

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2000-005199

04/28/2005

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
D. Whitford
Deputy

FILED: 05/02/2005

TERRY MILLER, et al.

CHARLES T STEGALL

v.

KEITH E YOUNG, et al.

KEITH E YOUNG
1256 E MINERAL
GILBERT AZ 85234-4805

ROBERT M COOK
WILLIAM G FAIRBOURN
GREGORY P GILLIS
ROBERT F HUGHES
SEAN K MCELENNEY
DAVID J OUIMETTE
GUY P ROLL
STEPHEN G SMYTH
TERRENCE P WOODS
JODI L YOUNG
1256 E MINERAL
GILBERT AZ 85234-4805

ORAL ARGUMENT
TAKEN UNDER ADVISEMENT/LATER:RULING

3:00 p.m. This is the time set for continuation of Oral Argument from April 25, 2005 on Defendant Wenz' Motion for Summary Judgment, and Plaintiffs' Cross-Motion for Summary Judgment on the Issue of Defendant Wenz's Liability. Plaintiffs are represented by counsel Charles Stegall. Defendant Paul Wenz is represented by counsel Robert Hughes.

The proceedings are recorded electronically by CD and videotape in lieu of a court reporter.

Oral argument having been presented,
Docket Code 019

Form V000A

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IT IS ORDERED taking the following motions under advisement:

- Defendant Wenz' Motion for Summary Judgment, and
- Plaintiffs' Cross-Motion for Summary Judgment on the Issue of Defendant Wenz's Liability

4:02 p.m. Oral argument concludes.

LATER:

Defendant's Wenz's Motion for Summary Judgment based upon Plaintiff's Failure to State a Claim against Defendant Wenz pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure, and Plaintiff's Cross Motion for Summary Judgment against Wenz on Liability Only having been under advisement,

THE COURT FINDS AND RULES AS FOLLOWS:

A fraudulent conveyance may be shown by "clear and satisfactory evidence" of an actual intent to hinder, delay, or defraud any creditor. *Gerow v. Covill*, 192 Ariz. 9 ¶33 (App. 1998); A.R.S. §44-1004(A)(1). The statute provides a non-exclusive list of "badges of fraud" from which intent can be inferred. *Id.*; A.R.S. §44-1004(B)(1)-(11). These "badges of fraud" are "signs or marks" from which fraudulent intent may be inferred, even though their value as evidence may be "relative and not absolute." *Id.* at ¶34, *quoting Torosian v. Paulos*, 82 Ariz. 304, 312 (1957). When several are found in the same transaction, "strong, clear evidence will be required to repel the conclusion of fraudulent intent." *Id.* Once actual intent is shown, no further evidence of the common law elements of fraud is needed. *Id.* at ¶33. The court may infer fraud from the circumstances absent sufficient explanation to dispel that inference. *Premier Financial Services v. Citibank (Arizona)*, 185 Ariz. 80, 86 (App. 1995).

Here, several of the statutory "badges of fraud" are present and undisputed. The transfer of the property was to an insider; the debtor retained control and effective possession of the property after the transfer; the transfer came after the debtor had been sued, and in fact had lost his case; and the transfer was of essentially all of the debtor's assets, resulting in his effective insolvency. The undisputed badges of fraud present are more than adequate to require an explanation by Defendant; no explanation is offered by Defendant. Nor does Defendant deny that, as an expert on asset protection law, that he was retained by the Youngs for the purpose of shielding Young family assets from Plaintiffs. His sole defense is that he "did nothing to either put any asset or property interest beyond the power of this Court and out of the Plaintiffs' reach or to reduce the value of any asset or property interest." However, the Court is of the opinion that this is too narrow an interpretation. While in theory Plaintiffs could obtain from the Court a charging order, as a practical matter a charging order would be worthless: as payment under the charging order would be required only when a distribution was made, the Youngs could thwart

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their obligation indefinitely simply by making no distributions at all, while continuing to use the undistributed property at their pleasure. Plaintiffs have not gone to the unproductive expense of obtaining charging orders with respect to all the Young entities and *McElhanon v. Hing*, 151 Ariz. 386 (App. 1985), on which Defendant relies, does not require them to do so.

The value of property that remains out of Plaintiffs' reach is far less than that property which they can seize and sell on the open market. The added legal costs involved in avoiding a fraudulent transfer pursuant to A.R.S. §44-1007(A)(1) further reduce the net value received by Plaintiffs. It is not the case, as Defendant asserts, that *McElhanon* requires "the loss of a specific item of property or decrease in value of a specific item of property caused by the wrongful act(s) of a particular defendant." All parties to a conspiracy are jointly and severally liable for all damages resulting from the wrongful act of any conspirator in furtherance of the conspiracy. A.R.S. §12-2506(D)(1). Thus, the law will allow recovery from all defendants jointly and severally, including Defendant Wenz, of either the value of the property, prior to its diminution in value resulting from the transfer, or the amount of the debt, whichever is less. *McElhanon*, *supra* at 394.

Thus, the Court concludes that Defendant's Motion for Summary Judgment is without merit; and that Plaintiffs' Cross-Motion for Summary Judgment on the Issue of Liability is well-founded. The evidence is sufficient that no reasonable juror could fail to find clear and convincing evidence of fraudulent transfer, or that Defendant was a knowing participant in the conveyance.

THEREFORE, IT IS ORDERED:

- 1) Denying Defendant Wenz's Motion for Summary Judgment,
- 2) Granting Plaintiffs' Cross-Motion for Summary Judgment on the Issue of Defendant Wenz's Liability