United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Robert McHugh

Bankruptcy No. 02 B 10425

Adversary Caption: Robert McHugh v. Donald Anderson
and
Donald Anderson, Counter-Plaintiff v. Robert McHugh and Sonia Galindo, Counter-Defendant

Adversary No. 02 A 00254

Date of Issuance: May 1, 2003

Judge: John H. Squires

Appearance of Counsel: Attorney for Counter-Plaintiff: David E. Grochocinski, Esq., Grochocinski, Grochocinski & Lloyd, Ltd., 800 Ravinia Place, Orland Park, IL 60462

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Trustee: Marilyn O. Marshall, Chapter 13 Trustee, 224 South Michigan, Suite 800, Chicago, IL 60604

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
ROBERT MCHUGH,	)	Chapter 13
	)	Bankruptcy No. 02 B 10425
Debtor.	)	Judge John H. Squires
	)	
	)	
ROBERT MCHUGH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 02 A 00254
	)	
DONALD ANDERSON,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
DONALD ANDERSON,	)	
	)	
Counter-Plaintiff,	)	
	)	
v.	)	
	)	
ROBERT MCHUGH and	)	
SONIA GALINDO,	)	
	)	
Counter-Defendants.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of the defendant/counter-plaintiff, Donald Anderson ("Anderson") for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on his amended counterclaim filed against the debtor/counter-defendant, Robert McHugh (the "Debtor") and Sonia Galindo

("Galindo") alleging that a transfer of real property to the Debtor by Galindo was a fraudulent conveyance. For the reasons set forth herein, the Court denies the motion. Concurrently entered herewith is a Preliminary Pretrial Order setting this adversary proceeding for pretrial conference on June 19, 2003 at 9:00 a.m.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (H) and (O).

II. APPLICABLE STANDARDS

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 a judgment as a matter of law.

Fed. R. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). 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. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

In 1986, the United States Supreme Court decided a trilogy of cases which encourages the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (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 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990). The Seventh Circuit has noted that trial courts must remain sensitive to

fact issues where they are actually demonstrated to warrant denial of summary judgment. Opp v. Wheaton, 231 F.3d 1060 (7th Cir. 2000); Szymanski v. Rite-way, 231 F.3d 360 (7th Cir. 2000).

The party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion, identifying those portions of the "pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Once the motion is supported by a prima facie showing that the moving party is entitled to judgment as a matter of law, a party opposing the motion may not rest upon the mere allegations or denials in its pleadings, rather its response must show that there is a genuine issue for trial. Anderson, 477 U.S. at 248; Celotex, 477 U.S. at 323; Matsushita, 475 U.S. at 587; Patrick v. Jasper County, 901 F.2d 561, 564-566 (7th Cir. 1990). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If the burden of persuasion at trial would be on the non-moving party, the party moving for summary judgment may satisfy Rule 56's burden of production by either submitting affirmative evidence that negates an essential element of the non-moving party's claim, or by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim. See Union Nat'l Bank of Marseilles v. Leigh (In re Leigh), 165 B.R. 203, 212-13 (Bankr. N.D. Ill. 1993) (citation omitted).

Rule 56(d) provides for the situation when judgment is not rendered upon the whole case, but only a portion thereof. The relief sought pursuant to subsection (d) is styled partial

summary judgment. Partial summary judgment is available only to dispose of one or more counts of the complaint in their entirety. Commonwealth Ins. Co. v. O. Henry Tent & Awning Co., 266 F.2d 200, 201 (7th Cir. 1959); Biggins v. Oltmer Iron Works, 154 F.2d 214, 216-17 (7th Cir. 1946); Quintana v. Byrd, 669 F.Supp. 849, 850 (N.D. Ill. 1987); Arado v. General Fire Extinguisher Corp., 626 F.Supp. 506, 509 (N.D. Ill. 1985); Capitol Records, Inc. v. Progress Record Distributing, Inc., 106 F.R.D. 25, 28 (N.D. Ill. 1985); In re Network 90°, Inc., 98 B.R. 821, 823 (Bankr. N.D. Ill. 1989); Strandell v. Jackson County, 648 F.Supp. 126, 136 (S.D. Ill. 1986). Rule 56(d) provides a method whereby a court can narrow issues and facts for trial after denying in whole or in part a motion properly brought under Rule 56. Capitol Records, 106 F.R.D. at 29.

Local Bankruptcy Rule 402.M of the Local Bankruptcy Rules for the United States Bankruptcy Court for the Northern District of Illinois, which deals with summary judgment motions, was modeled after LR56.1 of the Local Rules of the United States District Court for the Northern District of Illinois. Hence, the case law construing LR56.1 and its predecessor Local Rule 12(M) applies to Local Bankruptcy Rule 402.M.

Pursuant to Local Bankruptcy Rule 402, a motion for summary judgment imposes special procedural burdens on the parties. Specifically, Rule 402.M requires the moving party to supplement its motion and supporting memorandum with a statement of undisputed material facts ("402.M statement"). The 402.M statement "shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to

submit such a statement constitutes grounds for denial of the motion." Id.

Anderson filed a 402.M statement that substantially complies with the requirements of Rule 402.M. It contains numbered paragraphs setting out uncontested facts with specific references to attached exhibits, including an affidavit from Anderson.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b).

The Debtor has not technically complied with this Rule. Instead of responding paragraph by paragraph to Anderson's 402.M statement, the Debtor has responded paragraph by paragraph to the motion for summary judgment itself. The Court finds this pleading insufficient to meet the requirements of Rule 402.N. However, the Debtor filed a statement of additional facts with reference to an affidavit by the Debtor, as well as a portion of deposition testimony given by Anderson. See Local Bankruptcy Rule 402.N(3)(b).

The Seventh Circuit has upheld strict application of local rules regarding motions for

summary judgment. See Dade v. Sherwin-Williams Co., 128 F.3d 1135, 1140 (7th Cir. 1997); Feliberty v. Kemper Corp., 98 F.3d 274, 277-78 (7th Cir. 1996); Bourne Co. v. Hunter Country Club, Inc., 990 F.2d 934, 938 (7th Cir.), cert. denied, 510 U.S. 916 (1993); Schulz v. Serfilco, Ltd., 965 F.2d 516, 519 (7th Cir. 1992); Maksym v. Loesch, 937 F.2d 1237, 1240-41 (7th Cir. 1991).

Local Bankruptcy Rules 402.M and 402.N are patterned after and substantially similar to Local District Court Rules 56.1(a) and 56.1(b). The precedents decided about the latter are instructive and applicable to the former. Compliance with Local Rules 402.M and 402.N is not a mere technicality. Courts rely greatly upon the information presented in these statements in separating the facts about which there is a genuine dispute from those about which there is none. American Ins. Co. v. Meyer Steel Drum, Inc., 1990 WL 92882 at *7 (N.D. Ill. June 27, 1990). The statements required by Rule 402 are not merely superfluous abstracts of evidence. Rather, they "are intended to alert the court to precisely what factual questions are in dispute and point the court to specific evidence in the record that supports a party's position on each of these questions. They are, in short, roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information on its own." Waldridge v. American Hoechst Corp., 24 F.3d 918, 921 (7th Cir. 1994). Because the Debtor failed to technically comply with Rule 402.N, all material facts set forth in Anderson's 402.M statement are hereby deemed admitted. Even

so, the Court must deny Anderson's motion for summary judgment on his amended counterclaim because material issues of fact exist.

III. FACTS AND BACKGROUND

On November 8, 1995, the marriage of Galindo and Anderson was dissolved by the Circuit Court of Lake County, Illinois. Galindo was granted custody of the couple's two sons. Pursuant to an agreed order dated May 3, 1999, the state court granted Anderson's petition to change custody of the children from Galindo to himself. On that same date, the state court awarded Anderson $475.00 per month in child support against Galindo. Galindo failed to pay child support to Anderson. Anderson obtained a judgment against Galindo in the sum of $15,600.00 for child support arrearages. On August 25, 2000, Galindo obtained a protective order from the state court awarding her custody of the children based on her allegations against Anderson of child molestation. See Exhibit No. 1 to Debtor's Affidavit. On September 24, 2001, the state court found Anderson not guilty of child molestation. Shortly after that date, Galindo disappeared with the children.

The Debtor met Galindo at Senn High School in Chicago, Illinois in November 1999, while she was interviewing for a teaching position. Thereafter, Galindo was hired as a special education teacher at the school where she was earning approximately $60,000.00 per year. The two engaged in a romantic relationship from mid-2000 to September 2001, but were not involved on a consistent or exclusive basis. They did not cohabitate, own property jointly or share bank accounts.

During the course of their relationship, the Debtor loaned Galindo between $50,000.00 to $100,000.00, which she used for various purposes, including family expenses. On September 10, 2000, Galindo executed and delivered to the Debtor a quit claim deed purporting to convey the real estate commonly known as 2406 Madiera Lane, Buffalo Grove, Illinois (the "Property"). See Exhibit A to the Rule 402.M statement. Galindo resided at the Property with her children.

On February 15, 2001, the Debtor was involved in an automobile accident. Galindo and her two sons were passengers in the Debtor's car. The Debtor scheduled this car accident and his claim arising therefrom on his Schedules as an asset in the sum of $40,000.00. Galindo was also injured in the accident and suffered back and neck injuries. She was treated by several doctors on numerous occasions and missed several days of work.

Galindo allegedly gave the Debtor the deed to the Property as security for the loans he made to Galindo. The Debtor recorded the deed to the Property on October 16, 2001, shortly after Galindo disappeared with her children, because he thought that it would be difficult to obtain repayment of the loans he made to Galindo. Id.

On March 15, 2002, the Debtor filed a voluntary Chapter 13 petition. On that same date, the Debtor commenced the instant adversary proceeding against Anderson seeking authority to sell the Property. On April 3, 2002, the Court entered an order authorizing the Debtor to sell the Property and deposit the net sale proceeds into a trust account under the joint signatures of counsel for the Debtor and counsel for Anderson. The Property was sold

and the net proceeds in the approximate sum of $76,000.00 were deposited into the trust account pending further order of the Court.

On April 24, 2002, Anderson filed his answer to the complaint as well as a counterclaim, alleging that the transfer of the Property by Galindo to the Debtor was a fraudulent conveyance. Anderson failed to cite to any Bankruptcy Code provision (11 U.S.C. § 548) or Illinois statute (the Illinois Uniform Fraudulent Transfer Act, 740 IlCS 160.1 et seq.) as a basis for the relief requested. On May 29, 2002, the Court issued an order allowing Anderson to join Galindo as a counter-defendant in his counterclaim. On August 22, 2002, Anderson filed an amended counterclaim, once again, failing to state the statutory basis for the relief requested. To date, Anderson has been unable to obtain service of the summons and counterclaim on Galindo, whose last known address is in Mexico.

IV. DISCUSSION

Anderson seeks to avoid the subject transfer of the Property from Galindo to the Debtor as a fraudulent transfer. In his motion for summary judgment, Anderson invokes Sections 5 and 6 of the Illinois Uniform Fraudulent Transfer Act, 740 ILCS 160/1 et seq. (the "UFTA") as the basis for avoiding the alleged fraudulent transfer. Sections 5 and 6 of the UFTA provide:

> § 5. (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.

:

§ 6. (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

740 ILCS 160/5(a) and 160/6.

Sections 5 and 6 of the UFTA are analogous to 11 U.S.C. § 548(a)(1) and (2).[1] See Scholes v. Lehmann, 56 F.3d 750, 756 (7th Cir.), cert. denied sub nom. African Enter., Inc. v. Scholes, 516 U.S. 1028 (1995). "Because the provisions of the UFTA parallel § 548 of the Bankruptcy Code, findings made under the Bankruptcy Code are applicable to actions under the UFTA." Levit v. Spatz (In re Spatz), 222 B.R. 157, 164 (N.D. Ill. 1998) (citation omitted); see also In re Image Worldwide, Ltd., 139 F.3d 574, 577 (7th Cir. 1998) (because the Illinois UFTA is a uniform act which derived phrases from § 548 the court may look to cases under § 548 and other cases interpreting other states' versions of the UFTA for assistance). In this matter, contrary to the more typical fact pattern of avoidance actions, the Debtor was the transferee-recipient of the alleged fraudulent conveyance and Galindo was the transferor-grantor. Hence, the focus here must be placed on Galindo's financial situation and solvency.

Pursuant to § 5 of the UFTA, Anderson may recover the transfer made by Galindo to the Debtor under two theories: (1) if Galindo made the transfer with actual intent to defraud a creditor; or (2) if Galindo did not receive reasonably equivalent value in exchange for the transfer and was insolvent at the time of the transfer or became insolvent as a result of the transfer. The UFTA speaks to two types of fraud -- "fraud in fact" and "fraud in law." Scholes, 56 F.3d at 756-57.

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[1] An important difference between § 548 and the UFTA is that § 548 authorizes avoidance of transfers made within one year before the bankruptcy filing. 11 U.S.C. § 548(a). Causes of action for fraudulent conveyances can be brought under the UFTA, however, within four years after the transfer was made. 740 ILCS 160/10(a).

"Fraud in fact" or actual fraud pursuant to § 5(a)(1) of the UFTA occurs when a debtor transfers property with the intent to hinder, delay or defraud his creditors. Bay State Milling Co. v. Martin (In re Martin), 145 B.R. 933, 946 (Bankr. N.D. Ill. 1992), appeal dismissed, 151 B.R. 154 (N.D. Ill. 1993). The moving party must prove a specific intent to hinder, delay or defraud. Lindholm v. Holtz, 221 Ill. App.3d 330, 334, 581 N.E.2d 860, 863 (2d Dist. 1991) (citing Gendron v. Chicago & NorthWestern Transp. Co., 139 Ill.2d 422, 437, 564 N.E.2d 1207, 1214-15 (1990)). Anderson has the burden of proving all elements of actual fraud under Illinois law by clear and convincing evidence. Martin, 145 B.R. at 946 (citation omitted); Ray v. Winter, 67 Ill.2d 296, 304, 367 N.E.2d 678, 682 (1977). In determining whether a transfer is made with actual intent to defraud, the UFTA sets forth several factors--also known as the "badges of fraud"-- from which an inference of fraudulent intent may be drawn. Section 5(b) of the UFTA sets forth the following indicia:

> (1) the transfer or obligation was to an insider;
> (2) the debtor retained possession or control of the property transferred after the transfer;
> (3) the transfer or obligation was disclosed or concealed;
> (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) the transfer was of substantially all the debtor's assets;
> (6) the debtor absconded;
> (7) the debtor removed or concealed assets;
> (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

> (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

740 ILCS 160/5(b).

When these "badges of fraud" are present in sufficient number, it may give rise to an inference or presumption of fraud. Steel Co. v. Morgan Marshall Indus., Inc., 278 Ill. App.3d 241, 251, 662 N.E.2d 595, 602 (1st Dist. 1996) (citation omitted). Under the Federal Rules of Evidence, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." Fed. R. Evid. 301. The presence of seven badges of fraud have been held sufficient to raise a presumption of fraudulent intent. See Berland v. Mussa (In re Mussa), 215 B.R. 158, 170 (Bankr. N.D. Ill. 1997).

For purposes of the UFTA, a transfer "means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." 740 ILCS 160/2(l). A transfer of real estate is made "when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor . . . cannot acquire an interest in the asset that is superior to the interest of the transferee." 740 ILCS 160/7(a)(1). It is undisputed that the deed to the Property was recorded by the Debtor on October 16, 2001. Accordingly, a transfer was made by Galindo to the Debtor.

The Court finds that a material issue of fact exists regarding whether Galindo transferred the Property to the Debtor with the actual intent to defraud. The Seventh Circuit Court of Appeals has instructed courts to use summary judgment sparingly when subjective intent is a factor in the determination. See Alexander v. Erie Ins. Exchange, 982 F.2d 1153, 1160 (7th Cir. 1993). Based upon this limited record, the Court cannot make a finding of actual or presumptive fraudulent intent on the part of Galindo. Thus, Anderson has not demonstrated that he is entitled to summary judgment under § 5(a)(1) of the UFTA.

Under § 5(a)(2) of the UFTA, "fraud in law," on the other hand, does not require any showing of fraudulent intent. Scholes, 56 F.3d at 757; General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1079 (7th Cir. 1997). Because of its nature, the conveyance is deemed constructively fraudulent. Daley v. Chang (In re Joy Recovery Tech. Corp.), 257 B.R. 253, 268 (Bankr. N.D. Ill. 2001). Anderson has the burden of proving fraud in law by a preponderance of the evidence. See Martin, 145 B.R. at 946 (citations omitted). A different standard of proof applies to this theory because intent to defraud is presumed when the elements of constructive fraud are established. Id. (citations omitted).

In order to establish that a conveyance is fraudulent in law, Anderson must demonstrate four elements: (1) Galindo made a voluntary transfer; (2) at the time of the transfer, Galindo had incurred obligations elsewhere; (3) Galindo made the transfer without receiving a reasonably equivalent value in exchange for the transfer; and (4) after the transfer, Galindo failed to retain sufficient property to pay the indebtedness. See Lease Resolution, 128 F.3d at 1079 (citations omitted).

The distinction between "fraud in fact" and "fraud in law" cases is derived from whether or not there was any consideration for the conveyance under attack. Second Nat'l Bank of Robinson v. Jones, 309 Ill. App. 358, 365, 33 N.E.2d 732, 736 (4th Dist. 1941). Lack of consideration or inadequate consideration for a debtor's conveyance, coupled with the existence or prospect of other unpaid creditors, triggers the "fraud in law" theory in which intent to hinder, delay or defraud is presumed from the circumstances. See Capitol Indem. Corp. v. Keller, 717 F.2d 324, 327 (7th Cir. 1983); Wilkey v. Wax, 82 Ill. App.2d 67, 70, 225 N.E.2d 813, 814 (4th Dist. 1967). When the natural consequences of the transfer is to harm creditors, the law constructively and conclusively presumes fraudulent intent irrespective of the debtor's actual intent. Gendron, 139 Ill.2d at 438, 564 N.E.2d at 1215.

What constitutes "reasonably equivalent value" for purposes of the UFTA has not been defined by Illinois case law.[2] The Illinois Supreme Court, in discussing a prior statute, has stated that one of the necessary elements to establish a fraudulent conveyance is that "there must be a transfer made for no or inadequate consideration." Gendron, 139 Ill.2d at 438, 546 N.E.2d at 1215 (citations omitted). The Illinois Appellate Court has since implied that there is no "reasonably equivalent value" when there is "no or inadequate consideration." Regan v. Ivanelli, 246 Ill. App.3d 798, 805, 617 N.E.2d 808, 814 (2d Dist. 1993); see also Image Worldwide, 139 F.3d at 577 (discussing Illinois interpretation of "reasonably equivalent value").

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[2] 740 ILCS 160/4(b) sets forth a definition for "reasonably equivalent value" that does not apply to this matter.

In determining whether reasonably equivalent value was received under the UFTA, courts should consider how that phrase has been construed under the Bankruptcy Code. Image Worldwide, 139 F.3d at 577. The Bankruptcy Code does not define the term "reasonably equivalent value." Whether "reasonably equivalent value" has been given is a question of fact. Joy Recovery, 257 B.R. at 268; In re Crystal Med. Prods., Inc., 240 B.R. 290, 300 (Bankr. N.D. Ill. 1999). The factors utilized to determine reasonably equivalent value are: (1) whether the value of what was transferred is equal to the value of what was received; (2) the market value of what was transferred and received; (3) whether the transaction took place at an arm's length; and (4) the good faith of the transferee. Barber v. Golden Seed Co., Inc., 129 F.3d 382, 387 (7th Cir. 1997); Grigsby v. Carmell (In re Apex Auto. Warehouse, L.P., 238 B.R. 758, 773 (Bankr. N.D. Ill. 1999). There is no fixed formula for determining reasonable equivalence, but will depend on all the facts of each case, an important element being fair market value. Barber, 129 F.3d at 387.

It is undisputed that Galindo made a voluntary transfer of the Property to the Debtor. Further, at the time of the transfer, she had incurred child support obligations in favor of Anderson. The Court must deny summary judgment, however, because a material issue of fact exists regarding whether Galindo received a reasonably equivalent value in exchange for the transfer of the Property. Anderson contends that the Debtor loaned Galindo approximately $75,000.00 for the repayment of her ordinary living expenses. It is disputed, however, whether the transfer of the Property to the Debtor by Galindo was for adequate consideration. Finally, Anderson has not demonstrated that after the transfer, Galindo failed to retain sufficient

property to pay the indebtedness to Anderson. The limited record before the Court does not reflect Galindo's full financial picture which would allow the Court to make such a determination at this stage of the proceedings. Consequently, the Court denies Anderson's request for summary judgment under § 5(a)(2) of the UFTA.

Next, under § 6(a) of the UFTA, the elements of the cause of action are: (1) Anderson's claim arose before the transfer; (2) Galindo made the transfer without receiving a reasonably equivalent value in exchange for the transferred property; and (3) Galindo either was insolvent at the time of the transfer or became insolvent as a result of the transfer. See Daley v. Chang (In re Joy Recovery Tech. Corp.), 286 B.R. 54, 77 (Bankr. N.D. Ill. 2002); In re Liquidation of Medcare HMO, Inc., 294 Ill. App.3d 42, 50, 689 N.E.2d 374, 380 (1st Dist. 1997); Falcon v. Thomas, 258 Ill. App.3d 900, 909, 629 N.E.2d 789, 795 (4th Dist. 1994).

Section 6(a) includes the requirement that a creditor who has the right to assert some claim must have a claim that arose before the alleged fraudulent transaction. See 740 ILCS 160/6(a). It is undisputed that Anderson was a creditor of Galindo prior to the alleged fraudulent transaction. In 1999, the state court awarded Anderson $475.00 per month in child support payments. In March 2002, the state court awarded him $15,600.00, including sums that were due prior to October 16, 2001. Thus, the first element of § 6(a) has been shown.

For the reasons previously articulated, the Court finds that a material issue of fact exists as to whether Galindo made a transfer of the Property without having received a reasonably equivalent value.

Finally, regarding the issue of insolvency, the UFTA states that "[a] debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." 740 ILCS 160/3(a). This is the balance sheet test for insolvency, which is the same under the Bankruptcy Code. See 11 U.S.C. § 101(32). Actual insolvency is not required under the UFTA. Falcon, 258 Ill. App.3d at 911, 629 N.E.2d at 796. The test is whether the conveyance directly tended to or did impair rights of existing creditors. Id. (citation omitted). Moreover, under the UFTA, "[a] debtor who is generally not paying his debts as they become due is presumed to be insolvent." 740 ILCS 160/3(b).

The Court finds that a material issue of fact exists regarding whether Galindo was insolvent at the time of the transfer of the Property to the Debtor. Pursuant to his affidavit filed in response to the motion for summary judgment, the Debtor contends that he does not have personal knowledge of Galindo's financial affairs. In particular, the Debtor does not know if Galindo had other bank accounts, real property, retirement accounts, stock, savings bonds, jewelry or other property. Additionally, the Debtor avers that Galindo did not consult with him about her financial decisions and he never saw any documents reflecting her financial condition. The Debtor maintains that he loaned Galindo approximately $75,000.00. He states that other than her mortgage loan, car loan, utility bills and ordinary living expenses, he is unaware of any other of Galindo's expenses or debts. Further, he contends that she did not share the full

extend of her financial information with him. The Debtor states that Galindo may have a pension from the Chicago Board of Education as a result of her teaching position, but he does not know the dollar value thereof. In addition, the Debtor states that he has no knowledge of whether Galindo was seeing other men and whether she received money and other valuables from these men while he and Galindo were together.

Further, the Debtor states that as a result of the car accident that he and Galindo were involved in, Galindo's injuries and loss of work time were more significant than his, which he listed as an asset on his Schedules in the amount of $40,000.00. Contingent assets and liabilities must be reduced to their present value for purposes of determining whether a debtor is insolvent. In re Xonics Photochemical, Inc., 841 F.2d 198, 200 (7th Cir. 1988). To determine the present value of a contingent asset, a court must first assess the likelihood that the contingency will ever come to pass. Covey v. Commercial Nat. Bank of Peoria, 960 F.2d 657, 659 (7th Cir. 1992). There is no evidence in the record to allow the Court to determine the probable outcome of Galindo's claim for her personal injuries.

Anderson argues that Galindo was insolvent because the Debtor was helping Galindo pay her bills. The fact that Galindo may have needed assistance in paying her monthly bills does not, ipso facto, render her balance sheet insolvent. Anderson has not put forward enough evidence before the Court to conclusively determine whether Galindo was in fact insolvent under either the balance sheet test or in the equity sense of being unable to pay her bills as they became due. Anderson has not come forward with a listing of Galindo's assets and liabilities. Rather, the Court only has bits and pieces of her financial situation. Further, the record is

devoid of any substantive statement of financial condition of Galindo which would show that she was insolvent on the date of the transfer. The evidence in the record is insufficient for the Court to determine that Galindo was insolvent at the time of the conveyance to the Debtor as a matter of law. The partial record before the Court does not demonstrate that Galindo was generally not paying her debts as they became due. It is conceivable that Galindo was concealing her assets from the Debtor and actually had money to pay her monthly expenses, but chose to use the Debtor in order to pay her debts. The lack of comprehensive evidence proffered by Anderson regarding Galindo's financial condition is fatal to his motion for summary judgment under § 6(a) of the UFTA.

Finally, under § 6(b) of the UFTA, the elements of the cause of action are: (1) Galindo made a transfer to an insider; (2) for an antecedent debt; (3) Galindo was insolvent at that time; and (4) the insider had reasonable cause to believe that Galindo was insolvent. See APS Sports Collectibles, Inc. v. Sports Time, Inc., 299 F.3d 624, 630 (7th Cir. 2002).

If the debtor, in this case, Galindo, is an individual, an "insider" is defined by the UFTA to include "a relative of the debtor or of a general partner of the debtor." See 740 ILCS 160/2(g)(1)(A). Clearly, the Debtor, as transferee, does not fit within the statutory definition of an "insider." This statutory list, however, is not exhaustive. The Seventh Circuit Court of Appeals has stated that in determining whether a person is a non-statutory insider, courts generally focus on two basic factors: (1) the closeness of the relationship between the debtor and the transferee; and (2) whether the transaction between the transferee and the debtor was conducted at arm's length. See In re Krehl, 86 F.3d 737, 742 (7th Cir. 1996). Court have

found a number of relationships to qualify as an "insider." See, e.g., Hirsch v. Tarricone (In re A. Tarricone, Inc.), 286 B.R. 256 (Bankr. S.D. N.Y. 2002) ("golfing buddy" of the debtor's principal shareholder may be an insider); Walsh v. Dutil (In re Demko), 264 B.R. 404 (Bankr. W.D. Pa. 2001) (cohabitation by two people may render individual an insider); Freund v. Heath (In re McIver), 177 B.R. 366 (Bankr. N.D. Fla. 1995) (live-in girlfriend may be an insider).

The Court finds that a material issue of fact exists as to whether the Debtor was an insider of Galindo. Clearly, the Debtor does not fit within the statutory definition of an insider because he was not a relative of Galindo or her general partner. While it is undisputed that the Debtor and Galindo were engaged in a romantic relationship from mid-2000 until September 2001, Anderson stated in his deposition testimony that Galindo was also involved with other men. Anderson stated that men other that the Debtor gave Galindo significant sums of money, including money for her plastic surgery. Further, according to Anderson, men gave Galindo cocaine in exchange for sexual favors. According to Anderson, Galindo was sexually involved with approximately eight other men and was receiving gifts from them. Moreover, the Debtor averred in his affidavit that his relationship with Galindo never reached the level to qualify as an insider because there was no commingling of their financial affairs or personal business other than his loans to her. She did not involve him in her banking or business and they did not cohabitate. Rather, they maintained separate residences and finances. While it is clear to the Court that Galindo and the Debtor had a close relationship for approximately 15 months, there exists a material issue of fact regarding whether the Debtor was an insider of Galindo.

Additionally, for reasons previously stated, the Court finds that a material issue of fact exists regarding whether Galindo was insolvent at the time of the transfer or was rendered insolvent as a result of the transfer of the Property to the Debtor. A further material issue of fact exists regarding whether the Debtor had reasonable cause to believe that Galindo was insolvent. Pursuant to the Debtor's affidavit, he stated that Galindo did not share with him information regarding her financial affairs, nor did he ever see any documents which reflected her financial condition. Accordingly, Anderson's motion for summary judgment must be denied under § 6(b) of the UFTA.

V. CONCLUSION

For the foregoing reasons, the Court denies Anderson's motion for summary judgment on his counterclaim. Concurrently entered herewith is the Court's Preliminary Pretrial Order which sets this adversary proceeding for pretrial on June 19, 2003 at 9:00 a.m.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
ROBERT MCHUGH,	)	Chapter 13
	)	Bankruptcy No. 02 B 10425
Debtor.	)	Judge John H. Squires
	)	
	)	
ROBERT MCHUGH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 02 A 00254
	)	
DONALD ANDERSON,	)	
	)	
Defendant.	)	
	)	
	)	
	)	
DONALD ANDERSON,	)	
	)	
Counter-Plaintiff,	)	
	)	
v.	)	
	)	
ROBERT MCHUGH and SONIA GALINDO,	)	
	)	
Counter-Defendants.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 1st day of May, 2003, the Court denies the motion of Donald Anderson for summary judgment on his amended counterclaim. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting this adversary proceeding for a pretrial conference on June 19, 2003 at 9:00 a.m.

ENTERED:

DATE:_____ _____

John H. Squires

United States Bankruptcy Judge

cc: See attached Service List