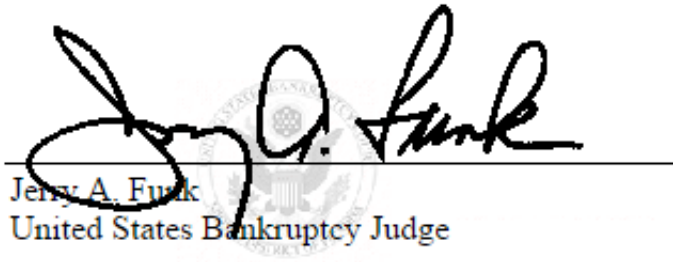
ORDERED.

Dated: September 28, 2018



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

Chapter 11

TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION,	Case No.	3:09-bk-07047-JAF
REO SPECIALISTS, LLC, and	Case No.	3:09-bk-10022-JAF
HOME AMERICA MORTGAGE, INC.	Case No.	3:09-bk-10023-JAF

Debtor,

(Jointly Administered Under Case No. 3:09-bk-07047-JAF)

_____/

NEIL F. LURIA, as Trustee for the TAYLOR, BEAN & WHITAKER PLAN TRUST,

Plaintiff,

Adv. Pro. No. 3:11-ap-0693-JAF

v.

THUNDERFLOWER, LLC,

Defendant.

_____/

ORDER GRANTING IN PART AND DENYING IN PART PARTIAL SUMMARY JUDGMENT

This proceeding is before the Court on the motion for summary judgment (Doc. 69) filed by Plaintiff NEIL F. LURIA, as Trustee for the TAYLOR BEAN & WHITAKER PLAN TRUST

(the "Plaintiff"), pursuant to Federal Rule of Civil Procedure 56(a), made applicable by Federal Rule of Bankruptcy Procedure 7056. Defendant THUNDERFLOWER, LLC ("Thunderflower") filed a response in opposition (Doc. 73), and Plaintiff filed a reply (Doc. 77). For the reasons stated herein, Plaintiff's motion is granted in part and denied in part.

JURISDICTION

The Court has jurisdiction over this proceeding, arising under §§ 544, 547, and 548 of the Bankruptcy Code, pursuant to 28 U.S.C. §§ 1334(b) and 157(a) and the standing order of reference. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(F) & (H).

FACTUAL BACKGROUND

Taylor, Bean & Whitaker Mortgage Corporation ("Taylor Bean") filed its Chapter 11 petition on August 24, 2009 (the "Petition Date"), case number 3:09-bk-07047. Taylor Bean's case was procedurally consolidated with two other cases. (Doc. 921, in case no. 3:09-bk-7047). The Court confirmed Taylor Bean's Chapter 11 plan and appointed the Plaintiff as trustee on July 21, 2011. (Doc. 3420 ¶ 68, in case no. 3:09-bk-07047). The Plaintiff filed this adversary proceeding on August 23, 2011. (Doc. 1). The complaint contains seven counts seeking to avoid certain money transfers from Taylor Bean to Thunderflower.

The Complaint

Count 1 seeks a preference avoidance but is not relevant to this Order. Counts 2 and 4 seek a transfer avoidance based on actual fraud.[1] Counts 3, 5, and 6 seek avoidance based on

[1] Count 2 is brought under § 548(a)(1)(A) of the Bankruptcy Code. Count 4 is brought under section 726.105(1)(A), Florida Statutes.

constructive fraud.[2] Count 7 is brought pursuant to § 550 of the Bankruptcy Code and seeks to recover from Thunderflower the value of any transfers avoided in this avoidance action.

Undisputed Facts

At all relevant times, Lee Farkas ("Farkas") owned and controlled Thunderflower. Farkas also effectively controlled Taylor Bean as its chairman and principal officer. Farkas made the subject transfers from Taylor Bean to Thunderflower. The money that was transferred was prepetition property of Taylor Bean. The business operations of Taylor Bean and Thunderflower were unrelated, and the two entities had no formal business relationship.

The affidavit of Taylor Bean's controller, Maureen Emig, attests to the core facts underlying the transfers (the "Emig Affidavit"). (Doc. 69 at 23). The Emig Affidavit attests that there are $7,173,714.57 in total avoidable transfers. (Doc. 69 at 23). The affidavit categorizes the transfers into three categories: a) transfers made within two years of the Petition Date, equaling $2,279,152.10; b) transfers made more than two years, but less than four years, before the Petition Date, equaling $3,897,635.65; and c) transfers made more than four years, but less than ten years, before the Petition Date, equaling $996,926.82. (Doc. 69 at 22, ¶¶ 12, 14).

The Emig Affidavit states that "some of" the transfers were repaid by Thunderflower but that the amounts sought to be avoided "take into account the repayments." (Doc. 69 at 23, ¶ 13). Taylor Bean's general ledger shows that the proceeds of the transfers are owed to Taylor Bean by Thunderflower. (Doc. 69 at 22-23). There is no evidence of a formal agreement between Taylor Bean and Thunderflower. There is no evidence showing that Taylor Bean received anything of value in return for the transfers made to Thunderflower.

[2] Count 3 is brought under § 548(a)(1)(B) of the Bankruptcy Code. Count 5 is brought under section 726.105(1)(b), Florida Statutes. Count 6 is brought under section 726.106(1), Florida Statutes.

STANDARD FOR SUMMARY JUDGMENT

The chief question at summary judgment is whether there is sufficient conflicting evidence to warrant a trial. That is, summary judgment is appropriate if the pleadings and discovery show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056. The court must view the evidence in a light most favorable to the non-movant. In re Delco Oil, Inc., 599 F.3d 1255, 1257 (11th Cir. 2010). The movant bears the initial burden of demonstrating the absence of a triable issue. Id. Once the movant meets the initial burden, the burden shifts to the non-movant to come forward with evidence, beyond its pleadings, showing a genuine fact-question exists. Id.

ANALYSIS

A. Thunderflower's primary defense.

Thunderflower's primary defense can be summed up as follows: "The Court should defer to its prior holding and find that Plaintiff is not entitled to recover against [Thunderflower] because it would be tantamount to [Taylor Bean] recovering for its own fraudulent acts." (Doc. 73 at 13). The prior holding to which Thunderflower refers is Certain Underwriters at Lloyd's v. Taylor, Bean & Whitaker (In re Taylor, Bean & Whitaker), 2015 WL 728493, 2015 Bankr. LEXIS 624 (Bankr. M.D. Fla. Feb. 19, 2015) (hereinafter, "Lloyd's").

In that proceeding, Taylor Bean had previously made an insurance claim against certain insurance policies and fidelity bonds that protected Taylor Bean against financial loss resulting from the dishonesty of an employee. The insurance underwriters filed the adversary proceeding seeking rescission of the fidelity bonds. Taylor Bean filed a counterclaim alleging the underwriters breached the bond agreements by refusing to pay on the claim of loss premises on the dishonest acts of its chairman, Farkas. The underwriters moved for summary judgment, and this Court held

that, under the applicable law and terms of the fidelity bonds, the fraudulent actions of Farkas (while chairman of Taylor Bean) did not qualify as dishonesty of an "employee" within the meaning of that term *as used in the fidelity bonds* at issue in that proceeding.

That is, Farkas had engaged in various criminal acts that caused Taylor Bean financial losses. Farkas was the key principal of Taylor Bean. The Court concluded that Farkas "dominated and controlled the corporation to such an extent that the corporation's independent existence was in fact nonexistent; Farkas became an alter ego of the corporation." Id. at *5. As a result, the Court concluded that Farkas was not an "employee" for purposes of the fidelity bonds at issue.

Here, Thunderflower's argument attempts to stretch the Lloyd's holding by contending that, because the Court treated Farkas and Taylor Bean as alter egos, Plaintiff should not now be allowed to "recover" for Farkas' fraudulent acts because those acts are the acts of Taylor Bean. While the Court generally agrees that an entity (or person) should not be allowed to "recover" for its own fraudulent acts, Thunderflower's argument conflates distinct legal issues.

First, the instant proceeding is not an action by Taylor Bean to recover monetary damages. This action is an action to avoid transfers that allegedly subvert the interests of a debtor's creditors. In re French, 440 F.3d 145, 152 (4th Cir. 2006) ("[T]he purpose of the Bankruptcy Code's avoidance provisions, [ ] is to prevent debtors from illegitimately disposing of property that should be available to their creditors."). In Lloyd's, Taylor Bean's counterclaim was an action for breach of a fidelity bond under which Taylor Bean was a beneficiary. The counterclaim was designed to benefit the party bringing the counterclaim, Taylor Bean. The harm alleged in the counterclaim was harm done to Taylor Bean.[3] In contrast, the allegedly aggrieved parties in a transfer-avoidance

[3] It so happens that any money recovered under Taylor Bean's breach-of-contract action would have likely gone to its creditors since Taylor Bean was a debtor in bankruptcy, but that fact is irrelevant in determining who that cause of action was designed to benefit.

action are the creditors of the debtor—not the debtor or bankruptcy trustee. Mellon Bank, N.A. v. Metro Commc'ns, Inc., 945 F.2d 635, 646 (3d Cir. 1991) ("fraudulent conveyance laws are intended to protect the debtor's creditors"). In other words, avoiding fraudulent transfers is not tantamount to Taylor Bean recovering for its own fraud.

Second, and more importantly, if the fraudulent acts of a debtor (e.g., Farkas' dishonest acts as the alter ego of Taylor Bean) would prevent avoidance of fraudulent transfers, then a large percentage of all fraudulent transfer-avoidance actions would lose viability, contrary to decades of case law. Thunderflower's defense undermines the concept of fraudulent transfer avoidance.

Finally, the defense conflates the dishonest acts at issue in Lloyd's with the alleged fraud at issue in this transfer-avoidance proceeding. These acts are legally and factually distinct. In sum, the Court must reject this defense.

B. Counts 2 and 4 – Actual intent to hinder, delay, or defraud.

Counts 2 and 4 are actual-fraud claims brought under 11 U.S.C. § 548(a)(1)(A) and section 726.105(1)(A), Florida Statutes, respectively. Under both counts, Plaintiff must prove the transfers were made with actual intent to hinder, delay, or defraud a creditor of the debtor. Actual-fraud claims "hinge on the intent of the debtor in making the transfer." Stettin v. Adler (In re Rothstein Rosenfeldt Adler, P.A.), 2010 WL 5173796, at *4 (Bankr. S.D. Fla. Dec. 14, 2010). "[T]he issue of fraudulent intent often cannot be resolved on a motion for summary judgment, because there is a factual question involving the parties' states of mind . . . ." Id. at *5.

Here, Plaintiff argues that "there could be no purpose for the Transfers other than to hinder, delay or defraud [Taylor Bean]'s creditors." (Doc. 69 at 15). Plaintiff derives this "ultimate fact"[4]

[4] See 89 C.J.S. Trial § 1272 ("Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense, and evidentiary facts are those subsidiary facts required to prove the ultimate facts; an ultimate fact is the final resulting effect that is reached by processes of logical reasoning from the evidentiary facts, or the core facts, such as the essential elements of a claim.").

of actual intent from the following subsidiary facts: a) Taylor Bean was insolvent at the time of all the transfers; b) Farkas personally caused the transfer to occur, c) Farkas was the controlling member of Thunderflower; d) Thunderflower's business was completely unrelated to Taylor Bean's business; and e) Taylor Bean received nothing of value in return for the subject transfers. (Doc. 69 at 15). However, even if the Court accepts all of the above subsidiary facts as true and undisputed, the Court must nevertheless draw an inference from these subsidiary facts that Farkas actually intended to hinder, delay, or defraud creditors. While the Court may draw such an inference at trial, it cannot do so at the summary-judgment stage because the inference is in favor of the movant Plaintiff. A trial and fact-findings based on the weight of the evidence are needed to reach the ultimate fact of actual intent in this case. See generally *Actions Involving State of Mind*, 10B Fed. Prac. & Proc. Civ. § 2730 (4th ed.).

C. Counts 3, 5, and 6 – Reasonably equivalent value.

Count 3 is a constructive-fraud claim brought under bankruptcy law, while Counts 5 and 6 are constructive-fraud claims brought under Florida law. Section 548(a)(1)(B) of the Bankruptcy Code permits avoidance of a transfer if the trustee can establish that: 1) the debtor had an interest in transferred property; 2) the transfer of that interest occurred within two years before the filing of the bankruptcy petition; 3) the debtor was insolvent at the time of transfer or became insolvent as result thereof; and 4) the debtor received less than reasonably equivalent value in exchange for such transfer. BFP v. Resolution Tr. Corp., 511 U.S. 531, 535 (1994). For purposes of Counts 5 and 6, "reasonably equivalent value" under Florida law is effectively the same as under bankruptcy law. See generally In re PSN USA, Inc., 615 Fed. App'x 925, 927 (11th Cir. 2015).

Here, the Court cannot discern any record evidence demonstrating Taylor Bean received something of value in connection with the subject transfers. In defense, Thunderflower contends

that it owes no obligation to repay Taylor Bean. The Court accepts Thunderflower's contention that it owes no promissory obligation to repay Taylor Bean; however, this fact does not constitute evidence showing that Taylor Bean received reasonably equivalent value in exchange for the transfers. Therefore, the Court will grant partial summary judgment, in favor of the Plaintiff, on the narrow fact-issue of reasonably equivalent value.

D. Statute of Limitations – Transferee liability for federal income tax liability of a transferor-taxpayer.

As stated above, Counts 2-6 contain fraudulent avoidance counts under both bankruptcy law and Florida law. Under bankruptcy law, the avoidable transfers must have been made within two years before the bankruptcy petition is filed. 11 U.S.C. § 548(a)(1) (2008). Under Florida law, the statute of limitations requires the avoidance action to be filed within four years after the transfer. § 726.110, Fla. Stat. (2008). Section 108 of the Bankruptcy Code tolls or extends, for two years, the limitations period for nonbankruptcy actions (such as, an avoidance action under Florida law) if the limitations period for that action did not expire prior to the filing of the bankruptcy petition. 11 U.S.C. § 108 (2011). Section 108 applies to the Plaintiff in this action. See Antioch Litig. Tr. v. McDermott Will & Emery LLP, 500 B.R. 755, 761 (S.D. Ohio 2013).

Here, the Emig Affidavit attests that a total of $6,176,787.75 was transferred within the four years before the Petition Date. (Doc. 69 at 23, ¶ 13). There is no evidence disputing the amounts or timing of these transfers. Therefore, $2,279,152.10 was timely transferred under bankruptcy law, and $3,897,635.65 was timely transferred under Florida law and § 108. However, Plaintiff seeks to avoid an additional $996,926.82 that was transferred more than four years before the Petition Date. As to these transfers, Plaintiff argues he can "step into the shoes" of the Internal Revenue Service (the "IRS") as a "golden creditor" and use a ten-year "lookback" window

applicable to the IRS—citing 26 U.S.C. § 6502(a)(1) and Mukamal v. Citibank (In re Kipnis), 555 B.R. 877, 878 (Bankr. S.D. Fla. 2016) (hereinafter "Kipnis").

That is, § 544(b) of the Bankruptcy Code allows a bankruptcy trustee to step into the shoes of an unsecured creditor and avoid any transfer "that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b) (2011). Thus, the determinative question is whether the IRS is an unsecured creditor[5] that could avoid the transfers that occurred more than four years before the Petition Date. If the IRS could avoid these transfers, so can Plaintiff. See In re Kaiser, 525 B.R. 697, 708 (Bankr. N.D. Ill. 2014) ("Accordingly, 'if the actual creditor could not succeed for any reason—whether due to the statute of limitations, estoppel, res judicata, waiver, or any other defense—then the trustee is similarly barred and cannot avoid the transfer.'").

"The IRS may collect tax liability from a transferee of property of the taxpayer." Id. at 709. "The IRS's ability to collect tax liability against a transferee of the taxpayer is dependent upon the IRS's ability to establish liability under state fraudulent-transfers law." Id. at 710. "However, in pursuing collection by way of transferee liability, the IRS is subject to the limitations periods set out in the Internal Revenue Code, not the statute of limitations set forth in the state fraudulent-transfers law." Id. "The process by which the IRS may collect taxes against the transferee of property of the taxpayer is first assessment of tax liability, then collection, both of which are subject to well-specified limitations." Id.

