IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

IN RE	)	
	)	**NO. 3-83-00372**
SOUTHERN INDUSTRIAL BANKING CORPORATION	)	
	)	**Chapter 11**
Debtor	)	
THOMAS E. DuVOISIN, Liquidating Trustee	)	
Plaintiff	)	
v.	)	**ADV. NO. 3-85-0530**
ELLA and ROY PEMBERTON	)	
Defendants	)	

M E M O R A N D U M

This adversary proceeding came before the court upon the plaintiff's complaint to recover the value of a preferential transfer under the provisions of § 550 of the Bankruptcy Code. Having considered the evidence and arguments of the parties, the court now makes its findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

I.

The parties stipulated the following facts:

1. Thomas E. DuVoisin is the Liquidating Trustee for Southern Industrial Banking Corporation Creditors' Liquidation Trust, the Debtor in the above bankruptcy case. The Chapter 11 case was filed March 10, 1983, by the Debtor.

2. Ella H. Pemberton was a resident of Blount County, Tennessee, at all times pertinent to this matter. She died on March 27, 1992, after a lingering illness.

3. Ella Pemberton had three children, roy Pemberton, Juanita Pemberton Foree, and James Pemberton. James was killed in World War II. Even prior to the death of her husband in 1954, Ella Pemberton lived with her daughter, Juanita Foree, until Mrs. Ella Pemberton's death in 1992. Juanita Foree's mailing address is P.O. Box 5 (now P.O. Box 05), Maryville, Tennessee.

4. Ella Pemberton had all of her financial dealings with the Bank of Maryville, now First Tennessee Bank, except for the investment certificate purchased at Southern Industrial Banking Corporation.

5. Ella Pemberton accumulated a small estate following the sale of her husband's business after he died, the conversion of their residence to a rental property which was later sold, and the sale of a separate rental house she and her husband had owned prior to his death. All funds accumulated by Ella Pemberton were kept on deposit in appropriate accounts or certificates of deposit with the Bank of Maryville.

6. Prior to August 17, 1982, Ella Pemberton withdrew $10,000 from the Bank of Maryville. She used the money to purchase Investment Certificate No. 035430 on August 17, 1982, from Southern Industrial Banking Corporation ("SIBC").

7. After obtaining the Investment Certificate, Ella Pemberton requested that her son, Roy Pemberton, sign a signature card with SIBC which he did. The signature card was then returned to SIBC by Ella Pemberton. Mrs. Pemberton retained possession of the Investment Certificate.

8. Ella Pemberton received a check dated February 17, 1983, payable to Ella H. Pemberton or Roy Pemberton from SIBC, being check #57331 in the amount of $10,000. The check was endorsed only by Ella H. Pemberton and subsequently cleared the Debtor's bank account of SIBC on March 1, 1983.

9. The check obtained from SIBC by Ella Pemberton was used to obtain Certificate of Deposit No. 0038910 with the Bank of Maryville on February 17, 1983, in the amount of $10,000. The Certificate of Deposit from the

Bank of Maryville was made payable to Ella H. or Roy Pemberton as joint tenants with the right of survivorship.

10. The Certificate of Deposit with the Bank of Maryville was for a six month period and was renewed on two additional occasions. The money was left on deposit in the certificate with the Bank of Maryville for a total of approximately eighteen months.

11. Ella H. Pemberton redeemed the Certificate of Deposit by endorsing it and turning it in to the Bank of Maryville, now First Tennessee Bank, upon its maturity following the eighteen month period. Ella M. Pemberton received check #29508 dated August 16, 1984, from First Tennessee Bank (formerly the Bank of Maryville), being the $10,000 that was originally used to purchase the Certificate of Deposit. Ella H. Pemberton subsequently endorsed the check and received the entire $10,000.

12. After 1984, Ella Pemberton handled her own financial affairs until the latter part of 1985. Ella Pemberton then sought the assistance of her daughter-in-law, Dorothy Pemberton, in handling the checking account. However, Ella Pemberton continued to write most of the checks up until approximately 1990.

13. Ultimately, a judgment was obtained by the Plaintiff against Ella Pemberton for the full amount of the Investment Certificate with SIBC plus all accrued interest. The payment by SIBC to Ella Pemberton in February 1983 was made to her, as a creditor of SIBC, on account of an antecedent debt made while SIBC was insolvent, within 90 days of the filing of SIBC's petition and was more than she would have received in a proceeding under Chapter 7. This court entered judgment against Ella Pemberton on March 3, 1989, holding that this payment was a preferential transfer under § 547 of the Bankruptcy Code. No payments were received from Ella Pemberton on the judgment.

14. There has not been an estate probated for Ella Pemberton as total assets owned by her at the time of her death were less than a hundred dollars.

Stipulation of the Parties (11-9-93).

In addition to the stipulations, the testimony of Roy Pemberton established that he did not know his mother, Ella Pemberton,

had withdrawn her moneys from SIBC nor did he know that she purchased and placed his name along with hers on the certificate of deposit at the Bank of Maryville. Moreover, he did not know that she later cashed the certificate of deposit and he never received any of funds from that certificate of deposit.

II.

Although the plaintiff has obtained a judgment against the late Ella Pemberton for the preferential transfer represented by the SIBC investment certificate in this case, the plaintiff seeks to recover from the defendant, Roy Pemberton, the value of that transfer under the provisions of § 550 of the Bankruptcy Code. Section 550 reads in pertinent part as follows:

> **Liability of transferee of avoided transfer**
>
> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section . . . 547 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> > (2) any immediate or mediate transferee of such initial transferee.
>
> (b) The trustee may not recover under section (a)(2) of this section from--
>
> > (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without

> knowledge of the voidability of the transfer avoided; or
> (2) any immediate or mediate good faith transferee of such transferee.

11 U.S.C.A. § 550(a), (b) (West 1993).

The evidence established Ella Pemberton was the initial transferee of the preferential transfer from SIBC within the meaning of § 550(a). Even though the SIBC check was payable to Ella Pemberton or Roy Pemberton, the proof showed it was Ella Pemberton who obtained and later endorsed and cashed the check to purchase a certificate of deposit. She had complete and sole control over the funds represented by the check and could have used them for any purpose. Consequently, she, and not Roy Pemberton, was the only initial transferee. *See In re Auto-Pak, Inc.*, 73 B.R. 52 (D.D.C. 1987) (debtor's president and not IRS found to be initial transferee where debtor's president caused debtor's check made payable to the IRS to be converted to cashier's check which he controlled).

Since Roy Pemberton was not an initial transferee under § 550 (a)(1),[1] the next question is whether he was an immediate or mediate transferee of the initial transferee within the meaning of § 550(a)(2). The court concludes he was not.

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[1] Nor can it be said that defendant Roy Pemberton was an entity for whose benefit the transfer was made within the meaning of § 550(a)(1). The initial transfer of funds from SIBC to Ella Pemberton conferred no benefit upon Roy Pemberton.

As noted, when Ella Pemberton withdrew the funds from SIBC, she was free to use those funds for any purpose. If she had given those moneys to defendant Roy Pemberton he would have, of course, been an immediate or mediate transferee. Likewise, if she had deposited those moneys into Roy Pemberton's bank account, he would have been an immediate or mediate transferee inasmuch as banks or financial institutions that merely hold funds in a demand account as a depositor for their customers are not transferees, but are more in the nature of conduits. *See, e.g., Bonded Fin. Servs. v. European Am. Bank*, 838 F.2d 890 (7th Cir. 1988); *In re Moskowitz*, 85 B.R. 8 (E.D.N.Y. 1988); *In re Columbian Coffee Co.*, 75 B.R. 177 (S.D. Fla. 1987); *see also First Nat'l Bank v. Rafoth (In re Baker & Getty Fin. Servs)*, 974 F.2d 712 (6th Cir. 1992). Ella Pemberton, however, did not transfer or give the moneys to defendant Roy Pemberton nor did she place the funds into a joint banking account with Roy Pemberton. Rather, she transferred the moneys to the Bank of Maryville in exchange for an investment instrument, i.e, a certificate of deposit. Therefore, under the facts of this case, it was not Roy Pemberton who was the immediate or mediate transferee of the SIBC funds; it was the Bank of Maryville. Of course, the plaintiff cannot recover the value of the preferential transfer from the bank because it gave value in return for the transfer in the form of a certificate of deposit and unquestionably would be

entitled to the defense provided in § 550(b)(1).[2]

Because the plaintiff would not be entitled to recover from the defendant, Roy Pemberton, under the provisions of § 550, an order will enter dismissing the plaintiff's complaint.[3]

JOHN C. COOK
United States Bankruptcy Judge

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[2] Unlike a transfer into an ordinary bank account in which the bank is characterized as a mere conduit of funds, the purchase of a certificate of deposit is usually governed by terms and conditions regarding a premature withdrawal of funds including the assessment of a penalty. In such a case, the bank is not a mere conduit of the funds. In the instant case, the proof did not re- veal the exact terms and conditions of the certificate of deposit at issue. How- ever, because the proof did establish the bank sold an investment instrument to Ella Pemberton in exchange for the transfer of the SIBC funds, the plaintiff failed to prove that such a sale transaction was different from any other sale transaction in which the recipient of the funds is considered the immediate or mediate transferee of the funds. Moreover, even if Roy Pemberton were to be considered a subsequent transferee of the bank upon the bank's issuance of the certificate of deposit, the plaintiff would not be entitled to recover the value of the preference from him since he certainly would qualify as a good faith transferee within the meaning of § 550(b)(2).

[3] Even if it could be concluded that the Bank of Maryville served as a mere conduit of the funds invested in the certificate of deposit, the proof failed to establish defendant Roy Pemberton had actual control or dominion over the certificate of deposit funds. *See Bonded Fin. Servs. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988) ("minimum requirement of status as `transferee' is dominion over the money or other asset, the right to put the money to one's own purposes"); *Norberg v. Societe Generale (In re Chase and Sanborn Corp.)*, 848 F.2d 1196, 1200 (11th Cir. 1988) (it would be "inequitable" to allow recovery against an entity merely because it had "technically . . . received the funds . . .," if the entity had "never actually *controlled* the funds."). One can hardly exercise dominion or control over an unknown asset or fund that is subject to the exclusive control of another person. By not telling her son that his name had been listed on her certificate of deposit, Ella Pemberton for all practical pur- poses kept for herself exclusive and actual control over the certificate of deposit that she later redeemed for her sole benefit.