

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOSEPH EDWARD HAICK

CASE NO. 01-60500

Debtor

Chapter 7

L. DAVID ZUBE, CHAPTER 7 TRUSTEE

Plaintiff

vs.

ADV. PRO. NO. 02-80289

PHILIPPA M. HAICK, a/k/a PHILIPPA M.
DICKSTEIN AND JOSEPH EDWARD HAICK

Defendants

APPEARANCES:

L. DAVID ZUBE, ESQ.
Chapter 7 Trustee
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Binghamton, New York 13901

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SCOTT R. KURKOSKI, ESQ.
Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Presently before the Court is a motion, filed by Joseph E. Haick (the “Debtor”) on March 8, 2004, pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”), seeking summary judgment as to an adversary complaint filed on November 27, 2002 (the

“Complaint”) by L. David Zube, Esq., the chapter 7 trustee (the “Trustee”). Oral argument was heard during the Court’s regular motion terms in Binghamton, New York on March 25, 2004 and April 29, 2004. The matter was submitted for decision on April 29, 2004.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(A), and 1334(b).

FACTS

On February 2, 2001, the Debtor filed a voluntary petition under chapter 7 of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”). The Trustee was appointed on February 5, 2001.

In his Complaint, the Trustee seeks to substantively consolidate the assets of Phillipa M. Dickstein-Haick, the Debtor’s wife, with the estate of the Debtor. Complaint ¶¶ 30-36. Dickstein-Haick’s principal asset is a residence located in Vestal, New York (the “Property”), which she purchased in June 1997 for \$605,000. *See Purchase Agreement attached to Affidavit of Joseph E. Haick, filed Mar. 24, 2004 (“Debtor Aff.”)*. The Trustee alternatively seeks to avoid transfers between the Debtor and Dickstein-Haick pursuant to Code § 544(b), and §§ 273 and 273-a of New York Debtor and Creditor Law (“DCL”). Complaint ¶¶ 42-43.

The Debtor and Dickstein-Haick’s personal relationship allegedly began in the mid-1990s

while the Debtor was in the midst of a divorce. Affidavit of Dickstein-Haick, filed Mar. 8, 2004 (“Dickstein-Haick Aff.”), ¶¶ 5-6. The Debtor’s divorce from Mary Lou Stevens was finalized in 1999. *Id.* ¶ 6. Stevens became a creditor of Debtor’s estate on the basis of her recovery in the divorce proceeding. Complaint ¶ 8. The Debtor married Dickstein-Haick later in 1999. *Id.* ¶ 6. According to Dickstein-Haick, the Debtor moved in with her at the Property after the couple was married. *Id.* ¶ 12.

The Debtor was employed by Whale Securities (“Whale”) until April 1, 2000. Deposition of Joseph E. Haick, dated Dec. 22, 2003, at 110 *attached to* Affidavit of L. David Zube, Esq., filed Mar. 21, 2004 (“Zube Aff.”). In 1994, during his tenure at Whale, the Debtor provided Dickstein-Haick with \$12,000 to fund a trading account. Dickstein-Haick Aff. ¶ 11. Under the Debtor’s management, Dickstein-Haick’s portfolio allegedly grew to several hundred thousands of dollars. *Id.* In addition, the Trustee alleges throughout his papers that several other transfers occurred between the Debtor and Dickstein-Haick.

On June 17, 1996, the Debtor and Dickstein-Haick contracted with EWM Development to purchase the Property. *See* Purchase Agreement *attached to* Debtor Aff. On April 19, 1997, the Debtor transferred his interest in the Property to Dickstein-Haick. *Id.* ¶ 5. Dickstein-Haick allegedly purchased the Property largely from the profits that accrued in her Whale trading account. Dickstein-Haick Aff. ¶ 11. Dickstein-Haick’s other income source was her salary as a retail sales manager, which never exceeded \$37,000 during the years 1994 to 1997. *See* Dickstein-Haick income tax analysis *attached to* Zube Aff.

Between 1994 and 1998 Scott C. Gottlieb was the Debtor’s client, friend and attorney. Affidavit of Scott C. Gottlieb, Esq., filed Mar. 21, 2004 (“Gottlieb Aff.”), ¶¶ 4, 6. According to

Gottlieb, the Debtor would transfer into Dickstein-Haick's account certain stock trades Gottlieb could not afford or sought to cancel. *Id.* 9. After Gottlieb inquired whether her consent was necessary, Gottlieb alleges that the Debtor laughed and said, "I am Philippa." *Id.* Gottlieb claims that in 1996 he heard the Debtor state in a conversation in a bar among friends that he intended to shelter the Property from Stevens by placing the Property in Dickstein-Haick's name. *Id.* ¶ 7. Gottlieb also alleges that the Debtor lived at the Property with Dickstein-Haick as early as 1997. *Id.* ¶ 8. Gottlieb avers that his friendship with the Debtor ended in December 1998, when he allegedly discovered irregularities in his Whale accounts. *Id.* ¶ 5. In November 2003, Gottlieb received an award of \$120,000 against Whale and the Debtor in a NASD arbitration; he is now a creditor of the Debtor's estate. *Id.* ¶¶ 1, 5.

DISCUSSION

I. Overview

The issues presented to the Court are as follows: (1) whether as a matter of law the Property, which is wholly owned by Dickstein-Haick, may be substantively consolidated with the assets of the Debtor and (2) whether the Trustee can avoid certain transfers between Dickstein-Haick and the Debtor.

The reigning standard for granting a motion on summary judgment requires that there exist no genuine issue as to any material fact. *Torres v. Irvin*, No. 02-0295, 2004 WL 1147089, at *1 (2d Cir. May 19, 2004). A genuine issue exists only when "the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 248 (1986).

II. Substantive consolidation of a non-debtor individual

The test crafted by the Second Circuit in *In re Augie/Restivo Baking Co.*, 860 F.2d 515 (2d Cir. 1988), governs to a great extent this Court’s decision whether to grant the judicially created remedy of substantive consolidation. The primary purpose of substantive consolidation is to ensure the equitable treatment of all creditors. *Augie/Restivo*, 860 F.2d at 518. Under *Augie/Restivo*, substantive consolidation of a debtor’s assets with those of another entity is appropriate if (1) “creditors dealt with the entities as a single economic unit and ‘did not rely on their separate identity in extending credit’ [or (2)] the affairs of the debtors are so entangled that consolidation will benefit all creditors.” *Id.* (citations omitted).

Generally, substantive consolidation merges the assets of two or more corporate entities, which are usually both debtors. Notwithstanding the norm, courts have granted substantive consolidation in cases involving the assets of individuals, whether as a debtor or non-debtor. *E.g.*, *In re Bonham*, 229 F.3d 750 (9th Cir. 2000) (individual debtor with corporate non-debtor); *In re Baker & Getty Fin. Servs., Inc.*, 78 B.R. 139 (Bankr. N.D. Ohio 1987) (corporate debtor with individual non-debtor). However, according to the Court’s review of extant case law, there is no reported precedent for consolidating with an individual debtor’s estate the asset of a non-debtor individual who was not related to the debtor at the time the asset was purchased. The Court also notes that “consolidating a non-debtor’s estate with the case of an existing debtor is a much more sensitive matter than consolidating existing debtors.” *In re Bonham*, 226 B.R. 56, 83 (Bankr. D. Alaska 1998). Nonetheless, the Court acknowledges that it is the relationship

among the entities, not their respective form, that determines whether substantive consolidation is an appropriate remedy. *See FDIC v. Colonial Realty Co.*, 966 F.2d 57, 60 (2d Cir. 1992).

Because the Court is considering this issue on summary judgment, it must confine its decision to the undisputed facts. As far as the Court can glean from the parties' submissions, it appears that they dispute all of the operative facts that govern this analysis—namely the circumstances surrounding Dickstein-Haick's purchase of the Property and the management of her bank and trading accounts.¹ Thus, summary judgment is inappropriate because the *Augie/Restivo* test is highly factual and because there are disputed material facts pertaining to a genuine issue. Moreover, though this case may be an unusual candidate for substantive consolidation, the Court cannot conclude solely as a matter of law that such a remedy cannot be effected under any set of factual circumstances. *See Colonial Realty*, 966 F.2d at 59-61 (2d Cir. 1992) ("no basis . . . for a blanket proscription" against the substantive consolidation of individuals).

In view of the foregoing, the Court cannot foreclose the availability to the Trustee of the remedy of substantive consolidation. Accordingly, the Court denies the Debtor's motion for summary judgment as it pertains to this issue and directs that this cause of action proceed to trial.

III. Avoidance

The Trustee, pursuant to the avoidance power granted by Code § 544(b), seeks to invoke

¹ This is true despite both parties' regrettable failure to adhere to Local Rule 7056-1, which requires the submission of "a separate, short and concise statement of the material facts" for which there is or is not a genuine issue, as the case may be. Bankr. N.D.N.Y. Local R. 7056-1 *available at* www.nynb.uscourts.gov/usbc/lbr/Effective/RULE7056-1.htm.

DCL §§ 273 and 273-a to avoid certain transfers that took place between the Debtor and Dickstein-Haick. The Debtor argues that summary judgment should be granted as against the Debtor's alleged transfer of \$12,000 into Dickstein-Haick's trading account because the Trustee's claim is time-barred.

A six-year statute of limitations governs actions predicated on DCL §§ 273 and 273-a. In this case, the Complaint was filed on November 27, 2002; thus, the Trustee can only avoid transfers between the Debtor and Dickstein-Haick that occurred after November 27, 1996.

The Debtor contends that the \$12,000 transfer from him to Dickstein-Haick occurred in 1994, thereby falling outside the reach of the Trustee. However, the Debtor has failed to conclusively prove the date of transfer. In addition, the Trustee cites several other transfers that allegedly took place within the statutory period; these, too, are ripe for challenge until proven otherwise. Accordingly, the Court will deny summary judgment on this cause of action and direct that it proceed to trial as well.

IT IS SO ORDERED.

Dated at Utica, New York

this 14th Day of June 2004

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge