

STATE OF MICHIGAN
COURT OF APPEALS

ATM PROPERTY MANAGEMENT, L.L.C.,

Plaintiff-Appellant,

v

FAOUAZ MOURAD, HUDSON'S CLEANERS,
INC., OMAR MOUHAJER, and MACY
CLEANERS, INC., d/b/a/ MACY'S CLEANERS,

Defendants-Appellees.

UNPUBLISHED
February 21, 2013

No. 307358
Wayne Circuit Court
LC No. 10-000345-CZ

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

This action arose out of plaintiff's attempts to collect judgments it had obtained against entities involved in a Dearborn dry-cleaning business and shopping center. Plaintiff purchased the shopping center and, as part of the purchase agreement, obtained guarantees from the dry-cleaning business to pay rent as a shopping center tenant for three years. The dry-cleaning business, originally known as Fairlane, defaulted on its lease, and plaintiff obtained judgments on the lease and on the underlying purchase agreement. During the same time period, defendant Hudson's Cleaners began operating the Fairlane dry-cleaning business. Defendant Mourad owned Hudson's. The dry-cleaning business defaulted on a promissory note to a bank, and the bank obtained a judgment lien against the business. Hudson's sold the dry-cleaning business to defendant Mouhajer, owner of defendant Macy's Cleaners, for \$50,000. Mouhajer was Mourad's brother-in-law and had previously worked for Hudson's.

Plaintiff sued defendants, alleging, among other things, that Mourad and Mouhajer had engaged in fraudulent misrepresentation to plaintiff, and that all defendants had violated the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.* During the course of the litigation, the trial court ruled on three summary disposition motions. The first motion was filed by defendants Mouhajer and Macy's. In the motion, these defendants argued that plaintiff's UFTA claim should fail. The trial court summarily denied summary disposition, later explaining that the motion was brought before discovery had been completed.

The second motion was filed by plaintiff, seeking summary disposition on all claims. In the motion, plaintiff presented arguments and evidence on the UFTA claim and the fraudulent misrepresentation claim. The trial court denied the motion on those claims, upon finding that factual issues remained. However, the court granted plaintiff's motion with respect to piercing Fairlane's corporate veil, upon finding that Fairlane was a shell corporation of Hudson's.

The third summary disposition motion was filed by defendants Mourad and Hudson's. The trial court granted this motion, upon finding that there was no evidence of fraud by Fairlane or Hudson's. The court found, "there was no fraudulent intent not to perform upon Defendants Mourad and Hudson's Cleaners, Inc. entering into a lease agreement with Plaintiff." The court further found there was "no fraudulent transfer of assets." Plaintiff filed a motion for reconsideration, which the trial court denied.

On appeal, plaintiff challenges the trial court's ruling on the third summary disposition motion. This Court reviews de novo the trial court's ruling on the summary disposition motion. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The Court considers the pleadings and the other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Dancey*, 288 Mich App at 7.

Plaintiff argues that the third summary disposition motion was limited to the fraudulent misrepresentation claim, and that the trial court therefore exceeded its authority by granting summary disposition in favor of all defendants on all claims. Plaintiff's argument fails, for two reasons. First, plaintiff is incorrect in its assertion that defendants' motion addressed only the fraudulent misrepresentation claim. The motion did not identify the specific claims upon which defendants were seeking summary disposition. Rather, the motion indicated that defendants were seeking summary disposition on the entire case. Although the legal argument in these defendants' summary disposition brief addressed primarily the fraudulent misrepresentation claim, the closing paragraph of their brief could be read to address the UFTA claim:

There is no record that might be developed that would indicate that Defendants could have done anything other than sell what assets they could. Moreover, there were no assets that might have satisfied J. P. Morgan Chase Bank's judgment and leave anything left over for any other creditor.

Accordingly, defendants' motion placed plaintiff on notice that defendants were seeking summary disposition on all claims.

Second, plaintiff had previously submitted its own summary disposition motion on both the UFTA claim and the fraudulent misrepresentation claim. In support of its motion, plaintiff presented legal argument and evidence on the UFTA claim. When considering successive motions for summary disposition under MCR 2.116(C)(10), a trial court is not limited to the evidence submitted on a single motion. Rather, the court may consider the entire record and may grant summary disposition for either party on the basis of the record. MCR 2.116(G)(5) ("The

affidavits, together with the pleadings, depositions, admissions, and documentary evidence *then filed in the action or submitted by the parties*, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10)” [emphasis added]; MCR 2.116(I)(2)). Accordingly, plaintiff cannot now argue that it had no opportunity to present evidence on the UFTA claim. When the trial court ruled on defendants’ motion for summary disposition, the court had authority to consider the entire record, not just the record submitted on that summary disposition motion. On the basis of the entire record, the trial court could address both the UFTA claim and the fraudulent representation claim.

Plaintiff next argues that the law of the case precluded the trial court from entering summary disposition on the UFTA claim. Specifically, plaintiff contends that the trial court had established law of the case when it ruled that factual issues precluded summary disposition on the second summary disposition motion. This contention is incorrect. The law of the case doctrine binds lower courts to rulings made by appellate courts. See *Driver v Haney (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). Under that doctrine, the trial court “may not take any action on remand that is inconsistent with the judgment of the appellate court.” *Kalamazoo v Dep’t of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). The doctrine does not apply to trial court decisions. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 560; 692 NW2d 58 (2004). Accordingly, the trial court was not bound by its prior denial of plaintiff’s motion for summary disposition.

Lastly, plaintiff argues that the trial court misapplied the UFTA by concluding that a UFTA claim requires proof of fraudulent intent. We disagree. The trial court’s order did not state that the lack of fraudulent intent precluded the UFTA claim. Rather, the court stated that it found no fraudulent transfer of assets. The record supports the trial court’s conclusion.

The UFTA prevents debtors from fraudulently transferring assets as a means of avoiding payments to creditors. MCL 566.31 *et seq.* If a plaintiff-creditor establishes that a defendant-debtor has engaged in a prohibited transfer under the UFTA, a court may void the transfer. MCL 566.37(1)(a). In the alternative, a court may enter a money judgment against the first transferee in favor of the plaintiff for the value of the transferred asset. MCL 566.38(2)(a). Prohibited transfers are described in MCL 566.34, as follows:

- (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
 - (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
 - (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
 - (i) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

(ii) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

According to MCL 566.34, a plaintiff-creditor seeking to establish a violation of the UFTA must prove either that the defendant had “actual intent to hinder, delay, or defraud” the plaintiff, or that the defendant engaged in a transfer without receiving a “reasonably equivalent value in exchange.”

The statute lists factors for the courts to consider in determining whether the defendant had intent to hinder, delay, or defraud creditors. MCL 566.34(2). These factors, known as “badges of fraud,” include:

- (a) The transfer or obligation was to an insider.
- (b) The debtor retained possession or control of the property transferred after the transfer.
- (c) The transfer or obligation was disclosed or concealed.
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (e) The transfer was of substantially all of the debtor's assets.
- (f) The debtor absconded.
- (g) The debtor removed or concealed assets.
- (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
- (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. [MCL 566.34(2); see also *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659-660; 513 NW2d 441 (1994).]

The plaintiff must establish fraud by clear and convincing evidence. *Szkrybalo v Szkrybalo*, unpublished opinion per curiam of the Court of Appeals, issued September 21, 2006 (Docket No. 269125), unpub op at 2, reversed in part on other grounds 477 Mich 1086; 729 NW2d 233 (2007); see generally *Foodland Distrib v Al-Naimi*, 220 Mich App 453, 457; 559 NW2d 379 (1996).

In plaintiff's motion for summary disposition, plaintiff argued that the transfer of Hudson's to Macy's was made with intent to defraud under MCL 566.34(1)(a), and that the "badges of fraud" existed in this case. Plaintiff specifically referenced and provided depositions from Mourad and Mouhajer, checking account ledgers, the purchase agreement, the articles of incorporation, invoices, and tax records. In addition, plaintiff argued that the transfer was not for reasonably equivalent value under MCL 566.34(1)(b) and referenced the same evidence in support.

Thus, at the time the trial court considered defendants Mourad and Hudson's summary disposition motion, the court had considerable documentary evidence upon which to assess plaintiff's claim. Defendants' motion provided unrefuted evidence that the bank had taken all of Hudson's financed equipment. Although there were previous references in the record to equipment remaining in Macy's possession, the subsequent affidavits make clear that those references were to equipment that was not subject to the bank lien. Moreover, the interrogatory responses and affidavits of Mourad and Mouhajer established that the dry-cleaning business had operated at a loss for a considerable time period. Further, Mouhajer attested that he originally sought to buy Hudson's real estate and its business for 1.5 million dollars, but that he was unable to obtain financing for the purchase. As a consequence, Mouhajer renegotiated a purchase for \$50,000, which included \$10,000 for inventory, \$25,000 for goodwill, and \$15,000 for furniture, phones, computers, and the customer list.

Plaintiff provided nothing to controvert this evidence on summary disposition. Although plaintiff provided an expert valuation of the Hudson's property in its motion for reconsideration, that valuation did not establish actual intent to defraud, or lack of reasonable value by clear and convincing evidence. As a result, the trial court properly granted summary disposition in favor of defendants on the UFTA claim and the fraudulent misrepresentation claim.

Affirmed.

/s/ Michael J. Riordan
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell