

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 98-11125
Chapter 7

THOMAS and THELMA SANDERS

Debtor(s)

DOUGLAS R. JOHNSON, TRUSTEE

Plaintiff

v

Adversary Proceeding
No. 98-1146

THOMAS C. SANDERS

Defendant

MEMORANDUM AND ORDER

The bankruptcy trustee brought this suit to recover an allegedly fraudulent transfer. The defendant has filed a motion to dismiss and a motion for summary judgment. This memorandum deals with those motions.

The motion to dismiss asserts that the court lacks jurisdiction because the alleged transfer occurred more than one year before the debtors filed bankruptcy, and as a result, the transfer can not be set aside under Bankruptcy Code § 548. 11 U.S.C. § 548(a)(1). Whether a transfer was made within the one year reach-back period of § 548 has nothing to do with the court's subject matter or personal jurisdiction. It raises the question of whether the trustee can prove a case under § 548.

In this proceeding, the defendant's argument is irrelevant. The complaint does not rely on Bankruptcy Code § 548. It relies on Tennessee statutes dealing with fraudulent conveyances. *Tenn. Code Ann.* §§ 66-3-301 – 66-3-315. The complaint fails to cite Bankruptcy Code § 544(b) that allows a trustee to rely on the rights of a creditor under state law. 11 U.S.C. § 544(b). The oversight is cured by the trustee's brief in response to the motion to dismiss. The brief points out that the trustee is relying on § 544(b) and the Tennessee statutes cited in the complaint. Those Tennessee statutes are not subject to the one year limitation in § 548. *Still v. Fuller (In re Southwest Equipment Rental, Inc.)*, 1992 WL 684872 (E. D. Tenn. Jul. 9, 1992) (District Judge Edgar); *Waldschmidt v. Shelton (In re Shelton)*, 33 B.R. 377 (M. D. Tenn. 1983); *see also Rosania v. Haligas (In re Dry Wall Supply, Inc.)*, 111 B.R. 933 (D. Colo. 1990).

The motion to dismiss seems to assert that the bankruptcy trustee can recover only under a provision of the Bankruptcy Code, such as § 548. This is not correct since § 544(b) allows the trustee to rely on the rights of a creditor under state law.

The defendant also relies on *Tenn. Code Ann.* § 66-3-313 in support of this argument.

That statute provides:

In any cases not provided for in this part, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent, and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern.

This statute says that Part 3 of Title 66 of the Tennessee Code is not the only source of the law for attacking a conveyance: if a conveyance can not be set aside under Part 3 of Title 66 of the Tennessee Code, then according to this statute, it may still be subject to attack under other statutes, such

as the bankruptcy law, and the rules of the common law. This obviously does not deprive the trustee of the power given by Bankruptcy Code § 544(b) to pursue the rights of a creditor under the Tennessee statutes.

The defendant also argues that the complaint fails to allege fraud with particularity as required by Rule 9(b). *Fed. R. Bankr. P. 7009; Fed. R. Civ. P. 1009(b)*. According to the defendant, the complaint merely recites the statute.

The court disagrees. The complaint identifies the property that was transferred, alleges the date of the transfer, explains the form of the transfer, and identifies the defendant as the transferee. The complaint then alleges that the property was transferred for less than fair consideration, and that the debtors were insolvent at the time of the transfer or were rendered insolvent by the transfer. The complaint does not allege the amount of the consideration the debtors received or the value of the property, but the defendant should know the consideration that passed to the debtors in return for the transfer to him, and as the owner of the property, he should have an opinion of its value.

In summary, the allegations of the complaint were sufficient to alert the defendant to issues and allow him to make a defense. It can not be dismissed on the ground that the fraud is not alleged with particularity. *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074 (7th Cir. 1997); *Nisselson v. Drew Industries, Inc. (In re White Metal Rolling and Stamping Corp.)*, 222 B.R. 417 (Bankr. S.D. N.Y. 1998).

This brings the court to the defendant's motion for summary judgment. *Fed. R. Bankr. P. 7056*. The defendant asserts that he is entitled to summary judgment because the complaint alleges only fraud by the debtors, not any fraud by the defendant.

Though it is styled a motion for summary judgment, this amounts to a motion for failure to state a claim upon which relief can be granted or a motion for judgment on the pleadings. *Fed. R. Bankr. P.* 7012; *Fed. R. Civ. P.* 12(b), (c) & (h)(2).

The bankruptcy trustee can have a fraudulent conveyance set aside on the ground of actual or constructive fraud by the debtors even though the transferee did not participate in the fraud, know of the fraud, or have any fraudulent intent. 11 U.S.C. § 550(a)(1); *Emerson v. Maples (In re Mark Benskin & Co.)*, 161 B.R. 644 (Bankr. W.D. Tenn. 1993); *see also Tenn. Code Ann.* §§ 66-3-310 & 66-3-312; *State v. Nashville Trust Co.*, 28 Tenn. App. 388, 190 S.W.2d 785 (1944) (transferee may be liable for more than the return of the property if he participated in the fraud). When the conveyance is set aside, the property must be returned to the bankruptcy trustee as the holder of the debtors' property interests and representative of their creditors. Therefore, the defendant's motion must be denied.

IT IS SO ORDERED.

ENTER:

BY THE COURT

entered Jan. 20, 1999

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE