| **Herald Ctr. Dept. Store of N.Y., LLC v Shchegol** |
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| 2024 NY Slip Op 35124(U) |
| November 22, 2024 |
| Supreme Court, Richmond County |
| Docket Number: Index No. 150734/2023 |
| Judge: Wayne M. Ozzi |
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At an IAS Part 23 of the Supreme Court of the State of New York, held in and for the County of Richmond at 26 Central Avenue, Staten Island, New York 10301 on the 22nd day of November 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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HERALD CENTER DEPARTMENT STORE OF NEW YORK, LLC
Plaintiff,

-against-

ALEX SHCHEGOL, ALLA SHCHEGOL and AND ASA COLLEGE, INC.,
Defendants

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**DECISION AND ORDER**
Index No. 150734/2023
Motion Seq No 005

PRESENT: Hon. Wayne M. Ozzi, JSC

The following documents e-filed under this Index Number have been reviewed and considered in this motion which was fully submitted on October 10, 2024, on which date the parties presented argument before the Court remotely: NYSCEF Doc. Nos 179 to 245.

This motion for summary judgment seeks a judgment in Plaintiff's favor on the First and Second Causes of Action in the Complaint which was brought under NY DCL §273 and §274 against Defendants Alex Shchegol ("Alex") and Alla Shchegol ("Alla"), his wife, to unwind and avoid the transfers of the following real property and funds withdrawals: (1) 724 Todt Hill Road, Staten Island, NY 10304; (2) 116 Norwalk Avenue, Staten Island, NY 10314; (3) 90 Dresden Place, Staten Island, NY 10301; and (4) 172 Coventry Road, Staten Island, NY 10304; (5) $350,000 from Alex's Citibank account; and (6)$246,585.66 from his Chase bank account. For the reasons set out below, the motion is granted as detailed below.

**BACKGROUND**

The Court summarized the factual background of this case in some detail in its decision on

Motion Seq 001 and 002 (see NYSCEF Doc No. 128), wherein it restrained the sale of certain other real estate owned by the parties. The following factual background is recounted as it is relevant to this motion.

The Plaintiff's action is brought under the New York Uniform Voidable Transaction Act (NY DCL §§ 270, et seq.) for a judgment (A) avoiding certain transfers and permitting Plaintiff to levy execution on the assets transferred, or, in the alternative, if the assets transferred no longer exist, holding Defendants jointly and severally liable in the amount equal to the value of the transferred assets, (B) enjoining Defendants against further disposition of the assets transferred or of other property, and c awarding Plaintiff its attorneys' fees, costs, and expenses.

This action has its genesis in a judgment issued by the Supreme Court, New York County. (the "New York County Action" or the "Guaranty Action"). Plaintiff secured a judgment in that case against Alex for $18,130,285.97, arising from Defendant Alex's execution of a personal guaranty of a commercial lease between Plaintiff and ASA College, Inc. ("ASA"), Alex's wholly-owned and controlled corporation.

By way of further background, Plaintiff is the owner of the real property located at 1293 Broadway, New York, New York (the "Building"). ASA was a New York corporation that operated a for-profit college with campuses in New York and Florida, wholly owned and controlled by Defendant Alex, who was its founder. Alla, Alex's wife, from whom he has long resided separately, was employed or engaged by ASA in various capacities at times during its operations.

Plaintiff and ASA entered into a commercial lease, dated April 16, 2004 (the "Lease"), pursuant to which ASA leased space in the building to operate one of its New York campuses. Alex personally guaranteed the lease. Eventually, ASA and Alex failed to pay the amounts owed on the lease. In 2018, following an investigation into ASA by the Middle States Commission on Higher Education, Alex

resigned as ASA's president in the Fall of 2018. He returned on interim bases thereafter and left for the last time in 2021. The College was suspended from certain federal programs as a result of a myriad of allegations and issues, closed in 2022, and lost its accreditation in 2023.

**The New York County Action and Judgment, and the Transfers**

On July 1, 2021, Plaintiff commenced the New York County action against Alex to enforce the lease guaranty, which resulted in the previously noted $18-plus million judgment. The six transactions Plaintiff seeks to void in this action were made during a two- to three-month period between January 31, 2022 through April 16, 2022. All were made by Alex and Alla, his wife from whom he lived separately, during the pendency of the guaranty action, and after Plaintiff had filed a motion for default judgment in that action. The last transfer at issue took place after default judgment was entered.

Plaintiff filed a motion for a default judgment on January 15, 2022 in the New York County action against Defendant Alex after he failed to appear in the action, despite being repeatedly served with process. About nine days after the default judgment motion was served on Alex, and before an adjournment was sought, it is undisputed that Alex directed Alla to transfer $350,000 from a personal joint bank account held by Defendants to an ASA account.

In response to the motion, Alex contacted an attorney about representation. The attorney stipulated with Plaintiff's counsel to a briefing schedule, to extend his time to oppose Plaintiff's motion and adjourn the original return date. On January 31, 2022, after the extension of time was granted, and before the default judgment motion was heard, Alex transferred ownership of four parcels of real property in Staten Island to Alla, which properties had been titled to both Alla and Alex. The transaction paperwork for each property recited $1 as the consideration. (NYSCEF Doc Nos. 29-31).

On February 28, 2022, the New York County Supreme Court granted Plaintiff's motion for default. On March 4, 2022, it entered judgment against Alex in the amount of $6,483,991.71, although as

noted below, this judgment amount was later amended after an inquest. On February 9, 2023, prior to the default judgment being entered, Alex's counsel, who had asked for the default motion to be adjourned, filed an Order to Show Cause to be relieved as counsel. In that application, the attorney averred that:

> " I was contacted by Mr. Shchegol on or about January 23, 2022 regarding this matter. He then requested that I send him a retainer agreement on January 27, 2022, as per the attached email annexed hereto as Exhibit "A". In contemplation of finalizing my engagement, I spoke to Plaintiff's counsel, Mark Chapman, Esq., and requested a two-week extension of time to respond to the pending motion filed by the Plaintiff seeking entry of a default, which was adjourned to February 15, 2022 pursuant to stipulation dated January 31, 2022 (NYSCEF #28).

(NYSCEF Doc No. 30, Index No. 654155/2021). This affirmation further provided that the "retainer agreement was never been finalized (sic), and I have had no communication with Mr. Shchegol for approximately ten days' time." The application to withdraw as counsel was granted on February 28, 2023 in the same decision granting default judgment.

Alex retained other counsel and, on April 13, 2022, through this counsel, brought an Order to Show Cause ("OSC")to vacate the default judgment and lift the restraints imposed in the New York Action on Defendant Alex and ASA's assets. As part of that motion, Alex obtained a temporary restraining order staying Plaintiff's restraining notices during the pendency of the motion. The restraints were lifted on April 14, 2022 and reinstated on April 18,2022, in an order that also precluded Plaintiff from executing on the judgment. During this four-day period wherein the restraints were temporarily lifted, on April 16, 2022, Alex directed Alla to withdraw $248, 585.66 from a joint account. She did so by obtaining two bank checks in equal amounts -- one issued to her, one to Alex.

Upon review of this OSC application, it appears that there were issues with the notice required by 22 NYCRR 202.7 for an OSC application with temporary restraints, prior to the restraints being issued. (See NYSCEF 66, Index No. 654155/2021; see also Doc No. 55 and compare Doc No. 63, Index No. 654155/2021). The restraints were lifted on April 14, 2022 and reinstated on April 18,2022, in an order

that also precluded Plaintiff from executing on the judgment.

Alla admitted in her deposition that, as soon as she learned from Alex that the monies were available, she withdrew money from a joint account owned by her and Alex, and did so at Alex's direction, for their personal use. Specifically, she testified that Alex informed her that "the block was overturned" and instructed her to "go to the bank and get the money." (2024 Alla Deposition pp. 16-18; 2023 Alla Deposition pp. 175-176). Alla complied with that instruction and obtained two bank Checks to split the funds between herself and Alex for their personal use. (2024 Alla Transcript pp. 11:16-18, 12:4-18; 2023 Alla Transcript p. 165).

The New York County Supreme Court entered an amended judgment after an inquest was conducted in favor of Plaintiff and against Alex in the amount of $18,130,285.97. The Judgment also provided that the amount could be reduced by any monies collected from non-party ASA College, Inc., for the judgment issued against it in a civil court matter. (NYSCEF Doc No. 162, Index No 654155/2021).

The Shchegols have sold other multi-millon dollar real estate properties they owned in Florida and directed the proceeds only to Alla, not Alex. This sale took place after the New York County judgment was entered, and after Plaintiff took steps to domesticate the New York County judgment in Florida, during a brief period in which enforcement was stayed pursuant to Florida law. (See NYSCEF Doc 128, Index No. 150734/2023 for detail on the Florida transaction).

**The Separation Agreement**

Alex and Alla were married in 1980. The Defendants claim that the real property transfers were made pursuant to a separation agreement executed in 2016, about 12 years after the couple claim that they separated permanently in 2004. As Plaintiff notes, while the signatures on the separation agreement are dated December 16, 2016, the notary stamp indicates an expiration date of March 18, 2021. Since notary

commissions are issued for four-year terms pursuant to Executive Law §130, it would seem that the commission related to the stamp could not have been issued until 2017, long after the date of the separation agreement. Thus, the alleged separation agreement is facially problematic and does not provide firm support for the Defendants' assertions.

Defendants assert that the separation agreement was filed with the Clerk of Richmond County in May 2019. Alex filed for divorce at this time; however, he did not proceed with this action, and thus did not move forward with having the Court accept the separation agreement.

About two months after the New York County judgment issued, in March 2023, Alla filed for divorce. This action is currently pending and Alla filed an RJI in the matter over a year later in June 2024. According to her Response to Plaintiff's Statement of Material Facts filed in regard to the instant motion, Alla has filed for summary judgement in that action seeking to enforce the settlement agreement. (NYSCEF Doc No. 243).

Although Defendants indicate that there had been some transfers of assets between them after the separation agreement was entered, there is no evidence that the parties otherwise effectuated the terms separation agreement, although years went by from when the agreement was allegedly made -- with the exception of the transfers at issue here after the New York County action was filed. The Court finds that is no evidence that the terms of the separation agreement have been effectuated in the main. Indeed Alla admits that there were "many aspects of the agreement that Alex and I did not act on" or "otherwise complete for years" but averred that is "their pattern." (NYSCEF Doc No. 237). The separation agreement was raised as a defense to this action.

Regarding the separation, it appears that the Defendants have long resided separately, although they continued to hold various real and other property jointly. Per their depositions, Alla still handles aspects of Alex's personal finances, specifically regarding all joint owned property. Additionally, she

testified that he has "been generous" with her since the separation and she occasionally has withdrawn monies for him for his personal use from their joint accounts. Alex claims not to even know the particulars of certain joint accounts although certain of his bills are paid from them, and he has received money from them for his personal use long after the alleged separation agreement was executed. Despite being separated for many years, the Shchegols filed joint tax returns through at least 2021. (2023 Alla Deposition pp. 192:24 -193:3; 2023 Alex Deposition p.151:20-24, p. 197:2-23). They are both members of several closely held LLCs. (2024 Alla Deposition pp. 49to 50; 52:20 to 53:25). Alla does not contest that Defendants continue to maintain certain joint accounts that according to the separation agreement were to be solely Alla's. (NYSCEF Doc Nos 237 and 243).

The separation agreement provides in part that Alla would have sole ownership of certain properties and Alex would retain ownership of ASA College of which he was already the sole shareholder/owner. As noted, ASA College closed in 2022, after a several year period during which it was investigated by certain authorities, and after a number of allegations were made against Alex. The parties do not appear to be claiming that ASA is an asset with any current value.

In the instant action, the Defendants argue that the 2022 real property transfers to Alla were in furtherance of this separation. Plaintiff argues that the assertions regarding the separation agreement were merely a ruse to make the transfers seem legitimate and render Alex judgment proof.

**The Standard for Summary Judgment**

Under CPLR § 3212, a party moving for summary judgment must establish his cause of action or defense sufficiently to warrant the court as a matter of law to direct judgment in his favor. Generally, the movant must do so through evidentiary proof in admissible form. *(Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 1066–67 (1979)).* If the moving party has demonstrated a prima facie case entitling him to summary judgment, the burden shifts to the opposing party, who must demonstrate

the existence of factual issues sufficient to require a trial through admissible evidence, with some limited exception, in order to deny summary judgment. *(See also see Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Friends of Animals, Inc. v. Associated Fur Mfrs., Inc., supra, 46 N.Y.2d at 1066–67; Moore v. 3 Phase Equestrian Ctr., Inc., 83 A.D.3d 677, 679 (2d Dept 2011); but see Roldan v. New York University, 81 A.D.3d 625, 627 (2d Dept. 2011).*

While some case law supports the proposition that the issue of intent is not ordinarily determined in a summary judgment motion, courts also have granted summary judgment where the record makes plain that fraudulent intent has been established. As discussed herein, summary judgment has been granted in cases brought under NY DCL §273 and §274, even when opposed by a defendant debtor who claimed transfers were made under prior agreements such as a separation agreement or, similarly, were transfers to a spouse, partner or family member by prior arrangement. As also detailed herein, because actual intent is rarely established through direct evidence, Courts commonly use certain legal presumptions and inferences to establish intent under NY DCL's provisions.

