[* FILED: NEW YORK COUNTY CLERK 07/30/2013] INDEX NO. 150344/2013
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 150344/2013
NORTHWEST 5TH & 45TH REALTY
vs
MITCHELL, MAXWELL & JACKSON,
Sequence Number : 001
TUENOVER 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 decided in accordance with the annexed memorandum opinion.

Settle order.

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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

Dated: 7/25/13

______, J.S.C.
HON. ANIL C. SINGH
SUPREME COURT JUSTICE

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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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IN THE MATTER OF THE APPLICATION OF
NORTHWEST 5TH & 45TH REALTY CORP.,

Petitioner,

For a judgment pursuant to Section 5225 (b) of the
Civil Practice Law and Rules,

Index No.: 150344/13

- against -

MITCHELL, MAXWELL & JACKSON, INC.,
STEVEN KNOBEL, JEFFREY JACKSON a/k/a
JEFFREY SATKIEWICZ a/k/a JEREMY
SATKIEWICZ, COOPERATIVE DATA CORP.,
MITCHELL, MAXWELL & JACKSON (NY), INC.,
BOLD DATA SERVICES, INC., TRI-STATE REALTY
PARTNERS, LLC, MMJ APPRAISAL MANAGEMENT, INC.,
MMJ COMMERCIAL, INC., NATIONAL APPRAISAL
MANAGEMENT, LTD., and PETER KNOBEL,

Respondents.

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HON. ANIL C. SINGH, J.:

Northwest 5th & 45th Realty Corp. (Petitioner) is the judgment creditor of its former tenant, judgment debtor Mitchell, Maxwell & Johnson, Inc. (Debtor). This special proceeding, under CPLR 5225 (b), seeks: 1) a declaratory judgment, pursuant to Debtor and Creditor Law (DCL) § 273, that the transfers made by Debtor to shareholders and to related entities owned by the shareholders were fraudulent; 2) an order directing the turn-over of monies equal to the outstanding judgments; and 3) a declaratory judgment piercing the corporate veil and holding the shareholders and their related entities jointly and severally liable for the judgments.

Respondents, who are represented by the same attorneys, cross-move to dismiss the

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petition and, in the alternative, for leave for Debtor to intervene. Respondents are Debtor, Steven Knobel (Knobel) and Jeffrey Jackson (Jackson), shareholders in Debtor, Peter Knobel, the brother of Steven Knobel, and entities affiliated with Debtor. They are Cooperative Data Corp. (CDC), Mitchell, Maxwell & Jackson (NY), Inc. (MMJNY), Bold Data Services, Inc. (BDS), Tri-State Realty Partners, LLC (Tri-State), MMJ Appraisal Management, Inc. (MMJAM), MMJ Commercial, Inc. (MMJC), and National Appraisal Management, Ltd. (NAM).

Debtor leased the ninth floor in premises belonging to Petitioner. In December 2009, Petitioner brought a nonpayment proceeding against Debtor in Housing Court and, on April 5, 2010, obtained a judgment for an award of rent through March 2010. Debtor paid this judgment. Debtor moved to another building before the lease term ended. In June 2011, Petitioner brought a plenary action seeking outstanding rent under the lease, alleging that Debtor owed monthly rent of $30,213 from June 2010 through April 2011, and monthly rent of $31,846.75 from May 2011 through November 2011. Petitioner was awarded summary judgment for rent in the amount of $450,823.74 ($405,292.89 in rent and $45,530.86 in statutory interest), entered April 6, 2012 and filed in the County Clerk's office on April 26, 2012, and a judgment for attorney fees in the amount of $38,500, entered October 26, 2012 and filed in the County Clerk's office on December 12, 2012. Petitioner seeks payment on the judgments, by setting aside allegedly fraudulent conveyances in excess of $2.14 million from Debtor to respondents, which rendered Debtor insolvent.

**Petitioner's Allegations**

Petitioner alleges that Debtor has been insolvent since June 2010, as it has never had a combined balance in its bank accounts at the close of any month which equaled one month's rent.

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Petitioner alleges that Debtor's bank statements show the following fraudulent conveyances. From June 2010 through April 2012, Debtor transferred: 1) $691,960 to Knobel; 2) $150,116.82 to Jackson; 3) $629,664.80 to CDC; 4) $547,825 to MMJNY; 5) $72,776.91 to Peter Knobel; 6) $44,150 to BDS; 7) $39,700 to Tri-State; 8) $27,850 to MMJAM; and 9) $13,600 to MMJC.

Petitioner states that the shareholders looted Debtor's assets and kept it perpetually undercapitalized, commingled Debtor's and the related entities and shareholders' funds, and dominated Debtor and the related entities to the extent that the companies do not have separate identities. It is alleged that Knobel used Debtor's American Express cards for personal expenses, paid personal bills from Debtor's bank accounts, and used Debtor's funds to pay a personal debt to his brother. It is alleged that Knobel withdrew over $400,000 from the Debtor's bank accounts in the form of cash ATM withdrawals since June 2010, and used the money to pay personal expenses, including travel, restaurant, auto, clothing, jewelry, and utilities.

**Respondents' Opposition - Knobel's Affidavit**

Knobel's affidavit alleges the following. He is the president of Debtor and president or member of the other entities. Knobel and Jackson have always been the sole shareholders or members in these companies, except for MMJC, of which one-third was owned by another party. Debtor, founded in 1991, conducts residential real estate appraisals on behalf of brokers. The respondent entities work with Debtor and each other to service clients in all aspects of the commercial and residential appraisal business. CDC is the employment arm and administration services provider to the other respondents and pays the salaries of their employees. NAM was created in 1997 to do appraisals on a national level. BDS was created in 1997 for the purposes of gathering data and selling it to companies, including the other respondents. MMJC was

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incorporated in 1998 to provide valuation services to attorneys and estates. Tri-State is a real estate investment firm founded in 1997 in which Knobel had a 22% interest. Tri-State invested primarily in Connecticut; of late it is closed and has no assets.

MMJAM conducts commercial appraisals for banks. MMJAM and MMJNY were created in 2010 in reaction to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Bill), enacted in 2010, 12 USC § 5301, *et seq.* The bill had serious consequences for the appraisal business; for example, there could no longer be in-house appraisers. MMJNY and MMJAM were created to meet the new requirements. It is alleged that each respondent services different customers in different aspects of the appraisal field, and each acts separately and independently of the others.

Knobel alleges that the appraisal fees earned by respondents have always been paid to Debtor, who then distributes the fees. For instance, MMJAM would perform appraisal services for banks, and Debtor would perform such services for brokers. "Upon receipt of the fees therefor, the proportionate share owed to each of the other entities would be determined and allocated by [Debtor] to said entities for the services they rendered" (Knobel affidavit at 7). The fees owed to the various respondents never belonged to Debtor, who had no right, title, or interest in those funds. Debtor "was merely a conduit for a pass-a-long of funds which rightfully belonged solely and wholly to the other entities" from the beginning (*id.* at 8). During his deposition, Knobel testified that, since the Dodd-Frank Bill passed, Debtor has not conducted any business, except to act as collector.

Knobel emphasizes that each respondent company maintained its own bank account, books, records, staff, and clients, separate from the others, and its own supplies. Respondents did

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not commingle funds. As an example of their separateness, respondents submit an assignment of lease from NAM to BDS, license agreements between BDS and various respondents, and agreements between CDC and other respondents.

Knobel says that Debtor's transfers to him were reimbursement for funds that he advanced to Debtor. Since short-term loans are hard to get from banks, Knobel has been lending money to Debtor and other respondents since the inception of the business. Debtor also paid Knobel and Jackson for performing appraisal services, just as payments were made to other employees.

Knobel states further that Peter Knobel, his brother, is not connected to any of the respondents or Debtor and has never been a director, shareholder or employee of any of them. On April 12, 2010, Peter Knobel loaned $99,000 to Knobel via a promissory note. On the same day, Knobel took $70,000 from his personal IRA to loan to Debtor. The money was used to pay Petitioner's judgment in the Housing Court action in the amount of $162,447.08. Debtor repaid both loans.

Knobel states that Debtor was never insolvent. As of June 30, 2010, due and owing to Debtor was $733,502 in accounts receivable as shown on its books. The cost basis of Debtor's fixed assets is $896,325, and Petitioner holds $114,321.67 of Debtor's money as a security deposit.

**Respondents' Opposition - Etzin's Affidavit**

Jeffrey Etzin submits an affidavit stating that he is a CPA who has been engaged by the individual respondents for their businesses for over 15 years. He alleges that, as Debtor grew, it began subcontracting some of its work to outside appraisers, some of which also provide services

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to respondent companies. Debtor became the conduit for collecting sales revenue for itself and the outside appraisers and also for the respondents. Etzin states that it was good business sense to have the billing and collection system in one company, Debtor.

New rules in the Dodd-Frank Bill prevented real estate agents and mortgage brokers from selecting and paying appraisal firms, such as Debtor, directly. MMJAM and MMJNY can do what Debtor can do no longer. The new companies are independent and not defacto successors to Debtor.

Etzin says that money is constantly traveling back and forth to support the needs of the respondent companies to pay bills, taxes, subcontractors, and other expenses. Debtor transfers money to respondent companies, and they transfer money to Debtor. At the end of the year, the proper sum is allocated to each respondent. Etzin says that Debtor's bank statements do not contain four of the transfers listed by petitioner, totaling $535,000. Other transfers were reasonable and made in the ordinary course of business and for fair consideration.

Etzin states that Knobel's practices of lending money to respondents and paying personal bills from business funds are common among small business owners. It is hard for small businesses to obtain short-term financing from lenders. When the business has cash, the owner repays himself. Debtor repaid Knobel for his loans to Debtor and other respondents.

Regarding the charges on Debtor's American Express account, Etzin alleges that the shareholders, like other business owners, pay personal transactions with business funds. At the end of the year, they return the funds to the business. He says that the shareholders were charged personally for personal charges, and that they were reimbursed for business expenses. Also, when the shareholders draw money from Debtor's ATM account for business expenses, they put

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much of it back into respondents.

**Petitioner's response to respondents' opposition**

Petitioner states that respondents did not deny commingling funds among the related entities and Debtor, and using Debtor's money for personal uses. Concerning the security deposit, petitioner alleges that Debtor cannot claim it. The court gave Debtor an offset equal to the security deposit on the judgment sought to be collected in this proceeding. Concerning Debtor's assets, Petitioner argues that they are worthless and that respondents are estopped from claiming otherwise.

**Discussion**

CPLR 5225 (b) applies to money or personal property of the judgment debtor in the hands of a person other than the judgment debtor. The statute permits the judgment creditor to obtain delivery or payment when the judgment debtor has an interest in the property or money or when the judgment creditor's rights are superior to those of the judgment debtor's transferee.

DCL § 273 provides that: "[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."

"A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured" (DCL § 271 [1]).

> "Fair consideration is given for property, or obligation,
> "a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

> "b. When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained."

(DCL § 272).

The party claiming that conveyance is fraudulent under DCL § 273 has the burden of proving insolvency and lack of fair consideration (*United States v Hansel,* 999 F Supp 694, 699 [ND NY 1998]). Insolvency is presumed if fair consideration is lacking; in such case, the burden shifts to the transferee or transferor to prove the legitimacy of the conveyance (*First Keystone Consultants, Inc. v Schlesinger Elec. Contrs.*, 871 F Supp 2d 103, 120 [ED NY 2012]; *United States v Alfano,* 34 F Supp 2d 827, 845 [ED NY 1999]). The transferee must show that the debtor was not insolvent at the time it made the transfer or was not thereby rendered insolvent (*First Keystone*, 871 F Supp 2d at 120; *RTC Mtge. Trust 1995-S/N1 v Sopher,* 171 F Supp 2d 192, 199 [SD NY 2001]).

A transaction will be deemed to lack fair consideration if it was not made in good faith (*American Panel Tec v Hyrise, Inc.*, 31 AD3d 586, 587 [2d Dept 2006]; *Matter of Mega Personal Lines, Inc. v Halton*, 9 AD3d 553, 555 [3d Dept 2004] [transfer of assets to an entity controlled by an insider establishes lack of good faith as a matter of law]). This is so even if the transaction involved the exchange of fair equivalents (*Sharp Intl. Corp. v State St. Bank & Trust Co.*, 302 BR 760, 779 [Bankr ED NY 2003], *affd* 403 F3d 43 [2d Cir 2005]). Transfers to a controlling shareholder, officer, or director of an insolvent corporation are deemed to be lacking in good faith and are presumptively fraudulent (*Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership,* 25AD3d 301, 303 [1st Dept 2006]). Payments of antecedent debts to corporate insiders lack good faith and are not transfers for fair consideration as a matter of law

(*Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 378 [1st Dept 2008]; *American Panel,* 31 AD3d at 587; *Farm Stores v School Feeding Corp.*, 102 AD2d 249, 254 [2d Dept 1984], *affd in part, dismissed in part* 64 NY2d 1065 [1985]). Transfers between family members without tangible consideration are also presumptively fraudulent (*Alfano*, 34 F Supp 2d at 845).

Good faith is required of both the transferor and the transferee (*Julien J. Studley, Inc. v Lefrak*, 66 AD2d 208, 213 [2d Dept], *affd* 48 NY2d 954 [1979]). Indications of lack of good faith include the close relationship between the debtor and grantees's principals, the lack of consideration, representation by the same attorney, a series of transfers by the debtor after incurring its obligation to the creditor, and the debtor becoming an empty shell (*see Cadle Co. v Organes Enters., Inc.*, 29 AD3d 927, 928 [2d Dept 2006]). Another sign is the debtor's business continuing through other close entities, while its assets have been put out of reach of the creditor (*see Lending Textile v All Purpose Accessories*, 174 Misc 2d 318, 320 [App Term, 1st Dept 1997]). All of these elements are present in this case. Debtor's assets are transferred to its affiliates in the same business controlled by the same owners. Although Debtor is allegedly no longer actively in business due to changes in the law, it receives and pays out significant sums. It pays the shareholders' salaries and Knobel's loans directly, not through another respondent. Assuming that respondents are correct about the impact of the Dodd-Frank Bill, the explanation is not a sufficient explanation for failing to pay Debtor's creditor.

Respondents argue that Debtor did not own the money that it transferred, that it was a conduit. A creditor only has access to property in which its debtor has an interest (*see Matter of MDJ 20th St. LLC v Picheny,* 40 AD3d 507, 508 [1st Dept 2007]). "Conduit" is a term from federal bankruptcy law. Transfers that are allegedly preferential may not be recovered from a

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"mere conduit" because a conduit has no dominion or control over the transferred property; conduits can do no more than to transmit the property received to another party (*In re Robert Plan of New York Corp.*, 456 BR 150, 159 [Bankr ED NY 2011]). In the same vein, transfers that are allegedly fraudulent may not be recovered where the transferor had no interest in the check that passed through its hands (*In re A.W. Lawrence & Co., Inc.*, 346 BR 51, 56 [Bankr ND NY 2006]). In this case, it is not shown that Debtor exercised no control over the money except for paying it to the other entities. Nor is it shown that Debtor had no control over funds after it transferred the funds to the other entities.

Respondents submit agreements for the years 2005 through 2011 between CDC and Debtor, and CDC and MMJC, and an agreement for 2011 between CDC and MMJAM. The agreements are the same. In them, CDC agrees to provide centralized payroll, administrative, and certain overhead expenses on behalf of the other party for a given year. The agreements state that, during the course of the year, numerous transfers back and forth will occur in the form of receipts and disbursements between the companies as a result of cash flow needs to fund ongoing operations. Each agreement provides an annual sum that CDC will pay or that will be paid to CDC. For example, in 2011, Debtor was to pay CDC $720,000, and MMJAM was to pay CDC $234,000. At the end of the year, transfers in excess of said sum will be posted to the corresponding company's inter-company exchange account.

According to the petition, from June 2010 through November 2011, Debtor paid CDC less than the amount in the agreement. Since the figures don't appear to jibe, it is not clear if the parties adhere to the agreements. In addition, if Debtor acted as collector and distributor of payments due to the other respondents, it is not clear where MMJAM obtained the funds that it

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paid to CDC. The agreements do not establish respondents' claim that Debtor was a conduit without control over the money that it transferred, or that Debtor's transfers to the other companies was authorized by the agreements.

**Fair consideration -** Debtor's repayments of Knobel's loans to Debtor and other respondents were not made in good faith in light of Knobel's position as officer and controlling shareholder. Debtor's repayments of loans to Knobel were fraudulent transfers, including the payment made to repay Knobel for the loan to pay Petitioner's Housing Court judgment. Additionally, to the extent that the repayments were for antecedent debts, they were fraudulent conveyances as a matter of law.

Peter Knobel loaned money to Knobel, not to Debtor. The loan was used to pay Petitioner's judgment for rent against Debtor. Debtor repaid Peter Knobel. Although this was an intra-family transfer, it was not a fraudulent conveyance. Peter Knobel gave Debtor fair consideration in exchange for the payment from Debtor. Peter Knobel's loan was made to his brother, but it benefitted Debtor. Fair consideration consists of benefit to the debtor which may be direct or indirect (*Matter of American Inv. Bank, N.A. v Marine Midland Bank,* 191 AD2d 690, 692 [2d Dept 1993]).

