

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

In re

PRO PAGE PARTNERS, LLC,

Debtor.

No. 00-22856
Chapter 7

MARY FOIL RUSSELL, Trustee,

Plaintiff,

vs.

PEOPLE'S COMMUNITY BANK,

Defendant.

Adv. Pro. No. 01-2037

M E M O R A N D U M

APPEARANCES :

MARK S. DESSAUER, ESQ.
HUNTER, SMITH & DAVIS, LLP
Post Office Box 3740
Kingsport, Tennessee 37664
Attorneys for Mary Foil Russell, Trustee

RICK J. BEARFIELD, ESQ.
JASON W. BLACKBURN, ESQ.
BEARFIELD & MCCLELLAN
Post Office Box 4210
Johnson City, Tennessee 37602
Attorneys for People's Community Bank

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court on a motion to alter or amend judgment or alternatively, for additional findings of fact filed by plaintiff Mary Foil Russell, chapter 7 trustee, on July 14, 2003, with respect to the court's July 3, 2003 memorandum opinion and order, both granting in part and denying in part the motions for summary judgment filed by the trustee and the defendant People's Community Bank (the "Bank"). As discussed below, the motion will be granted as to the court's previous ruling regarding good faith, the court concluding that a genuine issue of material fact exists on this subject precluding summary judgment. In all other respects, the motion will be denied. This is a core proceeding. See 28 U.S.C. § 157(b)(2)(F) and (H).

I.

As set forth in the opinion, the trustee is seeking to recover as fraudulent conveyances under 11 U.S.C. §§ 544 and 548, certain prepetition payments made by the debtor Pro Page Partners, LLC ("Pro Page") to the Bank. The undisputed facts in this regard are that after Pro Page commenced business in January 1997 as a paging company, it obtained three loans from the Bank in the amounts of \$90,000, \$200,000, and \$125,000. These loans were guaranteed by the debtor's members, including

Mark Halvorsen, Joe Potter, and Carlton A. Jones III (collectively, the "Members"). Thereafter, beginning in 1998, the Bank made four loans directly to the Members, in the amounts of \$70,500, \$402,000, \$20,200, and \$13,850. These four loans were secured by assets belonging to the Members; Pro Page was neither an obligor nor a guarantor of any of the four loans and none of Pro Page's assets was pledged as security for any of the loans.

The \$402,000 loan to the Members, made on May 29, 1998, was utilized to pay in full the balance owing on Pro Page's three loans from the Bank. Subsequently, Pro Page began making payments to the Bank on the Members' indebtedness. It is these payments that the trustee is attempting to recover in this adversary proceeding. As set forth in the trustee's motion for summary judgment, from June 26, 1998, until October 23, 2000, when Pro Page filed bankruptcy, Pro Page made 15 payments totaling \$17,420.76 to the Bank on the \$70,500 loan to the Members; 15 payments totaling \$88,791.74 on the \$402,000 loan; 13 payments totaling \$6,073.05 on the \$20,200 loan; and 3 payments totaling \$1,075.10 on the \$13,850 loan to the Members.¹

¹In the July 3, 2003 memorandum opinion, the court utilized the numbers and sums of payments set forth in the trustee's complaint, as amended. The numbers set forth herein are taken from the trustee's summary judgment motion and appear to be
(continued...)

In a July 3, 2003 memorandum opinion and order, this court granted summary judgment in favor of the Bank and denied the trustee's summary judgment motion with respect to payments made by Pro Page on the Members' \$402,000 and \$13,850 loans. The trustee had asserted that the payments on the loans were recoverable as fraudulent conveyances under both the Bankruptcy Code and the Tennessee Uniform Fraudulent Conveyance Act, TENN. CODE ANN. § 66-3-301, *et seq.*, because they were made while Pro Page was insolvent and without a fair consideration in that Pro Page was not liable on the debts. Additionally, the trustee had argued that the Bank had not received the payments in good faith, an element of fair consideration under state law, because the Bank knew or shown have known of Pro Page's insolvency. This court concluded that although Pro Page did not receive a direct benefit from its payments, *i.e.*, a corresponding reduction of its own indebtedness, Pro Page received an indirect benefit because the loan proceeds had been utilized on its behalf and this indirect benefit constituted fair consideration. As to the good faith issue, this court concluded that mere knowledge of insolvency standing alone did not constitute lack of good faith and absent proof by the trustee that "the Bank

¹(...continued)
amounts which are undisputed by the Bank.

failed to act honestly, fairly, or openly in its dealings with Pro Page or that the Bank took advantage of Pro Page in some fashion," the Bank was entitled to prevail.

With respect to the payments by Pro Page on the Members' \$70,500 and \$20,200 loans, this court similarly concluded that the Bank was entitled to summary judgment as to the good faith issue. Regarding the question of whether Pro Page received fair consideration for its payments on these loans, the court concluded as a matter of law that in the event Pro Page was indebted to the Members at the time of its payments to the Bank such that it received a right of setoff against its own indebtedness, this setoff right may constitute fair consideration. Although the Bank had submitted evidence in support of its summary judgment motion which it averred established that Pro Page was obligated to the Members during the relevant time period, this court agreed with the trustee that the proffered evidence had not been authenticated and was hearsay and thus, could not be considered by the court. Accordingly, the court reserved this issue for trial.

In her motion to alter or amend the judgment filed pursuant to Fed. R. Civ. P. 52(b) and 59(e), as incorporated by Fed. R. Bankr. P. 7052 and 9023, the trustee raises three alleged "clear errors of law" on the part of this court. First, the trustee

argues that because Pro Page received the \$402,000 and \$13,850 loan proceeds as capital contributions from the Members rather than as loans from the Members which Pro Page was indirectly repaying when it paid the Bank, Pro Page did not receive fair or reasonably equivalent consideration. Also in this regard, the trustee alleges that "the Court fail[ed] to consider the fairness of the transaction as a whole when determining whether the exchange was fair or reasonable." Secondly, the trustee contends that "the Court incorrectly granted the [Bank] summary judgment on the good faith element of TENN. CODE ANN. § 66-3-304 based solely on the fact that the [Bank] knew of [Pro Page's] insolvency, and the Court did not consider the [Bank's] honest belief, intent and knowledge that the transfers would hinder, delay or defraud others." Lastly, the trustee asserts that the Bank "did not meet its burden of producing evidence to rebut [the trustee's] contention that there was no fair equivalent exchange for the payments made on the \$70,100² and \$20,200 loans. As a result, no genuine issues of fact remain for trial on these transfers, and the [trustee] is entitled to judgment in the amount of \$23,493.82 for the transfers made on these loans."

²The actual amount of the original loan made on April 3, 1998, was \$70,500, although subsequent extensions of the debt on October 20, 1998, January 15, 1999, July 15, 1999, December 31, 1999, and October 18, 2000, were for \$70,100.

II.

With regard to the first issue, the capital contributions versus loans dichotomy, the trustee cites *Ray v. City Bank & Trust Co. (In re C-L Cartage Co, Inc.)*, 70 B.R. 928, 934 (Bankr. E.D. Tenn. 1987), wherein the court stated:

The courts have long recognized that a debtor can pay its debt to X by paying X's debt to Y. The debtor's payments to Y must reduce the debtor's legitimate debt to X. The reduction of the debt must be "reasonably equivalent" value in return for the payments. And, when multiple transactions are considered together, the end result must not violate the statutory purpose of conserving the debtor's property for the benefit of its creditors.

In her memorandum, the trustee states that although this court quoted in its memorandum opinion the first two sentences from this passage, the court "completely ignored" the requirements that "[1] when debt is to be considered as 'reasonably equivalent' exchange, it must be legitimate and [(2)] such legitimacy must be viewed in the context of protecting creditors." The trustee states that because the Members, rather than creating a legitimate debt from Pro Page to themselves, merely made a capital contribution to Pro Page when it utilized the loan proceeds on Pro Page's behalf, the benefit received by Pro Page from the loans may not constitute reasonably equivalent value within the meaning of 11 U.S.C. § 548(a)(1) or fair consideration as contemplated by TENN. CODE. ANN. § 66-3-304.

Other than the passage from *C-L Cartage* cited above, the trustee cites no authority for this proposition, neither in her present memorandum, nor in the memoranda regarding her original summary judgment motion. Furthermore, as this court expressly pointed out in the July 3, 2003 memorandum opinion, while the court in the *C-L Cartage* decision concluded that the facts before it satisfied the legitimate debt requirement, it observed that an indirect benefit may be found even in the absence of a legitimate debt. *In re C-L Cartage Co.*, 70 B.R. at 934. As stated by that court, "[i]t may not make a difference whether the debtor corporation actually owes a debt to the stockholder so long as the money or property that gave rise to the stockholder's debt was in fact received by the corporation." *Id.* at 935 (citing *Mayo v. Pioneer Bank & Trust Co.*, 270 F.2d 823 (5th Cir. 1959); *Butz v. Sohigro Serv. Co. (Matter of Evans Potato Co.)*, 44 B.R. 191 (Bankr. N.D. Ohio 1984)). The *C-L Cartage* court noted that it was not necessary for it to consider this alternative basis for an indirect benefit because it had concluded that the debtor before it did in fact owe its stockholder a debt. *Id.* at 935. Thus, contrary to the trustee's argument, the *C-L Cartage* decision does not stand for the proposition that the only means of satisfying the consideration requirement in indirect benefit cases is to have

a legitimate debt that the debtor is repaying.

In the July 3, 2003 memorandum opinion, this court cited and discussed in detail decisions wherein the courts have uniformly concluded that reasonably equivalent value had been met where the debtor received the benefits of the loan, even if the debtor had no legal obligation to repay the monies. See court's memo. opin., pp. 12-14 (citing *Crews v. First Union Nat'l Bank (In re Michelle's Hallmark Cards & Gifts, Inc.)*, 219 B.R. 316, 322-23 (Bankr. M.D. Fla. 1998)(debtor had received reasonably equivalent value in exchange for its payments because it had exclusive use of the property purchased by the shareholders with the loan proceeds); *Grant v. Sun Bank/N. Cent. Fla. (In re Thurman Constr., Inc.)*, 189 B.R. 1004, 1015 (Bankr. M.D. Fla. 1995)(debtor received reasonably equivalent value under § 548 for payments it made on loan to principals of debtor where purpose of loan was to obtain working capital for debtor and the debtor received the money directly and utilized the funds to pay operating expenses); *Nordberg v. Republic Nat'l Bank (In re Chase & Sanborn Corp.)*, 51 B.R. 739, 740 (Bankr. S.D. Fla. 1985)(when transfer is "from a corporate debtor in bankruptcy to a defendant bank in payment of the personal note of the debtor's dominant stockholder, where the benefit of payment inured immediately to the corporate debtor," the transfer is not

fraudulent); *Beemer v. Walter E. Heller & Co. (In re Holly Hill Med. Ctr., Inc.)*, 44 B.R. 253 (Bankr. M.D. Fla. 1984)(no fraudulent transfer because debtor had received the loan proceeds even though not liable on the debt); *Matter of Evans Potato Co.*, 44 B.R. at 194 (debtor's exclusive use of goods sold was reasonably equivalent value for payments); 9C AM. JUR. 2D *Bankruptcy* 2061 (2002) ("[V]alue [under 548] may be received by a debtor who transfers property in payment of a third party's debt where the debtor receives some benefit from the payment, such as the goods, services, or use of money for which the debtor has paid.")).

None of these cases, or any other to the court's knowledge, makes any distinction between monies which are loaned as opposed to merely given to the debtor in the form of a capital contribution, gift, or otherwise. And, this court can think of no appropriate rationale for such a distinction since in all of these cases the debtor is receiving a benefit in exchange for its transfers, the debtor's estate is not being depleted, and creditors are no worse off than if the contribution or gift had not been made. As stated by the Second Circuit Court of Appeals in *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 992 (2d Cir. 1981), the most-often cited indirect benefit decision, "If the consideration given to the third person has

ultimately landed in the debtor's hands, or if the giving of the consideration to the third person otherwise confers an economic benefit upon the debtor, then the debtor's net worth has been preserved, and [the statute] has been satisfied—provided of course, that the value of the benefit received by the debtor approximates the value of the property or obligation he has given up."

This same analysis applies to the trustee's assertion that the court has "fail[ed] to consider the fairness of the transaction as a whole." In this regard, the trustee maintains that absent avoidance of the transfers, the Bank will be in a better position than other creditors and the statutory goal of preserving the debtor's property for the benefit of all creditors will be defeated. This court disagrees. Pro Page's estate was not depleted by the payments to the Bank because it received in exchange for these payments the utilization of the loan proceeds on its behalf. In fact, Pro Page received far more than reasonably equivalent value in that the loan proceeds received by it totaled \$415,850 (the sum of \$402,000 and \$13,850), while it paid out only \$89,866.84 to the Bank in exchange. Thus, contrary to the assertion that Pro Page's estate and its creditors were harmed by the transaction, the reverse is true in that Pro Page's outstanding liabilities were

reduced and it owed less debt at the time of its bankruptcy filing. Furthermore, creditors are no worse off than if the Members had not obtained the loans from the Bank for Pro Page's benefit. Pro Page would have simply made payments to the Bank on its own indebtedness rather than that of the Members and there is no indication that these payments would have been recoverable as fraudulent transfers. Based on all the foregoing, the trustee's motion to alter or amend will be denied to the extent it is premised on the capital contribution argument and the court's alleged failure to consider the transaction as a whole.

III.

The second basis for the trustee's motion to alter or amend relates to the good faith issue. Under Tennessee's fraudulent conveyance statutes, a conveyance is fraudulent if it is made by one who is insolvent and "without a fair consideration." See TENN. CODE ANN. § 66-3-305. By statute, "'fair consideration' is made up of two components, (1) an exchange of a fair equivalent (2) made in good faith." *Still v. Fuller (In re Southwest Equip. Rental, Inc.)*, 1992 WL 684872, *17 (E.D. Tenn. July 9, 1992)(citing TENN. CODE ANN. § 66-3-304 and *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1296-97 (3d Cir.

1986)(construing Pennsylvania's UFCA)). In her previous motion, the trustee argued that she was entitled to summary judgment concerning the Bank's lack of good faith based on evidence that the Bank knew of Pro Page's insolvency. Because no Tennessee state court had defined good faith in the context of fraudulent conveyances, this court, in ruling on the issue, looked to cases from other jurisdictions which had considered the good faith requirement under the Uniform Fraudulent Conveyance Act and the Bankruptcy Code's fraudulent conveyance provision, 11 U.S.C. § 548(c). See *In re Southwest Equip. Rental, Inc.*, 1992 WL 684872, *14 ("Pursuant to TENN. CODE ANN. § 66-3-314, the Court must construe and interpret the relevant provisions of the TUFCA consistent with the decisions of other courts in states which have adopted the Uniform Fraudulent Conveyance Act ("UFCA"). Further, because the fraudulent conveyance provisions of the Bankruptcy Code are modeled after the UFCA, where Tennessee's state courts have not addressed a particular issue, this Court will be guided by authorities interpreting 11 U.S.C. § 548.").

This court noted that in *Webster v. Barbara (In re Otis & Edwards, P.C.)*, 115 B.R. 900 (Bankr. E.D. Mich. 1990), the bankruptcy court held that "more than mere knowledge of the debtor's financial situation or fraudulent intent is required to find a lack of good faith." *Id.* at 910. Instead, the

transferee must have aided in the debtor's fraudulent scheme by securing some advantage beyond mere payment of the debt or by causing some harm to other creditors "beyond the sort that would typically result from the postponement of their claims." *Id.* at 910 n.51. Applying the reasoning of the *Otis & Edwards* decision and other cited decisions, this court granted the Bank's summary judgment motion as to the good faith issue and denied the trustee's, concluding that the trustee had not established that the Bank had "failed to act honestly, fairly, or openly in its dealings with Pro Page or that the Bank took advantage of Pro Page in some fashion."

In her motion to alter or amend the judgment, the trustee asserts that contrary to this court's statement, a Tennessee court has defined good faith in the fraudulent conveyance context. In *Aetna Casualty. & Surety Co. v. Roberts*, 1993 WL 572, *3 (Tenn. App. Jan. 4. 1993), the Tennessee Court of Appeals referred to good faith as "honesty in fact." Similarly, the trustee notes that the district court in *Southwest Equipment Rental* observed that "the good faith requirement has been equated with lack of knowledge of insolvency," *In re Southwest Equipment Rental, Inc.*, 1992 WL 684872, *17 (citing *Tabor Court Realty*, 803 F.2d at 1296); and went on to list other factors which are relevant to the determination of good faith: "(1)

whether the transferee possessed an honest belief in the propriety of the activities in question, (2) whether there was any intent to take unconscionable advantage of others, and (3) whether there was any intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others." *In Southwest Equipment Rental, Inc.*, 1992 WL 684872, *17 (citing *In re Otis & Edwards, P.C.*, 115 B.R. at 910). The trustee asserts that in ruling against her on the good faith issue, this court "completely disregarded" the *Aetna Casualty & Surety Co. v. Roberts* and *Southwest Equipment Rental* decisions, which it is "bound to follow," and erred in failing to analyze the evidence utilizing the good faith factors set forth in *Southwest Equipment Rental*. The trustee also maintains that this court erred in concluding that she has the burden of proof on good faith issue, arguing that under Tennessee law when a badge of fraud exists, the burden of proof shifts to the defendant to explain the transaction and to show that it was not indeed fraudulent. See trustee's memo.³ (citing *Stevenson v.*

³The court notes that the trustee did not assert the "badges of fraud" and shifting burden of proof argument upon the court's initial consideration of the burden of proof issue. Instead, the trustee's original contention was that the Bank had the burden of proof on the good faith issue because it was a defense to the trustee's fraudulent conveyance action. As the court noted in its July 3, 2003 memorandum opinion, while good faith
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Hicks (In re Hicks), 176 B.R. 466 (Bankr. W.D. Tenn. 1995);
United States v. Freudenberg, 1999 WL 501006, at *2 (E.D. Tenn.
June 9, 1999)).

A review of the court's July 8, 2003 memorandum opinion readily demonstrates that this court heavily relied on the *Southwest Equipment Rental* decision⁴ in ruling on the good faith

³(...continued)
is one element of a defense to a fraudulent transfer action under § 548 of the Bankruptcy Code, see 11 U.S.C. § 548(c); under the Tennessee fraudulent conveyance provisions, lack of good faith is an element of an absence of fair consideration upon which the party attacking the conveyance has the burden of proof. See court's memo. opin., p. 29 n.5 and cases cited therein.

⁴With respect to the trustee's contention that the unpublished decisions in *Aetna Casualty & Surety Co. v. Roberts* and *Southwest Equipment Rental* are controlling authority which this court is "bound to follow," the court notes that Tennessee Supreme Court Rule 4(H) provides that except for parties to the case, unpublished decisions are only persuasive rather than controlling authority. As stated by the Sixth Circuit Court of Appeals in *Southern Railway Co. v. Foote Mineral Co.*, 384 F.2d 224, 228 (6th Cir. 1967), "it would be incongruous indeed to hold the federal court bound by a decision which would not be binding on any state court."

Similarly, the *Southwest Equipment Rental* decision was unpublished and, thus, is of limited precedential value. See *IRR Supply Centers, Inc. v. Phipps (In re Phipps)*, 217 B.R. 427, 431-32 (Bankr. W.D.N.Y. 1998)(self-evident proposition that bankruptcy court not bound by unpublished district court decisions); *In re Braddy*, 195 B.R. 365, 370 (Bankr. E.D. Mich. 1996)(Sixth Circuit Court of Appeals Rule 24(c) provides in part that "[c]itation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored"); *First of Am. Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236, 242 n.8 (Bankr. E.D. Mich. (continued...))

issue. As to the trustee's more specific contention that this court failed to evaluate in this case the good faith factors enumerated in *Southwest Equipment Rental*, it must be observed that the district court's authority for its list of good faith factors was the bankruptcy court's decision in *Otis & Edwards* and it was the *Otis & Edwards'* list which this court cited and utilized in evaluating the Bank's good faith. See *In Southwest Equipment Rental, Inc.*, 1992 WL 684872, *17 (citing *In re Otis & Edwards, P.C.*, 115 B.R. at 91). Because the *Southwest Equipment Rental* criteria was derived from the *Otis & Edwards* standard and are in effect the same test, the trustee's argument on this issue has no merit. As to this court's failure to cite *Aetna Casualty & Surety Co v. Roberts*, the unpublished decision wherein the Tennessee Court of Appeals referred to good faith as

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1991)(noting that if it were bound by the unpublished decision of a single district judge, it would be required to "canvas the chambers of the other 19 [district] judges to determine if they [had] reached a contrary conclusion," a process which the bankruptcy judge characterized as "unwieldy and haphazard"). Additionally, there is considerable authority that a bankruptcy judge is not bound by a decision of a single district judge in a multi-judge district, primarily because there can be no "law of the district" since one district judge is not bound by the decisions of the other district judges. See, e.g., *City of Olathe v. KAR Development Assocs., L.P.*, 180 B.R. 629, 639 (D. Kan. 1995). Notwithstanding any of the foregoing, this court does not believe that its summary judgment decision was contrary to, or inconsistent with, either the *Aetna Casualty & Surety Co. v. Roberts* or the *Southwest Equipment Rental* decisions.

"honesty in fact," the court rejects the assertion that this omission provides a basis for altering or amending the judgment. The decision was not cited by the trustee in any of her memoranda filed in connection with the summary judgment motions and more importantly, does not suggest a good faith standard at odds with the one used by this court.

With respect to the burden of proof issue, Tennessee law provides that the burden of proof in a fraudulent conveyance action is on the party attacking the conveyance. See *Nashville Milk Producers, Inc. v. Alston*, 307 S.W.2d 66, 71 (Tenn. App. 1957). If there are badges of fraud associated with the transfer, the "burden of going forward with proof of an explanation" falls to the transferee. *Macon Bank & Trust Co. v. Holland*, 715 S.W.2d 347, 349 (Tenn. App. 1986). See also *Anderson v. Nichols*, 286 S.W.2d 96, 102 (Tenn. App. 1955) ("If the complainant's evidence placed the conveyance attacked under a great suspicion of fraud, the burden is then cast on the vendee to prove the bona fides of the transaction, or, at the least, remove the suspicion."). Once the transferee satisfies this burden of production, "the burden of proof continues on complainant." *Nashville Milk Producers, Inc.*, 307 S.W.2d at 71. "A 'badge of fraud' is any fact that throws suspicion upon a transaction and calls for an explanation." *Macon Bank & Trust*

Co., 715 S.W.2d at 349. "Such badges of fraud, are not fraud in and of themselves, but evidence to establish a fraudulent intent." *Anderson*, 286 S.W.2d at 102. The weight to be given to any of the badges is a question of fact. *Macon Bank & Trust Co.*, 715 S.W.2d at 349. Badges of fraud recognized by the Tennessee state courts include inadequate consideration, a close relationship of the parties, and a vendor giving away of all his property while retaining a life estate, see *Macon Bank & Trust Co.*, 715 S.W.2d at 349; the "continued possession of the vendor after an absolute conveyance of the property," *Nashville Milk Producers, Inc.*, 307 S.W.2d at 71; and the transfer of all or nearly all of a debtor's property, especially when he is insolvent or greatly embarrassed financially. See *Bank of Blount County v. Dunn*, 10 Tenn. App. 95, 1929 WL 1621 (1929). But see *Bank of Hendersonville v. Dozier*, 142 S.W.2d 191 (Tenn. App. 1940)(relationship of the parties to a conveyance is not a badge of fraud, but is a fact which undoubtedly gives greater weight to other circumstances, if any such appear, than might otherwise attach to them).

Although the bankruptcy court in *In re Hicks* listed "transferor is in a precarious financial condition" as being a badge of fraud, see *In re Hicks*, 176 B.R. at 470; there is

authority under Tennessee law that "knowledge of indebtedness, or even the insolvency of the grantor, standing by itself, does not put the grantee on inquiry, but other suspicious circumstances must be shown, among them being an inadequacy of price." See *Bank of Blount County v. Dunn*, 1929 WL 1621, *7. See also 37 C.J.S. *Fraudulent Conveyances* § 94 (2003) ("Knowledge of the indebtedness, or even of the insolvency, of the transferor, standing by itself, does not put the transferee on inquiry; but knowledge of the financial embarrassment of the grantor may constitute notice to the buyer where there are other suspicious circumstances, such as inadequacy of price, ... the institution of an attachment suit against the debtor by another creditor, or great haste in making the sale."). This authority is consistent with other jurisdictions which have analyzed the Uniform Fraudulent Conveyance Act as adopted by the various states and concluded that mere knowledge of the debtor's insolvency, standing alone, is not enough to prevent a finding of good faith. See, e.g., *In re Otis & Edwards*, 115 B.R. at 91 (construing Michigan law).

Nonetheless, the parties' arguments regarding badges of fraud and burden of proof have caused the court to engage in weighing the good faith evidence while considering the parties' summary judgment motions, an inappropriate exercise. As noted

above, the weight to be given to any alleged suspicious circumstance and the determination of whether the circumstances as a whole justify a shifting of the burden of production and thereafter, a finding of good faith or lack thereof, must inherently take place only after a consideration of all of the evidence at trial. As observed by the court in *Anderson*, "Where fraud is to be shown by circumstantial evidence, such evidence should be considered in its entirety without giving undue importance to isolated facts; although each circumstance alone may be trivial and unconvincing, the combination of all the circumstances considered together may furnish irrefragable and convincing proof of fraud." *Anderson*, 286 S.W.2d at 102 (quoting 37 C.J.S. *Fraud* § 115).

While knowledge of Pro Page's insolvency standing alone is insufficient to justify a finding of lack of good faith sufficient to shift the burden of production, it does create a genuine issue of material fact, thus precluding summary judgment. The Bank in effect recognizes that there is a dispute as to this issue by stating in its memorandum that it has offered an explanation for every badge of fraud raised by the trustee. In other words, the parties are arguing the evidence in the context of summary judgment. Because this argument demonstrates that a genuine issue exists as to good faith, the

trustee's motion to alter or amend as to the good faith issue will be granted, with this issue to be considered at trial.

IV.

The final basis of the trustee's motion to alter or amend the judgment is that this court erred in not granting the trustee's motion for summary judgment as to the payments made by Pro Page on the \$70,500 and \$20,200 loans. The trustee's asserted basis for summary judgment was that there was no evidence that Pro Page received fair consideration (as required by TENN. CODE ANN. § 66-3-305) or reasonably equivalent value (the 11 U.S.C. § 548(a) standard) in exchange for the payments. To counter the trustee's summary judgment motion and in support of its own summary judgment motion, the Bank tendered evidence which tended to show that Pro Page had received consideration for its payments in the form of an indirect benefit. However, the trustee objected to the proffered evidence because it was hearsay and unauthenticated, objections which the court found valid. Accordingly, the court denied the Bank's summary judgment motion and also denied the trustee's motion, thus reserving the issue for trial.

In her motion to alter or amend, the trustee contends that this court erred in failing to grant her summary judgment

motion. The trustee states that because the Bank failed to come forward with proof from which a jury could reasonably find for it in the face of her summary judgment motion, the Bank "did not meet its burden under the summary judgment standard, and should not be allowed to have a 'second chance' to produce such evidence at trial." Accordingly, the trustee requests that the court grant her judgment against the Bank in the amount of \$23,493.81, which sum represents payments on the \$70,500 and \$20,200 loans, together with prejudgment interest.

"Summary judgment is a harsh remedy and should not be granted unless the movant 'has established his right to judgment with such clarity as to leave no room for controversy.'" *Rogic v. Mallinckrodt Med., Inc.*, 917 F. Supp. 671, 676 (E.D. Mo. 1996) (quoting *New England Mut. Life Ins. Co. v. Null*, 554 F.2d 896, 901 (8th Cir. 1977)). Although the trustee has submitted evidence that Pro Page did not receive a direct benefit from its payments on the \$70,500 and \$20,200 loans because it was not an obligor or guarantor of the debts nor had it pledged any of its collateral for the Members' obligations, a genuine issue of material fact remains as to whether Pro Page received an indirect benefit. The credit memorandum for the \$20,200 loan indicates that the purpose of the loan was "working capital for Pro Page." Pro Page's schedule of liabilities indicates that as of the

bankruptcy filing, it owed considerable sums to the Members, for which it would have had a right of setoff if these sums were owed when the payments were made. Lastly, the court notes that the evidence proffered by the Bank in connection with the summary judgment motions indicated that Pro Page owed the Members sums far greater than the amount of payments made by Pro Page on the Members' behalfs. While this court appropriately sustained the trustee's objection to the evidence because it had not been authenticated and was hearsay, this court cannot ignore the fact that the trustee's objection was not based on the assertion that the evidence was inaccurate or unreliable and the trustee did not dispute the Bank's assertion that the evidence had been produced by the trustee from Pro Page's records. In other words, because the trustee's objection was as to form and procedure rather than substance, a defect which may be cured at trial, see *Thomas v. Int'l Bus. Machines*, 48 F.3d 478, 485 (10th Cir. 1995)(the nonmoving party need not produce evidence in a form that would be admissible at trial, but the content or substance of the evidence must be admissible); *Committee for the First Amendment v. Campbell*, 962 F.2d 1517, 1526 n.11 (10th Cir. 1992)("In opposing a motion for summary judgment, the nonmovant must make a showing that, 'if reduced to admissible evidence,' would be sufficient to carry the nonmovant's burden of proof at

trial."); this court is unable to conclude that the trustee "has established [her] right to judgment with such clarity as to leave no room for controversy."

V.

An order will be entered in accordance with the foregoing.

FILED: July 31, 2003

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE