STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER IN EQUITY
	)	
COUNTY OF BEAUFORT	)	Case Nos.: 2011-CP-07-128 and 2011-CP-07-129
First Citizens Bank and Trust Company, Inc.,	)	
Plaintiff/Petitioner,	)	**ORDER**
v.	)	
Blue Ox, LLC and J. Chris Lindgren,	)	
Defendants/Respondents.	)	

INTRODUCTION

This matter came before me, the Beaufort County Master-In-Equity, on September 2, 2014, for a Supplemental Proceedings hearing. The Defendant, J. Chris Lindgren ("Lindgren") appeared, with Counsel, and was examined by Counsel for the Plaintiff/Petitioner to see if the Defendants had assets that were subject to execution and levy to be applied towards the Judgments that First Citizens holds against the Defendants/Respondents. During the Supplemental Proceedings hearing, Counsel for the Plaintiff/Petitioner discovered certain assets (in particular, Lindgren's voluntary post-judgment contributions to his 401k, IRAs and an education account) and moved to execute on the voluntary post-judgment contributions to the 401k and the IRA(s) during the hearing on September 2, 2014 hearing. Further discovery was conducted by Counsel for the Plaintiff/Petitioner after the September 2, 2014 hearing and this matter was set for a Continuation of the Supplemental Proceedings on November 3, 2014.[1] But, prior to the hearing scheduled for November 3, 2014, the parties agreed to submit briefs to the

[1] The Defendants/Respondents obtained a new attorney after the September 2, 2014 hearing and before the scheduled November 3, 2014 hearing.

Beaufort County Master In Equity on the Plaintiff's Motion to Execute on the debtor's post-judgment voluntary contributions to his 401(k), IRA accounts and Education account.

FACTS

The debtors Blue Ox, LLC and J. Chris Lindgren executed Confessions of Judgment on May 13, 2010, both of which were filed with the Beaufort County Clerk of Court on January 6, 2011.[2] During the September 2, 2014 Supplemental Proceedings hearing, Lindgren testified that he is the 100% owner of a company known as Rockmoor, Inc. (p.7-8, lines 24-1). Rockmoor, Inc. ("Rockmoor") has a 401(k) that is a profit sharing plan that is funded through "employee deferrals." (p.14, lines 5-24). Lindgren testified that he is no longer an employee of Rockmoor (p.27, lines 22-23). Lindgren testified that he has formed 38 LLCs at serve as "investment vehicles." (p.22, lines 2-6). Lindgren owns a membership interest in various LLCs (some of which are single member LLCs and some of which are multiple member LLCs) and the various LLCs own a number of real properties. Rockmoor is Lindgren's company that he uses as a management company to manage payroll and operations for the various LLCs.

Lindgren testified during the hearing that he had an IRA at Fidelity, which he estimated to have approximately $25,000.00 in the IRA at the time of the hearing. (p.18, lines 1-11). After the hearing on September 2, 2014, the parties engaged in the exchange of documents and some post-judgment discovery. The parties stipulated to the following facts regarding Lindgren's contributions to his 401(k), the IRA accounts and the Education account:

Mass Mutual f/k/a The Hartford 401(k) (Account No.: 2812622) → $45,366.67 in contributions since 2011

Fidelity IRA (Acct. No.: 197-778290) → $18,500.00 in contributions since 2011

Fidelity Roth IRA (Acct. No.: 218-395517) → $6,500.00 in contributions in 2014

[2] C/A No.: 11-CP-07-128 ($100,000.00) and C/A No.: 11-CP-07-129 ($13,702.24).

Fidelity Education Account (Acct. No.: 618-670855) → $22,000.00 contributed in 2012

In summary, Lindgren has voluntarily contributed a total of **$92,366.67** to his 401(k), IRA accounts and an Education Account.[3] For the reasons set forth herein, I find that the Plaintiff/Petitioner is entitled to execute on the debtor J. Chris Lindgren's voluntary contributions to the IRA accounts.

HOLDING

A Judgment Creditor is entitled to execute on the assets of a debtor, with limited exceptions as provided in S.C. Code Ann. § 15-41-30. The exemption found at S.C. Code § 15-41-30(A)(13), provides, in relevant part:

> The debtor's right to receive individual retirement accounts as described in Sections 408(a) and 408A of the Internal Revenue Code, individual retirement annuities as described in Section 408(b) of the Internal Revenue Code, and accounts established as part of a trust described in Section 408(c) of the Internal Revenue Code, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor. **A claimed exemption may be reduced or eliminated by the amount of a fraudulent conveyance into the individual retirement account or other plan**. (emphasis mine).

South Carolina's prohibition on fraudulent transfers/fraudulent conveyances, *i.e.*, the Statute of Elizabeth, S.C. Code Ann. § 27-23-10, provides:

> **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

[3] As of the time of the hearing, the education account no longer contained funds sufficient for the Plaintiff to pursue.

> 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**. (emphasis mine).

In *Mathis v. Burton,* 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995), the South Carolina Court of Appeals held that:

> For existing creditors, conveyances can be set aside in two instances:
>
> > First, where the challenged transfer was made for a valuable consideration, it will be set aside if the plaintiff establishes that (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. Second, where the transfer was not made on a valuable consideration, no actual intent to hinder or delay creditors must be proven. **Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him 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 plaintiff in full-not merely at the time of the transfer, but in the final analysis when the creditor seeks to collect his debt.** *Mathis* at 264-65 (citations omitted)

As an aside, even if the IRAs or 401(k) plan is one to which ERISA applies, "[t]he anti-alienation provision of ERISA and the Internal Revenue Code do not preclude the avoidance of fraudulent transfers." See *In re Goldschein*, 241 B.R. 370 (Bkry. D.Md. 1999), which provides as follows: "The anti-alienation provision of ERISA and the Internal Revnue Code do not preclude the avoidance of fraudulent transfers." *Id.*at 379 (emphasis mine).

Notwithstanding this fact, this Court notes that Lindgren has submitted an Affidavit in an effort to show/establish a "pattern" of contributing to his retirement account for a number of years. Having carefully reviewed and considered Lindgren's Affidavit, this Court finds that the

voluntary post-judgment transfers to the 401k are not subject to execution by First Citizens Bank.

However, for the reasons set forth in this Order, the voluntary post-judgment contributions to the IRAs are subject to execution. In this instance, there was no consideration for the transfer of the money into the IRA accounts. The attempted movement of a non-exempt asset (i.e. cash) into the IRA accounts, a purportedly exempt account cannot be a transfer supported by consideration because the transfer was nothing more than Lindgren moving money from one pocket to another pocket in an effort to protect cash from his judgment creditors. Lindgren was indebted to First Citizens at the time of all of the voluntary contributions to his IRA accounts and education account and Lindgren has failed to retain sufficient property/assets to pay First Citizens. Therefore, these transfers should be set aside.

Even if this Court were to assume that there was consideration, as a matter of equity these transfers should be set aside. It is undisputed that Lindgren voluntarily elected to contribute $25,000.00 to his IRA accounts, all the while knowing that he owed First Citizens in excess of $110,000.00. All contributions by Lindgren were voluntary and made with full knowledge of the Judgments that First Citizens held against him. Between 2011 and 2014, Lindgren made no effort to pay First Citizens' Judgments. In spite of Lindgren's voluntary contributions to his IRA accounts and Education account, along with his 38 investment vehicles, Lindgren maintains that he has no assets that can be used to apply towards the Judgments that First Citizens holds against him. Lindgren has used the IRA accounts in a number of instances, the maximum amount of money possible on an annual basis (as allowed by the IRS) to put the money beyond the reach of his judgment creditors. To the extent that this Court might be required to find this as a fraudulent intent, this Court finds that that the post-judgment voluntary contributions by

Lindgren to his IRAs and the education account were all contributions made with an intent to delay, hinder and defraud his creditors.

Marjorie A. Shields has provided some helpful insight on this issue in an article. In particular, the article provides that when a judgment debtor moves money into retirement accounts, the fact that the money is moved into an apparent "exempt" account, the Courts can, and should, set aside those transfers as fraudulent transfers.

> In *Gilchinsky v. National Westminster Bank N.J.*, 159 N.J. 463, 732 A.2d 482, 23 Employee Benefits Cas. (BNA) 1382 (1999), the Supreme Court of New Jersey recognized that a judgment debtor's individual retirement account (IRA) enjoys qualified immunity from attachment by creditors under N.J. Stat. Ann. § 25:2–1, however, under the Fraudulent Transfer Act, N.J. Stat. Ann. §§ 25:2–20 to 25:2–34, such funds may be attached if deposited as a fraudulent conveyance by a debtor. The court stated that the purpose behind the expansive protection afforded to IRAs is to prevent creditors from attaching money earmarked for retirement. That immunity, however, the court said, is not absolute; creditors can attach funds transferred into an IRA in "preference" of other creditors, as a "fraudulent conveyance," or if the money is subject to a support order. In exempting fraudulent conveyances from the otherwise broad–based immunity, the court said, the legislature clearly intended to prevent debtors from using New Jersey law to shield their assets from creditors. The court recognized a similar exception to the exemption of IRAs for fraudulent conveyances under New York law, N.Y. C.P.L.R. 5205(c)5. The court stated that, although New York law generally exempts individual retirement account (IRA) funds from attachment by creditors seeking to enforce money judgments, that exemption is unavailable where the debtor secretes funds into an IRA in an attempt to avoid paying a money judgment.

Marjorie A. Shields, *Individual Retirement Accounts As Exempt from Money Judgments in State Courts*, 113 A.L.R.5th 487 (Originally published in 2003).

While South Carolina's Homestead Exemption Act does offer debtors protection in limited situations and circumstances, the Homestead Exemption Act, along with the Statute of Elizabeth protects judgment creditors when a judgment debtor takes assets that are subject to

execution (i.e. cash) and attempts to place those assets beyond the reach of his creditors by moving the cash into IRA accounts and education accounts in an effort to cloak the cash with an exemption.

While First Citizens is not obligated to prove fraud, intent or attempted fraud, it is apparent to this Court that Lindgren had full knowledge of the fact that he owed First Citizens a substantial amount of money by way of the Confessions of Judgment. In spite of that fact, Lindgren was aggressively moving money into his IRAs and an education account – all of which might have some limited protections under the Homestead Exemption statutes. Notwithstanding that fact, our case law holds as follows:

> No rule is more clearly imbedded in the law of this state, than that a debtor must be just before he is generous. "The 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. The motive which prompts the donor to make the gift is wholly immaterial. If the donor is indebted at the time, and the event proves that it is necessary to resort to the property attempted to be conveyed away by a voluntary deed for the purpose of paying such indebtedness, the voluntary conveyance will be set aside, and the property subjected to the payment of such indebtedness upon the ground that it would otherwise 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." *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139, 146 (1932) (quotations and citations omitted).

Based on the case law of South Carolina, there is no requirement that a judgment creditor prove "actual fraud" or a "fraudulent intent." While it is not necessary for the Judgment creditor to prove "fraud" or fraudulent intent, I find that Lindgren did move cash into his IRAs and the education account with intent to avoid paying the Plaintiff. Even if he did not have fraudulent intent, I find that the case law of this state clearly prohibits the transfers of non-exempt assets

7 of 12

into "exempt assets" to the detriment of Judgment creditors. I find that Lindgren's transfers to his IRA accounts should be treated as fraudulent transfers.

Based on the facts of this case, this Court holds that all of Lindgren's past judgment conveyances into his IRA accounts are subject to execution. Lindgren's contributions to these various accounts are fraudulent transfers/fraudulent conveyances and First Citizens is entitled to this money such that said proceeds can be applied towards the First Citizens' judgments. "Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983).

With regards to the 401(k), I find that the statute, SC Code 15-41-30(14) precludes execution on the 401(k) plan. SC Code 15-41-30(A)(14) provides that the debtor has an exemption in: "The debtor's interest in a pension plan qualified under the Employee Retirement Income Security Act of 1974." Since the 401(k) is an ERISA plan, I find the proceeds in the 401(k) exempt from execution.

ORDER

For the reasons set forth herein, this court hereby sets aside Lindgren's voluntary post-judgment contributions to his IRA accounts as fraudulent transfers/fraudulent conveyances. First Citizens shall be entitled to serve this Order on Fidelity and upon service of this Order upon Fidelity, said entities are hereby ORDERED to issue payments (bank wires or checks), made payable to First Citizens Bank, to Counsel for First Citizens Bank, within fifteen (15) days of being served with a copy of this Order, in the following amounts:

Fidelity IRA (Acct. No.: 197-778290) → $18,500.00

Fidelity Roth IRA (Acct. No.: 218-395517) → $6,500.00

To the extent that there are any tax ramifications and/or penalties relating to these payments by Fidelity, Lindgren shall be responsible for the payment of said taxes and/or penalties.

IT IS SO ORDERED.

March 10, 2015
Beaufort, South Carolina

The Honorable Marvin H. Dukes, III
Beaufort County Master In Equity