IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-01248 COA

SOUTHERN TIRE MART, INC. **APPELLANT**

v.

JAM, INC.; MSLEASECO, A MISSISSIPPI PARTNERSHIP; VERNON MOORE, INDIVIDUALLY; AND JIMMY N. JOHNSON, INDIVIDUALLY **APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	08/07/95
TRIAL JUDGE:	HON. THOMAS L. ZEBERT
COURT FROM WHICH APPEALED:	RANKIN COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	SCOTT PHILLIPS
ATTORNEY FOR APPELLEES:	FRANK EDENS
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	APPELLEE FOUND TO HAVE PRIORITY LIEN
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

BEFORE McMILLIN, P.J., HERRING, AND KING, JJ.

HERRING, J., FOR THE COURT:

This is an action where the Appellant, Southern Tire Mart, Inc. (STM) charges that JMS Trucklines, Inc. (JMS) fraudulently conveyed numerous tractors and trailers to the Appellees, JAM, Inc., MSLEASCO, a Mississippi Partnership, Jimmy N. Johnson, and Vernon Moore, thereby defrauding STM in its capacity as a creditor of JMS. The Chancery Court of Rankin County, Mississippi ruled generally that there was no fraudulent conveyance and in favor of JMS and the other defendants. STM contends that its claim against JMS and its assets was superior to the claims of

JAM, Johnson, and Moore, and that the trial court committed reversible error in its findings of fact and conclusions of law.

I. ISSUES

On appeal, STM raises the following issues:

I. WHETHER THE LOWER COURT ERRED WHEN IT DECIDED THAT THE APPELLEES, JOHNSON, MOORE, MSLEASCO, ANDJAM, HAVE A PRIORITY LIEN ON THE PROPERTY OR ASSETS OF THE JUDGMENT DEBTOR, JMS.

II. WHETHER THE LOWER COURT ERRED WHEN IT DECIDED THAT STM WAS NOT ENTITLED TO HAVE THE CONVEYANCE OR TRANSFER OF THE PROPERTY OR ASSETS OF JMS, SET ASIDE AS A FRAUDULENT CONVEYANCE, MADE WITH THE INTENTION OF HINDERING, DELAYING, OR DEFRAUDING CREDITORS OF JMS.

III. WHETHER THE LOWER COURT ERRED WHEN IT DENIED STM'S MOTION FOR NEW TRIAL.

Having fully considered the evidence presented and applicable law in regard to these issues, we affirm the judgment of the trial court.

II. THE FACTS

Jimmy N. Johnson and Vernon Moore created and were the sole owners and stockholders of JMS Trucklines, Inc., a Mississippi corporation doing business in Richland, Mississippi, as a trucking company. Johnson and Moore were also partners in a proprietorship called MSLEASCO, which owned the building and property on which JMS conducted its business. According to the evidence, Johnson and Moore successfully operated JMS until they sold out to TOPOFTHELINE, Inc. (TOP), a Delaware corporation, on November 18, 1993. Richard Frances of New York was the sole stockholder of TOP.

In their sale to TOP, Johnson and Moore also conveyed their interests in JMS's corporate assets, which included 91 tractor trucks and 140 trailers. Some of these tractors and trailers were fully paid for, but 36 tractors and 44[(1)] trailers still were subject to purchase money indebtednesses to various lenders. Pretrial stipulations provide that Johnson and Moore personally guaranteed JMS's debt to lenders that financed the tractors and trailers conveyed to TOP by Johnson and Moore. The stipulations further provide that JAM repurchased only those vehicles on which Johnson and Moore had given personal guarantees of payment. In the buy-out agreement with TOP, Johnson and Moore retained security interests in thirty-two trailers because of personal guarantees of payment they had both given to the appropriate lenders.

The corporate name of "JMS Trucklines, Inc." was retained by TOP for its newly acquired business. In addition, TOP entered into a new lease agreement with MSLEASCO to continue to use the building and grounds that JMS was already occupying. Through their partnership, MSLEASCO, Johnson and Moore retained a landlord's lien upon all of JMS's and TOP's assets located upon MSLEASCO property for security of the rental payments.

JMS was sold by Johnson and Moore to TOP for the sum of $2,500,000. The sum of $1,500,000 was paid directly to Johnson and Moore at the time of the sale, and the remaining $1,000,000 was financed through (1) a $500,000 promissory note executed by TOP in favor of Johnson and (2) a similar note in favor of Moore. These notes, as well as TOP's lease with MSLEASCO, were guaranteed by TOP's sister corporations, St. Lawrence Freightways, Inc. and Penguin Truck Leasing, Inc. Following its purchase of JMS, TOP sold JMS's accounts receivable for $1,000,000. The record is silent as to whether any of these funds were applied to its indebtedness to Johnson and Moore.

Simultaneously with the sale of his shares of stock in JMS to TOP, Moore bought back forty shares of JMS, or twenty percent of the entire stock of the company. He also entered into a contract with TOP to work in Richland as its terminal manager for at least five years, at a salary of $12,500 per month. Johnson also entered into a contract with TOP to serve as a consultant at a salary of $6, 944.44 per month for a term of three years. Neither Johnson nor Moore served as either officers or members of the board of directors of TOP, JMS, or any other corporation related to TOP subsequent to the November 18, 1993, sale, and were not involved in management decisions.

Prior to November 18, 1993, STM had an excellent working relationship with JMS and its owners, Johnson and Moore, and over the years had regularly provided services and sold tires to JMS. According to the testimony, STM had always been timely paid. Subsequent to the sale of JMS to TOP, however, the corporation immediately became delinquent in its payments to STM and to others. Johnson and Moore both testified that they met with representatives of STM and did what they could to assist STM in obtaining payments from JMS. Nevertheless, by April 11, 1994, JMS owed the sum of $47,085.46 to STM.

Johnson and Moore became aware that JMS was defaulting in its obligations as early as January 1994, only two months after the sale to TOP. In addition to being contacted by STM concerning nonpayment of debt, Johnson and Moore were also contacted by a number of lenders in regard to the 36 tractors and 44 trailers to which Johnson and Moore had given personal guarantees of payment for their purchase money debts. In February 1994, these lenders began to take action to repossess the tractors and trailers because of nonpayment of the purchase money indebtednesses incurred when the vehicles and trailers were purchased. Johnson and Moore were given two choices by the lenders: (1) the vehicles and trailers would be repossessed by the lenders and transferred to Johnson and Moore, who would then pay the delinquencies on the indebtednesses and make regular payments thereafter, or (2) the lenders would repossess and sell the vehicles and trailers and call upon Johnson and Moore to pay the difference between the sales prices and the amount of the indebtednesses. Johnson and Moore took the first choice. Thus, the lenders went through the process of repossessing the tractors and trailers and then conveyed them to Johnson and Moore. Meanwhile, Johnson and Moore enforced their own security agreements against the trailers, terminated MSLEASCO's lease with JMS and seized the contents of the leased building pursuant to MSLEASCO's landlord's lien.

The repossession of the tractors and trailers took several months in the spring and summer of 1994. Both Johnson and Moore testified that they assisted the financial institutions in repossessing the collateral because they knew that the expenses involved in the process would be charged to them. In March 1994, after consultation with the lenders, Johnson and Moore reentered the trucking business and created a new corporation, JAM, Inc., to engage in their trucking activities. Prior to obtaining the necessary permits to do so, they leased the repossessed trucks and trailers to other truckers, in

order to generate income. Johnson and Moore also expended approximately $150,000 from their personal funds in order to salvage their credit with various lenders. In addition, they repossessed and cashed in two certificates of deposit in the sum of $150,000, which they had been given as security for selling JMS to TOP, borrowed $300,000, and established a new line of credit with a local bank to pay the delinquent debts on the repossessed tractors and trailers.

According to their testimony, neither Johnson nor Moore had intended to return to the trucking business. However, they had no choice since both of them were personally liable for the substantial indebtednesses for which they had given their personal guaranties. In other words, they reentered the trucking business to avoid being personally saddled with an enormous debt. It is noteworthy that there was little or no equity in any of the repossessed vehicles or trailers and that there was considerably more debt than value in regard to most of them.

On or about March 3, 1994, the attorneys for STM wrote to Johnson by certified mail and informed him that STM had a claim against him for $47,085.46,[(2)] representing the indebtedness incurred by JMS and TOP for the purchase of tires and related materials subsequent to JMS's sale to TOP. The letter alleged that Johnson was personally liable for the debt because of his failure to comply with applicable bulk transfer statutes[(3)] when JMS was conveyed to TOP. This letter was received by Johnson on March 7, 1994, at a time when he and Moore were in the process of assisting the lenders to repossess the 36 tractors and 44 trailers mentioned above.

