Northern Natural Gas Company v. Sheerin et al Doc. 31

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

NORTHERN NATURAL GAS COMPANY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. SA-09-CV-709-XR
	§	
BETTY LOU SHEERIN and JAMES L. SHEERIN,	§	
	§	
	§	
Defendants.	§	

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

On this day, the Court considered Plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 18), Defendants' response, and Plaintiff's reply. In evaluating the evidence attached to Defendants' response, the Court has also considered Plaintiff's Objections to Defendants' evidence (Docket Entry No. 24) and the responses thereto. Plaintiff's Objections are OVERRULED, and Plaintiff's Motion for Partial Summary Judgment is GRANTED IN PART AND DENIED IN PART.

Background

On November 13, 2002, Plaintiff Northern Natural Gas Company ("Northern") filed suit in Texas state court against Betty Lou Sheerin in connection with a $1,950,000 promissory note signed by Sheerin and McDay Energy Partners, Ltd. *N. Natural Gas Co. v. Sheerin*, No. 2002-CI-16421 (288th Dist. Ct., Bexar County, Tex. Nov. 13, 2002).[1] On February 8, 2008, Northern obtained a jury verdict in its favor against Betty Lou Sheerin in the amount of $1,950,000, plus $500,000 in

[1]The claims against McDay Energy Partners were severed and tried in a separate action. *See N. Natural Gas Co. v. Sheerin*, No. 2008-CI-01245 (288th Dist. Ct., Bexar County, Tex.).

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attorney's fees, for a total of $2,450,000.[2]

While the suit proceeded in state court, Betty Lou Sheerin and her husband, James L. Sheerin, owned approximately 4.47 acres of property and a 4,600 square-foot house in Newport, Rhode Island, as tenants by the entirety.[3] Tax records list the assessed value of the property at $5,188,200.[4] On August 29, 2008, following the rendering of the jury's verdict but before the state trial court's issuance of the final judgment, Betty Lou Sheerin transferred her interest in the property to her husband for $50,019.88.[5] James L. Sheerin claims in his affidavit, without providing supporting evidence, that he purchased the Newport property with his own separate property, and although the property was taken in his and his wife's name as tenants in the entirety, he did not intend to make a gift of the Newport property to her.[6] Mr. Sheerin states that it was determined in 2008 that his wife had a community interest in the property, and he compensated her for her share of the community property interest.[7]

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[2]*N. Natural Gas Co. v. Sheerin*, No. 2002-CI-16421 (288th Dist. Ct., Bexar County, Tex. Feb. 7, 2008) (Charge of the Ct.) (Pl.'s Ex. A).

[3]Warranty Deed, City of Newport, R.I., Book 790 at 92–95 (Jan. 2, 1998) (Pl.'s Ex. B).

[4]Letter from Allan Booth, Assessor, City of Newport attach. (Feb. 5, 2010) (Pl.'s Ex. D). James L. Sheerin disputes this amount, stating in his affidavit: "It is my opinion that the fair market value of the property is $4,900,000. I base my opinion, in part, on the December 31, 2005 appraisal of Raymond R. Heins, a certified residential appraiser." Aff. of James L. Sheerin (Apr. 2, 2010) (Defs.' Ex. A). Defendants do not include a copy of the 2005 appraisal or explain how the value of the home differs from that of the value assessed by the City of Newport, Rhode Island's Assessor's Office.

[5]Warranty Deed, City of Newport, R.I., Book 1961 at 86–88 (Aug. 29, 2008) (Pl.'s Ex. C).

[6]Defs.' Ex. A ¶¶ 13–14.

[7]*Id.* ¶ 14. Mr. Sheerin states that he compensated his wife $50,018.22. The warranty deed executed on August 29, 2008, states the value was $50,019.88. Pl.'s Ex. C at 3. Certified Public

The state trial court granted Northern's motion to disregard the jury's findings on the amount of damages and issued a final judgment on October 3, 2008.[8] The court awarded Northern contract damages in the amount of $3,010,515.93, plus $500,000 in attorney's fees, for a total of $3,510,515.93. On December 16, 2008, another state district judge granted Betty Lou Sheerin's request for a new trial, but the Texas Fourth Court of Appeals granted Northern's petition for a writ of mandamus, compelling the trial court to vacate the portion of its order that pertained to Betty Lou Sheerin's liability and attorney fees.[9]

Northern filed suit in this Court against Betty Lou Sheerin and James L. Sheerin for committing a fraudulent transfer or conveyance in violation of the Texas Uniform Fraudulent Transfer Act ("TUFTA"), TEX. BUS. & COM. CODE ANN. § 24.001 *et seq.* (Vernon 2008). Northern seeks a declaratory judgment pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 (2006), that the Sheerins are liable to Northern for fraudulent transfers; avoidance of the transfer to the extent necessary to satisfy Northern's claim; an injunction of further disposition of the Newport property; an injunction against further disposition by Betty Lou Sheerin of her separate, joint, and community property; an injunction against further disposition by either of the Sheerins of their joint or community property; judgment against the Sheerins for the value of the asset transferred

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Accountant C. Michael Gentry, who prepared a statement of assets and liabilities for Betty Lou Sheerin in 2008, attests that Ms. Sheerin's one-half interest in the reduction of the mortgage principal for the loan Mr. and Ms. Sheerin signed was $50,019.88. Aff. of C. Michael Gentry ¶ 3 (Apr. 2, 2010) (Defs.' Ex. B).

[8] *N. Natural Gas Co. v. Sheerin*, No. 2002-CI-16421 (288th Dist. Ct., Bexar County, Tex. Oct. 3, 2008) (Final J.) (Pl.'s Ex. E).

[9] *In re N. Natural Gas Co.*, No. 04-09-284-CV, slip op. (Tex. App.—San Antonio Dec. 23, 2009) (orig. proceeding [mandamus conditionally granted in part]) (Pl.'s Ex. G).

or the amount necessary to satisfy Northern's claims; and attorney fees.

Procedural History

Northern filed its First Amended Complaint on September 4, 2009,[10] and moved for partial summary judgment on February 19, 2010.[11] The Court granted the Sheerins an extension of time to respond to the motion pursuant to Federal Rule of Civil Procedure 56(f).[12] The Sheerins responded on April 2, 2010,[13] and Northern replied.[14] Northern has objected to evidence proffered by Defendants[15] to which the Defendants have responded.[16] Regarding the objection, Northern has replied,[17] and the Sheerins have filed a sur-reply without seeking leave of the Court.[18]

Legal Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, "a party may move for summary judgment at any time until 30 days after the close of all discovery." FED. R. CIV. P. 56(c)(1)(A).

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[10]1st Am. Compl., Sept. 4, 2009 (Docket Entry No. 2).

[11]Pl.'s Mot. for Partial Summ. J., Feb. 19, 2010 (Docket Entry No. 18).

[12]Order on Mot. for Extension of Time to Respond, Mar. 1, 2010 (Docket Entry No. 20).

[13]Defs.' Resp. to Pl.'s Mot. for Partial Summ. J., Apr. 2, 2010 (Docket Entry No. 21).

[14]Pl.'s Reply to Defs.' Resp. to Pl.'s Mot. for Partial Summ. J., Apr. 13, 2010 (Docket Entry No. 23).

[15]Pl.'s Objections to Evidence as Proffered in Defs.' Resp. to Pl.'s Mot. for Partial Summ. J., Apr. 13, 2010 (Docket Entry No. 24).

[16]Defs.' Resp. to Pl.'s Objections to Evidence as Proffered in Defs.' Resp. to Pl.'s Mot. for Partial Summ. J., Apr. 23, 2010 (Docket Entry No. 25).

[17]Pl.'s Reply to Defs.' Resp. to Pl.'s Objections to Evidence as Proffered in Defs.' Resp. to Pl.'s Mot. for Partial Summ. J., Apr. 30, 2010 (Docket Entry No. 26).

[18]Defs.' Resp. Pl.'s Reply to Defs.' Resp. to Pl.'s Objections to Evidence as Proffered in Defs.' Resp. to Pl.'s Mot. for Partial Summ. J., May 9, 2010 (Docket Entry No. 27).

Summary judgment is appropriate if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.* R. 56(c)(2); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict in favor of the nonmoving party. *Anderson*, 477 U.S. at 248; *Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000). A fact is "material" if its resolution in favor of one party might affect the outcome of the case. *Anderson*, 477 U.S. at 248; *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 409 (5th Cir. 2002). The Court reviews all facts in the light most favorable to the nonmoving party. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177, 181 (5th Cir. 2009).

"A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim." FED. R. CIV. P. 56(a). To obtain summary judgment, "if the movant bears the burden of proof on an issue . . , he must establish beyond peradventure *all* of the essential elements of the . . . [claim] to warrant judgment in his favor." *Chaplin v. NationsCredit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)) (first ellipses and bracket added). If the moving party fails to meet its burden, then the motion must be denied, regardless of the non-movant's response. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001).

Once the moving party meets its initial burden, the nonmoving party "must . . . set out specific facts showing a genuine issue for trial." FED. R. CIV. P. 56(e)(2); *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994). To avoid summary judgment, the nonmoving party must adduce admissible evidence that creates a fact issue and unsubstantiated assertions of actual dispute will not

suffice. *Thomas v. Price*, 975 F.2d 231, 235 (5th Cir. 1992). An affidavit must be made on personal knowledge and "[i]f a paper or part of a paper is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit." FED. R. CIV. P. 56(e)(1). "A party's self-serving and unsupported claim . . . is not sufficient to defeat summary judgment . . . ." *In re Hinsley*, 201 F.3d 638, 643 (5th Cir. 2000).

