

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

U. S. BANKRUPTCY COURT SOUTHERN DISTRICT OF MISSISSIPPI FILED
SEP 08 1994
CHARLENE J. PENNINGTON, CLERK BY _____ DEPUTY

IN RE: CECILIA M. COX

CASE NO. 92-01547EEW

FIRST NATIONAL BANK OF VICKSBURG, MS
AND HAROLD J. BARKLEY, JR., TRUSTEE

PLAINTIFFS

VS.

ADVERSARY NO. 930026WC

CECILIA M. COX
AND KATHERINE C. COX

DEFENDANTS

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C. Cox

Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

CAME ON for consideration before this Court, the Motion for Summary Judgment filed by the First National Bank of Vicksburg, Mississippi and Harold J. Barkley, Jr., Trustee. The Plaintiffs commenced this adversary proceeding against the Defendants as a result of a transfer of real property from the Debtor, Cecilia Cox, to her mother-in-law, Katherine Cox. The complaint contains claims for relief pursuant to both the preferential transfer and the fraudulent transfer provisions of the Bankruptcy Code found at 11 U.S.C. §§ 547 and 548, respectively. The Motion for Summary Judgment is based only on the Plaintiffs' preferential transfer

claim pursuant to § 547(b) of the Bankruptcy Code. After considering the motion, the response thereto and the respective arguments of counsel, the Court finds that there exist genuine issues of material fact precluding summary judgment.

Rule 18 of the Uniform Local Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of Mississippi, which pertains to motions for summary judgment, requires that the movant:

1. List and separately number each material fact in the prima facie case or affirmative defense upon which summary judgment is sought.
2. For each material fact listed, cite the factual authority.
3. Attach as exhibits to the motion the factual authorities relied upon for establishment of the material facts.

"The substantive law will identify which facts are material." Abbott v. Equity Group, Inc. (In re Ellington), 2 F.3d 613, 618 (5th Cir. 1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)).

In the present case, the substantive law is § 547(b) of the Bankruptcy Code which provides in pertinent part as follows:

11 USC § 547
§ 547. Preferences.

. . . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -

- (1) to or for the benefit of a creditor;
- (2) for or an account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;

(4) made -

. . .

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if -

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provision of this title.

As set forth in § 547(b)(5), one of the elements that must be proved in order to prevail in a preference action is that the creditor received more by virtue of the transfer than the creditor would have received if the case were one under chapter 7, the transfer had not occurred and the creditor's claim was satisfied in accordance with the provision of the Bankruptcy Code. Therefore, the value of the property received by Katherine Cox is a material fact necessary to make such a determination.

In an effort to satisfy this element of a preference action, the Plaintiffs list the following as a material fact:

(f) By executing and delivering said Warranty Deed, the Debtor enabled Katherine C. Cox to receive more than she would have received as an unsecured creditor under Chapter 7 of the Bankruptcy Code if the transfer had not been made and if Katherine C. Cox had received payment for such debt to the extent provided by provisions of Chapter 7. See Debtor's Sworn Bankruptcy Schedules herein on file.

Motion For Summary Judgment, para. 1(f).

The local rules require that the factual authorities upon which the movant relies must be attached to a motion for summary judgment. The pertinent portion of the Debtor's schedules are not attached to the motion. Nevertheless, the Court has reviewed the Debtor's Schedules of Assets and Liabilities and Statement of Financial Affairs. In her Statement of Financial Affairs, the Debtor lists a transfer of a one-half interest in 8.57 acres at Eagle Lake and also lists \$ 55,000 as consideration for the transfer. The Court has not found in the Debtor's schedules and statement of financial affairs any evidence of the value of the property conveyed.

The value of the property transferred to Katherine Cox is a material fact. Without any evidence before it, the Court is unable to find that the transfer in question allowed Katherine Cox to receive more than she would have received in a case under a chapter 7 if the transfer had not been made. Therefore, there exists a genuine issue as to the value of the property. Because there exists a genuine issue of material fact, the Plaintiffs' Motion For Summary Judgment should be denied.

In so holding, the Court makes no findings regarding any other facts necessary to the success of the Plaintiffs' claims. The Court will enter a separate order consistent with this opinion.

THIS the 7TH day of September, 1994.


UNITED STATES BANKRUPTCY JUDGE

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ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Consistent with the Court's opinion dated contemporaneously herewith, the Court finds with respect to the Plaintiffs' Motion for Summary Judgment that there exist genuine issues of material fact which preclude the granting of summary judgment. Therefore, the Plaintiffs' Motion for Summary Judgment should be and hereby is, denied.

SO ORDERED this the 7th day of September, 1994.


UNITED STATES BANKRUPTCY JUDGE