IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-252

Filed: 15 March 2016

Iredell County, No. 14 CVS 262

DWC3, INC., RYFO, LLC, PAUL MILLER, and KATHLEEN MILLER, Plaintiffs,

v.

WILLIAM G. KISSEL and DIANE L. KISSEL, Defendants.

Appeal by defendants from orders entered 28 August 2014 and 8 September 2014 by Judges Lisa C. Bell and Tanya T. Wallace in Iredell County Superior Court. Heard in the Court of Appeals 8 September 2015.

Rayburn Cooper & Durham, P.A., by Ross R. Fulton and Tory Ian Summey, for plaintiffs-appellees.

John F. Hanzel, P.A., by John F. Hanzel, for defendants-appellants.

GEER, Judge.

Defendants William G. ("Bill") and Diane L. Kissel appeal from two orders relating to plaintiffs' claims of a fraudulent transfer of assets between the two defendants. Defendants first argue that the trial court erred by dismissing their motion to dissolve the attachment on their property because plaintiffs failed to provide sufficient evidence demonstrating a fraudulent transfer. Secondly, defendants argue that the trial court erred by granting summary judgment to

plaintiffs because genuine issues of material fact remained. We hold that plaintiffs presented sufficient evidence to justify denial of defendants' motion to dissolve the attachment and entry of summary judgment in their favor. We, therefore, affirm the rulings below.

Facts

On 26 March 2012, plaintiffs DWC3, Inc., RYFO, LLC, and Paul and Kathleen Miller, entered into an asset purchase agreement with defendant Diane Kissel and Kissel Enterprises, Inc., formerly known as Analytical Testing Consultants, Inc. Diane was the sole shareholder of Kissel Enterprises at the time of sale. The following day, plaintiffs wired cash proceeds of $1,297,068.25 to a bank account held by Kissel Enterprises. Defendants used $1,000,000.00 of those proceeds to open two different accounts with First Citizens Investors Services ("FCIS"), each owned jointly by Bill and Diane. The $1,000,000.00 was divided equally between an investment account, identified as the "Paramount Account," and an annuity, identified as the "Lincoln Annuity."

As a result of alleged material misrepresentations in the asset purchase agreement, plaintiffs initiated an arbitration action against Diane and Kissel Enterprises, which culminated on 16 July 2013 in an arbitration award in favor of plaintiffs in the amount of $1,061,123.07. The Mecklenburg County Superior Court

confirmed this award and entered judgment against Diane and Kissel Enterprises on 25 September 2013.

During the two months between the arbitration award and entry of judgment, Diane liquidated all of her assets or transferred them to her husband Bill through several transactions. These included: (1) closing three joint bank accounts at First Citizens Bank on 19 July 2013, (2) closing an individual account at the North Carolina State Employees' Credit Union on 13 August 2013, (3) removing herself as a joint owner of the Paramount Account and the Lincoln Annuity on 12 August 2013, (4) selling four vehicles on 15 August 2013, the proceeds of which all went to Bill, and (5) transferring her interest in two parcels of real property held as tenancies by the entirety to her husband Bill on 19 August 2013 for zero dollars. As admitted by Diane in a deposition on 7 August 2014, she had no assets at the time of the entry of judgment against her in September 2013.

Defendants concede that Bill received "the great majority of the funds derived from the above-referenced accounts and sales, as well as the benefit of Diane's divestiture of her interests in the aforementioned real property." Diane also conceded that she was aware of the arbitration award at the time she completed these transfers. Many of these funds, including over $700,000.00 in the Paramount Account and the Lincoln Annuity, were diverted into bank accounts owned by Bisbee

Enterprises, LLC, a company owned and operated solely by Bill. Defendants contend they eventually spent much of this money on attorneys and other expenses.

Defendants also argue that during this time, they were in the process of separating and, as a result of defendants' separation agreement, Bill was to get all real property in North Carolina owned by them as tenants by the entirety in exchange for Diane receiving their jointly owned real property in Boca Raton, Florida. Diane testified in her deposition that she was not sure if they owned this Florida property jointly, but did claim that part of the arrangement was for Bill to pay the mortgage. Prior to this exchange and almost two weeks before the entry of the arbitration award, Diane filed a declaration of domicile in Palm Beach County, Florida, stating a change of residency.

On 10 February 2014, plaintiffs filed a verified complaint in Iredell Superior Court against Bill and Diane, alleging two claims of fraudulent transfers. On the same day, plaintiffs applied for and received an order of attachment with respect to Diane's assets, specifically identifying real property located at 116 Ketch Court, Mooresville, North Carolina. Defendants thereafter answered the complaint and filed a motion to dismiss and a motion to dissolve attachment on 10 March 2014. These motions, as well as plaintiffs' motion for summary judgment, were heard before Judge Lisa C. Bell on 5 May 2014. Judge Bell denied both of defendants' motions, as well as plaintiffs' summary judgment motion. Subsequently, plaintiffs' counsel

deposed Bill and Diane in July and August 2014, respectively. Based on these depositions, plaintiffs filed a second motion for summary judgment on 25 August 2014, which Judge Tanya T. Wallace granted on 8 September 2014. Defendants timely appealed to this Court from the order denying their motion to dissolve the attachment and the order granting plaintiffs' second motion for summary judgment.

I

Defendants first argue the trial court erred by failing to grant their motion to dissolve the attachment on their property. Although the statutory remedy of attachment must be strictly construed, "substantial compliance with the requirements of the statute is sufficient." *Bethell v. Lee*, 200 N.C. 755, 758, 158 S.E. 493, 494 (1931). Parties who wish to make use of this remedy must file "an affidavit setting forth the facts and circumstances supporting allegations that [the defendants] have done or are about to do any act with intent to defraud their creditors." *Connolly v. Sharpe*, 49 N.C. App. 152, 154, 270 S.E.2d 564, 566 (1980).

Pursuant to N.C. Gen. Stat. § 1-440.1(a) (2015):

> Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

"Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money . . . ." N.C. Gen. Stat. § 1-440.2 (2015).

An order of attachment may be issued when the defendant is

> (1) A nonresident, or
>
> . . . .
>
> (4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,
>
> a. Has departed, or is about to depart, from the State, or
>
> . . . .
>
> (5) A person or domestic corporation which, with intent to defraud his or its creditors,
>
> a. Has removed, or is about to remove, property from this State, or
>
> b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property.

N.C. Gen. Stat. § 1-440.3 (2015).

In order to secure an order of attachment, a plaintiff or his attorney must state by affidavit that (1) "[t]he plaintiff has commenced or is about to commence an action, the purpose of which . . . is to secure a judgment for money, and the amount thereof," (2) "[t]he nature of such action," and (3) "[t]he ground or grounds for attachment" as

stated in N.C. Gen. Stat. § 1-440.3. N.C. Gen. Stat. § 1-440.11(a)(1) (2015). Additionally, the affidavit must state the necessary facts and circumstances supporting an allegation "that the defendant has done, or is about to do, any act with intent to defraud his creditors[.]" N.C. Gen. Stat. § 1-440.11(a)(2)b. A verified complaint is sufficient to serve as the required affidavit. N.C. Gen. Stat. § 1-440.11(b). When an affidavit or verified complaint states upon belief, and not upon fact, that the defendants are " 'about to assign or dispose of their property with intent to defraud the plaintiffs, . . . the grounds upon which such belief is founded must be set out that the court may adjudge if they are sufficient.' " *Connolly*, 49 N.C. App. at 155, 270 S.E.2d at 567 (quoting *Judd v. Crawford Gold-Mining Co.*, 120 N.C. 397, 399, 27 S.E. 81, 81 (1897)).

In this case, plaintiffs filed both an affidavit and a verified complaint on 10 February 2014 laying out the particulars of the grounds for attachment. Both the affidavit and the verified complaint stated that plaintiffs obtained an arbitration award against Diane in July 2013 and a subsequent judgment against her in Mecklenburg County in September 2013. Both the affidavit and the complaint also stated that during this post-award and pre-judgment time period, Diane switched her residency from North Carolina to Florida and quitclaimed her interests in real and personal property to Bill. These actions constituted grounds for attachment as set out in N.C. Gen. Stat. § 1-440.3(1) and (4).

Plaintiffs further alleged in their verified complaint that Diane transferred numerous interests in real and personal property for no or inadequate consideration. Specifically, the complaint alleged: "On August 19, 2013, Diane Kissel transferred her interest in two parcels of Iredell County property to Bill Kissel for a purchase price of zero dollars ($0.00)." The verified complaint also asserted that as recently as 16 months before the arbitration award, Diane received over $1.1 million dollars for the sale of her business to plaintiffs, but by November 2013 she claimed to have no assets, as evidenced by her motion to claim exempt property. Finally, the verified complaint alleged that "[u]pon information and belief, Bill Kissel is the recipient of some or all of those fraudulently transferred cash proceeds[,]" concluding that "[g]iven the timing and lack of consideration of the aforementioned transfers, the transfers were made with the fraudulent intent of avoiding Plaintiffs' judgment, or were made for inadequate consideration at a time when Diane Kissel was insolvent." These assertions indicated that defendants were attempting to defraud plaintiffs under the circumstances laid out in N.C. Gen. Stat. § 1-440.3(5).

Taken together, the verified complaint and affidavit are sufficient to establish that plaintiffs have fulfilled the three affidavit requirements of N.C. Gen. Stat. § 1-440.11. First, plaintiffs established that they commenced an action to collect the judgment against Diane entered in Mecklenburg County on 25 September 2013 arising out of the arbitration award. Secondly, they presented the facts and

circumstances necessary to show that defendants' transfers were potentially fraudulent. And, finally, plaintiffs showed that defendants' actions met one or more of the grounds for attachment set out in N.C. Gen. Stat. § 1-440.3. We, therefore, affirm the ruling of the trial court denying defendants' motion to dissolve the attachment on their property.

II

Defendants next argue that the trial court erred by granting plaintiffs' motion for summary judgment. Appellate courts apply de novo review to an order granting or denying summary judgment. *Builders Mut. Ins. Co. v. N. Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006). "Summary judgment is proper when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Crocker v. Roethling*, 363 N.C. 140, 142, 675 S.E.2d 625, 628 (2009) (quoting N.C.R. Civ. P. 56(c)). In determining whether summary judgment is proper, the trial court must consider the evidence in the light most favorable to the non-moving party. *Id.* However, "[o]nce the movant demonstrates that no material issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial." *Orient Point Assocs. v. Plemmons*, 68 N.C. App. 472, 473, 315 S.E.2d 366, 367 (1984).

North Carolina's fraudulent transfer statute reads in pertinent part:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

N.C. Gen. Stat. § 39-23.5(a) (2013).[1] A transfer is defined broadly as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset . . . ." N.C. Gen. Stat. § 39-23.1(12) (2013). Insolvency is defined as the situation where "the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." N.C. Gen. Stat. § 39-23.2(a) (2013).

"Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied . . . ." N.C. Gen. Stat. § 39-23.3(a) (2013). However, "value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." *Id.* This definition of value is adapted from Section 548(d)(2)(A) of the Federal Bankruptcy Code, which states that

[1]Under the recently amended Uniform Voidable Transactions Act, the word "fraudulent" is replaced with "voidable." Because defendants made these transfers prior to 1 October 2015, the effective date of the recently amended act, we refer to the previous version of the act, known as the Uniform Fraudulent Transfer Act. 2015 N.C. Sess. Ch. 23, § 5.

value "does not include an unperformed promise to furnish support to the debtor or to a *relative of the debtor*." Bankruptcy Code, 11 U.S.C. § 548(d)(2)(A) (2015) (emphasis added). " 'Value' is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors." N.C. Gen. Stat. § 39-23.3, Official Comment ¶ 2.

Here, there is no genuine issue of fact that Diane was indebted to plaintiffs as of 16 July 2013 in the amount of $1,061,123.07 as a result of the arbitration award. There is also no genuine issue of fact that Diane was either insolvent as a result of this award, or became insolvent shortly thereafter as a result of the numerous transfers to Bill. As she freely admitted in her deposition of 7 August 2014, in the weeks shortly after the award, she closed numerous joint bank accounts, sold several cars, relinquished interests in two joint accounts to Bill, and gave all her interest in two parcels of real property in North Carolina, which Diane and Bill owned as tenants by the entirety, to Bill. Defendants concede that Bill was the beneficiary of all or most of these transfers.

The two accounts owned jointly by defendants, known as the Paramount Account and the Lincoln Annuity, consisted of $500,000.00 each at the time of their creation in 2012. Yet, Diane assigned all of her interests in these accounts to Bill as of August 2013. She also admitted to owning "[n]othing" in the weeks after the

arbitration award. Thus, there is no genuine issue of fact that Diane became insolvent as a result of these transfers to Bill.

Defendants' only remaining argument is that there is a genuine issue of fact whether Diane received "reasonably equivalent value" in exchange for these transfers. Defendants claim that because love and affection can account for adequate consideration in a conveyance of land from one spouse to the other, citing N.C. Gen. Stat. § 52-10 (2015) and *Biesecker v. Biesecker*, 62 N.C. App. 282, 285, 302 S.E.2d 826, 829 (1983), reasonable value was given in exchange for the transfers from Diane to Bill. They base this argument on the belief that consideration, as discussed in N.C. Gen Stat. § 52-10, is commensurate with "reasonably equivalent value" as defined in N.C. Gen. Stat. § 39-23.3(b).

Conversely, as plaintiffs properly note, "consideration" in Chapter 52 of the General Statutes has no bearing on what is a "reasonably equivalent value" as referenced in Chapter 39 of the General Statutes. Although there is no established precedent to this effect, we are persuaded by the Fourth Circuit's interpretation of the same provision of the Bankruptcy Code that formed the basis for the relevant provision of our State's Uniform Fraudulent Transfer Act. The Fourth Circuit explained that a transfer motivated by "love and affection does not constitute reasonably equivalent value." *Tavenner v. Smoot*, 257 F.3d 401, 408 (4th Cir. 2001).

Defendants also claim that Diane received adequate value in exchange for these transfers in the form of their jointly-owned house in Florida. They reference Diane's deposition, in which she stated "[t]he deal was he got the house in North Carolina, I got the house in Florida, and he would take care of the mortgage." There is no issue of fact as to defendants' joint ownership of this home as of March 2012. However, there is no indication that Bill has ever fulfilled the promise to transfer his interest in their Florida home to Diane. Diane claimed in her deposition that she did not know if Bill had transferred his interest in the home, but contended that he pays the mortgage on it. She further asserted that this exchange of real property was part of their arrangement of marital separation. However, contrary to these assertions, as of July 2014, defendants both still jointly owned the home in Florida, and, according to Bill, both defendants resided there.

Under the plain statutory language of N.C. Gen. Stat. § 39-23.3(a), "value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." Thus, because defendants failed to produce any evidence indicating that Bill has ever fulfilled this promise to transfer his interest in this property to Diane or that he has ever given Diane anything that she did not already own in exchange for her numerous transfers to Bill, defendants have failed to meet their burden of showing that genuine issues of fact remain for trial. Even in the light most favorable to defendants, there

no genuine issues of fact exist regarding whether Diane received any reasonable equivalent value in exchange for the numerous and substantial transfers of property to Bill in the weeks after plaintiffs prevailed in the arbitration proceeding. Because no genuine issues of material fact remain as to plaintiffs' fraudulent transfer claim pursuant to N.C. Gen. Stat. § 39-23.5(a), we affirm the trial court's grant of summary judgment to plaintiffs.

AFFIRMED.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).