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

In the matter of:)
CRAIG S. LEWIS) Chapter 11 Case
Debtor) Number 96-40572

MEMORANDUM AND ORDER
ON MOTION FOR APPROVAL OF SALE OF REAL ESTATE

On May 9, 1996, creditors, Lois I. Accurso and Patricia L. Accurso, filed an objection to the above Motion for approval of sale of real estate and proposed distribution of proceeds. This Court conducted a hearing to consider the same on May 30, 1996. Based upon the parties' briefs, the record in the file, the evidence submitted at trial, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

During the Spring of 1993, Debtor, Craig S. Lewis, and his wife, Lee Ann Romagosa Lewis, resided on Lauren Court in the Village Subdivision. On June 30, 1993, they sold their Lauren Court residence and retained equity of approximately \$13,000.00. About the same time, Mrs. Lewis' uncle, Lee Robert Marks, died bequeathing his residence at 125 Dutch Island Drive, Savannah, Georgia, to his two sisters, Doris Romagosa and Dixie Dickey who are the mother and aunt of Mrs. Lewis respectively. Before he passed

away, Mr. Marks expressed a desire that his niece, Mrs. Lewis, have an opportunity to purchase the property and pursuant to his wishes the sale to Mrs. Lewis was arranged.

Mrs. Romagosa and Mrs. Dickey agreed to sell Mrs. Lewis the home on favorable terms, conveying the property solely in her name for a stated consideration of \$130,000.00 (Ex. M-2). Mrs. Dickey accepted \$60,000.00 in cash which Mrs. Lewis raised by borrowing \$70,000.00 from NationsBank and in turn granting the bank a first-priority security deed. Mr. Lewis co-signed the note but held no record title to the real estate and thus did not execute the deed to secure debt. Mrs. Romagosa received a note and corresponding debt deed reflecting her \$70,000.00 interest. Thus, at the time of the sale, two \$70,000.00 security deeds encumbered the property: a first-priority deed to NationsBank and a second-priority deed to Mrs. Romagosa. The parties do not dispute the order of secured priorities: first NationsBank then Mrs. Romagosa. Indeed, Mrs. Romagosa's debt deed (Ex. M-3) dated June 30 and filed July 2, 1993, recites that it is secondary and inferior to a mortgage in favor of NationsBank in the principal amount of \$70,000.00.

There are two major issues raised by the objection to the sale. First, does Mr. Lewis' bankruptcy estate have any interest in the equity in the estate, and second, how much equity is there? There is no dispute as to the NationsBank debt. What is in factual dispute is the actual amount owed to Mrs. Romagosa by the Debtor and his estranged wife, Mrs. Lewis. In this regard, the creditors assert two positions: (1) because Mrs. Romagosa initially considered selling her interest for \$50,000.00 and because the amount of the monthly interest payments, \$333.34, is exactly eight percent of \$50,000.00, the actual indebtedness is

\$50,000.00¹ and (2) that as evidence by the HUD-1 closing statement Mrs Romagosa made a "gift of equity" and is owed nothing. Both the Lewises and Mrs. Romagosa assert that the true obligation is \$70,000.00 as evidenced by the amount recited in the deed to secure a debt. Specifically, the debt deed recites that Mrs. Lewis is indebted to Mrs. Romagosa in the amount of \$70,000.00, "according to the terms of a certain note given by [Lewis] to [Romagosa] bearing even date herewith with final payment being due on demand." (Ex. M-3). However, the parties have been unable to locate a promissory note reflecting this obligation.²

Considering the lost promissory note and monthly payments of exactly eight percent of \$50,000.00, some doubt initially existed as to the correct amount of the obligation to Mrs. Romagosa, \$50,000.00 or \$70,000.00. However, I hold that Mrs. Romagosa has satisfied her burden and that the obligation owed to her is \$70,000.00. The final arrangement, as reflected by Mrs. Romagosa's testimony and the debt deed, shows that in consideration for her willingness to accept low monthly interest payments without any immediate reduction in the principal, Mrs. Romagosa received a note and debt deed in the amount of \$70,000.00. Whether the omission of a corresponding adjustment to the monthly interest payments was an oversight or intentional is irrelevant. The evidence supports a finding that the amount owed to Mrs. Romagosa is \$70,000.00.

¹ Mrs. Romagosa and her daughter, Mrs. Lewis, initially agreed upon monthly payments of \$333.34, which equals eight percent of \$50,000.

² Mrs. Romagosa testified that she had been unable to find a copy of any promissory note, but both she and the closing attorney, Danny Falligant, believe that a note was prepared at the time of the closing and delivered to her and for unknown reasons cannot now be located.

More fundamentally, the creditors assert that Mrs. Romagosa made an outright gift of her one-half interest in the property to both Mr. and Mrs. Lewis. In this regard, the evidence reveals that the HUD-1 closing statement executed by the parties recites that the \$70,000.00 interest of Mrs. Romagosa was a "gift of equity" rather than a secondary deed to secure debt. Nevertheless, Mrs. Romagosa and Mrs. Lewis testified that the transaction was not a gift, but that Mrs. Romagosa agreed to accept a long term payout of the obligation in order to facilitate her daughter's purchase of the house.³ The evidence revealed that the parties represented their sale as a gift of equity despite the conveyance of a security interest back to Mrs. Romagosa for the sole purpose of qualifying for the loan from NationsBank.⁴ I therefore hold that Mrs. Romagosa has shown by a preponderance of the evidence that no gift was intended and that the obligation owed to her is \$70,000.00.

Even recognizing a valid deed to secure debt to Mrs. Romagosa, there is still equity in the property and the final legal dispute concerns the ownership of the residence. Debtor, Mr. Lewis, claims no interest in this property. The property is vested of record only in Mrs. Lewis, although Debtor co-signed the NationsBank note. The evidence revealed that Mrs. Romagosa would only sell the property if it were titled in her daughter's name alone but that NationsBank would advance the loan only if Debtor agreed to co-sign the obligation. The

³ Mrs. Romagosa testified that she has three other children and could not favor one child over the rest. She only intended to provide her daughter with a loan on favorable terms.

⁴ The Creditors allege that by this act the Debtor and his estranged wife have committed criminal and/or civil fraud. If true, any potential civil fraud claim only would arise in favor of NationsBank and, therefore, is irrelevant to the present proceeding. Moreover, the closing attorney testified that NationsBank acquiesced in the transaction between Mrs. Romagosa and Mrs. Lewis.

closing attorney, Mr. Falligant, testified that when the paperwork initially was drafted in his office, he prepared the deed from Mrs. Romagosa and Mrs. Dickey to both Mr. and Mrs. Lewis because he understood that both Mr. and Mrs. Lewis would be obligated on the deed to secure debt. However, when the closing instructions from the lenders arrived, they revealed that while the borrowers would be Mr. and Mrs. Lewis; title would be vested only in Mrs. Lewis' name. For that reason, and with the agreement of Mr. Lewis, Mr. Falligant redrafted the warranty deed to show Mrs. Lewis as the sole grantee. The evidence is uncontradicted that at the time of the transaction there was never any intent on any of the parties' behalf to convey an interest in this property to Mr. Lewis. I therefore find there was no actual intent by any of the parties for Mr. Lewis to retain any interest in the residence.

By consent of the parties this Court has approved the sale of the residence in the amount of \$172,000.00, the payment of all closing costs and expenses due under the contract, the payment of the first mortgage lien to NationsBank, and has ordered the remaining proceeds to be paid into the Registry of the Court.⁵ Creditors, Lois I. Accurso and Patricia L. Accurso, object to the proposed distribution and proffer two theories: first, a constructive or resulting trust exists in favor of the Debtor and his estate; second, the parties have engaged in a fraudulent conveyance under state law. The creditors point out that Mr. Lewis previously held joint title to the parties' former residence; he obligated himself on the note which was secured by a deed to secure debt of this residence without receiving title to the property, and at the time that this transaction occurred he was admittedly insolvent; therefore, the creditors

⁵ The objection that was interposed strictly addressed the issue of the payment of any proceeds to Mrs. Lewis and conceded the validity of NationsBank's security deed and the reasonable value of the sale price.

contend that Debtor should be deemed to have an equitable or legal interest in the property and that one-half of the net proceeds of this sale should be retained and used to pay creditors in his Chapter 11 case.

Debtor and his estranged wife have occupied the Dutch Island residence from the Summer of 1993 until the present and Mrs. Lewis now requests this Court's permission to sell the house, retire both debt deeds, and keep the remainder of the proceeds for herself. The creditors object contending that half of the net proceeds belong to the Debtor and, therefore, should be considered part of the estate. The evidence revealed that from the time of the closing until the fall of 1995 Mrs. Lewis tendered monthly checks in the amount of \$333.34 payable to Mrs. Romagosa which again amounted to an interest only payment of approximately five and a half percent of the final sale price (\$70,000). However, during that time period, Mrs. Lewis was unemployed and Debtor provided the sole source of income. Mrs. Lewis remained unemployed until September of 1995 and, therefore, acknowledges that while all of the checks written for the monthly interest payment to her mother were drawn on her sole account, the actual source of the funds was Mr. Lewis and his earnings. Copies of the cashed checks were submitted as evidence and virtually all of the checks clearly reveal on the memorandum line that the monthly payments were for the purpose of a "loan." The evidence also revealed that the Lewis' used approximately \$5,200.00 of the \$13,000.00 equity from the Lauren Court property to renovate and improve the Dutch Island residence.⁶

Mrs. Lewis, to the contrary, contends that because her family sold the

⁶ Testimony revealed that the Lewis' spent \$4,000 for floor coverings and \$1,200 for a new refrigerator.

property to her at a bargain price, the intention is clear that Mr. Lewis had no legal or equitable interest in this property. Further, she contends that the sale of the parties' previous residence which was titled in both names and occurred three year ago is not relevant to this Court's inquiry and beyond the preference period for insiders as provided by the Bankruptcy Code.

CONCLUSIONS OF LAW

I. Constructive or Resulting Trust

The Objectors first contend that Debtor's estranged wife held the real estate in a resulting or constructive trust for the Debtor. They allege that the true purchaser of the real estate was the debtor because his name was on the warranty deed until closing, he signed as a co-borrower, and, therefore, essentially controlled the transaction. Objectors cite O.C.G.A. Sections 53-12-90 through 53-12-93 in support of their position.

Georgia law recognizes two types of implied trusts: constructive trusts and resulting trusts. Although the distinction between the two may be characterized as slight, constructive trusts usually arise from fraudulent conduct and resulting trusts are imposed to reflect the parties' intentions. For example, had Mrs. Lewis fraudulently instructed the closing attorney to delete Mr. Lewis' name from the property without her husband's knowledge a constructive trust would clearly be implied in favor of Mr. Lewis. *See Chapman v. Faughnan*, 183 Ga. 114, 187 S.E. 634 (1936) (holding that an implied trust exists in favor of all intended purchasers even though purchasing agent had property titled in his name alone). Constructive trusts typically arise when the holder of the deed has committed a form of trickery or deceit against the rightful true owner divesting legal but not equitable title. Here, Mr. Lewis was aware of the terms of the transaction and signed the promissory note knowing that he would

not receive a corresponding interest. O.C.G.A. Section 53-12-93 clearly states that "the person claiming the beneficial interest in the property may be found to have waived the right to a constructive trust by subsequent ratification or long acquiescence." Clearly, Mr. Lewis ratified the transfer of title to his wife at the time of the sale and, therefore, these facts do not warrant an implied constructive trust in favor of Debtor's estate.

In pertinent part, O.C.G.A. Section 53-12-91 defines a resulting trust as follows:

A resulting trust is a trust implied for the benefit of the settlor or the settlor's successors in interest when it is determined that the settlor did not intend that the holder of the legal title to the trust property also should have beneficial interest in the property, under any of the following circumstances:

(3) A purchase money resulting trust as defined in subsection (a) of Code Section 53-12-92 is established.

O.C.G.A. Section 53-12-92, which defines a "purchase money resulting trust," provides as follows:

(a) A purchase money resulting trust is a resulting trust implied for the benefit of the person paying consideration for the transfer to another person of legal title to real or personal property.

(b) Except as provided in subsection (c) of this Code section, such payment of consideration shall create a presumption in favor of a resulting trust, but this presumption is rebuttable by a preponderance of the evidence.

(c) If the payor of consideration and transferee of the property are husband and wife, parent and child, or siblings, a gift shall be presumed, but this presumption is rebuttable by clear and convincing evidence.

When determining the existence of a purchase money resulting trust, the primary focus is on the intention of the parties. At the time of the purchase, did the parties intend to create an interest in the debtor? Here, the clear answer is no. O.C.G.A. Section 53-12-92(c) establishes a presumption that in a transaction between a husband and wife the transfer is a gift. This presumption is rebuttable by clear and convincing evidence. *See* O.C.G.A. § 53-12-92(c). Here, the Objectors have not satisfied their burden. A court may consider all facts and circumstances surrounding the transaction to determine whether the parties intended a purchase money resulting trust. *See Harrell v. Harrell*, 249 Ga. 170, 171 (1982); *Talmadge v. Talmadge*, 241 Ga. 609, 247 S.E.2d 61 (1978) (parol evidence of conduct, circumstances, and declarations, is admissible to show the intent of the parties). In the present case, the evidence reveals that at the time of the transaction the parties intended for Mr. Lewis to have no interest in the real estate. Mr. Lewis' name was deleted from the deed specifically because it was the intention of all parties involved that he receive no interest. Mr. Lewis accepted the terms of the agreement and testified that at no time did he consider himself an implied owner of the property. Therefore, a purchase money resulting trust does not exist in favor of the Debtor. *See Scales v. Scales*, 235 Ga. 509 (1975) (holding that because the appellees offered no evidence as to an understanding or agreement, either expressed or shown by the nature of the transaction, the presumption of gift remains un rebutted).

II. Fraudulent Conveyance under State Law

The first issue is the creditors' standing to assert this action. 11 U.S.C. 544(b) provides as follows:

(b) The trustee may 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 that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

Congress enacted 11 U.S.C. 544(b) as a means for the trustee or debtor-in-possession to set aside fraudulent transfers pursuant to applicable state laws that create a cause of action in favor of an actual creditor. Generally, a creditor has no standing to bring an adversary proceeding pursuant to 544(a) or (b). *See Saline State Bank v. Mahloch*, 834 F.2d 690 (8th Cir.1987); *In re LMJ, Inc.*, 159 B.R. 926 (D.Nev. 1993); *Matter of Milam*, 37 B.R. 865 (Bankr.N.D.Ga. 1984); *In re Prime Motor Inns, Inc.*, 135 B.R. 917 (Bankr.S.D.Fla. 1992). In addition to the language of the Section 544(b) which does not include a creditor within its grant of authority, courts have articulated strong policy consideration against permitting a creditor's standing under 544(b): "(1) general creditors otherwise would hinder plans to reorganize under chapter 11; (2) one group of unsecured creditors might benefit to the detriment of other unsecured creditors as a result of piecemeal litigation; and (3) the various motions and cross claims that would inevitably ensue might create needless confusion and inconvenience for all involved (citations omitted)." *Saline State Bank v. Mahloch*, 834 F.2d at 694. Some courts have modeled a limited exception that permits a creditors' committee to pursue these actions. *See*

In re Savino Oil & Heating Co., 91 B.R. 655, 655-57 (Bankr.E.D.N.Y. 1988).⁷ Only under extreme circumstances have courts permitted individual creditors to pursue claims under the trustee's strong-arm provisions. See In re McKeesport Steel Castings Co., 799 F.2d 91 (3rd Cir.1986) (holding that a utility may bring claim when there is a refusal to act by debtor-in-possession, non-participation by the creditors' committee, and creditor has a colorable claim); Matter of Shelby Motel Group, Inc., 123 B.R. 98 (N.D.Ala. 1990) (holding that a creditor with a colorable claim may be permitted to prosecute a claim on behalf of estate where debtor-in-possession refused to sue and bankruptcy court refused to appoint trustee).

In the present case, the objection to the proposed sale is now restricted to the question of distribution of the remaining proceeds. The assertion is that the circumstances surrounding the sale of joint property and purchase of a new home solely by the wife would be voidable under Section 544(b). For the following reasons, I hold that the creditors have standing to object to the distribution. First, the parties have not expressly raised the issue of standing, probably because the creditor has standing to object to the sale even if there is no standing to bring the underlying adversary. As a result, I hold that any lack of standing is waived. See In re Baugh, 60 B.R. 102 (Bankr.E.D.Ark. 1986) (debtor-in-possession did not desire to sue his father; parties agreed to allow creditor to bring action; therefore, "defendants have waived any objection they may have had to this incorrect procedure"). Second, the debtor-in-possession has expressed no desire to dispute this matter with his estranged wife.

⁷ In these instances before a creditors committee may pursue such an action, it must satisfy four requirements: (1) a demand must have been made upon the trustee or debtor-in-possession to bring such an action; (2) such demand must have been unjustifiably refused; (3) there must have been a prima facie demonstration of a colorable claim; and (4) the party seeking to bring the action must have obtained leave of the court to do so. See Louisiana World Exposition, Inc., 832 F.2d 1391, 1397 (5th Cir.1987).

Yet, no reason, other than Debtor's inaction on this one issue, exists that would support the appointment of a trustee. In order to conserve the limited resources of the estate, it would be imprudent to appoint a trustee when a willing creditor has already undertaken the litigation. Finally, the creditors have demonstrated a colorable claim pursuant to Section 18-2-22 of the Georgia Code which would otherwise support a motion to appoint a trustee, if requested and the debtor-in-possession refused to pursue the claim. For the above reasons, I hold the creditors have standing to proceed with their objection pursuant to 544(b).

In pertinent part, O.C.G.A. Section 18-2-22 states 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:

- (1) Every . . . transfer by a debtor, insolvent at the time, of real or personal property . . . to any person, either in trust or for the benefit of or on behalf of creditors, where any trust or benefit is reserved to the assignor or any person for him;
- (2) Every conveyance of real or personal estate, by writing or otherwise . . . with intention to delay or defraud creditors, where such intention is known to the taking party;
- (3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

Section 544(b) of the Bankruptcy Code incorporates these provisions to permit a challenge to certain transfers made by a debtor. Essentially, each paragraph of Section 18-2-22 has two requirements as follows:

18-2-22(1): (a) insolvent debtor; (b) trust or benefit is

reserved to the debtor;

18-2-22(2): (a) debtor's actual intent to delay or defraud creditors; (b) assignee's knowledge of debtor's intent;

18-3-22(3): (a) insolvent debtor; (b) conveyance or assignment not supported by valuable consideration;

Federal Deposit Insurance Corp. v. U.S., 654 F.Supp. 794 (N.D.Ga. 1986). In Georgia, conveyances between husband and wife are to be scrutinized closely and the burden to prove good faith is upon them. See United States v. McMahan, 392 F.Supp. 1159 (N.D.Ga. 1975), *aff'd*, 556 F.2d 362 (5th Cir.1977). The evidence proffered at trial does not support a finding of a fraudulent conveyance pursuant to Sections 18-2-22(1) or (2); however, under Section 18-2-22(3) I hold that Debtor fraudulently transferred to his wife his portion of the proceeds from the Lauren Court residence which ultimately was reinvested in the Dutch Island residence.

O.C.G.A. Section 18-2-22(1) requires proof that a trust or benefit was reserved for the debtor. No evidence supported a contention that the Debtor has reserved any portion of any proceeds for himself. In fact, the Debtor and his wife are in the process of obtaining a divorce in which he has not contested her ownership of the Dutch Island residence. O.C.G.A. Section 18-2-22(2) requires a plaintiff to demonstrate that the Debtor intentionally delayed or defrauded creditors and that the assignee had knowledge of debtor's intent. Although Debtor's intent may be inferred from the surrounding circumstances, these facts do not support a finding that Mrs. Lewis knew or reasonably should have known, at the time of the transfer approximately three years ago, that her husband's actions were defrauding creditors.

However, O.C.G.A. Section 18-2-23(3) requires only that the Plaintiff

demonstrate that the Debtor was insolvent at the time of the transfer and that the assignee, Mrs. Lewis, gave no consideration. Mr. Lewis admitted that he was insolvent at the time that he and his wife sold their Lauren Court residence and moved to Dutch Island. When Mr. Lewis reinvested the equity of a jointly owned residence in a residence titled solely in his wife's name without receiving valuable consideration, he effectively defrauded his creditors pursuant to O.C.G.A. Section 18-2-22(3). The total equity was \$13,000.00. I therefore hold that Mr. Lewis' one-half, or \$6,500.00, when transferred to his wife to reinvest in a home titled in her name was avoidable. The objection is sustained in part as to half of the Lauren Court equity.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THE COURT that \$6,500.00 of the proceeds from the approved sale be paid into the Registry of the Court.

IT IS FURTHER ORDERED that the remainder of the proceeds be distributed, \$70,000.00 to pay off the second deed to secure debt of Mrs. Romagosa and the balance to Mrs. Lewis.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 1996.