IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re: JOYCE L. FULLERTON, Debtor.	Bankruptcy No. 03-24693 Chapter 7
JOEL T. MARKER, TRUSTEE, Plaintiff, vs. ROBERT H. FULLERTON, Defendant.	Adversary Proceeding No. 03-2301

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Before the Court is the Plaintiff's Motion for Summary Judgment. Plaintiff's claim is pleaded under the Uniform Fraudulent Transfer Act seeking recovery of Debtor's property that was transferred to Defendant. Plaintiff supplemented his motion with a record of Plaintiff's Rule 2004 examination of Debtor regarding her interest in real property, with corresponding exhibits. Defendant filed his opposing Response to Motion for Summary Judgment and submitted an affidavit with an exhibit of a real property settlement agreement, and Plaintiff filed a Reply

Memorandum in Support of Plaintiff's Motion for Summary Judgment. The Court has considered all of the pleadings and the exhibits submitted therewith, and has conducted an independent review of applicable statutes and case law.

JURISDICTION AND LEGAL STANDARD

The Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. § 1334 (b) and § 157 (a). This is a core proceeding under 28 U.S.C. § 157 (b)(2)(H), and as such the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

A motion for summary judgment will be granted if the pleadings, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Pleadings must be liberally construed in favor of the party opposing summary judgment. *Harman v. Diversified Med. Invs. Corp.*, 488 F.2d 111, 113 (10th Cir. 1973). When a moving party's motion for summary judgment is made and supported as provided in this rule, the nonmoving party's response must set forth specific facts showing that there is a genuine issue for trial. Fed R. Civ. P. 56(e). If the nonmoving party's evidence is "merely colorable, or is not significantly probative, there is insufficient evidence and summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

FACTS

The Court determines which facts are undisputed by the parties at the summary judgment stage under the provisions of Fed. R. Bankr. P. 7056 and Local Rule 7056-1, the latter which

stipulates that "all material facts of record that are set forth with particularity in movant's statement of facts and that meet the requirements of Fed. R. Bankr. P. 7056 shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."

The following facts were either admitted or uncontroverted by Defendant, and as such, they are deemed undisputed by the parties. After approximately forty-five years of marriage, Defendant and Debtor instituted a dissolution of marriage proceeding. The decree of divorce entered by the Utah Fourth District Court on August 7, 2001 incorporated the parties' divorce settlement, including the parties' April 24, 2001 real property agreement governing the allocation of the marital home located at 868 West 225 South, Orem, UT. The home, which was purchased in 1978, was owned by Debtor and Defendant as joint tenants with right of survivorship. At the time of the decree, the home was free and clear of liens with a market value of approximately $163, 481. Although the home was awarded solely to Defendant, the agreement provided that Debtor would continue living in the home while paying monthly rent of $650 to Defendant, but would have discretion to rent out to family members. On August 23, 2001, Debtor quit-claimed her joint tenancy interest to Defendant for "the sum of ten dollars and other good and valuable consideration." Since the decree of divorce, Debtor continues to reside in the home with her son's family while her monthly rent payments have fluctuated in amount as a result of her inconsistent income flow.

On March 19, 2003, Debtor filed for bankruptcy under Chapter 7 and was granted a discharge on June 25, 2003. Shortly thereafter, on July 11, 2003, Plaintiff, as the Chapter 7

Trustee, conducted a Rule 2004 Examination of Debtor to investigate Debtor's transfer of her interest in the marital home as relevant to his administration of Debtor's estate. Plaintiff then filed this adversary proceeding on July 22, 2003, seeking judicial determination of a fraudulent transfer pursuant to Utah Code Ann. § 25-6-6 (1953) and its unwinding and recovery as relief sought.

In Defendant's pleadings, certain additional facts relating to the property division and debt allocation between the parties at the time of the divorce decree are disputed. Specifically, Defendant disputes the value of consideration for Debtor's transfer; Debtor's solvency at the time of transfer; and the date Debtor's creditor's interest arose. Therefore, the Court concludes that there remain material issues of disputed fact.

APPLICATION OF 11 U.S.C. § 544 (b)

Since Debtor's transfer of her interest occurred approximately two years before her Chapter 7 filing, Plaintiff argues that he may employ the more extensive four-year reach-back period for unwinding fraudulent transfers under 11 U.S.C. § 544 (b) and Utah Code Ann. § 25-6-10 (1953). The bankruptcy trustee may avoid any transfer of an interest of the debtor in property that is voidable under state law by a creditor holding an allowed unsecured claim. 11 U.S.C. § 544 (b). Pursuant to § 544 (b), Plaintiff contends that he may step into the shoes of allowed unsecured creditor America First Credit Union (the "Credit Union") which filed a proof of claim against Debtor in the amount of $9,675.20 on May 8, 2003 as evidenced in Exhibit D in Plaintiff's Memorandum in Support of Plaintiff's Motion for Summary Judgment. Plaintiff

further contends that but for the intervening bankruptcy case, Debtor's transfer would have been voidable by the Credit Union upon a finding that the transfer was fraudulent.

The applicable state statutory provisions in finding a voidable transfer are found in the Uniform Fraudulent Transfer Act as adopted in Title 25 Chapter 6 of the Utah Code. Claims that may have arisen before or after the transfer are governed Utah Code Ann. § 25-6-5 (1953) and the corresponding statute of limitations provision § 25-6-10. Here, Plaintiff cites to and relies on the legal standard under § 25-6-6, which is limited to claims that arose before the transfer. Since the Credit Union's proof of claim, supported by Debtor's Visa Platinum Card Membership Application and Acceptance Certificate dated April 27, 2001, reflects a claim incurred on May 16, 2001, predating the transfer, the uncontroverted evidence is that the Credit Union's claim arose before the transfer. According to 11 U.S.C. § 502 (a), the creditor's proof of claim is prima facie evidence of the creditor's interest. Thus, the Plaintiff has met his burden as moving party in directing the court's attention to appropriate legal and factual matters regarding the existence of a claim prior to the subject transfer. The Court concludes that an unsecured creditor with an allowed claim, specifically, the Credit Union, existed prior to the transfer, and that § 25-6-6 is the appropriate vehicle for the Court's voidable transfer analysis.

FRAUDULENT TRANSFER

§ 25-6-6 defines a transfer made by a debtor as fraudulent as to a creditor whose claim arose before the transfer if the debtor made the transfer without receiving reasonably equivalent value, and the debtor was insolvent or became insolvent as a result of the transfer. Plaintiff has

met the threshold requirement of establishing that there was a claim prior to the transfer. The remaining issues of reasonably equivalent value and insolvency are more difficult.

A. Reasonably Equivalent Value

Pursuant to Utah Code Ann. § 25-6-4 (1953), value is given for a transfer if in exchange for the transfer, property is transferred or an antecedent debt is secured or satisfied. Similarly, 11 U.S.C. § 548(d)(2)(A), derived partly from Section 3 of the Uniform Fraudulent Conveyance Act,[1] defines value as "property, or satisfaction or securing of a present or antecedent debt of the debtor," and explicitly excludes an unperformed promise to furnish support to the debtor. *See generally Hulsether v. Sanders*, 223 N.W. 335, 335-36 (S.D. 1929) (holding that under the UFCA, defendant's conveyance of real property to son in consideration of mortgage payoff of $6,000 and future support did not convey value equivalent to the value of the real estate). It follows that "value" excludes future considerations, such as mere executory promises, at least to the extent not actually performed. 5 *Collier on Bankruptcy* ¶ 548.07, at 548-63 (15th ed. 2003); *see also Wootton v. Ravkind (In re Dixon)*, 143 B.R. 671, 681 (Bankr.N.D.Tex. 1992) (holding that a transfer of art and money to an attorney in consideration of representation in possible future criminal proceedings was fraudulent); *Bailey v. Metzger, Shadyac & Schwarz (In re Butcher)*, 72 B.R. 447, 449-50 (Bankr.E.D.Tenn. 1987) (holding that a retainer paid to an attorney for future legal services to be rendered was a fraudulent transfer). The time at which

[1] 5 *Collier on Bankruptcy* ¶ 548.05, at 548-34 (15th ed. 2003). The Uniform Fraudulent Conveyance Act (UFCA) and the Uniform Fraudulent Transfer Act (UFTA) play an "integral part of fraudulent transfer avoidance under the Bankruptcy Code." 5 *Collier on Bankruptcy* ¶ 548.01, at 548-8. These two statutes are the source for state statutory fraudulent transfer laws. *Id.* Cases decided under the statutes are considered to be persuasive authority for similar issues arising under Section 548 of the Code. *Id.*

reasonably equivalent value is evaluated is at the time of the transaction. *Krommenhoek v. Natural Resources Recovery, Inc. (In re Treasure Valley Opportunities, Inc.)*, 166 B.R. 701, 704 (Bankr.D.Idaho 1994).

The parties respectively disagree as to the amount of consideration exchanged. Plaintiff argues that as a joint tenant, Debtor's interest in the home was a one-half interest in the amount of $81,740 at the time of the transfer, and asserts that Debtor did not acquire reasonably equivalent value in receiving only ten dollars. Defendant responds that in addition to Debtor's receipt of ten dollars, Debtor received the bulk of marital personal property including clothing valued at $10,000 and household appliances worth $5,050. Debtor was also awarded the 1997 Pontiac Grand Am in addition to various items of jewelry and furniture, totaling $15,650. Importantly, Defendant contends that Debtor received consideration of at least $98,550 by being able to pay reduced rent for life, for a sum total of $129,250 in consideration.

Defendant has not alluded to any judicial precedent or factual grounds under the divorce decree for deeming future reduced rent as constituting value under Utah law. According to the testimony of Debtor at her Rule 2004 examination, Debtor indicated that in agreeing to transfer her interest while remaining in the home, Debtor "knew there were going to be taxes, there was going to be insurance. [Debtor] was not in a financial situation to take care of these things that came up, plus the problems of owning a home, which we all run into things; water heaters, furnace." (2004 Examination of Joyce L. Fullerton at 42.) The testimony shows that, at best, Debtor received consideration for future promises.

The Court determines that future reduced rent for life is an unperformed obligation and may not be part of potential value that was received for a challenged transfer under Utah law.[2] The Court is persuaded by the reasoning in *Butcher* where a transfer to secure future legal services was not considered as value. *Butcher*, 72 B.R. at 449-50; *see also* 5 *Collier on Bankruptcy* ¶ 548.07, at 548-63. Thus, the Court determines that Defendant's arguments emphasizing the significant value of future reduced rent are not sufficiently probative to present a genuine issue of material fact under Fed. R. Civ. P. 56(e).

As a result of the Court's determination that future reduced rent may not be considered, and by applying the value formula proposed by Plaintiff, the amount of $98,550 will be subtracted from Defendant's alleged total consideration value of $129,250 in the Court's assessment of the challenged transfer. To determine if a challenged transfer is supported by reasonably equivalent value, courts compare the value of the property transferred with the value of that received in exchange. *In re Gabor*, 280 B.R. 149, 158 (Bankr. N.D. Ohio 2002). In the instant case, the remaining value of $30,700 representing alleged marital personal property will be compared to the value of Debtor's interest in the home at the time of the transfer.

To this formula, Defendant attests in his affidavit that he received a $20,000 inheritance in 1988 which was applied to the payoff of the mortgage on the home and accordingly, he claims that this amount should be considered in reducing the Debtor's interest in the transferred property, thus narrowing the gap between the respective consideration values. Plaintiff, on the

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[2] It is noted that under Utah Code Ann § 25-6-4 (1), unperformed promises made in the ordinary course of the promisor's business to furnish support to the debtor or another person may be considered as value given. The Defendant did not argue this nor present any evidence that the future rent was connected in any way with any ordinary course of his business to furnish support to the Debtor and accordingly, this subsection will not be considered by the Court.

other hand, maintains that Debtor's joint tenancy interest in the home should constitute one-half of its fair market value.

