

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

In re:

Bk. No. 05-11004-JMD
Chapter 7

Kathy B. Mann,
Debtor

Edmond J. Ford, Chapter 7 Trustee,
Plaintiff

Adv. No. 05-1101-JMD

v.

Henry Blaine and
Gertrude Blaine,
Defendants

*Marc W. McDonald, Esq.
Ford, Weaver & McDonald, P.A.
Portsmouth, New Hampshire
Attorney for Chapter 7 Trustee/Plaintiff*

*Paul M. DeCarolus, Esq.
Gottesman and Hollis, P.A.
Nashua, New Hampshire
Attorney for Defendants*

MEMORANDUM OPINION

I. INTRODUCTION

Edmond Ford, Chapter 7 Trustee (the “Trustee”), commenced this adversary proceeding against the Debtor’s parents, Henry and Gertrude Blaine (the “Defendants”), seeking to set aside a certain property transfer as a fraudulent transfer pursuant to the New Hampshire Uniform Fraudulent Transfer Act, N.H. Rev. Stat. Ann. (“NH RSA”) § 545-A (1997) (“UFTA”) and 11

U.S.C. § 544.¹ The complaint was brought under two counts: Count I alleges that actual fraud was involved in a prepetition transfer by the Debtor to her parents under UFTA; Count II alleges the same actual fraud and that a lack of reasonably equivalent value was received by the Debtor for the same transfer.

A trial was held on December 13, 2005. At the beginning of the trial, the Trustee orally amended Count II to include constructive fraud. The Court understood the Trustee to be proceeding on a constructive fraud claim under NH RSA 545-A:4(I)(b). At the close of the Trustee's case, the Defendants moved to dismiss. Finding that the Trustee failed to prove an actual intent to defraud, the Court granted the motion to dismiss as to Count I but denied it as to Count II.

The Trustee believed that he was proceeding on a constructive fraud claim under NH RSA 545-A:5, not RSA 545-A:4. On May 9, 2006, the Court issued a memorandum opinion (Doc. No. 26) finding against the Trustee under NH RSA 545-A:4(I)(b)² and entered a final judgment in favor of the Defendants (Doc. No. 25). Rather than request that the Court alter or amend its judgment pursuant to Federal Rule of Civil Procedure 59, which is made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 9023, the Trustee appealed the adverse judgment to the United States District Court for the District of New Hampshire. In his appeal, the Trustee claimed that this Court addressed the wrong fraudulent transfer statute and that the evidence at trial supported a judgment in his favor under NH RSA 545-A:5. The district court determined that it could not review on appeal a decision that was never made by

¹ Unless otherwise indicated, all references to "section" or "§" refer to Title 11 of the United States Code, as in effect prior to the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8.

² Ford v. Blaine (In re Mann), 2006 BNH 018.

this Court. The district court dismissed the appeal and remanded the case to this Court for any further proceedings that may be necessary.

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 Trustee seeks to set aside a prepetition transfer made by the Debtor to the Defendants. The transfer consisted of a 3.8 acre parcel of real property (the “Parcel”) that was contiguous with the Defendants’ 62 acre homestead in Newport, New Hampshire.

On or about April 12, 1999, the Defendants conveyed the Parcel to the Debtor for no consideration (the “1999 Conveyance”). The 1999 Conveyance was formalized with a warranty deed, which was recorded with the Sullivan County Registry of Deeds. Although nothing on the face of the deed indicates this was anything other than a standard conveyance of fee title, both the Debtor and her mother/co-defendant, Gertrude Blaine (“Debtor’s Mother”), testified that the conveyance was made with the understanding the Debtor and her husband would build a home on the Parcel so the Debtor could live close enough to her parents that she could care for them in their old age. No home was ever built on the Parcel.

Following the 1999 Conveyance, the Debtor and her husband separated and the Debtor began to experience financial difficulties. At some point thereafter, the Debtor received a delinquent tax notice indicating that \$1,015.54 was owed for real estate taxes on the Parcel for a portion of 2001 and 2002. Adjustments were made to the tax bill, and the adjusted amount was

paid in full by a check signed by the Debtor's Mother, drawn on the Defendants' joint checking account on January 15, 2003.

On June 19, 2003, the Debtor took out a consolidation loan for \$11,227.00 with Lake Sunapee Bank (the "Sunapee Loan"). The Debtor testified that she did not qualify for the loan on her own so the Debtor's Mother pledged the Defendants' joint passbook savings account with Lake Sunapee Bank (the "Bank") as security on the loan. The interest on the Sunapee Loan was set at 3.39%. The loan was in the Debtor's name and executed by the Debtor, but the Debtor's Mother signed the Third Party Agreement section of the loan and an Assignment of Deposit of Share Account on the same day. The Debtor's Mother testified that she provided security on the Sunapee Loan so her daughter could get a low interest loan that would enable her to pay off her debts.

The Debtor testified that her intent in taking out the loan was to pay off her outstanding obligations. A credit report from the Credit Bureau of New Hampshire, prepared for the Bank the day before the Sunapee Loan was finalized, indicates that prior to the loan the Debtor had somewhere in the range of ten creditors. The Debtor testified that she retained 10% of the loan proceeds to cover living expenses for herself and her dependent child and used 90% of the loan proceeds to pay off existing creditors, leaving only two creditors—the Bank and Toyota Financial Services, the company holding the lease on her automobile.

On July 1, 2003, the Debtor transferred the Parcel to the Defendants (the "2003 Conveyance"). As was the case with the 1999 Conveyance, the Defendants did not pay any consideration for the transfer. However, they took title to the property subject to outstanding real estate taxes. The 2003 Conveyance was formalized with a warranty deed recorded with the Sullivan County Registry of Deeds. The Debtor and the Debtor's Mother testified that the

transfer took place because the Debtor was not in a position to build a home on the property and it was a financial burden on the Debtor. They also testified that there was an understanding the property was meant to stay in the family if the Debtor did not build her home on it. Finally, the Debtor's Mother testified that she and her husband do not intend to reconvey the Parcel to the Debtor in the future. The Debtor filed her bankruptcy petition on March 21, 2005 (the "Petition Date"), nearly twenty-one months after the 2003 Conveyance.

The Trustee alleges the Debtor fraudulently transferred the Parcel in violation of state fraudulent transfer laws, NH RSA 545-A:5, for which the Trustee seeks recovery of the Parcel. At the hearing, the Court determined the Trustee failed to prove actual fraud. Accordingly, the issue before the Court is whether or not the Trustee met the burden of proof for constructive fraud under UFTA.

III. DISCUSSION

The Plaintiff brought his complaint under § 544(b) of the Bankruptcy Code seeking to avoid the transfer of the Parcel under UFTA, which provides in pertinent part at NH RSA 545-A:5:

- 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 at that time or the debtor became 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.

NH RSA 545-A:5.

As a threshold matter, the Trustee must establish his right to bring the fraudulent transfer claim. The Trustee's right to bring a claim under state fraudulent transfer law is derived from § 544 of the Bankruptcy Code. Section 544(a) provides "one of the 'strong arm' provisions of the Code, [and] confers upon the trustee the rights of a 'hypothetical judicial lien creditor' of the debtor at the time the case was commenced, whether or not such a creditor actually existed." In re Beaudoin, 160 B.R. 25, 31 (Bankr. N.D.N.Y. 1993). In contrast, § 544(b) provides that "the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b)(1) (emphasis added). Accordingly, to succeed under § 544(b), "the trustee must show that the transfer is voidable under state law by at least one unsecured creditor of the bankruptcy estate with an allowable claim." Williams v. Marlar (In re Marlar), 267 F.3d 749, 753 (8th Cir. 2001); Turner v. Phoenix Financial, LLC (In re Imageset, Inc.), 299 B.R. 709, 715 (Bankr. D. Me. 2003) (trustee must demonstrate the existence of an actual unsecured creditor holding an allowable unsecured claim who could avoid the transfer); Panama Williams, Inc. v. Parr (In re Panama Williams, Inc.), 211 B.R. 868, 871-72 (Bankr. S.D. Tex. 1997) (trustee must identify a real, existing creditor with an allowable unsecured claim); Young v. Paramount Communications Inc. (In re Wingspread Corp.), 178 B.R. 938, 945 (Bankr. S.D.N.Y. 1995) (trustee must show that at least one of the present unsecured creditors of the estate holds an allowable claim, against whom the transfer was invalid under applicable state or federal law).

In this case, the Trustee is proceeding under § 544(b)(1). In order to avoid the transfer in question, the trustee "not only must show that the conditions of state law have been satisfied, but also that, at the time that the transaction at issue occurred, there was in fact a creditor in

existence who was holding an allowed unsecured claim, and second that the transaction could have been avoided by such creditor under applicable state law.” Wingspread, 178 B.R. at 945. In order to have an allowed unsecured claim, a creditor must satisfy the requirements of the Bankruptcy Code. A creditor holding an unsecured claim must file a timely proof of claim. 11 U.S.C. § 501; Fed. R. Bankr. P. 3002(a). If a proof of claim is timely filed, it is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a).

In this case, the original notice of the bankruptcy case dated March 23, 2005, advised creditors that they did not need to file claims. See Doc. No. 2 in the main bankruptcy case. On August 19, 2005, the Trustee notified creditors of the need to file a proof of claim by November 16, 2005, if they wished to share in any distribution. See Doc. No. 10 in the main bankruptcy case. The claims register reflects that only one claim was ever filed in this case. Lake Sunapee Savings Bank filed a proof of claim on March 3, 2005, in the amount of \$5,422.07 as a secured claim. See Proof of Claim No. 1. On December 15, 2005, the Trustee objected to that claim because it was fully secured. See Doc. No. 19 in the main bankruptcy case. No response was filed by the creditor and on February 8, 2006, the Court sustained the Trustee’s objection. See Doc. No. 20 in the main bankruptcy case. The Trustee presented evidence that the Debtor was obligated on a car lease at the time of the 2003 Conveyance. However, no evidence was presented on whether payments on the car lease were current at the time of the 2003 Conveyance. In any event, the car lessor never filed a proof of claim in the main bankruptcy

case.³ Accordingly, no unsecured claims have been filed in the main bankruptcy proceeding and no unsecured claims have been allowed.⁴

At trial, the Trustee established that the Sunapee Loan was made to the Debtor on June 19, 2003, twelve days before the 2003 Conveyance on July 1, 2003. While the Debtor's obligations on the Sunapee Loan were in existence before the 2003 Conveyance, the evidence at trial established that the Debtor did not list the real estate involved in the 2003 Conveyance on her application for that loan, the loan was secured by a pledge of a savings account owned by the Defendants, and the loan was intended by the Debtor and the Defendants to be substantially contemporaneous transactions. The evidence also established that the transaction between the Debtor and the Defendants was a good faith effort to rehabilitate the Debtor outside of bankruptcy and was consideration for the Defendants payment of accrued real estate taxes on the property conveyed. Such evidence might be sufficient to establish a defense to the Trustee's constructive fraud claim under NH RSA 545-A:5 or NH RSA 545-A:8(VI). However, because the Trustee has not established the necessary predicate under § 544(b)(1) of the Bankruptcy Code, namely the existence of a creditor at the time of the 2003 Conveyance who held an allowed unsecured claim on the petition date, the Court need not decide whether such creditor could have prevailed under NH RSA 545-A:5. Bumgardner v. Sun Bank/South Florida, N.A. (In re Simco Mechanical, Inc.), 151 B.R. 978, 983 (Bankr. S.D. Fla. 1993).

³ In fact, the car lessor and the Debtor agreed that the Debtor would assume and reaffirm her remaining obligations under the car lease on June 10, 2005. See reaffirmation agreement dated June 10, 2005, filed as Doc. No. 10 in the main bankruptcy case.

⁴ It is unclear to the Court why the Trustee is pursuing this fraudulent transfer claim against the Defendants. In the absence of any creditors holding allowed prepetition claims against the estate, the only claims against any recovery from the Defendants would be the claims of the Trustee's counsel for attorney's fees incurred pursuing this fraudulent transfer claim.

V. CONCLUSION

For the reasons set forth in this opinion, the relief sought by the Trustee under Count II of the Complaint is denied. 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 in favor of the Defendants.

ENTERED at Manchester, New Hampshire.

Date: September 5, 2006

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