COURT OF APPEALS
DECISION
DATED AND FILED

October 18, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2862 **Cir. Ct. No. 2003CV7678**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MARK C. TRETER AS CHAPTER 128 RECEIVER OF 815 CORPORATION,

PLAINTIFF-RESPONDENT,

V.

JAMES J. VALONA,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: CLARE L. FIORENZA, Judge and VICTOR MANIAN, Reserve Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. James J. Valona appeals the order granting summary judgment to Mark C. Treter, the Receiver of 815 Corporation under WIS. STAT. ch. 128, and denying Valona's cross-motion for summary judgment. Valona also appeals the order denying his motion for reconsideration.[1] The trial court concluded that James A. O'Connor, 815 Corporation's sole shareholder, caused the corporation to fraudulently convey 815 Corporation's property to Valona. *See* WIS. STAT. § 242.04(1)(b). Valona contends that the trial court erred when it granted summary judgment on the fraudulent-transfer claim because: (1) genuine issues of material fact exist; (2) the claim is barred by what he asserts is a statute of repose; and (3) Treter's action is barred by both claim- and issue-preclusion. We affirm.

I.

¶2 O'Connor is the sole shareholder of 815 Corporation. Valona loaned $108,000 to O'Connor personally. To secure the loan, O'Connor had 815 Corporation give a mortgage and a mortgage note to Valona on May 4, 1999, for property it owned at 815-817 West National Avenue in Milwaukee. 815 Corporation did not make any payments on the note. In lieu of foreclosure, 815 Corporation transferred the National-Avenue property to Valona by quitclaim deed on August 24, 1999.

¶3 In anticipation of the transfer of the National-Avenue property, O'Connor, individually and as sole shareholder of Telephones Direct,

[1] The Honorable Clare L. Fiorenza issued the order granting summary judgment to Mark C. Treter. The Honorable Victor Manian issued the order denying James J. Valona's motion for reconsideration.

Incorporated, a telephone refurbishing business, entered into a commercial lease with Valona on August 4, 1999, in which O'Connor and Telephones Direct became joint lessees of the National-Avenue property. O'Connor and Telephones Direct did not pay rent to Valona after November of 2001. Valona filed an eviction action against them on April 1, 2002.

¶4 O'Connor and Telephones Direct answered and counterclaimed. They asserted as an affirmative defense that Valona was not the "true owner" of the National-Avenue property because Valona obtained the quitclaim deed "by virtue of extortion and the imminent threat of deadly violence."

¶5 The eviction action was ultimately settled. O'Connor stipulated that he transferred the quitclaim deed to Valona "of his own free will." Valona and O'Connor agreed that Valona would dismiss a foreclosure action on other property O'Connor had mortgaged to Valona after O'Connor made two installment payments to Valona. After O'Connor made the installment payments, Valona would give to O'Connor an "executed land contract" for the National-Avenue property. (Uppercasing omitted.) O'Connor signed the Settlement Agreement individually and, as material, as the president of Telephones Direct and 815 Corporation. O'Connor did not make the second payment, and Valona evicted him from the National-Avenue property.

¶6 815 Corporation sued Valona on August 22, 2003, to regain the National-Avenue property, alleging: failure of consideration, common-law fraud, and unjust enrichment. It claimed, as material, that the consideration for the quitclaim deed was a "sham, and of no value to 815 Corp[oration]."

¶7 815 Corporation subsequently filed an assignment for the benefit of its creditors under WIS. STAT. ch. 128. Treter was appointed the Chapter 128

Receiver, and filed an amended complaint against Valona. He alleged, as material, that the conveyance of the National-Avenue property to Valona was a fraudulent transfer under WIS. STAT. ch. 242 because, he alleged, 815 Corporation did not receive "reasonably equivalent value" for the transfer, *see* WIS. STAT. § 242.04(1)(b) ("A transfer made or obligations incurred by a debtor is fraudulent as to a creditor … if the debtor made the transfer … [w]ithout receiving a reasonably equivalent value in exchange"), and asked the trial court to void the mortgage, mortgage note, and quitclaim deed.

¶8 The parties were deposed. O'Connor testified that he started "doing business" with Valona when he set up Telephones Direct. As part of the set up, Valona and O'Connor agreed in October of 1998, that Valona would, in exchange for fifty-percent of Telephones Direct, lend $45,000 to that company so it could purchase antique telephone equipment.

¶9 Valona testified that, between October of 1998 and March of 1999, he loaned $108,000 to O'Connor. Valona claimed that O'Connor used $45,000 of the $108,000 to buy telephone equipment for Telephones Direct, but that he "really [did not] know where all the funding did go." Valona testified, however, that he believed the money went to 815 Corporation: "$108,000 was provided to James A. O'Connor, and how he chose to use the money amongst his many corporations was his discretion. How it ultimately ended up on this would show that he used it for 815 Corporation."

¶10 Valona sought summary judgment dismissing Treter's action, contending, as we have seen, that it was barred by both claim- and issue-preclusion. Valona also asserted that material issues of fact prevented summary judgment for Treter on the fraudulent-transfer claim.

¶11 As noted, the trial court granted Treter's motion for summary judgment, and denied Valona's motion for summary judgment. It concluded that the conveyance of the National-Avenue property was fraudulent under WIS. STAT. § 242.04(1)(b), and voided the mortgage and quitclaim deed. *See* WIS. STAT. § 242.07(1)(a) (prevailing creditor may "avoid[] … the transfer").

¶12 Valona retained new counsel and filed a motion for reconsideration. He argued that Treter could not avoid the mortgage or the deed because Treter's time for filing a fraudulent-transfer claim under WIS. STAT. § 893.425(2), what he contended was a statue of repose, had expired. The trial court denied the motion, concluding that the statute-of-repose argument was "a new argument that should have been made initially if it was going to be made."

II.

¶13 Our review of the trial court's grant of summary judgment is *de novo*, and we use the same methodology as did the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987).

> Under that methodology, the court first examines the pleadings to determine whether claims have been stated and a material issue presented. If the complaint states a claim and the pleadings show the existence of factual issues, the court examines the moving party's affidavits or other evidence for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. If the moving party made a *prima facie* case, the court examines the opposing party's affidavits for evidentiary facts or other proof to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts, and therefore a trial is necessary.

State Bank of La Crosse v. Elsen, 128 Wis. 2d 508, 511, 383 N.W.2d 916, 917 (Ct. App. 1986).

¶14 Valona contends that the trial court erred when it granted summary judgment on the fraudulent-transfer claim because, as we have seen, he argues that: (1) material issues of fact need to be tried; (2) the fraudulent-transfer claim was barred by what he says is a statute of repose; and (3) the fraudulent-transfer claim was barred under both claim- and issue-preclusion. We analyze each issue in turn.

A. *Fraudulent Transfer*.

¶15 WISCONSIN STAT. § 242.04(1)(b) provides:

> **(1)** A transfer made or obligations incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> ….
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> 1. Was engaged or 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 became due.

Valona argues that the trial court erred because Treter did not establish the *prima facie* elements of a fraudulent-transfer claim under § 242.04(1)(b). *See* ***Loyal Cheese Co. v. Wood County Nat'l Bank & Trust Co.***, 969 F.2d 515, 518 (7th Cir.

1992) (plaintiff must prove elements of fraudulent transfer by clear and convincing evidence). Specifically, Valona asserts that Treter did not show that 815 Corporation transferred its interest in the National-Avenue property without receiving "reasonably equivalent value" in return. He contends that, aside from his deposition testimony that he delivered the money to O'Connor, it is not clear from the summary-judgment record whether O'Connor used the money for personal expenses or to benefit 815 Corporation. We disagree.

¶16 As we have seen, Valona testified that he loaned the money to O'Connor. 815 Corporation gave to Valona a mortgage, and, ultimately, a deed to the property. A corporation is a separate entity from those who own its stock. *See* ***Jonas v. State***, 19 Wis. 2d 638, 644, 121 N.W.2d 235, 238 (1963). Valona does not dispute this paradigm principle, but, rather, points to the following, which he contends shows that 815 Corporation received the requisite value in return for its transfer of the National-Avenue property to him: (1) approximately one and one-half years after the deed to the National-Avenue property was transferred to Valona, 815 Corporation loaned $200,000 to another corporation that O'Connor owned, Metro Area Properties, Incorporated; (2) O'Connor says that he granted the May 4, 1999, mortgage to Valona "based on [Valona's] representation" that he would transfer to 815 Corporation his interest in Telephones Direct; and (3) Valona testified that he paid property taxes and other debts of 815 Corporation, transferred to 815 Corporation telephone equipment and an FCC license, paid for repairs, and paid liens against the property.

¶17 In connection with Valona's first assertion, the summary-judgment record shows that, in exchange for the loan, Metro Area Properties issued to 815 Corporation mortgages and mortgage notes on two properties that Metro Area Properties owned. This transaction does not show that 815 Corporation received

the requisite value at the time of the transfer of the National-Avenue property. *See* ***Running v. Widdes***, 52 Wis. 2d 254, 258–259, 190 N.W.2d 169, 172 (1971) ("The consideration and the transfer must be concurrent and simultaneous.").

¶18 Further, Valona does not point to any evidence showing that he actually performed his promise to transfer his interest in Telephones Direct to 815 Corporation, *see* WIS. STAT. § 242.03(1) ("value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person"), or show *when* he allegedly paid 815 Corporation's debts and transferred property to it, *see* ***Running***, 52 Wis. 2d at 258–259, 190 N.W.2d at 172. None of what Valona points to shows that 815 Corporation received the requisite "reasonably equivalent value." *See* § 242.03(1) ("Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied."). Accordingly, he has not satisfied his summary judgment burden. *See* ***Estate of Anderson v. Anderson***, 147 Wis. 2d 83, 88, 432 N.W.2d 923, 926 (Ct. App. 1988) (party asserting affirmative of a proposition has burden of proof); ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291–292, 507 N.W.2d 136, 140 (Ct. App. 1993) (burden of demonstrating sufficient evidence to go to trial on party who has burden of proof on issue at trial).

¶19 Valona also contends that there are genuine issues of material fact whether 815 Corporation "believed or reasonably should have believed" that the transfer of the National-Avenue property would result in "debts beyond [its] ability to pay as they became due." *See* WIS. STAT. § 242.04(1)(b)2. Again, we disagree.

¶20 To support his motion for summary judgment, Treter submitted an affidavit from O'Connor, in which O'Connor averred, as material, that: (1) at the time of its transfer to Valona, the National-Avenue property was the "sole or only significant asset" of 815 Corporation; (2) 815 Corporation was "rendered insolvent" by the transfer of the National-Avenue property to Valona; and (3) without that property, 815 Corporation was "left … with insufficient assets to pay its debts." Valona counters that: (1) 815 Corporation received rental income of $500 per month for outside storage at the property from 1998 to 2002, and (2) as we have seen, 815 Corporation loaned $200,000 to Metro Area Properties approximately one and one-half years after 815 Corporation gave to Valona the quitclaim deed. These contentions do not, however, address the requirement that 815 Corporation have assets other than the property allegedly fraudulently transferred *when that property was transferred*. *See* ***Telefest, Inc. v. VU-TV, Inc.***, 591 F. Supp. 1368, 1373 (D.N.J. 1984) (relevant date for determination of insolvency is the date of the transfer). Accordingly, Valona has not shown that there are genuine issues of fact on the fraudulent-transfer claim. *See* ***Transportation Ins. Co.***, 179 Wis. 2d at 291–292, 507 N.W.2d at 140.

B. *Statute-of-Repose Issue*.

¶21 Valona contends that the fraudulent-transfer claim is barred under WIS. STAT. § 893.425(2), which provides, as material:

> **Fraudulent transfers.** An action with respect to a fraudulent transfer or obligation under ch. 242 shall be barred unless the action is commenced:
>
> ….
>
> **(2)** Under s. 242.04 (1) (b) or 242.05 (1), within 4 years after the transfer is made or the obligation is incurred.

Valona argues that § 893.425(2) is a statue of repose, and that the trial court could not void the transfer of the National-Avenue property because the May 4, 1999, mortgage and mortgage note were executed more than four years before 815 Corporation filed its lawsuit on August 22, 2003.[2] The trial court concluded that this issue was raised for the first time in Valona's motion for reconsideration and, therefore, declined to address it.

¶22 We review a trial court's decision on a motion for reconsideration for an erroneous exercise of discretion. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 403–404, 685 N.W.2d 853, 856. To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. ***Id.***, 2004 WI App 129, ¶44, 275 Wis. 2d at 416, 685 N.W.2d at 862. Significantly, "a motion for reconsideration is not a vehicle for making new arguments or submitting new evidentiary materials after the court has decided a motion for summary judgment." ***Lynch v. Crossroads Counseling Ctr., Inc.***, 2004 WI App 114, ¶23, 275 Wis. 2d 171, 187, 684 N.W.2d 141, 148.

¶23 Valona contends that the trial court committed a manifest error of law because it did not apply WIS. STAT. § 893.425(2) at the original summary-judgment phase. We disagree. A "manifest error" is not demonstrated by the disappointment of the losing party. ***Koepsell's***, 2004 WI App 129, ¶44, 275 Wis. 2d at 416–417, 685 N.W.2d at 862. A manifest error "is the 'wholesale disregard,

[2] Valona also claims that Treter's "failure to file suit in compliance with the Statute of Repose prevented the trial court from acquiring the competency required for adjudication of the … claim." Valona did not, however, raise this issue before trial court. Therefore, we decline to address it. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (generally, appellate court will not review an issue raised for the first time on appeal).

misapplication, or failure to recognize controlling precedent.'" ***Ibid.*** (quoted source omitted). As we have seen, the trial court denied the motion to reconsider because, it found, the statute-of-repose contention raised a new issue after the grant of summary judgment to Treter, and concluded that it should have been asserted in the summary-judgment proceedings. The trial court explained:

> There obviously was no discussion, argument or even notice of a claim involving a statute of repose. But even if there were, given that [the date the deed was executed] was the critical date, I think it was within the statute. A mortgage as we know is not much more than a lien. It doesn't transfer ownership or rights other than the fact that it's a lien. The critical date is the date that the deed was executed, and that's within -- well within the statute of limitations. Given Judge Fiorenza's ruling and the lengths to which she went to render her decision, *I'm satisfied that the statute of repose argument is a new argument that should have been made initially if it was going to be made, that it's not appropriate to in effect re-open the case in order to hear a new argument once the Judge has decided -- once the Judge decided against the defense*…. I'm satisfied that Judge Fiorenza considered what was before her at the time that she rendered her decision based on the law and the facts as she understood them, that the decision was correct, and therefore the motion to reconsider is denied.

(Emphasis added.) We agree. *See* ***Lynch***, 2004 WI App 114, ¶23, 275 Wis. 2d at 187, 684 N.W.2d at 148. The trial court did not erroneously exercise its discretion when it denied Valona's motion for reconsideration.

C. *Claim- and Issue-Preclusion*.

¶24 Valona contends that the fraudulent-transfer claim is barred under claim- and issue-preclusion. Whether claim- or issue-preclusion applies is a question of law that we review *de novo*. *See* ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723, 728 (1995) (claim-preclusion);

Jensen v. Milwaukee Mut. Ins. Co., 204 Wis. 2d 231, 236, 554 N.W.2d 232, 234 (Ct. App. 1996) (issue-preclusion). We begin with claim-preclusion.

¶25 Claim-preclusion makes a final adjudication on the merits in a prior action a bar to later actions between the same parties as to all matters that were or could have been litigated in the earlier action. ***Northern States Power Co.***, 189 Wis. 2d at 550, 525 N.W.2d at 727. Claim-preclusion has three elements: (1) an identity between the parties or their privies in the prior and present suits; (2) an identity of the causes of action in the two suits; and (3) a final judgment on the merits by a court of competent jurisdiction. ***Id.***, 189 Wis. 2d at 551, 525 N.W.2d at 728. There is also an issue of overriding fairness:

> [W]hen deciding whether to apply claim preclusion to a nonparty's action, it is appropriate to consider whether such application will result in unfairness to the nonparty. In other words, claim preclusion should be applied so as not to deprive a party of a full and fair determination of an issue.

Pasko v. City of Milwaukee, 2002 WI 33, ¶22, 252 Wis. 2d 1, 19, 643 N.W.2d 72, 80 (citations omitted).

¶26 Valona's claim-preclusion argument is based on the April 2002 eviction action. Treter was not a party to the eviction action. There was also no privity between Treter and either 815 Corporation or O'Connor in connection with the eviction action. "Privity exists when a person is so identified in interest with a party to former litigation that he or she represents precisely the same legal right in respect to the subject matter involved." ***Id.***, 2002 WI 33, ¶16, 252 Wis. 2d at 15, 643 N.W.2d at 78.

¶27 Valona argues that 815 Corporation and Treter have "identical" interests because they both want to "get[] the Property back from Valona."

Although this may be true, it is only a small part of the analysis. "[P]rivity is not established merely because [the parties] are interested in the same question or in proving the same facts." ***Amber J.F. v. Richard B.***, 205 Wis. 2d 510, 516, 557 N.W.2d 84, 86 (Ct. App. 1996). In the eviction action, the primary interest was O'Connor's individual interest in not being evicted. He tried to get the National-Avenue property back by claiming that Valona got the deed from him through "extortion" and the "imminent threat of deadly violence." In contrast, Treter represents the interests of 815 Corporation's creditors, *see* ***Linton v. Schmidt***, 88 Wis. 2d 183, 198, 277 N.W.2d 136, 143 (1979) (a Chapter 128 Assignee must look primarily to the interests of the creditors), and is trying to retrieve the property in that capacity. Accordingly, Treter's suit is based on different objectives and interests, *see* ***Pasko***, 2002 WI 33, ¶¶20–21, 252 Wis. 2d at 17–18, 643 N.W.2d at 79–80 (interests of individual police officers different from interests of police union), and it would be unfair to bind creditors of 815 Corporation to the result of the 2001 eviction action, *see* ***id.***, 2002 WI 33, ¶22, 252 Wis. 2d at 19, 643 N.W.2d at 80.

¶28 The issue-preclusion doctrine determines whether a prior judgment prevents re-litigation of something that has already been decided. ***Northern States Power Co.***, 189 Wis. 2d at 550, 525 N.W.2d at 727. Application of issue-preclusion against a non-party requires assessment of various "fundamental fairness" factors. ***Jensen***, 204 Wis. 2d at 237–238, 554 N.W.2d at 234–235. Before that stage is reached, however, a court must first "determine whether the litigant against whom issue preclusion is asserted was in privity or had sufficient identity of interest with a party to the prior proceedings to comport with due process"—namely, whether "the litigant had sufficient opportunity to be heard" in the earlier proceedings. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 226, 594

N.W.2d 370, 377 (1999). As we have seen, there was no privity between either 815 Corporation or O'Connor and Treter in connection with the eviction action, and, as noted in our discussion of claim-preclusion, it would be unfair to prevent Treter from asserting on behalf of 815 Corporation's creditors that transfer of the corporation's assets to Valona was fraudulent against them. We affirm.

By the Court.—Orders affirmed.

Publication in the official reports is not recommended.