

No. 1-10-2594

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

NAB Bank, an Illinois Chartered Banking Institute,)	Appeal from the
)	Circuit Court of
Plaintiff,)	Cook County.
)	
v.)	
)	
LaSALLE BANK, N.A., as Successor Trustee to)	
AMERICAN NATIONAL BANK & TRUST COMPANY)	
OF CHICAGO, et al.,)	
)	
Defendants.)	
)	Nos. 02 CH 02449
)	01 CH 12018 (Cons.)
EDWARD G. TOM and DEBORAH A. TOM,)	
)	
Counter-Plaintiffs-Appellees,)	
)	
v.)	
WILSON MOY, et al.,)	The Honorable
)	Kathleen Pantle,
Counter-Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice R. E. Gordon and Justice Cahill concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted the Counter-Plaintiffs' motion to set aside the conveyance of title to tenancy in the entirety in Counter-Defendant's residence based on a finding that the conveyance was a fraudulent transfer.

¶ 2 Counter-Defendant Wilson Moy seeks reversal of the circuit court's finding that the transfer of title to tenancy by the entirety of the marital home he shared with his late wife, Adeline Moy, was fraudulent. Property held in tenancy by the entirety cannot be sold upon judgment against only one spouse. Mr. Moy argues Counter-Plaintiffs Edward and Deborah Tom failed to plead or prove a fraudulent conveyance under a three-prong test Mr. Moy urges is mandated by the controlling statutory provision. He contends the circuit court made no findings of fact or conclusions of law concerning the second and third prongs of the test, which compels reversal of the circuit court's decision. We affirm. The circuit court properly construed the requirements of the controlling statutory provision and, consistent with the record evidence, determined that Adeline Moy transferred the Moy's marital home with the sole intent to avoid her debt obligation to the Toms, a debt which existed at the time of the transfer and which she failed to pay following the entry of judgment against her, which renders the transfer fraudulent.

¶ 3 **BACKGROUND**

¶ 4 We follow the designations of counter-plaintiffs and counter-defendants used by the parties that started out on the same side of the foreclosure suit filed by NAB Bank, regarding the real property commonly known as 2401 South Archer Avenue, Chicago (the Archer property).

¶ 5 In 2002, the Toms filed a counterclaim against Adeline Moy and her son, Leslie Moy, arising from their alleged wrongful conduct from 1993 to 1994. The Toms' named as defendants only Leslie Moy and Adeline Moy, along with LaSalle Bank, N.A., as Successor Trustee to a land trust in which Adeline Moy was the sole beneficiary. The Toms asserted three causes of action: count I—specific performance; count II—fraudulent conveyance; and count III—breach of

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contract. The Toms alleged they spent more than \$600,000 to free the Archer Avenue property from the foreclosure sought by NAB Bank.

¶ 6 On January 27, 2003, the circuit court granted summary judgment in favor of the Toms, and against Leslie Moy and Adeline Moy, on all three counts of the Toms' first amended counterclaim. Summary judgment on count III, breach of contract, was vacated on February 4, 2004.

¶ 7 On May 16, 2003, Adeline and Wilson Moy entered into a quit claim deed conveying their residential property commonly known as 213 West 24th Place, Chicago, Illinois, into tenancy by the entirety. The Moy's son and a counter-defendant, Leslie Moy, prepared the quit claim deed. Mr. Moy and his wife, Adeline, had held title to the property as they received it at the purchase of the home more than thirty years earlier.

¶ 8 On November 13, 2008, the remaining claims against Adeline Moy, specifically civil conspiracy and tortious interference of contract, were resolved against her. The court entered judgment against Adeline, finding that "Adeline was aware at all time of what was occurring." On November 18, the circuit court awarded judgment to the Toms and against Adeline and Leslie, for \$612,234.68: \$521,443.68, as the amount the Toms paid to satisfy the judgment of foreclosure; \$30,950, as the amount the Toms paid to Leslie Moy to pay down the principal on the authorized mortgage that Leslie never forwarded to NAB Bank; and \$19,942.48, in interest on a loan the Toms secured to repurchase the property.

¶ 9 The court order of November 18, 2008, provides a summary of the facts explaining the litigation below.

"Most of the facts are not in dispute and were agreed to by stipulation between the parties. On April 4, 1993, Edward [Tom] owned the real property commonly known as 2401 South Archer Avenue, Chicago, Illinois ("the Property"). On or about that date, Edward entered into Real Estate Sales Contract ("Contract") with Leslie [Moy] whereby Edward agreed to sell and transfer title to the Property to Leslie as a financing device to enable Edward to obtain \$200,000.00 in financing secured by the Property for the benefit of Edward. At the same time, the parties entered into an Option Agreement ("Option"). Under the terms of the Option, Edward could repurchase the property from Leslie for \$200,000.00, which was the amount of the authorized mortgage that Leslie was to obtain from NAB Bank. The Option also contained a provision which required Leslie to convey the Property to Edward free and clear of all liens or encumbrances, including mortgages not authorized by Edward, at the time of the exercise of Edward's option.

* * *

Pursuant to the Contract, Leslie procured from the NAB in his individual name the previously agreed upon first mortgage loan in the principal amount of \$200,000.00 secured by the Property.

On or about May 26, 1994, Leslie conveyed title to the Property, via a Deed in Trust, to American National Bank & Trust Company of Chicago, not personally, but as Trustee ("Trustee") under a Trust Agreement dated May 26, 1994, and known as Trust No. 118338-03 ("the Land Trust"), for no consideration. Adeline [Moy] was the sole beneficiary of the Land Trust.

The property was encumbered by three [additional and] unauthorized mortgages that were secured by the Property:

[The three additional mortgages totaled \$150,000.000, one of which was "made by Leslie and Adeline."]

In January 2001, Edward advised Leslie that he intended to exercise the Option; however, the Property was never transferred back to Edward by Leslie. These mortgages were not repaid and a foreclosure action was filed in this Court. The Court entered a judgment of foreclosure and sale on January 27, 2003. The Toms paid the sum of \$521,443.68 to fully satisfy the judgment of foreclosure and sale. Moreover, the Toms had made payments in the amount of \$30,950.00 to Leslie. Leslie had indicated that this money would be used to reduce the principal on the authorized mortgage from NAB Bank. However, Leslie did not use this money to make the payments on the authorized mortgage.

Leslie also failed to pay the real estate taxes on the Property even though the Toms paid \$39,898.52 directly to him because Leslie indicated that he would pay the real estate taxes. The Toms also paid \$19, 942.48 as interest on the Lakeside Bank loan that was used to repurchase the Property."

¶ 10 On January 9, 2009, counsel for the Toms recorded the November 18, 2008, judgment against Adeline Moy against the Moy's marital home, commonly known as 213 West 24th Place, Chicago. The Toms attempted to collect payment from Adeline to satisfy the judgment, but they were rebuffed by the tenancy-by-the-entirety deed on the property. On June 23, 2009, the Toms filed a Motion to Set Aside Fraudulent Transfer. On July 8, Adeline's counsel filed a Suggestion of Record regarding Adeline's death and a Motion to Strike the Toms' motion to set aside the transfer. On July 31, Adeline's counsel filed a memorandum in support of the Motion to Strike. The memorandum argued that in light of Adeline's death, the transfer of title in the Moy's residence would impermissibly impact Wilson Moy, Adeline's surviving husband, who was not a party to the Toms' amended counterclaim. On August 26, 2009, the Toms filed their reply memorandum challenging the Motion to Strike and supporting the motion to set aside the transfer.

¶ 11 On October 22, 2009, the circuit court found Wilson Moy to be a necessary party to any legal action regarding the Moy's residence. Accordingly, the circuit court granted Adeline's counsel's Motion to Strike and granted the Toms leave to file a fourth amended counterclaim, naming Wilson Moy as a Counter-Defendant. On November 12, 2009, the Toms did just that.

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¶ 12 On January 13, 2010, the Toms filed a Renewed Motion to Set Aside Fraudulent Transfer. On July 2, 2010, the circuit court set the renewed motion for an "evidentiary hearing and/or oral argument" for August 2, 2010, which went forward on that date.

¶ 13 On August 9, 2010, the circuit court granted the Toms' Renewed Motion to Set Aside Fraudulent Transfer. In its order, the circuit court wrote: "After a review of all of the evidence presented by both sides, it is clear that the transfer was done with the sole intent to remove the residence as a potential judgment asset that could be used to pay Adeline's debts existing at the time of the transfer." The court gave its view of the evidence in support of the Toms' contention that the transfer by way of a quit claim deed was fraudulent. The court noted that Leslie Moy, a party to the Toms' action, prepared the quit claim deed. The court found his deposition testimony that " 'someone' told him 'it was better to do it this way' (that is, to effectuate a transfer) lack[ed] any semblance of a legitimate reason why the transfer occurred." The circuit court noted that neither Adeline nor Wilson Moy could explain the purpose of the transfer. The court concluded, "[I]t is clear that this transfer was done for the sole purpose of defrauding the Toms[,] and Adeline's sole intent was to avoid judgment debt in derogation of the Toms' rights." The court set aside the May 2003 transfer. The parties agree that as a result of the court's grant of the Toms' motion to set aside the transfer of title, the title to the subject property remained vested in Adeline Moy, deceased, and Wilson Moy, as tenants in common, which rendered a portion of the property subject to attachment or possible sale to satisfy the judgment against her in favor of the Toms.

¶ 14 Mr. Moy timely appeals

¶ 15

ANALYSIS

¶ 16 Whether the circuit court properly granted the Toms' motion to set aside the Moy's transfer of title in their marital home into tenancy by the entirety as a fraudulent transfer turns on the interpretation of the statutory requirements of section 12-122 of the Code (735 ILCS 5/12-112 (West 2008)). The parties agree that our review is *de novo*. *Paris v. Feder*, 179 Ill. 2d 173, 177-78 (1997).

¶ 17 Mr. Moy contends the 1997 legislative amendment to section 12-112 served to provide spouses with greater protection from creditors than previously existed under the Illinois Uniform Fraudulent Transfer Act (740 ILCS 160/1 *et seq.* (West 2008)). According to Mr. Moy's interpretation of the amended provision, before property held in tenancy by the entirety can be found to be the product of a fraudulent transfer, the plaintiffs must satisfy a "three prong test" he contends is now embodied in section 12-112. Mr. Moy asserts the Toms failed to plead or prove two of the three prongs of the test. Because an insufficient showing was made regarding the requirements of section 12-112 of the Code, as he reads it, the circuit court erred in granting the Toms' motion to set aside the transfer of title in the Moy's residence to tenancy by the entirety.

¶ 18 The Toms dismiss Mr. Moy's contention of three distinct elements mandated by section 12-112 as unsupported by the express language of the provision. The Toms write, however, that if "separate prongs" exist, "the Toms *did* satisfy the second prong by proving there was a debt existing at the time the transfer was made." (Emphasis in original.) Regarding the so-called "third prong," the Toms argue Mr. Moy never raised the issue of the absence of evidence during the proceedings below that Adeline Moy was unable to pay her debts as they became due.

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Because he failed to raise this issue before the circuit court, he may not do so in this court.

¶ 19 Mr. Moy replies that section 12-112, as amended, "sets forth a very specific standard" established by the 1997 amendment that must be met before a creditor can successfully challenge a property title transfer as fraudulent. Mr. Moy reiterates that the Toms neither pled nor proved any facts that there was a debt owed to them by Adeline Moy, "existing at the time of the transfer." As to the contention of waiver, Mr. Moy notes that is a limitation on the parties, not on this court.

¶ 20 We are unpersuaded that section 12-112 mandates a three-prong test, as Mr. Moy contends because he provides us with nothing but a bald contention to support his position. At the very least, we would expect Mr. Moy to make a comparison to other civil statutory provisions that have been found to contain a similar elements test to support his contention, which he has not done. Consequently, we address his contention as one challenging the sufficiency of the evidence to support the circuit court's decision based on the express language of section 12-112. We do so, however, within the context of Mr. Moy's three-prong test, without intending to give any credence to his contention that section 12-112 mandates proof of three elements in absence of supporting authority.

¶ 21 Our primary goal in construing a statute " 'is to ascertain and give effect to the intent of the legislature.' " *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009) (quoting *People v. Perry*, 224 Ill. 2d 312, 323 (2007)). The plain language of a statute is the most reliable indicator of the legislature's intent. *Id.* When the statutory language is clear and unambiguous, we apply its plain and ordinary meaning without looking to outside sources for aid. *Id.* To determine the

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plain meaning of statutory terms, we consider the statute itself, the subject it addresses, and the intent of the legislature in enacting it. *Id.* The statute should be read as a whole and construed "so that no term is rendered superfluous or meaningless." *In re Marriage of Kates*, 198 Ill. 2d 156, 163 (2001). If, however, the statute is reasonably capable of being understood in different ways, the statute will be considered ambiguous and the court may then properly consider extrinsic aids of construction to ascertain the legislative intent. *Landis v. Marc Realty, L.L.C.*, 235 Ill.2d 1, 11 (2009).

¶ 22 Section 12-122 of the Code of Civil Procedure protects a husband or wife, holding marital property in tenancy by the entirety, from having their property sold to satisfy the debt of one spouse by a judgment creditor, unless the transfer was made for the sole purpose of avoiding the payment of the debt. Section 12-112 now provides:

"Any real property, any beneficial interest in a land trust, or any interest in real property held in a revocable *inter vivos* trust or revocable *inter vivos* trusts created for estate planning purposes, held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or after October 1, 1990 against only one of the tenants, except if the property was transferred into tenancy by the entirety with the sole intent to avoid the payment of debts existing at the time of the transfer beyond the transferor's ability to pay those debts as they become due." 735 ILCS 5/12-112 (West 2008)).

¶ 23 Mr. Moy reads this section as mandating that three elements be proved, before a fraudulent transfer may be found.¹ In his main brief, he contends section 12-112 contains, what he labels, a "three prong test."

"Those three separate prongs are as follows:

- 1) The creditor must establish that the disputed transfer was made, 'with the sole intent' of avoiding payment of;
- 2) Debts 'existing at the time of the transfer'; and
- 3) The disputed transfer must create a circumstance where payment is, 'beyond the transferor's ability to pay those debts as they become due.' "

¶ 24 Mr. Moy contends the evidence does not support that the showing required under the second and third prongs were met in the instant case. According to Mr. Moy, the Toms offered no evidence that there were "existing debts" at the time of the transfer and offered no evidence that such debts were "beyond the transferor's ability to pay." Mr. Moy writes: "[A]lthough the circuit court may have made passing reference to certain debts 'existing at the time of transfer,' there are no corresponding findings of fact or conclusions of law to support that ultimate determination that Adeline Y. Moy owed a debt to the [Toms] at the time of the disputed transfer, and therefore, the August 9, 2010, Order should be vacated."

¹ Mr. Moy also contends the Toms were required to "plead" the three elements in their motion to set aside the conveyance of the Moy's marital home. In absence of a section 2-615 or section 2-619 motion in the record challenging the sufficiency of the pleading, we decline to address this contention further.

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¶ 25 According to Mr. Moy, "the *'sole'* basis upon which the Toms sought to avoid the May 16, 2003, transfer by which Adeline Y. Moy and her husband conveyed title in their home to tenancy by the entirety, was an Order entered on January 27, 2003, granting summary judgment in favor of the Toms and against Adeline Y. Moy, as to Counts I and II of the First Amended Counterclaim." (Emphasis in original.) He argues that because no ruling was made on count III of the first amended counterclaim, the order was not a final and appealable order as it did not dispose of all of the issues pending between the parties. Mr. Moy reiterates his argument that the relief granted as to counts I and II of the first amended counterclaim were "strictly equitable in nature, without any monetary component."

¶ 26 There is no disputing that the circuit court granted summary judgment in favor of the Toms and against Adeline Moy and LaSalle Bank, as trustee, under counts I and II of the Toms' first amended counterclaim in its January 27, 2003, order. The court circuit ordered LaSalle Bank to issue its trustee's deed in favor of the Toms for the Archer property, which Mr. Moy points out was not the Moy's residential premises. He contends the equitable nature of the relief granted does not satisfy the element that an existing debt be proved.

¶ 27 The court order of January 27, 2003, however, provided more than Mr. Moy acknowledges. The court "further ordered that leave be and is hereby granted to the Toms upon conveyance of title to them and upon payment by them of any indebtedness owed to NAB Bank and Transpacific Finance, LLC, deemed prior and superior to entry of judgment against the Moys for such sums as may be subsequently proved up by the Toms including any amounts paid by the Toms for any unpaid real estate taxes." Additionally, leave was granted to the Toms to

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"prove-up at a subsequent date such fees, costs and other expenses incurred by the Toms in enforcing or preserving the rights conveyed to them by the underlying documents." This would appear to support the existence of a debt in favor of the Toms as of January 27, 2003, that preexisted the transfer of the marital property by quit claim deed to tenancy by the entirety on May 16, 2003.

¶ 28 Mr. Moy insists that section 12-112 requires a *monetary judgment* against Adeline Moy to exist at the time of the transfer to satisfy, as he characterizes it, the second-prong of the test before the circuit court could properly find the property transfer was fraudulent. He rejects the contention by the Toms that Adeline Moy, "was aware or should have been aware that her home would be subject to collection for judgment at the time of transfer," on the grounds that Adeline Moy's state of mind at the time of the transfer was not relevant in the analysis the circuit court should have engaged in under section 12-112. According to Mr. Moy, before the protection afforded to an innocent spouse by section 12-112 arising from the debts of the other spouse under its "narrow exception," the Toms must plead and prove the element of an "existing debt." Mr. Moy contends the Toms failed to even suggest in their "Renewed Motion to Set Aside Fraudulent Transfer" that a debt was owed by Adeline Moy to them at the time of the disputed transfer. Instead, Mr. Moy claims the Toms merely alleged the Moy residence "would be subject to collection," which he contends was not enough to meet the statutory requirement of showing a debt existed at the time of the transfer.

¶ 29 The Toms provided this court with the only authority offered by either party on the issue of the meaning of the phrase "debts existing" of section 12-122. The Toms rely on the federal

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bankruptcy case of *In re Stacy*, 227 B.R. 272 (Bkrcty. N.D. Ill.,1998), to support their position that Adeline's debts existed at the time of her fraudulent transfer as required by section 12-112. In *Stacy*, the bankruptcy court considered whether there was an "existing debt" at the time of the disputed transfer by considering the plain and ordinary meaning of the phrase. *Id.* at 276. The court analyzed the dictionary definitions of "debts" and "existing" and construed the phrase "debts existing" broadly "to encompass those debts which exist or are in being that have yet to be reduced to judgment." *Id.* at 277.

"The Court disagrees that the language 'existing debt' as utilized in §12-112 is limited only to one on which judgment has already been entered in favor of a creditor at the time of the transfer of property.

First, the plain language of the enacted statute does not lend support to this argument. The Illinois General Assembly could easily have used the phrase 'existing debt on/for which judgment has been entered' or similar language if such was intended. ***

The Court concludes that the plain meaning of the phrase 'existing debt' is not limited to only those debts which have been reduced to judgment in favor of one or more creditors." *Id.* at 277.

¶ 30 Mr. Moy disparages the holding in *Stacy*. He contends the broad interpretation adopted by the bankruptcy court was the trustee's position and the bankruptcy court has a "predisposition" to accommodating the trustee:

"Although the United States Bankruptcy Court may have chosen to disregard the existing legislative history [as expressed by Senator Cullerton's comments] related to the passage of Section 12-112, the Illinois Appellate Court has previously taken the position that—particularly in a case where, as a part of the Court's analysis, the express language used by the legislature is dissected and compared with other similar language that *could* have been used in drafting the statute under scrutiny—the Court should look to existing legislative history for guidance. [Citation omitted]."
(Emphasis in original.).

¶ 31 Mr. Moy is mistaken in his assertion of an omission in the *Stacy's* court analysis. The *Stacy* court addressed the comments of Senator Cullerton at the time the statute was enacted:

"This may have been the Senator's view, but limiting the exception only in favor of judgment creditors is not the text of what the General Assembly legislated. The statutory language does not conclusively establish that the Illinois General Assembly intended that 'existing debt' be equated with a creditor's claim which has been reduced to judgment. A fair application of the plain meaning of the statute does not require such a narrow reading." *In re Stacy*, 227 B.R. at 278.

¶ 32 Nonetheless, Mr. Moy asserts the bankruptcy court disregarded the legislative history

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regarding passage of section 12-112, which casts doubt on its interpretation of the section.

Invoking a decision by this court, Mr. Moy contends the circuit court below erred because it "was bound to follow the precedent established in *LaSalle Bank, N.A. v. DeCarlo*, [336 Ill. App. 3d 280 (2003)]," which accurately expresses the legislative purpose for section 12-112.

¶ 33 The Toms agree that legislative intent must be considered in interpreting section 12-112. They assert, however, that *LaSalle Bank* addresses a different issue: *LaSalle Bank* centered on whether the "sole intent" phrase in section 12-112 is limited to the debtor's intent or extends to the debtor's spouse's intent as well. Unlike the *Stacy* court, the *LaSalle Bank* decision did not address the meaning of the phrase "existing debt." The Toms argue that because the instant case shares the issue that the bankruptcy court addressed, it provides a better guidance. We agree.

¶ 34 Similar to the facts in *Stacy*, the parties dispute whether Adeline's obligation to the Toms existed before she transferred the property into tenancy by the entirety with her spouse, Mr. Moy. Based on the persuasive analysis by the court in *Stacy*, we conclude that the Toms obtained a monetary judgment after the transfer was made is of no moment. We agree with the *Stacy* court's reading of the meaning of the phrase "debt existing" in section 12-112. Section 12-112 does not mandate that a *monetary judgment* be entered before a debt can be found to exist at the time of the fraudulent transfer. As the *Stacy* court ruled, "A fair application of the plain meaning of the statute does not require such a narrow reading." *In re Stacy*, 227 B.R. at 278.

¶ 35 Nor is the reading of section 12-112 offered by Mr. Moy reasonable. There is nothing in section 12-112 to support Mr. Moy's contention that it offers an impenetrable shield for an otherwise unexplained transfer of property title between a husband and wife. The plaintiff

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alleging fraudulent transfer is not cast in a race that he is certain to lose if he cannot obtain a judgment before the defendant spouse can effect a transfer of title. We find support for our rejection of this claim by Moy in the discussion by the *LaSalle Bank* court of section 12-112. Contrary to Mr. Moy's contention that the 1997 amendment was aimed at providing greater protection to homeowners, *LaSalle Bank* held that the 1997 amendment to the section 12-112 provided for "an exception when creditors may force the sale of such property to satisfy a judgment. [Citation.] By creating the exception, the legislature unambiguously expressed its intent to allow a creditor to break through the veil of protection when the transfer into tenancy by the entirety is made to avoid the payment of debts which existed at the time of the transfer beyond the transferor's ability to pay those debts as they become due. [Citation.]" *La Salle Bank*, 336 Ill. App. 3d at 284. Rather than providing greater protection for marital property held in tenancy by the entirety, the amendment allowed, under narrow circumstances, creditors to prove fraudulent transfers by a debtor spouse, which was not provided previously by section 12-112.

¶ 36 The express language of section 12-112 also supports this reading. The section provides that the transferor's ability to pay need not be immediate, but the trier of fact may take into account "the transferor's ability to pay those *debts as they become due*." (Emphasis added.) 735 ILCS 5/12-112 (West 2008). Mr. Moy fails to address this language that makes clear that debts are recognized as existing even though they have yet to come "due."

¶ 37 We agree with the Toms that, at the very least, the ordering of a prove-up by the circuit court in its January 2003 order following its grant of summary judgment against Adeline Moy on two counts, established the existence of her debt to the Toms. Under these facts, there can be no

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doubt that Adeline's obligation to the Toms existed before the title transfer was made. As the *Stacy* court ruled, "[Litigation over a debt] is sufficient to constitute an 'existing debt' under §12-112." *In re Stacy*, 227 B.R. at 276.

¶ 38 In his reply brief, Mr. Moy asserts "the new exception created by the 1997 Amendment must be understood to be an exception that is *subject to* three important qualifying conditions, referred to in the Appellant's initial brief as the 'three prongs' of Section 12-112." (Emphasis in original.) According to Mr. Moy, the "broad and liberal construction" the Toms urge in line with the *Stacy* decision is "at odds" with the cannon of construction endorsed by this court in *Harris Bank St. Charles v. Weber*, 298 Ill. App. 3d 1072 (1998), which compels that we reject the *Stacy* court's interpretation of section 12-112. Relying on *Harris Bank St. Charles*, Mr. Moy argues the 1997 amendment to section 12-112 was intended to clarify the conflicting case law concerning the interpretation of the section; the language of the amendment must be construed together with the language of the original act. We agree that the amendment must be construed with the language of the original act. We disagree with the suggestion that the *Stacy* court did violence to that language. Nor do we accept Mr. Moy's contention that the *Harris Bank St. Charles* decision provides support for his position.

¶ 39 We emphatically reject Mr. Moy's claim in his brief that "the trial court focused its attention solely and exclusively upon what it had determined to be the actual intention of Adeline Moy at the time the transfer was effectuated," which "blind[ed it] to the question of whether the transfer in question avoids a debt 'existing at the time of transfer.'" The circuit court, as we did here, considered the parties' arguments and briefs submitted to the court, which included

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arguments based on Mr. Moy's claim of the existence of a three-prong test showing in section 12-112. After fully considering the arguments and the evidence, the circuit court found the transfer to be fraudulent because of an existing debt owed by Adeline Y. Moy to the Toms. We find no basis to overturn that finding.

¶ 40 Mr. Moy alternatively claims the third prong showing was inadequate because "the Record contains no allegations or evidentiary matters, and no findings of fact or conclusions of law, to support the conclusion that the contested transfer of title rendered Adeline Y. Moy unable 'to pay [her] debts as they became due,' and therefore the August 9, 2010, Order should be vacated." Mr. Moy claims neither the Toms' fourth amended counterclaim nor the Toms' motion to set aside the transfer as fraudulent contains "any facts to support the conclusion that a disputed transfer rendered Adeline Moy incapable of paying the judgment that had been rendered in favor of the Counter-Plaintiffs." Mr. Moy argues that because the creditor bears a "substantial burden" in seeking to set aside a transfer under section 12-112, as addressed by the *Stacy* decision, the Toms' failure to provide evidentiary support on the third prong renders the circuit court's order finding that the transfer was fraudulent under section 12-112 erroneous. *In re Stacy*, 227 B.R. at 278.

¶ 41 The Toms assert Mr. Moy forfeited this issue because he failed to raise it before the circuit court and, therefore, cannot raise it for the first time on appeal. See *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994) ("the theory upon which a case is tried in the lower court cannot be changed on review, and *** an issue not presented to or considered by the trial court cannot be raised for the first time on review" (Internal quotations omitted)).

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¶ 42 Setting aside the issue of forfeiture, we agree with the argument advanced by the Toms that, based on the evidence, reversal is not warranted because "the basic facts of the underlying case are evidence of Adeline Moy's inability to pay her debt to the Toms." As a reviewing court, we defer to the findings of fact of the circuit court unless they are against the manifest weight of the evidence. *Chicago Investment Corp. v. Dolins*, 107 Ill. 2d 120, 124 (1985). We will not substitute our judgment for that of the trier of fact. *Id.* This is particularly true where the findings of fact depend on the credibility of witnesses. *Id.* A decision is against the manifest weight of the evidence only when the opposite conclusion is apparent or when the findings are unreasonable, arbitrary, or not based on the evidence. *Leonardi v. Loyola University*, 168 Ill. 2d 83, 106 (1995).

¶ 43 Whether Adeline Moy's obligation to the Toms was "beyond [her] ability to pay those debts as they become due" is a question of fact. See *Harris Bank St. Charles v. Weber*, 298 Ill. App. 3d 1072, 1081 (1998) (the resolution of the deciding question involved the weighing of evidence and assessing the credibility of witnesses, which made the question one of fact). In their fourth amended counterclaim, the Toms alleged that on November 18, 2008, judgment against Adeline Moy was entered for \$612,234.68. They claimed that to date, they had received no payment in satisfaction of that judgment. The Toms argued Adeline Moy did not have the means to satisfy the judgment against her absent the selling of her real estate and, therefore, they recorded the November 18, 2008, judgment against her and the property at issue on January 9, 2009, as a lien pursuant to section 12-101 of the Code (735 ILCS 5/12-101 (West 2008)). These record evidence amply supports the conclusion reached by the circuit court that the property

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transfer was fraudulent. Nor is the circuit court's implicit finding that Ms. Moy was unable to pay her debt to the Toms "unreasonable" or "arbitrary."

¶ 44 We will not disturb the circuit court's August 9, 2010, order granting the Toms' renewed motion to set aside as fraudulent the property transfer based on Mr. Moy's contention that the Toms' failed to plead and prove the third prong of the three-part test set forth in section 12-112. To be clear, we are unpersuaded that there exists a three-prong test imbedded in section 12-112, as Mr. Moy contends. Our ruling is based on the manifest weight of the evidence as it exists in the record before us.

¶ 45

CONCLUSION

¶ 46 We reject the counter-defendant's claim that the evidence did not support the circuit court's finding that a sufficient showing was made under section 12-112 to find a fraudulent transfer of the title in the marital home into tenancy by the entirety. In other words, the record supports the circuit court's conclusion that Adeline Moy's property transfer of the marital home, she held with Mr. Moy, into tenancy by the entirety was for the sole purpose of avoiding the debt she owed to the Toms. We affirm the circuit court's grant of the Toms' motion to set aside the fraudulent transfer. Title to the subject property remains vested in Adeline Moy and Wilson Moy as it existed before May 16, 2003.

¶ 47 Affirmed.