

**IT IS SO ORDERED.**

**Dated: 04:54 PM April 01 2008**



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

IN RE:	)	CASE NO. <b>06-50210</b>
	)	
<b>Ginger R. Staab</b>	)	CHAPTER <b>7</b>
DEBTOR(S)	)	
	)	
<b>Kathryn A. Belfance, Trustee,</b>	)	
PLAINTIFF(S),	)	<b>ADVERSARY NO. 07-5060</b>
	)	
vs.	)	JUDGE MARILYN SHEA-STONUM
	)	
<b>Ginger R. Staab and Allan Staab and</b>	)	
<b>Mary Cruise,</b>	)	<b>MEMORANDUM OF OPINION ON</b>
DEFENDANT(S).	)	<b>DEFENDANTS' MOTION TO DISMISS</b>
	)	
	)	

In this adversary action, the Interim Chapter 7 Trustee in the main bankruptcy case (the "Trustee") seeks to avoid several pre-petition transfers made by Debtor

Defendant Ginger R. Staab (“Debtor/Defendant”) or by Defendant Mary Cruise (“Cruise”), the Debtor/Defendant’s mother. Presently before the Court is the joint motion of the defendants to dismiss (Dkt #8), the Trustee’s response (Dkt #9) and the defendants’ reply brief (Dkt. #10).

## **I. JURISDICTION**

Fraudulent conveyance and preference proceedings are core proceedings under 28 U.S.C. § 157(b)(2)(H). The Court has jurisdiction over core proceedings under 28 U.S.C. §§ 1334 and 157(a) and Local General Order No. 84, entered on July 16, 1984, by the United States District Court for the Northern District of Ohio.

## **II. FACTS AND PROCEDURAL BACKGROUND**

The parties do not dispute that Defendant/Debtor made the following transfers of property prior to February 22, 2006, the date that Defendant/Debtor filed her chapter 7 petition with this Court:

1. On August 7, 1997 Defendant/Debtor transferred ½ of her interest in real property located at 61 S. Tamarack Dr., Akron, OH to her husband, Allen Staab (“Mr. Staab”), who is also a defendant in this case, but who is not a co-debtor in Case No. 06-50210 (the “Main Bankruptcy Case”).

2. On May 19, 1997, the Defendant/Debtor transferred 6 lots of real property located in Florida, again to Mr. Staab.

3. On December 30, 2001, Defendant/Debtor transferred to Mr. Staab her remaining ½ interest in 61 S. Tamarack Drive.

Nor is there any apparent dispute that on July 21, 2004, Cruise and her now deceased husband transferred to Mr. Staab their ownership interest in certain real property located at 4227 Springdale Rd, Uniontown, OH. The Trustee alleges that this transaction was made with a purpose to avoid or assign a prospective inheritance.

At least \$100,000 of the money for the purchase of the Tamarack Drive residence had been lent or otherwise provided by Mrs. Perrine, the Defendant/Debtor's then mother-in-law ("Mrs. Perrine"). Shortly after the house was purchased, Defendant/Debtor divorced her husband Thomas Perrine and was awarded the Tamarack Drive residence. In 1994, Mrs. Perrine sued the Defendant/Debtor in an effort to recover the money she had contributed to purchasing the Tamarack Drive house. By February 22, 2006, when the Defendant/Debtor filed her chapter 7 petition, the litigation between Mrs. Perrine and the Defendant/Debtor still had not been finally concluded. Mrs. Perrine was noticed of the February 22, 2006 bankruptcy filing by her former daughter-in-law.

The Trustee conducted the Debtor/Defendant's first meeting of creditors in the Main Bankruptcy Case on April 18, 2006 and alleges she had no knowledge of the transfers until that meeting. The Trustee filed this adversary proceeding on April 12, 2007. The Complaint enumerates four causes of action:

- I. **State Law Preference Claim.** In her first cause of action the Trustee alleges that the transfers from the Defendant/Debtor to her husband constitute unlawful preferences of one creditor over another under Ohio Revised Code § 1313.56 and that the Trustee therefore has the power to avoid the transfers pursuant to 11 U.S.C. § 544(b).
  
- II. **State Law Fraudulent Conveyance Claims.** The complaint's second cause of action alleges that these same transfers constitute fraudulent conveyances under Ohio Revised Code §§ 1336.04 and 1336.05. The second cause of action can also be fairly read to assert that the transfer of the Uniontown, OH real property to Mr. Staab by the Defendant/Debtors' parents is fraudulent within the meaning of §§ 1336.04 and 1336.05.
  
- III. **Declaratory Judgment Claims.** The third cause of action seeks a declaratory judgment with respect to each of the transfers and does not contain any substantive theory of avoidability that is not contained in the complaint's first two causes of action.
  
- IV. **Constructive Trust.** Finally, the fourth cause of action alleges that a constructive trust in favor of the Trustee results from the circumstances of the transfers and seeks a tracing of assets to the extent assets of the constructive trust have been converted.

The defendants timely filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), made applicable to adversary proceedings by Fed. R. Bank. P. 7012, in which they argued that the fraudulent conveyance cause of action is time barred because it was brought more than four years after the transfer of the real property was recorded. Defendants further argued that the transfer of real property by the Debtor's parents to the Debtor's husband is outside the scope of §§1336.04 and 1336.05 of the Ohio Revised Code. Although the motion to dismiss did not address the Trustee's preference cause of action, the defendants did address the preference claim in their reply to the Trustee's brief in opposition, arguing that the preference claim is also time-barred. The motion to dismiss did not address the constructive trust claim, nor did Trustee's response.

### **III. MOTION TO DISMISS STANDARD**

In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, a court construes the complaint in the "light most favorable to the plaintiff." *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir.1993). A complaint should not be dismissed for failure to state a claim unless it "appears beyond doubt that the plaintiff can prove no facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 335 U.S. 41, 45-46 (1957). The complaint must contain either "direct or inferential allegations with respect to all material elements necessary to sustain recovery under some viable legal theory." *Schied v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 437 (6th Cir.1988).

#### IV. DISCUSSION

The complaint specifically relies upon subsection (b) of 11 U.S.C. § 544 of the Bankruptcy Code, which provides in pertinent part:

(b) (1) ... [T]he trustee may avoid any transfer of an interest of the debtor in property ... that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of [Title 11] ....

Unlike the “strong arm” provision in subsection (a) of § 544, which releases the trustee in some respects from defenses that are based upon the creditor’s earlier knowledge of the transfer, subsection (b) merely permits the trustee to “step into the shoes” of a creditor in order to nullify transfers voidable under state fraudulent conveyance acts for the benefit of all creditors.” *In re Fordu*, 201 F.3d 693, 698 n. 3 (6th Cir.1999) (citing *NLRB v. Martin Arsham Sewing Co.*, 873 F.2d 884, 887 (6th Cir.1989)).

What **all** parties seem to have inadequately appreciated when briefing the present motion to dismiss is that the Trustee can establish standing even if there is only one unsecured creditor who could assert the state law avoidance action, regardless of any impediments that other unsecured creditors might face. *See Smith v. American Founders Fin. Corp.*, 365 B.R. 647, 659 (S.D. Tex. 2007) (bankruptcy trustee must show the existence of an actual unsecured creditor holding an allowable unsecured claim who could avoid the transfer in question); *In re Wingspread Corp.*, 178 B.R. 938, 945 (Bankr.S.D.N.Y.1995) (trustee must show that at least one of the present unsecured creditors of the estate holds

an allowable claim, against whom the transfer was invalid under applicable state or federal law). This key principle has informed this Court's approach to the motion to dismiss.

**A. Avoidance of the Transfers Made by the Debtor/Defendant to Her Husband in 1997 and 2001**

**1. The Parties' Arguments on the Preference Action**

With respect to the Trustee's avoidance claim under O.R.C. §1313.56, the parties cannot agree which statute of limitations is applicable. The Trustee believes that O.R.C. § 2305.09(D) sets forth the appropriate limitation period. That statute is labeled as establishing a period of limitations for "certain torts" and reads in relevant part:

An action for any of the following causes shall be brought within four years after the cause thereof accrued

. . .

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in sections 1394.35, 2305.10 to 2305.12, and 2305.14 of the Revised Code

. . . If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

The Trustee argues that she did not discover the alleged fraud until April 18, 2006 and her preference action was thus timely filed. Defendants point out that even if § 2305.09 is the proper statute of limitations, there is case law that glosses § 2305.09 by holding that an action for fraud must be brought within four years after the fraud "was or should have

been discovered” and that the filing of property transfer deed represents the point when the fraud “should have been discovered.” They further argue that for conveyances of real property, the fraud “should have been discovered” when the transfer deeds are recorded in the appropriate land recorder’s office.

**2. The Parties’ Arguments on the Fraudulent Conveyance Action under Ohio’s Uniform Fraudulent Transfer Act.**

Only one of the definitions of fraudulent transfers under O.R.C. § 1336.04 has a counterpart limitations period in § 1336.09 that could ever be more than four years. If the transfer was made “with actual intent to hinder, delay or defraud any creditor,” (O.R.C. § 1336.04(A)(1)) then under § 1336.09(A) the claim must be filed “within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or reasonably could have been discovered by the claimant.”

Again, the Trustee argues that she filed the present adversary action within one year of the meeting of creditors, which was when she discovered the transfers. Also again, the defendants argue that the transfers reasonably could have been discovered by creditors at the time the deeds of transfer were duly recorded. Here the defendants stress the decision of Judge Harris in *In re Spitaleri*, 2006 WL 4458357 (Bankr. N.D. Ohio), where he in essence held that once a deed is recorded, thne all creditors are deemed on notice and the four year statute begins to run.



Finally, the defendants argue in the alternative that at the very least the transfer could have been discovered upon the filing of the Debtor/Defendant's bankruptcy petition, schedules, and statement of affairs.

**3. The Court's Conclusion: The Defendants Have Not Established that as a Matter of Law the Ohio Statutes of Limitation Preclude the Trustee from Pursuing the Preference and Fraudulent Claims Relating to the Transfers by the Debtor/Defendant**

First, the Court must respectfully disagree with the breadth of the *In re Spitaleri* holding. In particular with respect to a creditor who may have no reason to believe that the transferor is disposing of property or that such disposition is intended to hinder, delay or defraud that creditor, whether recordation of a property transfer deed starts the running of an avoidance statute of limitations must be examined from that creditor's perspective. Certainly with respect to the statute of limitations set forth in O.R.C. § 2305.09, the Ohio Supreme Court examined its General Code precursor and held at syllabus two: "the cause of action does not accrue when the fraudulent deed is filed for record, unless the plaintiff then receives actual notice of its execution, and of the circumstances which render it fraudulent." *Stivens v. Summers* (1903), 68 Ohio St. 421, 67 N.E. 884.

With respect to Ohio's Uniform Fraudulent Transfer Act, the defendants have cited no case except *In re Spitaleri* stating that the recordation of a deed constitutes notice to the world for the purpose of a fraudulent conveyance action. The cases and quotes relied

upon in *In re Spitaleri* appear directed at transactions that do not have the marks of an intent to hinder creditors. There are strong reasons that the land recorder's system should operate as a "buyer beware" mechanism that in turn provides trust in the transfer transaction, but fraudulent conveyance law addresses an entirely different question, namely whether a deed transfer was done for an improper purpose and had an adverse effect upon a creditor who cannot possibly be expected to monitor all transfers of property by debtors owing money to that creditor. The Trustee's complaint alleges that the transfers made by Debtor/Defendant were with the actual intent to hinder, delay or defraud creditors of Debtor/Defendant. At the Rule 12(b)(6) stage, this allegation must be taken as true. And the Court believes that if there were an actual intent to hinder, delay or defraud creditors, a "notice by filing of deed" test for determining when the creditor should reasonably have discovered the transaction would be inappropriate.

Once the argument is rejected that under Ohio law a filing in the land records should equate with discovery of the transfer for fraudulent conveyance and preference purposes, the analysis under § 544(b) of the Bankruptcy Code focuses **not** on when the Trustee actually learned of the transfer or whether the pre-petition litigant Mrs. Perrine should have earlier discovered the conveyance of the very property at issue in that litigation. The question instead becomes whether a single creditor exists in the bankruptcy case that reasonably would not have discovered the transfer before April 12, 2006, which was one year before the Trustee filed this matter. Although the Trustee has not specifically alleged that such a single creditor exists, under principles of notice pleading, that allegation may be inferred inasmuch as it is part and parcel of § 544(b) analysis. In any

event, the Court notes that the claims register in this case shows at least one creditor (Chase) other than the Mrs. Perrine, the pre-petition litigant.

There is a possibility, if not a likelihood, that the meeting of the creditors in the Debtor/Defendant's bankruptcy represented the first point at which Chase reasonably could have discovered the transfers from Debtor/Defendant to her husband. The Schedules filed by the Debtor/Defendant in her bankruptcy case simply said that she owned no real property, and no question on the Statement of Financial Affairs would have required disclosure of the 1997 or 2001 transactions. The Court declines the invitation of the defendants to hold that in such a situation all estate creditors have information such that they reasonably should have discovered the transaction prior to the meeting of creditors.

**B. The Avoidance Claim with Respect to the Transfer by Debtor/Defendant's Parents of Real Property to Debtor/Defendant's Husband**

The defendants argue that Debtor Defendant never owned the property at 4227 Springdale Road and that the Uniform Fraudulent Transfer Act defines fraudulent conveyances as transfers made by a debtor. On its face, this argument would appear correct and the Trustee has made no attempt to offer a countervailing rationale that would protect this avoidance claim from dismissal.

## V. CONCLUSION AND RULING

For the foregoing reasons, the motion of the defendants to dismiss is:

**DENIED** with respect to the Trustee's preference claim and any avoidance claims based upon O.R.C. § 1336.04(A)(1) relating to the transfer of properties by the Debtor/Defendant to Mr. Staab;

**GRANTED** with respect to any avoidance claim that is premised upon O.R.C. § 1336.04(A)(2); and

**GRANTED** with respect to the transfer by Cruise and her now-deceased husband of the Uniontown OH property to Mr. Staab.

The Court will be entering a separate Judgment Entry as well as an order scheduling the next pre-trial hearing in this case.

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cc: via electronic service  
Kathryn Belfance, Trustee  
Jack Morrison, Jr.  
Thomas R. Houlihan  
Peter G. Tsarnas  
Marc P. Gertz