IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

REDEMPTION HOLDINGS, INC., **Plaintiff,** **v.** **EGBERT HALL,** **Defendant.**	)	**CIVIL NO. SX-09-CV-219** **ACTION FROR DECLARATORY JUDGMENT**
EGBERT HALL, **Counterclaimant,** **v.** **REDEMPTION HOLDINGS, INC.,** **Counter-Defendant.**	)	**VIOLATION OF VIRGIN ISLANDS FRAUDULENT CONVEYANCE ACT**

APPEARANCES:

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MEMORANDUM OPINION

MOLLOY, Judge.

THIS MATTER came before the Court for a Bench Trial on September 3, 2014. Attorney Edward Barry appeared for the Plaintiff/Counter-Defendant Redemption Holdings, Inc. Attorneys Vincent Colianni, Sr. and Vincent Colianni, II appeared for the Defendant/Counterclaimant Egbert Hall. At the close of trial, the Court instructed the parties to submit proposed Findings of Fact and Conclusions of Law as to the issues addressed on the record, including a legal analysis of other courts' interpretation of statutes that contain language similar to Title 28, Section 207 of the Virgin Islands Uniform Fraudulent Conveyance Act. Plaintiff/Counter-Defendant filed its proposed findings of fact and conclusions of law on September 10, 2014. Defendant/Counterclaimant filed his proposed findings of fact and conclusions of law on November 10, 2014. For the reasons set forth below, the Court finds in favor of Defendant-Counterclaimant Hall.

I. FINDINGS OF FACT

1. Plaintiff/Counter-Defendant Redemption Holdings, Inc. (hereinafter "RHI") commenced this action to quiet title to a parcel of real property located at 1 Estate Pearl, Queen Quarter, St. Croix, U.S. Virgin Islands ("the Property") on April 24. 2009. Compl. ¶ 1.

2. The Property was previously owned by Yusef I. Jaber ("Jaber"), subject to a first priority mortgage in favor of The Bank of Nova Scotia. Jaber defaulted on his obligation to the Bank, and the Bank filed a foreclosure action against Jaber and the Property on June 20, 2002. *See Bank of Nova Scotia v. Jaber*, et al., Case No. SX-02-CV-416.

3. The Government of the Virgin Islands was named as an interested-party Defendant with tax liens in the amounts of $47,306.99 and $62,120.64 against Jaber and the Property during the foreclosure litigation. *Id.*

4. Jaber did not appear at or defend against the foreclosure proceedings, and the Bank obtained Judgment by Default against Jaber in the amount $244,347.15 on April 28, 2003. Pl.'s Trial Ex. 1.

5. Under Virgin Islands law, Jaber had the right to redeem the Property within six months from the date of the order confirming sale issued on November 24, 2003. *See* 28

V.I.C. § 535.

6. In April 2004, Jaber elicited a series of personal loans from Defendant Egbert Hall (hereinafter "Hall") totaling approximately $670,000.00, commencing with a $400,000.00 note executed on April 1, 2004. Def.'s Ex. Trial 1, 2, & 6.

7. RHI was incorporated by Jaber on May 21, 2004. Def.'s Trial Ex. 3.

8. Jaber was the president and only shareholder of RHI. Def.'s Trial Ex. 5.

9. On May 24, 2004, the day his right of redemption was set to expire, Jaber assigned his right to redeem the Property to RHI. Pl.'s Trial Ex. 12.

10. RHI successfully redeemed the Property by tendering $254,843.84 to the Marshal, who transferred the Property to RHI by assignment and in satisfaction of Jaber's debt. Pl.'s Trial Ex. 3.

11. The Certificate of Redemption was recorded with the St. Croix Recorder of Deeds on November 25, 2005. Pl.'s Trial Ex. 2.

12. The assignment of the right of redemption was recorded with the St. Croix Recorder of Deeds on February 17, 2009. Pl.'s Trial Ex. 3.

13. On November 21, 2005, Harvey R. Clapp, III (hereinafter "Clapp") acquired the entire issued and outstanding stock in RHI, in the amount of 1,000 shares, from Jaber. Trial Tr. 125.

14. In 2007, Hall sued Jaber for breach of their personal loan agreement. *See Hall v. Jaber*, Case No. SX-07-CV-534.

15. On October 22, 2008, the Court entered Judgment by Default against Jaber and in favor of Hall for $642,552.00. *Id.*

16. Hall did not record the Judgment specifically against the Property. Def.'s Am. Answer 2.

17. RHI initiated this action for declaratory judgment on April 24, 2009, seeking a judgment from the Court quieting title to the Property, free and clear of any interest alleged by Hall and Government of the Virgin Islands. Compl. ¶ 1.

18. Hall filed an Answer on June 9, 2009, and an Amended Answer and Counterclaim deemed filed as of August 28, 2014, seeking judgment in his favor for RHI's violation of the Virgin Islands Uniform Fraudulent Conveyance Act. Answer ¶ 14.

19. A bench trial was held in this matter on September 3, 2014.

20. The Government of the Virgin Islands appeared at trial but was excused pursuant to a stipulated Consent Judgment between RHI and the Government, estinguishing three tax liens of the Government against the Property.

21. At the close of trial, the Court instructed the parties to submit proposed Findings of Fact and Conclusions of Law as to the issues addressed on the record, including a legal analysis of other courts' interpretation of statutes that contain language similar to Title 28, Section 207 of the Virgin Islands Fraudulent Conveyance Act. Trial Tr. 132-35.

22. RHI filed its proposed findings of fact and conclusions of law on September 10, 2014.

23. Hall filed his proposed findings of fact and conclusions of law on November 10, 2014.

II. CONCLUSIONS OF LAW

In the Virgin Islands, "[a]ny person in possession . . . of real property, may maintain an action of an equitable nature against another who claims an . . . interest therein adverse to him, for the purpose of determining such claim . . . or interest." 28 V.I.C. § 371. "[I]n an action to quiet title the plaintiffs must rely upon the strength of their own title and not upon the weakness of that of the defendants." *Dudley v. Meyers*, 422 F.2d 1389, 1394-95 (3d Cir. 1970). The Plaintiff has the burden of establishing title by a preponderance of the evidence. *Newfound Management Corp. v. Sewer*, 885 F. Supp. 727, 765 (D.V.I. 1995). "[T]he burden of proof in a quiet title action rests with the complainant as to all issues which arise upon the essential allegations of his complaint. Where the defendant in a quiet title action asserts and relies upon a fact as an affirmative defense, however, he has the burden of proving this fact." *Alexander Hamilton Life Ins. Co. v. Gov't of the V.I.*, 757 F.2d 534, 541 (3d Cir. 1985) (internal quotations and citations omitted).

RHI argues that it has proper title because the judgment in favor of Hall did not create a judgment lien against the Property and Hall cannot show that he suffered harm as a result of the assignment of the right of redemption to RHI because the Judgment was entered more than four years after the transfer of the Property to RHI. Hall contends that the assignment of the right of redemption between Jaber individually, and RHI, a closely-held corporation with Jaber as its sole shareholder, was a fraudulent conveyance pursuant to the Virgin Islands Uniform Fraudulent Conveyance Act. Hall states that the Property was redeemed by RHI with monies Jaber loaned to Hall and Hall failed to repay. Hall concedes that the judgment he obtained was not specifically against the Property but maintains that this Court should set aside the assignment as a fraudulent conveyance and permit him to execute upon the Property in satisfaction of the judgment.

At the bench trial, RHI submitted evidence to support a finding that it holds proper legal title to the Property by submitting documentation of the foreclosure judgment in *Bank of Nova Scotia v. Jaber*, assignment of the right of redemption by Jaber to RHI, the Certificate of Redemption, and the Marshal's Deed conveying the Property to RHI. Pl's. Trial Exs. 1, 2, & 12. The Court finds that RHI has made a prima facie showing of proper title to the Property. The burden now shifts to Hall to show, as an affirmative defense, that RHI does not have proper title due to Jaber's alleged fraudulent conveyance of his right of redemption. In order to determine if Jaber's assignment of his right of redemption was fraudulent, the Court must apply the Virgin Islands Uniform Fraudulent Conveyance Act to the facts of this case.

A. Violation of the Virgin Islands Uniform Fraudulent Conveyance Act

Under Virgin Islands law, fraudulent conveyances occurring before November 15, 2011 are governed by the Virgin Islands Uniform Fraudulent Conveyances Act ("UFCA").[1] The UFCA generally protects current and future creditors from debtors transferring assets in order to escape debts. 28 V.I.C. § 201, *et seq*. Under the UFCA, "[e]very conveyance made and every obligation incurred with actual intent as distinguished from intent presumed by law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." 28 V.I.C. § 207. Section 209 further states:

> § 209. Rights of creditors whose claims have matured
>
> (1)Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a

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[1] In November 2011, the Legislature repealed the Uniform Fraudulent Conveyance Act, codified at Title 28, Chapter 9 of the Virgin Islands Code and replaced it with the Uniform Fraudulent Transfer Act, codified at Title 28, § 171, *et seq*. of the Virgin Islands Code. However, the Uniform Fraudulent Transfer Act is presumed to be applied prospectively, and not retroactively. *Walters v. Walters*, 2014 WL 1681319, at *6, n. 14 (V.I. Apr. 28, 2014). Therefore, the provisions of the Virgin Islands Uniform Fraudulent Conveyance Act are applicable to this case.

> purchaser 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,
>
> (a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or
>
> (b) Disregard the conveyance and attach or levy execution upon the property conveyed.
>
> (2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment.

28 V.I.C. § 209.

Since "individuals are rarely willing to admit intent, actual fraud is rarely proven by direct evidence." *Carroll v. Prosser*, 2012 WL 2053868, at *3 (D.V.I. 2012) (citing *In re Pa. Gear Corp.*, 2008 WL 2370169, at *9 (Bankr. E.D. Pa. Apr. 22, 2008)). Therefore, courts commonly consider various factors or "badges of fraud" in determining whether a conveyance was made with actual intent to defraud. *Williams v. Vialet*, 19 V.I. 70, 72 (D.V.I. 1982); *see also Saintil v. Armand*, 34 V.I. 70, 72 (V.I. Terr. 1996) ("However, a conveyance will not be set aside in the absence of proof of intent to hinder, delay, or defraud, by the commonly accepted badges of fraud."). While there are various "badges of fraud," all need not be shown in order to prove a claim of actual fraud. *Springel v. Prosser*, 2012 WL 2149737, at *6 (D.V.I. June 6, 2012) (citing *In re Valley Bldg. & Constr. Corp.*, 435 B.R. 276, 286 (Bankr. E.D. Pa 2010)). "Where badges of fraud are shown, the burden shifts to the party seeking to uphold the transfer." *Saintil*, 34 V.I. at 73.

To prove that Jaber acted with actual intent to defraud, Hall must show that badges of fraud were present at the time of Jaber's assignment of the right of redemption to RHI. *See Jackson v. Star Sprinkler Corp. of Florida*, 575 F.2d 1223, 1237 (8th Cir. 1978) ("It is elementary that showing the presence of 'badges of fraud' continues to be a means of establishing intent to delay, hinder, or defraud creditors."). In his proposed findings of fact and conclusions of law, Hall provided the following examples of the badges of fraud in jurisdictions with statutes similar to the UFCA: (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 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 debt transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[2] Def.'s Findings of Fact and Conclusions of Law at 7.

Based on these badges of fraud, Hall states that Jaber's fraudulent intent in the assignment of his right of redemption can be adduced from the following: (1) the assignment

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[2] The Uniform Fraudulent Transfer Act ("UFTA") has been adopted by the 43 states, the U.S. Virgin Islands, and District of Columbia. Steven J. Boyajian, Reconsidering the Uniformity of Uniform Fraudulent Transfer Act, 33 Am. Bankr. Inst. L.J. 28 (April 2014). In their respective statutes, these jurisdictions list badges of fraud in identical numerical order to those submitted by Hall. Only two states (New York and Maryland), currently apply the UFCA, which does not codify badges of fraud. Nevertheless, the Court notes that the badges of fraud codified by the UFTA have been commonly applied by courts in jurisdictions with statutes similar to the Virgin Islands Uniform Fraudulent Conveyance Act. Therefore, the Court will consider and apply the badges of fraud submitted by Hall to the present case. *See In re Maryland Property Associates, Inc.*, 309 Fed. Appx. 737, 753 (4th Cir. 2009) (applying the badges of fraud under the Maryland Uniform Fraudulent Conveyance Act, Md. Code Ann., Com. Law § 15-207); *see also In re Sharp Intern. Corp.*, 403 F.3d 43, 56 (2d Cir. 2005) (applying the badges of fraud under the New York Uniform Fraudulent Conveyance Act, N.Y. Debt. & Cred. Law, § 276); *see also Matter of Foxcroft Square Co.*, 184 B.R. 671, 675 (E.D. Pa 1995) (applying the badges of fraud under the former Pennsylvania Uniform Fraudulent Conveyance Act).

of the of the right of redemption was between Jaber, individually, and RHI, a closely-held corporation with Jaber as its sole shareholder and president; (2) Jaber retained possession and control over the Property after its transfer; (3) Jaber's assignment of the property was concealed until February 17, 2009, when it was recorded with the Recorder of Deeds; (4) the redemption of the Property was made with monies loaned to Jaber by Hall, which Jaber failed to repay; (5) Jaber absconded or otherwise avoided legal process in the Virgin Islands; and (6) The conveyance occurred shortly after Jaber incurred debt to Hall in the amount of $400,000.00. *Id.* at ¶ 8.

First, the Court finds that Jaber's transfer of the Property to RHI was an insider transfer because Jaber was the sole shareholder and President of RHI at the time of the assignment and redemption. *See United States v. Black,* 725 F.Supp.2d 1279, 1291 (E.D. Wash. 2010) (finding that there was an insider transfer under Washington's UFTA where defendants created trusts to acquire the title to the subject property and then transferred the property to a corporation also formed by defendants for the purpose of shielding their assets from tax collection); *see also Saez Assoc., Inc. v. Global Reader Servs., Inc.*, 2011 WL 4600717, at *3 (Ohio Ct. App. Oct. 6, 2011) (finding that there was an insider transfer under Ohio's UFTA where $50,000 was transferred between two corporations with a single individual as the controlling shareholder, director, and operating officer for both corporations). Second, Jaber maintained possession and control over the Property as the sole shareholder and president of RHI. *See Saez Assoc., Inc.*, 2011 WL 4600717, at *3. Third, transfer of the Property was concealed because the assignment was executed on May 24, 2004, but not recorded until February 17, 2009. Additionally, the assignment was recorded after Hall obtained Judgment against Jaber on October 22, 2008. *See Tanguy v. Laux*, 259 S.W.3d 851, 859 (Tex. App. 2008) (finding that there was evidence to support a finding of a concealed transfer where the debtor was sued by his creditor, the debtor sold an aircraft seven months prior to judgment against him, and the debtior did not execute a bill of sale for the aircraft until nine months after the judgment was entered); *but see Matter of Foxcroft Square Co.*, 184 B.R. 671, 675 (E.D. Pa 1995) (finding no evidence of intent to conceal assignment where assignment was publically recorded within twenty days of execution). Fourth, although there is no direct evidence to show that the monies loaned to Jaber by Hall were used to redeem the Property, Hall has presented evidence to support a finding that a substantial debt of $670,000.00 was incurred by Jaber shortly before Jaber's assignment to RHI. Def.'s Trial Exs. 1, 2, & 6; *see SASCO 1997 NI, LLC v. Zudkewich*, 2007 WL 1827257, at *11 (N.J. Super. Ct. App. Div. June 27, 2007) (determining that a substantial debt was incurred before transfer under New Jersey's UFTA where the transfer occurred five months after the debt obligation was taken on). Fifth, the record supports a finding that Jaber absconded legal process in the Virgin Islands as judgment by default was granted in favor of Hall. *See Hall v. Jaber*, Case No. SX-07-CV-534.

Based on the evidence submitted, the Court finds that Hall has met his burden in establishing that badges of fraud were present during and subsequent to the assignment of Jaber's right of redemption, which support a finding that Jaber had actual intent to defraud Hall as a creditor. *See Firmani v. Firmani*, 752 A.3d 854, 857 (N.J. Super. Ct. App. Div. 2000) ("Although the presence of a single factor, i.e. badge of fraud, may cast suspicion on the transferor's intent, the confluence of several in one transaction generally provides conclusive evidence of an actual intent to defraud."). The burden now shifts to RHI to show that the assignment should be upheld.

B. Prejudice to the Defendant

In its proposed findings of fact and conclusions of law, RHI does not discuss the badges of fraud as ordered by the Court at trial or by the Court's Order issued on September 5, 2014. Rather, RHI contends that a creditor must show actual harm or that it was prejudiced by the transaction. RHI maintains that Hall was not harmed by the assignment of the right of redemption because Hall's judgment was against Jaber personally, and recorded more than four years following the assignment. Additionally, Hall was under no duty to acquire the Property based on the personal loan agreement between Jaber and Hall, and the assignment did not diminish Jaber's overall collectable assets or place his then-existing assets out his creditors' reach. Therefore, RHI asserts that Hall may not execute upon the Property held by RHI.

It is well-settled that "only one prejudiced by an allegedly fraudulent transfer may attack the transfer though fraudulent conveyance law." *In re Rountree*, 44 B.R. 389, 406 (Bankr. E.D. Va. 2011).[3] "A creditor does not sustain injury unless the transfer puts beyond his reach property which he otherwise would be able to subject to the payment of his debt."

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[3] *See United States v. Johnston*, 245 F. Supp. 433, 440 (W.D. Ark. 1965) ("A fraudulent conveyance may be defined generally as any transfer of property made with intent to hinder, delay, or defraud creditors, whether prior or subsequent, which transfer in fact operates to the prejudice of such creditors."); *see also Textron Financial Corp. v. Kruger*, 545 N.W.2d 880, 885 (Iowa 1996) ("A fraudulent conveyance will not be set aside unless complaining creditors can show they were prejudiced."); *see also Fidelity Nat'l Title Ins. Co. v. Schroeder*, 179 Cal.App.4th 834, 101 Cal.Rptr.3d 854, 859 (2009) ("A transfer in fraud of creditors may be attacked only by one who is injured thereby.... [P]rejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt." (citations and quotations omitted)); *see also Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F.Supp.2d 536, 542 (S.D.N.Y. 2007) ("To challenge a conveyance as fraudulent, a plaintiff must suffer prejudice or injury as a result of the conveyance at issue.").

Haskins v. Certified Escrow & Mortgage Co., 96 Cal. App. 2d 688, 691 (1950). The relevant inquiry in this case is whether the Property would have been subject to payment of Jaber's debt but was placed out of the reach of Hall due to the assignment.

In this case, the facts show that Hall obtained judgment four years after the conveyance and the amount awarded to Hall remains uncollected. Trial Tr. 8-9. Hall's injury can be adduced from the fact that Hall did not have actual or constructive notice of the assignment until it was recorded on February 17, 2009, 112 days after his judgment was entered against Jaber. This prevented Hall from requesting a judgment lien on the Property pursuant to 5 V.I.C. § 425(b) at the time judgment was entered on October 22, 2008. Additionally, there is no evidence to suggest that there are liens on the Property that exceed its market value and would wholly prevent the Property to being subject to the payment of Jaber's debt. *See Holthaus v. Parsons*, 469 N.W. 2d 536, 538 (Neb. 1991) (finding that a judgment creditor was not injured pursuant to the Nebraska UFCA because the property was subject to prior liens that exceeded the property's market value and therefore could not be applied to payment of the debt). Based on the evidence provided by Hall establishing that badges of fraud were present when Jaber assigned his right of redemption to RHI, and a finding of prejudice suffered by Hall due to concealment of the assignment, the Court finds that Jaber had actual intent to defraud Hall.

III. CONCLUSION

For the reasons stated above, this Court finds that Jaber's assignment of the right of redemption to RHI constituted a fraudulent conveyance as to Hall. RHI presented evidence to support a prima facie showing of proper title to the Property. The burden then shifted to

Defendant who provided evidence of the badges of fraud as an affirmative defense to support a finding that RHI does not have proper title to the Property. The burden again shifted to RHI to provide evidence upholding the transfer, which it failed to do. Therefore, pursuant to the Virgin Islands UFCA, the Court finds that Hall may disregard the conveyance and execute upon the Property to the extent necessary to satisfy the Judgment obtained in Case No. SX-07-CV-534. An appropriate Order follows.

Dated: February 25, 2015

ROBERT A. MOLLOY
Judge of the Superior Court

ATTEST:
ESTRELLA GEORGE
Acting Clerk of the Court

By: ______
Court Clerk Supervisor

Dated: 2/27/15