[Cite as *Ohio Carpenters' Pension Fund Bd. of Trustees v. Ramunno*, 2021-Ohio-4667.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

BOARD OF TRUSTEES OF THE OHIO CARPENTERS' PENSION FUND,

Plaintiff-Appellee,

v.

MARK V. RAMUNNO, et al.,

Defendants-Appellants.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0084

Civil Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 2016 CV 1834

BEFORE:
Cheryl L. Waite, Gene Donofrio, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed.

Atty. Thomas P. Dillon and *Atty. Nicholas T. Stack*, North Courthouse Square, 1000 Jackson Street, Toledo, Ohio 43604, for Plaintiff-Appellee

Atty. Richard G. Zellers and *Atty. Andrew R. Zellers*, 3695 Boardman Canfield Road, Bldg. B, Suite 300, Canfield, Ohio 44406, for Defendants-Appellants.

Dated: December 22, 2021

WAITE, J.

{¶1} Appellants Mark and Nancy Ramunno, Ramunno Builders, Inc., and Ramunno Family Builders, Inc. (collectively referred to as "Appellants") appeal a June 27, 2019 Mahoning County Court of Common Pleas judgment entry. The court adopted the magistrate's decision which granted summary judgment in favor of Appellee Board of Trustees, Ohio Carpenters' Pension Fund. Appellants argue that any fraud associated with the initial transfer of the three parcels of real estate at issue was removed once the properties were subsequently transferred to bona fide purchasers of value. Appellants also argue that Appellee asserted claims regarding these transfers during Chapter 7 bankruptcy proceedings involving Ramunno Builders and Ramunno Family Builders, thus are barred by *res judicata* from raising those same claims in state court. For the reasons provided, Appellants' arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This matter involves a multi-employer pension plan which is governed by Chapter 29 of U.S.C. § 1381-1453. A collective bargaining agreement established the plan in this matter, which requires construction industry employers who hire union workers to pay into a fund for pension, health, and welfare obligations for those workers. (3/15/19 Mark Ramunno Depo., p. 13.)

{¶3} Mark and Nancy Ramunno are the sole owners of Ramunno Builders, Inc. and Ramunno Family Builders, Inc. Because the businesses hire union workers, they are required to pay into the pension plan. On August 29, 2014, Appellee sent the Ramunnos a demand letter stating that they owed $267,446.00 to the pension fund. The demand letter also stated that monthly payments on this amount were due beginning on November 1, 2014. No payments were made. Consequently, on November 5, 2014, Appellee sent the Ramunnos a notice of default.

{¶4} On March 5, 2015, Appellee filed an action against Ramunno Builders and Ramunno Family Builders in the U.S. District Court for the Northern District of Ohio, Eastern Division (case number 4:15-cv-00424-BYP). In summation, the action sought judgment for Appellants' "share of the funds unfunded vested benefits" pursuant to the "Multiemployer Pension Plan Amendments Act." (7/12/16 Complaint, paragraph 9.)

{¶5} On July 8, 2015, Magistrate Judge Limbert scheduled mediation. On July 13, 2015, Ramunno Family Builders transferred a real estate parcel it owned, located in Mahoning County and referred to as the "Langston Run property," to Mark and Nancy Ramunno for consideration of only one dollar. On September 28, 2015, Appellee filed a motion for summary judgment. Shortly thereafter, Ramunno Family Builders transferred what are referred to as "Sageberry Property #1" and "Sageberry Property #2" to Mark and Nancy Ramunno for only one dollar consideration.

{¶6} Mark and Nancy originally purchased a lot on Langston Run for $69,128.50. They built a house on the property, which sold and generated income in a greater amount than the original purchase price. They then purchased a second lot on the street for $74,000. Alternatively, they planned either to build a house for themselves or build a

house for profit. When they sought a personal loan, Mark informed the loan officer that he may end up selling the house for profit. The loan officer informed Mark that obtaining a personal loan for an investment property was not allowed and that he could not, now, approve the Ramunnos' loan knowing what they intended to do with the property. (3/15/19 Mark Ramunno Depo., pp. 30-31.)

