United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Rochelle Steder and Nicholas Steder

Bankruptcy No. 02 B 00173

Adversary Caption: Rochelle Steder and Nicholas Steder v. Surplus Properties, Inc.

Adversary No. 02 A 00229

Date of Issuance: July 25, 2002

Judge: John H. Squires

Appearance of Counsel:

Attorney for Movant or Plaintiff: Timothy M. Hughes, Esq., Lavell Legal Services, Ltd., 208 South LaSalle Street, Suite 1200, Chicago, IL 60604-1003

Attorney for Defendant: Rod Radjenovich, Esq., Jeffrey Strange & Associates, 717 Ridge Road, Wilmette, IL 60091

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 13
ROCHELLE STEDER and	)	Bankruptcy No. 02 B 00173
NICHOLAS STEDER,	)	Judge John H. Squires
	)	
Debtors.	)	
	)	
	)	
ROCHELLE STEDER and	)	
NICHOLAS STEDER,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Adversary No. 02 A 00229
	)	
SURPLUS PROPERTIES, INC.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Surplus Properties, Inc. ("Surplus") for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on the two-count complaint filed by Rochelle and Nicholas Steder (collectively the "Debtors") against Surplus to avoid a transfer made by the Debtors to Surplus as fraudulent pursuant to 11 U.S.C. § 548(a)(1) (Count I) and as a preferential payment under 11 U.S.C. § 547(b) (Count II). For the reasons set forth herein, the Court denies the motion. Concurrently entered herewith is the Court's Final Pretrial Order setting this matter for trial on November 1, 2002 at 1:00 p.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)(F) and (H).

II. FACTS AND BACKGROUND

Many of the facts are undisputed. The Debtors owned real property located at 1218 East Evergreen Street, Wheaton, Illinois (the "Property") on and prior to December 4, 2001. The Debtors contend that the fair market value of the Property on December 4, 2001 was $210,000.00. The Property was subject to a first and second mortgage of $48,000.00 and $38,000.00, respectively, with the delinquent first mortgage having an arrearage of approximately $17,223.00. The Property had been scheduled to be sold on December 5, 2001 at a sheriff's sale pursuant to a foreclosure judgment. On December 4, 2001, Surplus purchased the Property from the Debtors, subject to the existing mortgages for the sum of $17,226.05, and subject to the Debtors' option to repurchase the Property within thirty days.

Pursuant to the terms of the contract, the Debtors had the option to buy back the Property for $32,226.05 on or before January 4, 2002. See Affidavit of John Argianas attached to Motion for Summary Judgment at ¶ 2. The Debtors never tendered any funds to Surplus. Id. at ¶ 3. Rather, they filed their Chapter 13 petition on January 3, 2002.

The Debtors filed the instant adversary proceeding on March 7, 2002. On April 12, 2002, the matter came before the Court for a status hearing. At that time, the Court gave Surplus leave to file a motion for summary judgment by or before April 15, 2002. Surplus filed the motion on April 16, 2002. Thereafter, on April 23, 2002, the Court entered its Preliminary Pretrial Order setting this matter for a pretrial conference on May 24, 2002. Neither party attended the pretrial conference. Thus, as a sanction for failure to attend, the Court dismissed this adversary proceeding on that date. Subsequently, on May 30, 2002, the Debtors filed a motion to vacate the order of dismissal, and on June 3, 2002, Surplus also filed a motion to vacate the dismissal, accompanied by its renewed motion for summary judgment. The Court afforded the parties leave to file a pretrial statement in compliance with the Court's Preliminary Pretrial Order. The parties subsequently filed that pretrial statement on June 27, 2002. Accordingly, on July 1, 2002, the Court vacated the dismissal of the adversary proceeding and set a briefing schedule regarding the summary judgment motion.

Surplus argues in the motion that the Debtors received a reasonably equivalent value from the transfer because it calculates that the repurchase option value was $172,000.00, or the difference between the fair market value of the Property ($210,000.00) less the option price of $38,000.00 (which amount is unexplained in Surplus' papers). Further, Surplus concludes that the addition to that economic value of the cash received by the Debtors of $17,226.05 provided total consideration to the Debtors of $189,226.05, which is "reasonable" to defeat Count I of the complaint. With respect to Count II of the complaint and the preference avoidance theory advanced by the

Debtors, Surplus disputes that the transaction constituted an "equitable mortgage" on the Property. Rather, Surplus argues that it was a transfer subject to the repurchase option, which the Debtors failed to exercise by January 4, 2002, or within the time extension afforded by 11 U.S.C. § 108(b).

In contrast, the Debtors contend that the repurchase option did not leave a value of $172,000.00, but was only worth $92,000.000 or the difference between the fair market value of the Property ($210,000.00) less the first and second mortgages ($48,000.00 + $38,000.00 = $86,000.00) or $124,000.00, less the option exercise cost of $32,000.00 or $92,000.00. The Debtors further argue that this transfer effectively rendered them insolvent when they transferred the Property to Surplus and only received the value of $92,000.00 in return. Moreover, the Debtors assert for purposes of Count II that the transaction created an equitable mortgage and that their asserted causes of action are not time barred via § 108(b)(2). In a second affidavit, John Argianas states that Surplus did not solicit the execution of the contract documents from the Debtors, but was contacted by Al Young who met with the Debtors regarding preventing the sheriff's sale, and who is not an employee or agent of Surplus. See Affidavit of John Argianas attached to Reply of Surplus to Motion for Summary Judgment at ¶ 3.

In their response to the motion, the Debtors attach the affidavit of Rochelle Steder. She states that her husband, Nicholas Steder, has been an alcoholic since 1999. See Affidavit of Rochelle Steder at ¶ 2. She further states that prior to the bankruptcy filing, Nicholas lost his employment due to his problems with alcohol, and was only able to obtain regular employment after the 11 U.S.C. § 341 creditors' meeting. Id. at ¶ 3.

Finally, she states that on December 4, 2001, Surplus solicited the execution of the sales contract and the quit claim deed with the Debtors. Id. at ¶ 4.

III. APPLICABLE STANDARDS FOR SUMMARY JUDGMENT

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 encourage 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 Electric 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).

Local Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. 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. Surplus filed a 402.M statement that substantially complied with the requirements of Rule 402.M. It contained numbered paragraphs setting out uncontested facts.

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 Debtors have complied with this Rule. They filed a statement of additional material facts as well as the affidavit from Rochelle Steder.

IV. DISCUSSION

A. Count I of the Complaint

Pursuant to Count I of the complaint, the Debtors contend that prior to the transfer of the Property to Surplus, they had a net worth of approximately $103,877.00. The Debtors further allege that after the transfer, they had a net worth of negative $103,570.00. The Debtors maintain that the transfer of the Property to Surplus rendered

them insolvent and was for less than a reasonably equivalent value. The Debtors seek to avoid the transfer pursuant to 11 U.S.C. § 548(a)(1), which provides in relevant part:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property, . . . that was made . . . on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--
> (A) made such transfer . . . 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, . . . indebted; or
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer . . . ; and
> (ii)(I) was insolvent on the date that such transfer was made . . . , or became insolvent as a result of such transfer . . . ;
>
> > (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.

11 U.S.C. § 548(a)(1).

The cause of action under § 548(a)(1)(A) is commonly referred to as "actual fraud" because of the element of the debtor's actual intention to hinder, delay or defraud creditors. In re FBN Food Servs., Inc., 82 F.3d 1387, 1394 (7th Cir. 1996). Section 548(a)(1)(B) is often called "constructive fraud" because it omits any element of intent.

Id. One decision has described the differences between the two causes of action under § 548(a)(1):

> The focus in the inquiry into actual intent is on the state of mind of the debtor. Neither malice nor insolvency are required. Culpability of the part of . . . the transferees is not essential.
>
> Unlike constructively fraudulent transfers, the adequacy or equivalence of consideration provided for the actually fraudulent transfer is not material to the question whether the transfer is actually fraudulent. . . . Conversely, the transferor's intent is immaterial to the constructively fraudulent transfer in which the issue is the equivalence of the consideration coupled with either insolvency, or inadequacy of remaining capital, or inability to pay debts as they mature.

In re Cohen, 199 B.R. 709, 716-17 (9th Cir. B.A.P. 1996). "Fraudulent conveyance law protects creditors from last-minute diminutions of the pool of assets in which they have interests." Bonded Fin. Servs., Inc. v. European American Bank, 838 F.2d 890, 892 (7th Cir. 1988).

Badges of fraud, the existence of which can be used to infer actual intent to defraud under § 548(a)(1)(A), include the following: (1) absconding with the proceeds of the transfer immediately after their receipt; (2) absence of consideration when the transferor and transferee know that outstanding creditors will not be paid; (3) huge disparity in value between the property transferred and the consideration received; (4) fact that the transferee was an officer, or agent or creditor of an officer of corporate transferor; (5) insolvency of the debtor; and (6) existence of a special relationship between the debtor and the transferee. Carmel v. River Bank America (In re FBN Food Servs., Inc.), 185 B.R.265, 275 (N.D. Ill. 1995), aff'd, 82 F.3d 1387 (7th Cir. 1996). The

Debtors do not specify under which subsection they proceed.

To obtain relief under § 548(a)(1)(B), the Debtors must establish not only that the transfer was for less than a reasonably equivalent value, but also that the Debtors were insolvent at the time of the transfer or became insolvent as a result of the transfer. Dunham v. Kisak, 192 F.3d 1104, 1109 (7th Cir. 1999). The Court assumes that the Debtors seek relief under this subsection based on the allegations in the complaint and their arguments in opposition to the motion at bar.

The Bankruptcy Code uses a balance sheet approach to insolvency. Steege v. Affiliated Bank/North Shore Nat. (In re Alper-Richman Furs, Ltd.), 147 B.R. 140, 154 (Bankr. N.D. Ill. 1992). Under that standard, the Court looks to whether a debtor's assets exceeded its liabilities at the time of a challenged transfer. Id.

Determination of reasonably equivalent value under § 548(a)(1)(B) is a two-step process. Anand v. National Republic Bank of Chicago, 239 B.R. 511, 516-17 (N.D. Ill. 1999). The Court must first determine whether the debtor received value, and then examine whether the value is reasonably equivalent to what the debtor gave. Id. at 517 (citations omitted). The second inquiry, whether what the debtor gave up was reasonably equivalent to what he received, is more difficult. Id.

The Bankruptcy Code does not define the term "reasonably equivalent value." Whether "reasonably equivalent value" has been given is a question of fact. 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. The Debtors bear the burden of proof as to all elements of § 548. Carmel v. River Bank America (In re FBN Food Servs., Inc.), 175 B.R. 671, 682 (Bankr. N.D. Ill. 1994), aff'd, 185 B.R. 265 (N.D. Ill. 1995), aff'd, 82 F.3d 1387 (7th Cir. 1996).

The Debtors contend that the transfer of the Property rendered them insolvent and was for less than a reasonably equivalent value. The Debtors bear the burden of proof with respect to these elements. As to the first element, the Debtors allege that the transfer of the Property left them with a negative worth of $103,570.00. Surplus disagrees with the Debtors' method of calculating the repurchase price and the consideration amount. Surplus argues that the Debtors were solvent after the transfer of the Property. The record is so sparse at this point that the Court cannot make a finding on the insolvency issue, as well as the other four issues stated above. There is no evidence before the Court showing the Debtors' respective assets and liabilities either before or after the subject transfer. The Court finds that a genuine issue of material facts exists with respect to the element of the Debtors' insolvency, and there is no evidence before the Court on the other issues with the parties in marked disagreement over the value of what was given and received in the transfer. Therefore, the Court must deny the motion for summary

judgment for this reason.

Regarding the second element, Surplus argues that the economic value of the repurchase option was $172,000.00 and that the cash consideration received by the Debtors was $17,226.05. This total ($189,226.05), according to Surplus, is a reasonably equivalent value given the Debtors' estimated fair market value of the Property at $210,000.00. The Debtors, on the other hand, contend that the repurchase option value was only $92,000.00 because they were responsible for payment of the first and second mortgages, $48,000.00 and $38,000.00, respectively. They maintain that this sum is not a reasonably equivalent value for the transfer of the Property to Surplus. Valuation is an inherently fact intensive inquiry and the parties patently disagree on this highly material fact. Thus, the Court finds that a genuine issue of material fact exists regarding this second element of whether the Debtors received a reasonably equivalent value of the transfer of the Property. Hence, the Court must deny Surplus' motion for summary judgment.

B. Count II of the Complaint

Pursuant to Count II of the complaint, the Debtors seek to avoid the transfer to Surplus under 11 U.S.C. § 547(b) because the transaction constituted a "mortgage financing" and an equitable mortgage. Section 547(b) provides that a trustee may avoid any transfer of an interest of the debtor in property if the transfer meets five requirements: (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 on or within 90 days before the date of the filing of the petition; and

(5) enables the creditor to receive more than such creditor would if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of such debt to the extent provided by the provisions of the Code. See 11 U.S.C. § 547(b); Warsco v. Preferred Technical Group, 258 F.3d 557 (7th Cir. 2001); In re Superior Toy & Mfg. Co., 78 F.3d 1169, 1171 (7th Cir. 1996). The trustee has the burden of proof to establish all elements of § 547(b) by a preponderance of the evidence. 11 U.S.C. § 547(g); In re Jones, 226 F.3d 917, 921 (7th Cir. 2000); In re Badger Lines, Inc., 140 F.3d 691, 698 (7th Cir. 1998); In re Prescott, 805 F.2d 719, 726 (7th Cir. 1986). The Court concurs with the line of cases that allows Chapter 13 debtors to assert bankruptcy causes of action normally asserted by case trustees, including avoidance actions like the complaint at bar. See Einoder v. Mount Greenwood Bank (In re Einoder), 55 B.R. 319, 322-23 (Bankr. N.D. Ill. 1985) (Chapter 13 debtor has standing to seek the avoidance of a preferential transfer under § 547); Robinson v. Taylor (In re Robinson), 80 B.R. 455, 457 (Bankr. N.D. Ill. 1987) (Chapter 13 debtor has standing to seek the avoidance of a fraudulent transfer under § 548).

The Bankruptcy Code presumes a debtor to be insolvent, as a matter of law, during the 90 days prior to the bankruptcy petition filing date. 11 U.S.C. § 547(f); see also Barash v. Public Fin. Corp., 658 F.2d 504, 507 (7th Cir. 1981). This presumption requires the defendant to present evidence to rebut the presumption, but it does not relieve the trustee of the ultimate burden of proof on this third element to establish a prima facie case under § 547(b). See In re Taxman Clothing Co., Inc., 905 F.2d 166, 168 (7th Cir. 1990); Schwinn Plan Comm. v. AFS Cycle & Co., Ltd. (In re Schwinn Bicycle

Co.), 192 B.R. 477, 485 (Bankr. N.D. Ill. 1996). There is no evidence establishing a debtor-creditor relationship prior to the transfer between the parties, and thus no evidence identifying any antecedent debt owed by the Debtors to Surplus to satisfy the second element.

The Debtors maintain that the quit claim deed to Surplus and the contract for repurchase constituted an equitable mortgage. Surplus, on the other hand, argues that the transactions did not create an equitable mortgage and that pursuant to § 108(b)(2), the Debtors' claim is time barred because they did not exercise the option to repurchase the Property within sixty days after the filing of the bankruptcy petition.

The Court must deny Surplus' motion for summary judgment pursuant to this count of the complaint. Surplus, however, failed to submit evidence to negate one or more of the essential elements that the Debtors are required to prove. Hence, Surplus failed to demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Surplus has not addressed the requisite elements of § 547(b), on which the Debtors have the burden of proof, or furnished any evidence that negates one or more of the required elements of proof with which the Debtors need to establish a prima facie case. For this reason, the motion for summary judgment must be denied.

V. CONCLUSION

For the foregoing reasons, the Court denies the motion for summary judgment. Concurrently entered herewith is the Court's Final Pretrial Order setting this matter for

trial on November 1, 2002 at 1:00 p.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: ROCHELLE STEDER and NICHOLAS STEDER, Debtors.	)	Chapter 13 Bankruptcy No. 02 B 00173 Judge John H. Squires
ROCHELLE STEDER and NICHOLAS STEDER, Plaintiffs, v. SURPLUS PROPERTIES, INC., Defendant.	)	Adversary No. 02 A 00229

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 25th day of July, 2002, the Court hereby denies the motion of Surplus Properties, Inc. for summary judgment. Concurrently entered herewith is the Court's Final Pretrial Order setting this matter for trial on November 1, 2002 at 1:00 p.m.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List