

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

In re,

Kathy JoAnn Salyers,

Debtor.

Michelle L. Vieira, Chapter 7 Trustee,

Plaintiff,

v.

Jordan R. Inman and Ricky J. Salyers,

Defendants.

C/A No. 15-02095-dd

Adv. Pro. No. 15-80146-dd

Chapter 7

AMENDED ORDER

Kathy JoAnn Salyers (“Debtor”) filed a voluntary petition for relief under chapter 7 of the bankruptcy code on April 17, 2015 (the “Petition Date”). The chapter 7 trustee’s (“Plaintiff”) complaint in this adversary proceeding contains two causes of action: fraudulent conveyance pursuant to 11 U.S.C. § 544 and S.C. Code § 27-23-10 and recovery of avoided transfers pursuant to 11 U.S.C. §§ 550(a)(1) and (2). Trial was held September 21, 2016. Plaintiff seeks to avoid the transfer of and recover real property located at 1450 Whispering Hills Road, Loris, South Carolina (the “Property”). Jurisdiction for is premised upon 28 U.S.C. §§ 1334 and 157(a). Venue is proper under 28 U.S.C. § 1409. This is a core proceeding. 28 U.S.C. § 157(b)(2)(H).

FACTS

Debtor and Ricky J. Salyers (“Mr. Salyers”) were previously married, but divorced in spring 2007. Debtor and Mr. Salyers reconciled in 2008. Debtor’s testimony was they have “been together” for twelve and a half years. Jordan Inman (“Mr. Inman”) is Debtor’s son. He has not

made a personal appearance in this proceeding, however, Debtor, using a power of attorney, has filed pleadings and discovery responses for him.

Debtor's mother died in February 2010, leaving her estate to Debtor and Debtor's siblings. Debtor retained Kelly M. Morgan to handle issues that arose with the distribution of her mother's estate. Debtor received approximately \$330,000.00 from her mother's estate. Despite receiving \$330,000, Debtor disputed and did not pay a portion of Mr. Morgan's legal fees. Mr. Morgan obtained a default judgment in Ohio for the legal fees that Debtor refused to pay. Debtor appealed the judgment, and Mr. Morgan prevailed in the appeal.

Debtor and Mr. Salyers later moved from Ohio to North Carolina. In September 2012, Debtor and Mr. Salyers moved to South Carolina, where Debtor used some of the money she received from her mother's estate to purchase real property, including the Whispering Hills property. Mr. Salyers has continuously supported Debtor financially, even after their divorce, dating back to 2008. Mr. Salyers has paid for Debtor's living expenses, including rent and various vacations.

Mr. Morgan domesticated his judgment in South Carolina in August 2013. The day after Mr. Morgan domesticated his judgment in South Carolina, Debtor transferred the Property to Mr. Salyers by a deed recorded on August 14, 2013, in Deed Book 3677 at page 816, in the Office of the Recorder of Deeds for Horry County, South Carolina. At, or about the same time, Debtor, again using a portion of her inheritance, transferred \$52,000.00 to Mr. Salyers for building materials to be used in building a house on the Property. Debtor testified that she paid for various permits required for the building of the house.

The Property was subsequently transferred from Mr. Salyers to Mr. Inman by a deed recorded on August 12, 2014, in Deed Book 3754 at page 2810, in the Office of the Recorder of Deeds for Horry County. Mr. Salyers stated at trial that he initially transferred the property to Mr. Inman because Mr. Salyers and Debtor had a “falling out.” Mr. Salyers and Debtor later reconciled and Debtor, acting with a power of attorney for Mr. Inman, transferred the property back to Mr. Salyers by a deed recorded on October 10, 2014, in Deed Book 3770 at page 1325, in the Office of the Recorder of Deeds for Horry County. Testimony from trial indicated that Mr. Salyers most recently transferred the Property back to Mr. Inman after he assaulted Debtor.¹ The most recent transfer from Mr. Salyers to Mr. Inman was by a deed recorded on November 7, 2014, in Deed Book 3777 at page 1168, in the Office of the Recorder of Deeds for Horry County. Mr. Inman currently holds title to the Property. The stated consideration on all deeds and the deed recording affidavits for each transfer is \$1.00.

Debtor also used some of the money she received from her mother’s estate to purchase a condominium in Myrtle Beach² (“Myrtle Beach Condo”). Mr. Salyers renovated the Myrtle Beach Condo, using his own money for the materials. Ms. Salyers later transferred the Myrtle Beach Condo to Mr. Salyers. Mr. Salyers pays the condominium owners’ association fees each month for the Myrtle Beach Condo. The Myrtle Beach Condo is currently leased. While Mr. Salyers hold title to the Myrtle Beach Condo, Ms. Salyers receives the money generated from the lease of the Myrtle Beach Condo. Mr. Salyers testified that Ms. Salyers receives the rent money from the Myrtle Beach Condo as “spending money.”

¹ Testimony from Mr. Salyers at trial indicated there is a history of domestic violence between Mr. Salyers and Debtor, and both parties have previously been jailed resulting from domestic violence. Testimony was also presented that the parties are reconciled.

² The Myrtle Beach Condo is subject to on-going litigation.

Debtor filed for protection under chapter 7 of the bankruptcy code on April 17, 2015. She, nor Mr. Salyers, nor Mr. Inman is represented by counsel.³ Michelle L. Vierra was appointed chapter 7 trustee of the Debtor's estate. On July 14, 2015, she filed this adversary proceeding against Mr. Inman and Mr. Salyers seeking to avoid a series of transfers of property between Debtor and Mr. Salyers.

ANALYSIS

Plaintiff's fraudulent conveyance cause of action requests relief pursuant to 11 U.S.C. § 544 and S.C. Code § 27-23-10(A). 11 U.S.C. § 544(b) provides, in relevant part:

Except as provided in paragraph (2)⁴, 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.

S.C. Code § 27-23-10(A), South Carolina's Statute of Elizabeth, states, in relevant part:

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.

This Court has previously explained the relationship between these two provisions, stating:

³ Ms. Salyers attempted to exercise her power of attorney to present Mr. Inman's defense. The Court entered an Order [Docket No. 72] prohibiting Debtor from engaging in the unauthorized practice of law in her attempt to defend on behalf of Mr. Inman.

⁴ Paragraph (2) exempts a transfer of certain charitable contributions.

The Statute of Elizabeth allows a creditor to avoid a fraudulent transfer of property by a debtor. Section 544 allows the Trustee to “step into the shoes” of those creditors. Therefore, in order for the Trustee to maintain a Statute of Elizabeth action there must be a creditor with a valid unsecured claim in the bankruptcy case.

Hovis v. Ducate (In re Ducate), 369 B.R. 251, 258 (Bankr. D.S.C. 2007) (internal citations omitted).

Several theories under which recovery may be had exist under state law, including actual fraud of creditors and constructive fraud. Plaintiff is proceeding under one of the constructive fraud theories. When there is an existing creditor, if the transfer was not made for valuable consideration, the conveyance can be set aside. South Carolina law provides:

no actual intent to hinder or delay creditors must be proven. Instead, as a matter of equity, the transfer will be set aside if the plaintiff shows that (1) the grantor was indebted to him 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 the transfer, but in the final analysis when the creditor seeks to collect his debt.

Ducate, 369 B.R. at 258 (quoting *Mathis v. Burton*, 319 S.C. 261, 460 S.E.2d 406 (Ct. App. 1995)). Accordingly, to prevail, Plaintiff must establish that a creditor existed at the time of the transfer, the transfer was not made for valuable consideration, and the grantor failed to retain sufficient property to pay creditors at the time of the transfer and at the time when the creditor sought to collect the debt.

The transfer of the Property by Debtor to Mr. Salyers is properly avoided under S.C. Code § 27-23-10(A), South Carolina’s Statute of Elizabeth, and 11 U.S.C. § 544. First, Mr. Morgan existed as a creditor at the time of the transfer, as evidenced by his proof of claim filed in the Debtor’s bankruptcy case.⁵ Mr. Salyers argues that the transfer should not be avoided because no

⁵ Debtor filed an objection to the claim, which the Court overruled [Case No., 15-02095-DD, Docket. No. 116].

creditor existed at the time of trial.⁶ This argument misses the point. South Carolina law requires a creditor at the time of the transfer. Case law from other jurisdictions are in accord: “The date of the filing of the petition is important because it generally fixes the rights of the estate and other parties in interest.” *In re DLC, Ltd.*, 295 B.R. 593, 605 (B.A.P. 8th Cir. 2003). The Eighth Circuit Bankruptcy Appellate Panel noted “it is inconsistent with the Bankruptcy Code to allow a transferee of a fraudulent transfer to defeat the bankruptcy trustee by paying a couple of creditors. The potential for abuse is obvious.” *In re DLC, Ltd.*, 295 B.R. at 605. As the Court of Appeals for the Eighth Circuit noted, allowing a debtor to pay off any remaining creditors on the eve of trial to prevent recovery after the trustee has expended time and money opens the door for abuse. Recovery of fraudulently transferred property is not just for the benefit of creditors, but for the benefit of the bankruptcy estate. *See* 11 U.S.C. § 550(a)(1) (“[T]he trustee may recover, for the benefit of the estate, the property transferred...”). As the Eighth Circuit recognized:

The fact that unsecured creditors settle on the eve of trial does not extinguish the bankruptcy estate as a legal entity, nor does it extinguish other claims on the assets of the estate, such as the administrative claims...We find no authority for the proposition that a debtor may settle with unsecured creditors on the eve of trial, thereby thwarting professionals in their attempt to collect fees for at least four years of work to administer the bankruptcy estate. The trustee and his attorneys reasonably pursued the avoidance, it was for the benefit of the estate, and they are entitled to administrative expenses.

Stalnaker v. DLC, Ltd., 376 F.3d 819, 824 (8th Cir. 2004). In *In re Rood*, No. DKC 12-1623, 2013 WL 55650 (D. Md. 2013), the court held “[f]iling the petition for bankruptcy fixes the rights of the estate and creditors. To recover transfers pursuant to § 544(b)(1), therefore, the Trustee ‘must identify a creditor with an allowable unsecured claim who had an allowable *claim against the*

⁶ Mr. Morgan’s claim was paid in full just prior to trial. Mr. Morgan filed an amended proof of claim on September 20, 2016 indicating that he had been paid in full. Plaintiff concedes that Mr. Morgan has been paid in full. The testimony indicated Mr. Salyers advanced the funds to pay Mr. Morgan.

debtor on the date the bankruptcy petition was filed.” In re Rood, 2013 WL 55650, at *4 (citing *In re DLC, Ltd*, 295 B.R. at 605) (emphasis added).

The petition date is the date at which point a creditor must have existed, and in this case, a creditor did exist at the petition date. Recovery of Property is for the benefit of the estate as required by the statute. This is true despite the fact that the only creditor has been paid in full prior to trial. Recovery of property by a trustee is not for a creditor as under state law, but for the estate. *See Moore v. Bay*, 284 U.S. 4, 5, 52 S.Ct. 3, 4 (1931) (holding the rights of a trustee in bankruptcy by subrogation are to be enforced for benefit of estate).

The second requirement is that the transfer was made for no consideration. Plaintiff argues that Debtor and Mr. Salyers should be considered an insider akin to a family member, and the burden should be shifted to Mr. Salyers to establish that valuable consideration was given and that the transfer was a *bona fide* transaction. Under South Carolina law, if a challenged transfer is made between insiders or family members, the burden of establishing that valuable consideration was given for the conveyance shifts to the defendant. *See First Union Nat’l Bank of North Carolina v. Smith*, 314 S.C. 459, 445 S.E.2d 457, 458-59 (Ct. App. 1994) (quoting *Gardner v. Kirven*, 184 S.C. 37, 41, 191 S.E.2d 814, 816 (1937)) (stating that in considering transfers to family members on the grounds of actual or constructive fraud, “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.”). Mr. Salyers argued that he is a good faith purchaser and not an insider. Based on the evidence in the record, Mr. Salyers and Mr. Inman are insiders, and the burden of proof is shifted for purposes of establishing that valuable consideration existed for the transfer. Debtor and Mr. Salyers live together, and Mr. Salyers testified that he has, and continues to take care of Debtor financially. Mr. Salyers built the house in which he and the Debtor currently

live. While Debtor and Mr. Salyers are no longer married, their situation is akin to a familial relationship. The relationship is in the nature of a joint venture in life and business as evidenced by Mr. Salyers continued support of Debtor and the way in which income from assets is distributed.

Because Mr. Salyers and Debtor are insiders, the burden of proof to establish consideration shifts to Mr. Salyers.⁷ The deed and the deed recording affidavit for the transfer of the Property from Debtor to Mr. Salyers indicate that Mr. Salyers paid monetary consideration of \$1.00 in connection with the transfer. However, Debtor testified at trial that she never received the \$1.00 from Mr. Salyers. Plaintiff introduced the transcript of Debtor's 341 meeting, during which Debtor stated, "He didn't pay anything...." Transcript of 341 Meeting at 10, In re Salyers, No. 15-02095 (Plaintiff's trial exhibit K).

Mr. Salyers presented no evidence that consideration was given at the time of the transfer. Mr. Salyers claims that the consideration given for the Property was the money that he had spent taking care of Debtor, and she transferred the Property to pay him back. Under South Carolina law "a promise founded upon a past consideration cannot be enforced, unless it is shown to be supported by new legal consideration, growing out of and connected with the original contract." *Henderson & Dempsey v. Skinner*, 146 S.C. 281, 281, 143 S.E. 875, 875 (1928). Therefore, any money Mr. Salyers spent to support Debtor prior to the transfer is not adequate consideration for the transfer. Further, any future expenditure by Mr. Salyers for the benefit of Debtor after the transfer is also not sufficient consideration for the transfer. See *Matthews v. Matthews*, 297 S.C. 170, 175, 35 S.E.2d 157, 159 (1945) (holding "[a]n agreement for future support is not a sufficient consideration..."). The transfer of the Property from Debtor to Mr. Salyers is voluntary under South Carolina law, that is, it was without consideration.

⁷ Plaintiff's complaint is that the transfer was not made for valuable consideration and thus Plaintiff has only sought to establish constructive fraud. The burden of establishing consideration existed shifted to Mr. Salyers.

The third requirement for avoiding the transfer is that the debtor failed to retain sufficient property to pay creditors at the time of the transfer and at the time the creditor sought to collect. Debtor transferred the Property and other assets to Mr. Salyers the day after Mr. Morgan domesticated his judgment in South Carolina. As a result of these transfers Debtor did not have sufficient property to pay her creditors and sought protection under chapter 7 of the bankruptcy code. Debtor failed to retain sufficient property to pay Mr. Morgan at the time of the transfer and at the time that Mr. Morgan sought to collect on the debt by domesticating his judgment in South Carolina.

Plaintiff established that a creditor existed at the time of the transfer, the transfer was not made for valuable consideration, and Debtor failed to retain sufficient property to pay creditors at the time of the transfer. Therefore, the transfer of the Property is properly avoided under 11 U.S.C. § 544 and S.C. Code Ann. § 27-23-10.

The Property is recoverable for the benefit of the estate under 11 U.S.C. § 550. 11 U.S.C. § 550 allows a trustee to recover, for the benefit of the estate, the property transferred if the transfer is avoided under 11 U.S.C. § 544, unless the transferee takes for value, “in good faith, and without knowledge of the voidability of the transfer avoided.” 11 U.S.C. § 550(b)(1). Mr. Salyers argues he is a good faith transferee of the Property for value. However, as discussed above no legally sufficient value was given to Debtor in exchange for the transfer of the Property. Mr. Salyers raised no other defenses, other than insisting that consideration was given for the Property. The Court finds Mr. Salyers did not take for value, and therefore, no applicable defenses to recovery under 11 U.S.C. § 550 exist in this case. 11 U.S.C. § 550(a) allows recovery of property avoided under section 544 from “any immediate or mediate transferee of such initial transfer.” 11 U.S.C. 550(a)(2). The trustee may not recover property from “any immediate or mediate good faith

transferee....” 11 U.S.C. § 550(b)(2). Mr. Inman is the current title holder of the Property. He is an immediate transferee of the Property. Mr. Inman made no defense to recovery under section 550. The Property may be recovered from Mr. Inman.

CONCLUSION

For the reasons set forth above, transfer of the Property is avoided under 11 U.S.C. § 544 and S.C. Code Ann. § 27-23-10, and the Property is recovered for the benefit of the estate under 11 U.S.C. § 550. This Order may be filed in the property records in Horry County, South Carolina.

AND IT IS SO ORDERED.

FILED BY THE COURT
10/14/2016



Entered: 10/14/2016



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