

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

899

CA 19-00269

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND TROUTMAN, JJ.

PETER L. HAINES AND MINNIE H. BRENNAN, AS
CO-EXECUTORS OF THE ESTATE OF PATRICIA S.
HAINES, DECEASED, PLAINTIFFS-RESPONDENTS,

V

MEMORANDUM AND ORDER

HOLLY WEST, ALSO KNOWN AS HOLLY W. WEST, AND
WILLIAM J. HURLBURT, INDIVIDUALLY, AND DOING
BUSINESS AS MILTON R. HURLBURT,
DEFENDANTS-APPELLANTS.

CARMEL, MILAZZO & DICHIARA LLP, NEW YORK CITY (CHRISTOPHER P. MILAZZO
OF COUNSEL), FOR DEFENDANT-APPELLANT HOLLY WEST, ALSO KNOWN AS HOLLY
W. WEST.

SHULTS & SHULTS, HORNELL (DAVID SHULTS OF COUNSEL), FOR
DEFENDANT-APPELLANT WILLIAM J. HURLBURT, INDIVIDUALLY, AND DOING
BUSINESS AS MILTON R. HURLBURT.

DAVIDSON FINK LLP, ROCHESTER (DAVID L. RASMUSSEN OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeals from an order and judgment (one paper) of the Supreme
Court, Steuben County (Daniel J. Doyle, J.), entered July 17, 2018.
The order and judgment granted plaintiffs' motion for summary
judgment.

It is hereby ORDERED that the order and judgment so appealed from
is unanimously reversed on the law without costs and the motion is
denied.

Memorandum: Plaintiffs commenced this action seeking, inter
alia, to set aside as a fraudulent conveyance a default judgment
entered against defendant Holly West, also known as Holly W. West, in
favor of defendant William J. Hurlburt, individually and doing
business as Milton R. Hurlburt. Defendants now appeal from an order
and judgment that granted plaintiffs' motion for summary judgment on
the third and fourth causes of action, for violations of Debtor and
Creditor Law § 276 and for attorneys' fees under section 276-a,
respectively. We reverse.

Debtor and Creditor Law § 276 provides that "[e]very conveyance
made and every obligation incurred with actual intent . . . to hinder,
delay, or defraud either present or future creditors, is fraudulent as

to both present and future creditors." To meet his or her initial burden in moving for summary judgment with respect to a section 276 cause of action, a plaintiff must establish the requisite intent to hinder, delay, or defraud by "clear and convincing evidence" (*Jensen v Jensen*, 256 AD2d 1162, 1163 [4th Dept 1998]). "[B]ecause direct evidence of fraudulent intent is often elusive, courts will consider badges of fraud which are circumstances that accompany fraudulent transfers so commonly that their presence gives rise to an inference of intent" (*A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1288 [4th Dept 2014] [internal quotation marks omitted]).

We agree with defendants that plaintiffs failed to meet their initial burden with respect to the section 276 cause of action because they did not eliminate triable issues of fact with respect to defendants' alleged fraudulent intent. We note that "the presence of one or more badges of fraud does not necessarily compel the conclusion that a conveyance is fraudulent" (*id.* at 1288-1289; see *Skiff-Murray v Murray*, 17 AD3d 807, 811 [3d Dept 2005]). Here, "[a]lthough the submitted facts establish . . . 'badges of fraud' indicative of fraudulent intent . . . , they fail to establish defendant[s'] fraudulent intent as a matter of law" (*Taylor-Outten v Taylor*, 248 AD2d 934, 935 [4th Dept 1998]).

We further conclude that, inasmuch as triable issues of fact exist with respect to defendants' actual intent to hinder, delay, or defraud, plaintiffs also failed to establish their entitlement to an award of attorneys' fees pursuant to Debtor and Creditor Law § 276-a (see *id.*; cf. *Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179 [1st Dept 2004]).