**Analysis**

The Court finds that Plaintiff has established that the transactions at issue in this motion were actually and constructively fraudulent and voidable under DCL § 273 and/or DCL § 274 as detailed below. There are no disputed issues of material fact that would preclude summary judgment.

DCL § 273 provides as follows:

> A transfer made or obligation incurred by a debtor is avoidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (I) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

> (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

DCL § 273c provides that a creditor making a claim for relief under subdivision (a) of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

DCL § 273b. also includes a non-exhaustive listing of what are referred to as "badges of fraud." This subsection provides that, in determining actual intent under paragraph one of subdivision (a) of this section, consideration may be given, among other factors, to certain factors, which include:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

Litigants and courts may rely on the aforementioned "badges of fraud" because of the difficulty

of proving such intent through direct evidence, which is rarely available. "Badges of fraud" are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of fraudulent intent. *(5706 Fifth Ave., LLC v. Louzieh, 108 A.D.3d 589 (2d Dept. 2013); Piccarreto v. Mura, 51 Misc. 3d 1230(A) (N.Y. Sup. Ct. 2016), aff'd, 158 A.D.3d 1095 (2018); See also Wall Street Assocs. v. Brodsky, 257 A.D.2d 526, 529 (1st Dept.1999); Morgenthau v. A.J. Travis Ltd., 184 Misc. 2d 835, 842 (Sup. Ct. 2000)).*

Plaintiff also moves for summary judgment under DCL § 274,which provides that:

> (a) A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
> (b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.
> © Subject to subdivision (b) of section two hundred seventy-one of this article, a creditor making a claim for relief under subdivision (a) or (b) of this section has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

Finally, the Court also notes in considering these transactions at issue in this motion that intra-family transactions are subject to enhanced scrutiny. *(Sardis v. Frankel, 113 AD3d 135, 145, 978 N.Y.S.2d 135 (1st Dept 2014)).* While the burden is on the Plaintiff to prove a fraudulent conveyance, "[a]n intra family transaction places a heavier burden on defendant to demonstrate fairness" (*Wall Street Assocs. v Brodsky, 257 AD2d 526, 528, 684 N.Y.S.2d 244 (1st Dept 1999).* A number of cases note that intra-family transfers without signs of tangible consideration are indicators of a fraudulent conveyance or are "presumptively fraudulent." *(See U.S. v. Alfano, 34 F.Supp.2d 827, 845 (E.D.N.Y.1999); See also AMEV Capital Corp. v. Kirk, 180 A.D.2d 775, 776 (2nd Dept.1992); See Wall Street Assocs. v. Brodsky, 257 A.D.2d 526, 529 (1st Dept.1999)).*

**The Transactions:**

**The $350,000 Transfer from Citibank to ASA**

Plaintiff seeks summary judgment unwinding and voiding this bank transfer, which took place during the pendency of the of the New York County guaranty case, and more precisely nine days after Plaintiff served its motion for a default judgment on Defendant Alex. In his deposition, Defendant Alex said that he did not remember that he "transferred $350,00 from his personal account to ASA. I don't remember." He did not deny the transfer happened, simply alleged that he did not recall. (2024 Alex Deposition p. 24). Defendant Alla, on the other hand, testified that she remembered that Alex called and directed her to make the transfer. She stated that at the time she understood that ASA, a corporation that Alex owned and controlled, had to make payroll. (Alla 2023 Deposition at pp. 139; Alla 2024 Deposition at pp.12, 13 and 17).

The Court finds that, as a matter of law, this transfer is voidable under DCL § 273 and DCL § 274. Regarding Numbered Paragraph 1 of DCL § 273, the Court finds that there is no question of fact but that the Defendant Alex made the transfer or incurred the obligation with actual intent to hinder, delay or defraud creditors from collecting debts. He had personally guaranteed the property lease with Herald Center, and days after being served with a default judgment motion, Alex, a sophisticated business person, directed Alla to transfer the money from a joint account to ASA – a corporate entity separate from him in title but controlled by him as sole shareholder. Alla also acknowledged that, from 2021, she knew that many allegations were being made against Alex, and there may be suits filed as a result, and she needed to protect her assets. (Alla 2023 Transcript at pp. 114:22-115:7; pp. 158-160).

The Court finds that Plaintiff has made out a prima facie case that this intra-family transaction

was made with the intent to defraud creditors based on the case law that intra family transfers without adequate consideration are presumptively fraudulent, cited above, and the facts underlying the transaction. Nearly all of the bases or "badges of fraud" for voiding the transaction under the "actual intent to hinder, delay or defraud" provision apply, including the following:

(1) the debtor made the transfer or incurred the obligation to "an insider" – See DCL § 170, a spouse is an insider; further, Alex directed the transfer be made to ASA, which Alex owned and controlled;

(2) the debtor (Alex) retained possession or control of the property transferred after the transfer-again Alex is the sole shareholder;

(3) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit – the default motion was pending, and both parties knew Alex could be liable for claims;

(4) the debtor removed or concealed assets;

(5) the transfer occurred shortly before or shortly after a substantial debt was incurred -- the default motion was pending, and both parties knew Alex could be liable for claims; and

(5) the transfer was made without consideration - the funds were simply handed over to a separate legal entity, with nothing returned to the individual parties.

Plaintiff has also made out a prima facie case regarding Paragraph 2 of DCL § 273 because the Defendants did not receive any reasonably equivalent value for the transfer – the money was simply paid out at Alex's direction to a separate legal entity that he owned and controlled. At the time of the transfer, Alex lacked the ability to pay his bills as they became due, satisfying Paragraph 2(ii) of DCL § 273. Alex admits in his deposition that he had no ability at the time of the suit to pay the lease through his personal funds. (Alex 2024 EBT, pp.122-124).

The transactions are also voidable under DCL § 274, which provides that a transfer is voidable as to a creditor whose claim arose before the transfer and the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer at a time when the debtor was insolvent. Regarding the issue of insolvency, Alex admits that he did not have the ability to pay the $850,000 owed in rent at that time. Plaintiff notes that the documentary evidence is that Alex had only $1 million in his bank accounts in 2022. A presumption of insolvency is created where there is a lack of consideration. *(Matter of Wimbledon Fin. Master Fund v. Bergstein, 166 AD 3d 496 (1st Dept 2018)).* Alex was incurring debts he was unable to pay as they became due. A debtor that is generally not paying the debtor's debts as they become due other than as a result of a bona fide dispute is presumed to be insolvent. *(N.Y. Debt. & Cred. Law § 271(b)).* The statute further provides that this presumption imposes on the party against which the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence. *Id.* While Plaintiff absolutely bears the burden of establishing its right to summary judgment, the legal presumptions and the undisputed facts here establish the insolvency requirement as a matter of law on this motion. Alex's admission, coupled with the legal presumptions recounted above, establishes such a prima facie case.

Defendants have not overcome this. There is no material issue of disputed fact that the claim arose prior to the transfer – there can be no dispute that the suit and indeed the motion was filed prior to the transfer. It was made shortly before or after a debt was incurred. Similarly, Alex was the owner and sole shareholder of ASA. *(See various filings, including NYSCEF Doc no 217, wherein Alex acknowledges he owned ASA).* Although Alex makes no admission or denial in his deposition about how he used these funds, Alla's contention that she transferred the funds to ASA at his direction is undisputed. Thus, there was no question but that Alex retained control of these funds after the transfer although he transferred them out of his name. Defendants affidavits/affirmations have not overcome this prima facie

case.

In his affidavit filed in opposition to this motion, Alex and Alla disagree with Plaintiff's use of their deposition testimony and provide different accounts of certain circumstances. The Court finds that this is not sufficient to overcome the Plaintiff's prima facie case. A "party's affidavit that contradicts his prior sworn testimony creates only a feigned issue of fact and is insufficient to defeat summary judgment. *(Vila v. Foxglove Taxi Corp., 159 A.D.3d 431, 431 (1st Dept. 2018)).* The affidavits raise at best feigned issues of fact, which are insufficient to defeat a motion for summary judgment *(Benedikt v. Certified Lumber Corp., 60 A.D.3d 798, 798, 875 N.Y.S.2d 526, 527 (2d Dept. 2009)),* and the claims therein are at points legally irrelevant.

The Court notes that Alex recounts in detail his assertions regarding the financial issues that ultimately led to ASA College's closing. He describes that he then had viewed these troubles as a "period of illiquidity," after ASA was put on probation by educational funding authorities. Defendant Alex argues that he had no reason to believe that he could not essentially "turn the ship around" at ASA, and believed that he was on the verge of going back to being eligible for the "advance payment method" – that is, that ASA would be receiving federal student assistance funds earlier, rather than many months after the request. He further argues that Alla did not know of the default judgment motion, or the proceedings under the lease.

Alex also avers in the affidavit that the $350,000 transfer was to make ASA payroll, and "was from an account [Alla] received under the separation agreement." However, he appears to refer to a joint Citibank account that was restrained after the judgment – so clearly she did not "receive" it in any real sense as it remained in both parties' names and Alla removed funds at Alex's direction and transferred them to an entity under Alex's control for his use.

These bald allegations – which the Court finds are only feigned attempts to raise fact issues in

opposition to the motion -- also not do not overcome Plaintiff's prima facie case as they are not relevant to the question of whether at the time Alex could pay his debts as they became due at the time of the transfer. Further, Alla admitted that she knew since 2021 that many claims were likely to be filed against Alex and that Alex was asking for personal joint funds allegedly to pay for corporate debts. She acted at his direction to withdraw funds from their personal account and place them in his control and beyond potential personal creditors. To meet the statutory criteria, it is not necessary that Alla knew details of the guaranty action, but only that she was aware at that time that claims likely would be made. Further, giving credence to her claim that the funds were sought for ASA payroll, she would have known that Alex's corporation was in dire straits, and unable to pay debts as due.

Specifically, Alla testified regarding the property transfers that she had heard that claims may be made against Alex, and Alex, the debtor, did know of all these things when he made the transfer. Alex 2024 Deposition, pp.74-75. Alex's alleged subjective belief as to his future prospects is not relevant to the issue of insolvency, which looks at the present moment and does not look to the potential for future solvency. Nor is it relevant to his intent at the time of the transaction.

At the time this transaction was made, Defendant Alex was aware he would be personally liable pursuant to the guaranty he signed for unpaid rent, and contacted a lawyer about the New York County guaranty action. While Alex casts this in the affidavit filed on the motion as a period of illiquidity, the papers, including Alex's own deposition, make clear that Alex could not pay the lease payments, and knowing this, took funds from his personal account and used these funds for other purposes. The Court finds that the "period of illiquidity" argument is not at all persuasive in light of the underlying facts, but more significantly is not material to the legal questions at issue here.

**The Four Real Estate Transfers to Alla**

As noted above, the four real estate deed transfers took place during this short pause in the litigation while the default judgment was adjourned at the request of an attorney acting on Alex's behalf. The Court finds that, in a series of last-minute transactions just before the default judgment was entered, Alex deeded four high value real properties to his wife for zero consideration that had been held jointly by the parties. The deed transfers note $1 consideration for each property. Alex admitted he was aware of the lawsuit at the time of the transfers. (Alex 2024 Deposition p. 92).

Alla testified that she wanted the transfers made because many people had approached her and related the various allegations of claims and possible lawsuits against Alex and ASA College, which were being reported in the press. She indicated she recognized that "this was it." She testified that "I was protecting my assets. I didn't know anything about your judgment or anything like that .... I was protecting my assets, because I thought there will be other lawsuits against him from all those ladies." (Alla 2023 Deposition at pp. 114:22-115:7; 158-160). The Court finds that this testimony evinces an intent to transfer joint assets to avoid satisfying claims and creditors.

The separation agreement that the parties purportedly entered into in 2016 does not provide consideration for the transfer. The Court has significant reservations about considering this facially problematic document as admissible evidence that should be considered on a motion for summary judgment. However, even if it is considered, the Court finds that Alex did not exchange anything of value for the properties, as the agreement was not effectuated in the main even years after it was allegedly made until the default motion was filed. Further, Alla testified that Alex was "very rich" at the time of the settlement agreement and wanted her to have these things. She testified that he got nothing in return for the transfers. (See Alla 2024 Deposition, pp. 18-20; Alla 2024 Deposition, at pp.74-75). While a transfer made pursuant to an agreement to divide marital property may be considered to be made with

consideration, here the settlement agreement was not effectuated for many years. However, this limited, strategic, one-sided transfer of assets after the filing of a default judgment motion, during a short adjournment sought by an attorney acting for Alex, which transfer was made because the transferee feared that other lawsuits were about to be filed, and therefore she needed to protect her assets, is not such a transfer.

The Court also finds that any purported transfer of consideration would be irrelevant in these circumstances, when the deposition testimony is considered. According to the deposition testimony, both parties agree that Alla took care of Alex's personal finances in that she paid all expenses on jointly held property from joint accounts that Alex and Alla still held, despite the separation agreement's terms regarding such accounts; and by her own testimony, Alla transferred or withdrew funds for Alex's direction for his personal use. Alex also gave Alla money and in Alla's words, he was generous with her after the separation. They continued to file joint tax returns. Any transfer of value between the two regarding their joint assets, though the Court finds that there was none, was illusory as their personal finances and property remained significantly co-mingled, and the two transferred property between them for personal and other expenses, without regard to the separation. The transfers here served only to make satisfaction of the judgment or of collection of debts likely to be incurred more difficult by changing the title in name only.

Plaintiff points to a number of cases where defendants attempted to defend against fraudulent transfer cases based upon alleged separation agreements, but the Court determined that the transfers were fraudulent nonetheless. *(See Cathay Bank v. Bonilla, No. 17CV3551NGSIL, 2023 WL 6812274, at *7 (E.D.N.Y. Oct. 16, 2023); Piccarreto v. Mura, 51 Misc.3d 1230(A) (Sup. Ct. Monroe County 2016).* Like those cases, the separation agreement here does not provide consideration for the transfers. Courts have granted summary judgment by rejecting such arguments, where the timing of the transactions, the haste in

which the transactions took place, and the suspicious surrounding circumstances made the conclusion that the alleged agreement was essentially a rouse to exclude assets from collection to avoid paying a judgment an unavoidable one. Like the Court in *Piccarreto*, the Court finds that "the conclusion is inescapable that this transfer is laden with fraudulent conduct by both defendants." It is clear that the real impetus for the transfers was not the separation agreement, but rather, the impending money judgment.

For all of these reasons, the Court finds that these transfers were made with the actual intent to hinder a creditor, at a time when the debtor was insolvent. A presumption of insolvency is created where there is a lack of consideration. *Matter of Wimbledon Fin. Master Fund v. Bergstein, 166 AD 3d 496 (1st Dept 2018). DCL § 273(1).*

The same badges of fraud found regarding the $350,000 transfer apply equally to these transactions. Under DCL § 273(2), the transactions are voidable, as the parties did not receive any reasonably equivalent value for the transfers and the debtor, Alex, admitted he could not pay his debts when due at this juncture. DCL § 274 also applies as the transfers were made after the obligation was incurred by Alex is as to a creditor whose claim arose before the transfer made, and the transfers were made without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent. As to both Numbered Paragraphs 1 and 2 of DCL § 274, the Plaintiff made out its prima facie entitlement to summary judgment on its claims by showing that the defendants transferred the property to an insider during a period in which it was insolvent.[1] *(Flowers v. 73rd Townhouse, LLC, 202*

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[1] Plaintiff alternatively argues that real estate transfers are voidable under DCL § 274(b), which provides that a "transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent." Defendant argues that the Court should not consider this argument because this subsection of the statute was not raised in the complaint. While this may not be dispositive in light the CPLR's fact pleading requirements (CPLR 3013), and the fact that the separation agreement was raised in the answer as an "antecedent debt," the Court declines to reach this argument in light of its conclusions that Plaintiff

*A.D.3d 403, 404, 162 N.Y.S.3d 41 (2d Dept. 2022)); see also Campos v. V&B Inv. Guttenberg LLC, No. 23CV1184 (DLC), 2024 WL 1178256, at *4 (S.D.N.Y. Mar. 19, 2024)(transfers occurred at a time when defendants were facing a high probability that a significant judgment would soon be entered against them).*

Defendants point to various cases for the proposition that intent, either actual or constructive, cannot be adjudged on a summary judgment motion as it ordinarily presents questions of fact. The cases cited by Defendants are factually distinguishable. None involve the myriad of transactions at issue here all of which occurred during a short period of time during the pendency of the guaranty action; the precise timing; or the claims of selectively effectuated terms of a years old and potentially outmoded separation agreement, which is itself facially problematic. For example, in *Grumman Aerospace Corp v. Rice, 199 AD 2d 365 (2d Dept 1993),* the Court merely denied summary judgment to the movant defendant debtor, finding that there were questions of fact regarding dueling valuations of real property. Similarly, *Furlong v. Storch, 132 AD 2d 866 (3d Dept 1987)*, involved a single transaction where property allegedly was transferred to a third party, not a spouse, for an antecedent debt. There, the Court found that the questions of good faith and consideration were legitimate fact questions that could not be resolved on summary judgment. Here, the transfers were made to a spouse.

**The $246,585.66 withdrawal from the Chase Bank Account to Alex and Alla**

The last transfer that Plaintiff is seeking to unwind is a withdrawal that took place after default judgment was entered during an approximately four-day period during which the asset restraints, which included restraints of bank accounts, were lifted. The Court finds this transaction is also voidable under both DCL § 273 and DCL § 274.

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has met the requirements for summary judgment as to the statutory sections specifically pleaded.

Specifically, Alla admits that "[a]s soon as the monies were available," Alex informed her that "the block was overturned" and instructed her to "go to the bank and get the money," despite the default judgment. (2024 Alla Deposition p. 11:16-18; 2023 Alla Deposition pp.175:23-176:7 ;172:7-12, 207:11-13). Alla complied with that instruction and obtained two bank checks to split the funds between herself and Alex for their personal use. (2024 Alla Deposition at pp.11:16-18, 12:4-18; 2023 Alla Deposition p. 165:8-14).

Certainly, there is direct evidence that Alex knew the judgment had been entered. He retained a lawyer who moved via Order to Show Cause to vacate it and moved immediately when the restraints were lifted to withdraw funds. Alla too knew that the funds had been restrained by a Court in connection with a proceeding. She testified that she knew the restraints must be part of "some judge order" (Alex 2024 Deposition p. 31) and while she claims she was unaware of the lawsuit, admits that she did learn about the judgment at some point and admitted that the earlier real property transactions were made to protect assets. (2023 Alla Deposition p. 176). Further, she does acknowledge knowing that multiple allegations were being made against Alex since 2021, and moving to protect assets as a result.

Although the Court finds that the NYCRR 202.8(e) notice issues regarding the OSC to lift the restraints in the New York County Action, recounted above, might themselves be a reason to void this transaction, which took place while the restraints were lifted apparently without proper notice, the Court finds that the transaction is voidable as it was made with the intent to defraud creditors. The Court finds that this was done with the actual intent to hinder, delay or defraud the creditor Plaintiff. DCL § 273(1). The same badges of fraud apply establishing actual intent to defraud. The transaction was made for zero consideration - the funds were simply withdrawn for personal expenses. As detailed above regarding the other transactions, the Debtor was insolvent and lacked the ability to pay his bills as they became due at the time the transaction took place. The requirements of DCL § 273(2) and DCL § 274 are also met for

the reasons provided in this decision.

**Conclusions**

The Court finds that these transfers resulted in assets being taken out of Alex's name without being taken from his control. The transfers to Alla did not put the assets out of reach to Alex, just to creditors. So that the Court's analysis of the individual transactions in this case not obscure the totality of the circumstances, the Court also considered the circumstances of the transfers in toto in reaching its conclusions. It finds, in considering the "intent to defraud" component of DCL § 273, and constructive fraud requirements of both DCL § 273 and § 274 that the entire pattern of re-titling assets, withdrawing or transferring substantial funds at Alex's direction, all during a very short window of opportunity that arose because of steps that Alex took, including the Florida transfers, only discussed briefly herein, make it as obvious and beyond question as it possibly could be that the parties acted with the intent to defraud the creditor Plaintiff. In sum, the pattern of transactions makes the Court's determinations inescapable.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgmenti n its favor on the First and Second causes of action, voiding and unwinding certain transactions is granted, and the transactions at issue are hereby voided and unwound; and it is further

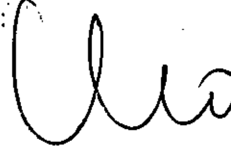
ORDERED that this Court continues all prior restraints and immediately restrains Alla and Alex Shchegol from transferring any assets that are the subject of this motion until the Order in this matter is settled and signed by the Court, and it is further

ORDERED that the undertaking for the above restraints, which are in the nature of an injunction (CPLR 6312(b)) is fixed in the sum of $1,000, which sum Plaintiff shall post within thirty(30)days of the date that a signed copy of this Order is filed on NYSCEF; and it is further

ORDERED that Plaintiff is hereby directed to deposit said undertaking in the form of cash together with a copy of this Decision and Order, and it is further

ORDERED that the Plaintiff shall settle an Order effectuating the court's determination within 30 days.

ENTER:



DATED: 11/22/24

HON WAYNE M. OZZI, JSC