

No. 1-16-2556

**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  
FIRST JUDICIAL DISTRICT

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CANCUN ASSOCIATES, LLC, a Delaware Limited Liability Company,	)	
	)	
Plaintiff-Appellant,	)	
	)	Appeal from
v.	)	the Circuit Court
	)	of Cook County
(JOSEPH J. CASPER III, an Individual,	)	
	)	11-L-009369
Defendant,	)	
	)	Honorable
and)	)	Alexander P. White,
	)	Judge Presiding
ROBIN W. ROBINSON, an Individual,	)	
	)	
Defendant-Appellee.	)	

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Burke and Justice Gordon concurred in the judgment.

O R D E R

*Held:* Summary judgment for defendant borrower/judgment debtor in supplementary proceeding affirmed as to claims of fraudulent transfer of real estate into sham trust where (1) borrower owned residence by tenancy in the entirety before borrower-lender relationship arose and subsequent transfer to trust could not defraud creditor of debtor’s assets; (2) transfer of other real property from corporation to trust did not hinder creditor or affect individual debtor’s solvency; and (3) sham trust claim lacked factual and legal support.

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¶ 1 This is an appeal from supplementary proceedings in which lender/judgment creditor Cancun Associates, LLC (Cancun) asked the trial court to enforce a \$3.2 million judgment by ordering the sale of real estate in Long Grove, Illinois which was purportedly owned by borrower/judgment debtor Robin W. Robinson and fraudulently transferred to a sham trust to avoid his creditor's reach. The trial court rejected Cancun's motion for turnover for sale and granted summary judgment to Robinson. Cancun contends it is uncertain why the ruling was in Robinson's favor, but that the facts and law warrant reversal. Robinson responds the record clearly showed the real estate was never subject to these judgment enforcement proceedings and that the transfers to the trust were, therefore, of no consequence to the creditor's rights. Robinson also contends the record indicates the trust is a valid and active entity rather than a sham.

¶ 2 Robinson and another individual, Joseph J. Casper III, took a senior loan from Everest Real Estate Fund, LLC and a junior loan from Cancun in 2005 in order to become part owners in commercial property and a project to develop a resort in Cancun, Mexico. Robinson and Casper personally guaranteed the loans. Following default on both loans, the lenders filed separate suits in Cook County. Everest's action was the subject of an appeal we concluded on September 21, 2017. See *Cancun Associates, LLC v. Joseph J. Casper III and Robin W. Robinson*, 2017 IL App (1st) 162224-U. Cancun's separate action in 2011 led to a judgment against the two individuals in 2014, which was followed by these supplementary proceedings to recover various assets belonging to the judgment debtors. See 735 ILCS 2-1402(a) (West 2012) (providing for a judgment creditor to initiate supplementary proceedings to discover the assets in the hands of a judgment debtor or third party, and apply those assets to satisfy the judgment); *Schack v. Blom*, 334 Ill. App. 3d 129, 133, 77 N.E.2d 635, 639 (2002).

¶ 3 Cancun pursued Robinson's and Casper's bank and investment accounts, as well as the real estate which is at issue in this interlocutory appeal. Although the record indicates that some of Cancun's collection efforts are ongoing in the trial court, Cancun states it is appealing from a final judgment as a matter of right pursuant to Rule 303(a)(1). Rule 303(a)(1) (eff. Jan. 1, 2015). Cancun is incorrect. An order or judgment is final for purposes of Rule 303(a) only if it "terminates the litigation between the parties on the merits of the cause or disposes of the rights of the parties either upon the entire controversy or upon some definite part thereof." Rule 303(a)(1) (eff. Jan. 1, 2015). The order resolving Cancun's motion for turnover for sale is not an order terminating the trial court proceedings, nor will there be such an order until all of the supplementary proceedings conclude.

¶ 4 Nevertheless, we have jurisdiction to review the summary judgment ruling on an interlocutory basis pursuant to Rule 304(a) because it is a ruling that finally determined the discrete issue of the parties' rights to the real estate and the trial court stated in a scheduling order entered on September 7, 2016 that there was no just reason to delay appeal of the summary judgment ruling. Rule 304(a) (eff. Mar. 8, 2016) (authorizing appeals from a final order resolving one of several claims where the trial court makes a requisite finding). The trial court's addition of 304(a) language rendered the order appealable prior to the complete resolution of the case. Furthermore, Cancun's error in stating the basis for our jurisdiction does not deprive us of jurisdiction, because the relevant question is not whether the appellant invoked the correct rule but whether there is a rule that provides this court with jurisdiction over their appeal. *Dolan v. O'Callaghan*, 2012 IL App (1st) 111505, ¶ 31, 979 N.E.2d 383.

¶ 5 The real estate is located in Lake County, Long Grove, Illinois and consists of two separate parcels. The first parcel is commonly known as 4492 Wellington Drive and was vacant

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land when Robinson and his wife, Deborah L. Robinson, purchased it on May 20, 1997, as tenants in the entirety, not as tenants in common, and not as joint tenants, and then built their residence on it. Tenancy by the entirety is provided by Illinois statute, is available only to married couples, and protects a marital residence (homestead) from being sold to pay a judgment entered against only one of the tenants. *Premier Property Management, Inc. v. Chavez*, 191 Ill. 2d 101, 107, 728 N.E.2d 476, 480 (2000). We reiterate that the only judgment debtors in this proceeding are the two borrowers, Casper and Robinson, and that the record does not indicate Robinson's wife was a borrower or guarantor of the Cancun loan, or judgment debtor to the Cancun lawsuit.

¶ 6 The couple's residence is located in a subdivision known as Royal Melbourne. The couple's corporation, D&R Real Properties, Inc., took title to a parcel of land which is near the Robinson residence and is commonly known as 4312 Half Day Road. As of August 3, 2000, the D&R corporation has leased its parcel of land to the Royal Melbourne Property Association for use as a community park and playground, on a rent-free, expenses-only basis. In Article 12 of the written lease, D&R gave Royal Melbourne Property Association an option to purchase the premises at any time during the lease arrangement. Like Deborah, D&R was not a borrower, guarantor, or judgment debtor of the Cancun loan or lawsuit.

¶ 7 On April 12, 1999, the Robinson Holdings Trust was formed with Deborah as trustee, and it has since held various assets. Defendant Robinson was not the grantor nor does he have an interest in the Robinson Holdings Trust.

¶ 8 On February 4, 2014, while Cancun's action was pending, title to both properties was quitclaimed to the Robinson Holdings Trust, and, according to Robinson, this was done for estate planning purposes. This transfer is the focus of Cancun's motion for turnover for sale and this

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appeal. The \$3.2 million judgment against Casper and Robinson was entered six months later on August 19, 2014.

¶ 9 On August 24, 2015, Cancun filed its motion for turnover for sale arguing fraudulent conveyance in four counts. The Uniform Fraudulent Transfer Act enables a creditor to defeat a debtor's transfer of assets to which the creditor was entitled. *A.G. Cullen Construction, Inc. v. Burnham Partners, LLC*, 2015 IL App (1st) 122538, ¶ 26, 29 N.E.3d 579; 740 ILCS 160/5 (West 2012). Cancun relied on sections of the Act which indicate a transfer is fraudulent as to a creditor (1) if, whether the creditor's claim arose before or after the transfer, the debtor made the transfer with actual intent to hinder, delay, or defraud the creditor, or (2) if the creditor's claim arose before the transfer, the transfer was made for less than reasonably equivalent value, and the debtor was insolvent or became insolvent as a result of the transfer. 740 ILCS 160/5(a)(1), 6(a) (West 2012); *Falcon v. Thomas*, 258 Ill. App. 3d 900, 909, 629 N.E.2d 789, 795 (1994). The first type of claim was authorized by section 5(a)(1) of the Act, and the second type was authorized by section 6(a). 740 ILCS 160/5, 6(a) (West 2012). A section 5(a) claim requires proof that the transfer was made with the actual intent to hinder, delay, or defraud the creditor, but there is no *scienter* requirement to a claim based on section 6(a) indicating a transfer was made for less than reasonably equivalent value and left the debtor unable to meet his obligation. *Apollo Real Estate Investment Fund IV, L.P. v. Gelber*, 403 Ill. App. 3d 179, 193 935 N.E.2d 963, 975-76 (2010) (distinguishing between claims of "fraud in fact" and "fraud in law"); *Falcon*, 258 Ill. App. 3d at 909, 629 N.E.2d at 795 (setting out elements of a section 6 claim and indicating proof of actual fraudulent intent is not necessary); *In re Hennings Feed & Crop Care, Inc.*, 365 B.R. 868, 874 (Bankr. C.D. Ill. 2007) ("As with a § 5(a)(2) claim, no proof of actual intent to defraud is required to establish fraud in law under § 6(a).") Under section 6(a), "a donor may make a

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conveyance with the most upright intentions, and yet, \*\*\* it may be set aside as fraudulent.” (Internal quotations omitted.) *Apollo Real Estate*, 403 Ill. App. 3d at 193-94, 935 N.E.2d at 976 (discussing cause of action for “fraud in law” and quoting *Birney v. Solomon*, 348 Ill. 410, 414-5, 181 N.E. 318, 320 (1932)). The test for determining the validity of a transfer under section 6(a) is “whether or not it directly tended to or did impair the rights of creditors.” *Apollo Real Estate*, 403 Ill. App. 3d at 193, 935 N.E.2d at 976 (quoting *Birney*, 348 Ill. at 414-5, 181 N.E. at 320). The Act defines a “transfer” as “every mode \*\*\* of parting with or disposing of an ‘asset’ or interest” in the same. 740 ILCS 160/2(1) (West 2012). The Act defines an “asset” as “property of a debtor” but specifies the term does not include “an interest in property held in tenancy by the entirety to the extent it is not subject to process by a creditor holding a claim against only one tenant.” 740 ILCS 160/2(b) (West 2012).

¶ 10 The first two counts concerned the marital residence and the next two counts concerned the park property. In Count I, Cancun relied on section 5 of the Act and alleged the transfer of the house to the trust was made with actual intent to hinder, delay, or defraud Cancun of its rights. Count II was based on section 6 of the Act and indicated the transfer of the house to the trust was made without receiving reasonably equivalent value and that defendant Robinson was either insolvent at the time or rendered insolvent by the transfer. The allegations were restated in Counts III and IV, to address the transfer of the park property. Robinson filed a response in which he argued that the residence which was alleged to have been fraudulently conveyed while Cancun’s lawsuit was pending was held in tenancy by the entirety prior to the 2014 conveyance and therefore was not the proper subject of a fraudulent conveyance action, and the park property was owned by the D&R corporation and not by Robinson before it was transferred to the trust. “Before a judgment creditor may proceed against a third party who is not the judgment debtor,

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the record must contain evidence that the third party possesses assets of the judgment debtor. Only then does the citation court have the jurisdiction to order that party to produce those assets to satisfy the judgment.” *Schack*, 334 Ill. App. 3d at 133, 77 N.E.2d at 639. With leave of court, Cancun then filed an amendment to its motion for turnover in which it added a fifth count seeking the trust’s real property or Robinson’s interest in the trust on grounds that the trust was a sham because it was “being operated for [his] sole benefit.” On June 24, 2016, the trial court ruled that neither conveyance was fraudulent and denied Cancun’s motion for turnover. Cancun sought clarification as to whether the order addressed Count V. On August 29, 2016, the trial court denied Cancun’s motion for turnover pursuant to Count V.

¶ 11 Cancun’s motion for turnover for sale lacked any citation or discussion of the procedural basis for the request, however, Robinson and the trial court construed it as a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure, and the court construed Robinson’s response as a crossmotion for summary judgment. 735 ILCS 5/2-1005 (West 2014). When reviewing a summary judgment ruling, we address the issues *de novo*. *People ex rel. Madigan v. Lincoln, Ltd.*, 383 Ill. App. 3d 198, 204, 890 N.E.2d 975, 980 (2008). The summary judgment process is intended to streamline litigation, avoid unnecessary trials, and reduce congestion on the court’s calendar. *Lincoln*, 383 Ill. App. 3d at 204, 890 N.E.2d at 980. When the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, show there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law, then the entry of summary judgment is appropriate. *Lincoln*, 383 Ill. App. 3d at 204, 890 N.E.2d at 980.

¶ 12 Cancun argues the elements of the fraudulent transfer claims set out in Counts I through IV were satisfied and entitled Cancun to judgment. In our opinion, the above facts, which are not

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disputed, and the legal principles which we outlined above indicate neither of the Long Grove properties was subject to turnover to Cancun.

¶ 13 As of 1997, the Robinsons owned the residential property as tenants by the entirety, and thus, even before Robinson took the loan from Cancun in 2005, the residential property was shielded from his creditors due to Deborah's interest in the property as a tenant in the entirety. *Premier Property Management*, 191 Ill. 2d at 107, 728 N.E.2d at 480; *In re Eichhorn*, 338 B.R. 793, 797 (Bankr. S.D. Ill. 2006) (Illinois property held in tenancy by the entirety is protected from a creditor holding a judgment against only one of the tenants); *People v. One Residence Located at 1403 East Parham Street*, 251 Ill. App. 3d 198, 621 N.E.2d 1026, 1031 (1993) (the "purpose of the homestead exemption is to secure to the homesteader a shelter beyond the reach of his improvidence"); 740 ILCS 160/2(b) (West 2012) (excluding property held in tenancy by the entireties where the creditor held a claim against only one tenant). The record indicates Deborah was not a party to the Cancun loan, was not adjudicated to be a judgment debtor, and was not named as a defendant in these supplementary proceedings to enforce the judgment. The tenancy by the entirety statute protects Deborah's residence in that the property cannot be sold to satisfy her husband's debt. *Premier Property Management*, 191 Ill. 2d at 105, 728 N.E.2d at 479. Due to Deborah's interest in the property as a tenant in the entirety as of 1997, the residential property was already beyond Cancun's reach before Cancun lent the money to Robinson in 2005, filed its collection suit in 2011, obtained the \$3.2 judgment in 2014, or filed its motion for turnover in 2015. The property was never available to Cancun. The 2014 transfer to the trust, which is the subject of Cancun's motion and this appeal, did not diminish Cancun's rights in any way because Cancun never had any rights to the property.



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¶ 14 Because Illinois protects real property held in a tenancy by the entirety from the judgment creditors of only one of the tenants, in order to reach the Robinson residence, Cancun would have to show in its section 5 claim that the 1997 purchase of the property was done with the intent of defrauding Cancun. Cancun did not make the necessary factual allegations, and could never prove allegations of that nature, because Cancun was not one of Robinson's creditors in 1997 and would not become his creditor until 2005. Because Cancun never had any rights to the property, Robinson could not have made "the [2014] transfer [to the Robinson Holdings Trust] with actual intent to hinder, delay, or defraud [his] creditor" as Cancun contended in Count I of its motion for turnover for sale which was based on section 5 of the Act. 740 ILCS 160/5(a)(1) (West 2012). The standard of intent that is actually relevant here is set out in the statute regarding tenancy by the entirety: "Any real property \*\*\* 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 transfer beyond the transferor's ability to pay those debts as they became due." (Emphasis added.) 735 ILCS 5/12-112 (West 1998); 1997 Ill. Laws 5779. According to the Illinois supreme court, the sole intent standard of the tenancy by the entirety statute prevails over the actual intent standard of the fraudulent transfer statute. *Premier Property Management*, 191 Ill. 2d at 110-111, 728 N.E.2d at 482. Because the property was already protected by the 1997 deed, the 2014 property transfer could not have been a fraudulent transfer perpetrated on the judgment creditor "with the sole intent to avoid the payment of debts" and Cancun could never prove and recover on the allegations in made in Count I.

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¶ 15 The preexisting tenancy by the entirety also precludes Cancun's recovery on Count II in which it alleged, based on section 6 of the Act, that Robinson was insolvent at the time or the transfer rendered him insolvent. 740 ILCS 160/6(a) (West 2012). It is impossible to conclude that transferring an asset which was never available to Cancun had any effect on Robinson's ability to meet his obligation to Cancun.

¶ 16 Stated most succinctly, the 2014 transfer of the residence was not made "with the sole intent to avoid the payment of debts" within the meaning of section 5 of the Act (*Premier Property Management*, 191 Ill. 2d at 110-111, 728 N.E.2d at 482) and did not impair the creditor's rights within the meaning of section 6 of the Act (*Apollo Real Estate Investment*, 403 Ill. App. 3d at 193, 935 N.E.2d at 975-76). Therefore, Cancun would never be entitled to judgment on Count I or II and it was proper to grant Robinson judgment on those counts as a matter of law.

¶ 17 We reach the same conclusion with respect to Counts III and IV which concerned the transfer of the park property. The record indicates that prior to the 2014 transfer, title was held by the D&R corporation which in 2000 began leasing the property to the Royal Melbourne Homeowners Association, and that after the 2014 transfer to the Robinson Holdings Trust, that lease remains in effect. Cancun relies on bare and conclusory statements rather than factual, evidentiary, and legal support indicating that when one third-party, the corporation, transferred its asset to another third party, the trust, the transaction was made with improper intent to impede the rights of Robinson's judgment creditor or that transferring an asset which was not Robinson's to begin with had any effect on his solvency or ability to satisfy his debt. There is no basis whatsoever for concluding that Cancun's creditor rights were affected by the transfer of the park

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property. To the contrary, Cancun would never be entitled to judgment on Count III or IV, and it was proper to grant Robinson judgment on those counts as a matter of law.

¶ 18 We also reject Cancun's arguments regarding its "sham trust" claim in Count V. In this count, Cancun contended the trust structure should be disregarded because nearly all of the assets contributed in 1999 have been distributed to Robinson and he is "[the] sole beneficiary entitled to all of [the trust] assets." This factual premise is incorrect. Even assuming for the purposes of argument that Robinson has received most of the trust assets, the record indicates Deborah is the trustee, the trust is an active, ongoing entity that maintains bank accounts at MB Financial and Chase Bank, and both Deborah and Robinson live in the residential property at issue. We cannot accept Cancun's premise that Robinson "was the only person who ever benefitted from the Trust's assets, and he should be deemed to be the owner of all of its assets, including without limitation, the Residence and the [park property]." Moreover, Cancun fails to cite any instance in which an Illinois court has declared a trust to be a sham in a debtor/creditor context, and the facts of this case do not suggest that we should be the first Illinois court to reach that conclusion. Cancun's "sham trust" claim lacked factual and legal support, it did not present a genuine issue of any material fact, and Robinson was entitled to judgment as a matter of law as to Count V.

¶ 19 For these reasons, we find the trial court's summary judgment ruling as to Counts I, II, III, IV and V in favor of Robinson was appropriate and we affirm that ruling.

¶ 20 Affirmed.