



U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(F). Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, I make the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

The Debtor in the underlying Chapter 13 proceeding, Carol Ann McGhee, entered into a contract with Defendant Berry Prescott in which the Debtor was to purchase a home. Defendant Bill Brasher acted as an agent on behalf of Defendant Prescott for this transaction. The terms of the contract provided for Debtor McGhee to pay the amount of \$9,900.00, in cash, as earnest money to be applied as partial payment of the purchase price of the property. (Defendant's Exhibit 1). The contract contains the following clause:

Purchaser agrees that if Purchaser fails or refuses to perform any of Purchaser's covenants herein, Purchaser shall forthwith pay Broker the full commission: provided that broker may first apply one-half of the earnest money toward payment of, but not to exceed, the full commission and may pay the balance thereof to seller as liquidated damages to the seller, if seller claims balance as Seller's liquidated damages in full settlement of any claim for damages, whereupon Broker shall be released from any and all liability for return of earnest money to the Purchaser. (Defendant's Exhibit

1).

The contract further provides that the sale shall be closed on or before October 15, 1997. The total down payment at closing "will be at least \$25,000.00 or more." (Defendant's Exhibit 1). The Contract was signed and dated on April 1, 1997, by Debtor Carol A. McGhee, defendant Berry Prescott, his wife Jean Prescott, and Defendant Bill Brasher. (Defendant's Exhibit 1). It was the understanding of the parties that Defendant Prescott was to begin construction on a new home, which he would occupy when the home at issue in this case was sold.

Debtor Carol A. McGhee stated that the \$9,900.00 cash payment made at the signing of the contract was for a down payment for the home and that it was made with the understanding of the parties that if closing did not occur the \$9,900.00 would be forfeited. On April 14, 1997, Debtor was asked by Defendant Brasher to bring in an additional \$10,000.00 which was to be used to assist Defendant Prescott in the construction of his new home. McGhee stated that she delivered the \$10,000.00 to Brasher's office and gave the money to Defendant Prescott. In turn, she received a receipt stating that on April 14, 1997, Berry Prescott received from Carol Ann McGhee ten thousand dollars. (Defendant's Exhibit 2). The payment of the \$10,000.00 as

evidenced by the face of the receipt brings the total amount paid on the account to \$19,900.00, making the balance due \$105,100.00. (Defendant's Exhibit 2).

At the time of these payments to Bill Brasher and Berry Prescott, Debtor and her husband were financially able to enter into the contract and go forward with the purchase of the house and subsequent mortgage payments. The couple owned and operated a welding business that left them financially able to purchase a home. They had equity in a home and in several items such as automobiles, motorcycles, and in a boat. The Debtor and her husband also owned items related to the welding business and several personal household items such as a big screen television, a stereo system, and home fitness equipment.

The Debtor's financial situation changed, however, in June of 1997 when her husband was arrested and later incarcerated in a federal prison. At this point, Debtor became unable to support herself and her three children financially as the welding business owned and operated by the Debtor and her husband ceased operations. Debtor was unable to provide the necessary funds to satisfy the terms of the contract to purchase Berry Prescott's home and move forward with the closing on October 13, 1997, and subsequently notified both Defendants as to that fact. As Debtor was unable to close, the

\$9,900.00 in earnest money, in accord with the terms of the contract as per agreement of the parties, was forfeited by the Debtor. The payment in contention in this case, the second payment of \$10,000.00 made to Berry Prescott on April 14, 1997, was not returned to the Debtor at the time of default.

Debtor's financial condition continued to deteriorate until she filed a Chapter 13 petition in May of 1998. In her schedules, Debtor listed Bill Brasher as a possible claimant and valued his claim at \$1.00. At no point on her schedules did the Debtor list a claim against Defendants Brasher or Prescott for the \$10,000.00 in dispute in this case.

#### CONCLUSIONS OF LAW

The Trustee filed this adversary seeking to reclaim the \$10,000.00 payment, arguing that the payment may be avoided under 11 U.S.C. § 548(a)(1) which states in relevant part that:

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-

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(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 . . . .

A transfer, as defined by Section 101(54) of the Code, is "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption." Under this definition, "any transfer of an interest in property is a transfer, including a transfer of possession, custody, or control, even if there is no transfer of title, because possession, custody, and control, are interests in property." 5 Collier on Bankruptcy § 548.02[1][a] (15<sup>th</sup> ed. 1998). Section 548 (d)(1) states that:

For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law

permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

The Uniform Commercial Code provides guidance in determining the elements necessary to protect an interest without filing. UCC § 9-305 states:

. . . a security interest in . . . money. . . may be perfected by the secured party's taking possession of the collateral. If such collateral other than goods covered by a negotiable document is held by a bailee, the secured party is deemed to have possession from the time the bailee receives notification of the secured party's interest. A security interest is perfected by possession from the time possession is taken without relation back and continues only so long as possession is retained, unless otherwise specified in this Article.

The United States District Court for the Northern District of Georgia held that a security interest in money which is "given or received as proceeds from the negotiation of an instrument is perfected by possession." In re Atlanta Times, 259 F.Supp. 820, 827 (N.D. Ga. 1966). Under the authority established by In re Atlanta Times and the Uniform Commercial Code, therefore, the title to money would transfer

at the time when actual possession of the funds was exchanged between parties. At that point, when possession changed, the possessor's interest became superior to all others, precluding any subsequent interests from taking priority in the money which had already exchanged hands.

The Trustee argues that the correct point of transfer in this case is October 15, 1997, the point that the closing failed, rather than at the point when possession of the funds was transferred between the parties on April 14, 1997, contending as a result that the exchange of the \$10,000.00 falls within the one year recovery period for voluntary transfers by the debtor under 11 U.S.C. § 548. This position, however, is inconsistent not only with a reading of the Uniform Commercial Code and the Bankruptcy Code's definition of transfer, but also with decisions handed down by different Circuits in the Courts of Appeal. A debtor's default on a contract to buy is an extinguishment of his equitable interest in the property, not a transfer. In re Wey, 854 F. 2d 196, 199 ( 7<sup>th</sup> Cir. 1988). At the date of the contract's expiration, there are no rights possessed by the debtor which could be transferred. Id. The only transfer, therefore, is the actual tendering of the down payment. Id. at 199. See In re McConnell, 934 F.2d 662 (5<sup>th</sup> Cir. 1991)(holding that the actual tendering of the down payment was a transfer subject to Section 548).

In accordance with the provisions set forth in the Bankruptcy Code, the Uniform Commercial Code, and existing case law, I find that the transfer at issue in the case at bar occurred on April 14, 1997, the date in which the Debtor Carol McGhee tendered the amount of \$10,000.00 to Defendants Bill Brasher and Billy Prescott. The Debtor's bankruptcy case was filed on May 4, 1998. The transfer made on April 14, 1997, therefore, falls outside the one year time period established in 11 U.S.C. § 548, and as such, cannot be recovered by the Trustee. Judgment is entered in favor of Defendants.



---

Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 27<sup>th</sup> day of April, 2000.