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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1591**

Anne E. Thommes,
Appellant,

vs.

Michael E. Thommes,
Respondent,

Melvin P. Thommes,
Respondent.

**Filed June 25, 2012
Affirmed in part, reversed in part, and remanded
Muehlberg, Judge***

Wright County District Court
File No. 86-CV-10-7988

Anne E. Thommes, Delano, Minnesota (pro se appellant)

Kathryn A. Graves, Katz, Manka, Teplinsky, Graves & Sobol, Ltd., Minneapolis,
Minnesota (for respondent Michael E. Thommes)

Gregg J. Cavanagh, Maple Grove, Minnesota (for respondent Melvin P. Thommes)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Muehlberg,
Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

MUEHLBERG, Judge

Appellant sued respondents for violating Minnesota's Uniform Fraudulent Transfer Act (UFTA), Minn. Stat. §§ 513.41–.51 (2010),¹ and the district court granted summary judgment in respondents' favor. We affirm the grant of summary judgment on appellant's claim under section 513.44(a)(1) related to the transfer of proceeds from liquidated individual retirement accounts and appellant's claim under section 513.45(b) related to a stock transfer. We also affirm the denial of appellant's request for a continuance. But because a genuine issue of material fact exists as to whether the stock transfer between respondents was made in exchange for reasonably equivalent value, we reverse the grant of summary judgment on appellant's stock-transfer-related claims under section 513.44(a)(1) and 513.45(a), and remand.

FACTS

The marriage of pro se appellant Anne Thommes and respondent Michael Thommes was dissolved by judgment and decree in May 2007. The district court awarded respondent five individual retirement accounts (IRAs) and the stock of ProCNC, Inc. (ProCNC), a closely held Minnesota corporation of which respondent was the sole shareholder. As part of the property settlement, the district court ordered respondent to pay appellant \$33,000 for her interest in ProCNC and an additional \$24,000. The latter award was to be paid in installments. These awards were secured by, among other things,

¹ Minn. Stat. § 513.41(12) was amended in 2012, but this change does not affect the analysis herein. 2012 Minn. Laws ch. 151, § 1 (effective Apr. 4, 2012).

the ProCNC stock. The district court also ordered respondent to pay child support, health-insurance premiums for appellant and the parties' children, a portion of the children's health-related expenses, and permanent spousal maintenance.

Transfer of IRA proceeds

By June 4, 2008, respondent owed appellant approximately \$29,000 in medical-support and spousal-maintenance arrears. Later that month, Wright County Human Services served a notice of support-judgment levy in the amount of \$33,466.67 against one of respondent's IRAs. In July 2008, respondent liquidated several IRAs, including the accounts awarded to him in the judgment and decree. Respondent paid \$10,558 of the proceeds toward his support arrears. He paid the remainder (\$52,155.28) to his parents² as partial repayment of loans totaling \$92,480.19.³

Transfer of stock

Respondent did not make the initial installment payment toward the \$24,000 property award, triggering a provision of the dissolution decree that allowed appellant to seek entry of judgment for the full unpaid amount of the property settlement. On December 31, 2007, the district court awarded the full unpaid amount to appellant. This judgment was entered and docketed in January 2008.

² Respondent Michael Thommes's parents are respondent Melvin Thommes and the late Joan Thommes. We refer to Michael Thommes as "respondent" and Melvin Thommes as "respondent's father." Collectively, we refer to them as "respondents."

³ Appellant contends that the \$92,480.19 figure overstates the amount owed because respondents' parents loaned \$15,000 to ProCNC and not to respondent personally.

At a hearing on June 11, 2010, the parties agreed that respondent would pay \$27,631.17 to satisfy the January 2008 judgment and to release the ProCNC stock from appellant's security interest and lien. Respondent borrowed the \$27,631.17 from his father. Upon release of the ProCNC stock, respondent transferred the shares to his father to repay the \$27,631.17 loan.

Current action

In December 2010, appellant brought the current action against respondents, alleging that they violated UFTA, Minn. Stat. §§ 513.41–.51, through the transfer of the IRA proceeds in 2008 and the transfer of the ProCNC stock in 2010. Respondents moved for summary judgment. After a hearing, the district court granted summary judgment in respondents' favor.

This appeal follows.

D E C I S I O N

I.

We first address whether the district court erred by granting summary judgment in respondents' favor on appellant's claims that respondents violated UFTA through the transfer of the IRA proceeds and the transfer of the ProCNC stock.⁴ Appellate courts "review a district court's summary judgment decision de novo. In doing so, [they] determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir*

⁴ For each of these transactions, the district court construed appellant's complaint to allege (1) actual fraud under section 513.44(a)(1) and (2) constructive fraud under sections 513.45(a) and (b). Appellant does not challenge this construction of her claims.

Doran, LLC v. JADT Dev. Grp., LLC, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). “[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 760, 761 (Minn. 1993). “[S]ummary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents sufficient evidence to permit reasonable persons to draw different conclusions.” *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006) (emphasis omitted).

A. Transfer of IRA proceeds

Appellant challenges the district court’s grant of summary judgment on her claim of actual fraud under section 513.44(a)(1) related to the transfer of the IRA proceeds.

UFTA provides: “A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer or incurred the obligation . . . with actual intent to hinder, delay, or defraud any creditor of the debtor” Minn. Stat. § 513.44(a)(1); *see also In re Butler*, 552 N.W.2d 226, 231 (Minn. 1996).

The existence of fraudulent intent is a question of fact. *New Horizon Enters., Inc. v. Contemporary Closet Design, Inc.*, 570 N.W.2d 12, 15 (Minn. App. 1997); *see also Hibbs v. Marpe*, 84 Minn. 10, 11–12, 86 N.W. 612, 613 (1901). Because the requisite intent “is seldom susceptible of direct proof, courts have relied on ‘badges of fraud’” as circumstantial evidence of intent. *Butler*, 552 N.W.2d at 231. UFTA lists 11 badges of fraud that may be considered, among other factors, in determining whether a transfer was made with fraudulent intent:

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;
- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) 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;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Minn. Stat. § 513.44(b).

Appellant argues that a genuine issue of material fact exists as to whether respondent concealed the transfer. It is undisputed that respondent transferred \$52,155.28 of the IRA proceeds to his parents on July 11, 2008. Appellant contends that respondent concealed this transfer by lying about it at an evidentiary hearing on August 1, 2008. At the hearing, respondent testified that he paid taxes and fees related to the liquidation of the IRAs and paid \$10,558 of the proceeds to Wright County. Respondent also testified about the contents of a series of documents referred to as Exhibit 9: “Those documents represent loans that I owe to Mel and Joan Thommes. And the last page on Exhibit Number 9 shows that I have got a line of credit I’m in debt for—on the line of credit alone for \$27,814.85 for [ProCNC].” Appellant argues that respondent’s testimony

concealed the fact that he had transferred approximately \$52,000 of the IRA proceeds to his parents several weeks before the hearing.

The evidence does not support appellant's argument about concealment because it is not clear from the record what Exhibit 9 from the August 2008 hearing states (or does not state) about the July 2008 transfer. The Exhibit 9 that appellant cites in her brief does not appear to be an exhibit from the August 2008 hearing because (1) it is not a multiple-page document and (2) it does not mention a \$27,814.85 debt. Appellant has failed to show a genuine issue of material fact as to whether respondent concealed the transfer of the IRA proceeds. Therefore, the district court did not err by granting summary judgment to respondents on appellant's claim that respondents engaged in a fraudulent transfer under section 513.44(a)(1) related to this transfer.

B. Transfer of stock

Appellant challenges the district court's grant of summary judgment on her claims related to the transfer of the ProCNC stock, contending that genuine issues of material fact exist.

Actual fraud under section 513.44(a)(1)

The district court concluded that appellant did not present sufficient evidence to show a genuine issue of material fact as to whether respondent acted with actual intent to hinder, delay, or defraud any creditor in transferring the stock to respondent's father. The existence of fraudulent intent is a question of fact and can be established by presenting evidence on more than one of the statutory badges of fraud. *See In re Sherman*, 67 F.3d 1348, 1354 (8th Cir. 1995) (applying Missouri's version of UFTA); *Hibbs*, 84 Minn. at

11–12, 86 N.W. at 613; *New Horizon*, 570 N.W.2d at 15. Here, the district court concluded that appellant presented sufficient evidence on two statutory badges of fraud: (1) the insider status of respondent’s father and (2) respondent’s insolvency. *See* Minn. Stat. §§ 513.41(7)(i)(A), (11), 513.44(b)(1), (9). The district court therefore erred by resolving the factual question of respondent’s intent on summary judgment. Consequently, we conclude that appellant’s claim of actual fraud under section 513.44(a)(1) related to the stock transfer survives summary judgment.⁵

Constructive fraud under section 513.45(a)

UFTA provides:

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 [1] made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and [2] the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Minn. Stat. § 513.45(a); *see also Butler*, 552 N.W.2d at 231. Here, the district court concluded that a genuine issue of material fact exists as to appellant’s insolvency. But because the district court concluded that no genuine issue of material fact exists as to whether respondent received reasonably equivalent value in exchange for the stock, it granted summary judgment on appellant’s section 513.45(a) claim.

⁵ “A transfer or obligation is not voidable under section 513.44(a)(1) against a person who took in good faith and for a reasonably equivalent value.” Minn. Stat. § 513.48(a). The existence of a genuine issue of material fact as to reasonably equivalent value, discussed later in this opinion, makes the applicability of this exception inappropriate for resolution on summary judgment.

Appellant contends that a genuine issue of material fact exists as to whether the value of the ProCNC stock was reasonably equivalent to the amount of debt discharged by its transfer. We agree.

In the 2007 dissolution judgment and decree, the district court found that the value of the ProCNC stock was \$66,234. Three years later, on June 11, 2010, respondent transferred the stock to his father in exchange for forgiveness of a \$27,631 loan. The record contains conflicting evidence as to the value of ProCNC when this transfer occurred. An internal balance sheet from ProCNC states that the company was worth \$31,576.58 as of December 31, 2009. According to ProCNC's accountant, the company was worth \$29,000 in June 2010. But according to an accountant retained by appellant, the "business valuation" of ProCNC was \$390,000 as of December 31, 2009.

Taken in the light most favorable to appellant, the evidence indicates that the value of the ProCNC stock is more than ten times the value of the loan respondent's father forgave in exchange for the stock transfer. *See Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995) ("It is axiomatic that on a summary judgment motion a court may not weigh the evidence or make factual determinations, but must take the evidence in a light most favorable to the nonmoving party."). We conclude that appellant has presented sufficient evidence to establish a genuine issue of material fact as to whether \$27,631 is the reasonably equivalent value of the ProCNC stock at the time of transfer. *See Citizens State Bank of Hayfield v. Leth*, 450 N.W.2d 923, 925–26 (Minn. App. 1990) (concluding that a transfer was not made for reasonably equivalent value under UFTA where the transferee paid \$100,000 for land

worth \$200,000); *Nardini v. Nardini*, 414 N.W.2d 184, 189-90 (Minn. 1987) (recognizing the “difficulty” and “imprecision” of valuing a closely held corporation and noting that large discrepancies in estimates are not unusual when valuing family-owned businesses).

Because there are genuine issues of material fact as to (1) whether the transfer was made without respondent’s receiving reasonably equivalent value for the stock and (2) respondent’s insolvency, appellant’s section 514.45(a) claim related to the stock transfer survives summary judgment.

Constructive fraud under section 513.45(b)

UFTA provides:

A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Minn. Stat. § 513.45(b); *see also Butler*, 552 N.W.2d at 231. A transfer is not voidable under this section if it was made “in the ordinary course of business or financial affairs of the debtor and the insider.” Minn. Stat. § 513.48(f)(2).

Appellant argues that the stock transfer was not made in the ordinary course of respondents’ financial affairs because “[t]he loan documents specifically state that [respondent] was to pay ‘interest only’ on the loans.” To support her argument, appellant relies on a document that summarizes respondent’s indebtedness to his parents. The document states, in relevant part:

On August 1, 2007 Mel & Joan Thommes made an agreement with Michael Thommes to pay interest only on the below listed loans . . . , due to the fact that his financial

situation is poor and he has not had the ability to make loan payments towards the principal of the loan.

It is further agreed, that Michael Thommes is not forgiven of this loan, but that interest only be paid until a date in which his financial situation affords him the ability to begin to make payments on the principal portions of loans.

Contrary to appellant's argument, this document is evidence of an arrangement whereby respondent pays interest on a series of loans and makes payment on the principal when funds become available to him—it is not evidence that respondent has no obligation to repay the loans. The district court did not err by granting summary judgment to respondents on appellant's claim under section 513.45(b).

II.

Appellant requested a continuance to conduct additional discovery, arguing to the district court that she detrimentally relied on the representations of respondents' attorneys that she would not need to engage in discovery to defend against their motions for summary judgment. The district court denied appellant's request:

[Appellant] refers generally to a “great deal more evidence” that [respondents] allegedly possess and to information “in the sole possession” of [respondents] but does not point to any specific documents or testimony that might help her defeat [respondents'] Motions for Summary Judgment. Moreover, [appellant] does not state which discovery motions are at issue or what requested information she needs in order to defend against the Motions for Summary Judgment.

Appellant challenges the district court's resolution of this issue.

“Absent a clear abuse of discretion, a [district] court's decision regarding discovery will not be disturbed.” *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn.

1987); *see also City of Maple Grove v. Marketline Constr. Capital, LLC*, 802 N.W.2d 809, 818 (Minn. App. 2011) (“We review a district court’s denial of a motion for a continuance for an abuse of discretion). When deciding whether to grant a motion for a continuance, the district court considers two factors: “(1) whether the nonmoving party is seeking further discovery in the good faith belief that material facts will be uncovered, or is [the party] merely engaging in a fishing expedition; and (2) whether the nonmoving party has been diligent in obtaining or seeking discovery before requesting the continuance.” *City of Maple Grove*, 802 N.W.2d at 818 (quotation omitted). Here, the district court determined that appellant was engaging in a fishing expedition because of the vague nature of her discovery-related request. On this record, the district court did not abuse its discretion by denying appellant’s request for a continuance.

Affirmed in part, reversed in part, and remanded.