UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re, James Harold Clutts, Debtor.	C/A No. 13-00184-DD Adv. Pro. No. 13-80068-DD Chapter 7
Michelle L. Vieira, Chapter 7 Trustee, Plaintiff, v. Penny L Clutts, Defendant.	**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

This adversary proceeding was initiated in this Court pursuant to 28 U.S.C. §§ 157(a) and 1334 and Local Civil Rule 83.IX.01, D.S.C.[1] The plaintiff, Chapter 7 Trustee Michelle Vierra ("Plaintiff" or "Trustee") filed, on August 9, 2013, a motion for partial summary judgment pursuant to Fed R. Civ. P. 56, as made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056 ("Motion").[2] Plaintiff seeks summary judgment with respect to her first cause of action (Sale Proceeds Transfer—Constructive Fraud), eighth cause of action (Rent Assignment—Constructive Fraud), and eleventh cause of action (Turnover). The defendant, Penny L. Clutts ("Defendant"), filed an Objection to Plaintiff's Motion, and Plaintiff submitted a reply.[3] A hearing on Plaintiff's Motion was held on October 8, 2013.

Plaintiff's counsel indicated at the hearing that she did not intend to pursue the other nine causes of action asserted in the complaint if she is successful in seeking summary judgment on the three causes of action for which she has sought summary judgment.

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[1] Adv. Proc. No. 13-80068, filed May 9, 2013.
[2] Doc. No. 22, filed August 9, 2013, and supplement thereto at Doc, No, 26, filed August 29, 2013.
[3] Doc. No. 29, filed September 10, 2013, and Doc. No. 32, filed September 25, 2013.

After consideration of the record, applicable law, and arguments of counsel, the Court proposes Plaintiff's Motion be granted. These proposed findings of fact and conclusions of law are submitted to the United States District Court for the District of South Carolina ("District Court") for review because entry of a final order or judgment in this adversary proceeding would not be consistent with Article III of the United States Constitution and the parties have not expressly consented to this Bankruptcy Court entering a final order or judgment. *In re Standing Order Concerning Title 11 Proceedings Referred Under Local Civil Rule 83.IX.01, Referral to Bankruptcy Judges*, Misc. No. 3:13-mc-00471-TLW (D.S.C. Dec. 5, 2013); *see Stern v. Marshall*, -- U.S. --, 131 S. Ct. 2594, 2609 (2011) ("When a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts." (internal quotation marks and citation omitted)). *Granfinanciera v. Nordberg*, 492 U.S. 33, 46-47 (1989) ("We therefore conclude that respondent would have had to bring his action to recover an alleged fraudulent conveyance of a determinate sum of money at law in 18th-century England, and that a court of equity would not have adjudicated it."); *see also Official Comm. of Unsecured Creditors v. Nat'l Patent Dev. Corp. (In re TMG Liquidation Co.),* C/A No. 7:12-629-TMC, 2012 WL 1986526, at *2 (D.S.C. June 4, 2012); *Lain v. Erickson* (*In re Erickson Ret. Cmty, LLC*), Bankruptcy No. 09-37010-sg11, Civil No. WDQ-11-3736, 2012 WL 1999493, at *3 (D. Md. June 1, 2012); *McCarthy v. Wells Fargo Bank, N.A* (*In re El-Atari*)., No. 1:11cv1090 (LMB/IDD), 2011 WL 5828013, at *2-*4 (E.D. Va. Nov. 18, 2011).

FACTS

The debtor, James Harold Clutts ("Debtor"), filed a petition for relief under Chapter 7 of the Bankruptcy Code on January 9, 2013. On April 19, 2013, during the pendency of the bankruptcy case, Debtor passed away. Defendant is the spouse and widow of the Debtor. The Trustee initiated this adversary proceeding on May 9, 2013, to avoid and recover allegedly fraudulent transfers pursuant to 11 U.S.C. §§ 544 and 548 and South Carolina Code Annotated § 27-23-10.[4] The Trustee also seeks relief under 11 U.S.C. §§ 542 and 550. Defendant filed an Answer in response to Trustee's Complaint.[5] The initial Complaint[6] contained twelve causes of action, however, the Trustee now seeks summary judgment only as to three causes of action. Defendant filed an Objection in response alleging valuable consideration was exchanged and setting forth the statute of limitations and laches as defenses to summary judgment.

The facts surrounding this adversary are essentially not in dispute. Between 2008 and 2010, Debtor made two monetary transfers following the sale of a business (collectively, the "Sale Proceeds Transfer") and an assignment of rent[7] ("Rent Assignment") to Defendant. The Trustee seeks to avoid these transfers as constructively fraudulent.

The Sale Proceeds Transfer

1. On July 1, 2008, Debtor sold his interest in Vanex, Inc. and realized sale proceeds of approximately $1,842,796.81.
2. Later in July of 2008, Debtor transferred $1,000,000.00 in proceeds from that sale to Defendant. The funds were deposited into Defendant's Wells Fargo bond account.
3. On March 3, 2009, Debtor transferred an additional $250,000.00 to Defendant.

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[4] All further references to the Bankruptcy Code, 11 U.S.C. § 101 *et seq*., will be by section number only.
[5] Doc. No. 15, filed June 7, 2013.
[6] Doc. No. 1, filed May 9, 2013.
[7] *See* Doc. No. 15, filed June 7, 2013. In Defendant's Answer she stated as follows: "35. Mrs. Clutts admits that there was an absolute assignment of rents issued in July of 2010."

4. The two transfers of $1,000,000.00 and $250,000.00 are collectively referred to hereafter as the “Sale Proceeds Transfer.”
5. On December 4, 2009, Debtor “borrowed” $200,000.00 from Defendant. The funds were a portion of the Sale Proceeds Transfer previously made from Debtor to Defendant. The Debtor and Defendant executed a promissory note and Defendant collected the $200,000.00 from Debtor on April 28, 2011.
6. Defendant testified in a state court supplemental proceeding on June 28, 2012, that the Sale Proceeds Transfer was intended to provide financial security to her in light of Debtor’s health issues. During her testimony Defendant stated that Debtor “gifted” the proceeds from the sale of his business to her. Pl.’s ex. D, p. 11, 30.
7. Similarly, during Debtor’s 11 U.S.C. § 341 meeting on February 28, 2013, Debtor testified that he “gave” the money at issue to Defendant. Pl.’s ex. A, pp. 4, 21-22.
8. In a letter from Debtor to the Trustee dated March 1, 2013, Debtor referred to the Sale Proceeds Transfer as a “monetary gift to my wife.” The letter explained that the “gift” was made due to Debtor’s poor health. Pl.’s ex. C. During the course of Debtor and Defendant’s marriage, Defendant did not work outside of the home.
9. Defendant testified at the preliminary injunction hearing held in this Court on May 22, 2013, in response to a question of whether she provided the Debtor anything in exchange for the Sale Proceeds Transfer as follows: “No, I did not. It was consideration for my welfare.” Pl.’s ex. B, pp. 76-77.
10. On October 8, 2013, the day of the hearing on Plaintiff’s motion for partial summary judgment, Defendant submitted an affidavit, filed late, that alleged the Sale Proceeds Transfer was “made in consideration of [her] demand to be made an equal partner in . . .

[the] marriage." Portions of the information contained in the affidavit contradict Defendant's previous sworn testimony. Def.'s ex. 1.

The Rent Assignment

11. Debtor was the owner of a one half interest in a commercial office building located at 914 West Main, Carbondale, Illinois (the "Carbondale Property"). The remaining one-half interest is held by Debtor's ex-wife.

12. On July 1, 2010, Debtor assigned his one-half interest in rents from the Carbondale Property to Defendant (the "Rent Assignment"). In Defendant's Answer she admits that there was an absolute assignment of rents in July of 2010.

13. Debtor testified at the section 341 meeting on February 28, 2013 that he assigned his interest in the Carbondale Property to Defendant and disclosed the assignment in his schedules.

14. Defendant testified at the preliminary injunction hearing held in this Court on May 22, 2013, in response to a question of whether she provided the Debtor anything in exchange for the Rent Assignment as follows: "No, I did not. It was consideration for my welfare." Pl.'s ex. B, pp. 76-77.

15. Since the assignment, Defendant has received one half of the net rental proceeds from the Carbondale Property of at least $1,500.00 per month ("Rent Proceeds"). The estimated total amount received by Defendant to date is $54,000.00.

16. The affidavit submitted by Defendant on October 8, 2013, also alleged that the Rent Assignment was "made in furtherance of [her] demand to be an equal partner in the marriage." Def.'s ex. 1.

Creditors

17. The following creditors have filed proofs of claim in the Debtor's bankruptcy case: (1) SunTrust Mortgage, Inc.[8] (2) SunTrust Bank;[9] (3) SCBT, as Successor by Merger with The Savannah Bank ("SCBT");[10] (4) RL REGI Financial, LLC ("RL REGI");[11] (5) PNC Bank, N.A., as Successor by Merger to RBC Bank (USA) f/k/a RBC Centura Bank ("PNC");[12] and (6) Bank of the Ozarks, as Successor in Interest to Woodlands Bank.[13]

18. SunTrust Mortgage extended a loan to Debtor on March 19, 2004. Pl.'s. ex. Y. Subsequently, on September 12, 2005, SunTrust Bank extended a loan to Debtor. Pl.'s ex. X. As of the date of Debtor's bankruptcy petition, both of these loans were current. During the pendency of the bankruptcy case, Debtor defaulted on both loans. Pl.'s ex. X, Y. The affidavit submitted by Defendant on October 8, 2013, attached a refinance application between Debtor and either SunTrust Bank or SunTrust Mortgage executed on November 4, 2008. Def.'s ex. 1.

19. On March 15, 2006, Debtor guaranteed the payment of a loan made by SCBT to Big Beach, LLC. There was a default in payment on December 1, 2010, and SCBT instituted litigation in the state court against Debtor on June 20, 2011. Plaintiff provided an affidavit from SCBT in which SCBT stated that it did not receive notice of the transfers at issue in this case until April 18, 2013. Pl.'s ex. O.

20. On March 7, 2007, Debtor guaranteed a loan made by RL REGI to MC Properties of Hilton Head, LLC. RL REGI declared the loan in default on December 1, 2010. RL

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[8] Proof of Claim #7, filed May 10, 2013.
[9] Proof of Claim #2, filed April 3, 2013.
[10] Proof of Claim #5, filed April 26, 2013.
[11] Proof of Claim #9, filed May 30, 2013.
[12] Proof of Claim #8, filed May 23, 2013.
[13] Proof of Claim #3, filed April 16, 2013.

REGI instituted an action against Debtor on February 4, 2011. Summary judgment was granted in RL REGI's favor on October 7, 2011. RL REGI indicated in its affidavit that it was not aware of the transfers to Defendant until April 17, 2013. Pl.'s ex. Q, R, S, Z.

21. On May 1, 2007, PNC extended a loan to Cases De Cay, LLC guaranteed by Debtor. On August 12, 2011, PNC declared the loan in default. PNC initiated an action against Debtor on November 7, 2011. Pl.'s ex. T, U.

22. Finally, on June 26, 2008, the Bank of the Ozarks made Debtor a loan. The loan term was extended several times with a final loan extension occurring on March 9, 2010. Debtor defaulted in payment on the loan on September 9, 2010. Bank of the Ozarks instituted litigation against Debtor on January 20, 2011, and obtained a judgment against Debtor on May 17, 2011. Bank of the Ozarks then instituted a supplemental proceeding in state court which was stopped when Debtor filed bankruptcy. According to its affidavit, Bank of the Ozarks learned of the transfers to Defendant during the supplemental proceeding. Pl.'s ex. N.

23. Debtor's schedules, filed January 23, 2013, indicate that Debtor's liabilities of $3,409,422.77 significantly exceed his assets of $1,633,565.50.

Status of Funds at Issue

24. In her amended responses to Plaintiff's first set of interrogatories, Defendant responded in the negative when asked whether she contends that any of the funds in her Wells Fargo Account *957 ("Wells Fargo Account") and SIU Credit Union Account *S59 ("Credit

Union Account") came from any other source other than the Sale Proceeds Transfer or income derived from the Sale Proceeds Transfer. Pl.'s ex. AA, questions 17, 18.[14]

25. In her first set of interrogatories, Plaintiff asked Defendant "[a]s to the current balance in Defendant's SunTrust Account *8115 ('SunTrust Account 2'), does the Defendant contend that any of the funds in that account came from any source other than the Sale Proceeds Transfer income derived from the Sale Proceeds Transfer, or Rent Proceeds? If so, describe all sources of any funds in SunTrust Account 2." Defendant responded in the affirmative and stated "[o]n August 13, 2013 $7,807.00 was deposited into the SunTrust Account 2. These funds represent a Social Security death benefit payable to the Defendant, specifically, a $255 death benefit and $1,888.00 for April, May, June, and July." Pl.'s ex. AA, question 19.

SUMMARY JUDGMENT STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), made applicable by Bankruptcy Rule 7056, the moving party is entitled to summary judgment if the pleadings, responses to discovery, and the record reveal that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A genuine dispute of material fact exists "if the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

As the party seeking summary judgment, the moving party bears the initial responsibility of informing this Court of the basis for its motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317,

[14] Plaintiff did not include Exhibit AA with the attachments to her summary judgment motion filed on CM/ECF. However, her counsel did discuss it at the hearing, and Defendant's counsel did not object to her discussion of it or indicate he was not provided sufficient notice she was relying on it in connection with her motion for summary judgment.

323 (1986). This requires that the moving party identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323; *see also Anderson*, 477 U.S. at 249.

Though the moving party bears this initial responsibility, the nonmoving party must then produce "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324; *see* Fed R. Civ. P. 56(e). In satisfying this burden, the nonmoving party must offer more than a mere "scintilla of evidence" that a genuine dispute of material fact exists, *Anderson*, 477 U.S. at 252, or that there is "some metaphysical doubt" as to material facts, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). One of the purposes of summary judgment is to determine whether the parties can provide evidentiary support for their version of the facts. If a party has credible evidence for its position, it must make the existence of such evidence known because summary judgment cannot be defeated by the vague hope that something may turn up at trial. *Id.* at 586. The Court is not obligated to search the record for the non-moving party's evidence. *Harris v. Pyramid Gom, Inc.* (*In re Capco Energy, Inc.*), Bankruptcy No. 08-32282, Adv. Pro. No. 10-3349, 2012 WL 253140, *4 (Bankr. S.D. Tex. Jan. 25, 2012)).

Importantly, at summary judgment, "'the facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts.'" *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). Summary judgment is proper "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there [being] no genuine issue for trial." *Matsushita*, 475 U.S. at 587 (internal quotations omitted).

ANALYSIS

This lawsuit presents twelve causes of action against Defendant, however Plaintiff has moved for summary judgment only as to the following three causes of action: (1) violation of S.C. Code Ann. §§ 27-23-10, sale proceeds transfer, constructive fraud; (2) violation of S.C. Code Ann. §§ 27-23-10, rent assignment, constructive fraud; and (3) 11 U.S.C. § 542, turnover. In response, Defendant asserts the causes of action are barred by the statute of limitations pursuant to S.C. Code § 15-3-530(7) and laches.[15] Defendant also argues that an issue of material fact exists as to the existence of valuable consideration to support the transfers.

Fraudulent Conveyance Pursuant to S.C. Code Ann. § 27-23-10

The Trustee seeks to avoid the Sale Proceeds Transfer and Rent Assignment pursuant to the Statute of Elizabeth, S.C. Code Ann. § 27-23-10, which provides in relevant part as follows:

> Every gift, grant, alienation, bargain, transfer, and conveyance of lands, tenements, or hereditaments, goods and chattels or any of them, or of any lease, rent, commons, or other profit or charge out of the same, by writing or otherwise, . . . which may be had or made to or for any intent or purpose to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, and forfeitures must be deemed and taken . . . to be clearly and utterly void, frustrate and of no effect, any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.
>
> S.C. Code Ann. § 27-23-10(A).

Section 544 states in relevant part,

> [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.
>
> 11 U.S.C. § 544(b)(1).

[15] Doc. No. 15, Answer to Complaint.

The Statute of Elizabeth, made applicable by § 544, allows a creditor to avoid a fraudulent transfer of property by a debtor. Section 544 allows the Trustee to assert the rights of those creditors. *See Campbell v. Deans (In re J.R. Deans Co.),* 249 B.R. 121 (Bankr. D.S.C. 2000). Therefore, in order for the Trustee to maintain an action under the Statute of Elizabeth, "there must be a creditor with a valid unsecured claim in the bankruptcy case who could assert a claim to avoid the transfer." *Hovis v. Ducate (In re Ducate)*, 369 B.R. 251, 258 (Bankr. D.S.C. 2007). As stated above, there were multiple creditors who were owed money by Debtor at the time of the transfers from Debtor to Defendant. These creditors are currently in existence and have allowed claims in the bankruptcy case.[16] Therefore, the Trustee may stand in the position of these creditors to avoid the transfers made from Debtor to Defendant.

Where, as here, the creditors whose rights the Trustee is asserting were in existence at the time of transfer, additional inquiry into whether the transfers were made for valuable consideration is necessary. If valuable consideration was exchanged, pursuant to an actual fraud theory, a transfer may be avoided if it is established that: "(1) the transfer was made by the grantor with the actual intent of defrauding its creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee." *Campbell v. Deans (In re J.R. Deans Co.)*, 249 B.R. 121, 130 (Bankr. D.S.C. 2000) (quoting *Mathis v. Burton,* 460 S.E.2d 406, 408 (S.C. Ct. App. 1995)). However, where a transfer is made without valuable consideration, under a constructive theory, no actual intent to hinder or defraud creditors must be proven. Instead, the trustee must demonstrate that: "'(1) the grantor was indebted to [the creditor] at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in full—not merely at the time of

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[16] A proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). No objections have been filed to the proofs of claim of the creditors whose rights Plaintiff is asserting in this action.

transfer, but in the final analysis when the creditor seeks to collect his debt.'" *Campbell v. Haddock* (*In re Haddock*), 246 B.R. 810, 814 (Bankr. D.S.C. 2000) (quoting *Mathis*, 460 S.E.2d at 408); *see also In re Southern Textile Knitters*, 65 F. App'x 426, 435 (4th Cir. 2003) (citing *Future Group, II v. Nationsbank*, 478 S.E.2d 45, 48-49 (S.C. 1996)). "This final requirement for setting aside a [constructively fraudulent] transfer is measured 'not merely at the time of transfer, but at the time plaintiff seeks to collect.'" *Bakst v. Probst* (*In re Amelung*), 436 B.R. 806, 810 (Bankr. D.S.C. 2010) (quoting *Future Group, II*, 478 S.E.2d at 48). "Thus, insolvency at the time of transfer is not required." *Id*; *see also Penning v. Reid*, 166 S.E. 139, 146 (S.C. 1932) ("The law will not permit one who is indebted at the time to give his property away, provided such gift proves prejudicial to the interest of existing creditors." (internal quotation marks and citations omitted)). Here, the Trustee seeks summary judgment arguing the Sale Proceeds Transfer and the Rent Assignment were both made without valuable consideration and were constructively fraudulent.

In situations, as here, "[w]here transfers to members of the family are attacked . . . on account of their voluntary character, the law imposes the burden on the transferee to establish both a valuable consideration and the bona fides of the transaction by clear and convincing testimony." *In re Ducate*, 355 B.R. 536, 544 (Bankr. D.S.C. 2006) (citing *In re J.R. Deans, Co., Inc.*, 249 B.R. 121, 134 (Bankr. D.S.C. 2000); *see also In re Haddock*, 246 B.R. 810, 816 (Bankr. D.S.C. 2000); *Windsor Properties, Inc. v. Dolphin Head Constr. Co., Inc.*, 498 S.E.2d 858, 860-61 (S.C. 1998) (citations omitted). As a result, the burden is on Defendant to present evidence that the transfers were in exchange for valuable consideration.

The Court first considers whether the Sale Proceeds Transfer and the Rent Assignment were made in exchange for valuable consideration. Defendant submitted an affidavit the day of

the hearing on the Summary Judgment Motion that was filed late and in part contradicts Defendant's earlier sworn testimony. Defendant previously testified that she did not provide Debtor anything in exchange for the Sale Proceeds Transfer or the Rent Assignment. However, the affidavit states, for the first time in these proceedings that "these transfers were made in consideration of my demand to be made an equal partner in . . . [the] marriage."[17] While Defendant's previous sworn testimony and the late filed affidavit present contradictory facts regarding whether valuable consideration was exchanged, it is well recognized that a party "may not avoid summary judgment by submitting an affidavit that conflicts with earlier . . . testimony." *See Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). "A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the . . . testimony is correct." *Id.* If a party "could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Id.* (quoting *Perma Research and Development Co. v. The Singer Co.,* 410 F.2d 572, 578 (2nd Cir.1969)). Therefore, even considering the affidavit submitted by Defendant, an issue of fact is not created because Defendant cannot create an issue of fact by submitting an affidavit contradicting her earlier sworn testimony.

Even if the Court were to accept Defendant's proffer of consideration in her affidavit, it does not constitute valuable consideration as a matter of law for purposes of the Statute of Elizabeth. In the affidavit, contrary to previous testimony, Defendant asserts that the Sale Proceeds Transfer and the Rent Assignment were in exchange for her "demand to be made an equal partner in [the] marriage" following years of remaining in the home and to provide Defendant support in light of Debtor's poor health. Defendant bears the burden of proof to

[17] Defendant's Exhibit 1, Defendant Affidavit.

demonstrate valuable consideration was exchanged by clear and convincing evidence. *In re Haddock*, 246 B.R. 810, 816 (Bankr. D.S.C. 2000).

In *Farmers' Bank v. Bradham* the South Carolina Supreme Court found that a wife providing help to her husband during their married life was inadequate consideration to support a deed conveyance. *Farmers' Bank v. Bradham*, 123 S.E. 835, 837 (1924) ("All that she did was in the nature of personal services, rendered in the capacity of wife and helpmeet, for her husband and for herself, for their mutual benefit, which is not a sufficient consideration to support this deed, which was given while the defendant J. J. Bradham was indebted to the bank, and which conveyance left him without means to complete his payment to it of what he justly owed, and which left the plaintiff bank without its legal remedy to enforce collection."); *see also Matter of Russo*, 1 B.R. 369, 376 (Bankr. E.D.N.Y. 1979) ("Even if the reason for the conveyance was, in fact, some marital difficulties between them it would not help their case because even if the evidence in the record is to be believed, fair consideration would still be lacking."); *Albertson v. Robinson*, 638 S.E.2d 81, 83-4, 371 S.C. 311, 317 (S.C. Ct. App. 2006) (finding that a transfer made for $5.00 and "love and affection" from husband to wife was not supported by valuable consideration when wife alleged "all of [her] years being married" constituted consideration and husband alleged consideration in the form of "looking out for [his] kids" and hoping to save his marriage); 37 Am. Jur. 2d Fraudulent Conveyances and Transfers § 54 ("[T]he performance by the transferee spouse of his or her ordinary marital or household duties is not a sufficient consideration to support a conveyance to the transferee spouse by the transferor spouse as against the transferor's creditors."). Defendant does not provide any specificity as to how "demanding to be an equal partner" in a marriage constitutes valuable consideration. Defendant's Objection to Plaintiff's Motion generally alleges that working through marital problems can be valuable

consideration for a transfer of property. However, Defendant points to only a single, distinguishable case from another district to support this assertion, and there is no evidence in the record to indicate the Defendant and Debtor were experiencing significant marital problems at the time of the transfers. *See In re Galbreath*, 207 B.R. 309 (Bankr. M.D. Ga. 1997) (finding that following the execution of three post-nuptial agreements and a reconciliation agreement settling alimony and property division issues, wife's waiver of claims for future alimony or property division pursuant to the written agreements as well as the forbearance of the right to sue for divorce constituted valuable consideration for the transfer of property from husband to wife under Georgia law).

Additionally, this Court has found that even when a debtor submitted an affidavit asserting that a conveyance "was made for legitimate estate planning purposes due to Debtor's poor health" a transfer made for five dollars and "love and affection" did not constitute valuable consideration. *In re Haddock*, 246 B.R. 810, 813 (Bankr. D.S.C. 2000). Defendant does not point to specific evidence in the record nor convincing case law to support the alleged consideration and therefore has not met her burden of demonstrating a genuine dispute of material fact exists with respect to whether valuable consideration was exchanged. Moreover even considering Defendant's allegations of consideration in the affidavit, the consideration allegedly exchanged does not constitute valuable consideration as a matter of law for purposes of the Statute of Elizabeth.

Having found that there was no valuable consideration exchanged during the Sale Proceeds Transfer or the Rent Assignment, the Trustee must only demonstrate that: (1) the grantor was indebted to the creditor at the time of the transfer; (2) the conveyance was voluntary; and (3) the grantor failed to retain sufficient property to pay the indebtedness to the plaintiff in

full. The first condition is clearly met. The loans at issue originated between March of 2004 and June of 2008 and the transfers occurred between July of 2008 and July of 2010. Therefore, Debtor was already indebted to the creditors at the time of the transfers. The transfers were without consideration and "voluntary" as discussed above. As reflected on the Debtor's bankruptcy schedules, Debtor did not retain sufficient funds to pay his creditors. Therefore, the Sale Proceeds Transfer and the Rent Assignment constitute fraudulent conveyances as a matter of law.

Statute of Limitations as a Defense

In her objection to the Summary Judgment Motion, Defendant asserts the statute of limitations as a defense to the Trustee's first cause of action, fraudulent conveyance of the Vanex, Inc. sale proceeds.[18] Pursuant to S.C. Code Ann. § 15-3-530(7), the statute of limitations for a claim under the Statute of Elizabeth is three years. *Campbell v. Deans* (*In re J.R. Deans Co.*), 249 B.R. 121, 132 (Bankr. D.S.C. 2000). "In South Carolina, the statute of limitations for causes of actions for fraud, including the Statute of Elizabeth, is governed by the 'discovery rule' which provides that the statute of limitations 'does not begin to run until discovery of the fraud itself or of 'such facts as would have led to the knowledge thereof, if pursued with reasonable diligence.'"[19] *Id.* (quoting *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.*, 386 S.E. 2d 798, 799

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[18] In her answer, Defendant did not assert the statute of limitations as an affirmative defense to the constructive fraud cause of action Plaintiff asserts in connection with the Rent Assignment.

[19] For many years, the right to institute and maintain an action in equity to set aside a transfer under the Statute of Elizabeth based on constructive fraud was not complete and the statute of limitations did not begin to run until the creditor "exhausted its legal remedies and had a *nulla bona* return on the execution issued to enforce its judgment." *See Walter J. Klein Co.*, 123 S.E.2d at 874; *Temple v. Montgomery*, 153 S.E. 640, 646 (S.C. 1930); *Suber v. Chandler*, 18 S.C. 526, 530 (S.C. 1883). "However, the . . . South Carolina Rules of Civil Procedure have modified prior procedure relating to joinder of claims." *Lebovitz v. Mudd*, 358 S.E.2d 698, 701 (S.C. 1987); *see also* S.C. R. Civ. P. 18(b) ("**Joinder of Remedies; Fraudulent Conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."). Therefore, obtaining a

(S.C. Ct. App. 1989)); *see also Walter J. Klein Co. v. Kneece*, 123 S.E.2d 870, 873-74 (S.C. 1962) (holding the statute of limitations on a Statute of Elizabeth cause of action "begins to run at the time of the acquisition of knowledge of such facts that are sufficient to put the party on inquiry which, if developed, will disclose the alleged fraud.").

At the hearing on the motion for partial summary judgment, the parties disagreed over who had the burden of proof with respect to whether Plaintiff's Statute of Elizabeth cause of action brought pursuant to section 544(b)(1) is barred by the statute of limitations. Under South Carolina law, "the burden of establishing the bar of the statute of limitations rests upon the one interposing it." *Brown v. Finger*, 124 S.E.2d 781, 786 (S.C. 1962) (citations omitted). In *In re Amelung*, this Court stated that "[t]he burden of demonstrating the existence of an actual creditor with a viable, allowed claim is on the trustee." *Amelung*, 436 B.R. at 809. In support of this statement, the Court cited a section in *Collier on Bankruptcy*, which provides that "[t]he burden is on the trustee seeking to take advantage of [section 544(b)(1)] to demonstrate the existence of an actual creditor with a viable cause of action against the debtor that is not time barred or otherwise invalid." 5 *Collier on Bankruptcy* § 544.06 (16th ed.) (citing *9281 Shore Rd. Owners Corp. v. Seminole Realty Corp* (*In re 9281 Shore Rd. Owners Corp.*), 187 B.R. 837, 852 (E.D.N.Y. 1995); *Amelung*, 436 B.R. at 809; *Dicello v. Jenkins* (*In re Int'l Loan Network, Inc.*), 160 B.R. 1, 18 n.30 (Bankr. D.C. 1993)). However, the statute of limitations was not an issue in *Amelung* because this defense was not pursued at the trial in that case. *Amelung*, 436 B.R. at 808. Along with *Amelung*, *Collier* cites two other decisions in support of its statement. Neither decision involves a court concluding that the burden of proof with respect to whether the statute of limitations bars a creditor's Statute of Elizabeth cause of action, which the applicable state law

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nulla bona return and exhausting one's legal remedies is no longer a "prerequisite to bringing a fraudulent conveyance action." *Id.*

places on the defendant, shifts to the trustee when the trustee proceeds on the creditor's behalf under section 544(b)(1). There is also no support for shifting the burden of proof in the text of section 544(b)(1), which provides that "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title." Notably, section 544(b)(1) says "an unsecured claim that is allowable under section 502," not a Statute of Elizabeth cause of action that is allowable. Whether the statute of limitations has run on an unsecured creditor's Statute of Elizabeth cause of action and whether a creditor has an allowable unsecured claim constitute two separate issues. Under section 502(a), a claim is allowed unless there is an objection to it, and there are no objections to the claims of the creditors whose rights Plaintiff is asserting in this adversary proceeding. *See In re Int'l Loan Network*, 160 B.R. at 18 ("[The trustee] has satisfied this requirement because a claim is allowed unless it has been objected to."). Defendant has not attempted to argue in this case that all of the creditors at issue are barred on statute of limitations grounds from collecting the debts owed to them, probably because such an argument would have no merit, considering it is undisputed at the time Debtor filed bankruptcy that one of the creditors was in the midst of a supplemental proceeding to collect the debt owed to it and the debts owed to two other creditors were current. The question of whether a transfer is "voidable under applicable law" is determined by applying the applicable law, which the parties agree in this case is South Carolina law, *see Butler v. NationsBank, N.A.*, 58 F.3d 1022, 1026 (4th Cir. 1995), and under South Carolina law, "the burden of establishing the bar of the statute of limitations rests upon the one interposing it." *Brown*, 124 S.E.2d at 786. Moreover, it is a well-established principle that the effect of section 544(b)(1) is "to clothe the trustee with no new or additional

right in the premises over that possessed by a creditor, but simply puts him in the shoes of the latter, and subject to the same limitations and disabilities that would have beset the creditor in the prosecution of the action on his own behalf." *Davis v. Willey*, 263 F. 588, 589 (N.D. Cal. 1920). In a situation such as exists here where the nonmoving party would bear the burden of proof at trial on this dispositive issue, the nonmoving party, in opposing the moving party's properly-supported motion for partial summary judgment, is required "to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (internal quotation marks omitted).

Defendant asserts that notice a conveyance of property has occurred is all that is required for the statute of limitations to begin running on a creditor's Statute of Elizabeth cause of action. In *Commercial Credit Loans, Inc. v. Riddle*, the South Carolina Court of Appeals held that an action "to set aside a fraudulent conveyance must be commenced *within six years of the conveyance*" but that "[t]he accrual of the action is tolled . . . until the aggrieved party discovers or should have discovered facts, which by the exercise of due diligence, would be sufficient to put the creditor on notice of the fraud."[20] 512 S.E.2d 123, 127 (S.C. Ct. App. 1999) (emphasis added) (citing S.C. Code Ann. § 15-3-530; *Walter J. Klein Co.*, 123 S.E. 2d at 873). Consequently, while *Riddle* at first glance may appear to support Defendant's argument, the Court of Appeals also stated that the discovery rule applies. When applying state law, federal courts have a duty "to ascertain from all the available data what the state law is and apply it." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940); *see also Comm'r of Internal Revenue v. Bosch*, 387 U.S. 456, 464-65 (1967). In this regard, a state's highest court is "the best authority on its own law." *Bosch*, 387 U.S. at 465; *see also West*, 311 U.S. at 236 ("[T]he highest court of

[20] Section 15-3-530 now provides for a three-year limitations period.

the state is the final arbiter of what is state law."). Case law from the South Carolina Supreme Court indicates that for the statute of limitations to begin running on a creditor's fraudulent conveyance cause of action based on constructive fraud, the creditor must be charged with notice not only that a transfer has occurred but also that the debtor has failed to retain sufficient assets to pay the debt owed. *See Walter J. Klein Co.*, 123 S.E.2d at 875 ("When the *nulla bona* return was made by the sheriff, the respondent knew that Jack M. Kneece did not have property to satisfy the judgment. This fact was sufficient to put the respondent on inquiry. If it had made the proper investigation, the alleged fraud would have been disclosed."); *Suber*, 18 S.C. at 529 ("If, however, no wrong was then intended, and the conveyance becomes injurious to creditors afterwards, because at some future time the grantor's property has failed to meet the just demands of the creditors, whose claims existed at the time of the deed, then a passive and legal fraud is developed, which, attaching to the deed, renders it void, not from the beginning, but at that moment.").

As an initial matter, summary judgment is appropriate because Defendant has not argued or presented any evidence demonstrating that all of the creditors whose rights Plaintiff is asserting had notice outside the limitations period of Debtor's failure to retain sufficient assets to pay his obligations.

Even assuming all that is required is notice of the transfers, Defendant, as the party with the burden of proof, has not presented sufficient evidence to create a genuine issue of fact with respect to whether the Debtor's creditors had notice of the transfers outside the limitations period. In her Objection, Defendant states without specificity or explanation that based on the financial statements produced by Debtor SCBT, Bank of the Ozarks, RL REGI, and PNC knew or should have known of the Sale Proceeds Transfer. In her affidavit, Defendant avers:

> Based upon my husband's business records, I believe that my husband provided his creditors with notice of the June 2008 and March 2009 transfers by providing them with copies of the financial statements attached as Exhibit A to the Objection to Summary Judgment. Based upon these financial statements, I believe his creditors either knew or should have known about the transfer of proceeds from the Vanex sale.

Defendant provides no explanation regarding what information contained in these financial statements would have put her husband's creditors on notice the transfers at issue had occurred.[21] Defendant's belief that her husband provided these financial statements to his creditors constitutes speculation, as there is no indication she personally witnessed her husband sending financial statements containing notice of the transfers to each of the creditors at issue. Taking the financial statements attached to Defendant's Objection and her affidavit at face value, they contain a "RL REGI" bates stamp on them. Even assuming this bates stamp establishes these financial statement came from RL REGI's records and that RL REGI had notice of the transfers, RL REGI is but one of the creditors whose rights Plaintiff is asserting in this action. As the chapter 7 trustee, Plaintiff "has a cause of action as long as there is *a* creditor with a valid unsecured claim." *Hovis v. Ducate* (*In re Ducate*), 355 B.R. 536, 542-43 (Bankr. D.S.C. 2006). Also attached to Defendant's affidavit is a "WORKSHEET – Uniform Residential Loan Application" with the following hand-written notation: "SunTrust refinance application 11/4/08." Again, Defendant provides no explanation as to how this application would put any of the creditors on notice that a fraudulent transfer had occurred.[22]

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[21] A review of the documents shows that the April 1, 2009 financial statement indicates Debtor realized income from the sale of Vanex. Again, Defendant provides no explanation how this information would put creditors on notice that some of the sale proceeds had been transferred to Defendant and that Debtor ultimately failed to retain sufficient assets to pay his creditors.

[22] Defendant also speculates in her affidavit that "SunTrust Bank and its affiliates had actual notice of the proceeds transfer as the funds were transferred through bank accounts with SunTrust Bank." However, no account statements are attached, and there is no elaboration regarding how transactions going through bank accounts at SunTrust would put this creditor on notice that a fraudulent conveyance had occurred.

Finally, in her Objection, Defendant did not contest the dates put forth by Plaintiff in her Motion regarding when Debtor defaulted on the various obligations at issue. Consequently, the Court views these dates as undisputed facts. *See* Fed. R. Civ. P. 56(e). The default dates for SCBT, Bank of the Ozarks, RL REGI, and PNC are within the three-year limitations period. It is improbable any of these creditors knew Debtor had failed to retain to sufficient assets to pay the debts owed until he defaulted on these obligations, and Defendant has not presented sufficient evidence to create an issue of fact over whether they were on notice before the defaults occurred. With respect to SunTrust Bank and SunTrust Mortgage, Defendant has not contested Plaintiff's assertion these obligations were current as of the date Debtor filed bankruptcy, and this fact is therefore considered undisputed. *See* Fed. R. Civ. P. 56(e). Similar to the other creditors, it is improbable these two creditors were on notice Debtor had failed to retain sufficient assets to pay his obligations until he filed bankruptcy, and Defendant has not presented evidence creating an issue of fact otherwise.

Laches as a Defense

Defendant also raised laches as a defense to the Trustee's fraudulent conveyance action. Plaintiff moved for summary judgment on this affirmative defense. Defense did not address laches in her response to Plaintiff's Motion. "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Robinson v. Estate of Harris*, 698 S.E.2d 214, 220 (S.C. 2010) (quotation marks and citation omitted). "The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." *Id*. "Whether a claim is barred by laches is to be determined in light of facts of each

case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." *Hallums v. Hallums*, 371 S.E.2d 525, 527 (S.C. 1988). "Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner." *Chambers of S.C., Inc. v. County Council for Lee County*, 434 S.E.2d 279, 281 (S.C. 1993). Furthermore, a party asserting laches as a defense faces a heightened standard when the applicable statute of limitations has not run on the opposing party's cause of action:

> In order to constitute laches, there must be shown, not merely neglect for a time to enforce a legal or equitable right, where such neglect is for a period short of that which is a bar under the statute of limitations, but it must further be made to appear that such delay was accompanied either by a failure to perform some legal duty, whereby prejudice has resulted to the person pleading such neglect, or that such delay was accompanied by some act on the part of the person so negligent, which operated to mislead the person pleading such neglect, to his prejudice to such an extent that it would be unjust and inequitable thereafter to permit such negligent party to enforce such right.

Edwards v. Johnson, 72 S.E. 638, 644 (S.C. 1911).

Even if the Court were not to apply the heightened standard for proving laches where a plaintiff's cause of action is timely under the applicable statute of limitations, Defendant has not presented evidence that creates a genuine dispute of material fact. Defendant has not explained how SunTrust Bank and SunTrust Mortgage can be charged with unreasonable delay in pursuing the debts owed to them considering Debtor was current on his obligations to these creditors at the time he filed bankruptcy. Similarly, Defendant has not explained how Bank of the Ozarks unreasonably delayed pursuing the debt owed to it, considering it was pursuing collection on its judgment through a supplemental proceeding at the time Debtor filed bankruptcy. In addition, this Court has concluded Defendant has not presented evidence creating a genuine dispute of material fact over whether any of the creditors had knowledge of the transfers outside of

limitations period or knowledge outside the limitations period that Debtor had failed to retain sufficient assets to pay his creditors. Finally, Defendant has not explained with any specificity how she may be prejudiced by any delay that may have occurred. Therefore, summary judgment in favor of Plaintiff on Defendant's laches defense is appropriate.

Recovery of Avoided Transfer, 11 U.S.C. § 550

Finally, having found that the avoidance of the Sale Proceeds Transfer and the Rent Assignment is appropriate, the Trustee is entitled to the recovery of the property that was fraudulently transferred, or the value of such property, pursuant to 11 U.S.C. § 550(a). Section 550 of the Bankruptcy Code provides the means for a trustee to recover transferred property pursuant to his avoidance powers under § 544. Section 550(a) states that:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> >
> > (2) any immediate or mediate transferee of such initial transferee.

The Fourth Circuit has previously interpreted the language of § 550(a) to evidence "a congressional intent to return the property transferred unless to do so would be inequitable." *In re Broumas*, 135 F.3d 769, 1998 WL 77842, at *6 (4th Cir. Feb. 24, 1998) (per curiam) (quotation marks and citations omitted). Based on Defendant's amended responses to Plaintiff's first set of interrogatories, which is Plaintiff's exhibit AA, and specifically the responses to interrogatories 17, 18, 19, Defendant does not dispute that the funds in the Wells Fargo Account, Credit Union Account, and SunTrust Account 2 contain only funds from the Sale Proceeds Transfer, income derived from the Sale Proceeds Transfer, and the Rent Proceeds, with the exception of $7,807.00 in the SunTrust Account 2. Plaintiff, therefore, is entitled to recover the

funds contained in the Wells Fargo Account, the Credit Union Account, and the SunTrust Account 2, with the exception of $7,807.00 in the SunTrust Account 2 and any interest attributable to the $7,807.00. In addition, Plaintiff is entitled to recover the assignment of the one-half interest in rents from the Carbondale Property Debtor made to Defendant.

CONCLUSION

For the reasons set forth herein, the Court proposes that:

1. Plaintiff's motion for partial summary judgment be granted;
2. Defendant be ordered to pay over to Plaintiff the funds contained in the Wells Fargo Account, the Credit Union Account, and the SunTrust Account 2, with the exception of $7,807.00 contained in the SunTrust Account 2 and any interest attributable to the $7,807.00; and
3. Plaintiff be entitled to recover the assignment of the one-half interest in rents from the Carbondale Property Debtor made to Defendant.

In accordance with Federal Rule of Bankruptcy Procedure 9033, the parties shall have 14 days from the entry date of these proposed findings of fact and conclusions of law to file with this Court "written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such objection." "A party may respond to another party's objections within 14 days after being served with a copy thereof." Fed. R. Bankr. P. 9033(b). In conjunction with filing objections or responses to objections, the party objecting or responding should designate portions of the record in this case that she wants transmitted to the District Court. Once the deadline for filing objections and responses has passed, these proposed findings

of fact and conclusions of law will be transmitted to the District Court along with any objections or responses that are filed and the portions of the record that are designated.

FILED BY THE COURT
12/06/2013

Entered: 12/06/2013

David R. Duncan
Chief US Bankruptcy Judge
District of South Carolina