

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

In re:

Bk. No. 05-10592-JMD  
Chapter 7

Kyle Plamondon and  
Olga Plamondon,  
Debtors

Kyle Plamondon and  
Olga Plamondon,  
Plaintiffs

v.

Adv. No. 05-1058-JMD

Debt Set Inc.,  
Defendant

*Carl D. Hanson, Esq.  
Law Offices of William Howard Dunn  
Claremont, New Hampshire  
Attorney for Plaintiffs*

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Manchester, New Hampshire  
Attorney for Defendant*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

On September 28, 2005, the Court entered an order dismissing this adversary proceeding (Doc. No. 17) (the “Dismissal Order”) on motion of the Defendant because (1) three of the four counts in the complaint were non-core matters and the sole core count could be pursued by the

Plaintiffs outside the bankruptcy court and (2) the Plaintiffs' standing to pursue the sole core count was questionable due to the provisions of 11 U.S.C. § 522(g)(1).<sup>1</sup> On October 4, 2005 Plaintiffs filed a Motion to Reconsider and Amend Judgment (Doc. No. 19) (the "Motion"). The Defendant filed an objection to the Motion (Doc. No. 21) (the "Objection") and after a hearing on November 8, 2005, the Court took the Motion 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**

The Plaintiffs commenced this adversary proceeding by filing a four count complaint against the Defendant (Doc. No. 1) (the "Complaint"). Count I was based upon § 548(a)(1)(B) and § 522(h), which permits a debtor to avoid certain transfers of property under § 548 if the trustee does not attempt to do so. Counts II, III and IV were based upon claims under federal and state non-bankruptcy laws, specifically 15 U.S.C. § 1679 et seq. (regulating advertising and business practices of credit repair organizations) and New Hampshire Revised Statutes Annotated ("NH RSA") chapters 359-D (regulating credit services organizations) and 358-A (consumer protection law). The Defendant responded with a motion to dismiss the Complaint (Doc. No. 13) (the "Motion to Dismiss") alleging that the Plaintiffs lack standing under § 522(h)

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<sup>1</sup> All references to the "Bankruptcy Code" and all references to specific statutory sections following the "\$" symbol are to the Bankruptcy Reform Act of 1978, as amended through October 16, 2005, 11 U.S.C. § 101 et seq.

and § 522(g)(1) because the transfers they sought to avoid were voluntary and for failure to state a claim under § 548. After notice and a hearing, the Court granted the Motion to Dismiss based primarily upon (1) the non-core nature of Counts II, III and IV of the Complaint, (2) the fact that the claims in Count I could be pursued outside of the bankruptcy court and (3) a likely lack of standing under § 522(h).

In the Motion, the Plaintiffs contend that the Dismissal Order was based upon a manifest error of law because the Court ruled that Count I of the Complaint could be brought outside of bankruptcy under state law. The Plaintiffs contend that only a creditor may bring an action under the state fraudulent transfer law, NH RSA 545-A:7, and that the burden of proof imposed upon the Plaintiffs to bring a common law fraud claim against the Defendant under state law would all but preclude their recovering on their claims against the Defendant. The Defendant disagrees with the Plaintiffs and contends that the analysis and rulings behind the Dismissal Order are sound.

After consideration of the arguments of the parties and a review of applicable law, the Court agrees that the Dismissal Order was based upon a manifest error of law. Accordingly, the Motion shall be granted.

### **III. DISCUSSION**

Section 522(h) confers limited standing on a debtor to pursue avoidance of the transfer of certain property under various provisions of the Bankruptcy Code if (1) the trustee does not attempt to avoid the transfer, (2) the debtor could have claimed the property as exempt under § 522(b) if the transfer had not been made, (3) the debtor did not conceal such property and (4) the transfer of the property by the debtor was not voluntary. In Count I of the Complaint, the

Plaintiffs allege that certain prepetition transfers authorized by them from their bank account were not voluntary within the meaning of § 522(g)(1) and are avoidable as constructively fraudulent transfers under § 548(a)(1)(B). Absent the provisions of § 522(h) a debtor would not have standing to pursue a claim under the fraudulent transfer provisions of § 548. 5 Collier on Bankruptcy ¶ 548.06[1] (Alan N. Resnick et al. eds., 15th rev. ed. 2005). Similarly, under state law, the Plaintiffs could not pursue a claim of fraud, either actual or constructive, under the New Hampshire fraudulent transfer statute. See NH RSA 545-A:7.

The Plaintiffs could pursue a claim of common law fraud against the Defendant outside of their bankruptcy proceeding. However, the necessary elements of a common law fraud claim must be proven by clear and convincing evidence. Snow v. Am. Morgan Horse Assoc., Inc., 141 N.H. 467, 468 (1996) (citing Caledonia, Inc. v. Trainor, 123 N.H. 116, 124 (1983)). Unlike common law and actual fraud, the burden of proof for a claim of constructive fraud under either NH RSA 545-A or § 548 is a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 286 (1991); Dahar v. Jackson (In re Jackson), 318 B.R. 5, 13 (Bankr. D.N.H. 2004).

In addition to the difference in the burden of proof between claims of common law and actual fraud and claims of constructive fraud, there are significant differences in the elements of each claim that need to be established. The necessary elements of common law fraud require proof that the defendant intentionally made material false statements, which the defendant knew to be false, with the intent that the plaintiff rely on the statements and that the plaintiff reasonably relied to his detriment. Snow, 141 N.H. at 468; NH RSA 545-A:4(I). “Unlike actual fraud, constructive fraud is essentially unconcerned with intent and instead focuses upon economic effect.” Dahar, 318 B.R. at 18. The necessary elements to establish constructive fraud under § 548(a)(1)(B) are that the debtor received less than reasonably equivalent value in

exchange for the transfer and the debtor was insolvent at the time of the transfer or was rendered insolvent by the transfer. Because of the differences in the elements necessary to establish a claim of common law fraud versus constructive fraud and the burden of proof imposed on the Plaintiff, the ability to bring a constructive fraud claim under § 548(a)(1)(B) and a common law fraud claim under state law are not equivalent. Accordingly, the Court made an error of law when it equated the opportunity to bring a common law fraud claim under state law with the Plaintiffs' constructive fraud claim under the Bankruptcy Code.

#### **IV. CONCLUSION**

For the reasons set forth in this opinion, the Court shall enter a separate order granting the Motion and vacating the Dismissal Order. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

ENTERED at Manchester, New Hampshire.

Date: November 14, 2005

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