"In general, the IRS is subject to a ten-year statute of limitations for collection, measured from the time of assessment." Id. (citing 26 U.S.C. § 6502(a)(1)). "Assessment of liability is, in turn, subject to varying time limitations." Id. "[T]he IRS generally has three years from the filing

[5] The unsecured claim must also be either an allowable claim or a claim that is not allowable under only § 502(e). The IRS was an unsecured creditor of Taylor Bean on the Petition Date, and the IRS's claim is an allowed general unsecured claim for $150,000.00. (Doc. 5122, in case no. 3:09-bk-7047).

of a tax return to assess tax liability against a taxpayer and one year thereafter to assess tax liability against a transferee." Id. (citing 26 U.S.C. § 6901(c)(1)); Shockley v. Comm'r, 686 F.3d 1228, 1234 (11th Cir. 2012) ("[W]ithin one year of the expiration of the three-year limitations period for assessment against the taxpayer, the IRS may assess the taxpayer's tax deficiency against a transferee of assets of the taxpayer-transferor."). Under § 6901(c)(1), the one-year portion does not begin to run until the three-year period has expired and the three-year period can be suspended for a variety of reasons. See Shockley, 686 F.3d at 1234-35 (holding that a proceeding in respect of the tax deficiency suspends the taxpayer-assessment limitations period and, thus, extends the transferee-assessment limitations period).

"[T]he trigger of all of these statutes of limitations is the filing of the tax return." Kaiser, 525 B.R. at 710-11. "If no tax return is filed, assessment of tax liability against the taxpayer can be made at any time." Id. at 711. "Thereafter[,] the IRS has ten years to collect." Id. at 710 (referring to 26 U.S.C. § 6502(a)(1)); see also *Transferee Liability In General*, IRS Prac. & Proc. ¶ 17.01 (2018); *Statute of limitations*, 14A Mertens Law of Fed. Income Tax'n § 53:48 (2018).

Further, bankruptcy case law does not make clear why the ten-year collections limitations period, under 26 U.S.C. § 6502(a)(1), should apply rather than the three-plus-one-year transferee-liability limitations period, under 26 U.S.C. § 6901(c)(1). Kaiser discussed § 6901(c)(1) but did not address its applicability. Kipnis did not mention § 6901.

In Holmes, the Tenth Circuit decided the applicability of § 6901(c)(1) in a tax case and held that the § 6502(a)(1) ten-year period, starting from the original taxpayer assessment, applies when the IRS files an independent avoidance action against the transferee, rather than pursuing administrative enforcement. United States v. Holmes, 727 F.3d 1230, 1233-34 (10th Cir. 2013). Essentially, Holmes held that § 6901 only applies in the administrative context. However, Holmes

contains a lengthy dissent that takes issue with the majority's reasoning and argues the IRS must file the avoidance complaint within the three-plus-one-year period found in § 6901(c)(1), not the ten-year collections period. Holmes, 727 F.3d at 1237 (Tymkovich, J., dissenting). If § 6901(c)(1) applied to an avoidance action filed by the IRS, then it would likewise apply to a bankruptcy trustee stepping into the shoes of the IRS. The dissent's holding would bring the limitations period applicable to the IRS in line with the typical four-year limitations period that often applies to bankruptcy trustees. The Holmes majority and dissent lay out the competing arguments, with the majority siding in favor of Plaintiff and Kipnis. This appears to be the only circuit court opinion addressing the issue. The Court will not presently decide the applicability of § 6901(c)(1), however, because the instant parties have not briefed the issue.

Turning back to the instant proceeding, the IRS assessed "taxpayer liability" against Taylor Bean on March 17, 2008. (Doc. 69 at 71). It is not patently clear if or when the period for assessing "transferee liability" expired, under § 6901(c)(1). Nevertheless, even assuming the ten-year period applies and § 6901(c)(1) is inapposite, the instant facts differ from Kipnis in that the transfers to Thunderflower, that occurred more than four years before the Petition Date, also occurred *before* the IRS assessed taxpayer-liability against Taylor Bean. In Kipnis, the transfer occurred *after* the taxpayer assessment. Kipnis, 555 B.R. at 878-79 (stating taxpayer liability was assessed on March 22, 2005 and the subject transfer occurred on August 5, 2005).

Plaintiff's argument implies that any transfers made within ten years before the Petition Date are potentially avoidable when stepping into the shoes of the IRS. Based on Kaiser and Kipnis, however, the ten-year period appears to be a look-forward period rather than a lookback period. The Court is unaware of case law permitting the IRS to avoid transfers made prior to the original taxpayer assessment (or, alternatively, prior to accrual of the tax liability); though, this

has not been addressed by Plaintiff. For now, the Court will not grant summary judgment as to transfers that occurred more than four years before the Petition Date. The parties may revisit this issue.

CONCLUSION

There is no dispute that Thunderflower was the initial transferee and that Plaintiff may recover from Thunderflower the proceeds of any transfers that are successfully avoided. There is no dispute that Taylor Bean was insolvent at the time of the transfers. There is no dispute that the money transferred to Thunderflower was prepetition property of Taylor Bean. There is no dispute that Taylor Bean received nothing of value in exchange for the transfers. It is undisputed that $2,279,152.10 was transferred within two years before the Petition Date and that an additional $3,897,635.65 was transferred within four years (but more than two years) before the Petition Date.

However, while this motion was pending, an agreed consent order was entered providing that discovery shall remain open until thirty (30) days after entry of the instant Order. (Doc. 80). If evidence is discovered that requires reconsideration of the rulings herein, the appropriate party should file such evidence in the record along with a motion for reconsideration[6] that i) identifies and pin-cites to the pertinent evidence in the record and ii) provides some case law supporting the asserted legal conclusions drawn from that evidence.

Accordingly, it is hereby ORDERED as follows:

1. Plaintiff's motion (Doc. 69) is GRANTED in part and DENIED in part.

2. The Court grants summary judgment, in favor of Plaintiff, on the question of whether Taylor Bean received reasonably equivalent value in exchange for the transfers.

[6] Motions for "reconsideration" of interlocutory orders can be appropriate in very limited circumstances, such as where there is a) an intervening change of law; b) new evidence available; or c) a need to correct a clear and obvious error or prevent manifest injustice. Antioch Litig. Tr. v. McDermott Will & Emery LLP, 500 B.R. 755, 757 (S.D. Ohio 2013).

3. All transfers made within two years of the Petition Date (equaling $2,279,152.10) and all transfers made more than two years before but less than four years before the Petition Date (equaling $3,897,635.65) are timely under bankruptcy law and Florida law, respectively.

4. No issues remain outstanding on Counts 3, 5, and 6 as applied to only those transfers made within four years before the Petition Date. Thus, the Court hereby grants partial summary judgment, in favor of Plaintiff, on Count 3 as to transfers equaling $2,279,152.10. The Court further grants partial summary judgment, in favor of Plaintiff, on Counts 5 and 6 as to transfers equaling $3,897,635.65.

5. The Court denies, without prejudice, summary judgment on Counts 3, 5, and 6 as applied to all transfers made more than four years before the Petition Date, which equal $996,926.82.

6. The Court denies summary judgment on Counts 2 and 4 as to all transfers because the summary-judgment standard precludes the Court from inferring actual intent at this stage. Such an inference must be drawn at trial based on the weight of the circumstantial evidence.

7. Thunderflower is liable, pursuant to Count 7 and § 550(a)(1), for recovery of any and all transfers successfully avoided in this action.

8. Finally, in light of the agreed consent order extending discovery, any party may file a motion for reconsideration if appropriate. Such evidence and motion for reconsideration (as described above) shall be filed, if at all, within fourteen (14) days of the close of discovery. A response in opposition to any such motion may be filed within seven (7) days of service of the motion for reconsideration. A reply may be filed within seven (7) days of service of the response.

9. A trial is set in this proceeding. Evidence will be taken as to any and all remaining fact questions at that time.