

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re:

Case No. 05-21668-PMG
Chapter 7

KEVIN CHRISTOPHER REILLY,

Debtor.

R. JAY HARPLEY,
CHAPTER 7 TRUSTEE,

Plaintiff,

v.

Adv. No. 06-00112

ELAINE V. KOSTAKIS,

Defendant.

**ORDER ON MOTION FOR SUMMARY
JUDGMENT ON TRUSTEE'S COMPLAINT TO
AVOID AND RECOVER PREFERENTIAL
TRANSFER AND FRAUDULENT TRANSFER**

THIS ADVERSARY PROCEEDING came before the Court for hearing to consider the Defendant's Motion for Summary Judgment on Trustee's Complaint to Avoid and Recover Preferential Transfer and Fraudulent Transfer, filed by the Defendant, Elaine Kostakis.

The plaintiff, R. Jay Harpley, as the Chapter 7 Trustee (Trustee), commenced this proceeding by filing Trustee's Complaint to Avoid and Recover Preferential Transfer and Fraudulent Transfer against Elaine V. Kostakis (Defendant), the former spouse of Kevin Christopher Reilly, the Debtor in this case.

Background

The Debtor filed his Chapter 7 bankruptcy petition on October 5, 2005. The Debtor did not list any transfers or payments to creditors in his Statement of Financial Affairs. The Debtor sold his residential property located at 531 Cedar Ridge Street, Shallotte, North Carolina, prior to the petition date. From the Debtor's testimony at his meeting of creditors on November 14, 2005, the closing

took place in March, 2005. The Debtor also testified at his meeting of creditors that he made a transfer of \$25,000.00 to the Defendant prior to the petition date, which both the Defendant and the Debtor have characterized as repayment for a loan. The transcript of the deposition of the Defendant on July 11, 2006, indicates that the Defendant made the loan in cash and the Debtor repaid the loan in cash on June 2, 2005. (Transcript of Deposition of Elaine V. Kostakis, July 11, 2006, Page 11, Lines 9-10 and Page 14, Lines 14-20.) The Defendant is the former spouse of the Debtor; they were divorced in 1984. (Kostakis Transcript, Page 8, Line 23.)

Neither the Debtor nor the Defendant has produced any documentation with regard to the original loan of \$25,000.00 and subsequent repayment. (Plaintiff's Amended Answers and Objections to Defendant's Request for Interrogatories, docket no. 9). The testimony of the Debtor at his creditors' meeting and the continuation of that meeting, and the testimony of the Defendant at her deposition are consistent in that they both contend that the transfer to the Defendant by the Debtor in June, 2005, was a repayment of loan and that the transaction was made in cash.

There are four counts of the Trustee's Complaint to Avoid and Recover Preferential Transfer and Fraudulent Transfer. In Count I the Trustee alleges that the transfer is a preferential transfer under §547 of the Bankruptcy Code. Count II contains allegations that the transfer is a fraudulent transfer under §548 of the Bankruptcy Code. In Count III, the Trustee seeks a determination that the transfer was fraudulent in violation of Florida Statutes Chapter 726 and avoidable pursuant to §§ 544 and 550 of the Bankruptcy Code. In Count IV the Trustee seeks a money judgment against the Defendant pursuant to 11 U.S.C. §550.

Defendant's Motion for Summary Judgment

The Defendant has filed a motion for summary judgment on all four counts of the Trustee's complaint. Transcripts of the §341 meetings of the Debtor and the deposition of the Defendant were submitted to the Court in support of the motion for summary judgment at the hearing. The Trustee did not file a response to the Defendant's Motion for Summary Judgment.

In Defendant's Motion for Summary Judgment, the Defendant is seeking the determination that, with regard to all four counts of the complaint, there is no genuine issue as to any material fact, and that the Defendant is entitled to judgment as a matter of law.

Bankruptcy Rule 7056 is applicable to this determination:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

As the party moving for summary judgment, the Defendant has the burden of demonstrating that there is no genuine issue as to any material fact. If there is a genuine dispute over a material fact, summary judgment may not be granted. As the Court makes this determination, the non-moving party is to be given the benefit of the doubt on all credibility issues and the benefit of any inferences that reasonably might be inferred from the evidence. In re Diagnostic Instrument Group, Inc., 283 B.R. 87, 94 (Bankr. M.D. Fla. 2002), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986).

There are two significant issues with regard to the various counts of the complaint and the Defendant's motion for summary judgment. The first issue is the nature of the transfer of the \$25,000 in cash from the Debtor to the Defendant in June, 2005. The characterization of this transfer is critical to the determination of the fraudulent transfer counts of the Trustee's complaint. Pursuant to 11 U.S.C. §548(a)(1)(B), the trustee may avoid certain transfers if the Debtor "received less than a reasonably equivalent value in exchange for such transfer..." The satisfaction of an antecedent debt of the Debtor is considered "value" pursuant to 11 U.S.C. §548(d)(2)(A). This language of "reasonably equivalent value" is also contained in Florida Statutes 726.105 and 726.106, which are incorporated in Count III of the Trustee's complaint.

Both the Debtor, at his creditors' meeting and at the continuation of that meeting, and the Defendant, at her deposition, testified that such payment was the repayment of an antecedent debt. However, in view of the lack of documentation and the large amount that was paid in cash, the Court must examine the circumstances surrounding the transfer. The form of the transfer does not establish its character as a repayment of a loan. The characterization of the \$25,000 cash transfer from the Debtor to the Defendant in June, 2005, as the repayment of an antecedent debt is an issue of fact that must be determined. See Carter v. Thompson, 808 F. Supp. 1548, 1552 (M.D. Fla. 1992), *citing* 12 C. Wright & A. Miller, *Federal*

Practice and Procedure, Advisory Committee Note to the 1963 Amendments of Rule 56, Appendix at 500 (1973). Accordingly, the Defendant's Motion for Summary Judgment with respect to the fraudulent transfer counts of the complaint should be denied.

The second issue with regard to the Defendant's Motion for Summary Judgment is whether the Defendant, as the former wife of the Debtor, would be considered an "insider" for purposes of avoiding a preferential transfer under 11 U.S.C. §547. If a transferee is considered an insider, a transfer made by the Debtor to such creditor/transferee may be avoided by the Trustee if it took place between 90 days and one year prior to the date of the filing of the petition. 11 U.S.C. §547(b)(4)(B). The transfer in this case was made approximately 95 days prior to the Debtor filing his bankruptcy petition.

The definition of insider pursuant to 11 U.S.C. §101(31) does not specifically include the Defendant, as a former spouse of the Debtor. However, a person other than those who are specifically enumerated as insiders may qualify as an "insider" with respect to a debtor in bankruptcy. The definition of insider pursuant to 11 U.S.C. §101(31) "includes" various individuals and entities; pursuant to 11 U.S.C. §102(3) "includes" is "not limiting." Walsh v. Dutil (In re Demko), 264 B.R. 404, 408 (Bankr. W.D. Penn. 2001); Barnhill v. Vaudreuil (In re Busconi), 177 B.R. 153, 158 (Bankr. D. Mass. 1995).

Many courts have analyzed personal relationships to determine whether "insider" status should be conferred on a creditor who received a transfer from a debtor in the one year preference period provided for in §547(b)(4)(B). Facts regarding the personal relationship between the debtor and creditor are critical to the issue of "insider" status. With regard to a former spouse, the court in Hunter v. Dupuis (In re Dupuis), 265 B.R. 878, 884 (Bankr. N.D. Ohio 2001) stated, "...a bald assertion that a transfer was made to a former-spouse does not subject that transaction to the one (1) year preference provided for in §547(b)(4)(B). Conversely, merely because a transfer was made to a former spouse does not mean that such a transfer automatically falls outside the scope of the one (1) year preference period." In a recent case, Salkin v. Chira (In re Chira), 353 B.R. 693, 725 (Bankr. S.D. Fla. 2006), Judge Olson determined that the ex-wife was an insider to the debtor; he analyzed the relationship of the debtor and his former wife by looking at whether "...their relationship puts the non-debtor party in a position to exercise some degree of control or influence over the [d]ebtor...."

Two recent decisions also analyze close relationships to determine whether a creditor is an "insider" for

preference avoidance purposes, citing the legislative history of §101(31) that an "insider" is "one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor." Marchand v. King (In re Lopresti), 2007 WL 2708605, *6 (Bankr. D.N.J.); Phongasavath v. Vongasamphanh (In re Phongasavath), 328 B.R. 895, 897 (Bankr. N.D. Ga. 2005) *citing* S.Rep. No. 95-989, 95th Cong.2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5810. Both courts agree that the existence of friendship is not enough to make a transferee an insider. In Marchand v. King (In re Lopresti), the Court found that despite the lack of romantic involvement between the debtor and creditor and the fact that they are not related, the creditor was an insider to the debtor and she gained preferential treatment because of her status and relationship with the debtor. Lopresti at *8. In Phongasavath v. Vongasamphanh (In re Phongasavath), the Court determined that it is a question of fact as to whether a *de facto* family relationship exists between a debtor and creditor such that "insider" status may be established for purposes of §547(b)(4)(B). Phongasavath at 898. *Also see Jensen v. Eck (In re Steele)*, 352 B.R 337, 339 (Bankr. M.D. Fla. 2006)("This Court is unwilling to expand significantly the definition [*of "insider" pursuant to §101(31)*] to include "friend.")

Accordingly, it is appropriate to deny the Defendant's Motion for Summary Judgment as to Count I of the Trustee's Complaint to Avoid and Recover Preferential Transfer and Fraudulent Transfer. The Court finds that whether the Defendant was an "insider" as such term is used in 11 U.S.C. §547(B)(4)(B) is a question of fact to be determined.

Conclusion

Although the Trustee did not file a response to the Defendant's Motion for Summary Judgment, the Defendant must nevertheless establish the lack of any genuine material triable issue of fact. In making this determination, the Court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought. In re O.P.M. Leasing Services, Inc., 28 B.R. 740, 746-7 (Bankr. S.D.N.Y. 1983). In this proceeding there are questions of fact as to whether the Debtor received "reasonably equivalent value" with regard to the transfer of the \$25,000 in cash to the Defendant and whether the Defendant would be considered an "insider" for preference avoidance purposes. Therefore, the Court determines that it is appropriate to deny the Defendant's Motion for Summary Judgment with regard to all counts of the Trustee's complaint.

Accordingly:

IT IS ORDERED that the Defendant's Motion for Summary Judgment is denied.

DATED this 27th day of March, 2007.

BY THE COURT

/s/ Paul M. Glenn

PAUL M. GLENN

Chief Bankruptcy Judge