SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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CITY NATIONAL BANK, a NATIONAL BANKING ASSOCIATION, for itself and as Acquirer of certain Assets and Liabilities of IMPERIAL CAPITAL BANK from the FEDERAL DEPOSIT INSURANCE CORPORATION acting as receiver,

Plaintiff,

- against -

MONROE BUS CORP., JOSEPH FREUND, PINCUS FREUND and HERMAN FREUND,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF008692/16

**DECISION, ORDER and JUDGMENT**

Motion Dates: August 9, 2017

The following papers numbered 1 to 18 were read and considered on (1) a motion by the Plaintiff, pursuant to CPLR §3212, for summary judgment setting aside transfers of shares in the Monroe Bus Corp. from Herman Freund to Joseph Freund and Pincus Freund as fraudulent; and (2) a cross motion by the Defendants Joseph Freund and Pincus Freund, pursuant to CPLR §§ 3001 and 3212, for a declaration that they are the 53% owners of shares in the Monroe Bus Corp., and dismissing the complaint insofar as asserted against them.

Notice of Motion- Andriola Affirmation- Exhibits 1-16- Memorandum of Law ..... 1-4
Notice of Cross Motion- Ramer Affidavit- Exhibits A & B- Freund Affidavit–
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Upon the foregoing papers, it is hereby,

ORDERED, ADJUDGED and DECREED, that the branch of the Plaintiff's motion which is for summary judgment on its first cause of action to set aside the transfers as fraudulent under Debtor and Creditor Law § 273-a is granted, and the transfers are ordered set aside; and it

is further,

ORDERED, ADJUDGED and DECREED, that the remaining branches of the Plaintiff's motion are denied; and is further,

ORDERED, ADJUDGED and DECREED, that the cross motion is denied; and it is further,

ORDERED, ADJUDGED and DECREED that Joseph Freund and Pincus Freund are not the bona fide owners of 53% of the shares of the Monroe Bus Corp., and that the transfers of same to them from Herman Freund are set aside as fraudulent as against the Plaintiff; and it is further,

ORDERED, ADJUDGED and DECREED, that Herman Freund is adjudicated the sole owner of the shares of the Monroe Bus Corp.

**Introduction**

In 2009, the Plaintiff City National Bank (hereinafter "City National Bank") commenced an unrelated action against, *inter alia*, a Defendant herein, Herman Freund (hereinafter "Herman"), seeking, among other things, to enforce guaranties executed by Herman (hereinafter the "Guaranty Action").

By Judgment dated October 21, 2015, issued in the Guaranty Action, City National Bank was awarded judgment against Herman in the amount of approximately $3.7 million.

In 2016, City National Bank commenced a turnover proceeding against, *inter alia*, Herman to compel him to turn over certain assets in satisfaction of the judgment. The assets included, *inter alia,* his 47% ownership interest in a former Defendant herein, the Monroe Bus Corp. (hereinafter "MBC").

In prior motion practice in the turnover proceeding, Herman Freund (hereinafter "Herman") asserted that he was the 47% owner of MBC, and that his two sons, the Defendants herein Pincus Freund (hereinafter "Pincus") and Joseph Freund (hereinafter "Joseph"), owned the remaining (53%) of the shares. Herman argued that he could not be compelled to turnover his shares because he and his sons had a verbal agreement since MBC was founded in 1985 that none would alienate his shares without the consent of the others. This, he asserted, was because MBC was a closely-held family corporation, and required close cohesion among the shareholders. Indeed, Herman contended, both he and his sons, as well as many employees, spoke and transacted business in Yiddish.

Pincus and Joseph each submitted affirmations in which they declined to consent to the transfer of Herman's shares to City National Bank.

City National Bank questioned the bona fides of the Defendants' allegations, noting that Herman had been the sole shareholder of MBC from 1985 until December 2011.

In a Decision and Order issued in the turnover proceeding, dated July 18, 2016, the Court held, *inter alia*, that Herman's shares in MBC were subject to turnover, and that giving effect to the alleged verbal agreement between the Defendants would, in effect, permit a fraud upon creditors.

Also in 2016, City National Bank commenced the action at bar to set aside the transfers of the shares in MBC from Herman to his two sons. City National Bank alleges that the transfers were fraudulent as against it under the Debtor and Creditor Law, *inter alia*, because they were intended to, and/or had the effect of, diminishing or negating its ability to collect a $3.7 million judgment against Herman (*supra*).

City National Bank alleges that Joseph and Pincus were aware of the Guaranty Action *supra*, and that, while it was pending, Herman made the following direct or indirect transfers of his shares in MBC – In December of 2011, he transferred 10% of his shares to Joseph and Pincus (5% each); in December 2012, he transferred 10% of his shares to his sons (5% each); and in December 2012, January 2013, and January 2014, he transferred 11% of his shares to his sons (5.5% each). Thus, in total, Herman transferred 53% of his shares in MBC to his sons during the period December 2011 through January 2014.

City National Bank alleges that the transfers were made without consideration, and that Herman made the transfers to avoid his obligations under the guarantees that resulted in the judgment in the Guaranty Action (*supra*), which remains unpaid. Thus, City National Bank argues, the transfers should be set aside as fraudulent within the meaning of Debtor and Creditor Law §§ 273-a, 274, 275 and 276.

In prior motion practice, the Defendants moved to dismiss the complaint on a variety of grounds, including failure to state a cause of action.

Herman argued, *inter alia,* that the allegations of the complaint must be dismissed based on documentary evidence, to wit: On December 27, 2005, he entered into a "Contract of Commitment" with Joseph and Pincus by which they agreed that, in exchange for their years of work and service to MBC, they would each be transferred shares in MBC. Thus, he argued, the shares at issue were transferred in satisfaction of an antecedent debt for past services rendered, which is a valid form of consideration. Herman noted that the Contract of Commitment predated both the execution of the guaranties that resulted in the judgment in the Guaranty Action, and the Guaranty Action itself (*supra*).

In opposition to the motion, City National Bank noted that the Guaranty Action was commenced against Herman on October 14, 2009, which is before any of the transfers at issue. At that time, City National Bank noted, Herman was made aware that he might be held liable for a judgment in excess of $1.5 million.

Moreover, City National Bank argued, there are "badges of fraud" throughout, to wit: there is a close relationship between Herman and the transferees (his sons); the transfers were made without consideration and were not in the regular course of business; the transfers were made at a time when Herman was exposed to considerable liability; and Herman transferred 53% of his shares to his sons, leaving him with a non-majority 47% interest in MBC.

Finally, City National Bank asserted, the action was not resolved by the alleged Contract of Commitment. Rather, it noted, the antecedent debt was not described in the contract, and there was no evidence that the work allegedly performed by Joseph and Pincus constituted "fair consideration" for the challenged transfers.

In the prior motion practice, MBC, Joseph and Pincus also moved to dismiss the complaint insofar as asserted against them for failure to state a cause of action, noting that none were a party to the Guaranty Action, or the guarantees underlying the same.

In a prior Decision and Order dated March 17, 2017, the Court dismissed the action as against MBC only. Otherwise, the Court held, *inter alia*, City National Bank had adequately alleged causes of action pursuant to Debtor and Creditor Law sections 273-a, 275 and 276.

**The Motion Practice at Bar**

**The Plaintiff's Motion**

The Plaintiff now moves for summary judgment seeking to set aside the transfers of the

shares of stock made by Herman to Joseph and Pincus as fraudulent.

In support of its motion, the Plaintiff submits an affirmation from its attorney, James Andriola.

Andriola notes that the Defendants admit that no payments were made for the shares at the time of the transfers. Rather, the Defendants argue that the transfers were not fraudulent because they were made in partial satisfaction of an antecedent debt, *i.e.*, to compensate Joseph and Pincus for their years of faithful service to MBC. In support of that claim, the Defendants rely on the Contract of Commitment (*supra*). However, Andriola argues, not only are the Defendants estopped from making such an argument, but also, the argument does not withstand scrutiny,

First, Andriola notes, there is evidence throughout the record that the transfers at issue were "gifts," to wit: In August 2011, Herman hired a company to value his shares in MBC "for gift tax purposes." Further, when he transferred the first shares in December 2011, each was made pursuant to a "Memorandum of Gift" which described Herman as a "donor" making a "gift" to a "donee." In fact, Andriola notes, Herman used the same method and same terms for each of transfers at issue (all of which occurred during the pendency of the Guaranty Action). Further, it is not disputed that the transfers were structured as gifts to avoid tax consequences. Given such, Andriola argues, the Defendants are estopped from arguing to the contrary in this action. Thus, he asserts, as it is not disputed that no payments were otherwise made in connection with the transfers, it may be found, as a matter of law, that the transfers were made without "fair consideration," as a gift, by definition, is a transfer without consideration.

In any event, he argues, the Defendants' argument does not withstand scrutiny.

First , he notes, the Court already questioned the bona fides of the Contract of Commitment in the prior Decision and Order dated March 17, 2017, when it stated:

> Concerning such, the Court notes that, although the contract, which is solely between Herman, Pincus and Joseph Freund, and is neither notarized nor witnessed, fortuitously predates the Guaranty Action, it also predates the first challenged transfer by some six years, and the last challenged transfer by some nine years. Further, as noted by City National Bank, the exact terms of the contract are rather vague.

Second, Andriola notes, the proffered contract is labeled "a promissory note." Consequently, he argues, it expired six years after it was signed, *i.e.*, it expired on December 27, 2011. Thus, he asserts, even if the contract was valid and enforceable, it had expired prior to the first transfer of shares on December 28, 2011.

Third, Andriola notes, both Joseph and Pincus were already being compensated for their work at MBC. At Joseph's examination before trial, he testified that he was a W-2 employee of MBC, and that he received a weekly salary. Presumably, so did Pincus. Further, Andriola notes, according to the valuation of the shares for gift tax purposes commissioned by Herman (*supra*), Joseph was being paid market rates for this work.

Finally, Andriola opines, as had been noted throughout the litigation, the transfers carried many other "badges of fraud."

In sum, he argues, the challenged transfers should be set aside as fraudulent.

**The Cross Motion of Joseph Freund and Pincus Freund**

Joseph and Pincus cross move for a judgment declaring that together they own 53% of the shares in MBC, and to dismiss the complaint insofar as asserted against them.

In support of their motion, they submit an affidavit from Michael Ramer, C.P.C, C.S.P. (Exhibit A). Ramer avers that he was hired to provide an expert opinion as to the value of the

services provided by Joseph and Pincus to MBC during the period of their employment. In preparing his report, he reviewed, *inter alia*, the pleadings and evidence in this and the related actions, the valuation of the shares of MBC for gift purposes (*supra*), the salaries, paid Joseph and Pincus by MBC, and general wage data relevant to the work they performed. He also interviewed Joseph and Pincus on several occasions.

Ramer notes that, based on the interviews, he determined that Joseph began working for MBC in 1987, and is 49 years old, and that Pincus started working for MBC in 1992 and is 35 years old. Each is married with 9 children, and work everyday except the Sabbath, which is from sundown on Friday to Sundown on Saturday. Both were instrumental to the growth of MBC, which went from a few employees and revenue of under $1 million in the early 1990s to 60 employees and revenue of around $6 million currently. Further, he asserts, both were aware that they were being under-compensated based on a "promise" from Herman that they would receive partial ownership of the company, and would take over MBC when Herman retired in 2013.

Currently, Joseph is the Chief Financial Officer of MBC and the de facto CEO, and Pincus is the Chief Operations Officer. Pincus is responsible for the maintenance of MBC's 60 bus fleet, for scheduling and for customer service. Both managed the drivers.

During the late 1990s, Joseph was paid $600.00 per week (or $31,200.00 per year), and Pincus was paid $300.00 per week (or $15,600.00 per year). These payments increased only modestly until 2011, when they become part owners of MBC.

Currently, he notes, Joseph earns a base salary of $150,800.00 per year, and Pincus earns a base salary of $124,800.00 per year. Neither had received any bonuses or pension payments during their employment. Both had health and other benefits valued at approximately 22% of

their base salaries.

For the six year period between 2011 and 2016, Ramer notes, Joseph received an average distribution of $33,297.00 per annum, and Pincus received an average distribution of $29,148.00 per annum. Based on extrapolations of the valuation of the business in 2011, he asserts, the approximate value of each's ownership stake in the business is $183,198.00.

Ramer opines that, based on his research, he determined that, during their employment at MBC, Joseph was under-compensated for his work at MBC in the amount of approximately $3.02 million, and Pincus in the amount of approximately $2.37 million.

Appended to Ramer's affidavit is a report detailing the bases for his opinions (Exhibit B).

In further support of the cross motion, Joseph avers that he and his brother worked long hours at MBC and accepted low compensation in order to grow the business. This, he asserts, was done based on the "expectation" that one day their father (Herman) would retire and they would own the business. Indeed, Joseph avers, he did not initially want to join the business, and started an electronics business in 1986 after graduating from the United Talmudical Academy. However, he asserts, seeing how hard his father was working, he agreed to help on a part-time basis. His father then asked him to come on full-time, and told him that he would be an owner of MBC when he retired. However, his father told him, he would need to work very hard for a long period of time to make the business successful and valuable.

Joseph avers that he was paid only $10,400.00 and given a few benefits for the first year he worked. He soon realized that the company needed more employees if it was to grow, and he convinced his father to hire more. Further, he convinced his brother Pincus to join the business in 1992, under the same agreement that he would one day be an owner.

Thereafter, he avers, he and Pincus worked long hours (up to 18 hours per day), and seldom took vacations. Further, they grew and modernized the business, and managed its affairs. Indeed, he notes, during their tenure, the business went from having 5 or 6 buses and ten employees, and making less than $1.5 million, to having 30 buses and 60 employees, and earning around $6 million.

In the 2000s, Joseph asserts, when his father was in his late 50s, they agreed that they would formalize their arrangement with the Contract of Commitment (*supra*), which was drafted according to Jewish law, and which required any disputes be decided by a Beth Din, which is a rabbinical tribunal. Joseph avers that, given such, and the family nature of the business, the parties did not feel the need to expend the time and money to hire a secular lawyer to draw up "more legalistic agreements." However, he avers, each knew that they needed secular advice on making sure the contract met legal and tax requirements as to the transfers, and they in fact obtained advice from Emmanuel Haas, Esq. Haas advised them on how to effectuate the intent of the contract.

Joseph asserts that, as his father aged, he worked less and less. In 2010, he avers, when his father was 62 years old, they started to effectuate a plan to make the transfer. The parties were advised that the simplest way to achieve their goal was to make stock transfers in small amounts over years to avoid gift and other taxes, which Joseph understood was common with a family business. Indeed, he asserts, regardless of what was going on in the Courts with the Guaranty Action or otherwise, the business of MBC still needed to be run.

Moreover, he contends, to prove that the transfers were not in fact merely gifts, he hired Ramer (*supra*) to show the economic value of the services he and Pincus provided to MBC from

their "sweat equity," which was extensive. Indeed, he asserts, they were both under-compensated during the course of their employment, and to prove the same, he provided Ramer with 30 years of financial records. Moreover, he avers, he can affirm that all of the information in Ramer's report (*supra*) is accurate and true.

Joseph argues that the Plaintiff is unfairly targeting MBC, and claiming that his father was insolvent when he made the challenged transfers, without having considered the father's other asserts. This includes the compensation given in exchange for property Herman owned at 60 Nostrand Avenue in Brooklyn that was taken by eminent domain. Joseph asserts that, although various properties owned by his father may be encumbered with mortgages, he "believed" that there was still equity in the same.

Further, Joseph opines, his father owned other property which Joseph believed had in excess of $500,000.00 in equity.

In addition, he avers, at the time of the challenged transfers, the father did not know that he would be under compensated for the Nostrand Avenue property (*supra*), or that he was going to lose his investment of $1 million in the Foundry Development Group, LLC, which resulted in a multi-million dollar judgment against him.

In sum, Joseph argues, the Court should not force him and Pincus to relinquish their ownership stake in MBC based upon a judgment against the father in a completely unrelated case. Rather, Joseph asserts, the Court should deny the Plaintiff's motion, and declare him the bona fide owner of 26.5 % of the equity in MBC.

In further support of the cross motion, Pincus avers that he and his brother dedicated their lives to MBC, working long hours and seldom taking vacations, with the expectation that would

assume ownership of the same upon the father's retirement. Indeed, he asserts, as was shown by the Ramer's valuation *supra*, he lost potential compensation of $2.37 million over the years. Pincus argues that the Court should not force him and Joseph to relinquish their ownership stake in MBC based upon a judgment against the father in a completely unrelated case. Rather, he asserts, the Court should deny the Plaintiff's motion, and declare him the bona fide owner of 26.5 % of the equity in MBC.

**The Defendants' Opposition to City National Bank's Motion**

In opposition to City National Bank's motion, Herman avers that he started MBC in the 1970s without much sophistication. Indeed, he notes, he did not incorporate until 1985. Around 1987, his son Joseph, who was more sophisticated in the ways of business and finances, joined the company, and convinced him to hire more drivers and buy more buses. Joseph also improved the over-all running of the business. Herman asserts that, when he saw the success that Joseph was bringing to the business, he allowed him more responsibility.

In 1992, Herman notes, Pincus joined MBC. At the time, Pincus knew nothing about the maintenance and repair of buses. MBC performed minor maintenance on its buses, but needed to use expensive mechanic's shops for the more sophisticated and involved repairs. Herman avers that, because Pincus wanted to save MBC money, he used his time to study books and manuals to learn how to make more extensive and complicated repairs on the buses. Pincus also organized the stock room for bus parts, and computerized the offices. Further, he handled customer complaints, and was a fill-in driver.

Herman avers that he made it clear to his sons that he was building the business for all of them. Thus, they worked very hard and were underpaid.

Moreover, he asserts, had there been a dispute among them, they would have litigated it in a rabbinical court. That is why the Contract of Commitment was simple and written in Hebrew. Indeed, he asserts, in his community, it was common for sons to be involved with the father's business. Here, he avers, MBC grew and thrived because of the time and effort put into the business by the sons.

Herman asserts that he unexpectedly lost a large sum of money on a variety of investments, and that he was underpaid for property he owned in Brooklyn that was taken by eminent domain, all of which resulted in the judgment at issue against him.

Herman argues that the Plaintiff challenged the stock transfers at issue not knowing the investment his sons made in MBC, and without inquiring into his other assets, which are substantial.

Herman avers that he is currently officially retired from MBC, although he occasionally fills in as a driver. MBC is now run by his sons.

In sum, he argues, the Court should deny the Plaintiff's motion.

**Discussion/Legal Analysis**

In general, the party seeking summary judgment bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law by tendering competent evidence in admissible form sufficient to eliminate any triable, material issues of fact from the case. If the moving party fails to meet this burden, the papers submitted in opposition need not be considered. If the moving party makes such a *prima facie* showing, the burden shifts to the opposing party to demonstrate the existence of an issue of fact requiring a trial. *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]; *Dempster v. Liotti*, 86 A.D.3d 169 [2nd Dept.

2011].

**City National Bank's Motion**

City National Bank seeks summary judgment, *inter alia*, on its first cause of action pursuant to Debtor and Creditor Law § 273-a, which provides in relevant part for the following:

> Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

"Fair consideration" is defined as existing "when in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied" or "[w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property, or obligation obtained." *Debtor and Creditor Law § 272.*

A conveyance that satisfies an antecedent debt is not fraudulent, even if made by an insolvent debtor, if the transfer simply prefers one creditor over another. *Zelouf Intl. Corp. v Rivercity, LLC*, 123 A.D.3d 1114 [2nd Dept. 2014].

The good faith of both transferor and transferee is stressed as an indispensable condition in the definition of fair consideration under either branch of the statutory language. *Stout Street Fund I, L.P. v. Halifax Group, LLC*, 148 AD3d 749 [2nd Dept. March 1, 2017].

Here, as noted *supra*, the Defendants do not dispute that no money was paid for the transfers at the time they were made. Rather, the sole "fair consideration" claimed for the transfers is an "antecedent debt" owed by Herman to Joseph and Pincus for their under-compensated work for MBC. As proof of the same, the Defendants rely on the Contract of

Commitment. However, as a threshold issue, the Defendants are estopped from arguing that the transfers were other than gifts.

It is not disputed that the transfers at issue were labeled and structured as "gifts," and necessarily reported to taxing authorities as such, to avoid taxes. Thus, as a matter of public policy, the Defendants are estopped from asserting a position to the contrary in this action. *Mahoney-Buntzman v Buntzman*, 12 N.Y.3d 415 (2009); *Braunstein v. Braunstein*, 132 A.D.3d 620 [2nd Dept. 2015]; *Man Choi Chiu v. Chiu*, 125 A.D.3d 824 [2nd Dept. 2015].

Consequently, since a gift is a voluntary transfer of property without consideration or compensation, and no other consideration was paid for the transfers, it may be found, as a matter of law, that the transfer were made without "fair consideration." *62 N.Y. Jur.2d, Gifts, § 1, at 182–183; Wilcox v. Wilco*, 233 A.D.2d 565 [3rd Dept. 1996].

Further, and in any event, the evidence proffered in support of the claim– the Contract of Commitment- is an unenforceable "agreement to agree".

In general, to form a binding contract, there must be a meeting of the minds, such that there is a manifestation of mutual assent sufficiently definite to assure that the parties are truly in agreement with respect to all material terms. By contrast, a mere "agreement to agree," which is expressly conditioned on the execution of a definitive agreement satisfactory in form and substance to both parties, or which leaves open a material term for future negotiation, does not give rise to an enforceable contract. *DCR Mortg. VI Sub I, LLC v. Peoples United Financial, Inc.*, 148 A.D.3d 986 [2nd Dept 2017]; *Trueforge Global Machinery Corp. v. Viraj Group*, 84 A.D.3d 938 [2nd Dept. 2011]; *Danton Const. Corp. v. Bonner*, 173 A.D.2d 759 [2nd Dept 1991].

Here, according to the Contract of Commitment, Herman[1] obligated himself to transfer his interest in MBC so that Joseph and Pincus "should be the exclusive owners" of the same. However, the contract does not state when or how the transfer is to take place. Rather, the contract notes that it had been "expressly stipulated" that the parties needed to consult an attorney or an expert, who would determine "the manner of the transfer, how and when it will occur, in order to save tax expenses, and the manner that best serves the interest of both parties."

Regarding the same, the fundamental precept of contract interpretation is that agreements are to be construed in order to effectuate the intent of the parties, and the best evidence of that intent is what the parties express in their writing. A companion interpretative principle is that the words so utilized are to be accorded their plain and natural meaning. *Goldman v. White Plains Center for Nursing*, 11 N.Y.3d 173 (2008); *Maser Consulting, P.A. v. Viola Park Realty, LLC*, 91 A.D.3d 836 [2nd Dept. 2012]. Further, the construction and interpretation of an agreement is not a factual determination, but an issue of law for the court (*Maser Consulting, P.A. v. Viola Park Realty, LLC*, 91 A.D.3d 836 [2nd Dept. 2012]) and the court, in exercising that interpretative function, may not rewrite the agreement or supply additional terms or conditions that the parties failed to insert under the guise of its interpretative role. *Bailey v. Fish & Neave*, 8 N.Y.3d 523 (2007); *Matter of Salvano v. Merrill, Lynch, Pierce, Fenner & Smith*, 85 N.Y.2d 173 (1995); *Maser Consulting, P.A. v. Viola Park Realty, LLC, supra.*

Here, the Court concludes and so finds that the material provisions of the Contract of Commitment have been omitted. The Court need not address whether such omission was

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[1] According to the translation, the contract is between "Chaim", Joseph and "Pinches" Freund. The Plaintiffs do not dispute that "Chaim" is Herman, and "Pinches" is Pincus.

intentional or unintentional. Thus, since the material terms of the document were omitted, the Contract of Commitment must be, and is hereby, declared an unenforceable "agreement to agree".

Further, the Court notes, there are other factors which suggest a lack of bona fides to the Contract of Commitment.

Not insignificantly, the first transfer of shares was not made until December 28, 2011, which is six years after the contract was signed (and two years after the Guaranty Action had been commenced). The Defendants did not proffer any evidence or allegation of anything in particular that occurred during the intervening period that triggered the transfers. Nor did any of them aver that further agreement concerning the shares had been reached.

Further, the Contract of Commitment is signed by Herman, Joseph and Pincus only, and each has demonstrated a willingness to tailor submissions to reach a desired result, to wit: In the turnover proceeding *(supra)*, it was averred that an agreement existed between the Defendants concerning the alienation of shares in MBC since it was formed in 1985. However, as is made clear by this action, Joseph did not join MBC until 1987, Pincus did not join MBC until 1992, and neither owned any shares until 2011, which is some 26 years after the claimed 1985 agreement.

However, it is noted, this is not necessarily determinative.

Compensation for past services may give rise to an antecedent debt if there was an implied or constructive promise to pay. *U.S. v. Scharfman*, 1981 WL 185548 [SDNY 1981].

Here, in their submissions to the Court, each of the Defendants averred that there was at least an implied promise that they would be given an ownership interest in MBC, although the

timing of the same is not clear. Indeed, the gist of the submissions is that there was an expectation that Joseph and Pincus would become the owners of MBC when Herman retired.

In sum, in support of its motion, City National Bank demonstrated, *prima facie,* that the challenged transfers were made by Herman without fair consideration at a time when he was a defendant in an action for money damages (the Guaranty Action) and were, therefore, fraudulent as against it regardless of his actual intent.

In opposition to this Plaintiff's *prima facie* showing, Joseph and Pincus failed to rebut the same and raise a triable issue of fact.

Thus, City National Bank is granted summary judgment on its first cause of action pursuant to Debtor and Creditor Law §273-a.

However, City National Bank did not demonstrate a *prima facie* entitlement to judgment as a matter of law under either Debtor and Creditor Law § 275 or Debtor and Creditor Law § 276. Thus, summary judgment is denied as to those two cause of action regardless of the sufficiency of the opposing papers.

However, it is noted, as the grant of summary judgment on the first cause of action affords City National Bank complete relief in the action, the denial as to the remaining causes of action is academic.

**The Cross Motion of Joseph and Pincus**

Given the analysis *supra*, the cross motion of Joseph and Pincus seeking a declaration that they are the sole owners of shares in MBC is denied.

Correspondingly, to the extent that the Defendants seek declaratory relief establishing and promulgating their legal relationships and the rights existing between the parties as to the subject

matter of this action, a contrary declaration is made. By the relief granted to the Plaintiff, i.e. the setting aside of the transfers at issues, coupled with the determination that Herman Freund be declared the sole owner of the MBC, the court has issued its declaratory relief; it has stabilized the legal relationships existing between the parties and has eliminated any uncertainty as to the scope and content of both present and prospective legal obligations. CPLR §3001; *Goodman v. Reisch*, 220 A.D.2d 383 [2nd Dept. 1995]; *Chanos v. Madac, LLC*, 74 A.D.3d 1007 [2nd Dept. 2010].

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, ADJUDGED and DECREED, that the branch of the Plaintiff's motion which is for summary judgment on its first cause of action to set aside the transfers as fraudulent under Debtor and Creditor Law § 273-a is granted, and the transfers are ordered set aside; and it is further,

ORDERED, ADJUDGED and DECREED, that the remaining branches of the Plaintiff's motion are denied; and is further,

ORDERED, ADJUDGED and DECREED, that the cross motion is denied; and it is further,

ORDERED, ADJUDGED and DECREED that Joseph Freund and Pincus Freund are not the bona fide owners of 53% of the shares of the Monroe Bus Corp., and that the transfers of same to them from Herman Freund are set aside as fraudulent as against the Plaintiff; and it is further,

ORDERED, ADJUDGED and DECREED, that Herman Freund be, and is hereby, declared the sole owner of the shares of the Monroe Bus Corp.

The foregoing constitutes the decision, order and judgment of the court.

DATED: September 29, 2017
Goshen, New York

**ENTER**

**HON. ROBERT A. ONOFRY, A.J.S.C.**

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