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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-339

Filed: 17 October 2017

Wake County, No. 15 CVS 13843

RENO ARAGON, Plaintiff,

v.

LEGACY IMPORTS, INC. d/b/a PERFECT 1864 VODKA and MARK SMITH (in his individual capacity), and PERFECT BRANDS, L.L.C., Defendants.

Appeal by defendants from judgment entered 6 December 2016 by Judge R. Allen Baddour, Jr., in Wake County Superior Court. Heard in the Court of Appeals 21 September 2017.

Hairston Lane, PA, by Donald G. Huggins, for plaintiff-appellee.

Berman & Associates, Attys., by Gary K. Berman, for defendant-appellants.

ARROWOOD, Judge.

Legacy Imports, Inc. (“Legacy”), and Mark Smith (“Smith”) (together “defendants”) appeal from judgment entered in favor of Reno Aragon (“plaintiff”). For the following reasons, we affirm.

I. Background

Plaintiff filed a complaint in 12 CVS 1286 against Legacy and Smith, the sole shareholder and the president of Legacy, in Wake County on 27 January 2012. While that action was pending, Legacy and Perfect Brands, L.L.C. (“Perfect Brands”), entered into an “Asset Purchase and Business Reorganization Agreement” (the “Agreement”) on 9 August 2013. Pursuant to the Agreement, Legacy was to transfer its Perfect 1864 Vodka brand (“1864 Vodka”) to Perfect Brands and Smith was to receive a 20% equity interest in Perfect Brands. On 3 November 2013, plaintiff voluntarily dismissed his claims against defendants in 12 CVS 1286 without prejudice.

After Perfect Brands announced its acquisition of 1864 Vodka, plaintiff filed a complaint in 14 CVS 8669 reasserting his claims against defendants in Wake County on 1 July 2014. Plaintiff additionally asserted claims against Perfect Brands as successor in interest to any liabilities of defendants. Plaintiff’s claims and defendants’ counterclaims in 14 CVS 8669 were tried in Wake County Superior Court on 6 July 2015. On 26 August 2015, judgment in 14 CVS 8669 was entered against Legacy and in favor of plaintiff.

On 15 October 2015, plaintiff, as a creditor of Legacy, initiated the present action against defendants and Perfect Brands under the Uniform Voidable Transactions Act, N.C. Gen. Stat. § 39-23.1, *et seq.*,¹ to set aside the transfer of 1864

¹ The Uniform Voidable Transactions Act was formerly cited as the Uniform Fraudulent Transfer Act. *See* N.C. Gen. Stat. § 39-23.12 (2015).

Vodka from Legacy to Perfect Brands or, alternatively, to set aside the transfer of the equity interest in Perfect Brands to Smith. Plaintiff asserted the transfers should be set aside because “Legacy did not receive any value for the transfer of its only substantial asset[]” and “the transfer of assets from Legacy for no value has left Legacy with insufficient funds to pay the [j]udgment against it.” Plaintiff also alleged that Smith “undertook the aforementioned transactions with the intent to hinder, delay, or defraud the Plaintiff.”

Perfect Brands filed a motion to dismiss for lack of personal jurisdiction on 17 November 2015, which the court granted on 14 April 2016. Prior to the dismissal of Perfect Brands, defendants filed an answer on 22 December 2015. Discovery ensued.

On 2 November 2016, defendants filed a motion for summary judgment. The parties then stipulated to certain facts in a 10 November 2016 pretrial order. That order also indicated that the only contested issue for trial was whether Legacy fraudulently transferred assets to Smith. Defendants’ motion for summary judgement was heard and denied on 14 November 2016. The case was then tried without a jury before the Honorable R. Allen Baddour, Jr., in Wake County Superior Court on 14 November 2016.

On 6 December 2016, judgment was filed in favor of plaintiff. The trial court found that plaintiff was a creditor of Legacy at the time that defendants transferred

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1864 Vodka to Perfect Brands pursuant to the Agreement. The trial court made the following pertinent findings of fact:

4. Pursuant to this transaction Defendant Legacy transferred all or substantially all of its assets, resulting in Defendant Legacy becoming insolvent as a result of the transfer.

....

6. The [Agreement] indicated that Defendant Mark Smith received significant value as part of the transaction. Specifically, Defendant Mark Smith received a Twenty Percent (20%) ownership interest in Perfect Brands

....

7. Defendant Mark Smith did not provide reasonably equivalent value for his receipt of this ownership interest. Instead, this ownership interest was granted in exchanged [sic] for Defendant Legacy's transfer of its interest in the brand Perfect 1864 Vodka.
8. Defendant Legacy did not receive reasonably equivalent value for this transfer, as the value received was given directly to Defendant Mark Smith. The value Defendant Legacy retained did not constitute reasonably equivalent value.

Based on its findings, the trial court concluded as follows:

1. Defendant Legacy transferred, by indirect means, the Perfect Brands Equity to Defendant Mark Smith.
2. Defendant Legacy's transfer of the Perfect Brands Equity was fraudulent in that Plaintiff was a creditor at the time of the transfer, Defendant Legacy did not receive reasonably equivalent value for the transfer, and Defendant Legacy became insolvent as a result of the transfer.

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3. Consequently, the transfer of the Perfect Brands Equity from Defendant Legacy to Defendant Mark Smith is void as to the Plaintiff, as a creditor, pursuant to [N.C. Gen. Stat.] § 39-23.5(a).

Because the transfer of the equity is void, the trial court ordered that (1) the transfer of the equity from Legacy to Smith be set aside; (2) the equity shall be subject to an attachment for the benefit of plaintiff; (3) Legacy shall be prohibited from encumbering the or disposing of the equity; (4) a receiver shall be appointed to take possession of the equity to assist in its sale or disposition, and (5) plaintiff shall be permitted to levy execution on the equity or the proceeds derived therefrom. Defendants filed notice of appeal from the 6 December 2016 judgment on 5 January 2017.

II. Discussion

On appeal, defendants first argue the trial court erred in finding that Smith did not provide reasonably equivalent value for his receipt of the equity interest in Perfect Brands and that Legacy did not receive reasonably equivalent value for the transfer of the equity interest. Defendants' arguments relate to findings of fact numbers 7 and 8 above.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of

law.’ ” *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (“ ‘[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.’ ” (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

The evidence before the trial court in this case included defendant’s responses to plaintiff’s first set of interrogatories and requests for production, including a copy of the Agreement, and affidavits filed by Dennis C. Cunningham (“Cunningham”), the sole manager of Perfect Brands, and Smith. Based on that evidence, defendants contend there is no evidence from which the trial court could determine that Smith did not provide reasonably equivalent value for his receipt of the Perfect Brands equity from Legacy. In support of their argument, defendants point to Sections 1.1 and 2.1(c) of the Agreement and the affidavits of Smith and Cunningham. Defendants contend those two sections of the Agreement show that Smith provided value for his receipt of the Perfect Brands equity. Defendants further contend the affidavits show that “each party to [the Agreement] transferred certain assets to the other party to [the Agreement]” and “[e]ach such transfer was for value, and the consideration for said transfer was fair, adequate, substantial, and reasonable.”

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Upon review of all the evidence before the trial court, we are not persuaded the trial court erred.

First we look to those sections of the Agreement between Legacy and Perfect Brands identified by defendants. It is clear in Section 2.1(c) of the Agreement that Smith “shall initially receive a TWENTY PERCENT (20%) [m]embership [i]nterest in [Perfect Brands.]” The ultimate question is whether there was evidence that Smith provided equivalent value to Legacy for the equity interest in Perfect Brands. Section 1.1 of the Agreement between Legacy and Perfect Brands provides that Legacy would transfer all property and assets relating to 1864 Vodka to Perfect Brands. The section, however, further recognized that “Smith rather than [Legacy] may individually be in the title possession and/or title ownership of certain intellectual or [b]usiness property and related ownership rights and [a]ssets relating to the operation of the [b]usiness and/or the ownership of the [b]rand and its related rights[.]” Thus, the Section further provides that,

[a]s such, Smith shall transfer any and all Smith [t]itled [a]ssets relating to the [1864 Vodka] [b]rand and [b]usiness directly to [Legacy] in writing prior to the [c]losing [d]ate and the Smith [t]itled [a]ssets shall then be included as part of the [a]ssets to be transferred from [Legacy] to [Perfect Brands] in title at [c]losing.

Yet, Section 1.1 is not specific as to what assets Smith “may individually be in title possession and/or title ownership of” and there is no indication in the other evidence before the trial court that Smith did in fact transfer anything of value to Legacy in

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exchange for the equity interest. Section 1.1 of the Agreement provides that the transfer of assets relating to 1864 Vodka from Smith to Legacy be in writing; but in response to plaintiff's request for production of all documents related to any transactions between defendants, defendants responded, "[s]ee the [Areement]." Moreover, in response to plaintiff's interrogatory concerning the amount of consideration Smith provided in exchange for his equity interest in Perfect Brands, defendants stated that "[t]he terms of the acquisition are in the [Agreement]." There is no evidence that Smith transferred anything of value to Legacy related to Legacy's transfer of 1864 Vodka to Perfect Brands, as contemplated in the Agreement.

The affidavits of Cunningham and Smith are similarly devoid of any evidence that Smith transferred anything of value for his receipt of the Perfect Brands equity interest. The affidavits discuss only the transaction between Legacy and Perfect Brands and not Smith's involvement. Specifically, those affidavits provide that "[t]he [Agreement] accurately and fully states the terms of the agreement between [Legacy] and [Perfect Brands]" and that each party to the Agreement transferred assets to the other party to the Agreement. As stated above, those affidavits also provide that "[e]ach such transfer was for value, and the consideration for said transfer was fair, adequate, substantial, and reasonable. The consideration for said transfer is accurately stated in the [Agreement]." There is nothing in the affidavits that shows

that Smith provided value for the receipt of the equity interest in Perfect Brands from Legacy.

Based on the evidence that Legacy transferred a twenty percent equity interest in Perfect Brands to Smith in connection with Legacy's transfer of 1864 Vodka to Perfect Brands without evidence that Smith transferred anything of value to Legacy, we hold the trial court did not err in making findings of fact numbers 7 and 8.

Lastly, based solely on defendants' first argument on appeal, defendants further argue the court erred in concluding that there was a fraudulent conveyance of assets from Legacy to Smith and ordering relief. Because we hold the trial court's findings are supported by the evidence, defendants' last argument fails.

III. Conclusion

For the reasons discussed above, we hold the trial court did not err in making findings of fact numbers 7 and 8 and affirm the judgment of the trial court.

AFFIRMED.

Judges HUNTER, Jr., and DILLON concur.

Report per Rule 30(e).