

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

In re:

Bk. No. 04-11455-JMD
Chapter 7

Lemery Building Company, Inc.,
Debtor

Steven M. Notinger,
Chapter 7 Trustee,
Plaintiff

v.
Lemery Development, LLC, et al.,
Defendants

Adv. No. 04-01215-JMD

Raymond C. Green, et al.,
Plaintiff

v.
Louise Lemery, et al.,
Defendants

Lemery Development LLC, et al.,
Plaintiff

v.
William Trainor, Sr., et al.,
Defendants

Steven M. Notinger,
Chapter 7 Trustee,
Plaintiff

v.
B Louise Lemery and B. Louise Lemery,
Trustee of the Betty Louise Lemery
1997 Family Trust
Defendant

Adv. No. 05-01006-JMD

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MEMORANDUM OPINION

I. INTRODUCTION

Lemery Development, LLC and B. Louise Lemery (collectively the “Lemery Defendants”) filed a motion to consolidate adversary proceeding Adv. 04-1215-JMD (the “04 Adversary”) with adversary proceeding Adv. 05-01006-JMD (the “05 Adversary”) (Doc. No. 91) pursuant to Fed. R. Civ. P. 42(a) and United States District Court Local Rule 42.1(a) and (d), and an identical motion in the 05 Adversary requesting consolidation with the 04 Adversary (Doc. No. 12) (collectively the “Motions”). After notice and a hearing on May 9, 2005, the Court took the Motions under advisement.

A. Procedural Background for the 04 Adversary

Steven Notinger, the Chapter 7 trustee (the “Trustee”), commenced the 04 Adversary against Lemery Development, LLC (“Development”) and the Green Defendants¹ by filing a complaint alleging: (1) the Debtor made a fraudulent transfer to Development pursuant to 11 U.S.C. § 544(b) and the New Hampshire Uniform Fraudulent Transfer Act, New Hampshire Rev. Stat. Ann. 545-A:4 I(a), I(b) and II; 545-A:5 I; 545-A:7; and 545-A:8 (“UFTA”) and (2) the

¹ Raymond C. Green, Inc. as Trustee of the Raymond C. Green Trust (“RCTG”), Rodman Financial Corp. (“Rodman”), and Raymond C. Green Investments Limited Partnership (“RCGILP”) (collectively the “Green Defendants”).

subsequent transfer to the Green Defendants was fraudulent pursuant to 11 U.S.C. § 554(b) and UFTA, sections 545-A:1(XII), 545-A:7, and 545-A:8. The Trustee also brought a common law fraud claim and a claim of alter ego/sham corporation against all the defendants. See 04 Adversary Doc. No. 1. After notice and a hearing, the Court approved a motion to approve compromise and settlement of adversary proceeding filed by the Trustee regarding his complaints against the Green Defendants. See 04 Adversary Doc. No. 114.

Although the Trustee and Green Defendants have reached a settlement, the 04 Adversary has not been resolved because a series of cross-complaints, counter complaints, and third-party complaints filed by and between the Green Defendants and the Lemery Defendants have not yet been resolved. See 04 Adversary Doc. Nos. 43, 51, 70, and 71. None of these actions were brought under Title 11 of the United States Code.

The Green Defendants filed a third-party complaint against B. Louise Lemery; Mark Robinson; Development; and Randall Bennett & Company, PC (“Third Party Defendants”). The third-party complaint denied that the 04 Adversary was a core proceeding, stated that the Green Defendants do not consent to the entry of final orders and rulings in this Court, and demanded a jury trial. Additionally, the third-party complaint alleged that the Third Party Defendants participated in a conspiracy to defraud creditors and cause payment to B. Louise Lemery. The complaint further alleged that the Third Party Defendants made material misrepresentations and were negligent, reckless, or fraudulent in failing to disclose material facts to the Green Defendants in order to induce them to make loans and accept the mortgages that are now being challenged. The complaint also alleges that B. Louise Lemery and Development were unjustly enriched. Subsequently, a Notice of Dismissal of the third-party actions against Mark Robinson

and Randall Bennett & Co. was filed by the Green Defendants, leaving Louise Lemery as the sole remaining third-party defendant.

The Lemery Defendants' answer to the third-party complaint demanded a jury trial and questioned whether the case was a core proceeding. It also asserted counterclaims, cross claims, and a third-party complaint based on breach of contract, unjust enrichment, misrepresentation, and breach of fiduciary duty among others. The Lemery Defendants filed a motion to amend their third-party complaint, which was granted, but the amended complaint has not yet been filed.

B. Procedural Background for the 05 Adversary

The Trustee commenced the 05 Adversary by filing a complaint alleging the Debtor made a fraudulent transfer to Betty Louise Lemery ("Lemery"), the ex-wife and co-habitor of the principal of the Debtor, individually and as Trustee of the Betty Louise Lemery 1997 Family Trust pursuant to 11 U.S.C. §§ 544(b), 547(b), and 550(a); and UFTA, sections 545-A:4 I(a), I(b) and II, 545-A:5 I, and 545-A:8 II.

On February 22, 2005, Lemery filed an answer to the complaint in which she admitted the Bankruptcy Court has jurisdiction but questioned whether this is a core proceeding. The answer denied the relevant factual allegations in the complaint and set forth ten affirmative defenses.

C. The Lemery Defendants' Motions for Withdrawal of Reference

On March 22, 2005, Lemery filed a Motion for Withdrawal of Reference in the 05 Adversary and, on May 9, 2005, the Lemery Defendants filed a Motion for Withdrawal of Reference in the 04 Adversary (collectively the "Withdrawal Motions"). The Court held a

hearing on the Withdrawal Motions on May 9, 2005, which were taken under advisement, subject to the Green Defendants right to file a memorandum of law in opposition to the Withdrawal Motions on or before May 23, 2005. Contemporaneous with the issuance of this opinion, the Court issued an LR 77.4(d) Report and Recommendation to the District Court for the 04 Adversary, recommending the reference be withdrawn and an LR 77.4(d) Report and Recommendation for the 05 Adversary, recommending the reference not be withdrawn.

D. The Motions

On April 6, 2005, the Lemery Defendants filed motions to consolidate the 04 Adversary with the 05 Adversary pursuant to FRCP 42(a) and LR 42.1(a) and (d). See 04 Adversary, Doc. No. 91 and 05 Adversary, Doc. No. 12.

The Trustee and the Green Defendants filed objections to the motion to consolidate the 04 Adversary with the 05 Adversary arguing that discovery and evidence do not overlap between the two cases because the two adversaries are fundamentally different. They support this assertion with the argument that the two actions involve different parties, facts, and transactions. Specifically, the sole disputes remaining in the 04 Adversary involve transfers and transactions between the Green Defendants and the Lemery Defendants subsequent to the Debtor's initial transfer of substantially all of its assets to Development, whereas the sole dispute in the 05 Adversary involves the initial transfer of assets by the Debtor to Lemery. Finally, they argue a consolidation would not be in the best interest of the bankruptcy estate because the Trustee would be required to be a party to disputes involving claims between several parties, none of whom is the Debtor. See 04 Adversary, Doc. Nos. 93 and 95. The Trustee also filed a parallel objection in the 05 Adversary. See 05 Adversary, Doc. No. 13.

E. 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).

II. DISCUSSION

Federal Rules of Civil Procedure (“FRCP”) 42 is made applicable to these proceedings by Federal Rule of Bankruptcy Procedure 7042. FRCP 42 gives a court the discretion to consolidate pending cases if the cases involve “a common question of law or fact.” LR 42.1(a) provides that related cases are those “which: (1) arise from substantially the same transaction or event; (2) involve substantially the same parties or property; . . . (4) call for resolution of substantially the same questions of law; or (5) would entail substantial duplication of labor if heard by different judges.”

The 05 Adversary is based on the Trustee’s action to pursue a preferential transfer of property from the Debtor to Lemery, individually and as Trustee of the Betty Louise Lemery 1997 Family Trust pursuant to 11 U.S.C. §§ 544(b), 547(b) and 550(a) and UFTA, sections 545-A:4 I(a), I(b) and II, 545-A:5 I, and 545-A:8 II. To prevail on these claims, the Trustee “must prove actual fraud by clear and convincing evidence and constructive fraud by a preponderance of the evidence.” Dahar v. Jackson (In re Jackson), 318 B.R. 5, 13 (Bankr. D.N.H. 2004).

Under UFTA, actual fraud requires proof that “the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor of the debtor.” UFTA 545-A:4(I). The

issue is the Debtor's intent at the time of the transfer. Id. Unlike actual fraud, constructive fraud does not necessitate a finding of intent but instead focuses upon economic effect. Constructive fraud has been defined as an "unintentional deception or misrepresentation that causes injury to another." Black's Law Dictionary 686 (8th ed. 2004). Constructive fraud under UFTA requires the plaintiff to establish that:

1. the debtor transferred an asset or incurred a debt "without receiving a reasonably equivalent value in exchange for the transfer or obligation,"
2. "[A]nd the debtor" did either of the following:
 - a. "[W]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or"
 - b. "[I]ntended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due."

RSA 545-A:4 (I)(b).

With either type of fraud, the determination is based solely on the defendants' actions that transpired prior to and through the completion of the alleged fraudulent transfer. Any transactions thereafter are not relevant to a determination of fraudulent intent or the economic effect of the initial transfer. Similarly, actions by third parties are not relevant to a determination of fraudulent intent under UFTA.

The remaining claims in the 04 Adversary involve transactions that occurred between the Lemery Defendants and the Green Defendants—different parties from those involved in the 05 Adversary—that occurred after the transfer at issue in the 05 Adversary took place. Therefore, the questions of fact and law raised in the 04 Adversary are not relevant to the outcome of the 05 Adversary and vice versa. Furthermore, the Court notes that neither the Debtor nor the Trustee

are a party to the transactions at issue in the 04 Adversary. Consolidation would result in the Trustee becoming a party to a proceeding involving only non-debtor parties and, thereby, wasting assets of the estate. Therefore, the Court determines that consolidation of the 04 Adversary and the 05 Adversary is not appropriate under FRCP 42. Accordingly, the Motions shall be denied.

III. CONCLUSION

For the reasons set forth in this opinion, the Court shall deny the Motions. 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 orders consistent with this opinion.

ENTERED at Manchester, New Hampshire.

Date: May 27, 2005

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge