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

DAVID W. MAYERS, JR.,	)	No. 66612-6-I
	)	
Appellant,	)	
	)	
v.	)	
	)	
JOHN GRAHAME BELL; and YOUNG deNORMANDIE, P.C., a Washington professional corporation,	)	UNPUBLISHED OPINION
	)	
Respondents.	)	FILED: April 16, 2012
	)	

Ellington, J. — Legal proceedings are not a shell game, and money received from a client by a law firm cannot be both refundable and nonrefundable. When the firm of Young deNormandie and its client John Grahame Bell responded to a writ of garnishment by characterizing Bell's fee deposit as a "nonrefundable litigation retainer" earned on receipt and "not subject to garnishment," they were estopped from later claiming the money actually belonged to Bell all along.

We reverse summary judgment dismissing the judgment creditor's action for fraudulent transfer and remand for trial.

FACTS

On December 11, 2008, David Mayers obtained a $60,000 default judgment against John Grahame Bell for legal malpractice.[1]

In January 2009, attorney John Young, a shareholder in the law firm Young

deNormandie, P.C. (YdN), received payment for work on the Exxon Valdez litigation, which occurred before the formation of YdN. John Grahame Bell had worked for Young on that litigation. Young deposited the payment to YdN's trust account and set aside $36,795 as Bell's share of the fees. Bell requested that Young keep the funds in the firm's trust account because he wanted to hire the firm to represent him in proceedings to set aside the Mayers default judgment.

On January 26, 2009, YdN wrote Bell and formally agreed to represent him in connection with the Mayers lawsuit and in any related action Bell might wish to bring against Mayers and others. The letter expressly conditioned representation upon Bell's payment of a $36,000 retainer against which YdN "will bill our fees as they are incurred," but also insisted "that the retainer be deemed earned upon receipt," refundable only with court approved withdrawal of representation.[2] The agreement letter concluded "Upon receipt of a countersigned copy of this letter, we will transfer $36,000 of the funds that we are holding in our trust account for you to our general account and will immediately start to work on your case."[3] The space above Bell's countersignature contained language expressly accepting YdN's conditions and asking YdN to transfer the money to the YdN "general account" as "an earned retainer."[4]

Mayers learned that Bell had money in YdN's trust account. In July 2009, he served a writ of garnishment. In its answer, YdN made the following representation:

---

[1] According to Mayers, Judge William Downing struck Bell's answer and entered a default judgment as a sanction for "repeated and persistent disregard for the rules of the court." Br. of Appellant at 6.

[2] Clerk's Papers at 24.

[3] Id.

[4] Id.

> On July 23, 2009, the date Young deNormandie, P.C. received the writ, Young deNormandie held $33,123.32 in its trust account as a non-refundable litigation retainer for the benefit of J. Grahame Bell. Mr. Bell paid these funds pursuant to a written fee agreement with Young deNormandie which states that the funds were immediately earned and non-refundable. Relying upon the [Washington State Bar Association's] [i]nformal [o]pinions: 1610 & 1838[,] Young deNormandie believes these funds are not subject to garnishment.[5]

Bell responded to the writ in the same fashion, stating that he had accepted YdN's terms, had agreed to provide a nonrefundable retainer, and had instructed YdN to "place my retainer into its general account as earned retainer."[6] He stated, "It is my belief that these funds are no longer mine, but the earned income of Young deNormandie. These funds are not subject of the garnishment filed by Plaintiff, David W. Mayer."[7]

Neither Bell nor YdN disclosed the language providing that the firm would "bill our fees as they are incurred," or that any unused fees would be refundable upon termination of the representation and court approval of withdrawal.[8]

In response to these representations, Mayers filed this action in August alleging Bell and YDN violated the Uniform Fraudulent Transfer Act (UFTA), chapter 19.40 RCW. Mayers then released the garnishment. The UFTA suit alleged that Bell transferred the funds to YdN without consideration of reasonably equivalent value and with actual intent to hinder, delay, or defraud Bell's creditors.

Bell hired YdN to represent him in the UFTA lawsuit. YdN represented itself as

---

[5] Clerk's Papers at 38. We discuss these opinions *infra*.

[6] Clerk's Papers at 73.

[7] Id.

[8] Clerk's Papers at 24. There is no indication YdN or Bell provided Mayer with a copy of the retainer letter itself.

well. Discovery disclosed that in fact, YdN never entered an appearance for Bell on the Mayers case and did only a small amount of work, apparently concluding there was no basis for a challenge to the judgment or for claims against Mayers. For this work, the firm paid itself $3,672 from Bell's "retainer."

Notwithstanding the fee agreement and the representations in its answer to the writ, YdN never transferred Bell's funds to its general account, and Bell retained control over the funds. On five occasions between September and December 2009—subsequent to his affidavit disclaiming any interest in the money—Bell directed YdN to make distributions from these funds to himself, his son, and "Monte Vista."[9] The cumulative amount of these distributions was $20,086.

In responding to the UFTA action, defendants reversed field. They claimed that "Bell always retained ownership" of the funds and "YdN did not perform any services for Bell and thus never acquired an ownership interest in the funds."[10] YdN stated that "after further research in the matter, YdN concedes that Bell's funds held in the trust account were subject to garnishment," and acknowledged that its prior representation to the contrary was "incorrect."[11] The defendants thus denied that any transfer occurred, and now describe Mayers' release of the garnishment as "a poor tactical decision."[12]

YdN also revealed it no longer held any funds for Bell because after the

[9] Clerk's Papers at 132. Bell testified he has a trailer in Monte Vista.

[10] Clerk's Papers at 13, 15. The firm did bill Bell for services, so this is a curious assertion.

[11] Clerk's Papers at 17.

[12] Br. of Resp't at 17.

garnishment was released, "Bell used the money to pay YdN to defend him on Mayers' fraudulent transfer claim. . . . YdN's fees in this matter have exceeded the $33,123.32 YdN held in trust for Bell and the entire amount has been paid to YdN."[13]

YdN moved for summary judgment on the UFTA claim, arguing that Mayers could not establish that "Bell transferred ownership of the funds or placed them outside the reach of his creditors."[14] Mayers objected, arguing that RPC 4.1 prohibits attorneys from making false statements of law or fact, that his reliance on those statements was reasonable and appropriate, and that defendants should be estopped from abandoning representations upon which he reasonably relied.

The court granted YdN's motion for summary judgment.[15] Mayers appeals. The usual standard for review on summary judgment applies.[16]

DISCUSSION

Transfer

To prevail on his UFTA action, Mayers must show either that Bell transferred assets to YdN with actual intent to hinder Mayers' ability to collect his judgment, or that Bell transferred the money for less than reasonably equivalent value while insolvent.[17]

---

[13] Clerk's Papers at 79. This representation does not account for the distributions of more than $20,000 to Bell, his son, and Monte Vista.

[14] Clerk's Papers at 11. YdN also argued the absence of a transfer rendered Mayers' complaint frivolous, and requested attorney fees.

[15] The record does not disclose the court's reasoning.

[16] This court reviews summary judgment de novo. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is affirmed when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Id.; CR 56(c). All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. Id.

[17] RCW 19.40.041(a)(1), .051(a).

Thus, the first question is whether any transfer occurred. Defendants argued that "[n]otwithstanding the terms of the [f]ee [a]greement, Bell actually gave YdN an 'advance fee deposit.' Because the funds stayed in YdN's trust account, they were subject to garnishment and were not beyond the reach of Bell's creditors."[18]

Mayers contends defendants are estopped from denying that a transfer occurred. We agree.

Equitable estoppel requires proof of "(1) an admission, statement or act inconsistent with a claim later asserted; (2) reasonable reliance on that admission, statement or act by the other party; and (3) injury to the relying party if the court permits the first party to contradict or repudiate the admission, statement or act."[19] Equitable estoppel does not apply where "the representations relied upon are questions of law rather than questions of fact."[20]

Inconsistent Statements

In answer to the writ, both YdN and Bell described the fee agreement. YdN stated that Bell paid "a non-refundable litigation retainer . . . pursuant to a written fee agreement . . . which states that the funds were immediately earned and non-refundable."[21] Bell stated he had paid a nonrefundable retainer and had directed that it be placed in the firm's general account. These assertions about the agreement are factual. They are also incomplete, and plainly inconsistent with the later revelation that

[18] Br. of Resp't at 8.

[19] Dep't of Ecology v. Theodoratus, 135 Wn.2d 582, 599-600, 957 P.2d 1241 (1998).

[20] Concerned Land Owners of Union Hill v. King County, 64 Wn. App. 768, 777-78, 827 P.2d 1017 (1992).

[21] Clerk's Papers at 38.

the agreement also provided for billing against the retainer as fees are earned, which is a refundable advance fee deposit.

Legal Opinions Versus Factual Statements

In its answer to the garnishment, YdN stated that it held funds *in its trust account* "as a non-refundable litigation retainer" which was "immediately earned and non-refundable," and that "[r]elying upon" two Washington State Bar Association (WSBA) advisory opinions, YdN "believes these funds are not subject to garnishment."[22] YdN now argues that when Mayers released the garnishment, he did so in reliance upon their interpretation of WSBA opinions, which is a legal matter not subject to estoppel.

We see no merit in this argument. Advisory Opinion 1610 simply states that client funds cannot be paid to client creditors without client authorization.[23] It has no relevance here.

Advisory Opinion 1838 clarifies the difference between a nonrefundable retainer, which is not deposited to the client trust account, and an "advance fee deposit" against which fees will be billed, which is deposited in trust.[24]

The argument seems to be that because nonrefundable funds should not be

---

[22] Clerk's Papers at 38.

[23] Washington State Bar Association, *Advisory Opinion 1610: Duty to Disburse Client Funds to Creditors After Client Withdraws Authorization* (1995) ("it would be a violation . . . to distribute the trust funds to the creditors over the objection of your clients).

[24] Washington State Bar Association, *Advisory Opinion 1838: Handling Nonrefundable Flat Fee Payments* (1998) ("If the flat fee is a retainer paid to secure the availability of the lawyer, the fee is considered earned at the time of receipt and is not deposited into the trust account. A nonrefundable fee paid pursuant to a fee agreement is a retainer and that nature is negated by . . . circumstances . . . in which the firm would refund the fee if the client requested a refund to change lawyers after only a small amount of work was done on the client's behalf. No portion of the nonrefundable fee should be placed in the trust account.").

held in trust, Mayers should have realized the retainer was refundable. But Bell's sworn answer to the garnishment stated he had instructed YdN to "place my retainer into its general account as earned retainer."[25] Which account actually held the funds was thus neither clear nor determinative. Reference to the WSBA opinions did not convert the factual statements to statements of opinion.

The language of the agreement is a matter of fact, not law, and Mayers' information came from the sworn statements of YdN and Bell. Mayers did not know their descriptions omitted key provisions. There is nothing to suggest that Mayers "relied" on their legal opinions.

Reasonable Reliance

"Reasonableness is founded on the notion that the party claiming estoppel did not know the true facts and had no means of discovering them."[26] Mayers had no reason to disbelieve sworn statements of fact made by officers of the court in legal proceedings. His reliance was reasonable.

Injury to the Relying Party

Any funds Mayers might have reached through the garnishment process have been depleted. Bell is otherwise insolvent,[27] so Mayers has lost his opportunity to collect his judgment.

The elements of estoppel are established. Bell and YdN may not now assert

---

[25] Clerk's Papers at 73.

[26] Laymon v. Dep't of Nat. Res., 99 Wn. App. 518, 527, 994 P.2d 232 (2000).

[27] Bell testified his only assets include "[t]he trailer in Monte Vista, the car, a few computers, a bunch of books, three television sets, just household goods. I own no real estate. I have no bank accounts. I have no other assets; didn't then, don't now. I did have an expectancy, which was, of course, as you well know, some funds that would be forthcoming from the Exxon Valdez litigation." Clerk's Papers at 130.

there was no transfer of the funds from Bell to YdN.

Evidence of Fraud

The UFTA recognizes both constructively fraudulent transfers and those entered into with actual intent to hinder, delay, or defraud creditors. Mayers alleges both theories. A plaintiff must demonstrate intent to defraud by "clear and satisfactory proof" and constructive fraud by "substantial evidence."[28] The question is whether the evidence raises questions of fact precluding summary judgment.

YdN and Bell first contend that "a fraudulent transfer does not occur unless the asset is placed beyond the creditor's reach."[29] On its surface this is just another argument that no transfer occurred. Bell and YdN are estopped from taking this position.

Further, "[t]he key to deciding if property was placed beyond the creditor's reach is whether the creditor was harmed by the fraudulent conveyance."[30] The sworn statements of Bell and YdN effectively put the funds out of Mayer's reach.

Actual Intent

As to intent to hinder, delay or defraud a creditor, the UFTA enumerates several nonexclusive factors, the so-called "badges of fraud," which include whether the debtor retained control of the property after the transfer, whether the transfer was of substantially all the debtor's assets, and whether the debtor was then insolvent or

[28] Clearwater v. Skyline Const. Co., Inc., 67 Wn. App. 305, 321, 835 P.2d 257 (1992).

[29] Br. of Resp't at 13 (quoting Deyon Mgmt., Ltd v. Previs, 47 Wn. App. 341, 347, 735 P.2d 79 (1987)).

[30] Deyong Mgmt., 47 Wn. App. at 350.

became so shortly thereafter.[31]

Based on the badges of fraud, the record establishes that Bell's intent is a question of fact. Bell retained control of the property;[32] the true nature of the transfer was misdescribed in court documents; the transfer occurred just weeks after Mayers obtained a $60,000 judgment against Bell;[33] the transfer constituted all of Bell's liquid assets;[34] and Bell was insolvent at the time of the transfer.[35] Further, Bell ostensibly paid YdN $36,000 to look into ways to avoid the Mayers judgment , a task for which YdN actually billed only $3,672, strongly suggesting that Bell did not receive consideration of reasonably equivalent value at the time of the transfer.[36]

Numerous questions of fact exist about Bell's intent, and summary judgment was improper.[37]

---

[31] These "badges of fraud" include: "(1) The transfer or obligation was to an insider; (2) The debtor retained possession or control of the property transferred after the transfer; (3) The transfer or obligation was disclosed or concealed; (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; (5) The transfer was of substantially all the debtor's assets; (6) The debtor absconded; (7) The debtor removed or concealed assets; (8) 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; (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor." RCW 19.40.041(b).

[32] See RCW 19.40.041(b)(2).

[33] See RCW 19.40.041(b)(4), (10).

[34] See RCW 19.40.041(b)(5).

[35] See RCW 19.40.041(b)(9).

[36] See RCW 19.40.041(b)(8).

[37] See Sedwick v. Gwinn, 73 Wn. App. 879, 887, 873 P.2d 528 (1994) ("in cases where the debtor denies that his or her intent was to defraud, the issue cannot be conclusively determined by the trier of fact until it has heard the testimony and assessed the witnesses' credibility"); S.H.C. v. Sheng-Yen Lu, 113 Wn. App. 511, 517, 54 P.3d 174 (2002) (factual issues may be decided on summary judgment "when reasonable minds could reach but one conclusion regarding the material facts").

Constructive Fraud

Constructively fraudulent transfers are those in which the debtor does not receive a "reasonably equivalent value" in exchange and the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer,[38] or under other circumstances not relevant here.[39] It is undisputed that Bell was insolvent at the time of the transaction, so here the question is whether he received consideration of reasonably equivalent value for the $36,000 transfer.

The UFTA provides:

> Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.[40]

Bell and YdN contend their fee agreement constitutes an unperformed promise made in the ordinary course of the promisor's business to furnish support to Bell. Again, given the scope of work for which Bell engaged YdN, *i.e.*, to "have prepared for me paperwork that would have that judgment cancelled,"[41] it is far from clear that Bell received consideration of reasonably equivalent value, especially given that Bell did not hire YdN until after the time for any appeal had expired.

Mayers also argues there was no consideration of reasonably equivalent value

---

[38] RCW 19.40.051(a).

[39] Under RCW 19.40.041(a)(2), constructive fraudulent transfers also occur when the debtor makes a transfer without receiving a reasonably equivalent value and (1) the debtor engages or is about to engage in a transaction for which his or her remaining assets are unreasonably small, or (2) the debtor intended to incur or should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

[40] RCW 19.40.031(a).

[41] Clerk's Papers at 134.

because YdN's efforts to "cancel" the judgment had no conceivable utility to the creditor, Mayers. "'Value' is to be determined in light of the purpose of the [a]ct to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition."[42]

YdN and Bell argue that the "viewpoint of the creditor" is that of any creditor, rather than Mayers alone. "Under Mayers's theory, Bell's payments to other creditors (e.g., landlord, grocery store, utility company) would be fraudulent transfers."[43]

Bell and YdN provide no authority for this proposition, which effectively prefers creditors at the debtor's whim. The only authority of which we are aware is directly to the contrary. In Clearwater v. Skyline Construction Co., Inc., the president of a corporation conveyed company-owned real property to herself while anticipating a judgment against the company that it would be unable to pay.[44] The president gave no consideration for the property, but argued there was reasonably equivalent value in her repayment of the promissory note held by her lender.[45] This court held that because repayment of the note "benefited [the debtor's] lender, but was of no benefit to the [UFTA plaintiff] . . . [it] did not constitute adequate consideration under the UFTA as a matter of law."[46]

Whether Bell made a constructively fraudulent transfer is also a question of fact.

---

[42] Clearwater v. Skyline Const. Co. , 67 Wn. App. 305, 322-23, 835 P.2d 257 (1992) (quoting Uniform Fraudulent Transfer Act, § 3 comment, 7A U.L.A. 650 (1984)).

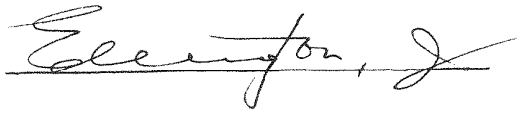
[43] Br. of Resp't at 6.

[44] 67 Wn. App. 305, 322, 835 P.2d 257 (1992).

[45] Id.

[46] Id. at 323.

Summary judgment was not appropriate. We hold that as a matter of law defendants are estopped from denying that a transfer occurred, and we reverse and remand for trial.



WE CONCUR: