

Good Gateway, LLC v Thakkar

2023 NY Slip Op 33872(U)

October 30, 2023

Supreme Court, New York County

Docket Number: Index No. 160660/2016

Judge: Paul A. Goetz

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ **PART** **47**

Justice

-----X

GOOD GATEWAY, LLC and SEG GATEWAY, LLC,

Plaintiffs,

- v -

ROHAN THAKKAR, SOLANI C. THAKKAR, CHITTRANJAN
THAKKAR and SHOPS AT NEW HOPE, LLC,

Defendants.

-----X

INDEX NO. 160660/2016

MOTION DATE 09/09/2022

MOTION SEQ. NO. 009

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 009) 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316

were read on this motion for SUMMARY JUDGMENT.

This action concerns, among other things, defendants' alleged transfer of a condominium located at 400 Fifth Avenue, Unit 32E, New York, New York (the property) to an entity that they allegedly control, defendant Shops at New Hope, LLC (Shops).

Plaintiffs Good Gateway, LLC (Good Gateway) and SEG Gateway, LLC (SEG) (together, plaintiffs) move, pursuant to CPLR 3212, for summary judgment on their third cause of action to set aside the transfer pursuant to former Debtor and Creditor Law §§ 273-a and 276 and for all consequential damages resulting therefrom to return the property to its pre-transfer state and value. Plaintiffs also move for summary judgment on their fourth cause of action seeking reasonable attorney's fees pursuant to former Debtor and Creditor § 276-a.

Defendants Rohan Thakkar (Rohan), Saloni C. Thakkar (Saloni), and Chittranjan Thakkar (Chittranjan) (collectively, the Thakkars) cross-move, pursuant to CPLR 3211 (a) (2), to dismiss for lack of subject matter jurisdiction.

BACKGROUND

The Parties

Plaintiffs are limited liability companies formed under Florida law (NY St Cts Elec Filing [NYSCEF] Doc No. 247, amended verified complaint ¶¶ 1-2). Chittranjan and Saloni are husband and wife, respectively, and Rohan is their son (*id.*, ¶¶ 6, 7, 8).

Plaintiffs allege that Shops is formed under the laws of Georgia, and that Chittranjan, Saloni, and Rohan are its members (*id.*, ¶¶ 10-11).

Florida Action

Plaintiffs commenced an action in the Circuit Court of the Ninth Judicial District in and for Orange County, Florida against, among others, Chittranjan, seeking recovery for breach of fiduciary duty, tortious interference, civil conspiracy, conversion, and constructive fraud (*id.*, ¶¶ 13-15; *see also* NYSCEF Doc Nos. 2, 3). A jury trial was held in July 2014 (NYSCEF Doc No. 247 ¶ 16). On July 16, 2014, a jury returned a unanimous verdict in favor of Good Gateway against Chittranjan and others for \$2,500,000 and in favor of SEG against Chittranjan and others for \$12,000,000 (*id.*). On October 3, 2014, plaintiffs obtained final judgments against Chittranjan, among others, which were amended on January 29, 2015 (*id.*; *see also* NYSCEF Doc Nos. 248, 249). On June 5, 2017, the Fifth District Court of Appeal of the State of Florida affirmed the judgments (NYSCEF Doc No. 258, Townsend affirmation, ¶ 3; NYSCEF Doc No. 259).

On June 30, 2021, Judge John E. Jordan of the Ninth Judicial Circuit Court of Florida granted plaintiffs summary judgment against Chittranjan and Solani jointly and awarded plaintiffs damages in the amount of \$789,236.37, plus statutory interest (NYSCEF Doc No. 100 in *Good Gateway, LLC v Thakkar*, index No. 152856/17). The judgment was stayed pending a

valuation hearing on certain assets turned over to Good Gateway (*id.* at 3). On April 20, 2022, Judge Jordan lifted the stay (NYSCEF Doc No. 264).

This Action

Plaintiffs subsequently commenced this action, seeking to set aside a loan forgiveness document purporting to cancel a debt owed by Rohan to Chittranjan in the amount of \$2,720,849.63 (NYSCEF Doc Nos. 1, 4).

Plaintiffs moved for a default judgment against Rohan (NYSCEF Doc No. 7). By decision and order dated November 17, 2017, plaintiff's motion was denied (Edwards, J., NYSCEF Doc No. 19).

On appeal, the First Department modified the court's decision, to grant the motion to the extent of setting aside the loan forgiveness document, and to remand the matter for a hearing on the appropriate remedy (*Good Gateway, LLC v Thakkar*, 163 AD3d 449, 449 [1st Dept 2018]).

The Court explained that:

“Plaintiffs allege, and submitted proof demonstrating, that they obtained final judgments in the total amount of \$14.5 million against defendant's father, Chittranjan Thakkar, in a lawsuit in Florida; that, during the pendency of the Florida lawsuit, Chittranjan executed a document in Florida forgiving a debt in the amount of \$2,720,849.63 that was owed to him by defendant, without receiving any consideration in return; and that Chittranjan has not paid any part of the judgments entered against him. Under Florida law, this evidence is sufficient to raise a rebuttable presumption that Chittranjan's forgiveness of his son's debt was a conveyance made with actual intent to hinder or delay creditors, including plaintiffs (*see General Elec. Co. v Chuly Intl., LLC*, 118 So 3d 325, 328 [Fla Dist Ct App 2013]; Fla Stat § 726.105). If New York law were applied, the loan forgiveness would also be constructively fraudulent (*see Debtor and Creditor Law § 273-a*), since there was a transfer for no consideration after the commencement of the action in which the unsatisfied judgments were entered (*see Garden City Co. v Kassover*, 251 AD2d 9 [1st Dept 1998], *lv dismissed* 93 NY2d 848 [1999])”

(*id.*).

On August 2, 2018, the court referred this matter to a Special Referee to hear and report on the issue of damages, including any late fees and interest (NYSCEF Doc No. 24).

Judicial Hearing Officer (JHO) Philip S. Straniere conducted a hearing on the issue of plaintiffs' damages (NYSCEF Doc No. 28). By judgment dated March 25, 2019, and amended judgment dated April 8, 2019, JHO Straniere awarded judgment in favor of plaintiffs and against Rohan in the amount of \$3,463,614.83, representing the amount of the Florida judgment, together with statutory interest from the date of the First Department's liability judgment dated July 10, 2018 (NYSCEF Doc No. 260). On April 17, 2019, the Clerk entered judgment in favor of plaintiffs and against Rohan in the sum \$3,463,614.83, plus interest and costs and disbursements, for a total of \$3,653,199.16 (NYSCEF Doc No. 87).

On a subsequent appeal, the First Department affirmed the money judgment (*Good Gateway, LLC v Thakkar*, 178 AD3d 616, 616 [1st Dept 2019], *lv denied* 35 NY3d 913 [2020]).

The Condo Action

Plaintiffs brought another action against the Thakkars, seeking to aside a transfer of the property on February 3, 2012 from Chittranjan and Rohan to Chittranjan, Rohan, and Saloni for \$0 consideration (the Condo action) (NYSCEF Doc No. 1 in *Good Gateway, LLC*, index No. 152856/17).

On January 10, 2020, plaintiffs moved for summary judgment to set aside the transfer under former Debtor and Creditor Law § 273-a in the Condo action (NYSCEF Doc No. 27 in *Good Gateway, LLC*, index No. 152856/17).

Shortly thereafter, on March 3, 2020, Rohan was ordered to show cause why a receiver should not be appointed for the property pursuant to CPLR 5228 in this action (NYSCEF Doc No. 148).

The Alleged Fraudulent Transfer

While plaintiffs' motion was pending, and shortly after being served with the order to show cause for appointment of a receiver, defendants transferred the property by quitclaim deed dated March 20, 2020 and recorded on June 30, 2020, purporting to transfer the property from Chittranjan, Saloni, and Rohan to Shops (NYSCEF Doc No. 55 in *Good Gateway, LLC*, index No. 152856/17 at 3). A handwritten note annexed to the deed indicates that Shops' members are Chittranjan, Solani, and Rohan (*id.* at 17).

Judgment is Entered in the Condo Action

By decision and order dated April 29, 2020, the 2012 transfer of the property was set aside (D'Auguste, J., NYSCEF Doc No. 270). The court entered a judgment declaring that "the Deed dated February 3, 2012, and recorded on March 8, 2012 for the Premises known as 400 Fifth Avenue, Unit 32E, in the Borough of Manhattan, Block 838, Lot 1016, CRFN 201200009137, Block 2126, Lot 25 is declared null and void to the extent it purports to transfer any interest belonging to Chittranjan Thakkar . . ." and directed the County Clerk to mark the land records accordingly (NYSCEF Doc No. 272 at 2).

A Receiver is Appointed in this Action

On July 29, 2020, the court appointed a temporary receiver, Jeffrey A. Wurst, Esq., to, among other things, administer, collect, improve, lease, repair and do any acts necessary to collect the current and future rental of the condominium, and to clear title, market, and sell the condominium in which Rohan had an interest (NYSCEF Doc No. 160).

The receiver marketed the property and received a bona fide cash offer from a third party for \$2,165,000 (NYSCEF Doc No. 177). The receiver moved to modify and extend his appointing order, and submitted an affirmation indicating that an attorney representing Shops

threatened to upset the prospective sale of the unit (NYSCEF Doc No. 175, Wurst affirmation ¶ 4).

The Condo Action is Consolidated into this Action

Thereafter, the receiver moved, by order to show cause, to consolidate this action with the Condo case, for a temporary restraining order, and to approve the sale of the property (NYSCEF Doc No. 196). Plaintiffs also sought leave to file a supplemental summons and verified amended complaint to name Shops as a party defendant (NYSCEF Doc No. 85 in *Good Gateway, LLC*, index No. 152856/17).

On July 16, 2021, the court consolidated the Condo action with this action, and restrained the Thakkars, individually and in their capacities as members of any corporation including Shops from further transfers of the property and denied the receiver's application to sell the property as a result of the purported transfer of the property to Shops (NYSCEF Doc No. 205 at 1-4). The court granted leave to supplement and amend the complaint to add Shops as a party (*id.*).

Undertaking Order

By order dated December 19, 2022, defendants were ordered pursuant to CPLR § 5519 (a) (6) to post a \$500,000 bond to protect the temporary receiver's estate from waste and pay the temporary receiver the amounts of: \$40,000 to allow the temporary receiver to pay 2023 real property taxes; \$250,723.89 to allow the temporary receiver to cure any delinquent mortgage payments; and \$14,000 monthly to allow the temporary receiver to pay the monthly carrying costs (NYSCEF Doc No 336).

The Parties' Arguments

Plaintiffs now move to set aside the transfer of the property to Shops pursuant to former Debtor and Creditor Law §§ 276 and 273-a. Plaintiffs assert that defendants acted with actual

intent to hinder and delay the sale of the property, based upon the following evidence: (1) defendants transferred the property to Shops after plaintiffs made their motion for summary judgment in the Condo action and within days after the order to show cause was filed seeking appointment of a receiver to sell the property (NYSCEF Doc No. 148; NYSCEF Doc No. 27 in *Good Gateway, LLC*, index No. 152856/17); (2) the property is subject to a \$1,495,000 interest only mortgage, which was last paid on March 2, 2020 (NYSCEF Doc Nos. 285, 286); (3) the Thakkars falsely asserted that Saloni was “owner” of the Condo and that “Saloni has been ensuring that the operating costs of the property are paid even when the rental revenues are insufficient to cover those costs” (NYSCEF Doc No. 153 at 9); (4) the transfer was actively concealed by defendants until it was discovered by plaintiffs’ counsel (NYSCEF Doc Nos. 54, 56 in *Good Gateway, LLC*, index No. 152856/17); (5) defendants have retained access to the property (NYSCEF Doc No. 283); and (6) Shops’ counsel asserted via email and telephone to the broker, receiver, condominium property manager and condominium association that Shops is the true owner of the property (NYSCEF Doc Nos. 178, 193).

With respect to former Debtor and Creditor Law § 273-a, plaintiffs assert that the Florida action resulted in unsatisfied judgments against Chittranjan, several years before the transfer to Shops. Moreover, a judgment was entered against Rohan before the transfer to Shops. Plaintiffs also argue that the transfer to Shops occurred without any consideration. Finally, plaintiffs request an order directing defendants to make the mortgage current or a money judgment against defendants, jointly and severally, in an amount required to do so.

In support of their cross-motion, the Thakkars argue that the court no longer has jurisdiction after entering judgments in this action and in the Condo action.¹ The Thakkars also

¹ Shops joins in the Thakkars’ cross-motion and opposition (NYSCEF Doc No. 301).

argue that plaintiffs' motion must be denied because they failed to submit a separate statement of material facts pursuant to 22 NYCRR 202.8-g. In any event, according to the Thakkars, plaintiffs have failed to establish that Saloni's transfer to Shops was fraudulent, and her interests in the property are not contingent. The Thakkars assert, with respect to plaintiffs' former Debtor and Creditor Law § 273-a claims, at the time of the transfer, that there were no judgments docketed against Saloni, or any final judgments that remained unsatisfied. Finally, the Thakkars contend that there are questions of fact as to whether the transfer was fraudulent.

To support their position, the Thakkars submit an affidavit from Scott Evans (Evans), defendants' attorney in Georgia (NYSCEF Doc No. 302, Evans aff, ¶ 1). Evans indicates that he reviewed Shops' operating agreement and determined that, at the time of the delivery of the quitclaim deed and as of September 2, 2022, Shops was 100% held by Simba Global Pty Ltd. (Simba), a registered Australian limited proprietary company (*id.*, ¶ 2). Evans states that his firm filed the quitclaim deed dated March 20, 2020 and recorded it in the Office of the City of New York, City Register File No. 2020000186086 (*id.*, ¶ 3). Further, Evans avers that he has no knowledge where the handwritten page setting forth the membership interests of Shops came from, and that it was not supplied by his office (*id.*, ¶ 4).

In reply, plaintiffs assert that defendants previously asserted that all deeds on file "[spoke] for themselves" (NYSCEF Doc Nos. 207, 244, 247, 252), and point out that Evans did not submit Shops' operating agreement. According to plaintiffs, 22 NYCRR 202.8-g no longer requires a separate statement of material facts. Furthermore, plaintiffs assert that the court is not divested of jurisdiction to enforce the judgment.

DISCUSSION

“On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citation omitted]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the moving party meets its burden, the burden shifts to the non-moving party “to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “On a motion for summary judgment, facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

A. Plaintiffs Were Not Required to Submit a Statement of Material Facts

Contrary to defendants’ contention, plaintiffs’ failure to include a statement of material facts does not require denial of their motion for summary judgment. 22 NYCRR 202.8-g was amended effective July 1, 2022 (prior to plaintiffs’ motion) to provide that:

“[u]pon any motion for summary judgment, . . . the court *may* direct that there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried”

(22 NYCRR 202.8-g [a], as amended by Court Notices [Judiciary, Notices of Adoption, 44 NY Reg 99] [July 6, 2022] [emphasis added]). The amended rule includes remedies in the event of noncompliance with the rule (22 NYCRR 202.8-g [e]). The court’s part rules do not require the submission of a statement of material facts.

B. Entry of Judgment Does Not Divest the Court of Jurisdiction

Defendants cross-move to dismiss, arguing that the court no longer has jurisdiction to grant the relief requested in plaintiffs' motion after it entered judgments in this action and in the Condo action.

A motion must be addressed to a pending action, and courts are without jurisdiction to entertain a motion after entry of final judgment (*Niagara Mohawk Power Corp. v Great Bend Aggregates*, 181 AD2d 998, 999 [4th Dept 1992]). “[A] ‘final’ order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters” (*Burke v Crosson*, 85 NY2d 10, 15 [1995]).

Although the court previously entered judgment against Rohan in this action and entered judgment setting aside the transfer of Chittranjan's interest under the February 3, 2012 deed in the Condo action, neither judgment was final as they did not dispose of all of plaintiffs' causes of action (*cf. Little Prince Prods. v Scoullar*, 258 AD2d 331, 332 [1st Dept 1999]). The complaint in the Condo action did not only seek to set aside Chittranjan's interest to Saloni; it also sought to set aside Rohan's interest in the property (NYSCEF Doc No. 1 in *Good Gateway, LLC*, index No. 152856/17). Furthermore, neither judgment awarded plaintiffs' attorney's fees under former Debtor and Creditor Law § 276-a, as requested (*see id.*; NYSCEF Doc No. 1).

Moreover, there is no basis to conclude that this court lacks subject matter jurisdiction over this dispute involving allegedly fraudulently-conveyed property (*see generally* former Debtor and Creditor Law §§ 278, 279). Subject matter jurisdiction “refers to objections that are ‘fundamental to the power of adjudication of a court.’ ‘Lack of jurisdiction’ should not be used to mean merely ‘that elements of a cause of action are absent,’ but that the matter before the

court was not the kind of matter on which the court had power to rule” (*Manhattan Telecom Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 203 [2013], quoting *Lacks v Lacks*, 41 NY2d 71, 74 [1976]). The Supreme Court “is a court of general jurisdiction, and it is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed” (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967], citing NY Const, art VI). And as the First Department recently held in a decision affirming this court’s decision granting the temporary receiver’s motion to renew his prior motion to approve the sale of the property, this court “retained jurisdiction to enforce the judgments that were entered in this consolidated action and, as a matter of discretion, [this] court was permitted to appoint a receiver in aid of enforcing the judgments” (*Good Gateway, LLC v Thakkar*, 2023 NY Slip Op 05364 [1st Dept Oct 24, 2023] [internal citations omitted]).

Accordingly, defendants’ cross-motion will be denied.

C. Former Debtor and Creditor Law § 276

Former Debtor and Creditor Law § 276² (conveyance made with intent to defraud) provides 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.” This statute “addresses actual fraud, as opposed to constructive fraud, and does not require proof of unfair consideration or insolvency” (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 529 [1st Dept 1999]).

“A creditor seeking legal redress pursuant to that section must prove by ‘clear and convincing evidence that a defendant had the [actual] intent to hinder, delay or defraud

² The Debtor and Creditor Law was amended effective April 4, 2020 (L 2019, c 580, § 2) for transfers prior to April 4, 2020 (*see Varbero v Belesis*, 2020 WL 5849516, *5 n 1, 2020 US Dist. LEXIS 182323, *13 n 1 [SD NY, Oct. 1, 2020, No. 20-CV-2538 (LJL)]).

creditors” (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1288 [4th Dept 2014] [citation omitted]). Because “[d]irect evidence of actual intent is often elusive,” “courts will consider ‘badges of fraud’ which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent” (*Dempster v Overview Equities*, 4 AD3d 495, 498 [2d Dept 2004], *lv denied* 3 NY3d 612 [2004] [internal quotation marks and citation omitted]). Badges of fraud include: (1) a close relationship between the parties to the alleged fraudulent transaction; (2) a questionable transfer not in the usual course of business; (3) inadequacy of the consideration; (4) the transferor’s knowledge of the creditor’s claim and the inability to pay it; and (5) retention of control of the property by the transferor after the conveyance (*In re Sharp Intl. Corp.*, 403 F3d 43, 56 [2d Cir 2005], citing *Wall St. Assoc.*, 257 AD3d at 529). Yet, “the presence of one or more badges of fraud does not necessarily compel the conclusion that a conveyance is fraudulent” (*A&M Global Mgt. Corp.*, 115 AD3d at 1288-1289).

Although actual intent to hinder, delay or defraud within the meaning of former Debtor and Creditor Law § 276 “is ordinarily a question of fact of fact that cannot be resolved on summary judgment” (*Shisgal v Brown*, 21 AD3d 845, 847 [1st Dept 2005] [internal quotation marks and citation omitted]), courts grant summary judgment where the record is clear and convincing that the transfer was done with intent to “hinder, delay or defraud” (former Debtor and Creditor Law § 276; *see e.g. 214 Knickerbocker LLC v Shou Pan*, 217 AD3d 431, 433 [1st Dept 2023]; *Machado v A. Canterpass, LLC*, 115 AD3d 652, 653-654 [2d Dept 2014]; *Dempster*, 4 AD3d at 498; *Dillon v Dean*, 236 AD2d 360, 361 [2d Dept 1997], *lv dismissed* 89 NY2d 1085 [1997]; *accord Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 303 [1st Dept 2006]).

Considering the badges of fraud present in this case, plaintiffs have offered clear and convincing evidence that defendants acted with actual intent to hinder, delay, or defraud plaintiffs. By quitclaim deed dated March 20, 2020, defendants conveyed the property from Chittranjan, Saloni, and Rohan to Shops (NYSCEF Doc No. 55 in *Good Gateway, LLC*, index no. 152856/17). According to a handwritten note on the quitclaim deed, the members of Shops are Chittranjan, Saloni, and Rohan (*id.* at 17). At the time of the conveyance, plaintiffs' motion for summary judgment seeking to set aside the 2012 transfer was pending (NYSCEF Doc No. 27 in *Good Gateway, LLC*, index no. 152856/17). Defendants also conveyed the property within days after the court signed an order to show cause seeking appointment of a receiver to sell the property (NYSCEF Doc No. 148). Plaintiffs also offer evidence that the Thakkars continue to use the property (NYSCEF Doc No. 283 at 7, 9, 10, 12, 14, 16, 18, 20, 21, 23).

Defendants have failed to raise an issue of fact as to their liability under former Debtor and Creditor Law § 276. Evans, defendants' Georgia attorney, states that he reviewed Shops' operating agreement, and determined that, on March 20, 2020, it was wholly owned by Simba, a registered Australian limited proprietary company (NYSCEF Doc No. 302, Evans aff, ¶ 2). However, because defendants did not submit the operating agreement itself, the affidavit is inadmissible hearsay (*U.S. Bank N.A. v Chait*, 197 AD3d 1077, 1078 [1st Dept 2021]; *Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569, 569 [1st Dept 2020]). Additionally, defendants have not refuted plaintiffs' evidence about the close relationship among the parties (*see* NYSCEF Doc Nos. 254, 310-313) or the questionable nature of the transaction, or proffered any legitimate explanation for the transfer. Indeed, as the First Department observed in the decision affirming this court's decision granting the temporary receiver's motion to renew his prior motion to approve the sale of the property, "the individual defendants' transfer of their

interests in the condominium to Shops clearly meets the criteria of a fraudulent transfer.

Defendants do not even attempt to argue that the transfers made by defendants Chittranjan Thakkar and Rohan Thakkar to Shops were not fraudulent transfers. Nor do they argue that the purported transfer of defendant Solani Thakkar's interest in the condominium did not meet the so-called 'badges of fraud,' giving rise to an inference of her fraudulent intent" (*Good Gateway, LLC v Thakkar*, 2023 NY Slip Op 05364 [1st Dept Oct 24, 2023] [internal citations omitted]).

Accordingly, plaintiffs are entitled to summary judgment on the issue of liability under former Debtor and Creditor Law § 276.

D. Former Debtor and Creditor Law § 273-a

Former Debtor and Creditor Law § 273-a (conveyances by defendants) provides that:

“Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.”

Former Debtor and Creditor § 272 provides that “fair consideration” exists where “[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 amount not disproportionately small as compared with the value of the property, or obligation incurred” (former Debtor and Creditor Law § 272 [a], [b]). “Good faith is required of both the transferor and the transferee, and it is lacking when there is a failure to deal honestly, fairly, and openly” (*Berner Trucking v Brown*, 281 AD2d 924, 925 [4th Dept 2001] [citations omitted]).

To prevail on a former Debtor and Creditor Law § 273-a claim,

“the movant must establish three elements: (1) that the conveyance was made without fair consideration; (2) that at the time of the transfer, the transferor was a

defendant in an action for money damages or a judgment in such action had been docketed against him; and (3) that a final judgment has been rendered against the transferor that remains unsatisfied”

(*Amos Fin., LLC v Noya 23, LLC*, 196 AD3d 450, 451 [2d Dept 2021], quoting *Fischer v Sadov Realty Corp.*, 34 AD3d 632, 633 [2d Dept 2006]). In an action under former section 273-a, “questions of actual intent and insolvency are irrelevant” (*Schoenberg v Schoenberg*, 113 Misc 2d 356, 358 [Sup Ct, Nassau County 1982], *affd as mod* 90 AD2d 827 [2d Dept 1982]; *accord Peterson v Vallenzano*, 849 F Supp 228, 230 [SD NY 1994], *rearg denied* 155 FRD 485 [SD NY 1994]; *In re Fair*, 142 BR 628, 631 [Bankr ED NY 1992]). The purpose of former section 273-a is “to provide a remedy for a creditor who has brought an action for money damages against a party who, after being named a defendant in that action, conveys assets to a third party for less than fair consideration leaving the ultimate judgment unpaid” (*Sklaroff v Rosenberg*, 125 F Supp 2d 67, 74 [SD NY 2000], *affd* 18 Fed Appx 28 [2d Cir 2001]).

Here, plaintiffs have failed to establish prima facie entitlement to summary judgment under former section 273-a. In their memorandum of law, plaintiffs insist that the conveyance was for “no consideration” (NYSCEF Doc No. 288 at 18). However, the quitclaim deed recites that the transfer was made “in consideration of Ten (\$10.00) and other valuable consideration paid by [Shops]” (NYSCEF Doc No. 55 in *Good Gateway, LLC*, index no 152856/17). Plaintiffs have not addressed the “other valuable consideration” language (*see generally Wadleigh v Wadleigh*, 111 App Div 367, 368 [2d Dept 1906]). Plaintiffs’ proof, therefore, is insufficient to establish the absence of “fair consideration” (former Debtor and Creditor Law § 272 [a], [b]). Indeed, “[t]he question of what constitutes fair consideration is generally one of fact, [dependent upon] the circumstances of the particular case” (*Tudor & Son Gen. Contr., Inc. v Kandov*, 190 AD3d 781, 782 [2d Dept 2021], quoting *Farmers Prod. Credit Assn. of Middletown v Taub*, 121

AD2d 681, 682 [2d Dept 1986]). In addition, at the time of the transfer at issue, there was no judgment against Saloni that was unsatisfied.

Accordingly, that branch of plaintiffs' motion seeking summary judgment under former Debtor and Creditor Law § 273-a will be denied, "regardless of the sufficiency of [defendants'] opposing papers" (*Winegrad*, 64 NY2d at 853).

E. Plaintiffs' Request for an Order Directing Defendants to Pay All Mortgage Arrears or for a Money Judgment to Bring the Mortgage Current

Plaintiffs also request an order directing defendants to pay all arrears on the interest only mortgage on the property, asserting that the property is a "wasting asset" because the mortgage became delinquent on April 1, 2020 (NYSCEF Doc No. 288 at 10, 11). Alternatively, plaintiffs request a money judgment against defendants, jointly and severally, for the sums required to bring the mortgage current (*id.*).

"[A]s a general rule, the creditor's remedy in a fraudulent conveyance action is 'limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance'" (*Schwartz v Boom Batta Inc.*, 137 AD3d 512, 513 [1st Dept 2016], quoting *Manufacturers & Traders Trust Co. v Lauer's Furniture Acquisition*, 226 AD2d 1056, 1057 [4th Dept 1996], *lv dismissed* 88 NY2d 962 [1996]). Nevertheless, "a court of equity may award a personal judgment against a party *in lieu of setting aside a transfer*" (*Schwartz*, 137 AD3d at 513 [emphasis added]), limited to situations where the debtor's assets have been sold and commingled with a transferee's assets (*Lending Textile v All Purpose Accessories*, 174 Misc 2d 318, 320 [App Term, 1st Dept 1997] [internal quotation marks and citation omitted]), or where "the grantee has disposed of the wrongfully conveyed property or depreciated it . . . or has tortiously interfered with it" (*Marine Midland Bank v Murkoff*, 120 AD2d 122, 133 [2d Dept 1986], *appeal dismissed* 69 NY2d 875 [1987]).

Plaintiffs have not demonstrated entitlement to this alternative relief, as they failed to explain how setting aside the transfer is not an adequate remedy (*cf. Schwartz*, 137 AD3d at 513; *see also Marine Midland*, 120 AD2d at 132 [Debtor and Creditor Law is “clearly geared toward reestablishing the status quo *ante*, rather than punishing the debtor”]; *accord Blakeslee v Rabinor*, 182 AD2d 390, 393 [1st Dept 1992], *lv dismissed* 82 NY2d 855 [1993]). In addition, plaintiffs have not established that, by failing to pay the mortgage on the premises, defendants depreciated the value of the wrongfully-conveyed property (*see Marine Midland Bank*, 120 AD2d at 133). In any event, the December 19, 2022 undertaking order adequately addresses the mortgage arrears and ongoing carrying costs (NYSCEF Doc No 336).

Accordingly, that branch of plaintiffs’ motion requesting an order directing defendants to pay all mortgage arrears or for a money judgment to bring the mortgage payments current will be denied.

F. Attorney’s Fees under Former Debtor and Creditor Law § 276-a and Receiver’s Reasonable Fees and Expenses Caused by the Transfer

Plaintiffs also request attorney’s fees under former Debtor and Creditor Law § 276-a, which provides as follows:

“In an action or special proceeding brought by a creditor, . . . , where such 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, in which action or special proceeding the creditor, . . . shall recover judgment, the justice or surrogate presiding at the trial shall fix the reasonable attorney's fees of the creditor, . . . , and the creditor . . . shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment.”

Given that plaintiffs have prevailed under former section 276, they are also entitled to reasonable attorney’s fees under former section 276-a. Actual intent to hinder, delay or defraud creditors is all that former section 276-a requires (*Priestley v Panmedix, Inc.*, 202 AD3d 417,

418-419 [1st Dept 2022]; *Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179 [1st Dept 2004]). The amount of reasonable attorney's fees will be fixed at the trial of this action, as required by statute (former Debtor and Creditor Law § 276-a).

Finally, plaintiffs request the temporary receiver's reasonable fees and expenses directly and proximately caused by the transfer to Shops (NYSCEF Doc No. 288 at 11, 19). This application will be denied as the temporary receiver may move for this relief pursuant to the order of appointment and CPLR 5228 (a).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 009) of plaintiffs Good Gateway, LLC and SEG Gateway, LLC for summary judgment is granted to the extent of granting plaintiffs liability on the third cause of action under former Debtor and Creditor Law § 276 and the fourth cause of action for reasonable attorney's fees under former Debtor and Creditor Law § 276-a, and the motion is otherwise denied; and it is further

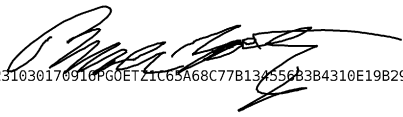
ORDERED that the cross-motion to dismiss of defendants Rohan Thakkar, Solani C. Thakkar, and Chittanjran Thakkar to dismiss for lack of subject matter jurisdiction is denied; and it is further

ADJUDGED and DECLARED that the deed dated March 20, 2020, and recorded on June 30, 2020, for the premises known as 400 Fifth Avenue, Unit 32E, in the Borough of Manhattan, Block 838, Lot 1016, CRFN 2012000091137, Block 2126, Lot 25 is declared null and void; and the County Clerk is directed to cancel the aforesaid deed and mark the land records accordingly; and it is further

ORDERED that defendant Shops at New Hope, LLC is directed to execute and file a deed returning the property from Shops at New Hope, LLC to Chittranjan Thakkar, Saloni C. Thakkar, and Rohan Thakkar within 10 days after the date of entry of this order, and to file proof of compliance with the Clerk; and it is further

ORDERED that entry of judgment for the foregoing is held in abeyance pending the trial in this action; and it is further

ORDERED that the clerk is directed to return the case to active status.



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10/30/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE