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ORIGINAL

SHORT FORM ORDER

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable Leonard Livote
Acting Supreme Court Justice

IAS TERM, PART 33

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Battlefield Freedom Wash, LLC,
Plaintiff,

Index No: 3683/10

-- against --

Motion Date: 02/14/14

Song Yan Zhuo, Ting Hui. Zheng
Jian Zheng and Chun Fang Zheng,
Defendants.

Seq. No: 6

FILED
NOV 24 2014
COUNTY CLERK
QUEENS COUNTY

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The following papers numbered 1 to 9 were read on the motion by plaintiff pursuant to CPLR §4403 for an order (a) rejecting and modifying the Special Referee's report and recommendations, who after trial held that the transfer of defendant's Song Yang Zhuo's interest in an investment property in Flushing to defendants Ting Hui Zheng, Jian Zheng and Chun Fang Zheng was without consideration and was not fraudulent under the NYS Debtor and Creditor Law and (b) upon rejecting and modifying the Special Referee's report, granting judgment for plaintiff setting aside the conveyance.

PAPERS
NUMBERED

Notice of Motion, Affirmation, Affidavits and Exhibits and Memo of Law.....	1 - 5
Answering Affirmations, Affidavits and Exhibits.....	6 - 7
Reply Affirmations, Affidavits and Exhibits.....	8 - 9
Other.....	

Upon the foregoing papers, the motion pursuant to CPLR §4403 to (a) reject and modify the Referee Yablon's report and (b) to set aside the conveyance of Song Yan Zhou's interest in Queens County real property is granted to the extent set forth below.

Background

Defendant Song Yan Zhuo was a part owner of a restaurant, International Buffet, which rented commercial real estate space

from Plaintiff in the State of Virginia. Mr Zhou defaulted on the Virginia commercial lease payments and plaintiff obtained a judgment dated October 24, 2008, for \$113,192.30 plus attorney's fees of \$24,912.00.

Defendent Zhuo was also the owner of a 1/4 interest in a multi-family property located at 31-01 Linden Place, Flushing, New York. The other owners of the property were co-defendants Chun Fang Zheng (Zhou's wife), and her relatives Ting Hui Zheng and Jian Zheng. On December 19, 2006, Zhou transferred his interest in the property to the co-defendants. Zhuo also commenced a divorce proceeding against his wife on that date.

Plaintiff commenced this action to vacate the property transfer on the grounds that it was a fraudulent conveyance pursuant to DCL §§ 273-276. By Order dated June 11, 2012, this action was referred to Referee Yablon to hear, try and report on all issues. By memorandum dated April 30, 2013, Referee Yablon reported a proposed Judgment for defendants on all causes of action. Plaintiff moves to modify the report pursuant to CPLR § 4403.

As a general rule courts will not disturb the findings of a referee's report to the extent that a review of the record substantiates her findings. (See, *Kardanis v. Velis*, 90 AD2d 727 [1st Dept. 1982]). The report of a referee should be confirmed whenever the findings are substantially supported by the record and the referee has clearly defined the issues and resolved matters of credibility (see, *Thomas v. Thomas*, 21 AD3d 949 [2nd Dept. 2005]).

Debtor and Creditor Law § 273 states: "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." In considering this section, Referee Yablon found that the transaction was made without consideration. The Court accepts this finding as it is supported by the record. Referee Yablon further ruled that the burden of proof on the issue of insolvency was on the plaintiff and went on to find that plaintiff had failed to meet its burden of proving that Zhuo was insolvent at the time of the transfer. Accordingly, Referee Yablon found for the defendants on this claim.

Ordinarily, the "burden of proving both insolvency and the lack of fair consideration is upon the party challenging the conveyance" (*American Inv. Bank, N.A. v. Marine Midland Bank*,

N.A., 191 A.D.2d 690, 692, [2d Dept 1993]). However, once a lack of fair consideration is established, insolvency is presumed, and the burden of overcoming the presumption is on the party that engaged in the transfer (*Petition of National City Bank of N.Y.* 58 N.Y.S.2d 620, 621 [2 Dept.1945]; see, *In re Corcoran* 246 B.R. 152, 163 [E.D.N.Y.,2000]). Because the Court accepts the finding of Referee Yablon that there was no fair consideration for the transfer, the evidence regarding insolvency must be considered with the burden of proof on the defendants.

With the burden of proof placed on the defendants, it is clear that they failed to establish that Zhuo was solvent at the time of the transfer. The direct evidence of Zhuo's solvency is limited to the testimony of the restaurant manager who testified that there was sufficient money in the bank account to pay the bills. On the other hand, there is a mass of evidence militating towards insolvency. Defendant Chun Fang Zheng testified that plaintiff was indebted to the employees of his other restaurant in the amount of \$30,000 and that opening the new restaurant left him with nothing. Furthermore, it is uncontested that, immediately after the transfer Zhuo began paying only part of the rent on his restaurant. In addition, on May 14, 2007, a judgment in the amount of \$39,654.55 was entered against Zhou. The judgment is relevant as to Zhuo's solvency at the time of the transfer and his ability to pay his debts as they mature. These facts compel a determination that defendants have not met their burden of establishing that Zhuo was solvent at the time of the transfer.

Applying this analysis to DCL § 274, the Court finds that the burden of proof was on the defendants to prove that the Zhuo had adequate capital and that defendants failed to meet their burden.

Applying this analysis to DCL § 275, the Court finds that the burden of proof was on the defendants to prove that Zhuo believed that he would be able to pay his debts as they mature and that defendants failed to meet their burden.

Referee Yablon's determination that there was no fraudulent intent is supported by the record. Accordingly, the Court confirms her ruling denying the claims pursuant to DCL § 276 and 276-a.


Finally, there is no separate cause of action for punitive damages (see, *Fiesel v. Nanuet Props. Corp.*, 125 A.D.2d 292 [2d Dept 1986]).

Accordingly, the Referee's report is modified to the extent

that plaintiff has proven its claims arising under DCL § 273, DCL § 274, and DCL § 275, and is granted judgment thereon. The report is otherwise confirmed.

Settle Judgment on notice to defendants.

Dated: November 6, 2014


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Leonard Livote, A.J.S.C.

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