

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
 :
DAVID C. ROSENBERGER, : Case No. 90-224-C H
 :
 Debtor. : Chapter 7
- - - - - :
DAVID C. ROSENBERGER, :
 :
 Plaintiff, :
 : Adv. No. 90-179
v. :
 :
DOUBLE D, INC., AND :
BANKERS TRUST COMPANY, :
 :
 Defendants. :

ORDER--COMPLAINT TO RECOVER FRAUDULENT
CONVEYANCES AND TURNOVER OF PROPERTY

On April 29, 1991, trial was held on the complaint to recover fraudulent conveyances and turnover of property. The following attorneys appeared on behalf of their respective clients: Ronald L. Hansel, Dreher, Wilson, Simpson, Jensen, Sellers, Harvey, Butters, Adams & Kaiser, P.C., for the Plaintiff; and, Thomas L. Flynn, Belin, Harris, Helmick, P.C., and John M. Bouslog, house counsel, Bankers Trust company, for the Defendant, Bankers Trust Company. The Defendant, Double D, Inc., did not appear by counsel. At the conclusion of the trial, the Court took the matter under advisement under a briefing schedule. Briefs were timely filed, and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E) and (H). The Court, upon review of the

pleadings, arguments of counsel, and briefs submitted, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. On May 7, 1975, the Plaintiff, David C. Rosenberger, purchased approximately 400 acres of land (farmland) from S. L. and Helen Longabaugh pursuant to a real estate contract. The purchase price was \$305,000.

2. David C. Rosenberger was the president and held an interest in Double D, Inc., an Iowa corporation. His wife, Doris, was the corporation's secretary.

3. Double D, Inc. executed a promissory note for \$725,324.57 in favor of Bankers Trust Company ("Bankers Trust") on February 4, 1982. The note was executed by David Rosenberger in his capacity as president of Double D and by David and Doris Rosenberger individually. The note was secured by an assignment of contract interest and mortgage in the farmland.

4. The note was renewed on April 8, 1982 in the principal amount of \$719,323.60; on December 15, 1982 in the principal amount of \$668,332.92; and on June 11, 1984 in the principal amount of \$599,021.36. Upon each renewal the three obligors remained the same and were jointly and severally liable for payment of each note. As of June 30, 1985, the

amount outstanding on the obligation was approximately \$581,000 (Plf's Exh. 15).

5. On July 8, 1985, the Longabaughs executed a warranty deed for the farmland in favor of David Rosenberger.

6. On July 11, 1985, David and Doris Rosenberger executed a warranty deed for the farmland in favor of the Double D corporation. This farmland was fully encumbered at the time.

7. On July 11, 1985, Double D executed a promissory note to Bankers Trust for \$693,298.42. The note was also signed by David and Doris Rosenberger in their individual capacities. The note served to renew the note executed on June 11, 1984, and also included an additional \$105,000 to pay off the balance owed on the real estate contract with the Longabaughs.

8. On July 11, 1985, Double D granted Bankers Trust a mortgage in the farmland and an assignment of rents.

9. Double D and the Rosenbergers defaulted on payment of the note and on May 15, 1989, Bankers Trust issued a notice of right to cure default.

10. Double D filed a voluntary Chapter 11 petition on June 8, 1989.

11. Bankers Trust filed a motion for relief from stay on July 11, 1989.

12. An order lifting the automatic stay was entered on

September 15, 1989. The order authorized Bankers Trust to pursue its state court remedies against the farmland.

13. On January 26, 1990, an involuntary Chapter 7 petition was filed against David Rosenberger. An order for relief was entered on August 17, 1990. The case was converted to Chapter 11 on August 28, 1990, and converted back to Chapter 7 on June 10, 1991.

14. Bankers Trust proceeded with foreclosure proceedings against the farmland. A judgment was entered in favor of Bankers Trust and against Double D, Inc. and David and Doris Rosenberger in the Iowa District Court for Warren County on July 19, 1990. A sheriff's sale was scheduled for August 30, 1990.

15. On August 29, 1990, the Plaintiff filed a complaint in the Rosenberger bankruptcy seeking to recover the farmland for the bankruptcy estate. The action was brought pursuant to §§ 542 and 544 and Double D, Inc. and Bankers Trust were named as Defendants. An injunction was granted staying the sheriff's sale.

DISCUSSION

I. Section 544(b)

Plaintiff seeks to have the conveyance of the farmland to Double D set aside as a fraudulent conveyance under § 544(b).

Plaintiff contends the Rosenbergers received inadequate

consideration for the transfer rendering it fraudulent and subject to avoidance.

Section 544(b) provides:

The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is avoidable under applicable law by a creditor holding an unsecured claim that is allowable under Section 502 of this title or that is not allowable only under Section 502(e) of this title.

Where no trustee has been appointed the debtor-in-possession is vested with the avoidance powers assigned to a trustee under § 544(b). See Saline State Bank v. Mahloch, 834 F.2d 690, 694 n. 9 (8th Cir. 1987).

Under 11 U.S.C. § 544(b), state law is applicable in federal bankruptcy proceedings. In re Graven, #90-1682, ____ F.2d ____, ____ (8th Cir. June 25, 1991). Subsection 544(b) grants a trustee the power to avoid certain transfers of a debtor to the extent a creditor with an allowable claim might avoid them under applicable state or federal law. Id. at n. 7. Unlike the trustee's power as a hypothetical judicial lien creditor under § 544(a), section 544(b) provides a trustee with only the avoidance power actual unsecured creditors would have under the applicable state law. 4 Collier on Bankruptcy ¶544.03 (15th ed. 1991).

Under Iowa law a fraudulent conveyance is generally defined as "a transaction by means of which the owner of real

or personal property has sought to place the land or goods beyond the reach of his creditors, or which operates to the prejudice of their legal or equitable rights." Graham v. Henry, 456 N.W.2d 364, 366 (Iowa 1990). In applying the doctrine of fraudulent conveyances, a court will look for certain badges or indicia of fraud such as inadequacy of consideration, insolvency of the transferor, and pendency or threat of third-party creditor litigation. Id.; Muehlenthaler v. DeBartolo, 347 N.W.2d 688, 690 (Iowa App. 1984). Transfers of property without actual consideration are presumed to be constructively fraudulent. First Nat'l Bank. v. Frescoln Farms, Ltd., 430 N.W.2d 432, 435-36 (Iowa 1988).

As a general rule, courts will not aid a fraudulent grantor to reclaim or recover from his transferee property transferred in fraud of creditors. 37 C.J.S. Fraudulent Conveyances, § 267(a) (1943). Iowa case law suggests support for the general rule. Shaw v. Addison, 239 Iowa 377, 28 N.W.2d 816, 826 (1947) (fraudulent conveyance will not be set aside in equitable action by transferor); Fulton v. McCullough, 232 Iowa 1220, 7 N.W.2d 910, 913 (1943) ("as between the parties a fraudulent conveyance is good and cannot be set aside except at the suit of creditors") quoting Johnston v. Jickling, 141 Iowa 444, 451, 119 N.W. 746, 748 (1909); see also First Nat'l Bank, 430 N.W.2d at 435 (suggesting fraudulent transfers can only be set aside by a

transferor's creditors).

Neither party has questioned the propriety under Iowa law of Plaintiff David Rosenberger attempting to set aside as fraudulent a conveyance in which he was the transferor. Assuming, without deciding, that his status as debtor-in-possession enables him to pursue this action, the court finds he has failed to establish the existence of a fraudulent conveyance in this case.

Plaintiff argues Double D received farmland from the Rosenbergers and in exchange provided the Rosenbergers with only \$105,000 to satisfy the remaining obligation on the real estate contract with the Longabaughs. Plaintiff asserts the consideration was inadequate rendering the transfer constructively fraudulent. Plaintiff fails to note, however, that at the time of the transfer, the farmland was fully encumbered by the assignment of contract and mortgage first given to Bankers Trust in April 1981. The transfer of fully encumbered property will not necessarily result in a fraudulent conveyance. See C. Mac Chambers Co. v. Iowa Tae Kwon Do Academy, 412 N.W.2d 593 (Iowa 1987) (transfer of assets fully encumbered by SBA security interest was not fraudulent conveyance subject to set aside by unsecured creditors); Hall Roberts' Son, Inc. v. Plaht, 253 Iowa 862, 114 N.W.2d 548, 550 (1962) (conveyance of homestead and land subject to mortgage could not be set aside because creditors

were not harmed or prejudiced by conveyance).

"For a conveyance to be set aside as a fraud on creditors, it is necessary to show they were prejudiced, even where there was actual fraudulent intent." C. Mac Chambers, at 596. Fraud without resulting injury does not give rise to a cause of action to set aside a fraudulent conveyance. Hall Roberts' Son, 114 N.W.2d at 550. "Prejudice" or "injury" means a creditor must show it would have received something which had become lost to it by reason of the conveyance. C. Mac Chambers Co., 412 N.W.2d at 596.

II. Section 542

The Plaintiff has failed to establish the existence of an unsecured creditor who was prejudiced by the conveyance of the fully encumbered farmland from the Rosenbergers to Double D, Inc. The lien of Bankers Trust predated the conveyance in question and even if the conveyance had not occurred, no unsecured creditor would have been able to claim a superior interest in the farmland. The pool of assets available to compensate unsecured creditors was not reduced by the conveyance of the farmland to Double D. Having failed to establish a fraudulent conveyance subject to avoidance, Plaintiff's request for turnover under § 542 must be denied. The injunctive relief previously imposed in this matter shall be terminated and Bankers Trust may proceed with its state

court remedies as authorized by this Court's earlier order granting its request for relief from the automatic stay in the Double D bankruptcy.

IT IS HEREBY ORDERED that the Plaintiff has failed to establish the existence of an avoidable fraudulent conveyance under § 544(b) and its request for turnover of property is denied.

LET JUDGMENT ENTER ACCORDINGLY.

Dated this 1st day of August, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE