

**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-137-PMG

Allain Girouard, individually and as trustee
of the Allain A. Girouard MD PA
Profit Sharing Plan & Trust,
and Renell Girouard,

Defendants.

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS CASE came before the Court for hearing to consider the Motion for Summary Judgment filed by the Plaintiff, Terry J. Soifer, not individually but as Creditor Agent for the Cladek Creditors Trust for the bankruptcy estate of Lydia Cladek, Inc.

The Plaintiff commenced this action by filing a Complaint to avoid a fraudulent transfer, and to recover the transfer from the Defendants pursuant to the Bankruptcy Code and Florida law.

Under §550(a)(1) of the Bankruptcy Code, a trustee may recover fraudulently-transferred funds from the “initial transferee” of the transfer, or from the entity for whose benefit the transfer was made. In this case, the Court cannot determine whether Renell Girouard is the “initial transferee” of the transfer, or a mere conduit of the transferred funds. Also, the Court cannot determine whether Allain Girouard is the beneficial recipient of the funds, or whether he received the funds only as a fiduciary for the Allain A. Girouard MD PA Profit Sharing Plan & Trust.

Additionally, 11 U.S.C. §548(c) and Fla. Stat. §726.109(1) provide transferees with a defense to fraudulent transfer actions based on actual fraud, if the transferees gave value in exchange for the transfer and acted in good faith. In this case, the Court cannot determine whether the Defendants received the transfer for value and in good faith pursuant to the defense provided by §548(c) and §726.109(1).

Because there are genuine disputes of material fact in this case, the Plaintiff’s Motion for Summary Judgment should be denied.

Background

The Debtor, Lydia Cladek, Inc., was engaged in the business of purchasing high interest automobile installment contracts from car dealers at a discounted price, and collecting payments from the borrowers under the contracts. (Complaint, ¶ 15).

The Debtor was operated as a Ponzi scheme. (Main Case, Doc. 530, Order Confirming Plan, ¶ 15)(“Upon the evidence presented at the hearing the Court finds and concludes that Lydia Cladek, Inc. was operated as a Ponzi Scheme.”).

“According to the Debtor’s books and records, during the course of Defendants’ relationship with the Debtor, the Defendant Allain A. Girouard, MD, PA, Profit Sharing Plan & Trust invested a total of \$748,787.42 with [the Debtor]”. (Doc. 7, Joint Pretrial Report, Undisputed Facts, ¶ 17). The investment was made through a series of “deposits” beginning on February 1, 2005, and ending on August 23, 2007. (Complaint, Exhibit A; Doc. 24, Motion for Summary Judgment, Exhibit A, Affidavit of Edward W. Buttner, IV, ¶ 4).

On July 30, 2008, the Debtor made a wire transfer in the amount of \$945,000.00 to an account at Compass Bank owned by Renell Girouard. (Doc. 7, Joint Pretrial Report, Undisputed Facts, ¶ 16).

On April 2, 2010, an involuntary bankruptcy petition was filed against the Debtor, and on April 5, 2010, the Debtor filed a voluntary Chapter 11 petition.

On February 16, 2011, the Court entered an Order Confirming the Amended Plan of Reorganization Submitted by the Official Committee of Unsecured Creditors, and the Plaintiff was appointed as the Creditor Agent and representative of the estate with the power to enforce the estate’s causes of action. (Main Case, Doc. 530).

On February 8, 2012, the Plaintiff filed a Complaint against the Defendants to Avoid and Recover Fraudulent Transfers Pursuant to 11 U.S.C. §§544, 548, and 550 and Fla. Stat. §§726.105, 726.106, and 726.108. (Doc. 1). The focus of the fraudulent transfer action is found at Paragraph 23 of the Complaint, which alleges:

[D]uring the course of Defendants’ relationship with the Debtor, (i) the Defendant Allain A. Girouard paid a total of \$748,787.42 to the Debtor; and (ii) the Defendants received the benefit of a total of \$945,000.00. Therefore, the Debtor made a transfer to or for the benefit of Defendants totaling \$196,212.58 in excess of what Defendant Allain A. Girouard paid to the Debtor (the “Profit Payment”).

(Complaint, ¶ 23). The Plaintiff seeks to avoid and recover the Profit Payment from the Defendants as an actually fraudulent transfer under §548(a)(1)(A) of the Bankruptcy Code and §726.105(1)(a) of the Florida Statutes, and as a constructively fraudulent transfer under §548(a)(1)(B) of the Bankruptcy Code and §726.105(1)(b) of the Florida Statutes.

Discussion

With respect to actually fraudulent transfers under §548 and Florida law, a plaintiff must show that (1) the debtor transferred an interest in property, and that (2) the transfer was made with the actual intent to hinder, delay, or defraud creditors. In cases involving Ponzi schemes, courts typically infer fraudulent intent because such a scheme is fraudulent by definition. “For that reason, ‘any acts taken in furtherance of [a] Ponzi scheme . . . are also fraudulent. Every payment made by the debtor to keep the scheme ongoing [is] made with actual intent to hinder, delay, or defraud creditors, primarily the new investors.’” In re Pearlman, 472 B.R. 115, 123-24 (Bankr. M.D. Fla. 2012).

With respect to constructively fraudulent transfers under §548 and Florida law, a plaintiff must show that (1) there was a transfer of an interest in the debtor’s property within two (or four) years of the petition, (2) the debtor received less than reasonably equivalent value in exchange for the transfer, and (3) the debtor was insolvent on the date that the transfer was made. In cases involving Ponzi schemes, courts typically find that the debtor receives “value” for any transfers up to the amount of the transferee’s principal investment, but that a debtor’s transfers in excess of the investor’s principal investment are not made for value and may be subject to recovery by the trustee. In re Pearlman, 472 B.R. at 124-25.

In this case, the Court has found that the Debtor was operated as a Ponzi scheme. (Main Case, Doc. 539, ¶ 15). The Plaintiff alleges that the Defendants received a transfer from the Debtor that exceeded the Defendant's advances by the sum of \$196,212.58 (the Profit Payment), that the primary source of the Profit Payment was the investment of other investors, and that the Profit Payment was made in furtherance of the Ponzi scheme. (Doc. 24, ¶¶ 20, 29; Affidavit of Buttner, ¶¶ 13, 14). Accordingly, the Plaintiff seeks to recover the Profit Payment as an actually and constructively fraudulent transfer under §548 and §550 of the Bankruptcy Code and Florida law.

In the Motion for Summary Judgment currently under consideration, the Plaintiff asserts that he is entitled to a judgment in his favor on the fraudulent transfer claims because "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." F.R.Civ.P. 56(a).

The Motion should be denied. Based on the record, it appears that issues of fact exist regarding (1) whether the Defendants are initial transferees or beneficial recipients of the transfer pursuant to §550(a)(1) of the Bankruptcy Code, and (2) whether the Defendants received the transfer for value and in good faith pursuant to the defense provided by §548(c) of the Bankruptcy Code and §726.109(1) of the Florida Statutes.

A. Section 550(a)(1)

In his Complaint, the Plaintiff seeks to recover the transfer from the Defendants pursuant to §550 of the Bankruptcy Code. Section 550(a)(1) provides that a trustee may recover fraudulently-transferred funds from the "initial transferee" of the transfer, or from the entity for whose benefit the transfer was made. 11 U.S.C. §550(a)(1).

First, the Plaintiff asserts that the transfer was made to an account owned by Renell Girouard, and that he may therefore recover the transfer from Renell Girouard as the initial transferee under §550(a)(1). In their Answer to the Complaint, the Defendants assert as an Affirmative Defense:

At best, Renell Girouard was a conduit for funds passing to Allain Girouard or The Allain A. Girouard MD PA Profit Sharing Plan & Trust. Renell Girouard never received any funds from Cladek or her business ventures, was not an employee, owner, manager, or agent for The Allain A. Girouard MD PA Profit Sharing Plan & Trust or for Allain A. Girouard MD PA.

(Doc. 4, p. 6). In response to the Affirmative Defense, the Plaintiff asserts that Renell Girouard was not a “mere conduit,” but was instead the initial transferee of the funds. (Doc. 24, ¶ 56).

In the Eleventh Circuit, three factors are generally considered in determining whether an entity is an “initial transferee” for purposes of recovery under §550(a)(1). First, the Court considers whether the entity is the first recipient of the debtor’s fraudulently-transferred funds. Second, the Court considers whether the entity is a “mere conduit,” with no control over the transferred funds. And third, the Court considers whether the entity has acted without bad faith, and is simply an innocent participant to the fraudulent transfer. In re ATM Financial Services, LLC, 446 B.R. 564, 569 (Bankr. M.D. Fla. 2011)(citing In re Harwell, 628 F.3d 1312 (11th Cir. 2010)). In establishing these three factors, the Eleventh Circuit Court of Appeals has concluded that:

[I]nitial recipients of the debtor’s fraudulently-transferred funds who seek to take advantage of equitable exceptions to §550’s statutory language must establish (1) that they did not have control over the assets received, i.e., that they merely served as a conduit for the assets that were under the actual control of the debtor-transferor *and* (2) that they acted in good faith and as an innocent participant in the fraudulent transfer.

In re Harwell, 628 F.3d 1312, 1323 (11th Cir. 2010)(Emphasis in original). The analysis established by the Eleventh Circuit is a “judicially created, equitable exception to the literal statutory language of

“initial transferee.”” In re Florida Manufacturing & Distribution, 484 B.R. 847, 852-53 (Bankr. S.D. Fla. 2012).

In this case, the Court cannot determine whether Renell Girouard is an “initial transferee” or a “mere conduit” of the transferred funds. In his Motion for Summary Judgment, the Plaintiff contends that the funds were transferred to an account in her name, that she had “dominion and control” over the funds, that she had the ability to use the funds for her own benefit, and that “nothing in the record indicates that Ms. Girouard’s account at Compass Bank was owned or controlled by any individual other than Ms. Girouard.” (Doc. 24, ¶ 59). In response to the Motion for Summary Judgment, the Defendants assert:

9. Renelle Girouard, was not and [sic] an employee of A. Girouard MD PA and did no action that would leave to believe that she was an implied employee or officer of the company, and had no ownership or right to any monies in the Girouard Profit sharing plan. The error was at LCI and was asked to be corrected in less than 24 hours. She had invested substantial monies of her father’s inheritance upon his death and subsequently donated it to the children trust fund. She was still in the computer thus when she came to get the check that was requested via telephone that morning from the defendant, an error was made by Lydia Cladek Inc. She retained none of the funds and should be dismissed.

(Doc. 31, ¶ 9). Based on the record, therefore, the Court cannot determine whether Renell Girouard had control over the funds after they were wire transferred to her account, as asserted by the Plaintiff, or whether she never had the right to allocate the funds that were mistakenly sent to her account, as asserted by the Defendants. In fact, according to the Joint Pretrial Report submitted by both parties, a “contested fact” in this case is “whether Defendant Renell Girouard received the Transfer as a mere conduit for Defendant Allain Girouard.” (Doc. 7, p. 6).

Second, the Plaintiff contends that he may recover the transfer from Allain Girouard as “the entity for whose benefit the transfer was made” within the meaning of §550(a)(1). According to the Plaintiff, the transfer was made for the benefit of Allain Girouard “on account of his principal investment with the Debtor,” and Allain Girouard is the “undisputed beneficial recipient” of the transfer. (Doc. 24, ¶¶ 19, 60).

The Defendants contend, on the other hand, that Allain Girouard closed his physical therapy practice in April of 2012, that he had a fiduciary obligation to pay his employees after closure, and that employees were paid according to their vested interests. (Doc. 31, ¶ 6). (See also, Exhibit K, to Doc. 31, Affidavit of Evelyn Atkins, ¶ 3)(Dr. Girouard “had a fiduciary [sic] responsibility per his sharing plan to give his employees their monies upon their request.”).

The parties agree that the entity that invested funds with the Debtor was the Allain A. Girouard, MD, PA, Profit Sharing Plan & Trust. (Doc. 7, Joint Pretrial Report, Undisputed Facts, ¶ 17). The Plaintiff acknowledges that the allegedly fraudulent transfer was made “on account of” the Profit Sharing Plan & Trust’s investment. (Doc. 24, Motion for Summary Judgment, Exhibit A, Affidavit of Buttner, ¶ 5). Consequently, the Court cannot determine whether Allain Girouard was the entity for whose benefit the transfer was made, or whether Allain Girouard received the funds only in his fiduciary capacity as trustee of the Profit Sharing Plan.

For these reasons, the Court finds that genuine disputes of material fact exist regarding whether the Plaintiff may recover the transfer from Renell Girouard as the initial transferee of the transfer, and from Allain Girouard as the entity for whose benefit the transfer was made, under §550(a)(1) of the Bankruptcy Code.

B. The good faith defense

In their Answer to the Plaintiff's Complaint, the Defendants assert as an Affirmative Defense that they "accepted any and all transfers in good faith and for value pursuant to 11 U.S.C. §548(c)." (Doc. 4, p. 5).

Section 548(c) of the Bankruptcy Code provides that a transferee of a fraudulent transfer "that takes for value and in good faith" may retain any interest transferred to the extent of the value given. 11 U.S.C. §548(c).

Section 726.109(1) of the Florida Statutes provides that a fraudulent transfer under §726.105(1)(a) is not voidable "against a person who took in good faith and for a reasonably equivalent value." Fla. Stat. §726.109(1).

"Both of these statutes 'provide 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)(quoting In re Evergreen Security, Ltd., 319 B.R. 245, 254 (Bankr. M.D. Fla. 2003)).

In this case, the Plaintiff does not dispute that the Defendants received the transfer in good faith. (Doc. 24, ¶ 52). The Plaintiff contends, however, that the Defendants cannot satisfy the "value" prong of the affirmative defense, because they received a return from the Debtor that exceeded the principal investment. "In the case of Ponzi schemes, the general rule is that a defrauded investor gives 'value' to the Debtor in exchange for a return of the principal amount of the investment, but not as to any payments in excess of principal." Perkins v. Haines, 661 F.3d 623, 627 (11th Cir. 2011).

The parties have agreed that “during the course of the Defendants’ relationship with the Debtor, the Defendant Allain A. Girouard, MD, PA, Profit Sharing Plan & Trust invested a total of \$748,787.42” with the Debtor, and that the Debtor transferred the sum of \$945,000.00 “to an account at Compass bank owned by Renell Girouard.” (Doc. 7, Joint Pretrial Report, Undisputed Facts, p¶ 16, 17). The Defendants dispute the amount that they actually received as the recipients of the transfer, however, because of the vested interests of the employees who participated in the Plan. (Doc. 31, ¶ 6). According to the Defendants, the amounts paid to employees with vested interests in the Plan should be subtracted from the total amount of the transfer before calculating the amount received by the Defendants.

As shown above, a genuine dispute exists in this case regarding whether Allain Girouard received the funds as the beneficial recipient of the transfer, or whether he received the funds only in his fiduciary capacity as trustee of the Profit Sharing Plan. Based on the current record, the Court cannot determine whether the dispute affects the computation of excess “value” for purposes of the affirmative defense provided by §548(c) and §726.109(1).

Conclusion

The Plaintiff commenced this action by filing a Complaint to avoid a fraudulent transfer, and to recover the transfer from the Defendants pursuant to the Bankruptcy Code and Florida law.

Under §550(a)(1) of the Bankruptcy Code, a trustee may recover fraudulently-transferred funds from the “initial transferee” of the transfer, or from the entity for whose benefit the transfer was made. In this case, the Court cannot determine whether Renell Girouard is the “initial transferee” of the transfer, or a mere conduit of the transferred funds. Also, the Court cannot determine whether Allain

Girouard is the beneficial recipient of the funds, or whether he received the funds only as a fiduciary for the Allain A. Girouard MD PA Profit Sharing Plan & Trust.

Additionally, 11 U.S.C. §548(c) and Fla. Stat. §726.109(1) provide transferees with a defense to fraudulent transfer actions based on actual fraud, if the transferees gave value in exchange for the transfer and acted in good faith. In this case, the Court cannot determine whether the Defendants received the transfer for value and in good faith pursuant to the defense provided by §548(c) and §726.109(1).

Because there are genuine disputes of material fact in this case, the Plaintiff's Motion for Summary Judgment should be denied.

Accordingly:

IT IS ORDERED that the Motion for Summary Judgment filed by the Plaintiff, Terry J. Soifer, not individually but as Creditor Agent for the Cladek Creditors Trust for the bankruptcy estate of Lydia Cladek, Inc., is denied.

DATED this 2 day of July, 2013.

BY THE COURT

Paul M. Glenn

PAUL M. GLENN
United States Bankruptcy Judge