IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

DBM CONSULTING ENGINEERS, INC., a Washington corporation, Respondent, v. JOSEPH D. SANDERS and the marital community composed of Joseph D. Sanders and Jane Doe Sanders; SOOS CREEK VISTA, INC., a Washington corporation, Appellants, CHRISTINE POLLACK and the marital community composed of Christine Pollack and John Doe Pollack; POLLACK INVESTMENT COMPANY, LLC, a Washington limited liability company, Defendants.	)	No. 59738-8-I UNPUBLISHED OPINION FILED: September 7, 2010

Ellington, J. — After DBM Consulting Engineers, Inc. obtained a judgment against Soos Creek Vistas, Inc., Soos Creek transferred its assets to president and sole shareholder Joseph Sanders. In supplemental proceedings, the court found the transfer violated the uniform fraudulent transfers act and ordered Sanders to return the assets. Because Sanders was not a party to the proceedings, the order is

invalid. We remand.

BACKGROUND

In April 2005, DBM obtained an amended judgment based upon a jury verdict against Soos Creek in the amount of $139,502.72. In June 2005, acting as president of Soos Creek, Joseph Sanders formally assigned its assets to himself, including three deeds of trust and promissory notes executed by purchasers of real estate in the Soos Creek development. At the same time, Sanders withdrew the several thousand dollars in Soos Creek's bank account, rendering the corporation insolvent and unable to satisfy the judgment.

DBM attempted to garnish the notes and discovered the transfers. In October 2005, DBM initiated supplemental proceedings to levy execution on the transferred assets, alleging the transfer was a preferential payment to an insider in violation of the uniform fraudulent transfers act, chapter 19.40 RCW (UFTA). DBM did not serve Sanders with the motion or otherwise attempt to make him a party to the supplemental proceedings.

Soos Creek argued the court lacked jurisdiction to decide the motion because Sanders was not a party and because a claim under the UFTA must be brought in a separate lawsuit. Soos Creek also argued the transfers were made for value in the ordinary course of business and were not fraudulent. In his capacity as a corporate officer, Sanders testified the corporation assigned the promissory notes to him in partial satisfaction of a $1.4 million loan he had made to Soos Creek in 1997. Sanders claimed the transfers actually occurred several months before the judgment

was entered and that he had received payment on the notes directly since that time.

After supplemental discovery, DBM produced evidence refuting Soos Creek's claims. Among other things, the evidence showed payments on the notes were made to Soos Creek, not directly to Sanders. Although Soos Creek assailed the evidence as unreliable and inconclusive, it provided no contrary evidence. Rather, Soos Creek argued Sanders had a valid lien on the notes so that they were not "assets" of Soos Creek under the UFTA.[1] Soos Creek maintained the court had no authority to decide the motion because it lacked personal jurisdiction over Sanders and because DBM's motion was procedurally improper. Soos Creek also argued DBM's failure to commence a separate lawsuit under the UFTA within the one year limitations period extinguished its claim.

The court found Sanders was an "insider" under the UFTA , the transfers were not in the ordinary course of business, and the assets were not subject to a valid lien. The court also found it had authority to command Sanders "in his individual & in his corporate capacity" to return the assets.[2] It therefore ordered Sanders "in his corporate capacity & as an 'insider'" to return the promissory notes and deeds of trust to Soos Creek.[3]

DISCUSSION

This case presents two issues: whether a plaintiff may raise a UFTA claim in

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[1] Under the UFTA, "'[a]sset' means property of a debtor, but the term does not include . . . [p]roperty to the extent it is encumbered by a valid lien." RCW 19.40.011(2)(i).

[2] Clerk's Papers at 519.

[3] Id.

supplemental proceedings and if so, whether the absence of the transferee in those proceedings renders the order invalid. These are questions of law, which we review de novo.[4]

Sanders and Soos Creek argue the only way to obtain relief under the UFTA is to commence a lawsuit pleading a UFTA cause of action within the applicable limitations period; in this case, one year.[5] Because DBM raised its UFTA claim in a post-judgment motion and has never filed a separate lawsuit under the UFTA, Sanders and Soos Creek contend the court was without authority to consider the matter, and any claim has now been extinguished. We disagree.

There are two paths to obtain relief under the UFTA. Certain remedies are available "[i]n an action for relief under this chapter," including avoidance of the transfer, attachment of the asset, injunction against further disposition, and appointment of a receiver to take charge of the asset.[6] But where, as here, "a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds."[7] The statute plainly contemplates that a creditor will invoke the UFTA after obtaining a judgment on some other basis, and provides a remedy in that event. Requiring a separate lawsuit in such circumstances would do nothing more than unnecessarily

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[4] Go2net Inc. v. Freeyellow.com, Inc., 158 Wn.2d 247, 253, 143 P.3d 590 (2006).

[5] A cause of action alleging a preferential transfer to an insider for an antecedent debt must be brought within one year of the transfer. RCW 19.40.051(b), .091(c).

[6] RCW 19.40.071(a).

[7] RCW 19.40.071(b).

tax judicial resources.

We conclude DBM's post-judgment motion to levy on assets was an appropriate way to gain relief under the UFTA. And since the motion was made within one year after the transfer, DBM's claim was not extinguished.

To levy execution, however, a judgment creditor must comply with CR 69 and related procedural statutes,[8] including chapter 6.32 RCW. RCW 6.32.270 applies where "it appears that the judgment debtor may own . . . personal property, and such ownership . . . is substantially disputed by another person.[9] In that event, "the court may*, if the person or persons claiming adversely be a party to the proceeding*, adjudicate the respective interests of the parties . . . and may determine such property to be wholly or in part the property of the judgment debtor."[10] But where, as here, "the person claiming adversely to the judgment debtor be not a party to the proceeding, the court shall by show cause order or otherwise cause such person to be brought in and made a party thereto."[11]

Despite Soos Creek's insistence that Sanders' absence left the court without authority to proceed, neither the court nor DBM made Sanders a party to the supplemental proceedings. Under the statute, the court had no authority to

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[8] CR 69(a) provides: "The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the State as authorized in RCW 6.13, 6.15, 6.17, 6.19, 6.21, 6.23, 6.32, 6.36, and any other applicable statutes."

[9] RCW 6.32.270.

[10] Id. (emphasis added).

[11] Id.

adjudicate the ownership of the transferred assets without him. Further, where the dispute as to ownership centers upon allegations of fraudulent transfer, "[f]undamental principles of due process require that transferees who claim an interest in real property or its proceeds have a full and fair opportunity to contest [the] claims."[12] As the transferee, Sanders is thus a necessary party to any action seeking to set aside the transfer.[13]

Because Sanders was not a party to the supplemental proceedings, the court's order granting DBM's motion to levy on assets is void.[14] We remand for further proceedings consistent with RCW 6.32.270.

Both parties request attorney fees and costs on appeal based upon the underlying contract, which provides: "In the event that Consultant prevails in any action between Client and Consultant, Client should pay Consultant's legal expenses, including attorney's fees, court costs and experts' fees."[15] Under RCW 4.84.330, such provisions are deemed a bilateral entitlement to fees and

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[12] Tanaka v. All-Lease, Inc., 76 Haw. 32, 37, 868 P.2d 450 (1994).

[13] Id.; see also Eggleston v. Sheldon, 85 Wash. 422, 434, 148 P. 575 (1915) ("Since the grantee of the property acquires an interest therein by reason of the conveyance, such grantee is a necessary and indispensable party to any proceeding brought to subject the property to the debt").

[14] Junkin v. Anderson, 12 Wn.2d 58, 67, 120 P.2d 548 (1941) ("If in a supplemental proceeding such a question of title is presented for determination, in the absence of voluntary appearance by the third party, any purported adjudication of the title is void, if jurisdiction over the parties or the property has not been obtained in some manner."); see also Tanaka, 76 Haw. at 36 (agreeing with numerous cited authorities and holding "where a creditor alleges a fraudulent transfer of property from a judgment debtor to a transferee who retains title to the subject property or who claims an interest in the property or its proceeds, the transferee is a necessary party to any action seeking to set aside the transfer").

[15] Clerk's Papers at 5.

costs.

In light of our holding, Soos Creek is the prevailing party on appeal and is entitled to its reasonable fees and costs on appeal. Sanders, who requests fees in his own right, was not a party to the contract and is not entitled to fees on that basis.[16]

Ellington, J.

WE CONCUR:

Appelwick, J.

Cox, J.

[16] Sanders argues he is personally entitled to attorney fees under Herzog Aluminum, Inc. v. General American Window Corp., which awarded fees based on a contract the prevailing party argued was void. 39 Wn. App. 188, 197, 692 P.2d 967 (1984) (cited with approval in Mt. Hood Beverage Co. v. Constellation Brands, Inc., 149 Wn.2d 98, 121, 63 P.3d 779 (2003)). This case is unlike Herzog because the claim against Sanders arises not from the contract, but from the UFTA.