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| STATE OF SOUTH CAROLINA |) | IN THE COURT OF COMMON PLEAS |
| |) | |
| COUNTY OF LEXINGTON |) | ELEVENTH JUDICIAL CIRCUIT |
| |) | |
| John Deere Construction & Forestry Company, |) | Civil Action No. 2021-CP-32-00328 |
| |) | |
| Plaintiff, |) | |
| |) | ORDER OF JUDGMENT |
| v. |) | |
| |) | |
| North Edisto Logging, INC.; The Paul & Brenda Gunter Revocable Trust UTD March 26, 2019; The Estate of Paul D. Gunter; Matthew P. Rush; and Matthew Cody Gunter, |) | |
| |) | |
| Defendants. |) | |
| |) | |

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SC Court of Appeals

This matter came before the Court for trial on February 5, 2024. Plaintiff John Deere Construction & Forestry Company ("Plaintiff") was represented by Amy H. Wooten, Esquire and Paul A. Fanning, Esquire admitted *Pro Hac Vice*. Defendants North Edisto Logging, Inc., the Paul & Brenda Gunter Revocable Trust UTD March 26, 2019, the Estate of Paul D. Gunter, and Matthew Cody Gunter (collectively, "Defendants") were represented by D. Randolph Whitt, Esquire. After hearing witness testimony and arguments of Counsel for all parties, the Court makes the following findings of fact and conclusions of law.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff John Deere Construction & Forestry Company ("Plaintiff") filed the instant action on February 2, 2021, seeking to set aside the transfer of title to certain tracts of real property alleged in the Complaint to constitute fraudulent real property transfers pursuant to the Statute of Elizabeth codified at S.C. Code Ann. § 27-32-10, *et seq.* Actions that seek to set aside conveyances under the Statute of Elizabeth are equitable in nature. *See Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459, 463 (2012). The instant action was added to the jury trial roster for a date certain trial the

week of February 5, 2024, by the entry of an Order dated November 28, 2023. On February 2, 2024, Plaintiff and Defendants communicated their consent to have the trial proceed as a bench trial in lieu of a jury trial, and on February 5, 2024, the parties reiterated and confirmed on the record their consent to moving forward with a bench trial.

Prior to trial, Plaintiff and Defendants filed Joint Stipulations of Facts with the Court on January 31, 2024 ("Parties' Stipulations"). Pursuant to the Parties' Stipulations, the Plaintiff and Defendants stipulated to the following facts:

1. As of November 15, 2018, Paul D. Gunter and NEL were indebted to Plaintiff.
2. Neither Paul D. Gunter nor NEL have made a payment on the indebtedness since January 13, 2017.
3. Brenda W. Gunter was Paul D. Gunter's spouse in 2019.
4. Paul Rockford "Rocky" Gunter is Paul D. Gunter's son.
5. Paula Gunter Kneece f/k/a Paula L. Gunter is Paul D. Gunter's daughter.
6. Debra Gunter Rush is Paul D. Gunter's daughter.
7. Matthew Cody Gunter is Paul D. Gunter's grandson.
8. Each of Paul D. Gunter's family members listed above knew about the Collection Lawsuit while it was pending.
9. Before his death, Paul D. Gunter was the 100% owner and President of NEL and controlled all decisions and actions of NEL.
10. Paul D. Gunter died intestate on July 3, 2019.
11. Thereafter, Paul Rockford "Rocky" Gunter became the 100% owner and President of NEL and controlled all decisions and actions of NEL.
12. On March 26, 2019, Paul D. Gunter and Brenda W. Gunter signed the Paul and Brenda Gunter Revocable Trust Agreement ("Revocable Trust").
13. Paul D. Gunter and Brenda W. Gunter are the only Settlers/Trustees of the Revocable Trust.
14. No schedules or amendments to the Revocable Trust exist.

15. In 2019, NEL and Paul D. Gunter transferred the property listed in the attached **Exhibit A** ("Property").
16. Property 13 is encumbered by a mortgage in favor of South State Bank recorded in the real estate records of Lexington County on December 15, 2017 in Mortgage Book 19693 at Page 22.
17. On March 26, 2019, Paul D. Gunter as President of NEL, and individually, voluntarily signed deeds to transfer Property Nos. 1-12 and Property Nos. 14-15 to the Trust.
18. On March 26, 2019, Paul D. Gunter voluntarily signed a deed to transfer Property No. 13 to Matthew Cody Gunter.
19. The deeds transferring Property Nos. 1-15 were all recorded on July 11, 2019.
20. No consideration was given to NEL and/or Paul D. Gunter in exchange for any of the transfers of the Property.

The transfers that Plaintiff seeks to avoid are the transfers of Property Nos. 1, 3, 5-6, and 8-15 (collectively, "Transfers"), as referenced in the attached and incorporated herein Exhibit A to the parties' stipulations. The grantor for the transfers of Property Nos. 1, 3, 5-6, and 8-9 is Defendant North Edisto Logging, Inc. ("NEL"). Paul D. Gunter was the grantor of the transfers of Property Nos. 10-15. The grantee for the transfers of Property Nos. 1-12 and 14-15 is the Revocable Trust. The grantee for the transfer of Property No. 13 is Matthew Cody Gunter. The Transfers were voluntary transfers to family members of Paul D. Gunter. At the time of the Transfers, NEL and Paul D. Gunter were indebted to Plaintiff.

STANDARD OF REVIEW

In a bench trial, the trial judge acts as the finder of fact. *Lollis v. Dutton*, 421 S.C. 467, 483, 807 S.E.2d 723, 731 (Ct. App. 2017). "[T]he judge, as the finder of fact, may believe all, some, or none of the testimony, even when [the testimony] is not contradicted." *Id.* (internal citation omitted). A trial judge will be accorded great deference where matters of credibility are involved. *Id.* (internal citations omitted).

LEGAL ANALYSIS

South Carolina "law will not permit one who is indebted at the time to give his property away, provided such gift proves prejudicial to the interest of existing creditors." *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814, 816-17 (1937) (finding that the motive that prompts the donation is immaterial, as the analytical focus is on whether the donor is indebted at the time, which causes the transfer to "operate as a legal fraud upon the rights of creditors, even though it might be perfectly clear that the transaction was free from any trace of moral fraud"). The Statute of Elizabeth expressly prohibits conveyances made to defraud creditors and declares such conveyances to be void and of no effect. Specifically, S.C. Code § 27-23-10(A) states:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, and every bond, suit, judgment, and execution which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

S.C. Code Ann. § 27-23-10(A) (2023).

In interpreting this statute, our courts have held that there are two conditions under which conveyances shall be set aside: (1) "where the transfer is made by the grantor with the actual intent of defrauding his creditors where that intent is imputable to the grantee, even though there is a valuable consideration" and (2) "where a transfer is made without actual intent to defraud the grantor's creditors, but without consideration." *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814, 816 (1937) (citations omitted); *see also Albertson v. Robinson*, 371 S.C. 311, 316, 638 S.E.2d 81, 83 (Ct. App. 2006); *McDaniel v. Allen*, 265 S.C. 237, 242–43, 217 S.E.2d 773, 775–76 (1975). The

first condition describes and is discussed by our courts as an actual fraudulent transfer while the second condition describes and is discussed by our courts as a constructive fraudulent transfer.

The elements of an actual fraudulent transfer are: "(1) the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee." *First Citizens Bank & Tr. Co., Inc. v. Park at Durbin Creek, LLC*, 419 S.C. 333, 340, 797 S.E.2d 409, 413 (Ct. App. 2017). The plaintiff typically carries the burden of proof to establish those elements by clear and convincing evidence, but when a grantor denies any fraudulent intent in transferring an asset outside a creditor's reach, where "one or more of the following 'badges of fraud' exist" fraudulent intent has been inferred by our courts:

[T]he insolvency or indebtedness of the transferor, [a] lack of consideration for the conveyance, [a] relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, [a] departure from the usual method of business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

First Citizens Bank & Tr. Co., Inc. v. Park at Durbin Creek, LLC, 419 S.C. 333, 341, 797 S.E.2d 409, 413 (Ct. App. 2017) (quoting *Coleman v. Daniel*, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973)); see also *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999). In that instance, a rebuttable presumption that the conveyance was fraudulent is created.

The elements of a constructive fraudulent transfer are: "(1) the grantor was indebted to [the creditor] at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the [creditor] plaintiff in full—not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt." *In re J.R. Deans Co., Inc.*, 249 B.R. 121, 130 (Bankr. D.S.C. 2000) (citing *Mathis v. Burton*, 319 S.C. 261, 265, 460 S.E.2d 406, 408 (Ct. App. 1995)); see also *Gardner v. Kirven*, 184 S.C. 37, 191 S.E.

814, 816-17 (1937) ("If in the final event the property of the debtor is not sufficient to pay his debts existing at the time of his voluntary conveyance, then such conveyance is null and void as to such debts.").

"It is well-established that: 'Where transfers to family members are attacked either upon the ground of actual fraud or on account of their voluntary character [i.e. where consideration is lacking], the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing testimony.'" *Windsor Properties, Inc. v. Dolphin Head Constr. Co., Inc.*, 331 S.C. 466, 498 S.E.2d 858, 861 (1998) (quoting *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814, 816 (1937)); see also *Coleman v. Daniel, II*, 261 S.C. 198, 199 S.E.2d 74 (1973); *First Union Nat. Bank v. Smith*, 314 S.C. 459, 445 S.E.2d 457, 458-59 (Ct. App. 1994). The same burden shifting framework applies in the context of a transfer from a corporate entity where the court concludes the transfer was in actuality an intra-family transfer. See *Windsor Properties, Inc. v. Dolphin Head Constr. Co., Inc.*, 331 S.C. 466, 498 S.E.2d 858 (1998) (approving the shifting of the burden of proof where the real property transfer challenged was from a husband's wholly owned corporation to his wife).

Here, the Transfers were voluntary intra-family transfers either from Paul D. Gunter to the Revocable Trust or from NEL to the Revocable Trust and/or Matthew Cody Gunter. The Transfers from NEL to the Revocable Trust and Matthew Cody Gunter were in reality intra-family transfers. Before his death and at the time of the Transfers, Paul D. Gunter was the sole owner and President of NEL and controlled all of the company's decisions and actions. At the time of the Transfers, Brenda W. Gunter was NEL's bookkeeper and signed NEL's 2018 Tax Return as its President. As the Transfers were voluntary transfers to family members, it is the grantees (here, the Revocable Trust and Matthew Cody Gunter) who bear the burden of establishing "both a valuable

consideration and the bona fides of the transaction by clear and convincing testimony." *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814, 816 (1937). The transferees' failed to meet their burden.

As noted, Paul D. Gunter and Brenda W. Gunter are the only Settlers/Trustees of the Defendant Revocable Trust. As Paul D. Gunter has passed away, Brenda W. Gunter is the sole remaining Settlor/Trustee of the Defendant Revocable Trust. Brenda W. Gunter was not called to testify and did not testify at the trial of this matter. Further, no exhibits evidencing (1) any consideration remitted by the Defendant Revocable Trust for the Transfers it received nor (2) any reasons (bona fide or otherwise) for the Transfers to the Defendant Revocable Trust were introduced.

Defendant Matthew Cody Gunter, who did testify, did not offer any testimony as to why Paul D. Gunter, who was his grandfather, transferred Property No. 13 to him, nor did he testify that he gave consideration to Paul D. Gunter in exchange for that transfer. Further, no exhibits evidencing (1) any consideration remitted by Defendant Matthew Cody Gunter for the Transfer he received nor (2) any reasons (bona fide or otherwise) for the Transfer he received were introduced. The Defendants also stipulated in the Parties' Stipulations that no consideration was given to NEL and/or Paul D. Gunter in exchange for the Transfers, that no schedules or amendments to the Revocable Trust exist, and that Brenda W. Gunter and Matthew Cody Gunter knew about the Collection Lawsuit, which Plaintiff commenced against NEL and Paul D. Gunter, prior to the Transfers, while it was pending.

Accordingly, neither the Defendant Revocable Trust nor Defendant Matthew Cody Gunter met their respective burdens of establishing, by clear and convincing testimony, valuable consideration and the bona fides of the transactions for which they were the transferees, which includes the Transfers as to Property Nos. 1-12 and 14-15 as to the Defendant Revocable Trust and

Property No. 13 as to Defendant Matthew Cody Gunter. *See Windsor Properties, Inc. v. Dolphin Head Constr. Co., Inc.*, 331 S.C. 466, 472, 498 S.E.2d 858, 861 (1998); *see also Judy v. Judy*, 403 S.C. 203, 209, 742 S.E.2d 672, 675 (Ct. App. 2013) (affirming grant of summary judgment regarding voluntary transfers made to family members where transferees did not testify and consequently did not meet their burden to establish the bona fides of the transfers).

The only other witness called by the defense was Paula Kneece, Paul D. Gunter's daughter. Ms. Kneece, who is not a transferee of any of the Transfers, testified that Paul D. Gunter was diagnosed with stage four colon cancer in October 2018 and advised "early on to get his affairs in order, he wouldn't have much time left." She offered no testimony regarding the Transfers themselves, nor did she testify that she is a Trustee, or other representative of the Defendant Revocable Trust.

Even if the Defendants had met their burden, which they did not, Plaintiff presented evidence of a number of "badges of fraud," creating a rebuttable presumption of fraud. Specifically, Plaintiff presented evidence of the following badges of fraud:

- a. the indebtedness of the transferors Paul D. Gunter and Defendant NEL (acknowledged and stipulated to by Defendants);
- b. lack of consideration for the Transfers (acknowledged and stipulated to by Defendants);
- c. the relationship between the transferors (Paul D. Gunter and Defendant NEL) and the transferees (the Defendants Revocable Trust and Matthew Cody Gunter) (familial relationships and full ownership and control of Defendant NEL exercised by Paul D. Gunter prior to his death acknowledged and stipulated to by Defendants);
- d. the pendency of litigation (acknowledged and stipulated to by Defendants);

e. except as to the Transfer of Property No. 13, the reservation of benefit to the transferor (Paul D. Gunter, through the Revocable Trust as a Settlor/Trustee as to Transfers of Property Nos. 1-12 and 14-15 and Defendant NEL through its ownership by Paul D. Gunter); and

f. except as to the Transfer of Property No. 13, the retention by the debtor of possession of the property (Paul D. Gunter, through the Revocable Trust as a Settlor/Trustee as to Transfers of Property Nos. 1-12 and 14-15 and Defendant NEL through its ownership by Paul D. Gunter).

In this Court's view, the rebuttable presumption of fraud that was created went un rebutted, establishing the actual fraud of Paul D. Gunter and of Defendant NEL in making the Transfers. While Ms. Kneece testified that Paul D. Gunter had been diagnosed with cancer and advised "to get his affairs in order", the inference to be drawn therefrom: that his motivations in making or (in the case of Defendant NEL causing to be made) the Transfers was devoid of moral fraud is wholly immaterial in addition to being hearsay. The law of South Carolina is clear that it "will not permit one who is indebted at the time to give his property away, provided such gift proves prejudicial to the interest of existing creditors" regardless of the motive that sparks the donation. *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814, 816-17 (1937) ("One is presumed to intend the natural consequences of his act.") (referencing *Rice v. City of Columbia*, 143 S.C. 516, 543, 141 S.E. 703 (1928)).

