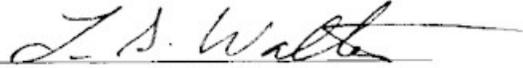


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: April 13, 2007


Lawrence S. Walter
United States Bankruptcy Judge

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

In re: EUGENE R. HECKENKAMP,

Debtor

Case No. 05-37538

Adv. No. 05-3483

PAUL H. SPAETH, TRUSTEE,

Plaintiff

Judge L. S. Walter

Chapter 7

v.

F. WILLIAM HECKENKAMP, AS TRUSTEE
OF THE IRREVOCABLE LIVING TRUST FOR
EUGENE R. HECKENKAMP,

Defendant

DECISION GRANTING SUMMARY JUDGMENT TO
PLAINTIFF-TRUSTEE PAUL H. SPAETH

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 matter is before the court on the motion for summary judgment filed by Plaintiff Paul H. Spaeth, Chapter 7 Trustee (“Trustee”) [Adv. Doc. 25]; the responsive memorandum filed in opposition by Defendant F. William Heckenkamp as Trustee of the Irrevocable Living Trust for Eugene R. Heckenkamp (“Defendant”) [Adv. Doc. 26]; and the reply of the Trustee [Adv. Doc. 27]. In addition, the court considers the documentary evidence provided by the parties in support of their positions on summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Trustee filed a complaint in this adversary proceeding seeking to avoid a transfer of real estate from Debtor Eugene R. Heckenkamp (“Debtor”) to the Defendant. The property at 2950-2952 Beechwood Road (the “Beechwood Property”) in Dayton, Ohio was transferred to the Defendant on June 25, 2004 to hold under the terms of an irrevocable living trust agreement for the benefit of the Debtor [Adv. Doc. 25, Exs. D and E]. The Trustee seeks to avoid the real estate transfer as a fraudulent transfer under 11 U.S.C. § 544 and certain provisions of the Ohio Uniform Fraudulent Transfer Act.

Prior to filing his bankruptcy petition, the Debtor was married to Kathy J. Heckenkamp. Mrs. Heckenkamp passed away on November 27, 2003 of cancer [*Id.*, Ex. B] and the Debtor was left with substantial medical bills related to her illness as well as some bills related to his own health issues [*Id.*, Ex. A - Transcript of Deposition of Debtor Eugene R. Keckenkamp dated May 31, 2006 (“Tr.”), pp. 22-29].

Before Mrs. Heckenkamp’s death, she and the Debtor owned the Beechwood Property jointly and the property was unencumbered by any mortgage or other liens at the

time of Mrs. Heckenkamp's death. [*Id.*, Tr., pp. 4-5, 10-11.] Upon her death, the Debtor became the sole owner of the Beechwood Property. [*Id.*, Ex. C.]

Following his wife's passing, the Debtor became concerned with his own death or disability and consulted with an attorney, Mary K. Soter, in June of 2004 about estate planning. [Adv. Doc. 26, Ex. A.] On June 25, 2004, the Debtor entered an Irrevocable Living Trust Agreement with his brother, F. William Heckenkamp, the Defendant in this case. [Adv. Doc. 25, Ex. E.] As part of the trust agreement, the Debtor agreed to transfer the Beechwood Property, as well as the household goods, furniture and equipment located at the property, to Defendant to hold in trust. [*Id.*] Proceeds from the sale of assets of the trust or income from the trust estate¹ were to be used as maintenance and support for the Debtor as the Defendant deemed necessary. [*Id.*] The Debtor was permitted to reside at the Beechwood Property and use the household goods and furniture during his lifetime as long as the Debtor continued to pay taxes, insurance and maintenance expenses related to the household. [*Id.*]

Pursuant to the terms of the trust agreement, the Beechwood Property was transferred to the Defendant by general warranty deed on June 25, 2004. [*Id.*, Ex. D.] The deed was recorded on July 26, 2004. [*Id.*] Although the warranty deed transferring the Beechwood Property to the trust mentions "valuable consideration" [*Id.*], the Debtor does not describe any consideration received in return for his transfer of the property. Instead, the Debtor entered the trust agreement and transferred the Beechwood Property to the Defendant so that the Defendant could take care of the Debtor should he become disabled or unable to care for himself. [*Id.*, Tr., p. 13; Adv. Doc. 26, Ex. A.]

¹ The Beechwood Property is a double that includes a rental unit. [Adv. Doc. 25, Tr., pp. 5-6.] The Debtor lives in one side of the double and a tenant leases the other unit. [*Id.*]

On July 29, 2005, a little over a year after the transfer of the Beechwood Property, the Debtor filed his Chapter 7 bankruptcy petition. [Bankr. Doc. 1.] The Debtor's schedules, at the time of filing, reveal assets totaling \$35,400 and debts totaling \$245,428.

For the purposes of a fraudulent transfer analysis, the value of the Debtor's debts and assets at the time of the transfer of the Beechwood Property is also relevant. On the date of the June 25, 2004 transfer, Debtor's assets included the Beechwood Property and the assets disclosed in his bankruptcy schedules except that the Debtor had a higher sum of money in a bank account.² [Adv. Doc. 25, Tr. pp. 29-33.] The Beechwood Property is valued by the Debtor at \$131,000 [*Id.*, Tr. p. 43] and valued by the Montgomery County Auditor at \$131,650 as of 2005 [*Id.*, Ex. G]. In addition, the Debtor's assets listed in his Bankruptcy Schedule B include household goods and furnishings valued at \$1,500, clothing worth \$500, three life insurance policies, one of which had a \$1,000 cash surrender value, a 401K retirement plan valued at \$30,000, and \$400 cash. [*Id.*, Tr. pp. 30-31; Bankr. Doc. 1, Schedule B]. In addition to these scheduled assets, the Debtor had a checking account with Liberty Savings Bank that had a balance of \$5,587.40 as of June 25, 2004. [*Id.*, Ex. F.]

The total value of the Debtor's assets as of the June 25, 2004 transfer was \$170,637.40 using the Montgomery County Auditor's valuation of the Beechwood Property. After transferring the Beechwood Property valued at \$131,650.00 to the Defendant, the value of the Debtor's assets was reduced to \$38,987.40.

² The Debtor owned another parcel of real estate at 226 Park End Drive, but it was sold on or about April 29, 2004, prior to the transfer of the Beechwood Property. [Adv. Doc. 25, Tr. pp. 33-34.] The Debtor used the proceeds from the sale of the Park End property to pay credit card debt. [*Id.*, Tr. pp. 34-35.]

The amount of the Debtor's debts at the time of the June 25, 2004 transfer is more difficult to calculate. However, the Trustee uses the Debtor's Schedule F to show that many of the Debtor's debts disclosed in his bankruptcy schedules also existed at the time of the June 25, 2004 transfer because they were related to his deceased wife's medical care occurring prior to the transfer. The total amount of the debt related to Mrs. Heckenkamp's medical care is approximately \$208,156.93. [Bankr. Doc. 1, Schedule F.] Furthermore, the Trustee provides the Debtor's claims register to demonstrate that, at the very least, the Debtor had \$163,570.31 in debts as of the June 25, 2004 transfer. [Ex. H.]

The Defendant does not dispute the accuracy of the Trustee's debt calculations using the Debtor's Schedule F and/or claims register. However, the Defendant objects to the calculation to the extent of the Trustee's inclusion of debts related to the Debtor's deceased wife's medical care and, most significantly, the inclusion of the \$155,470.54 debt owed to Miami Valley Hospital. The Defendant asserts that because these debts were for the wife's medical care rather than the Debtor's own care, the Debtor should not be held liable for them and they should not be included in the calculation of his debts existing as of the date of the Beechwood Property transfer. Furthermore, the Defendant notes that the Debtor listed the debts for his wife's medical care as "contingent" on his Schedule F. [Bankr. Doc. 1, Schedule F.] However, the Debtor made the same argument in his objection to Miami Valley Hospital's claim during the claims allowance process. [Bankr. Doc. 17.] After holding a hearing on the matter, the court denied the Debtor's objection noting that under state law,³ the Debtor was responsible for debts related to his

³ See Ohio Rev. Code § 3103.03; *Ohio State Univ. Hosp. v. Kinkaid*, 48 Ohio St.3d 78, 549 N.E.2d 517 (1990).

deceased wife's medical care. [Bankr. Doc. 25.] The court allowed Miami Valley Hospital's claim against the Debtor in the amount of \$155,470.54.⁴ [*Id.*]

SUMMARY JUDGMENT STANDARD

The appropriate standard to address the Trustee's motion for summary judgment filed in this adversary proceeding is contained in Fed. R. Civ. P. 56(c) and incorporated in bankruptcy adversary proceedings by reference in Fed. R. Bankr. P. 7056. Rule 56(c) 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.

⁴ The Trustee incorporates the court's order allowing Miami Valley's claim by reference in his Reply Brief. [See Adv. Doc. 27, p. 2.] Furthermore, the court may take judicial notice of the order and the findings it contains to the extent that the findings are not subject to reasonable dispute. Fed. R. Evid. 201; Fed. R. Bankr. P. 9017.

LEGAL ANALYSIS

The Trustee asserts that the Debtor's prepetition transfer of the Beechwood Property to the Defendant to hold in trust constitutes a fraudulent transfer pursuant to 11 U.S.C. § 544. This Bankruptcy Code section permits a bankruptcy trustee to "avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502" 11 U.S.C. § 544(b)(1). In other words, this provision of the Bankruptcy Code allows a trustee to "stand in the shoes" of an unsecured creditor and avoid fraudulent transfers to the extent avoidable by that creditor under applicable state law including the Ohio Uniform Fraudulent Transfer Act ("Ohio UFTA"), Ohio Rev. Code §§ 1336.01-1336.11. *Belfance v. Bushey (In re Bushey)*, 210 B.R. 95, 100-01 (B.A.P. 6th Cir. 1997); *Unencumbered Assets Trust v. Biomar Tech., Inc. (In re National Century Financial Enterprises, Inc.)*, 341 B.R. 198, 212 (Bankr. S.D. Ohio 2006). Before turning to the elements of the Trustee's Ohio UFTA claim, the court will dispose of two preliminary matters including a determination of the appropriate reach-back period for the claim and whether the Trustee has properly identified an unsecured creditor who would be able to pursue such a claim under § 544(b) and state law.

A. Reach-back Period for Avoidance Action Pursuant to Ohio UFTA

Initially, the Defendant argues that the June 25, 2004 Beechwood Property transfer occurred outside the permissible reach-back period for a fraudulent transfer claim and, consequently, summary judgment should not be granted to the Trustee. The Defendant is incorrect. The reach-back period for the type of avoidance action pursued by the Trustee under Ohio Rev. Code § 1336.04 or § 1336.05(A) is four years. Ohio Rev.

Code § 1336.09(B). *See also Rieser v. Hayslip (In re Canyon Systems Corp.)*, 343 B.R. 615, 634 n.15 (Bankr. S.D. Ohio 2006) (noting that the primary difference between an avoidance action under 11 U.S.C. § 548 and one under § 544 and the Ohio UFTA is that the Ohio UFTA provides that fraudulent transfers may be avoided up to four years after the date of the transfer). The transfer of property from the Debtor to the Defendant occurring on June 25, 2004 is, consequently, well within this time-frame.

Nonetheless, the Defendant argues that the Trustee should be restricted to a one-year reach-back period because that is the applicable limitation on a fraudulent transfer action pursuant to 11 U.S.C. § 548. However, as noted by the Trustee, he is not pursuing recovery under § 548, but, instead, proceeds with his avoidance action under a separate section of the Bankruptcy Code, § 544(b), which allows recovery under state law. There is simply no basis in law for applying § 548's one-year reach-back period to an avoidance action pursuant to § 544(b) and state law. The Defendant's argument is without merit.

B. Existence of a Creditor with Allowable Claim

As another preliminary argument, the Defendant asserts that the Trustee's motion for summary judgment must be denied because the Trustee fails to identify an actual unsecured creditor with an allowable claim as required by § 544(b). Indeed, this Bankruptcy Code section creates a requirement that the Trustee identify a creditor holding an allowable unsecured claim determined under the allowance rules of the Bankruptcy Code. *See* 11 U.S.C. § 544(b); *Bushey*, 210 B.R. at 101. Furthermore, the creditor identified must have standing under "applicable law" to prosecute the specific type of avoidance action brought by the Trustee. *Bushey*, 210 B.R. at 101. In this case, the Trustee brings his avoidance action pursuant to the Ohio UFTA. In order to pursue

an avoidance action under the Ohio UFTA, a creditor must have a claim against the transferor at the time of the challenged transfer. *Id.*; Ohio Rev. Code §§ 1336.04-1336.05.

In response to the Defendant’s argument, the Trustee identifies Miami Valley Hospital as a creditor meeting the requirements of 11 U.S.C. § 544(b). Miami Valley Hospital is an unsecured creditor whose claim has been allowed by the court through the claims allowance process. [Bankr. Doc. 25.] Furthermore, this creditor’s claim relates to the medical care given to the Debtor’s deceased wife, medical care that occurred prior to the Debtor’s transfer of the Beechwood Property. [*Id.*] As such, Miami Valley Hospital was a creditor of the Debtor at the time of the challenged transfer. The court concludes that the Trustee has properly identified an unsecured creditor meeting the requirements of § 544(b).

C. Trustee’s Avoidance Action Pursuant to Ohio UFTA

The Trustee asserts that no genuine issues of material fact exist and he should be granted summary judgment as to his avoidance claim against the Defendant under Ohio Rev. Code § 1336.05(A). Section 1336.05(A) of the Ohio UFTA states:

(A) A transfer made or an 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.

Ohio Rev. Code § 1336.05.⁵ Under this “constructive fraud” provision of the Ohio UFTA, a transaction can be avoided as a fraudulent transfer whenever it is made without reasonably equivalent value and the debtor is insolvent at the time of the transfer or is

⁵ Because the Trustee meets the elements of his claim under Ohio Rev. Code § 1336.05, the court need not analyze his claim pursuant to Ohio Rev. Code § 1336.04.

rendered insolvent as a result of the transfer. *Silagy v. Gagnon (In re Gabor)*, 280 B.R. 149, 155 (Bankr. N.D. Ohio 2002). If the debtor is rendered insolvent by the transaction, there is no requirement that the plaintiff establish any intent on the part of the debtor to hinder, delay or defraud creditors. *Id.*

The first element that the Trustee must demonstrate is that the transfer of the Beechwood property was made in exchange for less than reasonably equivalent value. “In determining whether a challenged transfer is supported by reasonably equivalent value, courts generally compare the value of the property transferred with the value of that received in exchange for the transfer.” *Canyon Systems Corp.*, 343 B.R. at 639 (citing *Aristocrat Lakewood Nursing Home v. Mayne*, 133 Ohio App.3d 651, 729 N.E.2d 768, 778 (1999)). In other words, the court compares what the Debtor gave to what he received in the transaction. In this case, the Debtor transferred the Beechwood Property valued at approximately \$131,650 to the Defendant. In exchange, the Trustee contends that the Debtor received nothing of value. Instead, the Trustee asserts that the Debtor’s purpose for entering the trust agreement and transferring the Beechwood Property to the Defendant was to take care of the Debtor in case he became disabled. [Adv. Doc. 25, Tr., p. 13.] In response to the Trustee’s motion for summary judgment, the Defendant does not contend or provide any evidence that the Debtor received reasonably equivalent value for the transfer of the Beechwood Property. Consequently, no dispute of fact exists and the court concludes that the Trustee has established the first element of his constructive fraud claim.

Next, the Trustee must show that the Debtor was insolvent at the time of the transfer of the Beechwood Property or was rendered insolvent as a result of the transfer.

Ohio Rev. Code § 1336.05(A); *Canyon Systems Corp.*, 343 B.R. at 646-47. Under the Ohio UFTA, “[a] debtor is insolvent if the sum of the debts of the debtor is greater than all of the assets of the debtor at a fair valuation.”⁶ Ohio Rev. Code § 1336.02(A)(1). In the case at hand, upon transferring the Beechwood Property, the value of the Debtor’s assets was reduced from \$170,637.40 to \$38,987.40. At the same time the Debtor’s liabilities totaled between \$163,570.31 and \$208,156.93 depending on whether the court bases the calculation on the Debtor’s schedules or the claims register. [Bankr. Doc. 1, Schedule F; Adv. Doc. 25, Ex. H.] Under either calculation, the transfer of the Beechwood Property rendered the Debtor insolvent.

The Defendant contends that at the time the Debtor filed his bankruptcy petition, he had only \$38,877.42 in debts that were actually the Debtor’s *own* debts. The remainder of the debts were listed in the Debtor’s schedules as “contingent” liabilities for medical care given to the Debtor’s deceased wife. The Defendant argues that these allegedly contingent debts should be excluded from the insolvency analysis. However, the Defendant cites no legal basis for the exclusion of contingent debts.

More significantly, the court has previously adjudicated the issue of whether the Debtor was personally liable for his deceased wife’s medical bills with respect to Miami Valley Hospital’s claim. Through the claims allowance process, the court determined that the Debtor was personally liable and allowed Miami Valley Hospital’s claim, over the Debtor’s objection, in the amount of \$155,470.54. [Bankr. Doc. 25.] Consequently,

⁶ The Defendant contends that the Debtor was paying his debts as they became due at the time of the Beechwood Property transfer. [Adv. Doc. 26, Ex. A.] While that fact is relevant to whether or not a *presumption* of insolvency exists (*see* Ohio Rev. Code § 1336.02(A)(2)), the final determination of insolvency is calculated using a balance sheet test comparing a debtor’s debts to his assets. *See* Ohio Rev. Code § 1336.02(A)(1). *See also* *Youngstown Osteopathic Hosp. Assoc. v. Pathways Center for Geriatric Psychiatry, Inc.* (*In re Youngstown Osteopathic Hosp. Assoc.*), 280 B.R. 400, 410 (Bankr. N.D. Ohio 2002).

Miami Valley Hospital's claim is not contingent in this bankruptcy case and is, in fact, a debt of the Debtor that existed at the time of the transfer of the Beechwood Property. Furthermore, this \$155,470.54 debt is sufficient, by itself, to prove that the Debtor was rendered insolvent when he transferred the Beechwood Property reducing his assets to \$38,987.40. The court concludes that no genuine issue of material fact exists that the Debtor was rendered insolvent as a result of the transfer and the Trustee has established this second and final element of his Ohio UFTA claim.⁷

CONCLUSION

The court concludes that no genuine issues of material fact exist and that the Trustee has established the elements of his fraudulent transfer claim pursuant to 11 U.S.C. § 544(b) and Ohio Rev. Code § 1336.05(A) as a matter of law. The Trustee's motion for summary judgment is **GRANTED**.

SO ORDERED.

cc:

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⁷ As a final note, the Defendant attempts to argue that his request for a jury trial should somehow prevent the court from granting summary judgment at this point in the case. However, the Defendant's request for a jury trial is irrelevant. On summary judgment, it is the court's duty to determine whether genuine issues of material fact exist that must be determined by the trier of fact, whether that trier of fact be a judge or jury. *See* Fed. R. Bankr. P. 7056. If no genuine issues of fact exist, as is true in this case, there is nothing for a trier of fact to resolve and the matter may be determined on summary judgment as a matter of law. Consequently, the Defendant's argument is without basis.

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