

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
The Honorable Joe M. Crosby, Master-In-Equity**

**Case No. 2011-CP-22-0180
Appellate Case No. 2013-001447**

**Kennedy Funding, Inc. as predecessor-in-interest, and BNP
Paribas**

Respondents,

v.

**Pawleys Island North, LLC, Will Darwin Wheeler, Peggy Wheeler-
Cribb, and J. Mars Sapp, Defendants,
Of whom Pawleys Island North, LLC, Will Darwin Wheeler and Peggy
Wheeler-Cribb are Respondents and**

J. Mars Sapp is the

Appellant.

**BRIEF OF RESPONDENTS PAWLEYS ISLAND NORTH, LLC
WILL DARWIN WHEELER AND PEGGY WHEELER-CRIBB**

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I. STATEMENT OF ISSUES ON APPEAL

A. Should the transfer of property valued at \$1,920,000.00 for "the sum of FIVE AND NO/100 DOLLARS (\$5.00) and no other consideration to the Grantor" to a limited liability company in which the Grantor held a 99% membership interest, be set aside as a fraudulent conveyance where the Grantor was indebted to the creditor at the time of the transfer, the conveyance was voluntary, and the Grantor failed to retain sufficient property to pay his indebtedness to the creditor?

1. Even if there was no actual intent to defraud the creditor, was the conveyance fraudulent when it was without consideration?
2. If the consideration for the transfer is deemed grossly inadequate, instead of being completely without consideration, did the Grantor overcome the rebuttable presumption of fraud arising from the transfer when he failed to offer any testimony as to the *bona fides* of the transfer?
3. Even if there was consideration for the transfer, was the conveyance fraudulent where it was made by the Grantor with actual intent to defraud the creditor and the intent is imputable to the Grantee in which the Grantor held a 99% membership interest?

B. Where a mortgage is given on property by a fraudulent Grantee to a subsequent creditor who has notice of the fraud, should the mortgage be void as to an existing creditor of the fraudulent Grantor?

C. Where a fraudulent Grantee creates new debt and gives a lender a mortgage for inadequate consideration when compared to the value of property, and the lender is on notice of the fraudulent conveyance, should the mortgage be set aside as a fraudulent conveyance, or declared subordinate to a creditor of the fraudulent Grantor?

II. STATEMENT OF THE CASE

This case involves foreclosure and guaranty collection claims brought by Respondent Kennedy Funding, Inc. (herein "Kennedy") by the filing of a

Summons and Complaint in Georgetown County on February 9, 2011. Kennedy sought to foreclose a mortgage given by Respondent Pawleys Island North, LLC (herein "Pawleys") on two (2) parcels of property (Lots 3 and 4) (collectively, "the Property"), sought to collect on loan guaranty agreements given by Respondents Will Darwin Wheeler (herein "Wheeler") and Peggy Wheeler-Cribb (herein "Wheeler-Cribb"), and sought a determination whether Appellant J. Mars Sapp's judgment lien against Wheeler was prior to the mortgage lien of Kennedy. Sapp answered the Complaint asserting that he was a judgment lien holder and requested that his lien be declared senior to Kennedy's lien. The Respondents Pawleys, Wheeler and Wheeler-Cribb likewise filed an Answer to the Complaint.

By Order filed March 22, 2012, the case was referred to the Honorable Joe M. Crosby, Master-In-Equity for Georgetown County ("The Master") with finality and any appeal to be taken to the South Carolina Supreme Court or Court of Appeals is appropriate (Order of Reference).

By Motion filed October 3, 2011, Kennedy moved for Summary Judgment seeking to dismiss Sapp's claim of an interest in the Property or to declare Sapp's lien junior and subordinate to Kennedy's lien (Motion for Summary Judgment). By agreement of the parties, the Master heard the Motion on January 17, 2012 and the Master granted, in part, Kennedy's Motion by Order filed March 5, 2012 when he declared Sapp's lien, if any, junior and subordinate to Kennedy's lien (Order Granting Plaintiff's Motion for Summary

Judgment as to Defendant J. Mars Sapp).

On March 8, 2012, Sapp moved for the Master to reconsider the Order Granting Plaintiff's Motion for Summary Judgment as to Sapp (Defendant Sapp's Rule 59 Motion to Alter or Amend Judgment). The Master heard oral argument on Sapp's Motion on August 13, 2012, but issued no ruling at that time. The Master issued a ruling from the bench at the trial of the case on February 11, 2013.

On September 5, 2012, Kennedy filed an Amended Summons and Complaint, adding BNP Paribas ("BNP") as a Plaintiff, alleging that Kennedy assigned its rights to BNP (Amended Complaint). Sapp answered the Amended Complaint on September 20, 2012. Sapp further asserted by way of cross-claim that the conveyance of the Property by Wheeler to Pawleys was a fraudulent conveyance under the Statute of Elizabeth, that Plaintiffs, Pawleys and the guarantors condoned and participated in the transfer of the Property, that the conveyance to Pawleys was void and that if the conveyance of the Property was not completely void, it was void as to Lot 3 which was unencumbered at the time of the transfer from Wheeler to Pawleys. Likewise, the Respondents Pawleys, Wheeler and Wheeler-Cribb filed Answers to the Amended Summons and Complaint of the Plaintiffs and filed responsive pleadings to the Cross-Claim of the Appellant.

On February 11, 2013, the Master conducted a non-jury trial. At the close of the testimony by Plaintiffs and Sapp, Sapp moved for a directed

verdict. By Order filed June 7, 2013, the Master found that the Plaintiffs mortgage to be a first lien on the Property and ordered that the Property be sold at a judicial sale and ordered that the Plaintiffs were owed \$1,825,935.33 as of April 10, 2012. The Master further found that the conveyance of the Property by Wheeler to Pawleys was not fraudulent.

Sapp filed a Notice of Appeal on June 27, 2013, appealing the Master's February 14, 2012 Summary Judgment Order and his June 7, 2013 Order and Judgment. Sapp filed an Amended Notice of Appeal confirming Pawleys, Wheeler and Wheeler-Cribb were also Respondents in the appeal.

III. STATEMENT OF FACTS

Appellant Sapp, in a separate civil action, sued Respondent Wheeler in 2008, seeking damages for the alleged breach of a Commercial Lease Guaranty. On June 4, 2010, Sapp obtained a verdict against Wheeler in the amount of \$257,789.00 and \$48,929.00 in attorney's fees. Wheeler appealed the verdict which was affirmed by the Court of Appeals on February 20, 2013. Sapp v. Wheeler, 402 S.C. 502, 741 S.E.2d 621 (2013). At the time of the commencement of the Sapp/Wheeler litigation, Wheeler was the sole owner in fee simple of two (2) parcels of property on Pawleys Island known as Lots 3 and 4 (previously referenced as the "Property"). Wheeler also owned Lots 1 and 2 in the same subdivision. (R. p. 724, line 21-p. 725, line 7). The Property is the subject of Kennedy's foreclosure action.

By Quitclaim Deed dated April 29, 2009, Wheeler transferred Lots 3 and 4 to Pawleys (Sapp Trial Exhibit 1; R. pp. 750-755). The Quitclaim Deed recited \$5.00 and no other consideration. The Quitclaim Deed further included the Affidavit required by S.C. Code §12-24-70 (1976, as amended), which set forth that the conveyance was exempt from the recording fee required by S.C. Code §12-24-10 because it was a transfer from a shareholder, partner, etc. to a corporation, partnership, etc. as a stockholder, partner, or trust beneficiary of the entity or so as to become a stockholder, partner, or trust beneficiary and no consideration was paid for the transfer other than stock in the corporation, interest in the partnership, etc., or the increase in the value of the stock or interest held by the Grantor (Sapp Trial Exhibit 1; R. pp. 750-755). Wheeler had a 99% membership interest in Pawleys and his mother Wheeler-Cribb had the remaining 1% membership interest.

On April 30, 2009, Kennedy made a loan to Pawleys and took a mortgage in the principal amount of \$960,000.00 on the Property. At the time of Kennedy's loan to Pawleys, Lot 3 of the Property had a market value of \$1,040,000.00 and Lot 4 had a fair market value of \$880,000.00 (Kennedy Trial Exhibit 1; R. pp. 511-518).

IV. STANDARD OF REVIEW

A clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. Oskin v. Johnson,

400 S.C. 390, 735 S.E.2d 469 (2012).

An action to establish lien priorities regarding property that is subject to a mortgage is an action in equity, as is an action to foreclose a mortgage. Likewise, an action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a *de novo* standard of review applies. Oskin v. Johnson, 400 S.C. 390, 735 S.E.2d 469 (2012). Oskin further states the oft-cited principle that an appellate court is not required to disregard the findings of the trial court because the trial court is in a better position to assess the credibility of the witnesses.

V. ARGUMENT

A. The transfer of the Property valued at \$1,920,000.00 by Wheeler to a limited liability company in which the Grantor (Wheeler) held a 99% membership interest is a conveyance supported by valuable consideration.

The Statute of Elizabeth, as codified in §27-23-10 of the South Carolina Code (Supp. 2005), governs fraudulent conveyances and provides in relevant part:

Every...conveyance of lands...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...debts...must be deemed and taken...to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing use, or any other matter or thing to the contrary notwithstanding.

South Carolina courts have held that under the Statute of Elizabeth Conveyances may be set aside under two conditions: first, 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, second, where a transfer is made without actual intent to defraud the Grantor's creditors, but

without valuable consideration. McDaniel v. Allen, 265 S.C. 237, 242-43, 217 S.E.2d 773, 775-76 (1975).

Albertson v. Robinson, 371 S.C. 311, 628 S.E.2d 81 (Ct. App. 2006).

The challenge by Sapp to the transfer of Property to Pawleys fails under either condition.

1. There is sufficient consideration to support the transfer of the Property to Pawleys.

It is conceded that the Grantor Wheeler had a 99% membership interest in the Respondent Pawleys Island North, LLC (Appellant's Brief, p. 8). Therefore, Wheeler received consideration because his membership interest in Respondent Pawleys was increased by 99% of the value of the Property at the time of the transfer. In other words, under the evidence presented, there is evidence of a benefit received by Wheeler in the transfer. He possessed a 99% membership interest in Pawleys which, at the time of the transfer, received real estate which had a value of \$1,920,000.00. The record supports but one reasonable inference- the Respondent Wheeler as Grantor was provided a valuable consideration because of the increase of the value of membership interest in the limited liability company and such constitutes a benefit received by him. Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).

2. The consideration given for the transfer should not be deemed grossly inadequate.

Appellant also charges that the consideration given for the transfer should be deemed grossly inadequate (Appellant's Brief, p. 15). In Royal Z

Lanes, Inc. v. Collins Holding Corporation, 337 S.C. 592, 524 S.E.2d 621 (1999), the court cited McGhee v. Wells, 57 S.C. 280, 35 S.C. 529 (1900) as defining grossly inadequate consideration as “a consideration so far short of the value of the property so as to arouse a presumption in the mind that the person who takes that property takes it under some kind of secret trust”. 524 S.E.2d at 623. Clearly, a transfer of property to a limited liability company in which the Grantor has a 99% membership interest is not so far short of the value of the Property as to arouse the presumption set forth in McGhee.

3. The transfer from Wheeler to Pawleys was not an intra-family transfer.

Appellant seeks to characterize the transfer by Wheeler to a limited liability company in which he held a 99% membership interest as an intra family transfer. Such comparison is misguided, however, because Wheeler was not divested of the asset. Appellant concedes that Wheeler retained possession and control of the Property through the limited liability company (Appellant’s Brief, p. 13). From Wheeler’s perspective, the character of the asset was converted from one of real estate to personal property (i.e., membership interest in Respondent Pawleys). The body of South Carolina cases which have addressed the issue of intra-family transfers have considered the term “intra-family” in its plain and obvious meaning—a transfer of property from one family member to another family member.

The transfer of property from a Grantor to a limited liability company, in which he held a 99% membership interest, would not qualify as an intra-family transfer.

4. Wheeler did not transfer the Property to Pawleys with the actual intent to defraud Sapp.

Because the challenged transfer was made for a valuable consideration, the Appellant must establish 1) that 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 Grantors' intent is imputable to the Grantee. Mathis v. Burton, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995). In the present case, the Appellant has failed to meet the burden of proof that the transfer was made by Wheeler with the actual intent of defrauding his creditors.

There is no evidence before the Court that Wheeler acted with the intent of defrauding his creditors. In his Answer to Appellant's Cross-Claim, Wheeler denied any intent to defraud Appellant. As stated earlier, from Wheeler's perspective, only the character of the asset changed. Other than a *nulla bona* return from the Georgetown County Sheriff, Appellant presented no evidence of Wheeler's insolvency or indebtedness at the time of the transfer or any time thereafter (R. p. 726, lines 11-18). It is undisputed that Wheeler retained a 99% membership interest in Pawleys after the transfer to Pawleys, and after the Kennedy transaction, Pawleys had a net worth of \$960,000.00.

Because Wheeler had a 99% membership interest in Pawleys, there was consideration for the conveyance. There was no secrecy or concealment of the transaction and the conveyance from Wheeler to Pawleys did not constitute a transfer of the debtor's entire estate inasmuch as the Appellant concedes that Wheeler owned Lots 1 and 2 of the same subdivision. Appellant did not conduct any discovery or present any evidence of Wheeler's financial condition at the time he obtained his judgment against Wheeler (R. p. 726, lines 11-18). Appellant admitted that he did not know of any asset search conducted on his behalf other than the execution served by the Georgetown County Sheriff (R. p. 726, lines 11-18). Appellant presented no evidence that he had taken Wheeler through Supplemental Proceedings or pursued other collection avenues. Appellant failed to show by clear and convincing evidence that Wheeler was insolvent. In the present case, the badges of fraud simply do not exist.

5. There is no evidence that Wheeler failed to retain sufficient property to pay the debt at the time of closing.

If it is determined that a transfer was not made for valuable consideration, no actual intent to hinder or delay creditors must be proven. Instead, as matter of equity, the transfer may set aside if a creditor shows 1) that the creditor was indebted to the creditor at the time of the transfer; 2) that the conveyance was made without consideration or for mere nominal consideration; and 3) that the Grantor failed to retain sufficient property to pay

his indebtedness to the creditor in full, not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect its debt. Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996). The burden of proof lies with the creditor and such burden is by clear and convincing evidence. In addressing the argument advanced by the Appellant that the transfer was not made on a valuable consideration, this also fails. Again, the evidence fails to show that the conveyance was voluntary (gratuitous). Future Group, II v. Nationsbank, 324 S.C. 89, 478 S.E.2d 45 (1996).

The Appellant has failed to establish that the Grantor failed to retain sufficient property to pay the indebtedness to the Appellant in full. Appellant presented no evidence that the Respondent Wheeler was insolvent at the time of the transfer or any time thereafter, other than the *nulla bona* return from the Georgetown County Sheriff at the time of the transfer (R. p. 726, lines 11-18). At the time of the Kennedy mortgage, Pawleys Island North retained equity in the Property in the sum of \$960,000.00 based upon the fair market value of the property at the time of the conveyance. Appellant provided no evidence of Wheeler's financial condition and presented no evidence that supplemental proceedings had been pursued. The Appellant failed to meet its burden by clear and convincing evidence that Wheeler was insolvent. There is no evidence that Wheeler attempted to conceal the transfer in any way or departed from normal business practices. There simply are no badges of fraud present which would shift the burden of proof to either Pawleys Island North, LLC or

Kennedy Funding.

Moreover, the distributional interest of Wheeler in Pawleys could be subject to a charge by the Court upon application by Sapp. See S.C. Code §33-44-504 (1976, as amended). S.C. Code §33-44-504 provides, in pertinent part:

- (a) On application by a judgment creditor of a member of a limited liability company or of a member's transferee, a court having jurisdiction may charge the distributional interest of the judgment debtor to satisfy the judgment. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances may require to give effect to the charging order.
- (b) A charging order constitutes a lien on the judgment debtor's Distributional interest. The court may order a foreclosure of a lien on a distributional interest subject to the charging order at any time. A purchaser at the foreclosure sale has the rights of a transferee.

In summary, the conveyance from Wheeler to Pawleys is supported by valuable consideration. In the event the court determines that valuable consideration does not exist, then the Appellant failed to prove by clear and convincing evidence that Wheeler failed to retain sufficient assets with which to pay his indebtedness to Sapp in full.

B. There is no evidence which would support a conclusion that the Kennedy Loan transaction should be invalidated.

Kennedy mortgage was supported by valuable consideration. The mortgage was supported by a \$960,000.00 loan to Pawleys. In exchange for the \$960,000.00 loan, Kennedy received a mortgage against the Property in the amount of \$960,000.00. This would constitute valid consideration. Because

there was valuable consideration, the transfer will only be set aside if the Grantor (Wheeler) had the actual intent to defraud creditors and such intent was imputable to Kennedy. Again, for the reasons earlier cited, Wheeler did not have intent to defraud creditors in his participation in the Kennedy transaction. Even more so, because this was an arm's length transaction, such intent, if it did exist, would not be imputable to Kennedy. Citing South Carolina National Bank v. Halter, 293 S.C. 121, 359 S.E.2d 74 (Ct. App. 1987), where a mortgage transaction is supported by valuable consideration, it must be shown not only that Wheeler intended to hinder, delay or defraud his creditors, but also that Kennedy participated in the fraud. Such proof is not present in this case.

C. The Kennedy Loan transaction should not be set aside as fraudulent conveyance, or deemed subordinate to the Sapp judgment lien.

The Kennedy mortgage should not be set aside as a fraudulent conveyance. For the reasons earlier cited, the Kennedy mortgage transaction did not violate the Statute of Elizabeth and therefore should not be set aside as a fraudulent conveyance or declared subordinate to a creditor of the Grantor.

V. CONCLUSION

This Court should affirm the Master's Order Granting Summary Judgment and the Final Order and Judgment.

Respectfully Submitted.



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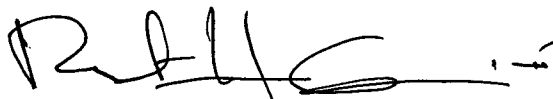
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J. Mars Sapp, Defendants,
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J. Mars Sapp is the

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The undersigned hereby certifies that this Final Brief of the
Respondents Pawleys Island North, LLC, Will Darwin Wheeler and Peggy
Wheeler-Cribb complies with Rule 211(b), SCACR.



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J. Mars Sapp is the

Appellant.

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**I hereby certify that I have served the Brief of the Respondents Pawleys
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