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SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY
Chancery Division
Docket No. C-108-19

TAI HE TRADING CORP.,

Plaintiff,

Civil Action

v.

MICHELLE C. NG, also known as
MICHELLE NG, also known as
MICHELE NG and JETHRO NG

Defendants.

FILED

OCT 29 2019

Jeffrey R. Jablonski, P.J.Ch.

ARGUED: October 10- October 11, 2019.

DECIDED: October 29, 2019.

Philip C. Gutworth, for the Tai He Trading Corp. (Philip C. Gutworth, P.A. attorneys)

Michelle C. Ng and Jethro Ng represented themselves.

JABLONSKI, P.J. Ch.

OPINION

The Plaintiff, Tai He Trading Corp. (Tai He) seeks to void the quitclaim deed that transferred title to premises known as 226 Harmon Cove Towers (the "property") by the Defendant, Michelle Ng (Ms. Ng) to her son, Jethro Ng (Mr. Ng) because the transfer was allegedly fraudulent.

This application is denied because this court finds that Tai He has not clearly and convincingly proven that the transfer was made with any fraudulent intent nor that it was made to thwart the Plaintiff's judgment collection efforts.

I. PROCEDURAL HISTORY

In 2016, Tai He sued 555 Asian Supermarket, Inc, John Ng, Kong Sang and Michelle Ng to recover \$34,747.16 on a book account. Ultimately, Tai He obtained judgment by default against these individuals on November 9, 2016.

On September 26, 2017, the Defendants moved to vacate the default judgment. This court granted the application under R. 4:50-(a) and (f) because service upon the Defendants was infirm and because the documents only revealed the name of the corporation on the invoices, rather than the individual members of the corporation for whom personal liability was sought. The matter was restored to the active trial calendar and discovery commenced. The Defendants, however, did not answer it.

Consequently, Tai He moved to strike the Defendants' answer. That application was granted on March 16, 2018, because of the Defendants' failure to participate in discovery. Final judgment

by default was entered on October 1, 2018, in the amount of \$36,831.08 plus costs.¹

Before final judgment was entered, on December 20, 2017, a quitclaim deed, dated November 14, 2017, was filed and transferred title to the property to Mr. Ng. When judgment collection efforts failed, Tai He filed a complaint in the chancery division to invalidate the transfer of the property.

At trial before this court, Tai He argued that the property transfer should be rendered void since it was designed to place the property beyond the reach of Tai He's judgment collection efforts. Tai He seeks the appointment of a receiver to sell the property to satisfy the outstanding debt.

¹ This court acknowledges the Plaintiff's judgment that was entered by default in the law division on October 1, 2018. As explained to the parties at the beginning of this trial, that judgment must remain undisturbed because the application made in the chancery division is purely equitable in nature. This court concluded that any additional consideration of the law division's action would be barred under the "law of the case" doctrine" that requires that a legal decision in a collateral matter "be respected by all other lower or equal courts during the pendency of that case." Lanzet v. Greenberg, 126 N.J. 168, 192 (1991) (citing State v. Reldan, 100 N.J. 187, 203 (1985)). The law of the case doctrine is a non-binding rule intended to "prevent relitigation of a previously resolved issue." In re Estate of Stockdale, 196 N.J. 275, 311, 953 A.2d 454 (2008) (citing Pressler, Current N.J. Court Rules, comment 4 on R. 1:36-3 (2008)). To that end, therefore, a number of exhibits admitted by both the Defendants and the Plaintiff concerning the validity of the judgment and the enforceability of it against Ms. Ng individually are not relevant to the present controversy.

In opposition, Mr. and Ms. Ng argue that the property transfer was not fraudulent and their intent in doing so was not for the nefarious purpose alleged by Tai He.

II. FINDINGS

After review of the exhibits admitted into evidence and after consideration of the testimony of the witnesses, this court makes the following factual findings that are supported by the competent, relevant, and reasonably credible evidence:

A.

In May 1997, Michelle Ng purchased property located at 226 Harmon Cove Towers in Secaucus for \$118,000.00. That deed was recorded on May 20, 2017. By deed dated November 17, 2017, the property was transferred to Mr. Ng for \$1.00. That deed, however, was recorded approximately 5 weeks later on December 20, 2017. The property was transferred as a gift from mother to son consistent with Chinese tradition. The property is currently the primary residence of Mr. Ng, Ms. Ng, and John Ng.

On November 27, 2017, Ms. Ng was sued by the Harmon Cove Towers I Condominium Association for the lack of payment of condominium association expenses. That matter was docketed under DC-10137-17. That judgment was paid in full with a check issued by Chhibubhai and Dharmistha Lad on December 15, 2017. Mr. and Ms. Lad were tenants of Ms. Ng according to a May 9, 2016, lease

agreement. On September 18, 2018, Mr. Ng, as the owner of the premises, sought to remove those tenants.

A number of judgments were also entered against Ms. Ng personally and her husband, John Ng totaling \$212,286.69 and claimed by a variety of creditors both private and governmental. No judgments exist against Jethro.

B.

At trial, the Plaintiff called Ms. Ng as its first witness. Ms. Ng testified that she became aware of the judgment entered by the Plaintiff in 2016. However, she also noted that the judgment was vacated in 2017 when the default judgment was extinguished. She candidly acknowledged that in November 2017, when a judgment was not yet in place, she transferred the property to her son. Ms. Ng noted that the transfer was consistent with cultural tradition to make a substantial gift to a child who reached adulthood. Ms. Ng noted that she had done the same for another son with other property located in Secaucus.

Ms. Ng noted that the deed was prepared on November 4, 2017, when she met with her attorney, signed on November 14, 2017, and was recorded 5 weeks later on December 20, 2017- the date of her son's birthday. It was Ms. Ng's understanding that any judgments would become the responsibility of the new owner of the premises.

In later testimony, Ms. Ng testified that in the Chinese culture, it is a tradition to present a child with a sizable gift

when that child reaches adulthood. She noted that if her intention were to shield the property from collection efforts or to escape responsibility to creditors, she would have sold the property for a profit secretly, rather than transfer it obviously to her son- particularly with the knowledge and belief that the judgment would attach to the real property and that her son would be responsible for the payment.

C.

Jethro Ng testified at the request of the Plaintiff as well. He candidly acknowledged that he received the property from his mother. He also acknowledged that he accepted it knowing that there were judgments that encumbered the premises- including that possessed by the Plaintiff. Mr. Ng. testified that it was his belief and his understanding that he would be responsible for the payment of any debt that would attach to the premises. In his closing, he noted that it did not make sense to transfer the property to avoid creditors since this would only result in additional litigation.

III. ANALYSIS

In light of these factual findings, this court makes these legal conclusions, based substantially on the credibility of the testifying witnesses and how those positive assessments

contributed to the overall reasonableness of Mr. and Ms. Ng's position as opposed to that of Tai He.

A.

Tai He alleges that the Defendants violated the Uniform Fraudulent Transfer Act (UFTA) when Ms. Ng transferred the premises to her son, Jethro. Under that statute, a transfer of an asset is considered fraudulent if a debtor transfers the assets:

- a. With the actual intent to hinder, delay, or defraud any creditor of the debtor; or
- b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:
 1. Was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or
 2. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due.

N.J.S.A. 25:2-25.

Our Supreme Court established two relevant inquiries to assess whether a transfer was fraudulent. Gilchinsky v. Nat'l Westminster Bank NJ, 159 N.J. 463, 476 (1998). The first is "whether the debtor [or the person making the conveyance] has put some asset beyond the reach of credits which would have been available to them" at some point in time "but for the conveyance." Ibid. (citing In Re Wolensky's Ltd. Partnership, 163 B.R. 615,

626-27 (Bankr. D.C. 1993; Grand Lab., Inc. v. Midcon Labs of Iowa, 32 F.3d. 1277, 1282 (8th Cir. 1994). The second is whether the debtor "transferred the property with an intent to defraud, delay, or hinder the creditor." Ibid. Transfers calculated to hinder, delay, or defeat collection of a known debt are deemed fraudulent because of the debtor's intent to withdraw the assets from the reach of process. Ibid.

Assessment of purportedly fraudulent transfers involve fact-specific determinations that can only be resolved on a case-by-case basis. Ibid. The entity seeking to set aside the conveyance of proving actual intent. Ibid. The Plaintiff in such a case must prove the allegations by clear and convincing evidence. Jecker v. Hidden Valley, Inc., 422 N.J. Super. 155, 164 (App. Div. 2011).

In determining whether the circumstances of a particular transaction give rise to the conclusion that the transferor intended to thwart or to evade creditors, courts generally look to factors commonly referred to as "badges of fraud." Ibid. "Badges of fraud" represent circumstances that so frequently accompany fraudulent transfers that their presence gives rise of an inference of improper intent. Ibid.

Specifically, badges of fraud:

are said to be facts which throw suspicion on a transaction, and which call for an explanation . . . More simply stated, they are signs or marks of fraud.

They do not of themselves or per se constitute fraud, but they are facts having a tendency to show the existence of fraud. Often a single one of them may establish and stamp a transaction as fraudulent. When, however, several are found in the same transaction, strong, clear evidence will be required to repel the conclusion of fraudulent intent.

Gilchinsky, 159 N.J. at 476 (quoting Schall v. Anderson's Implement, Inc., 240 Neb. 658 (1992)).

N.J.S.A. 25:2-26 reads:

In determining actual intent under subsection a. of R.S. 25:2-25 consideration may be given, among other factors, to whether:

- a. The transfer or obligation was to an insider;
- b. The debtor retained possession or control of the property transferred after the transfer;
- c. The transfer or obligation was disclosed or concealed;
- d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- e. The transfer was of substantially all of the debtor's assets;
- f. The debtor absconded;
- g. The debtor removed or concealed assets;
- h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

- j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

N.J.S.A. 25:2-26.

To assess the actual intent to defraud, courts must balance the factors set forth in N.J.S.A. 25:2-26 combined with any other factors relevant to the transaction. Gilchinsky, 159 N.J. at 477. The "proper inquiry is whether the badges of fraud are present, not whether some factors are absent." Id. at 489. Satisfactory proof of a fraudulent transfer must be proven by clear and convincing evidence. Barsotti v. Merced, 346 N.J. Super. 504, 520 (App. Div. 2002).

B.

Clear and convincing evidence is evidence that creates "a firm belief or conviction as to the trust of the allegations sought to be established." In re Purrazzella, 134 N.J. 228, 240 (1993). Clear and convincing evidence is evidence that produces "a firm belief or conviction that the allegations sought to be proved by the evidence are true. It is evidence so clear, direct, weighty in terms of quality, and convincing as to cause [a factfinder] to come to a clear conviction of the truth of the precise facts in issue. Model Jury Charges (Civil) 1.19 "Burden

of Proof-Clear and Convincing Evidence) (approved Apr. 1988, rev. August 2011). It "requires that the result shall not be reached by a mere balancing of doubts or probabilities, but rather by clear evidence which causes [a factfinder] to be convinced that the allegations sought to be proved are true." Ibid.

C.

According to the documentary evidence produced at trial, the property under scrutiny is encumbered by a number of sizable judgments. A threshold question is presented, therefore, as to whether Tai He has established that the property was an "asset" within the definition of that term in the UFTA. N.J.S.A. 25:2-21; Jecker, 422 N.J. Super. at 166. On this record, this court finds that it did not.

The UFTA defines the circumstances in which a transfer is deemed fraudulent. N.J.S.A. 25:2-25; Jecker, 422 N.J. Super at 166. A "transfer" is defined as "every mode, direct or indirect . . . of disposing of or parting with an asset." N.J.S.A. 25:2-22. The statute further provides that an "'asset' means property of a debtor, but the term does not include . . . [p]roperty to the extent it is encumbered by a valid lien." N.J.S.A. 25:2-22. A "valid" lien is a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings. N.J.S.A. 25:2-22. Therefore, a transfer of a

fully encumbered property does not involve an asset of the debtor and . . . it is not a 'transfer' at all within the meaning of the [UFTA]. Thus, state courts have consistently held that a transfer of fully encumbered property may not be set aside under the [UFTA]." Jecker, 422 N.J. Super. at 166 (citing David B. Young, Preferences and Fraudulent Transfers in Understanding the Basics of Bankruptcy & Reorganization 2007, at 713, 733-734 (PLI Commercial Law and Practice Course Handbook Series No. 11219, 2007)).

In New Jersey, when a purported asset has no monetary worth, a claimant cannot demonstrate a cause of action under the UFTA because no asset was transferred. Karo Mktg. Corp., Inc. v. Playdrome Am., 331 N.J. Super. 430, 444 (App. Div. 2000). Courts from other jurisdictions have held similarly: In re Wintz Companies, 230 B.R. 848, 861 (8th Cir. BAP 1999) (concluding that where property is encumbered by IRA tax liens and various mortgages that "a threshold determination to be made . . . is whether 'transfers' occurred at all. This inquiry is, in turn, dependent upon another, that is, whether any of the items purportedly 'transferred' constitute assets.) See also Farstveet v. Rudolph ex rel. Eileen Rudolph Est., 2000 ND 189 (N.D. 2001) (holding that property which is encumbered by valid liens exceeding the value of the property is not an asset within the meaning of the [UFTA] and is not subject to a fraudulent transfer); In re Valente, 360 F3d

256, 260 (1st Cir. 2004) (holding that since the property at issue in that matter was only worth \$150,000.00 and was encumbered by a \$168,000 first mortgage, it did not qualify as an "asset" at the time of the transfer.)

In this matter, Tai He has the burden of proving that the real property is considered an "asset" of Ms. Ng. See Jecker, 422 N.J. Super. at 166. Tai He produced no evidence at trial to the present market value of the property and only proved that the property was purchased in 1997 for \$118,000.00. Tai He has also produced evidence that judgments exceeding \$212,000.00 presently exist against Ms. Ng and/or her husband, John, and approximately \$123,000.00 encumber the property.² Without any proof of the existing market value of the premises by the Plaintiff, this court is deprived of the ability to ascertain whether the substantial judgments outweigh the market value of the premises so that it would be considered an asset of the debtor that if "transferred" under the UFTA might be considered fraudulent.

Therefore, Tai He has not established the monetary worth of the premises to allow for the requested conclusion that the conveyance to Mr. Ng was an impermissible "transfer of an asset of [Ms. Ng] subject to the UFTA.

² Most of the judgments reflected in the title search were docketed before the December 20, 2017, transfer. However, two of them (\$89,411.11 and \$2,094.17) were recorded on September 20, 2018, and on September 12, 2019, respectively.

D.

The testimony provided by the Plaintiff's business representatives focused exclusively upon the existence of the underlying default judgment that was, as noted previously, only a collateral issue in the litigation presently before this court. Similarly, the testimony of John Ng only contributed to a discussion about that issue. To that extent, the testimony of these three witnesses is secondary to the central issue presented before this court: was the property impermissibly transferred from Ms. Ng to Mr. Ng.

Even if the encumbered property were to be considered an asset, this court finds that the conveyance was neither illegal nor inappropriate based on the credible testimony of these two witnesses.

Central to the determination in his case is the credibility assessment that must be made about the veracity and consequent reasonableness of the two key witnesses to this controversy: Ms. Ng and Mr. Ng. This appraisal is fundamental to a decision as to whether Tai He has satisfied its burden of proof. In light of these principles, this court finds that the credibility determinations favor the Defendants in this matter rather than the position taken by the Plaintiff.

Primary to any determination in all litigation (and in this case in particular) is a consideration of the credibility of the witness testimony as to all issues presented. The ultimate outcome of this case centers squarely on the credibility assessments that this court is required to make. After an opportunity to hear the case, to see and observe the witnesses, and to hear each witness testify, this court has a unique perspective to evaluate the credibility and overall reasonableness of each witness' position. Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). Guidance as to credibility findings is also provided by the model jury charges. Factfinders are instructed to consider the witness' interest in the case outcome; the accuracy of the witnesses' recollection; and the witnesses' ability to know what he or she was talking about. Model Jury Instructions (Civil) 1.12(L) "Credibility" (approved November 1998). Additional consideration should be given to contradictions and changes in the witness testimony and the witnesses' demeanor. Ibid. Finally, common sense and overall reasonableness provide substantive lenses through which facts can, and should, be assessed. Ibid.

Here, this court finds that the testimony provided by both Ms. Ng and Mr. Ng was credible. This directly contributes to the positive assessment of the overall reasonableness of their litigation position. In this case, both Mr. Ng and Ms. Ng

testified directly and relevantly. Both were extraordinarily polite and overwhelmingly respectful. Both were aware of what they were talking about, both made good eye contact, and both provided prompt and direct answers to all questions asked that they were asked by the Plaintiff of each of them during their direct examination as adverse witnesses. In their case in chief, they testified directly and relevantly.

The court was aware that both Defendants disagreed with the Plaintiff's position that it had obtained a proper judgment against Ms. Ng personally. Periodically, both attempted to answer questions in a way to assert that position. However, after both were reminded by this court that the validity of this order was not under scrutiny in this litigation, both participated appropriately. Overall, Mr. Ng's and Ms. Ng's collective testimony was detailed and lacked any impermissible or unreasonable exaggeration. They did not seek to avoid any question and were more than willing to answer any question placed to them. Throughout their entire testimony, their positions remained consistent.

This court then must consider the scienter requirement of the cause of action and assess, in light of the valid and reasonable testimony provided by Mr. and Ms. Ng, whether Tai He has established, clearly and convincingly, that they are guilty of a fraudulent transfer. This court finds that after a consideration

of the badges of fraud, and the other circumstances, that Tai He has not done so.

The veracity and candor with which Ms. Ng and Mr. Ng testified mirror their statements' substantive reasonableness. Consequently, this court accepts the Defendants' version of the substantive events as reasonable to explain the validity of the transfer and concludes that the property transfer was not designed to hinder, delay, nor to defraud the Plaintiff:

The transfer was, most certainly made between "insiders", and specifically, mother and son. N.J.S.A. 25:2-26. However, no evidence was produced that the transfer was concealed, nor did Tai He provide any evidence to demonstrate the present value of the property that would have been of assistance to ascertain whether the property represented "substantially all" of Ms. Ng's assets. Id. Ms. Ng did not abscond after the transfer of the property, and ceded control to pursue collateral litigation to the new owner-Mr. Ng. Tai He wishes this court to believe that because a third party check was endorsed to the condominium association to satisfy a debt, that this represented, clearly and convincingly, that the property remained in control of Ms. Ng. This assertion is not persuasive. All that Tai He presented was the existence of the satisfaction of a debt. No additional testimony was provided other than the existence of a judgment and its satisfaction with a direct payment by the tenant.

Ms. Ng also candidly acknowledged the existence of a number of judgments, but no substantial evidence was presented that she was insolvent nor that any of the judgment creditors took similar efforts to execute on any open judgments, despite the fact that they were of similar amounts as the Plaintiff's judgment. At the time that the transfer was made, Ms. Ng acknowledged that litigation was pending, although this court similarly acknowledges that final judgment had not yet been entered.

Therefore, despite the existence of some of the badges of fraud, and considering the fact-sensitive nature of ultimate inquiry, the evidence is, at best, in equipoise and Tai He has not established clearly and convincingly that the transfer was made with the nefarious intent to defraud it. N.J.R.E. 101(b)(1)(2006); In re Estate of Reininger, 388 N.J. Super, 298 (App. Div. 2006) (finding that if evidence is in equipoise, the burden of proof has not been met.)

Central to this conclusion, is the credible statement made by Mr. Ng that he acknowledged both the existence of debts encumbering the property and his belief that he was responsible to pay them. Both Mr. Ng and Ms. Ng acknowledged an indebtedness (although they disagreed with the amount and the person or entity responsible for it). The testimony that the property was a gift is consistent with cultural tradition and was unrebutted by Tai He. Finally, this court finds persuasive the observation made by Mr. Ng that

the transfer, if designed to be fraudulent, would have been made more secretly and would have resulted in a profit for his mother.

IV. CONCLUSION

This court concludes that the Plaintiff has not proved clearly and convincingly that the transfer was made with the required fraudulent intent. Therefore, the Plaintiff's request to void the transfer is denied.