

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:)	
)	
MICHAEL JOSEPH MCGRATH,)	Case No. 15-00102-dd
)	
Debtor.)	Chapter 7
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Michelle L. Vieira, Chapter 7 Trustee for)	
Michael Joseph McGrath,)	
)	
)	Adv. Pro. No. 15-80030
Plaintiff,)	
)	
v.)	
)	
Shannon C. McGrath, Susan C. McGrath,)	
and Nationstar Mortgage, LLC,)	
)	
Defendants.)	
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**ORDER FOR DEFAULT JUDGMENT AS TO
SHANNON C. MCGRATH AND SUSAN C. MCGRATH**

This matter comes before the Court on the motion for default judgment¹ filed by Michelle L. Vieira (“Plaintiff” or “Trustee”), as chapter 7 trustee for Michael Joseph McGrath (“Debtor”).² The Court held a hearing on the Motion on May 19, 2015. After consideration of the record, applicable law, and arguments of counsel, the Court grants the Plaintiff’s Motion.

Following the United States Supreme Court decision in *Stern v. Marshall*, 564 U.S. ____ (2011) (slip op.), the undersigned judge adopted the practice of submitting proposed findings of fact and conclusions of law to the United States District Court for

¹ Doc. No. 10 filed April 15, 2015.

² Defendant Nationstar Mortgage, LLC has made an appearance in this matter. The Motion seeks default judgment against Defendants Shannon C. McGrath and Susan C. McGrath only. The Clerk of Court entered the default of the McGrath defendants on April 15, 2015.

the District of South Carolina in adversary proceedings, such as this one, where a defendant defaults but may have a right to Article III adjudication because the defendant had not expressly consented to the Court's authority to enter a final order or judgment. The Supreme Court has since ruled in *Wellness Int' Network, Ltd. v. Sharif*, No. 13-935, 575 U.S. ____, slip op. at 2, (May 26, 2015), that bankruptcy judges may enter final orders in proceedings entitled to Article III adjudication if the parties knowingly and voluntarily consent. A majority in *Wellness* recognizes that consent may be implied. The summons issued in this case states that a party's failure to respond is deemed consent to the authority of the bankruptcy court.³ The Court therefore concludes that Defendants have consented to its entry of a final judgment. *Baker v. Socialist People's Libyan Arab Jamahiriya, et al.*, 810 F.Supp.2d 90, 98 (D.D.C. 2011) (concluding that language in the summons informing the defendants of the consequences of inaction was sufficient consent to the magistrate judge's entry of a final judgment); *accord Exec. Sounding Board Assocs., Inc. v. Advanced Machine & Engineering Co. (In re Oldco M. Corp.)*, 484 B.R. 598, 614 (Bankr. S.D.N.Y. 2012) ("Having clearly been told the consequences of failing to timely respond to the complaint, and thereafter failing to do so, the defendant evinced clear and knowing, albeit implied, consent to this Court's entry of a default judgment").

PROCEDURAL HISTORY

Plaintiff initiated this adversary proceeding on March 2, 2015, to avoid and

³ Specifically, the summons states in bold, capital letters:

If you fail to respond to this summons, your failure will be deemed to be your consent to entry of a judgment by the bankruptcy court and judgment by default may be taken against you for the relief demanded in the complaint.

recover allegedly fraudulent transfers pursuant to 11 U.S.C. §§ 544, 550 and S.C. Code Ann. § 27-23-10.⁴ The Court issued a summons on March 3, 2015,⁵ and the complaint and summons were served on the Defendants Shannon C. McGrath and Susan C. McGrath (“Defendants”) on March 4, 2015.⁶ Defendants did not file a responsive pleading and have not made an appearance in this case.

The Trustee filed her motion for default on April 15, 2015 and served it on the Defendants.⁷ Defendants did not file an objection. On April 17, 2015, the Court entered an Order denying the Motion and scheduling a hearing so the Plaintiff could establish certain facts not specifically pled in the Complaint.⁸ Plaintiff filed an affidavit (the “Affidavit”) in support of the Motion on May 14, 2015,⁹ and submitted further evidence at the hearing on this matter in the form of verified copies of various filings (the “Filings”) by creditors in the Michael Joseph McGrath bankruptcy case.

FINDINGS OF FACT

1. Debtor filed a voluntary petition under chapter 7 of the Bankruptcy Code on January 7, 2015, in the United States Bankruptcy Court for the District of South Carolina, Case No. 15-00102-dd. (Petition, Bankr. Docket 1.)
2. Plaintiff was appointed chapter 7 trustee of the bankruptcy estate (the “Estate”). (Notice, Bankr. Docket 6.)
3. Defendant Shannon C. McGrath is the daughter of the Debtor. (Adversary Complaint, Adv. Docket 1.)

⁴ All further references to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, will be by section number only.

⁵ Doc. No. 2 filed March 3, 2015.

⁶ Doc. No. 3 filed March 4, 2015.

⁷ Doc. No. 10 & 11 filed April 15, 2015.

⁸ Doc. No. 13 filed April 17, 2015.

⁹ Doc. No. 19 filed May 14, 2015.

4. Defendant Susan C. McGrath is the former spouse of the Debtor. (Adversary Complaint, Adv. Docket 1.)
5. On or about May 19, 2008, the Debtor, Susan McGrath and Shannon McGrath acquired property located at 21 George Street, Unit 209, in Charleston, South Carolina (the “Property”). (Adversary Complaint, Adv. Docket 1; Exhibit A to Affidavit of Vieira, Adv. Docket 19.)
6. The purchase price for the Property was \$515,000.00. *Id.*
7. A portion of the purchase price was financed with a loan (the “Loan”) from U.S. Mortgage Corp. (“USM”) in the amount of \$412,000.00. (Adversary Complaint, Adv. Docket 1; Exhibit B to Affidavit of Vieira, Adv. Docket 19.)
8. The obligors on the Loan were the Debtor and Susan McGrath. *Id.*
9. Shannon McGrath did not contribute any funds to the purchase price and was not an obligor on the Loan. *Id.*
10. The Property was jointly titled in the names of the Debtor, Susan McGrath and Shannon McGrath. (Adversary Complaint, Adv. Docket 1; Exhibit A to Affidavit of Vieira, Adv. Docket 19.)
11. Shannon McGrath gave no consideration to acquire her interest in the property. (Adversary Complaint, Adv. Docket 1.)
12. The joint titling of the Property in the name of Shannon McGrath (the “Initial Transfer”) constitutes a transfer of an interest of the Debtor in the Property. *Id.*
13. On or about May 5, 2012, the Debtor, Susan McGrath and Shannon McGrath transferred the entire ownership interest in the Property into the name of Shannon McGrath (the “Second Transfer”). (Adversary Complaint, Adv. Docket 1; Exhibit

C to Affidavit of Vieira, Adv. Docket 19.)

14. The consideration stated on the deed for the Second Transfer was the sum of \$5.00. *Id.*

15. The Deed Affidavit for the Second Transfer, executed by Shannon McGrath, states that it is exempt from the deed recording fee because it is a family transfer. *Id.*

16. The Second Transfer to Shannon McGrath was made without valuable consideration. *Id.*

17. At the time of the Initial Transfer and the Second Transfer (together, the “Transfer(s)”), the Debtor was indebted to one or more unsecured creditors with an allowable claim as of the Petition Date (the “Existing Creditors”). (Adversary Complaint, Adv. Docket 1; Affidavit of Vieira, Adv. Docket 19; Proofs of Claim¹⁰ #1, #2, #3, #4, #5, #6, #7 & #8; Motion of Green Tree, Bankr. Docket 27.¹¹)

18. The assets of the Estate are insufficient to pay the claims of the Existing Creditors in full. (Adversary Complaint, Adv. Docket 1; Affidavit of Vieira, Adv. Docket 19.)

CONCLUSIONS OF LAW

This lawsuit presents two causes of action against the Defendants, both for the avoidance of fraudulent conveyances as to the Property, pursuant to 11 U.S.C. § 544 and S.C. Code Ann. § 27-23-10. Through their defaults, Defendants have admitted the “well-pleaded allegations of fact” contained in Plaintiff’s complaint. *Ryan v. Homecomings Fin.*

¹⁰ Verified copies of these Proofs of Claim were admitted into evidence at the hearing on the Motion.

¹¹ A verified copy of the motion filed by this creditor was admitted into evidence at the hearing on the Motion.

Network, 253 F.3d 778, 780 (4th Cir. 2001). The remaining issue before the Court is whether those allegations support the relief sought in this action. *Id.*

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

The Trustee seeks to avoid the Initial Transfer and the Second Transfer 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).

The Statute of Elizabeth 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). 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). The facts demonstrate that there was at least one creditor who was owed money by Debtor at the time of the Transfers, and that at least one of those creditors currently exists and has an allowed claim in the bankruptcy. The Trustee stands in the position of these creditors to avoid the Transfers.

The Trustee argues that the Transfers were made without valuable consideration and were constructively fraudulent. Where a transfer is made without valuable consideration, under a constructive fraud 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 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 v. Burton*, 460 S.E.2d 406, 408 (S.C. App. 1995)); 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 v. Nationsbank*, 478 S.E.2d 45, 48 (S.C. 1996)). “[I]nsolvency at the time of transfer is not required.” *Id.*

Additionally, “[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 *J.R. Deans*, 249 B.R. at 134; *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). The Defendants did not respond to the Complaint and have not asserted any evidence to counter the Plaintiff’s allegations.¹² The Court finds that no valuable consideration was exchanged for the Transfers.

There was no valuable consideration for the Transfers. The Debtor was indebted to the creditor at the time of the transfer; his conveyance was voluntary; and he failed to retain sufficient property to pay the indebtedness to his creditors in full. The Transfers are therefore fraudulent and may be avoided.

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

The Trustee is entitled to the recovery of the property that was fraudulently transferred, or the value of such property, pursuant to § 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.

¹² In this action, the Trustee is not seeking affirmative relief from Defendant Susan McGrath. The Trustee clarified in her Affidavit that Susan McGrath was named in this action out of abundance of caution and to provide notice to Susan McGrath, since she once had an interest in the Property. Any interest that Susan McGrath had in the Property has been transferred to Shannon McGrath, and the Trustee does not seek to avoid any transfer made by Susan McGrath. (Complaint, Docket 1; Affidavit of Vieira, Docket 19.)

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).

Defendant Shannon McGrath was the initial transferee of both Transfers, as the Transfers were made directly to her. As a result, the Trustee is entitled to recover the Transfers from Shannon McGrath. The recovery of the interest transferred from the Second Transfer is simple. As a result of the Second Transfer, the Debtor transferred his one-third interest in the Property to Shannon McGrath. The result of the avoidance of the Second Transfer returns a one-third interest in the Property to the Bankruptcy estate.

The avoidance of the Initial Transfer requires a slightly more detailed analysis. At the time the parties initially acquired the Property, it was titled jointly in the names of the Debtor, Susan McGrath and Shannon McGrath. The joint titling effectively granted each party a one-third interest. Because there was no consideration by Shannon McGrath, the Debtor was entitled to receive a one-half interest in the Property, rather than a one-third interest, and the portion of his interest that was transferred to Shannon McGrath is avoidable. The Debtor effectively transferred a one-sixth interest in the Property to Shannon McGrath with the Initial Transfer, while he retained two-sixths (or one-third) interest for himself. His transfer of a one-sixth interest to Shannon McGrath is avoidable. The result is the return of the one-sixth interest to the Estate. Together with the one-third interest recovered from the Second Transfer, the Estate has a one-half interest in the Property.

CONCLUSION

The Trustee is entitled to judgment in her favor pursuant to the First and Second Causes of Action alleged in the Complaint. For the reasons set forth herein, the Court grants the Plaintiff's motion for default judgment. The transfers are avoided and the Estate has a one-half ownership interest in the Property.

AND IT IS SO ORDERED.

**FILED BY THE COURT
06/03/2015**



Entered: 06/04/2015

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