

[Cite as *PFG Ventures, L.P. v. King*, 2011-Ohio-1248.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 95352

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**PFG VENTURES, L.P.**

PLAINTIFF-APPELLEE

vs.

**WALTER S. KING, ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:  
REVERSED AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-680740

**BEFORE:** Stewart, J., Kilbane, A.J., and E. Gallagher, J.

**RELEASED AND JOURNALIZED:** March 17, 2011

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MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, Bryan King, appeals from a summary judgment rendered on a complaint filed by plaintiff-appellee, PFG Ventures, L.P. The complaint sought damages caused by the fraudulent transfer of PFG assets to King. King argues that he lacked notice that a motion for summary had been filed against him and that even though unopposed, PFG's motion for summary judgment failed to establish the absence of any genuine issue of material fact, thus precluding judgment as a matter of law.

{¶ 2} PFG is a franchiser specializing in the marketing, sale, and distribution of printed business products and services under the “Proforma” name. Walter S. King, on behalf of his company, W. King & Associates, Inc., signed a franchise agreement with PFG. The franchise agreement stated that PFG would turn over a list of current Proforma customers to Walter S. King and his company, W. King & Associates. In exchange, W. King & Associates would remit a percentage of income generated from these and other customers to PFG. The parties agreed that should the franchise agreement expire or be terminated, Walter S. King would be required to pay a balance due to PFG for those accounts. The franchise agreement apparently terminated and PFG alleged that W. King & Associates owed \$281,517 plus interest as stated in the termination clause. PFG went on to allege that Walter S. King, in an effort to avoid paying the amount owed under the franchise agreement, fraudulently transferred his assets to his son, Bryan King and/or Bryan King’s company, King & Associates, without receiving reasonably equivalent value in exchange. The complaint alleged that Walter S. King and his company, W. King & Associates, sought bankruptcy protection after making the fraudulent transfer of PFG’s assets.

## II

{¶ 3} King’s first assignment of error is that summary judgment should not have been granted because he did not receive the motion and therefore

could not respond to it. He claims that he retained an attorney to represent him but that the attorney failed to attend a pretrial conference so he was unaware that the court had set a dispositive motion deadline or that a motion for summary judgment had been filed.

{¶ 4} It is a basic principle of appellate review that a reviewing court cannot add to the record on appeal and then decide the appeal on the basis of the new matter. *State v. Hill*, 90 Ohio St.3d 571, 573, 2001-Ohio-20, 740 N.E.2d 282. There is nothing in the record to substantiate King's assertion, made for the first time on appeal, that he was not served with the motion for summary judgment. PFG's motion for summary judgment contained a certificate of service as required by Civ.R. 5(D) and there is no evidence that the motion had been returned indicating failure of delivery, so there is a rebuttable presumption of proper service. *Winthrop v. Harden*, 8th Dist. No. 79803, 2002-Ohio-5217, ¶21. While King asserts that he did not know that a motion for summary judgment was filed, he obviously knew that the court had granted summary judgment as evidenced by his retention of counsel and timely filing of a notice of appeal. King could have offered evidentiary support for his argument by seeking relief from the summary judgment under Civ.R. 60(B), but he failed to do so. Having not offered proof that he did not receive the motion for summary judgment, King has failed to rebut the

presumption of proper service. *State ex rel. Collier v. Farley*, 4th Dist. No. 05CA31, 2006-Ohio-4901, ¶29.

### III

{¶ 5} In his second assignment of error, King argues that regardless of whether PFG's motion for summary judgment was unopposed, PFG failed to set forth sufficient facts to show that it was entitled to judgment as a matter of law. He maintains that PFG offered no evidence to meet its burden of proving the elements of fraudulent transfer.

{¶ 6} Summary judgment may issue when, after viewing the evidence in a light most favorable to the nonmoving party, there is no genuine issue as to any material fact and reasonable minds could conclude only that judgment must issue as a matter of law. See Civ.R. 56(C). The party seeking summary judgment has the initial burden of establishing the absence of any genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If this burden has been met, the nonmoving party must come forward with specific facts in the manner outlined by Civ.R. 56(E).

{¶ 7} In its motion for summary judgment, PFG stated that its claims against King were premised on a violation of the Uniform Fraudulent Transfer Act, R.C. 1336.04(A)(1). That section states that a transfer made or an obligation incurred by a debtor is fraudulent if the debtor made the

transfer or incurred the obligation with an actual intent to hinder, delay, or defraud any creditor of the debtor.

{¶ 8} An affidavit offered by Proforma's general counsel mentioned Bryan King only twice: that Walter S. King had, "upon information and belief," become employed by King & Associates, "a company potentially owned by Defendant's son, Bryan King" and that Walter S. King diverted Proforma customers to Bryan King and his company, King & Associates.

{¶ 9} PFG's affidavit falls far short of meeting its burden of showing the absence of material facts on whether King was the recipient of a fraudulent transfer. Affidavits that set forth opinions without setting forth facts are insufficient to meet a movant's obligation under Civ.R. 56(E). See *H&H Properties v. Hodkinson*, 10th Dist. No. 10AP-117, 2010-Ohio-5439, ¶11.

The affidavit not only fails to state with any certainty that Walter S. King became employed with King & Associates, it offers only the possibility that King & Associates is owned by Bryan King. These assertions should have been supported with a proper factual foundation, yet PFG offered none.

{¶ 10} PFG argues that its affidavit presented sufficient circumstantial evidence to prove the fraudulent transfer claim. We disagree. The affidavit is directed almost entirely to the activities of Walter S. King. Bryan King is mentioned only twice in the affidavit and in the most vague way. Even if taken as true, the conclusory allegations of the affidavit only offer proof of

Walter S. King's access to Proforma's proprietary information; there is no concomitant proof that Bryan King used any of this proprietary information in his business. In any event, Bryan King's use of PFG's proprietary information would not be an element of a fraudulent transfer claim under R.C. 1336.04(A)(1) as alleged in the complaint because R.C. 1336.04(A)(1) applies to transfers by "debtors" and there is no allegation that Bryan King or King & Associates were debtors of PFG.

{¶ 11} Perhaps acknowledging the insufficiency of its evidence in support of summary judgment, PFG claims that it was hampered in proving its allegations because King "did not participate in this case" apart from seeking leave to file an answer and counterclaim. Bryan King's minimal participation in defending the action did not excuse PFG's failure to seek discovery in support of its claims. The record contains no discovery requests by PFG nor does it contain any motion seeking to compel discovery from Bryan King. PFG cannot complain that it was hampered in receiving discovery when it made no discovery requests.

{¶ 12} We find that the affidavit offered in support of the motion for summary judgment was legally insufficient to meet PFG's initial burden of establishing the absence of any genuine issue of material fact. It follows that the court erred by granting summary judgment.

{¶ 13} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover of appellee his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

MARY EILEEN KILBANE, A.J., and  
EILEEN A. GALLAGHER, J., CONCUR