

Bankruptcy Court

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re UCH, NCH, ICH)
and ASC, trusts.)

81A-02886

83PA-1087

ROBERT MERRILL, trustee,)
Plaintiff/Appellee,)

DECISION ON APPEAL

v.)

NELSON FAMILY TRUST,)
Defendant/Appellant.)

Case No. 86-C-0699S

Debtors' trustee sued the Nelson Family Trust seeking to void and recover certain allegedly fraudulent and preferential transfers from the debtors to the Nelson Family Trust. The Nelson Family Trust appeals the bankruptcy court's decision to void transfers in the amount of \$114,347.18.

From June through Sept. 1980, the Nelson Family Trust invested \$88,353 in Multi-National D&G (diamond and gold) Exchange. Crowther and Blackmore were principals in Multi-National. In Sept. 1980, they assumed control of the clearing houses which are the debtors in this case. About that time, Nelson (of the Nelson Family Trust) was employed by ICH as a

salesman. Crowther and Blackmore apparently converted the Nelson's investment in Multi-National to clearing house contracts which were given, unsigned, to Nelson. The bankruptcy court, however, found no evidence that Nelson's investment of \$88,353 was transferred to the debtor clearing houses and did not specifically address the evidence that the Nelson Family Trust directly invested \$5,914 in Nov. 1980 and \$15,000 in Jan. 1981 in the clearing houses.

On Sept. 10, 1981, the clearing houses filed Chapter 11 bankruptcy. ASC, their accounting services corporation, filed on Dec. 17, 1981. Under 11 U.S.C. § 547 and 548, a trustee may avoid and recover preferential and fraudulent transfers made within one year before the bankruptcy was filed:

(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-

* * * * *

(2)(A) Received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(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;

The bankruptcy court found that the Nelson Family Trust received the following preferential and fraudulent transfers from the debtors and ordered them returned:

<u>Payer</u>	<u>Check No.</u>	<u>Date</u>	<u>Check Amount</u>
Accounting Services	001069	01/09/81	\$ 2,904.18
Accounting Services	001520	02/06/81	360.00
Accounting Services	000127	03/10/81	1,260.00
Accounting Services	000141	03/10/81	1,932.17
Accounting Services	000686	03/10/81	91,374.00
Accounting Services	003544	04/10/81	1,932.17
Accounting Services	003585	04/10/81	1,260.00
Accounting Services	001650	04/10/81	1,260.00
Accounting Services	001920	05/10/81	1,932.17
Accounting Services	007324	06/06/81	1,932.17
Accounting Services	007459	06/08/81	1,260.17
Accounting Services	010193	07/12/81	1,932.17
Accounting Services	010329	07/12/81	1,260.80
Payable Acct Company	001199	11/07/80	420.00
Payable Acct Company	000045	12/10/80	380.00
Tonder Payable Company	000190	12/10/80	2,508.15
Tonder Payable Company	001159	01/09/81	440.00
	TOTAL		\$114,347.18

The court based its decision on a finding that the criteria of § 548 had been satisfied; 1) that there was no evidence the clearing houses received the initial investment of \$88,353 from Multi-National, and 2) that the debtors were insolvent.

On appeal, the Nelson Family Trust raised five issues:

1. Whether the finding that debtors were insolvent at the time of the transfer is supported by substantial evidence;

2. Whether the bankruptcy court erred in concluding debtors were insolvent at all times;

3. Whether an "identity of interest" between Multi-National and the debtors renders the transfers non-fraudulent;

4. Whether the trustees recovery is precluded for failure to allege recoverability under 11 U.S.C. § 550; and,

5. Whether the ruling that the Nelson Family Trust gave no value for the payments received is clearly erroneous.

These five issues have since been narrowed to one. On March 8, 1988, the court heard oral argument regarding the effect of Judge Jenkins' Memorandum Opinion, dated July 23, 1987, addressing many of the issues raised herein. The parties agreed that issues 1, 2 and 4 were resolved in appellee's favor. The appellee concedes, however, that issue 5 must be resolved in appellant's favor because appellant made two direct investments with the clearing houses in the amounts of \$15,000 and \$5,914. Accordingly, appellee concedes that the judgment is in error to the extent it includes, as fraudulent transfers, payments attributable to these direct investments, and made to the appellant prior to the ninety-day preference period, in the amount of \$5,400.

The sole remaining issue is whether an identity of interest between Multi-National and the debtors renders the

transfers non-fraudulent. The debtor/appellant argues that the court erred in deciding that funds were transferred to appellant for less than full value and without fair consideration. Appellant contends its substantial payments to Multi-National D&G constitute equivalent value or fair consideration for transfers from the debtors because a payment to Multi-National amounted to a payment to the debtors due to an "identity of interest". To establish an "identity of interest", appellants direct the court's attention to evidence that 1) Crowther and Blackmore were principals in Multi-National and the clearing houses, 2) a salesman for Multi-National, Allen Toronto, was told by these principals that Multi-National Investments could be converted into clearing house contracts, 3) appellants received clearing house contracts (although they were not executed by the debtor), 4) appellants received no money from Multi-National after receiving the unexecuted contracts from debtors, 5) debtors deposited substantial sums with Multi-National, and 6) debtors assumed and paid the debts owed by Multi-National to appellant.

These facts, however, do not establish as a matter of law that the transfers at issue were non-fraudulent. First, the trustee's accountant testified he found no evidence the appellant's investment in Multi-National was transferred to the


debtors. This testimony was unrefuted. The possibility that appellant's investment in Multi-National D&G may have passed through the pockets of Crowther and Blackmore, who were also principals in the clearing houses, does not establish that an investment in Multi-National, without evidence such was paid to the clearing houses, provided value or consideration for future payments from the clearing houses. Multi-National dealt in diamonds and gold. The clearing houses were "factoring" schemes. Upon review of the record, this court concludes there is no evidence which links Multi-National D&G with the clearing houses which could support a finding that the transfers in question were non-fraudulent on the basis that an investment in Multi-National constituted value and consideration for the transfer of funds from the clearing houses.

Accordingly, the decision of the bankruptcy court on this issue is affirmed. As to the issue of payments made by the debtors to the Nelson Family Trust which are attributable to direct investments in the debtors by the Nelson Family Trust in the amount of \$5,914 in November of 1980 and \$15,000 in January of 1981, the case is remanded for further proceedings,

if necessary, to determine the proper amount of reduction in judgment in accordance with appellee's concession incorporated herein.

DATED this 15th day of August, 1988.

BY THE COURT:



DAVID SAM
U.S District Judge

cc: attys 8/16/88:dp
Daniel Jackson, Esq.
William G. Fowler, Esq.
Bankruptcy Clerk