

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-11474-MWV
Chapter 7

Philip V. DeCarolis,

Debtor

Timothy P. Smith, Trustee,

Plaintiff

v.

Adv. No. 01-1056-MWV

Daniel J. Looney III, Trustee of the
Looney Trust, Philip V. DeCarolis,
Janet DeCarolis, Daniel C. DeCarolis,
Eric S. DeCarolis, Carol Ann DeCarolis
and Christopher A. DeCarolis,
Defendant

*Marc W. McDonald, Esq.
FORD & WEAVER, P.A.
Attorney for the Plaintiff*

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THOMAS, UTELL, VAN DE WATER & RAICHE, P.A.
Attorney for the Defendants*

MEMORANDUM OPINION AND ORDER

The Court has before it a motion to dismiss by Defendants Daniel J. Looney, Trustee, Janet DeCarolis, Daniel (David) DeCarolis, Eric DeCarolis, Carol Ann DeCarolis and Christopher DeCarolis. With respect to three of the Defendants, Daniel (David) DeCarolis, Carol Ann DeCarolis and Christopher DeCarolis, there is no question that proper service has not been made on each of these Defendants. With respect to all of the above-listed Defendants, the motion to dismiss is based on the premise that this Court does not have jurisdiction over those defendants.

JURISDICTION

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).

DISCUSSION

The complaint which the Defendants seek to dismiss concerns the premises in which the Debtor and his non-debtor wife reside. The property was foreclosed on in 1990 while the Debtor and his wife resided there. However, in the fall of 1990 the Debtor caused the creation of trust known as the “Lucy Trust,” which purchased the property in January of 1991. The Debtor, his wife and the other DeCarolis defendants each have some beneficial interest in the Lucy Trust. Defendant Daniel Looney is the trustee.

The gravamen of the trustee’s complaint is two-fold. First, the creation of the trust was a sham, making the Debtor’s interest in the property property of the estate. Second, even if the trust is valid, the spendthrift provisions are unenforceable, and the bankruptcy estate has an interest in the Debtor’s beneficial or life estate. The trustee concedes that limitation periods for avoiding fraudulent transfers have expired. As indicated above, all of the Defendants are alleged to claim an interest in the property now held in the name of the Lucy Trust, with the Debtor’s interest allegedly property of the estate.

As such, this Court finds it does have jurisdiction over the Defendants for the sole purpose of determining the question of the bankruptcy estate’s interest, if any, in the property. Rule 19 of the Federal Rules of Civil Procedure, which is made applicable by Fed R. Bankr. P. 7019, requires a party to be joined in an adversary proceeding when “the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may . . . as a practical matter impair or impede the person’s ability to protect that interest” The Trustee has alleged that the Trust in issue here is a sham and that it cannot be enforced. The parties to the complaint each hold a beneficial interest in

the Trust with the exception of Mr. Looney, who is the Trustee. As such, their rights and interests relative to the trust may be affected by this Court's determination and they are proper parties to the action. Consequently, the motion to dismiss is denied.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

The trustee shall have thirty days to make proper service on the Defendants that have not been served. The dates included in this Court's pretrial order of April 18, 2001 are vacated. A continued pretrial hearing shall be held on **August 28, 2001 at 1:00 p.m.**, at the United States Bankruptcy Court, 275 Chestnut Street, 7th Floor Courtroom, Manchester, New Hampshire.

DONE and ORDERED this 11th day of June, 2001, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge