

SHORT FORM ORDER

S. C. W.

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

**Justice
TRIAL/IAS, PART 16
NASSAU COUNTY**

**CANAN TASKIRAN, as Administratrix of the
Estate of CIHAN TASKIRAN, and
NECATI TASKIRAN and SEVIM TASKIRAN,
Parents of Decedent,**

Petitioners,

MOTION DATE: 3/7/03

- against -

**MOTION SEQ. NO. 001
INDEX NO.: 3409/03**

**MICHAEL B. MURPHY and SUZANNE M.
MURPHY,**

Respondents.

The following papers read on this motion (numbered 1 - 3)

- Order to Show Cause.....1**
- Affirmation of Harold J. Levy in Opposition to Petition.....2**
- Affidavit of Suzanne M. Murphy in Opposition to Petition.....3**

Petitioners' application to set aside a real estate transaction pursuant to Sections 273, 275 and 276 of the Debtor and Creditor Law ("DCL") is determined as follows.

Petitioners are claimants in a wrongful death action commenced against respondent MICHAEL B. MURPHY on June 11, 2002 in the Supreme Court of the State of New York, Suffolk County, Index No. 14864/02 (the "Wrongful Death Action"). The Wrongful Death Action seeks \$15 million damages on behalf of the family of Cihan Taskiran, who died as a result of injuries allegedly sustained in an automobile accident on April 3, 2002 between his vehicle and a vehicle driven by MICHAEL B. MURPHY. In connection with that accident, MICHAEL B. MURPHY pled guilty to the charges of Vehicular Manslaughter in the Second Degree and Driving While Intoxicated. As of the date of this petition, sentencing was scheduled for March 10, 2003, and the parties anticipated that MICHAEL B. MURPHY would be incarcerated for a period of time.

On January 31, 2003, MICHAEL B. MURPHY transferred his interest in real property located at 87 Laurel Drive, Massapequa Park, New York 11762 (the "Property") to his wife, respondent SUZANNE M. MURPHY. The Property was the marital residence, and had been held by MICHAEL B. MURPHY and SUZANNE M. MURPHY as tenants by the entirety since August 2, 2001. Petitioners seek to set aside the January 31, 2003 transfer as a fraudulent conveyance. They also seek injunctive relief barring either respondent from disposing of any other assets, and the imposition of sanctions and attorneys fees against MICHAEL B. MURPHY and SUZANNE M. MURPHY.

The Court notes, at the outset, that this matter was brought as a special proceeding pursuant to **Article 4 of the Civil Practice Law and Rules**. As such, it was commenced in improper form. All civil proceedings must be prosecuted in the form of an action, except where the form of a special proceeding is authorized. **CPLR § 103(b)**. Nonetheless, the Court has obtained jurisdiction over the parties by virtue of the personal service of the Order to Show Cause and Petition upon both defendants pursuant to **CPLR §308(1)**, as evidenced by the affidavits of service dated March 4, 2003. Although the Petitioners failed to endorse the date of filing on the petition as directed by the Order to Show Cause, that omission is a minor technical defect which, in this instance, does not affect a substantial right of any party and, accordingly, shall be disregarded. **CPLR §2001**. The Court shall retain jurisdiction, convert the proceeding to a plenary action, and treat the instant application as a motion for summary judgment. *See CPLR §103(c); Matter of Greenberg*, 110 AD2d 585.

Turning to the merits, Petitioners claim that the conveyance by MICHAEL B. MURPHY of his interest in the Property constitutes actual fraud pursuant to **DCL §276** or constructive fraud pursuant to **DCL §275** or **DCL §273**. A conveyance is fraudulent if it is made with actual intent to "hinder, delay or defraud either present or future creditors". **DCL §276**. When such intent is shown, no inquiry into the adequacy of consideration or solvency of the transferor is required. *Grumman Aerospace Corp. v. Rice*, 199 AD2d 365; *Wall Street Assoc. v. Brodsky*, 257 AD526. Constructive fraud, on the other hand, requires no proof of intent to defraud. A conveyance is deemed fraudulent if it is made without fair consideration and either (i) the transferor is insolvent at the time of the transfer or will thereby be rendered insolvent [**DCL §273**] or (ii) at the time of transfer, the transferor intends or believes that he will become insolvent [**DCL §275**].

With respect to the claim of actual fraud, Petitioners bear the initial burden to establish a right to summary judgment by proof of actual intent to hinder, delay or defraud creditors. **DCL §276**. Because of the difficulty of obtaining direct proof, fraudulent intent is generally established by inference from the circumstances surrounding the allegedly fraudulent act. *Grumman Aerospace Corp. v. Rice*. A claimant may rely on

indicia or “badges” of fraud, i.e., circumstances that are so commonly associated with fraudulent transfers that they give rise to an inference of fraudulent intent. These are: (1) a close relationship between the parties to the alleged fraudulent transaction; (2) a secret or hasty transfer, not in the usual course of business; (3) inadequacy of consideration; (4) the transferor’s knowledge of the creditor’s claim and his or her inability to pay it; (5) the use of dummies or fictitious parties, and (6) the transferor’s retention of control of the property after the conveyance. **Wall Street Assoc. v. Brodsky**, *supra*, at 529; **Shelley v. Doe**, 249 AD2d 756, 758.

In this case, several facts support an inference of fraudulent intent. The parties to the conveyance are husband and wife. Both knew of the pending Wrongful Death Action commenced six months earlier and the husband’s impending incarceration. In a January 22, 2003 letter to MICHAEL B. MURPHY regarding the transfer, SUZANNE M. MURPHY’s attorney expressed Mrs. Murphy’s concern “about the possibility that a claim could be made against the marital residence . . . which could result in her losing the house and, along with the children, having no place to live.” [Exhibit C, Affirmation of SUZANNE M. MURPHY in Opposition to Petition.] This letter indicates that the conveyance was not made in the ordinary course of business, but rather, in a conscious effort to thwart a claim against the marital residence. The conveyance did not affect MICHAEL B. MURPHY’s possession or use of the Property; that is, to the Court’s knowledge, MICHAEL B. MURPHY continued to live in the marital residence and intends to return there when his incarceration ends. The purported consideration of \$31,500 was disproportionately small in relation to the value of the Property, which was appraised at \$530,000.00. *See* **DCL §272**.

The above indicia of fraud are sufficient to shift the burden to respondents to produce evidence that the transfer was made in good faith. *Cf.* **Grumman Aerospace Corp. v. Rice**, *supra* (sustaining a **DCL §276** claim based upon an interspousal transfer of a marital residence, the Court noted that the conveyance was made at a time when the husband was under federal investigation exposing him to financial liability, and that the husband continued to live in the marital home following the conveyance).

Respondents seem to argue that, despite his nominal joint title to the Property, MICHAEL B. MURPHY never really had a financial interest in it. When the Property was originally purchased on March 31, 1999, SUZANNE M. MURPHY was the sole owner and sole obligor on the Note and Mortgage. All of the funds used to purchase the Property came from her earnings or from family members, but not from MICHAEL B. MURPHY. SUZANNE M. MURPHY claims that she converted title to joint ownership on August 2, 2001, because, in the course of refinancing the home, the bank required her to do so. (According to the January 22, 2003 letter, however, she did so as a “courtesy” to

Mr. MURPHY.) In any event, Mrs. Murphy asserts that MICHAEL B. MURPHY paid no consideration for his interest. To the extent that MICHAEL B. MURPHY had an interest in the Property, respondents allege that he conveyed it to SUZANNE M. MURPHY in consideration for her prior advance to him of substantial funds, derived from her personal earnings and savings, for use in his legal defense. Mrs. MURPHY argues that the \$31,500 allegedly advanced to Mr. MURPHY was proportionate to the actual value of Mr. MURPHY's interest in the Property. She calculates that the present value of his interest at the time of the transfer was only \$28,000, after deducting the current balance on the mortgage (\$390,000.00), and discounting his share of the remaining equity to reflect the differential between the spouses' life expectancies based on actuarial tables.

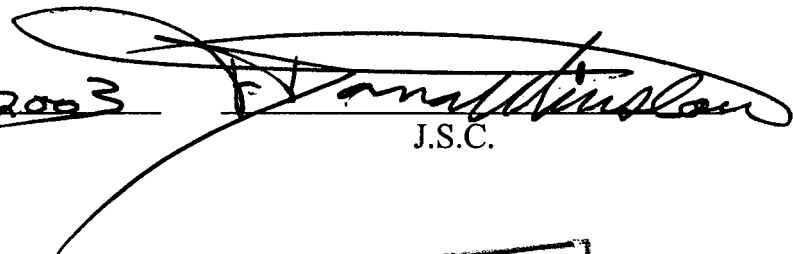
A determination of intent to hinder, delay or defraud creditors is ordinarily a question of fact, not often resolved on a motion for summary judgment. **Grumman Aerospace Corp. v. Rice**, *supra* at 366. In this case, however, Respondents have failed to produce evidence in admissible form sufficient to raise a material issue of fact. *See Zuckerman v. City of New York* 49 NY2d 557. "Conclusory averments of fact or law are insufficient." **Small & Landesman v. Baronick**, 143 AD2d 221. In proof of her assertions, SUZANNE M. MURPHY submits only two deeds evidencing (i) the initial conveyance of the Property to SUZANNE M. MURPHY as sole owner, and (ii) the August, 2001 conveyance from SUZANNE M. MURPHY, solely, to SUZANNE M. MURPHY and MICHAEL B. MURPHY, jointly. She has failed to produce copies of the original or refinanced Note and Mortgage. She submits no documentary evidence to demonstrate the source of the funds used for the down-payment and mortgage payments. She submits no documentary evidence of the funds allegedly advanced to Mr. MURPHY, which were the purported consideration for the January 2003 conveyance. She submits no record showing the current balance of the mortgage, which she used to calculate the value of the Property interest conveyed to her. In view of the fact that all such evidence is within Respondents' control, they cannot claim to be hindered by a lack of discovery in this case.

The opposition herein, consisting almost exclusively of unsubstantiated, conclusory averments, fails to raise an issue of fact sufficient to warrant a trial. Therefore, on the record to date, the Court is compelled to grant summary judgment in favor of Petitioners pursuant to **DCL §276**. In light of the foregoing, the Court need not consider alternative grounds for setting aside the conveyance [**DCL §273** or **DCL §275**]. The Court shall not, however, grant the additional relief requested. An injunction barring either respondent from disposing of his or her assets is overly broad and unwarranted, on the record to date. An award of sanctions or attorneys fees is also unwarranted, given that Respondents have offered a colorable, albeit unsubstantiated, defense. Accordingly, it is

ORDERED, that Petitioners' application to set aside the January 30, 2003 conveyance is **granted**, to the extent that the Bargain and Sale Deed of January 30, 2003, recorded in the Nassau County Clerk's Office on February 5, 2003 in Liber 11582 of Deeds page 630-633 (the "Deed") purporting to transfer an interest in the premises located at 87 Laurel Drive, Massapequa, New York 11762, Section 65, Block 193, Lot 10, from MICHAEL B. MURPHY and SUZANNE M. MURPHY, to SUZANNE M. MURPHY, is hereby vacated as a fraudulent conveyance. Upon presentation of a certified copy of this Order and payment of the proper fees, if any, the Clerk of the County of Nassau is directed to file and record this Order in the records pertaining to the Property, and to enter upon the margin of the record of the Deed "Vacated by Order of the Court".

This constitutes the Order of the Court. Petitioner shall serve a copy of this Order upon Respondents forthwith upon receipt of a copy of same from any source.

ENTER:

Dated: July 8, 2003 
J.S.C.

ENTERED
JUL 18 2003
NASSAU COUNTY
COUNTY CLERK'S OFFICE