THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 03-12436
	)	
RALPH W. DAFFNER,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
RICHARD A. BAUMGART, TRUSTEE,	)	Adversary Proceeding No. 03-1132
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
RALPH W. DAFFNER, et al.,	)	
	)	
Defendants.	)	

The chapter 7 trustee filed this complaint against the debtor Ralph Daffner, his brother Frank Daffner, and Frank Daffner's wife Carol Daffner. The trustee seeks to set aside the debtor's transfer of property to his brother and sister-in-law or recover the value of the property transferred on the ground that it was a fraudulent conveyance.[1]

The trustee moves for summary judgment, which the defendants oppose. The defendants move for summary judgment, which the trustee opposes. (Docket 21, 22, 23, 32, 33, 34, 35, 36). For the reasons stated below, both motions are denied.

[1] The trustee dismissed count III. (Docket 37).

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

FACTS

The debtor Ralph Daffner and his brother Frank Daffner each acquired a one-half interest in property located at 3492 W. 54th St., Cleveland, Ohio (the Property) when their mother died. In 1993, Ralph signed a warranty deed conveying his one-half interest to Frank,[2] but reserving a life estate for himself. The deed states that the consideration paid by Frank was $10.00. Ralph delivered the deed to Frank at that time. Frank did not, however, record the deed until April 30, 2002. (Trustee's motion, Exhs. A, B). (Docket 21). Ralph filed his chapter 7 case on March 3, 2003, within one year of the recording date. The county auditor values the Property at $36,200.00. (Trustee's motion, Exhs. A, D). (Docket 21).

The trustee asks to avoid this transfer as a fraudulent conveyance under 11 U.S. C. § 548(a)(1)(B). He supports his summary judgment motion with an affidavit and exhibits. The defendants oppose the motion and ask for summary judgment in their favor. They have attached two unauthenticated exhibits to their brief: one is the deed in question (which the trustee also offers) and the other is a copy of an affidavit by Attorney John Fitzmaurice filed by the debtor with his answer.[3]

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[2] The court will at times use first names in this opinion because the parties' last names are the same.

[3] Strictly speaking, a copy of an affidavit is not properly considered in connection with a summary judgment motion. In this case, however, the original affidavit is attached to the defendants' answers which the defendants refer to in their summary judgment papers. The court will, therefore, consider the affidavit.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c), made applicable by FED. R. BANKR. P. 7056; *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The movant must initially demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. at 323. The burden is then on the non-moving party to show the existence of a material fact which must be tried. *Id.* The non-moving party must oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves . . . ." *Celotex Corp. v. Catrett,* 477 U.S. at 324. "[T]he nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *Poss v. Morris (In re Morris)*, 260 F.3d 654, 665 (6th Cir. 2001). All reasonable inferences drawn from the evidence must be viewed in the light most favorable to the party opposing the motion. *Hanover Ins. Co. v. Am. Eng'g Co.*, 33 F.3d 727, 730 (6th Cir. 1994). Summary judgment may be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prods., Inc.,* 141 F.3d 612, 616 (6th Cir. 1998) (citing *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

11 U.S.C. § 548(a)(1)(B) AND THE POSITIONS OF THE PARTIES

The trustee bases his case on bankruptcy code § 548(a)(1)(B), which states:

> (a)(1) The trustee may avoid any transfer of an interest of the debtor in property . . . that was made . . . on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily–

> (B)(I) received less than a reasonably equivalent value in exchange for such transfer . . . ; and
> (ii)(1) was insolvent on the date that such transfer was made . . . , or became insolvent as a result of such transfer[.]

11 U.S.C. § 548(a)(1)(B). The trustee has the burden of proof. *Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.),* 92 F.3d 139, 144 (3d Cir. 1996).

The defendants acknowledge that the debtor transferred an interest in property within one year before he filed his bankruptcy. (Defendants' brief at 2). (Docket 23).[4] *See* 11 U.S.C. §§ 101(54) and 548(d)(1). They do not contest that the debtor was insolvent at the time. Instead, they argue that the trustee cannot prove the remaining statutory prong; i.e. that the debtor received less than a reasonably equivalent value in exchange for the transfer. Their position is that the debtor did not transfer anything of value to Frank. And if he did, then Frank gave reasonably equivalent value to the debtor, consisting of Frank giving up his right (a) to use and occupy the Property during the debtor's life; and (b) to receive rent from the debtor or from third parties. They also contend that the debtor received psychological benefits, such as peace of mind, from the transfer. (Defendants' reply at 3). (Docket 36). As a result, they believe that summary judgment should be entered in their favor. Alternatively, the defendants argue that Frank is entitled to a lien under § 548(c) for the value he gave in exchange for the transfer. 11 U.S.C. § 548(c).

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[4] The defendants say that this admission is for purposes of this motion only. However, this is also the conclusion required by law. The bankruptcy code looks to state law on perfecting an interest in property to determine the date of the transfer. *See* 11 U.S.C. § 548(d)(1). Under Ohio law, the transfer from Ralph to Frank was perfected on the date the deed was recorded. *See* Ohio Rev. Code § 5301.25(A). That date was within one year of the bankruptcy filing.

DISCUSSION

I.

Under bankruptcy code § 548, certain prepetition transfers by a debtor are deemed to be constructively fraudulent. Among these are transfers that a debtor made for less than reasonably equivalent value in the year before the filing, if the debtor was insolvent at the time of the transfer. These transfers are brought back into the bankruptcy estate and made available for distribution to creditors.

The phrase "reasonably equivalent value" is not defined in the bankruptcy code. "Value" is defined as:

> . . . property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor[.]

11 U.S.C. § 548(d)(2)(A). "Although the minimum quantum necessary to constitute reasonably equivalent value is undecided, it is clear that the debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value." *Butler Aviation Int'l, Inc. v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1125-26 (5th Cir. 1993). The Supreme Court has noted that outside of the foreclosure context, "reasonably equivalent value" will ordinarily mean something close to fair market value. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994). The Sixth Circuit has phrased the issue as whether there was a "reasonably equivalent economic benefit" in the transaction. *See Allard v. Flamingo Hilton (In re Chomakos)*, 69 F.3d 769, 771 (6th Cir. 1995).

The analysis, then, is this:

(1) did the debtor make a transfer;

(2) if so, what was the value of the transfer; and

(3) how does that value compare to the consideration received by the debtor at the time of the transfer. If there is a reasonable equivalence between the two, the transfer is not fraudulent. If there is not a reasonable equivalence, the transfer is deemed to be fraudulent and the trustee may avoid it.

In this case, the debtor did make a prepetition transfer to Frank. The bankruptcy code defines "transfer" as:

> every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property . . . .

11 U.S.C. § 101(54). Before the transaction, the debtor owned a one-half interest in the Property valued at $36,200.00. After the transaction, he owned only a life estate[5] in his one-half interest. Conversely, before the transaction Frank owned only a one-half interest in the Property. After the transaction, he owned his interest plus the debtor's one-half interest, subject to the debtor's life estate. The debtor, therefore, transferred property because he parted with his remainder interest in the Property.

The next task is to determine the value of the remainder interest so that it can be compared to the consideration which the debtor received for it. Ohio law recognizes that a remainder interest in real property has economic value. *See for example, Swartz v. Swartz*, 110 Ohio App.3d 218, 673 N.E.2d 972 (1996) (acknowledging that a remainder interest in real estate has value); *Markley v. Markley,* 1982 WL 6801 (Ct. App. 1982) (discussing the value of real estate parcel subject to a life estate). The trustee argues that the value is $18,100.00. This, however, is the value of the debtor's entire one-half interest in the Property. That number does

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[5] Under Ohio law, a life estate is "a freehold estate which is held by the tenant for his own life . . . The life tenant is entitled to full use and possession of the property. . . ," essentially so long as he takes appropriate care of it. *Bush v. Bush*, 1988 WL 42481, *2 (Ct. App. 1988).

not account for the fact that the debtor retained a life estate in that interest and transferred only the remainder interest to Frank. The defendants, on the other hand, argue that the value is zero, which does not account for the fact that the debtor transferred a significant property interest to Frank in the form of a one-half interest in the Property worth $36,200.00, subject to a life estate.[6] There is, therefore, a genuine issue of fact regarding the value of the transfer which the debtor made to Frank.

The trustee argues that this disputed fact is not material. His theory is this: regardless of the value of the interest transferred, the debtor did not receive *any* consideration from Frank, so that the transfer had to be for less than a reasonably equivalent value. In his view, this entitles the trustee to judgment as a matter of law. The defendants contend in their briefs that Frank did give reasonably equivalent value by (1) giving the debtor the right to live rent-free in the Property (2) giving up his right to receive his share of any rents that may have been collected during the debtor's lifetime, and (3) giving up his own right to live in the Property by accepting the deed. They also argue that the debtor received psychological benefits, including peace of mind, from making things "right" with Frank by giving him the remainder interest.

Certain additional facts, while not stipulated, are not disputed. They are that: (1) the debtor lived in the Property both before and after the bankruptcy filing; and (2) the debtor, thinking in 1993 (with good reason) that he might die imminently, initiated the transfer for estate planning purposes. Despite these facts, there is little or no evidence to support the defendants' argument that the debtor received any consideration at that time beyond the $10.00.

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[6] The court does not find the estate tax cases cited by the defendants to be dispositive on this issue.

First, while the defendants state in their brief that Frank gave the debtor the right to live rent-free in the Property after the transfer, there is nothing in an affidavit to show this and, in fact, the defendants state that the debtor lived in the Property rent-free both before *and* after the transfer. (Defendants' reply at 3). (Docket 36). Also, the defendants acknowledge that the debtor made this transfer solely for estate planning purposes. (Affidavit attached to answer). (Docket 15). Therefore, although Frank may have been entitled to claim rent for the debtor's sole use and occupancy of the Property, there is no evidence that he gave up this right in exchange for the transfer.[7] Second, the defendants contend that Frank gave up his right to live in the Property as a tenant in common. There is no evidence that Frank gave up any such rights at the time of the transfer; presumably, Frank could choose to live in the Property today if he wishes to. Also, it is unclear what the economic value of such a concession would be even if it were supported by the evidence. Third, there is no evidence that the Property was ever rented or that any rents were ever collected to support Frank's claim that he waived his right to them. And finally, the defendants did not provide any convincing support for the legal and/or factual proposition that the debtor received psychological benefits from the transfer or that any such benefits can amount to reasonably equivalent value for the real estate. The debtor did not, therefore, receive any consideration in this transfer beyond the token $10.00.

This does not, however, mean that the trustee is entitled to summary judgment. Although the debtor did not receive any consideration, the court cannot say based on this record that this either was or was not reasonably equivalent to the value of the transferred property. To determine that, the parties must quantify the value of the remainder interest which the debtor

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[7] Under Ohio law, a co-tenant in possession may be liable to a co-tenant not in possession for the use and occupancy. *See Cohen v. Cohen*, 157 Ohio St. 503, 106 N.E.2d 77 (1952); *Modic v. Modic*, 91 Ohio App.3d 775, 633 N.E.2d 1151 (Ct. App. 1993).

transferred to Frank. The parties have not provided any factual or legal basis for this valuation. This is, therefore, a genuine issue of material fact that must be resolved at trial.

II.

The defendants argue alternatively that they are entitled to summary judgment based on § 548(c) which states that a " transferee . . . of such a transfer . . . that takes for value and in good faith has a lien on or may retain any interest transferred . . . to the extent that such transferee . . . gave value to the debtor in exchange for such transfer[.]" 11 U.S.C. § 548(c). The defendants argue that Frank gave value in exchange for the transfer, but the evidence submitted failed to support that claim. They are not, therefore, entitled to summary judgment on that claim.

III.

There are two remaining issues that must be addressed, one from each side of this dispute.

A.

The defendants argue generally that the trustee's position is inequitable and should be rejected because the brothers intended this transfer of their boyhood home to go into effect 10 years ago when Ralph signed the deed. This misses the point. Under Ohio law, the transfer was effective as between Ralph and Frank in 1993. It was not, however, effective as against third parties such as the trustee until it was recorded. Frank had the deed, but did not record it until 2003. Ralph then filed for protection under the bankruptcy laws within one year. If Frank had recorded the deed when it was delivered to him–or even in the next nine years–the trustee would not be in a position to challenge the transfer under § 548. Or, if Ralph had not chosen to file his

bankruptcy case within a year of the transfer, the trustee would not be involved. To the extent that equity is relevant to this legal issue, the equities do not favor the defendants.[8]

B.

In his motion, the trustee asks for an order giving him authority to sell the Property free and clear of liens and interests. The defendants dispute his right to do so. The trustee's complaint did not include a count under 11 U.S.C. § 363(h) to sell property in which both the estate and co-owners hold interests. As a result, the issue of whether the trustee may sell this Property is not before the court at this time.

CONCLUSION

For the reasons stated, the trustee's motion for summary judgment is denied and the defendants' motion for summary judgment is also denied. A separate order will be entered reflecting this decision.

Date: 5 November 2003

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Richard Baumgart, Esq.
Susan Gray, Esq.

By: Joyce L. Gordon, Secretary
Date: 11/5/03

[8] This is not to say that the court is unsympathetic to the position in which the defendants find themselves. That sympathy cannot, however, substitute for applying the law, which law takes into account the interests of both a debtor and his or her creditors.

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Debtor.	)	Judge Pat E. Morgenstern-Clarren
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RICHARD A. BAUMGART, TRUSTEE,	)	Adversary Proceeding No. 03-1132
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
RALPH W. DAFFNER, et al.,	)	
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion filed this same date, the trustee's motion for summary judgment is denied and the defendants' motion for summary judgment is denied. (Docket 21, 22). The final pretrial and trial dates will remain in effect.

IT IS SO ORDERED.

Date: 5 November 2003

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Richard Baumgart, Esq.
Susan Gray, Esq.

By: Joyce L. Gordon, Secretary
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