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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
The Honorable Charles B. Simmons, Jr., Master-in-Equity
Common Pleas Case No.: 2014-CP-23-01871

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SC Court of Appeals

Appellate Case No.: 2016-1787

China Construction America of South Carolina, Inc., ... Appellant/Respondent,

v.

MS Production Solutions LLC a/k/a MSPS Steel Fabricators,
Manfred Sprenger and Patricia Sprenger, ... Respondents-Appellants.

RESPONDENTS' INITIAL BRIEF OF RESPONDENTS/APPELLANTS

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30 Am.Jur.2d Executions & Enforcement of Judgments § 651 (1994) . . . .

STATEMENT OF ISSUES ON APPEAL

1. Is the Master's decision in refusing to set aside transfers from MSPS to Manfred Sprenger supported by the record?

2. Is the Master's decision to limit the Appellant's recovery to transfers after a specific date supported by the record?

3. Is the Master's decision in refusing to enter a in personum judgment against the transferee of certain transfers supported by the record?

4. Is the Master's decision in refusing to execute on the operating account of MSPS supported by the record?

5. Are there any additional sustaining grounds appearing in the record on which to affirm the decision of the Master?

ARGUMENT

I. THE MASTER'S RULING THAT TRANSFERS FROM MSPS TO MANFRED SPRENGER WERE NOT FRAUDULENT IS SUPPORTED BY THE FACTS.

Standard of Review

The evidentiary standard governing fraudulent conveyance claims brought under the Statute of Elizabeth is the clear and convincing standard. Oskin v. Johnson, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012). "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a *de novo* standard of review applies." *Id.* "However, this broad scope [of review] does not relieve the appellant of his burden to show that the trial court erred in its findings[,] ... [and] we are not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the witnesses." Ballard v. Roberson, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). Gordon v. Lancaster, 419 S.C. 48, 59, 795 S.E.2d 857, 863 (Ct. App. 2016), *reh'g denied* (Feb. 16, 2017).

Discussion

In this case the Master refused to set aside certain payments made by MSPS to Manfred Sprenger. The Master's decision rests in part on a finding that the payments were in exchange for valuable consideration and bona fide. The record supports the Master's findings. The record shows payments from MSPS to Manfred Sprenger that constituted the repayment of emergency loans necessary to allow the company to continue to operate. (Order 8). Although the court noted the lack of formalities in documentation, the court was convinced that the transfers constituted the bona fide repayments of emergency loans and refused to set them aside.

The Statute of Elizabeth authorizes avoidance of fraudulent transfers. *See* Mathis v. Burton, 319 S.C. 261, 460 S.E.2d 406 (S.C.Ct.App.1995). Fraudulent 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. Gentry v. Lanneau, 54 S.C. 514, 32 S.E. 523 (S.C.1899). Here, the court found that the transfers to Manfred were the repayment of loans made to the company to keep its account from going into the negative. The record supports that finding.

Manfred Sprenger testified that he often put his own money in the company to cover bills and that the loans would be paid back shortly thereafter. 7/7 15. Mr. Sprenger also testified that it was not his practice to make formal loan documents for the money he provided the company on such a short term basis. 7/7. The record shows that the short term loans were a common practice over the life of the company and repayments by checks pre-dated MSPS's involvement with China. 15; 17-18 4th. In February of 2015 Mr. Sprenger deposited $40,000 of his personal money for MSPS to pay bills. 20/101; 104; D. Ex. 12; 14; 16-18 4th. Near the end of May of 2015 MSPS repaid the $40,000, along with $20,000 of Mr. Sprenger's back pay. 21-23/102-204;

26/109, D. Ex. 14. The $60,000 check was written to Patricia Sprenger to be deposited into their joint account. 21/102; D. Ex. 15; 16. On June 4, 2015 the Sprengers made a withdrawal from their joint personal account in the amount of $50,000 to keep as cash to pay personal bills and use "to help the business". 25 4th. $25,000 of the $50,000 was put back into the business the following July. 26 4th. Mx testified that the 27,000, 60,000 and 70,000 to Mrs. Sprenger were loan repayments from personal loans to help with cash flow. Mr. Sprenger Depo. 51-52. Transfers from MSPS to Mrs. Sprenger were either loan repayments or salary for Mr. Sprenger. Mr. Sprenger. Depo. 53. It was common practice for money to go back and forth from the Sprenger's joint personal account to the MSPS account when MSPS needed additional operating funds. Mrs. Sprenger Depo. 19-22. Based on this evidence the Master found that Mr. Sprenger repeatedly put his personal money into MSPS to meet MSPS obligations and that the challenged transfers were constituted repayments of those loans. (Order 8). The record supports this finding.

The emergency loans to MSPS constitute valuable consideration for the challenged transfers to Mr. Sprenger. Consideration may be said to consist in any benefit to the promisor, or in a loss or detriment to the promise. Anything which confers benefit on the party promising, or is loss or inconvenience to the party to whom the promise is made, is a sufficient consideration. It is not controlling that the consideration should be a benefit to the promisor. *See* Shayne of Miami, Inc. v. Greybow, Inc., 232 S.C. 161, 101 S.E.2d 486 (1957); Future Group. II v. Nationsbank, 478 S.E.2d 45, 324 S.C. 89 (1995). Challenged transfers of inventory, operating funds, business, and salary by debtor-corporation to its president and other alleged insiders were supported by valuable consideration and, thus, could not be set aside under South Carolina's Statute of Elizabeth. S.C.Code 1976, § 27-23-10. Here, the emergency loans by Manfred to

MSPS were valuable consideration for the subsequent transfers by MSPS to repay those loans.

Where challenged transfers are made in exchange for valuable consideration, those transfers are exempt from the Statute of Elizabeth unless an actual intent to defraud is proven. Here record fails to show an intent to defraud as to the loan repayments to the Sprengers. It is well-settled under S.C. Code Ann. § 27-23-10(A) (Supp.1998) that where there is valuable consideration, a transfer may be set aside as a fraudulent conveyance only if there is an actual intent to defraud creditors imputable to the grantee. Future Group II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996) (*citing* Gardner v. Kirven, 184 S.C. 37, 191 S.E. 814 (1937)). Here the record shows an established pattern of business conduct where Mr. Sprenger would provide emergency loans to MSPS which would then be repaid as cash flow permitted. This practice predated MSPS involvement with CCA. 15; 17-18 4th. Subsequent to the initiation of the case the court specifically allowed Mr. Sprenger to continue to make transactions that were in the normal course of business, which all of the loans and loan repayments were. 29. As all of these transactions were consistent with well established MSPS business practices predating the issue with CCA, the occurrence of the challenged transactions at any particular time does not constitute evidence of an intent to defraud. Because consideration existed and MSPS lacked the intent to defraud, the Statute of Elizabeth does not apply to the transfers of funds to the Sprengers as repayment of loans. The Master's findings that the transfers to Manfred were supported by consideration and bona fide are supported by the record. The refusal to set aside the transfers was therefore without error.

II. THE MASTER'S LIMITATION OF RECOVERY PRIOR TO THE FILING OF THE LAWSUIT WAS SUPPORTED BY THE FACTS.

In this case the Master limited the Plaintiff's recovery to transfers to Patricia Sprenger occurring subsequent to the date of the filing of the underlying action. Based on the facts of this case, the limitation is supported by the record. The initial contract date between the MSPS and CCA was December 12, 2012. CCA did not file an action until April 2, 2014. While CCA seeks to establish an operative date preceding the filing of the action, its brief does not state exactly when it "became clear that a conflict arose between CCA and MSPS". While CCA attempts to rely on the underlying circuit court's judgment to establish an operative date for its claim, the only date referenced as to the breach in the Amended Order of Judgment is August 12, 2014. While CCA asserts that this is a typographical error, CCA made no motion to correct the alleged error. Having not moved to alter or amend, appeal, or otherwise seek relief under Rule 60, the finding as to the date of breach being August 12, 2014 constitutes the law of the case and does not support CCA's argument on any earlier operative date for application of its Statute of Elizabeth argument.

In Albertson, cited by the Appellant, the court found that the inception of the debt or obligation arose with the breach of contract which was found to be in 2000. The challenged conveyance came two years later, and after the entry of the default in the underlying breach of contract action. There was in Albertson, no question or ambiguity as to the date of the breach. Here, in addition to the uncertainty as to the date of breach, the excluded transfers all occurred not only prior to the date of the entry of default, but prior to the filing of the underlying action. Here, if the Amended Order of Judgement leaves any question as to the date of breach, the date

CCA became an existing creditor is a question of fact for the Master. The Master's ruling to exclude transfers prior to the date of filing is therefore not inconsistent with the facts or the reasoning in Albertson. *See* Albertson v. Robinson, 371 S.C. 311, 638 S.E.2d 81 (2006).

The record supports the trail court's decision not to set aside transfers prior to the filing of the action based on the lack of any showing of fraud. CCA complains of transfers of $82,000 made between August 29, 2013 and March 27, 2014. Of the $82,000, $47,000 was transferred on March 27, 2014. While CCA implies bad faith because of the proximity of the payment to CCA's filing, the record fails to support that claim as such transfers were common business practice predating its involvement with CCA. A review of the MSPS general ledger show similar transfers dating back as early 2012, well before any involvement with CCA. Def Ex. 8 3/2/16. Although close in proximity to the filing, the payment of the $47,000 is clearly the repayment of an emergency loan and/or salary consistent with MSPS's existing business practices. Here the record shows that those transfers were either bona fide back pay for Mr. Sprenger or the repayment of emergency loans from Mr. Sprenger. The Master's decision to exclude any transfers prior to the date of filing is supported by the record.

III. THE MASTER'S RULING NOT TO ENTER A JUDGMENT AGAINST Mrs. Sprenger IN SUPPLEMENTAL PROCEEDINGS WAS PROPER WHERE Mrs. Sprenger WAS NOT A PARTY IN THE UNDERLYING ACTION OR JUDGMENT IN THE CIRCUIT COURT.

Whether a person not a party to the underlying action or judgment in the circuit court is subject to a money judgment through supplemental proceedings is a novel issue in South Carolina. In this case Patricia Sprenger was not a defendant in the underlying circuit breach of contract action. No judgment was entered against her in the circuit court. Ms. Sprenger is the

transferee in a challenge under the South Carolina's Statute of Elizabeth and was joined in the supplemental proceedings as a necessary party. Mrs. Sprenger lacked sufficient notice that CCA sought a personal judgment against her. Based on the record, the court refused to enter an *in personam* judgment against Mrs. Sprenger. The Master's ruling was consistent with the facts and equitable under the circumstances.

Pursuant to S.C. Code Section 15-39-410 [t]he 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, except that the earnings of the debtor for his personal services cannot be so applied. S.C. Code Ann. § 15-39-410. In this case Patricia Sprenger was not the judgment debtor and she was joined in the supplemental proceedings as the named transferee on a series of challenged transfers. By statute the court is allowed to order any property of the judgment debtor (MSPS), whether in the hands of the debtor or a transferee, to be applied toward satisfaction of the judgment. This much the court did, which is the full extent of what is allowed by statute. There appears to be no case reported in South Carolina that has extended the authority of the Master to apply the assets of a third party against the debt of the judgment debtor, or to enter a personal judgment against a third party.

The remedy provided under 15-39-410 is to void the fraudulent conveyance to allow recovery of the object of the transfer. While the historical remedy under the Statute of Elizabeth is to void the fraudulent conveyance, a few states have allowed the creditor to seek compensatory damages from a transferee as an alternative form of relief. In Tennessee, an attachment or other provisional remedy is available against the asset or other property of the transferee, but this is

pursuant to an express statutory provision. *See* T.C.A. § 66–3–309(a)(2). South Carolina does not have such a provision. In New York "a money judgment against the transferee may be an available form of substitute relief where the transferee has disposed of the wrongfully conveyed property in some manner *which makes it impossible for return.*" Joslin v. Lopez, 309 A.D.2d 837, 839, 765 N.Y.S.2d 895 (N.Y.App.Div.2003) (*emphasis added*). But even in New York the relief to which a defrauded creditor is entitled in an action to set aside a fraudulent conveyance is generally limited to setting aside the conveyance of the property which would have been available to satisfy the judgment had there been no conveyance (*see* Manufacturers & Traders Trust Co. v Lauer's Furniture Acquisition, 226 AD2d 1056 [1996]; Marine Midland Bank v Murkoff, *supra*; *see also* Hamilton Natl. Bank v Halsted, 134 NY 520 [1892]). Any substitute relief under the above cases would presumably be available only upon a showing that the setting aside the conveyance would not allow recovery by the creditor. Here, the Master denied a personal judgment against Mrs. Sprenger, finding instead that the appropriate remedy was to set aside certain transfers and grant full examination of Mrs. Sprenger to pursue recovery of the transferred assets. This is not only in accord with South Carolina law, it is consistent with the theory of substitute remedy.

Until CCA has established that the object of the voided transactions are unrecoverable, a personal judgment as a substitute remedy is inappropriate. It is evident from the court's order that CCA failed to show that the assets were unrecoverable from Mrs. Sprenger. As a result, even under the theory of substitute relief, the court ordered an appropriate remedy.

IV. THE MASTER'S RULING WAS NOT IN ERROR WHERE EXECUTION AGAINST THE OPERATING ACCOUNT OF MSPS WOULD NOT HAVE SUBSTANTIALLY REDUCED THE DEBT AND WOULD HAVE ENDED THE VIABILITY OF THE ON-GOING BUSINESS.

The Master's order is silent as to CCA's request to execute on the operating account of MSPS. Instead, the Master set aside certain transfers totaling $221,593.94. It is not disputed that the Small Business Loan Source, LLC (SBL) holds a security interest in the assets of MSPS. (Ex. 1, tab 11). The SBL security agreement provides a security interest in all accounts of MSPS. (Ex. 1, tab 11). A corresponding UCC financing statement includes all of MSPS accounts. (Ex. 1, tab 12). In fashioning equitable relief the court found that the status of other liens and encumbrances was questionable. (Order 8.)

S.C. Code Ann. Section 30-7-1 0 provides, in pertinent part, that all mortgages or other liens on real or personal property, or both, created by law or by agreement of the parties, shall be valid so as to affect the rights of the subsequent creditors from the day and hour when they are recorded. It is well settled that a mortgage lien has priority over a subsequent judgment lien. *Id.*, Prudential Ins. Co. of America v. Wadford, 102 S.E.2d 889,232 S.C. 476 (1958). Further, a prior unsatisfied judgment lien has priority over a subsequent judgment lien. S.C. Code Ann. Section 30-7-10. In this case, the SBA liens and security interests preceded any claim by CCA.

Judgments generally are enforced by way of writs of execution issued to the sheriff. *See* S.C.Code Ann. § 15-35-180 (1976) (providing that judgments requiring the payment of money or the delivery of real or personal property "may be enforced in those respects by execution as provided in this Title."); S.C. Code Ann. § 15-39-80 (setting forth the requirements for the contents of the execution, including that it be directed to the sheriff and intelligibly refer

to the judgment, stating the court, the county in which the judgment roll or transcript is filed, and the amount of the judgment). If a judgment is unsatisfied, the judgment creditor may institute supplementary proceedings to discover assets. S.C.Code Ann. § 15-39-310. In addition to their discovery functions, supplementary proceedings "furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution, such as choses in action." Lynn v. International Brotherhood of Firemen & Oilers, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955).

The relationship between a general depositor and his bank is that of creditor and debtor, and money deposited, unless put into a special account or specifically designated to be kept separate, becomes the property of the bank and goes into its general account. Owens v. Andrews Bank & Trust Co., 265 S.C. 490, 220 S.E.2d 116 (1975). The funds on deposit thus are no longer the personal property of the depositor; instead, the depositor has a chose in action against the bank for recovery of the deposit. McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473 (1933); *see also* 30 Am.Jur.2d Executions & Enforcement of Judgments § 651 (1994) (customary deposits in a bank create debts owed by the bank to the depositor and may be reached through supplementary proceedings). Therefore, the money in the MSPS account could not be reached through execution and levy, but only through supplemental proceedings. *See* McManus, 171 S.C. at 88, 171 S.E. at 474.

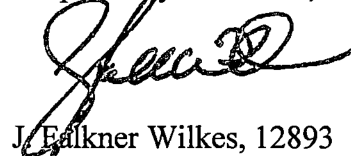
After conducting supplementary proceedings, the trial court *may* order non-exempt property of the judgment debtor in the hands of a third party or owed to the judgment debtor to be applied toward satisfaction of the judgment. S.C.Code Ann. § 15-39-410 *(emphasis added)*. Supplemental proceedings are equitable in nature and by statute, the Master has discretion in determining whether to order property to be applied toward satisfaction of the judgment. The

record shows that execution on the accounts of MSPS would not have substantially reduced the amount owed to CCA and would have likely caused the collapse of MSPS as an on-going business. 'In applying the doctrines of equity, the equities of both sides are to be considered, and each case must be decided on its own particular facts.' Carroll v. Page, 264 S.C. 345, 349, 215 S.E.2d 203, 205 (1975). Equity owes its birth to the desire to look beneath the rigid rules of the law–to seek substantial justice. State ex rel. Daniel v. Strong, 185 S.C. 27, 192 S.E. 671, 681 (1937). In this case, given the record, the Master's ruling was equitable and therefore, not reversible error.

CONCLUSION

Based on the foregoing, the decision of the Master as to the above issues should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 17th day of May, 2017, I served the Respondent's Initial Brief of Respondents/Appellants and Designation of Matter on the Appellant/Respondent by placing a copy of same into the United States Mail, first class postage pre-paid, addressed to counsel of record as indicated below, and by facsimile if so indicated:

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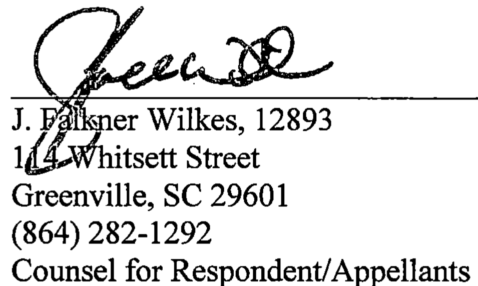

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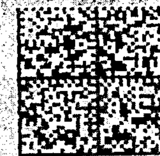

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