UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

RALPH J. MALANDRA
ROSEMARY T. MALANDRA

CASE NO. 00-63225

Debtors

ALLAN J. BENTKOFSKY, TRUSTEE

Plaintiff

vs.

ADV. PRO. NO. 00-80221

RALPH J. MALANDRA, ROSEMARY T. MALANDRA, JOSEPH F. MALANDRA and PATRICIA ANN MALANDRA

Defendants

APPEARANCES:

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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 for summary judgment, filed on March 19, 2001, by Allan J. Bentkofsky ("Trustee"), against Ralph J. Malandra, Rosemary T. Malandra

("Debtors"), Joseph F. Malandra and Patricia Ann Malandra ("Debtors' children") pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Rule 7056[1] of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), in an adversary proceeding commenced by Trustee on October, 27, 2000. Trustee seeks a judgment avoiding Debtors' transfer of residential real property to Debtors' children as fraudulent pursuant to § 544 (b)(1) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), which incorporates New York Debtor & Creditor Law ("N.Y. Debt. & Cred. Law") §§ 273, 275 and 276 . An affidavit in opposition to the Trustee's motion was filed by Debtor Ralph J. Malandra on April 13, 2001. *See* Ralph J.Malandra's affidavit ("Affidavit"), sworn to on April 5, 2001.

The motion was scheduled to be heard by the Court at its motion term on April 3, 2001, in Syracuse, New York, however, it was consensually adjourned to May 1, 2001, for oral argument and then submitted for decision.

JURISDICTIONAL STATEMENT

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

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[1] Although neither party has provided a separate, short and concise statement of material facts as required by the local rules of this Court (*see* Local Rule Bankr.P. 7056-1), it will consider Trustee's motion for summary judgment.

FACTS

In November of 1996, Debtor Ralph J. Malandra became unemployed. *See* Affidavit at ¶4. His gross income for the year 1996 totaled $32,483. *See* Trustee's Exhibit E. His gross income for the year 1997 totaled $16,010. *See* Trustee's Exhibit F. His gross income for the year 1998 totaled $24,420.[2] *See* Trustee's Exhibit G.

By deed dated April 3, 1998, both Debtors conveyed real property located at 318 Wells Avenue East, North Syracuse, New York 13212 ("Debtors' Residence") to their children. On April 30, 1998, the deed in which the Debtors' expressly reserved a life estate interest in said property was recorded. *See* Trustee's Exhibit C. At the time of conveyance, Debtors' Residence was appraised and valued at $43,000, subject to a $24,000 mortgage lien held by M&T Bank. *See* Trustee's Exhibit D. Debtors did not receive money or anything else of value in return for the conveyance of said property. *See* Ralph J. Malandra's deposition ("Transcript") at page 12. Additionally, Debtors did not owe any money to Debtors' children prior to, or at the time of the conveyance. *See* Transcript at page 13.

After the conveyance of the Residence, Debtors continued to reside there and, pursuant to the express provisions contained in the recorded deed, Debtors continued to pay the outstanding mortgage and real estate taxes on the property. *See* Transcript at page 16. Debtors' children made no payments towards the mortgage and real estate taxes on said property. *See*

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[2] Debtor indicates on his "Statement of Financial Affairs" that he received $10,320 in pension distributions and $14,100 in social security income for the year 1998. However, Internal Revenue Form 1099R indicates Debtor only received $9,801 in pension distributions. *See* Trustee's Exhibits A and G.

Transcript at page 16. Debtors' children's only contribution towards the maintenance and upkeep of said property was some front-yard landscaping. *See* Transcript at page 17.

On June 26, 2000, Debtors filed a voluntary petition seeking relief pursuant to Chapter 7 of the Code. Schedule A of Debtors' original petition did not list any interest in real property. Schedule D of Debtors' original petition did list a secured claim for a home equity loan held by M&T Bank in the amount of $24,000. *See* Trustee's Exhibit A. On September 6, 2000, Debtors amended Schedules A and C of their original petition to include the value of the life estate reserved in the Residence. *See* Trustee's Exhibit B; Affidavit at ¶ 7.

Schedules A and C of Debtors' amended petition inaccurately list the total value of Debtors' assets at $48,945. Debtors erroneously included the value of their Residence ($43,000), which they no longer owned at the time of filing, in their amended Schedules. Debtors' amended Schedules, if accurately filled out, should have listed the total value of Debtors' assets at $12,419 (life estate reserved in real property valued at $6,474 plus personal property valued at $5,945). *See* Trustee's Exhibit B. Debtors' personal property included: a 1990 Chevy van valued at $400.00 and a 1989 Pontiac 6000 sedan valued at $2000.00; household furniture valued at $2,500.00; wearing apparel valued at $1,000.00; and a nominal checking account balance. *See* Trustee's Exhibit B; Transcript at pages 18-21. Debtor asserts that the value of their personal property on the date of conveyance of the Residence, April 3, 1998, remained the same on the date Debtors amended Schedule C[3] of their petition. *See* Transcript at page 18.

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[3] Schedule C does not list the $2,500 annuity that Debtors possessed on April 3, 1998, as Debtors redeemed the annuity in February of 2000 to purchase cemetery plots. *See* Transcript at pages 19-20. Therefore, an accurate approximation of Debtors' total assets at the time of the conveyance in 1998, including the Residence, may be estimated at $51,445.

Schedule F of Debtors' petition lists Debtors' unsecured debt in the amount of $84,950 at the time of filing. *See* Trustee's Exhibit A. Debtor asserts that the amount of debt listed in Schedule F was incurred both before and after Debtor Ralph Malandra lost his job in November or December of 1996. Debtor further asserts that "a lot of [d]ebt[4] was incurred after I lost my job." *See* Transcript page 25 at lines 15-16.

ARGUMENTS

Trustee argues that the transfer of the Debtors' Residence to the Debtors' children in 1998 qualifies as a fraudulent conveyance under N.Y. Debt. & Cred. Law §§ 273 and 275. Trustee asserts that the conveyance was "constructively" fraudulent because Debtors transferred said property without fair consideration when Debtors were presumptively insolvent and knew they would be incurring debts beyond their ability to pay them. *See* Trustee's Memorandum of Law, filed March 19, 2001.

Trustee further contends that the transfer of Debtors' Residence is a fraudulent conveyance under N.Y. Debt. & Cred. Law § 276. Trustee asserts that the conveyance was "actually" fraudulent because certain "badges of fraud" are apparent in the transfer of said property and support the Trustee's position that the Debtors intended to defraud their creditors. As such, Trustee seeks to avoid the transfer under Code § 544(b)(1).

In response, Debtors argue that the Trustee's reasoning is misplaced because Debtors'

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[4] The exact amount of unsecured debt at the time of the transfer is undetermined as pages 22-24 are omitted from the transcript.

"Homestead Exemption" would negate any equity Trustee might have sought to recover if Debtors had filed their Chapter 7 petition prior to the time of the property transfer. Debtors assert that there has been no determination made with regard to whom and in what amount debts had matured at the time of the conveyance for the purpose of determining Debtors' insolvency. Debtors also contend that an action to set aside a deed can only be maintained by a creditor whose claim has not matured under N.Y. Debt. & Cred. Law § 279. *See* Debtor's Affidavit at ¶ 10.

Finally, the Debtors argue that the conveyance of their Residence was not fraudulent under N.Y. Debt. & Cred. Law § 276 because the conveyance lacks the requisite "mutual fraudulent intention" on the part of the grantors and grantees, noting that the Residence was transferred to Debtors' children for estate planning purposes in the same manner the property had been transferred to Debtor Ralph Malandra by his mother in 1989.

DISCUSSION

Fed.R.Civ.P. 56, incorporated by reference in Fed.R.Bankr.P 7056, "provides that summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled, as a matter of law, to a judgment in its favor." *In re Bennett Funding Group, Inc.*, 220 B.R. 743, 751-752 (Bankr. N.D.N.Y. 1997), citing *Federal Deposit Ins. Corp. v. Bernstein,* 944 F.2d 101, 106 (2d Cir. 1991). The moving party has the initial burden of demonstrating that there is no genuine issue of material fact for trial. *In re Corcoran*, 246 B.R. 152, 158 (Bankr. E.D.N.Y. 2000), citing *Matsushita Elec. Indus. Co. v Zenith Radio Corp.,* 106 S.Ct. 1348 (1986). Once the moving party has met its initial burden, "the non-movant must then

come forward with sufficient evidence on the elements essential to its case to support a verdict in its favor." *Corcoran,* 246 B.R. at 158, citing *Celotex Corp. v. Catrett,* 106 S.Ct. 2548 (1986).

In deciding to grant or deny summary judgment, "the trial court must resolve all ambiguities and draw inferences in favor of the party against whom summary judgment is sought." *Bennett Funding Group, Inc.,* 220 B.R. at 751, citing *LaFond v. General Physics Servs. Corp.,* 50 F.3d 165, 171 (2d Cir. 1995); *Corcoran*, 246 B.R. at 156, citing *Reyes v. Delta Dallas Alpha Corp.*, 199 F.3d. 626, 627-28 (2d Cir. 1999). Summary judgment is therefore inappropriate if any evidence exists in the record upon which a reasonable inference may be drawn in favor of the non-moving party. *Id.,* citing *Chambers v. TRM Copy Ctrs. Corp.,* 43 F.3d 29, 37 (2d Cir. 1994).

Bankruptcy Code § 544(b)(1) provides, as follows:

> Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable state law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b)(1). Pursuant to Code § 544 (b)(1), a bankruptcy trustee can utilize New York State's version of the Uniform Fraudulent Conveyance Act (UFCA), codified at N.Y. Debt. & Cred. Law §§ 270-281, to set aside fraudulent transfers for the benefit of the bankruptcy estate. *Corcoran,* 246 B.R. at 158. In doing so, the Trustee has the "option of proving that the challenged transactions are constructively fraudulent, *see* § 273, or actually fraudulent, *see* § 276." *Id.,* citing *HBE Leasing Corp., v. Frank,* 48 F.3d 623, 636 (2d Cir. 1995). Such actions

must be commenced within six years from the date of the contested transaction.[5] *Quadrazzi Concrete Corp. v. Mastroianni,* 56 A.D.2d 353, 355 (2d Dept. 1977); N.Y. Civil Practice Law and Rules 213 (McKinney 1990 & Supp. 2001). Conveyances that are found to be fraudulent may then be set aside under N.Y. Debt. & Cred. Law §§ 278-279. N.Y. Debt. & Cred. Law §§ 278-279 (McKinney 1990 & Supp. 2001).

N.Y. Debt. & Cred. Law § 273 provides that "every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made...without fair consideration." N.Y. Debt. & Cred. Law § 273 (McKinney 1990 & Supp. 2001). Thus, a transfer is considered a fraudulent conveyance under N.Y. Debt. & Cred. Law § 273 if the requirements of lack of fair consideration and insolvency are met, regardless of the transferor's intent. *In re Lollipop, Inc.,* 205 B.R. 682, 686 (Bankr. E.D.N.Y. 1997), citing *HBE Leasing,* 48 F.3d at 633.

Generally, N.Y. Debt. & Cred. Law § 273 places the burden of proving both lack of fair consideration and insolvency on the party challenging the conveyance. *United States v. McCombs*, 30 F.3d 310, 323-324 (2d Cir. 1994); *In re 375 Park Assocs., Inc.,* 182 B.R. 690, 695 (Bankr. S.D.N.Y. 1995); *American Inv. Bank, N.A. v. Marine Midland Bank, N.A.*, 191 A.D.2d 690, 692 (2d Dept. 1993). N.Y. Debt. & Cred. Law § 272 defines "fair consideration" as follows: "Fair consideration is given for property, or obligation, (a) when in exchange for such property, or obligation, as fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied." N.Y. Debt. & Cred. Law § 272 (McKinney 1990 & Supp. 2001). Debtors

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[5] By contrast, Code § 548 applies only to fraudulent transfers made within one year of a debtor's filed petition. 11 U.S.C. § 548.

concede that they did not receive money or anything else of value in exchange for the transfer of their residence. The record also indicates that Debtors did not have any outstanding debts owing to their children prior to, or at the time of the conveyance. As such, Trustee has demonstrated that there is no triable issue of material fact as to the lack of fair consideration for the property transfer.

Debtors acknowledge that much of the unsecured debt listed in their petition arose after Mr. Malandra lost his job and was outstanding at the time they transferred their Residence. Thus, having determined that the Debtors transferred their Residence to their children without fair consideration and that the transfer occurred at a time when debts were owed to creditors, a presumption exists that the transfer rendered them insolvent, thereby satisfying the Trustee's burden of proof. *See Corcoran*, 246 B.R. at 163 (citations omitted); *see also Tabala*, 11 B.R. at 408 (noting that "'[t]here is a rule of long standing in the New York courts that a *voluntary* conveyance made when the grantor is indebted is presumptively fraudulent. We think this means that, if one indebted makes a such a transfer, it is presumed, in the absence of some proof to the contrary, that he was then insolvent.'"(quoting *Feist v. Druckerman,* 70 F.2d 333, 334 (2d Cir. 1934)); *In re Russo*, 1 B.R. 369, 379 (Bankr. E.D.N.Y. 1979) (indicating that with respect to N.Y. Debt. & Cred. Law § 273 "a conveyance made by a grantor, without consideration, at a time when he is indebted to various creditors, raises a presumption of insolvency."). Accordingly, the burden shifts from the Trustee to the Debtors' children, as transferees, to demonstrate that the Debtors remained solvent after the transfer. *See* Corcoran, 246 B.R. at 163 (citations omitted).

N.Y. Debt. & Cred. Law § 271 provides that "a person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability

on his existing debts as they become absolute and matured." N.Y. Debt. & Cred. Law § 271 (McKinney 1990 & Supp. 2001). Section 271 "imposes a "balance sheet" test, namely assets versus liabilities." *Russo,* 1 B.R. at 380; *Tabala*, 11 B.R. at 408. Pursuant to N.Y.Debt. & Cred. Law § 271, the Debtors' children had the burden in this case to establish that the value of the Debtors' remaining assets exceeded the amount of their debt after the transfer of the Residence.[6]

Debtors' assets, including their Residence, totaled $ 51,445 at the time of conveyance on April 3, 1998. During that same period, Debtors' liabilities totaled $108,950 ($24,000 in secured debt comprised of the mortgage on their Residence and $84,950 in unsecured debt). Employing the "balance sheet" test, the fair salable value of Debtors' assets, $51,445, was not sufficient to pay Debtors' $108,950 debt obligation on the date of conveyance. The fact that the Debtors' $24,000 debt on the secured home equity loan may not have been "absolute or mature" at that time, does not change the fact that the Debtors's unsecured debt far exceeded the value of their assets. This is particularly true when one considers that after the transfer of their Residence to their children, the Debtors' liabilities, both secured and unsecured, remained the same while the value of their assets decreased as a result of the conveyance of a fee interest in the Residence and the reservation of only a life estate.

Neither the Debtors nor their children, who had the actual burden as transferees, have presented any facts indicating that the Debtors were solvent on April 3, 1998. Debtors' assertion that their exact amount of indebtedness prior to the conveyance has not been determined and that

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[6] The amount of income the Debtors may have been receiving in the form of pension benefits and Social Security benefits to cover their living expenses and other liabilities, in and of itself, is not relevant to the question of the Debtors' solvency at the time of the transfer. *See Russo*, 1 B.R. at 380.

there has been no determination concerning whether the debts were mature or not, is not sufficient to rebut the presumption of insolvency.[7] *Lollipop, Inc.,* 205 B.R. at 686. Indeed, a "[m]ovant may sustain his or her burden of proof in a summary judgment motion by showing that little or no evidence supports the nonmovant's case." *Id.* at 687. In this case, the Debtors' children did not proffer any evidence to satisfy their burden of demonstrating Debtors' continued solvency after Debtors transferred the property to them for no consideration. *Corcoran,* 246 B.R. at 163. In fact, nowhere in the record do Debtors' children even suggest that Debtors were solvent when they transferred their Residence to them.

Instead of raising issues of material fact contrary to their presumed insolvency, Debtors rely on the premise that the property transfer does not qualify as a fraudulent conveyance under N.Y. Debt. & Cred. Law § 273 because they could have claimed their Residence as exempt property under New York's "homestead exemption" provision if they had filed for bankruptcy protection at the time of conveyance. It is the Debtors' position that in the event that the Trustee were to be successful in avoiding the transfer of the Residence, they would again own the property as tenants by the entirety and would simply amend their schedules to claim their homestead exemption.

This argument fails to take into consideration Code § 522(g) which "limits the ability of a debtor to claim an exemption where the trustee has recovered property for the benefit of the estate." *In re Glass*, 164 B.R. 759, 761 (9th Cir. BAP 1994), *aff'd* 60 F.3d 565 (9th Cir. 1995)

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[7] Debtors' argument that an action to set aside a deed can only be maintained by a creditor whose claim has not matured is without merit. Debtors' reliance on N.Y. Debt. & Cred. Law § 279 is misplaced in that it merely identifies the remedies for those creditors whose claims have not matured. N.Y. Debt. & Cred. Law § 278 addresses the rights of creditors whose claims have matured and includes the right to set aside the conveyance. *See* N.Y. Debt. & Cred. Law § 278(1)(a).

(citations omitted). "Thus, under § 522(g)(1), a debtor may not exempt recovered property if the debtor voluntarily transferred such property or concealed the transfer of an interest in such property." *Id.* at 762. Clearly, the Debtors in this case transferred the Residence to their children voluntarily and, accordingly, Code § 522(g)(1) would prohibit them from claiming an exemption in the Residence.

In this case, in the absence of any evidence to support a factual finding that Debtors were solvent when they transferred their Residence without consideration to their children, the Court finds that the Trustee has met his burden of establishing constructive fraud pursuant to N.Y. Debt. & Cred. Law § 273 and is entitled to summary judgment. Furthermore, having granted Trustee's sought after relief on a determination of constructive fraud, the Court need not consider Trustee's causes of action alleging actual fraud.[8]

Based on the foregoing, it is hereby

ORDERED that Trustee's motion for summary judgment is granted as to the issue of whether the transfer of Debtors' Residence to their children qualifies as a fraudulent conveyance under N.Y. Debt. & Cred. Law § 273; and it is further

ORDERED that said conveyance be avoided under Code § 544(b)(1).

Dated at Utica, New York

this 22nd day of August 2001

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[8] Although Debtors vehemently argue that they transferred their Residence for letigimate estate planning purposes without any intent to defraud their creditors, such argument is irrelevant in light of the fact that "intent" is not an element of proving that a conveyance is constructively fraudulent within the meaning of N.Y. Debt. & Cred. Law § 273. *See In re Bennett Funding Group, Inc.,* 220 B.R. 743, 771 (Bankr. N.D.N.Y. 1997).

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge