

STATE OF MICHIGAN
COURT OF APPEALS

AMIR AL-NAIMI and SANDRA AL-NAIMI,

Plaintiffs/Counter-Defendants-
Appellees,

v

FOODLAND DISTRIBUTORS, INC.,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellant,

and

NABBY YONO, FARIS NAIMI, ALAA NAIMI,
ADNAN NAIMI, NADIA, INC., and AL-NAIMI
ENTERPRISES,

Third-Part Defendants-Appellees,

and

RICHARD OTTO,

Third-Party Defendant.

UNPUBLISHED

June 2, 2009

No. 285375

Oakland Circuit Court

LC No. 2007-083746-CH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant Foodland Distributors, Inc., appeals as of right from a circuit court order granting plaintiffs' and the third-party defendants' motions for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Amir Al-Naimi, the de facto owner and operator of a grocery business, obtained goods from Foodland on credit for which he could not pay. Foodland sued, seeking in part to hold plaintiffs individually liable for the business debt. This Court previously determined that there was sufficient evidence of fraud to justify piercing the corporate veil and remanded for

entry of judgment in Foodland's favor. *Foodland Distributors v Al-Naimi*, 220 Mich App 453; 559 NW2d 379 (1996). A judgment was entered in May 1997.

In January 1993, June 1997, and March 1998, plaintiffs issued to the third-party defendants numerous mortgages against their property as security for notes given in exchange for loans of large sums of money. Foodland filed judgment liens against the property in 2006 and 2007. Foodland concedes that its liens are subordinate to the mortgages issued to the third-party defendants, but contends that plaintiffs issued those mortgages with the intent to "hinder, delay, or defraud" it, and therefore sought to have them declared void. The trial court granted summary disposition in favor of plaintiffs and the third-party defendants, finding that Foodland failed to demonstrate a genuine issue of fact on its fraudulent conveyance claim.

We review the trial court's ruling on a motion for summary disposition de novo. *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 344; 745 NW2d 137 (2007). "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). "In reviewing a motion under MCR.2116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West, supra* at 183.

The crux of Foodland's appeal is that the trial court erred in granting the motions because the deposition testimony of various witnesses was sufficient to raise an issue of fact. Although not expressly stated by Foodland, it appears that Foodland takes issue with the dismissal of its claim to set aside the mortgages as fraudulent conveyances.¹

Under the former Uniform Fraudulent Conveyance Act, a conveyance made with actual intent to hinder, delay, or defraud present or future creditors was fraudulent as to both. MCL 566.17. That act was repealed in 1998 and replaced by the Uniform Fraudulent Transfer Act, which similarly provides that a transfer made by a debtor is fraudulent to a creditor, whether the creditor's claim arose before or after the transfer was made, if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." MCL 566.34(1)(a). "Fraud must be established by clear and convincing evidence and must never be presumed." *Foodland Distributors, supra* at 458. The fraudulent intent that must be proved is that of the transferor, not the transferee. *In re Auto Specialties Mfg Co*, 153 BR 457, 500 (WD Mich, 1993); *In re Otis & Edwards, PC*, 115 BR 900, 913 (ED Mich, 1990). The transferor's actual intent may be inferred from certain "badges of fraud." *Coleman-Nichols v Tixon Corp*, 203

¹ Foodland's counterclaim was titled in the alternative as one to quiet title. However, to obtain a judgment quieting title, the claimant "must establish title in himself," *Wilhelm v Herron*, 211 Mich 339, 345; 178 NW 769 (1920), and Foodland did not allege in its counterclaim and does not assert on appeal that it holds or should be determined to hold title to plaintiffs' property.

Mich App 645, 659; 513 NW2d 441 (1994). Frequently recognized “badges of fraud” may 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. Various badges of fraud are specifically enumerated in the statute, although the list is not exclusive. MCL 566.34(2). “These badges are not conclusive evidence [of fraud] but may be stronger or weaker depending upon their nature and number occurring in the same case.” *Coleman-Nichols, supra* at 659-660.

Foodland does not explain how the evidence it offered in opposition to the motions related to any recognized badges of fraud such that it created a genuine issue of fact whether plaintiffs granted the mortgages with an intent to hinder, delay, or defraud its collection of its judgment. Foodland argues that the trial court’s ruling should be reversed because the court concluded that there was an arguable question of fact whether the mortgages issued to Adnan Naimi were fraudulent transfers. However, those mortgages were only a small part of the encumbrances on the property. The bank mortgage and the other third-party defendants’ mortgages exceeded \$1.37 million in face value alone (\$2.37 million with interest) and Foodland has not shown that the property has any value in excess of those mortgages such that there would be anything left with which to satisfy its judgment liens even if it were to prevail on its claim to set aside the mortgages issued to Adnan Naimi. Accordingly, the trial court did not err in granting plaintiffs’ and the third-party defendants’ motions for summary disposition.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

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SHAPIRO, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that summary disposition was appropriate in this case.

"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), reh den 469 Mich 1224 (2003). Here, the trial court's opinion concedes an issue of fact related to at least one of the mortgages:

Other than the credibility argument, the only evidence that could potentially create a factual dispute regarding the legitimacy of the mortgages is the fact that Adnan Al-Naimi sued his brother Amir Al-Naimi in 2003 for money damages regarding rental property. This litigation is inconsistent with Adnan Al-Naimi's claim that he holds a legitimate mortgage on Plaintiffs' home or that Plaintiffs owe him \$200,000. Although this evidence arguably give rise [to] issues of fact regarding Foodland's fraudulent conveyance claim as the mortgage grated to Adnan Al-Naimi, Foodland provide[s] no evidence demonstrating a factual dispute regarding the legimacy [sic] of any other the other loans

Foodland's failure to provide evidence related to the other loans cannot support a grant of summary disposition as to a claim against a mortgage where such a factual dispute clearly exists.

Additionally, I disagree with the trial court's conclusion that there is no factual dispute as to the other loans. To the contrary, I conclude that there is a question of fact whether the challenged mortgages were entered into by plaintiff for purposes of avoiding collection on the judgment. First, the relevant mortgages are all to family members and friends rather than to a financial institution. Second, plaintiff has not made any installment payments on any of these mortgages, raising the question whether they are real loans at all, or simply paper loans to create encumbrances. Third, the documentation of these transactions all took place during the original lawsuit between the parties that gave rise to the judgment. These are all "badges of fraud" as set forth in MCL 566.34 and *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659-660; 513 NW2d 441 (1994). This evidence is sufficient to create a question of fact as to whether these were fraudulent transactions. In addition, evaluation of the witnesses through trial testimony is the best way for the trier of fact to determine credibility. Thus, I conclude that the trial court erred in granting summary disposition.

Finally, I note the majority's assertion that summary disposition is appropriate because "Foodland has not shown that the property has any value in excess of those mortgages such that there would be anything left with which to satisfy its judgment liens even if it were to prevail on its claim to set aside the mortgages issued to Adnan Naimi" is irrelevant. Whether Foodland is ultimately able to collect its judgment remains to be seen. The only question before us is where they stand in relation to other alleged creditors.

Accordingly, I would reverse and remand for trial.

/s/ Douglas B. Shapiro