

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

In the matter of:)
)
ROBERT RAY GREENBERG)
a/k/a Robert Roy Greenberg)
(Chapter 7 Case Number 01-42188))

Debtor

JAMES B. WESSINGER, III)
Chapter 7 Trustee)

Plaintiff

v.)
)
ROBERT RAY GREENBERG,)
SUSAN DISNEY GREENBERG,)
BARBARA J. HINES, and)
BETTIE C. JENKINS)

Defendants

Adversary Proceeding

Number 02-4025

FILED
at 2 O'clock & 30 min P M
Date 5/13/03

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia

MS

MEMORANDUM AND ORDER

On July 25, 2001, Robert R. Greenberg ("Debtor") filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. This adversary proceeding was filed on February 15, 2002 by James B. Wessinger, III, the Chapter 7 Trustee ("Trustee"), to set aside a conveyance of real property located at 605 Habersham Street ("House") from Debtor to his present wife Susan Disney Greenberg ("Disney"). This Court denied

26

Debtor's discharge in his Chapter 7 case by Order filed of record by the Clerk of Court on August 2, 2002. The trial for the adversary proceeding was conducted on February 13, 2003.

This Court has jurisdiction pursuant to 28 U.S.C. §157 (a) and (b)(1) over this core proceeding. Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

STATEMENT OF FACTS

On July 1, 1991 the Debtor's ex-wife, Lois Greenberg ("Lois"), obtained a Judgment for Arrearages for \$180,100.00 plus interest in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida. Pl.'s Ex. 3. The judgment related to amounts due from Debtor for past due child support, educational expenses for his child, health insurance for same child, reasonable cost of providing living quarters for the child and Lois, and attorney fees based on a 1981 "Property Settlement Agreement and Child Custody Agreement." In August 1991, Lois transferred the Florida judgment to the Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division. Pl.'s Ex. 4.

In 1992 Mary Raab ("Raab") obtained a judgment in the District Court of the Virgin Islands, Division of St. Thomas and St. John for the amount of \$98,237.50 plus interest. Pl.'s Ex. 1. The judgment included amounts for punitive damages and rental fees based on Debtor's fraud and breach of fiduciary duty to Raab. The Court found that Debtor

withheld half of the proceeds due to Raab in the sale of a condominium that he had brokered.

On April 22, 1994, Debtor purchased the House located at 605 Habersham Street. Pl.'s Ex. 6. Based on a Writ of Execution issued by the United States District Court for the Southern District of Chatham County, Georgia on March 18, 1994 and the judgment obtained in 1992, Raab filed a judgment lien in the amount of \$122,616.87 against Debtor's real and personal property, including the House, on January 6, 1995. Pl.'s Ex. 2.

On June 17, 1995, Debtor transferred a one-fourth interest in the House to Disney who was married to someone else at the time. Pl.'s Ex. 7. On July 1, 1996, Disney conveyed her entire interest in the House back to Debtor. Pl.'s Ex. 8. Disney stated that she conveyed the House on the advice of her domestic relations counsel in order to get the House out of her name during her pending divorce. Following the finalization of Disney's divorce, Debtor conveyed a one-half interest in the House to Disney on July 11, 1997. Pl.'s Ex. 9. On July 6, 1998, Debtor conveyed the remaining one-half interest to Disney. Pl.'s Ex. 10. All transactions were made for, "consideration of the sum of one (\$1.00) Dollar, cash in hand paid, and other good and valuable considerations." In August of 1998 Debtor and Disney were married.

On May 25, 2000, Lois revived the transferred Florida judgment and undertook collection efforts to enforce her judgment by attaching to certain trust assets in

Philadelphia, Pennsylvania. Pl.'s Ex. 4. The trust assets represent the corpus of a spendthrift trust created by Debtor's parents for his benefit. In an effort to deal with Lois' judgment and the freezing of the trust assets, Debtor filed this bankruptcy case on July 25, 2001.

Debtor signed a Quitclaim Deed transferring whatever interest he had remaining in the House to Disney on January 14, 2002. Pl.'s Ex. 11. Debtor stated that this transfer was needed to clarify the title after Disney's name change following their marriage. Also in January, 2002, Disney pledged the House as collateral to Barbara J. Hines and Bettie C. Jenkins and received mortgage proceeds in the amount of \$47,155.00. Def.'s Ex. 1.

On May 15, 2002 I issued an Order on Debtor's Motion for Leave to Sell Real Estate. It was ordered that the House be sold for \$155,000.00 and that all funds received should be held by the Trustee until the ownership of the House was resolved.

The Trustee argues that the transfers of Debtor's interest in the House to Disney were fraudulent pursuant to Georgia Statute §18-2-22(2) such that the conveyances can be avoided by 11 U.S.C. § 544(b)(1) of the Bankruptcy Code, and the House turned over for liquidation and distribution. Debtor made the transfers, Trustee argues, with the actual intent to hinder, delay or defraud creditors and that intent was known by Disney. Trustee bases his assertions on the fact that, at the time of the transfers, Debtor owed

substantial amounts for the Raab and Lois judgments as well as other various debts. Further, the transactions involved inadequate consideration and Disney had constructive notice of the Raab judgment.

Debtor testified that the transfers were not effectuated to defraud his creditors and that he was not made insolvent by the transfers; instead, he claimed to have also owned \$200,000 in cash and certificates of deposit at the time. Debtor's stated reason for conveying the House was to gain the confidence of Disney. Disney was married at the time Debtor met her and was described as being distrustful of men because of problems in her thirty-year marriage. In short, Debtor felt that transferring the House into Disney's name would be the best way to show her that "whatever he had was hers."

At the time of the transfers, Debtor was aware of the judgments to Lois and Raab. Debtor testified, however, that he was told by Lois and his daughter that he had no reason to "worry about" the Lois judgment and he felt that he had paid all amounts that were actually due. Further, Debtor believed that the Raab judgment was unenforceable because of certain irregularities in how that judgment was obtained and the fact that Raab was in jail. Debtor was not concerned about the effect of the judgments on the House despite the fact that he worked in the real estate business for approximately 50 years, was aware of the effect of the recordation of a judgment on title to real estate and had served as a bankruptcy trustee.

Disney testified that the conveyances were made with no prohibited purpose or intent to defraud or delay, but constituted a wedding gift from Debtor. She further testified that she was not aware of either the Raab or Lois judgment at the time she received the transfers of the House. Instead, she claims to have learned of the Raab judgment when she tried to sell the House in 1999¹ and the Lois judgment in May of 2000 when Debtor received a phone call concerning it. Further, Disney argues that she had no reason to suspect that Debtor owed amounts for child support since his children were no longer minors at the time of the conveyances.

CONCLUSIONS OF LAW

Trustee's Complaint is not Barred by the Statute of Limitations

As a threshold matter, it must be determined if this Court can allow Trustee's adversary complaint as timely filed. Trustee wishes to avoid two transactions² taking place on July 11, 1997 and July 6, 1998. Trustee filed his Complaint to Avoid Fraudulent Transfer on February 15, 2002. More than four years elapsed between the first conveyance and filing of the complaint. There is no statutorily defined time period in Georgia for bringing a fraudulent conveyance action. *See Mincey v. Milam (In re Milam)*, 37 B.R. 865, 867 (Bankr. N.D. Ga.1984). Further, the Georgia Code § 18-2-22, repealed

¹When Disney tried to sell the House, she learned that there was a lien on it; however, she testified that it was not until January 14, 2002 when she learned it was Raab who possessed the lien.

²The transfer of a one-quarter (1/4) interest on June 17, 1995 was negated by Disney's reconveyance to Debtor. Likewise, the Quitclaim Deed dated January 14, 2002 had no legal effect as Debtor had previously conveyed his entire interest in the House to Disney. Thus, I am only concerned with the two transactions mentioned.

by Ga. L. 2002, p.141, §2 (effective July 1, 2002),³ contains no statute of limitations. Similarly, there is no statute of limitations specifically applicable to fraudulent conveyance actions as such in the chapter of the Civil Practice Act entitled "Limitation of Actions." Ga.Code Ann. §§ 9-3-1 to -115 (1982 & Supp.2001). Despite this lack of statutory authority, O.C.G.A. § 18-2-22 is generally construed to allow seven years to avoid transfers of realty. See Dulock v. Hunerwadel (In re Dulock), 282 B.R. 54, 58 (Bankr. N.D. Ga. 2002) (noting that Georgia courts have adopted a seven-year statute of limitations for fraudulent conveyance actions involving realty by analogizing the nature of the relief sought to other actions to recover land). Thus, Trustee's claim arising out an allegedly fraudulent transfer of real estate is not time barred.

Trustee Bears the Burden of Proof that Transactions were Fraudulent

"[T]he 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." 11 U.S.C. §544(b)(1). Under Georgia law, certain transfers by debtors are deemed as fraudulent in law against creditors. O.C.G.A. §18-2-22. Here, the Trustee is arguing that Debtor's transfer of his interest in the House is fraudulent pursuant to O.C.G.A. §18-2-22(2).⁴ To establish his case under § 18-2-22(2), the Trustee

³The current provision states in relevant part: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor...if the debtor made the transfer...with actual intent to hinder, delay, or defraud any creditor of the debtor." O.C.G.A. §18-2-74.

⁴There have been no allegations that Debtor was insolvent at the time of the transaction. Thus, Trustee is not alleging that the conveyances were fraudulent pursuant to O.C.G.A. §18-2-22(1) or (3). The subsection of O.C.G.A. §18-2-22 that Trustee relies on states in relevant part that:

The following acts by debtors shall be fraudulent in law against creditors and others and

must prove by a preponderance of the evidence that: (1) Debtor conveyed the property, (2) with the intent to defraud his creditors, and (3) that Disney knew of Debtor's intent to defraud his creditors. See Stokes v. McRae, 247 Ga. 658, 659, 278 S.E.2d 393 (1981).

“[W]hen a transaction between a husband and wife is attacked for fraud by the creditors of either, the onus shall be on the husband and wife to show that the transaction was fair.” O.C.G.A. §19-3-10. See also Johnson v. Sheridan, 179 Ga.App. 331, 332-3, 346 S.E.2d 109 (1986); Jones v. J. S.H. Co. 199 Ga. 755, 769, 35 S.E.2d 288 (1945). The reason stated for shifting the burden of proof is that, in transactions between husband and wife, fraud might be so completely concealed that creditors could not expose it. See Arrington v. Awbrey, 190 Ga. 193, 198-9, 8 S.E.2d 648 (1940). The burden of proof only shifts, though, if the transaction involves a husband and wife. See First Nat. Bank of Cornelia v. Kelly, 190 Ga. 603, 606, 10 S.E.2d 66 (1940) (noting that jury charge that father and son bear burden of proof in conveyance between them is erroneous).

Interestingly, Debtor and Disney were not married at the time of the conveyances; however, they had lived together prior to the conveyances and were married within a month after the last conveyance. Despite the realities of their relationship, in the

as to them shall be null and void: (2) Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description had or made with intention to delay or defraud creditors, where such intention is known to the taking party; a bona fide transaction on a valuable consideration, where the taking party is without notice or ground for reasonable suspicion of said intent of the debtor, shall be valid.

absence of any Georgia precedent holding that the burden of proof can be shifted for a couple who have not entered into ceremonial marriage,⁵ I find that Trustee still bears the burden of proof on the issue of fraud; however, it is likely that the parties in this situation had a confidential relationship very similar to that of a husband and wife at the time of the transactions. It is commonly acknowledged that the relationship between the parties is a circumstance to be scrutinized in determining if a conveyance was fraudulent. *See Stokes*, 247 Ga. at 660 (noting that relationship of business and social acquaintances of fifteen years is circumstance to be considered in action to set aside fraudulent conveyance). In situations involving relatives, slight evidence of fraud may be sufficient to set aside the transaction. *McLendon v. Reynolds Grocery Co.*, 160 Ga. 763, 129 S.E. 65, 66 (1925). Accordingly, it is necessary to scrupulously inspect the conveyances of the House in this instance.

Conveyances not Founded or Good or Valuable Consideration

Direct proof of fraudulent intent is rarely available. For this reason, courts have traditionally relied on certain well-defined badges of fraud to presume fraudulent intent to transfer. *See Threlkeld v. Whitehead*, 95 Ga. App. 378, 390, 98 S.E.2d 76 (1957). “Badges of fraud do not in themselves constitute fraud, but are only signs or indicia from which it may be inferred as a matter of evidence; and they are subject to explanation.” *Burkhalter v. Glennville Bank*, 184 Ga. 147, 155, 190 S.E. 644 (1937).

⁵Trustee has not made the argument that Debtor and Disney were involved in a common-law marriage; however, it should be noted that Georgia repealed its common-law marriage statute for all marriages purported to have been contracted after 1/1/97. O.C.G.A. §§ 19-3-1 and 19-3-1.1.

Consideration that is greatly inadequate can be strong indicia of fraud. O.C.G.A. §13-3-46. *See also United States v. McMahan*, 392 F.Supp. 1159. 1166 (N.D. Ga. 1975), *aff'd*, 556 F.2d 362 (5th Cir. 1977) (conveyance to wife of property which had value of between \$8,900 and \$10,900 in excess of purported consideration for transfer, at time when defendant was insolvent, was fraudulent). “The consideration of a deed may always be inquired into when the principles of justice require it.” O.C.G.A. §44-5-30. Here, Debtor conveyed the House for one dollar and other valuable consideration. Trustee alleges that the consideration was inadequate and is evidence that Debtor was acting with fraudulent intent.

In Georgia, “[c]onsiderations are distinguished into ‘good’ and ‘valuable.’” O.C.G.A. §13-3-41. Good consideration is, “founded on natural duty and affection or on a strong moral obligation” whereas valuable consideration is founded, “on money or something convertible into money...except marriage which is valuable consideration.” *Id.* “To constitute consideration, a performance or a return promise must be bargained for by the parties to a contract.” O.C.G.A. §13-3-42(a). “A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.” O.C.G.A. §13-3-42(b). Debtor testified that he conveyed the House to Disney to “gain her trust” and she testified that it was a “wedding gift.” Clearly there was no mutual assent as to what consideration was given, if any. Since the consideration was not bargained for, I conclude that the conveyances were made as gifts and not founded on good or valuable consideration.

Debtor has a History of Fraudulent Activity

This adversary proceeding comes before this Court after the parties have agreed that Debtor should be denied discharge in the underlying Chapter 7 case because his original petition and schedules were seriously deficient. For example, at the time of the Meeting of the Creditors, Debtor had revealed no assets to administer for the benefit of the creditors. Subsequently, it was discovered that Debtor was entitled to receive the income stream from a trust located in Pennsylvania. Debtor has also been sanctioned for failure to appear for examination and document production. In a similar pattern, the District Court of the Virgin Islands sanctioned Debtor for fraud and breach of his fiduciary duty in a real estate transaction. These facts shed a highly unfavorable light on Debtor's character and call into question his credibility. Debtor's experience in real estate and bankruptcy is considerable and is relevant in determining fraudulent intent. Debtor obviously conveyed the House while fully aware of the outstanding judgments; he knew what effect the judgments could have on the House and acted with the actual intent to hinder, delay and defraud his creditors.

Trustee Failed to Prove that Disney had Knowledge of Debtor's Fraudulent Intent

O.C.G.A. §18-2-22(2) requires showing that the grantee had either actual or constructive knowledge of grantor's fraudulent intent. See Stokes, 247 Ga. at 659. A grantee has constructive knowledge of fraud if she is put on notice to suggest further inquiry into the grantor's intent. See Nelson v. United States, 821 F.Supp. 1496, 1503

(M.D. Ga. 1993). No evidence has been presented that Disney had actual knowledge of the judgment amounts owed by Debtor at the time she received her interests in the House. Indeed, Disney has presented unrefuted evidence that she was not aware of either judgment until 1999, after the House had been conveyed.

There is no prohibition against a solvent debtor making a gift. A person, though in debt, may make a "voluntary conveyance"⁶ of a part of his property, if the part which he retains is amply sufficient to pay his debts. See McCranie v. Cobb, 174 Ga. 370, 162 S.E. 692, 694-5 (1932); Cohen v. Parish, 105 Ga. 339, 31 S.E. 205, 208-9 (1898). Even a voluntary conveyance made by a husband, solvent at the time, to his wife, is binding against creditors. See Cordele Banking Co. v. Powers, 217 Ga. 616, 621, 124 S.E.2d 275 (1962); Pharr v. Pharr, 206 Ga. 354, 358, 57 S.E.2d 177 (1950). Disney's knowledge of Debtor's fraudulent intent only becomes irrelevant if Debtor was insolvent⁷ at the time of the conveyances and no such evidence has been presented. See Mitchell v. Weeks, 179 Ga. 886, 177 S.E. 737, 737-8 (1934) ("[t]hat the intention of the maker of a deed to hinder and defraud creditors was known to the party taking it is an essential allegation in a petition to cancel and set aside the conveyance"). Even though this court has found that the transactions were gifts and Debtor was acting with fraudulent intent, Trustee must still

⁶Under O.C.G.A. 18-2-22(3) a voluntary conveyance is one without present consideration.

⁷If Debtor were insolvent and this Court determined that there was no consideration for the conveyance, Trustee could proceed under O.C.G.A. §44-5-88(a) which states that, "[a]n insolvent person may not make a valid gift to the injury of his existing creditors."

prove that Disney had at least constructive knowledge of Debtor's fraudulent intent. *See U.S. v. Reid*, 127 F.Supp.2d 1361, 1372 (S.D. Ga. 2000) (conveyance not set aside even though father/grantor was acting with fraudulent intent and consideration was inadequate where child/grantee had no knowledge of such intent).

Trustee has failed to prove that Disney was aware of facts sufficient to excite her attention such that she should have discovered Debtor's fraudulent intent. The conveyances were not suspicious such that it was incumbent upon Disney to investigate Debtor's motive. Debtor's testimony that he had \$200,000 in cash and certificates of deposit at the time of the transfers was unrefuted, if improbable; thus, the Trustee has failed to show that Debtor was in a situation of financial distress such that Disney would have reason to suspect that the transfers were fraudulent. Nor was there a suspiciously short time frame between the gifts and the collection efforts or between the gifts and Debtor's bankruptcy filing such as would suggest a collusion between Debtor and Disney.

Disney had every reason to believe that she was receiving the House as a wedding gift. It is common or even typical for married people, or soon to be married people as the case may be, to convey a one-half interest in property so that the two can jointly hold title to property. *See Reid*, 127 F.Supp.2d at 1370-71. Given Disney's stated distrust for men and Debtor's desire to gain her trust, it is logical that Debtor conveyed the *entire* House to Disney.

Knowing nothing of Raab or the judgment, Disney was clearly under no duty to investigate and discover that Raab held a judgment against Debtor. Likewise, the facts surrounding Lois's child support judgment give this Court no reason to believe that Disney should have discovered it. The child support arrearage related to amounts due on a 1981 agreement and Debtor's children were past the age of majority at the time Disney became involved with Debtor. At best, Disney had constructive notice of the Raab judgment⁸ as a writ of execution was filed in the Superior Court of Chatham County. Constructive notice, however, is not sufficient in this situation.⁹ The fact that the Raab lien was filed on the General Execution Docket was not sufficient to excite Disney's attention and Disney was not negligent in failing that Debtor was acting fraudulently.

Aggregation of Factors

The Trustee has enumerated various badges of fraud. The conveyances were between a man and woman who were soon to married and the House was given as a gift. Further, Debtor effectuated the transaction while having full knowledge of the judgments and the effect that a recorded judgment can have on property. Also, Debtor has a history of deception that includes failing to fully disclose his assets to this Court at the time he filed bankruptcy. Trustee has failed, however, to show that Disney had anything

⁸The Lois judgment was never filed in Chatham County and, therefore, never attached to the House.

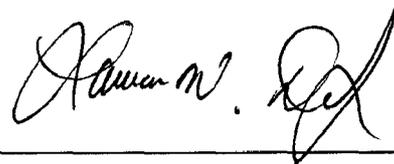
⁹ "The terms 'knowledge' and 'notice' are not synonymous or interchangeable, and should not, therefore, be confounded the one with the other. That which clearly does not amount to positive knowledge may often, in a legal sense, constitute actual notice." Clarke v. Ingram, 107 Ga. 565, 33 S.E. 802, 804 (1899).

more than constructive notice of the Raab judgment. While I find the motives of Debtor to be suspect, there is insufficient evidence to satisfy the final requirement of O.C.G.A. §18-2-22(2) that Disney knew of Debtor's intent to defraud his creditors.

ORDER

Debtor's transfer of his interest in the House to Disney was not fraudulent pursuant to O.C.G.A. §18-2-22(2). Accordingly, IT IS THE ORDER OF THIS COURT that Trustee's request to avoid the transfer of the House is denied.

IT IS SO ORDERED.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 15 day of May, 2003.