

Alan Gassman & Brandon Ketron on *Biel Rio*: Four-Year Fraudulent Transfer Statute Does Not Prevent Judgment Creditor from Proceeding Against Transferee

*“The crux of the court’s decision seems to rest on the fact that a proceeding supplementary is not an independent cause of action, rather it is ‘collateral to the main action at law,’ and serves as a means to enforce a judgment already existing. Therefore, as long as the judgment is timely brought and entered against the debtor, statute of limitation arguments from other substantive bodies of law cannot be used to bar an initiation of a proceeding supplementary.”*

**Alan Gassman** and **Brandon Ketron** provide members with their analysis of [\*Biel Rio v. Barefoot Cottages Development Co., LLC\*](#), a recent decision by Florida’s First District Court of Appeal which held that the statute of limitations in the Uniform Fraudulent Transfer Act did not prevent a judgment creditor from proceeding against a transferee more than four years after the transfer was made to avoid creditors.

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Members should take note of **LISI's** newly expanded coverage of the [49th Annual Heckerling Institute on Estate Planning](#) that is being held this week in Orlando. **Andy DeMaio** has included a number of exciting new items in the most recent [LawThreads](#) tab on the **LISI** homepage. As in past years, Andy has included links to the reports edited by **Joe Hodges**. This year, Andy has added a number of additional resources covering the Heckerling conference, including a timeline of favorite Twitter tweets from those attending the Conference.

Now, here is Alan Gassman and Brandon Ketron's commentary:

## **EXECUTIVE SUMMARY:**

In a recent First District Court of Appeal of Florida case, [Biel Rio v. Barefoot Cottages Development Co., LLC](#), the court held that the statute of limitations under the Uniform Fraudulent Transfer Act (UFTA) did not bar the initiation of a proceeding supplementary due to the fact that a proceeding supplementary can be filed for the life of the judgment.<sup>i</sup>

## **FACTS:**

In 2008 the debtors defaulted on a commercial loan that was personally guaranteed. After defaulting, each debtor transferred assets into newly established trusts under which the wives were named trustees, and the debtors were beneficiaries as co-tenants by the entirety with their respective wives. The trial and the appellate court both agreed that assets held in trust for a married couple as tenants by the entireties will be considered to be a creditor exempt asset, which is the first court case making this finding to our knowledge.<sup>ii</sup>

The bank then obtained a judgment against the debtors, who subsequently assigned the judgment to Biel Rio. Biel Rio then initiated proceedings supplementary under Fla Stat. § 56.29, impleading the wives as trustees and subjecting the trust assets to satisfy the judgment.<sup>iii</sup> The wives, as trustees, argued that under the UFTA, the statute of limitations barred the judgment holder's claim.<sup>iv</sup>

On this point, the court noted that:

Although the Trustees are correct that the manner of proving and defending fraudulent transfer claims under § 56.29 borrow substantively from the UFTA, this fact does not require the adoption of the UFTA's much shorter limitations period, because § 56.29's contrary scheme and precedent broadly establish the availability of proceedings supplementary for the life of the judgment, when a valid, unsatisfied execution exists.<sup>v</sup>

As a result, the court held that the statute of limitations was effectively 20 years (the entire length of the judgment), and that the four year statute of limitations under the UFTA did not apply.

## COMMENT:

The court's ruling may at first seem suspect, but the court relied on a number of precedents in reaching this result.

Under § 56.29, a judgment creditor may (1) pursue assets held by the debtor;<sup>vi</sup> (2) pursue assets held by another, so long as the property is not exempt from execution;<sup>vii</sup> or (3) void any transfer to a spouse or third party that was made for purposes of delaying, hindering, or defrauding a creditor.<sup>viii</sup>

Since § 56.29 is a procedural statute, claims brought under this section must be analyzed according to other substantive law. The court referred to case law and statutory interpretation of the UFTA in analyzing fraudulent transfer claims brought under § 56.29, since § 56.29 borrows substantively from the UFTA.<sup>ix</sup> One would think that this would lead to the conclusion that the statute of limitations barring claims not brought within four years would also apply to a proceeding supplementary. However, the court disagreed.

According to the court, to determine if a proceeding supplementary is timely initiated, the correct substantive body of law to apply is under Chapter 55.<sup>x</sup> Under § 56.29(1) any person holding an unsatisfied judgment under chapter 55 is "entitled" to proceedings supplementary.<sup>xi</sup> Therefore, the statute of limitations for a judgment applies, and not that statute of limitations under the UFTA.

The court relied upon *Young*, which "linked the timeliness of initiating a proceeding supplementary to 'the period of efficacy of an execution' concluding

that proceeding supplementary could be brought for the twenty year life of the judgment.”<sup>xii</sup>

The court also relied upon *Zureikat*, a case in which a debtor fraudulently used funds to improve the debtor’s homestead.<sup>xiii</sup> In granting an equitable lien upon the homestead after the passage of six years, the court stated that “even the passage of over six years will not prevent, by operation of statute of limitations, a judgment creditor from initiating proceedings supplementary.”<sup>xiv</sup>

Another decision the court relied on involved fraudulent conveyances to a family member of the debtor’s family.<sup>xv</sup> In this decision close to 12 years had passed since the original judgment had been entered. The court again rejected statute of limitation arguments from the UFTA, and instead applied the life of the judgment as the applicable limitation.<sup>xvi</sup>

However, this does not mean that the statute of limitation under the UFTA will never apply. The Middle District of Florida’s Bankruptcy court holding of *In re Hill* addresses this and states that “while proceedings supplementary in general may be commenced during the twenty year life of a judgment, § 56.29 does not extend or create new the statute of limitations for a fraudulent transfer to twenty years.”<sup>xvii</sup> Therefore, unless a judgment has been granted, § 56.29 cannot be used to undo a fraudulent transfer after the four year statute of limitations.

The Bankruptcy Solution--- Assuming that the fraudulent transfer statute does not prevent a proceedings supplementary in Florida's courts, debtors should still be able to file bankruptcy to prevent creditors from using this tool, and the four year fraudulent transfer statute will apply in bankruptcy. Quite likely legal counsel for the debtor in this case did not realize that a bankruptcy would have prevented this result, assuming that the debtor has not committed a fraudulent transfer of any kind within the one year period before a bankruptcy is filed, so as to not lose all rights to a bankruptcy discharge. Specifically, perhaps the debtors should have considered seeking relief in a Chapter 7 bankruptcy case.

In that event, once the bankruptcy case was filed, the right to recover the transfers would be property of the bankruptcy estate, not the judgment creditor.<sup>xviii</sup> The automatic stay would then immediately stop the proceedings supplementary.<sup>xix</sup> At that point, only the bankruptcy trustee has standing to pursue the transfers.<sup>xx</sup>

The trustee would have different limitations issues than the judgment creditor.<sup>xxi</sup> One decision has held that a trustee cannot use proceedings supplementary.<sup>xxii</sup>

Therefore, a bankruptcy discharge would have taken care of the judgment.<sup>xxiii</sup>

To be sure, there are many other issues to consider, but taking the bankruptcy route before the ruling on the proceedings supplementary needs to be considered and kept open as an option for debtors who have this issue on the horizon.

## **Conclusion**

The crux of the court's decision seems to rest on the fact that a proceeding supplementary is not an independent cause of action, rather it is "collateral to the main action at law," and serves as a means to enforce a judgment already existing.<sup>xxiv</sup> Therefore, as long as the judgment action is timely brought and entered against the debtor, statute of limitation arguments from other substantive bodies of law cannot be used to bar an initiation of a proceedings supplementary.

For example, if a cause of action for a judgment is brought four years and a day after the fraudulent transfer, a proceedings supplementary cannot be used to undue the fraudulent transfer. Alternatively, if a cause of action for a judgment is brought 3 years and 364 days after the fraudulent transfer, a proceedings supplementary can be used to undue the fraudulent transfer for the life of the judgment or 20 years.

In any event, debtors having this situation should be poised to file a bankruptcy action in order to avoid application of this inroad.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

*Alan Gassman*

*Brandon Ketron*

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## CITES:

*Biel Rio v. Barefoot Cottages Development Co., LLC* 2014 WL 7010427; *Mejia v. Ruiz*, 985 So. 2d 1109, 1112-13 (Fla. Dist. Ct. App. 2008); *Nationsbank, N.A. v. Coastal Utilities, Inc.*, 814 So. 2d 1227, 1229 (Fla. Dist. Ct. App. 2002); ); *Morton v. Cord Realty, Inc.*, 677 So.2d 1322, 1324 (Fla. 4th DCA 1996); *Young v. McKenzie*, 46 So. 2d 184, 185 (Fla. 1950); *Zureikat v. Shaibani*, 944 So.2d 1019, 1022–23 (Fla. 5th DCA 2006); Section 56.29, Florida Statutes; Section 726.110, Florida Statutes; Section § 55.081, Florida Statutes.

## CITATIONS:

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<sup>i</sup> 2014 WL 7010427.

<sup>ii</sup> *Biel Reo, LLC* at 2 n. 5

<sup>iii</sup> Section 56.29, Florida Statutes (2012), provides in relevant part that:

- (1) When any person or entity holds an unsatisfied judgment or judgment lien obtained under chapter 55, the judgment holder or judgment lienholder may file a motion and an affidavit so stating, identifying, if applicable, the issuing court, the case number, and the unsatisfied amount of the judgment or judgment lien, including accrued costs and interest, and stating that the execution is valid and outstanding, and thereupon the judgment holder or judgment lienholder is entitled to these proceedings supplementary to execution. \* \* \*
- (5) The judge may order any property of the judgment debtor, not exempt from execution, in the hands of any person or due to the judgment debtor to be applied toward the satisfaction of the judgment debt.

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- (6)(a) When, within 1 year before the service of process on him or her, defendant has had title to, or paid the purchase price of, any personal property to which the defendant's spouse, any relative, or any person on confidential terms with defendant claims title and right of possession at the time of examination, the defendant has the burden of proof to establish that such transfer or gift from him or her was not made to delay, hinder, or defraud creditors.
- (b) When any gift, transfer, assignment or other conveyance of personal property has been made or contrived by defendant to delay, hinder or defraud creditors, the court shall order the gift, transfer, assignment or other conveyance to be void and direct the sheriff to take the property to satisfy the execution. This does not authorize seizure of property exempted from levy and sale under execution or property which has passed to a bona fide purchaser for value and without notice. Any person aggrieved by the levy may proceed under ss. 56.16–56.20.

<sup>iv</sup> Fla Stat § 726.110 states that “A cause of action brought with respect to a fraudulent transfer or obligation is extinguished unless the cause of action is brought within 4 years after the transfer was made or the obligation was incurred, or within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant.”

<sup>v</sup> *Biel Reo, LLC* at 4.

<sup>vi</sup> § 56.29(1)-(2).

<sup>vii</sup> § 56.29(5).

<sup>viii</sup> § 56.29(6).

<sup>ix</sup> *Mejia v. Ruiz*, 985 So. 2d 1109, 1112-13 (Fla. Dist. Ct. App. 2008); *Nationsbank, N.A. v. Coastal Utilities, Inc.*, 814 So. 2d 1227, 1229 (Fla. Dist. Ct. App. 2002); ); *Morton v. Cord Realty, Inc.*, 677 So.2d 1322, 1324 (Fla. 4th DCA 1996).

<sup>x</sup> Fla. Stat § 55.081 - “ no judgment, order, or decree of any court shall be a lien upon real or personal property within the state after the expiration of 20 years from the date of the entry of such judgment, order, or decree.

<sup>xi</sup> *Biel Reo, LLC* at 3.

<sup>xii</sup> *Young v. McKenzie*, 46 So. 2d 184, 185 (Fla. 1950).

<sup>xiii</sup> *Zureikat v. Shaibani*, 944 So.2d 1019, 1022–23 (Fla. 5th DCA 2006).

<sup>xiv</sup> *Id.* at 1023.

<sup>xv</sup> *Ferre v. City Nat’l Bank of Miami*, 548 So.2d 701 (Fla. 3d DCA 1989)

<sup>xvi</sup> *Id.* at 703-704.

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<sup>xvii</sup> 332 B.R. 835, 843 (Bankr. M.D. Fla. 2005) *citing*, *Real Estate Corp of Florida, N.V. v. Dawn Developers, Inc.* 644 So.2d 145.

<sup>xviii</sup> *In re Moore*, 608 F.3d 253, 261 (5th Cir. 2010) (fraudulent transfer claims "become estate property once bankruptcy is under way by virtue of the trustee's successor rights under § 544(b)"); *In re C.D. Jones & Co., Inc.*, 482 B.R. 449 (Bankr. N.D.Fla. 2012); *In re Zwirn*, 362 B.R. 536 (Bankr. S.D.Fla. 2007).

<sup>xix</sup> 11 U.S.C. §362(a)(1), (2), and (3).

<sup>xx</sup> *In re Pearlman*, 472 B.R. 115, 121-122 (Bankr. M.D.Fla. 2012) ("Indeed, only the trustee can bring federal and state law fraudulent transfer actions to recover property for the bankrupt estate.")

<sup>xxi</sup> 11 U.S.C. §546(a).

<sup>xxii</sup> *Hill*, at 843 ("the Trustee cannot use Florida Statute § 56.29 as an alternative basis to set aside the transfers").

<sup>xxiii</sup> 11 U.S.C. §524(a)(1) & (2) ("[a] discharge in a case under this title ... voids any judgment at any time obtained ... [and] operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt..").

<sup>xxiv</sup> *Biel Rio, LLC* at 1 *citing* *Young* at 185.