

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR
Justice

PART 33

Index Number : 102301/2012
SANCHEZ, FABIO
vs.
BENNET HOLDING LLC., ET AL.
SEQUENCE NUMBER : 001
TURNOVER PROCEEDING

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

*See memorandum decision ~~and~~
~~judgment~~ annexed hereto.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/27/12

_____, J.S.C.
ALEXANDER W. HUNTER JR

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**-----X
In the Matter of the Petition of,

Index No.: 102301/12

Fabio Sanchez,

Petitioner,

Decision

For a Judgment Pursuant to C.P.L.R. 5225
and/or C.P.L.R. 5227

-against-

Bennet Holdings LLC, Jeffrey Bennett, Rock Holdings, LLC, Refik Radoncic, Talbott Simons, KRO Investments LLC, Claudia Sherwood, James Nelson, Jan Willem Van Der Dorpel, Norzom Holdings LLC, Champa Namgyal, John Christ, Jasam LLC, Shimon Shkury, Jonathan Ingham, Juliet Hillman Simonds, Jonathan M. Wainwright, and International Logistics and Marketing Services LTD., each of whom is a Member and/or Manager of NW 124 LLC, a Judgment Debtor of Petitioner,

Respondents.

-----X
HON. ALEXANDER W. HUNTER, JR.

The application by petitioner an order pursuant to C.P.L.R. 5225(b) and 5227 setting aside transfers made by NW 124 LLC ("NW 124") to respondents to the extent necessary to satisfy petitioner's judgment is granted.

In 2006, petitioner commenced an action against judgment debtor NW 124 to recover for personal injuries he sustained while working at a construction site located at 267 West 124th Street, New York, New York. Petitioner asserted strict liability claims against NW 124. In December 2008, petitioner was granted partial summary judgment on the issue of liability. Thereafter, the action proceeded to trial in order to determine an award of damages. The jury awarded petitioner a verdict in the amount of \$300,000.000. Judgment was entered in the amount of \$329,537.53 on January 2, 2010. No payments have been paid to date and the judgment remains wholly unsatisfied. With the accrual of post-judgment interest, petitioner asserts that the amount due is now approximately \$400,000.00.

Petitioner asserts that while his case was pending, NW 124 was actively marketing and selling condominium units at the subject premises. All eleven condominium units were sold by

September 2009.

On January 9, 2012, respondent Jeffrey Bennett, appeared for a deposition. At his deposition, Bennett stated that he had been aware of petitioner's lawsuit since 2006. Bennett further testified that he had signatory power over the corporation's bank accounts and made distributions of profits to its members, including himself. Respondent Bennett also testified that all distributions and returns of capital to NW 124's members were made while petitioner's action was pending. NW 124 no longer has any assets to satisfy the judgment.

Petitioner argues that the conveyance of NW 124's profits from the sale of the condominium units and other funds to its members was violative of Debtor and Creditor Law §§ 276, 273, 273-a, 274, 275, and 277. Petitioner asserts that NW 124 received no consideration for the monies conveyed to respondents. Pursuant to Debtor and Creditor Law § 273-a, petitioner argues that since NW 124 failed to satisfy the judgment and transferred monies to its members, the transfers must be invalidated.

Respondents oppose petitioner's application in its entirety on the grounds that: 1) petitioner fails to state a cause of action upon which relief can be granted; 2) respondents have superior rights to the funds received by NW 124; 3) the transfers made to respondents were made in the regular course of business, without the intent to defraud creditors; 4) the transfers pre-date petitioner becoming a judgment creditor of NW 124; 5) the transfers were made with fair consideration; 6) the transfers were made when NW 124 was solvent; 7) the transfers are not conveyances within the meaning of Debtor and Creditor Law; 8) petitioner may not use a turnover proceeding to pierce the corporate veil and instead must bring a plenary action; 9) petitioner's application is barred by the applicable statute of limitations; and 10) respondents acted in their capacities as agents of NW 124 and therefore are not liable for the actions of the disclosed principal.

Respondents assert that as members of NW 124, they each contributed significant capital and/or loans for the purpose of converting the Building into condominium units. As funds were received by NW 124, respondents received their return of capital. Respondents further assert that at all times, NW 124 was adequately capitalized and all transfers to respondents were made in good faith in the regular course of business.

Respondents maintain that as members of a corporation, they are not liable for the debts of the corporation and petitioner cannot use a turnover proceeding in an attempt to pierce the corporate veil to hold NW 124's former members personally liable for the corporation's debts.

In reply, petitioner asserts that respondents' opposition papers do not raise an issue of material fact and does not address his claims under Debtor and Creditor Law § 273-a. Petitioner avers that respondent Bennett's affidavit claiming that there was fair consideration for the transfer of monies to respondents is entirely without merit and lacks any documentary evidence to support any of respondents' affirmative defenses.

Debtor and Creditor Law § 273-a 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."

In order to establish a claim under Debtor and Creditor Law § 273-a, petitioner must establish that: 1) at the time of the transfer, the transferor was a defendant in an action for money damages; 2) the judgment remains unsatisfied; and 3) the transfer was made without fair consideration. Such conveyances are deemed fraudulent without regard to the transferor's actual intent or solvency. See, Farm Stores, Inc., v. School Feeding Corp., 102 A.D.2d 249 (2nd Dept. 1984), aff'd 64 N.Y.2d 1065 (1985); Blakeslee v. Rabinor, 182 A.D.2d 390 (1st Dept. 1992).

It is undisputed that NW 124 was a defendant in an action for money damages when the transfers were made to its members and/or managers. Respondents have failed to provide any proof to establish that the transfers they received were made in fair consideration of an antecedent debt. Respondents have also failed provide petitioner or this court with any documentation indicating the amount each respondent received from NW 124. As such, there is no way for this court to cap the liability for each respondent. Therefore, this court finds respondents jointly and severally liable for the entire judgment amount with interest from the date the judgment was entered.

This court finds respondents' remaining arguments without merit.

Accordingly, it is hereby

ADJUDGED that the petition is granted, with costs and disbursements to petitioner.

Settle order and judgment on notice.

Dated: August 27, 2012

ENTER:



J.S.C.

ALEXANDER W. HUNTER JR