[Cite as *Huntington Natl. Bank v. Winter*, 2011-Ohio-1751.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

HUNTINGTON NATIONAL BANK	:	APPEAL NO. C-090482 TRIAL NO. EX-0800603
and	:	
MERCHANTS BANK & TRUST CO.,	:	*D E C I S I O N.*
Plaintiffs-Appellees,	:	
vs.	:	
STEVEN A. WINTER	:	
and	:	
FIVE STAR FINANCIAL CORPORATION,	:	
Defendants-Appellants.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed

Date of Judgment Entry on Appeal: April 13, 2011

Kohnen & Patton LLP and *Louis C. Schneider*, for Plaintiff-Appellee Huntington National Bank,

Thompson Hine LLP and *Bryce A. Lenox*, for Plaintiff-Appellee Merchants Bank & Trust,

Steven A. Winter, pro se.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, Presiding Judge.

{¶1} Bringing forth four assignments of error, defendants-appellants, Steven Winter and his company, Five Star Financial Corporation, (collectively, "Winter") appeal the trial court's judgment granting Winter's creditors, plaintiffs-appellees Huntington National Bank and Merchants Bank & Trust Co. (collectively, "the Banks"), the right to garnish the cash values of Winter's life insurance policies. For the following reasons, we reverse.

{¶2} In 2007, Winter had defaulted on promissory notes and certain credit obligations owed to the Banks. Thereafter, in October 2007, Winter and his wife, Sarah, retained Leo Grote to form a revocable trust titled "The Winter Family Trust." Grote stated that the trust was funded with $700,000 from a payoff on a mortgage loan, $650,000 in cashier's checks made payable to Sarah Winter, which she endorsed over to the trust, and $150,000 drawn on a line of credit from one of the Banks. Both Grote and Winter admitted in their depositions that the trust was created to protect Winter's money from potential garnishment and execution.

{¶3} In November 2007, Grote, acting as the trustee, paid The Prudential Insurance Company of America ("Prudential") $144,000 from the trust to cover the yearly premiums of Winter's life insurance policies. Fourteen of the 16 life insurance policies were whole-life insurance policies with a total cash value of approximately $133,000. The beneficiaries of the life insurance policies were Winter's wife and children. Winter had maintained these policies for many years.

{¶4} In early 2008, the Banks obtained judgments against Winter and attempted to partially satisfy those judgments by serving writs of execution on

Prudential to garnish the cash value of Winter's life insurance policies. Winter objected to the writs of execution, arguing that R.C. 3911.10, which exempts the proceeds of life insurance policies from claims of creditors, applied. But the Banks argued that R.C. 3911.10 made an exception to its exemption when an insured had paid the insurance premiums to defraud its creditors.

{¶5} Following a hearing on Winter's objections, a magistrate determined that the exemption contained in R.C. 3911.10 was not applicable because Winter had paid his premiums to defraud his creditors, and that the Banks could therefore execute on the cash value of the life insurance policies. The trial court adopted the magistrate's decision. This appeal followed. Because the beneficiaries of the life insurance policies were Winter's wife and children, and because the life insurance policies had not reached maturity, we hold that the exemption to the execution on life insurance policies contained in R.C. 3911.10 was applicable and that the trial court erred by permitting the Banks to execute on Winter's whole-life insurance policies.

{¶6} In the first assignment of error, Winter contends that the trial court erred by permitting the Banks to garnish the cash value of Winter's life insurance policies absent the filing of a motion by the Banks to set aside a fraudulent transfer. We are unpersuaded.

{¶7} Winter, citing Civ.R. 6(D) and Loc.R. 14 of the Hamilton County Court of Common Pleas, maintains that the Banks should have been required to file a motion alleging that the trust funds paid into the policies had been fraudulently transferred to Prudential so that he would have had proper notice that the Banks were going to allege fraud at the exemption hearing. We find this argument

disingenuous because Winter was the one who had requested the exemption hearing, but had failed to specify on the hearing-request form which property was exempt and why it was exempt. Nevertheless, at the hearing before the magistrate, he specifically stated that the life insurance policies were exempt from garnishment under R.C. 3911.10. R.C. 3911.10 provides that the proceeds of a life insurance policy are exempt from execution except for the amount of the premiums for the policies that were paid to defraud creditors. Surely, Winter knew or should have known when he raised this exemption that the Banks would raise the issue of fraud. Further, Winter never asked for a continuance so that he could present witnesses or evidence demonstrating that he did not pay the premiums fraudulently. Although we are convinced that the Banks were not required to file a separate motion asserting that Winter had paid his premiums to defraud his creditors, we would hold, even if they were required to do so, that Winter was not prejudiced by the absence of a separate motion.[1] Accordingly, the first assignment of error is overruled.

{¶8} In the second assignment of error, Winter maintains that the trial court erred by allowing the cash value of his life insurance policies to be garnished absent evidence that he had made a fraudulent transfer. Essentially, Winter argues that there was insufficient evidence of fraud presented to the trial court. We disagree.

{¶9} R.C. 1336.04(A)(1) provides that "[a] transfer made * * * by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made * * * if the debtor made the transfer * * * [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." Because actual intent may be

[1] See *Miley v. STS Systems, Inc.*, 153 Ohio App.3d 752, 2003-Ohio-4409, 795 N.E.2d 1254, ¶26.

difficult to prove, a creditor may establish a debtor's fraudulent intent when the circumstances demonstrate the badges of fraud set forth in R.C. 1336.04(B).[2] The creditor need not demonstrate all the statutorily defined badges of fraud; as few as three badges of fraud have been held to constitute evidence of actual fraudulent intent.[3]

{¶10} The badges of fraud set forth R.C. 1336.04(B) include, but are not limited, to the following:

{¶11} "(1) Whether the transfer or obligation was to an insider;

{¶12} "(2) Whether the debtor retained possession or control of the property transferred after the transfer;

{¶13} "(3) Whether the transfer or obligation was disclosed or concealed;

{¶14} "(4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;

{¶15} "(5) Whether the transfer was of substantially all of the assets of the debtor;

{¶16} "(6) Whether the debtor absconded;

{¶17} "(7) Whether the debtor removed or concealed assets;

{¶18} "(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

{¶19} "(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

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[2] *UAP-Columbus JV326132 v. Young*, 10th Dist. No. 09AP-646, 2010-Ohio-485, ¶29; *Blood v. Nofzinger*, 162 Ohio App.3d 545, 2005-Ohio-3859, 834 N.E.2d 358.
[3] *UAP-Columbus*, supra, at ¶29.

{¶20} "(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;

{¶21} "(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor."

{¶22} Here, there is sufficient evidence in the record to demonstrate Winter's fraud. Winter admitted in his deposition that he had created the Winter Family Trust in 2007, at a time when the Banks were already his creditors, and that he used that trust to shelter his assets from his creditors. Grote, Winter's attorney, also testified at his deposition that the trusts were created to get the money "away from the chaotic and disorderly seizures[,] into the trusts where, you know, the money can be more orderly distributed to creditors upon their agreement or upon order of bankruptcy court." Grote testified that, at the direction of Winter and his wife, he had transferred $144,000 from the trust to Prudential in November 2007 to pay the premiums on Winter's life insurance policies. Winter retained an interest in that money after it was transferred, as that money was used to pay premiums on whole-life insurance policies that had a significant cash value. Although Winter had claimed that the transfer to Prudential came from his wife's separate funds, it is evident that the money came from the Winter Family Trust, which both Winter and his wife created. Based on the foregoing, we hold that there was sufficient evidence to demonstrate that Winter had transferred funds to Prudential to defraud his creditors. The second assignment of error is overruled.

{¶23} Winter contends, in the third assignment of error, that the trial court erred by ordering him to surrender the cash value of his life insurance policies to the

Banks. Citing *Deal v. Menke*,[4] Winter argues under R.C. 3911.10 that even if he had paid his premiums to Prudential to defraud his creditors, the Banks were still prevented from garnishing the cash value of the policies until the policies had matured, which would only occur upon his death or when he voluntarily accepts the cash surrender value of the policies We are constrained to agree with Winter.

{¶24} R.C. 3911.10 states in relevant part, "All contracts of life or endowment insurance or annuities upon the life of any person * * * which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary * * * to the spouse or children * * * for the benefit of such spouse [or] children * * * shall be held, together with the proceeds or avails of such contracts * * * free from all claims of the creditors of such insured person. * * * Subject to the statute of limitations, the amount of any premium upon such contracts * * * paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the contracts."

{¶25} R.C. 3911.10 limits a creditor's recovery of fraudulently paid premiums to the "proceeds" of the life-insurance contract. The few courts who have considered R.C. 3911.10, or its former version, have held that the proceeds of the contract come into existence when the contract matures—either at the death of the insured or when the insured voluntarily accepts the cash surrender value of the contract.

{¶26} In *Menke*, the court interpreted the former version of R.C. 3911.10, which is substantially similar to the current version, and it stated that it was the legislature's intent on "life insurance policies to limit the recovery of premiums paid

[4] (C.P.1939), 14 O.O. 414.

in fraud of creditors to the funds arising upon the maturity of the contract [and that] this fund may arise by the insured voluntarily accepting the cash surrender value of the policies or upon the death of the insured."[5] Further, in *Doethlaff v. Penn Mut. Life Ins. Co.*,[6] the Sixth Circuit Court of Appeals held that the former version of R.C. 3911.10 did not authorize the court to order a debtor who had filed for bankruptcy and had been accused of paying his premiums in fraud of his creditors to accept the cash surrender value of his life insurance policy so that he could repay his creditors. Instead, the court held that the creditors could only be paid from the proceeds of the policy and that the policy did not have any "proceeds" until it matured, which would occur when the debtor died.[7]

{¶27} Given these cases and the fact that R.C. 3911.10 is an exemption statute that is to be construed in favor of the debtor,[8] we hold that the trial court erred by ordering Winter to surrender the cash value of his life insurance policies to satisfy the Banks' judgments against him. If Winter had voluntarily cashed in the policies or had taken a loan against the cash value of the policies, that money would have been subject to execution by the Banks.[9] But that did not happen here, at least not on the record before us. Accordingly, the third assignment of error is sustained.

{¶28} Based on our resolution of the third assignment of error, Winter's fourth assignment of error, which challenges the trial court's ruling that payments made toward the premiums of term-life insurance policies could also be garnished, is moot.

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[5] Id.
[6] (C.A.6, 1941), 117 F.2d 582.
[7] Id. at 584.
[8] Id.
[9] See *Kuhn v. Wolf* (1938), 59 Ohio App. 15, 16 N.E.2d 1017.

{¶29} We accordingly reverse the trial court's judgment permitting the Banks to garnish the cash value of Winter's whole-life insurance policies.

Judgment reversed.

SUNDERMANN and **FISCHER**, **JJ.,** concur.

Please Note:

The court has recorded its own entry on the date of the release of this decision.