

**Excelsior Capital, LLC v Superior Broadcasting Co.**

2012 NY Slip Op 30163(U)

January 10, 2012

Sup Ct, Nassau County

Docket Number: 23475-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**EXCELSIOR CAPITAL, LLC and RICHARD  
DAVIS,**

**Plaintiffs,**

**-against-**

**SUPERIOR BROADCASTING CO., THE ESTATE OF C.  
ROBERT ALLEN, III, by its Executrix, GRACE M. ALLEN,  
ROBERT ROMANO, THADDEUS "THAD" ALLEN,  
STUART LOVE, MAJOR BROADCASTING, INC. a/k/a  
MAJOR MUSIC INC. d/b/a MAJOR BROADCAST MUSIC,  
APACHE POWERBOATS, INC., LUKE ALLEN, ANNE  
MARIE FIORENTINO, WALDO GIL PEREZ, JOSE  
RAMIREZ, EINAR HAUKELAND, JAN'S VIDEOTAPE  
EDITING, JOHN AND JANE DOES 1-100, DOE  
CORPORATION 1-100, DOE L.L.C. 1-100, and DOE L.P. 1-  
100,**

**Defendants.**

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**TRIAL/IAS PART: 16  
NASSAU COUNTY**

**Motion Seq. Nos. 1 and 2  
Index No: 23475-10  
Submission Date: 11/14/11**

**The following papers have been read on these motions:**

- Notice of Motion.....X**
- Affirmation in Support and Exhibits.....X**
- Moving Defendants' Memorandum of Law in Support.....X**
- Moving Defendants' Substituted Memorandum of Law in Support....x**
- Notice of Motion and Affirmation in Support.....X**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....x**
- Plaintiffs' Memorandum of Law in Opposition.....X**
- Reply Affirmation in Further Support and Exhibits.....X**
- Reply Memorandum of Law.....X**

This matter is before the Court for decision on 1) the motion by Defendants Superior Broadcasting Co. (“Superior”), C. Robert Allen, III (“Allen”), and Luke Allen as Guardian for the Property Management of C. Robert Allen, III, Thaddeus “Thad” Allen, Luke Allen, Anne Marie Fiorentino s/h/a “Anna Marie Florentino,” and Einar Haukeland (the “Non-Allen Defendants,” collectively with Superior and Allen, “Moving Defendants”) filed on January 28, 2011, and 2) the motion by Defendant Robert Romano (“Romano”) filed on June 13, 2011.<sup>1</sup>

Defendants argue that Plaintiffs are foreclosed from pursuing this action, pursuant to the doctrines of collateral estoppel and *res judicata*, in light of a prior related action, *Excelsior Capital LLC and Richard Davis v. Superior Broadcasting Company, Inc., C. Robert Allen, III, and Luke Allen as Guardian for the Property Management of C. Robert Allen, III*, Nassau County Index Number 8289/07 (“Related Action”), that was tried before the Honorable Ira B. Warshawsky in 2009. By prior Order dated August 21, 2011 (“Prior Order”), the Court directed that the pending motions would be the subject of oral argument before the Court to address the effect, if any, of the March 1, 2011 decision of the Appellate Division, Second Department regarding the Related Action, titled *Excelsior Capital, LLC v. Superior Broadcasting Company, Inc. et al.*, 82 A.D.3d 696 (2d Dept. 2011) (“Appellate Decision”) on the motions before the Court. The Court conducted that oral argument, and the motions were submitted on November 14, 2011. For the reasons set forth below, the Court denies the motions.

### BACKGROUND

#### A. Relief Sought

Moving Defendants move for an Order, pursuant to CPLR § 3211(a)(5), dismissing the Complaint (Ex. A to Wald Aff. in Supp.)

Defendant Romano moves for an Order, pursuant to CPLR § 3211(a)(5), dismissing the Complaint.

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<sup>1</sup> On June 21, 2011, the Court signed a Stipulation and Order substituting the Estate of C. Robert Allen, III as the defendant in this action, in place of C. Robert Allen, III who passed away on March 9, 2011 and amending the caption with respect to the name of Defendant Fiorentino.

## B. The Parties' History

The Complaint in the instant action ("Instant Complaint") contains five causes of action based on allegedly fraudulent transfers by Defendants. At oral argument, Plaintiffs advised the Court that they are not proceeding on the fourth cause of action which is based on Debtor and Creditor Law ("DCL") § 276. The remaining substantive causes of action allege that Defendants made fraudulent transfers in violation of DCL §§ 273, 274 and 275.<sup>2</sup>

The Second Department, in its Decision, outlined the Related Action as follows:

Over the approximately six-month period between January 15, 2004, and July 28, 2004, [Plaintiff Davis], as president of and on behalf of [Excelsior], made five loans to [Superior], totaling over \$18,000,000. Each loan was evidenced by a promissory note. Three of the five notes were personally guaranteed by [Allen], who owned 60% of Superior's stock, and was the trustee of a family trust which held an additional 30% of Superior's stock. In 2005 Allen allegedly requested an extension of the maturity dates of the three notes he had guaranteed, and Davis allegedly agreed to extend the maturity dates of the subject notes. Superior paid Excelsior a fee for extending the maturity date of at least one of the three notes, and Excelsior thereafter received payments for that note at a higher interest rate. After Superior defaulted on its payment obligations in 2006, Excelsior and Davis commenced this action, *inter alia*, to recover upon the notes and Allen's personal guarantees. The action proceeded to trial in June 2009 and, at the close of evidence, Allen and his property management guardian, Luke Allen, moved pursuant to CPLR [§] 4401 for judgment as a matter of law dismissing the ninth, thirteenth, and seventeenth causes of action, by which Excelsior sought to recover upon the personal guarantees. The Supreme Court granted the motion, concluding that Allen's obligation as guarantor was discharged because he did not consent to extend the maturity dates of the three notes guaranteed by him. Excelsior appeals from the dismissal of the ninth, thirteenth and seventeenth causes of action.

82 A.D.3d at 697-698.

In the Appellate Decision, the Second Department held that the trial court had erred in dismissing Excelsior's causes of action to recover on Allen's three personal guarantees. *Id.* at 699. The Appellate Division ordered that 1) the appeal from the judgment was dismissed, as the judgment was superseded by the amended judgment; and 2) the amended judgment was reversed, as appealed from. The Appellate Division denied the motion of Defendants Allen and Luke Allen for judgment as a matter of law on the ninth, thirteenth and seventeenth causes of action, reinstated those causes of action and severed them from the remaining causes of action

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<sup>2</sup> The fifth cause of action seeks attorney's fees pursuant to DCL § 276-a.

and remitted the matter to the trial court for a new trial on the ninth, thirteenth and seventeenth causes of action. *Id.* at 697.

In the Related Action, the Plaintiffs alleged, *inter alia*, that Allen, who had previously loaned at least \$70 million to Superior, improperly caused Superior to make loan repayments either to Allen directly, or to select transferees of his choosing, including certain family members and personal employees in violation of the terms of a subordination agreement (“Subordination Agreement”) executed by Davis, Christopher Devine (Superior’s President at the time) and Allen. The Subordination Agreement provided that the second loan, in the amount of \$5,000,000, would be permanently senior to all other outstanding and future loans entered into by Superior (Related Compl. at ¶ 4). Plaintiffs asserted that, by arranging for the above-referenced transfers, which were credited towards Superior’s loan debt to him, Allen breached the terms of the Subordination Agreement and unjustly enriched himself at the Plaintiffs’ expense.

The Related Action was tried by a jury. The Amended Judgment (Ex. K to DeOreo Aff. in Opp.), signed by Justice Warshawsky on February 23, 2010 and entered February 25, 2010, reflects that the jury rendered a verdict in favor of Plaintiff on the first, third, sixth, seventh, ninth, eleventh, thirteenth, and fifteenth causes of action. The Amended Judgment directs, *inter alia* that judgment be entered 1) in favor of Plaintiff Davis and against Defendant Superior on the first cause of action in the amount of \$533,250.00 plus interest, 2) in favor of Plaintiff Excelsior and against Defendant Superior on the third cause of action in the sum of \$5,221,006.00 plus interest, 3) in favor of Plaintiff Excelsior and against Superior on the seventh cause of action in the sum of \$4,516,151.00 plus interest, 4) in favor of Plaintiff Excelsior and against Defendant Superior on the eleventh cause of action in the sum of \$8,262,916.00 plus interest, and 5) in favor of Plaintiff Excelsior and against Defendant Superior on the fifteenth cause of action in the sum of \$8,257,790.00 plus interest.

In the Instant Complaint, dated October 12, 2010, Plaintiffs assert several fraudulent conveyance claims as against Superior, Allen and a series of “Allen” transferees, and demand relief include the setting aside of those transfers pursuant to the DCL. The Instant Complaint alleges that no part of the Amended Judgment has been paid or satisfied. The Instant Complaint further alleges that, on or about January 20, 2010, Plaintiffs sent Superior an Information Subpoena with Restraining Notice, and Superior responded in a manner that “made clear” that

Superior is insolvent (Inst. Compl. at ¶ 37). Plaintiffs contend that the Instant Action is intended in part as a means of enforcing the unsatisfied Judgment they previously secured against Superior and Allen, and that to that end, they are now attempting to “unwind numerous transactions” that, they submit, “rendered Superior ‘judgment proof’ and were consummated with intent to hinder Plaintiffs’ ability to enforce their rights as creditors of Superior” (Ps’ Memo. of Law at p. 5). Plaintiffs allege that a portion of these transfers, approximately \$1.3 million, were direct payments from Superior to Robert Allen (*id.*).

### C. The Parties’ Positions

Defendants move to dismiss the Complaint in the Instant Action on the grounds that it is precluded by the doctrines of *res judicata* and collateral estoppel, as well as the applicable statute of limitations.

Plaintiffs oppose Defendants’ motions submitting *inter alia* that the Instant Action is not foreclosed by the Related Action in light of the fact that 1) the Instant Action comes within the exception applicable to cases in which a plaintiff is enforcing a judgment through claims arising from the same course of dealing on which the claims underlying the judgment arose; and 2) even if that exception is inapplicable, the Related and Instant Actions arise from different transactions and, therefore, the Instant Action may proceed.

## RULING OF THE COURT

### A. Res Judicata

The general doctrine of *res judicata* gives binding effect to the judgment of a court of competent jurisdiction and prevents the parties to an action, and those in privity with them, from subsequently relitigating any questions that were necessarily decided therein. *Serio v. Town of Islip*, 87 A.D.3d 533 (2d Dept. 2011), citing *Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 13 (2008), quoting *Matter of Grainger [Shea Enters.]*, 309 N.Y. 605, 616 (1956). Under New York’s transactional approach to *res judicata*, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based on different theories or seeking a different remedy. *Id.* at 533-534, quoting *O’Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981). Courts should apply a pragmatic test to determine whether particular claims are part of the same transaction for *res judicata* purposes. This involves analyzing (a) whether the facts are related in time, space, origin or motivation, (b) whether they form a convenient trial unit, and (c) whether their treatment as a unit conforms to

the parties' expectations or business understanding or usage. *Maybaum v. Maybaum*, 933 N.Y.S.2d 43, 47 (2d Dept. 2011), citing *Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 100-101 (2005), quoting Restatement [Second] of Judgments § 24[2].

#### B. Collateral Estoppel

Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. *Maybaum*, 933 N.Y.S.2d at 47, citing *Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999), quoting *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 (1984). The doctrine applies if the issue in the second action is identical to an issue that was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action. *Id.* at 48, quoting *Parker*, 93 N.Y.2d at 349.

#### C. Statute of Limitations

A cause of action based on constructive fraud is governed by a six-year statute of limitations, and such a cause of action arises at the time the fraudulent conveyance occurs. *Bobash, Inc. v. Festinger*, 57 A.D.3d 464, 467 (2d Dept. 2008).

#### D. Application of these Principles to the Instant Action

The Court denies Defendants' motions based on its conclusion that the Instant Action is not barred by the principles of *res judicata* or collateral estoppel. This conclusion is based on the Court's determination that the DCL claims alleged in the Instant Complaint 1) arise out of materially distinct legal theories; 2) depend on different legal obligations owed; and 3) require evidence and proof relating to differing factual circumstances and occurrences. Although the Related Action arose out of similar transactions involving certain transfers allegedly arranged by Allen, the claims advanced in the Related Action were principally based on the breach of the Subordination Agreement. The claims in the Instant Action, in which additional party defendants have been named, rest on distinct statutory criteria relating to, *inter alia*, the financial status of the corporate debtor/transferor at the time the transfers were made. Both insolvency and inadequacy of consideration are prerequisites to a finding of constructive fraud, and the burden of proving both insolvency and the lack of fair consideration is upon the party challenging the conveyance. *Joslin v. Lopez*, 309 A.D.2d 837, 838 (2d Dept. 2003), citing, *inter alia*, *Marine Midland Bank v. Murkoff*, 120 A.D.2d 122 (2d Dept. 1986), *app. disp.*, 69 N.Y.2d

875 (1987). Superior's insolvency was not an element of the causes of the action in the Related Action, but is fundamental to the Instant Action. *See Studley, Inc. v. Lefrak*, 66 A.D.2d 208 (2d Dept. 1979), *aff'd*, 48 N.Y.2d 954 (1979) (litigation to enforce judgment against corporate assets not barred by prior litigation establishing debts owing to petitioner from corporations).

With respect to Defendants' motion to dismiss on statute of limitations grounds, the Court notes that the Instant Complaint identifies certain transfers that allegedly took place in 2004, but does not reflect the specific date in 2004. The Court denies the branches of the motions which seek to dismiss stated portions of the first through third causes of action on statute of limitations grounds, but directs that any constructively fraudulent transfers made more than six years prior to July 9, 2010, the date of filing of the Summons in the Instant Action, are time-barred.

All matters not decided herein are hereby denied.

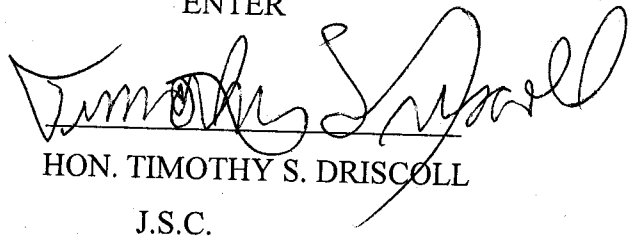
This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on February 8, 2012 at 9:30 a.m.

DATED: Mineola, NY

January 10, 2012

ENTER

  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**

JAN 13 2012

NASSAU COUNTY  
COUNTY CLERK'S OFFICE