The evidence here supports the conclusion that the Transfers were voluntary conveyances made at the expense of Plaintiff, and other creditors, for the benefit of Paul D. Gunter's family members and for the Defendant Revocable Trust of which Paul D. Gunter and his then wife Brenda W. Gunter were the sole Settlers/Trustees. Under the facts and circumstances presented, the actual

fraud of Paul D. Gunter and of Defendant NEL in making the Transfers is imputable to the grantees/transferees, the Defendants Revocable Trust and Matthew Cody Gunter, respectively.

The cornerstone of Defendants argument and response to Plaintiffs assertions is that constructive fraud cannot be established because Plaintiff failed to establish that Defendant NEL failed to retain sufficient assets to pay its debt to Plaintiff. The Court first notes that burden shifting required by the factual context of this matter and notes the Defendants are the ones whom must establish the bona fides of the transaction by clear and convincing testimony. Thus, Defendants must establish sufficient property was retained such that constructive fraud under the Statute of Elizabeth would fail, and this Court finds Defendants failed to establish such an argument by clear and convincing testimony.

Zach Hartje, of John Deer Credit Services Inc., testified about the indebtedness owing to Plaintiff at the time of the Transfers and at the time of the trial. Mr. Hartje also testified that all real property in the names of Paul D. Gunter and NEL was transferred, and no real property was retained by either. Defendants point to the "Total assets" referenced in the NEL tax returns for tax years 2018 through 2021. However, the NEL tax returns show "(o)rinary business losses" in each year, and the Defendants did not produce any documentation concerning Defendant NEL's liabilities. In fact, Defendants did not produce or present evidence or documentation of any short-term or long-term liabilities, financial statements, balance sheets, accounts receivable, accounts payable or bank account statements of any kind for any of the years that Defendant NEL has been indebted to Plaintiff. Evidence that Paul D. Gunter, or his estate, retained sufficient property to pay its indebtedness to Plaintiff was likewise absent.

The Defendants did not produce documentation of any kind nor did they present evidence of any kind, including witness testimony, concerning the assets or liabilities of Paul D. Gunter, or

his estate, for any of the years of indebtedness to Plaintiff. Paul D. Gunter died intestate. There is no will passing other property. The Defendant Revocable Trust lists no additional property or assets retained by Paul D. Gunter or his estate.

Therefore, the Court finds these Transfers are null and void under the Statute of Elizabeth because they were made with actual intent to defraud creditors of Paul D. Gunter and Defendant NEL, Defendants were indebted at the time, and the intent is imputable to the Irrevocable Trust and Matthew Cody Gunter. *See Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814, 820 (1937).

CONCLUSION

BASED ON THE FOREGOING FINDINGS OF FACT AND CONCLUSIONS OF LAW IT IS THEREFORE ORDERED AND ADJUDGED as follows:

1. Title transfer of Property Nos. 1, 3, 5-6, and 8-15 shall be and hereby is voided and set aside as fraudulent, or constructively fraudulent, under S.C. Code § 27-23-10, *et seq.*
2. Title to Property Nos. 1, 3, 5-6, and 8-15 shall remain encumbered by and subject to the *Lis Pendens* and this Order/Judgment until the indebtedness owing to Plaintiff is resolved.
3. Defendants shall not transfer, sell, encumber, dispose of, or dilute the value of, Property Nos. 1, 3, 5-6, and 8-15 until the indebtedness owing to Plaintiff is resolved. Defendants shall maintain, and timely pay all taxes, assessments, and encumbrances against, Property Nos. 1, 3, 5-6, and 8-15 until the indebtedness owing to Plaintiff is resolved.

The Court, and the parties, recognize that further legal proceedings will be necessary pertaining to the satisfaction of this Order of Judgment. The parties may seek those proceedings in the ordinary course.

IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]



Lexington Common Pleas

Case Caption: John Deere Construction & Forestry Company VS North Edisto Logging Inc , defendant, et al

Case Number: 2021CP3200328

Type: Order/Other

It Is So Ordered

s/ Walton J. McLeod