DOCKET NUMBER: 95-13354
ADV. NUMBER: 97-1263
JUDGE: M. A. Mahoney
PARTIES: Donald W. Koontz, Jr., Lonnie Mixon, Helen F. O'Connor
CHAPTER: 7
ATTORNEYS: L. C. Williams, T. O. Bear
DATE: 2/6/98
KEY WORDS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

DONALD W. KOONTZ, JR. Case No. 95-13354-MAM-7

Debtor

LONNIE MIXON, Trustee

Plaintiff

v. Adv. No. 97-1263

HELEN F. O'CONNOR,

Defendant

**ORDER AND JUDGMENT AVOIDING SECURITY INTEREST OF HELEN F. O'CONNOR**

Lionel C. Williams, Mobile, AL, Attorney for the Trustee/Plaintiff
Thomas O. Bear, Foley, AL, Attorney for Helen F. O'Connor, Defendant

This matter is before the Court for trial of the issues raised in the adversary complaint. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The complaint contains six causes of action against the Defendant. Four allege that the transaction at issue is a fraudulent transfer under 11 U.S.C. § 548. One alleges that the transaction is a preference under 11 U.S.C. § 547. The sixth cause of action asserts that the transaction is a fraudulent transfer under Alabama law which is avoidable under 11 U.S.C. § 544. For the reasons indicated below, the Court is awarding judgment to the Plaintiff/Trustee against the Defendant.

## FACTS

On December 4, 1995, Koontz filed a chapter 7 bankruptcy case. Koontz is a certified public accountant who, prior to bankruptcy, handled the business and financial affairs of numerous clients. He also had a number of business interests he managed including Elberta, Inc.

On September 30, 1994, Helen O'Connor wrote a check to Elberta in the amount of $30,000. On March 15, 1995, Donald W. Koontz, individually, and Elberta, Inc., by signature of Donald W. Koontz as President, gave a promissory note to James T. or Helen O'Connor for the sum. On March 15, 1995, Elberta gave a security interest in five vehicles to Helen O'Connor. Donald Koontz signed the security agreement for Elberta "as guarantor" and individually. On September 14, 1995, Helen O'Connor wrote a check to Elberta, Inc., for $15,000. On September 15, 1995, Koontz individually gave a promissory note to Ms. O'Connor for the sum. On September 27, 1995, a UCC-1 Financing Statement form was filed in the Probate Court of Baldwin County, Alabama, indicating that Donald W. Koontz, Jr., individually, and Elberta, Inc., gave a security interest in five listed vehicles to Helen O'Connor.

The vehicles in which the security interest was given are:

1973 Plymouth Cuda VIN B523H3B315702
1970 Plymouth Cuda VIN B523H0B401308
1973 Dodge Challenger VIN JH23G3B506858
1973 Dodge Challenger VIN JH23G3B216107
1972 Dodge Challenger VIN JH23G2B460324

There was no evidence that the monies were given to purchase the vehicles. The purpose for the loans was never explained.

When Donald Koontz filed bankruptcy, he listed the vehicles as his individual property. He valued them at $32,500 and was allowed an exemption of $1 in their value.

On November 19,1996, The Court approved a compromise between Elberta, Inc., Osprey, Inc., Donald W. Koontz, Jr. Trust, and Donna Woerner, its trustee, and the chapter 7 bankruptcy trustee of Koontz's case, Lonnie Mixon. Among other things, it approved an agreement between the parties whereby the bankruptcy trustee waived and released "all bankruptcy avoidance rights against funds received by the [Donald W. Koontz, Jr.] Trust from Donald W. Koontz, Jr." On March 27, 1997, the Court denied a discharge to Mr. Koontz. In the opinion, the Court stated that the trustee agreed to the November 19, 1996, compromise "in part due to his inability to get documentation from Koontz that fully explained the trust's, Elberta, Inc.'s, and Osprey, Inc.'s finances and their relation to Koontz's other financial transactions." The Court held that the debtor had not intended to defraud anyone with the manner he kept his books, but he had not preserved records from which the trustee could review his finances. The Court stated that Koontz had evidenced no actual intent to hinder, delay, or defraud his creditors.

