THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE KERSHAW COUNTY
Court Of Common Pleas

Jeffrey M. Tzerman, Master-in-Equity

CIVIL ACTION NO.: 2006-CP-28-0433
APPELLATE CASE NO. 2014-002455

Palmetto Residential Builders, LLC ..... Appellant,

v.

Michael Cox and Elizabeth Cox. ..... Respondents.

APPELLANT'S FINAL BRIEF IN REPLY

March 12, 2015

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ARGUMENT

Respondents' brief reveals the reversible error in the Master-in-Equity's order denying Palmetto's motion to set aside the fraudulent conveyances Mr. Cox made to his retirement account. Respondents offer no rebuttal to Palmetto's argument that South Carolina law extends no exemption or protection for fraudulent transfers to a judgment debtor's retirement account. Rather, Respondents agree with Palmetto's position. Nor do Respondents rebut Palmetto's argument that the law of this case, based on prior unappealed rulings, is that the anti-alienation provisions in ERISA and the Internal Revenue Code do not preclude Palmetto from setting aside the fraudulent transfers to Mr. Cox's retirement account. Respondents arguments related to tax law and garnishment miss the point, and their brief exposes the lack of evidence to support the Master-in-Equity's findings of fact.

The central issue before this Court is whether the voluntary, post-judgment contributions Mr. Cox made to his retirement account, which contributions were made from funds that otherwise would have been direct-deposited into Mr. Cox's checking account with the rest of his paycheck, were fraudulent conveyances such that those funds are not protected by the exemption in S.C. Code Ann. § 15-41-30(13) (Supp. 2014). The outcome is the same regardless of whether the Court deems the transfers to have been made for valuable consideration. The clear and convincing evidence in the record depicts a judgment debtor who the day after the jury returned the verdict against him began diligently and unapologetically taking every measure to impede Palmetto's ability to collect on its judgment. To date, the only money Palmetto has collected on its judgment is money the Master-in-Equity ordered the Respondents to pay, nearly all of which came from funds Mr. Cox fraudulently transferred to his retirement account.

I. Respondents concede that fraudulent transfers to Mr. Cox's retirement account are not exempt and may be set aside.

Respondents offer no rebuttal to Palmetto's argument that South Carolina law extends no exemption or protection for fraudulent transfers a judgment debtor makes to his retirement account. Nor do Respondents rebut Palmetto's argument that the law of this case, based on prior unappealed rulings in these supplemental proceedings, is that the anti-alienation provision in ERISA and the Internal Revenue Code do not preclude Palmetto from setting aside the fraudulent transfers to Mr. Cox's retirement account. To the contrary, "[t]he Respondents agree. No fraudulent conveyance may be made into a pension account; even a pension account covered by ERISA." (Resp.'s Brief at 3-4.) Based on this point of law alone, the Master-in-Equity committed reversible error when he held the anti-alienation provisions in ERISA and the Internal Revenue Code precluded Palmetto from setting aside the fraudulent transfers Mr. Cox made to his retirement account.

II. All of Mr. Cox's voluntary, post-judgment contributions to his retirement account were fraudulent transfers.

In light of Respondents' agreement that no fraudulent conveyance may be made to Mr. Cox's retirement account, the remaining issue is whether the voluntary, post-judgment contributions Mr. Cox made to his retirement account were fraudulent transfers. As discussed in more detail in Palmetto's brief, all of Mr. Cox's post-judgment contributions to his retirement account are fraudulent transfers because they were made voluntarily and without consideration, because they were made when Respondents were indebted to Palmetto, and because Respondents failed to retain sufficient assets to satisfy Palmetto's judgment. See Oskin v. Johnson, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012); Mathis v. Burton, 319 S.C. 261, 264-65, 460 S.E.2d 406, 408 (Ct. App. 1995).

Where a judgment debtor transfers property (i.e., diverts a portion of his paycheck to one of his accounts) without valuable consideration, no proof of actual intent to defraud is required. Id. It matters not whether the diverted funds are taxable as income or whether any of the contributions violated the terms of the plan. Nor does it matter how much money tax laws allow the debtor to contribute to his retirement account. Instead, Palmetto is required only to prove (i) Mr. Cox was indebted to it at the time of the transfer; (ii) the conveyance was voluntary; and (iii) Mr. Cox failed to retain sufficient property to pay the indebtedness to the plaintiff in full—not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt. Id. It is undisputed that Respondents were indebted when all of the transfers at issue were made, and it is disputed that all contributions were voluntary. Finally, it is undisputed that Respondents have insufficient assets to satisfy the judgment.

Respondents contend Palmetto was required to prove actual fraud because Mr. Cox's employer, International Paper, made matching contributions to the retirement account. Respondents contend, therefore, that the post-judgment transfers were made for valuable consideration. However, Respondents cite no authority and no part of the record to substantiate their argument. Furthermore, their argument misconstrues the facts. The undisputed evidence in this case is that Mr. Cox had portions of his paycheck deposited into his retirement account at J.P. Morgan. J.P. Morgan, the transferee, gave no value to the Respondents in return. Assuming, without conceding, Mr. Cox's employer matched all of the post-judgment contributions, International Paper paid that money into the retirement account at J.P. Morgan, not to Mr. Cox. "Value given to a person other than the debtor in exchange for the debtor's assets does not constitute consideration within the contemplation of the statute." Dufresne v. Regency Realty, Inc. of Hilton Head Island,

295 S.C. 1, 6, 366 S.E.2d 256, 258 (Ct. App. 1987) overruled on other grounds, Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 524 S.E.2d 621 (1999); see also Future Grp., II v. Nationsbank, 324 S.C. 89, 97, 478 S.E.2d 45, 49 (1996) (valuable consideration not present where corporation guaranteed debt of its director because corporation did not receive any benefit). While the promise of a matching employer contribution may be an *incentive* to transfer money into a retirement account, that incentive is not valuable consideration as contemplated by the Statute of Elizabeth. Therefore, Respondents' argument that they received valuable consideration for the voluntary, post-judgment contributions fails to hold water.

Moreover, to the extent Palmetto was required to prove actual intent to defraud, it did so by clear and convincing evidence. As the record reveals, the evidence before the Master-in-Equity clearly and convincingly established that Mr. Cox has taken every measure he can to avoid paying any money to Palmetto. Indeed, the evidence establishes several "badges of fraud."

> Among the generally recognized badges of fraud are the insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, 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.

Coleman v. Daniel, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973). Other badges of fraud include grossly inadequate consideration, Royal Z Lanes, 337 S.C. at 596, 524 S.E.2d at 623 (grossly inadequate consideration is a "badge of fraud" and creates a rebuttable presumption of intent to defraud), and failure to exercise a right of possession to property. Beaufort Veneer & Package Co. v. Hiers, 142 S.C. 78, 98, 140 S.E. 238, 245 (1927) (Cothran, J., dissenting).

The evidence in this case clearly establishes at least four badges of fraud. First, the record reveals no question that Respondents were indebted to Palmetto when each of the transfers was made because all of the transfers occurred after entry of judgment on the jury's verdict. Second, Respondents received no valuable consideration for the funds transferred to the retirement account because neither J.P. Morgan (the transferee) nor International Paper paid any money to the Respondents. Third, the transfers were made during the pendency of litigation because they were made during these supplemental proceedings to collect on the judgment against Respondents. Fourth, Respondents have repeatedly concealed transfers made to the retirement account and have refused to disclose the amount and date of each and every post-judgment contribution. Mr. Cox's conduct has been so egregious that the Master-in-Equity held him in contempt of court. (See App.'s Brief at 15-16.) Fifth, when Mr. Cox diverted the funds to his retirement account, he retained an interest in that money. Royal Z Lanes, 337 S.C. at 596, 524 S.E.2d at 623 (a debtor's retention of an interest in property he transfers is a badge of fraud creating a rebuttable presumption of intent to defraud); Coleman, supra.

Mr. Cox has worked diligently to hide assets, defraud his creditor and avoid paying Palmetto ever since the jury returned the verdict against him. His voluntary, post-judgment contributions, his prior fraudulent transfers to the same retirement account and his contemptuous conduct have been for no reason other than to prevent Palmetto from collecting on its judgment. Respondents' arguments to the contrary are based on assumption and speculation, not on any fact in the record.

Respondents also argue that setting aside the fraudulent transfers to the retirement account would amount to wage garnishment. Respondents point out that the money transferred to the retirement account was paid by Mr. Cox's employer directly out of Mr.

Cox's paycheck. Wage garnishment, however, relates to the withholding of wages from an employee, not the avoidance of a fraudulent transfer the employee voluntarily undertook with money he was paid and which otherwise would have been deposited into his checking account. Regardless of the tax benefits Mr. Cox received, International Paper paid Mr. Cox the money and would have direct-deposited the funds into his checking account with the rest of his paycheck had Mr. Cox not instructed his employer to send the money to J.P. Morgan. What Palmetto seeks is not an order to garnish or withhold Mr. Cox's wages but instead avoiding Mr. Cox's efforts to hide money from Palmetto in his retirement account.

Accordingly, the Master-in-Equity committed reversible error when he held, contrary to the clear and convincing evidence before him, that the voluntary, post-judgment contributions were not fraudulent transfers.

III. Respondents' brief illustrates the absence of factual support for their arguments and for the Master-in-Equity's Order.

Respondents' brief illustrates an absence of factual support for their arguments that contaminated the Master-in-Equity's order. Respondents contend that Mr. Cox's retirement account is an ERISA-qualified pension plan[1] (Resp.'s Br. at 1, 2, 4-5, 6) and that Mr. Cox made regular contributions to his pension account for over twenty-five (25) years (Resp.'s Br. at 9), yet Respondents' brief contains no citation to any authority for those allegations. The reason is the record before the Master-in-Equity contained no evidence to support those assertions.

[1] Respondents argue that they presented an "outline" of the International Paper plan at the June 25, 2014, hearing; however, they concede later in their brief that the outline was mere argument, not evidence presented at the hearing. (Resp.'s Br. at 6, 8.)

The evidence before the Master-in-Equity was that Mr. Cox made over $56,000 in voluntary, post-judgment contributions to a retirement account he controlled rather than paying Palmetto's judgment and has simply shown Palmetto empty pockets. Respondents presented no evidence to the Master-in-Equity in opposition to Palmetto's motion to set aside the post-judgment contributions, only arguments in their return to the motion. Under these circumstances, to allow Respondents to reap the fruit of their deceit would not only be an injustice, it would encourage the Respondents to continue defrauding their creditor, and it would encourage all other judgment debtors to do the same.

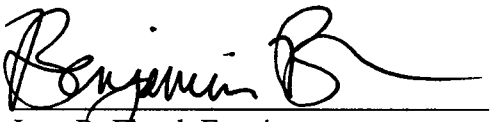
Respondents' insinuations related to the absence of a court reporter at the June 25th motions hearing have no merit. Respondents waived any right to complain when they agreed to proceed with the hearing on June 25th in the absence of a court reporter. They could have scheduled their own court reporter to appear or requested a continuance, but they did not. Furthermore, the absence of a transcript from that hearing has no impact on the record in this appeal. The Master-in-Equity took no evidence at the June 25th hearing; the parties' attorneys simply reiterated the arguments set forth in their filings, and the Master-in-Equity issued a written order setting forth his findings of fact and conclusions of law. Respondents' testimony was taken at two prior hearings before the Master-in-Equity, each time with a court reporter present. One of those transcripts is in the record on appeal. Therefore, the arguments made, the issues raised and the evidence presented to the Master-in-Equity clearly appear in the record. Respondents' arguments to the contrary are unfounded.

CONCLUSION

Respondents agree that South Carolina law extends no protection to fraudulent

transfers a judgment debtor makes to his retirement account. However, Respondents argue the transfers were made for valuable consideration, that none of the contributions violated the terms of the plan or any tax laws, and that the voluntary, post-judgment contributions are withheld wages. Those arguments notwithstanding, the undisputed evidence in the record is that all of the post-judgment contributions were made voluntarily with funds Mr. Cox's employer would have deposited into his account with the rest of his paycheck had Mr. Cox not diverted the money to his retirement account. While Respondents argue the transfers were all made on valuable consideration, the record clearly demonstrates otherwise. Furthermore, the clear and convincing evidence in the record shows a prevalence of fraudulent activity by Mr. Cox throughout these supplemental proceedings, all of which has been intended to thwart Palmetto's efforts to collect on its judgment.

Therefore, as set forth above herein, this Court should reverse the Master-in-Equity's order denying Palmetto's motion to set aside the voluntary, post-judgment contributions to Mr. Cox's retirement account.



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CERTIFICATION OF COUNSEL

The undersigned counsel for Appellant certifies that Appellant's Final Brief in Reply filed in this matter complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Bridget S. Steele, a Legal Assistant of Bruner, Powell, Wall & Mullins, LLC, attorneys for Appellants, Palmetto Residential Builders, LLC do hereby certify that on the 13th day of March 2015, I served the *Appellant's Final Brief in Reply* upon opposing counsel by depositing copy of the same in the U.S. Mail, postage prepaid, and addressed as follows:

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