STATE OF MICHIGAN

COURT OF APPEALS

MULTI-GRINDING, INC.,

Plaintiff-Appellant,

v

RICHARDSON SALES & CONSULTING SERVICES, INC., d/b/a REFABCO SCREW PRODUCTS, d/b/a REFABCO/RDC, d/b/a RDC BEAVER INDUSTRIES, and MASON RICHARDSON,

Defendants-Appellees,

and

ESG PARENT CORPORATION,

Defendant.

UNPUBLISHED
June 15, 2004

No. 245779
Macomb Circuit Court
LC No. 02-000614-CK

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In an action to collect a debt owed for grinding services, plaintiff, Multi-Grinding, Inc., appeals as of right from the trial court's order denying its motion for summary disposition against defendants-appellees, Richardson Sales & Consulting Services, Inc., and Mason Richardson (hereafter "Mason"), and granting defendants-appellees' motion for summary disposition. Plaintiff's claim was based on a various theories of liability stemming from its inability to collect payments on invoices for grinding services that were provided. We affirm in part, reverse in part and remand for further proceedings.

We review the trial court's decision de novo to determine if either party was entitled to summary disposition under MCR 2.116(C)(10). *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When the evidence does not establish a genuine issue regarding any material fact for trial, the moving party is entitled to judgment as a matter of law. *Id.* at 120-121.

Upon review de novo, we reject plaintiff's claim that it was entitled to collect its debt from Richardson Sales under a theory of successor liability, but find merit to plaintiff's claim that it established fraud within the meaning of the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.*

Addressing plaintiff's successor liability claim first, we conclude that plaintiff failed to establish factual support for its position that Richardson Sales was liable for debts owed by Refabco Screw Products, Inc., RDC Beaver Industries, Inc., RIC Tube & Tools, Inc., and Beaver Assemblies, L.L.C. (hereafter collectively referred to as "Refabco/RDC"). Viewed in a light most favorable to plaintiff, the evidence indicated that Mason sold his stock in Refabco/RDC to ESG Parent Corporation (ESG) in 1999 in exchange for $250,000 and a promissory note for $2,670,000, which was secured by Refabco/RDC's assets. There was no evidence that Mason had any ownership interest in ESG, although the purchase agreement gave Mason certain employment rights as a consultant of ESG for a minimum of five years.

As a matter of law, we conclude that neither Mason's reacquisition of Refabco/RDC's assets in 2001, pursuant to the return of the collateral agreement entered after ESG's default on the promissory note, nor Mason's subsequent transfer of the reacquired assets to Richardson Sales, rendered Richardson Sales liable for Refabco/RDC's debts. Plaintiff's reliance on *O D Silverstein, MD, PC v Services, Inc,* 165 Mich App 355; 359; 418 NW2d 461 (1987), is misplaced because the evidence indicated that the uncollected debt arose from the grinding services that plaintiff provided for Refabco/RDC. Under *O D Silverstein, MD, PC, supra*, the debt follows the corporation. Thus, upon review de novo, Refabco/RDC, and not Richardson Sales, was liable for the debt.

We also reject plaintiff's alternative claim that Richardson Sales may be held liable for Refabco/RDC's debts by treating the underlying transaction of its owner, Mason, as a sale of Refabco/RDC's assets. Plaintiff has not established any factual or legal basis for disregarding the secured transaction embodied within the purchase agreement, promissory agreement, and other referenced writings. "Where one writing references another instrument for additional contract terms, the two writings should be read together. The Court must look for the party's intent within the contract where the words of a written contract are not ambiguous or uncertain." *Forge v Smith,* 458 Mich 198, 207; 580 NW2d 876 (1998). Having failed to demonstrate that the contracting parties intended an asset sale, we find it unnecessary to address plaintiff's various arguments concerning an asset purchaser's liability for the debts of the selling corporation.

We note that plaintiff also relies on the equitable doctrine of piercing the corporate veil to support its claim that Richardson Sales should be liable for Refabco/RDC's debts. But that doctrine does not implicate the issue of successor liability. Rather, it provides a means for a court of equity to disregard the corporate structure when there is a unity interest between shareholders and a corporation and an abuse of the corporate form. See *Foodland Distributors v Al-Naimi,* 220 Mich App 453, 456-457; 559 NW2d 379 (1996).

Because plaintiff fails to set forth this equitable doctrine in the statement of questions presented in its brief, we need not address it. *Meagher v McNeely & Lincoln, Inc,* 212 Mich App 154, 156; 536 NW2d 851 (1995). In any event, we find it unnecessary to apply this equitable doctrine because the law, as set forth in the UFTA, provides an adequate remedy for plaintiff. *ECCO, Ltd v Balimoy Mfg Co,* 179 Mich App 748, 751; 446 NW2d 546 (1989).

We find merit to plaintiff's argument that the trial court erroneously found no evidence of a fraudulent transaction under the UFTA. As a uniform act, we may consider decisions from other states that have adopted the UFTA in determining how it should be applied in Michigan. See *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 378; 512 NW2d 86 (1994).

The UFTA was "designed to protect unsecured creditors against debtors who make transfers out of, or make obligations against, the debtor's estate in a manner adverse to the creditors' rights." *Nicholas Loan & Mortgage, Inc v W Va Coal Co-op, Inc*, 209 W Va 296, 300; 547 SE2d 234 (2001). The UFTA contains the following means of establishing fraud that are relevant here:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. [MCL 566.34.]

Our application of this statute is aided by a number of statutory definitions and other provisions in the UFTA. "If a statute provides its own glossary, the terms must be applied as expressly defined." *Barrett v Kirtland Community College*, 245 Mich App 306, 314; 628 NW2d 63 (2001).

"Transfer" is defined as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." MCL 566.31(l). "Lien" includes "a security interest created by agreement." MCL 566.31(j). "Asset" includes the debtor's property, but excludes property encumbered by a valid lien. MCL 566.31(b)(i). A "valid lien" is a "lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings." MCL 566.31(m). A "debtor" is "a person who is liable on a claim." MCL 566.31(f). A "creditor" is "a person who has a claim." MCL 566.31(d).

Here, the pertinent "transfer" that plaintiff claims was fraudulent is the security interest that was created by the December 7, 1999, agreement in which assets of the debtor, Refabco/RDC, were used to secure a debt owed by ESG to the creditor, Mason, for

Refabco/RDC's stock.[1] The trial court's decision that the evidence did not support an inference that the transaction was fraudulent is correct to the extent that the court applied the actual intent standard set forth in MCL 566.34(1)(a) to this transaction.[2] But the trial court's decision is erroneous as applied to MCL 566.34(1)(b)(i).

The first requirement of MCL 566.34(1)(b) is that the debtor, Refabco/RDC, not receive a "reasonably equivalent value" in exchange for the transfer. As adopted in Michigan, the UFTA does not define "reasonably equivalent value," except that MCL 566.33 states, in part:

> (1) Value is given for a transfer of obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. . . .
>
> (2) For the purposes of sections 4(a)(2) and 5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

The phrase "reasonably equivalent value" was derived from the federal Bankruptcy Code, 11 USC 548. *Leibowitz v Parkway Bank & Trust Co (In re Image Worldwide, Ltd),* 139 F3d 574 (CA 7, 1998). The UFTA has been construed to require that the value given in exchange for the transaction be received by and benefit the debtor-transferor, and not some third party or entity. See *Nat'l Westminster Bank NJ v Anders Engineering, Inc,* 289 NJ Super 602, 606; 674 A2d 638 (1996). But indirect benefits to the debtor-transferor may be considered, even if the net worth of the debtor-transferor is not affected. *Leibowitz, supra* 139 F3d at 579. Specifically, in *Leibowitz, supra*, 139 F3d at 579, the court provided:

> The most straightforward indirect benefit is when the guarantor receives from the debtor some of the consideration paid to it. See [*Rubin v Manufacturers Hanover Trust Co,* 661 F2d 979, 991 (CA 2, 1981)]; [*Heritage Bank Tinley Park v Steinberg (In re Grabill Corp),* 121 BR 983, 995-996 (ND Ill 1990)]. But courts have found other economic benefits to qualify as indirect benefits. For example, in *Mellon Bank, NA v Metro Communications, Inc,* 945 F2d 635, 646-648 (CA 3, 1991), the court found reasonably equivalent value for a debtor corporation's

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[1] The creation of the security interest is appropriately treated as a "transfer" under the statutory definitions in the UFTA. Cf. *Nicholas Loan & Mortgage, Inc, supra,* 209 W Va at 301 (creation of a security interest, with the consent of the debtor, in the property of the debtor so as to secure the payment of a debt, is a transfer under the UFTA, as adopted in West Virginia); see also *SCD Chemical Distributions, Inc, supra* at 378 (this Court may look to decisions in other states that have applied the uniform act).

[2] Plaintiff offered no admissible evidence to support a reasonable inference that the December 7, 1999, security agreement was actually intended to defraud Refabco/RDC's creditors within the meaning of MCL 556.34(1)(a).

> guarantee of an affiliate's debt when the loan strengthened the corporate group as a whole, so that the guarantor corporation would benefit from "synergy" within the corporate group. The *Mellon* court stated that indirect benefits included intangibles such as goodwill, *id.* at 647 and an increased ability to borrow working capital. *Id*. at 648. *TeleFest* [*Telefest, Inc v VU-TV, Inc,* 591 F Supp 1368 (D NJ 1984)] indicated that indirect benefits to a guarantor exist when "the transaction of which the guaranty is a part may safeguard an important source of supply, or an important customer for the guarantor. Or substantial indirect benefits may result from the general relationship" between affiliates. 591 F Supp at 1380-1381 (quoting Normandin, "Intercorporate Guarantees and Fraudulent Conveyances," in Personal Property Security Interests Under the Revised UCC 361, 370-371 (1977)). In *Xonics* [*In re Xonics Photochemical, Inc*, 841 F2d 198 (CA 7, 1988)], we recognized the ability of a smaller company to use the distribution system of a larger affiliate as an indirect benefit as well. See *Xonics*, 841 F2d at 202.

Ultimately, a court should consider all the facts and circumstances in making the "reasonably equivalent value" determination, keeping in mind that any significant disparity between the value received and obligation assumed by the debtor-transferor will significantly harm innocent creditors. See *Tri-Star Techs Co v Pitocchelli (In re Tri-Star Technologies Co),* 260 BR 319, 325-326 (D Mass, 2001).

Here, there was no evidence that Refabco/RDC received any actual consideration for the transfer. Further, the evidence did not support a reasonable inference that Refabco/RDC indirectly benefited from the transfer. A review of the record suggests that the only effect of the security interest was that it enabled Refabco/RDC's new owner, ESG, to purchase its stock on credit. It follows that Refabco/RDC did not receive a "reasonably equivalent value" for the security interest. And, defendants-appellees have not shown that a genuine issue of material fact exists with regard to the value element. See MCL 566.33 and MCL 566.34.

Factual support was also lacking for the other required element of MCL 566.34(1)(b)(i). The evidence discloses that there is no genuine issue of material fact with regard to plaintiff's ability to prove that the debtor, Refabco/RDC, engaged or was about to engage in a business or a transaction for which its remaining "assets," as defined in MCL 566.31(b)[3] to exclude property

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[3] For UFTA purposes, MCL 566.31 defines an asset, in relevant part as follows:

> (b) "Asset" means property of a debtor, but the term does not include any of the following:
>
> (i) Property to the extent it is encumbered by a valid lien.
>
> * * *
>
> (j) "Property" means anything that might be the subject of ownership.

(continued…)

encumbered by valid liens, were unreasonably small in relation to the business or transaction.[4] Hence, the trial court's order granting summary disposition to defendants-appellees is reversed in part with regard to plaintiff's fraud claim under MCL 566.34(1)(b)(i). As a matter of law, plaintiff, rather than defendants-appellees, was entitled to summary disposition with regard to this issue.

We find defendants-appellees' reliance on article 9 of the Uniform Commercial Code, MCL 440.9101 *et seq.*, as a basis for avoiding liability to be misplaced because plaintiff's meritorious claim arises from the creation, rather than the enforcement, of the security interest. See MCL 566.38(5)(b). But we express no opinion as to the appropriate remedy that may be ordered under the UFTA pursuant to MCL 566.37 and MCL 566.38. We remand for further proceedings consistent with our determination that plaintiff is entitled to summary disposition with regard to the question of fraud under MCL 566.34(1)(b)(i).

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction. No costs under MCR 7.219(A), neither party having prevailed in full.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

(…continued)

* * *

> (m) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

Because Refabco/RDC did not transfer assets encumbered by a security interest, but rather had its assets encumbered as a result of the transfer, the transfer comes within the scope of the UFTA. "'Property of a debtor' *is* an 'asset' to the extent it is *not* encumbered by a valid lien." *Webster Industries, Inc v Northwood Doors, Inc*, __ F Supp __; 2004 US Dist LEXIS 4893 at * 37 (ND Iowa, issued March 25, 2004)

[4] We further note that the evidence was undisputed that Refabco/RDC continued to engage in the same business after the transfer.