UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

DEAN ROBERT WILSON,	**CASE NO. 09-52620-NPO**
DEBTOR.	**CHAPTER 7**
B. H. HOMES, LLC, BECKY HOPKINS, AND GEORGE HOPKINS, III	**PLAINTIFFS**
VS.	**ADV. PROC. NO. 10-05022-NPO**
DEAN R. WILSON AND LAVETTA E. WILSON	**DEFENDANTS**

MEMORANDUM OPINION AND ORDER DENYING MOTION TO DISMISS AND MOTION FOR SANCTIONS

There came on for hearing (the "Hearing") on July 15, 2010, the Motion to Dismiss and Motion for Sanctions (the "Motion") (Adv. Dkt. No. 6)[1] and the Memorandum in Support of Motion to Dismiss (the "Defendants' Brief") (Adv. Dkt. No. 8) filed by Dean R. Wilson (the "Debtor") and his wife, Lavetta E. Wilson ("Mrs. Wilson") (together, the "Defendants"); the Plaintiffs' Combined Response and Memorandum in Opposition to Motion to Dismiss and Motion for Sanctions (the "Plaintiffs' Response and Brief") (Adv. Dkt. No. 13) filed by B.H. Homes, LLC ("B.H. Homes"), Becky Hopkins and George Hopkins, III (the "Hopkinses") (together, the "Plaintiffs"); the Plaintiffs' Supplemental Memorandum in Opposition to Motion to Dismiss and Motion for Sanctions (the

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[1] Citations to the record are as follows: (1) citations to docket entries in this adversary proceeding, Case No. 10-05022-NPO, are cited as "(Adv. Dkt. No. ____)"; (2) citations to docket entries in the main bankruptcy case, Case No. 09-52620-NPO, are cited as "(Bankr. Dkt. No. ____)"; and (3) citations to docket entries in other bankruptcy cases follow the same form but are preceded by the case number.

"Plaintiffs' Supplemental Brief") (Adv. Dkt. No. 14) filed by the Plaintiffs; and the post-Hearing Supplemental Memorandum in Support of Motion to Dismiss (the "Defendants' Supplemental Brief") (Adv. Dkt. No. 16) filed by the Defendants in the above-styled adversary proceeding (the "Adversary"). At the Hearing, Charles C. Wimberly, III ("Wimberly") represented the Plaintiffs; the Debtor, who is a licensed attorney and a member of the Mississippi Bar, represented Mrs. Wilson and himself; and the duly appointed and acting chapter 7 trustee, Kimberly R. Lentz (the "Trustee"), represented herself. The Court, having considered the pleadings, the arguments of counsel, and the briefs, finds that the Motion is not well taken and should be denied for the reasons set forth below.[2]

Jurisdiction

The Defendants challenge this Court's jurisdiction over the subject matter of this proceeding, an issue that is addressed at length below. The parties do not dispute that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H) and that notice of the Hearing was proper under the circumstances.

Facts

The following is a summary of the events that led to the commencement of this Adversary in which the Plaintiffs seek to avoid certain transfers of real property made by the Debtor to Mrs. Wilson, who is not a debtor in any bankruptcy case, on the ground that the Debtor made the transfers with the actual intent to hinder, delay, or defraud his creditors in violation of the Mississippi Uniform Fraudulent Transfer Act, Miss. Code Ann. §§ 15-3-101 to 15-3-121.

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[2] Pursuant to Federal Rule of Civil Procedure 52, as made applicable to this Adversary by Federal Rule of Bankruptcy Procedure 7052, the following constitutes the findings of fact and conclusions of law of the Court.

1. William G. Murphy, III ("Murphy") owned certain real property in Pass Christian, Mississippi (the "Pass Christian Property"), when on November 8, 2001, Wildwood Lane Property Owners Association, Inc. enrolled a judgment against him in the amount of $44,876.65. The enrollment of the judgment created a lien on the Pass Christian Property (the "Wildwood Judgment Lien").

2. On January 8, 2002, Murphy filed a voluntary chapter 7 petition for relief pursuant to the Bankruptcy Code[3] (Case No. 02-50089-ERG, Bankr. Dkt. 1). Murphy was represented by the Debtor, who had never previously handled a bankruptcy case.

3. Murphy obtained a discharge of his debts in his bankruptcy case on June 4, 2002, but the Wildwood Judgment Lien that had previously attached to the Pass Christian Property survived[4] (Case No. 02-50089-ERG, Bankr. Dkt. 17).

4. After the closure of his bankruptcy case, Murphy conveyed the Pass Christian Property by quitclaim deed to his son Sean Murphy.

5. In 2004, Sean Murphy conveyed the Pass Christian Property (the "2004 Transaction") by warranty deed, warranting the title to be free of any encumbrances, to the Hopkinses, who then conveyed the Pass Christian Property to B.H. Homes.

6. The Debtor was the closing attorney for the 2004 Transaction and rendered an opinion

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[3] "Bankruptcy Code" refers to the United States Bankruptcy Code located at Title 11 of the United States Code. All code sections hereinafter will refer to the Bankruptcy Code unless specifically noted otherwise.

[4] The Debtor erroneously believed that the discharge order not only discharged Murphy's personal obligation to pay the judgment obtained by Wildwood Lane Property Owners Association, Inc. but also discharged the underlying debt, thus allowing Murphy to retain the Pass Christian Property free of the Wildwood Judgment Lien. <u>See</u> Combined Answer ¶ 10 (Adv. Dkt. No. 7).

that the title to the Pass Christian Property was free of any liens.

7. On March 31, 2005, B.H. Homes conveyed the Pass Christian Property (the "2005 Transaction") to Cheryl Ann Payne and David Payne (the "Paynes").

8. The Debtor was the closing attorney for the 2005 Transaction and again rendered an opinion that the title to the Pass Christian Property was free of any liens.

9. On March 2, 2006, an attorney for the Paynes informed the Debtor[5] that the Wildwood Judgment Lien on the Pass Christian Property had been discovered when the Paynes had attempted to sell the Pass Christian Property after Hurricane Katrina.[6]

10. On May 23, 2006, less than three months after being informed about the alleged breach of warranty to the Paynes, the Debtor executed two quitclaim deeds conveying real properties located in Biloxi, Mississippi, at 1568 Rachel Drive and at 337 Hiller Drive (the "Biloxi Properties") to Mrs. Wilson. The Debtor and Mrs. Wilson occupied one of the Biloxi Properties as their residence, and the Debtor used the other for his law office. Mrs. Wilson did not pay the Debtor any monetary consideration at the time of the transfers. It is these conveyances to Mrs. Wilson that are the subject of this Adversary.

11. On September 28, 2006, the Paynes filed a complaint for breach of warranty of title in the Chancery Court of Harrison County, Mississippi, against the Plaintiffs (the "Chancery Court Lawsuit").

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[5] The Debtor denied receiving a letter but admitted receiving a telephone call from an attorney representing the Paynes. <u>See</u> Combined Answer ¶ 11 (Adv. Dkt. No. 7).

[6] Hurricane Katrina made landfall on the Mississippi Gulf Coast and surrounding areas on August 29, 2005. Therefore, the Paynes attempted to sell the Pass Christian Property sometime between that date and March 2, 2006.

12. On April 3, 2007, Wimberly notified the Debtor by letter that the Paynes had sued the Plaintiffs in the Chancery Court Lawsuit and that the Plaintiffs, in turn, intended to join the Debtor in the Chancery Court Lawsuit by filing a third-party complaint ("Third-Party Complaint") against him.[7]

13. On April 13, 2007, the Plaintiffs filed a motion for leave to file the Third-Party Complaint against the Debtor in the Chancery Court Lawsuit.

14. Over one month later, on May 16, 2007, Mrs. Wilson recorded in the Chancery Court of Harrison County, Mississippi, the two quitclaim deeds that the Debtor had executed one year earlier conveying the Biloxi Properties to her.

15. On June 14, 2007, the Plaintiffs filed the Third-Party Complaint against the Debtor in the Chancery Court Lawsuit.

16. On March 26, 2008, counsel for the Plaintiffs deposed the Debtor in connection with the Chancery Court Lawsuit.

17. On or about October 27, 2008, a judgment (the "Judgment") was entered in favor of the Plaintiffs against the Debtor in the Chancery Court Lawsuit.

18. On or about October 31, 2008, the Plaintiffs enrolled the Judgment in the Circuit Court of Harrison County, Mississippi.

19. On or about January 15, 2009, a final judgment ("Final Judgment") was entered in the Chancery Court Lawsuit in favor of the Plaintiffs and against the Debtor in the amount of $70,000, plus interest at the rate of six (6) percent per annum.

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[7] The Debtor denied having received the letter or having received any notice of the Plaintiffs' intent to file the Third-Party Complaint. See Combined Answer ¶ 14 (Adv. Dkt. No. 7).

20. On or about January 20, 2009, the Plaintiffs enrolled the Final Judgment in the Circuit Court of Harrison County, Mississippi.

21. After the Judgment and Final Judgment (collectively, the "Plaintiffs' Judgment") were enrolled, the Plaintiffs initiated proceedings to garnish the Debtor's wages. Notably, the enrollment of the Plaintiffs' Judgment did not create a lien on the Biloxi Properties (the "Plaintiffs' Judgment Lien") because Mrs. Wilson, not the Debtor, owned the Biloxi Properties at that time.

22. On November 20, 2009, the Debtor filed a voluntary chapter 7 petition for relief (the "Petition") (Bankr. Dkt. No. 1).

23. Concurrent with the Petition, the Debtor filed his Schedules and Statement of Financial Affairs (Bankr. Dkt. No. 7). The Debtor listed the Plaintiffs as creditors in "Schedule F-Creditors Holding Unsecured Nonpriority Claims" in the amount of $70,000. The Debtor listed in his Statement of Financial Affairs a $70,000 judgment rendered by the Chancery Court and the pre-petition garnishment by the Plaintiffs of the Debtor's wages in the amount of $667.73 per month.

24. The Debtor indicated in "Schedule A-Real Property" that he held no legal, equitable, or future interest in any real property.

25. On November 23, 2009, a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (Bankr. Dkt. No. 9) was sent to the creditors in the bankruptcy case. The meeting of creditors under § 341 was held on January 19, 2010, and continued to February 23, 2010 (Bankr. Dkt. Nos. 20, 23, 32, 33).

26. At the meeting of creditors on February 23, 2010, the Debtor testified that he quitclaimed the Biloxi Properties to Mrs. Wilson "rather than, you know, put them at risk." (Test. of Debtor at 9, 21, Plaintiffs' Supplemental Brief, Ex.1).

27. On May 14, 2010, the Plaintiffs filed a complaint (the "Complaint") (Adv. Dkt. No. 1) seeking to avoid the transfers of the Biloxi Properties by the Debtor to Mrs. Wilson, pursuant to the Mississippi Uniform Fraudulent Transfer Act, Miss. Code Ann. §§ 15-3-101 to 15-3-121, and §§ 544 and 550 (the "Avoidance Action"). The Plaintiffs aver that they initiated the Adversary with the knowledge and consent of the Trustee. Complaint ¶ 3.

28. The Complaint contains three Counts under which the Plaintiffs seek relief: (1) in Count I, the Plaintiffs seek to avoid the transfers and attach the Biloxi Properties on grounds that the transfers were made with the intent to hinder, delay, or defraud creditors pursuant to Miss. Code Ann. §§ 15-3-107 and 15-3-111; (2) in Count II, the Plaintiffs seek avoidance of the transfers under § 544 and a judgment against Mrs. Wilson for the Biloxi Properties pursuant to §§ 544 and 550; and (3) in Count III, the Plaintiffs request an injunction against Mrs. Wilson prohibiting her from disposing of the Biloxi Properties pursuant to Miss. Code Ann. § 15-3-111. In support of their claims for relief, the Plaintiffs allege that the Debtor did not receive reasonably equivalent value in exchange for the transfers of the Biloxi Properties to Mrs. Wilson, that the Debtor had liabilities beyond his ability to pay, and that the Debtor was insolvent or became insolvent shortly after the transfers to Mrs. Wilson.

29. On June 16, 2010, the Defendants filed the Motion before the Court in which they request dismissal of the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on grounds that this Court lacks subject matter jurisdiction due to the lack of standing of the Plaintiffs and that the Plaintiffs have failed to state a claim upon which relief can be granted because the statute of limitations has run on the Avoidance Action. Concurrent with the Motion, the Defendants filed the Defendants' Brief in support of the Motion.

30. On July 9, 2010, the Plaintiffs filed the Plaintiffs' Response and Brief and attached as an exhibit a transcript of the deposition testimony of the Debtor given on March 26, 2008, in connection with the Chancery Court Lawsuit.

31. On July 14, 2010, the Plaintiffs filed the Plaintiffs' Supplemental Brief and attached as an additional exhibit a transcript of the Debtor's testimony at the § 341 meeting of creditors on February 23, 2010.

32. On July 15, 2010, the Hearing on the matter was held and oral arguments were presented by the parties. At the conclusion of the arguments, the Court granted the request of the Debtor to file a post-Hearing brief on behalf of the Defendants in order to respond to the Plaintiffs' Supplemental Brief.

33. On July 21, 2010, the Defendants filed the Defendants' Supplemental Brief and attached as an exhibit a page from the transcript of the Debtor's deposition given on March 26, 2008.

Discussion

The Defendants raise two issues in their Motion: (1) whether the Plaintiffs have standing to bring the Avoidance Action, and (2) whether the Avoidance Action is barred by the applicable statute of limitations. The Defendants request dismissal of the Complaint as to the first issue, for lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1) and as to the second issue, for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). Rule 7012 of the Federal Rules of Bankruptcy Procedure renders both subsections of Rule 12(b)[8] of the Federal Rules of Civil Procedure applicable to this Adversary.

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[8] Hereinafter, citations to Rules refer to the Federal Rules of Civil Procedure, unless specifically noted otherwise.

A. Legal Standard

1. Rule 12(b)(1)

The Defendants' assertion that the Plaintiffs lack standing presents a jurisdictional question that this Court must consider as a preliminary matter. Ramming v. United States, 281 F.3d 158, 161 (5th Cir. 2001). In examining a challenge to subject matter jurisdiction under Rule 12(b)(1), this Court may base its findings on: (1) the Complaint alone; (2) the Complaint supplemented by undisputed facts evidenced in the record; or (3) the Complaint supplemented by undisputed facts plus the Court's resolution of disputed facts. Barrera-Montenegro v. United States, 74 F.3d 657, 659 (5th Cir. 1996). The burden of proof is on the Plaintiffs, since they are the parties asserting jurisdiction. Ramming, 281 F.3d at 161; Burrell v. Univ. of Tex. Med. Branch, No. H-09-3932, 2010 WL 1640939, at *2 (S.D. Tex. April 21, 2010).

2. Rule 12(b)(6) and Rule 56

The Defendants' assertion of the statute of limitations as an affirmative defense challenges the Complaint under Rule 12(b)(6) for failing to state a legally cognizable claim. See Jones v. Alcoa, Inc., 339 F.3d 359, 366 (5th Cir. 2003) (a statute of limitations defense may support dismissal under Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like). The legal standard for a dismissal motion under Rule 12(b)(6) requires this Court to assume that the well-pled factual allegations of the complaint are true and view them in the light most favorable to the Plaintiffs. Lane v. Halliburton, 529 F.3d 548, 557 (5th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544,

570 (2007)).

A Rule 12(b)(6) motion, however, is treated as a motion for summary judgment under Rule 56, applicable under Federal Rule of Bankruptcy Procedure 7056, if matters outside the pleadings are presented. Fed. R Civ. P. 12(d). Here, the conversion of the Motion is appropriate because both parties have attached exhibits to their pleadings. Thus, the Court will treat the Motion as a summary judgment motion. The standard for granting a summary judgment motion is well-established. Summary judgment is appropriate if "pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2).

B. Do the Plaintiffs lack standing to bring the Avoidance Action?

The Defendants assert that the Plaintiffs lack standing to bring this Adversary because the Trustee has the exclusive right to bring avoidance actions under §§ 544, 548,[9] 550, and any applicable state law. The Defendants further contend that the Trustee exercised her discretion not to initiate an avoidance action against them after determining that the Biloxi Properties lacked sufficient equity to benefit the bankruptcy estate. As a result, the Plaintiffs' sole remedy, according to the Defendants, was to file a motion to compel the Trustee to file an avoidance action against them or a motion to remove and replace the Trustee. See 11 U.S.C. § 324(a). The issue as to whether the Plaintiffs have standing raises two separate questions: (1) Do the Plaintiffs have constitutional standing? and (2) Do the Plaintiffs have statutory standing under the Bankruptcy Code? See City of Farmers Branch v. Farmer (In re Pointer), 952 F.2d 82, 85 (5th Cir. 1992). Both questions must

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[9] Although the Defendants cite § 548, the Plaintiffs do not include this provision as a basis for relief in their Complaint. At the Hearing, counsel for the Plaintiffs described the Adversary as a fraudulent conveyance action based on § 544 and Mississippi law, not on § 548.

be answered in the affirmative for this Court to exercise its jurisdiction.

1. Constitutional standing

Constitutional standing, which is based upon Article III of the United States Constitution and upon certain prudential considerations, limits federal court jurisdiction to the resolution of actual cases and controversies. Davis v. Fed. Election Comm'n, 128 S. Ct. 2759, 2768 (2008). To establish a case or controversy sufficient to invoke standing under Article III, a plaintiff must allege a personal injury that is "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Raines v. Byrd, 521 U.S. 811, 819 (1997) (citing Allen v. Wright, 468 U.S. 737, 751 (1984)). In addition to the constitutional component for standing under Article III, a plaintiff must satisfy prudential standing requirements by which courts consider "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11-12 (2004) (citing Allen, 468 U.S. at 751).

In this matter, the Plaintiffs purchased the Pass Christian Property in reliance upon the Debtor's representation as the closing attorney that it was free and clear of liens, when it was subject to the Wildwood Judgment Lien. As a result, the Plaintiffs obtained the Plaintiffs' Judgment in the Chancery Court Lawsuit against the Debtor. The gravamen of this Adversary is the Plaintiffs' allegation that they sustained a further injury when the Debtor conveyed the Biloxi Properties to Mrs. Wilson prior to the entry of the Plaintiffs' Judgment against the Debtor, which prevented the attachment of the Plaintiffs' Judgment Lien. The relief requested by the Plaintiffs in the Complaint

to avoid the transfers, enter judgment, and award injunctive relief would redress their injury. Thus, the Plaintiffs clearly have constitutional standing to bring this action.

2. Statutory standing

The question of statutory standing presents a thornier issue and requires this Court to determine whether the statutory provisions on which the Complaint rests grant a person in the position of the Plaintiffs a right to the judicial relief they seek. In that regard, Plaintiffs seek relief in their Complaint pursuant to the Mississippi Uniform Fraudulent Transfer Act, Miss. Code. Ann. §§ 15-3-101 to 15-3-121 and §§ 544 and 550. Section 544(b) grants the trustee authority to exercise rights that unsecured creditors may have under state laws to avoid fraudulent transfers. 5 Collier on Bankruptcy ¶ 544.06[2] (16th ed. 2010). Under the strong-arm powers of § 544(b), a trustee may step into the shoes of any unsecured creditor, avoid the debtor's transfer, recover the fraudulently conveyed property, and divide it equally among all similarly-situated creditors. Id. Thus, statutory standing for an avoidance action under § 544(b) is ordinarily satisfied when the trustee is the plaintiff. Here, however, the Complaint was filed not by the Trustee, but by the Plaintiffs, who are creditors of the bankruptcy estate.

The Plaintiffs allege in the Complaint that they initiated the Adversary with the knowledge and consent of the Trustee. Complaint ¶ 3. Indeed, the Trustee confirmed at the Hearing that after conducting a cost-benefit analysis, she chose not to pursue an avoidance action because there was no equity in the Biloxi Properties for the benefit of the unsecured creditors of the bankruptcy estate. The Defendants urge this Court to read § 544 as vesting exclusive standing in the Trustee to file the Avoidance Action, notwithstanding the Trustee's knowledge and consent, and to rule on that basis that the Plaintiffs lack standing.

The Plaintiffs agree that creditors and other non-trustees generally lack independent standing to pursue avoidance actions for fraudulent transfers. See Pointer, 952 F.2d at 88 (in general only trustees and debtors-in-possession, not creditors, have standing to invoke avoidance powers); Am. Nat'l Bank v. MortgageAmerica Corp. (In re MortgageAmerica Corp.), 714 F.2d 1266, 1275-76 (5th Cir. 1983) (the court determined that a suit under the Texas Fraudulent Transfers Act was an action to pursue property of the debtor and is usually brought by the trustee in bankruptcy for the benefit of all creditors equally). They also acknowledge that the purpose behind this general rule is to prevent individual creditors from interfering with property of the estate and disrupting the bankruptcy policy of equality of distribution among similarly-situated creditors. MortgageAmerica, 714 F.2d at 1276. The Plaintiffs, however, urge the Court to recognize an exception to the rule in this situation where the Avoidance Action was brought by a secured creditor in a chapter 7 liquidation case and the unwinding of the allegedly fraudulent transfer would not result in the return of any property to the estate. In support of their position, the Plaintiffs rely upon cases that have held in certain situations that the individual creditor– not the trustee– has independent standing to bring an avoidance action against the debtor. See, e.g., Schertz-Cibolo-Universal City, Indep. Sch. Dist. v. Wright (In re Educ. Group Health Trust), 25 F.3d 1281 (5th Cir. 1994) (recognizing that the trustee has exclusive standing if the cause of action belongs to the estate, but has no standing if it belongs to the creditors).

The Plaintiffs liken their situation to the one faced by the creditor in In re Speir, 190 B.R. 657 (Bankr. N.D. Ala. 1995). In that case, after the creditor sustained damages as a result of the debtor's business operations, the debtor conveyed all of his interest in his home to his wife. Following the transfer, the creditor obtained a judgment against the debtor in state court and initiated a separate

state court action against the debtor and his wife to set aside, as a fraudulent transfer, the debtor's conveyance of his home. The debtor filed a voluntary chapter 7 petition. The trustee negotiated a settlement of the fraudulent transfer claim with the debtor and his wife and sought the bankruptcy court's approval over the creditor's objection.

Of significance to this matter, the Speir Court refused to approve the settlement because it concluded that the trustee had no interest in the home that would yield any benefit to the bankruptcy estate. Id. at 661. Under the state's fraudulent conveyance law, if the debtor's transfer of the home to his wife was fraudulent, the creditor's judgment lien would attach to the property as of the date of the wrongful act. In contrast, the trustee's lien would not attach until the filing of the petition for relief under § 544. Thus, "the trustee cannot stand in the shoes of a *secured* creditor attempting to set aside a fraudulent transfer." Id. at 663 (emphasis added); see also Giffin v. Edwards, 708 N.E.2d 876 (Ind. App. 1999) (refusing to substitute bankruptcy case trustee as the plaintiff in a fraudulent conveyance action where the creditor's secured interest would take priority over the trustee's interest). By relying on Speir, the Plaintiffs turn the Defendants' argument on its head: The Trustee cannot have exclusive standing when she does not have any standing to pursue the Avoidance Action.

The Plaintiffs argue in the alternative that they have "derivative" standing because the Trustee consented to filing the Complaint. The Plaintiffs cite Vogel Van & Storage, Inc. v. Navistar Fin. Corp. (In re Vogel Van & Storage, Inc.), 210 B.R. 27 (N.D.N.Y.1997), aff'd on other grounds, 142 F.3d 571 (2d Cir. 1998), in which the trustee agreed to allow a creditor to pursue an avoidance action on the trustee's behalf, subject to the trustee retaining control over any assets that might be brought into the estate as a result of the action. The district court held that the creditor had derivative

standing to pursue the action. "This Court finds no reason not to allow trustees to 'deputize' a creditor to sue to avoid preferences on the trustee's behalf, as long as the fruits of the action belong to the estate, and the trustee retains control over the action." Id. at 33-34.

The Defendants, on the other hand, insist that the doctrine of derivative standing does not apply in chapter 7 cases. In support of their argument, the Defendants rely heavily upon Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A., 530 U.S. 1 (2000). In Hartford, the United States Supreme Court held that an administrative claimant in a chapter 7 case lacked standing to seek a surcharge on secured assets under § 506(c), a provision that on its face referred only to the right of "the trustee" to charge costs. Notably, § 506(c) constitutes an exception to the rule that administrative claims are inferior to secured claims. See 11 U.S.C. § 507(a)(2). The Supreme Court read the phrase "the trustee" to mean that only the trustee may recover administrative claims ahead of secured claims. Id. at 6. The Defendants insist that Hartford applies to avoidance actions under § 544 because of the same use of the term "the trustee."

The Defendants also rely upon Surf N Sun Apartments, Inc. v. Dempsey, 253 B.R. 490 (M.D. Fla. 1999). There, the district court vacated an order from the bankruptcy court granting an individual judgment creditor standing to prosecute a fraudulent conveyance action under § 548 on behalf of the chapter 7 bankruptcy estate. The creditor sought authorization to pursue the action after becoming frustrated by what he perceived as the lackluster efforts of the trustee to recover assets belonging to the estate. The trustee objected to the relief requested as being unnecessary since special counsel had already been retained to pursue the same assets. Although the district court recognized that some federal courts had granted creditors derivative standing to institute avoidance actions on behalf of the estate, it refused to do so under the facts presented in that case because of the absence

of any explicit language in § 548 allowing creditors derivative standing to pursue such actions.

Notwithstanding the Defendants' arguments, the Fifth Circuit has consistently approved the derivative standing doctrine based upon equitable principles and certain implied, qualified rights found in § 1103(c)(5), § 1109(b), and § 503(b). See La. World Exposition v. Fed. Ins. Co., 858 F.2d 233, 247 (5th Cir. 1988) (in some circumstances, creditor's committee may maintain action to maximize the value of the estate where the debtor-in-possession or trustee is unable or unwilling to fulfill its obligation). Moreover, the Defendants' interpretation of Hartford overlooks language in that case where the Supreme Court expressly acknowledged that its decision did not address the issue of "derivative," as opposed to "independent" standing. Hartford, 530 U.S. at 13 n.5 ("Whatever the validity of [allowing creditors derivative standing], it has no analogous application here . . . . Petitioner asserted an independent right to use § 506(c), which is what we reject today."); see Official Comm. of Unsecured Creditors of Cybergenics Corp. *ex rel.* Cybergenics v. Chinery, 330 F.3d 548 (3d Cir. 2003). There is also ample case authority in the Fifth Circuit for applying the doctrine in chapter 7 cases when unusual circumstances warrant its application. See, e.g., Dierschke v.O'Cheskey, 975 F.2d 181, 183 n.1 (5th Cir. 1992) (noting that the bankruptcy court had authorized the creditor's exercise of the trustee's right to reach fraudulent transfers); Lilly v. FDIC (In re Natchez Corp.), 953 F.2d 184, 187-88 (5th Cir. 1992) (§ 549 on its face does not permit a creditor to avoid a post-petition transfer but a creditor is not foreclosed from invoking the statute where it has moved the court for authority to do so and has shown appropriate circumstances that would permit the action).

Finally, the Court does not consider Surf N Sun persuasive authority. The holding in Surf N Sun that rejects the doctrine under any circumstances is inconsistent with decisions recognizing the

doctrine. See In re Blount, 276 B.R. 753, 762 (M.D. La. 2002) (questioning rationale of Surf N Sun); see also City of Boerne v. Boerne Hills Leasing Corp. (In re Boerne Hills Leasing Corp.), 15 F.3d 57, 60 (5th Cir. 1994) (a creditor may initiate an avoidance action in appropriate circumstances after moving the court for authorization to act on behalf of the trustee or debtor-in-possession). More importantly, Surf N Sun is distinguishable from the facts before the Court for many reasons. Here, the Plaintiffs do not rely upon § 548, but upon § 544 and non-bankruptcy or state law. See Jennings v. Quarles & Brady LLP (In re Jennings), 378 B.R. 678, 682-83 (Bankr. M.D. Fla. 2006) (distinguishing Surf N Sun on ground that claim before it was not created by Bankruptcy Code but arose under state law). Also, as secured creditors of the estate, the Plaintiffs do not seek to avoid the transfers of the Biloxi Properties for the benefit of the unsecured creditors but in order to enforce the Plaintiffs' Judgment Lien, which is personal to them. Moreover, there is no other action pending against the Defendants, and the Trustee does not object to the prosecution of this Adversary by the Plaintiffs.

The Court thus agrees with the Plaintiffs that standing exists here where there are exceptional circumstances: There is no equity in the Biloxi Properties for the benefit of any of the unsecured creditors and the Plaintiffs will have priority over any interest of the Trustee if they prevail in their Avoidance Action. For an analogous reason, the court in City Bank v. Compass Bank, No. EP-09-CV-96-KC, 2010 WL 1959808 (W.D. Tex. 2010), *8-9 (May 12, 2010), ruled that a creditor had standing to pursue fraudulent transfer claims because if the creditor prevailed, the property would not be returned to the bankruptcy estate but would flow directly to the creditor due to the creditor's prior lien. Likewise, the court in Osherow v. Porras (In re Porras), 312 B.R. 81, 94 (Bankr. W.D. Tex. 2004), held that the IRS had standing to assert fraudulent transfer actions against the debtor

jointly with the trustee, because the IRS was the only creditor with anything substantial to gain from the prosecution of the claims. It is thus appropriate for this Court, in the exercise of its equitable powers under § 105, to recognize that the Plaintiffs have standing in this Adversary.

The result reached by this Court is consistent with the bankruptcy policies of preserving the debtor's property and ensuring equitable distribution among similarly-situated creditors. In that regard it is worth noting that the Plaintiffs do not invoke § 544 to obtain an unfair advantage over other creditors. Any other result would leave the Plaintiffs without any remedy simply because the Biloxi Properties lack equity to benefit the unsecured creditors. Although the Defendants suggest that the Plaintiffs could ask the Court to compel the Trustee to act or to remove the Trustee from this case, the Court would have difficulty doing so in the absence of any evidence of improper conduct. Finally, although the better course of action from a procedural standpoint would have been for the Plaintiffs to obtain court authorization before filing this Adversary, the absence of such prior approval does not preclude the Avoidance Action. See Williams v. Indi-Bel-Inc. (In re Williams), 167 B.R. 77 (Bankr. N.D. Miss. 1994) (allowing a creditor to employ the trustee's avoidance powers where the debtor lacked incentive to do so even though permission had not been requested).

In conclusion, the Court finds that the Plaintiffs meet the requirements for both constitutional and statutory standing to pursue the Avoidance Action. Therefore, the Defendants' request for dismissal of the Complaint pursuant to Rule 12(b)(1) should be denied.

C. Is the Avoidance Action barred by the statute of limitations?

The Court next considers the Defendants' contention that the Avoidance Action is time barred by all of the statutes of limitations set forth in Miss. Code Ann. §15-3-115(a)-(c) of the

Mississippi Uniform Fraudulent Transfer Act. At the Hearing, counsel for the Plaintiffs clarified that the Plaintiffs seek avoidance of the transfer of the Biloxi Properties from the Debtor to Mrs. Wilson as authorized by § 544 under Miss. Code Ann. § 15-3-107(1), which provides, in pertinent part:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud any creditor of the debtor.

Miss. Code Ann. § 15-3-107(1) (2006). The statute of limitations applicable to that provision states:

> A cause of action with respect to a fraudulent transfer or obligation under this article is extinguished unless action is brought:
>
> > (a) Under Section 15-3-107(1), within three (3) years after the transfer was made or the obligation was incurred or, if later, within one (1) year after the transfer or obligation was or could reasonably have been discovered by the claimant.

Miss. Code Ann. § 15-3-115(a) (2006).

The Defendants contend that the Plaintiffs did not bring this action within three (3) years of the date of the transfers or within one (1) year of the date the Plaintiffs knew or should have known about the transfers. According to the Defendants, the transfers were made on May 23, 2006, when the Debtor delivered the quitclaim deeds to Mrs. Wilson, and the Plaintiffs knew or should have known about the transfers no later than March 26, 2008, when Wimberly deposed the Debtor in the Chancery Court Lawsuit.[10] Thus, because the Plaintiffs filed the Complaint on May 14, 2010, which

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[10] The Defendants claim that Wimberly became aware of the transfers at the Debtor's deposition when the Debtor testified about two pending lawsuits, one of which involved a construction dispute. When asked if he was representing himself in that case, the Debtor answered, "Yes. My wife and I, yes. It's her–it's her house. I mean, it's in her name." (Test. of Debtor at 8, 22, Plaintiffs' Supplemental Brief, Ex.1). Also, at the Hearing, the Debtor stated

is more than three (3) years after the delivery date of the deeds on May 23, 2006, and more than one (1) year after the Plaintiffs became aware of the transfers on March 26, 2008, this action is time barred, according to the Defendants.

In response, the Plaintiffs maintain that this action is within the three (3) year limitations period because Mrs. Wilson did not record the deeds until May 16, 2007, and they filed the Complaint on May 14, 2010. Moreover, the Plaintiffs deny that they were made aware of the transfers at the Debtor's deposition and view the dispute as irrelevant since the deposition took place in 2008, after Mrs. Wilson had recorded the deeds, giving the Plaintiffs constructive notice of the transfers.

The key to determining whether the Plaintiffs filed the fraudulent transfer action within the limitations period is determining when the transfers became effective within the meaning of Miss. Code Ann. § 15-3-115(a). The Mississippi Uniform Fraudulent Transfer Act specifically addresses when a transfer is made:

> With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee.

Miss. Code Ann. § 15-3-109(a)(i). The Plaintiffs point out that under Mississippi law, a transfer of real property is perfected against a good-faith purchaser when the deed conveying the property is recorded with the chancery clerk of the county where the land is located. See Miss. Code Ann. § 89-

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that he had discussed his assets in detail with Wimberly during a break in his deposition, but Wimberly denied that he himself participated in any such conversation.

5-1; Owen v. Potts, 115 So. 336, 338 (Miss. 1928) (a conveyance of land takes effect, as to a subsequent purchaser for valuable consideration without notice, or as to any creditor, only from the time when the deed is delivered to the clerk to be recorded).

The Court, however, finds that a different Mississippi statute applies to transfers that take place between spouses, as follows:

> A transfer or conveyance of goods and chattels, or lands, or any lease of lands, between husband and wife, shall not be valid as against any third person, unless the transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust is required to be. Possession of the property shall not be equivalent to filing the writing for record, but, to affect third persons, the writing must be filed for record.

Miss. Code Ann. § 93-3-9. Thus, unrecorded conveyances of real property between spouses are ineffective against any third person until such time as the conveyances are properly recorded, without regard to any other factual circumstances. The special treatment Mississippi law affords conveyances between spouses arises out of the difficulty in detecting fraud between husbands and wives when it involves the pretended transfer of property. See Hudson v. Allen, 313 So. 2d 401, 402 (Miss. 1975); see also Detrio v. Boylan, 190 F.2d 40, 43 (5th Cir. 1951) (the intent and purpose of the statute is to render invalid secret transfers and conveyances by a debtor as against the claims of a creditor, or any other third person whose interest might be affected by the unrecorded conveyance); Morgan v. Sauls, 413 So. 2d 370, 375 (Miss. 1982) (recognizing that § 89-5-1 does not deal as severely with unrecorded conveyances to a person other than a spouse, as does § 93-3-9). Accordingly, the date that the transfers were made for purposes of Miss. Code Ann. § 15-3-115, that is, the date the conveyances became perfected against a good faith purchaser, was the date Mrs. Wilson recorded the quitclaim deeds on May 16, 2007. Thus, the Complaint was filed within three (3) years of that

date when it was filed on May 14, 2010. For that reason, it is unnecessary for this Court to consider whether the statute of limitations was tolled by the concealed fraud doctrine or by § 108, issues that the Defendants addressed indirectly by insisting that the Plaintiffs became aware of the conveyances at the Debtor's deposition.[11] See Walls v. Ivy, No. 2008-CA-01669-COA, 2010 WL 1444553, *2 (Miss. Ct. App. Apr. 13, 2010) (acknowledging the doctrine of concealed fraud and noting that the doctrine ceases to toll the statute of limitations when the alleged fraudulent conveyance of property is recorded and made a part of the public record).

D. Are the Defendants entitled to sanctions?

At the Hearing, this Court indicated that it would reserve the issue of sanctions raised by the Defendants in the Motion for decision at a later time. It appears, however, that the Defendants failed to comply with the procedural requirements of Federal Rule of Bankruptcy Procedure 9011(c)(1)(A). Therefore, the Court concludes that the request should be denied for that reason alone.

Conclusion

The Court concludes that because the Plaintiffs have met their burden to establish standing to pursue the Adversary, this Court has subject matter jurisdiction. The Court further concludes that the Defendants have not met their burden to establish that the Complaint is time barred by the applicable statute of limitations. Finally, the Court concludes that the Defendants' request for sanctions does not meet minimal procedural requirements. Accordingly, the Defendants' Motion should be denied.

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[11] At the Hearing, the Debtor argued that under Carder v. BASF Corp., 919 So. 2d 258 (Miss. Ct. App. 2005), once acts of alleged fraud become a matter of public knowledge, any cause of action based on those acts ceases to exist. To the contrary, Carder held only that the doctrine of fraudulent concealment ceases to apply in such circumstances. Id. at 262.

IT IS, THEREFORE, ORDERED that the Motion hereby is denied.

SO ORDERED.

Dated this the 20th day of October, 2010.

/ s / Neil P. Olack
NEIL P. OLACK
U. S. BANKRUPTCY JUDGE