Analysis

A. Fraudulent Transfer Overview

"A fraudulent transfer is a transfer by a debtor with the intent to hinder, delay, or defraud his creditors by placing the debtor's property beyond the creditor's reach." *Nobles v. Marcus*, 533 S.W.2d 923, 925 (Tex. 1976). Pursuant to the Texas Uniform Fraudulent Transfer Act:

> A transfer made or 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.

TEX. BUS. & COM. CODE ANN. § 24.006(a). A fraudulent transfer also occurs when a creditor's claim arises:

> before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation (1) with actual intent to hinder, delay, or defraud any creditor of the debtor . . . .

Id. § 24.005(a)(1). Following a fraudulent transfer, a creditor is entitled to judgment against "(1) the first transferee of the asset or the person for whose benefit the transfer was made; or (2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent

transferee." *Id.* § 24.009(b)(1)–(2).

B. Determining Whether Betty Lou Sheerin Received a Reasonably Equivalent Value

A fraudulent transfer occurs when a debtor transfers property without receiving a reasonably equivalent value in exchange for the transfer or obligation. *Id.* § 24.006(a); *see also id.* § 24.005(a)(2).[19] "[A] person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." *Id.* § 24.004(b).[20] "The primary consideration in analyzing the exchange of value for any transfer is the degree to which the transferor's net worth is preserved." *S.E.C. v. Resource Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir. 2007) (quoting *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006)). The value of consideration is viewed from the perspective of the creditors. *In re Hinsley*, 201 F.3d at 643. Value is determined as of the date of transfer. *Mladenka v. Mladenka*, 130 S.W.3d 397, 408 (Tex. App.—Houston [14 Dist.] 2004, no pet.) (citing *In re Hinsley*, 201 F.3d at 643).

Northern argues that the Sheerins own the Rhode Island property in a tenancy by the entirety, and the property was worth $5,188,200 in 2008.[21] Plaintiff contends that Betty Lou Sheerin's

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[19]Whether or not a transferee received reasonably equivalent value is a factor courts may use to find actual intent under Section 24.005(a)(1). TEX. BUS. & COM. CODE ANN. § 24.005(b)(8). While it may also be a statutory element under Section 24.005(a)(2), just as it is in Section 24.006(a), Plaintiff has moved for summary judgment under Section 24.005(a)(1) and not (a)(2).

[20]Texas's statute includes the following provision: "'Reasonably equivalent value' includes without limitation, a transfer or obligation that is within the range of values for which the transferor would have sold the assets in an arm's length transaction." TEX. BUS. & COM. CODE ANN. § 24.004(d).

[21]Mot. at 6–7; Pl.'s Ex. D.

transfer of her interest in the property to her husband, James L. Sheerin, for $50,019.88 is not a reasonably equivalent value in light of the property's total appraised value of $5,188,200.[22]

The Sheerins claim that despite the deed that states they owned the Rhode Island property as a tenancy by the entirety, the property was actually James L. Sheerin's separate property.[23] They claim that based on a tracing of funds, it was determined that there was a community interest in the property of $100,039.76 as a result of payments made to reduce a 2002 mortgage.[24] To compensate Betty Lou Sheerin for her $100,039.76 community property interest in the Rhode Island property, James L. Sheerin paid her $50,019.88.[25]

Based on the party's characterizations, if the Sheerins' version of events is supported by the evidence, then Betty Lou Sheerin received a reasonably equivalent value for her relatively small, community property-share of the Rhode Island property. If Northern's version of events is supported by the evidence, then Betty Lou Sheerin did not receive a reasonably equivalent value when she divested her share of the tenancy by the entirety of the Rhode Island property. Determining whether Betty Lou Sheerin received a reasonably equivalent value for her share of the Rhode Island property depends on whether James L. Sheerin owned it as his separate property or whether both he and Betty Lou Sheerin owned it in a tenancy by the entirety.

1. The Rhode Island property was held as a tenancy by the entirety.

Rhode Island recognizes the creation of tenancies by the entirety as they existed in the

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[22]Mot. at 7; Pl.'s Ex. C.

[23]Resp. at 4.

[24]*Id.* at 7–8.

[25]*Id.*

common law. *Bloomfield v. Brown*, 25 A.2d 354, 356 (R.I. 1942); *see also Ruffel v. Ruffel*, 900 A.2d 1178, 1188 (R.I. 2006).[26] The Rhode Island Supreme Court has directly stated:

> At common law, tenancies by the entirety are created when there exist the four unities integral to the existence of the joint tenancy, namely the unities of time, interest, title and possession, *Knibb v. Security Insurance Co.*, 399 A.2d 1214, 1216 (R.I. 1979), plus the fifth unity, two natural persons as one person in law. *Van Ausdall v. Van Ausdall*, 135 A. 850, 851 (R.I. 1927).

Cull v. Vadnais, 406 A.2d 1241, 1244 (R.I. 1979). Defendants argue that no tenancy by the entirety was created because James L. Sheerin and Betty Lou Sheerin did not have a unity of interest since James Sheerin acquired the property as his separate property.[27]

"Unity of interest" means that the tenants' interests in the estate are equal; "the fact that they do not make equal contributions to the purchase price does not preclude the existence of a joint tenancy." 48A C.J.S. *Joint Tenancy* § 8 (2010). "When, during the course of a marriage, title to property for which one spouse has paid the purchase price is acquired in the names of both spouses, the transaction is presumed to be a gift or advancement for the benefit of the other spouse."

[26] In the Court's order on Defendants' motion to dismiss, the Court stated: "As there is no discernable conflict between the applicable laws covering fraudulent transfers of Texas and Rhode Island, 'the law of the forum state, Texas, should apply here as there is no conflict between the substantive law of Texas and [Rhode Island].'" Order on Mot. to Dismiss & Mot. for More Definite Statement 8, Dec. 14, 2009 (Docket Entry No. 9) (quoting *Schnieder Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532, 536 (5th Cir. 2008)). The evaluation of the nature of the Rhode Island property, however, is subject to the laws of Rhode Island. *See Brown v. Comm'r of Internal Revenue*, 180 F.2d 946, 950 (5th Cir. 1950) ("The law which governs the title to and the disposition of land is always that of the place where the land is situated."). While the issue regarding the fraudulent transfer may be adjudicated under the laws of Texas, the nature of the Rhode Island property is determined by the laws of Rhode Island.

[27] Defendants claim to have traced the funds of the Rhode Island property to James L. Sheerin's separate property. Defendants incorrectly base their entire analysis on Texas law. The Court, however, is able to apply the law of Rhode Island to the facts presented by Plaintiff and Defendants.

Stephenson v. Stephenson, 811 A.2d 1138, 1142 (R.I. 2002) (quoting *Quinn v. Quinn*, 512 A.2d 848, 852 (R.I. 1986)). Under the doctrine of transmutation, an individual can convert nonmarital, or separate property, into marital property if it is "changed in form and put into joint names." *Cloutier v. Cloutier*, 567 A.2d 1131, 1132 (R.I. 1989) (citing *Quinn*, 512 A.2d at 852). Under Rhode Island law, property purchased during the course of the marriage is presumed to be marital property absent clear and convincing evidence to the contrary. *See Quinn*, 512 A.2d at 852.

The evidence before the Court establishes that the Sheerins created a tenancy by the entirety. The warranty deed for the Rhode Island property reads: "I [the previous owner], for consideration paid, grant to J. Lawrence Sheerin and Betty Lou Sheerin, husband and wife, both of the City of San Antonio in the State of Texas, *as tenants by the entirety* and not as tenants in common . . . ."[28] In the deed divesting Betty Lou Sheerin's share in the Rhode Island property to her husband, the parties likewise acknowledge that she owns the property as a tenant by the entirety.[29] Based on this evidence, the Court presumes the Sheerins created a tenancy by the entirety.

Mr. Sheerin attempts to overcome the presumption by claiming that he did not intend to make a gift of the property to his wife. Mr. Sheerin attests that he purchased the Rhode Island property

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[28]Pl.'s Ex. B (emphasis added).

[29]Pl.'s Ex. C. The deed reads:

> KNOW ALL MEN BY THESE PRESENTS, That I, Betty Lou Sheerin, *as a tenant by the entirety* and not as a tenant in common, grant to J. Lawrence Sheerin, both of the City of San Antonio in the State of Texas, as his sole and separate property and estate, and with warranty covenants all of my right, title and interest in and to . . . .

Pl.'s Ex. C at 1 (emphasis added). (James L. Sheerin states that his middle name is misspelled as "Lawrence" in many public documents even though it is legally "Laurence.")

with his separate funds.[30] He claims that the earnest money came from his separate property funds and the remaining consideration came from a separate property loan from Texas State Bank in the principal amount of $1,374,977.50. However, to close on the property, he states that he used funds borrowed from Frost National Bank as a bridge loan to the Texas State Bank loan. Mr. Sheerin attests,"My wife and I signed the note to Frost Bank in the original sum of $1,320,000.00" even though he "considered this bridge loan to be [his] separate obligation."[31] Sheerin claims he paid off the bridge loan with the proceeds of his separate property loan from Texas State Bank.

Defendants' evidence fails to overcome the presumption that a tenancy by the entirety was created. No evidence supports Sheerin's self-serving declarations that he used his separate funds to procure the Rhode Island property. Defendants do not include any copy of the Texas State Bank loan or any bank account statement to show that Mr. Sheerin purchased the Rhode Island property with his separate funds. They do not include any supporting document to show that he paid the Texas State Bank loan with his separate funds. Moreover, he admits to willingly using a bridge loan signed by both he and his wife to purchase the property, which demonstrates a commingling of funds and obligations contrary to any intent to acquire the Rhode Island property as separate property. Mr.

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[30]Mr. Sheerin declares:

> I purchased this property with my separate funds. The earnest money came from my separate property funds. The remaining interest came from a separate property loan from the Texas State Bank in the principal amount of $1,374,977.50 dollars dated February 2, 1998. This is the loan I intended to use for the purchase money for the property and it was so used in the following manner: in order to close on the property on or about January 2, 1998, I utilized funds borrowed from Frost National Bank as a bridge loan to the Texas State Bank loan.

Defs.' Ex. A ¶ 13 at 2–3.

[31]*Id.*

Sheerin states that he "did not intend to make a gift of any part of [his] separate property interest and ownership in the property to [his] wife, Betty Lou Sheerin." However, none of the evidence provided to the Court supports his self-serving statement or creates a material issue of fact for dispute on this point. Defendants' self-serving affidavit is insufficient to defeat summary judgment.

Defendants also include the affidavit of C. Michael Gentry, a Certified Public Accountant who was hired to prepare a statement of assets and liabilities for Betty Lou Sheerin. Gentry calculated Ms. Sheerin's community property interest based on information provided to him regarding a 2002 mortgage loan on the residence by Chevy Chase Bank, F.S.B. Attached to Mr. Gentry's affidavit is a Mortgage Loan Modification Agreement from Chevy Chase Bank, F.S.B., dated June 12, 2007, that contains the signatures of both James Lawrence Sheerin and Betty Lou Sheerin. Also attached is an unsigned, October 31, 2002, note from Chevy Chase Bank, F.S.B. in the amount of $2,050,000 for the Rhode Island property. The final attachment is a May 8, 2008, account statement from Chevy Chase Bank to J. Lawrence Sheerin and Betty Lou Sheerin showing a principal balance of $1,962,242.11. There is no explanation as to how any of the Chevy Chase documents relate to Mr. Sheerin's affidavit about the Texas State Bank Loan being his separate property. If anything, the documents contradict his unsupported statements since they contain both his and his wife's name on them. Consequently, none of the evidence provided by the Sheerins creates an issue of fact that the Sheerins intended to create anything other than a tenancy by the entirety. In fact, the evidence before the Court establishes that Defendants held the Rhode Island property as a tenancy by the entirety.

2. Betty Lou Sheerin did not transfer her interest for reasonably equivalent value.

The inquiry as to whether a value constitutes a reasonably equivalent value is "largely a

question of fact, as to which considerable latitude must be allowed to the trier of the facts." *In re TransTexas Gas Corp.*, 597 F.3d 298, 306 (5th Cir. 2010) (quoting *In re Dunham*, 110 F.3d 286, 289 (5th Cir. 1997) (citations and internal quotation marks omitted)). This does not, however, "preclude a court from deciding that issue on summary judgment where no genuine issue of material fact exists." *Villaje Del Rio, Ltd. v. Colina Del Rio, LP*, No. SA-07-CA-947-XR, 2009 WL 2498238, at *4 (W.D. Tex. Aug. 12, 2009) (citing *Yokogawa Corp. of Am. v. Skye Intern. Holdings, Inc.*, 159 S.W.3d 266, 271 (Tex. App.—Dallas 2005, no pet.)). Tax assessment records from the City of Newport, Rhode Island, value the Rhode Island property at $5,188,200 in 2008.[32] Betty Lou Sheerin therefore had a share in the tenancy by the entirety valued at $2,594,100.[33] James L. Sheerin paid only $50,018.22 to Betty Lou Sheerin for her share of the property.[34] The payment constitutes only 1.93% of the value Betty Lou Sheerin held in the property.[35]

The Sheerins provide the Court with no evidence or even an argument that the $50,018.22 paid to Betty Lou Sheerin constitutes a reasonably equivalent value for her share of a tenancy by the entirety. Defendants' entire response is premised on the argument that the Rhode Island property was not a tenancy by the entirety, and the $50,018.22 is the one-to-one compensation for her share

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[32]Pl.'s Ex. D. In his affidavit, James L. Sheerin provides an unsupported, self-serving statement that the fair market value of the property is $4,900,000. *See supra* note 4.

[33]The share of ownership in a joint tenancy is presumed to be equal unless contrary evidence can be shown. *Flori v. Bolster*, No. C.A. PC/03-6151, 2006 WL 1073423, at *4 (R.I. Super. Ct. April 18, 2006) (citing *Lucchetti v. Lucchetti*, 127 A.2d 244, 248 (R.I. 1956)). "A joint tenant of real property holds an 'undivided one-half interest' in the property." *Ruffel*, 900 A.2d at 1188 (citing *Lucchetti*, 127 A.2d at 248).

[34]Pl.'s Ex. C at 3; Defs.' Ex. A ¶ 14 at 3.

[35]Even accepting Defendants' claimed $4,900,000 value would mean that James L. Sheerin paid only 2.04% of the value held by Betty Lou Sheerin.

of a community property interest. Defendants present no evidence to create a material issue of fact that the $50,018.22 is a reasonably equivalent value for Betty Lou Sheerin's interest in property worth $5,188,200 the year she sold it to her husband.[36] While the Court recognizes that the issue as to whether reasonably equivalent value is primarily a fact issue, if there is no genuine issue of material fact for trial, then the issue is foreclosed on summary judgment. Based on the evidence before the Court, there is no material issue of fact regarding the issue of reasonably equivalent value.

Because the Court has determined that Sheerin did not receive a reasonably equivalent value for her share of the property, the Court will now consider the other factors pursuant to each statutory scheme.

C. Evaluation of Liability Under Section 24.006(a)

Under Section 24.006(a), a fraudulent transfer occurs when the following elements occur: (1) the creditor's claim arose before the transfer was made, (2) the debtor made the transfer without receiving a reasonably equivalent value, and (3) the debtor was insolvent at the time the transfer was made. TEX. BUS. & COM. CODE ANN. § 24.006(a). Plaintiff has provided evidence to establish each element, and Defendants have failed to provide any evidence that would create a genuine issue of

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[36]In *In re Hinsley*, Hinsley submitted an affidavit in opposition to a motion for summary judgment in which she denied that the purpose of the partition of property with her husband was to defraud creditors and "recounted the marital troubles that partition was allegedly intended to address." *In re Hinsley*, 201 F.3d at 642. In her affidavit, Hinsley stated she believed the community estate to be worth $8 million and that the $3.75 million she received was equitable. *Id.* at 643. The Court stated: "Mrs. Hinsley's 'belief' about the value of her assets at the time of the partition is insufficient to create a issue of material fact on this issue in light of the credible and undisputed evidence as to the actual value of the assets." *Id.*

As in *In re Hinsley*, the Sheerins' "belief" that they did not create a tenancy by the entirety is insufficient to create an issue of material fact in light of the credible and undisputed evidence as to the nature of the Rhode Island property. As a result, the Court can determine on summary judgment that Betty Lou Sheerin did not receive reasonably equivalent value for her share of the Rhode Island property.

material fact for trial. The Court's analysis on each element follows.

1. Northern's claim arose prior to Betty Lou Sheerin's transfer of her interest in the Rhode Island property to James L. Sheerin.

Pursuant to the statute, "'[c]laim' means a right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id.* § 24.002(3). Northern lists the procedural history of its state court lawsuit to demonstrate that it held a claim against Betty Lou Sheerin and the Court has taken judicial notice of the proceedings. *See, e.g., Taylor v. Charter Med. Corp.*, 162 F.3d 827, 831 (5th Cir. 1998) (allowing reference to previous proceeding for limited purpose of occurrence and not findings of fact); *Davis v. Bayless, Bayless & Stokes*, 70 F.3d 367, 372 n.3 (5th Cir. 1995) (no error in taking judicial notice of state-court orders). The Sheerins argue that Northern's claim for $3,510,515.93 has not been established as a matter of law, that the jury's initial award of $1,950,000 was overturned, and that Northern's original state court petition did not specify an amount for damages. Defendants conflate a dispute over the amount of the claim with a dispute over whether or not a claim arose.

On November 13, 2002, Northern filed suit in Texas state court against Betty Lou Sheerin, asserting its right to recover on a promissory note. The jury returned a verdict in favor of Northern and against Betty Lou Sheerin. Betty Lou Sheerin then transferred her interest in the Rhode Island property on August 29, 2008, which constituted a transfer pursuant to Section 24.007.[37] On a motion

[37]Pl.'s Ex. C. Section 24.007 of the Texas Business & Commerce Code states that a transfer is made

> with respect to an asset that is real property. . . when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest

by Northern, the state trial court judge entered a judgment for an amount greater than that awarded by the jury. Although the state court judge had yet to reduce Northern's right to payment to a judgment, the evidence establishes that Northern held a claim against Betty Lou Sheerin prior to her transfer of the Rhode Island property. Consequently, Northern has established the first element of to show a fraudulent conveyance pursuant to Section 24.006(a).

2. Betty Lou Sheerin made a transfer without receiving reasonably equivalent value.

The Court's analysis of the party's arguments and the evidence establishes that Betty Lou Sheerin made the transfer without receiving a reasonably equivalent value. *See supra* Part B.2.

3. Betty Lou Sheerin was insolvent at the time of the transfer.

Under TUFTA, "a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at fair valuation." TEX. BUS. & COM. CODE ANN. § 24.003(a); *see also In re Erstmark Capital Corp.*, 73 Fed. App'x 79, 2003 WL 21756460 (5th Cir. June 23, 2003); *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 25 (Tex. App.—Tyler 2000, pet. denied). To show that Betty Lou Sheerin was insolvent at the time of the transfer, Northern provides the affidavit signed by Betty Lou Sheerin in the state court proceeding. In the affidavit, Sheerin states: "My net worth is negative ($3,418,063.00), excluding the [Northern Natural Gas] judgment."[38] The Sheerins provide no evidence in response that would create an issue of material fact for dispute on this

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of the transferee. . . .

TEX. BUS. & COM. CODE ANN. § 24.007. A Texas appellate court has deemed that this transfer to occurs as to real property when the deed is recorded. *Corpus v. Arriaga*, 294 S.W.3d 629, 635 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

[38]Aff. of Betty Lou Sheerin ¶ 4 at 1 (Oct. 30, 2008) (attached to Mot. to Set Lesser Amount of Bond or Deposit to Supercede J., *N. Nat. Gas Co. v. Sheerin*, No. 2008-CI-01245 (288th Dist. Ct. Bexar County, Tex. filed Oct. 30, 2008) (Pl.'s Ex. F).

element. Therefore, Northern has established that Betty Lou Sheerin was insolvent at the time of the transfer.

D. Evaluation of Liability Under Section 24.005(a)(1)

Under Section 24.005(a), a fraudulent transfer occurs (1) when a creditor's claim arises before or within a reasonable time after the transfer was made or the obligation was incurred (2) if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor. TEX. BUS. & COM. CODE ANN. § 24.005(a)(1). The Act lists eleven factors to determine whether a debtor transferred property with the requisite fraudulent intent.[39] *See id.* § 24.005(b)(1)–(11); *C.M. Asfahl Agency v. Tensor, Inc.*, 135 S.W.3d 768, 789 n.18 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Plaintiff moves for summary judgment on the ground that Betty Lou Sheerin transferred the Rhode Island property after Northern's claim arose and that actual

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[39] The eleven factors are whether:

(1) the transfer or obligation was to an insider;
(2) the debtor retained possession or control of the property transferred after the transfer;
(3) the transfer or obligation was concealed;
(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(5) the transfer was of substantially all the debtor's assets;
(6) the debtor absconded;
(7) the debtor removed or concealed assets;
(8) 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) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

TEX. BUS. & COM. CODE ANN. § 24.005(b)(1)–(11).

intent can be determined because she transferred her interest to an insider, TEX. BUS. & COM. CODE ANN. § 24.005(b)(1); she retains possession or control of the Rhode Island property, *id.* § 24.005(b)(2); she transferred the property after being sued, *id.* § 24.005(b)(3); she did not receive a reasonably equivalent value for the property, *id.* § 24.005(b)(8); she was insolvent or became insolvent shortly after the transfer, *id.* § 24.005(b)(9); and the transfer occurred shortly before or shortly after a substantial debt was incurred, *id.* § 24.005(b)(10). Defendants argue that the Court cannot determine fraudulent intent as a matter of law.

"Fraudulent intent under TUFTA can be decided by the Court as a matter of law." *U.S. v. Evans*, 513 F. Supp. 2d 825, 836 (W.D. Tex. 2007), *aff'd* 340 U.S. App'x 990 (5th Cir. 2009).[40] Northern argues that six of the eleven factors weigh in favor of establishing fraudulent intent. Defendants have failed to present an issue of material fact on any of the factors presented by

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[40] Defendants argue: "The court in *Evans* cited the decision in [*Connell v. Connell*], 889 S.W.2d 534, 542 (Tex. App.—San Antonio 1994, writ denied). . . . The [*Connell*] case does not support the proposition for which it was cited in *United States v. Evans* and advanced by Northern." Resp. at 8. The Court recognizes that:

> *Ordinarily*, whether the conveyance was made with intent to defraud creditors or whether the grantee had knowledge or notice of such intent are fact questions, *but, where evidence indisputably shows that the conveyance was not so made and there is no evidence tending to connect the grantee with any intent to defraud, the issue becomes one of law.*

Connell, 889 S.W.2d at 542 (emphasis added). Even if the proposition is not directly stated by the cited authority, the proposition obviously flows from it. An inferential step is needed between the authority cited and the proposition it supports. In any case, Defendants do not discuss the Court's reliance on *In re Hinsley* in which the Fifth Circuit Court of Appeals upheld the district court's grant of summary judgment in favor of the Plaintiff who established that Defendant had committed a fraudulent conveyance. Under Defendants' position, a party opposing a claim for relief would be alleviated from presenting evidence to demonstrate a genuine issue of material fact for trial. Summary judgment standards require that if the Plaintiff has presented evidence to establish its claim for relief "an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule—set out specific facts showing a genuine issue for trial." FED. R. CIV. P. 56(e)(2).

Northern. As a result, Northern has shown that its claim arose before Betty Lou Sheerin transferred the Rhode Island property, *see supra* Part C.1, and that the transfer was made with fraudulent intent. The Court's evaluation of the factors to show fraudulent intent follows.

1. Betty Lou Sheerin transferred the Rhode Island property to an insider.

The spouse of a debtor is an insider. TEX. BUS. & COM. CODE ANN. § 24.002(7)(a)(i) (defining an insider as a relative); *id.* § 24.002(11) (defining "relative" to include a spouse). It is undisputed that Betty Lou Sheerin transferred her interest in the Rhode Island property to her husband, James L. Sheerin.[41] Therefore, Betty Lou Sheerin transferred the Rhode Island property to an insider.

2. Betty Lou Sheerin's possession or control of the property.

James L. Sheerin, who has possession and control of the Rhode Island property, is currently married to Betty Lou Sheerin.[42] Although this does not automatically establish that Betty Lou Sheerin herself retains possession and control of the property, Defendants do not raise any issue of material fact to dispute this point. However, based on the evidence before the Court, it is not established the Betty Lou Sheerin has possession or control of the property. In any case, the remaining factors establish fraudulent intent.

3. Betty Lou Sheerin transferred her interest in the Rhode Island property after Northern filed suit.

Northern filed suit against Betty Lou Sheerin on November 13, 2002. The state jury found her liable on February 8, 2008.[43] She transferred her interest in the Rhode Island property on August

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[41]Pl.'s Ex. C.

[42]Defs.' Ex. A. ¶ 4.

[43]Pl.'s Ex. A.

29, 2008.[44] Northern has established that Betty Lou Sheerin transferred her interest in the Rhode Island property after Northern filed suit against her in Texas state court.

4. Betty Lou Sheerin did not receive a reasonably equivalent value for the property.

Betty Lou Sheerin, owning a tenancy by the entirety in the Rhode Island property, did not create a genuine issue of material fact that she paid a reasonably equivalent value for that tenancy by the entirety. *See supra* Part B.2.

5. Betty Lou Sheerin was insolvent or became insolvent shortly after transferring the Rhode Island property.

Betty Lou Sheerin provided an affidavit in the state court proceeding in which she stated that she had a negative net worth, and the Sheerins provide no evidence in response that would create an issue of material fact for dispute on this factor. *See supra* Part C.3.

6. Betty Lou Sheerin transferred the property transfer shortly after a substantial debt was incurred.

The state court jury found Betty Lou Sheerin liable to Northern on February 8, 2008.[45] The state court entered its final judgment on October 3, 2008.[46] Betty Lou Sheerin transferred her interest in the property on August 29, 2008; shortly after the jury rendered its verdict and shortly before the state court entered its final judgment.[47]

Requested Relief and Status of this Case

In the course of evaluating this motion, Northern has overcome Sheerin's affirmative

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[44]Pl.'s Ex. C.

[45]Pl.'s Ex. A.

[46]Pl.'s Ex. E.

[47]*See* Pl.'s Ex. C.

defenses of good faith and that Betty Lou Sheerin received a reasonably equivalent value for her share of the Rhode Island property. Northern moved for partial summary judgment, and then concludes its motion with a request that the Court grant it all the relief its seeks in its Complaint.[48]

Defendants state that they have previously filed a motion for continuance to gather documents and information material to their claims. The Court addressed Defendant's motion to extend the deadline to respond to Northern's motion for partial summary judgment and granted the Sheerins an additional thirty days to respond to the motion.[49] The Court notes that all the evidence Defendants allege to compile is within their control, or access can be authorized by the Sheerins. Moreover, as James L. Sheerin's affidavit demonstrates, the Sheerins were provided adequate time to provide affidavits in support of their response to Northern's motion.

Objections to Summary Judgment Evidence

Northern has objected to portions of Defendants' summary judgment evidence, and both parties have provided extensive briefing on the subject. The Court has considered Defendants' evidence but has afforded no weight to statements in the attached affidavits that are unsupported or self-serving in accordance with Federal Rule of Civil Procedure 56(e). Northern's objections are therefore OVERRULED as moot.

Conclusion

Plaintiff's objections to Defendants' evidence are OVERRULED. As the party asserting a claim for relief, Plaintiff bears the burden of proof on all of the essential elements of its claim.

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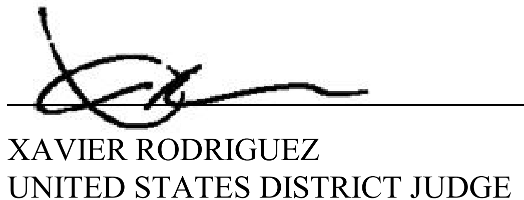
[48]Plaintiff has not provided the Court with any legal support to justify the precise remedy that would apply to this case even if this were a motion for summary judgment that would terminate this case if granted.

[49]Order on Mot. for Extension of Time to Respond, Mar. 1, 2010 (Docket Entry No. 20).

Defendants have not created a material issue of fact regarding Plaintiff's claims of fraudulent conveyance in violation of the Texas Uniform Fraudulent Conveyance Act. Plaintiff's motion is GRANTED as to these claims. Plaintiff provided no briefing regarding which specific remedy to which it is entitled, and Plaintiff only moved for partial summary judgment. The parties are ORDERED to provide briefing to the Court within fourteen days of this order as to what if any claims remain and what if any relief to which Plaintiff is entitled.

It is so ORDERED.

SIGNED this 21st day of June, 2010.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE