

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

PETER LEWIN

Debtor

Case No. 99-14337

MICHAEL J. O'CONNOR, ESQ., AS
CHAPTER 7 TRUSTEE

Plaintiff

-against-

Adversary No. 00-90060

PETER LEWIN AND LORRAINE LEWIN

Defendant

APPEARANCES:

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Attorneys for Chapter 7 trustee
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Michael J. O'Connor, Esq.
Trustee

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

Jurisdiction

The matters before the court include the Chapter 7 Trustee's recovery of a fraudulent conveyance pursuant to N.Y. Debt. & Cred. L. §§ 273 and 11 U.S.C. § 544(b) and denial of a discharge pursuant to 11 U.S.C. § 727(a)(2). The court has jurisdiction over these core

proceedings pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(H, J, O) and 1334(b).

Facts

The court finds the following facts based largely on the Debtor's interpretation of the record:

On June 30, 1997, the Debtor transferred his interest in the marital residence to his wife. Both he and his wife testified that this first of three transfers he made was compensation he owed her for working at his business, The Clock Center, for over ten years. His wife testified that they had discussed a transfer prior to June 1997 but it was not done until that time because it coincided with the release of an easement the prior owners had retained. (Tr. 61.) Almost immediately thereafter, she listed the house with a realtor for \$998,000. (Tr. 62-63; 67-69.) She testified the realtor thought \$998,000 was a fair asking price. (Tr. 69.) The only other evidence of the house's value was the Debtor's wife's testimony that the one offer she received for it would have yielded her about \$350,000 after the joint mortgage and the joint home equity line of credit totaling approximately \$500,000 were paid. (Tr. 63, 67-68.)

The Debtor transferred a boat called "Shamrock" to her in August 1997. At that time, the boat had a lien on it for at least \$20,879. (Tr. 25-26; Ex. 11.) When his wife traded it in on October 22, 1998, she received, as an "even trade," a 1999 Legacy. (Tr. 26-28; Ex. 11.) The bill of sale shows the trade was for \$32,000. (Ex. 11.)

On October 6, 1997, the Debtor allowed his wife to trade in his 1996 Suburban with a trade-in value of \$30,218 and a "net trade-in" value of \$21,088,¹ for the 1998 Suburban his wife

¹Both the Debtor's wife's testimony and Exhibit 10 supports a finding that the remaining loan on the 1996 Suburban totaled \$9,130.42. (Tr. 72; Ex. 10.)

purchased for \$41,593 (\$40,718 plus tax, title and delivery). (Ex. 10.) The Debtor testified that his wife agreed to assume the payments for the boat and for the new vehicle. He further testified he was not insolvent when he made the three transfers nor was he rendered insolvent after he made them, stating his business was “ongoing” and “as normal” and that he did not owe a penny to “the creditors that were suing [him].” (Tr. 157, 161.)

The documents admitted at trial, and sometimes the lack thereof, tell a different story. Nothing on the Debtor and his wife’s joint tax return for 1997 reflects her receipt of “back pay.” Nothing on their 1996, 1997 and 1998 joint returns shows they had a source of income other than the profit or loss derived from the Debtor’s d/b/a and a very modest income of about \$4,000/year from a rental property. Their 1998 and 1999 joint returns include “wages, salaries, tips, etc.” but copies of the applicable Forms W-2 were not attached. Similar to the three prior years’ tax returns, the Schedule C of their 1999 return reflects the Debtor’s d/b/a’s business address, however, the business name is “Peter Lewin” and not “The Clock Center.” (Ex. 19.) On the 1996 and 1997 returns, they claimed a car and truck expense on their Schedule C, but did not claim an expense for business use of their home. (Ex. 19.)

Other than their testimony, there is not a single business record that shows the Debtor’s wife was a regular employee of The Clock Center (e.g., time records, insurance records, employee benefit records, employment tax records, unemployment tax records, a Form W-4, etc.). Also, there were no written agreements regarding his wife’s assumption of payments for the boat or the lien remaining on his vehicle when he traded it in for her 1998 Suburban. (Tr. 175-177.) According to the Debtor, in 1998, she paid for the boat, the car and the mortgage with money from her incorporated business, Lorraine’s Collectibles. (Tr. 113-115.) According to

her, however, she “never did get to stock [her] store” and Lorraine’s Collectibles “never got off the ground because the sales reps wouldn’t talk to [her].” (Tr. 46.) She testified she began paying for bills in 1998 using the home equity line of credit that she and the Debtor both remained liable for, selling the store fixtures she had bought from her husband for \$15,000, managing a retail store called “Perfumania” and operating a clock repair business. (Tr. 20, 42-43, 45, 47-48 and 49-50.)

The Debtor closed The Clock Center on or about December 26, 1997. According to his testimony, he would have been unable to operate The Clock Center in the first quarter of 1998 due to the amount of money he owed his creditors at that time, somewhere in the neighborhood of at least \$300,000 - \$400,000, and the slow business cycle a retail business generally experiences during that time of year. (Tr. 158-161.) He attributed The Clock Center’s six month decline, from June 1997 to December 1997, to the customer base change that occurred due to its landlord’s “nickel and dime stores plus all the empty space.” (Tr. 158-159; 161-162.) The business’s creditors commenced lawsuits against him after the store’s closing and he answered each of the complaints, but he did not file his Chapter 7 bankruptcy petition until July 21, 1999. (Tr. 162.)

The record also supports the following findings, based on the Debtor and his wife’s testimony:

There is substantial testimony by the Debtor that he used income from his business to pay almost all of his household bills, including the mortgage, utilities, car expenses and medical bills. (Tr. 82- 83.) He paid remaining expenses with a credit card. (Tr. 82.) As of June 1997, the Debtor owed a little less than \$90,000 on his credit cards; he “used to pay the minimum

monthly balances.” (Tr. 89.) He testified that on July 1, 1997, he owed between \$150,000 - \$160,000. (Tr. 143.) The record reflects he paid at least the mortgage through 1997. (Tr. 12.) As already found above, after 1997, money to pay living expenses came from his wife’s business, her outside retail job, his credit card and their home equity line of credit.

In September 1997, the Debtor and his wife closed their joint bank accounts and his wife opened up her own account. In October 1997, the Debtor made his last rent payment for The Clock Center’s space and, around that same time, he paid off a \$100,000 business loan his wife had guaranteed. On November 12, 1997, he paid off the 11 monthly payments remaining on his Cadillac lease. On December 8, 1997, he paid his father in law \$26,604; he testified a payout schedule and an agreement existed for the \$25,000 principal/\$1,600 interest loan but did not offer any such documents into evidence. In December 1997, he also paid down his home equity loan by \$50,000 and, on January 12, 1998, he paid another \$55,000. According to the Debtor, by the Fall of 1997 money was tight and he did not have enough to pay the business’s rent, however, he presented inconsistent testimony when he stated he was current with some, if not all, of his vendors “through the last quarter” but then conceded he owed them whatever amounts were reflected in their judgments. (Tr. 103-106.)

Two other interesting items were revealed by the Debtor and his wife. In April 1998, despite his conceded financial difficulties, his wife used their home equity line of credit to purchase a time share in Aruba. (Tr. 120.) He further testified, “[we’ve] been going there for years,” for one week during April. (Tr. 119-120.) On August 14, 1998, once again, she used their home equity line of credit to pay Nations Bank \$20,879, the payoff balance on the Shamrock. (Ex. 11.)

Arguments

Although the transfers the Debtor made to his wife are undisputed, the questions of the consideration he received and his solvency when he made them are very much in dispute. The Trustee argues the Debtor received nothing from his wife for the house, boat and car. He challenges the Debtor's wife's position that she did not receive any prior compensation for working at The Clock Center by pointing out that both she and the Debtor derived the benefits of the Debtor's use of the business's income to pay for most of their personal living expenses. He also contends "a promise supported by past consideration" is not valid consideration for section 273 purposes. Although his primary argument is that the Debtor has the burden of proving solvency, the Trustee submits that the "general circumstances" surrounding the time period of June 1997 through January 1998 supports a finding that the Debtor was insolvent when he made the transfers. He refers mainly to the Debtor's testimony about his credit card debt in June and July 1997 and his lack of testimony regarding the value of his remaining assets.

The Debtor counters that he transferred the three properties in satisfaction of an antecedent debt, i.e., the back pay he owed his wife for working at The Clock Center. He also argues she assumed the remaining payments on each and those assumptions also constitute adequate consideration.

As for his solvency, the Debtor asserts none of the transfers rendered him insolvent. He refers to his testimony that he was current with his trade creditors. He also points out the fact that he had no lawsuits pending or judgments rendered against him when he made the transfers.

Regarding the grounds for denying discharge pursuant to section 727(a)(2)(A), the Trustee argues the court should apply the "doctrine of continuing concealment," a doctrine that

would enable him to overcome the seemingly absolute time bar spelled out by section 727(a)(2)'s "within one year prior to filing" language. He relies on *In re Silverstein*, 151 B.R. 657 (Bankr. E.D.N.Y. 1993), and the cases cited in that decision, including *In re Kaiser*, 722 F.2d 1574 (2d Cir. 1983). He argues the Debtor's concealment of the transfers and retention of each property's benefit, both of which occurred into the one year period, together with the existence of other "badges of fraud," constitutes conclusive evidence of actual intent to defraud.

Citing *In re Bresler*, 47 B.R. 856 (E.D.N.Y. 1985), the Debtor argues the Trustee's objection to discharge must be denied because the transfers fall outside section 727(a)(2)(A)'s one year lookback period. As for the continuing concealment doctrine, the Debtor states the doctrine has not been universally adopted and, even if adopted by this court, its application would still entitle him to a discharge. Relying on *Rosen v. Bezner*, 996 F.2d 1527 (3d Cir. 1993), he argues neither of the two elements required for a "concealment" exist. He goes on to assert *Silverstein* is "manifestly distinguishable" and although some badges of fraud exist, they are not sufficient to show an actual intent to defraud.

Discussion

I. 11 U.S.C. § 544(b)(1) and N.Y. DEBT. & CRED. L. § 273

Pursuant to section 544(b)(1), a trustee can avoid a debtor's transfers or obligations, provided an unsecured creditor exists,² under applicable state law. To prevail on his state law/section 273 cause of action the Trustee must show: (1) the Debtor conveyed property, (2) he made the conveyance without fair consideration and (3) the Debtor was insolvent when he made the conveyance or was rendered insolvent by it. *See United States v. McCombs*, 30 F.3d 310,

²The existence of an unsecured creditor is not in dispute.

323 (2d Cir. 1994). Generally, section 273 places the burden of proving both insolvency and the lack of fair consideration upon the party challenging the conveyance. *American Inv. Bank, N.A. v. Marine Midland Bank, N.A.*, 191 A.D.2d 690, 692 (N.Y. App. Div. 2d Dep't 1993). As mentioned above, in a decision from last year, the court addressed the burden of proof in a section 273 cause of action. *See In re Lewin*, Case No. 99-14337, Adv. Proc. No. 00-90060 (February 27, 2001). According to that decision, once the Trustee establishes (1) the absence of any tangible consideration or (2) a clandestine transfer of property designed to conceal the nature and value of the consideration, the burden of persuasion under section 273 shifts to the Debtor's wife (i.e., the transferee). *See also McCombs*, 30 F.3d at 325.

A. Consideration

“Fair consideration” is given for property when an antecedent debt is satisfied or the amount of money or the property received for it is not disproportionately small as compared with the value obtained. N.Y. DEBT. & CRED. L. § 272(a, b). The New York statute also requires “good faith.” As found above, other than his and his wife's self-serving testimony, the Debtor has not offered any evidence to show he intended his wife to receive wages for working at The Clock Center. In fact, everything indicates she worked there so the business maintained an income level that could support their personal living expenses. Additionally, the Debtor has not offered anything to show the value of the services she performed. *In re Bouldin*, 196 B.R. 202, 208 (Bankr. N.D. Ga. 1996). Thus, the court finds the alleged “back wages” were not sufficient consideration for the transfer of the house.

As for her assumption of the mortgage and home equity line of credit, there were no written agreements to that effect nor any evidence of payments made only by her beginning in

July 1997. In fact, the record supports a finding that the mortgage payments continued to come from The Clock Center's business operation since their rental income was only \$4,000/year at best and their tax return for 1997 does not show anyone received wages or that other sources of income existed. The court concludes that while she remained liable for the mortgages, her liability continued due to the joint liability she had with the Debtor; it was not hers solely.

The value of the house when it was transferred is not supported by any expert testimony or time relevant appraisal. Evidence of value can only be gleaned from the Debtor's wife's statement that the realtor thought \$998,000 was a fair price for the house and from the offer that would have netted her \$350,000. The better scenario for the Debtor is a finding that his wife did not provide adequate consideration for the \$350,000 in equity she received versus the \$498,000 in equity (i.e., \$998,000 - \$500,000) that arguably existed.

Regarding the car, the court concludes the wife did not "assume" the payments on the 1996 Suburban via its trade-in for her new car. As the calculation reflects, she received a "net trade-in value" of \$21,088. She neither paid anything additional nor performed any services entitling her to receipt of that equity, yet the transaction allowed her to use the vehicle to obtain a brand new 1998 Suburban priced at \$40,718. Even if the transaction caused an assumption of the \$9,130 loan balance, the court concludes that was not fair consideration for her receipt of a vehicle the dealer valued at \$30,218.

As for the boat, only the Debtor and his wife's declarations would support a determination that she assumed payments for it. She did not provide any evidence showing she made the payments on the boat from August 1997 to August 1998 when the payoff was made using their home equity line of credit. She also failed to show that she alone paid the home

equity line of credit after August 1998. Without a written assumption agreement or any evidence of the payments she made, the court can only conclude she provided no consideration for the boat that was ultimately traded in for another boat worth \$32,000. Thus, the court concludes the Debtor did not receive any consideration for the boat with a net value of \$11,121 (\$32,000 - \$20,879).

B. Insolvency

Having proven the Debtor did not transfer the three properties to his wife, a very close family member, for fair consideration, the burden has shifted to the Debtor to prove his solvency at the time of the transfers. *See McCombs*, 30 F.3d at 325. Even without the burden of proof shift, however, the testimony elicited by the Trustee at trial paints a fairly clear picture of the Debtor's finances when he transferred the properties: mounting credit card debt and increasing difficulties with his business's creditors, especially the landlord. Although use of credit cards is not sufficient to prove insolvency, it is indicative of an inability to pay typical living expenses using existing income, something the Debtor himself testified to at trial.

Whether the burden shifted by operation of case law or by the Trustee meeting his initial burden, it ultimately fell upon the Debtor to prove his solvency. He did not, however, prove it. In fact, the record does not contain any "balance sheet" analysis of what his assets and liabilities were in June, July or August 1997 when he made the three transfers.³ *See* N.Y. DEBT. & CRED. L. § 271(1). Once again, the Debtor offered only his self-serving testimony. Such declarations amidst evidence to the contrary, including the increasing use of credit cards, the home equity line

³The court notes, however, the evidentiary rulings it made regarding the Debtor's use of asset and liability statements prepared by him and by his accountant to refresh his recollection. (Tr. 143-157.)

of credit and the business's income to pay all of the family living expenses,⁴ does not meet his burden of proving solvency by a preponderance of the evidence.

II. Objection to Discharge

Section 727(a)(2)(A) provides, *inter alia*, for the denial of a discharge when a debtor has transferred his property within one year before filing with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under Title 11. Because of the "within one year" limitation, in order to succeed under section 727(a)(2)(A), the Trustee must convince the court to apply the "continuing concealment doctrine" in this case based on its particular facts and circumstances. When applied, a concealment that originated outside section 727(a)(2)(A)'s one year limitation is within its reach "if the concealment continued on into the year preceding the filing coupled with the requisite intent." *In re Korte*, 262 B.R. 464, 472 (B.A.P. 8th Cir. 2001)(citations omitted).

The Trustee does not cite directly to any controlling case law and, although the *Silverstein* decision he cites contains a citation to the Second Circuit's *In re Kaiser* decision, the Second Circuit did not address the substantive issue of continuing concealment. *In re Kaiser*, 722 F.2d at 1582-1584. As for the non-controlling case law that does exist, the courts' focus has been on the debtor's retention of a beneficial interest in the property, not the concealment of the transfer itself. *See, e.g., In re Keeney*, 227 F.3d 679 (6th Cir. 2000)(denial of discharge under

⁴Although it is true that The Clock Center was the Debtor's d/b/a and, essentially, its money was his to spend after he accurately reported income and business expenses on his tax returns, the joint returns for the years 1996 through 1998 show fairly modest, if any, depreciation expenses, i.e., the kind of expense where the taxpayer is usually not "out of pocket" for that year. More importantly, very modest net profits resulted in 1996 and 1997. When the substantial loss in 1998 is thrown in, the court finds it difficult to reconcile how the Debtor's business paid for so many personal living expenses.

section 727(a)(2)(A) proper based on debtor's continuing concealment of his beneficial interest in his parents' home).

Here, the Trustee showed no evidence that the Debtor actually used his wife's new Suburban, the Shamrock after he transferred it or the new boat the Shamrock was traded in for. Although the Shamrock's loan was paid off by the home equity line of credit, the Trustee has not shown, by a preponderance of the evidence, that only he paid off that loan. *In re Adams*, 31 F.3d 389 (6th Cir.1994), *cert denied*, 513 U.S. 1111 (1995)(elements of a violation of section 727 must be proven by a preponderance of the evidence). Thus, he has not shown by a preponderance of the evidence, the "secret interest" he maintained.

As for the house, the Debtor clearly derived a benefit from it because he continued to live there when he filed, and after he filed, his petition. The Trustee has not shown by a preponderance of the evidence, however, how the record supports a determination that within the year prior to his filing the Debtor alone derived the benefit of living in the house, only he made the mortgage payments or he alone maintained unlimited control over it, similar to the debtors in the cases he cites. *See In re Portnoy*, 201 B.R. 685, 695 (Bankr. S.D.N.Y. 1996); *In re Silverstein*, 151 B.R. at 661-662 (citing *In re Martin*, 698 F.2d 883 (7th Cir. 1983)). The fact that he continued to live in the house he transferred to her does not establish, in and of itself, the concealment of a property interest. It was not outside the natural course of events that the Debtor live with his wife, wherever her residence and regardless of who owned it. Without a record that shows something akin to an "illusion of destitution" or the "divestment of all valuable property of any sort," the court declines to apply the continuing concealment doctrine in order to expand the one year limitation that otherwise controls the result (i.e., a denial of the

Trustee's request for denial of discharge) in this adversary proceeding.⁵ *In re Craig*, 195 B.R. 443, 450 (Bankr. D.N.D. 1996); *See In re Johnson*, 189 B.R. 985 (Bankr. N.D. Ala. 1995).

Conclusion

Having determined that the Debtor is liable for fraudulently transferring one-half of the equity in the house that existed when he transferred his interest in it to his wife (i.e., ½ of \$350,000), together with the amount of equity in his 1996 Suburban (i.e., \$21,088) and in the Shamrock (i.e., \$11,121), the court holds that pursuant to 11 U.S.C. § 550(a), the Trustee may recover from the Debtor, as transferor, and his wife, as transferee, \$207,209, the value of the properties he transferred.

Accordingly, it is

ORDERED that the Trustee is entitled to recovery of \$207,209 from the Debtor and/or his wife pursuant to 11 U.S.C. §§ 544(b) and 550(a) and N.Y. DEBT. & CRED. L. § 273; and it is further

ORDERED that the Trustee's request for denial of discharge is denied; and it is further

ORDERED that the Trustee prepare and submit a judgment, consistent with this decision, for court review and signature.

Dated:

Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge

⁵Another adversary proceeding involving a creditor's request for denial of discharge pursuant to 11 U.S.C. § 727 will now go forward.

