

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

MEMPHIS METAL EXCHANGE, INC.,

Debtor.

BK #91-24089-WHB
Chapter 7

EDWARD L. MONTEDONICO,
Chapter 7 Trustee,

Plaintiff,

v.

Adversary Proceeding
No. 92-0433

DANIEL A. BUZIN; JACK BUZIN;
SALESCO CO.; CUMBERLAND
DIVERSIFIED SALES & LEASING CO.;
DEBORAH S. GENTRY; MARK T.
GENTRY; and HOPCO TRADING CO.,

Defendants.

MEMORANDUM OPINION AND ORDER ON
TRUSTEE'S FRAUDULENT CONVEYANCE COMPLAINT

This adversary proceeding was filed by the Chapter 7 Trustee on April 30, 1992. The complaint seeks the avoidance of alleged fraudulent transfers to the defendants under 11 U.S.C. §548 and §544(b) and it seeks monetary recovery from the defendants under 11 U.S.C. §550. This proceeding is core pursuant to 28 U.S.C. §157(b)(2)(H), and this opinion contains findings of fact and conclusions of law under Federal Rule of Bankruptcy Procedure 7052.

At the trial on June 21, 1993, the defendants Jack Buzin, Daniel A. Buzin, Salesco Co. and Cumberland Diversified Sales & Leasing Co. were represented by counsel, and Jack Buzin appeared

at the trial with his counsel. The defendants Deborah S. and Mark T. Gentry appeared pro se. The parties have submitted post trial memoranda. From clear and convincing evidence¹ the Court finds and concludes that the Trustee should prevail. While the Court will make findings in support of actual fraud as to creditors under 11 U.S.C. §548(a)(1), there is also sufficient proof of constructive fraud under §548(a)(2) to justify the relief sought by the Trustee.

This Chapter 7 case was commenced by the filing of an involuntary bankruptcy petition, and the Trustee was appointed on May 16, 1991. The debtor was incorporated in 1989, with Deborah S. Gentry as President. Tr. Ex. 1. All transfers that the Trustee seeks to avoid were made within one year of the filing of this case and of the entry of an order for relief on May 10, 1991.

Deborah Gentry opened checking accounts for the corporation at First Tennessee Bank and Boatman's Bank in Memphis, Tennessee. Tr. Exs. 3, 4, 5, 36 & 37. The first activity in the First Tennessee Bank account was a deposit of \$500.00 on November 30, 1990, and the last activity was a bank credit to close the overdrawn account. Tr. Ex. 36. The first activity in the Boatman's Bank account was a \$100.00 deposit on September 7, 1990, and the last activity on February 14, 1991, was a "forced debit" to clear a check after the account was closed. Tr. Ex. 37. The Boatman's account was used more than the First Tennessee account. After Deborah Gentry opened the accounts, she pre-signed numerous blank checks and sent them to Daniel Buzin in Florida. She received the bank statements in the mail in Memphis but she did not always review them and certainly did not review them carefully. She understood Daniel Buzin would fill out the payee and

¹ The standard of proof for fraudulent conveyance is only a preponderance of the evidence. Calhoun v. Baylor, 646 F. 2d 1158, 1163 (6th Cir. 1981). However, the Trustee's proof met and exceeded that standard.

the amount on the checks. Deborah Gentry did not maintain the bank records and produced no corporate records at trial other than narrative "minutes." Tr. Exs. 40, 41.

The corporation was never adequately capitalized, and the Court is persuaded that it was formed as a shell and sham for the purpose of allowing the Buzins and their solely owned proprietorship defendants Salesco Co. and Cumberland Diversified Sales & Leasing Co. to funnel money from the debtor's sales to the Buzins. See Tr. Ex. 39. Deborah Gentry shares responsibility, and Mark T. Gentry to a lesser degree, for their grossly reckless participation in what can be described as a scheme to defraud creditors of the debtor.

Deborah Gentry testified that she formed the corporation to build a viable, profitable business. However, she had no experience in, nor knowledge of, the steel business. She never attempted to involve herself in the business other than clerical tasks. At trial and in her deposition read into the record, Deborah Gentry evidenced either a cover-up of her intentions or a total lack of knowledge of the corporate activity. The Court was shocked at the cavalier manner in which this corporation was formed, undercapitalized, operated without corporate officer supervision, and abandoned by the primary corporate officer Deborah Gentry.

Deborah Gentry abandoned the assets of the corporation, which consisted of sales proceeds, to the Buzins, who were not corporate officers but who were in control of the assets and activity. The Court is persuaded that this corporation functioned as a purchaser of steel goods on credit and a quick seller of those goods to other purchasers before the corporate creditors were paid or could discover the corporation's scheme. As the Trustee's counsel aptly described the corporation's activity, as directed by Daniel and Jack Buzin and as allowed to occur by the inaction of Deborah

Gentry, the corporation engaged in a "hit and run" purchase scheme, buying metal on credit and then "short-selling" it to purchasers before the suppliers could act.

The debtor, through Deborah Gentry and Daniel Buzin, obtained an answering and mail service at 2600 Poplar, Memphis, Tennessee, that they represented to be corporate offices. Later the corporation shared office space at 5050 Poplar, and neither Deborah Gentry nor the Buzins maintained any significant presence nor oversight at either office. The mail was sent on to Daniel Buzin.

Not a single creditor for metal sales to the debtor was paid. Tr. Exs. 34, 36 & 37. These suppliers, as shown by the claims filed in the bankruptcy case, sold in excess of \$325,000.00 in goods to the debtor during the short life of the debtor. Tr. Ex. 34. Only the actions of Hubbell Steel Corporation in executing upon the corporate account stopped this assault on creditors. Hubbell Steel attached approximately \$29,000.00, which was avoided by the Trustee in a separate preference adversary proceeding. Tr. Ex. 7 and Adv. Pro. No. 91-0641. While the debtor purchased the metal on credit, approximately \$425,000.00 was deposited from third party checks into the debtor's two accounts, and the insiders Daniel and Jack Buzin, the Gentrys, and their controlled entities were paid almost \$200,000.00. In summary, the metal supplier creditors of the debtor financed the insiders' drain of substantially all of the debtor's sales income.

There is some evidence that someone representing the corporation supplied false or misleading information concerning Deborah Gentry and the corporation to Dunn & Bradstreet, a business credit reporting agency. See testimony of Joe McDonald and Tr. Exs. 1 & 2. Deborah Gentry denied this; however, her testimony was not credible nor did it overcome circumstantial evidence of the appalling lack of control over the corporate activity by Deborah Gentry as President.

Both Jack Buzin and Daniel Buzin filled out and endorsed checks that had been pre-signed in blank by Deborah Gentry. Some of the checks were payable to Salesco and Cumberland Diversified Sales & Leasing Co., proprietorship names used by the Buzins. Daniel Buzin personally received from the debtor \$14,814.47 and his proprietorship Cumberland Diversified Sales & Leasing Co. received \$82,271.48. Tr. Exs. 12, 13, 14 & 15; see also Summary at Tab 30 of Plaintiff's Trial Exhibit Book. The total to Daniel Buzin was \$97,085.95.

Jack Buzin individually received \$3,150.31 and his proprietorship Salesco Co. received \$41,697.07, for a total of \$44,847.38. Tr. Exs. 17 & 18; see also Summary at Tab 31 of Plaintiff's Trial Exhibit Book.

Deborah Gentry received \$16,485.33 plus checks payable to "cash" for \$7,883.46. Tr. Exs. 19, 20 & 21; see also Summary at Tab 32 of Plaintiff's Trial Exhibit Book. Mark Gentry received \$1,493.87 and his proprietorship Hopco Trading received \$8,195.53. Tr. Exs. 19, 20 & 21; see also Summary at Tab 32 of Plaintiff's Trial Exhibit Book.

There was no plausible explanation for why these parties, who all were so closely in control of the debtor as to be insiders of the debtor, received virtually all of the debtor's income. The Gentrys performed only clerical or "errand running" tasks, and none of the insiders were actual employees of the debtor. There was no proof that any of the defendants injected capital into the debtor. Deborah Gentry did not know what the checks to the Buzins were for; yet, she essentially turned over the checking accounts to them. Hopco Trading was Mark Gentry's business for trading and transporting "things," with no better description offered.

The facts and circumstances surrounding the transfers to the Buzins and their proprietorships lead to a finding by the Court that the debtor did not receive reasonably equivalent value in

exchange for the transfers. Both of the Buzins admitted that they received checks from the debtor. See Deposition of Daniel Buzin and testimony of Jack Buzin. Mr. Jack Buzin's testimony did not persuade the Court that he was credible nor candid concerning what occurred. It seems to be the position of the defendants that had Hubbell Steel not executed upon the debtor's bank account and had the debtor completed a sales transaction with McKinley Reed, the debtor would have become a successful business. The testimony about McKinley Reed was contradictory. See, e.g., Tr. Ex. 10, pp. 3, 5, 7, 10 & 11 and Tab 11 to Plaintiff's Trial Exhibit Book. Jack Buzin testified that he was paid by the debtor for services rendered to the debtor when he acted as an agent and consultant in giving advice on sales. However, he could not testify as to what that some of the "commission" checks to him or to Salesco were for. He also did not report this income to the Internal Revenue Service. He stated that he had no knowledge of the debtor's "potential" insolvency. However, Jack Buzin had more than forty years experience in the metal business, including time as a sales and a credit manager. It is not credible that a former credit manager would receive checks signed in blank, fill them out and negotiate them and then testify that he had no knowledge that the debtor was in financial trouble.

There was testimony from Deborah Gentry that Daniel Buzin was paid in part for his knowledge and contacts and for a future investment in his metal recycling project. There was no persuasive proof that Daniel Buzin gave reasonably equivalent value to the debtor for its transfers to him and his proprietorship.

There certainly was no persuasive proof that either of the Gentry's or Hopco Trading gave reasonably equivalent value to the debtor for its transfers to them.

There is clear proof that the debtor was insolvent throughout its existence, including when the transfers were made to the defendants, and the debtor was rendered more insolvent with each transfer to the defendants. Also, with no proof of capitalization and with proof of substantial liabilities, it is clear that this debtor was engaging in transactions with its creditors while the debtor had unreasonably small capital. And, it is clear that the debtor incurred debts that were beyond the debtor's ability to repay.

Thus, the statutory requirements of 11 U.S.C. §548(a)(2) are met and the Court so finds and concludes that each of the transfers to the defendants are avoidable as constructively fraudulent.

Moreover, as actual fraud under 11 U.S.C. §548(a)(1) is dependent upon intent, where a transfer is dominated by a controlling party, the dominant parties' intent is relevant. In re Towery Press, Inc., 8 Tenn. Bankr. Serv. 4-2 at 33 (Bankr. W.D. Tenn. 1989) (citing 4 COLLIER ON BANKRUPTCY ¶548.02[3] (15th Ed.)). Fraudulent intent usually requires an examination of all circumstances, including "badges of fraud," which are defined as "any fact that throws suspicion on the transaction and calls for an explanation" by the transferees/defendants. Macon Bank & Trust Co. v. Holland, 715 S.W. 2d 347, 349 (Tenn. App. 1986); see also Calhoun v. Baylor, 646 F. 2d at 1163. The Court's discussion in this opinion indicates that the Court has found numerous badges of fraud on the part of the defendants, the Gentrys and the Buzins, who controlled the debtor. In addition to indicia of fraud already discussed, it is clear that this debtor was in trouble from its formation. It remained in trouble due to the inaction and action of the defendants. The trouble was compounded by a lack of records. Deborah Gentry had none, other than corporate minutes that were peculiar at best, and she stated that all records were in Florida with Daniel Buzin. The Buzins produced no records and claimed that the corporate records were in Memphis. No corporate stock was ever

issued. In substance, this corporation existed to serve the whims of the Gentrys and the Buzins.

This is best summarized by the realization that the defendants were paid and no suppliers of material were paid. There is proof that the Buzins, who are father and son, acted in concert. Jack Buzin, for example, endorsed some checks payable to his son and to his son's Cumberland Diversified Sales & Leasing Co. Tabs 13 & 14 to Plaintiff's Trial Exhibit Book. There is proof that the Gentrys acted in concert. The Trustee seeks monetary recovery against each defendant for \$198,491.52 on a joint and several liability theory.² However, giving all possible benefit to the testimony of Deborah Gentry and weighing all of the equities concerning who exercised predominant power over this debtor, the Court concludes that each of the transfers should be avoided under both 11 U.S.C. §548(a)(1) and (2) and monetary judgment should be given to the Trustee under 11 U.S.C. §550(a) as follows:

1. Judgment is given against Daniel A. Buzin, Jack Buzin, Salesco Co. and Cumberland Diversified Sales & Leasing Co., jointly and severally, for \$141,933.33.
2. Judgment is given against Deborah S. Gentry, Mark T. Gentry and Hopco Trading Co., jointly and severally, for \$34,058.19.

Each judgment shall bear pre-judgment interest at the federal statutory rate from the date of the first transfer, September 24, 1990.

IT IS SO ORDERED this 25th day of August, 1993.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

² The Trustee includes in that amount \$22,500.00 paid to Winsky Enterprises, but there is insufficient proof to conclude that this transfer is avoidable as to these defendants.

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