STM filed suit on April 11, 1994, in the Circuit Court of Rankin County, Mississippi, to recover the indebtednesses due to STM against JMS and TOP, and also against Richard Frances, Johnson, and Moore, individually. On June 21, 1994, STM obtained a default judgment against JMS and Frances in the sum of $62,623.66, an amount which apparently included accrued interest on the indebtedness.

The present action was filed in the Chancery Court of Rankin County, Mississippi, on July 27, 1994, against JMS, JAM, MSLEASCO, Moore, and Johnson. In the chancery proceeding, STM charges Johnson and Moore, as representatives and as creditors of JMS, with fraudulently reconveying to themselves the assets which they originally transferred to JMS on November 18, 1993. According to STM, this reconveyance was accomplished by Johnson and Moore through their creation of a new corporation, JAM, Inc., which was wholly owned by them. In essence, STM alleges that when the corporate assets of JMS were repossessed, they were transferred to JAM, which was created in anticipation of and when litigation was pending against JMS all without adequate consideration. As a result, STM argues JMS was rendered insolvent and unable to pay its debts to STM. Finally, STM charges that the transfer of assets described above was maliciously and fraudulently contrived with the intent to defraud STM, in violation of section 15-3-3 of the Mississippi Code of 1972, as amended, and to deprive it of any avenue to collect its just accounts receivable. In its request for relief, STM sought, *inter alia,* judgment against Johnson and Moore in the sum of $62,623.66, plus accrued interest, as well as punitive damages, costs, and attorney's fees. A motion to transfer the chancery action to the Circuit Court of Rankin County was denied on September 27, 1994. From the record before us, it appears that the original circuit court action was never pursued against Johnson and Moore.

Following a trial on the merits, the chancellor found no evidence of fraudulent intent or fraudulent actions by Johnson or Moore, and that the ultimate transfer of the repossessed tractors and trailers to

JAM was valid.

III. ANALYSIS

In addressing the issues raised on appeal by STM, the Court will consider first what it considers to be the dispositive issue of the case, which is:

WHETHER THE LOWER COURT ERRED WHEN IT DECIDED THAT STM WAS NOT ENTITLED TO HAVE THE CONVEYANCE OR TRANSFER OF THE PROPERTY OR ASSETS OF JMS SET ASIDE AS A FRAUDULENT CONVEYANCE, MADE WITH THE INTENTION OF HINDERING, DELAYING OR DEFRAUDING CREDITORS OF JMS.

Upon reviewing the findings of fact of a chancery court, an appellate court will not reverse a chancellor's findings unless such findings are manifestly wrong or clearly erroneous. *Denson v. George*, 642 So. 2d 909, 913 (Miss. 1994). Additionally, "[w]henever there is substantial evidence

in the record to support the chancellor's findings of fact, those findings must be affirmed . . . . For questions of law, our standard of review is de novo." *Id.* at 913 (citations omitted).

STM argues on appeal that the lower court erred in failing to determine that there was a fraudulent conveyance in violation of Mississippi law. Pursuant to Mississippi law, a creditor may file suit in chancery court to have a conveyance set aside if that conveyance was "for the purpose of hindering, delaying or defrauding creditors." Miss. Code Ann. § 11-5-75 (Rev. 1991). "The creditor in such a case shall have a lien upon the property described therein from the filing of his bill, except as against bona fide purchasers before the service of process upon the defendant in such a bill." *Id.* Section 15-3-3 of the Mississippi Code of 1972 likewise prohibits conveyances which are designed to "delay, hinder, or defraud creditors . . . ." On the other hand, section 15-3-5 of the Mississippi Code of 1972, as amended, states:

Section 15-3-3 shall not extend to any estate or interest in any lands, goods or chattels, or any rents, common, or profit out of the same, which shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, bodies-politic or corporate, nor shall it in any case extend to creditors whose debts were contracted after such fraudulent act, unless made with intent to defraud them, and though a conveyance or contract be decreed void as to prior creditors, it shall not, on that account, be void as to subsequent creditors or purchasers.

Miss. Code Ann. § 15-3-5 (Rev. 1995). In *Barbee v. Pigott*, 507 So. 2d 77, 84 (Miss. 1987), the Mississippi Supreme Court, in dealing with the statutes involving fraudulent conveyances, stated, "These statutes invalidating fraudulent conveyances are designed to prevent debtors from putting their property which is available for the payment of their debts beyond the reach of creditors." Additionally, the court stated that it "takes a dim view of [those] attempting to circumvent creditors by deceitful means . . . ." *Id.* at 84.

Mississippi law involving fraudulent conveyances has remained relatively unchanged over the years. In *O'Conner v. Ward*, 60 Miss. 1025, 1036-37 (1883), the Mississippi Supreme Court established the criteria for finding the existence of a fraudulent conveyance. The court stated: "To bring a case within

the terms of the statute there must be a creditor to be defrauded, a debtor intending to defraud, and a conveyance of property which is appropriable by law to the payment of the debt due." The language of the statute on fraudulent conveyances in force in 1883 is substantially the same as the current statute, section 15-3-3. *See* Rev. Miss. Code § 1283 (1880); Miss. Code Ann. § 15-3-3 (Rev. 1995). The Mississippi Supreme Court reaffirmed the criteria set forth in *O'Connor* in *Kidd v. Kidd*, 210 Miss. 465, 470, 49 So. 2d 824, 826 (Miss. 1951). As such, we will evaluate the case *sub judice* pursuant to the four requirements mentioned in *O'Conner*.

A. *Creditor*

Pursuant to the stipulations as agreed between the parties prior to trial, STM had in fact been a creditor of JMS before and was a creditor after the sale of JMS to TOP. There is no dispute involving this issue. It is noteworthy that STM was paid up to date for its services prior to the sale of JMS on November 18, 1993.

B. *Debtor*

The Uniform Commercial Code defines a debtor, in part, as a "person who owes payment. . . ." Miss. Code Ann § 75-9-105(d) (Supp. 1996). When Johnson and Moore sold JMS to TOP, not only were the accounts receivable transferred to TOP, but the obligations and debts of JMS were also transferred as well. However, there were no debts of JMS to STM at the time of the sale, and the only indebtednesses to STM that we are dealing with in this case, is debt incurred subsequent to November 18, 1993. Nevertheless, following the criteria set out in *O'Conner*, JMS was clearly a "debtor" to STM as a result of transactions occurring after November 18, 1993. According to the evidence, the indebtedness in question from JMS to STM was in the sum of $47,085.46. With the

accumulation of interest, that indebtedness rose to the sum of $62,236.66 at the time this action was filed in the Rankin County Chancery Court.

STM argues, however, that Johnson and Moore are the responsible parties because they, along with the lenders, colluded with one another to defraud STM. Although its argument in this regard is not entirely clear, we assume that STM also alleges that Johnson and Moore are STM's "debtors" because (1) Moore repurchased stock in JMS and was guilty of some sort of corporate self-dealing when he and Johnson reacquired the tractors and trailer, and (2) the whole transaction was a scam designed to further the interests of Johnson and Moore.

We rule that STM failed to establish that either Johnson, Moore, JAM, or MSLEASCO were debtors to STM at the time this action was heard by the trial court. It is arguable that the stockholders of a corporation could become individually liable for its debts under fraudulent circumstances. "When a corporation wrongfully distributes assets to its stockholders, the stockholder recipients are liable to the corporate creditors for the value of the assets distributed." 18 C.J.S. *Corporations* § 416 (1990). In this case, JMS did not make a voluntary transfer to one of its stockholders. Instead, assets were repossessed for nonpayment of debts. Furthermore, it is undisputed that JMS was still in operation as a corporation and had not been dissolved. Moreover, the evidence and pretrial stipulations between counsel clearly established that the indebtedness which is the subject of this action was incurred by JMS, and not by Johnson and Moore individually, or by MSLEASCO, or JAM. In addition, there was no evidence or claim that Johnson or Moore gave personal guaranties to STM to pay the debts

incurred after November 18, 1993. Indeed, such guaranties would have been inconsistent with Johnson's and Moore's expressed intent to remove themselves from the day to day pressures and uncertainties of managing and owning a trucking business.

No claim has been made by JMS that Johnson or Moore have taken advantage of any improper corporate opportunity, or have improperly breached any supposed fiduciary relationship which they enjoyed with JMS's management team. In *Knox Glass Bottle Co. v. C.R. Underwood*, 228 Miss. 699, 741, 89 So. 2d 799, 814 (1956), a seminal case in Mississippi in regard to allegations of corporate self-dealing, our Mississippi Supreme Court defined the doctrine of corporate opportunity as follows:

The doctrine of 'corporate opportunity' is but one phase of the cardinal rule of 'undivided loyalty' on the part of fiduciaries . . . . In other words, one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence.

(Citation omitted). There are, of course, exceptions to this general rule, such as where a challenge to corporate self-dealing is estopped because of ratification by the corporation or because of its acquiescence. *Knox*, 228 Miss. at 745, 89 So. 2d at 816 (citation omitted). Otherwise,

where an officer or director represents both himself and the corporation, the contract is voidable by the corporation without reference to the good faith of the defendant whether the corporation suffered an actual injury; . . . fidelity in the agent is what is aimed at, and 'the law will not permit the agent to place himself in a situation in which he may be tempted by his own private interest to disregard that of his principle.'

Knox Glass, 228 Miss at 745, 89 So. 2d at 815-16 (citation omitted).

In the case *sub judice*, neither Johnson nor Moore were officers or directors of JMS, nor were they involved in the management of the corporation after its sale to TOP. The fact that they were consultants or were employed by JMS during a period of transition did not establish them as "fiduciaries" as defined in *Knox*. Indeed, according to the evidence, they did not even know about the delinquent indebtednesses until drastic action by them was necessary to avoid severe personal financial losses. In fact, when Johnson and Moore re-acquired the tractors and trailers after a legitimate foreclosure and re-assumed the indebtednesses on these assets, JMS and TOP were arguably placed in a better financial condition to deal with their other financial obligations which were unrelated to the tractors and trailers. Moreover, there has been no claim by any representative of JMS that Johnson or Moore did anything improper in regard to their relationships with JMS, and STM has no standing to make such a claim. Thus, JMS's liability cannot be imputed to Johnson or Moore on the basis that they are debtors of STM in some way, or that STM in some fashion has a fraud claim against them because it stands in the shoes of the stockholders of JMS. *See* 18 C.J.S. *Corporations* § 402 (1990).

C. *Intent to Defraud*

Notwithstanding STM's failure to establish that Johnson, Moore, JAM, or MSLEASCO are debtors

to STM, we will evaluate whether or not the evidence adduced at trial demonstrates an intent by Johnson and Moore to defraud STM. In *Southeast Bank of Broward v. I.P. Sarullo Enter., Inc.*, 555 So. 2d 704, 707 (Miss. 1989), the Mississippi Supreme Court stated "a court searches for certain 'badges of fraud,' or suspicious circumstances, which usually accompany a fraudulent conveyance." Such "badges of fraud" include inadequacy of consideration, a transfer not in the usual course of business, secrecy, and transfer of all property or security, and a closeness in the relationship of the parties. *Reed v. Lavecchia*, 187 Miss. 413, 424-25, 193 So. 439, 441 (1940). In *Southeast Bank*, the Mississippi Supreme Court also evaluated whether the transfer in question was made in anticipation of possible future litigation or a future judgment. *Southeast Bank*, 555 So. 2d at 707. Moreover, before a conveyance will be set aside, a creditor must establish fraud or intent to defraud on the part of the debtor by clear and convincing evidence. *Ivy v. Robertson*, 220 Miss. 364, 367, 70 So. 2d 862, 864 (Miss. 1954).

1. *Lack of Consideration*

One characteristic of fraudulent intent is lack of consideration in the transfer. *Reed*, 187 Miss. at 424, 193 So. at 441. Generally, if valuable consideration is given in the transfer, there is no fraud. However, even if good and valuable consideration is given for property, a transfer may be set aside if the sole function of the transfer was to deceive creditors. *Barbee*, 507 So. 2d at 84; *Blount v. Blount*, 231 Miss. 398,413-14, 95 So. 2d 545, 551-52 (Miss. 1957). In the case *sub judice*, there was consideration given for the tractors and trailers. Johnson and Moore borrowed money, paid the delinquencies on the indebtednesses to their lenders, and went back into the trucking business, all in an attempt to pay the debts on the assets conveyed to them. Obviously, they received no windfall by regaining title and possession of the tractors and trailers. Moreover, there was no intent on the part of Johnson and Moore to "cheat" STM. As stated above, their acquisition of the trucks and trailers after repossession, in some ways, improved JMS's financial status, since JMS was no longer burdened with the indebtedness for which the vehicles had been placed as security.

2. *Closeness in the relationship of the parties.*

Another "badge of fraud" is a closeness in the relationship of the parties. STM argues that Johnson and Moore occupied a fiduciary position with JMS. While it is true that directors and officers of a corporation hold fiduciary relationships with the corporation and to its stockholders, *Knox Glass*, 228 Miss. at 742, 89 So. 2d at 814, there was no evidence that Johnson or Moore occupied such a position. Moore was hired by JMS to be its terminal manager of the Richland, Mississippi office. Johnson was merely hired as a "consultant," although he was appointed the registered agent of JMS for service of process, apparently, since he was local to the area. A registered agent is not a fiduciary of a corporation for purposes of its day to day operations, in the absence of some compelling evidence to the contrary. *See Gibson v. Manuel*, 534 So. 2d 199, 202 (Miss. 1988) (holding that pledgee/shareholder having "effective control of corporate operations" has duties "fiduciary in nature" to corporation).

While it is arguable that Moore maintained some sort of fiduciary relationship with JMS because of his twenty percent ownership in the company, Moore testified at trial that he bought the stock in JMS because he was required to make the purchase by the terms of the buy-out agreement. Pretrial stipulations confirm that neither Johnson nor Moore were directors or officers of JMS after its sale to

TOP. In addition, JMS breached its employment contracts with both Johnson and Moore, and nothing in the record suggests that either man had any type of decision making authority or had any real responsibility for the dealings of the company.

3. *Transfer of all assets*.

Transfer of all of the assets of a corporation at the time of the transaction is another circumstance which could indicate a fraudulent intent. *Morris v. Macione*, 546 So. 2d 969, 970-71 (Miss. 1989). "Neither law nor equity will permit one corporation to take all the property of another, deprive it of the means of paying its debts, enable it to dissolve its corporate existence, and place itself practically beyond the reach of creditors, without assuming its liabilities." *Id.* at 971 (citations omitted). In the case *sub judice*, the trial court found that this was not a case where all of the property of JMS was conveyed to another corporation and that there was no evidence that the conveyance was designed to avoid the payment of the debts of JMS. We agree.

STM argues that Johnson, Moore, and/or JAM fraudulently acquired all the assets of JMS, leaving JMS without a means to pay its debts. *See Vicksburg & Y.C. Tele. Co. v. Citizens' Tele. Co.*, 79 Miss. 341, 30 So. 725 (Miss. 1901). However, there was no testimony or evidence to show that Johnson, Moore, JAM, MSLEASCO, or the finance companies obtained *all* of JMS's property. In fact, of the 91 tractor trucks and 140 trailers sold to JMS in the November 18, 1993, sale, only 36 trucks and 44 trailers were repossessed and transferred to Johnson and Moore. The tractors and

trailers were among those that Johnson and Moore were still individually liable to pay for. Thus, it would be inappropriate to affix this "badge of fraud" upon Johnson, Moore, JAM, or MSLEASCO.

4. *Transaction not in the usual course of business.*

STM also asserts that the transactions which are the subject of this appeal were not transactions in the usual course or mode of doing business, indicating that fraudulent conveyances occurred. *Reed*, 187 Miss. at 424-25, 193 So. at 441. Upon the default of the debtor, it is not unusual for lenders to repossess properties that have been placed as security for debts. Additionally, it is not unusual for lenders to resell property to third-party guarantors upon their agreement to satisfy the indebtedness. We conclude that the circumstances of the repossession of the tractors and trailers present in this case present no indicia of fraud in this case.

5. *Other "badges of fraud*."

Other circumstances indicative of fraud, including secrecy or transfer of property in anticipation of litigation, are simply not demonstrated by the evidence or testimony in this case. In the case *sub judice*, the chancellor found no evidence of fraud or of an intent to defraud STM. After a review of the record, we likewise find that there is nothing in the record to suggest that Johnson or Moore intended to defraud STM. At trial, STM called only two witnesses, Johnson and Moore, and they testified as adverse witnesses. Each testified that they did what they could to urge JMS to pay its debt to STM. It is undisputed that JMS not only defaulted on its debt to STM, but had also failed to pay Johnson and Moore according to the terms of their respective employment contracts. STM presented no evidence to refute the adverse testimony of Johnson and Moore. In summary, we find that the chancellor was correct in determining that Johnson and Moore at no time attempted or intended to

defraud STM. There was no intent to defraud STM and there was no fraudulent conveyance.

D. *Conveyance of property*

In order to establish a fraudulent conveyance, it is elementary that there must be a "conveyance" or a "transfer" of property "which is appropriable by law to the payment of a debt due." *Kidd v. Kidd*, 210 Miss. 465, 469, 49 So. 2d 824, 826 (Miss. 1951) (citation omitted). In the case *sub judice*, there was no evidence or testimony that JMS, the debtor in this case, made any conveyance or transfer to Johnson, Moore, MSLEASCO, or JAM. The testimony is uncontroverted that the lenders, through which Johnson and Moore originally financed the purchases of the trucks and trailers, repossessed these assets from JMS based upon their security agreements. Johnson and Moore only obtained title to the trucks and trailers from the finance companies after the vehicles were legitimately repossessed.

STM contends that the lenders conspired with Johnson and Moore in an attempt to deprive STM of its ability to satisfy JMS's debt to STM. However, there was simply no evidence presented to support STM's claim of such a conspiracy. There was no evidence presented to establish that the lenders had no right to repossess the tractors and trailers, and there was no evidence to support the claim that the lenders could not sell the repossessed vehicles to any third party. Moreover, it is clear from the testimony and other evidence that JMS did not voluntarily transfer the trucks and trailers to the lenders or to Johnson and Moore. Evidence to support STM's fraudulent conveyance claim falls far short of the requirements necessary to set aside the conveyances in this action. As such, we hold that no fraudulent conveyance occurred.

Southern Tire also raises the following issue for the Court's consideration:

WHETHER THE LOWER COURT ERRED WHEN IT DECIDED THAT THE APPELLEES, JOHNSON, MOORE, AND JAM, HAVE A PRIORITY LIEN ON THE PROPERTY OR ASSETS OF THE JUDGMENT DEBTOR, JMS.

STM filed its complaint on April 11, 1994, asserting that pursuant to the terms of section 11-5-75 of the Mississippi Code of 1972, as amended, it had a priority interest as of that date in the tractor trucks and trailers thereafter acquired by Johnson, Moore, JAM, the banks and finance companies. This assertion was based upon the terms of the statute which assigns a priority lien on property that has been fraudulently conveyed, as of the date of service of process upon the debtor of the creditor's lawsuit asserting a valid claim. *Id.*

To obtain a priority lien against fraudulently conveyed property pursuant to the provisions of section 11-5-75, it is inherent that there be a fraudulent conveyance to set aside. In this case, the trial court correctly ruled that no fraudulent conveyance existed and then ruled that Johnson and Moore had an interest in the property superior to the claim of STM. If STM had been successful in proving that a fraudulent conveyance occurred which prohibited Johnson and Moore from reaching the assets of JMS, then the trial court would have likely imposed a lien upon the property in favor of STM dating back to the date of its complaint and service of process on the Appellees, subject to the interests of bona fide purchasers of the property without notice. Miss. Code Ann. §11-5-75 (Rev. 1991); Miss. Code Ann. § 15-3-3 (Rev. 1995). Since there was no fraudulent conveyance, this issue is moot.

STM's final assignment of error raises the following issue:

WHETHER THE LOWER COURT ERRED WHEN IT DENIED STM'S MOTION FOR NEW TRIAL.

"Whether to grant a motion for a new trial is a decision left largely to the trial court's discretion. A trial judge's denial of a motion for new trial will be reversed . . . only when that denial evidences an abuse of the trial judge's discretion." *Bland v. Bland*, 629 So. 2d 582, 586 (Miss. 1993) (citations omitted).

In this case, the trial court denied STM's new trial motion. Based on our analysis of this case in the foregoing pages of this opinion, we find that the trial court did not abuse its discretion in denying STM's motion for new trial. Accordingly, we affirm the judgment of the trial court.

THE JUDGMENT OF THE CHANCERY COURT OF RANKIN COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. BRIDGES, C.J., NOT PARTICIPATING.

1. The number of tractors and trailers involved is unclear. Pretrial stipulations state 36 tractors and 44 trailers are involved, while there was some testimony at trial indicating that 34 tractors and 41 trailers were in dispute. Even further, the trial court concluded that 34 tractors and 44 trailers were in dispute. Nevertheless, the exact number of tractors and trailers, while possibly in dispute, does not affect the result of this case.

2. The pretrial stipulations indicate that this original amount was reduced by a payment in the amount of $4,916.09 made by JMS on January 27, 1994.

3. In the complaint filed in the case *sub judice*, there is no allegation that Mississippi bulk transfer statutes were violated by Johnson.