-27-

APN: 1420-28-212-017

RECORDING REQUESTED BY
WHEN RECORDED MAIL TO

BROOKE · SHAW · ZUMPFT
POST OFFICE BOX 2860
MINDEN, NEVADA 89423

DOC # 0652101
08/12/2005 11:34 AM Deputy: KLJ
OFFICIAL RECORD
Requested By:
BROOKE SHAW ZUMPFT

Douglas County - NV
Werner Christen - Recorder
Page: 1 Of 9 Fee: 22.00
BK-0805 PG- 5809 RPTT: 0.00

SPACE ABOVE THIS LINE
RESERVED FOR RECORDER'S
USE

ORDER
FIRST BOSTON FINANCIAL
V.
NEVADA SMALL ENGINES, INC.; RALPH and PENNY GRANT; HANS HERUP, HERUP HOLDINGS

Dated 29 July 2005
Ninth Judicial District Court
Case No. 02-CV-0305
Dept. II

Case No. 02-CV-0305

Dept. No. 2

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

-o0o-

FIRST BOSTON FINANCIAL, L.C.C., A Wyoming limited liability company,

Plaintiff,

vs.

NEVADA SMALL ENGINES, INC., a Nevada corporation; RALPH GRANT and PENNY GRANT, individually; HANS JOSEPH HERUP; HERUP HOLDINGS, LLC and DOES 1-10,

Defendants.

ORDER

This matter comes before the Court pursuant to the Closing Briefs of Defendant Herup and Plaintiff First Boston Financial filed on April 11, 2005.

FACTS

First Boston Financial, LLC ("AAA") purchased the assets, including the goodwill and customer base, of Nevada Small Engines, Inc., on or about May 20, 2002, for $250,000 from the Grants. AAA paid $70,000 at the close of escrow and executed a promissory note for $180,000. The promissory note provides that payments are due on the 20th of each month, beginning on June 20, 2002. The promissory note provides for a ten day grace period and late fees of six percent received after the expiration of the grace period. It also states that should default be made in payment of any installment when due, the whole sum of principal and interest shall become immediately due and payable at the option of the holder of note. AAA made the June and July payments within the grace

period. The August payment may have been paid after the grace period. The Grants received the September payment on or about October 3, 2002, three days after the expiration of the grace period. The Grants kept the payment and did not assess a late charge or accelerate the promissory note.

On October 5, 2002, the Grants entered the premises of the business and seized all the assets of AAA that were not included in the security agreement. The Grants entered the premises through the back door when AAA's employees were not present. The Grants did not notify AAA of their intent to accelerate the promissory note and declare a default prior to the repossession. The Grants never discussed the September payment with AAA until after the repossession.

On November 5, 2002, the Grants provided a document entitled "Notice of Our Plan to Privately Sell Property/Collateral" that called for a private sale on November 20, 2002, and stated that an accounting would be provided upon request so that AAA could cure the deficiency. AAA requested an accounting on November 13, 2002, but the Grants refused to provide an accounting.

The Grants did not actually conduct a sale at that time, but continued to use the assets to run their own small engine retail and repair business out of the same location until they sold the business to Hans Herup.

AAA filed a Complaint on November 7, 2002, and on February 26, 2003, moved for a restraining order to prevent the Grants from transferring the assets of the business. The restraining order was not granted by this Court until June 3, 2004. The Grants sold the repossessed business to Hans Herup on August 4, 2003, for $199,060.88 in cash.

CONCLUSIONS OF LAW

1. A transfer or obligation is not voidable under paragraph (a) of subsection 1 of NRS 112.180 against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee. ***NRS 112.220(1)***.

As suggested in Brophy, a "purchaser put upon inquiry may rebut the presumption of notice by showing that he made due investigation without discovering the prior right or title he was bound to investigate. The question whether he has made due inquiry is one of fact, to be investigated by the

jury. . . ." 8 Thompson, supra §§ 4326, at 451. ***Berge v. Fredericks***, 95 Nev. 183, 190.

Courts have consistently held that reliance upon a vendor, or similar person with reason to conceal a prior grantee's interest, does not constitute "adequate inquiry" for purposes of rebutting the presumption of notice. ***Id.***

Such duty arises when the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights. He is said to have constructive notice of their existence whether he does or does not make the investigation. The authorities are unanimous in holding that he has notice of whatever the search would disclose. ***Id. at 191.***

"'Were the circumstances under which the [property was] offered to defendant such as to cast suspicion on the title and lead a prudent man to make [inquiry] * * *? 'Defendant may have been ignorant of the true state of affairs, but ignorance due to negligence is the equivalent of notice, and want of notice is an essential element of bona fides, as that term is used in equity jurisprudence.'" ***Golden v. Oahe Enterprises, Inc.*** 240 N.W.2d 102, 112, 90 S.D. 263, 281. (Citing King Cattle Co. v. Joseph, 1924, 158 Minn. 481, 198 N.W. 798).

"[A] transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor's fraudulent purpose." ***In re World Vision Entertainment, Inc.***, 275 B.R. 641, 659 (Bkrtcy. M.D. Fla. 2002).

"The burden of proof on this question rests on the alleged bona fide purchaser." ***United States v. Gleneagles Investment Co., Inc.,*** 571 F.Supp. 935, 951.

"However, in order for the subsequent purchaser to prevail, he must show that he took in good faith and without notice of the prior unrecorded instrument. The burden of showing such lack of notice is upon the subsequent purchaser." ***Chalmers v. Raras***, 200 Cal. App. 2d 682, 686, 19 Cal. Rptr. 531, 533.

"'To prevail the subsequent purchaser must prove (1) that he was a purchaser, (2) that he purchased in good faith, and (3) that he gave value.' (Nordstram, Sales, §§ 170, p. 515). The burden of proof rests upon the party making the later purchase." ***Landrum v. Armbruster***, 28 N.C. App. 250, 254, 220 S.E.2d 842, 843.

DISCUSSION

The parties stray from the fundamental issue in this case when they argue about the intent to defraud. AAA does not have to prove that the Grants or Herup intended to defraud AAA to recover the property. The fact remains that the Grants wrongfully foreclosed upon the business and repossessed its assets. Consequently, the Grants did not

have the legal right to take possession, much less sell the property. Herup, as the party purchasing the business from the Grants, must show that he was a good faith purchaser in order to retain the business.

NRS 112.220(1) provides that a transfer or obligation is not voidable against a person who took in good faith and for a reasonably equivalent value.

The courts have consistently held that the party claiming status as a bona fide purchaser has the burden of proof. "The burden of proof on this question rests on the alleged bona fide purchaser." ***United States v. Gleneagles Investment Co., Inc.,*** 571 F.Supp. 935, 951. "However, in order for the subsequent purchaser to prevail, he must show that he took in good faith and without notice of the prior unrecorded instrument. The burden of showing such lack of notice is upon the subsequent purchaser." ***Chalmers v. Raras,*** 200 Cal. App. 2d 682, 686, 19 Cal. Rptr. 531, 533.

"'To prevail the subsequent purchaser must prove (1) that he was a purchaser, (2) that he purchased in good faith, and (3) that he gave value.' (Nordstram, Sales, §§ 170, p. 515). The burden of proof rests upon the party making the later purchase." ***Landrum v. Armbruster***, 28 N.C. App. 250, 254, 220 S.E.2d 842, 843.

The Court will not provide Defendant with the benefits of a bona fide purchaser when a number of factors were present that would indicate to a reasonable person purchasing a business of this extent that the purchase should not be completed. "[A] transferee may not remain willfully ignorant of facts which would cause it to be on notice of a debtor's fraudulent purpose." ***In re World Vision Entertainment, Inc.***, 275 B.R. 641, 659 (Bkrtcy. M.D. Fla. 2002).

The addendum to the purchase agreement executed by Defendant on June 3 showed Defendant was aware of pending litigation between the Seller and the former Buyer of Nevada Small Engines:

> Buyer is aware of pending litigation between the Seller herein and the former Buyer of Nevada Small Engines, Gardnerville, Nevada, which has no effect on the current business assets or operation. Seller herein indemnifies Buyer herein from liability of such litigation.

Defendant indicated that he believed the "pending litigation" referred to a suit by the Grants against the former Buyer. However, Defendant had a duty to prudently purchase the business. One case set out the requirements of a prudent purchaser, "'Were the circumstances under which the [property was] offered to defendant such as to cast suspicion on the title and lead a prudent man to make [inquiry] * * *? 'Defendant may have been ignorant of the true state of affairs, but ignorance due to negligence is the equivalent of notice, and want of notice is an essential element of bona fides, as that term is used in equity jurisprudence.'" ***Golden v. Oahe Enterprises, Inc.***, 240 N.W.2d 102, 112, 90 S.D. 263, 281. (Citing King Cattle Co. v. Joseph, 1924, 158 Minn. 481, 198 N.W. 798). The clause that Defendant signed gave him reason to be suspicious of problems in the business he was purchasing. Defendant should have investigated enough to find the ongoing litigation between the Grants and AAA. AAA filed a Complaint on November 7, 2002, and on February 26, 2003, moved for a restraining order to prevent the Grants from transferring the assets of the business.

In fact, there were a number of circumstances that gave Defendant reason to investigate his purchase thoroughly. Defendant purchased the property through a private sale that he knew to be recovered through repossession.

Herup argues that he acted without any bad faith toward First Boston, and was in fact ignorant of the existence of First Boston. Herup argues that he had a lack of bad faith and that he had no affirmative obligation to go conduct an investigation, "[h]is failure to do so may arguably have been negligent. However the failure to investigate was not done in bad faith." This will not suffice for a good faith purchaser, as previously mentioned, "Defendant may have been ignorant of the true state of affairs, but ignorance due to negligence is the equivalent of notice, and want of notice is an essential element of bona fides, as that term is used in equity jurisprudence." ***Golden.***

A party cannot become a good faith purchaser by being blissfully ignorant, particularly when the circumstances are such to arouse suspicion of problems with the first sale. "Such duty arises when the circumstances are such that a purchaser is in

possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights. He is said to have constructive notice of their existence whether he does or does not make the investigation. The authorities are unanimous in holding that he has notice of whatever the search would disclose." ***Berge.***

Herup further argues that a reasonably prudent buyer probably would not conduct an investigation when given written assurances that the pending litigation did not affect his acquisition of the property and that he would be indemnified by the sellers. Nonetheless, Herup was given notice of litigation and he cannot rely upon the Grant's assurances to claim protection as a good faith purchaser. "Courts have consistently held that reliance upon a vendor, or similar person with reason to conceal a prior grantee's interest, does not constitute "adequate inquiry" for purposes of rebutting the presumption of notice." ***Id.***

Herup may have had good intentions when he was purchasing the business at issue here. However, the business was wrongfully repossessed and should not have been sold by the Grants. Herup cannot sit back and claim ignorance as an excuse.

AAA made a down payment on the business of $70,000. It also made four installment payments in the amount of $2,896.03 each for a total of $11,584.12. The Court does not find enough evidence to show the market value of the business at the time of the repossession or at the time of the sale to Herup.

The sale of the business to Herup for $199,060.88 does not necessarily reflect the true market value. The Court will not award AAA with a windfall and return the business when AAA had not paid the full purchase price. Further, it would be very difficult to determine the true present value of the business as compared to the value at the time AAA owned it. The Court cannot determine how much inventory AAA had on hand at the time of the repossession, nor how much of the profit AAA returned to the business.

Therefore, the Court will order that Hans Herup pay First Boston the amount the Court can determine was lost by AAA as result of the repossession and second sale by the

Grants. Hans Herup is ordered to pay $81,584.12 to First Boston ("AAA").

The Court will not award attorney fees nor interest to either party.

FIRST BOSTON(AAA) CLAIMS AGAINST THE GRANTS

AAA asks for recovery of the down payment and four monthly payments totaling $81,584.12 for a breach of contract by the Grants. The Court is Ordering Herup to pay $81,584.12 to AAA, so it will not give AAA a double payment in this amount.

The Court Orders the Grants to pay $66,819.60 to AAA for profits the business generated during the Grant's wrongful possession. A profit and loss statement was introduced into evidence by AAA showing net income of $51,969.81 from November, 2002, through May, 2003, which was a portion of the time the Grants were wrongfully in possession of the business. AAA's counsel calculated a daily average profit of $247.48 over that time, and then projected that rate through August 3, 2004, the last day of the Grant's possession before their sale to Herup, for a total profit of $66,819.60.

AAA also asks for the value of assets converted, and for return of all proceeds derived therefrom. It states that the assets were reasonably valued at $199,060.04 as of August 4, 2003, by the Grant's own admissions and Herup's own records and testimony. The Court Orders that the Grants pay $199,060.04 to AAA for the value of the assets.

AAA secured finance agreements with a number of vendors, and the Grants interfered with its ability to fulfill the terms of the contracts with these vendors when they repossessed the collateral that served as the security. Ron Lachman testified that the Grant's foreclosure prevented him from returning the goods to Kawasaki and that Kawasaki obtained a judgment against AAA and Mr. Page. Exhibit 9 shows an execution in the amount of $13,671.55 on November 3, 2004. Therefore, the Court Orders that the Grants pay AAA $13,671.55 to account for damages they caused AAA.

Further, AAA asks for interest on each of these payments owed by the Grants to AAA. The Court will award $30,000 in interest from the Grants to AAA. It will not give the $42,342.48 requested by AAA, because it did not award AAA for the down payments and monthly payments.

Attorney fees may be appropriate where, as in the instant case, the attorney fees are incurred as a foreseeable result of the defendant's tortuous conduct or a breach of contract. ***Sandy Valley Assoc. v. Sky Ranch Estates***, 117 Nev.Adv.Op 78, p.7 (2001). The Court Orders the Grants to pay $23,110.92 in attorney fees to AAA. The Court also Orders the Grants to pay $3,796.82 in costs to AAA.

JUDGMENT

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant, Hans Joseph Herup pay $81,584.12 to Plaintiff First Boston Financial, L.L.C.

The Court FURTHER ORDERS that Defendants, Ralph Grant and Penny Grant pay Plaintiff, First Boston Financial, L.L.C. a total of $336,458.93.

Dated this 28th day of July, 2005.

WILLIAM A. MADDOX
District Judge

cc: Michael L. Matuska, Esq.
Robert C. Herman, Esq.
Ralph and Penny Grant

SEAL

CERTIFIED COPY

The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in my office.

DATE: August 11, 2005

ALAN GLOVER, Clerk of the Judicial District Court of the State of Nevada, in and for the County of Douglas.

By _____ Deputy