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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re JON C. VASILACOPULOS dba VASILACOPULOS AND ASSOCIATES, Debtor.	Bankruptcy Case No. 82C-01031
MAIN HURDMAN, TRUSTEE, Plaintiff, vs. CHAD ANDERSON, et al., Defendants.	Civil Proceeding Nos. 84PC-1094, 84PC-1101, 84PC-1111, 84PC-1121 84PC-1122, 84PC-1124, 84PC-1125, 84PC-1127, 84PC-1135, 84PC-1141, 84PC-1148, 84PC-1169, 84PC-1170, 84PC-1177, 84PC-1180, 84PC-1181, 84PC-1186, 84PC-1187, 84PC-1190, 84PC-1194, 84PC-1199, 84PC-1213, 84PC-1219, 84PC-1241, 84PC-1259, 84PC-1261, 84PC-1265, 84PC-1276, 84PC-1278, 84PC-1297, 84PC-1302, 84PC-1313, 84PC-1327, 84PC-1338, 84PC-1348, 84PC-1361, 84PC-1363, 84PC-1369, 84PC-1374, 84PC-1375, 84PC-1387, 84PC-1388, 84PC-1499 MEMORANDUM OPINION

Appearances: Carolyn Montgomery and William R. Richards, Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for the plaintiff-trustee; Paul N. Cotro-Manes, Salt Lake City, Utah, for defendant H. Wesley Winegar; and George K. Fadel, Bountiful, Utah, for numerous defendants.

The above-captioned adversary proceedings came on for the second phase of trial on January 10 and 11, 1989. At the conclusion of the first phase of the trial, held on October 16, 17, and 21, 1985, this court concluded that transfers to the defendants in excess of the amounts they deposited with the debtor constituted fraudulent conveyances pursuant to 11 U.S.C. § 548(a)(2) and may be avoided by the trustee. This court further concluded that the trustee may recover the funds transferred to each defendant, together with prejudgment interest at the legal rate, in such amounts as may be determined at a subsequent hearing.

This court's determination that the transfers in question were fraudulent conveyances was affirmed by the United States District Court for the District of Utah, Main Hurdman v. Anderson (In re Vasilacopulos), No. 86-C-0246S (D. Utah filed Aug. 12, 1988). In its affirmance, the district court concluded: "The court affirms the bankruptcy court's order that the trustee may recover excess funds transferred to each appellant, together with prejudgment interest at the legal rate, in amounts to be determined at a bankruptcy hearing." Vasilacopulos, No. 86-C-0246S, slip op. at 13.

The purpose of this second phase of the trial has been to determine the amount the trustee may recover from each defendant. The court, having now heard the testimony, examined all exhibits received in evidence, observed the candor and demeanor of the witnesses, considered the representations, stipulations, and arguments of counsel, and upon its own review of the applicable statutes, rules, and case authorities, does hereby render the following memorandum opinion.

Based on the evidence presented, the court first finds that the following defendants received fraudulent conveyances recoverable by the trustee in the following principal amounts:

84PC-1111	Susan Gigliotti Bartlett	$ 4,297.00
84PC-1121	Dan and Vicki Broderick	$ 3,919.00
84PC-1122	Kevin Broderick	$19,906.00
84PC-1125	Jeffrey S. Brown	$ 3,050.00
84PC-1127	Allan Bruun	$11,006.00
84PC-1135	David and Shannon Cable	$17,629.00
84PC-1141	Sheldon L. Callister	$ 300.00
84PC-1499	David Castleton	$ 9,874.00
84PC-1148	Randy Chapman	$ 966.00
84PC-1170	Lon C. Durrant	$ 1,606.00
84PC-1177	Affel G. Erekson	$ 5,000.00

84PC-1180	Doug Fay	$ 427.00
84PC-1181	Milton J. Ferrin	$99,375.00
84PC-1186	Robert Gardner and John Metcalf	$ 6,900.00
84PC-1186	Robert Gardner	$ 1,250.00
84PC-1190	Kevin Scott Graham	$ 1,380.00
84PC-1194	Glenn L. Gunter	$ 8,400.00
84PC-1199	Edison G. and Florence J. Harris	$ 900.00
84PC-1213	Gordon Holbrook	$ 1,788.00
84PC-1219	Robert S. Hosking	$ 5,640.00
84PC-1241	Angel Keele, Ella Jean Burningham, and Katie Morton	$ 2,475.00
84PC-1261	Stan and Colone Layton	$ 4,559.00
84PC-1265	L. F. and Janice E. Lindsey	$ 92.00
84PC-1276	Perry McCorkle	$ 8,828.00
84PC-1278	John D. Metcalf	$ 8,280.00
84PC-1297	Glenn C. Oman	$ 4,057.00
84PC-1094	Mike Oman	$ 1,259.00
84PC-1302	Wayne and Carol Page	$ 851.00
84PC-1313	Kenneth S. Porter	$ 4,600.00
84PC-1327	Kary G. Ryser	$ 510.00

84PC-1338	Phillip L. Squires	$ 1,470.00
84PC-1388	Jeffrey L. Theurer	$ 4,370.00
84PC-1348	Al Tanner and Mel Turner	$18,900.00
84PC-1361	Howard A. Turner	$13,240.00
84PC-1369	Wesley B. Whitlock	$ 25.00
84PC-1375	H. Wesley Winegar	$25,482.00

With regard to these defendants, the trustee submitted credible documentary evidence and testimony to support the trustee's determinations of the amounts of the defendants' fraudulent conveyances. None of these defendants presented any evidence contradicting or disputing the trustee's evidence, and some of these defendants stipulated to the trustee's proffer and submission of evidence.

The following defendants, on the other hand, disputed the amounts alleged by the trustee to be fraudulent conveyances:

84PC-1124	Ronald J. and Lorna Broderick
84PC-1387	Kim Duncan
84PC-1169	Kenneth L. (Lee) Duncan
84PC-1187	Louise Garrett
84PC-1259	Ronald Dean and Elga J. Layton
84PC-1363	J. L. Walker
84PC-1374	Steven Willey

The court will now discuss in turn each of these defendants.

Defendants Ronald J. and Lorna Broderick

The trustee initially determined that the amount of the recoverable fraudulent conveyances to Ronald J. and Lorna Broderick (hereinafter referred to as the "Brodericks") was $45,382.00, based on an investment of $22,500.00. However, during the trial the trustee agreed, based on evidence presented by the Brodericks, that the Brodericks actually invested $43,500.00 into their own account. The court finds also that the Brodericks invested an additional $2,500.00 into their own account (invested in the form of a cashier's check dated September 30, 1981, in the amount of $5,000.00, one-half of which was invested into the Brodericks' account), making the total investment $46,000.00. According to the trustee and the evidence presented, the Brodericks received $67,882.00 as withdrawals from their account. Thus, the total principal amount of the fraudulent conveyances to the Brodericks is $21,882.00.

With regard to the amounts alleged by the Brodericks to have been invested in the names of Patricia S. Broderick ($2,500.00), Bob Garrick ($1,000.00), and John and KaeLeen Garrick ($3,000.00), this court agrees with the trustee that accounts set up in other individuals' names prima facie establish that those accounts are the accounts of those individuals and not of another. The defendants have the burden to show otherwise. See, e.g., Peterson v. Peterson, 571 P.2d 1360 (Utah 1977); First

National Bank v. Connolly, 138 P.2d 613 (Or. 1943); see also In re Estate of Ross v. Ross, 626 P.2d 489 (Utah 1981); University State Bank v. Blevins, 605 P.2d 91 (Kan. 1980); Dillin v. Alexander, 576 P.2d 1248 (Or. 1978); Ingersoll v. Ingersoll, 502 P.2d 598 (Or. 1972); Winsor v. Powell, 497 P.2d 292 (Kan. 1972); Kinney v. Ewing, 492 P.2d 636 (N.M. 1972); North Arlington Medical Building, Inc. v. Sanchez Construction Co., 471 P.2d 240 (Nev. 1970); Kelsey v. Anderson, 421 P.2d 163 (Wyo. 1966); Henderson v. Tagg, 412 P.2d 112 (Wash. 1966); West v. West, 403 P.2d 22 (Utah 1965); Simonton v. Dwyer, 115 P.2d 316 (Or. 1941); In re Brady's Estate, 133 Misc. 795, 234 N.Y.S. 366 (N.Y. Surr. Ct. 1929). Although the Brodericks may have put up the funds actually invested in another's name, the Brodericks relinquished control over those funds, and the investments became that of the other individuals. Indeed, Lorna Broderick testified that the Brodericks intended the funds placed in other accounts to be gifts to those individuals. The court finds that the funds invested in others' names were gifts by the Brodericks to those individuals. The Brodericks presented no evidence to the contrary. Accordingly, the Brodericks are not entitled to include the investments in others' names in the calculation of their account.

Defendants Kim and Kenneth L. (Lee) Duncan

Kim and Kenneth L. (Lee) Duncan (the "Duncans") assert that the principal amounts of their fraudulent conveyances should be reduced by $500.00 each as a result of their investing $1,000.00 into an account in the name of their mother. Like the

Brodericks, however, the Duncans have not presented any evidence to establish that the account set up in their mother's name is not actually their mother's account. Despite the fact that the Duncans may have used their own funds to invest in their mother's name, the Duncans relinquished control over those funds upon investing the funds, and the investment became that of their mother. Accordingly, the Duncans are not entitled to include the $1,000.00 investment in the calculation of their accounts. The court thus finds that the principal amount of the fraudulent conveyances to Kim Duncan is $803.59; and the principal amount of the fraudulent conveyances to Kenneth L. (Lee) Duncan is $3,278.00.

Defendant Louise Garrett

The trustee presented credible documentary evidence and testimony supporting the trustee's determination that the principal amount of the fraudulent conveyances to Louise Garrett is $16,274.00. Ms. Garrett asserts, however, that a check in the amount of $3,870.00 was improperly allocated as a withdrawal from her account and that the amount should have been allocated as a withdrawal from her children's account, i.e., the account of Travis, Tyler, and Kelly Garrett. Ms. Garrett, however, presented no credible evidence to support her assertion that the $3,870.00 check, which was payable to and cashed by Ms. Garrett, was actually a check on the children's account and not on her own account. The court finds, therefore, that the principal amount of the fraudulent conveyances to Louise Garrett is $16,274.00.

Defendants Ronald Dean and Elga J. Layton

The trustee presented credible documentary evidence and testimony that the principal amount of the fraudulent conveyance to Ronald Dean and Elga J. Layton (the "Laytons") is $2,400.00. The Laytons assert, however, that funds invested in their sons' names ($1,000.00 in Bryan Layton's name and $2,000.00 in David Layton's name less a $600.00 withdrawal from the David Layton account) should be applied to offset the amount of profit from the Laytons' account. The Laytons, however, did not present any evidence to establish that the accounts set up in their sons' names are not actually their sons' accounts. Despite the fact that the Laytons may have used their own funds to invest in their sons' names,[1] the Laytons relinquished control over those funds upon investing the funds, and the investments became that of their sons. Accordingly, the Laytons are not entitled to include the investments in their sons' names in the calculation of the Laytons' account.

As an additional matter, the court notes that the evidence showed that on or about September 28, 1988, Mr. Layton sent a check in the amount of $165.00 to the trustee, apparently in payment of the amount believed to be owing to the trustee. It is undisputed that the trustee cashed the check. The evidence further showed that subsequently, on or about November 4, 1988, Mr. Layton and Mr. Gil Miller, a

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[1] *The court notes that with regard to the $2,000.00 invested in David Layton's name, Mr. Layton testified that he and his wife co-signed a loan taken out by David Layton to make the investment and subsequently paid off the loan.*

representative of the trustee, discussed the $165.00 payment. The court has reviewed the pertinent evidence, including Mr. Layton's cover letter included with the $165.00 payment and the evidence relating to the conversation between Mr. Layton and Mr. Miller, and determines that the trustee's cashing of the $165.00 check did not constitute an accord and satisfaction of the trustee's claim against the Laytons. Neither the letter nor the check placed any condition on the trustee's cashing of the check. Additionally, there is no evidence that the trustee agreed to accept the $165.00 payment in settlement of its claim. See Tates, Inc. v. Little America Refining Co., 535 P.2d 1228 (Utah 1975); Reliable Furniture Co. v. American Home Assurance Co., 466 P.2d 368 (Utah 1970); Hintze v. Seaich, 437 P.2d 202 (Utah 1968); Bennett v. Robinson's Medical Mart, Inc., 417 P.2d 761 (Utah 1966); see also Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985) (condition placed on cashing of check); Bennion v. LeGrand Johnson Construction Co., 701 P.2d 1078 (Utah 1985). Thus the court finds that the principal amount of the fraudulent conveyance to the Laytons is $2,400.00.

Defendant J. L. Walker

The trustee presented credible documentary evidence and testimony which support the trustee's determination that the principal amount of the fraudulent conveyances to J. L. Walker is $28,727.00. Mr. Walker disputes that amount, contending that he personally invested additional funds, through wire transfers, in the account of Gary and Barbara (a daughter) Koontz, in the account of Tom and Connie

(a daughter) Toth, in the name of a son, in the name of Mr. Walker's father-in-law, and in the name of a family friend.

There is insufficient credible evidence to support Mr. Walker's assertion that he invested his own funds into each of the accounts mentioned without receiving payments from those individuals. (Also, the court notes that in answer six to Mr. Walker's verified Answers to Interrogatories, Mr. Walker listed his investments totaling $55,500.00, the amount confirmed and utilized by the trustee in its calculations. Mr. Walker now seeks to increase that investment amount by amounts that were invested in others' accounts.) Nevertheless, this court finds that even if there were credible evidence to support the wire transfers and the use of Mr. Walker's personal funds, Mr. Walker did not present sufficient evidence to establish that the accounts set up in the other individuals' names are not actually the accounts of those individuals. Despite the fact that Mr. Walker may have used his own funds to invest in others' names, Mr. Walker relinquished control over those funds upon investing them, and the investments became that of the named individuals. (Although a limitation may have been placed on the allowable amount of investments and/or withdrawals, Mr. Walker did not submit sufficient evidence to rebut the prima facie showing by the trustee. Further, the court has reviewed the evidence presented during both phases of the trial and determines that the fact that the trustee would consider combining certain accounts in determining amounts due is insufficient evidence to satisfy the defendants' burden.)

Defendant Steven Willey

The trustee presented credible documentary evidence and testimony supporting the trustee's determination that the principal amount of the fraudulent conveyances to Steven Willey is $14,725.00. Mr. Willey disputes that amount, contending that $4,000.00 invested in his wife's name should be applied to reduce the amount owing to the trustee. However, Mr. Willey did not present any evidence to establish that the separate account set up in his wife's name was not actually his wife's account. Despite the fact that Mr. Willey may have used his own funds to invest in his wife's name, Mr. Willey relinquished control over those funds upon investing the funds, and the investment became that of his wife. (The court notes, also, that in answer six to Mr. Willey's verified Answers to Interrogatories, Mr. Willey did not even list as one of his investments the $4,000.00 placed in his wife's account.) This court finds, therefore, that the principal amount owing to the trustee from Mr. Willey is $14,725.00.

Prejudgment Interest

The final issues to be addressed by the court concern prejudgment interest. As mentioned, the court previously determined that the trustee is entitled to prejudgment interest. The court remains of the opinion that it is indeed proper to award prejudgment interest to the trustee in these proceedings.

The trustee is seeking prejudgment interest from the date of the trustee's demand letter to the defendants: May 14, 1984. The court agrees with the trustee that

the trustee's loss became certain and accurately calculable when the trustee sent its demand letter specifying the amounts due and owing to the trustee as a result of the trustee's power to avoid the fraudulent conveyances. The court finds that the trustee sent a demand letter to each of the defendants on May 14, 1984, and that the trustee is entitled to prejudgment interest on each of the principal amounts, from May 14, 1984, to the date of judgment.

The next question raised by the parties concerns whether state law or federal law prescribes the rate of prejudgment interest. Given the clear directive of the United States District Court for the District of Utah in Merrill v. Allen (In re Universal Clearing House Co.), 60 B.R. 985 (D. Utah 1986), with respect to the very issue that we have in this case, this court turns to Utah law to determine the appropriate rate of interest. In this regard, the district court in Universal Clearing House, 60 B.R. at 1002, stated clearly: "State law governs awards of prejudgment interest in bankruptcy proceedings."

The court notes, however, that a recent nonbankruptcy case from the district court, Amoco Production Co. v. United States, 663 F.Supp. 998 (D. Utah 1987), provides that when a federal court has federal question jurisdiction and the federal statute governing the substantive law is silent, the trial court is to apply federal common law in setting the prejudgment interest rate, which rate is discretionary with the court and should be compensatory and based upon fundamental considerations of fairness. The court notes, too, that even more recently the Tenth Circuit has stated in a

nonbankruptcy case that "[t]he issue of interest in a federal question case is governed by federal law." F.D.I.C. v. Rocket Oil Co., No. 86-2821, slip op. at 3 (10th Cir. filed Jan. 13, 1989). Even if Amoco and Rocket Oil are applicable to these adversary proceedings and dictate that this court apply federal common law in determining the applicable rate of prejudgment interest, the court finds that the Utah rate is a fair and equitable prejudgment interest rate and that the Utah rate equitably compensates the trustee for the loss of the use of the money to be recovered in this action. In Amoco, the district court, relying on 28 U.S.C. § 1961 (which governs federal awards of post-judgment interest), found that the appropriate equitable prejudgment interest rate to be the fifty-two week Treasury bill rate prescribed by Congress in section 1961. That federal rate is presently 9.16 percent (effective from January 13, 1989, through February 9, 1989). The applicable Utah rate, Utah Code Ann. § 15-1-1(1), is 10 percent.[2] Given the fact that the two rates are relatively comparable and, again, given the clear directive of the district court in the bankruptcy case of Universal Clearing House, the court finds that the Utah rate of 10 percent is the appropriate prejudgment interest rate to award the trustee.

Defendant H. Wesley Winegar asserts that if this court turns to Utah law to determine the prejudgment interest rate, the applicable rate under Utah law is not 10

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[2] *Utah Code Ann. § 15-1-1(1) provides in pertinent part: "[T]he legal rate of interest for the . . . forbearance of any money, goods, or chose in action shall be 10% per annum. Nothing in this section may be construed to in any way affect any penalty or interest charge which by law applies . . . to any contract or obligations made before May 14, 1981."*

percent, but 6 percent--inasmuch as the statutory rate prior to May 14, 1981, was 6 percent, and the 10 percent rate in section 15-1-1(1) does not affect any interest charge applicable to any contract or obligations made before May 14, 1981. Even if some investments and/or withdrawals were made prior to May 14, 1981, as Mr. Winegar alleges, the court disagrees with Mr. Winegar's position concerning the applicable rate. The defendants' obligation to pay prejudgment interest does not arise out of contract or out of the defendants' investments or withdrawals. Rather, the obligation arises from the defendants' statutory obligation to return funds to the trustee as a result of the trustee's avoidance powers under 11 U.S.C. § 548, which obligation came into existence and became fixed and ascertainable when the trustee made demand upon the defendants for return of the fraudulent conveyances.

Accordingly, this court concludes that the Utah statutory rate of 10 percent is the appropriate prejudgment interest rate to be applied in these proceedings and that prejudgment interest is to be calculated from May 14, 1984.

Counsel for the trustee are directed to prepare a judgment consistent with this opinion.

DATED this 6 day of February, 1989.

BY THE COURT:

GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT