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FIRST NATIONAL BANK V. HOOPER

SLAVIN: A fundamental principal of fraudulent transfer law is that preferential transfers are not fraudulent transfers unless the debtor benefits from the arrangement in someway other than the payment of his debt or the debtor transfers more property than is necessary to pay the debt.

PHILLIPS: It may be fundamental but is it expressly in the law?

SLAVIN: It is not in the written statute - well it is embodied in the written statute and codified and divided in various provisions of the act. It has been the law in Texas for over 100 years, and it is still the law today. And you will find those provisions bisected and divided in the reasonably equivalent value sections of the statute as well as the good faith provision of the statutes.

ENOCH: Well accepting that as all true isn't the real argument here whether or not the lien that was transferred was greater in value than the debt that was covered?

SLAVIN: Yes. That is one of the issues here, and the good faith of the bank as well.

ENOCH: What you have to do is not prove that you couldn't make a fraudulent transfer, you have to prove as a matter of law that taking the lien at the time that you did did not take an interest in the property greater than the value of the debt that the lien was supposed to cover?

SLAVIN: That would defeat both the constructive fraud submission and finding and along with the good faith of the transfer it would defeat any actual fraudulent finding by the TC and the jury.

PHILLIPS: Is it your position the petitioners need both?

SLAVIN: The jury found actual fraud and they found constructive fraud. The actual fraud being an intent to hinder, delay or defraud a creditor. A defense to that found in 24.009(a) is a transfer is not avoidable if taken by the transferee in good faith and for reasonably equivalent value. So to defeat that the bank needs to show both good faith and that it took for reasonably equivalent value.

On a constructive fraud, the proof of that is an insolvent debtor who transfers the property for less than reasonably equivalent value. So, therefore, by a finding or showing as a matter of law that reasonably equivalent value was given for this mortgage interest that defeats the constructive fraud claim. At that point, there is no judgment that can be affirmed other than a judgment in favor of the bank.

In fact, I believe on page 24 of the respondent's brief, the Hoopers have conceded that a creditor must show participation in the fraud by the transferee before an actually fraudulent transfer can go forward. So in that sense with that concession you are correct, that if we are able to show that reasonably equivalent value was given for this mortgage interest, then the case should be reversed and rendered. That is our position.

And in fact reasonably equivalent value was given. You first need to go to §24.004(a) of the statute, which is the statute dealing with value. And the act defines value when an antecedent or an existing debt is secured by a transaction. That by definition is value. Now the act does not give us what reasonably equivalent value means under those circumstances. But if we go to the official comments to the uniform act, which is the source of this provision, it does provide an answer to that question. If you go to comment 3 of §3 of the Uniform Act it states: under this act a transfer for security is ordinarily for reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured since the amount of the debt is the value of the interest and the asset transferred.

So that comment itself equates the debt with the value of the asset transferred. And the asset transferred is one of the important issues in this case. What is the asset transferred? It is a mortgage interest in this asset. It is not the entire asset. And that is recognized in the official comment and it does say ordinarily. And then the comment goes on to explain a situation that may be out of the ordinary. These would include transfers to insiders. The act specifically does not allow an insider to secure an existing debt as being a reasonably equivalent value. So that is one of the situations that is not in existence in this case but which may be out of the ordinary situation.

PHILLIPS: Who had the underlying ownership and the chance to do anything? Just getting down to actual fact here in term of keeping this pipeline in working order who had the right and the means to accomplish that?

SLAVIN: The debtor had the right to do that. The debtor owned the property and was not divested of the property until the foreclosure sale. So up until that point in time it was the debtor's right to deal with this property and the debtor's responsibility to upkeep the property. The bank did not acquire the actual property until it was the successful bidder at the subsequent foreclosure sale.

Now the loan documents that Mr. Thornton signed years before the default judgment was rendered in favor of the respondents in this case, the debtors signed documents that authorized the bank to require additional security for its loans if it deemed it was necessary and to require the debtor to come in and sign additional documentation if necessary to properly perfect its security interest in the collateral. The bank secured this $300,000 loan with a UCC financing statement and a security agreement that had attached to it a list of all the assets of the illegal gas gathering system. That attachment came straight from the bill of sale for the assets. What the bank neglected to do, and these are complicated transactions as the record indicates from Mr. Hooper that testified, is they did not get a deed of trust on the easements or the right of ways where the pipe had

been laid across the county and various entities.

When the bank was faced with the last resort that all banks want to do is foreclose on something like a pipeline and the responsibilities and potential liabilities that went with it, they discovered they had not gotten a deed of trust. They called Mr. Thornton in under his blown(?) documents and said you are required to sign this, we need it to properly perfect our security, otherwise this 254,000 feet of pipe that are listed as the equipment and part of the assets that we acquired a lien on, we won't be able to adequately protect without it.

So the bank did nothing but do what the loan documents allowed it to do and that is not a fraudulent transfer.

ENOCH: Does it make a difference that this money was lent to build this pipeline as opposed to say - it's sort of a line of credit for the business of construction out there and then at some point in the future the bank decides that it doesn't have enough collateral to cover the loan and so they go bring him in to give interest in some unrelated property?

SLAVIN: No. I don't think that makes a difference.

ENOCH: Then how could a bank ever be subject to the uniform fraudulent transfer act if all it ever did was just get a lien on property irrespective of whether the property is what it loaned the money on or unrelated, just as long as it's ever owned by the debtor. Could a bank ever be subject to the fraudulent transfer?

SLAVIN: Certainly it could be. If it was facilitating or knowingly participating in a transfer to benefit the debtor in some way other than the satisfaction of its debt. It certainly could.

ENOCH: So it's actual fraud, but you would never have constructive fraud?

SLAVIN: You could not have constructive fraud unless less than reasonably prudent value is given. Now there could be a loan transaction for example for a lender that is factitious that purports to secure more than is actually owed or something of that nature. And in that instance the deed of trust says it secures $300,000 of debt but actually there is not $300,000 of debt. There may be $100,000 of debt and it's some sort of factitious arrangement, then you have less than reasonably equivalent value under those circumstances.

PHILLIPS: That's actual fraud. The only constructive fraud would be if the bank made a mistake and it paid the _______?

SLAVIN: That could be actual fraud, but it is also constructive fraud. Because understanding constructive fraud it's an insolvent debtor and then for less than reasonably equivalent value. I was focusing on that arm of the constructive fraud test. So it could be an insolvent debtor who has a deed of trust interest that shows that it's for less than the value. But if it's not an insider,

which would also be another exception, and the debt is valid and the mortgage interest is given and the bank is not participating in anyway an intent to defraud other creditors or allow the debtor to have some benefit beyond payment of its debt, then that specific scenario does not give rise to a fraudulent transfer claim.

O'NEILL: If the deed of trust had been dated the day it was signed is it true that the Hoopers would have had preference with their judgment lien?

SLAVIN: No it's not. Because the important date is when the deed of trust is filed verses when the abstract of judgment is filed. That perfects the lien. So the deed of trust was filed and nothing of course was backdated on that date 15 days before the abstract of judgment was filed. So the bank's deed of trust lien was filed prior to the abstracted judgment...

O'NEILL: So in terms of creditor preference it wouldn't have made a difference whether it was backdated or not?

SLAVIN: No it would not. And the date on the front of it is the date of the original note that it secures. The date it was signed and notarized is the actual date, and the date it was filed. And there is nothing in the record to indicate there was any attempt to show that that had been filed earlier or to show that that had been signed at a different time and it was notarized on the document itself.

Another issue in the case that we have asserted is the personal judgment that was avoided by the bank. It's our position that that is an equitable remedy and that the law of equity supplements the provisions of the act and, therefore, requires an analysis before that kind of remedy is given against a transferee especially one that has had no liability findings and no improper conduct findings or anything of that nature that there be some showing of a knowing participation in the transfer before the money judgment can be awarded, or some other compelling equitable reason leads to that result.

No Texas cases have directly addressed that. But we cite Parkhill from the Washington CA that essentially holds that very provision. And what the Parkhill case was based on was the supplemental provision of the Act that requires equitable principles to overlay unless they are displaced by the provisions of the act. The case was not adding any new requirements that weren't already in the act. And if you review the act even the remedy of personal judgment is subject to adjustment as equities require. Of course the legal remedy in this kind of fraud would be a personal judgment against the debtor. Obviously that's often not anything that's of any value because the debtor may be insolvent. So the act provides these equitable remedies to address that situation.

OWEN: Did the debtor ever take bankruptcy?

SLAVIN: No. The debtor personally did not take bankruptcy. There was a rollover limited partnership that one of the partners did take bankruptcy in the middle of all this. Although

the record is not clear on the interplay with that. It apparently happened sometime before this original loan was made. I believe before 1988. And at that point in time it apparently affected the repayment of this loan because the loan was being repaid for 20 months. The principal of the loan was dropped from $300,000 to $183,000. And that was from payments under a gas contract that was being serviced by the pipeline.

There is some indication in the record that the default occurred when the bankruptcy trustee and the limited partnership seized some of those receivables or those payments for the gas. So there was some indication of some involvement of it in relation to the default. But the bankruptcy itself took place prior to the loan being made.

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RESPONDENT

CHANDLER: This case is fairly straightforward. There are 4 ways under the Fraudulent Transfer Act in Texas in which to avoid a fraudulent transfer. The first is under 24.005(a)(1). It says a transfer made with the actual intent to hinder, delay or defraud any creditor of the debtor. That is actual fraud. The other provisions are constructive fraud provisions. The second provision is 24.005(a)(2) which states that if the transfer is made without receiving reasonably equivalent value and the debtor is insolvent at the time of the transfer or becomes insolvent because of the transfer, then that is a fraudulent transfer.

ENOCH: How can a bank that takes a lien interest to the extent of the debt it's owed take a interest that exceeds the value of the debt? How can that not be an equivalent value?

CHANDLER: It cannot be equivalent value in a situation such as the one that's presented in this case. The value of the bank's debt was $202,000. That was what was actually secured by the deed of trust lien that was given on April 15. The value of the property as of April 15 by the jury's finding is $700,000.

ENOCH: Well the bank can't take $700,000.

CHANDLER: Well the bank is fully secured and the property is fully encumbered. If a bank or a lender lends money for the purchase of property it is fully secured in the property and the property becomes fully encumbered. The only way for a bank to get paid for that lien to be resolved is either (1) the note is paid, or the debt is paid; or 2) the property is sold. Until the property is sold, the equity cushion is out there but it's not available to other creditors because they become secondary lien holders.

PHILLIPS: If I get defeated in the election and we don't have any income, the bank all of a sudden has violated this statute?

CHANDLER: It has not violated the statute under those circumstances. Because in those

circumstances we're not dealing with actual intent. In this case there was clearly a finding of actual intent. The debtor transferred the property to the bank with the intent to hinder, delay or defraud the creditors. And one of those creditors was Sam and Mary Beth Hooper.

ENOCH: That would be your argument even if there had already been a security interest executed but not filed. The mere fact that the bank went and filed its security interest after knowing about the Hoopers' judgment, that would be a hindering of debt because they would improve their lien verses the abstract judgment lien?

CHANDLER: It depends on the facts of the case. Everyone of these cases is fact specific. These cases all revolve around the facts of the actual case.

ENOCH: But the fact would be that the bank knows that there's a judgment out there for $1,000,000, and they are going to go file an abstract of judgment against any property that's out there. We're sitting here in our office with a deed of trust that's been executed, and oh my gosh we haven't filed it. We've got to get to the courthouse before they do and file it to get our lien in advance of theirs, otherwise we might have a subordinated interest. And you would say that's in defraud of creditors because they hindered the other creditor by the mere act of trying to get their lien ahead of theirs.

CHANDLER: No. I wouldn't say that. What I would say is is that in that situation the original loan had this deed of trust. If the bank had taken a deed of trust when the original loan was granted in 1990, and it wasn't to purchase the pipeline, it was to consolidate Mr. Thornton's debts to the bank, if they had taken the deed of trust at that point in time Mr. Thornton wasn't insolvent and he wasn't attempting to hinder, delay or defraud his creditors. So the statute really revolves on what is the debtor's intent, not what a transferee's intent is. It's actually what the debtor intended to do.

OWEN: Where is the evidence of the fraudulent intent? Why is preferring one creditor over another hindering, or delaying or defrauding another creditor?

CHANDLER: In that situation what the evidence in this case is is that there was less than reasonably equivalent value transfer. And that's the crux of the argument.

OWEN: How do you deal with official Comment 3 to the Uniform Act, §24.004?

CHANDLER: I would point the court to §3, to read §3. The Comment 3 to §3 of the Uniform Fraudulent Act says that under this act that a transfer for security is ordinarily. This wasn't a transfer for security. This was a transfer for foreclosure. The bank attempted to do in two steps what it couldn't do in one step.

OWEN: What's the difference?

CHANDLER: The difference is is if I transfer a deed of trust to you for security, what I'm saying is is that I have the ability to pay you...

OWEN: No. This section doesn't even come up until your insolvent. So we're dealing with someone who's insolvent. They transfer a security interest. Everybody knows they are insolvent. They transfer security interest so...

CHANDLER: The cases seem to require the granting of new consideration on the part of the transferee.

HECHT: Why if you're already entitled to it?

CHANDLER: In this case the bank wasn't entitled to it.

HECHT: You don't think the loan documents gave it the right?

CHANDLER: No. I do not think so. They had a security interest in specific property on the pipeline. That's clear from the evidence. They then came back and found out that they weren't fully secured, but they had only secured a portion of the pipeline. They then came back in a rush to grant the rest of the pipeline after they had already decided to foreclose.

HECHT: They had a contract that said if we didn't get enough security you have to give us some more.

CHANDLER: Yes. You have to give more security. But in this case we're saying that that granting of security wasn't reasonably equivalent to the amount...

HECHT: Well I was just asking though did they have the right to ask the debtor to give them ______?

CHANDLER: Yes. They did have the right to ask the debtor to give them...

HECHT: Under the original loan papers?

CHANDLER: Under the original loan documents. That's correct.

OWEN: So we go back to Comment 3. It specifically says that in these circumstances the debt's measured by the value of the interest in the asset not the value of the asset.

CHANDLER: If you go further into it, it points to a case where a quick claim deed was given. A quick claim deed was given for, and the court in that case said that that was a fraudulent transfer. If you go on and look at Comment 2, §3 of the Uniform Act, the definition of §3 is not exclusive. Value is to be determined in light of the purpose of the act to protect a debtor's estate

from being depleted to the prejudice of the debtor's unsecured creditors.

The comment 3, §3, the case is Hartford Assn. v. Brownmaster Co. & Jurasic, 254 Mich. 131, 235 N.W. 836, a quick claim deed given as a mortgage held to be fraudulent to the extent the value of the property transferred exceeded the indebtedness incurred. Also comment 3, §4 of the Uniform Act states that unlike the uniform fraudulent conveyance act as originally promulgated this act does not prescribe different tests when a transfer is made for the purpose of securing, and when it is intended to be absolute. The premise of this act is when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to the unsecured creditors and, thus, cannot be regarded as the subject of the fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer.

OWEN: Now why wasn't the equity cushion as you call it available to unsecured creditors here? Someone could have bought this for value at the foreclosure sale.

CHANDLER: Because in this case the bank had decided prior to taking the security interest that they were going to foreclose. There is evidence in the record.

OWEN: But that doesn't affect the availability of the equity cushion to unsecured creditors. It's still there. If it's really worth $700,000 where's the cushion?

CHANDLER: Well we have two problems here. One is, is the fact that the property in question is a pipeline. As you can see from the record there were various offers to purchase the pipeline right around the time that the bank took its deed of trust. In each of those offers, the prospective purchasers asked to have time to do due diligence. Because we're dealing with 28 miles of pipeline they had to do due diligence to figure out what they were buying and how they were buying it. In this case, the bank took its deed of trust lien and immediately foreclosed on its nutra(?) deed of trust lien as quickly as it could.

OWEN: So we've got to construe the act on an asset by asset basis depending on what kind of asset it is?

CHANDLER: Depending on the asset and depending on the facts.

OWEN: So if this were a car and they had an equity cushion, if they had done this with an automobile the act would be construed one way, but since you're saying this is a pipeline and it's harder to sell a pipeline than a car we've got to construe the act a different way?

CHANDLER: I would construe the act a different way because one has a market value that's easily determinable.

ENOCH: Your real concern here is that by the foreclosure the bank somehow reduced the value of that asset.

CHANDLER: Yes.

ENOCH: What did the bank take that was not of equivalent value?

CHANDLER: The bank took the property.

ENOCH: But the bank can only take the property to the extent of its debt. Your argument is that by the way they took it they somehow reduced the value of that asset. How is the bank taking something of not equivalent value if all that happens is that because of foreclosure the asset totally isn't worth as much as the other creditors think it ought to be worth?

CHANDLER: In that situation what you have is a situation where the bank is attempting to capture the equity. Our belief is that the bank was attempting to capture the equity cushion. That is, foreclose, move forward, collect the entire amount of the pipeline, go to foreclosure sale, have a distress sale of the pipeline, own the pipeline and then turn around and sale it to one of the operators for the $700,000 to $1.5...

PHILLIPS: What does the record show about what factually happened?

CHANDLER: The record actually shows that the bank had decided to foreclose sometime prior. They were unaware of it. Post-foreclosure. At that point we don't know what happened. All we know is that we filed our lawsuit and they quit maintaining the pipeline.

HECHT: I'm not clear how they could "capture the equity cushion." Don't they owe it back to the debtor?

CHANDLER: If the bank had foreclosed like it did, paid $242,000 for the pipeline as it did, its now purchased an asset for $242,000 which is worth $700,000. That means the bank comes in and gets a $500,000 windfall at the sale. That's our position of how this case...

PHILLIPS: That was your theory in the case. But you didn't have any proof about what they actually did. Your theory is that's what they must have intended to do given the speed with which they acted.

CHANDLER: Given the course of conduct, given the speed at which they acted, given the nature of the fact that there as a judgment 15 days before they took a deed of trust, and they immediately signed the deed of trust and immediately began foreclosure.

PHILLIPS: But you don't know if they still own the pipeline.

CHANDLER: They own the pipeline. They have legal title to the pipeline.

O'NEILL: Isn't there a way to challenge the foreclosure sale otherwise than through the

fraudulent transfer act? Can't you contest that the sale is reasonable?

CHANDLER: I believe that that's the debtor. The debtor could contest that the sale was reasonable. We had no interest in the property.

O'NEILL: Is this supposed to work like a preference in a bankruptcy proceeding? Let's say the debtor had declared bankruptcy, and let's say that this pipeline had been transferred to the bank, and let's say that 6 months or 5-1/2 months before the debtor filed bankruptcy he had deeded the pipeline to the bank. What would the trustee in bankruptcy do to get that property back? Let's say the bank had then sold it. I just don't know bankruptcy law. What would be the value? What would the trustee sue for to get that back into the debtor's estate?

CHANDLER: In this circumstance or in the circumstance you've given, the trustee would file a preferential transfer action with the bankruptcy court. And since the trustee is a super creditor, he has the power to come in and have the court set aside the transfer.

O'NEILL: Let's assume that the asset had sold, as it did here. What value would the trustee be seeking to put back into the debtor's estate?

CHANDLER: The value of the pipeline at the time of the transfer.

O'NEILL: Is the purpose of this fraudulent transfer act to sort of - if the focus is on the insolvency of the debtor, is it _______ bankruptcy context to protect creditors?

CHANDLER: Yes. That's exactly what it's supposed to do. It's to protect creditors from competing creditors who are either insiders or taking for less than reasonably equivalent value.

OWEN: If that were true in every secured transaction where there's an equity cushion you're saying under this act all the unsecured creditors can come in and have that foreclosure set aside, and we would be radically changing the law wouldn't we?

CHANDLER: No you wouldn't because in this case you're not dealing with a normal course of events, the deed of trust.

OWEN: I thought in response to J. O'Neill's question you said this is just a preference like the bankruptcy act preference. And the bankruptcy act preference doesn't depend on intent, or to fraudulent, or to anything else. It's just a straight time thing.

CHANDLER: It is a straight time thing. And that's the advantage of the preferential...

OWEN: So is this that or not?

CHANDLER: It is not that. This goes one step further. This protects from fraudulent

transfers by insolvent debtors. Unlike a trustee we're not a super creditor. We don't have the powers and the bankruptcy court behind us. The bankruptcy court only deals in time as you've stated. However, in this case what we're dealing with is actual intent to hinder, delay or defraud.

ENOCH: What was the abstract judgment filed before the foreclosure?

CHANDLER: Yes. The abstract of judgment was filed before the foreclosure.

ENOCH: So would you have not been a claimant - you were not an unsecured creditor at this point at least for the real estate interest.

CHANDLER: Not for the real estate interest. Correct.

ENOCH: So you would not have the authority to challenge the foreclosure if it was less than market value? If they attempted to cutout your lien by underbidding the market value of the property wouldn't you have a claim?

CHANDLER: I don't know if I have a claim or not. We have not looked at that section of the law since it's all fairly new. My understanding though it's the debtor's ability. And it's the debtor's ability to file that suit because he is the one who actually owns the equity cushion.

ENOCH: In the priorities of liens recognizing that you would have had a lower priority under the circumstance here, it might have been in your client's best interest to go in and bid the $250,000 or whatever it was due on the loan and pickup and asset that you thought was worth $700,000.

CHANDLER: If we had been aware of the transfer. However, my client lives 1,000 miles away from the county in which all this occurred. And so my client was unaware of the foreclosure and unaware of the foreclosure sale. We would have gone in. We could have gone in.

SMITH: You say that the bank had the right to ask for that deed of trust under the original loan document?

CHANDLER: Yes.

SMITH: Are you saying that the execution of that deed itself was the fraudulent transfer? If they have the right then exercising it shouldn't be an issue here right?

CHANDLER: They had the right if he was solvent. This debtor was insolvent. They knew he was insolvent.

SMITH: But they had the right before he was insolvent and then the bank loses that right once he becomes ________?

CHANDLER: They must be much more careful about their lending practices after they become insolvent.

SMITH: But they're still entitled to it legally is what I'm trying to get to.

CHANDLER: Under the case law they are entitled to it if they give new value.

HECHT: Why do they have to give new value? That's the part I don't understand.

CHANDLER: Again, we're dealing with an insolvent debtor. In a normal course of events if you were not insolvent there would be no problem with giving additional security.

HECHT: In fact the creditor by receiving the deed of trust he would only be getting what he bargained for in the first place.

CHANDLER: Yes.

HECHT: But you think because the debtor is insolvent that changes it?

CHANDLER: It changes it. And it changes it under the statute.

OWEN: Isn't extending the loan new value?

CHANDLER: Yes. That is new value. But there is no evidence and there is no proof. In fact there is evidence against that...

OWEN: Where does the statute require that you get new value if you're insolvent?

CHANDLER: The statute doesn't require but the case law does. And the case law that we were looking at is Bosier Bank and Trust v. Fieling(?)...

OWEN: But the statute doesn't say one way or the other?

CHANDLER: The statute doesn't say one way or another. The statute is very straightforward. The statute says you prove actual intent to hinder, delay or defraud.

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REBUTTAL

SLAVIN: To continue with J. Owen's question. The statute at 24.004(a) provides value is given for a transfer or an obligation if in exchange for the transfer or obligation property is transferred or an antecedent debt is secured. The statute does not require any value. To the contrary the statute provides that existing debt is value for purposes of the fraudulent transfer act.

You will see in the record that after the deed of trust was given, Mr. Thornton received an offer from _________ contingent on it doing its due diligence to pay up to $700,000 for the pipeline. The letter specifically asked for 7 days of due diligence, which expired on April 30. After doing our due diligence as all the floated offers to make an offer had done before it, they never showed up, they never put down any escrow money, they decided upon their due diligence that they did not want to purchase this pipeline or certainly not want to purchase it for the amount of that offer. Six days after that letter, which was also signed off on by the bank that indicated that the bank was still trying to allow Thornton to sell this thing. The bank did not want to foreclose on this pipeline. Banks are very reluctant to foreclose on these kind of things. Banks want to get paid their debt. After that happened and this was the last of the series of offers that had it had, 6 days later is when they posted the property for foreclosure.

So that's the evidence in the record about what happened. That's the only evidence in the record about what happened in connection with the deed of trust. And in fact that the bank called _________ under its security provision to secure. How else could the bank secure 254,000 feet of pipe which I believe is about 48 miles worth of pipe that is listed specifically in an attachment to its security agreement and in an attachment to its financing statement when that pipe is in the ground how else can it properly perfect its security interest without requiring an additional deed of trust document? And that's what the loan documents allowed it to do, and that's what it did. And that is not fraudulent transfer.

Fraudulent transfers, the underlying purpose is to prevent a debtor from placing his assets for his benefit or of family's benefit or for some reason other than the payment of his debt. To abscond with it, to put it away from his creditors that is not in play in this case. This is simply a case between competing creditors. For example, if Mr. Thornton had known, we don't even have any evidence that this default judgment was ever sent to him within 2 weeks after it was rendered 1,000 miles away, they didn't offer any evidence that the court had sent him notice of this, but assume he had notice of it and assume he was mad the bank had been hassling him to come in and sign this deed of trust, and he decided he would rather the Hoopers get paid rather than him, so he delays until the Hoopers file their abstract on the real estate and becomes a lien in priority over the bank's lien. If our situation is a fraudulent transfer, that situation would be a fraudulent transfer as well. And that simply is not the law. It is not a fraudulent transfer to prefer one creditor over another. The only time that becomes an issue is in a bankruptcy context and the timing of it is closer to filing of the bankruptcy. The statutes provide trustees with super creditor status to be able to go set those aside and equitably divide that up. None of those provisions are in the fraudulent transfer act.

O'NEILL: Do you know if only a debtor can bring an action to challenge the reasonableness of the foreclosure, or can another creditor do that?

SLAVIN: I do not know. It seems to me that a junior lien holder should have some sort of standing to make that claim.