

Slip Copy, 2012 WL 3764525 (N.Y.Sup.), 2012 N.Y. Slip Op. 51677(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2012 WL 3764525 (N.Y.Sup.))

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.

In the Matter of the Petition of GARD ENTERTAINMENT, INC., Petitioner, for a Judgment pursuant to CPLR 5225, CPLR 5227, and/or CPLR 5239,
 v.

Adam R. BLOCK and Jeanne M. Block a/k/a Jeanne M. Cervantes Block, Trustees of “The Block Family Trust,” and JPMorgan Chase Bank, N.A., as Successor-in-Interest to Washington Mutual Bank, F.A.,
 Respondents.

No. 102399/2012.
 Aug. 21, 2012.

Bernard D'Orazio & Associates, P.C. ([Bernard D'Orazio](#), of counsel), for Petitioner.

Porzio, Bromberg & Newman, P.C. ([Allan I. Young](#), of counsel), for Respondent Adam R. Block.

[O. PETER SHERWOOD](#), J.

I. OVERVIEW

*1 In this special proceeding to enforce a judgment, petitioner, Gard Entertainment, Inc. (“Gard”) seeks an order (1) pursuant to [CPLR §§ 5225\(b\)](#), [5227](#) and/or [5239](#), determining that the transfer of respondent Adam Block's interest in a certain Manhattan condominium to “The Block Family Trust” (“Trust”) is invalid and subject to levy by the Sheriff to satisfy a judgment; (2) pursuant to [New York Debtor and Creditor Law § 278](#), setting aside such transfer of Adam Block's interest in the Manhattan condominium to the Trust or permitting petitioner to attach or levy upon the property transferred; and (3) pursuant to [New York Debtor and Creditor Law § 276-a](#), awarding attorneys' fees.

Respondents, Adam and Jeanne Block (“the Blocks”), oppose the application claiming that considered together with the other enforcement proceedings in which petitioner has engaged, this application constitutes a form of harassment as the property at issue has little equity. The Blocks also contend that the transfer was not fraudulent within the meaning of the Debtor and Creditor Law.

II. BACKGROUND

In a Decision and Order dated, May 2, 2011 this court granted petitioner's motion for summary judgment against Adam Block. Judgment was entered, an appeal was taken and the judgment was affirmed (*see [Gard Entertainment, Inc., v. Block](#), 96 AD3d 683* [1st Dept 2012]). Additional background facts are set forth in the May 2, 2011 Decision and Order and will not be recounted here except as necessary to an understanding of this motion.

On December 1, 2004, the Blocks purchased Apartment 4C, in the Vesta Condominium, located at 201 W. 17th Street in Manhattan (the “Condo”) for \$1,350,000.00. The Condo is a two-bedroom/two-bathroom, 1,150 square foot apartment. At the time of the purchase, the Blocks borrowed \$1 million from Washington Mutual Bank, F.A. (now known as “Chase Bank”) and granted a first priority lien on the property. It appears that the Condo is not the principal residence of the Blocks but instead is used primarily by Adam Block when he is in New York on business.

On July 12, 2010, the Blocks conveyed their interests in the Condo to “The Block Family Trust” without consideration. The Trust was created by Adam and Jeanne in 2003 and contains all monies and other personal property Adam and Jeanne had or thereafter would acquire, as well as their interest in a home they owned at 43 Legend Road, San Anselmo, California. Adam and Jeanne are the only trustees and trust beneficiaries. The Blocks are also permitted to use, possess, or control all real and personal property placed in the Trust. Petitioner contends that this transfer occurred shortly after Gard demanded repayment of a \$300,000.00 loan to Country in New York, LLC (“Country”), which Adam Block personally guaranteed.

On August 29, 2011, a judgment in the total sum of \$391,578.92 was entered in petitioner's favor against Adam Block, no part of which has been paid.

*2 On or about April 9, 2012, Gard commenced this proceeding to set aside transfer of the Condo to the Trust as invalid. The petition alleges six causes of action, as follows: pursuant to [CPLR 5225](#), [5227](#) and [5239](#), declare invalid the transfer of Adam Block's interest in the Condo to the Trust and that the Sheriff

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may levy on Adam's interest and apply the proceeds of any sale to satisfaction of Judgment (First Cause of Action); pursuant to [New York Debtor and Creditor Law § 276](#), declare that transfer of Adam Block's interest in the Condo to the Trust was made with actual intent to defraud creditors (Second Cause of Action); pursuant to [Debtor and Creditor Law § 276](#), declare that the subject transfer of the Condo was by a person who is or will be rendered insolvent thereby (Third Cause of Action); pursuant to [Debtor and Creditor Law § 274](#), declare that the subject transfer was by a person who is engaged in or about to engage in business (Fourth Cause of Action); pursuant to [Debtor and Creditor Law § 275](#), declare that the transfer was by a person about to incur debts beyond his ability to pay (Fifth Cause of Action); and pursuant to [Debtor and Creditor Law § 276-a](#), for an award of attorneys' fees incurred in this special proceeding.

Adam Block has not answered the petition. Instead he has submitted a personal affidavit and a Memorandum of Law. He argues that the petition should be denied as the transfer was not fraudulent. Specifically, Block contends that the transfer was not a simple transfer from a judgment debtor to a trust. Rather, it was a conveyance by tenants by the entirety to a trust which is exempt under the trust exemption of [CPLR 5205\(c\)](#) and can only be set aside if the transfer is made in violation of the Debtor and Creditor Law.

Block also maintains that the transfer was not made with intent to defraud under [Debtor and Creditor Law § 276](#). The Trust was created in 2003, upon advice of counsel, as an estate planning device years before the loan was made to Country, and guaranteed by Block. The Condo was purchased in 2004 by Block and his wife as tenants by the entirety. The Blocks claim that their attorney advised them to wait before transferring the Condo to the Trust because they had borrowed substantially all of the money for the purchase. Thereafter, a quitclaim deed was executed transferring their marital interest in the Condo as tenants by the entirety to the Trust. The Blocks contend that the fact such transfer occurred in close proximity to petitioner's effort to collect the debt was merely coincidental, and not with intent to defraud, as they had been planning all along to transfer their interests in the Condo to the Trust as a proper means of estate planning.

With respect to the other causes of action predi-

cated on the Debtor and Creditor Law, Adam Block contends that he was not insolvent or rendered insolvent by the transfer of the Condo; he was not left with unreasonably small capital as a result of the transfer; he did not intend to incur debts beyond his ability to pay, including the \$300,000 loan underlying the judgment at issue; and because he did not have an actual intent to hinder, delay, or defraud petitioner, petitioner is not entitled to an award of attorneys' fees. He provides no evidence to corroborate these assertions.

III. DISCUSSION

*3 [CPLR § 5205\(c\)\(1\)](#) provides that: "all property while held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor, is exempt from application to the satisfaction of a money judgment." Trusts self-created by a judgment debtor may be invaded by a judgment-creditor in order to satisfy a judgment and are void as against present and future creditors without regard to any intention of the judgment debtor and creator of the trust to defraud creditors (*see In re Kleinman*, 172 BR 764, 772-773 [U.S. Bankruptcy Ct., SDNY, 1994]).

Gard argues that the Condo placed in the Trust is non-exempt property and that the Trust must be considered void as against the judgment creditor and reachable to the extent of Adam Block's interest therein to satisfy the judgment. Adam Block responds that the Condo was transferred by him and his wife to the Trust and since it was a conveyance made not just by the judgment debtor, but by tenants by the entirety, the property is exempt under the trust exemption in [CPLR 5205\(c\)](#) and may not be reached by the judgment creditor to satisfy the judgment. The Blocks contend that as tenants by the entirety neither Adam nor Jeanne held partial or separate interests in the Condo, but rather each held an interest subject to the parallel right of the other. As such, the judgment creditor cannot reach Adam's interest in the property unless and until Jeanne dies before Adam.

Under [CPLR 5205\(c\)\(5\)](#), a trust conveyance may be set aside if the transfer was made in violation of the Debtor and Creditor Law. Insofar as relevant to this case, [CPLR 5205\(c\)\(5\)](#) states that trusts "shall not be exempt from application to the satisfaction of a money judgment if ... (ii) deemed to be **fraudulent convey-**

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ances under article ten of the debtor and creditor law.” The Blocks maintain that the transfer of the Condo to the Trust was not a fraudulent transfer within the meaning of the various provisions of the Debtor and Creditor Law upon which the petition is predicated.

A judgment debtor's tenancy by the entirety is not exempt for enforcement purposes. “The interests of a tenant by the entirety are a right to the use of an undivided half of the property during the joint lives of a husband and wife and a survivorship right to the entire fee” (*In re Persky*, 893 F.2d 15, 19 [2d Cir.1989]). Accordingly, an interest of a tenant by the entirety is not exempt from sale and enforcement by execution (*see id.*). In a bankruptcy proceeding, the Second Circuit has held that under the bankruptcy law a non-debtor, co-owner spouse's entire interest (both present possessory and survivorship interests) in the marital residence may be subjected to an order of sale under certain circumstances. However, in this case, Gard is seeking only to set aside the transfer as to Adam Block's interest in the Condo and having it sold to satisfy the judgment, not to reach Jeanne's interest therein (*see Sweeney, Cohn, Stahl & Vaccaro v. Kane*, 6 AD3d 72, 77 [2d Dept 2004], *lv to appeal dismissed* 3 NY3d 751 [2004] [“[P]laintiffs' judgments could have become liens against [the debtor-spouse's] interest in the home and been sold under an execution]).