{¶7} During the pendency of the Federal lawsuit, Mark and Nancy transferred the Langston Run property to their oldest son, Mark Jr. It appears that Mark Jr. worked for the family's business but was in the process of opening his own construction business, Northeast Ohio Cabinet and Construction. (3/15/19 Mark Ramunno Depo., p. 35.) Mark Jr. may have been working for the family businesses at the time the loan was turned down, as he began the process of starting his own business. (3/19/21 Mark Ramunno Depo., p. 52.) The Ramunnos transferred the property to Mark Jr. for his use in starting his new company. At some point, Mark then began working at his son's business as manager. Around this time, Mark Jr. entered into a contract to build a house on the Langston property for $85,000. Mark was heavily involved with this contract and the ensuing construction. (3/15/19 Mark Ramunno Depo., p. 36.)

{¶8} The Ramunnos then transferred the two Sageberry properties to their four children, then aged 25, 23, 21, and 18. Each of the four children paid Mark and Nancy $10,000 out of their own personal bank accounts. Nancy and Mark signed a promissory note to pay the $10,000 back to each child. (3/15/19 Mark Ramunno Depo., p. 45.) Mark and Nancy deposited the $40,000 total into the business account and allegedly used it to pay the expenses of the two companies.

{¶9} Based on the original transfers from the companies to Mark and Nancy, Appellee filed a separate state action against Ramunno Builders, Ramunno Family Builders, and Mark and Nancy Ramunno. This complaint contained three counts: (1) fraudulent transfer of the properties with knowledge of both of the companies' insolvency and the debt owed to Appellee, (2) the payment of dividends to the Ramunnos with knowledge of the companies' insolvency, (3) and an action to pierce the corporate veil. Appellee sought more than $25,000 in relief and to void the Sageberry property transfers.

{¶10} On September 20, 2016, Appellee filed an amended complaint. It appears that the sole addition contains notice that the federal court entered judgment in favor of Appellee for $320,935.20 on the underlying federal action. On September 19, 2017, Ramunno Builders and Ramunno Family Builders filed a notice of Chapter 7 bankruptcy. In the year before the bankruptcy proceedings, the Ramunno companies had held $60,000 in the bank. At some point before the proceedings were initiated, the amount dropped to $2,000. (3/15/19 Mark Ramunno Depo., p. 59.) On August 7, 2018, Appellee filed a notice of termination of the bankruptcy proceedings and a motion to return the case to the active docket, which the trial court granted.

{¶11} On September 7, 2018, the Ramunnos filed a motion for summary judgment. It does not appear that this motion was filed on behalf of Ramunno Builders or Ramunno Family Builders. The Ramunnos alleged that Appellee had filed a claim in the bankruptcy proceedings regarding the transfers and were barred by *res judicata* from asserting those same claims in state court. The court denied the motion, as genuine issues of material fact were found to exist.

{¶12} On April 18, 2019, Appellee filed a motion for summary judgment. Appellee raised the subsequent transfers of the properties to the Ramunno children. It appears that Appellee learned of these transfers for the first time during Mark Ramunno's deposition on March 15, 2019.

{¶13} On May 22, 2019, the magistrate granted Appellee's motion for summary judgment. On June 27, 2019, the trial court adopted the magistrate's decision and entered judgment in favor of Appellee in the amount of $74,000 as to the Langston property, which is no longer in the Ramunnos' control, and rescinded the transfers of the Sageberry properties and awarded those properties to Appellee. It is from this entry that Appellants appeal.

ASSIGNMENT OF ERROR NO. 1

The Trial Court erred in finding that a fraudulent transfer had taken place.

{¶14} Appellants present a confusing argument, here. It does appear that they acknowledge that the initial transfers to Mark and Nancy Ramunno "may" have been fraudulent. However, they argue for the first time during this lengthy case that a defense applies to remove any potential liability for fraud pertaining to the transfers. (Appellant's Brf., p.7) Appellants rely on R.C. 1336.08(A), which provides that "[a] transfer or an obligation is not fraudulent under division (A)(1) of section 1336.04 of the Revised Code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." Appellants assert that the subsequent transfers to their children cured any fraud that may have occurred in the original transfers.

{¶15} Appellee does not respond directly to this argument. Instead, Appellee argues that the trial court properly found the transfers were fraudulent based on three statutes. Beginning with R.C. 1336.05(B), Appellee argues that this provision is "somewhat akin to a strict liability statute." As to the elements, Appellee notes that Appellants do not dispute that the transfers took place after the federal claim had been filed. Those transfers were clearly completed by "insiders" who were the sole directors, officers, and shareholders of both companies. With the knowledge of the debt owed to Appellee and the insolvency of the companies, the properties were transferred to insiders. As to R.C. 1336.05(A), Appellee contends its claim arose before the transfers, the transfers were made without receipt of reasonably equivalent funds, and those transfers caused the companies to become insolvent. Finally, Appellee argues that the transfers were fraudulent pursuant to R.C. 1336.04(A)(1), which requires an analysis of eleven factors to determine actual intent to conduct a fraudulent transfer.

{¶16} We note that the parties appeared at a summary judgment "hearing," however, Appellants did not request the transcripts from that hearing. "It is the appellant's duty to transmit the record on appeal, including the transcript necessary for the determination of the appeal in accordance with App.R. 9(B). App.R. 10(A)." *In re Clinkscale*, 7th Dist. Mahoning No. 07-MA-23, 2008-Ohio-748, ¶ 12. We evaluate the arguments solely based on the evidence available within the appellate record.

{¶17} Although Appellants do not contest any element of these fraudulent transfer statutes, a review is provided for context. Appellants were found to have fraudulently transferred the property pursuant to three statutes: R.C. 1336.04(A), R.C. 1336.05(A),

R.C. 1336.05(B). Each of these statutes and the defenses named by Appellant are found within Chapter 1336 of the revised code.

{¶18} Beginning with R.C. 1336.04(A):

> A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before, or within a reasonable time not to exceed four years after, the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:
>
> (a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;
>
> (b) The debtor 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 became due.

{¶19} At issue, here, is subsection (A)(1) which requires actual intent to hinder, delay, or defraud a creditor. Actual intent is determined by evaluating eleven factors listed within subsection (B). R.C. 1336.04(B) states that:

(B) In determining actual intent under division (A)(1) of this section, consideration may be given to all relevant factors, including, but not limited to, the following:

(1) Whether the transfer or obligation was to an insider;

(2) Whether the debtor retained possession or control of the property transferred after the transfer;

(3) Whether the transfer or obligation was disclosed or concealed;

(4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;

(5) Whether the transfer was of substantially all of the assets of the debtor;

(6) Whether the debtor absconded;

(7) Whether the debtor removed or concealed assets;

(8) Whether 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;

(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;

(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

{¶20} Appellee focuses on the following R.C. 1336.04(B) factors: Mark and Nancy Ramunnos' status as "insiders," the transfers occurred after Appellee filed a federal claim, the transfers occurred shortly after a substantial debt, the companies were insolvent at the time of the transfers, the properties involved in the transfers were the major assets owned by the companies, the consideration received from the transfers was not "reasonably equivalent" in value, and Mark and Nancy retained control over the properties after the transfers.

{¶21} Again, Appellants appear to concede to a violation, but argue that they have a valid defense pursuant to R.C. 1336.08(A). However, Appellants did not raise this defense at any point during the trial court proceedings. Instead, they argued that the property was not technically transferred because Mark and Nancy originally bought the property as individuals and loaned the properties to the companies. The purpose of the subsequent transfers was merely to make Mark and Nancy whole after they loaned the company money for the Langston property. Because the defense was not raised before the trial court, neither the magistrate's decision nor the trial court's adoption of the magistrate's decision addressed it. Appellants' objections to the magistrate's decision also do not mention the defense.

{¶22} "[I]ssues not raised in the trial court may not be raised for the first time on appeal." *Mobberly v. Wade*, 2015-Ohio-5287, 44 N.E.3d 313, (7th Dist.), ¶ 25, citing *Mauersberger v. Marietta Coal Co.*, 7th Dist. Belmont No. 12 BE 41, 2014-Ohio-21; *State v. Abney*, 12th Dist. Warren No. CA2004-02-018, 2005-Ohio-146. As such, it appears that this issue is not properly before us.

{¶23} According to R.C. 1336.08(A), "[a] transfer or an obligation is not fraudulent under division (A)(1) of section 1336.04 of the Revised Code against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." Appellants argue that their children took the properties in good faith and for a reasonably equivalent value, $40,000.

{¶24} It is significant that all of these transfers occurred within the Ramunno family. Also, Mark and Nancy signed a promissory note to repay their children the $40,000 received from them at a future date. Based on these facts, Appellants cannot establish that any of these transfers were made in good faith. Even so, Appellants provide no support for their claim that these subsequent transfers can be substituted in place of the original transfers for purposes of R.C. 1336.08(A).

{¶25} Appellants bore the burden of establishing a defense under R.C. 1336.08(A)(1). See *E. Sav. Bank v. Bucci*, 7th Dist. Mahoning No. 08 MA 28, 2008-Ohio-6363. "Besides the general premise that defendants have the burden of establishing defenses, it is specifically well-established that once the UFTA plaintiff meets its burden of establishing a fraudulent transfer under R.C. 1336.04, the burden shifts to the defense." *Id.,* citing *Cardiovascular & Thoracic Surgery of Canton, Inc. v. DiMazzio*, 37 Ohio App.3d 162, 166, 524 N.E.2d 915 (5th Dist.1987); *Abood v. Nemer*, 128 Ohio App.3d 151, 155,

713 N.E.2d 1151 (9th Dist.1998). We must note, as did the trial court, the subsequent transferees were the Ramunnos' children. Appellants did not present any evidence that can be found in this limited record to suggest that $40,000 was appropriate consideration or that this subsequent transfer was made in good faith.

{¶26} Appellants also attempt to rely on R.C. 1336.05(A), (B). Pursuant to R.C. 1336.05:

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
>
> (B) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the transfer was made to or the obligation was incurred with respect to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

{¶27} The exception cited by Appellants, R.C. 1336.08(A), is expressly limited to transfers involving R.C. 1336.04(A)(1). Although Appellants do not address this, a separate subsection of R.C. 1336.08 applies to violations of R.C. 1336.05(A), (B). Pursuant to R.C. 1336.08:

(D) A transfer is not fraudulent under division (A)(2) of section 1336.04 or section 1336.05 of the Revised Code if the transfer results from either of the following:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law;

(2) Enforcement of a security interest in compliance with section sections 1309.601 to 1309.604 of the Revised Code.

(E) A transfer is not fraudulent under division (B) of section 1336.05 of the Revised Code as follows:

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider;

(3) If made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

{¶28} As to the violation of R.C. 1336.05(A), subsection D clearly does not apply, here, as this matter does not involve a lease or security interest.

{¶29} As to the R.C. 1336.05(B) violation, Appellants' best argument might arise under subsections (E)(2) and (E)(3). However, Appellants have provided no evidence that any of these transfers were made in the ordinary course of business necessary to (E)(2). As to subsection (E)(3), Appellants did not send any money received from the transfer to Appellee.

{¶30} Based on the record before us, even if these defenses were properly raised for the first time on appeal, and they are not, Appellants have not met their burden of establishing the elements. Appellants do not attack the decision of the trial court on any other grounds. As this record reflects the initial transfers were clearly fraudulent and Appellants have produced no evidence to show that any subsequent transfer was appropriate, Appellants' first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> The Trial Court erred in nothing [sic] finding res judicata applies to the circumstances of the fraudulent transfer.

{¶31} Appellants argue that Appellee raised the issue of the property transfers in the bankruptcy proceedings and those claims were adjudicated in those proceedings.

{¶32} Appellee argues that the bankruptcy court did not enter a final ruling on those claims. Even so, the Board argues that Appellants have failed to address all elements necessary to find the matter to be *res judicata.*

{¶33} Preliminarily, Mark and Nancy Ramunno as individuals were not a party to the bankruptcy proceedings. Thus, any argument regarding *res judicata* do not apply to claims filed against them as individuals. Additionally, while the bankruptcy docket does

indicate that Appellee entered an appearance in those proceedings, there is no evidence within this record to demonstrate that the bankruptcy court addressed or resolved any issues related to the property transfers involved in the instant case.

{¶34} Because this record on appeal does not demonstrate that the bankruptcy court addressed or resolved any issues surrounding the transfers at the heart of this case, this record does not establish that *res judicata* applies. As such, Appellants' second assignment of error is without merit and is overruled.

Conclusion

{¶35} Appellants argue that the trial court erroneously determined that a fraudulent transfer had occurred where Appellants now claim that a subsequent transfer was made in good faith and for a reasonably equivalent value which operated to cure any harm caused by the initial fraudulent transfer. Appellants also argue that Appellee brought claims regarding these transfers during the Chapter 7 bankruptcy proceedings of Ramunno Builders and Ramunno Family Builders, thus are barred by *res judicata* from raising those same claims in state court. For the reasons provided, Appellants' arguments are without merit and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

Robb, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellants.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.