

Fraudulent Transfer  
Standing  
Summary Judgment

Kerivan v. Frohnmayer, Deatherage, Adversary No. 10-6115-fra  
Krouse Ranch, Inc., Case No. 09-65465-fra11

10/22/2010 FRA

Unpublished

Plaintiffs filed an adversary proceeding against former attorneys for Debtor to avoid a pre-petition trust deed executed and recorded in favor of Defendant to secure current and future attorneys' fees related to a state court trial which was held soon thereafter. Plaintiffs seek avoidance under Code § 548 alleging the transfer involved actual and/or constructive (i.e. no reasonably equivalent value) fraud. Defendant filed a motion for summary judgment.

The Court denied the motion for summary judgment on the grounds that the Defendant did not present sufficient evidence with its motion to overcome the badges of fraud present or to show that Plaintiffs could not succeed in their constructive fraud claim.

The Code, however, gives express authority only to a trustee or debtor-in-possession to bring an avoidance action under § 548. Rather than dismiss the adversary proceeding immediately, however, the court instructed Plaintiffs to file an appropriate motion with the Court seeking authority to act for the estate in this action.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case
	)	No. 09-65465-fra11
KROUSE RANCH, INC.,	)	
	)	
<u>Debtor.</u>	)	
	)	Adversary Proceeding
ROBERT KERIVAN, and BRIDGEVIEW	)	No. 10-6115-fra
VINEYARDS, INC.,	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
FROHNMAYER, DEATHERAGE, JAMIESON,	)	
MOORE, ARMOSINO & McGOVERN, P.C.	)	MEMORANDUM OPINION
	)	
<u>Defendant.</u>	)	

Defendant filed a motion for summary judgment in this action by Plaintiff to recover an alleged fraudulent transfer. For the reasons that follow, Defendant's motion will be denied.

I. INTRODUCTION

Plaintiffs Robert Kerivan and Bridgeview Vineyards, Inc. are creditors of the Debtor Krouse Ranch, Inc. by virtue of a general judgment obtained by Plaintiffs in a lawsuit brought against the Debtor and Debtor's principal John Krouse in the Oregon Circuit Court for

1 Josephine County. The named Defendant in this adversary proceeding is  
2 the law firm engaged by the Debtor to represent it in the Circuit Court  
3 action.

4 On January 26, 2009, Defendant was made beneficiary of a trust  
5 deed by Debtor against Debtor's real property. The trust deed secures an  
6 amount up to \$100,000 for Defendant's then currently billed fees,  
7 approximately \$41,000, and additional fees to be billed by Defendant in  
8 representing Debtor in the Circuit Court trial and through possible  
9 appeal. The trial concluded with the award of damages to Plaintiffs by  
10 general judgment entered on February 24, 2009. Debtor filed bankruptcy  
11 under Chapter 12 on October 8, 2009 and later converted to Chapter 11.  
12 Defendant filed a proof of claim in Debtor's bankruptcy case with a claim  
13 in the amount of \$92,959.89, secured by the trust deed.

14 Plaintiffs filed this adversary proceeding seeking the  
15 avoidance of Defendant's trust deed interest as a fraudulent transfer  
16 under 11 U.S.C. § 548<sup>1</sup>. The complaint alleges that the transfer was made  
17 with the intent to "hinder, defraud, and unduly burden" the Plaintiffs in  
18 their attempt to collect their judgment. It also alleges that the Debtor  
19 received less than a reasonably equivalent value in exchange for the  
20 transfer.

## 21 II. SUMMARY JUDGMENT

22 Summary judgment is appropriate when the pleadings,  
23 depositions, answers to interrogatories, admissions, and affidavits, if  
24 any, show that there is no genuine issue of material fact and the moving

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26 <sup>1</sup> All statutory references made herein, unless specified otherwise,  
are to the Bankruptcy Code, 11 U.S.C. §§ 101 to 1532.

