

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
Charles C. Howland,

Plaintiff,

-against-

Eric E. Resteiner, Dr. Keith Mitchell, and
Marietta Mitchell,

Defendants.
-----X

Gold, S., *United States Magistrate Judge*

REPORT AND
RECOMMENDATION
CV-07-2332 (ILG)

Introduction

Plaintiff, Charles C. Howland (“Howland”), brings this action against defendant, Eric E. Resteiner (“Resteiner”), alleging a claim under New York State law for fraudulent transfer.¹ Plaintiff claims that Resteiner made a series of false representations in an effort to persuade plaintiff to invest money in a purported investment program. However, instead of investing the money as he promised to do, Resteiner used the funds to support a lavish lifestyle and to pay bribes to individuals in return for their assistance with his fraudulent scheme. As discussed more fully below, Resteiner has pled guilty to mail and wire fraud charges based on this and other fraudulent conduct.

Resteiner has failed to appear in this case. On October 22, 2007, the Clerk of the Court noted his default. Docket Entry 16. Senior United States District Judge I. Leo Glasser then referred this matter to me for a Report and Recommendation on what relief should be awarded. Docket Entry 17.

¹Plaintiff's claims against defendants Dr. Keith Mitchell and Mrs. Marietta Mitchell have been dismissed without prejudice on grounds of head-of-state immunity. Docket Entry 27.

Plaintiff has submitted a Memorandum of Law in support of his application for damages (“Submission on Damages”). Docket Entry 21. Plaintiff has also submitted his own declaration (“Howland Decl.”), Docket Entry 20, and a declaration of his attorney, Daniel A. Abrams (“Abrams Decl.”), Docket Entry 22. Additionally, plaintiff attached to his complaint defendant’s Indictment, Am. Compl. Ex. A, the transcript of defendant’s sentencing, Am. Compl. Ex. B, and the order of restitution in defendant’s criminal case, Am. Compl. Ex. C. Finally, in response to questions raised by the Court during a telephone conference held on February 28, 2008, plaintiff has submitted a letter further explaining the basis for the damages he seeks to recover from Resteiner. Docket Entry 30. I determine what damages to award based on these submissions as indicated below.

Background

The following facts are set forth in plaintiff’s amended complaint and other supporting documents, including defendant’s Indictment. For a period of time, Resteiner was the General Ambassador to the Nation of Grenada. Am. Compl. ¶ 7. Prior to and while an Ambassador, Resteiner operated an international mail fraud scheme, through which he offered an investment program that promised high returns and no risk. Am. Compl. ¶ 7. To induce investment in his program, Resteiner made misrepresentations to prospective investors with respect to several matters, including his status as a licensed broker, his methods for obtaining high returns on investments, and the fact that the investments had no risk and could be cashed in at a bank at any time. Am. Compl. Ex. A (Indictment in United States v. Resteiner, D. Mass., Docket No. 04-CR-10082) ¶ 8. Resteiner claimed that he could buy debt instruments at a discount and resell them to banks at a premium. Am. Compl. Ex. A ¶ 6. Resteiner asked for a twelve-month

commitment to his program and, to convince the investors of the purported legitimacy of the scheme, offered monthly payments to investors during the term of their investment. Am. Compl. Ex. A ¶ 9. Resteiner made the payments using the investor's own investment principal as well as funds from others who invested in the scheme. Am. Compl. Ex. A ¶ 14. Instead of investing the money as promised, Resteiner used it to support his lavish lifestyle and to bribe individuals for help shielding his fraud from detection. Am. Compl. ¶¶ 20-21 & Ex. A ¶¶ 14, 15.

Plaintiff is one of a group of approximately fifty individuals who together invested more than \$30 million in Resteiner's program. Am. Compl. ¶ 5. Around May 3, 1999, plaintiff personally invested a total of \$200,000 he raised by borrowing against his home. Howland Decl. ¶ 2. Plaintiff received several monthly payments from Resteiner during the term of his investment, but the majority of his investment was never returned. *Id.* ¶ 3.

Plaintiff alleges that, in June 2000, Resteiner's director of security witnessed a transfer of \$500,000 in cash from Resteiner to an official of the Government of Grenada. Am. Compl. ¶ 14. Plaintiff further alleges that the director indicated that another transfer of \$500,000 was made by Resteiner to the same individual on a separate occasion. Am. Compl. ¶ 15. Plaintiff contends that the transfers were in fact bribes, and that they were paid not for fair consideration but as part of a scheme to prevent creditors from recovering their investments by hiding their money and providing a safe haven for the defendant, leaving the funds and Resteiner beyond the reach of the authorities. Am. Compl. ¶¶ 20-21.

As a result of his participation in fraudulent investment scheme, Resteiner pled guilty to mail and wire fraud in the District of Massachusetts. Am. Compl. Ex. C (Judgment in United States v. Resteiner). Plaintiff is among the victims specifically identified in the indictment.

Am. Compl. Ex. A ¶¶ 49-51. Resteiner was sentenced to eighty-seven months of incarceration and ordered to pay \$33,902,762 in restitution. Am. Compl. Ex. C. Plaintiff received \$13,092 as partial restitution. Howland Decl. ¶ 4. Plaintiff has been advised that he would not be receiving any further restitution payments. *Id.* ¶ 5.

Discussion

A. Liability

Once found to be in default, a defendant is deemed to have admitted all of the well pleaded allegations in the complaint pertaining to liability. *See Greyhound Exhibitgroup, Inc., v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir. 1992), *cert. denied*, 506 U.S. 1080, 113 S. Ct. 1049 (1993); *Montcalm Pub. Corp. v. Ryan*, 807 F. Supp. 975, 977 (S.D.N.Y. 1992). A court, however, retains the discretion to determine whether a final default judgment is appropriate. *Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 95 (2d Cir. 1993). Even after a defendant has defaulted, “[a] plaintiff must . . . establish that on the law it is entitled to the relief it seeks, given the facts as established by the default.” *U.S. v. Ponte*, 246 F. Supp. 2d 74, 76 (D. Me. 2003) (citation omitted). *See also Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981) (recognizing the court’s authority, even after default, to determine whether plaintiff has stated a cause of action).

Plaintiff alleges one cause of action – fraudulent transfer. Section 276 of New York’s Debtor and Creditor Law provides that a conveyance is fraudulent if it is made “with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors.” To prevail on a fraudulent conveyance claim, a plaintiff creditor must prove, “by clear and convincing evidence: 1) a conveyance; 2) made with actual intent to defraud. Such

intent may be inferred from the circumstances surrounding the transfer.” *Cadle Co. v. Newhouse*, 2002 WL 1888716, at *6 (S.D.N.Y. Aug. 16, 2002), *aff’d*, 74 Fed. Appx. 152 (2d Cir. 2003) (quoting *United States v. Carlin*, 948 F. Supp. 271, 277 (S.D.N.Y. 1996)); *see also RTC Mortg. Trust 1995-S/N1 v. Sopher*, 171 F. Supp. 2d 192, 200 (S.D.N.Y. 2001).

The term “creditor” is defined in Section 270 of New York Debtor and Creditor Law as “a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.” Section 276 permits suits by “present or future creditors,” and as a result, courts have held that, “where the intent to defraud was actual and affirmative, ‘the exact status of the plaintiff, at the time of the acts complained of . . . is immaterial.’” *In re Kovler*, 253 B.R. 592, 596-97 (Bkrcty. S.D.N.Y. 2000) (quoting New York State case law). In other words, the plaintiff does not have to be a judgment creditor to invoke the statute. In fact, “[u]nder New York’s broad definition of ‘creditor,’ one who has a right to maintain a tort action but has not recovered judgment at the time of the transfer is a creditor, and ‘it is now accepted that the relationship of debtor and creditor [in tort cases] arises the moment the cause of action accrues.’” *Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 428 (S.D.N.Y. 2006) (citations omitted) (finding that the plaintiffs, who were victims in a scheme to defraud investors, were creditors of the defendants “by virtue of their claims against the defrauding defendants in the pending action”).

The allegations of the complaint adequately assert a claim for fraudulent conveyance. Plaintiff alleges that he was a creditor of Resteiner when the bribes were paid, Am. Compl. ¶ 20, and as the authorities cited above demonstrate, Resteiner’s fraudulent actions and the tort claims arising from them are sufficient to establish plaintiff’s right to invoke New York’s Debtor and Creditor Law. *See Drenis*, 425 F. Supp. at 428. Plaintiff further alleges that Resteiner paid one

million dollars to a government official in Grenada involved in the fraudulent scheme “with the actual intent to hinder, delay, and defraud his creditors, including plaintiff,” and prevent them from recovering their money. Am. Compl. ¶¶ 14-15, 20-21.² Indeed, Resteiner’s plea of guilty to mail and wire fraud, and the allegations in the indictment that plaintiff was a victim of the fraud, further demonstrate Resteiner’s intent to defraud plaintiff and other investors. These contentions are more than sufficient to demonstrate a conveyance made by Resteiner with the actual intent to defraud his creditors.

Thus, the allegations in the complaint – deemed admitted on defendant’s default – properly plead a claim for fraudulent transfer under New York law against Resteiner.³

B. Damages

Although the allegations of a complaint pertaining to liability are deemed admitted upon entry of a default judgment, allegations relating to damages are not. *See Greyhound Exhibitgroup*, 973 F.2d at 158. Rather, claims for damages generally must be established in an evidentiary proceeding at which the defendant is afforded the opportunity to contest the amount claimed. *Id.* Thus, a court must ensure that there is a basis for the damages sought by a plaintiff before entering judgment in the amount demanded. *See Fustok v. ContiCommodity Servs., Inc.*,

²Plaintiff also alleges that the conveyance, a bribe, was made without fair consideration. Am. Compl. ¶ 20. Although not direct evidence of actual intent, a payment made without consideration gives rise to a rebuttable presumption of fraudulent intent. *United States v. Mazzeo*, 306 F. Supp. 2d 294, 311 (E.D.N.Y. 2004) (“[L]ack of fair consideration gives rise to a rebuttable presumption of fraudulent intent.” (*quoting Carlin*, 948 F. Supp. at 277-78)).

³Although the amended complaint does not set forth the specific facts giving rise to personal jurisdiction over Resteiner, it does allege that jurisdiction is properly over Resteiner pursuant to N.Y. C.P.L.R. § 302(a)(3)(ii). Am. Compl. ¶ 11. Because the allegations of the complaint are deemed admitted upon default, I conclude that it is proper for this Court to exercise jurisdiction over plaintiff’s claim against Resteiner.

873 F.2d 38, 40 (2d Cir. 1989). A court may make this determination based upon evidence presented at a hearing or upon a review of detailed affidavits and documentary evidence. *See* FED. R. CIV. P. 55(b)(2); *Action S.A. v. Marc Rich & Co., Inc.*, 951 F.2d 504, 508 (2d Cir. 1991); *Fustok*, 873 F.2d at 40.

The type of relief available to a plaintiff asserting a fraudulent transfer claim depends on whether the plaintiff's status as a creditor has been reduced to a judgment. Although a plaintiff whose claim has not matured into a judgment may not invoke Debtor and Creditor Law Section 278 to secure transferred assets in satisfaction of a debt, he may "obtain a nullification of the conveyance." *Federal Deposit Ins. Corp. v. Porco*, 75 N.Y.2d 840, 842, 552 N.E.2d 158 (1990). New York Debtor Creditor Law Section 279 provides: "Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may, . . . [s]et aside the conveyance or annul the obligation, or . . . [m]ake any order which the circumstances of the case may require." Moreover, Section 280 provides: "In any case not provided for in this article the rules of law and equity including . . . the effect of fraud [and] misrepresentation . . . shall govern."

As the discussion above suggests, a claim for relief from a fraudulent transfer typically seeks to set the transfer aside. *See Stevens v. Aeonian Press, Inc.*, 2002 WL 31387224, at *7 (S.D.N.Y. Oct. 23, 2002); *Porco*, 75 N.Y.2d at 842. However, courts have interpreted the Debtor and Creditor Law as providing a basis to award damages to judgment creditors against those who participate in and benefit from a fraudulent conveyance, particularly when setting aside the transfer is not possible or will not adequately compensate the creditor. *Stochastic Decisions, Inc.*

v. DiDomenico, 995 F.2d 1158, 1172 (2d Cir. 1993) (affirming the District Court’s grant of money damages for a judgment creditor against a party who participated in a fraudulent transfer and benefitted from it); *Neshewat v. Salem*, 365 F. Supp. 2d 508, 521-22 (S.D.N.Y. 2005) (holding that “where the assets fraudulently transferred no longer exist or are no longer in possession of the transferee, a money judgment may be entered in an amount up to the value of the fraudulently transferred assets”); *United States v. Mazzeo*, 306 F. Supp. 2d 294, 321 (E.D.N.Y. 2004) (granting the government “the equivalent of a money judgment in the amount of the contemporaneous fair market value of each transfer”); *Sopher*, 171 F. Supp. 2d at 201-02 (holding an individual liable for money damages in favor of a judgment creditor because, “[u]nder New York law, a creditor may recover money damages against parties who participate in the fraudulent transfer and are either transferees of the assets or *beneficiaries of the conveyance*”) (emphasis added). Some courts have found that Section 280 authorizes such relief. *See McGillicuddy v. Laidlaw, Adams & Peck*, 1995 WL 1081307, at *6-8 (S.D.N.Y. Aug. 14, 1995) (holding that, under Section 280, a defendant is entitled to money damages where “[m]erely setting aside the conveyance and annulling the obligation would be of no avail.” (quoting *Halsey v. Winant*, 233 A.D. 103, 114-15, 251 N.Y.S. 81 (1st Dep’t 1931), *rev’d on other grounds*, 258 N.Y. 512, *cert. denied*, 287 U.S. 620 (1932))).

Plaintiff alleges that defendant benefitted from the bribes he paid because their purpose was to prevent detection of his fraud, hide its proceeds, and arrange for a safe haven for the defendant in a foreign country. Am. Compl. ¶¶ 20-21; Pl’s Letter dated March 10, 2008 (Docket Entry 30). Moreover, although plaintiff Howland is not a judgment creditor, he has provided a more than ample basis to demonstrate, with the same degree of certainty as a creditor with a

matured claim, that he is entitled to recover damages from Resteiner. Defendant's conviction and plaintiff's receipt of restitution demonstrate that plaintiff was in fact defrauded and that he is entitled to compensation. Therefore, the provision in Section 279, empowering the court to make "any order which the circumstances of the case may require," particularly when read together with the broad remedial language of Section 280, justifies awarding money damages to plaintiff under the circumstances presented here.

Plaintiff seeks to recover the funds he invested that were never returned to him, or the difference between what he initially invested and the amounts he received from Resteiner and the restitution payments ordered by the Court. Plaintiff invested a total of \$200,000 in Resteiner's program. Howland Decl. ¶ 2. For the sixth month period from August 1999 through January 2000, Resteiner provided plaintiff a monthly payment of \$7,000, for a total of \$42,000. *Id.* ¶ 3. In February 2002, Resteiner paid plaintiff an additional \$3,000, for a total of \$45,000 from Resteiner. *Id.* ¶ 3. Plaintiff also recovered \$13,092 in restitution. *Id.* ¶ 4. Subtracting the payments from Resteiner totaling \$45,000 and the restitution of \$13,092 from the \$200,000 invested results in \$141,908 owed to plaintiff. I therefore recommend that plaintiff be awarded \$141,908 in damages.⁴

Additionally, under New York law, it is within the court's discretion to award 9% pre-judgment interest on an award of compensatory damages for a fraudulent transfer claim. N.Y. C.P.L.R. §§ 5001(b), 5004. *See also In re Cassandra Group*, 338 B.R. 583, 599 (Bkrcty.

⁴Although plaintiff's complaint seeks attorney's fees and punitive damages, neither is raised or supported in his Submission on Damages. I therefore assume that plaintiff has abandoned these requests and in any event recommend that neither attorney's fees nor punitive damages be awarded.

S.D.N.Y. 2006) (awarding prejudgment interest for a fraudulent transfer claim); *In re All American Petroleum Corp.*, 259 B.R. 6, 20-21 (Bkrcty. E.D.N.Y. 2001) (same). Considering the egregiousness of defendant's conduct, and also to fully compensate plaintiff, prejudgment interest is appropriate. *See All American Petroleum*, 259 B.R. at 20-21 (noting that prejudgment interest is appropriate "to fully compensate the wronged party for actual damages suffered" and as a matter of fairness and equity). Where interest is appropriate, "§ 5001(a) dictates that interest is to be computed 'from the earliest ascertainable date' that the cause of action existed." *Kirton v. Northwestern Mut. Life Ins. Co.*, 2006 WL 3051772, at *7 (E.D.N.Y. Oct. 24, 2006) (quoting N.Y. C.P.L.R. § 5001(b)). Here, the appropriate date would be the date of the fraudulent conveyance. Plaintiff alleges that the fraudulent conveyance occurred in June 2000, and thus asks for prejudgment interest as of that time. Am. Compl. ¶ 14; Abrams Decl. ¶ 7. Plaintiff gives no specific date in June for the event, although the plaintiff's calculations provide for six months of interest for 2000, Abrams Decl. ¶ 8, which corresponds with a calculation from the beginning of July. Therefore, it is appropriate to calculate prejudgment interest from July 1, 2000.

Conclusion

For the reasons set forth above, I respectfully recommend that defendant Resteiner be found liable for making fraudulent transfers, and that a judgment be entered against him in the amount of \$141,908, with prejudgment interest at the rate of 9% per annum from July 1, 2000 to be calculated by the Clerk of the Court at the time final judgment is entered. Any objections to the recommendations made in this Report must be filed within ten days of this Report and Recommendation and, in any event, on or before April 1, 2008. Failure to file timely objections

may waive the right to appeal the District Court's Order. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(e), 72; *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989). Plaintiff is directed to serve copies of this Report and Recommendation upon defendant Resteiner and to provide proof of service to the court.

SO ORDERED.

_____/s/_____
Steven M. Gold
United States Magistrate Judge

Brooklyn, New York
March 18, 2008

U:\ASB 2007-2008\Damages Inquests\Howland v. Resteiner\Howland v. Resteiner 031408.wpd