

<b>Setters v AI Props. &amp; Devs. (USA) Corp.</b>
2015 NY Slip Op 31446(U)
August 3, 2015
Supreme Court New York County
Docket Number: 151372/14
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**

**PRESENT:** DEBRA A. JAMES  
*Justice*

**PART 59**

WILLIAM SETTERS and KATHLEEN SETTERS,  
Petitioners,

Index No.: 151372/14

Motion Date: \_\_\_\_\_

- v -

Motion Seq. No.: 01

AI PROPERTIES AND DEVELOPMENTS (USA) CORP.,  
and BOYMELGREEN FAMILY LLC,  
Respondents.

Motion Cal. No.: \_\_\_\_\_

The following papers, numbered 1 to 7 were read on this petition.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits - Exhibits \_\_\_\_\_

PAPERS NUMBERED

1

2 - 6

7

**Cross-Motion:**       Yes       No

Upon the foregoing papers,

Petitioner William Setters is a judgment creditor of W Squared LLC (W Squared) pursuant to a judgment filed in this County on November 17, 2011. Petitioner brings this proceeding pursuant to CPLR 5225 (b) & 5227 seeking to set aside asset transfers allegedly made by judgment debtor W Squared to the respondents to the extent necessary to satisfy the aforesaid judgment.

W Squared Managers, LLC (Managers) was the sole member of judgment debtor W Squared. In turn, respondents were the sole

**Check One:**       **FINAL DISPOSITION**       **NON-FINAL DISPOSITION**

**Check if appropriate:**       **DO NOT POST**       **REFERENCE**

**SETTLE/SUBMIT ORDER/JUDG.**

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

two members of Managers with co-respondent AI Properties and Developments (USA) Corp. ("AI") initially owning a 65% stake in Managers which in 2007 was increased to 80% with co-respondent Boymelgreen Family LLC (Boymelgreen) owning the remaining interest in Managers.

AI has appeared and opposes the relief sought by petitioner. Petitioner has filed proof of service of the petition and supporting papers upon Boymelgreen. Boymelgreen did not timely serve papers responsive to the petition by e-filing and therefore the court did not consider its attempted submissions on this application and must treat Boymelgreen as having not opposed the relief sought in this proceeding.

Petitioner commenced the personal injury action underlying the judgment (Setters v Carl Marks Realty Partners L.P., et al, Index No. 104163/2005, Sup Ct, NY County) on or about March 25, 2005. Petitioner William Setters obtained a default judgment in that action against the defendants including W Squared jointly and severally in the amount of approximately \$1.25 million.

Petitioner asserts that W Squared has failed to satisfy the judgment after due demand and that W Squared now has insufficient assets to satisfy the judgment due to transfers which were made to the respondents in violation of the Debtor and Creditor Law (DCL). AI argues that it has no interest in the funds of and is not indebted to W Squared and that there is no proof that any

transfers from W Squared to AI were for less than fair consideration.

CPLR 5225 (b) provides in relevant part

Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession.

DCL §273-a provides

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.

The court finds that the petitioner has established that transfers made by judgment debtor W Squared to the respondents meet the definition of fraudulent conveyances under DCL §273-a and that therefore petitioner is entitled to a judgment under CPLR 5225 (b) up to the amount of the unsatisfied judgment .

The table "W Squared, LLC Capital Account Transactions By Year . . . (2002-2012)" attached as an exhibit to the Affidavit

in Opposition by respondent AI's auditor demonstrates that there were numerous transactions that took place after the March 25, 2005, initiation of petitioner's suit which caused distributions to be made from the funds of the judgment debtor to the respondents in amounts far exceeding petitioner's judgment. As an example, one entry dated "Q4 2011" sets forth that five million dollars was transferred from the judgment debtor to the respondents as a "Reversal of litigation accrual." The judgment upon which petitioner seeks to execute was filed on November 17, 2011. Furthermore, a November 22, 2007 agreement between the respondents lists petitioner's action as one of the claims pending against W Squared thus evidencing the respondents' awareness at that time that petitioner could have a claim against the judgment debtor's assets.

AI counters that petitioner cannot establish a fraudulent conveyance under the DCL because of a failure to plead and establish that any transfers from W Squared to the respondents were made without fair consideration or in bad faith. However, the Court has stated on similar facts that

It is undisputed that [judgment debtor] was a defendant in an action brought by [plaintiff] in the Supreme Court, New York County, for money damages based upon breach of contract when the subject transfer to the shareholders was made. Judgment was entered against [judgment debtor] in that action in 1980. The amount of the judgment was later increased on appeal. Inasmuch as [judgment debtor] failed to satisfy the judgment in favor of [plaintiff] prior to the entry of judgment in the instant turnover proceeding, the transfer to the shareholders comes within

the purview of section 273-a of the Debtor and Creditor Law and must be invalidated. It has been held that where a fraudulent conveyance has been established, each transferee who was not a bona fide purchaser for fair consideration (see Debtor and Creditor Law, §278, subd 1) is liable to the creditor to the extent of the value of the money or property he or she wrongfully received. The shareholders cannot be considered bona fide purchasers for fair consideration who are immune from liability as transferees of fraudulently conveyed property, as the record reveals that they were aware that they were receiving money from [judgment debtor] when the claims of the general creditors had not been completely paid and, in fact, they consented to such a distribution of the corporate funds. Therefore, each shareholder has some liability to the trade creditors. There is insufficient evidence, however, to support a conclusion that the shareholders engaged in a conspiracy and actually intended to defraud the trade creditors. Thus, they may not be held jointly and severally liable. Rather, the liability of each [judgment debtor] shareholder must be limited to the amount he wrongfully received.

Farm Stores, Inc. v School Feeding Corp., 102 AD2d 249, 255-56 (2d Dept 1984), affd in part, appeal dismissed in part, 64 NY2d 1065 (1985) (internal citations omitted).

Therefore, the transfers from W Squared to the respondents after the initiation of petitioner's suit constitute fraudulent transfers to the extent W Squared remains unable to pay the judgment. Even if respondents were to attempt to characterize the transfers from W Squared as the repayment of loans respondents made to W Squared, the transactions would still be constructively fraudulent as to petitioner under the DCL as illustrated by the Court's holding in P.A. Bldg. Co. v Silverman (298 AD2d 327, 327-28 [1<sup>st</sup> Dept 2002]) where it was stated

We reject appellant's claim that, as a participant in a constructive, as opposed to an actual, fraudulent conveyance, he retains a right of pro rata distribution for repayment of antecedent debts. We further find that petitioner's status as a creditor with a turnover order from the Supreme Court gives it priority over appellant, since appellant did not obtain the property for fair consideration (CPLR 5202 [b]; 5225 [b]). Even were appellant able to establish that the funds he transferred from a corporation of which he was the chairman and 80% shareholder were equivalent to the value of the loans he had previously advanced to it, those transfers would still be invalid, inasmuch as preferential transfers to directors, officers and shareholders of insolvent corporations in derogation of the rights of general creditors do not fulfill the requirement of good faith.

Id.

As the evidence submitted on this petition demonstrates that each of the respondents as members of the parent of W Squared LLC received distributions during the pendency of petitioner's action, the respondents are liable to the petitioner under DCL §273-a and §278 (1) (b) and the court shall issue an order directing the payment of funds sufficient to satisfy petitioner's judgment pursuant to CPLR 5225. Because the evidence of the amount of fraudulent transfers to each of the respondents individually considerably exceeds the respondents' liability to petitioner on the judgment debt, the court shall enter an order against the respondents jointly and severally as the rule is the liability of the respondents is limited to the amount wrongfully received. See Farm Stores, Inc., supra, 102 AD2d at 256.

To the extent that there are costs to be assessed in this proceeding CPLR 5225 (b) only allows such costs to be assessed

against AI as "[c]osts of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession" and Boymelgreen by its deemed non-opposition is not a disputing party.

The court shall however deny petitioner's application for attorney's fees. DCL §276 provides "[e]very conveyance made and every obligation incurred 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." DCL §276-a continues in pertinent part

In an action or special proceeding brought by a creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors to set aside a conveyance by a debtor, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, in which action or special proceeding the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall recover judgment, the justice or surrogate presiding at the trial shall fix the reasonable attorney's fees of the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors in such action or special proceeding, and the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment.

The court agrees with AI that petitioner has failed to demonstrate any "actual intent" to defraud by the respondents and therefore there is no statutory entitlement to attorney's fees. The Court has held that the "trial court was also correct in holding that [creditor's] attorney was not entitled to fees under

section 276-a of the Debtor and Creditor Law in view of the absence of satisfactory proof of actual intent to defraud creditors. The attorney's fees provision of section 276-a is inapplicable where the subject conveyance is invalid under the constructive fraud provisions of the Debtor and Creditor Law as opposed to the actual fraud provisions thereof." Farm Stores, Inc., supra, 102 AD2d at 256-57 (citations omitted).

Accordingly, it is

ORDERED that pursuant to CPLR 5225 (b) respondents AI PROPERTIES AND DEVELOPMENTS (USA) CORP. and BOYMELGREEN FAMILY LLC, jointly and severally, are directed to pay to petitioner WILLIAM SETTERS the sum of \$1,251,347.00 plus post-judgment interest as calculated by the Clerk from the date of November 17, 2011 through the date of entry of this Order in the amount of \$ \_\_\_\_\_, for a total amount due of \$ \_\_\_\_\_ ; and it is further

ORDERED that upon submission of an appropriate bill of costs in this proceeding to the Clerk, respondent AI PROPERTIES AND DEVELOPMENTS (USA) CORP. is directed, pursuant to CPLR 5225 (b), to pay to petitioner WILLIAM SETTERS the amount of \$ \_\_\_\_\_ in costs as taxed by the Clerk.

This is the decision and order of the court.

Dated: August 3, 2015

ENTER:

*Debra A. James*  
**DEBRA A. JAMES** J.S.C.  
**J.S.C.**