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2000 JUN 27 AM 11:54
U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	)	
	)	
Debra R. Blair	)	Case No. 99-08835-W
	)	
Debtor,	)	Adv. Pro. No. 99-80410-W
	)	
Robert F. Anderson, Trustee,	)	Chapter 7
	)	
Plaintiff,	)	
-vs-	)	
	)	
Roger Frank Blair,	)	**ORDER**
	)	
Defendant.	)	
	)	

ENTERED
JUN 28 2000
S.R.P.

THIS MATTER comes before the Court upon the trial in the above captioned adversary proceeding. On December 22, 1999, Robert F. Anderson (the "Trustee") filed a Complaint against Roger Frank Blair ("Defendant"), in which he alleged that Defendant had received certain real property from Debra R. Blair ("Debtor") in violation of 11 U.S.C. §§ 544, 548 and 550,[1] as well as South Carolina Code §27-23-10 (Law. Co-op. 1976). After reviewing the pleadings in this matter and considering the evidence presented and the arguments of counsel at the trial on the merits, the Court makes the following Findings of Fact and Conclusions of Law pursuant to

[1] Further references to the Bankruptcy Code shall be by section number only.

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Fed. R. Civ. P. 52, made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7052.[2]

FINDINGS OF FACT

1. Debtor and Defendant were married on April 15, 1989. The parties' marriage was very turbulent. They had separated on more than one occasion prior to August of 1999. The stipulated record reflects that Defendant had, on occasions prior to August of 1999, sought to divorce Debtor.

2. Defendant and Debtor are presently separated and were separated prior to Debtor's filing for relief under Chapter 7 of the United States Bankruptcy Code on October 15, 1999.

3. During the marriage, the parties owned a home located on a one-acre tract of real property in Saluda County, South Carolina. In July of 1989, the marital real property was expanded to 3.78 acres with the purchase of an adjacent 2.78 acre tract. The marital residence was originally titled in Debtor's name; however, on June 14, 1994, Debtor transferred the title to both herself and Defendant.

4. Defendant made substantial physical improvements and paid off the mortgages on the real property during the marriage. At the time of the parties' separation in August of 1999, the real property was unencumbered.

5. Defendant and Debtor entered into a marital Separation Agreement dated August 11, 1999, and filed an action in the Saluda County Family Court on August 11, 1999. Debtor was represented by an attorney in the negotiation and preparation of the Agreement; however, Defendant was not represented by legal counsel. As provided by South Carolina law, Debtor's

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[2] 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.

attorney filed an action in the Saluda County Family Court on August 11, 1999 for the approval of the parties' Separation Agreement. Furthermore, on September 17, 1999 the Family Court for the Eleventh Judicial Circuit reviewed the parties' Separation Agreement and concluded, as a matter of law, that the agreement "was fair, reasonable and equitable under the circumstances" and approved and incorporated the Agreement into its Order.

6. Under the terms of the Separation Agreement, as incorporated into the Family Court's Order, Debtor agreed to convey her entire interest in the parties' marital home to Debtor.[3] Pursuant to the Agreement, Debtor deeded the real property to Defendant on August 12, 1999. Defendant, in turn, was obligated to pay several obligations on Debtor's behalf. More specifically, Defendant agreed to the following:

a. Assume all expenses and labilities associated with the aforementioned property.

b. Convey a 1996 Lincoln Town Car to Debtor, make the monthly payments on the automobile until paid in full, and, upon the payment of the lien, transfer the automobile to Debtor free and clear of any liens.

c. Pay both comprehensive and liability insurance for a period of two years on the 1996 Lincoln Town Car from the date of the approval of the Agreement.

d. Pay Debtor the sum of $1,175.00 in cash.

e. Pay the Conoco credit car which is solely in Debtor's name for a period of two

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[3] The Agreement more specifically provided:

> Husband and Wife agree that the marital residence shall be the sole and exclusive property of Husband. The parties agree that Husband shall assume all financial obligations and liabilities pertaining to this property, including but not limited to the mortgage indebtedness, property taxes, insurance, maintenance and repairs, and any and all other expenses related thereto, from which Husband shall hold Wife harmless and indemnify her in the event non-payment or other breach on the part of Husband. Husband further agrees to give Wife the right of first refusal to purchase the house and 3.2 acres in the event he decides to sell the property.

years from date of the approval of the Agreement.

f. Pay the balance on Debtor's MBNA credit card.

g. Assume liability to Self Memorial Hospital for Debtor's past medical bills.

h. Pay Debtor attorney's fees and costs incidental to the negotiation, preparation, and execution of the Agreement and representation in conjunction with its approval.

7. Pursuant to the Agreement, the parties waived their rights to alimony.

8. The parties agreed that Defendant's business entity, known as Autocare Pro Muffler Center, was to remain the sole and exclusive property of Defendant, free and clear of all of Debtor's claims.

9. The 1996 Lincoln Town car is presently in Defendant's name; even though, pursuant to the Agreement, Debtor received exclusive use of the vehicle. The vehicle is presently under lien to Ford Motor Credit Co. and, as of the date of the transfer, the balance owed was of approximately $8,000. Pursuant to the Agreement, Defendant has agreed to transfer the vehicle to Debtor once the lien is paid in full.

10. Defendant testified in a deposition that the 1996 Lincoln Town Car has a value of approximately $16,000.

11. Pursuant to the Agreement, Defendant has to pay comprehensive liability insurance on the 1996 Lincoln Town car for two years. Defendant pays the insurance premium on a quarterly basis and each payment is approximately $261.00, which amounts to annual premiums in the amount of $1,044.

12. As of the date of trial, the MBNA credit card, which is solely in Debtor's made, had a balance of approximately $3,500. Defendant admits that he stopped making payments on this credit card upon the filing of Debtor's bankruptcy petition. After the date the Agreement was

entered into, Defendant made two payments to MBNA, in the approximate amounts of $100.00 and $300.00 respectively.

13. Defendant paid the attorney's fees in the amount of $825.00 incurred by Debtor in conjunction with the separation proceedings.

14. Pursuant to the Agreement, Defendant paid Debtor $1,175 in cash. Defendant also testified that he paid her an additional $500.00, which was not required in the Agreement, to further help her with her moving costs.

15. On October 29, 1999, Defendant sold the real estate including any interest conveyed to him by Debtor to Kim M. Riddlehoover for $76,900. After payment of closing costs and a judgment lien held by Self Memorial Hospital, representing indebtedness owed by Debtor, Defendant received proceeds in the amount of $65,283.24 from the sale of the property.

16. Defendant presently does not own any real estate. He is living in the garage on his business premises, which he rents.

17. Pursuant to the separation, Debtor took the majority of furniture and household goods accumulated during the marriage.

CONCLUSIONS OF LAW[4]

In the Complaint, the Trustee alleges that the transfer of the marital residence to Defendant was done with the actual intent to hinder, delay, or defraud Debtor's creditors; thus, he requests that the Court void the transfers pursuant to §548, 544, 550, and S.C. Code Ann. §27-23-10. Generally, the Trustee bears the burden to prove by clear and convincing evidence every element under a claim of actual and constructive fraud. See, e.g., Campbell v. Deans (In re J.R.

[4] At the end of the Plaintiff's case-in-chief, Defendant moved for Judgment on Partial Findings pursuant to Fed. R. Civ. P. 52(c), made applicable in this adversary proceeding by Fed. R. Bankr. P. 7056. In light of the Court's Conclusions of Law as detailed in the Order, the Court finds that a ruling on the Motion for Judgment on Partial Findings is unnecessary.

Deans Co.), 249 B.R. 121, 134 (Bankr. D.S.C. 2000); Campbell v. Thames (In re Thames), 21 B.R. 704, 706 (Bankr. D.S.C. 1981). However, "when considering transfers to family members under either an actual or constructive fraud theory, the burden of proof shifts to the transferee to prove both that valuable consideration was exchanged between the parties and the bonafides of the transaction." Campbell v. Haddock (In re Haddock), 246 B.R. 810, 816 (Bankr. D.S.C. 2000); Campbell v. Deans (In re J.R. Deans Co.), 249 B.R. 121, 134 (Bankr. D.S.C. 2000) (quoting First Union Nat'l v. Smith, 445 S.E.2d 457, 458 (S.C. Ct. App. 1994)). In this case, because the parties are only legally separated and a divorce is yet to be finalized, the burden rests on Defendant to establish both a valuable consideration for the transfer of the real estate or the bonafides of the transaction.[5]

The Court first addresses the Trustee's assertion that the transfer of the real estate to Defendant should be voided pursuant to §544 and S.C. Code Ann. §27-23-10. Section 544 provides in pertinent part:

> (b)(1) . . . [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.

It is clear from its language that §544 does not provide the Trustee with substantive provisions for the avoidance of fraudulent transfers; rather, the section give the Trustee the status of a creditor and allows nonbankruptcy law to determine the rights that such creditor would have. In

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[5] The law intends for the burden of proof on fraudulent transfers to shift to the transferee in cases where the subject conveyances are to a member of the transferor's family because that by itself may be further indicia that the transfer was for the benefit of someone of close relationship with the transferor, to the detriment of creditors. While the transfer between the parties in this case may still fit within the definition of "intrafamily" transfer, due to the fact that their divorce is yet to be finalized, the Court notes that the truth of the matter is that Defendant and Debtor's relationship is adversarial in nature.

this case, the Court finds that there is at least one creditor with an allowed claim who provides the Trustee with standing to pursue the §27-23-10 claim, also known as the Statute of Elizabeth.[6]

The next issue before the Court is whether the transfer of real estate to Defendant may be voided pursuant to §27-23-10 which provides:

> Every . . . conveyance of lands, tenements or hereditaments, goods and chattels or any of them . . . 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.

For existing creditors, transfers may be set aside under two conditions, depending on whether the transfer was gratuitous or was made for valuable consideration. If the conveyance was made for valuable consideration, then it will be set aside if the following requirements are met: "the transfer was made by the grantor with the actual intent of defrauding his creditors; (2) the grantor was indebted at the time of the transfer; and (3) the grantor's intent is imputable to the grantee." 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. Ct. App. 1995)); see also Campbell v. Deans (In re J.R. Deans Co.), 249 B.R. 121, 134 (Bankr. D.S.C. 2000) (quoting Windsor Properties, Inc. v. Dolphin Head Constr., Co., 498 S.E.2d 858 (1998)). In the case of a gratuitous transfer, the conveyance may be voided if the grantor was indebted and yet proceeded to transfer property for no consideration while failing to retain sufficient property to pay his or her obligations. In re

[6] The Court notes that Universal Card Services Corp. a/k/a AT&T filed a proof of Claim on December 27, 1999, in the amount of $2,980.43 for a debt which was incurred by Debtor on February 8, 1995. Therefore, the Court finds that Universal Card Services Corp. was an existing creditor at the time of the subject transfer and confers upon the Trustee standing to assert the Statute of Elizabeth action.

Haddock, 246 B.R. at 814; see also In re J.R. Deans. Co., 249 B.R. at 134. In the latter case, there does not have to be any proof of actual intent to defraud or hinder creditors.

In this case, the Court finds that Debtor did not gratuitously transfer her interest in the residential residence to Defendant. Rather, Defendant met his burden to show that valuable consideration was given for the property.[7] Furthermore, in the present case, this Court must accord substantial evidentiary weight to the findings made by the Family Court. The Family Court, as required by South Carolina law, made proper findings of fact and conclusions of law concerning the separation of the parties' interests in the marital property. Without finding that the Rooker-Feldman Doctrine is applicable in the present case, the Court nevertheless acknowledges the policy considerations from which that doctrine flows. The Family Court has

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[7] After payment of closing costs and a judgment lien held by Self Memorial Hospital for services rendered to Debtor, Defendant received proceeds in the amount of $65,283.24 from the sale of the property. Assuming that the marital property should have been split equally among the parties, thus entitling Debtor to half of the interest in the marital home, she would have received $30,845.60 (calculated as follows: payoff of the hospital lien, $3,592.04, added to the net proceeds of $65,283.24 equals $68,875.28. Debtor would be entitled to one-half this amount, $34,437.64, minus the hospital lien of $3,592.04, which equals $30,845.60). When taking into consideration the value of the property that was transferred to Debtor as well as the value of the various obligations that Defendant agreed to pay pursuant to the Settlement Agreement in exchange for his sole interest in the marital residence, the Court notes that the estimated amounts of the interests received by Debtor approximately coincide with the interest in the real estate that she would have been entitled to if the property were divided in half. In fact, the value of the 1996 Lincoln Town car as of the date of the transfer was of approximately $16,000. Furthermore, Debtor transferred $1,675.00 in cash, $500.00 of which was not ordered under the Agreement. Defendant further paid $825.00 in Debtor's attorney's fees and paid $400.00 toward the outstanding balance of Debtor's MBNA credit card. Pursuant to the Agreement, Defendant is also obligated to pay the insurance premiums for a period of two years, which would amount to total payments of approximately $2,088. Defendant has also committed to pay Debtor's Conoco gasoline credit card for a period of two years. As the Trustee has acknowledged, utilizing an amount of $150.00 per month for 24 month in calculating the amount that will be paid pursuant to this obligation, results in a consideration $3,600. Finally, Defendant testified at trial that upon separation, Debtor took various pieces of furniture and household goods. Even though Defendant was not able to offer a precise value of the marital property that Debtor took possession of, he testified that the furniture and goods were purchased for an approximate amount of $7,400. When adding all the property that Debtor received and all the obligations that Defendant assumed on her behalf, the Court finds that the transfer of the marital residence to Defendant was supported by valuable consideration.

determined each party's property interest by approving the Settlement Agreement and deeming it to be fair and equitable. This Court acknowledges the Family Court's findings and recognizes the state court's expertise in such matters. As noted in Beauchamp v. Graham (In re Graham), 14 B.R. 246 (Bankr. W.D. Ky. 1981):

> With the greatly expanded jurisdiction recently conferred on Bankruptcy Courts, we could make incursions into the field of domestic relations litigation, sitting as a coequal or even an appellate forum in bankruptcy-related . . . cases. This we have scrupulously avoided, out of considerations of court economy, judicial restraint, and deference to our state court brethren and their established expertise in such matters.

Id. at 248 (holding that a judgment debt owed to former wife for child support and costs and fees directly related to the judgment were nondischargeable debts and, where the record did not reflect the amounts sought for costs and fees, the matter was best left to the state court's discretion).

Unlike the law of some other states, South Carolina law requires that the Family Court scrutinize marital agreements carefully to determine that all basic elements of a contract are met. Among other things, to approve an agreement, the Family Court must find that the agreement is supported by valuable consideration and that it is "fair under all the circumstances" Doe v. Doe, 334 S.E.2d 829 (Ct. App. 1985); Sanchez v. Tilley, 330 S.E.2d 319, 320 (Ct. App. 1985).[8] Concerning the issue of "fairness" and what constitutes adequate consideration, this Court further notes that, under South Carolina law, a Family Court dividing property between litigants does not simply divide the property in half – but in whatever proportion the court deems "equitable."

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[8] In this case, the Order to Approve Agreement of September 17, 1999 provides that "the Agreement of the parties if [sic] fair, reasonable and equitable under the circumstances and is merged and incorporated into [the Order to Approve Agreement]". Furthermore, the Court notes that when the Agreement was entered into, Debtor was represented by competent legal counsel, whereas Defendant represented himself and negotiated his interests without legal advice.

To determine what is equitable, the Family Court takes into account each spouse's contribution to the acquisition of the marital estate, and at least 15 other factors (including marital fault, income, length of marriage, health of the parties, etc.). See, Walker v. Walker, 368 S.E.2d 89 (S.C. Ct. App. 1988). The result of the Family Court's inquiry is, more often than not, a division of property that is intentionally unequal to the parties. Under the circumstances of the present case, which included uncontroverted testimony of both Debtor's fault in the separation and substantially greater direct financial contributions made to the marriage by Defendant, this Court believes that Debtor received a reasonably equivalent value in exchange for the transfer of real estate made to Defendant. There is ample reason to support this conclusion in the evidence presented to this Court. Moreover, this Court is persuaded by the findings made by the Family Court and will not, under the circumstances here present, entertain their disturbance.

Despite the evidence presented to this Court and the findings of the Family Court, the Trustee contends that Defendant's agreement to pay future debts incurred on Defendant's credit and gas cards cannot constitute proper consideration as a matter of law. Relying on Gray v. Snyder, 704 F.2d 709 (4th Cir. 1983), the Trustee argues that promises of future support or payments do not constitute consideration.[9] In reversing the lower court's finding of lack of equivalency of value, the Fourth Circuit in Gray specifically cautioned against construing too

[9] Section 548(d)(2)(A) provides: "'value' means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support of the debtor or to a relative of the debtor."

narrowly the statutory meaning of the word "value." Id. at 712. The Court notes, as emphasized in Gray, that there is a distinction to be drawn between cases where a divorce, order, or statue imposes an obligation to pay, and cases where there is merely a future promise to pay. In the present case, even though part of the consideration for the transfer was based on Defendant's agreement to pay future debts incurred on Debtor's credit cards, that, by itself, does not mean that such an agreement does not constitute proper consideration. This is particularly true in light of the fact that Defendant's obligations were backed by the force of a Family Court order and enforceable by that court's contempt powers. See, e.g., Gray, 704 F.2d at 711-12. Furthermore, the fact that Defendant may have been relieved of paying certain of these antecedent debts because of Debtor's bankruptcy filing does not strip them of value, as "the date for determining whether reasonably equivalent value was received by Debtor is the date of transfer." In re Morris Communications NC, Inc., 914 F.2d 458 (4th Cir. 1990).

Because of the Court's finding that valuable consideration was given for the subject transfer, the next issue to be determined is whether Defendant met the burden to prove the bonafides of the transfer of property.[10] Courts usually consider the following badges of fraud in determining whether sufficient indicia exists to sustain a finding that the transfer occurred with the actual intent to defraud creditors:

> [T]he insolvency or indebtedness of the transferor, lack of consideration for the conveyance, relationship between the transferor and the transferee, the pendency or threat of litigation, secrecy or concealment, departure from the usual method of

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[10] Even if the Court were to find that no reasonable consideration was given to Debtor for the transfer of her interest in the property, the Court would analyze the case under the inadequate consideration theory. Pursuant to an inadequate consideration theory, whereby the transferee gave "grossly inadequate consideration" for the transfer, actual intent to hinder still needs to be proven. See, e.g., Royal Z Lanes, Inc. v. Collins Holding Corp., 524 S.E.2d 621 (S.C. 1999). Therefore, a finding by the Court that inadequate consideration was given by Defendant for the real estate would not ultimately impact the holding in this case as it relates to §27-23-10 and §548(a)(1)(A).

> business, the transfer of the debtor's entire estate, the reservation of benefit to the transferor, and the retention by the debtor of possession of the property.

Campbell v. Haddock (In re Haddock), 246 B.R. 810, 813 (Bankr. D.S.C. 2000); see also Campbell v. Deans (In re J.R. Deans Co.), 249 B.R. 121, 134 (Bankr. D.S.C. 2000). Under the circumstances of the present case, no evidence has been represented to the Court indicating that Debtor's transfer to a family member was, in reality, a collusive effort between the parties to defeat Debtor's creditors. On the contrary, there appears in the present case such a market distrust between the parties as would preclude all possibility of such a conspiracy. The parties have, in fact, not lived in the same county, much less the same dwelling, since their separation. The adversarial nature of the parties' relationship is further shown in their Agreement; which, far from a familial agreement based on mutual trust, is a complex, arms-length transaction in which an attorney represented Debtor. Moreover, it is clear under such circumstances, and under the expressly non-modifiable terms of this Agreement, that Debtor has no way of benefitting from the property conveyed to Defendant. In fact, far from "preserving" the marital home for Debtor's later benefit, Defendant immediately sold it and retained the proceeds.

When weighing the badges of fraud and the credible evidence of Defendant presented at the trial on the merits, the Court finds that Defendant met his burden to prove that the transfer of the marital residence to him was not for the purpose of defrauding creditors. Therefore, the Court finds in favor of Defendant as it relates to §§27-23-10, and dismisses this cause of action.

In the Complaint, the Trustee also alleged that the transfer of the real estate to Defendant should be voided pursuant to §548, which provides in pertinent part:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year 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; or
> (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.

In this case, there is no dispute as to the fact that the subject transfer did occur within one year of Debtor's bankruptcy filing. However, as discussed above, Defendant has met his burden to prove that the property was not converted for the purpose of hindering, delaying, or defrauding any creditors; therefore, the cause of action under §548(a)(1)(A) is dismissed. Furthermore, as to §548(a)(1)(B), the Court has previously concluded that the marital residence was transferred to Defendant in exchange for other property or payment of obligations which amounted to equivalent value. Therefore, the Court finds that the cause of action under §548(a)(1)(B) shall also be dismissed. It is therefore,

ORDERED that Judgment is granted in favor of Roger Frank Blair on all causes of action pursuant to §§ 544, 548 and 550, as well as South Carolina Code §27-23-10 (Law. Co-op. 1976).

AND IT IS SO ORDERED.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
June 27, 2000

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:

JUN 28 2000

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

SHEREE R. PHIPPS

Deputy Clerk

✓ Trotter

✓ Smith

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DISTRICT OF SOUTH CAROLINA

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FOR THE DISTRICT OF SOUTH CAROLINA

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Debtor,	Adv. Pro. No. 99-80410-W
Robert F. Anderson, Trustee,	Chapter 7
Plaintiff,	
-vs-	
Roger Frank Blair,	**JUDGMENT**
Defendant.	

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S. R. P.

Based upon the Findings of Fact and Conclusions of Law as stated in the attached Order of the Court, Judgment is granted in favor of Roger Frank Blair on the 11 U.S.C. §§ 544, 548, 550 and S.C. Code Ann. §27-23-10 causes of action asserted against him.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
June 27, 2000

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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:

JUN 28 2000

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

SHEREE R. PHIPPS
Deputy Clerk

✓ Trotter
✓ Smith