

STATE OF MICHIGAN
COURT OF APPEALS

JANET M. DAVIS,

Plaintiff-Appellee/Cross-
Appellee/Cross-Appellant,

v

CHARLES THOMAS DAVIS,

Defendant-Appellee/Cross-
Appellant/Cross-Appellee,

and

ALDEN S. HALPERT,

Defendant-Cross-Plaintiff-
Appellant/Cross-Appellee.

UNPUBLISHED
July 30, 1996

No. 175102
LC No. 91-409596

Before: Hood, P.J., and Griffin and J. F. Foley,* JJ.

PER CURIAM.

Defendants appeal by right a judgment in favor of plaintiff and an order denying their motion for a new trial. Plaintiff cross appeals by right an order granting partial summary disposition pursuant to MCR 2.116(I)(2) in favor of defendants on her equitable mortgage claim and denying her motion for summary disposition pursuant to MCR 2.116(C)(9) and (10) on her fraudulent transfer claim. Plaintiff also cross appeals by right the trial court's ruling at trial refusing to admit certain evidence due to the attorney-client privilege. We affirm in part, reverse in part, and remand for further proceedings.

This case arose after defendant Davis assigned his interest in a land contract for property located in Osceola County, Michigan, to defendant Halpert approximately ten months before plaintiff filed for divorce from Davis. Plaintiff filed suit against Davis and Halpert alleging the following: (1)

*Circuit judge, sitting on the Court of Appeals by assignment.

defendants committed a fraud, (2) the transfer constituted a fraudulent conveyance against plaintiff, and (3) the transfer resulted in an equitable mortgage in plaintiff's favor. Halpert filed a cross complaint against defendant Davis and a counter-complaint against plaintiff seeking a declaration that he was the sole owner of the subject property, or alternatively, that he was entitled to a lien on the subject property in an amount that the court determined to be fair. Plaintiff subsequently filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10) to quiet title to the subject property. The trial court denied plaintiff's motion and granted partial summary disposition to defendants pursuant to MCR 2.116(I)(2) on the equitable mortgage issue.

After a bench trial, the trial court entered judgment in plaintiff's favor on the fraudulent conveyance claim. The court set aside the assignment of the land contract to Halpert and restored the subject property to the marital estate. The court left the distribution of the subject property to the court presiding over the divorce between plaintiff and Davis. The court also entered an order of no cause of action against plaintiff in favor of defendants on plaintiff's fraud claim and against defendant Halpert and in favor of plaintiff on Halpert's counterclaim. The court also entered a judgment for \$8,666.00, representing the down payment Halpert paid to Davis for the assignment of the land contract, against Davis in favor of Halpert on Halpert's cross claim. Defendants filed a motion for a new trial, arguing that plaintiff was not a creditor under the Uniform Fraudulent Conveyance Act, MCL 566.17; MSA 26.887, because she was not a creditor at the time of the assignment and that Davis had an absolute right to convey the subject property to Halpert. Defendants also argued that the trial court's remedy of setting aside the conveyance was improper. The trial court denied its motion.

Defendants first argue that the trial court erred in holding that plaintiff was a "creditor" entitled to make a claim under the Uniform Fraudulent Conveyance Act, MCL 566.17; MSA 26.887. We disagree.

MCL 566.221; MSA 26.892 defines a fraudulent conveyance as:

Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and any charge upon lands, goods or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void.

MCL 566.11; MSA 26.881 defines "creditor" as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Furthermore, MCL 566.17; MSA 26.887 expands the definition of "creditor" to include both present and future creditors:

Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

Defendants argue that plaintiff is not entitled to recovery because she was not a creditor at the time of the assignment since she was married to Davis. Defendants' argument is contrary to the clear provisions of §§ 566.11 and 566.17. Under § 566.17, a future creditor can be defrauded if an assignment is made with the actual intent to defraud such future creditor. MCL 566.17; MSA 26.887. The trial court held that an actual intent to defraud was present. At the time of the assignment, plaintiff was clearly not a present creditor of Davis since divorce proceedings had not yet begun. However, she was a future creditor. Plaintiff would have been a creditor of Davis at the time of the divorce since § 566.11 specifically includes persons with "contingent" claims within the definition of "creditor." MCL 566.11; MSA 26.881. At the time of the divorce, plaintiff's claim against Davis was contingent on the divorce court's ruling or the party's property settlement.

Therefore, because plaintiff's contingent claim against Davis fell within the statutory definition of "creditor," the trial court did not err in holding that plaintiff had standing to sue to set aside the fraudulent conveyance.

Defendants next argue that the trial court clearly erred in its finding of a fraudulent conveyance. We disagree.

This Court will not set aside a trial court's findings of fact unless they were clearly erroneous. MCR 2.613(C); *Hawkins v Smithson*, 181 Mich App 649, 651; 449 NW 2d 676 (1989). Actual intent to defraud may be inferred from certain "badges of fraud." *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 659; 513 NW 2d 441 (1994). These badges of fraud are not conclusive evidence, but may be strong or weak depending upon their nature and number occurring at the same time. *Id.* at 660. Examples of badges of fraud include: (1) lack of consideration for the conveyance, (2) a close relationship between transferor and transferee, (3) pendency or threat of litigation, (4) financial difficulties of the transferor, and (5) retention of the possession, control, or benefit of the property by the transferor. *Id.*

In finding that a fraudulent conveyance existed, the trial court held that the evidence established that Davis specifically intended to defraud plaintiff in transferring the subject property to Halpert, given the existence of nine "badges of fraud." Most compelling among these were (1) the fact that Davis continued to use the property as if he owned it after he assigned the land contract to Halpert (built log cabin and tool shed on property, paid taxes on property, sold property's timber rights and benefited therefrom), (2) the statement by Thomas Finnerty that Davis told him that he transferred the property to Halpert in order to keep it out of the marital estate, and (3) the existence of the quit claim deed from Halpert to Davis. The evidence presented at trial supported other "badges of fraud" not specifically mentioned by the trial court. These included: (1) Halpert paid Davis only \$35,856.71 in consideration for the property where Davis paid \$50,000.00 to acquire the same property approximately four years earlier; (2) Davis was Halpert's best man at his wedding, just over 2 ½ years before the conveyance. Based on the existence of these "badges of fraud," we hold that the trial court's finding of a fraudulent conveyance was not clearly erroneous.

Defendants argue that even given the "badges of fraud," the trial court erred in holding that a fraudulent transfer existed because Davis had a legitimate reason for the transfer. Defendants' argument

is unsound because the existence of a legitimate reason for the transfer will not save it from being deemed fraudulent if the transferor still intended to hinder, delay, or defraud a creditor. *In re Spearing Tool & Mfg Co, Inc*, 171 BR 578, 583 (WD, 1994). A transfer is fraudulent if one of the reasons for the transfer is to hinder, delay, or defraud creditors. *Id.* at 582; cf. *Bentley v Caille*, 289 Mich 74, 76; 286 NW 163 (1939).

Defendants also argue that a fraudulent conveyance could not have been found since there was no showing that Halpert intended to defraud plaintiff. Defendants' argument is without merit because it is not the grantee's state of mind that is relevant in fraudulent transfer cases based on actual intent; rather, it is the intent of the grantor. *Regan v Carrigan*, 194 Mich App 35, 38; 486 NW 2d 57 (1992); see also *Spencer v Miller*, 279 Mich 194, 200; 271 NW 731 (1937).

Defendants next argue that the trial court's remedy of setting aside the assignment between Davis and Halpert and restoring the property to the Davis's marital estate was contrary to MCL 566.19; MSA 26.889. We agree.

MCL 566.19; MSA 26.889 sets out the remedies available to a defrauded creditor:

(1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person *except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase*, or one who has derived titled immediately or mediately from such purchaser;

(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

(b) Disregard the conveyance and attach or levy execution upon the property conveyed.

(2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation may retain the property or obligation as security for repayment. (emphasis added).

Therefore, a purchaser for fair consideration and without knowledge of the fraud is not directly liable to a defrauded creditor. *Id.* Because the trial court did not make factual findings regarding whether Halpert paid fair consideration or whether he had knowledge of the fraud, it erred in setting aside the assignment between Davis and Halpert and placing the entire subject property into the Davis' marital estate. Accordingly, we remand this case to the trial court for further factual findings.

We note that even if the trial court finds that Halpert is directly liable to plaintiff, the trial court's order setting aside the conveyance between Davis and Halpert and placing the subject property into the Davis's marital estate was in error since subsection (1)(a) of § 566 only permits a court to set aside a conveyance to the extent necessary to satisfy the defrauded creditor's claim against the debtor. MCL 566.19(1)(a); MSA 26.889(1)(a); *Regan, supra* at 40. The most the trial court could have done is impose an equitable lien in favor of plaintiff against the subject property to the extent of her claim against Davis, keeping the legal title to the subject property in Halpert's name. See *id.* Furthermore, even if

the trial court finds that Halpert did not pay fair consideration for the subject property, if it finds that he acted without actual fraudulent intent, it should keep legal title to the property in Halpert's name until the consideration he paid for the subject property is repaid to him. See MCL 566.19(2); MSA 26.889(2).

In view of our disposition, we find it unnecessary to address plaintiff's claims of error.
Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Richard Allen Griffin

/s/ John F. Foley