United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re FBN Food Services, Inc.

Bankruptcy No. 91 B 08983

Adversary Caption: James E. Carmel, Trustee v. River Bank America, a New York Banking Corporation

Adversary No. 92 A 00961

Date of Issuance: April 28, 1997

Judge: Susan Pierson Sonderby

Appearance of Counsel:

Attorney for Movant or Plaintiff: Kenneth Marcus

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Trustee or Other Attorneys:

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	
FBN FOOD SERVICES, INC.,	)	Case No. 91 B 08983
	)	
Debtor.	)	
_____	)	
	)	
JAMES E. CARMEL, Trustee,	)	
	)	
Plaintiff,	)	Adversary No. 92 A 961
	)	
v.	)	
	)	
RIVER BANK AMERICA, a New York Banking Corporation,	)	Honorable Susan Pierson Sonderby
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court pursuant to an order by the Seventh Circuit remanding three questions for consideration. Because the first question posed by the Seventh Circuit provides a dispositive answer for all three, the Court has only considered the first question. Based on the papers submitted and on its review of the evidence, the Court holds that the transfer occurred with actual intent to defraud FBN's creditors, that River Bank has no claim to any amount left over after satisfying FBN's debts, and that this adversary proceeding is at an end.

BACKGROUND

The Court's December 6, 1994 opinion ("December 6 Opinion") contains an extensive background section that details the underlying facts in this proceeding, and the Court will assume familiarity with that opinion. Carmel v. River Bank America (In re FBN Food Services, Inc.), 175 B.R. 671 (Bankr. N.D. Ill. 1994). As the Seventh Circuit did in Betaco, Inc. v. The Cessna Aircraft Co., 103 F.3d 1281, 1283 (7th Cir. 1996), the Court will repeat only a few key points to set the stage for its analysis.

The crux of the matter is a $1.4 million transfer from Sizzler Restaurants International, Inc. ("Sizzler") to Quest Equities, Inc. ("Quest Equities"). The funds were transferred as part of an agreement between Sizzler and various other entities to settle litigation between Sizzler and FBN Food Services, Inc. ("FBN") and an arbitration between Sizzler and Midwest Restaurant Concepts, Inc. ("MRC"), another one of Sizzler's operating companies. Although FBN was both a plaintiff and a counterdefendant in the litigation and furnished releases to Sizzler pursuant to the settlement, its creditors never saw one dime of the $1.4 million transfer. Instead, the money was applied by Quest Equities' parent company, River Bank America ("River Bank") to a $7.5 million loan that River Bank had made to SIG Food Services Associates, L.P. ("SFSA"). When this Court unraveled the transaction in the December 6 Opinion, it found that River Bank's appropriation of the funds was fraudulent. Exactly who was defrauded and whether the Court properly found that the fraud was actual is the remanded subject of this opinion.

FBN was formed to operate certain Sizzler restaurants, and its shareholders were Anthony Basile (25%), Quest Equities (37.5%) and SIG Partners (37.5%). Both Basile and Gerald Kaufman, who was one of the SIG Partners, signed personal guarantees of FBN's various obligations to Sizzler. FBN leased the Sizzler restaurants and their hard assets from SFSA. SFSA's funds to acquire the restaurants and hard assets came from three sources: the $7.5 million loan from River Bank, a $100,000 loan from Basile, and

a $6.5 million loan from American National Bank & Trust Company of Chicago ("ANB"). River Bank's loan was subordinated to ANB's loan.

Not long after River Bank loaned the $7.5 million, SFSA defaulted. Avrom Waxman ("Waxman") was the president of River Bank. River Bank enlisted William Landberg's help ("Landberg") in getting its loan paid down. River Bank also employed Stephen Mann ("Mann") to assist in restructuring the loan. Waxman told Basile that if Basile helped Landberg refinance the River Bank loan, River Bank would forgive Basile's $100,000 promissory note to Quest Equities. Landberg eventually guaranteed a $1 million loan by World Life & Health Insurance Company and he received Quest Equities' interest in SFSA, FBN and related entities in return. Quest Equities held a 37.125% limited partnership interest in SFSA and a 37.5% equity interest in SFSA's general partner, SIG Food Services, Inc.

The issue of whether Waxman actually forgave Basile's $100,000 note was still being actively litigated as late as 1994 and was the subject of an appeal that was not dismissed until December 1995. Quest Equities Corp. v. Basile, 1994 WL 110393 (N.D. Ill. 1994).[1] As the Circuit noted, this litigation

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[1] This opinion by District Judge Hart denied the motion of Quest Equities for judgment as a matter of law or, in the alternative, for a new trial following a jury verdict in favor of Basile. According to the opinion, the jury had been instructed that in order to render a verdict in favor of Basile, it must find that Basile proved by a preponderance of the evidence:

> First, that the parties entered into an agreement in October 1988 at the meeting in New York City pursuant to which Mr. Waxman of Quest Equities Corp. orally promised Mr. Basile that if Mr. Basile assisted Mr. Landberg in attempting to refinance River Bank's loan to SIG Food Services Associates, that Mr. Basile would be relieved of his obligation to pay the note.
>
> Second, that Mr. Basile performed his obligations under the promise to forgive the note, and
>
> Third, that Mr. Basile's performance was unequivocally referable to Mr. Waxman's oral promise to forgive the note.

1994 WL 110393, *2. Judge Hart found that sufficient evidence existed to support a verdict and denied Quest Equities' motion.

devolved into a swearing contest in which Basile prevailed. Matter of FBN Food Services, Inc., 82 F.3d 1387, 1390 (7th Cir. 1996).

When FBN's restaurants started to lose money, FBN initiated a lawsuit against Sizzler. Sizzler eventually counterclaimed, and also instituted an arbitration proceeding against MRC. MRC, FBN and SFSA all had common ownership: Basile, Quest Equities, and SIG Partners. Pursuant to the arbitration, Sizzler made claims against MRC, FBN, Basile and Kaufman.

Philip Stahl was River Bank and Quest Equities' attorney. On September 13, 1990, Stahl and one of his associates met with Waxman, Mann, and Nicholas Etten, an attorney representing FBN, concerning the possibility of River Bank funding FBN's complaint against Sizzler. According to Stahl's testimony before this Court on December 17, 1993, Mann expressed concern at that meeting that no plan existed to give Quest Equities or River Bank any funds recovered from that litigation. Instead, FBN's unsecured creditors might receive those funds. Stahl testified that Quest Equities and River Bank felt that the money used to fund the litigation "should come back first if there were recovery of at least that much." Tr. at 1818.[2] That is, if the litigation was successful, the first funds recovered should go to River Bank as

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[2] On cross-examination, the Trustee's attorney questioned Stahl about the September 13 meeting. He asked whether Stahl recalled if Mann made a particular statement:

> Q: Do you recall him saying in form or substance, we don't have a plan to give us the money and not the unsecured creditors.
>
> A: Yes, that was in reference to the money that Quest or River Bank would use to fund the litigation. We felt that that should come back first if there were recovery of at least that much.

Tr. at 1818.

The Trustee's attorney then attempted to get Stahl to testify that Mann emphasized the word "us" in the statement "we don't have a plan to give us the money and not the unsecured creditors." Tr. at 1820. Stahl had no such recollection. The Trustee's attorney tried to refresh Stahl's recollection through the use of notes made by Stahl's associate. Tr. at 1820-22. After looking at the notes, Stahl still did not remember if Mann had emphasized the word "us." Tr. at 1823.

These notes were not introduced into evidence; materials used to refresh recollection are often not

repayment for the new money that River Bank was contemplating advancing to fund the litigation.

On September 16 and 17, 1990, a mediation conference was held in Chicago in an attempt to resolve all of the pending litigation. The mediator separated the Sizzler party from the non-Sizzler entities and conducted a form of "shuttle diplomacy." The mediator took offers of various amounts back and forth between the groups, and the parties eventually agreed to a combination of cash and real estate totaling $4,175,000.

Once the amount of the settlement was determined, Sizzler was essentially out of the picture. Back in the room where the non-Sizzler entities were gathered, Waxman demanded that a substantial portion of the funds paid by Sizzler be used to pay down the River Bank loan. As the Court found in the December 6 Opinion, "Waxman demanded a substantial portion of the funds paid by Sizzler in order to pay down the River Bank Loan. Waxman insisted that the apportionment of the $4,175,000 be reduced to writing at the Settlement Conference." 175 B.R. at 679-680 (citations omitted). He dictated the terms of the settlement agreement and apportioned the funds as follows:

FBN	$250,000.00
SFSA	$1,800,000.00
River Bank	$625,000.00
Quest Equities	$1,500,000.00

Of the $1.8 million to SFSA, $1.5 million was for the real estate portion of the settlement. The

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introduced into evidence. "The cardinal rule is that unless they may be introduced under the hearsay rule or one of its exceptions, they are not evidence, but only aids in the giving of evidence." Edward W. Cleary et al., McCormick on Evidence § 9, at 21 (3rd ed. 1984). Because Stahl did not remember whether Mann emphasized the word "us" even after the Trustee's attempt to refresh, the Court will not rely on any of the testimony about emphasis of the word "us." Furthermore, the associate's notes were not admitted into evidence and therefore cannot and do not provide any underpinning for the Court's decision today.

remaining $300,000 was to relieve FBN of a loan in that amount. River Bank received $625,000 in settlement of a loan to SFSA. Finally, Quest Equities was to receive $1.5 million in order to pay down the $7.5 million River Bank loan, although $100,000 of that was to pay FBN's legal fees.

Basile objected to any payment of the settlement amount to Quest Equities. When Waxman demanded a substantial amount of money from the settlement, Basile told Waxman that he was "screwing" FBN's creditors. Tr. at 324. In response, Waxman threatened to revive the $100,000 promissory note that Quest Equities had allegedly forgiven in September 1989 because of Basile's refinancing work with Landberg. Tr. at 324; Tr. at 366; 175 B.R. at 687. In the past, Waxman had threatened that he would take action against Basile's home and sailboat if he did not concede to River Bank's demands. Tr. at 556-557. Kaufman also pressured Basile to settle, Tr. at 324; Tr. at 366, because Kaufman too was feeling Waxman's pinch. Kaufman had signed personal guarantees on other loans from River Bank for between $8 million and $9 million. Tr. at 53.

Basile testified that "I . . . told him [Waxman] that he was screwing the creditors. He kept insisting on what he wanted, and then he started dictating and the mediator started writing what is called the settlement agreement, and he dictated all of the terms that are in this document. After the document was written, they put it in front of me, Mr. Waxman and Mr. Mann, and insisted that I sign the document. I did not want to sign the document." Tr. at 324. In the end, Basile signed the settlement agreement both individually and on behalf of FBN. But as he testified on cross-examination, "I am telling you here today that I did not like the way the monies were being disbursed. I was against it; I signed it after a number of people circled around me insisting that I sign." Tr. at 365.

Pursuant to the December 6 Opinion, this Court found that the $1.4 million payment to Quest Equities was indirectly transferred from FBN to River Bank by both actual and constructive fraud.

Although the Court's judgment was affirmed by the Seventh Circuit, the proceeding was remanded so that this Court could answer three specific questions. Since the first question provides a dispositive answer for all three, the Court has only considered the first question at this time. The issue before the Court as framed by the Seventh Circuit is:

> Did the transfer occur with actual intent to defraud FBN's creditors (as opposed to an intent to defraud Basile and Kaufman personally, or to defraud FBN's equity investors)? If the answer is yes, then River Bank has no claim to any amount left over after satisfying FBN's debts, and this adversary proceeding is at an end.

Therefore, the Court must now determine whether the $1.4 million transfer to Quest Equities occurred with actual intent to defraud FBN's creditors.

DISCUSSION

11 U.S.C. § 548 states in relevant part:

> (a) 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 --
>
> (1) 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.

First, the Seventh Circuit questioned whether this Court had equated permissible financial pressure on a guarantor with fraud. As the Circuit stated,

> [l]enders hope that the guarantors (especially inside guarantors) will use their influence to ensure that the debtors pay up. Everyone knows that guarantees have this effect; and an anticipated, even bargained-for, incentive cannot be relabeled fraud when the guarantor acts in his self-interest to induce the debtor to repay the loan.

82 F.3d at 1394 (citations omitted). The Circuit wants to be sure that this Court did not find that "any effort to collect a debt by reminding the debtor's managers that payment is in their personal interest" should

be condemned as fraudulent. 82 F.3d at 1395.

The Circuit should rest assured that this Court did not condemn as fraudulent, attempts to collect a debt by reminding guarantors that payment was in their personal interest. To substantiate that assurance, the Court will explicitly delineate the impermissible actual fraud on FBN's creditors that occurred. Rarely do defendants provide direct proof of their actual intent. See Consove v. Cohen (In re Roco Corp.), 701 F.2d 978, 984 (1st Cir. 1983). Since courts infrequently find direct proof of actual fraud, they must consider the circumstantial evidence surrounding the transaction in which fraud is suspected. Therefore, a judicial gloss on the statute has developed and some of the most common circumstantial indicators of fraudulent intent have been classified into "badges of fraud", the existence of which are used to infer an actual intent to defraud. Max Sugarman Funeral Home, Inc. v. A.D.B. Investors, 926 F.2d 1248, 1254-55 (1st Cir. 1991); Carmel v. River Bank America (In re FBN Food Services, Inc.), 185 B.R. 265, 275 (N.D. Ill. 1995).

Those badges of fraud include:

-- the absconding with the proceeds of the transfer immediately after their receipt;
-- the absence of consideration when the transferor and transferee know that outstanding creditors will not be paid;
-- the huge disparity in value between the property transferred and the consideration received;
-- the fact that the transferee was an officer, or an agent or creditor of an officer of an embarrassed corporate transferor;
-- the insolvency of the debtor; and
-- the existence of a special relationship between the debtor and the transferee.

FBN Food Services, Inc., 185 B.R. at 275.

The Court need not find that each of these badges of fraud is present. Instead,

> the presence of a single badge of fraud may spur mere suspicion . . . the confluence of several can constitute conclusive evidence of an actual intent to defraud, absent 'significantly clear' evidence of a legitimate supervening purpose.

Max Sugarman Funeral Home, 926 F.2d at 1255 (citation omitted).

The first and most obvious badge of fraud is the huge disparity in value between the property transferred and the consideration received. The Debtor transferred $1.4 million to River Bank "and received, in exchange -- nothing." 82 F.3d at 1394. This is more than a huge disparity in value; it is a total absence of consideration. Furthermore, Waxman and River Bank were aware that the chances of River Bank receiving payment on the loan were "next to impossible." 175 B.R. at 688. They wanted to recover some portion of the loan that had gone sour, and they weren't getting anywhere by sitting behind American National Bank and waiting. River Bank seized the day when the Sizzler settlement came through, and it did so with no regard for FBN's other creditors. When the parties know that creditors will receive no benefit from a transaction that lacks consideration, a second badge of fraud is present.

Third, there is no question but that FBN was insolvent at the time of the transfer. This Court made such a finding, noting "that at the time of the transfer, FBN's liabilities exceeded its assets by over $3 million." 175 B.R. at 690. The Seventh Circuit noted that River Bank did not contest that finding and the Circuit affirmed this Court's judgment that River Bank received a fraudulent conveyance under § 548(a)(2). 82 F.3d at 1393-1394. FBN's insolvency was one of the bases for the fraudulent conveyance finding under § 548(a)(2).

River Bank has argued that disparity in value combined with insolvency is not enough to find actual fraud in light of the fact that less than reasonably equivalent value combined with insolvency constitutes constructive fraud. Response at 12-13. But River Bank's argument misses the point. This transfer was not just for "less than reasonably equivalent value." FBN transferred $1.4 million to River Bank in return for payment on a loan that was millions of dollars under water. Furthermore, the Court has not only considered the objective elements of value received and insolvency, but also the circumstances surrounding

the transaction. Those circumstances -- the men gathered around Basile and Kaufman at the end of a long negotiating session, Waxman dangling the threat of reviving the promissory note -- combined with the absolute lack of consideration and FBN's insolvency, lead inexorably to the conclusion that the transfer was accomplished with actual intent to defraud. There has been no evidence of a legitimate supervening purpose to rebut this conclusive evidence of fraud, and the Court finds that no such purpose existed.

The Court is compelled to address the Circuit's concerns that the pressure placed on Basile and Kaufman by Waxman was impermissible coercion that was not fraud against FBN's creditors. 82 F.3d at 1395. After all, reminding a guarantor of his obligations is not fraud. The question, therefore, is whether Waxman crossed the line into economic duress. Whatever the answer to that question, the Court has already found an actual intent to defraud based on the presence of several badges of fraud. A finding that the pressure on Basile and Kaufman was not impermissible would not obviate the circumstantial evidence already present.

First, the Court will consider whether Waxman's threats to collect on Basile's $100,000 promissory note were threats to engage in frivolous litigation and so constitute impermissible financial pressure. If so, these actions would constitute intent to defraud. As the Circuit noted, no one has a right to threaten to file frivolous litigation. 82 F.3d at 1395; see Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741-44 (1983).

However, "a threat to enforce one's legal rights can never be unlawful unless it is 'wholly unfounded' or involves threats of giving of false testimony." Deltor Corp. N.V. v. Gardner, 1995 WL 505643 (S.D.N.Y. 1995) (finding that economic duress did not exist where a settlement agreement contained an agreement to forbear from a suit for which plaintiffs had a reasonable basis) (citation omitted). As the Court noted above, the enforceability of Basile's $100,000 promissory note was still being litigated

years after this transfer occurred. See Quest Equities Corp. v. Basile, 1994 WL 110393. In fact, the question of whether the note had been forgiven was submitted to a jury for consideration. The judge who heard the case acknowledged that "[a] verdict for either side was possible in this case . . . . Deference must be given to the jury's findings." Id. at *3. Therefore, Waxman's threats to revive the note and his subsequent agreement to refrain from doing so do not constitute impermissible financial pressure because the litigation that subsequently arose from the promissory note was not "wholly unfounded."

Finally, the Court will consider whether "the machinations used to induce . . . Kaufman to sign on the dotted line" showed that Waxman had an intent to defraud the creditors. 82 F.3d at 1394. Although Kaufman testified that he "generally did what Avrom Waxman told me to do," this by itself is not impermissible fraud. Tr. at 77. In any event, that explanation concerns why Kaufman signed a side agreement, not why he agreed to the settlement agreement pursuant to which the transfer here at issue occurred. In fact, Kaufman worked on convincing Basile to sign the settlement agreement, reminding him of all the reasons why they would want this litigation to go away: "that to pursue the action if we don't settle today is going to cost a lot of money, none of which we had; that there is another lawsuit arbitration going on in California which seems to be on a faster track so, you know, it was a possibility that if we did not do this the creditors could get nothing and we would end up with a lot more legal bills." Tr. at 73.

Kaufman had guaranteed FBN's obligations to Sizzler but not to River Bank. Kaufman would not have been acting in his self-interest, therefore, by inducing FBN to pay down River Bank's loan. The evidence is clear that Waxman controlled and dominated Kaufman. Kaufman was one of the SIG Partners, and SIG Partners was one of FBN's three shareholders. Waxman's impermissible financial pressure induced Kaufman as SIG Partners' agent to abandon the interests of his principal by agreeing to the $1.4 million transfer.

The Court has now reconsidered the issue of actual fraud and spelled out in more detail both the circumstantial indicators of actual fraud and the impermissible financial pressure exerted on Kaufman. The remaining question, therefore, is whether the actual intent to defraud was directed against FBN's creditors rather than Basile and Kaufman personally.

In its opinion, the Seventh Circuit provided the following hypothetical to illustrate a situation where actual fraud would not be on FBN's creditors:

> Suppose that, at the time of the Sizzler settlement, FBN owed $500,000 to River Bank and had no other creditors. Holding a gun to Basile's head (or blackmailing him) to induce Basile to sign over $1.4 million might be a crime, and a fraud on FBN's stockholders (who otherwise would receive the $900,000 surplus), but it would not be a fraud <u>on FBN's creditors</u> -- and it is this sense in which § 548(a)(1) speaks of fraud.

82 F.3d at 1394 (emphasis in original).

By the claims bar date in December 1991, $450,000 in claims had been filed against FBN. 82 F.3d at 1391. Therefore unlike in the Seventh Circuit's hypothetical, there were actual creditors to which FBN was indebted. This Court has never been asked to make a finding that a transferor who acted with actual intent to hinder, delay or defraud did so with respect to the creditors rather than the shareholders. Although this may appear at first glance to be a glaring omission in bankruptcy jurisprudence, this reflects the reality of fraudulent conveyance litigation.

As the Court stated above, FBN was insolvent at the time of this transfer. River Bank and the Trustee have battled in their briefs about River Bank's knowledge -- or lack thereof -- of FBN's financial state. The Court submits that when answering the question of whether <u>creditors</u> (rather than shareholders) were defrauded, River Bank's knowledge of FBN's insolvency is irrelevant. Because whether it knows it or not, a party that fraudulently transfers assets from an insolvent corporation is defrauding <u>creditors</u>.

How is this true? When a corporation is insolvent, the relationship of debt and equity is reversed.

Outside of bankruptcy, officers, managers and directors generally act -- or at least are expected to act -- in the best interests of shareholders, to whom they owe a fiduciary duty. Depending on state law and corporate bylaws, shareholders have varying amounts of control over aspects of corporate operations, such as election of a board of directors. Inside the realm of insolvency, however, that conventional wisdom must bow out. Creditors have the power, creditors have the control -- and creditors are the parties whose financial interests are most deeply affected by an insolvent corporation's actions.

The examples in bankruptcy abound. A creditors' committee is appointed in every Chapter 11 reorganization case. 11 U.S.C. § 1102(a)(1). Whether an equity security holders' committee is appointed, however, is left to the discretion of the United States Trustee. Id. Only creditors may vote for a candidate for trustee in a Chapter 7 case. 11 U.S.C. § 702(a). Only a creditor may receive administrative expense status for the actual, necessary expenses it incurs in recovering, for the benefit of the estate, any property transferred or concealed by the debtor. 11 U.S.C. § 503(b)(3)(B).

Professors LoPucki and Whitford addressed the question of corporate governance in bankruptcy reorganization. They noted that "[m]ost authorities agree that once insolvency intervenes, creditors can sue for breach of fiduciary duties by directors and officers. There is considerable wisdom in this point of view. Once insolvency intervenes, it is creditors who will bear the bulk of the company's losses . . .". Lynn M. LoPucki and William C. Whitford, Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies, 141 U. Pa. L. Rev. 669, 707-708 (1993) (footnote omitted).

FBN was insolvent at the time of the transfer, therefore its creditors were directly affected by the loss of the $1.4 million. The creditors have borne the bulk of the impact of this loss, and it is the creditors who were defrauded. Furthermore, it would make no sense that Waxman would try to defraud Basile and

Kaufman personally. Although relations between the parties were strained at best,[3] there is no evidence of a personal vendetta. And while it may be natural for Basile and Kaufman to protect their own interests, there is no reason why protecting their interests and defrauding creditors would be mutually exclusive.

The Seventh Circuit's hypothetical may find expression in Delta Service Co., Inc. v. Palatine National Bank (In re Cash Currency Exchange, Inc.), 93 B.R. 618 (N.D. Ill. 1988). In Delta, District Judge Marshall upheld the bankruptcy court's dismissal of an adversary proceeding in which the debtor sought to avoid a transfer that had been used to pay off the debt owed by the debtor's sole shareholder. Although there was evidence that the sole shareholder was scheming to defraud the creditors of other entities he owned, there was no evidence that the transfer at issue was part of a scheme to defraud the plaintiff's creditors. In fact, "[n]o evidence was submitted that [the plaintiff] had creditors." 93 B.R. at 621.

It is easy to distinguish Delta from the instant case. As the Circuit itself noted in the instant case, "[t]he allocation of the settlement proceeds to its investors left FBN with neither a business nor significant assets, and it collapsed, stiffing its trade creditors." 82 F.3d at 1390. There is no question that there were actual creditors to which FBN was indebted on and after the date of the transfer.

Clearly Waxman knew that if River Bank took the $1.4 million, FBN's unsecured creditors would be get nothing. The Court need not find that Waxman had expressed malice or ill will toward FBN's creditors in order to find that his actions defrauded the creditors. Coleman American Moving Services, Inc. v. First Nat'l Bank and Trust Co. of Kearney, Nebraska (In re American Properties, Inc.) explains why malice toward creditors is not a necessary element of § 548(a)(1). In American Properties, the

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[3] In its Response, River Bank characterizes the relationship between itself and FBN as "openly hostile and acrimonious." Response at 12, n.9.

bankruptcy court found that the president of the debtor's parent company had acted with actual intent to defraud under § 548. 14 B.R. 637, 643 (Bankr. D. Kan. 1981). Although he had

> a well founded belief that extending repayment of the debt of Coleman Nebraska would help weather the [financial] storm, and with full knowledge that the transaction as proposed would be detrimental to the creditors of American, nevertheless James Coleman on behalf of the Coleman Companies, intentionally entered into the transaction . . . . There was no element of malice towards the creditors of American because James Coleman genuinely hoped the storm would pass. The transaction was not entered into in an attempt to harm American's creditors but the transaction was entered into intentionally, to satisfy a Coleman Nebraska debt and with full knowledge harm would come to the creditors of American, hindering or delaying the ability of these creditors to receive satisfaction of debts owed to them by American.

14 B.R. at 643 (emphasis in original). See Hayes v. Palm Seedlings Partners-A (In re Agricultural Research and Technology Group, Inc.), 916 F.2d 528, 535 (9th Cir. 1990); Martino v. Edison Worldwide Capital (In re Randy), 189 B.R. 425, 438 (Bankr. N.D. Ill. 1995).

Intentionally carrying out a transaction with the knowledge that the effect of that transaction will be detrimental to creditors is sufficient to find actual intent to hinder, delay or defraud the creditors. Monzack v. A.D.B. Investors (In re EMB Associates, Inc.), 100 B.R. 629, 633 (Bankr. D.R.I. 1989), aff'd in part, rev'd on other grounds sub nom. Max Sugarman Funeral Home, Inc. v. A.D.B. Investors, 127 B.R. 508 (D.R.I. 1989), vacated in part on other grounds, 926 F.2d 1248 (1st Cir. 1991); 14 B.R. at 643. In the instant case, there was no innocent or naive hope that a temporary storm would pass. This storm had already done its damage; even after this transfer, River Bank's loan would still be far under water. The Court need not scour the record searching for malice toward creditors. In the December 6 Opinion, the Court concluded that "[i]t is clear from the evidence that Waxman, as a representative of River Bank, attended the Settlement Conference and manipulated the payment of the settlement proceeds in order to obtain funds to pay down the non-performing $7.5 million loan to SFSA." 175 B.R. at 688. Therefore,

the Court holds that Waxman's knowledge of the effect of this transaction and his intentional actions despite this knowledge constitute "actual intent" to hinder, delay or defraud creditors within the meaning of § 548(a)(1).

CONCLUSION

For the reasons stated above, the Court holds that the transfer of the $1.4 million occurred with actual intent to defraud FBN's creditors and that River Bank has no claim to any amount left over after satisfying FBN's debts.

ENTERED:

Date:

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SUSAN PIERSON SONDERBY
United States Bankruptcy Judge