STATE OF MICHIGAN

COURT OF APPEALS

LEASE EQUITIES FUND, INC.,

Plaintiff-Appellant,

V

CHARTERS, INC., d/b/a JET US, SCOTT TRAVEL, INC., and JOHN L. ADAMS, a/k/a LARRY ADAMS,

Defendants,

and

LEHMAN & VALENTINO, P.C. and SCOTT ADAMS,

Intervening Defendants-Appellees,

and

M-59 ASSOCIATES, SCOTT WERTHMAN, AND MICHAEL BAKALUKAS,

Garnishee Defendants.

UNPUBLISHED
August 17, 2001

No. 219086
Oakland Circuit Court
LC No. 93-461464-CK

Before: K.F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Plaintiff appeals by right from an order upholding a June 1994 stock transfer, involving a restaurant and bar business known as M-59 Associates, from John Adams (Adams) to his son Scott Adams (Scott). Plaintiff, whom Adams owed money and who sought garnishment, had argued that Adams made the transfer fraudulently, with the intent to hinder creditors. We affirm.

Plaintiff first argues that the trial court erred in determining that Adams had no intent to defraud within the meaning of MCL 566.17 (which was in effect at the time of the conveyance but was repealed by 1998 PA 434). This statute stated:

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors. [MCL 566.17, repealed by 1998 PA 434.]

We review findings of fact made by a trial court in an action where a fraudulent conveyance is claimed, including findings on solvency, for clear error. See, e.g., *Regan v Carrigan,* 194 Mich App 35, 37-38; 486 NW2d 57 (1992). Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake occurred. *Massey v Mandell,* 462 Mich 375, 379; 614 NW2d 70 (2000).

Determining actual intent to defraud under MCL 566.17 requires consideration of the circumstances surrounding the transaction. *Bentley v Caille,* 289 Mich 74, 77-78; 286 NW 163 (1939). "Surrounding circumstances which usually accompany an intent to hinder, delay or defraud creditors and from which fraud may be inferred are called 'badges of fraud.'" *Id.* Badges of fraud include "lack of consideration for the conveyance; a close relationship between transferor and transferee; pendency or threat of litigation; financial difficulties of the transferor; and retention of the possession, control, or benefit of the property by the transferor." *Coleman-Nichols v Tixon Corp,* 203 Mich App 645, 659-660; 513 NW2d 441 (1994). Evidence of a secret or hurried transaction, not conducted in the usual mode of doing business, is also an indicator of fraud, *US v Leggett,* 292 F2d 423, 427 (CA 6, 1961), and if a conveyance renders a debtor insolvent, intent to defraud may be inferred. *Regan, supra* at 39. Moreover, transactions between family members that adversely affect creditors must be closely scrutinized and require a full explanation when accompanied by other badges of fraud. *Bentley, supra* at 79. We must also keep in mind that

> . . . [b]adges of fraud are not conclusive, but are more or less strong or weak according to their nature and the number concurring in the same case, and may be overcome by evidence establishing the *bona fides* of the transaction. However, a concurrence of several badges will always make out a strong case. 27 C.J. p. 483. [*Bentley, supra* at 78, quoting *Timmer v Pietrzyk,* 272 Mich 238, 242; 261 NW 313 (1935).]

Finally, we note that the burden of showing fraud is on the person alleging it. *Goldberg v Goldberg,* 295 Mich 380, 384; 295 NW194 (1940). Fraud will not be presumed but must be proven. *Rossman v Hutchinson,* 289 Mich 577, 594; 286 NW 835 (1939). The party seeking to have a conveyance set aside must prove fraud by clear and convincing evidence. *US v Rode,* 749 F Supp 1483, 1493 (WD Mich, 1990), aff'd 943 F2d 53.

In the instant case, several badges of fraud were present. Scott gave no consideration for the stock and it is uncontested that the stock was a gift. Further, there was a close, family relationship between the grantor and grantee. These factors alone do not establish fraud. See *Linke v Goodrich,* 30 Mich App 228, 230; 186 NW2d 5 (1971). Another badge of fraud existed,

however, because litigation was pending that had a possible consequence of requiring Adams to pay a large judgment to plaintiff. Nevertheless, we cannot say that the trial court clearly erred in concluding that the evidence did not show an actual intent to hinder or defraud creditors. Indeed, as discussed more thoroughly below, there was evidence that although Adams was in no position to repay plaintiff in a lump sum, he was sufficiently solvent to make monthly payments under a forbearance agreement. Further, the evidence supported a finding that the stock was given to Scott as a bona fide gift because Scott was suffering financial repercussions from the demise of his former business. Moreover, the transaction was not secret or hurried, it was disclosed to a public body (the Liquor Control Commission), and testimony showed that Adams did not retain control over the stock after giving it to Scott. Finally, evidence presented at the evidentiary hearing demonstrated that Adams was in possession of numerous other assets, worth greater amounts than the stock in question, and he did not convert, convey, or diminish the value of those items to the detriment of any of his creditors, including plaintiff. Accordingly, considering the circumstances surrounding the transaction, see *Bentley, supra* at 77-78, the trial court did not clearly err in finding that there was no actual intent to hinder, delay, or defraud creditors. See *Regan, supra* at 37-38. We are simply not left with a definite and firm conviction that a mistake occurred. See *Massey, supra* at 379.

Next, plaintiff argues that the trial court erred in determining that no constructive fraud occurred under former MCL 566.14 (which was in effect at the time of the conveyance but was repealed by 1998 PA 434). Under this statute, a conveyance made "by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made . . . without a fair consideration." MCL 566.14, repealed by 1998 PA 434. Essentially, plaintiff contends that the trial court erred in determining that Adams was solvent at the time of the stock transfer. We disagree.

We first note that the parties disagree regarding which of them bore the burden of establishing Adams' solvency or insolvency. We conclude that we need not resolve this disagreement, because even assuming, arguendo, that defendants-appellees bore the burden of establishing Adams' solvency, they adequately met their burden.

In *Foodland Distributors v Al-Naimi,* 220 Mich App 453, 479; 559 NW2d 379 (1996), this Court, quoting *In re Otis & Edwards, PC,* 115 Bankr 900, 911 (ED Mich, 1990), stated that "'[f]or the court to hold that a fraudulent conveyance [has occurred] the court must find insolvency based upon the value of the assets and the liabilities as they existed prior to or *as a result of* the challenged transfer'" (emphasis in *Otis*). "'In other words, either just before or just after the transfer, the debtor must have been unable to make ultimate payment of then-existing obligations from then-existing assets." *Foodland, supra* at 479, quoting *Otis, supra* at 911.

MCL 566.12(1) defines insolvency as follows:

> A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts *as they become absolute and matured.* [Emphasis added.]

Thus, although MCL 566.11 defines "debt" as "any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent," determining solvency requires contemplation of debts as they become absolute and matured.

MCL 566.11 defines assets as follows:

> [P]roperty not exempt from liability for [the debtor's] debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

Any property having value, including good will, is an asset under the statute if it has value. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 378-379; 512 NW2d 86 (1994).

In sum, our courts recognize that if a debtor's existing assets were sufficient to meet his existing obligations, i.e., his absolute and matured debts, just before and just after the challenged conveyance, he was solvent. Accordingly, we reject plaintiff's argument that Adams' entire debt owed to plaintiff and his entire debt owed to Michael Fugle should have been considered as liabilities when determining solvency. There was evidence of a forbearance agreement in place that required payments on Adams' debt to plaintiff in the amount of $6,667 per month. The entire amount, almost $500,000, was not due at the time of the stock transfer. Similarly, there was no evidence that the entire amount Adams owed to Fugle was due and payable at the time of the transfer. Rather, Adams owed Fugle approximately $1,000 per month on that loan. The monthly payments, as each became due and owing, were the then-existing obligations of Adams. The entire debts were not. Thus, the trial did not clearly err in finding that the entire obligations were not liabilities for purposes of determining the solvency of Adams.

With regard to additional debts, there was evidence that Scott Travel's balance sheet showed stockholder loans to Adams in the amount of approximately $97,000. However, Adams testified that this money was essentially taken as income and that it was due "on demand." Given that Adams owned one hundred percent of Scott Travel and thus could control the repayment schedule of this money, the trial court did not clearly err in implicitly determining that this debt was not absolute and matured and therefore did not have to be considered for purposes of determining Adams' insolvency. Testimony at the evidentiary hearing also revealed that Adams had total expenses of between $4,000 to $5,000 per month, not including the forbearance payments to plaintiff but including payments on the Fugle debt. Under the forbearance agreement, Adams owed plaintiff $6,667 per month. Thus, the evidence supported a finding that Adams' total then-existing debt per month was approximately $11,667.

With regard to assets, the evidence showed that when the transfer was made, Adams had a house in White Lake, Michigan; one hundred percent ownership in Scott Travel; fifty percent ownership in Airmotive Investments; twenty five percent ownership in M-59 Associates; and a car. Neither party contests the trial court's valuation of Adams' automobile at $5,000 or Adams' M-59 stock at $50,000. The valuation of Adams' home at $70,000 was low based on the evidence. However, we cannot conclude that this value was clearly erroneous.[1] The trial court's valuation of Adams' interest in Airmotive Investments and in a Cessna Airplane was, however, clearly erroneous. Airmotive had an airplane, which was valued at $110,000. Adams testified that there was a lien on the airplane of $40,000 to $50,000 in 1994, making its net value

[1] We note that plaintiff does not object to Adams' home being considered a $70,000 asset.

approximately $60,000 to $70,000. Airmotive's other assets were minor and no value was assigned to them. Further, Adams did not testify about the value of his Airmotive stock apart from the airplane, which was basically the only asset. Given that Adams only owned fifty percent of Airmotive's stock, the most his investment was worth was $35,000. The trial court valued Adams' interest in Airmotive at $70,000 and his interest in the airplane at $80,000. This was erroneous. Nevertheless, Adams' assets were at least $125,000, considering only his home, his M-59 stock, and his automobile. Subtracting the amount that Adams testified would have been due under the forbearance agreement from December 1993 through May 1994 ($40,002) would leave total assets of $84,998.

Despite the trial court's error in valuing the Airmotive assets, the trial court's ultimate finding that Adams was solvent during the relevant "snapshot" time – just before the transfer and immediately thereafter, see *Foodland, supra* at 479 – was not clearly erroneous based on the above evidence. Indeed, the fair, salable value of Adams' assets, without even considering Airmotive or Scott Travel and subtracting the amount due under the forbearance agreement as testified to by Adams, was $84,998. In addition, Adams had income of approximately $65,000 in 1994.[2] Adams' existing assets were sufficient to allow him to meet his existing obligations of approximately $11,667 for the months preceding and following the stock transfer. Moreover, Adams testified that at the time of the transfer, he could pay his debts through the resources he had available and the transfer of ninety-nine shares of M-59 Associates stock did not eliminate his ability to pay. Because we are not left with a definite and firm conclusion that a mistake occurred, we cannot conclude that the trial court clearly erred in finding that Adams was solvent before and after the challenged stock transfer. See *Regan, supra* at 37-38, and *Massey, supra* at 379.

Additionally, we reject plaintiff's argument that in evaluating Adams' solvency, the trial court improperly relied on MCL 566.16, a statute not pleaded by plaintiff. The trial court ruled that a case for fraudulent conveyance could not be made under MCL 566.14. The trial court also found that MCL 566.16 possibly applied to the facts of the case but that it, too, could not support setting aside the conveyance. We find no impropriety with this ruling.

As its last argument, plaintiff contends that the trial court improperly considered the forbearance agreement when determining issues related to the stock transfer. Plaintiff argues that because Adams had been barred from utilizing the forbearance agreement as an affirmative defense in the primary case, he should not have been allowed to invoke it in the instant, post-judgment, garnishment proceedings. However, Scott, who was defending against plaintiff's efforts to set aside the stock transfer, offered the forbearance agreement when defending the

[2] We note that plaintiff argues that the trial court should not have considered Adams' income in evaluating Adams' solvency. We disagree. As previously discussed, an asset is something that has value. Adams offered evidence of his income in 1994. This income was an asset when the transfer was made. It was relevant to a determination of whether he could meet his then-existing obligations out of his then-existing assets, which is the applicable test.

stock transfer. He had not been precluded from offering the forbearance agreement for any purpose at any time and, indeed, was not a party to the original suit. Plaintiff's argument with regard to the forbearance agreement has no merit.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter