

TIM'S & CO. V. MUDGE BAY CONSTRUCTION, INC. (MOTION FOR SUMMARY JUDGEMENT – FRAUDULENT CONVEYANCE CASE)

Case Name:

Tim's & Co. v. Mudge Bay Construction Inc.

Between

Tim's & Co. Ltd., plaintiff, and

Mudge Bay Construction Inc. and William Joseph Bernard

Sutton and Madeleine Irene Sutton, defendants

[2004] O.J. No. 437

Court File No.: OT379/03

Ontario Superior Court of Justice

Gauthier J.

Heard: November 26, 2003 and January 14, 2004.

Judgment: January 20, 2004.

(67 paras.)

*Fraud and misrepresentation — Fraudulent conveyances and preferences — Conveyances and preferences
impeachable by creditors or others — Fraudulent preference, what constitutes — Conveyances between persons in close*

relationship — Evidence and proof — Impeachable conveyances and preferences under modern statutes — Conveyance to defeat or prefer creditors — Exceptions, payment of money to a creditor — Sale or transfer by debtor to third parties.

Motion by Mudge Bay for summary judgment dismissing Tim's claim. In March 2003 Tim's obtained judgment against Mudge Bay and Sutton, the owner of Mudge Bay, for a \$62,000 unpaid invoice from the fall of 2002. After obtaining this judgment, Tim's brought a new claim seeking to set aside certain transaction that Tim's argued were fraudulent conveyances and preferences. In early 2000 Sutton had begun to formulate a plan to develop and sell portions of a cottage property. In 2002 Mudge Bay obtained title to a small parcel of lands adjacent to the subject lands in exchange for a portion of Sutton's land. In January 2003 Mudge sold one parcel of land, and in February of 2003 Mudge exchanged some land with Sutton and then sold a parcel to another party. Mudge used the proceeds of the sales to pay two of its creditors. Tim's argued that the transactions were unlawful attempts by Mudge to defeat Tim's as creditor. Mudge sought an order dismissing Tim's statement of claim, arguing that there was no genuine issue for trial.

HELD: Motion allowed. The properties exchanged between Sutton and Mudge were of approximately equal value and therefore the exchange was for valuable consideration. Tim's did not provide any evidence of any fraudulent intent in this transaction, only speculation and suspicion. The proceeds of the land sales were used to pay Mudge's creditors and thus could not be rendered void as against another creditor. There was no triable issue regarding the proceeds of sale.

Statutes, Regulations and Rules Cited:

Assignments and Preferences Act, ss. 4, 5(1).

Counsel:

Joseph M. Chapman, for the plaintiff.

D. Peter Best, for the defendants.

¶ 1 **GAUTHIER J.**— During the fall of 2002, the Plaintiff, a lumber yard and building supply dealer, sold building materials to the Defendant company. The Defendant failed to pay the Plaintiff for the goods. On March 14, 2003, the Plaintiff obtained Judgment against the Defendant company and William Sutton in the amount of \$62,315.79. The Plaintiff’s motion for summary judgment was not opposed by the Defendant.

¶ 2 By way of Statement of Claim issued on March 18, 2003, the Plaintiff seeks to set aside certain transactions effected by the Defendants as being fraudulent conveyances, and, it seeks a declaration that the payment of certain sums of money on the closing of the impugned transactions are a fraudulent assignment and/or preference pursuant to the Assignments and Preferences Act. The action is brought against the company as well as the two principals and sole shareholders, officers and directors of the company.

¶ 3 The Defendants have delivered a Statement of Defence and are vigorously defending the Plaintiff’s action.

¶ 4 By way of Notice of Motion dated September 29, 2003, the Defendants have brought a motion for summary judgment dismissing the Plaintiff’s action. It is this motion which I heard on November 26, 2003, and January 14, 2004.

¶ 5 The chronology of events is of primordial importance on this motion.

¶ 6 The individual Defendants, hereinafter referred to as “the Suttons”, are husband and wife. They purchased a recreational or cottage property from Couch Holdings in August 1998. The subject property had previously been surveyed into different parts, however, when the Suttons purchased the cottage property, it was one single parcel of property. Title was taken in the name of the Suttons.

¶ 7 According to the Affidavit of William Sutton he and his wife began to formulate a plan to develop and sell portions of the cottage property. W. Sutton discussed this proposal with the Manager of the Manitouslin Planning Board, in early 2000.

¶ 8 For reasons which are not germane to this motion, the plan to create and sell separate lots could not be carried out, without the Suttons acquiring a further adjacent piece of property, owned by Couch Holdings.

¶ 9 William Sutton discussed this plan with Hugh McLaughlin, a real estate broker. McLaughlin, on behalf of the Suttons made an offer to purchase the adjacent property, which offer was to give Couch 20 to 30 feet of the Suttons' lake frontage, in return for the Couch property which included a thirty three foot wide strip of land parallel to the Suttons' property. The offer was not accepted by Couch at that time.

¶ 10 In early 2002, William Sutton once again was in contact with the Manitoulin Planning Board regarding his proposal to acquire the aforementioned Couch property.

¶ 11 In June 2002, Sutton once again offered to purchase the Couch property. The offer was made in the name of the Suttons, but title was actually taken in the name of the company. William Sutton says that the only reason for that to have occurred was (a) to facilitate severances by transfer from different registered owners and (b) for GST flow-through benefits.

¶ 12 At about the same time, according to Hugh McLaughlin, William Sutton approached him to market two lots for sale, subject to Planning Board approval. McLaughlin prepared a sketch showing the sizes and shapes of the lots which were to be sold/transferred.

¶ 13 On September 4, 2002, an Agreement of Purchase and Sale was entered into between the company and M. and W. Egrmajer for the purchase of a lot, subject to the approval of the Manitoulin Planning Board. The transaction was to be completed on the 9th of January, 2003.

¶ 14 Also, in September 2002, an Agreement of Purchase and Sale was prepared contemplating the sale to S. and P. Daly, of another lot. The Agreement showed the company as the Vendor, when title in fact was held by the Suttons. This Agreement, which was not signed, provided for a closing date of February 27, 2003.

¶ 15 On October 7, 2002, an Application was made to the Planning Board for approval of a "lot addition". It proposed that the property which was owned by the company be transferred to Suttons and eventually be added to the Suttons' cottage property.

¶ 16 On October 23, the Planning Board granted its approval for a lot addition to the property purchased from Couch Holdings.

¶ 17 In December 2002, a further application was made to the Planning Board to create the lot being sold to Daly. This application was approved subject to conditions.

¶ 18 On February 5, 2003, the company, Mudge Bay Construction Inc., transferred to Sutton a piece of property, and Sutton transferred to Mudge another piece of property which then formed part of the property transferred to Egrmajer.

¶ 19 On March 3, 2003, Mudge sold another piece of property to Parker et al.

¶ 20 The Plaintiff seeks to set aside, as fraudulent and void, the February 5, 2003 transfer from Mudge to Sutton. The Plaintiff's position is that this transfer was an unlawful attempt by Mudge to defeat its creditor, the Plaintiff. The Plaintiff relies on the Land Transfer Tax Affidavit filed in connection with this transaction. It indicates that the consideration for the transfer was "Nil".

¶ 21 Further, the Plaintiff seeks a declaration that the monies received by Mudge on the sale to Egrmajer, i.e. \$36,500, and the monies received on a further sale by Mudge to Parker et al., on March 3, 2003, i.e. \$24,500, were an unlawful and fraudulent assignment. The Plaintiff says that Mudge paid the monies to Suttons in an effort to defeat its creditor, the Plaintiff.

¶ 22 The Statement of Claim alleges in paragraphs 8 and 9 that the company directed the proceeds of sale (Egrmajer \$36,500; Parker et al. \$24,500) to Suttons.

¶ 23 The Statement of Claim further alleges that the transfer of property from Mudge to Suttons and the handling of the proceeds of sale evidence a conspiracy to obtain a fraudulent preference over the Plaintiff and other creditors. (See para 12 of the Statement of Claim).

¶ 24 The Defendants seek an Order dismissing the Plaintiff's claim. Their position is that the transfer by Mudge to Suttons on February 5, 2003 was done to carry out a long-standing development plan, and that although the Land Transfer Tax Affidavit indicates "Nil" consideration, in fact, there was valuable consideration: the value of the property transferred by Mudge to Suttons had an approximately equal value to the property transferred from Sutton to Mudge.

¶ 25 As well, the Defendants maintain that the funds received from the sales in February and March, 2003, that is, the \$36,500 and the \$24,500, respectively, were not paid to Suttons as alleged by the Plaintiff, but rather were paid to creditors of Mudge, thus, there was no fraudulent assignment or preference.

¶ 26 The test on a motion for summary judgment is whether or not there is a genuine issue which requires a trial.

¶ 27 If the moving party shows that there is no genuine issue of material fact which requires a trial, then the responding party must establish that its claim is one with a real chance of success. See *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 and [1999] S.C.J. No. 60, File No. 26654.

¶ 28 I begin with the impugned property exchange between the company and Suttons. The Plaintiff maintains that those transfers were intended to defeat the Plaintiff. The Defendant, on the other hand, says that the Plaintiff cannot, on the facts, prove such intention.

¶ 29 At the time Mudge transferred the property to Suttons, it was clearly indebted to the Plaintiff. If the transfer from Mudge to Suttons was without adequate consideration, then the fraudulent intent suggested by the Plaintiff would be presumed. On the other hand, if the transfer was for valuable consideration, it would be for the Plaintiff to show that the transfer was fraudulent.

¶ 30 The Land Transfer Tax Affidavit that was filed with the impugned transfer from Mudge to Suttons indicates no consideration. However, the affidavit also indicates that the transfer was "to fulfil (sic) conditions of severance approval". In addition, the Defendants have, on this motion, adduced evidence that the value of the property transferred from Mudge to

Suttons was equal to the value of the property transferred from Suttons to Mudge. This would mean that there was consideration for the transfer from Mudge to Suttons in exchange for the property it transferred to Suttons.

¶ 31 Thus, there is evidence that the impugned transfer was for valuable consideration. That being so, the onus is on the Plaintiff to show that, nonetheless, the intent by Mudge was to hinder or defeat the Plaintiff. In order to succeed, the Plaintiff must show an actual intention to defeat or defraud creditors, based on something more than mere suspicion. See *Shephard v. Shephard* (1925), 56 O.L.R. 555 (C.A.).

¶ 32 The fact that the debtor does not have sufficient assets to pay its debt at the time of the transfer of property is not, without more to result in the inference of fraudulent intent.

¶ 33 The evidence put forth by the Defendants is that the impugned transfer was effected in order to carry out a long-standing plan to develop and sell property which plan pre-existed the creation of the debt from Mudge to the Plaintiff and was in no way designed to defeat the Plaintiff's claim.

¶ 34 The evidence of Hugh McLaughlin would support the existence of an earlier development plan on the part of Suttons, which involved the acquisition of property from Mudge.

¶ 35 The responding material of the Plaintiff, i.e. the affidavit of Kevin Hutchinson does not provide any evidence of fraudulent intention on the part of the Defendants. At paragraph 4 of that affidavit, Mr. Hutchinson says that he believes that William Sutton as the directing mind of Mudge, did deliberately "attempt to transfer whatever assets and cash Mudge Bay Construction owned to William and Madeleine Sutton, the sole shareholders of the company before I obtained judgment against Mudge Bay Construction Inc."

¶ 36 Kevin Hutchinson has not specified the source of his belief, save and except as being the transactions themselves, and the timing of the transactions. This is, in my view, without more pure speculation and suspicion.

¶ 37 It is not affirmative evidence of the intent to defeat the Plaintiff. Nor does it lead to a clear and convincing inference of such intent.

¶ 38 I wish to touch as well on the Plaintiff's submission that the company sold the Parker property at far below market value before the Plaintiff could obtain a writ of execution.

¶ 39 The Plaintiff relies on the fact that abutting 100-acre parcels sold for \$34,900 and \$32,000. One such parcel was sold in 1997 and the other in 2002. William Sutton's evidence is that the Parker property was a bush lot, good only for firewood and deer hunting.

¶ 40 The Plaintiff, although impugning the transaction of sale from Mudge to Parker et al on this motion, does not seek, to have the transaction set aside. Rather, the Plaintiff, has sought relief in connection with the proceeds of that sale. I deal with that below.

¶ 41 Whether or not the Parker property was sold at less than market value, there is no evidence to establish the fraudulent intent suggested by the Plaintiff. As the transaction was for valuable consideration, there is no presumption of mala fides. Here again, the Plaintiff has not discharged the onus of showing the fraudulent intent.

¶ 42 The Plaintiff has not discharged the burden of proving fraudulent intention in the face of the affirmative evidence of the Defendants establishing a legitimate purpose for the transfers, and not a purpose designed to defeat the Plaintiff's claim.

¶ 43 That being so, the conclusion is that the Plaintiff has not established this portion of its claim as being one with a real chance of success. The Plaintiff has raised the credibility of William Sutton as an issue. That is not enough. The issue relating to credibility must be genuine. (See *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545).

¶ 44 Given the evidence of bona fides put forward by the Defendants, the lack of evidence from the Plaintiff that would establish a fraudulent intention, and the assumption that the Plaintiff has presented its best evidence on this point, the conclusion is that there is no triable issue with regard to the impugned transfer of property from Mudge to Suttons.

¶ 45 I turn now to the Plaintiff's claim that the payment of monies from the sales to Egrmajer and Parker et al. constitute an unlawful and fraudulent assignment and/or preference.

¶ 46 According to the evidence of William Sutton, the proceeds from the sale from Mudge to Egrmajer, namely \$25,297.17 were deposited into the company's bank account on February 6, 2003. On the same day, the company paid, out of its account, the sum of \$3,000 toward its TD business line of credit. The next day, the sum of \$22,364.19 was paid by the company to Canada Customs and Revenue Agency for payroll withholding taxes.

¶ 47 It is the irrefutable evidence of Suttons that they did not receive any of the proceeds of that sale.

¶ 48 On March 3, 2003, the transaction of sale from the company to Parker et al was concluded and the net proceeds of sale, \$19,234.56, were deposited into Mudge's bank account on March 11, 2003. On the same day, the company paid out, from that account, the sum of \$17,000, again on its TD bank line of credit.

¶ 49 Kevin Hutchinson's evidence is that he believes that the company, in an attempt to defeat its creditors, directed the Egrmajer proceeds to the Suttons or utilized it to pay debts of the Suttons. The Plaintiff has not adduced any evidence which could establish this allegation.

¶ 50 Mr. Hutchinson believes that the company, again attempting to defeat its creditors, directed the proceeds from the Parker sale to the Suttons or the Suttons' other creditors knowing that Mudge was insolvent. No evidence has been entered to support this belief.

¶ 51 There is evidence to establish that, save and except for approximately \$2,000, all of the proceeds of the sale to Egrmajer and to Parker et al were rerouted by the company to two of its creditors: Canada Customs and Revenue Agency and TD Bank.

¶ 52 By virtue of the provisions of s. 5(1) of the Assignment and Preferences Act, any payment of money to a creditor is protected, although it may be a preference. It is not rendered void as against other creditors. Such payment to a creditor is an exception to s. 4 of the Act which nullifies gifts, conveyances, transfers, etc. that are designed to hinder or defeat creditors. Section 5(1) specifically protects a payment to a creditor:

Nothing in section 4 applies...to any payment of money to a creditor.

¶ 53 The decision in *Kisluk v. B. L. Armstrong Co. Ltd* (1982), 40 O.R. (2d) 167 contains a thorough discussion of the effect of ss. 4 and 5(1) of the Assignment and Preferences Act. At page 180, Anderson J. recognizes the oddity of the exception:

It may be an anomaly that payments of money to a creditor should be singled out for separate and different treatment than other preferences. The law is full of anomalies. If there is an anomaly, I do not find its existence warrants departing from what is to me the clear effect of the Act.

¶ 54 Given the evidence of the payments by the company to the two aforementioned creditors, the provisions of s. 5(1) of the Assignment and Preferences Act, and given the lack of evidence of any monies, save and except perhaps some \$2,000 having been directed to the Suttons, there is no likelihood that the Plaintiff would succeed at trial in having the payments of the proceeds of sale to Suttons declared void. There is no evidence that any of the proceeds of sale, save and except perhaps some \$2,000, were directed to Suttons as alleged in the Statement of Claim and by Kevin Hutchinson. The only evidence tendered indicates the payment of debts of the company which payments are protected.

¶ 55 There is no triable issue, in my view, with regard to the said proceeds of sale. I would grant the Defendants' motion to dismiss this portion of the Plaintiff's claim.

¶ 56 The affidavit of Kevin Hutchinson refers to broken promises of William Sutton (para 3), repeated lies of William Sutton (para 4), gross dishonesty and treachery on the part of William Sutton (para 10). No evidence to prove these allegations of misconduct has been tendered on the motion, save and except for the transactions themselves, the timing of those, and the lack of payment of the debt by Mudge.

¶ 57 As well, Kevin Hutchinson believes that, as a result of the transfers of property which formed the subject of this motion, the Defendant Mudge does not have the ability to pay the outstanding judgment. This belief, based on inquiries Mr. Hutchinson made, is not evidence of the fraudulent intent, or conspiracy alleged by the Plaintiff.

¶ 58 I conclude that, based on the evidence which was before me on the motion, which is all the court may consider, there is no genuine issue for trial. There is no real likelihood that the Plaintiff would be successful at trial. The record on the motion does not disclose a genuine issue of disputed facts.

¶ 59 Having found that there is no triable issue with regard to the relief sought in para 1(a) and (c) of the Statement of Claim, I order that the Plaintiff's claim be dismissed in its entirety. The relief claimed in para 1(b) of the Statement of Claim, i.e. the request for certificate of pending litigation was argued by way of motion before Hennessy J. on May 23, 2003.

¶ 60 The relief claimed in para 1(d) of the claim, i.e. the sum of \$61,000 from the Defendants Sutton is without foundation. The Plaintiff has a judgment against the company and William Sutton. As indicated in these reasons, there is no evidence that any monies, save and except perhaps for some \$2,000 were remitted to the Suttons.

¶ 61 Paragraph 1(e) of the Statement of Claim seeking a payment into court pending the outcome of the action and seeking an injunction is now moot.

¶ 62 On the resumption of this motion on January 14, 2004, the Plaintiff sought to proceed on a new motion launched after the Defendants' counsel had made his submissions. The new motion sought, amongst other things, an amendment to the Statement of Claim to state that the Defendants had directed the proceeds of the sale of the properties in question to pay down the Mudge debts while Mudge was insolvent, which debts were personally guaranteed by Suttons and such payments were unlawful.

¶ 63 For reasons given orally on the record, I adjourned the motion without date and I declined the Plaintiff's request to adjourn the summary judgment motion until such time as William Sutton had fulfilled his undertaking to provide information as to whether or not Mudge's line of credit was personally guaranteed by Suttons. The Plaintiff had not, in its material on the summary judgment motion, made reference to any such undertaking. It was my view that to adjourn the motion awaiting further information would prejudice the Defendants and would add a new claim by the Plaintiff which had not been pleaded.

¶ 64 The motion for summary judgment had been outstanding since November. The Plaintiff had filed what is to be taken as its complete response by November 12, 2003. Counsel for the Defendants made his submissions on November 26, 2003. The matter was then adjourned (due to the lateness of the hour) to January 14, 2004 for Plaintiff's counsel to make his submissions.

¶ 65 The Plaintiff's motion was an attempt to reopen the matter and was brought too late in time. Therefore, the only evidence which was properly considered on the summary judgment motion was what was before the court on November 26, 2003.

¶ 66 It is on that evidence that I have concluded that the Defendants should have the relief sought in their motion, i.e. summary judgment dismissing the Plaintiff's claim issued March 18, 2003.

¶ 67 Counsel are to communicate with the Trial Co-Ordinator within ten days if they wish to address the issue of costs. If they do not do so, it will be presumed that they have reached agreement on the matter of costs.

GAUTHIER J.