

STATE OF MICHIGAN
COURT OF APPEALS

JANE KATHERINE GOUCHER,

Plaintiff-Appellee,

v

SANDRA J. GOUCHER, formerly known as
SANDRA J. NOWICKI,

Defendant-Appellant.

UNPUBLISHED
December 4, 2003

No. 239219
Lapeer Circuit Court
LC No. 99-026755-CZ

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

After a bench trial, the trial court found defendant liable for tortuous interference with a contract. The trial court also found that defendant was an intentional participant in a fraudulent conveyance. The trial court awarded plaintiff \$54,000 in damages and imposed a constructive trust on certain assets. Defendant appeals as of right. We reverse and remand.

The following facts are largely undisputed. Plaintiff married Ernest Goucher (“Goucher”) in 1978. Plaintiff and Goucher separated in November 1995. Defendant moved in with Goucher in December 1995, and they married in December 1997.

The judgment of divorce between plaintiff and Goucher was signed in June 1997. The judgment of divorce provided that Goucher would pay plaintiff approximately \$350 a week in spousal support. It specifically provided that Goucher would continue to maintain a \$50,000 life insurance policy through American United Life Insurance, Co. (“the AUL policy”) with plaintiff as the named beneficiary. But the judgment of divorce also provided that plaintiff would pay up to \$10,000 of Goucher’s funeral expenses out of the proceeds of the AUL policy.

In July 1997, Goucher borrowed \$3,400 from the cash value of the AUL policy.¹ The loan proceeds were deposited into defendant and Goucher’s joint bank account. Defendant testified that the money was used to pay bills, including Goucher’s spousal support obligation to

¹ Plaintiff noted that she and Ernest Goucher had borrowed from that cash value during their marriage.

plaintiff. In December 1997, the AUL policy was terminated for nonpayment of premiums and loan interest. Goucher did not renew the policy. He died in an automobile accident on March 12, 1999. Plaintiff's claim on the AUL policy was denied because the policy had terminated in 1997.

Plaintiff sued defendant under fraud, fraudulent conveyance, and tortious interference with contractual relations theories. Plaintiff also sought equitable relief in the form of a constructive trust. The trial court partially granted defendant's motion for summary disposition and dismissed the fraud claim.

Following a bench trial, the trial court found that defendant was an intentional co-participant or co-conspirator in a fraudulent conveyance that drained the cash value from the AUL policy. The trial court further found defendant liable for tortuously interfering with a contract. The trial court found plaintiff's damages to be \$54,000, plus interest and costs, and imposed a constructive trust on certain assets.

Defendant contends that the trial court erred in finding that she tortuously interfered with a contract. We review a trial court's findings of fact for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A finding is clearly erroneous if, after reviewing the record, we are "left with a firm and definite conviction that a mistake was made." *Marshall Lasser PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

The elements of tortious interference of a contract are "(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant." *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). Here, as part of their divorce agreement, Goucher was obligated to maintain the AUL policy for plaintiff, who, in turn, agreed to pay up to \$10,000 of Goucher's funeral expenses. Goucher failed to maintain the policy for plaintiff. Therefore, it appears that a contractual obligation was breached.

Defendant's primary challenge to the trial court's finding is that there was insufficient evidence that defendant unjustifiably instigated the breach. We agree. Although plaintiff may have opened the mail and paid the majority of the bills during her marriage to Goucher, defendant testified that Goucher sorted their mail, opened his own mail, and gave defendant the bills that he wanted her to pay. Defendant testified that she did not know that the \$3,400 loan proceeds came from the AUL policy or that Goucher was required to maintain the policy on plaintiff's behalf. Defendant also testified that Goucher told her to write "premium" and "loan" on the two checks that were sent to AUL on January 10, 1996—refuting an inference that defendant knew the purpose of the AUL policy. More importantly, there is no evidence indicating, short of mere speculation, that defendant had any role in Goucher's failure to maintain the policy. Accordingly, the trial court clearly erred in finding that defendant tortuously interfered with Goucher's obligation to maintain the policy.

Next, defendant contends that the trial court clearly erred in finding a fraudulent conveyance. Initially, we note that the trial court relied on the Uniform Fraudulent Transfer Act ("UFTA"), MCL 566.31 *et seq.*, effective December 30, 1998, rather than the Uniform Fraudulent Conveyance Act ("UFCA"), MCL 566.11 *et seq.*, which was repealed by passage of the UFTA. Here, the purported fraudulent conveyance occurred either at the time of the loan against the cash value of AUL policy (July 1997) or at the time the AUL policy lapsed for

nonpayment of the loan proceeds (December 1997). Thus, it appears that the trial court should have applied the UFCA.

Regardless, the provisions of the UFCA and UFTA are very similar. A fraudulent conveyance claim under either the UFCA or the UFTA requires proof of an “actual intent to hinder, delay, or defraud any creditor of the debtor.” MCL 566.34(1)(a); see *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659; 513 NW2d 441 (1994). The UFTA list several factors that a court may consider in determining whether a debtor had an actual intent to hinder, delay, or defraud:

- (a) The transfer or obligation was to an insider.
- (b) The debtor retained possession or control of the property transferred after the transfer.
- (c) The transfer or obligation was disclosed or concealed.
- (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (e) The transfer was of substantially all of the debtor’s assets.
- (f) The debtor absconded.
- (g) The debtor removed or concealed assets.
- (h) 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.
- (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
- (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
- (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. [MCL 566.34(2).]

Similarly, under the UFCA, the court could consider various “badges of fraud,” such as “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, supra* at 660.

Here, Goucher and defendant obviously had a close relationship. But there is no indication that Goucher had financial difficulties at the time of the conveyance, nor is there any indication that there was a threat of litigation or that Goucher was rendered insolvent by the transfer. The evidence did not indicate that Goucher absconded or incurred a substantial debt around the time of the transfer. Moreover, defendant testified that Goucher used the money to

pay bills, including his spousal support obligation to plaintiff. Accordingly, although Goucher retained control over the \$3,400 that was deposited into defendant and Goucher's joint account, he did not use the money in a manner to hinder, delay, or defraud creditors. In fact, it is arguable whether, under the circumstances, the money was even transferred to defendant. Consequently, the trial court clearly erred in finding that defendant was the beneficiary of a fraudulent conveyance.

Finally, defendant challenges the imposition of a constructive trust on all benefits she received as a result of Ernest Goucher's death. A constructive trust is an equitable remedy that arises out of operation of law. *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). "A constructive trust need not arise because the property was wrongfully acquired, it may arise out of unconscionability and unjust enrichment." *Grasman v Jelsema*, 70 Mich App 745, 752; 246 NW2d 322 (1976); *Kent v Klein*, 352 Mich 652, 657-658; 91 NW2d 11 (1958). We review de novo a trial court's decision to grant equitable relief. *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1997).

Here, it is apparent that Goucher unfairly and improperly failed to honor his obligations under the divorce agreement. And we are sympathetic to the fact that Goucher's actions have harmed plaintiff. But plaintiff failed to present any evidence indicating that *defendant* engaged in unconscionable behavior. Defendant was under no obligation to ensure Goucher's compliance with the divorce agreement. There was no evidence that defendant somehow interfered with Goucher's attempts to comply with the divorce agreement.

Further, plaintiff failed to introduce evidence establishing that defendant was unjustly enriched by Goucher's actions. Goucher did not replace the AUL policy with another life insurance policy, nor are we persuaded that there was a sufficient nexus between the lapsing of the AUL policy and the acquisition of the automobile insurance policy. Unlike a life insurance policy, the latter was required by law. Moreover, the evidence indicated that Goucher used the \$3,400 to pay bills, including his spousal support obligation to plaintiff. The payments to plaintiff plainly did not enrich defendant. In the absence of any evidence that the \$3,400 was spent in a manner to benefit defendant, defendant was not unjustly enriched by the \$3,400. Consequently, the trial court erred in imposing a constructive trust on defendant's assets.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad