

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT



NUMBER 2014 CA 1111

TRACER PROTECTION SERVICES, INC.
AND TRACER ARMED SERVICES, INC.

VERSUS

DAVID G. BURTON, SR. AND RHONDA W. HAYES

Judgment Rendered: JUN 05 2015

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 587952

Honorable R. Michael Caldwell, Judge

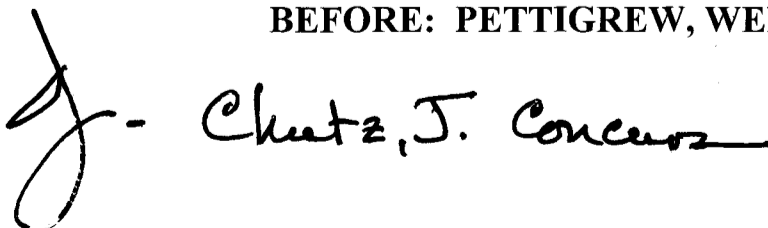
L.J. Hymel
Michael Reese Davis
Tim P. Hartdegen
Baton Rouge, LA

Attorneys for Appellees
Plaintiffs – Tracer Protection
Services, Inc., Tracer
Armed Services, Inc. and
Rene Ortlieb, III

Eric A. Kracht
Scott E. Frazier
Baton Rouge, LA

Attorneys for Appellant
Defendant – David G. Burton, Sr.

BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.



WELCH, J.

Appellant, David G. Burton, Sr., appeals a partial summary judgment granted in favor of appellees, Tracer Protection Services, Inc. (TPSI), Tracer Armed Services, Inc. (TASI), and Rene Ortlieb, dismissing all of appellant's claims arising out of the ownership of TPSI. In connection with this appeal, appellees filed an answer contesting the trial court's denial of their motion for summary judgment on the issue of TASI's ownership. We reverse and remand.

BACKGROUND

Much of the background forming the basis of the instant appeal can be gleaned from this court's prior opinion in **Tracer Protection Services, Inc. v. Burton**, 2011-1223 (La. App. 1st Cir. 3/6/12)(unpublished opinion)(**Tracer I**). In 2010, TPSI and TASI (sometimes collectively referred to as "the Tracer companies") filed this lawsuit seeking to recover damages against Mr. Burton and other defendants, alleging that, among other things, Mr. Burton misappropriated and converted the Tracer companies' assets for his own personal use, mismanaged the companies' business, assets, and employees, and gave himself unauthorized pay raises. Mr. Burton filed an answer, a reconventional demand and a third party demand against the Tracer companies, asserting that he was the 100% owner of both TPSI and TASI. He also filed third party demands naming as defendants, among others, Mr. Ortlieb and Clifton "Ted" Redlich, asserting that they claimed an ownership interest in the Tracer companies and that they illegally took control of the companies' assets and created false documents to give the impression they owned the Tracer companies, when in fact, Mr. Burton owned 100% of both companies. **Tracer I**, 2011-1223 at p. 1.

The Tracer companies and Mr. Burton filed cross motions for partial summary judgment on the issue of the Tracer companies' ownership. Mr. Burton claimed that he acquired ownership of 100% of the stock of both companies by

virtue of a February 12, 2004 agreement (the “2004 Agreement”) executed by Mr. Burton and Mr. Redlich. He also asked the court to determine that certain documents, executed after the 2004 Agreement, pursuant to which Mr. Redlich and Mr. Ortlieb claimed to own 100% of the Tracer companies’ stock, were null and void. *Id.*

In its motion for summary judgment, the Tracer companies asked the court to determine that the 2004 Agreement is absolutely null because it contradicted various documents connected in connection with TPSI’s bankruptcy reorganization documents, pursuant to which, all of TPSI’s shares, originally owned by Mr. Burton, were transferred to Ansted, Inc. (Ansted), a company owned by Mr. Redlich. They also argued that the document could not have transferred ownership of the Tracer companies to Mr. Burton because Mr. Ortlieb’s company, Alsace Lorraine Corporation (ALC), owned 50% of Ansted at the time the agreement was signed. **Tracer I**, 2011-1223 at p. 2.

Both sides introduced considerable evidence in support of and in opposition to the motions for summary judgment. At the hearing on the cross motions for summary judgment, the trial court ruled that the 2004 Agreement was a valid and binding contract and conveyed whatever interest Mr. Redlich owned in the Tracer companies to Mr. Burton. The trial court rejected each of the bases upon which the Tracer companies attacked the validity of the purported stock transfer, making four rulings: (1) the agreement did not evidence a bankruptcy fraud; (2) the fact that Mr. Redlich signed the document in his personal capacity did not invalidate it; (3) Mr. Ortlieb’s lack of consent to the transfer of the Tracer companies’ stock did not invalidate the document; and (4) the price for the stock transfer had been set by the parties. In accordance with these rulings, the trial court entered judgment denying the Tracer companies’ motion for partial summary judgment and granting Mr. Burton’s motion for partial summary judgment. The court’s judgment decreed

that: (1) the 2004 agreement is a valid and binding contract and transferred to Mr. Burton whatever stock Mr. Redlich owned in the Tracer companies on that date; (2) any interest in the Tracer companies that Mr. Redlich acquired upon the dissolution of his company, Ansted, also became the property of Mr. Burton by virtue of the after-acquired title doctrine; and (3) the documents executed after the 2004 Agreement were all invalid as they were inconsistent with that agreement. **Tracer I**, 2011-1223 at p. 4.

The Tracer companies appealed all three of the rulings entered by the trial court in granting Mr. Burton's motion for summary judgment. In connection with that appeal, the Tracer companies also sought review of the trial court's failure to grant summary judgment in their favor declaring the 2004 judgment to be null and void, as well as the trial court's failure to rule that ALC owned 50% of Ansted on the date the 2004 Agreement was executed, and as a result, Mr. Ortlieb currently owns 50% of the Tracer companies. **Tracer I**, 2011-1223 at p. 7.

After examining the evidence in light of the trial court's reasons for granting summary judgment in Mr. Burton's favor, this court reversed the trial court's grant of summary judgment in favor of Mr. Burton. Specifically, this court observed that it was evident that the trial court made several key credibility determinations in finding the 2004 Agreement to be a valid and binding contract. We noted that the determination of whether ALC had an ownership interest in Ansted on the day the 2004 Agreement was executed was crucial to a determination of whether Mr. Redlich, acting individually and without observing any corporate formalities, could unilaterally transfer Ansted's sole asset to Mr. Burton. In short, we concluded that the issue of whether ALC owned part of Ansted on the date Mr. Burton and Mr. Redlich executed the 2004 Agreement purporting to transfer 100% ownership of the Tracer companies to Mr. Burton, the sole asset of Ansted, must be determined

before the trial court could make a final ruling on the validity of the 2004 Agreement. **Tracer I**, 2011-1223 at p. 6.

This court further concluded that the trial court erred in finding the 2004 Agreement to be a valid and binding contract of sale because there were genuine issues of material fact as to whether the parties determined a price for the sale. Because of these rulings, this court also reversed the other rulings on which the trial court granted summary judgment in Mr. Burton's favor. **Tracer I**, 2011-1223 at p. 7.

Additionally, this court found no error in the trial court's denial of the Tracer companies' motion for summary judgment seeking a determination that the 2004 Agreement was null and void, that ALC owned 50% of Ansted on the day the 2004 Agreement was executed, and that Mr. Ortlieb owns 50% of the Tracer companies, finding that these were all disputed factual issues which could not be resolved on summary judgment. *Id.* In **Tracer I**, this court observed:

In short, the ownership of Tracer is the central issue to be resolved in this litigation, and that ultimate ruling can only be made after resolving a number of factual issues, on which the credibility of the claimants will no doubt play an important part. The issue of Tracer's ownership should be decided at a trial on the merits, which is designed to evaluate the facts when credibility is at issue.

Tracer I, 2011-1223 at p. 7

Following this court's remand for proceedings consistent with our opinion in **Tracer I**, TPSI, TASI, and Mr. Ortlieb (sometimes collectively referred to as "Tracer") filed a motion for partial summary judgment seeking a determination that the 2004 Agreement is null and void on two bases. First, Tracer maintained that the agreement is contrary to the representations made by Mr. Burton and Mr. Redlich to the bankruptcy court and memorializes a fraud on that court, and thus, the agreement is invalid because its object was unlawful and against public policy. Secondly, Tracer argued that the 2004 Agreement is null and without effect

because it completely disregarded corporate formalities, violated Ansted and TPSI's Articles of Incorporation, and failed to comply with Louisiana's Business Corporation law. Tracer urged that the 2004 Agreement, which was not entered into by TPSI's and TASI's owners, did not bind Ansted, TPSI, TASI, or ALC.

With respect to the latter attack on the 2004 Agreement, Tracer pointed out that after this court remanded the matter to the trial court, the trial court ruled that someone other than Mr. Redlich owned part of Ansted on the date the 2004 Agreement was executed. Tracer posited that the fact that the court did not determine who that someone was did not change the analysis of whether corporate formalities were required to perfect the sale of the Tracer companies to Mr. Burton. Tracer pointed out that Mr. Redlich did not own the stock of TPSI; rather, that company was owned by Ansted, a fact well known to Mr. Burton. Tracer insisted that the fact that Mr. Redlich signed the 2004 Agreement in his individual capacity rendered the agreement invalid. Further, Tracer maintained, Mr. Ortlieb's company, ALC, purchased 50% of Ansted for \$75,000.00; therefore, on the day the 2004 Agreement was signed, 100% of TPSI was owned by Ansted, and Ansted was owned 50% by Mr. Redlich and 50% by Mr. Ortlieb. Tracer argued that it is undisputed that neither Ansted's nor TPSI's Articles of Incorporation were followed with respect to the sale and that no corporate formalities were followed with respect to the 2004 Agreement. Tracer also insisted that the sale is invalid because it did not comply with the statutory requirements set forth in La. R.S. 12:121 of the Louisiana Business Corporation Law for the voluntary transfer or sale of "all or substantially all" of the assets of a corporation.

Tracer attached the following evidence to the motion for partial summary judgment: (1) the affidavits of Mr. Redlich, Mr. Ortlieb, Louis M. Phillips, who presided over TPSI's bankruptcy proceeding, and Peter Losavio, an attorney who represented TPSI in the bankruptcy proceeding; (2) documentary evidence

obtained from the bankruptcy proceeding, including a hearing transcript, various motions and orders, and four agreements effected by Mr. Burton and Mr. Redlich in connection with that proceeding; (3) excerpts of the deposition testimony of Mr. Burton and Mr. Redlich; (4) a copy of the 2004 Agreement; (7) the Articles of Incorporation of Ansted and TPSI; (5) copies of a 2005 tax return filed by Mr. Burton on behalf of TPSI; and (6) a copy a partial summary judgment rendered by the trial court on January 29, 2013, granting Mr. Ortlieb's motion insofar as it attempted to establish ownership of some portion of Ansted's stock in someone other than Mr. Redlich.

In opposition to Tracer's motion for partial summary judgment, Mr. Burton argued that the motion only re-hashed the issues that had been previously decided by this court in **Tracer I**. Mr. Burton insisted that the ownership of the Tracer companies should be resolved at a trial on the merits. He contended that there was no bankruptcy fraud and that the 2004 Agreement is a valid contract, sufficient to bind Mr. Redlich, without the observance of any corporate formalities. He maintained that it is undisputed that Mr. Redlich was the President and sole director of Ansted in 2004 and insisted that Mr. Redlich represented to him that he owned and controlled 100% of the stock of TPSI and TASI. Mr. Burton argued that if, and to the extent that Mr. Redlich owned the stock, he could legally convey his ownership of stock in both companies to Mr. Burton without observing any corporate formalities. Mr. Burton submitted that while there may be an issue concerning the extent of Mr. Redlich's ownership and control of the stock of TPSI and TASI, it cannot be disputed that Mr. Redlich effectively controlled not less than 50% of Ansted, TPSI, and TASI. He also contended that it is clear from Mr. Redlich's deposition testimony that he was the sole owner of TASI, that Ansted never owned TASI, and thus, Mr. Redlich had the capacity to transfer ownership of his TASI stock to Mr. Burton without the need for any corporate formalities.

Lastly, Mr. Burton pointed to a provision in the 2004 Agreement which stated that upon execution of this agreement, he would own 100% of both TPSI and TASI, which “shall be indicated accordingly on all corporate documents.” According to Mr. Burton, pursuant to this provision, Mr. Redlich undertook a binding obligation to prepare and execute other documents evidencing Ansted’s transfer of the Tracer companies to him.

In opposition to the motion for summary judgment, Mr. Burton submitted the following evidence: (1) his affidavit and excerpts of his deposition testimony; (2) a November 13, 2006 affidavit by Mr. Redlich to dissolve Ansted in which he listed only himself as a shareholder of Ansted; (3) excerpts of the deposition testimony of Mr. Ortlieb; (4) an excerpt of the deposition testimony of Jayne Apple, the Tracer companies’ CPA, and various documents attached to that deposition, including TASI’s 2001 and 2002 tax returns identifying Mr. Redlich as a 100% owner of that company; (5) excerpts of Mr. Redlich’s 2011 and 2012 depositions, along with various personal financial statements prepared by Mr. Redlich from June 15, 2000 through March 26, 2006; (6) a copy of the 2004 Agreement; (7) a 2011 letter written by Mr. Burton to the Internal Revenue Service indicating that he recently learned that tax returns for TPSI had listed Ansted as the owner of the company since 2004 and TASI’s returns listed Mr. Redlich as the owner, and seeking to correct that to list himself as the owner of both companies; (8) an excerpt of the deposition of Patrick Reso; (9) an August 16, 2010 affidavit of Marvin Owen, the attorney who represented him in connection with the execution of the 2004 Agreement; and (10) the affidavit of a bank officer and documents prepared in connection with a loan application by Mr. Redlich.

Tracer then submitted another excerpt of Mr. Burton’s deposition testimony, in which he acknowledged that Mr. Owen had prepared a draft of an agreement in

2004 for Mr. Burton and Mr. Redlich's consideration, along with a letter by Mr. Owen and a copy of the rough draft of the agreement Mr. Owen had prepared.

Following a hearing, on February 5, 2014, the trial court signed a judgment granting Tracer's motion in part only as to Mr. Burton's alleged ownership interest in TPSI and denying Tracer's motion with respect to Mr. Burton's alleged ownership interest in TASI. In the judgment, the trial court declared that as to TPSI, the 2004 Agreement is null and invalid and dismissed Mr. Burton's claim to ownership of TPSI on the basis of that agreement with prejudice. In oral reasons for judgment, issued by the trial court on January 13, 2014, the court expressed its belief that it was clear, within the four corners of the 2004 Agreement, that it was concocted and agreed upon to bypass or defraud the bankruptcy court and based on the terms stated therein, to abuse the bankruptcy process. Therefore, the court concluded that the 2004 Agreement's stated purpose is unlawful or against public policy. More importantly, the court noted, the 2004 Agreement did not mention Ansted, which was the owner of TPSI's stock. The court concluded that Tracer came forth with evidence or allegations questioning whether Mr. Burton could prove that corporate formalities were followed or that Ansted agreed to a sale of the stock, thus shifting the burden to Mr. Burton to come forward with evidence to show that he will be able to carry that burden at trial. The trial court noted that there was no proof offered to show that: (1) Ansted agreed to the transfer of TPSI's stock to Mr. Burton; (2) that Mr. Ortlieb's company, ALC, did not own 50% of Ansted at the time the agreement was concocted; or (3) there were any other assets of Ansted. The court stressed that there was no evidence to show that the formalities required by statute when all of the assets of a corporation had been sold had been complied with, as there was no evidence that two-thirds of Ansted's shareholders agreed to the sale, whether through a formal meeting or by written consent.

While the court found there were no genuine issues of material fact as to whether Mr. Redlich could validly transfer Ansted's ownership of TPSI to Mr. Burton, the court concluded that there remained genuine issues of fact regarding Mr. Redlich's attempted conveyance of TASI to Mr. Burton. The court observed that while the 2004 Agreement indicated that TASI was being considered only as a division of TPSI, there was evidence showing that may not have been correct, and therefore, material issues of fact existed concerning the ownership of TASI and whether Mr. Redlich could have transferred the stock of that corporation to Mr. Burton.

The trial court designated the February 5, 2014 judgment as a final, appealable judgment pursuant to La. C.C.P art. 1915(B)(1). In so doing, the trial court substantiated its designation with factors outlined by the Louisiana Supreme Court in **R.J. Messinger, Inc. v. Rosenblum**, 2004-1664 (La. 3/2/05), 894 So.2d 1113.

Mr. Burton filed an application for supervisory writs with this court, challenging the trial court's grant of summary judgment in favor of Tracer decreeing that he had no ownership interest in TPSI. On April 21, 2014, this court ruled that the judgment, insofar as it dismissed with prejudice Mr. Burton's claims of ownership with respect to TPSI, is a final, appealable judgment. We granted the writ for the limited purpose of remanding the case to the trial court with instructions to grant Mr. Burton an appeal. **Tracer Protection Services, Inc. v. Burton**, 2014-CW-1098 (La. App. 1st Cir. 4/21/14)(unpublished writ action). Before this ruling was entered, on April 2, 2014, Mr. Burton filed a motion for a devolutive appeal from the trial court's February 5, 2014 judgment, which was granted that day by the trial court.

Tracer also filed an application for supervisory writs in this court, challenging the trial court's denial of its motion for summary judgment with

respect to Mr. Burton's alleged ownership interest in TASI. This court denied that writ application. **Tracer Protection Service, Inc. v. Burton**, 2014-CW-0240 (La. App. 1st Cir. 4/21/14)(unpublished writ action), writ denied, 2014-CC-1058 (La. 9/12/14).

In this appeal, Mr. Burton contests the trial court's granting of Tracer's motion for partial summary judgment on the basis that the 2004 Agreement is invalid as to his ownership claim with respect to TPSI. Tracer answered the appeal, asking this court to review the denial of its motion for partial summary judgment on the issue of Mr. Burton's alleged ownership interest in TASI.

DISCUSSION

Summary Judgment

A motion for summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for the purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2). An appellate court reviews summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. **Aaron & Turner, L.L.C. v. Perret**, 2007-1701 (La. App. 1st Cir. 5/4/09), 22 So.3d 910, 914, writ denied, 2009-1148 (La. 10/16/09), 19 So.3d 476.

A trial court may not make credibility determinations on a motion for summary judgment. The credibility of a witness is a question of fact. In determining a motion for summary judgment, a trial court must assume that all affiants are credible. **Hutchinson v. Knights of Columbus, Council No. 5747**, 2003-1533 (La. 2/20/04), 866 So.2d 228, 234.

Bankruptcy Fraud

In 1996, TPSI filed a petition for relief under Chapter 11 of the United States Bankruptcy Code. In late 1997, the bankruptcy court confirmed a plan of reorganization that included four agreements executed by Mr. Burton and Mr. Redlich on October 6, 1997. Pursuant to these agreements, Mr. Burton surrendered and sold 100% of TPSI's stock to Ansted for \$100,000.00, Ansted was appointed as the exclusive manager of TPSI's business, and Mr. Burton was to continue to be employed by TPSI as a sales representative and was to serve as its nominal president. Mr. Burton and Mr. Redlich also executed a Stock Option Agreement, which gave Mr. Burton the right to purchase TPSI's stock for \$340,000.00 between September 5, 2001 and December 31, 2001.

The TPSI bankruptcy proceeding was closed around 2000. On February 12, 2004, over 6 years after Tracer's stock had been transferred to Ansted, Mr. Redlich and Mr. Burton met at the law office of Marvin Owen and signed a document prepared by Mr. Burton prior to the meeting entitled "Agreement." That document states:

This agreement is made by and between David G. Burton and Clifton J. Redlich regarding Tracer Protection Services, Inc. and Tracer Armed Services, Inc. This agreement supersedes the agreement that was submitted in Bankruptcy, which was a revision of our original verbal agreement. The purpose of this agreement is to honor the terms and conditions of our original agreement, which are as follows:

David Burton, 100% owner of Tracer Protection Services, Inc. was seeking bankruptcy protection and required financial assistance in order to successfully reorganize. On _____ both parties agreed that Clifton would invest _____ dollars into. For his investments, Clifton would be repaid his entire investment by Tracer plus he would receive compensation from Tracer in the amount of One Hundred Thousand dollars per year, for the rest of his life. In order to satisfy the court, Clifton would take temporary possession of Tracer Protection Services, Inc. stock while in bankruptcy. Although in possession of the stock while in bankruptcy, Clifton would only have control of the company financials, and David would maintain all operational authority. Once the bankruptcy was closed, all shares [of] Tracer Protection Services, Inc. stock would be returned to David.

As of now the bankruptcy is closed and Clifton is receiving compensation in the amount [sic] One Hundred Thousand Dollars per year and is receiving compensation in the amount of Twenty Thousand Dollars per year for unpaid portions of his investment and unpaid compensation. A complete audit will be performed forthright to determine the exact amounts of unpaid investments and compensation and will be filed as an addendum to this agreement. This audit will be completed and submitted on an annual basis until all unpaid investments and compensation have been paid. . . .

. . . All payments for unpaid investments and compensation will be approved and made by David and shall be made as soon as the company is able at a minimum amount of Ten Thousand Dollars per year. . . .

During this agreement a new company, Tracer Armed Services, Inc. was formed as an Armed Division of Tracer. The stock for Tracer Armed Services, Inc. is currently in Clifton's name, however for the purpose of this agreement, this company shall be considered an asset of Tracer Protection Services, Inc. and as of the execution date of this agreement David will own 100% of both Tracer Protection Services, Inc. and Tracer Armed Services, Inc[.] and this shall be indicated accordingly on all corporate documents.

The agreement is signed by Mr. Burton and Mr. Redlich. There is nothing in the document expressly stating that Mr. Redlich was signing the agreement on behalf of either TPSI or Ansted.

In support of its claim that the 2004 Agreement is invalid because it evidences a bankruptcy fraud and thus has an unlawful cause, Tracer submitted the affidavit of Louis Phillips, who presided over TPSI's Chapter 11 bankruptcy proceeding. Mr. Phillips attested that he reviewed the confirmation hearing transcript, the Final Plan of Reorganization, the confirmation order, and the motion for final decree, including the four agreements submitted by Mr. Burton and Mr. Redlich, as well as the 2004 Agreement. Mr. Phillips attested that he required, as a condition of approving TPSI's plan of reorganization, that Mr. Burton not have any future control over the operations of TPSI (including its affairs or finances) or any ownership interest in the company. He further attested that as a condition of closing the bankruptcy case, he required that written agreements be submitted to the court establishing and evidencing Burton's divesture and surrender of his stock

interest in TPSI, any control over the future operations of TPSI, and the specific terms of any subsequent financial relationship between him and TPSI, and that TPSI submitted such agreements to the court. Mr. Phillips focused on language in the 2004 Agreement stating that the agreement submitted in bankruptcy was a “revision of our original verbal agreement” and the purpose of the 2004 Agreement is to “honor the terms and conditions of our original agreement” as well as that portion of the agreement stating that “in order to satisfy the court, Clifton would take temporary possession of Tracer Protection stock while in bankruptcy.” According to Mr. Phillips, the documents executed in connection with TPSI’s confirmed plan contradict and preclude the existence of the described “original verbal agreement” or “any agreement” that Mr. Redlich would take temporary possession of TPSI stock during the bankruptcy. Mr. Phillips opined that the execution of the purported agreement would have constituted a fraud on the Bankruptcy Court, the bankruptcy estate of TPSI, and TPSI’s creditors. He attested that had he been aware of any “original oral agreement” or of any temporary possession of TPSI stock, he would have taken numerous actions, such as ordering the appointment of a trustee on the basis of fraud, and he would have made a criminal referral of Mr. Burton and Mr. Redlich to the United States’ attorney.

Tracer also submitted the affidavit of Peter Losavio, who was TPSI’s bankruptcy attorney. Mr. Losavio attested that he reviewed a number of documents from the bankruptcy proceeding and opined that the 2004 Agreement is a memorialization of an illegal oral agreement that constitutes bankruptcy fraud and has an unlawful cause, as it shows an agreement other than the written agreements submitted to the bankruptcy court. Mr. Losavio stated that had he been aware of any agreement other than the written agreements submitted to the

bankruptcy court, he would have been legally and ethically obligated to inform the court.

Additional evidence submitted by Tracer with respect to the fraud claim includes a transcript of a hearing held in September 1997 in the bankruptcy proceeding. During that hearing, Mr. Redlich testified that he would run TPSI, would control all of the checkbooks, pay every bill that gets paid, and that only he or his office manager would sign checks. Tracer also relied on an excerpt of Mr. Burton's deposition, in which he admitted that it would have been illegal, during the bankruptcy proceeding, to have any agreement with Mr. Redlich other than the written agreements that were submitted to the bankruptcy judge. When asked whether he had an agreement with Mr. Redlich other than the four agreements submitted to the bankruptcy court, Mr. Burton testified that he was told the agreement he was attempting to make would not be accepted by the bankruptcy court. Mr. Burton was asked what he meant when using the language "this agreement supersedes the agreement that was submitted in bankruptcy, which was a revision of our original verbal agreement." He testified that the term "supersedes the agreement" referred to another agreement that gave Mr. Redlich the company, and the original verbal agreement was an agreement made in his office prior to any knowledge of the bankruptcy laws pursuant to which Mr. Redlich would receive a hundred thousand dollars a year for the rest of his life and his original investment would be repaid. However, Mr. Burton acknowledged, he later learned that original agreement was illegal and he could not do it. He further acknowledged that the purpose of the 2004 Agreement was to honor the original verbal agreement he had testified about.

In opposition to the motion for summary judgment, Mr. Burton submitted his affidavit, in which he made the following attestations: while the TPSI bankruptcy was pending, Mr. Burton met with Mr. Redlich and Mr. Ortlieb and

attempted to make an agreement with them which involved them making an investment in TPSI. Mr. Burton attended a second meeting with Mr. Redlich alone; Mr. Redlich told Mr. Burton he was interested in investing in the company and Mr. Ortlieb would not be involved, and Mr. Burton and Mr. Redlich negotiated a tentative deal. Later, on the day they were going to bankruptcy court, Mr. Burton told his lawyer about the agreement he had negotiated and was attempting to make with Mr. Redlich, and the attorney advised Mr. Burton they could not make that deal because it would be illegal. So, Mr. Burton and Mr. Redlich did not make the agreement they had discussed. Instead, Mr. Burton's attorney drew up four written agreements that were submitted to the bankruptcy judge. Those were the only agreements Mr. Burton made in bankruptcy; there was no other oral agreement. After the TPSI bankruptcy, Mr. Burton was named President of the company and continued to run the business until early 2010. Mr. Burton was an employee of TASI, became its President in 2004, and ran that business from 2001 until 2010.

Regarding the 2004 Agreement, Mr. Burton attested that: in early 2004, Mr. Redlich told Mr. Burton he was contemplating retirement and they met several times to discuss his exit strategy. Mr. Redlich offered to sell Mr. Burton both of the Tracer companies and they negotiated the terms of a sale. Mr. Redlich told Mr. Burton that he owned 100% of the Tracer companies and never said that anyone else owned any part of them. On February 12, 2004, Mr. Burton and Mr. Redlich met at the office of attorney Marvin Owen, and in accordance with Mr. Burton's earlier request, Mr. Redlich brought Tracer's corporate records to the meeting. Mr. Burton and Mr. Redlich reviewed the agreement, discussed the history of the two Tracer companies with Mr. Owen, and agreed that the ownership of the Tracer companies would transfer to Mr. Burton when they signed the agreement.

Mr. Burton claimed that it was his belief that after the TPSI bankruptcy was closed, Mr. Redlich and he had the right to make any agreement that they mutually

agreed to and that in preparing and signing the 2004 Agreement, it was not his intent to violate any law or court order or to defraud the bankruptcy court. Mr. Burton stated that he and Mr. Redlich's reasons for signing the 2004 Agreement were simple: his objective was to become the owner of 100% of both of the Tracer companies, and Mr. Redlich's objective was apparent—he was planning to retire, he wanted to sell the companies as part of his exit strategy, and Mr. Redlich wanted to receive payments of money, as described in the 2004 Agreement, in exchange for the stock.

In his affidavit, Mr. Burton attempted to explain some of the language in the 2004 Agreement. First, with respect to the opening sentence declaring that “[T]his agreement supersedes the agreement that was submitted in Bankruptcy, which was a revision of our original oral agreement,” Mr. Burton explained that he and Mr. Redlich had discussed and came to a tentative agreement (“our original agreement”), but they were told by his bankruptcy lawyer the agreement would be illegal, and therefore, they never made that agreement. Instead, they agreed to and signed the four contracts that were approved by the bankruptcy judge. Mr. Burton claimed that he thought the 2004 Agreement “superseded” the terms of the Stock Option Agreement because he and Mr. Redlich agreed to different terms for the acquisition of Tracer stock.

Mr. Burton further explained that the language “[T]he purpose of this agreement is to honor the terms of our original agreement” referred to the tentative agreement that he and Mr. Redlich had discussed during the bankruptcy but did not make. He was attempting to state that now, in 2004, he and Mr. Redlich could make the deal that they had discussed, but had not made, during the bankruptcy. He also acknowledged that part of the “original oral agreement” involved Mr. Redlich taking temporary possession of the TPSI stock; however, that did not happen because Mr. Burton was told it would be illegal. Instead, Mr. Burton

signed the four contracts approved by the bankruptcy judge, and Mr. Burton lost ownership of all TPSI stock. He insisted that he and Mr. Redlich did not make an agreement for temporary possession, and Mr. Redlich did not take temporary possession of the TPSI stock. Finally, with respect to language in the 2004 Agreement stating that “[O]nce the bankruptcy was closed, all shares of TPSI stock would be returned to David,” reflected one of the terms of the “original oral agreement” that he and Mr. Redlich discussed but did not make. According to Mr. Burton, Mr. Redlich was not obligated to return the TPSI stock to him after the bankruptcy was closed and Mr. Burton never demanded that he do so. Instead, in 2004, almost four years after the bankruptcy proceeding was closed, Mr. Redlich offered to sell Mr. Burton the Tracer stock as part of his “exist strategy.” Mr. Burton insisted that their deal was made in 2004 and he did not re-acquire TPSI’s stock until he and Mr. Redlich signed the agreement in February 2004. According to Mr. Burton, starting in 2004 and for the next six years, Tracer made all of the payments that were due to Mr. Redlich under the terms of the 2004 Agreement; in total, Mr. Redlich was paid more than \$700,000.00 in consideration of the 2004 Agreement.¹

Other evidence in opposition to the motion includes two affidavits of Mr. Owen, the attorney who represented Mr. Burton in connection with the 2004 Agreement. In his August 16, 2010 affidavit, Mr. Owen discussed the meeting Mr. Burton and Mr. Redlich had in his office to discuss their buy-sell agreement, and while Mr. Owen had drafted a revised and more specific document than Mr. Burton drafted, Mr. Burton did not want to use the attorney’s draft. In his December 19, 2013 affidavit, Mr. Owen attested that he reviewed all of the documents submitted by Tracer in support of the instant partial motion for

¹ In opposition to the motion, Mr. Burton also submitted his deposition testimony in which he testified consistently with the statements made in his affidavit.

summary judgment and opined that the 2004 Agreement was a valid contract with a lawful cause. Mr. Owen made these attestations: Before executing the 2004 Agreement, Mr. Burton and Mr. Redlich acknowledged that Mr. Redlich owned the Tracer companies, and it was their intent as expressed to him to transfer 100% ownership of the Tracer companies to Mr. Burton. Mr. Burton's objective was to become 100% owner of the Tracer companies and Mr. Redlich's objective was to receive payment. Mr. Owen opined that the 2004 Agreement did not evidence a fraud on the bankruptcy court because, among other things: (1) Mr. Burton and Mr. Redlich never expressed an intent to deceive the court and neither mentioned a secret agreement or binding oral agreement relating to TPSI's stock; (2) Mr. Burton totally divested himself of TPSI's stock in the bankruptcy proceeding; and (3) the bankruptcy judge approved of an agreement that would allow Mr. Burton to later buy 70% of TPSI's stock; thus, the court never prohibited Mr. Burton from acquiring the Tracer companies' stock.

In this case, the trial court ruled that Tracer was entitled to summary judgment dismissing Mr. Burton's ownership claims because the language of the 2004 Agreement evidenced an intent to defraud the bankruptcy court. We note that summary judgment is seldom appropriate for determinations based on subjective facts of motive, intent, or good faith, and should only be granted on such subjective issues when no genuine issue of material facts exists concerning that issue. **Monterrey Center, LLC v. Education Partners, Inc.**, 2008-0734 (La. App. 1st Cir. 12/23/08), 5 So.3d 225, 232.

The crux of Tracer's bankruptcy fraud claim is that Mr. Burton and Mr. Redlich had a secret agreement in the bankruptcy proceedings pursuant to which Mr. Burton was to retain ownership of TPSI stock, while representing to the court that he was divesting himself of that stock and transferring it to Mr. Redlich's company, Ansted, with the intent to defraud the bankruptcy court. Mr. Phillips and

Mr. Losavio opined that such an agreement would constitute a fraud on the bankruptcy court; however, whether Mr. Burton and Mr. Redlich in fact only temporarily transferred TPSI's stock to Mr. Redlich is a disputed factual issue in this case. In opposition to the motion, Mr. Burton confirmed that he and Mr. Redlich discussed the temporary transfer of TPSI's stock to Mr. Redlich, but steadfastly maintained that he and Mr. Redlich did not confect that oral agreement but instead, Mr. Burton transferred all of TPSI's stock to Ansted. In addition to flatly denying that there was ever a "temporary" transfer of TPSI's stock to Mr. Redlich, as is discussed *infra*, Mr. Burton offered evidence showing that prior to 2004, Mr. Redlich was representing that he owned the Tracer companies to banks in connection with loan applications, and after 2004, Mr. Redlich was no longer representing to financial institutions that he owned the Tracer companies, but listed monies received from those companies as accounts receivables. Furthermore, there were countervailing affidavits regarding whether the 2004 Agreement evidenced a bankruptcy fraud.

Since the charge of fraud is a serious one, the person who alleges the fraud must carry the burden of establishing it. **Sanders v. Sanders**, 222 La. 233, 239, 62 So.2d 284, 286 (1952); **Hill's Mortuary, Inc. v. Hill**, 619 So.2d 1080, 1083 (La. App. 1st Cir.), writ denied, 629 So.2d 346 (La. 1993). Fraud must be proven by a preponderance of the evidence and may be established by circumstantial evidence. La. C.C. art. 1957.

In this case, Tracer failed to carry its burden of proof on the motion for summary judgment. The evidence on the motion demonstrates that the issue of whether Mr. Burton and Mr. Redlich intended to defraud the bankruptcy court is a fact very much in dispute. Their intent cannot be determined simply by examining the four corners of the 2004 Agreement; rather, the conduct of the parties is a relevant consideration in determining whether Mr. Burton and Mr. Redlich in fact

deceived the bankruptcy court. The only evidence on the motion for summary judgment relative to the parties' conduct suggests that all of the parties claiming an ownership interest in the Tracer companies were acting as though there had been a complete divestiture of the TPSI's stock by Mr. Burton and a transfer of that stock to Mr. Redlich's company, Ansted. A determination of whether Mr. Burton and Mr. Redlich intended to defraud the bankruptcy court can only be made by weighing credibility and determining the "truth of the matter," which cannot be done on a motion for summary judgment. See Advocate Financial, L.L.C. v. Dart, 2014-0788 (La. App. 1st Cir. 3/6/15) (unpublished opinion). Under these circumstances, we find that the trial court erred in ruling that, as a matter of law, the 2004 Agreement is invalid because it has an unlawful cause.

Lack of Corporate Formalities

We now address the second basis on which the court invalidated the sale, that is, the complete lack of evidence that any corporate formalities had been followed in connection with Mr. Redlich's purported sale of 100% of TPSI to Mr. Burton. The evidence on this issue submitted by the movers includes the affidavit of Mr. Redlich, in which he attested that before Mr. Ortlieb's company, ALC, purchased 50% of Ansted in November 1997, he owned all of the stock of Ansted. Mr. Ortlieb stated that TASI was formed on March 19, 2001, and as of February 12, 2004, Ansted's sole assets were the stock of TPSI and TASI. Mr. Redlich attested that on February 12, 2004, Ansted owned 100% of TPSI and TASI.

In his affidavit, Mr. Redlich also made the following attestations: (1) he never executed any agreement to sell TPSI or TASI in his capacity as a corporate officer or shareholder of Ansted; (2) Ansted never passed any type of resolution to sell its ownership of TPSI or TASI to Mr. Burton; (3) a shareholders meeting was never held by Ansted or by TPSI or TASI regarding the sale of Ansted's ownership of TPSI or TASI to Mr. Burton or anyone else; (4) there is nothing in Ansted's,

TPSI's, or TASI's corporate documents reflecting that Ansted or he sold TPSI or TASI to Mr. Burton; and (5) because he was only considering the sale of TPSI and TASI at the time, no notice of any purported sale of those companies was ever sent to any other owners or shareholders, including Mr. Ortlieb or ALC.

Ansted's Articles of Incorporation reflect that it was incorporated by Mr. Redlich and his wife, Ann Redlich, in 1996. During TPSI's 1997 bankruptcy hearing, Mr. Redlich testified that he was the sole stockholder and the sole officer of the corporation, stating that since he had taken the stock, his wife's portion "is an act of donation." He also indicated that he and his office manager would serve on TPSI's Board of Directors.

Ansted's Articles authorized the issuance of 100 shares of common stock at no par value. The Articles contain a provision stating that the affirmative vote of holders of 51% of the outstanding shares entitled to vote shall be necessary for the sale of the major part of the property or assets of the corporation. The articles further provide under a section entitled "Shareholders Consent" that "[w]hensoever the affirmative vote of the shareholders is required to authorize or constitute corporate action, the consent in writing to such action signed only by the shareholders holding that proportion of the total voting power on the question which is required by law or these Articles of Incorporation, [whichever] is the higher requirement, shall be sufficient for the purpose, without necessity for a meeting of the shareholders."

TPSI's Articles of Incorporation provide if shareholder action or approval is required by law in connection with the transfer of corporate assets, such action or approval shall be taken or given only upon affirmative vote of a majority of the number of shares entitled to vote on the question. They further provide that any other action, for which a larger vote is not specifically made mandatory by the Louisiana Business Corporation Law, may be made or taken upon the majority

vote or written consent of the shareholders entitled to vote under the articles. TPSI's Articles of Incorporation contain a provision identical to Ansted's Shareholder Consent provision.

In his affidavit, Mr. Ortlieb attested that after Ansted purchased TPSI out of bankruptcy, he was informed by Mr. Redlich that Ansted needed an infusion of capital, and in November 1997, his company, ALC, bought 50% of Ansted for \$75,000.00. Mr. Ortlieb stated that he had no knowledge of the 2004 agreement and that: neither he nor ALC were ever notified of a purported sale; neither he nor ALC ever passed any type of resolution allowing Ansted to sell TPSI or TASI; neither he nor ALC were ever notified of an Ansted shareholders meeting or a TPSI or TASI shareholder's meeting regarding the sale of TPSI or TASI by Ansted to Mr. Burton or anyone else; to his knowledge, there never was such a meeting, there are no corporate documents reflecting the sale of Ansted's ownership of TPSI or TASI to Mr. Burton, and no corporate formalities were followed regarding the 2004 Agreement. Lastly, Mr. Ortlieb attested that neither he nor ALC would have agreed to the 2004 Agreement or to any transfer of TPSI's or TASI's stock or ownership to Mr. Burton, and both he and his company object to any such purported agreement or any sale or transfer of TPSI or TASI.

Tracer's remaining evidence on the motion for partial summary judgment includes the deposition testimony of Mr. Redlich, in which he acknowledged that he did not prepare any corporate documents that would show a transfer of ownership of the Tracer companies to Mr. Burton and the trial court's January 29, 2013 judgment on Mr. Ortlieb's motion for partial summary judgment. Therein, the court granted Mr. Ortlieb's motion insofar as it attempted to establish ownership of some portion of the stock of Ansted in someone other than Mr. Redlich. However, the court denied the motion as to Mr. Burton's claims against Mr. Ortlieb for damages for his alleged participation in a civil conspiracy.

In opposition to the motion and in support of his claim that no corporate formalities were required in order for Mr. Redlich to legally transfer the stock of TPSI and TASI to him, Mr. Burton relied on the deposition testimony of Patrick Reso, who acknowledged that in his practice, it is not uncommon for a corporation to operate for many years without ever having issued stock certificates. Mr. Reso further acknowledged that his inability to locate any stock certificates for the Tracer companies did not cause him any concern. Mr. Burton also offered evidence in support of his claim that Mr. Redlich, not Ansted, owned 100% of TASI at the time of the transfer, which included the deposition testimony Mr. Redlich and Ms. Apple, the Tracer companies' accountant. Mr. Burton pointed to his affidavit, in which he attested that Mr. Redlich told him that he owned 100% of both TPSI and TASI and that Mr. Redlich never told him that anyone else owned or claimed to own any part of the Tracer companies. He also relied on Mr. Redlich's personal financial statements from 2000-2003 in which he listed the stock of TPSI and TASI as assets owned by him without delineating a percentage of his ownership interest in those stocks (making it, according to Mr. Burton, appear that Mr. Redlich owned 100% of those stocks). However, beginning in March 2004, Mr. Redlich's personal financial statements no longer listed the stock of TPSI or TASI as assets, but rather, reflect an account receivable from TPSI or income from the Tracer companies. In his deposition, Mr. Redlich acknowledged that it appeared he was representing to his bank that he owned 100% of TPSI.

The evidence on the motion for partial summary judgment shows that Ansted, which purchased TPSI out of bankruptcy, was the sole owner of TPSI at the time Mr. Redlich and Mr. Burton entered into the 2004 Agreement, which purported to transfer TPSI to Mr. Burton. In **Tracer I**, this court stressed that a determination of whether Mr. Ortlieb's company, ALC, had an ownership interest in Ansted on the day the 2004 Agreement was confected was crucial to a

determination of whether Mr. Redlich, acting alone and without observing any corporate formalities, could transfer ownership of TPSI to Mr. Burton. Thus, we held that the issue of whether ALC owed part of Ansted at the time the agreement was executed must be determined before the trial court could make a final ruling on the validity of the 2004 Agreement. On remand, the trial court entered partial summary judgment decreeing that someone other than Mr. Redlich owned Ansted at the time the 2004 Agreement was perfected; however, it did not determine who that someone was or what percentage of ownership that person or entity had at that time.² The trial court obviously was unable to resolve the issue of Ansted's ownership on remand because it would have to make a credibility determination in order to do so.

We disagree with Tracer's assertion that the failure of the trial court to fully resolve the issue of Ansted's ownership is irrelevant to the issue of whether Mr. Redlich could validly transfer any portion of TPSI's stock to Mr. Burton. Furthermore, even if Mr. Redlich, acting alone and without the consent of any other Ansted shareholder, could not bind Ansted to the sale of 100% of its ownership interest in TPSI, it remains to be determined whether Mr. Redlich could transfer his interest in Ansted's assets to Mr. Burton. Until there is a factual determination of Ansted's ownership, the validity of Mr. Redlich's purported transfer of TPSI stock to Mr. Burton cannot be finally resolved.³ Thus, we find that the trial court erred in declaring that Mr. Burton has no ownership interest

² Mr. Ortlieb sought supervisory review of this ruling with this court, attacking the trial court's limited ruling with respect to his motion, arguing that the trial court should have ruled that ALC owned 50% of Ansted on February 12, 2004 and that the 2004 Agreement could not and did not transfer ALC's ownership of Ansted, including its sole asset, Tracer (including TPSI), to Mr. Burton. This court denied Mr. Ortlieb's application for supervisory writs. **Tracer Protection Services, Inc. v. Burton**, 2013-CW-0321 (La. App. 1st Cir. 5/31/13)(unpublished writ action).

³ Additionally, Mr. Burton claims that by its very terms, the 2004 Agreement bound Mr. Redlich to prepare the corporate documents necessary to evidence his 100% ownership of TPSI. Whether Mr. Redlich obligated himself to prepare the necessary corporate documents to evidence or ratify the transfer is one that cannot be resolved until it is determined that the 2004 Agreement is in fact a legal and binding document.

whatsoever in TPSI due to Mr. Redlich's failure to observe corporate formalities or adhere to the provisions of the Louisiana Business Corporation Law⁴ pertaining to the sale of substantially all of a corporation's assets in connection with the purported transfer of TPSI's stock to Mr. Burton.

The ownership of the Tracer companies is the central issue to be resolved in this litigation. Whether the 2004 Agreement memorializes a bankruptcy fraud and whether it was ineffective to transfer any interest in TPSI to Mr. Burton require a trier of fact to resolve a myriad of factual issues, which depend largely on the credibility of those persons claiming an ownership interest in the Tracer companies. As we stressed in **Tracer I**, the ultimate issue of the Tracer companies' ownership should be decided at a trial on the merits, which is designed to evaluate the facts when credibility is at issue.

For the above reasons, we hold that the trial court incorrectly granted summary judgment in favor of Tracer on the issue of the validity of the purported transfer of TPSI to Mr. Burton, and we reverse that ruling.

Denial of Tracer's Motion for Partial Summary Judgment

Tracer answered the appeal, contesting that portion of the trial court's February 5, 2014 judgment denying its motion for partial summary judgment with respect to Mr. Burton's alleged ownership interest in TASI. Tracer maintains that the court should have held that the 2004 Agreement is an absolute nullity that is invalid or unenforceable as to anyone, including TASI. As we have reversed the trial court's granting of the motion for summary judgment on the issue of bankruptcy fraud, this argument must necessarily fail. Further, we note that there

⁴ In 2004, Louisiana's Business Corporation Law imposed special voting rights applicable to the sale or disposition of all or "substantially all" of a corporation's assets, depending on whether a corporation is solvent or insolvent. See La. R.S. 12:121 (prior to its repeal by La. Acts 2014, No. 328, §5; see also Glenn G. Morris & Wendell H. Holmes, *Business Organizations*, §37.04 at 289, in 8 *Louisiana Civil Law Treatise* (1999)).

are genuine issues of fact surrounding the formation of TASI, importantly, whether Mr. Redlich or Ansted in fact owned TASI.

The evidence on the motion for partial summary judgment consists of Mr. Redlich's statement that TASI was formed on March 19, 2001, and that at the time of the 2004 Agreement, Ansted owned 100% of TASI. However, in a deposition, Mr. Redlich testified that when he incorporated TASI in 2001, he was the only shareholder, and he believed that a certificate had been issued to him listing him as the 100% owner of TASI. Documentary evidence also showed that for the tax years 2001-2002, TASI's tax returns listed Mr. Redlich, not Ansted, as the 100% owner of TASI. Mr. Ortlieb stated in his affidavit that Mr. Redlich had planned to form a separate armed guard services division when Ansted purchased TPSI out of bankruptcy, and he pointed to the Debtor's Final Amended Plan of Reorganization, which stated that TPSI may continue with its plans to establish an armed guard security service, which it was pursuing when faced with the adverse financial conditions which necessitated the bankruptcy filing. Additionally, we note that in the 2004 Agreement, Mr. Redlich and Mr. Burton stated that for the purpose of the agreement, TASI "shall be considered an asset of Tracer Protection Services, Inc."

The evidence on the motion demonstrates that there are material issues of fact as to whether Mr. Redlich or Ansted owned TASI at the time the 2004 Agreement was signed, whether TASI is simply a division of TPSI or a separate corporate entity, and whether Mr. Ortlieb has an ownership interest in that company. Because the ownership of TASI at the time of the purported transfer of that company by Mr. Redlich to Mr. Burton is in dispute, the trial court correctly ruled that Tracer is not entitled to judgment as a matter of law on the issue of the validity of Mr. Redlich's purported transfer of TASI to Mr. Burton.

CONCLUSION

For the foregoing reasons, the judgment appealed from is reversed. The case is remanded to the trial court for proceedings consistent with this opinion. All costs of this appeal are assessed to appellees, Tracer Protection Services, Inc., Tracer Armed Services, Inc., and Rene Ortlieb.

REVERSED AND REMANDED.