

<b>LePatner Project Solutions LLC v 320 W. 115 Realty LLC</b>
2022 NY Slip Op 32230(U)
July 12, 2022
Supreme Court, New York County
Docket Number: Index No. 152337/2022
Judge: Louis L. Nock
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK **PART** **38M**

*Justice*

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LEPATNER PROJECT SOLUTIONS LLC, A/K/A LPS, and  
LEPATNER & ASSOCIATES LLP,

Petitioners-Judgment Creditors,

- v -

320 WEST 115 REALTY LLC, A/K/A 318-320 WEST 115  
REALTY LLC, A/K/A 320 WEST 115TH STREET REALTY  
LLC, A/K/A 320 WEST 125TH STREET REALTY LLC,

Respondent-Judgment Debtor,

-and-

STEVEN KIRSCHENBAUM and RONALD WINKLER,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 24, 31, 32, 36, 37, 38, 39, 40, 41, and 42

were read on this motion for ORDERS OF RESTRAINT AND TURNOVER.

LOUIS L. NOCK, J.

Petitioners LePatner Project Solutions LLC and LePatner & Associates LLP

("Petitioners" or "LePatner") filed this proceeding seeking turnover and related relief, pursuant to CPLR 5225 (b) and Debtor and Creditor Law §§ 273, 273-a, 274, 276, 276- a, 278, and 279.

The petition is granted to the extent set forth hereinbelow.

***Background:***

Petitioners are judgment creditors by virtue of the judgment entered in the Supreme Court, New York County, in the Office of the New York County Clerk, designating and naming respondent 320 West 115 Realty LLC (the "LLC") as judgment debtor in the matter of *LePatner Project Solutions, et al. v 320 West 115 Realty LLC, et al.* (index No. 651437/2018 [Sup Ct NY

County]) (the “Plenary Action”), pursuant to a judgment dated and entered September 1, 2021, in the principal amount of \$184,256.53, plus post-judgment interest in the amount of \$46.58 per day (the “Judgment”) based on Petitioners’ account stated claim (second cause of action) in the Plenary Action. The LLC’s managing members, respondents Steven Kirschenbaum and Ronald Winkler, were deposed in connection with enforcement proceedings on December 6, 2021 (the “Kirschenbaum Depo”) and December 20, 2021 (the “Winkler Depo”). At such depositions, Messrs. Kirschenbaum and Winkler admitted that the LLC, which had earned gross revenues in excess of \$15 million in 2017, has since been rendered “insolvent” due to their transfer of over \$3,000,000.00 of the LLC’s assets to themselves, individually – specifically, \$937,439.00 to Mr. Kirschenbaum and \$2,145,705.00 to Mr. Winkler. Accordingly, the petition in this proceeding seeks an order and judgment from this court pursuant to CPLR § 5225 and Debtor and Creditor Law §§ 273, 273-a, 274, 276, 276-a, 278, and 279, directing the following relief:

- a. That respondent Kirschenbaum be immediately restrained and enjoined from transferring, assigning, encumbering, spending, or in any other way disposing of any assets or monies in his possession, custody, or control, up to and including the amount of \$947,439.00;
- b. That respondent Winkler be immediately restrained and enjoined from transferring, assigning, encumbering, spending, or in any other way disposing of any assets or monies in his possession, custody, or control, up to and including the amount of \$2,145,705.00;
- c. That respondent Kirschenbaum immediately turnover, pay over, and deliver payment in the amount of \$500,000.00 to petitioners’ counsel, Weber Law Group LLP, to be held in escrow pending the final resolution of the Plenary Action;
- d. That respondent Winkler immediately turnover, pay over, and deliver payment in the amount of \$500,000.00 to said counsel to be held in escrow pending the final resolution of the Plenary Action;
- e. That said counsel may release from such escrowed funds to petitioners an amount sufficient to satisfy the principal and post-judgment interest owed pursuant to the Judgment; and
- f. An award of petitioners’ attorneys’ fees incurred herein.

