

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

IN RE:	)	Chapter 7
	)	
RICHARD L. HARRIS, JR.,	)	Case No. 02-10938 (MFW)
	)	
Debtor.	)	
_____	)	
	)	
JEFFREY L. BURTCH, TRUSTEE,	)	
	)	
Plaintiff,	)	Adversary No. 02-05803
	)	
v.	)	
	)	
RICHARD L. HARRIS, JR. and	)	
DONNA K. HENRY,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION**<sup>1</sup>

Before the Court is the Complaint of the Chapter 7 Trustee to avoid the transfer of the Debtor's real property to his mother as fraudulent pursuant to sections 544(b) and 548(a). The Trustee contends, as a result, that the property, or its value, must be returned pursuant to section 550(a) and that the Debtor's discharge should be denied pursuant to section 727(a)(2)(A). A trial on the merits was held on May 15, 2003, and the parties subsequently submitted post-trial Letter Memoranda to the Court. For the reasons set forth below, the relief requested in the

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<sup>1</sup> This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

Complaint will be granted.

I. FACTUAL BACKGROUND

Pre-petition, Richard L. Harris, Jr. ("the Debtor") was liable to Walter Thomas and Walter's Pest Control, Inc. ("the Creditors") on two notes in the amount of \$40,000 and \$13,182.25. When the Debtor failed to make payments on the notes, the Creditors attempted to collect the debts owed. Demand letters dated May 14 and June 7, 2001, were sent to the Debtor who neither responded nor made any payments on the notes. In addition, the Creditors requested that the Debtor return a number of items owned by them, including two 12 gauge shotguns, a Polaris 4x4 ATV, and a Master Tow Flatbed Trailer. The Debtor failed to return these items. Consequently, on August 3, 2001, the Creditors filed suit against the Debtor in the Superior Court of the State of Delaware in Sussex County on the delinquent notes.

On or about June 21, 2001, while the Creditors were seeking payment on the notes, the Debtor conveyed his residence located at 34353 Hitch Pond Road, Laurel, Sussex County, Delaware ("the Property") to his mother Donna K. Henry ("Henry") for \$78,420.97 ("the Transfer"). As a result of the Transfer, the purchase price was applied to satisfy the Debtor's mortgage. Despite the Transfer, the Debtor continues to live in the Property. Within

one year of the Transfer, on March 28, 2002 ("the Petition Date"), the Debtor filed a petition for relief under Chapter 7.

## II. JURISDICTION

This Court has jurisdiction over this matter as a core proceeding pursuant to 28 U.S.C. §§ 1334 & 157(b)(2)(A), (E), (H), (J), & (O).

## III. DISCUSSION

### A. Fraudulent Transfer

Section 548(a)(1) of the Bankruptcy Code provides in part that:

The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, 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; or

(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.

11 U.S.C. § 548(a)(1).

#### 1. Section 548(a)(1)(A)

To avoid the Transfer under section 548(a)(1)(A), the Trustee must establish that the Debtor transferred the Property

with the actual intent to hinder, delay, or defraud creditors. To establish actual fraudulent intent, the Trustee must provide evidence of intent.

Recognizing the difficulty of proving a debtor's actual intent to hinder, delay, or defraud, courts have identified several "badges of fraud" which may establish this intent circumstantially. In re Bernier, 282 B.R. 773, 781 (Bank. D. Del. 2002) (citing In re Cohen, 142 B.R. 720, 728 (E.D. Pa. 1992)). In Cohen, the Court considered evidence concerning "badges of fraud" because an individual's intent is seldom admitted and is difficult to prove. 142 B.R. at 728. Therefore, a court may find actual intent from its review of the totality of the circumstances. Id. Some of the pertinent "badges of fraud" include: (1) family relationship between the parties; (2) inadequacy of consideration; (3) the financial condition of the debtor before and after the transaction; (4) the pendency or threat of suits by creditors; and (5) whether the debtor retained possession of the property following the transfer. See Bernier, 282 B.R. at 781.

A court may consider additional factors to determine whether the debtor acted with actual fraudulent intent, such as: whether the transaction was conducted at arm's length; whether the debtor was aware of the existence of a significant judgment or outstanding debt; and the timing of the transfer in relation to

the filing of the bankruptcy petition. See In re Margaretta, 282 B.R. 773, 781 (D. Del. 2002). Once sufficient evidence of the debtor's actual fraudulent intent is provided, the debtor must present evidence of a "legitimate supervening purpose" for the transfer. BFP v. Resolution Trust Corp., 511 U.S. 531, 541 (1994).

Here, the Trustee produced substantial evidence to establish several "badges of fraud." First, the Transfer was between the Debtor and his mother. In addition to being a "badge of fraud", transfers between relatives are more closely scrutinized because fraud is easily practiced and effectively concealed in these situations. See United States v. West, 299 F. Supp. 661, 664 (D. Del. 1969) (citing Richards v. Jones, 142 A. 832, 835 (Del. Ch. 1928)). While there may be a legitimate reason for a transfer of property to a relative, in this case the Debtor had none. In fact, the Debtor offered no credible reason for the Transfer.

Since the Transfer was to a close relative, the Debtor must rebut the presumption of fraud by establishing that the consideration was fair. West, 299 F. Supp. at 664. In determining whether consideration is fair, courts review the totality of the circumstances, including the good faith of the parties, the difference between the amount paid and the fair market value, and whether the transaction was conducted at arms length. See, e.g., Peltz v. Hatten, 279 B.R. 710, 736 (D. Del.

2002).

We conclude that the consideration paid in this case was inadequate. Although the Debtor and Henry both testified that they felt the consideration given was fair, this is not supported by the evidence of value available to them at the time. At the time of the Transfer, Wilmington Trust told the Debtor and Henry that the Property was worth \$115,000.<sup>2</sup> Notwithstanding that appraisal, Henry paid only the amount due to the Debtor's mortgagee, which was less than \$80,000. Thus, we conclude that the totality of the circumstances surrounding the Transfer establishes that the consideration was not fair. This was a sale between two close relatives (with no arms length negotiation) for substantially less than they were told at the time it was worth.

Third, the Transfer constituted a sale of substantially all of the Debtor's property and rendered the Debtor insolvent. This is evident from the schedules filed by the Debtor in his bankruptcy case which reveal few other assets. At trial, the Debtor testified that all of his reported debts were in existence within one year before the Petition Date.<sup>3</sup> The Debtor also testified that he did not own or possess any other assets at any

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<sup>2</sup> At trial, the Trustee presented an expert who appraised the Property at \$95,200. The Debtor presented no expert. Therefore, we conclude that the value of the Property was \$95,200 at the time of the Transfer.

<sup>3</sup> The Debtor did not list the mortgage on the Property, because it was satisfied as a result of the Transfer.

time within one year before the Petition Date. Therefore, it is evident that the Transfer represented a transfer of the Debtor's only substantial asset.

In addition, the Transfer rendered the Debtor insolvent. Before the Transfer, the Debtor owned the Property (worth \$95,200) and few other assets. He also had debts exceeding \$166,000 (scheduled debts of approximately \$88,000 plus the mortgage of \$78,000). After the Transfer to his mother, the Debtor owned few assets but still had debt exceeding \$88,000. Thus, the Debtor was insolvent at the time or was rendered insolvent as a result of the Transfer.

Fourth, the Debtor had actual notice of the Creditors' threatened litigation before he transferred the Property. At trial, the Debtor admitted that the Creditors had demanded payment on the two promissory notes before the Transfer. In fact, the Creditors sent the Debtor four separate letters demanding payment of the notes. The final letter clearly stated that it was the last demand for payment before resorting to legal action. Therefore, we find that the Debtor had notice of threatened litigation against him before the Transfer occurred.

Fifth, the Debtor admitted that he continues to reside in the Property. Despite testifying that he was paying \$350 a month for rent, the Debtor failed to produce any extrinsic evidence to establish the existence of a lease. Retention of the Property by

the Debtor after the Transfer is clearly a "badge of fraud".

Accordingly, we conclude that the Trustee has established actual fraudulent intent, which the Debtor did not credibly rebut. Thus, we conclude that the transfer of the Property by the Debtor to Henry, his mother, was a fraudulent conveyance which is avoidable by the Trustee pursuant to section 548 of the Code.

2. Section 548(a)(1)(B)

Even if we were to conclude that the Trustee had not established actual intent to defraud, we conclude that the transfer is still avoidable under section 548(a)(1)(B). To avoid a transfer under that section, the Trustee must establish that the Debtor transferred the Property for less than reasonably equivalent value and that the Debtor was insolvent at the time of the Transfer or became insolvent as a result of the Transfer.

As we noted above, the value received by the Debtor was the payoff of the mortgage on the Property. This was less than \$80,000 at a time when the Property was worth \$95,200. This was not reasonably equivalent to the value of the Property.

Further, we find that the Transfer rendered the Debtor insolvent. The Bankruptcy Code defines insolvency as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at fair valuation, exclusive of (I) property transferred, concealed, or removed with



intent to hinder, delay, or defraud such entity's creditors." 11 U.S.C. § 101(32)(A).

Before the Transfer, the Debtor owned property worth little more than \$95,000 and had debts exceeding \$166,000. After the Transfer, the Debtor owned few assets but still had debt exceeding \$88,000. Thus, the Debtor was insolvent at the time or was rendered insolvent as a result of the Transfer.

Consequently, we conclude that the Transfer is avoidable under section 548(a)(1)(B) as well.

B. Recovery under Section 550

The Trustee seeks an order under section 550 requiring the Debtor's mother to return the Property, or its value, to the estate, to reimburse the estate for any liens or encumbrances incurred, and to account for all monies received from the Debtor since the fraudulent transfer of the Property.

Section 550(a) provides in relevant part:

Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a).

It is uncontested that Henry was the immediate transferee and remains the current owner of the Property. As noted in Parts

A and B above, we conclude that the Transfer of the Property to Henry is avoidable under section 548(a). Accordingly, we conclude that the Trustee is entitled under section 550 to recover the Property, or its value, from Henry. Since Henry has encumbered the Property with a mortgage in favor of Wilmington Trust, whose balance has not been established, we conclude that the Trustee is entitled to recover the value of the Property from Henry pursuant to section 550.

Based on the evidence presented, we conclude that the value of the Property at the time of the Transfer was \$16,779.03 (the appraised value of \$95,200 less the mortgage balance of \$78,420.97). Accordingly, judgment in that amount will be entered against Henry in favor of the Trustee.

C. Denial Of Discharge

The Trustee also seeks denial of the Debtor's discharge pursuant to section 727 which provides, in relevant part, that:

(a) The court shall grant the debtor a discharge, unless-

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-

(A) property of the debtor, within one year before the date of the filing of the petition.

11 U.S.C. § 727(a)(2)(A). To deny a discharge under section 727(a)(2)(A), it must be established by a preponderance of the

evidence that: (1) a debtor transferred, removed or mutilated, (2) his property, (3) within one year of the filing of the bankruptcy petition, (4) with the actual intent to hinder, delay, or defraud a creditor.

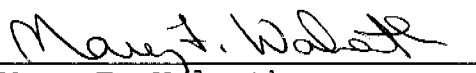
In the present case, it is undisputed that the Debtor transferred the Property within one year of the Petition Date. We concluded above that the Debtor did so with the requisite fraudulent intent to hinder, delay, or defraud the Creditors. Therefore, we conclude that the Debtor's discharge must be denied pursuant to section 727(a)(2)(A).

IV. CONCLUSION

For the foregoing reasons, judgment will be entered in favor of the Trustee on his Complaint to avoid the Debtor's Transfer of the Property as fraudulent pursuant to section 548(a), to recover \$16,779.03 (the value of the Property) from Henry pursuant to section 550(a), and to deny the Debtor's discharge pursuant to section 727(a)(1)(A).

An appropriate Order is attached.

BY THE COURT:

  
\_\_\_\_\_  
Mary F. Walrath  
United States Bankruptcy Judge

Dated: December 30, 2003

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: ) Chapter 7  
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RICHARD L. HARRIS, JR., ) Case No. 02-10938 (MFW)  
Debtor. )  
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JEFFREY L. BURTCHE, TRUSTEE, )  
Plaintiff, ) Adversary No. 02-05803  
v. )  
RICHARD L. HARRIS, JR. and )  
DONNA K. HENRY, )  
Defendants. )

O R D E R

AND NOW this 30th day of DECEMBER, 2003, upon consideration of the Trustee's Complaint and the Response of the Debtor thereto, it is hereby

ORDERED that JUDGMENT IS ENTERED in favor of the Trustee/Plaintiff against Donna K. Henry in the amount of \$16,779.03 pursuant to 11 U.S.C. §§ 548(a) & 550(a); and it is further

ORDERED that the Debtor's discharge is hereby DENIED pursuant to 11 U.S.C. § 727(a)(1)(A).

BY THE COURT:



Mary F. Walrath  
United States Bankruptcy Judge

cc: See attached

Service List

Jeffrey L. Burtch, Esquire  
824 Market Street, Suite 1000  
P.O. 549  
Wilmington, DE 19899-549

Neil Dignon, Esquire  
Brown Shields Beauregard & Chasanov  
10 East Pine Street  
P.O. Box 742  
Georgetown, DE 19947

Donna K. Henry  
34393 Hitch Pond Road  
Laurel, DE 19956

Richard L. Harris, Jr.  
34393 Hitch Pond Road  
Laurel, DE 19956

United States Trustee  
844 Kings Street, Room 2313  
Lockbox 35  
Wilmington, DE 19801