*4 On this basis, Adam Block's transfer of his interest in the Condo may be set aside and made subject to sale in satisfaction of the judgment. As noted above, the Condo is not the marital residence, but rather provides a place for Adam Block to stay while attending to his various business interests when in New York. He may not shield this property from the judgment creditor lest a husband or wife gain the advantage of protecting property which is otherwise vulnerable to execution, by simply erecting a tenancy by the entirety in all their real property.

Regarding the second and third causes of action, [Debtor and Creditor Law § 276](#) provides that “[e]very conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” Thus, this section governs conveyances based upon actual fraud requiring a showing of actual intent or, because of the difficulty of proving actual intent, a demonstration of the “badges of fraud”

which give rise to an inference of intent (*see Atsco Ltd. v. Swanson*, 29 AD3d 465, 465–466 [1st Dept 2006]; *Wall St. Assocs. v. Brodsky*, 257 A.D.2d 526 [1st Dept 1999]). Among the circumstances constituting “badges of fraud” are: “a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; the transferor's knowledge of the creditor's claim and the inability to pay it; and retention of control of the property by the transferor after the conveyance” (*Wall St. Assocs.*, 257 A.D.2d at 529) and timing of the transfer (*see CIT Group/Commercial Servs., Inc. v. 160–09 Jamaica Ave. L.P.*, 25 AD3d 301, 303 [1st Dept 2006]).

In arguing that there is evidence of “badges of fraud” sufficient to set aside the transfer of the Condo as fraudulent, petitioner notes that the transfer took place on July 10, 2010, after Country, Adam Block's company, had defaulted on the \$300,000 loan and after a demand letter dated June 2, 2012 had been sent to Country, attention Adam Block (D'Orazio Affirm. ¶ 40, Ex. “D”).

Both at his deposition and in his opposing affidavit, Adam Block contended that he and his wife had intended from the time of their purchase of the Condo in 2004 to transfer it to the Trust, but were advised by their attorney that they could not immediately transfer the Condo to the Trust as he and his wife were borrowing monies from a bank to finance the purchase and further advised that they should wait a year before completing such transfer. The transfer was not accomplished until six years later. In an effort to explain the delay, Adam Block states that he had no money and that it took him time to acquire funds to pay sufficient lawyer's fee for drawing up the deed of transfer. Adam further attested that the timing of the transfer in relation to the default on the Note was merely a coincidence.

*5 Although Adam Block's explanation as to the timing of the transfer is not plausible, “[t]he burden of proving actual intent is on the party seeking to set aside the conveyance ... Such intent must be demonstrated by clear and convincing evidence” (*In re Jacobs*, 394 BR 646, 658 [U.S. Bankruptcy Ct., EDNY, 2008]). An actual intent to defraud need not be provided by direct evidence but may be inferred from circumstances surrounding an allegedly fraudulent transfer (*see Capital Distributions Services, Ltd. v.*

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Ducor Express Airlines, Inc., 440 F Supp 195 [SDNY 2006]). The record here shows several badges of fraud that support the conclusion that transfer of the Condo was made with intent to hinder, delay, or defraud Adam Block's creditors. These include lack of consideration, retention of control over the Condo, and the timing of the transfer of the Condo to the Trust which coincides with the default on the Note and petitioner's Demand Letter. This constitutes substantial indicia of actual intent to hinder, delay or defraud Adam Block's creditors and is sufficient to meet the clear and convincing standard given a lack of any proof to corroborate the judgment debtor's self-serving statements that the transfer was made for estate planning purposes based on legal advice given six years earlier, that the Condo which was mortgaged eight years earlier has little value and that the timing of the transfer was a mere coincidence. These contentions are simply insufficient to raise triable issues of material fact requiring an evidentiary hearing (*see Citibank, N.A. v. Plagakis*, 8 AD3d 604, 605 [2d Dept 2004]). For these reasons the motion shall be granted as to the second and third Causes of Action.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED AND ADJUDGED that judgment shall be granted in favor of petitioner declaring the transfer of Apartment 4C in the Vesta Condominium located at 201 West 17th Street, New York, New York by Adam Block to respondent, the Block Family Trust to be invalid under [CPLR 5205\(c\)\(5\)](#); and it is further

ADJUDGED that the transfer of the aforementioned Condo to the Trust is declared invalid under [Debtor and Creditor Law § 276](#) in that the transfer was made with intent to hinder, delay and defraud creditors and that Adam Block's interest in such property is subject to levy toward satisfaction of a judgment in plaintiff's favor.

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