

RENDERED: DECEMBER 16, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-001915-MR

RANDALL S. WALDMAN

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 11-CI-00079

PNC BANK, NATIONAL ASSOCIATION

APPELLEE

AND

NO. 2014-CA-001916-MR

LAUREN WALDMAN F/K/A LAUREN
SYKES AND LSW LTD, LLC, AND LSW, LTD., LLC

APPELLANTS

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 11-CI-00079

PNC BANK, NATIONAL ASSOCIATION

APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This matter involves the appeals of co-defendants, Randall S. Waldman and Lauren Waldman, who are father and daughter. They appeal separately the Grayson Circuit Court grant of summary judgment in favor of PNC Bank, National Association (hereinafter “PNC”), successor to National City Bank (hereinafter “NCB”).

The Appellants contest the trial court’s decision that the transfer of real property by Randall Waldman, the Trustee, from the Randall S. Waldman Trust to RSW LTD III, LLC, and the subsequent transfer from RSW LTD III, LLC to LSW, LTD, LLC, of which Lauren Waldman was the sole Trustee, may be set aside. Pertinent to this litigation is a prior case in Bullitt Circuit Court wherein NCB was awarded a judgment against Randall, Integrity Manufacturing, and Integrity Tools, based on a promissory note and guaranty. Because the transfer was set aside, this real property may be used to satisfy the Bullitt Circuit Court judgment against Randall and Lauren.

Lauren contests the setting aside of the June 18, 2008 transfer of the disputed real property and awarding it to PNC under Kentucky Revised Statutes (KRS) 378.020, arguing both that the statute is unconstitutional and also that PNC is not the original bank, and hence, has no claim to the note. Randall disputes the

trial court's denial of his counterclaims. His claims against PNC are breach of fiduciary duty, fraud, tortious interference with a prospective business advantage, and slander of title. The trial court held that because of the previous Bullitt Circuit Court judgment, these counterclaims are *res judicata*.

After careful consideration, we affirm the summary judgment.

BACKGROUND

PNC filed its Complaint on March 2, 2011, under KRS 378.010, 378.020, and 378.030, seeking to set aside the conveyance of real property located at 309 Clarks Lane, Clarkson, Kentucky, in Grayson County (hereinafter the "Lake Property"). PNC brought the action in an attempt to satisfy its 2009 Bullitt Circuit Court judgment against Randall, which at the time of the filing of the Complaint, amounted to \$1,161,402.99, plus interest accruing in the amount of 12% per annum.

PNC alleged that Randall transferred the Lake Property to Lauren in violation of KRS 378.020. It claims that evidence shows that the property was transferred without valuable consideration, and further, at the time of the initial transfer, that is, between the Randall S. Waldman Trust and RSW LTD III, LLC, Randall was already indebted to PNC. Hence, under KRS 378.020, the transfer was void as to PNC's indebtedness.

Additionally, PNC sought the appointment of a receiver for the sale of the Lake Property so that the proceeds from the sale of the property would be applied to satisfy a portion of PNC's judgment. The Waldmans denied the specific

allegations of the Complaint and responded that PNC knew about the acquisition and transfer of the Lake Property.

The pertinent facts are many and convoluted. On May 16, 2007, Randall became indebted to NCB, which as previously noted, merged into PNC. This indebtedness has not been satisfied. The basis of the debt was Randall's execution of a commercial guaranty on a \$1.5 million promissory note issued by NCB for a line of credit to Randall's former companies, Integrity Manufacturing, LLC, a steel fabrication business, and Integrity Tool & Die, LLC, which were located in Bullitt County, Kentucky. These companies are closely-held, limited-liability companies organized under the laws of the Commonwealth of Kentucky. Randall was an 82% owner of the businesses and CEO of both enterprises.

The aforementioned judgment¹ was entered by the Bullitt Circuit Court, on May 19, 2009, in the amount of \$1,417,783.22, plus interest, which began accruing in November 2010, at the rate of 12% per annum, and continues until the debt is paid. It is uncontested that the NCB lien has not been satisfied after the Bullitt County judgment. Further, NCB's loan was an inferior lienholder because of another bank, Eclipse Bank, prior cross-collateralization agreement.

Around that same time that Randall procured the loan from NCB, on May 30, 2007, he purchased the Lake Property for \$327,000.00. Under the 2007 deed, the Lake Property became an asset of the Randall S. Waldman Revocable Trust, formed under his Revocable Trust Agreement, dated April 12, 2002

¹ No. 08-CI-01658.

(hereinafter the “Trust”). Moreover, under the terms of the Trust, all Trust assets were subject to the personal debts of Randall.

However, on June 18, 2008, Randall, as trustee of his revocable trust, conveyed, as a gift, the Lake Property to RSW LTD III, LLC, which is a Kentucky limited liability company whose sole member and manager was Randall. The only consideration stated in the deed was \$1.00. The effect of the transfer was to make the Lake Property no longer subject to Randall’s personal debts and to remove it from his estate. Nonetheless, PNC argues that because the conveyance was made without consideration, the conveyance is void as to Randall’s prior and continuous indebtedness to PNC.

The next significant event occurred on June 30, 2008 when Randall and Lauren executed the First Amendment to Operating Agreement of the articles of organization of RSW LTD III, LLC, changing the company’s name to LSW LTD, LLC, and naming Lauren as sole member and manager. This action transferred Waldman’s 100% interest in RSW LTD III, LLC to his daughter. Lauren executed an amendment to RSW LTD III, LLC’s articles, and changed the name of the limited liability company to LSW LTD, LLC. In essence, Randall gave a gift to Lauren. Inexplicably, Lauren did not file the amendment until February 18, 2009.

The trial court entered an interlocutory order in favor of PNC on June 17, 2014. This order was incorporated into a final judgment of the trial court on November 4, 2014. The trial court’s judgment set aside the general warranty deed

between Randall, trustee of the Randall S. Waldman Revocable Trust, and RSW LTD, III, a limited liability company, whose sole member is Randall, and declared the transfer null and void as to the Bullitt Circuit Court judgment, dated May 19, 2009, because of the indebtedness owed to PNC. Moreover, the trial court held that all claims of right, title, or interest of RSW LTD III and its successor, LSW LTD, LLC to the Lake Property are declared void and of no force or effect.

Thus, the trial court adjudged a lien against the Lake Property to secure payment of a portion of the 2009 Bullitt Circuit Court judgment. It further held that \$1,849,860.76, with interest accruing at the rate of 12% per annum from June 19, 2014, is due and owing to PNC. The trial court directed the Master Commissioner to conduct a sale of the Lake Property. Finally, the motion to hold KRS 378.020 unconstitutional was denied.

Randall and Lauren now separately appeal from this judgment.

Additional facts will be provided as needed.

ISSUES

On appeal, Randall maintains that the counterclaims he asserted against PNC are not *res judicata* despite the Bullitt Circuit Court's previous judgment and suggests that the trial court erred as a matter of law in determining that no genuine issues of material fact existed, and consequently, it should not have granted summary judgment. Additionally, Lauren contends that KRS 378.020 is unconstitutional; that PNC was not a creditor under KRS 378.020 at the time of the loan; and, that the trial court erred by granting the summary judgment.

PNC counters these arguments by contending that the doctrine of *res judicata* bars Randall's counterclaims; that Lauren's constitutional challenge of KRS 378.020 is meritless; that PNC was an existing creditor; that the trial court's grant of summary judgment was proper because Lauren's equitable defenses fail as a matter of law; and therefore, the trial court appropriately held that no genuine issues of law or fact existed.

STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rules of Civil Procedure (CR) 56.03. Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in her favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment is "proper where the movant shows that the adverse party could not prevail under any circumstances." *Id.* (citing *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985)).

On appeal, we must consider whether the trial court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779 (Ky. App. 1996). Because summary judgment involves only questions of law and

not the resolution of disputed material facts, an appellate court does not defer to the trial court's decision. *Goldsmith v. Allied Building Components, Inc.*, 833 S.W.2d 378 (Ky. 1992). Likewise, we review the trial court's interpretations of law *de novo*. *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

ANALYSIS

Counterclaims are res judicata

We begin our analysis with the Randall's contention that his counterclaims against PNC are not barred by *res judicata* notwithstanding the judgment obtained by NCB. Randall maintains that he was not required to bring these counterclaims in the Bullitt Circuit Court action, and thus, the trial court in the Grayson Circuit Court action improperly denied him the right to prosecute the counterclaims. In essence, the question is whether his counterclaims were compulsory counterclaims in the Bullitt Circuit Court action and whether they were preserved for review.

In the present action, Randall's first amended answer and counterclaims propose four causes of actions – fraud, breach of fiduciary duty, tortious interference with a prospective business advantage, and slander of title. Because ultimately we hold that these issues are not implicated in this action, we will not go into great detail as to the factual basis for these claims. Primarily, his claims are based on allegations that because of the estate planning provided by

NCB, it had knowledge of the Lake Property and Randall's intention to transfer it to the limited liability company.

A short rendition of the facts underlying these particular allegations indicates that he purchased the Lake Property, after the execution of both the promissory note and commercial guaranty with NCB. Further, at that time, he acknowledged that the Lake Property was subject to his personal debts. Then, a series of estate planning meetings with his private attorney and NCB personnel took place between June 26, 2007 and March 2008. The discussion involved the creation of a Delaware Trust to place a variety of Randall's assets including the Lake Property; however, Randall never followed through on the creation of the Delaware Trust.

In late March 2008, it was clear that Integrity was in dire financial straits, and Randall was on notice that the note, which he had personally guaranteed, was due and owing on May 31, 2008. He was unable to pay the loan and was in default. Nevertheless, on June 18, 2008, Randall transferred the Lake Property from the Trust to RSW LTD III, LLC, as a gift. The only consideration was \$1.00. On June 30, 2008, Randall had Lauren amend the articles of organization for RSW LTD III, LLC, changing the company's name (LSW LTD, LLC) and naming Lauren as the sole manager and member. The record clearly demonstrates Randall did so without any advice from NCB. Thus, as early as June 30, 2008, Randall knew he could not transfer the Lake Property into any Delaware Trust since he had gifted it to his daughter.

Having described the underlying basis of Randall's counterclaims, we now address his contention that an adjudication on the merits never took place in Bullitt Circuit Court and that it was a default judgment. Contrary to his argument, Randall and counsel did appear in Bullitt Circuit Court. Furthermore, the judgment itself states ". . . The Court having found and concluded that there are no genuine issues of material fact that NCB is entitled to judgment as a matter of law." Accordingly, the judgment was not a default judgment.

Randall relies primarily on *Coomer v. CSX Transportation, Inc.*, 319 S.W.3d 366 (Ky. 2010), to support his contention that his defenses and counterclaims are not barred by *res judicata*. The doctrine of *res judicata* "stands for the principle that once the rights of the parties have been finally determined, litigation should end." *Id.* at 371. Further, "it is an affirmative defense which operates to bar repetitious suits involving the same cause of action." *Id.* The Supreme Court explained that for *res judicata* to bar claims, "three elements must be present: (1) identity of the parties, (2) identity of the causes of action, and (3) resolution on the merits." *Id.*

The first element, identity of parties, is contested by both Randall and Lauren. They argue that because NCB entered into the original loan with Randall, PNC is a different party. This reasoning is incorrect. Because NCB and PNC (two national banks) legally merged, under the National Bank and Consolidation Act, a federal law, each original bank continues to exist in the resulting bank. 12 U.S.C.A. 215(e). Thus, the same bank that filed the action in Bullitt Circuit Court

in December 2008 is the same bank that filed the action in Grayson Circuit Court in March 2011.

The second element, identity of causes of action, “[t]he key inquiry in deciding whether the lawsuits concern the same controversy is whether they both arise from the same transactional nucleus of facts.” *Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998). In terms of the timing of the actions, only “slander of title” could have arisen after PNC filed the action in Bullitt Circuit Court on December 11, 2008, and the other three counterclaims would have occurred well before December 11, 2008. Hence, the facts and issues pertinent to counterclaims one through three are based on incidents that occurred well before the filing of the Bullitt Circuit Court actions. We believe that these loan-related transactions are part of the primary nucleus of facts, and thus, there is identity of causes of action between the first and second litigation.

Closely related to the second prong, identity of causes of action, is the rule against splitting causes of action. The Court described the rule as follows:

The rule, “found in *Restatement (Second) of Judgments*, §§ 24 and 26, is an equitable rule, limiting all causes of action arising out of a single ‘transaction’ to a single procedure.” It rests upon the concept that “parties are required to bring forward their whole case” and may not try it piecemeal. Therefore, it “applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

Coomer, 319 S.W.3d at 371 (citations omitted).

The Court then noted that the rule against splitting causes of action does not apply to claims that have not yet accrued. *Id.* at 372 (citations omitted). In *Coomer*, which is distinguishable from our facts, two separate injuries were involved. And one injury's cause of action had not accrued at the time the first suit, concerning the other injury, was filed. With the facts in *Coomer*, the Court stated that "if Coomer's cause of action for his neck, back, shoulder, and knee injuries accrued after the date he filed the Jefferson Circuit complaint, then he would not be barred by res judicata from bringing his later Perry Circuit suit for those injuries." *Id.* at 374. This conclusion is based on facts quite different from our matter. Here, the first three causes of action - fraud, breach of fiduciary duty, tortious interference with a prospective business advantage - had all accrued well before the December 11, 2008 filing date in Bullitt Circuit Court.

As stated in CR 13.01, "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Consequently, since these three causes would have occurred prior to the filing of the action in Bullitt Circuit Court, Randall must have brought them in the Bullitt Circuit Court action, and if not, he is barred from litigating them now.

Since these counterclaims were compulsory and he did not bring them, they have already been litigated and are barred by *res judicata* in the case at

bar. Kentucky case law is clear that compulsory counterclaims must be filed in an earlier litigation or they will be barred in subsequent litigation under *res judicata* *Egbert v. Curtis*, 695 S.W.2d 123, 124 (Ky. App. 1985).

In sum, the claim preclusion elements of *res judicata* are identity of parties, identity of causes of action, and resolution on the merits. In both the Bullitt and Grayson actions, the parties were the same, the causes of actions existed in both, and the matter was resolved by the Bullitt Circuit judgment.

Regarding the fourth counterclaim – slander of title, Randall’s complaint is based on an error found in the original *lis pendens*, which described the nature of the lien that PNC Bank was attempting to enforce in this action. The original *lis pendens* referred to “mortgage lien” that PNC was seeking to enforce on the Lake Property. The notice of action concerning the *lis pendens* was amended on February 18, 2014:

The undersigned hereby amends its Lis Pendens recorded March 2, 2011, in Encumbrance Book HH, Page 133, because it inadvertently refers to a mortgage lien rather than to Plaintiff’s judgment lien, and otherwise gives the same notice.

Therefore, the correction was from a “mortgage” lien to a “judgment” lien. And although not exactly a clerical error, it is merely a misstatement with the same monetary amount and similar encumbrance on the property.

On March 5, 2014, Randall proffered a “motion for leave to file first amended answer and counterclaims.” Therefore, the *lis pendens* was amended fifteen days before Randall filed the motion to amend his answer and counterclaim.

As previously mentioned, this counterclaim is the only one in the amended answer and counterclaims that arose after the conclusion of the Bullitt Circuit Court action. Nonetheless, Randall never articulated or provided evidence for slander of title before the trial court and did not mention it again until the filing of his appellate brief. Hence, he provided no evidence of material fact nor did he preserve it for appellate review on appeal.

To establish slander of title one must plead and prove that the defendant has knowingly and maliciously communicated, orally or in writing, a false statement which has the effect of disparaging the plaintiff's title to property and also plead and prove that he has incurred special damage as a result. *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765, 766 (Ky. App. 1980)(citations omitted). As noted, Randall provided no evidence that PNC knowingly and maliciously communicated, orally or in writing, a false statement which has the effect of disparaging the plaintiff's title to property or proved that he incurred special damage as a result of the error. So, Randall did not prove the elements of slander of title, any damages resulting from the alleged slander of title, or preserve the issue for our review.

Randall makes several other arguments to dispel the impact of *res judicata* including that the two banks shared confidential information and a speculative allegation regarding an advantage to PNC through the use of TARP funds. No evidence was provided to support these contentions, and the reasoning is specious. We are not persuaded by the charges.

We concur with the trial court that the first three counterclaims are *res judicata* since they should have been presented to the Bullitt Circuit Court. And the fourth counterclaim has no evidence supporting it nor was it preserved for our review. The trial court properly granted summary judgment on these issues.

Constitutionality of KRS 378.020

Although KRS 378.020 was repealed during the 2016 Legislative Session, the new statutory provisions were not effective until January 1, 2016, and hence, KRS 378.020 was in effect when this transfer occurred. Under the dictates of KRS 378.020, the transfer of the Lake Property from the Trust to RSW LTD III, LLC was a fraudulent conveyance. KRS 378.020 states:

Every gift, conveyance, assignment, transfer or charge made by a debtor, of or upon any of his estate without valuable consideration therefor, shall be void as to all his then existing creditors, but shall not, on that account alone, be void as to creditors whose claims are thereafter contracted, nor as to purchasers from the debtor with notice of the voluntary alienation or charge.

Hence, under applicable Kentucky law, a transfer of property to another without consideration is fraudulent if there are existing creditors.

No genuine issue of material fact exists that dispute the transfer of the Lake Property from the Trust to RSW LTD, LLC, was fraudulent as to PNC since the Deed shows that the Lake Property was transferred to RSW LTD, LLC on June 18, 2008, after Randall was indebted to PNC (as well as Eclipse Bank) under his Guaranty Agreement, dated May 16, 2007. Further, the conveyance itself included consideration of \$1.00.

Lauren challenges the constitutionality of the statute. Before addressing her contention, we observe that when an appellate court considers a constitutional challenge to a statute, there is a strong presumption in favor of constitutionality. *Fischer v. State Board of Elections*, 879 S.W.2d 475 (Ky. 1994).

A long history of the statute is provided by Lauren. And although other courts, including the federal courts, adopted different provisions for conveyances without consideration, this factor alone does not establish that the provision is unconstitutional. Lauren argues that the statute is unconstitutional based on broad statements about the United States Constitution's 5th Amendment's due process clause and its incorporation into the 14th U.S. Constitutional amendments, and invokes the floor of the minimum due process clause in the Kentucky Constitution. But Lauren never provides any case law, federal or state, that impugns the constitutionality of the statute.

The one cited case, *Lloyd v. Fulton*, 91 U.S. 479 (1875), although decided by the U.S. Supreme Court, was, in fact, considering a state law in Georgia, and as noted in the decision, because the Supreme Court was mandated to apply the property law of that state, it applied Georgia law.

Further, as admitted by Lauren, KRS 378.020 had never been challenged in Kentucky as unconstitutional. Moreover, we are not persuaded by her argument that the statute permits an allegation of fraud without proving it. As noted by Lauren, the statute requires proof of prior indebtedness before a party transfers it without valuable consideration. The rationale behind the statute is

explained well in *Oldham's Adm'x v. Oldham's Adm'x*, 141 Ky. 526, 133 S.W. 232, 233 (1911):

If a husband voluntarily conveys his wife property while he is indebted, as to antecedent creditors it is presumptively fraudulent. The fact that antecedent debts are left unpaid is some evidence that not enough was left to pay them; and the relation of the parties is some evidence from which a purpose to hinder and delay creditors may be inferred, especially when such is the result. A voluntary conveyance is declared void as to pre-existing debts by the statute.

Addressing Lauren's argument that the statute punishes the grantee rather than the grantor, we remain unconvinced both as to her argument, as well as to, the argument's impact on constitutionality. Since the grantor had no right to convey the property in the first place, any anger on the part of the grantee should be directed toward the grantor.

There is a very high bar in Kentucky to declare a statute unconstitutional because the statute is overly broad. Additionally, a statute is overbroad if in an effort to control impermissible conduct, the statute also prohibits conduct which is constitutionally permissible. *See Commonwealth v. Ashcraft*, 691 S.W.2d 229 (Ky. App. 1985). Here, the conduct regulated by the statute is impermissible and does not restrict conduct that is constitutionally permissible. The trial court did not err in denying the argument that KRS 378.020 was unconstitutional.

PNC was not an existing creditor

According to Lauren, PNC is a subsequent creditor of Randall, and therefore, not entitled to protection under KRS 378.020. In making this argument, Lauren suggests that pertinent to KRS 378.020, PNC was not a “then existing creditor” of Randall when the transfer of the Lake Property took place on June 18, 2008. Again, she is mistaken. The two banks merged and became one bank, and as previously noted, each original bank continues to exist in the resulting bank. 12 U.S.C.A. 215(e). Lauren’s reasoning appears to be based on the assumption that one bank purchased an asset or loan from the other bank. That is not the case, here. As stated,

The corporate existence of each of the consolidating banks or banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and such consolidated national banking association shall be deemed to be the same corporation as each bank or banking association participating in the consolidation.

Id.

