

STATE OF MICHIGAN
COURT OF APPEALS

ALLIANCE BANCORP,

Plaintiff-Appellant,

v

SELECT MORTGAGE, L.L.C., KHALIL &
COMPANY, a/k/a KHALIL COMPANY
ACCOUNTING & TAX SERVICES, ZAHYA
KHALIL, MOHAMMED KHALIL, KALIL F.
KHALIL, a/k/a KAL KHALIL, CHRIS DIXON,
a/k/a CHRISTINE L. SANDERS, SOUSAN
HAMAD, TAYLOR TITLE COMPANY, TARIQ
HAMAD and MARGARET MESSINA,

Defendants,

and

MOUFEDA KHALIL, ZARIFA KHALIL,
ZAHYA HASSAN and FAYEZ REAL ESTATE,
L.L.C.,

Defendants-Appellees.

UNPUBLISHED

March 18, 2008

No. 274853

Wayne Circuit Court

LC No. 04-429635-CB

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendants, Kalil F. Khalil (“Khalil”) and Tariq Hamad (“Hamad”), defrauded multiple mortgage companies out of over \$15 million. Plaintiff, Alliance Bancorp (“Alliance”),¹ was defrauded out of \$596,250 and was granted default judgments against Khalil and Hamad and two companies Khalil and Hamad owned, Select Mortgage, L.L.C. (“Select”), and Taylor Title Company (“TTC”). Given that Khalil, Hamad, Select and TTC were uncollectible, Alliance

¹ Alliance filed for Chapter 7 bankruptcy in July 2007.

claimed that Khalil fraudulently transferred assets to appellees and sought to have the transfers set aside pursuant to the Uniform Fraudulent Transfer Act (UFTA, MCL 566.31 *et seq*). The lower court granted summary disposition in favor of appellees and dismissed Alliance's complaint against all remaining defendants. Alliance appeals by leave granted.

Alliance argues that the trial court erred by determining that the UFTA did not apply to the instant case and by granting summary disposition to appellees. We disagree. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). Additionally, issues of statutory interpretation are reviewed de novo. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

Before 1998, Michigan followed the Uniform Fraudulent Conveyance Act (UFCA). The UFCA was replaced by the "similar" UFTA in 1998. *Nationsbank Mortgage Corp v Luptak*, 243 Mich App 560, 567; 625 NW2d 385 (2000). Michigan adopted the UFTA without substantive changes from the model UFTA drafted by the National Conference of Commissioners on Uniform State Laws. See MCL 566.31; *Estes v Titus*, 273 Mich App 356, 372; 731 NW2d 119 (2006).

Under the UFTA, a creditor can bring a cause of action alleging that a transfer was fraudulent under either MCL 566.34 or MCL 566.35. A UFTA cause of action under MCL 566.34 is appropriate where the debtor made the transfer with the intent to hinder, delay or defraud any creditor of the debtor, or without receiving reasonably equivalent value. *Szkrybalo v Szkrybalo*, 477 Mich 1086, 1086; 729 NW2d 233 (2007). A UFTA cause of action under MCL 566.35 is appropriate where the creditor's claim against the debtor arose before the fraudulent transfer and the debtor was insolvent or did not receive a reasonably equivalent value, or if the transfer was made to an insider, the debtor was insolvent and the transferee knew the debtor was insolvent. *Estes, supra* at 377 n 5. Although Alliance did not specify under which statute it was suing, the particular statute is not relevant since the specific issue is whether Khalil, under the UFTA, could transfer stolen money.

The UFTA defines a transfer 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); *Estes, supra* at 375 n 4. "Asset" means property of a debtor, and "property" is anything that may be the subject of ownership. MCL 566.31(b); MCL 566.31(j).

Alliance claims that as soon as its money was deposited into Khalil and Hamad's TCF Account, Khalil and Hamad acquired a right to possess the money. Therefore, Alliance claims that Khalil had "an interest in an asset" that was sufficient for making a transfer of the asset. However, a thief's stolen money is not "subject to ownership" because a thief has no title in the property that he steals. Restatement (Second) Torts, s 229 cmt d (1965). The Sixth Circuit held that, pursuant to Michigan law, stolen funds are not property of a debtor's estate. *In re*

Newpower, 233 F3d 922, 931 (CA 6, 2000). As one expert proclaims, “A thief does not ordinarily become the owner of the property he steals; he has mere possession. . . . There is no basis for a constructive trust as to the stolen property in the hands of the thief because of his lack of a property interest.” Bogert, *Trust & Trustees*, s 476 at 119 (2d ed. 1978 & Supp 1999). Furthermore, “own” means “to *rightfully* have or possess as property; to have *legal* title to,” and an “interest” is “a *legal* share in something; all or part of a *legal* or *equitable* claim to or right in property” (Black’s Law Dictionary (8th ed)) (emphasis added).

Michigan cases interpreting the UFTA include *Estes*, *supra* at 356, and *Mathers Investors, LLC v Larson*, 271 Mich App 254; 720 NW2d 575 (2006). In both cases, the debtor owned the assets before transferring them to another entity. Furthermore, in UFCA cases, the debtor transferred his own property or his interest in property. See, e.g., *LaBour v Bergin*, 334 Mich 437; 54 NW2d 710 (1952) (debtor fraudulently contributed his earnings to mortgage held in the entirety); *McCaslin v Schouten*, 294 Mich 180; 292 NW 696 (1940) (same); *Foodland Distributors v Al-Naimi*, 220 Mich App 453; 559 NW2d 379 (1996) (debtor business owner restructured personal debt and fraudulently imposed \$400,000 debt on business); *Doe v Ewing*, 205 Mich App 605; 517 NW2d 849 (1994) (debtor transferred his ownership in corporation’s shares to himself and his wife in the entirety).

We hold that the UFTA does not contemplate transfers of stolen money, and consequently, appellees are entitled to judgment as a matter of law. The UFCA and UFTA were implemented to give recourse to creditors against debtors that made otherwise legal transfers of property. Without such statutes, creditors would have no recourse against debtors that attempted to shield their assets by transferring them. On the other hand, where assets are acquired illegally and transferred to third parties, creditors can pursue possessory causes of action such as constructive trusts, equitable liens, or statutory conversion, MCL 600.2919a.

Alliance also attempts to argue that it is possible not all of the money Khalil transferred was stolen. However, throughout the lower court proceedings Alliance asserted in each written motion and motion hearing that the transferred funds were stolen. This Court need not address issues first raised on appeal. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder