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LYNN W. LANCASTER

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS

COUNTY OF LAURENS ) C.A. No.: 2010-CP-30-1141

2014 SEP 25 P 12: 34  
First Citizens Bank and Trust Company, )  
Inc., )

Plaintiff, LAURENS COUNTY  
CLERK OF COURT

vs. )

Park at Durbin Creek, LLC; Kenneth E. )  
Clifton; and Linda G. Whiteman, )

Defendants. )

ORDER DENYING DEFENDANTS'  
MOTION TO RECONSIDER

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OCT 27 2014

SC Court of Appeals

Following the non-jury trial held on June 26, 2014 in the above-referenced matter, this Court found in favor of the Plaintiff and entered an Order to Set Aside Conveyances dated July 30, 2014 (hereinafter "Order"). The Defendants Park at Durbin Creek, LLC, and Kenneth E. Clifton, by and through their counsel, thereafter filed a Motion to Reconsider, Alter or Amend this Court's Order for reason that (1) there was no evidence produced to show that Linda Whiteman in any way participated in a fraudulent conveyance and (2) the Court improperly admitted into evidence testimony regarding Kenneth E. Clifton's transfer of his interest in Park at Durbin Creek, LLC to Streamline Management, LLC (hereinafter "Motion").

The Court has reviewed the Defendants' Motion, as well as all responses filed thereto, and Defendants' Motion is hereby **DENIED** and this Court's previous Order is confirmed. Pursuant to Rule 59(f), this matter was decided upon brief without oral arguments, as any additional hearing would be redundant and unnecessary.

IT IS SO ORDERED.

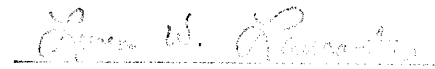


~~THE HONORABLE~~ EUGENE C. GRIFFITH, JR.  
8<sup>th</sup> Judicial Circuit Court Judge

Newberry, South Carolina

September 13, 2014

A TRUE COPY OF ORIGINAL



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Lynn W. Rountree, Esq.  
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STATE OF SOUTH CAROLINA )  
LAURENS COUNTY )  
2014 AUG -5 ) A 11:26 No.: 2010-CP-30-1141

COUNTY OF LAURENS

First Citizens Bank and Trust Company, )  
Inc., )

LAURENS COUNTY )  
Plaintiff, CLERK OF COURT )

ORDER TO SET ASIDE  
CONVEYANCES

vs. )

Park at Durbin Creek, LLC; Kenneth E. )  
Clifton; and Linda G. Whiteman, )

Defendants. )

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OCT 27 2014

**SC Court of Appeals**

THIS MATTER was before the Court on June 26, 2014 pursuant to the Complaint of the Plaintiff, First Citizens Bank & Trust Company, Inc. ("First Citizens" or "Plaintiff"), seeking relief against the Defendants under South Carolina's Statute of Elizabeth (S.C. Code Ann. § 15-7-10). The Plaintiff was represented by James H. Cassidy and Ella S. Barbery, attorneys with the firm Roe Cassidy Coates & Price, PA. Defendants Park at Durbin Creek, LLC, and Kenneth E. Clifton were represented by attorney J. Calhoun Pruitt, Jr. Defendant Linda G. Whiteman appeared *pro se*. Non-party witnesses present and who testified at trial were John B. Wood, Jr.; John B. Schwiers; Corbin Haskell; and Renee Gilreath.

**APPLICABLE LAW**

The Statute of Elizabeth provides for the following:

Every gift, grant, alienation, bargain, transfer, and conveyance of lands . . . 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 . . . to be clearly and utterly void . . . .

S.C. Code Ann. § 27-23-10(A). When interpreting this statute, the South Carolina Supreme Court has held that there are two occasions upon which a conveyance shall be set aside under the

Statute of Elizabeth: (1) where there was valuable consideration and the transfer is made by the grantor with the actual intent to defraud creditors; and (2) where the transfer was made without actual intent to defraud creditors but without valuable consideration. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012).

Under the first circumstance where there is valuable consideration, the plaintiff must establish by clear and convincing evidence that the grantor transferred the property with “a conscious intent to defeat, delay, or hinder [one’s] creditors in the collection of their debts.” *Judy v. Judy*, 403 S.C. 203, 209, 742 S.E.2d 672, 675 (Ct. App. 2013)(quoting *First Carolinas Joint Stock Land Bank of Columbia v. Knotts*, 191 S.C. 384, 409, 1 S.E.2d 797, 808 (1939)). However, the Court may infer fraudulent intent when the following “badges of fraud” exist:

- (1) The insolvency or indebtedness of the transferor;
- (2) Lack of consideration for the conveyance;
- (3) Relationship between the transferor and the transferee;
- (4) The pendency or threat of litigation;
- (5) Secrecy or concealment;
- (6) Departure from the usual method of business;
- (7) The transfer of the debtor's entire estate;
- (8) The reservation of benefit to the transferor; and
- (9) The retention by the debtor of possession of the property.

*In re Haddock*, 246 B.R. 810, 815 (Bankr. D.S.C. 2000)(citing *Coleman v. Daniel*, 261 S.C. 198, 199 S.E.2d 74, 79 (1973)). “A badge of fraud creates a rebuttable presumption of intent to defraud.” *Royal Z Lanes, Inc. v. Collins Holding Corp.*, 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999).

Under the second circumstance where there is lack of valuable consideration, the plaintiff does not have to establish actual intent; rather, a transfer may be set aside as fraudulent if (1) the grantor had existing debt owing to him at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay his indebtedness in full - not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt. *Future Group, II v. Nationsbank*, 324 S.C. 89, 96, 478 S.E.2d 45, 48 (1996).

In the present case, there are two transfers in question: (1) the September 18, 2008 conveyance of Defendant Clifton's interest in the Property to PDC and (2) the August 5, 2009 transfer of Defendant Clifton's interest in PDC to Streamline. Based upon the pleadings, testimony during the trial, evidentiary exhibits introduced at trial, and all matters of record, I hereby make the following findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

1. Defendants Kenneth E. Clifton ("Clifton") and Linda G. Whiteman ("Whiteman") purchased approximately 370 acres of real property located in Laurens County, South Carolina ("Property") as tenants in common in 1995. They owned the Property in their individual names as tenants in common from 1995 until September 18, 2008.

2. The Property was purchased for retirement purposes.

3. In addition to the aforementioned Property, Clifton and Whiteman owned two additional tracts of land which they purchased in 1992 and 1993. They owned these additional properties as tenants in common in their individual names until July 31, 2008 and September 18, 2008.

4. It was not uncommon or out of the ordinary for Clifton to own personal investment property in his individual name.

5. Clifton is in the real estate business and was actively engaged in real estate development until 2009.

6. Clifton typically purchased and/or transferred property he planned to develop into limited liability companies, which either he or his office staff organized. He had organized in excess of forty (40) limited liability companies over the course of his career.

7. In order to finance his real estate development business, Clifton routinely borrowed money from third party lenders, one of which was First Citizens.

8. Beginning in October 2002, Clifton personally borrowed or guaranteed loan obligations from First Citizens and had entered into three loans with the Plaintiff to finance three different real estate development projects. The original principal amount of Clifton's three loans with the Plaintiff totaled Three Million Eight Hundred Seventy-Three and 00/100 (\$3,873,000.00) Dollars.

9. These development loans were never intended to be long term.

10. On or around January 2008, two of Clifton's loan obligations with the Plaintiff were maturing, and Clifton requested an extension in time within which to pay.

11. Clifton presented to First Citizens a personal financial statement dated January 23, 2008 (hereinafter "Financial Statement"). The Financial Statement was relied upon by the Plaintiff in evaluating Clifton's financial condition in order to determine whether or not to modify and/or extend the loans.

12. The Financial Statement showed that Defendant Clifton had a net worth of approximately Fifty Million Dollars (\$50,000,000.00).

13. One of the assets listed on the Financial Statement was Clifton's fifty percent (50%) interest in the subject Property, which was unencumbered and valued at One Million Five Hundred Seventy and no/100 (\$1,570,000.00) Dollars.

14. Relying on the information set forth in the Financial Statement, the Plaintiff agreed to extend the loan obligations with on two his loans, with a new maturity date being January 2009.

15. The third loan with Clifton was set to mature on July 12, 2008.

16. Sometime in the Spring/Summer 2008, the real estate market had declined and sales in Clifton's development projects had significantly slowed and/or ceased altogether. The Plaintiff became increasingly concerned regarding the loans with Clifton and his ability to pay, as he was becoming slow in making his loan payments.

17. Clifton was unable to pay the third loan when it became due on July 12, 2008, and another extension was requested. An extension was granted on September 22, 2008, thereby extending the maturity date to January 2009 to coincide with the other two loans.

18. While Clifton and Plaintiff were negotiating the loan modification for the third loan, Clifton and Whiteman transferred their interest in the Property to Park at Durbin Creek, LLC ("PDC") on September 18, 2008.

19. Clifton testified that he transferred his interest in the Property to PDC at the insistence of Whiteman for liability protection, as the Property was being leased to third parties for recreational hunting.

20. Clifton and/or his office prepared the organizational documents for PDC and unilaterally decided when the Property would be transferred.

21. On or around the same time, Clifton and Whiteman transferred their interest in the other two properties they owned together jointly to limited liability companies, and Clifton also transferred his interest in property he owned individually to a limited liability company, as set forth below:

- a. July 31, 2008, Clifton and Whiteman transferred ownership of property they owned in their individual names since 1993 to Gardens at Fourteen, LLC.
- b. September 15, 2008, Defendant Clifton transferred ownership of four tracts of land which he owned individually since 2004 (or earlier) to Pawley Plantation, LLC.
- c. September 18, 2008, Defendant Clifton and Whiteman transferred ownership of property they owned in their individual names since 1992 (or earlier) to Pelham at Boiling Springs, LLC.
- d. September 19, 2008, Defendant Clifton transferred ownership of his office building which he owned individually since 1997 to Central Office, LLC.

22. The Plaintiff continued to be concerned regarding Clifton's ability to pay the loans when they became due.

23. Clifton payment status on the loans had slowed in September 2008.

24. Beginning in October 2008, the Plaintiff and Clifton began discussing another loan modification to extend the due dates of the loans past January 2009. The Plaintiff advised Clifton that he needed to bring his interest payments current on the three loans and to provide a business plan as to how he planned to pay down his loan balances. The Plaintiff also requested that he provide it with additional collateral. Clifton did not provide a business plan or additional

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collateral, and also failed to bring the loans current. As a result, First Citizens elected not to renew the three loans.

25. First Citizens accelerated on the loans and commenced foreclosure proceedings in February 2009.

26. Clifton retained an attorney to represent him in the foreclosure actions and filed Answers in each of the cases, thereby delaying the foreclosure process.

27. Foreclosure judgments were obtained in favor of Plaintiff in June 2009 and the foreclosures sales were held on August 3 and August 4, 2009. Deficiency sales were held on September 3, 2009. Deficiency judgments were entered against Clifton in the total amount of \$745,317.86, plus interest, on October 20, 2009.

28. On August 5, 2009, while the Plaintiff was in the process of obtaining judgments against Clifton, Clifton and his two daughters entered into an Assignment of Interest in Park at Durbin Creek, LLC ("Assignment"), wherein Clifton agreed to disassociate from PDC and transfer his membership interest in the company to Streamline Management, LLC ("Streamline").

29. Streamline was organized on January 12, 2010 and did not exist on August 5, 2009 when the Assignment was executed.

30. PDC is a member-managed limited liability company. Whiteman did not authorize or consent to Clifton's transfer or assignment of his membership interest in PDC to Streamline.

31. In October 2010, Plaintiff started supplemental proceedings against Clifton in an effort to try and collect on the judgments.

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32. By this time, the assets which Clifton had listed as owning in his Financial Statement had been foreclosed upon (or a deed in lieu of foreclosure had been given), he had transferred them to business partners in exchange for forgiveness of debt, or he had otherwise disposed of the property.

33. Clifton has no remaining assets to pay the debt owing to First Citizens.

### CONCLUSIONS OF LAW

After applying the applicable law to the facts of this case, and for the reasons set forth below, I hereby find Defendant Clifton's September 18, 2008 transfer of his interest in the Property into PDC was fraudulent and should be set aside under the Statute of Elizabeth, so that ownership of his fifty percent (50%) interest in the Property is restored to his individual name. I further find that the August 5, 2009 transfer from Clifton to Streamline was invalid and void *ab initio*.

#### **A. September 18, 2008 Transfer to Park at Durbin Creek**

The Court agrees with Clifton that valuable consideration was exchanged for the transfer of Clifton's interest in the Property to PDC. Therefore, the question becomes whether or not the transfer was made with fraudulent intent.

Clifton testified that he did not transfer the Property to PDC for the purpose of defrauding his creditors, but rather at the request and insistence of Whiteman. The Court does not find Clifton's testimony to be credible. It was Clifton and/or his office staff who prepared the organizational documents for PDC and decided when the transfer should occur. Whiteman testified that she had asked Clifton for years to transfer the Property, but nothing was ever done. The decision to transfer the Property into a limited liability company in September 2008 at a time when Clifton was personally experiencing financial trouble seems more than coincidental. His

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explanation that it was done at this time out of convenience since he was setting up companies for other development projects is not persuasive in light of the fact that Clifton and Whiteman had owned the Property since 1995. Clifton was active in the development business for many years and testified that he and/or his staff always used limited liability companies for his development projects and had established in excess of forty companies. Accordingly, Clifton could have easily established a company and transferred the Property into an LLC sooner rather than later in September 2008.

Moreover, Clifton did not just transfer the subject Property into an LLC in September 2008, he also transferred essentially all properties he owned individually into various LLCs, including two tracts of land he owned with Whiteman, four tracts of land he owned individually, and his office building. By doing this, he essentially divested himself of any individual ownership interest in any real property which had any significant equity that could be reached by creditors.

Furthermore, all of these transfers took place at a time when the real estate market had pummeled and Clifton's real estate developments had come to a halt. Clifton became slow in making his loan payments to First Citizens as a result. Clifton had a loan that matured in July 2008, which he could not pay and was in the process of negotiating another loan extension with First Citizens. While trying to work out a deal with the bank for an extension on his loan, Clifton was busy forming LLCs and divesting himself of all his personal holdings. Clifton never disclosed to First Citizens that he was transferring property or that his Financial Statement was no longer accurate. Clifton knew that he could not pay his debts owing to First Citizens when they became due. Although Clifton was hopeful that First Citizens would agree to renew his loans as they had done previously, there was no guaranty this would happen. Email

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correspondence by and between First Citizens representatives and Clifton and/or his daughters clearly establishes this fact. Clifton knew that failure to pay his loans could and/or would result in foreclosure.

Finally, the subject Property was purchased by Clifton for retirement purposes. He intended to hold on to the Property and perhaps pass it on to his daughters. The Property was not encumbered and had significant equity. Despite Clifton's contention that he transferred the Property into PDC because of other legitimate reasons, he knew that if the Property were out of his name it would be protected from creditors.

In light of the foregoing, I find that there is sufficient evidence to establish the existence of several "badges of fraud" to infer the requisite fraudulent intent on the part of Clifton, and hereby hold that the conveyance of his 50% interest in the Property to PDC is null and void pursuant to the Statute of Elizabeth.

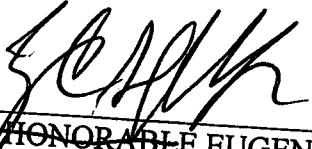
**B. August 5, 2009 Transfer to Streamline**

As for the second transfer of Defendant Clifton's interest in PDC to Streamline, the Court finds that the transfer is void *ab initio*. First, the Certificate of Existence on file with the South Carolina Secretary of State establishes that Streamline did not exist until January 12, 2010, after the Assignment was executed and the purported transfer took place. As a result, Clifton could not have transferred his interest in PDC to Streamline on August 5, 2009 as evidenced by the Assignment because no such entity existed. Second, applying basic contract principals, one cannot have a valid contractual agreement with a non-existent party, thereby making the Assignment invalid on its face. See *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct.App.2003)(A contract is an obligation which arises from actual agreement of the parties); *Carolina Amusement Co. v. Connecticut Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437

S.E.2d 122, 125 (Ct.App.1993)(the necessary elements of a contract are an offer, acceptance, and valuable consideration).

Finally, PDC was a member-managed company. Whiteman testified and Clifton confirmed that she was not advised of and did not consent to any purported transfer of Clifton's interest in PDC, explaining that she did not want to be in business with Clifton's daughters. In fact, Whiteman did not learn about the intended transfer of Clifton's interest to Streamline until discovery was conducted in the present action. South Carolina Code Annotated § 33-44-404(7) specifically prohibits the admission of a new member into a limited liability company without the consent of all members. Therefore, even if Clifton could have contracted with and transferred his interest in PDC to a non-existent entity, the conveyance would still be invalid. For these reasons, Clifton's transfer to Streamline is void *ab initio*. As a result, it is not necessary for the Court to analyze the transfer under the Statue of Elizabeth.

**IT IS SO ORDERED.**

  
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THE HONORABLE EUGENE C. GRIFFITH, JR.  
8<sup>th</sup> Judicial Circuit Court Judge

Newberry, South Carolina

July 30<sup>th</sup>, 2014

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L. V. [unclear] & CS  
Law Firm