

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:)	
)	Adversary Proceeding
JOHN DOUGLAS GALBREATH)	
(Chapter 7 Case Number <u>99-60517</u>))	Number <u>00-6017</u>
)	
<i>Debtor</i>)	
)	
)	
JAMES B. WESSINGER, III)	
TRUSTEE)	
)	
<i>Plaintiff</i>)	
)	
v.)	
)	
JOEL SPIVEY AND RONNIE SPIVEY,)	
DOUGLAS ASPHALT COMPANY,)	
JEAN S. GALBREATH, RICHARD A.)	
EDWARDS, and ALICIA G. EDWARDS)	
)	
<i>Defendant</i>)	

**MEMORANDUM AND ORDERS DENYING MOTIONS FOR SUMMARY JUDGMENT
FILED BY DEFENDANT DOUGLAS ASPHALT COMPANY
AND BY DEFENDANTS JOEL SPIVEY AND RONNIE SPIVEY**

Within the one-year period preceding the involuntary filing of his Chapter 7 bankruptcy case, John Douglas Galbreath (“Debtor”) entered into certain transactions in which he transferred his interests in certain parcels of real property to the Defendants. The Chapter 7 Trustee

(“Trustee”) sought to set aside the transactions as actually or constructively fraudulent or, in the alternative, to equitably subordinate the claims of the transferees to claims of other bankruptcy estate creditors. Defendants Ronnie Spivey and Joel Spivey (“the Spiveys”) and the Douglas Asphalt Company (“DAC”) were among the transferees named in Trustee’s Complaint. The Spiveys and DAC each filed motions for summary judgment on certain counts of the Complaint as more fully outlined below.

These matters constitute a core proceeding under 28 U.S.C. § 157(b) in which this Court has jurisdiction pursuant to the standing reference of the District Court for the Southern District of Georgia under 28 U.S.C. § 157(a).

“[S]ummary judgment is appropriate where ‘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.’ ” Hyman v. Nationwide Mut. Fire Ins. Co., 304 F.3d 1179, 1185 (11th Cir. 2002) (quoting Fed. R. Civ. P. 56(c)). A genuine issue exists when the evidence is such that a reasonable fact finder could find for the non-movant. *See* Buscaglia v. United States, 25 F.3d 530, 534 (7th Cir.1994) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51, 106 S. Ct. 2505, 2511-12, 91 L. Ed. 2d 202 (1986)). The evidence and all factual inferences from the evidence are to be viewed “in the light most favorable to the party opposing the [summary judgment] motion,” and all reasonable doubts about the facts are to be resolved in favor of the non-movant. Hyman, 304 F.3d at 1185 (internal

quotations omitted). Where the moving party negates an essential element of the non-moving party's case, "responsibility then devolves upon the non-movant to show the existence of a genuine issue as to the material fact." Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1116 (11th Cir. 1993). The non-moving party must set forth specific facts by affidavit or otherwise showing that there is a genuine issue for trial. Id.

I. The Douglas Asphalt Company Transactions

A. Factual Background

Within one year prior to the bankruptcy filing, Debtor executed a promissory note to DAC in the amount of \$1.5 million. That note was secured in part by debt deeds granted by Debtor to DAC, and the transfer of Debtor's property interest represented by those debt deeds was effected upon DAC's subsequent recordation of those deeds. Trustee asserted claims against DAC in which Trustee sought avoidance of the promissory note obligation and the property transfers on grounds of constructive and actual fraud. The Court bifurcated the claims against DAC into two separate phases for trial. The constructive fraud claims were addressed in the first phase, after which this Court issued a Memorandum and Order and entered a Judgment (collectively, "the Constructive Fraud Judgment") in Trustee's favor and against DAC. DAC appealed the Constructive Fraud Judgment in the District Court for the Southern District of Georgia. That appeal is pending.

Trustee seeks in this second phase a determination that the transactions between DAC and Debtor are avoidable as actually fraudulent under the provisions of O.C.G.A. § 18-2-22(2)

and 11 U.S.C. § 548(a)(1)(A). In the event and to the extent that any of DAC's claims against the estate are ruled enforceable, either on appeal of the Constructive Fraud Judgment or in connection with the second trial, Trustee alternatively seeks equitable subordination of DAC's claims. Finally, in the event that he prevails in his claim based on O.C.G.A. § 18-2-22(2), Trustee seeks to recover from DAC attorney fees pursuant to O.C.G.A. § 13-6-11.

DAC now moves for partial summary judgment in DAC's favor as to the actual fraud claims and the attorney fee claim.

B. Discussion: Avoidability of the DAC Transfers

Count One asserts that each of Debtor's transfers to DAC was a fraudulent conveyance pursuant to 11 U.S.C. § 548(a)(1) and O.C.G.A. § 18-2-22(2). Compl. ¶ 34 (as amended Mar. 8, 2001). Count Nine asserted, in the alternative, that any enforceable claim of DAC should be equitably subordinated beneath the claims of all other claimants. *Id.* ¶ 56. DAC asserts one basis, and only one basis, for dismissal or partial summary judgment as to Counts One and Nine – that the issues arising from those Counts are “moot.” *See* DAC's Summ. J. Mot. & Br. at 5 (Sept. 20, 2002). In support of its mootness assertion, DAC states that the transfers which Trustee sought to set aside in those Counts have already been set aside, and the related claims disallowed, by the provisions of the Constructive Fraud Judgment. *Id.*

DAC's summary judgment motion was fatuous in light of its pending appeal of this

Court's Constructive Fraud Judgment in the District Court. "Generally, an action is considered 'moot' when it no longer presents a justiciable controversy because [all] issues involved have become academic or dead." Black's Law Dict. 909 (5th ed.) (emphasis added). In this case, DAC has appealed the Constructive Fraud Judgment. DAC's filing of its appeal preserved the justiciable controversy at least until the District Court renders its decision. For as long as any appeal remains pending, it is unfathomable how DAC can argue that Counts One and Nine are moot. Trustee notes simply that DAC's mootness contention in the face of its pending appeal "is a ridiculous argument which fails for lack of consistency," Trustee's Resp. Br. at 5. The Court agrees.

II. The Spivey Transaction

A. Factual Background

In 1997, the Spiveys and Debtor jointly acquired a 46.32 parcel of real property located on Hutchinson Island ("the Hutchinson property"). Debtor's owned a one-third fractional interest in the Hutchinson property. Within one year prior to the bankruptcy filing, the Spiveys purchased Debtor's interest for a price which they state was based upon an earlier appraisal issued at the time of the joint purchase. Spiveys' Summ. J. Mot. and Br. (Sept. 20, 2002) at 3. Trustee asserts that the Hutchinson property transfer was actually fraudulent under O.C.G.A. § 18-2-22(2) or 11 U.S.C. § 548(a)(1)(A), and that the transfer was constructively fraudulent under 11 U.S.C. § 548(a)(1)(B). In the event that Trustee prevails under O.C.G.A. § 18-2-22(2), Trustee seeks attorney fees under O.C.G.A. § 13-6-11. The Spiveys contend that the transfer was not fraudulent because Debtor received equivalent value from the Spiveys in the form of non-cash consideration, the value

of which was \$752,000. *See id.* at 2-4; Spiveys’ Statement of Material Facts ¶ 40.

The Spiveys now move for summary judgment on the actual and constructive fraud claims and the attorney fee claims.

B. Discussion: Avoidability of the Spivey Transfers

Counts One and Six make actual and constructive fraud claims for avoidance of the Hutchinson property transfer. Debtor’s “actual intent to hinder, delay, or defraud” one or more of his creditors is required for avoidance under 11 U.S.C. ¶ 548(a)(1)(A),¹ and both Debtor’s intent and DAC’s knowledge of Debtor’s fraudulent intent is required for avoidance under O.C.G.A. § 18-2-22(2).²

¹ Section 548 provides for avoidance of any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted[.]
11 U.S.C. § 548(a)(1)(A).

² That Georgia Code section provides as follows:
The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void:
. . .
(2) Every conveyance of real or personal estate, by writing or otherwise, and every . . . contract of any description had or made with intention to delay or defraud creditors, *where such intention is known to the taking party*[.]
O.C.G.A. § 18-2-22(2) (emphasis added).

The Spiveys assert that Trustee has no admissible evidence to prove that Debtor intended to defraud his creditors or that DAC knew of Debtor's alleged intent to defraud. They also contend that Trustee cannot prove that the value of Debtor's one-third undivided interest in the Hutchinson property exceeded the \$752,000 value which Debtor received in exchange.

Because lack of equivalent value is not an element that Trustee must prove for avoidance under § 548(a)(1)(A)³ or O.C.G.A. § 18-2-22(2), and because Trustee has demonstrated – in addition to lack of equivalent value – evidence of numerous “badges of fraud” which are relevant to the classic fact question of “actual intent,” summary judgment as to Count One is not appropriate. As to Count Six, value remains an essential element of Trustee's case. By Order entered on November 5, 2002, this Court ruled that Trustee's expert opinion evidence is relevant and admissible. Trustee's

³ Although proof of lack of equivalent value is expressly required for avoidance based on constructive fraud, *see* 11 U.S.C. § 548(a)(1)(B), a trustee's burden in an avoidance action based on actual fraud is limited to proof of the debtor's intent to hinder, delay or defraud creditors, *see* § 548(a)(1)(A); O.C.G.A. § 18-2-22(2). The value of the interest transferred may very well be relevant to a determination of the debtor's intent; however, in that the language of subsection (a)(1)(A) does not condition avoidance on proof of harm to the estate, the trustee is not required to produce valuation evidence. *See* Bear, Stearns Sec. Corp. v. Gredd, 275 B.R. 190, 196 (S.D.N.Y. 2002) (declining “to make ‘diminution of estate’ an element of § 548(a)(1)(A)”); Teitelbaum v. Parameswaran (In re Parameswaran), 50 B.R. 780, 784 (S.D.N.Y. 1985) (“[A]n effort by the debtor to put property beyond the reach of his creditors[,] . . . regardless of the value of the property, may not be tolerated by the courts”) (“The law forbids all efforts to put property beyond the reach of creditors, no matter what its value.” (quoting Feynman v. Rosenthal (In re Feynman), 77 F.2d 320, 322 (2d Cir. 1935)); *Collier on Bankruptcy* ¶ 548.04[1] (15th ed. 2002) (“[F]raud may still be committed under section 548(a)(1)(A) even though a fairly equivalent consideration may pass to the transferor and even though creditors are merely hindered or delayed.”). The trustee's burden is similar in an action to void a transfer under Georgia law. Durham Iron Co. v. Durham, 62 Ga. App. 361, 7 S.E.2d 804 (Ga. App. 1940).

Should the trustee show that the debtor intended to defraud, delay, or hinder creditors, it then devolves upon the transferee to show that the estate was not diminished by the transfer. *See id.* (placing on transferee both “ultimate burden of proof as well as the initial burden of production” as to whether the transfer “reduce[d] the res that would have been available to any creditor or creditors” or “ha[d] any other adverse impact on any creditor or creditors generally”); *Collier on Bankruptcy* ¶ 548.04[1] (“The burden of showing a harmless effect when the fraudulent intent is made out surely belongs on the defendant in a proceeding by the trustee under section 548(a)(1)(A).”).

expert and the Spiveys' expert differ substantially in their opinions of value. Although not addressed in that order I also hold that all disclosures made by Trustee's expert regarding valuation were timely.⁴ Even without the disputed expert opinion, however, the value asserted by the Spiveys might not be adopted by the Court. Their expert's opinion may or may not hold up under cross-examination, or in light of other expert or non-expert evidence offered by Trustee.⁵ The value of the tract remains to be assessed. All material facts are not settled, and summary judgment is not supportable.

III. Award of Attorney Fees

Trustee asserts that, in the event he prevails as to either party in an actual fraud claim under O.C.G.A. § 18-2-22(2), he has the right to attempt to establish his entitlement to attorney fees under O.C.G.A. § 13-6-11.⁶ DAC and the Spiveys contend that Trustee's assertion of the right to attorney fees cannot be established under any set of facts and should be denied as a matter of law. They argue that Trustee has no standing to assert a claim for attorney fees and costs because the

⁴ Federal Rule 37 does provide sanctions for failure to disclose or "to amend a prior response" as required by Federal Rule 26(e)(1). Rule 26(e)(1) establishes a duty to supplement "if a party learns that . . . the additional . . . information has not otherwise been made known . . . during the discovery process." Here, it was during that process, in the deposition of Johnny Ganem, Trustee's expert, that such additional information was "otherwise made known." That supplemental disclosure was timely, since it occurred more than thirty days prior to trial. *See* Fed. R. Bankr. P. 26(a)(3).

⁵ For example, the only possible exclusion based on timeliness would be Ganem's opinion that the tract could be partitioned and that no fractional interest discount needs to be applied. This would in no way eliminate his opinion that the entire tract was worth \$3.7 million, or any of the facts underlying that opinion.

⁶ That section provides:

The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

O.C.G.A. § 13-6-11.

Bankruptcy Code does not provide for recovery of attorney’s fees in a fraudulent transfer action, and that Trustee is granted only the power to avoid certain transfers under state law, not the right to collect attorneys’ fees pursuant to state law.

The avoidance provisions in the Bankruptcy Code do not provide express direction as to the limits of a trustee’s recovery under applicable state law. The Code, which creates the bankruptcy trustee and empowers the trustee to perform certain actions, provides the trustee with the power to avoid certain transfers of a debtor’s property effected prior to the commencement of the case, including the power to “avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim,” 11 U.S.C. § 544(b)(1). If the transfer satisfies the requirements set out in the particular “applicable law” under which an unsecured creditor may have voided the transfer, then the trustee may avoid it. Thus, the trustee’s avoidance power is granted by federal law. In this case, however, the substantive elements for avoidance are those found in Georgia law, which the Bankruptcy Code empowers Trustee to assert.

Numerous bankruptcy and appellate court decisions indicate that recovery of attorney fees as provided by state law is conditionally appropriate, and DAC and the Spiveys have provided no controlling authority that denies, as a matter of law, Trustee the right to establish a claim for attorney fees, provided under Georgia law, for a claim substantively based on Georgia law. *See BankBoston v. Sokolowski (In re Sokolowski)*, 205 F.3d 532, 535 (2d Cir. 2000) (“While there is no

general right to attorney's fees in bankruptcy actions, a party may be entitled to them in accordance with state law.") (denying request for attorney fees because case "turned *solely* on issues of federal bankruptcy law." (emphasis added)); Rothery v. Marshack (In re Rothery), 200 B.R. 644, 650-51 (B.A.P. 9th Cir. 1996) (denying attorney fees because fraudulent transfer action is not "action on a contract" under state statute providing for award of attorney fees to prevailing party in such actions); Simons v. Wassenaar (In re Wassenaar), 268 B.R. 477, 481 (W.D. Va. 2001) (affirming allowance of attorney fees as provided under state fraudulent conveyance law which included attorneys' fee provision); Ackerman v. Kovac (In re All Am. Petroleum Corp.), 259 B.R. 6, 19-20 (Bankr. E.D.N.Y. 2001) (awarding attorney fees to trustee in avoidance action founded on state substantive law based on state attorneys' fee provision); Movitz v. Maricopa County (In re Ball), 257 B.R. 309, 316 (Bankr. D. Ariz. 2001) ("[A]ttorneys' fees may be awarded to the prevailing party in a bankruptcy proceeding only to the extent state law governs the substantive issues and provides for attorneys' fees.") (holding trustee not entitled to attorney fees because substantive issue was governed solely by 11 U.S.C. § 547); Turner v. Davis, Gillenwater & Lynch (In re Inv. Bankers, Inc.), 135 B.R. 659, 670-71 (Bankr. D. Colo. 1991) (approving notion that attorney fees are recoverable where pleadings or arguments were made in bad faith or were frivolous but denying award because record lacked evidence of either); *cf. also* Scott v. Wells Fargo Home Mortgage, Inc. (In re Scott), 281 B.R. 404, 407 (Bankr. M.D. Ga. 2002) (noting that because Georgia substantive law applies in breach-of-contract dispute, O.C.G.A. § 13-6-11 is applicable if other elements of damages are recoverable).⁷

⁷ *But see* Nat'l Bank of Alaska v. Seaway Express Corp. (In re Seaway Express Corp.), 105 B.R. 28, 32 (B.A.P. 9th Cir. 1989), *aff'd*, 912 F.2d 1125 (9th Cir. 1990). The Seaway court denied attorney's fees on the theory that the trustee's avoidance power arose pursuant to federal bankruptcy law, specifically 11 U.S.C. § 544(a)(3). I disagree with this non-controlling rationale. In Seaway the trustee was granted, by federal law, standing to assert the state law remedies available to a bonafide purchaser. He won his case based on state



I adopt the teaching of the cases cited above, which is that attorney fees are not barred, as a matter of law, in the event that a trustee is able to establish the substantive elements for avoidance under state law. Section 544 gives the Trustee standing to sue under state law. In such an action, the substantive issues are governed by Georgia law, not federal law. Georgia law provides in O.C.G.A. § 13-6-11 that if defendants in civil cases, which include those actions brought under O.C.G.A. § 18-2-22, act in certain ways, they may be assessed attorney's fees for their behavior. Accordingly, I hold that attorney's fees permitted under O.C.G.A. § 13-6-11 may be awarded if the transactions at issue are ultimately avoided under O.C.G.A. § 18-2-22(2).

ORDER

1) In that the issues in Counts One and Nine are not moot, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment by Defendant Douglas Asphalt Company as to Counts One and Nine IS DENIED.

2) In that material issues of fact remain to be determined at trial, including the value of Debtor's transferred interest in the Hutchinson property, IT IS THE ORDER OF THIS COURT that the Motion for Summary Judgment by Defendants Joel Spivey and Ronnie Spivey as to Counts One and Six IS DENIED.

3) In that an award of attorney's fees is not barred as a matter of law, IT IS THE

substantive law. If state law permitted successful bonafide purchaser litigants' attorney's fees, the trustee should have been awarded attorney's fees because the rights he asserted were those governed by state law.



ORDER OF THIS COURT that the Motion for Summary Judgment by Defendant Douglas Asphalt Company as to Count Ten and the Motion for Summary Judgment by Defendants Joel Spivey and Ronnie Spivey as to Count Ten ARE DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This _____ day of December, 2002.