STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of KEITH E. SATTLER.

FOUR D FARMS, LLC, and CIRCLE K FAMILY FARMS, LLC, Petitioners-Appellees,	UNPUBLISHED January 21, 2010
v JASON BAKER and LARRY SATTLER, Respondents-Appellants.	No. 287645 Gratiot Probate Court LC No. 08-000069-DA

Before: Bandstra, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Respondents appeal as of right from the probate court's order determining title to property and finding no fraudulent transfer took place in this case. We affirm.

Petitioners are two limited liability companies in good standing. Members of Circle K include Kelvin, Kim, and Kris Duflo (brothers), John LaRosa (their brother-in-law), and John Sommavilla (no relation). The three Duflo brothers are the members of Four D Farms. The deceased, Keith Sattler, was their uncle.

When he was alive, Sattler engaged in numerous, rather high-priced dealings. He ran a farm machinery dealership, had a farm; a party store in Sparta, Michigan; a party store in Houghton Lake, Michigan (also called the Roscommon County property); and he owned some gemstones he intended to sell at great profit.[1] While it is not clear how profitable some of these enterprises were, the gemstone business ended up costing him a large amount of money when

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[1] The gems are variously referred to in the record as "carvings," "sculptures," "statues," "rubies," and "gemstones." The security agreement identifies these as eight ruby sculptures ranging in size from a 2010-carat eagle with silver wings to a 3420-carat falcon. The gems were certified as genuine rubies but Sotheby's, Christie's, Detroit Institute of Art, and a California art institute all declined to appraise them because they lacked significant value. John Jones, of GreenStone Farm Credit, testified that Sattler believed they were worth ten million dollars.

Canadian gem traders allegedly swindled him into paying millions in taxes, commissions, and fees with the promise that they could sell his gems for tens of millions. Petitioners and respondents all loaned him money to cover these fees so the gems could be sold: petitioners loaned a total of $1.3 million, respondent Baker (Sattler's brother-in-law) loaned more than $100,000, and respondent Larry Sattler (also a nephew) claimed a loan of $500,000. They were all told to keep the loans secret so none of them knew the others were lending money at the time.

In 2006, Sattler gave GreenStone Farm Credit a $730,000 mortgage on his home and farm. As a nonnegotiable term, GreenStone required Kris Duflo to sign as guarantor. At this time, GreenStone advised Duflo to obtain security on Sattler's outstanding promissory notes. Sattler was unable to pay the $25,000 in interest that was due on the note in June 2007. In August 2007, GreenStone agreed to extend the due date to February 2008 on certain conditions: Duflo had to pay the amount due, GreenStone was to be given a security interest in the gemstones, and the gemstones were to be sold by October 1, 2007, or else certified and appraised by December 1, 2007. At the same time, GreenStone was negotiating a $900,000 loan to Circle K Family Farms to replenish its working capital that had been depleted by all the loans to Sattler. This loan also had conditions imposed: Circle K had to obtain a security interest or assignment of sales proceeds for the Houghton Lake party store, a security interest in the gemstones, an assignment of Sattler's interest in the Sparta party store (which was being sold by land contract), and an assignment from Sattler of current and future land rent.

On August 30, 2007, respondents secured their various loans by receiving from Sattler a mortgage on the Houghton Lake party store, a security agreement on the personal property including the liquor license of that store and also on the ruby carvings, an assignment of rents on seven parcels in Gratiot County, and an assignment of Sattler's rights as seller under a land contract for the Sparta party store. It was clear by that time that Sattler would not live much longer, and he in fact died on September 11, 2007. Three days later, the Houghton Lake party store real estate was sold at a sheriff's sale, foreclosing an already-existing mortgage held by Brenner Oil and given on March 5, 2007. Brenner Oil was the high bid at the sale, taking the property for $239,565.54. Brenner conveyed the property to R & K Real Estate Management (a Duflo enterprise) for $225,000 on February 21, 2008. The property was not redeemed, so title vested in R & K. Circle K Family Farms assigned all its interest in the promissory notes to Four D Farms. Four D Farms then proposed a purchase in lieu of foreclosure on the personal property, including the liquor license, that served as collateral for the security agreement. Four D Farms petitioned the probate court to approve the agreement.

Respondents filed an objection, arguing that the transactions on August 30, 2007—the mortgage on the Houghton Lake party store, the security agreement in the personal property, and the agreements—constituted a fraudulent transfer as defined by either MCL 566.34(1)(a) or (2)(a) or MCL 566.35(2). They asserted that petitioners were "insiders" under MCL 566.31(g)(i)(A), which is defined to include "[a] relative of the debtor" within the definition of "insider," and that petitioners had reason to know Sattler was insolvent at the time of the transfer. Petitioners responded that they were not relatives because they were corporate entities and one of the members was not related at all. They also asserted they were unaware Sattler was in such bad financial shape, especially because he held what he thought were millions of dollars in carved rubies and that, once those were sold, there would be plenty of money for everyone.

The probate court held a hearing and also took briefs. It issued a written opinion, ruling in favor of petitioners. It held petitioners were not "insiders" because MCL 566.31(g)(i)(D) provides that, when the debtor is an individual, a corporation is an insider if "the debtor is a director, officer, or person in control." The court then found there was no credible evidence of the "badges of fraud" identified in MCL 566.34 or MCL 566.35: The security was exchanged for valuable consideration; the transfer did not dispose of Sattler's entire estate; Sattler did not retain control; the transaction was not secret; and there was no litigation pending at the time of the transfer. The court also found there was no reason to "pierce the corporate veil," as respondents seemed to be urging when they argued that the corporate entities and the Duflos were one and the same. The court noted that there was no evidence of corporate fraud, illegality, or injustice in petitioners' corporate dealings, and that respondents, as strangers to petitioners' corporate dealings, had no standing to pierce the veil, in contrast to the situation that would exist if Sattler borrowed money through a shell corporation. The only testimony about the relationship between petitioners and their members was that GreenStone treated the corporations as separate from the individuals. The court analyzed for the sake of argument whether the veil should be pierced, and concluded it should not because there was no evidence the corporations operated in a way to avoid obligations or were operated as shams. Sattler received adequate consideration for the security in that petitioners were obligated on the loan, paid the past-due interest as one of the requirements to extend the loan, and obtained security from Sattler as another of those requirements. The loan extension was important because it was supposed to give Sattler time to sell the gems. In sum, even if there was some evidence pointing to "badges of fraud," the claim that petitioners are insiders failed for lack of clear and convincing evidence. Likewise, there was insufficient proof that Sattler was insolvent in August 2007 because the only evidence of his assets minus liabilities was a positive one from 2006. Nor was there evidence that the purpose of the transaction was to gain an illegal or improper advantage over anybody; instead, the transfer was done because GreenStone required it. Accordingly, the probate court declined to grant respondents the relief they sought.

"The standard of review on appeal in cases where a probate court sits without a jury is whether the court's findings are clearly erroneous." *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). Clear error exists when, although there exists evidence to support the finding, this Court is left with a definite and firm conviction that a mistake has been made. *Id*. Statutory interpretation is a question of law that is considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008). The probate court's key determination that respondents "failed to present any credible examples of the 'badges of fraud'" is a finding of fact, reviewed for clear error.

MCL 566.31 provides in relevant part:[2]

> (g) "Insider" includes all of the following:

[2] The definition goes on to identify insiders when the debtor is a corporation, a partnership, an affiliate, and a managing agent of the debtor. There is no dispute that the debtor here was an individual.

(i) If the debtor is an individual, all of the following:

(A) A relative of the debtor or of a general partner of the debtor.

(B) A partnership in which the debtor is a general partner.

(C) A general partner in a partnership described in sub-subparagraph (B).

(D) A corporation of which the debtor is a director, officer, or person in control.

MCL 566.32 reads in relevant part:

(1) 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.

(2) A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent.

The parts of MCL 566.34 on which respondents rely read:

(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.

* * *

(2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(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.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

> (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.
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> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
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> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
>
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

MCL 566.35(2) reads:

> A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

We agree with the probate court that the transfer was not done with the intent to defraud respondents. The burden was on respondents to prove their allegations of fraud by clear and convincing evidence. Although one could find evidence supporting some of the "badges of fraud" listed in MCL 566.34(2), those are simply "factors" for "consideration." The statute does not require a finding of actual intent even if some of the factors are present.

Respondents argue that the probate court erred when it found there was no evidence of insolvency or that petitioners knew of it. The evidence was overwhelming that Sattler was not paying his debts, and everyone knew it, so the presumption of insolvency arose under MCL 566.32(2). However, even if the presumption of insolvency arose because Sattler was not paying his debts, there was no evidence that anyone believed he was insolvent at the time of the transfer. Instead, the evidence showed that Sattler, petitioners, and respondents all thought the gems would be sold and everyone would get money back with interest. Sattler was simply short of cash because it was all tied up in the unsold gemstones.

Nor do we find support for any of the other factors under MCL 566.34(2). Petitioners gave ample consideration, paying the overdue interest on the farm mortgage and taking on considerable debt obligations by co-signing the farm mortgage. Respondents' claim that the August 22, 2007, letter was written merely to provide cover for the transfer is mere speculation. Further, the argument that Sattler was about to face a lawsuit because of the pending foreclosure is specious because foreclosure would not motivate a person to hide assets: this "badge" addresses people who seek to avoid paying a judgment. Respondents provide no explanation as to why either petitioners or Sattler would intentionally try to prevent respondents from getting their money back. It is settled law in this state that "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). In short, the slim evidence of "badges of fraud" does not lead us to conclude that the transfer involved any fraud. See *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 459; 559 NW2d 379 (1996)

(Fraud may be proved by facts that are inconsistent with an honest purpose). Thus, it cannot be said that the probate court clearly erred in finding Sattler had no intent to hinder, delay, or defraud respondents.

The analysis of MCL 566.35 involves a mixed question of fact and law; whether petitioners are insiders is a matter of statutory construction and whether they had reasonable cause to believe Sattler was insolvent is a factual determination. Respondents argue that the statutory definition "includes" listed persons, and that by using the word "includes," the Legislature intended the list to be illustrative, rather than exhaustive. Federal courts recognize these "non-statutory insiders." Under this interpretation, even if petitioners are not "per se" insiders because they are not one of the listed entities, they can still be insiders by virtue of the closer-than-arm's-length relationship they had with the debtor. However, respondents cite no Michigan authority for their proposition that there are both "statutory" and "non-statutory" insiders; and even the federal case law cited recognizes a non-statutory insider relationship only where it "commands preferential treatment" or "compels the conclusion" that the relationship is "close enough to gain an advantage attributable simply to affinity rather than to the course of dealings between the parties." *In re Kunz*, 489 F3d 1072, 1079 (CA 10, 2007). Here, everyone had the ability to gain the same advantage, so even under the broader construction of "insider," the facts of this case do not support a conclusion that the transfer was made with fraudulent intent. Even if petitioners might be considered insiders against total strangers, under these circumstances they are not. Nor, as we have discussed, would they have had reasonable cause to believe Sattler was insolvent at the time the transfer was made. The probate court did not clearly err in refusing to find the transfer was fraudulent under MCL 566.35.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens