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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
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U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 03-13453  
)  
LUSHION WHITE, ) Chapter 7  
)  
Debtor. ) Judge Pat E. Morgenstem-Clarren  
\_\_\_\_\_)  
)  
MARY ANN RABIN, TRUSTEE, ) Adversary Proceeding No. 03-1346  
)  
Plaintiff, )  
)  
v. ) **MEMORANDUM OF OPINION**  
) **ON MOTION FOR SUMMARY**  
LUSHION WHITE, et al., ) **JUDGMENT**  
)  
Defendants. )

The chapter 7 trustee filed a complaint to set aside a trust established by the debtor Lushion White and to recover real property which the trust transferred to the debtor's wife, Erma White.<sup>1</sup> The trustee now moves for summary judgment against Ms. White, who is the remaining defendant. (Docket 75, 77). Ms. White opposes that motion. (Docket 76).

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered in this district 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).

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<sup>1</sup> The complaint also requests authority to sell the real property free and clear of liens or other interests and named Meritage Mortgage Corp., the Cuyahoga County treasurer, and U.S. Bank N.A. as defendants. The trustee has entered into agreed orders with those other defendants. The trustee was granted default judgment against Lushion White.

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**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. *See* 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 nonmoving party to show the existence of a material fact which must be tried. *Id.* The nonmoving 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. 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). The issue at this stage is whether there is evidence on which a trier of fact could reasonably find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989).

**FACTS**

In 1997, about six years before filing his chapter 7 petition, Lushion White entered into a trust agreement that created a trust called The White Family Trust. The agreement provided that Mr. White was the trustor and the trustee of the trust. The original trust estate consisted of \$100.00 with the provision that additional property could be added. The agreement does not specifically identify the trust beneficiaries and there is no independent evidence as to their identity. There is a paragraph requiring the trustee to distribute specific trust property to named

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individuals (not including Mr. White), although there is no evidence to show that the property was in the trust estate at that time or any other time.

The trust agreement provides that as trustee Mr. White has the power to sell or convey the trust property if he deems it to be in the best interests of the trust beneficiaries. (Article VI(B)). The agreement further provides that Mr. White as trustor retains (during his lifetime) the right to revoke the trust and upon revocation to have the trust assets returned to him free of the trust. (Article II(A)).

At some point, real estate located at 31755 Sedgefield Oval, Solon, Ohio was transferred into the trust.<sup>2</sup> On January 28, 2003, Lushion White as trustee of the trust, quitclaimed title to the Sedgefield property to his wife, Erma White. Erma White did not provide any consideration for this transfer. There is no evidence as to what property, if any, remained in the trust either after the transfer or today.

Mr. White filed his chapter 7 case on March 21, 2003. Erma White still holds title to the Sedgefield property.

**DISCUSSION**

The chapter 7 trustee argues that the trust assets are Mr. White's property and are, therefore, property of his chapter 7 estate. She asserts that the transfer of the Sedgefield property to Ms. White was a fraudulent conveyance that can be avoided under bankruptcy code § 544(b)(1). Ms. White argues in defense that the trust assets are not property of the bankruptcy

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<sup>2</sup> There is no evidence as to when or how the Sedgefield property was transferred to the trust.

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estate. Because avoidance under § 544(b) is limited to transfers of a debtor's property, she argues that the transfer of the Sedgefield property cannot be avoided under that section.

**Property of the estate**

The trustee argues that the assets of the trust are assets of the chapter 7 estate based on the debtor's power to revoke the trust.<sup>3</sup> This argument has merit. Under bankruptcy code § 541, the debtor's chapter 7 estate includes his "legal and equitable interests . . . in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). A power under a trust which the debtor may exercise for his own benefit, including the power to revoke the trust, is such a property interest. *See Askanese v. Livingwell, Inc.*, 45 F.3d 103, 106 (5th Cir. 1995). *See also*, 11 U.S.C. § 541(b)(1) (excluding from the estate only those powers which a debtor "may exercise solely for the benefit of an entity other than the debtor"). As the trust agreement gives the debtor the power as trustee to revoke the trust and on revocation to have the trust assets returned to him, the chapter 7 trustee succeeded to that power and may exercise it under the terms of the trust agreement. The court interprets the complaint as a request by the trustee to revoke the trust. There is, however, a procedural difficulty because the complaint does not name the trust beneficiaries as parties or make a representation that there are no other beneficiaries. Without those parties or affirmation that all beneficiaries have been named, the court cannot make the declaration sought by the trustee. *See* FED R. BANKR. P. 7019 (incorporating FED. R. CIV. P. 19(a) (providing for the joinder of persons claiming an interest relating to the subject matter of the action)).

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<sup>3</sup> The chapter 7 trustee also contends that the trust assets are property of the estate based on the debtor's various roles as trustor, trustee and beneficiary. However, the evidence does not support the assertion that the debtor is a beneficiary of the trust.

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The trustee next argues that termination of the trust results in the Sedgefield property being included in the chapter 7 estate. The factual and legal basis for this argument is unclear, even if the trust is terminated after notice to all beneficiaries. The Sedgefield property has not been a trust asset since it was transferred to Erma White in 2003. Moreover, it was not a trust asset at the time the chapter 7 case was filed. Therefore, although the termination of the trust would result in the current trust assets being returned to the chapter 7 trustee (in the debtor's stead), the termination of the trust would not cause the Sedgefield property to automatically become property of the estate.

**11 U.S.C. § 544(b)(1)**

The trustee asserts that transfer of the Sedgefield property from the trust to Erma White is voidable under Ohio law<sup>4</sup> and is a fraudulent transfer within the meaning of § 544(b)(1). That section states:

[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 this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b)(1). Under § 544, the bankruptcy trustee “step[s] into the shoes of a creditor

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<sup>4</sup> The trustee's claim relies on Ohio Revised Code § 1336.05(A) which provides:  
(A) A transfer made . . . by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made . . . if the debtor made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer[.]

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in order to nullify transfers voidable under state fraudulent conveyance acts for the benefit of all creditors.” *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 697 at n. 3 (6th Cir. 1999).

By definition, a transfer must involve the debtor’s property to be avoidable under §544(b). *See Doss v. Green (In re Green)*, 986 F.2d 145, 148 (6th Cir. 1993) (“[B]ankruptcy law requires a finding that the debtor possessed an interest in the property in order to convey that interest fraudulently[.]”). In the context of § 541(a), this means that the debtor’s estate includes “that property that would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings.” *Cannon v. J.C. Bradford & Co. (In re Cannon)*, 277 F.3d 838, 849 (6th Cir. 2002) (discussing the term “interest of the debtor in property” as it appears in § 548(a)(1)) (quoting *Begier v. IRS*, 496 U.S. 53, 58 (1990)). Property which a debtor holds in trust for another person is not property of his bankruptcy estate. *Id. See also, Daly v. Kennedy (In re Kennedy)*, 279 B.R. 455, 458-59 (Bankr. D. Conn. 2002).

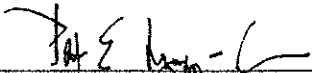
The trustee argues that the debtor quit-claimed his interest in the Sedgefield property to Ms. White without receiving consideration for it. However, the facts do not support this argument because Ms. White received her interest in the property from the *trust* rather than from the debtor. Under these facts, the debtor’s transfer of property which he held in trust is not avoidable under § 544(b)(1) because he did not have an interest in the property at the time of the transfer.

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CONCLUSION

For the reasons stated, summary judgment for the trustee is not appropriate and the trustee's second motion for summary judgment is denied. A separate order will be entered reflecting this decision.

Date: 11 March 2005

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center

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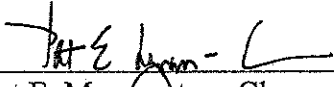
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MARY ANN RABIN, TRUSTEE, ) Adversary Proceeding No. 03-1346  
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Plaintiff, )  
)  
v. ) **ORDER**  
)  
LUSHION WHITE, et al., )  
)  
Defendants. )

For the reasons stated in the memorandum of opinion filed this same date, the trustee's second motion for summary judgment is denied. (Docket 75).

IT IS SO ORDERED.

Date: 11 Mar 2005

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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