

Freeman v D'Ull

2008 NY Slip Op 33311(U)

December 5, 2008

Supreme Court, New York County

Docket Number: 113807/2007

Judge: Marilyn Shafer

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

PRESENT: Marilyn Shafer
Justice

PART 8

Index Number : 113807/2007
FREEMAN, LEROY
VS.
D'ULL, WALTER
SEQUENCE NUMBER : # 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. 113807-07
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

ere read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

1, 2
3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted in part and the cross-motion is denied, in accord with the annexed affidavit.

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

FILED
DEC 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/5/08

Marilyn Shafer
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

-----X
LEROY FREEMAN,

Plaintiff,

- against -

Index No. 113807/2007

WALTER D'ULL, ALAN J. FEIN, VICTOR S.
FEIN, HYMAN FEIN, TOBI FEIN, IRA KELLMAN,
MAURY KELLMAN, JOSEPH KELLMAN, JAY
KELLMAN, LEE A. CAMPBELL, NEVILLE
BERKLEY, MEIR ROSENFELD, SHALOM
MAIDENBAUM, STEVEN SPIRA, SNV, L.P. and
FEIN PROPERTY MANAGEMENT CORP.,

Defendants.
-----X

FILED
DEC 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

MARILYN SHAFER, J.:

In this action to collect on an unpaid judgment, brought pursuant to provisions of the Debtor and Creditor Law governing fraudulent conveyances, plaintiff now moves for partial summary judgment, pursuant to CPLR 3212, on the complaint's first, second, fourth, fifth and ninth causes of action. Defendants cross-move, pursuant to CPLR 3126, for an order striking the complaint, dismissing the action and awarding defendants their attorneys' fees on account of plaintiff's alleged willful refusal to comply with his discovery obligations.

FACTUAL ALLEGATIONS AND BACKGROUND

Plaintiff Leroy Freeman suffered personal injuries in May 2003, when he was struck by a pipe which fell from a sixth floor apartment in the building located at 656 St. Nicholas Avenue, New York, New York (the Building). In 2004, plaintiff commenced an action -- *Freeman v St. Nicholas Venture, Inc.*, Sup Court, Soto, J., index no. 104690/04 (the Prior Action) -- against the tenant of the apartment and St. Nicholas Venture, Inc. (SNV, Inc.), the owner of the Building. The tenant failed to appear in the Prior Action, and a default judgment was entered against her, but SNV, Inc. initially appeared and defended the action.

On February 9, 2005, while the Prior Action was pending, SNV, Inc. sold the Building. After satisfying outstanding mortgages on the Building, SNV, Inc. allegedly realized \$1,548,417 in proceeds from the sale. Plaintiff has submitted copies of canceled checks, a deposit slip and a bank

statement which indicate that the sale proceeds were paid by two checks made payable to SNV, Inc., and that those checks were deposited on February 9, 2005 into a bank account maintained in the name of defendant SNV, L.P. (SNV, LP), which contained approximately \$135,000 in funds. Plaintiff has also submitted copies of canceled checks which indicate that, on February 15, 2005, 14 checks totaling \$1,606,000 were drawn on the foregoing bank account, signed by defendant Victor Fein on behalf of SNV, Inc., and made payable to defendants: (1) Walter D'Ull in the amount of \$756,000; (2) Victor Fein in the amount of \$97,750; (3) Alan Fein in the amount of \$85,000; (4) Hyman Fein in the amount of \$100,725; (5) Tobi Fein in the amount of \$12,750; (6) Ira Kellman in the amount of \$170,000; (7) Maury Kellman in the amount of \$12,750; (8) Joseph Kellman in the amount of \$19,125; (9) Jay Kellman in the amount of \$12,750; (10) Lee Campbell in the amount of \$45,900; (11) Neville Berkley in the amount of \$140,250; (12) Shalom Maidenbaum in the amount of \$12,750; (13) Meir Rosenfeld in the amount of \$12,750; and (14) Steven Spira in the amount of \$127,500 (all of the foregoing defendants, collectively, the Transferee Defendants).

Plaintiff has also submitted copies of four documents which indicate that certain interrelationships existed between certain of the defendants. The first, SNV, LP's limited partnership agreement dated September 15, 1993 (the Partnership Agreement), provides: that SNV, Inc. is the general partner of SNV, LP; that the sole purposes of SNV, LP shall be to acquire, own and operate the Building and another parcel of property; that SNV, Inc., as SNV, LP's general partner, is authorized to cause SNV, LP to acquire the foregoing properties; and, in general terms, that distributable cash proceeds from sales shall be distributed to SNV, LP's partners. A schedule attached to the Partnership Agreement sets forth the limited partners' shares of the capital contributions made to SNV, LP as: Hyman Fein 9.875%; Toby Fein 1.25%; Victor Fein 1.25%; Shalom Maidenbaum 1.25%; Meir Rosenfeld 1.25%; Leon Campbell 4.5%; Adam Berkley 13.75%; Joseph and Ruth Kelman 1.875%; Jay Kelman 1.25%; Maury Kelman 1.25%; Steven Spira 12.50%;

and Walter D'Ull 50%.¹ Thus, it appears that each of SNV, LP's partners -- except for D'Ull -- received a distribution from the Building sale proceeds, on February 15, 2005, which was relatively proportionate to that partner's share of the capital contributions made to the partnership, as indicated on the foregoing schedule.

The three other documents which plaintiff has submitted are copies of: (1) a memorandum of understanding between D'Ull and Alan Fein, dated September 29, 1993, pursuant to which each of them agreed (a) to contribute capital to SNV, Inc. and to receive 50% of its stock, (b) that SNV, Inc.'s board of directors would consist of D'Ull and Alan Fein, (c) that Alan Fein would act as SNV, Inc.'s president and D'Ull as its vice president and (d) that each of them could "subdivide their shares," a phrase which presumably means that each of them could transfer at least some of the incidents of ownership of those shares (Hyams Affirm., Ex. N, ¶ 4); (2) an "incumbency certificate" for SNV, Inc., dated September 9, 2002, which indicates that D'Ull, Alan Fein and Victor Fein are the officers and directors of SNV, Inc.; and (3) a copy of a "shareholder summary," which was allegedly filed with SNV, Inc.'s 2005 federal tax return, and which allegedly indicates the interests of SNV, Inc.'s shareholders to be Alan Fein 12.5%, Victor Fein 12.5%, Walter D'Ull 50% and Ira Kellman 25%.

By letter dated December 15, 2005, SNV, Inc. discharged the attorneys who had been representing it in the Prior Action, stating that "[t]he building owned by [SNV, Inc.] has been sold and there are no corporate assets. We do not intend to continue to appear or defend this action" (*id.*, Ex. L). SNV, Inc. failed to appear on the date set for the trial of the Prior Action, and a judgment was entered in plaintiff's favor in that action on March 17, 2006 (the Judgment) in the amount of \$153,438.91. Plaintiff alleges that no part of the Judgment has been paid.

The complaint asserts nine causes of action which allege: (1) against SNV, LP, that the transfer of funds by SNV, Inc. to SNV, LP on February 9, 2005 (the Corporation to Partnership

¹The names are set forth here as indicated on the schedule, regardless of whether the names or their spellings are the same as those indicated on the canceled checks dated February 15, 2005 or elsewhere in the record.

Transfer) should be set aside as a fraudulent conveyance because, at the time of the transfer, SNV, Inc. was a defendant in the Prior Action, and because SNV, Inc. has heretofore failed to satisfy the Judgment which was entered in the Prior Action; (2) against SNV, LP, that the Corporation to Partnership Transfer should be set aside as a fraudulent conveyance because the transfer was not made for fair consideration, and because SNV, Inc. was either insolvent at the time when that transfer was made or rendered insolvent as a result of the transfer; (3) against SNV, LP, that the Corporation to Partnership Transfer should be set aside as a fraudulent conveyance because SNV, Inc. made that transfer with actual intent to hinder, delay and defraud its creditors; (4) against all of the defendants, that -- by accepting the transfers of funds from SNV, Inc. and SNV, LP -- they wrongfully and unlawfully preferred themselves to SNV, Inc.'s creditors, including plaintiff; (5) against the Transferee Defendants, that SNV, LP's transfers of funds to the Transferee Defendants (the Partnership to Partner Transfers; collectively, with the Corporation to Partnership Transfer, the Transfers) should be set aside as fraudulent conveyances, because the Transfers were not made for fair consideration, and because SNV, LP was either insolvent at the time when the Transfers were made or rendered insolvent as a result of the Transfers; (6) against the Transferee Defendants, that the Partnership to Partner Transfers should be set aside as fraudulent conveyances because those transfers were made with actual intent to hinder, delay and defraud the creditors of SNV, Inc. and SNV, LP; (7) against Victor Fein, Alan Fein, Hyman Fein and defendant Fein Property Management Corp., that those defendants aided, abetted, and participated in the allegedly fraudulent conveyances; (8) against SNV, LP, Victor Fein, Alan Fein, Hyman Fein and Fein Property Management Corp., that the corporate veil of SNV, Inc. should be pierced to hold those defendants liable for the Judgment; and (9) against D'Ull, Alan Fein and Victor Fein, that those defendants are liable for breach of fiduciary duty.

DISCUSSION

Plaintiff's motion is granted in part, to the extent that plaintiff is granted partial summary judgment on the complaint's first and fourth causes of action as set forth below.

The first cause of action seeks to have the Corporation to Partnership Transfer set aside as a fraudulent conveyance on the grounds that SNV, Inc. was a defendant in the Prior Action at the time when that transfer was made, and that SNV, Inc. has failed to satisfy the judgment in the Prior Action. The fourth cause of action asserts that all of the defendants are liable to plaintiff for the amount of the Judgment because, by accepting the distributions which they received from the Transfers, defendants wrongfully and unlawfully preferred themselves to SNV, Inc.'s creditors, including plaintiff.

Debtor and Creditor Law (DCL) § 273-a provides that:

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

In order to prevail on a claim under DCL § 273-a, a plaintiff must establish three elements: “that the transferor was a defendant in an action for money damages at the time of the transfer, [that] the transferor has not satisfied the resulting judgment and [that] the transfer was made without fair consideration” (*Matter of Mega Personal Lines v Halton*, 9 AD3d 553, 555 [3d Dept 2004]). It is undisputed that SNV, Inc. was a defendant in the Prior Action, which sought money damages, at the time when the Transfers were made, and that SNV, Inc. has not satisfied the Judgment which resulted from the Prior Action. However, defendants argue that plaintiff cannot establish the third element of his DCL § 273-a claim, namely, that the Transfers were made without fair consideration.

Defendants' answer to the complaint asserts 26 affirmative defenses, of which the fourth asserts that defendants undertook the Transfers for value and fair consideration. DCL § 272 (a) provides that “[f]air consideration is given for property ... [w]hen in exchange for such property, ... as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied” The burden of proof generally rests upon a creditor who is seeking to have a conveyance set aside as fraudulent to establish that the conveyance was made without fair consideration (*see e.g. Gelbard v Esses*, 96 AD2d 573, 576 [2d Dept 1983]). “However, where the evidentiary facts as to the nature and value of the consideration are within the transferee's control, the burden of coming

forward with evidence on the fairness of the consideration shifts to the transferee” (*ACLI Govt. Sec. v Rhoades*, 653 F Supp 1388, 1391 [SD NY 1987] [applying New York law], *affd* 842 F2d 1287 [2d Cir 1988]; *see also Gelbard v Esses*, 96 AD2d at 576).

In support of their contention that fair consideration was given for the Transfers, defendants assert vaguely: that the “payment of antecedent loans constitutes fair consideration, thus rendering” a transfer non-fraudulent; and that “it has been held that transfers for past services rendered, as is the case here, have been ... made for consideration” (Def. Mem. of Law, ¶¶ 30-31). However, those generalized assertions are made in defendants’ memorandum of law, and are not supported by an affidavit of any person having knowledge of the nature and value of the purported antecedent loans and/or services rendered which allegedly served as fair consideration for the Transfers. Defendants’ mere unsubstantiated assertions are insufficient to establish that any such loans or services comprised a “fair equivalent” for the Transfers.

Moreover, even assuming, *arguendo*, that defendants had established that they had made antecedent loans and/or rendered prior services which were a “fair equivalent” for the Transfers, defendants cannot establish that the Transfers were made “in good faith” (DCL § 272 [a]), a separate and independent requirement for the presence of fair consideration. “The good faith of both the transferor and transferee is an indispensable element of fair consideration” (*American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 [2d Dept 2006]). Defendants’ third affirmative defense asserts that defendants undertook the Transfers in good faith. However, preferential transfers of a corporation’s funds to its directors, officers and shareholders, in derogation of the rights of the corporation’s general creditors, do not fulfill the requirement of good faith and, therefore, are deemed not to be transfers for fair consideration (*see e.g. Matter of Mega Personal Lines v Halton*, 9 AD3d at 555 [stating that “the transfer of corporate assets to an insider establishes a lack of good faith as a matter of law”]; *Matter of Superior Leather Co. v Lipman Split Co.*, 116 AD2d 796, 797 [3d Dept 1986]; *Farm Stores v School Feeding Corp.*, 102 AD2d 249, 254 [2d Dept 1984] [stating that, even “[a]ssuming, *arguendo*, that the shareholders [in that case] were able to establish that the funds they

received from [the corporation] were equivalent to the value of the loans and services they had previously advanced, the transfers to them were still invalid inasmuch as they were not made in good faith”], *affd* 64 NY2d 1065 [1985]; *Laco X-Ray Sys. v Fingerhut*, 88 AD2d 425, 433 [2d Dept 1982]; *In re Sharp Intl. Corp. v State St. Bank*, 403 F3d 43, 54 [2d Cir 2005] [applying New York law]; *HBE Leasing Corp. v Frank*, 48 F3d 623, 634-635 [2d Cir 1995] [applying New York law]).

The Transfers were made in two steps or phases, first from SNV, Inc. to SNV, LP and then from SNV, LP to its partners. However, for purposes of properly evaluating the allegedly fraudulent conveyances in context, the two steps or phases may be “‘collapsed’ and treated as phases of a single transaction” (*HBE Leasing Corp. v Frank*, 48 F3d at 635; *see also Orr v Kinderhill Corp.*, 991 F2d 31, 35 [2d Cir 1993] [applying New York law]).

Defendants do not dispute the authenticity, accuracy or import of the documentary evidence submitted by plaintiff -- including the copies of canceled checks, the Partnership Agreement, the memorandum of understanding between D’Ull and Alan Fein, the incumbency certificate for SNV, Inc. and the tax return attachment -- which indicates that: (1) D’Ull, Alan Fein and Victor Fein were the officers and directors of SNV, Inc.; (2) in 2005, D’Ull, Alan Fein, Victor Fein and Ira Kellman owned all of the shares of SNV, Inc.; (3) SNV, Inc. was the general partner of SNV, LP; and (4) D’Ull and members of the Fein and Kellman families owned approximately two-thirds of the partnership shares of SNV, LP, and received more than three-fourths of the funds distributed in the Partnership to Partner Transfers, on February 15, 2005, which were funded by the proceeds from SNV, Inc.’s sale of the Building on February 9, 2005. Inasmuch as the Transfers substantially resulted in transfers of funds from SNV, Inc. to individuals who were officers, directors and shareholders of SNV, Inc., and to other members of their families, the Transfers must be deemed not to have been made in good faith or for fair consideration under DCL § 272 (a). Accordingly, defendants have failed to raise an issue concerning their third and fourth affirmative defenses which precludes summary judgment with respect to plaintiff’s first and fourth causes of action.

Defendants’ sixteenth through nineteenth affirmative defenses assert that plaintiff ratified,

consented to and/or acquiesced to SNV, Inc.'s sale of the Building, and to the Transfers, and that plaintiff has, therefore, waived his right to challenge them. Victor Fein has submitted an affidavit in which he states: that, "[d]uring the pendency of the [Prior Action], ... Plaintiff was advised by my attorney ... of the contemplated transaction and [of] the fact [that] after all monies were ... paid out none would be left to satisfy any claims he may have against [SNV, Inc.]"; and that plaintiff "never raised an objection to any aspect of the [sale of the Building] or the distribution of the proceeds from it and never sought any judicial intervention of any sort to prevent or restrict any aspect of the sale or subsequent distributions" (V. Fein Affid., ¶ 6).

However, even assuming the truth of defendants' allegations, *arguendo*, they would fail to indicate the sort of "voluntary relinquishment of a known right by plaintiff" that would be required to constitute a waiver (*49-50 Assoc. v Free-Tan Corp.*, 248 AD2d 128, 129 [1st Dept 1998]). Defendants have also failed to allege any facts which would have permitted them to infer merely from plaintiff's silence, or from his failure to take any action to prevent the sale of the Building or the Transfers, that he ratified, consented to or acquiesced to, those transactions. Thus, defendants have failed to raise a triable issue of fact with respect to their defenses of ratification, consent, acquiescence and waiver.

Defendants have also failed to raise any issue of fact with respect to the remaining affirmative defenses asserted in their answer -- i.e., the first, second, fifth through fifteenth, and twentieth through twenty-sixth affirmative defenses -- which would preclude summary judgment in plaintiff's favor on the first and fourth causes of action. Defendants' answer pleads those defenses only as "conclusions of law without supporting facts" (*Petracca v Petracca*, 305 AD2d 566, 567 [2d Dept 2003]), and defendants' papers in opposition to plaintiff's motion do not advance any argument based upon any of those defenses. It is "axiomatic that summary judgment cannot be avoided on the basis of general, conclusory and unsubstantiated allegations," and also "that a party opposing a motion for summary judgment must produce evidentiary proof in admissible form adequate to require a trial of a material question of fact or else demonstrate an acceptable excuse for its failure to do so" (*US 7*

v Transamerica Ins. Co., 173 AD2d 311, 312 [1st Dept 1991]). Defendants having failed to do so, plaintiff is entitled to partial summary judgment on his first and fourth causes of action.

Defendants argue that plaintiff's motion for summary judgment should be denied because it is not supported by the affidavit of a person having knowledge of the facts relevant to plaintiff's claims, but only by the affirmation of plaintiff's attorney. However, a motion for summary judgment may be adequately supported by an attorney's affirmation where, as here, the attorney's affirmation is supported by accompanying documentary evidence that is sufficient to establish the movant's prima facie entitlement to summary judgment (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Cruz v City of New York*, 39 AD3d 398, 398 [1st Dept 2007]; *Eldon Group Am. v Equiptex Indus. Prods. Corp.*, 236 AD2d 329, 329 [1st Dept 1997]).

Defendants also argue that plaintiff's motion should be denied pursuant to CPLR 3212 (f), which provides that a court may deny a motion for summary judgment where "it appear[s] from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated." However, denial of plaintiff's motion with respect to the first and fourth causes of action is not warranted on that ground, inasmuch as defendants have failed to "set forth any credible evidentiary basis ... for believing that disclosure might reveal new information that would create an issue of fact" precluding summary judgment with respect to either of those causes of action (*J & A Concrete Corp. v St. Paul Mercury Ins. Co.*, 48 AD3d 334, 335 [1st Dept 2008]). Defendants' mere hope or speculation that evidence sufficient to defeat plaintiff's motion for summary judgment may be uncovered during the discovery process "does not fulfill their obligation to demonstrate the likelihood of such disclosure (CPLR 3212 [f])" and, accordingly, is insufficient to defeat plaintiff's motion (*Steinberg v Abdul*, 230 AD2d 633, 633 [1st Dept 1996]).

Plaintiff's first and fourth causes of action seek money judgments rather than to have the Transfers set aside, and "[a] court of equity ... may award a personal judgment against a party in lieu of setting aside a [fraudulent] transfer" (*Constitution Realty v Oltarsh*, 309 AD2d 714, 715 [1st Dept 2003] [citation and internal quotation marks omitted], citing *Baily v Hornthal*, 154 NY 648, 660-661

[1898] [stating that “a court of equity may adapt its relief to the exigencies of the case, and, when nothing more is required, may order a sum of money to be paid to the plaintiff, or give him a personal judgment therefor ...”]). Liability for such money damages may be “imposed on parties who participate in the fraudulent transfer of a debtor’s property and are transferees of the assets and beneficiaries of the conveyance” (*Constitution Realty v Oltarsh*, 309 AD2d at 716 [citation and internal quotation marks omitted]).

Plaintiff having established that the Transfers were constructively fraudulent, SNV, LP and each of the Transferee Defendants is potentially liable to plaintiff to “the extent of the value of the money ... [that each of those defendants] wrongfully received” by means of the Transfers (*Manufacturers & Traders Trust Co. v Lauer’s Furniture Acquisition*, 226 AD2d 1056, 1057 [4th Dept 1996], quoting *Farm Stores v School Feeding Corp.*, 102 AD2d at 255). On the instant motion, plaintiff seeks “judgment ... against each of the defendants in the amounts of the monies belonging to [SNV, Inc.] transferred to them, up to the amount of plaintiff’s judgment, with interest” (Hyams Affirm., ¶ 28; *see also* Complaint, at 10-11 [seeking judgment against D’Ull in an amount sufficient to satisfy the Judgment together with interest, against Steven Spira in the amount of \$127,500 together with interest, against Hyman Fein in the amount of \$100,725 together with interest, etc.]).

However, such a judgment would award plaintiff compensatory damages in an amount more than seven times the amount of the Judgment. The principle prohibiting double or multiple recovery for the same injury “limits an injured party’s recovery to the actual loss he suffered, and no more” (*Ott v Barash*, 109 AD2d 254, 263 [2d Dept 1985]; *see also Searles v Dalton*, 299 AD2d 788, 789 [3d Dept 2002]). Nor may a plaintiff recover a greater amount of compensatory damages for that injury merely because he claims against more than one defendant (*see Bender v City of New York*, 78 F3d 787, 793 [2d Cir 1996] [applying New York law]). Inasmuch as plaintiff has not set forth an appropriate means of apportioning the damages on his first and fourth causes of action among SNV, LP and the individual Transferee Defendants, plaintiff is granted summary judgment on his first and fourth causes of action to the extent that plaintiff is directed to settle an appropriate

judgment against those defendants -- in a total amount of \$153,438.91 together with simple interest at the rate of 9% per annum from the date of March 17, 2006 through the date of judgment -- which does not impose liability upon any one of them for an amount greater than the amount transferred to such defendant by means of the Transfers plus simple interest accrued thereon at the rate of 9% per annum from February 15, 2005.

With respect to the second, fifth and ninth causes of action, plaintiff's motion for summary judgment is denied. The second cause of action seeks to have the Corporation to Partnership Transfer set aside as a fraudulent conveyance, on the grounds that that transfer was not made for fair consideration and that SNV, Inc. was either insolvent at the time of the transfer or rendered insolvent as a result of the transfer. The fifth cause of action seeks to have the Partnership to Partner Transfers set aside on the grounds that those transfers were not made for fair consideration, and that SNV, LP was either insolvent at the time of those transfers or rendered insolvent as a result of those transfers. However, plaintiff has failed to establish a prima facie case of entitlement to summary judgment with respect to either of those claims.

The second and fifth causes of action are presumably based upon DCL § 273 -- which provides that "[e]very conveyance made ... by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made ... without a fair consideration" -- and/or DCL § 277 -- which provides that a conveyance of partnership property is fraudulent as to partnership creditors if the conveyance is made when the partnership "is or will be thereby rendered insolvent," and certain other conditions are satisfied. The transferor's insolvency is a prerequisite to a finding of constructive fraud under either section, and the burden of proving the transferor's insolvency generally rests upon a creditor who is challenging a conveyance as fraudulent (*see e.g. Joslin v Lopez*, 309 AD2d 837, 838 [2d Dept 2003]).

Plaintiff's moving papers do not allege or demonstrate the element of insolvency with respect to either SNV, Inc. or SNV, LP or, in fact, contain any argument that plaintiff is entitled to summary judgment on his second and fifth causes of action. It has been held that, where a transfer was made

for less than fair consideration, it will be presumed that the transfer rendered the transferor insolvent, and the burden then shifts to the transferee to rebut the presumption of insolvency (*see e.g. In re Borriello*, 329 BR 367, 373 [Bankr ED NY 2005] [applying New York law]). However, assuming, arguendo, that plaintiff intended to rely upon such a presumption of insolvency in connection with his second and/or fifth causes of action, plaintiff's moving papers should have stated that to be the case, so as to apprise defendants that the burden had shifted to them to rebut that presumption.

The ninth cause of action asserts a claim against D'Ull, Alan Fein and Victor Fein for breach of fiduciary duty. Plaintiff alleges that, as the officers and directors of SNV, Inc., those defendants owed a fiduciary duty to plaintiff to preserve the company's assets for the benefit of its creditors. Those defendants allegedly breached that fiduciary duty when they transferred SNV, Inc.'s assets to themselves and to others, and left the company without assets to pay the debt that it owed to plaintiff by reason of the Judgment. However, while "the officers and directors of an *insolvent* corporation ... hold the remaining corporate assets in trust for the benefit of its general creditors" (*Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 549 [2000] [emphasis added]), "[a]n officer or director does not owe a fiduciary duty to the creditors of a solvent corporation" (*Hughes v BCI Intl. Holdings*, 452 F Supp 2d 290, 308 [SD NY 2006] [applying New York law, citation and internal quotation marks omitted]; *see also Semi-Tech Litig., L.L.C. v Ting*, 13 AD3d 185, 188 [1st Dept 2004]). Rather, "the fact of insolvency causes such a duty to arise" (*Hughes v BCI Intl. Holdings*, 452 F Supp 2d at 308). Accordingly, in order to establish that D'Ull, Alan Fein and Victor Fein breached a fiduciary duty to him by transferring SNV, Inc.'s assets to themselves and others, plaintiff must establish that SNV, Inc. was insolvent at the time when the Transfers were made. Since plaintiff has not demonstrated that SNV, Inc. was insolvent at that time, as previously stated, plaintiff has failed to establish a prima facie case of his entitlement to summary judgment with respect to the ninth cause of action.

Defendants' cross-motion pursuant to CPLR 3126, for an order striking the complaint and dismissing the action on account of plaintiff's alleged willful refusal to comply with his discovery

obligations, is denied. Defendants allege that, on December 28, 2007, they served plaintiff with a first set of interrogatories, a first notice of discovery and inspection and a notice of deposition scheduling plaintiff's deposition for January 29, 2008. Plaintiff has allegedly refused to comply with those discovery demands, and has not appeared for deposition, despite defendants' repeated requests.

CPLR 3126 (3) provides that "[i]f any party ... wilfully fails to disclose information which the court finds ought to have been disclosed, ... the court may make such orders with regard to the failure ... as are just, among them ...an order striking out pleadings or parts thereof ... or dismissing the action or any part thereof" However, "[t]he drastic sanction of striking pleadings is only justified when the moving party shows conclusively that the failure to disclose was wilful, contumacious or in bad faith ..." (*Christian v City of New York*, 269 AD2d 135, 137 [1st Dept 2000]). Defendants have failed to make such a demonstration.

In support of their cross motion, defendants have submitted copies of various e-mails and a letter which were allegedly exchanged by counsel for the parties, and which appear to indicate, inter alia: that plaintiff's counsel served defendants' counsel with discovery demands before defendants' counsel served plaintiff's counsel with discovery demands; that plaintiff's counsel agreed to extend defendants' time in which to respond to certain of plaintiff's discovery demands; that plaintiff's counsel subsequently requested that defendant's counsel similarly extend plaintiff's time in which to respond to defendants' discovery demands, and suggested that the parties enter into a stipulation extending that time; and that plaintiff's counsel sent defendants' counsel a proposed stipulation on January 16, 2008, and a revised proposed stipulation on January 18, 2008, each of which would have extended to February 29, 2008 plaintiff's time in which to respond to defendants' first set of interrogatories and first notice of discovery and inspection.

Plaintiff's counsel sent an e-mail to defendants' counsel on February 5, 2008 in which he stated that defendants' counsel had agreed to produce certain discovery responses by January 15, 2008 that had not yet been produced and, further, that:

while you have verbally agreed to extend plaintiff's time to respond to defendants' discovery demands and to adjourn the deposition of plaintiff, you have failed to

return the stipulation reflecting our agreement that I forwarded to you on January 18, 2008.

... . Please ... contact me so that we can resolve these discovery issues in a mutually agreeable manner

(Cohen Affirm., Ex. D.) Defendants' counsel sent plaintiff's counsel a revised proposed stipulation on February 6, 2008. On February 11, 2008, in response to an e-mail from defendants' counsel asking when he would be responding to defendants' discovery requests dated December 28, 2007, plaintiff's counsel replied by asking whether defendants' counsel had yet responded to plaintiff's counsel's requests for discovery dated December 7, 2007. Defendants' counsel sent a letter to plaintiff's counsel, dated February 25, 2008, which asked plaintiff's counsel to let him know if and when plaintiff's counsel would respond to defendants' outstanding discovery requests, and stated, "I trust we can resolve this amicably" (Cohen Affirm., Ex. E).

While the parties' correspondence clearly evidences disagreements concerning their respective disclosure obligations, it does not demonstrate that, as of February 25, 2008, plaintiff had engaged in any such wilful, contumacious or bad faith failure to disclose as would warrant the drastic remedy of striking the complaint or dismissing this action. Plaintiff served defendants with the instant summary judgment motion on February 27, 2008, and the service of that motion stayed disclosure until determination of the motion (*see* CPLR 3214 [b]). Plaintiff's counsel has submitted an affirmation stating that, after the summary judgment motion is determined, plaintiff will respond to defendants' discovery demands. In view of defendants' failure to demonstrate a wilful, contumacious or bad faith failure to disclose, they have established no basis for striking the complaint or dismissing the action.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion is granted to the extent that plaintiff is granted partial summary judgment on the first and fourth causes of action, and plaintiff shall recover judgment on those causes of action in the amount of \$153,438.91 -- together with simple interest at the rate of 9%

per annum from the date of March 17, 2006 through the date of judgment and costs and disbursements -- and the first and fourth causes of action shall be severed; and it is further

ORDERED that defendants' cross motion is denied; and it is further

ORDERED that the remainder of the action shall continue.

Counsel for plaintiff is directed to settle a judgment consistent with this determination upon ten days' notice to defendants.

Dated: 12/27/08

ENTER **MARILYN SHAFER**

J.S.C.

FILED
DEC 11 2008
COUNTY CLERK'S OFFICE
NEW YORK