**[Cite as *Tonito's, Inc. v. S&J Ents., Inc.*, 2010-Ohio-776.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 92989**

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## TONITO'S, INC.

PLAINTIFF-APPELLANT

vs.

## S&J ENTERPRISES, INC., ET AL.

DEFENDANTS-APPELLEES

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## JUDGMENT:
## AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-477594

**BEFORE:** Kilbane, P.J., Blackmon, J., and Sweeney, J.

**RELEASED:** March 4, 2010

**JOURNALIZED:**

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MARY EILEEN KILBANE, P.J.:

**{¶ 1}** Appellant, Tonito's, Inc. ("Tonito's"), appeals the trial court's judgment in favor of appellees, S.H.A. Ltd. ("S.H.A.") and Hassan Awada ("Awada"), which denied Tonito's prayer for specific performance seeking immediate possession of a business known as Convenience Foodmart ("the store") located at 4021 Warrensville Road, Warrensville Heights, Ohio. Tonito's, by and through its principal, Tony Nassif, ("Nassif"), argues that Awada intentionally interfered with Tonito's procurement of the property by purchasing the property from the seller, S&J Enterprises ("S&J") and Jamal Abdel-Karim ("Abdel-Karim"), with full knowledge of existing claims between Tonito's and S&J. As such, Tonito's argues that Awada is not a bona fide purchaser for value and that Tonito's is entitled to specific performance of the asset purchase agreement entered into with S&J, which amounts to immediate possession of the store. After reviewing the pertinent law and facts, we affirm the trial court's decision in part, and reverse and remand for further proceedings consistent with this opinion.

## Factual and Procedural History

**{¶ 2}** On April 19, 2000, Tonito's and S&J entered into a purchase agreement titled "Sale of All Assets of Corporate Business" for the sale of the store in the amount of $125,000. The parties agreed that a third party, Retail Grocery Inventory Service ("RGIS"), would conduct an inventory and determine

its value in the April 22, 2000 closing of the sale, and that Tonito's would pay S&J for said inventory at the closing.

**{¶ 3}** On April 22, 2000, Tonito's and S&J convened at the store to close the purchase and sale of the store and to have RGIS conduct the inventory valuation. At this time, Abdel-Karim became dissatisfied with the valuation of the inventory and wanted more money for the inventory. Abdel-Karim walked away from the closing and refused to honor the signed sales agreement between S&J and Tonito's.

**{¶ 4}** On July 28, 2000, Tonito's filed a complaint with a jury demand and a motion for temporary restraining order ("TRO")("the initial civil action") against S&J and Abdel-Karim to stop a subsequent sale of the store to S.H.A. After the TRO was granted ex parte, a hearing on the underlying injunction was held on August 8, 2000. In the interim, S&J and Abdel-Karim filed a motion to dissolve the TRO and, alternatively, to require Tonito's to post a bond.

**{¶ 5}** On August 11, 2000, the trial court journalized an entry continuing the TRO "with the exception of the portion of the order granting possession and use of the premises to Tonito's, contingent upon [Tonito's] posting of a $100,000 bond."[1] However, Tonito's never posted the $100,000 bond to prevent the transfer of the store. Tonito's eventually dismissed the case on August 8, 2001.

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[1]See trial court journal entry of August 11, 2000 in Case No. CV-413918.

**{¶ 6}** On September 10, 2000, S&J entered into an asset purchase agreement with S.H.A. for the sale of the store. It is clear from the record that S.H.A. entered into the asset purchase agreement with full knowledge of Tonito's pending claim. Specifically, the asset purchase agreement stated in part:

> **"There are no facts known to Seller [S&J], other than facts which have been disclosed to Buyer in writing, which might have a material adverse affect on the premises, the other assets being sold herewith, or the use of said premises and other assets; and there is no litigation pending, nor, to the knowledge of the Seller, threatened against or affecting Seller in any court or before any governmental agency, *with the exception of Tonito's Inc. v. S&J Enterprises, Inc., et al., Case Number 413918, now pending in the Cuyahoga County Court of Common Pleas."* (Emphasis added.)**

**{¶ 7}** On May 11, 2001, S&J and Abdel-Karim moved for summary judgment, which the trial court granted on August 14, 2001. However, since Tonito's had filed a notice of dismissal of the initial civil action on August 8, 2001, the summary judgment in favor of S&J and Abdel-Karim was rendered moot and the matter was dismissed without prejudice.[2]

**{¶ 8}** On April 10, 2001, while the initial case was pending, Tonito's filed an additional civil action — a complaint with a jury demand against the subsequent purchasers of the store, S.H.A. and Awada. On September 10, 2001, Tonito's dismissed the case against S.H.A. and Awada without prejudice.

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[2]See trial court journal entry of August 21, 2001 in Case No. CV-413918.

**{¶ 9}** On August 1, 2002, Tonito's filed a third civil action, a nine-count complaint against S&J, Abdel-Karim, and S.H.A. and Awada ("the third civil action"). Count 1 alleged that S&J and Abdel-Karim breached their contract with Tonito's. Count 2 alleged that S&J and Abdel-Karim committed fraud against Tonito's. Count 3 alleged fraud against Abdel-Karim personally. Counts 4 and 5 alleged that S&J's corporate veil should be pierced so as to hold Abdel-Karim personally liable for S&J's actions, based upon Abdel-Karim's fraudulent representations to Tonito's. Count 6 alleged that Abdel-Karim tortiously interfered with the business contract between S&J and Tonito's. Count 7 alleged that S.H.A. and Awada tortiously interfered with the business contract between S&J and Tonito's. Count 8 alleged that S.H.A. failed to follow the corporate form, and that its corporate veil should be pierced in order to hold Awada personally liable. Count 9 alleged that Tonito's detrimentally relied upon the fraudulent representations of Abdel-Karim personally and on behalf of S&J.

**{¶ 10}** On November 17, 2004, after discovery was complete, Tonito's filed a motion for summary judgment against S&J and Abdel-Karim on the issues raised in its complaint. This motion went unopposed by S&J and Abdel-Karim. On February 17, 2005, the trial court granted partial summary judgment in favor of Tonito's and against S&J and Abdel-Karim.[3]

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[3]S&J and Abdel-Karim promptly gave notice that they had filed for bankruptcy on February 18, 2005. Once they emerged from bankruptcy, the court held a damages hearing on February 20, 2009, and awarded Tonito's $591,528 in compensatory

**{¶ 11}** On December 8, 2005, Tonito's filed a motion for summary judgment "with jury demand" against S.H.A. and Awada. On September 28, 2007, the trial court denied Tonito's motion for summary judgment against S.H.A. and Awada.

**{¶ 12}** On April 3, 2008, the case proceeded to a bench trial to determine whether S.H.A. tortiously interfered with Tonito's attempt to purchase the store, whether S.H.A. was a bona fide purchaser for value, and whether Tonito's was entitled to specific performance on its breach of contract claim against S.H.A. and Awada.

**{¶ 13}** On April 29, 2008, the trial court entered judgment against Tonito's and in favor of S.H.A. and Awada on Tonito's tortious interference claim, and stated that Tonito's did not prove by a preponderance of the evidence that "the defendant [S.H.A.] was not a bona fide purchaser for value."[4] This appeal followed, asserting four assignments of error.

**{¶ 14}** Tonito's First Assignment of Error States:

> **"The trial court erred in finding that Appellant failed to prove by a preponderance of the evidence that Appellee was not a bona fide purchaser for value."**

**Standard of Review**

**{¶ 15}** When reviewing civil appeals from bench trials, we apply a manifest weight standard of review. App.R. 12(C); *Seasons Coal v. City of Cleveland* (Apr.

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damages and $100,000 in punitive damages against S&J and Abdel-Karim.

[4]See April 29, 2008 journal entry in Case No. CV-477594.

18, 1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. We are guided by the presumption that the trial court's findings were correct, and we will not reverse its decision as against the manifest weight of the evidence "if it is supported by come competent, credible evidence going to all the essential elements of the case." *Seasons Coal*, at 80, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." Id. at 80.

**Whether S.H.A. Purchased the Store Absent Notice of Adverse Claims**

**{¶ 16}** A bona fide purchaser for value is a purchaser who takes property 1) for valuable consideration, 2) in good faith, and 3) absent notice of any adverse claims. *The Shaker Corlett Land Co. v. Cleveland* (1942), 139 Ohio St. 536, 542, 41 N.E.2d 243. In its brief, Tonito's argues that S.H.A. could not have been a bona fide purchaser for value because it purchased the store with notice that Tonito's had attempted to purchase the store first. Tonito's also alleges that because S.H.A. was involved in the underlying litigation for the sale of the store between Tonito's, S&J, and Abdel-Karim it could not have subsequently purchased the store without notice of Tonito's competing claim.

**{¶ 17}** Notice of adverse claims may be actual or constructive. *Union S&L Assn. v. McDonough* (1995), 101 Ohio App.3d 273, 276-277, 655 N.E.2d 426. A party will be deemed to have constructive notice of an adverse claim if he has knowledge of facts that would induce a prudent person to make an inquiry by which he would have or could have obtained knowledge of the adverse claim. *The Wayne Bldg. & Loan Co. of Wooster v. Yarborough* (1967), 11 Ohio St.2d 195, 202, 228 N.E.2d 841; *Thames v. Asia's Janitorial Serv., Inc.* (1992), 81 Ohio App.3d 579, 587, 611 N.E.2d 948.

**{¶ 18}** When evaluating whether an entity or individual takes property absent notice of any adverse claims, Ohio courts have consistently held that "[o]ne having notice of facts which would put a prudent man on inquiry is chargeable with knowledge of other facts he might have discovered by diligent inquiry. Whatever is notice enough to excite the attention of a prudent man and put him on his guard is notice of everything to which such inquiry might have led[.]" *Hightower v. Reiger* (Oct. 6, 1988), Cuyahoga App. No. 54447. (Internal citations omitted.)

**{¶ 19}** After reviewing the facts and circumstances under which S.H.A., by and through Awada, obtained the property, we hold that S.H.A. took possession of the property with notice of Tonito's adverse claims. S.H.A. and Awada were aware that Tonito's had negotiated with S&J for the purchase of the store and were aware of, and involved in, the litigation surrounding the sale of the store.

The purchase agreement S.H.A. entered into with S&J explicitly stated that any interest S.H.A. had in the store was subject to Tonito's competing interest, based upon the ongoing litigation surrounding the sale of the store.

**{¶ 20}** S.H.A. and Awada argue that any competing interest Tonito's had in the sale of the store expired when Tonito's failed to post the $100,000 bond required to prevent the sale of the store in their initial lawsuit. We disagree. The expiration of the TRO, by its own terms, does not extinguish any competing interest Tonito's had in the sale of the store. Once service has been made upon one defendant in a multidefendant lawsuit, the action is "pending" so as to charge third persons with notice of its pendency. *Beneficial Ohio, Inc. v. Ellis*, 121 Ohio St.3d 89, 2009-Ohio-311, 902 N.E.2d 452. Thus, even after the TRO expired, S.H.A. still had notice of Tonito's competing interest by virtue of the underlying litigation surrounding the sale of the store. In Ohio, "[w]hether a purchaser is a bona fide purchaser without notice, must be determined at the moment in time when the purchase is consummated, or at the latest at the time of payment." *Fello v. Fenton Invest. Co.* (Feb. 9, 1978), Cuyahoga App. No. 36978.

**{¶ 21}** The evidence in the record clearly indicated that S.H.A. had explicit knowledge of Tonito's claim, since its asset purchase agreement with S&J for the sale of the store explicitly mentioned Tonito's claim. Therefore, S.H.A. had notice of Tonito's claim at the time the purchase was consummated. In fact, the

evidence at trial demonstrated that Abdul-Karim and Awada met as early as June 2000 to discuss the purchase of the store, and that Awada knew of Tonito's claim on July 28, 2000, when he was served with a copy of Tonito's application of the TRO to prevent the sale of the store. (Tr. 110-111.)

**{¶ 22}** S.H.A. took possession of the property with notice and, therefore, cannot be considered a bona fide purchaser for value. We find that it was against the manifest weight of the evidence for the trial court to determine that S.H.A. was a bona fide purchaser for value, as the evidence adduced at trial clearly indicates that S.H.A. took with notice of Tonito's competing claims.

**{¶ 23}** Tonito's first assignment of error is overruled.

**{¶ 24}** Tonito's second assignment of error states:

> **"The trial court erred in failing to order specific performance for the sale of the store per the terms of appellant's [Tonito's] agreement with the seller and such holding is arbitrary, unreasonable, and unconscionable."**

**{¶ 25}** We will not disturb a trial court's failure to award specific performance absent an abuse of discretion. *Manning v. Hamamey* (Feb. 12, 1998), Cuyahoga App. No. 72072. (Internal citations omitted.) To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

**{¶ 26}** Tonito's argues that since S.H.A. entered into the September 10, 2000 purchase agreement with S&J subject to Tonito's competing claim, the trial court was required to order specific performance and grant Tonito's immediate possession of the store. We agree.

**{¶ 27}** As we have already determined, the evidence at trial was insufficient to establish that S.H.A. was a bona fide purchaser who took without notice of Tonito's claim. Under these circumstances, the trial abused its discretion in failing to order specific performance. See *Kammer v. Valley View Sports Arena* (Nov. 13, 1980), Cuyahoga App. No. 42009, holding, inter alia, a judgment that a subsequent purchaser was not a bona fide purchaser for value "would not necessarily preclude judgment for specific performance against [the subsequent purchaser]." See, also, *Clotfelter v. Telker* (App.1947), 52 Ohio Law Abs. 268, 83 N.E.2d 103, holding that in an action by a purchaser for specific performance of a written contract to convey realty, a subsequent purchaser of the realty has the burden of proving that they were bona fide purchasers for value without notice of plaintiff's claim. Here, the evidence established at trial clearly shows S.H.A. and Awada knew of Tonito's competing claim and entered into their purchase agreement with S&J subject to that claim. Tonito's second assignment of error is well taken. The trial court abused its discretion when it denied Tonito's claim for specific performance of immediate possession of the store.

**{¶ 28}** Tonito's third assignment of error states:

> **"The trial court erred in failing to find that appellee tortiously interfered with appellant's purchase asset agreement for the sale of the store with the seller."**

**{¶ 29}** In Ohio, tortious interference with a business relationship occurs when: (1) there is an existence of a contract, (2) that the wrongdoer has knowledge thereof; (3) there is an intentional interference causing a breach or termination of the relationship, (4) lack of justification, and (5) resulting damages therefrom. See *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 650 N.E.2d 863. See, also, *Chandler & Assoc., Inc. v. America's Healthcare Alliance, Inc.* (1997), 125 Ohio App.3d 572, 709 N.E.2d 190.

**{¶ 30}** Tonito's argues that Awada clearly knew of Tonito's interest in the store and that he offered S&J and Abdel-Karim $10,000 more than Tonito's offered, thereby intentionally procuring a breach of the business relationship between Tonito's and S&J.

**{¶ 31}** While it is true that Awada knew of Tonito's interest in the store, and the evidence suggests that Awada knew the store was for sale as early as June 2000, the record shows that Awada, by and through S.H.A., only found out about Tonito's claim when served with notice of the TRO in the initial civil action.

**{¶ 32}** During the trial in this matter, Awada testified to the following facts regarding his level of knowledge about Tonito's relationship with S&J:

**"Q: Did he disclose to you that he was already in negotiation or had another contract pending?**

**"A: No. No. I found out in the court.**

**"Q: So the first time you learned of the other deal is when Mr. Corrado sent you a copy of the TRO?**

**"A: Correct.**

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**"Q: Did you at any time instruct or request [Abdel-Karim] not to complete the contract?**

**"A: No.**

**"Q: Do you have any knowledge or understanding why [Abdel-Karim] refused to complete the transaction with Tonito's?**

**"A: No. (Tr. 110-111.)"**

**{¶ 33}** Based upon this record, there is no evidence indicating that S.H.A. or Awada intentionally interfered with the agreement between Tonito's & S&J. While Awada knew about the sale, his knowledge alone had nothing to do with the breakdown of the agreement between Tonito's and S&J. Neither S.H.A. nor Awada knew why Abdel-Karim refused to complete the sale of the store to Tonito's. Most importantly, there is no evidence that S.H.A. or Awada intentionally interfered with the negotiations between Tonito's and S&J.

**{¶ 34}** It was not an abuse of discretion for the court to rule in S.H.A.'s favor on the tortious interference claim and its claim to pierce the corporate veil

and impute liability to Awada personally, because Tonito's only established the existence of a contract and S.H.A.'s knowledge of that contract, nothing more. There was competent, credible evidence in the record to support the trial court's determination.

**{¶ 35}** Tonito's third assignment of error is overruled.

**{¶ 36}** Tonito's fourth assignment of error states:

> **"The trial court's award of summary judgment in favor of appellee was erroneous as a matter of law because there is no genuine issue of material fact that appellee is not a bona fide purchaser for value as he readily admits notice of appellant's interest."**

**Summary Judgment Standard of Review**

**{¶ 37}** We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Northeast Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

**{¶ 38}** Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that "(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of

the nonmoving party, that conclusion is adverse to the nonmoving party." *Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326, 672 N.E.2d 654.

**{¶ 39}** The moving party carries the initial burden of setting forth specific facts that support the motion for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate. If the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to establish the existence of a genuine issue of material fact. Id. at 293.

**{¶ 40}** Here, Tonito's argues, as it does throughout its brief, that S.H.A. and Awada entered into an agreement with S&J and Abdel-Karim with knowledge of Tonito's competing claim, and thus, he cannot be a bona fide purchaser for value. This is borne out by the record, as Awada testified explicitly at trial that he had knowledge of Tonito's competing claim, and even contracted subject to that claim in his asset purchase agreement with S&J and Abdel-Karim. (Tr. 43-48.)

**{¶ 41}** As this court has previously stated, "[w]hatever is notice enough to excite the attention of a prudent man and put him on his guard is notice of everything to which such inquiry might have led[.]" *Hightower,* supra. (Internal citations omitted.) A subsequent purchaser cannot "close its eyes to the real situation," and fail to ascertain "the all important facts" surrounding his purchase, and the consequences that flow from it. *Shaker Corlett*, supra, at 543.

**{¶ 42}** Here, Awada admitted he took possession of the store subject to Tonito's competing claim. It was error for the trial court to deny summary judgment, as Awada admitted that he took possession of the store subject to Tonito's claims.

**{¶ 43}** The judgment of the Court of Common Pleas is affirmed in part and reversed in part. The cause is remanded for further proceedings in accordance with law.

It is ordered that appellant recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR