

UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 98-14666-MWV
Chapter 7

Arthur Dunham, Jr.,
Debtor

Michael Askenaizer,
Chapter 7 Trustee,
Plaintiff

v.

Adv. No. 99-1054-MWV

Arthur Dunham, Jr. and
Barbara Dunham,
Defendants

MEMORANDUM OPINION

The Court has before it a complaint brought by the Chapter 7 trustee against the Debtor and Barbara Dunham, his ex-wife, seeking to overturn certain transfers made pursuant to a divorce decree as fraudulent transfers pursuant to NH RSA 545-A:4 and 5.

PROCEDURAL HISTORY

This litigation was commenced in the Hillsborough County Superior Court in April 1998 by a creditor, The Bank of New Hampshire. The original state court complaint contained three counts: a plea of debt against the Debtor and his corporation, NESSCO; a plea of assumpsit against Barbara Dunham; and a fraudulent transfer count. On December 7, 1998, on the eve of trial in the Superior Court, the Debtor filed his petition under Chapter 7 of the Bankruptcy Code, staying the state court action against him. Rather than seek relief from the stay to pursue the action in the Superior Court, The Bank of New Hampshire filed a notice of removal to this court on March 5, 1999.

Upon motion of the Trustee, the complaint was amended to substitute the Trustee as the plaintiff.

The counts of debt and assumpsit were withdrawn, and NESSCO was dismissed as a defendant. This Court further approved a motion to allow counsel for The Bank of New Hampshire to act as special counsel to the Trustee.

At the outset of the trial the Court acted on two motions in limine filed by defendant Barbara Dunham. The first, to exclude the testimony of the Plaintiff's expert on New Hampshire divorce law, was granted. The second was a motion to effectively limit this Court's jurisdiction over the matter, requesting that if this Court found against the Defendant on the fraudulent conveyance it was limited to sending the matter back to the divorce court for an adjudication of the proper division of the marital assets. The Court denied this motion.

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).

FACTS

Prior to trial, the parties filed a stipulation of facts that were uncontested and agreed to for the purpose of trial. Summarizing the stipulation, which this Court incorporates by reference, the parties agreed:

1. The divorce stipulation was signed between November 13 and November 21, 1997;
2. A decree of divorce issued on January 13, 1998;
3. On November 26, 1997, Arthur Dunham transferred his interest in seven parcels of real estate, having an aggregate appraised value of \$624,500;
4. Nine antique vehicles were transferred to Barbara Dunham having a total value of \$64,300;
5. Barbara Dunham received \$1,540.00 worth of other property;
6. The total encumbrances against these assets total \$305,029.47;
7. The Debtor received other property worth \$300;
8. The Debtor received three parcels of real estate with a total appraised value of \$127,000;

9. The Debtor retained all of the outstanding and issued shares of Northeast Specialty Supply Company, Inc. (NESSCO).

Absent from the stipulation was a value attributed to NESSCO for purposes of the divorce stipulation.

These stipulated facts were augmented at trial with the following facts: the parties were married in 1964; Mrs. Dunham had a high school education; Mr. Dunham started NESSCO in 1976; Mrs. Dunham had occasionally worked at NESSCO but had no say in running the business; for a number of years NESSCO had apparently been profitable; beginning in July of 1995 payments from NESSCO to the Bank of New Hampshire were sporadic according to the Bank's officer; over her objection, Mrs. Dunham signed a "limited recourse guarantee" to the Bank of New Hampshire on July 11, 1995, which was secured by mortgages on the three properties transferred to Arthur Dunham pursuant to the divorce stipulation; on September 5, 1997, the Bank made demand on the NESSCO obligations and indicated it would commence foreclosure proceedings, which it did; in December of 1997, the Bank foreclosed the three parcels netting a total of \$101,000; the Bank elected not to liquidate the remaining assets of NESSCO.

The divorce action alleged adultery on the part of Mr. Dunham, the co-respondent being a Ms. Golden who was a friend of Mrs. Dunham and who worked with Mr. Dunham at NESSCO. Upon NESSCO's demise, Ms. Golden started a similar business to NESSCO which uses the same phone number as NESSCO. Mr. Dunham now lives with Ms. Golden.

With respect to the November 26, 1997 transfers in question, there was testimony from Ms. Dunham and her attorney that the property division had been agreed to in April of 1997 but could not be reduced to a permanent stipulation until November because of certain procedural rules of the Superior Court.

DISCUSSION

The Trustee's complaint seeks to have this Court find that the transfers pursuant to the divorce stipulation were fraudulent under New Hampshire's fraudulent transfer statute, N.H. RSA 545-A:4 and 5. The Court will first focus on 545-A:5.

RSA 545-A:5: Transfers Fraudulent as to Present Creditors

RSA 545-A:5 provides:

- I. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent as a result of the transfer or obligation.
- II. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

N.H. Rev. Stat. Ann. 545-A:5.

Although not argued at trial, the Court will first dispense with RSA 545-A:5(II). The Court finds for the Defendant on RSA 545-A:5(II) on the grounds that there was no antecedent debt in the context of the divorce proceeding. Thus, since all of the factors in RSA 545-A:5(II) have to be met in order for there to be a fraudulent transfer, and one of those factors is a finding of an antecedent debt, there is no fraudulent transfer pursuant to this portion of the statute.

On the other hand, RSA 545-A:5(I) requires that the transfer be made for less than a reasonably equivalent value and that the transferor was insolvent or rendered insolvent by virtue of the transfer. If the Court finds that there was reasonably equivalent value given in exchange for the transfer the issue of insolvency is never reached. Therefore, the Court will first discuss reasonably equivalent value.

The transfers in question are pursuant to an agreed upon stipulation which was approved by the divorce court. The issues of alimony, support, and property settlement were never actually litigated in the divorce court.

Both the Plaintiff and Defendant agree that the proper inquiry in determining whether there was reasonably equivalent value is whether the “division of marital property between the divorcing parties was within the range of likely distribution that would be ordered by the state divorce court, if the property division had actually been litigated in the state court.” Harman v. Sorlucco (In re Sorlocco), 68 B.R.748, 753 (Bankr. D.N.H. 1986). This Court, in making its decision, must look to the factors under state law that the divorce court would have considered in making its distribution. These factors are found in RSA 458:16-a II, relating to property Settlements¹ and RSA 458:19 IV, relating to alimony.²

¹ RSA 458:16-a II provides:

When a dissolution of a marriage is decreed, the court may order an equitable division of property between the parties. The court shall presume that an equal division is an equitable distribution of property, unless the court establishes a trust fund under RSA 458:20 or unless the court decides that an equal division would not be appropriate or equitable after considering one or more of the following factors:

- (a) The duration of the marriage.
- (b) The age, health, social or economic status, occupation, vocational skills, employability, separate property, amount and sources of income, needs and liabilities of each party.
- (c) The opportunity of each party for future acquisition of capital assets and income.
- (d) The ability of the custodial parent, if any, to engage in gainful employment without substantially interfering with the interests of any minor children in the custody of said party.
- (e) The need of the custodial parent, if any, to occupy or own the marital residence and to use or own its household effects.
- (f) The actions of either party during the marriage which contributed to the growth or diminution in value of property owned by either or both of the parties.
- (g) Significant disparity between the parties in relation to contributions to the marriage, including contributions to the care and education of the children and the care and management of the home.
- (h) Any direct or indirect contribution made by one party to help educate or develop the career or employability of the other party and any interruption of either party’s educational or personal career opportunities for the benefit of the other’s career or for the benefit of the parties’ marriage or children.
- (i) The expectation of pension or retirement rights acquired prior to or during the marriage.
- (j) The tax consequences for each party.
- (k) The value of property that is allocated by a valid prenuptial contract made in good faith by the parties.
- (l) The fault of either party as specified in RSA 458:7 if said fault caused the breakdown of the marriage and:
 - (1) Caused substantial physical or mental pain and suffering; or
 - (2) Resulted in substantial economic loss to the marital estate or the injured party.
- (m) The value of any property acquired prior to the marriage and property acquired in

With respect to a property settlement, the statute states that the starting point is an equal distribution unless the court finds that an equal distribution would not be appropriate or equitable. There is no question that the distribution in dollars and cents is not equal and favors the Defendant Barbara Dunham. However, for the reasons that follow, this Court finds that the distribution is within the range of a likely distribution had the matter been actually litigated. The Court believes that factors considered for either a property settlement or alimony are essentially the same, and it will not distinguish between the two since that is not an issue before the Court.

First, the Dunhams were married in 1964, before Mrs. Dunham had graduated from high school. The marriage lasted 34 years. During most of that time Mrs. Dunham stayed at home or worked at clerical jobs at NESSCO. Currently, she is working in a food preparation position earning eight dollars per hour. The testimony is undisputed that during the entire term of their marriage she had little or no knowledge of the financial affairs of her husband or of his corporation, NESSCO. Because of Mrs. Dunham's lack of training she has little ability to generate income in the future.

exchange for property acquired prior to the marriage.

- (n) The value of any property acquired by gift, devise, or descent.
- (o) Any other factor that the court deems relevant.

N.H. Rev. Stat. Ann. 458:16-a II.

² RSA 458:19 IV provides:

The court may make orders for alimony in a lump sum, periodic payments, or both. In determining the amount of alimony, the court shall consider the length of the marriage; the age, health, social or economic status, occupation, amount and sources of income, the property awarded under RSA 458:16-a, vocational skills, employability, estate, liabilities, and needs of each of the parties; the opportunity of each for future acquisition of capital assets and income; the fault of either party as defined in RSA 458:16-a, II(1); and the federal tax consequences of the order. In determining amount and sources of income, the court shall not consider a minor child's social security benefit payments or a second or subsequent spouse's income. The court may also consider the contribution of each of the parties in the acquisition, preservation, or appreciation in value of their respective estates and the non-economic contribution of each of the parties to the family unit

N.H. Rev. Stat. Ann. 458:19 IV.

On the other hand, Mr. Dunham started and for years ran a successful business, apparently enabling him to purchase the assets which are the subject of this fraudulent conveyance action.

Fault is also an issue present. Apparently, the original divorce libel brought by Mrs. Dunham alleged adultery. Once again it is undisputed that Mr. Dunham was having an affair with an employee at NESSCO who was a long time friend of Mrs. Dunham. Mr. Dunham now lives with this woman who runs a business allegedly similar to the now defunct NESSCO, including the use of the same telephone number.

Mr. Dunham testified that he believed the value of NESSCO to be approximately three hundred thousand dollars when they agreed on the distribution in April of 1997. As part of the distribution he retained one hundred percent ownership of NESSCO. Despite having some financial problems, but for the divorce, greater value could have been obtained for NESSCO, either by keeping it as a going concern or liquidating it in an orderly fashion. However, instead of continuing to run NESSCO or causing its liquidation, Mr. Dunham walked away from NESSCO assuring its demise and leaving it with nominal value at best. Mrs. Dunham should not be penalized because Mr. Dunham decided to abandon this asset.

In short, this Court finds that the above factors constitute factors included in RSA 458:16-a(II)(a), (b), (c), (d) and (l) and RSA 458:19(IV), and considering these factors the Court finds the distribution is within the range that the divorce court would find if actually litigated. Thus, the Court finds that there was reasonably equivalent value and that no fraudulent transfer took place pursuant RSA 545-A:5.

RSA 545-A:4: Transfers Fraudulent as to Present and Future Creditors

Since the Court has found that there was reasonably equivalent value for the transfer, the Court finds for the Defendant under RSA 545-A:4(I)(b). RSA 545-A:4(I)(a) provides that a transfer is fraudulent if made “with actual intent to hinder, delay or defraud any creditor of the Debtor.” N.H. Rev. Stat. Ann. 545-A:4(I)(a). Part II of RSA 545-A:4 goes on to list factors which may be considered in making a determination of actual intent. The Court has already determined, pursuant to credible evidence by the Plaintiff and the Defendant, that the terms of their division of the marital assets were agreed to in April of 1997, although the actual transfers were made in November of 1997.

With respect to the so called badges of fraud listed in RSA 545-A:4(II), the Court comments as follows. The Court finds that the transfer was to an insider by definition but gives little or no weight to this factor since the parties were in the midst of a contentious divorce. This was not a sham divorce. The Debtor did not retain control of the transferred property. The transfer was not concealed but reduced to writing in a divorce stipulation and evidenced with respect to the real estate by deeds recorded in the appropriate registry of deeds. Although the actual transfers took place after the Debtor had received foreclosure notices, the agreement to transfer was made much earlier and before suit was threatened. Having found that the Debtor received reasonably equivalent value, it was not a transfer of substantially all of his assets. The Debtor did not abscond. The Debtor did not remove or conceal assets. The evidence is insufficient to determine whether or when the Debtor became insolvent.

Taking all the above factors into consideration, most importantly that this was not a sham divorce, the Court finds that the transfer was not made with actual intent to hinder, delay or defraud a creditor, and thus finds for the Defendant.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 24th day of January, 2000, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge