

No. 1-10-3588

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).

ROSE IMPORTING AND DISTRIBUTING, LLC,)	Appeal from the
VEGAS AMUSEMENTS, INC., and)	Circuit Court of
VEGAS REAL ESTATE HOLDINGS, LTD,)	Cook County
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 05 CH 14395
)	
GEORGE WIECZOREK, CYNTHIA)	Honorable
WIECZOREK and MID-WEST GAMING, INC.,)	James R. Epstein
d/b/a Vegas Party Suppliers, Inc.,)	Judge Presiding.
)	
Defendants-Appellees.)	

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justice Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly found that the debtor spouse did not fraudulently transfer stock to his wife where the debtor spouse never owned the stock. The trial court also properly found that the debtor spouse did not fraudulently transfer his interest in the marital home to his wife where plaintiffs failed to show that the debtor spouse received inadequate consideration for the transfer and evidence permitted a finding that the debtor spouse lacked actual intent to defraud plaintiffs.

¶ 2 This case arises from an action brought by plaintiffs Rose Importing and Distributing, LLC, Vegas Amusements, Inc. and Vegas Real Estate Holdings, LTD to recover sums alleged to have been misappropriated by defendants George Wieczorek and his business,

Mid-West Gaming, Inc., d/b/a Vegas Party Suppliers, Inc. (Midwest). George and Midwest were ultimately found to be liable to plaintiffs. To preserve plaintiffs' ability to enforce the judgment, they had also pled an additional count against George and his now former wife, Cynthia Wieczorek, to avoid George's allegedly fraudulent transfers of BP stock and the marital home to Cynthia pursuant to the Uniform Fraudulent Transfer Act (UFTA) (740 ILCS 160/1 *et seq.* (West 2008)). Following a trial on the fraudulent transfer count, the court entered judgment in favor of defendants. Plaintiffs now appeal from this judgment, asserting that the trial court erroneously failed to avoid the transfers of the BP stock and the marital home from George to Cynthia because such transfers were fraudulent in both law and fact. We affirm.

¶ 3

I. BACKGROUND

¶ 4

Plaintiffs commenced this action by filing a complaint against defendants George and Midwest in August 2005. Although the complaint was amended multiple times, plaintiffs alleged eight counts against George and Midwest raising different legal theories for their misappropriation of plaintiffs' funds. The complaint essentially alleged that George was responsible for performing certain clerical functions for plaintiffs, including writing checks and depositing checks into their respective bank accounts. It was alleged that while performing these duties, George deposited plaintiffs' funds into Midwest's bank account. Following the commencement of this action, the trial court granted a stay of these proceedings against George in light of pending proceedings in a related criminal case. George was subsequently found guilty of felony theft in his criminal trial and the

stay in the present civil case was lifted on December 10, 2007. After George was sentenced to four years in prison on February 1, 2008, he filed a notice of appeal from the criminal judgment.

¶ 5 It is undisputed that shortly thereafter, on March 25, 2008, George signed a warranty deed transferring his interest in the marital home (2956 192nd Place in Lansing, Illinois) to Cynthia, who was still his wife at that time.¹ The trial court in a separate civil case entered a judgment dissolving the marriage between George and Cynthia and incorporating a marital settlement agreement (MSA) on May 9, 2008 (08 D6 30386). The MSA awarded Cynthia the marital home as well as the BP stock, which she had inherited from her mother. Following the dissolution judgment, the warranty deed was recorded on July 2, 2008.

¶ 6 In August 2008, the trial court granted plaintiffs leave to file an amended complaint adding Cynthia as a defendant, as well as a count seeking to avoid George's allegedly fraudulent transfer of his interest in the marital home to Cynthia, an insider. Plaintiffs alleged that according to George's affidavit of assets and liabilities in his criminal case, the marital home was his only asset of value. Plaintiffs also alleged that George received no consideration for the transfer and that following the transfer, he was unable to pay the judgment in this case. As a result, plaintiffs argued they were entitled to relief pursuant to sections 5 and 6 of the UFTA (740 ILCS 160/5, 6 (West 2008)).

¹Cynthia's attorney later acknowledged that the warranty deed was not notarized contemporaneously with George's signature.

¶ 7 The record indicates that George was subsequently released from prison in March 2009. The appellate court affirmed his conviction shortly thereafter. *People v. Wieczorek*, No. 1-08-0626 (April 21, 2009) (unpublished order under Supreme Court Rule 23). In addition, it appears that following the appellate court's decision, plaintiffs moved for summary judgment in the present civil case as to the eight counts that solely concerned the liability of George and Midwest. The trial court granted the motion as to six of the eight counts in the amount of \$246,876.35 on July 27, 2009, possibly as a result of the final decision in George's related criminal appeal. In January 2010, the trial court granted plaintiffs leave to file an amended fraudulent transfer count adding a request to avoid the allegedly fraudulent transfer of George's interest in the BP stock to Cynthia. The amended count alleged that George and Cynthia had jointly owned the BP stock, that George agreed to transfer his right to the stock to Cynthia pursuant to the MSA and that on July 20, 2008, Cynthia sent the bank a formal request to remove George as joint owner of the stock.

¶ 8 On August 6, 2010, trial commenced solely on the fraudulent transfer count, leaving two counts concerning George and Midwest's liability for misappropriating plaintiffs' funds remaining. At trial, Cynthia testified, in pertinent part, that when her mother, Mary Cichon, died in May 2007, Cynthia and her sisters allocated Cichon's stock among themselves. Cynthia identified a stock transfer form, which was admitted into evidence. The form, dated June 14, 2007, indicated that it pertained to a joint account and stated that 2992 shares were to be issued to Cynthia as well as George as a "Joint owner/Second

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Trustee/Minor/Other." In addition, the form provided a box to be checked if shares were to be transferred to more than one owner, but the box remained unchecked. Cynthia testified that when she completed this form, George became the co-owner of the stock.

¶ 9 When George was convicted in the related criminal case, his bond was set at \$450,000. Cynthia and her relatives helped George post the requisite \$45,000 in cash, although there was no explicit agreement that George would transfer his interest in the marital home to Cynthia to secure their contribution. While in prison, George called Cynthia weekly. During one phone call, she told him she was going to divorce him and was taking the BP stock as well as the marital home, which they had purchased together in 1971. George agreed to her demand. Cynthia identified the warranty deed, which was admitted into evidence. She recalled that her lawyer had completed an affidavit stating the conveyance was tax exempt because no consideration was given in exchange. In addition, the MSA, admitted into evidence, shows that Cynthia was awarded the marital home with the caveat that she would be solely responsible for outstanding mortgage loan balances, taxes and insurance.

¶ 10 In July 2009, Cynthia wrote a letter directing the bank to remove George's name from the stock. She identified the letter, which was admitted into evidence and stated that George's name was to be removed due to the dissolution of their marriage and that Cynthia's three sons would be listed as beneficiaries. Cynthia further testified that in addition to the stock and marital home, she received a Ford truck and a Chrysler minivan but she never removed George's name from the car titles. When George was released

from prison in March 2009, he began living with Cynthia in the former marital home and began driving the Ford truck. We note that the MSA also shows that Cynthia was awarded her IRA and retirement benefits, while George was awarded his annuity through Alliance as well as the vehicle used by Midwest and his interest in Midwest itself. On cross-examination by George's attorney,² Cynthia added that she was not sure what the marital home was worth, that she guessed it was worth between \$120,000 and \$150,000, and that George had paid more than \$50,000 in attorneys' fees from marital funds.

¶ 11 George testified that Cynthia filed her petition for dissolution of marriage on April 14, 2008. Two days later, George signed the MSA, in which he agreed to transfer the house and the BP stock to Cynthia. George testified that when he signed the deed, no consideration was given in exchange and thus, no real estate transfer tax was paid. Following George's release from prison, he continued to reside in that home. George also identified an affidavit of assets and liabilities which he had signed in his criminal case. The affidavit, which was admitted into evidence, stated that the value of the marital home was \$200,000 and the value of his business was \$10,000 but George testified that he "was guessing" when he attributed those values to his assets. The affidavit also stated that his annuity insurance policy was worth \$576.53, that his monthly pension payment was \$334.07 and that his monthly social security payment was \$1,468.40. In addition, George testified that he and Cynthia both owned the BP stock when the \$246,876.35 judgment

²Because the examination of Cynthia ensued out of order, the record is unclear as to whether this was cross-examination as to plaintiffs' case, cross-examination as to Cynthia's case, or direct examination in George's case, but the record suggests the first scenario.

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was entered against him in this case, despite that the dissolution judgment entered into evidence showed that Cynthia was awarded the BP stock over a year earlier. George further testified that he had not paid the \$246,876.35 judgment and also owed attorneys fees but he was now insolvent.

¶ 12 On cross-examination by Cynthia's attorney, George testified that the deed was not recorded until the dissolution judgment was entered. In addition, George returned to live in the marital home when he was released from prison, because during his pre-sentencing interview, he had been required to provide a place of parole upon release. He also returned to the marital home because he had no money or place to go and Cynthia was struggling financially. Their relationship, however, was "rocky." George further testified that the dissolution judgment had awarded him Midwest, which the County assessor's office had valued at \$50,000. On redirect examination by plaintiffs' attorney, George testified that he was not present when the assessment occurred in February 2009 and did not know whether he was capable of paying plaintiffs' claim as of that time. George also testified that he was currently unable to convert the value of Midwest into cash.

¶ 13 Cynthia testified on her own behalf that when she and her sisters divided their deceased mother's stock amongst themselves, Cynthia had wanted her 2,992 shares of stock to be in her name alone but Cynthia's sister had told her that BP required Cynthia to include her husband's name on the stock. Cynthia had no knowledge about stock and complied. George never exercised control over the stock account. In addition, the stock was never

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commingled with other assets. On May 22, 2007, Cynthia deposited \$12,115.69 in inheritance from her mother into a bank account that Cynthia held jointly with George. She withdrew \$15,000 from the same account on September 24, 2007, to contribute toward the \$45,000 paid for George's bond. The remainder of that sum was contributed by Cynthia's family members as well as her deceased mother's checking account. When bond was posted, Cynthia mistakenly believed that the money would be returned. We note that the bond receipt admitted into evidence specifies that bond money may not be returned. Cynthia further testified that she sold 250 shares of the BP stock in exchange for approximately \$15,000 in order to repay family members for their contributions to the bond. She subsequently repaid additional sums but still owed more. Following the divorce, Cynthia paid approximately \$6,000 to eliminate the outstanding balance on the second mortgage to the marital home.

¶ 14 On September 17, 2010, the trial court entered judgment in favor of Cynthia and George. The court found, in pertinent part, that George never owned the BP stock because (1) the stock transfer form was equivocal on that point; (2) Cynthia testified the stock was her inheritance and George was listed solely due to erroneous information; (3) George never exercised control over the stock; and (4) George's affidavit did not list the stock as an asset. The court found that as a result, the purportedly fraudulent transfer was merely an attempted to correct the stock record to reflect that Cynthia was the true owner. The trial court also found that the marital home had not been fraudulently transferred, notwithstanding that George had transferred his interest to his wife, an insider, while

plaintiffs' action was pending. The court found there was no evidence that George (1) concealed the transfer; (2) transferred his interest *shortly* after a substantial debt was incurred; (3) retained control of the residence; or (4) failed to receive reasonably equivalent value in exchange for the transfer. As to the latter finding, the court clarified that the house was transferred pursuant to the dissolution judgment and the value of all assets had to be considered. Specifically, the court found that George retained sole ownership of his business, that the values of his pension, Cynthia's retirement account and the three vehicles were unknown, and that Cynthia and her relatives paid George's bond. As a result, Cynthia sold stock to repay those relatives. The court further found that neither George's decision to transfer the house to his wronged spouse of many years, nor Cynthia's decision to shelter her nearly destitute former spouse, appeared unreasonable. In a subsequent order, the trial court entered judgment against defendants as to the two remaining counts in the amount of \$45,366. Plaintiffs now appeal the trial court's determination that it failed to show the BP stock and marital home were fraudulently transferred.

¶ 15

II. ANALYSIS

¶ 16

On appeal, plaintiffs assert the trial court erroneously determined that the transfers of George's interests in the BP stock and the marital home were not fraudulent and avoidable under the UFTA.³ We review whether the trial court's findings were against the manifest

³We note that although Cynthia has responded to this appeal, George has neither appeared nor filed a response brief.

weight of the evidence, as the trial court had the opportunity to observe the witnesses and was in a better position to assess their credibility. *Falcon v. Thomas*, 258 Ill. App. 3d 900, 903, 909 (1994). In addition, a finding of the trial court is against the manifest weight of the evidence only where the opposite conclusion is apparent or where the court's findings appear to be arbitrary, unreasonable or not based on the evidence. *Munson v. Rinke*, 395 Ill. App. 3d 789, 795 (2009). The reviewing court may not substitute the trial court's judgment with its own. *Falcon*, 258 Ill. App. 3d at 909.

¶ 17 Pursuant to Illinois law, a transfer may be fraudulent in law or fraudulent in fact. *Gendron v. Chicago & North Western Transportation Co.*, 139 Ill. 2d 422, 437 (1990). Section 7(d) of the UFTA provides, however, that "a transfer is not made until the debtor has acquired rights in the asset transferred." 740 ILCS 160/7(d) (West 2008). In addition, section 2 provides that "asset" means "property of a debtor" and that "[t]ransfer" means "disposing of or parting with an asset or an interest in an asset." 740 ILCS 160/2(b), (1) (West 2008). Thus, a debtor cannot convey property to defraud his creditor unless he has an interest in that property. See *Regan v. Ivanelli*, 246 Ill. App. 3d 798, 804 (2008).

¶ 18 Here, the evidence supported the trial court's determination with respect to the BP stock that no fraudulent transfer occurred, whether fraudulent in law or fact, because George never had rights with respect to the stock. As the trial court found, the stock transfer form was equivocal as to whether George actually owned the stock. In addition, the trial court correctly noted that the assets and liabilities affidavit executed by George did not

list the stock as one of his assets. More importantly, Cynthia testified that she, to the exclusion of George, received the stock as inheritance from her mother and that George's name was only added to the stock as a formality due to erroneous information. She also testified that George never exercised control over the stock. Thus, the trial court was entitled to find from this evidence that George did not own the stock, notwithstanding Cynthia's earlier testimony that George became a co-owner of the stock upon her completion of the stock transfer form. The trial court, having heard the entirety of the parties' testimony, was entitled to find they ascribed only a technical, rather than a substantive, meaning to the term owner. Based on the trial court's finding that George never owned the stock, neither the MSA nor the removal of his name from the stock account resulted in a transfer, let alone a fraudulent one. Accordingly, the trial court's determination was not against the manifest weight of the evidence.

¶ 19 We also find the trial court was not required to determine that George's transfer of his interest in the marital home to Cynthia was fraudulent in law. Section 6(a) of the UFTA states as follows:

"A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." 740 ILCS 160/6(a) (West 2008).

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Fraud in law, otherwise known as constructive fraud, permits a transfer to be considered fraudulent based on the surrounding circumstances and requires that (1) a transfer was made without adequate consideration; (2) there was an existing or contemplated indebtedness against the transferor; and (3) the transferor failed to retain sufficient property to satisfy his creditors. *Gendron*, 139 Ill. 2d at 437-38. Thus, fraud in law does not require that the plaintiff prove the transferor possessed actual intent to defraud. *Apollo Real Estate Investment Fund v. Gelber*, 403 Ill. App. 3d 179, 193 (2010). In addition, pursuant to the fraud in law test, special scrutiny applies to transfers between spouses. *Kardynalski v. Fisher*, 135 Ill. App. 3d 643, 650 (1985). When the test for a fraudulent transfer in law has been satisfied, a presumption exists that the conveyance was fraudulent in its entirety. *Kardynalski*, 135 Ill. App. 3d at 649. The presumption of fraud in law can be overcome, however, by demonstrating that the debtor retained sufficient assets to satisfy his debts after the transfer, or, that adequate consideration was given for the transfer, thereby requiring proof of fraud in fact based on actual intent. *First Security Bank of Glendale Heights v. Bawoll*, 120 Ill. App. 3d 787, 791-92 (1983).

¶ 20 Here, the trial court was entitled to find that plaintiffs failed to demonstrate the transfer of the marital home was fraudulent at law because evidence did not show George conveyed his interest without receiving equivalent value in exchange. Contrary to plaintiffs' suggestion, the evidence at trial did not unequivocally show that the marital home was worth \$200,000. George testified that when completing his affidavit of assets, he only guessed that the marital home was worth \$200,000. Cynthia guessed that the house was worth between \$120,000 and \$150,000. These guesses are far from compelling proof of

the marital home's value. Even assuming the house was properly valued at \$200,000, the record fails to establish that the value of the property George received in exchange was inadequate.

¶ 21 We agree with the trial court that the transfer of George's interest in the marital home must be considered in the context of the MSA and the events leading up to the dissolution of marriage, notwithstanding testimony that no real estate transfer tax was paid because no consideration was given in exchange for the conveyance. First, we note that the value Cynthia received from the marital home was offset by the MSA's provision stating that she would be solely responsible for outstanding mortgage loan balances, taxes and insurance. Cynthia also testified that she paid \$6,000 to eliminate the outstanding balance on the second mortgage. In addition, inadequate evidence was presented regarding the value of other property received by Cynthia, and more importantly, other property received by George. As the trial court found, no value was presented regarding the defendants' vehicles, Cynthia's retirement account or her IRA. The court also found no evidence was presented regarding the total value of George's pension. In addition, George was awarded his annuity and his business, Midwest. While plaintiffs' brief states that George sold his annuity to repay one of Cynthia's sisters for her contribution to his bond, plaintiffs have failed to cite to a page in the record showing that such evidence was presented at trial. Furthermore, although evidence regarding Midwest's current value is lacking, George did not testify that the business was worthless. He merely testified that he was presently unable to convert the business to cash.

¶ 22 Not only was George awarded certain assets at the time of dissolution, but Cynthia also testified that more than \$50,000 of George's legal fees had been paid from marital funds and that she had sold some of her BP stock to repay relatives who had contributed to George's bond. We cannot agree with plaintiffs' suggestion that it was unreasonable for Cynthia to reimburse those individuals in the absence of a formal agreement. Under these circumstances, and in light of the limited evidence presented concerning the value of the relevant assets, the trial court was entitled to find that plaintiffs failed to show that George transferred his interest in the marital home without adequate consideration or that the transfer was fraudulent in law.

¶ 23 Similarly, we find the trial court was not required to find that George's conveyance of his interest in the marital home constituted fraud in fact, otherwise known as actual fraud, pursuant to section 5(a)(1), which states as follows:

"A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor[.]" 740 ILCS 160/5(a)(1) (West 2008).

Thus, fraud in fact cases require that the transferor had a specific intent to hinder, delay or defraud a creditor. *Gendron*, 139 Ill. 2d at 437. In addition, section 5(b) of the UFTA sets forth 11 non-exclusive factors, known as the badges of fraud, that may be considered in assessing the

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debtor's actual intent. *Falcon*, 258 Ill. App. 3d at 911.

¶ 24 Section 5(b) states as follows:

"In determining actual intent under paragraph (1) of subsection (a), consideration may be given, among other factors, to whether:

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;
- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lienor

who transferred the assets to an insider of the debtor." 740 ILCS 160/5(b) (West 2008).

The presence of the factors set forth in section 5(b) does not create a presumption of actual intent but merely provides indicators on which the trial court may rely to make findings regarding the debtor's intent. *Matthews v. Serafin*, 319 Ill. App. 3d 72, 77 (2001). Proof of some or even all of the factors included in section 5(b) does not create a presumption that the debtor had the actual intent to defraud. *Lindholm v. Holtz*, 221 Ill. App. 3d 330, 334-35 (1991). Where present in sufficient number, however, these factors *may permit* an inference of fraud. *Steel Co. v. Morgan Marshal Industries, Inc.*, 278 Ill. App. 3d 241, 251 (1996).

¶ 25 Here, the trial court stated that only two badges of fraud weighed in favor of actual intent to defraud. Specifically, the court found it was undisputed that the marital home was transferred to Cynthia, an insider (see 740 ILCS 160/2(g)(1)(A), (K) (West 2008)), and that this action was pending at the time. We also note that the court's findings supported a third badge of fraud, as the court found elsewhere in its written order that it appeared the transfer of George's interest in the marital home left him insolvent. It follows that the transfer was substantially all of George's assets, satisfying a fourth badge of fraud. Nonetheless, the court noted the absence of certain other badges of fraud in determining that the evidence weighed against finding an actual intent to defraud.

¶ 26 The trial court essentially found that George did not possess or control the marital home simply by virtue of living in the property. In addition, it appears that the transfer of the marital home was neither disclosed nor concealed. Although plaintiffs argue that the

deed was not recorded until July 2008, over three months after it was signed, it is not unexpected that the deed would not be recorded before the dissolution judgment was entered. We also reiterate that the record does not clearly show that George failed to receive reasonably equivalent value in exchange for the marital home. Furthermore, the trial court found George did not transfer his interest in the marital property *shortly* after a substantial debt was incurred because the debt occurred long before the transfer, apparently when he misappropriated plaintiffs' funds or when plaintiffs filed the complaint in 2005.

¶ 27 Finally, plaintiffs argue the trial court should have considered in their favor that the dissolution of the marriage was a sham because George continued to live with Cynthia upon his release from prison and continued to drive a car that had been awarded to Cynthia. These peculiar circumstances, including the requirement that George identify a place of parole and both individuals' financial hardships, do not compel a finding that the marriage dissolution was a sham. As stated, the factors in section 5(b) are not exhaustive and are merely a means to determining the transferor's actual intent. Thus, it was appropriate for the trial court to find that George transferred his interest in the marital home to Cynthia, his spouse of many years, because he had wronged her, not because he actually intended to defraud plaintiffs. Accordingly, the trial court's finding that plaintiffs failed to demonstrate George's conveyance of his interest in the marital home to Cynthia constituted actual fraud, was not against the manifest weight of the evidence. In light of our determination, we need not consider plaintiffs assertion that the MSA did not provide

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Cynthia with an affirmative defense.

¶ 28 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 29 Affirmed.