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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2010-CP-30-1141
Appellate Case No. 2014-002295

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

v.

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

Of Whom Park at Durbin Creek, LLC and Kenneth E. Clifton are the .....Appellants.

FINAL REPLY BRIEF

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ARGUMENT IN REPLY

This case and this appeal remain primarily concerned with the intention of the grantors in transferring property into a limited liability company where one of the grantors would eventually become insolvent. In arguing its preferred interpretation of the facts, First Citizens takes the position that there is but one possible interpretation of Ken Clifton's (hereinafter "Clifton") intentions regarding the transfer at issue here. In a difficult case, concerning a nuanced body of law, that position- and analysis- works a disservice upon the primary issue on appeal here. Providing a myriad of references to "mountains of evidence" and conclusory statements untethered to facts or applicable law, First citizens substitutes such references for analysis. For the reasons argued in Appellant's Brief, and the additional arguments that follow, this Court should REVERSE the decision below.

I. The Challenged Transfer Occurred for a Valid Purpose with Sufficient Evidence to Rebut Any Presumption of Fraud.

First Citizens relies on mischaracterizing Clifton's financial condition, contradictory statements about the interest of witnesses, and unsupported conclusions about other evidence of fraudulent intent. First, Respondent treats its own active consideration of loan renewal as substantial evidence of financial peril. Next, First Citizens argues that Linda Whiteman (hereinafter "Whiteman") is an interested witness whose testimony should be discounted before reversing course to claim that Whiteman's participation in the challenged transfer was somehow separate and distinct from Clifton's conveyance. Finally, First Citizens proffers unsupported arguments that other possible badges of fraud attached to the challenged transfer where the evidence adduced at trial centered on the most prescient detail: timing.

A. Clifton was able to meet his obligations at the time of the transfer and First Citizens misapprehends the relevance of renewal negotiations

The question before the Court as to Clifton's intent in making the challenged transfer requires examining his financial condition, and motivation for his action, at the time of that transfer. In September of 2008, Clifton was current on his loan obligations. Tr. p. 121:16-23, (R. p. 160). Two months later, with renewal under active consideration, he discussed making a final payment before renewal could be approved. Defendant's Exhibit 1, (R. p. 214). When First Citizens ultimately declined to renew his loan, only then did Clifton discover that any hope for an alternative financing option evaporated together with Respondent's election. Tr. p. 134:9-135:16, (R. pp. 173-174); Tr. p. 78:13-79:3, (R. pp. 117-118).

In characterizing renewal negotiations, First Citizens argues that Clifton was unable to meet his obligations at the time of the transfer if he was dependent on modification. (Resp't Br. at 14). That position is flawed for three reasons. First, Clifton was in fact current at the time of the transfer, despite requesting and pursuing a modification. Second, Clifton's testimony reflects that he was pursing modification as his primary, but not only, option at that time. Tr. p. 122:22 – 123:6, (R. pp. 122-123). Finally, the question of renewal is relevant beyond considerations of how declination ultimately affected Clifton's financial standing. Specifically, if, as Respondent seems to concede, he anticipated renewal, then his alleged motive to transfer property and avoid the attachment of judgments makes no sense.[1]

[1] First Citizens argues, and Clifton admits, that at the time of the transfer renewal was not approved. However, in order to adopt First Citizens' position regarding the relevance of modification negotiations as it relates to Clifton's state of mind, one would also be required to charge Clifton with the knowledge that his loans would not be renewed. Stated differently, if Clifton believed his loans were set for renewal, as he testified he did and as emails from the bank corroborated the reasonableness of that belief, then he had no

Clifton or those working on his behalf provided accurate information to Respondent while renewal negotiations were ongoing. First Citizens takes the position that a financial statement provided some nine months prior to the transfer at issue, and eleven months before renewal of loans was under active consideration, created a duty to continuously update that statement. (Resp't Br. at 14-15). Compounding that erroneous attempt to create a non-existent duty, First Citizens suggests that borrowing money from other banks, and pledging collateral, is indisputable proof that Clifton lacked the ability to meet his obligations. (Resp't Br. at 15, FN4). Given the course of dealing between the parties, those arguments are disingenuous. First Citizens had previously asked for and received a financial statement from Clifton. Having failed to ask for similar information during the renewal negotiations at issue, Respondent casts the blame to Clifton for failing to update previous information. Similarly, First Citizen's suggestion that Clifton's pattern of borrowing money to meet ongoing obligations evidenced his poor standing is at odds with his historical business practice and dealings with Respondent[2].

B. The testimony adduced at trial provided a sufficient, *bona fide* purpose for the challenged transfer

Liability protection is a legitimate purpose for transferring ownership of property from individuals to a limited liability company. In this case all three witnesses familiar with the transaction testified that liability concerns originating with Whiteman were the impetus for the transfer. Tr. p. 48:21-51:2, (R. pp. 87-90); Tr. p. 81:6 – 82:1, (R. pp. 120-121); Tr. p. 133:4-24, (R. p. 172). Respondent discounts that testimony entirely by labeling their testimony as "interested", "biased", and "self-serving." (Resp't Br. at 17).

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reason to convey the property for the reason First Citizens suggests is the only possible motivation for his actions.

[2] Indeed, First Citizens was well aware of Clifton's interdependent financial obligations no later than January 2008. See Plaintiff's Ex. 5, (R. p. 247-253).

Even assuming that testimony from these witnesses might be suspect, Respondent fails to address two key points: first, there is no basis for discounting this sworn testimony in its entirety, and second, there was no evidence that Linda Whiteman was biased or otherwise suspect.[3] Ken Clifton and his daughter testified about liability concerns at the property, and that testimony was supported by Plaintiff's own witness. Tr. p. 21:25-22:10, (R. pp. 60-61); Tr. p. 28:5-8, (R. p. 67). Linda confirmed that she pressed Clifton to transfer the property, which Clifton explained he likely would not have done but for Whiteman's insistence. Tr. p. 154:7-11, (R. p. 193).

Furthermore, Respondent suggestion that liability insurance covering the property eliminated concerns regarding hunting is unconvincing. (Resp't Br. at 16). First, insurance would have provided some protection from liability but would not have eliminated those risks. Second, one would only expect liability insurance to impact Whiteman's concerns if she was aware such a policy existed. Whiteman testified that she did not know anything about insurance, and Respondent has failed to provide any evidence to the contrary. Tr. p. 50:7-8, (R. p. 89); Tr. p. 56:9-13, (R. p. 95).

Under South Carolina law, our courts have established recognized badges of fraud to account for judicial inability to discover a grantor's state of mind. However, absent from Respondent's analysis here is any discussion of the interplay between evidence tending to establish the existence of badges of fraud and the testimony of grantors in the challenged transaction. As our Supreme Court recognized over forty years ago,

> "Certain circumstances so frequently attend conveyances to defraud creditors that they are recognized and referred to as 'badges of fraud'. The badges tend to excite suspicions as to the Bona fides of a challenged conveyance. Unexplained, they

[3] Indeed, Respondent later argues that Linda Whiteman's role in transferring the property should be treated completely separate from that of Clifton.

> may warrant an inference of fraud. Whether the inference is warranted depends in large measure on ***whether a satisfactory explanation is presented***." *Coleman v. Daniel*, 199 S.E.2d 74, 261 S.C. 198 (1973). [Emphasis added]

In this case, Clifton and other witnesses provided a consistent, satisfactory explanation for the conveyance. Respondent merely reiterates that fraud should be inferred without adequately addressing the sufficiency of Clifton's explanation, or that his testimony was supported by that of other witnesses.[4]

C. Respondent Failed to Provide Evidence of Other Badges of Fraud.

Clifton and Durbin Creek admittedly place great weight on the timing of the transfer relative to the threat of litigation. That position is based on the dominant theme of the evidence adduced at trial, as well as arguments advanced below. Respondent complains that focusing on timing of the transfer and whether litigation was imminent amounts to a wholesale discount of other, possible badges of fraud. (Resp't Br. at 17). Appellants' position follows the evidence in the record and Respondent has failed to analyze the applicability of other badges of fraud.

At the time of the transfer, litigation was not imminent. Rather, the parties were actively negotiated renewal. Respondent suggests that because renewal was not approved, litigation was imminent. (Resp't Br. at 19). However, the threat of litigation assumes that renewal would ultimately be declined. As previously argued, Clifton had every reason to belief that renewal was on track well after the challenged conveyance which strongly suggests that the transfer was not pursuant to the threat of litigation. Defendant's Ex. 1, (R. p. 214).

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[4] Indeed, even John Wood corroborated Clifton's testimony. Tr. p. 21:25-22:10, (R. pp. 60-61); Tr. p. 28:5-8, (R. p. 67). Wood worked for First Citizens and was involved with the loans at issue here. Mr. Wood also admitted that he and others had hunted the property, and that he was aware of concerns about liability.

While complaining of lack of attention to other badges of fraud, and amid assurances that the evidence below established numerous instances of same, Respondent consigns specific mention of other badges of fraud to a single footnote. (Resp't Br. at 16, FN5). Reservation of benefit and retention of possession are both recognized badges of fraud, and neither applies to the facts of this case. First, analyzing the conveyance at issue by reference to whether Clifton retained possession or benefit ignores the nature of the conveyance. More specifically, where an individual transfers his interest in property to a limited liability company in which he holds a membership interest the grantor will always retain some benefit. Second, our courts have previously applied the retention of benefit analysis in the context of title only transfers where there was no legitimate purpose advanced. *See, e.g., Judy v. Judy*, 403 S.C. 203, 742 S.E.2d 672 (Ct.App. 2013). In that case, the grantor made several conveyances to family while retaining both possession and income derived from farming the land. That case was also analyzed under the rubric of a voluntary conveyance. The reasoning of *Judy* does not apply when, as here, the conveyance was supported by valuable consideration and the grantor's interest following the conveyance is an ownership share in the grantee limited liability company.

II. The Challenged Conveyance Requires Examining the Single Transaction That Actually Occurred Rather Than Irrelevant Availability of Other Options to the Grantors.

Clifton and Whiteman transferred the property in a single instrument. First Citizens apparently concedes that there was no evidence of fraudulent intent on the part of Whiteman. (Resp't Br. at 21). Respondent then provides citation to various authorities for the unchallenged propositions that a) tenants in common may transfer their interest

without the consent of the other, b) a cotenant cannot convey more than his own interest, c) creditors may pursue a debtor's interest in his fractional share of property owned as tenants in common. (Resp't Br. At 20-21). Those three propositions, all correct statements of the law, are not relevant to the case at bar. Rather, this case concerns the actual conveyance at issue rather than other transactions that might have been possible or what relief a creditor may eventually pursue.[5]

It is undisputed that tenants in common may transfer, mortgage, or otherwise dispose of their individual interest in property. *See, e.g., Ex parte Johnson*, 147 S.C. 259, 145 S.E. 113 (1928). In this case, Clifton could have transferred his individual interest in the property without the consent or participation of Whiteman. However, what Clifton might have done is neither relevant nor instructive in evaluating the transfer that actually occurred. Furthermore, that Clifton might have had another option for transferring his interest is irrelevant to determining whether the court below could, as it attempted to do, set aside half of a deed.

It is similarly undisputed that Clifton, as a tenant in common with Whiteman, could not transfer more than his individual interest in the property. *See, e.g., Garret v. Wienberg*, 43 S.C. 36, 20 S.E. 756 (1895). That suggestion, while a correct statement of law, is irrelevant to the issue before the Court. In this case, Clifton and Whiteman chose to transfer their individual interests for an equivalent ownership share in a limited

[5] First Citizens complains that Appellants' position is without support or citation to supporting authority. As indicated in Appellants' Brief, the undersigned is not aware of any case that addresses the issue of dividing the deed. However, in challenging the conveyance at issue here, Respondent is necessarily attacking the deed utilized to effectuate the transfer. It stands to reason that a single transaction, and a single instrument, is not subject to piecemeal attack. While Respondent may urge the Court to treat a single deed as two separate and distinct transactions, the lack of case law addressing divisibility of a deed cuts both ways. There is no authority on point to support dividing the deed, just as there is no supporting authority for the proposition that a single deed should be treated as two separate conveyances at the insistence of a creditor subsequently attacking the validity of the transaction.

liability company formed for that purpose, whose sole asset was and is the property. Considerations of what might have occurred if Clifton attempted to transfer more than his own interest are irrelevant.

Further, the availability of future proceedings to attempt enforcement of First Citizen's judgment against Clifton's interest in the property is irrelevant to ascertaining the validity of the underlying transaction or the propriety of the attempted remedy below. If this Court affirms the decision below, First Citizens would no doubt attempt enforcement of its judgment against Clifton's individual interest.[6] However, the relevant inquiry here is whether the trial court impermissibly attempted to set aside half of the challenged conveyance and thereby divide the deed.

Finally, analyzing the transaction as one conveyance, utilizing a single deed, and a single transaction helps focus the relevant inquiry on the intent of the grantor. Here, the grantor was Ken Clifton AND Linda Whiteman. Plaintiff's Ex. 4(A), (R. pp. 225-227). As our Supreme Court recently explained, the Statute of Elizabeth is concerned with the intent of the grantor. *Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459, 464 (2012). Thus, the focus of the inquiry was on the intention of both Clifton and Whiteman. Having failed to provide any proof of fraudulent intent on the part of Whiteman, the appropriate result is a directed verdict in favor of Appellants rather than an attempt to recast a single

[6] Indeed, if First Citizens were unable to seek enforcement of its judgment following successful prosecution of its case, then the underlying action would make little sense. The upshot of Respondent's position is that in the absence of ability to set aside half the deed, they may be left without a remedy. However, having chosen to attack a conveyance as fraudulent, First Citizens is not at liberty to argue the transaction is half fraudulent where the evidence ultimately fails to demonstrates improper intent by one of the grantors. Appellants' position at trial and on appeal has been consistent: in opting to dismiss claims against Whiteman, First Citizens lost the ability to challenge the conveyance as the single deed at issue is not subject to division.

transaction as two "mutually exclusive conveyances."[7] Accordingly, the Court below erred in attempting to adopt remedial measures that divided the deed in the underlying transaction.

III. The Trial Court Improperly Considered the Legitimacy of a Transfer Not Raised in the Pleadings

As to the threshold issue of preservation, First Citizens misconstrues Appellant's objection and argument on appeal. Noting that there was no objection to the first mention of Streamline, Respondent argues that subsequent objections are ineffective to preserve the issue. (Resp't Br. at 22). However, Appellants' objection concerned evidence related to attacking the second transfer. Tr. 67:1-68:16; p. 87:13-16, (R. pp. 106-107; p. 126). Indeed, in arguing that evidence of the subsequent transfer was not properly before the Court, the following exchange clarified the nature of the objection:

MR. PRUITT: Not the transfer of his interest to Streamline but the deed from Clifton and Whiteman to the LLC. That is all this lawsuit is about.

THE COURT: It is the timing, the timing is the attack.

MR. PRUITT: Sir?

THE COURT: The timing of the deed is the attack.

MR. PRUITT: Yes, sir.

THE COURT: Whether it happened or not is not a question, it happened.

MR. PRUITT: Yes, sir. You are absolutely right.

Tr. p. 68: 6-16, (R. p. 107).

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[7] (Resp't Br. at 21). Assuming, *arguendo*, that the conveyance at issue was actually two conveyances- an assumption unsupported by the plain language of the deed or surrounding circumstances- those conveyances were certainly not mutually exclusive. Indeed, they not only occurred at the same time but in the same transaction. Respondent's effort to sever the transaction only serve to highlight their attempt to argue against a hypothetical version of what might have occurred rather than confront the actual conveyance.

The preceding dialogue was in the context of the first attempt by Respondent to introduce evidence of the value of the property, indicating an intention to challenge the sufficiency of consideration for the second transfer. The exchange that followed demonstrates that there was no objection to the fact of the transfer, only to the first and subsequent attempts to attack the validity of that transfer. As Appellants objected the first time such evidence was offered, renewed their objection during subsequent attempts to introduce such testimony, and raised the issue in a post-trial motion, the issue is properly preserved for review.

Having objected to admission of evidence concerning the second transfer, Appellants have also demonstrated prejudice.[8] While questions about Streamline were raised in discovery, and the fact of the transfer acknowledged, at the time of trial the Defendants had no notice that First Citizens sought to challenge the validity of the second conveyance. Indeed, Respondent's own argument on brief underscores that admission of the substance of the second transaction obscured the merits of the only transfer challenged in the pleadings. (Resp't Br. at 24) (Arguing that the second transfer provided "evidence of Clifton's dire financial condition" despite the passage of time and markedly different circumstances between the two transfers). While Respondent is correct that the Court could have entertained a motion to amend during trial, no such motion was made. Finally, First Citizens concludes that the issue was tried by implicit consent. That position is untenable where Appellants objected to the proffered evidence, argued the

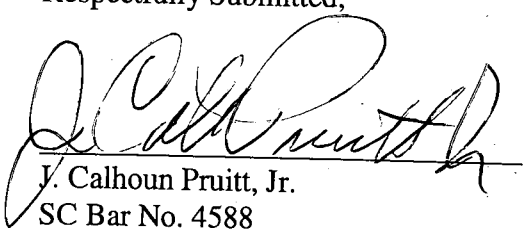
[8] First Citizens also mischaracterizes the nature of Appellants argument here, noting that a relevance objection was made not that the evidence is irrelevant. (Resp't Br. at 23). An objection on the grounds of relevance, and the basis for that objection, obviously lodges a challenge to the relevance of the proffered testimony. Again, the context demonstrates the basis for the objection. If, as Appellants claimed at trial and argue on appeal, a challenge to the second transfer was not properly before the Court, then evidence concerning adequacy of consideration or other aspects of that transfer are irrelevant to the first transfer.

issue at the close of Plaintiff's case, and raised the matter in a post-trial motion. As the issue was not otherwise before the Court, was not tried by consent, and there was no motion to amend, the Court below erred in admitting the challenged testimony and making a ruling thereon.

CONCLUSION

Ken Clifton and other witnesses established a legitimate reason for the transaction at issue here. Accordingly, there was insufficient evidence of fraudulent intent. To the extent First Citizens presented evidence of various badges of fraud, Appellants rebutted any presumption that attached by providing sufficient evidence of a valid purpose for the transfer. As Respondent now apparently concedes, there was no evidence of fraudulent intent on the part of Whiteman. As one of the grantors in the challenged transaction, the failure of proof as to either prevents application of the Statute of Elizabeth as the Court cannot divide the deed. Finally, Appellants properly objected to irrelevant evidence concerning a second conveyance not raised in the pleadings or tried by consent. Accordingly, that issue was not properly before the trial Court. This Court, exercising de novo review, should REVERSE the decision below.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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