

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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SOUTH CAROLINA

In Re:)
)
Charles Vereen,)
)
Debtor,)
)
)
)
Robert F. Anderson, Trustee for the)
Chapter 7 Bankruptcy Estate of)
Charles Vereen,)
)
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.)
)

Case No. 96-78369-W
Chapter 7
Adversary No. 98-80262-W

ENTERED
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ORDER GRANTING MOTION TO COMPEL DEPOSITION OF GARRETT SUTTON

This matter comes before the Court on Plaintiff's Motion to Compel the deposition of Garrett Sutton (the "Motion"). Based upon the pleadings filed in this matter, the evidence presented at the hearings on the Motion and the arguments of counsel at the hearings, the Court finds that the Motion should be granted for the reasons stated herein.

This action was brought by Plaintiff, as the Chapter 7 Trustee of the bankruptcy estate of the Debtor, to recover fraudulent conveyances made by the Debtor on and after July 25, 1994. The action was brought pursuant to 11 U.S.C. § 544, the Trustee strong-arm power, which provides that

“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” The Plaintiff also seeks damages against certain of the Defendants as a result of their participation in the fraudulent conveyances.

The Debtor was a defendant in a wrongful death lawsuit filed on October 8, 1993 in the United States District Court for the District of South Carolina. The action was brought against the Debtor and others by the parents of one of two young men killed at a bungee jumping attraction in August 1993.

A little less than a year after the Complaint was filed, beginning in July 1994, the Debtor conveyed property to Defendants Vereen Revocable Inter Vivos Trust (the “Trust”), East Cambridge Limited Partnership (the “Partnership”) and Five Star Management (“Five Star”). In their answers filed in this adversary proceeding, the Debtor and Five Star deny that the conveyances were fraudulent.¹ Furthermore, the Debtor contends that the conveyances were made on the advice of his attorney, Garrett Sutton (“Sutton”), for estate planning purposes.

Sutton is an attorney licensed to practice by the State of Nevada. Sutton represented the Debtor in creating the Trust, the Partnership and Five Star. Sutton was a party to this action but, by consent, has been dismissed as a result of a settlement with the Plaintiff.

Plaintiff noticed the telephone deposition of Sutton for August 11, 1999. At the time of the scheduled deposition, counsel for the Debtor and the Partnership and counsel for Five Star and Defendants Charles Clark Vereen, Sonya Ann Vereen Clark, Melanie Renee Vereen, Russell Wilson Vereen and Hamilton Julian Vereen, made a standing objection based on the attorney-client privilege to any question that would be asked during the deposition. As a result, counsel for Sutton instructed

¹ The Partnership and the Trust have been held in default and have, therefore, admitted the Plaintiff's allegations.

his client not to answer any questions due to the pendency of the standing objection until the Court could rule on the issues raised.

The Supreme Court, in Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985), held that a Chapter 7 trustee has the authority to waive the attorney-client privilege belonging to a corporate debtor. However, the Weintraub Court left the issue of waiver of an individual debtor's attorney-client privilege to be decided on a case-by-case basis.

In In re Ingram, Case No. 98-05909-W (Bankr. D.S.C. April 15, 1999), this Court recently held that the attorney-client privilege could be waived by the Chapter 7 trustee on behalf of an individual debtor. Other courts have held that the right to assert, or to waive, the attorney-client privilege, passes from the debtor to a bankruptcy trustee where it involves the recovery of assets of the estate in the nature of a pre-petition civil action. In re Foster, 217 B.R. 631, 638 (Bankr. D. Colo. 1997). See also In re Bazemore, 216 B.R. 1020 (Bankr. S.D. Ga. 1998)(privilege passes to trustee where trustee seeks to augment bankruptcy estate through inquiry of debtor's former attorneys); In re Gibco, Inc., 185 F.R.D. 296 (D. Colo. 1997)(trustee can waive privilege where he seeks information concerning alleged fraudulent transfers). In this adversary proceeding, as in Foster, the Chapter 7 trustee seeks to recover pre-petition conveyances by the debtor for the benefit of the bankruptcy estate. Therefore, the Plaintiff may waive the attorney-client privilege held by the Debtor and the Trust, the Partnership and Five Star, entities owned or controlled by the Debtor.

Furthermore, even if the Plaintiff could not expressly waive the attorney-client privilege on behalf of the Debtor, the Trust, the Partnership and Five Star, this Court finds that the attorney-client privilege has been impliedly waived by these defendants. As previously noted, the Debtor contends that the transfers were made on the advice of his counsel. Furthermore, the Debtor and Five Star dispute that the transfers were made with the intent to defraud, hinder or delay the Debtor's creditors.

By raising these defenses, the Debtor and the transferees have put the advice of Sutton “at issue” and have impliedly waived the attorney-client privilege. WAMCO, VIII, Inc. v. RTC Land Assets Trust 1995-NP2B (In re Long Point Road Limited Partnership), Case No. 93-72769-W, Adversary Proceeding No. 96-8296-W (Bankr. D.S.C. Sept. 8, 1997); Small v. Hunt, 152 F.R.D. 509, 512 (E.D.N.C. 1994). See also Gibco, 185 F.R.D. at 300 wherein the court held that “the defendants waived the attorney-client privilege by asserting a good faith defense to the trustee’s fraudulent conveyance claim.”

Finally, the attorney-client privilege will not protect communications between the Debtor, the Trust, the Partnership, Five Star and Sutton since such communications involved fraudulent transfers and, therefore, fall within the crime-fraud exception to the attorney-client privilege. This Court in Anderson v. Simchon (In re Southern Textile Knitters, Inc.), Case No. 98-07203-W, Adversary No. 99-80026 (Bankr. D.S.C. August 3, 1999), recognized that the most well known exception to the attorney-client privilege is the crime-fraud exception. In order to invoke the crime-fraud exception, the trustee must make a prime facie case by demonstrating one or more “badges of fraud is present”. Simchon; In re Andrews, 186 B.R. 219 (Bankr. E.D. Va. 1995). These badges of fraud include:

- (1) A relationship between the debtor and the transferee;
- (2) Lack of consideration for the conveyance;
- (3) Debtor’s insolvency or indebtedness;
- (4) Transfer of debtor’s entire estate;
- (5) Reservation of benefits, control, or dominion by the debtor;
- (6) Secrecy or concealment of the transaction; and
- (7) Pendency or threat of litigation at the time of transfer.

Andrews, 186 B.R. at 222.

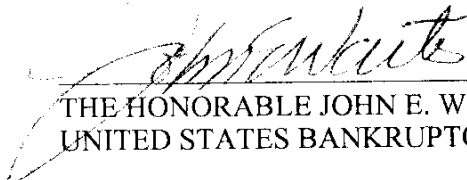
Here, the Plaintiff has demonstrated not just one, but most of these badges of fraud and has, therefore, made his prime facie case. The following badges of fraud were established by the Debtor’s own testimony at his §341 examination: (1) the Debtor transferred assets to entities he

controlled; (2) the Debtor had over \$6,000,000.00 in assets before the transfers and only \$12,500.00 in assets after the transfers; (3) the Debtor had a positive net worth before the transfers and a negative net worth after the transfers; (4) the Debtor has continued to receive the income from the transferred assets after the transfers; and (5) the transfers were made to protect the Debtor's assets from the potential judgment in the wrongful death action pending against the Debtor. Furthermore, the testimony of the Plaintiff, the documents relating to the transfers and the discovery in this case establish that the Debtor will not disclose what assets are now owned by Five Star, the Trust and the Partnership. As such, the attorney-client privilege cannot be invoked by the Debtor, the Trust, the Partnership and Five Star to preclude Sutton's testimony.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion to Compel the deposition of Garrett Sutton is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the witness, Garrett Sutton, shall answer all questions relating to his representation of the Debtor, East Cambridge, the Trust and Five Star or any other entities owned or controlled by the Debtor, the Trust, the Partnership and/or Five Star.

AND IT IS SO ORDERED this 7th day of September, 1999 at Columbia, South Carolina.


THE HONORABLE JOHN E. WAITES
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

The undersigned do hereby certify that the State
Bankruptcy Court has received a copy of the
that a copy of the same has been made on which the same appears
was made on the date hereinafter shown.

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*Hairline
manus
Andrew*

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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KELLY WOODMAN

Deputy Clerk

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U.S. COURT
DISTRICT OF SOUTH CAROLINA