

THIS OPINION IS NOT INTENDED FOR PUBLICATION

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

In re:) Case No. 98-52568
JOHN ANDREW BURKE,)
Debtor.) Chapter 7
)
RICHARD WILSON, TRUSTEE) Adv. No. 99-5107
Plaintiff,)
v.) JUDGE MARILYN SHEA-STONUM
)
LISA BURKE,)
Defendant.)

**ORDER DENYING, WITHOUT PREJUDICE,
DEFENDANT'S MOTION TO DISMISS COMPLAINT;
OR IN THE ALTERNATIVE, FOR JUDGMENT
ON THE PLEADINGS; OR FOR SUMMARY JUDGMENT**

On June 30, 1999, the chapter 7 trustee filed a "Complaint to Avoid and Recover Fraudulent Transfer, and for Imposition of Constructive Trust" (the "Complaint") against debtor's wife, Lisa Burke (the "Defendant"). On September 17, 1999, Defendant filed a "Motion to Dismiss Complaint; or in the Alternative, for Judgment on the Pleadings; or for Summary Judgment" (the "Original Motion"). Thereafter, on October 28, 1999, the trustee filed a "Response to Defendant's Motion to Dismiss Complaint, for Judgment on the Pleadings, or for Summary Judgment" (the "Original Response"). On November 3, 1999, Defendant filed a "Reply to Trustee's Response to Motion to Dismiss, Etc." (the "Reply") and, on November 5, 1999, the trustee filed a "Sur-Reply to Defendant's Reply" (the "Sur-Reply"). Finally, on November 12, 1999, Defendant filed a "Response to Plaintiff's Sur-Reply" (the "Response to the Sur-Reply"). (The Original Motion, the Reply and the Response to the Sur-Reply shall hereinafter be collectively referred to as the "Motion." The Original Response and the Sur-Reply shall hereinafter be collectively referred to as the "Response." The Complaint, the Motion and the Response shall hereinafter be collectively

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referred to as the "Pleadings"). The Court held a pre-trial in this matter on November 17, 1999, at which time counsel indicated to the Court that all necessary pleadings had been filed and that the matter of whether the Complaint should be dismissed was ready to be decided on the Pleadings. That matter was then taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (E) and (H) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon a review of the Pleadings and for the reasons set forth below the Court determines that the Motion is not well taken.

BACKGROUND FACTS

The following facts are not in dispute in this case. On September 8, 1992, debtor transferred his interest in real property located at 3938 Nichols Road, Medina, Ohio (the "Property") to Defendant (the "Transfer"). The Property was at the time of the Transfer and still is today, the marital home of debtor and Defendant. At the time of the Transfer, debtor owed debts to certain creditors including Alexander and Sandra Athens (collectively, "Athens") and MBNA America (Mastercard) ("Mastercard"). On July 16, 1997, Athens commenced a civil action against debtor in the Medina County Court of Common Pleas, alleging, *inter alia*, that the Transfer was fraudulent. Athens did not name Defendant in that state court action. On August 17, 1998, debtor filed a voluntary chapter 7 bankruptcy petition and on June 30, 1999, the trustee filed the Complaint seeking to avoid the Transfer.

STANDARD OF REVIEW

Defendant contends that the Complaint should be dismissed for failing to state a claim pursuant to Fed. R. Bankr. P. 7012(b) and Fed. R. Civ. P. 12(b)(6), because all

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claims set forth in the Complaint are barred by applicable statutes of limitation. When considering such a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The issue the court must decide is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims stated in the complaint. *Id.* Thus, a motion to dismiss for failure to state a claim will not be granted unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* (*emphasis added*).

DISCUSSION

In the Motion, Defendant argues that because the trustee has "assumed" Athens' fraudulent transfer claims pursuant to §544(b) and because Athens are barred by Ohio statutes of limitation from recovering against Defendant on account of the Transfer, the trustee is likewise barred from pursuing Defendant. That argument incorrectly assumes that the trustee has no other creditor whose fraudulent transfer claim it can "assume."

Section 544(b) of the Bankruptcy Code gives the trustee the power to avoid transfers or obligations of the debtor that are avoidable under applicable nonbankruptcy law by an actual, existing unsecured creditor. The parties in this case do not dispute that at the time of the Transfer, debtor owed debts to Athens and Mastercard. Therefore, even if Athens' ability to avoid the Transfer is barred by Ohio statutes of limitation, Mastercard's ability may still exist. *See, e.g.*, Ohio Revised Code ("ORC") §1336.09(A) (actions for fraudulent transfers under Ohio law must be brought within four years after the transfer was or reasonable could have been discovered by claimant).

Based upon the Pleadings, Defendant has not demonstrated beyond doubt that the trustee cannot prove no set of facts in support of his claim which would entitle him to

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relief. Because the parties have not yet engaged in any discovery, the trustee should be permitted to go forward with discovery so that he can determine whether, for instance, Mastercard's ability to avoid the Transfer pursuant to Ohio law still exists. Once the trustee has been given an opportunity to conduct such discovery, and if the facts of the case then warrant, Defendant should be given an opportunity to renew the Motion.

In the Motion, Defendant also contends that the trustee should have alleged specific facts regarding how and why the "discovery" provision of ORC §1336.09(A) applies to this case. Defendant essentially argues that because no specific facts were alleged, no such facts could exist. That argument is simply without merit because, as indicated above, no discovery has taken place in this matter. Accordingly, the trustee must be given an opportunity to discover the facts necessary to prove his case.

Finally, Defendant argues that, pursuant to Fed. R. Bankr. P. 7056, she is entitled to summary judgment in her favor because, based upon the Pleadings, there exists no genuine issue of material fact and Defendant is entitled to judgment as a matter of law. Whether or not a creditor in this case, and, therefore, the trustee, could successfully invoke the "discovery" provision of ORC §1336.09(A) is both in dispute and material to this case. Therefore, Defendant's argument in this regard is not well taken.

CONCLUSION

Based upon the foregoing, **IT IS HEREBY ORDERED:**

1. That the Motion is denied, without prejudice to Defendant to renew the Motion after expiration of the discovery period;
2. That all discovery in this matter shall be completed by not later than **February 25, 2000**;
3. That the January 26, 2000 pre-trial that was previously scheduled in this matter will not go forward;

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4. That a further pre-trial in this matter shall instead be held on March 1, 1999, at 1:30 p.m., in Room 250, U.S. Courthouse and Federal Building, 2 South Main Street, Akron, Ohio; and
5. That during the March 1st pre-trial, Defendant's counsel shall be prepared to address whether Defendant will be renewing the Motion and, if Defendant plans to renew the Motion, the Court will set forth a new filing schedule for pleadings relative to that matter. Otherwise, the Court will address with counsel whether this matter could be addressed through some form of alternative dispute resolution or whether it should be set for trial.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 12/30/99