UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

DAVID F. O'KEEFE — Case No. 00-13394

Debtor

JUDITH MINKOFF GREY

Plaintiff

-against- — Adversary No. 00-90167

DAVID F. O'KEEFE

Defendant.

MARC S. EHRLICH, CHAPTER 7 TRUSTEE

Plaintiff

-against- — Adversary No. 00-90226

DAVID F. O'KEEFE and MARY LOU O'KEEFE

Defendants.

APPEARANCES:

O'CONNELL AND ARONOWITZ
Attorneys for Trustee
100 State Street
Albany, New York 12207

Michael D. Assaf, Esq.
Of Counsel

DeVALL AND DeVALL
Attorney for Defendants
59 Franklin Street
Saratoga Springs, New York 12866

David F. DeVall, Esq.
Of Counsel

PAUL J. HYAMS, ESQ.
25 Wilshire Drive
Delmar, New York 12054

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

MEMORANDUM-DECISION AND ORDER

The first of the two adversary proceedings before the court was brought by Judith Minkoff Grey, representative of the Estate of Eric Arnold Grey, seeking denial of discharge pursuant to 11 U.S.C. § 727(a)(2). The second was brought by the Chapter 7 Trustee ("Trustee"), seeking recovery of fraudulent conveyances pursuant to 11 U.S.C. § 544(b) and N.Y. Debt. and Cred. L. §§ 273 and 276 from the Debtor and his wife (sometimes collectively referred to as "Defendants"), attorney's fees pursuant to N.Y. DEBT. & CRED. L. § 276-a and a denial of discharge pursuant to 11 U.S.C. §§ 727(a)(2) and 727(a)(4).[1] Because core proceedings under 28 U.S.C. §§ 157(b)(2)(F) and 157(b)(2)(J) are involved, the court has jurisdiction pursuant to 28 U.S.C. §§ 157(a), 157(b)(1) and 1334(b).

Facts

The facts surrounding the denial of discharge issue are the same in both adversary proceedings. Both the stipulation of facts[2] and the admitted exhibits reveal that the monetary recovery the Trustee seeks essentially involves two sets of funds: the "Pleasantville proceeds" and the "Hoo proceeds."

---

[1]The Amended Complaint states its thirteenth cause of action is based on 11 U.S.C. § 727(a)(5). That objection to discharge section is not mentioned in the Trustee's post trial submissions, thus, the court concludes he has withdrawn or abandoned that cause of action.

[2]The court has treated the document filed on August 6, 2001, the document marked #32 on the adversary proceeding's docket, as a joint stipulation of facts. That document is the Debtors' marked-up version of the original stipulation of facts proposed by the Trustee that he filed on August 2, 2001.

I. Background Facts[3]

In 1981, the Debtor went into business with Eric Arnold Grey ("Grey") selling retail and wholesale auto parts; each owned 50% of the company. Initially, the auto parts business was located on White Plains Road in the Bronx in a building that the Debtor and Grey owned via a company called "ARDA, Inc." They each owned 50% of that company as well.

In 1983, the year the Debtor and his wife were married, ARDA, Inc. purchased a new building on White Plains Road and the Debtor and Grey relocated the auto parts business there. In 1988, the Debtor bought out Grey's interest in the auto business for a total of $350,000. Payment was secured by a promissory note dated July 28, 1988 ("note") which provided for repayment of the outstanding principal sum at $4,333 per month and a 10% interest rate.

The Debtor made the regular monthly payments on the note until late 1994 or early 1995 when he began paying only the interest.[4] He made the payments on the note via direct deposits into Grey's bank account. The Debtor closed the auto supply business sometime in September 1995. When it closed, he owed some trade debt but he paid the vendors in full by giving back their inventory. (Ex. 41 p. 33.)[5] The bank apparently foreclosed on the building where the auto supply business operated, but there is no evidence in the record regarding what deficiency, if any, ARDA, Inc. or the Debtor owed. (Ex. 41 pp. 33-34.)

---

[3]The facts in this part of the decision are based largely on the stipulation.

[4]This is a stipulated fact. (Stip. ¶ 11.) The court notes, however, that the Debtor's actual deposition testimony is slightly different. He testified that it was two or three months before October 1995, maybe July or August, that he began paying only the interest. (Ex. 41 pp. 26, 33.)

[5]The transcripts of both the Debtor's and his wife's deposition testimony were admitted, without objection, pursuant to the court's scheduling order. They are Exhibits 38 through 41.

During both of his depositions, the Debtor testified that his income after the business closed came from Social Security (at approximately $1,150/month, three months after the business closed), a pension (at $270 - $282/month), sales proceeds from his house in Pleasantville, working at the Saratoga Race Track in August 1996 and working at B&J Auto Parts (for $6.50 - $9/hr, 20 hrs/week). (Ex. 38 p. 29-30, 33; Ex. 41 pp. 37-40.) He also testified that he usually gave his Social Security checks to his wife to deposit into her banking account and that he gave both his pension and his paychecks to his wife to cash; she cashed them and gave the money to him for spending money. (Ex. 38 pp. 34-35.) According to his deposition testimony neither he nor his wife had any stocks, bonds, brokerage accounts or other bank accounts; she owned two cars, one from her daughter, but he did not own any. (Ex. 38 pp. 37-38, 33-34.)

Grey died in June 1994. The Debtor testified at one of his depositions that he continued to pay on the note after Grey's death and "never missed a payment" until October 1995 when the auto supply business closed. (Ex. 41 pp. 20-21.) On September 17, 1997, Grey's estate obtained a judgment in the amount of $343,671.86. On or about May 16, 2000, his estate began a fraudulent conveyance recovery action against the Debtor in state court.

II. Facts Surrounding the Pleasantville Proceeds

The following facts are based on the stipulation, the Debtor's and Mary Lou O'Keefe's deposition testimony and other exhibits:

The Debtor testified that in 1983, he and his wife lived in a condominium in a development called "Stone Oaks"; according to him, title was in both of their names. (Ex. 38 p. 5.) His wife testified that beginning sometime in 1973 and ending approximately 12 years later,

she resided in a co-op. (Ex. 40 pp. 50-51.) The court has not seen any deposition testimony by her indicating title status on the co-op, other than her purchase of it. (Ex. 40 p. 50.) What both the Debtor and his wife have stipulated, however, is that while he operated the auto supply business, and up until October 1994, they lived in a house located in Pleasantville , NY. The deed to the Pleasantville house was in both spouses' names. (Ex. 41 p. 7.)

On or about October 1994, while he made interest-only payments on the note, the Debtor and his wife sold the Pleasantville residence and deposited the net proceeds of the sale, $234,392, into a joint bank account maintained at Hudson Valley National Bank bearing account #23709849. (Ex. 1.) On November 30, 1994, his wife deposited $200,000 of a $202,000 withdrawal from the joint account into a "personal money market account" in her name only. (Ex. 2 and 3.) During the month of February 1995, using funds from the joint account, the Debtor's wife distributed a $10,000 check to each of her four children as a gift. (Ex. 4 and 5.) A wealth of testimony from the deposition transcripts establishes the Debtor's wife used the remaining moneys in the joint account to pay living expenses for herself and the Debtor, before, during and after the couple's separation in 1995. The Debtor himself testified that other than a "very minor amount of money," he and his wife had no other assets in October 1994 when the Pleasantville house was sold. (Ex. 38 p. 71.) The Debtor's wife testified that the money from the sale of that house was hers and that she did not want her husband to put it back into the business. (Ex. 40 pp. 49, 139-140.)

While the couple was separated and the Debtor's wife was living off of the Pleasantville sale proceeds and had no other source of income, she bought a house at 27 Pine Ridge, Stillwater, NY for $210,000 with a $100,000 mortgage. From October 1994 through their year-

long separation period, the Debtor lived in a rental property on Hussey Road in Mount Vernon, NY where he believes he paid $1,700/month rent although he has not offered any documentation to support that. (Ex. 41 p. 5.) After he closed the auto parts business in September or October 1995, he moved to his wife's house on Pine Ridge.

The Debtor's wife sold the Pine Ridge house on March 15, 2000 for approximately $222,000, netting approximately $10,139 plus a $14,500 deposit. (Ex. 22.) Using that $14,500 deposit plus a $1,000 down payment, a $1,000 bank check, a $173.96 personal check and, presumably, a mortgage for the difference, the Debtor's wife purchased 1 Eureka Avenue in Saratoga, NY for a purchase price of $221,750; she closed on that same day. The Eureka Avenue address is the address the Debtor listed as his address on his petition. He did not list any real property on his Schedule A.

III. Facts Surrounding the Hoo Proceeds[6]

After ARDA, Inc purchased the new building on White Plains Road and the Debtor and Grey moved the auto parts business there, it leased the business's former building site to Norman Hoo ("Hoo"). Hoo eventually purchased that building, giving the Debtor a note as part of the purchase price ("Hoo note").[7] At first, the Debtor deposited principal and interest payments on the Hoo note in the joint account he had with his wife, but later it was deposited in his wife's account. The Hoo note is not an admitted exhibit and the parties have not stipulated when the Hoo note deposits into the Debtor's wife individual bank account began or the total amount of

[6]The facts in this part of the decision are based on the stipulation and Exhibits 6 and 15.

[7]The Debtor's wife testified that when Hoo bought the building, Grey received his half of the purchase price while the Debtor "took back notes on the other [half]." (Ex. 40 p. 102.)

those payments.[8] The last activities on the joint account recounted by both sides are the Debtor's wife's $202,000 withdrawal on November 30, 1994 and the four $10,000 checks she gave to each of her children in February 1995.

In 1997, Hoo paid the balance due on his note. The Debtor's wife retained counsel in White Plains, NY to assist her in this transaction because the money paid to retire the Hoo Note was paid to her. The funds were deposited into her counsel's escrow fund. Later, two checks of approximately $10,000 each, were distributed to her children, Jeri Ann Sicari and Frank Sicari. She received the balance, but the amount she received is not in the record.

Jeri Ann Sicari and Frank Sicari used the Hoo note proceeds they received as the down payment on the purchase of a parcel of income property in Saratoga County known as 43 Preakness Way. A property known as 302 Grand Avenue, Saratoga Springs, NY had also been purchased by Jeri Ann Sicari; title was placed in her name approximately one year prior to the purchase of Preakness Way. The down payment of approximately $20,000 is traceable to either the Hoo note proceeds and/or the $10,000 she received when the Debtor's wife gave her $10,000 in February 1995.

During the time they owned Preakness Way and Grand Avenue, Jeri Ann Sicari and Frank Sicari maintained a joint bank account for the deposit of rents and the payment of the mortgages. The Debtor's wife had signature authority on the account and she often wrote the

---

[8]The Trustee, using Exhibits 6, 15 and 40, calculates the total amount as follows: $900/month x 26 months = $23,400. The Trustee did not, however, pursue a line of questioning that established 26 payments of $900 were, in fact, made by Hoo or that 26 payments of $900 actually went into her individual account. (Ex. 40 p. 182.)

checks to pay the mortgage installments. In late 1999 and early 2000, the two properties were sold and the net proceeds of sale were deposited into the siblings' joint account.

On May 16, 2000, the Debtor and his wife were served with the Grey estate's fraudulent conveyance recovery complaint. That evening, the Debtor's wife went to Charter One Bank, the bank where the siblings' joint account was, and withdrew all of the net proceeds from the sale of the two rental properties. She took the money in the form of at least one bank check made payable to her. On June 7, 2000, she returned to Charter One Bank and cashed a $26,000 bank check that had been issued on May 16, 2000. She took half of this amount in cash and the other half in the form of another bank check.

IV. The Debtor's Schedules and Statement of Financial Interest[9]

On his Schedule A, the Debtor lists an interest in a pension from Local 239; he valued it at $0. His Schedule I shows the following sources of income per month: gross wages $275.20; Social Security $1,180; and "other income" $282. He signed the Declaration Concerning Debtor's Schedules on June 15, 2000. He lists B&J Auto Supply and Joseph M. Hostig, Inc. as his sources of employment income in answer to Question 1 on his Statement of Financial Affairs and Social Security and the Local 239 pension as his sources of income other than from employment in answer to Question 2. For Question 10, "Other Transfers," the Debtor states "None."

V. The Amended Complaint, the Answer to the Amended Complaint and the Trial

In his amended complaint, the Trustee alleged the Debtor and his wife purchased the Pleasantville house in 1987, sold it in 1994 and deposited the net proceeds of $234,392 into their

[9]The court admitted the Debtor's entire petition as Exhibit 43.

joint bank account. (Amended Complaint ¶ 19.) He also alleged the Debtor's wife withdrew the remaining moneys in the joint bank account sometime in November 1994[10] and transferred them to her own account. (Amended Complaint ¶ 20.) In their amended answer, the Debtor and his wife admit all of that. (Answer to Amended Complaint ¶¶ 1, 8.) Neither the amended complaint nor the answer to the amended complaint alleges the houses or bank accounts existing prior to the November 1994 transfer were anything other than jointly held by the Debtor and his wife. The Debtor and his wife's three affirmative defenses were that the disposition of sales proceeds did not render him insolvent, that there was no jurisdiction over the Debtor's wife's children[11] and that their alleged failure to schedule tax claims and/or liens was due to the advice of their prior attorney. (Answer to Amended Complaint ¶¶ 20-22.)

The court conducted a three-day trial. Neither side has filed any transcripts of the testimony given during it. Thus, specific findings of what happened during those three days are based largely on the court's proceeding memo for the trial and other papers filed in the adversary proceeding.

During the first day of trial, the Trustee made an oral motion for summary judgment on his section 273 cause of action; the court reserved on the motion until the next trial date. At the conclusion of the first day, the court instructed each party to file a memorandum of law regarding the legal effect of the Debtor and his wife's failure to plead as an affirmative defense the "separate property" defense they raised for the first time at trial.

---

[10]The court assumes the "5" in that part of paragraph 20 alleging the transfer occurred in "1995" was a typo and the correct year is 1994, the year the parties have stipulated as a fact.

[11]The Debtor's wife's children are now defendants in a separate adversary proceeding.

Prior to the second day of trial, the Debtor filed a motion to continue the trial. In the papers he filed he sought a continuation because of his attorney's concession of the issue of insolvency. To the court, the Debtor wanted what would have been his second opportunity to show that he was not insolvent in October 1994; his attorney had conceded insolvency during the course of the Trustee's presentation of proof on his section 273 cause of action.[12]

During that second day of trial the court denied the Debtor's motion for a continuance; it also informed the parties that it would decide the "separate property" issue post trial, permitting the Debtor's wife to offer testimony regarding the facts surrounding the purchase of the Pleasantville house. As the court has already pointed out, the trial testimony she gave was not made part of the record.

The only other "procedural" aspect of the trial the court recalls by reviewing the proceeding memo is the Trustee's second motion for summary judgment that he made at the close of his case in chief, this time on the remaining causes of action. Although the court reserved on that motion, it shifted the burden of going forward to the Debtor and his wife on all of the causes of action.

Argument

The Trustee contends he has met his burden of proving that the Debtor made two fraudulent transfers (i.e., the Pleasantville proceeds and the Hoo note proceeds) under N.Y. DEBT. & CRED. L. § 273. He argues that under § 273, he only had to establish that the Debtor

---

[12]Debtor's counsel reflects that concession at the bottom of unnumbered page 4 of his post trial "Preliminary Statement."

made a conveyance without consideration, while he was insolvent or which rendered him insolvent. He cites *In re Corcoran*, 246 B.R. 152 (E.D.N.Y. 2000).

Additionally, the Trustee argues he has proved both transfers meet the fraudulent transfer requirements under N.Y. DEBT. & CRED. L. § 276. In his post trial memorandum, he cites a number of cases where the courts have viewed certain "badges of fraud" as evidence of actual intent to defraud creditors and argues the "clear and convincing" evidence at trial shows nine of those badges exist. As for the Debtor's wife's allegation that the proceeds from the sale of the Pleasantville house were her "separate property," the Trustee asserts such a position was an affirmative defense the Debtor and/or his wife were required to plead, and failed to plead, under Fed. R. Civ. P. 8(c). He argues both are barred from raising it for the first time at trial. Alternatively, he contends the Debtor's deposition testimony that title was jointly held clearly shows the Pleasantville house was one-half his and was not rebutted by either the Debtor or his wife at trial; he relies on *DeJesus v. DeJesus*, 90 N.Y.2d 643 (1997) as support for this contention. He also argues that during the discovery phase of the proceeding, the Debtor and his wife continually stated they had "thrown away" all of their records or did not possess records responsive to discovery requests. According to him, he did not have any notice of the "separate property" argument, he was not prepared to properly litigate all issues; he cites *Blonder-Tongue Lab., Inc. v. University of Illinois Found.,* 402 U.S. 313 (1971).

The Trustee asserts he has also proven the Debtor should not receive a discharge. He believes the Debtor's admitted transfer of all of his income to his wife within the one year limitation period meets the criteria for denying discharge pursuant to 11 U.S.C. § 727(a)(2)(A). Relying on what he calls the "continuous concealment doctrine" and several circuit and district

court cases, he also argues the "larger transfers" meet that section's provisions too. As for a denial of discharge pursuant to 11 U.S.C. § 727(a)(4), the Trustee cites more district court cases and a few of the cases he relies on for section 727(a)(2)(A) purposes. In particular, he believes the Debtor's case is similar to the facts of *In re Johnson*, 189 B.R. 985 (N.D. Ala. 1995).

The Debtor and his wife contend the Trustee has not met its burden of proving all of the elements of N.Y. DEBT. & CRED. L. §§ 273 or 276 and neither the Trustee nor Grey's estate has proven the elements of 11 U.S.C. §§ 727(a)(2) or 727(a)(4). Instead of filing a memorandum citing and interpreting law they believe is favorable to them, they move sequentially through the Trustee's memorandum, pointing out six areas they believe the Trustee provided "inappropriate argument." Relying largely on one of their earlier submissions, they reiterate their interpretation of *A.J. Armstrong Co., Inc. v. Halikman*, 45 A.D.2d 995 (N.Y. App. Div. 2d Dep't 1974), arguing there is a legal distinction between a "conveyance" and a "transfer" for section 273 purposes. The Debtor also argues Grey's estate did not have a "claim" at the time of any of the transfers, especially since there was no acceleration clause. He also continues to assert he did not waive the issue of insolvency with regard to section 276 despite the court's ruling that he waived the issue during that part of the trial involving section 273. According to him, the diagrams drawn by the Trustee's counsel at trial[13] and his bankruptcy schedules show he is and has been gainfully employed. He says he did not disclose the income deposits into his wife's bank account because such deposits were not ones he made "other than in the ordinary course of [his] business or financial affairs."

[13]Neither party asked to have the diagrams admitted into evidence.

With regard to the section 727 causes of action, the Debtor and his wife argue the mere transfer of an income stream, standing alone, does not meet section 727(a)(2)(A). Reviewing the cases the Trustee cites, they argue those cases and every case they could find involved transferring real or personal property items, i.e., transfers that place a thing of value beyond the reach of levy and execution. They go on to assert that the Debtor's Social Security income and his other income, at least to the extent of 90%, was entirely exempt from levy. They do not cite any authority to support that assertion.

The Debtor believes he did not make any illegal transfers and argues he did not make a false oath or account by not disclosing the deposits into his wife's bank account. He also argues that because he relied on his attorney, he lacked the intent to hinder or delay a creditor. To that end, he does cite some cases, but does not point to the record to show when or how legal advice was obtained or rendered.

As for their "separate property" defense, the Debtor and his wife argue they were not required to plead "separate property" as an affirmative defense since it is the Trustee's burden to show the Pleasantville proceeds were the Debtor's in February 1995 when they were allegedly transferred. Their first alternative argument is that the only category under N.Y. Civ. P. L. & R. 3018 that applies here is the "surprise" one; they contend the Trustee cannot successfully claim it because of the Debtor's wife's deposition testimony that the Pleasantville proceeds were hers. They also contend that precluding them from producing evidence at trial of what they had already denied as a fact in their answer would reward the Trustee for his failure to ask follow-up questions regarding the purchase of that house. Their second alternative argument is that the

Debtor held his interest in the Pleasantville property in trust for his wife; once again, they rely on *Halikman*.

In his reply brief, the Trustee distinguishes *Halikman*[14] and discounts the Debtor and his wife's "separate property" defense; he even suggests that stating *Halikman* is directly on point is both a bad faith and facially sanctionable argument. He points out that they provide no case law or statutory authority to support their argument that Grey's estate did not have a claim when the transfers occurred and argues they have not referred to any facts in the record which show the Debtor was paying more than "interest only."

The Trustee uses, once again, the phrases "bad faith" and "facially sanctionable" with respect to Debtor's counsel's argument that the Debtor's insolvency was conceded only with respect to the section 273 cause of action. He further asserts that counsel's concession of insolvency during the first part of the proceeding (i.e., trial regarding the section 273 cause of action), means collateral estoppel and/or issue preclusion bars him from relitigating the issue during the part of the trial regarding the section 276 cause of action. He cites *Dabrowski*, 257 B.R. 394 (S.D.N.Y. 2001), for collateral estoppel's two-part test.

Regarding the two remaining points in the Debtor's brief, first, the Trustee responds that prior to the transfers, the "ordinary course" of the Debtor and his wife's financial affairs included having joint title to their homes and placing all money in joint bank accounts, not sole title and individual bank accounts. Second, he points out that nothing in the record shows the Debtor was

---

[14]In an earlier memorandum of law, the Trustee argued the case of *Federal Deposit Insurance Corporation v. Marke Painting Company, Inc.*, 1992 WL 212372 (S.D.N.Y. 1992) was directly on point and dispositive of the defense the Debtor and his wife assert.

"counseled" to sign the petition as it was prepared and ultimately filed, thus, he cannot use his attorney as a shield to protect him from his "not true" information.

Discussion

I. "Separate Property": An Affirmative Defense?

Fed. R. Civ. P. 8(c), made applicable in adversary proceedings via Fed. R. Bankr. P. 7008(a), sets forth the affirmative defenses a party "shall set forth" in pleading to a preceding pleading. "Separate property" is not listed but a catchall provision, "any other matter constituting an avoidance or affirmative defense," exists. Failing to assert an affirmative defense or withdrawing it at any time, provided it does not prejudice the plaintiff's ability to present his case, should not prevent a defendant from introducing arguments or evidence to the extent that such arguments or evidence relate to a defendant's denial of the elements of plaintiff's case in chief. *See Kwiatkowski v. Bear, Stearns & Co., Inc.*, 2000 WL 640625, at *2 (S.D.N.Y. May 18, 2000).

As found above, the Debtor and his wife did not deny they purchased the Pleasantville house in 1987, sold it on or about 1994 and deposited the net proceeds into their joint account; they admitted all of that in their answer. Arguably, the Trustee having alleged and the Debtor and his wife having conceded one of the elements of his section 273 cause of action (i.e., ownership), the question becomes what else in the Defendants' pleading would have put the Trustee on notice of their "separate property" defense, giving him knowledge of the defense despite technical noncompliance with Rule 8(c)? In the court's view, nothing. However, as found above, during her deposition by the Trustee's attorneys the Debtor's wife stated she viewed the Pleasantville proceeds as her money.

One court of appeals has held that if during discovery a plaintiff receives notice that an affirmative defense will be raised at trial and the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice, then it is not error for the trial court to hear evidence on the issue. *Hassan v. United States Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988) (citing *Bull's Corner Restaurant v. Director of the Federal Emergency Management Agency*, 759 F.2d 500, 502 (5th Cir.1985) and *Jones v. Miles*, 656 F.2d 103, 107 n. 7 (5th Cir. Unit B 1981)). Here, the Trustee certainly received a sufficient indication that the Debtor's wife would assert the Pleasantville proceeds were hers; he should not have been "surprised" at trial by her testimony on that point. Therefore, her testimony, although not made part of the record via a transcript, is received.

II. 11 U.S.C. § 544(b)(1)

Bankruptcy Code section 544(b)(1) provides as follows:

> (1) 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 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.

Therefore, pursuant to section 544(b)(1), a trustee can avoid a debtor's transfers or obligations, provided an unsecured creditor exists, under applicable state law. In New York, trustees often invoke various provisions of N.Y. DEBT. & CRED. L., particularly sections 271, 273, 273-a and 276. These sections cover several recovery of a fraudulent conveyance causes of action. Here, the Trustee seeks to recovery two alleged fraudulent conveyances pursuant to N.Y. DEBT. & CRED. L. §§ 273, 276 and 276-a. Although not at issue in this case, N.Y.C.P.L.R. 213(8) (McKinney 1990) provides for a six year statute of limitations for actions based on fraud.

III. N.Y. DEBT. & CRED. L. § 273

To prevail on his section 273 cause of action the Trustee must show: (1) there was a conveyance of property, (2) the transferor made the conveyance without fair consideration and (3) the transferor was insolvent when he made the conveyance or was rendered insolvent by it. *See United States v. McCombs*, 30 F.3d 310, 323 (2d Cir. 1994). "Conveyance" includes, *inter alia*, every payment of money and assignment or transfer of tangible property. N.Y. DEBT. & CRED. L. § 270. 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). In a decision from last year, the court addressed the burden of proof in a section 273 cause of action involving an alleged fraudulent transfer between a husband and a wife; it makes the same allocation here. *See In re Lewin*, Case No. 99-14337, Adv. Proc. No. 00-90060 (February 27, 2001). Therefore, 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). *McCombs*, 30 F.3d at 325.

Having denied the Trustee's motion for summary judgment on the first day of trial but also having determined on the second day that the burden had shifted to the Debtor and his wife to show why the Trustee's section 273 cause of action should not prevail, the court now concludes that the Trustee has met its burden of proof. The court reaches this conclusion largely due to the Defendants' failure to prove the Debtor, who conceded insolvency, did not transfer the

Hoo note final payment and his share of the $202,000 of Pleasantville proceeds[15] to his wife for no consideration. The Debtors' reliance on *A.J. Armstrong, Inc. v. Halikman*, 45 A.D.2d 995 (N.Y. App. Div. 2d Dep't 1974), is misplaced. The record before this court shows the Debtor and his wife held joint title to the Pleasantville house. Unlike in *Halikman*, the Debtor proffered no evidence to show he held the Pleasantville proceeds, money kept in their joint account until the $202,000 transfer to his wife's sole account, "in trust for" his wife. *Id*. at 995-96. In fact, the only evidence offered to support that is his wife's self-serving deposition testimony, insufficient proof to carry their burden on their "separate property" defense.

The record before the court shows the Debtor's wife received at least $20,000 of the final Hoo note payment in 1997, the amount she later transferred to her children, and gave nothing in return; it does not show what other "balance" she received. As for her actions regarding the Debtor's half of the Pleasantville proceeds, the deposition testimony indicates she used some of the money to pay both his and her living expenses for the year they lived apart. Although a promise to pay future support is not adequate consideration,[16] United States Bankruptcy Judge Michael J. Kaplan has recognized there is some authority for the proposition that when support has actually been paid, the value of a conveyance to the extent of the value of the support actually furnished is valid as against creditors. *In re Skalski*, 257 B.R. 707 (Bankr. W.D.N.Y. 2001)(citation omitted).

---

[15]Based on the facts already found, the court concludes $202,000 reflects the amount of money that went from the joint account directly into the Debtor's wife's sole account in November 1994.

[16]*Schmitt v. Morgan*, 98 A.D.2d 934 (N.Y. App. Div. 3d Dept. 1983)(citations omitted), *appeal dismissed*, *Schmitt v. Morgan*, 62 N.Y.2d 914 (1984).

Even if the court agreed with Judge Kaplan's proposition, the Debtor's wife has not proven what expenses she actually paid on her husband's behalf with his $101,000. Other than the Debtor's self-serving deposition testimony regarding monthly rent of $1,700, he offers nothing to show his wife paid that amount each and every month for the approximate year they lived apart. Furthermore, the court finds it very difficult to believe that while the Debtor's auto parts business was sinking, he and his wife maintained two households, one with $1,700/month rent, and yet had sufficient funds remaining from the Pleasantville proceeds for the Debtor's wife to make a significant down payment on the house on Pine Ridge. To the court, the Trustee has successfully proven a section 273 constructive fraudulent conveyance by the Debtor to his wife in the amount of $121,000 ($101,000 + $20,000).

IV. N.Y. DEBT. & CRED. L. §§ 276 and 276-a

In addition to the "constructively fraudulent" conveyance scenario described above, the Trustee seeks recovery of the same two conveyances under the "actually fraudulent" conveyance provisions of section 276 of the Debtor and Creditor Law. The advantage section 276 has over section 273 is the existence of a provision for recovery of a trustee's attorney's fees when a debtor has "actual intent" as opposed to "constructive intent." *See* N.Y. DEBT. & CRED. L. § 276-a. Unlike his successful recovery of the constructively fraudulent conveyances found above, the Trustee has not proved the Debtor actually intended to defraud Grey's estate. He has, however, met his burden of showing by "clear and convincing evidence" that the Debtor acted with the requisite "actual intent" to "delay or hinder" Grey's estate. *See McCombs*, 30 F.3d at 328; *Hassett v. Goetzmann*, 10 F. Supp.2d 181, 188 (N.D.N.Y. 1998).

Rarely, if ever, established by direct evidence, actual intent is often inferred from the circumstances surrounding the transaction. *Id*. Commonly referred to as "badges of fraud," the relevant circumstances include: transfers to the transferor's relatives; suspicious timing of the transfers; lack of fair consideration for the transfers; insolvency of the transferor after the transfer; and the transferor's continued possession, use or benefit. *Hassett v. Goetzmann*, 10 F. Supp.2d 181, 188. Thus, under N.Y. DEBT. & CRED. L. § 276, "the fraudulent nature of a conveyance may be inferred from the relationship among the parties to the transaction and the secrecy of the sale, or from inadequacy of consideration and hasty, unusual transactions." *McCombs*, 30 F.3d at 328 (citations omitted). Two other badges of fraud include the transferor's knowledge of the creditor's claim and his or her inability to pay it and the use of dummies or fictitious parties. *Shelly v. Doe*, 249 A.D.2d 756 (N.Y. App. Div. 3d Dept. 1998).

Here, the close relationship between the Debtor and his wife is indisputable as is the lack of fair consideration for the two transfers, the Debtor's insolvency after the transfers and his use of and the benefit he derived from the house his wife bought with his share of the Pleasantville proceeds. Furthermore, he knew about the debt he owed Grey when he allowed his wife to take control over the Pleasantville proceeds and when the Hoo note was transferred to her. The court concludes he acted with actual intent to hinder or delay Grey's estate and the two conveyances totaling $121,000 are set aside pursuant to N.Y. DEBT. & CRED. L. § 276 and 11 U.S.C. § 544(b)(1) as an actual fraudulent conveyance.

Attorney's fees are provided for under N.Y. DEBT. & CRED. L. § 276-a. That section requires an award of "reasonable attorney's fees" against a transferor when a conveyance was made with actual fraudulent intent. Special counsel to the Trustee will be directed to submit an

application, on notice to the Debtor and his counsel, supporting a reasonable fee request. The court does not, however, conclude attorney's fees against the Debtor's wife are mandated. Her involvement, while it included receiving the two transfers, had more to do with her attempt to keep the Debtor from using the moneys in his failing auto parts business. The court does not view it as her own actual intent to hinder, delay or defraud his creditors. *See In re All Amer. Petroleum Corp.*, 259 B.R. 6, 20 (Bankr. E.D.N.Y. 2001)(citing *Carey v. Crescenzi*, 923 F.2d. 18 (2d Cir. 1991).

V. 11 U.S.C. § 727(a)(2)

Under section 727(a)(2), a debtor would not receive a discharge if he or she intended to hinder, delay, or defraud a creditor by transferring (A) his or her property within one year before the date of the filing of his or her petition or (B) estate property after the filing date. The Trustee's allegations center on (A), but in order to fall within the statute's one year limitation, he must use a "continuing concealment doctrine" adopted by several courts. 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).

Although the court appreciates the Southern District of New York and one Court of Appeals have embraced the continuing concealment doctrine, the facts and the equities of those cases are distinguishable from the present one. Furthermore, given that the Trustee does not cite to any controlling case law, the court declines to apply the doctrine in this case. As a result, he cannot meet the section's one year limitation.

VI. 11 U.S.C. § 727(a)(4)

Section 727(a)(4) provides, *inter alia*, for another exception to discharge when a debtor knowingly and fraudulently made a false oath or account in a case. The court does not agree with the Trustee that the Debtor should be denied a discharge because he did not disclose the deposit of his Social Security checks and paychecks into his wife's bank account in response to Question 10 on his Statement of Financial Affairs. Not only did the Debtor fully disclose his income sources on his Schedule I, his wife paid their living expenses with the money deposited into her account. In other words, he did not "transfer" his Social Security checks or his paychecks to her, rather, they used the money they both deposited into that account to live on.

The court also does not agree that the Debtor should be denied a discharge because he did not disclose his "secret interest" in the income-producing properties his wife helped her children buy. Although the court has had to consider a six year period for purposes of sections 273 and 276 of the Debtor and Creditor Law, it has already noted it is not inclined to use the continuing concealment doctrine in this case. As for the cases the Trustee cites in his brief, they are both factually distinguishable and non-controlling. To the court, the Debtor did not demonstrate the "illusion of destitution" and did not "divest himself of all valuable property of any sort" like the doctor-debtors in his cited cases did. *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). Unlike those cases, section 727(a)(4) does not apply here.

Accordingly, it is

ORDERED that pursuant to N.Y. DEBT. & CRED. L. §§ 273 and 276 and 11 U.S.C. §§ 544(b)(1) and 550, the Trustee is allowed recovery of the $101,000 and $20,000 fraudulent conveyances; and it is further

ORDERED that pursuant to 11 U.S.C. § 550(a) the Debtor and/or his wife turn over a total sum of $121,000 to the Trustee within 15 days of the date of this decision; and it is further

ORDERED that in the event the Debtor and/or his wife does not turn over a total sum of $121,000 to the Trustee within 15 days of this decision the Trustee may submit to the court an application for a judgment against the Debtor and his wife in the amount of $121,000; and it is further

ORDERED that the Trustee's objection to discharge pursuant to 11 U.S.C. §§ 727(a)(2) and 727(a)(4) is denied; and it is further

ORDERED that with respect to attorney's fees awarded pursuant to N.Y. DEBT. & CRED. L. § 276-a, the Trustee's attorney shall file with the court and serve on the Debtor and his attorney an application for reasonable attorney's fees on or before April 15, 2002, together with a notice of hearing for April 25, 2001. The notice of hearing shall provide that any objections to the fee application shall be filed with the court and served on the Trustee's attorney on or before April 22, 2001.

Dated: April 2, 2002

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