

In the United States Bankruptcy Court

for the Northern District of Iowa

RONALD W. DOWNS SR.

Debtor(s).

Bankruptcy No. 94-11980KC

Chapter 7

HARRY R. TERPSTRA in his Sole

Capacity as Trustee

Plaintiff(s)

Adversary No. 95-1080KC

vs.

MARAGARET BAILS

Defendant(s)

ORDER RE TRUSTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

On December 14, 1995, the above-captioned matter came on for hearing pursuant to assignment. Wesley Huisinga represented Plaintiff Harry Terpstra as Chapter 7 Trustee. Larry Thorson and Karen Volz represented Defendant Margaret Bails. The matter before the Court is Trustee's Motion for Partial Summary Judgment. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H).

STATEMENT OF THE CASE

Trustee filed his complaint seeking to avoid certain transfers Debtor Ronald W. Downs, Sr. made to Defendant. Debtor was convicted of murdering Gloria Heising on January 14, 1994. The United States obtained a judgment against Debtor in September 1994 related to the murder conviction and filed an involuntary petition against Debtor on December 7, 1994.

Debtor transferred certain annuities and securities to Defendant in the second half of 1993. Between January 6 and January 13, 1994, Debtor transferred the proceeds from the sale of his residence, his 1988 Chevy Blazer and other property to Defendant. Trustee seeks to avoid these transfers.

Trustee moves for summary judgment on Counts III, IV and V of his complaint. Count III seeks to set aside transfers of property from Debtor Ronald Downs to Defendant between August 2, 1993 and January 13, 1994 pursuant to § 544(b) and the Federal Debt Collections Procedure Act, 28 U.S.C. §§ 3301-08. Count IV asserts that the transfers are voidable pursuant to § 547(b). Count V seeks personal judgment against Defendant under § 550(a)(1) for return of the transferred property, or its value, to the extent the transfers are determined to be void.

Trustee asserts that Defendant's responses to requests for admissions and answers to interrogatories show there are no genuine issues of material fact. He argues that the record supports a finding that Debtor transferred property and money to Defendant, an insider, with the intent to defraud his creditors. Trustee argues that sufficient badges of fraud are present to prove such intent.

Defendant asserts there are a number of disputed factual issues such as whether Debtor owed Defendant a debt prior to the transfers, whether Debtor was insolvent at the time of the transfers, whether Defendant gave Debtor any consideration in return for the transfers and whether the debts listed as Debtor's are actually his debts. Defendant asserts that Debtor was returning money to her which she had previously transferred to him to invest for her.

Defendant argues that transfers of Debtor's Chevy Blazer and proceeds from the sale of Debtor's residence which were exempt property are not subject to attack by Trustee. Further, she asserts that the record does not prove that Debtor intended to incur debts beyond his ability to repay or that Defendant is an insider. Defendant also asserts that some of the property transferred was Defendant's, not Debtor's, which Debtor held on her behalf, and that Debtor later received the benefit from other property transferred which she held on his behalf.

CONCLUSIONS OF LAW

Trustee must show the absence of any genuine issue of material fact in order to succeed in his motion for summary judgment. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56; In re Earhart, 68 B.R. 14, 15 (Bankr. N.D. Iowa 1986). In considering a motion for summary judgment, the Court must view the facts in the light most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences to be drawn from the facts. United States v. One 1989 Jeep Wagoneer, 976 F.2d 1172, 1176 (8th Cir. 1992). Where mental state or intent is at issue, summary judgment must be granted with caution, as usually such issues raise questions for determination by a factfinder. Id. Actual intent to hinder, delay or defraud is normally a question of fact which precludes summary judgment. In re Sackman Mortgage Corp., 158 B.R. 926, 938 (Bankr. S.D.N.Y. 1993).

Under the Federal Debt Collection Procedures Act ("FDCPA"), the United States may avoid a fraudulent transfer made in the previous six years in certain circumstances. 28 U.S.C. § 3306. A transfer is fraudulent if the debtor (A) makes the transfer with actual intent to hinder, delay or defraud a creditor or (B) fails to receive reasonably equivalent value when he should have known he was incurring debts beyond his ability to pay. 28 U.S.C. § 3304(b)(1). The FDCPA codifies some of the badges of fraud as factors to consider in determining actual intent. 28 U.S.C. § 3304(b)(2). Trustee asserts the right to avoid transfers under these provisions in Count III of the complaint.

In order for a transfer to be subject to avoidance as a preference under § 547(b),

- (1) there must be a transfer of an interest of the debtor in property, (2) on account of an antecedent debt, (3) to or for the benefit of a creditor, (4) made while the debtor was insolvent, (5) within [one year] prior to the commencement of the bankruptcy case [where the creditor was an insider], (6) that left the creditor better off than it would have been if the transfer had not been made and the creditor had asserted its claim in a Chapter 7 liquidation.

In re Interior Wood Prods. Co., 986 F.2d 228, 230 (8th Cir. 1993). The question of Debtor's insolvency is one of fact for the Court. In re Roco Corp., 701 F.2d 978, 981 (1st Cir. 1983). Trustee seeks to avoid transfers from Debtor to Defendant under these provisions in Count IV of the petition.

The foregoing is a thumbnail sketch of the elements Trustee is required to prove to be entitled to a judgment against Defendant under Counts III and IV. The Court concludes that summary judgment on the issue of whether the Debtor had the "actual intent to hinder, delay or defraud a creditor" under 28 U.S.C. § 3304(b)(1)(A) is not appropriate. Even though the record may at this time support Trustee's assertion that certain badges of fraud exist, the issue of actual intent requires a factual determination after trial.

Genuine issues of fact also exist regarding Debtor's insolvency at the time of or as a result of the transfers. Insolvency is also a question of fact for the Court. Defendant also disputes the sufficiency of the record on the issue of whether she was an insider and, significantly, whether the property transferred actually belonged to Defendant rather than Debtor. The Court concludes that disputed issues of fact preclude summary judgment.

WHEREFORE, Trustee's Motion for Partial Summary Judgment is DENIED.

SO ORDERED this 26th day of December, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge

