

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

99 APR 16 PM 12:13

IN RE:

Charles Vereen,

Debtor.

Robert F. Anderson, Trustee,

Plaintiff,

v.

Charles Vereen, Charles Clark Vereen, Sonya
Ann Vereen Clark, Melanie Renee Vereen,
Russell Wilson Vereen, Hamilton Julian
Vereen, Mark Groves, Garrett Sutton, Nancy
Lake, Vereen Joint Revocable Inter Vivos
Trust, East Cambridge Limited Partnership
and Five Star Management,

Defendants.

C/A No. 96-78369-W

Adv. Pro. No. 98-80262-W

DISTRICT COURT
DIST OF SOUTH CAROLINA

ENTERED

APR 19 1999

V. L. D.

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the motions of the Defendant Garrett Sutton to dismiss and for mandatory abstention pursuant to 28 U.S.C. § 1334(c)(2) are denied. The parties shall have ten (10) days from the entry of this Order to submit memorandums in the form of proposed orders as to their positions on the Defendant's request for a jury trial.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
April 15, 1999.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

Haselden

Howser APR 10 1999

Allen for Sutton Manos for Plaintiff

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

gmt index

VANNA L. DANIEL

Deputy Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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U.S. BANKRUPTCY COURT
DIST OF SOUTH CAROLINA

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ORDER

Chapter 7

THIS MATTER comes before the Court upon the motions of the Defendant Garrett Sutton ("Mr. Sutton") to dismiss the Complaint in this adversary proceeding and his motion for abstention. Mr. Sutton has also requested a jury trial. Based upon a review of the pleadings and the arguments of counsel, 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.¹

FINDINGS OF FACT

In 1995, the Debtor, Charles W. Vereen ("Mr. Vereen") had an interest in a bungee

¹ 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.

gut

jumping business operated in Myrtle Beach, South Carolina called Beach Bungee, Inc., a South Carolina Corporation owned by the Debtor and others. Michael Nash and Zachary Steinke were killed at Beach Bungee and on October 27, 1995, the Estates of Mr. Nash and Mr. Steinke obtained a Twelve Million Dollar judgment against the Debtor, Beach Bungee, Inc., Carolina Land Holding Company of Little River, Inc., Harold Morris, and Billy Player.

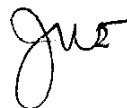
On November 14, 1996, the Debtor filed a voluntary Chapter 7 bankruptcy petition. On November 4, 1998, the Trustee filed the within adversary proceeding asserting his strong arm powers pursuant to 11 U.S. C. § 544 and alleging two causes of action; a fraudulent conveyance cause of action pursuant to the South Carolina Statute of Elizabeth codified at S.C. Code Ann. § 27-23-10 and a civil conspiracy cause of action. *The applicable paragraphs of the Complaint state as follows:*

20. Subsequently, Defendant Garrett Sutton met with the Debtor in South Carolina and Nevada on numerous occasions and discussed ways to protect the Debtor's assets from his creditors, including the Steinkes. Defendant Garrett Sutton was aware of the pending litigation brought by the Steinkes against the Debtor.

33. The documents necessary to create the Trust, Five Star and East Cambridge were prepared by Defendants Mark Groves and Garrett Sutton.

37. The Defendants knew or should have known of the claims against the Debtor, including the claim of the Steinkes, at the time of the purported conveyances, and each said Defendant formulated, designed, participated in and/or acquiesced in the fraud perpetrated on the creditors of the Debtor, including the Steinkes, by devising, preparing, executing, accepting and/or recording the documents purporting to make such conveyances.

41. The Debtor, Defendant Garrett Sutton, Defendant Mark Groves and Defendant Nancy Lake conspired to transfer the Debtor's assets into the Trust, East Cambridge and/or Five Star

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for the purpose of defrauding the Debtor's creditors and rendering him judgment proof.

On February 1, 1999, Mr. Sutton filed his Answer to the Complaint demanding a jury trial as well as the within motion to dismiss and motion for mandatory abstention pursuant to 28 U.S.C. § 1334(c)(2).

CONCLUSIONS OF LAW

Mr. Sutton initially asks this Court to be dismissed as a party defendant taking the position that the allegations in the Complaint fail to state a cause of action against him, relying on two cases, Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 522, 339 S.E.2d 887 (Ct. App. 1986) and Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). In both of these cases, a litigation defendant sued the attorney for the adverse party, alleging the attorney and the adverse party had conspired to bring an improper lawsuit against him. Such is not the case here. The Trustee's Complaint alleges that Mr. Sutton actively participated in perpetrating a fraud on the Debtor's creditors by virtue of advising the Debtor regarding the fraudulent conveyances and preparation of the documents necessary to make the fraudulent conveyances. As stated in McDermott v. Russell, 523 F.Supp. 347 (E.D. Pa. 1981), aff'd, 722 F.2d 732 (3d Cir. 1983), this conduct, if proven at trial, would be unlawful, and would entitle plaintiff to relief. See also McElhanon v. Hing, 151 Ariz. 386, 728 P.2d 256 (Ariz. Ct. App. 1985), aff'd in part and vacated in part, 151 Ariz. 403, 728 P.2d 273 (1986)(attorney's privilege for his actions in representing his client did not apply to intentional acts of furthering and participating in a fraudulent conveyance). Furthermore, South Carolina law specifically makes Defendant Sutton's actions in connection with the fraudulent conveyances unlawful.



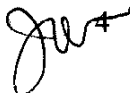
All parties to such ... fraudulent ... conveyances, or being privy to and knowing of them, or any of them, who shall wittingly or willingly put in use, avow, maintain, justify or defend them, or any of them, as true, simple and done ... shall incur the penalty and forfeiture of one year's value of such lands, tenements and hereditaments so purchased or charged ... to be recovered by action in any court of competent jurisdiction

South Carolina Code Ann. § 27-23-30.

On a motion to dismiss, all facts must be construed in the light most favorable to the non-moving party and the allegations of the Complaint are taken as true. Mylan Laboratories, Inc. v. Markari, 7 F.3d 1130 (4th Cir. 1993); Martin Marietta Corp. v. International Telecommunications Satellite Org., 991 F.2d 94 (4th Cir. 1992). A Rule 12(b)(6) Motion should be granted only in very limited circumstances. Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). A motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. Rogers at 325 (citing Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969)). Applying these standards and in particular in reviewing paragraphs 20, 33, 37 and 41 of the Complaint, the Court must deny Mr. Sutton's motion to dismiss.

Mr. Sutton has also filed a motion for mandatory abstention pursuant to 28 U.S.C. § 1334(c)(2) which provides as follows:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State

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forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2).² This Court has previously stated the requirements that must be shown for mandatory abstention.

There are six requirements for mandatory abstention: (1) a timely motion, (2) a state law claim in dispute, (3) the proceeding must be related to a case under title 11, (4) but not arising under that title, (5) the action could not have been commenced in a federal court, (6) an action must have been commenced in a state forum with jurisdiction to hear the matter.

In re Dunes Hotel Associates, 94-75715-W, C-95-8223 (Bkrtcy. D.S.C. 7/11/96). In the Dunes opinion, the Court found that a core proceeding is not subject to mandatory abstention.

A matter which is a core proceeding is not subject to mandatory abstention. 28 U.S.C. § 1334(c)(2). . . "Arising in' proceedings are those that are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of bankruptcy." Id. (quoting In re Wood, 825 F.2d 90, 96-97 (5th Cir. 1987)).

In re Dunes Hotel Associates, 94-75715-W, slip op. at 8. Also see In re Summerfield Pine Manor, 219 B.R. 637 (1st Cir. BAP 1998) ("The provision for mandatory abstention under 28 U.S.C. § 1334(c)(2) clearly does not apply to core matters"). While the causes of action asserted by the Trustee are state law causes of action, they are being asserted through the Trustee's strong-arm powers of 11 U.S.C. § 544. This Court has previously held that actions brought pursuant to 11 U.S.C. § 544 are core proceedings.

The Trustee has brought actions based upon Sections 544, 547, and 548 of the Bankruptcy Code. All of the causes of action are core proceedings. See 28 U.S.C. § 157 (Core Proceedings include: . . . (F) proceedings to determine, avoid, or recover preferences; . . .

² Mr. Sutton has not asked for this Court to exercise discretionary abstention pursuant to 28 U.S.C. § 1334(c)(1).



(H) proceedings to determine, avoid or recover fraudulent conveyances); Duck v. Munn (In re Mankin), 823 F.2d 1296 (9th Cir. 1987), cert. denied, 485 U.S. 1006, 108 S.Ct. 148, 99 L.Ed.2d 698 (1988) (Actions under Section 544(b), even though the Trustee avoids a transfer through the use of a state law, are core proceedings.).

In re United Trading Co., Inc., 93-76076-W, C-94-8277 (Bkrtcy. D.S.C. 4/13/95). As it appears that the allegations in the Complaint pursuant to 11 U.S.C. § 544 are core proceedings, mandatory abstention is not available.

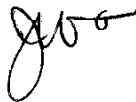
Additionally, mandatory abstention is not available unless it is shown that an action has been commenced in a state forum with jurisdiction to hear the matter. In this case, such an action in state court has not been shown. Matter of Walker, 224 B.R. 239 (Bkrtcy.M.D.Ga. 1998) and In re Baltimore Motor Coach Co., 103 B.R. 101 (D.Md. 1989). Therefore, for all of these reasons, Mr. Sutton's motion for mandatory abstention must be denied.

Mr. Sutton has also demanded a jury trial in this adversary proceeding but has not stated any grounds that would entitle him to a jury trial. However, while the Trustee opposes the request for a jury trial, counsel for the Trustee similarly has not stated any basis for an objection. Therefore, in the interest of justice, the Court will allow the parties ten (10) days from the entry of this Order to submit memorandums in the form of proposed orders to support their respective positions related to the issue of the jury demand.

AND IT IS SO ORDERED.

Columbia, South Carolina,
April 15, 1999.


UNITED STATES BANKRUPTCY JUDGE



CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
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Haselden APR 10 1999

Manos for Plaintiff

Howser Allen for Sutton

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

Jgmt index

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Deputy Clerk