DOCKET NUMBER: 97-11031
ADV. NUMBER: 99-1049
JUDGE: M. A. Mahoney
PARTIES: Mason Plan Company, Inc., Theodore L. Hall, Whitney Bank of Alabama, Whitney National Bank
CHAPTER: 7
ATTORNEYS: S. Olen, D. Hembree, J. Hartley
DATE: 9/7/2000
KEY WORDS:
PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In re

MASON PLAN COMPANY, INC. Case No. 97-11031-MAM

Debtor.

THEODORE L. HALL

Trustee,

v. Adv. No. 99-1049

WHITNEY BANK OF ALABAMA
and WHITNEY NATIONAL BANK

Defendant.

ORDER DENYING MOTION OF WHITNEY NATIONAL BANK FOR SUMMARY JUDGMENT AS TO COUNT ONE AND GRANTING JUDGMENT TO WHITNEY NATIONAL BANK AS TO COUNTS TWO, THREE, FOUR AND FIVE

Steve Olen, Mobile, AL, Attorney for the Trustee
Deborah Hembree and Jeffery Hartley, Mobile, AL, Attorneys for Whitney National Bank

This matter is before the Court on the motion for summary judgment of Whitney National Bank ("Whitney"). The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the motion for summary judgment of Whitney as to Count One is denied, and as to Counts Two, Three, Four, and Five is Granted.

FACTS

The facts are based on the testimony of Jerry Broughton, Chief Loan Officer of Peoples Bank, and other submissions of the parties. A hearing was held on August 28, 2000, after which the matter was taken under advisement.

Sam Vrachalus was the indirect owner of 100% of the stock in Mason Plan from 1971 until December 1996. On November 10, 1992, Peoples Bank made a loan to Sam Vrachalus individually in the amount of $625,000. The proceeds of this loan went into a Mason Plan account. Mason Plan then executed a check to AmSouth Bank as Trustee in the amount of $626,280.74, indicating that it was for $625,000.00 in principal and $1,280.74 in interest. On October 5, 1994, Whitney entered into a Branch Sale Agreement with Peoples Bank. As part of that agreement, Whitney purchased the loan held by Peoples Bank on which Sam Vrachalus was obligated. In March of 1996, Whitney renewed the loan to extend the maturity date and to include both Sam Vrachalus and Mason Plan as borrowers. Sam Vrachalus signed the new promissory note both individually and on behalf of Mason Plan. Mason Plan made loan payments totaling more than $200,000 to Peoples Bank and Whitney.

Mason Plan filed for relief pursuant to chapter 7 of the Bankruptcy Code on March 19, 1997. The Trustee filed this adversary proceeding against Whitney claiming that payments on the loan were made to Whitney as a result of fraudulent transfers, preferences and unjust enrichment. Whitney filed a motion for summary judgment and has also moved for this Court to strike testimony of Jerry Broughton on the grounds that it constitutes inadmissible hearsay.

The Trustee conceded that the only fact at issue is whether Mason Plan actually received benefit from the $625,000 placed in its account on November 11, 1992 and paid out of the

account on November 23, 1992, or whether it was a mere conduit. The Trustee concedes that summary judgment is appropriate as to Counts Two, Three, Four and Five of the Complaint. The only count which remains is Count One. The Trustee had no evidence to offer raising any issue as to whether the transfer to Mason Plan of the $625,000 was a fraudulent transfer except as stated above. If he cannot prove that the money did not benefit Mason Plan at trial, and prove to the Court that there is at least a genuine factual dispute as to that issue for purposes of this motion, Whitney Bank is entitled to judgment as to Count One as well.

LAW

A.

Motions for summary judgment are controlled by Rule 56 of the Federal Rules of Civil Procedure, which has been made applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7056. A court shall grant summary judgment to a party when the movant shows that "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), the Supreme Court found that a judge's function is not to determine the truth of the matter asserted or weight of the evidence presented, but to determine whether or not the factual disputes raise genuine issues for trial. *Anderson*, at 2510, 2511. In making this determination, the facts are to be looked upon in the light most favorable to the nonmoving party. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Rule 56(e) of the Federal Rules of Civil Procedure states that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible

in evidence . . . ." The requirement that affidavit testimony be admissible evidence also applies to deposition testimony. *Samuels v. Doctors Hospital, Inc*., 588 F.2d 485 (5th Cir. 1979). The evaluation of the admissibility of evidence at the time a summary judgment motion is presented must be made in accordance with the same standards used at trial. *Munoz v. International Alliance of Theatrical State Employees*, 563 F.2d 205 (5th Cir. 1977). The deposition of John Broughton contains testimony concerning what happened to the loan proceeds after being deposited into the Mason Plan account. This testimony was not from John Broughton's personal knowledge. John Broughton testified that he did not know what actually happened to the loan proceeds after they were deposited in Mason Plan's account and that any knowledge he had as to that fact came from what Sam Vrachalus and others told him. Therefore, the testimony of John Broughton as to what happened to the loan proceeds after they were deposited in the Mason Plan account shall be stricken from the record and will not be considered for the purpose of this motion for summary judgment. Whitney brought a motion seeking this relief and it is granted.

B.

The Trustee has brought fraudulent transfer claims under § 548 of the Bankruptcy Code and Alabama law, which the Trustee can invoke pursuant to § 544(b) of the Bankruptcy Code. Both statutes permit avoidance of a transfer if the transfer was made without receipt of reasonably equivalent value. 11 U.S.C. § 548(a); ALA CODE § 8-9A-5 (1993). Whitney asserts that Mason Plan received a benefit in exchange for the transfers at issue and that this benefit constituted reasonably equivalent value.

It is undisputed that the loan proceeds paid to Sam Vrachalus individually were deposited in Mason Plan's account. However, there is some dispute over what happened to the funds from

there. Mason Plan's journal entries show a debit in the amount of $625,000 for "Cash in Peoples Bank"and a credit in the amount of $625,000 to "Note Pay - (other)." There was no other evidence or explanation of any note payable. The journal entries then show a credit in the amount of $626,584.18 for cash and debits in the amounts of $625,000 for "Invest Acct - 3yrs" and $1,280.74 for interest expense. Again, there is no explanation or evidence as to any investment account. The copy of the check, signed by Sam Vrachalus, from Mason Plan in the amount of $626,280.74 indicated it was for $625,000 in principal and $1,280.74 in interest, and was payable to "AmSouth Bank as Trustee for Certificate # 10961." It cannot be ascertained from the evidence presented whether it involves an obligation or asset of Mason Plan or of Sam Vrachalus individually. What trust was involved? Who was the beneficiary? Why did Mason Plan pay funds to it? A trust account payment to AmSouth Bank as Trustee cannot be considered a direct payment to AmSouth Bank without more evidence than is available at this time..

Whitney argues that Mason Plan received a benefit by merely receiving the cash into its account no matter how briefly it was there. However, this Court finds no legal precedent asserting that as a matter of law. The cases cited are fact specific. The Trustee maintains that Mason Plan's account was used merely as a conduit for the personal loan to Sam Vrachalus and that the proceeds were used to pay his personal debt. It is possible a trial court might find that the loan proceeds were invested in a certificate of deposit for Sam Vrachalus individually or to pay a debt owed by Sam Vrachalus individually. Interpreting the facts in a light most favorable to Mason Plan, the Court finds that there is a genuine issue as to whether Mason Plan received equivalent value in return for making payments on and guaranteeing the loan from Peoples Bank.

C.

Whitney filed responses to the Trustee's June 26, 2000 requests for admissions on July 26, 2000. The admission requests dealt with Mason Plan's insolvency during 1990-1996, and all times relevant to this case. Whitney responded by admitting Mason Plan's insolvency, but objecting to the admissions as improperly directed to it, as hearsay, as irrelevant, etc. Since the Trustee admits that he has no grounds to pursue his preference claim and has no grounds to dispute any factual element except receipt of value as to the fraudulent transfer claim, the objections need not be decided. The preference claim is gone and it appears that Whitney will not contest Mason Plan's insolvency at the trial of Count One. Therefore, the objections are denied unless Whitney raises them again before trial.

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The motion of Whitney National Bank to strike testimony of Jerry Broughton is GRANTED.

2. The objections of Whitney National Bank to the Trustee's requests for admissions are DENIED.

3. The motion for summary judgment of Whitney National Bank as to Count One is DENIED; a pretrial as to Count One will be held on **October 24, 2000 at 10:00 a.m.**

4. The motion for summary judgment of Whitney National Bank as to Counts Two, Three, Four, and Five is GRANTED and JUDGMENT in favor of Whitney Bank is awarded as to Counts Two, Three, Four and Five.

Dated: September 7, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE