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.

APPELLANT'S PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellants Park at Durbin Creek, LLC and Kenneth E. Clifton, file the following petition for rehearing regarding this Court's decision in *First Citizens Bank and Trust Company, Inc. vs. Park at Durbin Creek, LLC, et. al.*, Opinion No. 5469 (S.C. Ct. App. filed February 15, 2017). Appellants contend that in affirming the decision below, the Court overlooked or misapprehended the following points:

1. **There was insufficient evidence to infer fraudulent intent, and to the extent the evidence might permit such inference Appellants met his burden to rebut.**

In order to set aside a conveyance supported by adequate consideration, the Plaintiff must prove by clear and convincing evidence the grantor's intent to defraud. *Oskin v. Johnson*, 400 S.C. 390, 398, 735 S.E.2d 459, 464 (2012) ("The Statute of Elizabeth is concerned with the intent of the grantor who conveys an interest in land." citing S.C. Code Ann. § 27–23–10(A) (2007) (additional citations omitted)). Accordingly, the key issue at trial and in this appeal is Clifton's intent in transferring the property. Our courts have identified specific badges of fraud that, if found to exists, create a rebuttable presumption of fraudulent intent.[1] In this case, to the extent any particular badge of fraud applies, Clifton presented sufficient evidence to rebut the presumption of fraud.

[1] Specific badges of fraud include (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)).

Respectfully, the Court overlooked the nature of the transaction at issue in affirming that several badges of fraud attached to the subject transfer.[2] In this case, Clifton decided to transfer ownership of the property at issue into a limited liability company for an equivalent ownership interest in the newly formed company. Against that backdrop, it is difficult to imagine how a property owner might avail himself of the legitimate desire to satisfy a co-owner's concerns about liability protection that did not, at least on the surface, involve badges of fraud more appropriate in other types of transactions. More specifically, an owner like Clifton would always retain possession of the property, have a relationship to the transferee, and retain a benefit in the property where he has an equivalent ownership in the company formed to hold the property. The circumstances here are notably contrast from previous fraudulent conveyance jurisprudence in this state where property owners, by virtue of their conduct, made transparent title-only transfers to close relative.[3]

The Court's analysis also emphasizes other potential badges of fraud where the evidence adduced at trial focused more specifically on the most relevant factor in this case: timing. It is undisputed that litigation had not commenced at the time Clifton transferred his interest in the Property. Rather, Respondent urged and this Court agreed that the threat of litigation was imminent. While failure to satisfy obligations, or in this case successfully complete loan renewals, would result in litigation, in order to impose prescient foresight on Clifton the Court would have to necessarily disregard Respondent's conduct thereafter. In this case, the transfer took place some two (2)

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2 The Court concluded, and Appellant agrees, that three badges of fraud do not apply: lack of consideration for the conveyance, departure from the usual method of business, and the transfer of the debtor's entire estate.

[3] *See, e.g., Judy v. Judy* 742 S.E.2d 672, 403 S.C. 203 (Ct.App., 2013) (finding fraudulent conveyance where owner transferred property to his children while continuing to farm and receive farm income.).

months before Respondent informed Clifton that renewal of the loans was nearing completion.[4] In that light, the Court would impose on Clifton knowledge that declination of his renewal requests would follow when he was assured- some two months later by Respondent's own agents- that the opposite was occurring. While litigation ultimately commenced when renewal negotiations failed, the timeline matters here not for what hindsight reflects but what foresight might have revealed. Accordingly, it was and remains inappropriate to charge Clifton with knowledge of what would happen when he was greeted by assurances from Respondent to the contrary.

As to the remaining two badges the Court found applicable, Clifton would respectfully argue that the Court's analysis lacks support in the record. Appellant admittedly remaining indebted at the time of the challenged transfer, but the actual issue as to this factor is the ability of the transferor to satisfy his obligations.[5] Furthermore, while there was some conflict in the trial testimony regarding the timing of Clifton's payments, there was no evidence that Appellant was insolvent at the time of the transfer or immediately following. Finally here, while Respondent urged and the Court agreed that Clifton's failure to amend his financial statement shrouded the transfer in secrecy, Respondent failed to present any evidence that such information was ever requested.

