STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Assignment for the Benefit of Creditors of Unison Corporation.

REBECCA MACKAY, Successor Trustee of the JOHN A. MACKAY REVOCABLE LIVING TRUST,

Appellant,

v

MCTEVIA & ASSOCIATES, INC., Assignee for the Benefit of the Creditors of UNISON CORPORATION,

Appellee.

UNPUBLISHED
February 23, 2001

No. 217385
Oakland Circuit Court
LC No. 99-011866-CZ

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

Rebecca MacKay, successor trustee of the John A. MacKay Revocable Living Trust (Trust), appeals by leave granted a trial court order granting McTevia & Associates, Inc.'s (McTevia) motion to compel surrender of property of Unison Corporation (Unison). We affirm.

I. Nature of the Case

This interlocutory appeal involves a dispute over the ownership of proceeds from four life insurance policies paid after and upon the death of John MacKay. The insurers issued the policies to Unison and listed Unison as sole owner and beneficiary. However, Rebecca MacKay argues that the proceeds belong to the family Trust pursuant to a stock redemption agreement (Agreement) executed by Unison and MacKay which provides that, should MacKay die before the agreement was fulfilled, the life insurance proceeds would go to the Trust. Rebecca MacKay says that the intent of the Agreement was to make MacKay or the Trust the beneficial owner of the policies and, therefore, McTevia, as the assignee for the benefit of Unison's creditors, has no right to the proceeds.

However, McTevia contends, and the trial court agreed, that it is entitled to the life insurance proceeds because Unison was the sole beneficiary of the policies and the proceeds, as property of Unison, passed to McTevia to pay Unison's creditors. McTevia maintains that the Agreement is simply a promissory note, making MacKay and the Trust unsecured creditors of Unison. Accordingly, McTevia says that the Trust has no right to the insurance proceeds and must stand in the same position as the hundreds of other unsecured creditors of Unison.

For the reasons discussed below, we hold that McTevia, as the assignee of Unison, is entitled to the insurance proceeds for the distribution to Unison's creditors. The Trust has no right to the insurance proceeds under the life insurance policies because Unison is the sole beneficiary and the Trust was not named as a payee. Moreover, the Agreement did not constitute an assignment of the insurance policies to secure the loan. Rather, the Agreement was an unsecured obligation by Unison to pay the Trust from the insurance proceeds. Accordingly, as property of Unison, the proceeds passed to McTevia for the benefit of Unison's creditors, which include the Trust.

II. Facts and Proceedings

On August 27, 1984, MacKay, acting for himself and as trustee of the Trust, entered into the stock redemption agreement with Unison. MacKay owned seventy percent of Unison's stock and Frederick McDonald owned the remaining thirty percent. The Agreement provided that Unison would pay $547,741.14 for MacKay's seventy percent interest in the stock. Pursuant to the Agreement, MacKay received from Unison a secured promissory note (Note) providing that Unison would pay the above amount over 180 months at $5,555.56 per month, plus interest.

Pursuant to the Agreement, Unison maintained four life insurance policies on MacKay, each policy listing Unison as the sole owner and beneficiary. The Agreement provided that Unison would pay the premiums on the policies until it satisfied its debt to MacKay. The Agreement also provided that, in the event of MacKay's death prior to full payment by Unison for the stock, proceeds of the insurance policies would be applied against the monthly amounts owed by Unison which would be paid to the successor Trustee. Unison failed to make payments on the Note for some years prior to MacKay's death in November 1998. However, consistent with the Agreement, Unison continued to make premium payments on the life insurance policies up to the time of MacKay's death.

On January 14, 1999, Unison, as assignor, entered into an agreement with McTevia, as assignee, for an assignment for the benefits of creditors[1] pursuant to MCL 600.5201 *et seq*.; MSA 27A.5201 *et seq*. The agreement provided for McTevia to take charge of all Unison

[1] The common law assignment for the benefit of creditors is codified in MCL 600.5201 *et seq*.; MSA 27A.5201 *et seq*. The assignee receives all nonexempt property from the assignor and acts as trustee of the estate for the benefit of the assignor's creditors. The assignee has the duty to pay and discharge that assignor's debts, as far as it is possible, from the assets of the assignor. *Parsons v Clark*, 59 Mich 414, 418; 26 NW 656 (1886). The assignee has the power to "[s]ue in his own name as such assignee and recover all the estate, debts and things in action belonging to or due to such assignor. . . ." MCL 600.5211; MSA 27A.5211.

property and assets, liquidate, and then make distributions to Unison's creditors pursuant to MCL 600.5251; MSA 27A.5251.

On January 22, 1999, McTevia filed a motion to compel the surrender of property of Unison Corporation to assignee, McTevia. The motion sought the surrender of the insurance policy proceeds taken out by Unison on the life of MacKay.[2] The proceed checks were issued and made payable to Unison, but were in the possession of Austin Kanter, a director of Unison and the authorized agent for disbursement.[3] Rebecca MacKay, as successor trustee, responded to McTevia's motion, arguing that the Agreement specifically provided that the proceeds were, net of any sums borrowed prior to MacKay's death, beneficially owned by the Trust and held in constructive trust by Unison for the benefit of the Trust.

On January 27, 1999, the trial court granted McTevia's motion to compel surrender of property of Unison Corporation to assignee. Upon learning of the trial court's decision, appellant filed a motion for a stay of proceedings which the trial court denied. Two days later, appellant filed an emergency appeal and a motion for a stay with this Court. On February 1, 1999, prior to this Court's ruling on appellant's application for leave to appeal, an involuntary bankruptcy petition was filed against Unison in the United States Bankruptcy Court. After notification of the bankruptcy proceedings, this Court dismissed appellant's appeal without prejudice. *In re Assignment for the Benefit of Creditors of Unison Corp*, unpublished order of the Court of Appeals, entered February 5, 1999 (Docket No. 217248).

On February 4, 1999, United States Bankruptcy Judge Ray Reynolds Graves dismissed the involuntary bankruptcy petition against Unison. Appellant immediately refiled its application for emergency appeal and motion for stay pending appeal and this Court granted both in an order entered on February 10, 1999. *In re Assignment for the Benefit of Creditors of Unison Corp*, unpublished order of the Court of Appeals, entered February 10, 1999 (Docket No. 217385). On May 14, 1999, the trial court ordered that the proceeds of the life insurance policies be deposited in an insured, interest-bearing escrow account pending a final determination of ownership.

III. Analysis

The resolution of this issue depends on the construction of the Agreement entered by the parties and its effect on the insurance policies owned by Unison. Both parties assert that the language of the Agreement is clear and unambiguous. Accordingly, "[t]he construction of a contract with clear language is a question of law that we review de novo." *Meridian Mut. Ins Co v Wypij*, 226 Mich App 276, 279; 573 NW2d 320 (1997). Paragraph 7 of the Agreement provides the following with respect to the insurance policies taken out on MacKay's life:

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[2] It appears that the amount in controversy is $604,155.54 in life insurance proceeds. The Trust also claims that it is owed $202,208.72 for outstanding payment and interest due on the Agreement and Secured Promissory Note.

[3] McTevia attached to its motion a schedule of life insurance that indicated that there were four policies on MacKay worth a total of $624,411; however, Kanter's attorney, in a letter to both parties, indicated that Kanter possessed only three checks totaling $604,155.64.

> It is acknowledged that the Corporation is the owner of certain life insurance policies upon the life of MacKay, and the Corporation agrees to keep such policies in effect and pay the premiums thereon and therefore until the terms of this Agreement have been fully paid. The Corporation shall, however, be entitled in its discretion to continue to borrow against the cash value of such policy as it may determine from time to time required for its operations.
>
> At such time as the sums due Trustee and/or MacKay hereunder have been fully paid, the Corporation shall distribute and transfer to MacKay the ownership of said policies and the right to designate the beneficiaries thereunder.
>
> In the event of MacKay's death prior to payment in full of all sums due hereunder, all proceeds of such policies shall be paid over by the Corporation to Trustee (or the successor trustee of the John A. MacKay Revocable Living Trust dated July 2, 1981) to be applied against the monthly payments remaining due Trustee under the terms of this Agreement. Further, in the event the proceeds payable under the terms of such policies are not sufficient to retire a sum equal to the total of all remaining monthly payments due Trustee under the terms of this Agreement, the balance due Trustee shall be paid to Trustee (or to his successor trustee) in equal monthly installments for the remaining term of the Note. In the event that such proceeds exceed a sum equal to the total of all remaining monthly payments under the terms of this Agreement due Trustee, such excess shall be deemed as additional purchase price for the sale of said shares.

The clear terms of the Agreement state that Unison was the owner of the life insurance policies and was obligated to pay the premiums until it paid the debt to MacKay in full. Once Unison paid the debt, the Agreement contemplates an assignment of the policies to MacKay. The Agreement also plainly provides that, in the event MacKay died before Unison finished paying the debt, Unison would collect the insurance proceeds which, in turn, would "be paid by the corporation to the trustee."

Rebecca MacKay contends that the Agreement evidences the clear intent of the parties to make MacKay and the Trust the beneficial owners of the policies. To support this claim, Rebecca MacKay provided to the trial court and attached to her brief on appeal an affidavit of Austin Kanter, the Unison officer who procured the insurance policies and an affidavit of Gordon Smith who drafted the Agreement, Note and the Stock Pledge Agreement. McTevia argues that this Court should not consider the affidavits because they are inadmissible hearsay. Whether hearsay or not, extrinsic evidence of the intent of contracting parties is not competent evidence if the terms of the contract are unambiguous. *Zurich Ins Co v CCR and Co (On Rehearing)*, 226 Mich App 599, 603-605; 576 NW2d 392 (1997). In this case, both parties claim the terms are unambiguous and we agree. Accordingly, the trial court did not err by failing to consider the affidavits and this Court will not consider them on appeal.

Nonetheless, Rebecca MacKay argues that the Trust had a vested interest as "intended beneficiary" of the insurance policies based on the intent of the Agreement. If Rebecca

MacKay's assertion is correct, it is unclear why the parties designated Unison as the sole beneficiary of the policies rather than the Trust.[4] Naming the Trust as beneficiary would have assured the payment of the proceeds directly to the Trust, rather than the proceeds first going to Unison. However, the policies do not name the Trust as beneficiary or payee and there is no evidence that Unison attempted to change the beneficiary to the Trust at any time. Moreover, Rebecca MacKay does not assert that naming Unison as the beneficiary constituted a mistake and it is clear from the Agreement that the parties contemplated that only Unison would receive the proceeds directly from the insurance companies.

Thus, it appears that the parties took a risk on Unison's solvency by naming Unison the beneficiary and by contracting for payment only after Unison collected on the policies. In light of the plain language of the policies and the Agreement, it is clear that Unison was the sole beneficiary of the policies and that the Agreement constituted a promissory note obligating Unison to pay the Trust.

Rebecca MacKay further claims that the Trust's right to the proceeds arose at the moment MacKay died in November 1998 and, therefore, the proceeds could not be part of Unison's assignment to McTevia filed on January 15, 1999. However, because the Trust was not a named payee in the policies, no right in the proceeds vested under the policies at the moment MacKay died. Rather, MacKay's death triggered Unison's right to collect the proceeds and, thereafter, the Agreement obligated Unison to pay the Trust. Despite its obligation under the promissory note, the proceeds remained with Unison and became part of the assignment to McTevia for the benefit of all Unison's creditors.

Moreover, as McTevia correctly points out, the Agreement does not constitute an assignment of the insurance policies to secure the debt. The plain language of the Agreement does not purport to transfer ownership of the policies and no evidence indicates Unison physically delivered the policies to MacKay or the Trust to evidence an assignment. The Agreement *contemplates* an assignment of the policies by Unison if it paid off its debt sometime in the future, but while MacKay was alive; however, the Agreement itself does not effect a transfer of ownership. We also note that the parties clearly knew how to formally assign a life insurance policy because they executed a formal, Absolute Assignment in April 1967, transferring another policy insuring MacKay's life from McDonald to Unison. For the above reasons, it is clear that the Agreement did not constitute an assignment of the insurance policies as security for the debt.

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[4] The arrangement is also unusual in that Unison, the debtor, insured the life of MacKay, the creditor. Traditionally, the creditor or debtor takes out a life insurance policy on the life of the debtor so that, to the extent there are amounts owing on the debt when the debtor dies, the creditor can collect it from the insurance proceeds. *Balcer v Peters*, 37 Mich App 492, 495; 195 NW2d 83 (1972). However, it appears that Massachusetts General Life Insurance Company and National Life Insurance Company issued the proceed checks to Unison without raising any claim regarding Unison's insurable interest in MacKay so we need not address the issue. *Secor v Pioneer Foundry Co*, 20 Mich App 30, 33; 173 NW2d 780 (1969).

We also decline to impose a constructive trust on the life insurance proceeds for the benefit of the Trust. Rebecca MacKay contends that the Agreement made Unison a constructive trustee of the insurance policies while MacKay was alive and, therefore, that McTevia has no right to retain what Unison was obligated to convey to the Trust when MacKay died. Conversely, McTevia argues that the insurance policies owned by Unison on the life of MacKay were not held in constructive trust for appellant, were not procured by fraud or undue influence, and were merely corporate assets of Unison.

A constructive trust is an equitable remedy which "may be imposed when property 'has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property.'" *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993), quoting *Potter v Lindsay*, 337 Mich 404, 411; 60 NW2d 133 (1953) and *Racho v Beach*, 254 Mich 600, 606-607; 236 NW 875 (1931). A constructive trust "may not be imposed upon parties 'who have in no way contributed to the reasons for imposing a constructive trust.'" *Kammer, supra*, quoting *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955).

Plaintiff relies on *Hicks v Cary*, 332 Mich 606; 52 NW2d 351 (1952), for the proposition that a constructive trust may be imposed to recover life insurance proceeds owned by a corporation. In *Hicks*, the plaintiff sued the defendant corporation for life insurance proceeds that were taken out on the life of the decedent as per a contractual obligation. *Id*. at 608. The decedent entered into an employment contract with the defendant and purchased the defendant's corporate shares. *Id*. The defendant agreed to insure the decedent's life for the amount of the shares for the purpose of redeeming the shares in the case of the decedent's death. *Id*. Thereafter, the contractual relationship between the defendant and the decedent terminated and the decedent sold his shares back to the defendant. A few days later the decedent died and the defendant, as named beneficiary, collected the full amount on the policies. *Id*. In holding that the elements of a constructive trust were not present in the case, the Court stated that "to prevail plaintiff must establish that the enrichment of defendants, if unjust, is at her expense." *Id*. at 612. The Court found that the plaintiff presented no equitable ground in which to construe a constructive trust or any unjust enrichment by the defendant. *Id*.

In this case, appellant argues that the *Hick's* Court recognized the right to recover under a constructive trust theory if the plaintiff had established a legal or equitable right. The legal right or equitable claim upon which appellant relies is the contractual language of Paragraph 7 of the Agreement. However, contrary to Rebecca MacKay's request in this case, in *Hicks*, the Court denied imposing a constructive trust, noting that such a remedy is "predicated on fraud, misrepresentation, concealment, mistake, undue influence, duress, breach of fiduciary or confidential relations or similar equitable considerations." *Id*. at 612. As in *Hicks*, there is no basis for us to find any wrongdoing or mistake in this case.

Plaintiff also relies on *Kent v Klein*, 352 Mich 652; 91 NW2d 11 (1958), in which the Michigan Supreme Court upheld the trial court's determination that a constructive trust existed. In *Kent*, title to a parcel of real estate was conveyed by deed to the defendant to hold in trust for her incompetent brother. *Id*. at 654. After the death of the defendant's brother, the brother's

widow and son sued for delivery of legal title to them. The defendant refused to transfer title to the property because legal title was in her name. *Id*. The Court upheld the trial court's decision to establish a constructive trust, finding that the property was unconscionably withheld.

We find *Kent* distinguishable. In *Kent*, it was the clear intention of the grantor to give title to the defendant for the purpose of holding for the benefit of her brother and that she refused to turn over the title out of self-interest. *Kent*, *supra*, 352 Mich 655-656. Here, there is no specific language in the Agreement establishing Unison as a trustee. Further, no evidence suggests that Unison failed to turn over the assets to procure a windfall.

We are also persuaded by the language cited by McTevia from the Sixth Circuit in *In re Omegas Group*, 16 F3d 1443, 1449 (CA 6, 1994), in which the Court observed:

> Constructive trusts are anathema to the equities of bankruptcy since they take from the estate, and thus directly from competing creditors, not from the offending debtor. [*Id*. at 1452.]

While this case is an assignment for the benefit of creditors and not an action in bankruptcy, we nonetheless find this reasoning persuasive. We cannot conclude that Unison would be unjustly enriched by its receipt of the insurance proceeds, not only because of the unambiguous terms of the Agreement and Unison's consistent payment of the premiums, but because the proceeds were assigned to McTevia for distribution to Unison's creditors.

For the above reasons, we hold that the trial court did not err in granting McTevia's motion to compel transfer of Unison's property as to the insurance policies. The clear language of the Agreement reveals that it constituted a promissory note for a debt owed by Unison to the Trust. This language of the Agreement was clear and unambiguous as were the terms of the insurance policies designating Unison as sole beneficiary. Further, the parties made no attempt to change the beneficiary or to assign the policies to MacKay or the Trust. Accordingly, the Trust contracted for a right to the proceeds only through the Agreement which, by its terms, constituted no more than an unsecured promissory note. Unison agreed to pay MacKay and the Trust for the stock redemption; however, without some vested right in the insurance policies or some showing of fraud or mistake, we cannot conclude that this promissory note should take priority over the many other unsecured creditors to which Unison also promised payment.[5]

Affirmed.

/s/ Mark J. Cavanagh
/s/ Henry William Saad
/s/ Patrick M. Meter

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[5] Because we find that the trial court did not err by granting McTevia's motion to compel surrender of the property of Unison with regard to these insurance policies, we need not address McTevia's claim that a distribution of the proceeds would violate the Michigan Business Corporation Act, MCL 450.1345; MSA 21.200(345).