Moreover, Lauren’s argument that a pre-emption analysis is required is incorrect. There is no conflict between the state law, KRS 378.020, and the federal law, 12 U.S.C.A. § 215. The federal statute only defines the status of consolidated banks after a merger, and the state law governs fraudulent conveyances. Pre-emption is not an issue.

Finally, Lauren’s proposition that *Warren v. Moody*, 122 U.S. 132, 7 S.Ct. 1063, 30 L.Ed. 1108 (1887), is factually and legally similar to the facts of this case is simply wrong. In *Warren*, according to Lauren, the U.S. Supreme Court

rejected the application of a similar federal vesting statute to a fraudulent conveyance statute.

Lauren's discussion of the similarity between *Warren* and the case here is fallacious. First, factual differences exist. In the *Warren* transfer, no indices of fraud were present, and the parties stipulated that at the time of the transfer (ten years prior), the father was prosperous. In the case at bar, PNC alleged nine separate indicators of fraud against Randall in its complaint, and Randall was not prosperous at the time of the transfer. He was indebted to PNC for failure to pay a promissory note and operating under a forbearance agreement. Indeed, the transfer was made 19 days after he defaulted on the loan and was in the process of negotiating the forbearance agreement.

Legally, the differences between *Warren* and this case are also striking. *Warren* was a federal bankruptcy case, and hence, decided under federal bankruptcy law. The Court held that because there was a stipulation of no fraud, the trustees could not prevail under a bankruptcy statute that required evidence of fraud. Moreover, the *Warren* Court determined the case was to be evaluated under federal bankruptcy laws and the Alabama fraudulent conveyance statute, like the Kentucky statute, was inapposite. *Id.* at 137–38.

Here, under 12 U.S.C.A. § 215(e), PNC is Randall's creditor; the trial court did not apply bankruptcy law but the Commonwealth's law concerning fraudulent conveyances; and, as a matter of law the transfer of the Lake Property was void.

The Propriety of Summary Judgment

Both Randall and Lauren maintain that the trial court erred as a matter of law by resolving genuine issues of material fact in granting the summary judgment.

1. Bank's actions

Randall makes some bold allegations regarding the actions of the bank and its relationship with him. These claims included a breach of fiduciary duty by the personnel on the bank's private client team, estate planning group and the asset resolution team. He claims, among other things, that the bank used his confidential information with outside counsel; failed to place the assets of his estate in a Delaware Trust; slandered the title on the Lake Property; and, misused the TARP funds to take a tax write-off.

The claims of fraud, breach of fiduciary duty, tortious interference with a business a prospective business advantage, and slander of title have already been addressed in the *res judicata* section of this opinion. Regarding the remaining claims, the trial court relied on Randall's release given to PNC in the forbearance agreement, dated July 1, 2008, to determine that no genuine issue of material fact existed. Section 5.02(B) of the forbearance agreement, titled "Waiver and Release," states:

Borrower and Guarantor [Randall Waldman] hereby fully and forever release, acquit, and discharge Bank, its affiliates, shareholders, directors, officers, employees, servants, representatives, agents, attorneys or other persons acting on behalf of any of the foregoing, and the

heirs, representatives, successors and assignees of each of them from any and all liability on account of any and all claims, demands, actions or causes of action whether in law or in equity or otherwise, whether in contract or tort or pursuant to any statute, code ordinance or regulations, whether direct or indirect, whether known or unknown, whether presently discoverable, whether suspected, unclaimed or claimed which Borrower or Guarantor ever had, now have or may have against Bank arising out of or in any way related to loan transactions with Bank, loan request to Bank, the Loan Documents, the negotiation and execution of this Agreement **or relationships or transaction of any kind or nature involving Bank and borrower and/or Guarantor or their related entities or persons, employees, agents, affiliates, successors or assignees.** Borrower and Guarantor represent, warrant and acknowledge that adequate, sufficient, good and valuable consideration have been received from Bank for this release.

(Emphasis added.) Besides providing no evidence supporting his attacks on PNC, Randall never challenged the forbearance agreement, and therefore, the trial court properly ruled that there were no genuine issues of material fact regarding these assertions.

2. Trial court improperly made findings of fact

Lauren maintains that the trial court made findings of fact, and in doing so, resolved genuine issues of material fact disputed by the parties. We disagree. The trial court effectively catalogued a complex and convoluted time line by chronicling the history of the case. Although titled “Findings of Fact” in the June 17, 2014 interlocutory order, the trial court did not act as the fact-finder and resolve disputed facts but merely listed the events. Ultimately, the trial court determined that the evidence on the record - pleadings, depositions, affidavits -

showed no genuine issue of material fact, and further, PNC was entitled to a judgment as a matter of law. *See* CR 56.03.

3. Trial court incorrectly asserted the LLC was dissolved

Lauren also argues on appeal that the trial court erred when it observed that she had not filed mandated corporate requirements to keep her limited liability company (successor to RSW LTD III, LLC) from being administratively dissolved. As explained by Lauren, although she had not timely filed required reports about the limited liability company, and therefore, it had been dissolved, but later she was able to have it reinstated.

Nevertheless, the trial court did not err, it merely noted the dissolution of LSW LTD, LLC at the time of the interlocutory order. Regardless, the reinstatement of LSW LTD, LLC has no material impact on whether Randall fraudulently conveyed the Lake Property to RSW LTD III, LLC. The later re-naming of the limited liability company and change of ownership was after this fraudulent conveyance, and the trial court, properly highlighted that it never had title to the Lake Property. Lauren's only interest through LSW LTD, LLC in the Lake Property derives from a deed to RSW LTD III, LLC, which has been declared null and void.

4. Waiver

Additionally, Lauren asserts that the trial court failed to consider her argument concerning "waiver." As Lauren acknowledges, this argument was made in her "motion to alter, amend, or vacate" the June 17, 2014 order. Consequently,

even if this argument had an impact, it was not made during the pendency of the case. And even though bank personnel knew about the Lake Property, this knowledge does not logically demonstrate that the bank had to procure a waiver from Randall to include this asset as collateral for the loan. When Randall signed the promissory note, he indicated no limitations on securing it with his assets.

5. PNC's standing

Further, in relation to this appeal, either Randall or Lauren or both made various defenses to the grant of summary judgment. The issue of PNC's standing has already been addressed.

6. Laches

The doctrine of laches creates a defense that, if effective, bars equitable remedies for the opposing party. Persons taking advantage of this defense claim that the other party's delay in seeking a remedy worked to the disadvantage of them. Lauren maintains a laches defense because she was in possession of the Lake Property since 2008, and she asserts that PNC had full knowledge of the transfer and the cost of ownership for the Lake Property. Yet, she notes that PNC waited over three years to seek recompense.

The trial court discounted laches as a defense to Randall's action to set aside the transfer from the Trust to the LLC. First, the trial court pointed out that the Bullitt Circuit Court Judgment is enforceable for 15 years. KRS 413.090. Further, the trial court noted that PNC filed its action within the five-year limitations period to set aside fraudulent conveyances. *See* KRS 413.120(11).

Further, if no limitation period has passed “one claiming a bar based on delay must also show prejudice.” *Plaza Condominium Association, Inc. v. Wellington Corporation*, 920 S.W.2d 51, 54 (Ky. 1996). Prejudice has not been demonstrated by either Randall or Lauren. Having to pay the normal expenses and maintenance on a piece of property does not rise to the level of prejudice. Because PNC brought the action in less than three years and within the allowable limits, the trial court denied the defense of laches. We concur.

7. Equitable Estoppel

Randall and Lauren maintain that PNC is equitably estopped from pursuing its claims in this case because of the estate planning advice provided by them. Further, Lauren argues that the trial court incorrectly determined that for her to claim the defense of equitable estoppel, she must establish all five steps of the Delaware Trust were completed by Randall. In fact, Randall never completed any steps for the Delaware Trust. Additionally, Randall’s own attorney informed him on March 3, 2008, that he must transfer the Lake Property into the RSW LTD III, LLC in order to transfer it to a Delaware Trust. Randall was never advised to reorganize the LLC and transfer it to Lauren.

To invoke the doctrine, a party must show (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Rivermont Inn, Inc. v. Bass Hotels & Resorts, Inc., 113 S.W.3d 636, 643 (Ky. App. 2003)(citations omitted). Randall had knowledge; ignored the advice of his own counsel; and, and his inaction was entirely his own choice. In sum, Randall withheld information about his financial circumstances to the bank and never executed the Delaware Trust. Based on these actions, he cannot now claim that PNC is equitably estopped from pursuing its claims.

Lauren asserts that NCB required Randall to transfer the Lake Property to complete the estate plan. That is not supported by the record. Randall was a customer of the estate planning department, and as such, he made all decisions regarding the estate planning. Further, if Randall truly was compelled to complete the estate plan, he would have had to transfer the real property into the LLC and then into the Delaware Trust. He did not do so. Under the laws of Delaware, real property outside the state of Delaware cannot be placed into a Delaware Trust. Instead, he reorganized the LLC in an attempt to transfer the Lake Property to Lauren.

Clearly, regarding all the arguments proffered by Randall and Lauren, the trial court focused on the information in the record to ascertain whether there existed a genuine issue of material fact. This record shows indisputably that Randall did not ever complete the process of setting up a Delaware Trust to protect the Lake Property nor could he have done so since he transferred his ownership in the Lake Property to an LLC and then reconfigured the LLC for Lauren's control and ownership. At this point, Randall had received information and advice about

how to use a Delaware Trust, but his actions in transferring the property made it impossible for him to complete a Delaware Trust. The trial court correctly denied the defense of equitable estoppel.

8. *Unclean Hands*

In Kentucky, the “unclean hands” doctrine is a rule of equity that forecloses relief to a party who has engaged in fraudulent, illegal, or unconscionable conduct but does not operate absolutely to “repel all sinners from courts of equity.” *Duncombe v. Amfot Oil Company*, 256 S.W. 427, 429 (Ky. 1923). The “unclean hands” principle of equity deals with the conduct of the plaintiff. The courts will not enforce equitable relief unless the plaintiff is without fault. *Steuerle v. Tindell*, 265 S.W.2d 787 (Ky. 1954). A court follows this maxim by refusing to enforce the plaintiff’s claim if he or she comes to court with “unclean hands.” *Id.* Randall and Lauren’s assertion that PNC does not have clean hands is an interesting one given that Randall fraudulently transferred his real property to his daughter. Further, they have provided no evidence of an act by the bank that was fraudulent, illegal, or unconscionable.

The trial court in denying the “unclean hands” defense returned to Randall’s actions in his apparent efforts to create a Delaware Trust. In this matter, Randall failed to execute a Delaware Trust prior to the Bullitt Circuit Court foreclosure action on his promissory note and guaranty. Once the foreclosure action began, it was too late to transfer the Lake Property into a Delaware Trust. And the inability to transfer the real property into a Delaware Trust rests solely on

Randall's shoulders. He never provided evidence that he filed an adequate financial statement with NCB or established PNC's creditor rights would not be impaired if he had transferred his Lake Property into a Delaware Trust. Randall could not have transferred the real property because he had to be solvent to do so, and he was not.

Moreover, Randall provided no evidence that anyone associated with NCB or PNC participated or contributed to his transfer of the Lake Property from the Trust to the LLC. In fact, his own attorney informed him that a Delaware Trust is not able to own real property outside the state of Delaware. The trial court appropriately determined that PNC did not have "unclean hands."

CONCLUSION

A review of the facts shows that Randall's initial indebtedness to PNC dated back to May 16, 2007, prior to the transfer of the Lake Property from the Trust to his limited liability company. At the time of the transfer of the Lake Property, Randall was indebted to PNC under loan contracts because he failed to pay the promissory note at maturity. Additionally, he was operating under the terms of a forbearance agreement in which he admitted his indebtedness to PNC and his present inability to pay it.

In sum, it is clear that at the time when Randall was indebted to PNC, he conveyed the Lake Property, worth at least \$327,000.00 from his Trust to a limited liability company for the nominal sum of \$1.00. His subsequent action of reorganizing the limited liability company and naming Lauren as its member and

manager are also void because the property was encumbered. Under Kentucky law, the conveyance made was fraudulent as to PNC and is void, and the property is subject to Randall's indebtedness to PNC. Thus, the trial court properly determined that no genuine issue of material fact existed regarding the determination that a fraudulent conveyance occurred under KRS 378.020.

Thus, we affirm the decision of the Grayson Circuit Court awarding summary judgment to PNC. Summary judgment is appropriate because PNC showed "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03.

ALL CONCUR

BRIEFS FOR APPELLANTS –
RANDALL S. WALDMAN AND
LAUREN WALDEN, ET AL.:

Michael R. Wilson
John R. Wilson
Louisville, Kentucky

BRIEFS FOR APPELLEE:

John A. Majors
Taylor M. Hamilton
Bradley S. Salyer
Louisville, Kentucky