IT IS SO ORDERED.

Kay Woods

Kay Woods
United States Bankruptcy Judge

Dated: May 21, 2010
01:59:23 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
MOUNTAIN CHEVROLET BUICK, INC.,	*	CASE NUMBER 06-40187
Debtor.	*	
* * * * * * * * * * * * * * * * * *	*	
MARK A. BEATRICE, CHAPTER 7 TRUSTEE,	*	ADVERSARY NUMBER 08-04031
Plaintiff,	*	
v.	*	
LEIGH CLINE,	*	HONORABLE KAY WOODS
Defendant.	*	

****

MEMORANDUM OPINION REGARDING COMPLAINT TO AVOID AND RECOVER VOIDABLE TRANSFERS AND FOR DAMAGES

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This cause is before the Court on Complaint to Avoid and Recover Voidable Transfers and for Damages (Doc. # 1) filed by

Plaintiff Mark A. Beatrice, Chapter 7 Trustee, on February 14, 2008. On April 13, 2009, Defendant Leigh Cox, f/k/a Leigh Cline, filed Answer (Doc. # 26). On March 4, 2010, Plaintiff and Defendant jointly filed Stipulation of Uncontested Material Facts ("Stipulation") (Doc. # 45). The Court held a hearing on the instant matter on March 8, 2010 ("Hearing").

For the reasons set forth below, the Court finds, *inter alia*: (i) Debtor Mountain Chevrolet Buick, Inc. fraudulently transferred the Vehicles[1] to Defendant pursuant to 11 U.S.C. § 548(a)(1)(B) and Ohio Revised Code ("O.R.C.") § 1336.04(A)(2); (ii) Defendant was the initial transferee of the Vehicles, as set forth in 11 U.S.C. § 550(a)(1); (iii) Plaintiff is entitled to recover the market value of the Vehicles at the time of the Transfers[2] pursuant to § 550(a)(1); and (iv) the market value of the Vehicles at the time of the Transfers was $73,176.73.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

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[1] As defined *infra* at 3.

[2] As defined *infra* at 3.

I. PROCEDURAL AND FACTUAL BACKGROUND

Debtor Mountain Chevrolet Buick, Inc. filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code on February 27, 2006 ("Petition Date"). In response to a motion filed by Debtor to appoint a chapter 11 trustee (Main Case, Doc. # 3), Mr. Beatrice was selected for appointment as Chapter 11 Trustee on March 8, 2006 (Main Case, Doc. # 11) and approved by this Court on March 9, 2006 (Main Case, Doc. # 15). In response to a motion filed by Mr. Beatrice, as Chapter 11 Trustee (Main Case, Doc. # 58), Debtor's case was converted to a chapter 7 proceeding on July 6, 2006 (Main Case, Doc. # 63). After conversion, Mr. Beatrice continued as Chapter 7 Trustee ("Trustee").

On February 14, 2008, Plaintiff Trustee filed Complaint, which commenced the instant adversary proceeding. Plaintiff alleges Debtor transferred two motor vehicles — a 2006 Chevrolet Tahoe and a 2005 Buick Terraza ("Vehicles") — to Defendant on or about January 5, 2006, on account of an antecedent debt ("Transfers"). (Compl. ¶ 6.) Plaintiff asserts the Transfers constitute: (i) avoidable preferences pursuant to 11 U.S.C. § 547(b) ("Count One") (*Id.* ¶¶ 19-27); and (ii) avoidable fraudulent transfers pursuant to: (a) 11 U.S.C. § 548 ("Count Two") (*Id.* ¶¶ 28-29), (b) O.R.C. § 1336 ("Count Three") (*Id.* ¶¶ 30-31), and (c) O.R.C. §§ 1313.56-1313.58 ("Count Four"). (*Id.* ¶¶ 32-33.) Plaintiff further asserts Defendant is a transferee, as set forth in 11 U.S.C. § 550(a); therefore, Plaintiff is entitled to recover from Defendant

the Vehicles or the value of the Vehicles ("Count Five"). (*Id.* ¶¶ 34-36.) Plaintiff also objects to "any and all proofs of claim filed or to be filed by [D]efendant herein, and asks that the Court disallow the same and/or subordinate by way of payment to all other claims of unsecured claimants ("Count Six") . . . ." (*Id.* ¶ 38.) Finally, Plaintiff asserts he is entitled to recover from Defendant prejudgment interest, costs, and attorneys' fees in connection with this adversary proceeding ("Count Seven"). (*Id.* ¶¶ 39-40.)

On April 13, 2009, Defendant filed Answer. Defendant asserts the Transfers were authorized and directed by an order of the Court of Common Pleas of Trumbull County, Ohio ("Trumbull Court") and, thus, cannot be avoided. (Ans. at 5.) In addition, Defendant contends the Transfers constitute substantially contemporaneous exchanges made in the ordinary course of business for which Debtor received reasonably equivalent value. (*Id.*) Defendant further contends the Transfers "were merely a pass-through with the benefit being derived by Clayton Cline." (*Id.* at 6.) Defendant requests the Court to enter judgment in her favor and award her attorneys' fees and costs in connection with this adversary proceeding. (*Id.*)

On March 4, 2010, Plaintiff and Defendant jointly filed Stipulation, in which they stipulated to, *inter alia*, the following uncontested material facts:

1. Debtor was an automobile dealership owned by brothers Clayton D. Cline and Floyd E. Cline, II. (Stip. ¶ 1);
2. Defendant and Clayton Cline were formerly married. (*Id.*

¶ 2);

3. On or about January 5, 2006 ("Transfer Date"), Debtor transferred the Vehicles to Defendant. (*Id.* ¶ 3);

4. Defendant and Debtor valued (i) the 2006 Chevrolet Tahoe as having a sales price, excluding taxes and fees, of $42,536.73; and (ii) the 2005 Buick Terraza as having a sales price, excluding taxes and fees, of $30,640.00. (*Id.*);

5. Defendant did not pay Debtor for the Vehicles; rather, the Vehicles were transferred to Defendant to pay an outstanding alimony/spousal support obligation owed to Defendant by Clayton Cline personally. (*Id.* ¶ 4.);

6. The Transfers were the subject of a Judgment Entry ("Divorce Decree"), entered on March 8, 2006, by the Trumbull Court in the divorce proceeding of Defendant and Clayton Cline, which approved the Transfers as full payment of Clayton Cline's alimony/spousal support obligation to Defendant. (*Id.* ¶ 5.);

7. With the assistance of Debtor, Defendant subsequently sold the Vehicles to Scott Fuller and retained the entire sales proceeds in the amount of $55,000.00. (*Id.* ¶ 4.);

8. There was no material change in Debtor's financial condition after January 1, 2006. (*Id.* ¶ 6.); and

9. Debtor was insolvent as of February 27, 2006, which was the Petition Date. (*Id.*)

In addition to stipulating to the aforementioned facts, Plaintiff and Defendant stipulated to the authenticity and admissibility of Plaintiff's Exhibits A, B, C, and E and Defendant's Exhibit 1 ("Exhibits"). (*Id.* ¶ 8.)

On March 8, 2010, the Court held a Hearing, at which appeared: (i) Joel E. Sechler, Esq., on behalf of Plaintiff; and (ii) