

UNPUBLISHED OPINION
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

236

In re)	
IRVING FINANCIAL CORPORATION,)	Bankruptcy Case No. 82C-02706
Debtor.)	
D. FRANK WILKINS, Trustee,)	
Plaintiff,)	Civil Proceeding No. 85PC-0181
v.)	
UNION BANK, a Utah)	
banking corporation,)	
Defendant.)	MEMORANDUM OPINION

APPEARANCES

Robert Stolebarger, Haley & Stolebarger, Salt Lake City, Utah, for the plaintiff; Lawrence E. Corbridge and Mark J. Morrise, Corbridge, Baird & Christensen, Salt Lake City, Utah, for the defendant.

PROCEDURAL BACKGROUND

On October 20, 1982, an involuntary petition under chapter 11 of the Bankruptcy Code (the "Code") was filed against the debtor, Irving Financial Corporation ("Irving"). The debtor converted the petition to a voluntary chapter 11 petition on March 7, 1983, and this Court appointed a trustee on March 10, 1983.

The trustee brought an adversary proceeding against Union Bank alleging that certain transactions involving Irving and Union Bank were preferential transfers and fraudulent conveyances. This matter came before the Court on Union Bank's motion for summary judgment.

FACTS

On July 1, 1982, Irving, the debtor herein, became an accommodation pledgor and executed an assignment of a trust deed note, the "Big Dutch Note," and underlying trust deed to Union Bank as collateral for a 90-day loan made by Union Bank to MFT Financial, Inc. ("MFT"), a subsidiary of Irving. In addition to its assignment of the Big Dutch Note and trust deed to Union Bank, Irving assigned a security interest in the same note and trust deed to Citizen's Bank and First Security Bank. On July 9, 1982, all three banks executed a Memorandum of Understanding that provided that First Security Bank would take possession of the Big Dutch Note in order to perfect each bank's security interest in accordance with the Utah Uniform Commercial Code. On July 15, 1982, First Security Bank obtained possession of the Big Dutch Note. The trustee stipulated that Union Bank had a perfected security interest in the Big Dutch Note outside the 90-day preference period which extended from July 22, 1982 through

October 20, 1982. In October 1982, the Big Dutch Note was sold and Irving applied the proceeds to retire MFT's loan obligation and accrued interest to Union Bank.

ISSUES

In connection with Union Bank's motion for summary judgment, these issues were presented to the Court: (1) Was Irving's October repayment of MFT's loan obligation preferential? (2) Did Irving receive "reasonably equivalent value" in exchange for securing and satisfying MFT's loan obligation?

DISCUSSION

I.

The first question before the Court is whether the trustee can recover the sum of \$204,499.13 paid to Union Bank by Irving as a preferential transfer under Code section 547. The source of the money paid to Union Bank for the purpose of retiring MFT's loan obligation was proceeds from the sale of the Big Dutch Note. The trustee stipulated that Union Bank had a perfected security interest in the Big Dutch Note.

In In re Maryville Savings & Loan Corp., 760 F.2d 119, 121 (6th Cir. 1985), the Sixth Circuit held that a creditor who failed to perfect its interest in certain promissory notes accompanying underlying trust deeds was not entitled to funds

collected by the trustee on the promissory notes. If the creditor had perfected its security interest in the promissory notes, it would have been entitled to the funds.

In the present case, the money paid to Union Bank to retire the MFT loan obligation did not arise from a foreclosure on the trust deed underlying the Big Dutch Note but arose from a sale of the note wherein Union Bank had a perfected security interest. This Court holds that Union Bank's status as a secured party in the Big Dutch Note and in its proceeds precludes the trustee from challenging the October payment to Union Bank as a preference under Code section 547. Accordingly, Union Bank's motion for summary judgment in connection with the trustee's preference action is granted.

II.

The second issue before the Court is whether Union Bank gave "reasonably equivalent value" in exchange for Irving's transfer of a security interest in the Big Dutch Note and underlying trust deed and its transfer of the \$204,499.13 payment to repay MFT's loan obligation. Pursuant to section 548(a)(2) of the Bankruptcy Code, the trustee can avoid a transfer as a fraudulent conveyance if it shows the debtor received less than a "reasonably equivalent value" and was insolvent at the time of the transfers. If there are no material facts disputing that Irving received a

reasonably equivalent value in connection with these transactions, summary judgment in Union Bank's favor is appropriate as a matter of law.

The policy underlying the avoidance of fraudulent conveyances under section 548 is to preserve the assets of the estate. In re Butcher, 58 B.R. 128, 130 (Bkrtcy. E.D. Tenn. 1986). Thus, an "analysis of an allegedly fraudulent transfer must be directed at what the debtor received irrespective of what any third party may have gained or lost." Id. (quoting In re Jamison, 21 B.R. 380, 382 (Bkrtcy. D. Conn. 1982)).

Under section 67(d) of the Bankruptcy Act, courts generally recognized that transfers made solely to benefit third parties were not made for "fair consideration." Rubin v. Manufacturer's Hanover Trust Co., 661 F.2d 979, 991 (2nd Cir. 1981). Under the Code, transfers which exclusively benefit third parties without conferring any benefit upon the debtor cause the debtor to receive less than a "reasonably equivalent value." In re Butcher, 58 B.R. 128, 131 (Bkrtcy. E.D. Tenn. 1986); In re Computer Universe, Inc., 58 B.R. 28, 30 (Bkrtcy. M.D. Fla. 1986).

However, courts have recognized an "indirect benefit" exception that prevents avoidance of a transfer under section 548 if the debtor received the benefit of the transaction despite any third party participation. Rubin, 661 F.2d at 991-92; Computer Universe, 58 B.R. at 31. See also, In re Evans Potato Co., 44

B.R. 191 (Bkrtcy. S.D. Ohio 1984) (no fraudulent transfer where debtor paid for goods bought by principal since debtor had exclusive use of the goods); In re Holly Hill Med. Center, 44 B.R. 253 (Bkrtcy. M.D. Fla. 1984) (debtor received "reasonably equivalent value" where it paid interest payments on a third party loan which had been re-loaned to the debtor).

If the debtor receives a significant benefit in either securing or satisfying a third party debt, the transfers do not substantially impact upon the estate's assets and creditors have no cause to complain. See, Rubin, 661 F.2d at 991. But, if an insolvent debtor fails to preserve its net worth in securing or satisfying a third party obligation, the debtor will receive less than a reasonably equivalent value in exchange and any transfer is avoidable under section 548(a)(2) as a constructively fraudulent conveyance.

The leading case discussing the "indirect benefit" exception is Rubin v. Manufacturer's Hanover Trust Co., 661 F.2d 979 (2nd Cir. 1981). The Rubin court formulated legal standards in analyzing "fair consideration" under section 67(d) of the Bankruptcy Act. The court suggested that a debtor's receipt of an indirect benefit from loan proceeds because of its corporate affiliation and identity of interest with the direct recipient of the loan was not sufficient evidence of the receipt of "fair consideration." The court further pointed out that the trustee

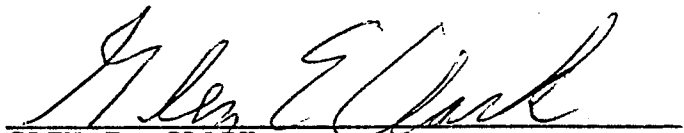
had failed to quantify the indirect benefit to the debtor by comparing the actual economic benefit received by the debtor with the obligation it assumed. Rubin, 661 F.2d at 993.

At the time of the July and October transfers, Irving was a 80 percent stockholder of MFT, its subsidiary. A material question of fact exists as to whether Irving's 80 percent ownership interest in MFT enabled it to receive a reasonably equivalent value in exchange for its securing and satisfying MFT's loan obligation to Union Bank. In particular, there exists a factual dispute regarding the quantity and nature of the indirect benefit, if any, received by Irving in the transactions. Consequently, Union Bank's motion for summary judgment in connection with the trustee's fraudulent conveyance action is denied.

Plaintiff's attorney is instructed to prepare an order consistent with this opinion and the Local Rules.

DATED this 20 day of July, 1987.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE