

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 97-10318-JMD  
Chapter 7

Alan D. Emerson and  
Brenda E. Emerson,  
Debtors

Jeffrey A. Schreiber,  
Chapter 7 Trustee,  
Plaintiff

v.

Adv. No. 00-1063-JMD

Alan D. Emerson,  
Brenda E. Emerson, and  
John W. Stephenson,  
Defendants

*Randall L. Pratt, Esq.*  
*OFFICE OF RANDALL L. PRATT*  
*Attorney for Plaintiff/Chapter 7 Trustee*

*Michael Burke, Esq.*  
*LAW OFFICE OF MICHAEL BURKE*  
*Attorney for Alan D. and Brenda E. Emerson*

*John A. Rogers, Esq.*  
*Attorney for John W. Stephenson*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

Jeffrey A. Schreiber, Chapter 7 trustee (the "Trustee"), filed a complaint on May 18, 2000 seeking to recover money on account of the damage that occurred postpetition to two of the Debtors' airplanes, a Piper Warrior (the "Warrior") and a Cessna CE-150 (the "Cessna"). The Debtors filed a motion to dismiss the complaint and John W. Stephenson ("Stephenson") filed a motion seeking summary judgment in his favor. The Court held a pretrial hearing on July 19, 2000 during which the Court heard argument on the motions filed by the Defendants. The Court took both the motion to dismiss

and the motion for summary judgment under advisement. This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## **II. FACTS AND PROCEDURAL HISTORY**

The Debtors filed a petition under Chapter 7 on January 31, 1997. The Trustee was appointed on February 3, 1997 to serve as the Chapter 7 trustee in the case. On August 5, 1997, the Trustee filed a complaint objecting to the Debtors’ discharge under 11 U.S.C. § 727. On January 8, 1999, the Trustee filed a complaint against Stephenson and his son seeking to avoid the transfers of two airplanes, the Warrior and another airplane, to them. The Court consolidated the two adversary proceedings on January 26, 1999 and conducted a three day trial in July 1999 on the discharge and avoidable transfer issues raised by the Trustee’s complaints.

On October 26, 1999, the Court issued a memorandum opinion and final judgment in which it denied the Debtors their discharge. The Court further held that the transfer of the Warrior to Stephenson could be avoided as a preferential transfer under 11 U.S.C. § 547(b) and as a fraudulent transfer under 11 U.S.C. § 544(b) and RSA 545-A:5(II). The Court stated that the Trustee could recover the Warrior pursuant to 11 U.S.C. §§ 550(a) and (c).

On January 27, 2000, the Trustee filed a motion seeking turnover of the Warrior. In addition, the Trustee filed a separate motion seeking turnover of additional aircraft, including the Cessna, and various equipment, inventory, and tools of the Debtors. On March 22, 2000, the Court granted both motions for turnover filed by the Trustee and ordered that the Cessna be produced by the Debtors and that the Warrior be produced by Stephenson. On March 23, 2000, both aircraft were turned over to the Trustee. The Trustee has alleged, and the Debtors have admitted, that the Cessna was turned over with a badly damage

strut and that the Warrior was turned over with a damaged wing tip. The Trustee has further alleged, and the Debtors have admitted, that the damage to the Cessna and the Warrior occurred postpetition. The Trustee and the Debtors further agree that the damage to the Warrior occurred as a result of Alan Emerson backing a vehicle into the airplane.

On March 27, 2000, the Trustee notified the Debtors and Stephenson of the damage to both aircraft and demanded that they file claims with their insurance companies for the damage. According to the Trustee, the Debtors filed a claim with their insurance carrier for the damage to the Warrior. As of July 19, 2000, no claim had been filed for the Cessna. However, the Debtors allege that there is insurance coverage for the Cessna damage.

On March 31, 2000, the Trustee filed a motion seeking authority to sell various aircraft of the Debtor, including the Warrior and the Cessna, as well as other items of the Debtors' personal property. The Court granted the motion on April 19, 2000, and on May 21, 2000, the Trustee conducted an auction at which he sold the Cessna purportedly for over \$12,500.00 and the Warrior purportedly for over \$29,000.00. The Debtors allege that the Cessna was appraised for \$4,000.00 on or about March 19, 1997 and that Stephenson had the Warrior appraised sometime before it was damaged for \$20,820.00.

Shortly before the sale of the two airplanes, the Trustee obtained written estimates for the damage to the Cessna and to the Warrior. The repair estimate for the Cessna totaled \$10,546.82 and the repair estimate for the Warrior totaled \$3,115.18. It appears that the estimate for the Cessna included repairs in addition to that required to fix the damaged strut (e.g., \$1,400.00 for "Prop overhaul" and \$5,000.00 for "Engine teardown & inspection").

On May 18, 2000, three days before his auction, the Trustee filed the instant action seeking to recover money from the Debtors and/or Stephenson for damage that occurred to the Warrior and the Cessna postpetition.

### III. DISCUSSION

#### A. Debtors' Motion to Dismiss

The Debtors have filed a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which is made applicable to this proceeding pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure, to dismiss the Trustee's complaint. In order to grant a motion under Rule 12(b)(6), the Court "must accept the allegations of the complaint as true, and if, under any theory, the allegations are sufficient to state a cause of action in accordance with the law, [it] must deny the motion to dismiss." Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1<sup>st</sup> Cir. 1994).

In the first count of his complaint, the Trustee alleges that he may recover from the Debtors for the damage to the Cessna and the Warrior pursuant to 11 U.S.C. §§ 105, 549, and 550. The Debtors argue that the Trustee has failed to allege that he has not received value from the sale of the airplanes at public auction and therefore the complaint should be dismissed as the Trustee cannot demonstrate that the bankruptcy estate has suffered damage.

The sections of the Bankruptcy Code cited by the Trustee do not support any recovery from the Debtors on account of property damage to either the Cessna or the Warrior. Section 549 of the Bankruptcy Code provides the Trustee with authority for avoiding postpetition transfers of estate property. As Collier's bankruptcy treatise explains "[t]he purpose of section 549 is to allow the trustee to avoid those postpetition transfers which deplete the estate while providing limited protection to transferees who deal with the debtor." Collier on Bankruptcy ¶ 549.02 (Lawrence P. King, ed., 15<sup>th</sup> rev. ed. 2000). Here, the Trustee has made no allegation that either the Cessna or the Warrior were transferred postpetition. Rather, it is undisputed that the Cessna was owned by the Debtors at the time they filed their Chapter 7 petition on January 31, 1997 and that the airplane became property of the Debtor's bankruptcy estate upon their bankruptcy filing. See 11 U.S.C. § 541(a) (stating a debtor's bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the

commencement of the case” wherever located and by whomever held). It is also undisputed that the Warrior had been transferred by the Debtors to Stephenson prepetition. Accordingly, the Court finds that section 549 is not applicable to the facts of this case.

The Trustee also cites section 550 as a basis for recovering from the Debtors for the property damage that occurred to the Cessna and the Warrior. Section 550(a) provides in relevant part:

[T]o the extent that a transfer is avoided under section 544 [and] 547 . . . 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 the 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). Again, this section provides no basis for the Trustee to recover from the Debtors as the Cessna was not the subject of any transfer and, while the Warrior was transferred, the Debtors were the transferors, not the transferees, and Stephenson was the party benefitted by the transfer. See Collier on Bankruptcy at ¶ 550.02[4][a] (“[A] debtor in a chapter 7 case is not a party benefitted by a transfer and no recovery may be had from such debtor under section 550(a)(1).”)

The Trustee also cites section 105 as authority for recovering from the Debtors. Section 105 of the Bankruptcy Code provides in relevant part that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). As the First Circuit Court of Appeals has explained, the equitable powers of the bankruptcy court can be “brought to bear” only in the service of the Bankruptcy Code. See Thinking Machs. Corp. v. Mellon Fin. Servs. Corp. #1 (In re Thinking Machs. Corp.), 67 F.3d 1021, 1028 (1<sup>st</sup> Cir. 1995). “[A] bankruptcy court’s exercise of its residual equitable powers must be connected to, and advance the purposes of, specific provisions in the Code.” Id. Here, the Trustee has not articulated any basis upon which the Court could exercise its equitable powers under section 105.

What the Trustee seeks to do in this case is to recover, from the Debtors, for property damage that occurred to the Cessna postpetition and to the Warrior both post-transfer and postpetition. Once the Debtors' bankruptcy estate was created and the Trustee was appointed to serve in this case as the Chapter 7 trustee, the Trustee was obligated to "collect and reduce to money the property of the estate" and to "be accountable for all property received." 11 U.S.C. § 704(1) and (2). Here, the Trustee was content to let the Debtors retain possession of the Cessna from the date of the petition until the date the Trustee filed a motion seeking turnover of the airplane. During this time, the Trustee bore the risk that the property would become damaged and, in fact, the property was damaged. The Trustee, however, decided not to wait to have any insurance coverage issues resolved prior to auction. Rather, the Trustee continued to proceed with his May 21, 2000 auction of the Debtors' airplanes, including the Cessna and the Warrior. To the extent that it is too late to now submit an insurance claim for damage to the Cessna, the Trustee's recovery from the Debtors for the damage is limited to the amounts he has already received for it from his auction. However, the Debtors should turn over to the Trustee any insurance proceeds that are recovered on account of the Warrior damage. See Pare v. Natale (In re Natale), 174 B.R. 362, 365 (Bankr. D.R.I. 1994) ("Property of the estate includes any rights the debtor may have under a policy of insurance which is in effect on the date of filing.") (citing In re Dennison, 84 B.R. 846 (Bankr. S.D. Fla. 1988)). See also Payne v. Wood, 775 F.2d 202, 204 (7<sup>th</sup> Cir. 1985) (holding that when property owned by the debtors is destroyed by fire postpetition, the Chapter 7 trustee gets whatever the insurance proceeds are for the assets of the estate and the debtors get whatever the insurance proceeds are for the property they exempted).

#### **B. Stephenson's Motion for Summary Judgment**

Stephenson has filed a motion seeking summary judgment in his favor. Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy

Procedure 7056, a summary judgment motion should be granted only when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” “Genuine,” in the context of Rule 56(c), “means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party.” Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1<sup>st</sup> Cir. 1993) (quoting United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1<sup>st</sup> Cir. 1992)). “Material,” in the context of Rule 56(c), means that the fact has “the potential to affect the outcome of the suit under applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1<sup>st</sup> Cir. 1993). Courts faced with a motion for summary judgment should read the record “in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party’s favor.” Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1<sup>st</sup> Cir. 1994).

Neither party has argued that the relevant facts are in dispute. Rather, Stephenson argues that as a matter of law the Trustee does not have a claim for damage because the Trustee sold the Warrior at public auction for \$29,000.00, which is more than the appraised value of the Warrior before the damage occurred. Stephenson argues that the Trustee is entitled to a single satisfaction on account of the avoided transfer of the Warrior and that the Trustee has received that and more from his auction. Stephenson also notes that the Warrior was covered by insurance and that a claim has been submitted for damage to the wing tip. Stephenson apparently has no issue with the Trustee receiving any insurance proceeds attributable to damage to the Warrior.

The Trustee argues that the Warrior was not damaged when it was transferred to Stephenson prepetition nor when his counsel viewed the plane sometime prior to its turnover. The Trustee argues that he is entitled to return of the property without a damaged wing tip and, because the Warrior was damaged at the time it was turned over to him, he is entitled to recover money for that damage.

In its memorandum opinion dated October 26, 1999, the Court held that the transfer of the Warrior from the Debtors to Stephenson could be avoided both as preferential under 11 U.S.C. § 547(b)

and as fraudulent under 11 U.S.C. § 544(b) and RSA 545-A:5(II). The Court further ruled that the Trustee could recover the Warrior pursuant to 11 U.S.C. §§ 550(a). As outlined above, section 550(a) provides that “the trustee may recover the property transferred or its value from the ‘initial transferee’ or the entity for whose benefit the transfer was made or any ‘immediate’ or ‘mediate’ transferee of the initial transferee.” Collier on Bankruptcy at ¶ 550.01[2]. Courts have explained the effect of section 550(a) as follows:

Section 550(a) is intended to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred. However, since the Bankruptcy Court does not provide guidance on when the Court should order payment of the value of property rather than order the return of property itself, it is within the Court’s discretion to make such a determination. The factors which the Court should consider in determining whether to order turnover of the property rather than payment of the value include whether the value of the property (1) is contested; (2) is not readily determinable; or (3) is not diminished by conversion or depreciation. Conversely, courts will generally permit the recovery of value if the value is readily determinable and monetary award would work a savings to the estate. Moreover, the language of § 550(a) which includes the term “for the benefit of the estate” should also guide the court in exercising its discretion.

Aero-Fastener, Inc. v. Sierracin Corp. (In re Aero-Fastener, Inc.), 177 B.R. 120, 139-40 (Bankr. D. Mass. 1994) (citations omitted). See also Morris v. Kansas Drywall Supply Co. (In re Classic Drywall, Inc.), 127 B.R. 874, 876 (D. Kan. 1991) (“Section 550(a) is intended to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred.”); First Software Corp. v. Computer Assocs. Internat’l, Inc. (In re First Software Corp.), 107 B.R. 417, 423 (D. Mass. 1989) (“The Bankruptcy Code does not provide guidelines to aid a court in deciding when to order recovery of the value of property rather than the property itself. . . . It is simply within the court’s discretion to determine whether a return of the value of property or return of the actual property is the appropriate remedy.”); Pritchard v. Brown (In re Brown), 118 B.R. 57, 60-61 (Bankr. N.D. Tex. 1990) (determining that the debtor’s assignment of an oil and gas lease and working interest in a producing oil well to his wife was a preferential transfer under 11 U.S.C. § 548(b) and holding that the trustee was entitled to recover under 11 U.S.C. § 550(a) the value of the transferred property as of the time of the transfer).

Here, the Trustee sought return of the property itself in its turnover motion filed in January 2000. The Trustee could have sought recovery of the value of the Warrior instead but he did not. Accordingly, the Trustee is bound by his choice and is not entitled to any further recovery from Stephenson.<sup>1</sup>

#### **IV. CONCLUSION**

For the reasons stated above, the Debtors' motion to dismiss and Stephenson's motion for summary judgment are granted. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 5<sup>th</sup> day of October, 2000, at Manchester, New Hampshire.

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J. Michael Deasy  
Bankruptcy Judge

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<sup>1</sup> To the extent that the Trustee might argue that he would have sought to recover the value of the Warrior had he know the plane was damaged, he could have filed a motion to reconsider the turnover order immediately upon the discovery of the damage. However, he did not.