In the Court of Appeals Second Appellate District of Texas at Fort Worth

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No. 02-19-00298-CV

CLYDE L. HECKERT, JR. AND CAROLINA FARMER, Appellants

V.

JULIA TERESA HECKERT, Appellee

On Appeal from the 342nd District Court
Tarrant County, Texas
Trial Court No. 342-278046-15

Before Sudderth, C.J.; Gabriel and Bassel, JJ.
Memorandum Opinion by Justice Gabriel

MEMORANDUM OPINION

Appellants Clyde L. Heckert, Jr. and his wife Carolina Farmer appeal from the trial court's judgment in favor of Clyde's ex-wife, Appellee Julia Teresa Heckert.[1] In two issues, Clyde and Carolina argue that the trial court erred by denying their motion to transfer venue and by ordering the avoidance of certain contributions to Clyde's retirement account. We will affirm the trial court's denial of Clyde and Carolina's motion to transfer venue, but we will reverse the trial court's avoidance of the contributions to Clyde's retirement account.

I. BACKGROUND

In 2014, a jury awarded Teresa $381,342.47 in a personal-injury action she had filed against Clyde.[2] The judgment from that award remained unsatisfied, and in 2015, Teresa filed the present lawsuit against Clyde and Carolina alleging that Clyde had made certain fraudulent transfers with the intent of hindering, delaying, or defrauding his creditors, including Teresa.[3] Among other things, Teresa alleged that Clyde had

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[1]We will refer to Appellee as "Teresa," as the parties have done in their briefs. We will refer to Appellants as "Clyde" and "Carolina."

[2]Teresa later obtained a turnover order against Clyde arising from that award that was the subject of an appeal before our court. *See Heckert v. Heckert*, No. 02-16-00213-CV, 2017 WL 5184840 (Tex. App.—Fort Worth Nov. 9, 2017, no pet.) (mem. op.).

[3]Teresa also filed suit against A2R, Ltd. and Averse 2 Risk, LLC, entities allegedly created by Clyde to defraud Teresa. A2R and Averse 2 Risk are not parties to this appeal.

fraudulently given Carolina $95,000 in exchange for a fifty percent ownership interest in certain real property owned by Carolina in Denton County (the Denton County Property) and had fraudulently made certain contributions to his retirement account. In her original petition, Teresa sought "an order from the Court awarding her an interest, whether a subrogation interest or otherwise, in the [Denton County Property]." Teresa also filed a notice of lis pendens in the Denton County real property records. The notice referred to the present lawsuit and stated that through the lawsuit, Teresa sought to establish an interest in the Denton County Property.

Clyde and Carolina later filed a motion to transfer venue, arguing that venue was mandatory in Denton County pursuant to the mandatory venue provision pertaining to an interest in land. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.011. Teresa amended her petition thirty-one days before the motion to transfer venue was heard by the trial court. In her amended petition, Teresa deleted her request that the trial court award her an interest in the Denton County Property. In her amended petition—which is her live petition—Teresa sought: (1) actual damages; (2) exemplary damages; (3) avoidance of the fraudulent transfers to the extent necessary to satisfy the underlying judgment; (4) an attachment against the assets fraudulently transferred or other property belonging to Clyde and Carolina; (5) an injunction against further disposition by Clyde and Carolina of the assets transferred or other property owned by them; (6) execution of the assets fraudulently transferred; (7) any other relief she may require, including turnover orders and the appointment of a receiver; and

(8) costs and attorney's fees. The trial court ultimately denied Clyde and Carolina's motion to transfer venue.[4]

The case proceeded to a bench trial. During the trial, evidence was presented that Clyde had made certain payments to Carolina in or around 2014, including making a payment to her for $95,000 in exchange for an interest in the Denton County Property. Evidence was also presented that between January 2014 and April 2015, Clyde contributed over $64,000 to a 401(k) account he had through his employer and that the account was governed by the Employee Retirement Income Security Act (ERISA). *See* 29 U.S.C. §§ 1001 et seq. The trial court ultimately signed a judgment awarding Teresa actual damages of $159,990.49 and attorney's fees of $56,154.12. The trial court also ordered the avoidance of transfers to Clyde's 401(k) account in the amount of $64,626.02. The trial court later issued findings of fact and conclusions of law, including a conclusion stating that "Teresa is entitled to void all fraudulent transfers." This appeal followed.

II. CLYDE AND CAROLINA'S MOTION TO TRANSFER VENUE

In their first issue, Clyde and Carolina argue that the trial court erred by denying their motion to transfer venue because venue was purportedly mandatory in

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[4]Clyde and Carolina later filed a motion to reconsider the trial court's order denying their motion to transfer venue. The trial court denied the motion to reconsider.

Denton County pursuant to Civil Practice and Remedies Code Section 15.011. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.011.

A. STANDARD OF REVIEW

We review a trial court's denial of a motion to transfer venue de novo. *In re E.P.*, No. 02-16-00049-CV, 2016 WL 4141041, at *5 (Tex. App.—Fort Worth Aug. 4, 2016, no pet.) (mem. op.); *Killeen v. Lighthouse Elec. Contractors, L.P.*, 248 S.W.3d 343, 347 (Tex. App.—San Antonio 2007, pet. denied). In deciding whether the trial court properly determined venue, we consider the entire record. Tex. Civ. Prac. & Rem. Code Ann. § 15.064(b); *Killeen*, 248 S.W.3d at 347.

B. THE LAW – SECTION 15.011'S MANDATORY VENUE PROVISION

Section 15.011 is a mandatory venue provision concerning certain actions relating to real property. Tex. Civ. Prac. & Rem. Code Ann. § 15.011. That section provides:

> Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located.

Id.

When determining whether a suit falls within Section 15.011's mandatory venue provision, we consider the "true nature" of the dispute. *In re Harding*, 563 S.W.3d 366, 370 (Tex. App.—Texarkana 2018, orig. proceeding); *In re Kerr*, 293 S.W.3d 353, 356 (Tex. App.—Beaumont 2009, orig. proceeding) (per curiam). In determining the

"true nature" of a dispute, we examine the pleadings, looking at the facts alleged, the rights asserted, and the relief sought. *Kerr*, 293 S.W.3d at 356; *see Harding*, 563 S.W.3d at 371.

A trial court must base its venue determination on the last pleading that was timely filed. *In re Hardwick*, 426 S.W.3d 151, 157 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding); *see Nabors Loffland Drilling Co. v. Martinez*, 894 S.W.2d 70, 73 (Tex. App.—San Antonio 1995, writ denied) (rejecting argument that allowing a plaintiff to amend its petition prior to venue hearing would circumvent venue statutes). A party may freely amend its pleadings at least seven days prior to a hearing on a motion to transfer venue. *See In re Fluor Enters., Inc.*, No. 13-11-00260-CV, 2011 WL 2463004, at *4 (Tex. App.—Corpus Christi–Edinburg June 13, 2011, orig. proceeding) (mem. op.) ("Whalen was clearly entitled to amend his pleadings at least seven days before the hearing on the motion to transfer [venue]."); *Watson v. City of Odessa*, 893 S.W.2d 197, 200 (Tex. App.—El Paso 1995, writ denied) (holding that amended petition filed seven days before venue hearing was timely and trial court was "bound" to consider it); *see also* Tex. R. Civ. P. 63.

C. Analysis

Clyde and Carolina spend much of their argument discussing *Kerr*. 293 S.W.3d at 353. As we will explain, *Kerr* is distinguishable because that suit involved a dispute over the rightful ownership of an interest in land, unlike Teresa's live petition. In *Kerr*, an oil and gas operator sued its former president, alleging that he fraudulently located

oil and gas reserves in Harris County. *Id.* at 355. The former president later developed those reserves on his own, and the operator filed suit against him in Jefferson County. *Id.* In its original petition, the operator sought damages and the recovery of existing mineral interests, operating interests, and leasehold interests. *Id.* at 357–58. Citing Section 15.011, the former president moved to transfer venue to Harris County. *Id.* at 355. The operator then amended its petition and specifically disclaimed any attempt to recover an interest in land. *Id.* at 358. The trial court denied the motion to transfer venue, and the former president filed a petition for writ of mandamus. *Id.* at 356.

The Beaumont Court of Appeals conditionally granted the writ of mandamus. *Id.* at 360. While noting that a plaintiff has the right to timely amend its pleadings, the court also noted that mandatory venue provisions may not be evaded by merely artful pleading. *Id.* at 358. The court determined that, despite the disclaimer in the operator's amended petition, the true nature of the dispute was "essentially over the rightful ownership of an interest in land in Harris County"—namely, the operator had to establish an ownership interest in the subject leases in order to obtain damages. *Id.* at 359–60. The court held that because the "rightful ownership of real property must be decided as a prerequisite to the relief requested, the mandatory venue statute govern[ed]." *Id.* at 360.

Here, in contrast to *Kerr*, Teresa's lawsuit was not "essentially over the rightful ownership of an interest in land." *Id.* at 360. Rather, Teresa's lawsuit was essentially a

suit for damages arising from Clyde's purported fraudulent transfers. To prove those damages, Teresa was not required to prove that she had an ownership interest in the Denton County Property; rather, she simply had to prove that Clyde fraudulently transferred money to Carolina. While Teresa's initial pleading sought an ownership interest in the Denton County Property, she timely amended her pleadings thirty-one days before the hearing on the motion to transfer venue. *See Hardwick*, 426 S.W.3d at 157; *Watson*, 893 S.W.2d at 200. As amended, Teresa did not seek an ownership interest in the Denton County Property. And while her amended petition did list other remedies like an attachment of the assets transferred or other property belonging to Clyde and Carolina, the appointment of a receiver to take possession of Clyde and Carolina's assets, and execution on the assets transferred, we note that these other remedies simply mirror the remedies available to creditors under the Uniform Fraudulent Transfer Act, and we hold that Teresa's pursuit of these other remedies did not change the true nature of her lawsuit. *See* Tex. Bus. & Com. Code Ann. § 24.008 (listing potential remedies of a creditor in a fraudulent transfer action). Finally, while Teresa filed a lis pendens in the Denton County real property records, a lis pendens is not an independent claim or a lien; rather it simply gives "notice to the world of its contents." *In re Miller*, 433 S.W.3d 82, 85 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (internal quotations omitted) (citing *David Powers Homes, Inc. v. M.L. Rendleman Co.*, 355 S.W.3d 327, 336 (Tex. App.— Houston [1st Dist.] 2011, no pet.)).

Because we have determined that the true nature of Teresa's lawsuit did not involve the rightful ownership of real property, the trial court did not err by denying Clyde and Carolina's motion to transfer venue. *See Harding*, 563 S.W.3d at 370; *Kerr*, 293 S.W.3d at 356. We thus overrule Clyde and Carolina's first issue.

III. THE TRIAL COURT'S ORDER PERTAINING TO CLYDE'S 401(K)

In their second issue, Clyde and Carolina argue that the trial court erred by ordering the avoidance of contributions to Clyde's 401(k) account in the amount of $64,626.02. This issue implicates the trial court's eighth conclusion of law, which stated that "Teresa is entitled to void all fraudulent transfers."

A. STANDARD OF REVIEW

In an appeal from a bench trial, a trial court's conclusions of law are reviewed de novo. *See Sw. Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 683 (Tex. 2020); *Harris Cty. Appraisal Dist. v. Wilkinson*, 317 S.W.3d 763, 766 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). We independently evaluate conclusions of law to determine whether the trial court correctly drew the legal conclusions from the facts. *Lloyd Walterscheid & Walterscheid Farms, LLC v. Walterscheid*, 557 S.W.3d 245, 258 (Tex. App.—Fort Worth 2018, no pet.); *Walker v. Anderson*, 232 S.W.3d 899, 908 (Tex. App.—Dallas 2007, no pet.). We will reverse the judgment of the trial court only if the conclusions of law are erroneous as a matter of law. *Walterscheid*, 557 S.W.3d at 258; *OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 736 (Tex. App.—Dallas 2007, pet. denied).

B. THE LAW – ERISA'S ANTI-ALIENATION PROVISION

Clyde's 401(k) plan was governed by ERISA. ERISA was enacted "to protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal Courts." *Dalton v. Dalton*, 551 S.W.3d 126, 137 (Tex. 2018) (quoting 29 U.S.C. § 1001(b)); *see Boggs v. Boggs*, 520 U.S. 833, 845 (1997) ("The principal object of the statute is to protect plan participants and beneficiaries."). As part of its design to ensure that benefits are available when participants and beneficiaries expect them, ERISA includes an anti-alienation provision that generally prohibits any assignment of retirement benefits. *Dalton*, 551 S.W.3d at 137 (quoting 29 U.S.C. § 1056(d)(1)); *Lipsey v. Lipsey*, 983 S.W.2d 345, 349 (Tex. App.—Fort Worth 1998, no pet.). ERISA provides only two narrow exceptions to its anti-alienation provision. *See* 29 U.S.C. § 1056(d)(2) (anti-alienation provision does not apply to an assignment or alienation of benefits executed before September 2, 1974); (d)(3)(A) (anti-alienation provision does not apply to qualified domestic relations orders); *see also Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990) (declining to approve an equitable exception to ERISA's prohibition on the assignment or alienation of pension benefits).

C. Analysis

Citing our opinion in *Edgefield Holdings, LLC v. Gilbert*, Clyde and Carolina argue that the trial court erred by voiding Clyde's contributions to his 401(k). No. 02-17-00359-CV, 2018 WL 4495566, at *8 (Tex. App.—Fort Worth Sept. 20, 2018, no pet.) (mem. op.). In *Edgefield*, a creditor attempted to garnish a debtor's IRA and pension plan, both of which were governed by ERISA. *Id.* at *2. The creditor argued that the debtor had violated the plan documents by having his employer deposit his income into accounts that were not in his name. *Id.* at *1, 8. The debtor later sought a declaration that the plan was exempt from execution under ERISA, "notwithstanding [the creditor's] assertion that transfers into the Pension Plan account [were] recoverable as fraudulent transfers," and moved for summary judgment on the issue. *Id.* at *2–3. The trial court granted the debtor's motion for summary judgment, finding that the funds in the IRA and pension plan were exempt under ERISA's anti-alienation provision from seizure by any creditor. *Id.* at *3.

On appeal, we affirmed the trial court's ruling. *Id.* at *10. We noted that "the United States Supreme Court [had] made it abundantly clear that 'ERISA's pension plan anti-alienation provision is mandatory and contains only two explicit exceptions, . . . which are not subject to judicial expansion.'" *Id.* at *1 (emphasis removed) (quoting *Boggs*, 520 U.S. at 851). We further noted that ERISA's anti-alienation provision applied "even for employee malfeasance or criminal activity." *Id.*

at *8 (quoting *Boggs*, 520 U.S. at 851). In rejecting the argument that the IRA and pension plan were subject to execution, we also cited *Shah v. Baloch*, 418 P.3d 902, 903–04 (Ariz. Ct. App. 2017), noting that *Shah* held that "even a fraudulent transfer of funds by a participant into his or her qualified plan may not be recovered unless a statutory exception applies." *Id.* at *8.

In light of our holding in *Edgefield*, and in light of authority from the United States Supreme Court providing that ERISA's anti-alienation provision is not subject to further judicial expansion, even for equitable reasons, we hold that the trial court erred when it concluded that Teresa was entitled to the avoidance of transfers to Clyde's 401(k) account.[5] *See Boggs*, 520 U.S. at 851 (holding that ERISA's anti-alienation provision is mandatory and not subject to judicial expansion); *Guidry*,

[5]Teresa cites a number of federal bankruptcy cases for her proposition that accounts governed by ERISA do not protect fraudulent transfers. *See, e.g.*, *Wagner v. Galbreth*, 500 B.R. 42, 48 (D.N.M. 2013); *In re Vaughan Co., Realtors*, 493 B.R. 597, 606–07 (Bankr. D.N.M. 2013); *In re Goldschein*, 241 B.R. 370, 379 (Bankr. D. Md. 1999); *In re CF & I Fabricators of Utah Inc.*, 163 B.R. 858, 878 (Bankr. D. Utah 1994). We note that the issues in those cases—which primarily involve whether a bankruptcy trustee has the ability to recapture funds that have been fraudulently transferred—arose in a bankruptcy context that is distinct from the present case. We see no reason why these nonbinding authorities should cause us to deviate from our prior holding in *Edgefield*, or deviate from United States Supreme Court authority regarding ERISA's anti-alienation provision, and we decline any invitation to do so. *See Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) (holding that Texas state courts are only obligated to follow higher Texas courts and the United States Supreme Court); *Roe v. Ladymon*, 318 S.W.3d 502, 510 n.5 (Tex. App.—Dallas 2010, no pet.) ("Although we look to decisions of the lower federal courts and other state courts, only decisions of the United States Supreme Court, the Texas Supreme Court, and prior decisions of this Court are binding precedent.").

493 U.S. at 376 ("Nor do we think it appropriate to approve any generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA's prohibition on the assignment or alienation of pension benefits."); *see also Shah*, 418 P.3d at 905 ("But *Guidry* rejected—in no uncertain terms—the suggestion that courts may create equitable exceptions to the anti-alienation rule. . . . *Guidry* held that because Congress has enumerated specific exceptions to anti-alienation, courts may not create other exceptions . . . even when the result is that funds are rendered immune from otherwise valid collection efforts.").

We sustain Clyde and Carolina's second issue.

IV. CONCLUSION

Having overruled Clyde and Carolina's first issue, we affirm the trial court's denial of their motion to transfer venue. Having sustained Clyde and Carolina's second issue, we reverse and render to delete the portion of the trial court's judgment ordering the avoidance of contributions to Clyde's 401(k) account.[6] The trial court's judgment is affirmed in all other respects.

/s/ Lee Gabriel

Lee Gabriel
Justice

Delivered: May 21, 2020

[6]We delete the following language in the trial court's judgment: "The Court further orders the avoidance of transfers to Clyde L. Heckert, Jr.'s American Airlines, Inc. 401K-$uper $aver account in the amount of $64,626.02."