

[Cite as *UAP-Columbus JV326132 v. Young*, 2010-Ohio-485.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

UAP-Columbus JV326132,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-646
Michael J. Young,	:	(C.P.C. No. 07CVE-12-17339)
Defendant-Appellant,	:	(REGULAR CALENDAR)
The Huntington National Bank et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 16, 2010

Taft Stettinius & Hollister LLP, and *Benjamin J. Parsons*, for plaintiff-appellee.

Ronald B. Noga, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Michael J. Young, appeals the Franklin County Court of Common Pleas' entry of summary judgment in favor of plaintiff-appellee, UAP-Columbus JV326132 ("UAP"), and the trial court's denial of Young's own motion for

summary judgment on UAP's foreclosure complaint. For the following reasons, we reverse the trial court's judgment.

{¶2} In *UAP-Columbus JV326132 v. O Valeria Stores, Inc.* (July 2, 2007), Franklin C.P. No. 06CVH-03-2850, the Franklin County Court of Common Pleas entered judgment in favor of UAP and against Young in the amount of \$168,147.19, together with interest from March 17, 2007, as a result of Young's liability as a personal guarantor under a commercial lease. Pursuant to R.C. 2329.02, a certificate of judgment was filed on October 16, 2007, which imposed a lien upon all real property owned by Young in Franklin County. See *UAP-Columbus JV326132 v. Young* (Oct. 16, 2007), Franklin C.P. No. 07JG-10-27075.

{¶3} On December 20, 2007, UAP initiated this foreclosure action to collect on its judgment. UAP alleged that Young owned real property located at 5550 Wood Ridge Drive (the "Wood Ridge property") in Columbus, upon which UAP had a valid and subsisting lien as a result of its unpaid judgment. UAP further alleged that it was entitled to have its lien foreclosed, to have the Wood Ridge property sold at public auction, and to receive the net proceeds to satisfy its judgment.

{¶4} In his answer, Young asserted that UAP's lien was not enforceable against the Wood Ridge property because that property was held in trust, with Young serving only as trustee. On September 25, 2008, Young filed a motion for summary judgment, similarly arguing that UAP's complaint failed to state a claim upon which relief could be granted because, when UAP obtained its judgment, the Wood Ridge property was titled, not in his name individually, but in the name of "Michael J. Young Trustee of the Michael

J. Young Trust dated January 24, 2006." Young thus argued that his individual debts could not be satisfied from the trust property.

{¶5} Young attached to his motion for summary judgment a copy of a Trust Agreement, dated January 24, 2006, which provides as follows:

This Trust Agreement, subscribed by Michael J. Young (hereinafter "Trustee"), hereby sets up a revocable trust for Justin M. Young (hereinafter "Beneficiary"), son of Michael J. Young, for the property known as 5550 Wood Ridge Drive, Columbus, Ohio (hereinafter "Real Estate"), more fully described in the Legal Description attached hereto as "Exhibit A" and made a part hereof.

Upon the death of Trustee, the title to said Real Estate shall vest in Justin M. Young, free and clear of all other claims except for real estate taxes, mortgages and other liens of record at the time of death of Trustee. Until such event of death of Trustee, possession and operation of said Real Estate shall remain fully under the control of Trustee, including the right to mortgage, pledge and otherwise assign said Real Estate as security to third parties during the period of this trust.

During the time of existence of this trust, title to said Real Estate shall be held in the name of Michael J. Young, Trustee.

Also attached to Young's motion was a quit claim deed, dated May 9, 2006, transferring the Wood Ridge property from "MICHAEL J. YOUNG" to "MICHAEL J. YOUNG, TRUSTEE of the Michael J. Young Trust dated January 24, 2006." Young admits that the Wood Ridge property was titled in his name, individually, for several days in May 2006, for purposes of refinancing.

{¶6} UAP opposed Young's motion for summary judgment, arguing that the Trust Agreement did not establish a valid trust because Young was the sole trustee and

sole beneficiary of the purported trust. Alternatively, UAP argued that the record demonstrated genuine issues of material fact as to whether Young's conveyance of the Wood Ridge property to the trust constituted a fraudulent transfer under Ohio law.

{¶7} The trial court denied Young's motion for summary judgment. The court concluded that no trust was created to shield the Wood Ridge property from Young's creditors because, pursuant to the Trust Agreement, Young was the sole trustee and sole beneficiary during the existence of the purported trust. The trial court also found that, even if a trust had been created, summary judgment was not warranted because genuine issues of material fact remained with respect to whether the conveyance of the Wood Ridge property to the trust amounted to a fraudulent transfer.

{¶8} With leave of court, UAP subsequently filed its own motion for summary judgment, arguing that it was entitled to judgment as a matter of law based on the trial court's finding that Young failed to create a valid trust. Young opposed UAP's motion and essentially asked the court to reconsider issues decided in the court's denial of his motion for summary judgment. Specifically, Young argued that the Trust Agreement named Justin Young ("Justin") as beneficiary and that the trial court, thus, erroneously concluded that Young was the sole trust beneficiary. Young also disputed the trial court's finding of a genuine issue of material fact regarding the allegedly fraudulent nature of the conveyance of the Wood Ridge property and argued that UAP waived that issue by failing to plead a claim of fraudulent transfer in its complaint.

{¶9} On June 4, 2009, the trial court granted UAP's motion for summary judgment and issued an Order, Judgment Entry and Foreclosure Decree.¹ The trial court again concluded that the purported trust failed, and, in light of that conclusion, noted that any further discussion of fraudulent transfer was moot.

{¶10} In his timely appeal, Young asserts the following assignments of error:

Assignment of Error No. 1

THE TRIAL COURT ERRED IN NOT GRANTING SUMMARY JUDGMENT TO APPELLANT MICHAEL J. YOUNG AS THE PROPERTY WHICH WAS THE SUBJECT OF THE FORECLOSURE COMPLAINT WAS THE RES OF A VALID TRUST AND NOT SUBJECT TO A JUDGMENT LIEN AGAINST THE TRUSTEE AS AN INDIVIDUAL.

Assignment of Error No. 2

THE TRIAL COURT ERRED IN GRANTING APPELLEE SUMMARY JUDGMENT BASED ON THE ERRONEOUS CONCLUSION OF LAW THAT A NAMED BENEFICIARY OF A TRUST IS NOT A BENEFICIARY IF THE DISTRIBUTION TO THE BENEFICIARY DOES NOT OCCUR UNTIL THE TRUST TERMINATES.

Assignment of Error No. 3

THE APPELLEE'S FAILURE TO JOIN THE TRUST OR THE BENEFICIARY AS A PARTY WILL PREVENT THE TRANSFER OF CLEAR TITLE TO THE SUBJECT PROPERTY AND WILL BE A FRAUD ON ANY PURCHASER AT PUBLIC SALE.

{¶11} We review a summary judgment de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.*

¹ The trial court issued an Amended Order, Judgment Entry and Foreclosure Decree, adding findings with respect to a late-intervening defendant, on June 10, 2009.

(1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711. We must affirm the trial court's judgment if any grounds the movant raised in the trial court support it. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶12} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only under the following circumstances: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶13} We begin with Young's second assignment of error, by which he contends that the trial court erred by granting summary judgment in favor of UAP. The parties' arguments under this assignment of error bring us to the lynchpin of this appeal, i.e., whether the Trust Agreement created a valid trust. UAP has argued that no trust was created because Young was the sole trustee and the sole beneficiary during the existence of the purported trust, whereas Young argues that he was not the sole beneficiary because the Trust Agreement expressly designated Justin as the trust beneficiary. While the trial court agreed with UAP, Young argues that the trial court's conclusion was based on the erroneous premise that Justin was not a trust beneficiary because the Wood Ridge property is not to be distributed to him until the trust terminates upon Young's death.

{¶14} A trust fundamentally involves a separation of the legal and equitable or beneficial interests in property. *In re Estate of Bicknell* (1958), 108 Ohio App. 51, 54. "If the legal title to the trust property and the beneficial interest become united in one person who is not under an incapacity, the trust fails." *Id.* at 55. It is well-established in Ohio law that a trustee may not be the sole trustee and the sole beneficiary of a trust. See *Hill v. Irons* (1953), 160 Ohio St. 21, 27, citing 54 American Jurisprudence 117, Section 137. This principle is codified in R.C. 5804.02(A)(5), which lists among the requirements of a trust that "[t]he same person is not the sole trustee and sole beneficiary." Where the sole trustee and the sole beneficiary are one and the same, "the result is a merger of the legal and the equitable title, defeating the trust and ordinarily conferring a fee simple title upon the person holding the legal title and

beneficial interest.' " *Hill* at 27, quoting 54 American Jurisprudence 46, 47, Section 35. For the doctrine of merger to apply, however, "the equitable interest of no other person than the holder of the legal title shall intervene, and * * * the legal and equitable estates [must] be coextensive and commensurate, the legal estate being at least as extensive as the equitable." *Estate of Bicknell* at 54.

{¶15} UAP argued that the trust failed because Young was not only the sole trustee, but also the sole beneficiary in as much as he retained the complete beneficial enjoyment of the Wood Ridge property during his life (and thus during the existence of the trust). The trial court held that, despite the Trust Agreement's designation of Justin as a beneficiary, "the actual beneficial enjoyment and/or interest in the trust property and the legal title of that property are in the same person: Michael J. Young." The trial court concluded that, because "Young is both the designated trustee and also the actual (if not designated) beneficiary of the trust during the term of the trust – and he thereby possesses both legal and beneficial interests with respect to the trust property – * * * the Trust Agreement does not actually create a trust that can operate to shield the at-issue property from this foreclosure action."

{¶16} Upon review of the Trust Agreement and the applicable law, we conclude that the trial court erred in its finding that Young was the sole beneficiary and that the legal and equitable title to the trust property merged in Young. In effect, the trial court concluded that Justin is not a beneficiary of the purported trust, despite contrary language in the Trust Agreement, because Young, the settlor, retains the entire present beneficial enjoyment of the trust property during his lifetime and Justin is not entitled to

distribution of the trust property until the trust terminates upon Young's death. Like UAP's argument, the trial court's conclusion is based on the erroneous premise that Justin is not a trust beneficiary.

{¶17} The Supreme Court of Ohio addressed an interest similar to that granted Justin under the Trust Agreement here in *First Natl. Bank of Cincinnati v. Tenney* (1956), 165 Ohio St. 513. In that case, a trust agreement provided that the settlor, who retained the power to amend, revoke or terminate the trust during her lifetime, was to be paid all of the net income from the trust property during her lifetime and that, upon the settlor's death, all trust property and accumulated income be paid over to her sister. At paragraph two of the syllabus, the court held that "[a]n *inter vivos* trust which reserves to the trustor the income for life and an absolute power to revoke during his lifetime, with a remainder over at his death, creates in the remainderman a vested interest subject to defeasance by the exercise of the power to revoke." Although no one other than the settlor was entitled to share in the trust property or income until the settlor's death, the court treated the trust agreement as creating a valid *inter vivos* trust. The court noted that, unlike a will, which speaks from the date of the testator's death, "a trust speaks from the date of its creation." *Id.* at 518. Thus, the court concluded that the beneficiary's interest vested upon creation of the trust. *Id.* at 518-19. See also *Adams v. Fleck* (1961), 171 Ohio St. 451, 456.

{¶18} Like the Trust Agreement here, the trust agreement in *Tenney* provided that the settlor retained the beneficial enjoyment of the trust property during her lifetime and provided for the complete transfer of the trust property to an identified beneficiary

upon her death. Here, while it is undisputed that legal title to the Wood Ridge property would not vest in Justin until Young's death and that, until that time, Young retained the beneficial enjoyment of the Wood Ridge property, the Trust Agreement created in Justin a vested interest in the property, subject to defeasance by Young should he exercise the reserved right to revoke the trust. Accordingly, Justin is a beneficiary under the terms of the Trust Agreement. See R.C. 5801.01(C) (defining "beneficiary," in part, as "a person that has a present or future beneficial interest in a trust, whether vested or contingent").

{¶19} Unlike in *Tenney*, Young not only reserved the right to revoke the trust and to retain the beneficial enjoyment of the trust property for his life, but also serves as the sole trustee. That fact, however, does not compel a different result. R.C. 5804.02(E) provides, in part, that "[a] trust is not invalid because * * * the creator of the trust, is * * * the sole trustee and the sole holder of the present beneficial enjoyment of the corpus of the trust, provided that one or more other persons hold a vested, contingent, or expectant interest relative to the enjoyment of the corpus of the trust upon the cessation of the present beneficial enjoyment." Because Justin has a vested interest in the Wood Ridge property, to be enjoyed upon the cessation of Young's present beneficial interest, i.e., when Young dies, the purported trust is not invalid for lack of a beneficiary separate from Young.

{¶20} The official comment to R.C. 5804.02(A)(5) provides specific guidance regarding the present situation and cautions against a finding of merger, as follows:

* * * The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate.
* * *

UAP argues that the example in the official comment requires a finding of merger here, even though, under the Trust Agreement's terms, the Wood Ridge property is to be transferred to Justin upon Young's death rather than to Young's probate estate. UAP's argument directly contravenes the comment, which notes that merger does not apply simply because the settlor is the sole trustee and sole life beneficiary. Despite UAP's contrary assertions, the doctrine of merger applies in the stated example precisely because of the payment of the remainder to the settlor's estate, rather than to an identified beneficiary, upon the settlor's death. Where the settlor is the sole trustee, sole life beneficiary, and where the remainder is payable to the settlor's probate estate, "all beneficial interests, both life interests and remainders, are vested in the same person." *Id.* Here, by contrast, Justin has a vested interest in the Wood Ridge property, to which he will obtain legal title upon Young's death, should Young not exercise his right to revoke the Trust Agreement. Therefore, the life interests and remainder are not vested in the same person, and the doctrine of merger does not invalidate the trust. Accordingly, we conclude that the trial court erred by granting summary judgment in

favor of UAP based on the erroneous conclusion that Young was the sole beneficiary, as well as the sole trustee, of the purported trust.

{¶21} We also reject UAP's argument that, to the extent a trust was created, it was a testamentary trust, subject to the requirements of a will. R.C. 5804.02(E) states that a trust, with the settlor as the sole trustee and sole holder of a present beneficial enjoyment, but with at least one person having an interest relative to the enjoyment of the trust property upon the cessation of the present beneficial enjoyment, "is not a testamentary trust that is required to comply with [R.C. Chapter 2107] in order for its corpus to be legally distributed."

{¶22} If a property owner intends and takes steps to create a trust by declaration, its validity as an inter vivos trust is not affected by the fact that the settlor serves as sole trustee, that the interests of beneficiaries other than the settlor take effect in possession or enjoyment only after the settlor's death, or that those interests are contingent or subject to conditions subsequent, including the exercise of a power of revocation, withdrawal or amendment reserved to the settlor. Restatement (Third) of Trusts (2003), Creation of Trusts, Section 25(1), Comment *b*. Illustration 3 to that comment states as follows:

By an unattested instrument, O declares herself trustee of certain of her property, to hold and manage it in her discretion and to pay the income to herself or to others, or to accumulate income, and on her death to distribute the property to her issue. She reserves the power to revoke the trust and the power to amend its terms. O dies without having exercised either of these powers. O's issue are entitled to the trust property in accordance with the terms of the declaration of trust. * * *

Restatement (Third) of Trusts (2003), Creation of Trusts, Section 17(1), Comment a similarly states that a trust is not testamentary merely because the settlor, in declaring the trust, reserves rights such as the right to enjoyment or possession of the trust property, the right to revoke or amend the trust, or the right to serve as sole trustee. "In such a trust, it does not matter that all the beneficial interests of others are future interests, even 'contingent' interests throughout or beyond the settlor's lifetime, and even though those interests are subject to control by amendment or revocation by the settlor. Nor does it matter that the settlor has deliberately used a revocable living trust as a substitute for a will and as a means of avoiding the estate administration procedures and formal safeguards normally associated with wills." *Id.*

{¶23} For these reasons, we sustain Young's second assignment of error. We do not, however, address whether there may be other bases, not argued in the trial court or on appeal, to support a judgment for UAP. In particular, neither party addressed the applicability of R.C. 5805.06(A)(1), which states, in part, that, "[w]hether or not the terms of a trust contain a spendthrift provision * * * [d]uring the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors."

{¶24} We now turn to Young's first assignment of error. While Young's second assignment of error revolved around the trial court's entry of summary judgment in favor of UAP, his first assignment of error asks this court to further conclude that the trial court erred by denying Young's own motion for summary judgment. Young contends that he was entitled to summary judgment on UAP's foreclosure complaint because the

Wood Ridge property was the subject of a valid trust and was, as a matter of law, not subject to UAP's judgment lien. Having already concluded that the trust did not fail based on the doctrine of merger, this assignment of error requires us to consider UAP's alternative argument in opposition to Young's motion for summary judgment, that genuine issues of material fact exist as to whether Young's transfer of the Wood Ridge property to the trust constituted a fraudulent transfer. The trial court concluded that genuine issues of material fact regarding fraudulent transfer precluded summary judgment in favor of Young. Upon review, we discern no error in that conclusion.

{¶25} The Ohio Uniform Fraudulent Transfer Act permits a creditor to challenge a debtor's transfer of property in specified circumstances and to avoid the transfer to the extent necessary to satisfy the creditor's claim.² See R.C. 1336.07(A)(1). "A transfer made * * * by a debtor is fraudulent as to a creditor whose claim arose before the transfer * * * if the debtor made the transfer * * * without receiving a reasonably equivalent value in exchange for the transfer * * * and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer." R.C. 1336.05(A). Further, regardless of whether the creditor's claim arose before or after the transfer, the transfer is fraudulent if the debtor made the transfer "[w]ith actual intent to hinder, delay, or defraud" the creditor. R.C. 1336.04(A)(1). R.C. 1336.04(B) sets forth a non-exhaustive list of 11 relevant factors to consider in determining the existence of actual intent to hinder, delay or defraud a creditor. Those factors include whether the transfer

² For purposes of R.C. Chapter 1336, a "claim" is defined 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." R.C. 1336.01(C).

was to an insider, whether the debtor retained possession or control of the transferred property after the transfer, whether the debtor received reasonably equivalent consideration for the transfer, whether the debtor had been sued or threatened with suit before the transfer, and whether the transfer occurred shortly before or shortly after a substantial debt was incurred.

{¶26} While Young responded to UAP's fraudulent transfer arguments in his reply memorandum in support of his motion for summary judgment, he did not substantively address those arguments. Instead, he argued that UAP's failure to plead a claim of fraud or fraudulent transfer in its complaint precluded the trial court from considering those issues.

{¶27} The Supreme Court of Ohio expressly dismissed the argument raised here by Young in *Wagner v. Galipo* (1990), 50 Ohio St.3d 194. In *Wagner*, the plaintiffs filed a foreclosure action to have property sold to satisfy a defendant's debt, which had been reduced to judgment. The defendants, the debtor and his wife, moved for summary judgment, arguing that the defendant-debtor had no interest in the subject property, based on a deed purporting to create an "estate by the entirety" in the defendants. The trial court granted summary judgment in favor of the plaintiffs, but the court of appeals reversed and remanded for a factual determination of whether the estate by the entirety was validly created. On appeal to the Supreme Court of Ohio, the defendants argued that they were entitled to summary judgment on the foreclosure complaint, in part because the plaintiffs' complaint contained no claim that the estate by the entirety was created by a fraudulent transfer. The Supreme Court explained that the

defendants' argument "confuses the *issue* of a fraudulent conveyance with a *claim* of common-law fraud." (Emphasis sic.) *Wagner* at 197. The court held that, "[i]n a foreclosure action where the defendant claims to have no interest in the subject property because it has been conveyed to another and the issue of fraudulent conveyance is raised on the facts of the case, such issue may be adjudicated by the court regardless of whether it is pleaded in the complaint." *Id.* at paragraph two of the syllabus. Accordingly, the absence of a claim for fraudulent transfer in UAP's complaint did not preclude consideration of that issue, where Young denied an ownership interest in the Wood Ridge property and the issue of fraudulent transfer is raised by the facts of the case.

{¶28} Based on the evidence in the record when the trial court denied Young's motion for summary judgment, the court did not err by finding genuine issues of material fact as to whether the transfer of the Wood Ridge property to the trust constituted a fraudulent transfer. Specifically, genuine issues of material fact remained as to whether Young transferred the Wood Ridge property with actual intent to defraud, hinder or delay UAP. The statutory elements are straight-forward. "[P]ursuant to R.C. 1336.04(A)(1), a creditor must show: (1) a conveyance or incurring of a debt; (2) made with actual intent to defraud, hinder, or delay; (3) present or future creditors." *Atlantic Veneer Corp. v. Robbins*, 4th Dist. No. 01CA678, 2002-Ohio-5363, ¶13. The only deed with respect to the Wood Ridge property before the court when it ruled on Young's motion for summary judgment was a quit claim deed, dated May 9, 2006, demonstrating a transfer of the Wood Ridge Property from Young, individually, to "MICHAEL J.

YOUNG, TRUSTEE of the Michael J. Young Trust dated January 24, 2006." Accordingly, the record contained evidence of a conveyance from Young. Moreover, it is undisputed that UAP is a creditor of Young. Thus, there was evidence before the court going to the first and third requirements for demonstrating a fraudulent conveyance.

{¶29} With respect to the second statutory element, the existence of fraudulent intent is to be determined based on the facts and circumstances of each case. *Stein v. Brown* (1985), 18 Ohio St.3d 305, 308. Ohio has recognized that proof of actual intent to defraud, hinder or delay will often be difficult to procure. *Id.* As a result, courts look to inferences from the circumstances surrounding the transaction and the relationship of the parties. *Id.* at 308-09. A creditor may establish a debtor's fraudulent intent if the circumstances demonstrate various "badges of fraud," now statutorily defined in R.C. 1336.04(B). See *Bank One, Columbus, N.A. v. Plaza East, Inc.* (Nov. 10, 1997), 10th Dist. No. 97APE02-184. A party need not demonstrate all of the statutorily defined badges of fraud; as few as three badges have been held to constitute clear and convincing evidence of actual fraudulent intent. *Id.*

{¶30} Here, evidence going to at least three badges of fraud demonstrates a genuine issue of material fact as to whether Young transferred the Wood Ridge property with actual intent to defraud, hinder or delay UAP. First, the record contains evidence that Young transferred the Wood Ridge property "to an insider" and that Young retained possession and control of the Wood Ridge property after the transfer. See R.C. 1336.04(B)(1) and (2). "An insider includes a family or retirement trust when the

transferors retain control over the trust and its property, act as trustees, or receive the benefits of the trust." *Blood v. Nofzinger*, 162 Ohio App.3d 545, 2005-Ohio-3859, ¶54, citing *Atlantic Veneer Corp.* at ¶44. See also *McKinley Fed. S. & L. v. Pizzuro Ents., Inc.* (1990), 65 Ohio App.3d 791, 797 (intra-familial conveyances in this context are suspect and subject to strict scrutiny). Indeed, the *Blood* court noted, at ¶54, that "[t]he creation of such trusts is a 'popular' method of effecting fraudulent transfers, and transfers to such trusts are 'fairly easy' to set aside."

{¶31} The timing of the creation of the trust and the transfer of the Wood Ridge property are also relevant to the question of whether Young acted with an actual intent to defraud, hinder or delay UAP. The evidence before the trial court established that UAP's counsel mailed Young a letter dated January 6, 2006, identifying various breaches of the commercial lease that Young personally guaranteed and stating that UAP would pursue collection against Young's personal assets were the breaches not cured. Two and a half weeks later, Young executed the Trust Agreement. Additionally, UAP filed the underlying lawsuit against Young on March 1, 2006, two months before the May 9, 2006 quit claim deed. From that evidence, reasonable minds could conclude that Young transferred the Wood Ridge property after being threatened with suit by UAP and shortly before incurring a substantial debt to UAP, two additional badges of fraud. See R.C. 1336.04(B)(4) and (10).

{¶32} Young disputes the evidence regarding the timing of the various actions and contends that the trial court based its finding of genuine issues of material fact on a misunderstanding of the timeline in this case. Specifically, Young maintains that the

Wood Ridge property had been held in trust since September 21, 2005, when it was transferred from Home Investors, Inc., a purportedly unrelated entity, to Michael J. Young, Trustee, and that the property was only in Young's individual name prior to the May 9, 2006 quit claim deed for purposes of refinancing. Although Young stated in his affidavit in support of summary judgment that the Wood Ridge property had been "in Trust" since September 21, 2005, the Trust Agreement itself was not executed until January 24, 2006, and the record before the trial court when it denied Young's motion for summary judgment contained no deed establishing the titled owner of the Wood Ridge property at any time prior to May 9, 2006. Our review of summary judgment is limited solely to the evidence that was before the trial court at the time of its decision. See *Charleston v. Vernay Laboratories, Inc.* (June 22, 1989), 2d Dist. No. 88-CA-104; *Chinnock v. Kelker* (June 2, 1994), 8th Dist. No. 64930. Based on the state of the evidence when the court decided Young's motion for summary judgment, the court did not err in denying that motion.

{¶33} In support of his argument regarding the factual timeline, Young relies on evidence filed after the trial court denied his motion for summary judgment. The additional evidence, attached to Young's memorandum in opposition to UAP's motion for summary judgment, includes the following: (1) a quit claim deed, recorded September 22, 2005, transferring the Wood Ridge property from "HOME INVESTORS, INC., TRUSTEE" to "MICHAEL J. YOUNG, TRUSTEE"; and (2) a deed, recorded May 5, 2006, transferring the Wood Ridge property from "Michael J. Young, Trustee by the power conferred by the Michael J. Young Trust, Dated January 24, 2006" to

"Michael J. Young." Even had the trial court had the opportunity to consider that evidence before denying Young's motion, the additional evidence does not establish Young's entitlement to judgment as a matter of law, but, in fact, highlights questions of fact regarding the ownership of the Wood Ridge property and its transfer to the trust. Indeed, it appears to be Young's contention that Home Investors, Inc. transferred title in September 2005 to a trust that did not yet exist and/or that Young created a trust, through the January 2006 Trust Agreement, over property he never owned. While the trial court has not yet considered or decided these issues, at best, questions of fact remain as to whether the present title to the Wood Ridge property, in the name of Young, as trustee, was procured as the result of a fraudulent transfer. Accordingly, we overrule Young's first assignment of error.

{¶34} Finally, by his third assignment of error, Young maintains that UAP's failure to join Young, in his capacity as trustee, or Justin, as the trust beneficiary, in this action will prevent the transfer of clear title to the Wood Ridge property. Because the trial court concluded that the Trust Agreement failed to create a trust, it did not address Young's arguments regarding the necessity of joining either Justin or Young, in his capacity as trustee, as parties to this action.

{¶35} Young admits in his appellate brief that, even were we to conclude that necessary parties were not joined in this action, the absence of those parties would not be sufficient to warrant dismissal of UAP's complaint. Rather, Young argues only that the absence of necessary parties would preclude summary judgment in favor of UAP. Because we have already concluded that the trial court erred by granting UAP's motion

for summary judgment based on the doctrine of merger, we decline to engage in further discussion of the issues raised in Young's third assignment of error, when the trial court has not addressed those issues in the first instance. On remand, the trial court will have the opportunity to decide whether Justin and Young, as trustee, are necessary parties to this action and to take any appropriate action to join those parties pursuant to Civ.R. 19. Young's third assignment of error is rendered moot.

{¶36} In conclusion, we overrule Young's first assignment of error, sustain Young's second assignment of error, and render moot Young's third assignment of error. Accordingly, we reverse the judgment of the Franklin County Court of Common Pleas and remand this matter for further proceedings consistent with this decision and the law.

Judgment reversed and cause remanded.

BROWN and CONNOR, JJ., concur.
