

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

In re:

Case No. 3:10-bk-2805-PMG

Lydia Cladek, Inc.,

\_\_\_\_\_  
Debtor.

Chapter 11

Terry J. Soifer, not individually  
but as Creditor Agent for the  
Cladek Creditors Trust,

Plaintiff,

vs.

Adv. No. 3: 12-ap-518-PMG

Jose L. Miranda, Jr., Architect, P.A.  
d/b/a Miranda Architects  
a/k/a Miranda Stauffer Architects,  
a Florida corporation,

\_\_\_\_\_  
Defendant.

**ORDER ON (1) DEFENDANT’S MOTION FOR SUMMARY JUDGMENT, AND**

**THIS CASE** came before the Court for hearing to consider (1) the Motion of the Defendant, Jose L. Miranda, Jr., Architect, P.A., for Summary Judgment on Complaint, and (2) the Motion of the Plaintiff, Terry J. Soifer, not individually but as Creditor Agent of the Cladek Creditors Trust, for Summary Judgment.

The Plaintiff commenced this adversary proceeding by filing a Complaint to avoid and recover a total of 36 transfers from the Defendant. The action is brought pursuant to §544 and §550 of the Bankruptcy Code and Florida's fraudulent transfer statutes.

Generally, a trustee in bankruptcy may avoid and recover a fraudulent transfer from either the initial transferee, or from the immediate transferee of the initial transferee. Under Florida law and §550(b), however, a fraudulent transfer may not be recovered by the trustee if the transferee shows that it took the transfer for value and in good faith. In this case, the Court finds that five of the transfers are not avoidable as a matter of law, because they constitute exchanges for value and were not intended to defraud creditors. As to the remaining thirty-one transfers, the Court finds that factual disputes exist regarding the exchange of reasonably equivalent value and the statutory defense of value and good faith.

### **Background**

The Debtor, Lydia Cladek, Inc. (LCI), was engaged in the business of purchasing and collecting loan repayments on high interest automobile finance contracts. Lydia Cladek individually (Cladek) was the sole shareholder of LCI.

The Defendant, Jose L. Miranda, Jr., Architect, P.A., is an architectural firm. In 2003, LCI and the Defendant entered into a Standard Form of Agreement between Owner and Architect pursuant to which the Defendant agreed to provide architectural services for an office building in St. Augustine Beach, Florida. (Doc. 9, Affidavit of Jose L. Miranda, Exhibit 1).

Three years later, in 2006, Cladek and the Defendant entered into a Standard Form of Agreement between Owner and Architect pursuant to which the Defendant agreed to provide architectural services

for a single-family residence on Captiva Island, Florida. (Doc. 9, Affidavit of Jose L. Miranda, Exhibit 3).

LCI's Chapter 11 case was commenced in April of 2010. On February 16, 2011, the Court entered an Order Confirming the Amended Plan of Reorganization Submitted by the Official Committee of Unsecured Creditors in the Chapter 11 case. (Main Case Doc. 530). In accordance with the confirmed Plan and the Lydia Cladek, Inc. Trust Agreement attached to the Confirmation Order, the Plaintiff was appointed as the Creditor Agent of the Cladek Creditors Trust.

On July 25, 2012, the Plaintiff filed the Complaint that commenced this adversary proceeding. The Complaint contains three Counts.

In Counts I and II, the Plaintiff alleges that LCI made seven transfers to the Defendant between April of 2006 and June of 2008 in the total amount of \$58,693.80, and that these "Initial Transfers" are avoidable as constructive or actual fraudulent transfers pursuant to §544 and §550 of the Bankruptcy Code and §726.105, §726.106, and §726.108 of the Florida Statutes.

In Count III, the Plaintiff alleges that LCI originally made a series of avoidable transfers to Cladek individually, and that Cladek then used the funds to make twenty-nine "Subsequent Transfers" to the Defendant. The twenty-nine Subsequent Transfers were made between April of 2006 and February of 2009 in the total amount of \$250,139.70. According to the Plaintiff, these Subsequent Transfers to the Defendant are recoverable pursuant to §550(a) of the Bankruptcy Code, because the Defendant is the "immediate or mediate transferee" of transfers that were avoided by a prior Judgment.

In response, the Defendant asserts that the transfers may not be recovered by the Plaintiff because it received the transfers for value and in good faith within the meaning of the fraudulent conveyance

statutes and the defenses provided by §550(b) of the Bankruptcy Code and §726.109 of the Florida Statutes. According to the Defendant, the transfers were made in exchange for architectural services provided under the contracts with LCI and Cladek, and the Defendant had no knowledge or notice of the voidability of the transfers.

### **Discussion**

The Plaintiff and Defendant have filed cross motions for summary judgment with respect to the Complaint. Pursuant to Rule 56 of the Federal Rules of Civil Procedure, as made applicable to this proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure, “the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ. P. 56(a).

Under the circumstances of this case, the Court finds that five of the Initial Transfers are not recoverable as a matter of law because they constitute exchanges for value and were not intended to defraud creditors. As to the two remaining Initial Transfers and the twenty-nine Subsequent Transfers, the Court finds that factual disputes exist regarding the exchange of reasonably equivalent value and the statutory defense of value and good faith.

#### **A. Fraudulent transfers**

Under §544(b) of the Bankruptcy Code, a trustee has the power to avoid transfers of property of the debtor that are avoidable under state law. 11 U.S.C. §544(b). In this case, Florida law is the applicable state law, and §726.105 and §726.106 of the Florida Statutes allow creditors to avoid transfers that are actually or constructively fraudulent.

Section 726.105 provides that a transfer of property of the debtor is fraudulent if it is made with “actual intent to hinder, delay, or defraud” a creditor. Fla. Stat. §726.105(1)(a). Sections 726.105(1)(b) and 726.106(1) provide that a transfer is fraudulent if it is made by a debtor without receiving reasonably equivalent value in exchange for the transfer, and while the debtor was insolvent or about to become insolvent. In re Taylor, Bean & Whitaker Mortgage Corporation, 2012 WL 2369331 (Bankr. M.D. Fla.); In re Amelung, 2010 WL 1417742 (Bankr. S.D. Fla.).

If a transfer is determined to be fraudulent under §726.105 or §726.106, the creditor’s state law remedy is found in §726.108 of the Florida Statutes, which provides for the avoidance of the fraudulent transfer. Fla. Stat. §726.108(1). If a transfer is avoidable under §726.108(1), it may be avoided by a trustee in bankruptcy pursuant to §544(b) of the Bankruptcy Code.

To the extent that a transfer is avoided under §544 and a state law such as §726.108(1), §550 of the Bankruptcy Code provides that a trustee may recover the transferred property for the benefit of the estate. 11 U.S.C. §550(a). Under §550(a), the trustee may recover the transferred property either from the initial transferee, or from any “immediate or mediate transferee” of the initial transferee. 11 U.S.C. §550(a)(2).

**B. For value and in good faith**

A trustee may not generally recover an allegedly fraudulent transfer, however, where the transferee received the transfer for value and in good faith.

If the transferee provided reasonably equivalent value in exchange for the transfer, of course, the transfer may not be avoided as constructively fraudulent, since the absence of reasonably equivalent value is an element of the cause of action. In re Amelung, 2010 WL 1417742, at 3.

Additionally, §726.109(1) of the Florida Statutes provides that a transfer is not avoidable as actually fraudulent under §726.105(1)(a) “against a person who took in good faith and for a reasonably equivalent value.” Fla. Stat. §726.109(1). The statute provides “an affirmative defense to actual fraud for individuals to whom the debtor’s property is transferred, to the extent the individuals provided the debtor value in exchange for the transfers, and if they took the property in good faith.” In re Pearlman, 440 B.R. 900, 905-06 (Bankr. M.D. Fla. 2010).

Further, with respect to subsequent transfers to any immediate or mediate transferee, §550(b)(1) provides that the trustee may not recover from “a transferee that takes for value, . . . , in good faith, and without knowledge of the voidability of the transfer avoided.” 11 U.S.C. §550(b)(1). While an initial transferee may be liable under Bankruptcy Code section 550 for the value of the property transferred, “a trustee may not recover an avoidable transfer from any *immediate* transferee if the immediate transferee took the transfer (1) for value, (2) in good faith, and (3) without knowledge of the voidability of the transfers.” In re Key Developers Group, LLC, 449 B.R. 148, 152 (Bankr. M.D. Fla. 2011)(Emphasis in original).

In determining whether a transferee took the transfer in “good faith,” courts generally consider whether the transferee had knowledge of circumstances that would have induced an ordinarily prudent person to inquire as to the transferor’s purpose. In re Pearlman, 440 B.R. at 906(quoting Wiand v. Waxenberg, 611 F.Supp.2d 1299, 1319-20 (M.D. Fla. 2009)). In other words, a transferee does not take in “good faith” under §550(b) if it knew or should have known that it was not trading normally, but that the purpose of the transaction for the debtor was to defraud the debtor’s creditors. In re Key Developers Group, 449 B.R. at 153(quoting In re Smoot, 265 B.R. 128, 140 (Bankr. E.D. Va. 1999)). **Application**

In this case, the Plaintiff alleges that the Initial Transfers may be recovered from the Defendant because they were actually or constructively fraudulent, and that the Subsequent Transfers may be recovered from the Defendant because the original transfers to Cladek were avoided, and the Defendant is the “immediate or mediate transferee” of Cladek.

**A. Counts I and II**

Counts I and II of the Complaint involve seven transfers (the Initial Transfers) that were made from LCI to the Defendant by checks that were dated between April 5, 2006, and June 26, 2008. The amount of the checks ranged from \$389.53 to \$22,256.81, and totaled the sum of \$58,693.80. In Count I of the Complaint, the Plaintiff alleges that LCI did not receive reasonably equivalent value in exchange for the Initial Transfers and that LCI was insolvent at the time of the payments. In Count II, the Plaintiff alleges that the seven Initial Transfers were made with the actual intent to hinder, delay, or defraud the creditors of LCI.

The record shows that five of the seven checks (Check Numbers 32634, 34651, 35652, 39738, and 58953) represented LCI’s payment of invoices that the Defendant had sent to LCI for architectural services performed by the Defendant pursuant to its written Agreement with LCI. The record also shows that the five checks were dated within thirty days of the date of the corresponding invoice. (Doc. 9, Affidavit of Jose L. Miranda, Jr., Exhibits 2, 5). The Plaintiff does not contend that the Defendant did not perform the architectural services reflected in the invoices.

For these reasons, the Court finds that the five transfers evidenced by Check Numbers 32634, 34651, 35652, 39738, and 58953 were not constructively fraudulent because LCI received reasonably

equivalent value in exchange for the transfers, and that the transfers were not actually fraudulent because they were not made with the intent to defraud LCI's creditors.

The other two Initial Transfers are evidenced by LCI's Check Number 2902 dated November 3, 2006, in the amount of \$22,256.81, and LCI's Check Number 2784 dated December 23, 2006, in the amount of \$21,875.00.

The Defendant acknowledges that these two checks were received from LCI in payment of invoices that it submitted to Cladek individually, for architectural services performed by the Defendant pursuant to its written agreement with Cladek. (Doc. 9, Affidavit of Jose L. Miranda, Jr., ¶ 10). In other words, LCI paid for the Defendant's architectural services with the two checks, even though the Defendant did not perform the services pursuant to its contract with LCI and did not bill LCI for the services. Additionally, it appears that the invoice paid by Check Number 2784 was marked "Second Notice," and that the payment may have been made more than thirty days after the date of the original invoice. (Doc. 9, Affidavit of Jose L. Miranda, Exhibit 4).

Since LCI used the two checks to pay for services provided to its insider, and since the payments were not made in the ordinary course of business, the Plaintiff asserts that LCI made the transfers with the intent to defraud its creditors and without obtaining reasonably equivalent value in exchange for the payments.

The Defendant contends, however, that LCI received value in connection with its contract with Cladek, because the project included a home office that Cladek intended to use in her operation of LCI's business. (Doc. 23, Affidavit of Jose L. Miranda, ¶¶ 6, 14, 16, 17, and 18). The Defendant also contends that it had no reason to inquire as to LCI's purpose in writing Check Number 2902 and Check

Number 2784, because (1) LCI would receive a benefit from the home office, (2) the Defendant routinely receives checks from third parties, and (3) it was not unusual in certain circumstances for a payment to be made more than thirty days after the invoice. (Doc. 23, Affidavit of Jose L. Miranda, ¶¶ 10, 11, 12, and 16).

For these reasons, the Defendant asserts that the transfers evidenced by the two checks may not be avoided as constructively fraudulent under §726.105(1)(b) and §726.106(1) of the Florida Statutes, because LCI received reasonably equivalent value in exchange for the transfers. Further, the Defendant asserts that the transfers may not be recovered as actually fraudulent transfers under §726.105(1)(a) of the Florida Statutes, because it received the transfers for value and in good faith within the meaning of the “good faith” defense of §726.109 of the Florida Statutes. See In re Phoenix Diversified Investment Corp., 2011 WL 2182881, at 5 (Bankr. S.D. Fla.).

The matters presented by the Defendant with respect to Check Number 2902 and Check Number 2784 are factual disputes that cannot be determined on the record. Accordingly, the entry of a summary judgment is not appropriate as to the transfers evidenced by Check Number 2902 and Check Number 2784, since factual disputes exist regarding the exchange of reasonably equivalent value and the statutory defense of value and good faith.

### **B. Count III**

Count III of the Complaint involves twenty-nine transfers (the Subsequent Transfers) that were made from Cladek to the Defendant by checks that were dated between April 17, 2006, and February 20, 2009. The amount of the checks ranged from \$113.34 to \$23,005.28, and totaled the sum of \$250,139.70.

In Count III of the Complaint, the Plaintiff alleges that LCI originally made a series of avoidable transfers to Cladek individually, and that Cladek then used the funds to make the Subsequent Transfers to the Defendant. According to the Plaintiff, the Subsequent Transfers are recoverable pursuant to §550(a) of the Bankruptcy Code, because the Defendant is the “immediate or mediate transferee” of transfers that were avoided by a Final Judgment that was entered on September 7, 2010. Pursuant to the prior Judgment, all transfers made by LCI to Cladek within four years before the bankruptcy petition date were avoided as fraudulent transfers. (Adv. 10-248, Doc. 40, ¶ 21).

The record shows that all of the Subsequent Transfers are evidenced by checks written by Cladek for payment of invoices that the Defendant had sent to Cladek, individually, pursuant to the written Agreement between the Defendant and Cladek. (Doc. 9, Affidavit of Jose L. Miranda, Jr.). Since the payments were made in exchange for architectural services performed under the Agreement, and since the payments were all made by the individual who was billed in the invoices, the Defendant contends that the good faith defense of §550(b)(1) prevents the Plaintiff from recovering the Subsequent Transfers.

Under the good faith defense, the Plaintiff may not recover transfers from a subsequent transferee who takes for value, in good faith, and without knowledge of the voidability of the original transfers. 11 U.S.C. §550(b)(1).

In this case, however, the Plaintiff asserts that the project that was the subject of the architectural agreement with Cladek was never completed, and that the construction site remains vacant. Consequently, the Plaintiff asserts that a factual dispute exists regarding whether the Defendant provided any value in exchange for the payments from Cladek. See In re Rothstein Rosenfeldt Adler,

PA, 2012 WL 6041275, at 6 (Bankr. S.D. Fla.)(The inquiry under §550 is what the transferee provided, not what the debtor received.).

Additionally, the Plaintiff asserts that the Defendant accepted two checks from LCI in payment of invoices sent to Cladek individually, and that at least one of the payments was not timely. According to the Plaintiff, the receipt of untimely payments from a third party shows that the Defendant was on inquiry notice of LCI's financial circumstances, and that the Defendant did not receive the Subsequent Transfers in good faith. (Doc. 24, ¶ 22). See In re Key Developers Group, LLC, 449 B.R. at 153(A lack of good faith may be shown by the subsequent transferee's knowledge of the debtor's financial difficulties, together with the irregular nature of the transaction and the original transferee's status as an insider.); and In re Enron Corp., 2005 WL 3832053, at 21 (Bankr. S.D.N.Y.)(A subsequent transferee may lack good faith if he has sufficient knowledge to place him on inquiry notice of the debtor's possible insolvency.).

The matters presented by the Plaintiff with respect to the Subsequent Transfers are factual disputes that cannot be determined on the record. Accordingly, the entry of a summary judgment is not appropriate as to the Subsequent Transfers, since factual disputes exist regarding whether the Defendant provided value in exchange for the payments, and whether the Defendant received the transfers for value and in good faith within the meaning of §550(b) of the Bankruptcy Code.

### **Conclusion**

The Plaintiff commenced this adversary proceeding by filing a Complaint to avoid and recover a total of 36 transfers from the Defendant. The action is brought pursuant to §544 and §550 of the Bankruptcy Code and Florida's fraudulent transfer statutes.

Generally, a trustee in bankruptcy may avoid and recover a fraudulent transfer from either the initial transferee, or from an immediate transferee of the initial transferee. Under Florida law and §550(b), however, the transfers may not be recovered by the trustee if the transferee shows that it took the transfers for value and in good faith.

In this case, the Court finds that five of the transfers are not avoidable as a matter of law, because they constitute exchanges for value and were not intended to defraud creditors. As to the remaining thirty-one transfers, the Court finds that factual disputes exist regarding the exchange of reasonably equivalent value and the statutory defense of value and good faith.

Accordingly:

**IT IS ORDERED** that:

1. The Motion of the Defendant, Jose L. Miranda, Jr., Architect, P.A., for Summary Judgment on Complaint, is granted as to the five Initial Transfers identified by Check Numbers 32634, 34651, 35652, 39738, and 58953, and those five Initial Transfers are not avoidable pursuant to §544 of the Bankruptcy Code or §726.105 and §726.106 of the Florida Statutes. The Defendant's Motion for Summary Judgment is otherwise denied.

2. The Motion of the Plaintiff, Terry J. Soifer, not individually but as Creditor Agent of the Cladek Creditors Trust, for Summary Judgment is denied.

**DATED** this 9 day of January, 2013.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN

United States Bankruptcy Judge