

United States District Court, W.D. Texas, San Antonio Division

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CIVIL ACTION NO. SA-01-CA-0522 NN (W.D. Tex. Mar 27, 2003)

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Decided March 27, 2003

BEIJING SANSHENG DEVEL. CORP. v. ADVERTISEMENT TECH

BEIJING SANSHENG DEVELOPMENT CORP., and BEIJING CROMALIN
ADVERTISING MATERIALS CO., LTD., Plaintiffs, v. ADVERTISEMENT
TECHNOLOGY CORPORATION; TRILLIONS, INC.; WEN FENG LIAW, Individual;
STEVE MIN HSUN LIAW, Individual; and TERESA YUN YING LIAW, Individual,
Defendants.

· CIVIL ACTION NO. SA-01-CA-0522 NN

· United States District Court, W.D. Texas, San Antonio Division

· March 27, 2003

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

NANCY STEIN NOWAK, Magistrate Judge

The matters before the Court are defendants Advertisement Technology Corporation (Ad-Tech), Steve Min Hsun Liaw and Teresa Yun Ying Liaw's motion for summary judgment, and plaintiffs' response thereto (docket entries 57 and 58). This matter is before me pursuant to the parties' consent (docket entry 45).¹ The court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(2).²

1.

28 U.S.C. § 636(c).

2.

Defendants have not challenged the jurisdiction of this Court. While they deny the averment in the complaint that defendant Wen Feng Liaw is a citizen of Texas, they do not assert that he is a citizen of China, which would affect complete diversity. *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553, 1557 (11th Cir. 1989) (stating that "the presence of at least one alien on both sides of an action destroys diversity"). Examining the propriety of jurisdiction *sua sponte* and based on the record before me, I find that diversity jurisdiction is present.

By their motion defendants ask the court to dismiss plaintiffs' claims seeking to set aside conveyances made to them by defendant Trillions, Inc. in September 1999, as being fraudulent. Plaintiffs respond that disputed factual issues prevent disposition of this claim on summary judgment.

In my previous Orders in this case I have set out the essential facts concerning the underlying dispute between plaintiffs and Trillions. After the arbitration proceedings commenced in China to resolve that dispute, Trillions transferred three properties to defendant Ad-Tech. Defendant Teresa Liaw is an officer and shareholder of Ad-Tech.³ Defendant Steve Liaw is an employee of Ad-Tech.⁴ Both are children of Wen Feng Liaw, President of Trillions.⁵

3.

Docket entry 57, Exh. J (Affidavit of Teresa Liaw).

4.

Docket entry 57, Exh. M and N (A-Tech Stock Holders Meeting Summary 1999 and 2000).

5.

Answer, Docket entry 13.

The motion before the Court is one seeking summary judgment. The applicable standard in deciding a motion for summary judgment is set forth in Federal Rule of Civil Procedure 56, which provides in pertinent part as follows:

The judgment sought shall be rendered forthwith if 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 the moving party is entitled to judgment as a matter of law.⁶

6.

FED.R.CIV.P 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Mere allegations of a factual dispute between the parties will not defeat an otherwise proper motion for summary judgment. Rule 56 requires that there be no genuine issue of material fact.⁷ A fact is material if it might affect the outcome of the lawsuit under the governing law.⁸ A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.⁹ Therefore, summary judgment is proper if, under governing laws, there is only one reasonable conclusion as to the verdict; if reasonable finders of fact could resolve a factual issue in favor of either party, summary judgment should not be granted.¹⁰

7.

Anderson v. Liberty Lobby, Inc. , 477 U.S. 242, 247 (1986).

8.

Anderson, 477 U.S. at 248; Thomas v. LTV Corp., 39 F.3d 611, 616 (5th Cir. 1994).

9.

Anderson, 477 U.S. at 248; Wise v. E.I. DuPont De Nemours Co. , 58 F.3d 193, 195 (5th Cir. 1995).

10.

Anderson, 477 U.S. at 249.

The movant on a summary judgment motion bears the initial burden of providing the court with a legal basis for its motion and identifying those portions of the record which it alleges demonstrate the absence of a genuine issue of material fact.¹¹ The burden then shifts to the party opposing the motion to present affirmative evidence in order to defeat a properly supported motion for summary judgment.¹² All evidence and inferences drawn from that evidence must be viewed in the light most favorable to the party resisting the motion for summary judgment.¹³ Significantly, when a motion for summary judgment is made and supported as provided in Rule 56, the nonmoving party may not rest upon the mere allegations or denials in his pleading.¹⁴ Rather, the nonmoving party's response must set forth facts showing that there is a genuine issue for trial.¹⁵ Accordingly, summary judgment motions permit the court to resolve lawsuits without the necessity of trials if there is no genuine dispute as to any material facts and the moving party is entitled to judgment as a matter of law.

11.

Celotex Corp., 477 U.S. at 323.

12.

Anderson, 477 U.S. at 257.

13.

Hibernia Nat'l Bank v. Carner, 997 F.2d 94, 97 (5th Cir. 1993).

14.

FED.R.CIV.P. 56(e); Anderson, 477 U.S. at 250; State of Texas v. Thompson, 70 F.3d 390, 393 (5th Cir. 1995).

15.

Celotex Corp., 477 U.S. at 324; Neff v. American Dairy Queen Corp., 58 F.3d at 1065; Engstrom v. First Nat'l Bank, 47 F.3d 1459, 1462 (5th Cir.), cert. denied, 516 U.S. 818 (1995).

Plaintiffs' fraudulent conveyance claims are based on Texas Business and Commerce Code § 24.005, which provides:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor. . . .

In assessing whether the transfer was made "with actual intent to . . . defraud", section 24.005(b) continues:

(b) In determining actual intent under Subsection (a)(1) of this section, consideration may be given, among other factors, to whether:

(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 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.

Accordingly, the key element of this cause of action is the intent of the transferee which is determined after considering a number of factors, none of which in and of themselves, are determinative of the issue of intent.

"Intent is a fact question uniquely within the realm of the trier of fact because it so depends upon the credibility of the witnesses and the weight to be given to their testimony."¹⁶ Nevertheless, "Texas law does not mandate that a case go to the jury merely because one of the elements of the claim is intent to defraud,"¹⁷ and several cases have held that intent to defraud can be decided as a matter of law.¹⁸ Generally, however, fraudulent intent must be determined by the trier of fact after evaluating the various facts and circumstances surrounding the challenged transfers.¹⁹

16.

Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 434 (Tex. 1986).

17.

BMG Music v. Martinez, 74 F.3d 87, 90 (5th Cir. 1996).

18.

E.g., *Id.* at 91 (summary judgment affirmed where no evidence submitted to overcome strong inference of fraud); and *In re Hinsley*, 201 F.3d 638 (5th Cir. 2000) (summary judgment affirmed where self-serving and unsupported affidavit claiming no intent found insufficient to raise genuine issue of material fact).

19.

Coleman Cattle Co., Inc. v. Carpentier, 10 S.W.3d 430, 434-435 (Tex.Civ.App.-Beaumont 2000).

Here, defendant contends that only one of the "badges of fraud" listed in section 24.005(b) — transfer to an insider — is arguably present to support an inference of fraudulent intent. Without additional evidence defendants argue summary judgment is appropriate. Plaintiffs respond that the transfer of property, for insufficient value, by the President of Trillions to a company run by his children, immediately after the commencement of the arbitration proceedings in China requires denial of the motion for summary judgment. Plaintiffs' evidence concerning the inadequacy of the consideration for the transfers consists of official records from the county tax assessor which reflect that the values of those properties in the year 2000 were between \$13,400 and \$27,000 more than the consideration actually paid for the properties just a year before.²⁰ The evidence before the court further reflects that Wen Feng Liaw, President of Trillions, made the transfers on behalf of Trillions to Ad-Tech,²¹ and that Wen's daughter Teresa Liaw was an officer and shareholder of Ad-Tech and son Steve Liaw was employed by Ad-Tech.²² Also, the evidence reflects that the arbitration proceedings concerning Trillions' failure to make the agreed investment into the Beijing Cromalin Advertising Materials Co., Ltd.(hereinafter referred to as "JV") commenced on June 1, 1999, barely three months before Trillions transferred the properties to Ad-Tech.²³ This is significant in that a conveyance may be invalidated, if made with fraudulent intent, regardless of whether the underlying liability has matured into a judgment at the time of transfer.²⁴ The timing of these transfers is certainly suspicious, particularly in light of the amount of consideration paid for the properties and the familial relationship of the principals of transferor and transferee.

20.

Docket entry 58, Exh. A, B and C.

21.

Docket entry 57, Exh. A, B and C.

22.

Docket entry 58, Exh. J (Affidavit of Teresa Liaw) and Exh. M N (A-Tech Stock Holder Meeting Summary 1999 and 2000).

23.

Docket entry 38, Exh. C-15 (Arbitration Award).

24.

Tex. Bus. C. CODE § 24.002(3); U.S. v. Chapman, 756 F.2d 1237, 1241 (5th Cir. 1985).

Plaintiffs suggest — but fail to present any evidentiary support for their allegations — that Trillions may have concealed or removed assets from the jurisdiction, that the challenged transfer rendered Trillions insolvent, and that Trillions has absconded so as to avoid its obligation. However, even in the absence of evidence to support these allegations, the

evidence which is before me and summarized above is otherwise sufficient to deny the summary judgment request. It will be the job of the trier of fact to assess the evidence presented at trial and determine whether to draw an inference of fairness with respect to the September 1999 transfers . . . or of fraud.

For the reasons stated above, it is ORDERED that defendants motion for summary judgment is DENIED.