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.

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SR HOLDING I, LLC.,

Plaintiff

DECISION & ORDER
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.

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The Court conducted a bench trial between December 5, 2019 and December 17, 2019. At the Court's direction, the parties submitted Post-Trial Memoranda in support of their respective positions. Upon consideration of all of the testimony,

evidence and the parties' submissions, the Court rendered a Decision After Trial dated February 10, 2021 and entered February 11, 2021. In substance, the Court found that the evidence at trial satisfied the statutory elements of Debtor and Creditors Law § 273 & 276 with respect to the Initial Transfer of the properties from the Transferor Defendants to the Transferee Defendants, warranting a judgment in Plaintiff's favor setting aside the transfers.

The Transferor and Transferee Defendants now move by Order to Show Cause and Notice of Motion to set aside the Court's Decision After Trial dated February 10, 2021, and to make new findings of fact and conclusions of law, render a new decision and direct entry of judgment based on the new decision pursuant to CPLR § 4404(b) and for a stay pursuant to CPLR § 2201, as the Decision After Trial is against the weight of the evidence and there is insufficient evidence to establish Transferor Defendants fraudulently conveyed the real properties at issue herein..

CPLR 4404(b) MOTION

Pursuant to CPLR 4404(b), after a non-jury trial, a court may, on the motion of a party or its own motion, set aside its decision and make new findings of fact or conclusions of law (*see Trimarco v. Data Treasury Corp.*, 146 A.D.3d 1008, 1009, 46 N.Y.S.3d 640; Paterno v. Strimling, 107 A.D.3d 1233, 1234, 968 N.Y.S.2d 643).

Defendants argue that the Court's Decision was not supported by a fair or reasonable interpretation of the evidence. However, the Court, in rendering it's Decision, assessed the credibility of the witnesses and the evidence offered. The Court discussed the issues at length, assessed the evidence presented and made a

determination based on the evidence and testimony offered. The Court will again review its Decision After Trial in view of the testimony and evidence offered at trial.

TRANSFER OF THE DEEDS

As the Court opined in its Decision after Trial, the deeds were executed but not delivered to the Transferee Defendants until the date of the refinance. Ronald Rauschenbach, President of Castle Title, testified that the Deeds were held and that he did not deliver them to the Transferee Defendants until the time of the M&T Bank and Provident Bank refinance. This occurred months after the deeds were executed. Although it is not necessary that such conveyance be recorded (*see Cayea v. Lake Placid Granite Co.*, 245 A.D.2d 659, 661, 665 N.Y.S.2d 127 [1997]), it is a well-established rule that delivery of the deed with intent to transfer title is required and the absence thereof will render the attempted transfer of ownership ineffective (*see 219 Broadway Corp. v. Alexander's, Inc.*, 46 N.Y.2d 506, 511, 414 N.Y.S.2d 889, 387 N.E.2d 1205 [1979]; *Cayea v. Lake Placid Granite Co.*, 245 A.D.2d at 660, 665 N.Y.S.2d 127). While there is a strong presumption that a deed purporting to transfer ownership in real property has been delivered and accepted, this presumption may be overcome by evidence of the parties' actual intent (*see Manhattan Life Ins. Co. v. Continental Ins. Cos.*, 33 N.Y.2d 370, 372, 353 N.Y.S.2d 161, 308 N.E.2d 682 [1974]; Janian v. Barnes, 284 A.D.2d 717, 718, 727 N.Y.S.2d 182 [2001]; *see also Diamond v. Wasserman*, 8 A.D.2d 623, 185 N.Y.S.2d 411 [1959]).

Furthermore, New York does not recognize conditional conveyances (*see In re Ellison Assoc.*, 63 B.R. 756, 761 [S.D.N.Y.1983]; *Herrmann v. Jorgenson*, 263 N.Y. 348, 353, 189 N.E. 449 [1934]; *Hamlin v. Hamlin*, 192 N.Y. 164, 167–168, 84 N.E. 805

[1908]). Thus, if the intention in transferring possession of a deed is merely to have it transmitted to a third person, such as an escrow agent, there is no legal delivery that will pass title to the property (*see Rapp v. Cansdale*, 29 Misc.2d 236, 244–245, 214 N.Y.S.2d 522 [1960], affd. 12 A.D.2d 884, 211 N.Y.S.2d 1002 [1961]). The Cannavos offered no evidence as to the role of Castle Title and on whose behalf, they were acting. The testimony offered at trial points to Castle Title being an agent of the Transferor Defendants. Leonard Cannavo testified that Castle Title's involvement went as far as having prepared some of the deeds transferring the property for several of the transactions making Castle Title more an agent of the Transferor Defendants than an independent third-party or a mere title company. What is clear from the testimony is that the Cannavos remained in control of the properties by managing and collecting rent after the deeds were executed, transferring the properties, and continued even after the transfers were completed and the deeds offered for filing.

In fact, not only did Rauschenbach testify that the deeds were held, and not delivered but 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.

The trial evidence clearly contradicts the Cannavos' version of events and demonstrates that the deeds at issue were never "delivered" until the dates of the closing of the mortgage refinance 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 the Plaintiff's contention that the deeds were delivered at the time of the closing of the refinance of the mortgages. .

PLAINTIFF'S CLAIM OF FRAUDULENT CONVEYANCE

Debtor and Creditor Law § 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be 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." 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" (*Joslin v. Lopez*, 309 A.D.2d 837, 838, 765 N.Y.S.2d 895 [2003]). An antecedent debt can constitute fair consideration (*Matter of American Inv. Bank v. Marine Midland Bank*, 191 A.D.2d 690, 692, 595 N.Y.S.2d 537 [1993]). A person is deemed insolvent when "the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured" (Debtor and Creditor Law § 271[1]; *see Ede v. Ede*, 193 A.D.2d 940, 941, 598 N.Y.S.2d 90 [1993]), and "fair consideration requires that the exchange not only be for equivalent value, but also that the conveyance be made in good faith" (*Ede v. Ede, supra* at 941–942, 598 N.Y.S.2d 90; *see* Debtor and Creditor Law § 272). The determination of what constitutes "fair consideration" is generally a question of fact to be determined under the circumstances of the particular case (*see Serota v. Power House Realty Corp.*, 274 A.D.2d 427, 711 N.Y.S.2d 778 [2000]; *Epstein v. Nieves*, 258 A.D.2d 436, 682 N.Y.S.2d 917 [1999]).

Here, there is no dispute as to the value of the properties at the time of the transfer. The question is whether the pay-off of the debts encumbering the properties at the time of the transfer, were fair equivalents to the value of the properties. This Court found and the record supported the contrary. Properties that were claimed to be under water one day, miraculously gained millions of dollars in value the next, after a simple refinance. This confirms that the total amounts of the pay-offs, including first and second mortgages and outstanding taxes were far from a fair equivalent value of the properties transferred.

As the Court opined in its Decision After Trial, "the deeds transferring the properties to Carmela Cannavo LLCs were not delivered for recording until the closing of the M&T and Providence refinancing of the properties." At this point there was already a written agreement in place between the Transferor Defendants and existing creditors for a discounted pay-oft of the balance due on their debt. In the end, the properties turned out not to be worthless and under-water, but of significant value, with Carmela's LLCs realizing a quick $15 million in equity. The Court is still of the opinion that based upon the evidence presented at trial, the total amount of the pay-offs, including first and second mortgages and outstanding taxes, were not fair equivalents.

Moreover, the Transferor Defendants' claim that there is no evidence that the Transferee Defendants took title subject to the liens, is not supported by the record. It is clear from the record that the deeds transferring the properties to Carmela Cannavo LLCs were not delivered for recording until the closing of the refinance of the properties, when there were already written agreements in place between the Transferor Defendants and existing creditors, for a discounted pay-off of the balance due on the

debt. Accordingly, the Transferee Defendants could not have taken title subject to the liens. Furthermore, this was even further contradicted by the sworn statements contained in Defendants' own tax returns and the TP-584's and RP-5217's. And Defendants made no effort at trial to offer any evidence contradicting the same.

Moreover, there was no testimony or evidence that the properties were transferred subject to payment of the mortgages and there was no language in the deeds to that effect. Since the Transferee Defendants were not parties to any of the ECP Forbearance Agreement, they never became obligated on the existing mortgages. Joseph and Leonard Cannavo negotiated the ECP Forbearance Agreements and the discounted pay-offs and made all the payments required. Here, the Transferor Defendants, Leonard and Joseph Cannavo, paid off the existing mortgages for less than the full amount that was owed. Any difference realized should have been reported on Transferor Defendants' income tax as cancelled debt income. This, however, would run contrary to 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. Since this was not the case and the Transferee Defendants received a windfall at the closing of the refinance, the transfer could not have been subject to the entire balance due on the mortgages and the cancelled debt income should have been reported by the Transferee Defendants as such, confirming that the transfers were made for less than fair consideration.

Defendants, to bolster their position to establish fair consideration, spent an inordinate amount of time discussing reporting of the cancelled debt income on their tax returns. The Transferor Defendants did report the cancelled debt income on their tax

returns, but this defeated Transferor Defendants' contention that the properties were transferred subject to the entire balances due on the mortgages. If that was the case, as the Court opined in its Decision After Trial, "the cancelled debt income from the discounted pay-offs should have been reported by the Transferee Defendants as such", but instead it was reported by the Transferor Defendants, which confirms that the properties were not transferred subject to the entire balance due on the mortgages, resulting in the Transferee Defendants avoiding tax liability on over $15 million in cancelled debt income. The Cannavos offered no independent testimony to establish that the transfers were made subject to the full balances due on the existing mortgages.

Another factor in determining fair consideration is whether or not the Transferor and Transferee Defendants acted in good faith. "Good faith is lacking when there is a failure to deal honestly, fairly, and openly" (*see Berner Trucking v. Brown*, 281 AD.2d 924, 925, 722 N.Y.S.2d 656 [2001] [citation omitted]; *see also Smith v. Kanter*, 273 AD.2d 793, 795, 709 N.Y.S.2d 760 [2000]). Once again, under the Debtor and Creditor Law, all transfers must rest on fair consideration (Debtor and Creditor Law, SS 273, 274, 275) and fair consideration, even for an antecedent debt, requires the transfer to be made in good faith (Debtor and Creditor Law, S 272; see also Julien J. Studley, Inc. v. Lefrak, 66 AD.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]).

In its Decision After Trial, addressing bad faith on the part of the Transferor and Transferee Defendants, the Court found that "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, " Courts view intra-family transfers made without any signs of tangible consideration as presumptively fraudulent (*see Ruby Weston Manor v. Vidal*, 18 Mise.3d. 1115A [Kings Cty., 2008]).

As the Court found in its Decision After 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."

Finally, where the transferee is aware of an impending enforceable judgment against the transferor, the conveyance does not meet the statutory good faith requirement and generally will be set aside as constructively fraudulent (*see Matter of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria v. Upstate Bldg. Corp.*, 262 A.D.2d 981, 692 N.Y.S.2d 285 [4th Dept. 1999]).This clearly does not support the Cannavos' position that they acted in "good faith.

Defendants then argue that Carmela's individual personal guarantees of the ECP Forbearance Agreement or the M&T and Providence Loans constituted additional consideration for the initial transfer. Defendants offered no authority and the Court could find none that support such a proposition. Defendants cited *First American Bank of New York v. Builders Funding Corp*, 200 A.D.2d 946 (1st. Dept, 1994) which holding is clearly in opposite to Defendants' position. In *First America* the Court opined that "[i]t is settled law that a guarantee executed in exchange for, and as a condition of, a promise to advance funds to a third party in the future, coupled with an actual advance at a later date, is supported by ample consideration."

Here, the ECP Forbearance Agreements do not contain a condition that the guaranteeing party, Carmela Cannavo, as an Individual Guarantor, promises to advance funds at a future date, nor did an actual advance by Carmela occur at a future date. In fact, all of the forbearance payments were made by the Transferor Defendants. Leonard Cannavo negotiated a discounted pay-off with ECP and as a result Carmela had to issue a personal guarantee. This was part of the negotiation and a separate transaction which occurred prior to the actual transfer of the properties to Carmela'a LLCs.

As the Court opined in its Decision After Trial, the evidence in the record suggests that Joseph and Leonard Cannavo, as the sole members of the Transferor Defendants, essentially sold the properties to themselves via their alto ego LLCs by transferring the equity upside to their sister without paying their obligations to creditors. Therefore, Carmela's personal guarantees were unrelated to and did not constitute additional consideration for the Initial Transfer at the refinance. Carmela and her LLCs' equity

stake in the transferred properties was increased by $15 millions at the closing of title to the properties. The Court reaffirms its position that these transfers lack fair consideration

THE INITIAL TRANSFER RENDERED THE TRANSFEROR DEFENDANTS INSOLVENT

The Court stands by its finding in Its Decision After Trial. As the Court opined, [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 S 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 NY.S.2d 306; *Matter of Oppenheim*, 269 App.Div. 1040,58 N.Y.S.2d 620).

Defendants offered no evidence at trial to rebut the presumption of insolvency and to meet Defendants' burden to prove that each Transferor Defendant was not rendered insolvent by the transfers. Defendants' contention that the Transferor Defendants were already insolvent prior to the transfer was not supported by the record.

The record supports the fact that after the properties were transferred, the Transferor Defendants could pay their creditors while the Transferee Defendants realized equity in the properties of approximately $15 million.

PLAINTIFF IS ENTITLED TO JUDGEMENT PURSUANT TO DCL 273 - CONSTRUCTIVE FRAUD.

As the Court stated above DCL § 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent ... without regard to his [or her] actual intent if the conveyance is made or the obligation is incurred without a fair consideration." "A finding of constructive fraud pursuant to Section 273 may thus be predicated upon proof of insolvency and lack of fair consideration, without a showing of actual motive or intent to defraud" (*see Zanani v. Meisels*, 78 A.D.3d 823, 910 N.Y.S.2d 533, [2d Dept 2010]). The burden of proof rests upon the party challenging the conveyance, (*see Matter of American Inv. Bank v. Marine Midland Bank*, 191 A.D.2d 690, 595 N.Y.S.2d 537; *Marine Midland Bank v. Murkoff*, 120 A.D.2d 122, 508 N.Y.S.2d 17; *Commercial Trading Co. v. Potter Securities Corp.*, 26 A.D.2d 761, 271 N.Y.S.2d 733).

Here, Plaintiff met its burden by establishing that the Initial Transfers were made without fair consideration and rendered the Transferor Defendants insolent. Defendants' failed to rebut this presumption.

PLAINTIFF IS ENTITLED TO A JUDGMENT PURSUANT TO DCL 276 - ACTUAL FRAUD

The Court again stands by its Decision After Trial. 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 NY.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, Carmela's 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. Since Plaintiff is not required to prove unfair consideration or insolvency, a fair interpretation of the evidence clearly support the Court's finding of actual fraud.

PLAINTIFF IS ENTITLED TO AWARD OF ATTORNEY'S FEES PURSUANT TO DCL 276-a

The Court stands by its Decision After Trial on the issue of attorneys fees. As the Court opined, to recover attorneys' fees under Debtor and Creditor Law S 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 AD.2d 249, 256, 257, 477 N.Y.S.2d 374, affd. 64 N.Y:2d 1065, 489 N.Y.S.2d 877, 479 N.E.2d 222 on opn. at AppDiv.; *Schmitt v. Morgan*, 98 AD.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 AD.2d 178, 185-186,411 N.Y.S.2d 915). 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. A hearing will be scheduled to determine the attorneys fees amount due Plaintiff.

ALTER EGO LIABILITY CAUSE OF ACTION

Here again, the Court Stands by its Decision After Trial. As the Court opined, 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 [st 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 other 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). The relevant transactions in these proceeding clearly support total domination by the Transferor Defendants and justifies piercing the corporate veil and imposing alto ego liability.

Based upon the trial testimony 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 about the transaction. In fact, Carmella did not even attend the closings. She testified that she had no knowledge of the formation, operation or membership interests in any of the Transferee LLCs. Secondly, Leonard and Joseph Cannavo used their influence and domination over the

Transferee Defendants 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-off's with lenders resulting in the balance due on these mortgages being well below the appraised value of the transferred properties. Here, the evidence clearly established Joseph and Leonard Cannavo's domination and control of both the Transferor and Transferee Defendants, clearly establishing the Transferee Defendants being the alto ego of the Transferor Defendants. Plaintiff is therefore entitled to a judgment on its "Forty-Sixth Cause of Action"

THE COURT PROPERLY APPLIED THE DOCTRINE OF TAX ESTOPPEL

"Under 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]). "We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns",(*see Mahoney Buntzman v. Mahoney*, 12 N.Y.3d 415, 909 N.E.2d 62, 881 N.Y.S.2d 369 [2009]).

The evidence presented at trial clearly established Defendants' filing of Forms TP-584's and RP-5217's, containing sworn affirmations of value of the properties that were financially beneficial to them at the time that they were filed. In fact, Leonard Cannavo

testified that at the time of the Initial Transfer, the properties were "under water", and had no value. This was corroborated in Forms TP-584's and RP-5217"s 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 the properties being transferred 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 included the outstanding mortgage debts on the properties, and that the properties were transferred subject thereto.

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 contradicting the Transferor Defendants' contention that the properties were under water and worthless. Defendants explanation lacked credibility and was clearly un-meritorious. The Doctrine of Tax Estoppel is clearly applicable against Defendants..

THE STATUS OF TRANSFERS AS VOID AND/OR VOIDABLE

The Court stands by its Decision After Trial. Even though Defendants M&T and Providence were not parties in the instant motion, the Court deemed it necessary to address this issue. "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 AD.2d 104, 105,733 N.Y.S.2d 45; *Kraker v. Roll*, 100 AD.2d 424, 430-431,474 N.Y.S.2d 527). RPL 9266 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 AD.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 9153 ["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 incumber 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

The Court stands by the holding in its Decision After trial. Even thought M&T and Sterling/Providence were not parties to the instant motion, the Court addressed this issue. 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 $terling/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, and there was no break in the chain of title, 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 bonafide encumbrancer for value, whose mortgage lien should not be "impaired" pursuant to RPL § 266 [Rights of purchaser or incumbrancer for valuable consideration protected], which provides that: "[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,"

(NY RPL § 266; *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, are bona fide encumbrancers with valid mortgages.

DOCTRINE OF EQUITABLE SUBROGATION

Although, M&T and Sterling/Providence were not parties to the instant application, the Court addressed this issue. 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. Vithoulkas 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 stated previously in (*Fischer v. Sadov Realty Corporation*, 34 A.D.3d 630, 631), the facts have to be of such a nature, to excite suspicion of an ordinary prudent person and cause an investigation. 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 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 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.

With respect to the Fox Island debts, Leonard and Joseph Cannavo are still responsible for the deficiency judgments since the foreclosure actions sought deficiency judgments against the grantors.

As to Brodnick Affirmation claiming that there was no “scheme”, while there may be better terms to describe what occurred, but the Court deemed “scheme” to be most descriptive.. What is clear from the testimony is, a plan was crafted which allowed Joseph and Leonard Cannavo, members of the Transferor Defendants, and also members of and sole controllers of the Transferee Defendants to negotiate a refinance of the properties to their benefit and to the detriment of creditors. Leonard negotiated

the re-finance and Carmela's own testimony confirms that she played no role in the Initial Transfer or the refinance. The Cannavos are experienced real estate investors with a wealth of knowledge. This was not simply a coincidence, but a planned maneuver designed to divert equity from the reach of creditors to the 'strawman", Carmela Cannavo. The fact that Carmela issued guarantees does not remove or diminish her status. It is clear from the testimony that the purpose of the plan was to benefit the Cannavos at the expense of the creditors.

Lastly, based upon the fair market value of the properties that were transferred, it is clear from the record that Plaintiff stood a better chance of recovery had the properties been sold to a bonafide purchaser in an arms length transaction. But instead, the Cannavos who were on both sides of the transfers ended up with $15 million in equity and the Plaintiff with two judgments which would prove difficult to collect. The Cannavos seek to characterize what occurred as coincidental, but the trial testimony and the record does not support such a finding. Defendants cannot avoid the reality of what occurred, and based upon the record the transactions were far from being arms length. This resulted in the Transferee Defendants acquiring the properties free and clear after paying off the existing encumbrances for approximately $15 million less than the fair market value of the properties. The record clearly supports the Court's original finding and the Court stands by its Decision After Trial.

The entry of a Judgment was stayed pending the Court's Decision on the instant motion. There may also be a pending stay of the Judgment by the Appellate Division, Second Department. This must be sorted out by Attorneys for the parties.

After reconsideration of its prior Decision After Trial and after consideration of the evidence including the trial testimony, the documentary evidence and the post trial briefs, Defendants' motion pursuant to CPLR 4404(b) to set aside the Court's Decision After Trial is denied. The Court finds that the record was sufficient to support its initial finding and Defendants offered no new argument not previously raised that would cause the Court to change its original Decision After Trial.

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

Dated: White Plains, New York
September 24, 2021

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