IT IS ORDERED as set forth below:

Date: November 28, 2011

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

IN RE:	)	
	)	CASE NO. 10-73348-WLH
JAY P. MOSKOWITZ and	)	
NADINE K. BADDOUR,	)	CHAPTER 7
	)	
Debtors.	)	JUDGE WENDY L. HAGENAU
	)	
CATHY L. SCARVER, TRUSTEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ADV. PROC. NO. 10-6650-WLH
	)	
M. ABUHAB PARTICIPACOES S.A.,	)	
	)	
Defendant.	)	
	)	

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant's Motion for Summary Judgment [Docket No. 21] on the Trustee's Complaint to Avoid Certain Transfers under 11 U.S.C. §§ 547 and 548 and O.C.G.A. § 18-2-74 and to Subordinate Defendant's Claim. As such, this matter is a core

proceeding pursuant to 28 U.S.C. § 157(b)(2)(B), (F), (H) and (O), and the Court has jurisdiction over it pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334.

The Court has considered the pleadings of record, the Motion, briefs, affidavits, and the original discovery filed by the parties. For the reasons set forth below, the Court concludes the Defendant's Motion is denied in part and granted in part. The following constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Fed. R. Bankr. P. 7052.

FACTS

The parties have disputed a number of each other's "undisputed" facts, but the following constitutes the Court's findings of undisputed fact based on all matters of record. M. Abuhab Participacoes S.A. ("MAP") is a Brazilian corporation which makes private equity investments in a variety of companies. Mr. Miguel Abuhab is the president and a shareholder of MAP. Mr. Abuhab is an entrepreneur who has owned and operated a number of businesses, most of which are in the information technology field. Neither of the Debtors owns any interest in MAP.

Mr. Abuhab has known both debtors for at least 17 years. He has visited the Debtors in their home in Atlanta, and Mr. Moskowitz has visited in Mr. Abuhab's home in Brazil at least four times. Mr. Moskowitz served on the board of a company named Agentrics, LLC during the period September 2008 through October 2009, at which time Mr. Abuhab also served on the board. Mr. Abuhab and MAP dispute the Trustee's allegation that either of them own a direct interest in Agentrics. They do not dispute, however, there is a relationship between and among Agentrics, Mr. Abuhab and MAP. They contend Mr. Abuhab owns an interest in a company which in turn owns 100% of Agentrics. Thus, Agentrics and MAP are at least brother/sister corporations with common ownership.

At some point, Mr. Moskowitz started a company called eMedicalFiles, Inc. eMedicalFiles filed a petition under Chapter 7 of the United States Bankruptcy Code in the Northern District of Georgia on March 30, 2009. eMedicalFiles' Schedules and Statement of Financial Affairs lists its shareholders and officers, but neither MAP nor Mr. Abuhab individually are identified as shareholders or officers of eMedicalFiles.

On October 31, 2008, MAP, both Debtors and eMedicalFiles, Inc. executed a "Memorandum of Terms for $500,000 Loan from M. Abuhab Participacoes to Jay P. Moskowitz and $500,000 Convertible Loan from Jay P. Moskowitz to eMedicalFiles, Inc. (Loan Agreement)" (hereinafter, referred to as the "Memorandum of Terms"). Under the Memorandum of Terms, MAP was to make a loan of $500,000 to Mr. Moskowitz ("MAP Loan") upon receipt of which Mr. Moskowitz would loan the funds to eMedicalFiles ("Moskowitz Loan"). The Map Loan was to be evidenced by a note ("MAP Note"). The MAP Note was to bear interest at the rate of 10% per year. The MAP Loan was to be repaid within 90 days of the date of the MAP Note. Similarly, the Moskowitz Loan was to be evidenced by a note ("Moskowitz Note"), which was also to bear interest at the rate of 10% per year. Like the MAP Note, the Moskowitz Note was to be repaid within 90 days after the date of the Moskowitz Note. The Memorandum of Terms provided, "Until such time as all principal and accrued interest on the Moskowitz Note have been paid in full, the holder of the Moskowitz Note, at its option exercised at any time, may convert all or any portion of the unpaid amount of such indebtedness into shares of the Company's [eMedicalFiles'] Class B Common Stock." Under the Memorandum of Terms, MAP could select its security as follows:

> At MAP's own selection – order criteria, the MAP Loan will be secured by (i) a pledge of all rights of the e-MedicalFiles Receivables … (ii) a pledge of all rights of the Step 3's Receivables … (iii) a first priority lien on all of Moskowitz' stock

> in Step 3 Consulting, Inc., (iv) a collateral assignment of the Moskowitz Note, and (v) 02 (two) Jamaica based properties, both on Cold Harbour Estate.

The Moskowitz Loan was to be secured by a first-priority lien on the eMedicalFiles' accounts receivable, which security interest Mr. Moskowitz was to assign to MAP. The Memorandum of Terms further provided that eMedicalFiles was to issue to MAP upon receipt of the Moskowitz Loan "warrants to purchase 500,000 shares of the Class B Common Stock". MAP disputes that this occurred.

Under the Memorandum of Terms, $500,000 was wired to Mr. Moskowitz on October 31, 2008. There is some issue as to whether the funds were the property of MAP or Mr. Abuhab. However, for purposes of this Motion for Summary Judgment, the Court need not resolve that issue. On September 17, 2008 (prior to execution of the Memorandum of Terms but apparently in anticipation of it), eMedicalFiles granted a security interest in its accounts receivable to Mr. Moskowitz. According to eMedicalFiles' bankruptcy Schedules, this security interest was then assigned to MAP on November 3, 2008.

On January 5, 2009, MAP, Mr. Moskowitz and Ms. Baddour, and eMedicalFiles executed a First Amendment to Loan Agreement extending the due date under the MAP Note to 180 days and reiterating their agreement to sign an Instrument of Mortgage to create a mortgage lien on the Debtors' Jamaican properties. An Instrument of Mortgage dated January 5, 2009 is included in the record. Subsequently, on May 30, 2009, MAP, Mr. Moskowitz and Ms. Baddour, and eMedicalFiles executed a Second Amendment to the Loan Agreement which further extended the due date of the MAP Loan to October 30, 2009 and provided for an increase in the interest rate to 12% for the period April 30, 2009 through October 30, 2009. Additionally, in the Second Amendment, the Debtors agreed to sign "a new Instrument of Mortgage" with

respect to the Debtors' Jamaican properties. An Instrument of Mortgage dated August 24, 2009 is included in the record.

The parties agree, however, that no Instrument of Mortgage was recorded until October 23, 2009. The documents provided to the Court do not indicate which of the Instruments of Mortgage previously signed was recorded, but for purposes of the Motion for Summary Judgment the Court need not resolve that issue. The Instrument of Mortgage recorded on October 23, 2009 secured the repayment of the $500,000 loan advanced by MAP on October 31, 2008. Thereafter, from October 2009 through February 2010, MAP made additional advances to Mr. Moskowitz totaling $150,000 to enable him to start a new business called NeoGen International, LLC. An Instrument of Mortgage on the Jamaican properties dated March 12, 2010 and which secures the repayment of the additional $150,000 in advances is included in the record. This additional Instrument of Mortgage was recorded in Jamaica on April 3, 2010. Notwithstanding the provisions in the Memorandum of Terms, Mr. Moskowitz never executed a note to MAP, and no repayments were ever made of either the $500,000 advance or the $150,000 advance.

On May 3, 2010, Mr. Moskowitz and his wife, Nadine Baddour, filed a petition under Chapter 11 of the Bankruptcy Code. On September 8, 2010, the Debtors and MAP filed a Joint Motion for Relief from Stay seeking permission for MAP to foreclose on the two Jamaican properties. Objections to the Motion for Relief from Stay were received and, after hearing, the Motion for Relief from Stay was denied. On October 18, 2010, the Chapter 11 case was converted to one under Chapter 7, and Ms. Scarver was appointed as Chapter 7 Trustee. Ms. Scarver filed a complaint on November 18, 2010, seeking to set aside the liens of MAP on the Jamaican properties and to subordinate or recharacterize the resulting unsecured claim of MAP.

In general, the Trustee alleges the granting and recording of the liens are preferences, constructive fraudulent conveyances under 11 U.S.C. § 548 and O.C.G.A. § 18-2-74, and transfers made with actual intent to hinder, delay or defraud creditors avoidable under 11 U.S.C. § 548. Finally, the Trustee alleges that MAP's resulting unsecured claim should be subordinated or recharacterized as an equitable interest in eMedicalFiles. MAP has now filed this Motion for Summary Judgment on the "October Transfer" and the loan of $500,000 only. (Memorandum in Support of Defendant's Motion for Summary Judgment, p. 2). The October Transfer is defined in the Complaint as the recording of an Instrument of Mortgage on October 23, 2009.

CONCLUSIONS OF LAW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)[1]; Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). "The substantive law [applicable to the case] will identify which facts are material". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 248, 251-52, 106 S.Ct. at 2510, 2511-12.

The party moving for summary judgment has "the initial responsibility of informing the … court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which it believes demonstrate the absence of a genuine issue of material fact." United States v. Four Parcels of Real Prop., 941 F.2d 1428, 1437 (11th Cir. 1991) (citing Celotex Corp., 477 U.S. at

[1] Fed. R. Civ. P. 56(c) is made applicable in adversary proceedings by Fed. R. Bankr. P. 7056(c).

323, 106 S.Ct. at 2553). What is required of the moving party, however, varies depending on whether the moving party has the ultimate burden of proof on the issue at trial.

> When the nonmoving party has the burden of proof at trial, the moving party is not required to 'support its motion with affidavits or other similar material negating the opponent's claim' (cites omitted) in order to discharge this 'initial responsibility'. Instead, the moving party simply may 'show – that is, point out to the … court – that there is an absence of evidence to support the nonmoving party's case. (cites omitted). Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial.

Four Parcels of Real Prop., 941 F.2d at 1437 (citing Celotex, 477 U.S. at 323-31, 106 S.Ct. at 2553-57). In the Eleventh Circuit, "it is never enough simply to state that the nonmoving party cannot meet its burden at trial … Instead the moving party must point to specific portions of the record in order to demonstrate that the nonmoving party cannot meet its burden of proof at trial." Four Parcels of Real Prop., 941 F.2d at 1438 n. 19; see also Haines v. Cherokee County, 2010 WL 2821853 (N.D. Ga. 2010). Once this burden is met, the nonmoving party cannot merely rely on allegations or denials in its own pleadings. Fed. R. Civ. P. 56(e). Rather, the non-moving party must present specific facts that demonstrate there is a genuine dispute over material facts. Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (11th Cir. 1993). Lastly, when reviewing a motion for summary judgment, a court must examine the evidence in the light most favorable to the nonmoving party and all reasonable doubts and inferences should be resolved in favor of the nonmoving party. Hairston, 9 F.3d at 918.

PREFERENCE

The Defendant first argues the Trustee's preference claim as to the October Transfer should fail as a matter of law because MAP is not an insider and the preference period may therefore not extend to one year. Under 11 U.S.C. § 547, the trustee may avoid a transfer of an interest of the debtor to or for the benefit of a creditor, for or on account of an antecedent debt,

made while the debtor is insolvent and made within 90 days before the date of the filing of the petition, or "between 90 days and one year before the date of the filing of the petition, if such creditor at the time of the transfer was an insider". 11 U.S.C. § 547(b)(4)(B). "Insider" is defined at 11 U.S.C. § 101(31) as follows:

> The term 'insider' includes –
> (A) if the debtor is an individual –
> (i) relative of the debtor or of a general partner of the debtor;
> (ii) partnership in which the debtor is a general partner;
> (iii) general partner of the debtor; or
> (iv) a corporation of which the debtor is a director, officer or person in control . . . .

The parties do not dispute that MAP does not fit any of the requirements for a statutory insider as it is not a relative of the Debtors, a general partner of the Debtors, a partnership in which the Debtors are general partners, or a corporation of which the Debtors are directors, officers or persons in control. Thus, the only way MAP could be considered an insider is if it qualifies as a "non-statutory" insider.

Whether a party is an insider is a mixed question of fact and law. In re Krehl, 86 F.3d 737, 742 (7th Cir. 1996). "Non-statutory insider status is a fact-intensive inquiry that must be determined on a case-by-case basis." In re Spitko, 2007 WL 1720242 at *9 (Bankr. E.D.Pa. 2007). This "non-statutory" insider analysis begins with the use of the word "includes" in 11 U.S.C. § 101(31). Therefore, the type of entities that may be insiders is broader than the entities and relationships specifically identified in Section 101(31). The matter is left to the bankruptcy court to determine who else may qualify as an insider. To determine whether a non-statutory insider relationship exists, the Eleventh Circuit considers two factors: the closeness of the relationship between the creditor and the debtor; and whether the transaction between the creditor and the debtor was conducted at arm's length. Miami Police Relief & Pension Fund v.

Tabas (In re The Fla. Fund of Coral Gables Ltd.), 144 Fed. Appx. 72, 75 (11th Cir. 2005). Both factors are required, and both factors must be examined as to MAP, since it is a transfer to MAP that is being challenged. The applicable date for the analysis is the date of the transfer, October 23, 2009. The Defendant argues MAP was not in control of the Debtors and therefore cannot be an insider. However, "the definition of 'insider' as one with a close relationship to the debtor who receives more than what the insider would have received in an arm's length transaction includes those without knowledge that they are being preferred or without actual control over the debtor sufficient to cause the transaction to occur." In re Healing Touch, Inc., 2005 WL 6488238 (Bankr. N.D. Ga. 2005). This definition of non-statutory insider is consistent with the legislative history of Section 101(31). "An insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor." H.R. REP. NO. 95-595 at 312 (1977).

Considerations important to determining the closeness of the relationship between the creditor and debtor include whether the parties maintained "frequent" contact; testimony that demonstrated a close relationship; whether the parties had a personal friendship; whether the creditor had the ability to coerce the debtor to enter into transactions not in the debtor's interest; whether the parties shared the same office space; whether the creditor had actual control over the debtor; whether the parties were involved in a joint venture to share profits. See, e.g., Shubert v. Lucent Techs. Inc. (In re Winstar Communs., Inc.), 554 F.3d 382, 397 (3d Cir. 2009); Miami Police Relief & Pension Fund v. Tabas (In re The Fla. Fund of Coral Gables, Ltd.), 144 Fed. Appx. 72 (11th Cir. 2005) (the parties were friends for 30 years); In re Krehl, 86 F.3d 737, 743 (7th Cir. 1996); In re Holloway, 955 F.2d 1008, 1012 (5th Cir. 1992); In re Friedman, 126 B.R. 63, 69 (9th Cir. B.A.P. 1991); In re Tarricone, Inc., 286 B.R. 256, 259 (Bankr. S.D.N.Y. 2002)

(The parties "were introduced in 1981 . . . and have dined and golfed together ever since, sometimes as often as once a week . . . ."); In re Emerson, 235 B.R. 702, 707 (Bankr. D.N.H. 1999) (debtor describing the creditor as a "good friend");

Here, the character of the relationship between the Debtors and the Defendant's principal is disputed. The Trustee argues the Debtors had a close relationship with Mr. Abuhab at the time of the October 2009 transfer which should be imputed to MAP for purposes of the insider analysis. Given that the determination of a non-statutory insider is intensely factual and that a corporation can only act through its officers and directors, the Court can consider the relationship between the Debtors and Mr. Abuhab in assessing whether MAP could be a non-statutory insider. Mr. Moskowitz testified on more than one occasion that he viewed Mr. Abuhab as a close personal friend. In his October 15, 2010, deposition, Mr. Moskowitz stated he and Mr. Abuhab "maintained a very close personal relationship". He testified he had been to Brazil many times, visiting with Mr. Abuhab's family and Mr. Abuhab had been to Atlanta "many, many times with his family in our house". Mr. Moskowitz also testified that he knew many of Mr. Abuhab's family in Brazil and most of his friends in Brazil. Moskowitz Dep. p. 44, lines 11-22, October 15, 2010. In his subsequent deposition on November 11, 2010, Mr. Moskowitz testified again that he viewed his relationship with Mr. Abuhab as "primarily personal. I mean, he's been a friend for many, many, many, many, many years." Moskowitz Dep. p. 221, lines 13-15, November 11, 2010. In his affidavit, Mr. Abuhab disagrees and characterizes the relationship between the parties as purely business. In its brief, Defendant argues that, since it takes two to be friends, the fact Mr. Abuhab does not believe the relationship to be one of friendship means as a matter of law it cannot be a friendship.

The Court disagrees with this analysis, however. Since the two parties disagree on the characterization of the relationship, it is up to the Court to hear all the testimony regarding their relationship, view the demeanor of the witnesses, and draw its own conclusion as to the closeness between the two parties.

In addition to the characterization of the relationship between the two parties, it is undisputed that Mr. Moskowitz and Mr. Abuhab served together on the board of Agentrics during the relevant time period, September 2008 through October 2009. This is precisely the time period during which the funds were advanced and the October Transfer was made. MAP argues it is unrelated to Agentrics because it holds no direct interest in it. However, even under MAP's version of the facts, Agentrics is a brother/sister corporation to MAP, both of them ultimately owned and controlled by Mr. Abuhab himself.

The Trustee draws the Court's attention to several websites and press releases regarding the relationship between MAP and Agentrics. The Trustee asks the Court to take judicial notice of these web-based documents under Fed. R. Evid. 201. At this stage of the litigation, the Court will take judicial notice of the fact the websites existed and the press release was made. However, the information contained in the websites and the press release are not the kind of facts "generally known within the territorial jurisdiction of the trial court or . . . capable of ready and accurate determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Thus, the Court does not accept them for the truth of the matter asserted. Instead, the Court accepts the Trustee's tender of these documents as impeachment evidence of Mr. Abuhab's affidavit and for what they are: a website and a press release. The Court makes no finding as to the ownership of Agentrics at this time but the contrary information regarding Agentrics creates another disputed material fact on which the Court would need to hear

testimony as to the actual relationship between the companies and their boards in order to assess whether any such relationship suggests a closeness between Mr. Moskowitz and MAP.

Additional evidence of the relationship between the parties is that the money funded to Mr. Moskowitz originated with Mr. Abuhab. According to Mr. Abuhab's affidavit, the money was wired directly from his personal account to Mr. Moskowitz and then his capital account at MAP was adjusted accordingly, so the money really came from MAP. This may be true, but Mr. Abuhab's personal involvement in sending the money to Mr. Moskowitz shows that Mr. Abuhab's relationship with Mr. Moskowitz can be attributed to MAP. Moreover, it also suggests that Mr. Abuhab cared enough about making this loan to Mr. Moskowitz that he arranged for the source of funding himself. Finally, the Court notes MAP advanced additional funds to Mr. Moskowitz between October 2009 and February 2010 in the amount of $150,000 even though, by that time, eMedicalFiles had failed, MAP's entire $500,000 had been lost, and no note had yet been executed to MAP. Given the size of the loss and the size of the additional advances, MAP's willingness to advance additional funds to Mr. Moskowitz further suggests a close personal relationship as opposed to a purely business transaction. For the foregoing reasons, the Court finds there are material issues of disputed fact as to the closeness between MAP and Mr. Moskowitz that require an evidentiary hearing.

Of course, for the Trustee to prevail on the argument that MAP is a non-statutory insider, she must prove both the closeness of the parties and that the transaction is not an arm's length transaction. In evaluating whether a transaction was conducted at arm's length, courts look to whether the loans were made on an unsecured basis and without inquiring into the debtor's ability to repay the loans; whether the creditor knew the debtor was insolvent at the time the debtor made the loans or recorded the security agreements; whether the loans were commercially

motivated; whether the parties remained disinterested during the transaction; whether the parties were sensitive to "potential conflicts of interest"; whether the creditor was a "de facto director" of the debtor; whether the transferee had the ability to control or influence the debtor; whether the transaction only benefits one party; whether the loan made to the debtor was documented (e.g., promissory note, mortgage, and specified repayment terms); whether there were any strings attached as to how the debtor could use the loan proceeds; whether there is evidence of a desire to treat this creditor differently from all other general unsecured creditors. See, e.g., Shubert v. Lucent Techs. Inc. (In re Winstar Communs., Inc.), 554 F.3d 382, 399 (3d Cir. 2009) (the creditor used a superior bargaining position to force the debtor to make a transaction); Anstine v. Carl Zeiss Meditec AG (In re U.S. Medical, Inc.), 531 F.3d 1272, 1281 (10th Cir. 2008); Miami Police Relief & Pension Fund v. Tabas (In re The Fla. Fund of Coral Gables, Ltd.), 144 Fed. Appx. 72, 75 (11th Cir. 2005); In re Holloway, 955 F.2d 1008, 1012 (5th Cir. 1992); In re Emerson, 235 B.R. 702, 707 (Bankr. D.N.H. 1999); Freund v. Heath (In re McIver), 177 B.R. 366, 370 (Bankr. N.D. Fla.1995); Rush v. Riddle (In re Standard Stores, Inc.), 124 B.R. 318, 325 (Bankr. C.D. Cal.1991).

Again, there is conflicting evidence on this point. The transaction between MAP and the Debtor is documented with the Memorandum of Terms. The loan calls for an interest rate which is reasonable on its face, and repayment terms are provided. Securing a loan such as that made in October 2008 with a pledge of the real property in Jamaica is, on its face, not improper. But there are other facts suggesting the transaction was not at arm's length. No note was ever executed, and no payment was ever made on the loan, of interest or otherwise. The execution of the mortgage and recording of it in October 2009, one year after the loan was made and after all of the money had been lost in eMedicalFiles, suggests something other than an arm's length

transaction. The funds advanced in October 2008 were wired to Mr. Moskowitz immediately upon execution of the Memorandum of Terms, but without execution of the Instrument of Mortgage and without execution of a note. This indicates a high level of trust between Mr. Abuhab and Mr. Moskowitz. The loan was made to Mr. Moskowitz with express conditions it be "loaned" to eMedicalFiles. The provision in the Memorandum of Terms allowing Mr. Abuhab to select the security that he wishes is not a typical provision since most secured lenders do not advance the funds until the documents granting the security interest have been fully executed.

Moreover, neither MAP nor Mr. Abuhab apparently did any investigation into Mr. Moskowitz's creditworthiness. By the time of the October Transfer, a search of Mr. Moskowitz's name in the public records would have reflected a Georgia Department of Revenue state tax execution in the amount $43,554.11 dated April 1, 2008; a consent final judgment held by Arbor Capital in the amount of $407,541.32 dated April 29, 2008; an IRS tax lien in the amount of $168,864.95 dated August 11, 2008; an IRS tax lien in the amount of $196,473.35 dated May 26, 2009; a Georgia Department of Revenue state tax execution in the amount of $60,918.71 dated June 1, 2009; and a judgment obtained by Marco Betti against Mr. Moskowitz in the amount of $117,446.98 dated September 8, 2009. Moreover, by the time of the October 2009 transfer, eMedicalFiles had failed, and the entire $500,000 loan had been lost. All of the foregoing raise issues that need to be heard by the Court in order to determine if the transaction was at arm's length. If these disputed facts, both as to the closeness of the parties and the arm's length nature of the relationship, are resolved in favor of the Trustee, these facts could support a finding that MAP was a non-statutory insider. Consequently, the Court DENIES MAP's Motion for Summary Judgment on the preference count as to whether it is a non-statutory insider.

CONSTRUCTIVE FRAUDULENT CONVEYANCE

In the Complaint, the Trustee alleges the October Transfer is a constructively fraudulent conveyance because the Debtors received less than reasonably equivalent value for the transfer at a time when they were insolvent. MAP seeks summary judgment on the constructive fraudulent conveyance count, arguing reasonably equivalent value was provided as a matter of law because, under 11 U.S.C. § 548(d)(2), value "means property, or satisfaction or securing of a present or antecedent debt of the debtor . . .". MAP argues that, since the October Transfer was a recording of the Instrument of Mortgage to secure the $500,000 advance made approximately one year prior, the transfer was for the purpose of securing an antecedent debt and therefore reasonably equivalent value was provided. Moreover, MAP argues the Trustee has provided no evidence the Debtors were insolvent at the time of the October Transfer.

The Trustee responds with four points: (i) Nadine Baddour had no antecedent obligation to MAP and therefore, at least as to her interest in the Jamaica property, the transfer was not on account of an antecedent debt and no value was provided to her for the transfer; (ii) MAP was not granted a security interest in the Jamaica property under the Memorandum of Terms so there was no value given for the subsequent recording of the Instrument of Mortgage; (iii) the "obligation" of Mr. Moskowitz to MAP was not really his obligation but an obligation of eMedicalFiles which received the money as an investment; and (iv) even if Mr. Moskowitz was obligated to MAP under a guarantee of the investment in eMedicalFiles, Mr. Moskowitz did not receive reasonably equivalent value for the obligation and therefore a transfer of property on account of that "obligation" was also not for reasonably equivalent value. The Trustee also argues there is sufficient evidence in the record from which a court could conclude the Debtors

were insolvent at the time of the October Transfer and therefore summary judgment should be denied. The Court will review each of the arguments.

First, the Court agrees with the Trustee that MAP has provided no evidence Nadine Baddour had an obligation to MAP under the Memorandum of Terms. All of the evidence submitted in connection with the Motion for Summary Judgment reflects the money was delivered to Mr. Moskowitz and in turn forwarded to eMedicalFiles. The Memorandum of Terms called for an execution of a note by Mr. Moskowitz to MAP but not by Ms. Baddour. At this point, therefore, there is no evidence of an antecedent debt by Ms. Baddour to MAP and therefore MAP's request for summary judgment that the October Transfer was for reasonably equivalent value to Ms. Baddour is DENIED.

Next, the Trustee argues the security interest in the Jamaican property was not granted in the Memorandum of Terms and therefore no reasonably equivalent value was received by Mr. Moskowitz on the date of the October Transfer. However, where subsequent consideration was part of the original agreement, it may be considered in determining reasonably equivalent value. In re Leonard, 418 B.R. 477, 483-84 (Bankr. S.D. Fla. 2009) (finding the intent for two transfers to be valued for each other in the original agreement even when no writing existed and there was a span of time between the first and second transfer). As the court in Official Comm. of Unsecured Creditors of Propex, Inc. v. BNP Paribas (In re Propex, Inc.), 415 B.R. 321 (Bankr. E.D. Tenn. 2009) said, "Past consideration is good consideration . . . the preferential transfer does not constitute a fraudulent conveyance. . . . An untimely perfection of a security interest securing an antecedent debt may be avoidable as a preferential transfer, but it is not avoidable as a fraudulent transfer." Id. at 332. Therefore, if a debt existed as a result of the wire transfer in

October 2008, the subsequent recording of the security interest in the Jamaican property in October 2009 could be for reasonably equivalent value.

That brings the Court then to the Trustee's primary argument with respect to Mr. Moskowitz' receipt of reasonably equivalent value for granting a lien on his interest in the Jamaican property. The Trustee argues Mr. Moskowitz received no value because either he was not obligated on the underlying obligation to MAP, or any such obligation itself is avoidable as a fraudulent conveyance because he received no reasonably equivalent value for the incurrence of the obligation.[2] In reviewing all of the evidence submitted by the parties, it appears the most favorable construction of the facts from the Trustee's perspective (as we must view them on Defendant's Motion for Summary Judgment) is that MAP or Mr. Abuhab made an investment in eMedicalFiles, but the investment was guaranteed by Mr. Moskowitz. It is clear from the Memorandum of Terms that both Mr. Moskowitz and MAP intended Mr. Moskowitz to be obligated to repay the $500,000. The fact that Mr. Moskowitz then used the money as an investment in eMedicalFiles does not invalidate any obligation he incurred to repay those funds.

MAP, however, is also in error in arguing that, as a matter of law, the $500,000 advance constitutes reasonably equivalent value. The argument that any payment on account of antecedent debt constitutes reasonably equivalent value as a matter of law oversimplifies the analysis. While the Court agrees payment on an antecedent debt is typically value for purposes of a fraudulent conveyance analysis, this definition of "value" presumes that the underlying obligation is a valid unavoidable obligation of the debtor. Thus, while MAP's statement that the October Transfer was on account of antecedent debt is true on its face, it begs the question of whether the underlying debt is an unavoidable obligation of Mr. Moskowitz.

[2] The Trustee has not sought in the Complaint to avoid the incurrence of the obligation to MAP. Nevertheless, the Court notes the bankruptcy case was filed on May 3, 2010, and the time within which the Trustee can bring Section 548 claims has not yet expired. See 11 U.S.C. § 546(a)(1)(A).

The need to evaluate the debt separately from the payments thereon is evidenced by 11 U.S.C. § 548(a) and O.C.G.A. § 18-2-74(a), which permit the obligation and the payments to be avoided separately or together. See In re Advanced Telecomm. Network, Inc., 490 F.3d 1325 (11th Cir. 2007); In re Omega Door Co., Inc., 399 B.R. 295 (6th Cir. B.A.P. 2009). Moreover, the Eleventh Circuit has recognized that "courts are to scrutinize the value of transfers [on antecedent debt] much more closely in situations . . . which involve transfers to insiders." Kipperman v. Onyx Corp., 411 B.R. 805, 851 (N.D. Ga. 2009) (transfers reducing a debt provide reasonably equivalent value if the transferee is not an officer, director or major shareholder of the transferor); see also In re Advanced Telecomm. Network, Inc., 490 F.3d 1325, 1336-37 (11th Cir. 2007). Thus, simply concluding the transfer was on account of antecedent debt is insufficient. Here, as set out in detail above, questions of fact remain as to whether MAP is an insider of the Debtors. If so, then the subsequent transfer of the lien to MAP is subject to heightened scrutiny in terms of reasonably equivalent value.

The Trustee argues a guarantee of an investment in eMedicalFiles would have been without reasonably equivalent value to Mr. Moskowitz. Compare In re Solomon, 299 B.R. 626 (10th Cir. B.A.P. 2003) (holding that where company owned by debtors was sole recipient of loan proceeds, debtors did not receive reasonably equivalent value when they granted a lien in their property to secure a previously unsecured guarantee obligation) to In re Tousa, Inc., 444 B.R. 615 (S.D. Fla. 2011) (court recognized indirect benefits as reasonably equivalent value, and such value may not be mathematically quantifiable). See also In re Renegade Holdings, Inc., 2011 WL 3962284 (Bankr. M.D.N.C. 2011) (downstream guaranty is presumed to be of indirect benefit, but presumption is not available when party whose obligation is guaranteed is insolvent). A determination of value is based on the circumstances that existed at the time and whether there

were legitimate and reasonable expectations of value accruing to the debtor at the time the obligation was incurred. In re Fruehauf Trailer Corp., 444 F.3d 203, 212 (3rd Cir. 2006). The record does not include such important information as the percentage ownership in eMedicalFiles held by Mr. Moskowitz, whether Mr. Moskowitz received a salary from eMedicalFiles, the condition of eMedicalFiles when the obligation was incurred, or any other facts which indicate that a guarantee of an eMedicalFiles obligation was for Mr. Moskowitz's benefit. Certainly, it is theoretically possible for the guarantee by an officer or director of a closely-held corporation to be for reasonably equivalent value. However, the facts are simply not in the record which would allow the Court to make that determination at this time.

Disputed issues of fact therefore remain as to whether Ms. Baddour received any value for the transfer of her interest in the Jamaican property, whether MAP is an insider of Mr. Moskowitz which would necessitate a closer scrutiny of the transaction from a fraudulent conveyance perspective, and to what extent Mr. Moskowitz personally received benefit from an investment in eMedicalFiles which would support a guarantee obligation to MAP. MAP's Motion for Summary Judgment on reasonably equivalent value is DENIED.

Next, MAP argues the Trustee has presented no evidence that would support a finding the Debtors were insolvent at the time of the October Transfer. The Trustee, however, has presented evidence that, by the time of the October Transfer, the public record reflected liens and judgments to the Georgia Department of Revenue, Arbor Capital, the IRS and Marco Betti of approximately $995,000.00. Moreover, by October 2009, eMedicalFiles had already filed its Chapter 11 bankruptcy case, so it was clear no income to Mr. Moskowitz was being received from eMedicalFiles. Finally, the Debtors' Statement of Financial Affairs shows total 2009 income of $40,385. Based on the evidence submitted to date by the Trustee, a finding that the

Debtors were insolvent as of the October Transfer would be justified. Consequently, MAP's Motion for Summary Judgment on the basis of insolvency is DENIED.

The Complaint also seeks to avoid the October Transfer under O.C.G.A. § 18-2-74, which allows the avoidance of a transfer made . . . (2) without receiving reasonably equivalent value and the debtor was either engaged or about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction, or the debtor intended to incur or believed or reasonably should have believed that he or she would incur debts beyond his or her ability to pay as they became due. The same evidence which suggests the Debtors were insolvent on a balance sheet basis is also sufficient to survive a motion for summary judgment under O.C.G.A. § 18-2-74. The assets available to the Debtors and their income and prospects for income as of October 2009 are weak enough to support a finding that the assets were unreasonably small in relation to the Debtors' remaining business and that the Debtors would continue to incur debts beyond their ability to pay. Thus, summary judgment is DENIED.

TRANSFER WITH ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD

Count Three of the Trustee's Complaint is for avoidance of the October Transfer under 11 U.S.C. § 548(a)(1), which allows the Trustee "to avoid any transfer made or obligation incurred with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted." In the Complaint, the Trustee alleges the Debtors were insolvent at the time of the October Transfer, the transfer was to an insider (MAP), and a number of "badges of fraud" exist. MAP has now moved for summary judgment, arguing that as matter of law it is entitled to judgment under 11 U.S.C. § 548(c), which provides a transferee that takes the transfer for value

and in good faith "has a lien on or may retain any interest transferred or may enforce any obligation incurred . . . to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation." MAP argues that, because it actually advanced the $500,000 to Mr. Moskowitz and such advance was made in good faith, it may retain its lien on the Jamaican property in the amount owed under the obligation. MAP also argues the Trustee has identified no evidence MAP intended to defraud creditors and therefore judgment as a matter of law should be made on behalf of MAP.

As both parties acknowledge, the Eleventh Circuit has stated fraudulent intent under Section 548 may be inferred from "the circumstantial evidence and the surrounding circumstances of the transactions." In re XYZ Options, Inc., 154 F.3d 1262, 1271 (11th Cir. 1998). In making this determination, the Court looks at various "badges of fraud" including (i) whether the transfer was to an insider; (ii) whether the debtor retained possession or control of the property after the transfer; (iii) whether the transfer was of substantially all the debtor's assets; (iv) whether the debtor removed or concealed assets; (v) whether the debtor was insolvent or became insolvent; (vi) whether the transfer occurred shortly before or after a substantial debt was incurred; or (viii) whether the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. The Trustee also cites in Count Two of the Complaint to O.C.G.A. § 18-2-74, which similarly permits the trustee to avoid a transfer made with the actual intent to hinder, delay or defraud any creditor of the debtor. O.C.G.A. § 18-2-74(b) states that, in determining actual intent under O.C.G.A. § 18-2-74, the Court could consider a specified list of factors "among other factors". This list of factors tracks the "badges of fraud" identified by the Eleventh Circuit and adds whether the transfer was disclosed or concealed, whether before the transfer was made or obligation incurred the debtor had been sued

or threatened with suit, whether the debtor absconded, or whether the debtor received reasonably equivalent value for the asset transfer. In short, this analysis is intensely factual, and a grant of summary judgment on this count is difficult in most cases.

The same is true in this case. As discussed earlier in this opinion, material facts remain in dispute as to whether MAP was an insider of the Debtors. Material facts also remain in dispute as to whether the Debtors were insolvent as of the October Transfer. As set forth above, there are sufficient facts in the record from which the Court could conclude the Debtors were insolvent at the time of the October Transfer. There are also many facts that remain in dispute as to whether either or both of the Debtors received reasonably equivalent value for the transfer. There are other "badges of fraud" that are not in dispute but might suggest an actual intent to hinder, delay or defraud. For example, the October Transfer was made while Mr. Moskowitz was in substantial debt and immediately after the entry of judgment against him by Mr. Betti. On the other hand, it is also undisputed that the October Transfer was not concealed but in fact was recorded as a matter of public record. Given the disputes as to the facts which are the "badges of fraud" as well as that various "badges of fraud" point in different directions as to the actual intent of the Debtors, it is inappropriate for the Court to grant summary judgment as to this count at this time.

Lastly, MAP argues that summary judgment should be granted because the good faith defense under 11 U.S.C. § 548(c) shields its actions from a fraudulent transfer claim by the Trustee. It is important to note the good faith defense does not apply to preference or constructively fraudulent conveyance claims. Meoli v. Huntington Nat'l Bank (In re Teleservices Group, Inc.), 444 B.R. 767, 808 (Bankr. W.D. Mich. 2011) ("The recipient's good faith is irrelevant when the avoidance is based upon preferential treatment or constructive fraud.

If, though, the debtor intended to actually defraud his creditors in making that transfer, then it is the recipient's own honesty and integrity – i.e., his good or bad faith – that will determine how he will fare with the estate.") The good faith defense under Section 548(c) requires MAP to show both that it gave value to the Debtors in exchange for the transfer and took the transfer in good faith. See CEP Holdings, Inc. et al. v. Schreier et al., 2010 Bankr. Lexis 1145, *15 (Bankr. N.D. Ga. 2010). As the Court has discussed above, material issues of fact remain as to whether, and to what extent, value was provided to Mr. Moskowitz individually by virtue of the $500,000 advance that was ultimately loaned to eMedicalFiles. Consequently, the Court cannot grant summary judgment at this time on the question of value.

MAP must also establish "good faith". "A transferee which reasonably should have known of a debtor's insolvency is not entitled to the good faith element of the defense provided in § 548(c)." Wessinger v. Spivey (In re Galbreath), 286 B.R. 185, 214 (Bankr. S.D. Ga. 2002). "Good faith is not defined in the Bankruptcy Code; it is determined on a case by case basis. A transferee does not act in good faith if he has sufficient knowledge to place him on inquiry notice of the debtor's possible insolvency. Whether a transferee has such knowledge is determined objectively, with a focus on what a transferee knew or should have known, not on the transferee's actual knowledge." Doeling v. Grueneich (In re Grueneich), 400 B.R. 688, 693 (8th Cir. B.A.P. 2009). As discussed above, there were a number of publicly available sources which would have disclosed to MAP at the time of the October Transfer liens and judgments on Mr. Moskowitz of approximately $995,000.00. That information, coupled with the knowledge that eMedicalFiles had already filed bankruptcy, is sufficient to create an issue of fact as to MAP's good faith. As a result, MAP's Motion for Summary Judgment on the good faith defense is DENIED.

SUBORDINATION/RECHARACTERIZATION

Lastly, the Trustee seeks in the Complaint to subordinate and/or recharacterize the $500,000 transfer as an equity investment not entitled to share equally with the other unsecured creditors in the Debtors' individual cases. MAP seeks summary judgment on this count, both as to the October Transfer and the $500,000 loan made. MAP argues it is not an insider and the Trustee has not alleged or provided evidence of sufficient inequitable conduct to justify subordination.

The Trustee argues extensively in response to MAP's Motion for Summary Judgment that the loan from MAP to Mr. Moskowitz should be recharacterized as an equity investment in eMedicalFiles. The Trustee accurately recites the case law and standards for recharacterization of a loan to equity. However, the recharacterization argument the Trustee makes is really with respect to eMedicalFiles and not with respect to the individuals. First, a recharacterization argument simply makes no sense in the context of an individual case. There is no equity interest in an individual, so recharacterizing a loan to Mr. Moskowitz as an investment in Mr. Moskowitz is not possible. Rather, the facts the Trustee argues lead to a conclusion that the loan ultimately made to eMedicalFiles was an investment in eMedicalFiles. The Trustee argues that eMedicalFiles was inadequately capitalized and had no ability to repay the loan. This argument simply does not work in the individual case, and summary judgment is GRANTED to MAP on the Trustee's argument that the $500,000 loan should be recharacterized as an equity investment for purposes of the individual case.[3]

[3] The Trustee's argument here may provide a basis under 11 U.S.C. § 548 to avoid the incurrence of the obligation by Mr. Moskowitz because he received no reasonably equivalent value. This same argument was discussed in the context of reasonably equivalent value above. However, the Trustee has not sought in the Complaint to avoid the incurrence of the obligation, only the transfers of the liens on the real property. Nevertheless, the Court notes the bankruptcy case was filed on May 3, 2010, and the time within which the Trustee can bring Section 548 actions has not yet expired. See 11 U.S.C. § 546(a)(1)(A).

The Trustee also seeks in the Complaint to subordinate the claim of MAP for the $500,000 loan to the claims of all other unsecured creditors. This count of the Complaint assumes MAP's lien in the Jamaican property has been avoided under one of the other counts discussed above. Section 510 of the Bankruptcy Code provides the court may "under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim." 11 U.S.C. § 510(c)(1). The parties agree that, under Eleventh Circuit law, equitable subordination is proper where "(1) … the claimant has engaged in inequitable conduct; (2) … the conduct has injured creditors or given an unfair advantage to the claimant; and (3) … subordination of the claim is not inconsistent with the Bankruptcy Code." Estes v. N & D Properties, Inc., 799 F. 2d 726, 731 (11th Cir. 1986). "If the claimant is not an insider or fiduciary, however, the trustee must prove more egregious conduct such as fraud, spoilation or overreaching, and prove it with particularity." Id. MAP argues it is entitled to a determination as a matter of law that it is not an insider and therefore this more egregious conduct must be pled. The Court has, however, already ruled that material issues of fact remain as to whether MAP is an insider. Consequently, the Court must evaluate whether the Trustee has identified evidence which would support a finding of inequitable conduct justifying equitable subordination.

The Trustee's argument effectively is Mr. Moskowitz was seeking investments into eMedicalFiles and that, rather than MAP making an equity investment directly, Mr. Moskowitz and MAP agreed to "run the transaction" through Mr. Moskowitz. By doing so, it would appear Mr. Moskowitz was personally liable to MAP and could therefore justify pledging unencumbered property that otherwise would have been available for Mr. Moskowitz's unsecured creditors. If true, these allegations could support a finding of inequitable conduct that

injured creditors, therefore justifying subordination of the claims. Of course, it may also be true there were other reasons for the way the transaction was structured. Moreover, the subordination argument is similar to the Trustee's argument there was no reasonably equivalent value provided to Mr. Moskowitz for incurring the obligation discussed above. Unfortunately, the Court simply has no evidence from MAP as to why the transaction was structured as it was, or what value if any was provided to Mr. Moskowitz individually by guaranteeing an equity investment in eMedicalFiles at this time. Because a determination of subordination is intensely factual and material issues of fact remain, the Court DENIES the request for summary judgment on the subordination count at this time.

CONCLUSION

A number of issues of material fact remain for the Court's determination. Mr. Moskowitz and Mr. Abuhab on behalf of MAP appear to see the transaction in two very different lights. The Court must hear the evidence and evaluate the demeanor of the witnesses before the Court can make a finding with respect to those facts. For the reasons set out above, the Court DENIES MAP's Motion for Summary Judgment on the October Transfer and the $500,000 loan in October 2008 which preceded it as to all grounds except the Trustee's request that the loan be recharacterized as equity for purposes of the individual bankruptcy case.

END OF ORDER

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