

SR Holding I, LLC v Cannavo
2021 NY Slip Op 32983(U)
February 10, 2021
Supreme Court, Westchester County
Docket Number: Index No. 54202/2016
Judge: Sam D. Walker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
SR HOLDING I, LLC.,
Plaintiff,

DECISION AFTER TRIAL
Index No. 54202/2016

-against-

JOSEPH CANNAVO, LEONARD CANNAVO, CARMELA CANNAVO, IRVING PLACE PROPERTIES LLC, ONE WAS PROPERTIES LLC, PUTNAM PARK PROPERTIES LLC, REGENT STREET PROPERTIES LLC, WASHINGTON PARK PROPERTIES LLC, BLUE MOUNTAIN PARTNERS LLC, CROWN ROYAL LLC, HASECO PROPERTIES LLC, WHITETAIL REALTY GROUP LLC, CAPITAL REALTY PARTNERS LLC, ALL NY HOLDING LLC, M&T BANK, PROVIDENT BANK n/k/a STERLING NATIONAL BANK, RED SOX FUNDING, LLC, BRANCA REALTY, LLC, CASTLE TITLE INSURANCE AGENCY, INC., BLACK DIAMOND GROUP LLC, RANDOM PROPERTY GROUP LLC, 82-84 HAMILTON MANOR LLC, DEREK WASHINGTON, BRANCA CONSULTING SERVICES, LLC, CREATIVE SCAPES MANAGEMENT, LLC, SINGER ENERGY GROUP, LLC, SHANA SIMMONS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and JOHN DOE #1 through JOHN DOE # 15 inclusive,

Defendants.

-----X

This matter was assigned to this Part for the purpose of conducting a non-jury trial. Testimony was taken on December 3-6, 9-11, 16 and 17, 2019, after which the Court instructed all the parties to submit post-trial memoranda. This decision is based upon the testimony, supporting exhibits and the post trial memoranda submitted by all.

the parties. After hearing testimony from Plaintiff, Defendants and their respective witnesses, the Court finds the following facts:

Sovereign Bank commenced a foreclosure action by Summons and Complaint dated August 16, 2010 against the Transferor Defendants ("First Foreclosure Action"). The First Foreclosure Action sought to foreclose a \$4,750,000 mortgage dated January 14, 2008 over 10 multi-family residential properties located in Port Chester, New York, which the Transferor Defendants, Joseph Cannavo and Leonard Cannavo, as mortgagors, had executed. The Summons and Complaint dated August 16, 2010 stated that \$5,166,253 was due under the mortgage.

A second foreclosure action was commenced by Sovereign Bank against the Transferor Defendants by Summons and Complaint also dated August 16, 2010 ("Second Foreclosure Action"). The Second Foreclosure Action sought to foreclose a \$4,890,000 Consolidated, Extension, Modification and Spreader Agreement dated June 3, 2008 over 10 multi-family residential properties also located in Port Chester, New York. The Second Foreclosure Action Summons and Complaint dated August 16, 2010 alleged that \$5,744,730 was due under the mortgage.

Plaintiff, SR Holdings I, LLC, purchased the two sets of mortgages being foreclosed (which secured almost \$11,000,000 in debt) from Sovereign Bank for \$3,000,000, and was substituted in place of Sovereign Bank as Plaintiff in the foreclosure actions just prior to the entry of foreclosure judgments. Plaintiff took title to all of the twenty properties at the two foreclosure sales. Of the twenty properties, nineteen were sold and Plaintiff was paid \$7,020,000. The twentieth property is still owned by Plaintiff. Two deficiency judgments were entered against the Transferor

Defendants in the total approximate amount of \$4,500,000 in September 2012 and January 2013.

Defendants, Joseph and Leonard Cannavo, through their limited liability companies, acquired over the past twenty years approximately seventy multi-family properties. Many of the properties were financed through Washington Mutual. These properties were refinanced repeatedly during the 2000's. The Cannavos argue that as a result of the real estate collapse and financial crisis in 2008 all of the fifty six properties at issue in this action, as well as other properties owned by them, were "underwater" because the value of the properties were less than the mortgage debt, taxes and other expenses, while the rental income decreased significantly due to the recession.

As a result, Defendants, Joseph and Leonard Cannavo developed bad credit which made it impossible for them to procure refinancing of the properties. They needed someone with good credit who could qualify for refinancing of these properties while at the same time negotiate a discount of the outstanding mortgages, so they looked to their sister Carmela Cannavo who had good credit and money to invest. Carmela agreed to purchase the properties and seek refinancing, while at the same time negotiating a discounted pay-off from the outstanding mortgagees on the properties. It is clear from the record that this idea was not Carmela's and she had no knowledge of what would occur.

Washington Mutual, which was purchased by JP Morgan Chase Bank was Defendants, Joseph and Leonard Cannavo's largest creditor. The parties then stipulated to the transactional details of the 56 properties that Defendants Leonard Cannavo and Joseph Cannavo transferred to Carmela Cannavo. Lenoard Cannavo

testified that the properties were transferred to Carmela Cannavo's LLC because they were over-burdened in debt and could not make the mortgage payments, the taxes were overdue, and second mortgages were due.

The deeds transferring the properties to Defendant, Carmela Cannavo's LLCs were dated April 5, 2010, June 1, 2011, November 1, 2011, December 30, 2011, January 17, 2012, and April 24, 2012. Defendant Carmela Cannavo and her Transferee LLCs then refinanced six of the properties, which closed from September 2010 through October 2012 in order to payoff the secured creditors and real estate taxes for forty seven of the properties.

The first refinancing occurred on September 18, 2010, at which time Transferee Defendant Capital Realty Partners LLC obtained a \$5.5 million mortgage from M&T Bank which satisfied the existing mortgage held by U.S. Bank. Eleven of the properties which are the subject of this action were part of the first refinancing. The closing statement from that refinancing shows that all of the proceeds went to pay outstanding liens on the properties, as well as other loans which Defendants Joseph and Leonard Cannavo owed M&T Bank. Defendant Carmela Cannavo executed a personal guaranty to M&T Bank regarding all sums due under the M&T mortgage. The eleven properties were also encumbered by mortgages held by Branca Realty LLC and Branca Consulting Services LLC..

The next five refinances involved thirty one properties which were subject to two Consolidated Extension and Modification Agreements ("CEMA") dated November 12, 2009 and November 24, 2009 made between the Transferor Defendants and JP Morgan Chase ("JP Morgan CEMAs"). The Transferor Defendants entered into the JP

Morgan CEMAs after the 2008 financial collapse to avoid foreclosure, to cross-collateralize the thirty one properties, and to obtain a lower interest rate.

In 2010, ECP Port Chester LLC ("ECP") was assigned the JP Morgan CEMAs ("ECP/JP Morgan CEMAs"). By letter dated December 17, 2010, ECP advised the Transferor Defendants that the combined sums due under the ECP/JP Morgan CEMAs was \$22,350,180. By Letter Agreement dated December 22, 2010, ECP agreed in concept (subject to a binding agreement) to transfer the ECP/JP Morgan CEMAs to the Transferor Defendants at a discounted payoff of \$10,750,000 if payment were made by April 31, 2011, or a discounted payoff of \$10,900,000 if payment was made by June 16, 2011. Monthly interest payments of \$50,000 were required during the pendency of the time in which the Transferor Defendants could purchase the ECP/JP Morgan CEMAs.

A Purchase Letter Agreement dated December 22, 2010 followed, by which ECP agreed to sell the ECP/JP Morgan CEMAs it held to the Transferor Defendants under terms substantially similar to the Letter Agreement dated December 17, 2010. The Purchase Letter Agreement dated December 22, 2010 was guaranteed by Defendants Joseph and Leonard Cannavo. The Transferor Defendants fell behind on payments under the ECP/JP Morgan CEMAs and thereafter unsuccessfully tried to refinance them. The Transferor Defendants blamed their inability to pay on the 2008 crash of the economy and the recession that followed. Leonard Cannavo testified that, the tenants in the properties were being furloughed from their jobs so they could not pay rents. There were more vacancies than usual and everything spiraled out of control and there was not enough money to pay the debt that was due.

A little over a year later, ECP and the Transferor Defendants and Defendant Carmela Cannavo entered into a Forbearance Agreement dated December 30, 2011. It is clear from the testimony that Defendant Carmela Cannavo was not involved in negotiating the refinance of the ECP/JP Morgan CEMA properties, as well as obtaining the September 18, 2010, \$5.5 million mortgage from M&T Bank or for seeking the time from ECP necessary to refinance the remaining properties. This was all left to Joseph and Leonard Cannavo. The testimony shows that the entire refinance was orchestrated and controlled by Joseph and Leonard Cannavo, and Carmela had very little if anything to do with it. The Forbearance Agreement, however, dated December 30, 2011 allowed Carmella's, LLC to undertake the next refinancing.

Defendant Carmela Cannavo, through her ownership of Transferee Defendant Whitetail Realty Group LLC, obtained a \$5,165,000 loan from M&T Bank dated December 30, 2011 secured by eleven properties subject to the ECP/JP Morgan CEMAs. Some of the properties were also encumbered by secondary mortgages. ECP was paid \$4,300,000 at closing in exchange for releasing and/or assigning the mortgages of eleven of the thirty one properties covered by the ECP/JP Morgan CEMAs.. Additional outstanding mortgage loans in the amount of \$278,000 were also paid. In addition, \$331,359 of real estate taxes were paid. Defendant Carmela Cannavo executed a personal guaranty dated December 30, 2011 to M&T Bank for all sums due under the M&T Bank's \$5,165,000 Mortgage.

At the closing of the M&T Bank \$5,165,000 mortgage loan, ECP entered into the above referenced Forbearance Agreement dated December 30, 2011, by which ECP acknowledged payment of \$4,300,000 and provided releases to M&T Bank for the

eleven properties to be secured by the M&T Bank December 30, 2011 \$5,165,000 mortgage. Based upon monthly interest payments, ECP agreed to extend the forbearance period to December 31, 2012, at which time it would accept a \$6,400,000 payoff to satisfy the mortgages. Defendants Carmela, Joseph and Leonard Cannavo guaranteed the sums due under the Forbearance Agreement dated December 30, 2011. ECP provided the Transferor Defendants with 1099-Cs reflecting debt forgiven under the ECP/JP Morgan CEMAs as a result of this transaction.

On January 24, 2012, an Amended and Restated Forbearance Agreement was entered into between ECP and Defendants Joseph, Leonard and Carmela Cannavo. Pending monthly payments of interest, ECP maintained the forbearance period (December 31, 2012) set forth in the Forbearance Agreement dated December 30, 2011, at which time it would accept a \$4,900,000 payoff to satisfy the mortgages. Defendants Carmela, Joseph and Leonard Cannavo guaranteed the sums due under the Forbearance Agreement dated January 24, 2012.

On April 13, 2012, Provident Bank n/k/a Sterling National Bank ("Sterling") loaned to the Transferee Defendant, Blue Mountain Partners LLC \$2,300,000. From those proceeds, ECP was paid \$1,900,000 at the closing in exchange for releasing or assigning the ECP/JP Morgan CEMAs on four of the thirty one properties covered by the ECP/JP Morgan CEMAs. Defendant Carmela Cannavo executed a personal guaranty to Provident Bank for all sums due under the Provident Bank \$2,300,000 mortgage loan. As part of the closing of the Provident Bank \$2,300,000 mortgage loan, ECP entered into a First Amendment to Amended and Restated Forbearance Agreement dated April 13, 2012. ECP acknowledged payment of \$1,900,000 in

exchange for the assignment/release of four of the thirty one properties covered by the ECP/JP Morgan CEMAS.

As a result, ECP reduced both the monthly interest payments to \$30,000 per month, and reduced the payout to \$3,000,000. Defendant Carmela Cannavo personally guaranteed the sums due ECP under the Third Amended and Restated Guaranty dated April 13, 2012. ECP provided the Transferor Defendants with a 1099-C reflecting debt forgiven under the ECP/JP Morgan CEMAs as a result of this transaction.

On June 4, 2012, Provident Bank provided a \$2,420,000 mortgage loan to Transferee Defendant Blue Mountain Partners LLC. ECP was paid \$1,700,000 at the closing and released five of the thirty one properties secured by the ECP/JP Morgan CEMAs. ECP provided the Transferor Defendants with a 1099-C reflecting the debt forgiven under the ECP/JP Morgan CEMAs as a result of this transaction. One of the properties subject to the Provident Bank \$2,430,000 mortgage was subject to a first mortgage held by Citibank Global Markets Realty Group, and a second mortgage. Defendant Carmela Cannavo executed a personal guaranty to Provident Bank for all sums due under the Provident Bank \$2,420,000 mortgage loan.

As a result, ECP executed a Second Amendment to Amended and Restated Forbearance Agreement dated June 4, 2012 which acknowledged payment of \$1,700,000 in exchange for assigning the ECP/JP Morgan CEMAs covering the properties to Provident Bank. The interest payments were reduced to \$10,000 per month and the payoff was reduced to \$1,300,000. Pursuant to a Fourth Amended and Restated Guaranty dated June 4, 2012, Defendant Carmela Cannavo guaranteed all sums due ECP.

On September 26, 2012, Provident Bank provided a \$1,267,000 mortgage loan to Transferee Defendant Blue Mountain Partners LLC. ECP was paid \$625,000 at the closing and a mortgage held by Red Sox Funding in the amount of \$250,000 was also paid. ECP released two of the thirty-one properties secured by the ECP/JP Morgan CEMAs. ECP provided the Transferor Defendants with a 1099-C reflecting debt forgiven under the ECP/JP Morgan CEMAs as a result of this transaction. One of the properties was encumbered by two mortgages other than the ECP/JP Morgan CEMAs. Defendant Carmela Cannavo executed a personal guaranty to Provident Bank for all sums due under the Provident Bank \$1,267,000 mortgage loan.

The last refinancing occurred when M&T Bank provided a \$3,000,000 mortgage loan dated October 12, 2012 to Transferee Defendant Crown Royal LLC. ECP was paid \$1,099,958 in exchange for releasing nine of the remaining properties subject to the ECP/JP Morgan CEMAs. ECP provided the Transferor Defendants with 1099-Cs reflecting debt forgiven under the ECP/JP Morgan CEMAs as a result of this transaction. In addition, a mortgage held by ACM Four Pines Comm LLC covering two of the properties were satisfied, and another property was subject to two mortgages totaling \$575,000. Defendant Carmela Cannavo executed a personal guaranty for all sums due under the M&T Bank \$3,000,000 mortgage loan.

Also, 4 Lockwood Place was transferred by Joseph Cannavo to Black Diamond Group LLC by deed dated April 24, 2012, and was thereafter transferred from Transferee Defendant, Black Diamond Group LLC, to Defendant, Creative Scapes Management LLC, by deed dated December 5, 2013. The property transferred was subject to a World Savings Bank \$497,000 mortgage to Joseph Cannavo dated October

4, 2007. A foreclosure proceeding was commenced by Wachovia Mortgage f/k/a World Savings Bank, which affirmed that \$511,175 was due when the action was commenced in 2014. Transferee Defendant ALL NY Holdings LLC provided a \$250,000 mortgage loan to Defendant Creative Scapes Management LLC, which used those funds to satisfy the World Savings Bank mortgage. In December 2013, World Savings Bank provided a satisfaction of mortgage and discontinued the foreclosure action.

DISCUSSION

TRANSFER OF THE DEEDS

It is Plaintiff's contention that the initial transfer deeds were not delivered on the date they were executed. The deeds for twenty-seven of the Initial Transfers are dated and acknowledged on November 1, 2011. Leonard Cannavo testified that after he executed the twenty-seven deeds, a representative of Castle Title took them and gave them to Ronald Rauschenbach, Castle Title's president. Rauschenbach testified that with respect to all of the Initial Transfer deeds, they were delivered to Castle Title by Great American Development or an attorney. The Defendants did not offer any testimony with respect to what Leonard Cannavo did with the remaining twenty-one deeds after he executed them.

Mr. Rauschenbach testified that the deeds were held, and that he did not deliver them to the Transferee Defendants until the time of the M&T and Provident re-financing, months later. In addition, the sworn statements contained in the Transferor Defendants' Federal Tax Returns, Form 4797 and the Transferee Defendants' Federal Tax Returns, Form 4562, either confirm the transfers occurred at the times of the mortgage

transactions or at least contradict that the deeds were delivered on the dates they were executed

Leonard Cannavo's sworn testimony with respect to the preparation, execution and custodianship of the deeds at issue directly contradicts that of non-party witnesses Attorney Crane and Mr. Rauschenbach. The trial evidence contradicts the Cannavos' version of events and demonstrates that the deeds at issue were never "delivered" until the dates of the mortgage closings, which is consistent with the sworn statements in the Cannavo tax returns. The lack of credible evidence corroborating the date (11/1/11) appearing on the deeds is consistent with the documentary and non-party witness testimonial evidence supporting Plaintiff's contention that the deeds were delivered at the time of the closing of the refinances.

With respect to all eleven Capital Realty properties, each deed is dated April 5, 2010. The Transferor Defendants' 2010 Form 4797's state a "date sold" of September 16, 2010 and Capital Realty's 2010 Forms 4562 state a "date in service" of September 16, 2010. The Capital Realty mortgage transaction closed on September 26, 2010 and encumber the eleven Capital Realty properties. Joseph Cannavo testified that he provided the information contained in the Transferor Defendants' tax returns to the accountant and that the information contained in said tax returns is correct.

With respect to eleven of the Whitetail properties, the deeds are each dated November 1, 2011. For nine of those properties, the Transferor Defendants' 2011 Form 4797's state a "date sold" of December 30, 2011 and Whitetail's 2011 Form 4562 states a "date in service" of December 30, 2011. For two of those properties, the Transferor Defendants' 2012 Form 4797's state a "date sold" of January 1, 2012 and Whitetail's

2012 Form 4562 states a "date in service" of February 17, 2012. For the remaining property, the Transferor Defendants' 2012 Form 4797's state a "date sold" of February 17, 2012 and Whitetail's 2012 Form 4562 states a "date in service" of February 27, 2012. The Whitetail/M&T CEMA transaction closed on December 30, 2011, two months after the purported transfers.

With respect nine of the Crown Royal properties, the deeds are dated November 1, 2011. The Transferor Defendants' 2012 Form 4797's state a "date sold" of January 1, 2012. The Crown Royal/M&T CEMA transaction closed on October 12, 2012, more than ten months after the purported transfers.

Based on the foregoing, Plaintiff has overcome the presumption of delivery of the deeds on the dates they claim to have been executed. Rauschenbach testified and the record shows that the deeds were delivered simultaneously with the M&T and Provident refinancing of the mortgages, many months after the purported transfers. The record clearly suggests that the deeds were transferred at the time of the re-finance closings and not at the time of the actual transfer.

Plaintiff's Claim of Fraudulent Conveyance

Plaintiff contends that the transfers of properties made by the Transferor Defendant entities owned and controlled by Joseph Cannavo and Leonard Cannavo to the Transferee Defendant entities were made in violation of Debtor and Creditor Law §§ 273, 273-a, 275 and 276 and therefore should be declared null and void and set aside; that the six subsequent transfers made by Capital Realty (three properties to All NY Holdings LLC); Whitetail Realty (one property to Blue Mountain and one property to Crown Royal LLC); and Black Diamond Group LLC (one property to Creative Scapes

Management LLC) should be declared null and void and set aside (the "Subsequent Transfers"); that the thirteen mortgage transactions entered into by the Transferee Defendants Capital Realty Partners, Whitetail Realty Group LLC, Crown Royal LLC, Blue Mountain Partners LLC and All NY Holdings LLC and the Subsequent Transferee Creative Scapes Management LLC with defendants M&T Bank, Provident Bank n/k/a Sterling National Bank, Branca Realty LLC, Branca Consulting Services LLC and Red Sox Funding LLC should be declared null and void and set aside (the "Mortgage Transactions"), that the trial record is replete with testimony by the Cannavos which was directly contradicted by them, the undisputed documentary evidence, and the testimony of disinterested non-party witnesses Ronald Rauschenbach, Michael House and John Crane; that the Initial Transfers are intra-familial and were made for no consideration or less than fair consideration; that the Initial Transfers are intra-familial and lacked the requisite good faith as evidenced by Joseph and Leonard's membership in and control of the transactions, operations and the Transferee Defendants; that the Transferor entities were in default on their debt and transferred the sole assets of each entity rendering each entity without any means to pay its obligations and no evidence was produced at trial by Defendants to rebut the presumption of insolvency and meet Defendants' burden to prove that each Transferor Defendant was not rendered insolvent by the transfers (Debtor and Creditor Law Sec. 271), that material, probative, irrefutable Badges of Fraud applicable to the Transferor and Transferee Defendants; that the Transferor and Transferee Defendants are estopped at trial, as a matter of law, from asserting positions that are contrary to sworn statements contained in these Defendants' filed Federal Tax Returns and New York State TP-584's and RP-5217's,

notwithstanding, Transferor and Transferee Defendants credibility is impeached by the sworn statements made in their filed tax returns and the directly contradicting statements made while under oath at trial; that since the Initial Transfers were rendered null and void as a matter of law, the Subsequent Mortgage Transactions and the Subsequent Transfers are likewise null and void; that the Transferee Defendants were not the record owners of the properties at the times of the Subsequent Mortgages; that the Mortgagees are not bona fide encumbrancers; and that the applicable mortgages have to be set aside as a matter of law, and to the extent that Mortgagees may be entitled to equitable subrogation, that amount is limited.

It is undisputed that on August 20, 2010, the Cannavos, Transferor Defendants were the record owners of the subject properties constituting the Initial Transfers, with the exception of the Capital Realty properties. It is also undisputed that the Transferor Defendants conveyed the subject parcels to the Transferee Defendants. The question is whether or not these transfers of real property constituted fraudulent transfers. The parties also stipulated to the value of the properties at the time of the initial transfer.

In general terms, the Debtors and Creditors law condemns as fraudulent a conveyance made without consideration by a debtor who is thus rendered insolvent (DCL, § 273). "Fair consideration" is given for property when, as a fair equivalent and in good faith, property is conveyed or an antecedent debt is satisfied, or when the property 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 (DCL § 272).

WAS THE TRANSFEROR DEFENDANTS RENDERED INSOLVENT

The burden of proving both insolvency and the lack of fair consideration is upon the party challenging the conveyance (see *Commercial Trading Co. v. Potter Securities Corp.*, 26 A.D.2d 761, 271 N.Y.S.2d 733; *Marine Midland Bank v. Murkoff*, 120 A.D.2d 122, 508 N.Y.S.2d 17), and the determination of insolvency or what constitutes fair consideration is generally one of fact to be determined under the circumstances of the particular case (see *Wagman v. Lagno*, 141 A.D.2d 720, 529 N.Y.S.2d 585; *Farmers Production Credit Assoc. v. Taub*, 121 A.D.2d 681, 504 N.Y.S.2d 448; 30 N.Y.Jur.2d, *Creditor's Rights and Remedies*, § 260, at 176–177).

Plaintiff's entitlement to relief depends upon whether Transferor Defendants were rendered insolvent by the transfer of the properties (see *Hickland v. Hickland*, 100 A.D.2d 643, 645, 472 N.Y.S.2d 951, appeal dismissed 63 N.Y.2d 951, 483 N.Y.S.2d 1027, 473 N.E.2d 44). An individual is "insolvent" within the meaning of the Debtor and Creditor Law when "the present fair saleable value of his [or her] assets is less than the amount that will be required to pay his [or her] probable liability on [] existing debts as they become absolute and matured" (Debtor and Creditor Law § 271[1]; see also *Grace Plaza of Great Neck, Inc. v. Heitzler*, 2 A.D.3d 780, 770 N.Y.S.2d 421 [2d Dept 2003]).

The Transferor Defendants argue that the properties were "under water" and had no value, and therefore, the debtor had conveyed nothing of value and did not otherwise diminish the value of the asset or estate of the debtor which remain available to creditors. However, in order for a conveyance to come within Debtors and Creditors Law § 273, which defines as a matter of law what constitutes a fraudulent conveyance, a debtor must have been solvent before the transfer, must have been rendered

insolvent by reason of having made the transfer and the transfer must have been made without fair consideration (see *Stokes Coal Co. v. Garguilo*, 255 App.Div. 281, 7 N.Y.S.2d 414, affirmed 280 N.Y. 616, 20 N.E.2d 562; *Prudential Savings Bank v. Grant*, Sup., 99 N.Y.S.2d 602, 603).

Notably, "[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 fair consideration" (Debtors and Creditors Law § 273) Accordingly, "both insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under [the statute], and the burden of proving these elements is upon the party challenging the conveyance" (see *Joslin v. Lopez*, 309 A.D.2d 837, 838, 765 N.Y.S.2d 895 [2003]). Actual motive or intent to defraud on the part of the transferor need not be shown (see *Gallagher v. Kirschner*, 220 A.D.2d 948, 949, 632 N.Y.S.2d 857 [1995]). However, when a transfer is made without fair consideration, a presumption of insolvency and fraudulent transfer arises, and the burden shifts to the transferee to rebut that presumption (see *Miner v. Edwards*, 221 A.D.2d 934, 634 N.Y.S.2d 306; *Matter of Oppenheim*, 269 App.Div. 1040, 58 N.Y.S.2d 620).

Here, the Initial Transfer rendered the Transferor Defendants unable to pay their debts and hence, insolvent The Transferee Defendants offered no evidence to show otherwise. Therefore, it is clear that Joseph and Leonard Cannavo engineered a scheme design to benefit Carmela Cannavo LLCs but rendered the Transferor Defendants LLCs insolvent and unable to pay Plaintiff.

WERE THE TRANSFERS FOR FAIR CONSIDERATION

In determining “[f]air consideration” under Debtor and Creditor Law § 272 it is not only a matter of whether the amount given for the transferred property was a “fair equivalent” or “not disproportionately small,” which the parties vigorously dispute, but whether the transaction is made “in good faith,” an obligation that is imposed on both the transferor and the transferee (see *Matter of CIT Group/Commercial Servs., Inc. v. 160-09 Jamaica Ave. Ltd. Partnership*, 25 A.D.3d 301, 303, 808 N.Y.S.2d 187 [1st Dept. 2006] [construing Debtor and Creditor Law § 273]; *Julien J. Studley, Inc. v. Lefrak*, 66 A.D.2d 208, 213, 412 N.Y.S.2d 901 [2d Dept. 1979], *affd.* 48 N.Y.2d 954, 425 N.Y.S.2d 65, 401 N.E.2d 187 [1979]). Furthermore, the determination of what constitutes “fair consideration” under the fraudulent conveyance statute is generally a question of fact to be determined under the circumstances of the particular case. (Debtor and Creditor Law § 275).

“Good faith is lacking when there is a failure to deal honestly, fairly, and openly” (see *Berner Trucking v. Brown*, 281 A.D.2d 924, 925, 722 N.Y.S.2d 656 [2001] [citation omitted]; see also *Smith v. Kanter*, 273 A.D.2d 793, 795, 709 N.Y.S.2d 760 [2000]). Here, it must be again observed that under the Debtor and Creditor Law all transfers must rest on fair consideration (Debtor and Creditor Law, §§ 273, 274, 275) and fair consideration, even for an antecedent debt, requires the transfer to be made in good faith (Debtor and Creditor Law, § 272; see also *Julien J. Studley, Inc. v. Lefrak*, 66 A.D.2d 208, 213, 412 N.Y.S.2d 901 [2d Dept. 1979], *affd.* 48 N.Y.2d 954, 425 N.Y.S.2d 65, 401 N.E.2d 187 [1979]).

Transfer of multiple properties to the transferors sister without consideration or at best based upon the assumption of mortgage debt while at the same time negotiating a reduction of the outstanding mortgage debt, causing an increase in the transferee equity interest in the property (the actual mortgage pay-off amounts were well below the uncontested appraised values of the properties) when the debt is satisfied, to the detriment of present or future creditors lacks good faith and is presumptively fraudulent. The Transferor Defendants controlled both sides of the transactions at every stage both as the transferors and the transferees. In fact, when a corporate insider participates in both sides of the transfer and when the insider controls the transfer, “the transfer will be deemed to have been made in bad faith if made to a creditor's detriment” (see *112 West 34th St. Co., LLC v Shamah*, 45 Misc 3d 1213[A], 2014 NY Slip Op 51554[U]).

Furthermore, intra-familial transfers such as this, [u]nder the Debtor and Creditor Law, places a heavier burden upon the Transferor Defendants to demonstrate fair consideration when the transaction involves family members and was made without any tangible consideration. The burden to demonstrate the giving of fair consideration shifts to the intra-family transferee where there is no tangible consideration, particularly when the record suggests that even after the transfer Leonardo and Joseph Cannavo were still in control of all aspects of the transfer and refinance, and the properties were simply parked in the Transferee Defendant LLCs while Leonard continued to exercise dominion and control over the properties. Courts view intra-family transfers made without any signs of tangible consideration as presumptively fraudulent (see *Ruby Weston Manor v. Vidal*, 18 Misc.3d. 1115A [Kings Cty., 2008]).

At trial, even though Carmela Cannavo testified that she authorized her brother Leonard Cannavo to act on her behalf with respect to several of these refinances, it was clear that she was simply a strawman with limited knowledge or powers over these transactions, and that the properties were simply transferred to her name for expediency and convenience purposes, and Leonard and Joseph Cannavo were still in charge. Carmela testified that she had no knowledge of the formation, operation or the membership interests in any of the Transferee LLCs. It is also clear from the testimony and not an unreasonable conclusion that the properties were transferred into Carmela's LLCs so that Joseph and Leonardo Cannavo could procure funding and possibly to avoid paying the debt owed to Plaintiff and for no other reasons. Leonard Cannavo clearly remained in charge of the properties as if he was still in control.

DEBTORS AND CREDITORS LAW § 276 - ACTUAL FRAUD

Debtors and Creditors Law § 276, unlike § 273, addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency (*see United States v. Carlin*, 948 F.Supp. 271). Due to the difficulty of proving actual intent to hinder, delay, or defraud creditors, the pleader is allowed to rely on "badges of fraud" to support his case, i.e., circumstances so commonly associated with fraudulent transfers "that their presence gives rise to an inference of intent", (*see Pen Pak Corp. v. LaSalle National Bank of Chicago*, 240 A.D.2d 384, 386, 658 N.Y.S.2d 407, quoting *MFS/Sun Life Trust– High Yield Series v. Van Dusen Airport Servs. Co.*, 910 F.Supp. 913, 935; *Shelly v. Doe*, 249 A.D.2d 756, 671 N.Y.S.2d 803). Among such circumstances are: 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 (see *Wall Street Associates v. Brodsky*, 257 A.D.2d 526, 684 N.Y.S.2d 244 (1st Dept. 1999)).

Here, badges of fraud include but are not limited to the fact that, Joseph, Leonard and Carmela Cannavo are siblings; Joseph and Leonard Cannavo are in total control of Transferee, Carmella LLC's. Joseph and Leonard Cannavo knew about the pendency of Action 1 and Action 2 at the time of the Initial Transfers; Transferor and Transferee Defendants have the same business address; Transferor and Transferee Defendants employed the same attorney; Transferor and Transferee Defendants employed the same accountant; and that the transfers were made for zero consideration or less than fair consideration.

There also existed a pattern of course of conduct whereby the Transferor Defendants divested their assets after becoming obligated on the debt. How the deeds were transferred raised serious questions of regularity and the transferred properties were managed by Joseph and Leonard Cannavo for three years before, as well as after the properties were purportedly transferred with no documentation supporting an arms-length management agreement. Plaintiff has established that the actions of the Joseph and Leonard Cannavo in conveying the properties to Carmela Cannavo's LLCs constituted both actual and constructive fraudulent conveyances.

Furthermore, Leonard Cannavo, Transferor Defendant, testified that at the time of the Initial Transfers, the properties were "under water" , and had no value. This was confirmed in Forms TP-584s' and RP-5217s' filed with the transfer documents. These

Forms did not list the outstanding mortgages as consideration for the transfer or the sale price of the property. They listed that the transfers were made for zero or nominal consideration. At trial, however, the Transferor Defendants changed their position by contradicting the content of the forms, stating that the consideration for the transfers were the outstanding mortgage debts on the properties, and that the properties were transferred subject thereto. In fact, at the time of the actual transfers all of the properties were mortgaged and Transferor Defendants had already negotiated discounted pay-offs of the balances, and had executed Forbearance Agreements with some creditors. As a result, the pay-off amounts were well below the uncontested appraised values of the properties, creating instant equity and a windfall to the Transferee Defendants, Carmela Cannavo, LLCs and contradicts the Transferor Defendants contention that the properties were under water and worthless.

Moreover, "[u]nder the doctrine of tax estoppel," Transferor Defendants are estopped from taking a position contrary to the sworn statements in a Real Property Transfer Report (RPT Report). (*Amalfi, Inc. v. 428 Co., Inc.*, 153 A.D.3d 1610, 1610, 61 N.Y.S.3d 434 [4th Dept. 2017]), [sworn statements in the RPT Report also estopped defendants from asserting that various mortgage assumptions worth over \$2 million constituted part of the purchase price of the restaurant]).

The record is very clear that the properties were encumbered by mortgages at the time of the initial transfer and with the reduced pay-off negotiated by the Transferor Defendants, the Transferee Defendant ended up with equity which Plaintiff claims should have been made available to satisfy Judgment-1 and Judgment-2.

Furthermore, Leonard Cannavo, testified that the Transferor Defendants paid off the existing mortgages for less than the full amount that was owed. In this instance, any difference realized should have been reported on the Transferor Defendants' income tax return as cancelled debt income. However, this would clearly contradict Leonard Cannavo's assertion that the properties were "under water" and that the transfers were made subject to the entire balance due on the mortgages. If that was the case, the actual transfer of the properties, which occurred simultaneously with the refinance, could not have been subject to the entire balance due on the mortgages and the canceled debt income from the discounted pay-offs, should have been reported by the Transferee Defendants as such.

In fact, at the time of the Actual Transfer and refinance of the properties Carmela Cannavo LLC, acquired \$12,807,638.30 in instant equity, funds which Plaintiff argues, if available, could have been used to satisfy Plaintiff's judgments. But instead the properties were transferred to Carmela's LLC for no or nominal consideration, then refinanced based upon a reduced negotiated pay-off amount resulting in a significant windfall in terms of equity to Carmela's LLCs. For instance, Capital Realty acquired free and clear title to properties on September 16, 2010 by paying off the existing mortgages for \$4,299,175.00. At the time of the transfers the properties had an appraised market value of \$7,585,000.00. As a result Capital Realty received \$3,285,825.00 in equity from the Judgment Debtors which would have been otherwise available to satisfy the Judgments. Similarly Joseph and Leonard Cannavo negotiated an agreement with ECP Port Chester for a reduced pay-off. ECP Port Chester received \$9,200,000.00 in full

satisfaction of its mortgages, which represented an approximate discount of fifty percent.

The same pattern occurred with the pay-off of the mortgages encumbering the Whitetail properties, where Whitetail acquired title to the properties free and clear on December 30, 2011 by paying off the existing ECP mortgages for \$4,300,000.00. At the time of the transfer, the properties had an appraised fair market value of \$8,030,000.00. As a result Whitetail received equity of \$4,180,000.00 from the Judgment Debtors. Similarly, the pay-off of the mortgages encumbering Blue Mountain properties resulted in Blue Mountain receiving \$1,175,000.00 in equity from the Judgment Debtor. This pattern continued for all the properties that were transferred to Carmela's LLC resulting in a net equity gain of \$12,807,638.30. Therefore, if the transfers had been made subject to the full, unreduced balance of the mortgages, the canceled debt income resulting from the discounted pay-offs should have been reported by the Transferee Defendants as canceled debt income and there is no merit to the Cannavo's testimony that at the time of the Initial Transfer, the balance due on the mortgages exceeded the value of the properties.

Furthermore, the deeds transferring the properties to Carmela Cannavo LLCs were not delivered for recording until the closing of the refinancing of the properties when there was already a written agreement in place between the Transferor Defendants and existing creditors for a discounted pay-off of the balance due on their debt. In the end, the properties turned out not to be worthless but of significant value, with Carmela's LLC's realizing a quick \$12,807,638.30 in equity. The existing creditors at the time negotiated a short pay-off with "Leonard Cannavo" which benefitted the

Cannavos, and it is clear from the record that a great amount of self-dealing on the part of Leonard Cannavo occurred, which clouded the transaction and from which the Cannavos should not be allowed to profit to the detriment of Plaintiff or any present and/or future creditor.

DEBTORS AND CREDITORS LAW 276-a - ATTORNEY'S FEES

To recover attorneys' fees under Debtor and Creditor Law § 276-a, actual intent to hinder, delay or defraud must be established (Debtor and Creditor Law § 276-a; see, *Farm Stores v. School Feeding Corp.*, 102 A.D.2d 249, 256, 257, 477 N.Y.S.2d 374, affd. *126 64 N.Y.2d 1065, 489 N.Y.S.2d 877, 479 N.E.2d 222 on opn. at App.Div.; *Schmitt v. Morgan*, 98 A.D.2d 934, 936, 471 N.Y.S.2d 365, appeal dismissed 62 N.Y.2d 914, 479 N.Y.S.2d 9, 467 N.E.2d 893; *Southern Inds. v. Jeremias*, 66 A.D.2d 178, 185-186, 411 N.Y.S.2d 945). Therefore, since Plaintiff has established its entitlement to a judgment against the Cannavos based upon their actual intent to defraud pursuant to the "Third", "Seventh", "Tenth", "Thirteenth", "Sixteenth", "Nineteenth", "Twenty-Second", "Twenty-Eighth", and "Thirty-Third" Causes of Action, attorneys' fees are available.

ALTER EGO LIABILITY CAUSE OF ACTION

In order to state a claim for alter-ego liability a plaintiff is generally required to allege "complete domination of the corporation [here Transferor Defendants] in respect to the transaction attacked" and "that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (see *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 623 N.E.2d 1157 [1993]). Because a decision to pierce the corporate veil in any given instance will necessarily depend on the attendant facts and equities, there are no

definitive rules governing the varying circumstances when this power may be exercised (*id.*; see *Baby Phat Holding Company LLC v. Kellwood Company*, 123 A.D.3d 405, 997 N.Y.S.2d 67 [1st Dept 2014]). “Generally, piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the [plaintiff, creditor] which resulted in [that creditor's] injury” (see *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141–142, 603 N.Y.S.2d 807, 623 N.E.2d 1157). Under New York law, the corporate veil will be pierced to achieve equity, even absent fraud, “[w]hen a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego” (see *Austin Powder Co. v. McCullough*, 216 A.D.2d 825, 827, 628 N.Y.S.2d 855; see also *Passalacqua Bldrs. v. Resnick Dev. South.*, 933 F.2d 131, 138–139).

Here, Plaintiff seeks to impose liability on the Transferee Defendant LLCs as alter egos of the Transferor Defendants. Based upon the trial testimony, it is clear that Joseph and Leonard Cannavo controlled the Transferee Defendant LLCs. Leonard Cannavo negotiated all of the mortgage discounts with Providence/Sterling and M&T and Carmela knew nothing of what was going on. In fact, she did not even attend the closings. She testified that she had no knowledge of the formation, operation or membership interests in the Transferee Defendants. Leonard and Joseph Cannavo used their influence and domination over the Transferee Defendant to fraudulently convey Transferor Defendants' assets in order to shield the properties from Plaintiff. The properties were equity laden while the Transferor Defendants declared that the

properties were worthless and had no value which was false and fraudulent. In fact, Joseph and Leonard Cannavo negotiated discounted pay-offs with lenders of up to 50% on the dollar and the balance due on these mortgages were well below the appraised value of the transferred properties. Therefore, the Cannavos' contention that the properties were transferred "subject to the mortgages" is without merit, because the balance on these mortgages did not exceed the value of the properties. Plaintiff is therefore entitled to a judgment on its Forty-Sixth Cause of Action.

VOID AND/OR VOIDABLE TRANSFERS

"A thing is void which is done against law, at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself, after it is done" (see *Blinn v. Schwarz*, 177 N.Y. 252, 259, 69 N.E. 542). A transfer will be void where the transferor has no title to the property, and thus cannot transfer any interest in it (see *Yin Wu v. Wu*, 288 A.D.2d 104, 105, 733 N.Y.S.2d 45; *Kraker v. Roll*, 100 A.D.2d 424, 430-431, 474 N.Y.S.2d 527). RPL § 266 does not protect a bona fide encumbrancer for value where there has been fraud in the factum, as the deed is void and conveys no title (see *Karan v. Hoskins*, 22 A.D.3d 638, 803 N.Y.S.2d 666).

Plaintiff seeks to set aside the transfer based upon actual fraud which would make the transfer void and not voidable. There is no claim here that the subject deed and transfer documents were forged, or executed under false pretense. As the Court of Appeals opined in *Faison v. Lewis*, 25 N.Y.3d 220, 32 N.E.3d 400, 10 N.Y.S.3d 185, (2015).

A forged deed that contains a fraudulent signature is distinguished from a deed where the signature and

authority for conveyance are acquired by fraudulent means. In such latter cases, the deed is voidable. The difference in the nature of the two justifies this different legal status. A deed containing the title holder's actual signature reflects "the assent of the will to the use of the paper or the transfer," although it is assent "induced by fraud, mistake or misplaced confidence" (Marden, 160 N.Y. at 50, 54 N.E. 726; see also Rosen v. Rosen, 243 A.D.2d 618, 619, 663 N.Y.S.2d 228 [2d Dept. 1997]; 26A C.J.S., Deeds § 153 ["where the grantor knowingly executes the very instrument intended, but is induced to do so by some fraud in the treaty or by some fraudulent representation or pretense, the deed is merely voidable"]). Unlike a forged deed, which is void initially, a voidable deed, "until set aside, ... has the effect of transferring the title to the fraudulent grantee, and ... being thus clothed with all the evidences of good title, may encumber the property to a party who becomes a purchaser in good faith" (Marden, 160 N.Y. at 50, 54 N.E. 726).

That being the case, Plaintiff's claim that the transfers were made to avoid its rights as judgment creditor to certain named defendants and that since the conveyances were fraudulent the deeds and transfers should be vacated is contrary to the holding in *Faison*. Here, the deeds and other transfer document were not forged but may have been executed with fraudulent intent. Transferor Defendants, Joseph and Leonard Cannavo, had full authority to transfer the properties. Therefore, this does not render the transfers void but rather voidable at best and although this Court finds the Transferee Defendant, Carmela Cannavo to be the alter ego of the Transferor Defendants, this does not on its face render the transfer void *ab initio*. Consequently, even though the deeds were found to have been transferred fraudulently and voidable, that does not affect Provident/Sterling's status as a bona fide encumbrancer and first lien mortgagee.

DELAY IN RECORDING OF DEEDS

Plaintiff highlights that the deeds were not recorded until several months after execution. However, the fact that the deeds transferring the properties were not recorded until a later date or simultaneously with the encumbrancing of the properties does not provide a factual basis for inquiry notice, so long as at the time of the transaction, the transfer documents, recorded or unrecorded, shows Carmela Cannavo. LLCs as the owner and Mortgagor and both M&K and Sterling/Provident as Mortgagees, which under RPL § 266 would make M&K and Sterling/Provident ("Lending Institutions) bona fide encumbrancers for value. Plaintiff has not offered any evidence to show otherwise. The same applies to the title report. If at the closing of these loans there were transfer documents showing title to the properties passing from the Transferor Defendants to the Transferee Defendants who is the Mortgagor, there is no factual basis for inquiry notice. Plaintiff has not established otherwise.

Furthermore, the failure to record and index the indenture against the subject property did not preclude [Transferor Defendants] from denying ownership. The applicable statute relating to the recording of deeds, Real Property Law § 291, was designed to protect the rights of innocent purchasers (*see Andy Assoc. v. Bankers Trust Co.*, 49 N.Y.2d 13, 424 N.Y.S.2d 139, 399 N.E.2d 1160). In this instance, plaintiff is not a member of the class for which the statute was designed to protect as Plaintiff has not shown how it was directly harmed by the delay in recording the deeds

Plaintiff offered no evidence that M&K and/or Providence/Sterling participated in the alleged fraud or had reason to know that the properties were transferred fraudulently. Therefore, both M&K and Sterling/Providence have maintained their status

as a good faith encumbrancer. Plaintiff has, therefore, failed to establish its entitlement to judgment on the Fourth, Twenty-Ninth, Thirtieth, Thirty-Fourth, Thirty-Fifth, Thirty-Sixth, Thirty-Seventh, Thirty-Eighth, Thirty-Ninth, Fortieth, Forty-First, Forty-Second, Forty-Third, Forty Fourth and Forty-Fifth Causes of Action.

M&T Bank also argues that it is also a bona fide encumbrancer for value, whose mortgage lien should not be "impaired" pursuant to RPL § 266, which provides that, "Rights of purchaser or encumbrancer for valuable consideration protected" provides: "[t]his article does not in any manner affect or impair the title of a purchaser or encumbrancer (sic) for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor," (see *Southwell v. Middleton* 17 Misc.3d 1129(A), 851 N.Y.S.2d 74 (Table),(Sup Ct., Kings Cty 2007). It is only if the facts within the knowledge of the [encumbrancer] are of such a nature, as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, that he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed" (see *Fischer v. Sadov Realty Corp.*, 34 AD3d 630, 631 [2006]). Here, the trial record clearly suggests that M&T had no knowledge of any fraud or fraudulent intent by the Transferor Defendants nor of any circumstances that would cause M&T to do further investigation into the transactions. M&T Bank, as is Sterling/Provident, therefore bona fide encumbrancers with valid mortgages.

DOCTRINE OF EQUITABLE SUBROGATION

Both M&T and Sterling/Provident mortgages are protected under the doctrine of equitable subrogation. The doctrine of equitable subrogation provides that “[w]here property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder” (see *King v. Pelkofski*, 20 N.Y.2d 326, 333, 282 N.Y.S.2d 753, 229 N.E.2d 435 [1967]). M&T and Sterling/Provident Mortgages were used to replace the mortgages and liens that encumbered the subject properties at the time the mortgages were made. Therefore, M&T and Sterling/Provident Mortgages maintain their status as first mortgage liens for the amount loaned to Carmela Cannavo LLCs. In the case of M&T seven million dollars was loaned to Capital Realty and Crown Royal Properties to pay-off the then existing encumbrances.

It is true that “a mortgagee is not protected in its title if it had previous notice of potential fraud by the immediate seller, or knowledge of facts which put it on inquiry notice as to the existence of a right in potential conflict with its own. A mortgagee has a duty to inquire when it is aware of facts that would lead a reasonable, prudent lender to inquire into the circumstances of the transaction at issue. A mortgagee who fails to make such an inquiry cannot claim to have made a bona fide incumbrance for value. (see *P. Vithoukas v. Meta et al, Plaintiff*, 61 Misc.3d 1207(A), 110 N.Y.S.3d 799 (Queens Sup., 2018).

Other than the fact that the deeds transferring the properties from the Transferor Defendants to the Transferee Defendants were not recorded until the properties were refinanced, Plaintiff offered no other credible evidence that the Lenders were aware of, or should have been aware of any fraud being perpetrated by the Cannavos in transferring the properties in an attempt to avoid Plaintiff's Judgments. The issues raised by Plaintiff that should have put the Lenders on inquiry notice were based solely on speculation and not upon what would have caused a reasonable lender to investigate further. As the Court opined in *Fischer v. Sadov Realty Corporation*, 34 A.D.3d 630, 824 N.Y.S.2d 434 (2d Dept. 2006) "[i]t is only if the 'facts within the knowledge of the [encumbrancer] are of such a nature, as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, [that] he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed". Courts have found that a transfer without consideration, designated as a gift, from a mother to her daughters, is not one "to excite the suspicion of an ordinarily prudent person." (see *Minor v. Edwards*, 221 A.D.2d 934, 634 N.Y.S.2d 306 (4th Dept. 1995). Moreover, the fact that Joseph and Leonard Cannavo were able to negotiate a reduction in pay-off of the then existing mortgages and the fact that the mortgages were intertwined and cross-collateralized could not be found to "excite the suspicion of an ordinary prudent person" such as M&T and Sterling/Provident.

Prior to the commencement of this action, in May 2016, M&T Bank assigned the Whitetail Mortgage to Flushing Bank. On July 11, 2014 M&T assigned certain of the Capital Realty Mortgage to Sterling National Bank. As a result, Sterling Bank no longer

has any security interest in those properties and is no longer a proper party. Flushing Bank is a real party of interest and should have been named in this action (CPLR 1001). Since the Court found in favor of M&T Bank and dismissed Plaintiff's Amended Complaint there is no adverse impact on the mortgagee's interest in the affected properties. However, if this litigation continues in its current form, Flushing Bank must be joined as a necessary party in place and stead of M&T Bank.

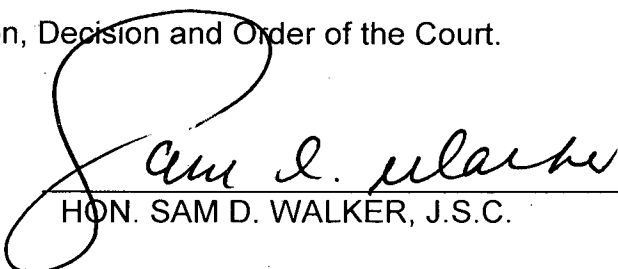
It is therefore, the findings of this Court after trial, that Joseph and Leonard Cannavo, Transferor Defendants fraudulently transferred the properties to the Transferee Defendant, their sister Carmela Cannavo LLC.'s. As a general rule, the relief to which a defrauded creditor is entitled in an action to set aside a fraudulent conveyance is limited to setting aside the conveyance of the property which would have been available to satisfy the judgment had there been no conveyance, (*see Joslyn v. Lopez* 309 A.D.2d 837, 765 N.Y.S.2d 895 (2d Dept. 2003)). A money judgment against the transferee may also be an available form of substitute relief where the transferee has disposed of the wrongfully conveyed property in some manner which makes it impossible to return (*see Marine Midland Bank v. Murkoff*, 120 A.D.2d 122, 508 N.Y.S.2d 17; see also *Wasey v. Holbrook*, 141 App.Div. 336, 125 N.Y.S. 1087, *affd.* 206 N.Y. 708, 99 N.E. 1119). Since there was no testimony at trial as to the current ownership status of the properties, Plaintiff has the burden of establishing that the Transferee Defendant, Carmela Cannavo disposed of the property in some manner that makes it impossible to return. However, Plaintiff judgments are based upon a sum certain which becomes liens on the subject transferred properties.

Plaintiff's claim against Defendant, Provident Bank n/k/a Sterling National Bank for fraudulent conveyance is denied in all respect. Provident/Sterling continues to maintain valid first mortgage liens as a good faith lender for value.

Plaintiff's claim against Defendant M&T Bank for fraudulent conveyance is denied in all respects. M&T Bank continues to maintain valid first mortgage liens as a good faith lender for value.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
February 10, 2021



HON. SAM D. WALKER, J.S.C.