UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:	)	Case No. 3:08-bk-02595-JAF
KEVIN DARRELL KRONK and BRENDA H. KRONK,	)	Chapter 7
Debtors.	)	
ROBERT ALTMAN, AS CHAPTER 7 TRUSTEE,	)	
Plaintiff,	)	
v.	)	Adv. No. 3:08-ap-257-JAF
SOUTHLAND HOMES CORP.	)	
Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This adversary proceeding came before the Court upon a complaint filed by Robert Altman, the Chapter 7 Trustee ("Plaintiff"), to avoid the transfer of property from Debtors to Southland Homes Corp. ("Defendant") pursuant to 11 U.S.C. § 548 and to recover the property pursuant to § 550. The Court conducted a trial of the adversary proceeding on June 30, 2009. In lieu of oral argument, the Court directed the parties to submit memoranda in support of their respective positions. Upon the evidence presented and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Facts

Debtor Kevin Kronk was the sole owner and president of Brentwood Homes, Inc. ("Brentwood"). (Tr. at 21.) Debtor Brenda Kronk was an officer. (Id.) Brentwood was a residential, multi-family construction company in Volusia and Flagler Counties. (Id.) Defendant is a home builder in Debary, Florida and has been in business since 1994. (Tr. at 82.) Ray Haygood, Brenda Kronk's uncle, has been the president of Defendant since its inception. (Id.)

On March 15, 2006 Brentwood purchased sixteen vacant residential lots located in Volusia County (the "Trail West Lots") from Defendant for $800,000.00. (Pl.'s Ex. 4.) Brentwood paid Defendant $80,000.00 cash for the Trail West Lots and financed the balance of the purchase price through a $600,000.00 loan from Harbor Federal Savings Bank, secured by a first mortgage on the Trail West Lots (the "Harbor Federal Mortgage"). (Pl.'s Exs. 4, 7.) Debtors personally guaranteed repayment of the Harbor Federal Mortgage.

Brentwood financed the balance of the purchase price through a $120,000.00 purchase money loan from Defendant. (Pl.'s Exs. 5, 6.) The Southland purchase money loan was evidenced by a Mortgage Note dated March 16, 2006 executed by Debtors individually and in their corporate capacity (the "Southland Note") and was secured by a second mortgage on the Trail West Lots. (Id.) Monthly interest payments of approximately $1,000.00 on the Southland Note were due on the first day of each month, with a balloon payment of the entire principal balance plus any accrued interest due on September 15, 2007. (Pl.'s. Ex. 5.)

Brentwood purchased the Trail West Lots for the purpose of building sixteen townhomes on the property. The construction never commenced. Brentwood defaulted on the Harbor Federal Mortgage by failing to make the interest installment payment due on October 1, 2006 and any subsequent payments. (Tr. at 27-28; Pl.'s Ex. 12.) Brentwood made the October 2006 payment on the Southland Note but defaulted on the Southland Note by failing to make the November 2006 payment. (Tr. at 28.)

Following the payment default, Mr. Haygood contacted Mr. Kronk to address the situation. (Tr. at 89.) The parties agreed that Debtors would satisfy their indebtedness to Defendant through a conveyance of property sold to Defendant. (Tr. at 119-120.) On January 2, 2007 Debtors entered into a contract with Defendant by which they agreed to sell to Defendant a lot which they owned in Ormond Beach, Florida ("Lot 45".) (Pl.'s Ex. 8.) Lot 45 was Debtors' only material unencumbered non-exempt asset. Mr. Kronk believed that the satisfaction of the Southland Note plus $15,000.00 in cash would be fair consideration for the transfer. (Tr. at 112.)

The contract states on the first page that the purchase price would be $142,562.38. (Pl.'s Ex. 8.) The contract states on another page that the purchase price would be $142,587.38, representing the sum of $120,000.00 to satisfy the Southland Note, $2,940.00 to pay accrued interest on the Southland Note, $1,933.50 for closing costs, $2,713.00 for 2006 real estate taxes on Lot 45, and $15,000.00 in cash. (Id.)

Debtors transferred lot 45 to Defendant on the same day the contract was signed. (Tr. at 29-30.) The HUD-1 Closing Statement indicates that the contract sales price was $137,940.06. (Pl.'s Ex. 9.) At the time Debtors transferred Lot 45 to Defendant, they

intended to surrender the Trail West Lots to Harbor Federal to satisfy the Harbor Federal Mortgage. (Tr. at 52.)

At the time Debtors transferred Lot 45 to Defendant, Debtors had a for-sale sign on the lot, with a $230,000.00 asking price. (Tr. at 35-36.) Mr. Kronk testified that he believed Lot 45 was worth between $100,000.00 to $150,000.00 when he sold it to Defendant. (Tr. at 37.) Mr. Haygood's testimony as to the value of Lot 45 varied. Initially he testified that he believed the "agreed-to" value of Lot 45 at the time it was transferred to Defendant was $175,000.00. (Tr. at 104.) He later testified that he believed he would have to sell Lot 45 for $175,000.00 within a year in order to "break even". (Tr. at 126.) After buying Lot 45 from Debtors, Defendant listed it for $199,000.00 (Tr. at 127.) Despite the listing price, Mr. Haygood testified that he actually thought Lot 45 was worth $150,000.00 to $160,000.00 when Southland bought it. (Tr. at 126, 128.) As of the date of the hearing of this adversary proceeding, some two and a half years after the purchase from Debtors, Defendant had not received any offers for Lot 45. (Tr. at 131.)

Debtors had also previously owned Lot 44, which was adjacent to Lot 45. (Tr. at 31.) While the dimensions of Lots 44 and 45 were similar, Lot 44 was a little bigger, had a little more frontage and was a little less pie shaped. (Id.) At the end of 2005 Debtors contracted to sell Lot 44. (Tr. at 69.) Mr. Kronk testified that at that time the real estate market was at its peak and was "smoking". (Tr. at 33, 69.) Debtors sold Lot 44 for $230,000.00. (Tr. at 33.) The sale closed on April 5, 2006. (Pl.'s Ex. 17.)

The sale of Lot 44 was a "package deal", a sale in conjunction with the construction of a home. (Tr. at 67-68.) Mr. Kronk testified that allocating a high portion of the package

price to the lot is standard practice in the building industry and gives builders who offer package deals a competitive advantage over those who do not. (Tr. at 68.)

Mr. Kronk testified that in the months following the sale of Lot 44, the real estate market declined dramatically. (Tr. at 36-37.) He testified that the lots in the area and in the subdivision stopped selling. (Tr. at 37.) According to Mr. Kronk, there were no contracts, "no calls, no nothing." (Id.)

Debtors listed debts totaling $273,784.35 on their Bankruptcy Schedule F. (Tr. at 40; Pl.'s Ex. 2.) Mr. Kronk testified that many of the debts listed on Schedule F are possible guaranties or guaranties of accounts for Brentwood. (Tr. at 41-42.) At the time Debtors transferred Lot 45 to Defendant, the majority of creditors listed on Debtors' Schedule F existed. (Tr. at 52.) Debtors' financial problems coincided with Brentwood Homes' financial problems. (Tr. at 42.) When asked whether at the time of the transfer, the sum total of his debts exceeded the sum total of the value of his assets, Mr. Kronk responded "I guess they would." (Tr. at 46.) However, Mr. Kronk, Brentwood's sole shareholder, testified that at the end of 2006, Brentwood's assets exceeded its liabilities by over $500,000.00. (Tr. at 60.)

The value of Debtors' non-exempt assets shown on Schedule B was less than $5,000.00. (Pl.'s Ex. 2.) In response to question 10 on their Statement of Financial Affairs, the only assets Debtors stated that they transferred within two years prior to the petition date were land-locked building lots to Mrs. Kronk's mother in exchange for monetary assistance to pay living expenses and Lot 45 to Defendant. Mr. Kronk testified that at the time Lot 45

was transferred to defendant Debtors had some debts that were beyond their ability to pay. (Tr. at 46-47.)

Conclusions of Law

Is the transfer of Debtors' interest in Lot 45 to Defendant avoidable pursuant to 11 U.S.C. § 548(a)(1)(B)?[1]

The trustee may avoid any transfer of any interest of the debtor in property that was made within two years of the petition date if the debtor (i) received less than a reasonably equivalent value in exchange for such transfer and (ii) was insolvent on the date that such transfer was made or became insolvent as a result of such transfer; was engaged in business or a transaction, or was about to engage in business or a transaction for which any property remaining with the debtor was an unreasonably small capital or intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured. 11 U.S.C. § 548(a)(1)(B). The Court first turns to the second element of § 548(a)(1)(B).

Were Debtors insolvent on the date of (or became insolvent as a result of) the transfer of Lot 45, engaged in a business or a transaction, or were about to engage in business or a transaction for which any property remaining with the Debtors was an unreasonably small capital or intended to incur, or believed that they would incur, debts that would be beyond their ability to pay as such debts matured

While it is not clear that Debtors were insolvent at the time of the transfer, Mr. Kronk conceded that at the time of the transfer Debtors had debts that were beyond their

[1] While Plaintiff alleged in the Complaint that Debtors transferred Lot 45 to Defendant with the actual intent to hinder, delay, or defraud creditors, Plaintiff did not make that argument in his brief. The Court deems the allegation abandoned and finds it unnecessary to address § 548(a)(1)(A), the provision dealing with actual fraud.

ability to pay. (Tr. at 46-47.) Accordingly, the Court finds that Plaintiff satisfied the second prong of §548(a)(1)(B).

Did Debtors receive reasonably equivalent value in exchange for the transfer of Lot 45?

The question of whether reasonably equivalent value is given in exchange for a transfer of property is a question of fact. In re McDonald, 265 B.R. 632, 636 (Bankr. M.D. Fla. 2001). The Court has previously looked to the following three factors to determine whether the preservation of an opportunity for economic benefit constituted "reasonably equivalent" value under § 548(a)(1)(B): (1) the fair market value of the opportunity compared to the amount of the transfer; (2) the arms' length (or collusive) nature of the transaction; and (3) the good faith (or lack thereof) of the transferee. Id. at 636; In re Morais, 2009 WL 837727 * 5 (Bankr. M.D. Fla. February 24, 2009).

The Court must first determine the fair market value of Lot 45 at the time of the transfer. While fair market value is a factor in the determination of reasonably equivalent value, "[b]y its terms and application, the concept of 'reasonably equivalent value' does not demand a dollar for dollar exchange." Advanced Telecommunication Network, Inc., 490 F.3d 1325, 1336 (11th Cir. 2007) (citations omitted). Plaintiff asserts that the fair market value of Lot 45 at the time of the transfer was $230,000.00 because Lot 44 was sold for that amount approximately nine months earlier. The Court finds that Plaintiff failed to prove that the fair market value of Lot 45 at the time of its transfer was $230,000.00.

While the closing on Lot 44 occurred in April, 2006, nine months prior to the transfer of Lot 45, the actual sales contract on Lot 44 was entered into over a year prior to the transfer of Lot 45. At the time of contracting for Lot 44, the market was described as "at its

peak" and "smoking". In the months following the sale of Lot 44, the real estate market declined dramatically. The lots in the area and in the subdivision stopped selling. According to Mr. Kronk, there were no contracts, "no calls, no nothing." The Court finds that the $230,000.00 contract price for Lot 44, negotiated over a year prior to the transfer of Lot 45, is not sufficiently close in time to provide any basis to establish a value for Lot 45, especially in a period of extraordinary downturn in the real estate market.

Secondly, the sale of Lot 44 was a "package deal", a sale in conjunction with the construction of a home. The allocation of a high portion of the package price to the lot is standard practice in the building industry and gives builders who offer package deals a competitive advantage over those who do not. Plaintiff made no attempt to determine what portion of the "package deal" for Lot 44 was attributable to the future home construction or to otherwise tease out the actual value of Lot 44 separate and apart from the "package" sale. Without any such evidence, a determination by the Court as to what part of the $230,000.00 price represented the cost of Lot 44 alone would be speculation. As a result, the $230,000.00 figure is meaningless to value Lot 44, let alone to derive a comparative value for Lot 45.

Finally, while Lots 44 and 45 were adjacent, they were not the same property. Lot 44 was described as "a little bigger, had a little more frontage" and had "less pie shaping". Whether these differences created a material value disparity between the properties is unknown. Plaintiff made no attempt to quantify or account for the differences in the physical characteristics of the two lots.

While it is difficult to precisely determine the fair market value of Lot 45 at the time of the transfer, the Court finds the fair market value at that time to be somewhere between $150,000.00 and $175,000.00. Even accepting the higher value, the Court finds that a sales price of $137,940.06 in exchange for property with a fair market value of $175,000.00 does not establish that the transfer was for less than reasonably equivalent value.

The Court turns to the issue of the arm's-length nature of the transaction. Although Mr. Haygood is Mrs. Kronk's uncle, there is no evidence of any participation by Debtors in the subsequent marketing of Lot 45 or of any deal by which Debtors would repurchase Lot 45 at some predetermined price. Plaintiff asserts that the fact that Debtors transferred Lot 45 to Defendant, which held nothing more than a second mortgage on property that Debtors knew was going to be foreclosed upon, at the expense of their other creditors indicates that the transaction was not at arm's-length. The Court disagrees. It is clear to the Court that Debtors transferred Lot 45 to Defendant not to curry favor with Mr. Haygood but rather to pay off a debt for which they were personally liable. The Court does not find that the transfer of Lot 45 to Defendant was collusive.

Finally, the Court turns to the issue of good faith. "[A] transferee does not act in good faith when he has sufficient knowledge to place him on inquiry notice of the debtor's possible insolvency." World Vision Entertainment, 275 B.R. 641, 659 (Bankr. M.D. Fla. 2002). While it is clear that Mr. Haygood was on notice of Debtors' financial problems, the Court finds that this factor, standing alone, does not establish that Debtors received less than reasonably equivalent value in exchange for the transfer of Lot 45 to Defendant. The Court finds that Plaintiff failed to prove by a preponderance of the evidence that Debtors received

less than reasonably equivalent value in exchange for the transfer. The transfer of Lot 45 from Debtors to Defendant is not avoidable pursuant to 11 U.S.C. § 548(a)(1)(B).

Conclusion

Plaintiff failed to prove by a preponderance of the evidence that the transfer by Debtors to Defendant of Lot 45 was for less than reasonably equivalent value. The transfer of Lot 45 is not avoidable pursuant to 11 U.S.C. § 548(a)(1)(B). The Court will enter a separate judgment consistent with these Findings of Fact and Conclusions of Law.

DATED this 8 day of February, 2010 at Jacksonville, Florida.

/s/

JERRY A. FUNK
United States Bankruptcy Judge

Copies Furnished To:

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