IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D20 2684
L.T. CASE NO. 50 2006 CA-011826 XXXX MB AA

JOHN G. MCGREGOR, DAVID GHYSLES,
DR. DAVID SARAGA, HARJAS CHATWAL,
MARIA L. MEZZOMO, et al.,

Appellants,

v.

MERCO GROUP OF THE PALM BEACHES
INC., et al.,

Appellees.

ANSWER BRIEF OF APPELLEE/THIRD PARTY RITTER, ZARETSKY, LIEBER & JAIME, LLP

On Appeal from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida

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STATEMENT OF THE CASE AND FACTS

Appellee Ritter Zaretsky provides this statement in order to accurately reflect the factual and procedural record below. An accurate portrayal is relevant on appeal because the lower court's ruling on summary judgment was not made in a vacuum. The court ruled on a record that established the lack of any basis to join the law firm of Ritter Zaretsky as an impleaded defendant under the Notice to Appear procedure of § 56.29, Fla. Stat. (2019): much less to paint it as complicit in a fraud.[1]

A. Nature of the Case

This case dates back to 2006. Reduced to a consent final judgment in 2008 (R. 341-45), it has nevertheless survived for the last 13 years in the form of various collection efforts. The specific effort at issue in this appeal was initiated in 2019, by appellants/plaintiffs' present counsel who appeared in 2017. (R. 396-472) In their Motion to Commence Proceedings Supplementary and to Implead Third Parties and to Seek Relief from Fraudulent Transfers ("the Motion") (R. 396-407), plaintiffs targeted the law firms of Fowler White Burnett ("Fowler White") and Ritter, Zaretsky, Lieber &

[1] See footnote 2, Initial Brief at p.7, which, instead of recounting the procedural history and relevant facts, simply refers to the impleaded defendants' alleged "unrelenting efforts to hide the fraudulent transfers" from plaintiffs.

Jaime, LLP ("Ritter Zaretsky"). The Motion is, in all but name, a prolix complaint. After pages of argument and reference to its sixteen exhibits the Motion culminates, as to Ritter Zaretsky, in a single Count, labeled Fraudulent Transfer as to Ritter. (R. 406) Plaintiffs allege that $511,267.85 transferred to the law firm's trust account in 2009 "was made to hinder, delay or defraud the plaintiffs." *Id*. at ¶57 Plaintiffs purport to be traveling under Florida Statutes § 56.29(3)(b), and seek a money judgment against Ritter pursuant to § 56.29(6). (R. 403 at ¶¶39-43)

B. Course of the Proceedings

The record documents Ritter Zaretsky's limited, and innocuous, involvement with the matter at hand. It demonstrates the lack of factual basis for the plaintiffs' allegations that the firm possessed fraudulently transferred funds or was complicit in a fraud.

1. Ritter Zaretsky's Role.

The record contains three sworn affidavits of Louis Zaretsky, Esquire.[2] He is a real estate transactional attorney. His law firm regularly receives funds from its clients to be used as deposits to purchase property, which

[2] For ready reference, they are located at:
R. 463 (first affidavit dated July 27, 2017) ("1st Aff."); R. 490-492 (second affidavit, dated May 20, 2019) ("2nd Aff."); R. 1058-1059 (third affidavit dated May 11, 2020) (3rd Aff.").

funds are disbursed at the clients' direction. (2nd Aff. at ¶8) The firm has hundreds of clients for whom Mr. Zaretsky acts as resident agent. *Id*. at ¶ 7

In 2004, defendant Merco Group of the Palm Beaches, Inc. ("Merco Group") retained the firm to assist in the acquisition of the property described in the underlying complaint [the Palladio project]. Once it acquired the property, Merco Group retained a different law firm. Ritter Zaretsky did nothing further with respect to this project. *Id*. at ¶¶10, 11

As registered agent, the law firm was served with the original complaint in the underlying action. (R. 449-51) Service was actually accepted by Liz Lamar, a member of the firm's staff. (R. 451) As was par for the course, other pleadings and suits on other Merco entities were served on Mr. Zaretsky, as resident agent, and signed for by an assistant. (R. 454-62) This was routine and within the scope of a registered agent as provided by Florida law.[3] Mr. Zaretsky never served as a director or officer of the Merco Group (R. 430-47), nor did he appear as counsel in the *McGregor* case.

[3] *See* § 607.0501(4), Fla. Stat. (2019): The duties of a registered agent are: (a) To forward to the corporation at the address most recently supplied to the registered agent by the corporation, a process, notice, or demand pertaining to the corporation which is served on or received by the registered agent …

2. Ritter Zaretsky Receives a Wire Transfer in 2009.

In April 2009, the firm's IOTA trust account received a wire transfer in the amount of $511,267.85. (2nd Aff. at ¶ 12; R. 415) It originated from the Fowler White firm. *Id*. The firm was told that these funds were proceeds from settlement of a hurricane damage claim, and they belonged to a client named Rio Apartments, Inc. (2nd Aff. at ¶12; 3rd Aff. at ¶6) The funds were disbursed in accordance with written instructions from that client. (3rd Aff. at ¶8) Mr. Zaretsky had no knowledge of any relation between the funds and Merco Group, or even that there was a judgment against Merco Group. *Id*. at ¶¶4, 7

3. A Subpoena Issued in 2013 does not Connect the April 2009 Transfer to Ritter Zaretsky with the 2008 Check Deposited in the Account of Fowler White.

Four years later, in 2013, then-counsel for the plaintiffs issued a records subpoena to Mr. Zaretsky that listed four categories of documents. (R. 464-66) It purported to attach a copy of the $781,205.76 check issued to Merco Group, dated June 12, 2008, together with the back of the check showing that it was endorsed to deposit into Fowler White's account. Three of the four categories of records were about this check, and the final one asked for records of payments received from Fowler White, on behalf of Merco, "***from January 1, 2006 to January 1, 2009***." (R. 466) There was

no way for Mr. Zaretsky to draw any association between this subpoena and the wire transfer received ***months after*** the time frame stated in the subpoena. He had no responsive documents. For this reason, Ritter Zaretsky was not a party to the proceedings, between the plaintiffs' counsel and Fowler White, which involved a similar subpoena and which took place over the next two years. The 2014 Order directed itself exclusively to documents produced in camera by Fowler White. (R. 419) The finding of fraud by the Merco Group related exclusively to Fowler White. *Id.* Ritter Zaretsky was not even served with a copy of the Order. (R. 420) Plaintiffs accuse Ritter Zaretsky of resisting production of records and of "unrelenting efforts to hide the fraudulent transfers from Appellants." (Motion at p.3; Initial Brief at fn. 2. and p. 9) Ritter Zaretsky did nothing of the sort.

4. Records Produced by Fowler White in 2015 do Not Implicate Ritter Zaretsky in any Fraud.

As a result of the discovery proceedings between Fowler White, Merco Group and the plaintiffs, Fowler White produced records, in June 2015, which showed that the Merco Group endorsed the check for $781,205.76 to the law firm. (R. 414) Fowler White deposited it in June 2008. *Id*. On June 23, 2015, Fowler White produced a ledger which showed how the funds were disbursed. (R. 421) One transaction was a wire transfer for $511,267.85, to Ritter Zaretsky, in April 2009. (R. 415) Plaintiffs concede that they were

aware of the transfer to Ritter Zaretsky as of this date. (Appellants' Initial Brief, at pp.9-10) The transfer authorization is devoid of any link to the Merco Group. Plaintiffs' claims, that Ritter Zaretsky knew that Merco Group was the source of the funds, is not supported by the contemporaneous documentation.

5. Louis Zaretsky Provides Affidavit in 2017.

Two years after Fowler White produced its records, Mr. Zaretsky provided plaintiffs' present counsel with the first of three affidavits. (R. 463) In it he explains that neither he nor his law firm are in possession of records sought in the subpoena attached as Exhibit A.[4] He had made a diligent search and could not locate any such records. His firm keeps accounting records for 7 years. *Id.* By the time of this affidavit, in July 2017, the transfer into its trust account was more than eight years previously.[5] Plaintiffs' counsel did not depose Mr. Zaretsky or otherwise contest his sworn testimony.

[4] While the exhibit filed by plaintiffs for purposes of the record on appeal does not include the subpoena, it is believed to be the subpoena attached to a Notice of Intent to Serve Third Party Subpoena Duces Tecum for Deposition [D.E. 677 of the trial court docket] which described the wire transfer to the firm and which asked about the treatment of, and current location of, the funds.

[5] Rules Regulating Fla. Bar 5-1.2(f) prescribes a six-year records retention period that commences upon conclusion of the representation.

6. Plaintiffs File the Motion and Secure a Notice to Appear.

The foregoing is a complete summary of the record, relative to Ritter Zaretsky, as it appeared in early 2019. Nevertheless, in February 2019 plaintiffs filed the Motion, falsely stating that:

> Ritter Zaretsky opposed 2013 discovery requests to it that related to the check it received;
>
> That Ritter Zaretsky was "not acting innocently" in letting its trust account be sued to perpetuate a fraud;
>
> That Ritter Zaretsky had "ample knowledge" of the dispute between plaintiffs and Merco Group and knowingly accepted "its share" of funds into its trust account;[6]
>
> That Ritter Zaretsky's "current position" is that it did not keep any records pertaining to the funds so that Mr. Zaretsky does not recall what happened to them; and
>
> That the law firm was a "willing participant" in "this fraud."

Plaintiffs assert in the Motion that they are traveling under § 56.29(3)(b). In Count II, against Ritter Zaretsky, they allege that the transfer to Ritter was made to delay, hinder, or defraud the plaintiffs, and they seek a money judgment against Ritter Zaretsky in the amount of $511,267.85. (R. 405)

[6] With respect to this accusation, plaintiffs' Motion cited a fraudulent transfer action against Merco Group's parent, for which summons served on Mr. Zaretsky as resident agent. (R. 401 at ¶27; 461) The exhibit reflects that the summons were issued in December 2009: eight months ***after*** the wire transfer into the law firm's trust account.

The Motion does not allege that the funds are in the hands of Ritter Zaretsky or under its control.

The lower court issued a Notice to Appear to Ritter Zaretsky based on these representations. (R. 474-75) It directed the firm to file an affidavit within seven days as to whether the money belonged to it, and to raise defenses opposing the application of the money to the satisfaction of the judgment. (R. 474)

7. Ritter Zaretsky Files a Response and Second Affidavit.

The firm, through counsel, filed a response to the Notice to Appear. (R. 478-87) It explained that the funds transferred from Fowler White in April 2009 were earmarked as being for a client other than Merco Group; that the firm had no information to the contrary; and that they were disbursed at the client's instruction a few months after the deposit. (R. 478-83) An affidavit of Mr. Zaretsky accompanied this response. (2nd Aff.) The response challenged plaintiffs' ability to proceed under § 56.29(3)(b) on the basis that the law firm did not have possession of any property belonging to the judgment debtor. Secondarily, it raised the defense that the cause of action was one for fraudulent transfer and therefore time barred by the one-year statute of repose contained in Florida Statutes § 726.110.

C. Disposition Below

In March 2020, plaintiffs moved for summary judgment, reiterating the false statements made in the Motion and basically seeking to overcome the impleaded defendants' defenses. (R. 519-670) They did not explain on what basis they were entitled to judgments totaling $1,292,473.61 on an original transfer of $781,205.76. They dismissed Ritter Zaretsky's defenses as "meritless" and argued that, under § 56.29(6), the fact that the impleaded defendant did not have possession of funds belonging to the judgment debtor was no impediment to the entry of a money judgment against it for the full amount transferred to its trust account They asserted that there was no applicable statute of limitations and concluded that "the Court should not reward impleaded defendants who committed an actual and intended fraud on the plaintiffs and Court…" (R. 545-47) They argued that they were entitled to a trial at which they could obtain money judgments. (R. 548)

Ritter Zaretsky filed its own motion for summary judgment. (R. 988-1005) In support, Mr. Zaretsky filed a third affidavit. (R. 1058-59) He reiterated that when the wire transfer to his firm occurred in April 2009 he had no knowledge that the funds had any relation to Merco Group. *Id*. at ¶4 He was told they were for a client named Rio Apartments, Inc. They were

disbursed within a short period of time pursuant to instructions from that client. *Id.* at ¶¶6, 8

Plaintiffs did not challenge the affidavits. After extensive briefing, and multiple hearings, the lower court granted Ritter Zaretsky's motion for summary judgment. (R. 1638-48) It denied plaintiffs' motion for rehearing as to its ruling granting summary judgment to Fowler White.[7] (R. 1636-37)

SUMMARY OF ARGUMENT

The lower court correctly granted summary judgment to Ritter Zaretsky on the basis that the applicable statute of repose had extinguished any claim of fraudulent transfer. Even if a valid claim under § 56.29(3)(b) is not "subject to" the statutes of limitation and repose under § 726.110, the lower court's grant of summary judgment was proper as the record conclusively negates the presence of elements essential for such a claim.

[7] The lower court granted Fowler White's Motion for Summary Judgment in June 2020: months before it ruled on Ritter Zaretsky's similar motion. (R. 1060-72) Because plaintiffs' motion for rehearing was filed in July 2020, and was directed the order granting Fowler White's motion, we defer to Fowler White to respond to Argument IV C. in the Initial Brief of Appellants. However, Ritter Zaretsky did file a Response in Opposition to the Motion for Rehearing and/or Reconsideration (R. 1525) and we rely on that as amply supporting its position that the plaintiffs' motion lacked merit.

ARGUMENT

The Court Correctly Applied the Statute of Repose from § 726.110 to Plaintiffs' Claim Under Florida's Proceedings Supplementary Statute, Which Claim Alleged Merco Group Made a Transfer With Actual Intent to Delay, Hinder, or Defraud Its Creditors, and Which Sought a Money Judgment Against Ritter Zaretsky.

A. Standard of Review

Where a trial court's ruling on a proceedings supplementary presents an issue of law, the standard of review is de novo. *Sargeant v. Al-Saleh*, 137 So. 3d 432, 434 (Fla. 4th DCA 2014), *cited with approval* in *Longo v. Associated Limousine Services, Inc.*, 236 So. 2d 1115, 1118 (Fla. 4th DCA 2018).

B. Introduction

In the proceeding below, plaintiffs sought to disguise the "wolf" of an extinguished cause of action for fraudulent transfer in the "sheep's clothing" of a claim under § 56.29(2) that could properly be initiated by a Notice to Appear. In a Motion which, in all but name was a Supplemental Complaint, plaintiffs allege that the Merco Group's deposit of $781,205.76 the Fowler White law firm was a fraudulent transfer. (R. 399, 405 at ¶¶17, 53) They assert that the subsequent transfer of $511,267.85 from Fowler White to Ritter Zaretsky was also a fraudulent transfer. (R. 400, 405 at ¶¶18, 57) The Motion alleges that, by the time plaintiffs learned of the initial transfer the

funds were "dissipated" and "depleted" and not subject to a Writ of Garnishment. (R. 399 at ¶¶14, 17) Cognizant of the hurdles ahead, plaintiffs argue in the Motion that they can proceed under the "fraudulent transfer rubric of § 56.29 alone, as opposed to Chapter 726", which allows them to initiate an action at any time during the life of the judgment and not be subject to the one-year statute of repose in Chapter 726. *Id.* at ¶ 43 (*citing* to *Biel Rio, LLC v. Barefoot Cottages Development Co., LLC,* 156 So. 3d 506, 510-11 (Fla. 1st DCA 2014). Count II – labeled "Fraudulent Transfer as to Ritter" explicitly seeks a money judgment against Ritter Zaretsky in the amount of $511,267.85 as well as "for any other equitable remedy that may be fashioned by the Court…." (R. 406 at ¶63 and *ad damnum* clause).

The record, largely consisting of plaintiffs' numerous exhibits to the Motion, conclusively shows that:

(1) the Ritter Zaretsky law firm received the funds from a transferor *other than the judgment debtor*, in the ordinary course of business, and was given a reason that did not connect the transfer with the debtor;

(2) the law firm did not associate the transfer with the debtor and was not aware that there was a judgment against the debtor;

(3) the funds were received in the law firm's trust account and were never in the possession of the law firm itself;

(4) the funds were subsequently disbursed from the trust account in compliance with instructions from the client whose funds the firm believed they belonged to;

(5) the law firm did not oppose discovery of relevant records;

(6) by 2017, when the law firm provided an affidavit, the firm's accounting records had been discarded, in accordance with the firm's ordinary retention policy.

Despite these facts, plaintiffs argue on appeal that they can cobble together a theory, linking §§ 56.29(3)(b) and (6), which would allow them to implead the two law firms at any time, ***until 2028***, and obtain money judgments: against both ***Fowler White*** -- for the full amount of the initial transfer -- ***and against Ritter Zaretsky*** for the amount of the portion that passed through its trust account.

The issue on appeal is as basic as whether plaintiffs' theory, and its efforts below, fail the "duck" test. More embedded in jurisprudence than any of the general rules of construction plaintiffs invoke, this mainstay of legal reasoning is that "if it looks like a duck, and walks, talks, and acts like a duck, one can safely assume it is a duck." *Florida Bar v. Nieman*, 816 So. 2d 587, 599 (Fla. 2002); *see Villamorey, S.A. v. BDT Investments, Inc.* 245 So. 3d 909, 911 (Fla. 3d DCA 2018) (a party to post-judgment proceedings was properly before the court when it "looked like a party, has quacked like a party, and is swimming like a party in the post-judgment litigation pond"). Here, the lower court correctly concluded that the matter at hand was a duck: i.e. a fraudulent transfer proceeding subject to the time limitations of

§ 726.110, Fla Stat. (2019). This conclusion was correct based on the fact that the Motion alleged the elements of actual fraud under § 726.105(1)(a) and sought a money judgment against a party that was not alleged to be in possession of the targeted funds.

C. Distinguishing a Fraudulent Transfer Claim from a Claim under Section 56.29(3)(b)

Plaintiffs' Motion did ***not*** allege the essential predicates for a claim under §§56.29(2) and (3)(b) (2019). Assuming arguendo that a claim joining these two sections was or is allowable, without being subject to Chapter 726, both sections are framed in the present tense, i.e. they presuppose property currently in the hands of the party to be impleaded. Under § (2), there is to be a motion describing "any property of the judgment debtor not exempt from execution ***in the hands of*** any person ***or*** any property, debt, or other obligation due to the judgment debtor ***in the custody or control of*** any other person which may be applied to satisfy the judgment." (*emphasis added*) This is a condition precedent to a Notice to Appear being issued: and any Notice so issued must describe with reasonable particularity the property, debt, or other obligation that may be available to satisfy the judgment. *Pena v. RDI, LLC*, No. 8:17-cv-1404, 2020 U.S. Dist. LEXIS 33570, at *4 (M.D. Fla. Feb. 27, 2020) (summarizing the prerequisites for a motion, affidavit and Notice to Appear under § 56.29(2); *Yurovskiy v. Impex Point, LLC*, No. 18-

81288, 2020 U.S. Dist. LEXIS 102677, at *6 (S.D. Fla. June 11, 2020) (same).

Section (3)(b) likewise presupposes that personal property of a judgment debtor ***is in the hands of*** a third party by virtue of a "gift, transfer, assignment or other conveyance" that has been "made or contrived by the judgment debtor to delay, hinder, or defraud creditors." A court can declare such a transfer void (seemingly without a Notice to Appear) and "direct the sheriff to take the property to satisfy the execution." Any person "aggrieved by the levy ***or*** Notice to Appear may proceed under §§ 56.16—56.20." Section (3)(b), standing alone, calls for the existence of property subject to levy or execution, which property was received as a result of actual fraudulent intent by a transferor/debtor. *In re British American Insurance Co.,* 607 B.R. 753, 756 (Bankr. S.D. Fla. 2019) ((3)(b) addresses turnover of fraudulently transferred personal property for application to payment of an unsatisfied judgment).

Plaintiffs did not, and could not, satisfy these elements as to Ritter Zaretsky. Plaintiffs' Initial Brief extensively quotes from § 56.29, but does not boldface the relevant terms in § (3)(b) regarding the requirement that a third party be in actual possession of fraudulently transferred property. (Initial Brief at p.17) They do not excerpt the sentence referring to §§ 56.16—

56.20. These references are important because § 56.29 does not exist in a vacuum. Chapter 56, entitled Final Process, consists of §§ 56.0101—56.30, and §§ 56.16—56.20 are integral to a functional understanding of proceedings supplementary practice.

Section (6) provides that §§ 56.16—56.19 apply to any orders issued under this subsection.[8] Sections 56.16—56.20 are the avenue by which an impleaded defendant may object to the rights asserted by a judgment creditor and defend its interest in the property.

Ritter Zaretsky's unrebutted testimony establishes that the funds transferred from Fowler White passed through its trust account so long ago that records did not exist by the time plaintiffs served their Notice to Appear. There is nothing on which a sheriff could execute, as is requisite under § (3)(b). There is nothing to litigate under §§ 56.16—56.20, and the court's ability to order a money judgment "irrespective of whether such person has retained the property" is subject to those sections as well as Chapters 76

[8] These sections provide for: Executions; claims of third parties to property levied on (§ 56.16); Executions; duty of officer on claim of third person being filed (§ 56.17); Executions: trial of claims of third persons (§ 56.18); Judgments upon claims of third persons (§ 56.19); and Executions on judgments against third party claimants (§ 56.20). Sections 56.18 and 56.19 address the circumstances under which money judgments may be awarded: and none are applicable here.

and 77[9], Florida Statutes and all applicable rules of civil procedure. Section 56.29 is part of a scheme and, as § (6) expressly provides, it is subject to applicable principles of equity. Those principles apply to an impleaded defendant just as well as a judgment creditor. *See Regions Bank v. MDG Lake Trafford, LLC (In re McCuan)*, 603 B.R. 829, 846-48 (Bankr. M.D. Fla. 2019) (declining to enter judgment against a transferee spouse who did not take control of the assets transferred). The elements of a claim under §§ (2) and (3)(b) are lacking here, to say nothing of the equities. As this Court held in *Longo v. Associated Limousine Services, Inc*., 236 So. 2d 1115, 1120 (Fla. 4th DCA 2018), no court will resort to a liberal interpretation approach when that would simply mean ignoring the plain language of the statute.

By contrast, a claim under Chapter 726, specifically § 726.105(1)(a), exists when:

> **726.105. Transfers fraudulent as to present and future creditors.—**
>
> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor …

[9] These Chapters are entitled, respectively, Attachment and Garnishment.

Plaintiffs' Motion is replete with allegations of actual fraud, including that the transfers were made by the judgment debtor to delay, hinder or defraud the plaintiffs. ¶63 Of course, what is missing is any evidence that Ritter Zaretsky knew or had any reason to suspect that the funds were linked to plaintiff's judgment debtor. Attorneys accept funds in trust on a regular basis: an aspect of client service that would certainly be chilled if a 20-year, no-fault tail liability accompanied every transaction.

The statutory remedies available under Chapter 726 include equitable relief or, under § 726.108(1)(c)(3), monetary relief. *Hansard Construction Corp. v. Rite Aid of Florida, Inc*., 783 So. 2d 307, 308 (Fla. 4th DCA 2001) (describing this subsection as a catchall provision sufficiently broad to encompass a monetary judgment). There are no provisions limiting a creditor's rights under this chapter to identifiable property, in the hands of a third party, subject to levy. Indeed, monetary relief can reach as far as a subsequent transferee provided there is proof that the transfer is voidable and the subsequent transferee is not a good faith transferee who took for value. § 726.109(2), Fla. Stat. (2019).[10]

[10] Of course, this remedy does not extend to plaintiffs' double dip theory, whereby they are entitled to judgment against the original transferee, for the full amount, and also to all downstream transferees for any portion of the original amount received.

Consistent with that scheme, the 2016 amendments to § 56.29(9) clarify that:

> The court may entertain claims concerning the judgment debtor's assets brought under [Florida Statute] chapter 726 and enter any order or judgment, including a money judgment against any initial or subsequent transferee, in connection therewith, irrespective of whether the transferee has retained the property.

The tradeoff for the broad reach of an action under Chapter 726 is that there are time limitations as well as recognized defenses.

D. The Lower Court Correctly Classified the Claim as Subject to Chapter 726

The linchpin of the Order appealed from was the addition of language, ***in 2014,*** to the effect that "[c]laims under Chapter 726 are subject to the provisions of Chapter 726 and applicable rules of civil procedure." § 56.29(5), Fla. Stat. (2014). The trial court correctly recognized that the character of plaintiffs' claim – as they describe it on page 15 of their Initial Brief -- brought it within the scope of Chapter 726. (R. 1638 at ¶¶18, 19, and 21) Given the allegations of the Motion and the fact that the relief sought is a money judgment, the "duck test" compels that it be treated as a claim subject to the provisions of Chapter 726 and applicable rules of civil procedure.

The consequence of this classification was the conclusion that the claim was time barred. Pursuant to § 726.110:

> **726.110 Extinguishment of cause of action**.—A cause of action with respect to a fraudulent transfer or obligation under ss. 726.101-726.112 is extinguished unless action is brought:
>
> (1) Under s. 726.105(1)(a), within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant …
>
> (2) Under s. 726.105(1)(b) or s. 726.106(1), within 4 years after the transfer was made or the obligation was incurred …

These provisions reflect the common purpose of all statutes of limitations and statutes of repose: to bring finality to claims, balancing the interests of both sides. *National Auto Service Centers, Inc. v. F/R 550, LLC,* 192 So. 3d 498, 509-510 (Fla. 2d DCA 2016) (explaining statutes of repose in the context of creditors and transferees). It is undisputed that plaintiffs had Fowler White's records as of June 23, 2015. If plaintiffs had asserted their claim by June 23, 2016, Ritter Zaretsky's records would most likely have been available to it.[11]

The presenting circumstances fit, analytically, within this Court's holding in *Uoweit, LLC v. Fleming*, 300 So.2d 1201(Fla. 4th DCA 2020), *rev. denied Uoweit, LLC v. Fleming,* 2020 Fla. LEXIS 2072 (Fla. Dec. 14, 2020)

[11] This is because it received the transferred funds on April 22, 2009, and likely would have still had them two months later, on June 23, 2009. Were that the case then the claim would have been made within the seven year-period the firm followed for retention of trust fund records.

and the decision in *In re British American Insurance Co.,* 607 B.R. 753 (Bankr. S.D. Fla. 2019) ("*BAICO*"). In *Uoweit*, the court distinguished plaintiffs' favored case of *Biel Rio, LLC v. Barefoot Cottages Development Co*., LLC, 156 So. 3d 506, 510 (Fla. 1st DCA 2014) on the basis that the 2014 and 2016 revisions to § 56.29 superseded the historic ability of a judgment creditor to bring a fraudulent transfer claim at any time during a judgment's life. *Id*. at 1205. As a result of those revisions, fraudulent transfer claims are permitted in a proceeding supplementary. But they are subject to – meaning subordinate to – the timeliness provisions in Chapter 726. *Id*. In *Uoweit*, the Court upheld the dismissal of a supplemental complaint on the basis that the statute of repose contained in § 726.110 had run.

The Court in *Uoweit* favorably cited to *BAICO,* which deemed the holding in *Biel Rio* to be inconsistent with the legislative intent manifest in the 2014 and 2016 amendments to § 56.29. 607 B.R. at 760-61. The opinion in *BAICO* is instructive for other reasons, as well, because it explained when a claim under §§ 56.29(2) and (3)(b) exists. It dismissed a creditor's effort to bring a claim that was outside the scope of the "narrowly tailored substantive claim" that § (3)(b) authorizes. *Id*. at 757. Section (3)(b) describes a narrow category of fraudulent transfer claims that can be

pursued by a Notice to Appear, but that is only when the relief sought is limited to avoiding transfers of personal property, making the property available for satisfaction of the judgment:

> Based on the text of the statute, the personal property must be the same property that the judgment debtor transferred and must be something identifiable that the sheriff may seize.

Id. This reading is inarguable, and was supported in the *BAICO* opinion by a citation to legislative history.[12] As the *BAICO* court further held, § (6) does not extend to relief sought under § (3)(b), as § (3)(b) provides a narrow exception to the requirement that fraudulent transfer claims be pursued in accordance with Chapter 726. *Id*. at fn.1. The *BAICO* court dismissed the Notice to Appear, with leave to amend it ***except*** as to transfers that would be time-barred under § 726.110. *Id.* at 756. In this respect it "lifted the hood" on the creditors' claims and ruled based on their true character.[13] The lower

[12] *Id.* at 758: "Other than the narrow category of claims that may be pursued under § 56.29(3)(b), a claim based in fraudulent transfer may not be commenced through the issuance of a Notice to Appear." Fla. S. Comm. On Judiciary, CS for SB 1042 (2016), Staff Analysis 4 (Jan. 12, 2016).

[13] The presiding judge in BAICO reiterated, in an opinion months later on renewed motions to dismiss, that if a money judgment rather than the return of identifiable personal property is sought against an impleaded defendant, the creditor must either file a supplemental complaint or an independent action. *In re British American Insurance Co.,* No. 09:31881, 2020 Bank. LEXIS 2236 at *6 (Bankr. S.D. Fla. May 5, 2020). Currently, § 56.29(9) is the procedural vehicle for a creditor to obtain the value of funds allegedly transferred to an impleaded defendant; the substantive claim arises under Chapter 726. *Id.* at *15.

court permissibly did the same in ruling on the parties' cross-motions for summary judgment.

The opinion in *Saadi v. Maroun,* No. 8:07-cv-1976, 2020 U.S. Dist. LEXIS 27100 (M.D. Fla. Feb. 18, 2020) does not alter this result. There, the district court partially reversed a magistrate's report and recommendation, ruling that a motion to dismiss and strike a claim for a money judgment, attorney's fees and costs in connection with a claim under § 56.29(3) would be denied. *Id.* at *4. The court allowed the claim to proceed. Its order does not reflect any findings on the merits. This case is distinguishable on two grounds: first, that lawsuit involves years of proceedings in which the impleaded defendant is alleged to be an alter ego of the judgment debtor as well as a participant in a host of fraudulent transactions. Moreover, the court in the *Saadi* case relied on an opinion in a case entitled *Regions Bank v. MDG Lake Trafford, LLC* (*In re McCuan)*, 603 B.R. 829 (Bankr. M.D. Fla. 2019). That case, which allowed for a money judgment in an action brought both under §§ 56.29 and 726.105(a), was: (1) decided under the 2013 version of 56.29, which had no references to fraudulent transfer claims being subject to Chapter 726; and (2) involved transfers under § (3)(a), which is quite different in scope and burdens of proof than (3)(b). *Id.* at 837. *Ghahan, LLC v. Palm Steakhouse, LLC,* No. 12-8062, 2020 U.S. Dist. LEXIS 54522

(S.D. Fla. Mar. 27, 2020) is also an order on a motion to dismiss. It allowed an impleader complaint based on § 56.29(3)(b), uncritically relying on *Biel Rio* and not addressing the relevant amendments to the statute. These interlocutory orders are not precedential: *Uoweit* is.

The lower court's lengthy and meticulous order rejected the premise of plaintiffs' case: that they can bring the exact claim under either Chapter 726 or §§ 56.29 (2), (3)(b) and (6), and have two different statutes of repose. The lower court's order makes sense of both mechanisms. Section 56.29 never created a cause of action redundant of an action under Chapter 726. The 2014 amendment makes that clear, and the 2016 amendment is even more explicit in providing that a Chapter 726 cause of action can be filed in a proceeding supplementary.

E. Two Red Herrings

Plaintiffs' Initial Brief revives an argument, made below, that the lower court's decision was based on a finding that "the claims concerned money which was not "personal property capable of being seized by the sheriff." (Initial Brief at p. 20) This is inaccurate and a misstatement of the Order. The Order recited that Ritter Zaretsky had responded to the Notice to Appear, denying that any property of the judgment debtor was in its possession. (R. 1639, ¶10) Therefore on summary judgment, the court

analyzed § 56.29 and concluded that § (3)(b) applies only when there can be an avoidance of a transfer of personal property such that the property can be seized in satisfaction of a judgment. (R. 1642-43) The court stated:

> By its plain language, this section first applies to property of the judgment debtor in the hands of any person. It is undisputed that the Funds at issue are not in the possession of RZL&J and Plaintiffs are not seeking to execute upon anything, but are instead seeking a money judgment.

(R. 1643) At no point did the lower court rule on whether money was personal property, and that is not an issue that this Court must address.

The second red herring is the newly-minted argument that the 2016 amendment to § 56.29, which added § (9), would violate plaintiffs' constitutional rights if applied to their claims. Plaintiffs assert that this would be a violation of due process, if applied retroactively, because it would extinguish their claims on June 23, 2016 based on an amendment that became law on July 1, 2016.

The fallacy with this argument is that the lower court's Order was based on the 2014 amendments, Ch. 2014-182, which amended then-section (5) to allow a court to:

> entertain claims concerning the judgment debtor's assets brought under Chapter 726 and enter any order or judgment, including a money judgment against any initial or subsequent transferee, in connection therewith, irrespective of whether the transferee has retained the property. Claims under Chapter 726 are subject to the provisions of Chapter 726 and applicable rules of civil procedure.

This amendment was expressly retroactive, with the legislature stating that the amendments "are remedial in nature, are intended to clarify existing law, and shall be applied retroactively to the full extent permitted by law."[14] "Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law…." *City of Lakeland v. Catinella*, 129 So.2d 133, 136 (Fla. 1961). The name itself, "proceedings supplementary" reflects that the legislative intent behind the statute is to provide a procedural remedy. This amendment applied in all cases currently pending even if the transfer at issue occurred before the law was enacted.

The 2014 amendment added the express reference to Chapter 726 and the authority of the court to enter money judgments. It added the "subject to" language. The lower court properly ruled that in light of the language as of 2014, a judgment creditor cannot elect to bring a fraudulent transfer claim, for a money judgment, under § 56.29(3)(b), without

[14] The Order, in paragraphs 18, 19, 20, 21, 28, 32, and 36 expressly references the 2014 amendments as clarifying that a claim for a fraudulent transfer seeking a money judgment is within the scope of Chapter 726. A judgment creditor cannot simply opt out of that framework and bring the same claim under an "amalgamation" of §§ 56.29(2), (3)(b), and (6): this would lead to an absurd result. (R. 1644 at ¶30)

application of the statute of repose found in the Uniform Fraudulent Transfers Act. (R. 1642) The 2016 amendment added § (9) as further clarification, but was not a substantive change. Although the issue need not be decided here, the *Longo* court left open the possibility that the 2016 amendment was retroactive. 236 So. 2d at 1117, fn. 1. True to its nature as a procedural statute, the constant goal remains "to ferret out what assets the judgment debtor may have or what property of his others may be holding for him, or may have received from him to defeat the collection of the lien or claim, that might be subject to execution." *Young v. McKenzie*, 46 So. 2d 184, 185 (Fla. 1950), *cited with approval* in *Longo v. Associated Limousine Services, Inc*., 236 So. 2d at 1118. The lower court's analysis and ruling served that goal.

CONCLUSION

The single issue below was whether the plaintiffs' fraudulent transfer claim against Ritter Zaretsky, seeking a money judgment in connection with funds the firm did not possess, was properly deemed subject to the statute of repose found in Chapter 726 of the Florida Statutes: the Uniform Fraudulent Transfers Act. The answer to that is yes. Appellees Ritter Zaretsky respectfully requests that this Court affirm the summary judgment in its favor.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court through the Florida Courts e-Filing Portal and is being served, on this 21st day of May, 2021, on all counsel of record listed on the below Service List via e-mail generated by the Florida Courts e-Filing Portal and to *Pro Se* Appellants via U.S. Certified, Return-Receipt Mail.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FONT AND WORD COUNT STANDARD FOR COMPUTER GENERATED BRIEFS

Pursuant to Florida Rule of Appellate Procedure 9.045, undersigned counsel hereby certifies that this answer brief is submitted in Arial 14-point font and contains approximately 7523 words.

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