

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY

The Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2018-000875

RECEIVED
APR 10 2019
SC Court of Appeals

Dr. Marvin Anderson,

Respondent,

v.

Mary Thomas, Forest Thomas, Prodigal Enterprises, LLC,
Brushy Creek BBQ, Inc. and Bail Pros Bail Bonding, LLC,
Defendants,

of whom, Mary Thomas is the

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT PROPERLY FIND APPELLANT LIABLE AS THE BENEFICIARY OF A FRAUDULENT CONVEYANCE FROM HER DEBTOR HUSBAND UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE?
2. DID THE TRIAL COURT PROPERLY FIND THAT APPELLANT UNJUSTLY BENEFITTED FROM THE TRANSFER OF A JOINTLY-HELD ASSET WITH HER HUSBAND SOLEY TO HERSELF WITHOUT ANY CONSIDERATION UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE?

STATEMENT OF THE CASE

Respondent filed an action against Debtor Husband (“Debtor Husband”) on February 22, 2012 (*Marvin L. Anderson v. Forest Thomas*, C.A. No. 2012-CP-23-1323, Greenville County Court of Common Pleas), which resulted in a judgment for Respondent against Debtor Husband in the amount of \$378,108.08, entered March 6, 2013. Respondent’s attempted Execution Against Property of Debtor Husband on September 18, 2013. Said execution was returned *nulla bona* on October 25, 2013.

On October 22, 2014, Respondent filed this action against Appellant, Debtor Husband, Prodigal Enterprises, LLC, Brushy Creek BBQ, Inc. and Bail Pros Bail Bonding, LLC. [*Anderson v. Mary Thomas, etc.*, C.A. No. 2014-CP-04-02419 (Anderson County Court of Common Pleas)] Respondent asserted two (2) claims: fraudulent conveyance and unjust enrichment.

By consent of the parties, the action was tried non-jury on February 21, 2017 before Circuit Court Judge J. Cordell Maddox, Jr. At the conclusion of all evidence, the Court took the matter under advisement. On May 19, 2017, Judge Maddox issued an Order and Judgment finding that Appellant (Wife of Debtor Husband) was liable to the respondent in the amount of \$125,000.00.

Appellant filed a motion to reconsider on May 26, 2017, which the Court heard on August 7, 2017. Upon hearing the arguments of counsel and reviewing the submitted briefs, the Court denied Appellant's Motion to Reconsider on March 15, 2018.

This appeal followed.

RELEVANT FACTS

The salient facts are poignantly set forth by the trial court in its order and judgment [Order, pp. 2-4]. These factual findings are directly supported from the evidence at trial.

In October 30, 2008, Respondent loaned Debtor Husband \$125,000.00. Respondent testified Debtor Husband needed the funds for the quick flip of a property in Florida. [TT pp. 10-11; Pl. Ex. 1] According to the Respondent, Debtor Husband agreed to pay 50% (\$62,500.00) if it took six (6) months to repay principle and interest; and 100% (\$125,000.00) if it took a year to repay principle and interest. [TT p. 10-12] There was no contemporaneous writing to memorialize this agreement. [*Id.*]

As the one-year deadline was approaching, Respondent began contacting Debtor Husband about payment. [TT pp. 13-14] Debtor Husband said that he would send payment, but no money was ever received. [TT p.13] Finally, on March 9, 2010, Respondent and Debtor Husband met to execute a promissory note, which Debtor Husband freely and voluntarily signed. [TT p. 14-15] The terms of the note acknowledged the 2008 loan and stated the amount owed was \$181,250.00. [TT p. 15; Pl. Ex. 2] The promissory note called for Debtor Husband to start making monthly payments in the amount of \$34,294.71, beginning April 1, 2010. [Pl. Ex. 2]

The first payment became due, but no payment was made. [TT p. 15] When the second payment (May 1, 2010) had become due and was not made, Respondent contacted Debtor Husband. [TT p.16] It was at that time that Debtor Husband told the Respondent that he was not going to pay anything. [TT, p. 16] Knowing that he was already behind on payments, Debtor Husband looked for a way to divest himself of his major asset at the time, his interest in Prodigal Enterprises, LLC, a limited liability corporation, that he shared with his wife. [TT pp. 34-35]

