

In the United States Bankruptcy Court

for the Northern District of Iowa

KATHLEEN ROMEO LICUP

Bankruptcy No. 98-02385-C

Debtor(s).

Chapter 7

WESLEY HUISINGA in his sole

Adversary No. 98-9313-C

Capacity as Trustee

Plaintiff(s)

vs.

BENJAMIN H. LICUP, ROLI R. LICUP,

LINDA LICUP, EMILIA GARCIA,

REYNALDO GARCIA and ARIZONA

DEPT. OF REVENUE,

Defendant(s)

ORDER RE TRUSTEE'S MOTION FOR SUMMARY JUDGMENT

This matter came before the undersigned on August 26, 1999 on Trustee's Motion for Summary Judgment. After hearing oral arguments, the Court took the matter under advisement. The time for filing briefs has now passed and this matter is ready for resolution. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (H), (N).

STATEMENT OF THE CASE

Trustee seeks a determination that Debtor's interest in Arizona real estate is property of the estate, and requests permission to sell the property. Trustee also seeks to recover fraudulent transfers. He requests summary judgment against Defendant Benjamin Licup ("Dr. Licup") on all issues. Dr. Licup asserts Debtor Kathleen Licup has no property interest in the real estate. He denies that any fraudulent transfers occurred.

FACTS

Trustee asserts the facts are undisputed, citing correspondence with Dr. Licup, Dr. Licup's Answer and Counterclaim, unanswered discovery requests, Debtor's affidavit and related exhibits. Dr. Licup agrees that the material facts are for the most part undisputed.

Dr. Licup is Debtor's father. He purchased four parcels of real estate in Arizona between 1989 and 1993. Rather than take title to the real estate in his own name, Dr. Licup had Debtor's name placed on the legal title to each of the parcels, along with other family members' names. One of the other family members who received legal title to the real estate is Roli Licup, Dr. Licup's son. Roli Licup is a

debtor in a Chapter 13 bankruptcy case pending in Arizona which is operating under a confirmed plan.

Dr. Licup asserts he paid the full purchase price for each of the parcels with no contribution from Debtor. He states it is essentially undisputed that it was never his intention to create a present interest in any of the property in Debtor. He put legal title in the names of family members for estate planning purposes. Dr. Licup now describes this estate plan as "misguided". He argues any interest Debtor possesses in the real estate is held in a constructive trust for his benefit.

In his post-hearing brief, Dr. Licup raises the legal theory of resulting trusts. Dr. Licup did not assert this theory in defense of Trustee's Complaint in his Answer or in his response to Trustee's Motion for Summary Judgment. Because Dr. Licup did not raise this legal argument prior to or at the hearing, the Court will not address it in ruling on Trustee's Motion for Summary Judgment.

One of the parcels of real estate is an 80-acre farm. Dr. Licup has farmed the land and planted crops. A lease exists, dated June 25, 1996 with signatures of Debtor and Roli R. Licup, purporting to give Dr. Licup control of the farm and crops for seven years. Debtor denies the signature on the lease is hers. Dr. Licup has never made lease payments to Debtor.

Trustee seeks to avoid transfers of ASCS payments and Debtor's 1993 and 1994 income. Dr. Licup has received ASCS payments from the U.S. government relating to his management of the 80-acre farm. Debtor had no knowledge of Dr. Licup receiving ASCS payments. Trustee seeks to recover the ASCS payments based on Debtor's property interest in the farm.

Trustee states Dr. Licup paid compensation to Debtor in 1993 totaling \$65,095, which Dr. Licup caused to be transferred back to him or to a related business entity. Debtor's 1993 tax return lists this amount as "other income." Trustee states Dr. Licup likewise paid Debtor compensation of \$19,000 in 1994 which he caused to be transferred back to him or to a related business entity. Debtor states she did not prepare or sign her 1993 and 1994 tax returns.

In his Answer to Amended Complaint, Dr. Licup generally denies the allegations regarding fraudulent transfers. He states that his professional corporation paid Debtor an annual salary of \$26,000 in 1993 and in 1994. He acknowledges receiving government farm program payments. Dr. Licup does not, however, address Trustee's fraudulent transfer claim in his opposition to summary judgment.

Trustee's post-hearing brief attaches a Supplemental Affidavit of Debtor, copies of deeds, and a transcript of Dr. Licup's examination related to Roli Licup's Chapter 13 case in the District of Arizona, among other documents. This Court considers the Motion for Summary Judgment fully submitted as of the hearing date. The purpose of the subsequent briefs was to address issues of law, not fact. The Court will not consider the supplemental documents attached to Trustee's post-hearing brief, or legal arguments related to this new information, in ruling on Trustee's Motion for Summary Judgment.

SUMMARY JUDGMENT STANDARD

Trustee seeks to resolve this matter through a motion for summary judgment. Summary judgment is a drastic remedy and must be exercised with extreme care. Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990); see also Geiger v. Tokheim, 191 B.R. 781, 785 (Bankr. N.D. Iowa 1996). The Eighth Circuit has recognized, however, that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole,

which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Wabun-Inini, 900 F.2d at 1238 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). In considering a motion for summary judgment, the Court must determine "whether the record, viewed in a light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rabushka v. Crane Co., 122 F.3d 559, 562 (8th Cir. 1997), cert. denied, 118 S. Ct. 1336 (1998).

CHOICE OF LAW

Under §363(b)(1), Trustee may, after notice and hearing, sell property of the estate. Property of the estate consists of all legal and equitable interests of Debtor in property. 11 U.S.C. §541(a)(1). To determine whether Debtor has an interest in the Arizona real estate which is property of her bankruptcy estate, the Court looks to state law which creates and defines property interests. In re Mahendra, 131 F.3d 750, 755 (8th Cir. 1997), cert. denied, 118 S. Ct. 1678 (1998); Barnhill v. Johnson, 503 U.S. 393, 398 (1992). The forum state's choice of law rules determine which state's substantive law will be applied. Jacobs v. Shields, 116 B.R. 134, 137 (D. Minn. 1990). It is a principle firmly established that the law of the jurisdiction in which real estate is located applies to determine rights in real estate. United States v. Crosby, 11 U.S. (7 Cranch) 115 (1812); In re Parkwood, Inc., 461 F.2d 158, 171 (D.C. Cir. 1971); Norris v. Loyd, 168 N.W. 557, 559 (Iowa 1918) (stating the law of the state in which the land is situated governs its transfer); Sportsmen's Wildlife Defense Fund v. Department of Interior, 949 F. Supp. 1510, 1529 (D. Colo. 1996) (same).

All of the real estate Trustee is seeking to sell is located in Arizona. Trustee's right to sell property is limited to the extent of Debtor's legal or equitable interest in the property. Based on the foregoing, the Court applies Arizona law in considering the extent of Debtor's interest in the Arizona real estate.

ARIZONA LAW

Generally, in construing deeds, "the court's role is to give effect to the intent of the contracting parties. If the instrument is unambiguous, the intent of the parties must be discerned from the four corners of the document. If however, the instrument is ambiguous, then extrinsic evidence of intent is admissible." Spurlock v. Santa Fe Pac. R.R. Co., 694 P.2d 299, 304 (Ariz. Ct. App. 1984) (citations omitted), cert. denied, 472 U.S. 1032 (1985). Every attempt should be made to carry out the intent of the grantor, and substance rather than form should control. Shulansky v. Michaels, 484 P.2d 14, 17 (Ariz. Ct. App. 1971). If a deed is subject to two interpretations, the interpretation upholding the deed is favored. Id. In the absence of clear and convincing evidence to support a grantor's allegation of mistake, the courts will not trifle with or cause to be reformed a duly executed and valid deed. Corn v. Branche, 249 P.2d 537, 538 (Ariz. 1952) (upholding deed as conveying entire property in fee simple, in spite of grantor's assertion that sisters meant to hold the property jointly). A grantor's unilateral mistake can be sufficient ground for a court to reform a voluntary conveyance. Yano v. Yano, 697 P.2d 1132, 1136 (Ariz. Ct. App. 1985).

Dr. Licup asserts Debtor holds title to the real estate in a constructive trust on his behalf. A constructive trust arises by operation of law and is generally imposed when property is acquired under inequitable circumstances resulting in unjust enrichment of one at the expense of another. Golleher v. Horton, 715 P.2d 1225, 1232 (Ariz. Ct. App. 1985). One of the factors considered in imposing a constructive trust is the grantor's family relationship with the grantee. Id. A constructive trust may arise even where actual fraud does not exist in the acquisition of property. Smith v. Connor, 347 P.2d 568, 576 (Ariz. 1959). A confidential relationship which can give rise to a constructive trust may exist where the grantor is justified in placing confidence in the belief that the grantee will act in the

grantors' interest. Id. "[A] person who wishes to impose a trust on a transaction which on its face appears to be a valid transfer must convince the trier of fact of the trust by clear and convincing proof." Id. at 570; see also Murillo v. Hernandez, 281 P.2d 786, 791 (Ariz. 1955). The Arizona law of constructive trusts has been considered in bankruptcy cases to determine parties' respective rights in property. See In re North Am. Coin & Currency, Ltd., 767 F.2d 1573, 1575 (9th Cir. 1985), cert. denied, 475 U.S. 1083 (1986); In re Allied Gen. Agency, 229 B.R. 190, 195 (D. Ariz. 1998).

It is well settled that a debtor does not own an interest in property held in trust for another and property held in trust is not "property of the estate." Begier v. I.R.S., 496 U.S. 53, 59 (1990); In re Megafoods Stores, Inc., 163 F.3d 1063, 1066 n.4 (9th Cir. 1998). Imposition of a constructive trust under state law upon a debtor's property generally confers on the true owner of the property an equitable interest in the property superior to the trustee's. In re N.S. Garrott & Sons, 772 F.2d 462, 466 (8th Cir. 1985). When a debtor holds only legal title to property under a constructive trust with a duty to reconvey it to the rightful owner, the estate generally holds the property subject to the same restrictions. In re Flight Transp. Corp. Sec. Litig., 730 F.2d 1128, 1136 (8th Cir. 1984).

FRAUDULENT TRANSFER

Under §544(b), a trustee or debtor-in-possession may avoid a transfer that is avoidable under applicable law. In re United Energy Corp., 944 F.2d 589, 593 (9th Cir. 1991). A trustee's rights under §544 are derivative; they are those of a creditor under state or applicable nonbankruptcy law. In re Rolain, 823 F.2d 198, 199 (8th Cir. 1987); In re Graven, 64 F.3d 453, 456 n.6 (8th Cir. 1995), cert. denied, 517 U.S. 1189 (1996). The trustee must establish that there was an existing unsecured creditor that could avoid the transfer at the time of the transfer. In re Mizrahi, 179 B.R. 322, 326 (Bankr. M.D. Fla. 1995); 11 U.S.C. §544(b). The statute of limitations from the applicable nonbankruptcy law applies and may allow the avoidance of transfers more than one year old. Graven, 64 F.3d at 456 n.5.

Trustee seeks to avoid transfers of Debtor's rights in 1993 and 1994 income and the ASCS payments pursuant to 28 U.S.C. §§3304 and 3306, the Federal Debt Collection Procedures Act of 1990. The Act renders transfers fraudulent as against a debt to the United States when (1) the debtor has the intent to defraud or (2) the debtor does not receive reasonably equivalent value and cannot pay debts as they become due. United States v. Barrier Indus., Inc., 991 F. Supp. 678, 680 (S.D.N.Y. 1998). A claim for relief under §3304 may be brought up to six years after the transfer was made. 28 U.S.C. §3306(b)(1). Debtor listed the Internal Revenue Service on Schedule E as holding a priority claim of \$24,324.88 for 1993 income taxes.

CONCLUSIONS

The foregoing are some of the legal principles applicable to this case. The Court applies Arizona law to determine the extent of Debtor's property interest in the Arizona real estate. Arizona law looks first to the four corners of the conveyance documents, with an eye to carrying out the intent of the grantors. Clear and convincing evidence of a unilateral mistake may be grounds for reforming a voluntary conveyance. Further, a confidential relationship may give rise to a constructive trust where a property transaction results in unjust enrichment. If property is deemed to be held in a constructive trust, it is not property of the estate and not available for distribution by Trustee.

Intent of the grantors and unilateral mistake are issues of fact. Whether a confidential relationship exists will also involve facts not apparent in the record as it currently stands. Summary judgment is not the preferred method for resolving these issues. The Court requires a more detailed record to make such determinations.

As to transfers of Debtor's 1993 and 1994 income, Trustee must initially prove that a transfer occurred between debtor and Dr. Licup. Debtor's 1993 tax return, Exhibit I attached to Plaintiff's Request for Admissions, shows income of \$65,095 from a Form 1099. The record does not contain a copy of that 1993 Form 1099. Dr. Licup states he paid Debtor compensation of \$26,000 in 1993. These assertions indicate genuine issues of fact exist regarding the amount of income Dr. Licup paid Debtor in 1993. Trustee and Dr. Licup also do not agree on the amount of income paid in 1994. The record does not contain a copy of Debtor's 1994 tax return. As to the ASCS payments, whether they were payable to Debtor depends on her property interest in the farm, which has yet to be determined. Issues of fact preclude summary judgment on Trustee's fraudulent transfer claim.

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

SO ORDERED this 22nd day of September, 1999.

Paul J. Kilburg
Chief Bankruptcy Judge