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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of Natalia Shvachko, Petitioner, Regarding a Prenuptial Agreement, dated October 25, 2000, against Robert Kotick, as Executor of the Estate of

CHARLES M. KOTICK,

Deceased,

and Robert Kotick, as Trustee of the Morgan Gruber Trust, Robert Kotick, as Trustee of the Jordan Gruber Trust, Robert Kotick, as Trustee of the William Gruber Trust, Robert Kotick, Individually, Judith Poller, as Trustee of the Kotick Family Trust, and Deborah Gruber, Respondents.

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DECISION AND ORDER

File No.: 2005-1202/F

M E L L A, S.:

Papers Considered	Numbered
Notice of Petitioner's Motion, dated October 15, 2014, to Amend Petition, with Affidavit, dated October 15, 2014, of Lawrence M. Rosenstock, Esq., attaching Exhibits A and B	1, 2
Petitioner's Memorandum of Law, dated October 15, 2014, in Support of Motion to Amend	3
Notice of Respondents' Motion, dated October 31, 2014, to Dismiss and in Opposition to Motion to Amend, with Affirmation of Lisa Buckley, Esq., attaching Exhibits 1 through 7	4, 5
Respondents' Memorandum of Law, dated October 31, 2014, in Support of Motion to Dismiss and in Opposition to Motion to Amend	6
Petitioner's Memorandum of Law, dated November 19, 2014, in Opposition to Motion to Dismiss and In Further Support of Motion to Amend	7
Affidavit, dated November 19, 2014, of Lawrence M. Rosenstock, Esq., in Opposition to Motion to Dismiss and in Further Support of Motion to Amend, attaching Exhibits A and B	8
Respondents' Reply Memorandum of Law, dated December 8, 2014, in Further Support of Motion to Dismiss	9
Petitioner's Supplemental Memorandum of Law, dated January 6, 2015	10
Respondents' Supplemental Memorandum of Law, dated January 6, 2015, with Affirmation, dated January 6, 2015, of Lisa M. Buckley, Esq., attaching Exhibits 1 and 2	11, 12

This is one of many proceedings in this court involving Natalia Shvachko ("Natalia" or "petitioner") and the estate of her deceased spouse, Charles Kotick. Decedent's son from a prior

marriage, Robert Kotick ("Bobby"), serves as executor under decedent's will and was formerly trustee of a trust established by decedent for Natalia's benefit. In this proceeding, Natalia claims: that decedent breached their October 25, 2000 prenuptial agreement, that Bobby interfered with her rights under that agreement, and that certain gifts made by decedent during his life were fraudulent because they were made to hinder decedent's ability to comply with his obligations under the agreement.

At the heart of this petition is Natalia's allegation that ten days before his death from cancer on March 21, 2005, decedent borrowed $1,077,000 from Bobby as evidenced by a promissory note payable to Bobby and that, pursuant to a letter of direction signed on the same date as the note, decedent gifted the borrowed funds in the following amounts: $211,000 to his daughter, Deborah Gruber; $233,000 to the Kotick Family Trust, benefiting Bobby's children; and $211,000 to each of the Morgan Gruber Trust, the Jordan Gruber Trust and the William Gruber Trust benefiting Gruber's children respectively. Bobby serves as trustee for the trusts benefiting Gruber's children and is sued here in that fiduciary capacity as well as in the capacity as decedent's executor and individually. Judith Poller is a respondent in this proceeding in her capacity as trustee of the Kotick Family Trust. The making of the note and the transfer of the funds by Bobby to these donees under the letter of direction will be referred to here as the "Note/Gift Transaction."

Fundamentally, Natalia claims that the Note/Gift Transaction effectively stripped decedent's estate of his assets and that this constituted a breach of the prenuptial agreement. In relevant part, the agreement provides, under Article III, that, upon death of a party, the survivor "shall be entitled to one-half of the marital property acquired by the parties or either of them during their marriage," and that, upon his marriage to Natalia, decedent shall

> "Change his will so that it provides that in the event of his death prior to the occurrence of a Separation Event the parties' primary residence will be left to a trust for Natalia's use and benefit during her lifetime or, if Natalia becomes a United States citizen or the federal estate tax shall be eliminated in full and such elimination shall be applicable to non-citizen spouses, to Natalia outright."[1]

The petition asks the court to direct Bobby as executor to: a) transfer the marital apartment to a trust for the benefit of Natalia or to Natalia outright, if she is a U.S. citizen and b) provide a list of marital assets and deliver half of those assets to Natalia. The petition alternatively seeks damages from Bobby individually, alleging that he tortiously interfered with the prenuptial agreement in orchestrating the Note/Gift Transaction and that he is liable for aiding and abetting that transaction as a fraudulent conveyance. Again, in the alternative, she seeks to reverse and recoup from the recipient donees the gifts decedent made in the Note/Gift Transaction, alleging that these gifts constitute fraudulent conveyances under sections 275 and 276 of the Debtor and Creditor Law ("DCL").

Currently before the court are two motions, one by petitioner to amend her petition in this matter pursuant to CPLR 3025(b) to "restructure" certain causes of action and to "add one additional cause of action for tortious interference based upon different but related facts" (P's Mem of Law, dated Oct. 15, 2014, at 1). Instead of one claim for relief against Bobby for tortious interference with the prenuptial agreement, the proposed amendment purports to state two claims – the third and fourth. The only difference in factual allegations between the two is that in the fourth claim Natalia alleges that, as a result of the Note/Gift Transaction, which was part of Bobby's "ongoing course of conduct" to deprive her of her inheritance and her rights under the prenuptial

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[1]To preserve the estate tax marital deduction for Natalia, a non-citizen spouse, the assets were left to a qualified domestic trust or QDOT. She has since become a citizen and, under the agreement, can have this property outright, rather than in trust.

agreement, even if the Note/Gift Transaction was legitimate and not a sham, Bobby is liable for no less than $2.5 million. The proposed amended petition also divides the fraudulent conveyance claim into two, one pursuant to DCL 275 against the donees of decedent's gifts, *i.e.*, Bobby and Poller as trustees of each of the trusts and Gruber, and the other pursuant to DCL 276, against the same parties, alleging that the transfers were made with actual intent to defraud Natalia.

The other motion is by Bobby, individually, as executor and as trustee, and by Poller as trustee of the Kotick Family Trust, to dismiss the petition on the grounds that the allegations are conclusively negated by documentary evidence, namely decedent's will (*see* CPLR 3211[a][1]) and that Natalia has failed to state any claim for relief as to the fraudulent conveyance claims (*see* CPLR 3211[a][7]). Bobby and Poller further argue in their motion and in opposition to Natalia's motion that amendment of the petition should not be allowed since any amendment would be futile as the proposed amended petition's allegations are meritless. For the reasons discussed below, the motion to dismiss is denied in part and granted in part, and the motion to amend is granted.

DISCUSSION

Tortious Interference Claim Not Barred by Statute of Limitations

There is lack of merit to Bobby's argument that the tortious interference claims asserted against him are untimely. This argument appears to be premised on the incorrect belief that the tortious interference allegations were first made in this petition, which was filed in November of 2009. But the tortious interference claim was interposed as a counterclaim no later than Natalia's second amended answer, in a related but separate proceeding pursuant to SCPA 1805,[2] in which

[2]SCPA 1805 provides a mechanism for paying debts of a decedent owed to decedent's estate fiduciary. However, the prior proceeding was not ex parte pursuant to subsection (2) of SCPA 1805. Instead, the validity of Bobby's claim under the note was challenged, making that

Bobby sought approval of payment of the same promissory note at issue here, as a debt of the estate to himself. That second amended answer was filed in January of 2007,[3] well before March of 2008, when the three-year limitation period would have run for making such claim – as counted from March of 2005 when the Note/Gift Transaction was consummated (*see Andrew Greenberg, Inc. v Svane, Inc.*, 36 AD3d 1094 [3d Dept 2007][applying a three-year statute of limitations to tortious inteference with contract claims]). By decision of this court dated January 13, 2014, (*Matter of Kotick*, 51 Misc 2d 1231[A], 2014 NY Slip Op 51953[U] [Sur Ct, New York County 2014]) that counterclaim for tortious interference was severed from the SCPA 1805 proceeding and consolidated with this proceeding.[4]

To the extent that Bobby's argument rests on a theory that some of the factual allegations supporting the tortious interference claim appeared in Natalia's second amended answer in the SCPA 1805 proceeding under the heading "affirmative defense" rather than in the subsequent first

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proceeding akin to one under SCPA 1809.

[3]The allegations regarding Bobby's tortious interference with the prenuptial agreement appear in two sections of Natalia's answer in the SCPA 1805 proceeding. In the section entitled "Sixth Affirmative Defense," she alleges that Bobby "knew or should have known that the transaction [he was] creating would make it impossible for [decedent] to meet his obligations to his wife under their pre-nuptial and intended that it would have that result." This "maliciously interfered with the contract obligations between [decedent] and Natalia." The "Seventh Affirmative Defense" which is also denominated as a "Counter-claim" alleges that Bobby's "methodology was and is to create a substantial debt of the [decedent's] Estate, so great that the assets of the Estate, other than the Sutton Place apartment [decedent's and Natalia's marital residence] could not satisfy the debt" (Second Amended Answer of Natalia in the SCPA 1805 proceeding, at ¶ 70)

[4]Statute of limitations as a basis for dismissal of this claim is not included in respondents' notice of motion (*see* CPLR 2214[a]), but the parties address the statute of limitations as a ground for dismissal on its merits in their briefs.

"counterclaim" heading, he misunderstands the requirements for pleading (*see* CPLR 3014,[5] 3026). His argument is also against his own expressed understanding that such a tortious interference claim had been made against him, as substantiated by his submissions on his summary judgment motion in the SCPA 1805 proceeding. It was nonetheless clear in the allegations under the "counterclaim" heading in Natalia's SCPA 1805 pleading that she was claiming interference with the prenuptial agreement against Bobby.

Otherwise, as limited by Bobby's brief here, the only claimed difference between the counterclaim in the SCPA 1805 proceeding and the tortious interference allegations in this proceeding relates to the relief requested.[6] Yet, Bobby neglects to specify any prejudice flowing from the alleged difference in the relief demanded in each proceeding. Bobby's argument that no relief was demanded in the 1805 answer and that he thus could not have known that a tortious interference claim was being made against him is also meritless. The first "counterclaim" section of Natalia's answer in the SCPA 1805 proceeding concludes:

> Bobby's "methodology was and is to create a substantial debt of the Estate, so great that the assets of the Estate, other than the Sutton Place apartment, could not satisfy the debt. Natalia incurred special damages as a result of [Bobby's] malicious scheme. . ."

In any event, even if damages were not specified, this could still state a claim for tortious interference since the allegations otherwise support a claim for relief (*Planned Consumer Mktg. v*

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[5]Although Natalia was not technically required to restate all the prior allegations for the counterclaim as per the express terms of CPLR 3014, she nonetheless "repeat[ed] and reallege[d]" all prior allegations under the heading "counterclaim" in her second amended answer in the SCPA 1805 proceeding, resolving any doubt on the issue.

[6]In the SCPA 1805 proceeding, Natalia complained of being deprived of the Sutton Place (the marital, primary residence) apartment if the note were enforced and she appears to claim special damages of her having incurred legal fees of approximately a million dollars. In the current proceeding, she demands $2.5 million as damages for Bobby's tortious interference.

Coats & Clark, 127 AD2d 355, 369 [1st Dept 1987]; *see generally* CPLR 3017[a]).

Consequently, Bobby's motion to dismiss the tortious interference claims on the ground that they are barred by the statute of limitations is denied.

Motion to Amend and Motion to Dismiss Standards

Leave to amend a pleading "shall be freely given upon such terms as may be just" (CPLR 3025[b]) and should be granted in the absence of evidence of substantial prejudice or surprise (*JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643 [1st Dept 2013]). However, the denial of a motion to amend is appropriate where the proposed amended pleading is patently devoid of merit (*Miller v Cohen*, 93 AD3d 424 [1st Dept 2012]; *Waddell v Boyce Thompson Inst. for Plant Research, Inc.*, 92 AD3d 1172 [3d Dept 2012]).

Respondents argue that dismissal of certain claims is merited because documentary evidence, namely, decedent's will, conclusively refutes those claims. For the court to order dismissal of a claim on the ground that a defense is founded upon documentary evidence, pursuant to CPLR 3211(a)(1), "the documentary evidence submitted [must] . . . resolve 'all factual issues as a matter of law, and conclusively dispose[] of the [petitioner]'s claim'" (*United States Fire Ins. Co. v North Shore Risk Mgt.*, 114 AD3d 408, 410 [1st Dept 2014]; *Wallach v Hinckley*, 12 AD3d 893, 894 [3d Dept 2004]).

Respondents also argue that dismissal under CPLR 3211(a)(7) for failure to state a claim is appropriate because the allegations fail to state facts necessary to support the fraudulent conveyance claims. In particular, respondents assert that the petition fails to include allegations substantiating that Natalia is a creditor protected by the DCL and that she insufficiently pleads the requisite intent on the part of decedent to defraud her, under either DCL 275 or 276. Further, no claim of aiding

and abetting as against a non-transferee of the assets claimed to have been fraudulently conveyed, according to respondents, exists under New York law. Allowing Natalia to amend the petition, in their view, would be futile because the allegations in the proposed amended pleading suffer from the same deficiencies as those in the original one.

On a motion to dismiss for failure to state a claim, the court must construe the allegations in the petition liberally, accepting them as true and giving the petitioner the benefit of every favorable inference therefrom, and then determine whether the facts fit within any cognizable legal claim or theory of recovery (*see Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]; *Dinerman v Jewish Bd. of Family and Children's Servs., Inc.*, 55 AD3d 530, 531 [2d Dept 2008]).[7]

Analysis of Respondents' Argument That There Was No Breach

In requesting dismissal of Natalia's claims concerning breach of the prenuptial agreement, Bobby's main argument is that documentary evidence, *i.e.*, decedent's will, establishes that the agreement was fully complied with in that the will gave to Natalia the Sutton Place apartment in which she and decedent resided at the time of his death, "subject to any mortgage, encumbrance or any loan secured by said Apartment . . ."[8] Additionally, Bobby argues that the prenuptial agreement

[7]The procedural posture here is somewhat unusual because the motion to dismiss is directed at the original petition while, at the same time, it attempts to provide grounds to deny the motion to amend. To be sure, the grounds upon which respondents rely for denying the motion to amend overlap with the grounds to dismiss the petition. For instance, respondents assert that the original petition should be dismissed and the proposed amended petition is devoid of merit because the decedent's will conclusively disposes of Natalia's claims of breach of the prenuptial agreement and tortious interference with it. Since here, there is significant overlap between the arguments for dismissal and denial of the motion to amend, the court will analyze the issues in unison (*Oyang v NYU Hosp. Ctr.*, 139 AD3d 531 [1st Dept 2016] [original and proposed amended claims may be reviewed together]).

[8]Bobby takes the position that the only obligation of decedent under the prenuptial agreement was to leave Natalia the marital residence and thus their motion does not address

did not obligate decedent to leave the primary residence free and clear of any encumbrances or guarantee that it would have some minimum value to Natalia. Bobby additionally points to the provision of the prenuptial agreement which states: "Except as otherwise provided, each party shall have the right to dispose (during lifetime or at death) of any and all of his or her property and estate as such party sees fit." In other words, Bobby claims in his motion that the Note/Gift Transaction was just another obligation that the decedent was free to incur under the prenuptial agreement. Consequently, he argues, the transfer of decedent's assets accomplished through that transaction cannot be considered a breach of the agreement.

For her part, Natalia claims that such a transfer constituted a breach of the prenuptial agreement. If the note is to be paid by the estate, the apartment must be sold to do so, and Natalia consequently will not receive it. Nor will she receive any other assets under the will or the prenuptial agreement, since decedent retained little after the transfer. Natalia claims in the current petition that both decedent and Bobby knew this and desired this result in complete violation of the decedent's obligations under the prenuptial agreement. This is somewhat different from her answer and counterclaims in the SCPA 1805 in that she claims here that decedent intended to deprive her of her rights under the prenuptial agreement, whereas there she alleged that decedent wanted to comply, but was improperly influenced by Bobby to enter into the Note/Gift Transaction. Regarding the provision in the prenuptial agreement permitting other lifetime or at-death transfers, Natalia emphasizes that this is only "except as otherwise provided," which would include

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whether decedent's obligation to leave Natalia one-half of the marital property was fulfilled by decedent in his will. When it comes to Natalia's entitlement to marital property, Bobby has moved to dismiss this claim on the ground that it is premature as it must await the determination of all outstanding claims against the decedent's estate and the outcome of the executor's accounting proceeding.

decedent's agreement to bequeath her their primary residence and her entitlement to one-half of the marital property.

A necessary element in stating claims for breach of the prenuptial agreement and for tortious interference with it is that the contract was actually breached (*see Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 595 [2012]; *Alavian v Zane*, 101 AD3d 475, 476 [1st Dept 2012]; *see also Foster v Churchill*, 87 NY2d 744, 749-750 [1996], *citing Israel v Wood Dolson Co.*, 1 NY2d 116 [1956]).[9] In response to Bobby's argument that this element is not satisfied here, Natalia asserts that decedent's lifetime transfer of property through the Note/Gift Transaction was inconsistent with his obligations under the agreement.

A review of the case law dealing with the question of whether and to what extent lifetime transfers or transactions inconsistent with a party's contractual obligations to make or maintain bequests are valid reveals that courts have struggled to find the proper balance between, on the one hand, the protection of the right of individuals to dispose of their property as they see fit including through lifetime transfers and, on the other, the rights of the intended beneficiaries of those contractual obligations (*see Rastetter v Hoenninger*, 214 NY 66 [1915]; *Matter of Salisbury*, 265 NY 536 [1934]; *Blackmon v Estate of Battock*, 78 NY2d 735 [1991]; *Dickinson v Seaman*, 193 NY 18 [1908]; *Matter of Weisman*, 251 AD2d 112 [1st Dept 1998]).

Recognizing that individuals, including testators, ordinarily possess "unfettered authority to dispose of all [their] property during their lifetimes" (*Blackmon*, 78 NY2d at 739), courts have been

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[9]The four elements of a tortious interference claim are: (1) the existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional procuring of the breach; and (4) damages (*Foster*, 87 NY2d at 749-750). The only issue raised regarding these elements on the respondent-movants' motion is whether there was a breach.

reluctant to imply into promises to make bequests or not to revoke or change testamentary dispositions a further promise not to make inter vivos transfers of property unless there is an express provision in the agreement or instrument prohibiting such transfers or there is a substantial basis within the four corners of the instrument for making such an inference (*Blackmon*, 78 NY2d at 739-740; *see also Matter of Zeh*, 24 AD2d 983 [2d Dept 1965], *affd* 18 NY2d 900 [1966]; *Matter of Wenzel*, 85 AD3d 563 [1st Dept 2011]). As the First Department stated in the context of a contract between spouses not to revoke a will:

> "Even an agreement that the survivor's entire estate will be left to certain beneficiaries will not necessarily prevent the survivor from making a lifetime gift, since such a gift does not necessarily defeat the purpose of the agreement, and, in the absence of express or otherwise substantial textual provisions from which the inference of a dispositional limitation . . . could have been unequivocally drawn, the Surrogate properly declined to expand the scope of the agreements here at issue beyond their specific, facially evident intendment (*see*, *Blackmon v Estate of Battcock*, 78 NY2d 735, 740)"

(*Weisman*, 251 AD2d at 112 [internal citations omitted])

However, a prohibition against lifetime transfers of property made in bad faith or with the intent to defeat the purpose of an agreement to make a testamentary disposition is always inferred (*Rastetter*, 214 NY 66 [agreement not to change will must be carried out honestly and in good faith and party to agreement may not make gift in the nature of testamentary disposition or to defeat agreement]; *Schwartz v Horn*, 31 NY2d 275, 279 [1972] [surviving testator of mutual wills who agreed not to revoke will is not free to make inter vivos gift to defeat agreement]; *Matter of Marsh*, NYLJ, Aug 6, 1997, at 26, col 2 [Sur Ct, New York County] [parties to agreement not to revoke will at liberty to dispose of their property during their lifetimes, short of making a gift to defeat purpose of the agreement]; *Matter of Schuman*, NYLJ, Oct 15, 1992, at 29, col 3 [Sur Ct, Nassau County] [test is whether making inter vivos gift would defeat agreement between parties not to

revoke will and purpose of joint will]).

In *Dickinson v Seaman*, a decedent was a party to a prenuptial agreement by which he promised to adopt his prospective wife's daughter and to give the daughter all his property under his will unless he had other children, in which case, he promised to devise all his property equally among all the children, including his wife's daughter (193 NY at 23-24). After the decedent's death, the wife's daughter commenced an action against the executor of the decedent's will alleging that the decedent's assignment of a $10,000 insurance policy on his life to his brothers, sisters and niece was a breach of the promise made in the prenuptial agreement (*id.*). The plaintiff alleged that she was wronged based on a theory not of actual but of constructive fraud. The Court of Appeals held in *Dickinson* that the plaintiff's action was properly dismissed for failure to allege that the assignment was made with the intent to defraud or defeat the agreement. According to the court, absent a bad faith motive or a lifetime gift so unreasonable in size as to defeat the purpose of the agreement, the decedent was free to use his property during his life as he saw fit. In the words of the Court of Appeals:

> "Any gift made with actual intent to defraud would be void, but none made without such intent, unless so out of proportion to the rest of his estate as to attack the integrity of the contract, when it would be fraudulent as matter of law. The gift might be so large that, independent of intent or motive, fraud upon the contract would be imputed, or arise constructively by operation of law. Reasonable gifts were impliedly authorized. Unreasonable gifts were not, even if made without actual intent to defraud. In the absence of intentional fraud, the question is one of degree and depends upon the proportion that the value of the gift bears to the amount of the donor's estate" (*Dickinson*, 193 NY at 25).[10]

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[10]Bobby's attempt to demote *Dickinson* to a meaningless relic of the past – because it has been seldom cited or followed – is also not persuasive. Although its citations are indeed few, *Dickinson* was cited with favor in *Schwartz v Horn* (31 NY2d at 281). And *Schwartz* was cited and analyzed in *Blackmon*, the very case on which respondents rely. Moreover, the principle expressed in *Dickinson*, that lifetime transfers made in bad faith to defeat an agreement to make a

Applying these principles, it cannot be said that the language giving the apartment to Natalia in decedent's will mandates dismissal of her claims of breach of the prenuptial agreement and tortious interference with that agreement. First, contrary to Bobby's argument, the prenuptial agreement did not limit decedent's obligations towards Natalia to giving her the marital apartment. Under the express terms of the agreement, Natalia is entitled to one-half of the parties' marital property. Moreover, in light of the questions raised by the decedent's transfer of assets, shortly before his death and likely in contemplation of it, in an amount "so out of proportion" to the rest of his probate estate as to render meaningless the promises made by him under the prenuptial agreement, the testamentary gift, on its own, does not dispose of the question of whether the agreement was breached.[11] Whether the decedent actually made the transfer, at Bobby's insistence,

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testamentary disposition are void, has been repeated by the Court of Appeals at least twice since *Dickinson* (*see Rastetter*, 214 NY 66, in addition to *Schwartz*, 31 NY2d 275) and by several lower court opinions. As to *Dickinson*'s holding that the reasonableness of a lifetime gift might have a bearing on whether it was made in good faith, the decision in one Surrogate's Court matter, *Matter of Marsh* (NYLJ, Aug 6, 1997, at 25, col 2 [Sur Ct, NY County]), attests to the continued validity in New York of that holding, which has also been followed in other jurisdictions (*see, e.g., Dubin v Wise*, 41 Ill App 3d 132, 354 NE2d 403 [Ill App Ct 1976]). Additionally, other than to note that the codification of the fraudulent conveyance law occurred in 1925, which came after the 1908 Court of Appeals decision in *Dickinson*, respondents have not sought to substantiate their argument, made in passing, that such codification was designed to replace and preempt the common law contract interpretation principles expressed in *Dickinson* regarding inconsistent transfers or obligations. This is insufficient (Statutes § 301[b] ["The common law is never abrogated by implication. . . . [other] than [to the extent] the clear import of the language used in a statute absolutely requires."]).

[11]There is no question here that the obligation represented by the note, $1,077,000, offsets a significant part of decedent's estate and could disrupt the plan set forth in the prenuptial agreement (*Matter of Weisman*, NYLJ, Dec 17, 1997, at 23, col 3 [Sur Ct, NY County]). The note amounts to 45% of the value of decedent's gross probate estate ($2.4 million). Deducting the value of the apartment, $1.65 million, as per the executor's interim account, leaves only $750,000, which is alleged in the accounting to have been reduced by other estate obligations, and in any event, even if available is insufficient to pay the amounts due under the note. In their supplemental briefing on the *Dickinson* decision, respondents argue that the value of decedent's pension plan accounts, totaling several million dollars, should, if *Dickinson* is applicable, also be

with the intent to defeat his obligations under the prenuptial agreement, as alleged by petitioner, is a question for another day. For now, the court simply concludes, on the strength of the authority cited above, that the prenuptial agreement here prohibited lifetime transfers made shortly before death and with the purpose of defeating the agreement or in an amount so significant that an inference of its being made in bad faith could reasonably be drawn (*see Matter of Duckman*, 110 Misc 2d 575 [Sur Ct, Monroe County 1981][attempted gift in will of forgiveness of debt was not enforceable, as to do so would make decedent's obligations under antenuptial agreement impossible to fulfill]). The authority on which Bobby relies to make his case that parties to an agreement to make a testamentary disposition are not restricted from making lifetime transfers of their assets unless such transfers are expressly prohibited by the terms of the agreement (*see, e.g.*, *Kaplan v Kaplan*, 284 App Div 972 [2d Dept 1954]); *Matter of Wenzel*, 85 AD3d 563) does not contradict the fundamental principle that good faith and reasonableness must always be read into any such agreement (*Dickinson*, 193 NY 18; *Rastetter*, 214 NY 66).

To hold otherwise, would exalt form over substance and make the promises decedent made in the prenuptial agreement, including the one to bequeath the apartment to Natalia, virtually meaningless, a result rejected in law (*see Beal Sav. Bank v Sommer*, 8 NY3d 318 [2007]; *see also Sippell v Hayes*, 189 Misc 656 [Sup Ct, Oneida County 1947]), and would render insubstantial the covenant of good faith and fair dealing implied in every contract, especially those between spouses, requiring the utmost good faith (*Dalton v Educational Testing Serv.*, 87 NY2d 384 [1995];

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considered in this calculation. Respondents fail to explain why it should be, however, in light of the facts that the estate was not among the designated beneficiaries of decedent's pension plan (in which case, the assets would be available to re-pay the note), and that the Note/Gift Transaction occurred ten days before decedent's death while in the hospital with terminal cancer, making it highly unlikely that the beneficiary designations would be changed again.

Christian v Christian, 42 NY2d 63 [1977]).

Bobby's attempt to analogize the note to decedent's mortgage on the apartment is ineffective. The note is not similar or related to an encumbrance, such as a mortgage in this case, which was an arms-length undertaking not out of proportion with the value of the property securing its payment, much less with the value of the estate generally. Additionally, a mortgage would not, as Natalia alleges here, deprive her of actually receiving the property.

Accordingly, that portion of respondents' motion seeking dismissal of the causes of action for breach of the prenuptial agreement and for tortious interference with that agreement on the basis of the will as documentary evidence is denied. For the reasons stated above, the court also concludes that it would not be futile to permit petitioner to amend her pleading to "restructure" her breach of contract claims and to add a claim of interference with the prenuptial agreement against Bobby, and therefore her motion to amend the petition with respect to those claims is granted.

With respect to Natalia's second claim (in both the original and proposed amended petition) in which Natalia alleges that Bobby, as executor, violated the provision of the prenuptial agreement that entitled her to one-half of the parties' marital property by "fail[ing] to distribute to [Natalia], or allocate to her in his estate accounting, numerous interests in . . . entities in which Decedent acquired an interest after the date of his marriage. . .," the court concludes that this claim should be severed and consolidated with the executor's accounting proceeding as an objection therein by Natalia. Although there is some logic to dealing with all issues raised by the prenuptial agreement in one proceeding, the court agrees with Bobby that there are outstanding claims against the estate that may or may not lead to abatement and that the question of whether Natalia has been allocated one-half of decedent's property is better presented in the proceeding in which all of decedent's

assets are accounted for.

Standing under Fraudulent Conveyance Law as a Creditor

The court now turns to petitioner's claims that the transfers of decedent's assets made as part of the Note/Gift Transaction were fraudulent conveyances under sections 275 and 276 of the DCL. Both claims seek the return of the gifted monies from the donees.

These laws protect "creditors," and Bobby and Poller first argue that petitioner is not a creditor within the meaning of the DCL, relying on three cases: *Matter of Searles* (82 NYS2d 219 [Sur Ct, Kings County 1948]); *Matter of Tanenbaum* (258 App Div 285 [2d Dept 1939]); and *Matter of Hoyt* (174 Misc 512 [Sur Ct, NY County 1940]).

Section 270 of the DCL defines the term "creditor" broadly, as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." On its face, this includes petitioner, who by virtue of the obligations decedent assumed in the prenuptial agreement, has a "claim" for enforcement of those obligations (*see Kasinski v Questel*, 99 AD2d 396 [4th Dept 1984]).

The Court of Appeals recognized as much in *Matter of Granwell* (20 NY2d 91, 94-95 [1967]), when it held that the beneficiary of an agreement to receive child support payments and one-half of his father's estate was a creditor who may "maintain an action" to set aside gratuitous transfers that made it impossible for the father's estate to comply with his obligations under the agreement.

Respondents' criticism of the *Granwell* holding is confined to their assertion that *Granwell* does not overrule *Searles*, *Tanenbaum* or *Hoyt*. But those cases do not involve claims under the DCL and are clearly distinguishable from the claims Natalia makes here. *Searles* involved a

testator's promise in a separation agreement to make a testamentary provision for his daughter and her mother (the testator's former spouse). The court held that their status as beneficiaries of such promise did not make them creditors for the purposes of the imposition of taxes or on the question of apportionment of taxes (82 NYS2d at 224-225). *Searles* cited both *Tanenbaum* and *Hoyt*, which concerned determinations of whether surviving spouses were creditors for the purpose of determining their elective shares against their spouses' estates.

None of these decisions suggests or implies that a beneficiary of an agreement to make a bequest is not a creditor for any and all purposes. And none said anything regarding whether such beneficiary would be a creditor for the purposes of fraudulent conveyances law. These cases are thus neither persuasive nor controlling in this matter governed by the clear statutory definition of "creditor" in DCL 270.

Consequently, the court determines that petitioner is a creditor within the meaning of the DCL, as a contract obligee under their prenuptial agreement.

Alleging Intent under DCL 275 and 276

Both the original and proposed amended petition contain allegations that decedent improperly borrowed $1,077,000 from his son Bobby for the purpose of gifting them to his daughter, and to trusts benefiting his grandchildren, and that decedent knew that he or his estate would be unable to fulfill his obligations to his creditors, including petitioner, because of his gift of these monies. Additionally, allegations as to decedent's intent in making the gifts, including "actual intent" under the DCL 276 claim, are found in the proposed amended petition.

Respondents assert that these allegations insufficiently plead claims and intent under both DCL 275, which considers fraudulent any transfer or obligation that is made "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," and DCL 276, which deems fraudulent transfers that are made with "actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors."

Regarding dismissal of these claims for relief for failure to state a claim under CPLR 3211(a)(7), more than legal conclusions parroting the statute with no specific factual allegations is required, as respondents correctly state (*NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410 [1st Dept 2010]). Although the fraudulent conveyance allegations in the proposed amended petition do mirror the relevant statutes, stating that decedent intended to incur debts beyond his ability to pay in respect of the DCL 275 claim and that decedent had the actual intent to "hinder, delay or defraud present or future creditors, including Petitioner" regarding the DCL 276 claim, the petition in this connection contains more than bare legal conclusions.

As to the DCL 275 claim, respondents argue that petitioner has failed to plead lack of fair consideration, citing the "fair consideration" definition in DCL 272(a): "[w]hen 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." Fair consideration, in respondents' view, exists in this case because "there [was] a good faith exchange of property or obligations of equal or similar value."

But petitioner is not claiming that decedent did not receive value for making the promissory note. That is not what caused the problem according to the petition. Rather, the alleged problem was decedent's gifting of the loaned funds to or for the benefit of his family members. Respondents point to nothing that decedent received in return for these gifts, and, indeed, gifts are something of the gold standard in terms of transfers that are made for no consideration, since love and affection,

though significant, do not constitute fair consideration as a matter of law (*Garden City Co. v Kassover*, 251 AD2d 9 [1st Dept 1998]; *Hickland v Hickland*, 100 AD2d 643 [3d Dept 1984]).

In addition to a lack of fair consideration, to plead a claim under DCL 275, there must be some allegations as to insolvency or the inability of the transferor to meet his obligations (*see Wall St. Assoc. v Brodsky*, 257 AD2d 526 [1st Dept 1999]; *Parsons & Whittemore v Abady Luttati Kaiser Saurborn & Mair*, 309 AD2d 665 [1st Dept 2003]). Here, the allegations are that the note itself created a debt of such magnitude that, when the proceeds of the loan were transferred to third parties, decedent became unable to fulfill his known obligations under the prenuptial agreement. Such allegations state a claim for violation of DCL 275 (*see Shisgal v Brown*, 21 AD3d 845 [1st Dept 2005]).

Regarding the "actual intent" that must be pled in DCL 276 claims, respondents are correct that the particularity requirement of pleading fraud (CPLR 3016[b]) must be satisfied (*IDC [Queens]Corp. v Illuminating Experiences*, 220 AD2d 337 [1st Dept 1995]). But this does not mean that the petitioner must prove her case in her pleading (*Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]); *Houbigant, Inc. v Deloitte & Touche, LLP*, 303 AD2d 92 [1st Dept 2003]). Instead, the fraud needs to be pleaded with sufficient detail to give notice of the actions constituting the fraud (*Foley*, 21 AD2d at 64; *Houbigant*, 303 AD2d at 97-99) and, in this regard, petitioner is entitled to rely on the "badges of fraud" which are so commonly associated with fraudulent transfers that they give rise to an inference of intent (*Wall St. Assoc.*, 257 AD2d at 529). These are: a close or familial relationship between the parties to the transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; and the transferor's knowledge of the creditor's claim and the inability to pay it (*id.*). Here, the transfers are alleged to have been to or for

the benefit of close family members and made with no consideration. There are also allegations that decedent knew of his obligations under the prenuptial agreement and that he wanted to frustrate those obligations by making a debt so large payable by his estate that only the sale of the apartment would satisfy it. These allegations are sufficient to raise an inference of actual intent to defraud and state a claim under DCL 276 (*see id.*).[12]

It follows that respondents' motion to dismiss the claims asserted under DCL 275 and 276 is denied and that Natalia is granted leave to amend the allegations concerning these claims as indicated in her proposed amended petition.

Aiding and Abetting Fraudulent Conveyances by Non-Transferees

Natalia seeks compensatory and punitive damages against Bobby, claiming that he aided and abetted the above-discussed conveyances. This claim for relief is based essentially on the same allegations she made in connection with the breach of contract and fraudulent conveyance claims. In her motion to amend, Natalia seeks permission to add allegations that Bobby wanted to prevent her from receiving property under both the prenuptial agreement "and the will of Decedent."

This claim is one against Bobby individually and seeks to make him answerable in damages for aiding and abetting the fraudulent conveyances under DCL 275 and 276. The court agrees with respondents that, on the authority of *Federal Deposit Ins. Corp. v Porco* (75 NY2d 840, 842

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[12]In addition to seeking dismissal for failure to state a claim, respondents seek dismissal of these claims on the same documentary evidence basis (CPLR 3211[a][1]) that the dismissal was sought on the claims of breach of and tortious interference with the prenuptial agreement: that decedent complied with all his obligations regarding the primary residence, in providing a bequest of an apartment to a trust for Natalia's benefit, and consequently, documentary evidence, the will, negates these claims. For the reasons set forth in the discussion above, the bare terms of decedent's will giving Natalia the apartment do not unequivocally resolve the issue of decedent's obligations under the prenuptial agreement, and, as with the claims of breach, the will is not documentary evidence that requires dismissal of the DCL 275 and 276 claims.

[1990]), there is no cause of action for aiding and abetting a fraudulent conveyance against a non-transferee, *i.e.*, a person not receiving assets from the debtor. This is so because the main purpose and relief to be sought under fraudulent conveyance law is the unwinding of the conveyance and return of the assets improperly conveyed (*see id.*).

Although the decision in *Joel v Weber* (197 AD2d 396 [1st Dept 1993]) speaks in terms of a cause of action for aiding and abetting fraudulent conveyances, the cause of action in that case was asserted against a law firm alleged to have obtained $75,000 from the insolvent debtor in improper fees for assisting in other suspect and claimed conveyances in fraud of plaintiff-creditor's rights.[13] Here, there is no allegation that Bobby individually received any assets from decedent, and consequently, he is not a proper respondent regarding claims of fraudulent conveyance, or having aided or abetted them. To be clear, this is true only in Bobby's individual capacity. In his capacity as trustee of the trusts to which decedent is alleged to have made gifts with the loaned funds, Bobby remains the proper party, since he is the legal title holder as trustee of the assets alleged to have been improperly transferred.

Accordingly, Bobby's motion to dismiss the claim of aiding and abetting the fraudulent conveyances is granted. The motion to amend the allegations concerning this claim is moot.

CONCLUSION

Respondents' motion to dismiss is granted only to the extent of dismissing Natalia's claim that Bobby aided and abetted the decedent in making fraudulent conveyances. That claim is

[13]The other case relied upon by petitioner, *Blakeslee v Rabinor* (182 AD2d 390 [1st Dept 1992]), does not support her argument that a cause of action for aiding and abetting applies to non-transferees.

improperly interposed against a non-transferee. The motion to dismiss is otherwise denied. The motion to amend the petition is granted. The second claim for relief regarding the proper allocation to petitioner Natalia Shvachko under the prenuptial agreement of property that decedent acquired during the marriage is severed and consolidated with the accounting proceeding by Robert Kotick as executor. Petitioner shall file and serve an amended petition in accordance with this decision no later than twenty days from receipt of a notice of its entry. Amended verified responsive pleadings should be filed in accordance with the deadlines established by the CPLR.

This decision constitutes the order of the court. The Clerk is directed to notify the parties.

Dated: October 14, 2016

SURROGATE