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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4430-13T4

LARRY BENNETT STUCCO &
CONSTRUCTION, INC.,

Plaintiff-Appellant,

v.

SHELDON HIMBER,

Defendant-Respondent.

Submitted May 19, 2015 – Decided July 10, 2015

Before Judges Guadagno and Gilson.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-4678-11.

Law Offices of Kathleen R. Wall, attorneys for appellant (Ms. Wall, on the briefs).

Peckar & Abramson, P.C., attorneys for respondent (Gerard J. Onorata and Patrick T. Murray, on the brief).

PER CURIAM

In this post-judgment collection action, plaintiff Larry Bennett Stucco & Construction, Inc. (LBSC) appeals from two orders entered on March 26, 2014. The first denied plaintiff's motion to substitute defendant Sheldon Himber's wife, Barbara

Himber, for a fictitiously named defendant. The second granted summary judgment in favor of Sheldon,[1] dismissing all claims against him with prejudice.

Plaintiff argues that the trial court erred in dismissing its complaint because material issues of fact remain as to several allegedly fraudulent conveyances. Having reviewed the record, we conclude that summary judgment was properly granted, and we affirm the order substantially for the reasons stated by Judge Katie A. Gummer in her thorough and cogent decision placed on the record on March 26, 2014. We also affirm the order denying LBSC's motion to add Barbara as a defendant.

I.

Sheldon Himber was the 100% shareholder of Himber & Associates, Inc. (HAI), a closely-held corporation created in 1995 and dissolved in 2011. Barbara Himber is married to Sheldon, although they have been separated for twenty-seven years.

In 2008, plaintiff filed a breach of contract action against HAI over work plaintiff performed as a subcontractor on a construction project. In October 2010, plaintiff obtained a

[1] Because of their common surname, we refer to the Himbers by their first names.

judgment against HAI in the amount of $169,968, later amended to include interest of approximately $105,000.

In 2011, plaintiff filed the instant action against Sheldon in his personal capacity, seeking to collect on the judgment and to set aside property transfers pursuant to the Uniform Fraudulent Transfer Act (UFTA), N.J.S.A. 25:2-20 to -34. Plaintiff named several fictitious "John Doe" individuals and corporate defendants, but did not name HAI or Barbara.

During the course of discovery, plaintiff served subpoenas on both Unity and Wells Fargo Banks seeking the banking records of HAI but decided not to obtain the Wells Fargo records due to the cost of reproduction. Plaintiff also deposed Sheldon and Barbara.

Plaintiff retained Brett W. Sabio, a certified public accountant, to review the electronic documents obtained through discovery. In his report, dated July 24, 2013, Sabio stated that the records provided to him were "not of much use, [because] the periods of reporting [were] not consistent, [and he did] not know what the year end [was]." Sabio then identified "a number of items of interest," including the following three items that he claimed warranted further investigation:

- There is an "Officer Loan" that reflects a January 31, 2007 balance of $850,000 and

then mysteriously increases by $367,000 to $1,217,000 as of November 30, 2008;

- Retirement account payments reflect $260,000 and $22,805 respectively for the same dates;

- Sub S Distributions as of November 30, 2008 reflect $100,000.

Sabio was unable to conclude that defendant engaged in any type of fraudulent conveyance and conceded in his report that each of the questioned items "may in fact be very valid."

After the close of discovery, defendant moved for summary judgment on or about November 21, 2013. On December 2, 2013, plaintiff filed a notice of motion to amend the complaint and substitute Barbara for a fictitiously named defendant.

Judge Gummer heard oral argument on the parties' respective motions on December 20, 2013, and read an oral decision into the record on March 26, 2014, denying plaintiff's motion to amend the complaint to add Barbara and granting defendant's motion for summary judgment. The decision was memorialized in written orders the same day.

Judge Gummer first found that plaintiff's opposition to defendant's motion was procedurally deficient in failing to provide a proper certification as required by Rule 1:6-6 and

Rule 4:46-5.[2] In spite of these deficiencies, the judge agreed to consider the motion substantively in the interests of justice.

Judge Gummer found that plaintiff "failed to raise a genuine issue of material fact . . . that [the] transfers totaling in excess of $22 million were made." Addressing the claim of fraudulent transfers to Barbara, the judge noted that without a certification from a person with knowledge, the court could not consider the account ledgers submitted by plaintiff as proof of the transfers to Barbara. The judge found that the "only evidence before the [c]ourt is that the funds were transferred by [defendant] to [Barbara] in consideration of the work she had done for the company during its formative startup days." The judge concluded there was insufficient evidence to establish a fraudulent conveyance.

Judge Gummer then addressed plaintiff's contention that defendant had "withdrawn in excess of $1.2 million from [HAI] based on . . . undocumented loans" for the purpose of defrauding plaintiff. Although the judge recognized that such a transfer could satisfy one condition of N.J.S.A. 25:2-22, she found that plaintiff had failed to show that defendant's remaining assets

[2] After the motion hearing, plaintiff "belatedly" submitted a second certification without leave of court.

were "unreasonably small in relation to the business or transaction" or that defendant "intended to incur . . . debts beyond [his] ability to pay as they [became] due." The judge noted that plaintiff's proof of HAI's insolvency consisted of evidence that "Mr. Himber didn't have money to pay, [and] plaintiff has otherwise failed to demonstrate sufficiently . . . that the debtor wasn't solvent . . . [at] the time that HAI failed to pay LBSC."

Judge Gummer separately noted that plaintiff's claims failed as a "matter of law" because plaintiff failed to provide an expert to opine as to the transfers or the value of HAI's debts and assets at the time of any purported transfer.

Judge Gummer also rejected defendant's off-hand comment, made during his deposition on June 5, 2011, that "[he] didn't have any money" to pay plaintiff in 2007. As she stated, "Plaintiff has provided the [c]ourt with no means of putting that [statement] in context with respect to a 2007 alleged transfer."

Addressing plaintiff's motion to amend, Judge Gummer first stated that "[p]laintiff has failed to exhibit due diligence in amending the complaint" to add Barbara, given that plaintiff was "aware of the alleged transfers to Ms. Himber years ago." "Moreover," the judge reasoned, that even if she granted the

motion for leave to amend, "allegations with respect to Ms. Himber would be futile." Consequently, Judge Gummer denied plaintiff's motion to amend the complaint.

On appeal, plaintiff argues that the trial court erred in granting defendant summary judgment because it had established an intentional fraudulent transfer under N.J.S.A. 25:2-25(a). We disagree.

II.

We review a ruling on summary judgment de novo. Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 115 (2014). Thus, we consider, as the motion judge did, "'whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Ibid. (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

Under the UFTA, a transfer made or obligation incurred by a debtor is fraudulent if done:

> a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (1) 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; or
>
> (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due.
>
> [N.J.S.A. 25:2-25(a), (b).]

In determining whether a party had the actual intent to fraudulently convey an asset under subsection (a), our courts look to a variety of factors, more commonly referred to as the "badges of fraud." Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 476-77 (1999). N.J.S.A. 25:2-26 provides a list of the "badges of fraud" that may be considered in determining whether a debtor conveyed property with the actual intent to place it beyond the reach of creditors:

> In determining actual intent under subsection a. of [N.J.S.A. 25:2-25] consideration may be given, among other factors, to whether:
>
> 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 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; and
>
> k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

In an action alleging an intentional fraudulent transfer, the court must consider "whether the badges of fraud are present, not whether some factors are absent." Gilchinsky, supra, 159 N.J. at 477. The "confluence of several [badges of fraud] in one transaction generally provides conclusive evidence of an actual intent to defraud." Ibid. Courts attempting to determine actual intent to defraud should balance the factors listed in N.J.S.A. 25:2-26, as well as weigh any other factors

relevant to the transaction, in what will necessarily be a fact-specific determination. Ibid.

To sustain its burden that HAI intended to defraud it, plaintiff relies primarily on: (1) supplemental answers to deposition questions provided in a letter from plaintiff's counsel dated August 23, 2013; (2) bank records from Wachovia Bank and Unity Bank; and (3) Sheldon's admission that some of HAI's records were destroyed.

The supplemental answers contained in the August 23, 2013 letter were included as an attachment to plaintiff's December 10, 2013 certification in opposition to summary judgment. Rule 1:6-6, cross-referenced in Rule 4:46-5, requires:

> If a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein. The court may direct the affiant to submit to cross-examination, or hear the matter wholly or partly on oral testimony or depositions.

Plaintiff's certification does not comply with Rule 4:46-2, as it does little more in his certification than annex a series of exhibits. "[M]ere annexation . . . of an exhibit list or even the exhibits themselves, without more, does not constitute

compliance with the rule." Pressler & Verniero, Current N.J. Court Rules, comment 1.2 on R. 4:46-2 (2015).

Plaintiff's August 23, 2013 letter merely lists a series of unverified statements and fails to cite any admissible evidence. Consequently, plaintiff's August 23 statements are procedurally deficient and do not provide competent evidence that would establish a material fact with regard to the allegedly fraudulent conveyance of some $22 million.

The "bank records" on which plaintiff relies are likewise inadmissible. These records are actually a spreadsheet created by plaintiff that purports to list defendant's canceled checks provided by Wachovia Bank. As Judge Gummer noted, plaintiff did not indicate what "specific records, or what else, if anything else, he reviewed," and did not "certify that the transfers represent transfers that were made for [defendant's] 'personal benefit.'"

It is also significant that, after reviewing these documents, plaintiff's expert was unable to conclude that they represented anything more than "items of interest" and that the transactions may be valid.

Further, plaintiff's spoliation argument is speculative. Plaintiff relies on defendant's December 27, 2012 deposition testimony wherein defendant admitted that some of HAI's bank

statements and records were "all shredded a long time ago." From this otherwise vague statement, plaintiff argues that defendant intentionally destroyed certain financial documents that he knew to be pertinent to plaintiff's case. We disagree.

The mere fact that defendant may have destroyed certain documents that may have been relevant in litigation five years later does not, by itself, establish a spoliation claim. "Spoliation, as its name implies, is an act that spoils, impairs or taints the value or usefulness of a thing." Rosenblit v. Zimmerman, 166 N.J. 391, 400 (2001). "In law, it is the term that is used to describe the hiding or destroying of litigation evidence, generally by an adverse party." Id. at 400-01.

"A duty to preserve evidence 'arises when there is pending or likely litigation between two parties, knowledge of this fact by the alleged spoliating party, evidence relevant to the litigation, and foreseeability that the opposing party would be prejudiced by the destruction or disposal of this evidence.'" Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 471-72 (App. Div.) (quoting Cockerline v. Menendez, 411 N.J. Super. 596, 620 (App. Div.), certif. denied, 201 N.J. 499 (2010)), certif. denied, 212 N.J. 198 (2012).

Judge Gummer reasonably rejected plaintiff's spoliation claim because plaintiff was unable to establish any timeframe

for the alleged destruction of evidence. Indeed, the only competent evidence presented to the trial court was Sheldon's testimony that certain documents had been destroyed "a long time ago."

Plaintiff's reliance on the requirement in the Internal Revenue Code, 26 U.S.C.A. § 6001, that certain taxpayers must retain records, is unpersuasive. Plaintiff does not establish how HAI violated the federal record-keeping provisions. Moreover, even if HAI is subject to penalties for failing to keep certain tax records, that would not constitute proof of an intentional destruction of evidence that is relevant to the present litigation.

Even if defendant had destroyed all of his copies of the bank records and canceled checks, the information was still available to plaintiff who subpoenaed defendant's banking records but chose not to procure them due to cost. Thus, there is no proof that the evidence plaintiff sought was either "destroyed [or] materially altered." Bldg. Materials, supra, 424 N.J. Super. at 473.

We find the remaining arguments raised by plaintiff to lack sufficient merit to warrant discussion beyond the following brief comment. R. 2:11-3(e)(1)(E).

Plaintiff argues that defendant constructively defrauded him by making certain distributions to himself and that, as a result of such distributions, defendant was left with assets that were unreasonably small in relation to his continuing liabilities. Plaintiff has failed to present any competent evidence regarding HAI's existing assets at the time of these transfers. Thus, plaintiff cannot prove that the remaining assets were unreasonably small or that the alleged debt was beyond HAI's ability to pay. Plaintiff's argument that HAI was insolvent at the time of the transfers, and that this is reflected in HAI's accounts payable for the years from 2007-2010, is unsupported in the record. HAI's accounts payable, standing alone, are insufficient to show insolvency. See 11 U.S.C.A. § 101(32)(A) (defining "insolvent" as a financial condition "the sum of such entity's debts is greater than all of such entity's property, at a fair valuation").

Finally, we are satisfied that Judge Gummer exercised sound discretion in denying plaintiff's motion to amend its complaint to add Barbara as a defendant. Plaintiff filed this motion almost two years after filing the complaint and on the eve of trial set to commence in January 2014. Judge Gummer reasonably determined that defendant would be prejudiced by the amendment and that plaintiff knew, or should have known, of its potential

cause of action against Barbara well before its notice of motion to amend was filed. We find no clear abuse of discretion in the denial of this motion.

Affirmed.