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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 395-38048-elp7
GEORGE M. CLEARWATER,)
) Adversary Proceeding No.
Debtor,) 96-3367-elp
)
MICHAEL A. GRASSMUECK, INC.,) MEMORANDUM OPINION
Trustee,)
)
Plaintiff,)
)
v.)
)
BECKY CLEARWATER-THOMPSON and)
JOHN MITCHELL, Chapter 7 Trustee)
for Becky Clearwater-Thompson,)
)
Defendants.)

Plaintiff, who is the trustee for the bankruptcy estate of George Clearwater, seeks to avoid certain transfers to Becky Clearwater-Thompson ("Becky") and to require Becky to turn over funds she received as a result of those transfers. Becky's Chapter 7 trustee, John Mitchell ("defendant"), is also named as a defendant in this action.

/ / / /

1 Chapter 13. On conversion to Chapter 7, defendant was appointed
2 trustee of her estate.

3 DISCUSSION

4 1. Gold Hill Receivable.

5 Plaintiff first seeks to avoid the transfer of George's
6 interest in the Gold Hill receivable to Becky, and asks for turnover
7 of one-half of the proceeds from that receivable. Plaintiff asserts
8 that his interest in the Gold Hill receivable is superior to Becky's
9 or defendant's pursuant to 11 U.S.C. § 544(a) (3) and ORS 93.640.

10 Section 544(a) (3) provides that plaintiff, as trustee for
11 George, may avoid any transfer of George's interest in property that
12 is voidable by a bona fide purchaser of real property who has
13 perfected such transfer. Under Oregon law,

14 "Every conveyance, deed, land sale contract * * * or other
15 agreement or memorandum thereof affecting the title of real
16 property within this state which is not recorded as provided
17 by law is void as against any subsequent purchaser in good
18 faith and for a valuable consideration of the same real
property, or any portion thereof, whose conveyance, deed,
land sale contract, * * * or other agreement or memorandum
thereof is first filed for record * * *."

19 ORS 93.640(1). Plaintiff asserts that, because the transfer of
20 George's interest in the Gold Hill receivable to Becky was not
21 recorded in the real property records before George filed
22 bankruptcy, plaintiff is entitled under section 544 to assert the
23 powers of a bona fide purchaser who has recorded his interest to
24 avoid the transfer.

25 A. Is the Gold Hill receivable part of George's estate?

26 Defendant argues first that George's interest in the Gold

1 Hill receivable passed to Becky by virtue of the judgment. He
2 concludes, therefore, that title to the Gold Hill receivable vested
3 in Becky before George filed bankruptcy and was not part of George's
4 bankruptcy estate.

5 A judgment that orders the transfer of property and also
6 contains a self-executing clause effects a transfer of the property.
7 Partlow v. Clark, 295 Or 778, 671 P2d 103 (1983). Because the
8 dissolution judgment in this case provided that the judgment itself
9 would "effect such conveyance" if the parties did not execute the
10 required documents, the transfer was accomplished by virtue of the
11 judgment itself.

12 Although the judgment effected a prepetition transfer of the
13 property and therefore George had no remaining interest when he
14 filed bankruptcy, that does not mean that his trustee is precluded
15 from avoiding the transfer. Section 544 contemplates that the
16 debtor has no remaining interest in the property that is the subject
17 of the avoided transaction. The trustee is given the ability to
18 bring into the estate any property that he can obtain through the
19 Bankruptcy Code avoidance powers. In re Anderson, 30 BR 995, 1009-
20 10 (MD Tenn 1983).

21 B. Did plaintiff have constructive notice of the transfer?

22 Defendant next argues that, although the transfer of George's
23 interest in the Gold Hill receivable was not recorded in the real
24 property records, the judgment was properly docketed in the judgment
25 docket in Jackson County, where the Gold Hill property is located,
26 and that judgment gives constructive notice of the transfer from

1 George to Becky.

2 In Partlow v. Clark, the Oregon Supreme Court held that a
3 dissolution decree affecting an interest in real property, entered
4 in the court file or circuit court journal, is constructive notice
5 as to real property in the same county. 671 P2d at 107-08. After
6 Partlow was decided, the Oregon legislature enacted ORS 93.643,
7 which provides, in part:

8 (1) To give constructive notice of an interest in real
9 property, a person must have documentation of the interest
10 recorded in the indices maintained under ORS 205.130
11 [requiring county clerks to maintain real property records]
12 in the county where the property is located. Such
13 recordation, and no other record, constitutes constructive
14 notice to any person of the existence of the interest, except
15 as provided in [statutes not applicable here.]”¹

16 (Emphasis supplied.) That statute supersedes the rule in Partlow
17 that would allow the docketing of a dissolution judgment to
18 constitute constructive notice of the transfer of real property
19 required by the judgment. The dissolution judgment that awarded
20 George's interest in the Gold Hill receivable to Becky and that
21 required George to execute any documents necessary for the transfer
22 does not constitute constructive notice of the transfer, because it
23 was not recorded in the real property records as required by
24 ORS 93.643.

25 C. Did plaintiff have inquiry notice of the transfer?

26 At trial, defendant argued that the reference in the

¹ One exception is ORS 18.350, which provides that, from the time of docketing, a judgment is a lien on real property owned by the debtor in the county where the judgment is docketed. That exception does not apply in this case, where the judgment is not claimed to create a lien.

1 dissolution judgment to the Gold Hill receivable should have given
2 rise to a duty to inquire. Under the traditional view of inquiry
3 notice, a purchaser is charged with constructive notice of a claim
4 to property when the circumstances are such that, with reasonable
5 observation and intelligence, the purchaser should have had notice
6 of that interest at the time of purchase. Belt v. Matson, 120 Or
7 313, 252 P 80 (1927). Whether or not the purchaser made any
8 inquiry, the purchaser is charged with notice of every fact that a
9 reasonable inquiry would have disclosed. High v. Davis, 283 Or 315,
10 584 P2d 725 (1978).

11 In this case, if a bona fide purchaser had looked at the
12 dissolution judgment, the purchaser would have seen in the attached
13 settlement agreement an award to Becky of the "Gold Hill
14 receivable." The award is in the exhibit to the settlement
15 agreement setting out the division of personal property, not in the
16 exhibit dividing real property. There is no description of the Gold
17 Hill property nor any other reference to the property or receivable
18 in the dissolution judgment or settlement agreement that would
19 indicate the "Gold Hill" referred to real property. The Oregon
20 Court of Appeals has held that, where the dissolution judgment does
21 not give any indication that it affects an interest in land, the
22 judgment is insufficient to provide constructive notice. Spady v.
23 Graves, 91 Or App 52, 755 P2d 128 (1988), aff'd on other grounds 307
24 Or 483, 770 P2d 53 (1989). In this case, there is nothing in the
25 judgment to indicate that it affects an interest in the Gold Hill
26 real property. As in Spady, the judgment would not have made a

1 person of reasonable observation and intelligence inquire further.

2 D. Is the transfer from George to Becky void under Oregon
3 law?

4 Defendant also argues that ORS 93.640, which provides that
5 every "conveyance" of an interest in real property is void as
6 against a bona fide purchaser who first records, does not apply to
7 the transfer from George to Becky because a transfer effected by a
8 judgment is not a "conveyance" within the meaning of ORS 93.640.
9 The issue was presented but not decided in Partlow v. Clark. In
10 that case, there was a dispute between a former wife who had been
11 awarded a one-half interest in property by a dissolution decree, and
12 subsequent purchasers of the entire interest from the former
13 husband. In asserting that her interest in the property was
14 superior to that of the subsequent purchaser, the former wife argued
15 that a transfer of property by decree was not a conveyance to which
16 ORS 93.640 applied. The Supreme Court concluded that a
17 determination of that issue was not necessary to a decision in the
18 case. 671 P2d at 105 n 4. Instead, the court decided the case
19 based on whether the subsequent purchaser had constructive notice of
20 the former wife's interest.

21 Although the Supreme Court did not consider whether
22 "conveyance" as used in ORS 93.640 includes transfers of property
23 that occur by operation of law, the court's decision was based on
24 the underlying principle that a subsequent bona fide purchaser of an
25 interest in real property takes the property subject to previous
26 interests of which the purchaser has actual or constructive notice

1 and free of interests of which the purchaser does not have actual or
2 constructive notice. The court recognized that, whether or not
3 ORS 93.640 applied to the facts, the subsequent purchaser could
4 prevail only if the purchaser did not have constructive notice of
5 the former wife's interest. Therefore, even if ORS 93.640 does not
6 apply by its terms to a transfer by dissolution judgment, under
7 Oregon law a subsequent purchaser of real property takes the
8 property subject only to those interests of which the purchaser has
9 actual or constructive notice.

10 Because the dissolution judgment transferring the Gold Hill
11 property from George to Becky does not give constructive or inquiry
12 notice of Becky's interest for the reasons discussed in 1.B. and C.
13 above, the transfer is void under Oregon law. Thus, plaintiff,
14 asserting the rights of a bona fide purchaser from George, should be
15 able to avoid the transfer to Becky of George's interest in that
16 property.

17 E. Which of the two trustees has superior rights to the
18 property?

19 In this case there are competing trustees, both asserting
20 rights of a bona fide purchaser. Defendant claims that his interest
21 is superior to plaintiff's, because plaintiff did not record his
22 asserted interest in the Gold Hill property and receivable before

23 / / / /

1 defendant did.²

2 Defendant has the rights and powers of a bona fide purchaser
3 from Becky. The issue is which trustee's rights under section 544
4 prevail. At the commencement of Becky's case, the real property
5 records showed that the Gold Hill property was owned jointly by
6 George and Becky, and that both of them had sold the property on a
7 land sale contract to a third party. There was nothing in the real
8 property records indicating that George's interest had been
9 transferred or otherwise had been extinguished. A purchaser of
10 property takes that property subject to the properly recorded
11 interests. Ellison v. Watson, 53 Or App 923, 633 P2d 840, 845 n 5,
12 rev denied, 292 Or 109 (1981). Therefore, defendant, as a bona fide
13 purchaser under section 544, took the property subject to George's
14 recorded one-half interest. His interest is not superior to that of
15 plaintiff.³

16 F. Remedy.

17 I have already ordered Becky to turn over to defendant
18 Mitchell the \$28,658, representing proceeds from the payoff of the
19 Gold Hill receivable. Becky shall also turn over to Mitchell
20 \$4,920, representing the funds she received in monthly contract

21 ² Plaintiff argues that he did record his interest in the property.
22 Defendant counters that plaintiff recorded after Becky filed bankruptcy, and
23 because plaintiff did not obtain relief from the automatic stay in Becky's case
24 before he recorded, the recording is void. I need not resolve that argument,
because there is no evidence in the record that plaintiff ever recorded.

25 ³ This is not a typical case in which the debtor, George, made a
26 prepetition transfer and then transferred the property postpetition to a good
faith purchaser. In that case, 11 U.S.C. § 549 would preclude plaintiff from
avoiding that transfer.

1 payments between July 1995 and April 1996. Plaintiff is entitled to
2 avoidance of the transfer from George to Becky and turnover from
3 Mitchell of one-half of any funds he recovers or has recovered
4 relating to said \$33,578.

5 2. Contribution claim.

6 Plaintiff also asserts a right to contribution for mortgage
7 payments George made on the Gold Hill property after the divorce but
8 before the bankruptcy filings. His theory of recovery is that the
9 payments gave rise to a resulting trust in favor of George.

10 Plaintiff did not plead that theory of recovery, nor did he provide
11 any legal authority in support of it. Because that theory was not
12 raised until the day of trial, and then only superficially, I
13 decline to award him contribution for amounts paid on the mortgage
14 between 1990 and 1994, when George filed bankruptcy.⁴

15 3. Union Club stock and personal property.

16 Plaintiff seeks to avoid as a state law fraudulent transfer a
17 September 30, 1993 transfer to Becky of George's stock in the Union
18 Club, asserting his rights under section 544(b). Under ORS

19
20 ⁴ The parties stipulated that George made the monthly payments on the
21 underlying mortgage from May 1990 through July 1995, and that payments received
22 from the land sale contract were applied to pay off a collateral assignment of the
23 contract. There was also evidence at the July 29, 1996 hearing that Becky did not
24 receive any of the proceeds of the loan that was secured by the collateral
25 assignment. Even if I were to treat the pleadings as having been amended to
26 conform to the evidence on issues tried by consent of the parties, see Fed R Civ P
15(b), I would find that plaintiff has not proved a right to contribution. If, as
the evidence suggests, George made the mortgage payments in return for his use of
the proceeds of the loan secured by the vendors' interest in the land sale
contract, his estate would not be entitled to contribution from Becky. Because
the evidence raises questions about George's right to contribution, I would not
order Becky or her successor trustee to make contribution.

1 95.230(1)(b), a creditor can set aside certain transfers if they
2 were made "[w]ithout receiving a reasonably equivalent value * * *."

3 According to George's testimony, he transferred his stock in
4 the Union Club to Becky in 1993 for no consideration. The only
5 evidence about the value of the stock was George's testimony that he
6 did not perceive the stock as having any economic value when he
7 transferred it, but that it could have had some value sometime in
8 the future.

9 Because there is no evidence that the stock had any economic
10 value when it was transferred or, if it did, what that value was, I
11 conclude that plaintiff has not proved that the transfer was for
12 less than reasonably equivalent value. Plaintiff is not entitled to
13 avoid the transfer of the stock or to recover the value of the stock
14 or its profits.

15 CONCLUSION

16 Plaintiff is entitled to avoid the transfer of George's
17 interest in the Gold Hill receivable to Becky and to recover from
18 defendant one-half of the proceeds defendant recovers. He is not
19 entitled to recover any portion of payments made by George on the
20 Gold Hill mortgage, or any proceeds from the sale of Union Club
21 stock or benefit of ownership of such stock. Mr. Seligson should
22 prepare the order.

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ELIZABETH L. PERRIS
Bankruptcy Judge

1 cc: Alan G. Seligson
2 Daniel F. Vidas
3 Keith Y. Boyd
4 T. Michael Ryan
5 U. S. Trustee
6 Martin E. Hansen

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