

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 INVACARE CORPORATION, INC. AND ALL OF ITS)
 SUBSIDIARIES, ASSIGNORS, AND ASSIGNEES,)
)
 Plaintiff,)
)
 vs.)
)
 MD MEDICAL, LLC AND GARY DAY,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 CASE NUMBER: 2014-CP-42-4205

ORDER

RECEIVED

MAY 02 2016

SC Court of Appeals

THIS MATTER CAME BEFORE ME for Supplemental Proceedings pursuant to S.C. Code Ann. § 15-39-430 and S.C. Code Ann. § 33-44-504. Mr. Gary Day appeared *pro se* for examination under oath on July 20, 2015. Dr. Anthony Mathis appeared with counsel for examination under oath on November 19, 2015. Conducting each examination on behalf of Plaintiffs was Brandon T. Reeser of Wilson & Heyward, LLC. Present for Dr. Mathis was Carlos Johnson of Lyles, Darr & Clark, LLP. Having heard the testimony of the witnesses and the arguments of counsel, the Court issues the following Order.

BRIEF PROCEDURAL AND FACTUAL BACKGROUND

MD Medical, LLC was a medical supply business formed in the mid-2000s that sold and leased medical supplies to providers. Mr. Day and Dr. Mathis were shareholders in the company, with Dr. Mathis holding a majority of the issued shares. Dr. Mathis served as President of the company, which was located at 126 Mills Avenue in Spartanburg. Mr. Day served as the company's Vice-President. Dr. Mathis owns the office location and operates his podiatry practice in another suite in that building. MD Medical, LLC entered into a lease with Dr. Mathis in which it would pay him approximately \$600 per month to use the suite.

2015 DEC 15 PM 36
 COURT CLERK

Invacare Corporation, Inc. ("Plaintiff") is a medical supply company that did business for a number of years with MD Medical, LLC. On September 26, 2013, MD. Medical, LLC

executed a promissory note for \$12,985.61 to make up for a series of late payments owed to the Plaintiff. Mr. Day signed the note on MD Medical, LLC's behalf. MD Medical, LLC made two payments under the note.

The Plaintiff filed its Summons and Complaint against Mr. Day and MD Medical, LLC in this matter on October 24, 2014 to collect the remaining \$10,285.61 remaining on the note. Mr. Day was served in his individual capacity as well as his capacity as an officer of MD Medical, LLC on November 25. No responsive pleading was filed, and judgment in favor of the Plaintiff against both MD Medical, LLC and Mr. Day was entered on January 21, 2015 in the amount of \$11,645.61, which included the original remainder on the note, reasonable attorneys' fees, and costs. This matter was referred to me in June of 2015 for supplemental proceedings.

TESTIMONY OF MR. DAY AND DR. MATHIS

The testimony of the witnesses in this matter demonstrates that in 2014 and 2015, MD Medical, LLC was performing poorly but was aware of its obligations to the Plaintiff. Mr. Day testified that throughout 2013 and 2014, MD Medical, LLC was aware of the note and that it stopped making payments with knowledge of its obligations. In mid-2014, Mr. Day approached Parker Medical Equipment and its owner, Dr. John Petrich, about selling its active hospice contracts and physical assets. After several meetings throughout 2014 and early 2015, Dr. Petrich and Dr. Mathis came to an agreement in which Dr. Mathis would sell MD Medical, LLC's contracts and physical assets to Dr. Petrich as a way to realize some income out of his ownership interest. As part of the sale, Mr. Day would "waive" his interest in the company.

Dr. Mathis testified that Mr. Day had provided him a list of payables in March or April of 2015 that listed MD Medical, LLC's outstanding debts, and Dr. Mathis confirmed that he became aware of MD Medical, LLC's debt to the Plaintiff in mid-March of that year,

approximately two months after the Plaintiff obtained its judgment. On April 1, 2015, Dr. Mathis and Dr. Petrich executed the asset sale. Dr. Mathis testified that he had experience purchasing and leasing medical equipment, and that, in his opinion, there was approximately \$180,000 in inventory in MD Medical, LLC's possession at the time of the sale. Dr. Mathis also sold all of MD Medical, LLC's remaining service contracts, which Mr. Day testified were valuable. In exchange, Dr. Mathis was to receive \$320,000 in total as a result of the sale - \$100,000 was to be paid immediately at the time of sale and the remainder to be paid monthly in installments of approximately \$4,000 - \$4,100.

On April 2, 2015, more than two (2) months after the Plaintiff's judgment was entered against MD Medical, LLC and despite Dr. Mathis' admission and knowledge of the debt, Dr. Mathis testified that he deposited the initial \$100,000 payment into MD Medical, LLC's checking account with Parker Sterling Bank ending in account number 4116. See Exhibit A. He transferred the deposit from the corporate account to his personal money market account the same day. Id. Bank records provided show that for several months before the asset sale, the 4116 account maintained an average balance of less than \$2,000 per billing cycle. See Exhibit B. None of the funds were used to satisfy the outstanding debts of MD Medical, LLC.

Around the time of the asset sale, April 1, 2015, Dr. Mathis opened an additional checking account in MD Medical, LLC's name with Parker Sterling Bank ending in account number 7059. See Exhibit C. Dr. Mathis testified that he would transfer money from the 4116 account into the 7059 account before depositing those funds into his personal money market account. See Id. The records provided as to the 7059 account show that Dr. Mathis transferred over \$15,000 from the 7059 account to himself over the course of three months, which equaled almost all deposits made during that time, until he closed the account. Id. No accounts were

#3
AK

retained by MD Medical, LLC to satisfy debtors.

Dr. Mathis testified that after the asset sale he attempted to use deposits coming into the 4116 account to pay some of the debts that MD Medical, LLC owed. To do so, he would withdraw money from the business accounts and make payments on his personal credit cards.¹ Despite transferring \$100,000 to his personal money market account in early April 2015 and an additional \$15,000 over the next three months, Dr. Mathis testified that MD Medical, LLC ultimately did not have enough in assets after the sale, either physical or liquid, to satisfy all debts that were owed.

LEGAL STANDARD

The Statute of Elizabeth, as codified in Section 27-23-10 of the South Carolina Code of Laws, provides in relevant part:

Every gift, grant, alienation, bargain, transfer, and conveyance of ... goods and chattels ... which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful ... debts ... must be deemed and taken ... to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

S.C. Code Ann. § 27-23-10 (1976).

Pursuant to this statute, conveyances may be set aside under two conditions: (1) where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is valuable consideration; and (2) where a transfer is made without actual intent to defraud the grantor's creditors, but without valuable consideration. Albertson v. Robinson, 371 S.C. 311, 316, 638 S.E.2d 81, 83 (Ct.App.2006).

While this Court is unwilling to find that Dr. Mathis intentionally defrauded his creditors, there clearly was no valuable consideration for the withdrawal of all of MD Medical, LLC's funds

¹ Dr. Mathis did not provide any information or records as to his personal credit card or money market accounts.

from its checking accounts after April 1, 2015. Furthermore, where a conveyance is made without an actual intent to defraud but without consideration, the conveyance will stand if the grantor reserves a sufficient amount of property not merely at the time of the transfer, but an amount from which in the final analysis the creditors are able to collect their indebtedness in full. Gardner v. Kirven, 184 S.C. 37, 41, 191 S.E. 814, 816 (1937).

ANALYSIS

The Court finds that, in this case, MD Medical, LLC, as the debtor, received no consideration in the removal of liquid assets from its accounts by the majority shareholder and disposed of its remaining accounts without preserving sufficient funds to satisfy the Plaintiff's judgment against it.

Under the Statute of Elizabeth, a voluntary transfer "will be set aside as a fraudulent conveyance if the grantor was indebted to the plaintiff at the time of the transfer and the grantor failed to retain sufficient property to pay his debt to plaintiff, not merely at the time of the transfer but at the time plaintiff seeks to collect." Future Group II v. Nationsbank, 324 S.C. 89, 96, 478 S.E.2d 45, 48-49 (1996) (internal citations omitted).

In this case, the April 2015 transfer conveyed all of MD Medical, LLC's assets to Dr. Petrich. After the removal of funds from MD Medical, LLC's accounts, MD Medical, LLC had insufficient funds in its existing bank accounts to pay the Plaintiff's debt. In 2013 and 2014, Mr. Day testified that he knew MD Medical, LLC was not making payments to the Plaintiff in accordance with the note it had executed. Additionally, Dr. Mathis testified that he was aware of the debt to the Plaintiff in mid-March 2015, two months after the Plaintiff obtained its judgment and several weeks before the asset sale was executed. While Dr. Mathis was able to pay some debts after the transfer, he testified that he failed to preserve sufficient assets to pay all of its

#5
M

creditors, including the Plaintiff. The Court has not been provided any evidence of how proceeds from the sale were used other than use by Dr. Mathis, but by his own testimony, an insufficient amount was retained for the Plaintiff.

From the testimony offered in this matter, the Court therefore finds that Dr. Mathis was aware of MD Medical, LLC's debt to the Plaintiff at the time of the transfer and failed to retain enough property, assets, or liquid funds to satisfy Invacare's judgment at any time after the asset transfer in April 2015. Therefore, the Court holds that the transfers of funds from MD Medical, LLC to Dr. Mathis were fraudulent transactions as to the Plaintiff, and those transfers are hereby set aside in accordance with Section 27-23-10 of the South Carolina Code of Laws to the extent the transfers did not preserve enough funds to satisfy the Plaintiff's judgment.

Plaintiff's counsel has also moved to attach the funds transferred by Dr. Mathis to satisfy Plaintiff's judgment against MD Medical, LLC. Dr. Mathis' counsel avers that because Dr. Mathis was not a party to the original lawsuit, and thus, that there is no judgment against him, that this Court lacks the power to compel Dr. Mathis to take any action in these proceedings. Counsel's argument, however, is misplaced. As the fund transfer has been set aside, Plaintiff has an ownership interest or a constructive trust in the transferred proceeds. Under Section 15-39-410 of the South Carolina Code, this Court has specific authority to order all MD Medical, LLC funds received by Dr. Mathis under these transactions, even as a third-party, to be applied toward the satisfaction of the Plaintiff's judgment:

The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment...

S.C. Code Ann § 15-39-410 (1976).

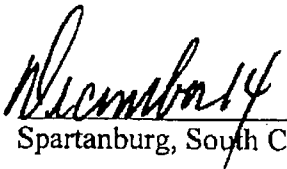


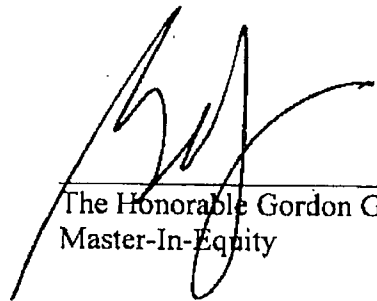
CONCLUSION

In light of the Court's findings of facts and conclusions on law discussed above, it is:

THEREFORE ORDERED that judgment in the amount of \$11,645.61 be entered against Dr. Anthony Mathis, and that Dr. Anthony Mathis is hereby ordered to apply any funds that shall be received pursuant to the terms of his April 2015 agreement with Dr. John Petrich to the satisfaction of Invacare Corporation, Inc.'s January 21, 2015 judgment in the amount of \$11,645.61 until such time as the judgment is satisfied. Further, Dr. John Petrich is hereby ordered to pay the Plaintiff in lieu of Dr. Mathis in accord with the contract between Dr. Petrich and Dr. Mathis.

IT IS SO ORDERED!


_____, 2015
Spartanburg, South Carolina



The Honorable Gordon G. Cooper
Master-In-Equity

2015 DEC 15 PM 2:36
CLERK OF COURT
SOUTH CAROLINA

#7
