UNITED STATES BANKRUPTCY COURT
-For the Southern District of Iowa

In the Matter of

EMERY D. CLEMENTS, Case No. 86-713-C

Debtor. Adv.Pro.No. 86-0130

DONALD F. NEIMAN, Trustee,

Plaintiff,

v.

EMERY D. CLEMENTS, ESTHER MARIE MICKESH, KEITH N. MICKESH

Defendants.

ORDER ON MOTION FOR SUMMARY JUDGMENT

On May 21, 1987 the trustee's motion for summary judgment filed on April 27, 1987 and a resistance thereto filed by defendants Esther Marie and Keith N. Mickesh came on for telephonic hearing in Des Moines, Iowa. Donald F. Neiman, the trustee, appeared. John D. Jordan appeared on behalf of defendant Emery D. Clements, and John Swift appeared on behalf of the Mickeshes. The matter was considered fully submitted at the end of the telephonic hearing.

The debtor filed his Chapter 7 petition on March 17, 1986. The trustee seeks to avoid the transfer of a parcel of farmland from the debtor to his daughter as fraudulent. For the reasons expressed below, the trustee's motion is granted.

FACTUAL BACKGROUND

The following facts are undisputed:

1. On or about November 18, 1983, Emery Clements (debtor) was involved in an automobile accident from which lawsuits arose.

2. On Schedule A-3, the debtor lists the plaintiff in the automobile accident action, James E. Braukman, and Mr. Braukman's insurer, American Family Insurance, as unsecured creditors without priority. The claims from these creditors are listed as amounting to $293,333.00. American Family Insurance has filed a proof of claim for $293,333.00 to which the debtor has not objected.

3. Shortly after the accident, the debtor's son-in-law, Keith E. Mickesh, advised the debtor to transfer the debtor's 50 acre farm to his daughter, Esther Marie Mickesh. (The particulars of the conversation between the debtor and Mr. Mickesh are set out in detail in the discussion section of this order.)

4. The debtor conveyed the farm to his daughter on or about November 28, 1983 for consideration of $1.00.

5. The legal description of the land in question is:

> The West 30 rods of the West one-half (W½) of the Northwest Quarter (NW¼) of Section 35, and the East one-half (E½) of the Southeast Quarter (SE¼) of the Northeast Quarter (NE¼) of Section 34, Township 82 North, Range 25 West of the 5th P.M., Boone County, Iowa.

6. At the time of the transfer, the debtor valued the land at $2,000.00 per acre.

7. The farmland constituted the debtor's only valuable asset in terms of cash value.

8. The debtor's income has consisted of $4,000.00 $5,000.00 per year from the farm, $287.00 per month in social security benefits and nominal wages from a part-time job.

DISCUSSION

The trustee's complaint alleges that Mr. Clements fraudulently transferred the property in question to his daughter with the intent to defraud creditors. The trustee seeks to avoid the transfer under 11 U.S.C. section 548. Moving for summary judgment, the trustee asserts that there is no genuine issue as to any material fact and that the trustee is entitled to a judgment as a matter of law.

Bankruptcy Rule 7056 provides that Federal Rule of Civil Procedure 56, which governs motions for summary judgment, applies in bankruptcy adversary proceedings. The Eighth Circuit Court of Appeals has set forth the following standard:

> Summary judgment is appropriate only when the moving party satisfies its burden of showing the absence of a genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the opposing party and must give that party the benefit of all reasonable inferences to be drawn from the

> facts. This Court often has noted that summary
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> judgment is "an extreme and treacherous remedy," and should not be entered "unless the movant has established its right to a judgment with such clarity as to leave no room for controversy and unless the other party is not entitled to recover under any discernible circumstances."

Foster v. Johns-Manville Sales Corp., 787 F.2d 390, 391-92 (8th Cir. 1986) (citations omitted).

At the outset, the court finds that an action against the debtor under section 548 cannot be sustained. The operative subsection of this provision provides:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that-was made or incurred.on-or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
>
> > (1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
> >
> > (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
> >
> > (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

> (ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or
>
> (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.

The trustee's action is barred by the one-year statute of limitations found in subsection (a). The alleged transfer occurred on November 28, 1983--more than two years prior to the debtor's bankruptcy filing.

Notwithstanding the trustee's failure to maintain a section 548 action, the court will consider the trustee's .assertions under section 544. Failure to property characterize a legal theory will not prevent a court from addressing the theory. Gatlin v. Missouri - Pac. R. Ca., 475 F.Supp. 1083, 1086 (E.D. Ark. 1979), aff'd, 631 F.2d 551 (8th Cir. 1980); see also, In re O.P.M. Leasing Services, Inc., 40 B.R. 380, 385 (Bankr. S.D. N.Y. 1984) (A court may examine a complaint to determine whether it justifies relief 'under any legal theory').

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 voidable 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(c) of this title.[1]

It is important to note that the trustee's power to avoid transfers under this section is not limited to the one-year period set out in section 548(a). Rather, the limits are set by state law. In Iowa, the statute of limitations to pursue actions based upon fraud is five years. Iowa Code section 614.1(4). In this case the five-year requirement is met as the trustee has brought this action within five years of the alleged transfer.

1 11 U.S.C. section 502 provides in pertinent part:

> (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest... objects.

In order to prevail, the trustee must shoulder two burdens. First, it must be shown that the transfer was voidable under Iowa law. Secondly, the trustee must establish that there was at least one actual creditor holding an allowable unsecured claim at the time the transfer occurred. In re Hecht, 51 B.R. 72, 76 (Bankr. D. Vt. 1985); In re Buchanan, 35 B.R. 842, 846 (Bankr. E.D. Tenn. 1983); In re Bethune, 18 B.R. 418, 419 (Bankr. N.D. Ala. 1982).

To set aside a transfer as fraudulent, intent to hinder and delay creditors must be established. Clark v. Clark, 229 N.W. 816, 817 (Iowa 1930). Fraud usually must be proved by circumstantial evidence. First National Bank of Iowa City v. Hartsock, 210 N.W. 919, 920 (Iowa 1926). The indicies of fraud include inadequacy of consideration, insolvency of the

transferor, and pendancy of third party creditor litigation. Rouse v. Rouse, 174 N.W.2d 660, 667 (Iowa 1970).

The deposition of the debtor and, in particular, his comments concerning his reasons for transferring the property do not reveal clearly an intent to defraud creditors. The relevant parts of the deposition read as follows:

Q. You said you sold your farm for a dollar to your daughter?

A. Yes.

Q. How long after the accident was that?

A. While I was still in the hospital.

Q. And did you give her a deed to the farm?

A. Yes.

Q. And what was the reason for that transfer?

A. Well, my son-in-law come down and wanted to know if I would do it and I wasn't thinking too fast anyhow and I told him to go ahead. She practically owned it anyhow because when my wife died why she got -- she was to get part of the farm and she didn't make me settle. She just let me keep it and I was to get the crops off of it as long as I lived.

....

Q. Now, as I understand it, then you had this accident and you were in the hospital and your son-in-law came to you in the hospital, is that right?

A. Yes.

Q. Now, had he ever asked to have your daughter buy this farm before then?

A. No.

Q. Am I correct in understanding he came to you and he said something to the effect of there is going to be a lawsuit and you will lose your farm?

A. He said there could be, yeah.

Q. And at that point you thought if there was a lawsuit you were going to lose it and would lose the farm?

A. I didn't stop to think or I probably wouldn't have done it. I just told him to go ahead and do it.

Q. What I'm getting at is if there had never been an accident and you didn't have any fear of a lawsuit in this case would you have sold the farm to her then?

A. No, I wouldn't have because this was already fixed so she was to get it.

Q. You mean when you died?

A. When I died.

Q. The reason you sold it to her before you died was so if there was a lawsuit and you lost the lawsuit you wouldn't have the farm any more, is that right?

A. That was the idea but I didn't stop to think it was after the accident that they could take it anyway.

At most these statements reveal that the transfer was made at the behest of the debtor's son-in-law. Since no intent to defraud creditors can be drawn from the debtor's statements in the deposition, the court turns to an examination of whether any badges of fraud exist which would indicate fraudulent conveyance.

First, there was a gross want of consideration involved in the transfer. The debtor's daughter paid only one dollar for the parcel that the debtor himself valued at $2,000.00 per acre at the time of the transfer.

Secondly, the pendancy of third party litigation existed at the time of the transfer. The debtor had just been involved in an automobile accident prior to the transfer and there was a question as to his liability.

Finally, the trustee contends that the debtor's filing of a Chapter 7 bankruptcy rebuts any presumption that the debtor was solvent after the transfer. The Iowa Supreme Court has ruled that those advancing a fraudulent conveyance claim must show that the debtor was insolvent at the time of the transfer. Richman v. Ady, 232 N.W. 813, 815 (Iowa 1930). The evidence is clear and satisfactory that the debtor was insolvent at the time of the transfer. The parcel of land was his only asset of noteworthy value. His income consisted of the farm income from the property in question, social security payments and nominal wages from a job at a senior citizens center. Neither his assets nor his income would have been able to service his liability arising from the accident.

With respect to the trustee's burden of proving the existence of at least one actual creditor holding an allowable unsecured claim at the time of the transfer, the court notes the proofs of claims and the debtor's schedules. Schedule A-3 completed by the debtor shows unliquidated claims totalling $293,333.00 held by the plaintiff in the lawsuit that arose out of the accident and that plaintiff's insurer, American Family Insurance, has filed a proof of claim in the amount of $93,333.00. The schedules indicate the claim arose on the date of the accident, November 18, 1983. No objection to the

claim has been made by the debtor. The debtor's schedules and the proof of claim filed by the insurance company lead the court to conclude an allowed unsecured claim existed at the time of the transfer.

CONCLUSION AND ORDER

WHEREFORE, based upon the discussion set forth above, no genuine issue as to any material fact exists in this case and, as a matter of law, the trustee is entitled to judgment.

THEREFORE, the trustee's motion for summary judgment is granted.

Signed and filed this lst day of October, 1987.

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LEE M. JACKWIG
U.S. BANKRUPTCY JUDGE