

**Westgate Fin. Corp. v Heaven**

2008 NY Slip Op 32668(U)

September 4, 2008

Supreme Court, New York County

Docket Number: 103619/08

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC  
*Justice*

PART 8

Westgate Financial

INDEX NO. 103619/08

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

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

- v -

HEAVEN

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

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*is decided pursuant to attached been*

**FILED**

SEP 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**MARILYN SHAFER**  
J.S.C.

Dated: 9/4/08

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 CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 8

-----x  
WESTGATE FINANCIAL CORP.,

Plaintiff,

Index No.: 103619/08

-against-

DECISION AND ORDER

JASON HEAVEN and JOSEPH HEAVEN,

Defendants.

-----x  
MARILYN SHAFER, J.

**FILED**

SEP 09 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**FACTUAL BACKGROUND**

Plaintiff is a factor that was awarded a judgment against defendant Joseph Heaven (Joseph) for breach of a settlement agreement. Plaintiff instituted the instant proceeding against Joseph for having wrongfully transferred funds to his son, defendant Jason Heaven (Jason), in derogation of plaintiff's claims.

Neither defendant has answered the complaint. Plaintiff now seeks a default judgment against both defendants. Jason has cross-moved to compel plaintiff to accept a late answer.

At the time the complaint was filed in the present action, Textile Fabric Connection, Inc. (TFC) identified 22 checks totaling \$60,907.47, that it had issued payable to Joseph, which Joseph endorsed or deposited into an account at Wachovia Bank, NA (Wachovia), maintained in the name of Jason. Pursuant to a

subpoena duces tecum, Wachovia also identified 6 additional TFC checks payable to Joseph, totaling \$19,838.37, that were also deposited into the same account.

On October 13, 2006, plaintiff commenced an action against Joseph, his wife Caryn, and Slawa Chojecki, to domesticate a \$65,413.45 judgment entered against those defendants on August 2, 2006, in New Jersey. Joseph and Caryn were deposed in that action, and Joseph stated that he was working on commission with TFC. Wachovia, pursuant to a subpoena, identified account number 1010162012802 as the depository for the checks issued by TFC to Joseph. The account is in the name of Jason, at his residence in Georgia.

At the time these checks were issued to Joseph, he was a judgment debtor to plaintiff. Joseph also had two other money judgments entered against him by other creditors<sup>1</sup>, and his house was in foreclosure. Bank records indicate that Jason has expended the funds deposited in the above-referenced account to pay for living expenses incurred by Joseph and/or his wife Caryn, and that none of the funds has been taken out in Jason's name or for his own benefit.

Plaintiff has alleged four causes of action. The first cause of action seeks an accounting, which plaintiff now

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<sup>1</sup> *Elm Industries, Inc. v Heavenly Fabrics, Inc. et al.*, Index No. 116742/04 (NY County); *Queenie, Ltd. v Gardner et al.*, 321 F3d 282 (2d Cir 2003)

considers moot because of the documentation it received from Wachovia. The second and third causes of action seek to set aside the transfers made by Joseph into the Wachovia account that is in Jason's name, pursuant to the New York Debtor Creditor Law (DCL) §§ 273, 273-a, 274, 275 and/or 276, 278 and/or 279. The last cause of action seeks reasonable attorney's fees and costs, pursuant to DCL § 276-a.

Joseph has been duly served, but has failed to file any answer. Plaintiff seeks a default judgment against Joseph. Jason filed an answer four days after the period for answering had expired, including extensions granted by plaintiff, and plaintiff refused to accept the answer. Plaintiff now seeks a default judgment against Jason. Jason has moved the court to compel plaintiff to accept his late response.

#### **DISCUSSION**

The movant must prove the facts constituting the claim before the court may grant a default judgment. *Zelnik v Bidermann Industries U.S.A., Inc.*, 242 AD2d 227 (1<sup>st</sup> Dept 1997). Therefore, the court must first determine whether plaintiff has sufficiently proven its case to entitle it to a default judgment, regardless of whether the defendants have filed an answer.

Under the New York Debtor Creditor Law (DCL), the determination as to whether the judgment creditor's rights are superior to the rights of the transferee is conditioned upon

whether the transfer is deemed to be a "fraudulent conveyance."

In order to have a transfer set aside as a fraudulent conveyance, the petitioner must prove either that: one, the judgment debtor's transfer lacked "fair consideration," pursuant to DCL §§ 273, 274, or 275; or two, the judgment debtor actually intended to defraud the judgment creditor by the transfer, pursuant to DCL § 276.

"Fair consideration" is deemed to be lacking when the transferor transfers the assets at a time when it is insolvent or when such transfer would render it insolvent (DCL §273); when the transfer would leave it with an unreasonably small amount of capital with which to operate the business (DCL § 274); or the transfer was made when the transferor knew that debts would be incurred beyond its ability to pay (DCL § 275). See *Matter of CIT Group/Commercial Services, Inc. v 160-09 Jamaica Avenue Limited Partnership*, 25 AD3d 301 (1<sup>st</sup> Dept 2006).

DCL § 271 defines insolvency as the time when the salable value of a person's assets is less than his existing debts. Also, under DCL § 271, a person's probable, as well as actual, liabilities are taken into account to determine insolvency. See *Staten Island Savings Bank v Reddington*, 260 AD2d 365 (2d Dept 1999). In the instant matter, at the time Joseph deposited the subject checks into Jason's account, Joseph was a judgment debtor in three actions and his home was in foreclosure. No evidence

has been presented to rebut plaintiff's assertion, based on these facts, that Joseph was insolvent. Therefore, unless it can be demonstrated that the subject transfers were made for fair consideration, plaintiff is entitled to have the funds turned over to it.

It is contended that the transfers to Jason were made to extinguish a pre-existing debt; however, no legally sufficient evidence of that debt has been produced. Furthermore, Jason is Joseph's son, and courts have held that an intra-family transaction places a heavier burden on a defendant to demonstrate the fairness of the consideration. *Wall Street Associates v Brodksy*, 275 AD2d 526 (1<sup>st</sup> Dept 1999). In addition, "[t]he rule that a debtor may generally favor one creditor over another is not a license to engage in sham transactions in furtherance of that preference [citation omitted]." *CIT Group/Commercial Services, Inc. v 160-09 Jamaica Avenue Limited Partnership*, 25 AD3d 301 *supra* at 302.

According to DCL § 273-a,

"[e]very conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such 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."

Since no evidence has been produced to demonstrate that the transfers from Joseph to Jason were made with fair consideration,

and the transfers were made after judgment was rendered against Joseph in favor of plaintiff, pursuant to DCL § 273-a, the transfer is deemed to be fraudulent.

Also, pursuant to DCL § 276, "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

"DCL § 276, unlike sections 273 and 275, addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency. Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on badges of fraud to support his case, i.e., circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. Among such circumstances are: a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance [internal quotation marks and citations omitted]."

*Wall Street Associates v Brodsky*, 257 AD2d 526, *supra* at 529.

In the instant case, the transfer was made from Joseph to his son at a time when Joseph knew of the judgment against him. The funds placed in Jason's account by Joseph have been used to defray Joseph's expenses, indicating his control over the transferred assets, and there is no legally sufficient evidence that the transfer was made for fair consideration. Therefore,

based on all the foregoing circumstances, it must be concluded that the transfers that are subject to this litigation are in violation of the DCL prohibitions, entitling plaintiff to a default judgment.

In his cross-motion, Jason seeks to compel plaintiff to accept his late answer to this action, pursuant to CPLR 3102 (d), which allows the court to extend the time to plead "upon such terms as may be just and upon a showing of a reasonable excuse for delay or default."

The determination as to whether to allow a defendant to submit a late answer is discretionary with the court, and in making its determination, the factors the court considers include the length of the delay, the reason for the delay, the potential prejudice to the plaintiff, and the "existence of a possible meritorious defense." *Finkelstein v Sunshine*, 47 AD3d 882, 882 (2d Dept 2008).

In the instant case, the answer was only four days late, and the reason for the delay postulated by Jason was his assertion that Joseph indicated to him that the matter might be settled. Although attempts to negotiate a settlement have been found to constitute a reasonable excuse for a delay, *Ruppert v Ruppert* (192 AD2d 925 [3d Dept 1993]), it is noted that Jason was not the one negotiating with plaintiff in hopes of reaching a settlement.

Jason also contends that, because no default judgment has

yet to be entered against him, "it was not necessary ... to serve an affidavit of merit in support of [his] motion to compel plaintiff to accept service of [his] answer." *Terrones v Morera*, 295 AD2d 254, 255 (1<sup>st</sup> Dept 2002). Although this is true, every case in which a motion to compel acceptance of an answer was granted, including the cases cited by Jason, indicate that one of the factors taken into consideration by the court is the possibility of a meritorious defense. *Nason v Fisher*, 309 AD2d 526 (1<sup>st</sup> Dept 2003) (although the defendants did not need to set forth a meritorious defense, they adequately set one forth); *Nuila v Manhattan Leasing Group, Inc.*, 204 AD2d 290 (2d Dept 1994) (the proposed answer asserted a conclusive defense); *Beecher v State Farm Mutual Automobile Insurance Company*, 186 AD2d 1012 (4<sup>th</sup> Dept 1992) (motion to compel granted in view of defendants indicating a meritorious defense); *Better v Town of Schodack*, 169 AD2d 965 (3d Dept 1991) (although a affidavit of merit is not a precondition to granting a motion under CPLR 3012 (d), there are affidavits in the record that reveal that some of the damages might have been caused by a third party).

In the case at bar, Jason has included in his motion papers a section entitled "Meritorious Defense," in which he asserts that the funds transferred to his account by Joseph constituted repayment of an antecedent debt. However, in support of this contention, Jason provides bank statements on which he indicates

items he maintains represent loans to Joseph. In every instance, the name of the payee is someone other than Joseph. Jason also supplies evidence of a \$30,000 loan he assumed, which he says was for Joseph's benefit, but Jason is the one indicated as the payee. None of the documents confirm Jason's assertion of an antecedent loan.

The documents submitted by Jason do not indicate a possibility of a meritorious defense. Further, if Jason's motion were to be granted, plaintiff would incur additional expense and time in an attempt to collect on a judgment that is already several years old. In the interests of the efficient administration and use of judicial resources, Jason's motion is denied.

Lastly, plaintiff seeks reasonable attorney's fees and costs, as allowed pursuant to DCL § 276-a, which the court is inclined to grant.

#### **CONCLUSION**

It is hereby

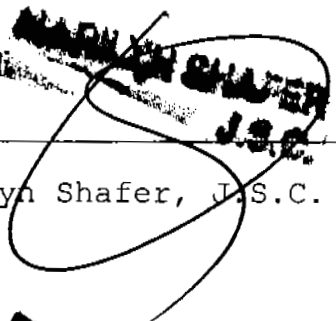
ORDERED that plaintiff's motion is granted to the extent of granting partial judgment in favor of plaintiff, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Joseph Heaven and Jason Heaven in the sum of \$65,412.45, with interest as prayed for allowable by law at the rate of 9% per annum from the date of 3/08, until the date of

entry of judgment, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that that portion of the plaintiff's action that seeks the recovery of attorney's fees is severed and an assessment thereof is directed; and it is further

ORDERED that a copy of this order with notice of entry be served upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed.

Dated: 7/3/08

ENTERED  J.S.C.  
Marilyn Shafer, J.S.C.

**FILED**  
SEP 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK