IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 30, 2014 Session

NORANDA ALUMINUM, INC. v. GOLDEN ALUMINUM EXTRUSION, LLC, ET AL.

Appeal from the Chancery Court for Williamson County
No. 34970 Robbie T. Beal, Judge

No. M2013-02274-COA-R3-CV - Filed September 26, 2014

The issue in this appeal is whether the trial court properly held that companies A and B could not be held liable for the allegedly fraudulent sale of equipment by company C because the equipment at issue was fully encumbered by a lien at the time of the sale and, therefore, did not qualify as an asset under the Uniform Fraudulent Transfer Act. We affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

J. Randolph Bibb, Jr. and Ryan N. Clark, Nashville, Tennessee, for the appellant, Noranda Aluminum, Inc.

William W. Jacobs and Thomas M. Ritzert, pro hac vice, Cleveland, Ohio, for the appellant, Noranda Aluminum, Inc.

E. Todd Presnell and Edmund S. Sauer, Nashville, Tennessee for the appellees, Golden Aluminum Extrusion, LLC, et al.

Jonathan M. Cyrluk, pro hac vice, Chicago, Illinois, for the appellees, Golden Aluminum Extrusion, LLC, et al.

OPINION

FACTUAL AND PROCEDURAL HISTORY

Golden Aluminum, Inc. ("Aluminum") is a corporation engaged in the business of manufacturing aluminum products, primarily for the packaging industry. Golden Metals, Inc. ("Metals") is a holding company that owns Aluminum. In 2007, the chief executive officer ("CEO") of Metals wished to purchase three struggling Alcoa-affiliated aluminum extrusion facilities in Warren, Ohio, Plant City, Florida, and Tipton, Georgia. Metals formed Golden Aluminum Extrusion, LLC ("Extrusion"), a limited liability corporation, to acquire the Alcoa facilities. Wells Fargo helped finance this transaction, which closed in October 2007. All of Extrusion's assets, including all of its equipment, secured its debt to Wells Fargo. Wells Fargo also capitalized Extrusion through a line of credit.

From approximately December 2007 through April 2008, Noranda Aluminum, Inc. ("Noranda") supplied aluminum billets to Extrusion's plant in Warren, Ohio. On April 3, 2008, Extrusion shut down its Warren plant and, around the same time, stopped paying Noranda.

As a result of the closure of the Warren plant, Extrusion and Wells Fargo (with its security interest in all of Extrusion's assets) had to decide what to do with Extrusion's assets. Because Extrusion wanted to be able to accept an offer to sell the real estate, which required it to remove all of the equipment or suffer a total loss, it sold the equipment from the Warren plant (hereinafter "the Warren equipment") for $819,000. The equipment was sold to Press Warehousing, Inc., a company consisting largely of Extrusion investors, on June 4, 2008. On June 19, 2008, Wells Fargo filed an amended Uniform Commercial Code ("UCC") financing statement removing its lien on the equipment. On July 16, 2008, Press Warehousing sold the equipment for two million dollars.

In August 2008, Noranda sued Extrusion, Aluminum, and Metals. Noranda alleged that Extrusion had breached its contract by failing to pay the amounts owed under its purchase agreements with Noranda. Noranda further alleged that Extrusion was guilty of conversion, unjust enrichment, and breach of the duty of good faith and fair dealing. As to Aluminum and Metals, Noranda asserted that they were parent or sister companies of Extrusion, exercised dominion and control over Extrusion, had ignored the corporate formalities and had treated Extrusion as if it had no separate legal existence. Furthermore, Noranda stated, Aluminum and Metals had interfered with Extrusion's contractual and other legal obligations. As a result of the actions of Aluminum and Metals, Noranda asserted that it had been damaged in the amount of $1,328,160.86 (the amount owed under the contract). Noranda also requested punitive damages against Aluminum and Metals.

In November 2008, a default judgment was entered against Extrusion and, in December 2008, the court entered judgment in the total amount of damages sought ($1,398,295.97) against Extrusion.

Noranda filed a motion for summary judgment on July 7, 2011. Metals and Aluminum (collectively referred to as "the defendants") filed a cross-motion for summary judgment on August 19, 2011. Both parties filed statements of undisputed material facts and voluminous supporting documents. On February 20, 2013, the defendants filed a renewed motion for summary judgment. On March 28, 2013, Noranda filed a cross-motion for summary judgment and opposition to the defendants' renewed motion for summary judgment.

The competing motions for summary judgment were heard on June 24, 2013. Noranda asserted that it was entitled to a judgment against the defendants under a theory of alter ego liability based upon three elements: (1) that the defendants controlled Extrusion, Noranda's debtor, (2) that the defendants exercised that control to violate the Uniform Fraudulent Transfer Act ("UFTA") in transferring Extrusion's assets to insiders for less than reasonably equivalent value, and (3) that the transfer proximately caused Noranda's damages because it rendered Extrusion insolvent. The defendants made several counter-arguments, including that Noranda could not establish alter ego liability because the Warren equipment was encumbered by Wells Fargo's lien and, therefore, did not qualify as an asset under the UFTA. The court determined that it should not pierce the corporate veil of Extrusion and impose alter ego liability upon the defendants for Extrusion's debt to Noranda. In particular, the court held that "the undisputed facts mandate a finding that Noranda cannot satisfy the second element of the alter ego test."[1] Thus, the court granted summary judgment in favor of the defendants.

The issue on appeal is whether the trial court correctly granted summary judgment in favor of the defendants. Specifically, the focus of this appeal is whether Aluminum and Metals may be held liable for an alleged fraudulent transfer by Extrusion. Noranda argues that Wells Fargo consented to the sale of the Warren equipment and that this consent operated as a release of its lien, thereby qualifying the equipment as an asset under the Uniform Fraudulent Transfer Act. The defendants assert that Wells Fargo's lien encumbered the Warren equipment at the time of its sale to Press Warehousing. Consequently, the defendants argue, the equipment was not an asset under the Act and its sale could not be fraudulent; the lack of fraud would render it impossible to satisfy the alter ego test.

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[1]The second element of the alter ego test is whether the defendants used their control to commit a fraud or wrong. *Iridex Corp. v. Synergetics USA, Inc.*, 474 F. Supp. 2d 1105, 1109 (E.D. Mo. 2007).

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn. 1993). If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Id.*; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998). To shift the burden of production to the nonmoving party who bears the burden of proof at trial, the moving party must negate an element of the opposing party's claim or "show that the nonmoving party cannot prove an essential element of the claim at trial." *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008).

ANALYSIS

According to the agreement governing the relationship between Noranda and Extrusion, disputes were to be resolved applying Missouri law. We will, therefore, apply Missouri law to the key issue here: whether Aluminum and Metals should be responsible for Extrusion's debt to Noranda pursuant to principals of alter ego liability.[2]

Under Missouri law, as under Tennessee law, "there is a presumption of corporate separateness, and courts do not lightly disregard the corporate form to hold a parent company liable for the torts of a subsidiary." *Iridex Corp. v. Synergetics USA, Inc.*, 474 F. Supp. 2d. 1105, 1109 (E.D. Mo. 2007). In order to justify piercing the corporate veil, a plaintiff must prove the following three elements of alter ego liability:

> (1) Control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and
> (2) Such control must have been used by the defendant to commit fraud or

[2]Tennessee will honor a contractual choice of law provision if the chosen state bears a reasonable relationship to the transaction and there is no violation of the forum state's public policy. *Wright v. Rains*, 106 S.W.3d 678, 681 (Tenn. Ct. App. 2003); *Bright v. Spaghetti Warehouse, Inc.*, No. 03A01-9708-CV-00377, 1998 WL 205757, at *5 (Tenn. Ct. App. Apr. 29, 1998).

> wrong, to perpetrate the violation of a statutory or other positive legal duty, or dishonest and unjust act in contravention of plaintiff's legal rights; and
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. (quoting *Radaszewski by Radaszewski v. Telecom Corp.*, 981 F.2d 305, 306 (8th Cir. 1992)).

The point of contention in this case is the second element of alter ego liability. Noranda argues that Extrusion engineered a fraudulent transfer of equipment to Press Warehousing for less than reasonably equivalent value. The parties agree that the Uniform Fraudulent Transfer Act ("UFTA") determines whether the equipment transfer was a fraudulent transfer sufficient to satisfy the second element of alter ego liability.[3] The UFTA contemplates both actual and constructive fraudulent transfers, but Noranda attempts in this case to prove a constructive fraudulent transfer, which requires that the debtor did not receive reasonably equivalent value for the transfer and that the debtor was insolvent at the time of the transfer or became insolvent as a result of it. Mo. Rev. Stat. § 428.029; Ohio Rev. Code Ann. § 1336.05.

The UFTA applies only to transfers of assets. Mo. Rev. Stat. §§ 428.009(12), 428.024; Ohio Rev. Code Ann. §§ 1336.01(L), 1336.05. Under the UFTA, an "asset" is defined as "property of a debtor"; the term does not include "[p]roperty to the extent that it is encumbered by a valid lien." Mo. Rev. Stat. § 428.009(2)(a); Ohio Rev. Code Ann. § 1336.01(B)(1). Thus, fully encumbered property does not qualify as an asset under this definition. *See Baker & Sons Equip. Co. v. GSO Equip. Leasing, Inc.*, 622 N.E.2d 1113, 1119 (Ohio Ct. App. 1993). The rationale behind this limitation is that, if an unsecured creditor could not attach an asset, then the asset cannot be fraudulently transferred. *See* Tenn. Code Ann. § 66-3-302, Uniform Law cmt. 2.

In this case, Wells Fargo had a lien against the Warren equipment to secure an indebtedness far in excess of two million dollars (the price obtained by Press Warehousing when it sold the equipment). To avoid this problem, Noranda argues that Wells Fargo consented to the sale of the equipment to Press Warehousing, thereby releasing the lien on

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[3]Noranda cites to Missouri law in its argument concerning the UFTA; the defendants cite to Ohio law, as well as to Missouri law, on the ground that Missouri law applies the "most significant relationship" test from the Restatement (Second) of Conflict of Laws to contract and tort claims. *See Dorman v. Emerson Elec. Co.*, 23 F.3d 1354, 1358 (8th Cir. 1994). Both Missouri and Ohio have adopted the UFTA, which is intended to make the law uniform among enacting states. *See* Mo. Rev. Stat. Ann. §§ 428.005–428.059; Ohio Rev. Stat. Ann. §§ 1336.01–1336.11. In all respects pertinent to the matter before us, the Missouri, Ohio, and Tennessee laws are the same.

the property in order to allow the sale to take place. Noranda references section 9-315(a)(1) of Missouri's UCC, which provides: "A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof *unless the secured party authorized in writing the disposition free of the security interest or agricultural lien* . . . ." Mo. Rev. Stat. § 400.9-315(a)(11); Ohio Rev. Code Ann. § 1309.315(A)(1)[4] (emphasis added). The issue, therefore, becomes whether Wells Fargo released its lien prior to the sale of the Warren equipment.

Noranda's evidence: release of lien

In arguing that Wells Fargo released its lien, Noranda points to testimony given by Douglas Wall, a business development officer for Wells Fargo. Mr. Wall worked with both Aluminum and Metals in financing projects. Then, in 2007, Mr. Wall was involved in the loans to Extrusion that permitted it to purchase the three Alcoa facilities. When questioned about the sale of the Warren equipment to Press Warehousing in 2008 for $819,000, Mr. Wall testified:

> A. . . . [Extrusion] would not have been able to sell it [the real property], what I meant was we would not have released our lien which essentially they couldn't have sold it and the same thing goes for the equipment, we would not have released our lien so they wouldn't have gotten free and clear title.
>
> Q. You hadn't—you had to agree in advance to release your lien on the [real] estate in order for that deal to go forward, correct?
>
> A. Correct.
>
> Q. And you had to agree in advance to release your lien on the equipment in order for that to go forward?
>
> A. Correct.
>
> Q. Because you understood that in both cases the buyer of the real estate and the buyer of the equipment wanted title free and clear of any liens and encumbrances, correct?
>
> A. Correct, that's usually the way they do it, yes.

[4]Ohio statute does not include the phrase "in writing."

. . .

Q. Okay. But you did let Leland Lorentzen [CEO of Metals and investor in Extrusion] know that an $800,000.00 price for machinery and equipment at Warren would be approved by Wells Fargo before that deal closed?

A. Yes, I think there was another email we saw where it was 800 and 800 or something [to] that effect if I'm correct.

. . .

Q. This is an email from Leland Lorentzen to you dated May 6th, 2008?

A. Yes.

Q. And Mr. Lorentzen is asking you whether he brings new equity in to purchase for cash all of the Warren equipment for $800,000.00, right?

A. Correct.

. . .

Q. Okay. And he's asking that Wells Fargo approve clearing all of its claims for anything in Warren, do you see that language?

A. Yes.

Q. Did you understand that to mean that you would release your liens on the real estate, and on the machinery and equipment?

A. Yes.

. . .

Q. Was it sufficient for your business purposes to tell him orally, we'll approve that?

A. I wouldn't have told him that until I at least ran it up the flag pole and got a verbal approval of it and, yes, and I would say, yes.

Q. And once you did that from your own supervisors—

A. Yes.

Q. —communicating that back to Mr. Lorenzten would have been sufficient for your business purposes to say those transactions can go forward and we'll release our liens?

A. Yes.

Defendants' evidence: timing of release

While acknowledging that Wells Fargo released its lien against the equipment, the defendants focus on the timing of the release of the lien. They cite the following UCC provision, which requires formal amendment or cancellation of a UCC financing statement to release a lien:

> A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition.

Mo. Rev. Stat. § 400.9-507(a); Ohio Rev. Code Ann. § 1309.507(A). In this case, it is undisputed that Wells Fargo did not file its amended UCC financing statement releasing its lien against the Warren equipment until June 19, 2008, well after the June 4, 2008 sale.

As for the testimony cited by Noranda, the following testimony by Mr. Wall cited by the defendants offers some clarification:

Q. Now the — Mr. Jacobs asked you questions that seemed to indicate that prior to the date of the sale to Press Warehousing, the June 4th, 2008, that Wells Fargo had released [its] lien on the equipment, do you recall those questions?

. . .

A. Not specifically but I don't think the release was prior to the sale of the equipment to Press Warehousing, I would say it would be pretty much concurrent with.

Q. Thank you. Now anywhere in any of the emails when you — any of the

communications — well, let me ask you this. If Press Warehousing hadn't come up with the $800,000.00 on June 4th, if they had changed their mind on June 3rd, was it your understanding that Wells Fargo still would have had a lien in the full amount of its loan on the equipment?

[Objection by Noranda]

A. Yes, we would have.

Q. And is it your understanding that until that money, that $800,000.00 hit Wells Fargo's bank account that Wells Fargo still had a lien on that equipment?

[Objection by Noranda]

A. Yes.

Q. Okay. I mean in your experience with Wells Fargo, are they in the habit of releasing a lien prior to getting money?

[Objection by Noranda]

A. No, not intentionally.

Q. Would that be bad business practice?

A. Yeah, I think it would be career threatening.

Q. So did you do anything to release the lien on the Press Warehousing equipment, that equipment that was sold to Press Warehousing, prior to June 4th, 2008?

[Objection by Noranda]

A. I don't recall doing anything to release the lien prior to receiving funds in hand.

Looking at all of Mr. Wall's testimony, we must conclude, as did the trial court, that Wells Fargo's lien was not released prior to the equipment sale and, therefore, there was no asset for fraudulent transfer purposes. *See* Mo. Rev. Stat. § 428.009(2)(a); Ohio Rev. Code Ann.

§ 1336.01(B)(1).

We will briefly address another argument asserted by Noranda on appeal: that the trial court's ruling that the equipment was not an asset is "entirely at odds with the purpose underlying the definition of 'asset' with respect to a lien or other encumbrance under the UFTA." According to Noranda, the purpose of UFTA's definition of "asset" is to "ensure that collateral is not factored into the calculation of insolvency, not to exclude assets which would otherwise be reachable by a plaintiff, secured or otherwise, from an action" under the UFTA. In support of this argument, Noranda cites dicta in an unreported federal district court case in which the court granted a preliminary injunction, *BancorpSouth Bank v. Hall*, No. 6:10-CV-03390-DGK, 2011 WL 529971, at *4 (W.D. Mo. Feb. 7, 2011). We fail to find support in *BancorpSouth* for the proposition stated by Noranda—namely, that "[a]lthough the Act defines 'assets' to exclude collateral, Mo. Rev. Stat. § 428.009(2) (2009), this exclusion is for purposes of calculating whether a given debtor is insolvent, not to exclude secured claims from the Act's protection." There is nothing in the UFTA that limits the statutory definition in this way. Moreover, cases directly addressing the issue have held that property encumbered by a lien is excluded from the UFTA's definition of an asset to the extent of the encumbrance. *See In re Dayton Title Agency, Inc.*, 724 F.3d 675, 679, 682 (6th Cir. 2013); *Dietter v. Dietter*, 737 A.2d 926, 935 (Conn. Ct. App. 1999); *Baker & Sons*, 622 N.E.2d at 1118-19; *Kellstrom Bros. Painting v. Carriage Works, Inc.*844 P.2d 221, 222 (Or. Ct. App. 1992); *Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp.*, 959 P.2d 1052, 1060 (Wash. 1998).

All we need decide for purposes of the present case is whether the Warren equipment qualified as an asset under the UFTA. Based upon all of this undisputed evidence, we agree with the trial court's conclusion that, "as a matter of law . . . , at the time of Extrusion's sale to Press Warehousing, the equipment was 'encumbered by a valid lien,' and therefore not an 'asset' for fraudulent transfer purposes."

CONCLUSION

The judgment of the trial court is affirmed in all respects. Costs of this appeal are assessed against the appellant, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE