IT IS ORDERED as set forth below:

Date: September 13, 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: PALISADES AT WEST PACES IMAGING CENTER, LLC, Debtor.	CASE NO. 09-87600-WLH CHAPTER 7
JANET G. WATTS, *as Chapter 7 Trustee* Plaintiff, v. PEACHTREE TECHNOLOGY PARTNERS, LLC, *et al.* Defendants.	ADVERSARY PROC. NO. 11-5183

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the Court on the Defendants' Motion for Summary Judgment (the "Motion") (Docket No. 8), Trustee's Response in Opposition thereto (Docket No. 14), and the Defendants' Reply to the Trustee's Response (Docket No. 17). Defendants' Motion seeks summary judgment on a Complaint to avoid alleged fraudulent transfers to Defendants pursuant to 11 U.S.C. §§ 544, 546 and 548 and O.C.G.A. § 18-2-70 *et seq*. The parties have admitted in the Complaint and Answer that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has jurisdiction over it pursuant to 28 U.S.C. § 1334.

The Court has considered the pleadings and supporting documents and briefs submitted by the parties. For the reasons stated below, the Court concludes that the Defendants' Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART WITHOUT PREJUDICE. The following constitutes the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

The Debtor, Palisades at West Paces Imaging Center, LLC, (the "Debtor") was formed in 2002 to provide offices and imaging services for various doctors and medical practices. At different times throughout 2004, the Defendants purchased membership units, in whole or in part, in the Debtor. On July 8, 2005, the Defendants, except RBLB Group, LLC ("RBLB"), filed suit in the Superior Court of Fulton County against the Debtor, its managers (Cynthia Vinson and Frankin Trell) and the Debtor's 30% member (Dr. William Stuart) (the "Superior Court Litigation"). The Superior Court Litigation second amended complaint (the only one in the record) made demand to inspect and copy the books and records of the Debtor and also sought relief based on alleged misrepresentations and omissions related to the Debtor's solicitation of the Defendants' investments and the Debtor's start-up of operations. Specifically, the complaint asserted claims for fraudulent inducement, fraudulent misrepresentation, negligent misrepresentation, breach of the Debtor's operating agreement, breach of fiduciary duties, violation of the Georgia Limited Liability Company Act, and violation of the Georgia Securities Act.

During discovery, the Defendants and the Debtor entered into two Settlement Agreements. On or about March 21, 2007, the Debtor, Trell, Vincent and Stuart on one hand and the Defendants that had filed the Superior Court Litigation ("Litigation Defendants") on the other, settled the Superior Court Litigation ("Litigation Settlement Agreement"). In consideration for the settlement of the Superior Court Litigation, the transfer and assignment of the membership units in Debtor and the payment of all the Litigation Defendants' attorney's fees incurred in the Superior Court Litigation, the Debtor was to pay (i) $100,000 contemporaneously with the execution of the settlement agreement; (ii) $400,000 within sixty (60) days from the effective date of the settlement agreement; (iii) $673,500 within one hundred twenty (120) days from the effective date of the settlement agreement; and (iv) $677,500 (plus a reasonable amount of attorneys' fees not to exceed $4,500) within two hundred ten (210) days from the effective date of the settlement agreement. (Compl. Ex. A). Upon receipt of the first $100,000 payment, the Litigation Defendants were to execute documents transferring their membership units to Debtor. The Litigation Defendants received a total of $1,850,500 on the payment schedule outlined in the Litigation Settlement Agreement. The record does not reflect whether the membership units were transferred.

On or about July 19, 2007, the Debtor, Trell and Vincent entered into a settlement agreement with RBLB ("RBLB Settlement Agreement" and, together with the Litigation Settlement Agreement, "Settlement Agreements"). The Debtor and RBLB agreed, among other things, that RBLB "hereby transfers and assigns to the [Debtor] all of RBLB's right, title and interest in the Membership Unit, free and clear of all liens, claims and encumbrances of any kind". The RBLB Settlement Agreement further provided that the Debtor, Trell and Vincent were to "jointly and severally" pay RBLB the sum of $232,000.00 with payment of (i) $56,000 within thirty (30) days from July 19, 2007, (ii) $77,000 within ninety (90) days from July 19, 2007, and (iii) $99,000 as a final payment within one hundred eighty (180) days from July 19, 2007. (Compl. Ex. B). RBLB received a total of $232,000 on the payment schedule outlined in the RBLB Settlement Agreement.

The Debtor filed a petition under Chapter 7 of the Bankruptcy Code on October 19, 2009. (Case No. 09-87600, Docket No. 1). The Trustee filed the instant adversary proceeding on April 5, 2011. The Trustee seeks to avoid the payments made to each Defendant as a result of the Settlement Agreements pursuant to 11 U.S.C. §§ 544, 546, and 548 and O.C.G.A. § 18-2-70 *et seq*.

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." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)[1]) 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) (quoting Celotex Corp., 477 U.S. at 323). 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 (citation omitted) in order to discharge this 'initial responsibility'. Instead, the moving party simply may 'show – that is, point out to

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

> the . . . court – that there is an absence of evidence to support the nonmoving party's case. (citation 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 (quoting Celotex, 477 U.S. at 323-31). In the Eleventh Circuit, "it is never enough simply to state that the non-moving party cannot meet its burden at trial … [I]nstead the moving party must point to specific portions of the record in order to demonstrate that the non-moving 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, No. 1:08-CV-2916-JOF/AJB, 2010 WL 2821853, at *8 (N.D. Ga. Feb. 16, 2010). Once this burden is met, the non-moving 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 non-moving party and all reasonable doubts and inferences should be resolved in favor of the non-moving party. Hairston, 9 F.3d at 918.

The Defendants argue that, because the payments at issue were made under a settlement agreement, the payments were on account of antecedent debt and therefore reasonably equivalent value was provided as a matter of law. The Defendants further argue that settlement of litigation is reasonably equivalent value as a matter of law. Defendants also argue that the transfers at issue were not transfers of property of the estate because a constructive trust does or should exist on the funds paid by Defendants. Finally, the Defendants argue that the statute of limitations bars the avoidance of certain transfers. The Court will address the arguments in reverse order.

Statute of Limitations

The Defendants argue the Trustee seeks to avoid two transfers that allegedly fall outside the statute of limitations set forth in the Bankruptcy Code and under applicable state law. The specific transfers at issue allegedly occurred on March 21, 2007 and March 4, 2007[2] for a total of $199,000.00. Relying on Section 548(a)(1), the Defendants argue that because the relevant reach-back period under Section 548(a)(1) is two (2) years from the petition date, which was October 19, 2009, the two alleged transfers in March 2007 are outside the statute of limitations. In addition, the Defendants argue the applicable Georgia statute of limitations under O.C.G.A. § 18-2-79(2) provides a four (4) year statute of limitations from the date the transfer was made. Based on the foregoing, the Defendants maintain that a March 20, 2011 and March 3, 2011 statute of limitations resulted from alleged transfers on March 21, 2007 and March 4, 2007 and since the Trustee did not file suit until April 5, 2011, the Trustee's action is barred under Georgia law.

The Defendants are correct that, under 11 U.S.C. § 548(a), the Trustee can only seek to avoid transfers made within two (2) years of the filing of the bankruptcy petition. In this case, the Trustee can use Section 548 to avoid transfers made after October 19, 2007, but cannot avoid transfers made prior to that date under Section 548.

Analysis of avoidance under Section 544 requires a review of the state statute of limitations. Courts have held that "[a]s long as the state law statute of limitations has not run before the debtor's filing for bankruptcy, the trustee can bring a fraudulent conveyance action as long as he or she complies with the provisions of § 546(a)." In re G-I Holdings, Inc., 313 B.R.

[2] This payment is identified in ¶ 14 of the Complaint as a payment on the RBLB Settlement Agreement. However, the RBLB Settlement Agreement was not entered into until July 19, 2007. Moreover, the $99,000 payment at issue was to be made 180 days after July 19, 2007. The Court believes it likely this payment was made on March 4, 2008, not 2007. However, given the Court's analysis, a transfer on either date is within the statute of limitations.

612, 646 (Bankr. D.N.J. 2004) (quoting In re Princeton-New York Investors, Inc., 199 B.R. 285, 294 (Bankr. D.N.J. 1996)); see also In re Leach, 380 B.R. 25, 29-30 (Bankr. D.N.M. 2007) (stating, “When applying the statute of limitations for [the New Mexico Fraudulent Transfer Act] brought pursuant to § 544(b) of the Bankruptcy Code, the [New Mexico Fraudulent Transfer Act] statute of limitations applies only to determine whether the trustee has a viable cause of action as of the bankruptcy filing date. Once the petition is filed, 11 U.S.C. § 546 governs the time for bringing the fraudulent transfer actions under state law”).

Applying Georgia law, under the Georgia Fraudulent Transfer Act, “[a] cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless the action is brought . . . within four [4] years after the transfer was made or the obligation was incurred . . . ”. O.C.G.A. § 18-2-79. Turning to the relevant dates in the present matter, the settlement dates of March 21, 2007 and July 19, 2007, represent the dates when the Debtor incurred an obligation. The two specific transfers at issue allegedly occurred on March 4 and March 21, 2007. Based on the foregoing, the Georgia statute of limitations for avoiding the obligations incurred by the Debtor in the Settlement Agreements would have expired on March 20, 2011 and July 18, 2011, respectively, absent bankruptcy. The statute of limitations on the specific transfers would similarly have expired on March 3 and March 20, 2011, absent bankruptcy. Since the Debtor filed its bankruptcy petition on October 19, 2009 and the Georgia statute of limitations had not yet expired, the Trustee had a viable cause of action as of the petition date to set aside the obligations and all transfers made thereunder.

Once the petition was filed on October 19, 2009, the Trustee had two (2) years from the petition date to file a cause of action under Section 544 and 548. See 11 U.S.C. § 546(a). The statute of limitations pursuant to Section 546 expires in October 2011 which has not yet occurred. The Trustee filed her Complaint on April 5, 2011. The Court concludes the Trustee is not barred by the statute of limitations under applicable Georgia law or Section 546 of the Bankruptcy Code from pursuing a cause of action under 11 U.S.C. § 544, but is barred from pursuing avoidance under Section 548 of any transfer occurring prior to October 19, 2007. The Court, therefore, denies in part and grants in part summary judgment relating to the Defendants' statute of limitations argument.

Constructive Trust

The Defendants argue the Debtor did not "transfer an interest of the Debtor in property" under Section 548(a)(1)(b) of the Bankruptcy Code, because the Debtor obtained title to the funds through its agents' fraudulent misrepresentations. In support of this argument, the Defendants cite Eason v. Farmer, 261 Ga. 675 (Ga. 1991), which states that "a constructive trust is implied 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." Id. at 676. The Defendants base their claim of fraud on the Settlement Agreements which state that under certain circumstances the payments due under the Settlement Agreements would be non-dischargeable pursuant to Sections 523(a)(2)(A), (a)(4), and (a)(6) of the Bankruptcy Code. Defendants' argument fails for several reasons.

First, a careful reading of the Settlement Agreements shows that the stipulation regarding non-dischargeability is not a general admission of fraud by the Debtor but is limited to a bankruptcy case in which Trell or Vinson is the debtor. The stipulation of non-dischargeability in their bankruptcy case is "only for such bankruptcy proceeding". This adversary proceeding is pending in a bankruptcy case involving Palisades at West Paces Imaging Center, LLC and is not a bankruptcy case of Trell or Vinson. Therefore, the stipulation regarding non-dischargeability is simply irrelevant in this context. Second, the existence of fraud is not an undisputed fact. The undisputed facts are that the Debtor and its principals resisted the allegations of fraud in the Superior Court Litigation for well over a year before entering into the Settlement Agreements. The Trustee has pointed to the Subscription Agreements as evidence that the Defendants did not reasonably rely on any representations of the Debtor and also contends some of the deposition testimony conflicts with this conclusion. A constructive trust would only be appropriate as a remedy if fraud were found. Since fraud has not been determined with respect to this Debtor, no basis presently exists for the imposition of a constructive trust and one has never been imposed.

Next, a constructive trust "is a remedial device created by a court of equity to prevent unjust enrichment." Eason v. Farmer, 261 Ga. at 676 (quoting Lee v. Lee, 260 Ga. 356 (1990); see also St. Paul Mercury Ins. Co. v. Meeks, 270 Ga. 136, 137 (1998) (a constructive trust is impressed upon property when it is against equity that the person holding title to the property be allowed to enjoy the beneficial interest in the property). As a remedy, it is not a foregone conclusion that, even if fraud were found, a constructive trust is implied. The imposition of a constructive trust would be left to the discretion of the trier of fact. Defendants admit as much in their brief, when they argue that, through the alleged fraud of the debtor's agents, the funds paid by the defendants "likely would have been subject to a constructive trust." Since the remedy of a constructive trust has not been imposed, Defendants are not entitled to summary judgment on the basis of any such trust.

Finally, Defendants' argument fails because there has been no evidence presented that the funds used to make the transfers to Defendants were funds that could have been the subject of a constructive trust. Even if a constructive trust were implied as to the funds paid by the Defendants, the Defendants could apply the trust only to the funds themselves or to any other property in which the original funds could be traced. See Total Supply, Inc. v. Pridgen, 267 Ga. App. 125, 126 (2004). There is no evidence in the record as to whether the funds used for the transfers under the Settlement Agreements in 2007 and 2008 were either the funds invested by the Defendants in 2004 or the proceeds thereof. The record suggests that at various times principals of the Debtor invested money in the Debtor. Evidence would be necessary to trace any funds on which a constructive trust was imposed. For all the foregoing reasons, Defendants' Motion for Summary Judgment on the basis the property transferred was not property of the estate is DENIED without prejudice.

Reasonably Equivalent Value

The Defendants' primary argument in favor of summary judgment is that the Settlement Agreements created a debtor-creditor relationship, so the settlement payments to the Defendants were on account of a valid, antecedent debt and the Debtor received reasonably equivalent value for the payments within the meaning of 11 U.S.C. § 548(d)(2)(A). The Defendants argue that any payment on account of antecedent debt constitutes reasonably equivalent value as a matter of law. The Defendants also argue that settlement of litigation is reasonably equivalent value in the eyes of the law. However, in each instance, the Defendants oversimplify the analysis.

The Defendants and Trustee spend most of their time arguing about whether the obligations under the Settlement Agreements were "antecedent debt" or actually a return of equity. The arguments made by both counsel under Section 510 are largely irrelevant, and the cases cited by both parties arise in contexts completely different from a fraudulent conveyance action.[3] Section 510 is a section dealing with the priority of claims, not the existence of reasonably equivalent value for the claim. Section 510(b) provides,

> For the purpose of distribution under this title, a claim arising from rescission of a purchase or sale of a security of the debtor or an affiliate of the debtor, for

[3] The Defendants spend over five pages in their brief analogizing the Defendants' claims to those not subordinated under Section 510, then chastise the Trustee for refuting that argument and conclude, rightly, that Section 510(b) "is not truly applicable here".

> damages arising from the purchase or sale of such a security, or for reimbursements or contribution allowed under section 502 on account of such a claim, shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security . . . .

It is important to note that Section 510 only applies to claims and not to equity interests. The cases on which the Defendants and the Trustee rely address whether a particular claim should be subordinated. While some of the discussion in that context may be helpful, it begs the question of whether reasonably equivalent value exists for the claim. The decisions which subordinate claims under Section 510 on the basis that the claim arises out of the purchase and sale of a security do not address whether the parties' claim can be avoided as a fraudulent transfer. Similarly, a determination that a claim cannot be subordinated under Section 510 does not address the question of reasonably equivalent value.

To the extent the Settlement Agreements between the Debtor and the Defendants enabled the Defendants to avoid the subordination provisions of Section 510, the Trustee may have had a preference claim. Since the incurrence of the obligations under the Settlement Agreements and all of the payments occurred well outside any preference period, including that for transfers to insiders, however, any preference claim is barred. The Defendants' recovery of payments on a claim ahead of other unsecured creditors, however, does not address whether they received a fraudulent conveyance.

Further, the fact that Defendants may have had an equity interest in the Debtor does not mean that any claim they also had is really an equity interest as opposed to a claim, as the Trustee argues. For example, in the Ponzi scheme cases including In re Int'l Mgmt. Assocs., Inc., No. A06-62966-PWB, 2009 WL 6506657, at *10 (Bankr. N.D. Ga. Dec. 1, 2009), the courts frequently find that the creditor has a claim for fraud, which is a claim as opposed to an equity interest, even though the claim for fraud arises while the claimant is in the process of buying an equity interest. Those claims may be subordinated under Section 510. However, it is still a claim and not an equity interest. In this case, had the Debtor not settled with the Defendants, but rather filed bankruptcy, the Defendants could have filed a claim in the Debtor's bankruptcy case on all the same grounds identified in the Superior Court Litigation. A claim for fraud or a claim for misrepresentation which gives rise to damages, even though such damages may equal the amount of the equity investment, may nevertheless be a claim. However, under Section 510, that claim would likely have been subordinated because it arose from rescission of a purchase or sale of a security or was for damages arising from the purchase or sale of a security.

Assuming, without deciding, that Defendants held a claim under the Settlement Agreements, the Defendants argue that payment of the debt constitutes reasonably equivalent value as a matter of law. Section 548(d)(2)(A) defines value as "property, or satisfaction or securing of a present or antecedent debt of the debtor . . . ". While the Court agrees that payment on an antecedent debt is typically value for purposes of a fraudulent conveyance analysis, this definition of "value" presumes that the underlying obligation was in fact a valid unavoidable obligation of the Debtor. Thus, while Defendants' statements are true on their face, they beg the question of whether the underlying debt is an unavoidable debt of the Debtor.

The need to evaluate the debt separately from the payments thereon is evidenced by Section 548 and O.C.G.A. § 18-2-75(a), which permit the obligation and the payments to be avoided separately or together. <u>See</u> <u>In re Advanced Telecomm. Network, Inc.</u>, 490 F.3d 1325 (11th Cir. 2007): <u>In re Omega Door Co., Inc.</u>, 399 B.R. 295 (6th Cir. BAP 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." <u>In re Advanced Telecomm. Network, Inc.</u>, 490 F.3d 1325, 1336-37 (11th Cir. 2007); <u>see</u> <u>also</u> <u>Kipperman v. Onyx Corp.</u>, 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). Thus, simply concluding the payments were on antecedent debt is insufficient.

Defendants have not demonstrated an entitlement to summary judgment on the issue of whether payments under the Settlement Agreements were for reasonably equivalent value because the payments were on antecedent debt. First, the record does not show that Defendants were not insiders, officers, directors or major shareholders of the Debtor. Defendants invested over $2 million of equity into the Debtor in 2004, but there is no information as to the amount of equity provided by others. The Court cannot conclude that Defendants were not major shareholders. Additionally, the Second Amended Complaint filed in the Superior Court Litigation reflects that a principal of RBLB, Mr. Matt Brill, was also the former Director of Investor Relations at the Debtor. This statement raises the factual issue as to whether RBLB would be considered an insider, the transfers to whom would require further scrutiny under Eleventh Circuit case law discussed above. Moreover, the avoidability of the payments turns on the avoidability of the obligations under the Settlement Agreements. The question for the Court, then, is not whether the Debtor made payments pursuant to a settlement agreement under which it obligated itself, but whether the settlement agreement itself was made for reasonably equivalent value.[4]

In evaluating the reasonably equivalent value of the Settlement Agreements, the Court utilizes a "totality of circumstances" approach. Fritze, LLC v. KeySpan Home Energy Services (In re Fritze, LLC), No. 07-19059, 2009 WL 3245499, at *4 (Bankr. D. N.J. Oct. 6, 2009). What constitutes reasonably equivalent value must be determined by looking at all the facts and

[4] While the Complaint does not specifically seek to avoid the Settlement Agreements as a fraudulent conveyance, the statute of limitations for the Trustee to seek the avoidance of the obligation incurred by virtue of the Settlement Agreements has not yet expired. Moreover, the Trustee and the Defendants argued extensively in their briefs regarding the validity and value of the Settlement Agreements to the Debtor.

circumstances surrounding the transaction. Official Comm. of Unsecured Creditors v. Wachovia (In re Heilig-Meyers Co.), 297 B.R. 46, 52 (Bankr. E.D. Va. 2003). Totality of the circumstances includes consideration of the good faith of the parties, the difference between the amount paid and the fair market value of what is received, the existence of an arm's length transaction, and any indirect benefits. Whether a settlement agreement constitutes reasonably equivalent value under the totality of circumstances test is fact specific. Id. The determination of reasonable equivalence must be made as of the time of transfer (citations omitted) (footnote omitted) . . . . and is analyzed from the point of view of the debtor's creditors [as to whether the transfer led to] a diminution of a debtor's prepetition assets". In re Jordan, 392 B.R. 428, 441 (Bankr. D. Idaho 2008).

The Court notes there are two Settlement Agreements at issue in the Complaint that involve different parties and have different terms and must be analyzed separately. The Defendants argue the Debtor received reasonably equivalent value from the Defendants in the form of the Settlements Agreements that allowed for, in the case of the Litigation Settlement Agreement, (1) dismissal of contentious litigation that resulted in the cessation of legal expenses and other costs to the Debtor; (2) dismissal of pending and threatened claims against the Debtor; (3) return of membership units to the Debtor; and (4) a grant to the Debtor of full release of liability from each of the Litigation Defendants. With respect to the RBLB Settlement Agreement, the arguable value to the Debtor was the return of a membership unit and the full release of potential claims against the Debtor. The Defendants rely upon several decisions finding that reasonably equivalent value is provided to the Debtor by settlement of litigation. Defendants also argue that an evaluation of ultimate liability in civil litigation need not be considered as long as the claim is not groundless.

The Court does not disagree that settlement of litigation can provide reasonably equivalent value. However, the totality of the circumstances test outlined above must be applied. The court in In re Tousa, Inc., 444 B.R. 613 (S.D. Fla. 2011) described it as determining whether the debtor's expectation of value was "legitimate and reasonable". Id. at 660. However, in each of the cases cited by Defendants as well as those found by the Court, the court undertook some analysis of the merits of the litigation. See In re Advanced Telecomm. Network, Inc., 490 F.3d 1325, 1337 (11th Cir. 2007) (in evaluating a settlement, the value of contingent future liability should be discounted by probability of its occurrence). The Court believes an analysis of the underlying litigation is required to an extent that allows the Court to find that the settlement entered into was reasonable in light of the various considerations of the parties at the time.

The question for the Court then is, in evaluating the Settlement Agreements, whether the stipulated amount of the "claim" for damages is reasonable in light of the allegations of the Defendants and the defenses of the Debtor, and whether the Debtor received reasonably equivalent value for the incurrence of the obligations. With this back drop, the Court will evaluate Defendants' Motion for Summary Judgment on the issue of whether the obligations under the Settlement Agreements, and therefore the transfers made pursuant thereto, were for reasonably equivalent value as a matter of law.

LITIGATION SETTLEMENT AGREEMENT

In applying the totality of the circumstances test to the Litigation Settlement Agreement, the Court looks first at whether the settlement agreement was entered into at arm's length. The Defendants point out that the parties stipulated in the Litigation Settlement Agreement that it was entered into at arm's length. The mere fact the parties to the Litigation Settlement Agreement stipulated it was made at arm's length does not mean the fact is established for all purposes. As stated above, the Defendants invested over $2 million in the Debtor, which is a sizeable amount.

The record does not reflect the percentage ownership reflected by that investment, so the Court cannot rule out that Defendants were major shareholders. Their potentially dominate position may provide contrasting evidence on the "arm's length" negotiations.

Next, under the totality of the circumstances test, the Court evaluates the good faith of the parties. There is no evidence in the record as to the good faith of the parties. The Defendants argue that good faith is presumed absent some other contrary evidence. The only case cited though is in the context of settlement of a class action suit. For purposes of a motion for summary judgment, the Defendants must initially point to specific items in the record establishing good faith before shifting the burden to the Trustee. The Court declines to hold that entry into the Litigation Settlement Agreement in and of itself is sufficient to shift the burden to the Trustee on the issue of good faith. See, e.g., Long Dev., 211 B.R. 874, 885-886 (Bankr. W.D. Mich. 1995).

The next question under the totality of the circumstances test is a fair market value comparison. As courts describe it, the court compares what the debtor received to what the debtor paid and evaluates the reasonableness of the comparison. Sometimes that comparison allows you to evaluate on a dollar-for-dollar basis; but more often the court must look into all of the circumstances and evaluate the reasonableness from the perspective of the debtor and its creditors at the time of entering into the agreement. In re Jordan, 392 B.R. at 441.

The Litigation Settlement Agreement calls for installment payments. After only the first installment payment of $100,000, the membership units held by the Litigation Defendants were to be transferred to the Debtor. There is no evidence in the record that the units were transferred to the Debtor or that they had any value at all. Defendants have stipulated for the purpose of this Motion only that Debtor was insolvent. That fact would suggest no value to the Debtor for the redemption of its stock. See Corp. Jet Aviation, Inc., 45 B.R. 629 (Bankr. N.D. Ga. 1985); In re

Pinto Trucking Serv., Inc., 93 B.R. 379, 388 (Bankr. E.D. Penn. 1988). In the recent case of In re DBSI, 447 B.R. 243 (Bankr. D. Del. 2011), the court found the trustee had sufficiently pled constructive fraud in a suit to avoid payments for the repurchase of "worthless equity and partnership interests". Id. at 248. The terms of the Litigation Settlement Agreement raise factual issues as to whether the membership units were transferred to the Debtor and the value of them.

The remaining payments under the Litigation Settlement Agreement appear designated for damages, including attorney's fees. While the Court has no intention of holding a "mini" trial on the underlying Superior Court Litigation, the Court must look to the allegations and the defenses in order to evaluate the reasonableness of the settlement. In that respect, the Court makes several observations: first, the Court does not have any indication of the defenses raised by the Debtor. The Trustee, however, points to the Subscription Agreements signed by the Defendants and the provisions therein which could arguably provide a defense to the Debtor. Moreover, the Trustee raises various aspects of the deposition testimony as to whether the Defendants were misled by the Debtor and whether any reliance by them on representations of the Debtor was reasonable. Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment acknowledges Debtor's liability was not assured, by stating "Debtor likely would have been liable for the wrongdoing of the Debtor's Principles (*sic*) through indemnification or common law." (¶ 44). However no evidence of an indemnification agreement or evidence of Debtor's liability is included in the record. The Court notes that apparently the litigation ensued for well over a year before there was a settlement, so the Court can assume the Debtor raised defenses and disputed the allegations of the Litigation Defendants in the Superior Court Litigation. Defendants allege the settlement only occurred after a motion to compel documents from non-parties was granted. This allegation raises the inference that Debtor's principals settled the litigation to protect non-Debtor entities. Moreover, the Court notes that the Litigation Settlement Agreement provides for only the Debtor to make payments, while the principals of the Debtor received the benefit of the releases. Lastly, the Court notes there is a question as to whether the Debtor was in business at the time of the settlement and therefore whether the cessation of litigation provided any additional value to the Debtor to enable it to continue in business.

In many of the cases cited by each party, the reasonableness of the settlement depended on not just the resolution of claims, but also on indirect benefits to the Debtor, such as continuing in leased facilities, or facilitating the sale of a business which provided funds for creditors. Even in the case of In re Corp. Jet Aviation, Inc., 45 B.R. 629 (Bankr. N.D. Ga. 1985), where Judge Drake stated, “it is beyond dispute that a corporation receives nothing of value for the benefit of creditors by redeeming stock to be held by the corporation as treasury stock”, id. at 633, the court ultimately found that reasonably equivalent value had been provided when considering the transaction as a whole. Thus, the Trustee overstates her case in arguing the fact that stock was redeemed means there was no reasonably equivalent value as a matter of law. Given the early stage of this case and the minimal record before the Court, the Court simply cannot conclude on either side as to the outcome. The Defendants assert there was litigation as evidenced by a complaint, the litigation was settled, the settlement amount was paid, and therefore as a matter a law they prevail. The law is not so simple. A number of material facts remain in dispute, or at least unknown to this Court, in terms of the allegations made, the defenses raised, and the benefit to the Debtor itself at the time of the Litigation Settlement Agreement. Therefore, the Court DENIES the Motion for Summary Judgment as to the Litigation Settlement Agreement without prejudice.

RBLB SETTLEMENT AGREEMENT

Next, the Court must undertake the same analysis with respect to the RBLB Settlement Agreement. As with the Litigation Settlement Agreement, the document itself stipulates that the parties operated at arm's length. However, the Superior Court Litigation complaint (Exh. B to Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment) shows that Mr. Matt Brill, an apparent principal of RBLB, is a former officer of the Debtor, holding the position of the Director of Investor Relations. This fact creates a disputed issue of fact for the Court as to whether the RBLB Settlement Agreement was entered into at arm's length.

As with the Litigation Settlement Agreement, the Court declines to find a presumption that the RBLB Settlement Agreement was entered into in good faith without any evidence of that fact.

Next, the Court must evaluate the fair market value of the RBLB Settlement Agreement to the Debtor. The RBLB Settlement Agreement is significantly different from the Litigation Settlement Agreement. RBLB was not a party to the litigation in the Superior Court. While the existence of litigation is not required in order to establish that a settlement provided reasonably equivalent value to the Debtor, the lack of litigation raises the question as to whether a settlement was necessary. Moreover, the RBLB Settlement Agreement states in paragraph 3, "(vi), RBLB has not filed any complaint or judicial or administrative proceeding against any and/or all of the Palisades Group, (vii), RBLB is not currently contemplating initiating any judicial or administrative proceeding against any and/or all of the Palisades Group . . .". This provision of the RBLB Settlement Agreement again raises the question as to whether the RBLB Settlement Agreement was a resolution of a claim as opposed to a repurchase of RBLB's equity interest.

The Court also notes the consideration recited for the Settlement and Release Agreement is "RBLB would like to sell and the Palisades Group would like to acquire RBLB's Membership Unit according to the terms of this Agreement." If the Debtor was insolvent as the parties have stipulated for purposes of this Motion only, an agreement for the purchase of worthless stock of the company would certainly raise a question as to whether any value was provided to the Debtor. See In re DBSI, 447 B.R. 245 (Bankr. D. Del. 2011). Lastly, there has been no evidence presented as to how the RBLB Settlement Agreement actually aided the Debtor or provided any direct or indirect benefit to the Debtor and its operations at the time. Consequently, the Court again declines to grant summary judgment to the Defendants on the RBLB Settlement Agreement at this stage of the case.

CONCLUSION

In summary, the Trustee's claims under 11 U.S.C. § 544 are not barred by the statute of limitations. However, any claim by the Trustee under 11 U.S.C. § 548 with respect to a transfer occurring prior to October 19, 2007 is barred and Defendants' Motion for Summary Judgment is GRANTED to that extent. After reviewing the materials submitted by the Defendants, and the record in this case to date, the Court concludes that many disputed issues of material fact remain, including the extent to which the Debtor received reasonably equivalent value in return for the obligations incurred under the Settlement Agreements which support the transfers made. Consequently, the Court DENIES Defendants' Motion for Summary Judgment on all other issues, but without prejudice to Defendants re-filing a motion for summary judgment at the conclusion of discovery when the record may be more complete.

END OF ORDER

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