

At Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of October, 2012.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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LEONID AKODES and LEONID AKODES as sole proprietor of
FIBER OPTIC DEVICES, USA,

Plaintiffs,

- against -

**DECISION
AND
ORDER**

Index No. 29672/08

ROMAN PYATETSKY, 1925 NE 10 LLC d/b/a V.R.M.
DEVELOPMENT, ZORIK ERIK IKHILOV, ERIK IKHILOV, P.C.
d/b/a IKHILOV & ASSOCIATES, R & M MANAGEMENT,
ANATOLY SHVARTZBERG, GALINA PYATETSKY, VIKTORIYA
SHTATLENDER, MARK LUPOLOVER, BENJAMIN N. KAPLAN,
and ROBERT GRINBERG

Defendants.

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The following papers numbered 1 to 5 read on this motion:

Papers Numbered:

The following papers numbered 1 to 5 read on this motion:	Papers Numbered:
Notice of Motion / Attorney Affirmation / Akodes Affidavit / Exhibits	1
Memorandum of Law in Support	2
Attorney Affirmation in Opposition	3
Memorandum of Law in Opposition / Exhibits	4
Reply Affirmation	5

Plaintiff Leonid Akodes moves, pursuant to CPLR 3212, for partial summary judgment on its nineteenth cause of action, to set aside the transfer of defendant Roman Pyatetsky's ("Pyatetsky") 50% interest in a residential condominium unit to defendants Anatoly Shvartsberg ("Anatoly") and Galina Pyatetsky ("Galina") (collectively, the

“Shvartsberg Defendants”) as fraudulent pursuant to Debtor and Creditor Law § 274.

BACKGROUND

This action arises from a series of transactions in which Pyatetsky, falsely claiming to be an attorney, fraudulently induced plaintiff to lend him money that he never repaid. In or about September 2006, Pyatetsky drafted and recorded mortgage documents in connection with a loan that plaintiff extended in a real estate transaction. Thereafter, plaintiff informed Pyatetsky that he was seeking to purchase an interest in an existing business and asked Pyatetsky to perform due diligence on his behalf. Although he was not, and never had been, a member of the bar and never attended law school, Pyatetsky, through explicit misrepresentations, misleading business cards, and use of office space that he temporarily leased to defendant Zorik Erik Ikhilov, Esq., led plaintiff to believe that he was an attorney in order to gain plaintiff’s trust and solicit his investment in fictitious projects.

In or about May 2007, Pyatetsky approached plaintiff with an investment opportunity with his “client,” defendant 1925 NE 10 LLC (“1925”), which was purportedly seeking a short-term loan to fund a construction project. On June 5, 2007, after receiving \$100,000.00 from plaintiff, Pyatetsky executed a promissory note on behalf of defendant V.R.M. Development, which Pyatetsky claimed was the name under which 1925 was doing business in New York (the “V.R.M. Note”). Pyatetsky subsequently informed plaintiff that he needed an additional loan to prosecute a “large book” of personal injury cases that he had recently purchased. On November 30, 2007, Pyatetsky executed a promissory note acknowledging receipt of \$313,000.00 and extending an additional \$100,000.00 line of credit (the “Pyatetsky

Note”). Pyatetsky further acknowledged receipt of an additional \$50,000.00 on December 3, 2007 and \$60,000.00 on January 22, 2008 from plaintiff in connection with the Pyatetsky Note. Pyatetsky tendered only two payments pursuant to the two promissory notes, in the form of checks, one of which was drawn from the account of defendant R&M Management; both checks were returned due to insufficient funds.

Plaintiff contends that, on April 19, 2007, “in anticipation of soliciting . . . funds,” Pyatetsky fraudulently transferred his only significant asset, a 50% interest in his residence, located at 2805 East 28th Street, Unit 1B, Brooklyn, New York (the “Property”), after his initial contacts with plaintiff and approximately one month prior to signing the V.R.M. Note, “in order to ensure that Plaintiff would be unable to satisfy any judgment later obtained against him.” The deed, dated April 19, 2007, by which Pyatetsky effected such transfer was executed by himself and Galina as grantors to Galina and Anatoly as grantees “in consideration of Ten (\$10.00) dollars” (the “Transfer”). Thus, only Pyatetsky’s interest was conveyed on April 19, 2007. Pyatetsky obtained his interest in the Property on March 2, 2006 when Polina Shvartsberg (“Polina”), Pyatetsky’s mother-in-law, conveyed the Property to him and his wife Galina through a bargain and sale deed listing consideration of only \$10.00. The Shvartsberg Defendants state that this was an informal family transaction with the understanding that Pyatetsky and Galina would pay between \$1,500.00 and \$2,000.00 per month in “rent,” which Pyatetsky never paid. The Shvartsberg Defendants argue that the actual consideration for the Transfer was the forgiveness of Pyatetsky’s antecedent debt, including unpaid “rent” and unspecified sums that Pyatetsky borrowed from Anatoly.

On May 30, 2008, Galina initiated a divorce action against Pyatetsky (*see Pyatetsky v Pyatetsky*, Sup Ct, Kings County, index No. 53785/08). On August 11, 2009, Pyatetsky and Galina executed a stipulation of settlement, which states that “the Wife shall retain exclusive ownership of and in the [Property] . . . in view of all other considerations and obligations set forth in this Stipulation of Settlement, including but not limited to the Wife’s acceptance of de minimis child support for the parties’ son” (the “Stipulation”). While Pyatetsky’s monthly child support payments would have been \$523.32 pursuant to Domestic Relations Law § 240 (1-b), Pyatetsky and Galina agreed, at paragraph 50 of the stipulation, to a monthly payment of \$500.00 because of, *inter alia*, “the Husband’s transfer of his interest in the [Property] to the Mother.” Moreover, Galina claims to have waived maintenance, partially in consideration of the Transfer of Pyatetsky’s interest in the Property. Plaintiff argues that the Transfer could not have constituted consideration for reduced child support payments or waiver of maintenance because the Transfer of Pyatetsky’s interest to Anatoly occurred over two years prior to execution of the Stipulation and over one year prior to the initiation of the divorce action.

Plaintiff commenced this action on October 29, 2008 by filing a summons and complaint and a lis pendens against the Property. Plaintiff’s original complaint requests, as its seventeenth and eighteenth causes of action, that the Court set aside the Transfer as fraudulent pursuant to Debtor and Creditor Law §§ 275 & 276. Plaintiff amended his complaint on July 29, 2009 to include, as his nineteenth cause of action, a claim for the same relief pursuant to Debtor and Creditor Law § 274. The Shvartsberg Defendants interposed

an answer, dated September 3, 2009, in which they raised five conclusory affirmative defenses without any supporting allegations. On November 23, 2010, upon plaintiff's motion, the Court granted a default judgment against Pyatetsky. On September 28, 2011, the Shvartsberg Defendants moved for summary judgment dismissing this action as against them, which was denied by short form order stating that "[n]umerous questions of fact have been raised regarding the consideration for [the] transfer."

On April 27, 2012, plaintiff filed the instant motion, seeking summary judgment against the Shvartsberg Defendants on his nineteenth cause of action. Plaintiff offers identical evidence and advances the same legal arguments in support of this motion as he did in opposition to the Shvartsberg Defendants' prior motion for summary judgment, although he did not cross-move for judgment at that time. Plaintiff asserts that the deed effecting the Transfer conclusively establishes that consideration for Pyatetsky's share of the Property was "not 'fair,'" as the parol evidence rule precludes the Shvartsberg Defendants from providing oral testimony in contravention of the nominal consideration specified on the deed. Plaintiff further contends that, even if the Shvartsberg Defendants were permitted to testify that Pyatetsky's antecedent debt was included as consideration, such debt could not possibly constitute fair consideration for 50% of the Property.¹ Plaintiff provides an appraisal valuing the Property at the time of the Transfer at \$435,000.00 and claims that "the total amount of this antecedent debt, at the very most, was \$24,000 only half of [which], a total of

¹ It is noted that Galina's half interest in the Property is not in dispute, as her interest was not changed by the deed of April 19, 2007. Thus, the Transfer at issue can only have been fraudulent to the extent that Pyatetsky conveyed his half interest to Anatoly.

\$12,000, was attributable to Roman Pyatetsky.” The Stipulation “estimates” the value of the Property to be \$450,000.00.² Plaintiff also claims that “[i]t is undisputed that at the time of the conveyance, on April 19, 2007, Roman Pyatetsky was about to engage in a transaction with Plaintiff” and that “after conveying his interest in the [Property], Roman Pyatetsky was left with no capital at all.” To support the latter contention, plaintiff relies on the Shvartsberg Defendants’ deposition testimony, representations of Pyatetsky’s assets in the Stipulation, and an April 2007 bank statement showing a negative balance.

The Shvartsberg Defendants argue that the Court’s denial of its motion for summary judgment on September 28, 2011 is law of the case and that plaintiff is precluded from relitigating the issue of fairness of consideration for the Transfer upon the same factual evidence. Moreover, the Shvartsberg Defendants contend that the Transfer cannot be declared void because it was treated, in the Stipulation, as consideration for reduced child support payments. In reply, plaintiff argues that the Court’s decision on the Shvartsberg Defendants’ summary judgment motion does not preclude him from rearguing the issue of fairness of consideration on a different legal theory.

DISCUSSION

Upon motion for summary judgment, the movant has the initial burden to produce admissible evidence sufficient to “warrant the court as a matter of law in directing judgment in [its] favor” (CPLR 3212 [b]; see *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d

² The Stipulation also acknowledges the pendency of the instant action alleging the prior fraudulent conveyance of the Property.

1065, 1067 [1979]). Once the movant establishes its prima facie entitlement to judgment, the burden shifts to the opposing parties to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]; see CPLR 3212 [b]; *Friends of Animals*, 46 NY2d at 1067-68). While all “facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]), mere conclusory allegations or defenses are insufficient to preclude summary judgment (see *Zuckerman*, 49 NY2d at 562). “If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion” (CPLR 3212 [b]).

As a threshold matter, the Shvartsberg Defendants contend that the Court’s holding, upon their prior summary judgment motion, that triable issues of fact exist regarding the consideration for the Transfer is law of the case barring plaintiff from relief upon the instant motion, as the Court could have granted summary judgment to plaintiff on its nineteenth cause of action pursuant to CPLR 3212 (b) but did not do so. The Shvartsberg Defendants rely upon *Brownrigg v New York City Hous. Auth.* (29 AD3d 721, 722 [2d Dept 2006]), in which the Second Department held that an order denying summary judgment upon “finding triable issues of fact” was “law of the case” precluding a subsequent motion for summary judgment based upon the same evidence and legal claims. “The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding. The doctrine applies only to legal determinations that were

necessarily resolved on the merits in a prior decision” but “may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence” (*id.* [internal citation omitted]). In his reply, plaintiff correctly contends that law of the case doctrine cannot prevent a party from advancing a new legal theory that was not raised upon a prior summary judgment motion (*see D’Amato v Access Mfg.*, 305 AD2d 447, 448 [2d Dept 2003]; *Itamari v Giordan Dev. Corp.*, 298 AD2d 559, 559-60 [2d Dept 2002]). However, plaintiff made the same legal argument and offered the exact same evidence in opposition to the Shvartsberg Defendants’ prior motion. While plaintiff could have moved for leave to reargue pursuant to CPLR 2221 (d),³ plaintiff cannot be afforded the relief he requests on a *de novo* summary judgment motion (*see Brownrigg*, 29 AD3d at 722).

Debtor and Creditor Law § 274 states 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 his actual intent.

Under Debtor and Creditor Law § 272:

[f]air consideration is given for property . . .

a. When in exchange for such property, . . . as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is

³ A motion pursuant to CPLR 2221 (d), which is addressed to “matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion,” must be “identified specifically as such” and “made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.”

satisfied, or

b. When such property . . . 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.

Plaintiff argues that consideration for the Transfer was presumptively unfair because the deed lists a consideration of, and the accompanying Real Property Transfer Report lists the “Full Sale Price” as, \$10.00, which was grossly disproportionate to the actual value of his interest in the Property, and that the parol evidence rule prevents the Shvartsberg Defendants from arguing that consideration included forgiveness of an antecedent debt. While “parol evidence is inadmissible to explain, vary, or contradict a deed which is clear and unambiguous” (*Coleman v Village of Head of Harbor*, 163 AD2d 456, 458 [2d Dept 1990]), “where nominal consideration is expressed,” a party may present parol evidence “to show what the real consideration was” (*Medical Coll. Lab. v New York Univ.*, 178 NY 153, 165 [1904]; see *King v Union Trust Co.*, 148 App Div 110, 112 [1st Dept 1911]; see also *Century 21 Constr. Corp. v Rabolt*, 143 AD2d 873 [2d Dept 1988] [permitting, although ultimately rejecting as insufficient, evidence of consideration where a deed expressly lists no consideration]; accord *Century Ctr. v Davis*, 100 AD2d 564 [2d Dept 1984]; *Merman v Miller*, 82 AD2d 826 [2d Dept 1981]). The Court takes judicial notice that deeds frequently list such nominal consideration and rarely recite the full terms of the transaction. Therefore, the Shvartsberg Defendants’ oral testimony is admissible to demonstrate that forgiveness of Pyatetsky’s antecedent debt constituted fair consideration for the Transfer.

However, in an intra-family transaction, such as that herein, a heavy burden is placed upon the transferee to demonstrate that consideration was fair (*see Prudential Farms of Nassau County v Morris*, 286 AD2d 323, 324 [2d Dept 2001]; *Wall St. Assoc. v Brodsky*, 257 AD2d 526, 528 [1st Dept 1999]; *Liggio v Liggio*, 53 AD2d 543, 549 [1st Dept 1976]). Plaintiff provides an appraisal stating that the value of the Property at the time of the Transfer was \$435,000.00, making Pyatetsky's share worth \$217,500.00. Although the Shvartsberg Defendants claim that consideration for the Transfer included Anatoly's forgiveness of unpaid "rent," given that the Transfer occurred a mere thirteen months after Polina's initial conveyance to Pyatetsky and Galina, forgiveness of any such debt incurred could not have constituted fair consideration for half of the Property. Moreover, Anatoly's deposition testimony was vague and evasive, claiming at most only occasional modest advances of between \$50 and \$200, and he has provided no documentary evidence to support his claim that he loaned significant sums to Pyatetsky.

Upon the authority of *Century 21 Construction Corp. v Rabolt* (143 AD2d 873), *Century Center Ltd. v Davis* (100 AD2d 564), and *Rampello v. Cioffi* (282 AD2d 442 [2d Dept 2001]), cited by plaintiff, plaintiff may well have had grounds to move for re-argument of this Court's ruling of September 28, 2011 and seek summary judgment on his own behalf, but he failed to do so. Such ruling, made upon the same legal theories and the same evidence, is therefore the law of the case precluding the relief plaintiff now seeks upon a *de novo* motion for summary judgment (*see Brownrigg*, 29 AD3d at 722).

CONCLUSION

Accordingly, plaintiff's instant motion for summary judgment is denied based upon law of the case doctrine.

The foregoing constitutes the decision and order of the Court.

E N T E R :

HON. CAROLYN E. DEMAREST, J.S.C.