LAW

As indicated above, the trustee has asserted six causes of action against the Defendant. The Court will discuss the preference theory first, and then the fraudulent transfer issues. The plaintiff/trustee bears the burden of proof by a preponderance of the evidence as to the elements of each cause of action. 11 U.S.C. § 547(g). *Jenkins v. Chase Home Mortgage Corp. (Matter of Maple Mortgage Corp.)*, 81 F.3d 592 (5th Cir. 1996). Once proven, the defendant must prove the existence of any defense. 11 U.S.C. § 547(g).

11 U.S.C.§ 547

There are five necessary elements to proof of a preference under 11 U.S.C. § 547. They are:

(1) A transfer was made for the benefit of a creditor;

(2) The transfer was on account of an antecedent debt;

(3) The transfer was made while the debtor was insolvent;

(4) The transfer was made within 90 days of the debtor's bankruptcy filing (or within one year if the transferee is an insider);

(5) Because of the transfer, the transferee would receive more than she would if the transfer had not occurred.

*Union Bank v. Wolas*, 502 U.S. 151, 112 S. Ct. 527, 116 L. Ed. 2d 514 (1991); *Ellenberg v. Mercer (In re Home Co.)*, 108 B.R. 357 (Bankr. N.D. Ga. 1989).

A "transfer" is defined in the Bankruptcy Code as "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." 11 U.S.C. § 101(54). The recordation of a financing statement which perfected a security interest in Koontz's property is a "transfer" under this definition. The transfer was for the benefit of Ms. O'Connor, a creditor, who held a debt incurred on September 30, 1994 and September 14, 1995. Therefore, the debt was an "antecedent debt" under 11 U.S.C. § 547(b)(2) since the UCC-1 was recorded on September 27, 1995, at least 13 days after the second check. The trustee relied on the presumption of insolvency contained in 11 U.S.C. § 547(f). The Defendant offered no evidence to rebut this presumption. The recordation occurred within 68 days of the date that Koontz filed bankruptcy. It is therefore well within the 90 day period for preferential recoveries. Finally, the debtor's own schedules valued the autos at $32,500 which would yield a 72% dividend on the

defendant's claim. Ms. O'Connor would receive much less than that in this chapter 7 case without the lien as shown by the schedules and by the trustee's testimony. The trustee testified he had no assets to distribute to creditors.

Therefore, unless some defense to the preference exists, the trustee is entitled to avoid the lien for the benefit of the creditors of the estate. All five of the required elements of 11 U.S.C. § 547(b) are present. Ms. O'Connor raised three defenses to the avoidance—collateral estoppel, res judicata and waiver. The Court concludes that none of them rebut the evidence of the trustee as to the preference requisites.

Ms. O'Connor asserts that the trustee waived his right to assert a preference (or any other avoidance action) against this lien perfection through the compromise approved by the Court on November 19, 1996. However, the language of the compromise order does not bear this out. The compromise released and waived all avoidance rights against funds received by the Koontz Trust from Donald W. Koontz, Jr. If the trustee had sued the Trust or Elberta for return of the $45,000, that action would be precluded by the compromise. Suing a third party to avoid a lien on property of Koontz, not Elberta or the Trust, is a totally different matter. Waiver is the "intentional relinquishment or abandonment of a known right." *Glass v. United of Omaha Life Ins. Co.*, 33 F.3d 1341, 1347 (11th Cir. 1994); *Hamilton v. Watkins*, 436 F.2d 1323, 1326 (5th Cir. 1970). The language of the compromise represents no clear relinquishment of rights against the defendant or Koontz's individually owned autos. The defendant has not sustained her burden of proving that the right to avoid the transfer was waived.

Ms. O'Connor also pled res judicata as a defense. It is not proven. Res judicata or claim preclusion requires the following four elements to be present for application of the doctrine:

(1) A final decision on the merits in a prior action by a court of competent jurisdiction;

(2) The second action involves the same parties, or privies, as the first;

(3) The second action raises an issue actually litigated or which should have been litigated in the first action;

(4) An identity of the causes of action.

*Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991); *I. A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541 (11th Cir. 1986).

Under Eleventh Circuit case law, a consent judgment or settlement does fulfill the "actually litigated" prong of the res judicata test. *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1244 (11th Cir. 1991) ("[R]es judicata applies to Title VII consent decrees" if the harm and the parties are the same). However, there is no identity of parties between the compromised action and this one. Ms. O'Connor was not involved in the prior case. The trustee sought relief against the Donald Koontz Trust, its trustee, and Elberta, Inc., and Osprey, Inc. There is no identity of claims. The trustee wanted the Court to declare that the assets of the entities were actually assets of the debtor and he sought a fraudulent transfer determination as to any transfers by Koontz to the trust or the two corporations. The issues involved had nothing to do with Koontz's perfection of a lien in favor of Ms. O'Connor against his vehicles. Therefore, res judicata as to the compromise is not appropriate. As to the denial of discharge order, it also is inapplicable. There is no identity of parties or issues. Only the trustee and the debtor were involved. Only the debtor's discharge was at issue.

Ms. O'Connor asserts that the Court's ruling on the denial of discharge of Mr. Koontz and/or the compromise order dictate application of the doctrine of collateral estoppel or issue

preclusion, if res judicata is not applicable. Collateral estoppel is appropriate if four requirements are met. They are:

(1) The issue in the prior action and the issue in the bankruptcy court are identical;

(2) The bankruptcy issue was actually litigated in the prior action;

(3) The determination of the issue in the prior action was a critical and necessary part of the judgment in that litigation; and

(4) The burden of persuasion in the prior proceeding must not be significantly heavier than the burden of persuasion in the initial action.

*Bush v. Balfour Beatty Bahamas, Ltd. (In Re Bush)*, 62 F.3d 1319, 1322 (11th Cir. 1995); *HSSM #7 Limited Partnership v. Bilzerian (In re Bilzerian)*, 100 F.3d 886 (11th Cir. 1996).

The factors are not met in this case. As stated above about res judicata, the issues to be precluded are not identical to those involved in the prior action and the issues' determination were not essential to the prior judgment. Ms. O'Connor's lien on Koontz's vehicles was not even remotely considered in the compromise order. The order denying Koontz's discharge found that Koontz had not intended to hinder, delay or defraud his creditors by failing to keep proper records. This finding was essential to the order of March 27,1997, but that issue has no relationship to the issue of whether the lien given Ms. O'Connor was preferential.

11 U.S.C.§ 548

The trustee asserts four causes of action are present under 11 U.S.C. § 548 to avoid the lien perfection. The causes of action are those set forth in sections 548(a)(1), 548(a)(2)(A)-(B)(i), 548(a)(2)(A)-(B)(ii), and 548(a)(2)(A)-(B)(iii). The Court will discuss section 548(a)(1) first and then section 548(a)(2).

Section 548(a)(1) provides that a transfer made within one year of a bankruptcy filing is a fraudulent transfer if made "with actual intent to hinder, delay, or defraud any creditor of the

debtor." Since it is very rare that a debtor will admit to such an intent, the trustee must prove such intent by circumstantial evidence. There are six badges of fraud which courts look at in determining fraudulent intent. The badges are:

(1) The lack or inadequacy of consideration;

(2) The family, friendship or close associate relationship between the parties;

(3) The retention of possession, benefit or use of the property in question;

(4) The financial condition of the party sought to be charged both before and after the transaction in question;

(5) The existence or cumulative effect of a pattern or series of transactions or courses of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; and

(6) The general chronology of events and transactions under inquiry.

*Cates-Harman v. Reininger-Bone (Matter of Reininger-Bone)*, 79 B.R. 53 (Bankr. M.D. Fla. 1987).

The trustee did not prove that Koontz gave the lien to Ms. O'Connor with an intent to hinder, delay or defraud his creditors. The trustee showed only that a suspect transaction occurred within a short time before bankruptcy. He did not prove that Ms. O'Connor had any special relationship with Koontz to make the transfer suspect. It is clear that Ms. O'Connor did loan money which Elberta, Inc. received so there was a true debtor-creditor relationship. The values of the autos and the amount of the loan were roughly equivalent. Therefore, the facts do not support a fraudulent conveyance ruling under 11 U.S.C. § 548(a)(1).

Section 548(a)(2)(A)-(B)(I), (ii), and (iii) require that the trustee prove that the lien recordation was given for less than reasonably equivalent value. The grant of the security interest must constitute "reasonably equivalent value." At the time of the recordation of the lien, the

value had already been given by Ms. O'Connor. If the transfer of money and security interest were contemporaneous, it is easy to find reasonably equivalent values were exchanged. But what if the transfers of value are not contemporaneous? Can an antecedent debt be "value" under section 548(a)(2)?

Section 548(d)(2) defines "value" as "property, or satisfaction or securing of a present or antecedent debt of the debtor." Therefore, the value given and received by debtor and transferee do not have to be contemporaneous. *Gennet v. Docktor (In re Levy)*, 185 B.R. 378 (Bankr. S.D. Fla. 1995); *Abraham v. Central Trust Co. (Matter of Abraham)*, 33 B.R. 963 (Bankr. M.D. Fla. 1983). The values given just must be reasonably equivalent. In this case, Koontz, due to his promissory note obligation, owed Helen O'Connor $45,000. He valued his autos at $32,500. These values are roughly equivalent which meets the "reasonably equivalent" standard. *Butler Aviation Int'l v. White (Matter of Fairchild Aircraft Corp.)*, 6 F.3d 1119 (5th Cir. 1993); *Levy, supra* at p. 383. Since the Court cannot find that Ms. O'Connor and Koontz did not exchange "reasonably equivalent value," the Court must conclude that the recordation of the lien is not a fraudulent transfer under any subsection of 11 U.S.C. § 548(a)(2). The claim of the trustee under federal fraudulent transfer law is due to be denied.

ALA. CODE §§ 8-9A-4 and 5 (1975) and 11 U.S.C. § 544

ALA. CODE §§ 8-9A-4 and 5 (1975) are sections of Alabama's Fraudulent Transfer Act. The sections contain essentially the same causes of action as contained in the federal fraudulent transfer statute at 11 U.S.C. § 548(a)(1) and § 548(a)(2)(A)-(B)(I),(ii), and (iii). The state statute differentiates the relief allowed by type of creditor—present or future. The trustee in a chapter 7 bankruptcy case stands in the shoes of the bankruptcy creditors, most of whom were creditors both on September 27, 1995 and December 4, 1995. For the same reasons that the

Court concludes there was no fraudulent transfer under federal law, it concludes that there is not fraudulent transfer under Alabama law. The requisite intent or absence of reasonably equivalent value is lacking. Therefore, the claim of the trustee under Alabama law and 11 U.S.C. § 544 is due to be denied.

## CONCLUSION

Based upon the facts presented at trial and the arguments of counsel, the Court concludes that the perfection of defendant's lien by its recordation was a preferential transfer pursuant to 11 U.S.C. § 547(b). The Court concludes that the lien perfection was not a fraudulent transfer pursuant to 11 U.S.C. § 548 or ALA. CODE § 8-9A-4 or 5 (1975) as made applicable to bankruptcy cases under 11 U.S.C. § 544.

THEREFORE IT IS ORDERED AND ADJUDGED that the plaintiff, Lonnie Mixon, is awarded a judgment against the defendant, Helen F. O'Connor, declaring that the security

interest the defendant obtained against the following vehicles is avoided for the benefit of all creditors of the debtor's estate:

| | |
|---|---|
| 1973 Plymouth Cuda | VIN B523H3B315702 |
| 1970 Plymouth Cuda | VIN B523H0B401308 |
| 1973 Dodge Challenger | VIN JH23G3B506858 |
| 1973 Dodge Challenger | VIN JH23G3B216107 |
| 1972 Dodge Challenger | VIN JH23G2B460324. |

Dated: February 6, 1998

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE