

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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. 2019-002091

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

v.

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

PETITION FOR CERTIORARI

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S.C. SUPREME COURT

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PETITION FOR CERTIORARI

Pursuant to Rule 242 the Petitioner hereby moves this Court to grant certiorari and review the decision of the Court of Appeals.

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

China Construction appealed the master's finding that certain loan repayments from MSPS to Manfred Sprenger were in exchange for valuable consideration and made in good faith. Applying a de novo standard of review the court of appeals set aside the loan repayments based on a finding that the repayments, given in exchange for valuable consideration, were made with the intent to defraud. The court of appeals based its ruling specifically 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 findings are unsupported by the record. The record shows not only that the pattern of emergency loans and repayments occurred years prior to this action, but that loans and repayments followed a predictable pattern linked to the balance of the MSPS operating account and its immediate outstanding obligations. The record therefore fails to show that the transfers were anything other than repayments of loans made in a manner consistent with

MSPS regular business practice. Although the court of appeals opinion cited the clear and convincing evidence standard, it failed to properly apply it.

The MSPS general ledger shows that the practice by MSPS of making and repaying emergency loans from and to Manfred Sprenger existed at least far back as 2012, prior to China's relationship with MSPS and this litigation. 826-827. Although the source of the deposits dating back to 2012 are not explicitly indicated in the MSPS general ledger, transfers from Sprenger to MSPS can be identified as they follow in the same pattern and even amounts as seen subsequent to the China litigation. Loans from Sprenger show up as deposits in even amounts and occur at times when, without them, MSPS would otherwise be unable to cover all of the checks written within that same week, if not on same day.

The pattern of loans and repayments covers the transfers at issue. 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

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

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 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 opinion of the court of appeals, this pattern of emergency loans and repayments were part of a regular course of business for MSPS for years, rather than something contrived after the litigation simply as a means to defraud creditors.

The record shows that critically low balances in the MSPS operating account are followed by infusions of money loaned from Manfred 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 opinion of the court of appeals 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 a regular course of business for MSPS, and although it was probably a poor business practice, it was MSPS's normal business practice nonetheless. The opinion below picks apart this cycle to find an intent to defraud.

In dissecting MSPS's normal business cycle the court of appeals 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

²Additionally, 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.

MSPS at operating levels. Repayments occurred when the accounts had returned to a sufficient balance, with loans being made again if income lagged significantly 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 May of 2015 MSPS repaid the \$40,000. 261-263; 268-269; 603; 855. Then in July Sprenger 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 fail to 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). A conveyance made for a valuable consideration can be set aside if the plaintiff establishes that the transfer was made by the grantor with the actual intent of defrauding his creditors. Gentry v. Lanneau, 54 S.C. 514, 32 S.E. 523 (S.C.1899). Evidence of an intent to defraud must be clear and convincing. Oskin v. Johnson, 400 S.C. 390, 399, 735 S.E.2d 459, 464 (2012). Here payments at issue were given as repayments for loans, and therefore, in exchange for valuable consideration. The analysis must then turn to whether

the pattern of repayments were manipulated in a way to intended to defraud creditors, rather than simply repayment of the loans in the same manner as preceding the litigation and MSPS's involvement with China. As shown above the timing of loans and repayments at issue was well within the regular pattern of loans and repayments that existed prior to the litigation and MSPS's involvement with China. The record therefore fails to support the opinion of the court of appeals.

In reversing the master the court of appeals further erred in disregarding the master's implicit findings as to Sprenger's credibility on key facts relating to intent. Sprenger testified extensively to the pattern of loans and repayments. The master's ruling indicates that the master not only found Sprenger's testimony consistent with the documentary evidence but credible on the issue of intent as well.

The record therefore fails to establish by clear and convincing evidence that MSPS transferred any money outside of what may have been poorly managed, but nevertheless, its regular course of business.

Further discussion of the evidence is unnecessary. We have carefully considered all of it and are of the opinion that it adequately supported the findings and conclusions of the lower court. Our duty in equity cases to review challenged findings of fact as well as matters of law does not require that we disregard

the findings below or that we ignore the fact that the trial judge, who saw and heard the witnesses, was in better position than we are to evaluate their credibility; nor does it relieve appellant of the burden of convincing this court that the trial judge erred in his findings of fact. Twitty v. Harrison, 230 S.C. 174, 94 S.E.2d 879.

Inabinet v. Inabinet, 236 S.C. 52, 55-56, 113 S.E.2d 66, 67 (1960).

The record fails to show by clear and convincing evidence that the repayments at issue were made with the intent to defraud creditors. The court of appeals opinion is therefore in error.

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 of appeals erred in finding that MSPS checks made payable to Patricia Sprenger (Manfred Sprenger's wife) were not in exchange for valuable consideration. Manfred Sprenger was an employee of MSPS and entitled to a salary pursuant to a contract of employment. Although the checks at issue were made out to Patricia Sprenger, they clearly represented Manfred Sprenger's salary. Other than the checks at issue there is no evidence of Manfred Sprenger receiving any pay for his work. 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. As Manfred Sprenger's pay, the checks were given in exchange for valuable consideration. 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.

The opinion of the court of appeals rests on the finding that Patricia Sprenger was not an employee of MSPS and did not claim the checks as her own personal income on "her taxes." The court however completely overlooked that fact that Manfred Sprenger claimed the checks as his income for tax purposes. The parties' joint tax returns show that the income represented by checks, although made out in Patricia Sprenger's name, was

declared as "business income" on the Schedule C prepared by a CPA. The record shows that the income represented by those checks was not attributed to Patricia Sprenger. The checks therefore can only represent Manfred's income. R. 270-287. All of the evidence indicates that the challenged checks represented Manfred's salary. The opinion below overlooks that there is no evidence to the contrary.

A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. Oskin v. Johnson, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (2012). This includes the issue of valuable consideration. Given the evidence, the court of appeals clearly erred in applying the clear and convincing standard as required in this case. As to the issue of intent, the record shows that making Manfred Sprenger's pay checks out in his wife's name was an established pattern of conduct predating MSPS's involvement with China. The mere continuation of the practice subsequent to MSPS's litigation with China fails to show any, much less clear and convincing evidence, of an intent to defraud. The court of appeals opinion is therefore in error.

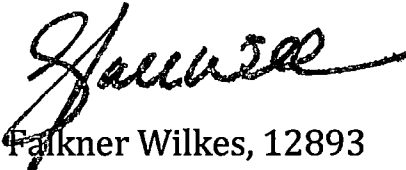
III. THE COURT ERRED IN HOLDING THAT A LACK OF EVIDENCE REQUIRED THE ISSUE OF SECURITY INTEREST AND EXECUTION BE REMANDED.

The opinion of the court of appeals held that there is insufficient evidence to determine the existence and priority of any liens on MSPS deposit accounts that would act as a bar to execution on those accounts. Based on this finding the court remanded the issue for further findings. The court's opinion 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. "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005).

CONCLUSION

Based on the foregoing the Petition moves this Court to grant certiorari and review the decision of the court of appeals.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Falkner Wilkes", written in a cursive style.

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January 6, 2020.

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CERTIFICATE OF SERVICE

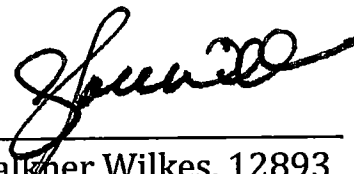
I certify that on the 6th day of January, 2020, I served the Petition for Certiorari and Certificate(s) on the Respondent by placing a copy of same into the United States Mail, first class postage pre-paid, addressed to counsel of record as indicated below, and by facsimile if so indicated:

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A handwritten signature in black ink, appearing to read "J. Falkner Wilkes", written over a horizontal line.

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CERTIFICATE

I certify that the that a petition for rehearing or reinstatement was
made and finally ruled on by the Court of Appeals.



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January 6, 2020.