STATE OF MICHIGAN

COURT OF APPEALS

PRODUCT SUPPORT WAREHOUSE, II,

Plaintiff-Appellant,

v

PAUL A. BOSCO, SR., ROBERT J. SOLNER, NAZIR JAWICH, SOLNER & SOLNER, P.C., and MICHIGAN NATIONAL BANK,

Defendants-Appellees,

and

PAUL A. BOSCO & SONS CONTRACTING CORP. and NEW LAND CONSTRUCTION COMPANY, INC.,

Defendants.

UNPUBLISHED
January 17, 1997

No. 177589
Oakland Circuit Court
LC No. 94-474965

PRODUCT SUPPORT WAREHOUSE, II,

Plaintiff-Appellant,

v

PAUL A. BOSCO & SONS CONTRACTING CORP. and NEW LAND CONSTRUCTION COMPANY, INC.,

Defendants-Appellees,

and

No. 184744
Oakland Circuit Court
LC No. 94-474965

PAUL A. BOSCO, SR., ROBERT J. SOLNER,
NAZIR JAWICH, SOLNER & SOLNER, P.C.
and MICHIGAN NATIONAL BANK,

Defendants.

Before: Saad, P.J., and Griffin and M. H. Cherry*, JJ.

PER CURIAM.

In each of these consolidated appeals, plaintiff appeals as of right the trial court's order granting summary disposition for defendants. We affirm.

I

Plaintiff is a judgment creditor of defendants Paul A. Bosco & Sons Contracting Corp. (Bosco & Sons). Before entry of plaintiff's default judgment against Bosco & Sons, defendants Solner & Solner, P.C., and Michigan National Bank each obtained a security interest in some of Bosco & Sons' property.[1] Plaintiff alleges that both of these transfers were fraudulent conveyances in violation of the Michigan Uniform Fraudulent Conveyance Act, MCL 566.11, *et seq.*; MSA 26.881, *et seq*. Plaintiff also claims that the trial court should find the named defendants responsible for the judgment debt under the equitable remedy of "lien marshaling." Additionally, plaintiff claims that Bosco & Sons transferred substantially all its assets to defendant New Land Construction Co, Inc. (New Land), an entity plaintiff claims to be an "extension or continuation" of Bosco & Sons that should have successor liability for Bosco & Sons' debts.

II

Docket No. 177589
A

On appeal, plaintiff first contends that the trial court erred in granting summary disposition to defendants Michigan National Bank, Solner & Solner, P.C., Paul A. Bosco, Sr., Robert J. Solner, and Nazir Jawich on its fraudulent conveyance claims. We disagree. We review the trial court's ruling on a motion for summary disposition pursuant to MCR 2.116(C)(10) de novo to determine whether the pleadings or the uncontroverted documentary evidence establish that defendant is entitled to judgment as a matter of law. MCR 2.116(I)(1); *Kennedy v Auto Club of Michigan*, 215 Mich App 264, 266; 544 NW2d 750 (1996). The existence of either circumstance merits a grant of summary disposition. *Kennedy*, *supra* at 266.

The pertinent portions of Michigan's Uniform Fraudulent Conveyance Act, MCL 566.11 *et seq.*; MSA 26.881 *et seq.*, provide:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration. [MCL 566.14; MSA 26.884.]
>
> Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent. [MCL 566.15; MSA 26.885.]
>
> Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors. [MCL 566.16; MSA 26.886.]
>
> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors. [MCL 566,17; MSA 26.887.]

Generally, "where a sale of property is attacked as fraudulent as to creditors, the burden of proof is on the attacking party to establish such fraud." *Mason v Mason,* 296 Mich 622, 626; 296 NW 703 (1941); *In re Otis & Edwards, PC,* 115 BR 900, 910-911 (Bankr ED Mich 1990). To establish a prima facia case that an asset transfer was fraudulent under MCL 566.14; MSA 26.884, MCL 566.15; MSA 26.885, or MCL 566.16; MSA 26.886, the attacking party must first establish that the transfer was made for "inadequate consideration" to the debtor.[2] *Mason, supra* at 628; *Otis & Edwards, supra* at 911. Only after the attacking party has established inadequate consideration must the parties seeking to uphold the transaction prove the value of the involved assets or that the debtor was solvent at the time of the transaction. *Otis & Edwards, supra* at 911

Here, instead of offering documentary evidence to establish that the transfers were made for inadequate consideration, plaintiff simply rested on the bald allegations in its complaint. Plaintiff attached no documentary evidence in response to any of the defendants' motions for summary disposition that could establish a material factual dispute on the issue whether the subject transfers were made for inadequate consideration. Plaintiff is incorrect in claiming that defendants had the initial burden of demonstrating adequate compensation for the asset transfers. See *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994) (the party opposing a motion for summary disposition pursuant to MCR 2.116(C)(10) is the party obligated to set forth specific facts demonstrating a genuine issue for trial); see also *Mason, supra* at 626; *Otis & Edwards, supra* at 711. Thus, the trial court correctly dismissed plaintiff's claims under MCL 566.14; MSA 26.884, MCL 566.15; MSA 26.885, and MCL 566.16; MSA 26.886.

Furthermore, to establish that a conveyance was fraudulent under MCL 566.17; MSA 26.887, the attacking party must establish "actual intent" to "hinder, delay, or defraud either present or future creditors." Under MCL 566.17; MSA 26.887, "actual intent to defraud may be inferred from certain 'badges' of fraud." *Coleman-Nichols v Tixon Corp,* 203 Mich App 645, 659; 513 NW2d 441 (1994). These badges of fraud include: "lack of consideration for the conveyance; a close relationship between transferor and transferee; pendency or threat of litigation; financial difficulties of the transferor; and retention of the possession, control, or benefit of the property by the transferor." *Id.* at 660. However, the presence of one or more badges of fraud is not, in itself, conclusive of intentional fraud. *Id.* at 659-660.

In the present case, the only documentary evidence plaintiff supplied to support its fraudulent conveyance claim under MCL 566.17; MSA 26.887 was a worksheet designed to establish that creditors knew that Bosco & Sons was liquidating its assets due to its poor financial condition. However, poor financial condition is but one "badge" of fraud which, standing alone, does not establish an "actual intent" to defraud. Because plaintiff presented no other documentary evidence that could reasonably establish a material factual dispute that defendant actually intended to hinder, delay, or defraud Bosco & Sons' creditors, the trial court correctly granted summary disposition on this theory, as well. *Bankers Trust Co v Humber,* 263 Mich 426, 428; 248 NW2d 858 (1933).

B

Next, plaintiff claims that the trial court erred in granting summary disposition to defendants Michigan National Bank and Solner & Solner, P.C., on plaintiff's request for marshaling of assets. We disagree. This Court explained this remedy in *SCD Chemical Distributors, Inc v Maintenance Research Laboratory, Inc,* 191 Mich App 43, 46; 477 NW2d 434 (1991), as follows:

> [T]he equitable remedy of marshaling of assets exists for the benefit of persons who hold a subordinate *secured* claim in property; where a senior creditor has a lien against two funds or parcels and the junior lienor has a lien against only one of those properties, a court of equity may compel the former to satisfy its claim out of the property that is encumbered by only its lien. However, application of the doctrine is limited in that it will not be allowed if it cannot be invoked without prejudicing or injuring the rights of the senior creditor or where it would harm the interests of a third party. [Emphasis added.]

Plaintiff is not a secured creditor. Nor has plaintiff garnished any of Bosco & Sons' assets. Therefore, plaintiff has no enforceable junior lien on which the marshaling of assets remedy can apply. Furthermore, plaintiff offers no evidence to counter Michigan National Bank and Solner & Solner's documented allegations that asset marshaling would prejudice them because the value of their attached collateral is less than what Bosco & Sons owes them. Accordingly, the trial court did not err in granting summary disposition to the secured creditors, Michigan National Bank and Solner & Solner, P.C., on plaintiff's lien marshaling claim. See *Amorello v Monsanto Corp,* 186 Mich App 324, 329; 463 NW2d 487 (1990).

C

Plaintiff further contends that the trial court erred in granting summary disposition before the completion of discovery. We disagree. Generally, summary disposition is inappropriate before discovery is complete. *Bellows v Delaware McDonald's Corp,* 206 Mich App 555, 561; 522 NW2d 707 (1994). However, summary disposition may be warranted before the completion of discovery if the opposing party fails to show that it has a fair chance to establish a material factual dispute. See *Prysak v R L Polk, Co,* 193 Mich App 1; 483 NW2d 629 (1992). Thus, if the party opposing summary disposition cannot document its case because discovery is incomplete, summary disposition remains appropriate unless the party produces some evidence, even hearsay evidence, to show that the nonmoving party has a fair chance to establish a material factual dispute. *Michigan National Bank v Metro Institutional Food Service, Inc,* 198 Mich App 236, 241; 497 NW2d 225 (1993); *Pauley v Hall,* 124 Mich App 255, 263; 335 NW2d 197 (1983).

Essentially, plaintiff contends that further discovery could have bolstered his theory that New Land is an extension or continuation of Bosco & Sons. According to plaintiff, this factual inseparability between the two corporations would allow plaintiff to pierce New Land's "corporate veil" and claim against its assets. Plaintiff supports this contention with a hearsay affidavit in which an affiant states that a New Land employee told him that Paul Bosco, Sr., runs New Land. However, viewing this hearsay affidavit in the light most favorable to plaintiff, plaintiff has not established that it has a fair chance of developing a material factual dispute.

Where one person owns all a corporation's stock, the law generally treats the corporation as distinct from its stockholders. *Bitar v Wakim,* 211 Mich App 617, 621; 536 NW2d 583 (1995). Moreover, it is well established that different corporations, even parent and subsidiary corporations, will be respected as separate entities absent some abuse in corporate formality that justifies a "piercing" of the "corporate veil." *Seasword v Hilti, Inc (After Remand),* 449 Mich 542, 547; 537 NW2d 221 (1995). As this Court held in *SCD Chemical Distributors v Medley,* 203 Mich App 374, 381; 512 NW2d 86 (1994):

> There are three requisites to piercing the corporate veil and finding an identity between business entities. First, the corporate entity must be a mere instrumentality of another entity or individual. Second, the corporate entity must be used to commit a fraud or wrong. Third, there must have been an unjust loss or injury to the plaintiff.

Here, plaintiff's affidavit alleging that Paul Bosco's control of New Land can, at most, establish a potential abuse in corporate formality. However, plaintiff has failed to produce any evidence to establish that its debtor used the distinct corporations to defraud plaintiff. Therefore, plaintiff's hearsay affidavit does not establish that it has a fair chance to establish a material factual dispute whether New Land's "corporate veil" should be pierced. Accordingly, we find that the trial court did not err in granting summary disposition to the individual defendants before the end of discovery.

III

Docket No. 184744

A

Plaintiff argues that the trial court abused its discretion in entertaining and granting Bosco & Sons and New Land's motion for summary disposition because it was not filed until five days before the cut-off date for hearing dispositive motions. However, plaintiff cites no authority in support of its position. Therefore, the issue has been waived. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for a claim. *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 14; 527 NW2d 13 (1994); *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 640; 502 NW2d 368 (1993); cf. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994). Moreover, plaintiff has not established how he was prejudiced by the allegedly tardy filing of defendants' motion for summary disposition. Nevertheless, MCR 2.116(B)(2) and (D)(3) provide that a motion for summary disposition pursuant to MCR 2.116(C)(10) may be raised at any time.

B

Next, plaintiff claims that the trial court abused its discretion in refusing to order production of documents after New Land's president, Nazir Jawich, asserted lack of relevancy and privilege at a deposition. We disagree. MCR 2.302(b)(1) provides:

> In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Here, plaintiff requested Nazir Jawich to produce a wealth of documents pertaining to business New Land transacted after May 15, 1993, the date plaintiff alleges that Bosco & Son fraudulently transferred assets to New Land in exchange for New Land's assumption of some of Bosco & Son's debts. Without supporting its position with relevant argument or authority, plaintiff simply claims that the requested documentation would pertain to "whether a fraudulent transfer took place or whether there is successor liability." We fail to see how documentation of business transactions unrelated to and occurring subsequent to the allegedly fraudulent transaction on May 15, 1993, could establish that the May 15, 1993, transaction lacked adequate consideration. Even if, as plaintiff contends, the requested documentation could establish that Paul Bosco ran or controlled New Land, the information would not be relevant to establish a fraudulent transfer or that New Land's "corporate veil" should be "pierced." Therefore, we conclude that the trial court did not abuse its discretion in refusing to compel production of the requested documents. Accordingly, the trial court did not err in refusing to award plaintiff its

expenses in seeking the motion to compel production of the sought-after documents. See MCR 2.313(A)(5).

C

Finally, plaintiff argues that the trial court abused its discretion in refusing to order defendants to pay plaintiff's costs for unilaterally terminating a deposition. However, plaintiff has, once again, waived this issue by failing to support its position with relevant authority. *Goolsby*, *supra* at 655, n 1; *Isagholian, supra*, at 14; *Patterson*, *supra* at 640. Further, after reviewing the record on this matter, we are not persuaded that the trial court abused its discretion in refusing to order sanctions. See MCR 2.313(A)(5); *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 197 Mich App 482, 494; 496 NW2d 373 (1992), aff'd 445 Mich 558 (1994).

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry

[1] Solner & Solner was granted its security interest in some of Bosco & Sons' assets to pay for unpaid legal work. The bank, a prior secured creditor who had a lien on virtually all of Bosco & Sons' assets, received additional security in June, 1992, in exchange for forbearance of their collection efforts on the prior debt.

[2] MCL 566.13; MSA 26.883 defines fair consideration as follows:

> Fair consideration is given for property, or obligation;
>
> (a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or
>
> (b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.