NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 07-15732
JAMES VINCENT CARAVONA,	)	Chapter 7
Debtor.	)	Judge Pat E. Morgenstern-Clarren
RICHARD A. BAUMGART, TRUSTEE,	)	Adversary Proceeding No. 07-1650
Plaintiff,	)	
v.	)	**MEMORANDUM OF OPINION**
LISA L. SYKES,	)	
Defendant.	)	

The plaintiff Richard Baumgart, chapter 7 trustee, filed this adversary proceeding under 11 U.S.C. § 548 against the defendant Lisa Sykes. The plaintiff timely moved for summary judgment against the defendant, and for an order deeming his request for admissions to be admitted.[1] For the reasons set forth below, the requests for admission are deemed conclusively established, and summary judgment is granted in part and denied in part.[2]

[1] Docket 11.

[2] In the court's view, the value of this opinion is solely to decide the dispute between the parties, rather than to add anything to the general bankruptcy jurisprudence. For that reason, the opinion is not intended for commercial publication.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334(e) 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)(A) and (H).

FACTS

The debtor James Vincent Caravona filed a voluntary petition for relief under chapter 7 of the bankruptcy code on July 31, 2007 (the "petition date"). On December 13, 2007, the plaintiff trustee filed a complaint against the defendant seeking to avoid and recover an allegedly fraudulent transfer made by the debtor to the defendant.[3] The complaint's single count alleges that the defendant received $25,230.72 (the "funds") from the debtor on or about February 23, 2006.[4] Paragraphs six through ten comprise the remainder of the complaint, save the prayer, and they recite the statutory elements of a fraudulent transfer under bankruptcy code § 548 and Ohio Revised Code § 1336.01, et seq. In addition, paragraph eleven alleges that the plaintiff is entitled to recover the funds from the defendant under 11 U.S.C. § 550.

The defendant answered the complaint on January 12, 2008.[5] In her answer, she denied that the funds were transferred to her, denied that any of the statutory elements were met, and denied that the plaintiff was entitled to recover the funds from her.

On March 26, 2008, the plaintiff's counsel served a set of requests for admission (the "requests") on the defendant and her counsel, seeking admission of these facts:

---

[3] Docket 1.

[4] Complaint ¶ 5.

[5] Docket 7.

1. The real estate located at 7989 Sonny Drive, Walton Hills, OH was sold on or about February 23, 2006.

2. At the time of the sale of the real estate located at 7989 Sonny Drive, Walton Hills, OH, in February 2006, the defendant owned an undivided one-half interest in such real estate.

3. At the time of the sale of the real estate located at 7989 Sonny Drive, Walton Hills, OH, in February, 2006, the Debtor, James Vincent Caravona, owned an undivided one-half interest in such real estate.

4. The net proceeds from the sale of the real estate located at 7989 Sonny Drive, Walton Hills, OH, was $50,461.44.

5. The net proceeds from the sale of the real estate located at 7989 Sonny Drive, Walton Hills, OH, in the amount of $50,461.44, were distributed to the defendant on or about February 23, 2006.

6. The Debtor did not receive any distribution of the net proceeds from either the defendant, or Revere Title Agency, Inc., from the sale of the real estate located at 7989 Sonny Drive, Walton Hills, OH, on or about February 23, 2006.

7. The Debtor, James Vincent Caravona, transferred to the defendant any distribution of the net proceeds that he received from the sale of the real estate located at 7989 Sonny Drive, Walton Hills, OH on or about February 23, 2006.

8. The Debtor transferred his one-half interest of the net proceeds from the sale of the real estate located at 7989 Sonny Drive, Walton Hills, OH, in the amount of $25,230.72, to the defendant on or about February 23, 2006.

9. The defendant is the ex-girlfriend of the Debtor, James Vincent Caravona.

10. No consideration was given by the defendant to the Debtor, James Vincent Caravona, for the transfer of his one-half interest in the net proceeds from the sale of the real estate located at 7989 Sonny Drive, Walton Hills, OH, in the amount of $25,230.72, to the defendant on or about February 23, 2006.

The factual scenario set forth by the requests, that on or about February 23, 2006, the defendant received the debtor's one-half interest in the sale proceeds of the Walton Hills real estate in the amount of $25,230.72 without reasonably equivalent value (the "transfer"), forms the basis of the summary judgment motion. The defendant did not respond to the requests. Based upon the failure to respond, the plaintiff's motion first seeks to have the requests deemed admitted. Then, based on the admissions, the plaintiff asserts that all of the elements of a fraudulent transfer cause of action under 11 U.S.C. § 548 and Ohio Revised Code § 1336.01 et seq. have been established. Accordingly, the plaintiff argues that there is no genuine issue as to any material fact and he is entitled to judgment as a matter of law. The defendant did not respond to the motion.

DISCUSSION

A. The Summary Judgment Standard

The summary judgment standard is found in federal rule of civil procedure 56 (made applicable here by federal rule of bankruptcy procedure 7056). That rule provides, in pertinent part:

> **Rule 56. Summary Judgment**
> **(a) By a Claiming Party.** A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim.
>
> * * *
>
> **(c) Serving the Motion; Proceedings.** * * * The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.
>
> **(d) Case Not Fully Adjudicated on the Motion.**
> ***(1) Establishing Facts.*** If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court

should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts–including items of damages or other relief–are not genuinely at issue. The facts so specified must be treated as established in the action.

* * *

(e) Affidavits; Further Testimony.

(2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must–by affidavits or as otherwise provided in this rule–set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

FED. R. CIV. P. 56. Citing United States Supreme Court opinions, the Sixth Circuit has expressed the summary judgment standard as follows:

> Summary judgment for [the movant] is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). However, [the movant] bears the burden of proving that there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Nance v. Goodyear Tire & Rubber Co., 527 F.3d 539, 546 (6th Cir. 2008). Further:

> In evaluating the evidence presented, a court must draw all inferences in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). A genuine issue of material fact exists when there are "disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587, 106 S.Ct. 1348.

Savedoff v. Access Group, Inc., 524 F.3d 754, 762 (6th Cir. 2008). If the movant meets its initial burden of proof, the non-moving party has an affirmative duty to point to those portions of the record that create a genuine issue of material fact. *Youngstown Osteopathic Hosp. Ass'n v. Pathways Ctr. for Geriatric Psychiatry, Inc. (In re Youngstown Osteopathic Hosp. Ass'n)*, 280 B.R. 400, 407 (Bankr. N.D. Ohio 2002) (citing *Liberty Lobby, Matsushita*, and *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989)).

The plaintiff must first show that: (1) there is no dispute over any fact affecting the outcome of the suit under 11 U.S.C. § 548 or Ohio Revised Code § 1336.01 et seq., and (2) he is entitled to judgment as a matter of law. If the motion is properly supported, then the defendant has the affirmative duty to identify material facts which are in dispute. If summary judgment is appropriate on any part of the plaintiff's claims, the court must specifically state those facts in any order granting partial summary judgment, which facts will be treated as established in the action. FED. R. CIV. P. 56(a), (d)(1).

B. The Requests for Admission

Requests for admission are governed by federal rule of civil procedure 36, made applicable by federal rule of bankruptcy procedure 7036. Rule 36 provides, in relevant part:

> Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

FED. R. CIV. P. 36(a)(3). Thus, a party's failure to answer or respond to a rule 36 request within thirty days of service of that request results in the admissions being conclusively established, unless the court permits withdrawal or amendment. *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106

F.3d 147, 153 (6th Cir. 1997). No motion is required by the propounding party for the admissions to be deemed admitted; the rule is "self-executing." *FTC v. Medicor, LLC*, 217 F.Supp.2d 1048, 1053 (C.D. Cal. 2002).

In this case, the plaintiff properly served the requests upon the defendant's counsel of record.[6] The defendant failed to respond in writing within thirty days of service.[7] Therefore, the requests were deemed admitted and conclusively established on April 29, 2008, the day after the requests were required to be answered.

C. 11 U.S.C. § 548

The trustee of a bankruptcy estate may avoid a fraudulent transfer under 11 U.S.C. § 548, which provides:[8]

> **§ 548. Fraudulent transfers and obligations**
> (a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years 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 or obligation; and
> >
> > > (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation....

---

[6] Vardzel Aff. ¶ 2.

[7] *Id*.

[8] Only the portions of § 548 which plaintiff pleaded in his complaint *and* which are supported in the motion are set forth.

11 U.S.C. § 548. Thus, to be entitled to summary judgment under § 548, the plaintiff must first show that these facts are undisputed:

> (1) the debtor had an interest in one-half of the proceeds from the sale of the Walton Hills real estate;
>
> (2) the debtor transferred that interest to the defendant;
>
> (3) the transfer occurred within the two years prior to July 31, 2007;
>
> (4) the debtor received less than reasonably equivalent value in exchange for the transfer; and
>
> (5) the debtor was insolvent when the transfer occurred.

See 11 U.S.C. § 548(a)(1)(B)(i), (ii)(I).[9]

The admissions conclusively established the first four facts necessary to avoid the transfer in this case under 11 U.S.C. § 548, and therefore, partial summary judgment is appropriate on that portion of the § 548 claim. However, the admissions do not address the insolvency element. Thus, as directed by rule 56, the court must look not only to the discovery, but to the record as a whole. *Savedoff*, 524 F.3d at 762, *citing Matsushita*.

D. Retrojection

As noted, the remaining fact that the plaintiff must prove is that the debtor was insolvent *at the time the transfer occurred*, or became insolvent as a result of the transfer. *See* 11 U.S.C. § 548(a)(1)(B)(ii)(I) (emphasis added). An individual is "insolvent" within the meaning of this statute if his financial condition is:

> (A) . . . such that the sum of [his] debts is greater than all of [his] property, at a fair valuation, exclusive of–

---

[9] While there are other approaches to prove the debtor's insolvency under § 548(a)(1)(B)(ii), the court limits its discussion to the allegations made in the complaint and the analysis in the summary judgment motion.

> (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud [his] creditors; and
> (ii) property that may be exempted from property of the estate under section 522 of this title . . . .

11 U.S.C. § 101(32)(A). "Fair valuation has been construed to refer to the fair market value of the Debtor's assets and liabilities within a reasonable time of the transfer." *Ohio Corrugating Co. v. DPAC, Inc. (In re Ohio Corrugating Co.)*, 91 B.R. 430, 436 (Bankr. N.D. Ohio 1988) (citations omitted).

Insolvency may be shown by applying the doctrine of retrojection.[10] This doctrine permits the court to infer that the debtor was insolvent at the time of the transfer if the proponent establishes that (1) the debtor was insolvent within a reasonable time after the transfer (usually using the petition date as the benchmark), and (2) the debtor's financial condition did not change substantially between the transfer date and the date of established insolvency. *Dahar v. Jackson (In re Jackson)*, 318 B.R. 5, 16 (Bankr. D.N.H. 2004), *aff'd*, 459 F.3d 117 (1st Cir. 2006); *Parlon v. Claiborne (In re Kaylor Equip. & Rental, Inc.)*, 56 B.R. 58, 62 (Bankr. E.D. Tenn. 1985). However, the "debtor's own balance sheets are not conclusive on the issue of insolvency, and values shown therein should be adjusted in light of testimony presented at trial." *A.M. Mancuso v. T. Ishida USA, Inc. (In re Sullivan)*, 161 B.R. 776, 783 (Bankr. N.D. Tex. 1993). And,

> . . . the Debtor's schedules are not persuasive, dispositive, or controlling on the question of the Debtor's insolvency at the time of the alleged preference; proper analysis should focus on more accurate evidence, including current appraisals, opinion valuation, actual sales of the assets, and tax returns.

---

[10] While the plaintiff does not use the term "retrojection," it is apparent that he is urging its application to this case.

Matson v. Strickland (In re Strickland), 230 B.R. 276, 283-84 (Bankr. E.D. Va. 1999).

Courts vary on what length of time between the petition date and the transfer date can support application of the retrojection doctrine. The shorter the interval, the more likely that a court will find it reasonable to infer that the debtor's insolvency on the petition date should be imputed to the transfer date.[11] Where retrojection has been permitted, the average interval between the transfer date and the petition date is approximately six months. In those cases, parties successfully invoking the doctrine have provided reliable evidence of the debtor's

---

[11] *See Gillman v. Scientific Res. Prods. Inc. of Delaware (In re Mama D'Angelo, Inc.),* 55 F.3d 552, 554-55 (10th Cir. 1995) (transfers one and three months prior to petition, with dispute as to valuation of assets); *Briden v. Foley*, 776 F.2d 379, 382 (1st Cir. 1985), *appeal dismissed* (one month; overstated assets on balance sheet and debtor's admission of no change in financial condition); *Consove v. Cohen (In re Roco Corp.)*, 701 F.2d 978, 983 (1st Cir. 1983) (three months, on financial statements and expert testimony); *Misty Management Corp. v. Lockwood*, 539 F.2d 1205, 1213 (9th Cir. 1976) (two and one-half months, upon adjusted balance sheet of debtor, accounting for all changes in financial condition of debtor during interval); *Schoenmann v. Shankar (In re Shankar)*, No. 07-3047DM, 2008 WL 962865, at *1 (Bankr. N.D. Cal. April 7, 2008) (six months, based upon schedules, statement of financial affairs and no substantial changes in assets or liabilities); *Shubert v. Lucent Technologies Inc. (In re Winstar Communications, Inc.)*, 348 B.R. 234, 274 (Bankr. D. Del. 2005), *aff'd*, No. 01 01063 KJC, Civ. A. 06 147 JJP, 2007 WL 1232185 (D. Del. Apr. 26, 2007) (less than one month, on expert testimony); *Silagy v. Gagnon (In re Gabor)*, 280 B.R. 149, 160 (Bankr. S.D. Ohio 2002) (six months, based upon debtor's petition and unchanged circumstances since transfer); *Hopkins v. D.L. Evans Bank (In re Fox Bean Co., Inc.)*, 287 B.R. 270, 282 (Bankr. D. Idaho 2002), *aff'd*, 144 Fed. Appx. 697 (9th Cir. Sept. 29, 2005) (about three months, insolvency proven by the debtor's schedules, tax returns, and a financial statement prepared six months prior to the petition date); *Monus v. Antonucci (In re Monus),* No. 92-4132, 1995 WL 469694, at *12 (Bankr. N.D. Ohio May 18, 1995) (thirty-three days, balance sheet unreliable but debtor not paying debts as they came due); *French v. Nardolillo (In re Perry)*, 158 B.R. 694, 697 (Bankr. N.D. Ohio 1993) (three and one-half months, where majority of debts were incurred prior to the transfer, without analysis of assets); *Sullivan*, 161 B.R. at 785 (insolvency proven six months prior to and subsequent to the transfer at issue); *Ossen v. Bernatovich (In re Nat'l Safe Northeast, Inc.)*, 76 B.R. 896, 899 (Bankr. D. Conn. 1987) (three months, asset values based on sale price, liabilities adjusted for uncollectible items); *Dunlavey v. Uhlmeyer (In re Uhlmeyer)*, 67 B.R. 977, 980 (Bankr. D. Ariz. 1986) (two months, upon debtor's testimony and review of schedules); *Bartl v. Twardy (In re Claxton)*, 32 B.R. 224, 235 (Bankr. E.D. Va. 1983) (two months' retrojection appropriate, but unnecessary where evidence of insolvency on the transfer date was competent).

financial condition at transfer, as well as evidence that neither assets nor liabilities had changed substantially in the interval. Conversely, courts have consistently declined to apply retrojection where the interval exceeds six months, and where insufficient proof of the debtor's assets and liabilities at transfer was provided.[12]

E. The Debtor's Solvency

In an effort to prove that the debtor was insolvent at the time of the February 2006 transfer, the plaintiff presented the admitted requests and the debtor's voluntary petition as evidence. The plaintiff's argument is twofold: (1) the debtor's assets did not change in the interval between February 23, 2006 and July 31, 2007; and (2) most of the debtor's debts existed

---

[12] *See Killips v. Schropp (In re Prime Realty, Inc.)*, 380 B.R. 529, 535 (B.A.P. 8th Cir. 2007) (nearly one year between transfers and petition date, unreliable balance sheet, and no evidence regarding continuity of debtor's financial condition); *Daneman v. Stanley (In re Stanley)*, 384 B.R. 788, 807 (Bankr. S.D. Ohio 2008) (almost two years, no testimony as to value of assets at time of transfer and debtor testified to substantial change in circumstances); *Gold v. Laines (In re Laines)*, 352 B.R. 397, 402 n.6 (Bankr. E.D. Va. 2005) (over one year without evidence of debtor's financial condition at time of transfers); *Dahar*, 318 B.R. at 16-17 (two and one half years; insolvency not established due to lack of proof that debtor's financial condition was static in the interval); *Nicholls v. Jones (In re Jones)*, No. 03-1203 HRT, 2004 WL 826031 (Bankr. D. Colo. Feb. 5, 2004) (six months too long, without proof of "the Debtor's financial condition at any point in time other than the petition date"); *Strickland*, 230 B.R. at 283-84 (nine months, only proof of insolvency was debtor's schedules, which did not show insolvency on date of transfer); *Washington Bancorporation v. Hodges (In re Wasington Bancorporation)*, 180 B.R. 330, 334 (Bankr. D.D.C. 1995) ("In short, the evidence provided by the plaintiff is insufficient to support a finding that the debtor's finances were static during this period." [six months]); *War Eagle Floats, Inc. v. Travis (In re War Eagle Floats, Inc.)*, 104 B.R. 398, 400 (Bankr. E.D. Okl. 1989) (six months; "information provided in the Schedules is insufficiently contemporaneous with the time of the transfer to demonstrate with any accuracy the insolvency of the corporation."); *Ohio Corrugating*, 91 B.R. at 440 (sixteen days, where proof of insolvency at time of transfer was insufficient); *Annis v. First State Bank of Joplin (In re Annis)*, 78 B.R. 962, 967 n.16 (Bankr. W.D. Mo. 1987) (schedules not admissible to demonstrate insolvency, but insufficient even if they were); *Kaylor Equipment*, 56 B.R. at 62 (approximately one year, with unreliable balance sheets and no evidence that circumstances had not changed); *Kanasky v. Randolph (In re R. Purbeck & Assoc., Ltd.)*, 27 B.R. 953, 955 (Bankr. D. Conn. 1983) (nearly six months, where evidence of debtor's insolvency at time of transfer was "scant," and balance sheets were not reliable).

before the transfer. In support, the plaintiff relies upon an express assumption, for "simplicity purposes," that the debtor gained no assets in the interval.[13] Thus, he reasons, the debtor's assets were the same at transfer as on the petition date. In addition, the plaintiff argues that the debtor could not have disposed of any assets in the interval, because any such transfer would have been reflected on the Statement of Financial Affairs ("SOFA"), which covers the same time period as the interval. Finally, relying on the debtor's schedules, the plaintiff states that most of the debtor's debts were incurred before the transfer.

Construing this uncontroverted evidence in a light most favorable to the defendant, it is insufficient to prove that the debtor was insolvent at the time of the transfer. The transfer occurred 17 months and 5 days before the debtor filed his petition. The plaintiff did not cite, and the court has not found, any case where a court applied retrojection to an interval of more than six months between the transfer date and the petition date. Thus, the length of the interval alone is sufficient to deny retrojection in this case.

Even if retrojection could be applied to such a lengthy time period, an inference of insolvency is not appropriate in this case because the plaintiff did not show that the debtor's financial condition did not change substantially between the transfer date and the petition date. The SOFA discloses only the transfer of the Walton Hills real estate in response to question 10. However, question 10 is limited to transfers made other than "in the ordinary course of the business or financial affairs of the debtor . . . ." Assets could have been transferred in the ordinary course of the debtor's financial affairs, particularly where the debtor is attempting to make ends meet. Given the length of the interval, it is not reasonable at the summary judgment

---

[13] Motion, at 9 n.3.

stage to assume that the assets on the petition date were the only assets the debtor owned at the time of the transfer. In addition, it is not reasonable to assume that the value of any of the debtor's assets, such as insurance policies or stock, did not change in the interval. As a result, the plaintiff has not established that the debtor did not have a change in assets since the transfer.

In addition, the plaintiff did not establish that the debtor's liabilities were essentially the same on the transfer date as they were on the petition date. The debtor's schedules alone indicate otherwise. While the debtor owed unsecured creditors a substantial amount (about $60,000.00) before the transfer,[14] his liabilities on the petition date totaled $79,138.00, per the Summary of Schedules. Thus, approximately $18,000.00 of the debtor's scheduled unsecured debt was incurred in the seventeen months after the transfer. Nor has the plaintiff shown that the transfer rendered the debtor insolvent. Although the transfer decreased the debtor's assets by $25,000.00, and the debtor's liabilities increased since that time, the impact on the debtor's solvency is inconclusive, given the lack of proof of assets at the time of the transfer. As a result, the plaintiff did not show that the debtor's financial picture remained static in the interval.

Because insolvency is an element of a § 548 cause of action, it is a material fact. Based upon the record as a whole, there is insufficient evidence of the debtor's insolvency *at the time of transfer*; therefore, a genuine issue of material fact remains. Accordingly, the plaintiff is not entitled to summary judgment on the issue of the debtor's insolvency.

---

[14] Although Judge Speer in *Perry, supra*, applied retrojection by recognizing the majority of the unsecured debts were incurred before the transfer, the interval in that case was only three and one-half months between the transfer and the petition date.

F. Ohio Revised Code Fraudulent Transfers

The complaint seeks judgment under Ohio Revised Code § 1336.01 et seq. although it does not identify a particular subsection of that statute. The plaintiff did not rely on this state law in his motion for summary judgment and so the court will not address it further at this time.

G. Partial Summary Judgment

Rule 56(a) provides that "[a] party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim." FED. R. CIV. P. 56(a). If summary judgment is not rendered on all of the claim, the court must proceed under rule 56(d), which provides:

> If summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what m2aterial facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts–including items of damages or other relief–are not genuinely at issue. The facts so specified must be treated as established in the action.

FED. R. CIV. P. 56(d). A cohesive reading of Rule 56(a) and (d) demonstrates that partial summary judgment[15] on a portion of a claim is appropriate. *See McCord v. Jaspan Schlesinger Hoffman, LLP (In re Monahan Ford Corp. of Flushing),* ---B.R.---, No. 04-1496-CEC, 2008 WL 2608194, at *5 (Bankr. E.D.N.Y. July 2, 2008); *In re Monster Worldwide Litigation, Inc.*, 549 F.Supp.2d 578, 582 (S.D.N.Y. 2008); *McDonnell v. Cardiothoracic & Vascular Surgical*

[15] Some courts prefer to use the term "partial summary adjudication." *See Harris Technical Sales v. Eagle Test Sys., Inc.,* No. 06-02471-PHX-RCB, 2008 WL 343260, at *11 (D. Ariz. Feb. 5, 2008); *Beatty v. Republic of Iraq,* 480 F.Supp. 2d 60, 100-01 (D.D.C. 2007); *Curen v. Bank of the West (In re Hat)*, No. 05-2506-B, 2007 WL 2580688, at *8 (Bankr. E.D. Cal. Sept. 4, 2007); *Americans Disabled for Accessible Public Transportation (ADAPT), Salt Lake Chapter v. Skywest Airlines, Inc.*, 762 F.Supp. 320, 324 (D. Utah 1991). The practical effect is without distinction.

Associates, Inc., No C2-03-0079, 2004 WL 1234138, at *2 (S.D. Ohio May 27, 2007); *France Stone Co. v. Charter Twp. of Monroe*, 790 F.Supp. 707, 710 (E.D. Mich. 1992). "Rule 56(d) permits the court to enter relief in that nature of what the Trustee seeks: a determination as to a single issue of law based upon the undisputed facts [. . .] without reaching the question of whether affirmative defenses apply." *Hat,* 2007 WL 2580688, at *8. Partial summary judgment should not be granted where such a motion seeks "the resolution of a merely evidentiary matter en route to summary judgment, or [ ] an adjudication of an issue of fact which would not be dispositive of an issue or even part of an issue." *Id*. Thus, partial summary judgment results in an interlocutory determination, conclusive for purposes of the action, that some individual elements of a cause of action have been established. Here, partial summary judgment is appropriate on all elements of the plaintiff's § 548 claim, except for the insolvency issue.

CONCLUSION

For the reasons stated, the plaintiff's requests for admission are conclusively established for the purposes of this action. Summary judgment is GRANTED IN PART on the first four elements of the plaintiff's cause of action under 11 U.S.C. § 548; and summary judgment is DENIED IN PART on the remaining elements and causes of action in plaintiff's complaint.

A separate order reflecting this decision will be entered in accordance with the directive of Rule 56(d).

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 07-15732
	)	
JAMES VINCENT CARAVONA,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
RICHARD A. BAUMGART, TRUSTEE,	)	Adversary Proceeding No. 07-1650
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**ORDER GRANTING IN PART**
LISA L. SYKES,	)	**AND DENYING IN PART**
	)	**PLAINTIFF'S MOTION FOR**
Defendant.	)	**SUMMARY JUDGMENT**

For the reasons set forth in the separate memorandum of opinion, the plaintiff's motion for summary judgment is granted in part and denied in part. In accordance with federal rule of civil procedure 56(d), the court has determined the following material facts are not genuinely at issue, and, therefore, must be treated as established in this action:

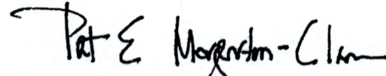
1. The debtor, James Vincent Caravona, had a one-half interest in the real estate located at 7989 Sonny Drive, Walton Hills, Ohio on or about February 23, 2006, when that real estate was sold.

2. The debtor's interest in the real estate became an interest in one-half of the proceeds of sale, in the amount of $25,230.72, on or about February 23, 2006.

3. The debtor transferred his interest in the proceeds to the defendant, Lisa L. Sykes, on or about February 23, 2006, which date was within the two years immediately preceding the petition date of July 31, 2007.

4. The debtor received less than reasonably equivalent value from the defendant in exchange for the proceeds of the Walton Hills real estate.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge