

ENTERED
JUL 17 1998
L.A.B.
DEPUTY CLERK

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

David L. Myers,

Debtor.

Robert A. Thompson,

Plaintiff,

v.

David L. Myers, Anne M. Myers and Richard
J. Covelli,

Defendants.

C/A No. 97-10215-W

Adv. Pro. No. 98-80017-W

ORDER

Chapter 7

THIS MATTER came before the Court for a pre-trial conference¹ based upon the complaint of the Plaintiff, an unsecured creditor, seeking to avoid a pre-petition transfer of the Debtor's residence jointly owned by him and his wife, Anne M. Myers, to the Defendant Richard J. Covelli as an alleged fraudulent transfer.

However, it appears to the Court that the Plaintiff, as an unsecured creditor of the estate, lacks standing to pursue this avoidance cause of action in as much as any possible recovery would enure to the benefit of the estate to be distributed on a pro rata basis by the Chapter 7 Trustee.

In almost all cases, it is the bankruptcy trustee, or the debtor in possession acting in the capacity of the trustee pursuant to section 1107 of the Code, that will commence the fraudulent transfer

¹ Also before the Court was the Defendants' David L. Myers and Anne M. Myers motion for leave to amend answer and motion to dismiss, the Defendant Richard J. Covelli's motion for summary judgment and the Plaintiff's motion for summary judgment.

adversary proceeding. Only the trustee is expressly given the avoiding powers under section 548.

5 Collier on Bankruptcy, ¶ 548.06[1] (15th ed. rev. 1997) citing Glenny v. Langdon, 98 U.S. 20, 25 L.Ed. 314 (1878) (right to bring fraudulent transfer action vested in trustee; thus, action cannot be brought by creditor acting alone and without court's permission). Therefore, as the Trustee is not a party to this adversary proceeding and the Court has not given the Plaintiff permission to pursue this avoidance cause of action and as it appears that the recovery of a fraudulently transferred parcel of real property would become property of the Chapter 7 estate pursuant to 11 U.S.C. §§ 550 and 541(a)(3), it is the finding of the Court that the Chapter 7 Trustee is the proper party to prosecute this adversary proceeding.² For the reasons stated within, it is therefore,

ORDERED, that within fifteen (15) days of the entry of this Order, the Chapter 7 Trustee shall decide whether to become a party to this adversary proceeding. If the Trustee decides to join as a party, she must file the appropriate motion within this time period, otherwise this adversary proceeding shall be dismissed.

AND IT IS SO ORDERED.

Columbia, South Carolina,

July 16, 1998.


UNITED STATES BANKRUPTCY JUDGE

² This finding is without prejudice to the Trustee to retain Plaintiff's counsel to prosecute the adversary proceeding if the Trustee so chooses, however, the proper party plaintiff is the Trustee.

CERTIFICATE OF MAILING

The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on 7-17-98, to:

Robbins ~~Robbins~~
Weston # to chambers
Fairbanks
Cottrane
Lowrey
HOB

Deputy Clerk