DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

GENERAL ELECTRIC CAPITAL CORPORATION, a Delaware corporation, Plaintiff/Appellee, v. JB REALTY INVESTMENTS, INC. and RONALD TUCEK, Third Parties/Appellants. MELCAR, INC., Garnishee/Appellee.	1 CA-CV 12-0278 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2009-025563

The Honorable John R. Doody, Commissioner

AFFIRMED

Kutak Rock, LLP — Scottsdale
By Andrew J. Russell
Attorneys for Plaintiff/Appellee

Michael P. Fiflis — Scottsdale
Attorney for Third Parties/Appellants

O R O Z C O, Judge

¶1 JB Realty Investments, Inc. (JB) and Ronald Tucek (Tucek) (collectively, Appellants) appeal the trial court's order overruling their objection to the garnishment judgment assigning General Electric Capital Corporation (GE) as the judgment creditor. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 On August 7, 2009, GE filed a complaint against Nick Giannis, Donna Giannis and Chris Giannis (collectively, the Giannis family) alleging that they breached their obligations to GE by failing to make payments pursuant to a security agreement in which GE loaned the principal amount of approximately $6 million to the Giannis family. On October 1, 2009, the Giannis family filed an answer to the complaint, denying the allegations. Thereafter, the Giannis family failed to participate in pretrial matters. Consequently, on June 2, 2010, the trial court entered an order striking the Giannis family's answer and granting a default judgment in favor of GE, in the amount of approximately $6 million.

¶3 GE filed a writ of garnishment seeking to collect the default judgment from Melcar, Inc. (Melcar) as garnishee.[1] Melcar filed an answer, admitting that it owes Donna "certain

[1] Donna owns a thirty percent interest in a building in Scottsdale, Arizona (the Scottsdale property) that was rented by Melcar.

sums under a [l]ease [a]greement" and that it would be "withholding the amounts owed to Donna Giannis" pursuant to the writ of garnishment. Appellants subsequently filed objections to the garnishment judgment. They claimed that they had a perfected security interest that took priority over the GE security interest in relation to the Scottsdale property owned by Donna and subject to garnishment. Upon Appellants' request, the trial court joined Appellants as third parties in the garnishment proceedings.

¶4 The trial court held an evidentiary hearing on the objections filed by Appellants to determine who had priority to the garnished funds as between Appellants and GE. Appellants alleged that they cumulatively lent $450,000 to Nick and Donna, which was evidenced by a promissory note dated August 7, 2009, signed by both Nick and Donna, and a deed of trust dated February 19, 2010 signed by Donna that granted a security interest in the Scottsdale property.

¶5 After reviewing the exhibits and listening to oral arguments, the trial court overruled Appellants' objections to the writ of garnishment. It found no evidence that Appellants lent funds to Donna, and as such, "the security agreements themselves [were] mere empty vessels." Furthermore, it found that if money was actually lent, the transactions were between

Payroll Preferred Services, Inc. (Payroll),[2] the Mildred Tucek Family Trust (the Trust),[3] and Nick and not between Appellants and Nick and Donna.

¶6 In addition, the trial court held that the February 2010 loan documents signed by Donna, including the deed of trust and assignment of rents, lacked consideration and were "unenforceable because the names of the lenders [did] not match the names of the parties on the loan documents." It further found that neither Appellants nor their entities lent any money to Donna, and if money was lent at all, it was to Nick by Payroll and the Trust. The trial court noted that that distinction was of importance "because [Donna], not Nick, is the alleged owner of the funds being held by the garnishee Melcar."

¶7 In the alternative, the trial court also found that the February 2010 security agreement was voidable as a fraudulent transfer pursuant to Arizona Revised Statutes (A.R.S.) section 44-1004 (2003) because Donna was indebted to GE before she granted $450,000 in security interests on the Scottsdale property to Appellants and because "there [was] no evidence that [Donna] received reasonably equivalent value for that transfer."

¶8 Appellants timely appealed. We have jurisdiction under A.R.S. §§ 12-120.21.A.1 (2003) and -2101.A.1 (Supp. 2012).

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[2] The owner of JB is also the owner of Payroll.

[3] Tucek is the trustee of the Trust.

DISCUSSION

¶9 Appellants claim that they had a valid security interest in the rents held by Melcar and that the trial court erred in overruling their objection to the garnishment judgment. They contend that Donna received consideration for the deed of trust and security agreement she signed, as well as loan proceeds and reasonably equivalent value for the lien. Appellants also claim that there is no evidence of a fraudulent conveyance. We disagree.

¶10 On appeal, we review a trial court's garnishment judgment for an abuse of discretion. *See Cota v. S. Ariz. Bank & Trust Co.*, 17 Ariz. App. 326, 327, 497 P.2d 833, 834 (1972). Abuse of discretion occurs when "the reasons given by the court for its action are clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983). We also view the evidence in a light most favorable to sustaining the trial court's ruling. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5, 972 P.2d 676, 679 (App. 1998). It is the role of the trial court to weigh the evidence. *Id.* at 347, ¶ 13, 972 P.2d at 680. Accordingly, we will not disturb a judgment if there is evidence to support it. *Yano v. Yano*, 144 Ariz. 382, 384, 697 P.2d 1132, 1134 (App. 1985).

¶11 Fraud is never presumed, but must be proven by clear and satisfactory evidence. *Transamerica Ins. Co. v. Trout*, 145 Ariz. 355, 360, 701 P.2d 851, 856 (App. 1985). However, direct proof of fraud is not required; "[a] party can meet its burden of proof by showing circumstantial evidence through which fraud may reasonably be inferred." *Premier Fin. Servs. v. Citibank (Arizona)*, 185 Ariz. 80, 85, 912 P.2d 1309, 1314 (App. 1995). Furthermore, a fraudulent conveyance exists where the evidence clearly shows an "actual intent to hinder, delay or defraud any creditor of the debtor." A.R.S. § 44-1004.A.1. In determining actual intent, consideration may be given to the following factors: (1) whether the transfer was to an insider; (2) whether the debtor retained control or possession of the property after the transfer; (3) whether the transfer was concealed or disclosed; (4) whether the debtor had been sued or threatened with suit before the transfer was made; (5) whether the transfer was of a majority of the debtor's assets; (6) whether the debtor absconded; (7) whether the debtor concealed or removed assets; (8) whether the debtor received a value of consideration that was reasonably equivalent to the value of the asset transferred; (9) whether the debtor was insolvent or became insolvent shortly after the transfer was made; (10) whether the transfer took place shortly before or after a substantial debt was incurred; or (11) whether the debtor transferred the assets of the business to a

lienor who then transferred the assets to an insider of the debtor. A.R.S. § 44-1004.B.

¶12 In this case, multiple "badges of fraud" exist to support the trial court's ruling that there was actual intent on behalf of the Giannis family to hinder, delay or defraud GE by granting a security interest to Appellants in the Scottsdale property. When "several [badges of fraud] are found in the same transaction, strong, clear evidence will be required to repel the conclusion of fraudulent intent." *Premier Fin. Servs.*, 185 Ariz. at 84 n.2, 912 P.2d at 1313 n.2 (citation and internal quotation marks omitted).

¶13 First, Donna did not receive consideration that was reasonably equivalent to the value of the security interest in the Scottsdale property that she assigned to Appellants. *See* A.R.S. § 44-1004.B.8. It is well established that inadequate consideration is a badge of fraud. *Torosian v. Paulos*, 82 Ariz. 304, 313, 313 P.2d 382, 388 (1957). Although Donna and Nick both signed the promissory note evidencing a loan between Appellants and the Giannis family, Donna's name does not appear on the separate loan agreement signed by Tucek and Nick.[4] Furthermore, that loan agreement lists Nick and Boston Blackies Management,

[4] Apart from the promissory note, assignment of rents and leases, and the deed of trust, there is nothing in the record that demonstrates a separate loan agreement between JB and the Giannis family.

Inc. (Boston Blackie's)[5] as borrowers. Moreover, two of the three checks that Appellants claim represent funds loaned to Nick and Donna were made payable only to Nick as payee. While the third check named both Donna *and* Nick as the payees, all three checks were endorsed only by Nick. In his deposition, Tucek admitted that the loan documents demonstrate that only Nick made a personal guarantee on the loan. Accordingly, we find no evidence that Donna actually received the funds or benefited from the funds. As the trial court noted, this is an important fact because Donna is the owner of the collateral that is subject to garnishment. Therefore, we find the deed of trust that she signed securing the loan from Appellants with the Scottsdale property as collateral, lacks consideration.

¶14 Second, Donna became substantially indebted to GE shortly before she granted a security interest in the Scottsdale property to Appellants. *See* A.R.S. § 44-1004.B.10. The Giannis family signed a security agreement on October 7, 2008, guaranteeing a loan agreement between GE and Boston Blackie's in the amount of approximately $6 million. The Giannis family defaulted on the loan and on May 20, 2009, GE sought to accelerate the loan and made demand for the full amount pursuant to the loan agreement. In August 2009, Nick and Donna allegedly

[5] The various Boston Blackie's corporations are owned and operated by the Giannis family.

entered into a loan agreement with Appellants. Donna signed a deed of trust granting a security interest in the Scottsdale property in February 2010 in order to secure that loan agreement. In other words, within a few months of a demand from GE to pay the $6 million dollar loan, Donna allegedly entered into a loan agreement with Appellants and signed a deed of trust that granted a security interest in the Scottsdale property as collateral. We find that the evidence supports GE's argument that Donna was aware of the impending debt and was subject to a judgment by GE.

¶15 Third, the Giannis family was threatened with a lawsuit before the security interest in the Scottsdale property was granted. *See* A.R.S. § 44-1004.B.4. On May 20, 2009, GE sent a notice of default and demand for payment to the Giannis family. GE subsequently filed suit against the Giannis family on August 7, 2009. Coincidentally, this is the same date that the promissory note was executed that evidences the alleged loan between Appellants and Nick and Donna. However, the deed of trust, giving Appellants a security interest in the Scottsdale property, was not signed by Donna until February 19, 2010, five months after the date that GE filed a suit against the Giannis family. Therefore, the evidence indicates that Donna knew of the GE lawsuit when she transferred her interest in the Scottsdale property to Appellants.

¶16 Accordingly, we find there was sufficient evidence for the trial court to find that several badges of fraud existed. Therefore, the trial court was justified in finding that the security agreement giving Appellants an interest in the Scottsdale property was a fraudulent conveyance under A.R.S. § 44-1004.

¶17 The trial court also found there no evidence that Donna received any consideration for the conveyance of an interest in the Scottsdale property. Without an underlying bona fide debt or obligation, the security agreement assigning the Appellants interest in the Scottsdale property was meaningless. *See Merryweather v. Pendleton*, 90 Ariz. 219, 224, 367 P.2d 251, 254 (1961). Therefore, the trial court did not abuse its discretion in overruling Appellants' objection to the writ of garnishment.

¶18 Because we conclude that the trial court correctly found that the security interest in the Scottsdale property granted to Appellants on behalf of Donna was a fraudulent conveyance and there was no consideration given for the security interest in the Scottsdale property, we need not address Appellants' other arguments. *See Forszt v. Rodriguez*, 212 Ariz. 263, 265, ¶ 9, 130 P.3d 538, 540 (App. 2006) (This court "may

affirm the trial court's ruling if it is correct for any reason apparent in the record.").[6]

Attorney Fees

¶19 Both Appellants and GE request attorney fees associated with this appeal under A.R.S. § 12-1580 (2003). As the prevailing party on appeal, GE is awarded its reasonable attorney fees and costs pursuant to § 12-1580.E and upon compliance with Arizona Rule of Civil Appellate Procedure 21.

CONCLUSION

¶20 For the foregoing reasons, we affirm.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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ANDREW W. GOULD, Presiding Judge

/S/
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MARGARET H. DOWNIE, Judge

[6] Appellants also argue that they took in good faith and therefore, under A.R.S. § 44-1008.A (2003), the transfer of interest in the Scottsdale property should not be voidable as to them. Because, as previously stated, there is no evidence that Donna received consideration for the assignment of the interest, we find that this argument is without merit and decline to address it.