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SIXTH DIVISION  
July 20, 2012

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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BERKSHIRE LIMITED PARTNERSHIP, as Assignee of )	Appeal from the
Garafolo Investment Limited Partnership; and JILL )	Circuit Court of
GARAFOLO, )	Cook County.
)	
Plaintiffs-Counter Defendants-Appellees, )	
)	
v. )	No. 08 CH 22911
)	
CAELUM, L.L.C.; JADINE CHOU; THOMAS W. )	
BARTKOSKI; and DEVON BANK, as Trustee Under the )	
Trust Agreement Dated August 20, 1995, )	The Honorable
)	Leroy Martin,
Defendants-Counter Plaintiff-Appellants. )	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

**ORDER**

¶ 1 *HELD:* The circuit court properly found the debtor did not hold the subject property as tenancy in the entirety and, therefore, the Illinois Uniform Fraudulent Transfer Act applied to the underlying claim. The circuit court's finding that the subject property was an asset of the debtor was not against the manifest weight of the evidence. The debtor failed to establish claims for

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slander of title or to quiet title.

¶ 2 Defendants Caelum, L.L.C., Jadine Chou, Thomas Bartkoski, and Devon Bank, as trustee under the trust agreement dated August 20, 1995, appeal the circuit court's finding in favor of plaintiffs, Berkshire Limited Partnership, an assignee of Garafolo Investment Limited Partnership, and Jill Garafolo, on plaintiffs' complaint for fraudulent conveyance. Defendants contend the circuit court erred in finding the property at issue was no longer held as tenancy in the entirety and, therefore, the question of defendants' "sole intent" in transferring title to the property was relevant. Defendants also contend the circuit court erred in finding they violated the Illinois Uniform Fraudulent Transfer Act (UFTA) (740 ILCS 160/1 (West 2004)) where plaintiffs failed to establish the property at issue was an "asset." Defendants finally contend the circuit court erred in denying Caelum's counterclaim for slander of title or to quiet title. Based on the following, we affirm.

¶ 3 **FACTS**

¶ 4 In 1996, Chou purchased property located at 2232 N. Wayne in Chicago, Illinois (Wayne property), for approximately \$279,000. The building is a multi-level dwelling with rented units on the garden level and the first floor and Chou's home on the remaining floors. In 2001, Chou married Barkoski.

¶ 5 Chou also owned a majority interest in MCG CLR, LLC (MCG), a company established to own and manage an apartment building located at 4022 N. Clarendon in Chicago, Illinois (Clarendon property). Chou obtained her majority interest through her sole ownership of MCG II, LLC, MCG's majority member. In January 2002, plaintiffs collectively invested \$60,000 in

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MCG and received 36% membership interest in the company.

¶ 6 On August 20, 2005, Chou transferred title to the Wayne property to Devon Bank, as trustee under the trust agreement known as trust number 7105. Chou and Bartkoski owned the beneficial interest of the land trust as tenants by the entirety. At trial, Chou and Bartkoski testified that Chou was advised by her attorney and accountants to transfer title to the Wayne property into a trust for privacy of ownership, to avoid future probate costs and estate settlement delays, to avoid the appearance of wealth, to protect against identity theft, and for asset protection. At the time of the transfer, Chou's estimated net worth was in excess of \$6 million. The transfer of title to the Wayne property triggered a default in the mortgage and the lender called due the note. Then, on November 30, 2005, Chou conveyed her 50% beneficial interest to Bartkoski to enable him to refinance the Wayne property under his name only. Bartkoski refinanced the Wayne property with a mortgage in his name only. At the closing of the new mortgage, Bartkoski "had to add money to cover the value of the loan."

¶ 7 Just prior to transferring her beneficial interest in the Wayne property, on November 21, 2005, MCG sold the Clarendon property. Plaintiffs did not receive any proceeds from the sale and filed a lawsuit against Chou in November 2006. On January 25, 2008, plaintiffs were awarded summary judgment in the full amount requested, i.e., \$236,705. On March 12, 2008, plaintiffs recorded their judgment against the Wayne property, which, as of April 26, 2007, had been transferred as a land trust with its beneficiary interest to Caelum, L.L.C. (Caelum), a company formed by Bartkoski to own and manage the Wayne property.

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¶ 8 On June 24, 2008, plaintiffs filed a complaint for fraudulent conveyance in violation of the UFTA. The circuit court dismissed the complaint for failure to state a sufficient claim where plaintiffs did not name all of the necessary parties and granted plaintiffs leave to amend the complaint. On October 17, 2008, plaintiffs filed an amended complaint. Defendants responded by filing a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2004)), arguing that the Joint Tenancy Act (JTA) (765 ILCS 1005/0.01 (West 2004)) protected Chou and Bartkoski from having to sell the Wayne property to satisfy Chou's debt because they had held title as tenants by the entirety. Following a hearing on December 12, 2008, the circuit court dismissed plaintiffs' amended complaint "with respect to the homestead property" and denied the motion to dismiss "with respect to the non-homestead property." Plaintiffs were granted leave to file a second amended complaint. On February 4, 2009, plaintiffs filed an "amendment to amended complaint," asserting separate claims with respect to the non-homestead (count II) and homestead (count III) portions of the Wayne property and reasserting its original fraudulent conveyance claim (count I). On March 9, 2009, Caelum filed a countercomplaint for slander of title or to quiet title against plaintiffs. Plaintiffs also recorded a *lis pendens* on the Wayne property. The parties then filed cross-motions for summary judgment, which were denied.

¶ 9 Following a bench trial, the circuit court found in favor of plaintiffs on the reinstated original fraudulent conveyance claim (count I) pursuant to section 5(a)(1) of the UFTA (740 ILCS 160/5(a)(1) (West 2004)). The court held that Chou was "considered the current title holder" of the Wayne property where the property transfers from Chou to Devon Bank as trustee,

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from Devon Bank as trustee to Bartkoski, and from Bartkoski to Caelum were fraudulent transfers under the UFTA. The court, therefore, found "that Plaintiffs may take all acts permitted by law against the Wayne Property to satisfy the judgment entered in their favor and against Jadine Chou" for the Clarendon property case. The circuit court further found in favor of plaintiffs on Caelum's counterclaim for slander of title or to quiet title. This appeal followed.

¶ 10

## DECISION

¶ 11

### I. Tenancy By The Entirety

¶ 12 We first must determine whether the Wayne property was protected as a property in tenancy by the entirety under the JTA (765 ILCS 1005/0.01 (West 2004)) in order to apply the relevant law to the underlying fraudulent transfer claim. Typically, property that is held as tenancy by the entirety cannot be sold to satisfy the debt of only one spouse (735 ILCS 5/12-112 (West 2004)). The statute provides:

"Any real property, or any beneficial interest in a land trust, 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 transfers beyond the transferor's ability to pay those debts as they become due." 735 ILCS 5/12-112 (West 2004).

In contrast, section 5(a)(1) of the UFTA provides that a creditor may avoid a property transfer if the debtor made the transfer "with the actual intent to hinder, delay, or defraud any creditor of the debtor." 740 ILCS 160/5(a)(1) (West 2004). The UFTA provides a nonexclusive list of 11

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factors to use in order to determine the debtor's "actual intent" in making the property transfer.

740 ILSC 160/5(b)(1)- (b)(11) (West 2004).

¶ 13 Defendants contend Chou's transfer of title to Devon Bank into the land trust on August 20, 2005, with the beneficial interest provided to Chou and Bartkoski as tenants by the entirety lends protection to the property. In contrast, plaintiffs respond that the Wayne property was transferred out of tenancy by the entirety just three months later, on November 30, 2005, with Bartkoski as the sole beneficiary and title has never been reinstated; therefore, any protections afforded by section 12-112 of the Code of Civil Procedure (Code) have long since lapsed.

¶ 14 The question before us is one of statutory interpretation wherein our primary goal is to ascertain and give effect to the legislature's intent. *Davis v. Toshiba Machine Co., America*, 186 Ill. 2d 181, 184 , 710 N.E.2d 399 (1999). "Where the language of a statute is clear and unambiguous, a court must give it effect as written, without 'reading into it exceptions, limitations or conditions that the legislature did not express.' " *Garza v. Navistar International Transportation Corp.*, 172 Ill. 2d 373, 378, 666 N.E.2d 1198 (1996) (quoting *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill. 2d 76, 83, 630 N.E.2d 820 (1994)). Our standard of review is *de novo*. *Davis*, 186 Ill. 2d at 184.

¶ 15 In order for defendants to be afforded the protection provided by a tenancy in the entirety, the language of section 12-112 of the Code must be applicable. Again, the statute provides:

"Any real property, or any beneficial interest in a land trust, *held in tenancy by the entirety shall not be liable to be sold upon judgment entered on or*

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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 transfers beyond the transferor's ability to pay those debts as they become due." (Emphasis added.) 735 ILCS 5/12-112 (West 2004).

The plain language of the statute, therefore, protects a property held in tenancy by the entirety *at the time of judgment*.

¶ 16 The judgment at issue was garnered in a separate proceeding on January 25, 2008. The Wayne property was transferred out of tenancy in the entirety on November 30, 2005.

Accordingly, the property was not held as a tenancy by the entirety at the time of judgment. In fact, the property was held in tenancy by the entirety for only three months and was transferred 9 days after defendants defrauded plaintiffs by selling the Clarendon property and retaining all of the proceeds. We will not read into the statute the additional language that would be necessary to support defendants' argument. The language of the statute does not provide protection for any and all properties that once were held in tenancy in the entirety. Rather, "section 12-112 clearly sets forth the legislative goal of creating a veil of protection for the marital property from prospective creditors by preventing land *held in tenancy by the entirety* to be sold to satisfy a judgment." (Emphasis added.) *LaSalle Bank, N.A., v. DeCarlo*, 336 Ill. App. 3d 280, 283-84, 783 N.E.2d 211 (2003). Section 12-112 further contemplates the scenario in which a debtor transfers property *into* tenancy by the entirety to avoid the payment of debts existing at the time of the transfer. 735 ILCS 5/12-112 (West 2004); *DeCarlo*, 336 Ill. App. 3d at 284. However,

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the statute does not extend protection to a property that once was held in tenancy by the entirety, but has not been held as such for over three years prior to entry of the judgment. We need not address the hypothetical situations presented by defendants, which are mere attempts to distract this court from the facts before us.

¶ 17 Because we hold that the property was not a tenancy by the entirety at the relevant time, our fraudulent conveyance analysis need not consider the "sole intent" standard required by section 12-112 of the Code. Instead, the fraudulent conveyance claim was appropriately analyzed by the circuit court under the UFTA.

¶ 18 II. Asset

¶ 19 Defendants next contend that plaintiffs failed to establish the Wayne property was an asset as required by the UFTA.

¶ 20 A UFTA action involves the assets of the judgment debtor and imposes liability based on the value of the transferred asset. *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 187, 935 N.E.2d 963 (2010). Section 8 of the UFTA provides, in relevant part, that a creditor may obtain "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim" (740 ILCS 160/8(a) (West 2004)) or "[i]f a creditor has obtained a judgment on a claim against a debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds" (740 ILCS 160/8(b) (West 2004)). The UFTA defines "asset" as "property of a debtor, but the term does not include: (1) property to the extent it is encumbered by a valid lien; (2) property to the extent it is generally exempt under the laws of this State; or (3) an interest in property held in tenancy by the entireties to the extent it is not subject

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to process by a creditor holding a claim against only one tenant." 740 ILCS 160/2(b) (West 2004).

¶ 21 We have already established the property was not held in tenancy by the entirety at the relevant time. Therefore, the question that remains is the extent, or if, the property was encumbered by a lien or exempt under other Illinois laws, such as the homestead exemption (735 ILCS 5/12-901 (West 2004)), such that it was not an asset as defined by the UFTA.

¶ 22 Whether the Wayne property was an asset is a question of fact. The circuit court weighed the evidence and was the trier of fact. *DeCarlo*, 336 Ill. App. 3d at 286. "Where the findings of fact depend on the credibility of witnesses, a reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence." *Id.* We will not substitute our judgment for that of the trier of fact. *Id.* Moreover, a decision is against the manifest weight of the evidence only where an opposite conclusion is apparent or where the findings are unreasonable, arbitrary, or not based on the evidence. *Id.*

¶ 23 It is undisputed that Chou purchased the Wayne property for \$279,000. It is further undisputed that, on August 25, 2005, when executing the land trust agreement, Chou and Bartkoski valued the property at \$600,000. Moreover, according to the trial testimony of both Chou and Bartkoski, approximately \$200,000 remained on the mortgage note as of November 2005. Therefore, at the time of transfer, the Wayne property had an approximate asset value of \$400,000 less real estate taxes, which as of 2008 equaled \$12,514, and the homestead exemption of \$15,000 (735 ILCS 5/12-901 (West 2004)). Despite not having a precise appraisal valuing the property at the time of the transfer, which we note is not a requirement supported by law, we

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conclude that a finding that the Wayne property was an asset was not against the manifest weight of the evidence.

¶ 24 III. Slander Of Title Or Quiet Title

¶ 25 Defendants finally contend the circuit court erred in denying Caelum's counterclaim for slander of title or to quiet title. Defendants argue that plaintiffs improperly recorded their judgment in the Clarendon case against the Wayne property when the judgment was against Chou only. Caelum alleges it suffered injuries when it was unable to refinance the mortgage on the property.

¶ 26 To establish a claim for slander of title, the claimant must demonstrate: (1) the defendants made a false and malicious publication; (2) the publication disparaged the claimant's title to property; and (3) resulting damages. *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 62, 922 N.E.2d 380 (2009). "The act of maliciously recording a document that clouds another's title to real estate is actionable as slander of title. [Citations.] However, if the party who records the document has reasonable grounds to believe that he has title or a claim to the property, he has not acted with malice. [Citations.] Malice is a question of fact. [Citations]." *Id.* We do not find the circuit court's determination that Caelum failed to establish its claim was against the manifest weight of the evidence. Plaintiffs, as creditors, had a reasonable basis to record the judgment and *lis pendens* against the Wayne property after learning through asset discovery of Chou's connection to the property.

¶ 27 In the alternative, in order to successfully quiet title, a claimant must establish its interest in the property was superior to plaintiffs' alleged interest. *Dudley v. Neteler*, 392 Ill. App. 3d

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140, 143, 924 N.E.2d 1023 (2009). Defendants failed to establish Caelum's superior interest in the Wayne property where the transfers were deemed fraudulent and the property is subject to sale to satisfy Chou's debt.

¶ 28

#### CONCLUSION

¶ 29 We affirm the judgment of the circuit court finding defendants liable for fraudulent conveyance in violation of the UFTA.

¶ 30 Affirmed.