



actual fraud and Counts 3 and 4 are based on constructive fraud. In Count 5, Trustee seeks to recover usurious interest paid to Defendants. Defendants filed an answer to the complaint but thereafter failed to respond to Trustee's discovery requests. Trustee has accumulated evidence from reports prepared by Debtors' accountants, records obtained from Debtors' bank accounts, Trustee's and his accountant's analyses, and expert forensic analyses of Debtors' business records.

Trustee filed a motion for partial summary judgment seeking judgment under Count 2, which is based upon the actual fraud provisions of the Georgia fraudulent conveyance statute, §18-2-74. Trustee seeks to avoid and recover transfers from Debtors to Defendants in the aggregate amount of \$411,782 (the "Transfers"). Defendants filed no response to Trustee's motion for summary judgment. Therefore, under BLR 7056, Trustee's motion is deemed unopposed and Trustee's statement of undisputed material facts is deemed admitted.

### DISCUSSION

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. The burden of proof is on the moving party to establish that a genuine issue of material fact is absent. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *Clark v. Coats & Clark, Inc.*, 929 F. 2d 604 (11th Cir. 1991). Evidence is to be construed in the light most favorable to the nonmoving party. *Id.*; *Rollins v. TechSouth, Inc.*, 833 F. 2d 1525 (11th Cir. 1987).

O.C.G.A. §18-2-74(a)(1) provides:

§ 18-2-74. Transfer made or obligation incurred by debtor that is fraudulent as to creditor; determination of intent

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With actual intent to hinder, delay, or defraud any creditor of the debtor;....

Trustee must show a creditor existed as of the petition date and that the Transfers were made with actual fraudulent intent. Schedule F for each Debtor shows in excess of \$33 million in unsecured debt. Trustee has accumulated cancelled checks from Debtors to Defendants that total \$411,782. Those transfers were part of a Ponzi scheme for which Debtor Anthony Christou was tried and convicted in United States District Court for the Northern District of Georgia, Case No. 1:06-CR-483. The existence of the Ponzi scheme and the connection of the Transfers with that Ponzi schedule were also established by Trustee's analysis of Debtors' records and by the expert report from Trustee's forensic accountant. Any transfer made in the course of a Ponzi scheme is deemed to be made with actual fraudulent intent. *In re AFI Holdings*, 525 F. 3d 700 (9<sup>th</sup> Cir. 2008); *SEC v. Resource Development Intern'l LLC*, 487 F. 3d 295 (5<sup>th</sup> Cir. 2007); *In re C.F. Foods, L.P.*, 280 B.R. 103 (Bankr. E.D. Penn. 2002); *In re Manhattan Investment Fund*, 310 B.R. 506 (Bankr. S.D. N.Y. 2003).

Although Defendants did not respond to Trustee's motion for summary judgment to assert an affirmative defense, Trustee has presented evidence, undisputed by Defendants, to negate the elements of the affirmative defense set forth in O.C.G.A. §18-2-78 that renders a

transfer not voidable if Defendants accepted the transfer in good faith and for reasonably equivalent value. Defendants failed to provide responses to Trustee's discovery requests and failed to respond to Trustee's motion for summary judgment. Therefore, Defendants have offered no evidence to support their burden of proof to show objective good faith or reasonably equivalent value. Trustee's forensic accountant concluded that a reasonable person should have conducted due diligence prior to engaging in the transactions with Debtors and the lack of information and refusal of Debtors to allow due diligence would have convinced Defendants that the transactions were highly risky and probably fraudulent. Additionally, receiving the usurious interest paid by Debtors should have been a red flag to Defendants that the transactions were fraudulent.

Finally, the undisputed facts show that Defendants were initial transferees within the meaning of 11 U.S.C. §550. Therefore, Trustee is entitled to recover the transfer, in the amount of \$411,782, from Defendants. Accordingly, it is hereby

ORDERED that Trustee's motion for summary judgment is *granted*.

**The Clerk, U.S. Bankruptcy Court, is directed to serve** a copy of this order upon Plaintiff's attorney, Defendants' attorney, Debtors' attorney, the U.S. Trustee, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 23<sup>rd</sup> day of September, 2009.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE