

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

In the matter of:)	
)	Adversary Proceeding
JAMES WILLIAM DONNELLY)	
(Chapter 7 Case Number <u>98-43608</u>))	Number <u>99-4110</u>
)	
<i>Debtor</i>)	
)	
)	
WILEY A. WASDEN, III)	
Chapter 7 Trustee)	
)	
<i>Plaintiff</i>)	
)	
v.)	
)	
ROBERT WATSON)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

Trustee, Wiley A. Wasden, III, filed this action alleging that the Defendant received a preferential transfer, as defined by 11 U.S.C. § 547(b), of \$3,000.00 within ninety (90) days of the filing of Debtor’s bankruptcy petition. This Court conducted a trial of the adversary proceeding on December 1, 1999. After consideration of the evidence adduced at trial and the arguments of counsel, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Trustee filed this action because, in the Debtor's Statement of Financial Affairs Number 3(a), the Debtor claims to have paid \$3,000.00 to the Defendant on November 12, 1998. The Debtor claims to have made the payment against a debt which was originally in the amount of \$13,000.00. The Debtor's bankruptcy schedules show that the Debtor still owes a debt of \$13,000.00 to Mr. Watson.

At trial, Debtor, James William Donnelly, testified that he paid \$3,000.00 in cash to Mr. Watson on November 12, 1998. He testified that he did not ask Mr. Watson for a receipt and has nothing to document the transfer. Mr. Watson unequivocally denies ever receiving the \$3,000.00 or any part of it from the Debtor.

The Debtor and Mr. Watson both testified that the Debtor asked Mr. Watson for a loan of \$10,000.00. As consideration for the loan the Debtor gave Mr. Watson a check made payable to cash for \$13,000.00. The Debtor agreed to make the check good in full within three weeks by paying \$1,000.00 a week until the third week and then paying the balance in full.

The Debtor was the proprietor of an auction business. He took goods on consignment, but also purchased goods at private sales for resale at auction. The Debtor told Mr. Watson that he would use Mr. Watson's loan to buy a gun collection which the Debtor would resell at auction for more than enough to cover the \$13,000.00 check. The Debtor admits that the money was not used for that purpose.

The Debtor made no payment on the loan for some weeks. Then he asked

Mr. Watson to lend him another \$30,000.00. Mr. Watson refused to do so. The Debtor testified that he then borrowed \$10,000.00 cash from Mr. W. R. Hires in exchange for a \$13,000.00 check on the same type of arrangement he had made with Mr. Watson. The Debtor admits that he told Mr. Hires that he would use the \$10,000.00 to purchase merchandise for resale at auction. The Debtor then claims to have paid Mr. Watson \$3,000.00 from the Hires loan proceeds.

The transactions between Debtor, Mr. Watson, and Mr. Hires all took place at the Debtor's office. Mr. Joe Bradley is a retiree who volunteered to help the Debtor work through his financial problems. Mr. Bradley was in the Debtor's office almost every day during this period. He reviewed accounting records for the Debtor and attempted to negotiate work-out arrangements with 22 of the Debtor's lenders. He was aware of the existence of the company's operating account and the company's escrow account and discussed financial matters daily with the Debtor. The Debtor told Mr. Bradley that Mr. Bradley was dealing with all of the Debtor's lenders. Mr. Bradley testified that the Debtor concealed the debts to both Mr. Watson and Mr. Hires.

CONCLUSIONS OF LAW

The Trustee must establish, by a preponderance of the evidence, each essential element of a voidable preference under Section 547(b). Travelers Ins. Co.. v. Cambridge Meridian Group, Inc. (In re Erin Food Services, Inc.), 980 F.2d 792, 799 (1st Cir. 1992); In re Ralar Distributors, 4 F.3d 62 (1st Cir. 1993); ABB Vecto Gray, Inc. v. First Nat'l Bank of Bethany, Oklahoma, 9 F.3d 871, 874 (10th Cir. 1993) (citing 4 Collier on Bankruptcy 547.21[5], at 547-107 (15th ed. 1995); In re Robin Industries, Inc., 78 F.3d 30,

The first fact which the Trustee must prove is that there was a transfer of \$3,000.00 by the Debtor to Mr. Watson. The Trustee's only evidence of the transfer is the testimony of the Debtor who says he gave Mr. Watson \$3,000.00 in cash.

Mr. Watson testified unequivocally that he did not receive the \$3,000.00 cash or any part of it from the Debtor. The Court had the opportunity to observe Mr. Watson's demeanor as a witness and finds that his testimony is credible. Without any corroborating evidence of a transfer, the Trustee failed to carry his burden of proof as a matter of law. The Trustee has failed to prove a transfer by a preponderance of the evidence, even if the Debtor's testimony were credible. It is not.

The testimony of Mr. Watson, the testimony of Mr. Bradley, and even the testimony of the Debtor under cross-examination demonstrate the Debtor's pattern of deception. The Debtor admits that he lied to Mr. Watson about his use of the Watson loan proceeds. The Debtor admits that he lied to Mr. Hires about the use of the \$10,000.00 he obtained from Hires. The Debtor even lied to his own business associate, Mr. Bradley, who was working as a volunteer to make payment arrangements with creditors.

Besides his history of deceit, the Debtor's claim to have paid Mr. Watson in cash is inherently questionable. The Debtor did business regularly by check, and even documented the Watson and Hires loans with checks. He offers no credible reason why he would choose to repay Mr. Watson with cash, and without getting a receipt.

This Court concludes that the Trustee has failed to prove that the Debtor paid the \$3,000.00 to Defendant. Therefore, the prayers of the Trustee's complaint are denied.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT judgment be entered in favor of the Defendant.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of April, 2000.