DOCKET NUMBER: 95-13354
ADV. NUMBER: 97-1264
JUDGE: M. A. Mahoney
PARTIES: Donald W. Koontz, Jr., Lonnie Mixon, The Estate of Kenneth R. Hand, The Cynthia Hand Bragg Trust, The Dustin Bragg Trust, Marvin H. Taylor
CHAPTER: 7
ATTORNEYS: L. C. Williams, J. M. Gaines
DATE: 2/4/98
KEY WORDS:
PUBLISHED:

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. 97-1264

THE ESTATE OF KENNETH R. HAND, deceased; THE CYNTHIA HAND BRAGG TRUST; THE DUSTIN BRAGG TRUST; MARVIN H. TAYLOR, only in his capacity as trustee of the above two trusts and/or as executor of the estate of Kenneth R. Hand, deceased

Defendants

ORDER GRANTING SUMMARY JUDGMENT TO THE PLAINTIFF AND DENYING SUMMARY JUDGMENT TO DEFENDANTS

Lionel C. Williams, Attorney for the Trustee
James M. Gaines, Attorney for the Defendants

This case is before me on the opposing motions for summary judgment of the Plaintiff and Defendants in the adversary proceeding. This Court has jurisdiction to hear these matters pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is granting the summary judgment motion of the Plaintiff and denying the summary judgment motion of the Defendants.

FACTS

Donald Koontz, Jr. filed his chapter 7 bankruptcy case on December 4, 1995. Prior to that time, he was a self-employed certified public accountant who handled the financial affairs of a variety of businesses and individuals. On February 25, 1987, Kenneth R. Hand executed a will which named Koontz executor of the will and trustee of several trusts established in the will. At Mr. Hand's death, Koontz assumed those roles.

Koontz treated the estate and trust as he treated all of his other business involvements—carelessly. See Order and Judgment Denying Debtor's Discharge dated March 27, 1997. Beginning in 1994, Koontz began to borrow money from the estate or trusts for his personal use. He did so informally, with no notes and no notification to beneficiaries. The sum borrowed eventually equaled $55,000.

On September 1, 1994, Koontz executed at least a note to the estate and trusts in the amount of $55,000. On the same date, he may have executed a mortgage as well giving "The Estate of Kenneth Hand" a second lien on the real property from which he conducted his accounting business. Koontz asserts he did make the mortgage simultaneously with the note, but then lost the mortgage. He then drafted a replacement one which was dated August 15, 1994. It was recorded in Baldwin County in Real Property Book 0634, pages 1314-1317, on June 28, 1995. It makes no difference to the result in this case whether a mortgage was signed on September 1, 1994. Koontz testified in his affidavit that the property was worth enough to secure the mortgage to the Hand estate in full.

The trustee of Donald Koontz's chapter 7 estate brought this lawsuit alleging that the recordation of the mortgage was either a preferential transfer pursuant to 11 U.S.C. § 547 or a

fraudulent transfer pursuant to 11 U.S.C. §§ 544 or 548. In either event, the trustee argues that the mortgage is due to be avoided for the benefit of all of the creditors of the bankruptcy estate.

LAW

The trustee has alleged that the recordation of the mortgage on June 28, 1995 is a preferential transfer or a fraudulent conveyance under federal or state law. Since the Court concludes that the mortgage recordation was preferential, this opinion will not discuss the fraudulent transfer issues.

Section 547(b) provides that a transfer constitutes a preference if five elements are present:

(1) The transfer must be to or for the benefit of a creditor;

(2) The transfer must be for or on account of an antecedent debt;

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

(4) The transfer must have been made

(A) on or within 90 days before the date of the filing of the bankruptcy petition; or

(B) between 90 days and one year before the date of the filing of the bankruptcy petition, if the creditor to whom the transfer was made is an insider;

(5) That enables the creditor to receive more than the creditor would receive under chapter 7 if the transfer had not been made.

The Defendants stipulate that all of the elements have been met except the fourth one. The Defendants assert that they are not insiders of the debtor and, therefore, since the mortgage was recorded more than 90 days before the bankruptcy filing, the transfer is not avoidable.

The term "insider" is defined at 11 U.S.C. § 101(31). It lists certain parties who are insiders but states that the listed parties are not the only possible insiders because it uses the word "includes." The nonexclusive definition states that insiders include:

(A) if the debtor is an individual--

(i) relative of the debtor or of the general of the debtor;
(ii) partnership in which the debtor is a general partner;
(iii) general partner of the debtor; or
(iv) corporation of which the debtor is a director, officer, or person in control.

The term "includes" is not a limiting word and is meant to be expansive. 11 U.S.C. § 102(3). The legislative history to the section bears this out. It states that an insider is "one who has a sufficiently close relationship with a debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor." S. Rep. No. 95-989, 95th Cong., 2nd Sess. 25 (1978) and H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 312 (1977), reprinted in U.S. Code Cong. & Admin. News, 1978, pp. 5787, 5810, 6269; *Koch v. Rogers (In re Broumas)*, 203 B.R. 385 (D. Md. 1996).

The defendants assert that the estate/trusts did not control Koontz; he controlled them. They are correct. The defendants only acted through Koontz. They allege that this fact leads to a conclusion that the defendants are not insiders of Koontz. Many of the cases discuss the fact that the insider must exert control over the debtor sufficient to cause the debtor to pay the insider first and most. *E.g., Dent v. Martin*, 104 B.R. 477 (S.D. Fla. 1989); *ABC Elec. Services, Inc. v. Rondout Elec., Inc. (In re ABC Elec. Services, Inc.)*, 190 B.R. 672 (Bankr. M.D. Fla. 1995); *Damir v. Trans-Pacific Nat'l Bank (In re Kong)*, 196 B.R. 167 (N.D. Cal. 1996).However, "actual control is not a predicate to finding someone to be an extra-statutory insider." *Broumas,* 203 B.R. at 385, 390 (D. Md. 1996); *Winick v. Daddy's Money of Clearwater, Inc. (In re Daddy's Money of Clearwater, Inc.)*, 187 B.R. 750 (M.D. Fla. 1995). Collier on Bankruptcy states that an insider generally is "an entity whose close relationship with the debtor subjects any transactions made between the debtor and such entity to heavy scrutiny." 2 Collier on

Bankruptcy § 101.31 at 101-87 (15th ed. 1991). In *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1010 (5th Cir. 1992), the Fifth Circuit Court of Appeals stated:

> The cases which have considered whether insider status exists generally have focused on two factors in making that determination: (1) the closeness of the relationship between the transferee and the debtor; and (2) whether the transactions between the transferee and the debtor were conducted at arm's length.
> (Cites omitted.)

In this case, the debtor, Koontz, used the estate/trust's assets as if they were his own. Only when he was within six months of a bankruptcy filing did he seek to protect the defendants and himself by recording a mortgage to the defendants. A near alter ego of the debtor is an insider of the debtor. The purpose of the preference statute is to prevent parties with special access to a debtor from receiving preferential treatment. It is clear that this is exactly what the estate/trusts were able to receive. It is clear their lien is a result of Koontz's knowledge and control of his own estate and the Hand assets too. If girlfriends, *Freund v. Heath (In re McIver)*, 177 B.R. 366 (Bankr. N.D. Fla.1995); *Gennet v. Docktor (In re Levy)*, 185 B.R. 378 (Bankr. S.D. Fla. 1995), and ex-spouses, *In re Holloway*, *supra.*; *Miller v. Schuman (In re Schuman)*, 81 B.R. 583 (9th Cir. BAP 1987), can be insiders because of their close relationship to debtors, Koontz in his trustee role is just as close to Koontz, the debtor.

The defendants cite the case of *Sticka v. Anderson (In re Anderson)*, 165 B.R. 482 (Bankr. D. Or. 1994) as support for their position. The case held that a judgment lien obtained by a probate estate was not avoidable as a preference even though the debtor had been a personal representative of the estate and the estate was the debtor's mother's estate. The debtor had been removed as co-personal representative because he had taken money from the estate without an accounting. The estate obtained a judgment against him for $1,080,000. He was a 50%

beneficiary of the estate as well. The debtor argued that the judgment lien against his property should be avoided by the bankruptcy court as a preference after his bankruptcy filing. He alleged that the estate was an insider under 11 U.S.C. § 101(31). The Court held that the estate was not an insider because the estate and the debtor had hostile positions regardless of the debtor's previous position as personal representative and his interest as a beneficiary of the estate.

In this case, Koontz and the defendants were not hostile to each other in any manner at the time of the recordation of the mortgage. Their transactions were not the result of arms-length dealings. The *Anderson* case presents a situation directly opposite to the one at issue in this case.

For the reasons stated above, the Court concludes that the defendants are insiders of the debtor for purposes of 11 U.S.C. § 547(b)(4)(B). Since the parties agreed that all other conditions under 11 U.S.C. § 547(b) were met for the recordation of the mortgage of the defendants against Koontz's property to be held a voidable preference, the summary judgment motion of the trustee is due to be granted and judgment awarded for the trustee. The summary judgment motion of the defendants is due to be denied.

THEREFORE IT IS ORDERED AND ADJUDGED:

1. The motion for summary judgment of the trustee is GRANTED and judgment is awarded for the trustee, Lonnie Mixon, declaring that the mortgage of the defendants, the Estate of Kenneth R. Hand, deceased, the Cynthia Hand Bragg Trust, the Dustin Bragg Trust, and Marvin H. Taylor, only in his capacity as trustee of the trusts and/or as executor, is avoided and the transferred property is preserved for the benefit of the bankruptcy estate.

2. The summary judgment motion of the defendants is DENIED.

Dated: February 4, 1998

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE