

STATE OF MICHIGAN
COURT OF APPEALS

INTERNATIONAL FIDELITY INSURANCE
COMPANY,

UNPUBLISHED
March 13, 1998

Plaintiff-Appellant,

v

No. 198234
Oakland Circuit Court
LC No. 95-496204 CZ

RUTH RICH and MORTON NOVECK, successor
co-trustees of the SAMUEL RICH TRUST,

Defendants-Appellees,

and

QUAKERTOWN INVESTMENTS, INC. f/k/a
GLOBE AGENCY COMPANY,

Defendant-Third-Party Plaintiff,

and

GOLDFARB BONDING AGENCY,

Third-Party Defendant.

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendants' motion for summary disposition.¹ We affirm.

In 1978 and in 1981, plaintiff, at the request of Samuel Rich, president of Acorn Building Components, Inc., issued a \$100,000 and a \$200,000 workers' disability compensation bond with plaintiff acting as surety, Acorn as principal, and the Michigan Department of Labor as obligee, to be

effective from August 1978 to August 1979 and from August 1979 to August 1982, respectively. To obtain the bonds, Rich furnished plaintiff with indemnity agreements in June 1979 and November 1979, signed by Acorn and Rich, individually, as indemnitors.² Rich promised to indemnify plaintiff in the event Acorn failed to pay its obligations. Rich also provided plaintiff with a personal financial statement setting forth his assets and liabilities. The financial statement showed that Rich had net assets in excess of \$4 million, which included his Acorn stock valued in excess of \$3 million. The statement made no mention of the existence of a Samuel Rich Revocable Living Trust.

When Rich died in 1983, his Trust was funded with, among other assets, the Acorn stock, while his estate contained approximately \$5,000. In 1992, Acorn filed for bankruptcy. At that time, there were five pending disability claims outstanding against the company. Plaintiff assumed the obligation to pay the claims because Acorn was unable to do so.

Subsequently, plaintiff filed a claim seeking indemnification from Ruth Rich, individually, and Ruth Rich and Morton Noveck, as successor co-trustees of the trust. Plaintiff alleged fraud and misrepresentation on the part of defendants due to (1) Samuel Rich's misleading financial statement and (2) the transfer of his ownership of the Acorn stock to the trust because the trust was actually worth the money that Rich indicated he owned individually. The trial court granted defendants' motion for summary disposition because the trust was not liable under the indemnity agreements and because it was not required or directed to make the payments. However, the court allowed plaintiff to amend its complaint to pursue fraudulent conveyance and promissory estoppel claims which were raised for the first time at the motion hearing.

Plaintiff filed an amended complaint and alleged fraud and misrepresentation in regard to the creation of the trust and the financial statement. Plaintiff asked the court to declare a constructive trust of assets in the amount of its claim. The trial court granted defendants' motion for summary disposition, finding that while it was unfair that plaintiff had to assume the obligation, there was no showing of fraud.

Plaintiff first argues that under a theory of promissory estoppel, defendants were estopped from claiming that the absence of the trust's signature on the indemnity agreements precluded its recovery. Plaintiff was allowed to amend its complaint to address this issue below and failed to do so. Thus, the trial court did not evaluate this issue and we will not review it here. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

Plaintiff also argues that there were genuine issues of material fact regarding its claim of fraudulent concealment and silent fraud. This Court reviews the trial court's decision on a motion for summary disposition de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion. The court's task is to review the record evidence, and all reasonable inferences drawn from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.*

Plaintiff contends that pursuant to a subsection of the Uniform Fraudulent Conveyance Act (UFCA), MCL 566.131; MSA 26.921, and *In re Barnhart Estate*, 127 Mich App 381, 388; 339 NW2d 28 (1983), a creditor may contest a conveyance if the creditor is prevented from collecting his claim. While we agree that plaintiff has standing to raise a cause of action under the UFCA for fraudulent conveyance, we find that plaintiff failed to establish that the conveyance in the case at bar was fraudulent.

Plaintiff alleges that pursuant to MCL 566.12; MSA 26.882 and MCL 566.15; MSA 26.885, it does not need to establish fraudulent intent because Rich rendered himself insolvent by transferring the Acorn stock to the trust. Under the UFCA:

A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured. [MCL 566.12; MSA 26.882.]

* * *

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 during the continuance of such business or transaction without regard to his actual intent. [MCL 566.15; MSA 26.885.]

In *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659; 513 NW2d 441 (1994), we interpreted MCL 566.15; MSA 26.885 to mean that to establish a cause of action under this subsection, the defendant corporation had to be left with unreasonably small capital.

In the case at bar, we find that plaintiff has failed to come forward with sufficient factual support to raise a genuine issue of material fact that Rich fraudulently conveyed the Acorn stock. According to the shareholder meeting minutes, Rich still owned the stock after the financial statement and indemnity agreements were given to plaintiff. Plaintiff has presented no evidence to contradict this or to establish when Rich transferred the stock into the trust, whether it was done when originally created or at some later date, such as when Rich found out he was terminally ill. Moreover, since at the time of Rich's death in 1983, the company was still viable, and did not become bankrupt until some years later, plaintiff has failed to establish that the transfer of the stock rendered Acorn, as the principal, with unreasonably small capital for the purposes of paying workers' compensation claims. Thus, there was no reason to believe that the company would not continue in its existence and in its ability to pay its creditors at that time. As well, because plaintiff has failed to establish that Rich was insolvent when he transferred the assets to the trust, its reliance upon *Regan v Carrigan*, 194 Mich App 35; 486 NW2d 57 (1992), is inapplicable. Furthermore, while this Court will scrutinize transactions between a husband and a wife when creditors are involved, the burden is upon plaintiff to establish the evidence to support its claim. *Dean v Torrence*, 299 Mich 24, 35; 299 NW 793 (1941). Finally, having found that the conveyance was not fraudulent, plaintiff's argument that a constructive trust should have been imposed on the assets transferred to the trust is moot.

Plaintiff also argues that it established a cause of action for silent fraud and fraudulent concealment because it showed that Rich did not disclose that the trust existed when he completed the financial statement, he had defendant Ruth Rich's signature forged on the indemnity agreement and had it notarized by his secretary as being executed by defendant Rich. Since these actions took place while Rich and plaintiff were in negotiations regarding the bonds, plaintiff contends it has established that Rich had a specific intent to deceive or recklessly failed to disclose the existence of the trust.

To establish fraud and silent fraud claims, there must be (1) a material representation, (2) that is false, (3) that defendant made it knowing it to be false or that it was made recklessly without any knowledge of its truth and as a positive assertion, (4) with the intent that it should be acted upon by the plaintiff, (5) that it was acted upon by the plaintiff, and (6) resulted in plaintiff's injury. *Clement-Rowe v Michigan Health Care Corp*, 212 Mich App 503, 507; 538 NW2d 20 (1995). A claim of silent fraud requires that a plaintiff allege that the defendant intended to induce him to rely on its nondisclosure and that defendant had an affirmative duty to disclose. *Id.* at 508. Beyond its allegations, we find that plaintiff has failed to establish that the trust was funded with the Acorn stock when Rich signed the financial statement and indemnity agreements. Accordingly, the trial court properly granted summary disposition on behalf of defendants.

Affirmed.

/s/ David H. Sawyer

/s/ Myron H. Wahls

/s/ Maureen Pulte Reilly

¹ Goldfarb Bonding Agency, Inc., was dismissed as a third-party defendant. Quakertown Investments, Inc.'s motion for summary disposition was granted. Neither party is a party on appeal.

² The signature of defendant Ruth Rich, Samuel Rich's wife, was also on the indemnity agreements. However, her signature was deemed to be a forgery and the indemnity agreements were not enforceable against her.