THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Gordon G. Cooper, Master-In-Equity

Case No. 2016-000916

Ex Parte Anthony L. Mathis,	Appellant,
Invacare Corporation, Inc., and all of its subsidiaries, assignors, and assignees,	Respondents,
v.	
MD Medical, LLC, and Gary Day,	Defendants.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This matter arises out of supplemental proceedings held before the Honorable Gordon G. Cooper, Master-In-Equity for Spartanburg County, pursuant to S.C. Code Ann. §§ 15-39-430 and 33-44-504. MD Medical, LLC (hereinafter "MD Medical") was a medical supply business formed in the mid-2000s by shareholders Gary Day and Dr. Anthony Mathis. Respondent Invacare Corporation, Inc. (hereinafter "Invacare") is a medical supply company that formed a business relationship with MD Medical LLC for the provision of medical equipment for sale and/or lease.

Invacare executed a promissory note in the amount of $12,985.61 with MD Medical evidencing monies owed by MD Medical for equipment provided to it. Mr. Day executed the note on MD Medical's behalf. MD Medical defaulted on the note, and Respondent filed a Summons and Complaint against Mr. Day, in his individual capacity, and MD Medical on October 24, 2014. Service was perfected on Mr. Day individually and as an officer of MD Medical on November 24, 2014. No responsive pleading was filed, and a judgment was entered against Mr. Day and MD Medical on January 21, 2015 in the amount of $11,645.61, such amount including the remainder due under the note, costs, and reasonable attorneys fees. Invacare sought supplementary proceedings via Petition filed on June 1, 2015, and an Order of Reference for Rule to Show Cause was filed and issued on June 5, 2014 as to MD Medical, LLC and Mr. Day. Service was then perfected on Mr. Day.

Mr. Day appeared to testify on behalf of MD Medical and himself individually on July 20, 2015. Mr. Day testified that he was a 23% owner of MD Medical and served as its vice president and manager. (R. pp. 65-66.) He further testified that Dr. Anthony Mathis owned the remaining 77% of the company and served as its president. (Id.) Mr. Day also testified that he

helped orchestrate a sale of MD Medical's assets to Dr. John Petrich with the total transaction value of $320,000 going to Dr. Mathis as follows: $100,000 at execution with the remainder to be paid in monthly installments with interest. (R. pp. 69-71.) As part of the transaction, Mr. Day's ownership interest was waived, and the transaction served to buy out Dr. Mathis' ownership interest of 77%. (R. pp. 70-72.) Further, as a result of the sale, MD Medical transferred all of its assets. (R. p. 75.) The sale was consummated on April 1, 2015. (R. p. 76.)

According to Mr. Day, MD Medical retained one bank account from which the business's debts were paid, and only he and Dr. Mathis retained access to the account. (R. pp. 76-77.) On April 2, 2015, approximately two months after Invacare's judgment was filed, $100,000 was deposited into MD Medical's bank account and then withdrawn by Dr. Mathis. (R. p. 78.)

Following Mr. Day's testimony, the Court requested testimony by Dr. Anthony Mathis for the purpose of tracking the funds emptied from MD Medical's bank accounts. (R. pp. 92-93.) An Order of Reference for Rule to Show Cause was filed and issued on August 25, 2015 and served on Dr. Mathis on September 1, 2015. Dr. Mathis appeared to provide testimony on November 19, 2015.

At the hearing, Dr. Mathis testified that he was a majority owner of MD Medical. (R. p. 101.) Dr. Mathis testified that he was made aware of Invacare's judgment against MD Medical a few weeks before the planned sale of MD Medical's assets. (R. p. 109.) Dr. Mathis also made the decision to pay other debtors of MD Medical after the asset sale, but Invacare was not paid its judgment. (R. p. 110.) Dr. Mathis confirmed the details of the asset sale of April 1, 2015 to Dr. Petrich and the amount of the sale at $320,000. (R. pp. 112-13.) As part of the sale of the business, Dr. Petrich received "all the equipment in the building," inventory that Dr. Mathis was "pretty sure" was over $180,000 in value, as well as MD Medical's existing service contracts,

which were worth "a considerable amount." (R. pp. 114-15.) Dr. Mathis also confirmed the deposit of $100,000 into MD Medical's account on April 2, 2015 and his subsequent transfer of those funds to a personal account. (R. pp. 122-23.) Dr. Mathis further admitted to making additional withdrawals from MD Medical's account, though he did not provide records of those transactions. (R. pp. 124-25.) His entire motivation was to "get out of that company." (R. p. 126.)

Following Dr. Mathis' testimony, the Court issued an Order filed on December 15, 2015 entering judgment for the amount of $11,645.61 against Dr. Mathis. (R. p. 22.) The Court further ordered that Dr. John Petrich was to issue payments pursuant to an existing contractual obligation arising from the asset purchase to Invacare until such judgment was satisfied. (Id.) Dr. Mathis filed a Motion to Reconsider pursuant to Rule 52, SCRCP, on January 6, 2015, which was heard on March 29, 2015 and ultimately denied by an Order filed on March 30, 2015. Dr. Mathis filed his Notice of Appeal on April 28, 2015.

STANDARD OF REVIEW

"[The appellate court's] scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury." Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989) (citing Wigfall v. Fobbs, 295 S.C. 59, 60-61, 367 S.E.2d 156, 157 (1988)). "Supplementary proceedings are equitable in nature." Ag-Chem Equip. Co., Inc. v. Daggerhart, 281 S.C. 380, 383, 315 S.E.2d 379, 381 (Ct. App. 1984). The Court does not "disregard the findings of the Master, who saw and heard the witnesses and was in a better position to evaluate their credibility." Tiger, Inc., 301 S.C. at 237, 391 S.E.2d at 543.

ARGUMENTS

I. THE MASTER-IN-EQUITY'S FACTUAL FINDINGS AND LEGAL DETERMINATIONS AS TO THE APPLICABILITY OF THE STATUTE OF ELIZABETH AND ITS ORDER COMPELLING PAYMENT OF FUNDS PAID IN EXCHANGE FOR MD MEDICAL'S ASSETS IN ITS DECEMBER 15, 2015 ORDER WERE PROPER UNDER ESTABLISHED SOUTH CAROLINA LAW.

Dr. Mathis contends that the Master-in-Equity committed error by concluding that the contractual arrangement between Dr. Mathis and Dr. Petrich to sell the assets of MD Medical in April of 2015 was improper. However, for the reasons explained below, the Master-in-Equity's December 15, 2014 Order setting aside the transfer of funds from MD Medical to Dr. Mathis as fraudulent to the extent of Invacare's debt pursuant to the Statute of Elizabeth, S.C. Code Ann. 15-39-410 (1976), was proper.

Pursuant to 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 the plaintiff, not merely at the time of the transfer but at the time the plaintiff seeks to collect." Future Group II v. Nationsbank, 324 S.C. 89, 96, 478 S.E.2d 45, 48-49 (1996) (internal citation omitted). "If in the final event the property of the debtor is not sufficient to pay his debts existing at the time of his voluntary conveyance, then such conveyance is null and void as to such debts." Penning v. Reid, et al., 167 S.C. 263, 283, 284, 166 S.E. 139, 146 (1932) (internal citations omitted).

The Court made numerous findings based on the testimony of Dr. Mathis and Mr. Day and the underlying record in this matter. Invacare indisputably received a judgment for $11,645.61 against Mr. Day and MD Medical on January 21, 2015. Mr. Day and Dr. Mathis were aware of the judgment and Invacare's judgment debtor claim in mid-March of 2015. Dr.

Mathis further specifically testified that he was aware of the judgment to Invacare at that time under examination. Although Dr. Mathis paid himself $100,000 out of MD Medical's funds as the controlling shareholder of MD Medical, he testified that an insufficient amount was available to satisfy Invacare's judgment. Dr. Mathis further concedes this in his Initial Brief before this Court. After hearing Dr. Mathis' testimony, the Court specifically found that Dr. Mathis was aware of MD Medical's judgment debt to Invacare well before all of MD Medical's assets, valued at $300,000 per the contract and valued well in excess of Invacare's judgment, were transferred to Dr. Petrich. (R. pp. 20-21.)

However, the Court limited its holding to set aside a mere portion of the complete sale of the business. Specifically, per the testimony of Dr. Mathis, Dr. Mathis deposited $100,000 paid by Dr. Petrich in exchange for MD Medical's assets into MD Medical's bank account. Those funds were later withdrawn into Dr. Mathis' personal bank account instead of applied, as assets of MD Medical, to its outstanding debts.

Dr. Mathis makes numerous assertions that the funds he undisputedly withdrew from MD Medical's bank accounts following the transfer of MD Medical's assets were made pursuant to Dr. Mathis' status as a creditor of MD Medical. However, both Mr. Day and Dr. Mathis failed to provide any evidence of a debt or other obligation MD Medical owed to him, which were subject to production pursuant to the lower court's Rule to Show Cause issued to each party. (See R. pp. 9-12.) There was no evidence before the Court of any loan or other obligation by which MD Medical was in debt to Dr. Mathis.

Dr. Mathis further contends that Invacare failed to provide clear and convincing evidence that the contract between Dr. Mathis and Dr. Petrich for the sale of MD Medical's assets was fraudulent, and thus, setting aside the transfer of assets was improper under the Statute of

Elizabeth. However, the lower court's order clearly invalidates only the transfer of $100,000 from MD Medical's possession to Dr. Mathis, which undisputedly occurred. Further, Dr. Mathis' contention that Invacare must prove that the entire transaction was fraudulent is also contrary to established law. Our Supreme Court has explained that:

> Under [the Statute of Elizabeth], a transfer made without valuable consideration 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 transfer, but at the time plaintiff seeks to collect . . . . If there is valuable consideration, the transfer will be set aside only where the grantor was indebted at the time of the transfer and had an actual intent to defraud creditors imputable to the grantee.
>
> Future Group II, 324 S.C. at 96, 478 S.C. at 96-96 (internal citations omitted).

There is no requirement that intent to defraud be proven to set aside a transfer or a portion of a transfer without valuable consideration. There is no dispute that MD Medical was indebted to Invacare pursuant to its January 21, 2015 judgment at the time MD Medical's assets were sold to Dr. Petrich nor is there dispute that that MD Medical was so indebted at the time Dr. Mathis withdrew the $100,000 deposit from MD Medical's bank account. Further, Dr. Mathis' own testimony firmly establishes that MD Medical lacked sufficient assets to satisfy Invacare's judgment. The lower court held that, given these findings and a complete lack of evidence that MD Medical received consideration for such a transfer, Invacare need not prove fraudulent intent to have the transfer of funds from MD Medical to Dr. Mathis set aside. Rice v. City of Columbia, 143 S.C. 516, 543, 141 S.E. 705 (3) (1928) (Watts, C.J. Dissenting) ("It is well to bear in mind, however, that under such circumstances, the invalidity of the conveyance arises purely from the presumed intent with which it was executed, although such intent is determined by the attending circumstances, rather than from the actual intention of the parties.")

Finally, Dr. Mathis claims that the monies deposited into MD Medical's bank account and withdrawn by Dr. Mathis were not property of MD Medical. There is no dispute in the record that Dr. Petrich was receiving MD Medical's assets as part of his contract with Dr. Mathis. There is no testimony that the assets sold by Dr. Mathis were his personally as opposed to those of the judgment debtor, and in his testimony, Dr. Mathis agreed that the assets sold to Dr. Petrich were those of the business. In essence, Dr. Mathis entered into the transaction as a shareholder of MD Medical, as there is no evidence that the conveyed assets were owned by him individually. Additionally, Dr. Mathis failed to raise ownership of the assets, which he admitted in previous testimony were property of MD Medical, as an issue to be decided by the lower court, and thus, the argument has not been properly preserved for review by this Court on appeal.

There is no dispute, however, that the monies received in consideration of the sale of MD Medical's assets were at least partially deposited in MD Medical's bank account from which MD Medical paid its debts in the normal course of business and that the funds were subject to its control and disbursement. Dr. Mathis testified that such deposit was made and the documents produced to the lower court demonstrate that such funds were available to MD Medical in its account on April 2, 2015, two months after Invacare's judgment was obtained. By virtue of its judgment against MD Medical, at a minimum Invacare was then due its judgment from those funds and any other assets of MD Medical available for levy. Pursuant to its powers under S.C. Code Ann. § 15-39-410, the lower court ordered that the funds received in exchange for MD Medical's assets be applied toward the satisfaction of Invacare's judgment:

> The judge may order any property of the judgment debtor, not exempt from execution, in the hands of either 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).

As such, the lower court exercised its proper statutory authority to order that funds exchanged for MD Medical's assets be applied to Invacare's judgment. Dr. Mathis, through testimony elicited before the lower court, admitted that the funds deposited into MD Medical's account in exchange for MD Medical's assets were withdrawn into his personal possession, and as a third-party, the lower court had specific authority to order the application of those funds in his possession to the satisfaction of Invacare's judgment by entering a personal judgment against him. Dr. Mathis raises no issue of law holding that the entering of a personal judgment is an improper way to secure payment of funds due a judgment debtor in the hands of a third-party, i.e., Dr. Mathis. The same analysis applies to Dr. Petrich, who agreed to exchange funds for MD Medical's assets, such funds being deposited into MD Medical's possession and therefore subject to an order compelling satisfaction of Invacare's judgment against MD Medical. See Deer Island Lumber Co. v. Virginia Carolina Chemical Co., 111 S.C. 299, 299, 97 S.E. 833, 834 (1919) ("[] a judgment creditor may by the plain words of the statute arrest a fund in the hands of a third party, and alleged by such creditor to belong in truth to the judgment debtor, and proven prima facie to so belong....").

2. IN ISSUING THE RULE TO SHOW CAUSE AND ENTERING ITS ORDER OF DECEMBER 15, 2015 THE MASTER-IN-EQUITY ACTED PURSUANT TO ITS POWERS AND PROVIDED SUFFICIENT NOTICE OF SAME IN COMPELLING THE PAYMENT OF FUNDS EXCHANGED FOR THE ASSETS OF MD MEDICAL BY DR. JOHN PETRICH.

Dr. Mathis claims that Invacare's judgment of $11,645.61 was improperly issued against him for lack of notice. However, for the reasons explained below, the Master-in-Equity was acting well within its powers, both statutory and inherent, in issuing such judgement.

While citing numerous cases in support of his position, Dr. Mathis extrapolates his argument from inapplicable factual and legal scenarios. Each case concerns the specific filing of motions and subsequent orders issued by the lower court resolving those motions on grounds other than those specified in the motion or the original served pleadings. See Griffin v. Capital Cash, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct. App. 1992) (reversing a decision of the Master-in-Equity denying a motion to vacate a judgment pursuant to Rule 60(b)(4) using a standard under Rule 60(b)(1), SCRCP); Bass v. Bass, 272 S.C. 177, 178-80, 249 S.E.2d 905, 906 (1978) (reversing an monetary award for compensation when no such claim was asserted in the underlying Complaint); Turbeville v. Floyd, 288 S.C. 171, 174, 341 S.E.2d 651, 652-53 (Ct. App. 1986) (reversing a grant of summary judgment on a ground not argued before the circuit court); Skinner v. Skinner, 257 S.C. 544, 549-50, 186 S.E.2d 523, 526 (1972) (reversing the grant of a motion to amend awarded support provisions on the basis of reconsideration of previous factual findings, such reconsideration not being requested).

In this case, the Order of Reference for Rule to Show Cause served on Dr. Mathis provided that he was to specifically show cause "why any property, assets, accounts, funds, or holdings belonging to [MD Medical] . . . should not be turned over . . . and the proceeds applied toward the satisfaction of [Invacare's] judgment," and he was specifically notified that the lower

court had the explicit power to "rule upon all motions necessary to dispose of this matter," including "to sell all or certain property of [MD Medical]" and to "enter a Final Order." (R. pp. 9-10) Dr. Mathis was also specifically notified that Invacare was granted leave to obtain discovery from him as to MD Medical's assets, funds, holdings, and financial documents. (Id.) There was no provision limiting the Master-in-Equity's power to hear and dispose of this case with the same power as the circuit court, which would include the power to enter judgment.

The final case cited in support of Dr. Mathis' position is instructive. In Salvo v. Hewitt, Coleman & Assocs., Inc., our Supreme Court held that the grant of summary judgment on the basis of contractual liability, even though such grounds were not clearly set forth in the motion, was not insufficient to apprise the opposing party of such relief as the existence of the contract was specifically alleged in such Complaint. 274 S.C. 34, 39, 260 S.E.2d 708, 711 (1979). Even though the Complaint sounded in tort, the fact that the existence of the contract was alleged provided sufficient notice of liability on those grounds regardless of the grounds actually set forth in the summary judgment motion. Id.

In this case, Dr. Mathis was well aware that he would be testifying as to the assets of MD Medical, their location, the debts of the business, the financial condition of the business, and therefore would testify as to the sale of MD Medical's assets subsequent to MD Medical's judgment. He was also aware, per the Rule to Show Cause, that the Master-in-Equity would have power to compel the application of any assets of MD Medical to the satisfaction of Invacare's judgment and that the Master-in-Equity had full power to issue a final order in the case. That is precisely what the December 15, 2015 Order purported to do by compelling the funds from the sale of MD Medical's assets to be paid to Invacare via a judgment against Dr. Mathis, as he had long previously withdrawn the asset funds deposited into MD Medical's

account, and compelling the payment of funds under the contract by Dr. Petrich to Invacare directly, as such funds have replaced the assets of MD Medical pursuant to the asset sale agreement.[1]

Dr. Mathis further asserts that a third-party, Dr. John Petrich, was not provided sufficient notice prior to the lower court's order compelling monthly payment funds directly to Invacare. However, Dr. Mathis fails to cite any legal standard or requirement dictating that a transferee of assets must be given notice before a court may order the property of a judgment debtor to be applied directly to a judgment, as was done in this case pursuant to S.C. Code Ann. § 5-39-410.[1] As a practical matter, to imply such notice would require notifying an infinite number of unknown persons or entities of a supplemental proceeding, as the status of any assets are unknown prior to testimony and could be in the control of any individual or entity. Indeed, the purpose of supplementary proceedings is to specifically discover assets that may satisfy a judgment and provide a method for reaching those assets. Lynn v. Int'l Bhd. of Firemen and Oilers, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955) ("Proceedings supplementary to execution, in addition to providing for examination of the judgment debtor for the purpose of discovering property out of which the judgment against him may be satisfied, furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution . . . .").

Finally, notice is only required when the personal rights of an individual are to be affected by consideration of the court. Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214,

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1 At the November 29 hearing, counsel for Dr. Mathis objected to and argued against Invacare's position when counsel for Invacare moved for an order requiring Dr. Mathis to place any funds received pursuant to the MD Medical asset sale aside for the payment of Invacare's judgment. (R. pp. 143-46.) Counsel did not object to or argue the right to enter evidence regarding the invalidation of the transfer of $100,000 from MD Medical to Dr. Mathis nor did counsel object to or argue the right to enter evidence as to the direction of payments by Dr. Petrich directly to Invacare. (Id.) Those issues were raised for the first time in Dr. Mathis' Motion to Reconsider Pursuant to Rule 52(b), SCRCP, and as such, are not properly preserved for review before this Court.

216 (1972). Dr. Petrich has not had a judgment entered against him, his rights have not been altered under the asset sale contract in any way, and he was allowed to retain possession of MD Medical's physical assets for the same price as expressed in the agreement. His rights and obligations have not changed under the contract as a result of the lower court's order nor have his personal rights been affected; instead, he was compelled, pursuant to the lower court's statutory authority, to direct future payments to Invacare until such time as its judgment was satisfied in lieu of paying Dr. Mathis.

CONCLUSION

For the reasons stated in the above paragraphs, this Court should affirm the December 15, 2015 Order of the lower court, as it was entered pursuant to the lower court's inherent and statutory authority pursuant to the Rule to Show Cause filed on August 25, 2015, as the Rule to Show Cause provided Dr. Mathis sufficient notice of the scope of the proceedings and the lower court's power, as Dr. Mathis has failed to preserve any argument as to the invalidation of the transfer of $100,000 from MD Medical's account to his possession, as he has failed to preserve any argument as to the lower court's order compelling the payment of any funds to Invacare by Dr. Petrich, and as the factual findings and legal conclusions issued by the lower court were substantiated by the testimony presented to and legal authority of the court.

Respectfully submitted,

October 31, 2016

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In The Court of Appeals

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief complies with Rule 211(b), SCACR.

October 31, 2016

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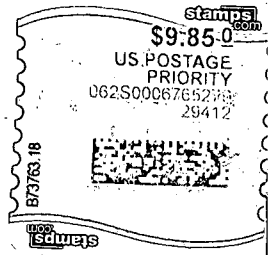

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