ORIGINAL

SHORT FORM ORDER

INDEX No. 606697/2019
CAL. No. 202000683OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 8/20/20 (002)
MOTION DATE 10/8/20 (003)
ADJ. DATE 10/15/20 (002 & 003)
Mot. Seq. # 002 MotD
Mot. Seq. # 003 XMD

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ROBERT MASTRANTONIO,

Plaintiff,

- against -

RONALD KING, a/k/a RONALD E. KING, a/k/a RON KING, HOWARD POGROB a/k/a HOWARD D. POGROB a/k/a HOWARD DARRON POGROB,

Defendants.

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Upon the following papers read on the e-filed motion for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by plaintiff, filed July 23, 2020; Notice of Cross Motion and supporting papers by defendants, filed September 18, 2020; Answering Affidavits and supporting papers by defendants, filed September 18, 2020020, and by plaintiff, filed October 8, 2020 ; Replying Affidavits and supporting papers by plaintiff, filed October 8, 2020; Other _____; it is

ORDERED that plaintiff's motion is granted to the extent set forth herein, and is otherwise denied; and it is

ORDERED that the defendants' cross motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that a MICROSOFT TEAMS conference to discuss the scheduling of a hearing on the issue of attorney fees shall be held on **April 13, 2021, at 12:00 p.m.**

This action commenced by plaintiff, Robert Mastrantonio, to set aside alleged fraudulent conveyances has a protracted history. In May 2017, plaintiff purchased a house in Fort Salonga, New

York, that had been newly constructed by nonparty 12 Meadow Glen Road Corp. (12 Meadow). The defendants, Ronald King and Howard Pogrob, were the principals and controlling shareholders of 12 Meadow. The contract of sale between plaintiff and 12 Meadow included a new home warranty mandated by article 36-B of the General Business Law. Although the statutory home warranty "is implied in the contract or agreement for the sale of a new home" (General Business Law § 777-a), paragraph 39 of the contract of sale reiterated that the statutory home warranty applied. The warranty applied to different portions of the house for different time periods; at its longest, the warranty protected against "material defects," a defined statutory term, for six years.

Approximately six months after 12 Meadow sold the house to plaintiff, the defendants dissolved 12 Meadow and distributed its assets, which consisted of the sale proceeds, to themselves and other individuals. The dissolution was effective on or about October 11, 2017.

Almost one year after closing on the property, roughly six months after the defendants dissolved 12 Meadow, and after allegedly trying to contact King to no avail, plaintiff's counsel wrote a letter to King, as principal of 12 Meadow, in April 2018. The letter was a notice of claim under the statutory home warranty due to water leakage into the basement. The letter demanded almost $48,000.00, which represented costs incurred so far to fix the leakage and an estimate of additional remedial costs.

King's counsel, who also represents the defendants in this action, responded with a letter of his own. In pertinent part, counsel stated that "[t]he only parties to the [c]ontract of [s]ale . . . were [plaintiff] and a corporation named '12 Meadow Glen Road Corp.' Please be advised that this corporation was dissolved on October 11, 2017 . . . . This [c]ontract does not contain a personal guaranty. No individual is liable for the alleged contractual breach by the corporation."

Plaintiff then commenced an action against 12 Meadow (the prior action) for breach of warranty, breach of contract, and negligence. Among other things, the complaint in the prior action alleged that a contractor retained by plaintiff "traced the source of the leaks and flooding to an inferior and defective drainage and waterproofing systems installed by defendant at the time of the construction." 12 Meadow defaulted in the prior action, and this Court entered a default judgment against 12 Meadow in the amount of $54,942.38. The judgment included an award of $3,801.70 in attorney fees.

To enforce his judgment against 12 Meadow, plaintiff then commenced this action against King and Pogrob to set aside as fraudulent the conveyance of the sale proceeds from 12 Meadow to defendants. Specifically, plaintiff asserted claims of constructive fraudulent conveyance under former Debtor and Creditor Law (DCL) §§ 273, 274, and 275, and actual fraudulent conveyance under former DCL § 276. Plaintiff also requested attorney fees under former DCL § 276-a. The defendants answered, but did not interpose any affirmative defenses.

Plaintiff now seeks summary judgment in his favor. In support of his motion, plaintiff submits, among other things, the pleadings, the complaint from the prior action, transcripts of the defendants' depositions, the contract of sale, the deed, and the default judgment entered against 12 Meadow. The defendants oppose the motion and cross-move for summary judgment dismissing the complaint. The

defendants submit, among other things, their own affidavits, deeds, an inspection record, and a punch list.

On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (***Matter of Eighth Jud. Dist. Asbestos Litig.***, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

Pertinent to all of plaintiff's claims is the effect, if any, of 12 Meadow's default in the prior action on the defendants in this action. Plaintiffs contend that by defaulting, 12 Meadow admitted all of the material allegations in the complaint. Plaintiffs further allege that the defendants, as 12 Meadow's majority shareholders, controlled 12 Meadow and, therefore, were in privity with it. They argue that 12 Meadow's default is binding on the defendants, and that the defendants admitted all of the material allegations in the complaint.

"A defendant who has defaulted in answering admits all traversable allegations in the complaint, including the basic allegation of liability" (***Deutsche Bank Natl. Trust Co. v Hall***, 185 AD3d 1006, 1008, 129 NYS3d 146, 148 [2d Dept 2020]; *see* ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 760 NYS2d 727 [2003]; ***HSBC Bank USA, N.A. v Simms***, 163 AD3d 930, 81 NYS3d 517 [2d Dept 2018]). In addition to being binding on the defaulting defendant itself, a default judgment is also binding on any person or entity that is in privity with the defaulting defendant (*see* ***Sancar Mgt. v OneWest Bank, FSB***, 165 AD3d 1306, 84 NYS3d 794 [2d Dept 2018]; ***Goldstein v Engel***, 240 AD2d 280, 659 NYS2d 16 [1st Dept 1997]).

Here, the defendants were the controlling members of 12 Meadow. In their motion papers, the defendants concede that they "were the initial and only officers and shareholders of [12 Meadow] during its four-year existence." As the controlling shareholders of a closely-held corporation, the defendants were in privity with 12 Meadow and, therefore, are bound by the default judgment entered against 12 Meadow (***Sterling Doubleday Enters. v Marro***, 238 AD2d 502, 656 NYS2d 676 [2d Dept 1997]; ***Specialty Rests. Corp. v Barry***, 236 AD2d 754, 653 NYS2d 972 [3d Dept 1997]; *see* ***Briggs v Chapman***, 53 AD3d 900, 863 NYS2d 97 [3d Dept 2008]). "Controlling status over a corporation constitutes privity with it as a matter of law" (***Karali v Araujo***, 48 Misc 3d 1043, 1047, 11 NYS3d 823, 826 [Sup Ct, Suffolk County 2015]).

In opposition, the defendants contend that 12 Meadow had been dissolved before plaintiff commenced the prior action. The defendants contend that, as a non-existent corporation, 12 Meadow "was legally dead at the time the [prior action] was filed" and, therefore, could not have possibly defended the prior action. The defendants contend that when plaintiff commenced the prior action, 12

Meadow "did not exist and, thus, defendants herein could not have been in privity with the then-dead entity." The defendants also note that they were not parties to the prior action.

Fatal to the defendants' arguments, though, is that under Business Corporation Law §§ 1005 and 1006 (a) (4), 12 Meadow could have defended itself in the prior action as part of the winding up its affairs (*see* ***Tedesco v A.P. Green Indus., Inc.***, 8 NY3d 243, 832 NYS2d 141 [2007]; ***Harris v Stony Clove Lake Acres***, 221 AD2d 833, 633 NYS2d 691 [3d Dept 1995]; ***Briere v Barbera***, 163 AD2d 659, 558 NYS2d 278 [3d Dept 1990]; *see also* ***Greater Bright Light Home Care Servs., Inc. v Jeffries-El***, 151 AD3d 818, 58 NYS3d 68 [2d Dept 2017]; ***Cava Contr. Co. v Gealtec Remodeling Corp.***, 58 AD3d 660, 871 NYS2d 654 [2d Dept 2009]). Business Corporation Law § 1005 (a) (2) specifically states that after a non-judicial dissolution of a corporation, "[t]he corporation shall proceed to wind up its affairs, with power to fulfill or discharge its contracts . . . discharge or pay its liabilities, and do all other acts appropriate to liquidate its business." Section 1006 (a) (4) states that a dissolved corporation "may sue or be sued in all courts and participate in actions and proceedings . . . in its corporate name, and process may be served by or upon it." "Thus, a corporation undergoing dissolution continues to exist for the purpose of and for as long as is necessary to satisfy and provide for its debts and obligations[,] and it may sue or be sued on these obligations until its affairs are fully adjusted. Included as corporate liabilities are contractual obligations and contingent claims" (***Matter of Rodgers v Logan***, 121 AD2d 250, 253, 503 NYS2d 36, 39 [1st Dept 1986] [citations omitted]; *see* ***Cava Contr. Co. v Gealtec Remodeling Corp.***, *supra*). 12 Meadow's contingent liability on the statutory home warranty remained outstanding, so defending the prior action would have been part of winding up 12 Meadow's affairs under Business Corporation Law §§ 1005 and 1006. Thus, 12 Meadow could have defended the prior action.

To the extent that defending the prior action was not part of the winding up 12 Meadow's affairs, it still could have defended the prior action because the warranty predated its dissolution and, therefore, was a "liability incurred before such dissolution" (Business Corporation Law § 1006 [b]; *see* ***Matter of Ford v Pulmosan Safety Equip. Corp.***, 52 AD3d 710, 862 NYS2d 56 [2d Dept 2008]; *see also* ***MMI Trading, Inc. v Nathan H. Kelman, Inc.***, 120 AD3d 478, 989 NYS2d 911 [2d Dept 2014]; ***Gutman v Club Mediterranee Intl.***, 218 AD2d 640, 630 NYS2d 343 [2d Dept 1995]). Thus, the defendants' arguments on this point are unpersuasive.

The defendants, at a minimum, were the majority shareholders and officers of 12 Meadow. They controlled 12 Meadow and were in privity with it. Although 12 Meadow was dissolved, it had the ability to participate in the prior action. Instead, the defendants made the decision for 12 Meadow to default in the prior action. Accordingly, the defendants are bound by the default judgment against 12 Meadow under principles of res judicata and collateral estoppel.

The binding nature of the default judgment against 12 Meadow on the defendants does not resolve the motions before this Court for determination. Rather, it precludes the defendants from relitigating certain facts, described above, that they admitted through the default judgment. Accordingly, the Court now turns to the substance of plaintiff's two claims: fraudulent conveyance and constructive fraudulent conveyance.

Former DCL § 276 states that "[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Former "section 276 requires proof that the transferor actually intended to hinder, delay, or defraud any present or future creditors" (***Zanani v Meisels***, 78 AD3d 823, 825, 910 NYS2d 533, 535 [2d Dept 2010] [quotation marks and citations omitted]). In other words, the transferor must have engaged in "deception intentionally practiced to frustrate the legal rights of another" (***Southern Indus. v Jeremias***, 66 AD2d 178, 181, 411 NYS2d 945, 948 [2d Dept 1978]). Under the plain language of former section 276, an intent to defraud is one of three mental states that makes a conveyance fraudulent; any conveyance made with intent "to hinder, delay, or defraud" creditors suffices. "A deliberate attempt to stave off creditors by putting property in such a form and place that creditors cannot reach it, even when the purpose of that action is not to defraud them of ultimate payment . . . comes within the meaning of 'hinder' and 'delay' as set forth in [former] section 276" (***Flushing Sav. Bank v Parr***, 81 AD2d 655, 656, 438 NYS2d 374, 376-377 [2d Dept 1981], *appeal dismissed* 54 NY2d 770, 443 NYS2d 61 [1981]). "A failing debtor cannot in this way require creditors to follow assets into other hands. It is precisely such transactions, devised to 'hinder and delay,' even if they do not actually 'defraud' creditors, [that] [former section 276] is intended to prevent" (***Rose v Rose***, 241 App Div 3, 5, 271 NYS 5, 8 [1st Dept 1934]).

The plaintiff has shown, prima facie, that 12 Meadow, the "transferor[,] actually intended to hinder, delay, or defraud any present or future creditors" (***Zanani v Meisels***, *supra*, 78 AD3d at 825, 910 NYS2d at 535; *see also* ***In re Platinum-Beechwood Litig.***, 427 F Supp 3d 395 [SD NY 2019] ["With respect to the § 276 claim . . . it is the transferor's intent to defraud—rather than the transferee's intent, as PBIHL argues—that matters."]). In opposition, the defendants have failed to raise a triable question of fact. They mainly contend that they could not have had any malintent because they did not know of the water leakage issue until after they dissolved 12 Meadow. This contention reveals a fundamental misunderstanding by the defendants of the nature of 12 Meadow's obligation. It was not plaintiff's complaint about water leakage issues that created an obligation. The obligation—a contingent obligation, but an obligation nonetheless—was the statutory home warranty that undisputedly predated the defendants' decisions to strip 12 Meadow of its assets and dissolve it (*see* former Debtor and Creditor Law § 270 [defining "debt" as "any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent"]). Although the defendants claim that the proceeds of the sale were used to repay loans to themselves and, apparently, certain unidentified individuals, they offer no proof that any such loans existed (*see* ***Murin v Estate of Schwalen***, 31 AD3d 1031, 819 NYS2d 341 [3d Dept 2006]; ***Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership***, 25 AD3d 301, 302, 808 NYS2d 187, 189 [1st Dept 2006] ["in the absence of a copy of the lease . . . invoices or rent history records evidencing proof of the monthly rental obligation and the total amount of arrears, the (debtor) fails to demonstrate a bona fide debt, antecedent or otherwise"]). "In opposition to the motion, the defendants submitted [their own testimony and] affidavits—devoid of supporting documentary evidence—[that] contained nothing but conclusory assertions in respect to the existence of the alleged antecedent debt" (***Small & Landesman v Baronick***, 143 AD2d 221, 222-223, 532 NYS2d 20, 21 [2d Dept 1988]).

To the extent that the defendants claim that they were "purchaser[s] for fair consideration without knowledge of the fraud at the time of the purchase," a defense to plaintiff's claim under former DCL § 278, the defendants did not obtain 12 Meadow's assets for fair consideration, as explained below. Accordingly, the branch of plaintiff's motion that seeks summary judgment in his favor on his fraudulent conveyance claim pursuant to former DCL § 276 is granted.

Accompanying plaintiffs' motion for summary judgment on the actual fraudulent conveyance claim is a request for attorney fees under former DCL § 276-a, which plaintiff also requested in the complaint. Under former DCL § 276-a, where a conveyance is found to have been "made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors," the court "shall fix the reasonable attorney's fees of the creditor." Unlike former section 276, former section 276-a requires fraudulent intent by the transferee as well. Here, plaintiff made a prima facie case that King possessed fraudulent intent. Plaintiff's submissions show that King, who had been in the home construction business for roughly 30 years, knew of the existence of the statutory home warranty. Despite such knowledge, at a minimum, he assisted in divesting 12 Meadow of its assets and dissolving it. King's testimony demonstrates a longstanding pattern of creating corporations to build and sell homes and then, shortly after selling the home, dissolving the corporations. Pogrob, on the other hand, testified that he was unaware that a home warranty was given to plaintiff. Unlike King, Pogrob did not have extensive experience in the new home construction industry. Thus, plaintiff has shown, prima facie, that he is entitled to attorney fees from King, but not from Pogrob. In opposition, King failed to raise a triable question of fact. The Court shall schedule a conference to discuss the scheduling of a hearing on the issue of attorney fees.

Plaintiff's constructive fraudulent conveyance claim is based on former DCL §§ 273, 274, and 275. Former DCL § 273 states that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." "A finding of constructive fraud pursuant to [former] 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 "(***Zanani v Meisels***, *supra*, 78 AD3d at 824, 910 NYS2d at 535 [quotation marks and citations omitted]). "[B]oth insolvency and lack of fair consideration are prerequisites to a finding of constructive fraud under [former] section 273" (***Joslin v Lopez***, 309 AD2d 837, 838, 765 NYS2d 895, 897 [2d Dept 2003]). "A person is insolvent when the present fair salable value of his [or her] assets is less than the amount that will be required to pay his [or her] probable liability on his [or her] existing debts as they become absolute and matured" (former DCL § 271 [1]). Fair consideration exists "[w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied," or "[w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in [an] amount not disproportionately small as compared with the value of the property, or obligation obtained" (former DCL § 272). Fair consideration "is not only a matter of whether the amount given for the transferred property was a fair equivalent or not disproportionately small . . . but whether the transaction [was] made in good faith, an obligation that is imposed on both the transferor and the transferee" (***Sardis v Frankel***, 113 AD3d 135, 141-142, 978 NYS2d 135, 141 [1st Dept 2014]). "The good faith of both transferor and transferee is stressed as an

indispensable condition in the definition of fair consideration under either branch of the statutory language" (***Bridgehampton Natl. Bank v D & G Partners, L.P.***, 186 AD3d 1310, 1312, 131 NYS3d 347, 350 [2d Dept 2020] [alterations, quotation marks, and citations omitted]; *see* ***Stout Street Fund I, L.P. v Halifax Group, LLC***, *supra*; ***Julien J. Studley, Inc. v Lefrak***, 66 AD2d 208, 412 NYS2d 901 [2d Dept 1979], *affd* 48 NY2d 954, 425 NYS2d 65 [1979]).

There is one important limitation on the general proposition that payment of antecedent debts is fair consideration. "Transfers to a controlling shareholder, officer[,] or director of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent" (***Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership***, *supra*, 25 AD3d at 303, 808 NYS2d at 190; *see* ***Brennan v 3250 Rawlins Ave. Partners, LLC***, 171 AD3d 603, 99 NYS3d 5 [1st Dept 2019]; ***Matter of Uni-Rty Corp. v New York Guangdong Fin., Inc.***, 117 AD3d 427, 985 NYS2d 487 [1st Dept 2014]; ***American Panel Tec v Hyrise, Inc.***, 31 AD3d 586, 819 NYS2d 768 [2d Dept 2006]; ***48-48 Assoc. v Piccoli***, 243 AD2d 291, 663 NYS2d 33 [1st Dept 1997]; ***Julien J. Studley, Inc. v Lefrak***, *supra*). "An insider payment is not in good faith, regardless of whether or not it was paid on account of an antecedent debt" (***American Media, Inc. v Bainbridge & Knight Labs., LLC***, 135 AD3d 477, 478, 22 NYS3d 437, 439 [1st Dept 2016]; *see* ***American Panel Tec v Hyrise, Inc.***, *supra*; ***Berner Trucking v Brown***, 281 AD2d 924, 722 NYS2d 656 [4th Dept 2001]). As the Appellate Division, Second Department, explained in analyzing this issue, "[w]hether it be upon the theory that directors of insolvent corporations are trustees for the benefit of all creditors, or upon the theory that it would be inequitable to allow directors to use inside information and their controlling voice in corporate affairs to benefit themselves over the claims of others, the common law forbids preferences to directors of insolvent corporations as being contrary to principles of fair, honest and open dealing" (***Farm Stores v School Feeding Corp.***, 102 AD2d 249, 254, 477 NYS2d 374, 378 [2d Dept 1984] [quotation marks and citations omitted]; *see* ***Southern Indus. v Jeremias***, *supra*).

Here, plaintiff has shown, prima facie, that the conveyance of assets from 12 Meadow to the defendants was constructively fraudulent under former section 273. Plaintiff has shown that the transfer of the sale proceeds from 12 Meadow to the defendants, among others, rendered 12 Meadow insolvent under former DCL § 271 (*see* ***Cadle Co. v Organes Enters., Inc.***, 29 AD3d 927, 815 NYS2d 732 [2d Dept 2006] ["the real property (that was conveyed) was the only asset owned by the debtors that was sufficient to satisfy their obligation to the plaintiff"]). Indeed, King admitted at his deposition that 12 Meadow "was at a loss. The company was closed," and that there was "no plan" to honor the statutory home warranty that 12 Meadow provided to plaintiff. He also stated that after 12 Meadow closed, he and Pogrob "disbursed the money back to the lenders, which would be Howard and myself. And that's how it gets disbursed." King explained that his portion of the sale proceeds was held in "escrow, and then [he] used it for other deals." Pogrob, too, stated that "we just split whatever we got." Pogrob explained that "after the house was sold, we had no other projects going on, so the company was closed. We had no use for it anymore." Pogrob contended that King instructed the closing attorney on how to disburse the sale proceeds. Finally, the April 20, 2018 letter from defense counsel to plaintiff's counsel, explaining that 12 Meadow had been dissolved and no one else was "liable for the alleged contractual breach by [12 Meadow]," is evidence that 12 Meadow did not have the assets to satisfy its obligations under the statutory home warranty. Thus, the transfer of the sale proceeds rendered 12 Meadow

insolvent. Moreover, it is undisputed that the defendants were the controlling officers and shareholders of 12 Meadow. Accordingly, even if made to satisfy an antecedent debt, the conveyances to the defendants were not for fair consideration. Thus, plaintiff has satisfied his prima facie burden. In opposition, the defendants failed to raise a triable question of fact. Thus, the branch of plaintiff's motion that seeks summary judgment in his favor on his claim for constructive fraudulent conveyance pursuant to former DCL § 273 is granted.

Plaintiffs also allege that the transfer of the sale proceeds from 12 Meadow to the defendants was a constructive fraudulent conveyance under former DCL § 274. Former section 274 states that "[e]very conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent." For the reasons stated above, plaintiff has shown that the conveyances of the sale proceeds from 12 Meadow to plaintiff violated former section 274 (*see* ***Matter of City of Syracuse Indus. Dev. Agency [Amadeus Dev., Inc.—Financitech, Ltd.]***, 156 AD3d 1329, 68 NYS2d 596 [4th Dept 2017] [explaining that a claimant showed both that a debtor was insolvent and was left with unreasonably small capital], *lv dismissed* 32 NY3d 947, 84 NYS3d 428 [2018]; ***Medical Arts-Huntington Realty, LLC v Meltzer Rosenberg Dev., LLC***, 149 AD3d 824, 52 NYS3d 382 [2d Dept 2017] [same]). In opposition, the defendants failed to raise a triable question of fact. Thus, so much of plaintiff's motion as seeks summary judgment on his claim for constructive fraudulent conveyance under former DCL § 274 is granted.

Plaintiff has also satisfied his prima facie burden on that branch of his motion that seeks summary judgment on his claim for constructive fraudulent conveyance under former DCL § 275, which states that "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors." Under former section 275, "a conveyance made by a person who has a good indication of oncoming insolvency is deemed to be fraudulent" (***Grace Plaza of Great Neck v Heitzler***, 2 AD3d 780, 781, 770 NYS2d 421, 423 [2d Dept 2003] [quotation marks and citations omitted]). Stated differently, there must be an "awareness by the transferor that, as a result of the conveyance, [it] will not be able to pay present and future debts" (***In re Chin***, 492 BR 117, 129 [Bankr ED NY 2013], and cases cited therein).

As explained above, plaintiff's submissions demonstrate a prima facie case that the complained-of conveyances were not for fair consideration. Significantly, the parties' depositions reveal that 12 Meadow had more than a good indication of upcoming insolvency when it sold the house to plaintiff. Pogrob testified that after the purported loans were repaid, he and King split the sale proceeds, and that the plan to do so pre-existed the conveyances at issue and "was discussed years before." Further, King testified that he had been building homes for approximately 30 years through various corporate entities. King testified at his deposition that he presently was involved in the construction of new homes in Blue Point, Holtsville, and Southampton, explaining that "Southampton is under 3 Park Avenue Ventures LLC, and Holtsville is under King Associates Holding Corp., and Blue Point might be Ron King Corp.

I'm not sure." He stated that over the past 30 years, when a house was built and the project was finished, "most times" he dissolved the corporation that built and sold the home and then distributed the money. King explained that "[w]e loan the corporation money. It develops a property. And when it sells, we split the profits." The defendants failed to raise a question of fact in opposition. Thus, so much of plaintiff's motion as seeks summary judgment on his claim for constructive fraudulent conveyance under former DCL § 275 is granted.

Finally, the defendants' cross motion for summary judgment dismissing the complaint is denied. Insofar as the defendants challenge the amount of the default judgment against 12 Meadow, including the imposition of attorney fees, such relief is beyond that requested in defendants' notice of cross motion.

Dated: MAR 09 2021

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**