Reversed and Rendered and Memorandum Opinion filed September 8, 2016.

In The

Fourteenth Court of Appeals

NO. 14-14-00171-CV

CHING ENTERPRISES, INC., AN QUOC NGUYEN, NGA THU NGUYEN, AN QUOC NGUYEN CHILDREN'S TRUST, & CIRCLE VENTURES, INC., Appellants

V.

DORIS BARAHONA, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 2009-26656

M E M O R A N D U M O P I N I O N

This appeal arises out of an on-the-job-injury that appellee Doris Barahona suffered while working for appellant Ching Enterprises, Inc. Barahona won a negligence judgment against Ching that was affirmed in part on appeal. Barahona eventually filed the present suit seeking to impose liability for the negligence judgment on An Quoc Nguyen (Andy), Nga Thu Nguyen (Anna), Circle Ventures,

Inc., and the An Quouc Nguyen Childrens' Trust. Following a bench trial, the trial court signed a final judgment in favor of Barahona holding all defendants except the Trust jointly and severally liable on a theory of fraudulent transfer. The trial court's judgment also included a $10,000 sanction against Andy and Anna.

Because we conclude that Barahona's fraudulent-transfer claims were extinguished by the statute of repose, we reverse and render a take-nothing judgment on that cause of action. We further conclude that Barahona waived her request for sanctions based on Andy and Anna's pretrial conduct when she failed to obtain a ruling before trial began. Finally, Barahona did not preserve her cross-issues for appellate review because she did not file a notice of appeal. We therefore reverse the trial court's final judgment and render a take-nothing judgment.

BACKGROUND

Andy and Anna are husband and wife. Their company, Ching, was in the business of making eggrolls and selling wholesale groceries. Andy was the sole shareholder, president, agent, and manager of Ching, while Anna served as Ching's corporate secretary. Ching's business operation was located in a warehouse leased from the Trust. Ching's registered office was Andy and Anna's residence.

Barahona worked for Ching making eggrolls, and she suffered a hand injury on the job. She brought a negligence suit against Andy and Ching, a non-subscriber to workers' compensation insurance. The trial court signed a judgment in favor of Barahona, holding Ching and Andy jointly and severally liable for her damages of $144,908.81. The trial court also signed findings of fact and conclusions of law. On appeal, the First Court of Appeals affirmed the judgment against Ching but reversed and rendered a take-nothing judgment against Andy. *See Ching Enters., Inc. v. Barahona*, No. 01-07-00454-CV, 2008 WL 4006758

(Tex. App.—Houston [1st Dist.] Aug. 28, 2008, no pet.) (mem. op.).

In May 2004, while Barahona's negligence suit was ongoing, Andy and Anna transferred title to 20 acres of undeveloped land in Texas City to the Trust. The next month, Ching ceased operations and Andy and Anna set-up a new corporation, Circle Ventures, Inc. All assets of Ching were transferred to Circle in June 2004. Andy and Anna held the same positions in Circle that they had held in Ching. Like Ching, Circle's registered office was Andy and Anna's residence. Circle, like Ching, was involved in the wholesale grocery business. Circle operated out of the same warehouse as Ching and had the same employees and vendors. In addition, Circle registered the assumed name "Ching Food Company" with the Harris County Clerk. Ching was not officially dissolved as a corporation until 2006.

On April 29, 2009, Barahona filed this suit against Ching, Andy, Anna, Circle, and the Trust (collectively "defendants"). Barahona sought to hold Andy, Anna, Circle, and the Trust liable for the negligence judgment, alleging that they were alter egos of Ching. Defendants filed an answer in which they asserted, among other affirmative defenses, "the statutes of limitation of the State of Texas and allege that this suit is barred by them." More than three years later, Barahona filed her Third Amended Petition, which added a cause of action for fraudulent transfer against appellants. The case was scheduled to go to trial before the bench on November 7, 2013.

During discovery, the trial court imposed a $7,500 sanction on all defendants for failure to produce documents. Barahona filed another motion for sanctions on the eve of trial, alleging that the Trust had failed to comply with a discovery order and had spoliated evidence. The trial court brought up the motion with the parties before starting the trial. Barahona explained the basis of the motion and

defendants protested that they had not had an opportunity to respond. The trial court granted defendants the chance to respond and carried the motion with the trial, which started immediately thereafter. After a three-day trial, the court took the case under advisement. Three months later, the court signed a final judgment against Andy, Anna, and Circle based exclusively on Barahona's cause of action for fraudulent transfer. The final judgment also included an additional $10,000 discovery sanction against Andy and Anna, jointly and severally. Appellants asked the trial court to make findings of fact and conclusions of law, but the court did not do so. This appeal by Andy, Anna, and Circle followed.

In response to appellants' motion, we abated the appeal and ordered the trial court to file findings of fact and conclusions of law.[1] The trial court subsequently filed more than 50 pages of findings of fact and conclusions of law.

ANALYSIS

I. Barahona's fraudulent-transfer claims are barred by the statute of repose.

Appellants argue in their second issue that the trial court erred when it concluded that (1) they had not adequately pleaded the statute of repose governing Barahona's fraudulent-transfer claims; and (2) even if appellants had pled the statute of repose, Barahona's claims were filed within its limits.

A. Appellants adequately pleaded the statute of repose.

Barahona alleged that appellants fraudulently transferred Ching's assets to Circle and the Trust. Barahona alleged multiple fraudulent-transfer theories. She initially alleged, and the trial court concluded, that appellants violated the Texas Uniform Fraudulent Transfer Act (TUFTA) when they transferred Ching's assets

[1] This step rendered moot appellants' first issue complaining of the trial court's failure to file findings of fact and conclusions of law.

to Circle with the actual intent to hinder, delay, or defraud her, a judgment creditor of Ching. *See* Tex. Bus. & Com. Code Ann. § 24.005(a)(1) (West 2015) (providing that a transfer is fraudulent if a debtor makes a transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor"). Barahona also alleged, and the trial court concluded, that the transfer of Ching's assets to Circle was fraudulent because the transfer was made for no consideration or for less than a reasonably equivalent value. *See id.* § 24.005(a)(2) (providing that transfer is fraudulent if made without receiving reasonably equivalent value in exchange for the transfer and the debtor was either left with unreasonably small remaining assets or was about to incur debts beyond its ability to pay as they became due). Finally, Barahona alleged, and the trial court concluded, that the transfer was fraudulent because Ching became insolvent as a result of the transfer. *See id.* § 24.006(a) (providing that a transfer is fraudulent if made without receiving reasonably equivalent value in exchange for the transfer and the debtor became insolvent as a result).

Appellants asserted in their answer that Barahona's claims were barred by the "statutes of limitation of the State of Texas." Barahona did not specially except to appellants' answer. The trial court rejected appellants' defense by noting in its Findings of Fact and Conclusions of Law that TUFTA contains a statute of repose, not a statute of limitations. The court concluded that appellants "failed to raise the statute of repose as an affirmative defense; thus Barahona's claim of fraudulent transfer is not time barred." Appellants contend, in their second issue, that this legal conclusion is erroneous. When a party challenges the trial court's construction of a statute or application of the law, the standard of review is de novo. *Foley v. Capital One Bank, N.A.*, 383 S.W.3d 644, 647 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

The trial court correctly observed that TUFTA contains a statute of repose. *See* Tex. Bus. & Com. Code Ann. § 24.010 (providing that "a cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless action is brought" within certain specified periods); *Nathan v. Whittington*, 408 S.W.3d 870, 874 (Tex. 2013) (concluding that section 24.010 is a statute of repose, not limitations). We disagree, however, with the trial court's conclusion that appellants failed to plead the defense adequately.

Texas courts apply a fair-notice standard to pleadings. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000). This standard considers whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant. *Id.* Additionally, because Barahona did not specially except to appellants' answer, we liberally construe it in appellants' favor, *id.* at 896–97, and in a manner consistent with appellants' intent. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

TUFTA contains a single section addressing the time period within which a plaintiff must bring a claim. *See* Tex. Bus. & Com. Code Ann. § 24.010. By raising the "statutes of limitation of the State of Texas" in their answer and alleging that Barahona's "suit is barred by them," appellants provided Barahona with sufficient notice that they intended to raise a defense that the time to file Barahona's claims had expired before she brought her suit. As to her fraudulent-transfer claims, the only statutory provision relevant to the bar raised by appellants is TUFTA section 24.010. *See Horizon/CMS Healthcare Corp.*, 34 S.W.3d at 897 (holding defendant sufficiently pled statutory limit on exemplary damages even though it cited wrong section where there was only one such provision in the relevant chapter of the statute). Courts themselves frequently (if mistakenly)

referred to this TUFTA statute of repose as a statute of limitations before the supreme court clarified the issue in its 2013 *Nathan* decision.[2] Appellants' answer was filed in 2009, so it is hard to imagine that Barahona was unaware the defense could apply to her fraudulent-transfer claims. On this record, therefore, the trial court erred in concluding that appellants failed to plead the statute of repose as an affirmative defense.

B. The evidence conclusively establishes that Barahona's fraudulent-transfer claims were extinguished by the statute of repose.

Appellants next argue that the trial court erred when it determined that Barahona's claims were not extinguished by the statute of repose. Appellants had the burden to prove all elements of their affirmative defense of the statute of repose. *Walker v. Anderson*, 232 S.W.3d 899, 910 (Tex. App.—Dallas 2007, no pet.). Whether a fraudulent-transfer claim is extinguished by the statute of repose ordinarily presents a question of fact for the fact-finder to resolve. *Id.* at 909. The issue can be resolved as a matter of law, however, if reasonable minds could not differ on the conclusion to be drawn from the facts in the record. *Id.*

The trial court found that the transfer of Ching's assets to Circle occurred on June 30, 2004. This finding has not been challenged on appeal and is therefore binding on this Court. *Id.* at 907. The trial court went on to conclude that the transfer to Circle was fraudulent. Barahona alleged, and the trial court concluded,

[2] *E.g.*, *Williams v. Khalaf*, 802 S.W.2d 651, 654–55 n.3 (Tex. 1990); *Zenner v. Lone Star Striping & Paving, L.L.C.*, 371 S.W.3d 311, 315 & n.1 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) ("Texas courts use the terminology 'statute of repose' and 'statute of limitations' interchangeably when referring to section 24.010 of TUFTA."); *Flores v. Ontiveros*, 218 S.W.3d 98, 105 (Tex. App.—Corpus Christi 2005), *rev'd in part on other grounds*, 218 S.W.3d 70 (Tex. 2007) (per curiam); *Mladenka v. Mladenka*, 130 S.W.3d 397, 403–04 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Hunt Steed v. Steed*, 908 S.W.2d 581, 583 (Tex. App.—Fort Worth 1995, writ denied); *cf. Cadle Co. v. Wilson*, 136 S.W.3d 345, 350 (Tex. App.—Austin 2004, no pet.) (calling the statute a "limitations period" even after recognizing that it "is technically a statute of repose").

that the transfer violated three TUFTA sections: 24.005(a)(1); 24.005(a)(2); and 24.006(a).

Sections 24.005(a)(2) and 24.006(a). We turn first to Barahona's claims under these portions of TUFTA. The TUFTA statute of repose provides that a cause of action brought under either section 24.005(a)(2) or section 24.006(a) is extinguished if not brought within four years after the transfer was made. Tex. Bus. & Com. Code Ann. § 24.010(a)(2). This section of the statute does not contain a discovery rule. *Id.*; *see Walker*, 232 S.W.3d at 909. Barahona's fraudulent-transfer claims thus accrued on the date the conveyance occurred: June 30, 2004. Tex. Bus. & Com. Code Ann. § 24.010(a)(2). Barahona did not assert her fraudulent-transfer claims until she filed her Third Amended Petition on August 27, 2012, more than eight years after the conveyance took place. We hold that Barahona's fraudulent-transfer claims brought under sections 24.005(a)(2) and 24.006(a) had been extinguished by the TUFTA statute of repose. Tex. Bus. & Com. Code Ann. § 24.010(a)(2).

Section 24.005(a)(1). The TUFTA statute of repose provides that a cause of action brought under section 24.005(a)(1) is extinguished if not brought within four years after the transfer was made or, if later, within one year after the transfer was or reasonably could have been discovered. Tex. Bus. & Com. Code Ann. § 24.010(a)(1). Unlike section 24.010(a)(2), this section contains a discovery-rule provision. *Zenner v. Lone Star Striping & Paving, L.L.C.*, 371 S.W.3d 311, 315 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *Johnston v. Crook*, 93 S.W.3d 263, 270 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). Because the fraudulent transfer at issue occurred more than four years before Barahona initiated her section 25.005(a)(1) cause of action, it is extinguished unless the discovery rule deferred its accrual.

When determining whether the TUFTA discovery rule applies, Texas courts apply the rules developed under the common law. *See Zenner*, 371 S.W.3d at 315 (applying common-law discovery rules to TUFTA claim). The TUFTA discovery rule therefore defers the accrual of a cause of action until a claimant knows, or through the exercise of reasonable diligence should know, of the facts giving rise to a cause of action under that statute. *Id.* This does not mean that accrual is deferred until a plaintiff knows all facts relating to an allegedly fraudulent act or the full extent of her injuries. *See PPG Indus., Inc. v. JMB/Houston Ctr. Partners Ltd. P'ship*, 146 S.W.3d 79, 93–94 (Tex. 2004); *Cadle Co. v. Wilson*, 136 S.W.3d 345, 352–53 (Tex. App.—Austin 2004, no pet.). The discovery rule instead defers accrual only until the plaintiff discovers the injury or acquires knowledge of facts which, in the exercise of reasonable diligence, would lead to discovery of the wrongful act and resulting injury. *See Li v. Univ. of Tex. Health Science Ctr. at Houston*, 984 S.W.2d 647, 652 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (applying discovery rule to statute of limitations).

Barahona filed her original petition against appellants and the Trust on April 29, 2009. Barahona alleged that she had been unable to collect on the underlying judgment because Ching "was improperly stripped of assets by its controlling shareholder . . . ." She further alleged that Circle was the successor corporation to Ching and was "a repository for all the assets of Ching Enterprises, Inc." Barahona's Third Amended Petition shows that these same transfers, which Barahona knew about in April 2009, form the basis of her claims that the assets of Ching were fraudulently transferred, which she did not assert until August 2012. According to that petition, "Ching was improperly stripped of its assets and accounts receivable by [Andy and Anna], its controlling shareholders, who fraudulently transferred the assets to Circle Ventures, the successor corporation."

We hold that the record conclusively establishes that as of April 29, 2009, Barahona had knowledge of facts regarding the transfer that would have prompted a reasonably diligent creditor to investigate her potential causes of action. *See Zenner*, 371 S.W.3d at 316 (holding plaintiff's knowledge that transfer had occurred "would prompt a reasonably diligent creditor to seek further information about the . . . proceeds"); *Cadle*, 136 S.W.3d at 353 (stating TUFTA discovery rule required Cadle to file suit within one year of learning of relevant transaction, "not within a year after the allegedly fraudulent details were actually discovered"). Because Barahona did not bring her fraudulent-transfer claims within one year of this date, they were extinguished by the TUFTA statute of repose. Tex. Bus. & Com. Code Ann. § 24.010(a)(1); *Cadle*, 136 S.W.3d at 353 (holding plaintiff's fraudulent-transfer suit was extinguished by statute of repose because it was not filed within one year of date plaintiff first learned of transaction). We therefore sustain appellants' second issue on appeal and reverse the trial court's final judgment based on fraudulent transfer.[3]

II. Barahona waived additional sanctions based on pretrial conduct.

In their fourth issue, appellants challenge the trial court's imposition of the additional $10,000 sanction against Andy and Anna for discovery abuse. Appellants contend that Barahona waived her sanctions request because the motion addressed known conduct in pretrial discovery and she failed to obtain a ruling

[3] Having reversed the trial court's judgment based on fraudulent transfer, we also reverse the parts of the final judgment awarding Barahona attorney's fees and costs because the only basis for these awards was Barahona's success on her fraudulent-transfer claims. We therefore need not address appellants' fifth and eighth issues challenging these awards. Tex. R. App. P. 47.1. We also need not address appellants' third, sixth, and seventh issues, which challenge the fraudulent-transfer judgment on other grounds. *Id.* Finally, we conclude that appellants' ninth issue, asking that we order the trial court to include the findings of fact and conclusions of law in the underlying negligence suit in the record of this appeal, is moot because the findings already are contained in the appellate record.

before trial began. We agree.

A party who fails to obtain a pretrial ruling on discovery disputes that exist before commencement of trial waives a claim for sanctions based on that conduct. *Graves v. Tomlinson*, 329 S.W.3d 128, 150 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (citing *Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993)). Here, it is undisputed that the additional $10,000 sanction included in the final judgment was based on conduct during pretrial discovery that was known to Barahona.

In April 2013, the trial court imposed a $7,500 discovery sanction on Andy, Anna, and the other defendants. On November 6, 2013, the day before trial began, Barahona filed a motion for sanctions against the Trust, alleging that it had failed to comply with a discovery order and had spoliated evidence prior to trial. On January 23, 2014, Barahona filed a request for ruling on its motion for sanctions against the Trust. When the trial court imposed the additional $10,000 sanction on Andy and Anna in its final judgment, it specified that the sanction was "for the same factual reasons set forth in" the April 2013 sanctions order and the November 2013 and January 2014 filings.[4]

The order and filings do not support this sanction. There is no indication in our record that Barahona asked the trial court to award additional sanctions against Andy and Anna based on discovery misconduct that had occurred before trial and been punished in the April 2013 order. The November 2013 and January 2014 filings sought sanctions against the Trust, not Andy and Anna. Yet even if those filings could be read to seek additional sanctions against Andy and Anna for their pretrial conduct, Barahona did not obtain a ruling on her November 2013 motion before trial began or object to the trial court's failure to rule. As we explained in

[4] The judgment incorrectly refers to the date of the January 2014 filing as January 22.

Graves, requiring a pretrial ruling on existing allegations of discovery abuse is an important safeguard because it prevents such disputes from being invoked as a basis for undoing or modifying the results at trial. 329 S.W.3d at 150.

By failing to obtain a pretrial ruling, Barahona waived any claim for additional sanctions she may have had. We therefore sustain appellants' fourth issue and reverse the sanctions award contained in the final judgment.

III. Barahona did not preserve her cross-issues for appellate review.

Barahona included two cross-issues in her brief of appellee. In both issues, Barahona argues the trial court erred when it denied her motion to modify the final judgment. Barahona contends in her first cross-issue that the trial court erred when it refused to modify the judgment to make the Trust liable to Barahona for fraudulent transfer. Barahona argues in her second cross-issue that the trial court erred when it denied her request "to widen the scope of its judgment by finding" all defendants—appellants as well as the Trust—liable under theories of alter ego and individual liability following a corporate dissolution. The final judgment finds against Barahona on these theories. Barahona did not file a notice of appeal.

Rule 25.1(c) requires a party seeking to alter the trial court's judgment to file a notice of appeal. Tex. R. App. P. 25.1(c). An appellate court may not grant a party who did not file a notice of appeal more favorable relief than the trial court did. *Id.* In her cross-issues, Barahona argues the trial court erred when it denied her motion to modify seeking to alter the final judgment and obtain more favorable relief than she had obtained in the trial court. She was therefore required to file a notice of appeal. *Frontier Logistics, L.P. v. Nat'l Prop. Holdings, L.P.*, 417 S.W.3d 656, 666 (Tex. App.—Houston [14th Dist.] 2013, pet. denied). Because she did not, we cannot consider her cross-issues. *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 171 (Tex. 2004); *Frontier Logistics, L.P.*, 417 S.W.3d at 666.

CONCLUSION

Having sustained appellants' second and fourth issues on appeal, we reverse the trial court's judgment and render judgment that Barahona take nothing.

/s/ J. Brett Busby
Justice

Panel consists of Justices Boyce, Busby, and Brown.