NEW YORK SUPREME COURT -- COUNTY OF BRONX

IAS PART 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

X

Frank Berisha

Petitioner

-against-

4042 East Tremont Café Corp
et al

Respondents

Index No. 260877-15

Present:
Howard H. Sherman

Justice

X

The following papers numbered 1 to ____ Read on this motion,

	PAPERS NUMBERED
No. ____ on Calendar of _____	
Notice of Motion-Exhibits & Affidavits Annexed	
Order to Show Cause-Exhibits & Affidavits Annexed	
Answering Affidavit and Exhibits	
Replying Affidavit and Exhibits	
_____ Affidavit Pleadings -- Exhibit _____	
Stipulation(s)-Referee's Report-Minutes	
Filed Papers	

Petition is decided in accordance with the attached memorandum decision.

Dated: 6/29/17

HOWARD H. SHERMAN, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 4 x

FRANK BERISHA

Petitioners,

For a Judgment Pursuant to CPLR 5225(b) and/or or CPLR 5227,

Index No. 260677-16

4042 EAST TREMONT CAFÉ CORP. d/b/a "TOSCA CAFÉ," A Party In Possession Or Control Of Property of TOSCA CAFÉ INC., and/or TOSCA COAL BURNING OVEN, INC., Judgment Debtors of Petitioner; HASIM "EDDIE" SUJAK; ADIS RADONCIC; TOSCA CAFÉ INC.; and TOSCA COAL BURNING OVEN, INC.,

Respondents
x

HON. HOWARD H. SHERMAN:

This petition concerns a Judgment awarded in the sum of $982,000 for damages incurred in an assault, in favor of the petitioner Frank Berisha. This Judgment was entered against Tosca Café Inc. and Tosca Coal Burning Oven Inc. on August 12, 2013. The Tosca Café is a bar/restaurant located at 4038-4042 East Tremont Avenue in the Bronx which was founded by Hasim "Eddie" Sujak in 1998 [hereinafter "Eddie Sujak"]. The entity currently operating the Tosca Café is purported to be 4042 East Tremont Café Corp. ("4042 Corp"). However, the contention of petitioner is that the Tosca Café has at all times since its founding been owned and controlled by Eddie Sujak, notwithstanding his claim

that ownership of the restaurant business has been twice transferred amongst three distinctive corporate entities, the first time in 2006, and the second time in 2013.

4042 Corp. is itself owned and operated by Eddie Sujak's brother in law, Adis Radoncic. Berisha contends that Adis Radoncic is a mere nominee of Eddie Sujak, who continues to own and manage this business, and that the transfer to Adis Radoncic was devised to defeat execution of the Judgment. Berisha seeks to set aside this transfer, and to enforce his judgment employing a range of options permitted under the Debtor and Creditor Law.

The Tosca Café

As noted, ownership of this restaurant business has allegedly been transferred twice in recent years, the first time in 2006, from Tosca Café Inc. to Tosca Coal Burning Oven Inc. ("Tosca Coal"), and the second time in 2013, after Tosca Coal had 'abandoned' the business, to 4042 Corp.

The respondents' account of the circumstances surrounding these two transfers are supported almost entirely by the testimony of Eddie Sujak, and that of his brother-in-law Adis Radoncic. The type and quantity of documentary evidence which one would expect to be generated by the sale of a business of this caliber is lacking. Eddie Sujak contends that he formed Tosca Café Inc. in 1998 to purchase a business at 4038 East Tremont

Avenue, which was at that time a bakery. He was the sole shareholder. Over the years the bakery was converted to a pizzeria and then expanded into a restaurant/bar/lounge. The landlord was then Hedyko Realty Corporation ("Hedyko"). Tosca Café Inc. entered into a lease with the landlord for a 15 year period ending in April 2013.

In 2000, Eddie Sujak, together with his brother Samir "Sammy" Sujak, formed Tremont Realty LLC, purchased the realty from Hedyko, and assumed the prior owner's lease with Tosca Café Inc.

Eddie Sujak claims that in 2005-2006 he grew weary of operating the Café, and decided to sell it to his brother Amir[1] Sujak, who for this purpose formed Tosca Coal, of which Amir was the sole shareholder. Tosca Coal and Tremont Realty LLC entered into a ten year lease running from March 2006 through February 2016. This lease provided that all fixtures at the premises were the property of the landlord. Amir also purportedly signed a promissory note in the amount of approximately $400,000.00, but a copy of this note has not been provided by Respondents.

The assault on Berisha occurred on January 24, 2008. The personal injury action was commenced against Tosca Café Inc. on February 21, 2008. Sometime before 2012, while this litigation was pending, Amir purportedly decided to abandon the Tosca Café business because the café was falling behind in its bills, and

[1]Apparently Amir Sujak and Samir Sujak are two different people.

because Amir had family matters which he had to devote time to. Moreover, Amir had made no payments on the $400,000 promissory note. He had left it to his two young sons to run the café.

Meanwhile, Sammy Sujak wanted to cash out his 50% interest in Tremont Realty LLC. Eddie Sujak accordingly formed 4040 Tremont Realty LLC, of which he was sole owner and member, purchased his brother's interest in the premises, and refinanced the property. Through 4040 Tremont Realty LLC., Eddie Sujak was now the sole landlord of the property.

After Amir 'abandoned' the restaurant, Eddie Sujak approached his brother in law, Adis Radoncic ("Radoncic"), and asked him to take it over. Radoncic formed 4042 Café to operate the restaurant, and entered into a lease with the new landlord entity running from January 2013 through December 2023.

Radoncic signed a promissory note for $400,000 - this Note has been produced as part of the record of this case - payable to Eddie Sujak personally. This note contains no mention of the transfer of the restaurant business to Radoncic or to 4042 Corp. nor is there any mention of the restaurant for that matter.

In March 2015 -- after Judgment had been entered against the defendants - the landlord 4040 Tremont Realty LLC brought a nonpayment proceeding against 4042 Corp, a proceeding which purportedly did not go forward after the rent payments were brought current, according to Eddie Sujak. The latter also claims that, at the present time 4042 Corp is again behind in its

payments to its landlord, and to its suppliers, and Radoncic has allegedly made no payment on the promissory note.

Four years after Berisha commenced the personal injury action against Tosca Café Inc., the 2006 transfer to Tosca Coal was discovered. On January 10, 2013, the Court permitted the plaintiff to amend his pleading to add Tosca Coal as a party defendant pursuant to the 'relation back' doctrine.

Berisha proceeded to inquest after the counsel for both defendants was permitted to withdraw. Judgment was entered against Tosca Café Inc. and Tosca Coal on August 12, 2013. A motion by new counsel to vacate the Judgment on bhalf of both defendants was denied on February 24, 2014.

Subsequent to entry of Judgment, Berisha discovered that both corporate defendants, Tosca Café Inc. and Tosca Coal, are corporate shells with no assets, and that ownership of the Tosca Café had allegedly been transferred in 2013, while the inquest proceedings were pending, from Tosca Coal to 4042 Corp.

This Proceeding

In this petition, Berisha seeks the following relief:

1. pursuant to Section 278 of the Debtor and Creditor Law setting aside the transfer of the Tosca Café by judgment debtors Tosca Café Inc. and/or Tosca Coal to respondent 4042 Corp. to the extent necessary to satisfy Berisha's judgment, or in the

alternative

2. awarding Berisha damages against 4042 Corp. to the extent that the transfer is voidable, or

3. permitting Berisha to disregard the transfer of the Tosca Café to 4042 Corp, and

4. granting leave to Berisha to attach or levy execution upon the property transferred.

Berisha also seeks the appointment of a temporary receiver pursuant to CPLR §5228, with the authority to administer, collect, improve, lease, repair or sell any real or personal property in which the Judgment debtors have or had an interest, or to do any acts designed to satisfy the Judgment, together with any other relief available under Debtor and Creditor Law § 278, and for attorneys fees.

The Respondents Eddie Sujak and Tosca Café Inc. have cross-moved for dismissal of the petition for failure to state a cause of action pursuant to CPLR §3211 (a)(7). Eddie Sujak also moves for dismissal of the cause of action seeking attorneys fees against him personally on the grounds that he was neither the debtor nor the transferee with respect to the alleged fraudulent transfer to 4042 Corp. He also moves for dismissal of the petition as against Tosca Café Inc., since transfer of this business from Tosca Café Inc. to Tosca Coal was effected in 2006, two years prior to the 2008 assault, and as such, this earlier transfer could not be considered to have been made with intent to

defraud a creditor whose claim did not yet exist.

Respondents Adis Radoncic and 4042 Corp. have also cross-moved for dismissal for failure to state a cause of action upon similar grounds. Adis Radoncic also asserts that the claim for attorneys fees must be dismissed as against him personally, since he was neither a debtor nor transferee of an intentionally fraudulent transfer pursuant to DCL § 276-a. With respect to 4042 Corp, the petition should also be dismissed on the grounds that it was not a transferee of an alleged fraudulent conveyance.

The Transfers

Berisha argues that the extent of Eddie Sujak's continuous control of the Tosca Café business from the time of its purchase in 1998 through the present, is substantiated by various documents and other evidence elicited in the course of discovery, with respect to both purported transfers.

The circumstances surrounding the two transfers of this café business are curious. In his affidavit dated December 12, 2012 filed in opposition to the plaintiff's motion to add Tosca Coal as a party defendant, Eddie Sujak fixes the approximate date of transfer to Tosca Coal/Amir Sujak at February 2006. He avers that "We established the new corporation, Tosca Coal Burning Oven Inc.", and that "Tosca Café Inc." was no longer a functioning corporation." [emphasis supplied].

With respect to this first transfer, in an application to transfer the liquor license to Tosca Coal, which was filed with the NY State Liquor Authority by Amir Sujak on behalf of Tosca Coal Burning Oven Inc., the purchase/contract price is listed as "$100", with operating capital of $1000. The source of the money used to pay for these expenses, including the S.L.A. fee of $4,452.00, was listed as a "gift" from Amir Sujak's mother in the sum of $6,052.00.

When amending the insurance policy for the premises with Tower Insurance Company in February 2007 for the limited purpose of changing the name of the business to Tosca Coal Burning Oven Inc., the application contained the notations "Same Financial Control and interest" and "Same owner."

In 2007, Eddie Sujak on behalf of Tosca Café Inc., listing himself as "owner", filed an application with the New York City Building Department for the construction and operation on the premises of a sidewalk café enclosure. This was one year after Eddie Sujak had purportedly transferred this business to his brother Amir, who was ostensibly running the café business under the corporate entity Tosca Coal.

In the course of pretrial discovery, Rasim Sujak, a cousin of Eddie Sujak, testified that he was the manager on duty on the night of the shooting, and that he gave his report of the incident to Eddie Sujak, and to no one else. He also testified that he had been hired by Eddie Sujak in 2007. This testimony

also undercuts Eddie Sujak's present claim that he had sold the business to Amir Sujak in 2006, as does nearly all of the documentary evidence.[2]

Berisha argues that the incorporation of 4042 Corp. in November 2012 was a direct response to Berisha's motion to add Tosca Coal Burning Oven Inc. as a party defendant. The timing of this transaction is indeed supportive of the petitioner's claim.

On March 7, 2013 an application was filed with N.Y.S.L.A. on behalf of 4042 Corp. This application was filed as a "new application", and the provisions contained in the application pertaining to purchase and sale were crossed out. The principal of 4042 Corp, according to the N.Y.S.L.A. application, was Sujak's brother in law, Adis Radoncic. However, Radoncic apparently gave a false answer to a question in the N.Y.S.L.A. application, denying that he had "any relationship with the current/previous licensee or any of the principals of the licensee."

On February 8, 2013, Eddie Sujak signed a lease on behalf of 4042 East Tremont Realty Inc. with 4042 Corp for a term ending December 31, 2023. However, at this time, the premises were still subject to a lease held by Tosca Coal for a term ending in February 2016. 4040 Tremont Realty LLC did not have lawful possession of the premises at the time it purported to lease the premises to 4042 Corp. Moreover, if Eddie Sujak had sold the

[2]Tosca Coal has defaulted in response to this petition.

business for $400,000 to Amir Sujak and Tosca Coal Burning Oven Inc. in 2006, he was clearly without the ability to sell it again to Adis Radoncic and 4042 Corp in 2013. The purported sale of Tosca Café to 4042 Corp/Adis Radonic is not documented, aside from a $400,000 promissory Note dated May 1, 2013, which was payable to Hasim Sujak personally, and which makes no reference to Tosca Café or to the sale of any business. All of the documentary evidence with respect to both transfers leads to the unescapable conclusion that this pattern of control by Eddie Sujak was continuous throughout the history of the café business, both before and after the two supposed transfers of ownership.

Particularly inexplicable is the claim that Amir Sujak merely "abandoned" a valuable asset like the Tosca Café, which is as plausible as the claim that he obtained this business without a written agreement, or based on an alleged promissory note that he never made any payments on. Of all the unlikely accounts provided by respondents, this might be the least credible portion.

The promissory note signed by Radoncic, which has been produced, required no payments for two years. In his deposition testimony, Adis Radoncic stated that he had a contract of purchase, but as with the earlier transaction, this document has not been provided. Mr Radoncic made no payments on the note, although the Tosca Café generates impressive revenue. The last year for which financial information has been disclosed, 2014,

indicates that the Café business generates gross revenues in excess of $4.6 million, which greatly undermines any contention that $400,000 would be a fair and reasonable price for a business of this character.

Fraudulent Transfers

This is a proceeding brought pursuant to CPLR 5225 (b), which reads as follows:

(B) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgement, to a designated sheriff...

Pursuant to DCL §273-a a conveyance is fraudulent where 1. It is made without fair consideration 2. by a person who is a defendant in an action for money damages or a judgment in such action has been docketed against him, and 3. if after final judgment for the plaintiff in that action the defendant fails to satisfy the judgment. If these facts are established, the conveyance is deemed fraudulent without regard to the actual intent of the defendant.

In the alternative, petitioner seeks relief pursuant to CPLR 5227, which provides as follows:

Upon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment creditor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment and to execute and deliver any document necessary to effect payment, or it may direct that a judgment be entered against such person in favor of the judgment creditor.

Finally, Berisha seeks the appointment of a receiver pursuant to CPLR § 5228, which provides as follows:

"Upon motion of a judgment creditor...the court may appoint a receiver who may be authorized to administer, collect, improve, lease, repair or sell any real or personal property in which the judgment debtor has an interest or to do any other acts designed to satisfy the judgment...."

DISCUSSION

The Respondents devote considerable time in discussion of the alleged transfer of the Café business from Tosca Café Inc. to Tosca Coal in 2006, some two years prior to the assault on Berisha. Respondents contend that the timing of this alleged transaction wholly refutes any contention that this specific transfer was made with fraudulent intent, since Berisha's claim had not yet arisen. However, this argument is largely a red herring, as it disregards the fact that a Judgment has been granted on default against both Tosca Café Inc. and Tosca Coal, and remains in full force and effect. Respondents are

collaterally estopped from re-arguing this finding of the Court. Both Tosca Café Inc. and Tosca Coal defaulted in appearance at the trial of the personal injury action, and the claims against both of them were adjudicated at an inquest. Both defendants - supported by the affidavit of Amir Sujak as the "owner" of Tosca Coal - moved to vacate their default, and this motion was denied with respect to both defendants by order of this Court dated February 24, 2014. The Judgment remains in full force and effect as against both Tosca Café Inc and Tosca Coal.

The relevant aspect of this 2006 transaction is that it corresponds in numerous particulars with the 2013 transaction in terms of both being replete with 'badges of fraud.' Moreover, Berisha argues that Eddie Sujak's control of the Tosca Café began with his purchase of the premises in 1999, and continues up to and including the present time, inclusive of the purported transfer to Tosca Coal in 2006.

Since the Judgment against Tosca Coal remains in full force and effect, the chief inquiry of the Court is whether the alleged transfer of ownership to 4042 Corp from the defendant Tosca Coal -after Amir Sujak's purported 'abandonment' of the business in 2013 - was fraudulent and should be set aside, thus resulting in ownership vesting once again in the defendant Tosca Coal.

Summary judgment is available where, as here, a party is seeking a turnover order pursuant to CPLR 5225 (a) and plaintiff

has made a prima facie showing that the underlying judgment has not been paid in full. Where the debtor fails to raise a question of fact as to satisfaction of the judgment, no hearing is required, and the Court may summarily resolve the issue. CPLR § 409 [b]; Matter of TNT Petroleum Inc. V. Sea Petroleum Inc. 72 AD 3d 694 [2nd Dept 2010]; Valley Psychological PC v. Government Employees Insurance Company, 105 AD 3d 1110 [3rd Dept 2013].

Berisha moves to vacate the transfer by Tosca Coal pursuant to both DCL § 273-a, and also pursuant to DCL § 273, since the transfer to 4042 Corp was made without consideration, thus rendering the defendant judgment creditors insolvent.

This release, relinquishment, or 'abandonment' of an interest in the subject property by Tosca Coal is considered a transaction subject to DCL Section 270. Palestine Monetary Authority v. Strachman, 62 AD 3d 213 [1st Dept 2009]; Everite Trading Corp v. Wanpress Realty Corp., 178 Misc 503 [Sup Ct NY 1942]; Mutual Life Ins. Co. of N.Y. V. 160 East Seventy-second Street Corp., 49 N.Y.S. 2d 927 [Sup Ct NY 1944].

The Court must agree with Berisha that with respect to both of the alleged transfers, proof of fair consideration is lacking, and since there is no genuine issue of fact, judgment can be granted in favor of the petitioner summarily.

Fair consideration is given for property or an obligation when such property is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately

small as compared with the value of the property or obligation obtained. Debtor and Creditor Law § 272 subd b. There is a total lack of proof that anything of value was provided by either Amir Sujak or Radoncic, and no triable issue of fact has been raised by the respondents on this issue.

In proceedings pursuant to CPLR 5225 [subd b] where a judgment creditor seeks payment from a transferee of the judgment debtor, the creditor has the burden of establishing that his rights are superior to those of the transferee. Whether such rights are superior is a matter to be determined by applying the fraudulent conveyance provisions of the Debtor and Creditor Law. The burden of proof is on the creditor seeking to set aside a conveyance as fraudulent to establish that the debtor's conveyance was made without fair consideration. Petretti v. Finnigan, 68 Misc 2d 1007 [Sup Ct Nassau Co 1972; Fox v. Sizeland 170 Misc 390 [Sup Ct Jefferson Co. 1938].

In Gelbard v. Esses, 96 AD 2d 573 [2nd Dept 1983] it was determined that, where the creditor asserts that the transferees paid insufficient consideration and the evidentiary facts as to the nature and value of the consideration were within the transferee's control, "the burden of coming forward with evidence disclosing the nature and value of the security interest furnished by the corporation in return for the transferee's loan of $100,000 (on which they rapidly foreclosed) and the fairness of the consideration should be cast upon the transferees." *Id,*

96 AD 2d at 576. The Respondents rely on the self-serving testimony of Eddie Sujak and the mirror-image contentions of his brother in law. As noted, the disclosed documentary evidence, to the extent that it exists at all, serves to undermine the Respondents' claims, not support them.

Both of the transfers under discussion are replete with the badges of fraud which are symptomatic of fraudulent transfers.

Since direct evidence of fraudulent intent is elusive, the Court will consider these "badges of fraud" that are indiciative of an intent by the debtors to hinder, delay or defraud plaintiff. These badges include transfers between family members, transfers for inadequate or no consideration, and suspicious timing of such transactions, such as e.g. immediately after a matrimonial action has been commenced. Machado v. A. Canterpass LLC, 115 AD 3d 652 [2nd Dept 2014]; Pen Pak Corp v. La Salle Nat'l Bank of Chicago, 240 AD 2d 384 [2nd Dept 1997]. All three such considerations strongly support the petitioner's claim that the transfer to 4042 Corp was made with the intention of defeating execution of Berisha's judgment. This conclusion is based on a consideration of 1. The close relationship among the parties to the transaction.2. The inadequacy of consideration 3. The transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them and 4. The retention of control of property by the transferor after the conveyance. MFS/Sun Life Trust-High Yield

Series v. Van Dusen Airport Servs. Co., 910 F Supp 913 [SD NY 1995]. See also Swartz v. Swartz, 145 AD 3d 818 (2nd Dept 2016).

The record before the Court wholly substantiates the petitioner's claim that no consideration was paid for these two alleged transfers of this substantial business. The two promissory notes - one substantiated, one not -- have no apparent relationship to the transfer of the business, and are not evidence of such a transfer. There is no proof that any money was paid pursuant to these notes, and the note executed by Radoncic was payable to Eddie Sujak in his personal status, not as principal of the corporate owner of the business.

On this record, there is no genuine issue of fact with respect to consideration. There are no contracts of sale or similar documents. With respect to the initial transfer, the alleged promissory note which constituted payment for the café has not been produced, and it is acknowledged that no monies were paid in this purchase. With respect to the second transfer to 4042 Corp., the promissory note which has been produced makes no reference to a sale of a business whatsoever, and no monies were paid on this note at any rate. The burden of proof of establishing that this was a bona fide transfer is on the respondents. US v. Alfano, 34 F Supp 2d 827 [ED NY 1999]. Aside from the self-serving account provided by Eddie Sujak, there is no defense provided by the respondents on this issue of fair consideration, and the Court finds that the respondents have not

met their burden on this issue.

Other Matters

With respect to the cross-motions by respondents for dismissal upon the grounds that the petition fails to state a cause of action, the sole criterion is whether the pleading states a cause of action, and if, from its four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail. Guggenheimer v. Ginzburg, 43 NY 2d 268 [1977]. The factual allegations in the pleading must be deemed true and the petitioner must be afforded the benefit of every favorable inference. Matter of Palmore v. Bd of Education of Hempstead Union Free Sch. District, 145 AD 3d 1072 [2nd Dept 2016]. A motion pursuant to CPLR 3211 (a)(1) to dismiss a complaint may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law. Anzora v. 81 Saxon Ave. Corp., 146 AD 3d 848 [2nd Dept 2017].

For reasons already stated, the petition clearly states a valid cause of action, and indeed, the Court finds that the alleged transfer of the Tosca Café business to 4042 must be vacated and set aside.

Berisha has also made claims for attorneys fees against the

individual respondents, Eddie Sujak and Adis Radoncic. In Joel v. Webber 197 AD 2d 396 [1st Dept 1993] the Court ruled that in setting aside a transfer pursuant to DCL 276-a, where the respondents personally committed the acts constituting the fraud and aided and abetted the fraud committed, they are personally liable for attorneys fees. With regard to Eddie Sujak, such intent consistent with aiding and abetting a fraud can be inferred from the timing of the transfer to 4042 Corp., as he was an active participant in the personal injury action, and had at almost the same time participated in motion practice with respect to the addition of a party defendant. The claim for attorneys fees as against Eddie Sujak should be granted. With respect to Radoncic, however, such participation cannot be presumed, and evidence is wholly lacking with respect to his knowledge of, or participation in, the then-pending personal injury action. The Court therefore is constrained to grant Berisha judgment on his claim for attorneys fees as against Eddie Sujak, but to deny this claim as against Radoncic. The cross-motion by Radoncic for dismissal of this claim is granted to this limited extent.

The Remedy

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. Marine

Midland Bank v. Murkoff, 120 AD 2d 122, 133 [2nd Dept 1986]; Travelers Ins. Co. v. 633 Third Associates, 973 F 2d 82 [2nd Cir 1992].

The proper remedy in a fraudulent conveyance claim is to rescind, or set aside, the allegedly fraudulent transfer, and to cause the transferee to return the transferred property to the transferor. Geren v. Quantum Chem Corp., 832 F Supp 728 [SD NY 1993]. The purpose of such an action is to force the debtor to recover property transferred for inadequate consideration so that the property can be used to satisfy the debt owed to the creditor. The creditor's remedy is limited to reaching the property which would have been available to satisfy the judgment had there been no conveyance, and requiring that it be restored to the debtor's possession. *Id.* The petitioner has demonstrated beyond all doubt that the transfer from the defendants was fraudulent, and lacked consideration, or indeed, substantiation, and as such, the transfer from the defendants is vacated and set aside.

What remains is to determine whether the appointment of a receiver is required in order to execute on the judgment. The appointment of a receiver pursuant to CPLR 5228 (a)(2) is wholly a matter of the court's discretion. Drucker v. Drucker, 53 Misc 2d 446 [Sup Ct Queens Co, 1967]. Commentators have nevertheless cautioned that such appointments should only be granted when a special reason appears to justify one. Siegel Practice

Commentaries, McKinneys. Cons Laws of NY, Book 7B, CPLR C5228:1, at 324]. Court have therefore considered such factors as 1. Alternative remedies available to the creditor, 2. the degree to which receivership will increase the likelihood of satisfaction and the risk of fraud or insolvency if a receiver is not appointed. United States v. Zitron, 1990 WL 13278 [SD NY 1990]; Melluzzo v. Melluzzo, 62 AD 2d 1061 [2nd Dept 1978]. A receiver may be appointed e.g. where the debtor fails to explain his failure to satisfy the judgment and presents no acceptable evidence of the financial condition of the corporation at issue. Sealy v. Sealy 57 AD 2d 893 [2nd Dept 1977]. A receiver may also be appointed where an identifiable risk exists that the defendants will be unable to satisfy a judgment. Hotel 71 Mezz Lender LLC v. Falor, 14 NY3d 303 (2010).

Petitioner contends that a receivership is the sole reasonable method available for collecting on this debt because of the manner in which ownership of this family business has been managed, and that a receiver would be the best means for ensuring that the monies needed to satisfy the Judgment will be made accessible, and that no alternative remedy would be as satisfactory.

The sole objection of substance to receivership is that it would allegedly trigger a default under the terms of the lease by the ostensible tenant, 4042 Corp, but this pre-supposes a valid transfer to a bona fide third party. Instead, this would be an

alleged default by a tenant entity controlled by Eddie Sujak, with respect to a landlord entity also controlled by Eddie Sujak, following a fraudulent transfer to the tenant entity at the behest of Eddie Sujak. The Court finds that special circumstances amply justify the appointment of a receiver because only a receiver would successfully effectuate collection of this debt, or substantially increase the likelihood of such collection, and minimize the further risk of attenuating these proceedings through further fraudulent transfers of the business. There is no satisfactory alternative remedy. Finally, under these circumstances, the appointment of an independent receiver, not the petitioner, is warranted, and such appointment will be made in the order to be settled herein.

Conclusion

Berisha has made a prima facie showing that he is entitled as a matter of law to judgment on his petition to set aside the conveyance as fraudulent pursuant to DCL §276, and the respondents have failed to raise a triable issue of fact. The evidence is clear and convincing, and uncontradicted, that the conveyance of the Tosca Café to 4042 Corp was made with the intent to hinder, delay or defraud Berisha's ability to collect on his judgment. The timing of the transfer, and the totality of objective evidence, including the numerous badges of fraud which

attended the transfer, dictate that summary judgment be granted in favor of Berisha setting aside the transfer of the Tosca Café by judgment debtors Tosca Café Inc. and/or Tosca Coal to respondent 4042 Corp. Leave is granted to Berisha to attach or levy execution upon the property transferred. That portion of the petition seeking attorneys fees against the individual respondents is granted as against Hasim "Eddie" Sujak, but denied as against Adis Radoncic. The application for receiver is granted. Beyond this, all motions are denied.

Settle order.

DATE: 6/29/17

HOWARD H. SHERMAN J.S.C.