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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JACK VAUGHN et al.,

Plaintiffs and Appellants,

v.

BARBARA DARWISH et al.,

Defendants and Respondents.

B265018

(Los Angeles County
Super. Ct. No. BC529033)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Rafael A. Ongkeko, Judge. Reversed and remanded with directions.

Mesisca Riley & Kreitenberg, Dennis P. Riley, Rena E. Kreitenberg for
Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Caroline E. Chan
for Defendants and Respondents.

Plaintiffs obtained a judgment and then brought this separate, fraudulent transfer action in an attempt to collect on the judgment. After certain defendants posted an appellate bond in connection with the appeal of the underlying matter, the trial court in the instant action granted a motion for judgment on the pleadings, finding that plaintiffs were secured creditors and had no valid fraudulent transfer claim.

We reverse. Although the appellate bond could affect plaintiffs' ability to establish they were prejudiced by fraudulent transfers, plaintiffs allege and contend their claims against defendants exceed the value of the appellate bond. Based on the pleadings, plaintiffs have unsatisfied claims against defendants that plaintiffs may seek to satisfy by setting aside any fraudulent transfers. Because the viability of plaintiffs' fraudulent transfer claims could be affected by disposition of the appellate bond, however, we instruct the trial court, upon remand, to determine whether a stay of this action is warranted.

BACKGROUND

The underlying action

In a previous action (*Vaughn et al. v. Darwish et al.*, Super. Ct. L.A. County, 2013, No. BC454063 (*Vaughn I*)), plaintiffs and appellants, Jack Vaughn, Esmeralda Hernandez, Wayne Hart, Dennis Goldson, Carlos Rodriguez, and Ernest Johnson, sued defendants and respondents, Barbara and David Darwish, as well as other parties, alleging that, after the Darwishes purchased a building in which plaintiffs were living as tenants, the Darwishes engaged in a campaign of harassment intended to drive plaintiffs from the building. Plaintiffs' lawsuit, filed in January 2011, pled multiple causes of action, including tortious breach of warranty of habitability and quiet enjoyment, retaliatory eviction, and violations of the

Los Angeles Rent Stabilization Ordinance (LARSO) (L.A. Mun. Code, § 151.00 et seq.).¹

The *Vaughn I* jury found in favor of plaintiffs and awarded each plaintiff economic and noneconomic damages and penalties. These awards to each plaintiff ranged from \$34,600 to \$65,277.80. Following a second phase of trial, the jury found each plaintiff was also entitled to punitive damages in the amount of \$916,666.67. Additionally, the trial court determined that plaintiffs could recover a total of \$845,351.25 in attorney fees.

In July 2016, this Court largely affirmed the *Vaughn I* judgment, but reduced the punitive damages awards to a range of \$100,000 to \$240,000 per plaintiff. Following disposition of the appeal, the total judgment in favor of plaintiffs was approximately \$2 million, not including the costs awarded to plaintiffs on appeal.

The instant action

Plaintiffs² filed the instant fraudulent transfer action in November 2013 against the Darwishes, the Darwishes' adult children, and numerous entities allegedly controlled by the Darwishes or their children (collectively, defendants).³ Plaintiffs alleged that the *Vaughn I* defendants (the judgment

¹ This factual and procedural background of *Vaughn I* is taken primarily from the opinion in the appeal of that matter (*Vaughn et al. v. Darwish et al.* (Jul. 6, 2016, B252762) [nonpub. opn.]), of which we take judicial notice.

² During the pendency of the *Vaughn I* appeal, it was brought to the Court's attention that plaintiff Goldson apparently had died in April 2016. Neither side raises Goldson's death as a potential issue in this appeal and so we do not address it, except to note that it may affect proceedings in the trial court following remand.

³ One of these defendants was Gingko Rose Ltd. (Gingko Rose). Gingko Rose filed for bankruptcy protection and is not a party to this appeal.

debtors) conspired with the remaining defendants to transfer the judgment debtors' assets to prevent plaintiffs from collecting on the *Vaughn I* judgment. The complaint identified many real property transactions—involving the judgment debtors, the Darwish children, and entities allegedly controlled by them—that occurred after damages were awarded in *Vaughn I* or after the judgment debtors were sued by plaintiffs. According to the complaint, most of these transactions involved inadequate or no consideration, among other deficiencies.

In August 2014, defendants brought a motion for judgment on the pleadings, arguing that plaintiffs' fraudulent transfer action was premature because the *Vaughn I* judgment was on appeal. Defendants further argued that, even if the action was not dismissed, it should be stayed until resolution of the *Vaughn I* appeal. The trial court denied the motion, finding that the action was not premature and there was no good cause for a stay.

In January 2015, pursuant to Code of Civil Procedure section 917.1, the judgment debtors posted an appellate bond in *Vaughn I* in the amount of \$3,117,750. Thereafter, defendants filed another motion for judgment on the pleadings in the instant action, arguing that the posting of the bond made plaintiffs secured creditors, leaving them unable to pursue a fraudulent transfer claim. In the alternative, defendants again moved for a stay.

In opposition, plaintiffs argued that secured creditors could properly bring a fraudulent transfer action, and that, in any event, the appellate bond did not secure the entirety of plaintiffs' claim against defendants. Plaintiffs asserted that, at most, the filing of the bond would warrant a stay, not dismissal.

The trial court granted defendants' motion for judgment on the pleadings,⁴ dismissing the case. In doing so, it denied a request by plaintiffs for leave to amend the complaint.

Plaintiffs timely appealed.

DISCUSSION

I. Standard of Review

A motion for judgment on the pleadings serves the function of a demurrer, challenging defects on the face of the complaint. (*Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999.) In reviewing the sufficiency of a complaint, we accept factual allegations as true and give them a liberal construction. (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 515-516.) We also consider matters of which judicial notice was properly taken. (*Engine Manufacturers Assn. v. State Air Resources Bd.* (2014) 231 Cal.App.4th 1022, 1035.) We do not concern ourselves with whether a plaintiff may have difficulties in proving the claims made in the complaint. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) Rather, we determine de novo whether the facts as alleged support a valid cause of action or, if they do not, whether amendment could cure the defect. (*Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1347.)

II. Judgment on the pleadings was improper

As relevant here, the Uniform Fraudulent Transfer Act (UFTA)⁵ allows a creditor to set aside a debtor's transfer of property when that transfer is

⁴ The trial court found that defendants had complied with Code of Civil Procedure section 1008, subdivision (b)'s requirements for bringing a renewed motion. The posting of the appellate bond in *Vaughn I* constituted a new or different fact or circumstance pertinent to this matter properly considered under Code of Civil Procedure section 1008, subdivision (b). (See *Glade v. Glade* (1995) Cal.App.4th 1441, 1457 [stay order recently entered in other action involving same parties was a new fact supporting reconsideration].)

fraudulent to and prejudices the creditor. (Civ. Code, § 3439 et seq.⁶) A transfer made with “actual intent to hinder, delay, or defraud any creditor of the debtor” is voidable. (§ 3439.04, subd. (a)(1).) Alternatively, a transfer can be set aside for constructive fraud; this includes when a debtor makes a transfer without receiving a reasonably equivalent value in exchange, and the debtor was insolvent at the time or became insolvent due to the transfer. (§§ 3439.04, subd. (a)(2), 3439.05; *Mejia v. Reed* (2003) 31 Cal.4th 657, 661 (*Mejia*).)

