

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 04-11075
)	
THOMAS LEE PLATZAR,)	Chapter 7
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
LAUREN HELBLING, TRUSTEE,)	Adversary Proceeding No. 04-1661
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	<u>REGARDING MOTION FOR</u>
THOMAS LEE PLATZAR, et al.,)	<u>SUMMARY JUDGMENT</u>
)	
Defendants.)	

The chapter 7 trustee’s amended complaint seeks to avoid five transfers of real estate made by the debtor as fraudulent transfers.¹ The trustee has moved for summary judgment against defendants Thomas Platzar, Louella Platzar, and Top Holding, Inc. (Docket 42). For the reasons set forth below, the trustee’s motion is denied.

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).

¹ The amended complaint adds defendants and requests a determination as to the validity and priority of liens and authority to sell real estate.

DISCUSSION AND FACTS²

A. The Transfers

The debtor Thomas Platzar filed his chapter 7 case on January 31, 2004. The parties agree that before September 6, 2000, the debtor owned these five parcels of real estate:

- (1) a one-third undivided interest in property at 29851 Eddy Road, Willoughby, Ohio;
- (2) the property at 29901 Eddy Road, Willoughby, Ohio;
- (3) a one-half undivided interest in property at 4309 Clinton Avenue, Cleveland, Ohio;
- (4) a one-half undivided interest in property at 4407 Clinton Avenue, Cleveland, Ohio; and
- (5) a one-third undivided interest in property at 1372 West 58th Street, Cleveland, Ohio.

The debtor transferred these properties to Top Holding, Inc., in September of 2000. Top Holding is an Ohio corporation owned by Louella Platzar, the debtor's mother. The trustee's complaint asserts that these transfers are fraudulent conveyances.

The debtor owned these additional interests in real estate which he also transferred to Top Holding in September 2000: a one-third interest in property located at 5800 Detroit Avenue, Cleveland, Ohio and a one-half interest in property located at 5712 Detroit Avenue, Cleveland, Ohio. The trustee does not challenge these transfers.

B. Summary Judgment

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)

² These are the undisputed facts based on stipulations of fact filed by the parties and the evidence offered by the parties in connection with the summary judgment motion.

(made applicable by FED. R. BANKR. P. 7056). *See also 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 may 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. American 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) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

C. 11 U.S.C. § 544

The trustee’s amended complaint seeks to avoid the five transfers under bankruptcy code § 544(b), which gives the trustee the right to avoid any transfer by the debtor which is avoidable under applicable law by a creditor holding an allowable unsecured claim. *See* 11 U.S.C. § 544(b)(1).³ The applicable law cited by the trustee is Ohio revised code §§ 1336.04(A) and 1336.05(A). Section 1336.04(A) provides:

³ That section states: Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor 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).

(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;

(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.

OHIO REV. CODE § 1336.04(A). Section 1336.05(A) provides:

(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.

OHIO REV. CODE § 1336.05(A). These sections require a finding that the debtor made the transfers without receiving reasonably equivalent value in exchange or, alternatively, that the debtor made the transfers with the intent to defraud.

The defendants oppose the trustee's motion in part based on the argument that the debtor transferred seven parcels of real estate (rather than the five which the trustee seeks to avoid) as one transaction which was not intended to defraud creditors. Via the affidavits of Thomas Platzar and Louella Platzar, they assert that the properties located on Detroit Road and the 29851

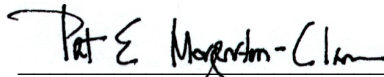
Eddy Road property were subject to mortgages, and that the debtor received reasonably equivalent value for the transfers because, as a result of the transaction, Top Holding became responsible for paying those mortgages. In addition, they state that both the debtor's parents canceled a \$100,000.00 mortgage note which they held on the 29901 Eddy Road property in connection with the transaction.

Summary judgment is not appropriate under the circumstances. The defendants have provided evidence suggesting that the transfers of the seven parcels of real estate were part of one transaction which was not done with an intent to defraud and for which the debtor received some consideration. As this is sufficient to raise a genuine issue of fact regarding these matters, the trustee's motion for summary judgment must be denied.

CONCLUSION

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

Date: 15 August 2005



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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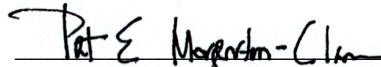


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LAUREN HELBLING, TRUSTEE,)	Adversary Proceeding No. 04-1661
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Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
THOMAS LEE PLATZAR, et al.,)	
)	
Defendants.)	

For the reasons stated in the memorandum of opinion issued this same date, the trustee's motion for summary judgment is denied.

IT IS SO ORDERED.

Date: 15 August 2005



 Pat E. Morgenstern-Clarren
 United States Bankruptcy Judge

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