

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: LARAMIE ASSOCIATES, LTD.,	:	
Debtor,	:	
	:	
PROVIDENT LIFE AND ACCIDENT	:	
INSURANCE CO.,	:	
Plaintiff,	:	CIVIL ACTION NO.
	:	97-3135
v.	:	
	:	
GENERAL SYNDICATORS OF AMERICA,	:	
MANAGERS, INC., IMC, INC., JOHN	:	BANKRUPTCY COURT NO.
DOE AND JOHN DOE CORP.,	:	95-19102DAS/97-CV-0035
	:	
Defendants.	:	ADVERSARY NO. 96-1080

McGlynn, J.

September 8, 1997

MEMORANDUM OF DECISION

Presently before the Court is a non-core proceeding initiated in bankruptcy court by Provident Life and Accident Insurance Co. ("Plaintiff"), on behalf of Laramie Associates, a Chapter 11 debtor ("Debtor"). The bankruptcy court has submitted its Report and Recommendation containing Proposed Findings of Fact and Conclusions of Law pursuant to 28 U.S.C. § 157(c)(1) and Bankruptcy Rule 9033 ("Proposed Findings"), and plaintiff has filed specific objections thereto. Plaintiff has also filed a subsequent appeal pursuant to Bankruptcy Rule of Procedure 8002, which will be consolidated with plaintiff's objections to the Proposed Findings.

Based upon the Court's independent review of the entire record and upon consideration of the bankruptcy court's proposed

findings, see 28 U.S.C. § 157(c)(1), the Court makes the following:

FINDINGS OF FACT¹

1. Debtor filed the voluntary Chapter 11 bankruptcy case underlying the above-captioned adversary proceeding on November 17, 1995.

2. Plaintiff filed the adversary proceeding on debtor's behalf on September 17, 1996 against General Syndicators of America, Inc. ("GSA"), Managers, Inc. ("Managers") (collectively GSA and Managers are referenced as the "Defendants"), and Thomas F. Flatley, the president and sole shareholder of both GSA and Managers. Plaintiff is the first mortgagee of the debtor's single real estate asset, the Gateway Shopping Center, located in Laramie, Wyoming (the "Property").

3. In its original complaint, Provident asserted claims for fraudulent transfers of property, breach of contract, punitive damages, conversion, unjust enrichment, civil conspiracy and sought a turnover of funds under 11 U.S.C. § 542. The trial, originally scheduled for October 9, 1996, was continued until January 8, 1997.

4. On November 13, 1996, the bankruptcy court issued an order/memorandum in which it partially granted the defendants' summary judgment motion by dismissing Flatley as a party defendant. The bankruptcy court also determined that the lease

¹The facts are taken from the Proposed Findings, except where indicated otherwise.

between the debtor and GSA included a waiver of the right to a jury trial. Although the bankruptcy court denied all other aspects of defendants' motion, it did grant plaintiff permission to file an amended complaint.

5. On November 14, 1996, after a hearing on defendants' motion to compel discovery, the bankruptcy court issued an order which granted much of defendants' motion but restricted discovery to a period beginning on January 1, 1994 and concluding at the discovery deadline.

6. Plaintiff filed an amended complaint on November 18, 1996 in which it added IMC, Inc. as a defendant in place of Flatley and asserted an additional claim for collection of a debt owed by GSA to debtor under the Intermediate Lease. In response, the defendants filed a motion to dismiss; however, the bankruptcy court reserved its decision on the motion until trial.

7. The non-jury trial in the above-captioned matter took place on January 8, 1997.

8. At trial, plaintiff disclosed that it held a first mortgage on the Property in the amount of \$4,927,952.81 as of the date of filing. In addition, other mortgagees on the Property included Norwest Bank Wyoming (allegedly owed \$1,054,135), GSA (allegedly owed \$3,692,051), and Pension Group Investors (a wrap mortgage in the alleged amount of \$5,435,243).

9. The debtor, acting through Managers, entered into the Lease with GSA, which acted through its two general partners, Managers and IMC. Debtor leased the property to GSA in

consideration for, inter alia, payments of fixed rent in certain amounts stipulated in the Lease. GSA then entered into several subleases with "actual" tenants of the property.

10. As referenced in the plaintiff's amended complaint, the relevant time period for this proceeding begins on March 1, 1995, when debtor defaulted on its mortgage payments to plaintiff. The time period ends on September 10, 1995, when plaintiff enforced its rights to obtain the rents directly from the actual tenants. Plaintiff eventually obtained title to the Property under the terms of the confirmed plan.

11. For the year 1995, the fixed rent payments owed to debtor by GSA were in the amount of \$100,000 per month.

12. Debtor has not paid any mortgage payments to plaintiff since May 1995, which accounted for payments through March 1995, despite the fact that GSA collected rents from the actual tenants after that time. In fact, the total amount of rents collected by GSA from February 1, 1995 to November 17, 1995, the date of the bankruptcy filing, was \$573,161.65.

13. The rents collected by GSA from the tenants of the Property were pooled with the rents collected by GSA from the tenants of other real estate partnerships which were owned and controlled by GSA, Flatley, or other Flatley-owned or Flatley-controlled entities.

14. GSA paid \$37,282.38 in expenses on behalf of the debtor from April 5, 1995 to September 25, 1995. No information was provided for expenses from February 1, 1995 to April 4, 1995, or

in any other time period. GSA also made two mortgage payments to Provident during 1995, which totalled approximately \$110,000.

15. Although no business ledgers of GSA were introduced at trial, GSA did "pay" the debtor \$1.2 million in fixed rent in 1995 by giving the debtor a credit on its loan balance, as reported in its income tax returns, for that amount.

16. At trial, Flatley described the concept of syndicated real estate transactions engaged in by GSA and him from 1983 to 1986. During this time, he syndicated ten partnerships which owned a total of fourteen properties, located in different locations around the country. This syndication process was discontinued in the mid-1980s after changing tax laws eliminated the tax advantages for the investors. All but two of the partnerships syndicated have now been subject to foreclosure.

17. Debtor includes forty-eight investors. Environmental problems at the Property reduced its value and made it impossible to refinance.

18. Flatley contended that the Lease was "non-recourse to GSA." In fact, because the rents due under the Lease were in excess of the rents collected from the "actual" tenants, it was contemplated that the rents due under the Lease would be credited to GSA's mortgage against the Property.

19. However, the Lease provides, in relevant part:

[t]he Fixed Rent shall be paid by Lessee at the monthly rate herein provided in monthly installments in advance on the first day of each calendar month during the term hereof, in lawful money of the United States which

shall be legal tender in payment of all debts and dues . . . public or private, at the time of payment , at Lessor's office address above set forth, or at such other place as Lessor may from time to time designate in writing, together with such other sums as are herein provided to be paid as additional rent, . . .
(emphasis added)

20. Notwithstanding the above paragraph, the Lease further provides, at § 31:

THIRTY-FIRST: (a) Notwithstanding anything to the contrary contained in this lease, it is specifically understood and agreed that the liability of Lessee hereunder shall be limited to Lessee's interest in this lease, and Lessor hereby agrees that its sole remedy as a result of a breach of any of the terms, covenants or conditions hereof by Lessee shall be to terminate this lease and Lessee's interest in the demised premises and Lessor shall not seek any judgment against Lessee, or any officer, director, shareholder or principal of Lessee, disclosed or undisclosed, or any assignee or sublessee of Lessee, provided, however, that Lessee shall without limitation as to liability, be liable for any and all funds held by Lessee to which Lessor may be entitled under the provisions of this lease.

(b) Notwithstanding anything to the contrary contained in this lease, it is specifically understood and agreed that the liability of Lessor shall be limited to the interest of Lessor in the demised premises, and Lessee shall not seek any judgment against Lessor, or any general or limited partner of Lessor and Lessee hereby agrees that any judgment it may obtain against Lessor as a result of a breach of the terms, covenants or conditions hereof by Lessor shall be enforceable solely against Lessor's interest in the demised premises.

This provision purportedly supports Flatley's testimony that no "real" liability for rent was established under the Lease.

21. At the conclusion of the trial, the parties submitted Proposed Findings of Fact and Conclusions of Law. In its submission, plaintiff argued three causes of action: "actual" fraudulent conveyances, "constructive" fraudulent conveyances, and preferences. Of these three, only the actual fraudulent conveyance claim was referenced in plaintiff's amended complaint. Plaintiff further stated that the bankruptcy court need not decide its other claims, including breach of contract, unjust enrichment, civil conspiracy, turnover under 11 U.S.C. § 542, and conversion.

22. In their submission, defendants opposed plaintiff's efforts to expand the claims set forth in the amended complaint in its post-trial submission, since they had no notice or opportunity to defend these issues.

23. After the bankruptcy court issued its Report and Recommendation, in which it recommended the dismissal of plaintiff's complaint, plaintiff filed two motions: (1) a Motion for Leave to Take Further Discovery in Order for the Court to Amend or Make Additional Findings of Fact and Conclusions of Law, or in the Alternative, for a New Trial; and, (2) Motion for Reconsideration of the Court's Report and Recommendations.

24. The bankruptcy court denied both motions and ordered that its Report and Recommendation would stand as originally issued.

DISCUSSION

This action is based on plaintiff's claim that a transfer of

\$573,161.65 in rents paid by the tenants of debtor's property between February 1995 and November 17, 1995 is avoidable as a pre-bankruptcy fraudulent transfer. Plaintiff seeks to avoid this transfer pursuant to § 548(a)(1) of the Bankruptcy Code, which provides:

(a) The trustee may avoid any transfer of any 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 --

(1) 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; . . .

See generally Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 645 (3d Cir. 1991), cert. denied sub nom. Committee of Unsecured Creditors v. Mellon Bank, N.A., 503 U.S. 937 (1992). Since GSA was only obligated to pay the monthly fixed rent to the debtor, the bankruptcy court concluded that the only possible offending conduct was that GSA paid money that it owed to the debtor to the creditors of other Flatley-controlled partnerships. According to the bankruptcy court, the act of failing to pay the rent that GSA allegedly owed to the debtor under the lease was an indirect transfer of the debtor's property. This conclusion is buttressed by two additional facts: GSA was an insider of the debtor and GSA paid the money it owed to the creditors of other Flatley-controlled partnerships.

The bankruptcy court used a "badges of fraud" analysis to

examine the record for proof of actual fraud under § 548(a)(1), i.e., to hinder, delay, or defraud creditors.² After it determined that only two of the eleven badges of fraud had been proven (badges (1) and (9)), it concluded that plaintiff did not present "clear and convincing" evidence of any intent of GSA to hinder or delay payment to the debtor. Consequently, it denied plaintiff's claims under 11 U.S.C. § 548(a)(1).

²Specifically, the bankruptcy court applied the list of "badges of fraud" set forth in § 4(b) of the proposed Uniform Fraudulent Transfers Act:

(b) In determining actual intent . . . consideration may be given, among other factors, to whether:

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, 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 or the amount of the obligation incurred;
- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (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.

7A UNIFORM LAWS ANNOTATED 653 (1965); see also In re Pinto Trucking Service, Inc., 93 B.R. 379, 386 (Bankr. E.D. Pa. 1988).

The bankruptcy court also concluded that plaintiff had abandoned its claims for breach of contract, unjust enrichment, civil conspiracy, turnover under 11 U.S.C. § 542 and conversion. Since plaintiff failed to discuss these theories of liability in its post-trial submission and instead directed the bankruptcy court not to make a decision under these claims, the court merely questioned the merits of these claims but declined to resolve them. Although the bankruptcy court did not encourage plaintiff to file an amended complaint, it nevertheless granted plaintiff an additional fifteen days from the date of the order to amend its amended complaint and clarify its position on these claims.

Because it denied plaintiff's only viable claim, the bankruptcy court recommended a dismissal of plaintiff's complaint. Instead of filing an amended complaint, plaintiff filed a motion for leave to take further discovery and for reconsideration of the court's report and recommendation. The bankruptcy court denied both. Plaintiff also objected to two findings of fact and three proposed conclusions of law in the court's report and recommendation.³ For the reasons stated below, this Court will adopt the bankruptcy court's report and recommendation and dismiss plaintiff's complaint.

Pursuant to 28 U.S.C. § 157(c)(1) and Bankruptcy Rule

³As stated previously, plaintiff also filed an appeal pursuant to Bankruptcy Rule of Procedure 8002. Because plaintiff's appeal will be consolidated with its objections, plaintiff's appellate brief will be considered as a brief in support of its initial objections.

9033(d), this Court must enter judgment after "considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected." De novo review requires this Court to make an independent judgment of the issues. Crossley v. Lieberman, 90 B.R. 682, 685 (E.D. Pa. 1988), aff'd 868 F.2d 566 (3d Cir. 1989); Matter of Campbell, 812 F.2d 1465, 1467 (4th Cir. 1987); Moody v. Amoco Oil Co., 734 F.2d 1200, 1210 (7th Cir. 1984). To this end, this Court has reviewed the entire record in this matter and has arrived at the following:

CONCLUSIONS OF LAW

1. The standard of review in this matter is "clearly erroneous" as to findings of fact by the bankruptcy court, and "plenary" as to conclusions of law. In re Stendardo, 991 F.2d 1089, 1094 (3d Cir. 1993); Brown v. Pennsylvania State Employee Credit Union, 851 F.2d 89 (3d Cir. 1988).

2. Neither Proposed Finding of Fact No. 12 nor No. 13, to which the plaintiff specifically objected, are clearly erroneous. These findings are supported by the record, and this Court will let them stand as Findings of Fact Nos. 15 and 16 in this Memorandum.

3. Since plaintiff has not proven a sufficient number of "badges of fraud," plaintiff cannot prove the existence of actual fraud under § 548(a)(1) to render the transfer of \$573,161.65 in rents paid to GSA avoidable. See In re Pinto Trucking Service, Inc., 93 B.R. 379, 386 (Bankr. E.D. Pa. 1988) (a "goodly number"

of badges of fraud must be shown by clear and convincing evidence). Although this Court adopts the bankruptcy court's conclusion in this regard, this Court will nevertheless review plaintiff's objection.

In its objection and subsequent appeal to this Court, plaintiff focuses almost entirely on the bankruptcy court's conclusion that the debtor may have received reasonably equivalent value for the transfer of rent money due to it from GSA. In determining the presence of actual fraud, the court may consider whether "the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred." 7A UNIFORM LAWS ANNOTATED 653 (1965); see supra note 2. Whether a transfer is made for reasonably equivalent value is a question of fact to be determined from all the evidence in the case. See Mellon Bank v. Official Comm. of Unsecured Creditors of R.M.L., Inc., 92 F.3d 139, 149 (3d Cir. 1996); Jobin v. Resolution Trust Corp., 160 B.R. 161, 169 (D. Colo. 1993). Although a transfer of property made solely for the benefit of a third party is not usually made for reasonably equivalent value,⁴ the court applied the exception: when a debtor receives the benefit of the original consideration, then he has received reasonably equivalent value.

⁴See Jobin v. Resolution Trust Corp., 160 B.R. 161, 169 (D. Colo. 1993) ("transfers made to benefit third parties generally are not made for reasonably equivalent consideration"); In re Factory Tire Distributors, Inc., 64 B.R. 335, 338-39 (Bankr. W.D. Pa. 1986).

See In re R.W.L., Inc., 195 B.R. 602, 618 (Bankr. M.D. Pa. 1996) (citing In re Chicago, Missouri & Western Railway Co., 124 B.R. 769, 773 (Bankr. N.D. Ill. 1991)).

In support of this exception, defendants' testified that from 1983 to 1995, debtor had been sustained by a pool of funds and services valued at more than it had or was required to contribute to the pool. Because no evidence was presented to contradict this testimony or the fact that debtor survived for over ten years without defaulting on its \$660,000 annual mortgage, the court could assume that reasonably equivalent value was received.

Plaintiff disputes the conclusion that value was received for this transfer and criticizes the bankruptcy court for engaging in "pure speculation in proposing that it was possible that some value may have been given at some time for some transfers." See Pl. App. Brief at 9. In addition, plaintiff asserts that it was unable to present any contradictory evidence because the bankruptcy court limited plaintiff to obtaining discovery on the pooled payments from January 1, 1994 to the date of the requests. See Bankruptcy Court's Order of 11/8/96 (Scholl, Bankr. Judge); supra p. 3, ¶ 5. Plaintiff argues that it was "severely prejudiced by the bankruptcy court's discovery limitation and denied the right of effective cross-examination and a fair trial on a critical issue of the case." Pl. Obj. at 2. Plaintiff seeks a discovery on these issues and a new trial.

In light of the bankruptcy court's conclusions as to the

other ten badges of fraud, see supra p. 9 and note 2, plaintiff overestimates the significance of this issue. Although the Court agrees that the bankruptcy court's order did limit plaintiff's ability to discover potentially relevant evidence, this Court nevertheless concludes that this additional discovery, even if helpful for the plaintiff, will not be sufficient to prove a "goodly" number of badges of fraud necessary to support an actual fraudulent conveyance claim. Plaintiff will have proven, at most, three of the eleven badges of fraud considered to determine the presence of actual fraud. Therefore, plaintiff cannot prove by clear and convincing evidence the presence of actual fraud under § 548(a)(1) to render the transfer of \$573,161.65 avoidable.

4. Plaintiff abandoned its claims for breach of contract, unjust enrichment, civil conspiracy, turnover under 11 U.S.C. § 542, conversion and punitive damages. Given plaintiff's failure to discuss six of the seven claims asserted in its adversary complaint in its post-trial submission, this Court adopts the reasoning of the bankruptcy court and concludes that plaintiff cannot attempt to revoke its waiver or abandonment of these claims at this late stage in the proceeding. See In re Kaplan, 1995 WL 500599, at *13 n.8 (Bankr. E.D. Pa. Aug. 22, 1995) (since debtor failed to advance defenses listed in complaint by necessary proofs or legal argument, court considered them abandoned); In re Cara Corp., 148 B.R. 760, 770 (Bankr. E.D. Pa. 1992) (court disposed of claims in complaint on the ground that

"since they were not argued, they are waived.").

Accordingly, this Court will adopt the report and recommendation of the bankruptcy court to the extent discussed herein, and dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted.

An appropriate order will be entered.

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	:	
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Debtor,	:	
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PROVIDENT LIFE AND ACCIDENT	:	
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MANAGERS, INC., IMC, INC., JOHN	:	BANKRUPTCY COURT NO.

DOE AND JOHN DOE CORP., : 95-19102DAS
Defendants. : ADVERSARY NO. 96-1080
_____ :

O R D E R

AND NOW, this 8th day of September, 1997, upon consideration of Plaintiff's Objections to the Report and Recommendations of the Bankruptcy Court, Defendants' Response thereto, and Plaintiff's Appellate Brief, **IT IS ORDERED** that:

1. The Report and Recommendations of Bankruptcy Judge Scholl, dated February 12, 1997, are **ADOPTED**.
2. Judgment is entered in favor of the remaining Defendants and against the Plaintiff.
3. The only claim properly raised and not abandoned in the Debtor's Amended Complaint, arising under 11 U.S.C. § 548(a)(1), is **DISMISSED**.

BY THE COURT:

Joseph L. McGlynn, Jr., J.