Uni-Rty Corp. v New York Guangdong Fin., Inc.
2020 NY Slip Op 33131(U)
September 23, 2020
Supreme Court, New York County
Docket Number: 157621/2012
Judge: Laurence L. Love

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

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UNI-RTY CORPORATION, GOLDEN PLAZA LIMITED PARTNERSHIP,

Petitioner,

- v -

NEW YORK GUANGDONG FINANCE, INC, GUANGDONG BUILDING INC.,THE ESTATE OF JOSEPH CHU, ALEXANDER CHU, CENTRE PLAZA, LLC,EASTBANK, N.A., CHINA CONSTRUCTION BANK, AGRICULTURAL BANK OF CHINA, SHERIFF OF NEW YORK COUNTY,

Respondent.

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INDEX NO. 157621/2012

MOTION DATE 8/28/2020

MOTION SEQ. NO. 016 017

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 016) 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 536, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 682, 694, 695, 697

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 531, 537, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 698

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions are decided as follows:

In this CPLR Article 52 proceeding, petitioners, the holders of a multi-million dollar judgment against respondent, dissolved judgment debtor, New York Guangdong Finance, Inc.

(NYGFI) (NYSCEF doc. no 449, ¶ 88), seek the turnover of money and property held by respondents, and other relief, in order to satisfy the judgment (NYSCEF doc. no. 1 at 22-23).

Respondents China Construction Bank (CCB) and Agricultural Bank of China (ABC) (together, the Banks) move, pursuant to CPLR 409, for summary judgment in their favor, dismissing the proceeding against them (NYSCEF doc. no. 448). Respondents Alexander Chu (Alexander), the estate of Joseph Chu, Guangdong Building Inc., Centre Plaza LLC and Eastbank, N.A. (together, the Chu Respondents or Chu Respondents) move for the same relief (NYSCEF doc. no. 391).

It is undisputed that the Banks, as well as a company controlled by the late Joseph Chu (Joseph), were, until 2005, three of the five shareholders of judgment debtor NYGFI (NYSCEF doc. no. 402, ¶¶ 2-6; 695, ¶¶ 2-4, 86). The other two NYGFI shareholders were nonparties Guangdong International Trust & Investment Corporation (GITIC) and Lawrence "Larry" Wong (Wong) (NYSCEF doc. no. 402, ¶¶ 2-6; 695, ¶¶ 2-4). Each of the five NYGFI shareholders held an equal, 20%, interest in NYGFI, a company that made investments and loans, including using capital contributed by shareholders (NYSCEF doc. nos. 402, ¶¶ 7; 392, ¶ 4; 695, ¶5). NYGFI was dissolved on April 11, 2011 (NYSCEF doc. nos. 402, ¶ 15; 474; 695, ¶ 88).

In the verified petition, petitioners allege that each of the respondents holds or controls assets, or held or controlled assets, in which NYGFI held or holds an interest, or that belong to NYGFI, and also that NYGFI had claims against certain respondents (*see* NYSCEF doc. no. 1, ¶¶ 4, 37, 38). Petitioners further allege that respondents engaged in a scheme to strip NYGFI of its assets, through a settlement agreement reached in unrelated shareholder actions (the Shareholder Actions), by transferring those assets to NYGFI's stockholders, directors and officers, or by retaining assets that belonged to NYGFI (NYSCEF doc. no. 1, ¶¶ 35, 37, 66, 70, 71, 77, 79).

Petitioners contend that, as part of the settlement of the Shareholder Actions, payments totaling $11.5 million dollars were made directly to the Banks and GITIC, and NYGFI was rendered insolvent, and incapable of paying its debts (*see* NYSCEF doc. no. 1, ¶¶ 82-87).

It is undisputed that, in 1995, prior to the commencement of the Shareholder Actions, petitioners commenced a federal action (the Federal Action), against: (1) NYGFI; (2) Joseph; (3) Joseph's son, Alexander Chu (Alexander) (NYSCEF doc. no. 392, ¶ 1); (3) Guangdong Building Inc.; and (4) Eastbank, N.A., of which Alexander is chairman (the Chu Group) (NYSCEF doc. nos. 392, ¶ 1; 695, ¶ 89). In the Federal Action, petitioners alleged RICO claims, and breach of a joint venture agreement with NYGFI and fraudulent inducement concerning a building in Chinatown, New York (the GP Building) (NYSCEF doc. no. 695, ¶¶ 90-92). The GP Building was then held by respondent Guangdong Building Inc (GBI) (NYSCEF doc. no. 393, ¶ 12). The Chu Group countersued petitioners for breach of a lease and nonpayment of a $3 million loan that Joseph made to petitioners (NYSCEF doc. no. 695 ¶ 93). In January 2004, the jury in the Federal Action returned a verdict in favor of petitioners, solely on the issue of RICO proximate causation, but that verdict was overturned in December 2004, as against the weight of the evidence (NYSCEF doc. no. 695, ¶ 96-97). In June 2005, the RICO claims were dismissed, but the Federal Action otherwise continued (NYSCEF doc. no. 695, ¶ 98).

Ultimately in the Federal Action, in July 2009, petitioners obtained a jury verdict against NYGFI, for $8.25 million in damages, for breach of the joint venture agreement (the Judgment), and a $250,000 verdict against Joseph and Alexander, for fraudulent inducement into a sale-and-lease-back agreement for the GP Building (NYSCEF doc. no. 516 at 2-3). The Chu Group also obtained a verdict against petitioners, for $1 million in damages on the loan counterclaim (NYSCEF doc. no.516 at 2-3) While the jury also determined that petitioners breached their lease

with GBI, no damages were awarded to the Chu Group for the breach (NYSCEF doc. no. 516 at 2-3). In 2012, judgments reflecting the verdicts were granted to both sides, and were, thereafter, increased to reflect interest awards (NYSCEF doc. no. 518). In this proceeding, petitioners seek to satisfy the Judgment (*see generally*, NYSCEF doc. no. 1).

While the Federal Action was pending, the two Shareholder Actions, commenced by the Banks, respectively, in 2001 in Texas, and in 2002 in New York, were litigated (NYSCEF doc. nos. 459; 460). The Texas case included the Banks' derivative claims of misappropriation of NYGFI Texas assets against Wong, and direct claims against NYGFI shareholders (NYSCEF doc. no. 459). The New York action was a derivative action commenced by the Banks in New York, against Alexander, Joseph, Eric Chu, Eastbank N.A. and GBI alleging misappropriation of NYGFI's New York assets (New York Shareholder Action) (NYSCEF doc. no. 460). Countersuits were interposed against the Banks for the failure to account for NYGFI assets located in China (*see e.g.* NYSCEF doc. nos. 500, 507, 508 [at exhibit A]). The Shareholder Actions settled through agreements entered in 2004 and 2005 (the Settlement Agreements) (NYSCEF doc. nos. 461, 462, 491), through which petitioners claim that NYGFI's assets and cash were fraudulently conveyed to its five shareholders, leaving NYGFI without sufficient assets to satisfy the Judgment, and insolvent (NYSCEF doc. no. 1,¶¶ 76-79, 89, 135).

NYGFI received no monetary settlement in the Shareholder Actions, but, as part of the settlements, its ownership was transferred from its five shareholders to an entity owned by Wong (W. Ong Co.) (NYSCEF doc. no. 695, ¶¶ 65, 72). Thus, in settling, the Banks relinquished their equity in NYGFI (NYSCEF doc. no. 695, ¶¶ 79), and assert that they relinquished their claim for $17.5 million in outstanding loans to NYGFI, assigning the loan rights to W. Ong Co (NYSCEF

doc. no. 695, ¶¶ 65, 78-79). The defendants in the Shareholder Actions paid the Banks and GITIC a total of $11.5 million, and the defendants were released from liability, including by NYGFI, as were the Banks (NYSCEF doc. no. 695, ¶¶ 68, 69, 74, 75, 79).[1] This petition, filed October 23, 2012, followed (NYSCEF doc. no. 1). The note of issue was filed on October 31, 2018 (NYSCEF doc. no. 372).

Discussion

A motion for summary determination, pursuant to CPLR 409(b), is adjudicated in the same manner as a CPLR 3212 motion for summary judgment (*Matter of Friends World Coll. v Nicklin*, 249 AD2d 393, 394 [2d Dept 1998]). "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). "[O]n a motion for summary judgment, 'facts must be viewed in [a] light most favorable to the non-moving party'" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [citation omitted]). Upon the movant's proffer of evidence establishing a prima facie case, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008] [citation omitted]). The moving party's "'[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the

[1] In their memorandum of law, the Banks contend that there is no evidence that W.Ong Co ever collected on the loan payments owed by NYGFI (NYSCEF doc. no. 450 at 21). This assertion is disregarded as respondents, carrying the initial burden of presenting affirmative evidence of entitlement to summary judgment, may not rely upon the absence of evidence to support their moving burden (*Hairston v Liberty Behavioral Mgt. Corp*., 157 AD3d 404, 405 [1st Dept 2018], *lv to appeal dismissed* 31 NY3d 1036 [2018] ["Merely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden"]).

motion, regardless of the sufficiency of the opposing papers]'" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [citation and emphasis omitted]).

Motion Sequence 016

The Banks seek dismissal of petitioners' remaining claims in this proceeding, for fraudulent conveyance under New York Debtor and Creditor Law (DCL) §§ 273-a[2] and 276 (NYSCEF doc. nos. 86; 391; 448). DCL § 273-a provides 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."

The Banks argue that petitioners' DCL§ 273-a claim must be dismissed because there was no transfer to the Banks from NYGFI, as the former NYGFI shareholders, and not NYGFI itself, transferred settlement money to the Banks, and the Settlement Agreements do not provide for a transfer from NYGFI (NYSCEF doc. no. 450 at 10-11). This argument is unpersuasive as the Banks' claims in the New York Action were derivative (*Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 140 AD3d 446, 447 [1st Dept 2016] [opining that the record demonstrates conclusively that GFI was the indirect transferor of $7.66 million to the banks in the New York Shareholder Action]). In addition, Alexander avers that he paid settlement money to the Banks on behalf of his father's estate and himself, and understood the payment to be an indirect payment to NYGFI, on whose behalf the Shareholder Actions had been brought, and that NYGFI was, in effect, directing him to pay the Banks (NYSCEF doc. no. 392, ¶ 22). This averment raises a fact issue

[2] DCL§ 273-a and other provisions of the DCL have been repealed by L.2019, c. 580, § 2, but only effective April 4, 2020.

countering the Banks' argument that there is no evidence that any of the parties to the Settlement Agreement understood that NYGFI was to make the settlement payments (NYSCEF doc. no. 450 at 15).

To prevail on their arguments that conveyances to the Banks met the requirements of DCL § 273-a, the Banks must demonstrate that there was fair consideration for the monetary transfers to them (*Sardis v Frankel*, 113 AD3d 135, 142 [1st Dept 2014] [burden rests on moving respondent]). "'Fair consideration' under Debtor and Creditor Law § 272 is not only a matter of whether the amount given for the transferred property was a 'fair equivalent' or 'not disproportionately small'" (*id*. at 141-42 [1st Dept 2014] [citing *Matter of CIT Group/Commercial Servs., Inc. v 160–09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]). Fair consideration also requires that "the transaction [was] made in good faith, an obligation that is imposed on both the transferor and the transferee" (*id*. at 142 [internal quotation marks omitted]). "'Preferential 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'" (*Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 117 AD3d 427, 428-29 [1st Dept 2014] [citation omitted]).[3]

Viewing the evidence submitted in a light favorable to the nonmoving party (*see Vega*, 18 NY3d at 503), Alexander's averment that Wong took over management of NYGFI (NYSCEF doc. no. 392, ¶ 11), coupled with Wong's testimony indicating that NYGFI was probably completely

[3] While the Banks argue that the presumption against shareholders of insolvent corporations is not available, because the Appellate Division determined that petitioners have not established that NYGFI was insolvent at the time of the settlements (*Uni-Rty Corp*., 140 AD3d at 448), this ignores that in the trial court motion under review before the First Department, petitioners had moved for summary judgment in their favor, and, thus, carried the initial burden to eliminate material fact issues with admissible evidence (*id.* at 447). Here, the Banks carry that burden.

insolvent after the settlements (NYSCEF doc. no. 541[tr at 124-125]), raises a fact issue as to whether or not NYGFI was rendered insolvent by the settlement of the Shareholder Actions and, thus, whether the transfers to the Banks were made "in good faith" (DCL § 272). In addition, the Banks' moving submissions, demonstrating that NYGFI's assets exceeded its liabilities in 2000 (NYSCEF doc. nos. 476 [2000 balance sheet], 479 [2000 tax return], 483 at 1 [report analyzing NYGFI's operations through 2001]), do not demonstrate that NYGFI was solvent when the Settlement Agreements were entered in 2004 and 2005. The Banks argue that NYGFI necessarily held approximately $35 million in assets after 2000, as unanimous action was required by NYGFI shareholders in order to dispose of the assets, and that there is no evidence suggesting that there were changes in NYGFI's asset structure in the time period leading up to the settlement (NYSCEF doc. no. 450 at 23). To credit the Banks' argument would require the drawing of inferences against the nonmoving party based upon the Banks' argument about a lack of evidence. The argument is also unpersuasive because it ignores petitioners' allegation that NYGFI shareholders held NYGFI assets in their own names, or those of nominees, and retained those assets (NYSCEF doc. no. 1,¶ 79; *see e.g.* NYSCEF doc. no. 493 at 11 [report submitted by Banks stating that NYGFI United Orient Bank (UOB) shares held in the name of "Chu Group"]). While NYGFI may not have been dissolved until 2011(NYSCEF doc. nos. 402, ¶ 15; 474; 695, ¶ 88), this is not dispositive as to its solvency at the time of the settlements.

Respondents' reliance on the approval by New York and Texas courts of the shareholders' settlement is also unavailing (NYSCEF doc. no. 450 at 6, 22). That approval was "a function of the derivative nature of the suits," no provision was made in the Settlement Agreements "for payment of petitioners' claims in the event of a judgment against NYGFI," and the Banks still have not demonstrated that the courts were apprised of the settlement's failure to consider the Uni-

Rty Litigation (*Uni-Rty Corp. v New York Guangdong Fin., Inc.*, Sup Ct, NY County, July 25, 2013, Coin, J., index no. 157621/12, *affd* 117 AD3d 427).

The Banks move to dismiss petitioners' DCL § 276 claim. DCL § 276 provides that: "[e]very 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."[4] Thus, the claim's elements are that: "(1) the thing transferred has value of which the creditor could have realized a portion of its claim; (2) that this thing was transferred or disposed of by the debtor; and (3) that the transfer was done with actual intent to defraud" (*Chambers v. Weinstein*, 44 Misc 3d 1224(A), 2014 NY Slip Op 51331(U) at *7 [Sup Ct, NY County 2014, Sherwood, J. [citation and internal quotation marks omitted]).

As a threshold issue, the Banks and Chu Respondents argue that petitioners' DCL § 276 claim is time-barred because petitioners' principal, Kung Hsung Joseph Chuang (Chuang),[5] knew about the Settlement Agreement more than two years prior to the commencement of this action (NYSCEF doc. nos. 450 at 24-25; 447 at 25-26). "[A] fraud-based action must be commenced within six years of the fraud or within two years from the time the plaintiff discovered the fraud or could with reasonable diligence have discovered it" (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009] [citation and internal quotation marks omitted]). A court's review of "whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was 'possessed of knowledge of facts from which [the fraud] could be reasonably inferred'" (*id.* [citation omitted]). As a general rule, "knowledge of the fraudulent act is required and mere

[4] DCL§ 276 and other provisions of the DCL have been repealed by L.2019, c. 580, § 2, but only effective April 4, 2020.
[5] Chuang is also referred to as Joseph Chuang (*see e.g.* NYSCEF Doc. no. 1, ¶ 1; 475 [label describing transcript as that of "Joseph Chuang"]).

suspicion will not constitute a sufficient substitute" (*id.*). Therefore, in instances "[w]here it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred [the issue] should be left to the trier of the facts" (*id.* [citation and internal quotation marks omitted]), as the inquiry involves a mixed question of law and fact (*Saphir Intl., SA v UBS PaineWebber Inc.*, 25 AD3d 315, 315-316 [1st Dept 2006]).

Petitioners do not dispute respondents' assertion that the alleged fraudulent conveyance took place on October 24, 2005, through the Settlement Agreements, and that the petition was filed more than six years after that date (NYSCEF doc. nos. 450 at 24; 447 at 25). To demonstrate that when petitioners' duty of inquiry arose, the Banks turn to Chuang's testimony, in 2016, that he learned about the New York Action in about 2008 or 2009, when his lawyers showed him a document that he stated talked about the New York settlement agreement and the New York action (NYSCEF doc. no. 450 at 24-25[citing NYCEF doc. no. 449, ¶ 100, citing NYCEF doc. no. 475 (tr at 53)]). The Banks argue that this demonstrates that, at least as of 2009, Chuang was aware of the settlement of the New York Action, and, thus, had a duty to inquire about its terms (NYSCEF doc. no. 450 at 25). In opposition, petitioners contend that Chuang corrected his testimony and testified that he did not know about the existence of the Settlement Agreements until after the Judgment had been entered [NYCEF doc. nos. 608 at 19, n 16; 680 at 20, n 14). Chuang's testimony is not conclusive, as he stated that he saw a document that addressed the Settlement Agreement 2008 or 2009, but also testified that he did not know about the settlement until 2012 (NYSCEF doc. no. 475 [tr at 51-53, compare tr at 70, 110, 117]). Where Chuang was not questioned at the deposition as to why his testimony appeared inconsistent, and as the testimony

must be viewed in a light favorable to the nonmoving petitioners (s*ee Vega*, 18 NY3d at 503), Chuang's testimony presents a fact issue.[6]

The Banks argue that the undisputed facts show that the Banks and NYGFI entered into the Settlement Agreements without actual intent to hinder petitioners, and that petitioners cannot make any showing that the Banks acted with the requisite intent to defraud (NYSCEF doc. no. 450 at 25-26**)**. The Banks contend that petitioners must show at least "badges of fraud," giving rise to an inference of fraud, and that petitioners cannot make a showing that NYGFI's transfer to the Banks was made in exchange for inadequate consideration, as the Banks provided fair consideration, relinquishing their $17 million loan, owed by NYGFI, and the Banks' equity interests in NYGFI (NYSCEF doc. no. 450 at 19-21, 25-26). Addressing the badges of fraud, the Banks contend: (1) that the settlement payments by the Chu Group, did not constitute transfers not in the usual course of business, but were par-for-the-course settlement payments to resolve years of litigation, (2) that petitioners have not demonstrated that NYGFI had knowledge of petitioners' claim and an inability to pay it; (3) that prior to the Shareholder Actions, NYGFI was solvent, in that it retained assets in excess of its liabilities, with petitioners failing to show otherwise; (4) that petitioners cannot show that NYGFI retained any control over property it purportedly transferred; and (5) that the Shareholder Actions demonstrate that the Banks did not have a close relationship with NYGFI (NYSCEF doc. no. 450 at 23, 26-27).

As actual intent is difficult to prove, a creditor may rely on badges of fraud to infer intent. Circumstances demonstrating badges of fraud can be the "close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business;

[6] The facts in *MBI Intl. Holdings Inc. v Barclays Bank PLC* (151 AD3d 108, 115 [1st Dept 2017]) were conclusive of plaintiff's duty of inquiry

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" subsequent to the transaction (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). NYGFI was aware of the Federal Action against it, as it was a defendant in that action (NYSCEF doc. no. 511; *see also* doc. no. 493 at 13, ¶ 5 [indicating that CCB was aware of legal action concerning GP Building, described as "Golden Plaza"]). As, previously discussed, the Banks have not established whether or not, at the time the Settlement Agreements were entered, NYGFI was solvent. Furthermore, the record reveals that NYGFI was in the loan and financing business (NYSCEF doc. no. 392, ¶ 4). Settlement of the Shareholder Actions effectively changed the entire ownership structure of NYGFI (NYSCEF doc. no. 695, ¶ 79), and resolved claims that NYGFI's shareholders had misappropriated or failed to account for substantial NYGFI assets (*see e.g.* NYSCEF doc. no. 459, ¶ 27; 460, ¶¶ 83, 94, 95; 500, ¶ 23), raising a fact issue as to whether or not the settlements were in the regular course of NYGFI's day-to-day business dealings.

The Banks argue that petitioners have adduced no evidence to demonstrate that the Banks appropriated, or are in current possession of NYGFI's assets in China, and that none of the discovery in this case supports the assertion that the Banks ever owned, or still retain, any of NYGFI's assets (NYSCEF doc. no. 450 at 7). The Banks contend that the undisputed facts show that the Banks never had possession of NYGFI's China assets and that petitioners' claims are based solely on the unsubstantiated counterclaims of Wong and the Chu Group in the respective Shareholder Actions (NYSCEF doc. no. 450 at 27-28). The Banks contend that they held an indirect interest in NYGFI's assets in China through NYGFI's 70% interest in a Hong Kong corporation called Guang Xin Properties, Ltd., which was an investment company formed to oversee construction projects in China, including a bridge and highway project, and that NYGFI

had other assets in China (NYSCEF doc. no. 450 at 28). The Banks contend that GITIC was responsible for the management of Guang Xin Properties, Ltd (Guang Xin), providing some evidence in support (NYSCEF doc. nos. 450 at 28; 477; 493[7]).

In opposition, plaintiff provides Wong's affidavit, dated February 12, 2004, that NYGFI invested $4.8 million in Guang Xin and that all of the activity related to NYGFI's investments in the projects in China were handled by GITIC, ABC and/or CCB (NYSCEF doc. no. 590, ¶ 3).[8] On summary judgment, "the court's function is issue finding rather than issue determination" (s*ee Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018]), and the affidavit, viewed in a light most favorable to petitioners, raises a fact issue as to ABC and CCB's control over the assets (s*ee Vega*, 18 NY3d at 503 [motion should be denied "where there is any doubt as to the existence of a triable issue or where the issue is arguable"]). The Bank's evidence, indicating that Wong changed his position about his court submissions concerning the management of investments in China by the Banks and GITIC, and later discounted the merits of his claims in one of the Shareholder Actions, (NYSCEF doc. no. 450 at 28 [citing NYSCEF doc. no. 468 [tr at 138-139]), merely raises a credibility issue (*Vega*, 18 NY3d at505 [court's function is not to make credibility determinations]; *Ferrante v American Lung Assn*, 90 NY2d 623, 631 [1997) [same]). In addition, while the Banks provide reports to show that GITIC managed a bridge and highway project in China (NYSCEF doc. nos. 477; 493[9]), their assertion

[7] NYSCEF doc. no. 477 is a letter report and 493 an unsigned investigative report, both of which were submitted by the Banks to demonstrate that certain NYGFI assets were controlled by GITIC.

[8] Wong's averment (NYSCEF doc. no. 590, ¶ 3), as well as his verification, on behalf of NYGFI, of NYGFI's interrogatory answers in the Texas action, commenced by the Banks, that certain NYGFI assets were wholly controlled by the Banks, and by GITIC (NYSCEF doc. no. 539 at 18-23), must be viewed as indicating that each of the three entities controlled the assets.

[9] *See* n 7, *supra*.

that their knowledge of NYGFI's assets in China was limited, due to their inability to access NYGFI's books and records (NYSCEF doc. no. 450 at 28), does not demonstrate that information was not otherwise available to the Banks about the projects.

Motion Sequence 017

In moving, the Chu Respondents acknowledge that there are fact issues concerning whether or not NYGFI had an interest in the GP Building,[10] but also contend that this motion does not require consideration of those facts (NYSCEF doc. no. 447 at 9, n 3, 16). Chu Respondents also demonstrate that, in the mid-90s, NYGFI moved its operations to Texas, including its files (NYSCEF doc. no. 392, ¶ 11). Alexander avers that Joseph continued to lend money to and/or invest in NYGFI, but did not have a representative in Texas, so that his family's insight into NYGFI's operations was lessened significantly (NYSCEF doc. no. 392, ¶ 12). Alexander also avers that, after Joseph's death in 2004, the GP Building was transferred to a trust, and thereafter transferred to defendant Centre Plaza LLC (NYSCEF doc. no. 392, ¶ 26). Documentary evidence reveals that in 2006, GBI transferred the GP Building to a Chu family trust, and that the same day, the Trust transferred the building to Centre Plaza LLC (NYSCEF doc. nos. 19; 20).

In moving, the Chu Respondents argue that there is no evidence that they are in possession of anything that belongs to NYGFI, as NYGFI did not transfer property to the Chu Respondents under the Settlement Agreements, but gave them general releases, which are not property that can

[10] Whether a joint venture was created involving NYGFI concerning the GP Building, is not ascertainable from the record. Alexander's averment that after GBI took title to the GP Building, NYGFI did not contribute to its upkeep or costs, is not dispositive as to existence of a joint venture with NYGFI, as he also states that he did not have first-hand knowledge of his father's understanding with NYGFI concerning the GP Building (NYSCEF doc. no. 392, ¶ 18). Petitioners assert that NYGFI paid Joseph $6.5 million, transferred to his personal bank account, in relation to the purchase of the GP Building and that the Chu Respondents were authorized to manage the building (NYSCEF doc. no. 609, ¶ 34, citing NYSCEF doc. no 625 [tr 712-739]).

be turned over under the CPLR Article 52 (NYSCEF doc. no. 447 at 5). However, petitioners do not seek turnover of those releases, but of the assets that they maintain belonged to NYGFI, and were retained by Chu Respondents or entities under their control, or the control of nominees (NYSCEF doc. no. 1 [*see e.g.* ¶¶ 118, 70, 79]). DCL § 270 includes in the definition of "Conveyance" both transfers and releases, so that an insolvent company may not simply permit its shareholders to retain company assets, to the detriment of potential creditors.

Chu Respondents state that petitioners can obtain turnover under the DCL only if they prove superior rights to the property allegedly transferred by establishing a violation of the debtor creditor law (NYSCEF doc. no. 447 at 1). While, ultimately, this is true, on summary judgment the burden rests with Chu Respondents to establish that there are no material factual issues for trial.

Chu Respondents contend that there was fair value for the Settlement Agreement exchanges, and that they were made in good faith (NYSCEF doc. no. 447 at 19-23). To demonstrate fair value, Chu Respondents argue that NYGFI, presumably indirectly, received the $7 million payment, that Alexander caused to be paid to the Banks, which benefitted NYGFI, as the company owed a debt to the Banks and GITIC (NYSCEF doc. no. 447 at 19).[11] Chu Respondents also attribute value to their release of claims that Joseph may have had against NYGFI (NYSCEF doc. no. 447 at 20).[12] Chu Respondents contend that NYGFI actually gave up

[11] The Banks dispute Chu Respondents' assertion that NYGFI itself paid them anything and contend that their claims in the Shareholder Actions had value (NYSCEF doc. no. 450 at 5-6, 14-15). The Settlement Agreement did not include Centre Plaza, LLC (NYSCEF doc. nos. 392, ¶ 20; 462).

[12] Reading Alexander's affidavit in a light favorable to the nonmoving parties, he appears to indicate that he did not have evidentiary support for either his father's claims or to defend against claims in the Shareholder Actions (*see e.g.* NYSCEF doc. no. 392 ¶¶ 6, 11, 18, 21, 23). Alexander also often does not state the basis for what he asserts was his understanding (*see e.g.* NYSCEF doc. no. 392 ¶¶ 14, 15, 21, 23).

nothing of value, as its claims against the Chu Respondents in the Shareholder Actions could not succeed for various reasons (NYSCEF doc. no. 447 at 19-23). While the Chu Respondents' $7 million settlement payment to the Banks may have been made on behalf of NYGFI, which the Banks dispute (NYSCEF doc. no. 450 at 6, 10-11), the Chu Respondents' contentions that NYGFI's claims were valueless is unpersuasive, as it rests upon speculation as to what might have occurred in the New York Shareholder Action (NYSCEF doc. no. 447 at 19-23). Chu Respondents also do not submit evidence demonstrating that they would have raised the same arguments and defenses in the Shareholder Actions that they raise now.[13]

Concerning the good faith prong of DCL § 273-a, the Chu Respondents' contention that they were not insiders, but minority shareholders, and, thus, are not subject to the presumption against good faith applicable to preferential transfers to shareholders of insolvent corporations (NYSCEF doc. no. 447 at 24; *see Uni-Rty Corp.*, 117 AD3d at 428-29) is not persuasive (*see Uni-Rty Corp v New York Guangdong Finance, Inc.*, Sup Ct, NY County, July 24, 2013, Coin, J., index no. 157621/12, n 5). There were only five shareholders in NYGFI (NYSCEF doc. no. 402, ¶ 6), and the Chu Respondents contend only that they did not conduct "new" business from New York on behalf of NYGFI (NYSCEF doc. no. 447 at 7), suggesting that they still conducted some NYGFI business. In addition, the Chu Respondents do not dispute that they directed or controlled the litigation on behalf of NYGFI when it was a defendant in the Federal Action (NYSCEF doc. no. 660 [tr at 855]; 676 [tr at 93]; 685 at 14-15). These facts and circumstances raise a fact issue as to the Chu Respondents role with NYGFI.

[13] Chu Respondents' argument that any claims that NYGFI would have had against Chu Respondents are substantially identical to the claims in the New York Shareholder Action and time-barred now, is conclusory and not sufficiently developed (NYSCEF doc. no. 447 at 29).

While the Chu Respondents argue that, based upon the petition's allegations, NYGFI was not insolvent at the time of the Settlement Agreements, the petition is not dispositive, as it is fairly read as indicating that respondents retained or took NYGFI's assets (NYSCEF doc. no. 1). In reply, concerning NYGFI's solvency, Chu Respondents contend that petitioners fail to provide adequate admissible evidence to support their response (NYSCEF doc. no. 685 at 15). However, the Chu Respondents do not demonstrate that NYGFI was not insolvent at the time of the Settlement Agreements. Paragraph 98 of Chu Respondents' statement of material facts states only that Alexander has no reason to believe that the Settlement Agreements would prevent petitioners from satisfying their claims against NYGFI if they succeeded in proving them (NYSCEF doc. no. 402). That assertion turns on paragraph 25 of Alexander's affidavit,[14] in which he avers that he "did not think that the Settlement Agreement meant that NYGFI no longer had any assets" (NYSCEF doc. no. 392, ¶ 25). Alexander provides no support for this "thought," rendering his averment conclusory. Furthermore, Alexander is the chairman of a bank, the former president of NYGFI, which was in the loan business, and an attorney (NYSCEF doc. no. 392, ¶¶ 1, 4, 5), but only states his thoughts about whether NYGFI may have had any assets, not whether or not it was solvent or insolvent. Chu Respondents state, as fact, that at a certain point in time, NYGFI had substantial assets (NYSCEF doc. no. 402, ¶ 11 [relying on exhibits to petition, which include UOB bank stock]), but that does not resolve the issue. Circumstantially, petitioners raise that Alexander does not explain why he paid $7 million to the Banks if NYGFI had the assets to do so (NYSCEF

[14] Concerning Alexander's assertions about NYGFI's assets at the time of the Settlement Agreement, Chu Respondents cite to paragraph 24 of Alexander's affidavit, but this is likely a typographical error, as in that paragraph Alexander does not state anything about his beliefs about NYGFI (NYSCEF doc. no. 392, ¶ 24).

doc. no. 608 at 16). In light of these unresolved factual issues, the motion to dismiss petitioners' DCL § 273-a claim is denied.

Chu Respondents contend that the DCL § 276 claims against them are time-barred because the petition was filed more than six years after the alleged fraudulent conveyance, on October 24, 2005, and more than two years after petitioners were aware of enough facts that they could have, with reasonable diligence, discovered the alleged fraud (NYSCEF doc. no. 447 at 25).

Chu Respondents contend that Chuang testified that a conversation discussed in a letter from the petitioners' counsel in the Federal Action,[15] took place in September 2010, and that Chuang understood that the GP Building, which he believed to be an asset important to NYGFI, has been transferred to a different owner (NYSCEF doc. no. 447 at 25-26). As did the Banks, Chu Respondents also contend, that, in his deposition, Chuang admitted that he became aware of the New York Shareholder Action and the Settlement Agreement, in 2008 or 2009, but took no action to investigate (NYSCEF doc. no. 447 at 26). Chu Respondents assert that Chuang also knew from the Federal Action, "which took place in 2009," that the GP Building had been transferred from GBI to a different entity, and that there were disputes among NYGFI shareholders that resulted in a lawsuit and a settlement (NYSCEF doc. no. 447 at 26). Chu Respondents contend that, from those facts, a duty arose to investigate and discover the complaint from the New York Shareholder Action and the settlement agreement, which were publicly filed (NYSCEF doc. no. 447 at 26-27).

[15] The Chu Respondents acknowledge that this court previously concluded that the letter from petitioners' counsel to the federal judge in the Federal Action did not definitively establish when petitioners' duty of inquiry arose (NYSCEF doc. no. 447 at 25). That letter, from September 2010, stated that petitioners' principal had learned that all assets of GBI and NYGFI had been transferred to Alexander or his affiliates or trusts in order to evade the obligation to petitioners, and that petitioners were prepared to make an application, under the DCL, to restore the assets and set aside any transfers (NYSCEF doc. no 402, ¶106).

In opposition, petitioners argue that had they known about the Settlement Agreements, those agreements would have been the centerpiece of the March 2012 special proceeding they commenced, but that, in that proceeding, they only challenged a transfer relating to one of the properties in which NYGFI held an interest (NYSCEF doc. no. 608 at 18). They further argue that the failure to ascertain that an allegedly fraudulent conveyance has occurred through the inspection of public records is not a basis for imputing knowledge of the fraud in the absence of circumstances that would have required the party to inspect the public records, and that Chuang corrected his testimony concerning the settlement (NYSCEF doc. no. 608 at 19, no. 16).[16] The claim is not being dismissed as time-barred, on this record, because, as discussed above, Chuang's testimony is conflicting as to whether petitioners knew of the Settlement Agreement (NYSCEF doc. no. 475 [tr at 51-53, compare tr at 70, 110, 117]). In addition, the remainder of the evidence submitted by the Chu Respondents primarily concerns a single asset (NYSCEF doc. nos. 402, ¶¶ 108, 109; 475 [tr at 56-64]), and the basis of petitioners' claims are conveyances of all of NYGFI's assets through the Settlement Agreements (NYSCEF doc. no. 1).

Respondents contend that the DCL ¶ 276 claim should be dismissed because petitioners cannot carry their burden of proving by clear and convincing evidence that Chu Respondents had an actual intent to hinder, delay or defraud creditors, as there is no direct evidence of such intent and the circumstantial evidence does not adequately demonstrate that Chu Respondents entered into the Settlement Agreement with such intent (NYSCEF doc. no. 447 at 27-28). In support, based upon Alexander's affidavit and testimony, Chu Respondents contend that Alexander, who was represented by counsel, entered into the Settlement Agreement to end years of litigation over

[16] Chuang also testified, it appears, that because of the derivative nature of the New York Shareholder Action, there was no reason to look into that action, as the recovery would belong to NYGFI (NYSCEF doc. no. 475 [tr at 52]).

business dealings involving his deceased father, a legitimate business reason for the transaction (NYSCEF doc. no. 447 at 27 [citing NYSCEF doc. no. 392, ¶¶ 21, 24; 408 [tr at 49-50][17]). They also point to the timing of the Settlement Agreement in 2005, four years before the jury verdict in the Federal Action (NYSCEF doc. no. 447 at 23). Chu Respondents contend that the Settlement Agreements were approved by the Texas and New York courts, publicly filed, and that the transfers being attacked, the releases, are not transactions between close family members, the consideration was not grossly inadequate, and NYGFI did not retain control over the transferred asset and was not immediately dissolved (NYSCEF doc. no. 447 at 23-24). As addressed above concerning the Banks, there remain badges of fraud that raise a fact issue concerning good faith.

In light of the foregoing, it is

ORDERED that respondents' motions for summary judgment dismissing the petition are denied.

9/23/2020
DATE

LAURENCE L. LOVE, J.S.C.

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

[17] Alexander's transcript demonstrates only Alexander's recollection about what occurred at settlement meetings for the Shareholder Actions (NYSCEF doc. no. 408 [tr at 49-50]). While Alexander may have been represented by counsel, this does not demonstrate that Alexander settled for a legitimate business reason or that he was advised by counsel to do so.