Some of the payments to Knobel and apparently all of the payments to Jackson are allegedly salary payments. While transfers from the debtor to insiders to repay loans made by the insiders are deemed to be fraudulent conveyances, transfers for salaries in return for work are not (*see In re Le Café Creme, Ltd.*, 244 BR 221, 241, 243 [Bankr SD NY 2000]). An economically distressed corporation's continued payment of an officer's salary while it remains actively engaged in business is not a fraudulent conveyance where there is no evidence that the salary is either excessive or unreasonable or that the corporation did not receive full value in return (*Cilco Cement Corp. v White*, 55 AD2d 668, 668-669 [2d Dept 1976]). "The compensation paid to a corporate officer must be in proportion to his ability, services and time devoted, corporate earnings and other relevant facts and circumstances" (*id.* [citation and quotation marks omitted]; *see also In re TC Liquidations, LLC,* 463 BR 257, 268-269 [Bankr ED NY 2011]).

Respondents submit invoices showing the amounts that the shareholders billed Debtor for appraisal services. Etzin alleges that Debtor paid Knobel $183,100 for services rendered for the period June 2010 to December 2011. This is more than Knobel billed. Apart from Etzin's conclusory statement that the shareholders' salaries are on the low end for such services, there is no evidence that these billings are reasonable.

It may be that spending Debtor's money for business expenses was appropriate; however, respondents do not produce evidence of that or differentiate between business and personal expenses. Respondents do not overcome the presumption that transfers to insiders lack fair consideration. Therefore, the expenses, not the salary, will be deemed to have lacked fair consideration. There is a question of fact regarding whether the shareholders' salaries were appropriate. All the expenses were Knobel's; it does not seem that any are imputed to Jackson.

Respondents' claim that some of Debtor's transfers were for respondents' business expenses, overhead, and employee salaries might be acceptable, if it were proven, which it is not. Whether those payments were for fair consideration is an issue of fact.

**Alter ego theory** - Petitioner seeks to pierce the corporate veil of Debtor in order to impose liability against Knobel and Jackson under an alter ego theory. Respondents argue that section 38 of the lease, a "good guy" guaranty, forbids this. Knobel and Jackson are the guarantors. Such

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guaranties generally bind guarantors to obligations that accrue before the premises are surrendered (*Russo v Heller*, 80 AD3d 531, 532 [1st Dept 2011]). In this case, the landlord alleges that the guarantors prevented the tenant from paying the judgments by dominating it. Although the landlord seeks payment on judgments based on rent that accrued after the tenant left the premises, Knobel and Jackson's liability is based on their status as corporate owners, not guarantors. The lease does not prevent Petitioner from placing Debtor's liabilities on its owners.

Courts will pierce the corporate veil only when necessary to prevent fraud or achieve equity (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]). A party seeking go beyond the corporate entity and place the corporation's liabilities on the owners must show that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*id.* at 141). Petitioner alleges that the shareholders stripped Debtor of its assets in order to avoid paying the judgments and continued to operate the business through other corporate entities that they also dominate (*see Holme v Global Mins. & Metals Corp.*, 63 AD3d 417, 417-418 [1st Dept 2009]; *Godwin Realty Assoc. v CATV Enters.*, 275 AD2d 269, 270 [1st Dept 2000]). In addition, the petition alleges commingling of funds, inadequate capitalization, and personal use of corporate funds (*see D'Mel & Assoc. v Athco, Inc.*, 105 AD3d 451, 452 [1st Dept 2013]). These allegations of continuity, domination, and failure to respect corporate boundaries sufficiently support the claim to impose liability on shareholders and the entity respondents. No material issues of fact are raised in regard to shareholder Knobel. On the other hand, respondents allege that the companies are separate and were created in response to changes in the law governing their industry. Therefore,

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this is an issue of fact in regard to the entity respondents and Jackson.

**Insolvency** - A debtor is insolvent when its debts exceed its salable assets at the time that the challenged transfers took place (*Farm Stores, Inc.*, 102 AD2d at 253, *see also In re Trinsum Group, Inc.*, 460 BR 379, 391-392 [Bankr SD NY 2011]). Petitioner refers to Debtor's bank statements to show that Debtor has not had as much as one month's rent in its accounts by the end of any month from June 2010, when the transfers began. While bank records showing that a creditor's claim exceeds a debtor's assets can show insolvency (*Matter of CIT*, 25 AD3d at 303), that by itself is not enough. However, the bank records together with the evidence submitted by respondents – that is, the tax returns and the "Depreciation Detail Listing" – show insolvency. The depreciation listing, of computer and other office equipment, shows that Debtor's assets have a total cost of $896,325 and a claimed depreciation of $895,388. This indicates that the assets have virtually no salable value, as the accumulated depreciation is almost equal to the cost.

Debtor does not show that its accounts receivable, totaling $733,502, have any value. During his deposition, Knobel testified that Debtor is not able to collect the accounts receivable, that Debtor had tried and failed. In excess of $220,000 of the accounts are listed as being owed by "Other" or "Private" or another unidentified party. Knobel testified that the Debtor has no way of determining who they are. Knobel also testified that some of the accounts are past the statute of limitations. Petitioner states that, as of 2010, at least $98,800 would be barred for that reason and, as of the date of the petition, at least $305,251.

Only assets with a present salable value are considered in determining insolvency (*United States v Red Stripe, Inc.*, 792 F Supp 1338, 1343 [ED NY 1992]). An asset that cannot be sold (*In re Nirvana Rest., Inc.*, 337 BR 495, 506 [Bankr SD NY 2006]), and accounts receivable that are "inchoate, uncertain and contingent" are not counted in determining the value of a debtor's assets (*Farm Stores*, 102 AD2d at 253).

In addition, respondents are estopped from claiming that Debtor has saleable assets or that it is solvent. "Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding" (*Maas v Cornell Univ.*, 253 AD2d 1, 5 [3d Dept], *affd* 94 NY2d 87 [1999]). The doctrine prevents a party from taking a position inconsistent with previous assertions in a discovery proceeding (*see Casper v Cushman & Wakefield,* 74 AD3d 669, 670 [1st Dept 2010]; *Karasik v Bird,* 104 AD2d 758, 758-759 [1st Dept 1984]). Respondents' argument that the accounts receivable have value is inconsistent with Knobel's past testimony that the accounts are uncollectible.

Debtor's tax returns for 2010 and 2011 reveal that liabilities exceed assets and do not list the accounts receivable as assets. A party to litigation may not take a contrary position to a position in an income tax return (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]). Respondents are estopped from claiming accounts receivables as assets (*see Naghavi v New York Life Ins. Co.*, 260 AD2d 252, 252 [1st Dept 1999]).

**Joint and several liability** - DCL § 273 involves constructive fraud, as opposed to actual fraud (*Jaliman v D.H. Blair & Co. Inc.*, 105 AD3d 646, 647 [1st Dept 2013]). An actual intent to defraud, and conspiracy among respondents is not alleged (*see Farm,* 102 AD2d at 256). For this reason, joint and several liability is not available.

**Remedy** - As a general rule, a defrauded creditor in an action to set aside a fraudulent conveyance is "limited to [setting aside the conveyance of] the property which would have been

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available to satisfy the judgment had there been no conveyance" (*Marine Midland Bank v Murkoff*, 120 AD2d 122, 133 [2d Dept 1986], *see also Blakeslee v Rabinor,* 182 AD2d 390, 393 [1st Dept 1992]). Where the transferee has disposed of the transferred money in some manner which makes it impossible to return, a money judgment against the transferee may also be an available form of substitute relief (*Marine Midland,* 120 AD2d at 132-133; *see also Joslin v Lopez,* 309 AD2d 837, 839 [2d Dept 2003]). Obviously, the shareholders and Debtor's affiliates disposed of some of the funds; to what extent is not known. A judgment will be entered ordering Knobel to pay what he received, less his salary, and piercing the corporate veil between Knobel and Debtor, and Knobel and the other respondents. Petitioner must work out the exact amount, taking into account Etzin's allegation that Petitioner overstated the fraudulent transfer amount, which Petitioner does not deny. The judgment shall be supported by an affidavit made on personal knowledge setting forth how the amount was calculated. Otherwise, the petition is denied. Whether the shareholders' salaries were for fair consideration, whether the other respondents gave fair consideration for what they received, and whether Debtor's veil may be pierced to place liability on the other respondents concern issues of fact.

Respondents' cross-motion to dismiss the petition and to allow Debtor to intervene is denied. Petitioner points out that Debtor is a party and was served with the petition.

Petitioner shall settle order in conformity with 22 NYCRR 202.48.

Dated: 7/25/13

ENTER:

ANIL C. SINGH

HON. ANIL C. SINGH
SUPREME COURT JUSTICE