

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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In the Matter of the application of:

Index No.: 27265/07

Motion Date: 3/5/08

COLLIER, HALPERN, NEWBERG, NOLLETTI
& BOCK, LLP,

Motion Cal. No.: 4

Motion Seq. No.: 1

Petitioner,

For an Order and Judgment Pursuant to CPLR 5225(b) to
Compel Payment of Money or Delivery of Property,

-against-

ERIC GHIM,

Respondent.

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The following papers numbered 1 to 12 read on this petition by Collier, Halpern, Newberg, Nollelli & Bock, LLP, for an order, pursuant to CPLR §§5221(a)(4) and 5225(b), directing respondent Eric Ghim to turn over monies to the petitioner Collier, Halpern, Newberg, Nollelli & Bock, LLP which it owes to the judgment debtor Hi Pockets, Inc.

	PAPERS NUMBERED
Notice of Petition-Petition-Affirmations-Exhibits.....	1 - 4
Memorandum of Law in Support.....	5 - 6
Answer to Petition-Exhibits.....	7 - 9
Reply Affidavit-Exhibits.....	10 - 12

Upon the foregoing papers, it is ordered that the petition is disposed of as follows:

This is a special proceeding instituted by petitioner Collier, Halpern, Newberg, Nollelli & Bock, LLP (“petitioner”) to compel respondent Eric Ghim (“respondent”) to turn over monies to the petitioner, that it was awarded by judgment of the Supreme Court, County of Westchester, in an action entitled, *Collier, Halpern, Newberg, Nollelli & Bock, LLP v. Hi Pockets, Inc., Babette Rhoads and Marco Macaluso*. Petitioner instituted this proceeding, pursuant to CPLR §§5221(a)(4) and

5225(b), to enforce the judgment entered in the Supreme Court of the State of New York, County of Westchester, and to require the payment of money from respondent, a person who is a transferee of money and property from the judgment debtor, Hi Pockets, Inc.

Pertinent Facts

On June 3, 2005, petitioner was granted a final judgment against Hi Pockets, Inc., and Babette Rhoads, a shareholder and officer of Hi Pockets, Inc., for the sum of \$183,635.66, which was entered in the Office of the Westchester County Clerk on June 28, 2005, and docketed in the Office of the Putnam County Clerk on May 26, 2006. On July 9, 2005, petitioner also served a restraining notice to the judgment debtor, Hi Pockets, Inc. (“Hi Pockets”). During the pendency of the action in Westchester County, Hi Pockets ceased operations and transferred its assets to three storage containers located at the Liffey Van Lines Storage Facility, 429 Stillwater Road, Mahopac, New York, located in Putnam County; judgment debtor Babette Rhoads (“Rhoads”) filed for Bankruptcy protection. Respondent, the owner and operator of The Four Seasons Billiard & Café, which is located at 35-11A Prince Street, Flushing, NY 11354, who allegedly knew interested people in the billiards industry, allegedly was asked to sell the contents of the three storage containers. In response to petitioner’s service of a property execution to enforce its judgment against the property in storage, the Sheriff of Putnam County, by letter dated December 20, 2006, informed petitioner that he ascertained that two of the three storage containers had been sold and the proceeds of the sale remitted to “Babs” Hedges, whom petitioner refers to as Babette Rhoads. Respondent, at a subsequent deposition held on June 27, 2007, admitted that he sold the property of Hi Pockets for the sum of \$20,000.00. Alleging that Hi Pockets was rendered insolvent by the transfers to respondent of all of the assets without fair consideration, petitioner seeks to recover the sum of \$20,000.00 plus interest from respondent.

Discussion

Pursuant to CPLR § 5221(a)(4), this special proceeding against respondent must be commenced “either in the supreme court or in a county court, in a county which the respondent resides or is regularly employed or has a place for the regular transaction of business.” Moreover, pursuant to CPLR § 5221(a)(4):

Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to

deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding.

“CPLR § 5225 (subd.[b]) authorizes the institution of a special proceeding against a transferee of property from a judgment debtor “where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee” (citations omitted).” Gelbard v. Esses, 96 A.D.2d 573, 575 (2nd Dept. 1983). “In proceedings pursuant to CPLR § 5225 (subd. [b]), wherein a judgment creditor seeks payment from a transferee of the judgment debtor, the creditor has the burden of establishing that his rights are superior to those of the transferee. Whether such rights are superior is a matter to be determined by applying the fraudulent conveyance provisions of the Debtor and Creditor Law (citation omitted). The burden of proof is on the creditor seeking to set aside a conveyance as fraudulent to establish that the debtor’s conveyance was made without fair consideration.” Id. at 576. Debtor and Creditor Law § 273-a, entitled “Conveyances by defendants,” states in pertinent part, the following:

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.

“A fraudulent conveyance is a transfer made without fair consideration by a debtor when he or she is insolvent or which renders him or her insolvent (see Debtor and Creditor Law § 273) or by a defendant in an action for money damages who is unable to satisfy a judgment that the plaintiff finally obtains (see, Debtor and Creditor Law § 273-a).” Palermo Mason Const., Inc. v. Aark Holding Corp., 300 A.D.2d 458, 460 (2nd Dept. 2002); see, Hirschhorn v. Hirschhorn, 294 A.D.2d 404, 405 (2nd Dept. 2002); Rampello v. Cioffi, 282 A.D.2d 442 (2nd Dept. 2001); Prudential Farms of Nassau County v. Morris, 286 A.D.2d 323 (2nd Dept. 2001). Further, Debtor and Creditor Law § 272, states that “fair consideration is given for property, or obligation, (a) when in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or (b) when 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;” see, also, Liberty Co. v. Boyle, 272 A.D.2d 380 (2nd Dept. 2000). “Thus, both insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under § 273, and the burden of proving these elements is upon the party challenging the conveyance (citations omitted). Whether the subject 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 (citations omitted).” Joslin v. Lopez, 309 A.D.2d 837, 838 (2nd Dept. 2003); see, American Inv. Bank, N.A. v. Marine Midland Bank, N.A., 191 A.D.2d 690, 595 N.Y.S.2d 537 (2nd Dept.1993); see, also, Madison Hudson Associates LLC v. Neumann, 4 A.D.3d 257 (1st Dept. 2004). Moreover, “as a general rule, the relief to which a defrauded creditor is entitled in an action to set aside a fraudulent conveyance is limited to setting aside the conveyance of the property which would have been available to satisfy the judgment had there been no conveyance (citations omitted). [Nevertheless], a money judgment against the transferee may also be an available form of substitute relief where the transferee has disposed of the wrongfully conveyed property in some manner which makes it impossible to return (citations omitted).” Joslin v. Lopez, 309 A.D.2d 837, 839 (2nd Dept. 2003).

Here, pursuant to final judgment of the Supreme Court, Westchester County, in an action entitled, *Collier, Halpern, Newberg, Nolletti & Bock, LLP v. Hi Pockets, Inc., Babette Rhoads and Marco Macaluso*, petitioner was granted a money against Hi Pockets and Rhoads on June 3, 2005, which was entered in the Office of the Westchester County Clerk on June 28, 2005. During the pendency of that action, Hi Pockets ceased operations and entered into a bailment contract whereby its assets were transferred to three storage containers located at a storage facility in Putnam County. Thereafter, on June 29, 2005, four days after the underlying judgment was entered, the bailment contract was allegedly assumed by respondent, the owner and operator of The Four Seasons Billiard & Café, who was asked to sell the contents of the containers upon the belief that he knew interested people in the billiards industry. According to the Office of the Putnam County Sheriff and Correctional Facility, upon service of petitioner’s property execution upon the storage facility on December 4, 2006, the facility advised, based upon a review of its records, that respondent had removed the contents of containers one and two on October 17, 2005 and October 2, 2006, respectively. Respondent, in his deposition conducted on June 27, 2007, and by Answer to the Petition, admits that he sold the property of Hi Pockets for the sum of \$20,000.00.

Based upon the foregoing facts, it is determined by this Court that petitioner has made a prima facie showing of its entitlement to maintain this special proceeding and recover the sum of \$20,000.00 plus interest from respondent. The record clearly indicates that Hi Pockets transferred to respondent of all of its assets without fair consideration while an action for a money judgment was pending against it and Rhoads, its shareholder and officer. Indeed, the record is devoid of any evidence that the transfer was made in good faith to secure an antecedent debt owed to respondent, or any other indicia of fair consideration given to respondent by Hi Pockets. To the contrary, respondent was asked to sell the contents of the containers filled with the assets of Hi Pockets upon the belief that he knew interested people in the billiards industry, rather than to absolve some existing obligation. As these factors clearly indicate that Hi Pockets was rendered insolvent by this transfer, such evidence is sufficient to prove that the conveyance was fraudulent under Debtor and Creditor Law § 273. The allegations and affirmative defenses set forth in the Answer to the Petition have been considered by this Court, and found without merit.

Accordingly, the petition by Collier, Halpern, Newberg, Nolletti & Bock, LLP, for an order, pursuant to CPLR §§5221(a)(4) and 5225(b), directing respondent Eric Ghim to turn over monies to the petitioner Collier, Halpern, Newberg, Nolletti & Bock, LLP which it owes to the judgment debtor Hi Pockets, Inc., is granted, and petitioner hereby is granted judgment in the amount of \$20,000.00, together with interest calculated at the statutory rate from January 1, 2007, plus costs and disbursements. Upon presentation of a proper Judgment, the County Clerk is directed to enter judgment accordingly.

Dated: April 14, 2008

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J.S.C.