IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In Re GREGORY ALLEN HEIT and LAUREN LEVINSON HEIT, Debtors. LAWRENCE J. WARFILED, Chapter 7 Trustee, Plaintiff, v. SHAMROCK FOODS COMPANY, an Arizona corporation Defendant.	Chapter 7 Case No. 03-21065-SSCP Adv. No. 04-861 MEMORANDUM DECISION (OPINION TO POST)

I. Introduction

This matter comes before the Court on the Plaintiff's November 17, 2004 Motion for Summary Judgment. The Defendant, Shamrock Foods, filed a Response to the Motion on January 5, 2005. The Plaintiff subsequently filed a Reply to the Response on February 3, 2005. On March 8, 2005, the Court held oral argument on the Motion. At the conclusion of the hearing, the Court entered its oral ruling on the record granting the Motion for Summary Judgment.

In this Memorandum Decision, the Court has now set forth more detailed findings of fact and conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. The

issues addressed herein constitute a core proceeding over which this Court has jurisdiction. 28 U.S.C. §§ 1334(b) and 157(b) (West 2005).

II. Factual Background

A. Undisputed Facts

The Debtors are the sole members of First Destination Sedona GLS, LLC dba Savannah's Prime Dining ("LLC"). On June 4, 2003, the Defendant filed an action against the LLC in Maricopa County Superior Court ("State Case"). The State Case was commenced to recover an obligation owed to the Defendant by the LLC. The Debtors were not personally liable for any of the obligations of the LLC in connection with the State Case.

In July 2003, the Debtors asked Ms. Lauren Heit's father, Mr. Steve Levinson ("Debtor's Father"), for assistance with the payment of the LLC's obligations to the Defendant. The Debtor's Father obtained a line of credit for $73,000 to loan money to the Debtors. On July 2, 2003, the Debtors executed a promissory note, secured by a deed of trust on the Debtors' Sedona home, in favor of the Debtor's Father. On July 2, 2003 a check for the sum of $25,000.00 was payed to Ms. Elizabeth Yancy, the attorney for the LLC. On July 3, 2003, the sum of $23,000.00 was transferred from Ms. Yancy's trust account to the trust account of Mr. Kirkorsky, the attorney for the Defendant in the State Action. The $23,000 payment was made in settlement of the State Action.

On November 15, 2003, the Debtors signed an amended promissory note promising to pay the Debtor's Father the sum of $25,000.00, plus interest. The Debtors filed their voluntary petition for relief under Chapter 7 on December 2, 2003.

B. Legal Position of the Parties

1. Trustee

Pursuant to §548, a transfer may be set aside as fraudulent if the transfer was made within one year of the filing of the bankruptcy petition (a) if made with the intent to hinder, delay, or defraud creditors, or (b) the debtor did not receive reasonably equivalent value in exchange for the property transferred, and (I) the debtor was insolvent or was made insolvent by the transaction, (II) was operating or about to operate without property constituting

reasonably sufficient capital, or (III) was unable to pay his or her debts as they became due. In re United Energy Corp., 944 F.2d 589 (9th Cir. 1991); In re Kemmer, 265 B.R. 224 (Bankr.E.D.Cal. 2001). Pursuant to 11 U.S.C. §550, to the extent that a transfer is avoided under §548, the trustee may recover, for the benefit of the estate, the property transferred or the value of that property from the initial transferee.

The Trustee asserts that the transfer of $23,000 to the Defendant constitutes a constructive fraudulent transfer. The Debtors filed their Chapter 7 petition on December 2, 2003; the transfer in question occurred on July 3, 2003, well within the one-year time limit set by §548. The Debtors received no consideration in exchange for the transfer. Hence, the Debtors did not receive "reasonably equivalent value." *See* Harman v. First American Bank of Maryland, 956 F.2d 479, 484 (4th Cir. 1992) cited by In re Northern Merchandise Inc., 371 F.3d 1056, 1058 (9th Cir. 2004). The Trustee also argues that the payment of the debt of another does not constitute reasonably equivalent value when the debtor is not legally obligated to repay the debt. Hopkins v. D.L. Evans Bank (In re Fox Bean Co.), 387 B.R. 270, 281 (Bankr. Idaho 2002) citing In re Fair Oaks, Ltd., 168 B.R. 397, 402 (BAP 9th Cir. 1994). The Trustee claims that the Debtors did not benefit in any way from the transfer. The net effect of the transfer was the depletion of equity in the Debtors' residence. Accordingly, the Trustee believes that the transfer under §548 may be avoided, and the Trustee may recover the sum of $23,000 for the benefit of the estate under §550.

The Trustee also asserts the presence of actual fraud. In determining actual fraud, the courts look for "badges of fraud." These badges include:

a. Whether there was a close relationship between the transferor and transferee;
b. Whether the transfer was in anticipation of a pending lawsuit;
c. Whether the transferor debtor was in poor financial condition;
d. Whether the debtor received adequate or less than adequate consideration for the transfer; and
e. Whether all or substantially all of the assets were transferred.

In re Acequia, Inc. 34 F.3d 800, 805 (9th Cir. 1994). The Trustee claims that several badges of fraud are present. The State Case is evidence of a pending lawsuit; the transfer was made in contemplation of the filing of the Debtors' bankruptcy petition; the Debtors received no

consideration; and the Debtors were in poor financial condition.

Once the transfer is avoided under §548, liability is governed by §550. Under §550(a)(1) a trustee may recover from the initial transferee. The Ninth Circuit applies the dominion and control test to determine whether a party is an initial transferee. In re Bullion Reserve of N. Am., 922 F.2d 544, 549 (9th Cir. 1991). Under this theory a party who acts as a conduit that merely facilitates the transfer is not an initial transferee. Bonded Fin. Servs., Inc. v European Am. Bank, 838 F.2d 890, 893 (7th Cir. 1988), cited by In re Blackburn Mitchell Inc., dba Mitchell Development, 164 B.R. 117, 123-130. (Bankr. N.D.Cal. 1994). The Trustee argues, in this matter, that the Defendant was the initial transferee. The lawyer for the LLC had a fiduciary duty to turn over the funds to the Defendant.

2. Defendant

The Defendant counters the above arguments by claiming the payment was not made by the Debtors; instead it was made by the Debtor's Father. The fact that a promissory note was signed by the Debtors does not, the Defendant argues, conclusively establish the Debtors as the transferors of the funds. The Defendant also states that there is a factual question as to what consideration was received for the transfer. The Defendant presumes that allowing the LLC to exist was some benefit to the Debtors, because it was a continuing source of income to them. The Defendant offers no evidence in support of its claims.

III. Discussion

A. The Standard for Summary Judgment

A motion for summary judgment should be granted if the movant has shown that there are no genuine issues of material fact, and the movant is entitled to judgment as a matter of law. Fed.R.Bankr.P. 7056(c). Ruling on a motion for summary judgment necessarily implicates that substantive evidentiary standard of proof which would apply at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A material fact is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party. Id. Procedurally, "the proponent of a summary judgment motion bears a heavy burden to show that there are no disputed facts warranting disposition of the case on the law without trial." In re Aquaslide 'N'

Dive Corp., 85 B.R. 545, 547 (9th Cir. BAP 1987).

Once that burden has been met, "the opponent must affirmatively show that a material issue of fact remains in dispute." Frederick S. Wyle P.C. v. Texaco, Inc., 764 F.2d 604, 608 (9th Cir. 1985). The opponent may not assert the existence of some alleged factual dispute between the parties. Liberty Lobby, 477 U.S. 242 at 252, 106 S.Ct. 2505 at 2512, 91 L.Ed.2d 202.

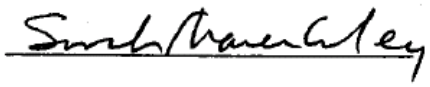
Instead, to demonstrate that a genuine factual issue exists, the objector must produce affidavits which are based on personal knowledge, and the facts set forth therein must be admissible in evidence. Aquaslide at 547. In addition, summary judgment must be used with care and restraint, Hutchinson v. United States, 677 F.2d 1322, 1325 (9th Cir. 1982), and is reviewed in the light most favorable to the non-moving party. Hifai v. Shell Oil Co., 704 F.2d 1425, 1428 (9th Cir. 1983).

In this matter, the Defendant does not meet the burden of proof. Rule 56(e) requires that a party responding to a motion for summary judgment must respond with affidavits and admissible evidence, and may not rely upon unsupported denials of the allegations made by the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 324-325, 106 S. Ct. 2505 (1986). The Defendant offers no admissible evidence to support its claims. The Defendant's claims are unsubstantiated claims, and the cases of Aquaslide and Celtoex require admissible evidence to withstand a well-pled motion for summary judgment. None was provided. Conversely, the Trustee has provided sufficient admissible evidence to set forth a prima facie case, warranting that this Court conclude that a fraudulent transfer, whether constructive or actual, has occurred.

IV. Conclusion

Based on the foregoing, the Court concludes that the Trustee's Motion for Summary Judgment is Granted. The Court will execute a separate order incorporating this Memorandum Decision.

DATED this 1st day of June, 2005.



Honorable Sarah Sharer Curley
Chief U. S. Bankruptcy Judge

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