Affirmed and Memorandum Opinion filed August 22, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00170-CV

BELINDA DAWN TIDWELL, Appellant

V.

JOHN ROBERSON AND GRIMES & FERTITTA, P.C., Appellees

On Appeal from the 506th District Court
Waller County, Texas
Trial Court Cause No. 13-03-21887

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

John Roberson litigated a child custody dispute with his ex-wife Belinda Dawn Tidwell. A September 2012 final judgment awarded custody to Roberson, along with $45,118.51 in attorney's fees against Tidwell.

Roberson and the law firm that represented him in the custody proceeding, Grimes & Fertitta, P.C., filed a subsequent lawsuit in 2013 asserting a fraudulent transfer claim and seeking judicial foreclosure in connection with the earlier $45,118.51 judgment. They assert that Tidwell unlawfully sought to evade payment of the September 2012 judgment

by purchasing a 32-acre property in Anderson County and registering title to the property in her daughter's name. Roberson and the law firm filed a motion for traditional summary judgment on their fraudulent transfer claim; they also asked the trial court to sign an order requiring turnover of the 32-acre property and to appoint a receiver. The trial court signed a December 7, 2015 order granting their motion for summary judgment, granting turnover relief, and establishing a receivership.

Tidwell, acting *pro se*, challenges the trial court's December 7, 2015 order on appeal. Although her briefing is not entirely clear, Tidwell appears to assert that (1) the appellees failed to establish a fraudulent transfer; and (2) the 32-acre property was purchased with funds protected by the homestead exemption and therefore should not have been the subject of a turnover order.

We affirm the trial court's order because (1) the evidence presented by the appellees establishes their fraudulent transfer claim as a matter of law; and (2) the 32-acre property is not protected by the homestead exemption.

BACKGROUND

Tidwell's appellate briefing asserts various facts pertaining to the parties' divorce and custody proceedings, her acquisition of the 32-acre property, and the present suit. The facts below, listed in chronological order, are relevant to the disposition of Tidwell's arguments on appeal:

- May 4, 2009 – Roberson initiates case number 09-05-19791 against Tidwell by filing a petition for divorce.
- September 22, 2009 – Tidwell executes a deed of trust in favor of Joe Taylor to purchase the 32-acre property. Tidwell acquires a separate 10-acre tract through the execution of a general warranty deed.[1]
- November 19, 2009 – Tidwell and Roberson's final divorce decree is signed

[1] The 10-acre tract is contiguous with the 32-acre property.

in case number 09-05-19791.

- June 1, 2010 – Tidwell assigns the 32-acre property and the additional 10-acre tract to her daughters Jennifer McCallum and Jessica Tidwell. The assignment is recorded on May 28, 2013.
- June 9, 2010 – Roberson files to modify the parties' custody arrangement in case number 09-05-19791.
- April 2012 – Tidwell receives insurance proceeds in connection with fire damage at her residence.
- April 3, 2012 – The 32-acre property is repossessed and sold at a foreclosure sale following Tidwell's failure to remit the payments required under the 2009 deed of trust. Taylor reacquires the 32-acre property at the foreclosure sale.
- May 9, 2012 – Tidwell repurchases the 32-acre property from Taylor using insurance proceeds. Tidwell executes a general warranty deed covering the 32-acre property and lists her daughter, McCallum, as owner.
- September 11, 2012 – Final judgment is signed in the custody dispute in case number 09-05-19791; judgment is assessed against Tidwell for $45,118.51.
- February 14, 2014 – A writ of execution is issued to enforce the September 11, 2012 judgment against Tidwell's 10-acre property.
- April 2, 2014 – Tidwell files a homestead designation on the 10-acre tract.
- April 14, 2014 – Anderson County informs the appellees that it cannot enforce the writ against the 10-acre tract because Tidwell designated the tract as her homestead. The county is unable to locate other property owned by Tidwell that would be subject to execution.

In the fraudulent transfer suit underlying this appeal, Roberson and the law firm sought to

set aside Tidwell's 2012 purchase of the 32-acre property in McCallum's name. They alleged that the transfer was executed to avoid payment on the 2012 judgment against Tidwell. In their motion for summary judgment, Roberson and the law firm asserted that Tidwell's 2012 purchase of the 32-acre property occurred while she was engaged in litigation and only months before the appellees received a $45,118.51 judgment against her. They further contend that the 2012 purchase divested Tidwell of substantially all assets that could be used to satisfy the September 2012 judgment, as evidenced by the appellees' unsuccessful attempt to execute the judgment on Tidwell's property.

For her part, Tidwell focused on her 2009 acquisition of the 32-acre property and her 2010 assignment of the property to her daughters. Tidwell asserted that these earlier transfers were the proper focus of the fraudulent transfer analysis and did not occur while the parties were engaged in litigation. Tidwell also claimed that the 2012 purchase of the 32-acre property could not be set aside as a fraudulent transfer because it was made with funds exempt from seizure as proceeds received for damage to her homestead.

The trial court granted the appellees' motion for summary judgment on their fraudulent transfer claim and ordered turnover of the 32-acre property and the appointment of a receiver.

STANDARDS OF REVIEW

A summary judgment is reviewed *de novo*.[2] *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When reviewing a summary judgment, we examine the record in the light most favorable to the nonmoving party, indulging every reasonable inference and resolving any doubts in the nonmoving party's favor. *Cantey Hanger, LLP*

[2] In its order on the appellees' motion for summary judgment, the trial court's conclusion that the appellees made the showing necessary to warrant judgment as a matter of law is included under a heading entitled "Findings of Fact." Findings of fact are inappropriate in a summary judgment proceeding. *See Salas v. LNV Corp.*, 409 S.W.3d 209, 215 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The trial court's order granting summary judgment is reviewed *de novo* rather than under a factual sufficiency standard. *Id*. at 214-15.

v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015).

For a traditional summary judgment, the burden is on the moving party to show that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.[3] Tex. R. Civ. P. 166a(c); *Byrd*, 467 S.W.3d at 481. When a plaintiff moves for a traditional summary judgment on a claim it asserts, it must conclusively prove each element of the claim as a matter of law. *In re Gen. Agents Ins. Co. of Am., Inc.*, 254 S.W.3d 670, 674 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding [mand. denied]). If the plaintiff satisfies this burden, the burden shifts to the defendant to raise a genuine issue of material fact sufficient to defeat summary judgment. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).

A trial court's order requiring turnover and appointing a receiver is reviewed for an abuse of discretion. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) (turnover order); *Sheikh v. Sheikh*, 248 S.W.3d 381, 386-87 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (receivership order). A turnover order will be affirmed unless the trial court acted in an unreasonable or arbitrary manner, an inquiry that examines whether the action was taken "'without reference to any guiding rules and principles.'" *Buller*, 806 S.W.2d at 226 (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985)). "[A] trial court's issuance of a turnover order, even if predicated on an erroneous conclusion of law, will not be reversed for abuse of discretion if the judgment is sustainable for any reason." *Id*.

[3] In their appellate briefing, Roberson and the law firm assert that their summary judgment motion proceeded under a "no-evidence" standard. A no-evidence summary judgment motion is properly utilized when the moving party asserts that there is no evidence of one or more elements of a claim or defense on which the nonmoving party would have the burden of proof at trial. *Mendoza v. Fiesta Mart, Inc.*, 276 S.W.3d 653, 655 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Here, the appellees' summary judgment motion sought judgment as a matter of law on their fraudulent transfer claim — a claim for which they bore the burden of proof. Accordingly, the appellees' summary judgment motion and the trial court's order granting it are properly analyzed under a traditional summary judgment standard.

ANALYSIS

I. Fraudulent Transfer Claim

The trial court granted traditional summary judgment in favor of Roberson and the law firm on their claim that Tidwell engaged in a fraudulent transfer when she purchased the 32-acre property on May 9, 2012, and registered title to the property in her daughter's name. In her first issue, Tidwell contends that the trial court erred in granting a traditional summary judgment in favor of Roberson and the law firm on their fraudulent transfer claim.

A. Uniform Fraudulent Transfer Act

Texas' Uniform Fraudulent Transfer Act ("UFTA") is intended to prevent a debtor from defrauding its creditors by transferring assets out of its creditors' reach. *Citizens Nat'l Bank of Tex. v. NXS Constr., Inc.*, 387 S.W.3d 74, 79 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

A transfer may be considered fraudulent under the UFTA if it was done with "actual intent to hinder, delay, or defraud any creditor of the debtor." Tex. Bus. & Com. Code Ann. § 24.005(a) (Vernon 2015). Fraudulent intent may be inferred from a consideration of several non-exclusive "badges of fraud." *Id*. at § 24.005(b). Although the presence of an individual badge of fraud is not conclusive, the presence of several badges of fraud may support an inference of fraudulent intent. *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 566-67 (Tex. 2016) ("a confluence of several [badges of fraud] presents a strong case of fraud"). The UFTA lists the following badges of fraud potentially relevant to this case:

- The transfer was to an insider;
- the transfer was concealed;
- the transfer was of substantially all the debtor's assets; and
- before the transfer occurred, the debtor had been sued or threatened with suit.

Tex. Bus. & Com. Code Ann. § 24.005(b)(1), (3), (4), (5).

In addition to providing a statutory cause of action, the UFTA provides a remedial

scheme through which a creditor may seek recourse for a fraudulent transfer of assets or property. *Id*. §§ 24.008, 24.009 (Vernon 2015); *Arriaga v. Cartmill*, 407 S.W.3d 927, 932 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The UFTA's remedies include the avoidance of a transfer, temporary attachment of the transferred asset, and other equitable remedies. Tex. Bus. & Com. Code Ann. § 24.008(a). If a creditor obtains a judgment on a claim against the debtor, the trial court may order the equitable relief necessary to effectuate the judgment. *See Arriaga*, 407 S.W.3d at 932-33.

B. Summary Judgment on the Fraudulent Transfer Claim

To establish their fraudulent transfer claim, Roberson and the law firm presented evidence pertaining to the badges of fraud listed above. The appellees' evidence supports three badges of fraud identified by the UFTA and is sufficient to establish the appellees' fraudulent transfer claim as a matter of law.

First, the evidence shows that the challenged transfer was to an insider — Tidwell's daughter McCallum. *See* Tex. Bus. & Com. Code Ann. § 24.002(7) (Vernon Supp. 2016) ("'Insider' includes: . . . a relative of the debtor"). Second, the evidence shows that, at the time the challenged transfer occurred on May 9, 2012, Tidwell was engaged in custody litigation in case number 09-05-19791, which culminated in a judgment against her signed on September 11, 2012. Third, the evidence shows that the 2012 transfer of the 32-acre property divested Tidwell of substantially all of her assets. Following the transfer, Roberson and the law firm were unable to satisfy their judgment against Tidwell and a writ of execution could not be enforced against any exempt property Tidwell owned. Further, Tidwell's affidavits filed in the trial court make repeated reference to her indigence. The evidence presented by Tidwell does not raise an issue of fact in regard to these three badges of fraud or the resulting inference of fraudulent intent.[4]

[4] To provide additional support for their individual arguments, both parties rely on Tidwell's 2009 acquisition of the 32-acre property and her 2010 assignment of the property to her daughters. The appellees assert that, because the 2010 assignment remained unrecorded until 2013, Tidwell's actions evidence fraudulent intent with regard to the challenged 2012 transfer. Tidwell, focusing on her 2009 and 2010 actions, asserts that these actions occurred after the parties' final divorce decree was signed and before

Tidwell argues that the challenged 2012 transfer was not made with the requisite fraudulent intent necessary to warrant summary judgment on the appellees' claim. Tidwell asserts that the 2012 transfer was made to ease the disposition of the 32-acre property following her death by removing it from subsequent probate proceedings. Tidwell's sole evidence in support of this contention is statements made in her affidavits. These conclusory statements, supported by no independent facts, are not sufficient to create a fact question regarding whether the transfer at issue was undertaken with fraudulent intent. *See Purcell v. Bellinger*, 940 S.W.2d 599, 602 (Tex. 1997); *Garza v. City of Houston*, No. 14-06-00475-CV, 2007 WL 2089287, at *5 (Tex. App.—Houston [14th Dist.] July 24, 2007, no pet.) (mem. op.).

Considering a similar factual scenario, the El Paso Court of Appeals affirmed summary judgment on a fraudulent transfer claim and held that self-serving statements in an interested witness' affidavit did not create a question of fact on the issue of fraudulent intent. *See Matteson v. El Paso Cty.*, No. 08-00-00095-CV, 2001 WL 898729, at *3 (Tex. App.—El Paso Aug. 10, 2001, pet. denied) (not designated for publication). The evidence in *Matteson* showed that the (1) transferor conveyed the property in question to an insider, her daughter-in law; (2) transferor knew that the property had been pledged to pay for other debts; and (3) allegedly fraudulent transfer involved all or nearly all of the transferor's estate. *Id*. In the transferee's affidavit, she asserted that the transferor lacked the fraudulent intent necessary to set aside the property transfer because the transferor conveyed the property to facilitate its disposition upon her death. *Id*. The transferee's conclusory statements were insufficient to avoid summary judgment on the fraudulent transfer claim. *Id*. Likewise, Tidwell's conclusory statements of intent do not give rise to a material issue of fact on the appellees' claim.

Tidwell received notice of Roberson's June 2010 request to modify the parties' custody arrangement. Relying on these 2009 and 2010 events, Tidwell claims that the challenged transfer did not occur while the parties were engaged in litigation. These arguments addressing the 2009 and 2010 transfers implicate transactions separate from the 2012 transfer at issue in this case and are not determinative of whether the challenged 2012 transfer was undertaken with fraudulent intent.

Tidwell also asserts that the challenged transfer cannot be set aside as fraudulent because it was made with exempt funds received as an insurance payment for damage to her homestead. As the party claiming the exemption, the burden is on Tidwell to prove her entitlement to the homestead exemption. *Almanza v. Salas*, No. 14-12-01114-CV, 2014 WL 554807, at *3 (Tex. App.—Houston [14th Dist.] Feb. 11, 2014, no pet.) (mem. op.).

The 2012 purchase of the 32-acre property was made using insurance proceeds Tidwell received for damage caused by a fire at her residence. Under Texas law, a homestead is exempt from seizure to satisfy the claims of creditors. Tex. Prop. Code Ann. § 41.001(a) (Vernon 2014). Similarly, the conveyance of a homestead cannot be set aside as a fraudulent transfer under the UFTA. *See* Tex. Bus. & Com. Code Ann. § 24.002(2)(B), (12); *Martinek Grain & Bins, Inc. v. Bulldog Farms, Inc.*, 366 S.W.3d 800, 805-06 (Tex. App.—Dallas 2012, no pet.). Like the homestead itself, proceeds received from the sale of a homestead or as compensation for damage to a homestead are exempt from seizure for six months after receipt. Tex. Prop. Code Ann. § 41.001(c); *Cameron v. Fay*, 55 Tex. 58, 63 (Tex. 1881); *Fitzgerald v. Antoine Nat'l Bank*, 980 S.W.2d 228, 231 (Tex. App.—Houston [14th Dist.] 1998, no pet.). If the funds are not reinvested in a new homestead within the prescribed six-month period, they lose their entitlement to the homestead exemption. *Swayne v. Chase*, 30 S.W. 1049, 1052 (Tex. 1895); *Hodes v. Diagnostic Experts of Austin, Inc.*, No. 03-09-00185-CV, 2010 WL 2867344, at *2 (Tex. App.—Austin July 22, 2010, no pet.) (mem. op.).

Tidwell filed a designation of homestead in April 2014 on a 10-acre tract separate from the 32-acre property at issue in this case. Although Tidwell asserts here that the 32-acre property is her homestead, she has not presented any evidence or argument to support that conclusion or to controvert her 2014 homestead designation on the separate 10-acre tract. Under Texas law, a claimant is "entitled to only a single homestead at once." *Drake Interiors, L.L.C. v. Thomas*, 433 S.W.3d 841, 848 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Accordingly, because the insurance proceeds were invested in property other than Tidwell's homestead, the proceeds lost any homestead protection to which they may

have been entitled. *See Swayne*, 30 S.W. at 1052; *Hodes*, 2010 WL 2867344, at *2-3. Thus, the transfer at issue in this case and the acquisition of the 32-acre property are not exempt from the remedies provided under the UFTA. *See Hodes*, 2010 WL 2867344, at *2-3.

In sum, the appellees presented evidence sufficient to establish their fraudulent transfer claim as a matter of law. Tidwell did not present evidence to raise a genuine issue of fact on the appellees' claim and failed to show that the transfer was exempt from the UFTA's provisions. For these reasons, we overrule Tidwell's first issue and affirm the trial court's summary judgment.

II. Turnover and Appointment of a Receiver

In her second issue on appeal, Tidwell asserts that the trial court abused its discretion by granting the appellees' request for turnover and the appointment of a receiver. For the reasons discussed below, we affirm the trial court's order granting the appellees' requested relief.

A. Texas Turnover Statute

The turnover statute provides a procedural remedy that permits a judgment creditor to reach the assets of a judgment debtor that are otherwise difficult to attach or levy on by ordinary legal process. Tex. Civ. Prac. & Rem. Code Ann. § 31.002 (Vernon 2015); *Buller*, 806 S.W.2d at 226.

A judgment creditor may pursue turnover relief against a judgment debtor if the debtor owns property that (1) cannot readily be attached or levied on by ordinary legal process; and (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities. Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a). In its order granting turnover relief, a trial court may appoint a receiver with the authority to take possession of the debtor's nonexempt property, to sell it, and to pay the proceeds to the judgment creditor. *Id*. at § 31.002(b). Turnover relief may be sought in the same proceeding that seeks to adjudicate the ownership of certain property, but may be granted only after disputed issues

of ownership are resolved. *Id*. at § 31.002(d); *Lesikar v. Moon*, No. 01-12-00406-CV, 2014 WL 4374117, at *16 (Tex. App.—Houston [14th Dist.] Sept. 4, 2014, pet. denied) (mem. op.).

A trial court is not required to identify the specific property subject to turnover. Tex. Civ. Prac. & Rem. Code Ann. § 31.002(h). Moreover, while there must be some evidence that the judgment debtor has non-exempt property that is not readily subject to attachment or levy, "[s]ection 31.002 does not specify, or restrict, the manner in which evidence may be received in order for a trial court to determine whether the conditions of section 31.002(a) exist, nor does it require that such evidence be in any particular form, that it be at any particular level of specificity, or that it reach any particular quantum before the court may grant aid under section 31.002." *Tanner v. McCarthy*, 274 S.W.3d 311, 322 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *see also Gillet v. ZUPT, LLC*, No. 14-15-01033-CV, 2017 WL 716633, at *5 (Tex. App.—Houston [14th Dist.] Feb. 23, 2017, no pet.). A lack of evidence to support turnover relief does not automatically invalidate a trial court's order, but is a "relevant consideration in determining if the trial court abused its discretionary authority in issuing the order." *Buller*, 806 S.W.2d at 226.

B. Order Requiring Turnover and the Appointment of a Receiver

Tidwell asserts that the trial court abused its discretion by granting the appellees' requested turnover relief because the funds used to purchase the 32-acre property were exempt as proceeds received as compensation for damage to her homestead. As discussed above, Tidwell's designated homestead is a 10-acre tract separate from the 32-acre property at issue in this case. The insurance proceeds Tidwell received were not reinvested in her homestead but were instead used to purchase the 32-acre property and, accordingly, lost any homestead protection to which they may have been entitled. *See Swayne*, 30 S.W. at 1052; *Hodes*, 2010 WL 2867344, at *2-3. Thus, the insurance proceeds and the 32-acre property acquired with the proceeds are not exempt from turnover and the evidence before the trial court was sufficient to support its finding that Tidwell possessed nonexempt property. *See* Tex. Civ. Prac. & Rem. Code Ann. § 31.002(a)(2).

Evidence also showed that the 32-acre property could not readily be attached or levied on by ordinary legal process. *See id*. at § 31.002(a)(1). The appellees tendered as evidence a letter they received from the Anderson County Sheriff's Office indicating that the sheriffs had been unable to locate any non-exempt property belonging to Tidwell. *See Gillet*, 2017 WL 716633, at *5 (writ of execution returned *nulla bona* was evidence that debtor's nonexempt property could not be readily attached or levied on by ordinary legal process). Reviewing this evidence, the trial court concluded that Tidwell's last-minute homestead designation on her 10-acre tract was undertaken to frustrate the appellees' ability to enforce their judgment against her. *See Allen v. Bentzin*, No. 03-00-00021-CV, 2000 WL 1759441, at *2-3 (Tex. App.—Austin Nov. 30, 2000, pet. denied) (not designated for publication) (evidence of debtor's actions taken to shield property from creditors relevant to court's decision to enter turnover order). Based on this conduct, the trial court concluded that Tidwell would avoid and fail to cooperate with future collection efforts, necessitating the appointment of a receiver. The evidence presented by the appellees satisfies the showing necessary to warrant turnover relief.

Finally, the trial court's turnover order was issued following the resolution of the appellees' fraudulent transfer claim and permitted Roberson and the law firm to reach the fraudulently transferred property to satisfy their judgment against Tidwell. *See Lesikar*, 2014 WL 4374117, at *16. Further, the trial court was free to take judicial notice of its final judgment on the appellees' claim. *See, e.g., In re K.F.*, 402 S.W.3d 497, 504 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) ("We presume the trial court took judicial notice of its record without any request being made and without any announcement that it has done so."). We conclude that the trial court did not abuse its discretion by ordering turnover and the appointment of a receiver. We overrule Tidwell's second issue.

CONCLUSION

We affirm the trial court's order granting summary judgment on the appellees' fraudulent transfer claim, authorizing turnover, and appointing a receiver.

/s/ William J. Boyce
Justice

Panel consists of Justices Boyce, Jamison, and Brown.