

2010 WL 8971245 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of California,  
North County Division.  
San Diego County

Elaine STINSON, an individual, Plaintiff,

v.

Phyllis J. KITTINGER, an individual; Russell Kittinger, an individual; Kittinger  
Family Trust, an entity of unknown form; and Does 1 through 25, Defendants.

No. 37-2009-00062072-CU-FR-NC.  
April 2, 2010.

**Defendant Russell Kittinger's Demurrer To Plaintiff's First Amended Complaint**

James M. McNair, Bar No.250847, Law Office of James M. McNair, 205 West Fifth Avenue, Suite 104, Escondido, California 92025, Telephone: (760) 294-6751, Attorney for Defendant, Russell Kittinger.

Christina Rimkus Denning, SBN 211137, [Robert J. Fitzpatrick](#), SBN 265602, Marks, Golia & Finch, LLP, Attorneys At Law, 8620 Spectrum Center Boulevard -- Suite 900, San Diego, California 92123-1489, Telephone: (850) 737-3100, Facsimile: (858) 737-3101, Attorneys for Plaintiff Elaine Stinson.

Judge: Hon. [Thomas P. Nugent](#).

Date: July 30, 2010

Time: 1:30 pm per??/LA

Dept.: 30

TO ELAINE STINSON AND HER ATTORNEYS OF RECORD:

Defendant RUSSELL KITTINGER for himself only and no other defendant generally demurs to the Third Causes of Action in the Complaint filed by Plaintiff and specially demurs to the First, Second and Third Causes of Action on the following grounds:

***GENERAL DEMURRER TO THE THIRD CAUSE OF ACTION***

Defendant demurs to Plaintiff's Third Cause of Action for **Financial Abuse** of an **Elder** on the ground that the Complaint fails to state facts sufficient to constitute a cause of action.

***SPECIAL DEMURRER TO THE COMPLAINT IN ITS ENTIRETY***

Defendant jointly specially demurs to Plaintiff's entire Complaint on the ground that the case is not ripe for adjudication.

DATED: April 1, 2010

Respectfully submitted,

<<signature>>

James M. McNair, Esq.

Attorney for Defendant

RUSSELL KITTINGER

**ELAINE STINSON'S OPPOSITION TO THE DEMURRER OF PHYLLIS J.  
KITTINGER, RUSSELL KITTINGER AND THE KITTINGER FAMILY TRUST**

Assigned to: Hon. Thomas P. Nugent, Dept. 30

Date: July 30, 2010

Time: 1:30 p.m.

Dept.: 30

Complaint Filed: November 23, 2009

Trial Date: Not Set

*I INTRODUCTION*

The demurrer fails as a matter of law for two reasons. First, the alleged fraudulent transfers deprived Elaine Stinson (“Stinson”) of a property right. Accordingly, Stinson's first amended complaint in the captioned action (“Complaint”) states a cause of action for **financial abuse** of an **elder** under [Welfare & Institutions Code section 15610.30](#). Second, the causes of action under the California Uniform Fraudulent Transfer Act (“Act”) are ripe for adjudication because, under the Act, there is no requirement the underlying action is reduced to a judgment for relief to be granted. The Complaint alleges that Stinson is a creditor of defendant Phyllis Kittinger (“Phyllis”). As a creditor, Stinson has a ripe cause of action. <sup>1</sup>

**II**

***SUMMARY OF FACTS AS ALLEGED IN THE COMPLAINT***

In January of 2008, Stinson filed San Diego Superior Court Case No. 37-2008-00050484-CU-PO-NC against Phyllis and Leisure Palms, a business entity of unknown form, alleging damages resulting from statutory **elder abuse**, neglect and negligence (“Underlying Action”). (Complaint, ¶ 9.) The Underlying Action went to trial in June 2009. (Complaint, ¶ 9.)

On June 15, 2009, at the conclusion of trial, the jury determined that Stinson proved by clear and convincing evidence that Phyllis and Leisure Palms committed statutory **elder abuse** with knowing disregard of the rights and safety of others, recklessness, malice, oppression and fraud. (Complaint, ¶ 10; concurrently filed request for judicial notice (“RJN”), Exhibit “1.”) The jury further determined that the **elder abuse** was a substantial factor in causing Stinson's damages and that Stinson proved by clear and convincing evidence that Phyllis and Leisure Palms caused her \$588,163.00 in special and general damages. <sup>2</sup> (Complaint, ¶ 10; RJN, Exhibit “1.”) The judgment in the underlying action is forthcoming and a statement of decision acknowledging the

forthcoming judgment has been issued. (RJN, Exhibit “2.”) Stinson is therefore a “creditor,” and Phyllis is a “debtor,” under [Civil Code section 3439.01](#). (Complaint, ¶ 10.)

On June 23, 2009, Phyllis and her husband, Russell Kittinger (“Russell”), transferred to each other six parcels of real property. (Complaint, ¶¶ 11-17.) Russell transferred his heavily encumbered properties to Phyllis, and Phyllis transferred her equity-rich properties to Russell for no consideration. (Complaint, ¶¶ 18-20.)

As a result of the transfers, all or substantially all of Phyllis' assets were transferred to Russell, and Phyllis assumed substantial debt. (Complaint, ¶¶ 20-21.) This debt rendered Phyllis insolvent under [Civil Code section 3439.02](#). (Complaint, ¶¶ 22.) Stinson alleges each defendant in this action acted with actual intent to hinder, delay or defraud Stinson. (Complaint, ¶ 48.)

In furtherance of defendants' plan to fraudulently conceal the assets of Phyllis, on June 22, 2009, after 37 years of marriage and just two days before all of the above property transactions were recorded, Phyllis' counsel in the Underlying Action (and in this action) prepared a petition for dissolution of marriage on behalf of Phyllis' husband, Russell. (Complaint, ¶¶ 23.) The date of separation stated on the petition for dissolution of marriage is June 15, 2009, the very same day the final jury verdict was returned in the Underlying Action. (Complaint, ¶¶ 25.)

As discussed below, by transferring and concealing the properties in an effort to defraud Stinson, defendants took, secreted, appropriated and retained the property of Stinson. Moreover, in the Underlying Action, the jury awarded Stinson damages for services she paid for, but which she never received. Those damages constitute a disgorgement of Stinson's personal property and, consequently, Phyllis remains in possession of Stinson's property. (Complaint, ¶ 49.) The actions described above constitute **financial abuse** of an **elder** or dependent adult under [Welfare and Institutions Code section 15610.30, subdivision \(a\)](#). (Complaint, ¶ 49.)

### III

#### **STANDARD ON DEMURRER**

In ruling on a demurrer, the complaint should be construed “liberally ... with a view to substantial justice between the parties.” ([Code Civ. Proc.](#), § 452; [Stevens v. Superior Court](#) (1999) 75 Cal.App.4th 594, 601.) A complaint which, considered as a whole, shows any right to relief will withstand a demurrer. ([Gressley v. Williams](#) (1961) 193 Cal.App.2d 636, 639.) Where a demurrer is granted, the court must specify the grounds. ([Code Civ. Proc.](#), § 472d.) The Court should also liberally grant an opportunity to amend where there is any possibility of correcting the defect. ([Goodman v. Kennedy](#) (1976) 18 Cal.3d 335, 349.)

### IV

#### **STINSON HAS SUFFICIENTLY ALLEGED A CAUSE OF ACTION FOR **FINANCIAL ELDER ABUSE****

The only cause of action the defendants specially demur to is the cause of action for **financial elder abuse**. [Welfare & Institutions Code section 15610.30](#) supports a cause of action for **financial elder abuse** under the facts alleged the in the Complaint.

[Welfare & Institutions Code section 15610.30](#) states:

(a) **Financial abuse** of an **elder** or dependent adult occurs when a person or entity does any of the following:

(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud, or both.

(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an **elder** or dependent adult for a wrongful use or with intent to defraud ...

\* \* \*

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an **elder** or dependent adult is *deprived of any property right*, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an **elder** or dependent adult.

(Welf. & Inst. Code, § 15610.30 [emphasis added].)

The statute clearly states that taking, secreting, appropriating, obtaining, or retaining property includes *deprivation of any property right*. The statute does not require a physical taking of tangible property.

#### **A. Stinson Has A Property Right In Her Underlying Cause Of Action**

The Complaint alleges Phyllis, with the help of Russell, took, secreted, appropriated and retained real or personal property of Stinson, by transferring [her properties] for the purpose of rendering herself insolvent and defrauding Stinson. (Complaint, ¶ 49.)

Stinson's claim in the Underlying Action is her personal property. “The term ‘property’ is sufficiently comprehensive to include every species of estate, real and personal, and everything which one person can own and transfer to another. It extends to every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.” (*Yuba River Power Co. v. Nevada Irrigation Dist.* (1929) 207 Cal. 521, 523.)

In California, personal property includes money, goods, chattels, *things in action*, and evidences of debt. (See *Civ. Code*, § 14 [emphasis added].) A “thing in action,” also known as a “chose in action,” is a right to recover money or other personal property by a judicial proceeding. (See *Civ. Code*, § 953.) “A cause of action to recover money in damages, as well as money recovered in damages, is a chose in action and therefore a form of personal property.” (*Parker v. Walker* (1992) 5 Cal.App.4th 1173, 1182-1183; see also *McFadden v. Santa Ana, Orange & Tustin Street Railway Co.* (1891) 87 Cal. 464, 467 [“The right to recover damages for a personal injury ... is property ...”].) Specifically, an unliquidated tort claim, i.e., one that has not been reduced to judgment, is personal property. (*Everts v. Will S. Fawcett Co.* (1937) 24 Cal.App.2d 213, 215-217; see also, *Civ. Code*, § 663; *Civ. Code*, § 953.)

California law clearly recognizes that Stinson's claim in the Underlying Action is her personal property, even though the claim has not been reduced to a judgment. Further, because the jury issued a verdict of \$588,163.00 in compensatory damages, and the forthcoming judgment will include hundreds of thousands of dollars in fees and costs, Stinson's claim has clear monetary value. (See RJN, Exhibit “2.”)

#### **B. Stinson Was Deprived Of A Property Right**

Defendants deprived Stinson of the above discussed property right, and continue to do so, by virtue of the fraudulent transfers. Stinson alleged in the Complaint that the fraudulent transfers were designed to hinder, delay and/or defraud her from collecting her claim, and that such transfers constituted **financial elder abuse**. (Complaint, ¶¶ 30-34,49.) The alleged fraudulent transfers effectively reduced the value of Stinson's claim by delaying and hindering enforcement of and execution on the forthcoming judgment.

Stinson also alleges in the Complaint that because the jury awarded Stinson damages for services she paid for, but which she never received, those damages constitute a disgorgement of Stinson's personal property. (Complaint, ¶ 49.) As such, the Complaint alleges that Phyllis remains in possession of Stinson's property. (Complaint, ¶ 49.) Allegations that a person retained the property of an **elder** for a wrongful use or with intent to defraud, is, by itself, sufficient to support a cause of action for **financial elder abuse** under [Welfare & Institutions Code section 15610.30](#). (*Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 175.)

Defendants deprived, or assisted in depriving, Stinson of a property right. Such conduct gives rise to a cause of action for **Financial Elder Abuse** under [Welfare & Institutions Code section 15610.30](#). Thus, the special demurrer to the **financial elder abuse** cause of action should be overruled.

## V

### THE FRAUDULENT TRANSFER CAUSES OF ACTION ARE RIPE FOR ADJUDICATION

Defendants provide no authority that Stinson's causes of action are not ripe. “A ‘claim’ means 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.” (Civ. Code, § 3439.01, subd. (b) [emphasis added].) A “creditor” means a person who has a claim. (Civ. Code, § 3439.01, subd. (c).) Stinson is a creditor of Phyllis by virtue of her underlying claim against Phyllis, regardless of whether it has been reduced to a judgment.

Under the Act, “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 obligation was incurred, if the debtor made the transfer or incurred the obligation as follows: (1) with actual intent to hinder, delay, or defraud any creditor of the debtor.” (Civ. Code, § 3439.04, subd. (a); see also Civ. Code, § 3439.05.) Moreover, the Act sets forth available remedies in cases where the underlying claim has not been reduced to a judgment. (See Civ. Code, § 3439.07 subd. (a) through (c).)

The Complaint alleges that defendants Russell and Phyllis transferred real property to and from each other with the intent to defraud Stinson. The Complaint alleges that the transfers were meant to conceal Phyllis' assets for the purpose of defrauding Stinson with respect to her underlying claim. (Complaint, ¶¶ 26-40.) For purposes of a cause of action under [Civil Code section 3439.04](#), it is irrelevant whether the transfers occurred before or after the claim arose, or whether the claim has been reduced to a judgment. Stinson is a creditor of Phyllis by virtue of her claim in the Underlying Action. As such, Stinson has a ripe cause of action under the Act, and the general demurrer to all causes of action should be overruled.

## VI

### CONCLUSION

Stinson has pled sufficient facts to maintain all causes of action against defendants. Accordingly, defendants' demurrer should be overruled in its entirety. In the alternative, if this Court is inclined to sustain the demurrer as to any cause of action, leave to amend should be granted.

DATED: July 19, 2010

Respectfully submitted,

MARKS, GOLIA & FINCH, LLP

By: <<signature>>

CHRISTINA RIMKUS DENNING

ROBERT J. FITZPATRICK

Attorneys for Plaintiff Elaine Stinson

Footnotes

- 1 Originally, all defendants demurred to all causes of action on the basis that Stinson did not have the capacity to sue. However, that issue was resolved when this Court appointed Allen Stinson as Stinson's guardian ad litem. Here, defendants demur to the **financial elder abuse** cause of action on the basis that it was not Stinson's property that was transferred and to all causes of action on the basis of ripeness.
- 2 Punitive damages were originally awarded, however, the Court granted a new trial on the issue of punitive damages. That trial concluded in June, 2010, and judgment is forthcoming upon resolution of fees and costs to be awarded. Judge Dahlquist of Department 29 of this Division issued a statement of decision. The statement of decision is attached as RJN, Exhibit "2."

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