In the United States Bankruptcy Court

for the Northern District of Iowa

Bissonnette Chevrolet Inc. *Debtor(s).*	Bankruptcy No. X91-02298M Chapter 7
LARRY S. EIDE Trustee *Plaintiff(s)* vs. JAMES R. BISSONNETTE and ROBERT L. DANGER *Defendant(s)*	Adversary No. 92-4180XM

ORDER RE: MOTION FOR SUMMARY JUDGMENT

The matter before the court is the trustee's motion for summary judgment against defendants James R. Bissonnette and Robert L. Danger. Hearing was held July 20, 1993 in Mason City, Iowa. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F) and (H).

On September 1, 1992, the trustee filed a complaint seeking to recover property transferred by the debtor to defendants Bissonnette and Danger. The trustee alleged that the transfers were avoidable either as preferences under 11 U.S.C. § 547 or as fraudulent transfers under § 548. Bissonnette and Danger each filed an answer September 28, 1992 denying the material allegations of the complaint.

The trustee served requests for admission on Bissonnette and Danger on March 12, 1993. No response to the requests was timely filed. Under Fed.R.Civ.P. 36, made applicable in adversary proceedings by Fed.R.Bankr.P. 7036, if the party to whom requests for admission are directed fails to admit or deny a matter, the matter is deemed admitted. Any matter admitted under Rule 36 is conclusively established. Fed.R.Civ.P. 36(b). The admissions of Bissonnette and Danger are attached as exhibits to the trustee's statement of material facts in support of his motion for summary judgment. Document no. 10.

The answers of Bissonnette and Danger and the admissions on file establish the following as undisputed material facts:

1. The debtor filed a chapter 11 petition on December 19, 1991.

2. Bissonnette and Danger are officers, directors or shareholders in control of the debtor.

3. Bissonnette and Danger each received a transfer of property from the debtor on December 16, 1991, which the debtor identified in its schedules as a payment of corporate debt. Bissonnette received $10,863.51, and Danger received $11,646.34.

4. On or about November 15, 1991, the debtor paid 1992 membership dues in the Charles City Country Club for Bissonnette and Danger.

5. In 1991, the defendants each received a bonus which had the effect of eliminating loans they had received during 1989. There was no written requirement that the debtor pay the bonus. Bissonnette received a bonus of $33,128.20 in 1991 and had received a loan of $31,596 in 1989. Danger received a bonus of $5,227.94 in 1991 and the same amount in 1989.

6. The debtor was insolvent as of February 1, 1991.

7. On February 1, 1991, Danger exchanged 128 shares of his stock in the debtor for two motor vehicles from the debtor. The values of the 128 shares of stock and the two vehicles were each $12,800.00.

The trustee may avoid any of the transfers from the debtor to Bissonnette or Danger as a preferential transfer, if the trustee proves that there was a transfer of an interest of the debtor in property--

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by 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; or
>
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; 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 by the provisions of this title.

11 U.S.C. § 547(b).

Alternatively, the trustee seeks to avoid the transfers as fraudulent transfers under 11 U.S.C. § 548(a) which provides:

> (a) 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--

> (1) 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
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(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;
>
> * * *

11 U.S.C. § 548(a).

The granting of a motion for summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Bankr.P. 7056(c). The trustee bears the burden of proof by a preponderance of the evidence that a transaction is avoidable under § 547 or § 548. 11 U.S.C. § 547(g); Samore v. Breuer (In re Breuer), 68 B.R. 48, 51 (Bankr. N.D. Iowa 1985).

The admissions of Bissonnette and Danger establish as elements of a preferential transfer that in each transaction there has been a transfer of an interest of the debtor in property to or for the benefit of a creditor. The admissions also establish that Bissonnette and Danger are officers, directors or shareholders in control of the debtor and are thus insiders under 11 U.S.C. § 101(31)(B). Therefore, the trustee may seek to avoid transfers made on or within one year before the date of the filing of the petition.

However, the trustee has not proved each of the other elements of a preference and is not entitled to summary judgment as a matter of law. In two of the transfers, the corporate debt payments on December 16, 1991, and the exchange of vehicles for stock, the trustee has not shown that the transfers enabled the defendants to receive more than they would have received in a case under chapter 7 and if the transfer had not been made. The trustee also has not shown that the transfers were for or on account of an antecedent debt as to the payment of country club memberships and the vehicle for stock exchange. Finally, the admissions of the parties do not establish when during 1991 that the bonuses were paid. Therefore, the trustee has not proved that the transfer was made while the debtor was insolvent.

For the purposes of avoiding the transfers as fraudulent transfers, the trustee has offered no evidence to prove the intent of the debtor under § 548(a)(1). Questions of intent are often inappropriate for disposition on summary judgment. National Union Fire Ins. Co. v. Turtur, 892 F.2d 199, 205 (2d Cir. 1989). Therefore, the court will determine whether the trustee has proved the elements of a fraudulent transfer under § 548(a)(2).

The trustee has proved by the admissions on file that the transfers were of an interest of the debtor in property made on or within one year before the date of the filing of the petition. Again, the admissions do not establish the date bonuses were paid leaving unresolved whether the debtor was insolvent on the date of that transfer. In the other three transfers, the trustee has not proved that the debtor received less than a reasonably equivalent value in exchange for the transfer. The admissions show that the exchange of stock for vehicles was an equivalent transfer. The debtor presumably received an equivalent cancellation of its debt for the December, 1991 payments. Whether the debtor received a

reasonably equivalent value in exchange for the country club memberships is a question of fact. The issue depends on whether the fair market value of the defendants' services to the debtor corporation were equivalent to the value of the transfer. See Jacoway v. Anderson (In re Ozark Restaurant Equipment Co., Inc.), 850 F.2d 342, 344-45 (8th Cir. 1988).

The trustee has failed to prove that he is entitled to judgment as a matter of law, and the motion will be denied.

ORDER

IT IS ORDERED that the trustee's motion for summary judgment is denied.

SO ORDERED THIS 26th DAY OF JULY, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U. S. mail to: Larry Eide, Roger Sutton and U. S. Trustee.