

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

China Construction America of South)
Carolina, Inc.,)
)
Petitioner,)
)
v.)
)
MS Production Solutions, LLC a/k/a)
MSPS Steel Fabricators, Manfred)
Sprenger and Patricia Sprenger,)
)
Respondents.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2014-CP-23-1871

**ORDER SETTING ASIDE FRAUDULENT
CONVEYANCES**

RECEIVED
AUG 29 2016
SC Court of Appeals

THIS MATTER came before me for hearing on March 2, 2016, pursuant to Petitioner China Construction America of South Carolina, Inc.'s ("Petitioner" or "China") Motion to Set Aside Fraudulent Transfers. Appearing on behalf of Petitioner was Robert C. Osborne, III. Rhett D. Burney appeared on behalf of Respondents, MS Production Solutions, LLC a/k/a MSPS Steel Fabricators ("MSPS"), Manfred Sprenger ("Manfred") and Patricia Sprenger ("Patricia"). The Court heard testimony from Manfred Sprenger and Benjamin O'Dell as well as extensive argument from both lawyers. In addition to the testimony and argument of counsel, in reaching its decision, the Court reviewed the exhibits entered into evidence, the testimony of Manfred Spenger from the earlier supplemental proceedings hearing and the deposition testimony of Manfred and Patricia Sprenger.

FACTUAL BACKGROUND

Petitioner filed this action on April 2, 2014. Petitioner prayed for damages in excess of \$400,000.00 in its Complaint. MSPS did not answer or otherwise respond to Petitioner's Complaint and was held in default. On January 29, 2015, after a damages hearing, the Circuit Court filed an Amended Order of Judgment against MSPS in the amount of \$657,137.30.

Petitioner commenced Supplemental Proceedings and a Rule to Show Cause was entered against MSPS on May 1, 2015. A Supplemental Proceedings hearing was held on June 2, 2015 and the court heard testimony from Manfred Sprenger. Notably, Manfred testified that his wife, Patricia, was not an employee of MSPS, nor an owner of MSPS. Petitioner took the depositions of both Manfred and Patricia on September 21, 2015. During her deposition, Patricia testified that although she was not an employee of MSPS, checks from the MSPS account were frequently made payable to her. Additionally, she testified the checks were written to her rather than Manfred because she was the one who would deposit the checks and it was easier for her to do so at the bank if the checks were in her name. Patricia further testified that she would make cash withdraws from the Sprenger's personal account and keep the cash in their home. At her deposition, Patricia testified that she thought she had approximately \$50,000.00 in cash at her home. In his deposition, Manfred also testified that Patricia was not an employee of MSPS and that he was the sole owner of MSPS. Addressing the cash kept in their home, Manfred alleged that the amount was significantly less than \$50,000.00.

Following the depositions, Petitioner filed its Motion to Set Aside Fraudulent Transfers. A hearing on the motion was held on October 2, 2015. Petitioner argued that MSPS had fraudulently transferred money out of the company in an effort to avoid paying the judgment against it. Following the hearing, on October 27, 2015, this Court entered an order instructing MSPS to exercise reasonable efforts to recover the \$50,000.00 Patricia testified to in her deposition. This Court deferred ruling on the issue of the fraudulent transfers until a later date.

Another hearing involving the parties was held on November 18, 2015. At that hearing, Petitioner moved to add Manfred and Patricia Sprenger as parties to the action. Petitioner also moved to hold MSPS in contempt of the order entered on October 27, 2015 for failing to take

reasonable steps to recover the money Patricia testified to in her deposition. The court also addressed Respondent's Motion to Quash and for a Protective Order regarding a subpoena Petitioner served on Saunders O'Dell, P.A seeking information related to the accounting records of MSPS, Manfred Sprenger and Patricia Sprenger. On December 23, 2016 the Court entered an Order joining Manfred and Patricia Sprenger as parties to the Supplemental Proceedings. Ruling on Petitioner's Motion for Contempt, the court ordered that MSPS deposit \$8,000.00 into the trust account of its attorney until such further proceedings can be had regarding the transfers. Addressing the Motion to Quash and for a Protective Order, the Court limited the subpoena to records relied on by Saunders O'Dell in preparing the tax returns of the Respondents from October 2012 forward. The court also ordered that the records be labeled as confidential and only available for review to certain limited persons, including counsel for both parties. The Court again deferred on ruling on Petitioner's Motion to Set Aside Fraudulent Transfers until the parties had an opportunity to review the documents from Saunders O'Dell.

On March 2, 2016, the court addressed the merits of Petitioner's Motion to Set Aside Fraudulent Transfers. Petitioner asserted that from August 2013 to December 2015, Manfred wrote numerous checks to himself and Patricia, totaling \$361,393.84. Petitioner contends the payments from MSPS to Manfred and Patricia are fraudulent transfers in violation of S.C. Code §27-23-10 (referred to hereinafter as the "Statute of Elizabeth"). The Respondents contend the checks were written to reimburse Manfred for money he injected into the company to keep it running and also for his salary.

The transfers at issue can be divided into two categories. First, there are checks written from MSPS to Patricia dating from August 2013 to December 2015. In addition, there are checks from MSPS written to Manfred during that same period. In total, the checks alleged to be fraudulent transfers by Petitioner equal \$361,393.84. An index of all the transfers alleged by the

Petitioner to be fraudulent transfers is attached hereto as **Exhibit A**.

DISCUSSION

South Carolina's prohibition on fraudulent transfers/fraudulent conveyances, the Statute of Elizabeth, provides:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution 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 actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) 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 § 27-23-10 (emphasis added). In *Durham v. Blackard*, the Court of Appeals, interpreting the Statute of Elizabeth, held that conveyances can be set aside in two instances:

First, where the challenged transfer was made for a valuable consideration, it will be set aside if the plaintiff establishes that (1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee. Second, where the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full—not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.

313 S.C. 432, 437, 438 S.E.2d 259, 262 (Ct. App. 1993).

A. Checks From MSPS to Patricia Sprenger

Petitioner argues that the transfers from MSPS to Patricia should be set aside as fraudulent transfers because they were made with both fraudulent intent and because they were not based upon valuable consideration. Petitioner contends that these payments were fraudulent because MSPS intended to transfer money out of the business in an effort to avoid its creditors. Petitioner argues the payments to Patricia were not supported by valuable consideration because both she and Manfred previously testified that she was not an employee of MSPS. Finally, Petitioner argues that the timing of certain transfers near significant dates in the lawsuit evidence MSPS' intent to hinder, delay or defraud Petitioner from collecting its judgment.¹ The Respondents argue that the payments to Patricia were salary or loan repayments to Manfred. Respondents contend Manfred wrote the checks to Patricia so she could deposit into their joint bank account. Therefore, they were based upon valuable consideration and not made with fraudulent intent. Based on the record before me, witness testimony and the arguments of counsel, I find that the transfers to Patricia were not based upon valuable consideration, even though Manfred contends the checks were for his salary. The payments to Patricia are set aside as fraudulent transfers.

Due to the close relationship between MSPS and Patricia Sprenger, "the law imposes a duty on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing [testimony]." *Coleman v. Daniel*, 261 S.C. 198, 208, 199 S.E.2d 74, 79 (1973). Patricia has not provided the Court with sufficient evidence establishing that the transfers alleged to be fraudulent were bona fide and based upon valuable consideration. To the

¹ From March 2014 to May 2015, MSPS wrote checks to Patricia in the following amounts: \$40,000.00, \$27,000.00, \$70,000.00 and \$60,000.00. These checks are written close to significant dates in the lawsuit. The \$40,000.00 check was written less than a week before Petitioner filed suit. The \$27,000.00 check was written less than a week before the Order of Default Judgment was entered. The \$70,000.00 check was written approximately two weeks after MSPS was served with notice of the damages hearing. Finally, the \$60,000.00 check was written a week before the Supplemental Proceedings hearings began.

contrary, at their depositions, both Manfred and Patricia testified that Patricia was never an employee of MSPS. Manfred also testified that she was not an employee during the supplemental proceedings hearing. Furthermore, Respondents' accountant testified that Patricia was not an employee of MSPS for tax purposes. He further testified that Patricia was not taxed for the checks she received, but rather Manfred claimed the checks as his income. I find Respondent's argument that the checks were, in substance, salary intended for Manfred to be without sufficient evidentiary support.

Under the unique facts of this case and due to the absence of valuable consideration, a finding of fraudulent intent is not necessary. *See Durham v. Blackard*, 313 S.C. at 437, 438 S.E.2d at 262. Petitioner has shown that (1) MSPS was indebted at the time of the transfers to Patricia²; (2) the transfers were voluntary, i.e., not based upon valuable consideration; and (3) MSPS failed to retain sufficient assets to satisfy the judgment. *See id.* Nothing more is required for the court to set aside the transfers pursuant to the Statute of Elizabeth.

Although the funds transferred to Patricia are no longer in the hands of MSPS, the judgment debtor, South Carolina law still provides a basis for recovery. Pursuant to S.C. Code 15-39-410, a judge may order property of the judgment debtor which is currently in the hands of another person to be applied towards the debt. I find that MSPS improperly transferred its assets into the hands of Patricia. Petitioner is entitled to a full examination of Patricia to determine her assets. Petitioner shall be entitled to execute on any non-exempt assets of Patricia up to \$221,593.84 which represents the transfers from MSPS to Patricia dating from April 2, 2014, the date this lawsuit was filed, until December 24, 2015. *See Exhibit A.* The court finds that upon the filing

² The fact that Petitioner's judgment was not in place prior to some of the transfers at issue is irrelevant. "It is only necessary that the debt should have been in existence or the right of the action have [sic] accrued at or before the time of the transfer. It may be reduced to a judgment at a later date." *Albertson v. Robinson*, 371 S.C. 311, 317, 638 S.E.2d 81, 84 (2006).

of the lawsuit, MSPS was clearly on notice of Petitioner's claims and the transfers from MSPS to Patricia after that date should be set aside. The court chooses not to go behind the date of the filing of the lawsuit based on the unique facts of this case.

B. Transfers From MSPS to Manfred Sprenger

Petitioner also argues that transfers from MSPS to Manfred should be set aside as fraudulent transfers. Petitioner argues that MSPS made these payments to keep money out of the company so as to make collecting the judgment against MSPS impossible. MSPS set forth a number of arguments in support of its position that Petitioner is not entitled to set the payments from MSPS to Manfred. MSPS contends that regardless of this Court's finding on whether the payments were fraudulent transfers, a blanket mortgage covering all of MSPS assets precludes Petitioner from executing on any of MSPS' assets. MSPS also argues that the payments were repayments for personal loans that Manfred provided to MSPS in order to keep the business operating. As such, there were based upon valuable consideration and not made with fraudulent intent.

In response, Petitioner argues that the mortgagee's security interest in MSPS' deposit accounts and in the cash Patricia testified that was in their home was not perfected. Petitioner clarified that it only sought to execute on MSPS' deposit accounts and the cash it alleged was improperly transferred out of MSPS and currently being held in the Sprenger's home. Petitioner referred the Court to S.C. Code § 36-9-104 which states that a security interest in deposit accounts is only perfected through control. Petitioner also argues that a security interest in cash is also only perfected by possession or control. Furthermore, Petitioner contends that MSPS kept no documentation evidencing the loans from Manfred to MSPS such that it could prove that the payments were in fact due back to Manfred. Respondents argued that a one owner limited liability company was not required to execute loan documents when the money being loaned to the company was being loaned by the sole owner of the company. Finally, Petitioner argues that

even if these transfers were loan repayments, Manfred, acting as the controlling member of MSPS, impermissibly chose to repay himself before paying his creditors. Petitioner argues that Manfred is an unsecured creditor of MSPS and Petitioner's judgment lien took priority over the alleged debt owed back to Manfred. The Respondents argued that without the cash being deposited into MSPS account by Manfred the company could not survive. Additionally, the Respondents argued that had Manfred intended to defraud creditors he would not have put his own money into the company to keep it running. The Respondents further argued that Manfred was entitled to a salary and presented records showing many months where he did not pay himself because the company had poor cash flow.

Despite the lack of records evidencing the loans and the fact that Manfred failed to properly differentiate his individual assets from those of MSPS, I find that the transfers from MSPS to Manfred should not be aside as fraudulent transfers. First, there is a significant question concerning the security interests noted above, second, from the bank records admitted into evidence clearly show that Manfred often made loans to MSPS that were necessary to keep the business bank accounts from having a negative balance. On more than one occasion, without the loans from Manfred, MSPS' bank account would have had a negative balance. And, the evidence also shows that Manfred would be repaid some of these amounts, albeit without proper documentation, by MSPS.

Therefore, I find and so hold that Petitioner is not entitled to set aside the payments from MSPS to Manfred.

ORDER

For the reasons set forth herein, this Court hereby sets asides up to \$221,593.84 in payments from MSPS to Patricia as fraudulent transfers dating from April 2, 2014 (the date the

lawsuit was filed) through December 24, 2015. It is ordered that the \$8,000.00 put into the trust account of counsel for the Respondents following the November 18, 2015 hearing be paid to Petitioner within thirty (30) days of the entry of this Order. It is further ordered that Petitioner be entitled to a full examination of Patricia within 30 days from the entry of this Order to determine if any assets that were improperly transferred from MSPS to Patricia remain. The Petitioner is entitled to recover any remaining non-exempt assets from those improperly transferred from MSPS to Patricia between April 2, 2014 and December 24, 2015, up to \$221,593.94

This Order shall remain valid until Petitioner either recovers the \$221,593.84 in assets hereby found to be fraudulent transfers or the judgment against MSPS is satisfied. However, this Order shall not be construed as a judgment against Patricia. It is intended only to allow the Petitioner to recover the assets improperly transferred from MSPS to Patricia, up to \$221,592.84.

IT IS SO ORDERED.

SIGNATURE PAGE TO FOLLOW EXHIBIT 'A'

EXHIBIT A

2014-CP-23-01871
 Order Setting Aside Fraudulent Conveyances
 Exhibit A- Index of Transfers

INDEX OF TRANSFERS

	Date	Check No.	Payable To The Order Of	Amount
1.	8/29/2013	53663	Patricia Sprenger	\$7,000.00
2.	9/27/2013	53716	Patricia Sprenger	\$7,000.00
3.	10/30/2013	53751	Patricia Sprenger	\$7,000.00
4.	11/26/2013	53784	Patricia Sprenger	\$7,000.00
5.	2/25/2014	53894	Patricia Sprenger	\$7,000.00
6.	3/27/2014	53948	Patricia Sprenger	\$40,000.00
7.	3/27/2014	53946	Patricia Sprenger	\$7,000.00
8.	4/28/2014	54042	Patricia Sprenger	\$7,000.00
9.	5/14/2014	54079	Patricia Sprenger	\$1,600.00
10.	5/29/2014	54084	Patricia Sprenger	\$7,000.00
11.	6/24/2014	54119	Patricia Sprenger	\$7,000.00
12.	7/30/2014	54165	Patricia Sprenger	\$27,000.00
13.	8/27/2014	54191	Patricia Sprenger	\$7,000.00
14.	9/29/2014	54255	Patricia Sprenger	\$70,000.00
15.	9/29/2014	54252	Patricia Sprenger	\$7,000.00
16.	11/3/2014	54283	Patricia Sprenger	\$7,000.00
17.	12/22/2014	54341	Patricia Sprenger	\$7,000.00
18.	5/27/2015	54522	Patricia Sprenger	\$60,000.00
19.	6/23/2015	54548	Patricia Sprenger	\$7,000.00

20.	8/12/2015	54598	Manfred Sprenger	\$7,000.00
21.	9/22/2015	55055	Manfred Sprenger	\$7,000.00
22.	9/23/2015	55057	Manfred Sprenger	\$14,000.00
23.	9/24/2015	54806	Patricia Sprenger	\$499.56
24.	10/6/2015	55060	Manfred Sprenger	\$7,000.00
25.	10/8/2015	55701	Patricia Sprenger	\$499.56
26.	10/15/2015	55708	Patricia Sprenger	\$499.56
27.	10/22/2015	55716	Patricia Sprenger	\$499.56
28.	10/29/2015	55723	Patricia Sprenger	\$499.56
29.	11/5/2015	55730	Patricia Sprenger	\$499.56
30.	11/12/2015	55737	Patricia Sprenger	\$499.56
31.	11/18/2015	55118	Manfred Sprenger	\$10,000.00
32.	11/19/2015	55743	Patricia Sprenger	\$499.56
33.	11/27/2015	55749	Patricia Sprenger	\$499.56
34.	12/3/2015	55139	Manfred Sprenger	\$10,000.00
35.	12/3/2015	55757	Patricia Sprenger	\$499.56
36.	12/7/2015	55140	Manfred Sprenger	\$2,800.00
37.	12/10/2015	55766	Patricia Sprenger	\$499.56
38.	12/17/2015	55774	Patricia Sprenger	\$499.56
39.	12/24/2015	55782	Patricia Sprenger	\$499.56
40.	12/24/2015	55790	Patricia Sprenger	\$499.56
TOTAL				\$361,393.84



Greenville Common Pleas

Case Caption: China Construction America Of South Carolina Inc vs. MS
Production Solutions LLC , defendant, et al
Case Number: 2014CP2301871
Type: Order/Other

And It Is So Ordered!

s/ Judge Charles B. Simmons, Jr. (3023)