

**JRC Lbr. Corp. v Samuel Feldman Lbr. Co., Inc.**

2007 NY Slip Op 32640(U)

August 20, 2007

Supreme Court, New York County

Docket Number: 0102265/2007

Judge: Nicholas Figueroa

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FALANO

PART 46

Index Number : 102265/2007

JRC LUMBER CORP.

vs

SAMUEL FELDMAN LUMBER CO. INC.

Sequence Number : 001

TURNOVER PROCEEDING

INDEX NO. 102265/07

MOTION DATE 4/11/07

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion at cross motion

be accepted as ordered

**FILED**  
AUG 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: August 20, 2007

Y F

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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JRC LUMBER CORP.

Petitioner,

- against -

SAMUEL FELDMAN LUMBER CO., INC.,  
JRC MILLWORKS INCORPORATED  
and M & P LUMBER AND MILLWORKS  
LTD.,

Respondents.

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Index No. 102265/07

**DECISION  
AND ORDER**

**FILED**  
AUG 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**Nicholas Figueroa, J.:**

Petitioner moves pursuant to CPLR §5525(b) and Debtor and Creditor Law §§273-278, for a judgment declaring that certain payments made from respondent JRC Millworks to respondent Feldman Lumber, to pay the debt of respondent M&P Lumber and the non-respondent Julio Suarez was a fraudulent conveyances; and, directing the turnover of the \$36,000 allegedly fraudulently conveyed.

Respondent Feldman Lumber Co., Inc., opposes the petition and cross-petitions for a declaratory judgment that a \$75,000 payment from respondent JRC Millworks to petitioner was fraudulent and seeks an order directing petitioner to turn-over those funds to it. Feldman Lumber does not allege that it has a New York judgment against any party.

Petitioner obtained a May 5, 2006 judgment in this court against respondent, JRC Millworks and non-respondents Julio Suarez and Thomas C. Zawalich. The judgment is for \$157,034.16, and remains unsatisfied.

According to petitioner, respondent M & P Lumber obtained \$400,000 in financing from a bank in 2002, a year in which it was operating at a \$541,000 loss. Respondent Feldman Lumber subsequently agreed to pay M&P's debt to the bank in July, 2002. The consideration for the agreement was a promissory note from M&P and Suarez for \$400,000, as well as certain M&P assets.

Subsequent to the loan transaction, M&P discontinued its operations and Suarez formed JRC Millworks in December, 2002.

On June 2, 2003 Feldman Lumber sued Suarez and M&P Lumber in New Jersey, demanding \$264,591.83. Suarez wrote a June 12, 2003-letter acknowledging the debt, but stated, "Truthfully, I don't have a dime to my name . . . let's arrange a payment schedule until I can borrow the money and pay them off."

Petitioner alleges that JRC Millworks made \$36,000 in transfers to Feldman Lumber although it was undercapitalized from its inception and began to experience financial difficulties, including defaulting on a promissory note to petitioner that resulted in a \$151,902.74 judgment entered in this court in May, 2006 and a default on payments for materials, resulting in an October 19, 2006 New Jersey judgment for \$309,790.22.

In support of its argument that JRC was undercapitalized at the times it made the transfers totaling \$36,000, petitioner alleges that "The financial statements, tax returns and internal accounting records of JRC Millworks are rife with false entries, misstatements, and transactions that make no sense under generally accepted accounting practices." Petitioner notes a number of transactions that it asserts are fraudulent. It argues that JRC's books overstate the value of its assets, including its inventories.

Petitioner also contends that the information on JRC Millwork's 2004 tax return "is false, and it results from a convoluted series of improper accounting entries that have no basis in fact or generally accepted accounting purposes."

Continuing, petitioner characterizes \$659,693 in assets listed on the return as a "thinly veiled accounting fraud in which debit entries correlating with expenses that would have resulted in the reporting of a huge loss were inappropriately capitalized as assets, in order to 'dress up' the income statement and balance sheet to mislead creditors and potential creditors."

Next, petitioner argues that the financial statements JRC issued in 2004 "contain false information to an extent above and beyond the 2004 tax returns in that the long-term liability to Broadway National Bank of \$244,104, which is listed in the tax returns, is omitted entirely. The \$244,104 was improperly transferred into 'Additional paid-in capital' to give the impression that JRC Millworks's shareholders had an additional \$244,104 in equity."

According to petitioner, it conducted a forensic accounting review of JRC's financial records and created a set of four reports on its solvency. Glenn S. Cohen, petitioner's vice president, prepared the reports.

Cohen states that he has "extensive experience managing business and data processing operations and conducting financial analysis." He alleges that he received a bachelor of business administration from Hofstra University in 1987, and received a master of business administration degree in corporate policy and management from the Wharton School of the University of Pennsylvania in 1989.

Cohen does not state that he is an accountant and does not state that his affidavit or reports were made with a reasonable degree of accounting certainty.

Cohen submits, among other things, four attachments to his affirmation that he asserts are financial statements showing the purported true financial status of JRC on July 20, 2003, December 31, 2003, December 31, 2004, and March 30, 2005. According to Cohen, he created the financial statements using “an accounting software system after correcting entries were made. . .” Cohen does not name or otherwise describe the system he used.

Cohen ends his affidavit by stating that Suarez formed seven other entities, in addition to JRC, and that he “operates the business and uses its cash flow to pay for his personal expenses and fraudulent transfers of assets to himself, his family members and his associate, Janet Corona.”

The petition cannot be granted on the papers submitted and a trial is necessary in order to determine whether the \$36,000 payments from JRC Millworks to Samuel Feldman Lumber to pay down the debts of M&P Lumber and Julio Suarez were fraudulent conveyances, and whether Feldman Lumber must pay the \$36,000 to petitioner.

Feldman Lumber’s cross-petition is dismissed as that entity does not have a New York judgment and so may not seek to use New York enforcement devices. Although a plenary action is not necessary to set aside a fraudulent conveyance when the judgment creditor relies on CPLR 5225 to direct payment of the fraudulently conveyed funds (see *Gelbard v. Esses*, 96 AD2d 573), Feldman Lumber may not rely on that statute, as it does not possess a New York judgment; rather, it only has a New Jersey judgment. Therefore, it cannot bring a special proceeding against petitioner by way of cross-petition, as it is attempting to do.

Although petitioner may rely on CPLR 5225 to enforce its New York judgment, and need not bring a plenary action to set aside the allegedly fraudulent conveyance, its papers do not factually establish its entitlement to the relief it seeks and a hearing it required (*Gelbard v. Esses, id.*).

The affidavit in support of the petition is conclusory. It alleges that various tax filings and business records were fraudulently made using questionable accounting techniques. Petitioner fails to provide a factual basis for these assertions, leaving the court without an inkling as to how the accounting techniques were improper.

Moreover, petitioner made its own analysis of JRC Millwork's financial condition using an unidentified computer program. Again, the court does not have a factual basis for evaluating the merits of petitioner's financial analysis. The facts that would show whether a fraudulent conveyance occurred can only be established at a hearing.

Therefore, it is

ORDERED that the petition is granted to the extent that a trial is directed on the issue of whether payments totaling \$36,000 made by JRC Millworks Incorporated to Samuel Feldman Lumber Co., Inc., were fraudulent conveyances, and it is further

ORDERED that within sixty days of this order, the petitioner shall file with the Clerk of the Trial Support Office (Room 158), a copy of this order with notice of entry, a note of issue and a statement of readiness, and shall pay the appropriate fees, if any, and said Clerk is directed thereupon to assign this matter to an appropriate part for trial, and it is further

ORDERED that the proceeding shall be dismissed if petitioner does not comply with the immediately preceding paragraph, and it is further


ORDERED that petitioner shall serve a copy of this order with notice of entry on the Clerk of the Court and on the attorney for the respondent and on all other respondents regardless of whether they have appeared or answered the petition, within seven days of its entry, and it is further

ORDERED that the cross-petition of Samuel Feldman Lumber Co., Inc., is denied.

This constitutes the decision and order of the court.

Dated: August 20, 2007

ENTER

  
\_\_\_\_\_  
J.S.C.

**FILED**  
AUG 23 2007  
NEW YORK  
COUNTY CLERK'S OFFICE