FILED
United States Court of Appeals
Tenth Circuit

July 14, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

R. WAYNE KLEIN, as Receiver,

Plaintiff - Appellee,

v.

TRUDY SHEPHERD, an individual,

Defendant - Appellant.

No. 21-4064
(D.C. No. 2:19-CV-00695-DN)
(D. Utah)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **BACHARACH**, and **PHILLIPS**, Circuit Judges.

Defendant-Appellant Trudy Shepherd,[1] a salesperson who sold solar lenses to investors on behalf of RaPower-3, LLC ("RaPower"), International Automated Systems, Inc., ("IAS"), LTB1, LLC, ("LTB1"), their subsidiaries and affiliates

---

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Trudy Shepherd litigates this matter pro se, we construe her filings liberally but do not act as her advocate. *See United States v. Parker*, 720 F.3d 781, 784 n.1 (10th Cir. 2013) (citing *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008)).

(collectively with RaPower, IAS, and LTB1, the "Receivership Entities"),[2] Neldon Johnson, and R. Gregory Shepard (collectively with Receivership Entities, the "Receivership Defendants"), appeals from the district court's grant of summary judgment to R. Wayne Klein, the court-appointed Receiver ("Receiver"), who now controls the Receivership Entities. In an ancillary action, the government brought suit against Receivership Defendants for allegedly operating a fraudulent and unlawful solar energy tax scheme, in which they encouraged investors to take federal tax deductions for purchasing defunct solar technology. The district court enjoined these entities from continuing to promote the scheme, ordered disgorgement of their gross receipts, and appointed Mr. Klein as the Receiver of the Receivership Entities with full control of their assets and business operations.

Thereafter, the Receiver initiated lawsuits against individuals and entities—including Ms. Shepherd—that were paid commissions for selling the Receivership Defendants' solar lenses to investors. Among other claims, the Receiver brought claims for avoidance of a fraudulent transfer under the Uniform Voidable Transactions Act ("UVTA"), offer and sale of unregistered securities, and offer and sale of securities by an unregistered broker-dealer or agent. The district court granted summary judgment to Mr. Klein on these claims.

---

[2] The subsidiaries and affiliated entities are: Solco I, LLC; XSun Energy, LLC; Cobblestone Centre, LC; LTB O&M, LLC; U-Check, Inc.; DCL16BLT, Inc.; DCL-16A, Inc.; N.P. Johnson Family Limited Partnership; Solstice Enterprises, Inc.; Black Night Enterprises, Inc.; Starlite Holdings, Inc.; Shepard Energy; and Shepard Global, Inc.

Ms. Shepherd now appeals from the district court's judgment. Although she raises twenty-one arguments, her arguments may be distilled into four main claims. First, she argues that the district court did not have subject-matter jurisdiction over the present matter. Second, she collaterally attacks the factual findings made in the ancillary proceedings against the Receivership Defendants. Third, she asserts that the district court erred in granting summary judgment on the Receiver's UVTA claim. And fourth, she claims that the district court inappropriately granted summary judgment to the Receiver on his securities claims. Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm**.

I

A

This appeal arises from an ancillary action, associated with *United States v. RaPower-3, LLC*, 343 F. Supp. 3d 1115 (D. Utah 2018) ("Civil Enforcement Case"). In the Civil Enforcement Case, Mr. Johnson claimed to have invented a solar energy technology, which involved placing arrays of solar lenses on towers. *See United States v. RaPower-3, LLC*, 960 F.3d 1240, 1244 (10th Cir. 2020). To generate income for the project, Mr. Johnson sold the solar lenses to prospective investors. *See id.* Specifically, through a multi-level marketing model, "buyers would purchase lenses from one of Mr. Johnson's entities, IAS or RaPower-3 . . . for a down payment of about one-third of the purchase price." *Id.* In return, the Receivership Defendants promised investors substantial returns and tax benefits.

When customers purchased lenses, they also signed operations and maintenance agreements with LTB1, with LTB1 agreeing to operate and maintain the customers' lenses to produce revenue. *See id.* LTB1 was to make quarterly payments to the lens purchasers, representing a portion of the revenues earned from the electricity generated from the solar lenses.

Customers never leased their solar lenses to an entity other than LTB1. *See* Aplt.'s App., Vol. III, at 116 (District Ct. Mem. Decision and Order Granting in Part Receiver's Mot. for Summ. J., filed Apr. 15, 2021). Furthermore, customers never took direct physical possession of their lenses. *See id.* The Receivership Defendants did not even track which lenses belonged to which customer; thus, there was no means for a customer to know which specific lens she owned.

As such, Mr. Johnson's entities retained the lenses and controlled what happened to them. *See id.* at 117. Indeed, "[t]he Receivership Defendants emphasized how little any customer would have to do with respect to 'leasing out' their lenses[,] '[s]ince LTB[1] install[ed], operate[d] and maintain[ed] your lenses for you.'" *Id.* (third and fourth alterations in original). However, it was soon determined that Mr. Johnson's purported solar energy technology never had been and never would be "a commercial-grade solar energy system that converts sunlight into electrical power or other useful energy." *RaPower-3*, 960 F.3d at 1244 (quoting *RaPower-3*, 343 F. Supp. 3d at 1150).

Accordingly, the government brought suit against Receivership Defendants, alleging that they were operating a fraudulent and unlawful solar energy tax scheme

by encouraging investors to take federal tax deductions based on their purchase of defunct solar technology. *See id.* at 1243. After a bench trial, the district court enjoined the Receivership Entities from continuing to promote the scheme and ordered disgorgement of their gross receipts. *See id.* The court further ordered the entities to turn over their assets and business operations to Mr. Klein—who would serve as the Receiver of the Receivership Entities. We affirmed the district court's decisions. *See id.* at 1244.

B

In his role as Receiver, Mr. Klein initiated lawsuits against individuals and entities that were paid commissions for selling the Receivership Defendants' solar lenses to investors. Of relevance here, Ms. Shepherd acted as a salesperson for the Receivership Defendants and sold solar lenses to prospective investors. In exchange, she received commissions from the Receivership Defendants.

The Receiver alleged that Ms. Shepherd was not licensed under state or federal securities laws to sell securities, and that the lens purchase program was not registered with the U.S. Securities and Exchange Commission or the Utah Division of Securities as a security, as it should have been. As such, the Receiver sought to recover the commissions Receivership Defendants paid to Ms. Shepherd, as they were allegedly obtained pursuant to illegal contracts and in violation of securities laws.

The Receiver brought three claims for Avoidance of a Fraudulent Transfer under Utah Code Ann. § 25-6-5(1), § 25-6-8, § 25-6-202(1)(a) and § 25-6-303 (First,

Second and Third Claims); a claim for unjust enrichment (Fourth Claim); a claim for Fraud in Offer and Sale of Securities (Fifth Claim); Offer and Sale of Unregistered Securities (Sixth Claim); and Offer and Sale of Securities by an Unregistered Broker-Dealer or Agent (Seventh Claim). After discovery, the Receiver filed a motion for summary judgment on his First, Second, Third, Sixth, and Seventh claims.

The district court granted summary judgment in favor of the Receiver and against Ms. Shepherd on the Receiver's First, Sixth, and Seventh claims brought under Utah Code Ann. § 25-6-202(1)(a) (actual fraud); § 61-1-7 (the securities were not properly registered); and § 61-1-3 (Ms. Shepherd was improperly licensed to sell securities), and corresponding federal securities laws. *See* Aplt.'s App., Vol. III, at 113, 140. It then found the Receiver's Second, Third, Fourth, and Fifth claims to be moot. *See id.* This appeal followed.

II

Ms. Shepherd now appeals from the district court's judgment. Although she raises twenty-one arguments, her arguments may be distilled into four main claims. First, she claims the district court's "judgment is void" because the court did not have subject-matter jurisdiction to hear the present matter. Aplt.'s Opening Br. at 8–10 (capitalization omitted).[3] Second, she collaterally attacks the factual findings made in the Civil Enforcement Case. Alternatively, she appears to claim that the district

[3] Because the black page numbers in the bottom lefthand corner of Ms. Shepard's opening brief repeat page 12, thereby producing incorrect pagination on the subsequent pages, for clarity, we cite herein to the green page numbers in the top righthand corner of her opening brief.

court erred in taking judicial notice of the factual findings made in the Civil Enforcement Case. Third, Ms. Shepherd argues that the district court erred in granting summary judgment on the Receiver's UVTA claim. Finally, she contends that the district court inappropriately granted summary judgment to the Receiver on his securities claims.

The Receiver argues that "the district court appropriately took judicial notice of the factual findings from the Civil Enforcement Case under Federal Rule of Evidence 201." Aplee.'s Resp. Br. at 24. The Receiver further contends that, based on the undisputed material facts, "the district court correctly entered summary judgment in favor of the Receiver on his [UVTA] claim." *Id.* at 17 (bold-face font omitted). Finally, he asserts that the "district court correctly granted summary judgment in favor of the Receiver on his securities claims." *Id.* at 25 (bold-face font omitted).

After carefully considering the briefs, we first conclude that the district court had subject-matter jurisdiction to hear the present matter. Furthermore, we hold that the district court appropriately took judicial notice of the factual findings made in the Civil Enforcement Case. We also conclude that, based on the undisputed material facts, the district court properly granted summary judgment to the Receiver on his UVTA claim and his securities claims. Finally, we find the remainder of Ms. Shepherd's arguments to be waived and, accordingly, decline to consider them further.

III

"We review the district court's summary judgment decision de novo, applying the same standards as the district court." *Punt v. Kelly Servs.*, 862 F.3d 1040, 1046 (10th Cir. 2017). "Summary judgment is proper if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Peterson v. Martinez*, 707 F.3d 1197, 1207 (10th Cir. 2013). However, the "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)). To determine whether a "genuine issue" as to a material fact exists, we consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52. Furthermore, "[m]ere allegations unsupported by further evidence . . . are insufficient to survive a motion for summary judgment." *Potts v. Davis Cnty.*, 551 F.3d 1188, 1192 (10th Cir. 2009) (quoting *Baca v. Sklar*, 398 F.3d 1210, 1216 (10th Cir. 2005)).

IV

A

Ms. Shepherd first argues that the district court did not have subject matter jurisdiction to hear the present case.[4] *See* Aplt.'s Opening Br. at 8–10, 18. Specifically, Ms. Shepherd claims that the district court erred in determining that it had ancillary jurisdiction. She asserts that in the original action (i.e., the Civil Enforcement Case) "there was no indication of any securities violations." *Id.* at 18. However, in the instant action, she notes that the Receiver has raised multiple securities claims. As such, she contends that the district court could not assert ancillary jurisdiction over the present matter, because the Receiver's securities claims were not sufficiently related to the original action. Ms. Shepherd's argument is foreclosed by our precedent.

As we made clear in *Oils, Inc. v. Blankenship*, 145 F.2d 354, 356 (10th Cir. 1944), "[a] federal court, which has appointed a receiver in a proceeding of which it has jurisdiction, has jurisdiction to entertain a suit or proceeding to collect or recover assets." The Supreme Court has similarly recognized that a federal receiver may sue in the court of his appointment "to accomplish the ends sought and directed by the suit in which the appointment was made," and that "such action or suit is regarded as

[4] Although Ms. Shepherd did not challenge the district court's jurisdiction below, "[o]bjections to subject-matter jurisdiction . . . may be raised at any time. Thus, a party, after losing [below], may move to dismiss the case because the court lacked subject-matter jurisdiction." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434–35 (2011).

ancillary" to the court's original subject matter jurisdiction. *Pope v. Louisville, N.A. & C. Ry. Co.*, 173 U.S. 573, 577 (1899).

Here, the district court granted the Receiver the power and duty to "take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Defendants; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto" and to "bring . . . legal actions based on law or equity in any state, federal, or foreign court as the Receiver deems necessary or appropriate in discharging his/her duties as Receiver." Aplt.'s App., Vol. I, at 281–82 (Mem. Decision and Order Freezing Assets and to Appoint a Receiver, dated Aug. 22, 2018). Accordingly, in line with the district court's mandate and our precedent, the Receiver appropriately brought suit in the district court in which he was appointed to recover the allegedly fraudulent transfers that were made to Ms. Shepherd. As such, the district court correctly determined that it had ancillary jurisdiction to hear the present case.

B

Alternatively, Ms. Shepherd claims that the district court exceeded its jurisdiction, when it ruled "that to qualify [as a solar energy technology] [Mr. Johnson's] project was required to make commercial grade electricity." Aplt.'s Opening Br. at 9. "By doing this," Ms. Shepherd alleges that the district court violated certain procedural safeguards and lost subject-matter jurisdiction over the proceedings. *Id.* Stated another way, Ms. Shepherd claims that the district court's

erroneous legal conclusion stripped it of subject-matter jurisdiction. Ms. Shepherd's jurisdictional argument is unavailing.

The basis of Ms. Shepherd's jurisdictional challenge centers on her disagreement with the district court's legal determination that Mr. Johnson's scheme did not qualify as a solar energy technology. Regardless of Ms. Shepherd's contention, however, her disagreement with the district court's *merits* analysis does not strip the court of subject-matter jurisdiction to hear the present case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.").

As such, we reject Ms. Shepherd's jurisdictional challenges, and find that the district court had subject-matter jurisdiction to hear the present case.

V

Next, Ms. Shepherd collaterally attacks the factual findings made in the Civil Enforcement Case. Specifically, she claims that contrary to the district court's findings (which we affirmed) in the Civil Enforcement Case, the solar energy tax scheme was a legitimate enterprise. Indeed, she asserts that the solar lenses were "fully operational," and would eventually be used to produce electricity. Aplt.'s Opening Br. at 11. As such, she attempts to relitigate the factual findings and legal conclusions reached and affirmed in the Civil Enforcement case.

However, Ms. Shepherd failed to raise this challenge below. As such, she has forfeited the present claim. *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("[F]orfeiture is the failure to make the timely assertion of a right."). Additionally, Ms. Shepherd's failure to now argue for plain error waives the issue; in other words, she has no entitlement to be heard on this line of argument. *See, e.g.*, *In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1271 (10th Cir. 2019) ("If an appellant does not explain how its forfeited arguments survive the plain error standard, it effectively waives those arguments on appeal."); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011) ("[F]ailure to argue for plain error and its application on appeal[] surely marks the end of the road for an argument for reversal not first presented to the district court.").

Furthermore, to the extent Ms. Shepherd is asserting that the district court erred in taking judicial notice of the factual findings made in the Civil Enforcement Case, that argument is unavailing. Here, the district court appropriately took judicial notice of the factual findings that it made in the Civil Enforcement Case under Federal Rule of Evidence 201. We have made clear that a district court may "take judicial notice, whether requested or not . . . of its own records and files, and facts which are part of its public records." *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979). Indeed, "[j]udicial notice is particularly applicable to the court's own records of prior litigation closely related to the case before it." *Id.*

Here, the district court reasonably relied upon the factual findings that it made in a closely related proceeding—*viz.*, the Civil Enforcement Case. As the district court noted, the present action "arose directly from the Civil Enforcement Case." Aplt.'s App., Vol. III, at 125. More specifically, in the Civil Enforcement Case, the district court determined that the solar energy tax scheme was fraudulent and appointed the Receiver to recover any fraudulent transfers made by the Receivership Defendants. Accordingly, on that basis, the Receiver commenced the present action against Ms. Shepherd. We conclude that the district court acted in accordance with our precedent and Federal Rule of Evidence 201 in taking judicial notice of the findings that it made in a closely related proceeding—i.e., the Civil Enforcement Case.

We next consider whether the district court erred in granting summary judgment on the Receiver's UVTA claim.

VI

A

Ms. Shepherd first challenges the Receiver's standing to sue under the UVTA. *See* Aplt.'s Opening Br. at 10. However, she fails to identify a specific reason for why the Receiver lacks standing. Regardless, her argument is unavailing, as our precedent makes clear that the Receiver had standing to raise his present UVTA claim.

The UVTA provides rights and remedies for defrauded creditors. *See* Utah Code Ann. §§ 25-6-202, 25-6-303. As we made clear in *Klein v. Cornelius*, 786 F.3d

1310, 1316 (10th Cir. 2015), a business entity abused by a fraudulent scheme qualifies as a defrauded creditor for the purposes of the UVTA. In reaching that conclusion, we adopted the reasoning of *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995), which held that defrauded corporations were creditors "because the corporations had been 'evil zombies' under the defendant's 'spell,' [and accordingly] had been injured." *Cornelius*, 786 F.3d at 1317 (quoting *Scholes*, 56 F.3d at 754). Furthermore, we have consistently endorsed the view that the receiver of such defrauded entities has standing to recover fraudulent transfers under the UVTA. *See id.*; *Wing v. Dockstader*, 482 F. App'x 361, 363 (10th Cir. 2012) (unpublished) (concluding that a receiver had standing to bring claims on behalf of the defrauded corporation under the UVTA); *see also Donell v. Kowell*, 533 F.3d 762, 776–77 (9th Cir. 2008) (holding that a receiver had standing to bring claims on behalf of a defrauded entity under the California Uniform Fraudulent Transfer Act); *cf. Eberhard v. Marcu*, 530 F.3d 122, 132–33 (2d Cir. 2008) (discussing *Scholes* and other relevant Seventh Circuit authority on receiver standing, and reasoning that the receiver "lacks standing" because he is not a receiver for the defrauded entity).

Here, the Receiver stands in the shoes of the Receivership Entities. These entities were allegedly "evil zombies" under Mr. Johnson's spell and were used to advance Mr. Johnson's personal ends. More specifically, Mr. Johnson used the Receivership Entities to perpetuate and expand his fraudulent solar energy tax scheme. Accordingly, the Receivership Entities had been injured and were considered defrauded creditors under the UVTA. Thus, once Mr. Johnson was

removed and the Receiver was put in place, the Receiver could assert the claims of the defrauded Receivership Entities. As such, we conclude that the Receiver had standing to assert the present claims under the UVTA.

B

Next, Ms. Shepherd claims that the Receiver's UVTA claim is time barred. *See* Aplt.'s Opening Br. at 20. Specifically, she asserts that the Receiver was required to bring his UVTA claim no later than one year after the fraudulent transfer was made. *See id.*

As the Receiver notes, however, Ms. Shepherd "did not raise this argument below." Aplee.'s Resp. Br. at 18. As such, her statute of limitations claim is forfeited. *See Olano*, 507 U.S. at 733. And her failure to argue for plain-error review effectively waives the issue. *See In re Rumsey*, 944 F.3d at 1271; *Richison*, 634 F.3d at 1131. As such, we decline to consider this argument further.

C

Ms. Shepherd also claims that the Receiver "has not offered any evidence to support his allegations that would support a Summary Judgment finding by the [district] court." Aplt.'s Opening Br. at 21.

The Receiver responds by arguing that "[t]he record on appeal contradicts [Ms.] Shepherd's bare assertion." Aplee.'s Resp. Br. at 21. Specifically, the Receiver notes that he "presented evidence of, and the district court found, forty-two undisputed material facts that are set forth in the district court's Memorandum Decision." *Id.* at 21–22. Furthermore, he claims that "[Ms.] Shepherd did not even

attempt to dispute many of the undisputed material facts below." *Id.* at 22. As such, the Receiver contends that the "district court correctly entered summary judgment in favor of the Receiver" on his UVTA claim. *Id.* at 17. We agree.

Under the UVTA, a transfer is voidable if the debtor (i.e., the Receivership Defendants) made the transfer with the "actual intent to hinder, delay, or defraud any creditor of the debtor." Utah Code Ann. § 25-6-202(1)(a). Here, the undisputed facts show that the Receivership Defendants made the relevant transfers to Ms. Shepherd in exchange for Ms. Shepherd selling solar lenses to investors. More specifically, the district court found that Ms. Shepherd "acted as a salesperson for the Receivership Entities and sold solar lenses for depreciation deductions or solar energy tax credits" and "received commissions from the Receivership Entities for these sales." Aplt.'s App., Vol. III, at 121–22. Furthermore, the sale of these solar lenses was the primary means of advancing the Receivership Defendants' fraudulent tax scheme. Indeed, as the district court noted, the "whole purpose of [the Receivership Entities] . . . was to perpetuate a fraud to enable funding for [Mr.] Johnson." *Id.* at 128–29 (omission in original). As such, it clearly follows that the Receivership Defendants made the relevant transfers to Ms. Shepherd for the purpose of perpetuating and expanding the fraudulent scheme. Accordingly, the transfers are voidable under the UVTA.

In an attempt to avoid this conclusion, Ms. Shepherd seems to imply that she had no knowledge of the fraudulent scheme or any wrongdoing by the Receivership

Defendants.[5] *See, e.g.*, Aplt.'s Opening Br. at 19 ("Each person is imputed with the knowledge required to carry out his role in the transaction, but has no duty to inquire further."). However, as our precedent makes clear, "nothing in the [UVTA] requires that a transferee be aware of the fraud." *Cornelius*, 786 F.3d at 1320–21. Rather, our focus is on the intent of the transferor. *See id.*

Accordingly, the Receiver provided undisputed material facts that show that the transfers were made to Ms. Shepherd with the "actual intent to hinder, delay, or defraud" creditors—*viz.*, the Receivership Defendants, through the Receivership Entities, made transfers to Ms. Shepherd in order to advance and expand their fraudulent scheme. As such, the district court did not err in concluding that the undisputed material facts established the essential elements of a fraudulent conveyance under the UVTA.

D

Finally, Ms. Shepherd claims that the Receivership Defendants were not insolvent under Utah law. *See* Aplt.'s Opening Br. at 18. Specifically, she asserts

[5] To the extent this argument could be read as Ms. Shepherd's attempt to invoke the good faith defense, it is unavailing. The recipient of a fraudulent transfer may invoke the good faith defense—as a means of retaining the transfer—if she can show that she (a) took the transfer in good faith *and* (b) for reasonably equivalent value. *See* Utah Code Ann. § 25-6-9(1) ("A transfer or obligation is not voidable under Subsection 25-6-202(1)(a) against a person that took in good faith and for a reasonably equivalent value . . . ."). Although Ms. Shepherd asserts—and the Receiver does not contest—that she took the fraudulent transfer in good faith, she makes no attempt to show that she provided the Receivership Entities with reasonably equivalent value. As such, Ms. Shepherd cannot successfully invoke the good faith defense.

"[n]ot a single element of the [UVTA] was met to qualify Ra-[P]ower 3 as insolvent." *Id.* at 20. We fail to see the relevance of Ms. Shepherd's argument.

The district court did not make a ruling regarding the insolvency of the Receivership Defendants. That is because the district court found to be moot the Receiver's second and third causes of action—which asserted a voidable transfer claim based on the Receivership Entities' insolvency. Indeed, the district court did not need to find "constructive fraud" based on insolvency, because it had already found an actual intent to hinder, delay, or defraud creditors. As such, even if Ms. Shepherd's insolvency argument were correct, it would have no bearing on the outcome of this case.

***

In sum, we conclude that the district court properly granted summary judgment to the Receiver on his UVTA claim. Next, we address whether the district court erred in granting summary judgment to the Receiver on his securities claims.

VII

A

Ms. Shepherd first challenges the district court's determination that the "solar lens purchase program constitute[d] a security because it [was] an investment contract." Aplt.'s App., Vol. III, at 134 (bold-face font omitted). Specifically, she claims the Receivership Defendants "sold to the customer a solar energy *product*," rather than an investment opportunity. Aplt.'s Opening Br. at 14 (emphasis added). Furthermore, Ms. Shepherd contends the "customer could take the product and do

with it as they chose." *Id.* As such, she claims the solar lens purchase program was not a security and did not require registration. In other words, Ms. Shepherd asserts that she did not violate Utah or federal securities laws by selling the solar lenses.

Unsurprisingly, the Receiver disagrees. The Receiver claims that, in accordance with *Securities and Exchange Commission v. Howey Co.*, 328 U.S. 293, 298–99 (1946), "the district court correctly found the sale of solar lenses by Receivership Defendants and [Ms.] Shepherd constituted an investment contract and a security." Aplee.'s Resp. Br. at 29. As such, the Receiver contends the solar lens program "was required to be registered in accordance with securities laws and [Ms.] Shepherd was required to be licensed to sell securities." *Id.* at 31. "Because the securities were not registered, and [Ms.] Shepherd was not properly licensed," the Receiver asserts that "[Ms.] Shepherd's sale of the solar lenses constituted a violation of Utah and Federal securities laws." *Id.* at 31–32. We believe that the Receiver has the better of this argument.

In order to determine whether a scheme constitutes an investment contract—and is thus subject to securities laws—we apply the three-part test outlined in *Howey*, 328 U.S. at 298–99. A scheme constitutes an investment contract if it involves (1) an investment of money; (2) in a common enterprise; (3) with profits derived solely from the efforts of others. *See id.* at 301 ("The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others."). "[T]he ultimate question of whether an instrument is a security is 'a question of law and not of fact.'" *SEC v. Thompson*, 732 F.3d 1151, 1160 (10th

Cir. 2013) (quoting *Ahrens v. American-Canadian Beaver Co.*, 428 F.2d 926, 928 (10th Cir. 1970)).

Here, the first element of the *Howey* test is clearly satisfied. Contrary to Ms. Shepherd's assertion, investors were not merely purchasing solar lenses for their own personal use. Instead, by acquiring the solar lenses, the investors were purchasing the right (1) to receive tax credits and deductions and (2) to share in the profits from future electricity sales. Stated another way, the purchasers were investing money in the scheme with the expectation of future returns.

Furthermore, the purchasers were investing money in "a common enterprise." As the district court correctly noted, the solar lenses would not be economically feasible on their own; instead, to eventually earn profits from the sale of electricity, investors needed the broader scheme to succeed. *See* Aplt.'s App., Vol. III, at 137. The Receiver also presented evidence showing that the Receivership Defendants "retained the lenses and controlled what happen[ed] to them (if anything)." *Id.*, Vol. I, at 42 (Receiver's Mot. for Summ. J., filed Oct. 30, 2020); *see also id.*, Vol. III, at 117. Indeed, it is undisputed that investors did not even know which specific lens they owned—which severely undercuts Ms. Shepherd's contention that investors were simply purchasing a product for their own personal use. Thus, it clearly follows that the scheme was marketed as "an opportunity to contribute money and to share in the profits of a large [solar energy] enterprise managed and partly owned by [Receivership Defendants]." *Howey*, 328 U.S. at 299.

Ms. Shepherd attempts to avoid this conclusion by arguing that purchasers were *not obligated* to lease the lenses to the Receivership Defendants and, accordingly, could use the lenses however they wished. However, Ms. Shepherd failed to present any evidence showing that customers ever took direct physical possession of their solar lenses. *Cf.* Aplt.'s App., Vol. III, at 116 ("Customers never took direct physical possession of their lenses."). Furthermore, even if Ms. Shepherd had presented such evidence, our conclusion would remain "unaffected by the fact that some purchasers [chose] not to accept the full offer of an investment contract by declining to enter into a service contract with the [Receivership Defendants]." *Howey*, 328 U.S. at 300–01. As such, the second element of the *Howey* test is satisfied.

Finally, the third element—*viz.*, profits derived solely from the efforts of others—is also easily met. It is undisputed that the "Receivership Defendants emphasized how little any customer would have to do with respect to 'leasing out' their lenses[,] '[s]ince LTB[1] install[ed], operate[d], and maintain[ed] [their] lenses for [them]." Aplt.'s App., Vol. III, at 117 (second and third alterations in original). Furthermore, the district court found—and Ms. Shepherd does not contest—that the investors "[did] not have special expertise in the solar energy industry." *Id.* It follows, then, that any profits from this scheme would derive solely from the efforts of the Receivership Defendants.

Accordingly, because all three elements of the *Howey* test are met, we conclude that the district court correctly determined that the solar lens scheme was an

investment contract subject to securities laws. Thus, Ms. Shepherd was required to be licensed to sell the securities and the securities were required to be registered in accordance with securities laws. Because neither of these requirements were met, Ms. Shepherd's sale violated Utah and federal securities laws.

B

Ms. Shepherd also asserts that the Receiver failed to present evidence on his fraud in the offer and sale of securities claim—i.e., the Receiver's fifth claim. *See* Aplt.'s Opening Br. at 15–16. We fail to see the relevance of Ms. Shepherd's argument.

As an initial matter, the Receiver did not move for summary judgment on his fifth claim. More importantly, the district court found the fifth claim to be moot. As such, even assuming *arguendo* that the Receiver failed to present evidence on his fraud in the offer and sale of securities claim, it would have no effect on the outcome of this case.

***

Accordingly, we conclude that the district court properly granted summary judgment on the Receiver's securities claims.

VIII

Ms. Shepherd also raises a bevy of other arguments in her Opening Brief. Specifically, she claims that (1) the district court violated her procedural and due process rights, (2) the relevant Utah and federal laws were unconstitutionally vague,

and (3) the federal government improperly interfered with contracts between private parties. *See id.* at 1–3, 10–12.

However, none of these arguments were raised below, and Ms. Shepherd fails to argue for plain-error review. As such, Ms. Shepherd has effectively waived these arguments, and we decline to consider them further. *In re Rumsey*, 944 F.3d at 1271 ("If an appellant does not explain how its forfeited arguments survive the plain error standard, it effectively waives those arguments on appeal."); *Hynes v. Energy W., Inc.*, 211 F.3d 1193, 1201–02 (10th Cir. 2000) ("If a party fails to raise an issue in the trial court, it is deemed waived on appeal unless plain error is demonstrated." (quoting *Hinds v. Gen. Motors Corp.*, 988 F.2d 1039, 1045 (10th Cir. 1993))).

IX

For the foregoing reasons, we **AFFIRM** the district court's judgment.

Entered for the Court

Jerome A. Holmes
Chief Judge