IT IS SO ORDERED.

Dated: 12:07 PM October 26 2009

MARILYN SHEA-STONUM LN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 08-52388
	)	
LAURA ANN HAMANN,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
KATHRYN BELFANCE, TRUSTEE,	)	**ADVERSARY NO. 08-5161**
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	
RICHARD NEMEROVSKY	)	
	)	**MEMORANDUM OPINION**
DEFENDANT(S).	)	

This matter comes before the Court on plaintiff-trustee's complaint seeking to avoid a fraudulent transfer by debtor and seeking an order requiring defendant to turn over funds to the bankruptcy estate. A trial was held on August 24, 2009. Appearing at the trial were Brian Angeloni, counsel for plaintiff-trustee and Antoinette Freeburg, counsel for defendant. During the trial, the Court received evidence in the form of exhibits and in the form of testimony from defendant. At the conclusion of the trial, the Court took the matter 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 testimony and evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and debtor's main chapter 7 case and pursuant to Fed. R. Bankr. P. 7052, the Court makes the following findings of fact and conclusions of law.

BACKGROUND FACTS[1]

A. Laura Hamann (fka Laura Nemerovsky) and defendant were legally married and have four children. On or around March 20, 2006, defendant and Ms. Hamann entered into a binding Separation Agreement (the "Separation Agreement"). That Separation Agreement was fully incorporated into a Judgment Entry of Divorce which was entered by the Cuyahoga County Common Pleas Domestic Relations Court (the "Domestic Relations Court") on April 7, 2006.

B. Defendant was represented by counsel during the divorce proceeding and that counsel prepared the Separation Agreement. Ms. Hamann was not represented by counsel throughout the divorce proceeding.

C. According to the terms of the Separation Agreement, Ms. Hamann was entitled to receive certain payments from defendant totaling $20,000.00:

> 2. REAL ESTATE
>
> The Husband is awarded the parties [sic] marital residence. . . Husband agrees that when the [W]ife vacates the marital premises, he shall pay to her $15,000.00 for her one-half interest in the said residence. Said payment will be no sooner than 18 months unless agreed by the parties. At that time, the Wife shall quit claim his [sic] interest in the marital residence to the Husband. . . .

[1] Pursuant to a Pre-Trial Order, the parties filed a list of facts which they agreed were not in dispute. *See* Docket #15. These Background Facts are based upon that list as well as the evidence presented at the trial.

8. PENSION, RETIREMENT AND LIFE INSURANCE ACCOUNTS

The Husband will withdraw sufficient funds from his employer sponsored 401K plan, so as to pay $5000.00 to the Wife.

Joint Exhibit A - Separation Agreement at ¶2 and ¶8.

D. Ms. Hamann did not receive from defendant the full $20,000.00 referenced in paragraphs 2 and 8 of the Separation Agreement.

E. On April 18, 2007 defendant and Ms. Hamann entered into an agreement (the "Agreement") which sets forth the following:

> Now comes [sic] the parties, Richard L. Nemerovsky (hereafter "Richard") and Laura Nemerovsky (hereafter "Laura") and for valuable consideration, the sufficiency of which is acknowledged, agree as follows:
>
> 1. Richard will pay to Laura a one time payment of Ten Thousand Dollars and no cents ($10,000.00) on or before October 27, 2007.
>
> 2. In consideration of the above, one time payment, Laura agrees to accept that Ten Thousand Dollars and no cents ($10,000.00) as payment in full for the following obligations as set forth in the parties [sic] Judgment Entry dated April 27, 2006, Vol 4679 Pages 520 through and including 543 (hereafter "Entry");
>
> a. Paragraph number Eight (8) granting Laura a Five Thousand Dollar ($5,000.00) interest in Richard's 401K, and
>
> b. Paragraph number Two (2) granting Laura a single payment of Fifteen Thousand Dollars and no cents ($15,000.00) in consideration for her interest in the 2751 Fleger Drive Parma, Ohio real property.
>
> 3. The parties understand that this is a compromise and each party knowingly and freely enter this compromise agreement as their own free will.
>
> 4. The parties agree that this agreement constitutes a modification, as set forth in Paragraph Twelve (12) of their Entry and is set forth in writing and signed by the parties as required.
>
> 5. All other provisions of the parties [sic] Judgment Entry, not directly addressed herein shall remain in full force and effect.

Joint Exhibit B. The Agreement was never approved by or filed with the Domestic Relations Court.

F. The Separation Agreement also included the following provisions:

> 3. HOUSEHOLD GOODS AND PERSONAL PROPERTY
>
> Except as otherwise expressly agreed in writing, and signed by both parties, Husband and Wife, have divided, to their mutual satisfaction, all household goods, furniture, furnishings, appliances, fixtures, books, items of art, linens, silverware, dishes, tools, items of personal property, and all other such personal property acquired before the marriage, and during the marriage, and during any period of separation. Such property shall be, and remain, the sole property of the one in whose possession it is, free and clear of any claim on the part of the other. . . .
>
> 4. AUTOMOBILES
>
> The [W]ife shall keep as her sole possession free and clear of all claims of the husband the 2005 Chrysler Town and Country van. The Husband agrees to make the payments on the loan secured by the vehicle as well as the insurance premiums. Once the vehicle is paid in full, Husband shall sign the title over to the Wife. The Husband shall keep as his sole possession free and clear of all claims of the Wife the 2000 Chevrolet Cavalier.

Joint Exhibit A - Separation Agreement at ¶3 and ¶4.

G. Neither the Separation Agreement nor the Judgment Entry of Divorce address how the parties were to allocate joint credit card debt acquired during their marriage.

H. Ms. Hamann's bankruptcy case was commenced with the filing of a voluntary chapter 7 petition on July 1, 2008.

I. On her Schedule B - Personal Property, Ms. Hamann indicates that the only "[a]utomobiles, trucks, trailers, and other vehicles and accessories" owned by her is a 1998 Coleman Santa Fe Pop-Up Trailer (the "Pop-Up Camper") that she values at $800.00.

DISCUSSION

Plaintiff-trustee contends that, pursuant to the Agreement, debtor transferred her interest in $10,000.00 to defendant and that the bankruptcy estate is entitled to avoid that transfer as fraudulent pursuant to § 548 of the Bankruptcy Code and § 1336.04 and § 1336.05 of the Ohio Revised Code ("O.R.C.").[2] Plaintiff-trustee further contends that, once the transfer is avoided, she is entitled to recover those funds from defendant for the benefit of the bankruptcy estate.

I. 11 U.S.C. § 548

In her first two claims for relief plaintiff-trustee relies upon 11 U.S.C. § 548(a)(1)(A) and (B) which provide as follows:

> (a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property . . ., that was made . . . on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily -
>
> > (A) made such transfer . . . with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made . . . indebted; or
> >
> > (B) (i) received less than a reasonably equivalent value in exchange for such transfer . . . and
> >
> > (ii) (I) was insolvent on the date that such transfer was made . . ., or became insolvent as a result of such transfer . . .;
> >
> > (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

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[2] The causes of action premised on the Ohio Revised Code are brought pursuant to 11 U.S.C. § 544(a)(3) which allows a trustee in bankruptcy to "step into the shoes" of a creditor in order to nullify transfers voidable under state fraudulent conveyance laws. *In re Fordu*, 201 F.3d 693, 697-98 (6th Cir. 1999).

> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
>
> (IV) made such transfer to or for the benefit of an insider, . . . under an employment contract and not in the ordinary course of business.

Plaintiff-trustee bears the burden of proving the elements of a § 548 fraudulent conveyance action by a preponderance of the evidence. *In re Triple S Restaurant, Inc.*, 422 F.3d 405, 414 (6th Cir. 2005); *In re Hayes*, 322 B.R. 644, 646 (Bankr. E.D.Mich. 2005).

Under § 548(a)(1)(A), plaintiff-trustee must demonstrate that by entering into the Agreement Ms. Hamann actually intended to hinder, delay or defraud her creditors. "The focus of an inquiry into actual intent is on the state of mind of the debtor; neither malice nor insolvency are required; and culpability on the part of the transferee is not essential." *In re Cahillane*, 408 B.R. 175, 191 (Bankr. N.D.Ind. 2009) (citations omitted).

During trial and despite being available, plaintiff-trustee chose not to call debtor as a witness. Accordingly, the Court is without *any* direct evidence as to Ms. Hamann's motivation for entering into the Agreement. However, since a debtor will rarely admit to acting with a fraudulent purpose, actual intent can be established by or inferred from circumstantial evidence commonly referred to as "badges of fraud." Such badges can include: whether debtor retained possession or control over the property after the transfer, whether the transferee shared a familial or other close relationship with debtor, whether debtor received consideration for the transfer, whether the transfer was disclosed and whether the debtor was or became insolvent at the time of the transfer. *Kelly v Armstrong*, 206 F.3d 794, 798 (8th Cir. 2000). When there exists a confluence of these "badges of fraud," a presumption of fraudulent intent will arise. *Id.*

The only evidence presented during trial from which Ms. Hamann's intent in entering into the Agreement could be inferred was the testimony of defendant. Defendant testified that prior to their divorce he and Ms. Hamann agreed that he would be entitled to retain the Pop-Up Camper. He further testified that on or about April 26, 2006, Ms. Hamann gave him a $6,400.00 check to compensate him for her portion of joint credit card debt incurred during their marriage. When defendant attempted to deposit that check it was not honored by his bank due to insufficient funds in the drawer's account. According to defendant, he and Ms. Hamann entered into the Agreement because she never made good on that "bounced" check and because he agreed to allow her to keep the Pop-Up Camper. Defendant indicated that at the time they entered into the Agreement the Pop-Up Campter was worth approximately $4,500.00.

As has already been noted, plaintiff-trustee chose not to call debtor as a witness during trial. Accordingly, the Court has nothing other than the testimony of defendant from which to determine debtor's motivation to enter into the Agreement. Notwithstanding that defendant has every reason in this proceeding to want to protect his own financial interest, the Court finds his testimony to be credible and nothing in that testimony could lead to a finding that Ms. Hamann entered into the Agreement with an actual intent to hinder, delay or defraud her creditors. Accordingly, plaintiff-trustee cannot succeed on her claim under § 548(a)(1)(A).

Under § 548(a)(1)(B), plaintiff-trustee must first demonstrate that Ms. Hamann received less than a reasonably equivalent value in exchange for entering into the Agreement. Based upon defendant's testimony, Ms. Hamann gave up her right to collect the full amounts due under paragraphs 4 and 8 of the Separation Agreement in exchange for (1) a $10,000.00 payment from defendant; (2) defendant's agreement to not seek payment on the $6,400.00 "bounced" check and (3) defendant's relinquishment of his rights to the Pop-Up Camper which, according to defendant, was

worth approximately $4,500.00. Such consideration would appear to constitute a reasonably equivalent value to Ms. Hamann in exchange for her entering into the Agreement.

In her petition, debtor lists the value of the Pop-Up Camper at only $800.00. Such valuation is not, however, entitled to any weight. Although the Court is without any evidence as to how debtor arrived at that value, defendant's trial testimony reveals that debtor's Schedules are not accurate. As previously noted, on Schedule B - Personal Property the only automobile or other vehicle that debtor lists as owning as of the date of the petition is the Pop-Up Camper. During trial, defendant testified that, pursuant to paragraph 4 of the Separation Agreement, he paid off the loan on the parties' 2005 Chrysler Town and Country van (the "Mini Van") and signed over title to Ms. Hamann. Defendant further testified that the Mini Van was in debtor's possession as late as the day before trial because he saw it in her garage when he dropped off his children at the house where debtor now resides with her new husband.

During questioning by the Court counsel for plaintiff-trustee indicated that his client just recently learned of the existence of the Mini Van and was investigating the matter. On October 1, 2009 plaintiff-trustee filed in debtor's main chapter 7 case a notice of her intent to sell the Mini Van and on October 16, 2009 an order was entered granting plaintiff-trustee's application to retain an auctioneer to liquidate that vehicle for the benefit of the creditors of debtor's estate.

"[T]he test used to determine whether a transfer was supported by reasonably equivalent value focuses on whether there is a reasonable equivalence between the value of property surrendered and that which was received in exchange." *In re Fordu*, 201 F.3d 693, 708 (6th Cir. 1999). Based upon defendant's testimony, Ms. Hamann received a $6,400.00 debt forgiveness and the Pop-Up Camper (worth approximately $4,500.00) in exchange for a one time $10,000.00 payment from defendant and a waiver of her right to receive the balance due under paragraphs 4 and 8 of the Separation

Agreement. This consideration cannot support a finding that debtor received less than a reasonably equivalent value in exchange for entering into the Agreement. Accordingly, plaintiff-trustee cannot succeed on her claim under § 548(a)(1)(B).

II. O.R.C. § 1336.04

In her next two claims for relief plaintiff-trustee relies upon O.R.C. §1336.04(A)(1) and (A)(2) which provide as follows:

> (A) A transfer made or 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; [or]
>
> (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.[3]

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[3] In determining actual intent under subsection (A)(1) the statute further indicates that consideration may be given to all relevant factors (*i.e.* "badges of fraud") including the following:

> (1) Whether the transfer or obligation 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;

In order to succeed under an action based upon O.R.C. § 1336.04(A)(1) and (A)(2), plaintiff-trustee must make essentially the same proofs that are required for an action under § 548(a)(1) but do so by the higher standard of clear and convincing evidence. *In re Grove-Merritt*, 406 B.R. 778, 793 (Bankr. S.D.Ohio 2009). As demonstrated above, plaintiff-trustee has failed to meet her burden of proof on these necessary elements of a cause of action for fraudulent conveyance. Accordingly, plaintiff-trustee cannot succeed on her claims under O.R.C. § 1336.04.

III. O.R.C. § 1336.05

In her next two claims for relief plaintiff-trustee relies upon O.R.C. §1336.05(A) and (B) which provides the statutory framework under which a creditor whose claim against debtor arose before the challenged transfer took place must prove its case. That statute sets forth as follows:

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(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.

O.R.C. § 1336.04(B).

> (A) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
>
> (B) A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the transfer was made to or the obligation was incurred with respect to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

To succeed under subsection (A) plaintiff-trustee must first prove that Ms. Hamann failed to receive a reasonably equivalent value in exchange for entering into the Agreement and then must prove that she either was insolvent when she entered into the Agreement or became insolvent as a result of entering into the Agreement. As already discussed, plaintiff-trustee has failed to prove the issue of reasonably equivalent value. As to insolvency, the only evidence presented by plaintiff-trustee as to that issue was debtor's bankruptcy petition. Given that the petition failed to include all of debtor's assets it is not, standing alone, reliable evidence. Moreover, that petition purportedly shows debtor's financial condition on the date it was filed (July 1, 2008) and not on the date she entered into the Agreement (April 18, 2007).

To succeed under subsection (B) plaintiff-trustee must prove that defendant is an "insider." A debtor's ex-spouse is generally not considered an "insider" unless it is demonstrated that such individual is able to exert control or influence over the debtor's financial decisions. *See* 11 U.S.C. § 101(31). *See also, In re Schuman,* 81 B.R. 583, 585-86 (9th Cir. B.A.P. 1987). During the trial defendant testified that after their separation and divorce he maintained a civil relationship with Ms. Hamann only for the benefit of his children. There was no evidence presented to suggest that defendant exercised *any* amount of control over her financial decisions.

Based upon the foregoing, plaintiff-trustee has failed to make the proofs necessary under either subsection of O.R.C. § 1336.05. Accordingly, plaintiff-trustee cannot succeed on her claims under § 1336.05(A) and (B).

CONCLUSION

Plaintiff-trustee has failed to prove that any transfer of interest from debtor to defendant pursuant to the Agreement was fraudulent. Accordingly all the causes of action pled in plaintiff-trustee's complaint must fail. A separate judgment consistent with these findings of fact and conclusions of law will be entered.

# # #

cc (*via* electronic mail):
BRIAN ANGELONI, Counsel for Plaintiff-Trustee
ANTOINETTE FREEBURG, Counsel for Defendant