STATE OF MICHIGAN

COURT OF APPEALS

LOCHINVAR CORPORATION, Plaintiff-Appellant,	UNPUBLISHED June 19, 2012
v	No. 304706 Oakland Circuit Court LC No. 2011-116797-CZ
KENNETH LEE ROSEN, ROBERT ROSEN, LAWRENCE ROSEN, and ROBERT & JOAN ROSEN PROPERTIES, L.L.C., Defendant-Appellees.	

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

In this suit to recover assets that were alleged to have been fraudulently transferred, plaintiff Lochinvar Corporation appeals by right the trial court's order granting summary disposition in favor of defendants Kenneth Lee Rosen, Robert Rosen, Lawrence Rosen, and Robert & Joan Rosen Properties, LLC (Rosen Properties). For the reasons explained below, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

Lochinvar manufactures water heaters, boilers, and related products. Kenneth Rosen, Robert Rosen, and Lawrence Rosen owned FSC Operations, Inc. Robert Rosen also served as a managing partner for Rosen Properties. FSC Operations purchased products from Lochinvar on credit for installation or resale and leased real property for its business from Rosen Properties.

In June 2008, FSC Operations notified its creditors that it would soon complete the sale of its assets to Williams Distributing Company. Lochinvar was advised that, after completion of the sale, FSC Operations would discontinue business and begin "winding up its affairs, including addressing its accounts payable." FSC Operations paid approximately forty vendors, to whom it owed less than $1,000 each, in full. It offered the remaining vendors between twenty to thirty cents on the dollar, which most accepted.

Lochinvar refused to compromise with FSC Operations. In July 2008, Lochinvar sued FSC Operations for nonpayment on an open account. Lochinvar later amended its complaint to add a count demanding recovery from Kenneth Rosen for allegedly making improper distributions to FSC Operation's shareholders. Kenneth Rosen settled with Lochinvar and the

trial court dismissed the claim against him with prejudice. In September 2009, the trial court entered judgment against FSC Operations for $65,230.05.

Lochinvar was unable to recover from FSC Operations and in February 2008 it sued defendants under Michigan's uniform fraudulent transfers act. See MCL 566.31 *et seq*. Lochinvar alleged that FSC Operations fraudulently transferred four rebate checks that it received between 2006 and 2008, which were endorsed to Lawrence Rosen, Kenneth Rosen, and Rosen Properties, fraudulently paid excessive compensation to defendants, and fraudulently refunded prepaid rents to Rosen Properties.

Defendants did not answer the complaint but instead moved for summary disposition, which the trial court granted. Regarding the claim that FSC Operations fraudulently paid defendants excessive compensation, the trial court concluded that summary disposition was appropriate because Lochinvar failed to present any evidence to support that claim. The trial court also concluded that the fraudulent transfers act did not apply to the refund of prepaid rents to Rosen Properties because the refund was not paid by FSC Operations; it was paid by Williams Distributing. The trial court determined that two of the rebate checks at issue were endorsed to Kenneth Rosen, whom Lochinvar stipulated to dismiss from the action. Of the two remaining checks, the first was for $18,932.07 and was endorsed to Lawrence Rosen in 2006. The trial court explained that the transfer could not have been fraudulent because it was made over two years before the underlying debt was incurred, and, as a result, Lochinvar could not show that the intent of the transfer was to hinder, delay, or defraud. The second check was for $12,500 and was endorsed to Rosen Properties in 2008. Because that was the only remaining transfer at issue and the amount of the dispute was less than $25,000, the trial court concluded that it lacked subject matter jurisdiction over the claim. For these reasons, the trial court granted defendants' motion for summary disposition.

This appeal followed.

II. THE REBATE CHECKS

A. STANDARD OF REVIEW

Lochinvar argues that the trial court erred when it granted defendants' motion for summary disposition with regard to its claims to the rebate checks. Defendants moved for summary disposition under both MCR 2.116(C)(8) and (10), but the trial court did not specify under which subrule it decided the matter. However, the trial court considered material beyond the pleadings; accordingly, we shall analyze the issue under MCR 2.116(C)(10). See *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). We review de novo a trial court's decision to grant summary disposition under MCR 2.116(C)(10). *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2010). We also review de novo whether the trial court had subject matter jurisdiction. *In re Lager Estate*, 286 Mich App 158, 162; 779 NW2d 310 (2009).

B. ANALYSIS

Lochinvar first argues that the trial court erred when it determined that the check transfer in 2006 could not be fraudulent because it occurred more than two years before FSC Operations incurred the debt to Lochinvar. Under the fraudulent transfer act, a transfer can be fraudulent as to a creditor even when the claim arose after the transfer:

> (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 or 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. [MCL 566.34(1) (emphasis added).]

Consequently, the trial court erred to the extent it concluded that the 2006 transfer to Lawrence Rosen could not have been fraudulent because it was made before FSC Operations became indebted to Lochinvar.

Defendants concede that MCL 566.34(1) applies to transfers made by a debtor regardless of when a creditor's claim arose, but argue that FSC Operations received equivalent value in exchange for the transfer; specifically, defendants contend that FSC Operations was indebted to Lawrence Rosen and the transfer reduced its debt. In an affidavit submitted in support of defendants' motion, Lawrence Rosen averred that, as of March 6, 2006, FSC Operations was indebted to him in an amount in excess of the amount of the check in question. See MCL 566.33(1). We note, however, that the affidavit did not comply with the court rules because the affiant did not state that, if sworn as a witness, he could testify competently to the stated facts. See MCR 2.119(B)(1)(c).

Further, the affidavit relates more directly to Lochinvar's claim under MCL 566.34(1)(b). But Lochinvar asserted claims under MCL 566.34(1)(a) and MCL 566.34(1)(b). The former provides that a transfer is fraudulent as to a creditor if it was made "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." MCL 566.34(1)(a). Summary disposition is rarely appropriate in cases involving questions of intent. *In re Handelsman*, 266 Mich App 433, 438; 702 NW2d 641 (2005). In determining whether the debtor had the actual intent under MCL 566.34(1)(a), among other factors, a court may consider that:

(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).]

Lawrence Rosen averred that FSC Operations owed him more than $18,000, which supports defendants' argument that FSC Operations received a reasonably equivalent transfer in value. However, there is also evidence that the transfer was to an insider. "Insider" includes "[a] relative of a general partner, director, officer, or person in control of the debtor." MCL 566.31(g)(*ii*)(F). It is undisputed that Lawrence Rosen is the brother of Kenneth Rosen, who was FSC Operations' president at all relevant times. Thus, even if the affidavit were considered evidence capable of supporting the conclusion that FSC Operations received value for the transfer, there is also evidence that could support a finding that the transfer was to an insider and, accordingly, evidence that the transfer might have been done with the intent to defraud.

There was evidence too that FSC Operations was insolvent at the time of the transfer. Under MCL 566.32, a debtor is "insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation", however, if the debtor "is generally not paying his or her debts as they become due" the debtor "is presumed to be insolvent." Lochinvar submitted portions of FSC Operation's tax returns, which showed that it incurred losses of $712,586 and $1,549,847 during the 2006 and 2007 tax years. Further, it is uncontested that in 2008 FSC Operations was not paying its debts in full and that after the asset sale, FSC Operations offered its unsecured creditors between twenty and thirty cents on the dollar.

Although this is not dispositive evidence that FSC Operations was insolvent at the time of the 2006 transfer, the evidence tended to suggest that FSC Operations' assets were surpassed by its debts and that it had had trouble meeting its obligations. Moreover, the parties had not been able to conduct discovery prior to defendants' motion. Generally, summary disposition is premature if granted before discovery on a disputed issue is complete. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). More importantly, however, as the party moving for summary disposition, defendants had the burden of identifying all the matters that had no disputed issues of fact, and supporting their position by affidavits, depositions, admissions, or other documentary evidence. *Barnard Mfg*, 285 Mich App at 369-370. "If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion." *Id.* Although defendants argued that FSC Operations was solvent in 2006, defendants provided no evidence to support that argument, but instead merely asserted that Lochinvar had not proven otherwise. Defendants could not satisfy their burden of production by stating that they believed Lochinvar would be unable to establish a question of fact as to solvency. *Id.*

The evidence that FSC Operations later sold its assets for millions of dollars also did not establish that FSC Operations was solvent; indeed, that evidence establishes the contrary proposition. Although Williams Distributing purchased FSC Operations' assets, it did not generally assume FSC Operations' liabilities. And, after the sale of its assets, FSC Operations was still unable to pay its creditors in full, which indicates that its liabilities exceeded its assets at least at the time of the sale.

Lochinvar also argued that the transfer of the 2008 rebate check to Rosen Properties was fraudulent under MCL 566.35. The trial court never addressed that issue, however, but instead accepted defendants' argument that it lacked jurisdiction on the ground that, because the transfer of the 2006 rebate check was not fraudulent as a matter of law, the amount in controversy was now less than $25,000. See MCL 600.8301(1). Because the trial court erred with regard to the transfer of the 2006 rebate check, its jurisdictional analysis is inapposite.

Our inquiry, however, does not end there. In their motion for summary disposition, defendants argued, as an alternative ground for summary disposition, that Lochinvar's claim under MCL 566.35 was untimely. MCL 566.39 provides:

> A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:
>
> (a) Sections 4(1)(a) and (b) and 5(1), within the time period specified in sections 5813 and 5855 of the revised judicature act of 1961, 1961 PA 236, MCL 600.5813 and 600.5855.
>
> (b) Section 5(2), within 1 year after the transfer was made or the obligation was incurred.

Lochinvar asserted claims under §§ 5(1) and (5)(2), thus bringing two different limitations periods to bear. Lochinvar's claim under MCL 566.35(2) is untimely because the transfer was made in 2008, and it did not sue until 2011, well beyond the one-year limitations period. But Lochinvar's claim under MCL 566.35(1) is governed by the six-year limitation period under MCL 600.5813, and therefore is not untimely.

III. EXCESSIVE COMPENSATION

Next, Lochinvar argues that the trial court erred when it granted defendants' motion for summary disposition in connection with its claim that FSC Operations paid Robert and Lawrence Rosen excessive compensation between 2006 and 2008. Again, because the trial court based its decision in part on material outside the pleadings, we conclude that the court granted the motion under MCR 2.116(C)(10). *Hughes*, 277 Mich App at 273.

Defendants argued, and the trial court agreed, that there was no evidence to support Lochinvar's claim that Robert and Lawrence Rosen were paid excessive compensation. Defendants, as the moving party, had the initial burden to identify all the matters that justified the grant of summary disposition and to support its motion with proper evidence. *Barnard Mfg*, 285 Mich App 369-370. Yet defendants did not submit any evidence relating to Lawrence Rosen's salary and whether it was reasonable. Defendants did submit an affidavit stating that Robert Rosen was the vice president of marketing and received a salary of $26,000 a year. However, even if Robert Rosen was paid only $26,000 a year, that alone does not establish that the salary was reasonable. As our Supreme Court has explained, "the general rule is that whether a salary is excessive is a question of fact in the determination of which all the circumstances of the case should be considered . . . ." *Luyckx v R L Aylward Coal Co*, 270 Mich 468, 474; 259 NW 135 (1935); see also *Miller v Magline*, *Inc*, 76 Mich App 284, 300; 256 NW2d 761 (1977). Accordingly, inquiry must be made into all the circumstances of case, e.g., the number of hours worked, job responsibilities, experience, educational background, and the industry standard for compensation. Defendants provided no such evidence in support of their motion. Therefore, they failed to properly support their motion and, as to these claims, the trial court should have denied their motion. *Barnard Mfg*, 285 Mich App at 370.

IV. PREPAID RENTS

Lochinvar next argues that the trial court erred when it granted defendants' motion as to its claim that the refund of prepaid rents to Rosen Properties was fraudulent. The trial court decided this motion on the basis of the pleadings alone. See MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004).

Lochinvar produced a copy of a statement of closing between Rosen Properties and Williams Distributing, which was executed in conjunction with FSC Operation's sale of assets. The document shows that Williams Distributing owed Rosen Properties $30,515.88 for rent, security deposit, and real estate tax on two pieces of property. Lochinvar argues that the transfer to Rosen Properties was fraudulent under the MCL 566.35. However, by its plain language,

MCL 566.35 applies to a transfer made by a debtor. Here, FSC Operations is the debtor, not Williams Distributing. Therefore, MCL 566.35 did not apply to that transfer. Further, a transfer is not made under the fraudulent transfers act "until the debtor has acquired rights in the asset transferred." MCL 566.36(4). There is no evidence that FSC Operations had any right to the payments at issue. Rather, the only party with any right to payment was Rosen Properties, the owner of the property. Nor can this transaction be classified as an "indirect transfer" under MCL 566.35. "An indirect transfer occurs when the debtor surrenders an asset or interest to a third party for the ultimate benefit of the alleged transferee." *In Re Craig*, 144 F3d 587, 592 (CA 8, 1998). Here, FSC Operations did not surrender an asset or interest to a third party. Therefore, summary disposition was proper as to this claim.

Lochinvar additionally argues that the trial court erred in dismissing its claim concerning the non-compete agreement between Robert Rosen and Williams Distributing. The evidence presented below shows that Williams Distributing agreed to pay Robert Rosen $225,000 in exchange for his agreement not to compete. Lochinvar argues that the transaction was fraudulent and the trial court erred by failing to address that claim. Lochinvar, however, did not allege a claim against Robert Rosen in relation to his non-compete agreement. In its general allegations, Lochinvar noted that Robert Rosen received $225,000 in exchange for a non-compete agreement, but did not allege that the transaction was fraudulent. Because Lochinvar never asserted any claim in relation to the non-compete agreement, the issue was not properly before the court below, and is thus not properly before this Court.

VII. CONCLUSION

For the reasons stated, the trial court erred when it dismissed Lochinvar's claims that FSC Operations fraudulently transferred the 2006 and 2008 rebate checks to Lawrence Rosen and Rosen Properties, respectively. Additionally, the trial court erred when it granted summary disposition on the claims that FSC Operations paid excessive compensation because defendants failed to properly support their motion. However, summary disposition was properly granted on the issue of prepaid rents.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. None of the parties having prevailed in full, none may tax their costs. MCR 7.219(A).

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Mark T. Boonstra