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Date and Time: 08 Mar 2016 6:40 p.m. EST

Job Number: 30012510

Document(1)

1. [In re Butcher, 72 B.R. 447](#)

Client/Matter: -None-



Caution

As of: March 8, 2016 6:41 PM EST

In re Butcher

United States Bankruptcy Court for the Eastern District of Tennessee

April 15, 1987, Filed

No. 3-83-01036, Adv. Proc. No. 3-85-1221

Reporter

72 B.R. 447; 1987 Bankr. LEXIS 545

In re Jacob F. BUTCHER, a/k/a Jake F. Butcher, Jake Butcher, and JFB Petroleum & Land Company, Inc., Debtor; John H. BAILEY, III, Trustee Plaintiff v. METZGER, SHADYAC & SCHWARZ, a partnership, and , Defendants; METZGER, SHADYAC & SCHWARZ, Cross-Claimant v. , Cross-Defendant and Third-Party Plaintiff v. ; Daniel, Claiborne & Lewallen; Troutman, Sanders, Lockerman & Ashmore, Third-Party Defendants

Prior History: **[**1]** Memorandum on Plaintiff Trustee's Motion for Summary Judgment Against Defendant Metzger, Shadyac & Schwarz.

Core Terms

transferred, summary judgment, services, equivalent value, insolvent, trustee's

Case Summary

Procedural Posture

Plaintiff trustee filed motion for summary judgment against defendant, contending that trustee was entitled to avoid a transfer from debtor to defendant as an agreement to render future legal services for debtor's wife and children pursuant to [11 U.S.C.S. § 548\(a\)\(2\)](#).

Overview

Plaintiff trustee sought to avoid a transfer resulting from an agreement between debtor and defendant law firm to render future legal services for debtor's wife and children pursuant to [11 U.S.C.S. §](#)

[548\(d\)\(2\)\(A\)](#). Trustee argued that a promise to perform future services was not within the scope of value defined in [§548\(d\)\(2\)\(A\)](#). Defendant insisted that debtor's duty of support included the obligation to pay his wife's legal fees and that debtor received value in exchange for the challenged transfer. Since [§ 548\(d\)\(2\)\(A\)](#) excluded future considerations, at least to the extent not actually performed, trustee was entitled to recover the amount transferred after entry of the order for relief in which debtor's estate received nothing in exchange.

Outcome

The court granted trustee's motion to recover the amount transferred by defendant to a law firm, which occurred after entry of the order for relief, from which debtor's estate received nothing in exchange for the transfers.

LexisNexis® Headnotes

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview

HN1 See [11 U.S.C.S. § 548\(a\)](#).

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview

HN2 To avoid a transfer pursuant to [11 U.S.C.S. § 548\(a\)\(2\)](#), the trustee must establish four elements: (1) a transfer of property of the debtor; (2) an exchange for less than reasonably equivalent value; (3) the debtor must have been insolvent on the date the transfer was made or rendered insolvent

as a result of the transfer; and (4) the transfer occurred within one year preceding the petition date.

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Value

HN3 See [11 U.S.C.S. § 548\(d\)\(2\)\(A\)](#).

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > General Overview

Bankruptcy Law > ... > Avoidance > Fraudulent Transfers > Value

HN4 Under [11 U.S.C.S. § 548\(d\)\(2\)\(A\)](#), value excludes future considerations, at least to the extent not actually performed.

Counsel: Bass, Berry & Sims, Wallace W. Dietz, Esq., for Plaintiff.

Metzger, Shadyac & Schwarz, Richard C. Shadyac, Sr., Esq., Joseph H. Lahoud, Jr., Esq., Richard C. Shadyac, Jr., Esq., Charles R. Corbin, Jr., Esq., Pro Se.

Jules S. Cohen, P.A., Jules S. Cohen, Esq.; Arnett, Draper & Hagood, Jack B. Draper, Esq., for Maguire, Voorhis & Wells, P.A.

Claiborne, Davis, Buuck & Hurley, David L. Buuck, Esq., D. Scott Hurley, Esq., for Daniel, Claiborne & Lewallen.

Lacy & Winchester, J. Michael Winchester, Esq, Pro Se.

Troutman, Sanders, Lockerman & Ashmore, Ezra H. Cohen, Esq., Mary Grace Diehl, Esq.; David L. Buuck, Esq., for Troutman, Sanders, Lockerman & Ashmore.

Judges: Richard Stair, Jr. United States Bankruptcy Judge.

Opinion by: STAIR, JR.

Opinion

[*448] RICHARD STAIR, JR. UNITED STATES BANKRUPTCY JUDGE

At issue is whether an agreement to render future legal services for the debtor's wife and children in exchange for a \$ 50,000.00 prepetition transfer by the debtor constitutes value in the context of [11 U.S.C.A. § 548 \(West 1979\)](#) (Fraudulent transfers and obligations). Seeking to avoid the transfer, the plaintiff trustee contends a promise to perform future services is not [*2] within the scope of "value" as defined in [11 U.S.C.A. § 548\(d\)\(2\)\(A\) \(West 1979\)](#). Defendant law firms insist the debtor's duty of support includes an obligation to pay his wife's legal fees and that the debtor did receive value in exchange for the challenged transfer.

This is a core proceeding. [28 U.S.C.A. § 157\(b\)\(2\)\(E\)](#) and [\(H\) \(West Supp. 1987\)](#).

I

On June 29, 1983, an involuntary petition was filed against Jacob F. Butcher a/k/a Jake Butcher (the debtor). An order for relief under Chapter 7 was entered on August 22, 1983. The election of John H. Bailey, III, as trustee was approved by the court on September 30, 1983. Of significance to this proceeding, on March 7, 1985, after finding that JFB Petroleum & Land Company, Inc. (JFB) was merely an alter ego of the debtor, this court entered Order No. 103 providing for the amendment of the caption and the administration of the assets and liabilities of JFB as part of the debtor's case.

On September 27, 1985, the trustee filed his complaint naming two law firms, Metzger, Shadyac & Schwarz (Metzger) and Maguire,

Voorhis & Wells, P.A. (Maguire), as defendants.¹ The trustee alleges that on March 3, 1983, the debtor wire transferred \$ 50,000.00 [**3] to Metzger from a JFB account at City & County Bank of Union County; that Metzger wire transferred \$ 25,000.00 on August 23, 1983, and \$ 15,000.00 on September 13, 1983, to Maguire; that the \$ 40,000.00 transferred by Metzger to Maguire represents a portion of the \$ 50,000.00 transferred to Metzger by the debtor; and that the \$ 40,000.00 transferred to Maguire was used to pay legal expenses incurred by the debtor's wife, Sonya Butcher, also a Chapter 7 debtor.² The trustee asserts he is entitled to avoid the \$ 50,000.00 transfer to Metzger as a fraudulent transfer, [11 U.S.C.A. § 548\(a\)\(1\)](#) and [\(2\) \(West 1979\)](#). Alternatively, the trustee maintains Metzger knew, or should have known, an involuntary petition had been filed against the debtor and thus Metzger must turn over and account to the trustee the sum of \$ 50,000.00, pursuant to [11 U.S.C.A. § 542\(a\) \(West 1979\)](#). Additionally, the trustee contends [11 U.S.C.A. § 550\(a\) \(West 1979\)](#) entitles him to judgment in the amount of \$ 40,000.00 against Maguire.

[**4] II

On July 18, 1986, the trustee filed his motion for summary judgment against Metzger, contending he is entitled to avoid [**449] the \$ 50,000.00 transfer pursuant to [§ 548\(a\)\(2\)](#),³ which enacts in part:

HNI Fraudulent transfers and obligations

(a) 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 --

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

(B)(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;

[11 U.S.C.A. § 548\(a\) \(West 1979\)](#).

Both Metzger and Maguire oppose the trustee's motion for summary judgment.⁴

HN2 [**5] To avoid the \$ 50,000.00 transfer to Metzger pursuant to [§ 548\(a\)\(2\)](#) the trustee must establish four elements: (1) a transfer of property of the debtor; (2) an exchange for less than reasonably equivalent value; (3) the debtor must have been insolvent on the date the transfer was made or rendered insolvent as a result of the transfer; and (4) the transfer occurred within one year preceding the petition date. Undisputedly, the \$ 50,000.00 transfer occurred within the one-year time period preceding the debtor's bankruptcy.

¹ Metzger's offices are in Washington, D.C.; Maguire's offices are located in Orlando, Florida.

² An involuntary petition was filed against Sonya Butcher on September 9, 1983, in this court. An order for relief under Chapter 7 was entered on March 28, 1984. See Case No. 3-83-01422.

³ Alternatively, the trustee requests summary judgment pursuant to [§ 542\(a\)](#), contending that Metzger should have turned over any monies received from the debtor. The court need not address the trustee's alternative contention.

⁴ Maguire opposes the motion because [§ 550\(a\)](#) provides that to the extent a transfer is avoided under [§ 548](#) the trustee may recover the property transferred, or the value of such property, from (1) the initial transferee [Metzger] or (2) any immediate or mediate transferee of such initial transferee. While Maguire admits receiving \$ 40,000.00 from Metzger, Maguire denies any liability under [§ 550\(a\)](#), insisting it took for value, in good faith, and without knowledge of the voidability, if any, of the \$ 50,000.00 transfer from the debtor to Metzger. See [11 U.S.C.A. § 550\(b\) \(West 1979\)](#).

On July 18, 1986, asserting [§ 550\(b\)](#) as a defense, Maguire filed a motion for summary judgment against the trustee. Because a pre-trial order entered August 28, 1986, continues indefinitely the response time to Maguire's motion, pending resolution of the trustee's motion, the court defers decision on Maguire's motion. A response time will be fixed.

Also, there is no dispute that the debtor was insolvent at the time of the transfer. The trustee's affidavit averring that as of the transfer date (March 3, 1983) the debtor had a negative net worth of nearly \$ 44,000,000.00, excluding contingent liabilities, is unchallenged.

Metzger and Maguire do contend that the \$ 50,000.00 transferred to Metzger represented joint funds of the debtor and Sonya Butcher. According to the debtor's deposition testimony, he considered the \$ 50,000.00 to be property owned jointly with his wife Sonya. However, the debtor further testified: "I always considered ever since I have been married, anything I had was half hers." ⁵ Sonya Butcher [****6**] has no personal knowledge of the \$ 50,000.00 transfer to Metzger; she does not know whether the funds were hers or the source of the funds. A debit memo from City & County Bank of Union County reflects a \$ 50,000.00 wire transfer to account # XXXX3203 at Virginia National Bank-Norfolk on March 3, 1983. Metzger admits its account at Virginia National Bank was so credited. ⁶ The debit is against an account of JFB at City & County Bank of Union County. As JFB was the debtor's alter ego, the monies in the JFB account were the sole property of the debtor. ⁷

The only remaining element - an exchange for less than reasonably equivalent value - is strenuously disputed. Asserting that the debtor received value, Metzger and Maguire maintain legal services are a necessity and that a husband's duty to support his wife and children includes an obligation to pay their legal fees. The trustee insists the debtor's intervening bankruptcy [***450**] petition prevents the debtor from using prepetition assets to pay [****7**] future obligations.

[Section 548 of the Bankruptcy Code](#) contains a specific definition of "value":**HN3**

"Value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor

[11 U.S.C.A. § 548\(d\)\(2\)\(A\) \(West 1979\)](#).

HN4 Under this definition, value "excludes future considerations, at least to the extent not actually performed." ⁴ [Collier On Bankruptcy, para. 548.07](#) at 548-73 (15th ed. 1987).

Metzger's agreement to perform future legal services on behalf of the debtor's family is outside the scope of "value" as defined in [§ 548](#). Metzger did bill the debtor \$ 1,266.15 and \$ 1,614.29 for professional services and expenses during March and May 1983. Additionally, Metzger drew \$ 7,000.00 from the \$ 50,000.00 retainer. However, Metzger cannot describe the services performed on behalf of the debtor. ⁸ Taking into account the \$ 40,000.00 transferred to Maguire, the balance of the \$ 50,000.00 retainer held by Metzger is only \$ 119.56.

In ruling on the trustee's [****8**] motion for summary judgment, the court is not persuaded that the debtor did not receive value in exchange for the \$ 9,880.44 Metzger drew against the \$ 50,000.00 retainer. On the other hand, the court also is not persuaded that the debtor did receive reasonably equivalent value.

The \$ 40,000.00 forwarded to Maguire in two transfers is a different matter. Although Metzger insists it transferred the \$ 40,000.00 to Maguire at its client's instruction, the fact remains the debtor's

⁵ Deposition of Jake F. Butcher at 32.

⁶ See Deposition of Richard C. Shadyac at 9.

⁷ To her knowledge Sonya Butcher never had any interest in JFB. See Deposition of Sonya Butcher at 12.

⁸ Ralph B. Long, the attorney at the Metzger firm with whom the debtor dealt, is deceased.

estate received nothing in exchange for the transfers, both of which occurred after entry of the order for relief, and many weeks after the filing of the involuntary petition, against the debtor. Metzger received \$ 50,000.00 from the debtor; Metzger did not give reasonably equivalent value for at least \$ 40,119.56 of that amount.

Accordingly, the trustee is entitled to summary judgment against Metzger for that amount, plus pre-judgment interest at the rate of ten (10) percent per annum. See [Tenn. Code Ann. § 47-14-123](#) (1984).