

2017 IL App (2d) 160416-U  
No. 2-16-0416  
Order filed March 17, 2017

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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IRENE WACHOWSKI,	)	Appeal from the Circuit Court
	)	of DuPage County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 14-CH-1812
	)	
SUSAN WACHOWSKI and	)	
DANIEL WACHOWSKI	)	Honorable,
	)	Bonnie M. Wheaton,
Defendant-Appellee.	)	Judge, Presding

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JUSTICE HUTCHINSON delivered the judgment of the court.  
Justices Zenoff and Birkett concurred in the judgment.

**ORDER**

- ¶ 1     *Held:* The trial court did not err in denying plaintiff's motion for summary judgment and granting defendant's motion for same as defendant's transfer of the subject property as a trustee was not a fraudulent conveyance under the UFTA because defendant debtor did not have an actual ownership interest in the subject property.
- ¶ 2     Plaintiff, Irene Wachowski, appeals the trial court's denial of her motion for summary judgment alleging defendant, Daniel Wachowski, fraudulently conveyed real property to defendant Susan Wachowski pursuant to the Uniform Fraudulent Transfer Act (UFTA). 740 ILCS 160/1 *et seq.* (West 2014). Plaintiff contends that defendants made judicial admissions in

their answer to plaintiff's complaint that amount to a *prima facie* case of fraud in law under the UFTA. We affirm.

¶ 3

## I. BACKGROUND

¶ 4 The subject of the present appeal is born of lengthy litigation concerning the dissolution of Irene and Daniel Wachowski's marriage. Before delving into the facts which directly affect the matter before us, we will provide a brief recitation of the background leading the parties to this point.

¶ 5

### Judgment Awarding Irene a Portion of Daniel's Pension

¶ 6 On July 15, 1996, a judgment for dissolution of Irene and Daniel's marriage was entered which incorporated the parties' written marital settlement agreement. *In re Marriage of Wachowski*, 2014 IL App (1st) 130814-U, ¶ 6. Pursuant to the dissolution order, Irene was entitled to a portion of Daniel's pension. *Id.* Daniel retired on September 1, 2002, and Irene filed a petition for immediate payment of pension funds pursuant to court order, for entry of a qualified Illinois domestic relations order (QILDRO) and for disbursement of spousal annuity owed to petitioner. *Id.*, ¶ 8. Following disagreement between the parties on how to determine the value of Daniel's pension, the First District Appellate Court ordered the trial court to reevaluate the value of Daniel's pension plan pursuant to *In re Marriage of Richardson*, 381 Ill. App. 3d 47 (2008), which mandates the trial court's examination of both the immediate offset and reserved jurisdiction approaches to distribution of pensions not matured at the time of marital dissolution. *In re Marriage of Wachowski*, 2014 IL App (1st) 130814-U, ¶ 26.

¶ 7 On remand, the trial court found that Daniel's pension would be valued using the reserved jurisdiction approach discussed in *Richardson*. Using the reserved jurisdiction approach, "the trial court may choose to devise a formula at the time of the dissolution to

determine the marital portion of the pension benefits as well as the non-employee spouse's share of that marital portion or the court may wait to ascertain the marital interest and the non-employee's share until the pension benefits vest and the employee spouse begins to collect the benefits. *In re Marriage of Wachowski*, 2014 IL App (1st) 130814-U, ¶ 15 (citing *Richardson*, 381 Ill. App. 3d, at 53-54). On August 10, 2012, the trial court incorporated the *Richardson* court's method of calculating Daniel's pension value via the reserved jurisdiction approach and utilized Irene's expert's valuation of Daniel's pension. *In re Marriage of Wachowski*, 2014 IL App (1st) 130814-U, ¶ 26. Irene's counsel was directed by the trial court to prepare a QILDRO consistent with that determination.

¶ 8 On September 17, 2012, Daniel filed a motion for clarification while Irene filed both a motion to enter QILDRO and a motion seeking entry of an order in favor of Irene for \$196,287.34 (\$189,343.94 in back payments plus \$6,944.40 in interest). *Id.*, ¶ 27. The trial court denied Daniel's motion for clarification and entered an order in favor of petitioner for \$189,343.94 (the trial court denied Irene's interest request). *Id.*, ¶ 28.

¶ 9 On June 30, 2014, the First District Appellate court upheld the trial court's adoption of the reserved jurisdiction approach and valuation endorsed by Irene's expert giving Irene a \$189,343.94 judgment against Daniel. *Id.*, ¶ 48. Daniel subsequently paid Irene \$8,879.93, leaving \$180,463.01 unpaid.

¶ 10 Transfer of 437 Austin Street

¶ 11 Defendants, Daniel and Susan Wachowski, married in 2003. Susan acquired 437 Austin Street, Downers Grove, as fee simple title in 1997 following a divorce from her previous husband. She was the sole owner of this property at the time she married Daniel. Daniel owned a property at 2206 W. Erie St., Chicago, at the time he married Susan. This property was owned

solely by Daniel following the dissolution of his marriage to Irene and prior to his marriage to Susan. On November 18, 2005, Daniel and Susan conveyed their respective properties to Daniel J. Wachowski and Susan M. Wachowski, as Co-Trustees, under the Daniel J. Wachowski and Susan M. Wachowski Family Trust (2005 Trust). The purpose of the 2005 Trust was to provide for the care of the survivor of Daniel or Susan and, upon death of both Daniel and Susan, distribute any remaining property between the children from Daniel and Susan's prior marriages. 2206 W. Erie St. was removed from the trust and sold on March 28, 2007. The proceeds derived from the sale of 2206 W. Erie St. were used to pay-off the remaining mortgage on 437 Austin St.

¶ 12 On October 1, 2012, Daniel and Susan, as Co-Trustees under the 2005 Trust, conveyed 437 Austin Street to Susan M. Wachowski, as Trustee under the Susan M. Wachowski Trust (2012 Trust). The 2012 Trust was created for the purpose of assuring that Susan's children from her first marriage would receive the 437 Austin Street property upon Susan's death.

¶ 13 Complaint To Set Aside Fraudulent Conveyance and Summary Judgment

¶ 14 On October 3, 2014, Irene filed a three-count verified complaint to set aside the fraudulent conveyance of 437 Austin Street. Her complaint alleged that defendants were aware that Daniel would owe Irene money based on current and back payments related to his pension disbursements before October 1, 2012. Her complaint further alleged that Daniel and Susan owned the property at 437 Austin Street when it was transferred to both the 2005 Trust and the 2012 Trust.

¶ 15 Count I of the complaint alleged a fraudulent conveyance of 437 Austin Street to the 2012 Trust pursuant to section 160/5(a)(1) of the UFTA. 740 ILCS 160/5(a)(1) (West 2014). The complaint asserted that the transferred property was conveyed to the 2012 Trust to remove all ownership interest of Daniel, and that defendants transferred the property with the actual

intent to hinder, delay and defraud Irene. Count I points to Daniel's testimony at a 2013 citation examination in which he claimed that the transfer of property into the 2012 Trust was due to his legal problems, and his statement that "my wife said she didn't want any of her stuff \*\*\* going to my side \*\*\*." Count I also focused attention on Daniel's counsel stating in open court on November 15, 2013, that Daniel had been transferring assets from himself to his wife. Count I also enumerated statements made by Susan at a December 11, 2013, deposition in which she testified that (1) she was aware of Daniel's debt to Irene in terms of his pension; (2) the 2005 Trust was dissolved to protect property for their children; (3) 437 Austin Street was transferred from the 2005 Trust, in which both Susan and Daniel had an interest, to the 2012 Trust where only Susan had an interest; and (4) she filed her 2012 income tax return separately from Daniel "[s]o [Irene] couldn't take my portion of it."

¶ 16 Count II alleged a fraudulent conveyance of the 437 Austin Street property pursuant to section 160/5(a)(2) of the UFTA. 740 ILCS 160/5(a)(2) (West 2014). Irene alleged that Susan did not pay Daniel reasonable value for the transferred property and, further, that Daniel was insolvent both before and after the transfer was made while having incurred debt to Irene beyond his ability to pay.

¶ 17 Count III alleged a fraudulent conveyance of the property pursuant to section 160/6(a) of the UFTA. 740 ILCS 160/6(a) (West 2014). Again, it was alleged that Susan did not pay Daniel reasonable value for the transferred property and, further, that Daniel was insolvent both before and after the transfer was made while having incurred debt to Irene beyond his ability to pay.

¶ 18 On May 4, 2016, following summary judgment motions filed by both parties, the trial court denied plaintiff's motion and granted defendants'. The trial court stated:

“I think as a matter of law, Daniel never had any individual interest in this property. His only interest was a beneficiary of a trust. But that’s different from having an interest in real property.

I believe that, as a matter of law, this cannot be a fraudulent transfer of the Austin Street property, because he never had any record ownership interest in the property.”

¶ 19 Neither party filed post-judgment motions. Plaintiff timely appealed.

¶ 20 **II. ANALYSIS**

¶ 21 Plaintiff contends that the trial court erred in denying her motion for summary judgment and granting defendants’ motion for summary judgment. Additionally, plaintiff contends that she is entitled to the proceeds resulting from Daniel’s sale of the 2206 W. Erie St. property.

¶ 22 Plaintiff argues that her motion for summary judgment illustrated that the defendants engaged in a *prima facie* case of fraud under the UFTA. Plaintiff points to defendants’ answer to her verified complaint to set aside fraudulent conveyance as judicial admissions that constitute the elements of fraud in law under the UFTA. Specifically, plaintiff argues that defendants’ answer admits that the transferred property (437 Austin St.) was placed in joint tenancy and, whether for the purposes of estate planning or convenience, amounts to a binding judicial admission on both defendants. We begin our analysis with a review of whether defendants’ answer amounted to a binding judicial admission.

¶ 23 Judicial admissions are defined as “deliberate, clear, unequivocal statements by a party about a concrete fact within that party’s knowledge.” *In re Estate of Rennick*, 181 Ill. 2d 395, 406 (1998) (citing *Hansen v. Ruby Construction Co.*, 155 Ill. App. 3d 475, 480 (1987)). They are “formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the [function] of withdrawing a fact from issue and dispensing wholly with the need for

proof of the fact.” *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 557–58 (2005); see also *Lawlor v. North American Corp. of Illinois*, 409 Ill. App. 3d 149, 163 (2011). “[A]ny admissions not the product of mistake or inadvertence become binding judicial admissions.” *Rynn v. Owens*, 181 Ill. App. 3d 232, 235 (1989) (citing *American National Bank & Trust Co. of Chicago v. Erickson*, 115 Ill. App. 3d 1026, 1029 (1983)). Whether an admission is a judicial admission is a question of law, which we decide *de novo*. *Herman v. Power Maintenance & Constructors, LLC*, 388 Ill. App. 3d 352 (2009).

¶ 24 Paragraph 17 of plaintiff’s verified complaint alleges “Susan and Daniel owned the property located at 437 Austin Street, Downers Grove, Illinois. On November 18, 2005, Susan and Daniel transferred 437 Austin Street, Downers Grove, Illinois to Daniel J. Wachowski and Susan M. Wachowski, as Co-Trustees under the Daniel J. Wachowski and Susan M. Wachowski Family Trust.” The defendants’ answer says that “[t]hese [d]efendants state that Susan did bring the 437 Austin Street, Downers Grove, Illinois home into their marriage, but retained it as non-marital property placing that in joint tenancy only for purposes of estate planning; further answering, the trust referred to was prepared partially in connection with that estate plan.”

¶ 25 Paragraph 19 of plaintiff’s verified complaint alleges “[p]rior to October 1, 2012, both Daniel and Susan had an ownership interest in the [t]ransferred [p]roperty. On and after October 1, 2012, only Susan had an ownership interest in the [t]ransferred [p]roperty.” Defendants, in their answer, stated “[t]he defendants admit that prior to October 1, 2012, Daniel and Susan showed ownership interest in the transferred property but denies that Daniel had any actual ownership of this non-marital property belonging to his wife. The transfer to Susan by deed only confirms that arrangement.”

¶ 26 Attached to plaintiff's verified complaint were the deeds in trust concerning 437 Austin Street for both the 2005 and 2012 Trusts. The deeds in trust do not illustrate the character of a deed in joint tenancy. The Illinois Joint Tenancy Act provides that “[n]o estate in joint tenancy in any lands \*\*\* shall be held or claimed under any grant, legacy or conveyance \*\*\* unless the premises therein mentioned shall expressly be thereby declared to pass not in tenancy in common but in joint tenancy \*\*\*.” 765 ILCS 1005/1 (West 2014). Neither the 2005 or 2012 deeds in trust contain any such language. Defendants' answers to plaintiff's verified complaint are consistent with the notion that Daniel never took title to the transferred property in joint tenancy. The deeds and the answers identify Daniel as a trustee, which does not create his interest in a joint tenancy short of the express language conveyed in the Illinois Joint Tenancy Act. We do not agree that defendants' answer amounts a judicial admission of Daniel's actual ownership of the transferred property at any time prior to October 1, 2012.

¶ 27 Finding that defendants' answers to plaintiff's verified complaint did not amount to judicial admissions of Daniel's actual ownership of the transferred property as a joint tenant, we move on to plaintiff's contention that the trial court erred in denying her motion for summary judgment and granting defendants' motion for same. Plaintiff argues that she proved a *prima facie* case of fraud in law under sections 160/5(a)(2) and 160/6(a) of the UFTA. 740 ILCS 160/5(a)(2), 160/6(a) (West 2014).

¶ 28 Summary judgment is proper when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2–1005(c) (West 2014). “The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists.” *Illinois State Bar Ass'n Mutual Insurance Co. v.*

*Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14. A genuine issue of material fact precluding summary judgment exists where the material facts are disputed or where reasonable persons might draw different inferences from the undisputed facts. *Id.* Although summary judgment can aid in the expeditious disposition of a lawsuit, it is a drastic measure and, therefore, should be allowed only where the right of the moving party is clear and free from doubt. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A circuit court's order granting summary judgment is reviewed *de novo*. *Illinois State Bar Ass'n Mutual Insurance Co.*, 2015 IL 117096, ¶ 14. Summary judgment in favor of a defendant is proper when a plaintiff cannot establish an essential element of his or her cause of action. *Volpe v. IKO Industries*, 327 Ill. App. 3d 567, 577 (2002).

¶ 29 Section 7(d) of the UFTA states that “a transfer is not made until the debtor has acquired rights in the asset transferred.” 740 ILCS 160/7(d) (West 2014). Section 2(b) defines an “[a]sset” as “property of a debtor.” 740 ILCS 160/2(b) (West 2014). Section 2(l) defines a “[t]ransfer” as “disposing of or parting with an asset.” 740 ILCS 160/2(l) (West 2014). Thus the only property which can be conveyed to defraud creditors is that in which the debtor has an interest. *Regan v. Ivanelli*, 246 Ill. App. 3d 798, 804 (1993).

¶ 30 437 Austin Street was owned solely by Susan following a divorce from her previous husband. As sole owner, Susan conveyed the property into the 2005 Trust with Daniel. The property was then conveyed to the 2012 Trust by Susan and Daniel as co-trustees. There is nothing in either the 2005 or 2012 trustee deeds illustrating Daniel’s interest in the property aside from that of a trustee.

¶ 31 Section 5/2-1403 of the Code of Civil Procedure provides:

“Judgment debtor as beneficiary of trust. No court, except as otherwise provided in this Section, shall order the satisfaction of a judgment out of any property held in trust for the judgment debtor if such trust has, in good faith, been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor.” 735 ILCS 5/2-1403 (West 2014).

¶ 32 Since the judgment debtor, Daniel, appears in title only as a trustee, and the fund held in trust (437 Austin Street) proceeded from a person other than Daniel, section 5/2-1403 protects the subject property from plaintiff creditor’s claims. Add to this the fact that 437 Austin Street had been solely owned by Susan and Daniel had no actual ownership interest in that property, plaintiff’s claims pursuant to the UFTA must fail. Accordingly, no fraudulent transfer occurred. See 740 ILCS 160/7(d) (West 2014). Therefore, the trial court did not err in denying plaintiff’s motion for summary judgment and granting defendants’ motion for same.

¶ 33 Finally, plaintiff contends that she is entitled to the funds that Daniel received from the sale of 2206 W. Erie St. because the funds were used to pay-off the mortgage for 437 Austin Street while Daniel owed an existing debt to Irene.

¶ 34 Plaintiff failed to raise this issue in her verified complaint to set aside fraudulent conveyance. All claims in the complaint speak to the transfer of 437 Austin Street to the 2012 Trust on October 1, 2012. Although references to 2206 W. Erie St. appear throughout the record, plaintiff’s contention that she is entitled to the funds resulting from its sale was never raised before the trial court in plaintiff’s verified complaint or motion for summary judgment. As correctly referenced by defendants in their reply brief, in a review of a summary judgment motion, “we must consider whether a duty arises within the context of the cause of action initially pleaded, not whether some other theory of liability not pleaded would dictate a different

result.” *Nelson v. Aurora Equipment*, 391 Ill. App. 3d 1036, 1038 (2009). As such, since plaintiff failed to present this theory of entitlement to the funds Daniel received from the sale of 2206 W. Erie St. in her initial pleading, we will not consider it in this appeal.

¶ 35

### III.CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of DuPage County.

¶ 37 Affirmed.