Preferential transfer
Insider

Philip and Melissa Chauvet v. Sidney Kline — 95-6024-fra
(In re Philip and Melissa Chauvet) — 694-63749-fra11

9/25/95 FRA Unpublished

Plaintiffs brought this adversary proceeding to avoid an alleged preferential transfer made to the defendant Sidney Kline, Trustee of the Kline Family Trust.

The debtors and the defendant had entered into a "joint venture agreement" whereby the defendant would provide the money needed for the debtors to construct five houses. After the initial joint venture agreement was executed, the debtors gave the defendant a security interest in the debtors' Christmas tree business as additional security. Because the security interest was given more than 90 days but less than one year from the petition date, avoidance of the security interest is dependant on whether the defendant can be classified as an insider under 11 U.S.C. § 547(b)(4)(B). The debtors argued that a partnership was formed by the debtors and the defendant. The defendant argues that it was merely a loan transaction. The debtors also had to prove that they were insolvent on the date of the transfer.

The court determined that under the facts of the case, the defendant was a general partner with the debtor and thus, under 11 U.S.C. § 101(31)(a)(iii), was an insider at the time of the transfer. The court also determined that the debtors were insolvent at the time of the transfer. Because all the elements of a preferential transfer were present, the security interest was held to be avoidable.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE	)	
	)	
PHILIP CHAUVET and MELISSA CHAUVET,	)	Case No. 694-63749-fra11
	)	
Debtors.	)	
	)	
PHILIP CHAUVET and MELISSA CHAUVET,	)	
	)	
Plaintiffs,	)	
vs.	)	Adversary No. 95-6024-fra
	)	
SIDNEY KLINE, Trustee, Kline Family Trust,	)	
	)	MEMORANDUM OPINION
Defendants.	)	

Plaintiffs Philip and Melissa Chauvet ("Chauvet") brought this adversary proceeding to avoid the transfer of a security interest in property of the estate to Defendant Kline Family Trust ("Trust").

11 U.S.C. § 547. Parties agree that all the elements of a preferential transfer exist, except for two:

a. Whether Plaintiffs were insolvent at the time of the transfer; and

b. Whether Defendant was, at the time the transfer was made, an insider, as that term is defined by 11 U.S.C. § 101(31).

I find that the Defendant Trust was a partner of the Plaintiffs at the time of the transfer, and thus was an insider. I further find that, at the time of the transfer, Plaintiffs were insolvent.

1. *The Parties were Partners.*

For purposes of preferential transfers a creditor is an "insider" if it is a general partner of the debtor. 11 U.S.C. § 101(31)(a)(iii). A preferential transfer to an insider is subject to avoidance if it occurs within one year of the date of the petition for relief. 11 U.S.C. § 547(b)(4)(B).

The parties entered into a "joint venture agreement" on February 23, 1990. The agreement was modified, in writing, twice thereafter. Each amendment specified that the preceding agreement remained valid except to the extent different provisions were set out in the amendment. It follows that all three documents should be construed together as a single agreement.

Parties agree that California law governs whether or not a partnership existed between the parties. California has adopted the Uniform Partnership Act, as California Corp. Code § 15001 et. seq. The Act defines a partnership as "association of two or more persons to carry on as co-owners a business for profit." California Corp. Code § 15006(1). The Code provides that "business

includes every trade, occupation or profession." California Corp. Code § 15002. The Code further provides that "in any case not provided for in this Act the Rules of Law and Equity, including the Law Merchant, shall govern." California Corp. Code § 15005. Essential elements of a partnership are a community of interest and an agreement to share profits or losses resulting from the enterprise. Sandberg v. Jacobsen, 61 Cal. Rptr. 436, 253 C.A. 2d 663 (1967).

Plaintiffs argue that the relationship between the parties monumented by the written agreements constitutes a partnership. Defendant asserts that the agreement is no more than a financing arrangement. Given all the circumstances of the case, I conclude that a partnership existed between the parties. Several elements of the relationship in particular support this conclusion:

1. The business was to be carried out under an assumed business name of "C & K Builders" (presumably standing for "Chauvet and Kline"). This conduct could expose both parties to joint and several liability to any person with whom they have dealt under that assumed name. See Cal. Corp. Code § 15016.

2. The parties were to open a joint bank account under the assumed business name. The account would require signatures of both the Trust and Chauvet on any check in excess of $5,000.

3. The parties were to be jointly liable on a construction loan funding the business's operations. (Especially absent any sort of indemnity, this amounts to an agreement to share losses.)

4. The agreement called for a division of "net profits" after "investments" were recovered.

5. The agreements required approval of both parties of any sale or encumbrance of the property, and, significantly, all architectural and design plans.

It is noteworthy that, throughout the documents, the agreement and the relationship created thereby were couched in terms consistent with a partnership. Monies contributed were "investments". Monies returned were "profits", or, in some instances, "reimbursements". While it is often said that courts are not bound by the parties' characterization of their relationship, it is no less true that these characterizations are powerful evidence of the parties' intentions. This is especially true, where, as here, the contracting parties were reasonably sophisticated (Mr. Kline, in fact, was characterized at trial as a capable businessman), and where the documents were drafted by Defendant's attorneys. It is well established that ambiguities in written agreements are to be construed against the party who drafted them.

As noted, Defendant argues that the transaction was no more than an elaborately protected loan. However, this agreement involves far more than a lender's due diligence. Rather, the agreement, taken as a whole, reflects a desire to participate as an owner.

2. *Insolvency*

The transfer sought to be avoided was perfected on October 13, 1993. In order to prevail Plaintiffs must prove, by a preponderance of the evidence, that they were insolvent on that

date. The presumption set out in Bankruptcy Code § 547(f) is not applicable, since the date in question is more than 90 days prior to the date of Plaintiffs' petition for relief.

Plaintiffs, through the testimony of Philip Chauvet and numerous exhibits, have made a prima facie case that their liabilities at the time in question exceeded the value of their assets. Specifically, I find that, as of October 13, 1993, Plaintiffs had total assets of $1,007,714 and total liabilities of $1,932,197, for a total deficit of $924,483.

The liability side of the ledger is largely undisputed. As to assets, Defendant argues that they are significantly undervalued; in support of its argument Defendant presents financial statements prepared by Plaintiffs in 1991, 1992 and 1993.

Taking all the evidence into account I find the pro forma balance sheet (Exhibit 7) and supporting documents a more reliable indicator of the Plaintiffs' financial status on the date in question than financial statements prepared some time previously.

To summarize: It is my conclusion that Plaintiffs and Defendant formed a partnership in 1990, which relationship subsisted through at least October 13, 1993. Plaintiffs were insolvent as of that date. It follows that the security interest in the collateral described in Exhibits 4 and 5 at trial (and Exhibit A of the complaint) should be avoided and Defendant's claim as a secured creditor be disallowed.

The foregoing constitutes the Court's findings of fact and conclusions of law. They will not be separately stated. Counsel

for Plaintiffs should tender to the Court a form of judgment consistent herewith.

FRANK R. ALLEY, III
Bankruptcy Judge