IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ESTATE OF JOE K. SNELL, *Plaintiff/Appellee*,

v.

CHARLES MARTIN, et al., *Defendant/Appellants*,

WELLS FARGO BANK NA, *Garnishee/Appellee.*

No. 1 CA-CV 18-0321
FILED 8-13-2019

Appeal from the Superior Court in Maricopa County
No. CV2014-050563
The Honorable Steven K. Holding, Commissioner

AFFIRMED

COUNSEL

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Counsel for Plaintiff/Appellee

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By Carlie Tovrea, Daniel J. Inglese
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By Gregory G. McGill
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Chief Judge Peter B. Swann delivered the decision of the Court, in which Presiding Judge Michael J. Brown and Judge Kenton D. Jones joined.

S W A N N, Judge:

¶1 Appellants Kenneth Charles Martin and Kathi Norton appeal the trial court's order requiring them to disgorge $58,500 after finding they had fraudulently transferred the money from three bank accounts to avoid garnishment. They also appeal the trial court's order denying their motion for new trial. For the following reasons we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In 2017, appellee, the Estate of Joseph Snell (the estate), obtained a judgment against appellants totaling over $1 million.[1] On November 21, 2017, in an effort to enforce the judgment, the estate filed an application for a writ of garnishment against appellee Wells Fargo Bank NA (Wells Fargo). In answering the writ of garnishment, Wells Fargo incorrectly stated that it was not holding funds for appellants. On December 7, 2017 the estate filed an objection to that answer and requested a hearing. In the week after the estate filed the objection and request for hearing, appellants withdrew a total of $58,500 from their three Wells Fargo accounts. The accounts were frozen on December 13, 2017.

[1] This court recently issued a memorandum decision affirming the damages award but remanding for a re-determination of the fee award. *See Estate of Snell v. Martin,* No. 1 CA-CV 17-0629, 2018 WL 6495397, at *4, ¶ 21 (Ariz. App. Dec. 11, 2018) (mem. decision).

¶3 At the garnishment hearing the Wells Fargo representative testified that the bank had made a mistake in their answer and that appellants in fact held three accounts with Wells Fargo. The representative further testified that the mistake occurred because the bank was confused by the name on the accounts, which was "Martin-Norton Living Trust, LLLP." However, it was later realized by the bank that each account was a trust account and at least one of the appellants was listed as a trustee on each account. Appellants did not provide any evidence that they control a limited liability limited partnership in the name listed on the bank accounts. Instead, appellants control a LLLP in the name of "Martin-Norton Family, LLLP" and a trust in the name of "Martin-Norton Living Trust." Additionally, Mr. Martin testified that they created the accounts to reduce their liability to potential creditors and that the money in the accounts was from personal funds, not from any businesses they controlled.

¶4 Following the hearing, the court found that Wells Fargo had violated its disclosure requirement and breached its duty by not freezing the accounts in question and ordered Wells Fargo to pay the estate $61,476.91. The trial court also found that appellants intentionally attempted to avoid creditors by creating a "hybrid" account and "aggressively attempted to evade a valid judgment by withdrawing funds as soon as they were aware that those funds may be subject to a garnishment." The court therefore ordered appellants to disgorge $58,500 to the clerk of the court. Appellants filed a motion for new trial, which the superior court denied. Appellants then filed this timely appeal.

DISCUSSION

I. Jurisdiction

¶5 As an initial matter, we address both appellees' arguments that this court lacks jurisdiction over the appeal. Both appellees argue that because there are still proceedings that could occur to enforce the disgorgement order, and because the court did not make specific findings as to what will happen with the money if it is ever disgorged to the clerk of the court, it is not a final judgment. We find this argument unpersuasive. Indeed, neither party cites to any case law that would indicate that the possibility of additional proceedings to enforce a judgment would have any effect on the finality of that judgment. A judgment is final when it resolves the parties' rights and liabilities as to the controversy between them. *Fields v. Oates*, 230 Ariz. 411, 415-16, ¶ 17 (App. 2012). The judgment in this instance is final because there remain no issues between the parties. Appellants are ordered to disgorge funds to the clerk of the court; once

those funds are disgorged Wells Fargo may seek to have them distributed to it from the clerk of the court, and appellants will have no right to the funds or have incurred any liabilities to Wells Fargo. Thus, it is a final order as to the parties in this matter.

¶6 Wells Fargo also argues that the order is not a final order because the initial under advisement ruling did not contain the necessary language pursuant to Arizona Rules of Civil Procedure (Rule) 54(b) or (c) and the court's later order incorporating the under advisement ruling with Rule 54(c) language did not change it to a final order. We disagree. This court specifically stayed the appeal so appellants could seek a final order from the trial court with the necessary Rule 54 language. The trial court corrected the error and the judgment became final and appealable. We therefore have jurisdiction under Arizona Revised Statutes (A.R.S.) section 12-2101(A)(1) (2019).

II. Standing to Join the Estate of Joe Snell into the Appeal and Request to Dismiss Appeal for Failure to Obey a Court Order

¶7 The estate argues that appellants do not have standing to bring them into this appeal because they have no interest in its outcome. Wells Fargo has already paid the estate the $61,476.91 as ordered by the court, and the estate is thus "made whole." The estate argues that standing requires that each party possess an interest in the outcome of the litigation, citing *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8*, 221 Ariz. 104, 108, ¶ 7 (App. 2009). [Id.] Because we affirm the trial court's ruling we do not address this issue. *See Manic v. Dawes*, 213 Ariz. 252, 253, ¶ 5 (App. 2006).

¶8 Citing to *Stewart v. Stewart*, 91 Ariz. 356 (1962), the estate also argues that this court should dismiss the appeal because appellants seek to reverse a court order that they have disobeyed. We find many distinctions between the *Stewart* case and the current appeal. Namely, in *Stewart* the appellant had disobeyed multiple court orders during his divorce proceedings, was found to be in contempt of court, and was a fugitive of the court hiding out in California. *Id.* at 357-58. Here, appellants have failed to satisfy one judgment. Additionally, we deny the request to dismiss the appeal based on the appellants' failure to obey the trial court order. *Id.* at 358.

III. Disgorgement Order

¶9 We review the superior court's garnishment judgment for an abuse of discretion. *Cota v. S. Ariz. Bank & Trust Co.*, 17 Ariz. App. 326, 327

(1972). "An abuse of discretion occurs when there is no evidence to support a holding or the court commits an error of law when reaching a discretionary decision." *Dowling v. Stapley*, 221 Ariz. 251, 266, ¶ 45 (App. 2009) (citations omitted). We view the evidence in a light most favorable to sustaining the superior court's ruling and will not disturb the judgment if there is evidence to support it. *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 5 (App. 1998).

¶10 Appellants argue that the trial court abused its discretion by finding that they intended to defraud the estate. They argue that there was not "a scintilla of evidence" that they caused confusion with the naming of the three Wells Fargo bank accounts, that any confusion that existed meant that they acted to evade the judgment against them, that they were responsible for the bank's incorrect answer to the writ of garnishment, or that they transferred any funds after the January 2018 charging order.[2] We disagree.

¶11 First, we note that the court did not make any findings regarding confusion in the naming of the accounts, nor did it find that appellants were responsible for the bank's incorrect answer. Nor did the court make a finding regarding anything occurring after the charging order. Instead, the court found that the appellants "attempted to create a 'hybrid' (a cross between a trust and Limited Liability Partnership) to avoid creditors," and that they "aggressively attempted to evade a valid judgment by withdrawing funds as soon as they were aware that those funds may be subject to a garnishment." The evidence supports this finding.

¶12 Although there was not a claim made directly under Arizona's Uniform Fraudulent Transfer Act (UFTA), garnishment proceedings are an appropriate avenue to resolve fraudulent conveyance matters. *Carey v. Soucy,* 245 Ariz. 547, 551-552, ¶ 17 (App. 2018)*; see also Premier Fin. Services v. Citibank (Ariz.)*, 185 Ariz. 80, 86 (App. 1995) (affirming superior court's conclusion at a garnishment proceeding that parents fraudulently transferred a certificate of deposit to their daughter). Thus, we look to the UFTA to determine what constitutes a fraudulent transfer.

¶13 Under the UFTA a transfer is fraudulent, whether the creditor's claim arose before or after the transfer was made, if the debtor

[2] Appellants also assert that the commissioner lacked the authority to order a disgorgement under Arizona Supreme Court Rule 96. This argument was not raised in the trial court and was therefore waived. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, 265, ¶ 15 (App. 2004).

made the transfer with 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 whether the debtor had been sued or threatened with suit before the transfer was made. A.R.S. § 44-1004(B)(4). Actual intent to defraud, hinder, or delay a creditor may be shown by direct proof or by circumstantial evidence from which actual intent may be reasonably inferred. *Gerow v. Covill*, 192 Ariz. 9, 17, ¶ 33 (App. 1998) (citations omitted). When a court finds a fraudulent transfer has occurred it may order "[a]n attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by law." A.R.S. § 44-1007(A)(3). Disgorgement orders are appropriate when issued to prevent a wrongdoer from enriching himself through ill-gotten gains. *Hirsch v. Ariz. Corp. Comm'n*, 237 Ariz. 456, 466, ¶ 41 (App. 2015).

¶14 At the hearing, Mr. Martin testified that the three Wells Fargo Bank accounts were set up to reduce liability exposure. He also testified that the LLLP named on the account does not exist, nor does the LLLP he does have, "Martin-Norton Family, LLLP," generate income. Additionally, he testified that although the names on the three accounts are LLLPs, the accounts are in fact trust accounts. [Id. at 3]. Finally, Mr. Martin testified that he withdrew the money after he found out the estate was seeking garnishment of the three accounts and did so to "make sure that if anything happened during these proceedings" his mother would be taken care of. The evidence supports the trial court's findings and the court therefore did not abuse its discretion in finding that appellants sought to evade a valid judgment. The court appropriately ordered appellants to disgorge the funds they fraudulently transferred to prevent them from enriching themselves through ill-gotten gains. We therefore affirm the order.

IV. Attorneys' Fees and Costs

¶15 Appellees Wells Fargo, and the estate request attorneys' fees and costs pursuant to Arizona Rules of Civil Appellate Procedure (ARCAP) 25, asserting that the appeal was frivolous. In our discretion we decline to award attorneys' fees pursuant to ARCAP 25. The estate also requests attorneys' fees and costs pursuant to A.R.S. § 12-1580. However, that statute only allows this court to award fees against the debtor if the "judgment debtor is found to have objected to the writ solely for the purpose of delay or to harass the judgment creditor." A.R.S. § 12-1580(E); *see also Ironwood Commons Cmty. Homeowners Ass'n, Inc. v. Randall*, 246 Ariz. 412, 417, ¶ 22 (App. 2019). We cannot say that appellant's appeal was filed for the purpose

of delay or harassment. We therefore decline to award attorneys' fees on that basis.

¶16 Additionally, appellants and both appellees request attorneys' fees pursuant to ARCAP 21(a). However, ARCAP 21(a) does not provide a substantive basis for a fee award and only sets forth the procedure for requesting fees. *See Bed Mart, Inc. v. Kelley*, 202 Ariz. 370, 375, ¶ 24 (App. 2002). We therefore deny the requests.

CONCLUSION

¶17 For the foregoing reasons the trial court's order requiring appellants to disgorge $58,500 to the clerk of the court is affirmed. We award costs to appellees Wells Fargo and the estate upon compliance with ARCAP 21.

AMY M. WOOD • Clerk of the Court
FILED: AA