The sole asset of Prodigal Enterprises, LLC was land it owned at Highway 81 North, Piedmont, SC 29673 [hereinafter "Brushy Creek Bar-B-Q property"]. [TT p. 30] The land and the commercial building located on it was where Appellant operated the family business of Brushy Creek Bar-B-Q, Inc. [*Id.*]

By 2005, the members of Prodigal Enterprises, LLC other than Defendants Appellant and Debtor Husband, had been repaid for their interests. [TT pp. 30-31] Although none of the paperwork had been executed. [*Id.*] By 2010, Appellant and Debtor Husband were the only *de facto* members of Prodigal Enterprises. Debtor Husband was the managing member of Prodigal Enterprises, LLC. [TT p. 64] At the time of transfer to Appellant, the land and building were owned free and clear of any mortgage or liability to any other third party. [TT p. 32]

In September of 2009, Defendants Debtor Husband and Appellant consulted with Attorney Bill Hood to explore the possibility of transferring the title of the property to Appellant in connection with her opening a bail bond business. [TT p. 67] According to the promissory note signed by Debtor Husband in March 2010, September 2009 would have been just a few weeks after the \$181,250.00 was due the Respondent on July 30, 2009.

[Pl. Ex. 2] Mr. Hood testified that, while the Thomases did meet with him in September 2009, the file sat idle for several months with no activity. [TT p. 72] Indeed, it was not until late May and early June of 2010 that the Thomases had an urgent need to get the work completed. [TT pp. 71-72]

In June 2010, the other members of Prodigal Enterprises LLC all executed satisfactions of their mortgages relating to the Brushy Creek Bar-B-Q property. [TT pp. 30-31] Debtor Husband testified that these other parties were repaid their loans/investment years before, but they had not gotten around to do the paperwork until June 2010. [TT p. 30]

With the monthly payments on the promissory note past due and continuing to be missed, on July 7, 2010, Defendants Debtor Husband and Appellant executed a series of documents that did the following:

- 1) For nominal consideration, transfer the title of the Brushy Creek Bar-B-Q property from Prodigal Enterprises, LLC to Appellant. [Pl. Ex. 14] [TT pp. 31-32];
- 2) Appellant filed with the Anderson Clerk of Court pledging the property as collateral for a bond company, Bail Pros; [Pl. Ex. 15; TT.p.31]; and
- 3) Dissolved Prodigal Enterprises, LLC. [Pl. Ex. 16; TT p. 32]

At the time of transfer, the property was worth \$203,535. [Pl. Ex. 15; TT p. 31]. Debtor Husband admitted that, as a 50% owner of Prodigal Enterprises, LLC, the value of his interest in the property was worth more than \$100,000.00, which he transferred to Appellant for \$10.00. [TT p. 32]

Debtor Husband testified on cross-examination that at the time of this transfer, his interest in Prodigal Enterprises, LLC (with its unencumbered ownership of the Brushy Creek Bar-B-Q property) was the single largest asset he owned at that time. [TT p. 34-35] He also admitted this transfer was made to his wife without any consideration. [TT p. 32] Further, he admitted that following this transfer, he did not have any assets to satisfy the amounts owed to the Respondent. [TT pp. 34-35]

The Respondent ultimately retained a lawyer to bring an action against Debtor Husband for collection of the promissory note. [TT p. 18] A judgment was entered in Respondent's favor against Debtor Husband in the amount of \$378,108.08 on March 6, 2013. [Pl. Ex. 18] Respondent's attempt to collect on that judgment to date have been unsuccessful. [TT p. 14] The judgment was placed in the hands of the Sheriff for collection and returned *nulla bona*. [Pl. Ex. 19] Respondent testified that he has never received a dime from the defendant for the original \$125,000.00 loan to Debtor Husband. [TT p. 14]

LEGAL ARGUMENT

1. Standard of Review

The parties tried the case non-jury by consent. Both of respondent's claims are equitable. For Respondent's claim for fraudulent conveyance under S.C. Code of Laws §27-23-10, *et seq.*, a clear and convincing evidentiary standard applies to fraudulent conveyance claims brought under the Statute of Elizabeth. Oskin v. Johnson, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012). "An action to set aside a conveyance under the Statute of Elizabeth is an equitable action, and a de novo standard of review applies." *Id.* Regarding Respondent's claim for unjust enrichment, "[u]njust enrichment is an equitable

doctrine." Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). On appeal from a non-jury trial, an appellate court may find facts according to its own view of the preponderance of the evidence; however, it is not required to ignore the trial judge's findings. K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 571, 682 S.E.2d 252, 256-57 (2009); Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (S.C., 1976).

2. THE TRIAL COURT PROPERLY FOUND APPELLANT LIABLE FOR THE FRAUDULENT CONVEYANCE OF PROPERTY TO HER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

When a party denies any fraudulent intent in transferring an asset outside the reach of a creditor, fraudulent intent is inferred if one or more of the following "badges of fraud" exist(s):

[T]he insolvency or indebtedness of the transferor, [a] lack of consideration for the conveyance, [a] relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, [a] 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.

First Citizens Bank & Trust Co. v. Park at Durbin Creek, LLC, 419 S.C. 333, 797 S.E.2d 409 (S.C. App., 2017), quoting, Coleman v. Daniel, 261 S.C. 198, 209, 199 S.E.2d 74, 79 (1973). It is generally recognized that, although the identification of one badge of fraud does not create a presumption of fraud, "whe[n] there is a concurrence of several such badges of fraud[,] an inference of fraud may be warranted." Coleman, at 209–10, 199 S.E.2d at 79–80 (*quoting*, 37 AM. JUR. 2D Fraudulent Conveyances §10 (1968)). "A badge of fraud creates a rebuttable presumption of intent to defraud." First Citizens Bank

& Trust Co. v. Park at Durbin Creek, LLC, 419 S.C. 333, 797 S.E.2d 409 (S.C. App., 2017) (quoting, Royal Z Lanes, Inc. v. Collins Holding Corp., 337 S.C. 592, 596, 524 S.E.2d 621, 623 (1999)).

Appellant first argues the Statute of Elizabeth does not apply because the grantor (Prodigal Enterprises) was an LLC; and not a direct debtor to the Respondent. The following facts are not disputed:

- (1) Debtor Husband signed a promissory note to Respondent on March 9, 2010 with the first installment payment due in April 2010 [Pl. Ex. 2];
- (2) Once Debtor Husband missed his second consecutive deadline for making an installment payment; Respondent began contacting Debtor Husband in May 2010 about payments he owed under the promissory note [TT p. 16];
- (3) While Debtor Husband and Appellant initially consulted Attorney Hood to discuss Appellant entering the bail bonds business in September 2009, the file sat dormant until May/June 2010, when there was an urgent need to get everything take care of right away [TT p. 72];¹
- (4) The original members of Prodigal Enterprises other than Debtor Husband and Appellant had been paid in full for their interests in Prodigal Enterprises in 1998, but no paperwork confirming this was generated until May/June 2010 [TT pp. 30-31];

¹ The attorney who prepared the transfer documents testified as follows:

[Question]: And so that is accurate that [the file] sort of sat dormant for along time until that May 2010 time period.

[Answer]: That would be correct.

[TT, p. 72]

- (5) At the time of transferring the property to his wife (Appellant), Debtor Husband was a 50% owner of Prodigal Enterprises [TT p. 27];
- (6) At the time of transferring the property to his wife (Appellant), Debtor Husband was the managing member of Prodigal Enterprises [TT p. 27];
- (7) At the time of transfer (July 7, 2010), the property transferred was the sole asset of Prodigal Enterprises [TT p. 31];
- (8) At the time of transfer (July 7, 2010), Debtor Husband's ownership of Prodigal Enterprises was his only asset not subject to a homestead exemption [TT pp. 34-35];
- (9) At the time of transfer wife, the property was worth \$205,535.00 [TT p. 15; Pl Ex. 15];
- (10) At the time of transfer to his wife, his share of the property was worth in excess of \$100,000.00 [TT p. 32];
- (11) Following the transfer to his wife, Debtor Husband was judicially insolvent [TT. 34-35]; and
- (12) Immediately following the transfer, Debtor Husband simultaneously dissolved Prodigal Enterprises so that deeding back the property was no longer feasible. [TT p. 33; Pl. Ex. 16]
- (13) Appellant did not incorporate her bonding business until five (5) months later in December 2010. [TT p. 33; Pl. Ex. 17]

Because of the unique sequence of the events, some equitable maxims forged from South Carolina law are applicable. "Equity will not suffer a wrong to be without a remedy." Lane v. N.Y. Life Ins. Co, 147 S.C. 333, 145 S.E. 196, 207 (S.C., 1928). Equity abhors a

wrong without a remedy. State ex Rel. Daniel v. Strong, 185 S.C. 27, 192 S.E. 671 (S.C., 1937). Equitable power of court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all circumstances, to deny it would permit one party to suffer gross wrong at hands of other. Hooper v. Ebenezer Sr. Services and Rehabilitation Center, 687 S.E.2d 29 (S.C. 2009).

Another long-standing equitable maxim is “Equity regards substance rather than form.” After a party establishes an equitable right, the court may dispense with pure formalities which would otherwise defeat the equity. Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011). The notion that equity looks to substance rather than form evolved out of judicial regard for that which ought to be done; this maxim applies by dispensing with pure formalities which would otherwise defeat the equity. *Id.*

The focal issue is that at the time the Debtor Husband and Appellant knew Respondent’s note was coming due and that his debt would be reduced to a judgment. To thwart Respondent from collecting against Debtor Husband’s singularly largest unencumbered asset, held by a closely-held corporation where they were the sole members, Debtor Husband and Appellant Wife transferred their LLC’s lone asset solely in her name only. The transaction was designed to lay the ground work for the very arguments raised in this case by liquidating the sole asset held by Debtor Husband at that time, namely, his one-half interest in Defendant Prodigal Enterprises, LLC.² Then Debtor Husband and

² Appellant argues the transfer serves a legitimate purpose for serving as collateral for her newly operating bail bond business. [App. Br. at pp. 4-5]. The fact that Appellant did not incorporate her business for another five (5) months after the fraudulent transfer

Appellant Wife immediately closed Prodigal Enterprises down, knowing, if successful, that Respondent's claim against Debtor Husband would leave him empty-handed. See, e.g., Lebovitz v. Mudd, 293 S.C. 49, 358 S.E.2d 698 (1987) (Allegations that defendants' conveyances rendered partnership insolvent and were made with knowledge of Respondents' tort claims against partnership and with actual intention to defraud Respondents stated causes of action against defendants for fraudulent conveyances.)

These are the very reasons why the equitable powers of the Court are so broad. Not every fraudulent transfer fits neatly into a box. And this is why the Court's decision to enter a money judgment against Appellant in the amount of \$125,000.00 is the more just and appropriate available remedy under the unique circumstances of this case. She was the one who has directly benefitted from the transfer of title for the property in her name only.

The trial court saw through Appellant and Debtor Husband's attempt to divest Debtor Husband of his sole asset at the time which was subject to being sold to satisfy any collection attempts by Respondent. Because Appellant and Debtor Husband immediately dissolved their LLC after the transfer, simply rescinding the fraudulent conveyance was no longer an option. Exercising its equitable powers authorized by long-standing South Carolina law, the trial court forged the only result that could do justice to the parties in this case. There is no dispute that Appellant was the beneficiary of a one-half interest in a commercial property for which she paid no consideration. Having witnessed the testimony of the witnesses and reviewed the corresponding documentation, the trial court's order and

further underscores the timing of the transfer was related to Respondent's demand for money and not her newly found interest in opening a bail bond business. [TT. p. 33, 52; Pl. Ex. 17]

judgment simply divests Appellant of the benefit she received from this fraudulent conveyance.

The fraudulent conveyance statute envisions a money judgement as part of the equitable relief because it authorizes the Court to invalidate “any lease, rent, commons or other profit or charge out of the same ...” S.C. Code of Laws §27-23-10 (1976 Ann.) Thus, the Court’s award of \$125,000.00 against the Appellant disgorges her of the profit she received from the fraudulent conveyance.

The trial court correctly found that Respondent well met the clear and convincing standard to establish his recovery under the fraudulent conveyance statute. As such, the trial court’s order and judgment should be affirmed.

3. THE TRIAL COURT’S AWARD OF DAMAGES AGAINST APPELLANT FOR THE UNJUST ENRICHMENT WAS APPROPRIATE UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE.

In its order and judgment, upon finding the transfer was a fraudulent conveyance, the trial court recognized that voiding the transaction was neither feasible nor practical by the time of trial. For example, Debtor Husband and Appellant immediately dissolved their LLC following the transfer of its only asset to Appellant. As such, the transaction could not simply be “undone” because the Court did not have the power to resurrect the dissolved LLC. [Order p.7] Additionally, Appellant argued at trial that because the land currently serves as collateral for her bonding business, transferring title would dramatically disrupt her bail bond business. [Post-trial Hearing transcript, p. 5]

Cognizant of these realities, the Court found that awarding damages to the Respondent was the only feasible remedy equitably available; namely, a monetary award

against the Appellant. [Order, p. 8] "Unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff." Regions Bank v. Wingard Properties, Inc., 394 S.C. at 256-57, 715 S.E.2d at 356. "Unjust enrichment is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1998). "A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." Dema v. Tenet Physician Servs.–Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009).

Although unjust enrichment is often associated with claims of *quantum meruit*, quasi-contract, or implied by law contract (*see, e.g., Bank v. Wingard Properties Inc.*, 394 S.C. 241, 715 S.E.2d 348 (S.C. App., 2011)), it is not limited to those circumstances. Here, the appellant certainly received a substantial benefit from the fraudulent conveyance, which "in justice and equity" belongs to Respondent. It is not disputed that if Respondent was a judgment creditor in 2010, he would have been able to seize Debtor Husband's one-half interest in the LLC, which was a one-half interest in the commercial property the LLC owned. Appellant benefitted from the gift of this solely because she and her Debtor Husband consummated the transaction before Respondent could reduce husband's debt to a judgment.

Under the facts and circumstances of this case, it would be inequitable and unjust to permit Appellant to retain this benefit. For this reason, the trial court's award for unjust enrichment is proper and the order and judgment should be AFFIRMED.

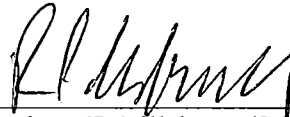
CONCLUSION

The unique facts and circumstances of this case underscore the importance of allowing South Carolina courts to enjoy broad equitable powers. In this case, when assessing the veracity of witnesses at trial and reviewing the totality of the evidence, the trial court found by clear and convincing evidence that Appellant and her Debtor Husband acted in concert to divest husband of the one significant asset which was subject to creditor collections: namely, his one-half interest in the LLC which he jointly owned with Appellant. Confronted with the difficulties of unwinding the deed transfer, the trial court found that awarding damages against Appellant was the best available equitable remedy under the circumstances. This decision is supported under either fraudulent conveyance or unjust enrichment.

For these reasons, the trial court's order and judgment should be affirmed.

Respectfully Submitted,

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April 8, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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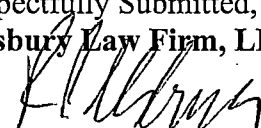
Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on April 8, 2019, the Initial Brief of Respondent and Designation of Matter were served on Petitioner's counsel of record via U.S. Mail, to the below address:

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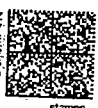
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