The trial court here found that the judgment debtors’ posting of the appellate bond in *Vaughn I* required dismissal of the instant action. In most cases where a judgment is for “[m]oney or the payment of money,” the posting of a bond or undertaking is required to “stay enforcement of the judgment . . . in the trial court.” (Code Civ. Proc., § 917.1, subd. (a)(1).) “Through a bond or undertaking, a third person (surety) basically promises in writing to pay a sum of money to respondent on appellant’s behalf should respondent prevail on appeal and appellant fail to comply with the affirmed judgment or order.” (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 7:96, p. 7-34.)

Defendants argued below, and contend on appeal, that, following the posting of the appellate bond, plaintiffs could no longer pursue their fraudulent transfer claim because plaintiffs became secured creditors. In

⁵ The Uniform Voidable Transactions Act (UVTA), effective January 1, 2016, supersedes the UFTA with respect to transfers made or obligations incurred on or after the effective date of the UVTA. (Civ. Code, § 3439.14, subd. (a).) Since all transactions at issue here occurred prior to 2016, the UFTA applies.

⁶ Unless otherwise noted, all further statutory references are to the Civil Code.

support of this assertion, defendants rely on *Mejia*, which, in discussing the background of the UFTA, explained that the UFTA “declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims.” (*Mejia, supra*, 31 Cal.4th 657, 664, quoting Legis. Com. com., 12A West’s Ann. Civ. Code (1997 ed.) foll. § 3439.01, p. 272; see also *Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1235 (*Renda*).) The portion of the Legislative Committee Comments from which this statement was drawn, however, was focused on rights of unsecured creditors, not the rights of secured creditors. (Legis. Com. com., 12A pt. 2 West’s Ann. Civ. Code (2016 ed.) foll. § 3439.01, p. 253.) We do not believe that the *Mejia* court intended to suggest that secured creditors could never assert claims under the UFTA. Such an interpretation would be contrary to the relevant statutory language. “Creditor,” under the UFTA, is defined as “a person that has a claim” (§ 3439.01, subd. (c)), and “claim” is defined broadly as a “right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, *secured*, or unsecured” (§ 3439.01, subd. (b), italics added). Defendants’ interpretation also conflicts with case law, which has found, “The status of “creditor” is not lost because security has been taken for a debt, and a secured creditor is entitled to bring an action to set aside a fraudulent conveyance by his debtor.” (*Douglas v. Hill* (Wash. 2009) 199 P.3d 493, 496; see *Renda*, at p. 1239 [decisions of other states construing parallel UFTA provisions are instructive].)

Nevertheless, regardless of whether a creditor is secured or unsecured, a creditor can only seek to set aside a transfer under the UFTA when he or she has been injured by it. (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 (*Mehrtash*).) “In other words, prejudice to the plaintiff is essential.”

(*Ibid.*) In *Mehrtash*, an unsecured creditor attempted to set aside a debtor's transfer of property when the property was already heavily mortgaged in an amount greater than the property's value. The court found no basis for a fraudulent transfer claim, because, due to the already existing encumbrances, setting aside the conveyance would not provide any net recovery to the plaintiff. (*Id.* at p. 81.) Along these lines, a creditor that is fully secured generally will not suffer injury by a debtor's transfer of property in which the creditor has no interest, so long as the creditor's security interest remains in place and is of sufficient value to satisfy the creditor's claim. If the creditor's claim is fully secured and available to collect, the creditor is unlikely to be injured by a debtor's transfer of other property.

This conclusion finds support in the principle against double recovery. In *Renda*, in an underlying action, the plaintiff obtained a money judgment against the defendant. (*Renda, supra*, 223 Cal.App.4th 1231, 1234.) After the defendant did not pay the judgment, and the plaintiff learned the defendant was transferring assets to sham entities, the plaintiff brought a fraudulent transfer action. The plaintiff obtained a judgment setting aside the transfers, but argued that he was also entitled to a personal money judgment against the debtor in the amount of the transfers. The court disagreed, holding, "The UFTA does not impose on the debtor any liability additional to or distinct from the existing claim of the creditor; it simply allows the creditor to obtain '[a]voidance of the transfer . . . to the extent necessary to satisfy the creditor's claim.' (§ 3439.07, subd. (a)(1), italics added)." (*Renda*, at p. 1238.) Since the plaintiff was awarded damages in the underlying action, "the principle against double recovery for the same harm bars him from obtaining a second judgment against [the debtor] under the UFTA for a portion of those same damages." (*Ibid.*)

Here, assuming plaintiffs collect on the appellate bond, any recovery on the fraudulent transfer claim—to the extent it is duplicative of the amount collected on the bond—would be barred, because it would constitute a double recovery. Thus, the judgment debtors’ posting of the appellate bond (which the trial court here judicially noticed) potentially extinguished the prejudice to plaintiffs caused by defendants’ allegedly fraudulent transfers of property.

We find that the trial court erred in granting judgment on the pleadings, however, because plaintiffs allege and contend their claim is not fully secured by the appellate bond, and so recovery in the fraudulent transfer action would not necessarily constitute a double recovery. Plaintiffs’ complaint in this action alleged that the total judgment in the underlying action was for \$5,778,000. Following disposition of the appeal, the judgment totaled approximately \$2 million, less than the appellate bond of \$3,117,750. Nevertheless, plaintiffs contend they are entitled to interest, additional attorney fees, and other sums, so that the total amount owing by the judgment debtors will likely exceed the amount of the appellate bond.⁷

This fraudulent transfer action is still at the pleading stage, and the record contains no allegation refuting plaintiffs’ assertions that they are undersecured. If the appellate bond is insufficient to cover the entirety of plaintiffs’ claims, the alleged fraudulent transfers could possibly be set aside to satisfy the remainder. Thus, since plaintiffs still have a potentially valid

⁷ Defendants argue plaintiffs should have objected to the bond on the ground that the amount was insufficient. But regardless of whether plaintiffs may have had a valid objection, there is no statutory or other authority providing that a plaintiff forfeits his or her right to bring a fraudulent transfer action by not contesting the amount of an appellate bond in another matter.

fraudulent transfer claim, the motion for judgment on the pleadings should not have been granted.

III. A stay of the action may be warranted

At various points during the trial court proceedings, both defendants and plaintiffs argued that this action was appropriately stayed while the appellate bond was outstanding. The trial court, however, elected to dismiss the case rather than stay it.

Upon remand, the trial court shall determine whether a stay is appropriate. Since payment of the judgment—either by the judgment debtors or the surety—may obviate the need to set aside transfers, a stay may be warranted until (i) the judgment (including any interest and costs) is paid in full, at which point this action can potentially be dismissed,⁸ or (ii) the facts show it is likely the judgment will not be paid in full following appeal, at which point the action could recommence.

“The law neither does nor requires idle acts.” (Civ. Code, § 3532.) Imposing a stay here may best avoid unnecessary litigation. The trial court has authority to issue a stay under its own equitable powers (see *Webster v. Superior Court* (1988) 46 Cal.3d 338, 345), as well as its statutory power to “provide for the orderly conduct of proceedings before it” (Code Civ. Proc., § 128, subd. (a)(3)).⁹

⁸ Since we find that the motion for judgment on the pleadings was improperly granted, we do not decide whether the trial court erred by denying leave to amend. This opinion does not limit plaintiffs’ right to move for leave to amend their complaint, however, so long as such a motion is procedurally proper and in compliance with any stay that may be in effect. If plaintiffs’ complaint is eventually amended, any amendments may affect whether and when this action would appropriately be dismissed.

⁹ Code of Civil Procedure section 917.1 provides for a stay upon the giving of an undertaking of “enforcement of the judgment or order in the trial

DISPOSITION

The judgment is reversed. On remand, the trial court shall determine whether a stay of this action is appropriate. The parties shall bear their own costs on appeal.

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GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

court,” not in a separate action, and so would not mandate a stay in this action.

* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.