Res Judicata
Fraudulent transfer
Trustee's "strong-arm" powers

Roost v. Lisa McCourt 97-6379-fra
(In re Harold McCourt 697-61940-fra7)

9/25/98 FRA Unpublished

Debtor Harold McCourt filed a previous bankruptcy in 1994. At, or prior to, the petition date, he was the owner of certain real property. At some point he transferred his interest in the property to his wife, Lisa McCourt, the defendant in this proceeding. A creditor filed an action in the Circuit Court for Lane County, alleging that the transfer was fraudulent. A preliminary injunction was entered on the stipulation of the parties that Mrs. McCourt would convey a ½ interest in the property back to Harold. It was ultimately agreed that Mrs. McCourt would participate in executing and delivering to the creditor a trust deed securing a note for $60,000 and that Harold would thereafter convey all of his interest in the property back to Mrs. McCourt. Finally, the parties to the agreement stipulated that the bankruptcy case could be dismissed. The agreement was filed with the bankruptcy court with a motion enforcing the agreement and later with a motion to dismiss. Debtor made arrangements to pay the trustee's fee and the trustee did not object to dismissal. The case was thereafter dismissed.

Debtor filed a second bankruptcy; the current trustee filed this proceeding using his "strong-arm" powers under § 544 (which allows the trustee to stand in the shoes of an actual or hypothetical creditor) to assert a fraudulent transfer under state law. Defendant filed a motion for summary judgment, arguing that the settlement agreement approving the transfer was ratified by the bankruptcy court and the previous trustee and is res judicata in this bankruptcy. The Trustee answered with his own motion for summary judgment.

The court denied Defendant's motion, stating that an affidavit by the previous trustee puts into question whether he was a party to the agreement and was actually bound by its terms. Moreover, the court stated that notice to creditors of the proposed settlement was inadequate to put them on notice of the transfer, thus keeping their rights, and the current trustee's, alive. The trustee's motion for summary judgment was also denied because of contested material facts.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE HAROLD B. MCCOURT, Debtor. ERIC R.T. ROOST, TRUSTEE, Plaintiff, vs. LISA A. MCCOURT, Defendant.	)	Case No. 697-61940-fra7 Adversary No. 97-6379-fra MEMORANDUM OPINION

Both parties to this fraudulent conveyance action have filed motions for summary judgment. For the reasons set out in this memorandum, both must be denied.

I. FACTS

All, or nearly all, of the material facts are agreed to. Debtor Harold McCourt filed his petition for relief under Chapter 7 in this case in April, 1997. He filed a previous case in August, 1994.

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At or perhaps prior to the filing of the first case Debtor was the owner of real property in Lane County. At some point he transferred his interest in the property to his wife, Lisa McCourt, who is the Defendant in this adversary proceeding.

Lonesome Doe, Inc., a creditor, filed an action in the Circuit Court for Lane County, Oregon, alleging that the transfer from Harold to Lisa was fraudulent. A preliminary injunction was entered on the stipulation of the parties providing that Mrs. McCourt would convey a one-half interest in the property back to Harold.

Negotiations ensued. Ultimately it was agreed that Mrs. McCourt would participate in executing and delivering to Lonesome Doe a trust deed securing a note for $60,000. The parties agreed that, thereafter, Harold could transfer all of his interest in the property to Mrs. McCourt. In an affidavit filed with the Bankruptcy Court Harold stated that:

> My interest in the Wheeler Road property will be conveyed to my wife, so that her interest in the property will remain free of the claims of my creditors, including Lonesome Doe, except for the $60,000 obligation.

Thereafter. Harold would confess judgement to Lonesome Doe in the sum of $100,000, although the judgment would not be a lien on the subject property in light of the transfer to Mrs. McCourt. [1]

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[1] Lonesome Doe is scheduled as an unsecured creditor in the pending case, with a claim for $110,000.

Finally, the parties to the agreement stipulated that the Bankruptcy case could be dismissed.

The agreement was filed with the Court, first with a motion for an order enforcing the agreement, and later in support of a motion to dismiss the case, pursuant to the parties' agreement. Copies of the motion, with supporting affidavits and all documentation relating to the settlement were, according to the Court's records, served on Debtor's attorney, the Assistant U.S. Trustee, the Debtor, Lonesome Doe's attorney, Mrs. McCourt's attorney, Western Sureties' attorney, and the Chapter 7 Trustee. Notice to all other interested parties simply stated that the Court would convene a hearing on March 27, 1995 "To consider and act upon the following: Debtor's motion to dismiss case and motion to enforce settlement agreement." There is no evidence in the present record that creditors (other than the participants in the settlement agreement) had actual knowledge of the terms of he agreement.

At the hearing on March 27, according to the Court's record of proceedings, counsel for Debtor Harold McCourt stated that a settlement had been reached with the Debtor's major creditor and that the Debtor now wished to dismiss the case. Debtor had made arrangements to pay the Trustee's fees and the Trustee did not object to the dismissal. The Court was further advised by Lonesome Doe's counsel that Lonesome Doe did not oppose dismissal. The Court ordered that the case be dismissed.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is governed by Bankruptcy Rule 7056, which incorporates Fed.R.Civ.P. 56. The Rule provides that

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

III. ANALYSIS

A. Defendant's Motion

The Trustee bases this action on the so called "strong arm" powers conferred on a Trustee by 11 U.S.C. § 544. This provision allows the Trustee to assert state law claims available to creditors. The state law relied upon by the Trustee is the Uniform Fraudulent Transfer Act as enacted in Oregon at ORS Chapter 95. ORS 95.230 provides that

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) with actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation....".

State law grants to any affected creditor the right to avoid the transfer to the extent necessary to satisfy the creditor's claim. ORS 95.260(a).

The Trustee may stand in the shoes of an actual or hypothetical creditor. Code § 544(a) allows the Trustee to

exercise the state law right to avoid the transfer of a creditor who extends credit to the debtor at the time the case is commenced and obtains a judicial lien on the creditor's property or obtains at the time of the bankruptcy petition an execution which is returned unsatisfied. Any such creditor would have the right to maintain an action under ORS 95.260.

Section 544(a) extends this ability to the Trustee "without regard to any knowledge of the trustee or of any creditor." It follows that the Trustee relying on the strong arm powers is not estopped by virtue of the knowledge of any actual creditor, or any predecessor trustee. *See* 5 Colliers ¶544.03 (15th Ed. 1998).

The Trustee also stands in the shoes of an actual creditor. Here the Defendant asserts that the actual creditors were on notice of the proposed settlement, and are bound by the Trustee's and the Court's implicit approval thereof. However, the former Trustee has filed an affidavit in this proceeding asserting that he did not intend to assent to anything more than the dismissal of the case, on the understanding that the effect of dismissal would be to restore the parties to their state law rights and remedies. This gives rise to a disputed question of fact as to whether the Trustee was actually bound, particularly in light of the fact that he was not actually a party to the settlement agreement.

In addition, I do not believe that the notice to unsecured creditors and interested parties was sufficient as a matter of law to put them on notice of that provision of the settlement

agreement providing for the transfer by Harold to Lisa of the property. The transfer had the extraordinary effect of putting the property beyond the reach of Harold's creditors after being made available (in part) to one creditor in particular. I do not believe that notice of a proposed dismissal, and a compromise with a particular creditor, is sufficient to put other creditors on notice of the proposed transfer. At best, parties receiving the Court's hearing notice would have been put on notice that a settlement had been reached between Harold McCourt and Lonesome Doe. A reasonably alert creditor would not have reason to suspect the transfer of the remaining equity in the property to Mrs. McCourt. The essence of the deal was that Lonesome Doe's claim would be secured by the property only to the extent of the first $60,000. It was not necessary to transfer Mr. McCourt's interest back to Mrs. McCourt in order to make the deal work. For example, Lonesome Doe could have provided a release of its judgment as to the property in question. The transfer is notable not for its limitation on Lonesome Doe's lien rights, but its for frustration of the claims of creditors who were not party to the arrangement.

Local Bankruptcy Rule 1017-2.A requires that a notice of dismissal state the basis of the dismissal. Defendant suggests that this means that such notices operate to put interested parties on inquiry as to every element of a settlement. The argument overlooks the fact that in this case the notice failed to mention the proposed transfer to Mrs. McCourt. Interested

parties were nevertheless entitle to assume that they had been fully informed by the noticing party (Debtor Harold McCourt). It follows that they were not on notice about the transfer; indeed, the notice had the effect of assuring that no such thing would occur.

Case law advanced by the Defendants to the effect that the Plaintiff is bound by the prior Trustee's acts is inapposite, since it establishes only that a creditor in "privity" with a trustee may be bound by the trustee's settlement of a case in which the trustee was a party. In this case the Trustee was not a party to the settlement agreement, even though he was aware of its terms, and even though dismissal of the case was a condition of the settlement.[2] While a trustee's actions as a party to an agreement, judgment or a stipulation may bind unsecured creditors, that is not the same as saying that a trustee's knowledge of an agreement or proposed transfer is imputed to all creditors.[3]

It is plain that the agreement binds only its parties. Defendant seeks to bind others who were effected by – but did not benefit from – the agreement by claiming that they should have objected to the agreement. Failure to object to dismissal based on undisclosed terms is insufficient to bar future claims.

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[2]The agreement was contingent on dismissal of he bankruptcy, and all parties were required to use their best efforts to obtain dismissal. However, the trustee's consent was not a condition.

[3] Of course, it is not imputed to hypothetical creditors under §544(a) as a matter of law.

Harold McCourt's avowed purpose--protecting his wife's interest from his creditors--gives rise to an inference of an additional purpose, which is to put his property beyond the reach of his creditors. The record reveals several other badges of fraud as enumerated under ORS 95.230(2). Given these inferences, and the Trustee's standing to bring an action under ORS 95.260, it does not appear to me that the Defendant is "entitled to a judgment as a matter of law."

B. Plaintiff's Motion

In order to prevail the Plaintiff must establish either that the transfer was made with the actual intent to defraud creditors or was made for an inadequate consideration at a time when the Debtor was insolvent. Each of these is an issue of fact which appears to be disputed on this record. Defendant avers that her execution of the $60,000 trust deed was adequate consideration for the transfer of Harold's interest to her. This dispute is sufficient to deny entry of summary judgement.

IV. CONCLUSION

Neither party is entitled to judgment as a matter of law, based on the record now before the Court. There are issues of fact which are contested, and the matter must proceed to trial. An order denying each motion for summary judgment will be entered.

FRANK R. ALLEY, III
Bankruptcy Judge

cc: Mr. Eric R. T. Roost
Mr. David Wade