

<b>Propper v AIM Holdings, Inc.</b>
2014 NY Slip Op 31552(U)
June 17, 2014
Sup Ct, NY County
Docket Number: 654241/2012
Judge: Anil C. Singh
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 61

-----X  
 RICHARD PROPPER, MICHAEL WALAS, and  
 CHARDAN CAPITAL II, LLC,

Plaintiffs,

-against-

Index No.: 654241/2012

AIM HOLDINGS, INC., AIM EDUCATION, INC., AIM  
 LEARNING GROUP, INC., CRITERION PICTURES  
 USA INC., CRITERION PICTURES, VISUAL EDUCATION  
 CENTER LTD., LEARN 360 INTERNATIONAL, INC.,  
 INTERNATIONAL TELEFILM, HAWK OPPORTUNITY  
 FUND L.P., R. SCOTT WILLIAMS, and HAROLD ENGEL,

Defendants.  
 -----X

**SINGH, J.:**

Defendant Harold Engel (Engel) moves, pursuant to CPLR 3211 (a) (1), (4), and (7), to dismiss the seventh, eighth, ninth, and tenth causes of action of plaintiffs Richard Propper (Propper), Michael Walas (Walas), and Chardan Capital, II, LLC's (Chardan) amended complaint. Plaintiffs cross-move, pursuant to CPLR 3211 (c), to convert Engel's motion to dismiss into a motion for summary judgment, and to grant summary judgment in favor of plaintiffs for the seventh, eighth, ninth, and tenth causes of action.

**FACTUAL ALLEGATIONS**

Defendant AIM Holdings, Inc. (Holdings), is a Delaware corporation which has an office located at 1000 Woodbury Road in Woodbury, New York. In 2009, defendant Engel, who served as a former executive and chairman of Holdings, loaned \$1,175,000 to Holdings. In 2010, defendant Hawk Opportunity Fund, L.P. (Hawk), loaned Holdings \$1,130,000.

Plaintiffs also provided Holdings with several loans in 2010. On March 9, 2010, Propper

loaned Holdings \$100,000, payable upon demand, at a six percent interest rate per annum. The loan was evidenced by a promissory note, and a wire transfer with the money to be sent to AIM Education, Inc. (Education), a subsidiary of Holdings. On April 13, 2010, Propper loaned Holdings another \$100,000, payable upon demand, at a six percent interest rate per annum. On April 29, 2010, Propper loaned Education and Holdings \$50,000, payable upon demand, at a six percent interest rate per annum. On June 1, 2010, Chardan loaned Holdings \$100,000, payable upon demand at a six percent interest rate per annum, which Chardan made by a wire transfer to Education.

Plaintiffs maintain that Holdings was to repay their loans before December 31, 2010, however as of that date, the loans remained unpaid. Defendants allege that Holdings was experiencing cash flow problems and held a board meeting to discuss potential solutions to avoid bankruptcy. In November of 2010, Engel commenced two separate actions against Holdings, both in the Supreme Court, Nassau County (*Engel v. AIM Holdings, Inc.*, Index No. 20569/10 and *Engel v Fisher*, No. 20568/10). In those actions, Engel alleges that he was owed money for his loans to Holdings, that he was unlawfully removed from control of Holdings by James Christopher Sanborn (Sanborn), president of Holdings, and that Sanborn had breached a fiduciary duty. Engel alleges that Sanborn was attempting to gain control of Holdings in order to force a sale of the company to entities in which his father-in-law, Propper, had an interest.

On January 11, 2012, Propper received a letter from Sanborn in which Holdings acknowledged that the repayment of plaintiffs' loans were past due. Sanborn requested that plaintiffs forebear on the enforcement of the loans until June 30, 2012. Propper maintains that, based upon the assurances by Holdings and its Board, plaintiffs continued to attempt to have the

loans repaid without commencing a lawsuit. Propper states that Alan Cohen, a member of the Board of Holdings, assured him that plaintiffs' loans would be repaid prior to the loans made by Hawk or R. Scott Williams's (Williams), a partner in control of Hawk.

In November of 2012, Propper alleges that he had discussions with Williams in which Williams explained that when Holdings' assets were sold, Engel and Hawk would be repaid money, and that there would be no money left to pay the plaintiffs. Plaintiffs allege that in January or February of 2013, Holdings repaid a substantial amount of money to Hawk for its loans, and repaid at least \$700,000 of Engel's loan. Propper maintains that plaintiffs decided to commence litigation when it became apparent that Holdings and Williams had no intention of repaying plaintiffs' loans upon the sale of Holdings' assets.

Plaintiffs maintain that they have made numerous written demands seeking repayment of the loans to Holdings, however Holdings has failed to repay the loans. Walas submits an affidavit in which he states that repayment of the loans to Williams and Engel was made when Williams and Engel knew that Holdings would have no assets remaining to repay the plaintiffs.

On December 5, 2012, plaintiffs served on defendants a verified complaint alleging causes of action for unjust enrichment, breach of contract, and violations of New York Debtor and Creditor Law §§ 273, 274, 275, and 276. Engel now moves, pursuant to CPLR 3211 (a) (1), (4), and (7), to dismiss the seventh, eighth, ninth, and tenth causes of action of the verified amended complaint.<sup>1</sup> Engel maintains that the payments which he received from Holdings were

---

<sup>1</sup> In the notice of motion, defendant Engel indicates that he is moving, pursuant to CPLR 3211 (a) (1) (4). Although Engel commenced two separate actions against Holdings in the Supreme Court, Nassau County, Engel fails to elaborate as to why he is moving pursuant to CPLR 3211 (a) (1) (4), since there is no indication that those cases involve the same parties and same causes of action as this matter.

not a result of fraud and that the causes of action made pursuant to DCL §§ 273, 274, 275, and 276, must be dismissed.

### DISCUSSION

The Court of Appeals has held that a motion to dismiss "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002) (citations and internal quotations omitted). "[T]he pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994) (citations omitted). Pursuant to CPLR 3211 (a) (1), a motion to dismiss should be granted when the documentary evidence establishes a defense to the asserted claims. *See Foster v Kovner*, 44 AD3d 23, 28 (1st Dept 2007) (holding that in a motion made pursuant to CPLR 3211 (a) (1), "documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law").

When asserting a claim for constructive fraud, the plaintiff must demonstrate that the transfer;

"was made without fair consideration and (1) the debtor was insolvent or was rendered insolvent by the transfer, NYDCL § 273, (2) the debtor was left with unreasonably small capital, id., § 274, or (3) the debtor intended or believed that it would incur debts beyond its ability to pay when the debts matured. Id., § 275."

*In re Vargas Realty Enters., Inc.*, 440 BR 224, 240 (SD NY 2010) (citations omitted). Liability which is based on DCL §§ 273, 274, or 275, does not require actual motive or an intention to defraud. *See Zanani v Meisels*, 78 AD3d 823, 824 (2d Dept 2010); *Wall Street Assocs. v*

*Brodsky*, 257 AD2d 526, 529 (1st Dept 1999).

Specifically, DCL § 273 provides that "[e]very conveyance made and every obligation incurred 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 or the obligation is incurred without a fair consideration." DCL § 274 further discusses conveyances which are fraudulent. It states:

"[e]very conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent."

DCL § 275 provides that "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors."

"A determination of insolvency and what constitutes fair consideration are generally questions of fact." *Epstein v Nieves*, 258 AD2d 436, 436 (2d Dept 1999). A transaction will be deemed to lack fair consideration if it was not made in good faith. *See American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 (2d Dept 2006) (holding that the defendant's preferential repayment of debt to its president did not demonstrate good faith, and thus, did not constitute fair consideration). Furthermore, the Appellate Division, First Department, has held that "[t]ransfers to a controlling shareholder, officer, or director of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent." *Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 (1st Dept 2006); *see also*

*Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 378 (1st Dept 2008) (holding that defendant gave a security interest to its shareholders, as opposed to outsiders and “[s]uch a conveyance cannot be found, as a matter of law, to have been made for fair consideration.”).

