

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE)	CASE NO. 94-51481
WILMA L. BUSHEY,)	
Debtor,)	ADV. NO. 95-5005
)	
KATHRYN A. BELFANCE,)	JUDGE MARILYN SHEA-STONUM
Plaintiff,)	
)	

OPINION

v.

WILMA L. BUSHEY, et al.,
Defendants.

This matter is before the Court after the trial on the complaint of the trustee, Kathryn Belfance, to avoid the transfer in 1986 of the debtor's interest in her residence to her adult daughter as a fraudulent transfer of property. The plaintiff also seeks an appropriate remedy under 11 U.S.C. § 550. Appearing at the trial were Kathryn Belfance, trustee and counsel to the trustee; Christopher Manos, counsel for defendant Bushey; and David Weick, counsel for defendant Nolan. The Court heard the testimony of Wilma Bushey and Sharon Jones Nolan. At the close of the plaintiff's case, counsel for the defendant Sharon Jones Nolan moved for judgment on partial findings pursuant to Bankruptcy Rule 7052(c). The Court denied that motion. This Court considered all of the testimony presented and the exhibits admitted during the trial in reaching its decision.

I. JURISDICTION

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This matter involves the application of 11 U.S.C. § 544(b) to a transfer of title to property made by the debtor in 1986. Resolution of this matter is a core proceeding in accordance with 28 U.S.C. § 157(b)(2)(H). This Court has jurisdiction to enter a final order in this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and the Standing Order of Reference entered in this District on July 16, 1984.

II. ISSUE PRESENTED¹

The trustee alleges that pursuant to 11 U.S.C. § 544(b) and O.R.C. § 1336.04, 1336.06, and 1336.07(as in effect in 1986), she may avoid the debtor's transfer of the title to her residence to her daughter Sharon Jones Nolan. As a remedy for this fraudulent conveyance, the trustee requests that this Court impose a constructive trust in favor of the trustee for the benefit of the debtor's creditors. The debtor denies that pursuant to the sections of the O.R.C. cited by the trustee the conveyance of that title to her daughter was fraudulent as to her creditors, present or future.

The Court's findings of fact and conclusions of law pursuant to

¹This adversary has been before the Court on two separate sets of cross-motions for summary judgment. On the first set of cross-motions for summary judgment, this Court ruled that the trustee's action was not barred by the statute of limitations because Ohio applies a discovery of the fraud rule, and the alleged fraud was not discovered until the first meeting of creditors in the debtor's chapter 7 case. *Belfance v. Bushey(In re Bushey)*, Ch. 7 case No. 94-51481, Adv. No. 95-5005, slip op. (Bankr. N.D. Ohio Dec. 7, 1995). The second set of cross-motions for summary judgment determined that the trustee has standing to assert a complaint pursuant to 11 U.S.C. § 544(b) and O.R.C. § 1336.04, 1336.06, and 1336.07(as in effect in 1986) and that a constructive trust is a recognized remedy for fraudulent conveyance. *Belfance v. Bushey(In re Bushey)*, 210 B.R. 95 (6th Cir. BAP 1997).

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Bankruptcy Rule 7052(a) are as follows:

III. FINDINGS OF FACT

Mrs. Wilma Bushey filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on September 23, 1994. The debtor's petition for relief listed her residence as 888 Blanding Ave., Akron, Ohio(the "Subject Property"). In addition, her schedules listed assets totaling \$3,108.56 in personal property, and no real property; and liabilities totaling \$19,642.58 in unsecured nonpriority claims, and \$711.33 in secured claims.² Schedule I shows the debtor's income as \$958.56 per month(\$530.00 for social security disability and \$428.56 from pension/retirement income).

On November 8, 1994, the trustee held the first meeting of creditors in this case pursuant to 11 U.S.C. § 341 and inquired about the Subject Property. During the first meeting of creditors, the debtor explained that she has resided at the Subject Property since she and her husband purchased it in 1957, financing the approximately \$13,700 purchase price with a 30 year mortgage. From 1957 until 1988, the debtor and her husband lived in that residence where they raised their four children. By 1975, Mr. Bushey was suffering from emphysema and alcoholism. At that time, the debtor and her husband began receiving income from social security disability and all of the Busheys' medical expenses were

²The debtor scheduled liabilities totaling \$20,353.91 owed to Summa Health Systems, JC Penney, Kaufmann's, Citibank Visa and Citibank MasterCard. The debtor testified that she had listed Summa Health Systems in the amount of \$5,203.67 because at the time her health insurer had not paid that creditor. The debtor stated that creditor was paid in full by her insurer in accordance with her policy. The proof of claims filed in this case total \$13,924.48.

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covered by Mr. Bushey's insurance or by Medicare.

In 1978, Mr. Bushey, who was still sick with emphysema, transferred his interest in the Subject Property, their family home, to Mrs. Bushey prior to seeking in-patient treatment for his alcoholism. Mrs. Bushey testified that this was because Mr. Bushey was afraid they would lose the home due to his alcoholism and he wanted to make sure everything was in order in case something happened to him. While Mr. Bushey was seeking in-patient treatment, the debtor received some financial assistance from one of her children allowing her to pay the monthly bills. The debtor testified that with the financial help from her son she was able to pay the majority of her bills. She called those creditors that she could not pay and worked out payment arrangements with them.

When Mr. Bushey returned from treatment, he continued to suffer from emphysema and required supplemental oxygen. As of 1986 the debtor and her husband had a combined monthly income of approximately \$1,700.00 from his pension and social security disability payments to each of them. In addition to that income, the debtor testified that she and her husband had other assets in 1986. The debtor and her husband had purchased³ a 1980 Buick Regal which the debtor testified she believes was worth \$5,000.00 in 1986. See Defendant's Exhibit B6(titled to James Bushey). In addition, the debtor and her husband then

³The debtor testified that she and her husband purchased this car on credit through the "credit union" and that the car was titled in her husband's name until his death. The original purchase price was approximately \$7,300.00. The debtor testified that the car was paid off in 1986. The debtor continues to use this car to this day.

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owned various household goods worth, in the debtor's non-expert opinion, more than \$1,500. The debtor also had a bank account at the Ohio Edison Family Credit Union, Inc. with a balance between \$5,000 and \$6,000 in the first half of 1986. See Defendant's Exhibit B7, 8, 15. In contrast, the debtor and her husband had combined monthly expenses of approximately \$1,000.00 per month.⁴ The debtor recalled that she had credit accounts at that time, but did not recall owing very much on those accounts. The remaining balance on the mortgage was approximately \$1,200.00, including the interest and property tax escrow.

In 1984, the debtor's daughter, Sharon Jones Nolan, began divorce proceedings against her then husband Mark Alan Jones. The divorce decree was entered on March 8, 1985. See Plaintiff's Exhibit K. Sharon Jones Nolan was not given ownership of the marital residence. As a result, she and her two year old daughter moved back home to live with her parents. The testimony is somewhat unclear as to when this took place. The debtor testified that her daughter moved home for a few months in 1986. Sharon Jones Nolan testified

⁴The debtor's schedule of current monthly expenses reads as follows: rent or home mortgage payment of \$75.00; electricity and heating fuel costs of \$95.00; water and sewer costs of \$45.00; telephone costs of \$45.00; other utility costs of \$15.00; Home Maintenance cost of \$25.00; food costs of \$250.00; clothing costs of \$50.00; laundry and dry cleaning costs of \$5.00; medical and dental expenses of \$40.00; transportation costs of \$30.00; Recreation, clubs and entertainment, newspapers, magazines, etc. costs of \$30.00; charitable contributions in the amount of \$25.00; Health insurance payments of \$30.00; Auto insurance payments of \$30.00; and AARP Health insurance payments of \$11.00 for a total of \$801.00 per month. The debtor estimated her expenses at the time her husband was alive to be approximately \$900.00 or \$1000.00 per month.

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that she moved back home for a few months in 1986 due to her divorce. At another point in her testimony, however, Sharon Jones Nolan testified that she moved back home when she was 29 years old. By the Court's calculation that would have been during the year 1984. In any event, the testimony is clear that the debtor lived at home for a few months and then moved into her own apartment.

On April 8, 1986, the debtor transferred the Subject Property to her daughter Sharon Jones Nolan. She and her husband continued to reside there after that transfer of title. The property was transferred by the debtor, according to her testimony, at the suggestion of her husband. The debtor said that she agreed with her husband's suggestion and that is why she transferred the property to her daughter. In addition, at trial the debtor testified that she gave the house to Sharon as an absolute gift so that her daughter and granddaughter would always have a place to live. The debtor testified that she simply "trusted that Sharon would not put her out in the street." Sharon's testimony was that she viewed the transfer of the property as a gift from her parents "to handle and to hold," given to her because her parents trusted her to take care of her mother in the future.

At the time of the transfer to the debtor's daughter, the Subject Property was mortgaged with a balance remaining of approximately \$1,200, including interest and property tax escrow. Mr. and Mrs. Bushey continued to make the required mortgage payments, which included the real estate taxes, until the mortgage was paid off in September 1987. DX B3. After the mortgage was paid in full, Sharon Jones Nolan began paying the real estate taxes, see DX B4, and

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for the upkeep, care and maintenance of the property. The debtor and her husband continued to pay the insurance on the property and the utilities. After the transfer of the subject property, the debtor has not paid her daughter rent for the use of the Subject Property. On March 28, 1988, Mr. Bushey, the debtor's husband died.

Mrs. Bushey received the insurance proceeds from his life insurance policy. With the insurance proceeds from that policy, Mrs. Bushey paid all of her debts in full. See DX B9(O'Neil's in the amount of \$464.53, paid on 6/29/88), B10(Citibank Visa in the amount of \$3,089.86, paid on 6/29/88), B12(JC Penney in the amount of \$497.24, paid on 6/29/88), B13(Citibank MasterCard in the amount of \$230.98, paid on 9/1/88).

After that point Mrs. Bushey continued to use her credit cards. The balance on Mrs. Bushey's Citibank Visa in February, 1989 was \$456.55. PX E(statement date 2/9/89). One year after she had paid the full balance on her card with the insurance proceeds from her husband's life insurance policy, the debtor's balance was \$625.66. PX E (statement date of 7/12/89). Within two years, her balance was \$5,525.17. Similarly, the debtor continued to use her Citibank MasterCard. As of the January 12, 1989 statement date, her balance on that card was \$430.00; and within one year of having paid that card balance in full, her balance was \$1,942.42. PX E (statements dated 1/12/89 and 9/13/89). Plaintiff's exhibits E and F(DX B5) reveal charges on the debtor's credit cards to various jewelers in 1989 and 1990, and for various cash advances from 1989 through the time the debtor filed her petition for relief. Those same exhibits also show that the debtor continued to make at least the

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minimum required payments to those creditors in a timely fashion.

The debtor testified she intended to pay all of her creditors for the charges she was incurring. Eventually, the debtor was unable to continue paying the minimum balances on her four accounts as the balances grew with additional purchases and interest charges.⁵ The debtor testified that in the four months prior to her filing she realized that she was having trouble making all of her payments.

IV. CONCLUSIONS OF LAW

The Trustee brought this action under 11 U.S.C. § 544(b) to avoid the 1986 transfer of the Subject Property as a fraudulent conveyance under O.R.C. §§ 1336.04, 1336.06 and 1336.07.⁶ The trustee carries the initial burden of

⁵The account statements submitted show total payments to the Visa account of \$8,230.93 between February, 1989 and December, 1993 and to the Mastercard account of \$8,296.68 from January, 1989 through December, 1993. Of those payments, \$4,603.10 was applied to interest charges on the Visa account and \$4,228.79 was applied to interest charges on the Mastercard account. Thus, out of \$16,527.61 in payments only \$7,695.72 or 47 percent of the total payments for this period were applied to reduce the principal balances on these two accounts. When the 1988 balance payoffs to Visa and Mastercard are added to this stream of payments, the debtor has paid those two creditors nearly \$20,000 since the challenged transfer.

⁶ The parties agree that the applicable state law is the law that was in effect in 1986. In 1986, the applicable sections of the Ohio Revised Code read: **§ 1336.04- Conveyances resulting in insolvency** - Every conveyance...by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made...without fair consideration. **§ 1336.06 - Debts incurred beyond ability to pay** - Every conveyance made...without fair consideration, when the person making the conveyance...intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors. **§ 1336.07 - Intent to Defraud** - Every conveyance made...with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

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proof in establishing a claim pursuant to the above cited sections of the Ohio Revised Code.

1. CONVEYANCES RESULTING IN INSOLVENCY

As to her claim pursuant to O.R.C. § 1336.04, the Trustee has the burden of proving that (1) the transfer occurred without fair consideration and (2) the debtor was either insolvent at the time of transfer or rendered insolvent by the transfer. The intent of the transferor is irrelevant. *Cardiovascular & Thoracic Surgery of Canton v. DiMazzio*, 524 N.E. 2d 915, 918 (Ct. App. Ohio 1987).

FAIR CONSIDERATION

Fair consideration is given for property...(A) When in exchange for such property... as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied; or (B) When such property... is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property... obtained.

O.R.C. § 1336.03

The defendants argued that in addition to the one dollar of consideration listed in the quitclaim deed from Wilma Bushey to Sharon Nolan Jones, DX B4, other good and valuable consideration was given for the transfer from the debtor to her daughter. In their proposed findings of fact and conclusions of law, the defendant suggests that payment of the real estate taxes and maintenance expenses for the Subject Property arising after the transfer is adequate consideration. The evidence adduced at trial supports the finding that those costs were borne by the transferee. However, those are costs associated with ownership of real property.

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The evidence does not support a finding that fair consideration was given for the transfer of the Subject Property from the debtor to her daughter.

INSOLVENCY

As stated above, the trustee bears the burden of establishing the defendant's insolvency at the time of the transfer or as a result thereof. *In re Poole*, 15 B.R. 422, 429 (Bankr. N.D. Ohio); *Cardiovascular & Thoracic Surgery of Canton v. DiMazzio*, 524 N.E. 2d 915(Stark Co. 1987). A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liabilities on his existing debts as they become absolute and matured. O.R.C. § 1336.02. In Ohio, the Courts use a standard which is a blend between the equitable insolvency test and the balance sheet approach to determine if one is insolvent pursuant to O.R.C. § 1336.02. *Id.* at 459-460.; see *Cellar Lumber Co. v. Holley*, 224 N.E.2d 360, 363(Ct. App. Ohio 1967); *Staats v. Palermini(In re Palermini)*, 113 B.R. 380, 383(Bankr. S.D. Ohio 1990). The blending of the two tests requires the court to consider "the debtor who, although presently meeting his obligations as they become due, has incurred unmatured debts to such an extent that it is apparent he will not be able to meet them when they become absolute and matured." *Cellar Lumber Co.*, 224 N.E.2d at 363. The relevant time frame is the time of transfer. *Fifth Third Bank of Columbus v. McCloud*, 628 N.E.2d 131, 134(Ct. App. Ohio 1993)(Applying pre-1990 law).

This Court will begin its analysis with the debtor's balance sheet. Prior to

⁷Because the defendant was married at the time of the transfer, her assets, at that

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the transfer in April, 1986, the debtor had the following assets⁷: the Subject Property, a 1980 Buick Regal, titled in her husband's name; various household goods; and a bank account at the Ohio Edison Family Credit Union. The debtor, in her non-expert opinion, valued the Buick at \$5,000 and her household goods at approximately \$1,500. DX B 7, 8, and 15 show that the debtor's bank account had a balance between \$5,000 and \$6,000 during the first half of 1986. Allowing for the exemptions the debtor would have been entitled to at that time, the debtor had assets upon which her creditors might levy at the time of the transfer of an approximate value of not less than \$9,000 (excluding the equity in the subject property).

The debtor testified that her liabilities at that time included the mortgage with property tax escrow of \$1,200.00 and any amounts she owed on her running accounts with Citibank, O'Neils, JC Penney, which she did not think was very much. The balances on these accounts totaled approximately \$4,300 after Mr. Bushey's death in 1988. No other evidence of liabilities existing at the time of the transfer that were matured or unmatured was presented to the Court. The evidence does not support a finding that the debtor was insolvent at the time of the transfer. Nor does it support a finding that the debtor was rendered insolvent as a result of the transfer. At and after the time of the transfer, the fair saleable value of the debtor's non-exempt property exceeded her probable liabilities on existing debt. Thus, the trustee has failed to prove her allegation that the transfer of the Subject Property was fraudulent pursuant to O.R.C. § 1306.04.

time, include those assets of her husband which were their marital property.

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2. DEBTS INCURRED BEYOND ABILITY TO PAY

Under O.R.C. § 1336.06, the trustee must prove that (1) the transfer occurred without fair consideration and (2) the debtor intended to incur or believed that she would incur debts beyond her ability to pay as those debts mature.

FAIR CONSIDERATION

As stated above, the evidence does not support a finding that the transfer occurred with fair consideration. The trustee proved the first element of a cause of action under O.R.C. § 1336.06.

BEYOND ABILITY TO PAY

The second element that the trustee must prove is that the debtor intended or believed at the time of the transfer that she would incur debts beyond her ability to pay as those debts mature. The trustee argues that the debtor's spending habits evidenced by PX E and F after the transfer together with the earlier transfer of the Subject Property to the debtor by her husband, indicate a pattern or practice from which the Court can infer an intent on the part of the debtor to incur debts beyond her ability to pay. Debtor's counsel argues that the debtor's subsequent financial problems do not render the prior transfer fraudulent, particularly in light of the debtor having paid all of her creditors in full in 1988.

The trustee argues that the debtor only paid all of her creditors in full in 1988 due to the receipt of her husband's life insurance proceeds. Absent the receipt of such a lump sum amount of money, the debtor would have continued paying the minimum amount due on her credit cards each month. Based on the

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debtor's testimony that her spending habits and payment habits did not change much from 1986 to the present, this Court finds that the debtor was engaged in financial practices that would eventually place her in a situation of being unable to pay her debts as they became due. However, O.R.C. § 1306.06 requires that the trustee prove that the debtor intended or believed she would incur debts beyond her ability to pay. No evidence supports an inference that at the time of the transfer of the Subject Property the debtor intended or believed that she would wind up in a precarious financial situation.

The debtor's subsequent insolvency, eight years after the transfer, does not render her earlier gratuitous transfer of property fraudulent. See *McCall v. Pixley*, 27 N.E. 887(1891). Despite having shown Ms. Bushey's apparent spending and payment practices, the trustee failed to prove that at the time of the gratuitous transfer, Ms. Bushey was acting with the intent or belief that she would incur debt that she could not repay as it became due. Therefore, the transfer of the Subject Property was not fraudulent pursuant to O.R.C. 1306.06.

3. ACTUAL INTENT TO DEFRAUD

Under the trustee's third claim pursuant to O.R.C. § 1336.07, she bears the burden of proving that the debtor made the conveyance with the actual intent to hinder, delay or defraud either present or future creditors. Courts, recognizing the difficulty of proving actual intent with direct evidence, have developed a variety of factors from which a Court may infer a debtor's intent to defraud her creditors. Those factors, commonly referred to as "Badges of Fraud," are (1) transfers between related parties, (2) lack of adequate consideration, (3) transfer of the debtor's entire estate, (4) reservation of benefits to the transferor, (5) threat

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or pendency of litigation. The Court must consider the totality of the circumstances in each case. Although the Court need not find all of the badges of fraud to be present, proof by the plaintiff of a sufficient number of these factors may give rise to a rebuttable presumption of fraudulent intent. The burden then shifts to the debtor to present sufficient credible evidence negating the fraud.

In this case, several badges of fraud are present. Mrs. Bushey transferred the Subject Property to her daughter, Sharon Jones Nolan. This transfer was between related parties. Second, as stated above, no consideration was given for the transfer of the subject property. This transfer lacked adequate consideration. Third, the debtor quitclaimed the Subject Property to her daughter. If one ignores the debtor's on-going income stream from her husband's pension rights and her social security disability payments, the Subject Property was the largest single asset owned by the debtor prior to the transfer. A large portion of the debtor's estate was transferred, but not all. Fourth, the debtor has had continuous possession of the Subject Property. She resides at the Subject Property, and she does not pay rent.

In addition to the badges of fraud, the Court "must examine the totality of the circumstances to determine whether the plaintiff has established an inference of fraud necessary to shift the burden to the defendant to prove that fraud did not exist." *Crocker v. Hood*, 113 Ohio App.3d 478, 483(Ct. App. Ohio 1996). The combination of a sufficient number of badges of fraud and "other suspicious circumstances" is sufficient to prove fraud. *Poole*, 15 B.R. at 431-32; *Maston*, 44 B.R. 880. Although a number of the badges of fraud are present, three specific factors cause this Court to conclude that there was the opposite of

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"suspicious circumstances" in this case. They are (1) the dependable flow of monthly income to the debtor, (2) the regular application of a portion of that income to at least minimum payments to the four holders of claims in whose shoes the trustee stands, totaling almost \$20,000 from 1988 through 1993 to the holders of two of those claims, and (3) the use of the life insurance proceeds in 1988 to pay in full all of those creditors. Further, the debtor did not change her basic debtor creditor pattern that long pre-existed the challenged transfer. She did not, for instance, seek any new sources of credit. *cf. In re Lord*, Adv. No. 97-5045 (N.D. Ohio March 30, 1998).

Thus, the trustee presented evidence on the existense of several "badges of fraud" sufficient to raise a presumption of fraud. However, the totality of the circumstances surrounding this case negate that presumption of fraud. *Crocker v. Hood*, 113 Ohio App.3d 478 (finding adequate consideration and the presence of only two badges of fraud); *In re Maston*, 44 B.R. 880; *Cardiovascular & Thoracic Surgery of Canton v. DiMazzio*, 524 N.E.2d 915; *John Deere Industrial Equipment Co. v. Gentile*, 459 N.E. 2d 611; *In re Harper*, 132 B.R. 349 Thus, this Court finds that the 1986 transfer of the Subject Property was not fraudulent pursuant to O.R.C. § 1306.07.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 6/16/98

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