

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

In the matter of:

LARRY ALLEN DENNIS
(Chapter 7 Case 93-40713)

Debtor

JAMES L. DRAKE, JR.,
TRUSTEE

Plaintiff

v.

LARRY DENNIS, II
and
TAMMY ANN DENNIS

Defendants

Adversary Proceeding

Number 93-4 147

FILED

at 9 O'clock & 56 min AM

Date 10-4-94

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia



MEMORANDUM AND ORDER

The above adversary proceeding having been tried on July 20, 1994, the
Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor, Larry Allen Dennis, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on April 27, 1993. Defendant Larry Dennis, II, is the minor son of Debtor, Larry Allen Dennis, and the Defendant, Tammy Ann Dennis. Defendant was born in 1981. Defendant, Tammy Ann Dennis, is the wife of the Debtor and the mother of Larry Dennis, II.

Debtor entered into a contract (the "Contract") with PRH Enterprises (the "Seller") on or about January 26, 1990, for the purchase of 904.67 acres in Jenkins County, Georgia (the "Property"), for the agreed sum of \$235,000.00. (Exhibit P-1). The earnest money deposit of \$15,000.00 required under the Contract was paid by the Debtor. This payment is evidenced by check number 357 issued by Debtor on January 26, 1990 (Exhibit P-2). No person other than the Debtor had any interest in funds on deposit in this account. The sale of the Property under the Contract was closed on or about February 20, 1990. (Exhibits P-4 and P-5). At the closing of the sale, Debtor paid an additional \$10,000.00 to the Seller. This payment is evidenced by check number 403 issued by Debtor on February 8, 1990 (Exhibit P-3). No person other than the Debtor had an interest in the funds on deposit in this account.

Debtor directed in the Contract that title to the Property be placed in the name of "Larry Dennis, II." Debtor made no disclosure, at or prior to the closing, to either the Seller, the real estate agents involved, or the closing attorney, that Larry Dennis, II was someone other than the Debtor. Accordingly, PRH Enterprises conveyed the Property to Larry Dennis, II by Warranty Deed dated February 20, 1990, recorded in Deed Book 3-C, Pages 254-256, Jenkins County Records (Exhibit P-5). At the time of the conveyance, Larry Dennis, II was nine (9) years old.

At or prior to the closing, Debtor executed and delivered to Seller a promissory note in the amount of \$110,000.00, representing a portion of the purchase price for the Property (Exhibit P-6). Said note was paid by the Debtor on or about May 8, 1990. At or prior to the closing, Debtor executed and delivered to Seller a second promissory note in the amount of \$100,000.00, representing the balance of the purchase price for the Property (Exhibit P-7). Said note was paid by the Debtor on or about December 15, 1990. At or prior to closing, Debtor executed a Deed to Secure Debt to Seller to secure payment of the notes described above. Said Deed to Secure Debt is recorded in Deed Book 3-C, pages 257-259, Jenkins County records (Exhibit P-8).

Thus, Debtor paid the entire \$235,000.00 purchase price for the

Property from the liquidation of other assets owned by the Debtor and from income earned by the Debtor. No portion of the purchase price was paid by either of the Defendants in this adversary proceeding.

On or about February 8, 1991, Debtor executed and delivered a Deed of Conveyance from Larry Dennis, II, as Grantor, to Tammy Ann Dennis, as Grantee, which described the Property. Said Deed is recorded in Deed Book 3-E, pages 123-124, Jenkins County records. No consideration was paid by Tammy Ann Dennis in exchange for the Property. Said deed was void in that it was signed by the Debtor without legal authority, was from a minor child, and was not approved by any court having jurisdiction of said minor child.

The fair market value of the Property is \$305,000.00, as indicated by an appraisal prepared by Lanier Appraisals, Inc., on January 6, 1993 (Exhibit P-11). There are no liens or encumbrances against the Property other than 1993 property taxes.

Debtor continued to exercise dominion and control over the Property subsequent to February 20, 1990, inconsistent with any intention to gift the Property to his minor son, in that:

- 1) Debtor resides on the Property and raises livestock on the Property but has never paid rent to his son for the use of the Property;
- 2) Debtor paid the ad valorem taxes on the Property in 1990 and paid the ad valorem taxes on the Property in 1991 and 1992 jointly with his wife;
- 3) Debtor attempted to borrow \$100,000.00 from the Bourbon Agricultural Deposit Bank & Trust Company in Paris, Kentucky, using the Property as collateral for the loan. The proceeds of this loan were to be used for the purchase of additional livestock and to satisfy a personal obligation of the Debtor to E. S. Robbins Corporation; and
- 4) Debtor made the decision to transfer the Property to his wife on February 8, 1991, and attempted to convey the Property to his wife by signing his son's name to the Deed of Conveyance recorded in Deed Book 3-E, pages 123-124, Jenkins County records.

Approximately five months after closing on the Property, on July 30, 1990, Debtor executed and delivered a Personal Financial Statement to the Bourbon Agricultural Deposit Bank & Trust Company (the "Bourbon Agricultural Bank") in

Paris, Kentucky (Exhibit P-13). The financial statement was prepared in the Debtor's handwriting and listed the Property as a personal asset of the Debtor. Debtor signed the financial statement and certified that the information contained therein was true and correct. At the time the financial statement was delivered, Debtor owed \$66,129.00 to the Bourbon Agricultural Bank, and Debtor's notes to the Bourbon Agricultural Bank were renewed subsequent to the date of the financial statement.

That statement revealed that:

- 1) Debtor had cash of \$16,000.00 in hand and on deposit in the Bourbon Agricultural Bank on July 3, 1990;
- 2) Debtor had outstanding accounts receivable of \$73,000.00 on July 3, 1990. Of this amount, \$9,000.00 proved to be uncollectible;
- 3) Debtor owned motor vehicles having a total value of \$32,000.00 on July 3, 1990;¹
- 4) Debtor owned livestock having a value of \$65,000.00 on July 3, 1990;

¹ Debtor owned a 1989 Ford pickup truck valued at \$14,000.00, a 1990 Dodge pickup truck valued at \$16,000.00, and a 1986 Ford pickup truck valued at \$2,100.00. The 1988 Toyota pickup truck on the July 3, 1990, financial statement was in fact owned by Debtor's wife, and Debtor claimed no interest in this vehicle.

- 5) Debtor owned fencing equipment having a value of \$46,500.00 on July 3, 1990. This value represents the total amount realized by Debtor from the sale of said equipment during the latter part of 1990;²
- 6) Debtor owned fencing inventory having a value of \$27,000.00 on July 3, 1990;
- 7) Debtor owed a note payable to the Bourbon Agricultural Bank having an outstanding balance of \$66,129.00 on July 3, 1990;
- 8) Debtor owed a note payable to PRH Enterprises having an outstanding balance of \$100,000.00 on July 3, 1990;
- 9) Debtor owed 1985 income taxes to the State of Kentucky in the amount of \$17,200.00 on July 3, 1990.³
- 10) Debtor owed \$61,361 on an open account to E. S. Robbins Corporation on July

² Debtor testified that he sold two tractors to Mr. and Mrs. Lonnie Hollon for the sum of \$9,500.00. The balance of the fencing equipment was sold to Debtor's brother in two sales totalling \$37,000.00.

³ Debtor now disputes this amount, but no adjustment has been made to Debtor's tax liability by the State of Kentucky. This liability is listed on the July 3, 1990, financial statement prepared by Debtor and was also listed as a priority claim on Schedule "E" of Debtor's bankruptcy petition.

3, 1990.⁴

In addition, Debtor owed the sum of \$43,798.31 to George E. Barnett and Mary Lou Barnett on July 3, 1990, based on a judgment entered by the Robertson Circuit Court for the Commonwealth of Kentucky on October 15, 1987 (Civil Action No. 87-CI-004). Said judgment remains outstanding as evidenced by the Proof of Claim filed by Mr. and Mrs. Barnett in this bankruptcy proceeding. Debtor has not objected to the Proof of Claim filed by Mr. and Mrs. Barnett, and this claim is also listed as an unsecured claim on Schedule "F" of Debtor's bankruptcy petition.

The Court finds from the evidence presented that, as of July 3, 1990, Debtor had total assets of \$250,600.00 and total liabilities of \$288,488.32, computed as follows:

⁴ E. S. Robbins Corporation subsequently obtained a judgment against Debtor in the Circuit Court of Madison County, Alabama, for the sum of \$76,987.96 on August 19, 1991, in the case of E. S. Robbins Corporation v. Larry Dennis, II, a/k/a Larry Dennis, d/b/a Larry Dennis Fencing (Civil Action No. CV91-1280B).

ASSETS		
Cash		\$16,000.00
Accounts Receivable	\$73,000.00	
Less: Uncollectible Accounts	(9,000.00)	\$64,000.00
Motor Vehicles		\$32,100.00
Livestock		\$65,000.00
Fencing Equipment		\$46,500.00
Fencing Material		\$27,000.00
	TOTAL ASSETS	\$250,600.00

LIABILITIES		
Note Payable - Bourbon Bank		\$66,129.00
Account Payable - E. S. Robbins Corporation		\$61,361.01
Mortgage Payable - PRH Enterprises		\$100,000.00
Taxes Payable		\$17,200.00
Judgment Payable - Mr. and Mrs. George Barnett		\$43,798.31
	TOTAL LIABILITIES	\$288,488.32

Clearly, then, on July 3, 1990, Debtor was insolvent in that his liabilities exceeded his assets by \$37,888.32. Working backwards in time to February 20, 1990,

the date that the Property was closed upon, the Court finds that Debtor owned the following assets:

- 1) \$7,869.36 cash in hand and on deposit in the Bourbon Agricultural Bank (Exhibit P-14);
- 2) Motor vehicles having a total value of \$32,100.00;⁵
- 3) Livestock having a value of \$60,000.00;
- 4) Fencing equipment having a value of \$46,500.00;⁶
- 5) Fencing inventory having a value of \$27,000.00;
- 6) Outstanding accounts receivable of \$209,348.60 on February 20, 1990,⁷ of which amount, \$59,524.10 proved to be uncollectible.⁸

⁵ As previously noted, Debtor owned a 1989 Ford pickup truck valued at \$14,000.00, a 1990 Dodge pickup truck valued at \$16,000.00, and a 1986 Ford pickup truck valued at \$2,100.00. The 1988 Toyota pickup truck listed on the July 3, 1990, financial statement was in fact owned by Debtor's wife, and Debtor claimed no interest in this vehicle.

⁶ This value again represents the total amount realized by Debtor from the sale of said equipment during the latter part of 1990.

⁷ Debtor's accounts receivable on February 20, 1990, consisted of the following: Lonnie Hollon and Deborah Hollon - \$102,980.00; Herrington - \$35,844.50; Ed Peterson - \$29,015.00; Sally Barlow - \$5,500.00; Carolina Cup Racing Association - \$1,500.00; Hilary Weber - \$14,509.10; and One-for-All Fencing - \$20,000.00.

⁸ The following accounts receivable proved to be uncollectible: Ed Peterson - \$29,015.00; Hilary Weber \$14,509.10; and One-for-All Fencing - \$16,000.00. The Weber account is represented by two checks dated October 1, 1989, and October 7, 1989, which checks were dishonored upon presentment. The One-for-All Fencing account is represented by a check for \$20,000.00, which was also dishonored upon presentment. None of these accounts were listed on the July 3, 1990, financial statement prepared by Debtor and none were listed on Schedule "B" of Debtor's bankruptcy petition.

As of that same date, Debtor was subject to the following liabilities:

- 1) A note payable to the Bourbon Agricultural Bank having an outstanding balance of \$84,751.00;
- 2) An open account debt of \$33,461.10 to E. S. Robbins Corporation;
- 3) Two notes payable to PRH Enterprises having an outstanding balance of \$210,000.00;
- 4) 1985 income taxes to the State of Kentucky in the amount of \$17,200.00;
- 5) The sum of \$43,798.31 to George E. Barnett and Mary Lou Barnett on February 20, 1990, based on a judgment entered by the Robertson Circuit Court for the Commonwealth of Kentucky on October 15, 1987 (Civil Action No. 87-CI-004).

Therefore, the Court finds from the evidence presented that immediately following the transfer of the Property to his son on February 20, 1990, Debtor had total assets of \$323,293.86 and total liabilities of \$389,210.41, computed as follows:

ASSETS		
Cash		\$7,869.36
Accounts Receivable	\$209,348.60	
Less: Uncollectible Accounts	(59,524.10)	\$149,824.50
Motor Vehicles		\$32,100.00
Livestock		\$60,000.00
Fencing Equipment		\$46,500.00
Fencing Material		\$27,000.00
	TOTAL ASSETS	\$323,293.86

LIABILITIES		
Note Payable - Bourbon Bank		\$84,751.00
Account Payable - E. S. Robbins Corporation		\$33,461.10
Mortgage Payable - PRH Enterprises		\$210,000.00
Taxes Payable		\$17,200.00
Judgment Payable - Mr. and Mrs. George Barnett		\$43,798.31
	TOTAL LIABILITIES	\$389,210.41

Accordingly, the transfer of the Property to his minor son on February 20, 1990, rendered Debtor insolvent in that his liabilities exceeded his assets by \$65,916.55,

following the transfer.

In reaching this conclusion, the Court finds that Debtor's fencing business had no goodwill value on February 20, 1990, or July 3, 1990. Debtor assigned no value to goodwill on his July 3, 1990, financing statement furnished to the Bourbon Agricultural Bank, and Debtor did not realize any goodwill upon liquidation of the business during the latter part of 1990. Debtor's testimony as to the value of business goodwill was speculative at best and was not supported by any credible evidence of value.

The Court also finds that Debtor did not have a cognizable claim against E. S. Robbins Corporation on either February 20, 1990, or July 3, 1990. Debtor continued to purchase fencing material from E. S. Robbins Corporation through November 1990, and no such claim is listed on his financial statement dated July 3, 1990. Debtor did not assert a counterclaim or any claim of set off in the civil action filed by E. S. Robbins Corporation in the State of Alabama, nor has Debtor filed any independent civil action to assert his professed claim against E. S. Robbins Corporation. In addition, the Court notes that no such claim is listed as an asset on Schedule "B" of Debtor's bankruptcy petition.

Furthermore, the Court finds that Debtor was unable to meet his obligations

as they matured on February 20, 1990. This is evidenced by the fact that as of February 20, 1990, Debtor owed outstanding tax obligations to the State of Kentucky in excess of \$17,000.00, dating from 1985, and an outstanding judgment to Mr. and Mrs. George Barnett in excess of \$30,000.00, dating from 1987.

Finally, according to the Schedules filed by Debtor in this bankruptcy proceeding, Debtor owes secured claims of \$39,998.11, priority claims of \$30,000.00 and unsecured claims of \$126,200.00,

Based upon this evidence, the Chapter 7 Trustee contends that he is entitled to recover the property for the benefit of the bankruptcy estate under section 544(b) of the Code because the transfer by Debtor to his minor son was voluntary, without a valuable consideration, and rendered the Debtor insolvent. "Section 544(b) [of the Bankruptcy Code] confers upon the trustee the power to avoid any of the debtor's transfers or obligations that are voidable for fraud or any other reason under applicable state or federal law."⁹ 4 Collier on Bankruptcy, ¶1544.03[1], at 544-20 (15th Ed. 1994). Section 544(b) of the Bankruptcy Codes provides as follows:

⁹ The Trustee also contends that the Property is property of the bankruptcy estate pursuant to 11 U.S.C. Section 541(a)(1) because it is subject to an implied trust under O.C.G.A. § 53-12-90. See also 11 U.S.C. § 542(a). Because the court finds that the Trustee is entitled to recovery of the property under section 544(b), however, this theory of recovery will not be addressed herein.

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.

11 U.S.C. §544(b). The transfer in this case is voidable under Subsection (3) of O.C.G.A. Section 18-2-22, which 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:

(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

Paragraph 3 of O.C.G.A. Section 18-2-22 is based upon a voluntary conveyance which renders the Debtor insolvent and does not require proof of fraudulent intent:

While under the Code, Section 28-201(2) [O.C.G.A. §18-2-22(2)], a fraudulent intent by the debtor is necessary to cancellation, it need not be shown where a voluntary conveyance is rendered void under the Code, Section 28-201(3) (O.C.G.A. §18-2-22(3)) Under this section, the only facts necessary to be shown in order to render the deed . . . fraudulent in law, are the indebtedness, the insolvency of the debtor,

and that the deed was voluntary. When these facts are proved, the law conclusively presumes a fraudulent intent and declares the instrument void so far as creditors who held demands against the donor at the time of the conveyance are concerned.

Mercantile National Bank v. Aldridge, 233 Ga. 318, 210 S.E.2d 791, 793 (1974).
Accord Chambers v. Citizens & Southern National Bank, 242 Ga. 498, 249 S.E.2d 214, 217 (1978). "This rule of law is mandatory, and is based upon the moral and legal principle that one should be just before he is generous." Mercantile, *supra* at 793.

"A voluntary deed made by a debtor may be set aside by his creditor, if the debtor was insolvent when the deed was executed, or was thereby rendered insolvent." Downs v. Powell, 215 Ga. 62, 64, 108 S.E.2d 715 (1959). *Accord*, United States v. McMahan, 392 F.Supp. 1159, 1166 (N.D.Ga. 1975). "A debtor is insolvent and his voluntary deed is void when, after such conveyance, property left or retained by the debtor is not ample to pay his existing debts." Mercantile, *supra* at 794 (*quoting* Federal Land Bank of Columbia v. Bush, 179 Ga. 627, 628, 176 S.E. 639 (1934)).

The Court concludes therefore, that the transfer of the Property by Debtor, Larry Allen Dennis, to the Defendant, Larry Dennis, II, on February 20,

1990, was voluntary, without a valuable consideration, and rendered the Debtor insolvent. Such transfer is void under O.C.G.A. Section 18-2-22(3) and may be avoided by the Chapter 7 Trustee pursuant to 11 U.S.C. Section 544(b).

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Defendant, Larry Dennis, II, be, and hereby is, divested of title to the Property described in that certain Warranty Deed from PRH Enterprises, as Grantor, to Larry Dennis, II, as Grantee, dated February 20, 1990, recorded in Deed Book 3-C, pages 254-256, Jenkins County records, and title to said property is hereby vested in James L. Drake, Jr., as Trustee of the estate of Larry Allen Dennis, pursuant to Bankruptcy Rule 7070 and Rule 70 of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that any subsequent conveyances of the Property, including but not limited to that certain Deed of Conveyance from Larry Dennis, II, as Grantor, to Tammy Ann Dennis, as Grantee, dated February 8, 1991, recorded in Deed Book 3-E, pages 123-124, Jenkins County records, and that certain Deed of Conveyance from Tammy Ann Dennis, as Grantor, to Tammy Ann

Dennis Inter Vivos Trust Fund, as Grantee, dated March 12, 1991, recorded in Deed Book 3-F, pages 252-253, Jenkins County records, are null and void and shall be stricken from the deed records of Jenkins County, Georgia.

IT IS FURTHER ORDERED that the Defendants Tammy Ann Dennis and Larry Dennis, II, shall forthwith surrender possession of the Property to James L. Drake, Jr., as Trustee of the estate of Larry Allen Dennis.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 30th day of September, 1994.