

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

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| In the Matter of | : | Case No. 02-2720-CH |
| MARVIN R. MITCHELL and | : | Chapter 7 |
| MARLENE M. MITCHELL, | : | |
| Debtors. | : | |
| ----- | | |
| CHARLES L. SMITH, TRUSTEE, | : | Adv. No: 03-30062 |
| Plaintiff, | : | |
| | : | |
| vs. | : | |
| MAURICE D. MITCHELL, SR. and | : | |
| PHYLLIS F. MITCHELL, | : | |
| Defendants. | : | |

ORDER — JURY DEMAND

This matter comes before the court on Defendants’ demand for a jury trial in the above captioned adversary proceeding. On September 5, 2003, the court conducted a telephonic hearing in the above captioned proceeding on Defendants Maurice D. Mitchell and Phyllis F. Mitchell’s jury demand. Peter C. Riley represented Defendants. Charles L. Smith represented himself. At the conclusion of the hearing, the court took the matter under advisement on a briefing schedule. Neither party filed a post-hearing brief within the allowed time period. The court considers the matter fully submitted.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157(b)(1) & § 1334 and order of the United States District Court for the Southern District of Iowa. This matter arises in a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E), (F), (H), (K), & (O). The court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. The plaintiff in this proceeding is the chapter 7 trustee Charles L. Smith. On April 23, 2003, Plaintiff commenced the above captioned adversary proceeding

seeking to recover money and property and to determine the extent and validity of liens. Plaintiff filed an amended complaint on May 9, 2003.

2. The defendants are Maurice and Phyllis Mitchell. Defendants are the parents of Marvin Mitchell and the in-laws of Marlene Mitchell, the Debtors in the main case in which this adversary arises.

3. Marvin R. Mitchell and Marlene M. Mitchell (hereinafter Debtors) filed their voluntary chapter 7 petition in the United States Bankruptcy Court in the Western District of Louisiana on March 5, 2002. Subsequently, the Louisiana court entered an order transferring the case to the Southern District of Iowa.

4. Prior to filing for bankruptcy protection Debtors and Defendants engaged in farming, and had a business as well as familial relationship.

5. Various trustees rejected appointment to the case after its transfer to this district. Charles L. Smith was named chapter 7 trustee in the case on the fourth notice sent out on June 10, 2002.

6. After requesting and receiving an extension of time in which to file a response to the complaint, Defendants filed an answer and jury demand on June 9, 2003, generally denying the allegations of fraudulent conveyances and preferential transfers. They filed a substituted answer and jury demand on June 10, 2003.

7. Maurice Mitchell filed a proof of claim in the main case on August 22, 2002, in the amount of \$769,894.57 for money loaned. He indicated that the claim was incurred on 12-22-98, 1-15-02, and 2-21-02, and was secured by real estate and other property.

8. Phyllis Mitchell has not filed a proof of claim in the main case.

DISCUSSION

Defendants claim a Seventh Amendment right to trial by jury on the issues contained in the complaint and demand such a trial. Plaintiff disputes the assertion, opposes a jury trial, and favors a trial before the bankruptcy court on all counts set forth in the complaint.

The Seventh Amendment to the Constitution of the United States provides that “[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any [c]ourt of the United States, than according to the rules of the common law.” The fact that such a controversy is brought before the bankruptcy court in the context of a core proceeding does not in and of itself divest a party of this right. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

“Suits at common law” refer to “suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered.” Id. at 41, quoting Parsons v. Bedford, 3 Pet. 433, 447 (1830). The amendment preserves the right to jury trials that existed in 1791 and also “applies to actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty. Id. at 42.

In determining whether the right to a jury trial exists, the court compares the action to actions brought in 18th century English courts prior to the merger of the courts of law and equity, then determines whether the remedy sought is legal or equitable in

nature. Id. The nature of the remedy is more important to the determination than is the historical analogy. Id. If the factors indicate that the party is entitled to a jury trial under the Seventh Amendment, the court must decide whether action falls under the public rights doctrine whereby Congress may assign the resolution of a matter to a non-Article III tribunal and has done so. Id. at 42 & 54.

In essence, if the theory of recovery sounds under common law and was ordinarily heard as such in the 18th century English law courts, the action is a “suit at common law” with an accompanying right to trial by jury. Hedback v. American Family Mutual Insurance (In re Matthews), 203 B.R. 152, 156 (Bankr. Minn. 1996). Where the legal theory does not readily allow for the classification, the right to jury trial turns on the relief sought by the plaintiff. If the plaintiff prays for “simply...the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.” Id. quoting Whitehead v. Shattuck, U.S. 146, 151 (1891). If the plaintiff seeks an equitable remedy such as an accounting or injunctive relief, the action sounds in equity and no jury trial right is present. Id.; Granfinciera, 492 U.S. at 49, n. 7.

Finally, even if a defendant has a Seventh Amendment jury trial right, the party may effectively waive that right by submitting to the equitable jurisdiction of the bankruptcy court. For instance, when a creditor files a claim against the bankruptcy estate, the process of allowance and disallowance of claims is triggered subjecting the creditor to the equitable power of the bankruptcy court. Langenkamp v. Kulp, 498 U.S. 42, 44 (1990). Consequently, if the creditor is met with a preference action, the action becomes part of the restructuring of the debtor-creditor relationship which is triable only

in equity. Id. However, if the creditor withdraws the claim before being met with the action, the creditor will retain its jury trial rights.

In this case, Plaintiff filed a complaint containing eight counts. Count I contains a jurisdiction and venue statement. It also contains common allegations concerning Defendants' relationship to Debtors, the structure of Third Rock, Inc., a wheat crop raised and marketed, the disposal of the proceeds from the sale of the wheat, the disposal of funds withdrawn from Debtors' bank account known as the REMA account, liens granted in favor of Defendant Maurice Mitchell based on a confession of judgment and a UCC-1 financing statement, and Debtors' transfer of real property located in Wayne County to both Defendants. Count I does not state an express cause of action or contain a prayer for relief.

Count II alleges that certain of the transfers constitute fraudulent conveyances based on actual fraud and made within one year prior to the commencement of the bankruptcy estate pursuant to 11 U.S.C. § 548(a)(1)(A) and are avoidable under the strong arm powers pursuant to 11 U.S.C. §§ 548, 550, & 551. Plaintiff asks that the court avoid the transfers of Debtors' interest in Third Rock, Inc.; the wheat crop; and checks written to Maurice Mitchell and require Defendants to turnover the property or its reasonable value and for costs incurred.

Count III alleges that the same transfers were also constructively fraudulent because Debtors received less than reasonably equivalent value in exchange for the transfers. At the time of the transfers Debtors were made or became insolvent as a result of the transfers; they were engaged in a business for which their remaining assets were unreasonably small; and Debtors intended to incur or reasonably should have believed

that they would incur debts beyond their ability to pay. Plaintiff asks that the transfers be avoided and for turnover of the property or its reasonable value and for costs incurred.

Counts IV and V allege that the identified transfers constitute actual fraud and constructive fraud within the meaning of Iowa Code § 684.1(11). Count VI alleges that the identified transfers constitute avoidable preferential transfers to insiders. Plaintiff asks that the transfers be avoided and for turnover of the property or its reasonable value and for costs incurred.

Count VII alleges that Debtors made post-petition transfers of estate property including their interest in Third Rock, Inc., the wheat crop, Fireman's Fund checks, and Marvin Mitchell transferred his interest in some Wayne County real estate to Maurice Mitchell. The count also alleges that Debtors transferred payments received from a real estate contract with Gary and Elizabeth Brand to Maurice Mitchell. Plaintiff asks that the transfers be avoided and for turnover of the property or its reasonable value and for costs incurred.

Count VIII alleges that all the property transferred constituted property of the bankruptcy estate. Plaintiff asks that the court order Defendants to turn over the property to the trustee. Alternatively, Plaintiff asks for an accounting of the property or its value and damages for its detention to be turned over to the trustee.

Each of the counts contains allegations that property was fraudulently or preferentially conveyed to Maurice Mitchell. The property interests identified includes checks written to Maurice Mitchell, wheat or the proceeds from the sale thereof, liens to secure promissory notes and judgments, and real property. The only allegation concerning Phyllis Mitchell is found at paragraph 24. There, Plaintiff alleges that on or

about February 13, 1998, Debtors transferred three parcels of real estate located in Wayne County to Maurice and Phyllis Mitchell. The time of the conveyance places this transfer into Counts IV and V.

Maurice Mitchell has filed a proof of claim in Debtors' case. Accordingly, the claim allowance/disallowance process has been triggered and he is subject to the equitable power of the bankruptcy court. See Langenkamp, 498 U.S. at 44; Granfinanciera, 492 U.S. at 59. Therefore, the court finds that Maurice Mitchell has waived his jury trial right, and indeed, in his brief, he concedes the issue.

However, Phyllis Mitchell has not filed a proof of claim, nor does the record reveal that she has made any other claim against the bankruptcy estate. Consequently, the court finds that she has not waived her right to a jury trial.

The court also finds that the action brought by Plaintiff against Phyllis Mitchell is one for the recovery of real property or a money judgment for its value including damages for withholding the property. Such action is an action at law. Whitehead, 138 U.S. at 151. Accordingly, Phyllis Mitchell has a constitutional right to demand a jury. Id. Further, Phyllis Mitchell has not made a claim on the bankruptcy estate, and therefore has not waived her right to a jury.

The court acknowledges that authority exists holding that the fraudulent conveyances of real property invoke equitable processes. See Resolution Trust Corporation v. Pasquariello (In re Pasquariello), 16 F.3d 525, 530-31 (3d Cir. 1994); Campana v. Pilavis (In re Pilavis), 228 B.R. 808, 809-11 (Bankr. D. Mass. 1999). However, those cases do not address Whitehead, 138 U.S. at 151 and appear to misread the Supreme Court's approval of its prior analysis and tacit rejection of those Circuit

Court cases holding otherwise. Granfinanciera, 492 U.S. at 49, n. 7 (stating that the holdings in In re Graham, 747 F.2d 1383 (11th Cir. 1984) and Damsky v. Zavatt, 289 F.2d 46 (2d Cir. 1961) are questionable to the extent that they are in tension with Whitehead's determination that when an action is for the recovery of specific real or personal property the parties have a right to jury trial). Accordingly, the court discounts this authority and absent contrary direction by the Eighth Circuit Court, reads Granfinanciera to hold that in adversary proceedings where the trustee seeks to avoid alleged fraudulent conveyances of real property, defendants who have not made a claim on the bankruptcy estate retain their rights to trial by jury. Id. at 61-65.

The court's determination that Phyllis Mitchell is entitled to a jury trial concerning the transfer of the Wayne County real estate and that Maurice Mitchell is not, creates the potential for disparate rulings based on identical evidence should the court and jury disagree in their factual findings. Further, conducting two separate hearings on essentially the same issue and utilizing the same evidence is a waste of judicial resources and those of the parties. Consequently, the court finds that a jury should hear and determine this matter for both Maurice and Phyllis Mitchell.

The question remains whether this court or the district court should preside over the jury trial portion of this proceeding. The Supreme Court in Granfinanciera declined to decide whether a bankruptcy court could conduct a jury trial. Id. at 64. The Eighth Circuit subsequently held that it could not, based on a lack of statutory authority permitting the bankruptcy court to do so. In re United Missouri Bank of Kansas City, N.A., 901 F.2d 1449 (8th Cir. 1990). Congress provided such authority through the Bankruptcy Reform Act of 1994. It added paragraph (e) to 28 U.S.C. § 157 providing:

If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.

In an order dated December 1, 1994, the United States District Court for the Southern District of Iowa specially designated the bankruptcy court to conduct jury trials and enter final orders in those cases if the parties consent to the bankruptcy judge conducting the jury trial and entering the final order. Therefore, it is within the authority of this court to preside over all matters in this adversary proceeding including the jury trial portion if the parties consent. Should the parties not consent to the bankruptcy court presiding over the jury portion of the trial, a motion to withdraw the reference must be filed.

For all the foregoing reasons, the court will grant in part and deny in part the demand for jury trial. Within 20 days the parties shall file a document consenting to jury trial before the bankruptcy court, or if they do not agree to have the bankruptcy court preside over the jury trial, they shall file a joint motion to withdraw the reference.

In conclusion, the court reminds counsel to exercise a sense of decorum when drafting documents for filing in federal court. The court acknowledges and approves of the practice of using shortened forms and abbreviations for long and cumbersome proper names. Such practice conserves space and improves readability. However, counsel must exercise caution and good judgment when selecting a shortened form to use. Generally, the surname is appropriate for a party, or in cases where more than one party has the same surname; the given names might be appropriate. The court does not condone, and in fact, disapproves of the use of “Mom” and “Dad” to identify parties. Such terms of

familiarity and endearment are appropriate in informal settings, but do not show the proper respect for the opposing parties and sense of propriety before the court.

ORDER

IT IS ACCORDINGLY ORDERED as follows

1. Defendants Maurice and Phyllis Mitchell's jury demand is hereby granted in part and denied in part. A trial by jury shall be conducted on Counts IV and V to the extent that those counts concern the transfer of the real estate in Wayne County to both Maurice and Phyllis Mitchell.

2. All other issues raised in the complaint will be considered in a bench trial.

3. If the parties consent to the bankruptcy court conducting the jury trial and entering a final order after the jury trial, the parties shall file a document expressing their consent within 20 days of the entry of this order. Counsel for each party must sign the document.

4. If the parties do not consent to the bankruptcy court conducting the jury trial, a motion to withdraw the reference must be filed within 20 days of the entry of this order by the party who does not so consent. If none of the parties consent, then they shall file a joint motion.

Dated this _____ day of December, 2003.

RUSSELL J. HILL, JUDGE
U.S. BANKRUPTCY COURT