STATE OF MICHIGAN

COURT OF APPEALS

JOHN CECI, P.L.L.C.,

Plaintiff-Appellant,

v

JAY JOHNSON and JOHNSON PROPERTIES, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
May 11, 2010

No. 288856
Livingston Circuit Court
LC No. 08-023737-CZ

Before: BANDSTRA, P.J., and FORT HOOD and DAVIS, JJ.

PER CURIAM.

Plaintiff, acting in propria persona, appeals as of right from the trial court order that (1) denied his motion for summary disposition of his claims under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq*.; (2) *sua sponte* granted summary disposition in favor of defendants pursuant to MCR 2.116(I); and (3) awarded costs and attorney fees to defendants on the ground that plaintiff's claims were frivolous. We reverse in part, affirm in part and remand.

Plaintiff is an attorney who represented defendant Jay Johnson's former wife, Linda Johnson, in their divorce proceeding. Linda Johnson, who is not a party below or on appeal, terminated plaintiff's services prior to entry of the divorce judgment, which was entered on September 4, 2007. The divorce judgment included the division of the two parcels of real estate that are at issue in this case. One parcel of residential property ("the Lindross property") was awarded to Jay Johnson as his sole property, subject to an award to Linda Johnson of "one-half of any net proceeds from the sale of either, or both, properties in the event that [defendant] remarries or sells either property." A second parcel ("the Fisher Road property"), which had been owned by the Johnsons as a tenancy by the entireties, was ordered to be placed on the market and sold, with 40% of the proceeds going to Jay Johnson and 60% to Linda Johnson.

A dispute arose between plaintiff and Linda Johnson concerning plaintiff's fee. The fee dispute went to arbitration. On January 28, 2008, the arbitrator issued a report and award granting plaintiff $34,000. A few days later, on February 8, 2008, plaintiff filed a complaint in an independent action against Linda Johnson seeking court confirmation of the arbitration award and a judgment against Linda Johnson in the amount of that award. On the same day, Linda Johnson executed quitclaim deeds conveying to Jay Johnson her interests in the Lindross and Fisher Road properties for the stated consideration of $1.00 each. Shortly thereafter, Jay Johnson filed Articles of Organization creating defendant Johnson Properties, LLC, and

transferred the Lindross and Fisher Road properties to the newly created company for the stated consideration of $1.00 apiece. A judgment enforcing the arbitration award was entered on May 15, 2008, awarding plaintiff $34,170.

Plaintiff subsequently filed the instant action against defendants Jay Johnson and Johnson Properties, LLC, under the UFTA, alleging that Jay Johnson was aware of the debt Linda Johnson had incurred as a result of the $34,000 arbitration award when he accepted transfer of her interests in the Lindross and Fisher Road properties, unsupported by adequate consideration, and then in turn transferred the properties to his company. Plaintiff alleged fraud under MCL 566.35(1) and MCL 566.34(1)(a), claiming actual intent to delay, hinder, or defraud a creditor under MCL 566.34(2)(d) and (j). Plaintiff asserted that the transfers were voidable under MCL 566.37, and that judgment could be entered against defendants under MCL 566.38(2)(a), (b) as transferees of the properties. The trial court denied plaintiff's motion for summary disposition, and instead *sua sponte* granted summary disposition in favor of defendants under MCR 2.116(I).

On appeal, plaintiff argues that the trial court erred in denying his motion for summary disposition and in *sua sponte* granting summary disposition in favor of defendants. We agree.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A court may grant summary disposition to the opposing party under MCR 2.116(I)(2) if it determines that the opposing party, rather than the moving party, is entitled to judgment. *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

Because documentary evidence was submitted and because the trial court looked outside the pleadings, we consider summary disposition to have been granted under MCR 2.116(C)(10). See *Mino v Clio School Dist*, 255 Mich App 60, 63 n 2; 661 NW2d 586 (2003), citing *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v City of Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). "When a motion under [MCR 2.116(C)(10)] is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Lind*, 470 Mich at 238; *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

The UFTA permits a creditor to seek remedies including avoidance, attachment, execution, and injunctive relief when a fraudulent conveyance has been made by a debtor. MCL 566.37(1); *Estes v Titus*, 481 Mich 573, 587; 751 NW2d 493 (2008). Plaintiff alleged that the transfers of Linda Johnson's interests in the Lindross and Fisher Road properties, and the subsequent conveyance of the properties to Johnson's Properties, LLC, were fraudulent under § 5(1) of the UFTA. Section 5(1) permits a cause of action for constructive fraud where the creditor's claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange and the debtor was insolvent at that time or became insolvent as a result of the transfer. MCL 566.35(1).

Plaintiff further alleged that the transfers were fraudulent under § 4(1)(a) of the UFTA, which provides as follows:

> 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,[1] 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. [MCL 566.34(1)(a).]

MCL 566.34(2) sets forth a nonexclusive list of factors that may be considered in determining whether § 4(1)(a) is satisfied. Section 4(2) provides, in relevant part:

> In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:
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> * * *
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (e) The transfer was of substantially all of the debtor's assets.
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> * * *
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> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

The UFTA specifically provides for remedies against "third-party" transferees of property, such as defendants in the instant case, including avoidance of the transfer. MCL 566.37. Where a transfer is voidable under § 7, the creditor may recover a judgment against the first transferee of the asset or the person for whose benefit the transfer was made, MCL 566.38(2)(a), or against any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee, MCL 566.38(2)(b). Accordingly, a grantee who

[1] "Debtor" is defined by the UFTA as an individual or legal entity "who is liable on a claim." MCL 566.31(f). A "creditor" is "a person who has a claim." MCL 566.31(d). Finally, a "claim" is "a right to payment, whether or not the right is reduced to judgment. . . ." MCL 566.31(c).

receives property or money without giving fair consideration to the fraudulent grantor is subject to having the conveyance set aside and also subject to any other remedies normally available to the creditor. See *Kelley v Thomas Solvent Co*, 722 F Supp 1492, 1499 (WD Mich, 1989).[2] The UFTA does not by its terms require joinder of the debtor transferor in an action against a transferee; however, because the UFTA defines debtor as a person who is "liable on a claim," MCL 566.31(f), a claim under the UFTA cannot proceed unless the debtor's liability for the creditor's claim has already been established, whether by judgment or otherwise, MCL 566.31(c). *Mather Investors, LLC v Larson*, 271 Mich App 254, 259-260; 720 NW2d 575 (2006).[3]

The trial court's *sua sponte* grant of summary disposition to defendants seems to have been based primarily on its erroneous belief that the Johnsons' divorce judgment awarded the two subject properties to defendant as his sole property, and that therefore no "transfer" occurred within the meaning of the UFTA. Contrary to the trial court's understanding, however, the divorce judgment did not award the Fisher Road property to defendant as his sole property. Rather, this tenancy-by-the-entireties property was ordered to be sold, and Linda Johnson was further awarded a 60% interest in the proceeds of its sale. Because the judgment did not otherwise provide for ownership of the Fisher Road property, the Johnsons continued to own this property as tenants in common upon the divorce. MCL 552.102; *Budwit v Herr*, 339 Mich 265, 273, 63 NW2d 841 (1954). The judgment additionally granted Linda Johnson an interest in one-half of any future net proceeds from the sale of the Lindross property in the event that defendant either remarried or sold the property.

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) (emphasis supplied); *Estes*, 481 Mich at 375 n 4. "Asset" is defined as property of a debtor, MCL 566.31(b), and "property" is "anything that may be the subject of ownership," MCL 566.31(j). Because Linda Johnson clearly owned a tenancy-in-common interest in the Fisher Road property—as well as in 60% of the proceeds of its sale—and an ownership interest in any net proceeds from the sale of the Lindross property, the trial court erred in granting summary disposition to defendants on the basis that Linda Johnson had no interest in the subject properties.

Although the trial court erred in granting summary disposition to defendants, we are unable to conclude on the existing record that plaintiff is entitled to summary disposition of his claim to the extent that it is based on § 5(1) of the UFTA. MCL 566.35(1) provides:

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[2] Although this case is not binding on us, we agree with it.

[3] Defendants argue—for the first time on appeal, and without citation to authority—that the UFTA does not apply to them because they are not "debtors." As noted, however, §§ 7 and 8 of the UFTA expressly permit judgment against transferees. To the extent that defendants may be understood to argue that joinder of Linda Johnson is required in this case, we disagree, because her liability to plaintiff has already been established by judgment. See *Mather*, 271 Mich App at 259-260.

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation *and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.* [Emphasis supplied.]

"A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." MCL 566.32(1). Additionally, "[a] debtor who is generally not paying his or her debts as they become due is presumed to be insolvent." MCL 566.32(2).

Plaintiff asserts that Linda Johnson became insolvent after transferring her interests in the subject properties, as evidenced by the fact that she has not satisfied the $34,000 judgment against her and thus is "generally not paying . . . her debts as they become due" within the meaning of § 2(2) of the UFTA. However, other than the undisputed assertion that Linda Johnson did not pay this outstanding judgment, there is no evidence concerning her other debts and whether she was paying them; thus, it cannot be determined from the record whether she was generally not paying her debts as they became due. "[A] debtor has the right to prefer one creditor to another, to use his property for the payment of one debt or of many debts to the exclusion of one or many creditors." *Harnau v Haight*, 209 Mich 604, 609; 177 NW 281 (1920).[4]

Nevertheless, we do conclude that the trial court erred in denying plaintiff's MCR 2.116(C)(10) motion for summary disposition of his claim under § 4(1)(a) of the UFTA. Actual intent to defraud under § 4(1)(a) may be inferred from the "badges of fraud" set forth in § 4(2). *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659; 513 NW2d 441 (1994); see *Szkrybalo v Szkrybalo*, 477 Mich 1086; 729 NW2d 233 (2007). "These badges of fraud are not conclusive evidence, but may be strong or weak depending upon their nature and number occurring in the same case." *Coleman-Nichols*, 203 Mich App at 659-660. A "'concurrence of several [of these factors] will always make out a strong case'" in support of fraudulent intent. *Bentley v Caille*, 289 Mich 74, 78; 286 NW 163 (1939), quoting *Timmer v Pietrzyk*, 272 Mich 238, 242; 261 NW 313 (1935).

In this case, plaintiff presented evidence that less than two weeks after the issuance of an arbitration award of $34,000 in his favor against Linda Johnson, and three months before entry of the circuit court judgment enforcing the award, she executed quitclaim deeds transferring her interests in the two subject properties to defendant for the stated consideration of only $1.00 apiece. Plaintiff additionally presented evidence that defendant, shortly after these transfers, created a limited liability company and transferred the properties to the company, again for the stated consideration of $1.00 apiece. This evidence is demonstrative of actual intent to hinder,

[4] Although plaintiff has submitted, for the first time on appeal, documents purporting to detail Linda Johnson's assets and liabilities as disclosed to plaintiff during the divorce proceedings, these documents are not contained in the lower court record, and may not be considered on appeal. MCR 7.210(A)(1); *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 18; 527 NW2d 13 (1994).

delay, or defraud a creditor pursuant to several of the relevant factors set forth in § 4(2) of the UFTA. See MCL 566.34(2)(d) ("[b]efore the transfer was made . . . the debtor had been sued or threatened with suit"); MCL 566.34(2)(h) ("[t]he value of the consideration received by the debtor was [not] reasonably equivalent to the value of the asset transferred"); MCL 566.34(2)(j) ("[t]he transfer occurred shortly before or shortly after a substantial debt was incurred").[5]

Rather than responding to plaintiff's motion, as required under MCR 2.116(G)(4), with admissible documentary evidence demonstrating a genuine issue of material fact regarding "actual intent to hinder, delay, or defraud," defendants chose to rest entirely on the pleadings, claiming only that they were entitled to a trial on the issues and asserting, without evidentiary support, that they were unaware of plaintiff's claim against Linda Johnson.[6] However, a party cannot create a genuine issue of material fact by merely asserting conclusory statements. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 470; 646 NW2d 455 (2002). Nor do defendants cite on appeal any evidence suggesting that a genuine factual issue remains with respect to the badges of fraud or actual intent to defraud. Because defendants have failed to demonstrate the existence of a genuine issue of material fact with respect to plaintiff's claim under § 4(1)(a) of the UFTA, he is entitled to summary disposition on this claim.

Finally, in light of the foregoing, we hold that the trial court clearly erred in finding that plaintiff's complaint was frivolous, and we reverse the imposition of sanctions. MCL 600.2591; MCR 2.114(E); MCR 2.625(A)(2); *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

Reversed in part, affirmed in part, and remanded for entry of partial summary disposition in plaintiff's favor consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis

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[5] Unlike a claim under § 5(1), a claim under § 4(1)(a) of the UFTA does not require a showing of the debtor's insolvency (although such a fact may be considered under § 4(2)(i) as indicative of actual intent to defraud). See *Coleman-Nichols*, 203 Mich App at 658-659.

[6] Defendants also assert that plaintiff had tried to obtain a lien for his fees against Linda Johnson's property while representing her in the prior, independent, finalized divorce action. This assertion is not supported by the record in this matter, and plaintiff could not have been a party to the divorce action. But in any event, an attorney cannot obtain a lien for fees against the real estate of a client absent particular circumstances that do not include a court order. See *George v Sandor M Gelman, PC*, 201 Mich App 474, 478, 478 n 1; 506 NW2d 583 (1993). Plaintiff's inability to obtain an attorneys' lien within the confines of the divorce case has absolutely no bearing on the validity of the judgment against Linda Johnson in this matter.