[Cite as *Van Dyne v. Cortez*, 2015-Ohio-3070.]

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
J. ELLIOTT VAN DYNE	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellant	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 14-CA-00030
LOUISE CORTEZ, ET AL	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Perry County Court of Common Pleas, Case No. 12-CV-00374
JUDGMENT:	Affirmed in part; Reversed and Remanded in part
DATE OF JUDGMENT ENTRY:	July 28, 2015

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
JOHN ONESTO 600 South High Street Columbus, OH 43215	ADAM VERNAU 1288 Brittany Hills E. Newark, OH 43055

Gwin, P.J.

{¶1} Appellant appeals the July 16, 2013 judgment of the Perry Court of Common Pleas denying his motion for summary judgment and the October 31, 2014 judgment entry dismissing his complaint.

Facts & Procedural History

{¶2} Appellant J. Elliott Van Dyne is an attorney. Appellant and John Cortez entered into a written attorney employment contract on March 4, 2008 in which appellant agreed to represent John Cortez relative to two different criminal indictments on various charges including sexually oriented offenses committed against D.C. The contract stated a total fee of $65,000. Appellee Louise Cortez ("Louise"), John's mother, co-signed the written fee contract with appellant and made payments pursuant to the contract entered into by the parties. On January 9, 2009, guilty pleas were entered in both criminal cases, and John Cortez was sentenced. Following the pleas and sentencing, appellant's representation of John Cortez concluded pursuant to the parties' agreement.

{¶3} Appellant filed a complaint against Louise for the collection of $17,700 due according to the agreement in the Licking County Court of Common Pleas on March 18, 2010. Louise was served with the complaint on March 19, 2010. On September 13, 2011, the Licking County trial court entered judgment in favor of Louise. Appellant filed an appeal of the Licking County ruling on September 26, 2011. On June 11, 2012, this Court issued an opinion reversing the judgment entry of the Licking County trial court. On August 23, 2012, appellant obtained a judgment against Louise for $12,700.

{¶4} On October 10, 2012, appellant filed the instant case in the Perry County Court of Common Pleas against Louise and appellee Michael Cortez ("Michael"), Louise's son. Appellant seeks to have a March 2010 transfer of real estate located at 5757 Township Road 19 in Perry County adjudged as a fraudulent conveyance pursuant to R.C. 1336.04(A)(1). In his complaint, appellant requested damages, including punitive damages and attorney fees. Appellees filed an Answer to appellant's complaint on October 25, 2012. Appellant filed a motion for summary judgment on December 11, 2012. On July 16, 2013, the trial court issued a judgment entry denying appellant's motion for summary judgment, finding genuine issues of material fact existed as to the fraudulent transfer claim. Appellees filed a motion for summary judgment, which the trial court denied on September 22, 2014.

{¶5} On September 30, 2014, the trial court conducted a bench trial on appellant's complaint. The court heard testimony from Louise, Michael, and appellant. The following facts were adduced at trial.

{¶6} John bought the real estate for $43,000 on March 20, 2006. The real estate was transferred from John to Noel Joyce ("Joyce") without any consideration on February 1, 2008. After litigation, Joyce transferred the real estate to Louise on March 31, 2008. Louise paid no money and gave no other consideration to acquire the title to the real estate. Louise paid real estate taxes and utilities while she owned the property.

{¶7} On March 15, 2010, via a deed signed on March 12, 2010, Louise transferred the real estate to Michael. Louise testified that she actually signed the deed on March 8, 2010. Both Louise and Michael testified that Michael paid Louise nothing for the real estate. Louise testified that she transferred the real estate to Michael

because she was in poor health and she wanted him to take care of the real estate for John until he was released from prison in 2025. Louise stated she did not transfer the real estate to avoid liability to appellant and had no intent to defraud anyone, including appellant. Louise testified that she did not know of appellant's intention to sue her for the balance of the agreement until after she already transferred the property. Michael testified that he did not pay for the real estate because he was just holding it for John and did not intend to keep the property. Michael stated that he had no intent to defraud appellant and that he intended that John or John's victims would own the real estate.

{¶8} D.C., a victim of John's crimes, filed a lawsuit against John, Louise, and Michael on March 15, 2010 and Louise was served on March 16, 2010. A written settlement and release agreement was signed by Louise and Michael on February 18, 2012, which required Michael to transfer the title of the real estate to D.C., in exchange for a full and final satisfaction and release of all claims by D.C.

{¶9} Michael testified that the real estate was transferred to him before appellant filed his suit in Licking County and long before appellant obtained judgment against Louise in Licking County in August of 2012. Louise stated that she transferred the real estate to Michael prior to the decision of the Licking County trial court being reversed and prior to any judgment being entered against her. Appellees stated that they transferred the real estate to D.C. upon advice of their counsel. Michael transferred the title to the real estate to D.C. via a deed signed on February 18, 2012 and recorded on July 18, 2012. D.C. subsequently sold the real estate to a purchaser for $42,000 on September 6, 2013.

{¶10} Appellant's attorney sent Louise a letter dated March 5, 2010, making demand for payment due on the contract balance of $17,700. On March 12, 2010, Louise sent a letter to appellant asking for a record of payments and balance due on the contract. On March 16, 2010, appellant's attorney sent a letter to Louise with a statement of payments made. On March 18, 2010, Louise sent a letter to appellant stating that he omitted from his records a payment she had made in the amount of $5,000, along with a receipt for the payment. Louise testified that she attempted to make arrangements with appellant to pay him and acknowledges that she still owes him $12,700.

{¶11} Louise testified that she never tried to sell or mortgage the real estate while she owned it and never received any benefit from owning the real estate, only the liabilities of paying taxes and utilities.

{¶12} Michael testified that neither he nor Louise made any money holding title to this real estate. Michael stated that Louise lives with him due to diabetic neuropathy and he has taken care of her since 2003. Michael testified that, after the transfer of real estate to him, he kept his job, kept his home, and that, prior to the transfer to D.C., he never tried to mortgage or sell the real estate. He kept the real estate up while he owned it by occasionally visiting, but he never lived there.

{¶13} Louise testified that she did not know what the real estate was worth at the time of the transfer. Michael testified that he did not know the value of the real estate when it was transferred to him.

{¶14} After the parties filed proposed findings of fact and conclusions of law, the trial court issued a judgment entry dismissing appellant's complaint on October 31,

2014. The trial court specifically found both Louise and Michael to be credible in their testimony that they had no intent to defraud appellant or any other creditor. The trial court found that both Louise and Michael believed the property was John's, they had no intent to keep it, and neither paid for it when they obtained it. The trial court concluded the circumstances indicate that there was no intent to defraud. Further, that there was no evidence that either Louise or Michael removed or concealed assets and that there is no evidence as to the insolvency of Louise or Michael after the transfer.

{¶15} Appellant appeals the July 16, 2013 and October 31, 2014 judgment entries of the Perry County Court of Common Pleas and assigns the following as error:

{¶16} "I. THE TRIAL COURT ERRED IN FAILING TO GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

{¶17} "II. THE TRIAL COURT'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

II.

{¶18} Appellant argues the trial court's decision dismissing the complaint was against the manifest weight of the evidence.

{¶19} A trial court's decision will not be disturbed on appeal unless the decision is against the manifest weight of the evidence. As an appellate court, we neither weigh the evidence nor judge the credibility of the witnesses. Our role is to determine whether there is relevant, competent, and credible evidence upon which the fact finder could base its judgment. *Cross Truck Equip. Co. v. The Joseph A. Jeffries Co.*, 5th Dist. Stark No. CA5758, 1982 WL 2911 (Feb. 10, 1982). Accordingly, judgments supported by competent, credible evidence going to all the essential elements of the case will not be

reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978).

{¶20} Appellees first argue that since appellees no longer hold title to the real estate and D.C. transferred the real estate to a bona fide purchaser who is not a party named in this action, appellant cannot attach a lien to the real estate to satisfy the debt. Appellees are correct that a transfer is not fraudulent "against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee." R.C. 1336.08. However, in his pleadings, appellant admits that the real estate is not available to be attached by him as a remedy, but seeks a determination of the amount of damages. Further, R.C. 1336.07(3) provides that "subject to the applicable principles of equity and in accordance with the Rules of Civil Procedure," a creditor may obtain "(c) any other relief that the circumstances require." Accordingly, a lien against the real estate is not the only remedy sought or available to appellant.

{¶21} R.C. 1336.04, Ohio's fraudulent transfer statute, provides:

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim or the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred * * * (1) With actual intent to hinder, delay, or defraud any creditor of the debtor * * *.

{¶22} Thus, pursuant to R.C. 1336.04(A)(1), a creditor must show: (1) a conveyance or incurring of a debt; (2) made with actual intent to defraud, hinder, or delay; (3) present or future creditors. *John Deere Indus. Equip. Co. v. Gentile*, 9 Ohio App.3d 251, 459 N.E.2d 611 (8th Dist. 1983). There is no dispute that Louise

transferred the real estate to Michael. However, the parties dispute the element of intent. Appellant argues the March 15, 2010 transfer was fraudulent and made for the purpose of defrauding appellant of being able to collect on the fee agreement. Appellees argue there was no intent to defraud or to avoid paying appellant's bill.

{¶23} The issue concerning fraudulent intent is to be determined upon the facts and circumstances of each case, and the "burden of proof in an action to set aside a fraudulent conveyance must be affirmatively satisfied by the complainant." *Stein v. Brown*, 18 Ohio St.3d 305, 480 N.E.2d 1121 (1985). While the creditor seeking to set aside a transfer as fraudulent has the ultimate burden of proving, by clear and convincing evidence, the debtor's intent pursuant to R.C. 1336.04(A)(1), Ohio has recognized that proof of actual intent will often be impossible to show. *Id.* If the party alleging the fraud is able to demonstrate a sufficient number of "badges of fraud," an inference or presumption of actual fraud arises and the burden of proof then shifts to the transferee or defendant to go forward with the proof that the transfer was not fraudulent and explain the transaction. *Cardiovascular & Thoracic Surgery of Canton, Inc. v. DiMazzio*, 37 Ohio App.3d 162, 524 N.E.2d 915 (5th Dist. 1987); *Abood v. Nemer*, 128 Ohio App.3d 151, 713 N.E.2d 1151 (9th Dist. 1998).

{¶24} While the existence of one or more badges does not constitute fraud per se, a complaining party is not required to demonstrate the presence of all badges of fraud. *Baker & Sons Equip. Co. v. GSO Equip. Leasing, Inc.*, 87 Ohio App.3d 644, 622 N.E.2d 1113 (10th Dist. 1993). As few as three badges have been held to constitute clear and convincing evidence of actual fraudulent intent. *Bank One v. Plaza East, Inc.*, 10th Dist. No. 97APE02-184, 1997 WL 710664 (Nov. 10, 1997). Ultimately, the party

asserting fraud must carry the final burden of proof. *Baker*, 87 Ohio App.3d 644, 622 N.E.2d 1113 (10th Dist. 1993).

{¶25} R.C. 1336.04(B) sets forth several of the well-established badges of fraud and states as follows:

> In determining actual intent under division (A)(1) of this section, consideration may be given to all relevant factors, including, but not limited to, the following:
>
> (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.

{¶26} In this case, it appears from the judgment entry that the trial court determined that there were not enough badges of fraud present for an inference of fraud to arise to shift the burden to appellees to "go forward with * * * proof and explain" the transaction and ended the inquiry there.

{¶27} However, we find that there is not competent and credible evidence to support the trial court's determination that there were not sufficient badges of fraud to shift the burden to appellees, as the evidence presented contains indicia of several badges of fraud. Louise transferred the real estate to her son, statutorily defined as an insider. According to Michael and Louise, Michael did not give Louise any money or property in exchange for the real estate, which was purchased by John in 2006 for $43,000. Further, there is evidence that Louise retained control of the real estate after the transfer because she and Michael deeded the real estate to D.C. in 2012. Additionally, Michael testified that Louise paid for the real estate taxes and utilities after the property was transferred to him. Thus, the evidence presented contains indicia of badges of fraud (1), (2), and (8). There is a question as to whether the fourth badge of fraud is implicated, as Louise was aware that she still owed appellant money, but there is no indication in the letters sent from appellant's attorney that he intended to file suit against her and Louise testified she thought she was working with appellant's counsel to resolve the matter. However, as noted above, as few as three badges have been held to constitute clear and convincing evidence of actual fraudulent intent. *Bank One v. Plaza East, Inc.*, 10th Dist. No. 97APE02-184, 1997 WL 710664 (Nov. 10, 1997).

{¶28} Given these several badges of fraud, the burden shifts to Louise and Michael to provide "proof and explain the transaction." *Cardiovascular & Thoracic Surgery of Canton, Inc. v. DiMazzio*, 37 Ohio App.3d 162, 524 N.E.2d 915 (5th Dist. 1987); *Witschey, Witschey & Firestone Co., L.P.A. v. Daniele,* 9th Dist. Summit No. 26811, 2013-Ohio-5724. As noted by the Ninth District, simply because appellees failed to satisfy the requirement of R.C. 1336.08(A) of reasonably equivalent value, "does not mean they did not rebut the presumption" that the transfer of the deed was fraudulent. *Witschey, Witschey & Firestone Co., L.P.A. v. Daniele,* 9th Dist. Summit No. 26811, 2013-Ohio-5724. "Section 1336.08(A) merely codifies one way in which a transferor can defend against an action under Section 1336.04(A)(1)" and the fact that a plaintiff established several badges of fraud simply shifts the burden to the defendant to "go forward with * * * proof and explain the transaction." *Id.*

{¶29} In this case, the trial court did not proceed to analyze whether the evidence appellees presented rebutted the presumption of fraud under R.C. 1336.04(A)(1). Accordingly, we remand this case to the trial court to determine, based on the evidence presented at trial, whether appellees evidence concerning the circumstances of the transfer rebutted appellant's evidence that the transfer was fraudulent under Section 1336.04(A)(1).

{¶30} Appellant's second assignment of error is sustained as to the indicia of badges of fraud.

I.

{¶31} Based upon our disposition and discussion of appellant's second assignment of error, we find there are genuine issues of material fact as to the badges of fraud and the rebuttal of the presumption of fraud. Appellant's first assignment of error is overruled.

{¶32} The July 16, 2013 judgment entry of the Perry County Court of Common Pleas denying summary judgment is affirmed. The October 31, 2014 judgment entry of the Perry County Court of Common Pleas is reversed as to the indicia of badges of fraud and is remanded to the trial court for further proceedings in accordance with the law and this opinion.

By Gwin, P.J.,

Farmer, J., and

Baldwin, J., concur