STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1059

Perry Schwartz, et al.,
Respondents,

vs.

Virtucom, Inc., et al.,
Appellants.

Filed May 12, 2009
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-02-000265

James H. Kaster, David E. Schlesinger, Jessica J. Clay, Nichols Kaster, PLLP, 4600 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondents)

Jack E. Pierce, Tracy Halliday, Pierce Law Firm, P.A., 6040 Earle Brown Drive, Suite 420, Minneapolis, MN 55430 (for appellants)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant St. Regis Ventures, Inc. d/b/a Virtucom Group claims that the district court erred by holding it liable for a default judgment against Virtucom, Inc., and

Virtucom Group, Inc. under a successor-liability theory. Because the district court did not err by applying the fraudulent-transfer exception to the general rule against successor liability, we affirm.

FACTS

This appeal arises from a contractual dispute between respondent The Idea Farm, Inc. and Virtucom, Inc. The Idea Farm is a Minnesota corporation; respondent Perry Schwartz is its owner and president. Virtucom, Inc. was incorporated in Delaware in 1997 by founders Michael Jacobs and Tom Murphy. Jacobs and Murphy were the only shareholders, and Jacobs was the original CEO. Virtucom, Inc. did business as Virtucom Group, Inc. In 1998, Virtucom, Inc. moved to Minneapolis, as did Jacobs.

In February 2001, The Idea Farm and Virtucom, Inc. entered into a contract where Virtucom, Inc. would pay The Idea Farm commission for providing sales assistance to Virtucom, Inc. The Idea Farm received one payment on the contract in March 2001. Virtucom, Inc. made no additional payments. Schwartz and The Idea Farm filed a lawsuit against Virtucom, Inc. for breach of contract in April 2001.

In October 2001, Virtucom, Inc. incorporated in Minnesota. The following month, the Delaware Virtucom, Inc. and the Minnesota Virtucom, Inc. merged, with the Minnesota Virtucom, Inc. as the only surviving entity. In approximately July 2002, Virtucom, Inc. changed its name to Virtucom Content Solutions, Inc. (VCSI). This was a name change only; the legal entity did not change in any way. Virtucom, Inc. had used the domain name www.virtucomgroup.com. Following Virtucom, Inc.'s name change to VCSI, an individual entering www.virtucomgroup.com would be redirected to

www.virtucomcsi.com. Jacobs owned roughly 60% of all VCSI stock as of November 2002. Shortly thereafter, Jacobs became the company's only major shareholder.

Shortly after Virtucom, Inc. changed its name to VCSI, Jacobs incorporated Versant Publishing Service, Inc. in New York in August 2002. Jacobs was the chairman, president, treasurer, secretary, and controlling shareholder. In April 2003, Versant Publishing Service, Inc. changed its name to St. Regis Ventures, Inc. St. Regis operates a division under the name of Virtucom Group. In the fall of 2006, 90% of St. Regis's work was within the Virtucom Group division. Jacobs owns 50% of the shares of St. Regis. The remaining shares are owned by an individual with whom Jacobs has a personal relationship. Although different parties have been members of the boards of VCSI and St. Regis, Jacobs has had substantial, if not complete, control over VCSI and St. Regis.

St. Regis acquired the following assets which were previously held by VCSI: the Virtucom Group domain name, the URL www.virtucomgroup.com, Virtucom Group's customer contacts, the Virtucom name, and the goodwill associated with Virtucom's name. Nearly all of St. Regis's customer contacts came from Jacobs's dealings with VCSI and its predecessor. In addition, the logos of Virtucom Group and St. Regis are nearly identical, sufficiently identical for one to believe they are the same entity.

In mid-2003, VCSI stopped participating in The Idea Farm's lawsuit and its counsel withdrew. In August 2003, Jacobs informed the American Arbitration Association that VCSI was not a viable entity and had no money to pay for arbitration. Jacobs abandoned VCSI, and it ceased having board meetings and doing business.

Around the same time, St. Regis began to service clients, and to hold itself out to customers and vendors, under the name Virtucom Group.

The Idea Farm obtained a default judgment against Virtucom, Inc. and Virtucom Group, Inc. in November 2003 in the amount of $232,921.84. The Idea Farm subsequently amended its complaint to add St. Regis as a defendant, seeking to hold St. Regis liable for the default judgment under a successor-liability theory. After a court trial on the amended complaint, the district court held that St. Regis is the successor of VCSI under the mere-continuation and fraudulent-transfer exceptions to the general rule against successor liability. St. Regis moved for amended findings of fact, conclusions of law, or in the alternative, a new trial. The district court denied this motion. The Idea Farm moved for attorney fees, costs, and interest. The district court awarded The Idea Farm $116,882.35 in attorney fees and costs, as well as interest calculated on the default judgment. This appeal follows.

D E C I S I O N

I. The district court did not err by holding St. Regis Ventures, Inc. liable for the default judgment against Virtucom, Inc. and Virtucom Group, Inc. under a successor-liability theory.

St. Regis argues that because it was not a mere continuation of VCSI, and because there was no fraudulent transfer of assets, the district court erred in finding St. Regis liable as a successor corporation. "An appellate court is not bound by, and need not give deference to, the district court's decision on a question of law." *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001) (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)). However, findings of fact will not be set

aside unless clearly erroneous and "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. St. Regis argues that the district court erred as a matter of law by imposing successor liability given the facts found by the district court.[1]

In Minnesota, a successor company is generally not liable for the debts of its predecessor. *See J.F. Anderson Lumber Co. v. Myers*, 296 Minn. 33, 37, 206 N.W.2d 365, 368 (1973) ("The general rule is that where one company sells or otherwise transfers all its assets to another company, the purchasing company is not liable for the debts and liabilities of the transferor."). The exceptions to this rule are:

> (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.[2]

Id. at 37-38, 206 N.W.2d at 368-69 (quotation omitted). The district court held that the mere-continuation and fraudulent-transfer exceptions apply in this case.

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[1] St. Regis assigns specific error to only one of the district court's findings of fact and that finding relates solely to the court's application of the mere-continuation exception to the general rule against successor liability. St. Regis alleges that the district court erred by finding that the services provided by VCSI and St. Regis are in essence the same. Because we affirm the district court's judgment based on the fraudulent-transfer exception and do not consider the mere-continuation exception, we do not address the accuracy of this particular finding.

[2] A 2006 amendment to Minn. Stat. § 302A.661, subd. 4 altered the applicability of these exceptions. Nonetheless, because the events giving rise to liability in this case occurred prior to the amendment, pre-amendment law will be applied in this case. Furthermore, the fraudulent-transfer exception survived the amendment.

A company may be held liable for the debts and liabilities of a judgment debtor if the debtor's assets are fraudulently transferred to the company in order for the debtor to escape liability for such debts. *Id.* Relevant portions of the Minnesota Fraudulent Transfers Act (MFTA) provide that a transfer is fraudulent if it was made "with actual intent to hinder, delay, or defraud any creditor of the debtor." Minn. Stat. § 513.44(a)(1) (2008). "'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." Minn. Stat. § 513.41(12) (2008).

In considering whether there was actual intent to hinder, delay, or defraud a creditor, courts may consider the factors set out in Minn. Stat. § 513.44(b) (2008). These factors include, but are not limited to whether:

> (2) the debtor retained possession or control of the property transferred after the transfer; (3) the transfer or obligation was disclosed or concealed; (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; . . . (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.

Minn. Stat. § 513.44(b). Application of these factors to the district court's findings of fact indicates that there was a fraudulent transfer of assets from VCSI to St. Regis and that the district court's application of the fraudulent-transfer exception to the rule against successor liability is appropriate.

First, the underlying litigation was initiated prior to the corporate changes involving Virtucom, Inc. and Versant Publishing Services, Inc. The Idea Farm filed suit against Virtucom, Inc. in April 2001. In October 2001, Virtucom, Inc. incorporated in Minnesota. The Delaware and Minnesota Virtucoms then merged. In July 2002, Virtucom Group changed its name to VCSI. Versant Publishing Service incorporated in August 2002 and changed its name to St. Regis Ventures in April 2003. In August 2003, Jacobs informed the American Arbitration Association that VCSI was insolvent and would no longer be participating in the lawsuit. Around the time that VCSI ceased doing business, St. Regis began to hold itself out as Virtucom Group and began to utilize assets previously held by VCSI. In November 2003, The Idea Farm obtained default judgment against Virtucom, Inc. and Virtucom Group, Inc. The timing of these events supports the conclusion that assets were transferred from VCSI to St. Regis in an effort to hinder, delay, or defraud The Idea Farm. *See id.* ("(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit; . . . (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").

Moreover, VCSI did not receive any consideration for the transferred assets. *See id.* ("(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"). Inadequate consideration for the transfer of assets is indicative of fraud. *See J.F. Anderson Lumber Co.*, 296 Minn. at 41, 206 N.W.2d at 370 (stating the receiving

corporation is responsible for the debts of the transferring corporation where the transfer is "entered into for inadequate consideration, or otherwise fraudulently, in order to escape liability for such debts").

And the transfer was not disclosed. *See* Minn. Stat. § 513.44(b)(3) ("the transfer or obligation was disclosed or concealed"). For example, the president of Redline Marketing, David Arundel, began a relationship with a company he knew as "Virtucom" in 2001. The relationship continues today. Arundel worked with "Virtucom" spanning the time that Virtucom, Inc. d/b/a Virtucom Group changed its name to VCSI and the time that St. Regis began using the name Virtucom Group. Arundel had never heard of St. Regis and was not aware that Virtucom Group or VCSI had stopped doing business. As stated by the district court: "St. Regis holds itself out as Virtucom Group and in so doing benefits from the goodwill and reputation associated with the Virtucom name."

Appellant argues that there was no fraudulent transfer because there is no evidence that an actual asset transfer occurred. Appellant stresses that the record is devoid of information regarding the identity of the transferor and transferee, the date of the transfer, and the actual value of the transferred assets. This argument is unconvincing. The Virtucom Group name, logo, domain name, established business, good will, and reputation are assets with measurable value. *See J.F. Anderson*, 296 Minn. at 39, 206 N.W.2d at 369 (stating that "in a proper case, if there is an asset of the corporation labeled 'good will,' which is transferred and which can be measured in money terms, perhaps there would be some basis for determining that the creditor of the transferring corporation has a claim against the receiving corporation").

The value attributable to the Virtucom Group name is evidenced by St. Regis's relationship with Best Buy. St. Regis does business under the name Virtucom Group and holds itself out to the public as the Virtucom Group. St. Regis uses the Virtucom name because it has "recognition." Best Buy decided to outsource some of its work in 2004 and hired a corporation it knew only as Virtucom Group. A former employee of Best Buy testified that he had never heard of St. Regis Ventures, despite working with the company for nearly a year. Best Buy even stated that "St. Regis Ventures has never been a vendor for Best Buy." St. Regis never identified itself as St. Regis Ventures to Best Buy.

The Virtucom Group name, logo, domain name, customer contacts, good will, and reputation originally belonged to VCSI, and they are now used by St. Regis. It is undisputed that St. Regis provided no consideration for these assets. While this case does present an interesting situation in part because the assets are intangible and the precise details of the transfer to St. Regis are unknown, it is clear that assets previously owned by VCSI are now held and utilized by St. Regis. It is also clear that Jacobs had control of the assets of VCSI and St. Regis Ventures before and after the unknown transfer date, which also indicates a fraudulent transfer. *See* Minn. Stat. § 513.44(b)(2) ("the debtor retained possession or control of the property transferred after the transfer"). We agree with the district court's conclusion that the factors discussed above, when taken together, indicate that assets were transferred from VCSI to St. Regis with intent to defraud. The district court appropriately summarized this situation by citing to *J.F. Anderson*:

> Transfers of all of the assets of a person or corporation in straitened circumstances, without fair consideration, to a corporation having substantially the same ownership, by which the just claims of creditors are defeated, are of such fraudulent nature that the new corporation may be held to the debt of the old.

296 Minn. at 38, 206 N.W.2d at 369 (quoting *Econ. Ref. & Serv. Co., v. Royal Nat'l Bank of N.Y.*, 97 Cal. Rptr. 706 (Cal. Ct. App. 1971)).

We affirm the district court's judgment under the fraudulent-transfer exception to the general rule against successor liability. It is therefore unnecessary to consider the second ground for the district court's award of judgment, that being the mere-continuation exception.

II. The district court did not abuse its discretion by awarding The Idea Farm attorney fees, costs, and interest.

St. Regis argues that the district court abused its discretion in awarding attorney fees, costs, and interest to The Idea Farm. We disagree.

Attorney fees are recoverable when provided for by contract. *Barr/Nelson, Inc. v. Tonto's Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). "On review, this court will not reverse a [district] court's award or denial of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). The contract between The Idea Farm and Virtucom, Inc. provides:

> If either party shall bring any action for any relief against the other, declaratory or otherwise, arising out of this Agreement, the losing party shall pay the successful party a reasonable sum for the attorneys fee which shall be deemed to have accrued on the commencement of such action and shall be paid whether or not such action is prosecuted to judgment.

St. Regis, as successor to VCSI, is liable for attorney fees awarded against Virtucom, Inc. under the contract between Virtucom, Inc. and The Idea Farm.[3] The district court did not abuse its discretion by awarding attorney fees.

Furthermore, the district court did not abuse its discretion by awarding costs and interest to The Idea Farm. The district court has discretion to determine the amount of an award of costs and disbursements under Minn. Stat. §§ 549.02, .04 (2008). "[A] district court abuses its discretion when its decision is against logic and facts on the record." *Posey v. Fossen*, 707 N.W.2d 712, 714 (Minn. App. 2006). The costs awarded were not against logic or the facts in the record. St. Regis argues that only those costs related to this action should be awarded, as St. Regis was not a party to the underlying contractual dispute between Virtucom, Inc. and The Idea Farm. This argument fails to recognize that St. Regis is liable as a successor corporation for the underlying judgment resulting from the contractual dispute between Virtucom, Inc. and The Idea Farm, as well as the costs associated with obtaining that judgment.

St. Regis also argues that the district court erroneously awarded the Idea Farm prejudgment interest under Minn. Stat. § 549.09, subd. 1(b) (2008). The district court ordered "[t]hat the Court Administrator shall also enter judgment . . . against St. Regis Ventures for interest calculated on the judgment entered on November 21, 2003 in the amount of $232,921.84 as provided by Minn. Stat. 549.09." *See* Minn. Stat. § 549.09, subd. 1(a) (2008) ("When a judgment or award is for the recovery of money . . . interest from the time of the verdict, award, or report until judgment is finally entered shall be

[3] Appellant does not challenge the amount of the attorney fees.

computed . . . and added to the judgment or award."). Again, St. Regis fails to recognize that it is liable for the default judgment against Virtucom, Inc., and its liability extends to post-judgment interest. The interest that the district court awarded was post-judgment interest on the November 2003 judgment against Virtucom, Inc. and Virtucom Group, Inc., not pre-judgment interest.

Finally, St. Regis argues that it should have been allowed to defend against the successor-liability claim on the ground that there was no breach of the underlying contract between The Idea Farm and Virtucom, Inc. The district court denied St. Regis's motion for a new trial and for an opportunity to defend against the underlying contractual dispute on the merits because St. Regis failed to establish any ground for a new trial under Minn. R. Civ. P. 59.01. We review this decision under an abuse-of-discretion standard. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

The district court did not abuse its discretion by denying St. Regis's motion for a new trial and for an opportunity to defend against the underlying breach-of-contract claim on the merits. A default judgment was entered against Virtucom, Inc. and Virtucom Group, Inc. on November 21, 2003. St. Regis was not a party to the underlying lawsuit at that time, but became a party upon amendment of the complaint on June 30, 2004. Yet St. Regis never moved the district court to vacate the underlying judgment and grant a new trial pursuant to Minn. R. Civ. P. 60.02. St. Regis concedes that it had standing to bring a motion for relief from judgment once the complaint was amended to include it as a party. But St. Regis fails to cite legal authority for the proposition that it should be

allowed to defend against the merits of the underlying breach-of-contract claim, after judgment had issued, absent a timely motion for relief from judgment. Because St. Regis failed to establish a basis for a new trial, the district court did not abuse its discretion by refusing to provide St. Regis an opportunity to defend against the underlying breach-of-contract claim on the merits.

Affirmed.

Dated:

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals