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United States District Court, M.D. Florida,
Tampa Division.

IN RE Ronald BIFANI, Debtor.
Arlene M. LaMarca, Appellant,
v.
Shari Streit Jansen, Chapter 7 Trustee, Appellee.

Case No.: 8:13–cv–02197–JDW
|
Bankr. Case No.: 8:12–bk–00562–MGW
|
Signed 02/13/2014

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ORDER

JAMES D. WHITTEMORE, United States District Judge

***1** This is an appeal of the Bankruptcy Court's Order granting summary judgment to the Trustee and imposing an equitable lien on Appellant's home in Sarasota, Florida. The Bankruptcy Court did not err in concluding that no genuine disputes of material fact remained on the Trustee's fraudulent transfer claims and properly granted summary judgment. The imposition of an equitable lien on Appellant's homestead, however, violates the homestead exemption of the Florida Constitution. For those reasons, the Order is AFFIRMED *in part* and REVERSED *in part*.

I. INTRODUCTION

Appellant Arlene LaMarca met Ronald Bifani in 2000. About two years after they met, LaMarca and Bifani began living together in a house Bifani owned at 207 North Ridge Street in Breckenridge, Colorado. In 2006, Bifani quitclaimed the North Ridge Street property to LaMarca in exchange for $10.00 (Dkt. 1–10 at 108).[1] When the North Ridge Street property was transferred to LaMarca, it was encumbered by a $450,000 mortgage securing a line of credit Bifani had with Wells Fargo Bank.

LaMarca and Bifani lived together in the North Ridge Street property until LaMarca sold it in February 2009 for $955,000.00 (Dkt. 1–10 at 109). LaMarca was required to satisfy the $450,000 mortgage held by Wells Fargo (Dkt. 1–10 at 111, 112). After closing costs, LaMarca received $341,297.57 in net sales proceeds (*id.*). She split the proceeds with Bifani, who received $170,648.79 (Dkt. 1–10 at 113).

Four months later, LaMarca sold two additional Colorado properties which had been quitclaimed to her by Bifani. On March 31, 2008, Bifani purchased property at 988 Bald Eagle Road, in Silverthorne, Colorado, for $348,000.00 (Dkt. 1–10 at 121). Although the record contains some conflicting evidence about the date of the transfer, it suffices to say that Bifani quitclaimed the Bald Eagle Road property to LaMarca on June 19, 2009 (Dkt. 1–10 at 122–26). On the same day, Bifani quitclaimed property at 1400 Golden Eagle Road in Silverthorne, Colorado to LaMarca (Dkt. 1–10 at 128). The Bald Eagle Road and Golden Eagle Road properties were jointly encumbered by a $242,700 mortgage.

On the same day Bifani transferred the Golden Eagle Road and Bald Eagle Road properties to LaMarca, he executed a promissory note in favor of LaMarca in the amount of $126,867.93, with an 8% interest rate (Dkt. 1–10 at 115). The note purported to amend and extend a promissory note executed in March 2008 (Dkt. 1–10 at 114), which was purportedly secured by the Bald Eagle Road and Golden Eagle Road properties, as well as a half interest in a boat located in Europe (Dkt. 1–10 at 115).

Later in 2009, LaMarca sold the Golden Eagle Road property for $970,000.00 (Dkt. 1–10 at 129). After satisfying the $242,700 mortgage on the property and paying closing costs, LaMarca received $669,233.29 in net sales proceeds (Dkt. 1–10 at 131). One week later, LaMarca purchased property located at 101 Garden Lane in Sarasota, Florida, for $650,000.00 (Dkt. 1–10 at 133–35, 140). She currently resides at the Garden Lane property with Bifani.

***2** When the three Colorado properties were purchased, transferred, and sold, Bifani was a defendant in a state court lawsuit in Colorado. The suit was originally filed in May 2001 by Richard Davis, Bifani's former business partner. The Colorado lawsuit was initially dismissed, but that decision was reversed on appeal, and the case was remanded to the trial court on November 11, 2008. One week before Bifani transferred the Golden Eagle Road and Bald Eagle Road properties to LaMarca, the Colorado trial court entered an order scheduling a telephonic status conference in light of the remand. The trial court eventually entered a final judgment against Bifani in the amount of $166,750.15. [2]

One month after the judgment was entered, Bifani filed for Chapter 7 bankruptcy protection. Appellee Shari Streit Jansen was appointed Trustee for Bifani's bankruptcy estate. A total of nine proofs of claim have been filed in the bankruptcy case, three of which were filed by LaMarca. One of LaMarca's claims, for $126,868, was based on the promissory note executed June 19, 2009 (Dkt. 1–10 at 159). LaMarca also filed two other proofs of claim for $36,489.50 each (Dkt. 1–10 at 150, 155). [3] LaMarca's proofs of claim totaled $199,847.00.

The Trustee instituted an adversary proceeding against LaMarca on April 11, 2012. In the Second Amended Complaint (Dkt. 1–6), the Trustee sought to avoid and recover the allegedly fraudulent transfers of the Bald Eagle Road and Golden Eagle Road properties (Counts I–VI) and to impose an equitable lien on the Garden Lane property in Sarasota, Florida (Count VII).

After discovery, the Trustee moved for summary judgment on the Second Amended Complaint (Dkt. 1–13), to which LaMarca responded in opposition (Dkt. 1–19). The Bankruptcy Court convened a hearing (*see* Dkt. 1–23), and ultimately granted the motion on Counts I, IV, and VII (Dkt. 1–1). [4] The remainder of the motion was denied as moot (Dkt. 1–1).

In its Order granting summary judgment, the Bankruptcy Court found no genuine issues of material fact existed with regard to the existence of "badges of fraud," and concluded that the badges of fraud combined to evidence actual intent on the part of Bifani to hinder, delay, or defraud his creditor (*id.*). Specifically, the Bankruptcy Court found that Bifani transferred property to a functional insider at the time a lawsuit was pending against him, did not receive reasonable equivalent value in exchange for the transfers, and maintained control of the property after it was transferred "at least in some respects" (Dkt. 1–1 at 5–6, 7). [5] The final paragraph of the Order summarizes the Bankruptcy Court's decision:

> The undisputed facts of this case fit the classic pattern of most fraudulent transfer cases. The Debtor was engaged in litigation with his former business partner for nearly a decade, and just when that lawsuit appears to be heading toward a judgment against him, the Debtor transfers nearly all of his property to a close friend he had been living with for years. His friend then sells some of the property the Debtor transferred to her and invests it in homestead property in Florida. On those undisputed facts, the Trustee is entitled to partial summary judgment as a matter of law on her fraudulent transfer and equitable lien claims.

***3** (Dkt. 1–1 at 8).

On appeal, LaMarca argues that the Bankruptcy Court erred by imposing an equitable lien on LaMarca's homestead and by granting summary judgment on a finding of "actual fraud" when material facts remained in dispute (Dkt. 8 at iii). Because no genuine disputes of material fact remained and the Trustee was entitled to judgment as a matter of law, the Bankruptcy Court properly granted summary judgment on the fraudulent transfer claims. However, the Bankruptcy Court abused its discretion by imposing an equitable lien on the Garden Lane property.

II. STANDARD

A district court reviews a bankruptcy court's order granting summary judgment *de novo*. *In re Optical Techs., Inc.*, 246 F.3d 1332, 1335 (11th Cir. 2001). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine factual dispute exists only if a reasonable fact-finder 'could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict.' " *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1300 (11th Cir. 2012) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). A fact is material if it may affect the outcome of the suit under governing law. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997).

The moving party bears the initial burden of demonstrating, by reference to materials on file, that there are no genuine disputes of material fact that should be decided at trial. *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1260 (11th Cir. 2004) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the moving party fails to demonstrate the absence of a genuine dispute, the motion should be denied. *Kernel Records*, 694 F.3d at 1300 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 606–08 (11th Cir. 1991)). Once the movant adequately supports its motion, the burden shifts to the nonmoving party to show that specific facts exist that raise a genuine issue for trial. *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 812, 815 (11th Cir. 2010). The nonmoving party must "go beyond the pleadings," and designate specific facts showing that there is a genuine dispute. *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593–94 (11th Cir. 1995) (citing *Celotex*, 477 U.S. at 324). A mere scintilla of evidence in the form of conclusory allegations, legal conclusions, or evidence that is merely colorable or not significantly probative of a disputed fact cannot satisfy the nonmoving party's burden. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991); *Kernel Records*, 694 F.3d at 1301.

The evidence presented must be viewed in the light most favorable to the nonmoving party. *Ross v. Jefferson Cnty. Dep't of Health*, 701 F.3d 655, 658 (11th Cir. 2012). If there is a conflict between the parties' allegations or evidence, the nonmoving party's evidence is presumed to be true. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1164 (11th Cir. 2003). "Although all justifiable inferences are to be drawn in favor of the nonmoving party," *Baldwin Cnty. v. Purcell*, 971 F.2d 1558, 1563–64 (11th Cir. 1992), "inferences based upon speculation are not reasonable." *Marshall v. City of Cape Coral*, 797 F.2d 1555, 1559 (11th Cir. 1986). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine dispute over a material fact, summary judgment should not be granted. *Samples ex rel. Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1998). However, if the nonmovant's response consists of nothing more than a repetition of conclusory allegations, summary judgment is not only proper, but required. *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981), *cert. denied*, 456 U.S. 1010 (1982).

***4** Equitable determinations, including the imposition of equitable liens, are reviewed for abuse of discretion. *In re Kingsley*, 518 F.3d 874, 877 (11th Cir. 2008) (citing *In re Gen. Dev. Corp.*, 84 F.3d 1364, 1367 (11th Cir. 1996)); *In re Flanagan*, 503 F.3d 171, 179–80 (2d Cir. 2007). When reviewing for abuse of discretion, the district court must recognize a "range of possible conclusions" the bankruptcy court may reach and affirm unless the bankruptcy court "has made a clear error of judgment, or has applied the wrong legal standard." *Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1238 (11th Cir. 2007). A decision that is contrary to the law constitutes an abuse of discretion. *Id.*

III. THE BANKRUPTCY COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT

To prevail on a claim for fraudulent transfer under § 726.105(1)(a), *Florida Statutes*, the Trustee was required to prove that Bifani transferred property within four years of filing his bankruptcy petition and the transfer was made with the "actual intent to hinder, delay, or defraud a creditor."[6] The statute provides eleven non-exclusive factors to be considered in determining "actual intent." *See* § 726.105(2).

In its Order granting summary judgment on the Trustee's claims that Bifani fraudulently transferred the Golden Eagle Road and Bald Eagle Road properties to LaMarca, the Bankruptcy Court found four badges of fraud: (1) LaMarca is a "functional insider" of Bifani, (2) Bifani retained possession or control over the property after the transfer, (3) Bifani had been sued or threatened with suit before the transfer was made, and (4) the value of the consideration received by Bifani for the transfers was not reasonably equivalent to the value of the asset transferred. *See* §§ 726.105(2)(a), (2)(b), (2)(d), (2)(h). Based on those findings, the Bankruptcy Court concluded that the evidence was sufficient to demonstrate "actual intent" to hinder, delay, or defraud a creditor.

LaMarca does not contest the Bankruptcy Court's underlying factual findings. She argues, rather, that the Bankruptcy Court's legal conclusions arising from those factual findings were erroneous.

A. “Functional Insider”

LaMarca contests the Bankruptcy Court's finding that she is a “functional insider” to Bifani. She argues that because she and Bifani are not married or related by blood, they cannot be “insiders” as defined in § 726.102(8), *Florida Statutes*. While LaMarca is correct that section 726.102(8) only mentions family members, “[a] close relationship between a transferor debtor and a transferee is a factor equivalent to a badge of fraud which should be considered in determining fraudulent intent.” *Gen. Trading Inc. v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1489 (11th Cir. 1997). *See also Orlando Light Bulb Serv., Inc. v. Laser Lighting & Elec. Supply, Inc.*, 523 So. 2d 740, 744 (Fla. 5th DCA 1988) (close business relationship, although not listed in the statute, is badge of fraud). Accordingly, considering the undisputed relationship between LaMarca and Bifani, the Bankruptcy Court did not err in concluding that LaMarca was a “functional insider,” which was indicative of fraud.

B. Retention of Possession or Control over the Property

***5** LaMarca next challenges the Bankruptcy Court's conclusion that Bifani retained control over at least some of the property after it was transferred.[7] She argues that the fact that Bifani lives in the Sarasota home purchased with the proceeds of LaMarca's sale of the Golden Eagle Road property does not demonstrate possession or control after transfer. LaMarca cites no authority supporting her argument, however. Nor does she point to any facts in the record demonstrating that the factual issues supporting the Bankruptcy Court's conclusion were in dispute.[8] LaMarca has not demonstrated that the Bankruptcy Court erred in finding that Bifani retained possession or control over some of the transferred property. *See Compania de Elaborados de Cafe v. Cardinal Capital Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1281 n.5 (S.D. Fla. 2003) (“It is the non-moving party's obligation to present evidence that precludes the entry of summary judgment ..., the Court is not required to ‘scour the record to determine whether there exists a genuine issue of material fact to preclude summary judgment.’ ”) (quoting *L.S. Heath & Son, Inc. v. AT&T Info. Sys. Inc.*, 9 F.3d 561, 567 (7th Cir. 1993)). *See also Veigle v. United States*, 873 F. Supp. 623, 627 (M.D. Fla. 1994) (living in transferred property rent free is indicative of continued control over fraudulently transferred property)

C. Suit or Threat of Suit Before the Transfer

As to the third badge of fraud found by the Bankruptcy Court, LaMarca argues that “unusual circumstances” mitigate in her favor. Specifically, she argues that the duration of the Colorado litigation and prior dismissal of the suit (before it was reinstated by the Colorado appellate courts) demonstrate that Bifani lacked the actual intent to fraudulently transfer the properties. These arguments are unpersuasive. Again, LaMarca presents no authority to support her argument that these factors should mitigate against a finding of actual intent. Section 726.105 requires only that Bifani “had been sued or threatened with suit” before the transfers. § 726.105(2)(d).

There is no dispute that the Colorado lawsuit had been filed, and was active, when the transfers occurred, and the statutory badge of fraud was therefore met. Any factual disputes outside of whether Bifani had been sued are simply not material to the existence of this statutory badge of fraud. Accordingly, the Bankruptcy Court did not err in concluding that Bifani's transfers soon after the litigation was reinstated by the Colorado appellate courts was indicative of actual intent, supporting a finding of a badge of fraud. *See United States v. Romano*, 757 F. Supp. 1331, 1337 (M.D. Fla. 1989) (“[W]hen a debtor transfers property after being sued, an indication of fraud results that the debtor must rebut.”). LaMarca presents no evidence to rebut the conclusion.

D. Reasonably Equivalent Value

Finally, LaMarca argues that the value of consideration received by Bifani was reasonably equivalent to the property transferred because Bifani owed LaMarca nearly $1 million. As pointed out by the Trustee, however, the undisputed evidence belies this assertion. The purported $1 million in debt consists in part of (1) LaMarca satisfying the $450,000 mortgage on the Ridge Street Property with the proceeds from the sale of that property; (2) the $171,000 LaMarca provided to Bifani when they split the remaining proceeds from the sale of the Ridge Street Property; and (3) LaMarca satisfying the $242,700 mortgage on the Golden Eagle Road property with the sale proceeds (the remainder of which was used to purchase the Sarasota house). LaMarca's attempt to characterize the transfers as payments of debts owed to her is unavailing.[9]

***6** The Bankruptcy Court did find, however, that Bifani owed LaMarca $126,897.93 pursuant to an amended promissory note in favor of LaMarca purportedly memorializing Bifani's obligation to repay sums LaMarca had previously advanced (Dkt. 1–1 at 3). But none of the property transfers extinguished or reduced that debt. When Bifani filed for bankruptcy, LaMarca asserted a claim against the Estate for the full amount of the promissory note. The Bankruptcy Court did not err in finding that Bifani did not receive reasonably equivalent consideration for the transferred property.

E. Finding Actual Intent

After finding the four badges of fraud, the Bankruptcy Court concluded that the Trustee was entitled to judgment as a matter of law on the fraudulent transfer claims. This conclusion necessarily implies a finding of actual intent based on the badges of fraud. LaMarca argues that the rarity of granting summary judgment to plaintiffs on fraudulent transfer claims based on actual intent demonstrates that the Bankruptcy Court erred in finding actual intent. I disagree.

Evidence of actual intent to defraud is rarely accomplished through direct proof, so fraudulent conduct may be inferred through circumstantial evidence and the surrounding circumstances of the transactions. *In re XYZ Options, Inc.*, 154 F.3d 1262, 1271 (11th Cir. 1998). Because actual intent is often proved through circumstantial evidence, it typically presents a jury question. *Wiand v. Waxenberg*, 611 F. Supp. 2d 1299, 1312 (M.D. Fla. 2009) (Whittemore, J.); *Nationsbank, N.A. v. Coastal Utilities, Inc.*, 814 So. 2d 1227, 1231 (Fla. 4th DCA 2002) (summary judgment in cases involving actual intent to hinder, delay, or defraud is available "only in extraordinary circumstances").

If, however, the evidence is one-sided, the plaintiff may be entitled to summary judgment on a fraudulent transfer claim. *Wiand v. Cloud*, 919 F. Supp. 2d 1319, 1331 (M.D. Fla. 2013). In deciding whether summary judgment is appropriate, it must be determined "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Hickson*, 357 F.3d at 1260 (quoting *Liberty Lobby*, 477 U.S. at 251).

The Bankruptcy Court determined that no genuine disputes of material fact remained concerning the four badges of fraud, and concluded that Bifani's actual intent to hinder, delay, or defraud a creditor could be inferred from the badges and surrounding circumstances. This case presents one of those rare circumstances where the evidence is "so one-sided" that the only available conclusion is that Bifani acted with actual intent, and that conclusion is adequately supported by the four badges of fraud. *See* *In re Seminole Walls & Ceilings Corp.*, 446 B.R. 572, 595 (Bankr. M.D. Fla. 2011) (finding actual intent based on five badges of fraud). No reasonable jury could find for Bifani on the issue of actual intent, and summary judgment was therefore appropriate. *Liberty Lobby*, 477 U.S. at 248.

F. A Finding of Insolvency Was Not Required

LaMarca argues that a genuine dispute over whether Bifani was insolvent at the time of the transfers precludes summary judgment and the failure of the Bankruptcy Judge to make a factual finding concerning insolvency constitutes error. This is incorrect. A finding of insolvency is unnecessary under the plain terms of the statute. *See* § 726.105(1)(a), Fla. Stat. When concluding that a debtor transferred property with the actual intent to hinder, delay, or defraud a creditor, insolvency is a contributing, but not necessary, element of the determination. *See id.*; *Veigle*, 873 F. Supp. at 628 (section 726.105(1)(a) does not require court to make a finding as to insolvency).

G. LaMarca's Status as a Creditor and *Jacksonville Bulls*

***7** Finally, LaMarca argues that her status as a creditor of the Estate negates any intent to defraud. In support of that broad conclusion, she cites *Jacksonville Bulls Football, Ltd. v. Blatt*, 535 So. 2d 626 (Fla. 3d DCA 1988). *Jacksonville Bulls* does not stand for the proposition for which LaMarca cites it. Rather, the Third District held:

> [I]f a judgment debtor disposes of assets for adequate cash, the transaction will not be considered fraudulent in the absence of a showing that the debtor intended to give the funds received to other than existing creditors. Otherwise stated, it is *not* fraudulent to give the funds to some but not all existing creditors, even though the effect might be to injure or prejudice an existing creditor who

> was not chosen to receive the debtor's largesse.

Id. at 629. Such transfers are called "preferential transfers," and they are not fraudulent. *Id.*

The transfers of property from Bifani to LaMarca, however, were not "preferential transfers." There is no evidence that Bifani received above-market compensation for the property and used the income to selectively compensate LaMarca as a creditor, as in *Jacksonville Bulls*. As the Bankruptcy Court found, the undisputed record evidence demonstrates that Bifani received *nothing* in exchange for quitclaiming the North Ridge Street, Bald Eagle Road, and Golden Eagle Road properties to LaMarca–not even a partial satisfaction of the debt allegedly owed to her, now evidenced by a claim against the Bankruptcy Estate. LaMarca's status as a creditor of the Estate does not render summary judgment inappropriate.

Because the Bankruptcy Court correctly concluded that four badges of fraud existed and that there was no genuine dispute that Bifani acted with actual intent to hinder a creditor, summary judgment was appropriate.

IV. THE BANKRUPTCY COURT ABUSED ITS DISCRETION BY IMPOSING AN EQUITABLE LIEN

After the Bankruptcy Court granted summary judgment on the fraudulent transfer claims, it determined that the Trustee was entitled to summary judgment on Count VII and imposed an equitable lien on the Garden Lane property in Sarasota, Florida, which is LaMarca's homestead. This was an abuse of the Bankruptcy Court's discretion because it invades the homestead protections provided by the Florida Constitution. [10]

Article X, section 4 of the Florida Constitution provides:

> (a) There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor performed on the realty, the following property owned by a natural person:
>
> (1) a homestead ....

Fla. Const. Art. X, § 4. This provision generally protects homesteads from liens except in three circumstances: (1) the payment of taxes or assessments, (2) obligations incurred for the purchase, improvement, or repair of the homestead, and (3) obligations incurred for labor performed on the homestead property. *Dowling v. Davis*, No. 8:06–cv–562–T–27TGW, 2007 WL 1839555, at *3 (M.D. Fla. June 26, 2007) (Whittemore, J.). The homestead exemption must be liberally construed, but not so liberally "as to make it an instrument of fraud or imposition upon creditors," however. *Havoco of Am., Ltd. v. Hill*, 790 So. 2d 1018, 1020 (Fla. 2001).

***8** In *Havoco*, the Florida Supreme Court answered a question certified by the Eleventh Circuit by "holding that a homestead acquired by a debtor with the specific intent to hinder, delay, or defraud creditors is not excepted from the protection of article X, section 4" of the Florida Constitution. *Id.* at 1030. Nonetheless, *Havoco* also recognized that courts are permitted to invoke equitable principles to reach beyond the literal language of the homestead exemption, but "only where funds obtained through fraud or egregious conduct were used to invest in, purchase or improve the homestead." *Id.* at 1028.

Florida's appellate courts have interpreted *Havoco* to limit equitable liens on homesteads to cases "in which the homesteads were purchased with the fruits of fraudulent activity." *Willis v. Red Reef, Inc.*, 921 So. 2d 681, 684 (Fla. 4th DCA 2006). Those cases do not include situations where the owner of the homestead converted otherwise reachable funds into an exempt homestead, even if this is done through a fraudulent transfer made with the actual intent to hinder, delay, or defraud creditors. *Id.*; *See Dowling*, 2007 WL 1839555, at *4 ("[T]he homestead exemption does not contain an express exception for real property that is acquired in Florida for the sole purpose of defeating the claims of out-of-state creditors."); *Conseco Servs., LLC v. Cuneo*, 904 So. 2d 438, 440 (Fla. 3d DCA 2005) ("It is not enough that the Cuneos transferred their nonexempt funds to an exempt asset in order to keep those funds from creditors. If a debtor acquires homestead property with the 'specific intent to hinder, delay, or defraud creditor,' the property still enjoys Florida's constitutional homestead protection.").

Havoco and its progeny instruct that the fraudulent transfer of assets into a homestead does not provide a basis for imposition of an equitable lien. [11] The Bankruptcy Court therefore abused its discretion by imposing an equitable lien on LaMarca's homestead, as the lien infringes on the homestead exemption granted in article X, section 4 of the Florida Constitution.

Accordingly, the Order of the Bankruptcy Court (Dkt. 1–1) is **AFFIRMED *in part*** and **REVERSED *in part***. The case is **REMANDED** to the Bankruptcy Court with instructions to **DISSOLVE** the equitable lien imposed on LaMarca's homestead, and for further proceedings consistent with this Order.

DONE AND ORDERED this 13th day of February, 2014.

All Citations

Not Reported in Fed. Supp., 2014 WL 12795661

Footnotes

1 Citations to docket entries (Dkt.) are to the district court docket, rather than the docket of the adversary proceeding. Page number references are to the page numbers generated by the automatic filing system of CM/ECF.

2 The judgment was entered on December 12, 2011.

3 Both $36,489.50 claims were based on vehicles Bifani transferred to LaMarca purportedly to secure a debt he owed to her (Dkt. 1–10 at 150, 153, 155, 158).

4 Count I sought to avoid the fraudulent transfer of the Golden Eagle Road property on the basis of LaMarca's “actual intent to hinder, delay or defraud creditors of the Debtor”; Count IV sought to avoid the fraudulent transfer of the Bald Eagle Road property, also on the basis of actual intent to hinder, delay, or defraud; and Count VII sought to impose an equitable lien on LaMarca's house because she allegedly purchased the house with proceeds garnered from the sale of Golden Eagle Road property.

5 The Bankruptcy Court also imposed an equitable lien on the Sarasota home because it had been purchased with funds obtained by selling the Golden Eagle Road property after it had been fraudulently transferred to LaMarca by Bifani.

6 A plaintiff may also prove a fraudulent transfer by demonstrating that the transferor did not receive a reasonably equivalent value in exchange for the transfer, and (1) the transferor was engaged or was about to engage in a business or a transaction for which the remaining assets of the transferor were unreasonably small in relation to the business or transaction, or (2) the transferor intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. § 726.105(1)(b), Fla. Stat.

7 The Bankruptcy Court found that Bifani “has–at least in some respects–maintained control of the property after it was transferred” (Dkt. 1–1 at 6). He added, “After all, LaMarca purchased the Sarasota home with the proceeds from the Golden Eagle Road property, and it is undisputed [Bifani] has been living with LaMarca at that house ever since.” (*Id.*)

8 LaMarca argues that Bifani was not on the deed when the Sarasota, Florida home was purchased. She fails, however, to establish that such evidence was presented to the Bankruptcy Court. She also fails to provide a citation to the record establishing that fact. In any event, the lack of the debtor's name on the deed does not preclude a finding of this badge of fraud. *See* *Osley v. Adams*, 268 F. 114, 116 (5th Cir. 1920) (debtor

was in actual possession even after deed was transferred); *In re Lee*, 223 B.R. 594, 600 (Bankr. M.D. Fla. 1998) (debtor retained control over property in a manner indicative of fraud even though his name did not appear on the deed).

9 I agree with the Bankruptcy Court's conclusion that there "is no credible argument–nor is there any record evidence to suggest–that the" mortgage payoffs or distribution of sale proceeds were loans (Dkt. 1–1 at 6).

10 There is no dispute that the Garden Lane property is LaMarca's homestead.

11 The cases cited by the Trustee are inapposite. They were either decided before *Havoco*, or they involved fraudulent or egregious conduct other than fraudulent transfers. *See* *In re Fin. Federated Title & Trust Inc.*, 273 B.R. 706, 716 (Bankr. S.D. Fla. 2001) (majority of funds originally obtained by fraud); *Babbit Electronics, Inc. v. Dynascan Corp.*, 915 F. Supp. 335 (S.D. Fla. 1995).

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