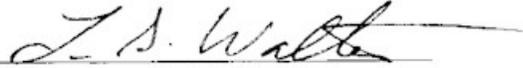


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: January 31, 2008


Lawrence S. Walter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: DOUGLAS WEBB,

Debtor.

Case No. 06-33788

Adv. No. 07-03144

RUTH A. SLONE, TRUSTEE,

Plaintiff,

Judge L. S. Walter

Chapter 7

v.

PHILIP SMITH, ET AL.,

Defendants.

DECISION DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This is a core proceeding by virtue of 28 U.S.C. § 157(b)(2)(F) and (H).

This matter is before the court on the motion for summary judgment (“Motion”) filed by Defendants Phillip and Kimberly Smith (“Defendants”) [Adv. Doc. 11]; and the responsive memorandum (“Response”) of Plaintiff Ruth Slone, Chapter 7 Trustee (“Trustee”) [Adv. Doc. 14].

FACTUAL BACKGROUND

The facts set forth here are drawn from the admissions and uncontroverted statements set forth in the parties’ pleadings. The Trustee’s complaint [Adv. Doc. 1] seeks avoidance of the alleged preferential or fraudulent transfer of real property located at 1554 Montgomery Avenue, Fairborn, Ohio (the “Property”) by Debtor Douglas Webb (“Debtor”) to Defendants. The Complaint also requests denial of any exemption Debtor might claim with respect to the Property.

The Property was originally owned by Debtor and his wife Beulah, now deceased. In August of 1988, Debtor and Beulah entered in to an oral agreement with Defendants by which Defendants were intended to ultimately obtain title to the Property. Defendant Phillip Smith is Beulah’s son and Debtor’s step-son. Pursuant to the oral agreement, Defendants would occupy the Property and be responsible for paying all associated expenses such as the mortgage and real estate taxes. Upon Defendants’ payment in full of the mortgage debt, Debtor and Beulah were to deed the Property to Defendants.

Defendants paid off the mortgage sometime in April of 2002 and, consistent with the agreement, Debtor and Beulah executed and delivered a survivorship deed to Defendants on April 19, 2002. Defendants attempted to record the deed with the Greene County Recorder’s office. However, because of technical deficiencies, the Recorder rejected the deed (the “Unrecorded Deed”). On December 31, 2004, Debtor and Beulah provided Defendants with a corrected survivorship deed which the Defendants did not

record until June 21, 2006 (the “Deed”). Although the Deed references “valuable consideration,” it does not reveal the amount or nature of the consideration.

On December 18, 2006, less than six months after the recording of the Deed but more than four years after the execution and delivery of the Unrecorded Deed to Defendants, Debtor filed his chapter 7 bankruptcy case. The Debtor did not schedule the Property as an asset and did not list any associated liabilities.

SUMMARY JUDGMENT STANDARD

The standard for addressing Defendants’ Motion for Summary Judgment is contained in Fed. R. Civ. P. 56(c) and incorporated in bankruptcy adversary proceedings by reference in Fed. R. Bankr. P. 7056. The rule states in part that a court must grant summary judgment to the moving party if:

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.

Fed. R. Civ. P. 56(c). In order to prevail, the moving party, if bearing the burden of persuasion at trial, must establish all elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986). If the burden is on the nonmoving party at trial, the movant must: 1) submit affirmative evidence that negates an essential element of the nonmoving party’s claim; or 2) demonstrate to the court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim. *Id.* at 331-32.

Thereafter, the opposing party “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-251 (1986). All inferences drawn from the underlying facts must be

viewed in a light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 586-88.

Summary judgment is proper when the nonmoving party has had adequate time for discovery and yet “fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

LEGAL ANALYSIS

According to the Trustee’s complaint, Debtor’s prepetition transfer of the Property to Defendants constitutes either a preferential transfer pursuant to 11 U.S.C. § 547 or a fraudulent transfer pursuant to 11 U.S.C. § 548. The Trustee has the burden of proof as to all the required elements of these claims, including establishing that the Debtor has an interest in the Property. *Baumgard v. Bedlyn, Inc. (In re Empire Interiors, Inc.)*, 248 B.R. 305, 307 (Bankr. N.D. Ohio 2000); *Fox v. KeyBank National Association (In re Fox)*, 265 B.R. 739, 744 (Bankr. N.D. Ohio 2001) (citing *Crews v. Shopping Center Equities, Inc. (In re Sneakers Sports Grill, Inc.)*, 228 B.R. 795, 800 (Bankr. M.D. Fla. 1999)).

Section 547 of the Bankruptcy Code permits a bankruptcy trustee to:
avoid any transfer of an interest of the debtor in property –

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made –
 - ...
 - (B) between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would have received if –
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and

(C) such creditor received payment for such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

For purposes of section 547, a transfer is made at the time such transfer is perfected and a debtor is presumed to have been insolvent on and during the ninety days immediately preceding the date of the filing of the petition. 11 U.S.C. § 547(e) and (f).

The Trustee asserts that the challenged transfer occurred on June 21, 2006, approximately six months prior to Debtor's bankruptcy filing. A transfer on that date would qualify for preference avoidance so long as the transferee is an "insider." Although Defendants argue to the contrary, there can be no doubt that Mr. Smith, who is Debtor's step-son, is an "insider" of Debtor. According to 11 U.S.C. § 101(31), an insider, among other things, is a "relative of the debtor..." A "relative" is an individual related by affinity or consanguinity within the third degree as determined by the common law, and includes individuals in a step or adoptive relationship. 11 U.S.C. § 101(45). Given these unequivocal statutory definitions, the period within which the transfer may qualify for avoidance as a preference is extended to one year prior to the petition date. 11 U.S.C. § 547(b)(4)(B).

The Trustee's alternative claim is pursuant to 11 U.S.C. § 548(a) which permits the avoidance of a transfer of an interest of a debtor in property made within two years prior to the bankruptcy petition filing. 11 U.S.C. § 548(a)(1). In her complaint, the Trustee references the "constructive fraud" subsection, 11 U.S.C. § 548(a)(1)(B). In order to prevail under this section, the Trustee must show that: (1) the debtor had an interest in the property transferred; (2) the transfer occurred within two years of the petition date; (3) the debtor was insolvent at the time of the transfer or became insolvent as result thereof; and (4) the debtor received less than the reasonably equivalent value in

exchange. *Reisz v. Stinson (In re Stinson)*, 364 B.R. 278, 281-282 (Bankr. W.D. Ky. 2007).

However, in her Response, The Trustee appears to reshape her claim to fall under the “actual intent” subsection, 11 U.S.C. § 548(a)(1)(A). To recover under this section, the Trustee must show that (1) there was a transfer of an interest of the debtor in property; (2) the transfer occurred within two years prior to the petition date; and (3) the transfer was made with actual intent to hinder, defraud or delay creditors. 11 U.S.C.A. § 548(a)(1)(A). *Slone v. Brennan (In re Fisher)*, 362 B.R. 871, 887 (S.D. Ohio 2007).

In their Summary Judgment Motion, Defendants broadly maintain that the Trustee cannot meet any of the threshold elements of either § 547 or § 548, but their primary focus is on the timing of the Property transfer. Whereas the Trustee espouses a transfer date of June 21, 2006, well within the statutory prescriptions, the Defendants champion a transfer date of April 19, 2002, the date Debtor and his wife executed and delivered the Unrecorded Deed to Defendants. If Defendants were correct about this transfer date, more than four years prior to the filing of Debtor’s bankruptcy petition, the Trustee would indeed be unable to prevail. Defendants cite Ohio law for the proposition that execution and delivery of a deed to the purchaser constitutes a transfer. *Wayne Bldg. & Loan Co. of Wooster v. Yarborough*, 11 Ohio St. 2d 195 (1967). In support of their argument, Defendants attach a copy of the Unrecorded Deed purporting to transfer the Property from Debtor and his wife to Defendants. The Unrecorded Deed is dated April 19, 2002 and contains a notarization date (probably erroneous) of April 19, 2001.

In her Response, The Trustee contends that, as a matter of law, pursuant to §§ 547(e)(1) and 548(d)(1), the transfer occurred on the date the Deed was recorded, June 21, 2006, and not the date the deed was executed and/or delivered. In support of

her Response, The Trustee attaches a copy of the Deed, bearing an execution date of December 31, 2004 and a recording date of June 21, 2006.

The Trustee is correct. For purposes of preferential and/or fraudulent transfer claims under §§ 547 or 548 of the Code, the date the conveyance of the Property was recorded, thus perfected under Ohio law, constitutes the date of transfer. *In re Bethel Resources, Inc.*, 79 B.R. 717, 721 (Bankr. S.D. Ohio 1987). Under Ohio law, until an interest in real property is recorded or filed for record in the office of the county recorder wherein the real property is located, the transfer is fraudulent so far as it relates to a subsequent *bona fide* purchaser. *See*, Ohio Rev. Code § 5301.25(A). While *Yarborough* reiterates the well-established principle of law that a deed need not be recorded to pass title, it also acknowledges that until a deed is recorded, the record owner retains “power, under Section 5301.25, Revised Code, to pass title to a ‘bona fide purchaser having, at the time of purchase, no knowledge of the existence of such former deed * * *.’” *Yarborough*, 11 Ohio St. 2d at 213. Therefore, Defendants may have been the titled owners of the Property as early as April 19, 2002, but they were not the record owners until the transfer was perfected by recordation of the Deed on June 21, 2006.

Correspondingly, specific language in both sections 347 and 348 make it clear that the key determinant of when a transfer occurs is the time of perfection. Both statutory sections contain nearly identical language to the effect that a transfer is effective at the moment when the transfer from a debtor to a transferee is so perfected that a bona fide purchaser cannot obtain superior rights to that of the transferee. 11 U.S.C. §§ 547(e)(1) and 548(d)(1).¹

¹11 U.S.C. § 547(e)

(1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the

In light of the above, Defendants have not met their burden of submitting affirmative evidence negating the Trustee's claim that the transfer of the Property occurred within one year of the filing of Debtor's petition for purposes of 11 U.S.C. § 547(b), or two years of the filing of the petition for purposes of 11 U.S.C. § 548(a). *Celotex Corp.* 477 U.S. at 331-332.

Likewise, Defendants have not presented any evidence negating any of the other elements underlying the Trustee's causes of action. For example, Defendants have submitted affidavits purporting to establish that Debtor was not insolvent on the date of the transfer of the Property and that he received reasonably equivalent value in exchange for the transfer. Both are questions of fact requiring consideration of all relevant evidence. *See In re Humble*, 19 Fed.Appx. 198, 200 (6th Cir. 2001) (unpublished) (analysis of reasonably equivalent value is "based upon the facts and circumstances of each particular case"). Other than the affiants' conclusory statements, there is no evidence to support Defendants' argument as to either of these elements.

Furthermore, if the Trustee bases her fraudulent transfer claim on 11 U.S.C. 548(a)(1)(A), she must establish that Debtor possessed the requisite intent to defraud. 11 U.S.C. 548(a)(1)(A). Because there is seldom direct evidence that a challenged transfer was made with fraudulent intent, courts must infer fraudulent intent from circumstances surrounding alleged fraudulent transfer. *In re Fisher*, 362 B.R. at 888. Again, conclusory

debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee;....

11 U.S.C. § 548(d)

(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

statements are insufficient to preclude the court from considering all the relevant circumstances.

Finally, the court notes that the filing of a summary judgment motion early in the case, as in this instance, tends to limit a plaintiff's opportunity for discovery necessary to fully support her claims. For that reason, summary judgment is seldom appropriate at this stage of the litigation. *Celotex*, 477 U.S. at 322.

CONCLUSION

The court concludes that, as a matter of law, the transfer occurred on June 21, 2006 and that Mr. Smith is an insider of Debtor. The court further concludes that there exist genuine issues of material fact as to the following elements of the Trustee's claims:

(i) In connection with 11 U.S.C. §547(a)(2): (a) whether Defendants were creditors of Debtor at the time of the transfer; (b) whether the transfer of the Property was made on account of an antecedent debt owed by Defendants to Debtor; and (c) whether Debtor was insolvent on the date of the transfer.

(ii) In connection with 11 U.S.C. §548(a)(1)(A) and (B): (a) whether Debtor made the transfer with intent to defraud; (b) whether Debtor received reasonably equivalent value in exchange for the transfer; and (c) whether Debtor was insolvent on the date of the transfer.

For all of the foregoing reasons, the court **DENIES** the Defendants' Motion for Summary Judgment.

IT IS SO ORDERED.

cc:

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