

**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**

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.**

PETITION FOR REHEARING

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OCT 07 2019

SC Court of Appeals

PETITION FOR REHEARING

Pursuant to SCRAP Rule 221 the Respondent/Appellants hereby move this Court to reconsider its opinion and grant the Appellant a rehearing in this case based on the following:

- I. THE COURT ERRED IN FINDING THAT TRANSFERS FROM MSPS TO MANFRED SPRENGER WERE MADE WITH THE INTENT TO DEFRAUD ITS CREDITORS.

This Court ruled that MSPS made payments to Manfred Sprenger with the intent to defraud its creditors. The Court based its ruling on a finding that the amount and dates of the transfers to Sprenger were not consistent and only began to occur after the initiation of the case. The Court's opinion overlooks relevant facts that not only show that the pattern of emergency loans and repayments occurred years prior to this action, but that loans and repayments also followed a predictable pattern linked to the balance of the MSPS operating account and its immediate outstanding obligations. In light of the evidence overlooked or misperceived, the Court's ruling that payments to Sprenger were made with the intent to defraud creditors was in error.

Contrary to the Court's findings, the MSPS General Ledger shows that the practice by MSPS of making and repaying emergency loans to and from Sprenger existed at least far back as 2012, which was prior to China's

relationship with MSPS and years before this litigation. 826-827. Although the source of the deposits are not explicitly indicated in the general ledger, it is easy to identify transfers from Sprenger to MSPS as they follow in the same pattern and even amounts as seen subsequent to the China litigation. Loans from Sprenger show as deposits in even amounts and occur at a time when, without them, MSPS would otherwise be unable to cover all of the checks written within that same week, if not on same day.

On May 30, 2012 MSPS wrote a \$50,000 check to Patricia Sprenger¹. 826. On June 25, 2012 MSPS made a deposit of \$60,000. This deposit corresponded to a low balance in the MSPS account and was necessary to ensure MSPS would be able to cover all of the checks that followed that week. 826-827. This occurred again on July 16, 2012 with a \$40,000 deposit into the MSPS account when the balance dropped to only \$16,076.54. 827. Then on July 18, 2012, after its account balance had increased substantially, and the bills had been paid, MSPS wrote Patricia Sprenger a \$170,000 check. 827. Again, MSPS deposited \$25,000 on October 3, 2012, when its account balance was down to \$16,487.03. 830. All of the deposits were timed to cover low

¹Checks to Manfred to repay loans were also made out to Patricia as she made all of the deposits into the personal account.

balances, and the payments to Sprenger made when the account balance was sufficient for MSPS to repay the loan. 829. All of the deposits showed the same type of entry, and although they did not state the source, it is clear that they were not from customer payments as each customer deposit is clearly identified as such. 823-840. Contrary to the Court's findings, this pattern of emergency loans and repayments were part of the normal course of business for MSPS for years, and not something that was created after the litigation simply as a means to defraud creditors.

The payments at issue in this case stem from a long standing course of business MSPS has engaged in for years. The record shows a pattern of critically low balances in MSPS's operating account that are followed by an infusion of money loaned from Sprenger. This pattern of emergency loans and repayments that has continued from 2012 to the present are clearly out of necessity rather than any intent to defraud China. 433-435; 478. Contrary to the court's findings, there is ample evidence in record to show that the practice of borrowing and repaying money from Sprenger not only pre-dated the litigation, but China's involvement with MSPS entirely.

The court's finding that the repayment of loans constituted the intent to defraud rests heavily on its finding that the loans to MSPS, totaling \$105,000

that were made between November 2014 through July of 2015, would not have been necessary but for the \$130,000 in repayments made between September 2014 to May of 2015. This reasoning is flawed as the ongoing need for loans, and their repayment, was simply a cycle in which MSPS operated. This cycle was the normal course of business for MSPS, and although it was probably a poor business practice, it was MSPS's normal business practice nonetheless. The Court's opinion picks apart this cycle to find an intent to defraud.

In dissecting MSPS's normal business cycle the Court blames the need for loans on the existence of prior repayment of the loans.² This is clearly not the case as the record shows that loan repayments never triggered the critically low balances but became part of pattern of trying to keep the MSPS at operating levels. Repayments occurred when the accounts had returned to a sufficient balance with loans being made again if income lagged for the month. In February of 2015 Sprenger loaned \$40,000 of personal money to MSPS to cover bills. R. 257-258; 261-265; 600-602; 845; 855. Near the end of

² Additionally, under the Court's reasoning that loan repayments in the amount of \$130,000 contributed to the need for additional loans, and somehow constituted evidence of an intent to defraud, it was still error to set aside more than \$130,000 in transfers.

May of 2015 MSPS repaid the \$40,000. 261-263; 268-269; 603; 855. Then in July he loaned money to MSPS again. R. 267; 609. The record shows that cycle of loans and repayments were simply part of MSPS's less than ideal, but regular business practice. As a result, the repayments themselves did not create the need for loans and therefore, do not support the Court's finding as to an intent to defraud.

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. Gentry v. Lanneau, 54 S.C. 514, 32 S.E. 523 (S.C.1899). Here payments at issue were given in exchange for valuable consideration. The pattern of emergency loans and repayments existed years before this litigation, which shows that the cycle of loans and repayments at issue were made without the intent to defraud. The court therefore erred in finding that these transfers should be set aside.

II. THE COURT'S OPINION OVERLOOKS OVERWHELMING EVIDENCE THAT MSPS MADE HUSBAND'S SALARY CHECKS PAYABLE IN THE WIFE'S NAME SIMPLY TO ALLOW HER TO ENDORSE AND DEPOSIT THE CHECKS.

The Court's opinion rests on the implicit finding that the checks at issue were not compensation for Manfred Sprenger's work. The Court overlooks the fact that all of the evidence in record is completely to the contrary. Despite the checks being made out to Patricia Sprenger, all of these checks clearly represented Manfred Sprenger's salary and compensation. That being the case, they were given in exchange for Manfred's work, and therefore, valuable consideration. Making the checks payable to Patricia rather than Manfred was merely a convenience to allow Patricia to endorse and deposit her husband's pay check into their joint personal account. The record overwhelmingly supports this fact.

The record shows that MSPS was obligated to pay Manfred Sprenger a \$12,000 a month salary as compensation for his work. R. 854-855. Due to cash flow Manfred's salary was reduced over time to \$6,000 or \$7,000 a month. R. 167; 855. Manfred testified that his compensation was paid by the company through checks made out to Patricia. R. 168-169; 176. The testimony of Manfred and Patricia were consistent in that Manfred put her

name on the checks to make it for his wife to deposit them in their joint personal account. R. 211-212; 414-418. This was customary even prior to MSPS's involvement with China. R. 254-255; 823-840. Joint tax returns show that the income represented by checks made out to Patricia was declared as "business income" on the Schedule C and the CPA that prepared the returns testified that the income represented by those checks was attributed to Manfred. R. 270-287. All of the evidence indicates that the challenged checks represented Manfred's salary and were made payable to Patricia simply so she could endorse and deposit them into their joint account. The Court's opinion overlooks that there is no evidence to the contrary.

As this was an established pattern of conduct predating MSPS's involvement with CCA, the mere continuation of the practice subsequent to MSPS's litigation with China fails to show any intent to defraud.

IV. THE COURT ERRED IN HOLDING THAT A LACK OF EVIDENCE REQUIRED THE ISSUE OF SECURITY INTEREST AND EXECUTION BE REMANDED.

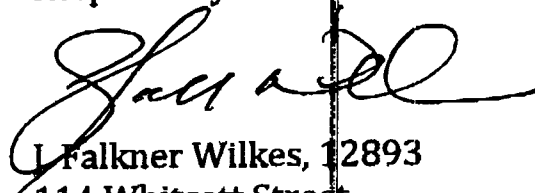
This Court's opinion holds that there is insufficient evidence to determine the existence and priority of any liens on MSPS deposit accounts. The Court overlooks evidence in record showing that the Small Business Loan

Source, LLC (SBL) holds a security interest in all of the assets of MSPS. 517-556; 680-715. The SBL security agreement provides a security interest in all accounts of MSPS. 517-556; 680-715. A corresponding UCC financing statement includes all of MSPS accounts. 793-822. While the Master stated that the status of other liens and encumbrances were questionable, the record is sufficient for this Court to find that execution by China is barred by the prior attachment of interest by the Small Business Loan Source, LLC. Remand on the issue is therefore unnecessary given the SBA loan documentation in record.

CONCLUSION

Based on the foregoing the Appellant moves this Court to reconsider its opinion and grant a rehearing in this case.

Respectfully submitted,



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October 7, 2019.

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CERTIFICATE OF SERVICE

I certify that on the 7th day of October, 2019, I served the Petition for Rehearing of the Respondents-Appellants and Certificate(s) 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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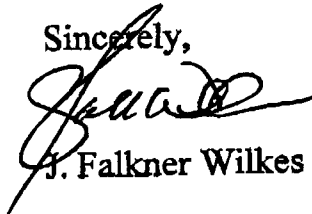
Re: China Construction America v. MS Production, *et al.*
Circuit Court Case No.: 2014-CP-23-01871
Appellate Case No.: 2016-001787

Dear Ms. Kitchings,

Accompanying this letter please find the original and six copies of the Petition for Rehearing of MS Production, *et al.*, along with a certificate of service. Also please find a fifty dollar check for the filing fee. I am also sending a copy of the Petition by facsimile to avoid having to drive to Columbia today to hand deliver the Petition. It is my understanding that it is still the practice of your office to accept the facsimile as to the date of actual receipt so long as the original is sent contemporaneously. If this is incorrect please advise immediately and I will drive the original to Columbia personally today.

If I need to do anything further please let me know.

Sincerely,


J. Falkner Wilkes

c:

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