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| Yuan Bo Lai v Pu Ti Buddhist Assn. |
| 2020 NY Slip Op 31509(U) |
| May 20, 2020 |
| Supreme Court, Kings County |
| Docket Number: 517421/18 |
| Judge: Pamela L. Fisher |
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At an IAS Term, Part 94 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of May, 2020.

P R E S E N T:

HON. PAMELA FISHER,
Justice.

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YUAN BO LAI, as assignee and possessor of the rights and powers of the Chapter 7 Trustee of NAN GUANG,

Plaintiff,

- against -

Index No. 517421/18

PU TI BUDDHIST ASSOCIATION,
Defendant.

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The following papers numbered 1 to 7 read herein:

Papers Numbered

| | |
|---|-----------------|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____ | _____ 1-4 _____ |
| Opposing Affidavits (Affirmations) _____ | _____ 5-6 _____ |
| Reply Affidavits (Affirmations) _____ | _____ 7 _____ |

Upon the foregoing papers, plaintiff Yuan Bo Lai, as assignee and possessor of the rights and powers of the Chapter 7 Trustee of Nan Guang (Chapter 7 Trustee), moves (in motion sequence [mot. seq.] four) for an order, pursuant to CPLR 3212, granting him summary judgment and voiding or undoing the alleged fraudulent conveyance between

defendant Pu Ti Buddhist Association (sued herein as Puti Buddhist Association) (defendant) and the debtor, Nan Guang (Guang), pursuant to former Debtor and Creditor Law (DCL) §§ 273, 273-a, 274, 275 and 276, as well as an award of attorney's fees, pursuant to DCL § 276-a.¹

Background

On November 16, 2012, Guang purchased the property at 7927 New Utrecht Avenue in Brooklyn (Property) for \$515,000.00. Later that month, Guang and Kings Builder Group contracted to make improvements to the Property, and between November 2012 and July 2014, Guang paid over \$338,000.00 to Kings Builder Group for a construction project at the Property. On November 12, 2013, Lai, a construction worker, was injured while working on the construction project at the Property.

In April 2015, Lai commenced a labor law action against Kings Builder Group and Guang (Underlying Labor Law Action). About three months later, on July 16, 2015, Guang retained a real estate agent, Larry Cricchio (Cricchio), to list the Property for sale for \$2,500,000.00. On August 21, 2015, Kings Builders Group's insurance company, United States Liability Insurance Company, disclaimed coverage and refused to investigate, defend, indemnify or otherwise represent Kings Builders Group or any other party in the Underlying Labor Law Action.

¹ The court notes that on April 4, 2020, Article 10 of the DCL was repealed and replaced with a new statutory scheme. However, the new DCL provisions are not retroactive and only apply to transfers made after April 4, 2020 (*see* McKinney's 2019 Session Law News of NY Ch. 580 [A. 5622]). Thus, this decision and order references the "former" DCL.

On March 5, 2016, Guang instructed Cricchio to lower the listed price for the Property to \$1,988,888.00. On March 9, 2016, Guang answered Lai's complaint in the Underlying Labor Law Action. On March 14, 2016, United States Liability Insurance Company again disclaimed coverage in the Underlying Labor Law Action, which left no insurance for Lai's alleged injuries. On March 16, 2016, Guang contracted to sell the Property to defendant for \$600,000.00, and, three days later, on March 19, 2016, Guang transferred the Property to defendant (no commission was paid to Cricchio). The next day, defendant instructed Cricchio to relist the Property for \$1,988,888.00. Sometime before July 31, 2016, defendant received a \$1,600,000.00 offer for the Property, but rejected it.

On June 1, 2018, prior to the trial in the Underlying Labor Law Action, Guang filed a petition for Chapter 7 bankruptcy relief in California. Guang did not list the March 19, 2016 transfer of the Property in his bankruptcy filing, since he was only required to report transfers that took place within two years of his bankruptcy petition. In the bankruptcy petition, Guang reported that his assets were under \$5,000.00.

In October 2018, the Chapter 7 Trustee, Paul Mansdorf, commenced this action seeking to cancel and void Guang's March 19, 2016 transfer of the Property to defendant. The Bankruptcy Court of the Northern District of California lifted the bankruptcy stay, allowing this action to continue.

Discussion

The proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Once such a showing is made, the burden shifts and the party opposing the motion must tender evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which would require a trial or tender an acceptable excuse for his or her failure to do so (*see Zuckerman*, 49 NY2d at 557; *Provident Bank v Giannasca*, 55 AD3d 812, 812 [2008]; *Verela v Citrus Lake Dev., Inc.*, 53 AD3d 574, 575 [2008]; *Greenberg v Coronet Prop. Co.*, 167 AD2d 291, 292 [1990]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*see Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572, 573 [1989]). The party opposing a motion for summary judgment is entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties (*see Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 386 [2003]).

Former DCL § 273 provides: “[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.” To establish a claim of constructive fraud, pursuant to DCL § 273, the Chapter 7 Trustee must establish “insolvency and lack of fair

consideration, without a showing of actual motive or intent to defraud” (*American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 [2006]), *see also Medical Arts-Huntington Realty, LLC v Meltzer Rosenberg Dev., LLC*, 149 AD3d 824, 826 [2017] *lv denied* 30 NY3d 903 [2017]). Former DCL § 272, in defining fair consideration, requires that the consideration not be “disproportionately small as compared with the value of the property.”

Here, the Chapter 7 Trustee, in support of his summary judgment motion, proffers the expert affidavit of Dominick Negalia (Negalia), an affidavit from Crichio and an appraisal of the Property that was performed by RCI Appraisal Corp. (RCI). It is uncontroverted that Lai is Guang’s creditor within the meaning of former Article 10 of the DCL. In addition, Guang’s insolvency is established by the California bankruptcy petition in which he stated that he has assets of less than \$5,000.00. Furthermore, the Chapter 7 Trustee has made an evidentiary showing that the \$600,000.00 that defendant paid Guang for the Property does not constitute fair consideration. RCI appraised the Property at the time of the March 19, 2016 transfer for \$900,000.00 (\$300,000.00 more than the sale price). Additionally, Crichio’s undisputed testimony that the Property was listed by Guang for \$1,988,888.00 two days prior to the transfer and relisted for the same amount by defendant one day after the transfer, as well as the rejected offer of \$1,600,000.00 made within six months of the transfer, strongly indicate that \$600,000.00 was not fair consideration.²

² The court has not considered Negalia’s affidavit in determining this branch of the motion as he admits he did not perform an appraisal of the Property.

Defendant, in opposition, proffers no evidentiary proof, in admissible form, that there was fair consideration for its March 19, 2016 purchase of the Property from Guang. Defendant's submits only an attorney affirmation alleging that RCI's appraisal failed to consider the fact that the Property lacked a certificate of occupancy and that Crichio's affidavit may be biased. However, an attorney's affirmation "based upon unsubstantiated hypotheses and suppositions, [is] insufficient to defeat the motion for summary judgment" (*Marietta v Scelzo*, 29 AD3d 539, 540 [2006]; *see also Zuckerman*, 49 NY2d at 563). Accordingly, the court determines, as a matter of law, that Guang's March 19, 2016 sale of the Property to defendant was constructively fraudulent pursuant to former DCL § 273.

Those branches of the Chapter 7 Trustee's summary judgment motion regarding former DCL §§ 276 and 276-a are denied. While DCL § 273 requires no proof of actual fraud, it is a requirement of DCL § 276. "The burden of proof to establish actual fraud under [DCL] § 276 is upon the creditor who seeks to have the conveyance set aside" (*Marine Midland Bank v Murkoff*, 120 AD2d 122, 126, [1986] *citing Brody v Pecoraro*, 250 NY56 [1928] *lv dismissed* 69 NY2d 875 [1987]). "[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 (*id.* at 128, *see also, Bashian & Farber, LLP v Syms*, 173 AD3d 659, 661 [2019]). "Badges of fraud include (1) the close relationship among the parties to the transaction, (2) the inadequacy of the consideration, (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them, and (4) the retention of control of

property by the transferor after the conveyance” (*Dempster v Overview Equities*, 4 AD3d 495, 498 [2004] *lv denied* 3 NY3d 612 [2014]).

Here, the Chapter 7 Trustee alleges that Guang and Quan Qin Shi (Shi), defendant’s principal, had a close relationship and provides evidence that they shared an address in California. Shi, however, attests that she did not have a close relationship with Guang other than as landlord and tenant. Shi further explained that she used Guang’s address at the closing of the sale of the Property out of fear that documents might go missing if they were sent to her residential address. Cognizant of the fact that on a motion for summary judgment the party opposing the motion is to be given every favorable inference (*Nicklas*, 305 AD2d at 386), the court accepts, for purposes of this motion, Shi’s assertion that there is no close relationship. Additionally, while the consideration of \$600,000.00 for the Property was not fair value, it cannot be established, as a matter of law, that such sum would have been inadequate to satisfy Lai’s potential award in the Underlying Labor Law Action, or that defendant was aware that said amount would render Guang insolvent. Finally, there is no indication that Guang retained any control of the Property after the transfer. Therefore, on this record, actual fraud cannot be determined, as a matter of law.

The Chapter 7 Trustee’s claim pursuant to former DCL § 273-a is dismissed.³ “The existence of an unsatisfied judgment is an essential element of a constructive fraud cause of action pursuant to former DCL § 273-a” (*Coyle v Lefkowitz*, 89 AD3d 1054, 1056 [2011]). Here, it is undisputed that there is no judgment against Guang. The Chapter 7

³ The Court, in its discretion, may award summary judgment to the non-moving party (*see* CPLR 3212 [b]).

Trustee's argument that Guang's bankruptcy petition and the appointment of a trustee are the functional equivalent of an unsatisfied judgment is unavailing.

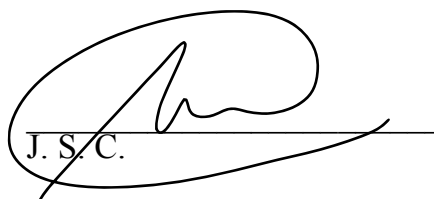
Finally, the Court need not consider the Chapter 7 Trustee's motion regarding former DCL §§ 274 and 275, since the elements pleaded and the relief sought are indistinguishable from the Chapter 7 Trustee's claim under DCL § 273 (*see Sun Graphics Corp. v Levy, Davis & Maher, LLP*, 94 AD3d 669, 669 [2012]). Accordingly, it is

ORDERED that the Chapter 7 Trustee's motion (in mot. seq. four) for summary judgment is only granted to the extent that the March 19, 2016 transfer of the Property at 7927 New Utrecht Avenue in Brooklyn is voided, pursuant to former DCL § 273, and the summary judgment motion is otherwise denied; and it is further

ORDERED that plaintiff's cause of action pursuant to former DCL § 273-a is dismissed, pursuant to CPLR 3212 (b).

This constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.