SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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AMALGAMATED BANK,

Index No.: 650776/2012

Petitioner,

DECISION & ORDER

-against-

SCHNEIDER & SCHNEIDER, INC. and LYNN SCHNEIDER,

Respondents.

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SHIRLEY WERNER KORNREICH, J.:

Respondents move by order to show cause for clarification of the court's order dated January 29, 2016, which, *inter alia*, granted partial summary judgement on liability to Amalgamated on its DCL claims. *See* Dkt. 151 (the Decision). Familiarity with the Decision is presumed, and all defined terms used herein have the same meaning as in the Decision.

Respondents seek clarification regarding the specific DCL causes of action on which the court granted summary judgment. As discussed in the Decision, Amalgamated asserted claims under DCL § 273 for constructive fraudulent conveyance and DCL § 276 for intentional fraudulent conveyance. While the substantive relief under both sections is the same (the value of the Assets), a successful § 276 claim also would entitle Amalgamated to recover its ***reasonable*** attorneys' fees ***in this action***, not the fees incurred in the Underlying Action, under § 276-a. *See Apparel Corp. (Far E.) v Sheermax LLC*, 126 AD3d 413, 414 (1st Dept 2015).[1] The parties'

[1] It should be noted that some federal courts appear to disagree with the proposition, proffered by Amalgamated, that it is necessarily the case that "[a] plaintiff that successfully establishes actual intent to defraud is entitled to a reasonable attorney's fee under [§ 276-a]". Compare Dkt. 160 at 3 .n.3, citing *5706 Fifth Ave., LLC v Louzieh*, 108 AD3d 589, 590 (2d Dept 2013), with *In re Janitorial Close-Out City Corp.*, 2013 WL 492375, at *7 (Bankr EDNY 2013) ("[I]t is not axiomatic that liability under DCL § 276 gives rise to a right to recover attorney's fees. On the

dispute over whether the court granted summary judgment on Amalgamated's § 276 claim has impeded the parties' settlement negotiations.

Amalgamated opposes the motion, contending the court has no power to clarify the Decision. However, it is well settled that, prior to a ruling on appeal, this court has the inherent power to vacate and modify its own orders. *See Goldman v Cotter*, 10 AD3d 289, 293 (1st Dept 2004), quoting *Ladd v Stevenson* 112 NY 325, 332 (1889); *see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 225-26 (2013). That said, while the court modifies the Decision to the extent set forth below, the only clarification warranted is in Amalgamated's favor.

As previously discussed:

> § 276 governs claims for intentional fraudulent conveyance. It provides that "[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." "To properly plead a claim under § 276, 'the claimant must allege that (1) the thing transferred has value of which the creditor could have realized a portion of its claim; (2) that this thing was transferred or disposed of by the debtor; and (3) that the transfer was done with actual intent to defraud.'" *Chambers v Weinstein*, 44 Misc3d 1224(A), at *7 (Sup Ct, NY County 2014) (Sherwood, J.), quoting *In re Monahan Ford Corp. of Flushing*, 340 BR 1, 37 (Bankr EDNY 2006); *see RTN Networks, LLC v Telco Group, Inc.*, 126 AD3d 477, 478 (1st Dept 2015) (plaintiff must plead with particularity that defendants had "intent to hinder, delay or defraud present or future creditors"). "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, i.e., circumstances so commonly associated with fraudulent transfers 'that their presence gives rise to an inference of intent.'" *Wall St. Assocs. v Brodsky*, 257 AD2d 526, 529 (1st Dept 1999) (citations omitted); *see also Ray v Ray*, 108 AD3d 449, 451 (1st Dept 2013); *CIT Group*, 25 AD3d at 303.

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contrary, while recovery of a fraudulent transfer under DCL § 276 only requires a showing of the transferor's fraudulent intent, **recovery of attorney's fees under DCL § 276-a requires the plaintiff to prove the fraudulent intent of both the transferor, i.e., the Debtor, and the transferee.**") (collecting cases; emphasis added). Here, however, the transferor (Helmsley) and the transferee (respondents) were controlled by the same person – Ms. Schneider.

Decision at 11-12.

"The badges of fraud include circumstances such as '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.'" *Square Mile Structured Debt (ONE) LLC v Swig*, 2013 WL 6409967, at *3 (Sup Ct, NY County 2013) (Friedman, J.), quoting *Wall St. Assocs.*, *supra*, 257 AD2d at 529. Amalgamated established, and respondents never substantively disputed,[2] the existence of almost all of the badges of fraud. A "close relationship" exists because the transferees – respondents – not only were insiders in Helmsley, they had exclusive control over the company. It is unsurprising, therefore, that no one objected to their taking of the Assets without consideration given Swig's indifference. The transfer of the Assets, moreover, clearly was not made "in the usual course of business." Presumably, the "desks and chairs" were simply taken from whatever offices they were located in. Nor do respondents contend that Helmsley was paid for the transferred management contracts. Likewise, since it is undisputed that Helmsley received no consideration for the Assets, the "inadequacy of the consideration" factor weighs in Amalgamated's favor. And while "retention of control of the property by the transferor after the conveyance" is not present, that is unremarkable because the sale to Swig resulted in Helmsley being left with no assets at all.

Finally, while the first prong of the "the transferor's knowledge of the creditor's claim and the inability to pay it" factor is not present, that is of relative unimportance in this case.

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[2] *See* Note 3, *infra*.

Unlike DCL § 273, "§ 276 is applicable to both present and future creditors." *Bd. of Managers of Chocolate Factory Condo. v Chocolate Partners, LLC*, 43 Misc3d 1223(A), at *16 (Sup Ct, Kings County 2014) (Demarest, J.), citing *Planned Consumer Marketing, Inc. v Coats & Clark, Inc.*, 71 NY2d 442, 450 (1988); *see* DCL § 270 ("'Creditor' is a person having any claim, whether *matured or unmatured*, liquidated or unliquidated, absolute, fixed or contingent") (emphasis added). Thus, it is of no moment that respondents could not have had actual knowledge of Helmsley's debt to Amalgamated at the time they took the Assets – the sale to Swig occurred in 2007, the Underlying Action was commenced in 2009, and judgment was entered in 2011 – because a claim under § 276 does not require the judgment creditor to prove the transferee's fraudulent intent with respect to the specific debt at issue. Otherwise, § 276 could not apply to unknown future creditors. *See In re Allou Distributors, Inc.*, 446 BR 32, 61 (Bankr EDNY 2011) ("[i]t is well accepted that intent to hinder or delay *creditors* is sufficient, and intent to defraud need not be proven.") (citations omitted; emphasis added). Liability under § 276 turns on whether "the debtor's solvency is [] affected thereby, that is, if the conveyance [depletes] or otherwise diminish[es] the value of the assets of the debtor's estate remaining available to creditors." *See id.* at 62. Thus, it is the transfer's effect on creditors generally, not any specific creditor, that matters.

Here, since Amalgamated established a *prima facie* case of fraudulent intent with the discussed badges of fraud, summary judgment could only be denied if respondents raised a material question of fact. *See Square Mile*, 2013 WL 6409967, at *4 ("After a prima facie showing is made that a debtor transferred property with fraudulent intent, the burden shifts to the transferee to establish its receipt of the property for fair consideration and in good faith or

without knowledge of the fraud"); *see also Cadle Co. v Newhouse*, 2002 WL 1888716, at *7 (SDNY 2002) ("Although the issue of fraudulent intent usually cannot be resolved on a motion for summary judgment, in this case, the facts are essentially undisputed and the 'badges of fraud' discussed in D.C.L. § 276 cases are clear and indisputable.") (citation omitted), *aff'd* 74 FApp'x 152 (2d Cir 2003). Respondents did not do so on the original motion, nor do they do so now.[3] And, even though the Assets are worth far less than the judgment, they appear to have been valued at approximately $300,000.[4] *See* Decision at 5. Simply put, the Assets were taken by

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[3] For instance, in their brief in opposition to Amalgamated's summary judgment motion, respondents stated in conclusory fashion that discovery was necessary to establish intent. *See* Dkt. 128 at 10-11. While that is ordinarily true, it is respondents, not Amalgamated, that possess all of the evidence of their own intent regarding the Assets. Under CPLR 3212(f), denial of summary judgment as premature on the ground that further discovery is needed is appropriate only where the party seeking summary judgment has exclusive possession of material evidence not disclosed to the non-moving party. *See Pastor v DeGaetano*, 128 AD3d 218, 227 (1st Dept 2015); *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986) (if movant makes *prima facie* showing, burden shifts to opposing party to **produce evidence** sufficient to establish existence of material issues of fact) (emphasis added). Moreover, this is a summary proceeding, where, pursuant to CPLR 409, the court is supposed to make summary determinations unless a material question of fact is raised. Respondents' only non-conclusory arguments regarding intent related to the HS Illinois Funds (which the court held were not fraudulently transferred). *See* Decision at 13-15. Respondents, however, failed to raise any question of fact regarding the Assets. If respondents had a legitimate explanation for why the Assets were taken, such an explanation (along with any supporting evidence) should have been proffered.

[4] Their actual value, of course, will be determined through discovery. That said, at oral argument on the instant motion, Amalgamated's counsel suggested that it may also have a claim to other of Helmsley's assets acquired by Swig pursuant to the Purchase Agreement. As discussed at oral argument on the previous motions and in the Decision, the transaction with Swig was "principally a stock sale whereby HSI purchased all of Helmsley's stock from S&S" [*see* Decision at 5] and that Amalgamated's claims regarding Helmsley's assets were limited to those taken by respondents. The reason Amalgamated has no claim to the assets of Helmsley acquired by Swig is that an acquisition of all of a company's stock effectively results in the purchaser acquiring the company's assets. Ergo, those assets could not have been fraudulently transferred to respondents and are therefore irrelevant to this action and not subject to discovery. Indeed, Amalgamated made clear in its briefs that its DCL claims only seek to challenge the assets transferred from Helmsley to respondents, and not the transfers between respondents and Swig.

respondents from Helmsley without consideration and could have been used to partially satisfy the judgment or any other debts Helmsley may have had.

For these reasons, Amalgamated is entitled to summary judgment on its § 276 claim regarding the Assets and, therefore, it is entitled to reasonable attorneys' fees for this action under § 276-a. The court should have so specified in the Decision.[5] Accordingly, it is

ORDERED that subpart (2) in the first "ordering language" paragraph in the court's order dated January 29, 2016 (*see* Dkt. 151 at 16) is hereby vacated and the following language is substituted in its place: "summary judgment on liability is granted to Amalgamated on its causes of action under DCL §§ 273 and 276 with respect to the Assets, and § 276-a with respect to reasonable counsel fees for this action."

Dated: February 25, 2016

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C

See, e.g., Dkt. 110 at 8-9.

[5] Further discussion regarding § 273 is not warranted because, as noted, § 273 does not afford any relief to Amalgamated that is not already available on its § 276 claim.