

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Tarra Sobota,

Debtor.

Kevin Campbell, Trustee,

Plaintiff,

v.

Glen Allen Dudley and Reign C. Dudley,

Defendants.

C/A No. 08-01700-dd

Adv. Pro. 08-80184-dd

JUDGMENT

Chapter 7

Pursuant to Fed. R. Bank. P. 9021 the Court, following trial, enters judgment for the Defendants.

**FILED BY THE COURT
06/02/2009**



Entered: 06/03/2009

US Bankruptcy Court Judge
District of South Carolina

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ORDER

Chapter 7

THIS MATTER came before the Court for trial on the Plaintiff's complaint to avoid certain transfers by Debtor pursuant to 11 U.S.C. § 548 and pursuant to the Ohio Uniform Fraudulent Transfer Act § 1336.01 through §1336.10 by virtue of Trustees status pursuant to 11 U.S.C. § 544. For the reasons set forth, judgment is entered for the Defendants.

Facts at Issue

Pursuant to an order entered November 13, 2008, the Plaintiff and Defendants were ordered to, among other things; submit a Joint Pretrial Order including facts which are admitted and require no proof¹, facts that remain to be litigated, and exhibits to be introduced at trial with objections reserved thereto. Following one less than successful effort in proposing an intelligible order, the Joint Pretrial Order was entered on May 11, 2009. As pertinent to trial, some fifty two facts were admitted and required no proof. The facts which remained to be litigated included:

¹ Defendants argued that these "facts which are admitted and require no proof" aren't stipulations and therefore must have been presented at trial from the witness stand. This argument is sophistic at best. The very purpose of the Joint Pre-Trial Order is to narrow the issues before the Court, avoid the unnecessary expenditure of time and to speed along these non-jury proceedings. By definition the admitted facts require no proof.

1. Was there consideration for the transfer of the Real Property from the Debtor to the Defendant?
 2. Was the value of consideration received by the Debtor less than a reasonably equivalent value in exchange for making the transfer?
 3. Was the amount of consideration given to the Debtor, if any, grossly inadequate, which would allow this Court to infer fraudulent intent?
 4. Was this a voluntary transfer?
 5. Did the Debtor make this transfer with the actual intent to hinder, delay, or defraud her creditors?
- ...
14. As a result of the Transfer did she (the Debtor) remain insolvent?

The list of exhibits to be introduced at trial was prefaced “[t]he Plaintiff may introduce the following exhibits . . .” and concludes with the statement “[t]he Defendants reserve the right to object to any documents offered by the Plaintiff.” Clearly there was no stipulation as to the admissibility of the exhibits. Many of the facts remaining for litigation encroach upon the admitted facts.

During opening statements counsel for Plaintiff stated his belief “that through the stipulated facts as submitted in this Court’s joint pre-trial order, there are sufficient facts to justify finding in the Trustee’s favor. Therefore the Trustee will not be calling any witnesses.” The Defendants immediately moved for a verdict. During the discussion of whether plaintiff could survive a directed verdict², Plaintiff belatedly attempted to introduce his exhibits, without a witness. The Court orally ruled that some of the exhibits would be admitted but was frankly in error in doing so. No foundation was laid for any of the exhibits and the exhibits were not authenticated or self authenticating. The admissions contained in the bankruptcy schedules are

² There is no motion for directed verdict under the Federal Rules of Civil Procedure. The concept survives pursuant to Rules 41(b) and 50.

admissions of the Debtor, not those of a party to this litigation. While it is true that some part of the information contained in the exhibits Plaintiff sought to introduce is also encompassed within one or more of the 52 admitted facts, the exhibits go beyond the admitted facts and often go to the heart of those facts Plaintiff conceded it must prove at trial. Defendants' objections to the exhibits are sustained and Plaintiff's exhibits are not admitted into evidence.

Conclusions of Law

The Plaintiff seeks to avoid a transfer of real property in Ohio under theories that rest in both federal and state law. The Court turns first to the fraudulent conveyance theories under the Bankruptcy Code. Section 548 of the Bankruptcy Code provides, in relevant part,

(a) (1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

“The burden of proof of establishing the existence of the elements of a voidable transfer under section 548 of the Bankruptcy Code rests on the trustee. This burden of proof never shifts.” 5-548 *Collier on Bankruptcy-15th Edition Rev. P 548.10* (internal citations omitted). The Trustee must prove the elements of § 548 by a preponderance of the evidence. See *Ivey v. Crown Mem'l Park, LLC (In re Lee Memory Gardens, Inc.)*, 2006 Bankr. LEXIS 664 (Bankr. M.D.N.C. 2006) (Utilizing the preponderance of evidence standard in regards to claims under 11 U.S.C. § 548).

The Trustee alternatively seeks avoidance under § 548(a)(1)(A) and (B) alleging actual fraud or seeking to prove fraud by virtue of the existence of certain badges of fraud.

Under section 548(a)(1)(A), a trustee may avoid any transfer of an interest of the debtor in property made within one year of the filing of the petition if the debtor made such transfer with actual intent to hinder, delay, or defraud creditors. This provision requires proof of actual intent to defraud. However, no showing of actual fraud is required under section 548(a)(1)(B). Under section 548(a)(1)(B), a trustee may recover without establishing actual fraud. In order to avoid a transfer under section 548(a)(1)(B), a trustee must establish that (1) the debtor had an interest in the property transferred; (2) the interest was transferred within one year of the filing of the bankruptcy petition; (3) the debtor was insolvent at the time of the transfer or became insolvent as a result thereof; and (4) the debtor received less than a reasonably equivalent value in exchange for such transfer.

Ivey v. Crown Mem'l Park, LLC (In re Lee Memory Gardens, Inc.), 2006 Bankr. LEXIS 664, 4-5 (Bankr. M.D. N.C. 2006) (Note that the referenced 1 year look back period is now 2 years.).

The Joint Pretrial Order specifically left open issues of fact requiring proof involving insolvency and reasonably equivalent value in exchange for the transfer. The issue of actual intent to defraud was also left open. Plaintiff argued that actual fraud must be inferred in this case from the badges of fraud that underlie and give voice to the Debtor's intentions. A court may infer actual intent from badges of fraud. The existence of “badges of fraud,” does not, however, end the inquiry.

While each fact does not have to demonstrate actual fraud, the facts taken together must lead to the conclusion that actual fraud existed. 4 *Collier on Bankruptcy*, para. 548.02[5] (15th ed. 1989). Courts, however, are aware that there is a difference between actual and constructive fraudulent intent. Regardless of the ability of courts to infer actual fraudulent intent from the presence of "badges of fraud," see *Boston Trading Group, Inc. v. Burnazos*, 835 F.2d 1504, 1509 (1st Cir. 1987), actual fraudulent intent requires a subjective evaluation of the debtor's motive. Certainly, an objective determination has bearing on whether constructive fraudulent intent exists, but is not conclusive for actual fraudulent intent. See *Id.* at 1509.

In re Jeffrey Bigelow Design Group, 956 F.2d 479, 483-484 (4th Cir. 1992).

Plaintiff asks the Court to infer actual fraudulent intention from a series of postulated facts. No exhibits support the inferences and no testimony was given from which credibility and demeanor could be assessed. While many of the admitted facts, an intra-family transfer of property at or near the time of litigation with creditors, lend themselves to support a suspicion of fraud, something more is required – especially where, as here, the Plaintiff specifically agrees that the points of contention remain in contest for trial.

Plaintiff also seeks avoidance under applicable state law. The Ohio Uniform Fraudulent Transfer Act provides:

- (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:
 - (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
 - (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:
 - (a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;
 - (b) The Debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.
- (B) In determining actual intent under division (A)(1) of this section, consideration may be given to all relevant factors, including, but not limited to, the following:
 - (1) Whether the transfer or obligation was to an insider;
 - (2) Whether the debtor retained possession or control of the property transferred after

- the transfer;
- (3) Whether the transfer or obligation was disclosed or concealed;
 - (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
 - (5) Whether the transfer was of substantially all of the assets of the debtor;
 - (6) Whether the debtor absconded;
 - (7) Whether the debtor removed or concealed assets;
 - (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
 - (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred;
 - (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;
 - (11) Whether debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Ohio Rev. Code Ann. § 1336.04. Plaintiff suffers the same fatal flaw with respect to the causes of action under Ohio law. Insolvency and the value of the property transferred compared to the consideration, if any, for the transfer are essential elements for avoidance of alleged fraudulent transfers. Additionally, there was no testimony as to other relevant factors, which are not limited to those listed in the statute.

It remains a mystery to the Court why no witness, perhaps the Debtor to identify and authenticate exhibits and establish the consideration for the transfer, was called. The Court simply cannot glean inferences of fraud from a cold record of stipulated facts when the very inferences Plaintiff wishes the Court to draw are locked within the scope of the facts that Plaintiff conceded were at issue.

The Plaintiff failed to carry his burden of proof. Judgment for Defendants.