

**Miller v Cohen**

2015 NY Slip Op 31041(U)

June 17, 2015

Supreme Court, New York County

Docket Number: 111380/2009

Judge: Robert D. Kalish

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - PART 29**

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**Harvey S. Shipley Miller,  
as Trustee of the Trust known as  
Judith Rothschild Foundation**

**Plaintiff**

**DECISION AND ORDER**

**-against-**

**INDEX NO.: 111380/2009**

**Todd Cohen, Terrence Lowenberg,  
the Icon Group, LLC, Martin Cohen,  
CJR Associates LP, Marc Lowenberg,  
Lowenberg Family Limited Partnership,  
Lowenberg II Family Limited Partnership,  
Lowenberg III Family Limited Partnership,  
Icon Development and Construction LLC,  
Icon Realty Management LLC and T  
&T Realty Management LLC**

**Defendant**

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Upon the foregoing papers, the Plaintiff's motion for partial summary judgment on its first and second causes of action, and the Defendants' cross-motion for summary judgment are both hereby granted in part and denied in part to the extent as follows:

Procedural History

The Court has before it the Plaintiff's motion for summary judgment and the Defendants' cross-motion for summary judgment. The underlying action originally appeared before the Honorable Justice Tingling before being transferred to this Court. The parties appeared for oral argument on the motion on May 12, 2015 before the Court.

### Background and Underlying Dispute

In the underlying action, the Plaintiff alleges in sum and substance that on or about June 4, 2009, he obtained a prior judgment against the Defendant Icon Group LLC in the amount of \$2,004,814.93. Said judgment was based upon a contract that the Icon Group LLC breached in June of 2007. The Plaintiff further alleges that the Icon Group LLC was used as an instrumentality of the individual Defendants, and that during the pendency of the Plaintiff's prior action, the individual Defendants caused the Icon Group LLC to distribute its assets in an effort to make it judgment proof. The Plaintiff asserts that to date, no payment has been made on the prior judgment.

The Plaintiff's first and second causes of action stem from allegations that from June 2007 to the date of the prior judgment, the Icon Group LLC conveyed money and other capital to its two principals, the individual Defendants Todd Cohen and Terrence Lowenberg. Specifically, the Plaintiff alleges that the Icon Group LLC conveyed to Mr. Cohen and Mr. Lowenberg each a sum of no less than \$850,000.00 without fair consideration (Plaintiff's first cause of action and second cause of action respectively). Due to said conveyances, the Icon Group LLC was rendered insolvent and unable to satisfy its obligations to the Plaintiff. Therefore, said conveyances were fraudulent pursuant to the Creditor and Debtors Law.

The Plaintiff's third cause of action alleges in sum and substance that the Icon Group LLC was merely the corporate alter-ego for the individual Defendants, CJR Associates LP and the Lowenberg Family Limited Partnerships. As such, the individual Defendants, CJR Associates LP and the Lowenberg Family Limited Partnerships are liable for the debts of the Icon Group LLC including the prior judgment rendered against the Icon Group LLC for \$2,004,814.93.

The Plaintiff's fourth cause of action alleges in sum and substance that, in order to avoid paying the prior judgment, the Icon Group LLC transferred its business and operations to Icon Development and Construction LLC, Icon Realty Management LLC and/or T&T Realty Management LLC. Plaintiff claims that each of these entities is a corporate alter-ego of, successor in interest to and/or the mere continuation of the Icon Group LLC and therefore liable to the Plaintiff for the prior judgment of \$2,004,814.93.

The Plaintiff's fifth cause of action alleges in sum and substance that during the pendency of the prior action between the Plaintiff and the Icon Group LLC, the Icon Group LLC conveyed money and other financial assets to the Defendants Martin Lowenberg and the Lowenberg Family Limited Partnerships in an amount believed to be \$1.5 million. Said transactions were not made for consideration and rendered the Icon Group LLC unable to satisfy its obligations to the Plaintiff. Plaintiff alleges that said transfers were made for the purpose of putting the monies and capital in question beyond the reach of the Icon Group LLC's creditors, including the Plaintiff.

### Plaintiff's instant motion for summary judgment

In the instant motion, the Plaintiff moves for partial summary judgement on his first and second causes of action against the Defendants Todd Cohen and Terrence Lowenberg (respectively) each in the amount of \$606,832.88. The Defendant's motion for summary judgment points to three specific types of conveyances that the Icon Group LLC made to Mr. Cohen and Mr. Lowenberg, which the Plaintiff's argues were fraudulent pursuant to Debtor and Creditor Law §§ 273 and 273-a.

The Plaintiff argues that documents produced by the Defendants during discovery show that from June 15, 2007 to April 30, 2009, the Icon Group LLC paid Mr. Cohen and Mr. Lowenberg \$49,832.88 each as a "salary". The Plaintiff attaches with the moving papers an affidavit by Bart Raffaele, a CPA engaged by the Plaintiff, who argues that since Mr. Cohen and Mr. Lowenberg were the owners of the Icon Group LLC, said "salary" is deemed by the I.R.S. and New York State to be disbursements of capital. The Plaintiff further argues that the Icon Group LLC's "salary" payments to Mr. Cohen and Mr. Lowenberg totaling \$99,665.76 constituted withdrawals of capital from the Icon Group LLC, and that said disbursements of capital were not made for fair consideration.

The Plaintiff further argues that Mr. Cohen and Mr. Lowenberg each took monthly disbursements of \$9,500.00 from the Icon Group LLC from July of 2007 though the end of 2007, in the total amount of \$114,000.00. The Plaintiff attaches with the moving papers a ledger for the Icon Group LLC for said period entitled "Personal Expenses" that denotes said disbursements.

The Plaintiff further argues that in July of 2007, an entity called Christopher West Associates deposited \$1,000,000.00 into the Icon Group LLC's checking account. Mr. Cohen and Mr. Lowenberg both testified at their depositions that said monies were their personal property (\$500,000.00 each), the proceeds from a sale of property in which they shared an interest with Christopher West Realty. The Plaintiff argues that the \$1,000,000.00 was thereafter used to provide the funds underlying a check from the Icon Group LLC to an escrow agent (Ma and Associates) for the purchase of certain real property by the Icon Group LLC. The escrow agreement provided that the funds would be repaid to the Icon Group LLC in the event that the parties failed to reach terms for the sale of the property prior to September 17, 2007. The Plaintiff indicates that the property sale did not go through and that by check dated September 10, 2007, the escrow agent repaid the Icon Group LLC the sum of \$1,001,286.05. Immediately after said repayment, the Icon Group LLC wrote checks for \$500,000.00 each to Mr. Cohen and Mr. Lowenberg.

The Plaintiff argues that when the \$1,000,000.00 was deposited in the Icon Group LLC's bank account, it then became the Icon Group LLC's capital. Further, when the Icon Group LLC repaid this sum to Mr. Cohen and Mr. Lowenberg, said repayment constituted a return of capital. The Plaintiff acknowledges the Defendants' argument that the Icon Group LLC was acting as the nominee for some unknown entity when it paid the sum to the escrow agent and was later repaid said sum by the escrow agent. However, the Plaintiff argues that there is no documentary evidence supporting the Defendants' argument on this point and that no such nominee is identified in the documents that the escrow agent forwarded to the Plaintiff. The Plaintiff further argues that the escrow agreement was made between the owner of the property and the Icon Group LLC, which establishes that the Icon Group LLC was the contemplated purchaser, not some third party.

The Plaintiff argues in sum and substance that the the Icon Group LLC was insolvent throughout the period that it was making the "salary" payments, monthly disbursements and \$1,000,000.00 disbursement to Mr. Cohen and Mr. Lowenberg, and that these all constituted fraudulent conveyances under Debtor and Creditor Law §§ 273 and 273-a. As such, the Plaintiff is entitled to partial summary judgment against the Defendants Todd Cohen and Terrence Lowenberg each in the amount of \$606,832.88, representing the sum of said fraudulent conveyances.

Finally, the Plaintiff argues in the memorandum of law that all of the conveyances from the Icon Group LLC to Mr. Cohen and Mr. Lowenberg that are at issue in the instant motion are subject to increased scrutiny and cannot satisfy the good faith requirement for fair consideration as defined under Debtor and Creditor Law §272. Specifically, the Plaintiff argues that Mr. Cohen and Mr. Lowenberg are the principles of the Icon Group LLC and therefore any transfers between the Icon Group LLC to Mr. Cohen and Mr. Lowenberg lack good faith and are presumptively fraudulent.

#### Defendants' Opposition to the Motion for Summary Judgment

In opposition to the Plaintiff's motion for summary judgment and in support of their cross-motion for summary judgment, the Defendants addresses each of the Icon Group LLC's three specific types of conveyances to Mr. Cohen and Mr. Lowenberg.

The Defendants argue in sum and substance that the "salary" payments to Mr. Cohen and Mr. Lowenberg totaling \$99,665.76 and the monthly disbursements totaling \$114,000.00 were all made for fair consideration, and therefore did not constitute fraudulent conveyances pursuant to Debtor and Creditor Law §273. The Defendants argue that Mr. Cohen and Mr. Lowenberg worked every day for the Icon Group LLC, generating income in the form of management and development fees, and that they were paid the minimum salary allowable. The Defendants further argue that salaries are presumed to be made for fair consideration, and that the Plaintiff has failed to establish that the salaries paid to Mr. Cohen and Mr. Lowenberg were excessive or in bad faith. Further, the Defendant's argue that the Plaintiff's expert, Mr. Raffaele, is incorrect in determining that any and all payments made by the Icon

Group LLC to Mr. Cohen and Mr. Lowenberg constituted disbursements under the I.R.S. tax regulations. The Defendants attach an affidavit by their own expert, Mr. Stuart M. Schabes that directly disputes Mr. Raffaele's conclusions as to the nature of Mr. Cohen and Mr. Lowenberg's salaries with the Icon Group LLC. Similarly, the Defendants argue that the Icon Group LLC's monthly disbursements to Mr. Cohen and Mr. Lowenberg, minus health insurance premiums, were made for fair consideration as part of Mr. Cohen and Mr. Lowenberg's compensation structures.

The Defendants argue that the Icon Group LLC's \$1,000,000.00 disbursement to the Defendants did not constitute a fraudulent transfer since the \$1,000,000.00 was never the Icon Group LLC's property. The Defendants argue that Christopher West Realty LLC wired the \$1,000,000.00 to the Icon Group LLC on July 26, 2007, and neither Mr. Cohen and Mr. Lowenberg nor the Icon Group LLC treated the \$1,000,000.00 as a capital contribution. Defendants argue that said money was recorded as being paid-by/owed-to a third party and thereby represented a liability and not an asset of the Icon Group LLC. The Defendants state that Mr. Cohen and Mr. Lowenberg owned the \$1,000,000.00 funds that were transferred to the Icon Group LLC, not the Icon Group LLC. The Defendants argue that the Icon Group LLC served as a conduit for Mr. Cohen and Mr. Lowenberg to place their funds when the opportunity arose to purchase a property located at 412 West 14<sup>th</sup> Street. The Defendants argue that Mr. Cohen and Mr. Lowenberg directed their funds to be wired to the Icon Group LLC in order to facilitate the signing of a contract and down payment for 412 West 14<sup>th</sup> Street. When said sale negotiations deteriorated, the \$1,000,000.00 was transferred from the Icon Group LLC back to Mr. Cohen and Mr. Lowenberg. The Defendants argue in sum and substance that the \$1,000,000.00 merely "passed through" the Icon Group LLC's accounts and did not constitute a beneficial transfer.

Finally, the Defendants argue that even assuming that the Court finds that the \$1,000,000.00 did belong to the Icon Group LLC, said funds were conveyed to Mr. Cohen and Mr. Lowenberg for fair consideration. The Defendants argue that the Icon Group LLC's transfer of \$1,000,000.00 to Mr. Cohen and Mr. Lowenberg was part of a substantially contemporaneous exchange of value. The Icon Group LLC was paying back the exact same amount of money to Mr. Cohen and Mr. Lowenberg, that the Icon Group LLC gratuitously received when Christopher West Realty LLC wired Mr. Cohen and Mr. Lowenberg's \$1,000,000.00 to the Icon Group LLC's accounts. As such, the Defendants argue that the Icon Group LLC's receipt of the \$1,000,000.00 belonging to Mr. Cohen and Mr. Lowenberg and subsequent transfer of said funds back to Mr. Cohen and Mr. Lowenberg in no way resulted in any loss on the part of the Icon Group LLC.

### Plaintiff's Reply

Plaintiff submitted reply papers, wherein he reiterates the arguments presented in his moving papers. The Plaintiff emphasizes that once Mr. Cohen and Mr. Lowenberg provided the \$1,000,000.00 to the Icon Group LLC, said funds became the property of the Icon Group LLC. When the Icon Group LLC distributed said funds to Mr. Cohen and Mr. Lowenberg, said disbursement became subject to the Debtor and Creditor Law.

The Plaintiff further argues that Mr. Cohen and Mr. Lowenberg worked to procure investment opportunities for other entities and not the Icon Group LLC. Specifically, the Plaintiff argues that whatever investment opportunities Mr. Cohen and Mr. Lowenberg sought were for entities other than the Icon Group LLC, and therefore the "salary" payments that they received from the Icon Group LLC for said "work" was not paid for fair consideration.

The Plaintiff further argues that the Defendants have presented no basis to support their argument that the Icon Group LLC's monthly disbursements to Mr. Cohen and Mr. Lowenberg were part of a compensation structure. Specifically, the Plaintiffs argue that the Icon Group LLC's records differentiates between Mr. Cohen and Mr. Lowenberg's bi-weekly salary payments and the monthly \$9,500.00 disbursements. The Plaintiff argues that said disbursements were clearly a return of capital from the Icon Group LLC to Mr. Cohen and Mr. Lowenberg.

### Defendant's Reply

The Defendants also submitted reply papers in which they reiterate their argument that the \$1,000,000.00 was never an asset of the Icon Group LLC despite that fact that it was held by the Icon Group LLC prior to being transferred to Mr. Cohen and Mr. Lowenberg. At oral argument on the instant motion and cross-motion, Defendants' counsel argued that due to the speed of the potential property sale, the Defendants did not take the steps necessary to create a separate LLC wherein to deposit the \$1,000,000.00 and conduct the sale negotiations on their behalf. However, the Defendants never intended for the \$1,000,000.00 to become the property of the Icon Group LLC upon depositing said sum in the the Icon Group LLC's accounts.

The Defendants further argue that the Plaintiff has failed to refute the presumption that the Icon Group LLC's salary payments to Mr. Cohen and Mr. Lowenberg were made for fair consideration. The Defendants argue in sum and substance that although the Icon Group LLC did not directly engage in the investment opportunities that Mr. Cohen and Mr. Lowenberg procured for other entities, said investments were arranged and commenced through the Icon Group LLC, which generated fees on behalf of the Icon Group LLC. The Defendants argue that the Icon Group LLC did not generate a substantial amount of income as it neither invested in real estate nor regularly performed development or management tasks for new businesses of the Icon entities". The Defendants further argue that the Plaintiff has failed to submit any evidence to establish that the Icon Group LLC's salary payments to Mr. Cohen and Mr.

Lowenberg were either excessive or that the Icon Group LLC did not receive full value in return. The Defendant further reiterates that the Icon Group LLC's monthly disbursements to Mr. Cohen and Mr. Lowenberg were part of their compensation structure for work that they performed for the Icon Group LLC.

#### Defendants' cross-motion for summary judgment

The Defendants further cross-move for summary judgment dismissing the Plaintiff's claims as to the three specific types of transactions that are the subject of the Plaintiff's motion for summary judgment. The Defendants argue that there are no issues of fact as to the Defendants' arguments in opposition to the Plaintiff's motion for summary judgment, and therefore the Defendants are entitled to summary judgment based upon said arguments. The Defendants further cross-move for summary judgment dismissing the Plaintiff's claims as alleged in the Plaintiff's motion for summary judgment under Debtor and Creditor Law §273-a. Specifically, the Defendants argue that the Icon Group LLC was not a Defendant in any pending action with the Plaintiff's when the Icon Group LLC made the conveyed \$1,000,000.00 to Mr. Cohen and Mr. Lowenberg. Further, all but two of the salary payments for 2007 were made prior to the litigation, and at least \$95,000.00 of the total alleged \$114,000.00 of the monthly disbursements predate the litigation. Therefore, said conveyances are not fraudulent conveyances pursuant to Debtor and Creditor Law §273-a.

#### Analysis

##### Summary Judgment Standard

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (NY 1993)). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (NY 1985)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY1980)).

“Summary judgment is a drastic remedy, to be granted only where the moving party has ‘tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact’ and then only if, upon the moving party’s meeting of this burden, the non-moving party fails ‘to establish the existence of material issues of fact which require a trial of the action’” (Vega v Restani Constr. Corp., 18 N.Y.3d 499, 503 (NY 2012) citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (NY 1986)). “Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial.” (Ostrov v. Rozbruch, 91 A.D.3d 147, 152 (NY App Div 1st Dept 2012) citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (NY 1985); Alvarez v Prospect Hosp., 68 NY2d 320 (NY 1986)). The proponent of a motion for summary judgment must establish that “there is no defense to the cause of action or that the cause of action or defense has no merit,” (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See Bush v. St. Clare’s Hospital, 82 NY2d 738, 739 (NY 1993)). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (NY 2008)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, “by evidentiary proof in admissible form” (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY1980)).

In deciding a motion for summary judgment, the Court’s function is to identify material triable issues of fact, not to make credibility determinations or findings of fact. Issue-finding, rather than issue-determination is the key to the procedure (See Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 505 (NY 2012); Farias v. Simon, 122 A.D.3d 466 (NY App Div 1st Dept 2014)). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (See Negri v. Stop & Shop, Inc., 65 N.Y.2d 625 (NY 1985)). If there is any doubt as to the existence of a triable issue, then the motion for summary judgment should be denied (See Grossman v. Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002) citing Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223 (NY 1978); Stone v. Goodson, 8 N.Y.2d 8 (NY1960)).

“On the other hand, to defeat a motion for summary judgment the opposing party must ‘show facts sufficient to require a trial of any issue of fact’. Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate. We [The Court of Appeals of New York] have

repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY 1980) citing CPLR §3212(b); Phillips v. Joseph Kantor & Co., 31 NY2d 307 (NY 1972); Indig v. Finkelstein, 23 NY2d 728 (NY 1968); Alvord v Swift & Muller Constr. Co., 46 NY2d 276 (NY 1978); Fried v Bower & Gardner, 46 NY2d 765 (NY 1978); Platzman v American Totalisator Co., 45 NY2d 910 (NY 1978); Mallad Constr. Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285 (NY 1973)).

The Plaintiff’s claims pursuant to Debtor and Creditor Law §273-a fail as matter of law as to any claims relating to transactions that occurred prior to the initiation of the prior action under index number 603855/2007.

Debtor and Creditor Law §273-a of the Debtor and Creditor law reads as follows:

§ 273-a. Conveyances by defendants

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.

To prevail on a fraudulent conveyance claim pursuant to Debtor and Creditor Law § 273-a, “the movant must establish three elements: (1) that the conveyance was made without fair consideration; (2) that at the time of transfer, the transferor was a defendant in an action for money damages or a judgment in such action had been docketed against him; and (3) that a final judgment has been rendered against the transferor that remains unsatisfied.” (Fischer v. Sadov Realty Corp., 34 A.D.3d 632, 633 (NY App. Div 2d Dept 2006).

At oral argument on the instant motion and cross-motion, Plaintiff’s counsel conceded that the Plaintiff did not commence the prior action until November of 2007, and that the Plaintiff did not obtain a judgment against the Icon Group LLC until June 2009. Further, there is no dispute that the \$1,000,000.00 was placed in the Icon Group LLC’s accounts in July of 2007 and transferred to Mr. Cohen and Mr. Lowenberg in September of 2007, before to the commencement of prior litigation.<sup>1</sup> Therefore, the Plaintiff’s motion for summary judgment pursuant to Debtor and Creditor Law § 273-a only applies to the “salary” and monthly disbursements that took place after the prior action was commenced in November of 2007.

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<sup>1</sup> Debtor and Creditor Law §273-a specifically requires that the fraudulent conveyance be made while the person making the transaction is a defendant in an action or after a judgment has been entered against him/her. As such, in the instant action, any fraudulent conveyances as defined by Debtor and Creditor Law §273-a could only occur from the date of the commencement of the action, November 21, 2007, or from the date of the entry of prior judgment in June of 2009. This excludes payments and/or distributions that occurred between the date that the Icon Group LLC breached its contract with the Plaintiff in June of 2007 and the date of the commencement of the prior action, November 21, 2007.

The Plaintiff commenced the prior litigation under index number 603855/2007 by filing a summons and complaint with the Court on November 21, 2007. As such, Plaintiff's motion for summary judgment pursuant to Debtor and Creditor Law § 273-a is denied as to the "salary" payments and monthly disbursements that occurred prior to November 21, 2007. Similarly, the Plaintiff's motion for summary judgment pursuant to Debtor and Creditor Law § 273-a is also denied as to the \$1,000,000.00 "transfer" between the Icon Group LLC and Mr. Cohen and Mr. Lowenberg, which took place prior to November 21, 2007.

The Court will now address the Plaintiff's arguments for summary judgment pursuant to Debtor and Creditor Law § 273 and Debtor and Creditor Law § 273-a as to the "salary" payments and monthly disbursements that occurred after the commencement of the prior action on November 21, 2007.<sup>2</sup>

Debtor and Creditor Law §§ 272 and 273 read as follows:

§ 272. Fair consideration

Fair consideration is given for property, or obligation.

- 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 property, 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.

§ 273. Conveyances by insolvent

Every 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.

The party claiming that conveyance is fraudulent under DCL § 273 has the burden of proving insolvency and lack of fair consideration. Insolvency is presumed if fair consideration is lacking; in such case, the burden shifts to the transferee or transferor to prove the legitimacy of the conveyance (Matter of Northwest 5th & 45th Realty Corp. v. Mitchell, Maxwell & Jackson, Inc., 2013 NY Slip Op 31734U (NY Sup Ct New York County, 2013) citing United States v. Hansel, 999 F. Supp. 694 (NDNY 1998); First Keystone Consultants, Inc. v. Schlesinger Elec. Contrs., 871 F. Supp. 2d 103 (E.D.N.Y. 2012); United States v. Alfano, 34 F. Supp. 2d 827 (E.D.N.Y. 1999)). For a transfer to be fraudulent under DCL § 273, it must have been made without fair consideration, and must have been made by a transferor who was insolvent or rendered insolvent by the transfer (See Peckar & Abramson, P.C. v Lyford Holdings, Ltd., 2011 NY Slip Op 33008(U) (NY Sup Ct NY County 2011). "[B]oth insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under [Debtor and Creditor Law §273], and the burden of proving these elements is upon the party

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<sup>2</sup> For the remainder of this decision, any reference to the Plaintiff's claims under Debtor and Creditor Law § 273-a in the instant motion for summary judgment will only refer to the Plaintiff's claim under Debtor and Creditor Law § 273-a for those "salaries" and monthly disbursements that occurred between the Icon Group LLC and Mr. Cohen and Mr. Lowenberg following the commencement of the prior action on November 21, 2007.

challenging the conveyance'. Actual motive or intent to defraud on the part of the transferor need not be shown. A person is deemed insolvent when 'the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured', and 'fair consideration requires that the exchange not only be for equivalent value, but also that the conveyance be made in good faith'" (Murin v. Estate of Schwalen, 31 A.D.3d 1031, 1032 (N.Y. App. Div. 3d Dep't 2006); see also Ede v. Ede, 193 A.D.2d 940 (NY App Div 3d Dept 1993); Debtor and Creditor Law § 272). "The determination of insolvency and what constitutes fair consideration are generally questions of fact" (Epstein v. Nieves, 258 A.D.2d 436 (NY App Div 2d Dept 1999); Glasser v. Kashinsky, 237 A.D.2d 252 (NY App Div 2d Dept 1997)).

The parties do not dispute that the Icon Group LLC was insolvent at the time of and/or rendered insolvent due in part to the conveyances at issue in the instant motion. The heart of the Plaintiff's motion for summary judgment pursuant to Debtor and Creditor Law §§ 273 and 273-a is that the salaries, disbursements and \$1,000,000 conveyances from the Icon Group LLC to the Defendants Mr. Cohen and Mr. Lowenberg were fraudulent due to lack of fair consideration.

The Plaintiff has failed to meet his prima facie burden to show that the "salary" payments made by the Icon Group LLC to Mr. Cohen and Mr. Lowenberg are not properly categorized as "salary". There is also an issue of fact as to whether or not said "salary" payments were made for fair consideration.

Upon review of the submitted papers, the Court finds that the Plaintiff has failed to meet his burden to show that the Icon Group LLC's "salary" payments to Mr. Cohen and Mr. Lowenberg were deemed by the I.R.S. and New York State Law to be disbursements and not salary. Mr. Raffaele states in his affidavit in sum and substance that pursuant to Internal Revenue Code §731(a), all payments from a limited liability company such as the Icon Group LLC to its owners are considered disbursements and not salaries. However Internal Revenue Code §707(c) specifically addresses "salaries" paid by a partnership to a partner. "To the extent determined without regard to the income of the partnership, payments to a partner for services or the use of capital shall be considered as made to one who is not a member of the partnership..." (26 USCS § 707). Similarly 26 CFR 1.707-1 specifically indicates that "[p]ayments made by a partnership to a partner for services or for the use of capital are considered as made to a person who is not a partner, to the extent such payments are determined without regard to the income of the partnership".

Upon examination of the Plaintiff's motion for summary judgment, this Court finds that the Plaintiff has failed to meet its prima facie burden to establish that the "salaries" that the Icon Group LLC paid to Mr. Cohen and Mr. Lowenberg were disbursements pursuant to Internal Revenue Code §731(a) and not guaranteed payments for services pursuant to Internal Revenue Code §707(c). Specifically, the Plaintiff has submitted insufficient basis for its argument that all payments from a limited liability company such as the Icon Group LLC to its owners are disbursements and not salaries.

Assuming arguendo that this Court were to treat the Defendants' "salary" payments as such, this Court would still find that there are issues of fact as to whether or not Mr. Cohen and Mr. Lowenberg's "salaries" were for "fair consideration". In analyzing fair consideration under the Debtor Creditor Law, the Court measures what was given and what was received in the transaction at issue (See Pryor v. Tiffen (In re TC Liquidations LLC), 463 B.R. 257, 268 (Bankr. E.D.N.Y. 2011). Further, salary payments are a normal business function from which it would be improper to grant summary judgment due to the mere payment, to infer malicious intent without detailed analysis (See Holme v Global Minerals & Metals Corp., 2012 NY Slip Op 33529U (NY Sup. Ct. NY County 2012) citing Cilco Cement Corp. v. White, 55 A.D.2d 668 (NY App. Div. 2d Dept 1976).

In the instant motion, the Plaintiffs have failed to submit evidence sufficient to establish that Mr. Lowenberg and/or Mr. Cohen's salaries were overly excessive for the services performed or that said salaries were not paid for fair consideration. Although the Defendants do not dispute that they worked to procure investment opportunities for other entities not the Icon Group LLC, said investments were arranged and commenced though the Icon Group LLC, which generated fees on behalf of the Icon Group LLC. The Plaintiff argues that Mr. Cohen and Mr. Lowenberg both worked every day for the Icon Group LLC finding and entering transactions, which in turn generated management and development fees as income for the Icon Group LLC. The Plaintiff does not argue that the Icon Group LLC did not generate any income from said fees nor does the Plaintiff present sufficient proof to establish that the Mr. Cohen and Mr. Lowenberg salaries were excessive or not paid for fair consideration given the Icon Group LLC's income from management and development fees.

Accordingly, the Court finds that there are issues of fact as to whether or not the Icon Group LLC's "salary" payments to Mr. Cohen and Mr. Lowenberg were excessive and/or made without fair consideration.

The Plaintiff's motion for summary judgment is granted and the Defendants' cross-motion is denied as to the Icon Group LLC's monthly disbursements to Mr. Cohen and Mr. Lowenberg pursuant to Debtor and Creditor Law §273.

Upon review of the submitted papers, the Court finds that the Plaintiffs are entitled to summary judgment as to the monthly disbursements that the Icon Group LLC made to Mr. Cohen and Mr. Lowenberg from July 2007 through the end of 2007. The Plaintiff's submitted papers are sufficient to meet their prima facie burden to establish that the Icon Group LLC treated these monthly disbursements to Mr. Cohen and Mr. Lowenberg as separate from Mr. Cohen and Mr. Lowenberg's bi-weekly salaries, and that said monthly disbursements were not made for fair consideration. As such, taken together with the Icon Group LLC's insolvency, the Plaintiffs have established prima facie that the Icon Group LLC's monthly disbursements to Mr. Cohen and Mr. Lowenberg were fraudulent pursuant to Debtor and Creditor Law §273.

Further, although the Defendants argue that said monthly disbursements were part of Mr. Cohen and Mr. Lowenberg's compensation plan, they have submitted no evidence to create an issue of fact on this point. The Defendants do refer to portions of Mr. Cohen and Mr. Lowenberg's deposition testimonies, however upon review of said portions of the EBTs, the Court finds that neither Mr. Lowenberg nor Mr. Cohen testified that the monthly disbursements were part of their compensation plan.

The Defendants' argument in opposition to the Plaintiff's motion for summary judgment as to the monthly disbursements hinges upon the idea that the monthly disbursements were part of Mr. Cohen and Mr. Lowenberg's compensation plan, and that the work Mr. Lowenberg nor Mr. Cohen performed for the Icon Group LLC. As the Defendants have failed to establish that the monthly disbursements were part of a compensation plan sufficient to create an issue of fact, there is no basis for this Court to conclude that said monthly disbursements were made for fair consideration.

As such, the Plaintiff's motion for summary judgment is granted and the Defendants' cross-motion for summary judgment is denied as to the monthly disbursements that the Icon Group LLC made to Mr. Cohen and Mr. Lowenberg from July 2007 through the end of 2007, in the total sum of \$114,000.00.

There are issues of fact as to whether or not the Icon Group LLC's \$1,000,000.00 disbursement to Mr. Cohen and Mr. Lowenberg was a fraudulent conveyance as defined by Debtor and Creditor Law §273.

“A creditor may resort only to such property as belongs to the debtor and may not reach property rightfully belonging to others though held by the debtor” (Edrington v. Richman, 260 A.D. 46, 47 (NY App Div 1<sup>st</sup> Dept 1940) see also Matter of Northwest 5th & 45th Realty Corp. v. Mitchell, Maxwell & Jackson, Inc., 2013 NY Slip Op 31734U (NY Sup Ct NY County 2013)). “[T]ransfers that are allegedly fraudulent may not be recovered where the transferor had no interest in the check that passed through its hands” Matter of Northwest 5th & 45th Realty Corp. v. Mitchell, Maxwell & Jackson, Inc., 2013 NY Slip Op 31734U (NY Sup Ct NY County 2013) citing A.W. Lawrence & Co. v. Burstein (In re A.W. Lawrence & Co.), 346 B.R. 51 (Bankr. N.D.N.Y. 2006))

The major dispute between the parties as to \$1,000,000.00 disbursement centers upon whether or not said capital was the Icon Group LLC's property since it was deposited within the Icon Group LLC's accounts before being disbursed to Mr. Cohen and Mr. Lowenberg. Upon review of the parties' submitted papers, this Court finds that there is an issue of fact as to whether the \$1,000,000.00 was the Icon Group LLC's property prior to being disbursed to Mr. Cohen and Mr. Lowenberg or if the Icon Group LLC was merely acting as a conduit with no dominion or control over the \$1,000,000.00. Although there is no dispute that said money was deposited in the Icon Group LLC's accounts, the Defendant's submitted papers are sufficient to create an issue of fact as to whether or not the Icon Group LLC was merely holding the \$1,000,000.00 as a nominee on behalf of Mr. Cohen and Mr. Lowenberg. The Court notes the lack of documentary evidence supporting the Defendants' argument that the Icon Group LLC was acting as a nominee as to said transactions, and the Defendants' submitted papers are insufficient to establish as a matter of law that the Icon Group LLC was merely acting as a conduit for the \$1,000,000.00. However, the Defendants' papers are still sufficient to create an issue of fact to warrant denying summary judgement. The Parties' submitted evidence on this point shall be weighed by the trier of fact.

The Defendants' cross-motion for Summary Judgment is granted only as to dismissing the Plaintiff's claims under Debtor and Creditor Law §273-a as to the "salary" payments, monthly disbursements and the \$1,000,000.00 disbursement that occurred before November 21, 2007.

For the reasons previously stated in the instant decision, the Plaintiff does not have a claim against the Defendants pursuant to Debtor and Creditor Law §273-a as to the "salary" payments, monthly disbursements and the \$1,000,000.00 disbursement that occurred prior to November 21, 2007.

As such, the Defendants' cross-motion for summary judgment is granted to the extent that the Plaintiff's claims pursuant to Debtor and Creditor Law §273-a are hereby dismissed as to any of the "salary" payments and the \$1,000,000.00 that all occurred prior to November 21, 2007.<sup>3</sup>

There are issues of fact as to whether the "salary" payments and the \$1,000,000.00 disbursement were fraudulent conveyances as defined by Debtor and Creditor Law §273.

Upon review of the Defendants' submitted papers, the Court finds that the Defendants have failed to establish that they are entitled to summary judgment dismissing the Plaintiff's claims under Debtor and Creditor Law §273 as to the "salary" payments and the \$1,000,000.00 disbursement. For the reasons previously stated in the instant decision, there are issues of fact as to whether the "salary" payments and the \$1,000,000.00 disbursement were fraudulent conveyances as defined by Debtor and Creditor Law §273. There are also issues of fact as to the Plaintiff's claims for the "salary" payments that occurred after November 2007 pursuant to Debtor and Creditor Law §273-a.

As such, the Defendants' cross-motion for summary judgment is granted only to the extent that the Plaintiff's claims pursuant to Debtor and Creditor Law §273-a are hereby dismissed as to any of the "salary" payments, monthly conveyances and the \$1,000,000.00 that all occurred prior to November 21, 2007.

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<sup>3</sup> As the Court has granted the Plaintiff's motion for summary judgment as to the monthly distributions for the entire period from July 2007 to the end of 2007 pursuant to Debtor and Creditor Law §273, the Defendants' motion for summary judgment dismissing the Plaintiff's claims as to said monthly disbursements pursuant to Debtor and Creditor Law §273-a is rendered moot. Similarly, the Defendants' motion for summary judgment dismissing the Plaintiff's claims as to the monthly disbursements pursuant to Debtor and Creditor Law §273 is also denied as the Court has granted the Plaintiff summary judgment on this point.

Conclusion

Accordingly and for the reasons so stated:

- Plaintiff's motion for partial summary judgment on its first and second causes of action is hereby granted solely as to the monthly disbursements that the Icon Group LLC made to the Defendants Todd Cohen and Terrence Lowenberg from July 2007 through the end of 2007, including interest.
- The Defendants' cross-motion for summary judgment is granted solely to the extent that the Plaintiff's claims pursuant to Debtor and Creditor Law §273-a are hereby dismissed as to any of the "salary" payments, monthly disbursements and the \$1,000,000.00 disbursement that all occurred prior to November 21, 2007.

The Plaintiff is hereby directed to settle an order with the Court, upon notice to the Defendants. Said proposed order shall include a calculation of the Icon Group LLC's monthly disbursements to Todd Cohen and Terrence Lowenberg for the period from July 2007 through the end of 2007, and accrued interest.

The Court notes that the instant decision has no bearing upon any other claims that the Plaintiff has made against the Defendant in the underlying action that were not specifically addressed in the instant decision.

The foregoing constitutes the Judgment and Decision of the Court.

**Dated: June 17, 2015**

  
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**HON. ROBERT D. KALISH**  
J.S.C.