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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HERBERT A. STOLTENBERG,  
TRUSTEE OF THE 1680  
PROPERTY TRUST, et al.,

Plaintiffs and Appellants,

v.

SHEPPARD, MULLIN, RICHTER, &  
HAMPTON, LLP,

Defendant and Respondent.

B271524

(Los Angeles County  
Super. Ct. No. BC556922)

APPEAL from a judgment of the Superior Court of the  
County of Los Angeles. Daniel S. Murphy, Judge. Affirmed.  
LOVE, LLP, Richard A. Love, for Plaintiffs and Appellants.  
Sheppard, Mullin, Richter & Hampton, LLP, Richard W.  
Brunette and Robert T. Sturgeon, for Defendant and Respondent.

The law firm that represented the losing defendants at trial obtained a lien on specific client property to secure payment of accrued, but unpaid, legal fees. Plaintiffs/judgment creditors, unable to satisfy the judgment, sued the law firm to set aside the lien, alleging actual and constructive fraud. The trial court granted the law firm's motion for summary judgment. We affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. The Underlying Action and Sheppard Mullin's Security Interest**

This legal saga began in 2004 when plaintiffs<sup>1</sup> sued Ampton Investments, Inc. and Laurence Strenger (the Ampton defendants) for fraud (underlying action). The Ampton defendants retained Sheppard, Mullin, Richter & Hampton (Sheppard Mullin) in February 2011, and the firm filed a formal substitution of attorneys in early March 2011.

The jury trial in the underlying action began April 4, 2011. On May 4, 2011, the jury returned a special verdict in favor of plaintiffs in the amount of \$8,516,704 and found the Ampton defendants acted with malice and oppression. Despite the trial court's order that the Ampton defendants turn over financial information relating to their net worth for the punitive damage phase of the trial, the Ampton defendants only provided federal

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<sup>1</sup> The plaintiffs and appellants are: Herbert W. Stoltenberg, trustee of the 1680 Property Trust; Michael L. Epstein, trustee of the Michael L. Epstein Trust; Stephen Ellis Gordon, trustee of the Stephen Ellis Gordon and Linda S. Gordon Revocable Trust; and Ruth Ann Runnels LaMonica, trustee of the LaMonica Family Trust. We refer to them collectively as plaintiffs.

tax returns for years 2008 and 2009. The jury did not award punitive damages.

On June 9, 2011, the trial court entered judgment on the jury's verdict. That same day, the Ampton defendants applied ex parte for an order temporarily staying enforcement of the judgment. The trial court granted a one-week stay, ordered defendant Strenger to file a declaration explaining why a temporary stay was appropriate, and set the matter for further hearing on June 16, 2011.

In the meantime, before judgment was entered, Sheppard Mullin began to press the Ampton defendants to pay their legal fees. According to Sheppard Mullin, as of April 30, 2011, the Ampton defendants incurred \$837,702.31 in attorney fees for the defense of the underlying action, but had not made any payments to Sheppard Mullin. On June 8, 2011, the day before judgment was entered, Sheppard Mullin e-mailed Strenger a draft security agreement dated June 6, 2011, in which Strenger would grant Sheppard Mullin a security interest in two pieces of art to secure the Ampton defendants' outstanding legal fees. The cover letter advised payment was expected on or before July 15, 2011; the agreement itself also provided it constituted an inducement for Sheppard Mullin "to continue to represent the [Ampton defendants] in connection with the post-trial motions in the [underlying action]."

After sending this letter, Sheppard Mullin apparently discovered a UCC-1 financing statement evidencing a financial institution's preexisting security interest in Strenger's art

collection,<sup>2</sup> including the two paintings that were originally intended to serve as the security for the payment of Sheppard Mullin's attorney fees. Sheppard Mullin sent Strenger a revised security agreement that expanded the collateral securing the payment of past and future attorney fees to include Strenger's entire art collection. On June 14, 2011, Strenger agreed in substance to grant Sheppard Mullin a lien on his art collection.

The parties returned to court on June 16, 2011, for the hearing on the Ampton defendants' request for a temporary stay of enforcement. Plaintiffs' counsel voiced concern about the Ampton defendants' transferring assets during the requested stay:

Mr. Strenger talks in terms of the business of Ampton, a limited number of employees, and some obscure need for cash or credit lines for that business to go forward. For what, we don't know.

My major concern here is that there's a substantial amount of real property and personal property unconnected to the business of Ampton which is subject to transfer in the

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<sup>2</sup> On March 30, 2011, Strenger executed a valuation agreement with Sotheby's in New York, requesting an appraisal of the fine art and antiques he owned. Sotheby's issued a final appraisal to Strenger in December 2011, concluding 875 pieces of fine art and furnishings had a fair market value of \$6,084,390 and an insurance value of \$13,660,960. Strenger gave Sheppard Mullin a draft of the appraisal during the negotiation of the security agreement in May and June 2011.

absence of either an execution or an order staying transfer.

So, the stay, even accommodating his request to continue business, I think should be conditioned upon an order that there is no transfer of personal property—transfer, encumbrance of personal property or real property of Mr. Strenger or Ampton, other than in the normal course of business, in terms of cash or funds that are available.

In response to the concerns expressed by plaintiffs’ counsel, the trial court proposed an order preventing the Ampton defendants from selling or transferring real property. When plaintiffs’ counsel reminded the trial court that Strenger owned an “extensive” art collection, “which [on] the basis on the tax returns is [valued at] \$1.6 million,” court and counsel discussed possible dispositions of Strenger’s assets. Ultimately, the trial court suggested, “There’s no disposition of the real property, there’s no disposition of the art collection except as to pay attorneys, costs of bond, and ordinary expenses [of] running Ampton.” After a brief recess so the Sheppard Mullin attorney could speak with Strenger, the following colloquy ensued:

[Defense counsel:] I think [Strenger has] consented to what your Honor proposed. And if I may restate it, just so I’ve got it clearly.

The Court: All right.

[Defense counsel:] With respect to his real property . . . there will be no transfer of the real property for any purpose during the stay period.

With respect to the personal property, which I understand to be [Strenger's interest in certain entities] and the art collection, there will be no transfers within the stay period except for the purposes of paying legal fees and necessary business expenses of Ampton and securing an appellate bond.

The Court: Sounds good to me.

Plaintiff, what do you think?

[Plaintiffs' counsel:] I guess that's fine, your Honor . . . .

With that, the court proposed to grant a stay of 70 days on the following terms: "that the real property outlined and the personal property outlined not be liquidated for any purpose other than securing an appellate bond, paying attorneys and everyday expenses of Ampton . . . ."

Following the hearing, plaintiffs and the Ampton defendants each submitted proposed orders specifying the terms and conditions of the stay order. Plaintiffs' order provided in part that "during the pendency of this stay, [the Ampton defendants] may: [¶] Pay from cash or cash equivalents available, or liquidate, encumber or sell items in the art collection, if necessary, to pay the normal and customary business expense of Ampton or reasonable attorney fees . . . ."

Instead of executing one of the submitted orders, the trial court issued a minute order that provided, in pertinent part: “The defendant is ordered not to transfer specific assets prior to filing an appeal bond. The court’s specific ruling is fully detailed in the notes of the Official Court Reporter.”

On June 22, 2011, Sheppard Mullin sent Strenger a revised version of the security agreement. Among other things, the revised version extended the due date to pay the outstanding legal fees to September 30, 2011, and expanded the definition of the collateral to include “all antiques, furniture and related decorations, china, porcelain ceramics, and fine art, including, but not limited to, items listed on Exhibit A [an itemized list of the art collection] . . . .” That same day, Strenger e-mailed Sheppard Mullin and attached an executed copy of the signature page of the final version security agreement. Sheppard Mullin then filed UCC-1 financing statements in New York and California scheduling the assets pledged as collateral under the security agreement.

Three months later, in September 2011, in connection with work it performed on a petition for writ of supersedeas seeking a waiver of a surety bond on appeal, Sheppard Mullin requested a security interest in three cooperative apartments in New York City owned by 118 8th Avenue Associates, a New York partnership in which Strenger was a partner. On September 15, 2011, Sheppard Mullin and the Ampton defendants, among others, executed an amendment to the security agreement that granted Sheppard Mullin a continuing security interest in all the shares of stock of 118 Eighth Avenue Housing Corporation. On September 27, 2011, Sheppard Mullin filed an UCC-1 financing statement in New York scheduling as collateral the interest it

received in the shares of 118 Eighth Avenue Housing Corporation under the amendment to the security agreement.

### **B. The Appeal in the Underlying Action**

On September 2, 2011, the Ampton defendants filed a timely notice of appeal from the judgment in the underlying action, but did not post a bond to stay enforcement of that judgment. (Code Civ. Proc., § 917.1.) Instead, they petitioned for a writ of supersedeas to stay enforcement of the judgment pending appeal. This court denied the petition.

As enforcement of the judgment was not stayed, plaintiffs registered the judgment in the state of New York, where the Ampton defendants were domiciled, and initiated enforcement proceedings there, including the service of subpoenas on the Ampton defendants for financial information. When the Ampton defendants failed to respond to the subpoenas or orders to show cause requiring compliance, a New York trial court found them in contempt and fined them.

When the Ampton defendants did not comply with the contempt order, plaintiffs sought the dismissal of the appeal in this court based on the disentitlement doctrine. Following briefing and further proceedings in this court, we dismissed the Ampton defendants' appeal in a published decision. (*Stoltenberg v. Ampton Investments, Inc.* (2013) 215 Cal.App.4th 1225.) Although the Ampton defendants subsequently petitioned to reinstate the appeal, we denied the petition.<sup>3</sup>

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<sup>3</sup> On March 14, 2014, the New York trial court found the Ampton defendants in contempt for a second time and, on June 15, 2015, the trial court in the underlying action also found the



### C. The Current Lawsuit

On September 8, 2014, plaintiffs sued Sheppard Mullin for actual fraud, constructive fraud, and declaratory relief. Sheppard Mullin filed a motion for summary judgment or, alternatively, summary adjudication of issues, asserting the appellate decision in *Wyzard v. Goller* (1994) 23 Cal.App.4th 1183, 1187 (*Wyzard*) controlled and the law firm was entitled to judgment as a matter of law.

The trial court took the matter under submission after the hearing and issued a written ruling granting summary judgment in favor of Sheppard Mullin. The trial court agreed with Sheppard Mullin that “the transfer in question was simply a preference, and there [was] no evidence of intent to hinder, delay, or defraud plaintiffs.” The court concluded it was bound by *Wyzard, supra*, 23 Cal.App.4th 1183: “Here, as was the case in *Wyzard*, it is established and conceded that Sheppard Mullin rendered legal services to [the Ampton defendants] and thus earned the fee which is secured by the security interests. [*Wyzard, supra*, 23 Cal.App.4th at p. 1191.] Plaintiffs’ argument that the secured property is worth considerably more than the legal fees owed is unavailing. Sheppard Mullin retains a lien on the subject property—it does not own the property outright. Once the property is liquidated, Sheppard Mullin will only receive the amount to which it is entitled pursuant to the lien. [¶] At oral argument, plaintiff attempt[ed] to distinguish *Wyzard* by asserting that, unlike *Wyzard*, [Sheppard Mullin’s] attorney fees are in dispute. The court finds that the hourly rate and hours that [Sheppard Mullin] charged does not rise to a triable issue of

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Ampton defendants in contempt for failing to comply with a turnover order.

material fact . . . . Contrary to plaintiffs’ assertion, the court finds *Wyzard* to be dispositive. As stated previously, in *Wyzard*, as in this case, the attorneys rendered legal services and thus earned attorney fees which were secured by the security interests.”

Plaintiffs timely appealed from the judgment.

## **DISCUSSION**

### **A. Standard of Review**

Our review of a summary judgment is governed by well-established principles. We independently review the trial court’s decision; Sheppard Mullin has the burden to demonstrate that plaintiffs cannot establish the elements of their causes of action; and we liberally construe plaintiffs’ evidence and resolve any evidentiary doubts in plaintiffs’ favor. (See generally, *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.) “There is to be no weighing of evidence.” (*Kids’ Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 880.) Summary judgment will be defeated “based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact.” ([Code Civ. Proc.] § 437c, subd. (c).)” (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1530, fn. 14.)

### **B. Legal Principles Applicable to Debtors and Creditors**

In 1872, California codified the principle that “[a] debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to

another.” (Civ. Code, § 3432.) Alongside this venerable statute, California law also provides that a debtor who transfers property to a third party with the intent to “hinder, delay, or defraud” a creditor from satisfying the debt or who fails to receive “a reasonably equivalent value in exchange” makes a fraudulent conveyance. (Civ. Code, § 3439.04, subd. (a).) The creation of a lien in favor of a creditor is a transfer. (Civ. Code, § 3439.01, subd. (m).)

In 1994, Division Four of this District rendered its decision in *Wyzard, supra*, 23 Cal.App.4th 1183. Our colleagues described the “principal issue” in that appeal as “whether a preferential transfer, if made for proper consideration . . . but with recognition that the transfer will effectively prevent another creditor from collecting on his debt, is one made with ‘actual intent to hinder, delay, or defraud’ that creditor.” (*Id.* at p. 1189.) Our colleagues concluded, “the transfer to [the attorney], in payment for his legal services, while a preference, is not for that reason a transfer made to ‘hinder, delay or defraud’ [the judgment creditor]” (*id.* at p. 1191) and affirmed summary judgment for the attorney.

When *Wyzard, supra*, 23 Cal.App.4th 1183 was decided, the “badges of fraud” enumerated in the Uniform Fraudulent Conveyance Act had not yet been incorporated into Civil Code section 3439.04. That occurred in 2004, with the addition of subdivision (b).<sup>4</sup> Nonetheless, the *Wyzard* court discussed the

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<sup>4</sup> California law now tracks the Uniform Fraudulent Conveyance Act and includes the 11 “badges.” Civil Code section 3439.04, subdivision (b) provides: “In determining actual intent under paragraph (1) of subdivision (a), consideration may be given, among other factors, to any or all of the following: (1) Whether the transfer or obligation was to an insider.

badges and accepted them “merely [as] evidence from which an inference of fraudulent intent may be drawn.” (*Ibid.*) *Wyzard* concluded none of the “badge” inferences at issue in that case raised a triable issue of material fact because “[i]t was established and conceded that [the attorney] had rendered the services he claimed to have rendered, and thus had earned the fee secured by the encumbrances.” (*Ibid.*)

### C. Analysis

In *Wyzard*, *supra*, 23 Cal.App.4th at page 1186 the defendant’s attorney was a “longtime friend [of] and attorney” for the debtor defendant. (*Id.* at p. 1186.) Here, Sheppard Mullin attorney James McCarney, who tried the underlying action on

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- (2) Whether the debtor retained possession or control of the property transferred after the transfer.
  - (3) Whether the transfer or obligation was disclosed or concealed.
  - (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
  - (5) Whether the transfer was of substantially all the debtor's assets.
  - (6) Whether the debtor absconded.
  - (7) Whether the debtor removed or concealed assets.
  - (8) Whether 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) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
  - (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.
  - (11) Whether the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.”

behalf of the Ampton defendants, worked closely with Strenger to try to ensure the law firm's bills would be paid before plaintiffs recovered anything on their judgment. McCarney and the law firm continued to represent the Ampton defendants in a variety of postjudgment matters and continued to bill for their services. The subsequent real property lien was to secure payment of attorney fees that accrued after the trial in the underlying action concluded.

Plaintiffs contend Sheppard Mullin's apparent failure to attempt to enforce the lien reflects collusion with the Ampton defendants and is an indicia of fraud that should have defeated summary judgment. But as judgment creditors, plaintiffs did not need to wait for Sheppard Mullin to act. Plaintiffs could have forced the issue. (See Code Civ. Proc., § 720.510 et seq.)

The underlying judgment debtors in *Wyzard*, *supra*, 23 Cal.App.4th 1183 did not have sufficient assets to satisfy the judgment and also pay their attorney. Moreover, the individual judgment debtor had given his former wife a lien on the same property. (*Id.* at pp. 1186, 1187.)

Here, it initially appeared Strenger had sufficient assets to pay the Sheppard Mullin fees and at least a portion of plaintiffs' judgment. It also appeared the property to which Sheppard Mullin's lien attached was, on paper, worth far more than the lien itself. In fact, plaintiffs' counsel agreed Strenger could use the art and furnishings not only to pay attorney fees, but also to pay Ampton's ongoing expenses. Nothing in the record indicates if, or how much of, Strenger's assets were consumed running Ampton.

