

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:)
)
ELMER R. BAILEY,) Bankruptcy Case No. 97-60112
)
Debtor.)
_____)
)
RONALD K. BAILEY, on behalf of)
the Estate of Elmer R. Bailey,)
)
Plaintiff,)
)
vs.) Adversary Case No. 98-6040
)
BOATMENS BANK OF SOUTH)
CENTRAL ILLINOIS,)
)
Defendant.)

OPINION

This matter having come before the Court for trial on a Complaint to Set Aside Preferential Transfers and Sell Property Free of Interests filed by Ronald K. Bailey, on behalf of the Estate of Elmer R. Bailey, and Motions to Dismiss filed by Debtor, Elmer R. Bailey, and the Defendant, Boatmens Bank of South Central Illinois; the Court, having heard arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

For the purpose of clarity, the Court will first deal with Count III of the Complaint to Set Aside Preferential Transfers and Sell Property Free of Interests. Under Count III, the Plaintiff seeks to have

the filing of continuation statement under 810 ILCS 9-403, by the Defendant, to be declared as a voidable preferential transfer pursuant 11 U.S.C. § 547(b). The allegation in the Complaint states that the continuation statement filed by the Bank on November 27, 1996, is an avoidable preferential transfer as to Debtor's equipment. At hearing on June 18, 1999, the Plaintiff agreed to voluntarily dismiss Count III, based upon the conclusion that the equipment in question had no value. The fact that the equipment had no value is clearly supported by the record in this proceeding and was also made very clear by this Court's ruling in a prior adversary proceeding. In Adversary Case No. 97-6016, in an Opinion in January 1998, this Court ruled on a Motion for Summary Judgment, in favor of the Debtor, finding that the same equipment involved in Count III of the instant Complaint had absolutely no value and that matters complained of as to the equipment were wholly immaterial, citing a line from a letter from Trustee Donald Hoagland to the parties' attorneys in which he stated: "I hope you gentlemen can find other tasks to spend your time, but in the future, I would appreciate not being sent to waste a day on a wild goose chase." This Court's finding that the equipment at issue had no value is further supported by an Opinion entered by District Judge Stiehl, on September 3, 1998, affirming this Court's Opinion and Order on the Motion for Summary Judgment in Adversary Case No. 97-6016, wherein Judge Stiehl stated that: ". . . the Court adopts the Bankruptcy Trustee's opinion that 'the property is not worth the cost of hauling it away.'" It is clear from this Court's prior Opinion in Adversary Case No. 97-9016, on the Defendant's Motion for Summary Judgment, and from the District Court's affirmation of this Court's ruling, that the equipment involved in Count III of the instant adversary had no discernable value. As such, nothing of value was transferred when the continuation statement was filed by the Bank. As a result, the Plaintiff's voluntary dismissal of Count III is wholly appropriate in that it is

impossible for the Plaintiff in the instant adversary to state a cause of action under 11 U.S.C. § 547(b).

In ruling upon the Motions to Dismiss filed by both the Debtor and the Defendant in the instant adversary, the Court finds it appropriate to set forth a brief history of the underlying bankruptcy case, the instant adversary proceeding, and a prior adversary case in which the Plaintiff herein complained of the Debtor.

In its Opinion in January 1998, ruling upon a Motion for Summary Judgment filed by Defendant, Elmer R. Bailey, in Adversary Case No. 97-6016, this Court stated:

The genesis of this case dates back to a time long before the bankruptcy petition was filed by the Debtor/Defendant herein. The principal parties in this adversary are brothers who were engaged in the timber business together on and off for a period of in excess of 35 years. According to the Plaintiff, Ronald K. Bailey, they were most recently engaged in the timber business as "partners" from 1990 until sometime in 1993. Following a disagreement, the parties went their separate ways, and the principal plaintiff in this adversary, Ronald K. Bailey, sued Debtor/Defendant, Elmer R. Bailey, in State Court. The State Court case proceeded through a series of hearings and depositions until the eve of trial when the Defendant filed the instant Chapter 7 proceeding, seeking to discharge debts allegedly owed to the Plaintiffs herein.

In the Opinion in Adversary Case No. 97-6016, this Court went on to state:

Throughout the various hearings held in this matter, the Court notes that, while the parties were well prepared and well versed in the facts of the case and the law, the Court has come to recognize that this case is nothing more than an old family feud. This has been an unusual case from the very beginning, given the extensive and detailed detective work that has been done and the depth of the ill will apparent between the parties. There have been allegations of name calling, face making, and disagreements over wholly insignificant matters, including small repair bills and a hidden safe deposit box that ended up containing nothing more than an old pocket watch, their Mother's Will, and their father's straight razor. The further the Court has delved into this case, the more apparent it has become that the objections and matters raised by the Plaintiffs have little, if any, significance, let alone rise to the level to support an objection to the Debtor/Defendant's discharge or the dischargeability of any debt owed to the Plaintiffs.

This Court's recitation of the history and genesis of the instant bankruptcy case and of the

adversary proceedings before it was reiterated by District Judge Stiehl in his Memorandum & Order, of September 3, 1998, in which he affirmed this Court's decision on the Motion for Summary Judgment in Adversary Case No. 97-6016, where Judge Stiehl stated that:

As the Bankruptcy Court stated, this case stems from an intense family feud whose principal parties are brothers. Throughout the case, the parties have filed a plethora of other motions on various issues and bickered over matters not germane to this case.

Unfortunately, the Court finds that the instant adversary proceeding is nothing more than a continuation of the intense feud between the brothers, Ronald K. Bailey and Elmer R. Bailey, and that, in the end, after sorting out all of the details of this matter, the Court can reach only one conclusion but that the instant adversary Complaint must be dismissed as to the remaining Counts I and II for the reasons hereinafter delineated.

The genesis of the instant adversary proceeding is nearly as colorful as the history of Debtor's underlying bankruptcy case and of the proceedings in Adversary Case No. 97-6016, previously ruled on by this Court. The main basis for Counts I and II of the instant adversary Complaint originated in the underlying case file when on November 4, 1997, Hershel Kasten, Dorothy Bailey, and Ronald K. Bailey, filed an Objection to the claim of Boatmens Bank of South Central Illinois, now known as NationsBank. Said Objection was subsequently amended on November 10, 1997. The sole basis for the Objection was that the secured claim filed by the Bank was excessive and, rather than a claim in the amount of \$185,203.04, the secured claim should be allowed in an amount no more than \$147,836.99. Prior to hearing on the Amended Objection to Claim, the parties entered into a stipulated Order in which the Objectors withdrew their Amended Objection to Claim based upon the Bank producing

certain documents, reasonably satisfactory to the Objectors and their counsel, that the Bank had a superior interest in certain equipment and real estate. The stipulated Order entered between the parties further indicated that, in the event NationsBank did not produce documents reasonably satisfactory to the Objectors, the Objectors could bring an adversary proceeding seeking avoidance of the transfer of interest in certain equipment and real estate to the Bank. The Bank, in this stipulated Order, further waived any objection it might have to the standing of the Objectors to bring such a claim, while reserving its rights to raise all defenses in any such adversary proceeding other than the standing of the Objectors.

In reviewing the record of Debtor's case file, the Court finds that evidently the Bank did not produce documents satisfactory to the Objectors. As a result, on April 28, 1998, Ronald K. Bailey and his wife, Dorothy Bailey, filed a Motion for Leave to Bring Adversary Proceeding in Debtor's case file, which stated that the Bank had not supplied the documentation called for in the stipulated Order and that there was property, including timber trucks, having a value in excess of \$30,000, and equipment with the value of \$7,500, that should be the subject of an adversary proceeding to bring said property into the bankruptcy estate overriding the interest claimed by the Bank in said property. There were no responses or objections to the Motion for Leave to Bring Adversary Proceeding, and, as a result, said Motion was allowed. A Complaint to Set Aside Preferential Transfers and Sell Property Free of Interests was filed as the instant adversary proceeding, some months later, on November 16, 1998. This occurred several months after Darrell Dunham, who was counsel for Ronald K. Bailey and Dorothy Bailey, had withdrawn from the proceeding and been replaced by present counsel, Marcus Herbert.

In analyzing the remaining Counts of the instant adversary Complaint, the Court will start with Count II, which requests that certain real estate of the Debtor be sold and that the proceeds of sale be distributed first to the secured creditor, NationsBank, and the remaining proceeds be paid over to the bankruptcy estate for distribution to the estate's creditors. As a basis for Count II, the Plaintiff asserts that the sale of real estate of the Debtor will net, not only enough to pay off NationsBank in full, but also enough to pay additional monies into the bankruptcy estate for distribution to unsecured creditors. The Court finds that, based upon the clear evidence available, this assertion is simply not true. A review of Debtor's bankruptcy case file shows that the Trustee has already sold the bulk of Debtor's real estate, and that the sum obtained for that sale is not nearly enough to even cover the Bank's secured claim, let alone pay anything to unsecured creditors. In fact, the Bank agreed to allow the Trustee to retain a certain portion of the funds to simply cover administrative expenses. This sale of real estate was not without difficulty because the Plaintiff herein objected to the sale at first, then later withdrew his objection, and then refused to release a *lis pendens* notice on the real estate up until the date of hearing in this matter. At that hearing, the Plaintiff finally acquiesced and allowed the real estate to be sold. The Court further concludes that it does not matter whether the Bank's secured claim is in the amount claimed by the Bank or whether it is in the amount of approximately \$138,000 claimed by Plaintiff herein. The fact remains that, regardless of the amount of the Bank's secured claim, there is no evidence that there is real estate of a sufficient value to in any way cover the amount of the Bank's secured claim.

At hearing on this matter on June 18, 1999, when pressed to identify what real estate remained that could be sold to not only satisfy the Bank's secured claim, but to provide money for unsecured

creditors, the Plaintiff was unable to do so. In fact, the information provided by the Plaintiff clearly establishes that most of the real estate which the Plaintiff would seek to have sold is not titled in the name of the Debtor, but is rather titled in the name of the Debtor's wife, who is not, and never has been, in bankruptcy. As such, the Court has no jurisdiction to order a sale of said real estate. The Plaintiff was able to identify a small tract of real estate that is still titled in Debtor's name that could be sold. However, here again, the Court finds that a sale of said real estate would only benefit the Bank and would have no benefit to unsecured creditors, regardless of whether the Bank's secured claim is in the amount as claimed by the Bank or in the amount as claimed by the Plaintiff. Thus, pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure, making applicable Rule 12 of the Federal Rules of Civil Procedure, the Court finds that the Plaintiff has failed to state a claim upon which relief can be granted under Count II of the Complaint. Rule 12(b)(6) FRCP. This ruling is further bolstered by the fact that, although the Plaintiff served both the Debtor and his wife with summons in this proceeding, neither the Debtor nor his wife were ever named as parties, nor was any relief ever requested from them.

Finally, the Court addresses Count I of the instant adversary Complaint, which alleges that a certain note signed by the Debtor in the amount of \$36,000, secured by real estate of the Debtor in favor of the Bank, constitutes a voidable preference pursuant to 11 U.S.C. § 547(b), in that the mortgage securing said \$36,000 note was allegedly entered into within the preference period prior to the time in which Debtor filed for relief under Chapter 7 of the Bankruptcy Code. The Court finds that Count I must also be dismissed for various reasons. First, the Court notes that the procedural posture of this case is highly unusual in that neither the Debtor nor the Trustee is seeking to avoid a preferential

transfer, but rather Ronald K. Bailey is seeking to avoid the transfer on behalf of the bankruptcy estate. In order to have even the slightest chance to have standing, Ronald K. Bailey would have to be determined to be a creditor of the Debtor. The basis for Ronald K. Bailey's claim in this bankruptcy proceeding is an alleged partnership between he and the Debtor, Elmer R. Bailey. This Court has previously found, in its Opinion allowing a Motion for Summary Judgment in Adversary Case No. 97-6016, that Ronald K. Bailey and Elmer R. Bailey were not partners. This finding was affirmed by the District Court in its Memorandum and Order dated September 3, 1998, in which Judge Stiehl stated: "The evidence demonstrated that the Bailey brothers were not partners." There has never been any evidence that Ronald K. Bailey's claim against the Debtor was based upon anything more than an alleged partnership. The finding of this Court and the District Court that the Bailey brothers were not partners firmly defeats the claim of Ronald K. Bailey and necessitates a finding that Ronald K. Bailey is not a creditor.

As noted previously in this Opinion, Ronald K. Bailey became the Plaintiff on behalf of the bankruptcy estate by virtue of his Motion to file this adversary proceeding and the stipulation by the Bank that it would not object to his standing. Even if Ronald K. Bailey was found to be a creditor, as a general rule it has been held that individual creditors cannot bring suits to avoid preferences on their own behalf. The power to bring suits to avoid preferences generally may be exercised only by a trustee or a debtor-in-possession. See: In re Conley, 159 B.R. 323 (Bankr. D. Idaho 1993); and In re Vogel Van & Storage, Inc., 210 B.R. 27 (D. Ct. N.D. N.Y. 1997). It has been further held that only a limited exception exists to the rule that individual creditors cannot bring suits to avoid preferences on their own behalf where it can be found that the trustee or debtor-in-possession unjustifiably refused to

bring such action. In such extraordinary circumstances, individual creditors have been allowed to avoid preferences. Conley, supra, at 324; and Vogel, supra, at 32. While the Court recognizes that the Bank waived any objection it might have to the standing of Ronald K. Bailey to bring the instant adversary proceeding, the Court finds that the Bank's waiver is not sufficient to abrogate the rule of law as to standing. In the instant case, the Court finds that the Plaintiff herein does not have standing to bring the preference action as alleged under Count I of the Complaint in that there is absolutely no showing that either the Trustee or the Debtor in this case unjustifiably or wrongfully refused to bring the avoidance action. In fact, the Court finds that, even if it were to find that the Plaintiff had standing and the Plaintiff was successful on his avoidance action, no benefit would inure to the bankruptcy estate or to the unsecured creditors of the Debtor. As noted above, regardless of whether the \$36,000 mortgage lien on behalf of the Bank is avoided or not, there is simply not enough real estate available titled in the name of the Debtor to pay the Bank's secured claim in full. As such, a victory for Plaintiff under Count I would be fruitless and serve to accomplish nothing but increasing the costs of litigation for all parties involved.

In conclusion, the Court finds that the Motion to Dismiss filed by Defendant, NationsBank, at trial on June 18, 1999, should be allowed based upon the clear evidence available from the record of Debtor's bankruptcy proceeding and the record of the instant adversary proceeding, together with documentation supplied by both the Defendant and the Plaintiff. The Court further finds that the Motion to Dismiss filed by the Debtor is rendered moot by virtue of the ruling on the Motion to Dismiss filed by the Defendant at trial.

ENTERED: July 14, 1999

GERALD D. FINES
United States Bankruptcy Judge