

IT IS SO ORDERED.

Dated: 02:40 PM March 15 2006


MARILYN SHEA-STONUM **AFL**
U.S. Bankruptcy Judge

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

IN RE:)	CASE NO. 03-54285
)	
APRIL R. AHMED,)	CHAPTER 7
)	
DEBTOR(S))	
)	
)	
HAROLD A. CORZIN, TRUSTEE,)	ADVERSARY NO. 04-5183
)	
PLAINTIFF(S),)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	
)	
APRIL R. AHMED, ET.AL.)	MEMORANDUM AND OPINION
)	
DEFENDANT(S).)	

On December 6, 2004 the chapter 7 trustee for the estate of April R. Ahmed filed a complaint seeking to avoid allegedly fraudulent transfers and named as defendants April R. Ahmed ("Debtor"), Ahmed S. Ahmed ("Ahmed") and Homecomings Financial Network, Inc. ("Homecomings"). The Court held a trial of the matter on August 9, 2005, at which the Trustee reported it had entered into an agreement resolving the matter with respect to Homecomings (see docket # 38), however, a trial went forward with respect to the other named defendants. At the conclusion of the trial, the matter was 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. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (H) over which this Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 157(a) and (b).

FINDINGS OF FACT

The following facts are not in dispute and are the subject of Stipulations of Fact (docket #35) filed by the parties:

1. Debtor filed for chapter 7 relief on August 19, 2003, and Harold A. Corzin (“Trustee”) was appointed as the chapter 7 trustee for Debtor’s estate.
2. Debtor and Ahmed were married on June 4, 1994.
3. On April 10, 2000, Debtor and Ahmed entered into a Separation Agreement and filed a petition for dissolution of their marriage on April 18, 2000.
4. Debtor’s Affidavit of Property filed with the Common Pleas Court of Summit County, Division of Domestic Relations records the present fair market value of the Marital Residence (as defined herein) as \$265,000.
5. On September 7, 2000, that court entered its Decree of Dissolution (the “Decree”) of the marriage of Debtor and Ahmed and incorporated the Separation Agreement as part of its decree. The Decree has not been modified, amended or altered by any court since its entry.
6. The Decree set forth the following terms regarding 2573 Myersville Road, Uniontown, Ohio (the “Marital Residence”):

MARITAL RESIDENCE

The parties are co-owners of real property commonly known as 2573 Myersville Road, Uniontown, Ohio, 44685. Said property shall be placed on the market for sale. The parties agree to cooperate in the listing, showing, and sale of said real estate. Upon the sale of said real estate there shall be deduction from the gross proceeds realized as follows: ordinary and usual closing costs, real estate commissions, and a payoff on the existing mortgage. It is further agreed that from the proceeds of the sale of the property that the following debts shall be paid: Citibank, Capital One, First

USA Credit Card, First USA, and Elam (sic), specifically providing however that the total paid on these debts shall not exceed Thirty-three Thousand Dollars (\$33,000). The balance of the proceeds shall be the net proceeds and shall be divided equally between the parties. The Husband shall be responsible for the payment of any and all expenses associated with said real estate until said property is sold, including the payment of the mortgage, taxes, insurance, utilities, maintenance and repairs and other expenses. The parties agree to jointly reside at said property until the same is sold, subject to further Order of this Court. The Court shall retain jurisdiction to resolve and determine any issue related to the marital residence.

7. Ahmed is the fee simple title holder of the Marital Residence which he purchased for \$235,000 and acquired title to on July 2, 1997. At that time, Debtor had a dower interest in the property.
8. The Decree provided that Ahmed “shall be responsible for the payment of any and all marital debts arising out of said marriage.”
9. Debtor’s Schedule F includes the following creditors holding unsecured consumer credit claims and the respective amounts of each claim as follows:

AT&T Universal Card	\$1,370
Bank of America	\$3,802
Capital One	\$3,552
Chase Advantage Credit	\$2,152
Chase Shell Mastercard	\$3,870
Citibank	\$5,247
First USA Bank	\$5,604

10. Ahmed made payments to Elum Music during the period of July 2000 through April 2003 in the amount of \$77,624.35. (See Exhibit D - Stipulations of Fact).
11. Ahmed made payments to First USA during the period of January 2000 through June 2002 in the amount of \$2700. Debtor made a \$150 payment to First USA in April 2003. (See Exhibit F - Stipulations of Fact).

12. On July 23, 2002, Debtor and Ahmed signed a document reading “I, April Renee Ahmed, agree to have no claim on the house located at 2573 Myersville Rd. Uniontown Ohio in exchange for \$10,000 (ten thousand dollars no change). Ahmed Saleh Ahmed agrees to this transaction” (the “2002 Agreement”). A notary stamp is on the document, however, the document does not contain the signature of the notary. (See Exhibit F - Stipulations of Fact).
13. Ahmed issued Debtor a check in the amount of \$10,000 on July 23, 2002.
14. Ahmed listed the Marital Residence for sale with Geneva Chervenik Realty in March 2000 with a sale price of \$265,000.
15. Ahmed listed the Marital Residence for sale with Cutler GMAC Real Estate on July 26, 2003 with a sale price of \$269,900.
16. Debtor had a credit card through Chase Shell Mastercard (aka JP Morgan Chase Credit Card) which held a balance of \$1461.98 in April 2000, of \$3397.10 in September 2000, and of \$3,959.49 in August 2002.
17. On September 25, 2002, Ahmed refinanced the Marital Residence with Homecomings Financial Network, Inc. by executing a promissory note and mortgage for \$168,300; the mortgage balance as of August 4, 2005 was \$162,989.41.

The Court makes the additional findings of fact based on the testimony adduced and evidence presented at trial:

18. The Debtor owed Elum approximately \$15,000 - \$16,000 at the time of the divorce.
19. Ahmed continues to reside in the Marital Residence.
20. Credits posted to the First USA account from February 2000 through December 2003 total \$7,452.17 (Supplement to Ahmed’s Trial Exhibit E).
21. The Debtor’s “Schedule F - Creditors Holding Unsecured Nonpriority Claims” lists \$28,166 in unsecured debt, of which approximately \$26,000 is credit card debt.

22. The Court assumes the 2005 purchase price for the Marital Residence to be \$269,900 (absent evidence of a more current appraisal value).
23. “Proceeds from the sale of the property” as anticipated under the Decree would have been \$85,319,¹ and the Debtor’s right to proceeds after the marital debts were paid would be \$26,159.50.²
24. Creditors Capital One and First USA Bank listed on Debtor’s Schedule F represent \$9,156 of marital debt that remains unpaid by Ahmed (discussed *infra*).

DISCUSSION

The Trustee asserts that, according to the terms of the Decree, the right to payment of the debts and to any remaining sale proceeds from the sale of the Marital Residence are property of the estate pursuant to 11 U.S.C. § 541. The Trustee further contends that Debtor and Ahmed have failed to act in accordance with the Decree because they have not yet sold the Marital Residence, and that the alleged transfer of Debtor’s interest in the proceeds from the sale of the Marital Residence is not a valid transfer under O.R.C. §5301.01 and is therefore avoidable by the Trustee pursuant to 11 U.S.C. § 544(a)(3). Further, the Trustee generally asserts in his complaint that the 2002 Agreement was a fraudulent transfer under O.R.C. § 1336 and is avoidable by the Trustee pursuant to § 548.³ At trial, the Trustee asserted that several of Debtor’s creditors may represent residual “marital debts” which were to be paid by Ahmed. The Trustee seeks specific performance, requesting the Court order the house sold and creditors paid according to the terms of the Decree.

¹ Employing \$269,900 as a starting premise, the Court deducted an assumed eight percent real estate transaction cost (\$21,592) and an outstanding mortgage of \$162,989 (as of the time this matter proceeded to trial) to arrive at a net proceed amount of \$85,319.

² An amount equal to half of the net sale proceeds less \$33,000 $(\$85,319 - \$33,000) / 2 = \$26,159.50$.

³ The 2002 Agreement in question occurred outside of the one-year look-back period afforded to the Trustee in §548, but the Court notes that §544 likewise grants the Trustee similar avoidance powers based in state law. Given that Ohio law has a four year statute of limitations on fraudulent transfers (see R.C. §1336.09), the Court proceeds in its analysis under §544(b).

At trial, Ahmed argues that the July 23, 2002 check made payable to Debtor, in addition to the payments he made to Elum and First USA serve as accord in satisfaction and payment and release of his obligations under the Decree. In addition, Ahmed argues that, because he claims that he cannot read English and was not represented by independent counsel, he did not intend to execute the Decree with those terms, and therefore the Decree should not be binding against him. That argument is not appropriately addressed to this Court which will not, in this context, disturb the consensual agreement overseen by the state domestic relations court.

When a defendant asserts the affirmative defense of accord in satisfaction, the defendant must prove that the parties went through a process of offer and acceptance - the accord - and that the accord was carried out – a satisfaction. *Allen v. R.G. Indus. Supply* (1993), 66 Ohio St. 3d 229, 232. Further, this process must be supported by consideration. *Id.* at 233.

Property of the Estate and Fraudulent Transfer

The Trustee correctly asserts that the Debtor's right to payment of certain debts and receipt of any remaining proceeds from the sale of the house are property of the estate pursuant to 11 U.S.C. § 541(a)(1). That section defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case" with the exception of those set forth in subsections (b) and (c)(2), which are inapplicable here. Though what is property of the debtor's estate raises a federal question, it is well-settled that a debtor's property rights are created and defined by state law. *Demczyk v Mutual Life Ins. Co.* 126 F.3d 823,827 (6th Cir. 1997).

Under Ohio law, the Debtor has an equitable right created by the Decree that entitles her to payment of certain marital debts and receipt of proceeds from the sale of the Marital Residence. Central to the Trustee's argument is the notion that the Decree created a real property interest in the Debtor such that any transfer, release, or conveyance of that interest would be governed by O.R.C. § 5302 et. seq., which sets forth the statutory requirements for

land conveyances under Ohio law. A close review of the case law supplied by the Trustee on another point, however, goes directly against this contention that the terms of the Decree should be treated as a recordable conveyance of real property under Ohio law. *See Third Federal Sav. and Loan Ass'n. of Cleveland v. Hayward*, 1998 WL 488642 (Ohio App. 9 Dist., 1998) (*comparing language of two divorce decrees and finding that, unless specifically stated in the decree, a division of marital property does not act as a conveyance such to implicate the recording requirements of R.C. § 5301.01*);⁴ *see also Robins v. Robins*, 2005 WL 2303703 (Ohio App. 10 Dist., 2005) (*finding that decrees that incorporate a separation agreement reached by the parties should be construed using normal rules of contract interpretation and to effect the parties' intent*). Under the terms of this Separation Agreement, the Debtor did not have an interest in *real* property as defined under state law, therefore, the Trustee's reliance on

⁴ In *Hayward*, the language of the divorce decree read:

The Brandywine home shall immediately be placed on the market for sale. The Court will continue to keep jurisdiction over this home until it is sold. From the net proceeds Husband's mother shall first receive \$45,979. Husband and Wife shall divide equally the next \$21,000 (\$10,500 each). The remaining proceeds shall be divided equally. From Husband's and Joyce Hayward's proceeds, the Parkview Federal Mortgage shall be paid. 1998 WL 488642 at *2.

Based on that language, the *Hayward* court held:

The decree of dissolution reviewed in *Costell*, by its terms, was to operate as a conveyance of land in the event the husband failed to convey the property as ordered by the court. It was also deemed by its terms to be a recordable instrument. The divorce decree before this Court, however, did not act as a conveyance of the Brandywine property so as to trigger the recording provisions of Section 5301.25(A) of the Ohio Revised Code, nor did the trial court designate it a recordable instrument. Moreover, it was not an "instrument[] of writing properly executed for the conveyance or encumbrance of lands," which would require it to be recorded by Section 5301.25(A) of the Ohio Revised Code. The divorce decree was not signed or acknowledged by a "grantor, mortgagor, vendor, or lessor" in the presence of two witnesses as required for proper execution by Section 5301.01(A) of the Ohio Revised Code. Nor was it the sort of writing normally used by or among an owner or owners of servient estates to establish an encumbrance. *See, e.g., Emrick v. Multicon Builders, Inc.* (1991), 57 Ohio St.3d 107, 566 N.E.2d 1189 (restriction contract executed by landowners must be recorded to be enforceable against bona fide purchaser without actual knowledge of the restrictions). The divorce decree in the case before this Court merely established the interests of the parties in the Brandywine property, ordered that the property be listed for sale, and retained jurisdiction over the property until the sale had been effected. As such, the divorce decree was not required to be recorded. The General Assembly has not required through the provisions of Section 5301.25 of the Ohio Revised Code that court orders concerning real property be recorded, nor has it included situations such as the one before this Court in the recordation provisions set forth in Section 5301.39 relative to mortgages and other liens.

Id. at *4.

11 U.S.C. § 544(a)(3) as a means for exercising his “strong-arm powers” is misplaced. Though the Decree gave the Debtor rights to debt payment and sale proceeds, it did not convey a real property interest to her such that the Trustee can act as a bona fide purchaser to avoid a transfer of that interest.

Although it was not the focus at trial, the Trustee generally asserts in his complaint and the Court finds that the evidence presented supports that the 2002 Agreement constitutes a fraudulent conveyance pursuant to § 544(b) and O.R.C. § 1336.04, and is recoverable pursuant to § 550. Section 544(b) grants the Trustee the power to avoid any transfers or obligations that are voidable under applicable state or federal law. Section 1336.04 of Ohio’s Revised Code governs when transfers or obligations incurred are fraudulent as to a creditor, and reads:

(A) A transfer made of an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:

- (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
- (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and if either of the following applies:
 - (a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;
 - (b) The debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

When considering actual intent pursuant to § 1336.04 (a)(1), the statute allows Courts to consider all relevant factors, including the following:

- (1) Whether the transfer was to an insider;
- (2) Whether the debtor retained possession or control of the property transferred after the transfer;
- (3) Whether the transfer or obligation was disclosed or concealed;
- (4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;

- (5) Whether the transfer was of substantially all of the assets of the debtor;
- (6) Whether the debtor absconded;
- (7) Whether the debtor removed or concealed assets;
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- (9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred;
- (11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Here, there was sufficient evidence to support a finding that, though legally divorced at the time, Ahmed should be treated as an insider in this transaction; checks dated at late as April 2003 list the Debtor as a signatory on checks, indicating that she remained named on Ahmed's checking account as of that date. Further, the parties continue to share a co-parenting relationship over a child from their marriage who is still a minor.

Moreover, the Court finds that the consideration received by the Debtor in the 2002 Agreement was not adequate or reasonable given the terms of the Decree and anticipated proceeds the Debtor was to receive upon the sale of the Marital Residence. The financial disclosure completed by the Debtor in April 2000 valued the Marital Residence at \$265,000, consistent with the asking price in the listing agreement entered into in March 2000. The July 2003 listing agreement contained an asking price of \$269,900, yet when the Debtor and Ahmed entered into the 2002 Agreement, the basis for their division of sale proceeds was a sale value of \$235,000 - nearly \$30,000 less than the value on which the parties had agreed two years earlier. Further, from that sale price, the Debtor subtracted, in full, the \$33,000 in marital debt that the Decree ordered the parties pay; the Court is wholly unpersuaded, however, that those debts were paid in full when the Debtor entered into the 2002 Agreement. Therefore, this Court deems it inappropriate to deduct that amount, in full, from the sale proceeds the Debtor was entitled to receive pursuant to the Decree, as discussed further in this opinion.

Finally, the Court considers the absence of any proof that the marital or individual debts which predated 2002 had been paid, as evidence the debtor was insolvent, or became insolvent near the time of the transfer. For these reasons, the Court finds that the Debtor fraudulently conveyed her interest in sale proceeds to Ahmed based on state law governing the transfer of interest between parties.

With respect to the Trustee's assertion that the Debtor's Schedule F reflects "marital debt" that should be paid by Ahmed, the Trustee did present credible evidence that the Capital One and First USA Bank debts listed on Debtor's petition totaling \$9,156 are the same creditors as listed in the Decree. Both creditors bear the same name as those listed in the Decree and Debtor's petition states that the credit card purchases owed to those creditors were incurred over time from 1995-2002, during which period the Debtor was married the majority of the time. However, the Court does not consider the Citibank credit card debt listed on Debtor's Schedule J as a marital debt. Despite carrying the same creditor's name as was included in the Decree, the credit card statement proffered into evidence reflects that the card was only opened as of March 2000, and further reflects that the balance due on the card was the result of a \$5,000 balance transfer from an existing MBNA card; given the contemporaneous nature of the account being opened and the Separation Agreement being filed, in addition to the absence of any reference in the Decree to debts from MBNA, the Court does not consider that Citibank account to be the same as the one represented in the Decree. The Court credits the Debtor's testimony that the credit card was opened in her name only at the time of their separation, and that Ahmed was unaware of Debtor's actions.

Because O.R.C. § 3105.171(I) precludes a court from making a future modification to the division or disbursement of property made in a decree, this Court cannot find, as the Trustee asserts, that the remaining creditors on Debtor's petition represent marital debt, not individual debt.

Accord in Satisfaction

Though Ahmed presents evidence of over \$10,000 in payments to First USA over the time since the divorce, the evidence presented at trial reveals that Ahmed's First USA account balance was only \$382.62 at the time closest in proximity to the date that the state court entered the Decree; Ahmed's evidence includes a July 7, 2000, billing statement with a \$382.62 balance and omits any subsequent billing statements on the account until the April 7, 2001 statement, which then shows a balance of \$4,911.06. Given that the First USA account provided Ahmed with a revolving line of credit from 1995 until at least December 2003, the Court cannot credit most of Ahmed's payments on that account as satisfaction of the debts set forth in the Decree. Instead, the Court credits Ahmed with payment of the balance that he presented as most contemporaneous to the Decree being entered, which was \$382.62.

Likewise, Ahmed relies on multiple payments over time on the Elum debt as evidence of accord in satisfaction. Ahmed offered testimonial evidence that the debt owed to Elum at the time of the divorce was approximately \$15,000 - \$16,000. However, Ahmed concedes that Elum was, and continues to be, a supplier for Ahmed's convenience store business. This Court is not in a position to question the propriety of considering this debt a "marital debt" under terms of the Decree, however, due to the absence of any evidence that the balance owing to Elum was ever reduced below the \$15,000 - \$16,000 level, the Court cannot find that the proffered payments to Elum made on a revolving business account over a period of three years constitute satisfaction of the terms of the Decree.

Further, Ahmed's testimony with respect to payment he made to the remaining creditors, First USA Credit Card, Citibank, and Capital One, lacked credibility. Despite his testimony that he was confident he had paid First USA Credit Card and Citibank, he was unable to produce any records of such payments, and he further testified that he had burned all records with respect to the Capital One account. Given the undisputed evidence that Ahmed has owned

and operated a retail business in Ohio for more than a decade, the Court does not credit Ahmed's argument that he entered into the Separation Agreement unknowingly or that he lacked the ability to read and comprehend its terms.

CONCLUSION

In light of the foregoing, the Court credits Ahmed with having paid \$382.62 toward the marital debt obligations set forth in the Decree, but finds that the 2002 Agreement was a fraudulent transfer and is therefore void as to the release or satisfaction of the Decree's terms.⁵ Ahmed remains obligated to pay the \$9,156 in marital debt listed on the Debtor's petition, in addition to \$26,159.50, which is the amount that the Court finds would have been equivalent to the Debtor's portion of the remaining proceeds from the sale of the property. Therefore, the Court finds that the Debtor's estate is entitled to judgment in the amount of \$35,315.50 which is due and owing at the judgment rate assigned to domestic relations obligations.⁶ Given this relief, the Trustee's request for specific performance will be abated for 90 days to allow Ahmed to provide cash satisfaction of this Court's judgment. If the judgment is not satisfied within 90 days from the date of this Court's Entry of Judgment, the Trustee may renew his request for specific performance.

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cc: Michael P. Moran (via electronic mail)
Harold A. Corzin
David P. Weimer

April R. Ahmed (via regular mail)
Ahmed S. Ahmed

⁵ Because the 2002 Agreement was deemed a fraudulent transfer and is therefore without effect, should Ahmed file a claim in Debtor's bankruptcy for repayment of the \$10,000 he paid to her in relation to that transaction, that claim would be subordinated to all other holders of general unsecured creditors of this estate.

⁶ To the extent this judgment exceeds the sum of the total amount of allowed claims, the Trustee's fees, and associated professional fees incurred in conjunction with this litigation, the Debtor may waive her right to collect those excess funds from Ahmed in satisfaction of the judgment.