Per the petition in this proceeding, respondents total debt to petitioners would exceed \$1,000,000.00 by the time the Plenary Action is finally resolved, based on the following factors: (i) \$184,256.53 (based on the Judgment); (ii) \$8,384.40 (based on post-Judgment interest owed on the Judgment, as of March 1, 2022); (iii) \$500,000.00 (based on the additional unresolved causes of action in the Plenary Action); (iv) \$187,500.00 (based on pre-judgment interest owed on such causes of action as of March 1, 2022); (v) \$90,000.00 (based on pre-judgment interest owed on such causes of action estimated through March 2024); and (vi) \$40,000.00 (based on attorneys' fees incurred in connection with this proceeding).

At their depositions, Messrs. Kirschenbaum and Winkler admitted that the LLC had earned over \$15 million from the construction project underlying the Plenary Action, but claimed the LLC is now "insolvent" (*see* Kirschenbaum Depo [NYSCEF Doc. No. 8] at 21:11-12, 16:6-14, 123:13-23 [the LLC's "gross revenue" was "\$15,436,613;" but now "the LLC is insolvent. It does not have any money."]; Winkler Depo [NYSCEF Doc. No. 9] at 12:2-4).

Messrs. Kirschenbaum and Winkler further testified - and the LLC's General Ledger and bank statements are submitted to confirm such testimony - that the reason the LLC is insolvent is because they transferred over \$3 million of the LLC's assets to themselves individually. Specifically, the following six payments were made to Mr. Kirschenbaum out of the LLC's bank account on the following dates, in the total amount of \$947,439.00:

12/12/2017 Steven Kirschenbaum \$80,000.00  
 12/18/2017 Steven Kirschenbaum \$150,000.00  
 12/18/2017 Steven Kirschenbaum \$9,069.00  
 12/21/2017 Steven Kirschenbaum \$127,883.00  
 12/21/2017 Steven Kirschenbaum \$275,000.00

4/11/2018 Steven Kirschenbaum \$305,487.00

Further, the following six payments were made to Mr. Winkler out of the LLC's bank account on the following dates, in the total amount of \$2,145,705.00:

12/12/2017 Ronald Winkler \$85,000.00

12/18/2017 Ronald Winkler \$199,185.000

12/21/2017 Ronald Winkler \$1,239,185.00

12/22/2017 Ronald Winkler \$196,815.00

12/26/2017 Ronald Winkler \$33,470.00

4/11/2018 Ronald Winkler \$392,050.00

Messrs. Kirschenbaum and Winkler have taken the position that such payments were lawfully made because such payments represented "principal and interest" on loans they each made to the LLC (*see* Kirschenbaum Depo at 139:8-140:5, 150:15-21; Winkler Depo at 48:5-9). However, as more fully set forth below, any such transfer of assets from a debtor-LLC's accounts to the LLC's members that rendered the LLC insolvent is considered "fraudulent" *per se* under the Debtor and Creditor Law, regardless of whether they were loan repayments.

The reason Messrs. Kirschenbaum and Winkler paid themselves as and when they did out of the LLC's assets was because they "wanted to get some of our money back" from the LLC "while they could," before the assets of the LLC were used to satisfy other creditors, like petitioners (*see* Winkler Depo at 51:23-52:5, 87:21-25, 89:3-6, 89:25-90:16).

***The Debtor and Creditor Law:***

Debtor and Creditor Law § 273 provides that conveyances made by an entity that is "rendered insolvent" are "fraudulent" *per se*, without regard to "actual intent," if the conveyance is made "without fair consideration." "Fair consideration" is defined under Debtor and Creditor

Law § 272 (a) as an exchange made as a “fair equivalent” and in “good faith” for antecedent debt. In this case, the \$3,093,144.00 that Messrs. Kirschenbaum and Winkler transferred to themselves from the LLC’s assets is deemed “fraudulent” under Debtor and Creditor Law § 273 because it rendered the LLC “insolvent” and was made without “fair consideration.” The only alleged consideration for such \$3,093,144.00 in payments is as a repayment of principal and interest of over \$1,000,000.00 on loans Messrs. Kirschenbaum and Winkler made to the LLC. However, the law is clear that an LLC member’s repayment of loans to him or herself from the LLC’s assets is an “insider payment” that does not constitute “fair consideration” (*see American Media, Inc. v Bainbridge & Knight Laboratories, LLC*, 135 AD3d 477, 439 [1<sup>st</sup> Dept 2016]; *American Panel Tec v Hyrise, Inc.*, 31 AD3d 586 [2d Dept 2006]).

Accordingly, the \$3,093,144.00 transferred by Messrs. Kirschenbaum and Winkler from the LLC’s bank account to themselves was *per se* a fraudulent conveyance under Debtor and Creditor Law § 273, regardless of whether they were for purported loan repayments.

In addition, Debtor and Creditor Law § 273-a provides that conveyances made by an entity when “it is a defendant in an action for money damages” are “fraudulent” *per se*, without regard to “actual intent,” if the conveyance is made “without fair consideration.” In this case, the LLC was named as a defendant in the Plenary Action, which was commenced on March 26, 2018, and seeks money damages in excess of \$640,000.00. Nevertheless, on April 11, 2018 – after commencement of the Plenary Action – \$305,487.00 was transferred from the LLC to Mr. Kirschenbaum, and \$392,050.00 was transferred from the LLC to Mr. Winkler. As set forth above, such transfers were made without fair consideration as a matter of law, regardless of whether they were made for purported loan repayments.

Accordingly, such \$697,537.00.00 transferred from the LLC to Mr. Kirschenbaum (\$305,487.00) and Mr. Winkler (\$392,050.00) on April 11, 2018, after the Plenary Action was commenced, were *per se* “fraudulent” conveyances under Debtor and Creditor Law § 273-a.

In addition, Debtor and Creditor Law § 276 provides that conveyances made “with actual intent” to “hinder, delay or defraud either present or future creditors” are “fraudulent.” In this case, the deposition testimony (*see supra*) indicates that the transfers were made because they “wanted to get some of our money back” from the LLC “while they could” (*see* Winkler Depo at 51:23-52:5, 87:21-25, 89:3-6, 89:25-90:16).

***The Instant Proceeding:***

CPLR 5225 (b) governs turnover proceedings and provides that upon a special proceeding commenced by a judgment creditor against a person “who is a transferee of money” from the judgment debtor, where it is shown the “judgment creditor’s rights” to such money are “superior to those of the transferee,” the court “shall require such person to pay the money” to the judgment creditor (*see also* McKinney’s Practice Commentary C5225:7; *Interpool Ltd. v Patterson*, 890 F Supp 259, 269 [SD NY 1995] [affirming a turnover order for property “fraudulently transferred” to third-party]).

Debtor and Creditor Law § 278 provides that with respect to fraudulent conveyances, a creditor with matured claims has the right to:

- a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy the claim, or
- b. Disregard the conveyance and attach or levy execution upon the property conveyed.

Debtor and Creditor Law § 279 provides that, with respect to fraudulent conveyances, a creditor whose claim has not matured has the right to:

- a. Restrain the defendant from disposing of his property;
- b. Appoint a receiver to take charge of the property;
- c. Set aside the conveyance or annul the obligation; or
- d. Make any order which the circumstances of the case may require.

Debtor and Creditor Law § 276-a provides that in proceedings to set aside fraudulent conveyances made with actual intent to “hinder, delay, or defraud either present or future creditors,” the creditor is entitled to recover its reasonable attorneys’ fees.

In sum, the petition in this proceeding, which reasonably estimates a total possible debt exceeding \$1,000,000.00 (*see supra* at 3), requests that the court issue an order and judgment directing the following relief:

That respondent Kirschenbaum be immediately restrained and enjoined from transferring, assigning, encumbering, spending, or in any other way disposing of any assets or monies in his possession, custody, or control, up to and including the amount of \$947,439.00;

That respondent Winkler be immediately restrained and enjoined from transferring, assigning, encumbering, spending, or in any other way disposing of any assets or monies in his possession, custody, or control, up to and including the amount of \$2,145,705.00;

That respondent Kirschenbaum immediately turnover, pay over, and deliver payment in the amount of \$500,000.00 to petitioners’ counsel, Weber Law Group LLP, to be held in escrow pending the final resolution of the Plenary Action;

That respondent Winkler immediately turnover, pay over, and deliver payment in the amount of \$500,000.00 to said counsel to be held in escrow pending the final resolution of the Plenary Action;

That said counsel may release from such escrowed funds to petitioners an amount sufficient to satisfy the principal and post-judgment interest owed pursuant to the Judgment; and

An award of petitioners’ attorneys’ fees incurred herein.

Counsel for the respondents has focused his opposition argument on CPLR article 63, addressing prejudgment attachment (*see* Transcript [NYSCEF Doc. No. 42]) due to the fact that

Messrs. Kirschenbaum and Winkler are technically not judgment debtors; but rather, members of a judgment debtor. He argues that those respondents transferred the assets out of the LLC in “the ordinary course of business” on account of the fact that they were trying to recover on their loans to the LLC (*id.* at 8). However, this ignores the well-settled rule that a loan repayment to an insider of the debtor LLC, from that LLC, is not considered a transfer supported by adequate consideration (*see* discussion, *supra*). The point is not that the individual respondents are not the debtors; but rather, that the LLC respondent *is*, and, therefore, *its* remittance of assets to third parties – insiders – in the midst of *its* state of indebtedness, so as to render *it* insolvent, is vulnerable to reversal under the Debtor and Creditor Law.

Counsel for the respondents urges that the LLC was not rendered insolvent at the precise moment in time that the transfers were made (*see* Transcript at 11-12). However, as petitioners’ counsel correctly notes, insolvency need not be measured by the point in time of the preferential transfer; but also can be measured by a post-transfer point in time at which the debtor had become solvent as a result of the transfer (*see American Panel Tec, supra*, 31 AD3d at 587 [“Debtor and Creditor Law § 273 provides that ‘[e]very conveyance made and every obligation incurred by a person who is **or will be** thereby rendered insolvent is fraudulent . . . .’”] [emphasis added]; *American Media, supra*, 135 AD3d at 478 [“The requirement of good faith is not fulfilled through preferential transfers of corporate funds to directors, officers or shareholders of a corporation that is, **or later becomes**, insolvent, in derogation of the rights of creditors”] [emphasis added]).

***Conclusion:***

For all the foregoing reasons, it is hereby

ORDERED that the petition is granted; and, accordingly, it is

ORDERED that respondent Steven Kirschenbaum shall preserve, to the extent he possesses it, the sum of \$947,539.00 during the pendency of the action titled *LePatner Project Solutions, et al. v 320 West 115 Realty LLC, et al.*, (index No. 651437/2018 [Sup Ct NY County]) (the “Plenary Action”), or until such earlier time as the court might designate; and it is further

ORDERED that respondent Ronald Winkler shall preserve, to the extent he possesses it, the sum of \$2,145,705.00; during the pendency of the Plenary Action, or until such earlier time as the court might designate; and it is further

ORDERED that respondent Steven Kirschenbaum turn over, pay over, and deliver payment in the amount of \$500,000.00, to the extent he possesses it, to petitioners’ counsel, Weber Law Group LLP (Attn.: Jason A. Stern, Esq., 290 Broadhollow Road, Suite 200E, Melville, New York 11747, Tel.: 631-549-2000) (“Petitioners’ Counsel”), within thirty days from the date of filing hereof, to be held in escrow pending the final resolution of the Plenary Action; and it is further

ORDERED that respondent Ronald Winkler turn over, pay over, and deliver payment in the amount of \$500,000.00, to the extent he possesses it, to Petitioners’ Counsel, within thirty days from the date of filing hereof, to be held in escrow pending the final resolution of the Plenary Action; and it is further

ORDERED that Petitioners’ Counsel may release from such escrowed funds to petitioners an amount sufficient to satisfy the principal and post-judgment interest owed pursuant to the Judgment as of March 1, 2022; to wit, \$192,640.93; and it is further

ORDERED that the issue of attorneys’ fees shall be severed and addressed preliminarily at a status conference to be held on Wednesday, July 27, 2022, at 10:00 a.m.

This will constitute the decision and order of the court.

ENTER:



<u>7/12/2022</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE