

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: JACK P. HOLLEMAN, DEBTOR

CASE NO. 05-12653-DWH

HENRY J. APPLEWHITE, TRUSTEE

PLAINTIFF

VERSUS

ADV. PROC. NO. 07-01058-DWH

RAYBURN PARKS

DEFENDANT

and

CONSOLIDATED ADVERSARIES

HENRY J. APPLEWHITE, TRUSTEE

PLAINTIFF

VERSUS

ADV. PROC. NO. 07-01059-DWH

HOLLEMAN & PARKS OIL & GAS, INC.

DEFENDANT

OPINION

On consideration before the court are the complaints filed by the plaintiff, Henry J. Applewhite, trustee, against the defendant, Rayburn Parks, and the defendant, Holleman & Parks Oil & Gas, Inc.; answers and affirmative defenses having been filed by said defendants; on proof in open court; and the court, having heard and considered same, hereby finds as follows, to-wit:

I.

The court has jurisdiction of the parties to and the subject matter of these consolidated proceedings pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(b). These are core adversary proceedings as defined in 28 U.S.C. §157(b)(2)(A), (F), and (H).

II.

In a pre-trial statement, the attorneys representing the plaintiff and the defendants submitted a Statement of Uncontradicted Facts which is set forth verbatim immediately hereinbelow, to-wit:

1. Jack P. Holleman filed a Chapter 7 no asset petition in bankruptcy on April 14, 2005 at which time Henry J. Applewhite was appointed Chapter 7 Trustee.
2. Debtor Holleman provided financial documents to the Chapter 7 Trustee as required.
3. A checking account in the name of PMBMH Investments, LLC was established by his Certified Public Accountant for Jack Holleman's use in December 2000 due to multiple tax liens having been filed against him.
4. During the year immediately preceding the filing of Holleman's Chapter 7 petition, checks from the account were used for personal and business matters and some were written to Holleman & Parks Oil & Gas, Inc.
5. The total amount of the checks from Debtor Holleman to Holleman & Parks Oil & Gas, Inc. in the year immediately preceding the filing Holleman's bankruptcy petition was \$20,500.00.
6. Jack Holleman and Rayburn Parks have conducted business transactions with each other for a number of years, as well as other people, engaging in drilling transactions.

7. Records from the Office of the Mississippi Secretary of State reflect that Jack Holleman is President and a Director of Holleman & Parks Oil & Gas, Inc.
8. Records from the Office of the Mississippi Secretary of State reflect that Rayburn Parks is Secretary/Treasurer and Director of Holleman & Parks Oil & Gas, Inc.
9. On November 18, 2004 Jack Holleman executed a promissory note and assignment of his interest of 200 shares of Chickasaw Oil & Gas, Inc. to secure a pre-petition debt of \$18,000.00 owed to Rayburn Parks.
10. Records from the Office of the Mississippi Secretary of State reflect that Jack Holleman is President and a Director of Chickasaw Oil & Gas, Inc.
11. Records from the Office of the Mississippi Secretary of State reflect that Rayburn Parks is Vice President and Director of Chickasaw Oil & Gas, Inc., and Jim Kifer is Treasurer and Director.
12. Rayburn Parks holds a security interest on the stock of Chickasaw Oil & Gas, Inc., owned by Jack Holleman, to secure the debt owed to Rayburn Parks.

III.

As noted hereinabove, the plaintiff is the duly appointed Chapter 7 trustee for the bankruptcy estate of the debtor, Jack P. Holleman. In his complaints, he seeks to set aside and recover for the benefit of the bankruptcy estate certain transfers made to the defendants, Rayburn Parks and Holleman & Parks Oil & Gas, Inc., as preferential payments pursuant to §547(b) of the Bankruptcy Code, as well as, as fraudulent conveyances pursuant to §548(a)(1)(B) of the Bankruptcy Code. The pertinent provisions of these Bankruptcy Code sections are set forth as follows, to-wit:

11 USC §547(b).

(b) Except as provided in subsection (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made—
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 USC §548(a).

(a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation incurred (including any obligation to or for the benefit of an insider under an employment contract) by the debtor, that was made or incurred on or within 2 years 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 to 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;
- (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; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

IV.

In Adversary Proceeding 07-01058, the trustee asserts that on November 18, 2004, within five months prior to the filing of his bankruptcy petition, the debtor, Holleman, executed a promissory note in favor of the defendant, Parks, in the sum of \$18,000.00 to secure a pre-petition indebtedness owed to Parks. As security for this indebtedness, Holleman assigned 200 shares of stock that he owned in Chickasaw Oil & Gas, Inc., to Parks. The evidence presented at trial, however, indicated that this was not a debt owed directly to Parks. The proof showed, without contradiction, that an entity which was not named as a party to the adversary proceeding, Parks & Parks, Inc., which was owned by Parks, sustained a loss approximating \$36,000.00 on a gas well drilling venture that had occurred in Pontotoc County, Mississippi. Funds for this venture had been routed through the named defendant in the companion adversary proceeding, Holleman & Parks Oil & Gas, Inc., as the operating entity. Holleman & Parks Oil & Gas, Inc., served primarily as a conduit and had only a nominal role in the drilling venture. While there was no actual debt owed by Holleman to Parks, individually, Holleman felt that he was morally obligated to share the misfortune, so he executed the promissory note, secured by his shares of corporate stock, for approximately one-half of the loss sustained by Parks & Parks, Inc. This was simply a voluntary accommodation by Holleman who owed no legal obligation to either Parks or Parks & Parks, Inc.

While the above scenario has most of the indicia of a fraudulent conveyance, which will be discussed further hereinbelow, it is not a preferential payment because it was not a transfer to or

for the benefit of a creditor and was not on account of an antecedent debt owed by the debtor before the transfer was made, both circumstances being required by §547(b)(1) and (2). In addition, as discussed in the following paragraph, the requirement of §547(b)(3), the debtor's insolvency at the time of the transfer, was not established by any testimony or documentary evidence. Therefore, the trustee's cause of action to avoid the execution of the promissory note and the assignment of the corporate stock of Chickasaw Oil & Gas, Inc. to Parks as a preferential transfer is not well taken.

The requirements of §548(a)(1)(B), with one exception, have clearly been established by the trustee since this was a transfer of property and the execution of a promissory note for less than reasonably equivalent value. However, the court has carefully reviewed the trial record, specifically a transcription of the testimony of the debtor, Holleman, and finds no proof that Holleman was insolvent on the date that the transfer was made and the obligation incurred, or that he became insolvent as a result of the transfer or the incurrence of the obligation. The element of insolvency is required to sustain an action to avoid both a preferential transfer and a fraudulent conveyance. While the court could certainly speculate that Holleman was insolvent at the time of the transfer, particularly after examining his bankruptcy schedules, in the absence of a stipulation, admission, or a statutory presumption, this element must be proven by competent evidence. Consequently, because the record is silent as to Holleman's solvency at the time of this transfer, the trustee's complaint alleging a fraudulent conveyance is also not well taken.

V.

In Adversary Proceeding No. 07-01059, the trustee asserts that checks totaling \$20,500.00 were paid to Holleman & Parks Oil & Gas, Inc., from a checking account in the name of PMBMH Investment, LLC. This account had been set up for Holleman's benefit by his accountants so that he could conduct business activities, avoiding a notice of intent to levy issued by the Internal Revenue Service. The court has examined the checks that were drawn on this account and observes that many were written for the purpose of paying Holleman's personal expenses, and, indeed, checks totaling \$20,500.00 were paid to Holleman & Parks Oil & Gas, Inc., for reasons that were not disclosed. Holleman's bankruptcy schedules do not list Holleman & Parks Oil & Gas, Inc., as a creditor, nor was there any evidence introduced at trial to reflect that it was a creditor or that there was an antecedent debt owed by Holleman to Holleman & Parks Oil & Gas, Inc. Since these elements, which are necessary to establish a preferential transfer, have not been established, the trustee's complaint to recover these payments from Holleman & Parks Oil & Gas, Inc., is not well taken.

Regarding the trustee's contention that the payments to Holleman & Parks Oil & Gas, Inc., are fraudulent conveyances, the court cannot conclude from the proof presented that Holleman and/or PMBMH Investment, LLC, received less than reasonably equivalent value in exchange for the transfers which could have been for legitimate business reasons. As stated hereinabove, the record also fails to establish that Holleman was insolvent on the date that the transfers were made or became insolvent as a result of the transfers. Consequently, the trustee's complaint to set aside these transfers as fraudulent conveyances is also not well taken.

For the reasons set forth hereinabove, the court must conclude that the adversary complaints filed by the Chapter 7 trustee against the defendants, Rayburn Parks and Holleman & Parks Oil & Gas, Inc., must be dismissed because the evidence does not establish all of the necessary elements to constitute either preferential transfers as contemplated by §547(b) of the Bankruptcy Code or fraudulent conveyances as contemplated by §548(a)(1)(B) of the Bankruptcy Code. A separate order of dismissal will be entered consistent with this opinion.

This the 5th day of August, 2008.

/s/ David W. Houston, III
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE