UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE PERRY O. LEMMONS, Debtor.	CASE NO. 00-70964-MGD CHAPTER 7 JUDGE DIEHL
IRA D. GINGOLD, Chapter 7 Trustee, Plaintiff, v. PERRY O. LEMMONS and BETTY C. LEMMONS, Defendants.	ADVERSARY PROCEEDING NO. 01-6452

ORDER

On September 20, 2001, the Chapter 7 Trustee ("Trustee" or "Plaintiff") filed a complaint seeking to avoid certain transfers made by Debtor, Perry O. Lemmons ("Debtor"), to his wife, Betty C. Lemmons (collectively, "Defendants") pursuant to O.C.G.A. §§ 18-2-22(2) and 18-2-22(3) in accordance with 11 U.S.C. § 544. The Trustee also seeks to recover the property or its value for the benefit of the bankruptcy estate pursuant to 11 U.S.C. § 550(a). The Defendants timely filed an answer on November 13, 2001. At the completion of discovery and after entry of a Pre-Trial Order, a trial was held before the undersigned on January 17, 2006 and April 24, 2006. At the conclusion of the evidence and after hearing argument from the parties, the Court took the matter under advisement. The Court has jurisdiction over this case and over the parties pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This proceeding is a core proceeding under 28 U.S.C. § 157(b)(2)(H). This opinion constitutes the Court's Findings of Fact and Conclusions of

Law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. A separate judgment will be entered pursuant to Bankruptcy Rule 9021.

FINDINGS OF FACT

Debtor and his wife have been married since March 1958. In 1960, they purchased the house located at 1938 Lebanon Drive, Atlanta, Georgia 30324, in which they continue to live. Debtor and Ms. Lemmons testified that the down payment for the house was paid from Ms. Lemmons' income pursuant to an agreement between Debtor and Ms. Lemmons to pay living expenses from Debtor's income and save Ms. Lemmons' income to put toward the purchase of a house. The house, however, was titled in Debtor's name only.

Debtor received his CPA certification in 1962 and founded Perry O. Lemmons & Associates in 1963 as an accounting and CPA firm. Debtor was admitted to the State Bar of Georgia as an attorney in 1968. From 1963 until 1997, Debtor operated his business as a sole proprietorship and did not draw a salary. Ms. Lemmons also worked at the office at various times prior to 1987 and was not paid a salary. The profits from the business were distributed to Debtor and used to pay living expenses, including the home mortgage.

On or before September 23, 1979, Debtor drafted a will for Dewey Bowen, which created the Dewey Bowen Trust (the "Trust"). Debtor and James L. Webb, a Fulton County Solicitor, were appointed co-trustees of the Trust. After the death of Ruth Bowen, the lifetime beneficiary of the Trust, Debtor filed a Petition for Interpretation of the Dewey Bowen and Ruth Bowen wills in Fulton County Superior Court on January 4, 1995 (the "Superior Court Action"). The Newton Group, which was determined in the Superior Court Action to be beneficiaries of the Trust, filed an answer to the petition on February 14, 1995, setting forth counterclaims

against Debtor for disallowance of fees and expenses for bringing the Petition, and requesting an accounting.

Debtor failed to perform timely the accounting as required by court order and on August 31, 1995, the Court appointed a Special Master. On June 7, 1996 and July 10, 1996, the Superior Court issued orders requiring Debtor to produce records of the Trust to the Special Master. Debtor failed to produce the records. On September 26, 1996, the Superior Court found that Debtor at all times had possession, control, and supervision over the documents to be produced and that Debtor was in willful contempt of court for failing to produce the documents. Thereafter, on September 30, 1996, the Newton Group filed a motion asserting mismanagement and requesting removal of Debtor and Mr. Webb as trustees. That motion was granted on November 12, 1996.

Mr. Raymond Lee, authorized representative of the Newton Group, also filed complaints against Debtor with the State Bar of Georgia on October 11, 1996 and the Georgia State Board of Accountancy on October 19, 1996. The Georgia State Board of Accountancy found that Debtor's registration as a CPA had expired on December 31, 1979 and that he had not been registered as a CPA since that time. On August 6, 1997, Debtor signed a voluntary cease and desist order, agreeing to refrain from any practice requiring CPA certification. Debtor was suspended from the practice of law in Georgia for two years on October 18, 1999 and was ultimately disbarred on April 30, 2001.

On August 5, 1997, Debtor filed for chapter 13 relief (Case No. 97-73979). Debtor testified that he filed bankruptcy to stop a pending foreclosure on his office building located on Piedmont Road. The mortgage on the office building was held by the executors of the Estate of

Ruth Bowen. Debtor's Chapter 13 plan was not confirmed and the case was dismissed on February 6, 1998. The office building on Piedmont Road was subsequently sold at foreclosure. Debtor did not receive any proceeds from the foreclosure sale.

The Special Master's Report was filed with the Superior Court of Fulton County on April 23, 1998 and adopted by order of the Superior Court. The Special Master's Report stated that Trust funds were disbursed by transfer from the Trust investment account at Merrill Lynch to the Lemmons escrow account and then by check for expenses on behalf of Ruth Bowen. The Special Master stated that all withdrawals from the Trust investment account between January 17, 1990 and January 23, 1995 were deposited into the Lemmons escrow account. The report further stated, "Special Master could not make a correlation between the amount withdrawn from the Trust investment account at Merrill Lynch and the checks written on the Lemmons escrow account on the Bowen matter for a given period because deposits into the escrow account did not match up with following checks written." The Special Master concluded that $180,939.68 transferred from the Lemmons escrow account to an account of Debtor or withdrawn from the escrow account to cash without justification was funded by the Trust money or money due to the Trust in the form of tax refunds. The Special Master had written Debtor on April 9,1997 requesting an explanation of these withdrawals and did not receive a response from Debtor (P-22 at p. 12). The Special Master further concluded that Trust funds in the amount of $22,538.57 were used to fund payments to the Internal Revenue Service for past due taxes for Perry O. Lemmons & Associates, and that $19,954.67 in Trust funds were used to pay a debt of Debtor. Additionally, the Special Master concluded that Debtor improperly made a double bequest under the Ruth Bowen will to Helen Webb, once before Ms. Bowen's death and once after. Finally,

the Special Master concluded that Debtor improperly transferred $40,000 of funds from the Trust, through the escrow account, to the Ruth Bowen Estate Account at Wachovia Bank. On July 1, 1997, the Special Master again wrote Debtor, detailed his conclusions, and requested that Debtor provide any additional information to the Special Master. None was provided.

On August 3, 1998, the Newton Group amended its response to the petition in the Superior Court Action to assert claims for fraud, conversion, and breach of fiduciary duty. After a week long trial, on July 15, 2000, a jury verdict was rendered in the Superior Court Action and on August 2, 2000, a judgment was entered in favor of the Newton Group and against Debtor in the amount of $758,000 in compensatory damages, plus $165,000 in attorney's fees, together with interest at the legal rate of twelve percent plus costs, and in favor of the Estate of Ruth Bowen in the amount of $96,000 with interest at the statutory rate of twelve percent, plus all costs.

Debtor filed the instant Chapter 7 case on August 17, 2000. The Trustee initiated this adversary proceeding to avoid transfers made by Debtor to his wife of his residence and ninety percent of the stock in Perry O. Lemmons & Associates. The facts surrounding the transfer of the stock appear to be undisputed. The business, which had been a sole proprietorship, was incorporated in June 1997, at a time when the Special Master's investigation was well underway and Debtor had been requested to explain over $180,000 of unauthorized withdrawals of Trust Assets for his personal benefit. On June 25, 1997, five hundred shares of stock of Perry O. Lemmons & Associates were issued to Debtor, who provided office furniture and equipment as capital. On June 30, 1997, Debtor transferred four hundred and fifty shares of stock to his wife.

The majority of the evidence presented at trial focused on the transfer of the house. Defendants contend that the deed transferring the property from Debtor to his wife was executed on June 30, 1990. The Trustee, however, contends that the transfer occurred in September 1997, when Debtor was facing a significant judgment in the Superior Court Action, in an effort to hinder or delay Debtor's creditors. A copy of the deed was admitted into evidence at trial as Plaintiff's Exhibit 6. The deed is signed by Debtor and bears the date June 30, 1990 typed above Debtor's signature. The deed also bears the signatures of Helen W. Winslow,[1] as notary and a Newton County notary seal. The deed was witnessed by Debtor's son, Kenneth Lemmons. Finally, the deed also bears a stamp indicating it was filed with the Superior Court of Fulton County on September 11, 1997.

Debtor testified at trial that he prepared and executed the deed on June 30, 1990, the Saturday before the July 4th holiday, while alone at his office. Debtor testified that the husband of his office manager, Helen Winslow Lov, died in May 1990 and that his financial affairs were not in order. Debtor further testified that Ms. Bowen, who was in a coma at the time, had not made arrangements for a power of attorney to act on her behalf. Debtor testified these events persuaded him to put his own financial affairs in order and to transfer the property to his wife as he had promised her he would do. Debtor testified that at the same time he prepared a living will and a durable power of attorney for healthcare for himself.[2] Debtor further testified that he took the deed home and gave it to his wife that night and that she put the deed in her private papers.

Debtor testified that in 1997, at a time when his mother-in-law was admitted to a nursing

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[1] Ms. Winslow now goes by the name of Helen Winslow Lov.

[2] These documents were not tendered or admitted into evidence at the trial.

home, his wife decided to transfer her interest in property located in Greenville, South Carolina, to her brother. Debtor testified that while looking through his wife's papers for the deed to the Greenville property they found the deed transferring the house from Debtor to Ms. Lemmons and discovered that it had not been notarized or recorded. Debtor did not recall the date the deed was discovered, but he testified that it would have been around September 2, 1997, the date the deed to the Greenville property was executed.[3] Debtor testified that he remembered taking the deed into his office and stating to Ms. Lov that it was his signature and asking her to notarize it, which she did. He testified that the deed was dated June 30, 1990 when he gave it to Ms. Lov to notarize. He further testified that there was no discussion regarding the date. He also testified that his son, Kenneth Lemmons, was in the office and served as a witness to his signature. Kenneth Lemmons was not called to testify at trial. Finally, Debtor testified that the deed was recorded that day or the next day.

Debtor's testimony at trial is inconsistent with the testimony that he gave in his November 2001 deposition, in which he stated the deed was notarized at or about the same time it was executed. In his November 2001 deposition, Debtor testified that he specifically remembered that he signed the deed in Ms. Lov's office, in front of Ms. Lov and his son, on June 30, 1990.[4] It was not until the parties discovered that Ms. Lov did not become a notary in Newton County until 1995, that Debtor asserted that the deed was notarized years after it was executed.

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[3]This document was not tendered or admitted into evidence at trial.

[4]Debtor testified that he based his testimony in the November 2001 deposition on his discussion with Ms. Lov in which she told him that she would not notarize a signature of a date different that the date she was signing.

Debtor's wife testified at trial that she was not present when the deed was executed. She further testified that she did not recall the date on which Debtor gave her the deed, but that it was years before the deed was recorded in 1997. Although she testified that it was her memory that she was making dinner when Debtor gave her the deed, Ms. Lemmons did not have a benchmark on which to base a belief that she received the deed in 1990. This is consistent with her testimony in her November 2001 deposition in which she stated that she did not know exactly what year she received the deed, but it was before 1997. She further testified at trial that when she received the deed she did not notice whose signatures were on it. As support for her contention that she was the owner of the house in 1990, Ms. Lemmons relied on the homeowner's insurance policy issued by West American Insurance Company. The applications for homeowner's insurance were admitted as Defendant Betty Lemmons' Exhibit 3. These documents indicate that the policy was issued to Betty C. Lemmons in 1989, 1990, and 1991. Since, however, it appears that the insurance policy was held in Ms. Lemmons' name prior to the date that even the Defendants contend the transfer occurred, the fact that the policy continued to be in her name thereafter cannot be evidence that the transfer occurred in 1990.

Furthermore, Ms. Lemmons did not appear to have a clear memory of the events surrounding the discovery of the deed in 1997. She testified that her daughter was involved in a serious car accident on the same day that her mother was admitted to a nursing home in March 1997. She further testified that during that time she was overwhelmed with taking care of her daughter and trying to work a full time job. Ms. Lemmons testified that around that time she transferred her interest in the Greenville property to her brother. She stated that Debtor *would have* asked for her papers in relation to this transfer and she *would have* given him the folder in

which she kept her personal papers. This is consistent with her testimony in her November 2001 deposition that she did not specifically remember giving Debtor the deed or the folder during that time. She further testified at trial that she was not personally involved in the notarizing or recording the deed in 1997.

Ms. Lov testified at the trial that she became a notary in Newton County in 1995. She testified that she often notarized documents for Debtor that were not dated. Moreover, Ms. Lov adamantly stated that the deed in this case did not contain the date, June 30, 1990, when she notarized it. Ms. Lov testified that if Debtor's signature on the deed was dated June 30, 1990, she would not have notarized it in 1997. Ms. Lov testified that to do so would violate the instructions she was given as a notary.

Ms. Lov's testimony at trial was inconsistent with her statements in her affidavit signed on August 1, 2000, in which she stated that "the deed speaks correctly of the date that I notarized Perry O. Lemmons' signature, namely June 30, 1990." Ms. Lov testified, however, that Debtor prepared the affidavit, that she made a cursory review of it and signed it in the office, and immediately gave it back to him. She testified that Debtor told her that it was an affidavit stating that he was a "good guy" and that she relied on his representations. She further testified that when she signed the affidavit, she did not have a copy of the deed, and therefore, did not notice that the deed bore her Newton County notary seal.

Upon review of the testimony and evidence submitted at trial, the Court finds that the transfer of the residence from Debtor to his wife occurred some time after Ms. Lov became a Newton County Notary in 1995, and most likely occurred in 1997, at or about the time the deed was recorded and the stock transfer occurred. The Court finds Defendants' testimony regarding

this matter to be unpersuasive and not credible. First, Debtor's testimony conflicts with the account of events that he provided in his deposition. Further, his statements are discredited by the testimony of Ms. Lov, who is a disinterested third party. Also, the documents that Debtor contends support his account of the transfer were not presented as evidence at trial. Additionally, Ms. Lemmons' testimony is of little value since she was not present during the execution and recording of the deed and does not remember when she received the deed. Moreover, the Court finds the most plausible explanation to be that Debtor transferred the property to his wife in 1997, around the same time as the Special Master had identified claims against Debtor and Debtor transferred ninety percent of the stock in his company to his wife, and Debtor filed bankruptcy, and was facing foreclosure on the Piedmont Road office building.

CONCLUSIONS OF LAW

1. Section 544(b)(1)

The Trustee seeks to avoid the transfers in accordance with § 544(b)(1), which provides that the trustee may avoid "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 [of the Code] or that is not allowable only under section 502(e) [of the Code]." 11 U.S.C. § 544(b)(1). To prevail on a claim under § 544(b)(1), the Trustee must show the existence of an actual creditor with a viable cause of action against the debtor. Collier on Bankruptcy at ¶ 544.09. In this case, the Newton Group is a judgment

creditor with a viable fraudulent transfer claim against the Defendants under O.C.G.A. §§ 18-2-22(2) and 18-2-22(3).[5]

Defendants contend that the Trustee's claims under O.C.G.A. §§ 18-2-22(2) and 18-2-22(3) are barred by laches or the applicable statute of limitations. An action by the Trustee pursuant to § 544 must be brought within the applicable state law limitation period. *Id.* Georgia fraudulent conveyance statutes, however, do not provide a statute of limitations. *Broadfoot v. Hunerwadel (In re Dulock)*, 282 B.R. 54, 57-58 (Bankr. N.D. Ga 2002)(Bihary, J.). Nonetheless, based on the time for bringing an action to recover property of the kind, Georgia courts have applied a four year statute of limitations for transfers of personal property and a seven year statute of limitations to transfers of real estate. *Id.* at 58-59. Additionally, a case brought under § 544 is subject to time limitations under § 546. *See* 11 U.S.C. § 546. Section 546(a)(1) provides that "[a]n action or proceeding under section 544 . . . may not be commenced after the earlier of – (1) the later of (A) 2 years after the entry of the order for relief; or (B) 1 year after the appointment or election of the first trustee . . . or (2) the time the case is closed or dismissed." *Id.*

Debtor filed his petition for relief under Chapter 7 of the Bankruptcy Code on August 17, 2000. The Trustee was appointed on August 21, 2000 and the instant adversary proceeding was filed on September 20, 2001. As stated above, the Court finds that both the stock and the house were transferred by Debtor to his wife in 1997. Although the statute of limitations under Georgia law ran as to the stock transfer on June 30, 2001, the time for bringing an action under

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[5]The Uniform Fraudulent Transfer Act (UFTA), 2002 Ga. Laws 141, § 3, as codified at §§ 18-2-70 to 18-2-80, which took effect on July 1, 2002, repealed § 18-2-22. *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1081 (11th Cir. 2004). The UFTA, however, was not retroactive. *Id.* Thus, where the underlying events occurred prior July 1, 2002, § 18-2-22 still applies. *Id.*

§ 544 may be extended by § 108, which permits the Trustee to bring a suit either "(1) within the regularly-applicable statute of limitations or (2) within two years of the order for relief if the regularly-applicable limit did not expire before the filing of the bankruptcy petition." 11 U.S.C. § 108; Collier on Bankruptcy at ¶ 544.09; *see also Beck v. Deloitte & Touche*, 144 F.3d 732, 736 (11th Cir. 1998). Thus, the claims related to the stock transfer are not time barred. Additionally, the claims related to the transfer of the house were brought within the seven year statute of limitations.[6]

2. O.C.G.A. § 18-2-22(2)

Section 18-2-22(2) provides that "[e]very conveyance of real or personal estate, by writing or otherwise . . . made with intention to delay or defraud creditors, where such intention is known to the taking party" shall be fraudulent in law against creditors and shall be null and void. O.C.G.A. § 18-2-22(2). In order to prevail on an action under § 18-2-22(2), the Trustee must show that a debtor made the conveyance with the intent to delay or defraud present or future creditors, and his intentions were known to the grantee. *Lionheart Legend, Inc. v. Norwest Bank Minn. Nat'l Ass'n*, 253 Ga. App. 663, 665, 560 S.E.2d 120, 123 (2002); *Hadlock v. Anderson*, 246 Ga. App. 291, 294, 540 S.E.2d 282, 284-85 (2000). For purposes of § 18-2-22(2), a debtor's fraudulent intent may be evidenced by the presence of certain badges of fraud including a close family relationship between the grantor and grantee, inadequacy of consideration, and whether the grantor remained in possession of the property after the conveyance. *See Guida v. Lesser*, 264 Ga. App. 293, 590 S.E.2d 140; *Stokes v. McRae*, 247 Ga.

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[6]It is worth noting that, even if the transfer of the house occurred in 1995, the action under O.C.G.A. § 18-2-22 was brought within the statute of limitations.

658, 660, 278 S.E.2d 393, 396 (1981).

When a transfer is from one spouse to another, even slight circumstances may be sufficient to establish the existence of fraud. *Dearing v. A.R. III, Inc.*, 266 Ga. 301, 302, 466 S.E.2d 565 (1996). The burden is on the husband and the wife to show that the transaction was fair. *Id.* Further, when the consideration for a transfer between husband and wife was love and affection or some nominal consideration, fraud is presumed. *In re Dante*, 1 B.R. 547 (Bankr. N.D. Ga. 1979) (Kahn, J.).

The deed in this case states that it was made upon the consideration of $1 and love and affection. Defendants testified that consideration for the transfer of the house also included Ms. Lemmons paying the down payment for the house in 1960 and her contributions over the years of money and labor in making improvements to the house such as painting, wallpaper, drapes, and interior decorations. Debtor further testified that the transfer of the house was an attempt to equalize the assets between himself and his wife, in which he retained ownership of the office building and she took title to the house. Similarly, Debtor testified that the stock was transferred to his wife in consideration of her working in the office without pay for several years, and was intended to supplement her social security income, which was less than it would have been if she had received a salary while working at the office from which social security could have been withheld. These contributions, however, do not constitute present consideration. Since the transfers were made from one spouse to another for little or no present consideration, there is a presumption of fraud.

The evidence at trial also established other badges of fraud. There was no shift in possession or control of the house or the business following the transfers. While Ms. Lemmons

contends that the fact that the homeowner's insurance policy was held in her name evidenced her control, as stated above, the insurance policy was held in her name prior to the transfer and therefore is of no evidentiary value. In regards to the ownership of the business, Ms. Lov, the office manager of Perry O. Lemmons & Associates, testified that she was not aware that anyone other than Debtor had an ownership interest in the business. Moreover, Debtor testified that Ms. Lemmons' influence over the business was limited to decisions regarding furniture and some general say as to the leasing of office space and location. Additionally, the transfers were made while the state court litigation was pending, which ultimately resulted in a large judgment against Debtor. In the year preceding the transfers, the litigation in the Superior Court Action was such that Debtor should have anticipated that an action seeking a large judgment would be brought, even though the Newton Group had not made an official claim for recovery at that time. Debtor, who had controlled the distributions from the Trust and who had received an inquiry from the Special Master as to certain improper disbursements, must be charged with knowing the conclusions of the Special Master's Report and should have expected the Newton Group, which had already filed complaints against him with the State Bar of Georgia and the Georgia State Board of Accountancy, to assert claims in the Superior Court Action. Finally, at the time of the transfers, Debtor was facing foreclosure of his office building, and ultimately filed for bankruptcy relief.

Further, the Court concludes that Ms. Lemmons had constructive knowledge of Debtor's fraudulent intent. A grantee's knowledge of debtor's fraudulent intent can be established by evidence of actual or constructive knowledge. *E.g., Bryant v. Browning*, 259 Ga. App. 467. A transferee has constructive knowledge of the transferor's fraudulent intent if a reasonable person

would have grounds for suspicion sufficient to suggest further inquiry into the transferor's intent. *See e.g, United States v. Reid*, 127 F. Supp. 2d 1361, 1369 (S.D. Ga. 2000). Ms. Lemmons testified that she was aware of the pending foreclosure of the office building and the chapter 13 bankruptcy filing. Moreover, although she claims she was not aware of the potential for a large judgment, she admitted that she was aware that an action was pending in the superior court. Ms. Lov also testified that she heard Ms. Lemmons complain to Debtor about the impact of the deed on the house not being filed. This knowledge provided Ms. Lemmons grounds to reasonably suspect fraudulent intent by Debtor.

For the reasons stated above, the Court finds that the evidence presented at trial was sufficient to establish a presumption of fraud by Defendants and that Defendants failed to meet their burden of establishing that the transfers were made in good faith. Thus, the transfers of Debtor's residence and the stock are null and void pursuant to O.C.G.A. § 18-2-22(2).

3. O.C.G.A. § 18-2-22(3)

Section 18-2-22(3) provides that "[e]very voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance" shall be fraudulent in law against creditors and shall be null and void. In order to prevail, the Trustee must prove (1) the voluntariness of the deed or conveyance, (2) lack of valuable consideration, and (3) insolvency of debtor. *Holmes v. Perry (In re Holmes)*, 296 B.R. 567, 572 (Bankr. M.D. Ga. 2003) (citing *Dearing v. A.R. III, Inc.*, 266 Ga. 301, 466 S.E.2d 565, 566 (1996)). The Trustee is not required to prove that Debtor intended to defraud his creditors. *Barclay v. First Nat'l. Bank,* 265 Ga. 744, 462 S.E.2d 374 (1995); *Stokes v. McRae,* 247 Ga. 658, 659(1), 278 S.E.2d 393 (1981); *Bryant v. Browning*, 259 Ga. App. 467, 469, 576 S.E.2d 925, 927 (2003).

For purposes of § 18-2-22(3), the terms "voluntary" and "not for valuable consideration" have the same meaning. *In re Holmes*, 296 B.R. 567 ("The cases show that the word 'voluntary' is not used in its ordinary sense, meaning 'free choice' as opposed to 'compelled.' In fact, the word 'voluntary' is used to mean 'without valuable consideration.'")(quoting *Brown v. Citizens & Southern Nat'l Bank*, 253 Ga. 119, 317 S.E.2d 180, 183 (1984)); *see also Stokes v. McRae*, 247 Ga. 658, 278 S.E.2d 393 (1981). Thus, a voluntary conveyance is one without present or valuable consideration. *Cavin v. Brown*, 246 Ga. App. 40, 42, 538 S.E.2d 802, 806 (2000) (citing *Barclay v. First Nat'l Bank*, 265 Ga. 744, 744-45, 462 S.E.2d 374 (1995)). As stated above, the transfers in this case were not supported by present consideration.

Whether Debtor was insolvent is determined by ascertaining whether he retained sufficient assets to satisfy his obligations after the transfers. *Rolleston v. Cherry*, 237 Ga. App. 733, 736, 521 S.E.2d 1, 4 (1999); *Tidwell v. Galbreath (In re Galbreath)*, 207 B.R. 309, 316 (Bankr. M.D. Ga. 1997). Under Georgia law, the Court must consider an unliquidated tort claim in determining insolvency. *Bryant v. Browning*, 259 Ga. App. 467, 576 S.E.2d 925 (2003) (holding that failure to consider the unliquidated wrongful death claim in determining the insolvency of the debtor was reversible error even where at the time of the transfer the debtor did not know who held the right to bring the claim, the value of the claim, or if someone would sue to collect on the claim). The Superior Court Action was pending at the time of the transfers, even though the Newton Group had not yet amended their response to the petition for interpretation of the will to assert claims of fraud, conversion, and breach of contract. Debtor should have been aware that claims related to his mismanagement of the Trust would be filed and that there was a potential for a large judgment. *See Id.* (holding that the debtor should have

been aware that a wrongful death action seeking millions of dollars in damages would probably be filed against him).

Debtor's Schedules and Statement of Financial Affairs filed in his chapter 13 bankruptcy case on August 5, 1997, listed Debtor's total assets in the amount of $430,045 and total liabilities, excluding the Superior Court judgment, in the amount of $119,480. The statement of total assets does not include the value of Debtor's residence. Additionally, it is based on Debtor having significant equity in his office building. The value of Debtor's interest in the Piedmont Road building is scheduled as $330,000 with a secured claim against it of $95,000. However, the Special Master's Report indicates that no mortgage payments had been made since May 1985 and that, as of April 1998, the mortgage debt exceeded $320,000. When the office building was sold at foreclosure, Debtor did not receive any of the sales proceeds. Even if the Court were to assume that Debtor's schedules accurately stated the value of Debtor's assets and liabilities, and the Court included value for the residence, Debtor did not have assets approaching the amount of his actual liabilities, including the claim represented by the judgment. Therefore, the Court finds that Debtor was insolvent even before the transfer of either the house or the stock to his wife.

For the reasons stated above, the Court concludes that the transfers by Debtor to his wife of the residence and the stock were voluntary and not for valuable consideration. The Court further concludes that Debtor was insolvent at the time of the transfers or was made insolvent by the transfers. Accordingly, the transfers are null and void pursuant to § 18-2-22(3).

4. Trustee's Motion to Amend Complaint

On January 13, 2006, the Friday before the Tuesday the trial began, the Trustee moved to amend the complaint to add a claim under O.C.G.A. § 44-2-14, contending that an original copy

of the deed was not validly acknowledged and that the deed was altered between the time that Ms. Lov notarized the deed and the time that it was recorded. The Trustee contends that under Georgia law the recording of the deed was ineffective to give notice and was therefore avoidable by the Trustee as a hypothetical lien creditor or bona fide purchaser.

Federal Rule of Civil Procedure 15(a) provides that leave to amend pleadings "shall be freely given when justice so requires." Generally, a motion to amend the answer will be granted, unless there is evidence of bad faith or dilatory motive on the apart of the movant, or, if allowing the amendment would result in undue delay, undue prejudice to the opposing party, or the amendment would be futile. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962); *Laurie v. Ala. Court of Crim. Appeals*, 256 F.3d 1266, 1274 (11th Cir. 2001). In this case, allowing the amendment of pleadings on the eve of trial in a case that has been pending for more than four years would be unduly prejudicial to Defendants and would cause undue delay of the proceedings since additional evidence would be required. Moreover, amendment of the complaint in this case would be futile and unnecessary since the Court has found that the transfers are null and void under O.C.G.A. §§ 18-2-22(2) and (3). Therefore, the Trustee's Motion to Amend the Complaint is denied.

5. Remedies

To the extent that a transfer is avoided under § 544, § 550(a) permits the Trustee to recover from the transferee the property transferred or the value of such property. 11 U.S.C. § 550(a). Section 550 is intended "to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred." *Hirsch v. Gersten* (*In re Centennial Textiles*), 220 B.R. 165, 176 (Bankr. S.D.N.Y. 1998); *Kelley v. GMAC (In re Farmer)*, 209 B.R. 1022, 1024

(Bankr. M.D. Ga. 1997); *Tidwell v. Chrysler Credit Corp.* (*In re Blackburn*), 90 B.R. 569, 573 (Bankr. M.D. Ga. 1987)(citing *Reiber v. Baker* (*In re Baker*), 17 B.R. 392, 395 (Bankr. W.D.N.Y 1982); *see also Aero-Fastener, Inc. v. Sierracin Corp.* (*In re Aero-Fastener, Inc.*), 177 B.R. 120, 139 (Bankr. D. Mass. 1994). Generally, the transferee should return the property transferred, unless to do so would be inequitable, in which case the transferee is liable for the value of the property. *Shape, Inc. v. Midwest Eng'g (In re Shape, Inc.)*, 176 B.R. 1, 3 (Bankr. D. Me. 1994); *In re General Industries, Inc.*, 79 B.R. 124, 135 (Bankr. D. Mass. 1987). In this case, the appropriate remedy is the return of the real property and the value of the stock.

Ms. Lemmons contends that she is entitled to an equitable interest in the house. To determine Ms. Lemmons' rights and interests in the house, the Court must consider state law. *In re McBarnette*, 173 B.R. 248, 249 (Bankr. N.D. Ga. 1994) (Drake, J.). Georgia law provides two types of implied trusts, a constructive trust or a resulting trust. O.C.G.A. § 53-12-90. A constructive trust exists "whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." O.C.G.A. § 53-12-93(a). Generally, a constructive trust requires the presence of fraud. *Parris v. Leifels*, 280 Ga. 135, 625 S.E.2d 390 (2006); *Whiten v. Murray*, 267 Ga. App. 417, 419-20, 599 S.E.2d 346, 350 (2004); *Mays v. Perry*, 196 Ga. 729, 735-36, 27 S.E.2d 698, 702 (1943). A constructive trust usually arises where the holder of the deed tricks the true owner at the time of the transfer into conveying legal title to him or takes legal title with the understanding that he will transfer the property back to the true owner, but later decides not to abide by the agreement. *In the Matter of Lewis*, 1996 WL 33401163 (Bankr. S.D. Ga. 1996) (unreported); *see also Whiten v. Whiten*, 267 Ga. App. 417. A

mere broken promise to convey cannot create a constructive trust. *E.g., Parris v. Leifels*, 280 Ga.135, 625 S.E.2d 390. To hold otherwise would undermine the Statute of Frauds. *Id.* Ms. Lemmons does not allege fraud on the part of Debtor. She knew that title to the property would be vested solely in her husband. Therefore, imposition of a constructive trust is not appropriate.

A resulting trust arises when the parties did not intend that the holder of legal title to also have beneficial interest in the property. O.C.G.A. § 53-12-91. The relevant type of resulting trust in this case is a purchase money resulting trust, which arises when the consideration for the transfer was provided by someone other than the person holding legal title. *See* O.C.G.A. § 53-12-91(a). As between husband and wife, payment of the purchase money by one spouse, which causes legal title to vest in the other spouse, is presumed to be a gift. O.C.G.A. § 53-12-91(c); *Lewis*, 1996 WL 33401163 at 5; *Harrell v. Harrell*, 249 Ga. 170, 171, 290 S.E.2d 906, 906-907 (1982). The presumption, however, may be rebutted and a resulting trust imposed upon clear and convincing evidence of the intent of the parties at the time of the transfer. *Id.*

In this case, Defendants testified that Ms. Lemmons provided the down payment for the house in 1960 from savings from her salary during the marriage. The purchase price of the house was $18,250 and the loan obtained by Mr. Lemmons was $13,650, a difference of $4,600 (Perry Lemmons Exhibit 13). The social security statement for Ms. Lemmons indicates her total earnings (before taxes) during the marriage and prior to 1960 were $6,319. No documentary evidence was provided as to the source of the down payment. Debtor testified that it was his intent when the house was purchased that Ms. Lemmons have a one half interest in the house. Debtor further testified that the only reason Ms. Lemmons' name was not listed on the deed as

co-owner was because the mortgagee would not lend the money for the purchase of the house, if a woman's name was on the deed. No corroborating evidence was offered by Debtor. Payments on the mortgage loan were made by Debtor from his earnings. Title remained solely in Debtor's name for in excess of thirty (30) years and for over five (5) years after the mortgage had been satisfied.[7] The Court does not find the evidence of Debtor's intent to be clear and convincing so as to overcome the presumption of a gift.

Even if an equitable interest were involved, that interest is avoidable. While there is a split in authority regarding whether a Chapter 7 trustee can avoid the unrecorded, equitable interest of a third party through his status as a bona fide purchaser under § 541 or whether the trustee takes the property into the estate subject to the equity interest under § 541(d), the better position is that the transfer may be avoided. Section 541(d) provides

> Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (a)(2) of [Section 541] only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

11 U.S.C. § 541(d). The majority view holds that the trustee's strong arm powers under § 544 function independently from § 541(d) and thus § 541(d) does not preclude avoidance of an equitable interest, while the minority view holds that § 541(d) operates to prevent the trustee from bringing into the bankruptcy estate property that a debtor did not hold both the legal and equitable property interests. Compare *In re Seaway Express Corp.*, 912 F.2d 1125, 1128-29 (9th Cir.1990; *Belisle v. Plunkett*, 877 F.2d 512, 516 (7th Cir. Wis. 1989); *In re Tleel*, 876 F.2d 769,

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[7]The security deed at issue did not contain a "due on sale" clause. As a result, there was no impediment to a conveyance by Debtor prior to the satisfaction of the security deed.

771-72 (9th Cir. Cal. 1989); *Mullins v. Burtch (In re Paul J. Paradise & Assocs.)*, 249 B.R. 360, 371-72 (D. Del. 2000); *Patel v. Rupp*, 195 B.R. 779, 782 (D. Utah 1996); *Ebel v. Ebel*, 144 B.R. 510, 514-15 (D. Colo. 1992); *In re Cascade Oil Co.*, 65 B.R. 35, 42 (Bankr. D. Kan. 1986); *In re Great Plains Western Ranch Co.*, 38 B.R. 899, 906 (Bankr. C.D. Cal. 1984); *In re Dlott*, 43 B.R. 789, 792 (Bankr. D. Mass. 1983); *In re Anderson*, 30 B.R. 995, 1009-10 (M.D. Tenn. 1983) with *Haber Oil Co. v. Swinehart (In re Haber Oil Co.)*, 12 F.3d 426, 434 (5th Cir. 1994); *Universal Bonding Ins. Co. v. Gittens & Sprinkle Enterprises, Inc.*, 960 F.2d 366 (3d Cir. 1992); *In re DeLauro*, 207 B.R. 412 (Bankr. D.N.J. 1997). The Eleventh Circuit, in *General Coffee Corp. v. City National Bank of Miami* (*In re General Coffee Corp.*), 828 F.2d 699 (11th Cir. 1987), declined to resolve the tension between § 541(d) and § 544, finding that the trust property was not property of the estate under either view.

The Court hereby adopts the majority view and holds that the trustee, as a hypothetical bona fide purchaser, may avoid an unrecorded equitable interest under § 544(a)(3). This is consistent with Georgia law, that a resulting trust is subordinate to the interest of a bona fide purchaser. *See Whiten v. Murray*, 267 Ga. App. 417; *see also Parker v. Barnesville Sav. Bank*, 34 S.E. 365, 367 (1899). Therefore, the Court concludes that any equitable interest of Ms. Lemmons in the house would be avoidable by the Trustee pursuant to § 544(a)(3).

In regards to the transfer of stock, the stock has declined in value since the time of the transfer, and therefore return of the stock would be inequitable. This is because stock of a closely-held personal services business such as a professional practice such as Perry O. Lemmons & Associates, depends heavily, if not exclusively, on the continued services provided by the principal. The Court concludes that the appropriate remedy is the return to the bankruptcy

estate the value of the stock at the time of its fraudulent transfer to Ms. Lemmons. Debtor valued his interest in the stock on Schedule B in his 1997 chapter 13 bankruptcy case at $50,000. The Trustee contends that the value listed on Schedule B represents only the value of Debtor's ultimate ten percent interest and thus the Trustee should be permitted to recover $450,000 as the full value of the stock transferred to Ms. Lemmons. Debtor, however, was careful to indicate on Schedule B the percentage of interest he held when it was less than one hundred percent, as evidenced by the listing directly below the entry for Perry O. Lemmons & Associates, which indicates a five percent interest in Parkair Apartments. Moreover, the description under Item 12 on Schedule B reads: "The corporation was planned pre-petition and concluded post-petition. It continues debtor's accounting practice." Upon review of Debtor's schedule B and the trial testimony regarding the value of Debtor's business, the Court concludes that the fair value of the ninety percent of the stock transferred to Ms. Lemmons on the date of the transfer was $45,000 and grants a judgment in that amount against Ms. Lemmons and in favor of Trustee.

In conclusion, the transfers of the house and stock by Debtor to his wife are null and void pursuant to O.C.G.A. § 18-2-22(2) and § 18-2-22(3) and are therefore avoidable by the Trustee pursuant to § 544. Additionally, even if Ms. Lemmons is entitled to an equitable interest in the house under state law, that interest is also avoidable by the Trustee. Finally, in accordance with § 550, Defendants are ordered to return the house to the Trustee for the benefit of the estate and are ordered to pay the Trustee $45,000 for the value of the stock.

IT IS SO ORDERED, this the 7th day of July, 2006.

Mary Grace Diehl

MARY GRACE DIEHL
UNITED STATES BANKRUPTCY JUDGE