

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ
Justice

PART 03

DARVESH HOLDINGS, LLC and MYCROFT ASSOCIATES, LLC,
Individually, as Judgment Creditors of GLICK DEVELOPMENT
AFFILIATES and GLICK CONSTRUCTION CORP., and Derivatively
on behalf of BRIGHTWATER TOWERS ASSOCIATES, L.P.,

INDEX NO. 601878/2004

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

Plaintiff,

-against-

BRIGHTWATER TOWERS ASSOCIATES, L.P., BRIGHTWATER
TOWERS, LLC, GLICK DEVELOPMENT ASSOCIATES, GLICK
CONSTRUCTION CORP., DRSSB ASSOCIATES, BWT
CONDOMINIUM APARTMENTS, L.P., CHARLES W. RUSSELL,
CWR GROUP, L.P., STANLEY S. ITSKOWITZ, DAVID
ITSKOWITZ, ALISON ITSKOWITZ, LAURA DULDNER and
MARIANNE DULDNER,

Defendants.
_____x

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: October 19, 2006

KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

PAPERS NUMBERED
FILED
OCT 19 2006
NEW YORK
COUNTY CLERKS OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
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ASSOCIATES, LLC, Individually, as
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DEVELOPMENT AFFILIATES and GLICK
CONSTRUCTION CORP., and Derivatively
on behalf of BRIGHTWATER TOWERS
ASSOCIATES, L.P.,

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DECISION and ORDER

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DEVELOPMENT ASSOCIATES, GLICK
CONSTRUCTION CORP., DRSSB ASSOCIATES,
BWT CONDOMINIUM APARTMENTS, L.P.,
CHARLES W. RUSSELL, CWR GROUP, L.P.,
STANLEY S. ITSKOWITCH, DAVID
ITSKOWITCH, ALISON ITSKOWITCH, LAURA
DULDNER and MARIANNE DULDNER,

Defendants.

-----X
MOSKOWITZ, J.:

Motion sequence numbers 001 and 002 are consolidated for
disposition.

Plaintiffs Darvesh Holdings, LLC (Darvesh) and Mycroft
Associates, LLC (Mycroft) are judgment creditors of defendants
Glick Development Affiliates (GDA) and Glick Construction
Corporation (GCC). In this action, plaintiffs seek to enforce
their judgments against GDA and GCC by, inter alia, asserting
causes of action that GDA and GCC allegedly possess against
defendant Brightwater Towers Associates, L.P. (BTA), a New York
limited partnership in which GDA and GCC were limited partners;
defendant BWT Condominium Apartments, LP (BWT), BTA's general

partner; defendant DRSBB Associates (DRSBB), BTA's other limited partner, as well as its members and/or transferees; and defendant Brightwater Towers, LLC (BTLLC), a New York limited liability company to which BTA transferred all of its assets on June 20, 2000.

In motion sequence number 001, plaintiff Darvesh now moves for summary judgment (1) declaring that defendants breached, or participated in the breach of, the fiduciary duties that BWT owed to GDA and GCC, by transferring BTA's assets to BTLLC for no consideration, (2) imposing a constructive trust, for the benefit of BTA, on the improperly transferred assets and/or any proceeds from their sale and (3) directing an accounting of BTLLC's affairs to date. Additionally, because the transfer of assets resulted in BTA's dissolution, Darvesh requests the appointment of a receiver for BTA to receive back the improperly transferred assets, wind up BTA's affairs, and pay over to Darvesh, toward satisfaction of its judgment, all distributions that would be due to GDA and GCC.

In motion sequence number 002, defendants move for summary judgment dismissing all of plaintiffs' causes of action.

BACKGROUND

For purposes of rendering a decision on these motions, it will not be necessary to recite all of the facts and lengthy procedural history that gave rise to this action. Briefly,

Darvesh is the assignee of a judgment that Chemical Bank obtained against GDA and GCC, among others, on October 2, 1991, in the face amount of \$6,553,955.56. (See Sugarman Affirm., Exh. 45).¹ Mycroft is the assignee of a judgment that the Bowery Savings Bank obtained against GDA, among others, on August 8, 1991, in the face amount of \$6,310,490.58. (See Sugarman Affirm., Exh. 40).² Plaintiffs allege that, including interest, the amounts now due on these two judgments exceed \$14 million.

Initially, plaintiffs had hoped to satisfy these judgments from GDA's and GCC's limited partnership interests in BTA. It is undisputed that, prior to June 20, 2000, BTA had owned, and was in the business of marketing, a large number of condominium apartments and parking spaces in two large apartment buildings in Brooklyn, New York, known as Brightwater Towers. At the time, GDA owned a 1% limited partnership interest, and GCC owned a 22% limited partnership interest in BTA. Defendant DRSSBB, a general partnership, owned the majority, 76% limited partnership interest in BTA. Defendant BWT, BTA's then general partner, owned the.

¹Darvesh Holdings LLC, a Nevada limited liability company, acquired the Chemical Bank judgment on June 27, 2002. (See Sugarman Affirm., Exh. 45). On March 10, 2004, the Nevada Darvesh assigned the judgment to plaintiff Darvesh, a New York limited liability company. (Id., Exh. 48).

²Mycroft acquired the Bowery Savings Bank judgment on December 15, 1998 from Washington Mutual Bank, FA, the successor by merger to Home Savings Bank, FSB, formerly known as the Bowery Savings Bank. (See Sugarman Affirm., Exhs. 40 and 43).

remaining 1% limited partnership interest in BTA.

In 2003, however, when plaintiffs began to inquire about the status of GDA's and GCC's limited partnership interests, plaintiffs learned that BTA previously had transferred all of its assets, consisting of all unsold apartments and parking spaces at Brightwater Towers, to BTLLC. Specifically, plaintiffs learned that, sometime in early 2000, BWT and DRsBB had decided to streamline and "reconstitute" BTA's business operations into a new entity. To effect this reconstitution, in February 2000, defendants Russell, Itskowitch, and the Duldners, the then owners and general partners of DRsBB, had formed the new limited liability company known as BTLLC. On June 20, 2000, with the consent of DRsBB, BWT had transferred all of BTA's assets to BTLLC. BTLLC had assumed BTA's remaining mortgage debt and other obligations upon the transfer, but otherwise paid no consideration for the transferred assets. GDA and GCC were not apprised of the transfer and acquired no interest in BTLLC. Although, under the terms of BTA's limited partnership agreement, the transfer of assets resulted in BTA's dissolution, there was no wind up of BTA's partnership's affairs or distribution of partnership assets.

Plaintiffs allege that DRsBB, BWT, Russell, Itskowitch, the Duldners, and their families and/or family entities (together,

the Russell defendants),³ authorized this self-dealing transaction in order to steal BTA's assets for themselves and deprive GDA and GCC of the value of their limited partnership interests, as well as any continuing interest in the partnership business. Plaintiffs further allege that the asset transfer, by causing GDA's and GCC's partnership interests to become worthless, effectively deprived plaintiffs of the opportunity to satisfy their judgments from these partnership interests.

In this action, plaintiffs seek to enforce their judgments against GDA and GCC by pursuing various causes of action that GDA and GCC allegedly could have asserted against defendants, in order to recover the assets of the limited partnership, on behalf of BTA, or obtain, for GDA and GCC, an ownership interest in BTLIC upon which plaintiffs could then seek a charging order.

In their complaint, plaintiffs assert, in both individual and derivative causes of action, four causes of action alleging breach of the fiduciary duties owed to BTA, GDA and GCC (first through fourth causes of action), and four causes of action alleging breach of BTA's Limited Partnership Agreement (fifth through eighth causes of action). As relief on these particular

³In April of 2000, defendant Russell transferred his interest in DRSB to defendant CWR Group, L.P., whose partners included Russell, his wife, and his four children. In November 2000, defendant Stanley S. Itskowitch transferred his interest in DRSB to his two children, defendants Alison and David Itskowitch.

causes of action, plaintiffs seek, inter alia, an accounting; the retransfer of assets to BTA, or a declaration that GDA and GCC are members of BTLLC, nunc pro tunc; and damages. Plaintiffs also seek, in separate causes of action, the imposition of a constructive trust on the BTA partnership assets BTLLC holds or the proceeds of the assets (twelfth cause of action); the imposition of an equitable lien on them (thirteenth cause of action); preliminary and permanent injunctive relief to prevent BTLLC from transferring or distributing the partnership assets, other than in the ordinary course of business (fourteenth cause of action); and the imposition of a charging order against GDA's and GCC's partnership interests in BTA, or, alternatively, against any interest that GDA and GCC might have in BTLLC (fifteenth cause of action). In addition, plaintiffs assert a cause of action, on behalf of GDA, for breach of various sales and service agent agreements related to the conversion (ninth cause of action), as well as two causes of action against the Russell defendants for fraudulent conveyance, in violation of sections 276 and 277 of New York's Debtor and Creditor Law (DCL) (tenth and eleventh causes of action). Finally, plaintiffs assert a cause of action against defendants seeking attorneys' fees (sixteenth cause of action).

Plaintiff Darvesh⁴ now moves for summary judgment on its first four causes of action alleging breach of fiduciary duty, as well as its fifteenth cause of action seeking a charging order. Darvesh argues that it is entitled to a declaratory judgment against defendants on, at least, its second cause of action alleging breach of fiduciary duty, because the evidence establishes that defendants caused BWT to transfer all of BTA's assets to BTLLC for no consideration, thereby putting BWT's and the Russell defendants' interests ahead of the interests of the BTA partnership, GDA and GCC. Although, in its notice of motion, Darvesh initially sought the imposition of a constructive trust on the partnership assets for the benefit of BTA, Darvesh has since requested a declaration that GDA and GCC are members of BTLLC, nunc pro tunc. Darvesh argues that it is entitled to this equitable relief because defendants "acknowledged," in the real property transfer tax returns that they were required to file following the asset transfer to BTLLC, that the transfer from the partnership represented a mere "change of identity or form of ownership," and did not effect a beneficial change in ownership of the assets. (See Zitter Affirm., Exh. R). Darvesh argues that, in light of this "admission," this court should find that

⁴Plaintiff Mycroft is not a party to this motion, as issues of fact may exist as to whether Mycroft's judgment against GDA and GCC remains unsatisfied. Mycroft does, however, join in Darvesh's request for a constructive trust and an accounting.

GDA's and GCC's membership interests in BTA continued into BTLLC. Darvesh further argues that this court should then grant it a charging order on GDA's and GCC's resulting membership interests in BTLLC, nunc pro tunc, to pay Darvesh's judgment. If this court is unwilling to grant Darvesh this requested relief, Darvesh seeks a constructive trust for the benefit of BTA on the transferred assets, or their proceeds, and the appointment of a receiver to wind up BTA's affairs, and distribute to it any distributions attributable to GDA and GCC, in satisfaction of its judgment.⁵

Defendants argue that this court should deny Darvesh's motion on the ground that plaintiffs, as mere judgment creditors of GDA and GCC, lack standing and/or capacity to bring derivative claims on behalf of BTA, or to assert any of the non-economic rights that GDA or GCC might have been entitled to assert as limited partners of BTA. Defendants now move to dismiss all these causes of action. In addition, defendants move to dismiss the complaint on the ground that GDA and GCC were no longer limited partners in BTA on the date of the asset transfer and, thus, no longer had any rights that defendants could violate.

In any event, defendants argue that, even if this court

⁵After plaintiffs filed this action, the members of BTLLC completed the transfer of all of their ownership interests in BTLLC to non-party Whitehill Ventures, LLC, in exchange for purchase money notes, mortgages and other contract rights.

should determine that GDA and GCC still possessed partnership interests in BTA on the date of dissolution, and that plaintiffs have standing to assert their derivative and non-economic claims, this court should dismiss plaintiffs' breach of fiduciary duty and breach of contract claims, as BTA's partnership agreement expressly permitted the challenged transfer, and BTLLC paid fair consideration for the transferred assets by assuming BTA's indebtedness. Defendants additionally argue that this court should dismiss plaintiffs' fraudulent conveyance claims for failure to state a cause of action, as the evidence establishes that plaintiffs were judgment creditors of GDA and GCA, not BTA, and there is no evidence that either judgment debtor participated in the challenged transfer. Finally, defendants argue that this court should dismiss all of plaintiffs' requests for equitable relief, as, to the extent plaintiffs do prevail on their claims, money damages should give them complete and adequate relief.

DISCUSSION

A court only grants a motion for summary judgment when the movant has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once a movant has made the requisite showing, the party opposing the motion bears the burden of producing evidentiary facts sufficient to raise

triable issues of fact. (See Zuckerman v City of New York, 49 NY2d 557 [1980]).

To the extent that Darvesh seeks summary judgment on its breach of fiduciary claims, and either a declaration that GDA and GCC are members of BTLLC, nunc pro tunc, or, alternatively, the imposition of a constructive trust on the partnership assets, this court denies the motion, as Darvesh is not entitled to the requested relief.

Plaintiffs note that, as a judgment creditors of GDA and GCC, they are entitled to stand in their debtors' shoes and enforce their judgments against any assignable causes of action belonging to their debtors. Plaintiffs argue that this entitles them to assert any claims that GDA and GCC could have asserted regarding the allegedly improper transfer of BTA partnership assets to BTLLC, including derivative claims on behalf of BTA.

It is true that a judgment creditor is entitled, subject to certain exemptions, to enforce its judgments against any assignable or transferable property or debt of their debtors, including assignable or transferable causes of action. (See CPLR 5201 [a] and [b]). Under the Revised Limited Partnership Act (RLPA), that BTA formally adopted in 1993 (see Russell Opp. Aff., Exh. 1; Sugarman Opp. Affirm., Exh. 12), absent any contrary contractual restriction, a partnership interest is assignable. (See RLPA § 121-702 [a]). The RLPA defines a partnership

interest as "a partner's share of the profits and losses of a limited partnership and the right to receive distributions." (See RLPA § 121-101 [m]).

Where the debtor is a partner, a judgment creditor is entitled to seek satisfaction of its judgment by obtaining a "charging order" against the debtor's partnership interest. (See RLPA § 121-703).⁶ However, "[t]o the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest." (Id.).

Under the RLPA, the "assignment of a partnership interest does not ... entitle the assignee to become or to exercise any rights or powers of a partner." (Id., § 121-702 [a] [2]). Rather, "[t]he only effect of an assignment is to entitle the assignee to receive, to the extent assigned, the distributions and allocations of profits and losses to which the assignor would be entitled." (Id., § 121-702 [a] [3]; see also In re Wilmot, 244 AD2d 980 [4th Dept 1997]; In re Schick, 235 BR 318 [Bankr SDNY 1999]). A judgment creditor of a partner has no right to seek satisfaction of its judgment against the individual assets of the partnership itself. (See e.g. Loft Management Co. v Gavish, 202 AD2d 328 [1st Dept 1994]). Thus, as noted in the

⁶A judgment creditor may also seek to attach a partnership interest by ordinary execution, as provided by CPLR 5230. (See Princeton Bank and Trust Co. v Berley, 57 AD2d 348 [2d Dept 1977]). Plaintiffs did not pursue this approach.

practice commentary to the RLPA,

[t]he only right that would be deemed granted to the judgment creditor is to become an assignee of the economic rights of the partnership interest. The judgment creditor would not have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the partnership. The rationale for a charging order is to give judgment creditors of a partner a remedy with respect to the partner's partnership interest, while making it clear that the creditor's rights are to the economic, and not any management, interest, of the partner ... This rationale follows § 121-701 that provides that an interest in a limited partnership is personal property and a partner has no interest in specific partnership property

(Rich, Practice Commentaries, McKinney's Cons Laws of NY, Book 38, RLPA, at 311).

Under the RLPA, only a limited partner has the right to bring a derivative claim on behalf of a partnership. (See RLPA § 121-1002 [b] [requiring that at least one plaintiff in a derivative action must have been a limited partner at the time of bringing the action]; Sterling v Minskoff, 226 AD2d 125 [1st Dept 1996]; Levine v Murray Hill Manor Co., 143 AD2d 298 [1st Dept 1988], lv dismissed 73 NY2d 995 [1989]). Insofar as plaintiffs' breach of fiduciary claims are based on the Russell defendants' alleged improper transfer of partnership assets to BTLIC, that damaged GDA and GCC by rendering their partnership interests worthless, the claims are derivative in nature, as they arise out of the same injury as that caused to the partnership. (See Sterling v Minskoff, 226 AD2d 125, supra; Strain v Seven Hills

Assoc., 75 AD2d 360 [1st Dept 1980]; Longo v Butler Equities II, L.P., 278 AD2d 97 [1st Dept 2000]). Because neither plaintiff was, or is, a limited partner of BTA, plaintiffs lack standing to bring these derivative claims. Therefore, this court denies Darvesh's motion for summary judgment on its fiduciary duty claims and grants defendants' motion to dismiss these four causes of action.

This court also grants defendants' motion to dismiss plaintiffs' seventh and eighth breach of contract causes of action, as plaintiffs assert these causes of action as derivative claims, as well. Additionally, as this court finds that plaintiffs, as judgment creditors of GDA and GCC, are not entitled to seek equitable relief with respect to the separate property of the partnership, this court grants defendants' motion to dismiss plaintiffs' twelfth, thirteenth and fourteenth causes of action.

However, to the extent that defendants seek to dismiss plaintiffs' fifteenth cause of action, for a charging order, on the ground that GDA and GCC were no longer limited partners of BTA on the date of its dissolution, this court denies the motion.

In support of their motion, defendants have alleged that on June 20, 2000, immediately prior to BTA's transfer of assets to BTLIC, defendants Russell, Itskowitch and the Duldners "informally" foreclosed on GDA's and GCC's partnership interests,

in order to recover certain monies that GDA and GCC allegedly owed these individuals under an indemnification agreement that BTA's partners, and their respective members, had executed in 1989 (the Indemnification Agreement). (See Russell Opp. Aff., Exh. 2). According to defendants, the partners and their members had executed the Indemnification Agreement in conjunction with BTA's plan to convert Brightwater Towers, that was then a Mitchell-Lama housing development, into a condominium. Defendants allege that, in order to finance the conversion, the partnership had taken out various bank loans and that the bank had required that these bank loans be backed by personal guarantees from, among others, defendants Russell, Itskowitch, and non-party Kurt P. Duldner, the Duldner's father⁷ (together, the Indemnitees). After BTA defaulted on some of these loans, the bank required these Indemnitees to make payments in accordance with their personal guarantees. Defendants allege that GDA, that was BTA's general partner at the time,⁸ had agreed to indemnify the Indemnitees for those amounts, under the

⁷In early 2000, Kurt Duldner transferred his interest in DRSBBS to his daughters, defendants Laura and Marianne Duldner, effective as of January, 2000.

⁸Prior to November of 1993, GDA had been the general partner of BTA. GDA was required to withdraw as general partner of BTA following the commencement of bankruptcy proceedings against it. The partners of DRSBBS then formed BWT to replace GDA as the general partner of BTA and assigned BWT 1% of DRSBBS's then 77% partnership interest. They amended BTA's partnership agreement to effect the change. (See Zitter Affirm., Exh M).

terms of the Indemnification Agreement. Defendants further allege that GDA never repaid the Indemnities for their losses, and that in order to recover these amounts, the Indemnitees had "informally" foreclosed on GDA's and GCC's partnership interests, that GDA and GCC had agreed to pledge as collateral security in the Indemnification Agreement.

If this court finds that this informal foreclosure was ineffective, defendants allege that they have since acquired any partnership interests remaining to GDA and GCC in a non-judicial foreclosure. Specifically, defendants allege that, shortly after plaintiffs filed this suit, when it became apparent that some more formal action would be prudent, the Indemnitees proceeded to acquire any remaining partnership interests in a non-judicial foreclosure sale conducted pursuant to UCC 9-610.

As regards defendants' first alleged foreclosure, while a secured party may foreclose on collateral in full or partial satisfaction of the obligation it secures following a default, it may do so only when, and if, foreclosure meets certain conditions; these conditions include notification to the debtor, and certain other secured parties or lienholders, of the proposal to accept collateral in satisfaction of a debt. (See Uniform Commercial Code [UCC] §§ 9-620 and 9-621). Here, defendants concede that the Indemnitees never notified, or attempted to notify, GDA, GCC, or anyone else, of their intent to foreclose on

GDA's and GCC's partnership interests. Nor does it appear that the Indemnitees made any attempt to determine whether any other secured parties or lienholders existed. Instead, defendants argue that no formal notification or action was required, as defendants believed that GDA and GCC no longer existed, and were unaware of any unsatisfied judgments against GDA or GCC. Defendants have, however, cited no relevant authority to support defendants' contention that an "informal" foreclosure, lacking any attempt at notification, would be effective under any circumstances.

As to defendants' second alleged foreclosure, UCC § 9-610 provides that, after a default, a secured party may sell or otherwise dispose of collateral, provided that it is done in a commercially reasonable manner. To proceed under this section, UCC § 9-611 requires that the secured party send an authenticated notification of disposition to the debtor and "any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral." (Id., § 9-611 [c] [3] [A]). Defendants concede that they did not provide notice of the non-judicial foreclosure sale to plaintiffs, although plaintiffs already had filed this action asserting a claim on those partnership interests. Nor do the notices that defendants did send (see Russell Aff., Exhs. 20-23) conform to the content

specifications set forth in UCC § 9-613 (a). Specifically, this court does not see where the notices state that the debtor was "entitled to an accounting of the unpaid indebtedness and state[] the charge, if any, for an accounting." (See UCC § 9-613 [a] [4]).

In light of all these apparent infirmities, this court finds that there exists, at the very least, an issue of fact whether defendants effectively foreclosed on GDA's and GCC's partnership interests in the 2004 non-judicial foreclosure sale.

Additionally, this court notes that plaintiffs dispute both the validity and continued enforceability of the Indemnification Agreement and have raised a number of issues with respect to defendants' assertions as to the amounts that GDA and GCC allegedly owed under the Indemnification Agreement.⁹ These

⁹For example, in their July 7, 2004 demand letter (Russell Aff., Exh. 20), the Indemnitees claimed that GDA and GCC owed them more than \$15 million, on an original principal amount of \$11,212,000. The demand letter asserted that, under paragraph 7 of the Indemnification Agreement, the Indemnitees were entitled to 24% interest on the amount due.

Plaintiffs contend that by July 7, 2004, when the Indemnities made their first demand for payment, they had recovered most of their losses and thus were not entitled to the full amounts claimed. Additionally, plaintiffs note that paragraph 7 of the Indemnification Agreement provides that the 24% interest rate begins to accrue only after a default, and defendants have produced no evidence to establish when GDA and GCC actually defaulted on their the obligation to indemnify the Indemnitees for their losses.

In this latter regard, this court notes that, in their demand letter, the Indemnitees asserted that they incurred

issues also would arguably preclude this court from granting summary judgment to dismiss the fifteenth cause of action.

This court grants defendants' motion to dismiss plaintiffs' ninth cause of action, alleging breach of various sales and service agent agreements, and plaintiffs' tenth and eleventh causes of action, alleging that the transfer of assets from BTA constituted a fraudulent conveyance under DCL §§ 276 and 277. Plaintiffs effectively concede that these cause of actions fail to state a cause of action as currently pleaded and, in their opposition memorandum, request leave to amend their complaint to allege a fraudulent conveyance based on the defendants' attempts to foreclose on GDA's and GCC's partnership interests. Specifically, plaintiffs now seek to assert a cause of action alleging that defendants' attempts to foreclose on GDA's and GCC's partnership interests were intended to hinder, delay, and prevent plaintiffs from collecting on their judgments, all in

indemnifiable losses on or about October 30, 1992. Although defendants proffered a letter, dated June 11, 1991, to show that the Indemnitees notified GDA of the bank's impending claims against them and requested that GDA and/or its principals perform their obligations under the Indemnification Agreement (see Russell Opp. Aff., Exh. 3), the Indemnitees admittedly had yet to incur any losses as of that date. Defendants have produced no evidence to show that at any time after October 30, 1992, they notified and/or demanded indemnification from GDA or GCC. Thus, there is no evidence that, prior to the July 7, 2004 demand for payment, GDA and GCC were in default of their obligations and thus that defendants were entitled to interest.

violation of DCL § 276. Plaintiffs additionally seek to assert a claim alleging prima facie tort on these same facts.

The court denies plaintiffs' request for leave to amend their fraudulent conveyance claims, as plaintiffs have yet to allege, or show, that their debtors in any way participated in the challenged transactions. (See e.g. In re Flutie New York Corp., 310 BR 31 [Bankr SDNY 2004]). In light of this determination, this court also dismisses plaintiffs' sixteenth cause of action, seeking attorneys' fees, as plaintiffs have failed to allege any other basis that would entitle them to such relief.

To the extent that Darvesh seeks the appointment of a receiver to wind up the BTA partnership and distribute any remaining assets, this court grants the motion. It is undisputed that the partnership dissolved on June 20, 2000 and that there was no subsequent wind up of the partnership's affairs. Defendants argue that there was no need to wind up BTA following its dissolution, because BTA's outstanding debt exceeded the value of its assets and, thus, there was nothing left to wind up, marshal and distribute. Defendants further argue there is no need to appoint a receiver at this time because, assuming that Darvesh is entitled to some amount, as a judgment creditor of GDA and GCC, this court is capable of determining the amount and granting a money judgment. In any event, defendants argue that

plaintiffs have not demonstrated the necessity for the appointment of a receiver and that this appointment would be unnecessarily disruptive and costly. In the event this court decides to appoint a receiver, defendants argue that this court should select DRsBB, or one of its members, to serve in that role.

Contrary to defendants' contention, the winding up of a dissolved limited partnership is not optional. The RLPA provides that upon the dissolution of a limited partnership, the partnership "shall be wound up" (see RLPA § 121-801), and that upon the winding up of a limited partnership, the assets "shall be distributed" (id., § 121-804). To the extent that GDA and GCC have retained their partnership interest, Darvesh would be entitled to a charging order on those interests and to receive whatever distributions GDA and GCC were entitled to receive after the wind up. There is no way for this court to determine whether, as defendants claim, the partnership's liabilities exceeded the value of the transferred assets, as there has been no wind up or accounting of BTA. Nor is this court in a position to determine what amount, if any, to which Darvesh might be entitled, even if that determination were appropriate.

Normally, in the event of dissolution, the general partner, or if none, the limited partners may wind up the limited partnership's affairs. (See RLPA § 121-803 [a]). Here, however,

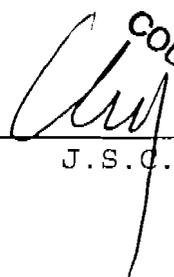
the general partner no longer exists. (See Russell Opp. Affirm., Exh. 18). Although DRSBB still exists, it is not disputed that its members both authorized and benefitted from the asset transfer that caused the dissolution. Thus, this court finds that there is adequate cause for the appointment of a disinterested receiver to oversee the wind up.

The court denies plaintiffs' request that this court appoint Darvesh as the receiver for the wind up, as the appointment of an impartial non-party as receiver would be most appropriate under the circumstances. The parties are hereby directed to select and appoint, as a receiver, an individual that is mutually agreeable to both sides. In the event that the parties are unable to agree upon the appointment of a receiver within 20 days from the date of this decision and order, upon notification from the parties, this court will appoint one for them.

In sum, Darvesh's motion is granted to the extent of directing the appointment of a receiver to wind up BTA and defendants' motion is granted to the extent of dismissing all but plaintiffs' fifth, sixth, and fifteenth causes of action.

Settle Order providing for a receiver accordingly.

Dated: October 19, 2006



J.S.C.

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