

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

IN RE:)
)
PATRICIA A. FEEZOR,) Bankruptcy Case No. 92-41094
d/b/a HANDY PANTRY,)
)
Debtor.)

OPINION

This matter having come before the Court on a Motion for Order, Nunc Pro Tunc, Permitting Creditors' Committee to Pursue Fraudulent Conveyance Action on Behalf of Estate and upon an Objection to confirmation of Debtor's Amended Plan of Reorganization filed December 30, 1994; 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.

Findings of Fact

The material facts concerning both the Motion for Order, Nunc Pro Tunc, and the Objection to the Debtor's Amended Chapter 11 Plan or Reorganization are not in dispute and are in pertinent part as follows:

1. On August 25, 1992, the Debtor filed for relief under Chapter 11 of the Bankruptcy Code. The Debtor has operated as a debtor-in-possession since the date of filing of the bankruptcy petition.

2. In April 1992, Creditor, Southard Oil Company, Inc. (Southard Oil), filed a fraudulent conveyance suit against both the Debtor and her husband, Gerald K. Feezor, in the Circuit Court for the First Judicial Circuit of Williamson County, Illinois. On or about

October 8, 1993, the Williamson County, Illinois, lawsuit was voluntarily removed to the Bankruptcy Court and trial was held in September 1994, with a judgment being entered against Gerald K. Feezor to the extent necessary to satisfy the claim of Plaintiff, Southard Oil.

3. Apparently, in discussions between the representative of Southard Oil and other unsecured creditors, particularly Duke & Long Distributing Company, it was agreed that Southard Oil would proceed on its fraudulent conveyance action for the benefit of all unsecured creditors. However, no motion was ever made to add the Unsecured Creditors' Committee or any particular unsecured creditors as additional parties plaintiff to Southard Oil's adversary proceeding (Adv. No. 94-4001). Based upon this oral agreement between Southard Oil's representative and other unsecured creditors, Southard Oil's lawsuit proceeded to judgment with the unsecured creditors having the belief that the entire fraudulent conveyance between the Debtor and her husband, Gerald K. Feezor, would be avoided with the proceeds of said conveyance being made available to all unsecured creditors through the Debtor's bankruptcy estate. A cursory reading of the Illinois Fraudulent Conveyance Act which controlled Southard Oil's available remedies clearly indicates that a plaintiff in a fraudulent conveyance action may only have the fraudulent conveyance avoided to the extent necessary to satisfy the claim of the plaintiff. Thus, unsecured creditors of the Debtor other than Southard Oil now find that there is no benefit for them as a result of the judgment obtained by Southard Oil.

4. Subsequent to the Debtor's bankruptcy filing, the United

States Trustee appointed an Unsecured Creditors' Committee in this case consisting of unsecured creditors: Duke & Long Distributing Company, Southard Oil, and a third unsecured creditor. The third unsecured creditor never participated in the Unsecured Creditors' Committee and Southard Oil withdrew its participation prior to obtaining judgment in Adversary Case No. 94-4001. At present, only Duke & Long Distributing Company remains on the Unsecured Creditors' Committee, and it is apparent that said committee has existed in name only in that no record exists showing active participation of the Unsecured Creditors' Committee as a unit in Debtor's bankruptcy proceeding.

5. The record of Debtor's bankruptcy further indicates that the Unsecured Creditors' Committee has never sought or obtained approval to be represented by legal counsel.

6. In addition to its request *nunc pro tunc* to proceed as the only member of the Unsecured Creditors' Committee, Creditor, Duke & Long Distributing Company, has filed an Objection to the Debtor's Chapter 11 Plan of Reorganization as amended on December 30, 1994, claiming as a basis for the Objection that the Debtor's Plan does not adequately account for any assets which may be brought into the Debtor's bankruptcy estate as a result of the adversary proceeding (Adv. No. 94-4077), for which authority to proceed has been requested.

Conclusions of Law

In considering the Motion for Order, Nunc Pro Tunc, Permitting Creditors' Committee to Pursue Fraudulent Conveyance Action on Behalf of Estate, the Court has reviewed the authority cited for the proposition that a creditors' committee may proceed to pursue a fraudulent conveyance action on behalf of the bankruptcy estate and

finds that that authority does not support the granting of the order requested in this instance. In this case, while it is unfortunate that Debtor's unsecured creditors were proceeding under the assumption that they would be protected by the judgment obtained by Southard Oil in Adversary No. 94-4001, it is apparent that the law under which Southard Oil proceeded clearly limited the potential recovery to an extent necessary to cover the claim of Southard Oil only. The Court notes that the parties' attempted agreement was ineffective in changing the relief available to Southard Oil, as Plaintiff in Adversary No. 94-4001, and that is a fact which could have been easily discovered prior to the issuance of Southard Oil's judgment. The Court also notes that, in essence, there is no real Unsecured Creditors' Committee remaining in Debtor's bankruptcy estate given that two or the three unsecured creditors appointed are no longer serving on that Committee and there has been, in fact, little if no action taken by the Committee as a unit. The granting of *nunc pro tunc* relief as requested herein is generally only allowed where it can be found that extraordinary circumstances exist supporting the relief requested. See: In re Land, 943 F.2d 1265 (10th Cir. 1991), cited with approval in In re McFarland, Bankr. Case No. 92-50074 (S.D. Ill. 1993). The Court finds that no extraordinary circumstances have been shown by the Unsecured Creditors' Committee in that the Court finds the Unsecured Creditors' Committee's reliance on its agreement with counsel for Southard Oil was not reasonable in light of the clear recitation of remedies available to a plaintiff under the Illinois Fraudulent Conveyance Act applicable to the claim of Southard Oil in Adversary No. 94-4001.

In addition to finding that there is insufficient support for

granting the Unsecured Creditors' Committee in this case authority to pursue a fraudulent conveyance action on behalf of the bankruptcy estate, the Court would note that, pursuant to Bankruptcy Rule 2014, the unsecured creditors' committee is required to seek Court approval for employment of legal counsel. This is true even if counsel does not seek compensation from the bankruptcy estate. See: In re Land, supra, at 1267. Given that the Unsecured Creditors' Committee has never sought nor obtained approval of this Court to be represented by legal counsel, the Court must find that counsel was without authority to file the Motion for Order, Nunc Pro Tunc, Permitting Creditors' Committee to Pursue Fraudulent Conveyance Action on Behalf of Estate without first having requested approval to be employed as counsel for the Unsecured Creditors' Committee. At this point in time, giving the Court's finding that no extraordinary circumstances exist for granting *nunc pro tunc* relief to pursue a fraudulent conveyance action, the Court must also find that there are no extraordinary circumstances existing to grant *nunc pro tunc* relief approving employment of legal counsel for the Unsecured Creditors' Committee even if one were to be filed. All in all, the Court finds that there are numerous procedural infirmities which, when taken as a whole, lead the Court to conclude that the relief requested in the Motion for Order, Nunc Pro Tunc, Permitting Creditors' Committee to Pursue Fraudulent Conveyance Action on Behalf of Estate is not supported by a proper basis either in law or in equity.

Having found that the Motion for Order, Nunc Pro Tunc, Permitting Creditors' Committee to Pursue Fraudulent Conveyance Action on Behalf of Estate should be denied, the Court now turns to the Objection to

confirmation filed by Duke & Long Distributing Company and finds that said Objection must also be denied given that the basis for said Objection no longer exists in that, the Unsecured Creditors' Committee having failed to receive authority to pursue a fraudulent conveyance action on behalf of the bankruptcy estate, there will be no recovery had on behalf of the estate to be included in the Debtor's Plan. The Court further finds that all other objections to the Debtor's Plan have been cured by amendments filed thereto, the last of which was filed December 30, 1994. The only other objection which Duke & Long Distributing Company raised concerned the amount of its claim, and the Court has been advised that that matter has been clarified and that the Debtor intends to treat Duke & Long Distributing Company as an unsecured creditor for the amount of the Proof of Claim filed by Duke & Long Distributing Company. As such, the Court finds that confirmation of the Debtor's Chapter 11 Plan of Reorganization, as amended, is appropriate, and an Order will be so entered.

ENTERED: February 14, 1995.

/s/ GERALD D. FINES
United States Bankruptcy Judge