

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

PLUM PROPERTY ASSOCIATES, INC.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
MINERAL TRADING COMPANY, LLC,	:	
JAMES R. CLARKE, JONATHAN LASKO,	:	
AND MELISSA HENNIS,	:	
	:	
Appellee	:	
	:	
v.	:	
	:	
MULLIGAN MINING, INC.,	:	
	:	
Appellee	:	No. 970 WDA 2013

Appeal from the Order May 14, 2013,
Court of Common Pleas, Washington County,
Civil Division at No. 2011-5687

BEFORE: DONOHUE, OTT and MUSMANNO, JJ.

MEMORANDUM BY DONOHUE, J.:

FILED JULY 29, 2014

Appellant, Plum Property Associates, Inc. ("Plum Property"), appeals from the order entered on May 14, 2013 in the Court of Common Pleas, Washington County, denying Plum Property's Objection to Sheriff's Determination of Ownership of Property. For the reasons that follow, we reverse.

Mineral Trading Company, LLC ("Mineral Trading"), is an Ohio corporation engaged in strip-mining and limestone operations in Hubbard,

Ohio.¹ Mulligan Mining, Inc. and/or Mulligan Mining Holdings, Inc. ("Mulligan Mining"), is a strip-mining company in Burgettstown, Pennsylvania. Mineral Trading and Mulligan Mining share investors. In addition, John Lasko ("Lasko") is the president of Mulligan Mining and the managing member of Mineral Trading. As the president and managing member, Lasko had the authority to act on behalf of Mulligan Mining and Mineral Trading at all relevant times.

On July 27, 2011, Plum Property obtained a judgment in its favor in the Allegheny County Court of Common Pleas, Docket Number GD-10-001816, against Mineral Trading in the amount of \$85,513.17.² Plum Property filed a praecipe for writ of execution in the Court of Common Pleas of Washington County and levied on five pieces of equipment that Plum Property asserted belonged to Mineral Trading.

On June 28, 2012, Mulligan Mining filed a goods claim, asserting ownership of the five pieces of equipment upon which Plum Property levied. On July 9, 2012, the Sheriff determined that Mulligan Mining owned the

¹ By the date of the hearing, Mineral Trading was no longer in business. N.T., 3/15/13, at 17.

² In its brief, Plum Property states that it filed an action against Mineral Trading to collect payment for coal sales. Plum Property asserts that "[t]he judgment resulted from the grant of Plum Property's Motion for Summary Judgment, the basis of which was the admission by an officer of Mineral Trading in a deposition that Mineral Trading owed Plum Property \$75,342 [plus prejudgment interest of \$10,171.17, plus continuing interest and costs]." Plum Property's Brief at 6, n.1.

equipment. Plum Property appealed the Sheriff's determination to the Court of Common Pleas of Washington County.

The trial court held an evidentiary hearing on March 15, 2013. At the hearing, the parties stipulated that Mulligan Mining owned four of the five pieces of equipment. Plum Property's only remaining issue was the ownership of a CAT Bulldozer, serial number 9XR170 (the "Dozer").

The evidence presented at the hearing showed that Mineral Trading purchased the Dozer for \$425,000 in 2009. Mineral Trading experienced financial difficulties in 2010 and 2011. In order to keep the business afloat, Mulligan Mining transferred substantial funds to Mineral Trading. At the hearing, Lasko referred to these transfers as loans. Mineral Trading made payments to Mulligan Mining during this time, but the payments occurred without a set schedule or established interest rate.

Lasko testified at the hearing that Mulligan Mining executed an equipment purchase agreement and bill of sale with Mineral Trading to acquire the Dozer because Mineral Trading owed money to Mulligan Mining for outstanding loans. The bill of sale indicated that Mulligan Mining purchased the Dozer from Mineral Trading for \$397,443.44, which Mineral Trading received as a credit against the balance of the outstanding loans owed to Mulligan Mining. Lasko further testified that since Mulligan Mining and Mineral Trading executed the equipment purchase agreement and bill of

sale, the Dozer has been located at Mulligan Mining's site, used by Mulligan Mining in its operations, and is listed as Mulligan Mining's corporate asset.