To the extent record evidence establishes badges of fraud, Clifton presented sufficient evidence to rebut that presumption. In this case, all three witnesses with direct knowledge of the transfer testified that Clifton transferred the property at the insistence of

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[4] In email correspondence from November 25, 2008, John Wood of First Citizens relayed to Renee Gilreath that "I think we have everything worked out for the extension thru [sic] July, just waiting on the appraisals and the budget." Defendant's Exhibit 1, (R. p. 214)

As Clifton testified, at the time of the transfer he retained access to additional sources of credit to satisfy his obligations- sources that would only disappear after Respondent elected to litigate. Tr. p. 122:22 – 123:6, (R. pp. 161-162); Tr. p. 134:9 – p. 135:16, (R. pp. 173-174).

Whiteman.[6] Whiteman testified that she wanted the property in a limited liability company based on her fear of liability that might arise from hunting activities on the property.[7] Furthermore, while Whiteman testified regarding longstanding concerns about liability, she also emphasized that recent events related to the subject property lead her to again pressure Clifton to place the property in a limited liability company. *Id.*[8] Even if the trial Court found, as this Court agreed, that Clifton's testimony was not credible, there was no basis for disregarding the testimony of other witnesses whose interest were unrelated to business dealings with Respondent.

As our Supreme Court recently concluded in *Oskin v. Johnson*, a transaction that is legitimate on its face made to protect a bona fide interest in property does not become fraudulent merely because the ultimate upshot is an uncompensated creditor. 400 S.C. 390, 735 S.E.2d 459. It is undisputed that Clifton transferred his property at the behest of a co-owner at a time when all parties believed he would continue a successful business relationship with Respondent. Respectfully, this Court overlooked the nature of the transaction at issue and what the circumstances at that time would have presented to Clifton regarding the aftermath of the transfer.

2. **The Court Misapprehended Clifton's Argument Regarding a Novel Issue under South Carolina Law.**

As was undisputed at trial or on appeal, there is no reported South Carolina case whereby the Court set aside half of a deed. Clifton's position has been consistent: either the transaction was fraudulent or it was not. While Clifton agrees with the Court

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[6] 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).
[7] Ironically, several of the individual hunting the property were employed by Plaintiff First Citizens. Tr. p. 21:8-12, (R. p. 60). Indeed, John Wood, a Senior Vice President that had worked closely with Ken Clifton, acknowledged hunting on the property and conversations about liability from hunters on the property. *Id.*; Tr. p. 28:5-8, (R. p. 67).
[8] Tr. p. 48:21 – 51:2, (R. pp. 87-90).

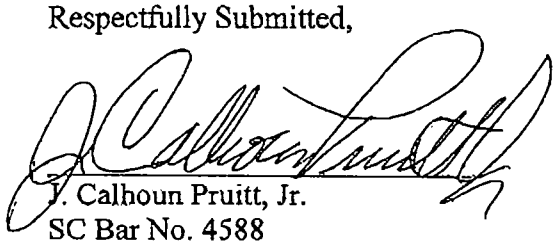
regarding the well-settled ability of a co-tenant to transfer his interest independent of a co-owner, that correct statement of law misses the issue here. The question before the Court is not whether Whiteman's admittedly valid purpose could affect Clifton's intention or whether the parties could have independently transferred their respective interests; rather, the question for the Court is whether a single deed and conveyance is susceptible to piecemeal attack. In this case, the trial Court concluded and this Court ostensibly agreed that a deed may be half-fraudulent. When these co-owners decided the transfer their property to a company created for that purpose, the entire transaction is subject to review. Stated differently, it is the transfer itself rather than the hypothetical ability to structure the transaction differently that is subject to review.

CONCLUSION

Respectfully, the Court overlooked the nature of the transaction to conclude that certain badges of fraud attached to this transfer. The Court also charged Appellant with knowledge about events he reasonably believed would unfold quite differently. Furthermore, in the absence of evidence related to fraudulent intent on the part of Whiteman, setting aside half the deed was an error of law that this Court should correct. The Court should withdraw its opinion, agree to rehear the matter, and review the transfer at issue in light of the nature of the transaction and how the parties chose to accomplish such transfer, and ultimately REVERSE the Court below.

[signature page to follow]

Respectfully Submitted,



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