

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

IN RE: )  
)  
MICHAEL V. FRIERDICH, SR., ) Bankruptcy Case No. 99-30454  
)  
Debtor. )  
\_\_\_\_\_)  
)  
STEVEN N. MOTTAZ, Trustee of )  
the Estate of MICHAEL V. )  
FRIERDICH, SR., )  
)  
Plaintiff, )  
)  
vs. ) Adversary Case No. 00-3120  
)  
BEVERLY OSWALD, COLUMBIA )  
CENTRE, INC., O&F PROPERTIES,) )  
INC., a Missouri Corporation,) )  
and MICHAEL V. FRIERDICH, JR.,) )  
)  
Defendants )

OPINION

This matter having come before the Court on a Motion for Summary Judgment filed by the Plaintiff, and Cross-Motion for Summary Judgment filed by Defendant, Beverly Oswald; the Court, having heard arguments of counsel and reviewed written memoranda of the parties 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 Court finds that the material facts in this matter are not in dispute and are, in pertinent part, as follows.

1. The instant bankruptcy proceeding was initiated by the filing of an involuntary bankruptcy petition under Chapter 7 of the Bankruptcy Code on February 17, 1999.

2. Plaintiff is the duly appointed, qualified, and acting Trustee of the Estate of Michael V. Frierdich, Sr.

3. The instant adversary proceeding arises out of and relates to the Chapter 7 bankruptcy case of Michael V. Frierdich, Sr. pending before this Court.

4. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. §§ 544 and 548. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H).

5. The schedules filed by the Debtor in his bankruptcy proceeding indicate that, at the time of the filing of the involuntary petition in bankruptcy on February 17, 1999, the Debtor had debt in the amount of \$8,530,395, and assets in the amount of \$1,200. Also at the time of the filing of the involuntary petition, there were 12 lawsuits pending against the Debtor, five of which were pending prior to September 10, 1998. The claims on file in Debtor's bankruptcy proceeding reflect that there were debts in excess of \$400,000, incurred prior to January 1, 1998, including federal taxes owing in the approximate amount of \$240,000.

6. In addition to the debts scheduled by the Debtor in the instant bankruptcy proceeding, there is a related bankruptcy under the name of South of the Border, Inc., Case No. 98-32101, presently pending

before this Court, in which the Debtor, Michael V. Frierdich, Sr., was the major shareholder and guarantor of many of the debts of South of the Border, Inc.

7. As of January 2, 1998, the Debtor, Michael V. Frierdich, Sr., was the owner of 360 shares of stock in a corporation known as Columbia Centre, Inc. The undisputed facts indicate that Michael V. Frierdich, Sr. was also a director and treasurer of Columbia Centre, Inc. in January 1998.

8. In August 1998, Michael V. Frierdich, Sr. signed an agreement with Columbia Centre, Inc. for the sale of his 360 shares for the sum of \$400,000. At the same time, Michael V. Frierdich, Sr. resigned as treasurer and director of the corporation. Michael V. Frierdich, Sr. also signed a receipt for \$400,000 for the purchase price of the sale of stock, and a check was issued by Columbia Centre, Inc. payable to Michael V. Frierdich, Sr. in the amount of \$400,000, on September 10, 1998. The check was endorsed by Michael V. Frierdich, Sr. and deposited into a bank account owned solely by his wife, Beverly K. Oswald, a Defendant herein. In both August and September of 1998, Michael V. Frierdich, Sr. was reflected in the books of Columbia Centre, Inc. as the owner of the 360 shares of stock that were sold for the sum of \$400,000. The transfer of the \$400,000 received by the Debtor, Michael V. Frierdich, Sr., for the sale of the 360 shares of Columbia Centre, Inc. stock is the subject of the instant adversary proceeding.

### Conclusions of Law

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy procedure 7056. Rule 56(c) reads in part:

(T)he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed.R.Civ.P. 56(c); See Donald v. Polk County, 836 F.2d 376, 378-379 (7th Cir. 1988).

The United States Supreme Court has issued a series of cases which encourage the use of summary judgment as a means of disposing of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348 (1986). "The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute." Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmens Federal Savings & Loan Ass'n, 806 F.2d 146, 149 (7th Cir. 1986)). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 256, 106 S.Ct. at 2514. There is no genuine issue for trial if the record, taken as a whole, does not lead

a rational trier of fact to find for the non-moving party. Matsushita, 475 U.S. at 587, 106 S.Ct. at 1356. "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson, 477 U.S. at 249-250, 106 S.Ct. at 2511.

The Court finds that there are no material facts in dispute in this matter; and, therefore, pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is appropriate.

Pursuant to 11 U.S.C. § 548(a)(1):

(a) (1) 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 -

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and,

(ii) (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.

Pursuant to 11 U.S.C. §§ 544(b):

(b) (1) Except as provided in paragraph (2), 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.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

In examining the undisputed facts before it, the Court finds that the stock in Columbia Centre, Inc. remained the property of the Debtor, Michael V. Frierdich, Sr., until the sale in the amount of \$400,000, which occurred on September 10, 1998. The Debtor has attempted to argue that the stock was actually transferred to Defendant, Beverly Oswald on January 8, 1998, which was more than one year prior to the filing of the instant bankruptcy proceeding. However, the Court finds that, pursuant to 810 ILCS 5/8-301, the purported transfer of the stock on January 8, 1998, was not effective. Further, the Court finds that the sale of the stock by Michael V. Frierdich, Sr. back to Columbia Centre, Inc. on September 10, 1998, for the sum of \$400,000 belies any purported transfer on January 8, 1998. All of the evidence clearly indicates that the Debtor, Michael V. Frierdich, Sr., remained the sole owner of the 360 shares of stock at issue up until the sale on September 10, 1998. That sale is well within the time frame of 11 U.S.C. § 548.

Under 11 U.S.C. 548(a)(1)(A) and (B), the Court concludes that the sale of Debtor's stock on September 10, 1998, and the subsequent transfer of the funds into a bank account owned solely by Defendant, Beverly K. Oswald, is a transfer that may be avoided by the Trustee. Under the undisputed facts, the Court has no difficulty in finding that the transfer in question was made with the actual intent to hinder, delay, or defraud Debtor's creditors. Further, the Court finds that, under 11 U.S.C. § 548(a)(1)(B), Debtor received less than reasonably equivalent value in exchange for the transfer of \$400,000 in cash to the Defendant, Beverly Oswald. The Debtor was clearly insolvent on the date of the transfer, or, at the very least, became insolvent as a result of the transfer. The Debtor was engaged in a business or transaction for which any property remaining with the Debtor was an unreasonably small capital amount. Finally, it is clear that the debts that the Debtor had at the time of the transfer were well beyond the Debtor's ability to pay such debts as they matured.

In addition to finding that the Trustee may avoid the transfer of the \$400,000 in cash on September 10, 1998, the Court also concludes that the transfer in question is voidable by the Trustee pursuant to 11 U.S.C. § 544(b)(1), in that said transfer is clearly a fraudulent conveyance as that term is defined under Illinois law, found at 740 ILCS § 160/5, *et seq.* Having concluded that the transfer of \$400,000 in cash on September 28, 1998, from the Debtor, Michael V. Frierdich, Sr., to Defendant, Beverly Oswald, is avoidable, both under 11 U.S.C.

§§ 548 and 544, the Court concludes that judgment should be entered in favor of the Plaintiff and against Defendant, Beverly Oswald, in the sum of \$400,000.

ENTERED: April 4, 2001.

/s/ GERALD D. FINES  
United States Bankruptcy Judge