

IN THE COURT OF APPEALS OF THE STATE OF OREGON

MAX ZWEIZIG,
Plaintiff-Appellant,

v.

TANYA ROTE; TIMOTHY ROTE; and NORTHWEST HOLDING, LLC, an
Oregon
limited liability company,
Defendants-Respondents

TIMOTHY AND TANYA ROTE,
Third Party Plaintiffs,

v.

JOEL CHRISTIANSEN AND WILLIAMS KASTNER,
Third Party Defendants,
and

SANDRA WARE, TARYN BASAURI, AND JOHN DOES,
Third Party Defendants.

Clackamas County Case # 19CV01547
A175781

APPELLANT’S PETITION FOR RECONSIDERATION

Appellant-plaintiff, Max Zweizig, seeks reconsideration of this court’s decision affirming the trial court summary judgment. A copy of this court’s February 16, 2022 decision is attached.

Plaintiff is owed \$1 million by defendant Timothy Rote pursuant to the amended federal court judgment. (Ex. 1, attached). At a time when plaintiff’s claim was in existence and before it was reduced to judgment, Timothy Rote, and

his wife, Tanya Rote, made transfers affecting valuable Sunriver property which had the result of placing the real property beyond the reach of plaintiff's \$1 million judgment.

Plaintiff filed this appeal from a summary judgment on plaintiff's claims for fraudulent transfer related to the Sunriver property. Plaintiff alleges that the transferors, Timothy Rote, his wife, Tanya Rote, and their wholly owned corporation, made the transfers of the Sunriver property in order to avoid it being available to satisfy plaintiff's \$ 1 million judgment. At the time of the challenged transfers, the Sunriver property likely had equity of \$488,000 which could have partially satisfied plaintiff's judgment. The transfers to Rotes' wholly owned LLC and between the spouses placed the property's equity beyond the reach of plaintiff's judgment. The challenged transfers were fraudulent for the reasons detailed in plaintiff's briefing to this court.

This case is one of many litigation cases stemming from defendants' ongoing and concerted efforts to avoid paying plaintiff's judgment. In this case, plaintiff challenges as fraudulent two real property transfers orchestrated by defendants at a time when plaintiff was owed significant sums of money and his claims were unpaid. Plaintiff contends that the 2017 quit claim deed from Timothy Rote to his solely owned LLC and a subsequent transfer by the LLC to Rote's spouse, Tanya Rote, were fraudulent transfers under Oregon statute (ORS 95.230)

and case law. The real property at Sunriver should have been available to satisfy plaintiff's judgment but the transfers effectively blocked plaintiff's collection efforts.

Argument in Support of Reconsideration

Pursuant to ORAP 6.25, plaintiff urges this court to reconsider its affirmance of the trial court summary judgment. The two subsections of ORAP 6.25 that apply include: ORAP 6.25 (b) procedural disposition; and ORAP 6.25 (e) error in construing the law.

This court erred in affirming the summary judgment because the existence of a fraudulent transfer is a fact question which cannot be resolved on summary judgment. Whereas defendants claim their alleged intra-party transfers in 2012 shield their liability for transfers made in 2017 and 2018, the law is not on their side.

Oregon law consistently holds that fraudulent intent is a fact question and so is the issue of whether the debtor received "reasonably equivalent value" for quit claiming property to his LLC. ORS 95.230(1) supplies the basis for plaintiff's recovery here. It provides:

(1) 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:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or the obligation, * * *.”

It is undisputed that the challenged transfers occurred. Whether a transfer was made with fraudulent intent is a **fact question**. *Morris v. Nance*, 132 Or App 216, 221, 888 P2d 571 (1994). The trial court’s role is limited to a “**case-by-case factual determination** of whether a transfer was made with actual intent to hinder, delay or defraud.” *Morris*, 132 Or App at 221 (emphasis added). Determining defendants’ mental state under ORS 95.230: “suggests the need to weigh the factual circumstances... before drawing any inference.” *Morris*, 132 Or App at 221. Of course, “weighing” the evidence is impermissible on summary judgment. *Wieck v. Hostetter*, 274 Or App 457, 468, 362 P3d 254 (2015).

ORS 95.230 lists what have been called the “badges of fraud” in a challenged transaction. Several badges of fraud are present on the facts of this case:

- 1) The challenged transfers were made by the debtors;
- 2) Plaintiff’s claims arose well before the transfers;
- 3) Both challenged transfers were to and among “insiders;”
- 4) The result of the transfers is that plaintiff is unable to collect his judgment against assets of the debtors;
- 5) After making the last transfer, the parties dissolved the corporate debtor.

“ORS 95.230(2) provides a means for creditors to overcome the difficulties of proving fraudulent intent by direct evidence. It allows the inference of actual intent to be drawn from the presence of the listed factors or other suspicious factual circumstances surrounding the transfer.” *Morris*, 132 Or App at 221. As the party opposing summary judgment, plaintiff is entitled to the benefit of all reasonable inferences, including the inference of “actual intent” to defraud plaintiff. ORCP 47.

Here, there are several badges of fraud and other “suspicious factual circumstances” surrounding the challenged transfers. Why would defendants implement alleged 2012 private, unrecorded agreements in 2017 and 2018 – conveniently at a time when plaintiff is owed a \$1,000,000 judgment? Under what circumstances and, for what reasons, did the challenged transfers occur? It is clear from the undisputed facts that the result was Timothy Rote’s shedding of a valuable asset which should have been available to satisfy plaintiff’s judgment.

This court recognizes that the presence of most badges of fraud weighs in favor of the creditor, here the plaintiff. *Doughty v. Birkholtz*, 156 Or App 89, 97, 964 P2d 1108 (1998). Whether any badges of fraud exist is a factual issue which will be addressed in an evidentiary proceeding. *In re Serrato*, 214 B.R. 219, 225 (Bankr. N.D. Cal. 1997)

Rotes' Trial Strategy

On the same day this court affirmed this case without opinion, it also affirmed without opinion plaintiff's award of attorney fees against Timothy and Tanya Rote in case #A174364. Plaintiff's Petition for appellate attorney fees in that case is pending. This court is likely aware of the numerous cases filed and pursued by Timothy Rote, all with the goal of avoiding payment of the \$ 1 million judgment. In case #A174364, the trial court made a finding that the Rotes' goal was to harass and intimidate plaintiff and to force him to incur substantial attorney fees. (Case #A174364: "The Rotes have acted willfully, maliciously, and in bad faith to harass and intimidate Mr. Zweizig because Mr. Zweizig is trying to collect on a judgment against the Rotes, to force him to incur large attorney fees, and to delay resolution of his claim that the Rotes have fraudulently concealed assets to avoid paying on the judgment." ER-5)

The Sunriver property is a valuable and critical asset that should have been available to partially satisfy plaintiff's \$ 1 million judgment. The trial court summary judgment and this court's affirmance allow the Rotes to unlawfully and with fraudulent intent transfer the equity outside the reach of creditors. The trial court erred in granting summary judgment where the challenged transactions exhibited many "badges of fraud" as the statutes and caselaw recognize – i.e. transfers to insiders (a spouse and a solely owned LLC) where the debtor retains

control; the debtor had been sued for significant damages and owed a judgment; and there are disputed facts about the debtor's intent as well as what consideration, if any, the debtor received for the transfer.

The trial court erroneously made conclusory findings on disputed issues including "fraud," "intent," and "reasonably equivalent value." Those issues are for the jury, not the trial judge. Remaining fact issues include: Rotes' intent in making the challenged transfers; whether there was an exchange of **any value**, much less, "reasonably equivalent value;" the significance of private, unrecorded, agreements (allegedly executed in **2012**) on transfers occurring in 2017 and 2018; and why Timothy Rote still acted as if he control of, and retained value in, the Sunriver property in 2019 and told a federal court that he did. If the 2012 documents were valid, he would not have retained any value – his inconsistent positions raise fact questions and support plaintiff's claims.

Given this court's strong case law holding that "intent," fraud and "reasonably equivalent value" are all fact questions, the appropriate disposition of this case is a remand for trial. See *Morris v. Vance*; *Doughty v. Birkholtz*, and ORS 95.230.

This court should apply special scrutiny to the challenged transfers from Timothy Rote to his solely owned LLC and the transfers between the spouses and their solely owned LLC. This court applies special scrutiny to transfers between

spouses. *Greeninger v. Cromwell*, 140 Or App 241, 246, n. 3, 915 P2d 479 (1996)(Reversing grant of summary judgment to debtor).

The trial court was misled and erred by adopting the defense that, somehow, two private and unrecorded agreements among defendants allegedly signed in 2012 could somehow shield the 2017-2018 challenged transfers from the taint of fraud. By 2012, plaintiff already had claims against defendants as “claim” is defined in ORS 95.200.

Because “intent” and “value” are inherently factual and are disputed in this matter, summary judgment was not proper. On reconsideration, this court should reverse and remand for factual determinations under the fraudulent transfer statute based on the “suspicious” and “curious” timing of the challenged transfers. (See trial judge comments at Tr. 85-86)

The trial court improperly made conclusory findings:

“there is no genuine issue of material fact that the transfer of ownership of the [Sunriver real property from Rote to Northwest Holding] was made for reasonably equivalent value, in good faith, and not to hinder, delay or defraud any creditor...” (Order, p. 2; ER- 3)

And:

“there is no genuine issue of material fact that the 2018 transfer of the Sunriver property from NWH to Tanya Rote was not a transfer by a debtor

because it is undisputed that NWH has never been a debtor of Zweizig...”

(Order, p. 2; ER -3)

The trial court and this court’s role is not to weigh the evidence but rather to determine whether there are disputed issues of fact: “Neither court, when considering whether a party is entitled to judgment as a matter of law at the summary judgment stage of the case, is permitted to make factual findings or weigh the evidence...” *Wieck v. Hostetter*, 274 Or App at 468.

The 2012 documents to which the trial court referred are private agreements between the defendants and their solely owned corporation. (Exs. 2 and 3; ER-14-24) By 2012, of course, plaintiff already had claims against the defendants so the transfers are vulnerable to challenge. The result of the challenged transfers in 2017-2018 from Timothy Rote to his solely owned LLC and to his spouse resulted in assets valued at more than \$450,000 being pushed out of reach of creditors, notably plaintiff.

There remain several factual disputes, including the significance and timing of the alleged 2012 private agreements on transfers occurring in 2017 and 2018 as well as the inherently factual questions of “reasonably equivalent value” and “intent.”

Here, the factual record illustrates transfers back and forth between spouses and back and forth between the individual defendants and the LLC defendant.

These transfers deserve special scrutiny which did not (and indeed could not) occur on summary judgment. Summary judgment is no place for applying the appropriate scrutiny or resolving the factual disputes regarding intent and value. A factfinder could conclude the challenged transfers were fraudulent and were intended to hinder plaintiff's collection of the substantial judgment.

Apparently, defendant Timothy Rote did not give significance to the 2012 agreements when, in December 2019, Timothy Rote, in a court filing with the Ninth Circuit Court of Appeals he declared that the *lis pendens* "interfered with [his] ability to borrow money for counsel." (ER-25) As between the defendants, the 2012 alleged agreements were apparently meaningless and Timothy Rote retained control of the Sunriver property for his own purposes.

"Value" is always a fact question and a factfinder would thus examine Timothy Rote's equity in the Sunriver property and its value at the time of the 2017 transaction. As noted, the property likely had equity of \$488,000. What value was exchanged? Was it "reasonably equivalent?" Was the 2012 private and unrecorded agreement enforceable 5 years after its alleged creation.

If defendants have defenses, their viability is also decided by triers of fact. ORS 95.240 requires that the transfers be made "in good faith." "Good faith" means "honesty in fact and the observance of reasonable commercial standards of

fair dealing.” *In re Nelson*, 2007 Bankr. LEXIS 3457, @*6 (Bankr. D. Or. 2007)

“Good faith” is also a fact question.

It was error to conclude – as a matter of law – that the transfers were made for “reasonably equivalent value.” “Valuation is a fact-based analysis necessarily taken on a case-by-case basis.” *Tofte and Tofte*, 134 Or App 449, 457, n. 5, 895 P2d 1387 (1995).

“Intent” is also a fact question. *Bivens v. Hancock*, 71 Or App 273, 692 P2d 153 (1984). See *In re Nelson*, 2007 Bankr. LEXIS 3457, at *3-*4 (Bankr. Or. 2007)(“Questions of motive and intent are generally not appropriate for disposition on summary judgment.”)

Tanya Rote’s defense would have to be that she took in good faith for reasonably equivalent value. Those defenses, like plaintiff’s claims, are fact questions not properly resolved on summary judgment.

This court should reverse the summary judgment and remand for trial on issues of fraudulent intent and “reasonably equivalent value.”

Conclusion

This court should reconsider its affirmance of the trial court summary judgment. Pursuant to ORAP 6.25(b) and (e), the case should be remanded for trial on the pivotal fact questions including: “intent,” badges of fraud, and “reasonably equivalent value.”

Plaintiff should be awarded his costs and attorney fees. ORS 95.260(1)(c)(C).

Respectfully submitted this 1st day of March 2022

____s/ Helen C. Tompkins____
Helen C. Tompkins, OSB # 872100
Attorney for Appellant

Certificate of Service

I hereby certify that on this date I served the foregoing APPELLANT’S PETITION FOR RECONSIDERATION on the attorneys of record by notification via the eFiling system:

Brooks M. Foster

bfoster@chenowethlaw.com

and on:

Timothy Charles Rote
24790 SW Big Fir Rd
West Linn, OR 97068

Tanya Rote
24790 SW Big Fir Rd
West Linn, OR 97068

By first class mail, postage prepaid addressed to the address above.

I hereby certify that on this date I filed the foregoing APPELLANT’S PETITION FOR RECONSIDERATION By eFiling, addressed as follows:

State Court Administrator
Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

Dated this 1ST day of March 2022

_____/s/ Helen C. Tompkins_____
Helen C. Tompkins, OSB # 872100
Of Attorneys for Appellant, Max Zweizig

FILED: February 16, 2022

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MAX ZWEIZIG,
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v.

TANYA ROTE; TIMOTHY ROTE; and NORTHWEST HOLDING, LLC, an Oregon
limited liability company,
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TIMOTHY ROTE and TANYA ROTE,
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and

SANDRA WARE, TARYN BASAURI, and JOHN DOES,
Third Party Defendants.

Clackamas County Circuit Court
19CV01547

A175781

Ulanda L. Watkins, Judge.

Submitted on December 03, 2021.

Before Mooney, Presiding Judge, and Shorr, Judge, and DeHoog, Judge pro tempore.

Attorney for Appellant: Helen C. Tompkins.

Attorney for Respondent Timothy Rote: Timothy C. Rote *pro se*.

Attorney for Respondents Northwest Holding, LLC, and Tanya Rote: Brooks M. Foster.

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

- No costs allowed.
 Costs allowed, payable by Appellant.
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MAX ZWEIZIG,

No. 3:15-cv-02401-HZ

Plaintiff,

AMENDED JUDGMENT

v.

NORTHWEST DIRECT TELESERVICES,
INC.; NORTHWEST DIRECT MARKETING
OF OREGON, INC.; TIMOTHY ROTE;
NORTHWEST DIRECT MARKETING
(DELAWARE), INC.; NORTHWEST DIRECT
OF IOWA, INC.; ROTE ENTERPRISES, LLC;
and NORTHWEST DIRECT MARKETING, INC.;

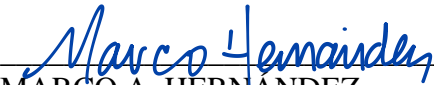
Defendants.

HERNÁNDEZ, District Judge:

Based on the Jury's January 17, 2018 Verdict [184] and the Ninth Circuit's August 2, 2021 Memorandum [357] and September 8, 2021 Mandate [360], IT IS ORDERED AND ADJUDGED that Judgment is entered for Plaintiff and against Defendants Timothy C. Rote, Northwest Direct Teleservices, Inc., Northwest Direct Marketing of Oregon, Inc., Northwest Direct Marketing, Inc., Northwest Direct of Iowa, Inc., Rote Enterprises, LLC, and Northwest Direct Marketing, Inc.

(Delaware) jointly and severally in the amount of one million dollars (\$1,000,000.00) with interest accruing on Plaintiff's claims against Defendants under Oregon Revised Statutes Chapter 659A at the rate of 2.70% per annum from the date judgment is entered.

DATED: September 20, 2021.



MARCO A. HERNÁNDEZ
United States District Judge