

*Motion  
Remitted  
1988*

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**

98 JUN -2 AM 10: 53

C/A No. 97-01350-BKRUPTCY COURT  
DIST OF SOUTH CAROLINA

Adv. Pro. No. 97-80304-W

IN RE:

John Garland Wellman,

Debtor.

Kevin Campbell, Trustee,

Plaintiff,

v.

Francis B. Wellman,

Defendant.

**ENTERED**

JUN - 3 1998

V. A. C.

**JUDGMENT**

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Plaintiff's Motion for Summary Judgment is denied.

*[Signature]*  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

*June 1*, 1998.

98-112

36

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 6/3/98, to:

DEBTOR,  
DEBTOR'S ATTORNEY,  
TRUSTEE

*Metzger*  
*Reynolds*

*[Signature]*  
Deputy Clerk

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

98 JUN -2 AM 10: 53

U.S. BANKRUPTCY COURT  
DIST OF SOUTH CAROLINA

IN RE:

John Garland Wellman,

Debtor.

Kevin Campbell, Trustee,

Plaintiff,

v.

Francis B. Wellman,

Defendant.

C/A No. 97-01350-W

Adv. Pro. No. 97-80304-V

ENTERED

JUN - 3 1998

V. A. C.

ORDER

Chapter 7

THIS MATTER comes before the Court upon the Plaintiff's motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure made applicable to this adversary proceeding pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure.<sup>1</sup> The Defendant filed a response to the Plaintiff's motion taking the position that the motion must be denied as there are genuine issues of material fact. Based upon the pleadings and the evidence presented at the hearing, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.<sup>2</sup>

<sup>1</sup> Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* shall be by section number only and further references to the Federal Rules of Bankruptcy Procedure shall be by rule number only.

<sup>2</sup> The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

*JW - 1 of 9 -*

55

### FINDINGS OF FACT

On August 14, 1990, the Debtor transferred his interest in an undeveloped parcel of real estate known as Lot 9, Block A, Country Club Road in Florence County, South Carolina to his wife, the Defendant herein, for inadequate consideration. On February 18, 1997, the Debtor filed for Chapter 7 relief and the Plaintiff was appointed as Trustee.

On October 1, 1997, the Trustee filed the within complaint pursuant to § 544 and the South Carolina Statute of Elizabeth codified at S.C. Code Ann. § 27-23-10, based upon actual and constructive fraud theories, alleging that the August 14, 1990 transfer was fraudulent. In his motion for summary judgment, the Trustee takes the position that there are no genuine issues of material fact remaining concerning the transfer and therefore he must be granted summary judgment. The Defendant takes the position that there is an issue of fact relating to the statute of limitations for the Trustee to bring a cause of action pursuant to the Statute of Elizabeth through his strong arm powers of § 544(b) and therefore summary judgment must be denied. The Defendant posits that there were only three (3) unsecured creditors in existence at the time of the transfer whose shoes the Trustee can hypothetically step into pursuant to § 544(b) and that the Trustee cannot step into the shoes of two of these creditors because they never filed a proof of claim and therefore did not have an allowable claim and as to the other creditor, the Trustee has not shown when or if the claim ever matured to begin the running of the statute of limitations, which is (3) three years pursuant to the Statute of Elizabeth for claims accruing after April 5, 1988.

Among other unsecured debts listed in Schedule F, the Debtor scheduled three (3) claims

A handwritten signature in cursive script, appearing to be "JWZ", is located at the bottom center of the page.

that arose prior to the 1990 transfer: a claim arising in 1988 to Edward W. Crafton in the amount of \$4,206,026.88 representing a personal guarantee of a corporate loan, a 1986 personal loan obligation in the amount of \$40,000.00 to R.M. Ott and Company, and another 1986 personal loan obligation to Robert McKittrick in the amount of \$25,000.00.

On February 20, 1997, the Clerk of Court issued a notice to creditors which stated that at that time, there did not appear to be assets available to pay unsecured creditors and therefore they should not file a proof of claim until further directed to do so. On or about July 17, 1997, the Chapter 7 Trustee declared the case to be an asset case and the Clerk of Court sent a notice to creditors to file their proofs of claims prior to October 15, 1997.

Robert McKittrick filed a proof of claim for \$35,339.58 on August 25, 1997 and stated in the proof of claim that the debt was incurred on September 30, 1989. Edward Crafton and R.M. Ott and Company have not filed claims nor has the Trustee or Debtor filed claims on their behalf.

### CONCLUSIONS OF LAW

In this adversary proceeding, the Trustee is seeking to exercise his strong arm powers pursuant to §544(b). Section 544(b) of the Bankruptcy Code provides as follows:

(b) 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.

11 U.S.C. §544.<sup>3</sup> There are two key elements under § 544(b) that the Trustee must show to

---

<sup>3</sup> If a Statute of Elizabeth claim is viable on the petition date, the trustee has two years from the date of his appointment to institute the § 544(b) action under 11 U.S.C. § 546. In re Ambulatory Medical and Surgical Health Care, Inc., 187 B.R. 888 (W.D. Penn. 1995).



exercise his strong arm powers. First, the Trustee may only avoid a transfer that could have been avoidable by an actual creditor. Secondly, that creditor must have an unsecured claim that is allowable under § 502. As to the first element, the Trustee is taking the position that he is stepping into the shoes of a creditor that could have avoided the 1990 transfer pursuant to the Statute of Elizabeth which is codified in South Carolina at S.C. Code § 27-23-10. The Statute of Elizabeth provides as follows:

(A) 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, and every bond, suit, judgment, and execution 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 (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every one of them whose actions, suits, debts, accounts, damages, penalties, and forfeitures by guileful, covinous, or fraudulent devices and practices are, must, or might be in any ways disturbed, hindered, delayed, or defrauded) 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. As stated in the Findings of Fact, there were three (3) creditors that may have been in existence when the 1990 transfer occurred. These are the claims of Edward W. Crafton in the amount of \$4,206,026.88 representing a personal guarantee of a corporate loan, the claim of R.M. Ott and Company representing a 1986 personal loan obligation in the amount of \$40,000.00, and the claim of Robert McKittrick representing another 1986 personal loan obligation in the amount of \$25,000.00.

However, before addressing whether either of these three (3) creditors could have avoided the 1990 transfer pursuant to the Statute of Elizabeth, the Court will address the second element pursuant to § 544(b) that must also be shown by the Trustee; that is, whether the creditor into

A handwritten signature in black ink, appearing to be "JL" followed by a flourish.

whose shoes the Trustee is stepping, holds an unsecured claim that is allowable under § 502.<sup>4</sup>

The Trustee initially argues that Mr. Crafton, who did not file a proof of claim, still has an allowable claim pursuant to Rule 3003 of the Federal Rules of Bankruptcy Procedure which provides that a claim is allowable if it was scheduled in the Debtor's Schedules and Statements. This argument is incorrect. A cursory review of Rule 3003 shows that the rule is limited to the filing of claims in a Chapter 9 or Chapter 11 reorganization case. For Chapter 7 cases, Rule 3002 controls. Rule 3002 of the Federal Rules of Bankruptcy Procedure states that "[a]n unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004 and 3005." Also, § 502(a) states that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects." 11 U.S.C. § 502(a). Additionally, on July 17, 1997, the Clerk of Court sent a notice to creditors to file their proofs of claims which stated that to have an allowed claim, the claim for a non-governmental entity had to be filed prior to October 15, 1997.

In order to have a claim or interest allowed so that a creditor may share in any distribution from the estate, a creditor must file a proof of claim or interest, whether or not he is included in the list of creditors filed by the debtor. Proofs of claims or interest by governmental units which are not filed by 01/13/98, and claims or interests by others which are not filed by 10/15/97, will not be allowed except as otherwise provided by law. Claims or interests that are filed late must move the court for late acceptance. The trustee will not be required to object to late filed claims or

---

<sup>4</sup> The Trustee may also step into the shoes of a creditor who holds a claim that is not allowable only under § 502(e); however, § 502(e) does not appear to apply to this particular adversary proceeding.



interests.

Notice to File Proof of Claim or Interest dated July 17, 1997 (emphasis added). Among others, this notice was served on Edward W. Crafton, R.M. Ott and Company and Robert McKittrick. Of the three (3) creditors in existence at the time of the transfer, Edward W. Crafton, R.M. Ott and Company and Robert McKittrick, only Robert McKittrick filed a proof of claim.<sup>5</sup>

Therefore, as Robert McKittrick was the only creditor of these three to file a proof of claim, he is the only one with an allowable claim into whose shoes the Trustee may step pursuant to § 544(b).

Pursuant to § 544(b), the Trustee must also demonstrate that Robert McKittrick was an actual unsecured creditor who had a viable claim under the applicable state limitations period to bring the Statute of Elizabeth cause of action. In re OPM Leasing Services, Inc., 32 B.R. 199 (S.D.N.Y. 1983); In re Colonial Realty Co., 168 B.R. 506 (D. Conn. 1994), In re Mahoney, Trocki and Associates, Inc., 111 B.R. 914 (S.D.Ca. 1990).

The limitations period for fraud actions in S.C. Code Ann. § 15-3-530 governs Statute of Elizabeth actions. Walter J. Klein Co., Inc. v. Kneece, 123 S.E.2d 870 (S.C. 1962); Tucker v. Weathersbee, 82 S.E. 255 (S.C. 1893). For claims accruing on or after April 5, 1988, a cause of action for a fraudulent conveyance accrues three (3) years from the time the creditor discovers facts which reveal the existence of the fraudulent conveyance or when the creditor has knowledge of facts sufficient to put him on inquiry, which if developed, would have disclosed the allegedly fraudulent conveyance. Tucker v. Weathersbee, 98 S.C. 402 (S.C. 1914); Walter J. Klein Co., Inc. v. Kneece, 123 S.E.2d 870 (1962). The standard is objective and the Court must

---

<sup>5</sup> Robert McKittrick filed a proof of claim in the amount of \$35,339.58 on August 25, 1997 and stated in the proof of claim that the debt was incurred on September 30, 1989.



look to whether the facts and circumstances would put a person of common knowledge and experience on notice that a claim may exist. Burgess v. American Cancer Society, 386 S.E.2d 798 (S.C. App. 1989); Austin v. Conway Hospital, Inc., 356 S.E.2d 153 (S.C. App. 1987).

Unfortunately in this case, there was no evidence presented about when or if Mr. McKittrick knew about or was otherwise on notice of the 1990 transfer. The Trustee asserts that none of these creditors could have known about the 1990 transfer because the deposition testimony of the Debtor is that none of the creditors visited the property in Florence County and the deposition testimony of the Debtor and Defendant is that neither the Debtor nor Defendant told any of the creditors about the transfer of the Florence County property. While this may establish that the Debtor and the Defendant do not think that the creditors knew about the transfer, it does not show the creditor's actual state of knowledge or notice.

Additionally, the Court has not been presented with sufficient facts to make a determination as to when Mr. McKittrick's right to institute an action on the debt may have begun to run. The evidence presented shows that this debt appears to be a general unsecured personal loan with no specified maturity date. A letter dated April 7, 1998 from the attorney for the Debtor to the attorney for the Trustee which was attached to the Trustee's motion, states that the loan to the Debtor from Robert McKittrick was a verbal agreement and that no documentation exists for the debt. However, attached to Mr. McKittrick's proof of claim is a document outlining the balance of the loan including principal and interest, which reflects that a \$20,000 loan was made on September 30, 1989 and that it was to be repaid at 9% interest. While this document does not show a maturity date of the loan, it does imply at least that the loan was to be paid back at 9% interest. The Debtor testified in his deposition that there was no written

A handwritten signature in black ink, appearing to be 'J. McKittrick', is located at the bottom center of the page.

note and that the loan was to be repaid whenever the Debtor wanted to pay it back, however, he did not state how Mr. McKittrick determined that the loan was to be paid back at 9% interest. Based upon the facts as submitted, it would appear that either Mr. McKittrick could have sued to recover the loan anytime after the loan was made which would mean that the statute of limitations on an action to recover the debt could have expired in 1992 or 1993 or that because the loan was to be repaid whenever the Debtor wanted to repay the loan, Mr. McKittrick's right to sue to recover the debt has not yet accrued. In either event, there appears to remain an issue of fact as to when Mr. McKittrick's right of action on the note began to accrue which would begin the statute of limitations on the Statute of Elizabeth action. "Until a party's interest vests, the statute of limitations [for the Statute of Elizabeth] does not begin to run against him as to an action he may wish to institute challenging another's title to the property. Klugh v. U.S.A., 620 F.Supp. 892 (D.S.C. 1985). A reasonable creditor would have no reason to be charged with knowledge of fraudulent conveyance until his debt matured and he had the right and ability to collect it. See Suber v. Chandler, 18 S.C. 526 (S.C. 1883); Belser v. Mutual Life Insurance Co. of N.Y., 77 F. Supp. 826 (E.D.S.C. 1948) (a right of action for breach of contract accrues at the time of the breach).<sup>6</sup>

---

<sup>6</sup> The Trustee also takes the position that he could step into the shoes of Edward Crafton whose debt was supported by a Promissory Note executed by the Debtor dated August 15, 1989 to guarantee a \$2,395,484.00 corporate debt to Edward Crafton that was due and payable on August 31, 1994. While the Court has found that Mr. Crafton did not have an allowable claim because he did not file a proof of claim, it must also be noted that the Trustee did not present sufficient evidence for a summary judgment motion that this was even the debt of Mr. Crafton. The Trustee relies upon the deposition testimony of the Debtor and the Defendant and a letter from the attorney for the Debtor which purported to contain two promissory notes between the Debtor and Mr. Crafton. However, there was only one note attached and while it was dated August 15, 1989 and contained a maturity date of August 31, 1994, the note appears to be between the Debtor and Polyportables, Inc., not Edward Crafton. More significantly, the note

A handwritten signature in black ink, appearing to be "Jw" with a flourish at the end.

In a motion for Summary Judgment, the evidence must be viewed in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Rivanna Trawlers Unlimited, 840 F.2d 236 (4th Cir. 2/22/88) and Estate of Samson v. Ward (In re Ward), 94-74034, Adversary No. 94-8253 (Bkrcty. D.S.C. 5/3/95)(JW). The movant bears the burden of coming forward with proof of the absence of any genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 321, 91 L.Ed.2d 265, 273 (1986), Phipps v. Brown (In re Brown), 84-00163, C-84-0145 (Bkrcty. D.S.C. 9/5/85); Wright & Miller, Federal Practice & Procedure, Civil, §2727 at p. 124 (1969). In this case, it appears that the Trustee has not met his burden of proof to show that there are no genuine issues of material fact remaining. For all of these reasons, it is therefore,

**ORDERED**, that the Trustee's motion for summary judgment is denied.

**AND IT IS SO ORDERED.**

Columbia, South Carolina,

June 1, 1998.

  
UNITED STATES BANKRUPTCY JUDGE

---

provided to the Court is an unexecuted copy. The letter states that the executed copy was probably in the possession of Mr. Crafton but a copy was not produced to the Court. Additionally, while Mr. Crafton's debt allegedly did not mature until August 31, 1994, there was no evidence presented that the debt may have been extended by a subsequent note or even went into default prior to the maturity date (even though it appears that this note matured with a single balloon payment, there could have been other events that triggered a default).



**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 6/3/98, to:

DEBTOR, *Metzger*  
DEBTOR'S ATTORNEY, *Pennington*  
TRUSTEE

*[Signature]*  
Deputy Clerk