

Matter of Riviera Produce Corp. v Park
2019 NY Slip Op 30853(U)
March 29, 2019
Supreme Court, New York County
Docket Number: 155968/2017
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 155968/2017

In the Matter of
RIVIERA PRODUCE CORP.

MOTION DATE 04/05/2018

Petitioner,

MOTION SEQ. NO. 003

- v -

MICHAEL PARK,

DECISION AND ORDER

Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for CONFIRM/DISAPPROVE AWARD/REPORT

In this turnover proceeding pursuant to CPLR 5225(b), the petitioner moves pursuant to CPLR 4403 to confirm a referee's report in part and reject it in part. The respondent does not oppose the motion. The motion is granted to the extent that the court confirms so much of the report as concluded that the respondent transferred assets in violation of Debtor and Creditor Law §§ 273 and 273-a, rejects so much of the report as concluded that there was insufficient proof that the respondent transferred assets in violation of Debtor and Creditor Law § 276, and thereupon confirms the conditional recommendation that the petitioner be awarded attorneys' fees under Debtor and Creditor Law § 276-a. The motion is otherwise denied.

In or about June 2015, the petitioner made demand upon 830 Third Ave. Gourmet Food, Inc. (hereinafter the judgment debtor), for the payment of \$88,157.08 in connection with a 2014 contract for the sale of produce. The respondent, Michael Park, was a principal of the judgment debtor. On or about July 5, 2015, the judgment debtor sold all its assets to a similarly named company, 830 Third Ave. Gourmet, Inc. (hereinafter the purchaser), and ceased doing business. The purchaser financed a portion of the purchase price with a promissory note in favor of the

judgment debtor. On September 10, 2015, the petitioner commenced a breach of contract action (Supreme Court, New York County, under Index No. 159299/15) against the judgment debtor, and on December 2, 2016, secured an \$85,297.12 judgment against the judgment debtor.

When the purchaser failed to repay the note that financed its purchase of the judgment debtor's assets, the judgment debtor commenced an action (Supreme Court, New York County, Index No. 651176/16) against the purchaser. The judgment debtor settled that action with the purchaser. Rather than allocating a portion of the settlement proceeds to satisfy the petitioner's judgment against it, the judgment debtor transferred \$172,675.02 of the proceeds to Park in his individual capacity on May 19, 2016.

The petitioner commenced this turnover proceeding against Park, alleging that he violated Debtor and Creditor Law §§ 273, 273-a, 275, and 276, and was liable for attorneys' fees under Debtor and Creditor Law § 276-a by virtue of violating Debtor and Creditor Law § 276. Park defaulted. The matter was thereafter referred to a referee to hear and report on whether Park violated any of those statutory provisions, whether he was liable for attorneys' fees, and, if so, in what amount. Before the referee, the petitioner not only adduced proof of the 2016 transfer, but submitted evidence that, in 2015, Park, himself, had borrowed a substantial sum of money from the judgment debtor that he never repaid. The referee concluded that Park violated Debtor and Creditor Law §§ 273 and 273-a, but that he did not violate Debtor and Creditor Law §§ 275 and 276. He found, however, that if the court ultimately concluded that Park in fact violated Debtor and Creditor Law § 276, he would be liable for an award of attorneys' fees in the sum of \$19,000.00

As a general rule, the court should not disturb the findings of a referee, and the report should be confirmed if the referee's findings are supported by the record, the referee has clearly defined the issues, and the referee resolved matters of credibility (*see Board of Mgrs. of Boro Park Vil.-Phase I Condominium v Boro Park Townhouse Assoc.*, 284 AD2d 237 [1st Dept 2001]);

Freedman v Freedman, 211 AD2d 580 [1st Dept 1995]; *Kaplan v Einy*, 209 AD2d 248, 251 [1st Dept 1994]). Any conclusions of law must be substantially supported by the record (see *Last Time Beverage Corp. v. F & V Distrib. Co., LLC*, 98 AD3d 947, 950 [2d Dept 2012]; *Manow International Corp. v High Point Chair, Inc.*, 98 AD2d 623 [1st Dept 1983]).

A cause of action under Debtor and Creditor Law § 273 requires proof that a conveyance was “made . . . by a person who is or will be thereby rendered insolvent . . . without regard to his actual intent” and that “the conveyance is made . . . without a fair consideration” (see *Joslin v Lopez*, 309 AD2d 837, 838 [2d Dept 2003]). A cause of action under Debtor and Creditor Law § 273-a requires proof that a conveyance was “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,” that a “final judgment for the plaintiff” was entered against the defendant, and that “the defendant fail[ed] to satisfy the judgment,” regardless of that defendant’s intent (see *Fischer v Sadov Realty Corp.*, 34 AD3d 632, 633 [2d Dept 2006]). Here, the record supports the referee’s conclusion that the transfer of the settlement proceeds from the judgment debtor to Park was made in violation of these two statutory provisions. Hence, that portion of the report must be confirmed.

The referee’s conclusion with respect to Debtor and Creditor Law § 276, however, is not substantially supported by the record. Rather, the record supports the conclusion that Park also violated that statute. A cause of action under Debtor and Creditor Law § 276 requires proof that a conveyance was “made . . . with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors.” Because actual intent is difficult to prove, a plaintiff may “rely on ‘badges of fraud’ to support his [or her] case” (*Wall Street Assocs. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999] [internal quotation marks and citation omitted]; see *Marine Midland Bank v Murkoff*, 120 AD2d 122, 128 [2d Dept 1986] “[f]raudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act”). Factors that implicate badges of

fraud include a “close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor’s knowledge of the creditor’s claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance” (*Wall Street Assocs. v Brodsky*, 257 AD2d at 529). Although “the presence of one or more badges of fraud does not necessarily compel the conclusion that a conveyance is fraudulent” (*A&M Global Mgmt. Corp. v Northtown Urology Assocs., P.C.*, 115 AD3d 1283, 1289 [4th Dept 2014]), under the circumstances presented here, such a conclusion is warranted.

“Good faith is required of both the transferor and the transferee, and it is lacking when there is a failure to deal honestly, fairly, and openly” (*Berner Trucking v Brown*, 281 AD2d 924, 925 [4th Dept 2001] [citation omitted]; see *Smith v Kanter*, 273 AD2d 793, 795 [4th Dept 2000]). “Transfers to a controlling shareholder, officer or director of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent” (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]; see *A.F.L. Falck, S.p.A. v E.A. Karay Co., Inc.*, 722 F Supp 12, 17 [SD NY 1989]; see also *Julien J. Studley, Inc. v Lefrak*, 66 AD2d 208, 213 [2d Dept 1979], *affd* 48 NY2d 954, [1979]). Given the “badges of fraud” present here, which include the close relationship between the parties to the transaction, the fact that Park was a principal of the insolvent debtor, the lack of consideration, Park’s knowledge of the judgment debtor’s obligations and its inability to pay them, the timing of the transfer, and Park’s failure to rebut the petitioner’s allegations, there is no evidence negating the inference that the judgment debtor and Park intended to hinder and delay the petitioner from satisfying the subject judgment (see *Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d at 303; *Pen Pak Corp. v LaSalle Natl. Bank of Chicago*, 240 AD2d 384, 386, 7 [1997]). Hence, the court rejects the referee’s findings that Park did not violate Debtor and Creditor Law § 276 and concludes that the petitioner satisfied its burden of proving that Park did violate that statute.

A cause of action under Debtor and Creditor Law § 275 requires proof that a conveyance was “made . . . without fair consideration” by a person who “intends or believes that he will incur debts beyond his ability to pay as they mature.” A claim under this provision requires, in addition to the conveyance and unfair consideration elements, an element of intent or belief that insolvency will result (*see Wall Street Assoc. v Brodsky*, 257 AD2d at 528). Inasmuch as the court agrees with the petitioner that Debtor and Creditor Law § 276 is applicable here and notes that the petitioner effectively agreed to withdraw its cause of action under § 275 in the event that it was successful on its cause of action under § 276, the court denies, as academic, that branch of the petition which is to reject the report as to § 275.

Because the petitioner is prevailing on its cause of action under Debtor and Creditor Law § 276, it is entitled to an award of attorneys’ fees under Debtor and Creditor Law § 276-a. The referee’s contingent award of \$19,000.00 for attorneys’ fees is supported by the record.

Prejudgment interest under CPLR 5001 must be awarded on causes of action successfully prosecuted under the fraudulent transfer provisions of the Debtor and Creditor Law, including § 273, where, as here, the transfer impaired the ability of the petitioner to collect on an underlying contractual obligation (*see Matter of Kopicel v Schnaier*, 145 AD3d 599, 600 [1st Dept 2016]; *Matter of Mogil v Building Essentials, Inc.*, 129 AD3d 1378 [3d Dept 2015]; *CDR Créances S.A.S. v Cohen*, 104 AD3d 17, 30 [1st Dept 2012], *affd as mod* 23 NY3d 307 [2014]). The court thus awards the petitioner statutory interest on the principal sum of \$85,297.12 from May 19, 2016, the date that the transfer was made.

Accordingly, it is

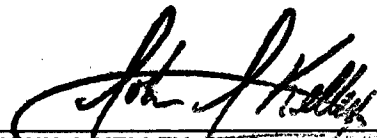
ORDERED that the petitioner’s motion is granted to the extent of confirming so much of the report as concluded that the respondent transferred assets in violation of Debtor and Creditor Law §§ 273 and 273-a, rejecting so much of the report as concluded that there was insufficient proof that the respondent transferred assets in violation of Debtor and Creditor Law § 276, and confirming the conditional recommendation that the petitioner be awarded attorneys’

fees under Debtor and Creditor Law § 276-a, the report is confirmed and rejected as indicated, and the motion is otherwise denied; and it is further,

ORDERED that the Clerk of the court shall enter judgment in favor of the petitioner, Riviera Produce Corp., and against the respondent, Michael Park, in the principal sum of \$85,297.12, with statutory interest at the rate of 9% per annum from May 19, 2016, plus costs, including an award of attorneys' fees in the sum \$19,000.00.

This constitutes the Decision and Order of the court.

3/29/2019
DATE



JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: