[Cite as *Seed Consultants, Inc. v. Schlichter,* 2012-Ohio-2256.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

SEED CONSULTANTS, INC.,	:	
Plaintiff-Appellant,	:	CASE NO. CA2011-02-002
	:	O P I N I O N
- vs -		5/21/2012
	:	
JOHN SCHLICHTER, et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 10CVH00030

Kiger & Kiger Lawyers, David V. Kiger, 132 South Main Street, Washington C.H., Ohio 43160, for plaintiff-appellant

Ricketts Co., LPA, Eric J. Wittenberg, 50 Hill Road South, Pickerington, Ohio 43147, for defendants-appellees, John & Debbie Schlichter, Fifth Third Bank Central Ohio, and Fayette County Treasurer

PIPER, J.

{¶ 1} Plaintiff-appellant, Seed Consultants, Inc., appeals a decision of the Fayette County Court of Common Pleas granting summary judgment in favor of defendants-appellees, John and Debbie Schlichter.

{¶ 2} The Schlichters were married in 1979, and purchased property in Fayette County in 2004, on which they built a home. Fifth Third Bank holds a first and second

mortgage on the property and home, which at the time of suit totaled approximately $318,000. Both John and Debbie signed the note and mortgage, and each owned a one-half interest in the property.

{¶ 3} John had a farming business, and accumulated farm-related debt to several creditors. Seed Consultants was one such creditor. John purchased seed corn and soybeans from Seed Consultants on credit from 2003 to 2008, and defaulted on the account in the amount of $90,709.53. Seed Consultants filed suit against John, and was granted judgment in March 2008. After granting judgment, the trial judge recused himself from "any post judgment proceedings in this matter." While both parties received notice of the recusal, the trial judge did not give any reason for his recusal.

{¶ 4} In 2007, and before the judgment, John purported to sell his interest in the Fayette County property and home to his wife, Debbie, for $10,000. In 2010, Seed Consultants filed an action for a declaratory judgment, asserting that the transfer was fraudulent and designed to avoid creditors attaching their judgment liens against the Schlicters' marital home. The Schlicters filed a motion for summary judgment, in which they maintained that the transfer was not fraudulent, and Seed Consultants filed its own motion for summary judgment.

{¶ 5} The declaratory judgment action was assigned to the trial judge, who presided over the motions for summary judgment, as well as all other filings and scheduling orders. The trial judge did not explain on the record why he did not remain disqualified due to his previous recusal. However, neither party made objection to his involvement in the case. The trial judge granted summary judgment in favor of the Schlicters. Seed Consultants now

appeals the decision of the trial court, raising the following assignments of error.[1] For ease of discussion, we will discuss the second assignment of error first.

{¶ 6} Assignment of Error No. 2:

{¶ 7} THE TRIAL COURTS [SIC] RULING IN FAVOR OF DEFENDANTS [SIC] MOTION FOR SUMMARY JUDGMENT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS GENUINE ISSUES OF MATERIAL FACT EXIST IN THE RECORD WHICH PRECLUDE SUMMARY JUDGMENT.

{¶ 8} Seed Consultants argues in its second assignment of error that the trial court erred by granting summary judgment in favor of the Schlichters.

{¶ 9} This court's review of a trial court's ruling on a summary judgment motion is de novo. *Broadnax v. Greene Credit Serv.*, 118 Ohio App.3d 881, 887 (2nd Dist.1997). Civ.R.56 sets forth the summary judgment standard and requires that (1) there be no genuine issues of material fact to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to only one conclusion being adverse to the nonmoving party. *Slowey v. Midland Acres, Inc.*, 12th Dist. No. CA2007-08-030, 2008-Ohio-3077, ¶ 8. The moving party has the burden of demonstrating that there is no genuine issue of material fact. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64 (1978).

{¶ 10} The nonmoving party "may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in Civ.R. 56, must set forth specific facts showing the existence of a genuine triable issue." *Mootispaw v. Eckstein,* 76 Ohio St.3d 383, 385, 1996-Ohio-389. A dispute of fact can be considered "material" if it affects the outcome of the litigation. *Myers v. Jamar Enterprises*, 12th Dist. No. CA2001-06-056, 2001 WL 1567352 at *2 (Dec. 10, 2001). A dispute of fact can be considered "genuine" if it is

1. The Schlichters did not file an appellate brief for our consideration.

supported by substantial evidence that exceeds the allegations in the complaint. *Id.*

{¶ 11} According to Ohio's Uniform Fraudulent Transfer Act, R.C. 1336.04,

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:
>
> (a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;
>
> (b) The debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

{¶ 12} The creditor has the burden to prove that the transfer was fraudulent, and in turn, must prove the debtor's intent pursuant to R.C. 1336.04(A)(1). However, early Ohio common law made proof of actual intent very difficult, if not impossible, to demonstrate. *Wagner v. Galipo*, 97 Ohio App.3d 302, 309 (8th Dist.1994). For this reason, the Ohio legislature codified "badges of fraud" that were founded in common law as a way for creditors to demonstrate the debtor's intent. *Saez Assoc., Inc. v. Global Reader Servs., Inc*., 8th Dist. No. 96555, 2011-Ohio-5185. According to R.C. 1336.04(B), these badges include:

> (1) Whether the transfer or obligation was to an insider;
>
> (2) Whether the debtor retained possession or control of the property transferred after the transfer;
>
> (3) Whether the transfer or obligation was disclosed or concealed;
>
> (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;

> (5) Whether the transfer was of substantially all of the assets of the debtor;
>
> (6) Whether the debtor absconded;
>
> (7) Whether the debtor removed or concealed assets;
>
> (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;
>
> (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;
>
> (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

{¶ 13} When considering whether the debtor has a fraudulent intent, such intent is to be determined based on the facts or circumstances of each case. *Stein v. Brown*, 18 Ohio St.3d 305, 308 (1985). "If the party alleging fraud is able to demonstrate a sufficient number of 'badges,' an inference of actual fraud arises and the burden then shifts to the defendant to prove that the transfer was not fraudulent." *Saez Assoc*., 2011-Ohio-5185 at ¶ 13. While the existence of one or more badges does not establish a per se fraudulent transfer, a creditor need not demonstrate the presence of all badges in order to carry its burden. *Baker & Sons Equip. Co. v. GSO Equip. Leasing, Inc*., 87 Ohio App.3d 644, 650 (10th Dist.1993). *See also Bank One, N.A. v. Plaza E.,* 10th Dist. No. 97APE02-184, 1997 WL 710664 (Nov. 10, 1997) (finding three badges sufficient to establish the debtor's fraudulent transfer).

Undisputed Badges

{¶ 14} Some of the badges were not disputed by the parties in their motions for summary judgment. These badges included (1), (2), (6), (10), and (11). Regarding the first badge, whether the transfer or obligation was to an insider, the record is clear that John

made the transfer to an insider, his wife. Regarding the second badge, John retained possession or control of the property after the transfer because he continues to live in the home and still owes on the note as a signator. The record is also clear that John has not "absconded" according to the sixth badge. Regarding the tenth badge, the record indicates that the transfer occurred shortly before or after a substantial debt was incurred. The transfer occurred in 2007, and the record demonstrates that John's debts specific to tax liens and money owed to Seed Consultants occurred in 2006-2007, and Seed Consultants was granted judgment in 2008. Although the parties did not dispute it, the eleventh badge is not, in fact, applicable to the case at bar because the transfer was made directly to Debbie, not a third party lienholder.

Disputed Badges

{¶ 15} After our de novo review of the record, we find that genuine issues of material fact remain regarding several of the disputed badges: (3), (4), (5), (7), (8), and (9).

{¶ 16} Regarding the third badge, whether the transfer was disclosed, the Schlichters argued to the trial court that the transfer was disclosed because it was recorded in the Fayette County Official Record. The trial court agreed. However, Seed Consultants argues that the transfer was not properly disclosed because the Schlichters never disclosed the transaction to Fifth Third Bank, the mortgage holder for both the first and second mortgages on the home. During John's deposition, he admitted that prior to making the transfer, he did not notify Fifth Third Bank of his plans to deed his interest in the home to Debbie.

{¶ 17} The mortgage and incorporated rider permits Fifth Third Bank to accelerate the loan, requiring payment in full if it does not receive prior written notice of the mortgagor's transfer of any interest in the real estate used as collateral to the mortgage. The mortgage also specifically states that each signor is jointly and severally liable on the loan. Moreover, courts have found that failure to inform a creditor of a transfer constitutes concealment for

purposes of this badge. *Harrison v. Creviston*, 8th Dist. No. 86732, 2006-Ohio-3964, ¶ 21. *See also Esteco, Inc. v. Kimpel*, 7th Dist. No. 07 CO 3, 2007-Ohio-7201 (finding that recordation of a deed does not prove that the transfer was not concealed where the transfer is not disclosed to the creditor). While officially recording documents is a form of notice, it is not the same as the affirmative act of "disclosure." Therefore, this badge requires further litigation.

{¶ 18} Badge four addresses whether the debtor had been sued or threatened with suit before the transfer was made. The Schlichters pointed out to the trial court that the transfer was made before Seed Consultants filed suit. The Schlichters are correct that the transfer occurred in 2007 and that Seed Consultants did not file suit until 2008. Conversely, Seed Consultants argues that John completed the transfer in an attempt to keep his home away from creditors who would eventually file suit to collect on the debt. The record seems to support Seed Consultants' argument because John testified that his farming business was failing as of 2006 and that he had large amounts of outstanding debts before the 2007 transfer. However, beyond a reasonable inference, the record does not contain any *evidence* that Seed Consultants or any other creditor had threatened or initiated suit before the transfer. As a consequence, a material issue of fact needs to be litigated as to badge four.

{¶ 19} Review of the fifth badge raises issues of material fact regarding whether the transfer was of substantially all John's assets. The trial court found that there was no evidence that the transfer involved all of John's assets. However, the record indicates that John knew that his farm business was failing as of 2006, and he stated in his deposition that he began to liquidate his assets. Any assets that John had other than his farm equipment, which at the time included a salary from his elected position as a state representative, would have to be balanced against his outstanding debt. This debt, as previously discussed,

included over $300,000 in the first and second mortgage on the marital home, over $168,000 in federal taxes, as well as the farm-related debt of which over $90,000 was owed to Seed Consultants. The record also contains evidence that John applied for and was granted a trusteeship by the Washington Court House Municipal Court to administer any funds to his creditors in lieu of having his wages garnished according to R.C. 2329.70. Despite the trial court's finding otherwise, the record does contain evidence that tends to support Seed Consultants' argument that John's transfer of the home to Debbie was substantially all his assets. Consideration of this badge raises genuine issues of material fact.

{¶ 20} We also find genuine issues of material fact regarding whether John removed or concealed assets relative to the seventh badge listed in R.C. 1336.04(B). According to John's interrogatory answers and the depositions of John and Debbie, John sold grain bins from his farm business and placed half of the proceeds in Debbie's account. Debbie then used these proceeds to pay John for his equity in the farm. Debbie admitted during her deposition that she was not a part of John's farming business, and that she had little to no knowledge of John's farming finances. Once Debbie "bought" John's interest in the home for $10,000, John used the money to pay on back taxes, as well as to rent farming equipment. There exist genuine issues of material fact regarding why John placed the money in Debbie's account and then had it paid back to himself.

{¶ 21} The eighth badge is specific to whether the value of the consideration received by John was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. John received $10,000 for his one-half interest in the home that was appraised at $330,000 shortly before the transfer. John and Debbie argued to the trial court, and the trial court agreed, that John was properly compensated because the asset was limited to John's interest in the equity of the home.

{¶ 22} In January 2006, the Schlichters' home was appraised at $330,000. Once they

took out the second mortgage, the mortgage debt totaled $318,000, and the resulting equity was $12,000. Of their own accord, the Schlichters determined that another $8,000 in equity had accrued in their home by the time the transfer was completed in 2007. Based on the total $20,000 equity, Debbie paid John $10,000 for his one-half interest in the home. Although the trial court decided that the $10,000 was adequate consideration, we find that there are genuine issues of material fact remaining.

{¶ 23} John and Debbie's testimony regarding the compensation amount raises genuine issues of material fact. John testified that he considered $10,000 to be the fair market value of only the equity, and only if the transfer was between himself and his wife. When asked if the amount was fair solely because the transfer was to his wife, John responded "correct." John then testified that the $10,000 payment would not be a fair market value if transferred to a third party. John further testified that he would continue to pay on the mortgage if "need be," and that he is still obligated to pay on the note and mortgage. Debbie also testified that she would not accept $10,000 for her half interest in the home. During her deposition, the following exchange occurred.

> [Seed Consultants] If I offered you the sum of $10,000.00 today for your interest in your home on State Route 753 would you accept that offer?
>
> [Debbie] No.
>
> [Seed Consultants] Why not?
>
> [Debbie] I just wouldn't.
>
> [Seed Consultants] Not enough money. Your home is worth far more, correct?
>
> [Debbie] Yes.

{¶ 24} The Schlichters' testimony raises genuine issues of material fact regarding their intent when transferring the marital home to Debbie for $10,000.

{¶ 25} There are also genuine issues regarding the ninth badge, whether John was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred. According to R.C. 1336.02(A)(1) "a debtor is insolvent if the sum of the debts of the debtor is greater than all of the assets of the debtor at a fair valuation. (2) A debtor who generally is not paying his debts as they become due is presumed to be insolvent." While the trial court found that the record did not contain definitive proof that John was insolvent, there is sufficient evidence in the record to raise a genuine issue of material fact. John had incurred $162,248.08 in federal tax liens as of 2006, as well as thousands of dollars in farm-related debt. This farm-related debt included the $90,000 outstanding debt John owed Seed Consultants. Additionally, and as previously stated, John was subject to wage garnishment, and moved the court to appoint a trustee to disperse payment to his creditors. These facts raise a genuine issue regarding whether John was paying his debts as they became due.

{¶ 26} After reviewing the record, we find that there are genuine issues of material fact regarding several of the disputed badges of fraud. Therefore, the trial court's grant of summary judgment is reversed and the matter is remanded for further proceedings.

{¶ 27} Assignment of Error No. 1:

{¶ 28} THE TRIAL JUDGES [SIC] RULING ON DEFENDANTS [SIC] MOTION FOR SUMMARY JUDGMENT IS VOID AS A MATTER OF LAW AFTER DISQUALIFYING AND RECUSING HIMSELF AS JUDGE OVER A PARALLEL CASE AND UNDERLYING CASE.

{¶ 29} Seed Consultants argues in its first assignment of error that the trial court's ruling is void because the trial judge recused himself from any post judgment proceedings in the underlying case, which would have included the complaint for declaratory judgment.

{¶ 30} The record indicates that the trial judge recused himself after granting judgment in favor of Seed Consultants. Counsel for both parties received notice of the recusal and that a different judge had been assigned by the Ohio Supreme Court for "any post judgment

proceedings," though no reason for the recusal was given in the notice to counsel.

{¶ 31} Once a judge recuses himself from further dealings in the matter, the judge no longer has authority to act concerning the case. *State v. Raypole*, 12th Dist. No. CA99-05-012, 1999 WL 1042574 (Nov. 15, 1999); and *Justice v. City of Columbus*, 10th Dist. No. 91AP-675, 1991 WL 244996 (Nov. 14, 1991).

{¶ 32} However, whether a declaratory judgment action is the "same case" is unclear. While we understand that the declaratory judgment action was to facilitate collection on the earlier judgment by declaring the transfer fraudulent, the declaratory judgment action in this case may be considered as a separate action. The declaratory judgment action has a separate case number, and the record does not contain any filings from the judgment awarded in the other case unless attached to the motions for summary judgment or referenced in the complaint and answer. Moreover, the declaratory judgment action file does not contain any record of the trial judge's recusal or the appointment of a new judge, as these are contained in the file specific to the judgment against John Schlicter.

{¶ 33} The declaratory judgment action is between the same parties and does arise from the prior judgment in which the trial judge recused himself "from all post judgment proceedings in this matter." However, because the declaratory action in this case may or may not be considered a post judgment proceeding, Seed Consultants should have asked The trial judge to recuse himself, or filed an affidavit of disqualification according to R.C. 2701.03. Otherwise the issue is waived.

> In the absence of extraordinary circumstances, an affidavit of disqualification should not be used to disqualify a judge after lengthy proceedings have taken place in the case. A party may be said to have waived the right to obtain a judge's disqualification when the alleged basis therefor has been known to the party for some time * * *.

In re Disqualification of Pepple v. Gilroy, 47 Ohio St.3d 606, 607 (1989) (Internal citations

omitted).

{¶ 34} The record is clear that both parties were well-aware that the trial judge was handling the case. Seed Consultants' complaint for declaratory judgment relief includes the name of the assigned judge in the case caption, and all other filings indicate that the trial judge was presiding over the matter. The filings included motions to move a scheduled pretrial conference date, as well as motions for an extension of time to make filings. The Schlichters filed their motion for summary judgment on May 10, 2010, and a telephone pretrial conference occurred on May 25, 2010. While there are no transcripts of the proceedings in the record, the record does not contain any indication that Seed Consultants objected to the trial judge's participation in the case. In fact, Seed Consultants filed its cross-motion for summary judgment on July 20, 2010, after the telephone conference was completed, and made no mention of the prior recusal.

{¶ 35} Seed Consultants argues in its brief that it should not have been required to file an affidavit of disqualification because the trial judge should have recused himself automatically based on his previous recusal. However, there are an unlimited number of reasons a judge might recuse himself, and we will not speculate as to the trial judge's reasons for recusal or why he determined that he was able to preside over the declaratory judgment action. Without any objection from Seed Consultants, we deem the argument waived. However, that is not to say that upon remand, the recusal issue cannot be revisited by the parties and the trial court. Seed Consultants' first assignment of error is overruled.

{¶ 36} Judgment reversed, and the cause is remanded for further proceedings consistent with this opinion.

POWELL, P.J., and HENDRICKSON, J., concur.