Ivy League Medical Realty Corp. v Toran
2010 NY Slip Op 33677(U)
December 1, 2010
Sup Ct, New York County
Docket Number: 10-600991
Judge: Martin Schoenfeld
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SCANNED ON 12/2/2010

[* 1]

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

PRESENT: Schoenfeld PART 28

Justice

Ivey League

- v -

Teran

INDEX NO. 600991/10

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Turnover

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-6
Answering Affidavits — Exhibits	7-12
Replying Affidavits	13-18

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

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).

Dated: 12/1/10

J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFER

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JU

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

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IVY LEAGUE MEDICAL REALTY CORP.

Petitioners

DECISION AND JUDGMENT

-against-

Index No.: 10-600991

ERROL TORAN; ET AND AK BILLING, INC.; ANN TORAN; MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.; PRNY HEALTH AND SPA, INC.; PILATES REFORMING NEW YORK, LTD.; INWOOD VENTURA II, LLC; AND FIRST HUDSON CAPITAL, LLC

Respondents.

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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).

HON. MARTIN SCHOENFELD, J.:

Petitioner Ivy League Medical Realty Corp. ("Ivy League") brings this turnover proceeding pursuant to CPLR sections 5225 and 5227 against Respondents to satisfy a judgment entered on December 16, 2009. The judgment of $700,974.79 for the Petitioner and against Respondents Errol Toran (sometimes referred to hereinafter as "ET") and ET and AK Billing, Inc. (hereinafter referred to as "ET & AK Billing"), a corporation owned by Mr. Toran, was for rent due plus interest on a commercial lease. Petitioner contends that Mr. Toran personally and through his corporation ET & AK Billing has fraudulently conveyed his assets to the other Respondents in this proceeding with the intent of evading the judgment.

Currently, there is a TRO in place enjoining Respondents Ann Toran (sometimes referred to hereinafter as "AT"), Merrill Lynch, Fenner, and Smith., Inc., PRNY Health and Spa, Inc., Pilates Reforming New York, LTD., Inwood Ventura II, LLC, and First Hudson Capital, LLC

from paying money to ET or ET & AK Billing pursuant to Petitioner, Ivy League's, Order to Show Cause signed by Judge Jaffe on April 22, 2010.

BACKGROUND[1]

On April 24, 2008 Petitioner, Ivy League, commenced an action in the Supreme Court, NY County against ET and ET & AK Billing for, among other things, past rent and future rent on a commercial lease. Judge Michael D. Stallman signed an order and decision in that case on October 28, 2009 in part granting summary judgment in favor of Petitioner and against ET and ET & AK Billing, jointly and severally, for rent due in the amount of $610,503.23 plus interest. On December 16, 2009, judgment was entered in favor of the Petitioner, Ivy League, in that action for a total amount of $700,974.79.

Petitioner deposed ET on March 17, 2010 in conjunction with it's judgment against him. Following this deposition, on April 15th, Ivy League filed its Order to Show Cause and its original petition in the current action. It also served restraining notices against Respondents PRNY Health and Spa, Inc., First Hudson Capital, LLC, Inwood Ventura II, LLC, ET and ET & AK Billing, AT, and Merrill Lynch. On or about May 12th, Petitioner served a restraining notice

[1]At the outset it must be noted that the papers presented by Petitioner and Respondents ET and ET & AK Billing and by Ann Toran, the wife of Mr. Toran who is separately represented, were full of typographical errors as to dates and amounts of money in question and errors as to the sequence of exhibits attached to pleadings, making more work for the court in deciphering the facts. Counsel should be on notice that such errors in court documents are unacceptable.

Further, the inclusion of case citations in the affidavits, rather than by separate memoranda of law are confusing and improper. See 22 N.Y.C.R.R. § 202.8 (c) ("Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law.").

on Merrill Lynch, Pierce, Fenner and Smith, Inc. after receiving Merrill Lynch & Co.'s answer in the current case which correctly names Merrill Lynch, Pierce & Smith, Inc. ("Merrill Lynch") as being the entity that maintains AT's personal account.

Petitioner argues in its pleadings that ET personally and through his corporation, ET & AK Billing, has fraudulently conveyed money to these other Respondents in order to avoid satisfying the judgment against him and ET & AK Billing. It specifically requests turnover of the following:

1) Monies allegedly received by Errol Toran as a result of a refinance of his co-op apartment which were transferred to a Merrill Lynch account held by his wife Respondent Ann Toran;

2) Monies allegedly held by Respondent Inwood Ventura II, LLC as a security deposit on a commercial lease;

3) Monies held by Respondent First Hudson Capital, LLC as a security deposit on a separate commercial lease; and

4) Monies allegedly held by Respondent PRNY Health and Spa, Inc., a corporation created by Mr. Toran, transferred to it by Respondents Pilates Reforming New York, Ltd. and Errol Toran or ET & AK Billing.

The facts concerning each of these claims are set forth below.

1) The Refinance

In September 2009, Respondents Errol Toran and his wife Ann Toran began refinancing their co-op apartment at 45 Park Terrace, NY, NY 10034 for a total of $255,000.[2]

[2]Although Petitioner argues that this co-op was solely owned by Mr. Toran, papers provided by Mrs. Toran including the co-op stock certificate in both their names, are adequate proof that both Errol Toran and Ann Toran owned the co-op.

On December 9, 2009, a wire transfer was received into AT and ET's joint checking account with Chase Bank for the amount of $166,624.82, the proceeds from ET and AT's refinancing of their coop apartment. The next day, December 10, 2009, AT transferred by personal check the same amount, $166,624.82, into a Merrill Lynch account held solely in her name. Respondent Merrill Lynch confirmed this transaction in its Answer.

On December 24, 2009 AT transferred from her Merrill Lynch account $59,000.00 to Ryan LLC 101. In her affidavit, Ms. Toran claims this money was transferred to a former landlord to satisfy a past debt of hers and her husband's. She has provided no evidence of the existence of this debt other than her affidavit.

On March 8, 2010, AT transferred from her Merrill Lynch account $10,700.00 to Pilates Reforming New York. On April 28, 2010, AT transferred from her Merrill Lynch account an additional $10,000.00 to Pilates Reforming New York. Ms. Toran claims that these two transfers were for "payroll obligations" and debt incurred from the purchase of pilates equipment respectively. She offers no evidence to support her contentions other than her Merrill Lynch statement that the money was transferred.[3]

On May 6, 2010, AT transferred from her Merrill Lynch account $50,000.00 to Ralph Kamhi, AT's father. Ms. Toran states that this transfer was to pay an old debt that she and ET owed to her father. To corroborate this statement, she has provided an affidavit from her father to that

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[3]Moreover, AT states that the two transfers were for $10,000 each. However, her statement indicates that the transfer on March 8, 2010 was actually for $10,700.

effect. Neither AT nor her father, however, was able to provide the court with any evidence other than their affidavits that this debt existed.

As of July 31, 2010, $40,163.76 remains in AT's Merrill Lynch account.

2) Security Deposit Held by Respondent Inwood Ventura II, LLC

On June 1, 2007, Respondent Inwood Ventura II LC (owner) (hereinafter "IV") and ET & AK Billing (renter), a company owned by ET, entered into a seven year commercial lease of 5025-5035 Broadway, NY, NY. Petitioner alleges that IV has retained a $7276.50 security deposit pursuant to this lease. In his answer Mr. Toran confirms that there should be a security deposit on this lease but neither side has provided evidence as to the amount being held. IV has not appeared in this case.

3) Security Deposit Held by Respondent First Hudson Capital, LLC

On April 20, 2009, Respondent Pilates Reforming NY, LTD entered into a five year lease with Pigranel Management Corporation for the commercial property located at 54 West 39th Street, NY, NY. Reforming New York LTD[4], a New York state corporation formed by Ann Toran on March 12, 2002, wrote a check to Pigranel Management Corporation for $31,097.98 indicating it

[4]There is some confusion as to the proper name of this corporation. Respondent Errol Toran insists that Petitioner incorrectly identified the company and states that its true name is Reforming New York, LTD not *Pilates* Reforming New York, LTD as appears on the caption. Mrs. Toran's pleadings make no mention of either name or the claims against the corporation despite the fact that the evidence shows that she formed the corporation. Both names appear on the lease in question and the check allegedly used to pay for the security deposit to Pigranel Management Corp. Therefore, for the purposes of this proceeding, the court will consider them interchangeable.

was for a security deposit and the first month's rent. Petitioner contends that $21,000 of this money was transferred from ET & AK Billing's corporate accounts and ET's personal accounts to Respondent First Hudson Capital LLC as a security deposit for 54 West 39th Street, Front of Second Floor, NY, NY. However, the only document provided by Petitioner is a copy of a check in the amount of $31,097.98 to Pigranel Management Corporation not First Hudson made from a Reforming Pilates account (and not from ET & AK Billing). Respondent ET claims to be unaware of any transactions with First Hudson. He also points out that Reforming Pilates is his wife AT's solely owned business and thus the money was not his to begin with. First Hudson has not appeared in this case.

4) Monies allegedly held by Respondent PRNY Health and Spa, Inc.

On November 27, 2009, soon after the decision of Justice Stallman in the underlying case but prior to the entry of judgment in that case, Errol Toran filed articles of incorporation for PRNY Health and Spa, Inc., with the Secretary of State of NY. No evidence has been provided as to the assets of this corporation or any transfers to or from the corporation.

DISCUSSION

Sections 5225 and 5227 of the CPLR allow a judgment creditor to seek an order requiring a third party to turn over money to satisfy a judgment. Specifically, under section 5227 the court may order a third party who is indebted to the judgment debtor to turn over the debt to the creditor. Further, pursuant to section 5225(b) the court may order a third party in possession of property

or money of the judgment debtor to give it to the creditor where the creditor has a superior right of possession.

Motions made pursuant to these sections are special proceedings treated by the court "in the nature of a motion for summary judgment." Aluminum Co. Of America v. Moskovitz, 1991 WL 177246 (S.D.N.Y. 1991); see Triangle Pac. Bldg. Products Corp v. National Bank of North America, 62 AD.2d 1017 (2d Dept. 1978); General Motors Acceptance Corp. V. Norstar Bank of Hudson Valley, 156 A.D. 2d 876 (3d Dept. 1989); A.F.L. Falck v. E.A. Karray Co., 722 F. Supp. 12, 15 (S.D.N.Y. 1989). The court may decide such motions on the submissions of the parties unless there are"disputed issue[s] of material fact." Aluminum Co., 1991 WL 177246. The court's job is "not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." Knight v. U.S. Fire Insurance Co., 804 F.3d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 107 (1987). The court must also determine whether issues in dispute are "material to the outcome of the litigation." Id. An issue that is unresolved but not material to the outcome of the case will not defeat the motion. Id. at 11-12 (citing Quarles v. General Motors Corp., 758 F.2d 839, 840 (2d Cir. 1985)).

Here, the judgment debtor, Ivy League, seeks turn over of assets that the Respondents ET and ET & AK Billing allegedly fraudulently conveyed to third parties in order to avoid paying the judgment against them. In making its decision, the court has relied solely on submissions in this case, finding no hearing to be necessary in determining the issues before it.

1) Proceeds of the refinance

The first issue is whether the Petitioner is entitled to any of the proceeds from the refinance of AT's and ET's co-op apartment.

The Petitioner contends that it is entitled to the entire amount of the proceeds totaling $255,000. It argues that ET was the sole owner of the co-op apartment, and as such, the total amount of the proceeds was owned by him. Moreover, it contends that there is no explanation for the reduction of the $255,000 to the amount of $166,624.82 which was transferred to AT and ET's joint account on December 10, 2009. Both of these premises are contradicted by the evidence.

First, AT has provided a copy of the co-op stock certificate and lease, both in her name and ET's name, which are sufficient evidence of co-ownership of the co-op especially in light of the fact that Petitioner provided no evidence to the contrary. Second, both AT's and ET's affidavits and documentary evidence, in the form of a HUD-1 RESPA settlement statement provided by AT, show that the $166,624.82 figure was the amount of the proceeds from the refinance of the co-op after paying off the old loan on the co-op. Petitioner has not put forth any evidence to challenge this. Thus, the amount in question is $166,624.82, not $255,000 as Petitioner argues.

The issue then is whether Petitioner has presented sufficient evidence that it has a claim to any of the $166,624.82 proceeds of the refinanced cooperative apartment owned by both ET and AT.

Since January 1, 1996, married couples who purchase co-op shares in New York take those shares as tenants by the entirety, unless they "expressly declare" that they are taking them as

joint tenants or tenants in common. EPTL 6-2.2. Tenants by the entirety, like joint tenants and tenants in common, are each entitled to one-half of the proceeds of the profits from the ownership. See Ratkovitch v. Ratkovitch, 49 A.D.2d 890, 891 (2d Dept. 1975).

Here, no evidence has been provided as to how AT and ET own the co-op. However, the stock certificate and lease show that they purchased the co-op on November 23, 1999, after the change in NY law providing that co-ops purchased by married couples[5] are taken as tenants by the entirety. Thus, it appears that they did take those shares as tenants by the entirety. As such, AT and ET were each entitled to half of the proceeds of the co-op refinance. It should be noted that even if evidence was presented that AT and ET took the co-op as joint tenants or tenants in common, the result would be the same. Each spouse would be entitled to half of the proceeds. See Ratkovitch, 49 A.D.2d at 891.

The money was deposited into ET and AT's joint Chase account. There is a rebuttable presumption that money deposited into a joint account "is vulnerable to levy of a money judgment" against one of its joint owners by his creditors. Viggiano v. Viggiano, 136 A.D.2d 630 (2d Dept. 1988). Only where it can be shown that the account was set up as a joint account solely for "convenience" of one party and not intended to be used jointly, can this presumption be rebutted. Here no such evidence was presented.

[5]The court has no reason to doubt that at the time of the purchase of the co-op ET and AT were legally married. They shared a surname at that time. Moreover, AT asserts in her affidavit that they have been married since 1994.

The account, however, is only vulnerable "as to the actual interest of that judgment debtor in the account." Id. At 631. In this regard, of the $166,624.82 deposited after the refinance, ET had an interest in half or $83,312.41 of the proceeds that were deposited into the Chase account. Thus, as ET's judgment creditor, Petitioner was entitled to this amount.

The entire $166,624.82, however, was immediately transferred by check from AT and ET's joint account into a Merrill Lynch account solely in the name of AT. Petitioner argues that this transfer was a fraudulent conveyance of funds to which Petitioner was entitled pursuant to its judgment.

New York's Debtor and Creditor Law section 273-a states:

> 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.

Courts have found that a successful claim under DCL section 273-a requires that 1) the conveyance was made without fair consideration; 2) the conveyor is a defendant in a money judgment action or a judgment has already been docketed against him; and 3) the defendant has not satisfied the judgment. Grace v. Bank Leumi Trust Company of New York, 443 F.3d 180, 188 (2d Cir. 2006).

Here, 2 and 3 are not at issue. Respondent became a defendant in a money judgment action on April 24, 2008 and was a defendant on December 10th, 2009, the date the money was conveyed

to AT's account, satisfying the second element of this section. In addition, Respondent has presented no evidence that he has satisfied the judgment. Therefore, whether the transfer of proceeds of the refinance belonging to ET and thus attachable by the Petitioners (one half as established above) was fraudulent rests on whether the transfer was made without fair consideration.

Consideration for purposes of this law is defined in DCL section 272. This section requires that "the recipient of the debtor's property must either convey property or discharge an antecedent debt in exchange; ... the exchange must be for a fair equivalent; and . . . the exchange must be 'in good faith.'" Neshewat v. Salem, 365 F.Supp.2d 508, 519 (S.D.N.Y. 2005) (citations omitted).

ET and AT claim that there was fair consideration because AT used the refinance money transferred to her account to pay antecedent debt on behalf of both ET and AT. Specifically, they contend that the money was used for the following purposes: 1) $59,000 was transferred to Ryan LLC on December 24, 2009 to pay a debt to a former landlord; 2) $20,700, transferred in March 2010, to pay for payroll and other debt incurred by Pilates Reforming of New York, AT's company; and 3) $50,000 to Ralph Kamhi, AT's father, for an old debt owed to him by AT and ET.

The court rejects this argument. The transaction in question here is the transfer of the money from ET and AT's joint account to the Merrill Lynch account, solely in AT's name, not the transfers by AT to pay off alleged antecedent debts. Cadle Co. v. Newhouse, 2002 WL 1888716

(S.D.N.Y. 2002). No evidence has been presented that AT gave anything of value to ET for his share of the refinance proceeds transferred to AT or that the money was consideration for any debt ET owed AT.

Moreover, fair consideration requires good faith on the part of the transferee. The circumstances under which AT received the money into her personal account indicate a lack of good faith on her part. In general courts look to intra family transfers with suspicion when considering whether a transaction was fraudulent. See United States v. Mazzeo, 306 F. Supp. 294, 311 (E.D.N.Y. 2004). Here, under the circumstances AT should have known of her husband's debt to Petitioner and his inability to pay that debt. See Frank v. Von Bayer, A.D. 298, 301 (1st Dept. 1923), judgment modified in part by 236 N.Y. 473 (1923). Yet, she transferred the money out of their joint account, making it inaccessible to her husband's creditors.

ET and AT's argument that AT's payment of alleged antecedent debt from her Merrill Lynch account somehow constituted consideration for the transfer from ET to AT is without merit. Neither AT nor ET presented evidence of an agreement to use these funds to pay off antecedent debt. Furthermore, even if the court were to accept the argument that it should look to AT's transactions to determine consideration, the evidence does not support the finding of fair consideration.

Antecedent debt may be considered fair consideration under DCL section 272. However, to prove such consideration Respondents "were obligated to lay bare their proof and disclose

evidentiary facts sufficient to raise triable issues of fact." Century 21 Construction Corp. v. Rabolt, 143 A.D.2d 873, 874 (2d Dept. 1988). In Century 21, the court considered whether a conveyance by a judgment debtor and his wife of title to their home held as tenants by the entirety to his wife should be set aside. On the deed, there was a marginal notation indicating that there was no consideration for the transfer as it was a "family transaction." In their affidavits, husband and wife explained that the transfer was for forgiveness of an antecedent debt owed to the wife's father. They supported their claim with an affidavit of the wife's father as well as various checks and money orders, two of which had notations that the funds were to benefit the husband. The court found this evidence insufficient to prove the existence of the antecedent debt. See also Bank of New York v. Cherico, 209 A.D.2d 914, 915 (3d Dept. 1994) (finding affidavits alone without other proof not sufficient to prove existence of antecedent debt). Here, as in Century 21 Respondents fail to prove the antecedent debt.

AT states that the first transaction of $59,000 she made to Ryan LLC on December 24, 2009 was to pay an antecedent debt owed by her and her husband to a former landlord. She, however, fails to provide any evidence of this debt, such as the lease in question or correspondence concerning this so-called debt. As previously noted, an affidavit alone is not sufficient evidence to prove that the antecedent debt existed. Bank of New York, 209 A.D.2d at 915.

With regard to the $20,700 paid to Pilates Reforming of New York, Respondents have provided no evidence to substantiate the reason for these payments other than their affidavits. No pay stubs or invoices are provided to substantiate their claim. Furthermore, the payments were

made in March 2010, more than three months after the transfer of the refinance money, indicating that apparently there was no debt at the time the money was transferred to AT, thus no antecedent debt to be paid off at the time of the transfer. Also, the evidence shows that Pilates Reforming of New York, is AT's corporation not ET's. Thus, the debt, if it existed, was likely not ET's responsibility.

Finally, the court finds no merit in the argument that AT's transfer of $50,000 to her father constituted fair consideration. AT made this transfer in May 2010, more than five months after the refinance money was deposited into her account. Moreover, the only evidence provided by AT is insufficient to prove such a debt existed. She provides only an affidavit of her father, a bank statement from 1998 that indicates a deposit of $36,000 without any information as to the source of the money, and various checks from a joint account of AT and ET to Mr. Kamhi totaling $1,800 written in 1998 and 1999. She has produced no written agreement or checks with notations indicating the existence of such a substantial debt. Nor has she provided any evidence as to the source of the $36,000 deposit into her account and how it relates to the alleged debt payment of $50,000. As in Century 21, AT has failed to present sufficient evidence to raise a triable issue of fact as to whether there was valuable consideration for the transfer.

In conclusion, $83,312.41 of ET's money that was attachable by Petitioner was fraudulently conveyed to AT's account. According to the papers, however, only $40,163.76 of that money still remains in AT's account. Therefore, the court grants Petitioner's motion under CPLR section 5225 by ordering that Merrill Lynch turn over this amount to Petitioner.

With regard to the outstanding $43,148.65, the First Department has held that:

> A personal judgment against the transferee of a fraudulent conveyance may be obtained where the transferee has made it impossible to return the property to the creditor by, for example, disposing of wrongfully conveyed property or depreciating it. Federal Deposit Ins. Corp. V. Heilbrun, 167 A.D.2d 294, 294 (1st Dept. 1990) (citing Marine Midland Bank v. Murkoff, 120 A.D.2d 122, 133 (1986), appeal dismissed, 69 N.Y.2d 875 (1987)).

Specifically, CPLR section 5225(b) "furnishes a mechanism for obtaining a money judgment against the recipient of a fraudulent conveyance who has, in the interim spent or dissipated the property conveyed." Federal Deposit Insurance Corp. v. Conte, 204 A.D.2d 845, 846 (3d Dept. 1994). The amount of such a money judgment "is naturally limited to the value of the transferred property" or assets. Hoenlein v. Kaplan, 2005 WL 6229792 (N.Y. Cnty 2005); see Brown v. Kimmel, 68 A.D.2d 896 (2nd Dept. 1979); Citibank v. Benedict, 2000 WL 322785 (S.D.N.Y. 2000).

Here, $83,312.41, ET's half of the proceeds of the refinance was fraudulently conveyed to AT. She then dissipated all but the $40,163.76 remaining in her Merrill Lynch account. Thus, the court also directs the entry of a judgment against AT for $43,148.65, the amount of the fraudulently conveyed money that AT has already spent.

2) Monies held as security deposits

Petitioner argues that it is entitled to the turnover of money held as security deposits for two commercially leased spaces. It bases this argument on two theories. First, it contends that the

security deposits are the property of ET and not the landlord and that Petitioner has priority as a judgment creditor to these funds.

Petitioner is correct that under the General Obligations Law section 7-103, security deposits paid by renters to landlords "continue to be the money of the person making such deposit." However, the fact that this money is still legally the renter's does not give creditors of the tenant a superior right to the money as argued by Petitioner. On the contrary, "[a] landlord requires such a deposit, although still the property of the tenant, to attain the status of a protected creditor should the tenant breach the lease." Glass v. Janbach Properties, Inc., 73 A.D.2d 106, 108-09 (2d Dept. 1980); see also Park Holding Co .v. Johnson, 106 Misc.2d 834, 836 (Civ. Ct. 1980). Absent "improper commingling" of the deposit, the landlord has the right to retain the deposit despite the existence of other creditors. Glass, 73 A.D.2d at 107; see also In re Pal-Playwell, Inc., 334 F.2d 389 (2d Cir. 1964) (holding that bankruptcy trustee is not entitled to security deposit funds until renter's obligation to landlord is fulfilled).

Here, Petitioner claims entitlement to two security deposits: 1) $7276.50 deposit for a seven year commercial lease between IV and ET & AK Billing for 5025-5035 Broadway signed June 1, 2007 and 2) $31,097.97 deposited for a five year commercial lease signed on April 20, 2009 by Pilates Reforming NY, LTD and Pigranel Management Corporation for 54 W. 39th Street.[6] Petitioner has presented no evidence that the leases are not still in effect (and according to the

[6]Petitioner names First Hudson as a Respondent claiming that it holds this security deposit. However, it has presented no evidence to tie First Hudson with this deposit. The check was made out to Pigranel Management Corp.

leases, both should remain in effect until 2014). Nor is there evidence that the deposited money was improperly commingled. Absent such evidence, the landlords of these properties, not Petitioner, have the right to retain these security deposits.

Second, Petitioner argues that it is entitled to the security deposits because the transfers were fraudulent conveyances. This argument also fails. To prove fraudulent conveyance, whether that of a judgment debtor or as a potential debtor, lack of consideration for the conveyance must be shown. As discussed above, consideration requires a fair and equivalent exchange of property made in good faith. Neshewat v. Salem, 365 F.Supp.2d at 519 (citations omitted).

Here, however, Petitioner presents no evidence to support its contention that the deposits were fraudulent conveyances. In fact, the only evidence presented was copies of the leases in question which indicate that the deposits were given in consideration for the use of the property being rented. Further, nothing in the record indicates that these leases were entered into in bad faith.[7] Therefore, the court denies Petitioner's motion for turnover of the security deposits in question.

3) Monies allegedly transferred to PRNY Health and Spa, Inc. by ET and ET & AK Billing and Pilates Reforming New York, LTD

[7]It is important to note that with regard to the 54 W. 39th Street lease, Petitioner has also failed to show that the security deposit money was in fact ET's and/or ET & AK Billing's. Petitioner presents as evidence a check from a Reforming New York, LTD account, AT's corporation. It presented no evidence that this money came from ET or ET & AK Billing. In addition, it is notable that the lease for 5025-5035 Broadway was signed in 2007 far before ET was a defendant in the Ivy League case. Thus, the second prong necessary to prove fraudulent conveyance under the Debtor and Creditor Law section 273-a has not been met with regard to this lease.

Petitioner contends that Mr. Toran and ET & AK Billing and Pilates Reforming New York fraudulently transferred money to PRNY Health and Spa, Inc., a corporation created by Mr. Toran in November of 2009, to avoid payment to Petitioner. It may seem suspicious that ET formed yet another corporation so soon after the court signed an order and decision against him and ET & AK Billing for $610,503.23 plus interest and just before the judgment was entered. However, suspicion alone is not enough to prove fraud. Petitioners have failed to point to any evidence of money being transferred to this corporation from ET or ET & AK Billing or Pilates Reforming New York let alone point to a fraudulent conveyance. The record being devoid of evidence of such nefarious transactions, there are no disputed issues to be resolved. Thus, the court denies Petitioner's motion as to turnover of money allegedly transferred from ET and ET & AK Billing or Pilates Reforming New York to PRNY Health and Spa, Inc.

In accordance with the foregoing, it is

ADJUDGED that the Petition is denied with regard to Respondents PRNY Health and Spa, Inc., Pilates Reforming New York, LTD, Inwood Ventura II, LLC, and First Hudson Capital, LLC., and the action is dismissed as against these Respondents, and it is further

ADJUDGED that the Petition is granted with regard to Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc. and Ann Toran; and it is further

ORDERED and ADJUDGED that Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. is directed, upon receipt of a certified copy of this order and judgment to turn over to the Petitioner,

Ivy League Medical Realty Corp., funds in the account of Ann Toran, Respondent, held in said Bank under account number_____, in the amount of $40,163.76; and it is further

ADJUDGED that upon such turn-over of funds, the Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc. shall be discharged of all liability; and it is further

ADJUDGED that a money judgment be entered against Respondent Ann Toran and in favor of Petitioner Ivy League Medical Realty Corp. in the amount of $43,148.65.

J.S.C.

Dated: New York, New York
December 1, 2010

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 ... Room