In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

Garland Attrill
Debtor(s).

Bankruptcy No. X88-01008S
Chapter 7

DONALD H. MOLSTAD Trustee
Plaintiff(s)

vs.

PATRICIA LEVICH
Defendant(s)

Adversary No. X89-0064S

MEMORANDUM OF DECISION AND ORDER RE: TRUSTEE'S § 547/548 COMPLAINT

The matter before the court is the complaint of the trustee to set aside a transfer pursuant to 11 U.S.C. § § 547 and 548. Trial was held on March 28, 1990 in Sioux City, Iowa. The court now issues its findings of fact and conclusions of law pursuant to Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F) and (H) .

FINDINGS OF FACT

In the summer of 1987, the debtor, Garland G. Attrill

(ATTRILL), became unable to meet payments on a debt owed to Telco

Triad Credit Union (TELCO TRIAD). On or about August 18, 1987,

Patricia Levich (LEVICH), Attrill's girl friend, transferred

approximately $750.00(fn.1) into Attrill's bank account to pay the remainder of the Telco Triad debt. Levich states that in consideration for this transfer, she received Attrill's 1972 Triumph TR6 automobile. Levich adds that the vehicle was not relied upon for

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Levich believes she transferred $747.00 into Attrill's account, but she was not certain as to the exact amount. At trial, both parties appeared to accept $750.00 as the amount actually transferred.

regular transportation and was placed in storage during the winter months. Both Attrill and Levich, who were living together, continued to use the vehicle sporadically after the alleged sale.

Levich received no documentation regarding her ownership in the car until June 13, 1988. At that time, title in the vehicle was transferred into Levich's name. Attrill filed his chapter 7 bankruptcy petition two weeks later, on June 29, 1988.

The trustee contends that the transfer of the vehicle to Levich was for an antecedent debt and is, therefore, preferential under 11 U.S.C. § 547(b). The trustee further contends that the transfer was made for less than the reasonably equivalent value of the vehicle, and therefore the transfer is fraudulent under 11 U.S.C. § 548(a)(2)(A).

Levich argues that her payment of Attrill's debt in return for the automobile was treated by both parties as a sale, and that this sale was completed on August 18, 1987, more than 90 days prior to Attrill's bankruptcy. Levich claims that she became the owner of the automobile as of August 18, 1987 and that the delayed transfer of title was merely an oversight which is not determinative of when her ownership of the vehicle became effective.

DISCUSSION

The trustee maintains that, assuming the transfer of the vehicle to Levich was a sale, Attrill did not receive reasonably equivalent value in return, and therefore the transfer is fraudulent pursuant to § 548(a)(2)(A). Levich paid approximately $750.00 for the automobile; she states that she made no additional payments or loans for the car at any time before or after the $750.00 transfer.

The trustee bears the burden of proving by a preponderance of evidence all the conditions that bring a transaction within 548. Samore v. Breuer (In re Breuer), 68 B.R. 48, 51 (Bankr. N.D. Iowa 1985); Emerald Hills Country Club, Inc. v. Hollywood, Inc. (Matter of Emerald Hills Country Club, Inc.), 32 B.R. 408, 420 (Bankr. S.D. Fla. 1983). In order to prove constructive fraud under § 548(a)(2), the trustee must show that the debtor received less than a reasonably equivalent value in exchange for the transfer, § 548(a)(2)(A), and that at the time of the transfer the debtor was either insolvent, undercapitalized, or he intended to incur debts beyond his ability to pay such debts, 548(a)(2)(B) .

Unlike § 547(f), § 548 makes no presumption as to a debtor's

insolvency prior to the filing of bankruptcy. Insolvency is an

element that must be proven by the bankruptcy trustee. Pinto v. Philadelphia Fresh Food Terminal Corp. (In re Pinto), 89 B.R. 486, 500 (Bankr. E.D. Pa. 1988); Kleinfeld v. Nacol (In re Nacol), 36 B.R. 566, 568 (Bank. M.D. Fla. 1983).

Levich testified at trial that Attrill intended to file bankruptcy at the time he transferred title to her. However, the contemplation of bankruptcy is not proof of insolvency. See Edmondson v. Caldwell (In re Phippens), 4 B.R. 155, 159 (Bankr. M.D. Tenn. 1980). The Bankruptcy Code test to determine the insolvency of an individual debtor is whether the individual's debts are greater than all of the individual's property, at a fair valuation, exclusive of fraudulent transfers and exempt property. 11 U.S.C. S 101(31)(A).

Attrill may well have been insolvent at the time of the transfer, which was only two weeks prior to the filing of his chapter 7 petition. Unfortunately, no evidence of any kind was introduced at trial to establish Attrill's insolvency. A transfer cannot be avoided, even if the debtor did receive less than reasonably equivalent value, if no evidence has been presented on the issue of insolvency. Delta Service Co., Inc. v. Palatine National Bank (In re Cash Currency Exchange, Inc.), 85 B.R. 65, 69 (Bankr. N.D. Ill. 1988), aff'd. 93 B.R. 618 (N.D. Ill. 1988); In re Rouse, 48 B.R. 236, 239 (Bankr. E.D. Pa. 1985). Therefore, regardless of whether Attrill received less than reasonably equivalent value for his automobile, the trustee has failed to meet his burden of proof pursuant to § 548(a)(2)(B).

The trustee also argues that the transfer of title on June 13, 1988 constitutes a preference, and therefore the transfer can be avoided under 11 U.S.C. § 547(b). Section 547(b) states as follows:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest in the debtor in property--
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> (1) to or for the benefit of a creditor;
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> (2) for or on account of an antecedent debt owed by
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> the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition . . . and

(5) that enables such creditor to receive more than such

creditor would receive if--

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt

to the extent provided for by the provisions of this title.

A central issue in this case is whether Attrill transferred his automobile to Levich on August 18, 1987, the date of the payment, or on June 13, 1988, the date title was transferred to Levich's name. There is no dispute as to Attrill's insolvency as of June 13, 1988. Insolvency is presumed within 90 days preceding filing pursuant to § 547(f), and this presumption has not been rebutted by Levich.

The question of when a transfer is made for preference purposes is a federal question which the federal courts are to decide by reference to state law. Ramy Seed Co. v. Habstritt Farms, Inc. (In re Ramy Seed Co.), 57 B.R. 425, 428 (Bankr. D.

Minn. 1985). A transfer of personal property takes place when

the transfer is "perfected." Section 547(e)(2)(B) (fn.2). The transfer of a motor vehicle is perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." Section 547(e)(1)(B); General Motors Acceptance Corp. v. Martella (In re Martella), 22 B.R. 649, 651 (Bankr. D. Colo. 1982).

With respect to the ownership of an automobile in the state of Iowa, Iowa Code § 321.45(2) states that:

> No person shall acquire any right, title, claim or interest in or to any vehicle subject to registration under this chapter from the owner thereof except by virtue of a certificate of title issued or assigned to the person for such vehicle or by virtue of a manufacturer's or importer's certificate delivered to the person for such vehicle . . .

The statute adds that no waiver or estoppel may operate in favor of any person claiming title to or interest in any vehicle against a person having possession of the certificate of title. Iowa Code § 321.45(2). The statutory exceptions to this are not applicable here.

This is not to say that the failure to transfer the certificate of title to Levich would have precluded her from bringing an

action for breach of contract. Sandhorst v. Mauk's Transfer,

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2 Perfection clearly did not take place within ten days; therefore, § 547(e)(2)(A) is inapplicable.

Inc., 252 N.W.2d 393, 398 (Iowa 1977). However, as to third parties, Attrill, not Levich, would have been recognized as the owner of the automobile as long as title remained in his name. Blessing v. Norwest Bank Marion, N.A., 429 N.W.2d 142, 144 (Iowa 1988). Therefore, under Iowa law, a creditor could have obtained a judgment lien superior to that of

Levich until the time title was transferred to her name. The transfer of the automobile to Levich was perfected on June 13, 1988, which was well within 90 days of the filing of Attrill's bankruptcy petition.

"Creditor" is defined as an entity "that has a claim against the debtor that arose . . . before the order for relief concerning the debtor." 11 U.S.C. § 101(9)(A). "Claim" is broadly defined as a right to payment or a right to an equitable remedy. 11 U.S.C. § 101(4)(B). "Debt" is simply a liability on a claim. 11 U.S.C. § 101(11). Levich became a creditor of Attrill when she transferred $750.00 to his account in August of 1987, her claim being to the title to Attrill's car. Conversely, the debt Attrill owed Levich was the transfer of title to his automobile. The fact that Attrill implicitly recognized Levich as the owner of the car in no way affected Levich's underlying claim to the car's title. The subsequent assignment of title to Levich constituted a "transfer" within the broad meaning of 11 U.S.C. 101(50).

In addition, it is clear that the transfer of title was for an antecedent debt pursuant to § 547(b)(2). The transfer of

title, which occurred almost ten months after the alleged sale date, cannot be considered a "substantially contemporaneous exchange" within the meaning of § 547(c)(1).

> If a transfer made for contemporaneous consideration is not perfected at once or within the statutory grace period of ten days, § 547(e)(2), that "debt, which is effective when actually made, will be made antecedent to the delayed effective date of the transfer and therefore will be made a preferential transfer in law, although in fact made concurrently with the advance of money."

Grover v. Gulino (In re Gulino), 779 F.2d 546, 552 (9th Cir. 1985) (quoting Corn Exchange Nat. Bank & Trust Co. v. Klauder, 63 S.Ct. 679, 681 (1943)).

Therefore, the assignment of title which took place on June 13, 1988 was a transfer to the benefit of Levich for an antecedent debt owed by Attrill and made within 90 days of his filing for bankruptcy. However, the analysis does not end at this point. Section 547(b)(5) requires that the transfer also enabled Levich to receive more than she would have if the transfer had not been made and she had received payment for her claim under a chapter 7 liquidation. It is here that the trustee falters.

Initially, the court must determine the value of the automobile. Evidence presented by both parties as to the actual value of the car as of August 18, 1987 was not substantial. The trustee introduced two items of evidence indicating that the value of the car was at least $1,500.00. The first is a June 29, 1987 dissolution decree between Attrill and his former wife in which an Iowa District Court valued the vehicle at $1,600.00. Plaintiff's exhibit 2 at 10. There is no indication in the dissolution decree as to what evidence, if any, the judge considered in his valuation.

Second, Attrill used the automobile as collateral for the loan that Levich paid off in August of 1987. Because the loan was for $1,500.00, it is arguable that the value of the car must have been at least equal to that of the loan. However, the loan was not made for the purchase of the car itself and there loan was no evidence the lender relied on the value of the car in making the loan.

Levich contends that she paid more than reasonably equivalent value for her car because she was informed by Attrill that a friend of his who collects vintage cars told him that the vehicle was worth approximately $500.00. However, she could not identify the friend, and she did not learn of the friend's appraisal until after she transferred the money to Attrill.

No appraised evidence was presented by either party as to the value of the car. In a suit to recover a preference, the bankruptcy trustee must prove each element by a preponderance of the evidence. Green v. A. G. Edwards & Sons, Inc., 582 F.2d 439, 443 (8th Cir. 1978); Aspen Data Graphics, Inc. v. Boulton (In re Aspen Data Graphics, Inc.), 109 B.R. 677, 681 (Bankr. E.D. Pa. 1990). The Eighth Circuit has stated that:

> "Preponderance of the evidence" means the greater weight of evidence. It is the evidence which, when weighed with that opposed to it, has more convincing force and is more probably true and accurate. If, upon any issue in the case, the evidence appears to be equally balanced, or if it cannot be said upon which side it weighs heavier, then the plaintiff has not met his or her burden of proof.

Smith v. U.S., 726 F.2d 428, 430 (8th Cir. 1984). While the evidence offered by the trustee is weak, it is more persuasive than that presented by Levich. Consequently, the court finds that on August 18, 1987 the vehicle was worth $1,600.00.

No additional evidence was presented regarding the value of the car on the date title was transferred. However, Levich has failed to introduce any evidence indicating that the value of the automobile declined significantly between the date of the alleged sale and the date title was transferred. Therefore, the court finds that the vehicle was worth at least $750.00 on June 13, 1988.

There is some dispute as to whether Levich's transfer of $750.00 to Attrill was a sale or a loan. However, this distinction is irrelevant to the outcome of the case. If the $750.00 payment was intended as a loan, the transfer of the car title conferred on Levich ownership to a car worth at least the amount of the loan. Therefore, the transfer constituted full payment of the debt. If the payment contemplated a sale, the transfer of title conferred upon Levich precisely what she had bargained for, the automobile. Therefore, regardless of whether the transaction was a loan or a sale, Levich received at least 100% of the value of her claim against the debtor when title was transferred to her name.

Having determined that Levich received 100% of her claim as

a result of the transfer of title, the court must now find what

Levich would have received in a chapter 7 liquidation had title never been transferred.

If the transaction was intended to be a loan, Levich would have a $750.00 unsecured claim against the bankruptcy estate. Because Levich had access to and use of the car at all times after the loan, it is doubtful she would have been entitled to interest on the loan.

If the transaction was intended as a sale, the failure of Attrill to transfer title to her name would have left Levich with a breach of contract action against the estate. Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d at 398. The breach would entitle Levich to the market value of the car. I.C. §

554-2713(I). The court has determined that the automobile was worth $1,600.00 on the date Levich allegedly purchased it; therefore, Levich's claim for damages would total $1,600.00.

Because the court finds that the transfer of title to Levich on June 13, 1988 constituted full payment on her claim regardless of whether the transaction between Attrill and Levich was a loan or a sale, in order to prevail on the preference issue, the trustee must demonstrate that Levich would have received less than 100% of her claim against the estate in a chapter 7 liquidation.

The trustee can employ a variety of methods to meet his burden under § 547(b)(5). He may testify as to the assets, claims and costs of administration himself. Tidwell v. Fickling & Walker Ins. Agency, Inc. (Matter of Georgia Steel, Inc.), 58 B.R. 153, 157 (Bankr. M.D. Ga. 1984). If the claims bar date has passed and liquidation has been completed, total assets and timely claims may be placed into evidence. Friedman v. 1000 Brickell, Ltd. (In re Advertising Associates, Inc.), 95 B.R. 849, 850 (Bankr. S.D. Fla. 1989). In some cases, the debtor's schedules may even be presented as evidence of the payment a creditor would likely receive in a chapter 7 liquidation.3 American Bank of Martin Co. v. Leasing Service Corp. (In re Air Conditioning, Inc. of Stuart), 845 F.2d 293, 297 (llth Cir. 1988), cert. denied sub nom. First Interstate Credit Alliance, Inc. v. American Bank of Martin County, 109 S.Ct. 557 (1988).

In this case, no evidence has been presented to the court indicating whether or not there would be sufficient funds in the estate to pay 100% of all unsecured claims against the estate. The court admits that this is unlikely; it is a rare case in which unsecured creditors are paid the full amount of their claims. However, it does happen.

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3 The trustee did in fact offer the debtor's bankruptcy

and schedules into evidence to show that the transfer of Levich was intended as a loan. Question 12 (b) of the Statement of Affairs states that the transfer was "for personal expenses." Levich objected to the schedules as and the court sustained the objection. The schedules offered to show what Levich would have received in a chapter 7 liquidation, and therefore the issue of admissibility on these grounds was and is not before the court.

The trustee has the burden of proving each of the elements of

a preferential transfer. Brown v. First Nat. Bank of Little Rock, Ark., 748 F.2d 490, 491 (8th Cir. 1984). Courts have consistently held that a failure to present any evidence as to whether the transfer of property would enable the creditor to receive more than she would in a straight liquidation precludes the trustee from prevailing in a preference action. Barry v. State of Arkansas, Dept. of Finance & Administration (In re Wieser), 86 B.R. 157, 159 (Bankr. W.D. Ark. 1988); Taylor v. Fairhope Floor Covering & Interiors (In re K. Pritchard Co.), 17 B.R. 508, 510 (Bankr. S.D. Ala. 1981); Kanasky v. Purbeck (In re R. Purbeck & Associates, Ltd.), 12 B.R. 406, 408 (Bankr. D. Conn. 1981). As the court in In re Wieser stated:

> (t]he Trustee does not address the fifth condition, namely, that the . . . payment enabled the State to receive more than it would receive in a straight liquidation. This case is, in fact, a Chapter 7 straight liquidation but there is no argument or evidence presented with regard to whether the fifth condition has been met . . . The Court can only conclude that the Trustee has failed to establish all the
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> elements of proof required to prevail in a preference action.

In re Wieser, 86 B.R. at 159.

Had the trustee met his burden under § 547(b)(5), the transfer would have been preferential. See Gennett v. Lindholm (In re Emrick), 97 B.R. 655, 657 (Bankr. S.D. Fla. 1989) (preferential transfer occurs when a car was paid for and transferred to the purchasers but the certificate of title was not issued for another five months); Palmer v. Morfand (Matter of Canup Mechan- ical, Inc.), 1 B.R. 703, 706 (Bankr. M.D. Fla. 1979) (preferential transfer occurred under Bankruptcy Act § 60b where a purchaser did not apply for the issuance of a certificate of title in his name until three months after the sale). The result in this case may be unfortunate. However, the court cannot sua sponte fill in gaps in the evidence before it in order to enable one party to prevail over another. Without any evidence enabling the court to conclude Levich would not have received a 100% dividend in this case, the court cannot set aside the transfer.

ORDER

IT IS THEREFORE ORDERED that plaintiff's complaint is dismissed. Judgment shall enter accordingly.

SO ORDERED ON THIS 20th DAY OF APRIL,, 1990.

William L. Edmonds
Chief Bankruptcy Judge