

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D23-0152
L.T. 2018-000931-CA-01

JOHN W. SCHMITZ, *et al.*,

Appellants,

v.

DOROTHY JOAN SCHMITZ, *etc., et al.*,

Appellees.

MOTION TO CONSOLIDATE APPEALS

Pursuant to AO3D13-06 and Fla. R. App. P. 9.300, Appellees, NANCY J. COOK, as Personal Representative for the Estate of Dorothy Joan Schmitz and Successor Trustee of the Thomas Schmitz Family Trust, CHERYL SCHMITZ, individually and as Co-Trustee of the Michael D. Schmitz GST Non-Exempt Marital Trust Dated 1/18/2000 and SCHMITZ DEVELOPMENT COMPANY, provide

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notice of a related case¹ and move to consolidate this appeal, No. 3D23-152, filed January 25, 2023, with the presently pending appeal 3D21-1083 filed May 6, 2021. In support, the Appellees state:

1. Appeal 3D21-1083 is an appeal from an Amended Final Judgment entered following a trial and post-trial hearings. No bond was posted; no stay requested or entered. During the appeal of 3D21-1083, the trial court conducted proceedings in aid of execution relating to several transfers made by the judgment debtors shortly before and after judgment was entered.

2. On December 28, 2022, the trial court entered an order on the proceedings supplementary. That Order is the subject of the 3D23-152 appeal. The Order states “the evidence submitted during the evidentiary hearings conducted by the Undersigned and considering the findings of fact (made by the predecessor judge) reveals duplicitous conduct rarely seen in the light of day.” The Order sets aside various transfers made by John and Lucila Schmitz, which

¹ As did Appellants. See Notice of Appeal, footnote 1: “This appeal is related to the earlier filed appeal/Cross-Appeal taken from the AMENDED FINAL JUDGMENT, docketed in the Third District Court of Appeal as *John W. Schmitz v. Dorothy Joan Schmitz*, No. 3D21-1083. Final.”

the trial court found were “made or contrived by the judgment debtor to delay, hinder, or defraud creditors.” Order, p. 55, 58.

3. On January 25, 2023, Appellants, John and Lucila Schmitz appealed the Order as “...a post-final, **final order**, resolving Count III of the Counter Claim” (emphasis in original).²

4. Case 3D23-152 is related to Case 3D21-1083 and is an outgrowth of the same transactions and occurrences in Case 3D21-1083; the issues arise from the same trial court case, Case No. 2018-000931-CA-01 (44). The matters are interwoven and should be consolidated before the same panel, with one record on appeal.³

5. The December 28, 2022 Order is pertinent to the issues on appeal relating to the trial court’s imposition of a constructive trust on the SDC shares owned by John Schmitz, and John’s claim that the trial court should not have imposed such a trust because those shares because they were owned by him and his wife in “Joint Trust

² Count III of the Counterclaim was for failure to produce corporate records. Appellants appear to be referring to Count IV, for relief under Illinois’ “Oppressed Shareholder” statute, 805 ILCS 5/12.60, through which the trial court imposed a constructive trust.

³ Appellees recognize that Case 3D21-1083 will be delayed but the judicial efficiency of a single panel considering the voluminous record(s) outweighs the cost of the delay.

with Right of Survivorship”, issues that are captured in Appellant’s Initial Brief, Section II, pp. 44-47, and responded to in Appellees’ Answer Brief, Section II, pp. 88-98 in Case 3D21-1083.

6. John and Lucila defended the proceedings supplementary using these same “JTWRS” arguments and presented evidence to support them. After receiving the evidence, the trial court rejected the arguments in toto. Order attached to the Notice of Appeal in 3D23-152, pp. 8-21.

7. Judicial economy will be served by consolidation.

8. Undersigned counsel has conferred with counsel for Appellants, Elliot Kula, who has indicated that Appellants object to the relief sought in this motion.

WHEREFORE, Appellees respectfully request this Court grant this motion and consolidate appeal 3D23-152 filed January 25, 2023, with appeal 3D21-1083 filed May 6, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the court via the Florida Courts E-filing Portal on February 3, 2023, which will transmit a service copy to all counsel of record listed below.

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