

STATE OF MICHIGAN
COURT OF APPEALS

DENNIS TRACY,

Plaintiff-Appellant,

v

MORBARK INDUSTRIES, INC.,

Defendant,

and

FOREMOST FABRICATIONS, INC.,

Garnishee-Defendant,

and

ISABELLA INVESTMENT CORPORATION,

Intervening Defendant-Appellee.

Before: Reilly, P.J., and MacKenzie and B. K. Zahra*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order that dissolved his writ of garnishment against Foremost Fabrications and released certain escrowed funds to Isabella Investment Corporation. We affirm.

The underlying action in this case began in 1988, when plaintiff filed a breach of contract action against his employer, Morbark Industries. At roughly the same time, Morbark was pursuing a patent infringement action against Foremost Fabrications. The patent case settled in 1991, with Foremost agreeing to pay Morbark \$430,000 in four annual installments ending in 1994. On August 3, 1993, the

* Circuit judge, sitting on the Court of Appeals by assignment.

jury in plaintiff's breach of contract case returned a verdict against Morbark in the amount of \$76,316. An order of judgment was entered on September 28, 1993. On September 2, 1993, between the time of the jury verdict and the entry of judgment, Morbark assigned various receivables, including the remainder of the Foremost settlement, to Isabella Investment Corporation as partial payment of a 1989 loan. This case involves plaintiff's attempt to garnishee Foremost's escrowed 1994 settlement payment to Isabella Investment. The trial court rejected plaintiff's claim that Morbark's assignment of the settlement proceeds was an invalid effort to place the proceeds out of reach of any judgment creditors and ordered the funds released to Isabella Investment.

Only obligations owed or payable to a judgment debtor at the time a writ of garnishment is served are subject to garnishment by a judgment creditor. *Royal York of Plymouth Ass'n v Coldwell Banker Schweitzer Real Estate Services*, 201 Mich App 301, 304; 506 NW2d 279 (1993). See also MCL 600.4011(1)(b); MSA 27A.4011(1)(b). When a judgment debtor assigns to a third party a debt owed to it prior to commencement of the garnishment proceedings, a judgment creditor cannot acquire rights to the debt unless the assignment was fraudulent. *Mihajlovski v Elfakir*, 135 Mich App 528, 534; 355 NW2d 264 (1984); *Blumenthal v Simons*, 110 Mich 42, 44-46; 67 NW 1102 (1896).

Plaintiff argues that the assignment of the proceeds from the Foremost settlement, which was made after the verdict against Morbark had been rendered in plaintiff's favor but before the judgment against Morbark had been filed, was not an arm's length transaction and was an attempt by Morbark to defraud its creditors. Defendants counter that the assignment was made to satisfy a preexisting debt between Morbark and Isabella Investment and was not done in an attempt to defraud any judgment creditors. We find no error in the trial court's conclusion that the assignment was made in satisfaction of a preexisting debt and was thus valid.

As stated above, a judgment creditor cannot acquire rights to a debt that has previously been assigned, unless the assignment was fraudulent. *Mihajlovski, supra* at 534. Pursuant to MCL 566.14; MSA 26.884 through MCL 566.17; MSA 26.887, a fraudulent conveyance may be found if the transfer is either intentionally or constructively fraudulent. In order for a conveyance to be intentionally fraudulent, the transferor must have the actual intent to hinder, delay, or defraud creditors. MCL 566.17; MSA 26.887. The focus is on the intent of the transferor, not the transferee. *In re Otis*, 115 BR 900, 913 (Bankr ED Mich, 1990). A conveyance is constructively fraudulent if the transfer has not been made for fair consideration and renders the transferor insolvent or in similar financial straits. MCL 566.14; MSA 26.884.

The transfer of the Foremost settlement proceeds from Morbark to Isabella Investment was not a fraudulent conveyance. The evidence shows that Isabella Investment extended a substantial line of credit to Morbark in 1989, several years prior to the resolution of plaintiff's claim against Morbark. In the intervening years, the line of credit fluctuated as Morbark paid back the debt and received other advances. Furthermore, the loan to Morbark represented approximately five percent of the total credit Isabella Investment had outstanding. In 1993, two judgments were entered against Morbark which rendered it insolvent. Isabella Investment, concerned about the credit which had been extended to

Morbark, requested additional security. Morbark, following the verdict in plaintiff's favor, executed several mortgages on its property in favor of Isabella Investment and also assigned the last two payments from the Foremost settlement to Isabella Investment. At the time plaintiff's writ of garnishment was filed, Foremost was no longer obligated to pay Morbark, but instead owed the money to Isabella Investment. Despite the close corporate structures of Morbark and Isabella Investment, the evidence established that the assignment was an arm's length transaction made to cover a preexisting debt and thus fair consideration was given for the transfer. MCL 566.14; MSA 26.884. Although somewhat suspect because of the close nature of their relationship, plaintiff has failed to show that Morbark fraudulently conveyed the proceeds to Isabella Investment. *Mihajlovski, supra* at 534. Plaintiff could not garnishee Foremost to satisfy his judgment against Morbark because Foremost no longer owed the proceeds to Morbark. *Royal York, supra*. As such, the lower court properly dismissed plaintiff's writ of garnishment against Foremost and properly released the funds from escrow.

Affirmed.

/s/ Maureen P. Reilly
/s/ Barbara B. MacKenzie
/s/ Brian K. Zahra