In reviewing reasonably equivalent value, courts must look to the entirety of the surrounding circumstances. *Gabor*, 280 B.R. at 158. Generally, Utah law provides that property inherited during marriage will retain its separate character unless "(1) the other spouse has by his or her efforts or expense contributed to the enhancement, maintenance, or protection of that property, thereby acquiring an equitable interest in it, ... or (2) the property has been consumed or its identity lost through commingling or exchanges or where the acquiring spouse has made a gift of an interest therein to the other spouse." *Mortensen v. Mortensen*, 760 P.2d 304, 308 (Utah 1988). These issues were not specifically addressed in Defendant's Response to Motion for Summary Judgment, except in his Statement of Contested Material Facts which indicated that "the Debtor received approximately $129,225.00 in consideration for the transfer." (Resp. to Mot. for Summ. J. ¶ 1.) Although Defendant's response is somewhat general, the Summary of Undisputed Material Facts in the Memorandum in Support of Plaintiff's Motion for Summary Judgment simply states that "[t]he only consideration that the Debtor received for the Transfer was $10.00." (Mem. in Supp. of Pl.'s Mot. for Summ. J. ¶ 4.) The Defendant's Affidavit in Support of Response to Motion for Summary Judgment states he received $20,000 in inheritance which was applied to the Orem home. (Aff. in Supp. of Resp. to Mot. for Summ. J. ¶ 5.) Defendant's general response coupled with his affidavit are sufficient to raise a disputed question of fact as to the Defendant's contribution to the home value and what exactly was transferred to the Defendant in exchange. In addition, absent the state divorce court's actual finding of

percentage of the parties' property division, and the lack of pertinent facts set forth in the parties' memoranda and other papers, the Court determines that the valuation of Debtor's interest in the home at the time of transfer is one of material fact to be determined by the fact finder at trial.

B. Insolvency

Under Utah Code Ann. § 25-6-3 (1953), "(1) a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation," or "(2) a debtor who is generally not paying his debts as they become due is presumed to be insolvent." In this case, Plaintiff relies on the balance sheet insolvency test. Both Plaintiff and Defendant allege contradictory facts pertaining to Debtor's solvency on the date of transfer. Plaintiff argues that Debtor became insolvent as a result of her transfer, i.e. Debtor's assets of $7,000 were less than Debtor's liabilities of $10,000. Defendant argues that Debtor's liabilities at the time were no more than $3,000. Insolvency is a material fact for purposes of summary judgment in the case at bar. Further, Plaintiff has conceded that a genuine issue of material fact exists as to the issue of insolvency in his Reply Memorandum. The Court agrees.

CONCLUSION

The Court determines that there is no material fact that exists relative to the existence of claim of the Credit Union prior to the transfer, and therefore, Plaintiff has satisfied this requirement under § 25-6-6(1). The Court determines that future reduced rent cannot constitute value to the Debtor under § 25-6-4 as a matter of law. The Court further concludes that the value of the home is no less than $163,481. However, the Court determines that genuine issues of material fact remain as to the degree of Debtor's interest in the home, and the specific values of

the other assets claimed by the Defendant including the value of various items of personal property. Finally, issues of material fact regarding Debtor's insolvency as defined in § 25-6-3 exist and can only be properly resolved by a finder of fact at trial.

For the reasons set forth above, it is hereby

ORDERED, that the Plaintiff is granted partial summary judgment only on the issues of the existence of a claim prior to the transfer and exclusion of future reduced rent as value in the consideration analysis. The Scheduling Order dated October 29, 2003 shall govern the remainder of the issues in this adversary proceeding and is not amended except as by the rulings in this Order.

DATED this 19th day of December, 2003.

WILLIAM T. THURMAN
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing Order Granting Partial Summary Judgment to the following on the 19th day of December, 2003:

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