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NO. 66612-6

King County Superior Court Case No. 09-2-31926-0 SEA

COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION ONE

DAVID W. MAYERS, JR.,
Plaintiff/Appellant,

v.

JOHN GRAHAME BELL and
YOUNG DENORMANDIE, P.C.,
Defendants/Respondents.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

As was explained in Mayers' opening brief, the superior court erred in several ways: 1. By concluding as a matter of law that Young deNormandie (YdN) was not estopped from changing the position upon which Mayers relied in electing to proceed under the Uniform Fraudulent Transfer Act, (UFTA) RCW 19.40 *et seq.*; 2. By concluding as matter of law that the payment by Bell to YdN was not a transfer as defined in the UFTA; 3. By concluding as a matter of law that Mayers did not establish a case of constructive fraud under the UFTA; 4. By concluding as a matter of law that Mayers did not establish an intentional fraud case under the UFTA; and, 5. By concluding as a matter of law that there was no genuine issue of material fact before the court.

In trying to defend the superior court's rulings YdN ignores the fundamental principles of the UFTA, attempts to explain away controlling legal authority while citing to irrelevant material and presents controverted facts as if there no dispute as to their accuracy. When this dispute is viewed objectively, and not through the prism urged by YdN it is apparent that the superior court's rulings must be reversed.

ARGUMENT

I. THE ARGUMENT THAT BELL'S PAYMENT TO YdN WAS NOT A FRAUDULENT TRANSFER WITHIN THE MEANING OF THE UFTA IGNORES THE CLEAR LANGUAGE OF THE STATUTE AND YdN'S AND BELL'S OWN ADMISSIONS.

Transfer Admitted in Answer. One of the most notable problems with this argument is that in response to Paragraph 5 of Mayers' Complaint To Avoid Fraudulent Transfer YdN clearly and expressly answered , "Defendants admit the allegations contained in paragraph 5 of Plaintiff's Complaint and that Bell paid YdN a retainer to represent him in a legal action filed in King County Superior Court." YdN then claimed a lack of information regarding the balance of the paragraph. However, when YdN brought its motion for summary judgment the basis for the motion which the superior court allowed them to argue was that Bell did not transfer ownership of the funds.¹ Another considerable problem with this argument is that Bell, the legal owner of the funds, very clearly intended for ownership of the funds to pass to YdN.

Bell Intended Transfer. Bell expressed that intention in writing²

1.. CP 13.
2. CP 24.

and specifically stated under oath that the funds are, “. . .no longer mine but the earned income of Young deNormandie.”³ Bell has never, to this day, repudiated that position. Bell, who is no longer a lawyer and is not subject to the Rules of Professional Responsibility relating to fees, has the naked legal right, subject to the UFTA, the criminal law, the tax law, etc., to make any arrangement he chooses with another. Bell’s sworn statement that, “It is my belief that these funds are not longer mine, but are the earned income of Young deNormandie.”, is undisputable evidence that he elected to transfer the funds on an immediate and non-refundable basis and he has never changed that election.

Reasonably Equivalent Value No Received. In apparent recognition of the problems inherent in these circumstances YdN takes a new tack on appeal and argues that Bell received reasonably equivalent value in exchange for his money. And that seeking to “reverse”⁴ or cancel⁵ the Mayers judgment did not constitute hindering or delaying the

3. CP 73.

4. CP 48.

5. CP 48.

enforcement of the judgment.

The test for the determination of “reasonably equivalent value” is set forth in the UFTA⁶ and in well established Washington case law⁷.

There is no conceivable need to resort, as YdN does, to case authority from a Michigan Bankruptcy Court⁸ to explain the concept.

“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. **Consideration having no utility from a creditor’s viewpoint does not satisfy the statutory definition.**”⁹

(Emphasis added).

YdN’s (and Bell’s) complete failure to assert any explanation how the transfer of \$36,000.00 in exchange for the agreement to represent a specific individual in the future, in a specific legal proceeding could have any utility “from a creditor’s viewpoint” demonstrates the lack of substance inherent in the argument that Bell received reasonably value as required by

6. *Uniform Fraudulent Transfer Act*, Sec.3 comment, 7A U.L.A. 650(1984).

7. *Clearwater v. Skyline Const. Co.*, 67 Wn.App. 305, 835 P.2d 257 (1992).

8. Respondent’s Brief, Page 6, Note 18.

9. *Id.*, at 323.

the UFTA. The court in *Clearwater* established the test set forth above and rejected the notion that the fact that because in that case the debtor had satisfied an indebtedness on a transferred asset there was value from a creditor's viewpoint, noting that only the lender benefitted. The situation is very similar in this case, only YdN benefitted from the transfer.

YdN's reliance upon RCW 19.40.031 is even less persuasive. That statute is one which is specifically directed toward businesses furnishing support to others in the ordinary course of business. Such language relates to care facilities of various varieties which may provide healthcare, room, board, assisted-living or other support. It obviously has nothing to do with insolvent debtors transferring most of their assets to lawyer friends to "reverse" or "cancel" judgments obtained by their creditors.

The UFTA specifically defines the term "transfer" as,

“(12) Transfer means 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, and includes payment of money, release, lease and creation of a lien or other encumbrance.”¹⁰

10. RCW 19.40.011(12).

11. The argument that some or all of the fee might have to be refunded by the lawyer is specious because such a refund was solely within Bell's control and he has never made such a demand.

12. RCW 19.40.011(12).

The payment of the \$36,000.00 to YdN with the intent, as expressed under oath by its owner, that it was immediately earned was a mode of disposing of or parting with the major asset of an insolvent debtor¹¹ to avoid his creditor. If the payment is viewed as a retainer agreement the payment was direct and absolute¹². If the payment is viewed as a refundable fee agreement the payment is conditional. In either event the payment was a transfer as defined under the UFTA. A transfer which was made by an insolvent debtor, without receiving reasonably equivalent value, to defraud his pre-existing judgment creditor.

The Washington UFTA specifically provides, at RCW 19.40.903, “[T]his chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.” In the context of the legislative mandate it is useful to examine sister-state authority relating to transfers. The Arizona courts have defined a UFTA “transfer” as one which includes, “. . . any

13. RCW 19.40.011(12).

transaction in which a property interest was relinquished.”¹⁴ Such definition applies even though a transaction would be otherwise legal absent the UFTA. In construing the Colorado UFTA that state’s appellate court has held that the act applies not only to outright transfers but also, “. . . to a debtor’s assumption of a binding duty to transfer an asset in the future, even though no actual transfer has yet taken place.”¹⁵

II THE ARGUMENT THAT BELL’S USE OF THE \$36,000.00 TO CHALLENGE MAYERS’ JUDGMENT DID NOT CONSTITUTE HINDERING OR DELAYING UNDER THE UFTA IS FACTUALLY ERRONEOUS AND LEGALLY IMMATERIAL.

Under the UFTA relief may be based upon the actual intent¹⁶ of the debtor to defraud his creditor or upon the debtor’s constructive fraud.¹⁷ This action and Mayers’ summary judgment motion was based alternatively on either theory.

14. *State ex rel Indus. Com’n v. Wright*, 202 Ariz. 255, 256, 43 P.3d 203(2002).

15. *Sands v. New Age Family Partnership, Ltd.*, 897 P.2d 917, 919(1995).

16. RCW 19.40.051.

17. RCW 19.40.041(1).

Actual Intent to Defraud. RCW 19.40.041. The actual fraud theory includes the element of intent to hinder, delay or defraud¹⁸. The statute does not define these words. Words which are plain and unambiguous not otherwise defined should be given their ordinary meaning.¹⁹

Young deNormandie Urges A Dual Standard. YdN's Response Brief suggests that the plain and unambiguous words "hinder" and "delay" mean one thing when referring to civilians and something else when referring to lawyers. If in fact that was what the legislature intended when the statute was enacted it was incumbent upon that body to provide appropriate language in the act.

“[The] court should assume that the legislature means exactly what it says. Plain words do not require construction.”²⁰

YdN's Response Brief quotes from Mayers' Brief regarding Bell's legal right to challenge the judgment and from that makes a leap in logic to

18. RCW 19.40.041.

19. *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961(1991).

20. *Davis v. State ex rel Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554(1999).

the conclusion that it is Mayers' position that, "...a debtor must either satisfy or supercede a judgment before hiring an attorney to pursue the appeal."²¹ Without more that is of course an outrageous statement and it does not represent Mayers' position. It is when the additional elements of a UFTA Intentional Fraud action are added to the mix that the hinder or delay language applies. As is set forth in Mayers' opening brief, Bell's circumstances factually warranted the application of the statute. While it is correct that a judgment creditor is "...not required to satisfy or supercede the judgment before pursuing an appeal."²² It is also clear that if that judgment debtor is insolvent and makes the transfer of substantially all of his assets to an attorney to hinder or delay the enforcement of a judgment he and his transferee risk the application of the provisions of the intentional fraud provisions of the UFTA.²³

Constructive Fraud. RCW 19.40.051. Mayers is a creditor whose claim arose before Bell transferred the funds to his friend Young.

21. Response Brief, Page 7.

22. Response Brief, Page 8.

23. *Hanson v. Thompson*, 167 Wn.2d 414, 219 P.3d 659(2009). A case which actually involved transferee liability rather than placing assets beyond the reach as urged by YdN.

For that reason Mayers is entitled to the protection of the constructive fraud provisions of the UFTA as well. To establish this cause of action Mayers proved that: 1. His claim arose before the transfer; 2. That Bell was insolvent before and after the transfer; and, 3. That Bell did not receive reasonably equivalent value for the transfer. There was no dispute as to elements 1 and 2. The only element of the UFTA constructive fraud statute which YdN disputed was whether Mayers had satisfied the element that reasonably equivalent value was not received. As is discussed above, the arrangement between Bell and YdN was not one which meets the long established test set forth by the *Clearwater* Court.

III YOUNG deNORMANDIE'S DECISION TO LEAVE THE FUNDS IN ITS TRUST ACCOUNT WAS IN VIOLATION OF R.C.P. 1.15A(C) AND STRONGLY SUGGESTS THAT THE TRANSFER WAS CONTRIVED.

YdN allegedly required that Bell pay fee which was non-refundable and immediately earned. In transferring funds to YdN Bell specifically directed that the fee was non-refundable and immediately earned. Notwithstanding the crystal clear terms expressed by both parties to the transfer the funds remained in the YdN trust account 6 months later. Notwithstanding the tortured explanations offered by YdN for that circumstance, two things are clear: 1. Bell intended the funds to become

the property of YdN and has never altered that intention; 2. The failure of YdN to separate its funds from client funds in its trust account is a blatant violation of R.C.P. 1.15A(c). Taken in combination with the other troubling aspects of this transaction it is well within reason to conclude that it is possible that what was happening was that Bell's friend Young was allowing his firm's trust account to be used to conceal Bell's assets from his creditors and probably from the IRS.. Such an arrangement also allowed Bell to continue with his practice of directing payments to third-parties from the YdN trust account²⁴ and evading the reporting of earnings (including the *Exxon Valdez* fees) to tax authorities by failing to file income tax returns.²⁵ It is evident from the circumstances which are now known that the relationship between the insolvent debtor and his friend Young were anything but professional or arms length. The relationship was wrongful and inappropriate in its methods. Such methods give good basis for a conclusion that the relationship was wrongful and inappropriate in its purpose as well. A such it falls squarely within the UFTA and the superior court erred when it denied Mayers' motion for summary judgment

24. CP 69.

25. CP 68-69.

and in granting YdN's motion.

CONCLUSION

For the forgoing reasons, this Court should reverse and enter judgment in Mayers' favor as a matter of law. Alternatively, this Court should, at a minium, reverse the superior court's grant of summary judgment and remand for trial of the issues of fact.

Respectfully Submitted this 27th day of May, 2011.

~~THOMAS R. BUCHMEIER, P.S.~~



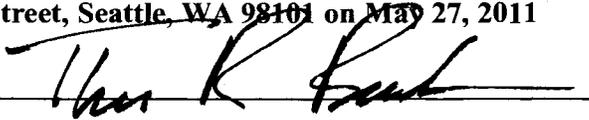
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CERTIFICATE

The undersigned certifies that:

I delivered a true copy of the foregoing Reply Brief to Dean vonKallenbach, 1191 2nd Avenue, Suite 1901, Seattle, WA 98101 on May 27, 2011.

I delivered an original and one copy of the foregoing Reply Brief to the Clerk, Court of Appeals, Division I, 600 University Street, Seattle, WA 98101 on May 27, 2011

A handwritten signature in black ink, appearing to read "Thomas R. Frank", is written over a horizontal line.