IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 30, 2007 Session

KATHERINE MCKAY
v.
RONNIE REECE AND HIS WIFE, MARY REECE; JAMES BLANKENSHIP AND HIS WIFE, PATRICIA BLANKENSHIP; AND CITIZENS BANK OF LAFAYETTE

An Appeal from the Chancery Court for Sumner County
No. 2005C-24 Tom E. Gray, Chancellor

No. M2006-01706-COA-R3-CV - Filed on September 11, 2007

This is an action to set aside a warranty deed based on fraud. The plaintiff inherited family-owned property after her father's death, and she lived on the property. She obtained a line of credit for $40,000 from the defendant bank, secured by the property. The plaintiff defaulted on the loan, and the bank initiated foreclosure proceedings. The plaintiff contacted the defendants, acquaintances of her father, seeking their advice on how to stop the foreclosure. The defendants told the plaintiff that the bank could not stop the foreclosure, but suggested that, in order to avoid foreclosure, they would assume the plaintiff's $40,000 loan and the plaintiff would transfer the property to them. The parties agreed that, in addition to the defendants' assumption of the $40,000 loan, the plaintiff could live on the property for one year and repurchase the property at the end of the year for the amount of the loan plus any incidental costs. With that understanding, the plaintiff executed a warranty deed transferring the property to the defendants, and the defendants assumed the loan. Before the end of the agreed year, the defendants listed the property for sale with a real estate agent for approximately $400,000. When the plaintiff questioned the defendants, she was told that she could purchase the property for one dollar over the highest offer the defendants had received for the property. The plaintiff then filed this lawsuit, asking the court to set aside the warranty deed transferring the property to the defendants. After a bench trial, the trial court set aside the deed based on inadequacy of consideration and other badges of fraud. The defendants now appeal. We affirm, upholding the trial court's credibility determinations and finding that the preponderance of the evidence supports the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which DAVID R. FARMER, J., and DONALD P. HARRIS, SR. J., joined.

Charles Hill Beaty, Gallatin, Tennessee, for the appellants, Ronnie Reece and his wife, Mary Reece; and James Blankenship and his wife, Patricia Blankenship.

Michael W. Edwards and Russell E. Edwards, Hendersonville, Tennessee, for the appellee, Katherine McKay.

OPINION

In the 1990s, the parents of Plaintiff/Appellee Katherine McKay ("McKay") lived on approximately ninety-six (96) acres of real property located in Sumner County ("the property"). In the late 1990s, McKay moved in with her parents to care for them until their deaths in 1998 (mother) and 2000 (father). McKay became acquainted with Defendant/Appellant James "Bud" Blankenship ("Blankenship"), who did repairs at her parents' home, such as repairing a garage door, gutters, appliances and other items. McKay also became acquainted with Defendant/Appellant Ronnie Reece ("Reece"), whom her father permitted to cut hay on her parents' property and sell it for his own profit.[1] After her father's death, McKay inherited the property from her father's estate and continued to live in her parents' home on the property. McKay supported herself by selling antique china called "Flow Blue" over the internet, operating her business out of the home.

In September 2002, McKay borrowed $10,040 from defendant Citizens Bank of Lafayette ("Citizens Bank" or "Bank"), secured by two vehicles, a 1995 Ford and a 1998 Toyota. Soon after that, McKay obtained a $40,000 "business line of credit" with Citizens Bank through its loan officer, Mark Darnell ("Darnell"). The business line of credit was secured by the real property McKay inherited from her father. The line-of-credit loan had a one-year maturity date. On September 25, 2002, McKay executed an "Open-Ended Deed of Trust," pledging the property to Citizens Bank to secure the line of credit. After the line of credit was established, it was used to pay in full the debt that was secured by the two vehicles, and the lien on the vehicles was released. However, for reasons not explained in the record, when the loan secured by the vehicles was paid off, Citizens Bank did not return the titles to the vehicles to McKay.

By September 25, 2003, the loan's maturity date, McKay had borrowed $39,963 against the line of credit. She was unable to pay the debt at that time. To prevent foreclosure, McKay met with loan officer Darnell at Citizens Bank to renegotiate the loan. Ultimately, McKay signed a commercial note and security agreement to pay the amount due over a period of eight years in ninety-six (96) monthly installments of $528.76 beginning on February 15, 2004.

McKay, however, did not make any payments on the renegotiated loan. After McKay failed to make the first three payments, Darnell accelerated the loan, called the note due and payable, and sent out the requisite notices of the Bank's intent to foreclose on the property. When McKay learned of the impending foreclosure, she contacted Darnell to try to stop it. She was rebuffed; Darnell told

[1] Reece earned his living by owning and operating a trailer park and by rolling and selling hay.

her that, unless she paid the line-of-credit loan in full, she would have to bid for the property at the foreclosure sale to get it back.

Thereafter, McKay contacted Blankenship and Reece, with whom she had become acquainted through her late father. Reece was a customer at Citizens Bank and had a working relationship with the employees at the Bank. Reece told McKay that he would use his contacts at the Bank to try to stop the foreclosure. After talking to McKay, Reece spoke with Michael Whittemore ("Whittemore"), the president of Citizens Bank. He later reported to McKay that the Bank had refused to stop the foreclosure. Reece and Blankenship were unwilling to co-sign on a loan to McKay without owning the property; consequently, they suggested to McKay that they purchase the property from her.

According to McKay, she reached a verbal agreement with Reece and Blankenship. Under the verbal agreement, Reece and Blankenship would assume the debt on McKay's line of credit, and McKay would convey title on the property to them. McKay would continue to reside on the property for one year, rent-free, and at the end of the year she could purchase the real property back from them for the amount remaining on the loan plus the principal, interest, and other expenses paid by Reece and Blankenship. If she did so, she would not lose her property. In return, Reece and Blankenship would have continued free use of the hay fields located on the property. In the event that McKay could not buy back the property at the end of the year for the loan amount, Reece and Blankenship could sell the property to a third party.

The closing on their transaction took place on May 14, 2004, one day after the scheduled Bank foreclosure. McKay executed a warranty deed transferring fee simple title to the real property to Reece and Blankenship, and to their wives, Defendants/Appellants Mary Reece and Patricia Blankenship, for the stated purchase price of $44,398.20, the payoff amount on the line of credit, including principal, interest, and foreclosure costs. The Reeces and the Blankenships did not pay McKay any money; instead, they simply assumed the remaining balance owed on McKay's loan to Citizen's Bank.

Prior to the closing with McKay, Reece had obtained an offer from a third party to purchase the real property for $250,000. In addition, prior to the closing, Citizens Bank had obtained appraisals on the property; a tax appraisal done in August 2002 valued the property at $96,000, and a later appraisal valued the property at approximately $200,000.

At the time of the parties' transaction, McKay was under the impression that the titles to her vehicles were still encumbered. Therefore, prior to the closing, McKay asked Blankenship and Reece to obtain the release of the titles to the two vehicles used to secure her first loan. Blankenship told McKay that, for them to get the vehicles' titles released, she would need to pay them $12,000. McKay did so at the time of the closing. Six months later, the titles to her vehicles were returned to her by the Bank.

After the closing with McKay, but prior to the expiration of the one-year period, the Reeces and the Blankenships bought homeowners insurance on the real property and made improvements, such as tearing down two useless buildings and cleaning and clearing the property. They also paid a surveyor to settle a boundary-line dispute with a neighboring landowner.

At some point during the one-year period after closing, the Reeces and the Blankenships placed "for sale" signs on the real property; it was eventually listed with a realtor for a sales price of $399,000. In response to McKay's initial inquiry after the "for sale" signs went up, Reece and Blankenship told her that they were simply preparing the property to sell in the event that she could not repay her loan at the maturity date. Later, however, in response to McKay's further inquiry, Blankenship told her that the property was going to be sold no matter what, and that she could purchase it back for $250,001, one dollar more than the previous offer they had received.

Alarmed at this turn of events, on January 31, 2005, McKay filed this lawsuit against the Reeces, the Blankenships (collectively, "the Defendants"), and Citizens Bank for a declaratory judgment and to set aside or rescind the warranty deed and the purchase agreement on the basis of fraud. McKay also sought compensation for her damages stemming from the alleged fraud.

In October 2005, while McKay's lawsuit was pending, the Defendants filed an action in the local General Sessions Court, seeking a detainer warrant in order to evict McKay from the property. McKay did not retain an attorney in the General Sessions action, and she was late to court on the date of the hearing. By the time she arrived, the General Sessions Court had granted by default the Defendants' request for a detainer warrant. McKay then retained an attorney and timely appealed the General Sessions judgment to the Circuit Court for a *de novo* hearing. She requested a temporary injunction in both Circuit and Chancery Court; both requests were denied. Accordingly, the Defendants were permitted to evict McKay. They did so by moving all of McKay's belongings to the roadside. In her appeal to the Circuit Court of the issuance of the detainer warrant, McKay sought damages for the wrongful eviction and damages to her personal property. This lawsuit has yet to be adjudicated on the merits, and the proceedings have apparently been held in abeyance pending the outcome of this appeal.

The trial court conducted a bench trial in this case on January 25 and 26, 2006. The parties and other corroborating witnesses testified at trial.

McKay testified at the outset of the trial. She said that, at the time of trial, she was fifty-six (56) years old, had a high school education and had attended college, just short of earning a degree. She described her business of selling "Flow Blue" antique china over the internet out of her home. McKay said that her parents had owned the property since 1970. In the late 1990's, she moved back home to take care of them when their health began to decline. Prior to that, McKay had been living in Alaska. McKay said that, when her mother and father passed away in 1998 and 2000, respectively, their ashes were scattered on the property. Though McKay had four siblings, the property was devised to her in her father's will.

McKay testified about the loans she obtained from Citizens Bank. She said that she used the loan proceeds to purchase inventory for her Flow Blue business. In the summer of 2002, when McKay needed immediate funds, loan officer Darnell helped her obtain the first $10,000 loan secured by her two vehicles. In September 2002, she obtained the $40,000 line of credit secured by her real property and arranged to pay off the line-of-credit loan in one year. Though she used funds from the line of credit to pay off the first loan secured by her vehicles, the vehicle titles were not sent back to her. When she called the Bank regarding the titles, Bank officials told her that the Bank did not have them.

McKay acknowledged that she did not pay off the line-of-credit loan on the maturity date. She explained that on the maturity date of the loan, she was in Alaska. When she returned to Tennessee, she met with Darnell to negotiate an arrangement for paying the loan over time. In January 2004, McKay paid the Bank over $4,000 in interest due on the initial loan, and renegotiated with the Bank to pay the $40,000 in principal over eight years.[2] When the initial payments on the renegotiated loan came due in February, March, or April 2004, McKay did not make the payments; she claimed that she failed to pay because the loan documents were blank when she signed them, and she left for Alaska soon after they were signed without knowing how much she owed or when her payments were due. McKay said that she gave the Bank a telephone number and address where she could be reached in Alaska, but claimed that she received no correspondence from the Bank while she was there.

Around the beginning of May, McKay said, a friend called her and told her about a newspaper notice stating that a foreclosure sale of her property was scheduled for May 13, 2004. McKay then called Citizens Bank and spoke to Whittemore, the Bank president. Whittemore told her the next day that foreclosure on her property had already been assigned to an attorney. McKay said that she offered $16,000 to pay up the loan and get the property out of foreclosure, but Whittemore responded that he would have to check with the attorney working on the foreclosure. McKay said that she later spoke with Darnell; she also told him that she was prepared to pay up to $16,000 to catch up the payments on the loan. McKay said that Darnell responded by saying that he "was tired of fooling with it" and that, if she wanted her property back, she would have to "bid on it at the court steps like everybody else . . . ." McKay's attempts to borrow money from friends and relatives proved fruitless, and so she was unable to obtain sufficient funds to purchase the property at the foreclosure sale.

Panicked in the face of foreclosure, McKay then called Blankenship for advice. Blankenship told McKay that he would speak to his friend Reece, who had an established relationship with Citizens Bank. McKay then met with Reece and Blankenship and told them that she wanted to stop the foreclosure and had $16,000 available to help pay the arrearage. McKay testified that Reece told her that he would talk to his contacts at the Bank to see about canceling the foreclosure sale. Subsequently, Reece told McKay that he had spoken to Whittemore, and that the Bank refused to

[2] McKay requested that the loan have a duration of ten years with notes of less than $400. The Bank, apparently, wanted an earlier payoff, and McKay signed all of the necessary documents agreeing to the eight-year loan.

stop the foreclosure. Reece suggested that he and Blankenship get a loan from the Bank to buy back her property at the foreclosure sale for the amount of the loan, $40,000, plus interest, adding that the Bank would not make the loan to him and Blankenship unless the property was put in their names. McKay testified that the parties agreed that McKay "would be able to buy it back within the year" for the amount of the loan from Citizens Bank, including interest, and agreed that McKay could continue to live on the property during the interim. McKay told Reece and Blankenship that it was her intent to buy back her property by the end of the summer, within a few months of the sale. Meanwhile, McKay continued to permit Reece to cut hay from the property at no expense to him and sell the hay. She conceded that the parties' agreement to allow her to repurchase the property for the amount of her line-of-credit loan at the end of one year was not in writing. McKay said that Reece and Blankenship assured her that they would act in accordance with the oral agreement, emphasizing that "[t]heir word was their bond." She said that she trusted Reece and Blankenship, and consequently did not feel the need to consult a lawyer about their agreement.

McKay testified about the May 14, 2004 closing at Citizens Bank. The record reflects that the Reeces and Blankenships purchased the property from McKay for a sales price of $44,398.20. McKay testified that, at the closing, Blankenship told her that he could get the titles to her automobiles released from Citizens Bank for an additional $12,000. He emphasized to her that he and Reece were doing her a favor, securing a loan to help her get through the foreclosure so that the property could essentially remain hers. Because Reece and Blankenship were helping her, McKay said, she did not want them to incur out-of-pocket expenses associated with the transaction. Therefore, in order to regain the titles to her vehicles and to reimburse Reece and Blankenship for their closing costs, McKay paid them $12,000. At the closing, McKay gave a plant to Reece's wife and another to Blankenship's wife to thank them for participating in the closing. Six months later, McKay received back the titles to her vehicles. McKay said that the topic of her paying rent in order to continue living in her parents' home on the property was never discussed among the parties.

McKay testified that she did not realize until January 2005 that, during the closing, she had signed a warranty deed conveying the property to Reece and Blankenship. McKay said that the property was appraised for tax purposes for over $95,000, and that she knew that it was worth more than $250,000. She explained that she sold the property to the Defendants for substantially less than its value because she believed that they were helping her keep her property, and she trusted that they would permit her to purchase the property back from them within twelve months for the amount of her Bank loan, as they had agreed.

During the months after the closing, Reece and Blankenship had two buildings on the property removed. They also cut down brush around a creek that runs in front of the property. During this time, McKay said, Blankenship repeatedly told her that she needed to save her money so that she could buy back her property and keep the interest payment down. In November 2004, to raise money to buy back the property, McKay held an auction and sold most of her antique furniture for about $8,000. Including the amount she made at auction, she had accumulated a total of approximately $37,000 by the end of 2004 to use to buy back the property from Reece and Blankenship. Around that same time, Reece and Blankenship had put up "for sale by owner" signs

on the property, but explained to McKay that they did so only as a fallback plan in case she was unable to pay them the $40,000 by May. McKay said that she did not object to the "for sale" signs, but she assured Reece and Blankenship that she would have the money to buy the property back before the one-year period expired.

Later, Reece and Blankenship sent a real estate agent to McKay's home to measure it in order to list the property for sale. McKay became concerned that Reece and Blankenship did not intend to honor their verbal agreement to allow her to repurchase the property for the amount of the loan plus expenses, so she called Blankenship. At that point, McKay testified, Blankenship told her that he and Reece intended to sell the property "come hell or high water" and that McKay "could only buy the place back at the price that it was listed for." McKay said that Reece and Blankenship offered to sell back the property to her for $250,001, $1 over the highest offer they had received at that point. McKay then realized that "they were not going to follow through with the original deal." She later met with Reece and Blankenship at her home. In that meeting, she said, both of them told her that "there was no way" they would sell the property back to her for $40,000 plus interest and expenses because the property was worth much more than that. McKay acknowledged that she offered Reece and Blankenship $108,000 for the property, but said that the offer was not accepted. She also asked them for the right of first refusal to purchase the property after the realtor listed it, and Reece and Blankenship indicated that they would agree to that term. However, at that point, rather than continuing to pursue purchasing the property, McKay hired an attorney and filed the instant lawsuit.

Finally, McKay testified about being ejected from her home. On November 21, 2005, Reece and Blankenship brought the Sheriff and others to McKay's home to move all of her property to the roadside. McKay testified about the damage that was done to her personal property as a result of the eviction, as well as lost inventory and business opportunities in her Flow Blue business.

At the conclusion of McKay's proof, she took a voluntary nonsuit as to defendant Citizens Bank, dismissing the Bank from the lawsuit.

Bank president Whittemore did not testify at trial, but an excerpt from his deposition was read into evidence. Whittemore testified that he recalled speaking to McKay on the telephone about the impending foreclosure on her property, but he did not remember meeting with her in person. He said that he had done Bank business with Reece fore more than twenty years. He remembered Reece approaching him about obtaining a loan from the Bank to buy the property with a partner, but did not recall Reece asking him to stop the foreclosure proceedings. Instead, Reece told Whittemore that he wanted to buy the property and "mentioned that [McKay] would have an opportunity to buy the property back at some point." Whittemore noted that the Bank's first appraisal on the property was "90-something thousand," and the later appraisal was for "up close to $200,000."

Blankenship testified at trial. He said that McKay contacted him and asked for his help in stopping the foreclosure proceedings. Blankenship then called Reece for assistance in dealing with Citizens Bank. Blankenship said that Reece spoke to unnamed business contacts at the Bank, who

reportedly told him they could not stop the foreclosure on McKay's property. He denied that McKay told him that she had $16,000 available to stop the foreclosure proceedings. Blankenship said that he suggested to McKay that she let the property sell at the scheduled foreclosure, but McKay did not want one of her relatives to buy the property at foreclosure. She told Blankenship that "she didn't want [her relatives] to have a blade of grass off that place." Blankenship testified that McKay told him that "she'd rather us to have it than anybody else she knew."

Blankenship told McKay that he would not guarantee any loans on her behalf unless he owned the property himself. Therefore, Reece and Blankenship purchased the property for $44,000 less the $12,000 McKay paid them, a net purchase price of $32,000.

Blankenship explained that $5,000 of the $12,000 they received from McKay paid the closing costs, and he and Reece split the remainder. He later indicated that part of the money was a payment to the Defendants for their role in getting the titles to McKay's vehicles released by the Bank. Blankenship said that McKay told him there was a lien on her vehicles and asked him to get the titles released. He and Reece agreed to do so, and Blankenship said that he did not know at that time that the titles should have been released by the Bank previously when McKay paid off her first loan. The remainder of the $12,000, Blankenship said, was considered rent. Blankenship characterized this as "cheap rent," and explained that he wanted the total paid up front because he did not want to have to collect from McKay each month.

Blankenship claimed that, although he paid the Bank to appraise the property before the closing, he did not look at the appraisal. He later learned that it appraised for over $200,000. At the time of the closing with McKay, he said, he did not know how much the property was worth, but he acknowledged that he knew it was worth more than $44,000.

Blankenship denied any agreement with McKay to allow her to repurchase the property at the end of one year for the amount of the loan plus expenses. He admitted that McKay said to him and Reece that she had a plan to repurchase the property by the end of the summer, but said there was no agreement to allow her to do so at any definite price because "we didn't know how much we was going to have in it by the end of summer." He conceded that he and Reece permitted McKay to stay on the property for one year, but claimed that they told McKay that they planned to sell the property before the end of the one-year period.

Shortly after the closing with McKay, Blankenship said, he and Reece received a verbal offer from a third party to purchase the property for $250,000. Blankenship acknowledged that after he and Reece acquired the property, they tore down two old buildings on the property without first asking McKay's permission. They also cleared a part of the creek bank and did other repairs to the property. In addition, they hired a surveyor to settle a boundary-line dispute with a neighboring property owner. On January 19, 2005, he and Reece signed a listing agreement with a real estate agent for the property for a listed price of $399,000. They later told McKay she could purchase the property by matching or paying more than the best offer they would accept, provided she could show proof that she was financially able to make the purchase.

Blankenship recalled telling McKay that his word was his bond. He asserted that McKay's sale of the property to the Defendants for a net price of $32,000 was a fair, arm's length transaction, and he added that he was only doing what McKay asked of him.

Reece's testimony at trial generally corroborated Blankenship's version of events. Reece said that, for some time, he had been permitted to cut hay on McKay's property to make the property look better and to sell the hay for profit. He claimed that, at the meeting with McKay and Blankenship, he called Bank president Whittemore on the telephone and told Whittemore that he wanted to help McKay stop the Bank foreclosure. Reece said that Whittemore responded that he could not stop the foreclosure because Bank loan officer Darnell was in charge of the account. Reece apparently did not contact Darnell. When Reece reported to McKay that he could not stop the foreclosure, Reece said that McKay then asked him to co-sign a bank loan for her. Reece told McKay that the only way he would sign co-sign a note for the remainder of her debt would be for her to sign the property over to him and Blankenship. He said that they proposed to McKay that they keep the property for one year, during which time she could continue to live on the property, and then sell it at the end of the year. Later in his testimony, Reece indicated that Blankenship and McKay had entered into an agreement for McKay to continue to live on the property for one year, and that he acquiesced to that arrangement.

Reece acknowledged that, at the time of the closing with McKay, he knew that the property was worth around $180,000 or $200,000. He testified that, even before he and Blankenship acquired the property from McKay, someone offered them $250,000 for the property. Although the offeror told Reece that he would permit McKay to live on the property if his offer were accepted, the Defendants did not sell to him because of their agreement to allow McKay to live there for one year.

In Reece's interrogatory responses, which were entered into evidence, he stated that he and Blankenship accepted the $12,000 from McKay at the closing to obtain releases for the titles to her vehicles. He agreed that the $12,000 amount covered more than the closing expenses, and that he and Blankenship split the remainder.

During the year after Reece and Blankenship purchased the property from McKay, Reece said, they did not pay any of the principal on the loan, and they did not pay taxes for 2004. At the end of the year, they paid the interest due and renewed the loan.

Reece testified that, at some point, McKay offered to purchase the property back from the Defendants for $208,000. Reece said that he and Blankenship rejected that offer and told McKay that she could pay one dollar over the highest bid they received for the property.

After McKay filed the instant lawsuit, Reece testified, he and Blankenship had McKay evicted because her dogs lived in the house and the place was not being properly maintained. Reece asserted that, generally, McKay was treated in a fair and respectful manner in the entire transaction.

Loan officer Darnell testified as a representative of Citizens Bank. He acknowledged that the titles to McKay's vehicles should have been released when her first loan was paid off and said that he did not know why they were not. Darnell denied that McKay signed a blank note in January 2004 for the eight-year loan. He asserted that McKay did not give him her contact information in Alaska when she left shortly after the eight-year loan was made; Darnell said that she asked him to send the loan payment book to her local P.O. Box, which was done. Darnell testified that he did not grant McKay's request to stop the Bank foreclosure because he did not expect that McKay would pay any more regularly in the future. He denied that McKay ever made an offer of $16,000 to stop the foreclosure. That concluded the testimony presented at trial.

At the conclusion of the trial, the trial court held that the transfer of the real property to the Defendants should be set aside based on fraud. The trial court made the following findings of fact:

> Ms. McKay called Mr. James Blankenship, an acquaintance, who had done some work for her father and for her, and she wanted to meet with him, and she did. She told him about the foreclosure. Mr. Blankenship didn't immediately have any suggestions.
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> Then Mr. Blankenship got in touch with Mr. Reece. Mr. Reece had been recommended by Mr. Blankenship to Ms. McKay as a person who would – who could and would cut the hay. . . . Ms. McKay had an acquaintance with Mr. Reece because she had allowed him to cut the hay, and he had done as he said about cutting hay and keeping the property clean, according to the testimony . . . .
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> Mr. Reece was a customer of Citizens Bank, and he was to talk to the bank about stopping the foreclosure. Mr. Reece and Mr. Blankenship came and talked to Ms. McKay, and Mr. Reece . . . refused to sign the note . . . or to co-sign a note . . . .
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> The Court finds that . . . [Reece] came to the bank and had knowledge of the foreclosure, but he . . . talked to the bank about purchasing the property. Mr. Reece did not use his status as a customer, as a good customer of the bank, to try to stop the foreclosure.
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> An agreement was reached between Katherine McKay and Mr. Reece and Mr. Blankenship about Ms. McKay would convey the property to them and they would pay the note and she had one year to reside on the premises and that she could buy the property back. The price for her to buy the property back was not set. Ms. McKay was led to believe that Mr. Reece and Mr. Blankenship were accommodating her and that she could just pay off the loan and keep them harmless from any loss of money and that she would be granted the property back.
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> . . . [O]n May 14, 2004, [McKay and the Defendants] went to a closing at the Citizens Bank. Katherine McKay did by warranty deed convey and transfer the property to the Reeces and the Blankenships . . . . The amount of $44,398.20 was the amount that was paid for the property. . . .

> The warranty deed recital was for $44,398.20 when in fact Mr. Reece had had an offer, an oral offer, on this farm prior to the closing for $250,000, and also the bank's appraisal of the property was for $96,000, which that information was also available. But Mr. Reece and Mr. Blankenship were much aware that the property was worth significantly more than $44,398.20.
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> . . . Ms. McKay requested of Mr. Blankenship about release of the titles on her vehicles, and Mr. Blankenship said that he could do that, they could do that for $12,000. The loan for which the vehicles had been collateral had been previously paid, and the Citizens Bank should have long before released the title. Mr. Blankenship did nothing to secure the return of the titles. His testimony was that he talked to Mr. Darnell. Mr. Darnell did not recall any conversation about any return of the titles.
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> The $12,000 was used by Mr. Blankenship and Mr. Reece to pay closing costs, and the difference, which I believe was $6,008 [sic], they pocketed and . . . testified to the Court that it was for rent for the year. There was no agreement between . . . Ms. McKay and Mr. Reece and Mr. Blankenship that Ms. McKay would pay rent, any rent for a year. . . . [T]here was no consideration for this $12,000 that she paid.
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> Mr. Reece and Mr. Blankenship before the year was up placed for sale signs by owner on the property, and Mr. Reece and Mr. Blankenship listed the property with a realty company, and an agent listed the property at $399,000 before the year was up. The realtor came to the residence. . . . Ms. McKay was present, and the realtor took measurements inside the dwelling.

The trial court found that the value of McKay's property was $250,000 and that, under the circumstances, the purchase price of $44,398.20 was so low as to shock the conscience of the court. The trial court referred to other "badges of fraud," noting specifically the $12,000 payment for no consideration. In light of the grossly inadequate consideration for the property and the further badges of fraud, the trial court concluded that the deed from McKay to the Defendants should be set aside:

> The circumstantial indicators of fraud are often termed badges of fraud, and badges of fraud has been described as any facts that throws suspicion on the transaction and calls for explanation. There was inadequacy of consideration. [McKay] was in a foreclosure seeking assistance, help, advice on how to stop the foreclosure, of what she should do. The buyers also gave to her the right to live on the premises for one year. . . . [T]here's nothing here that says anybody was evading the creditor. The creditor was well collateralized, but foreclosure was imminent. There was a decline by the bank to stop the foreclosure although the foreclosure didn't take place . . . because the bank had been informed that Ms. McKay was going to convey the property to them and they were going to become the – become obligated on any indebtedness that she owed the bank at that time.

> . . . [T]he Court finds that based on the law of inadequacy of consideration and badge of fraud in this matter that the deed should be set aside. And the Court further finds that Ms. McKay, however, owes the money due Citizens Bank with all the interest. And as for the $12,000, that was without – there was no consideration for that $12,000.

On February 13, 2006, the trial court entered an order holding in favor of McKay for the reasons stated in open court and incorporating its verbal ruling verbatim. On April 19, 2006, the trial court entered an order requiring that the property be transferred from the Defendants back to McKay. On July 21, 2006, the trial court denied the Defendants' motion for a new trial. From this order, the Defendants now appeal.

On appeal, the Defendants argue that (1) upon McKay's voluntary nonsuit of Citizens Bank, all necessary parties were not before the court; (2) the warranty deed should not be set aside because McKay acknowledged that the consideration was adequate under the terms of the deed; (3) the weight of the evidence preponderated against the trial court's findings; and (4) McKay's reliance on the misrepresentations of the Defendants, if any, was not reasonable. To the extent that the trial court credited McKay's testimony, the Defendants argue, the trial court clearly erred because her testimony was inconsistent and unreliable.

Because this case was tried by the trial court without a jury, we review the trial court's findings of fact *de novo*, presuming those findings to be correct unless the evidence preponderates otherwise. Tenn. R. App. P. 13(d); ***Doe v. Sundquist***, 2 S.W.3d 919, 922 (Tenn. 1999); ***Buckner v. Yarber***, No. E2006-00475-COA-R3-CV, 2007 WL 1555835, at *4 (Tenn. Ct. App. May 30, 2007). The trial court's conclusions of law are reviewed *de novo*, with no such presumption of correctness. ***Buckner***, 2007 WL 1555835, at *4. When factual findings are based on a trial court's determination of the witnesses' credibility, we give great deference to the trial court's findings, because the trial court is in a far better position than this Court to make such determinations. ***Jones v. Garrett***, 92 S.W.3d 835, 839 (Tenn. 2002); ***McCaleb v. Saturn Corp.***, 910 S.W.2d 412, 415 (Tenn. 1995). Thus, "appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary." ***Wells v. Tenn. Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999).

"In Tennessee, a conveyance is fraudulent, and therefore void, if it is made '[w]ithout a fair consideration, leaving the grantor insolvent; or . . . [m]ade with actual intent to hinder, delay, or defraud creditors.' " ***Reagan v. Connelly***, No. E2000-00451-COA-R3-CV, 2000 WL 1661524, at *4 (Tenn. Ct. App. Nov. 6, 2000) (quoting ***Hicks v. Whiting***, 258 S.W. 784, 796 (Tenn. 1924)). "Inadequacy of consideration is not a ground for rescission unless it is mixed with fraud or is so great as to shock the conscience of the court." ***Lloyd v. Turner***, 602 S.W.2d 503, 509 (Tenn. Ct. App. 1980) (quoting ***Farrell v. Third Nat'l Bank in Nashville***, 101 S.W.2d 158, 163 (Tenn. Ct. App. 1936)). In determining whether a conveyance is fraudulent, a court must consider "the facts and circumstances of each case and [the fraud] is normally proven by circumstantial evidence." ***Reagan***, 2000 WL 1661524, at *4. Such circumstantial evidence is sometimes termed "badges of fraud." A

"badge of fraud" can be "any fact that throws suspicion on the transaction and calls for an explanation." ***Id.*** (quoting ***Macon Bank & Trust Co. v. Holland***, 715 S.W.2d 347, 349 (Tenn. Ct. App. 1986)). Tennessee courts have recognized at least nine "badges of fraud:"

> 1. The transferor is in a precarious financial condition.
> 2. The transferor knew there was or soon would be a large money judgment rendered against the transferor.
> 3. Inadequate consideration was given for the transfer.
> 4. Secrecy or haste existed in carrying out the transfer.
> 5. A family or friendship relationship existed between the transferor and the transferee(s).
> 6. The transfer included all or substantially all of the transferor's nonexempt property.
> 7. The transferor retained a life estate or other interest in the property transferred.
> 8. The transferor failed to produce available evidence explaining or rebutting a suspicious transaction.
> 9. There is a lack of innocent purpose or use for the transfer.

Id. (quoting ***Stevenson v. Hicks (In re Hicks)***, 176 Bankr. 466, 470 (Bankr. W.D. Tenn. 1995) (citing the rulings in several Tennessee appellate decisions)). Where one or more of the badges of fraud are present, a presumption of fraud arises "and consequently shifts the burden of disproving fraud to the defendant." ***Id.***

We first address the Defendants' contention that the trial court's decision should be reversed because, at the close of McKay's proof, she took a voluntary nonsuit on her claims against defendant Citizens Bank. They argue that, after Citizens Bank was voluntarily dismissed, all necessary parties were no longer before the court. In response, McKay argues, Citizens Bank is not a necessary party under the present circumstances. We agree. The trial court's decision would not have been different had Citizens Bank not been dismissed from the lawsuit, and the trial court did not require any action from the Bank in its decision. The property at issue has now been conveyed to McKay from the Defendants, and McKay has paid in full the note to Citizens Bank.[3] This issue is without merit.

The Defendants also argue that in the warranty deed transferring the property to the Defendants, McKay acknowledged that the consideration for the conveyance was adequate, and contend that she is now bound by that acknowledgment. The warranty deed stated that the conveyance was "for and in consideration of [$44,398.20], cash in hand paid by the Grantees to the Grantors, the receipt and sufficiency of which are hereby acknowledged in full . . . ." They argue that McKay admitted that she knew that her property was worth more than $250,000, and nevertheless

[3] The appellate record was supplemented to include these post-judgment facts.

executed the warranty deed.[4] Therefore, the Defendants argue, McKay cannot now challenge the amount of consideration paid as inadequate.

In this case, it is undisputed that the fair market value of the property was far in excess of the purchase price. The trial court found, however, that McKay entered into the transaction because the Defendants led her to believe that, at the end of the one-year period, she would be able to buy back the property for the loan amount plus any monies the Defendants had paid. Under these circumstances, we agree with the trial court that McKay was not bound by the language in the warranty deed and was permitted to assert that the purchase price was inadequate consideration for the property.

We next address the Defendants' contention that the evidence preponderates against the trial court's findings. Here, the trial court based its finding of fraud in large part on a fact that is essentially undisputed, that the purchase price of approximately $44,000 (or actually a net of $32,000) was far below the fair market value of the property, found by the trial court to be $250,000. The remainder of the trial court's findings regarding further "badges of fraud," however, were based on the trial court's decision to credit the testimony of McKay and other witnesses over the testimony of Reece and Blankenship.

Reece testified that he contacted Bank president Whittemore in an effort to stop the Bank's foreclosure on McKay's property. Whittemore did not recall any request by Reece to stop the foreclosure; he remembered only Reece's efforts to purchase the property at essentially a foreclosure price. The trial court discredited Reece's testimony and found that Reece made no effort to stop the Bank foreclosure. McKay testified that she understood from Reece and Blankenship that she would be permitted to buy back the property at the end of the one-year period by paying off the Bank loan amount plus any expenses the Defendants had incurred, while Reece and Blankenship denied any such agreement. The trial court credited McKay on this issue. McKay testified that she gave $12,000 to Reece and Blankenship at the closing so that they could get the titles to her vehicles released by the Bank, and said that there was no discussion of her paying rent in order to live on the property for the one-year period. Bank loan officer Darnell testified that the titles on McKay's vehicles were in fact unencumbered as of the time of the closing, and were simply inadvertently not released by the Bank for unknown reasons. Reece and Blankenship asserted that they in fact applied for release of McKay's vehicle titles and that, after closing costs, the remainder of the $12,000 was considered to be "cheap rent" for McKay to continue to live on the property. The trial court discredited the testimony of Reece and Blankenship and found that they obtained the $12,000 from McKay for no consideration. Thus, virtually all of the trial court's findings on "badges of fraud" beyond inadequacy of price turned on issues of credibility.

[4]The Reeces and the Blankenships executed an affidavit contained in the same warranty deed in which they stated under oath that the actual consideration for the transfer was $44,398.20 or the fair market value, whichever is greater.

The Defendants acknowledge on appeal that many of the trial court's findings on fraud were based on its assessment of the witnesses' credibility. The argue, however, that the trial court committed "clear error" in crediting McKay's testimony on the issue of fraud because her testimony on other issues was not credible. For example, McKay testified that, when she renegotiated the line of credit in January 2004, the loan documents were blank when she signed them. However, Bank loan officer Darnell maintained that the loan documents were not blank when McKay signed them. Another example cited by the Defendants relates to the statement in McKay's complaint that she did not know that the document she signed in May 2004 was a warranty deed. McKay later admitted that she did sign a warranty deed conveying the property to the Defendants. The Defendants argue that these and other discrepancies in McKay's testimony show that the trial court clearly erred in crediting the portions of McKay's testimony that related to the Defendants' alleged fraud. Because the trial court committed clear error in crediting McKay's testimony, they claim, the evidence was not sufficient to support the trial court's decision.

We find this argument unpersuasive. We are mindful that trial courts are not presented with testimony from perfect people; even rigorously honest witnesses can have differing perceptions and recollections of the same events. The trial judge is faced with the difficult task of assessing the relative credibility and truthfulness of the imperfect human beings who offer testimony before the court. That is the reason for the "great deference" accorded by the appellate court to the trial court's determinations of credibility. Such determinations will not be overturned absent clear and convincing evidence to the contrary. ***Wells***, 9 S.W.3d at 783. Indeed, when the trial court resolves a conflict in testimony in favor of one party over another, such a credibility determination is "binding on the appellate court unless from other real evidence the appellate court is compelled to conclude to the contrary." ***Reed v. Alamo Rent-A-Car, Inc.***, 4 S.W.3d 677, 683 (Tenn. Ct. App. 1999) (citation omitted); ***see In re Estate of Walton v. Young***, 950 S.W.2d 956, 959 (Tenn. 1997). From our review of the record as a whole, the relatively minor inconsistencies in McKay's testimony relied upon by the Defendants simply do not amount to "real evidence" compelling us to conclude that the trial court erred in crediting the critical portions of her testimony. We find that the trial court's credibility determinations are well supported in the record.

Giving appropriate deference to the trial court's decision to credit McKay's testimony, we conclude that sufficient evidence exists to support the trial court's finding of fraudulent conveyance. The Defendants clearly took advantage of McKay's situation. McKay was vulnerable at the time she approached them, facing almost certain foreclosure on long-held family property. The Defendants purchased the property for less than 20% of its fair market value and led McKay to believe that she could buy it back for approximately the same amount. In addition, they talked McKay into giving them $12,000 in cash, and gave her essentially nothing as consideration. During the ensuing year, the Defendants continued to lead on McKay, explaining away the "for sale" signs on the property by telling her that selling the property was simply a fallback position only if she could not pay off the loan. Finally, when the property was prepared for sale, the Defendants informed McKay that they were going to sell the land out from under her for its fair market value "come hell or high water." Thus, clearly inadequate consideration and other badges of fraud were present so as to raise the presumption that the conveyance was fraudulent, and the Defendants submitted no credible

evidence to rebut this presumption. Under these circumstances, there is ample evidence in the record to support the trial court's conclusion that this conveyance was based on fraud and must be set aside.

Finally, the Defendants make the perennial last-resort argument of those found to have engaged in fraud, namely, that the Plaintiff's reliance on the Defendants' misrepresentations was not justifiable and, therefore, she cannot recover in an action based on their fraud. We reject that argument under the facts of this case. Here, McKay approached Reece and Blankenship as long-time acquaintances of her father, seeking help to avoid foreclosure on her property and to ensure that she could continue to live on her family's property. Reece and Blankenship responded by leading her to believe that, despite their efforts, they could not get the foreclosure stopped, but that they could achieve the same result by purchasing the property from her for the loan amount and selling it back to her at essentially the same price at the end of one year. In fact, Reece did not use his influence to stop the foreclosure, but instead set out on a path to acquire the property at a foreclosure price and resell it later at a handsome profit. McKay's downfall was believing that the Defendants were trying to help her keep her property, when in fact they were not. Under the circumstances, we find no error in the trial court's implicit holding that McKay's reliance on the Defendants' false representations was justifiable.

The decision of the trial court is affirmed. Costs on appeal are to be taxed to Appellants/Defendants Ronnie Reece and his wife, Mary Reece; and James Blankenship and his wife, Patricia Blankenship, and their sureties, for which execution may issue, if necessary.

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HOLLY M. KIRBY, JUDGE