

**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

John W. Stephenson,
Plaintiff

v.

Adv. No. 01-1070-JMD

Jeffrey A. Schreiber,
Chapter 7 Trustee,
Defendant

John A. Rogers, Esq.
ATTORNEY AT LAW
Attorney for Plaintiff

Randall L. Pratt, Esq.
LAW OFFICES OF RANDALL L. PRATT
Attorney for Defendant

MEMORANDUM OPINION

I. INTRODUCTION

John Stephenson (“Stephenson”) has filed a complaint seeking the net proceeds from the auction sale of the Debtor’s Piper Warrior aircraft (the “Warrior”) by Jeffrey Schreiber, the Chapter 7 trustee (the “Trustee”). The Trustee denies that the net proceeds from the sale should be turned over to Stephenson and has filed a motion seeking summary judgment in his favor. The underlying facts relevant to this dispute can be found in prior memorandum opinions of the Court, Schreiber v. Stephenson (In re Emerson), 235 B.R. 702 (Bankr. D.N.H. 1999), and Schreiber v. Emerson (In re Emerson), 244 B.R. 1 (Bankr. D.N.H.),

denying reconsideration, 244 B.R. 41 (Bankr. D.N.H. 1999). A short summary of the relevant facts follows.¹

II. FACTS

In 1999, the Trustee brought suit against Stephenson seeking to recover the Warrior and to avoid a security interest in certain inventory, equipment, accounts, and general intangibles that the Debtors granted to Stephenson in 1996. The Trustee brought similar claims against Stephenson's son. The Trustee's theories of recovery were based upon 11 U.S.C. § 547(b), 11 U.S.C. § 548, and 11 U.S.C. § 544 and RSA 545-A:4 and 5, New Hampshire's Uniform Fraudulent Transfer Act (the "UFTA"). After considering all of the evidence presented at a three day trial, the Court issued a memorandum opinion in which it concluded that the Debtors' transfer of the Warrior to Stephenson in October 1996 was preferential under 11 U.S.C. § 547(b) and fraudulent under 11 U.S.C. § 544 and RSA 545-A:5(II).

III. DISCUSSION

Stephenson asserts that under the UFTA he holds a lien on the proceeds of the sale of the Warrior because he held a lien on the Warrior at the time it was auctioned by the Trustee. Stephenson relies specifically on RSA 545-A:8(IV) which provides:

Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to

- (a) A lien on or a right to retain any interest in the asset transferred;
- (b) Enforcement of any obligation incurred; or
- (c) A reduction in the amount of the liability on the judgment.

¹ 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).

RSA 545-A:8(IV). Stephenson argues that he was a good faith transferee who gave \$30,000 to the Debtors and received the Warrior in return, only when the Debtors indicated that they could not repay Stephenson the monies they owed him. According to Stephenson, the Trustee received less than \$30,000 for the Warrior at auction. As result, Stephenson argues that he is entitled to the net proceeds of the sale.

The Trustee takes the position that Stephenson is not a good faith transferee because the Court has already determined that Stephenson is an insider and insiders cannot be good faith transferees under the UFTA as a matter of law. The Trustee argues that Stephenson is estopped from asserting that he is a good faith transferee because of the Court's findings and rulings in the Trustee's prior actions against Stephenson in this Court. At the hearing, the Trustee also argued that the Court need not reach the good faith transferee issue under RSA 545-A:8(IV) because, even if Stephenson were entitled to such a defense under the UFTA, Stephenson cannot defeat the Trustee's avoidance of the transfer of the Warrior to Stephenson under the Bankruptcy Code's preferential transfer provision, 11 U.S.C. § 547(b), nor his recovery of the Warrior pursuant to 11 U.S.C. § 550. According to the Trustee, his final judgment under sections 547(b) and 550 of the Bankruptcy Code cannot be affected by any defense or claim by Stephenson under the UFTA.²

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 (1st Cir. 1993) (quoting United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992)). "Material," in the context of Rule 56(c), means that the fact has "the

² Although collateral estoppel is raised by the Trustee as an affirmative defense, he did not argue in his motion for summary judgment that Stephenson is collaterally estopped from raising any defense under RSA 545-A:8(IV) because he failed to raise such defense in the original litigation. However, for the reasons set forth in this opinion, the Court need not consider any collateral estoppel defense.

potential to affect the outcome of the suit under applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st 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 (1st Cir. 1994).

In the instant case, the only possible factual issue for the Court to decide is whether Stephenson was a good faith transferee. However, before the Court even reaches the factual issue, the Court must first make a legal determination as to whether Stephenson is entitled to assert the defense. In addition, the Court must decide whether the issue is moot given the Trustee’s ability to recover the Warrior pursuant to sections 547(b) and 550.

A question of law exists in New Hampshire as to whether an insider can assert the good faith transferee defense contained in section 8 of the UFTA. The Trustee argues that the UFTA would be internally inconsistent if an insider were permitted to claim the defense because RSA 545-A:5(II) eliminates any requirement that property be transferred for less than reasonably equivalent value. RSA 545-A:5(I) provides that recovery of a transfer to any transferee, insider or non-insider, may be avoided if the plaintiff establishes, inter alia, that the transfer was made without the debtor receiving reasonably equivalent value:

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 equivalent value in exchange for the transfer or the obligation and the debtor was insolvent at the time or the Debtor became insolvent as a result of the transfer or obligation.

RSA 545-A:5(I) (emphasis added). However, where the transfer is to an insider, a transfer may be avoided without evidence regarding to the exchange of reasonably equivalent value if the debtor was insolvent and the insider had reasonable cause to believe that the debtor was insolvent. RSA 545-A:5(II) provides:

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.

RSA 545-A:5(II). The Trustee argues that an insider with reasonable cause to believe that the debtor is insolvent cannot, as a matter of law, be a good faith transferee. In the alternative, the Trustee argues that permitting an insider defendant to claim the benefit of the defense available to a good faith transferee under RSA 545-A:8(IV) would, in effect, repeal RSA 545-A:5(II) or would permit an insider defendant to raise the element of reasonably equivalent value despite the legislative elimination of that element.

The Court notes that there is limited case law on the issue before it. However, the case most on point seems to support the Trustee's position. In J. Michael Putnam, M.D. P.A. Money Purchase Pension Plan v. Stephenson, 805 S.W.2d 16, 20 (Tex. App. 1991), the court held that an insider, a pension plan administrator, who was the wife's personal physician and a friend of both the wife and the husband borrower and who knew of the husband's insolvency at the time a deed was executed in favor of the pension plan, was not a good faith transferee and could not reap the benefits of section 8(d) of the UFTA.

The Trustee also cites the official comment to the UFTA in support of his position. It provides in relevant part:

An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

Unif. Fraudulent Transfer Act § 8(d), Comment 4, U.L.A. (1984). Stephenson argues that the comment has not been adopted by the New Hampshire legislature and therefore should not be considered.

However, the Court need not decide the issue of whether the comment is applicable or, more importantly, whether Stephenson, as an insider, is entitled to assert the good faith transferee defense under the UFTA. Even if the defense under RSA 545-A:8(IV) were available to Stephenson, and he could establish that he was a good faith transferee, he would only have protection from the Trustee's final judgment on the fraudulent transfer count under RSA 545-A:5(II). The Trustee has also obtained a judgment avoiding the transfer of the Warrior as a preference under section 547(b) and recovering the airplane under section 550. A defense under the UFTA is not a defense to a preferential transfer action

under the Bankruptcy Code. Accordingly, Stephenson has not established any claim or defense under which he can ultimately prevail against the Trustee with respect to the proceeds from the sale of the Warrior and his claim under RSA 545-A:8(IV) is moot.

IV. CONCLUSION

For the reason stated above, the Trustee's motion for summary judgment is granted and judgment will be entered in the Trustee's favor. 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 24th day of July, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge