At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 6th day of May, 2020.

P R E S E N T:
HON. PAMELA L. FISHER,
J.S.C.

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STEVEN SEIDLER, STEPHANIE SEIDLER FAMILY TRUST and SCOTT SEIDLER FAMILY TRUST,

Plaintiffs,

DECISION/ORDER

- against -

Index No: 518713/2019

WORKABLE ATLANTIC LLC, 1236 ATLANTIC LLC, ATLANTIC LEV Y LLC, LOFT E LLC, HYMAN SCHATTNER a/k/a CHAIM SCHATTNER, and SIGNATURE BANK,

Defendants.

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Emergency Order to Show Cause and Affidavits (Affirmations) Annexed	1, 2, 3
Memorandum of Law in Support	4
Opposing Affidavits (Affirmations) Annexed	5, 6
Memorandum of Law in Opposition	7

Upon the foregoing papers, defendant Workable Atlantic LLC moves by emergency order to show cause, for an order, pursuant to CPLR 6514, to cancel the notice of pendency as being improperly filed by plaintiffs, or in the alternative, to cancel the notice of pendency pursuant to CPLR 6515 upon Workable's posting of an undertaking, or to compel plaintiffs to post an undertaking to maintain the notice of pendency pursuant to CPLR 6515.

Procedural History

In 2014, plaintiffs commenced a lawsuit against Jacob Knopf, Solomon Knopf, Chaya Knopf, Ruth Knopf, Fischer Knopf, Ashburton 70 LLC, AAR Group Holding LLC, Loft E LLC, Robert

Teitelbaum, Esq., Atlantic Lev Y LLC, Hyman Schattner and 1236 Atlantic LLC. In their verified second amended complaint, "plaintiffs seek damages and/or equitable relief for, among other things, fraud, breach of fiduciary duty, fraudulent concealment by fiduciary, civil conspiracy to defraud, breach of contract, breaches of the Securities Act of 1933 and the Securities Exchange Act of 1934 and unjust enrichment" (2014 Amended Complaint ¶ 1, annexed as exhibit C to defendant's motion papers, motion sequence 3). The relief requested in the complaint includes money damages, and an order declaring that "the plaintiffs are entitled to an ownership interest in 1236 Atlantic LLC or the entities that are members of 1236 Atlantic LLC that is equal to their share of all funds invested as of October 10, 2008 to acquire the" "real property known as 1236 Atlantic Avenue, Brooklyn, New York, block 1200, lot 21 in Kings County" (*Id.* at ¶¶ 1, 2-A, 221).

In 2018, plaintiffs commenced a lawsuit against Signature Bank, 1236 Atlantic LLC, Loft E LLC, Atlantic Lev Y LLC, AAR Group Holding LLC and Hyman Schattner. The 2018 complaint indicates that "[t]he plaintiffs seek damages and injunctive relief relating to fraudulent conveyances totaling $3,300,000 that were undertaken to hinder, delay, or defraud the plaintiffs' rights as future judgment creditors of the LLC Defendants and Schattner in the 2014 Lawsuit" (2018 Complaint ¶ 3, annexed as exhibit D to defendant's motion papers, motion sequence 2). The causes of action are based on 1236 Atlantic LLC taking out loans from Signature Bank for $6,000,000 and $7,500,000, in 2012 and 2017, respectively (*Id.* at ¶¶ 37, 62). The plaintiffs are seeking a "declaratory judgment declaring that [those] conveyance[s] and the distribution of [their] proceeds without fair consideration are fraudulent and void under Debtor and Creditor Law § 276" (*Id.* at 12). No notice of pendency was filed in either the 2014 or 2018 actions, and no judgment has been rendered in either action.

In 2019, plaintiffs commenced an action against Workable Atlantic LLC, 1236 Atlantic LLC, Hyman Schattner, and Signature Bank. In the complaint, plaintiffs allege that 1236 Atlantic LLC fraudulently conveyed the real property, known as 1236 Atlantic Avenue, Brooklyn, NY, block 1200,

lot 21 in Kings County, to Workable Atlantic LLC in December 2018 in order to "hinder, delay or defraud the plaintiffs' rights as future judgment creditors of" the defendants in the 2014 and 2018 lawsuits (2019 Complaint ¶¶ 3, 18, 51, annexed as exhibit A to defendant's motion papers, motion sequence 2). Plaintiffs are seeking money damages, and an order declaring that the conveyance is fraudulent and void under Debtor and Creditor Laws §§273-a and 276 (*Id.* at 15). Plaintiffs filed an amended complaint on January 24, 2020. A notice of pendency was filed in this action on August 23, 2019, the same date the complaint was filed. On October 25, 2019, Defendant Workable Atlantic LLC filed a motion to dismiss the complaint and cancel the notice of pendency. The motion was adjourned by stipulation from February 5, 2020 to April 1, 2020. On February 14, 2020, Workable filed an emergency order to show cause seeking to cancel the notice of pendency.

Parties' Contentions

In support of their motion to cancel the notice of pendency, defendant Workable submits an affidavit from Sara Williams Willard, a managing member of Workable City LLC, which is a member of Workable Atlantic LLC, explaining the emergency that necessitated the order to show cause. In her affidavit, Willard contends that "exigent circumstances have arisen" since the original motion was filed, including that Workable is in "imminent danger of (a) losing the $4.75 million sale of the Commercial Unit at the Property; and (b) defaulting on its $8 million Mortgage with Flushing Bank" (Willard Aff ¶ 3). Willard states that Workable's motion to cancel the notice of pendency should be granted, because the allegations in plaintiffs' 2019 complaint have no merit, and plaintiffs have no claim against the property, as their claims against the "former owner 1236 Atlantic LLC and its investors were for money damages only, and have nothing to do with the use, ownership or enjoyment of the Property" (*Id.* at ¶¶ 4, 8-9*; see also* Memo of law in support at 18-19) (contending that notice of pendency was filed in bad faith as no notice of pendency was filed in either the 2014 or 2018 actions, and plaintiff is asserting a claim to the property for the first time in this action). Defendant maintains

that if the "notice of pendency is not cancelled outright," defendant would be willing to post an undertaking in the amount of $800,000 (Willard Aff ¶¶ 50-51).

In opposition to defendant Workable's motion to cancel the notice of pendency, plaintiffs contend that the notice of pendency is proper under CPLR 6501, because the "fraudulent conveyance lawsuit seeks to rescind the conveyance of the Building pursuant to Debtor And Creditor Law §279," which "would affect the title to, or the possession, use or enjoyment of real property" (Zanani Affirmation ¶ 3). Plaintiffs affirm that the notice of pendency cannot be cancelled pursuant to CPLR 6514(b), as the plaintiffs' allegations were made in good faith (*Id.* at ¶ 4). Plaintiffs also maintain that Workable knew that the conveyance was fraudulent and was aware of the 2014 and 2018 lawsuits (*Id.* at ¶ 18). Plaintiffs allege that "[c]ancelling the notice of pendency would subvert and destroy the plaintiffs' statutory and preferred remedy under Debtor and Creditor Law § 279 to obtain a nullification of the fraudulent conveyance of the debtor's assets" (*Id.* at ¶ 4). Plaintiffs state that if the court allows the notice of pendency to be cancelled, defendant's undertaking should be in the sum of at least $16,579,865.60 (*Id.* at ¶ 41). In opposition to the motion, plaintiffs submit an affidavit of Certified Public Accountant Joseph Romano, who reviewed the tax returns of 1236 Atlantic LLC from 2011 to 2018 at the request of Doron Zanani, Esq. He affirms that "[t]he total sum available to be distributed to 1236 Atlantic LLC's members from all sources during the years 2011-2018 is $16,579,865.60" (Romano Aff at ¶ 26).

Law

Cancellation of Notice of Pendency

CPLR 6501 states that "[a] notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to, or the possession, use or enjoyment of, real property, except in a summary proceeding brought to recover the possession of real property" (CPLR § 6501). "A person whose conveyance or incumbrance is recorded after the

filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party" (*Id.*). Courts have strictly applied the requirement that a notice of pendency may only be filed where the "judgment demanded would affect the title to, or the possession, use or enjoyment of real property" (*See 5303 Realty Corp. v. O & Y Equity Corp.*, 64 N.Y.2d 313, 315-316 [1984] (holding that a "suit to specifically perform a contract for the sale of stock representing a beneficial ownership of real estate will not support the filing of a notice of pendency"); *Braunston v. Anchorage Woods*, 10 N.Y.2d 302, 305 [1961] (stating that "a notice of [pendency] cannot be filed where the party who has filed it claims no right, title, or interest in or to the real estate against which it is filed, and where the suit concerns simply some encroachment or wrong perpetuated by defendants on plaintiffs' land)).

"In entertaining a motion to cancel, the court essentially is limited to reviewing the pleading to ascertain whether the action falls within the scope of CPLR 6501" (*5303 Realty*, 64 N.Y.2d at 320). "[T]he complaint filed with the notice of pendency must be adequate unto itself, a subsequent, amended complaint cannot be used to justify an earlier notice of pendency" (*Id.*). "When the court entertains a motion to cancel a notice of pendency in its inherent power to analyze whether the pleading complies with CPLR 6501," it may not assess "the likelihood of success on the merits" (*Natasi v. Natasi*, 26 A.D.3d 32, 36 [2d. Dept. 2005]).

A notice of pendency must be cancelled upon motion "if service of a summons has not been completed within the time limited by section 6512; or if the action has been settled, discontinued or abated; or if the time to appeal from a final judgment against the plaintiff has expired; or if enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519" (CPLR § 6514(a)). A notice of pendency may also be cancelled upon motion, "if the plaintiff has not commenced or prosecuted the action in good faith" (CPLR § 6514(b)). "Where a plaintiff is using the notice of pendency for an ulterior purpose a finding of lack of good faith can be made" (*Natasi*, 26 A.D.3d at 41, citing *Weisinger v. Rae*, 19 Misc.2d 341, 351 [Sup Ct, Queens County, Special Term,

Part I 1959]). "The party seeking to cancel the notice of pendency must demonstrate the requisite lack of good faith," and "[t]his burden is not easily met since defendant must raise at least a substantial question as to whether plaintiff has not commenced or prosecuted the action in good faith" (*551 W. Chelsea Partners LLC v. 556 Holding LLC*, 40 A.D.3d 546, 548 [1st Dept 2007]) (holding that when "parties offer sharply conflicting factual accounts," a finding of lack of good faith cannot be made).

CPLR 6515 allows a court to cancel a notice of pendency upon motion "upon such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in the amount to be fixed by the court, and if the court finds that adequate relief can be secured to the plaintiff by the giving of such undertaking" (CPLR § 6515(1)). CPLR 6515 also states that if the "plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not cancelled" (CPLR § 6515(2)). This double bonding procedure is often used in cases where the relief demanded is specific performance, but courts have declined to have both parties post an undertaking in cases where the plaintiff's claims lack merit (*See Brooklyn Restorations, LLC v. South 1st St. Dev.*, 2013 WL 12160961, at *4, *6 [Sup Ct, Kings County 2013]; *Ansonia Realty Co. v. Ansonia Assoc.*, 117 A.D.2d 527, 527 [1st Dept 1986]; *Weksler v. Yaffe*, 129 Misc.2d 633, 634, 638 [Sup Ct, Kings County, Special Term, Part I 1985]; *Sparks Assoc, LLC v. North Hills Holding Co. II, LLC*, 74 A.D.3d 1183, 1183-84 [2d Dept 2010]).

"The determination to cancel a notice of pendency pursuant to CPLR § 6515 is a matter entirely within the discretion of the court" (*Brooklyn Restorations*, 2013 WL 12160961, at *3). Courts consider the merits of the plaintiff's lawsuit and the likelihood of success, as well as "the uniqueness of the property," "the circumstances surrounding the action," "the question of good faith," and "the financial burden on the defendant if the notice of pendency remained." (*See Sparks Assoc*, 74 A.D.3d at 1184; *Weksler*, 129 Misc.2d at 637; *Brooklyn Restorations.*, 2013 WL 12160961, at *3). The focus of the

inquiry is whether "adequate relief can be secured to the plaintiff by the giving of such an undertaking" (*Bobash, Inc. v. Festinger*, 57 A.D.3d 464, 466 [2d Dept. 2008]) (holding that canceling a notice of pendency upon posting of an undertaking by appellants was appropriate "since the ultimate object of [the] action [was] to enforce a money judgment against the property rather than to affect title to the property"). Courts have based the undertaking amount on the damages claimed in plaintiff's complaint (*See Brooklyn Restorations*, 2013 WL 12160961, at *4, *6; *Weksler*, 129 Misc.2d at 638; *Pix Furniture v. Loew's Theatres & Realty Corp.*, 131 Misc.2d 517, 518, 521 [Sup Ct, Bronx County 1986]).

Fraudulent Conveyance

Debtor and Creditor Law § 273-a states that "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" (NY Debtor and Creditor Law § 273-a).

Debtor and Creditor Law § 276 states that "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" (NY Debtor and Creditor Law § 276). "Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on 'badges of fraud' to support his case, i.e. circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent'" (*Wall Street Associates v. Brodsky*, 257 A.D.2d 526, 529 [1st Dept 1999]) (quoting *MFS Sun/Life Trust-High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F. Supp. 913, 935 [SDNY 1995]). "Among such circumstances are: 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 Associates*, 257 A.D.2d at 529). Causes of action under Debtor and Creditor Law § 276 must be pleaded with "sufficient particularity to satisfy CPLR 3016(b)" (*Gateway I Group, Inc. v. Park Avenue Physicians, P.C.*, 62 A.D.3d 141, 150 [2d. Dept 2009]). CPLR 3016(b) states that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR § 3016(b)). The particularity requirement is relaxed in cases where "the circumstances constituting a fraud" "are peculiarly within the knowledge of the [opposing] party" (*Jered Contracting Corp. v. New York City Transit Authority*, 22 N.Y.2d 187, 194 [1968]).

Debtor and Creditor Law § 279 indicates the remedies available to creditors whose fraudulent conveyance claims have not yet matured, including "[r]estrain[ing] the defendant from disposing of his property," "[a]ppoint[ing] a receiver to take charge of the property," "[s]et[ting] aside the conveyance or annul[ling] the obligation, or" "[m]ak[ing] any order which the circumstances of the case may require" (NY Debtor and Creditor Law § 279(a)-(d)).

Analysis

Plaintiff's notice of pendency may not be cancelled pursuant to CPLR 6501, as the plaintiffs have asserted a cause of action in which the "judgment demanded would affect the title to, or the possession, use or enjoyment of real property" (CPLR § 6501). The court must look to the face of the original complaint, as the amended complaint cannot be used to justify the earlier notice of pendency (*See 5303 Realty*, 64 N.Y.2d at 320). Plaintiffs assert four causes of action in their original complaint, including a fraudulent conveyance action under Debtor and Creditor Law § 276, one for attorney's fees and costs under Debtor and Creditor Law § 276-a, a fraudulent conveyance action under Debtor & Creditor Law § 273-a, and a fourth cause of action for money damages (2019 Complaint ¶¶ 68, 72, 98,

101-02). The second and fourth causes of action do not affect the "title to, or the possession, use or enjoyment of real property," while the first and the third do, as the plaintiffs are seeking to set aside the fraudulent conveyance under Debtor and Creditor Law § 279 (*Id.* at ¶¶ 69, 99). Plaintiffs have failed to state a cause of action under Debtor & Creditor Law § 273-a, as no final judgment has been rendered against the defendants in the prior actions. Therefore, the court must look at the first cause of action under Debtor and Creditor Law § 276 to see if it is sufficiently pleaded.

Plaintiffs have sufficiently pleaded a fraudulent conveyance action under Debtor and Creditor Law § 276. The elements of a fraudulent conveyance action under Debtor & Creditor Law § 276 include that (1) a conveyance was made with (2) actual intent to hinder, delay or defraud present or future creditors (Debtor and Creditor Law § 276). In their complaint, the plaintiffs allege that 1236 Atlantic LLC conveyed the building to Workable Atlantic LLC on December 12, 2018, so the plaintiffs have sufficiently pleaded the first element of their fraudulent conveyance action (2019 Complaint ¶ 82). There is no direct proof of actual intent, so the plaintiffs have relied on "badges of fraud" to plead the second element of their fraudulent conveyance action.

In their complaint, the plaintiffs contend that the conveyance of the Building from 1236 Atlantic LLC to Workable Atlantic LLC is fraudulent due to the inadequacy of consideration and the close relationship between the parties to the alleged fraudulent transaction, which are two "badges of fraud" that courts have indicated are evidence of actual intent. The plaintiffs support their inadequacy of consideration claim by a 2008 email from Jacob Knopf, the sole member and managing member of AAR Group, an entity that is a part of 1236 Atlantic LLC (*Id.* at ¶ 44-45). The email suggests that the property's net profit after being converted to a Condo Loft or Condo Hotel would be over $32,000,000 (*Id.* at ¶ 45). Plaintiffs also claim that the property's fair market value in December 2018 was greater than $40,000,000, and the property was conveyed to Workable for only $17,100,000, or approximately 40% of the Building's fair market value (*Id.* at ¶ 52). Plaintiffs maintain that the consideration was

inadequate, because Workable Atlantic did not assume or satisfy the Signature Bank mortgage (*Id.* at ¶¶ 60-61). They also allege that "the members and managing members of Workable Atlantic LLC are Schattner and/or individuals and entities affiliated with or controlled by some or all of the defendants in the 2014 and/or 2018 lawsuit" (*Id.* at ¶ 54). Although they do not provide any evidence of their contention that Workable is controlled by defendants from the 2014 or 2018 lawsuits, plaintiffs have sufficiently pleaded actual intent, as they have identified two badges of fraud in support of their fraudulent conveyance claim, and CPLR 3016(b) has been liberally construed by courts to not penalize a party when certain facts are in possession of the opposing party (*See Jered*, 22 N.Y.2d 187 at 194). Since the plaintiffs have sufficiently pleaded the elements of a fraudulent conveyance action, the court may not cancel the notice of pendency pursuant to CPLR 6501.

The court may not cancel the notice of pendency pursuant to CPLR 6514(b), as the plaintiffs have not failed to commence or prosecute the action. There is also no evidence that the plaintiffs lacked good faith or had an ulterior purpose when filing the notice of pendency, as the plaintiffs and defendants provide conflicting factual accounts of the transaction. Therefore, the notice of pendency may only be cancelled pursuant to CPLR 6515, upon Workable's posting of an undertaking.

The notice of pendency against Workable Atlantic LLC may be cancelled upon Workable's posting of an undertaking, as plaintiffs' fraudulent conveyance claim lacks merit. Although plaintiffs have sufficiently pleaded a cause of action, their cause of action is unlikely to succeed, because they have failed to allege sufficient facts to support their contention that the property was sold for less than fair consideration. An email to Seidler in 2008 indicating what the property's profits would be upon being converted to a condo or hotel is speculative and not enough to substantiate plaintiffs' argument that the property was sold for less than fair consideration. The 2019 appraisal report by BBG flatly contradicts plaintiffs' contention that the property is valued at $40,000,000 (See Dipietra Aff ¶ 5, motion sequence 2, containing appraisal report by BBG, a commercial real estate company, stating that

the fair market value of the property was $17,400,000 on April 17, 2019). Plaintiffs' claims that Workable did not assume or satisfy the Signature Bank mortgage, and that 1236 Atlantic and Workable share the same members are refuted by documentary evidence (*See* Exhibits G, K to motion sequence 2, indicating that the Signature Bank mortgage was paid off through a wire transfer on December 12, 2018; *see also* exhibit N to motion sequence 2; exhibit I to motion sequence 3, stating the members of Workable Atlantic LLC and 1236 Atlantic LLC, respectively)

The removal of the notice of pendency upon defendant's posting of an undertaking is appropriate in this case, because plaintiffs filed the notice of pendency to protect their interest in a future money judgment. Plaintiffs have no interest in the land itself. If the notice of pendency were to remain in place, the defendant would suffer significant damages, as it would lose its contract to sell a commercial unit at the property for $4.75 million (Willard Aff ¶¶ 14-16). Defendant has also indicated that the notice of pendency violates its mortgage contract with Flushing Bank, which could cause it to default on its $8 million mortgage (Willard Aff ¶¶ 19-29). Therefore, since plaintiffs' cause of action lacks merit, and plaintiffs have no real interest in the property itself, an undertaking in the amount of their potential damages should adequately compensate them in the event that a judgment is rendered in their favor, and 1236 Atlantic is unable to pay it.

Defendant's motion to cancel the notice of pendency is granted provided defendant posts an undertaking for $8,300,000. The 2019 amended complaint indicates that plaintiffs are seeking more than $5,000,000 in damages in the 2014 lawsuit, and more than $3,300,000 in damages in the 2018 lawsuit (2019 Amended Complaint ¶¶ 1, 2, annexed as exhibit D to defendant's motion papers, motion sequence 3). Under these circumstances, an undertaking of $8,300,000 should adequately compensate the plaintiffs if a judgment in their favor is rendered in the prior lawsuits and this lawsuit. The court declines to allow plaintiffs to post an undertaking to maintain the notice of pendency, as their cause of

action for fraudulent conveyance lacks merit. Defendant Workable Atlantic LLC is to post an undertaking of $8,300,000 within 30 days of the date of this order.

This constitutes the decision and order of the Court.

E N T E R:

Hon. Pamela L. Fisher
J.S.C.