IT IS ORDERED as set forth below:

Date: March 16, 2012

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	:	Case No. 10-76803-MGD
LENDXFINANCIAL, LLC,	:	Chapter 7
Debtor,	:	Judge Diehl
JASON L. PETTIE, CHAPTER 7 TRUSTEE FOR THE ESTATE OF LENDXFINANCIAL, LLC,	:	Adversary Proceeding
	:	No. 11-05330-MGD
Plaintiff,	:	
v.	:	
IRENE BONERTZ,	:	
Defendant.	:	

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the Court on a Motion for Summary Judgment filed by Jason L. Pettie, the Chapter 7 Trustee ("Plaintiff") for the estate of LendXFinancial, LLC ("Debtor").

Docket No. 7.[1] In accordance with the avoidance powers under 11 U.S.C. §§ 544, 547, 548, and 550, Plaintiff seeks to avoid and recover a transfer of real property that Debtor made to Irene Bonertz ("Defendant") in December 2009. Docket No. 1. This matter is a core proceeding pursuant to 28 U.S.C. § 157 (b)(2)(F) & (H), and the Court has jurisdiction over it pursuant to 28 U.S.C. § 157 (b)(1) and 28 U.S.C. § 1334. Plaintiff seeks summary judgment on all claims in the Complaint. Based on the undisputed facts presented to the Court, Plaintiff's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.

STATEMENT OF MATERIAL UNDISPUTED FACTS

The material facts in this adversary proceeding involve the transfer of real property from Debtor to Defendant on December 14, 2009, the events surrounding that transfer, and Debtor's financial condition at the time of the transfer.

I. *The Property Transfer*

The real property at issue here is located at 5295 Morton Road, Alpharetta, Fulton County, Georgia ("Property"). Affidavit of Irene Bonertz, Docket No.15, Exh. K, p.1. Defendant acquired ownership of the Property in July 1987 and has operated a horse farm on it and paid the property taxes since that time. *Id.* On May 22, 2008, Defendant transferred the Property to Debtor by quitclaim deed, for no consideration. *Id.* at p.2. Debtor, a limited liability corporation, had been formed the previous day to operate as a residential mortgage broker. State of Delaware, LLC Certificate of Formation, Docket No. 15, Exh. G., p.1. Defendant transferred the Property to Debtor on the day after Debtor's formation to assist it in obtaining warehouse financing. Affidavit of Irene

[1] All docket citations are to the docket in Adversary Proceeding No. 11-5330, unless otherwise noted.

Bonertz at p.2. Defendant further alleges that Debtor orally agreed to transfer the Property back to her upon obtaining sufficient financing or in one year, which occurred first. *Id.* During the time that Debtor owned the Property, Defendant continued operating the horse farm and paying some of the property taxes. *Id*.; Record of hearing on February 7, 2012.

Approximately one year later, on May 29, 2009, Debtor executed a quitclaim deed to Defendant for the Property. Affidavit of Irene Bonertz at p.2. The parties did not record the deed at that time. Affidavit of Wayne Bonertz, Docket No. 15, Exh. I, p.2. Instead, Debtor continued to reflect ownership of the Property on its balance sheets through November 2009. Debtor's November 30, 2009 Balance Sheet, Docket No. 15, Exh. U, p.1. The deed was ultimately recorded by Wayne Bonertz[2] on December 14, 2009. Affidavit of Wayne Bonertz at p. 2. Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code about six months later. Case No. 10-76803-MGD, Docket No. 1.

II. *The Circumstances of the Transfer*

Debtor's formation as an LLC relates to another residential mortgage broker, AME Financial Corp. ("AME"). Opinion & Order of January 26, 2010, *Forsberg v. Pefanis, et al.* (07-cv-03116-JOF), Docket No. 15, Exh. H, p.33. A former AME employee sued AME for employment discrimination in the District Court for the Northern District of Georgia (the "discrimination suit"), and judgment was entered against AME (the "AME judgment"). *Id*. at pp.2-33. The district court then found that AME's principals created Debtor in a fraudulent effort to avoid the AME judgment. *Id*. at pp.3, 26-27. The district court added Debtor as a defendant in the discrimination suit and held that Debtor was liable for the AME judgment. *Id*. at 33-34.

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[2] Wayne Bonertz is Defendant's husband. His role in the transfer is discussed below.

The Defendant and the Property in this adversary proceeding are also related to AME. Wayne Bonertz, the co-owner of AME, is the husband of Defendant. Answer, Docket No. 4, ¶ 12. Although Wayne Bonertz never owned Debtor, the district court found that Wayne Bonertz helped set up Debtor, had a "significant and vital role" in Debtor, and identified himself in a document as one of two persons "owning and carrying on" Debtor. Opinion & Order of January 26, 2010 at pp.8–9, 32. Also, while Wayne Bonertz was co-owner of AME in 2007, AME listed the Property on its balance sheet for purposes of obtaining financing, although Defendant apparently owned the Property. Affidavit of Irene Bonertz from *Forsberg v. Pefanis, et al.*, Docket No. 15, Exh. J, p.1.

III. *Debtor's Financial Status as of the Property Transfer*

Information on Debtor's financial status at the time of the transfer comes from three sources: first, the discrimination suit and the resulting AME judgment; second, Debtor's November 2009 balance sheet (dated two weeks before the transfer); and, third, Debtor's January 2010 balance sheet (dated six weeks after the transfer). There is no specific financial information in the record for December 2009 when the transfer at issue took place.

A. *The Discrimination Suit*

The district court entered judgment against AME in the discrimination suit for $4,575,000 in October 2009. Opinion & Order of December 8, 2009, *Forsberg v. Pefanis, et al.* (07-cv-03116-JOF), Docket No. 15, Exh. E, p.2. The plaintiff in the discrimination suit filed and served a motion to add Debtor as a defendant on November 13, 2009. Opinion & Order of January 26, 2010 at p. 8. Debtor was served with a notice of hearing on this motion on December 2, 2009—twelve days before the transfer of the Property on December 14. Civil Docket Sheet in *Forsberg v. Pefanis, et al.*,

Docket No. 15, Exh. P, p.2. By the time of the hearing, the AME judgment had been reduced to $2,775,000 due to statutory caps on damages. *Id*.; Opinion & Order of January 26, 2010 at p.3.

On December 23, 2009, the district court entered both an order adding Debtor as a defendant and an amended judgment reflecting Debtor's liability for the AME judgment. *Id*. at p.4. The district court later entered an opinion and order on January 26, 2010 that set forth its reasoning for holding Debtor as a defendant liable for the AME judgment. *Id.* at 1. Debtor appealed the district court's order that added Debtor as a defendant, but the Eleventh Circuit has dismissed the appeal. Declaration of Benjamin A. Stone, Docket No. 11, p.3. AME also appealed the judgment against it, but the Eleventh Circuit stayed the appeal when AME filed bankruptcy under Chapter 7 in January 2010. Record of February 7, 2012 hearing.

B. *Debtor's November 2009 Balance Sheet*

Debtor's balance sheet of November 30, 2009 ("November 2009 balance sheet"), dated two weeks before the transfer, showed a total net worth of approximately $3.9 million. Debtor's November 2009 Balance Sheet, Docket No. 15, Exh. U, p.1. It listed approximately $8.4 million in assets, including approximately $2.1 million for the Property, $3.8 million for loans in inventory, and $1.5 million of investment cash. *Id.* The $1.5 million in investment cash never existed, however. Defendant's Response to Plaintiff's Statement of Undisputed Material Facts, Docket No. 19, ¶ 41. The November 2009 balance sheet also listed approximately $4.5 million in liabilities. November 2009 Balance Sheet at p1. This included a liability listed as "Wh1line" for $3,621,731.22, which appears to be a warehouse line of credit corresponding to the approximately $3.8 million of loans in inventory. *Id*. The liabilities did not include a contingent, estimated liability for the AME judgment, which at the that time was for $4,575,000. *Id*. But Debtor was aware of

its potential liability for the AME judgment two weeks before the November 2009 month-end balance sheet. Opinion & Order of January 26, 2010 at p.8.

C. *Debtor's January 2010 Balance Sheet*

Debtor's balance sheet of January 31, 2010 ("January 2010 balance sheet"), dated six weeks after the transfer, showed a negative net worth of $1.63 million. Debtor's January 2010 Balance Sheet, Docket No. 15, Exh. V, p.1. The balance sheet listed approximately $637,000 in assets, including $128,000 of loans in inventory that had totaled $3.8 million in November 2009. *Id.* The assets did not include the $2.1 million Property or the $1.5 million of investment cash from the November 2009 balance sheet. *Id.* The January 2010 balance sheet also listed approximately $2.3 million in liabilities. *Id.* The liabilities no longer included a liability of approximately $3.6 million for the "Wh1line." *Id.* Nor did the liabilities include any liability for the AME judgment, which had been entered against Debtor in December 2009. *Id.*

IV. *Debtor's Bankruptcy and the Ensuing Procedural History*

Debtor ceased all business operations on January 21, 2010. LendX—Georgia Appraiser Forum Screen Shot, Docket No. 15, Exh. T, p.1. Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on June 7, 2010. Case No. 10-76803-MGD (Docket No. 1). In its Statement of Financial Affairs, Debtor declared under oath that it had gifted the property to Defendant in 2009. Case No. 10-76803-MGD (Docket No. 13), Statement of Financial Affairs, § 7. Debtor further declared that the property value decreased from $2.1 million in 2009 to $600,000 by June 2010. *Id.*

In June 2011, Plaintiff initiated this adversary proceeding by filing a complaint against Defendant to avoid the transfer and recover the Property for the benefit of Debtor's estate. Count

One of Plaintiff's Complaint seeks to avoid the transfer as a preference under 11 U.S.C. § 547(b). Count Two seeks to avoid the transfer as a fraudulent transfer under § 548(a)(1)(A). Count Three seeks to avoid the transfer as a constructively fraudulent transfer under § 548(a)(1)(B). Count Four seeks to avoid the transfer as a fraudulent transfer under 11 U.S.C. § 544 and O.C.G.A. § 18-2-74(a)(1). Count Five seeks to avoid the transfer as a constructively fraudulent transfer under 11 U.S.C. § 544 and O.C.G.A. § 18-2-74(a)(2)(B). Count Six seeks to avoid the transfer as a constructively fraudulent transfer under 11 U.S.C. § 544 and O.C.G.A. § 18-2-75. Finally, Count Seven seeks to recover the transferred property under 11 U.S.C. § 550.

Plaintiff filed his Motion for Summary Judgment ("Motion") on August 23, 2011 as to all counts in the Complaint. Docket No. 7. Defendant filed a response on September 21, 2011, and Plaintiff filed a reply on September 30, 2011. Docket Nos. 19-23. The Court heard oral arguments on Plaintiff's Motion on February 7, 2012. Present at the hearing were counsel for Plaintiff, counsel for Defendant, and Defendant.

DISCUSSION OF LAW

Under Rule 56 of the Federal Rules of Civil Procedure, applicable to this Court in accordance with Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is appropriate only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Material facts are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party has the burden of establishing its entitlement to summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The moving party must identify the pleadings, discovery materials, or affidavits that show the absence of a genuine issue of material fact. *Celotex Corp. v. Cartrett*, 447 U.S. 317, 322 (1986). 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 nonmoving party must present specific facts supported by evidence that demonstrate there is a genuine material dispute. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). The "[o]ne who resists summary judgment must meet the movant's affidavits with opposing affidavits setting forth specific facts to show why there is an issue for trial." *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000); Fed R. Civ. P. 56(e). In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985).

The Court will first address Plaintiff's counts that deal with actual fraud (Counts Two and Four), turn next to constructive fraud (Counts Three and Five), and turn last to the preference claim (Count One).

I. *The Actual Fraud Claims*

A. *Actual Fraud under the Bankruptcy Code*

Section 548(a)(1)(A) provides that the trustee may avoid a transfer made within two years of the petition-date if the debtor voluntarily or involuntarily

> (A) made such transfer or incurred such obligation 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.

The clause about intent in this section is disjunctive, and is thus satisfied by showing only one intent—whether intent to hinder, or to delay, or to defraud. *In re Bayou Group, LLC*, 396 B.R. 810 (Bankr. S.D.N.Y. 2008), *aff'd in part, rev'd in part*, 439 B.R. 284 (S.D.N.Y 2010). So long as an intent to interfere with a creditor's rights or collection efforts is present, actual harm to creditors need not be shown. *Davis v. Davis* (*In re Davis*), 911 F.2d 560, 562 (11th Cir. 1990) (*quoting Future Time, Inc. v. Yates*, 26 B.R. 1006, 1009 (Bankr. M.D. Ga. 1983)). While actual intent to defraud may be shown through direct evidence, that is difficult to do. Consequently, courts generally infer actual intent through circumstantial evidence. *In re XYZ Options, Inc.*, 154 F.3d 1262, 1271 (11th Cir. 1998). "In determining whether the circumstantial evidence supports an inference of fraudulent intent, courts should look to the existence of certain badges of fraud." *Id*. Such badges of fraud include whether:

> (1) The transfer was to an insider;
> (2) The debtor retained possession or control of the property transferred after the transfer;
> (3) The transfer was disclosed or concealed;
> (4) Before the transfer was made the debtor had been sued or threatened with suit;
> (5) The transfer was of substantially all the debtor's assets;
> (6) The debtor absconded;
> (7) The debtor removed or concealed assets;
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred;
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made;
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Id; *see also* O.C.G.A. § 18-2-74(b).

When applying a badges-of-fraud test, courts look to the totality of the circumstances. *XYZ*, 154 F.3d at 1271. One badge of fraud may be insufficient to establish intent, but "a confluence of several can constitute conclusive evidence of an actual intent to defraud." *Id*. at n.17 (quoting *Max Sugarman Funeral Home, Inc. v. A.D.B. Investors*, 926 F.2d 1248, 1254 (1st Cir. 1991)).

Plaintiff fails to meet the summary judgment standard on his § 548(a)(1)(A) claim because there is an issue of material fact about Debtor's intent to hinder, delay, or defraud creditors. While there is sufficient evidence for Plaintiff to prevail on this claim at trial, there is some evidence from which the trier of fact could find otherwise. But before turning to this factual dispute over intent, the Court first disposes of two arguments by Defendant that create legal, not factual, disputes. First, Defendant asserts that the actual fraud claim loses merit because the transfer occurred in May 2009, not December 14, 2009. This argument does not have any legal effect on the Trustee's § 548(a)(1)(A) claim, however, because a transfer in May 2009 is still within two years of the bankruptcy filing. More significantly, § 548(d)(1) provides that a transfer is deemed to have been made at the time it was perfected. Here, the transfer was perfected when the quitclaim deed was recorded on the property records. Defendant does not dispute that Wayne Bonertz recorded the quitclaim deed on December 14, 2009. The legally relevant date of the transfer is therefore December 14, 2009.

Second, Defendant asserts she is not an insider of Debtor, and that Plaintiff's claims are therefore insufficient as a matter of law to the extent that they rely on her being an insider. This second legal argument fails, too. Under 11 U.S.C.§ 101(31)(B), an individual is an insider of a debtor corporation if that individual is a "relative of a... person in control of the debtor...." Section 101(45) defines relative as an "individual related by affinity or consanguinity...." A spouse is a

"relative" under § 101(45) because spouses are related by affinity. *Miller v. Schuman* (*In re Schuman*), 81 B.R. 583, 585 (B.A.P. 9th Cir. 1987); 2-101 COLLIER ON BANKRUPTCY ¶ 101.45 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Here, based on the findings in the discrimination suit, Wayne Bonertz is a person in control of the Debtor. Specifically, the district court found that Wayne Bonertz had a significant and vital role in establishing Debtor and had identified himself in a document as one of two persons owning and carrying on Debtor. Opinion & Order of January 26, 2010 at pp.8-9,32. Further, Wayne Bonertz was a co-owner of AME, and the district court ruled that Debtor was a fraudulent successor of AME. Thus, Wayne Bonertz is an insider. Because Defendant is the wife of Wayne Bonertz, she is a relative of an insider and therefore an insider as well.

Turning now to the factual dispute over Debtor's intent, the Court considers the circumstantial evidence offered by Plaintiff and by Defendant. Because Plaintiff has the burden of establishing the right to summary judgment, the Court consider's Plaintiff's circumstantial evidence—i.e., badges of fraud—first. Plaintiff asserts that the first badge of fraud is that the transfer was to an insider. The second is that, before the transfer was made, Debtor was threatened with suit. Before making the transfer, Debtor had been on notice for a month that the plaintiff in the discrimination suit sought to hold Debtor liable for the judgment against AME. Indeed, the transfer occurred twelve days after Debtor received notice of a hearing on this very issue. Third, Debtor transferred its only hard asset—and its only apparent asset for securing warehouse financing. Without the Property, Debtor could not continue to secure the financing necessary to operate its business.

Plaintiff's fourth badge of fraud is that the transfer was made for either nominal or no consideration. Defendant has produced no evidence that—at the time of the transfer—Debtor

received something of roughly equivalent value in return.[3] The fifth and final badge of fraud is that Debtor became insolvent the very next month after transferring the Property to Defendant. In addition to these badges of fraud, Plaintiff argues that the discrimination suit is additional circumstantial evidence of Debtor's intent. Specifically, Plaintiff points to the district court's finding that Debtor was created in a fraudulent effort by AME to avoid the discrimination-suit judgment.

In opposition to Plaintiff's circumstantial evidence, Defendant asserts the following circumstantial evidence. First, Defendant has proffered an affidavit saying that Debtor had orally agreed to reconvey the Property to Defendant upon obtaining warehouse financing or in one year, whichever occurred first.[4] Second, Defendant has proffered an affidavit averring that Wayne Bonertz did not record the quitclaim deed until December 14, 2009 because of mere inadvertence, not because Debtor would soon become liable for the AME judgment. And the quitclaim deed transferring the Property to Defendant was in fact executed in May 2009.

Viewing the evidence in the light most favorable to Defendant, a genuine issue of material fact exists over Debtor's intent to hinder, delay, or defraud creditors. Defendant has offered circumstantial evidence that could lead a reasonable jury to find that Debtor did not have the requisite intent. On a motion for summary judgment, the Court is not to weigh the evidence for and against a fact. Because Plaintiff and Defendant each include circumstantial evidence in the record

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[3] Defendant does assert legal arguments that certain benefits made before the transfer to Defendant constitute consideration. Those arguments are addressed below with respect to constructive fraud.

[4] Plaintiff asserts that this evidence is barred by the statute of frauds because the agreement is not in writing. But Defendant is not here attempting to enforce the oral agreement, only to offer it as evidence that Debtor did not intend to hinder, delay, or defraud creditors—the inference being that Debtor was simply complying with its obligation to reconvey the Property to Defendant.

in support of their conflicting statements of fact about Debtor's intent, summary judgment is inappropriate on Plaintiff's actual fraud claim under § 548(a)(1)(A).

B. *Actual fraud under Georgia law*

Section 544(b) of the Bankruptcy Code allows a trustee to step into the shoes of an unsecured creditor and avoid a transfer that is avoidable under state law. 11 U.S.C. § 544; *Westgate Vacation Villas, Ltd. v. Tabas* (*In re Int'l Pharmacy & Discount II, Inc.*), 443 F.3d 767, 770 (11th Cir. 2005). Here, the Plaintiff, as trustee for Debtor's estate, seeks to recover the transfer of the Property under O.C.G.A. § 18-2-74(a). That section provides that

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor. . . .

O.C.G.A. § 18-2-74(a).

This same statute further provides that actual intent may be proved with the same badges of fraud that are listed above in the discussion of 11 U.S.C. § 548(a)(1)(A). Indeed, O.C.G.A. § 18-2-74(a)(1) substantially mirrors § 548(a)(1)(A) of the Bankruptcy Code. The Georgia statutes are different in that a creditor may recover property up to four years after the transfer occurred. O.C.G.A. § 18-2-79. Because the analysis is the same as under U.S.C. § 548(a)(1)(A), the Court incorporates its analysis from above. Based on the conflicting evidence presented to the Court, a reasonable jury could find that Debtor lacked the requisite intent. This dispute over a material fact demands the same conclusion as above, and Plaintiff is therefore not entitled to summary judgment on his claim under O.C.G.A. § 18-2-74(a)(1).

II. *The Constructive Fraud Claims*

A. *Constructive fraud under the Bankruptcy Code*

Section 548(a)(1)(B) provides that the trustee may avoid a transfer made within two years of the petition-date if the debtor voluntarily or involuntarily

> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or.
>
> . . .

11 U.S.C. § 548(a)(1)(B).

Plaintiff asserts that he is entitled to summary judgment under § 548(a)(1)(B) because it is undisputed that Debtor transferred the Property without receiving reasonably equivalent value at the time of the transfer; and because Debtor's financial condition satisfies all the three prongs under § 548(a)(1)(B)(ii).

1. *Reasonably Equivalent Value*

The Court first considers whether Debtor received reasonably equivalent value when it transferred the Property to Defendant. This determination involves a two-part test: (1) did Debtor receive any value whatsoever, whether in the form of an indirect or direct benefit; and (2) was the value reasonably equivalent to the Property. *Pension Transfer Corp. v. Beneficiaries* (*In re Fuehauf Trailer Corp.*), 444 F.3d 203, 212-14 (3d Cir. 2006). In the context of § 548, value means "property, or satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2)(A).

Here, Debtor did not receive any value. Value must be conferred at the time of the transfer. *Id*. at 212. The transfer here was made on December 14, 2009, the date the deed was recorded. 11 U.S.C. § 548(d)(1). Defendant has alleged no facts to suggest that any value was given to Debtor by Defendant at the time of the transfer. Presumably, if any value was received, it would be reflected on the January 2010 balance sheet. But that balance sheet does not show anything specific that was received by Debtor for the Property. Although the deed states that a consideration of $1.00 was exchanged, that is of course immaterial.

Defendant argues that she gave value to Debtor by her operating a horse farm on the Property and paying some property taxes (which Defendant alleges Debtor had orally agreed to pay) during the time that Debtor owned the Property. But these actions do not constitute value because they were not given at the time of the transfer—they gave Debtor nothing to replace the absence of the Property on Debtor's books on December 14, 2009, or anytime thereafter. And even if it could be argued that these actions gave value at the time of the transfer, they did not give anything close to a reasonably equivalent value to Debtor, as explained below.

The second part of the "reasonably equivalent value" test involves comparing the value given by the Debtor to the value of whatever the Debtor received in exchange. *Fuehauf Trailer Corp.*, 444 F.3d at 212-13. This comparison is a factual analysis. If the values appear close, courts "look to the totality of the circumstances, including (1) the fair market value of the benefit received as a result of the transfer, (2) 'the existence of an arms-length relationship between the debtor and the transferee,' and (3) the transferee's good faith." *Id*. at 213 (quoting *Mellon Bank v. Official Comm. Of Unsecured Creditors of R.M.L.* (*In re R.M.L.*)), 92 F.3d 139, 148-49, 153 (3d Cir. 1996). A

precise calculation of the exchanged values is unnecessary, however, if there is sufficient evidence to conclude the values are plainly not equivalent. *Id*. at 213-14.

Here, the Debtor valued the Property at $600,00 at the time of the bankruptcy filing; Plaintiff alleges that the Property had a value of $2,100,000 at the time of the transfer. Whatever the exact value of the Property, any value given by Defendant was grossly unequal. First, Defendant alleges that operation of the horse farm gave value to Debtor by maintaining the Property's value. But Defendant has tendered no evidence to support this allegation. Second, Defendant alleges that she paid some property taxes while Debtor owned the Property, though the amount of taxes paid is not in evidence. At most, then, Debtor could have received a benefit of one year's property taxes. The total value of the Property and one year's property taxes are not reasonably equivalent. Thus, the undisputed facts show that Debtor did not receive reasonably equivalent value for the transfer of the Property to Defendant.

2. *Debtor's financial condition*

The next element under § 548(a)(1)(B) concerns Debtor's financial condition. Under § 548(a)(1)(B)(ii), this element is met if at the time of the transfer Debtor was insolvent or was rendered insolvent; or if the transfer left Debtor with unreasonably small capital; or if when Debtor made the transfer it believed or knew it would be unable to pay maturing debts.

a. *Insolvency*

Determining whether a business is insolvent under § 548(a)(1)(B)(ii) a question of fact. *Join-In Int'l (U.S.A.) Ltd. v. Wholesale Distribs. Corp.* (*In re Join-In Int'l (U.S.A.) Ltd.*), 56 B.R. 555, 560 (Bankr. S.D.N.Y. 1986). A business is insolvent if "the sum of [its] debts is greater than all of [its] property, at a fair valuation . . . ." 11 U.S.C. § 101(32)(A)(I). This determination has been called

the "balance sheet test," and involves tallying a debtor's assets and liabilities. *Mellon Bank, N.A. v. Metro Commc'n, Inc.* (*In re Metro Commc'n, Inc.*), 945 F.2d 635, 648 (3rd Cir. 1991). The balance sheet test is applied at the time of the transfer. *In re R.M.L.*, 92 F.3d at 154.

Here, Plaintiff attempts to establish his factual claim that Debtor was insolvent at the time of the transfer or was thereby rendered insolvent with reference to Debtor's November 2009 and January 2010 balance sheets. At the February 7, 2012 hearing on Plaintiff's Motion, Defendant asserted that no evidence establishes Debtor's insolvency as of December 14, 2009. Indeed, there is no balance sheet or other specific evidence of Debtor's actual financial condition on December 14, 2009. But Plaintiff asserts that the November 2009 and January 2010 balance sheets nonetheless show Debtor's financial condition at the time of the transfer. Debtor's November 2009 balance sheet shows a total net worth of $3.9 million. It is undisputed, however, that the $1.5 million in investment cash did not exist, giving Debtor a net worth of approximately $2.4 million. And the November 2009 balance sheet does not include an estimated, contingent liability for the then $4,575,000 AME judgment, which would further reduce Debtor's net worth. According to Plaintiff, this is evidence that Debtor was insolvent on December 14, 2009.

However, neither the balance sheet nor any other evidence shows how much the AME judgment should be estimated at on Debtor's balance sheet. If this contingent liability were less than $2.4 million (Debtor's approximate net worth), then Debtor may have been solvent; if more than $2.4 million, then Debtor may have been insolvent. Additionally, Debtor may have acquired other assets between November 30 and December 14 that could have raised its net worth. Thus, the November 2009 balance sheet is not evidence of Debtor's insolvency on December 14, 2009. Summary judgment is inappropriate because the evidence in the record does not show that Debtor's

insolvency on the date of the transfer is undisputed.

Plaintiff next attempts to establish his factual claim that Debtor was rendered insolvent by pointing to Debtor's insolvency in January 2010. By January 31 2010, Debtor's net worth was negative $1.63 million, exclusive of the AME judgment. But the two balance sheets show various changes in assets and liabilities between November 2009 and January 2010. By January 31, 2010, the loans in inventory are greatly reduced, and what appeared to have been the corresponding liability of the warehouse line of credit is absent. While this change on the balance sheet would seem to be related to the transfer of the Property off Debtor's books, that is speculation.

It is speculation because, first, there are no affidavits or other evidence giving a financial analysis of the balance sheets and explaining the cause of Debtor's insolvency. Second, the balance sheets themselves do not show that the Property transfer caused insolvency—if the Property were added back on to the January 2010 balance sheet, Debtor might have a positive net worth or a negative net worth. Debtor's net worth is uncertain because the January 2010 balance sheet still does not reflect a contingent liability for the AME judgment (which AME was appealing at the time). For example, if the contingent liability were for $2,775,000 (the full amount of the judgment at that time), then Debtor's owning the Property would not make Debtor solvent. Without evidence to show the amount of the contingent liability for the AME judgment, it is possible that Debtor may have been insolvent in January 2010 even if it still owned the Property. Thus, summary judgment is inappropriate because the evidence presented by Plaintiff does not show it is undisputed that Debtor was rendered insolvent by the transfer.

b. *Unreasonably small capital*

The unreasonably small capital prong "'denotes a financial condition short of equitable insolvency.'" *Peltz v. Hatten*, 279 B.R. 710, 744 (D. Del. 2000) (quoting *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1070 (3d Cir. 1992)). To determine if a debtor was left with unreasonably small capital, courts generally look to whether a debtor is unable to generate sufficient cash flow and secure operating capital to remain financially viable. *Smith v. Litchford* (*In re Bay Vista of Va., Inc.*), 428 B.R. 197, 225-226 (citations omitted). This requires a case-by-case analysis. *Id*. (citing *In re Rieser v. Hayslip* (*In re Canyon Sys. Corp.*), 343 B.R. 615, 650 (Bankr. S.D. Ohio 2006).

Here, it is undisputed that the transfer of the Property left Debtor with unreasonably small capital. In order to operate as a residential mortgage broker, Debtor had to obtain financing. Defendant does not dispute that Debtor's ownership of the Property is what allowed Debtor to obtain this financing; rather, Defendant asserted at the hearing that she had insufficient knowledge whether this was so. But the evidence tendered by Plaintiff shows that the Property was originally transferred to Debtor for the purposes of allowing Debtor to obtain financing—and that the Property therefore played a fundamental role in Debtor's business by allowing it to secure operating capital. The balance sheets also support the fundamental role played by the Property, as they do not show any other hard assets that Debtor could use as security for financing. Further, only a month after transferring the Property to Defendant, Debtor ceased operating.

Thus, Plaintiff has tendered evidence to support his factual claim that the Property transfer left Debtor with unreasonably small capital. And Defendant has tendered no evidence in the record that supports the factual claim that the Property was not essential to Debtor's financial viability. The

evidence in the record therefore shows that is undisputed that the transfer of the Property left Debtor with unreasonably small capital. Plaintiff is entitled to summary judgment on its constructive fraud claim under the reasonably small capital prong of 548(a)(1)(B)(ii).

c. *Inability to pay maturing debts because of a transfer*

As to the final prong of § 548(a)(1)(B)(ii), this prong is satisfied when a debtor transfers property or incurs a debt with the knowledge or intent that it will be unable to pay maturing debts. *In re WRT Energy Corp.*, 282 B.R. 343, 414-15 (W.D. La. 2001). A debtor's knowledge or intent "can be inferred where the facts and circumstances surrounding the transaction show that the debtor could not have reasonably believed that it would be able to pay its debts as they matured." *Id*. at 415.

Here, the undisputed facts are that (1) Debtor was aware of a potential liability for up to (at the time) $4,575,000; that (2) Debtor knew its net worth was approximately $3,900,000; and that (3) Debtor transferred its key and only hard asset to Defendant for nominal or no consideration. At the least, these circumstances allow an inference that Debtor transferred the Property with the knowledge that its ongoing ability to pay maturing debts would be compromised. Without its central asset for obtaining financing, Debtor could not have reasonably believed that it would be able to continue its business and pay maturing debts. Defendant has tendered no evidence to support a factual claim that Debtor believed or intended that it could continue paying its debts as they matured. Thus, Plaintiff has presented evidence showing it is undisputed that Debtor made the transfer with the knowledge or belief that it would be unable to pay its maturing debts. Plaintiff is entitled to summary judgment on his constructive fraud claim under this prong as well.

B. *Constructive fraud under Georgia law*

Section 544(b) of the Bankruptcy Code also allows Plaintiff to avoid a transfer under O.C.G.A. § 18-2-74(a)(2)(B) and § 18-2-75. Section 18-2-74(a)(2)(B) provides that

> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> . . . .
>
> (B) 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.

And § 18-2-75 provides that

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

As with actual fraud under Georgia law, both § 18-2-74(a)(2)(B) and § 18-2-75 substantially mirror the constructive fraud claims under the Bankruptcy Code. Thus, the Court incorporates here its analysis from above on Plaintiff's claim under § 548(a)(1)(B). The same undisputed facts in support of Plaintiff's § 548(a)(1)(B) support Plaintiff's constructive fraud claims under Georgia law. Plaintiff is therefore entitled to summary judgment under O.C.G.A. § 18-2-74(a)(2)(B), but not entitled to summary judgment under O.C.G.A. § 18-2-75 (as the evidence presented does not establish Debtor's insolvency on the date of the transfer or Debtor's being rendered insolvent).

III. *The Preference Claim*

Plaintiff's Complaint and Motion for Summary Judgment also seek to avoid the transfer and recover the Property as a preference under 11 U.S.C. § 547. This is plead as an alternative to the

fraudulent conveyance claims. Because Plaintiff has been granted summary judgment on the constructive fraud claims, it is unnecessary for the Court to reach a decision on the preference claim.

IV. *The Recovery Claim*

Section 550 of the Bankruptcy Code allows the trustee to recover property that was avoided under sections 544, 547, or 548. Because Plaintiff is entitled to summary judgment on his constructive fraud claims, he is likewise entitled to summary judgment on his § 550 claim and may recover the Property for the estate.

V. *Plaintiff's Other Requests For Relief in the Motion for Summary Judgment*

Plaintiff also requests to recover his legal fees under O.C.G.A. §§ 13-6-11 and 18-2-77. If Plaintiff seeks to pursue this request, Plaintiff must file a brief with the Court setting forth why legal fees should be awarded, including citations to relevant caselaw.

VI. *Conclusion*

Under the undisputed material facts, Plaintiff is entitled to summary judgment on the constructive fraud claim that the transfer for less than reasonably equivalent value left Debtor with unreasonably small capital. Plaintiff is also entitled to summary judgment on the constructive fraud claim that Debtor made the transfer for less than reasonably equivalent value with the intent or belief that Debtor could not pay maturing debts. Plaintiff is not entitled to summary judgment on the constructive fraud claim that Debtor made the transfer for less than reasonably equivalent value while insolvent or was rendered insolvent thereby. The evidence in the record does not establish the fact that Debtor was insolvent at the time of the transfer or was rendered insolvent by the transfer, and therefore that fact is left in dispute. Finally, Plaintiff is not entitled to summary judgment on the actual fraud claims because there is a factual dispute over whether Debtor intended to hinder, delay,

or defraud creditors.

Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART** as follows.

Plaintiff is **DENIED** summary judgment on the actual fraud claims under 11 U.S.C. § 548(a)(1)(A) in Count Two and under 11 U.S.C. § 544 and O.C.G.A. § 18-2-74(a)(1) in Count Four.

Plaintiff is **GRANTED** summary judgment on the constructive fraud claims under 11 U.S.C. § 548(a)(1)(B) in Count Three and 11 U.S.C. § 544 and O.C.G.A. § 18-2-74(a)(2)(B) in Count Five.

Plaintiff is **DENIED** summary judgment on the constructive fraud claim under 11 U.S.C. § 544 and O.C.G.A. § 18-2-75 in Count Six.

Plaintiff is **GRANTED** summary judgment on the recovery claim under 11 U.S.C. § 550 in Count Seven.

The Clerk of Court shall serve a copy of this Order on Plaintiff, counsel for Plaintiff, Defendant, and counsel for Defendant.

END OF DOCUMENT