2019 IL App (2d) 171007-U
No. 2-17-1007
Order Filed January 24, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

INDEPENDENT BANK, Plaintiff-Appellant, v. RICHARD C. NELSON, RICHARD C. NELSON DECLARATION OF TRUST, JUDITH A. NELSON, and JUDITH A. NELSON DECLARATION OF TRUST Defendants-Appellees.	)	Appeal from the Circuit Court of Du Page County. No. 17-CH-743 Honorable Bonnie M. Wheaton, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: Where appellant failed to raise arguments below concerning "unity of interest" and the "common law rule," those arguments were forfeited for purposes of appeal, and where the appellate court declined appellant's invitation to extend a federal district court's "alter ego" theory to expand the definitions in the Illinois Uniform Fraudulent Transfer Act under which appellant sued, the judgment of the trial court was affirmed.

¶ 2 Plaintiff, Independent Bank, appeals orders of the circuit court of Du Page County (1) granting defendants' combined motion for partial summary judgment under the Uniform

Fraudulent Transfer Act (Act) (740 ILCS 160/2(c-g) (West 2012)), and (2) denying its motion to reconsider. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On February 9, 2013, the circuit court of Grand Traverse County, Michigan, entered judgment in favor of plaintiff and against Richard C. Nelson (Nelson)[1] and three others in the amount of $961,416.25, based in part on a personal guaranty executed by Nelson for a business loan. On April 21, 2016, the circuit court of Du Page County granted plaintiff's petition to domesticate the Michigan judgment in Illinois.

¶ 5 On October 25, 2013, Nelson, acting as trustee of the Richard C. Nelson Declaration of Trust (Richard Nelson Trust), quitclaimed 50% of the Richard Nelson Trust's 100% interest in a residential property in Downers Grove to his wife's trust, the Judith A. Nelson Declaration of Trust (Judith Nelson Trust). On May 16, 2017, Independent Bank filed a verified complaint, wherein count I alleged that Nelson had fraudulently transferred assets, including a 50% interest in the Downers Grove property, to the Judith Nelson Trust with intent to "hinder, delay, and/or defraud [p]laintiff," in violation of the Uniform Fraudulent Transfer Act (Act) (740 ILCS 160 *et seq*. (West 2012)). Count II alleged unjust enrichment based upon the alleged fraud perpetrated in count I. Count III alleged that defendants conspired to prevent plaintiff from lawfully recovering liquidated assets.

¶ 6 In lieu of an answer to the verified complaint, defendants filed a combined motion pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West

[1] Defendants in this case are Richard C. Nelson, Judith A. Nelson, the Richard C. Nelson Trust, and the Judith A. Nelson Trust, and we refer to them collectively as defendants. We refer to Richard C. Nelson, the individual, as Nelson.

2016)). Defendants sought partial summary judgment as to count I and dismissal as to counts II and III.

¶ 7 At the hearing on the combined motion, defendants argued that there could be no fraudulent transfer as alleged in count I because the Act requires that the "debtor" initiate a transfer. Defendants maintained that the transfer, as shown by plaintiff's exhibits, was executed by the Richard Nelson Trust, not Nelson individually, and that the trust was not a "debtor" under the Act. Therefore, according to defendants, there could be no fraudulent transfer when the debtor made no transfer at all, and summary judgment in their favor was appropriate. As to counts II and III, defendants argued that there was no basis for either claim without the fraudulent transfer, and that the claims must be dismissed.

¶ 8 Plaintiff countered that fraud was a question of fact which could not be settled by summary judgment. According to plaintiff, Nelson should not be allowed to shield his property in a trust when he included that property in his financial disclosure that he used to obtain the loan. Plaintiff argued that it would be inequitable for defendant to use the property as an inducement for the loan and then permit him to shield the property from satisfying the loan under cover of his self-settled trust.

¶ 9 On September 18, 2017, the trial court granted the combined motion as to all counts. As to count I, it found that the Richard Nelson Trust was a separate legal entity, apart from Nelson, and that the Michigan judgment identified Nelson as the "debtor." Therefore, any transfers made by the Richard Nelson Trust were made by a non-debtor under the Act and were not fraudulent. The court also found that counts II and III were based on the alleged fraudulent transfer and the court dismissed both counts.

¶ 10 On November 17, 2017, the trial court heard arguments on plaintiff's motion to reconsider. With respect to count I, plaintiff argued that the trial court should apply the 140-year-old common law rule on spendthrift trusts. It asserted that the common law rule permits creditors access to a debtor's interest in a trust when "a judgment debtor creates or [transfers assets] into his or her trust, and it includes a spendthrift provision." Defendants' countered that plaintiff was raising this common law argument for the first time in its motion to reconsider, and that the court should disregard the argument. The court denied plaintiff's motion to reconsider. On December 13, 2017, the court closed the case and made its November 17, 2017, order "final and appealable." Plaintiff timely appealed.

¶ 11 II. ANALYSIS

¶ 12 This appeal presents two issues: (1) whether the trial court erred in granting partial summary judgment as to count I of the verified complaint, and (2) whether the trial court abused its discretion in denying plaintiff's motion to reconsider. Plaintiff does not appeal the dismissal of counts II and III.

¶ 13 A. Partial Summary Judgment

¶ 14 We first consider whether the trial court erred in granting partial summary judgment. Summary judgment is proper where, when strictly construing all pleadings, depositions, admissions, and affidavits in favor of the nonmoving party, there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Peacock v. Waldeck ex rel. Waldeck*, 2016 IL App (2d) 151043, ¶ 3. A party may file a motion for summary judgment at any time, even before filing an answer. *Garlick v. Naperville Township*, 2017 IL App (2d) 170025, ¶ 47. We review *de novo* the granting of a motion for summary judgment. *Waldeck*, 2016 IL App (2d) 151043, ¶ 3.

¶ 15 The general purpose of the Act is "to protect a debtor's unsecured creditors from unfair reductions in the debtor's estate to which creditors usually look [for] security." (Internal quotation marks omitted.) *Rush University Medical Center v. Sessions*, 2012 IL 112906, ¶ 19. The Act provides a method whereby a creditor may defeat the fraudulent transfer of assets by a debtor. *Northwestern Memorial Hospital v. Sharif*, 2014 IL App (1st) 133008, ¶ 16. As used in the Act, a "debtor" is a person liable on a claim (740 ILCS 160/2(f) (West 2012)), a "person" can be an individual or a trust (740 ILCS 160/2(i) (West 2012)), and a "claim" is a right to a payment (740 ILCS 160/2(c) (West 2012)).

¶ 16 Defendants argue that this claim implicates only Nelson individually, not the Richard Nelson Trust. The Michigan judgment was entered against Nelson and three other individuals, with no trusts named in that judgment. Defendants argue that the Richard Nelson Trust executed the transfer of the Downers Grove property, and that the Richard Nelson Trust was not a "debtor" under the Act. Thus, partial summary judgment in their favor was proper.

¶ 17 Plaintiff responds that the trial court erred in granting partial summary judgment based on its finding that Nelson and the Richard Nelson Trust were separate entities. Plaintiff contends that, even if Nelson and the Richard Nelson Trust were separate legal entities, the trust could still not be "used as a shield to defraud creditors." Plaintiff argues that (1) there was a "unity of interest," which made any actions by the trust attributable to Nelson, (2) the common law rule made Nelson and the trust one entity for the "purposes of debtor/creditor relationships," and alternatively, (3) the trust is an "alter ego" of Nelson.

¶ 18 1. *Unity of Interest*

¶ 19 Plaintiff argues that a "unity of interest," under which the actions of the trust are attributable to the individual, is created when a single person is the settlor, trustee, and

beneficiary of a trust. Therefore, according to plaintiff, "Nelson's 'debtor' status was indeed that of the [Richard Nelson Trust] with respect to the transfer." Plaintiff cites only *Hawkins v. Voss*, 2015 IL App (5th) 140001, ¶¶ 5, 31, which does not use the phrase "unity of interest" or connect this theory to the Act. The substance of plaintiff's theory is of no consequence, as we need not address the merits of this argument. Plaintiff did not plead "unity of interest" in its verified complaint, or argue this theory in any other memoranda or hearing prior to the court's ruling on the combined motion. Therefore, the issue is forfeited on appeal. *Olson v. Williams All Seasons Co.*, 2012 IL App (2d) 110818, ¶ 41 ("An appellant who fails to raise an issue in the circuit court forfeits that issue on appeal.").

¶ 20 Plaintiff concedes that it "did not raise the unity of interest argument, styled as such, as a separate argument," but contends that we should view the few sentences in its verified complaint where it collectively referenced Nelson and the Richard Nelson Trust as the combined " Defendant Debtor"[2] as a corollary to its main argument under the Act. Plaintiff cites no authority, and we decline to construe defendant's "corollary" as a separate argument raised before the trial court.

¶ 21 Plaintiff further points to arguments made in its motion to reconsider to demonstrate that it raised these issues before the trial court. Plaintiff fails to account, however, for the fact that these arguments, whatever their merits, were not raised until its motion to reconsider, after the

[2] Plaintiff contends that Nelson represented that he had a personal interest in the Downers Grove property in his financial statement to the bank. It is true that Nelson listed the property under a section titled "assets" on the statement, but he clarified in a required schedule, which was included as part of the financial statement, that the property was titled in the name of "Nelson Living Tr[ust]."

court had ruled on the combined motion. Plaintiff cannot now claim that the trial court erred by disregarding arguments plaintiff did not raise. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36 ("Arguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal."). Plaintiff did not timely raise this issue below and thereby failed to preserve the issue for appeal. This argument is forfeited.

¶ 22 2. *Common Law Rule*

¶ 23 Plaintiff next argues that the trial court erred by not applying the long-standing common law rule that prevents a debtor from shielding his retained interest in a self-settled trust from creditors. *Sessions*, 2012 IL 112906, ¶ 20. In *Sessions*, our supreme court determined that the Act and the common law rule both generally serve to protect the interests of creditors, but that they each protect different spheres and require different proofs. See *Sessions*, 2012 IL 112906, ¶¶ 20-22. The Act, for example, requires proof of fraudulent intent and is broader in scope than the common law rule, applying to situations outside of trusts as well as trusts with multiple beneficiaries. *Sessions*, 2012 IL 112906, ¶ 22. The common law, on the other hand, is confined to self-settled trusts with retained interests, and is unconcerned with whether transfers are made with fraudulent intent. *Sessions*, 2012 IL 112906, ¶¶ 23-24.

¶ 24 Plaintiff makes several substantive arguments about why it should be permitted to access the assets of the Richard Nelson Trust under the common law rule. We do not address the merits of these arguments, because plaintiff has also forfeited these arguments on appeal. Plaintiff concedes that it never raised the issue of the common law rule until its motion to reconsider, after the court had already granted partial summary judgment. *Evanston*, 2014 IL 114271, ¶ 36 ("Arguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal.").

¶ 25 Plaintiff contends that we should nonetheless consider the argument, because to do otherwise would result in a "manifest injustice." Plaintiff first cites *Raintree Homes. Inc. v. Village of Kildeer*, 302 Ill. App. 3d 304, 306 (1999), where we determined that only matters ruled on by the lower court are subject to review, unless the lower court's refusal to rule on a matter was itself the issue. Nothing in *Raintree* supports an argument that we should review an otherwise forfeited issue when failing to do so would result in a "manifest injustice," and *Raintree* is therefore inapposite.

¶ 26 Plaintiff next cites *People v. Williams*, 275 Ill. App. 3d 242 (1995), arguing that it permits review of unpreserved issues when failing to do so causes a "serious injustice." In *Williams*, a criminal defendant attempted to revive an unpreserved issue under the plain-error doctrine. *Williams*, 275 Ill. App. 3d at 247. Plain error is a doctrine that may be invoked in criminal cases where the evidence at trial is closely balanced or where the error is alleged to have denied the defendant a fair trial. *People v. Friesland*, 109 Ill. 2d 369, 375 (1985). Plaintiff asserts that the plain-error doctrine may also be applied in civil cases, and that it would be a miscarriage of justice if it were not applied here, citing *Cunningham v. Millers General Insurance, Co.*, 227 Ill. App. 3d 201, 207 (1992).

¶ 27 The *Cunningham* court recognized that the plain-error doctrine has a more significant application in criminal cases, but that it can sometimes be extended to apply in civil cases. *Cunningham*, 227 Ill. App. 3d at 207. Our supreme court has identified the "*Belfield* exception," which permits application of the plain-error doctrine in civil cases. *Gillespie v. Chrysler Motors Corp.*, 135 Ill. 2d 363, 375-77 (1990); see also *Belfield v. Coop*, 8 Ill. 2d 293, 313 (1956). The "*Belfield* exception" is exceedingly rare, and is applied only when "the prejudicial error was so egregious that it deprived the complaining party of a fair trial *and* substantially impaired the

integrity of the judicial process itself," in cases that involve "blatant mischaracterizations of fact, character assassination, or base appeals to emotion and prejudice." (Emphasis in original.) *Gillespie*, 135 Ill. 2d at 377; see also *Matthews v. Avalon Petroleum Co.*, 375 Ill. App. 3d 1, 8 (2007). Here, plaintiff is essentially arguing that it was prejudiced by its own failure to raise an argument during the hearing on summary judgment. Plaintiff is not alleging blatant mischaracterizations of fact, character assassination, or base appeals to emotion and prejudice, during a trial. Consequently, this case does not fit into the "*Belfield* exception," and we decline to review under the plain-error doctrine. The issue is forfeited.[3]

¶ 28 3. *Alter Ego*

¶ 29 Plaintiff alternatively asserts that the Richard Nelson Trust was the alter ego of Nelson. Plaintiff's counsel reiterated at oral argument that Nelson and the trust should be considered one entity, and therefore both "debtors" subject to plaintiff's claim under the Act. Plaintiff concedes that it did not allege an "alter ego" theory in its verified complaint, but asserts that we should nevertheless review this issue because "alter ego" was not a separate cause of action, but rather an evidentiary fact, which plaintiff is not required to set out in its pleading. *Board of Education*

[3] In its reply brief, plaintiff offers a second reason why we should review this issue, suggesting that it had no prior opportunity to raise this common law argument before its motion to reconsider. For reasons discussed below, we find this argument unpersuasive. Regardless, plaintiff forfeited this "prior opportunity" argument by failing to raise it in its opening appellant's brief. *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010) ("[T]his court has repeatedly held that the failure to argue a point in the appellant's opening brief results in forfeiture of the issue.").

of Kankakee School District No. 111 v. Kankakee Federation of Teachers Local No. 886, 46 Ill. 2d 439, 446-47 (1970).

¶ 30 Plaintiff raised the possibility of "alter ego" in its response to the combined motion in its now-abandoned claim that the Richard Nelson Trust was an Illinois land trust, and again at the hearing on the combined motion, where it argued that Nelson would not be entitled to include the property in his personal financial statement if the trust were not an "alter ego" of Nelson. We determine that plaintiff raised this issue before the trial court and preserved it for appeal.

¶ 31 In support of its "alter ego" theory, plaintiff cites *Dexia Credit Local v. Rogan*, No. 02-C-8288, 2008 WL 4543013, at *7 (N.D. Ill. Oct. 9, 2008), which held that a trust may be considered the "alter ego" of a judgment debtor when the debtor uses the trust's assets for his own benefit and exercises authority over the trust's assets. The defendant in *Dexia* conspired with others to commit over $19 million in Medicare and Medicaid fraud, resulting in "substantial profits" for the defendant. *Dexia*, 2008 WL 4543013, at *2-3. The defendant established trusts, ostensibly for the benefit of his children, and funded those trusts in large part with the proceeds of his fraudulent activities. *Dexia*, 2008 WL 4543013, at *3. The defendant then funneled millions of dollars out of those trusts to himself "via a circuitous route," to conceal that he was the actual recipient. *Dexia*, 2008 WL 4543013, at *3. Certainly it appears that the facts of *Dexia* are distinguishable from what was alleged in the present case, but we need not make that definitive determination.

¶ 32 In reaching its decision, the court in *Dexia* cited *In re Turner*, 335 B.R. 140, 147 (Bankr. N.D. Cal. 2005), and detailed factors to consider in making an "alter ego" determination. The factors included, *inter alia*, (1) the relationship of the debtor to the trust, (2) consideration received in the transfer, (3) whether the trust was created to shield assets in anticipation of

collection activity, and (4) whether the debtor continued to enjoy benefits of the asset following the transfer. *Dexia*, No. 02-C-8288, 2008 WL 4543013, at *7 (N.D. Ill. Oct. 9, 2008), citing *United States v. Schaut*, No. 97-C-4114, 2001 WL 1665314, at *3 (N.D. Ill. Dec. 28, 2001). While *Dexia* purported to be interpreting the Act, none of the cases cited in *Dexia* were interpreting Illinois law. Plaintiff has not cited, and we have found no Illinois authority that supports the holding in *Dexia*. Plaintiff's counsel asserted at oral argument that *Dexia* supported the same public policy articulated in *Sessions*, arguing that "if you are going to have a trust, you can't use it as an artifice to defeat your creditors." Plaintiff conceded, however, that the reasoning from *Dexia* would be a new application of the common law rule outlined in *Sessions*. We decline plaintiff's invitation. *Dexia* is an unreported case from a non-binding authority that relies on foreign law, and we find it unpersuasive.

¶ 33 Even agreeing with plaintiff's public policy argument, we know of no authority that would permit us to read its "alter ego" theory into the Act. "When interpreting a statute, the primary objective is to give effect to the legislature's intent, which is best indicated by the plain and ordinary language of the statute itself." *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 25. When enacting statutes, the legislature is presumed to have acted with full knowledge of previous judicial decisions, and its silence indicates its acquiescence to them. *In re Marriage of Mathis*, 2012 IL 113496, ¶ 25.

¶ 34 Plaintiff asserts that the definition of "debtor" in the Act "is not clear and unambiguous," and that we should look to "similar statutes" and "external aids" to ascertain its meaning. We disagree. Our legislature provided clear definitions in the Act. Relative to this appeal, a "claim" means a right to a payment (740 ILCS 160/2(c,) (West 2012)). A "debtor" is a "person" liable on a claim (740 ILCS 160/2(f) (West 2012)), and a "person" can be an individual or a broad

range of entities, including a trust (740 ILCS 160/2(i) (West 2012)). Under these definitions, a trust could potentially be liable under the Act, but only if it is the "debtor," which is not the case here, where Nelson is named individually in the judgment. The common law rule, which prevents a debtor from shielding his retained interest in a self-settled trust from creditors, has a 500-year lineage and goes back more than 140 years in Illinois. *Sessions*, 2012 IL 112906, ¶ 20, n. 3. Had the legislature intended to include such a trust as an "alter ego" of its settlor in its definition of "debtor," it could have done so in any of these provisions. Consequently, we reject plaintiff's argument that the Richard Nelson Trust should be considered an "alter ego" of Nelson, and thus, the combined "debtor" under the Act.

¶ 35 B. Motion to Reconsider

¶ 36 We next consider whether the trial court abused its discretion in denying plaintiff's motion to reconsider the order granting partial summary judgment. "A ruling on a motion to reconsider is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 347 (2002). "An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Seymour v. Collins*, 2015 IL 118432, ¶ 41.

¶ 37 Plaintiff argues that the trial court misapplied the law when it did not consider the common law rule outlined in *Sessions*. See *Sessions*, 2012 IL 112906, ¶¶ 20-22. Plaintiff concedes that it raised this issue for the first time in its motion to reconsider, but asserts that the trial court had the discretion to consider the matter pursuant to *Delgatto v. Brandon Associates, Ltd.*, 131 Ill. 2d 183, 195 (1989), where our supreme court held that failing to bring a matter until

the motion to reconsider may be excused if the movant provides a reasonable explanation as to why that argument was unavailable at the time of the original hearing.

¶ 38 Plaintiff argues that this issue under the common law rule was implicated only when defendants attached the Richard Nelson Trust document to their reply to plaintiff's response to defendants' combined motion. Plaintiff argues: "the first opportunity that [plaintiff] had to examine the document, determine that it was a self-settled trust, and argue that [*Sessions*] precluded Nelson from using the [Richard Nelson Trust] as a means to avoid his creditors, was by way of its Motion for Reconsideration." Defendants filed their reply memorandum on September 9, 2017, which included the Richard Nelson trust document as an attached exhibit. The trial court conducted a hearing on the combined motion nine days later, on September 18, 2017. Plaintiff offers no reasonable explanation of why it could not have reviewed this relatively short document and prepared to argue any matters stemming from it during the nine days between its filing and the hearing. Under these circumstances, we cannot say that the trial court abused its discretion by refusing to consider plaintiff's new legal theory raised in its motion to reconsider.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 41 Affirmed.