

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON DOCKET
JUN 16 2008

IN RE:	:	CASE NO. 05-74924-JB
	:	
Ignatius Nebolisa Ojemeni,	:	
	:	
Debtor.	:	
_____	:	CHAPTER 7
	:	
John W. Ragsdale, Jr.,	:	
as Trustee for the Estate of	:	
Ignatius Nebolisa Ojemeni,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 07-06412
v.	:	
	:	
Anthonia Ojemeni,	:	
	:	
Defendant.	:	

ORDER

This adversary proceeding is before the Court on Plaintiff's motion for partial summary judgment. (Docket No. 17). Plaintiff, the Chapter 7 Trustee ("Trustee"), seeks a determination that debtor's transfers to his wife of cash and a fifty percent interest in real property were fraudulent transfers or preferences under 11 U.S.C. §544, §547, and §548. Plaintiff seeks a judgment against Defendant Antonia Ojemeni in the amount of \$74,642.97 with interest and a judgment setting aside the transfer of debtor's interest in the real property. In the motion, plaintiff requests that the remaining issues raised by the

complaint be reserved for trial, including any damages associated with the transfer of the real property, attorney's fees, and punitive damages.

This is a core proceeding under 28 U.S.C. §1334 and 28 U.S.C. §157(b)(2)(F) and (H). After carefully considering the briefs and affidavits submitted, as well as the record in this case, the Court concludes that there are genuine issues of certain material facts which make summary judgment inappropriate. However, when a motion is brought under Fed. R. Bankr. P. 7056, incorporating Fed. R. Civ. P. 56, and judgment is not rendered for the relief requested, the Court can, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. In accordance with Fed. R. Bankr. P. 7056 and Fed. R. Civ. P. 56(d), the Court finds that the following facts exist without substantial controversy.

Debtor made two transfers to his wife in March of 2005. The first transfer, a transfer of a cashier's check in the amount of \$74,642.97, occurred on or about March 5, 2005. The second transfer, a transfer by warranty deed of debtor's one-half undivided interest in certain real property located at 3962 Winterstreet Drive, Decatur, Georgia (the "Property"), occurred on March 24, 2005. At the time of these transfers, debtor was insolvent. Debtor filed a petition under Chapter 7 of the Bankruptcy Code on August 17, 2005. The transfers of the funds and the Property both occurred within one year prior to the petition date, and these transfers enabled the defendant to receive more than she would have otherwise received as a creditor in this case. The Trustee

filed a complaint against Mrs. Ojemeni alleging that these transfers should be set aside under 11 U.S.C. §544, §547, and §548. The Trustee alleges that debtor made these transfers with the actual intent to hinder, delay, or defraud his creditors and without receiving reasonably equivalent value. In the alternative, the Trustee alleges that the transfers are voidable preferences. Defendant filed an answer denying the material allegations of the complaint.

The Trustee seeks a summary judgment on his claim that debtor's transfers were actual and constructively fraudulent transfers under both federal and Georgia fraudulent conveyance law. The Trustee contends that both transfers were made with actual intent to hinder, delay, or defraud an entity to which the debtor was liable, and that the debtor did not receive reasonably equivalent value. Defendant denies the Trustee's contentions and asserts that there was no fraudulent intent on the part of the debtor. Defendant argues that debtor made these transfers in consideration for defendant's continued support and payment of debtor's living expenses, as debtor had not worked since 2000; defendant also contends that these transfers were contemporaneous exchanges. In addition, defendant alleges that she was a mere conduit for the funds transferred by the debtor, as a significant portion of the money went to Africa for the benefit of the children of the debtor and the defendant. With respect to the Property, defendant contends that she or her family members paid for the Property, that the Property was considered hers alone and that debtor did not

contribute any funds to the purchase of the Property. Defendant states that in her culture it is customary to place the man's name on the documents.

A court will enter summary judgment only upon a showing 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). Courts must review all evidence in the light most favorable to the non-moving party. *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir.1988). In the instant case, plaintiff bears the initial burden of establishing that there is no issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). After plaintiff meets this initial burden, the burden shifts to the defendant who must go beyond the pleadings and show that an issue of material fact indeed does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion." *Samples*, 846 F.2d at 1330.

A trustee may avoid a transfer made with an intent to defraud creditors under 11 U.S.C. §548(a)(1)(A). To prevail on a claim under §548(a)(1)(A), the trustee has the burden of proving the following elements by a preponderance of the evidence: (1) a transfer; (2) of an interest of the debtor in property; (3) within one year of the date of the petition; (4) made by the debtor with actual intent to hinder, delay, or defraud any current

or future creditor of the debtor. *Whitaker v. Volvo Commercial Finance, LLC (In re Gulf Northern Transport, Inc.)*, 323 B.R. 786, 791 (Bankr. M.D. Fla. 2005). There is no dispute that debtor transferred interests in both real and personal property to the defendant within one year prior to the petition date. However, the parties dispute whether the transfers were made with the actual intent to hinder, delay, or defraud any current or future creditor of the debtor. Plaintiff contends that actual intent to hinder, delay, or defraud can be presumed from the relationship of the defendant to the debtor and the absence of adequate consideration. Defendant, however, denies any actual intent to defraud, and argues that the transfers were made in consideration for defendant's continued support and payment of the living expenses of the debtor. There is a genuine dispute as to debtor's intent and summary judgment on plaintiff's §548(a)(1)(A) claim cannot be granted.

To prevail on a claim of constructive fraud under 11 U.S.C. §548(a)(1)(B), the trustee has the burden of proving the following elements by a preponderance of the evidence: (1) a transfer; (2) of an interest of the debtor in property; (3) within one year of the date of the petition; (4) for which the debtor received less than reasonably equivalent value in exchange, including payment of a debt; (5) while the debtor was insolvent. *Wessinger v. Spivey (In re Galbreath)*, 286 B.R. 185, 197 (Bankr. S.D. Ga. 2002); *Whitaker*, 323 B.R. at 790. Again, there is no dispute that debtor transferred interests in both real and personal property to defendant within one year prior to the

petition date and that debtor was insolvent at the time of both transfers. However, the parties dispute whether debtor received reasonably equivalent value in exchange for the transfers. The Trustee argues that reasonably equivalent value was not obtained, but defendant asserts that her support of the debtor, by providing for his food, utilities, and necessities constitutes substantial value. Additionally, defendant asserts that a significant portion of the funds she received from the debtor was sent to Africa for the benefit of their children. Thus, there are genuine disputes of fact, and summary judgment on plaintiff's §548(a)(1)(B) claim is inappropriate at this time. The recent Eleventh Circuit case of *Bakst v. Wetzel (In Re: Kingsley)*, 518 F.3d 874 (11th Cir. 2008) may be relevant here, and counsel should review the facts in the case at bar in light of the *Kingsley* case.


The Trustee also seeks a summary judgment on his alternative theory that the transfers are voidable preferences. To prevail on a preference claim under §547 of the Bankruptcy Code, the trustee has the burden of proving the following elements by a preponderance of the evidence: (1) a transfer of the debtor's property; (2) to or for the benefit of a creditor; (3) for or on account of an antecedent debt owed by the debtor before such transfer was made; (4) made while the debtor was insolvent; (5) within 90 days before bankruptcy or between 90 days and one year if the creditor was an insider; and (6) the effect which transfer was to give the creditor more than he would have received in a Chapter 7 distribution, had the transfer not been made. 11 U.S.C. § 547(g); *Cohen v. Kern (In re Kennesaw Mint, Inc.)*, 32 B.R. 799, 803 (Bankr. N.D. Ga. 1983).

While there is no dispute that debtor transferred property to his wife within one year prior to the petition date at a time when he was insolvent, defendant contends that there was no antecedent debt and that the transfers were a contemporaneous exchange for defendant's continued support of the debtor. Thus, it appears that a genuine dispute exists as to whether the transfers were made on account of an antecedent debt and whether the transfers were in fact a contemporaneous exchange within the meaning of §547(c)(1) such that summary judgment cannot be granted on the preference claim.

Finally, the Trustee briefly mentions §544 of the Bankruptcy Code in his moving papers, but does not discuss any of the elements of the Georgia fraudulent transfer statute. The same factual disputes that prevent the granting of a summary judgment under § 548 of the Bankruptcy Code prevent the granting of any summary judgment under 11 U.S.C. §544.

In accordance with the above reasoning, Trustee's motion for partial summary judgment must be DENIED, and a trial on the remaining factual issues will be set by separate Order.

IT IS SO ORDERED, this 13th day of June, 2008.



JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

A copy of the foregoing Order was mailed to the following:

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