

**North Hill Funding of N.Y., LLC v Amincor Other  
Assets, Inc.**

2016 NY Slip Op 32638(U)

January 17, 2016

Supreme Court, New York County

Docket Number: 653092/14

Judge: O. Peter Sherwood

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

-----X  
NORTH HILL FUNDING OF NEW YORK, LLC

Plaintiff,

-against-

Index No. 653092/14

AMINCOR OTHER ASSETS, INC., AMINCOR INC.,  
CAPSTONE BUSINESS CREDIT, LLC and,  
CAPSTONE SPECIAL PURPOSE FUND, L.P.,

Defendants.

-----X  
**SHERWOOD, J.:**

This is a breach of contract and fraudulent conveyance action brought by a mortgage lender, plaintiff North Hill Funding of New York, LLC (North Hill) against the guarantor of a mortgage loan, defendant Capstone Business Credit LLC (CBC), to enforce a \$7 million judgment. Plaintiff also brings claims against defendant Amincor, Inc. (Amincor) on the ground that Amincor assumed all of the assets of both CBC and defendant Capstone Special Purpose Fund, L.P. (Capstone Special Purpose), as well as CBC's obligations under the loan, and against Amincor Other Assets, Inc. (Amincor Other, and with Amincor, the Amincor entities) on the ground that Amincor Other assumed Amincor's obligations, rendering Amincor Other a successor and assign of both CBC and Capstone Special Purpose. Motion sequence nos. 001, 002, and 003 are consolidated for disposition.

In motion sequence no. 001, defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (a) (7). On April 12, 2016, this court notified the parties that, pursuant to CPLR 3211 (c), it converted defendants' motion into a motion for summary judgment. In motion sequence no. 002, North Hill moves for summary judgment on all seven causes of action against the Amincor entities pursuant to CPLR 3212. Premised on this grant of summary judgment, North Hill seeks,

pursuant to CPLR 3217 (b), to discontinue its claims against CBC and Capstone Special Purpose, without prejudice. In motion sequence no. 003, defendants move to dismiss the complaint as barred by RPAPL 1301 (3) and 1371 (3) and/or CPLR 3211 (a) (7) for lack of standing.

For the reasons set forth below, plaintiff's motion for summary judgment is granted, and both of defendants' motions are denied.

## FACTS

### The Guaranty Action

On January 9, 2008, North Hill, as lender, loaned \$34 million to non-party 158 Madison Avenue Associates, LLC (158 Madison Avenue), secured by a first priority property mortgage on 158 Madison Avenue in Manhattan (the 158 Madison Avenue Property). On the same date, the guarantors: defendant CBC; Maiden & Madison Holdings, LLC (Maiden & Madison); RIP Holdings V, LLC; Capstone Capital Group I, LLC (Capstone Capital); John P. Rice III (Rice) and Joseph Ingrassia (Ingrassia) (collectively, the Guarantors, or the Original Defendants) each executed a limited guaranty of payment of the mortgage loan (the Guaranty [*see* aff of Scott A. Brody, exhibit C]).

CBC and Capstone Capital were factoring and investment companies through 2009 (Ingrassia aff, ¶ 3). These two operating entities borrowed money from two lending entities, each called Capstone Special Purpose (one is a Cayman Islands entity, the other is a Delaware entity), which raised money from private investors (*id.*).

As part of the January 9, 2008, mortgage loan transaction, and pursuant to the terms of a Subordination Agreement (*see* complaint, exhibit A), the Capstone Special Purpose entities (the Subordinated Creditors), agreed to subordinate the debt CBC owed it (the Subordinated Debt) in

favor of the mortgage debt of North Hill (*see* Subordination Agreement, § 1 [a]). Pursuant to § 1 (b) of the Subordination Agreement, the Subordinated Creditors and CBC agreed that the payment of the Subordinated Debt was junior to the obligations of CBC under the Guaranty. Pursuant to section 2 (a), in the event of default, the Subordinated Creditors could not take or receive from CBC, either directly or indirectly, any cash or property. Section 6 (a) of the Subordination Agreement specifically states that North Hill has no security interest in any of CBC's assets.

The Guaranty placed "Restrictions on Asset Transfers" of CBC, barring it from making or permitting any substantial diminution of its net worth, and from selling, transferring, or pledging any material portion of its property without North Hill's written consent (*see* Guaranty, § 5). The Guaranty explicitly treated the Subordinated Debt, as defined in the Subordination Agreement, to be equity of the guarantors (*see id.* § 20).

On November 9, 2008, 158 Madison Avenue defaulted under the mortgage loan from North Hill by failing to obtain a construction mortgage commitment. On November 13, 2008, North Hill served a notice of default, and simultaneously gave notice of this default to the Guarantors under the Guaranty, and to the parties under the Subordination Agreement, including the Subordinated Creditors (*see* aff of Alfonso Kimche, exhibit C).

Thereafter, the parties entered into a Forbearance Agreement, dated as of April 30, 2009 (*see* Kimche aff, exhibit D), in which 158 Madison Avenue and the Guarantors agreed that the designated events of default were continuing. The Subordinated Creditors executed a document acknowledging receipt, review and approval of the Forbearance Agreement (*see* Kimche aff, exhibit E). In September 2009, 158 Madison Avenue defaulted on the Forbearance Agreement. Under section 8.4 of the Forbearance Agreement, notices had to be sent to the mortgagor, the Guarantors, Rice,

Ingrassia and their attorney, but not separately to the Subordinated Creditors. Plaintiff contends that by approving the Forbearance Agreement, the Subordinated Creditors also approved this notice provision.

On September 1, 2009, North Hill served a notice of default upon, inter alia, CBC, Rice, and Ingrassia. The 158 Madison Avenue Property was sold, and plaintiff North Hill received the proceeds.

On September 29, 2009, North Hill filed a summons and complaint seeking liability pursuant to the Guaranty against the Guarantors of the 158 Madison Mortgage Loan, including CBC (*North Hill v Maiden & Madison Holdings LLC* (Sup Ct, NY County, index No. 602997/09 [the Guaranty Action])). On July 12, 2010, the court in the Guaranty Action entered a \$36,380,931.04 judgment against the Guarantors, jointly and severally. On August 10, 2010, North Hill and the Guarantors entered into a second forbearance agreement, in which North Hill agreed to accept \$35.5 million paid over time, as well as certain jewelry as further collateral.

On May 25, 2011, by so-ordered stipulation, North Hill released its mortgage lien on the 158 Madison Avenue Property in exchange for the \$34.4 million in proceeds from the sale of the property. By order dated December 19, 2011, the court referred the Guaranty Action to Special Referee Ira Gammerman, to hear and report on the amount that was due plaintiff. On April 16, 2014, that court entered a subsequent deficiency judgment in the amount of \$7,052,401.20. No part of the judgment has been paid.

#### **Defendants' "Restructuring" or "Liquidation"**

While the Guaranty Action was pending, Rice, Ingrassia, CBC, and Capstone Capital agreed to a "restructuring" (*see* Consent [Kimche aff, exhibit G]). Pursuant to this restructuring, which was

effected by documents dated December 30/31, 2009, all assets of CBC and Capstone Capital were assigned to Joning Corp. (“Joning”), which later became Amincor, and Joning assumed all liabilities under the “Loan Documents,” which were defined as the loan agreement between the Subordinated Creditors and CBC/Capstone Capital and “any documents executed and/or delivered . . . in connection therewith” (*see* Assignment and Assumption Agreement [Kimche aff, exhibit F]). Defendants refer to this restructuring as a “liquidation.” Defendants concede that the Subordinated Creditors received back the assets from CBC and Capstone Capital in exchange for relieving the operating companies of “well more than \$100 million over and above the assets transferred” (Ingrassia aff, ¶ 4).

One of the assets assumed by Amincor from CBC was a \$3.5 million mortgage loan on real property in Pelham Manor, New York (the Pelham Manor Property), owned by Imperia Family Realty, LLC. In 2013, CBC caused the mortgaged Pelham Manor Property to be deeded to Amincor Other. Amincor Other holds the Pelham Manor Property for the benefit of Amincor. Amincor values its equity interest in the Pelham Manor Property as \$6,000,000 in its SEC filings (Kimche aff, ¶ 20). Plaintiff claims that this assignment was in violation of the Guaranty and the Subordination Agreement. Plaintiff also contends that the Amincor assignment was a fraudulent conveyance, to shelter the assets from judgment in the 2009 suit.

#### **Relationship Between the Amincor Entities and the Capstone Entities**

The Capstone entities, including CBC, Capstone Capital, Capstone Special Purpose Funds, and Amincor/Amincor Other are all controlled and principally owned by Rice and Ingrassia. Rice and Ingrassia are signatories for all of these entities. All of the Capstone entities had their principal places of business at the same office where Rice and Ingrassia worked, 1350 Avenue of the

Americas, 24<sup>th</sup> floor. Amincor occupies space subleased by CBC and Capstone Capital (Amincor's 2010 10-K, at 28 [Brody aff, exhibit H ]). Rice is president and Ingrassia is vice-president of Amincor, and together they own 85.42% of the Class A common stock (*id.* at 60). Rice and Ingrassia are the controlling shareholders and the corporate general partner of the Capstone Funds, and the owners and managing members of CBC and Capstone Capital.

### **This Action**

On October 10, 2014, North Hill commenced this action against defendants Amincor, Amincor Other, CBC, and Capstone Special Funding. This action arises out of CBC's transfer of the Pelham Manor Property, which plaintiff alleges violated the Guaranty, the Subordination Agreement, and New York Debtor and Creditor law (DCL). The first cause of action seeks specific performance of the Guaranty. The second cause of action seeks specific performance of the Subordination Agreement. The third through sixth causes of action allege violations of DCL §§ 273-a, 273, 274, and 276. Plaintiff alleges that the conveyance was made without fair consideration while CBC was a defendant in a lawsuit, that the transfer was made at a time when CBC's debts exceeded its assets, that the transfer left CBC with relatively little capital, and that it was made with the intent to defraud plaintiff. The seventh cause of action alleges that, based on the foregoing, plaintiff is entitled to execute against certain property owned by Amincor or Amincor Other, against which it does not have a judgment.

## **DISCUSSION**

### **Defendants' Motion for Summary Judgment (Motion Sequence No. 001)**

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence

of any material issues of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and “should not be granted where there is any doubt as to the existence of a triable issue” of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

Defendants argue that (1) North Hill failed to serve the subordinated creditors with a notice of default; (2) laches applies; and (3) the alleged fraudulent transfers satisfied an antecedent debt. As set forth below, none of defendants’ arguments are a basis for dismissal, or provide a defense to North Hill’s motion for summary judgment.

#### **1. Failure to Provide Notice of Default**

Defendants argue that the Subordination Agreement is a nullity and that the second cause of action must be dismissed, because of an insufficient notice of default given to the Subordinated Creditors – the two Capstone Special Purpose Funds which are owned by the same individuals who own and control defendants.

Specifically, defendants contend that North Hill failed to give notice of an event of default

to the Subordinated Creditors pursuant to section 2 (a) of the Subordination Agreement (*Westchester Fed. Sav. & Loan Assn. v Secor Lake Camp* (37 AD2d 615, 615 [2d Dept 1971] [failure to allege that condition precedent was satisfied required dismissal of complaint in foreclosure action]). Section 2(a) of the Subordination Agreement provides that “if an Event of Default exists,” then North Hill, as lender, shall deliver a “notice of an Event of Default” to the Subordinated Creditors. Defendants refer to the default notice sent on September 1, 2009, where CBC was served, but the Subordinated Creditors were not (*see Brody aff*, exhibit D).

In opposition to the motion, North Hill argues that the November 13, 2008, Notice of Default served on the Subordinated Creditors (*see Kimche aff*, exhibit C), satisfied section 2(a) of the Subordination Agreement. The court agrees. North Hill has met its burden of proof for occurrence of its contractual performance (full compliance with section 2 [a]) by presenting the notice of default served on the Subordinated Creditors, by proving that the Subordinated Creditors explicitly acknowledged and approved the Forbearance Agreement, which provided that CBC and Capstone Capital were in default, and by proving that North Hill provided the Notice of Default under the Forbearance Agreement in accordance with its terms, which had been approved by the Subordinated Creditors.

In addition, even if the court found that the notice was not sufficient, i.e., if North Hill had been required by the Forbearance Agreement to provide the Notice of Default to the Subordinated Creditors, it is clear that North Hill also sent notice to Rice and Ingrassia, the officers and directors of the corporate general partner of the Subordinated Creditors, at the office of the Subordinated Creditors, as well as to their attorney, for the interest of Rice and Ingrassia. It is thus clear that the Subordinated Creditors had actual notices of the defaults. “Strict compliance with contract notice

provisions is not required in commercial contracts when the contracting party receives actual notice and suffers no detriment or prejudice by the deviation” (*J.C. Studios, LLC v Telenext Media, Inc.*, 32 Misc 3d 1211[A], 2011 NY Slip Op 51251[U], \*9 [Sup Ct, Kings County 2011] [citing multiple cases]; *see also Suarez v Ingalls*, 282 AD2d 599, 599-600 [2d Dept 2011]).

## 2. Laches

Defendants argue that this action must be dismissed on the ground of laches because plaintiff has been fully aware of the “restructuring” done by the Capstone entities, as well as of its rights under the Subordination Agreement, since October 2010, but waited over four years to commence this action. Defendants assert that this delay has caused substantial prejudice to the Amincor entities because they borrowed money against the Pelham Manor Property to pay off other debts and to free up money for their investors.

However, the defense of laches is inapplicable to actions of law, which include North Hill’s fraudulent conveyance claims (third through sixth causes of action ) (*see International Assoc. of Machinists & Aerospace Workers v Allegis Corp.*, 144 Misc 2d 983, 989 [Sup Ct, NY County 1989]). In addition, an action to enforce a judgment (seventh cause of action) is not subject to a laches defense (*see Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d 677, 678 [2d Dept 2011]).

Accordingly, laches can be raised only as a defense to specific performance of the Guaranty and the Subordination Agreement, as pleaded in the first and second causes of action.

“To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded in the complainant. All four elements are necessary for the proper invocation of the doctrine”

(*Meding v Receptopharm, Inc.*, 84 AD3d 896, 897 [2d Dept 2011] [citation omitted]). A claim cannot be barred by laches unless there is “undue delay” (*Matter of DeLorenzo*, 67 AD3d 494, 494 [1st Dept 2009]).

The second, third, and fourth elements of laches are absent as a matter of law. The second element is absent because the court did not enter the \$7 million judgment against CBC until April 2014 and this action was filed in October 2014. There can be no “undue delay” where a judgment creditor waited to obtain a contested judgment before bringing all of its claims in a single action. Indeed, North Hill could not even bring a DCL § 273-a action until it obtained a final judgment that was not satisfied.

The third factor also cannot be met, because North Hill vigorously sought to obtain a final judgment against CBC from 2011 to 2014, which was opposed by CBC. Thus, defendants (all controlled by Rice and Ingrassia) knew that North Hill was pursuing its right to collect the amount owed under the Guaranty.

With respect to the fourth factor, defendants completely fail to show any injury or prejudice. Although Ingrassia claims prejudice from the delay, he does not identify why defendants would have been in a better position had North Hill sued earlier. Although defendants assert that Amincor expended hundreds of thousands of dollars for legal fees and \$500,000 more in back taxes, they fail to provide any evidence of any bills for the legal expenses, or to address the \$800,000 in mortgage proceeds obtained after expenses were paid.

### **3. Priority of Secured Debt**

The last defense raised by defendants is that the secured debt of the Subordinated Creditors comes ahead of North Hill’s judgment lien. However, defendants provide no evidence that any debt

held by the Subordinated Creditors was perfected, such as copies of filed UCC-1s. Indeed, plaintiff asserts that a search uncovered no filed UCC-1s by the Subordinated Creditors (*see* Gross aff, ¶ 10). An unperfected lien comes behind a judgment lien (*see Matter of Citibank v Prime Motor Inns Ltd. Partnership*, 98 NY2d 743, 744-745 [2002]; *Commissioners of State Ins. Fund v Isis Staffing Solutions, Inc.*, 2010 WL 1733477, 2010 NY Slip Op 30976[U] [Sup Ct, NY County 2010]). Here, North Hill filed its transcript of judgment in Westchester County on October 8, 2014 (*see* Gross aff, exhibit 5).

In addition, in making this argument, defendants ignore the fact that corporate insiders do not have the right to pay the debts owed to entities owned by them in preference to obligations owed to third party creditors:

“Under New York law, directors of an insolvent corporation have a duty not to divest the corporation of assets without offering creditors an opportunity to present and enforce their claims. This duty exists to ensure that directors do not divert the insolvent corporation’s assets improperly in a manner designed to benefit themselves or a particular stockholder, thereby subverting the rights of other creditors”

(*Brenner v Phillips, Appel & Walden, Inc.*, 1997 WL 33471053, \* 6 [SDNY 1997] [internal citations omitted]).

Finally, this defense is contrary to the terms of the Subordination Agreement, in which the Subordinated Creditors agreed to subordinate their secured debt to the debt of North Hill, and ignores the provision of the Guaranty which treats the secured debt owed by CBC to the Subordinated Creditors as equity, not debt.

Accordingly, defendants’ motion for summary judgment is denied.

**Plaintiff’s Motion for Summary Judgment (Motion Sequence No. 002)**

Plaintiff moves for summary judgment on the claims for specific performance on the

Guaranty and the Subordination Agreement. Plaintiff also seeks summary judgment for the constructive fraudulent conveyance and intentional fraudulent conveyance claims under the DCL. Finally, plaintiff argues that the Amincor entities are liable as alter egos of the Capstone entities.

**1. Specific Performance of the Guaranty (First Cause of Action)**

Section 5 of the Guaranty establishes restrictions on CBC's asset transfers which barred CBC from making or permitting "any substantial diminution" in its net worth, or from selling, mortgaging or pledging any "material portion" of its property without North Hill's written consent.

Summary judgment on the first cause of action for specific performance of the Guaranty is granted. It is clear that, by giving away all of its assets to Amincor/Amincor Other, CBC suffered a "substantial diminution" in net worth, and that this asset transfer constituted a sale without North Hill's consent. Defendants present no evidence that CBC obtained North Hill's written consent before allowing the Pelham Manor Property to be deeded to Amincor. Thus, this transaction was a direct violation of the Guaranty.

Although defendants argue that there was no diminution because Amincor simultaneously assumed the Subordinated Debt, the court rejects this argument. There was no release or other instrument relieving CBC of the debt owed to the Subordinated Creditors. The parties "did not demonstrate an unequivocal intention to extinguish the prior obligation . . . and to replace it with the new obligation personally assumed by [the] defendant" (*Meyersohn v Bloom*, 259 AD2d 432, 433 [1st Dept 1999]).

Accordingly, North Hill is entitled to specific performance of the Guaranty. The Guaranty was a binding contract, North Hill fulfilled its obligations by making the loan, Amincor Other is capable of returning the Pelham Manor Property to CBC, and North Hill has no adequate remedy at

law under the Guaranty against CBC, because CBC is judgment proof (*see Matter of Lamberti v Angiollilo*, 73 AD3d 463, 464 [1st Dept 2010] [“the court properly placed the parties, to the extent possible, in the positions they would have occupied had the contract been performed according to its terms, granting no party superior right, then would have been enjoyed had there been proper performance”]; *see also Aquabella v Harvey*, 69 Misc 2d 606, 610 [Sup Ct, Monroe County 1972] [granting specific performance of guaranty]).

## 2. Specific Performance of the Subordination Agreement (Second Cause of Action)

In support of its motion for summary judgment on the second cause of action, North Hill asserts that the transfer of all of CBC’s assets to Amincor violated the following provisions of the Subordination Agreement:

- Section 1 (a) – subordination of the obligations of the Subordinated Security Agreements to the obligations of the Guaranty;
- Section 3 (a) – North Hill’s entitlement to be paid first on a “liquidation” which is the term that defendants use to describe the transaction;
- Section 7 (a) – barring CBC from converting or exchanging the Subordinated Debt, assigning the Subordinated Debt, or allowing the terms of the Subordinated Debt to be changed; and
- Section 8 – barring CBC from paying the Subordinated Debt or taking any other action in contravention of the Subordination Agreement.

North Hill also asserts that, because notice of an event of default was provided, the transfer of all of CBC’s assets also violated additional sections of the Subordination Agreement:

- Section 1 (b) – agreement to subordination of debt by the Subordinated Creditors;
- Section 2 (a) – after notice of default, no payment by CBC allowed on the Subordinated Debt;

- Section 3 (c) – all payments after notice of default held in trust by the Subordinated Creditors for the benefit of North Hill.

Pursuant to section 3 (d) of the Subordination Agreement, North Hill is entitled “to demand specific performance of this Agreement . . . at any time when the Subordinated Creditor shall have failed to comply with any of the provisions of this Agreement applicable to it.” Section 13 provides that North Hill is entitled to attorneys’ fees and expenses in connection with the exercise of its rights under the Subordination Agreement.

Here, Ingrassia, former Managing Member of CBC, admits in his affidavit that CBC (and Capstone Capital) assigned all of their assets to Amincor/Amincor Other to be relieved of the debt owed to the Subordinated Creditors (*see* Ingrassia aff, ¶ 3). Defendants’ attorney alleges that CBC and Capstone Capital transferred assets to Joning, Amincor’s predecessor, “in satisfaction of their defaulted liabilities” to the Subordinated Creditors (Brody aff, ¶ F). The Subordination Agreement is binding on all transferees, successors and assigns of CBC and Capstone Special Purpose Fund (Subordination Agreement, § 16). Moreover, it is the “economic substance” of a transaction which governs, and “not the form or labels used in the transaction” (*Sumitomo Mitsui Banking Corp. v Credit Suisse*, 44 Misc 3d 1224[A], 2014 NY Slip Op 51295[U], \*6 [Sup Ct, NY County 2014], citing *Chemical Bank v Meltzer*, 93 NY2d 296, 302, 304 [1999] [“it is clear that a court ‘must first look to the substance of the entire transaction, rather than its form,’ and it is the ‘essential character’ of the transaction that governs”] [additional citation omitted]).

Plaintiff asserts that the economic substance here is that the Subordinated Creditors “leapfrogged” the priority of North Hill by having the Guarantors’ assets conveyed to an entity (Amincor) that assumed only the Subordinated Debt, but not the debt owed to North Hill.

Accordingly, defendants have breached, at a minimum, sections 1 (a), 3 (a), 7 (a) and 8 of the Subordination Agreement. In addition, since the court has found that notice of the event of default was provided to the Subordinated Creditors, defendants have also breached sections 1 (b), 2 (a) and 3 (c) of the Subordination Agreement. Consequently, pursuant to section 3 (d) of the Subordination Agreement, plaintiff is entitled to specific performance of the Subordination Agreement, as well as to its attorneys' fees, pursuant to section 13 (*see generally Fleet Capital Corp. v Yamaha Motor Corp.*, 2002 WL 31174470, \* 36-37 [SD NY 2002] [subordination agreement is breached when defendant exercised a right or claim to the proceeds when plaintiff had a superior right or claim; covenant of good faith and fair dealing presumed in every contract breached when subordinated creditor destroyed priority interest of secured creditors]).

### **3. Fraudulent Conveyance Claims (Third Through Sixth Causes of Action)**

Pursuant to the DCL, a creditor may seek damages from a debtor who conducts either an actual fraudulent transfer (*see* DCL § 276), or a constructively fraudulent transfer (*see* DCL §§ 273-275). A transfer is deemed to be actually fraudulent if it was made with the intent to hinder, delay or defraud either present or future creditors (*see* DCL § 276; *see also Grumman Aerospace Corp. v Rice*, 199 AD2d 365, 366 [2d Dept 1993]). A transfer is deemed to be constructively fraudulent, i.e., without regard to actual intent, if: (1) it was made without fair consideration; and (2) the debtor was either insolvent or rendered insolvent by the transfer (*see* DCL §§ 273-275; *see also Shelly v Doe*, 249 AD2d 756, 757 [3d Dept 1998]; *Taylor-Outten v Taylor*, 248 AD2d 934, 935 [4<sup>th</sup> Dept 1998]).

“Fair consideration” exists “[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” (DCL

§ 272[a]). Good faith is thus an essential element of fair consideration (*see Furlong v Storch*, 132 AD2d 866, 868 [3d Dept 1987]; *accord Sardis v Frankel*, 113 AD3d 135, 142 [1st Dept 2014]).

North Hill argues that the conveyance of the Pelham Manor Property to the Amincor entities when the Guaranty Action was pending was contrary to DCL § 273-a (conveyance by defendant), § 273 (conveyance by insolvent) and § 274 (conveyance by person in business). The court agrees. CBC transferred all of its assets to the Amincor entities without receiving anything in return. Thus, there was no “fair consideration” under DCL § 272. No antecedent debt was satisfied because (1) CBC was not relieved of the Subordinated Debt; and (2) the Guaranty defines the Subordinated Debt as equity. Indeed, defendants concede that they stripped CBC and Capstone Capital of all assets, rendering them judgment proof, while the Guarantor Action was pending. Defendants further concede that the Amincor entities, controlled and largely owned by Rice and Ingrassia, were the recipients of all of these assets from CBC.

In addition, the transfer fails to satisfy the “good faith” requirement. When a corporate insider participates in both sides of the transfer and when the insiders control the transfer, “the transfer will be deemed to have been made in bad faith if made to a creditor’s detriment” (*112 West 34<sup>th</sup> St. Co., LLC v Shamah*, 45 Misc 3d 1213[A], 2014 NY Slip Op 51554[U], \*3 [Sup Ct, NY County 2014] [citation omitted]). Bad faith is established if the purpose of the transfer is to give an insider a preference over other creditors (*see Matter of Bernasconi v Aeon, LLC*, 105 AD3d 1167, 1169 [3d Dept 2013]). Payments of antecedent debts of insiders, to the detriment of other creditors, are fraudulent conveyances (*see HBE Leasing Corp. v Frank*, 48 F3d 623, 634-635 [2d Cir 1995]; *In re Trunsum Group Inc.*, 460 BR 379, 391 [Bankr SD NY 2011]).

For instance, in *Laco X-Ray Systems, Inc. v Fingerhut* (88 AD2d 425 [2d Dept 1982]), where,

similar to the instant matter, the challenged transfer was between two entities controlled by the same principal, with the transferee assuming the transferor's debt, the court found that the transfer was a fraudulent conveyance:

"In essence, the transfer of debits, credits and assets between the two nominal business entities controlled by [the same principal] constituted at the most mere paper transactions and bookkeeping entries in an intra-organizational structure. In no way did they result from arm's length negotiations between parties having diverse interests and goals. Succinctly stated, the assets of [the transferor] were conveyed in such a manner that its principals . . . became preferred creditors to the detriment of the creditors such as plaintiff?"

(*id.* at 432-433).

The remaining elements for constructive fraudulent conveyance under the DCL are also satisfied. Under § 273-a, CBC made the conveyance while a defendant in North Hill's action for money damages, and North Hill has obtained a judgment which CBC and the other Guarantors have not satisfied. Under § 273, CBC was insolvent and/or rendered insolvent when it made the transfer (*see* CBC balance sheet [Kimche aff, exhibit H]). Under § 274, CBC was in business when it made the conveyances, and had unreasonably small capital remaining after the conveyances.

Accordingly, plaintiff is entitled to summary judgment on its constructive fraudulent conveyance claims (third, fourth and fifth causes of action).

Plaintiff is also entitled to summary judgment on its intentional fraudulent conveyance claim (sixth cause of action). Pursuant to DCL § 276, "[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." Where, as here, the record shows clearly and convincingly that the transfer was made with intent to hinder,

delay, or defraud a creditor, a court may grant summary judgment to plaintiff (*see Dillon v Dean*, 236 AD2d 360, 361 [2d Dept 1997] [transfer by defendant to corporation wholly owned by him when action pending]).

An inference of intent to defraud may be established by a showing of badges of fraud. “Among such circumstances are: a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the ordinary 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” (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]). All of these badges are present here. The transferee and transferor are controlled by the same people. The liquidation prejudices the senior creditor, and the transfer leaves all of the remaining assets of the judgment debtors in the control and principal ownership of the judgment debtors’ principals. The timing of the conveyance, a few months after North Hill brought suit, is another badge of fraud (*see Henry v Soto-Henry*, 89 AD3d 617, 618 [1st Dept 2011]; *Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]).

Accordingly, summary judgment is granted in favor of plaintiff on its intentional fraudulent conveyance claim, as there is clear and convincing here that the transfer was made with the intent to hinder, delay or defraud plaintiff.

#### **4. Alter Ego Liability (Seventh Cause of Action)**

In support of its motion for summary judgment on the seventh cause of action, plaintiff asserts that the Amincor entities are liable for CBC’s debts, as alter egos and mere continuations of CBC. The doctrine of piercing the corporate veil does not furnish a basis for a cause of action

independent of plaintiff's cause of action against the corporation (*see ARB Upstate Communications LLC v RJ Renters, LLC*, 93 AD 3d 929 [3d Dept 2012]). The doctrine presupposes that the corporation whose "veil" is being "pierced" has an underlying liability to plaintiff (*see Morris v State Dept. of Taxation and Finance*, 82 NY 2d 135, 140 [1993]). Such is the claim being made here.

To establish alter ego liability, the plaintiff must bear the "heavy burden" of showing that the defendants controlled the transaction and that such domination was used to commit a wrong or fraud against the plaintiff, resulting in the plaintiff's injury (*see Colbolt Partners, L.P. v G.S.C. Capital Corp.*, 97 AD 3d 35, 40 [1st Dept 2012]; *Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]). A transaction intended to defraud creditors is a basis to impose successor liability (*Tommy Lee Handbags, Mfg. v 1948 Corp.*, 971 F Supp 2d 368, 378 [SD NY 2013]). A plaintiff may pierce the veil on an alter ego theory if it can prove "that corporate funds were purposefully diverted to make it judgment proof or that a corporation was dissolved without making appropriate reserves for contingent liabilities" (*Baby Phat Holding Co., LLC*, 123 AD3d at 407).

Here, by defendants' own admission, all of CBC's assets were assigned to Amincor/Amincor Other, making CBC judgment proof, and causing CBC to cease acting as an operating entity. The two Amincor entities are controlled by the same individuals who controlled CBC: Rice and Ingrassia. Amincor/Amincor Other are also liable as the mere continuation of CBC because they acquired CBC's business locations, employees, management and good will (*see Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 172 [1st Dept 2013]).

In addition, under the terms of the Assignment and Assumption Agreement, Amincor (under its prior name of Joning) assumed the "rights and obligations of the Assignor under the Loan

Documents.” The “Loan Documents” encompassed not only the agreements between CBC and the Subordinated Creditors, but also all of the documents and agreements executed “in connection therewith.” Accordingly, as the Subordination Agreement and Guaranty were both executed in connection with loans made by the Subordinated Creditors, both the Subordination Agreement and Guaranty were assumed by the Amincor entities, and the Amincor entities are bound by the terms of both agreements (*see* Subordination Agreement, § 16 [b] [binding successors and assigns]).

Accordingly, the Amincor entities are liable as alter egos and mere continuations of CBC, and plaintiff’s motion for summary judgment on the seventh cause of action is granted.

**Defendants’ Second Motion to Dismiss (Motion Sequence No. 003)**

Defendants assert a second motion to dismiss the complaint, pursuant to RPAPL §§ 1301, 1371 and/or 3211 (a) (7) for lack of standing on the ground that the June 11, 2015, decision and order of the First Department in *North Hill Funding of New York, LLC v Maiden & Madison Holding, LLC* (index No. 602997/2009) deprives plaintiff of standing in this action. In that decision, the court held that plaintiff’s motion to amend its judgment against the defendants in that action was “in essence an impermissible motion for a deficiency judgment in an action on a mortgage debt (*see* RPAPL §§ 1301 and 1371).” Further, that court held the plaintiff failed to establish that it had disposed of collateral in a commercially reasonable manner.

On May 25, 2011, by so-ordered stipulation, North Hill released its lien on the 158 Madison Avenue Property in exchange for the \$34.4 million in proceeds from the sale of that property. Plaintiff reserved its right to seek a deficiency judgment. Plaintiff then filed its motion seeking to establish defendants’ deficiency. In a decision and order dated December 19, 2011, the court referred the matter to Justice Gammerman, to hear and report on the amount that was due plaintiff

under the Note and Guaranty. On January 20, 2012, the Guarantors moved to reargue that decision on the ground that, through its motion, North Hill impermissibly sought to seek a deficiency judgment in contravention of the Real Property Actions and Proceeding Law. The court denied the motion on the ground that reargument cannot be used to assert legal arguments that could have been raised earlier, but were not. In early 2013, Justice Gammerman conducted a series of hearings, which this court confirmed. On April 16, 2014, the clerk entered the subsequent deficiency judgment in the amount of \$7,052,401.20 (the Subsequent Judgment). Defendants appealed.

In a decision dated June 11, 2015 (later recalled), the First Department held that it had no appellate jurisdiction over those issues raised in defendants' first notice of appeal of the December 19, 2011, decision, because defendants failed to perfect the appeal. Nevertheless, it noted that, if it were to reach the issue, it would hold that this court's interpretation of the Guaranty and the application of the sales proceeds were correct. The Court also held that, despite this court's correct application of the sales proceeds, the Subsequent Judgment "would nonetheless have to be vacated," because plaintiff's CPLR 5019 motion to obtain such judgment "was in essence an impermissible motion for a deficiency judgment on a mortgage debt" in contravention of RPAPL 1301 and 1371, and because "the correction of the judgment impermissibly affected a substantial right of defendants." The Court remanded the matter to establish that the "disposition of the collateral was commercially reasonable."

On September 8, 2015, upon a motion for reargument, the Court "recalled and vacated" the June 11, 2015 decision and order. In its decision, the Court deleted all references to the RPAPL, and reaffirmed that this court "correctly construed the limitation in the guaranty." The Court again remanded the case for a hearing to determine the commercial reasonableness of the collateral of the

jewelry and the 158 Madison mortgage.

Defendants' second motion to dismiss must be denied as violative of the "single motion rule" (*Landes v Provident Realty Partners II, L.P.*, 137 AD3d 694, 694 [1st Dept 2016]). CPLR 3211 (e) provides that, at any time before service of a responsive pleading is required, a party may move to dismiss a pleading "on one or more grounds set forth" in CPLR 3211 (a), and that "no more than one such motion shall be permitted." The "single motion rule prohibits parties from making successive motions to dismiss a pleading" pursuant to CPLR 3211 (a) (*Ramos v City of New York*, 51 AD3d 753, 754 [2d Dept 2016]); accord *Bailey v Peerstate Equity Fund, L.P.*, 126 AD3d 738, 738-739 [2d Dept 2015]). Here, defendants made two successive motions to dismiss, in violation of the single motion rule and the second motion to dismiss must be denied. Accordingly, it is unnecessary to reach the merits of defendants' second motion to dismiss (see *Oakley v County of Nassau*, 127 AD3d 946 [2d Dept 2015]). However, even if this court were to reach the merits of the motion, the motion would still be denied, as it relies entirely upon the First Department's vacated decision.

The court has considered the remaining arguments, and finds them to be without merit.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (motion sequence no. 002) is granted, and plaintiff is entitled to specific performance on the Guaranty and Subordinated Agreements dated January 9, 2008 (first and second causes of action), judgment on its causes of action for violation of the New York Debtor and Creditor Law (third through sixth causes of action), and judgment on the seventh cause of action for alter ego liability; and it is further

ORDERED that plaintiff is directed to settle order with respect to the particular relief that it is seeking on each cause of action; and it is further

ORDERED that defendants' motions to dismiss (motion sequence nos. 001 and 003) are both denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

**DATED: January 17, 2016**

**ENTER,**

A handwritten signature in black ink, appearing to read "O. Peter Sherwood", written over a horizontal line.

**O. PETER SHERWOOD**

**J.S.C.**