UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re LOUIS J. PEARLMAN, et. al., Debtors.	)	Case No. 6:07-bk-00761-KSJ Chapter 7
SONEET R. KAPILA, CHAPTER 11 TRUSTEE, Plaintiff, vs. WATSKY, MARTINEZ & COMPANY, CPA'S, P.A., n/k/a MARTINEZ, OLSON & ASSOCIATES CPAS, P.A., Defendant.	)	Adversary No. 6:09-ap-00718-KSJ

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Chapter 11 Trustee, Soneet R. Kapila, filed this adversary proceeding to recover payments the Defendant, Watsky, Martinez & Company CPA's, P.A. n/k/a Martinez, Olsen & Associates CPAs, P.A., received from the Debtors. The Trustee alleges the transfers were constructively fraudulent pursuant to sections 548(a)(1)(B) and 550 of the Bankruptcy Code,[1] and sections 726.105(1)(b), 726.106(1), and 726.108 of the Florida Uniform Fraudulent Transfer Act (FUFTA).[2] The Trustee also asserts an unjust enrichment claim.

Defendant moves for summary judgment[3] on all counts and argues that substantive

[1] All references to the Bankruptcy Code refer to Title 11 of the United States Code.
[2] Via §§ 544(b)(1) and 550 of the Bankruptcy Code.
[3] Defendant's Motion for Summary Judgment, Doc. No. 34.

consolidation of the various debtor entities making payments extinguished the Trustee's "wrong payor" claims. Defendant also asserts it provided reasonably equivalent value in exchange for the payments received by the now merged Debtors. Because no material fact exists as to the reasonable value of the accounting services provided by the Defendant to the Debtors in exchange for the payments, Defendant's motion for summary judgment is granted.

Defendant, an accounting firm, provided accounting services to the Debtors in the years prior to the bankruptcy. The Trustee seeks to recover transfers totaling $657,797.50 paid by the Debtors for these services.[4] The Court substantively consolidated the debtor entities in 2011.[5] The thrust of the substantive consolidation order was to eliminate the Trustee's "wrong payor" fraudulent transfer claims—claims against defendants who received payment from one debtor to compensate it for goods or services provided to a different debtor.[6]

After the substantive consolidation and more than three years after filing the complaint, the Trustee filed a motion to amend his complaint to add counts of actual fraud and to "delete claims for constructive fraud and unjust enrichment."[7] In his motion to amend, the Trustee further admitted that as a result of the substantive consolidation "the constructive fraud claims which were viable when pled are no longer viable."[8] The Court denied the motion to amend.[9] Defendant then filed its motion for summary judgment.[10]

---

[4] Transfers were made from the following entities: LJP Enterprises, Inc.; Louis J. Pearlman; Trans Continental Airlines, Inc.; Trans Continental Companies, Inc.; Trans Continental Leasing, LLC; Trans Continental Records, Inc.; Trans Continental Studios, Inc.; and Trans Continental Management, Inc.

[5] Amended Order Granting Substantive Consolidation of the Joint Debtors' Estates, Case No. 6:07-bk-00761, Doc. No. 3490. *See also* Amended Memorandum Opinion Granting Substantive Consolidation of the Joint Debtors' Estates, Case No. 6:07-bk-00761, Doc. No. 3489.

[6] The consolidation eliminated the "wrong payor" claims "because the consolidated estate will have received value in exchange for its transfer, and the consolidated estate will have realized a reduction in assets in exchange for its payment to the defendants." *In re Pearlman*, 462 B.R. 849, 852 (Bankr. M.D. Fla. 2012).

[7] Motion of Trustee for Leave to Amend the Complaint, Doc. No. 23.

[8] *Id.* at ¶ 4.

[9] Order Denying Motion to Amend Complaint, Doc. No. 27.

[10] Defendant's Motion for Summary Judgment, Doc. No. 34.

Constructively Fraudulent Transfers – 548(a)(1)(B) and FUFTA

In its motion, the Defendant asserts it provided reasonably equivalent value to the Debtors and that no material issues of fact remain. Under Federal Rule of Civil Procedure 56, made applicable by Federal Rule of Bankruptcy Procedure 7056, a court may grant summary judgment where "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."[11] The moving party has the burden of establishing the right to summary judgment.[12] Conclusory allegations by either party, without specific supporting facts, have no probative value.[13] In determining entitlement to summary judgment, "facts must be viewed in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts."[14] "Where the record, taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."[15]

Although the movant bears the initial burden to prove that no material issues of fact remains, a respondent also bears a burden in challenging a motion for summary judgment. The Supreme Court's discussion of this burden in *Celotex Corp. v. Catrett* provides analysis relevant to the present case:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which it has the burden of proof.[16]

[11] Fed. R. Civ. P. 56.
[12] *Fitzpatrick v. Schlitz (In re Schlitz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986).
[13] *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985).
[14] *Scott v. Harris*, 550 U.S. 372, 380 (2007).
[15] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).
[16] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

To recover the transfers under Bankruptcy Code section 548(a)(1)(B) and FUFTA as constructively fraudulent transfers, the Trustee must prove the Debtor "received less than a reasonably equivalent value in exchange for [the] transfer."[17] The burden of proving lack of "reasonably equivalent value" rests with the party challenging the transfer and is an element of the party's prima facie case.[18]

In its motion, the Defendant alleges the Debtors paid it for its "time, expertise, and services provided for the benefit of the Debtors," and the Debtors received reasonably equivalent value in the "benefit of the services performed, in exchange for the payments."[19] Further, affidavits by two of the Defendant's principals state that the Defendant provided accounting, tax, and consulting services to the Debtors.[20]

The Trustee failed to factually confront the reasonable value of the Defendant's services in its response.[21] Instead, the Trustee argues that the Ponzi scheme was ongoing while the Defendant provided accounting services to the Debtors, and because of the nature of Ponzi schemes the Debtors *could not* have received value. This is a purely legal argument—one this Court previously has rebuffed—and does not preclude entry of summary judgment. "Courts must assess value on a case-by-case basis looking at the surrounding circumstances and focusing on the precise transfer in question and not on the value of the transfer to the debtor's overall fraudulent enterprise."[22]

The Trustee goes to great lengths to differentiate 548(a)(1)(B)'s reasonably equivalent value component with the "for value and in good faith" defense of section 548(c). But the Trustee failed to address a very distinct difference between the two—the plaintiff bears the burden of proof for the

[17] 11 U.S.C. § 548(a)(1)(B)(i); Fla. Stat. 726.105(1)(b) & 726.106.
[18] *See Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.)*, 904 F.2d 588, 593-94 (11th Cir. 1990).
[19] Doc. No. 34, at 4.
[20] *See* Affidavit of Jorge Martinez, Ex. 1 to Defendant's Motion for Summary Judgment, Doc. No. 34-1; Affidavit of Harold Watsky, Ex. A to Defendant's Notice of Filing Affidavit of Harold Watsky, Doc. No. 39.
[21] *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Doc. No. 38.
[22] *In re World Vision Entm't, Inc.*, 275 B.R. 641, 657 (Bankr. M.D. Fla. 2002).

former, but the latter is an affirmative defense. Rather than prove his prima facie case, the Trustee argues the Defendant did not act in good faith. Lack of good faith, however, is a part of the 548(c) affirmative defense and is only relevant upon proof of the Trustee's allegations of constructive fraud.

The Trustee failed to establish a prima facie case or raise factual allegations to dispute whether the Debtors received reasonably equivalent value in return for Defendant's accounting services. Here, the Trustee does not argue the Defendant performed the services billed to the Debtors or that the rates were excessive. The Trustee simply argues bad faith, which is not determinative.

Upon considering the holding in *Celotex*, discussed above, the Defendant is entitled to judgment as a matter of law because the Trustee has failed to make a sufficient showing on an element essential to its case on which it bears the burden of proof: lack of reasonably equivalent value. This conclusion, coupled with the Trustee's admissions that "the constructive fraud claims which were viable when pled are no longer viable,"[23] mandates that this Court enter summary judgment in favor of the Defendant on the first and second counts of the complaint.

Unjust Enrichment

In the alternative, the Trustee pleaded a count of unjust enrichment. To maintain an unjust enrichment claim under Florida law, "a plaintiff must allege facts, if taken as true, would show: (1) a benefit was conferred upon the defendant; (2) the defendant either requested the benefit or knowingly and voluntarily accepted it; (3) a benefit flowed to the defendant; and (4) under the circumstances, it would be inequitable for the defendant to retain the benefit without paying the

[23] Motion of Trustee for Leave to Amend the Complaint, Doc. No. 23 at ¶ 4.

value thereof."[24]

The Trustee's constructive fraud claims and unjust enrichment claims go hand in hand.[25] Defendant argues it provided reasonably equivalent value to the Debtors, in the form of accounting services, in exchange for the transfers. The Trustee does not dispute that the Defendant provided the accounting services or factually confront the value of those services. Because the Debtors received value in exchange for the payments, this Court finds that it is not "inequitable" for the Defendant to retain the payments. Summary judgment on the third count is granted.

Defendant provided accounting services to the consolidated Debtors in return for the payments. The Trustee's original claims to claw back those payments were predicated on the "wrong payor" theory of recovery. But, by the Trustee's own admission, the substantive consolidation rendered these claims unviable. Defendant is "entitled to a judgment as a matter of law" because the Trustee failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof—lack of reasonably equivalent value. The motion is granted.

DONE AND ORDERED, in Orlando, Florida, on October 11, 2013.

KAREN S. JENNEMANN
Chief United States Bankruptcy Judge

[24] *In re Wiand*, 2007 WL 963165, at *5 (M.D. Fla. Mar. 27, 2007) (citing *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So. 2d 297, 303 (Fla. 1st DCA 1999)).

[25] "The doctrine of fraudulent conveyance rests on principles of unjust enrichment." *In re Operations NY LLC*, 490 B.R. 84 , 99 (Bankr. S.D.N.Y. 2013) (citing Restatement (Third) of Restitution & Unjust Enrichment § 48 cmt. A (2011)).