

85 Mass.App.Ct. 1114
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

GENWORTH MORTGAGE
INSURANCE CORPORATION
v.
CHING YEE M. TSUI.

No. 13–P–370.

|
April 14, 2014.

By the Court (CYPHER, GRASSO & SULLIVAN, JJ.).

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

*1 After a jury returned a verdict in favor of Genworth Mortgage Insurance Corporation (Genworth) against Ching Yee Tsui (Tsui) on a claim for violation of the Uniform Fraudulent Transfer Act, [G.L. c. 109A, § 5\(a\)\(1\)](#), in connection with a purchase of property in San Jose, California, the trial judge allowed Tsui's motion for judgment notwithstanding the verdict ("JNOV"). The judge ruled that Genworth had failed to introduce sufficient evidence to (1) establish that Tsui purchased the property with money furnished by her former husband and Genworth's judgment debtor (Hu) with knowledge and intent to hinder Genworth's collecting its debt, and (2) prove its damages (evidence of the amount fraudulently transferred from Hu to Tsui). An amended final judgment entered incorporating the judge's decision on the motion for JNOV.

On appeal from that determination,¹ Genworth contends that the evidence, although circumstantial, sufficed. We affirm.² At trial, Genworth argued at length that despite its inability to identify any transfer of money from Hu to Tsui for purchase of the California property, the jury could nevertheless reasonably infer that such a transfer had taken place, since Tsui was unemployed and her testimony regarding the source of funds she used to buy the California property was not believable. As the judge explained in his memorandum of decision, the fundamental flaw in Genworth's reasoning is its contention that disbelief of Tsui's testimony and other

evidence regarding the source of her down payment for the purchase of the California property provided the evidence from which the jury could infer that Hu was the source. See [Ward v. Grant](#), 9 Mass.App.Ct. 364, 367 (1980) (creditor bears burden of proving fraudulent conveyance). The judge reasoned that:

1 Genworth does not appeal from the jury's verdict in favor of Tsui on its other claims of fraudulent transfer relating to her purchase and subsequent sale of a home in Westford, and stock options awarded to her as part of a California divorce agreement.

2 We pass over Tsui's contention that Genworth's appeal should be dismissed for failure to comply with [Mass.R.A.P. 18\(a\) and \(b\)](#), as amended, 425 Mass. 1602 (1997), and proceed to the merits. In doing so, we expressly decline to consider nonrecord material that Genworth has improperly included in the record appendix.

"Genworth fails ... to identify any evidence produced at trial of any specific transfer of funds from Hu to Tsui in connection with the purchase of the (California) property. Such proof is necessary to satisfy the second element (of [G.L. c. 109A, § 5\(a\)\(1\)](#)). To the contrary, testimony and other evidence at trial indicated the money for the purchase of the (California) property came from Tsui's relatives and a friend. Even if, as Genworth suggests, the jury disbelieved this testimony, such disbelief did not relieve Genworth of its burden at trial of proving that the funds for the purchase of the property came from Hu. Assuming ... that the jury rejected Tsui's testimony about where the down payment came from, this would not support a reasonable inference, without more, that Hu provided the down payment."

On appeal, Genworth reiterates its argument that Tsui's proof was not credible, and again fails to point out record evidence from which the jury could have reasonably concluded that Hu provided the funds for Tsui's purchase of the California property. Absent such evidence, no "combination of circumstances could be found from which a reasonable inference could be drawn in favor of [Genworth]." [Doe v. Senechal](#), 66 Mass.App.Ct. 68, 76 (2006), quoting from [Raunela v. Hertz Corp.](#), 361 Mass. 341, 343 (1972). The jury's verdict must be based on evidence, not on "speculation and conjecture." [Phelan v. May Dept. Stores Co.](#), 443 Mass. 52, 55 (2004) (citations omitted). Accordingly, the judge did not err in allowing Tsui's JNOV motion.³

3 There is no merit to Genworth's contention that Tsui waived her right to file a motion for JNOV because the judge had already directed a verdict in her favor. Although the judge was inclined to allow Tsui's motion for a directed verdict regarding the California property, he permitted the jury to pass upon the question of her liability in accordance with the preferred practice. See [McAllister v. Boston Hous. Auth.](#), 429 Mass. 300, 301 (1999).

*2 Moreover, as Genworth's appeal fails to challenge the jury's determination in favor of Tsui on its claim of a fraudulent transfer involving the Westford property, we discern no basis for Genworth's continued attachment of proceeds from the sale of that property. Accordingly, the

Superior Court order for the turnover of funds held in escrow is also affirmed.⁴

4 This order was stayed by a single justice of this court pending resolution of this appeal.

Judgment affirmed.

Order for turnover of funds held in escrow affirmed.

All Citations

85 Mass.App.Ct. 1114, 6 N.E.3d 569 (Table), 2014 WL 1407324