Engel argues that the causes of action alleging that he committed constructive fraud must be dismissed because his relationship with Holdings was strained at the time in which his loan was partially repaid. Engel contends that the money which he was owed from Holdings was a secured debt, that he could not be considered to be an insider of the company because he was not involved in the later operations of Holdings, and that he was engaged in litigation with Holdings for two years prior to the repayment of the secured debt.

Here, plaintiffs sufficiently assert claims under DCL §§ 273, 274, and 275. The affidavits of Sanborn, Walas, and Propper, raise questions of fact and credibility which cannot be determined by this motion. Plaintiffs allege that Engel was a member of the board of directors of Holdings, that Engel consented to the sale of all of Holdings’ assets which left Holdings with nothing to repay plaintiffs, that he could be considered to be an insider of the company as he was a board member, and that he lacked good faith at the time of the repayment.

The affidavit of Walas states that Engel and Williams were members of Holdings’ board of directors and authorized the payment of the loans. Walas states that “[t]he repayment of the Williams Loan and the Engel Loan were done at a time when Williams, Holdings, and Engel each knew that Holdings would have no assets remaining to repay Plaintiffs.” (Walas Affidavit, ¶ 27). Propper’s affidavit also states that Engel was a member of Holdings’ board of directors, that he authorized the repayment of the loan to himself, and that the repayment of the loan was completed when Engel was aware that Holdings would have no assets remaining to repay

plaintiffs.

Engel fails to submit his own affidavit refuting plaintiffs allegations or the allegations which were made in the affidavits of Sanborn, Walas and Propper. Therefore, as plaintiffs sufficiently raise causes of action under DCL §§ 273, 274, and 275, and because factual disputes are raised by the affidavits which plaintiffs submit, Engel's motion to dismiss the seventh, eighth, and ninth causes of action, must be denied.

With regards to plaintiffs' tenth cause of action for actual fraud, DCL § 276 states that "[e]very conveyance made . . . with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." "The existence of actual intent to defraud is never presumed, and intent to defraud cannot be found based merely on suspicion, conjecture, or doubtful interference." *Lippe v Bairnco Corp.*, 249 F Supp 2d 357, 375 (SD NY 2003) affd. 99 Fed Appx (2nd Cir. 2004) (citations and internal quotations omitted). "Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on "badges of fraud" to support his case . . . ." *Wall Street Assocs.*, 257 AD2d at 529. Factors which are considered to be "badges of fraud" include:

"a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance."

*Id.*

Here, from the record, it is disputed whether Engel could be considered to be an insider and what the status of his relationship was with Holdings at the time of his repayment.

Furthermore, as discussed above, and based upon the affidavits which plaintiffs submit, it remains unclear whether Engel, if an insider, acted in good faith, or whether there was an intention to hinder, delay or defraud the plaintiffs. Therefore, as factual questions exist regarding Engel's alleged intent to defraud, Engel's motion to dismiss the tenth cause of action must be denied.

Finally, although plaintiffs cross-move, pursuant to CPLR 3211 (c), to convert this motion to dismiss into a motion for summary judgment, the court denies the cross motion without prejudice. The motion for summary judgment is premature. Engel contends that several issues of fact require discovery, including determining when Holdings became insolvent, whether Propper was an insider, whether plaintiffs' loans were legitimate, and whether Propper, Sanborn, or other alleged "insiders" received fraudulent conveyances. Therefore, once the answer of Engel is served, discovery must continue.

#### **CONCLUSION and ORDER**

Accordingly, it is

ORDERED that defendant Harold Engel's motion to dismiss the seventh, eighth, ninth, and tenth causes of action, is denied; and it is further

ORDERED that plaintiffs Richard Propper, Michael Walas, and Chardan Capital II, LLC's motion pursuant to CPLR 3211 (c), to convert the motion to dismiss into a motion for summary judgment is denied; and it is further

ORDERED that defendant Harold Engel is directed to serve an answer to the complaint within 20 days of service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for all parties are directed to appear for a compliance conference

17  
on September 17, 2014, at 9:30 a.m. in room 320, 80 Centre Street, New York, New York.

Dated: 6/17/14

ENTER:



J.S.C.  
**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**