 276

The fifth cause of action alleges a violation of Debtor and Creditor Law § 276. Plaintiff moves for partial summary judgment against only Berkowitz.

Debtor and Creditor Law § 276 requires "actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors" to set aside a conveyance as fraudulent. Because actual intent is difficult to prove, a plaintiff may "rely on 'badges of fraud' to support his [or her] case" (*Wall Street Assoc.*, 257 AD2d at 529 [internal quotation marks and citation omitted]; *Marine Midland Bank v Murkoff*, 120 AD2d 122, 128 [2d Dept 1986], *appeal dismissed* 69 NY2d 875 [1987] [stating that "[f]raudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act"]). Factors that implicate badges of fraud include 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 Street Assoc.*, 257 AD2d at 529). "[T]he presence of one or more badges of fraud does not necessarily compel the conclusion that a conveyance is fraudulent" (*A&M Global Mgmt. Corp.*, 115 AD3d at 1289).

Plaintiff has demonstrated that the circumstances surrounding the post-2012 conveyances to Berkowitz are sufficient to infer actual fraudulent intent (*see Machado v A. Canterpass, LLC*, 115 AD3d 652, 654 [2d Dept 2014] [finding that the "'badges of fraud' and the defendants' failure to proffer any legitimate explanation for the conveyances" meant that "actual fraudulent intent is readily inferrable"]). There was a close relationship between Valoc and Berkowitz when the transfers were made because, as noted earlier, Berkowitz enjoyed total control over Valoc following Miller's death. The charges to Valoc's credit card were made when the tax liens were outstanding and when Valoc was a cross claim defendant in the Foreclosure Action. Berkowitz, Valoc's treasurer, admitted that the corporation began experiencing cash flow problems after the company lost its sole revenue-producing asset.

Defendants argue that this cause of action fails to meet the pleading requirements of CPLR 3016. But, as with the fourth cause of action, a summary judgment motion does not concern the sufficiency of a pleading. Berkowitz's averment that Miller granted him fringe benefits is inadequate to establish that these perks would have continued after her death and after the Lease expired, particularly in the absence of any competent, corroborating evidence. Notably, Berkowitz testified that he and Miller never discussed his use of Valoc's credit card after Valoc stopped conducting its business. Thus, defendants have failed to raise a triable issue of fact.

As plaintiff has demonstrated its entitlement to summary judgment on the Debtor and Creditor Law § 276 claim, it is also entitled to an award of reasonable attorneys' fees pursuant to

Debtor and Creditor Law § 276-a (*see Shifer v Shifer*, — AD3d —, 2018 NY Slip Op 06584, *2 [2d Dept 2018]; *Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179 [1st Dept 2004], *rearg denied* 2005 NY App Div LEXIS 693 [1st Dept 2005]).

Accordingly, plaintiff's motion for summary judgment on liability against Berkowitz on the fifth cause of action, including reasonable attorneys' fees, is granted, and defendants' motion for summary judgment dismissing this cause of action is denied.

C. The Sixth Cause of Action Under the Common-Law Trust Fund Doctrine

The sixth cause of action seeks to recover damages for breach of fiduciary duty under the common-law trust fund doctrine. The trust fund doctrine provides that "officers and directors of an insolvent corporation are said to hold the remaining corporate assets in trust for the benefit of its general creditors" (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 549 [2000]). "The application of the trust fund doctrine in New York customarily has been for the purpose of imposing liability on corporate directors or transferees for wrongful dissipation of assets of an insolvent corporation, in actions later brought by court-appointed receivers, trustees in bankruptcy or judgment creditors" (*id.* at 550; *Brenner v Philips, Appel & Walden*, 1997 WL 33471053, *6, 1997 US Dist LEXIS 11539, *16-17 [SD NY 1997] [stating that a "duty exists to ensure that directors do not divert the insolvent corporation's assets improperly in a manner designed to benefit themselves or a particular stockholder, thereby subverting the rights of other creditors"]).

Defendants argue that plaintiff cannot show Valoc was insolvent prior to 2015, when the Judgment was entered. At best, Valoc operated within the zone of solvency, and the trust fund doctrine does not apply where a corporation is "operating within the 'zone of solvency'" (*RSL Communications PLC v Bildirici* (649 F Supp 2d 184, 203 [SD NY 2009]). Defendants' reliance

on *RSL Communications PLC*, though, is misplaced as the court in that action expressly refused to "address the issues of when and whether the trust fund doctrine may be invoked in regard to a corporation allegedly operating in the 'zone of insolvency'" (649 F Supp 2d at 203 n10). In any event, defendants have not presented evidence of Valoc's solvency at the time of each transfer.

In addition, a "simple contract creditor may not invoke the [trust fund] doctrine to reach transferred assets before exhausting legal remedies by obtaining judgment on the debt and having execution returned unsatisfied" (*Credit Agricole Indosuez*, 94 NY2d at 550). Dismissal is warranted where plaintiff "has not yet obtained a judgment on the debt and had execution return unsatisfied" (*Aldoro, Inc. v Gold Force Intl. Ltd.*, 52 AD3d 223, 224 [1st Dept 2008]). As applied to the present action, the Judgment was docketed in 2015, the contents of the Janney Account have been disbursed to satisfy a portion of the Judgment, and the balance of the Judgment has not been paid.

Therefore, defendants' motion for summary judgment dismissing the sixth cause of action is denied.

D. The Seventh Cause of Action under CPLR 5201

The seventh cause of action asserts a derivative claim for breach of fiduciary duty pursuant to CPLR 5201 (a). CPLR 5201 [a] states that "[a] money judgment may be enforced against any debt, which is past due or which is yet to become due, certainly or upon demand of the judgment debtor." "A cause of action which could be assigned or transferred" is also considered a debt (CPLR 5201 [a]). Thus, a debt owed to a judgment debtor from a third party may be used to satisfy a judgment (*see JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d 293, 301 [1st Dept 2007]), provided that the debt possesses the requisite legal certainty (*see Fishgold v COF., Inc.*, 288 AD2d 827, 828 [4th Dept 2001], citing *Colonial Press of Miami v Bank of Commerce*, 71 Misc 2d 987,

988 [App Term, 1st Dept 1972]). CPLR 5225 and 5227 identify a special proceeding as the procedural mechanism by which a judgment creditor may seek enforcement (*see Port Chester Elec. Constr. Corp. v Atlas*, 40 NY2d 652, 657 [1976]; Richard C. Reilly, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5227:2). A special proceeding "obviates the necessity for a plenary action" (*Siemens & Halske GmbH. v Gres*, 32 AD2d 624, 624 [1st Dept 1969]).

Defendants contend that this cause of action should have been raised in a turnover proceeding, not a plenary action. However, CPLR 103 [c] provides that the court shall not dismiss a proceeding "solely because it is not brought in the proper form." As such, the court may exercise its discretion to convert a cause of action into a special proceeding (*see Port Chester Electrical Constr. Corp.*, 40 NY2d at 653). Nonetheless, the court declines to dismiss the seventh cause of action or sever and convert the claim into a special proceeding as plaintiff may assert the claim in a hybrid proceeding (*see Indo-Med Commodities, Inc. v Wisell*, 2014 NY Slip Op 33918[U], *4 [Sup Ct, Nassau County 2014] [permitting the plaintiff to maintain a hybrid proceeding under Article 52 and the Debtor and Creditor Law]).

As to the merits, a judgment creditor must "'stand[ ] in the judgment debtor's shoes' and 'prov[e] the judgment debtor's case' against the garnishee" (*JPMorgan Chase Bank, N.A.*, 47 AD3d at 302 n4 [internal quotation marks and citation omitted]). "To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct" (*Castellotti v Free*, 138 AD3d 198, 209 [1st Dept 2016]). It is settled that "[d]irectors and officers, in the performance of their duties, stand in a fiduciary relationship to their corporation" (*Schachter v Kulik*, 96 AD2d 1038, 1039 [2d Dept 1983], *appeal dismissed* 61 NY2d 758 [1984]). "Without a showing of a

breach of fiduciary duty to the corporation, judicial inquiry into the actions of corporate directors is prohibited, even though 'the results show that what [the directors] did was unwise or inexpedient'" (*Jones v Surrey Coop. Apts.*, 263 AD2d 33, 36 [1st Dept 1999] [internal quotation marks and citation omitted]). It is the plaintiff who bears the burden of demonstrating that a director or officer breached his or her fiduciary duty (*id.* at 36-37).

Defendants do not address the actual merits of this cause of action, stating only in conclusory fashion that plaintiff's claim is speculative and that its damages are incapable of being quantified. In any event, plaintiff has raised a triable issue of fact as to whether Miller's or Berkowitz's actions caused harm to the corporation.

Accordingly, defendants' motion for summary judgment dismissing the seventh cause of action is denied.

E. The Eighth Cause of Action under Business Corporation Law §§ 719 and 720 (b)

The eighth cause of action asserts a claim under Business Corporation Law §§ 719 and 720 (b). Business Corporation Law § 719 (a) discusses a corporate director's liability in voting for certain corporate actions, such as declaring a dividend or distribution, a purchase of shares, a distribution of assets after dissolution, and the making of a loan. The relevant portion of Business Corporation Law § 720 (b) provides that "[a]n action may be brought for the relief provided in this section, and in paragraph (a) of section 719 . . . by a corporation . . . or judgment creditor thereof . . . ." The statutes, when read together, expressly authorize a judgment creditor to commence an action against a corporation's directors premised on a "declaration of any dividend or other distribution to the extent that it is contrary to the provisions of paragraphs (a) and (b) of section 510 . . ." (Business Corporation Law § 719 [a] [1]). Business Corporation Law § 510 (a) states that "a corporation may declare and pay dividends or make other distributions . . . except when

currently the corporation is insolvent or would thereby be made insolvent . . . ." Consequently, a judgment creditor of a debtor corporation may recover against a corporation's directors for a violation of Business Corporation Law § 719 (*see Crete Concrete Corp. v Josephs*, 66 Misc 2d 837, 842 [Sup Ct, Rockland County 1971], *mod on other grounds* 39 AD2d 543 [2d Dept 1972], *lv denied* 31 NY2d 644 [1972] [entering judgment against the defendant, who was the president and sole shareholder of six subchapter S corporations, for a Business Corporation Law § 510 violation]).

Despite the foregoing, defendants cite *Planned Consumer Mktg. v Coats & Clark* (127 AD2d 355 [1st Dept 1987], *affd* 71 NY2d 442 [1988]), for the proposition that a judgment creditor may not assert a Business Corporation Law § 719 claim. That matter involved a turnover proceeding where the petitioner judgment creditor sought to recover allegedly fraudulent payments a corporate director had made to an employment benefit plan. In dismissing the Business Corporation Law §§ 510 and 719 cause of action, the Court stated that a "judgment creditor is not the proper party to bring an action under section 719 of the Business Corporation Law" (127 AD2d at 369]). The petitioner in that action, though, did not invoke Business Corporation Law § 720, a fact noted in the Court's decision. Moreover, the Court of Appeals in affirming the decision of the Appellate Division, First Department, stated that the statute "enables a judgment creditor of a corporation to bring an action against a director or officer '[to] set aside an unlawful conveyance, assignment or transfer of corporate assets'" (71 NY2d at 451). Therefore, defendants' argument that a judgment creditor, such as the plaintiff herein, cannot assert a claim under Business Corporation Law §§ 719 and 720 is not legally supported.

Defendants' contention that Business Corporation Law § 510 pertains solely to C corporations, whereas Valoc was organized as a closely-held S corporation, is equally

unpersuasive. Importantly, Business Corporation Law § 103 (a) states that "[t]his chapter applies to every domestic corporation and to every foreign corporation which is authorized or does business in this state" and "to a corporation of any type or kind, formed for profit under any other chapter of the laws of this state." Defendants admitted in their answer that Valoc was a domestic corporation registered in New York (answer ¶ 8). Thus, Valoc's actions are subject to scrutiny under Business Corporation Law § 510. Accordingly, defendants' motion for summary judgment dismissing the eighth cause of action is denied.

F. The Ninth Cause of Action for Breach of Contract

In the ninth cause of action, plaintiff seeks to hold the Estate liable for Valoc's breach of the Lease on the basis that Miller abused the corporate form for her own personal gain.

The doctrine of piercing the corporate veil is "an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993). As such, "New York does not recognize a separate cause of action to pierce the corporate veil" (*Chiomenti Studio Legale, L.L.C. v Prodos Capital Mgt. LLC*, 140 AD3d 635, 636 [1st Dept 2016] [internal quotation marks and citation omitted]). Counter to defendants' position, plaintiff has not brought an action independent of a claim against Valoc (*see Olivieri Constr. Corp. v WN Weaver St. LLC*, 144 AD3d 765, 766 [2d Dept 2016]). Plaintiff seeks to recover the unsatisfied Judgment from one of Valoc's officers, and Valoc is a party to this action (*see Stewart Tenants Corp. v Square Indus.*, 269 AD2d 246, 248 [1st Dept 2000]). Therefore, plaintiff may maintain the ninth cause of action (*see Moss v Garcia-Chamorro*, 110 AD3d 475, 476 [1st Dept 2013] [finding defendants liable for an underlying judgment "on theories of piercing the corporate veil . . . and fraudulent conveyance"]).

It is well settled that "a corporation exists independently of its owners, as a separate legal entity, [and] that the owners are normally not liable for the debts of the corporation" (*Matter of Morris*, 82 NY2d at 140). However, courts will pierce the corporate veil and disregard the corporate form "whenever necessary 'to prevent fraud or to achieve equity'" (*id.* [internal quotation marks and citation]). Those seeking to pierce the corporate veil or establish an alter ego relationship bear a heavy burden (*see Etex Apparel, Inc. v Tractor Intl. Corp.*, 83 AD3d 587, 587 [1st Dept 2011]). In determining whether to pierce the corporate veil, the court may consider the following factors:

> "[D]isregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm's length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation's debts by the dominating entity"

(*Fantazia Intl. Corp. v CPL Furs N.Y., Inc.*, 67 AD3d 511, 512 [1st Dept 2009], citing *Freeman v Complex Computing Co.*, 119 F3d 1044, 1053 [2d Cir 1997]). Evidence of domination alone is insufficient "without an additional showing that it led to inequity, fraud, malfeasance" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). Indeed, a plaintiff must "do more than merely allege that the individual engaged in improper acts or acted in 'bad faith' while representing the corporation" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011]). A plaintiff seeking to pierce the corporate veil must show that a defendant took steps to render the corporation judgment proof or insolvent so as "'to perpetrate a wrong or injustice against'" the plaintiff (*James v Loran Realty v Corp.*, 20 NY3d 918, 919 [2012], quoting *Matter of Morris*, 82 NY2d at 141), or treated the business as "a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather

than corporate ends" (*Walkovszky v Carlton*, 18 NY2d 414, 418 [1966]). The inquiry is "fact-laden . . . [and] particularly unsuited for resolution on summary judgment" (*see Ledy v Wilson*, 38 AD3d 214, 215 [1st Dept 2007] [internal quotation marks and citation omitted]; *see also Emposimato v CIFC Acquisition Corp.*, 89 AD3d 418, 420 [1st Dept 2011] [stating same with regards to alter ego liability]).

The evidence suggests that Miller failed to adhere to nearly all corporate formalities. As president, she failed to call corporate meetings and document corporate actions. She authorized payment from Valoc's funds of fringe benefits she and Berkowitz enjoyed which, arguably, were wholly unrelated to the corporation's business. Miller failed to adhere to the conditions precedent described in the employment agreement requiring Berkowitz to maintain receipts for his expenses. Similarly, Miller's annual salary was not set forth in writing as the only records of her compensation were Valoc's tax returns. Even then, Miller's salary was inaccurate. Moreover, it appears that Valoc was undercapitalized for several years. Valoc's tax returns show sustained negative net income each year ranging from $190,856 in 2007 (Sherman affirmation in support, exhibit 27 at 4) to $319,600 in 2011 (Sherman affirmation in support, exhibit 25 at 4), yet, the corporation continued to pay Miller an annual salary of $720,000 and Berkowitz an annual salary plus medical expenses of $220,000.

Nevertheless, "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil" (*Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 AD3d 1, 12 [1st Dept 2016], *affd* 31 NY3d 1002 [2018], *reh denied* 31 NY3d 1141 [2018] [internal quotation marks and citation omitted]). "An inference of abuse does not arise . . . where a corporation was formed for legal purposes or is engaged in legitimate business" (*TNS Holdings Inc.*, 92 NY2d at 339-340). Here, Valoc was formed for the legitimate purpose of

holding the Lease and subleasing the Premises, and the Judgment against Valoc arose from its breach of the Lease. In addition, plaintiff has not demonstrated that Miller abused the corporate form by dominating Valoc to perpetrate a wrong against plaintiff, i.e. that Miller caused Valoc to breach the Lease for her own personal gain (*see Cobalt Partners, L.P. v GSC Capital Corp.*, 97 AD3d 35, 42 [1st Dept 2012]), or that she paid herself and others so that she could leave the corporation judgment proof (*see James*, 20 NY3d at 919; *cf. Manshion Joho Ctr., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005] [finding that the defendant "effectively stripped the assets of the corporation transferred to him by plaintiff to enrich himself while making the corporation judgment proof, thus committing a wrong against plaintiff that resulted in injury"]). Therefore, plaintiff's motion and defendants' motion for summary judgment on the ninth cause of action are denied.

G. The Tenth Cause of Action for Unjust Enrichment

The tenth cause of action alleges that defendants have been unjustly enriched to plaintiff's detriment. Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). To prevail on the claim, "[a] plaintiff must show 'that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and citations omitted]).

Defendants contend that plaintiff is precluded from maintaining this cause of action because a contractual relationship existed between Valoc, Miller and Berkowitz. Where a valid and enforceable contract governing the subject matter exists, a plaintiff is precluded from recovery on a quasi-contract claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388

[1987]). Despite defendants' assertion, there was no contract between plaintiff, Miller and Berkowitz that controls this claim. Defendants produced no evidence of a written contract between Valoc and Miller concerning her salary, and Berkowitz's employment agreement, which made no reference to fringe benefits, expired in April 2011. Additionally, the unjust enrichment claim pertains to whether the Estate and Berkowitz improperly benefited from purportedly fraudulent transfers at plaintiff's expense. Thus, defendants' motion for summary judgment dismissing the tenth cause of action is denied.

The court has considered the other arguments advanced by the parties and finds them unavailing.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion for partial summary judgment on liability (Motion Sequence No. 006) is granted on the first, second and third causes of action against defendants Valoc Enterprises, Inc., Norman K. Berkowitz, in his individual capacity, in his capacity as the executor of the Estate of Rhoda Miller Goldman a/k/a Rhoda Miller and in his capacity as an officer and director of Valoc Enterprises, Inc., and the Estate of Rhoda Miller Goldman a/k/a Rhoda Miller and on the fifth cause of action against Norman K. Berkowitz, in his individual capacity, and the balance of the motion is otherwise denied; and it is further

ORDERED that the amount of reasonable attorneys' fees due to plaintiff on the fifth cause of action against defendant Norman K. Berkowitz shall be determined at the disposition or trial of the remaining causes of action; and it is further

ORDERED that the motion of defendants Valoc Enterprises, Inc., Norman K. Berkowitz, in his individual capacity, in his capacity as the executor of the Estate of Rhoda Miller Goldman a/k/a Rhoda Miller and in his capacity as an officer and director of Valoc Enterprises, Inc., and the Estate of Rhoda Miller Goldman a/k/a Rhoda Miller for summary judgment dismissing the complaint (Motion Sequence No. 007) is denied in its entirety.

12-14-18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE