

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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<i>In re:</i>	:	
	:	Case No. 11-11388 (JLG)
Big Apple Volkswagen, LLC,	:	Chapter 11
<i>Debtor</i>	:	
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Alan Nisselson, Chapter 7 Trustee of Big Apple Volkswagen, LLC,	:	
<i>Plaintiff</i>	:	Adv. Proc. No. 11-2251 (JLG)
v.	:	
Ratiba Salim and Wahid Saleem,	:	
<i>Defendants</i>	:	
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**MEMORANDUM DECISION AND PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW TO GRANT IN PART AND DENY IN PART PLAINTIFF'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

**A P P E A R A N C E S :**

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**JAMES L. GARRITY, JR.**  
**U.S. BANKRUPTCY JUDGE**

Before the Court is Plaintiff Alan Nisselson’s Motion for Partial Summary Judgment [AP ECF Doc. Nos. 39, 40, 41, and 60, collectively]<sup>1</sup> (the “**Motion**”)<sup>2</sup> on his June 14, 2011 complaint [AP ECF Doc. No. 1] (the “**Complaint**”)<sup>3</sup> against defendants Ratiba Salim (“**Ratiba**”) and Wahid Saleem (“**Wahid**”) (collectively, the “**Defendants**”). Mr. Nisselson is the court-appointed chapter 7 trustee (the “**Trustee**”) for the estate of Big Apple Volkswagen, LLC (“**Big Apple**” or the “**Debtor**”). In the Complaint, the Trustee seeks to avoid and recover as fraudulent and preferential under federal and state law Debtor’s prepetition transfer of estate funds to Ratiba, and her subsequent transfer of real property located at 8529 65<sup>th</sup> Road, Rego Park, New York titled in her name, and that had been freed of a mortgage using some of the Debtor’s funds transferred to Ratiba (the “**Premises**”), to her husband, Wahid.<sup>4</sup>

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<sup>1</sup> Citations to “ECF Doc. No. \_\_\_” or to AP ECF Doc. No. \_\_\_” refer to the location that the referenced document can be found on the Court’s electronic case filing dockets for this case and adversary proceeding, respectively. Citations to “12 Civ. Dkt. No. \_\_\_” refer to the location that the referenced document is in 12 Civ. 92 (PGG) and “15 Civ. Dkt. No. \_\_\_” refer to the location that the referenced document is in 15 Civ. 4629 (PGG), as applicable, both as commenced in the United States District Court for the Southern District of New York.

<sup>2</sup> The Motion is comprised of the (i) *Motion for Summary Judgment (Partial)*, including the *Affidavit of Alan Nisselson in Support of Motion for Partial Summary Judgment*, and exhibits thereto [collectively, AP ECF Doc. No. 39 through 39-26] (the “**T. Aff.**”), *Local Bankruptcy Rule 7056-1 Statement of Material and Undisputed Facts* [AP ECF Doc. No. 40] (the “**7056-1 Statement**”); *Memorandum of Law in Support of the Motion* [AP ECF Doc. No. 41] (the “**T. Memo.**”); and *Reply Memorandum of Law in Further Support of Plaintiff’s Motion for Partial Summary Judgment* [AP ECF Doc. No. 60] (the “**Reply**”).

<sup>3</sup> When citing to the Complaint, the notation “Compl. ¶ \_\_\_” refers to paragraphs in the Complaint.

<sup>4</sup> See T. Memo. 1. In the Complaint, among other things, the Trustee alleges that he is entitled to a judgment against Wahid (i) avoiding and preserving the Subsequent Transfer, (ii) directing that the Subsequent Transfer be set aside, and (iii) recovering the Subsequent Transfer or the value thereof from Wahid for the estate’s benefit. Compl. ¶ 65. For these purposes, the term “Subsequent Transfer” means “Ratiba Salim’s subsequent transfer to Defendant Wahid Saleem of property freed from a mortgage obligation through use of the Debtor’s funds.” Compl. ¶ 2. The “property” referenced in the definition of “Subsequent Transfer” is the Premises. Compl. ¶¶ 14-15.

Only the first of the Complaint's nine claims for relief is relevant to the Motion.<sup>5</sup> There the Trustee is seeking to avoid and recover payments made by the Debtor to Ratiba as preferential transfers under the Bankruptcy Code (the "**Code**"). The gravamen of the Motion is that prepetition, Julian Salim ("**Julian**"), Big Apple's former managing member and majority owner, caused the Debtor to make two transfers aggregating \$705,000 (the "**Transfers**") to an account at the Queens County Savings Bank bearing Ratiba's name and the address of the Premises (the "**Bank Account**"), in satisfaction of debts then due and owing to her by the Debtor totaling no less than \$675,000. Ratiba is Julian's mother. A portion of that indebtedness consisted of a \$300,000 loan that Ratiba made to Julian and the Debtor in 2006. Ratiba financed that loan by taking out a \$300,000 mortgage (the "**Mortgage**") on the Premises. The Trustee seeks a judgment pursuant to §§ 547, 550 and 551 of the Code (i) avoiding the Transfers and preserving them for the benefit of Debtor's estate; (ii) directing that the Transfers be set aside; and (iii) recovering the Transfers, or the value thereof, from Ratiba for the benefit of the Debtor's estate. To the extent that the Transfers are avoided, the Motion also seeks a judgment avoiding Ratiba's conveyance of the Premises to Wahid, her husband and Julian's father, as a subsequent transferee of the value of a portion of the avoided Transfers. It is undisputed that before Ratiba conveyed the Premises to Wahid, approximately \$335,000 from the Transfers was paid to a third party mortgagee (the "**Mortgagee**"), for Ratiba's benefit, to satisfy the Mortgage.

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<sup>5</sup> See Notice of Trustee's Motion Pursuant to Bankruptcy Rule 7056 and Rule 56 of the Federal Rules of Civil Procedure for Partial Summary Judgment on his First Claim for Relief for Avoidance and Recovery of Preferential Transfers as Set Forth in Complaint Against Ratiba Salim and Waheed Salim [AP ECF Doc. No. 39] (stating that Trustee seeks "partial summary judgment on his first claim for relief for avoidance and recovery of preferential transfers as set forth in his complaint against Defendants Ratiba Salim and Waheed Salim").

The Motion was previously before the Court on March 11, 2014 (the “**March 2014 Hearing**”). Defendants did not respond to the Motion,<sup>6</sup> but their counsel participated at that hearing.<sup>7</sup> Counsel advised the Court that Defendants did not oppose the Motion and that they acknowledged that the Transfers were preferential payments, but that they denied liability for the Transfers because they allegedly had no control over the Bank Account. Counsel objected on the record to the entry of any order holding Defendants liable for the Transfers.<sup>8</sup> On March 12, 2014, the Court<sup>9</sup> issued a memorandum decision granting the Motion, and on March 20, 2015, the Court entered an order granting the Trustee summary judgment on the First and Eighth Claims for Relief in the Complaint. *See Nisselson v. Salim*, Adv. Proc. No.11-2251 (RG), Mar. 12, 2014 Mem. Decision [AP ECF Doc. No. 45] (the “**Decision**”); March 20, 2014 Order Granting the Motion [AP ECF Doc. No. 46] (the “**Order**”). On June 26, 2014, the Court entered final judgment with respect to the First and Eighth Claims for Relief in favor of the Trustee on

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<sup>6</sup> Defendants had ample opportunity to respond to the Motion. By *Stipulation and Order Regarding Briefing Schedule* “so ordered” by the Court on February 19, 2014 [AP ECF Doc. No. 44], the Defendants were granted an additional eleven days to file a brief in opposition to the Motion, but failed to do so.

<sup>7</sup>The record of the March 2014 Hearing reflects that Defendants were represented at that hearing by Navpreet Kaur of the Kadochnikov Law Group, who appeared at the hearing on behalf of Defendants’ then counsel of record, Lust & Leonov. *See* Transcript of March 2014 Hearing (“**March 2014 Tr.**”) [AP ECF No. 68] at 1:18-21 and 2:7-10.

<sup>8</sup> Ms. Kaur advised the Court that “[Defendants] have no opposition to the motion. It’s clear. The Defendants believe that there is no argument that the funds were put in Mr. and Mrs. Salim’s account.” March 2014 Tr. at 2:17-19. *See also Id.* at 4:12 – 15 (Ms. Kaur conceding that transfer of funds to the Bank Account constituted preferential payments). However, Ms. Kaur was clear that Defendants denied that they were liable for the Transfers “[b]ecause from the depositions it seems as if Defendants had no control over the accounts . . . .” *See, e.g., Id.* at 2:21-22. Accordingly, she advised the Court that she was appearing at the hearing only “to make sure that certain language is not used in the order [granting summary judgment]” because “[Defendants’ counsel of record] wants . . . language in [the order] to make sure there’s no liability issues [as to Ratiba and Wahid].” *Id.* at 2:16-21.

<sup>9</sup> When the Debtor filed this case, it was assigned to the Honorable James M. Peck. After Judge Peck’s retirement effective January 31, 2014, the case was temporarily assigned to the Honorable Robert E. Grossman, sitting by designation in the United States Bankruptcy Court for the Southern District of New York pursuant to an order signed by the Honorable Robert A. Katzmann, Chief Circuit Court Judge for the Second Circuit Court of Appeals. Judge Grossman presided over this adversary proceeding until it was reassigned to Judge Garrity on February 18, 2015.

behalf of the Debtor's estate, against Ratiba and Wahid, jointly and severally, in the sum of \$705,000. *See* Judgment in Favor of Trustee [AP ECF Doc. No. 50] (the "**Judgment**").

This matter is back before the Court because by order dated July 8, 2015, the District Court (Gardephe, J.) granted Defendants' petition for a writ of mandamus and directed this Court to (i) vacate the Decision; (ii) vacate the Judgment; and (iii) issue proposed findings of fact and conclusions of law with regard to the avoidance claims. *See Salim, et al. v. Nisselson, et al.*, 15 Civ. 4629 (PGG) July 8, 2015 Order [15 Civ. Dkt. No. 20] (the "**July 2015 Order**") at \*9. The District Court found that this Court exceeded its constitutional authority in entering the Judgment. Furthermore, it determined that this Court had disregarded the District Court's directive in its March 25, 2013 Memorandum Opinion and Order (the "**March 2013 Order**")<sup>10</sup> denying Defendants' motion to withdraw the reference of the Complaint from the Bankruptcy Court to the District Court (the "**Reference Motion**"), that it not enter a final judgment on the claims in the Complaint but instead, issue proposed findings of fact and conclusions of law for review by the District Court. *Id.*

This Court complied with the District Court's order and vacated the Decision and Judgment. *See Order Vacating (I) Entry of Summary Judgment, And (II) Entry of Final Judgment* [AP ECF Doc. No. 55]. On December 14, 2015, after receiving additional submissions from the parties,<sup>11</sup> the Court heard additional argument on the Motion. For the

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<sup>10</sup> *See Nisselson v. Salim*, 2013 WL 1245548, at \*5 (S.D.N.Y. Mar. 25, 2013) [12 Civ. Dkt. No. 19].

<sup>11</sup> At an October 20, 2015 conference with the parties, this Court granted Defendants' request for leave to supplement the summary judgment record with a memorandum of law addressing (i) issues related to avoidability of transfers and *in rem* and/or *in personam* liabilities for an avoided transfer under Bankruptcy Code §550 and (ii) the issue of whether Defendants are secured creditors of the Debtor. The Court also granted the Trustee the opportunity to file a reply memorandum of law, if he elected to do so. *See Scheduling Order*, dated October 28, 2015 [AP ECF Doc. No. 57]. The Defendants timely filed their *Objections By Defendants to Summary Judgement* (the "**Objection**") including affidavits from Wahid (the "**Wahid Affidavit**") and Ratiba (the "**Ratiba Affidavit**") [AP ECF Doc. No. 58] and the Trustee timely filed his Reply, respectively.

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