

ORLANDO RESIDENCE, LTD.,)
)
Plaintiff/Appellee,)
)
VS.)
)
NASHVILLE LODGING COMPANY,)
NASHVILLE RESIDENCE CORP.,)
and KENNETH E. NELSON,)
)
Defendants/Appellants,)
)
METRIC PARTNERS GROWTH)
SUITE INVESTORS, L.P.,)
)
Defendant/Cross Plaintiff/Appellee.)

Davidson Chancery
No. 92-3086-III

Appeal No.
01-A-01-9606-CH-00256

<p>FILED</p> <p>December 18, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

HONORABLE ROBERT S. BRANDT, CHANCELLOR

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REVERSED, VACATED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
SAMUEL L. LEWIS, JUDGE
WILLIAM C. KOCH, JR., JUDGE

ORLANDO RESIDENCE, LTD.,)	
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OPINION

The captioned appellants have appealed from the judgment of the Trial Court invalidating a real estate conveyance as fraudulent, awarding plaintiff compensatory and punitive damages, and awarding the captioned cross claimant indemnity from appellants.

The origins of the controversy begin in 1981, when Samuel A. Hardige hired Kenneth Nelson to head a corporation owned by Hardige. Soon afterward, Nelson was terminated; and considerable litigation ensued between Nelson and various enterprises of Hardige. As a part of the settlement of that litigation certain properties were vested in a corporation designated in the record as Nashville Residence Corporation, or NRC 83 of which Nelson was principal stock holder. Included in the properties vested in NRC 83 was land at 2300 Elm Hill Pike occupied by a hotel known as the Nashville Residence Inn. Also as part of the settlement, certain property was vested in Orlando Residence, Ltd., (ORL) which was a limited partnership of which Hardige was the general partner. Also, as part of the settlement, NRC 83 and two sureties executed a note payable to ORL in the amount of \$250,000, due on October 31, 1986. On December 16, 1986, ORL sued NRC 83 in Federal Court for non-payment of the note.

Six days later, on December 22, 1986, NRC 83 executed and, on December 29, 1986, delivered a quitclaim deed to Nashville Lodging Company (NLC) conveying the interest of NRC 83 in property known as Nashville Residence Inn. NLC was a limited partnership of which the general partner was a corporation also named Nashville Residence Corporation and identified in the record as "NRC 86" to distinguish it from NRC 83. Nelson and the sureties on the \$250,000 note were limited partners.

On April 24, 1989, NLC conveyed the Nashville Residence Inn property to Metric Partners Growth Suite Investors, LP. (hereafter "Metric").

On March 21, 1990, judgment was entered in Federal Court in favor of ORL and against NRC 83 and the two sureties for the \$250,000 principal and interest due on the above mentioned note.

The Present Suit:

On October 16, 1992, ORL filed the present suit against NLC, NRC 86, Nelson and Metric alleging that the December 26, 1986 quitclaim deed from NRC 83 to NLC was a fraudulent transfer undertaken to avoid payment of indebtedness due ORL 83, praying for invalidation of the deed and "such other relief as may be just and reasonable."

The ensuing litigation is a labyrinth of procedures the record of which fills three large storage boxes. The technical record consists of 14 volumes of 1,778 pages and the evidentiary record consists of 16 volumes of 1,485 pages plus countless exhibits.

The highlights of the procedure are:

October 16, 1992 - Complaint.

November 24, 1992 - Answers of NLC and NRC 86.

December 11, 1992, answer and crossclaim of Metric seeking exoneration from NRC 86 and NLC.

January 7, 1993, answer of Nelson.

December 7, 1993, order requiring completion of discovery by June 15, 1994, motions for summary judgment by June 30, 1994, and trial on August 22, 1994.

April 7, 1993, answer of NRC 86 and NLC to cross claim.

May 18, 1994, motion of plaintiff for partial summary judgment that the December 26, 1986, deed was fraudulent and void.

May 24, 1994, Motion of NLC, NRC 86 and Nelson for summary judgment.

August 9, 1994, Motion of NLC, NRC 86 and Nelson for summary judgment overruled; judgment against NLC, and NRC 86 for \$501,934.53 compensatory damages.

August 21, 1995, trial before a jury on issue of whether NLC, NRC 86 and Nelson intended to defraud, jury verdict yes, and punitive damages awarded.

August 24, 1995, jury verdict for \$850,000 punitive damages.

September 5, 1995, judgment for \$501,934 compensatory and \$850,000 punitive damages.

October 1, 1995, order approving punitive damages.

The appellants present seven issues for review. The first issue questions the jurisdiction of the Trial Court over the subject matter. Subject matter jurisdiction relates to the power of the Court to act upon the subject matter of the litigation.

No question is made as to the jurisdiction of the Trial Court to entertain and decide a suit of this character. Appellants' challenge is to the standing of the plaintiff to prosecute this particular suit. Standing is not a matter of subject matter jurisdiction, but of the eligibility of a party to seek the relief requested. Standing is a judge-made doctrine used to refuse to determine the merits of a controversy regardless of its merits where the prosecuting party is not properly situated to prosecute the action. *Knierim v. Leatherwood*, Tenn. 1976, 542 S.W.2d 806, 808; *Curve Elementary School Parent and Teacher's Organization v. Lauderdale County School Board*, Tenn. App. 1980, 608 S.W.2d 855. The question of standing is whether the plaintiff has such a personal stake in the outcome of the case as to warrant its invocation of the court's jurisdiction and to justify the exercise of the Court's powers on its behalf. *Metropolitan Air Research Testing Authority Inc. v. Metropolitan Government of Nashville and Davidson County*, Tenn. App. 1992, 842 S.W.2d 611, 615.

Appellants assert collateral estoppel by a judgment entered by another trial court on September 11, 1995 after entry of judgment in the present case on September 5, 1995. The doctrine of collateral estoppel precludes further litigation of particular facts on which jury or court necessarily made findings in a former action. *Shelley v. Gipson*, Tenn. 1966, 400 S.W.2d 709, 714. A prior judgment is not shown in the present case.

During oral argument counsel stated that the gravamen of appellant's jurisdiction/standing issue is that there are two entities named Orlando Residence, Ltd., (ORL), in one of which Hardige is the general partner owning 98%, and in the other of which he is the sole owner. In this situation, the doctrine of "de minimis lex non carat" (the law is not concerned with trifles) applies. Whether Mr. Hardige is 98% or 100% owner of the plaintiff, as general

partner or as owner, he is entitled to prosecute this suit on behalf of the plaintiff which should be more specifically identified by amendment. T.R.C.P. Rule 17.01.

No merit is found in appellants' first issue.

Appellants' second issue is:

Did the Trial Court err in denying Defendants' motion for summary judgment?

The record indicates that, after the adverse ruling upon appellants' motion for summary judgment, there was an evidentiary hearing disposing of the merits of the issues presented to defendants' second issue thereby rendering unnecessary any consideration of plaintiff's second issue. *Hobson v. First State Bank*, Tenn. App. 1989, 777 S.W.2d 24. *Mullins v. Precision Rubber Products*, Tenn. App. 1984, 671 S.W.2d 496, 498. *Tate v. County of Monroe*, Tenn. App. 1973, 578 S.W.2d 642, 644.

Appellants' fifth issue is:

Did the Trial Court err in denying the Defendants' Motion for Summary Judgment based on the statute of limitation?

Appellants insist that an action to set aside a fraudulent conveyance and for damages incident thereto is "an action for injury to personal property" for which T.C.A. § 28-3-105 provides a statutory limitation of three years.

T.C.A. § 28-2-103 provides a seven year limitation upon actions for the recovery of real estate.

T.C.A. § 28-3-110 provides a ten year limitation upon all cases not otherwise provided for.

In the present case, the allegedly fraudulent conveyance was delivered on December 29, 1986. This suit was filed on October 16, 1992, more than three years later, but not as much as seven years later.

In *Ramsey v. Quillen*, 73 Tenn. (5 Lea) 184 (1880), the Court held that the seven year statute barred a suit to recover from the innocent grantee of a fraudulent conveyance.

In *Akers v. Gillentine*, 33 Tenn. App. 212, 231 S.W.2d 372 (1950), suit was filed in 1947 to set aside a fraudulent deed executed in 1939. This Court held that the action was barred by the seven years statute.

In *Boro v. Hidell*, 122 Tenn. 80, 120 S.W. 961 (1909), suit was filed against the vendor 18 years after the execution of an allegedly fraudulent deed. The Supreme Court held that recovery of the property from the vendee was barred by seven years possession under an assurance of title.

In *Howell v. Thompson*, 95 Tenn. 396, 32 S.W. 309 (1895), the Court held that a suit by a creditor to set aside a transfer of bank stock was governed by the three year statute on recovery of personal property. The present suit is, in part, for the recovery of real estate.

On the other hand, plaintiff seeks damages both compensatory and punitive, in addition to recovery of real property. The applicable statute of limitations in a particular case will be determined according to the gravamen of the complaint, *Vance v. Schulder*, Tenn. 1977, 547 S.W.2d 927, 931. In the cited case the three year limitation on actions for damages to property, real and personal, was held applicable to an action for fraudulent inducement to sell capital stock at less than its true value. The Court said:

We reject the notion that injury to property as contemplated therein is limited to physical injury to property. In our opinion, the loss in value sustained by plaintiff from the alleged tort of fraud and deceit is included within the phrase, “injuries to

personal property” as contemplated in T.C.A. § 28-305.

While plaintiff’s action against Metric Partners to set aside the allegedly fraudulent conveyance was controlled by the seven year statute, the right of plaintiff to recover damages from appellants and the prayer for such other and further relief as may be just and reasonable, is subject to the three years limitation of § 28-3-105.

Nevertheless, plaintiff insists that, because the quitclaim deed was not recorded, plaintiff had no notice, either actual or constructive, of the fraud until December 22, 1991, when the first evidence of the subject conveyance was made a public record. If this is true, the three year statute did not begin to run until December 22, 1991, or such other date as plaintiff had actual or constructive notice of the conveyance. The date of such notice is not shown by uncontradicted evidence. Therefore, the running of the statute upon plaintiff’s action for damages depends upon an issue of fact which must be determined by the jury. *Hill v. A.O. Smith Corp.*, 6th Cir. 1986, 801 F.2d 217, 225.

It was not error for the Trial Court to overrule appellants’ motion for summary judgment based upon limitation of actions.

Appellants’ third issue is:

Did the Trial Court err by granting partial summary judgment in favor of ORL and setting aside the December 1986 deed as a fraudulent conveyance?

On May 18, 1994, plaintiff moved for summary judgment that the conveyance delivered on December 29, 1986 was null and void; supported by a certified copy of a federal court judgment, the deposition of Kenneth E. Nelson, answers of defendants to interrogatories and certain other documents.

In response, appellants offered evidence that the equity conveyed by the subject quitclaim deed was worthless because the property was worth substantially less than the mortgage. Appellants attack this evidence as irrelevant because it does not accurately determine the value of the realty at the time of the alleged fraudulent conveyances, and offer evidence of subsequent transactions indicating that the equity conveyed by the quitclaim deed did have some value. The evidence is disputed as to the value of the property conveyed.

Plaintiff relies upon T.C.A. § 66-3-305 which provides:

Conveyances by insolvent without fair consideration declared fraudulent. -- Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.

In order to make a conveyance fraudulent against creditors, it must be without a fair consideration, leaving the grantor insolvent; or it must be made with actual intent to hinder, delay, or defraud creditors. *Hicks v. Whiting*, 149 Tenn. 411, 258 S.W. 784, 794 (1924); *Ottarson v. Dobson & Johnson, Inc.*, 58 Tenn. App. 408, 430 S.W.2d 873, 877 (1968); *Macon Bank & Trust Co., v. Holland*, Tenn. App. 715 S.W. 2d 347, 349 (1986).

Every conveyance without a fair consideration is fraudulent if the conveyor is thereby rendered insolvent, or if he is engaged or about to engage in a business or transaction for which his remaining property is an unreasonably small capital, or if he intends or believes that he will incur debts beyond his ability to pay; the second situation making the conveyance fraudulent as to creditors and as to persons who become creditors during the continuance of such business transaction, and the third as to both present and future creditors. *State ex rel. v. Nashville Trust Co.*, 28 Tenn. App. 388, 190 S.W.2d 785, 796 (1944).

A conveyance which renders the grantor execution-proof is fraudulent, irrespective of grantor's intent, and may be set aside where there was no consideration for the conveyance, and grantee knew of the fraud at the time of the conveyance. *Citizens Bank & Trust Co., v. White*, 12 Tenn. App. 583 (1930).

There is evidence that the conveyance was without consideration, that at the time of the conveyance the conveyor was insolvent or that the conveyance rendered the conveyor insolvent. However, there is a factual dispute in the evidence on these issues which precludes a summary judgment that the conveyance was fraudulent and void. See *Byrd v. Hall*, Tenn. 1993, 847 S.W.2d 208; see *Braswell v. Carothers*, Tenn. App. 1993, 863 S.W.2d 722, 729.

Plaintiff insists that, because the issue of the fraudulent character of the conveyance was subsequently adjudicated by the jury, the issue of the correctness of the summary judgment is moot. As explained hereafter, the non-jury determination of fraud by the Trial Judge resulted in error in the jury charge which establishes the relevancy of appellants' third issue.

The factual issue of fraud should have been presented to the jury by a proper charge. The Trial Judge erred in rendering summary judgment that the conveyance was fraudulent and void.

Appellants' fourth issue is:

Did the Trial Court err in awarding punitive damages?

Appellants argue that punitive damages are not allowable in a fraudulent conveyance case.

T.C.A. § 66-3-101 provides:

Conveyances in fraud of creditors or purchasers void.

Every gift, grant, conveyance of lands, tenements, hereditaments, goods, or chattels, or of any rent, common or profit out of the same, by writing or otherwise; and

every bond, suit, judgment, or execution, had or made and contrived, of malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures; or to defraud or to deceive those who shall purchase the same lands, tenements, or hereditaments, or any rent, profit, or commodity out of them, shall be deemed and taken, only as against the person, such person's heirs, successors, executors, administrators, and assigns, whose debts, suits, demands, estates, or interest, by such guileful and covinous practices as aforementioned, shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use, of any other matter or thing, to the contrary notwithstanding.

T.C.A. § 66-3-301 et seq. is the Uniform Law of Fraudulent Conveyances. § 66-3-305 provides:

Conveyances by insolvent without fair consideration declared fraudulent. -- Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration.

§ 66-3-308 provides:

Conveyances with intent to defraud. - Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud, either present or future creditors, is fraudulent as to both present and future creditors.

§ 66-3-310 provides:

Remedies of creditor on matured debt. - Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when the claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser;

(1) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy the creditor's claim; or

(2) Disregard the conveyance and attach or levy execution upon the property conveyed.

Appellants insist that § 66-3-310 is the exclusive remedy for fraudulent conveyance and thereby excludes the recovery of damages. This Court does not agree. § 66-3-310 allows procedure against the property by the holder of a matured debt. § 66-3-312 provides for other remedies for a creditor of an unmatured debt. Neither statute excludes compensatory or punitive damages where the facts justify.

T.C.A. § 66-3-313 reads as follows:

Application of general law. - In any case not provided for in this part, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause shall govern.

This section evidences the legislative intent that no existing remedy be excluded by the remedy provided in the uniform law.

Punitive damages are allowable in cases involving fraud. *First National Bank of Louisville v. Brooks Farms*, Tenn. 1991, 821 S.W.2d 925. *Dodson v. Anderson*, Tenn. 1986, 710 S.W.2d 510, 513. *Hutchison v. Pyburn*, Tenn. App. 1977, 567 S.W.2d 762; *Gill v. Godwin*, 59 Tenn. App. 582, 442 S.W.2d 661 (1967).

Punitive damages may be awarded where rescission is granted for fraud. *Seaton v. Lawson Chevrolet - Mazda Inc.*, Tenn. 1991, 821 S.W.2d 137, 138.

Appellants insist that their conduct was not shown to be truly reprehensible conduct as required by *Hodges v. S. C. Toof & Co.*, Tenn. 1992, 833 S.W.2d 896, 901. The extensive evidence of the convoluted, serpentine series of transactions carried out by appellant need not be reviewed at this time. On remand the same or similar matters will be resubmitted to another jury which will evaluate the evidence heard at that time and render its verdict thereon.

For the same reason, it is unnecessary at this time to review the amount of punitive damages allowed.

Appellants' final issue complains of the action of the Trial Court in requiring a substantial bond for stay pending this appeal. No breach of discretion is found in respect to the amount of bond required. Appellants argue that the Trial Court failed to state reasons for the amount of bond required. This Court does not interpret T.R.C.P. Rule 62.05 to require a statement of reasons for amount of bond, but only for complete denial of stay on any condition.

In submitting the case to the jury, the Trial Judge stated to the jury that a fraudulent transfer and compensatory damages had already been found. The findings were erroneous, and it was consequently error to report such findings to the jury. It was also error for the Trial Court to express opinions as to the facts in the hearing of the jury. For these reasons, the verdict of the jury must be vacated and the cause remanded for retrial.

The judgment in favor of Metric upon its derivative action for exoneration must also be vacated to await the result of the new trial.

The partial summary judgment and final judgment in favor of plaintiff and the final judgment in favor of the cross plaintiff are reversed and vacated. The cause is remanded to the Trial Court for retrial on all issues. Costs of this appeal are taxed against the plaintiff-appellee.

REVERSED, VACATED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE