

IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF GEORGIA  
AUGUSTA DIVISION

In the Matter of:	*	Chapter 13 Case
	*	Number 89-10496
JOHNNY GRISSOM and	*	
JEANETTE HOLLAND GRISSOM,	*	
	*	FILED
Debtors	*	Aug. 23 6 45 PM '90
	*	
JOHNNY GRISSOM and	*	
JEANETTE HOLLAND GRISSOM	*	
	*	
Plaintiffs/Appellees	*	
	*	
vs.	*	CIVIL ACTION
	*	CV190-035
C & S NATIONAL BANK, BIRNET L.	*	
JOHNSON, LESLIE R. JOHNSON,	*	
	*	
Defendants/Appellant	*	

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ORDER ON APPEAL

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Before the Court is the request for oral argument of appellant Citizens & Southern National Bank. Having reviewed the record and the parties' briefs, I believe oral argument would not substantially assist the Court in resolving the issues on appeal. Therefore, the request is DENIED.

This is an appeal from an order and judgment of the United States Bankruptcy Court for the Southern District of Georgia, Augusta Division. The facts of the case are summarized as follows. Appellant, Citizens & Southern National Bank ("C & S"), made a loan to appellees, Johnny and Jeanette Grissom (the "Grissoms"). C & S secured the loan by a deed to secure debt conveying title to the Grissoms' property. The Grissoms defaulted on the loan and C & S conducted a non-judicial foreclosure sale of the property. On April 4, 1989, Birnet and Leslie Johnson purchased the property from C & S for the sum of \$14,049.00, which equalled the defaulted loan

amount. On April 5, 1989, the Grissoms filed their Chapter 13 petition. On April 10, 1989, the Clerk of Superior Court for Richmond County recorded the deed under power of sale conveying the property to the Johnsons. The Grissoms filed their complaint in the bankruptcy court on May 14, 1989, alleging that: (1) C & S and the Johnsons<sup>1</sup> violated the stay provisions of 11 U.S.C. §362 by recording the deed after the order for relief was entered; and (2) the transfer was avoidable as fraudulent under 11 U.S.C. §548(a)(2).<sup>2</sup> The bankruptcy court tried the case on July 7, 1989. Finding no violation of the automatic stay

occurred, the bankruptcy court held the Grissoms were not entitled to recover on count one of the complaint. On count two the bankruptcy court held the transaction was a fraudulent transfer avoidable under section 548 and awarded the Grissoms a joint and several money judgment against C & S and the Johnsons for \$11,941.00<sup>3</sup> pursuant to 11 U.S.C. §550. The Grissoms did not appeal the bankruptcy court's ruling on count one of the complaint.

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<sup>1</sup>The Bankruptcy Court held the Johnsons in default for failing to file responsive pleadings.

<sup>2</sup>11 U.S.C. §548(a)(2) provides:

The trustee may avoid 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 -  
(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and  
(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

<sup>3</sup>The Bankruptcy Court arrived at this figure by subtracting the amount received at the foreclosure sale (\$14,059.00) from the fair market value of the property (\$26,000.00).

Essentially two issues are raised on appeal:

- 1) Whether the bankruptcy court erred in finding that the fair market value of the property was \$26,000.00; and
- 2) Whether this Court should exercise its equitable powers to except C & S from the dictates of 11 U.S.C. §550.

The appropriate standard for reviewing the findings of the bankruptcy court is whether the finding was clearly erroneous. Bankruptcy Rule 8013; In re Garfinkle, 672 F.2d 1340, 1344 (11th Cir. 1982).

The parties do not dispute that the foreclosure left the Grissoms insolvent. Thus, if the transfer was for less than a reasonably equivalent value, it is avoidable. 11

U.S.C. 548(a)(2).<sup>4</sup> Based on evidence adduced at trial, the bankruptcy court determined the fair market value of the property at the time of the foreclosure sale was \$26,000.00. Having determined the fair market value, the bankruptcy court correctly followed the general rule that a sale for less than seventy percent (70%) of the fair market value is less' than a "reasonably equivalent value." Durrett v. Washington National Insurance Co., 621 F.2d 90 (11th Cir. 1989); Walker v. Littleton, 888 F.2d 90 (11th Cir. 1989). Thus, the bankruptcy court held that C & S's sale of the property for \$14,059.00 was for less than a reasonably equivalent value.<sup>5</sup>

C & S argues the bankruptcy court's finding that the fair market value of the property was \$26,000.00 is incorrect. C & S contends the bankruptcy court improperly relied on the Richmond County tax card in assessing the value because the

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<sup>4</sup>See footnote number 2.

<sup>5</sup>\$26,000.00 x .70 = \$18,200.00.

tax card was hearsay for "any purpose other than the fact that it was the tax card relating to this property." C & S alleges the "only evidence of value" was Birnet L. Johnson's testimony that the property was worth \$18,000.00. The sale was for a reasonably equivalent value if the fair market value was \$18,000.00.<sup>6</sup> Durrett, Walker, supra.

Under the public records exception to the hearsay

rule,<sup>7</sup> the tax card is not hearsay and was properly used by the bankruptcy judge to measure the property's value. Furthermore, the bankruptcy court correctly concluded that other evidence as to the property's value was not independent and thus, less reliable than the tax card. Mr. Johnson's testimony was not independent because he owns the property. Likewise, Mrs. Grissom's interest in the outcome of this controversy affected the credibility of her testimony. The tax card was the only independent evidence on which the bankruptcy court could rely. As the trier of fact, the bankruptcy court was in the best position to evaluate the evidence. I

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<sup>6</sup>\$18,000.00 x .70 = \$12,600.00. The property sold for \$14,059.00.

<sup>7</sup>Rule 803: The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . (8) **Public records and reports.**

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness . . .

cannot find that the bankruptcy court was clearly erroneous. Accordingly, the bankruptcy court's holding that the fair market value of the property was \$26,000.00 is AFFIRMED.

C & S argues that even if this Court affirms the bankruptcy court's finding as to the property's value, the entry of a money judgment against C & S pursuant to 11 U.S.C. § 550 is inequitable. C & S asserts that if it satisfies the judgment, it will only receive \$2,118.00 for a \$14,059.00 debt and that this is cause for this Court to except C & S from the provisions of section 550.<sup>8</sup> Section 550(a) allows the trustee to recover property fraudulently transferred, or in the court's discretion, the value thereof, from:

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.<sup>9</sup>

C & S argues the foreclosure sale only enabled it to satisfy the Grissoms' debt. Thus, C & S contends it did not benefit from the transfer. C & S urges this Court to exercise its equitable powers to circumvent the alleged unjust result that follows from a strict application of section 550 in this case.

It is true that under certain circumstances a literal application of section 550 will produce an unjust result by authorizing the trustee to recover from an innocent third party. Armstrong v. Ketterling, 93 B.R. 686 (Bankr.

S.D. Ohio 1988). 4 Collier on Bankruptcy, ¶ 550.02 (L. King 15th ed. 1989). For

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<sup>8</sup>C & S received \$14,059.00 for the sale of the property. If C & S pays the entire judgment, \$11,941.00, C & S is left with \$2,118.00.

<sup>9</sup>The Bankruptcy Court correctly pointed out that the section 550(b)(1) defense is not available in this case because the defense only applies to immediate or mediate transferees of the initial transferee. This case involves an "initial transferee" (the Johnsons) and an "entity for whose benefit such transfer was made" (C & S).

example, the Armstrong court held that an entity acting as a commercial conduit of funds is not an "initial transferee" within the ambit of section 550(a)(1) and thus, the trustee can not recover for a fraudulent transfer from that entity. Armstrong, 93 B.R. at 694; see also Metsch v. City National Bank of Miami, 64 B.R. 585, 586 (Bankr. S.D. Fla. 1986); Metsch v. First Alabama Bank of Mobile, 59 B.R. 643, 645 (Bankr. S.D. Fla. 1986); Salmon v. Universal Trading Corp., 59 B.R. 873, 875 (Bankr. S.D.N.Y. 1986). An entity acting as a commercial conduit is excepted from section 550 because such an entity does not derive a benefit from the transfer or have discretion in disposing of the property transferred. Metsch, 59 B.R. at 645. Collier illustrates two other situations where a literal application of section 550 is inappropriate.

[I]f property is transferred to a good faith surety or endorser as consideration incidental to the guarantee of an antecedent debt of a creditor, and the surety subsequently pays the creditor, the property or its value should be recovered from the creditor for whose benefit the transfer was made rather than from the surety or endorser to whom the transfer was made. Likewise, if a transfer is made to a creditor who is not an insider more than 90 days but within one year before bankruptcy and the effect is to preferentially benefit an insider-guarantor, recovery should be restricted to the guarantor and the creditor should be protected.

4 Collier on Bankruptcy ¶ 550.02 (L. King 15th ed. 1989). See, e.g., Schmitt v. Equibank, 34 B.R. 888, 893-94 (Bankr. W.D. Penn. 1983); In re Duccuilli Formal Wear, 8 B.C.D. 1180 (Bankr. S.D. Ohio 1982); In re Cove Patio Corp. 19 B.R. 843 (Bankr. S.D. Fla. 1982); But cf. Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186, 1201 (7th Cir. 1989) (holding "the preference-recovery period for outside creditors is one year when the payment produces a benefit for an inside creditor . . .").<sup>10</sup>

In the examples above where a court has exercised its equitable powers to except a party from section 550, the party excepted received no benefit from the

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<sup>10</sup>Other examples of parties who are entitled to the court's equitable protection because they were not benefitted by a fraudulent transfer are ". . . a messenger, the postal service, a common carrier, a warehouse, or a broker." Metsch, 59 B.R. at 645.

transfer. C & S, however, had a beneficial interest in the transfer at issue. C & S argues it did not benefit by receiving what it was legally entitled to. This argument is unfounded. C & S received \$14,059.00 which satisfied the outstanding loan. No analogy can be drawn between the facts of this case and the above-cited cases where an exception to section 550 was necessary. Therefore, the exceptions do not apply to C & S.

C & S has produced no authority, nor has this Court located any, which supports excepting C & S from section 550 under the equitable powers of this Court. "Bankruptcy courts . . . cannot use equitable principles to disregard unambiguous statutory language." Ray v. City Bank and Trust Co., 899 F.2d 1490, 1494 (6th Cir. 1990); Northwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988). Section 550 is not unclear; it provides that the trustee can recover for a fraudulent

transfer from either the initial transferee or the entity for whose benefit the transfer was made. Here, the initial transferee was the Johnsons; the transfer was made for the benefit of C & S. "[T]he trustee may recover from any combination of the entities mentioned [in section 550 (a)] subject to the limitation of a single satisfaction set forth in section 550(c)." 4 Collier on Bankruptcy ¶ 550.02 n.8 (L. King 15th ed. 1989). Thus, section 550 authorized the bankruptcy court to award the Grissoms judgment against C & S and the Johnsons jointly and severally. For the reasons stated, the judgment is AFFIRMED. The case is REMANDED to the bankruptcy court for further proceedings consistent with this decision.

ORDER ENTERED at Augusta, Georgia, this 23rd day of August, 1990.

DUDLEY H. BOWEN, JR.  
UNITED STATES DISTRICT JUDGE