

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
STATE OF MISSOURI
ASSOCIATION DIVISION

JEFFERSON COUNTY RAIN TREE)		
COUNTRY CLUB, LLC.)		
)		
Plaintiff,)		
)	Cause No.:	18JE-AC00739
v.)		
)		
BLACK HOLE, LLC,)	Division:	12
)		
Defendant.)		

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT,
RAINTREE PLANTATION PROPERTY OWNERS ASSOCIATION, INC.’S
MOTION TO DISMISS**

COMES NOW Plaintiff, by and through the undersigned counsel and for its Memorandum in Opposition to Defendant’s Motion to Dismiss states as follows:

Motion to Dismiss for Breach of Settlement Agreement

Defendant argues that Plaintiff’s claims against Raintree Plantation Property Owners Association, Inc. (“**RPOA**”) violate the terms of a settlement agreement entered into between First State Community Bank and RPOA and therefore should be dismissed. On its face, this claim is frivolous. In order state a claim for breach of contract, a party must plead the “following essential facts: (1) a contract between the plaintiff and the defendant exists; (2) the plaintiff had rights and the defendant had obligations under the contract; (3) the defendant breached the contract; and (4) the plaintiff suffered damages.” Guidry v. Charter Communications, Inc., 2699 S.W.3d 520, 527 (Mo. App. W.D. 2008).

In this case, by its own pleading, RPOA concedes that there is no contract between Plaintiff and RPOA but rather a contract between First State Community Bank (“**FSCB**”) and RPOA [Defendant’s Motion to Dismiss, ¶1]. “It has long been a basic tenet of contract law that **one not a party to a contract is not bound thereby and is not**

liable for breach of a contract to which he is not a party.” Moore v. Armed Forces Bank, N.A., 534 S.W.3d 323, 327-328 (Mo. App. W.D. 2017) (emphasis added); *see also* Turner v. Wesslak, 453 S.W.3d 855, 858 (Mo. App. S.D. 2014). As a result, Plaintiff cannot breach a contract to which it is not a party and Defendant’s argument that Plaintiff breached a contract to which it was not a party is without merit.

While Defendant states that Plaintiff indicated it was an assignee of FSCB, that is not the case. Plaintiff has alleged that DKAAT purchased the golf course and country club from FSCB. [See Plaintiff’s Amended Petition, ¶13 attached hereto and incorporated herein as Plaintiff’s **Exhibit 1**]. Plaintiff has not alleged that FSCB assigned its rights and/or obligations under the terms of the Settlement Agreement that FSCB entered into with RPOA to Plaintiff. As a result, Plaintiff is not bound by the terms of a settlement agreement entered into between FSCB and RPOA.

For all these reasons, the Court should deny Defendant’s Motion to Dismiss Count I for Breach of the Settlement Agreement and issue such other and further orders as this Court may deem just and proper under the circumstances.

Motion to Dismiss for Failure to State a Claim

Defendant also argues that Plaintiff’s claim against RPOA should be dismissed because it fails to state a claim under the Missouri Uniform Fraudulent Transfers Act (“**MUFTA**”) because: (1) RPOA is not a “debtor” as that term is defined under MUFTA; and/or (2) Plaintiff is not a “creditor” under MUFTA; and/or (3) Black Hole is not an “insider” under MUFTA; and/or (4) two or more badges of fraud are not present in the transfer of the lots from RPOA to Black Hole. All these arguments, however, miss the mark.

A. RPOA is a Debtor under MUFTA.

MUFTA defines the term “debtor” as a person who is liable on a claim. MO. REV. STAT. §429.009(6). The owner of the country club assesses dues annually on lots in sections 20-25, based on who owns a particular lot at the time the dues are assessed. The dues run for a one year period from June 15th to June 14th of the following year. Plaintiff assessed lots owned by RPOA for annual dues for the years 2013, 2014 and 2015 and RPOA was liable for those annual dues. Plaintiff sent RPOA invoices for each of the years setting out the amount of dues owed and identifying each lot owned by RPOA that was subject to the dues. A true and accurate copy of the 2013 Invoice is attached hereto and incorporated herein as Plaintiff’s **Exhibit 2**; a true and accurate copy of the 2014 Invoice is attached hereto and incorporated herein as Plaintiff’s **Exhibit 3**; a true and accurate copy of the 2015 Invoice is attached hereto and incorporated herein as Plaintiff’s **Exhibit 4**.

As indicated on the respective invoices, RPOA paid Plaintiff the amounts owed for the 2013 dues on April 9, 2015. Subsequently, RPOA paid the amounts owed for the 2014 dues on July 3, 2015 and it paid the amounts owed for the 2015 dues on August 7, 2015 [See Plaintiff’s **Exhibits 2-4**]. If RPOA had not fraudulently transferred the lots, it would have been liable for the 2016 and 2017 dues for the lots that it owned in Sections 20-25 of Raintree Plantation. As such, RPOA is a debtor as that term is used in MUFTA.

B. Plaintiff is a Creditor under MUFTA.

MUFTA defines the term “creditor” as a person who has a claim. MO. REV. STAT. §428.009(4). As set out above, Plaintiff was a creditor of RPOA for the years 2013-2015 and would also have had a claim against RPOA for the following years if

RPOA had not fraudulently transferred the lots it owned in sections 20-25 to a shell corporation. Therefore, Plaintiff is a creditor as that term is defined under MUFTA.

C. Black Hole is an “Insider” under MUFTA.

MUFTA defines the term “insider” in a number of ways depending on what type of entity the debtor is. For a corporation (as is the case for RPOA), MUFTA defines “insider” as either:

- a. A director of the debtor;
- b. An officer of the debtor;
- c. A person in control of the debtor...” MO. REV. STAT. §428.009(7)(b).

It defines the term “person” as

“an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.” MO. REV. STAT. §428.009(9).

In this case, RPOA transferred the lots to Black Hole, LLC. The sole member of Black Hole, LLC is RPOA [See Plaintiff’s **Exhibit 1**, ¶28]. Clearly, RPOA meets the definition of a “person” in control of the “debtor” as RPOA is the debtor. This is precisely the type of transaction MUFTA was designed to prohibit. RPOA set up a shell corporation, which it completely controlled, with no capitalization and no ability to pay its debts as they came due [See Plaintiff’s **Exhibit 1**, ¶¶19-34, 42]. Black Hole is an insider as that term is used under MUFTA [See Plaintiff’s **Exhibit 1**, ¶¶29-34].

D. Two or more badges of fraud are present.

MUFTA sets out badges of fraud which include:

- (1) The transfer or obligation was to an insider;
- (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;
- (5) The transfer was of substantially all the debtor’s assets;
- (6) The debtor absconded;

- (7) The debtor removed or concealed assets;
- (8) The value of 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; and
- (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.” MO. REV. STAT. §428.024.2.

In this case, several badges of fraud are present. The transfer was to an insider as Black Hole was and is completely controlled by debtor thereby meeting the badge of fraud listed in paragraph 1 [See Plaintiff’s **Exhibit 1**, ¶¶28-30]. Since the debtor controlled Black Hole it retained possession and control of the lots transferred thereby meeting the badge of fraud listed in paragraph 2 [See Plaintiff’s **Exhibit 1**, ¶30].

In addition, Debtor had been sued and paid a substantial amount in a settlement shortly prior to the transfer thereby meeting the badge of fraud listed in paragraph 4 [See Plaintiff’s **Exhibit 1**, ¶¶19-23]. On or about December 3, 2014, FSCB sued RPOA for annual dues it owed for lots RPOA owned in sections 20-25 (“**FSCB Lawsuit**”) [See Plaintiff’s **Exhibit 1**, ¶19]. On December 9, 2014, RPOA had a closed board meeting in which the FSCB Lawsuit was discussed and the RPOA board voted to settle the FSCB Lawsuit [See Plaintiff’s **Exhibit 1**, ¶20]. Based on the meeting minutes from that closed board meeting, immediately after deciding to settle the case, the board had a discussion “on future liability of lots owned in sections 20-25. Motion made to create ‘holding’ company LLC and transfer title into the ownership of this new LLC. Motion passed” [See Plaintiff’s **Exhibit 1**, ¶21].

RPOA received nothing of real value in return for the transfer of lots [See Plaintiff’s **Exhibit 1**, ¶¶27, 31-35]. The transfer was documented by a deed of trust but

not a promissory note [See Plaintiff's **Exhibit 1**, ¶35]. According to the testimony of the President of RPOA, Black Hole had no financial resources to pay money for the lots and the only way that RPOA would get paid was if Black Hole sold the lots [See Plaintiff's **Exhibit 1**, ¶36]. RPOA knew at the time of the transfer that Black Hole had no assets and had no intention of paying the country club dues or the real estate taxes [See Plaintiff's **Exhibit 1**, ¶¶32-33]. RPOA also knew at the time of the transfer that it was likely that the lots RPOA transferred in sections 20-25 would be sold at a tax sale and that RPOA would not recover any money it was allegedly owed for the transfer [See Plaintiff's **Exhibit 1**, ¶37]. Furthermore, as additional evidence that RPOA knew at the time of the transfer that it would never recover the value it assigned to the lots, there was no requirement that Black Hole sell the lots for at least the assigned value [See Plaintiff's **Exhibit 1**, ¶38]. As a result, the value received for the transfer was not reasonably equivalent to the value of the lots thereby meeting the badge of fraud listed in paragraph 8.

Furthermore, the transfer occurred after a substantial debt was incurred and prior to more debt being incurred as these were annual dues thereby meeting the badge of fraud listed in paragraph 10 [See Plaintiff's **Exhibit 1**, ¶¶19-26].

As a result, Plaintiff has alleged sufficient facts to show that two or more of the badges of fraud are present in this case and that RPOA transferred the lots in sections 20-25 to Black Hole with the intent to hinder, delay and/or defraud Plaintiff.

Conclusion

For all these reasons, the Court should deny Defendant's Motion to Dismiss and issue such other and further orders as this Court may deem just and proper under the circumstances.

Hockensmith McKinnis Hamill, P.C.

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CERTIFICATION UNDER RULE 55.03(a)

Pursuant to Rule 55.03(a), Paul C. Hamill certifies that he signed an original of this pleading and that an original of this pleading shall be maintained by him for a period of not less than the maximum allowable time to complete the appellate process.

/s/ Paul C. Hamill

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent via the court's electronic filing system this 28th day of August, 2018 to all counsel of record.

/s/ Audrey G. McElyea