

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE:

MARK BENSKIN & CO., INC.,
Debtor.

BK #89-22793-WHB
Chapter 7 (Involuntary)

GEORGE EMERSON, Trustee,
Plaintiff,

v.

Adversary Proceeding
No. 89-0267

DONALD and KATHERINE HOLLIE,
Defendants/Cross-Defendants,

and

DONALD RUTHERFORD,
Defendant/Intervenor/
Cross-Plaintiff.

MEMORANDUM OPINION

This adversary proceeding was tried on November 15, 1993, at which time the parties stipulated to numerous facts and exhibits. The Court has now received all testimony, depositions, exhibits and the entire record in this proceeding and a final order and judgment will be entered. In this proceeding a partial settlement was reached under the terms of which the Defendants Donald and Katherine Hollie paid \$60,000.00 into an escrow fund to be held jointly by the Trustee and the intervenor Donald Rutherford. See Agreed Order Of Settlement entered March 16, 1993. The

Hollies have been released and dismissed from this adversary proceeding as a result of that settlement. See Order Of Dismissal entered March 16, 1993. The Trustee and Donald Rutherford both look to the \$60,000.00 for their recovery and each have consented to the entry of a final order by this Court, subject to the parties' rights to appeal. 28 U.S.C. §158. Moreover, the Court has determined that the issues raised involve determinations of transfer avoidance, property of the estate and allowance of claims against the estate, and, as such, they are core pursuant to 28 U.S.C. §157(b)(2)(A), (B) and (H). The jury trial demanded by the Hollies was waived by the other parties, after dismissal of the Hollies.

Counsel for the Trustee and the intervenor have been involved in other adversary proceedings in this case and are familiar with the history of this case. The Court has entered, on December 7, 1993, an amended memorandum opinion, a final order and judgment in another adversary proceeding in this case, the result of which is dispositive of this proceeding. Emerson v. Maples, et al. (In re Mark Benskin & Co., Inc), Adv. Proc. No. 91-0157 (Bankr. W.D. Tenn. Dec. 7, 1993) (hereinafter "Maples"). For purposes of judicial economy the Court adopts that Maples' opinion in full and incorporates its findings of fact, except for those that relate solely to the debtor's transactions with Beverly Poston, and its conclusions of law. A copy of that Maples' opinion will be an appendix to this opinion. For the same factual and legal reasons as found in the Maples' opinion, the Court must decide in favor of the Trustee.

For background information, the Court specifically adopts the "History of The Case" found at pages 2-4 of the Maples' opinion. Just as was true with Beverly Poston, the debtor obtained funds from this intervenor Donald Rutherford under the false pretense of making investments for Mr. Rutherford. Unfortunately, the debtor perpetuated the fraudulent scheme of depositing Mr.

Rutherford's \$50,000.00 investment into the National Bank of Commerce escrow account, where the funds were commingled with other customer's funds, and the debtor then used the commingled funds for payment of illusory profits to the Hollies and for payment of other checks written on the account. Mr. Rutherford's \$50,000.00 credit to the escrow account was depleted prior to the filing of this bankruptcy case. See Exs. 9 & 10.

Adopting the legal conclusions and reasoning of the Court's Maples' opinion on §548(a),¹ the Court concludes that the Trustee has proven both an actual and a constructive fraudulent transfer in the amount of the \$65,569.93 transfer to the Hollies on March 29, 1989. Ex. 1. The debtor's fraudulent intent is clear. See, e.g., guilty pleas and indictments, Exs. 5 & 6. Moreover, the debtor was insolvent and did not receive reasonably equivalent value for the \$65,569.93 transferred to the Hollies. It was stipulated that the Hollies had invested only \$4,800.00 with the debtor and that they had previously withdrawn \$22,000.00. Therefore, they gave no value for their \$65,569.93 withdrawal of illusory profits. The Trustee is entitled to an avoidance of that fraudulent conveyance. Had the Hollies not settled, the Trustee would be entitled to a monetary judgment against them for \$65,569.93 plus prejudgment interest. See, Dicello v. Jenkins, et al. (In re International Loan Network, Inc.), 24 BCD 1276 (Bankr. D.D.C. 1993). As a result of the settlement, the Trustee is entitled to a judgment against the \$60,000.00 escrow account, plus its accruing interest.² As to the Rutherford's claims against the \$60,000.00 escrow account, his counsel again presented excellent proof on the posting method utilized in 1989 by the National Bank of Commerce, and as in the

¹ See Maples' opinion, pp. 7-11.

² At the end of the Trustee's proof, the Court granted Mr. Rutherford's motion that the Trustee had not proven a preferential transfer. As there was no antecedent debt owed to the Hollies, §547(b)(2) could not be satisfied.

Maples' proceeding, Mr. Rutherford's proof demonstrated a tracing of the \$50,000.00 Rutherford deposit into the debtor's check number 1636 issued to the Hollies. See Exs. 9 & 10; affidavits of Jim Lindsey and Jerry Whitehorn. However, adopting the reasoning of the Maples' opinion at its pages 11-23, the Court again concludes that the bankruptcy Trustee's avoidance power is superior to the state law remedies avoidable to the intervenor.

The Court will assume that a constructive trust was created when Mr. Rutherford deposited his \$50,000.00 with instructions for investment on his behalf. Unfortunately, the debtor exercised control over that deposit, commingling and dissipating all of the funds. The debtor did not invest Mr. Rutherford's funds. As the Court discussed in the Maples' opinion, there was no perpetuated trust res. At the time of the bankruptcy filing the debtor's estate had an avoidance action against the Hollies, which action vested in the bankruptcy Trustee. The Trustee's §548 avoidance power is superior to Mr. Rutherford's claims against the \$60,000.00 escrow fund.³ Mr. Rutherford is in the same position as Beverly Poston and other similarly defrauded unsecured creditors.

CONCLUSION

³ While of little consolation to Mr. Rutherford, the Court notes that Mr. Rutherford testified that he had previously withdrawn \$15,000.00 from the debtor, but apparently no avoidance action was filed by the Trustee against Mr. Rutherford.

In summary, based upon the reasoning and legal conclusions of this Court's Maples' opinion (Appendix to this opinion) and upon the particular facts found in this adversary proceeding, the Trustee's federal fraudulent conveyance action is sustained⁴ and is superior to the state law, nonbankruptcy creditor's rights and remedies of Donald Rutherford. A separate order and judgment will be entered.

SO ORDERED this 8th day of December, 1993

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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⁴ See generally, In re International Loan Network, Inc., 24 BCD 1276, an opinion read by this Court subsequent to entry of its Maples' opinion. The Loan Network opinion discusses the trustee's fraudulent conveyance avoidance of Ponzi scheme transfers.

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