

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

IN RE: ) In Proceedings  
) Under Chapter 7  
ABDUL W. KAZI, M.D., )  
and SAMINA W. KAZI, ) No. BK 90-30166  
)  
Debtor(s), )  
)  
STEPHEN R. CLARK, Trustee in )  
Bankruptcy of Abdul Kazi, )  
et al., )  
Plaintiff, ) Adv. No. 92-3018  
)  
vs. )  
)  
ABDUL W. KAZI and )  
SAMINA W. KAZI, Debtors; )  
and ABDUL W. KAZI, as )  
Administrator of the Abdul )  
W. Kazi Pension and Profit )  
Sharing Plan, )  
)  
Defendants. )

OPINION

Abdul W. Kazi, M.D. (Dr. Kazi), and Samina W. Kazi, husband and wife, filed jointly for bankruptcy protection under chapter 7 of the Bankruptcy Code on February 28, 1990. Stephen R. Clark was appointed trustee of the debtors' estate. On June 3, 1992, the trustee filed a two count amended complaint (complaint)<sup>1</sup> which alleges that the transfer of approximately \$300,000.00 by Dr. Kazi to the Abdul W. Kazi Pension and Profit Sharing Plan (Plan) is a voidable transfer pursuant to 11 U.S.C. section 544(b)<sup>2</sup> and section

---

<sup>1</sup>The original complaint was filed on February 26, 1992.

<sup>2</sup>Section 544(b) provides:

The trustee may avoid any transfer of an

4 of Illinois' Uniform Fraudulent Conveyance Act (UFCA).<sup>3</sup>

The complaint names debtors and Dr. Kazi, as administrator of the Plan, as defendants. In its first count, the complaint alleges that Dr. Kazi's transfer of approximately \$300,000.00 to the Plan in October, 1987, for no consideration, or for inadequate consideration, either rendered debtors insolvent or occurred when debtors were insolvent already, thus constituting "fraud in law". In its second count, the complaint alleges that due to Dr. Kazi's dual positions as Plan administrator and sole Plan beneficiary, the transfer of the monies to the Plan was, in effect, a transfer by Dr. Kazi to himself. Thus, by converting nonexempt cash into an exempt asset over which he retains full use and control, Dr. Kazi succeeded in depriving his

---

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.

11 U.S.C. § 544(b).

<sup>3</sup>Section 4 of the UFCA states:

Every gift, grant, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder or defraud creditors or other persons, and every bond or other evidence of debt given, suit commenced, or judgment entered, with like intent, shall be void as against such creditors, purchasers and other persons.

Ill. Rev. Stat. ch. 59, para. 4 (1989).

creditors of the right to the transferred monies. According to the complaint, the transfer was made with the intent to hinder, delay or defraud his creditors and constitutes "fraud in fact".

On June 26, 1992, Dr. Kazi, individually, and as Plan administrator, moved to strike and to dismiss the complaint raising an assortment of grounds in support of the motion. At the hearing on the motion on July 9, 1992, Dr. Kazi asked the Court, inter alia, to determine whether the complaint properly was brought under section 4 of Illinois' UFCA rather than under its successor, section 5 of the Uniform Fraudulent Transfer Act (UFTA).<sup>4</sup> The Court having denied the motion to strike and to dismiss the complaint on all other grounds at the hearing on July 9, 1992, the sole issue remaining is whether the

---

<sup>4</sup>Section 5 of the UFTA provides, in pertinent part:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Ill. Rev. Stat. ch. 59, para. 105 (1992).

complaint states a cause of action under the UFCA.<sup>5</sup>

The crux of Dr. Kazi's argument that the UFTA rather than the UFCA applies to the instant cause of action is that the trustee's complaint was filed after January 1, 1990, the effective date of the UFTA.<sup>6</sup> According to Dr. Kazi, a complaint filed after the effective date of the UFTA is governed by the UFTA even when this results in the statute's retroactive application to conduct occurring prior to its effective date. The trustee, on the other hand, contends that the date the complaint is filed is of no import. Rather, the date of the questionable conduct controls because the UFTA must be applied prospectively in the absence of an express legislative directive for its retroactive application to conduct occurring before its effective date. Since the transfer at issue occurred in October, 1987,<sup>7</sup> prior to the effective date of the UFTA, the UFCA is the proper statute to apply.

---

<sup>5</sup>Dr. Kazi's written motion to strike and to dismiss the complaint does not raise the issue of the applicability of the UFCA to this cause of action. However, Dr. Kazi's counsel argued this point at the hearing on July 9, 1992 without objection from plaintiff. Accordingly the Court will construe Dr. Kazi's argument as a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12 (b) (6) of the Federal Rules of Civil Procedure.

<sup>6</sup>The complaint was filed on February 26, 1992 and amended on June 3, 1992.

<sup>7</sup>The complaint states that Dr. Kazi transferred approximately \$300,000.00 to the Plan in October, 1987. For purposes of a motion to dismiss, all allegations in the complaint must be accepted as true. E.g., In re Smurzynski, 72 B.R. 368, 369 (Bankr. N.D. Ill. 1984). In any event, Dr. Kazi has not disputed the date of the transfer.

When interpreting state law, a federal court must look to decisions by the highest state court, and "[i]n the absence of a definitive ruling by the highest state court, a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand' . . . ." Michelin Tires (Canada), Ltd. v. First Nat'l Bank of Boston, 666 F. 2d 673, 682 (1st Cir. 1981) (quoting McKenna v. Ortho Pharmaceutical Corp., 622 F. 2d 657, 663 (3rd Cir.), cert. denied, 449 U.S. 976 (1980)). The court's considerations may include state appellate court decisions. See Western Casualty & Sur. Co. v. Southwestern Bell Tel. Co., 396 F. 2d 351, 354 (8th Cir. 1968). They may also include authority within the Seventh Circuit that interprets state law on this issue. E.g., American Mut. Ins. Co. v. Romero, 428 F. 2d 870, 873 (10th Cir. 1970).

No reported decision from the Illinois Supreme Court speaks to the question of whether the UFTA shall be applied retroactively to causes of action pending or filed after its effective date seeking redress for fraudulent conduct occurring prior to that date. However, the Illinois Supreme Court has held that Illinois statutes may not be given retroactive effect in the absence of an express statutory mandate calling for retroactive treatment. E.g., Mulligan v. Joliet Regional Port District, 527 N.E. 2d 1264, 1273 (Ill. 1988); Board of Trustees of Community College District No. 508 v. Burris, 515 N.E. 2d 1244, 1249 (Ill. 1987); United States Steel Credit Union v. Knight, 204 N.E. 2d 4, 6 (Ill. 1965). And, these decisions make clear that the date of the questionable conduct - and not the date the lawsuit is filed - controls

which statute applies. E.g., Board of Trustees of Community College District No. 508 v. Burris, 515 N.E. 2d at 1249 ("[The statute] operates prospectively, and therefore proceedings under the statute are governed by the law in effect **at the time of the alleged injury.**") (emphasis added); United States Steel Credit Union v. Knight, 204 N.E. 2d at 6 (A retroactive law is "'one that takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability **in respect of transactions or considerations already past.**'") (emphasis added); (quoting 82 C.J.S. Statutes § 412). See also Klawitter v. Crawford, 541 N.E. 2d 1159, 1164 (Ill. App. Ct. 1989). Moreover, other courts construing Illinois law on this question have followed this approach. E.g., In re Sevko, Inc., No. 90B12478, 1992 WL 148320, at \*5-6 (Bankr. N.D. Ill. Mar. 30, 1992), reference withdrawn, No. 92C2394, 1992 WL 162314 (N.D. Ill. May 20, 1992); In re Martin, Adv. No. 91A00418, 1992 WL 148317, at \*4 (Bankr. N.D. Ill. Mar. 30, 1992); In re Aluminum Mills Corp., 132 B.R. 869, 885 n.14 (Bankr. N.D. Ill. 1991); In re Lyons, 130 B.R. 272, 278 (Bankr. N.D. Ill. 1991); In re Grabill Corp., 121 B.R. 983, 996 n.8 (Bankr. N.D. Ill. 1990).

None of the cases cited by Dr. Kazi in support of retroactive application of the UFTA persuade the Court that the Illinois Supreme Court would deviate from the standard set forth above. Although the state appellate court has twice permitted the UFTA to be applied retroactively in order to afford to a plaintiff injunctive relief<sup>8</sup>

---

<sup>8</sup>Section 8(a)(3)(A) of the UFTA, Ill. Rev. Stat. ch. 59, para. 108(a)(3)(A) (1992), provides for an injunction against further

against pre-enactment fraudulent conveyances not available under the UFCA, Cannon v. Whitman Corp., 569 N.E. 2d 1114, 1117-18 (Ill. App. Ct.), cert. denied, 580 N.E. 2d 109 (Ill. 1991); Farm Credit Bank of St. Louis v. Lynn, 561 N.E. 2d 1355, 1357 (Ill. App. Ct. 1990), the plaintiff here is not seeking injunctive relief. The Court finds little merit in the appellate court's departure from a strict rule of statutory construction in favor of the subjective standard of "whether justice, fairness, and equity" require retroactive application. Cannon v. Whitman, 569 N.E. 2d at 1118; Farm Credit Bank of St. Louis v. Lynn, 561 N.E. 2d at 1357. Nor does the Court accept the conclusion in Cannon that the UFTA is a remedial statute entitled to retroactive application.<sup>9</sup> In any event, the Court is far from convinced that the Illinois Supreme Court will adopt the view expressed by the appellate court or would apply its reasoning to the facts at hand. In re Martin, 1992 WL 148317, at \*4.<sup>10</sup>

---

disposition of the transferred asset or of other property.

<sup>9</sup>The Cannon court relied in large measure on In re Gherman, 103 B.R. 326 (Bankr. S.D. Fla. 1989), in reaching its decision. In Gherman, the bankruptcy court found Florida's Uniform Fraudulent Transfer Act, Fla. Stat. § 726.101 et seq., to be a remedial statute and concluded that its remedial nature warranted retroactive application. This Court, however, finds greater merit in the view expressed in In re Martin, 1992 WL 148317, at \*4, that the statute is not remedial because it merely codifies a right existing in common law rather than creating a remedy that would not otherwise be available. Id. (citing McDonald's Corp. v. Levine, 439 N.E. 2d 475 (Ill. App. Ct. 1982)).

<sup>10</sup>Dr. Kazi also cites United States v. Kitsos, 770 F. Supp. 1230 (N.D. Ill. 1991), aff'd on other grounds by unpublished opinion, 968 F.2d 1219 (7th Cir. 1992), in support of dismissal. However, the Court finds no support for Dr. Kazi's position in its reading of the Kitsos case.

See written order entered this date.

\_\_\_\_\_/s/ Kenneth J. Meyers  
U.S. BANKRUPTCY JUDGE

ENTERED: September 30, 1992