UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Bk. No. 98-13223-JMD
Chapter 7

William Gahara,
Debtor

Edmond J. Ford,
Chapter 7 Trustee,
Plaintiff

v.

Adv. No. 99-1105-JMD

Song Chen,
Defendant

Edmond J. Ford, Esq.
FORD & WEAVER, P.A.
Chapter 7 Trustee and Attorney for Plaintiff

Leonard G. Deming, II, Esq.
DEMING LAW OFFICE, P.A.
Attorney for Defendant

MEMORANDUM OPINION

I. INTRODUCTION

On June 4, 1999, Edmond J. Ford, Chapter 7 Trustee (the "Trustee") brought a complaint against Song Chen ("Chen") and Nancy Gahara ("Gahara"), the wife of William Gahara (the "Debtor"), pursuant to 11 U.S.C. § 544 and RSA 545-A in which the Trustee sought to avoid transfers made to Chen and to Gahara in July 1997. The Court approved the Trustee's settlement of his claims against Gahara on August 25, 1999. The Trustee continued to pursue his claims against Chen, and the Court held a trial of the matter on November 22, 1999.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy

Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The facts of this case are straightforward, and the parties have entered into a stipulation regarding most of them. The parties agree that the Debtor was the sole shareholder and president of Worldwide Medical Plastics, Inc. ("WMPI") during the spring and early summer of 1997. WMPI was experiencing financial difficulties during this time, and the Debtor approached a friend, Chen, about borrowing money to fund operations. Chen agreed to lend WMPI some money on an unsecured basis. On June 18, 1997, Chen wired $5,000 from his bank account in Michigan to WMPI's bank account at CFX Bank New Hampshire ("CFX") in Keene, New Hampshire. The Debtor and Chen agreed that the loan would be short term. The Debtor anticipated that WMPI would pay Chen back within one or two months. The Debtor did not personally guarantee the loan from Chen to WMPI.

On July 10, 1997, WMPI received $200,000 from Pecs Medical, a customer of WMPI, in the form of a wire transfer to WMPI's account at Fleet Bank ("Fleet"). Fleet set off approximately $50,000 from the monies received by WMPI from Pecs Medical, leaving WMPI with approximately $150,000 in its account. On July 10, 1997, WMPI issued a check on the Fleet account made payable to the Debtor, personally, in the amount of $115,000. The Debtor used this $115,000 to purchase two bank checks from Fleet. One check in the amount of $57,500 was issued to Gahara. The other check, also in the amount of $57,500, was issued to the Debtor. At trial, the Trustee entered into evidence a check stub which indicated that the $115,000 check was issued to the Debtor in repayment of notes and corporate expense reimbursement owed to Gahara and the Debtor. The Debtor testified that he did not withdraw all of the funds in WMPI's Fleet account on July 10, 1997. Rather, he withdrew amounts that were due and owing to him and his wife.

Upon receiving his $57,500 Fleet bank check, the Debtor proceeded to CFX where he had a series of bank checks issued in $10,000 denominations in his name. The Debtor testified that he kept these checks at his home and not at WMPI's office. On July 16, 1997, the Debtor had CFX convert one of the $10,000 bank checks into two $5,000 bank checks. One of these $5,000 bank checks was made payable to Chen and listed the Debtor as the remitter.

During this time, the Debtor also used $1,400 of the $57,500 he received from WMPI to pay WMPI's payroll taxes for which the Debtor was personally liable, and he used another $1,500 to pay for a business trip to Hungary. It is undisputed that the Debtor used the balance of the funds, or approximately $49,600, for ordinary living expenses over the next year. The Debtor testified that upon receipt of the $57,500 he was not restricted in any way from using the monies as he wished.

According to the Debtor, during the summer of 1997, WMPI was having financial difficulties and creditors were attaching WMPI's bank accounts. The Debtor testified that WMPI began using bank checks to conduct its financial operations. The Debtor acknowledged at trial, however, that during this time WMPI also continued to use its bank accounts and in fact issued several corporate checks to pay corporate debts from July 10, 1997 to July 25, 1997.

The parties agree that at the time the Debtor remitted the $5,000 check to Chen the Debtor was insolvent. The parties also stipulate that the conveyance to Chen was not on account of any personal or individual obligation owed by the Debtor to Chen. The parties further agree that the Debtor did not receive reasonably equivalent value in exchange for the transfer.

III. DISCUSSION

In Count I of the complaint the Trustee seeks to avoid the July 16, 1997 transfer of $5,000 to Chen pursuant to 11 U.S.C. § 544(b)(1) and RSA 545-A:4(I) on the basis that the money was transferred by the Debtor with actual intent to hinder, delay, or defraud a creditor of the Debtor. In Count II the Trustee seeks to avoid the transfer pursuant to 11 U.S.C. § 544(b)(1) and RSA 545-A:5 on the basis that the Debtor transferred the money without receiving reasonably equivalent value.

To establish a claim under RSA 545-A:4(I), the Trustee must show:

a. That the Debtor made a transfer or incurred an obligation;

b. With actual intent to hinder, delay, or defraud any creditor of the Debtor; or

c. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, the Debtor:

   i. Was engaged or about to be engaged 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

   ii. Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

See RSA 545-A:4(I). To establish a claim under RSA 545-A:5(I), the Trustee must show:

a. That the Debtor made a transfer or incurred an obligation;

b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

c. The Debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

See RSA 545-A:5(I). To meet his burden under RSA 545-A:5(II), the Trustee must prove:

a. That the debtor made a transfer to an insider for an antecedent debt;

b. That the debtor was insolvent at the time; and

c. That the insider had reasonable cause to believe that the debtor was insolvent.

See RSA 545-A:5(II).

At trial, the Trustee focused his efforts on proving the elements of his claim under RSA 545-A:5(I), pursuant to which he must prove that the Debtor made a transfer to Chen at a time when the Debtor was insolvent (or, alternatively, that the Debtor became insolvent as a result of the transfer) for which the Debtor did not receive reasonably equivalent value. The parties stipulated that the Debtor was insolvent at the time of the July 16, 1997 transfer to Chen and that the Debtor did not receive reasonably equivalent value in exchange for the transfer. The parties agree that the only outstanding issue is whether the Debtor, in his individual capacity, transferred money to Chen. To decide this issue, the Court must determine whether the $57,500, which the Debtor obtained from the $115,000 WMPI check in the form of a bank check made payable to him individually, was property of the Debtor at the time he sent Chen the bank check in repayment of the WMPI loan or whether the $57,500 was property of WMPI at the time of the transfer. The parties agree that in making this determination the Court should examine the totality of the circumstances surrounding the transactions at issue and should consider the Debtor's intentions with respect to the funds.

The Trustee argues that at the time the money was transferred to Chen the money belonged to the Debtor, was within the Debtor's exclusive control, and was free to be used by the Debtor as he wished. According to the Trustee, the money was property of the Debtor. Chen argues that the money belonged to WMPI in that it represented proceeds of corporate funds that were being held by WMPI's president and sole shareholder in the form of a bank check because the corporation's bank accounts were being attached by creditors. Chen argues that the money was still WMPI's property at the time of the transfer.

The Debtor testified at trial that he and his wife each received a bank check in the amount of $57,500 in repayment of loans they made to WMPI and for reimbursement of expenses paid personally by Gahara. The check stub for the $115,000 check describes the disbursements made to the Debtor and his wife. The stub indicates that Gahara's check was to repay expenses in the amount of $4,285.15, cash advances in the amount of $6,100.00, and promissory notes in the total amount of $47,114.85. The stub also indicates that the Debtor's check was partial repayment of WMPI's obligations to the Debtor on a promissory note. The check stub contains no reference to Chen or to the repayment of his $5,000 loan. The Debtor testified that there was no restriction on his use of the $57,500 and that he could use the funds for personal expenses. At trial, the Debtor stated that the stub is the only contemporaneous record evidencing the intent of WMPI and the Debtor regarding the amounts paid to the Debtor and his wife.

In light of the Debtor's testimony and the documentary evidence, the Court finds that the $57,500 became the personal funds of the Debtor at the time the $115,000 bank check was converted into two smaller bank checks, one of which was made payable to the Debtor personally. While it is uncontroverted that the Debtor then used a portion of these funds to repay some of WMPI's corporate debts, specifically, the $5,000 owed to Chen, $1,400 for payroll taxes, and $1,500 for the Debtor's business trip to Hungary, the Court finds that these later transactions are irrelevant as they do not change the fact that these funds were no longer monies of the corporation, having been previously transferred to the Debtor in repayment of corporate obligations. The Debtor testified that he felt personally obligated to repay Chen because Chen was a friend. He also stated that he paid the payroll taxes because as an officer of the corporation he would be liable for them. In the Court's experience, using personal funds to pay corporate debts is not unusual, especially when the principal of the corporation has a legal or moral obligation which is satisfied by such payment. Principals often use personal funds in an attempt to save a failing business. However, the Debtor's motivation or intent in satisfying the corporation's obligation to Chen from his personal funds does not revest such funds in the corporation.

Chen suggested at trial that the $115,000 transfer to the Debtor and the subsequent $57,500 transfers to the Debtor and his wife were not authorized nor ratified by WMPI's board of directors. Chen argues that these transfers were not in made in the ordinary course of business and consequently they are void. The Debtor testified that as president of the corporation he had authority to repay the demand notes held by him and his wife. According to the Debtor, the demand notes that WMPI repaid were executed in 1995 and in 1996 and were ratified by the board at the next year's annual meeting. By the time the 1998 annual meeting should have taken place, at which payment of the demand notes would have been ratified, the corporation was no longer operating.

At trial neither party presented the articles of incorporation or WMPI's by-laws, which presumably would evidence any restriction on the power of the officers of WMPI to operate the corporation. Without evidence that the Debtor's power to operate the corporation was in any way limited, the Court finds that the repayment of demand notes to the Debtor and his wife were ordinary corporate transactions for which the Debtor, as president of WMPI, had apparent authority to authorize and pay.

Accordingly, the Court finds that at the time the Debtor remitted the $5,000 bank check to Chen on July 16, 1997 the money was property of the Debtor. For that reason, the Court finds that the Debtor “made a transfer” within the meaning of RSA 545-A:5(I) when he repaid Chen’s loan to WMPI. Because the parties have stipulated that the Debtor was insolvent at the time of the transfer and that the Debtor did not receive reasonably equivalent value, the Court holds that the Trustee has satisfied his burden under RSA 545-A:5(I).

IV. CONCLUSION

The Trustee has established that the Debtor made a transfer to Chen at a time when the Debtor was insolvent for which the Debtor did not receive reasonably equivalent value. Accordingly, the $5,000 transfer to Chen is avoided pursuant to 11 U.S.C. § 544(b)(1) and RSA 545-A:5(I). Pursuant to 11 U.S.C. § 550(a)(1), the Trustee may recover $5,000 from Chen for the benefit of the bankruptcy estate. Because the Trustee can obtain only one recovery against Chen, see 11 U.S.C. § 550(d), the Court need not address the Trustee’s other claims under RSA 545-A:4 and 5(II) in Counts I and II of the complaint.

This opinion constitutes the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 14th day of December, 1999, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge