Filed 5/18/12 Marriage of Ferdman CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| In re the Marriage of JUDITH and MICHAEL FERDMAN.<br>_____<br>MICHAEL FERDMAN,<br>Respondent,<br>v.<br>JUDITH FERDMAN,<br>Appellant. | B226116<br>(Los Angeles County Super. Ct. No. BD383471) |

APPEAL from an order of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Order affirmed.

Lawyers for Family Support, Patricia A. Lang; Ted L. Travis for Appellant.

Charles K. Wake for Respondent.

## INTRODUCTION

Judith Ferdman appeals from an order denying her motion to join third parties Luiza Yusupova (Yusupova) and Absolute AVLC, Inc. (Absolute) to a proceeding to enforce a judgment for spousal support against her former spouse Michael Ferdman,[1] based on Judith's claim that Michael fraudulently transferred his separate property assets to them. Joinder of a third party to a family law proceeding is required only in the rarest of circumstances. This is not one of them. Judith has not satisfied any of the three criteria for joinder: she has not shown that Absolute and Yusupova potentially have control of community assets or that these two parties were indispensable to a determination of the issue of fraudulent transfer or were necessary to the enforcement of any judgment rendered on that issue. We affirm the order denying the motion for joinder.

## FACTUAL AND PROCEDURAL HISTORY

Michael and Judith married on October 22, 1975, and divorced on November 3, 2003. Pursuant to the parties' marital settlement agreement incorporated into the judgment of dissolution, Michael was required to pay Judith spousal support of $7,300 per month.

During the marriage Judith and Michael co-owned family companies, among which were AMCO Rents and Sales, Inc. in Los Angeles, AMCO Rents and Sales Corp. in Chicago, and AMCO Rents and Sales Corp. in Toronto (AMCO). AMCO was in the business of renting computers, printers, and audio visual equipment. The community property businesses and corporations, including these AMCO entities, were assigned to Michael as his separate property, and Michael assumed any and all liens, encumbrances, claims, demands, debts and obligations of AMCO. Michael thus was made responsible for a $750,000 Small Business Administration loan from Bank of America obtained during the marriage in June 1999.

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[1] As is customary in family law cases where parties share a surname, we refer to them by their first names for ease and clarity of reference, meaning no disrespect. (*In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1304, fn. 1.)

On November 20, 2003, Michael married Luiza Yusupova.

On May 24, 2004, Michael renegotiated the Bank of America loan for $489,756.06. Judith co-signed that renegotiated loan.

On February 14, 2008, Judith obtained a writ of execution for $324,325.02 for past due spousal support owed to her by Michael, and obtained a court order stating that in present and future writs of execution and abstract of support judgments, Michael was to be named as "Michael Ferdman aka AMCO Rents and Sales Inc." On February 22, 2008, Judith caused bank levies to be served on AMCO accounts on U. S. Bank and on Preferred Bank. The levies returned $6,530.50 from Preferred Bank and $80.05 from U.S. Bank. In a stipulated order of April 28, 2008, the parties stipulated that $2,000 of levied funds were to be released to Judith's counsel and the remainder ($4,610.55) was to be released to Michael. The stipulated order also ordered Michael to pay $324,325.02 unpaid spousal support to Judith at $1,500.00 per month from May 10, 2008 through December 10, 2008, with monthly payments increasing by $500.00 per month each year beginning January 10, 2009.

On November 24, 2008, Bank of America filed a notice of judgment lien against AMCO for a $387,519.31 judgment entered on July 1, 2008.

On April 15, 2009, Merrill Lynch Mortgage Lending, Inc./Wilshire Credit Corp. filed a notice of default and election to sell under deed of trust for Michael's residence at 1527 N. Fairfax Avenue in Los Angeles, where AMCO operated its business. The trust deed secured obligations which included a note for $960,000. In a declaration of September 8, 2009, Michael stated that in the previous two years, AMCO's business was down and neither he nor AMCO was able to pay bills. Michael also stated that he suffered from severe cardiac arrhythmias for two years and during the previous year required hospitalization for three cardiac conversions to re-set his heart.

Luiza Yusupova separated from Michael on May 9, 2009.

Between March 2008 and July 2009, Bank of America attempted to collect sums owed to it by AMCO, Michael, and Judith, and filed a confession of judgment against AMCO, Michael, and Judith in Los Angeles County Superior Court. Between May 2008

and July 2009, Bank of America's attorney and Michael's attorney attempted to negotiate a consensual resolution of debts AMCO and Michael owed to the bank, without success. Bank of America thereafter elected to foreclose on its security interest in AMCO's personal property, its equipment and inventory. On May 23, 2009, Bank of America made a formal demand for surrender of its collateral, stating that AMCO was in default under a forbearance and settlement agreement entered into between AMCO and Bank of America on June 15, 2006.

On May 28, 2009, Yusupova filed articles of incorporation with the California Secretary of State forming a new entity, Absolute AVLC, Inc. (Absolute). Michael had no financial or equitable ownership of Absolute, exercised no control over Absolute, and has never been employed by Absolute.

On June 1, 2009, Yusupova filed a petition for dissolution of her marriage to Michael.

On June 17, 2009, Michael consented to permit Bank of America to seize AMCO's assets and sell them pursuant to its rights under the commercial security agreement. Bank of America did not foreclose on AMCO's accounts receivable or equipment leased from Predictifund, Inc. In June 2009, AMCO stopped payments on all leases.

On June 18, 2009, Bank of America sent a notification of disposition of collateral to all relevant parties, including other secured parties of AMCO, and to Judith. The Bank stated it would sell the collateral by private sale sometime after June 30, 2009.

On June 19, 2009, a stipulated judgment was entered in the marital dissolution of Michael and Yusupova. The stipulated judgment confirmed Yusupova's earnings, accumulations, and acquisitions since the parties' date of separation to her as her sole and separate property. The stipulated judgment confirmed the residential property at 1527 N. Fairfax Avenue, Los Angeles, three notes secured by trust deeds which were in default, and the business known as AMCO Rents and Sales, Inc. and its assets and debts, to Michael as his sole and separate property.

On July 1, 2009, Bank of America sold AMCO's foreclosed assets to Absolute for $20,000. After purchasing AMCO's assets, Absolute developed new relationships with AMCO's customers and attempted to retain AMCO's former employees to ensure the smooth operation of Absolute's business.

On July 9, 2009, Michael filed a Chapter 7 bankruptcy petition, which listed Judith, her attorneys, and counsel for Yusupova as creditors.

On July 10, 2009, counsel for AMCO informed Judith that after AMCO was unable to provide Bank of America with a satisfactory payment of AMCO's outstanding debt, Bank of America obtained a judgment against AMCO and on June 17, 2009, foreclosed on its security interest and took possession of AMCO's assets. Bank of America sold the AMCO assets on July 1, 2009, the purchase price provided no surplus to pay AMCO's unsecured creditors, and no distribution would be paid to general unsecured creditors. Judith was further informed that AMCO had closed and Michael had filed a personal Chapter 7 bankruptcy.

Bank of America, however, did not foreclose on accounts receivable or leased equipment of AMCO. Until August 2009, AMCO collected accounts receivable and paid creditors, including Yusupova. Between 2004 and 2008, Yusupova had loaned AMCO $83,358, becoming one of AMCO's largest creditors. In July 2009 Yusupova was repaid $33,126.71 of the nearly $83,358 she had loaned to AMCO; at Yusupova's request, repayment was made to Absolute, Yusupova's corporation. Yusupova also received some checks directly.

AMCO's bank account had funds of $9,560.48 on June 30, 2009. During July of 2009 AMCO had $37,874.62 in credits, and $47,435.10 in debits, leaving a $0 balance on July 31, 2009.

Judith submitted a declaration from Michael's brother, Vladimir Ferdman, who was Chief Financial Officer of AMCO from January 2003 to January 3, 2006, and was responsible for collecting and depositing money into AMCO's corporate bank account. Vladimir stated that during this time Yusupova never made a loan to AMCO. Michael responded with a declaration stating that he and Vladimir had not communicated since

Vladimir filed a lawsuit against him in February 2006. Michael stated that he never disclosed to Vladimir that Yusupova loaned money to Michael and AMCO, and thus Vladimir had no personal knowledge of the loans.

Judith also submitted a declaration from Clark Hartigan, a former employee of both AMCO and Absolute. Hartigan stated that after he continued working for and being paid by Absolute, Michael continued to be his boss, continued to run Absolute the same way he did when it was AMCO, and terminated Hartigan in October 2009. Hartigan stated that Yusupova did not run Absolute and was incapable of doing so. Hartigan also stated that the divorce between Michael and Yusupova was a standing joke at work, and that Michael and Yusupova joked about how they filed for divorce to make it look like Yusupova owned Absolute. Michael responded with a declaration from Yusupova stating that her divorce from Michael was not a joke and that she and Absolute's Operations Manager, Eduardo Perez, collectively made the decision to terminate Hartigan and together informed Hartigan of their decision.

Judith presented no evidence of payments from Yusupova or Absolute to Michael after Absolute purchased AMCO's assets from the Bank of America, and presented no evidence that Bank of America colluded with Michael when it foreclosed on AMCO's assets and then sold them to Absolute.

On August 25, 2009, Judith filed a motion for joinder of Yusupova and Absolute AVLC, Inc. The motion alleged that Michael voluntarily closed AMCO, formed a new corporation, Absolute, in which Yusupova was sole shareholder, and that Michael and Yusupova conspired to hide and protect Michael's assets and income from Judith by changing the name of AMCO to Absolute and transferring ownership to Yusupova, for the purpose of preventing Judith from ascertaining Michael's income and recovering her judgment against him. Judith's motion argued that Yusupova and Absolute were indispensable parties to a determination of Michael's assets and income, and that Judith was unable to recover her past due support judgment against Michael without the requested joinder of Yusupova and Absolute.

After a hearing, the trial court denied Judith's joinder motion.

Judith filed a timely notice of appeal.[2]

ISSUES

Judith claims on appeal that:

1. Denial of the motion to join Yusupova and Absolute as parties to the dissolution action was an abuse of discretion;

2. The trial court erroneously concluded that joinder was improper because of Bank of America's non-judicial foreclosure in June 2009 of only the assets of AMCO secured by the bank's financing statement.

3. In light of rulings on discovery motions and as applied to determination of the motion for joinder, the trial court failed to appreciate the gamesmanship practiced by Michael, Yusupova, and Absolute in presenting evidence and declarations in opposition to the motion for joinder.

DISCUSSION

1. *The Law of Joinder and the Standard of a Review of an Order on a Joinder Motion*

Family Code section 2021 provides the statutory basis for joinder to a family law action: "the court may order that a person who claims an interest in the proceeding be joined as a party to the proceeding in accordance with rules adopted by the Judicial Council[.]" California Rules of Court, rule 5.150 states that "a person who claims or controls an interest subject to disposition in the proceeding may be joined as a party[.]" "The petitioner or the respondent may apply to the court for an order joining a person as a party to the proceeding . . . who has in his or her possession or control or claims to own any property subject to the jurisdiction of the court in the proceeding." (Cal. Rules Ct., rule 5.154(a).) The rule for permissive joinder states: "The court may order that a person

[2] A postjudgment order which affects the judgment in some way or relates to its enforcement is appealable so long as the appeal involves issues other than those decided by the judgment. (Code Civ. Proc., § 904.1, subd. (a)(2); *In re Marriage of Cooper* (2008) 160 Cal.App.4th 574, 576.)

be joined as a party to the proceeding if the court finds that it would be appropriate to determine the particular issue in the proceeding and that the person to be joined as a party is either indispensable to a determination of that issue or necessary to the enforcement of any judgment rendered on that issue." (Cal. Rules Ct., rule 5.158(b).)

"Rules of court dealing with joinder are written in the permissive 'may' rather than the mandatory 'shall.' Hence, even if a corporation fits criteria set forth in rule [5.150] or [5.158(b)], joinder is not automatic. The standard of review is abuse of discretion." (*Schnabel v. Superior Court* (1994) 30 Cal.App.4th 758, 762-763.) *Schnabel* further asserts: "[J]oinder of a third party to a family law proceeding is compelled only in the rarest of circumstances[.]" (*Id*. at p. 760, italics omitted.)

2. *Judith Did Not Satisfy Any of the Three Joinder Criteria*

The rules set out three reasons for joinder of a third party to a family law proceeding. (*Schnabel v. Superior Court, supra*, 30 Cal.App.4th at p. 764.) *Schnabel* found that the case before it was that rare instance where the moving party established all three criteria and joinder was compelled. (*Id.* at pp. 760, 764-765.) Judith, however, has established none of the three criteria for joinder.

A. *Judith Has Not Shown That Absolute and Yusupova Potentially Have Control of Community Assets*

The first joinder criterion is whether Absolute and Yusupova claim or control an interest subject to disposition in the proceeding, i.e., whether they potentially have control of community assets. (*Schnabel v. Superior Court, supra*, 30 Cal.App.4th at p. 764.) AMCO, however, was confirmed to Michael as his separate property in the dissolution proceeding. Thus unlike in *Schnabel*, Yusupova and Absolute did not claim or control an interest subject to disposition in the proceeding.

Moreover, the AMCO assets which Judith's joinder motion sought to reach were purchased by Absolute from the Bank of America. The Bank of America had previously foreclosed on those assets, in which it held a security interest pursuant to a loan made to AMCO. The Bank of America then sold those AMCO assets to Yusupova and Absolute. Judith's joinder motion in part argued that a fraudulent transfer had occurred. The

Uniform Fraudulent Transfer Act (UFTA) permits defrauded creditors to reach property in the hands of a transferee. (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663.) A transfer made by a debtor is fraudulent as to a creditor if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor." (Civ. Code, § 3439.04, subd. (a)(1).) For a fraudulent transfer to occur, however, there must be a transfer of an "asset" as defined in the UFTA. (*Fidelity National Title Ins. Co. v. Schroeder* (2009) 179 Cal.App.4th 834, 841.) The UFTA defines a "transfer" as "every mode . . . of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." (Civ. Code, § 3439.01, subd. (i).) An "asset" includes the property of a debtor, but does not include "[p]roperty to the extent it is encumbered by a valid lien." (*Id*. at subd. (a)(1).) Because of the foreclosure, we assume that Bank of America had a valid lien on the assets of AMCO. Thus the transfer of AMCO's assets encumbered by a valid lien cannot be the subject of a fraudulent transfer claim.

Further, Judith did not allege, or provide any facts showing, that AMCO's transfer by foreclosure of assets to Bank of America was fraudulent. By not challenging AMCO's transfer of assets to the Bank of America, Judith cannot allege that a fraudulent transfer of assets occurred by the sale of those assets to Yusupova and Absolute.

Judith also alleged that AMCO made payments of $24,800 to Yusupova after AMCO had purportedly ceased to do business after the foreclosure by Bank of America. However, there was evidence that AMCO owed Yusupova $83,358. An insolvent or failing debtor can prefer one creditor over another. A preferential transfer for proper consideration, although it prevents another creditor from collecting on her debt, is not for that reason a transfer made to hinder, delay, or defraud that creditor. (*Lyons v. Security Pacific Nat. Bank* (1995) 40 Cal.App.4th 1001, 1019-1020.) Although this rule is subject to exceptions based on fraud (*id*. at p. 1020), this court implies factual findings in support of the trial court's order, and reviews the trial court's exercise of discretion based on implied findings that are supported by substantial evidence. (*Fair v. Bakhtiari* (2011) 195 Cal.App.4th 1135, 1148-1149.) There was evidence that Yusupova loaned $83,358

from her separate property to Michael and AMCO, that Michael and AMCO agreed to repay all the money loaned by Yusupova, and that after Absolute was formed, Yusupova demanded that Michael pay her back but she was repaid only $33,126.71. Substantial evidence supported the finding that AMCO owed Yusupova $83,385. Payment of $24,800 to Absolute was not fraudulent, but was a permissible creditor preference.

Judith has not shown that Absolute and Yusupova potentially have control of community assets.

B. *Judith Has Not Shown That Yusupova and Absolute Were Indispensable to a Determination of the Issue of Fraudulent Transfer or Were Necessary to the Enforcement of Any Judgment Rendered on That Issue*

The second and third joinder criteria are whether Yusupova and Absolute are indispensable parties to the proceeding or are necessary to enforcement of a judgment rendered on an issue that it is appropriate to determine in the proceeding. (*Schnabel v. Superior Court, supra,* 30 Cal.App.4th at p. 764.) California Rules of Court, rule 5.158(b) states, in relevant part: "The court may order that a person be joined as a party to the proceeding if the court finds that it would be appropriate to determine the particular issue in the proceeding and that the person to be joined as a party is either indispensable to a determination of that issue or necessary to the enforcement of any judgment rendered on that issue."

Judith makes no argument that the trial court should have found that joining Yusupova and Absolute would be appropriate to determine the particular issue (the issue of fraudulent conveyance) in the proceeding or to the enforcement of any judgment rendered on that issue.

Michael argues that the trial court properly denied the motion for joinder because it lacked subject matter jurisdiction over Judith's fraudulent transfer claim. We agree.

Family Code section 2010 states: "In a proceeding for dissolution of marriage . . . the court has jurisdiction to inquire into and render any judgment and make orders that are appropriate concerning the following:

"(a) The status of the marriage, including any marriage under subdivision (c) of Section 308.

"(b) The custody of minor children of the marriage.

"(c) The support of children for whom support may be ordered, including children born after the filing of the initial petition or the final decree of dissolution.

"(d) The support of either party.

"(e) The settlement of the property rights of the parties.

"(f) The award of attorney's fees and costs."

In the Family Rules, rule 5.104 states: "Neither party to the proceeding may assert against the other party or any other person any cause of action or claim for relief other than for the relief provided in these rules, Family Code sections 17400, 17402, and 17404, or other sections of the Family Code." (Cal. Rules Ct., rule 5.104.) Tort claims, such as for fraud, cannot be joined with or pleaded as part of a marital dissolution action. (*In re Marriage of McNeill* (1984) 160 Cal.App.3d 548, 556, overruled on unrelated ground, *In re Marriage of Fabian* (1986) 41 Cal.3d 440, 451.) Although a tort claim can be consolidated with a pending dissolution action under suitable circumstances pursuant to Code of Civil Procedure section 1048, subdivision (a), the dissolution proceeding of Michael and Judith was no longer pending, judgment having been entered in that dissolution proceeding on November 3, 2003. (*Sosnick v. Sosnick* (1999) 71 Cal.App.4th 1335, 1339.) Even if Judith had filed her tort claims as a separate action, the trial court lacked jurisdiction to consolidate that action with the marital dissolution proceeding. (*Id*. at p. 1340.)

Moreover, the trial court lacked jurisdiction to adjudicate a fraudulent transfer claim with respect to Michael's separate property. The trial court has only limited jurisdiction over the parties' separate property. (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 810.) The traditional rule states: "The court may *characterize* disputed assets and liabilities as being separate or community, may *confirm* separate property to the owner spouse and, to the extent permitted by statute, may order *reimbursement* from the community to a party's separate estate or to the community from

a party's separate estate. . . . But unless the parties otherwise agree, the court's jurisdiction over *separate property* extends no further (e.g., the family law court has no jurisdiction in a marital proceeding to impose a constructive trust on one spouse's [separate property] or to award damages for a [separate property] conversion). To obtain other relief affecting separate property interests, an *independent civil action* must be filed." (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2011) ¶ 8:903, pp. 8-222 to 8-223, italics in original; *In re Marriage of Braud*, at p. 810.)

Determination of a post-judgment fraudulent transfer claim is also not within the enforcement power of the family law court. Family Code section 290 states: "A judgment or order made or entered pursuant to this code may be enforced by the court by execution, the appointment of a receiver, or contempt, or by any other order as the court in its discretion determines from time to time to be necessary."

The issue of the fraudulent transfer of Michael's separate property not being properly before the trial court, Yusupova and Absolute were not indispensable to a determination of that issue or necessary to the enforcement of any judgment rendered on that issue.

C. *Conclusion*

Judith's motion for joinder satisfied none of the three reasons for joinder. The trial court appropriately exercised its discretion in denying that motion and its order should be affirmed.

3. *Judith Identifies No Erroneous Discovery or Sanctions Order Requiring Reversal*

Judith claims that the trial court failed to appreciate the gamesmanship practiced by Michael, Yusupova, and Absolute in their presentation of evidence and declarations in opposition to the motion for joinder, which those parties had not produced during discovery or in compliance with court orders. Judith does not claim that the trial court made erroneous discovery orders or erroneously failed to exclude testimony and evidence not properly disclosed during discovery. Judith claims that after representing that Michael, Yusupova, and Absolute would make their best effort to construct a

confidentiality agreement, that did not occur, but does not claim that the trial court erroneously denied a request for discovery sanctions. There being no claim of error, we have no basis for reversal of the order.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent Michael Ferdman.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.