On May 14, 2013, the trial court denied Plum Property's Objection to Sheriff's Determination of Ownership of Property, affirming the Sheriff's determination that Mulligan Mining owned the Dozer. Trial Court Opinion, 5/14/13, at 3. Plum Property timely filed a notice of appeal and a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). On appeal, Plum Property raises the following issues for our review:

1. Whether the [trial] court committed error of law and fact in concluding that the monetary transfers between Mineral Trading and Mulligan Mining constituted loans instead of contributions to capital.
2. Whether the [trial] court committed error of law and fact in finding that Mulligan Mining met its burden of proof by clear and convincing evidence that: (a) [Mineral Trading] was solvent at the time of the transfer of the [D]ozer; (b) the transfer of the [D]ozer did not render [Mineral Trading] insolvent; and (c) Mulligan Mining paid fair consideration for the [D]ozer.
3. Whether the [trial] court committed error of law and fact in concluding that Mineral Trading owed Mulligan Mining any money at the time of the transfer of the [D]ozer.

Plum Property's Brief at 5.

For its first issue on appeal, Plum Property argues that the trial court erred in concluding that the monetary transfers between Mineral Trading and

Mulligan Mining constituted loans rather than contributions to capital. **Id.** at 10. Plum Property asserts that if the monetary transfers were loans, then Mulligan Mining's claim that the transfer of the Dozer was a loan repayment by Mineral Trading "forms the basis for its goods claim and claim of ownership of the Dozer." **Id.** at 12. However, if the monetary transfers were capital contributions, Plum Property contends that "the transfer of the Dozer was without consideration and the ownership of the Dozer rests with Mineral Trading with the result that [Mulligan Mining's] goods claim fails." **Id.** Thus, we must determine whether the monetary transfers from Mulligan Mining to Mineral Trading constituted loans or contributions to capital.

In **O'Reilly v. Cellco Industries, Inc.**, 402 A.2d 686 (Pa. Super. 1979), this Court considered whether a shareholder's transfer of distribution of profits to the company constituted corporate debt or equity. In that case, Cellco, Inc. ("Cellco") borrowed money in the form of a loan in order to purchase a plant. The loan agreement required each Cellco shareholder to transfer one-fourth of the distribution of profits they received back into Cellco until the loan was repaid. **Id.** at 688. Cellco shareholders received certain instruments, labeled notes, evidencing the transfer of their distribution of profits. O'Reilly, a former Cellco shareholder, claimed that these instruments represented corporate debts owed to him.

In its decision, this Court held that "the determination [of] whether funds advanced are to be regarded as a 'capital contribution' or 'loan' must

be made in the light of all the facts of the particular case. Rarely should any one element be determinative.” **Id.** at 690 (citing **Gilbert v. Comm’r**, 262 F.2d 512, 514 (2d Cir. 1959)). This Court considered multiple factors, including seven factors advanced by federal tax law. These factors included: (1) whether the corporation had been inadequately capitalized at its inception; (2) whether an outside investor would have made similar advances without security; (3) whether the advances were made substantially in proportion to the stock ownership of the stockholders; (4) whether the advances were made with regard to the normal creditor safeguards; (5) whether an effort was made to enforce the obligations; (6) whether repayment was expected based upon the success of the business; and (7) whether the advances constituted risk capital as a matter of “substantial economic reality.” **Id.** at 689.

After considering all of these factors, in addition to the fact that the instruments were labeled “Note” and contained a fixed maturity date and rate of interest, this Court determined that the cash advances constituted debts rather than equity. **Id.** at 689. We held that “because the instruments on their face are debt instruments, and based on the evidence adduced at trial, the parties thereto obviously intended that the obligations be so treated there being no evidence of record to show anything to the contrary.” **Id.** at 690.

Similar to the list of factors considered by this Court in **O'Reilly**, a recent bankruptcy court case, **In re Shubh Hotels Pittsburgh, LLC**, 476 B.R. 181 (W.D. Bankr. 2012), applied a list of 11 factors that courts utilize in determining whether a monetary transfer is a loan or an equity contribution. **Shubh**, 476 B.R. at 187. These 11 factors include:

(1) the names given to the instruments, if any, evidencing the indebtedness; (2) the presence or absence of a fixed maturity date and schedule of payments; (3) the presence or absence of a fixed rate of interest and interest payments; (4) the source of repayments; (5) the adequacy or inadequacy of capitalization; (6) the identity of interest between the creditor and the stockholder; (7) the security, if any, for the advances; (8) the corporation's ability to obtain financing from outside lending institutions; (9) the extent to which the advances were subordinated to the claims of outside creditors; (10) the extent to which the advances were used to acquire capital assets; and (11) the presence or absence of a sinking fund to provide repayments.

Id. (citations omitted).

The trial court in the case presently before this Court relied upon these 11 factors in making its determination of whether the monetary transfers from Mulligan Mining to Mineral Trading constituted a loan or an equity contribution. In its 1925(a) opinion, the trial court, citing to the 11 factors in **Shubh**, determined that factors 1, 4, 7, 8, 9, 10, and 11 supported a determination that the monetary transfers constituted loans, while factors 2, 3, 5, 6, and 11 supported a determination that the monetary transfers

constituted equity contributions. Trial Court Opinion, 10/16/13, at 4-5. The trial court's 1925(a) opinion also acknowledged that the transfer of the Dozer occurred before Plum Property obtained a judgment or attempted to levy on the Dozer, that Mulligan Mining listed the Dozer as an asset and used the Dozer in its operations, and that Mulligan Mining and Mineral Trading considered the monetary transfers as loans and maintained their accounts and ledgers as such. **Id.** at 5. The trial court balanced all of these factors and held that "the monetary transfers were intended as loans and should be characterized as loans." **Id.** at 6. After a review of the record, we conclude that the trial court's determination is unsupported by the evidence of record.

With regard to the first factor, there is no evidence of indebtedness. Lasko failed to produce any promissory notes or documentation evidencing any loans made by Mulligan Mining to Mineral Trading. N.T., 3/15/13, at 45. Moreover, Suzanne June ("June"), the previous controller at Mulligan Mining, testified that she never saw a promissory note for the alleged loans. **Id.** at 71. June also testified that Mulligan Mining's general ledger account represents the loan account with Mineral Trading. **Id.** The title of the loan account with Mineral Trading is "Accounts Receivable Mineral Trading." **Id.** at 72. Mulligan Mining does not maintain an account with Mineral Trading titled as a loan account. **Id.** Considering all of the evidence presented,

there is no evidence that the transfers constituted loans or that Mulligan Mining and Mineral Trading intended the transfers to constitute as loans.

The record is also devoid of any evidence supporting the trial court's determination that factors four, seven, eight, and 11 support a characterization of the transfers as loans. With regard to the fourth factor, Lasko testified that Mineral Trading was only expected to repay Mulligan Mining when it had the available cash to make payments. ***Id.*** at 47-48. The absence of a set payment schedule supports a determination that Mulligan Mining and Mineral Trading intended the monetary transfers to be equity contributions rather than loans. ***See Shubb***, 476 B.R. at 189; ***O'Reilly***, 402 A.2d at 689.

Under the seventh factor, Lasko admitted in his testimony that the monetary transfers from Mulligan Mining to Mineral Trading were not secured by any equipment or assets of Mineral Trading and that Mulligan Mining did not file a UCC financing statement against Mineral Trading for the Dozer to secure the loan. N.T., 3/15/13, at 47. With respect to the eighth factor, despite Lasko's claim that Mineral Trading attempted to obtain a loan from a bank, Lasko failed to produce any records referencing the loan application. ***Id.*** at 43. Moreover, Lasko could not recall when Mineral Trading requested the loan, the amount of the loan, or which bank Mineral Trading contacted. ***Id.*** Finally, Lasko testified that Mineral Trading did not use a separate account or a sinking fund during the time Mulligan Mining

extended the funds, to provide repayment. ***Id.*** at 44. As a result, there is no evidence supporting the trial court's determination that these factors support a characterization of the transfers as loans.

Conversely, the record is replete with evidence to support a characterization of the monetary transfers as equity contributions. In addition to aforementioned factors, Lasko's interest in and control over both Mulligan Mining and Mineral Trading supports a determination that the monetary transfers constituted equity contributions. Moreover, the absence of a fixed schedule of payments and interest rate suggest that Mulligan Mining intended the transfers to be equity contributions. After a review of the record, we conclude that the evidence does not support the trial court's determination that the transfer of funds from Mulligan Mining to Mineral Trading constituted loans instead of equity contributions. Accordingly, we conclude that the trial court erred. The transfer of the Dozer was without consideration and the ownership of the Dozer rests with Mineral Trading with the result that Mulligan Mining's goods claim fails.

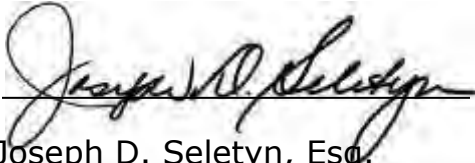
For their second and third issues on appeal, Plum Property argues that the trial court committed an error of law in finding that Mineral Trading was solvent at the time of the transfer, that the transfer of the Dozer did not render Mineral Trading insolvent, that Mulligan Mining paid fair consideration for the Dozer, and that Mineral Trading owed Mulligan Mining money. However, the record reflects that the trial court never made findings of fact

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on these matters given its conclusion that the monetary transfers were loans. Given our contrary conclusion, we need not address these final issues.

Order reversed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/29/2014