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ADV. NUMBER: 99-1046
JUDGE: M. A. Mahoney
PARTIES: Mason Plan Company, Inc., AmSouth Bank, N.A.
CHAPTER: 7
ATTORNEYS: S. Olen, E. B. Peebles, III
DATE: 5/23/00
KEY WORDS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

MASON PLAN COMPANY, INC. Case No. 97-11031-MAM-7

Debtor.

THEODORE L. HALL

Trustee/Plaintiff,

v. Adv. No. 99-1046

AMSOUTH BANK, N.A.

Defendant.

ORDER AND JUDGMENT DENYING COMPLAINT OF TRUSTEE TO RECOVER TRANSFERS MADE TO AMSOUTH BANK, N.A.

Steve Olen, Mobile, Alabama, Attorney for the Trustee
E. B. Peebles III, Mobile, Alabama, Attorney for Amsouth Bank, N.A.

This proceeding is before the Court on the complaint of the trustee Theodore L. Hall to recover transfers made to Amsouth Bank, N.A. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 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 Court finds that the transfers from Mason Plan Company, Inc. to Amsouth are not avoidable.

FACTS

On March 19, 1997, the debtor Mason Plan Company, Inc. filed this chapter 7 case. Sam Vrachalus is the primary shareholder in the debtor and was its chief executive officer until December 19, 1996.

On July 18, 1996, Vrachalus entered into a loan agreement with Amsouth in the amount of $40,000. On August 9, 1996, Vrachalus entered into a new loan agreement with Amsouth in the amount of $45,000. The loan worksheets prepared by Amsouth described the purpose of the loans as "personal investment" and "personal investment in Mason Plan" respectively. Both loans were unsecured. In accordance with the instructions on Amsouth's worksheets, the loan advances were deposited into Mason Plan's account. The parties stipulated that Mason Plan made the following payments to Amsouth on the indebtedness of Vrachalus:

DATE	AMOUNT
9/16/96	$329.38
10/17/96	$812.22
10/28/96	$637.50
10/28/96	$1,420.84
11/15/96	$5,292.78
11/25/96	$1,375.00
12/30/96	$1,375.00
1/15/97	$1,220.69
1/17/97	$802.68

Sam Vrachalus was listed on Mason Plan's bankruptcy schedules as a creditor with an unsecured claim in the amount of $14,516. Mason Plan indicated in its statement of financial affairs that this was the amount still owing Vrachalus and that Mason Plan had made payments in unknown amounts to Vrachalus and/or to a corporation controlled by Vrachalus on account of this indebtedness. Vrachalus was also scheduled as a codebtor and a defendant in a possible action by Mason Plan.

LAW

The trustee set forth four counts in his complaint: (1) fraudulent transfer, (2) avoidable preference, (3) constructive trust/accounting, and (4) unjust enrichment. Each count will be discussed below in turn.

A.

The trustee asserts fraudulent transfer claims pursuant to § 548 of the Bankruptcy Code and Alabama law which he may invoke pursuant to § 544(b) of the Bankruptcy Code. Both statutes permit avoidance of a transfer based on actual intent to defraud creditors or, regardless of intent, if the transfer was made without receipt of reasonably equivalent value. 11 U.S.C. § 548(a); ALA. CODE §§ 8-9A-4, 8-9A-5 (1993). No evidence of actual fraud was presented. The pertinent provisions are those dealing with transfers allegedly made without receipt of reasonably equivalent value by the debtor. 11 U.S.C. § 548(a)(2); ALA. CODE § 9-9A-5(a).

The purpose of fraudulent transfer statutes is to protect creditors from the diminishing value of a debtor's estate due to suspect transfers. 5 COLLIER ON BANKRUPTCY ¶ 548.01 (15th ed. 1999). If the debtor receives reasonably equivalent value in exchange for the transfers, then avoidance is generally unnecessary. The debtor's estate is not diminished.

In related cases, the Eleventh Circuit has held that an indirect benefit to the debtor may qualify as reasonably equivalent value. *Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.)*, 904 F.2d 588, 593-95 (11th Cir. 1990); *General Electric Credit Corp. v. Murphy (In re Rodriguez)*, 895 F.2d 725, 727 (11th Cir. 1990).[1] Benefits, albeit indirect, to the debtor can qualify as reasonably equivalent value if the benefits are worth as much as the property transferred by the debtor. *See, Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 991 (2d Cir. 1981) (approving the indirect benefit rule; court was considering "fair consideration," the Bankruptcy Act's version of "reasonably equivalent value").

[1]These cases are part of a vast body of decisions that arise out of the desperate, fraudulent and ultimately unsuccessful attempt of Alberto Duque Rodriguez to save both his own and his family's business empires. *In re Chase & Sanborn*, 904 F.2d at 590-91.

The *Rodriguez* case arose out of a loan by General Electric Credit Corp. (GECC) to a subsidiary of the debtor. The subsidiary executed the loan to purchase a private jet. The loan was secured by a chattel mortgage on the jet and guaranteed by a related company and the owner of the entities. The debtor did not guarantee the loan. The transfers were loan payments made by the debtor on behalf of the subsidiary. GECC argued that the debtor received value through its entitlement to use the plane and indirectly through any benefit received by its subsidiary. The Court found that the debtor never used the plane and found that any benefit to the debtor's subsidiary did not inure to the debtor. Accordingly, the Eleventh Circuit found that the debtor did not receive reasonably equivalent value in exchange for the transfers and affirmed the lower courts' decisions to avoid the transfers.

In the *Chase & Sanborn* case, the trustee sought to avoid as fraudulent transfers payments made by the debtor to Arab Banking Corp. (ABC) for overdrafts incurred by the owner of the debtor. Prior to the transfers by the debtor to cover the overdrafts, payments were made from the owner's account at ABC to the debtor. These payments created the owner's overdrafts. The total amount paid to the debtor exceeded its payments to ABC. The Eleventh Circuit affirmed the finding of the bankruptcy court that the transfers to ABC were made in exchange for the payments from the owner's account and that the value of each was reasonably equivalent. *In re Chase & Sanborn*, 904 F.2d at 594.

The Court finds that Mason Plan received an indirect benefit (proceeds from the loans between Sam Vrachalus and Amsouth Bank) in exchange for its transfers to Amsouth Bank and that this indirect benefit constitutes a reasonably equivalent value. Analogous to the *Rodriguez* and *Chase & Sanborn* cases, the transfers were not based on an express contractual relationship between Mason Plan and Amsouth Bank. The key fact bringing this situation in line with *Chase*

& Sanborn and distinguishing it from *Rodriguez* is the value received by Mason Plan in exchange for the payments made to Amsouth. The loans to Sam Vrachalus were incurred to capitalize Mason Plan. The proceeds of the loans were deposited in the Mason Plan account. Likewise, the debtor in *Chase & Sanborn* received the funds from the NSF checks written by the debtor's owner. The amount received by Mason Plan and *Chase & Sanborn* exceeded the value of the alleged fraudulent transfers. The debtor in *Rodriguez* did not receive anything of value prior to its payments to GECC. Accordingly, the Court finds that the payments by Mason Plan to Amsouth were made in exchange for reasonably equivalent value and therefore are not fraudulent transfers.

B.

To ensure that similarly situated creditors receive equal treatment, the Bankruptcy Code permits the trustee to avoid certain prepetition transfers of the debtor that prefer some creditors over others. 5 COLLIER ON BANKRUPTCY ¶ 547.01 (15th ed. 1999). The elements of an avoidable preference are as follows: (1) any transfer of an interest of the debtor in property, (2) to or for the benefit of a creditor, (3) for or on account of an antecedent debt owed by the debtor before the transfer was made, (4) made while the debtor was insolvent, (5) made within 90 days before bankruptcy or between 90 days and one year if the transferee was an insider, and (6) that enables the creditor to receive more than it would receive in a hypothetical chapter 7 distribution. 11 U.S.C. § 547(b).

Based on the stipulated facts, the Court finds that elements one, four, five and six are satisfied. The second and third elements are at issue. 11 U.S.C. §§ 547(b)(1) and (2). These two elements provide the trustee with two alternative theories of recovery. One, the transfers were preferential because they were to Amsouth (a creditor) on account of an antecedent debt

owed by Mason Plan or two, the transfers were preferential because they were made for the benefit of Sam Vrachalus (an insider creditor) on account of an antecedent debt owed by Mason Plan. The trustee has the burden of proof. 11 U.S.C. § 547(g).

Under either theory and notwithstanding the status of Vrachalus as an insider and § 547(b)(4)(B),[2] the trustee may only recover from Amsouth transfers made within the 90-day preference period because Amsouth is a non-insider. 11 U.S.C. § 550(c).[3] The transfers to Amsouth during the 90-day preference period total $3,398.37.

1.

To succeed on the first theory, the trustee must prove that Amsouth was a creditor of Mason Plan and that the transfers were made on account of the debt owed by Mason Plan. The trustee argued that Amsouth cannot have it both ways, i.e., it cannot claim that Mason Plan received reasonably equivalent value for purposes of § 548, but it is not a creditor under § 547. A similar argument was adopted by Judge George L. Proctor in *Hall v. Arthur Young and Co. (In re Computer Universe)*, 58 B.R. 28 (Bankr. M.D. Fla. 1986). Arthur Young performed accounting services, including preparation of consolidated returns, for Computer Universe's parent company and its parent's subsidiaries. All work was billed to the parent. As a result of the parent's financial difficulties, an agreement was reached whereby equipment would be

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[2]"[T]he trustee may avoid a transfer . . . made . . . between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider." 11 U.S.C. § 547(b)(4)(B).

[3]"If a transfer made between 90 days and one year before the filing of the petition -
(1) is avoided under section 547(b) of this title; and
(2) was made for the benefit of a creditor that at the time of such transfer was an insider;
the trustee may not recover . . . from a transferee that is not an insider." 11 U.S.C. § 550(c).

transferred from Computer Universe to Arthur Young in satisfaction of the parent's indebtedness to Arthur Young. Judge Proctor found:

> To the extent that Arthur Young claims that reasonably equivalent value passed to Computer Universe by virtue of the extinguishment of its debt to its parent, Arthur Young necessarily concedes that there has been a novation. Such novation substituted Arthur Young as the creditor for [the parent] thus meeting the "to a creditor" element of a preference.

Id. at 31.

Unlike this case, there was an agreement in *Computer Universe* between the parent company of Computer Universe and Arthur Young. According to the agreement, Computer Universe essentially assumed the indebtedness of its parent. There is no such agreement between Amsouth and Sam Vrachalus. The trustee relies solely on the apparent inconsistent positions of Amsouth. However, it is not inimical to assert that reasonably equivalent value has been received in exchange for a transfer while maintaining that there is no creditor/debtor relationship between the debtor and the transferee. Under both § 547 and the pertinent fraudulent transfer statutes, transfers will not be avoidable if the debtor's assets were not depleted. *See*, 11 U.S.C. §§ 547(c)(1) (contemporaneous exchange exception), 547(c)(4) (new value exception); 548(a)(2)(A) (reasonably equivalent value provision); ALA. CODE § 8-9A-5. However, unlike fraudulent transfers, preferential transfers are avoidable not based on actual or constructive fraud, but primarily on the equitable goals of treating similarly situated creditors equally and deterring a "race to the courthouse" by creditors of a financially distressed debtor. Section 547's applicability is dependent on whether the transferee was a creditor. Section 548 avoids fraudulent transfers without regard as to whom the transfer was made. Therefore, the purposes of §§ 547 and 548 are not defeated if, notwithstanding its status as a non-creditor, a

transferee is found to have provided reasonably equivalent value. The concepts are not synonymous.

Although not synonymous, reasonably equivalent value and status as a creditor are related. In *Nordberg v. Societe Generale (In re Chase & Sanborn Corp.)*, 68 B.R. 530, 532-33 (11th Cir. 1986),[4] the debtor transferred $50,000 to Societe Generale in partial satisfaction of a loan by Societe Generale to a subsidiary of the debtor. The Eleventh Circuit stated that "[t]he debts of an incorporated affiliate do not, by that fact alone, become the debts of a debtor in bankruptcy for purposes of § 547." *Id*. at 532. The transfer to Societe Generale was found not to be "'to or for the benefit of a creditor' of [Chase & Sanborn], nor was it 'for or on account of an antecedent debt owed' by [Chase & Sanborn]." *Id*. The Court also found that reasonably equivalent value was not provided. Both determinations were affected by the fact that the loan proceeds from Societe Generale to the debtor's subsidiary were never transferred to the debtor.

The Court gleans from this jurisprudence that determining if a direct transferee in tripartite transactions is a creditor is a fact-specific inquiry. Although relevant, the receipt of value by the debtor is not determinative of whether the transferee is a creditor. The central inquiry is whether the transferee has a right to payment from the debtor, whether or not such right is fixed, liquidated, disputed or contingent. 11 U.S.C. §§ 101(5) (definition of claim), 101(10) (creditor means an entity that has a claim against the debtor).

Based on the stipulated facts, the Court finds that Amsouth is not a creditor of Mason Plan for purposes of § 547(b). There was no agreement between Amsouth and Mason Plan. There was no evidence that Mason Plan guarantied or otherwise agreed to assume responsibility

[4]Another case related to the failure of Alberto Duque Rodriguez's businesses. *See, supra* note 1.

for the indebtedness of Sam Vrachalus to Amsouth. Additionally, even assuming the rationale of *Computer Universe* is applied, Amsouth is not necessarily a creditor because there was no evidence of an agreement between Amsouth and Vrachalus whereby Amsouth would look to assets of Mason Plan in satisfaction of Vrachalus' indebtedness. Amsouth's position for purposes of § 547 is similar to Societe Generale in the *Chase & Sanborn* case. The trustee has failed to prove that Amsouth is a creditor on account of the loans underlying the transfers by Mason Plan. Therefore, the Court finds that Amsouth was not a creditor for purposes of this proceeding.

2.

To succeed on his second theory, the trustee must prove that Sam Vrachalus was a creditor for whose benefit the transfers were made on account of a debt owed by Mason Plan. The *Deprizio* case is probably the most renowned case involving a transfer "for the benefit of a creditor." *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186 (7th Cir. 1989).[5] It is now well established that a transfer that benefits a guarantor of the debtor (*Deprizio* situation) or a transfer by a guarantor debtor on behalf of the primary obligor satisfies the "for the benefit of a creditor . . . on account of an antecedent debt owed by the debtor" elements of a preferential transfer. *See*, *In re Chase & Sanborn*, 904 F.2d at 595 (argument that transfers by guarantor debtor were not "on account of antecedent debt" found to be frivolous); *compare, Hendon v. Associates Commercial Corporation (In re Fastrans, Inc.)*, 142 B.R. 241 (Bankr. E.D. Tenn. 1992) (insider who guaranteed indebtedness of debtor found not to be a creditor for preference purposes because insider had waived any claim against debtor in the event that insider was required to

[5]Commonly referred to as *Deprizio* because the debtor was V. N. Deprizio Construction Co.

honor its guaranty). What makes the debtor/creditor relationship unclear in this case is that Mason Plan did not guarantee the indebtedness of Sam Vrachalus to Amsouth. There is no writing expressly evidencing an obligation of Mason Plan to Vrachalus.

Grant v. Sun Bank/North Central Florida (In re Thurman Construction, Inc.), 189 B.R. 1004 (Bankr. M.D. Fla. 1995) involved facts similar to this case. James and Beverly Thurman, principals of the debtor, entered into a revolving credit arrangement with Sun Bank. The credit arrangement was renewed. The Bank's fact sheets indicated that the renewal was to obtain working capital for the debtor corporation. Draws on the line of credit were deposited directly into the debtor's bank account. Prior to filing bankruptcy, the debtor made several transfers to Sun Bank on account of this indebtedness. Beverly Thurman was listed as a creditor on the debtor's schedules.[6] The Court found that the Thurmans were insider creditors of the debtor and that the transfers were made for their benefit. *Id*. at 1009. Accordingly, the transfers on account of the revolving credit indebtedness were found to be avoidable preferences.

Sam Vrachalus was listed as a creditor like Beverly Thurman in *Thurman Construction*, but that does not end the inquiry. *Ray v. City Bank and Trust Company (In re C-L Cartage Co. Inc.)*, 899 F.2d 1490, 1493 (6th Cir. 1990) (failure to list president as creditor is not dispositive of his status as a creditor). Likewise, the fact that Sam Vrachalus may have had an equity interest in Mason Plan does not preclude him from being a creditor of the bankruptcy estate of Mason Plan. *See, Ross v. National Bank of Commerce (In re Auto-Pak, Inc.)*, 55 B.R. 403 (Bankr. D.C. 1985) (sole-shareholder of debtor found to be a creditor). Once again, the determination depends on the specific facts of this case.

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[6]James Thurman was not listed probably because he died prior to the bankruptcy.

The Court finds that the trustee has failed to prove by a preponderance of the evidence that Sam Vrachalus is a creditor for purposes of § 547. Vrachalus is characterized in the schedules of Mason Plan as the President, CEO and an insider of Mason Plan. This implies an equity, as opposed to a debt relationship. However, Vrachalus is also listed as a creditor. The exact nature of this indebtedness of Mason Plan to Vrachalus is uncertain. Mason Plan's statement of financial affairs indicates that it made payments to Vrachalus and/or an investment company controlled by him in partial satisfaction of this indebtedness. Thus, even if the Court assumes that the scheduled claim of Vrachalus arises out of the same transaction underlying the transfers at issue, Vrachalus may be a "net-debtor," not a creditor for purposes of § 547. *Amdura Corporation v. Ryder Truck Rental, Inc. (In re Amdura Corp.)*, 151 B.R. 557 (Bankr. D. Colo. 1993) (expectation of payment did not make subsidiary a creditor of Amdura Corp. because subsidiary was a "net-debtor" according to intercompany account). Whether Vrachalus is a "net-debtor" or "net-creditor" cannot be determined because the amount paid Vrachalus by Mason Plan is unknown. Even if Vrachalus is owed more than he received, it is unlikely that the scheduled indebtedness of Mason Plan to Vrachalus corresponds to the loan by Amsouth to Vrachalus. *See, Southmark Corp. v. Southmark Personal Storage, Inc. (In re Southmark Corp.)*, 138 B.R. 831, 834 (Bankr. N.D. Tex. 1992) (§ 547(b) requires a "creditor" based on the claim underlying the challenged transfer). There are too many questions precluding this Court from finding that the transfers were made for the benefit of a creditor on account of an antecedent debt owed by Mason Plan.

This case can be distinguished from *Thurman Construction* and *C-L Cartage*, 899 F.2d 1490 (similar tripartite relationship; president of debtor found to be creditor notwithstanding lack of any written agreements between president and debtor). Like those cases, the money loaned by

Amsouth was deposited in Mason Plan's account. Mason Plan made eight payments to Amsouth on the indebtedness. There was no written agreement evidencing a debtor/creditor relationship between the third-party beneficiary (Vrachalus in this case) and the debtor. However, unlike *C-L Cartage*, the trustee did not present any evidence that Vrachalus expected Mason Plan to pay his indebtedness to Amsouth. Unlike *Thurman Construction*, the trustee did not prove that the scheduled claim of Vrachalus against Mason Plan arose out of the loans by Amsouth to Vrachalus. Although not expressly set forth, this determination is implicit to the conclusion in *Thurman Construction*. *Thurman Construction*, 189 B.R. at 1009 (transfers reduced amount of the Thurmans' indebtedness to Sun Bank); *see, Southmark*, 138 B.R. at 834 ("creditor" status must arise out of obligation underlying the transfer). Thus, this case is distinguishable from *Thurman* and *C-L Cartage*. The Court finds that the trustee did not prove that Sam Vrachalus has a claim against Mason Plan on account of the loans by Amsouth. Therefore, Vrachalus is not a creditor for purposes of § 547(b).

In conclusion, the transfers at issue were not for the benefit of a creditor on account of an antecedent debt of Mason Plan. Neither § 547(b)(1) nor (2) has been satisfied. The Court therefore finds that the transfers at issue are not avoidable preferences.

C.

Counts 3 and 4 asserted by the trustee invoke the equitable doctrines of constructive trust/accounting and unjust enrichment. The elements of these doctrines require a mistake by the transferor or misconduct or fraud by the transferee. *Jordan v. Mitchell*, 705 So.2d 453, 457-458 (Ala. Civ. App. 1997). These elements were not argued by the trustee. The Court finds no evidence to support counts 3 and 4 and they are therefore denied.

THEREFORE IT IS ORDERED AND ADJUDGED that the complaint of the trustee Theodore L. Hall is DENIED.

Dated: May 23, 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE