

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: April 10 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No.: 05-34196
)	
Kermit W. Berger, Jr., and Linda L. Berger,)	Chapter 7
)	
Debtors.)	Adv. Pro. No. 05-3214
)	
Patricia A. Kovacs, Trustee,)	Hon. Mary Ann Whipple
)	
Plaintiff,)	
)	
v.)	
)	
Kenneth W. Berger,)	
)	
Defendant.)	

**MEMORANDUM OF DECISION AND ORDER DENYING
MOTION FOR JUDGMENT ON THE PLEADINGS**

Plaintiff Patricia A. Kovacs (“Trustee”), the trustee of the bankruptcy estate of Kermit W. Berger, Jr., and Linda L. Berger (“Debtors”), is before the court on the Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c) that she filed in this adversary proceeding on September

23, 2005. After reviewing the motion, the response thereto filed by Kenneth W. Berger (“Defendant”), and the pleadings, the court will deny the motion.

Debtors commenced their Chapter 7 bankruptcy proceeding on April 28, 2005. On July 20, 2005, Trustee filed the complaint initiating this proceeding. The complaint sought the avoidance of Debtors’ transfer of a certain 1996 Honda motorcycle to Defendant, who is their son, as a preferential and fraudulent transfer.¹ On August 15, 2005, Defendant filed an answer that admitted many of the averments of the complaint, but denied that the transfer was preferential or made with the requisite fraudulent intent. In an affirmative defense, Defendant alleged that he bought the motorcycle in 2002 and transferred it to Debtor Kermit W. Berger, Jr., for no consideration on April 22, 2004. He also alleged that Kermit Berger transferred the motorcycle back to Defendant for no consideration on April 11, 2005, which is less than three weeks before Debtors filed their bankruptcy case. The answer further alleged that Debtor Kermit Berger never had possession of the motorcycle, never purchased license plates for it, and never insured the motorcycle, and that Defendant insured the motorcycle until June 5, 2004, and again after May 19, 2005.

Rule 12(c) of the Federal Rules of Civil Procedure, made applicable in bankruptcy adversary proceedings by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, authorizes motions for judgment on the pleadings. “For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to a judgment.” *S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973) (citation omitted). “The motion is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law.” *Paskvan v. City of Cleveland Civil Serv. Comm’n*, 946 F.2d 1233, 1235 (6th Cir. 1991) (citation omitted).

¹ The complaint did not specifically seek the turnover of the motorcycle or a money judgment for its value.

Trustee's motion seeks the avoidance of the April 2005 transfer as a fraudulent conveyance under Ohio law and the Bankruptcy Code.² She relies, first, on § 1336.04(A)(1) and (2)(b) of the Ohio Revised Code, available to trustees under 11 U.S.C. § 544.³ Section 1336.04(A)(1) permits the avoidance of transfers made “[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.” Defendant has denied that Debtor acted with such intent, so judgment on the pleadings is inappropriate. O.R.C. § 1336.04(A)(2)(b) permits the avoidance of transfers made (i) without the debtor receiving reasonably equivalent value in exchange for the transfer, when (ii) 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.” While Defendant has admitted a lack of reasonably equivalent value, the complaint did not allege (so Defendant has not admitted) the “equity insolvency” element of this provision. Accordingly, judgment on the pleadings on this theory must also be denied.

Trustee also relies on two provisions of the Bankruptcy Code's fraudulent conveyance statute. 11 U.S.C. § 548(a)(1)(A) is virtually identical to O.R.C. § 1336.04(A)(1) and, since Defendant has denied the Debtors acted with fraudulent intent, judgment on the pleadings must, again, be denied. The other provision of § 548(a) upon which Trustee relies is Paragraph (1)(B)(i) and (ii)(IV), which was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-9, § 1402(3), 119 Stat. 23, 214.⁴ That statute permits the avoidance of a

² It appears that Trustee has abandoned her claim for avoidance of the transfer as a preferential transfer under 11 U.S.C. § 547.

³ To the extent that Trustee relies on Subsection (b) of § 544, the court notes that the complaint alleged, and Defendant admitted, that “[t]here are creditors of the debtor who have allowable claims against the Debtor, which claims were in existence at the time of said transfer.” *See* Fed. R. Bankr. P. 7008(a); Fed. R. Civ. P. 8(d) (allegations not denied are admitted); *Congrove v. McDonald's Corp. (In re Congrove)*, 330 B.R. 880 (B.A.P. 6th Cir. 2005) (unpublished table decision), *available at* 2005 WL 2089856, at *9 (“Bankruptcy Code § 544(b) requires the existence of an actual creditor with a claim under the statute in order for a debtor in possession to invoke this state law remedy”).

⁴ This addition to the Code applies to cases commenced after the effective date of the Act, which was April 20, 2005. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-9, § 1406(a), (b)(1), 199 Stat. 23, 215-16. Because this case was commenced on May 5, 2005, the amendment is applicable.

transfer made (i) for less than reasonably equivalent value, when the transfer was made (ii) to or for the benefit of an insider, (iii) under an employment contract, and (iv) not in the ordinary course of business.” Again, Defendant has admitted a lack of reasonably equivalent value, and he clearly constitutes an “insider” of Debtors’. 11 U.S.C. § 101(31)(A)(i). However, the complaint did not allege (so Defendant has not admitted) that the transfer was made under an employment contract or that the transfer was not made in the ordinary course of business. Nor did Trustee otherwise make allegations in the complaint that would raise a cause of action or permit a cause of action under § 548(a)(1)(B)(i)(I),(II) or (III). Accordingly, judgment on the pleadings on any of these theories is also inappropriate.

Lastly, all of the causes of action asserted by Trustee permit avoidance of any transfer of “an interest of the debtor in property.” Defendant’s averments styled as affirmative defenses must be taken as true for purposes of this motion. They raise a factual dispute over whether Debtors ever had a property interest in the motorcycle. Thus, that issue also cannot be decided on the pleadings.

THEREFORE, for the foregoing reasons,

IT IS ORDERED that Plaintiff’s motion for judgment on the pleadings [Doc. #11] is denied. A separate scheduling order will issue.