As in *Wyzard*, *supra*, 23 Cal.App.4th at page 1191, plaintiffs here also disputed the amount of attorney fees the law

firm charged. To the extent there was a factual issue as to the amount of Sheppard Mullin's fees, it did not rise to the level of an issue of material fact sufficient to defeat summary judgment. The declaration of plaintiffs' counsel was not so much fact-based as it was argument. The trial court presided over the lawsuit before, during, and after trial and considered the evidence concerning the amount of the legal fees. The "experienced trial judge is the best judge of the value of professional services rendered in his court." (*Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) In this case, the experienced trial judge was not making a judgment call concerning a precise amount for attorney fees; he was acknowledging the client was obligated to pay for the legal services Sheppard Mullin provided.

Plaintiffs further argue that *Wyzard, supra*, 23 Cal.App.4th 1183 did not involve concealment of the lien from the debtor, as allegedly occurred here. Citing to the transcript of the hearing on the Ampton defendants' request for a temporary stay of execution, plaintiffs contend the Ampton defendants, through Sheppard Mullin, intentionally concealed the existence of the lien from them at the hearing, conduct they insist raised an inference of fraudulent intent.

A fair reading of the transcript of the temporary stay proceedings, however, supports the inference that the Ampton defendants adequately informed the trial court and counsel of their intent to use the art collection to pay attorney fees as well as the costs of operating Ampton. They also mentioned using the asset to pay for an appellate bond, but that did not occur. Plaintiffs' counsel understood and agreed to the use of the art collection for that specific purpose because he drafted and submitted a proposed order that expressly allowed the Ampton

defendants to encumber the art collection to pay attorney fees. Given those facts, the purported concealment did not give rise to a material factual dispute concerning the Ampton defendants' intent to defraud.

Nor was there a triable issue of fact as to the constructive fraud claim. The viability of that cause of action turned on whether the debtor received a "reasonably equivalent value in exchange" (Civ. Code, § 3439.04, subd. (a)(2)), not on any actual intent to hinder, delay or defraud. Strenger's art collection was valued by Sotheby's at between \$6 and \$14 million; the debt to Sheppard Mullin was at most \$837,702. From these facts, plaintiffs conclude there was no reasonable equivalence between the value of the property pledged to secure the debt and the debt itself.

Under California law, the Sheppard Mullin lien was coextensive with the debt, not the security. (See, e.g., 8 Witkin, Cal. Procedure (5th Ed. 2008) Enforcement of Judgments, § 488, p. 527 ["The premise of the [Uniform Fraudulent Transfers] Act is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured"]; *Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 439 ["A security interest cannot exist without an underlying obligation, and therefore a [lien] is generally extinguished by either payment [of the amount of the debt] or sale of the property in an amount which satisfies the lien"].) Although Sheppard Mullin had a potentially larger pool of resources from which to satisfy the lien, once the value of the items executed upon reached \$837,702, the debt would be satisfied and the lien extinguished. This is not a situation where the preferred creditor created a lien in excess of the money it claimed was due.

Plaintiffs also maintain the Ampton defendants' conduct following the entry of judgment in the underlying action, including efforts to stay enforcement of the judgment without posting an appellate bond and the initial and subsequent contempt citations in New York, the first of which led to our dismissal of the appeal from the underlying judgment, suggests an intent to defraud. That conduct, however, like the badges of fraud plaintiffs cite, was insufficient to raise a triable issue of fact in light of the holding in *Wyzard, supra*, 23 Cal.App.4th 1183.

Finally, the holding in *Wyzard, supra*, 23 Cal.App.4th 1183 supports sound public policy. Without the "*Wyzard rule*," attorneys will have less incentive to represent clients who cannot pay adverse judgments, particularly if entering into a security transaction like the one here exposes them to lawsuits seeking to void the preference.

A debtor may treat one legitimate creditor preferentially over another. (Civ. Code, § 3432.) Without a doubt, the preferential treatment may hinder or delay the other creditor's efforts to satisfy the debt. But as a matter of law, that does not permit the disadvantaged creditor to collaterally attack and void the preferential transfer. The preferential treatment of a legitimate creditor is not a fraudulent transfer. Summary judgment was properly granted.



### **DISPOSITION**

The judgment is affirmed. Sheppard Mullin is awarded costs on appeal.

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DUNNING, J.\*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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\* Judge of the Orange Superior Court appointed by the Chief Justice pursuant to article IV, section 6, of the California Constitution.