

**CIT Group/Commercial Servs., Inc. v Yedid**

2009 NY Slip Op 30818(U)

April 7, 2009

Supreme Court, New York County

Docket Number: 113516/08

Judge: Marilyn Shafer

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

PRESENT: Marilyn Shafer

PART 8

Index Number : 113516/2008  
CIT GROUP/COMMERCIAL SERVICES  
VS.  
YEDID, ALBERT  
SEQUENCE NUMBER : 001  
TURNOVER PROCEEDING

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

in 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 in accord  
with the annexed memorandum.

This judgment is binding on the County Clerk and notice of entry cannot be entered hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MARILYN SHAFER  
J.S.C.

Dated: 4/7/09

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: IAS PART 8

----- X  
THE CIT GROUP/COMMERCIAL SERVICES, INC.,

Petitioner,

For a Judgment Pursuant to CPLR 5225 (b)  
And 5227 to Compel Payment of Money  
Or Delivery of Property

Index:  
113516/08

-against-

ALBERT YEDID AND RAFI YEDID

Respondents.

----- X

**UNFILED JUDGMENT**  
*This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).*

Marilyn Shafer, J.

In this turnover proceeding, pursuant to CPLR 5225 (b), petitioner CIT Group/Commercial Services, Inc. (CIT), seeks a judgment to compel payment of \$111,118.00, with interest, to satisfy part of an order and judgment against the respondents, Albert Yedid and Rafi Yedid. Petitioner is also seeking attorneys' fees pursuant to Article 10 of the New York Debtor and Creditor Law, and costs and disbursements for this proceeding. Respondents request that this petition be denied, or in the alternative, that discovery and trial should be held on the matter.

**BACKGROUND AND FACTUAL ALLEGATIONS**

Respondents Albert Yedid (Albert) and Rafi Yedid (Rafi) are brothers who, until 2004, were both 50% stock-holding partners of Planet Earth Sportswear, Inc. Planet Earth, formed in 1992, was

a retail store located in the Bronx which sold brand-name men's and women's clothing.<sup>1</sup>

In January 2005, Albert and Rafi entered into an agreement where in exchange for Rafi's shares in Planet Earth and to forgive other indebtedness, Albert would pay Rafi a "salary" of \$1,000.00 a week for a "no-show job" for three or five years.<sup>2</sup> In 2005 and 2006, Planet Earth paid Rafi a salary of \$52,000.00 and \$44,000.00 respectively, plus federal income taxes on behalf of Rafi in the amount of \$14,918.00. Albert also testified that, as part of the arrangement, he would no longer be involved with Planet Earth. Petition, Exhibit 4, at TR 146.

Over the years, due to its success and ability to repay its creditors, Planet Earth built up a reputation of having good credit, and was able to procure hundreds of thousands of dollars of merchandise. According to the respondents, 2005 was a successful year for Planet Earth, and they were optimistic about the future. In the retail industry, goods are typically ordered six to nine months in advance to arrive in time for each season. Planet Earth ordered a substantial amount of merchandise and used CIT Group/Commercial Services, Inc. (CIT) as its factor.

Respondents state that business took a severe downturn

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<sup>1</sup> The Petition indicates that originally there were five Planet Earth stores, with the remaining store located at 136 East Fordham Rd, Bronx, NY.

<sup>2</sup> Albert's testimony indicated that he had thought the arrangement was for 3 years; Rafi thought it was to last 5 years. The matter is moot now, since Rafi was only paid through October 2006.

starting in early 2006 due to other competitors selling the same merchandise for cheaper prices, vendors "dumping" their goods for steep discounts to any competitor who would buy them, and the general downturn of the retail business. As a result, Planet Earth was stuck with large quantities of un-sold merchandise in its store. In mid-2006, Planet Earth contacted its suppliers and vendors seeking discounts and relief to try and weather the industry downturn. It continued to pay its rent, staff and also CIT. Respondents claim they notified CIT about their difficulties and continued to make payments as often as they could. Planet Earth paid CIT a total of \$1,160,159.95 for 2006.

Also in mid-2006, Albert claims that he suffered from severe asthma-like pulmonary disease which made it difficult for him to breathe and caused severe fatigue. Albert stated that he asked Rafi to return to the store to assist with managing the store. Respondents state that Rafi received no extra compensation for this job besides his \$1,000.00 per week, and that if he did not return to the store, Planet Earth would have had to hire a "manager." Due to Planet Earth's limited income, payment to Rafi stopped at the end of October 2006.

Respondents allege that by the Fall of 2006, they knew that they would be stuck with a large inventory of un-sold merchandise which would have be sold at a discounted rate, and that they would have difficulty paying their factors due to their limited

income for the year. Respondents indicated that they contacted suppliers on November 8, 21, and December 11, 2006 asking them for relief on the invoices, and also for return of the inventory. Respondents Exhibits C-F. None of the suppliers offered any relief or receipt of un-sold inventory, and Planet Earth was advised that it would not be extended credit for 2007. On January 9, 2007, after none of the suppliers accepted return of the goods, Planet Earth advised the vendors that it would have to sell off its inventory at any discount. Rafi attended a fashion conference in early 2007, but was told that he could not order any goods due to Planet Earth's lack of credit approval. Planet Earth closed the store in February 2007.

CIT commenced suit against Planet Earth on December 7, 2006, seeking judgment for goods sold and delivered in the amount of \$802,724.38. CIT obtained two judgments against Planet Earth in the amounts of \$150,238.52 and \$579,145.85. Petition, Exhibits 2,3. Both judgments remain unsatisfied.

CPLR 5225 and 5227 provide for special turnover proceedings. CPLR 5225 may serve as a means to "set aside a transfer made by a judgment debtor to defraud his creditors." *Gelbard v Esses*, 96 AD2d 573, 575 (2d Dept 1983). Furthermore,

[i]n proceedings pursuant to CPLR 5225 (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.  
*Id.* at 576.

Petitioner alleges that Planet Earth's conveyances to Rafi were made in violation of Article 10 of the New York Debtor and Creditor Law (DCL), and is seeking relief under DCL sections 273, 273a, 274, 275 and/or 276 and 276a. DCL § 278 (a) allows a conveyance to be set aside to the extent necessary to satisfy a claim. Judgment is sought against Rafi as the transferee and/or beneficiary of the conveyances, and against Albert for having received a benefit from the conveyances.

#### DISCUSSION

##### Fair Consideration

Lack of consideration as well as insolvency is a requirement to prove that a conveyance is fraudulent under DCL sections 273, 274 and 275. The burden of proving these elements is upon the party challenging the conveyance. See e.g. *Joslin v Lopez*, 309 AD2d 837, 838 (2d Dept 2003). However, insolvency is presumed when a conveyance is made without fair consideration and the burden of overcoming such a presumption is on the transferee. *United States v Alfano*, 34 F Supp 2d 827, 845 (ED NY 1999).

In New York, the test for fair consideration for a conveyance requires that there be a fair exchange of value and that there be good faith. Specifically under DCL § 272, fair consideration is given for property:

- 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 party, 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.

CIT claims that Planet Earth received no consideration for the shares transferred to Albert. Respondents state that Rafi's shares were valuable and Planet Earth received these shares, and in return, made payments to Rafi. At the time of the transaction, Planet Earth was a successful business and it did not anticipate its future failure. Rafi could have sold his shares to someone else, but chose to sell them to Albert. Respondents maintain that the way the transaction was crafted should not undermine the inherent consideration.

CIT alleges that the payments made to Rafi lacked good faith and should be considered fraudulent. CIT contends that many of the transfers to or on behalf of Rafi, and on behalf of Albert, occurred while Planet Earth was insolvent. Respondents maintain that Planet Earth was not insolvent at the time of the transaction in question, nor was it insolvent during the time any of the payments to Rafi were conveyed.

CIT's petition insinuates that the conveyances lacked consideration because Rafi's work performed was unrelated to the money he was receiving. Respondents agree that Rafi came back to work voluntarily, but that the original transaction was not based

on Rafi performing services at the store.

It is well settled that the courts may determine what is considered fair consideration by examining the facts in each particular case. See e.g. *Petersen v Vallenzano*, 849 F Supp 228, 231 (SD NY 1994). The court finds that fair consideration was not present in the original transaction and the subsequent payments because, although Albert received fair consideration when he obtained valuable stocks in return for money, Planet Earth as a company received no benefit. There was not a fair exchange in value to Planet Earth for Rafi's shares. Additionally, payments to Rafi were never contingent on the services he inevitably provided for Planet Earth. Rafi gratuitously came back to work for Planet Earth and presumably would have been paid his \$1,000.00 per week with or without helping out at Planet Earth. The transaction can not be re-crafted at this point so that fair consideration can be present.

Respondents attempt to demonstrate that, had these transactions been composed in a way that Albert was being paid a salary and then gifted money to Rafi, petitioner would not attempt to collect this money to enforce a judgment. Although \$1,000.00 per week might be a reasonable and fair compensation to Albert as president of the company, this is not what happened in the present circumstances. The court will not attempt to consider hypothetical transactions. Furthermore, in respondents'

scenario, different laws would apply.

Although the conveyances lacked fair consideration, it should be noted that the court does not find that respondents lacked good faith when the transaction in question was originated, nor for any of the subsequent conveyances. It is true that Planet Earth borrowed substantial amounts from CIT from May 2006 through October 2006, which it eventually was unable to pay. However, during that time, Planet Earth made payments to CIT vastly larger than the ones given to Rafi. It also paid its staff and the rent on the business space. Planet Earth remained open for months after the last payment to CIT, attempting to stay in business.

CIT's argument that the conveyances lacked good faith as they were "preferential transfers to directors, officers and shareholders while they were insolvent as a way to undermine the rights of other creditors," is misguided. Petitioner Memo of Law, at 9, citing to *P.A. Building Co. v Silverman*, 298 AD2d 327 (1st Dept 2002). While it is true that transfers for the benefit of Albert as 100% shareholder of Planet Earth at the time Planet Earth was insolvent would be lacking in good faith, the original transaction was not made when Planet Earth was insolvent. In fact, Rafi's arrangement with Planet Earth was made before the debts to CIT even started to emerge. Also, as previously indicated, there is no indication that Planet Earth attempted to

undermine the rights of other creditors when it continued to make payments to CIT as well as other creditors at the same time it made payments to Rafi.

DCL § 273

Under DCL § 273, a conveyance is considered fraudulent if it lacks consideration and it is incurred by a person who is or will be thereby rendered insolvent. DCL § 271 defines insolvency as when the present fair salable value of the assets is less than the amount that will be required to pay the probably liability on existing debts as they become absolute and matured.

CIT claims it establishes Planet Earth's insolvency at the time of the conveyances by demonstrating judgments exceeding \$1,290,000.00 entered against Planet Earth. Petition, Exhibits 1-3, 6-10. These judgments include money owed to multiple creditors for goods sold to Planet Earth ranging from May 2006 through February 2007. These judgments were entered between March and October 2007.

Respondents claim that the petition is devoid of proof of when or how this "moment of insolvency" occurred. They allege that the payments to Rafi originally started in January 2005, when Planet Earth was successful, and were projected for either three to five years. Respondents contend that CIT can not prove that payments made to Rafi were in any way the cause of Planet Earth's insolvency, either at the time it originally occurred or

on an ongoing basis. Respondents argue that in 2005 they made over \$1.1 million in payments to CIT and \$1.16 million in 2006. Respondents also paid its landlord over \$17,000.00 per month in rent and as of mid-2006, still maintained the sales staff, kept up advertising and tried to operate the store normally. Respondents Answer, at 8.

The court finds that there is a question of fact as to whether some of the conveyances to Rafi were fraudulent under DCL § 273. While CIT has failed to refute respondents' showing that Planet Earth was not insolvent when it commenced making payment to Rafi, it appears that, as of September 2006, Planet Earth was unable to pay most/all of its creditors. At this point the court is unable to ascertain the point when Planet Earth became insolvent, thereby possibly rendering some of the conveyances to Rafi fraudulent under DCL § 273. This question remains one of fact for discovery and trial.

DCL § 273-a states that every conveyance made without fair consideration while the defendant was in an action for money damages or a judgment in such action was docketed against him, is considered fraudulent. DCL § 273-a is not applicable in this matter since Planet Earth did not become a party in a judgment action until December 2006, after the payments to Rafi ended.

DCL § 274

Under DCL § 274 conveyances are fraudulent which leave the

transferor with an "unreasonably small capital." CIT claims that in September 2006, Planet Earth knew it had reasonably small capital for its business, and believed it would incur debts beyond its ability to pay as they mature, yet continued to make payments to Rafi. Petitioner references Rafi's testimony in which he states that he saw in September 2006 how much money Albert owed, and how Planet Earth could not keep operating all of its stores. Petition, Exhibit 5, at TR 134.

Planet Earth reports that at no point did the conveyances to Rafi leave it with "unreasonably small capital," considering that Planet Earth always retained a "valuable lease, an established trade name, and a substantial inventory of goods." Respondents Memo of Law, at 9.

Considering the major monetary payments made to the landlord, factors and the recession in the business, the court agrees with respondents that the initial payments made to Rafi in 2005 were not the cause of Planet Earth's insolvency, nor did it leave Planet Earth with unreasonably small capital. However, as previously mentioned, whether payments made in 2006 left Planet Earth with reasonably small capital would be a question of fact for a jury to decide. The court has already determined that the conveyances lacked consideration. Accordingly, there is a question of fact as to when respondents became insolvent under

DCL § 274.<sup>3</sup>

DCL § 275

Under DCL § 275, a conveyance is fraudulent if it lacks consideration and the person who is making the conveyance "intends or believes that he will incur debts beyond his ability to pay as they mature." It applies to both present and future creditors. Planet Earth states that nothing ever establishes that in 2004, when Albert agreed to purchase Rafi's shares and pay for them through Planet Earth, Albert believed Planet Earth would incur debts beyond its ability to pay. Because Planet Earth ordered its goods six to nine months in advance, it ordered goods for 2006 in 2005. Planet Earth was then committed to large purchases on credit with CIT, after Planet Earth's business had started to take a downturn.

It has been held that, for purposes of finding insolvency, "any hardship existing at [the time of the transfer] does not tend to demonstrate insolvency." *Bleru Realty Corp. v 158 East 23<sup>rd</sup> Street Rest. Corp.*, 200 AD2d 547 (1st Dept 1994).<sup>4</sup> Planet Earth was paying CIT for goods ordered six to nine months previously. Where goods are ordered so far in advance, it is impossible to predict what will happen to a business in the

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<sup>3</sup> The court notes that, should petitioner prove that Planet Earth was insolvent by September 2006, it would only be entitled to, at most one or two months since payments to Rafi ended in October 2006.

<sup>4</sup> It is irrelevant for this proposition that fair consideration was found to exist in *Bleru*.

future. There is no evidence showing that, in 2005, Planet Earth did not intend or believe that it would incur debts that it was unable to pay. Planet Earth's undisputed evidence reveals that, even with a retail downturn, Planet Earth was still hopeful it would be successful as it was in previous years.

However, it is unclear, when or if, in 2006, Planet Earth intended or believed it would incur debts beyond its ability to pay as they matured. In his testimony Rafi states that he "saw how much" Albert owed in September 2006, and that he was entering negotiations to terminate leases and receive relief from creditors. Petition, Exhibit 5, at TR 134. Accordingly, whether conveyances made in 2006 are fraudulent under DCL § 275 remains a question of fact for discovery and trial.

DCL § 276

For a conveyance to be fraudulent under DCL § 276, actual intent to hinder, delay or defraud must be incurred. This applies to both present and future creditors. Respondent seeks to have the conveyances set aside as fraudulent under DCL § 276.

CIT argues that respondents concealed the true nature of the transaction by never explaining why they chose to have Albert purchase Rafi's portion of shares by having Planet Earth make payments to Rafi for a "no-show" job. CIT also states that, although Planet Earth paid taxes on Rafi's salary, Planet Earth reported \$1,000.00 per week in gross income on their tax return

even though Rafi received \$1,000.00 per week in net income. CIT also maintains using Planet Earth's assets to purchase Rafi's share and then reporting this as a salary to the IRS, fraudulently caused a detriment to CIT. Petitioner cites to *Flushing Savings Bank v Parr* (81 AD2d 655,656 [2d Dept 1981]), which states that "[a] deliberate attempt to stave off creditors by putting property in such a form and place that creditors cannot reach it, even when the purpose of that action is not to defraud them of ultimate payment but only to obtain enough time to restore the debtor's affairs, comes within the meaning of 'hinder and delay' as set forth in section 276 of the Debtor and Creditor Law [citations omitted]."

Respondents claim that the petition is devoid of any proof of actual intent to defraud, stating that Planet Earth arranged the transaction with Rafi long before it became insolvent and it still made payments to CIT in 2006 for \$1.16 million. Respondents maintain that the reports to the IRS were legitimate and proper and they complied with all discovery requests.

This court finds that CIT has produced no evidence to refute respective claim that respondents intended to place Planet Earth's funds beyond the reach of creditors. The payments were reported on Planet Earth's tax returns and their other records. CIT, being a major lender to Planet Earth, had every opportunity

to review Planet Earth's records during the years in question.

It is CIT's burden to prove actual fraud by clear and convincing evidence. *Hassett v Goetzmann*, 10 F Supp 2d 181, 188 (ND NY 1998). Actual intent, being rarely susceptible to evidence under New York Law, may be "gleaned from the circumstances surrounding the alleged fraudulent transaction." *Le Café Creme, Ltd. v Le Roux* (In re Le Café Creme, Ltd.), 244 BR 221, 239 (Bankr SD NY 2000). None of the circumstances around the original transaction, or the continued payments to Rafi allude to any intent to defraud CIT or other creditors.

DCL § 276-a

CIT is seeking an award of attorneys' fees under DCL § 276-a. DCL § 276-a provides for attorneys' fees in the event a party proves that a transfer is made and received with actual intent to hinder, delay or defraud either present or future creditors. CIT has not shown sufficient evidence that Planet Earth acted with intent to defraud. Accordingly, CIT will not be entitled to recover reasonable attorney fees.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ADJUDGED that the request for counsel fees is denied and the remainder of the action should continue with discovery and trial.

A conference will be held on 5/6/2009 @ 9:30

Dated: 4/7/09

MARILYN SHAFER  
ENTER: J.S.C.  
J.S.C.

**FINAL JUDGMENT**  
This judgment has been entered by the County Clerk and notice of entry shall be served based hereon. To obtain entry, counsel or a clerk's representative must appear in person at the Judgment Clerk's Desk (Room 141B).