1 party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56,  
2 made applicable by Fed. R. Bankr. P. 7056. The movant has the burden of  
3 establishing that there is no genuine issue of material fact. Celotex  
4 Corp. v. Catrett, 477 U.S. 317, 323 (1986). The court must view the  
5 facts and draw all inferences in the light most favorable to the  
6 nonmoving party. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,  
7 809 F.2d 626, 630-31 (9<sup>th</sup> Cir. 1987). The primary inquiry is whether the  
8 evidence presents a sufficient disagreement to require a trial, or  
9 whether it is so one-sided that one party must prevail as a matter of  
10 law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986).

11 A party opposing a properly supported motion for summary  
12 judgment must present affirmative evidence of a disputed material fact  
13 from which a factfinder might return a verdict in its favor. Anderson v.  
14 Liberty Lobby, Inc., at 257. Fed.R.Bank.P. 7056, which incorporates  
15 Federal Rule of Civil Procedure 56(e), provides that the nonmoving party  
16 may not rest upon mere allegations or denials in the pleadings, but must  
17 respond with specific facts showing there is a genuine issue of material  
18 fact for trial. Absent such response, summary judgment shall be granted  
19 if appropriate. See Celotex Corp. v. Catrett, at 326-27.

### 20 III. DISCUSSION

#### 21 A. Code § 548

22 (a)(1) The trustee may avoid any transfer . . . of an  
23 interest of the debtor in property, or any obligation  
24 . . . incurred by the debtor, that was made or  
25 incurred on or within 2 years before the date of the  
26 filing of the petition, if the debtor voluntarily or  
involuntarily -

(A) made such transfer or incurred such  
obligation with actual intent to hinder,  
delay, or defraud any entity to which the

1 debtor was or became, on or after the date  
2 that such transfer was made or such obligation  
was incurred, indebted; or

3 (B)(i) received less than a reasonably  
4 equivalent value in exchange for such  
transfer or obligation; and

5 (ii)(I) was insolvent<sup>2</sup> on the date that such  
6 transfer was made or such obligation was  
7 incurred, or became insolvent as a result of  
such transfer or obligation;

8 (II) was engaged in business or a transaction, or  
9 was about to engage in business or a transaction, for  
10 which any property remaining with the debtor was an  
unreasonably small capital;

11 (III)intended to incur, or believed that the  
debtor would incur, debts that would be beyond the  
debtor's ability to pay as such debts matured; or

12 (IV) made such transfer to or for the benefit of  
an insider, or incurred such benefit of an insider,  
under an employment contract and not in the ordinary  
course of business.

13 B. Intent to Hinder, Delay or Defraud

14 Proving actual intent "requires a subjective inquiry into the  
15 transferor's state of mind at the time the transfer was made." 5 Collier  
16 on Bankruptcy ¶ 548.04[2][a] (16th ed.). Because a trustee rarely  
17 obtains direct proof of intent, the trustee usually must rely on  
18 circumstantial evidence of intent. See e.g. In re Acequia, Inc., 34 F.3d  
19 800, 805-06 (9th Cir. 1994)(Courts applying Code § 548 frequently infer  
20 fraudulent intent from circumstances surrounding the transfer, taking  
21 particular note of certain recognized indicia or badges of fraud).

22 In the present case, there are several badges of fraud present,  
23 especially given the requirement that this court view the facts and

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26 <sup>2</sup> Insolvency in this context means "balance sheet" insolvency:  
liabilities are greater than assets. § 101(32)(A).

1 inferences in the light most favorable to the nonmoving party, i.e.

2 Plaintiff, including:

3 (1) Debtor transferred an interest in his property on the eve  
4 of trial, the result of which could have (and subsequently did) produce a  
5 substantial money judgment against Debtor;

6 (2) The amount of the transfer was more than double the amount  
7 of the legal fees owing at the time the transfer was made; and

8 (3) The transfer was apparently not disclosed to creditors or  
9 potential creditors at the time it was made.

10 In its motion for summary judgment, Defendant provides little  
11 evidence that the Court can utilize as to actual intent to defraud or to  
12 rebut the badges of fraud present. There is no affidavit or declaration  
13 from the Debtor or the Defendant regarding their intention with respect  
14 to the transfer. Nor is there evidence regarding the transaction itself  
15 and the necessity for the trust deed. In its Reply to Plaintiffs'  
16 Response, Defendant states that the transaction was an arms-length  
17 transaction and that the attorneys were acting in good faith to secure  
18 their current and future fees. That the transfer of the interest in the  
19 property was in lieu of a retainer for legal services. However, a  
20 memorandum written by Defendant's attorney is not evidence, either at  
21 trial or for purposes of Defendant's motion for summary judgment.

22 C. Reasonably Equivalent Value

23 Plaintiffs allege in their Complaint that the transfer of  
24 Debtor's interest in his property was for less than reasonably equivalent  
25 value. Defendant counters that the trust deed secured past and future  
26 legal fees of approximately \$93,000. Moreover, the Debtor valued his

1 real property at \$2.1 million and secured and unsecured debt, even after  
2 the trust deed was recorded, was substantially less than the value of  
3 Debtor's assets, leaving more than enough equity to pay Plaintiffs'  
4 judgment. Once again, the problem is that Defendant provides little in  
5 the way of evidence. It points to Debtor's schedules which value the  
6 real property at \$2.1 million and show total debts, both secured and  
7 unsecured, of \$362,318; meaning that the Debtor was not insolvent at the  
8 time of the transfer or rendered insolvent by the transfer.

9           The Court takes judicial notice of the docket in the Debtor's  
10 bankruptcy case. Plaintiffs argue in the main case in their objection to  
11 confirmation of Debtor's Chapter 12 plan that most of the value in  
12 Debtor's assets "reflect [Debtor's] speculation that it will obtain  
13 permits to conduct gravel mining operations on the property. . . ." The  
14 Court notes that those permits have not been obtained and Debtor's  
15 current chapter 11 plan does not include mining gravel. Given the  
16 admitted unreliability of Debtor's asset valuations, the Court is not  
17 prepared to speculate as to Debtor's solvency at the time of the  
18 transfer.

19           As to evidence of reasonably equivalent value, the only  
20 admissible evidence regarding the transfer is the execution of a deed of  
21 trust in the maximum amount of \$100,000, current billings by Defendant at  
22 the time of transfer of approximately \$41,000 and a proof of claim filed  
23 by Defendant(which has been objected to as to amount) in the amount of  
24 approximately \$93,000. Whether this constitutes reasonably equivalent  
25 value will be determined at trial.

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1 D. Standing to Bring Action

2 Defendant correctly points out that only a trustee (or a debtor  
3 in possession in chapter 11) has the authority to bring an action under  
4 Code § 548 ("The *trustee* may avoid any transfer . . . ." § 548(a)(1)  
5 (*italics added*)). Defendant is not a trustee or the debtor in possession  
6 and thus does not have express authority under the Code to bring this  
7 action. However, in special circumstances, courts have allowed a  
8 creditors' committee or an individual creditor to bring the action for  
9 the bankruptcy estate. 5 Collier on Bankruptcy ¶ 548.06 (16th ed.)

10 While this adversary proceeding could be dismissed at this  
11 point due to the Plaintiffs' lack of standing to bring the action, I will  
12 not do so at present. Plaintiffs are instructed to file an appropriate  
13 motion within 21 days of the entry of the Court's order herein for  
14 authority to initiate and pursue this action for avoidance and recovery  
15 of the alleged fraudulent transfer. Failure to do so will result in  
16 dismissal of the adversary proceeding.

17 IV. CONCLUSION

18 Defendant has presented insufficient evidence rebutting the  
19 circumstantial evidence of actual fraud present in this case or to show  
20 that Plaintiffs will be unable to prosecute a successful claim for  
21 constructive fraud. Because Plaintiffs lack authority to bring this  
22 action, however, they must seek court authority to do so. An order will

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1 be prepared and entered by the court consistent with my findings of fact  
2 and conclusions of law herein.

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6 FRANK R. ALLEY, III  
7 Chief Bankruptcy Judge  
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