



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-15-00480-CV

**LIBERTY SPORT AVIATION, L.P.,**  
Appellant

v.

**TEXAS HILL COUNTRY BANK,**  
Appellee

From the 216th Judicial District Court, Kendall County, Texas  
Trial Court No. 14-314A  
Honorable N. Keith Williams, Judge Presiding

Opinion by: Jason Pulliam, Justice

Sitting: Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice  
Jason Pulliam, Justice

Delivered and Filed: September 7, 2016

**AFFIRMED**

**INTRODUCTION**

This appeal arises from suit filed by appellant Liberty Sport Aviation against nonparties to this appeal. In the underlying litigation, Liberty Sport Aviation sought to domesticate a foreign judgment and to foreclose on a security interest held in an aircraft by asserting a cause of action for fraudulent transfer of the aircraft. Appellee Texas Hill Country Bank (THCB) intervened and asserted its competing security interest in the aircraft superseded Liberty Sport Aviation's. The trial court granted THCB's motion for summary judgment, declaring THCB held a prior perfected

security interest in the subject aircraft. The trial court then granted THCB's motion for severance of its claim for declaratory relief from Liberty Sport Aviation's suit against the nonparties. Liberty Sport Aviation perfected this appeal arguing the trial court abused its discretion by granting the motion for severance and erred by granting summary judgment to THCB. We affirm the trial court's severance order and summary judgment.

#### **BACKGROUND**

Sometime in 2012, Barry Pruitt, through his company, Bristell USA, LP ("Bristell") bought an aircraft in Pennsylvania for \$125,000. The aircraft was Bristell's sole asset. Bristell subsequently assigned to Liberty Sport Aviation a security interest in the aircraft as collateral on a loan. In December 2012, Pruitt moved to Texas, and on March 3, 2013, THCB loaned Bristell \$125,000 for an unsecured working-capital line of credit.

In 2013, Liberty Sport Aviation sued Pruitt and Bristell in Pennsylvania state court to foreclose on the security interest it held in the aircraft. Shortly after being served with notice of the Pennsylvania lawsuit, on February 2, 2014, Bristell transferred title to the aircraft to PFM Group, LLC. Liberty Sport Aviation obtained a judgment against Bristell on February 18, 2014, and a judgment against Pruitt on April 7, 2014, in the Pennsylvania action.

In the meantime, on March 6, 2014, THCB renewed the line of credit with PFM, rather than Bristell, and extended the limit to \$130,000. Upon this renewal, THCB also took a security interest in the subject aircraft and a personal guarantee by three individuals. THCB recorded the security interest in the aircraft on April 30, 2014.

At some point, the aircraft was wrecked and declared a total loss by the insurer, which assessed proceeds at \$137,500. On July 7, 2014, Liberty Sport Aviation filed suit against Pruitt, Bristell and PFM in Kendall County, Texas to domesticate the Pennsylvania judgments against Pruitt and Bristell. Liberty Sport Aviation alleged the February 2014 transfer of the aircraft by

Bristell to PFM was a fraudulent transfer under the Texas Uniform Fraudulent Transfer Act of the Business and Commerce Code (“TUFTA”), and therefore, should be voided to allow Liberty Sport Aviation to execute its security interest granted by Bristell. Liberty Sport Aviation sought a temporary injunction and a writ sequestering the aircraft.

THCB intervened in the Texas suit, claiming its prior and properly perfected security interest in the aircraft superseded any interest Liberty attempted to assert. THCB was not named as a party to this suit. As intervenor, THCB filed a motion for summary judgment seeking declaratory judgment regarding the priority of its security interest and that it was entitled to the insurance proceeds. Liberty Sport Aviation also filed a summary judgment motion on its fraudulent transfer cause of action against Pruitt, Bristell, and PFM.

The trial court denied Liberty Sport Aviation’s summary judgment motion, but granted THCB’s summary judgment motion. In granting THCB’s motion for summary judgment, the trial court made the following findings, or declarations: (1) THCB has a properly perfected security interest in the aircraft; (2) the earliest date Liberty Sport Aviation could have had an enforceable Texas judgment was July 7, 2014; (3) THCB had a prior perfected security interest in the aircraft, precluding any claim by Liberty Sport Aviation to the aircraft; (4) THCB is entitled to the insurance proceeds from the aircraft; (5) THCB is entitled to judgment as a matter of law, and Liberty Sport Aviation is not entitled to levy or execute on the aircraft, and is not entitled to a writ of sequestration or any other right to possession of or interest in the aircraft; (6) counsel for Liberty Sport Aviation stipulates that THCB has a properly perfected security interest in the aircraft under the FAA Act. The trial court then granted THCB’s motion to sever its claim for declaratory relief from the claims asserted by Liberty Sport Aviation against Pruitt, Bristell, and PFM. Liberty Sport Aviation filed a motion for rehearing and new trial and then perfected this appeal.

*Preliminary issues:*

On appeal, Liberty Sport Aviation presents two issues. As basis for its arguments supporting these issues, Liberty Sport Aviation makes several declarations that factor into resolution of both issues, and therefore, must be addressed prior to determination of both appellate issues: (1) Liberty Sport Aviation bases its appellate arguments upon the declaration that it pled a counterclaim against THCB; and (2) Liberty Sport Aviation bases its appellate arguments upon the presumptive conclusion that determination of the fraudulent transfer cause of action in its favor would automatically place its security interest above THCB's.

*(1) Whether Liberty Sport Aviation asserted a counterclaim against THCB*

First, Liberty Sport Aviation presents its appellate argument based upon the proclamation that it asserted a counterclaim against THCB in its answer to the plea in intervention. Liberty Sport Aviation contends litigation and determination of this counterclaim precluded severance and summary judgment in THCB's favor. Liberty Sport Aviation does not assert what the specific counterclaim was, only that a counterclaim was included in its answer pleading and remains undetermined.

To sufficiently set out a particular cause of action, a pleading must give fair and adequate notice to the pleader's adversary of the nature of the cause of action asserted. *Castleberry v. Goolsby Bldg. Corp.*, 617 S.W.2d 665, 666 (Tex. 1981); *see Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 186 (Tex.1977). The pleading must give the required notice to allow the pleader's adversary to adequately prepare a defense. *Castleberry*, 617 S.W.2d at 666; *Bradt v. W.*, 892 S.W.2d 56, 75 (Tex. App.—Houston [1st Dist.] 1994, writ denied). Ordinarily, in the event of a pleading defect, such as if a pleader omits an element of a cause of action or fails to state it with sufficient clarity, the adversary must specifically except to the pleading, or it will waive any complaint. TEX. R. CIV. P. 90; *Aquila Southwest Pipeline, Inc. v. Harmony Exploration, Inc.*, 48

S.W.3d 225, 233 (Tex. App.—San Antonio 2001, pet. denied). However, should a pleader fail to plead a viable cause of action, such omission is not a pleading defect, and the adversary is not required to file special exceptions that would suggest to the pleader all possible causes of action that could be asserted. *Crabtree v. Ray Richey & Co.*, 682 S.W.2d 727, 728 (Tex. App.—Fort Worth 1985, no writ); *Hansberger v. EMC Mortg. Corp.*, 04-08-00438-CV, 2009 WL 2264996, at \*5 (Tex. App.—San Antonio July 29, 2009, pet. denied).

Guided by these principles, review of Liberty Sport Aviation’s answer to the plea in intervention reveals Liberty Sport Aviation did not assert any counterclaim against THCB. Liberty Sport Aviation titled its pleading, “Counter-Defendant’s Original Answer to Intervenor’s Plea in Intervention and Counterclaim”, and within this pleading asserted the same factual allegations which support its fraudulent transfer cause of action against Pruitt, Bristell and PFM. However, Liberty Sport Aviation did not assert any factual allegations that named or pertained to THCB or that would support any separate cause of action against THCB. Liberty Sport Aviation did not allege in its answer, as it contends on appeal, that THCB had knowledge of the fraudulent transfer or that THCB was not a “good faith creditor”, which would nullify any superior security interest. Liberty Sport Aviation alleges no facts that would implicate THCB in the fraudulent transfer or otherwise deter the validity of THCB’s security interest. Under the title “Counterclaim”, Liberty Sport Aviation states only that it “applies to this Court to make a determination regarding whether the transfer of the subject aircraft . . . from [Bristell] to [PFM] was a fraudulent transfer and determine the rights [Liberty Sport Aviation] has in the aircraft and/or any proceeds derived from insurance proceeds. . . .”

Although titled “Counterclaim”, based upon review of the allegations and assertions in its answer to THCB’s plea in intervention, Liberty Sport Aviation reiterates and seeks only determination of its fraudulent transfer cause of action asserted against Pruitt, Bristell and PFM.

Liberty Sport Aviation did not assert any independent counterclaim or cause of action against THCB nor did it assert any factual allegations that would require THCB assert special exceptions or otherwise defend the validity or alleged superiority of its security interest.

For these reasons, Liberty Sport Aviation did not assert any counterclaim against THCB and did not assert any other factual allegations other than those supporting its cause of action against Pruitt, Bristell and PFM. Therefore, this court must proceed to determination of the issues presented on appeal in this light: Liberty Sport Aviation did not assert a counterclaim against THCB, nor did it assert any factual allegations that pertained to THCB.

(2) *Whether an affirmative finding of fraudulent transfer between Bristell and PFM would automatically place Liberty Sport Aviation's security interest above THCB's*

Liberty Sport Aviation presents its appellate argument based upon the presumptive conclusion that an affirmative finding of fraudulent transfer against Pruitt, Bristell and PFM would automatically place Liberty Sport Aviation's security interest in the aircraft before THCB's. For this reason, Liberty Sport Aviation contends severance was improper and fact issues exist that preclude summary judgment in THCB's favor.

Under the Texas Uniform Fraudulent Transfer Act (TUFTA), a transfer of property is void as to a creditor if the transfer was intended to delay, hinder, or defraud any creditor from obtaining "that to which he is, or may become, entitled." TEX. BUS. & COM. CODE ANN. §§ 24.02, 24.03 (West 2015). A conveyance which is found to be fraudulent as to a creditor is wholly null and void as to that creditor, and legal and equitable title remain with the debtor relative to the defrauded creditor for the purpose of satisfying debts. *United States v. Chapman*, 756 F.2d 1237, 1240 (5th Cir. 1985); *Texas Sand Co. v. Shield*, 381 S.W.2d 48, 54 (Tex. 1964). When a fraudulent transfer is set aside, cancellation restores to the creditor and the transferor, only, the rights they had against each other prior to the fraudulent transfer. *See Mladenka v. Mladenka*, 130 S.W.3d 397, 401 (Tex.

App.—Houston [14th Dist.] 2004, no pet.). Thus, “a transfer in fraud of creditors is voidable in the general sense that good title may be passed to a transferee who does not have notice of the fraud, TEX. BUS. & COM. CODE ANN. § 24.02(b), and void in the very limited sense that creditors may otherwise treat the transferred property as though the transfer had never taken place, *see Texas Sand Co. v. Shield*, 381 S.W.2d 48, 55 (Tex. 1964).” *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1272-73 (5th Cir. 1983).

In accord with these principles, a fraudulent conveyance determination would affect only the rights and relationship between Liberty Sport Aviation, as creditor, and Pruitt and Bristell, as de-frauding debtor. *See United States v. Chapman*, 756 F.2d at 1240; *Mladenka*, 130 S.W.3d at 401. An affirmative finding would void any transfer from Bristell to PFM, as it relates to Liberty Sport Aviation, only, and would restore to Liberty Sport Aviation the rights it held in relation to Pruitt and Bristell prior to the fraudulent transfer. *See Mladenka*, 130 S.W.3d at 401; *In re MortgageAmerica Corp.*, 714 F.2d at 1272-73. Thus, should Liberty Sport Aviation obtain a favorable determination of its fraudulent transfer claim against Pruitt, Bristell and PFM, such a determination would operate to restore its rights prior to the transfer, but would not affect the rights of THCB. *See Mladenka*, 130 S.W.3d at 401; *In re MortgageAmerica Corp.*, 714 F.2d at 1272-73. Thereby, Liberty Sport Aviation would hold a valid security interest in the aircraft given to it by Bristell. However, this restoration of security interest does not necessarily place its security interest before THCB’s. Determination of superiority of security interest still must be determined by appropriate law and will be addressed within analysis of Liberty Sport Aviation’s second appellate issue.

## ANALYSIS

Determination of the issues presented in Liberty Sport Aviation's second appellate issue factor into determination of the first appellate issue. Therefore, due to the nature of the arguments presented, this court must address Liberty Sport Aviation's second appellate issue first.

### **Issue Two: Whether the Trial Court Abused its Discretion by Granting THCB's Motion for Summary Judgment**

In its second issue on appeal, Liberty Sport Aviation contends the trial court abused its discretion by granting THCB's motion for summary judgment and thereby awarding declaratory judgment that THCB held a superior security interest in the aircraft. Liberty Sport Aviation contends genuine issues of material fact exist with regard to whether Bristell fraudulently transferred the aircraft to PFM. Liberty Sport Aviation contends THCB is not entitled to summary judgment on the issue of the priority of the competing security interests in the aircraft until determination of its fraudulent transfer cause of action against Pruitt, Bristell and PFM because an affirmative finding would place its security interest ahead of THCB's.

In addition, Liberty Sport Aviation contends a fact issue exists "as to THCB's ability to claim itself as a 'good faith creditor' because it had knowledge of the fraudulent transfer of the aircraft..." Because fact issues exist whether THCB is a good faith creditor, Liberty Sport Aviation contends THCB cannot establish as a matter of law that its security interest holds priority over Liberty Sport Aviation's.

#### *Standard of Review*

A declaratory judgment rendered by summary judgment is reviewed under the same standards that govern summary judgments generally. *Hourani v. Katzen*, 305 S.W.3d 239, 248 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Lidawi v. Progressive Cnty. Mut. Ins. Co.*, 112 S.W.3d 725, 729 (Tex. App.—Houston [14th Dist.] 2003, no pet.). An appellate court must



review the trial court's grant or denial of summary judgment *de novo*, thereby reviewing all questions presented and all summary-judgment evidence presented by both sides. *Smith v. Janda*, 126 S.W.3d 543, 545 (Tex. App.—San Antonio 2003, no pet.). If the appellate issue raised is based on undisputed and unambiguous facts, the appellate court will review the trial court's award of declaratory relief and determine its propriety as a matter of law. *See Gramercy Ins. Co. v. MRD Invs., Inc.*, 47 S.W.3d 721, 724 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (citing *Comm'rs Court of Titus Cnty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997)).

To prevail on a motion for summary judgment, the movant must show “there is no genuine issue as to any material fact and the [movant] is entitled to judgment as a matter of law.” TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Thus, a plaintiff moving for summary judgment on its claims for affirmative relief must conclusively prove each element of its cause of action as a matter of law and must produce evidence that would be sufficient to support an instructed verdict at trial. *See Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972); *Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mountain Ranch, Inc.*, 04-13-00529-CV, 2014 WL 7185081, at \*4 (Tex. App.—San Antonio Dec. 17, 2014, no pet.). Once the movant establishes a right to summary judgment as a matter of law, the burden shifts to the nonmovant to present some evidence raising a genuine issue of material fact to avoid judgment in favor of the movant. TEX. R. CIV. P. 166a(c); *Pascual Madrigal P.L.L.C. v. Commercial IT Sols. Inc.*, 04-13-00742-CV, 2014 WL 4230174, at \*1 (Tex. App.—San Antonio Aug. 27, 2014, no pet.).

When reviewing a traditional summary judgment, we must take all evidence favorable to the nonmovant as true and indulge all reasonable inferences in the nonmovant's favor as well as resolve all doubts in favor of the nonmovant. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Pascual Madrigal*, 2014 WL 4230174, at \*1. In this light, factual evidence which favors the movant is not considered unless it is uncontroverted. *Great Am. Reserve Ins. Co. v. San*

*Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). “After all the evidence has been sifted in this manner, the Court must determine whether the movant is entitled to a judgment as a matter of law.” *Id.*

#### *Application*

Because THCB was an intervening party moving for summary judgment, it was required to prove its entitlement to summary judgment as a matter of law. *See Swilley*, 488 S.W.2d at 67. In its motion for summary judgment, THCB asserted entitlement to summary judgment as a matter of law based upon undisputed facts that it perfected its security interest with the FAA on April 30, 2014, and Liberty Sport Aviation filed suit in Texas to domesticate its Pennsylvania judgment against Pruitt and Bristell on July 7, 2014. Thereby, the summary judgment evidence and undisputed facts conclusively show the earliest date Liberty Sport Aviation could have established notice of any security interest in the subject aircraft was July 7, 2014.

This court must address, first, Liberty Sport Aviation’s argument on appeal that a fact issue exists whether THCB is a good faith creditor, and this fact issue precluded summary judgment. Review of the record reveals Liberty Sport Aviation did not present this argument or any factual allegations to support such argument in either its answer to the intervention or in its response to THCB’s motion for summary judgment. Liberty Sport Aviation presented this argument to the trial court for the first time during the hearing on THCB’s motion for summary judgment. THCB objected to Liberty Sport Aviation’s presentation of this argument at the summary judgment hearing absent supporting pleadings or assertion in the summary judgment response, and the trial court took the matter under advisement. Subsequently, the trial court entered summary judgment in favor of THCB.

Any issues a non-movant contends avoid the movant’s entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the

motion and are not expressly presented by mere reference to summary judgment evidence. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341-43 (Tex. 1993) (citing by analogy *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979)). “Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.” TEX. R. CIV. P. 166a(c); *McConnell*, 858 S.W.2d at 341-43; *Clear Creek Basin Authority*, 589 S.W.2d at 678. However, if a non-movant fails to present any issues in its response or answer, the movant must still establish its entitlement to summary judgment. The effect of such a failure is that the non-movant is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant. *McConnell*, 858 S.W.2d at 343; *Clear Creek Basin Authority*, 589 S.W.2d at 678.

As already determined, Liberty Sport Aviation did not assert any counterclaim against THCB. In addition, Liberty Sport Aviation did not assert in its response to summary judgment that a fact issue existed with regard to the superiority of security interests based upon THCB’s failure to establish itself as a “good faith creditor”. Therefore, this court shall not consider this argument. See TEX. R. CIV. P. 166a(c); *McConnell*, 858 S.W.2d at 341-43; *Clear Creek Basin Authority*, 589 S.W.2d at 678.

Based upon this conclusion, this court will address only Liberty Sport Aviation’s argument that THCB is not entitled to summary judgment because fact issues exist whether Bristell fraudulently transferred the aircraft to PFM, the only assertion presented in its answer to THCB’s intervention and the only argument presented in its response to THCB’s motion for summary judgment.

On appeal, Liberty Sport Aviation reiterates its argument that THCB cannot be entitled to a summary judgment declaring its security interest in the aircraft supersedes Liberty Sport

Aviation's because an affirmative determination of the fraudulent transfer would automatically void THCB's security interest. Liberty Sport Aviation's argument fails for several reasons.

First, as determined previously, should Liberty Sport Aviation obtain a favorable determination of its fraudulent transfer claim against Pruitt, Bristell and PFM, such a determination would operate to restore its rights prior to the transfer, but would not affect the rights of THCB. *See Mladenka*, 130 S.W.3d at 401; *In re MortgageAmerica Corp.*, 714 F.2d at 1272-73. Thereby, Liberty Sport Aviation would hold a valid security interest in the aircraft given to it by Bristell. However, this restoration of security interest does not necessarily place its security interest before THCB's. Determination of superiority of security interest still must be determined by appropriate law.

Second, the long-standing general rule of priority of competing security interests in collateral, where both interests are perfected by filing, is that priority vests in the party who first properly filed a financing statement or other appropriate instrument. TEX. BUS. & COM. CODE ANN. § 9.322(a) (West 2011); *see also Borg-Warner Acceptance Corp. v. Tascosa Nat. Bank*, 784 S.W.2d 129, 133 (Tex. App.—Amarillo 1990, writ denied) (citing previous codification, § 9.312(e)(1)); *Franklin Nat. Bank v. Boser*, 972 S.W.2d 98, 101 (Tex. App.—Texarkana 1998, pet. denied) (same).

The record and undisputed facts conclusively show THCB perfected its security interest in the subject aircraft on April 30, 2014, prior to any perfection obtained by Liberty Sport Aviation through the filing of suit to perfect the Pennsylvania judgments against Pruitt and Bristell on July 7, 2014. Thus, based upon the undisputed facts, THCB's security interest in the aircraft was superior to Liberty Sport Aviation's as a matter of law. *See* TEX. BUS. & COM. CODE ANN. § 9.322(a); *Borg-Warner Acceptance Corp.*, 784 S.W.2d at 133; *Franklin Nat. Bank*, 972 S.W.2d at 101.

Finally, to the extent Liberty Sport Aviation argues favorable determination of its fraudulent transfer claim would necessitate the voidance of THCB's security interest to satisfy any judgment, this argument also fails. Determination of superiority in THCB's security interest does not leave Liberty Sport Aviation without remedy should it receive an affirmative finding on its fraudulent transfer cause of action against Pruitt, Bristell and PFM. Remedy to the creditor for fraudulent transfer can be several forms: (1) voidance of the transfer to the extent necessary to satisfy the creditor's claim; (2) attachment against the property; (3) injunction against further disposition of the property or other property; and/or (4) any other relief the circumstances may require. TEX. BUS. & COM. CODE ANN. § 24.008(a) (West 2015). In addition, a creditor may obtain a judgment and levy execution on the property or may obtain a judgment for the value of the asset transferred or in the amount necessary to satisfy the creditor's claim, whichever is less. TEX. BUS. & COM. CODE ANN. §§ 24.008(b), 24.009(b). Thus, should Liberty Sport Aviation obtain a favorable determination of its fraudulent transfer claim against Pruitt, Bristell and PFM, such a determination would not necessitate the voidance of THCB's security interest to satisfy any judgment. Instead, Liberty Sport Aviation could be awarded a judgment in the amount of the value of the aircraft.

For these reasons, we conclude that based upon the undisputed facts, THCB was entitled to summary judgment as a matter of law. Therefore, the trial court did not err by granting THCB's motion for summary judgment. Liberty Sport Aviation's second issue on appeal is overruled.

**Issue One: Whether the Trial Court Abused its Discretion by Granting THCB's Motion for Severance**

Liberty Sport Aviation contends the trial court abused its discretion by granting THCB's motion for severance because the issues presented in Liberty Sport Aviation's suit against Pruitt, Bristell and PFM involve the same facts and issues as THCB's assertions in its intervention.

Liberty Sport Aviation contends the question of which party, Liberty Sport Aviation or THCB, has a superior security interest in the aircraft is the subject of both cases because resolution of its fraudulent-transfer cause of action affects the superiority of the competing security interests.

#### *Standard of Review*

Texas Rule of Civil Procedure 41 provides that “[a]ny claim against a party may be severed and proceeded with separately.” TEX. R. CIV. P. 41. In addition, Rule of Civil Procedure 174(b) provides a trial court may order a separate trial of any claims or of separate issues in furtherance of convenience or to avoid prejudice. TEX. R. CIV. P. 174(b). An appellate court will review a trial court’s decision to grant a severance under an abuse-of-discretion standard of review. *H.E. Butt Grocery Co. v. Currier*, 885 S.W.2d 175, 176 (Tex. App.—Corpus Christi 1994, no writ) (citing *Guaranty Fed. Savs. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990)). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or if it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). Determination whether a trial court abused its discretion is made on a case-by-case basis. *Federal Deposit Ins. Corp. v. Kendrick*, 897 S.W.2d 476, 481 (Tex. App.—Amarillo 1995, no writ).

#### *Applicable Law*

In principle, courts permit severance to avoid prejudice, do justice, and increase convenience. *F.F.P. Oper. Partners v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007). In effect, severance divides a lawsuit into independent suits that will be adjudicated by distinct and separate judgments. See *Van Dyke v. Boswell, O’Toole, Davis & Pickering*, 697 S.W.2d 381, 383 (Tex. 1985); *Kansas Univ. Endowment Ass’n v. King*, 350 S.W.2d 11, 19 (Tex. 1961); *Dalisa*, 81 S.W.3d at 879. In light of these fundamental principles, severance of a claim is proper if “(1) the controversy involves more than one cause of action; (2) the severed claim is one that

would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that it involves the same facts and issues. *Guar. Fed. Sav. Bank v. Horseshoe Op. Co.*, 793 S.W.2d 652, 658 (Tex. 1990); *H.E. Butt Grocery Co. v. Currier*, 885 S.W.2d 175, 176 (Tex. App.—Corpus Christi 1994, no writ).

The trial court held a hearing on THCB's motion to sever and accepted argument pertaining to the factors of consideration. The record reveals that in this underlying action, Liberty Sport Aviation asserted a fraudulent-transfer cause of action against Pruitt, Bristell and PFM, contending the transfer of ownership interest in the aircraft from Bristell to PFM was fraudulent under the TUFTA. THCB intervened to assert a claim for declaratory relief to protect its alleged superior security interest in the same aircraft that was the subject of the suit. Liberty Sport Aviation asserted no cause of action against THCB, nor did it join THCB as a party to the suit.

Based upon the alignment of the parties and intervenor, the underlying litigation comprises two actions involving a common party, but different causes of action seeking entitlement to the same subject property: (1) Liberty Sport Aviation's action against Pruitt, Bristell and PFM for fraudulent transfer, and (2) THCB's intervention asserting superior security interest in the same subject aircraft over any interest held by Liberty Sport Aviation. While the underlying action, essentially, is an action of competing interests in the same property, it involves separate and independent claims, or causes of action.

Liberty Sport Aviation's argument on appeal focuses primarily on the third element: whether the facts and issues pertaining to its fraudulent-transfer cause of action against Pruitt, Bristell and PFM are so interwoven with THCB's assertion of superior security interest in the subject aircraft so as to require THCB to remain in the litigation and participate at trial.

Because THCB is not a party to Liberty Sport Aviation's action against Pruitt, Bristell and PFM, and Liberty Sport Aviation asserted no factual allegations or cause of action against

THCB, the remaining litigation and trial of Liberty Sport Aviation's cause of action against Pruitt, Bristell and PFM does not necessitate participation from THCB. The remaining action pertains to the validity of Liberty Sport Aviation's security interest in the aircraft and any consequential remedy available to it for recovery of funds loaned to Pruitt and Bristell. The issues involved in THCB's intervening action pertain to which party, THCB or Liberty Sport Aviation, holds a superior security interest in the aircraft.

The facts and law determinative of the issue in the intervening action are different from the facts and law determinative of the viability of Liberty Sport Aviation's fraudulent transfer cause of action asserted against Pruitt, Bristell and PFM. As already determined, even if the litigation between Liberty Sport Aviation and Pruitt, Bristell and PFM results in a finding of fraudulent transfer, this finding would not implicate or impede upon THCB's security interest in the same property. Because determination of THCB's intervening claim established its priority of security interest in the subject aircraft, regardless of the outcome of Liberty Sport Aviation's causes of action asserted against Pruitt, Bristell and PFM, this severed action is not affected or implicated by Liberty Sport Aviation's claim against Pruitt, Bristell and PFM. Therefore, although each involve competing interests in the same property, the two actions, essentially, were separate and distinct, as they involved different assertions and any possible result in each did not affect the other action.

For these reasons, the record supports the trial court's severance of THCB's intervening claim of superior security interest from Liberty Sport Aviation's action against Pruitt, Bristell and PFM. Therefore, the trial court did not act in an arbitrary or unreasonable manner or without reference to any guiding rules or principles, and the trial court did not abuse its discretion. *See Downer*, 701 S.W.2d at 241-42. We affirm the trial court's order of severance. Liberty Sport Aviation's first issue on appeal is overruled.



**CONCLUSION**

For the foregoing reasons, we conclude the trial court did not abuse its discretion by granting THCB's motion to sever, and the trial court did not err by granting THCB's motion for summary judgment. Accordingly, the trial court's severance order is affirmed, and the trial court's summary judgment is affirmed.

Jason Pulliam, Justice