

STATE OF MICHIGAN
COURT OF APPEALS

KURT WINTERS,

Plaintiff-Appellant,

v

BEAR CREEK INVESTMENTS, INC., BRENT J.
SNYDER, and THOMAS JOHNS,

Defendants-Appellees,

and

JACK KORTE,

Defendant.

UNPUBLISHED

March 12, 2002

No. 226494

Washtenaw Circuit Court

LC No. 99-010400-CK

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

MARKEY, J. (concurring in part and dissenting in part).

I concur with the majority opinion except as follows. In the interest of justice, I note that another provision of the BCA, MCL 450.1345, appears to be relevant, although not cited by any of the parties at the trial level or on appeal. MCL 450.1345 provides, in part:

(1) A board may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation and the limitation in subsection (3).

* * *

(3) A distribution shall not be made if, after giving it effect, the corporation would not be able to pay its debts as the debts become due in the normal course of business.

This statute appears to prohibit the action taken by defendants in the present case and would support voiding the transfer of the \$90,000 to the individual defendants if the original payments from those defendants were not considered loans. Consequently, I conclude that MCL

450.1345 supports entry of a judgment voiding the transfer without need to continue the trial because there appears to be no issue of fact that defendant corporation was unable to pay plaintiff for the excavation services after the \$90,000 was transferred to the individual defendants.

/s/ Jane E. Markey