FILED
FEB 22 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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H. SHERM NELSON, Et al,

Appellees,

vs.

PAMPERED BEEF-MIDWEST, INC., BRYANT BEEF, INC., AND ROBERT BRYANT,

Appellants.

Filed February 22, 1979

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2-61966

Appeal from the Cherokee District Court - Richard W. Cooper, Judge.

Appeal from trial court's order granting plaintiffs' motion for summary judgment and denying defendants' motion for summary judgment in an action to impress a lien on assets transferred by defendant-judgment debtor. Affirmed on defendants' motion for summary judgment; reversed on plaintiffs' motion for summary judgment.

RobertR. Eidsmoe of Gleysteen, Harper, Eidsmoe & Heidman of Sioux City and David L. Sayre of McDonald, Sayre & Wittgraf of Cherokee, for appellants.

Dale Johnson and James L. Kramer of Johnson, Burnquist, Erb, Latham & Gibb, P.C., of Fort Dodge, for appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

This action involves an attempt by plaintiffs-appellees to set aside the transfer of certain assets from defendant Pampered Beef-Midwest, Inc. (Pampered Beef) to defendants Bryant Beef, Inc. and Robert Bryant, and to impress a lien upon such assets. Plaintiffs' claim stems from a confession of judgment in the sum of $40,000 entered in favor of plaintiffs and against defendant Pampered Beef on January 19, 1977. After the execution of the agreement upon which plaintiffs' $40,000 judgment was based (but prior to the entry of that judgment), defendant Pampered Beef transferred to the other defendants virtually all of its assets consisting of both personal property and real estate.

This action by plaintiffs is founded on two theories: (1) that the transfer was fraudulent as to the creditors of Pampered Beef, including plaintiffs; and (2) that the transfer was part of a scheme whereby the transferee merely continued the business of the transferors. Defendants filed a joint answer in which plaintiffs' judgment is admitted as are the transfers. Defendants deny that the transfers were for the purpose of hindering, delaying or defrauding the creditors of Pampered Beef. They also deny that the transfers resulted in a mere continuation of the business of the transferor by the transferees.

The rules for deciding the issues raised by plaintiffs' alternative claims of fraudulent transfer and corporate continuation, are clearly stated in Arthur Elevator Co. v. Grove, 236 N.W.2d 383, 391-93 (Iowa 1975). In view of defendant's denials, the facts which must be determined in the application of these rules are sufficiently in dispute to preclude the granting of summary judgment for plaintiffs.

Plaintiffs rely primarily upon an unsworn statement of facts in their motion for summary judgment signed only by counsel to establish the nonexistence of genuine issues of material fact. It is their position that upon filing such motion, the burden was placed upon defendants to affirmatively show that a factual dispute existed. We disagree. As stated in Sherwood v. Nissen, 179 N.W.2d 336, 338 (Iowa 1970):

> "Frequently the question on motions for summary judgment is whether the showing in resistance to the motion is adequate. . . . Here, however, the question is whether the showing in support of the motion was sufficient in the first place."

To the same effect, see Daboll v. Hoden, 222 N.W.2d 727, 731 (Iowa 1974); Meade v. Lane, 203 N.W.2d 305, 306-07 (Iowa 1972). The answers to interrogatories, the sworn testimony

of defendant Robert Bryant upon a debtor's examination, and other matters of record, including defendants' affidavits in resistance to the motion, do not conclusively establish that there are no material factual issues as to either of plaintiffs' theories of recovery.

The same reasons which compel us to conclude that the trial court improperly sustained plaintiffs' motion for summary judgment, lead to the conclusion that it correctly denied defendants' motion for summary judgment. We reverse the judgment entered and remand for further proceeding consistent with our decision.

REVERSED AND REMANDED.