Affirmed and Opinion filed April 6, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01276-CV

SENIOR COMMODITY CO., S.A.M., Appellant

V.

ECONO-RAIL CORP. and BEAUMONT BULK TERMINAL, INC., Appellees

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 97-44760

O P I N I O N

Senior Commodity Co., S.A.M., appellant, appeals from a take-nothing judgment granted to Econo-Rail Corp. and Beaumont Bulk Terminal, Inc., appellees, in Senior Commodity' s fraud-based lawsuit. Because Senior Commodity has presented no evidence of its claims, we affirm the judgment.

I. Background

Senior Commodity is a Monaco-based company in the business of trading petroleum coke, also known as petcoke, a petroleum-refining byproduct sold as industrial fuel. On behalf of his company, Riny Doyle, president of Senior Commodity, in 1989, began purchasing petcoke from Construction Aggregates,

Inc., also known as Con-Agg, eventually engaging in dozens of petcoke purchases during the relationship. In January 1993, Senior Commodity contracted with Con-Agg to purchase approximately 50,000 metric tons of petcoke. After several delays and ultimately no delivery, in September 1993, Senior Commodity filed a complaint for breach of contract with the International Court of Arbitration of the International Chamber of Commerce. After the arbitration court ruled in favor of Senior Commodity, the United States District Court for the Southern District of Texas in May of 1996 entered a final judgment against Con-Agg in favor of Senior Commodity based on the arbitration award. When Senior Commodity attempted to collect the judgment, it discovered that Con-Agg was no longer an operating entity and that it had no assets.

Senior Commodity filed suit against Econo-Rail and Beaumont Bulk Terminal, alleging: (1) Con-Agg manager Bill Scott was the actual or apparent agent of Econo-Rail and Beaumont Bulk Terminal; (2) Con-Agg was the alter ego of Econo-Rail and Beaumont Bulk Terminal; and (3) after Con-Agg received notice Senior Commodity's arbitration claim, Con-Agg fraudulently conveyed its assets to Econo-Rail, taking them out of Senior Commodity's reach. After the close of evidence, the trial court granted the defendants' motion for a directed verdict on the issue of fraudulent transfer. The jury then answered three pairs of questions, finding: (1) Bill Scott was acting under the authority of Econo-Rail and Beaumont Bulk Terminal; (2) Bill Scott had committed actual fraud for Econo-Rail and Beaumont Bulk Terminal; and (3) Econo-Rail and Beaumont Bulk Terminal were responsible for Con-Agg's debt. The trial court then granted the defendants' motion for judgment notwithstanding the verdict.

II. Agency

In its first appellate issue, Senior Commodity complains the trial court erred in granting JNOV on the issue of whether Bill Scott had actual or apparent authority to act for Econo-Rail and Beaumont Bulk Terminal. Specifically, Senior Commodity complains there is legally sufficient evidence to show Bill Scott had actual implied authority to act for appellees.

A. Standard of review for JNOV

A trial court may disregard a jury's findings and grant a judgment n.o.v. only where there is no evidence upon which the jury could have made its findings. *See Mancorp, Inc. v. Cullpepper*, 802

S.W.2d 226, 227 (Tex. 1990). A trial court may render JNOV only when a directed verdict would have been proper. *See* TEX. R. CIV. P. 301; *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991). In reviewing the JNOV, the reviewing court must determine whether there is any evidence upon which the jury could have made the finding. *See Navarette v. Temple Indep. Sch. Dist.*, 706 S.W.2d 308, 309 (Tex. 1986). The court reviews the record in the light most favorable to the finding, considering only the evidence and inferences that support the finding and rejecting the evidence and inferences contrary to the finding. *See id*. If there is more than a scintilla of competent evidence to support the jury's finding, then the JNOV will be reversed. *See Southern States Transp., Inc. v. State,* 774 S.W.2d 639, 640 (Tex. 1986). *See generally* W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 456-57 (1998).

B. Actual implied authority

The question of agency is generally one of fact. *See Ross v. Texas One Partnership,* 796 S.W.2d 206, 209-10 (Tex. App.–Dallas 1990), *writ denied,* 806 S.W.2d 222 (Tex. 1991). The question can become one of law, however, where the facts are established or undisputed. *See Ross*, 796 S.W.2d at 209-10. An agency is the consensual relationship between two parties where one, the agent, acts on behalf of the other, the principal, and is subject to the principal's control. *See Schultz v. Rural/Metro Corp. of New Mexico-Texas*, 956 S.W.2d 757, 760 (Tex. App.–Houston [14th Dist.] 1997, no writ). As in the case of contracts generally, the consent of both the principal and the agent is necessary. *See Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1296 (5th Cir. 1994); *Southern Methodist Univ. v. Evans*, 131 Tex. 333, 336, 115 S.W.2d 622, 624 (1938) (no contract without evidence of offer and acceptance); *First Nat'l Bank v. Farmers & Merchants State Bank*, 417 S.W.2d 317, 330 (Tex. Civ. App.–Tyler 1967, writ ref'd n.r.e.) (consent of both principal and agent necessary to create agency); 3 TEX. JUR. 3D *Agency* §§ 15, 16 (1996). Although consent may be implied rather than express, the principal must intend that the agent act for him, and the agent must intend to accept the authority and act on it, and such intention must find expression either in words or conduct between them. *See Farmers & Merchants State Bank,* 417 S.W.2d at 330.

Actual authority usually denotes the authority that a principal (1) intentionally confers upon an agent, (2) intentionally allows the agent to believe that he or she possesses, or (3) allows the agent to believe that he or she possesses by want of care. *See Sociedad De Solaridad Social El Estillero v. J.S. McManus Produce Co.*, 964 S.W.2d 332, 334 (Tex. App.–Corpus Christi 1998, no pet.). Actual authority includes both express and implied authority. *See Streetman v. Benchmark Bank*, 890 S.W.2d 212, 215-16 (Tex. App.–Eastland 1995, writ denied). Express authority exists where the principal has made it clear to the agent that he wants the act under scrutiny to be done. *See Mexico's Indus., Inc. v. Banco Mex. Somex, S.N.C.*, 858 S.W.2d 577, 583 (Tex. App.–El Paso 1993, writ denied). Implied authority exists where there is no direct proof of express authority but appearances justify finding that in some manner the agent was authorized to do what he did. *See Insurance Co. of N. Am. v. Morris*, 928 S.W.2d 133, 144 (Tex. App.–Houston [14th Dist.] 1996), *rev'd on other grounds*, 981 S.W.2d 667 (Tex. 1998).

Implied authority may rise: (1) from some indication from the principal that the agent possesses the authority; (2) from being the necessary implication of an expressly authorized act; and (3) from a previous course of dealing. *See Pasant v. Jackson Nat'l Life Ins. Co.*, 52 F.3d 94, 97 (5th Cir. 1995); *Texas Conservative Oil Co. v. Jolly*, 149 S.W.2d 265, 267 (Tex. Civ. App.–El Paso 1941, no writ). Agency can be implied from the conduct of the parties under the circumstances. *See Thornburgh*, 39 F.3d at 1296-97; *Grace Community Church v. Gonzales*, 853 S.W.2d 678, 680 (Tex. App.–Houston [14th Dist.] 1993, no writ). On the question of implied agency, it is the manifestation of the purported principal-agent relationship as between themselves that is decisive and not the appearances to a third party or what that third party should have known. *See Esso Int'l, Inc. v. SS Captain John*, 443 F.2d 1144, 1148 (5th Cir. 1971) (citing RESTATEMENT (SECOND) OF AGENCY § 7 (1958)).

For an agency to be implied from the acts and conduct of the parties, there must be some act amounting to an appointment as agent. *See Newell v. Lafarelle*, 225 S.W. 853, 855 (Tex. Civ. App.–El Paso 1920, writ dism'd) (one has no authority to act as agent of another except by virtue of some act of the other amounting to appointment as agent); 3 TEX. JUR. 3D *Agency* § 19 (1996). Actual authority relies for its creation on some manifestations, written or spoken words or conduct of the principal,

communicated to the agent. *See Spring Garden 79U, Inc. v. Stewart Title Co.*, 874 S.W.2d 945, 948 (Tex. App.–Houston 1st Dist.] 1994, no writ). The mere declarations of a purported agent, standing alone, are not competent to establish either the existence of the purported agency or the scope or extent of the purported agent's authority. *See Ferguson v. Red Arrow Freight Lines*, 580 S.W.2d 84, 88 (Tex. Civ. App.–Corpus Christi 1979, no writ); 3 TEX. JUR. 3D *Agency* §289 (1996).

C. Discussion

Senior Commodity contends that Econo-Rail and Beaumont Bulk Terminal used Bill Scott as their undisclosed agent to perpetrate a fraud upon Senior Commodity. Senior Commodity acknowledges that Bill Scott never held himself out as the agent of Econo-Rail or Beaumont Bulk Terminal and that neither Econo-Rail nor Beaumont Bulk Terminal held Bill Scott out to Senior Commodity as their agent. Senior Commodity argues, nevertheless, that Econo-Rail and Beaumont Bulk Terminal, acting through Bill Scott, fraudulently induced Senior Commodity into contracting with Con-Agg, a company with few assets, rather than either Econo-Rail or Beaumont Bulk Terminal, corporations with substantial assets. Because Bill Scott was the agent of Econo-Rail and Beaumont Bulk Terminal, Senior Commodity argues, the companies are bound by his actions. Senior Commodity concedes there is no direct evidence of an agency relationship; we must, therefore, examine the record to determine if such a relationship can be proven circumstantially. There must be evidence that both Bill Scott and Appellees agreed to the agency relationship. Bill Scott at trial denied being the agent for either Econo-Rail or Beaumont Bulk Terminal. Therefore, if we find no evidence that Appellees acted to appoint or to acknowledge Bill Scott as their agent, as a matter of law, no relationship can be proven. Senior Commodity acknowledges that neither Bill Scott nor Appellees held themselves out to Doyle, Senior Commodity's president, as agent or principals. Therefore, Senior Commodity does not rely on apparent authority, which would require reliance on the part of Senior Commodity. Senior Commodity, thus, relies solely on implied actual authority.

Senior Commodity alleges that Bill Scott, acting under the undisclosed authority of Econo-Rail and Beaumont Bulk Terminal, made two material misrepresentations to Doyle. First, Senior Commodity alleges that Bill Scott represented to Doyle that Con-Agg held a petcoke supply contract with Lyondell, when in reality the Lyondell contract was held by Econo-Rail. Second, Senior Commodity alleges that Bill Scott

represented to Doyle that Con-Agg was part owner with Mitsubishi of a wood chip handling terminal in Beaumont, when in reality, Beaumont Bulk Terminal was the joint venturer with Mitsubishi in the Beaumont terminal. There was evidence, however, that Con-Agg handled the petcoke at the Houston terminal under subcontract to Econo-Rail and that Con-Agg had a crushed-limestone operation in Beaumont across the road from the wood chip terminal. Senior Commodity argues that it relied on Bill Scott's representations about the Lyondell and Mitsubishi contracts in making its decision to use Con-Agg as a petcoke supplier. Senior Commodity argues that if it had known that Con-Agg did not have contracts with Lyondell or Mitsubishi and had known that those contracts were held by Econo-Rail and Beaumont Bulk Terminal, it would have sought guarantees from Econo-Rail or Beaumont Bulk Terminal or would have sought to purchase its petcoke from Econo-Rail or Beaumont Bulk Terminal, rather than from Con-Agg.

As circumstantial evidence tending to show the agency relationship between Appellees and Bill Scott, Senior Commodity cites six segments of testimony from the trial.

First, Steve Traicoff, a Lyondell representative, testified that he perceived Bill Scott as acting for Econo-Rail during the negotiation and the performance of the petcoke contract between Econo-Rail and Lyondell. Traicoff testified as follows:

> Q. [By plaintiff's attorney:] After Econo-Rail started handling the Petcoke, who was your primary contact at Econo-Rail?
>
> A. [Traicoff:] My primary contact since Econo-Rail took over those duties would have been Bill Scott.
>
> ....
>
> Q. During those meetings [with Econo-Rail], did you ever have an impression as to who the ultimate authority was among those people?
>
> A. I would look to Bill and since Bill was the driver in the deal, he's the individual that I've really – we've been negotiating with.

Second, Traicoff testified that he had a lunch meeting with Bill Scott and Bill Scott's mother, Nita Scott, president of Con-Agg, Econo-Rail, and Beaumont Bulk Terminal. Traicoff testified that Lyondell was seeking a company to purchase its petcoke after the previous purchaser had gone bankrupt. During the meeting, the parties discussed the purchase of Lyondell's petcoke, although the testimony does not

specify which company, Con-Agg or Econo-Rail, was to purchase the petcoke. Traicoff testified as follows:

> Q. [By defendant's counsel:] Now, you did know that Mr. [Bill] Scott was not the owner of Econo-Rail, didn't you, that it was, in fact, Nita Scott?
>
> A. [Traicoff:] Yeah.
>
> Q. And that wasn't concealed from you by Mr. Scott. In fact, he told you that on at least one occasion, correct?
>
> A. He made a point to introduce his mother to me shortly after the Tetrax bankruptcy, introduced his mother to me and we sat down at lunch and they made a proposal to handle our Petcoke in the interim.

Third, Dan Orsini, management consultant working with Con-Agg, Econo-Rail, and Beaumont Bulk Terminal, testified that he perceived Bill Scott as performing tasks for both Con-Agg and Beaumont Bulk Terminal.

Fourth, Senior Commodity president Doyle testified that he perceived Bill Scott as being in charge of the Houston petcoke operation. Doyle testified, "[Bill Scott] was obviously running the handling operations in Houston."

Fifth, Doyle testified that he perceived Bill Scott to be in charge of the Mitsubishi wood chip operation in Beaumont. After observing Bill Scott's actions in Beaumont, Doyle testified as follows:

> He was obviously conducting business there. I mean, I wasn't here all the time but when I would call to speak to him about something, I'd find him either in the Houston office or in the Beaumont office, particularly in the thick of developing this new terminal. And you know, if I went to see him there in Beaumont, I mean, he'd be barking at all of the truck drivers and bulldozers and somebody would run out and say, what do you want to do with this or that, and he'd be on the phone, the mobile phone, all the time in the car giving instructions to people, people calling him for instructions. He was obviously deeply – a very busy man.

Sixth, there was testimony that Con-Agg, Econo-Rail, and Beaumont Bulk Terminal shared certain facilities, equipment, and personnel. Renee Edwards, administrative assistant for Econo-Rail, testified from a deposition read into the record as follows:

Q. [By plaintiff's counsel:] Was there a particular physical location within the Econo-Rail office where you worked when you were doing-performing services for Construction Aggregates?

A. [Edwards:] At my desk.

Q. And is that the same desk that you worked at when you were performing services for Econo-Rail?

A. Yes, sir.

Q. Do you know if the two companies used the same fax line?

A. Yes.

Q. When you received faxes for Construction Aggregates, would that come to the same fax machine that faxes for Econo-Rail would arrive at?

A. Yes, sir.

Q. When you were performing tasks for Construction Aggregates, did you use different supplies than the supplies you would use when you were performing tasks for Econo-Rail?

A. No, sir.

Q. Okay, you used the same paper supplies, the same paper clips, that type of thing?

A. Yes, sir, that is correct.

Q. When you made long distance phone calls on behalf of Construction Aggregates, did you ever differentiate those calls between a call that you would make on behalf of Econo-Rail?

A. No.

Diane Henslee, who worked as a payroll clerk and later as Nita Scott's assistant, testified that she made no effort to differentiate between the time she spent performing tasks for Con-Agg, Econo-Rail, or Beaumont Bulk Terminal. She testified as follows from a deposition read into the record:

Q. [By plaintiff's counsel:] During the period of time that you have worked as an administrative assistant for Ms. Scott, have you performed tasks for more than one company?

A. [Henslee:] Yes.

Q. Have you performed services for more than one company?

A. What do you mean by services?

Q. Things such as typing letters, signing checks.

A. Yes. That type of thing, yes.

Q. Okay, what companies have you performed services or tasks for during the time that you were working as an administrative assistant to Nita Scott?

A. Scott Employment, Econo-Rail, Beaumont Bulk and Construction Aggregates.

Q. During the time that you were working for Nita Scott as her administrative assistant, did you ever make any effort to differentiate how much time was spent performing the tasks or services for one company rather than another one?

A. No.

We do not find the cited testimony manifests an intent communicated by either Econo-Rail or Beaumont Bulk Terminal to Bill Scott that he act as their agent.

Although Traicoff testified that he perceived Bill Scott as having authority to act for Econo-Rail, he did not state the basis of his perceptions. He did not specify what actions by Econo-Rail, if any, constituted circumstantial evidence that the company bestowed authority on Bill Scott. There was evidence that Bill Scott was manager of Con-Agg and that Con-Agg was handling the Lyondell petcoke contract under subcontract to Econo-Rail. Any actions Bill Scott undertook with respect to the petcoke contract may have been undertaken as manager for Con-Agg. As for the meeting involving Traicoff, Bill Scott and Nita Scott, Traicoff did not testify about what actions Nita Scott took or statements she made at the meeting that could constitute a conferral of authority on Bill Scott to act on behalf of Econo-Rail. Without testimony about actions that Econo-Rail, or Nita Scott, took to grant Bill Scott authority, the cited evidence does not show Econo-Rail granted Bill Scott authority. Bill Scott's mere presence at the meeting with Nita Scott, without more, is no evidence, either direct or circumstantial, that Econo-Rail granted authority to Bill Scott.

As for Orsini's testimony that he perceived Bill Scott as performing tasks for both Beaumont Bulk Terminal and Con-Agg, we likewise find the testimony fails to show Beaumont Bulk Terminal's intent to grant authority to Bill Scott. Although the consultant testified as to his perceptions, he did not testify as to

the basis of his perceptions. He did not testify about what Beaumont Bulk Terminal did to clothe Bill Scott in implied actual authority.

Doyle's testimony is concerned only with Bill Scott's actions. Even if we were to take his testimony as circumstantial evidence that Bill Scott believed himself to be the agent of Econo-Rail or Beaumont Bulk Terminal, Doyle does not testify about what actions were taken either by Econo-Rail or Beaumont Bulk Terminal to grant Bill Scott authority or to induce Bill Scott to think he had authority. As the trial court stated in its order granting Appellees' motion for JNOV, "[T]he acts of the agent are no evidence as to authority from the principal. A person who walks on a plant site and begins ordering truck drivers around bears no indicia or authority from the actual owners, even if some of the drivers obey." As mentioned previously, at either the Houston facility or the Beaumont facility, Bill Scott may have been acting for Con-Agg, which was involved with the Houston petcoke operation and which had a plant across the street from the Beaumont Bulk Terminal wood chip terminal.

The deposition testimony of Edwards and Henslee that Con-Agg, Econo-Rail, and Beaumont Bulk Terminal shared certain employees, equipment, and office supplies, is arguably relevant to the question of alter ego, but does not constitute circumstantial evidence showing that either Econo-Rail or Beaumont Bulk Terminal granted authority to Bill Scott.

Senior Commodity, citing *Thornburgh*, argues that we may look to the acts of the agent in dealing with third parties to determine whether the purported principal granted authority to the purported agent. Senior Commodity argues that we may look to the acts of Bill Scott toward Lyondell's Traicoff, a third party, to determine whether a principal-agent relationship existed between appellees and Bill Scott.

Senior Commodity's reliance on *Thornburgh* is misplaced. It is not disputed that Bill Scott's actions and statements made in the presence of a third party may be relevant on the issue of the existence of implied actual authority. Bill Scott's actions or statements in the presence of a third party are not sufficient in themselves, however, to establish proof of the relationship. There must also be evidence of the purported principals' actions or statements. In *Thornburgh*, both the purported agent, Dickman, and the purported principal, Thornburgh, denied there was an agency relationship. After the trial court determined that an agency relationship existed, the Fifth Circuit found evidence sufficient to show both the

grant and the acceptance of authority. *See id*. at 668-69 (evidence showed Thornburgh authorized Dickman to speak and act on his behalf and that Dickman conceded he was "intermediary" for Thornburgh). Without evidence of both, no agency relationship could have been proven. Here, on the other hand, the trial court found no evidence of an agency relationship. Therefore, if we determine there is a failure of evidence regarding either the purported agent or purported principal, we must uphold the trial court's decision. Although Bill Scott's statements or actions may help prove that he believed himself to be appellees' agent, his actions and statements standing alone do not constitute evidence sufficient to prove that either Econo-Rail or Beaumont Bulk Terminal granted him authority.

After examining the cited testimony regarding the actions of Econo-Rail and Beaumont Bulk Terminal, we find that there is no evidence, direct or circumstantial, that either Econo-Rail or Beaumont Bulk Terminal: (1) intentionally conferred authority upon Bill Scott; (2) intentionally allowed Bill Scott to believe that he possessed authority; or (3) by want of care, allowed Bill Scott to believe that he possessed authority.

We find the first pair of jury questions is dispositive of Senior Commodity's first appellate issue. The jurors were asked three pairs of questions – the first pair on agency, and the second and third on alter ego. The jurors were instructed that if they did not find Bill Scott had the authority to act for Econo-Rail or Beaumont Bulk Terminal, they need not answer the second and third pair of questions. Because we have determined there was no evidence to support an affirmative jury finding on the first pair of questions, the jurors would not have reached the second and third pair of questions had they correctly interpreted the evidence related to agency. On appeal, Senior Commodity does not complain of the jury instructions or of the conditioning of the questions and thus has waived any complaint about the conditioning of the questions. *See Federal Sign v. Texas S. Univ.*, 951 S.W.2d 401, 407 (Tex. 1997)(where party does not raise issue on appeal, reviewing court may not reverse trial court's judgment based on unassigned issue). Thus, without deciding that the conditioning of the questions was correct, we need not address the issue of alter ego.

Having found no evidence that an agency relationship existed between Bill Scott and appellees, we overrule Senior Commodity's first appellate issue.

III. Fraudulent transfer

In its second appellate issue, Senior Commodity complains the trial court erred in granting a directed verdict to appellees on Senior Commodity's fraudulent transfer claim. It seeks to void the transfer pursuant only to section 24.005(a)(1) of the Business and Commerce Code. *See* TEX. BUS. & COM. CODE ANN. § 24.005(a)(1) (Vernon Supp. 1999). Because the evidence does not show that the transfer was voidable, the trial court did not err in allowing the conveyance to stand.

A. Standard of review for directed verdict

A directed verdict is proper: (1) when a defect in the opponent's pleadings makes the pleadings insufficient to support a judgment; (2) when the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) when the evidence offered on a claim is insufficient to raise a fact issue. *See Kline v. O'Quinn*, 874 S.W.2d 776, 785 (Tex. App.–Houston [14th Dist.] 1994, writ denied). In reviewing the grant of a directed verdict, the reviewing court will decide whether there is any probative evidence to raise fact issues on the material questions presented. *See Qantel Bus. Sys., Inc. v. Custom Controls*, 761 S.W.2d 302, 34 (Tex. 1988). The reviewing court must consider all of the evidence in the light most favorable to the party against whom the verdict was directed, disregard all contrary evidence and inferences, and give the losing party the benefit of all reasonable inferences created by the evidence. *See Szczepanik v. First S. Trust Co.*, 883 S.W.2d 648, 649 (Tex. 1994). Any reasonable intendment deducible from the evidence is to be indulged in the nonmovant's favor. *See Trenholm v. Ratcliff*, 646 S.W.2d 927, 931 (Tex. 1983). If there is any conflicting probative evidence on the claim, the directed verdict was improper and the case must be reversed and remanded for the jury's determination of the issue. *See Szczepanik*, 883 S.W.2d at 649.

B. Relevant law

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor. *See* § 24.005(a)(1). A transfer or obligation is not voidable under

section 24.005(a)(1) against a person who took in good faith and for a reasonably equivalent value. *See* TEX. BUS. & COM. CODE ANN. § 24.009(a) (Vernon 1987). *See also Hawes v. Central Tex. Prod. Credit Ass'n*, 503 S.W.2d 234, 235-36 (Tex. 1973) (notwithstanding fraudulent transfer statute, conveyance of property by an insolvent debtor to unsecured creditor in payment of debt valid if value of the property does not exceed amount of debt and grantee creditor receives conveyance in good faith); *Bossier Bank and Trust Co. v. Phelan*, 615 S.W.2d 872, 874 (Tex. Civ. App.–Houston [1st Dist.] 1981, writ ref'd n.r.e.) (relying on *Hawes*). Good faith is defined as not having a secret agreement to benefit the grantor in some way other than by discharge of the debt. *See Hawes*, 503 S.W.2d at 235-36; *Phelan*, 615 S.W.2d at 874. This exception applies even though the grantor actually intended to prefer one of his creditors over other creditors and the grantee had notice of the grantor's intent. *See Hawes*, 503 S.W.2d at 236; *Phelan*, 615 S.W.2d at 874.

C. Discussion

Here, the uncontroverted evidence shows that in exchange for certain personal property owned by Con-Agg (primarily materials-handling equipment, including a motorgrader, an excavator, an end dump truck, some wheel loaders, a crawler tractor, and a forklift), Econo-Rail assumed Con-Agg's obligations under a promissory note dated June 1, 1994. The amount of the principal was $539,870.86. In addition, Econo-Rail forgave the remaining unpaid balance of a promissory note dated December 31, 1990, in the original amount $663,236.48, that had been executed by Con-Agg and made payable to Econo-Rail. Econo-Rail consultant Dan Orsini testified that the book value of the Con-Agg personal property was approximately $600,000, and that Con-Agg made about $300,000 on the sale. The evidence further shows that the transfer was effective October 1, 1993, and that Econo-Rail took physical possession of the assets on December 1, 1993. The uncontroverted trial evidence thus shows that the property was conveyed for greater than its book value. There is no evidence of a secret agreement to benefit Con-Agg apart from the discharge of the debt. We do not interpret the two-month delay from legal transfer to physical transfer to be legally sufficient evidence of an improper secret agreement. Under section 24.009(a), *Hawes*, and *Phelan*, the trial court did not err in allowing the conveyance to stand. The trial

court did not err in granting directed verdict to appellees on Senior Commodity's fraudulent transfer claim. We overrule Senior Commodity's second appellate issue.

IV. Conclusion

Having overruled Senior Commodity's two appellate issues, we affirm the trial court's judgment.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed April 6, 2000.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish — TEX. R. APP. P. 47.3(b).