SHORT FORM ORDER **INDEX NO. 605318/2020**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

SCOTT SCHNEIDER,

Plaintiff,

-against-

BEN KRUPINSKI BUILDER LLC and BEN KRUPINSKI GENERAL CONTRACTOR, LLC,

Defendants.

ORIG. RETURN DATE: MAY 26, 2020
FINAL SUBMISSION DATE: AUGUST 13, 2020
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: JUNE 25, 2020
FINAL SUBMISSION DATE: AUGUST 13, 2020
MTN. SEQ. #: 002
MOTION: MD

ORIG. RETURN DATE: JUNE 25, 2020
FINAL SUBMISSION DATE: AUGUST 13, 2020
MTN. SEQ. #: 003
MOTION: MG

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Upon the **E-file document list** numbered 5 to 70 read on plaintiff's motion for an Order, pursuant to CPLR 602, consolidating this action with the special proceeding entitled *Ben Krupinski General Contractor, Inc. v. Schneider*, Index No. 6716/2018; on plaintiff's Order to Show Cause for an Order, pursuant to CPLR 2201, staying this action until thirty days after the Appellate Division, Second Department renders a decision on plaintiff's pending appeal in the action entitled *Ben Krupinski*

General Contractor, Inc. v. Schneider, Index No. 6716/2018, or in the alternative, pursuant to CPLR 3217 (b) discontinuing this action without prejudice; on defendant's cross-motion for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the plaintiff's causes of action alleging violations of Debtor Creditor Law §§ 273, 274, and 275 and the declaratory judgment cause of action; it is

ORDERED that the respective motions (motion sequences 001, 002, and 003) are consolidated for purposes of a determination herein; and it is further

ORDERED that plaintiff's motion for an Order, pursuant to CPLR 602, consolidating this action with the special proceeding entitled *Ben Krupinski General Contractor, Inc. v. Schneider*, Index No. 6716/2018, is hereby **DENIED** for the reasons set forth herein; and it is further

ORDERED that plaintiff's motion for an Order, pursuant to CPLR 2201, staying this action until thirty days after the Appellate Division, Second Department renders a decision on plaintiff's pending appeal in the action entitled *Ben Krupinski General Contractor, Inc. v. Schneider*, Index No. 6716/2018, or in the alternative, pursuant to CPLR 3217 (b), discontinuing this action without prejudice, is hereby **DENIED** for the reasons set forth herein; and it is further

ORDERED that defendants' motion for summary judgment dismissing plaintiff's causes of action alleging violations of Debtor Creditor Law §§ 273, 274, and 275 and the declaratory judgment cause of action, is hereby **GRANTED** for the reasons set forth herein.

Plaintiff Scott Schneider ("plaintiff" or "Schneider") commenced this action on March 5, 2020, by the filing of a summons and complaint. Issue was joined on May 22, 2020, through the service and filing of an answer by defendants Ben Krupinski Builder LLC ("BKB") and Ben Krupinski General Contractor, Inc. ("BKGC") (collectively referred to herein as "defendants"). In this action, plaintiff seeks to set aside the August 31, 2018 sale of certain assets of BKGC to BKB (the "subject asset sale"). Plaintiff alleges that the subject asset sale violates Sections 273, 274, and 275 of the New York Debtor Creditor Law ("DCL"). Plaintiff asserts that he is a creditor of BKGC due to his filing of a demand for arbitration on December 4, 2018 (the "arbitration"), over three months after the closing of the subject asset sale. The arbitration demand arises from

Schneider's claim that the construction project at his residence located at 6 Pine Point, Lloyd Harbor, New York (the "subject residence"), which was performed by BKGC (the "subject project"), was defective, resulting in pervasive leaks and requiring extensive remedial work. Schneider also seeks a declaration that defendant BKB, as the successor to BKGC, is liable to plaintiff for all debts and obligations allegedly due and owing from BKGC to plaintiff. According to the complaint, Schneider and his wife moved into the subject residence in September of 2010 and have lived there ever since. The Court notes that in a special proceeding commenced by BKGC to stay the arbitration, entitled *Ben Krupinski General Contractor, Inc. v. Schneider*, Index No. 6716/2018 (the "prior special proceeding"), this Court ruled on May 6, 2020 that the subject project was substantially complete in 2010 and that Schneider's claims for breach of contract against BKGC expired in 2016.

Defendants now move for summary judgment on plaintiff's fraudulent conveyance and declaratory judgment counts and submit, *inter alia*, an attorney affirmation, the sworn affidavit of Stratton Schellinger, the sworn affidavit of Robert E. White, a copy of the pleadings, newspaper articles, the asset purchase agreement, promissory note, security agreement, guaranties, amended and restated agreements, and a memorandum of law. Plaintiff opposes the motion and submits, *inter alia*, an attorney affirmation, interrogatories, AIA document, assignment agreement, construction punch list, electronic mail communications, and construction payment. Defendants reply by attorney affirmation.

In support of their motion for summary judgment dismissing the complaint, defendants argue that the subject sale was not to defraud creditors but was precipitated by the untimely passing of Bernard J. Krupinski, who was the president and sole shareholder of BKGC. According to the sworn affidavit of Robert White, the executor of the Estate of Bernard J. Krupinski, Mr. Krupinski's certified public accountant for over thirty years, and the new president of BKGC, BKGC and BKB "specifically structured the sale to keep BKGC in financial health for years to come." Mr. White avers it was imperative to assure the completion of at least 15 major ongoing construction projects of BKGC, as its good will was a major contributor to the success of the corporation. Mr. White further avers that the sole beneficiary of Mr. Krupinski's estate was his granddaughter, who was seventeen years old at the time of his passing, and that it was in her best interest to sell certain of the assets of BKGC rather than turn over the management of the construction company to her. According to Mr. White, both Stratton Schellinger and Ray Harden were long-time construction managers for BKGC and to ensure

a smooth and seamless transition, Schellinger and Harden created BKB shortly after Mr. Krupinski's death. BKGC and BKB negotiated the subject asset sale over the course of several months and both were represented by counsel during all phases of the transaction.

Mr. White explains that the subject asset sale included not only certain assets of BKGC but also assets of the affiliated company Ben Krupinski Builders & Associates, Inc. ("BKBA"). Mr. White further avers that the asset purchase agreement dated as of August 31, 2018 between BKGC and BKBA as sellers and BKB as purchaser (the "asset purchase agreement"), which he signed on behalf of BKGC, involved a heavily negotiated purchase price that would be paid over a five-year period based upon the net income of BKB. According to Mr. White, the formula, contained in section 2.05 of the asset purchase agreement, was designed to ensure that BKGC would "continue to have an income stream for at least the next five years" and promoted "a healthy cash flow" to BKGC. Specifically, BKGC was guaranteed a payout of fifty-percent of BKB's net income for the first three years and forty-percent of BKB's net income for the final two years. According to Mr. White, the parties arrived at the formula and the scope of the assets to be included in and excluded from the sale after extensive negotiations. Ultimately, the sale of BKGC was of certain selected assets of the company as defined in section 2.01 of the asset purchase agreement, those being, work in progress under executory contracts, certain equipment, name, goodwill and the business phone number. Mr. White explains that the contract between BKGC and Schneider was not included, as it was not an ongoing project, having ben substantially completed ten years earlier and the Schneiders moved into the subject residence in September of 2010. As to the liabilities being assumed by BKB, those were listed in section 2.03 of the asset purchase agreement and included "all liabilities and obligations arising under or relating to the assigned contracts." Inasmuch as the BKGC and Schneider contract was not an assigned contract listed in the asset purchase agreement, BKB did not assume any liabilities arising from the subject project completed in 2010. Mr. White further explains that BKGC extended a revolving line of credit in the amount of two million dollars to BKB to fund BKB's operating costs, which was secured by a promissory note and security agreements from BKB, as well as personal guaranties from Schellinger and Harden. The line of credit accrued interest at a rate of ten-percent per annum. According to Mr. White, the personal guaranties "protected BKGC's right to a future income stream" and ensured "the payment of the obligation to BKGC, and thus BKGC's ability to generate income, even if BKB fails." Mr. White avers that the purchase formula and the extension of

credit to BKB "were intended to ensure that both entities remain solvent, going concerns."

According to the sworn affidavit of Mr. Schellinger, who signed the asset purchase agreement on behalf of BKB, he and Ray Harden worked for many years as construction managers for BKGC. Shortly after Mr. Krupinski's death on June 2, 2018, they formed BKB on June 26, 2018 and offered to purchase BKGC from the Estate in order to save the company they helped Mr. Krupinski build. Schellinger avers that BKB hired a well-known law firm in eastern Suffolk County to negotiate the purchase of BKGC and it spent almost one hundred thousands dollars on attorneys and accountants in connection with the subject asset sale. Schellinger further avers that a large part of the value of BKGC was in the ongoing construction projects, and as a construction manager for BKGC, he was aware of the contracts that were ongoing and had to be completed. He further avers that the subject residence was completed in September of 2010 and at the time of the asset purchase agreement there was no ongoing work to be completed on the subject project. Schellinger explains that was why the BKGC and Schneider contract was not listed in the assigned contracts being assumed by BKB, as it was not an ongoing but rather a completed project. Schellinger further explains the purpose and necessity of the line of credit to finish the outstanding construction jobs.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact *(see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The proponent of 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Seidman v Indus. Recycling Props., Inc.,*** 52 AD3d 678, 861 NYS2d 692 [2d Dept 2010]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable

issue of fact (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790; ***Burns v City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept. 2010]).

Under the Debtor and Creditor Law ("DCL"),[1] a creditor is a person who has "any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent" (DCL 270). Further, a conveyance by a debtor is deemed constructively fraudulent[2] if it falls within the parameters of, *inter alia*, § 273, § 274, or § 275 of the DCL (*see* ***In re Sharp Intern. Corp.,*** 403 F3d 43 [2d Cir 2005]). As these claims assert constructive fraud, actual motive or intent to defraud need not be shown (*see* ***American Panel Tec v Hyrise, Inc.,*** 31 AD3d 586, 819 NYS2d 768 [2d Dept 2006]; ***Joslin v Lopez,*** 309 AD2d 837, 765 NYS2d 895 [2d Dept 2003]). Specifically, DCL 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration" (DCL 273; *see also* ***Joslin v Lopez,*** 309 AD2d 837, 765 NYS2d 895 [2d Dept 2003]). DCL 274 provides that "[e]very 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 actual intent" (DCL 274). DCL 275 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" (DCL 275; *see also* ***Matter of***

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[1] The Uniform Voidable Transactions Act adopted by New York is effective April 4, 2020 and is not retroactive. Thus, the prior New York Debtor Creditor Law applies to this action relating to a August 31, 2018 asset sale.

[2] Constructive fraud has been defined as "a breach of duty which, irrespective of moral guilt or intent, the law declares fraudulent because of its tendency to deceive, to violate a confidence or to injure public or private interests which the law deems worth of protection" (***Southern Indus., Inc. v Jeremias,*** 66 AD2d 168, 411 NYS2d 945 [2d Dept 1978]).

CIT Group v 160-09 Jamaica Ave. Ltd. Partnership, 25 AD3d 301, 808 NYS2d 187 [1st Dept 2006]). The DCL "applies to individual and corporate debtors alike" (***Julien J. Studley, Inc. v Lefrak,*** 66 AD2d 208, 213, 412 NYS2d 901 [2d Dept 1979]).

The common element in each of these DCL sections upon which plaintiff relies is a conveyance made without fair consideration (*see* ***Atlanta Shipping Corp., Inc. v Chemical Bank,*** 818 F2d 240 [2d Cir 1987]). "Fair consideration exists '[w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, properly is conveyed or an antecedent debt is satisfied' or '[w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained' " (DCL 272; ***Matter of BSL Dev. Corp. v Aquabogue Cove Partners,*** 212 AD2d 694, 623 NYS2d 253 [2d Dept 1995]). Thus, good faith and the payment of a fair equivalent value for the property interest are the two necessary elements of fair consideration (*see* DCL 272; ***In re Sharp Intern. Corp.,*** 403 F3d 43 [2d Cir 2005]; ***Murin v Estate of Schwalen,*** 31 AD3d 1031, 819 NYS2d 341 [3d Dept 2006]; *see also* ***Julien J. Studley, Inc. v Lefrak,*** *supra*). Indeed the "good faith of both the transferor and transferee is an indispensable element of fair consideration" (***American Panel Tec v Hyrise, Inc.,*** 31 AD3d 586, 587, 819 NYS2d 768 [2d Dept 2006]). Whether fair consideration was paid is generally a question of fact which must be determined under the circumstances of the particular case (*see* ***Joslin v Lopez,*** 309 AD2d 837, 765 NYS2d 895 [2d Dept 2003]). The burden of proving a lack of consideration is upon the party challenging the conveyance (*see* ***Matter of CIT Group v 160-09 Jamaica Ave. Ltd. Partnership,*** 25 AD3d 301, 808 NYS2d 187 [1st Dept 2006]; ***Matter of American Inv. Bank v Marine Midland Bank,*** 191 AD2d 690, 595 NYS2d 527 [2d Dept 1993]).

Based upon the admissible evidence presented herein, defendants have demonstrated a *prima facie* entitlement to summary judgment dismissing the fraudulent conveyance counts of the complaint. Defendants provided extensive proof of the subject asset sale through the submission of the asset purchase agreement, sworn affidavits of Mr. White and Mr. Schellinger who executed the asset purchase agreement on behalf of BKGC and BKB, respectively, as well as the facts and circumstances surrounding the necessity of the sale of BKGC, the consideration paid, and the good faith negotiations

between BKGC and BKB, which resulted in the asset purchase agreement. There is no evidence of any wrongdoing by either defendant nor any attempts by BKGC or BKB to divert assets of BKGC to defraud its creditors. On the contrary, BKGC remains an ongoing business, it retained certain assets after the sale, and it maintains an income stream from BKB. Having established that the consideration was fair, the Court need not address the other factors under Sections 273, 274, and 275. Notwithstanding, defendants have provided sufficient evidence that BKGC was not rendered insolvent, inasmuch as it retained certain assets, receives a percentage of the net income of BKB for several years, and the line of credit is to be repaid with interest and is secured by promissory notes and guarantees. In addition, the assets remaining with BKGC cannot be considered unreasonably small capital, considering the value of BKGC was predominately its ongoing construction projects and the goodwill of the business name. Further, the evidence demonstrates that the purchase price paid to BKGC over the course of five years, enables it to pay its debts as they become due.

Defendants, having established their *prima facie* entitlement to summary judgment, the burden then shifts to plaintiff to submit evidence establishing the existence of a triable issue of fact with respect to a bona fide defense (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***U.S. Bank Trust N.A. Trustee v Butti***, 16 AD3d 408 [2d Dept 2005]; ***Griffon V, LLC v 11 E. 36th, LLC,*** 90 AD3d 705, 707, 934 NYS2d 472 [2d Dept 2011]). Here, plaintiff failed to submit any evidence in admissible form to raise a triable issue of fact (*see* ***Licata v Cuzzi,*** 161 AD3d 844, 77 NYS3d 418 [2d Dept 2018]). In that regard, the affirmation of plaintiff's attorney has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). With regard to plaintiff's argument that he requires discovery to obtain evidence to support his fraudulent conveyance claims, the Court concludes that plaintiff has failed to show any facts which may exist to demonstrate that the consideration paid was not fair and reasonable. Plaintiff has not submitted an affidavit in this regard as to what facts he intends to ascertain through discovery. Plaintiff further does not refute the facts as alleged in the affidavits of Mr. White and Mr. Schellinger, and in that respect, those facts may be deemed admitted by the Court (***Kuehne & Nagel, Inc. v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Argent Mtge. Co, LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***Madeline D'Anthony Enter., Inc. v Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). As such, an award of summary judgment dismissing the fraudulent conveyance counts is appropriate (CPLR 3212 [f]).

Plaintiff's fourth cause of action seeks a declaration that BKB is liable for all debts and obligations of BKGC and that BKB is the alter ego of BKGC. On a claim that one corporation is the alter ego of another, the plaintiff is seeking to pierce the alleged debtor's corporate veil and hold the purported alter egos liable for any alleged debts or obligations claimed to be due plaintiff (*see* ***Fernbach, LLC v Calleo,*** 92 AD3d 831, 939 NYS2d 501 [2d Dept 2012]). The corporate veil will be pierced to achieve equity "when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" (***John John, LLC v Exit 63 Development, LLC,*** 35 AD3d 540, 541, 826 NYS2d 657 [2d Dept 2006] *quoting* ***Austin Powder Co. v McCullough,*** 216 AD2d 825, 628 NYS2d 855 [3d Dept 1995]). In this context, courts consider "whether there is an overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form ... such that one of the corporations is a mere instrumentality, agent and alter ego of the other" (***Id.*** *quoting* ***Matter of Island Seafood Co., Inc. v Golub Corp.,*** 303 AD2d 892, 759 NYS2d 768 [3d Dept 2003]).

Here, defendants provided sufficient evidence to show that BKGC and BKB are separate entities, that BKB was only created after the death of Mr. Krupinski for the purpose of purchasing the business and continuing its ongoing construction operations without interruption, and there is no evidence that BKB used its alleged dominion over BKGC to commit any wrong against plaintiff or that it in fact so dominated BKGC that BKB can be called BKGC's alter ego (*see* ***Fernbach,*** *supra*). Further, Mr. White avers in his sworn affidavit that he is the new president of BKGC and neither Mr. Schellinger nor Mr. Harden hold an ownership interest or position as officer of director of BKGC. Therefore, there is no basis upon which to hold BKB liable for any alleged debts of BKGC. In any event, plaintiff failed to oppose summary judgment on his fourth cause of action and thus, he is deemed to have abandoned this claim (*see* ***Genovese v Gambino,*** 309 AD2d 832, 766 NYS2d 213 [2d Dept 2003]).

Inasmuch as the defendants are awarded summary judgment dismissing plaintiff's complaint in its entirety, the motions by plaintiff to consolidate this action with the prior special proceeding and the request for a stay of this action pending the appeal in the prior special proceeding are rendered academic. Notwithstanding, both motions are **DENIED**, inasmuch as the prior

special proceeding has been marked disposed, and thus, there is no action with which to consolidate. Further, CPLR 5519, which is applicable to requests for stays pending an appeal, does not apply to plaintiff's request herein, as any stay would be with respect to the enforcement of the Order in the prior special proceeding, not the within action.

Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is **GRANTED** and plaintiff's motions are **DENIED**.

The foregoing constitutes the **Decision** and **Order** of the Court.

Dated: September 15, 2020

HON. JOSEPH FARNETI
Acting Justice Supreme Court

__X__ FINAL DISPOSITION **_____ NON-FINAL DISPOSITION**