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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1774**

Steve M. Johnson, et al.,
Appellants,

vs.

USL Products, Inc.,
Defendant,

Clam Corporation, Inc.,
Respondent.

**Filed June 11, 2012
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge**

Hennepin County District Court
File No. 27-CV-10-9077

J. Scott Andresen, Mark R. Bradford, Bassford Remele, P.A., Minneapolis, Minnesota
(for appellants)

Thomas P. Kane, Michael T. Berger, Hinshaw & Culbertson, LLP, Minneapolis,
Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and
Collins, 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UNPUBLISHED OPINION

STONEBURNER, Judge

Appellants, creditors of defendant debtor who fraudulently transferred assets to respondent transferee, challenge the dismissal of their claims against transferee. The district court granted transferee's motion for summary judgment, and, in the alternative, granted transferee's motions in limine, precluding creditors from presenting evidence to support their claims against transferee and resulting in the district court's dismissal of all claims against transferee. The district court did not err or abuse its discretion by granting summary judgment and motions in limine regarding successor liability based on theories of agreement, de facto merger, and "mere continuation." But we conclude that material fact questions regarding creditors' right to relief from transferee for debtor's fraudulent transfer under the Minnesota Fraudulent Transfer Act (MFTA) and successor liability under a theory of constructive fraud make summary judgment inappropriate in this case. And, because the issue of the value of consideration remains relevant to the scope of relief to which creditors are entitled from transferee for debtor's fraudulent transfer, we conclude that the district court abused its discretion by precluding creditors from presenting evidence about the value of the assets transferred merely because creditors did not have an expert witness on this issue. We therefore affirm in part, reverse in part, and remand to the district court for trial on creditors' entitlement to relief against transferee under the MFTA for debtor's fraudulent transfer of assets to transferee.

FACTS

Until shortly after December 20, 2002, defendant USL Products, Inc. (USL) manufactured and distributed hunting products, including tree stands, pet carriers, and ice-fishing products. Ronald Randall was the majority shareholder and CEO of USL. Dennis Clark, designer of the popular “clam” ice-fishing shelter, was a minority shareholder and vice president of USL’s marketing and sales. At all times relevant, the ice-fishing products were USL’s most profitable line of business.

Appellant Steve M. Johnson is the managing member of appellant JT&O Technologies, LLC, a Tennessee limited liability company (collectively Johnson). On December 20, 2002, Johnson sued USL in federal district court in Tennessee for approximately \$3 million, asserting unlawful procurement of a breach of Johnson’s contract with the patent holder of a tree stand.

After USL was sued by Johnson in Tennessee, USL began to sell its assets. Only the sale of the ice-fishing business is involved in this lawsuit. Clark, who was very experienced in the ice-fishing business, had a friend, David Osborne, who had no knowledge about or experience in the ice-fishing business, but who had the resources to acquire USL’s ice-fishing business. Clark anticipated working with Osborne if Osborne acquired the ice-fishing business. Clark sold his USL shares to Randall on November 22, 2002, but remained USL’s vice-president of marketing and sales until USL went out of business in the spring of 2003. Osborne began negotiations with USL’s chief operating officer, Hans Friedebach, to purchase USL’s ice-fishing business in December 2002.

On February 10, 2003, Osborne formed respondent Clam Corporation, Inc. (Clam). Osborne is the sole shareholder of Clam. On February 12, 2003, USL sold the ice-fishing business to Clam for \$1.05 million. Clark, while still employed by USL, negotiated a \$978,608 purchase order for Clam with Arctic Cat, Inc., a USL client. Clark left USL on March 31, 2003, and became the president of Clam. Eventually all of USL's former ice-fishing-business customers became customers of Clam for the same products USL had provided.

After the April 2003 closing on the transfer of assets from USL to Clam, USL's counsel withdrew from representing USL in the Tennessee litigation. On February 2, 2005, the federal district court in Tennessee entered a \$3 million default judgment in favor of Johnson and against USL.

On February 9, 2009, in this action, Johnson sued USL, Randall, Clam, Osborne, and several "John Does" for fraudulent transfer of assets, breach of fiduciary duties, alter ego liability/piercing the corporate veil, and successor liability. Johnson later dismissed the claims against Osborne and settled with Randall. In December 2010, Clam moved for summary judgment on the claims against it contained in Counts I and IV of the complaint. Clam argued that it did not assume any liability of USL—there was no continuity of corporate form between USL and Clam, no corporate merger, and no common-law successor liability for Johnson's judgment against USL. Clam also argued that there was no fraudulent transfer. Clam asserted, among other claims, that Johnson did not have sufficient evidence to support its claim that Clam did not pay "reasonably

equivalent value” for the ice-fishing business, noting that Clam had not offered any expert opinion or business-valuation evidence on this issue.

The district court ordered Clam to submit a list of undisputed facts and ordered Johnson to respond to the asserted undisputed facts. Clam submitted 140 facts that it claimed were undisputed. Johnson responded, disputing, at least in part, approximately 54 of Clam’s asserted facts. The district court denied Clam’s motion for summary judgment by order dated February 25, 2011, stating only: “The Motion of [Clam] for Summary Judgment is denied. There exist genuine issues of material fact and this matter shall proceed to trial.” Nothing in the record identifies the fact issues that the district court found to exist.

On the morning of trial in April 2011, the district court heard arguments on four motions in limine brought by Clam seeking to exclude evidence regarding assumption of liability, de facto merger, mere continuance, and constructive fraud. And the district court sua sponte reconsidered Clam’s summary judgment motion.

After hearing the arguments, the district court made its ruling from the bench. Stating that it was going to adopt “the undisputed facts that were submitted earlier,” the district court stated additional undisputed facts on the record and granted summary judgment in favor of Clam. In the alternative, it granted all motions in limine, resulting in dismissal of all of Johnson’s claims against Clam. Subsequently, the district court entered a default judgment against USL on Count I, based on the following facts contained in Johnson’s complaint: (1) the transfer of assets from USL to Clam was fraudulent pursuant to Minn. Stat. § 513.44(a) because USL made the transfer (a) with

actual intent to hinder, delay, or defraud Johnson, (b) without receiving reasonably equivalent value in exchange for the transfer and USL's remaining assets were unreasonably small in relation to the business or transaction, and (c) with intent to incur, or believed or reasonably should have believed that USL would incur, debts beyond its ability to pay as they became due; (2) the transfer of assets was made to an insider; (3) some or all owners of USL retained possession or control of the property transferred to Clam after the transfer; (4) the transfer of assets was not disclosed to Johnson and was concealed; (5) Johnson sued USL before the transfer; (6) the transfer was of all or substantially all of USL's assets; (7) USL was insolvent or became insolvent shortly after the transfer; (8) the transfer occurred shortly before or shortly after a substantial debt was incurred and after notice of the claim had been served on USL; (9) Clam is explicitly identified as "formerly USL Outdoor Products, Inc."; and (10) Johnson was damaged in the amount of \$3 million.

Johnson now appeals the dismissal of its claims against Clam.

D E C I S I O N

I. Standard of review

A. Summary judgment

"We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted). "A motion for summary judgment shall be granted when the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). “On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Id.*; see Minn. R. Civ. P. 56.03.

[T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party’s case to permit reasonable persons to draw different conclusions.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997). And “the party resisting summary judgment must do more than rest on mere averments.” *Id.* “[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party’s case, the nonmoving party must make a showing sufficient to establish that essential element.” *Id.* at 71; see also *Schroeder v. St. Louis Cnty.*, 708 N.W.2d 497, 507 (Minn. 2006) (describing *substantial evidence* as “incorrect legal standard” and clarifying that “summary 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”).

B. Motions in limine

“The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or

constitutes an abuse of discretion.” *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-56 (Minn. 1997) (quotation omitted). On appeal from an order excluding evidence, the appealing party must establish that the district court abused its discretion and that the defendant was thereby prejudiced. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

II. Application of the MFTA to transferees

Minnesota adopted the MFTA, Minn. Stat. §§ 513.41-.51 (2010), to “prevent debtors from putting property which is available for the payment of their debts beyond the reach of their creditors.” *In re Butler*, 552 N.W.2d 226, 232 (Minn. 1996) (quoting *Kummet v. Thielen*, 210 Minn. 302, 306, 298 N.W. 245, 247 (1941)); accord *New Horizon Enters., Inc. v. Contemporary Closet Design, Inc.*, 570 N.W.2d 12, 14 (Minn. 1997) (“The [MFTA] prohibits a debtor from transferring property with the intent to hinder, delay, or defraud any creditors.”).

The district court, holding that claims of fraudulent transfer under Minn. Stat. § 513.44 (2010) can be asserted only against a debtor/transferor (USL in this case) and cannot be asserted against the transferee (Clam), dismissed Count I insofar as Count I asserted claims against Clam. The plain language of the statute supports the district court’s holding that section 513.44 of the MFTA is directed to the actions of the transferor and not the transferee. But other portions of the MFTA plainly apply to the transferee once a fraudulent transfer has been established under the MFTA. And we conclude that Johnson’s pleadings are sufficient to have put Clam on notice that it was seeking the relief provided against a transferee of fraudulently transferred assets. The

district court erred by dismissing all of Johnson's MFTA claims against Clam as a matter of law.

Through the default judgment against USL, Johnson established USL's fraudulent transfer under Minn. Stat. § 513.44(a)(1), (2) and all of the factors from section 513.44(b) alleged in the complaint to establish actual intent under section 513.44(a)(1). The judgment against USL was not appealed and is a final judgment, determining that the transfer was made with actual intent to defraud Johnson and was made without USL receiving a reasonably equivalent value in exchange for the transfer under the circumstances described in the statute. And caselaw establishes that a grantee may not set up a defense that the grantor might have had to the original claim. *See Larson v. Tweten*, 185 Minn. 366, 368, 241 N.W. 43, 44 (1932) (citing *Weber v. Arend*, 176 Minn. 120, 121, 222 N.W. 646, 647 (1928)).

The relief available to a creditor for a fraudulent transfer, subject to the limitations in Minn. Stat. § 513.48 (2010), includes:

- (1) avoidance of the transfer . . . to the extent necessary to satisfy the creditor's claim;
- (2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by chapter 570 [governing attachment];
- (3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:
 - (i) an injunction against further disposition by . . . a transferee . . . of the asset transferred or of other property;
 - (ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Minn. Stat. § 513.47(a), (b).

Section 513.48 sets out the defenses, liability, and protection of a transferee. Clam appears to have invoked the defense set out in Minn. Stat. § 513.48(a), which provides: “A transfer . . . is not voidable under section 513.44(a)(1) [transfer by debtor with actual intent to delay or defraud a creditor] against a person who took in good faith and for a reasonably equivalent value”¹ But the judgment against USL is not limited to a finding of fraudulent transfer under section 513.44(a)(1). The judgment against USL also established fraudulent transfer under section 513.44(a)(2)(i), (ii) (providing that a transfer is fraudulent as to a creditor if the debtor made the transfer “without receiving a reasonably equivalent value in exchange for the transfer” and other factors set out in the statute are met). Johnson has asserted appropriate claims against Clam under the MFTA, and the district court erred in dismissing as a matter of law claims against Clam that result from judgment entered against USL on Count I.

III. Successor liability

Count IV of the complaint asserts that Clam is liable for USL’s debt to Johnson as USL’s successor. Generally, if a corporation sells or transfers all of its assets to another

¹ The district court did not make any finding with regard to Clam’s good faith. Johnson asserts that there are genuine issues of material fact about Clam’s good faith. Because good faith is not a defense to section 513.44(a)(2), we need not reach this issue.

corporation, the second corporation is *not* liable for the debts and liabilities of the transferring corporation, with the following exceptions: (1) the purchaser expressly or impliedly agrees to assume such debts; (2) the transaction amounts to a consolidation or merger of the corporation; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) *the transaction is entered into fraudulently in order to escape liability for such debts.* *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 98 (Minn. 1989) (quoting *J.F. Anderson Lumber Co. v. Myers*, 296 Minn. 33, 37-38, 206 N.W.2d 365, 368-69 (1973)).

In addition, Minn. Stat. § 302A.661, subd. 4 (2010) (Minnesota Business Corporations Act), provides:

The transferee is liable for the debts, obligations, and liabilities of the transferor only to the extent provided in the contract or agreement between the transferee and the transferor or to the extent provided by this chapter or other statutes of this state. A disposition of all or substantially all of a corporation's property and assets under this section is not considered to be a merger or a de facto merger pursuant to this chapter or otherwise. The transferee shall not be liable solely because it is deemed to be a continuation of the transferor.

In *Niccum*, the supreme court interpreted the first sentence of this provision to mean that the legislature did not intend to extend successor liability beyond the four exceptions already established. 438 N.W.2d at 99. The second part was added by the Minnesota legislature to clarify applications of the statute. 18 John H. Matheson & Philip S. Garon, *Minnesota Practice* § 7.21 (2nd ed. 2004).

A. Assumption of liabilities

The first exception to successor liability is met if Clam assumed USL's liabilities. A successor corporation is not liable for the liabilities of its predecessor unless it agrees to assume those liabilities. *J.F. Anderson Lumber Co.*, 296 Minn. at 40-41, 206 N.W.2d at 370; *see also Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 297 (Minn. 2003) (finding that the defendant did not have successor-corporation liability under Minnesota's corporate law because it "carefully defined the liabilities it would assume, and debts such as [plaintiff's] judgments were not among them"). Johnson argues that Clam's actions indicate that it assumed USL's debts regardless of the terms to the contrary in the Asset Purchase Agreement. The Asset Purchase Agreement states: "Buyer is not assuming, and does not assume, any duties, responsibilities, obligations or liabilities of Seller of any kind or nature, known or unknown, contingent or otherwise, including, without limitation, any liabilities relating to any federal, state, or local taxes." The disclaimer of any assumption of liability in the Asset Purchase Agreement is clear. But Johnson argues that, by honoring warranties on products sold by USL, Clam impliedly assumed all of USL's debts and liabilities. Johnson points to Clark's testimony about Clam honoring warranties on USL-sold fish houses "to retain . . . customers and customer loyalty base." Johnson cites nonprecedential caselaw dealing with substantially different situations to support this argument.

More persuasive, though equally nonprecedential, is the reasoning in *Cooper v. Lakewood Eng'g & Mfg. Co.*, in which the United States District Court for the District of Minnesota applied Minnesota law when it considered the issue of implied assumption of

liability. 874 F. Supp. 947, 953 (D. Minn. 1994). In *Cooper*, the defendant specifically assumed “all of the obligations, duties, liabilities, taxes, unemployment contributions, fees, and debts of [transferor], contingent or absolute, accrued or unaccrued, or that may be properly assessable against [transferor],” but only inasmuch as it related to the property and assets transferred to the defendant. *Id.* The defendant then chose to maintain insurance to cover claims arising from the transferor’s products after the transferor could no longer be sued and defended three lawsuits based on such claims. *Id.* at 955. The court determined that these actions by the defendant “could not be evidence of an implied agreement” between the defendant and the transferor because the transferor was no longer in existence and could not agree to the terms of the assumption and the defendant took such steps unilaterally. *Id.*

Cooper is persuasive when considering Clam’s liabilities after accepting the transfer of USL’s assets. Here, as in *Cooper*, there was an express clause in the contract dealing with assumption of liability and the transferee chose to assume some further liability beyond that required in the contract. We conclude that the transferee’s unilateral decision to assume some liability of its predecessor does not constitute full assumption of all of the predecessor’s liabilities. The district court therefore did not err when it granted Clam’s motion to exclude any assumption-of-liability evidence based on the agreement between USL and Clam.

B. De facto merger

The second exception to successor liability is met if the sale of USL’s assets to Clam was a de facto merger. In determining whether a de facto merger has occurred,

courts examine the following four factors: (1) the continuity of management, personnel, physical location, assets, and general business operations; (2) the continuity of shareholders from the seller corporation to the purchasing corporation; (3) whether the purchased corporation ceases ordinary business operations, liquidates, or dissolves as soon as legally and practically possible; and (4) whether the purchasing corporation assumed the ordinary obligations of the seller for the continuation of normal business operations of the seller. *Source One Enters., L.L.C. v. CDC Acquisition Corp.*, No. Civ. 02-4925, 2004 WL 1453529, at *4 (D. Minn. June 24, 2004); *New York Life Ins. Co. v. Landmark Dev. Corp.*, No. CI-92-2006, 1993 WL 152157, at *2-*3 (Minn. App. May 11, 1993) (citing *Shannon v. Samuel Langston Co.*, 379 F. Supp. 797, 801 (W.D. Mich. 1974)). And, although no single factor is dispositive, “a de facto merger requires the existence of a continuity of shareholders through a stock purchase.” *Source One Enters.*, 2004 WL 1453529, at *4 (citing *Sylvester Bros. Dev. Co. v. Burlington N. R.R.*, 772 F. Supp. 443, 448 (D. Minn. 1993)).

Johnson argues that the continuity of management and personnel, the cessation of USL’s business almost immediately after the sale of the ice-fishing business to Clam, and Clam’s assumption of USL’s ordinary obligations for the continuation of normal business is sufficient to show de facto merger. Johnson also invites this court to adopt the statement in *C. Mac Chambers Co. v. Iowa Tae Kwon Do Acad., Inc.*, in which the Iowa Supreme Court stated that continuity of shareholders is not an essential element to establish a de facto merger. 412 N.W.2d 593, 597 (Iowa 1987). We decline this invitation.

In this case, there is no continuity of shareholders. Randall was the sole owner and majority shareholder of USL. Clark had a minority share of the stock in USL, but sold it to Randall before the sale to Clam. Osborne is the sole shareholder of Clam. Without continuity of shareholders, there is no de facto merger. The district court did not err by granting Clam's motion in limine seeking exclusion of evidence regarding the de facto merger claim.

C. Mere continuation

The third exception involves the mere continuation of the business entity. Mere continuation traditionally refers primarily to a reorganization of a corporation under federal or state laws. *Niccum*, 438 N.W.2d at 99. The supreme court has held that if there is no continuation of the corporate shareholders, stock and directors, the successor corporation is not liable under the mere continuation exception. *Id.* (rejecting an argument for expansion of the exception to focus on the continuity of the business operation not the corporate entity). Because there is no continuation of the USL corporate entity, Johnson cannot establish the mere continuation exception, and the district court did not err when by excluding evidence regarding Johnson's mere continuation claims.

D. Constructive fraud

The final exception to successor liability is constructive fraud. Constructive fraud requires "proof of (1) a transfer; (2) a prior claim; (3) no 'reasonably equivalent value'; and (4) debtor insolvency." *Clarinda Color LLC v. BW Acquisition Corp.*, No. 00-CV-722, 2004 WL 2862298, at *5 (D. Minn. June 14, 2004); *see also* Minn. Stat. § 513.45(a)

(providing that 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 without receiving a reasonably equivalent value for the transfer and the debtor was insolvent at the time or became insolvent as a result of the transfer). The elements of constructive fraud are the same as those in section 513.44, discussed above; therefore, the judgment entered against USL established the elements of constructive fraud that would give rise to Clam's liability for USL's debt to Johnson. Because one of the exceptions to the general rule against successor liability has been established in this case, the district court erred by granting summary judgment to Clam on Count IV of the complaint.

IV. Exclusion of “intent and valuation” evidence

The district court's explanation on the record of its rulings on Clam's motions in limine does not address the motion to exclude “intent and valuation evidence.” The district court's written order also grants the motion without explanation.

It appears from the arguments to the district court on the motion in limine that the “intent” referred to is the “good faith” requirement in section 513.48(a), but the argument presented was primarily about Johnson's lack of an expert witness on valuation. From our painstaking review of the record, we conclude that there are material fact questions that make summary judgment inappropriate on both of these issues and that the district court abused its discretion by precluding evidence on these issues. Johnson has asserted, and it appears to be undisputed, that Clark, while still an officer of USL, acted as an agent for Clam to secure certain of USL's assets for Clam for no value or for less than the value that documentary evidence and testimony would support as reasonable for the assets

transferred. Clam's evidence about valuation as well as intent may be more persuasive than Johnson's evidence, but it does not establish that, as a matter of law, Clam took all of the assets transferred "in good faith and for a reasonably equivalent value" under Minn. Stat. § 513.48(a).

Neither Clam nor the district court has provided authority for the position that expert testimony is required on the issue of valuation. Johnson's written responses to Clam's assertion that there is no fact issue regarding valuation reference admissible documents and testimony to support its assertion that assets transferred had greater value than USL received. This evidence was also asserted at argument on Clam's pretrial motions. That the evidence may not ultimately be persuasive or sufficient to establish Johnson's claim does not make it inadmissible. And exclusion of this evidence was highly prejudicial to Johnson's case. Similarly, Johnson has presented evidence that Clark, while employed by USL, acted contrary to USL's best interests and for Clam's best interests, implicating Clam's good faith.

We conclude that the grant of the motion in limine excluding any evidence on the issues of Clam's good faith and whether the transfer was for reasonably equivalent value was an abuse of discretion. We reverse the dismissal of Johnson's claims and remand for trial on Johnson's entitlement under the MFTA to relief against Clam for USL's fraudulent transfer of assets to Clam.

Affirmed in part, reversed in part and remanded.