

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17  
Justice

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TWIN BROTHERS ELECTRICAL SUPPLY CORP.		Number <u>16346</u>	2006
		Motion	
		Date <u>December 13,</u>	2006
- against-		Motion	
		Cal. Number <u>63</u>	
TAKIS & VALENTIS MAINTENANCE, INC., et al.		Motion Seq. No. <u>1</u>	
	x		

The following papers numbered 1 to 13 read on this motion by plaintiff for summary judgment in its favor against defendants Takis Korniotis, Maria Korniotis and Kostas Korniotis setting aside the deed dated March 10, 2003, and awarding compensatory damages against defendants in the sum of \$46,545.80, plus interest from January 12, 2005, and punitive damages and reasonable attorneys' fees.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Answering Affidavits - Exhibits.....	5-10
Reply Affidavits.....	11-13

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff alleges that it is the judgment creditor of defendants Takis & Valentis Maintenance, Inc. and Takis Korniotis, having obtained a default judgment dated January 12, 2005 against them, in the amount of \$48,052.72, in the action entitled Twin Brothers Electrical Supply Corp. v Takis & Valentis Maintenance, Inc. (Supreme Court, Queens County, Index No.

7744/2004). In that action, plaintiff asserted causes of action against Takis & Valentis Maintenance, Inc. to recover for goods sold and delivered by plaintiff, an account stated and unjust enrichment, and a cause of action against Takis Korniotis to recover payment due under a personal guaranty of the account of Takis & Valentis Maintenance, Inc. Plaintiff alleged that Takis & Valentis Maintenance, Inc. purchased electrical supplies from it, during the period February 2000 until August 2003, but issued checks against insufficient funds to pay for the merchandise, and that Takis Korniotis failed to pay the outstanding account of Takis & Valentis Maintenance, Inc. pursuant to his personal guaranty. Takis Korniotis moved by order to show cause to vacate and set aside the judgment. By order dated June 1, 2005, the motion was denied on the ground that Takis Korniotis failed to establish a reasonable excuse for his default, and did not deny owing the sum claimed.

In this action, plaintiff alleges the judgment remains unsatisfied. Plaintiff further alleges that defendant Takis Korniotis and his wife, defendant Maria Korniotis, owned the property known as 25-40 44<sup>th</sup> Street, Long Island City, New York (Block 702, Lot 60) as tenants by the entirety, and that they transferred their ownership interests to defendant Maria Korniotis and Kostas Korniotis, their son, by a deed dated March 10, 2003. According to plaintiff, the transfer was without fair consideration, at a time when defendant Takis Korniotis and Takis & Valentis Maintenance, Inc. were becoming increasingly indebted to plaintiff and were insolvent, and with the intent to hinder, delay and frustrate plaintiff's efforts to collect the debts from defendants Takis & Valentis Maintenance, Inc. and Takis Korniotis. Plaintiff commenced this action asserting causes of action pursuant to Debtor & Creditor Law §§ 273, 275, 276, and 276-a, and a claim that the transfer was made with the intent to defraud plaintiff and other creditors. It seeks to set aside the transfer as fraudulent and in violation of its rights as a creditor, and to recover damages, including punitive damages, and reasonable attorneys' fees.

Defendants served an answer denying allegations of the complaint, but admitting that defendants Takis Korniotis and Maria Korniotis transferred title to the premises to defendants Maria Korniotis and Kostas Korniotis by deed dated March 10, 2003. Defendants also asserted various affirmative defenses.

Plaintiff moves for summary judgment as against defendants arguing that the conveyance of the property should be set aside

pursuant to Debtor and Creditor Law article 10, because it was made without fair consideration, rendered defendant Takis Korniotis insolvent, and was made with an intent to defraud. In support of the motion, it offers, among other things, a copy of the pleadings, an affirmation of its counsel, and a copy of the relevant deed.

Defendants oppose the motion, asserting that the transfer was made prior to the commencement of the lawsuit leading to the underlying judgment, and was made, in effect, for elder-law or estate-planning purposes. Defendants offer the affidavits of the individually named defendants, wherein they assert that Debbie Korniotis, the daughter of defendants Takis and Maria Korniotis, and the sister of defendant Kostas Korniotis, was married and owned a home, and that it was the intent of Takis and Maria that their son also should own a home. Defendants further assert that Kostas's name was placed on the deed in an effort to simplify matters in the event anything untoward should happen to Takis and Maria. Defendants Takis and Maria Korniotis admit defendant Kostas Korniotis made no payment in consideration of the transfer, but assert they hoped he would be responsible for all expenses related to the property and financially support defendant Maria Korniotis. Defendants further assert that although defendant Takis Korniotis was an officer of defendant corporation, Takis did not intend to be, or believe he was, personally liable for the debts of Takis & Valentis Maintenance, Inc. Rather, they assert, defendant Takis Korniotis believed the debts of defendant corporation would be paid, even as of the date of the transfer of his ownership interest. As evidence of such belief, they point to the history of the payments by defendant corporation as reflected in the payment ledgers, and in particular, to the payments, in the amounts of \$29,000.00, and \$5,000.00, made to plaintiff on dates following the conveyance. In addition, they assert defendant Takis Korniotis did not retain control of the property following its transfer.

It is well established that 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 demonstrate the absence of any material issues of fact," (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

Pursuant to Debtor and Creditor Law § 273, a conveyance made by a person at a time he was insolvent or thereby rendered insolvent is fraudulent, without regard to actual motive or intent to defraud, if the conveyance is made without fair consideration

(see American Panel Tec v Hyrise, Inc., 31 AD3d 586 [2006]; St. Teresa's Nursing Home v Vuksanovich, 268 AD2d 421 [2000]; Gallagher v Kirschner, 220 AD2d 948 [1995]; County of Dutchess v Dutchess Sanitation Servs., 86 AD2d 884 [1982]).

An individual is "insolvent" within the meaning of the Debtor and Creditor Law when "the present fair saleable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured" (Debtor and Creditor Law § 271[1]). "The element of fair consideration exists when, in exchange for property or an obligation, 'as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied' (Debtor and Creditor Law § 272[a])" (American Panel Tec v Hyrise, Inc., 31 AD3d at 587).

In general, the burden of proving both insolvency and lack of fair consideration is upon the party challenging the conveyance (see Joslin v Lopez, 309 AD2d 837, 838 [2003]). Whether a conveyance has rendered the debtor insolvent, and whether fair consideration was paid, are generally questions of fact which must be determined under the circumstances of the particular case (see Joslin v Lopez, 309 AD2d at 838; Matter of American Inv. Bank v Marine Midland Bank, N.A., 191 AD2d 690 [1993]; Wagman v Lagno, 141 AD2d 720 [1988]). Nevertheless, "love and affection," and the conjectural promise of future support, are not fair consideration within the meaning of Article 10 of the Debtor and Creditor Law (see Debtor and Creditor Law § 272; Rush v Rush, 19 AD2d 846 [1963]). In addition, where a transfer is made in consideration of a promise of future support at a time when the transferor is in debt, insolvency is presumed and the burden of overcoming the presumption is upon the grantee (see Petition of National City Bank of N.Y., 269 App Div 1040 [1945]; Cohen v Benjamin, 246 App Div 866 [1936], lv denied 271 NY 663 [1936]).

In contrast to section 273 of the Debtor and Creditor Law, which permits a finding of constructive fraud by circumstances such as insolvency and lack of fair consideration, section 276 requires proof of actual intent to hinder, delay, or defraud either present or future creditors. Actual fraud must be established by clear and convincing evidence (see Marine Midland Bank v Murkoff, 120 AD2d 122 [1986], appeal dismissed 69 NY2d 875 [1987]).

In this case, it is undisputed that no consideration was paid in connection with the interest transferred to defendant Kostas Korniotis. In addition, there is no claim by defendants

that the conveyance was made as a good faith satisfaction of an antecedent debt. Defendants, instead, claim the transfer was made out of desire that defendant Kostas Korniotis should have housing, and in a "good faith" hope that Kostas financially would support his mother and care for the property, in exchange for the conveyance. Such consideration, however, is not fair consideration (see Apple Bank for Sav. v Contaratos, 204 AD2d 375 [1994]; Rush v Rush, 19 AD2d at 846; see also Hickland v Hickland, 100 AD2d 643 [1984]; Schmitt v Morgan, 98 AD2d 934 [1983]; Elmore Milling Co. v Carkees, 255 App Div 410 [1938]; Demo v Parr, 254 App Div 621 [1938]; Farino v Farino, 113 Misc 2d 374, 385 [1982]; Marine Midland Bank v Stein, 105 Misc 2d 768 [1980]; Orbach v Pappa, 482 F Supp 117 [1979]).

In addition, with respect to the element of insolvency, by the time of the transfer, defendant Takis & Valentis Maintenance, Inc. owed plaintiff the amount of \$60,484.40 on account, and had failed to make any payment to plaintiff for a period of over three months, notwithstanding its purchase of approximately \$10,000.00 worth of additional goods during that same period (see Debtor and Creditor Law § 275). Defendant Takis Korniotis was personally liable for the debt of defendant Takis & Valentis Maintenance, Inc. based upon a guaranty of payment. Thus, plaintiff is entitled to the presumption that the transfer left defendant Takis Korniotis insolvent.

Defendants have failed to make any showing, of continued solvency of defendant Takis Korniotis after the transfer, to rebut that presumption. Moreover, defendant Takis Korniotis admits that upon the transfer, he was divested of the only real estate interest he owned. He further admits that he is unemployed and dependent on his son for his support financially, and that defendant corporation closed its doors by the end of 2003. In addition, his responses to the information subpoena served by plaintiff in the underlying action, indicate that his interest in the property was his sole asset sufficient to satisfy his obligation to plaintiff.

Plaintiff has demonstrated a prima facie case with respect to its claim pursuant to Debtor and Creditor Law § 273. In opposition, defendants have failed to raise a triable issue of fact. Under such circumstances, plaintiff is entitled to summary judgment declaring the deed dated March 10, 2003 effected a fraudulent conveyance and is null and void, and directing the Register of Queens County to mark its records accordingly (see Cadle Co. v Organes Enterprises, Inc., 29 AD3d 927 [2006]).

With respect to the cause of action based upon Debtor and Creditor Law § 276, however, questions of fact remain herein relative to the actual intent of defendant Takis Korniotis in transferring title to the property (see Farmers Production Credit Assn. of Middletown v Taub, 121 AD2d 681, 682 [1986]; see also Matter of Shelly v Doe, 249 AD2d 756, 757 [1998]; Taylor-Outten v Taylor, 248 AD2d 934 [1998]). Summary judgment relative to that claim, and the associated claim for attorneys' fees pursuant to Debtor and Creditor Law § 276-a, therefore, is unwarranted (see Cadle Co. v Organes Enterprises, Inc., 29 AD3d at 929 [2006]; Manufacturers & Traders Trust Co. v Lauer's Furniture Acquisition [appeal No. 2], 226 AD2d 1056, 1057-1058 [1996], lv dismissed 88 NY2d 962 [1996]; Furlong v Storch, 132 AD2d 866, 867 [1987]). Nonetheless, plaintiff is not entitled to punitive damages, because even if the challenged conveyance was effected with the intent to avoid creditors, such conduct does not give rise to punitive damages (see Cadle Co. v Organes Enterprises, Inc., 29 AD3d at 929).

The motion by plaintiff is granted only to the extent of granting summary judgment on the cause of action pursuant to Debtor and Creditor Law § 273 declaring the deed dated March 10, 2003 effected a fraudulent conveyance and is null and void, and directing the Register of Queens County to mark its records accordingly (see Cadle Co. v Organes Enterprises, Inc., 29 AD3d 927 [2006]). The claim for punitive damages is dismissed, and the remaining claims are severed.

Dated: February 28, 2007

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J.S.C.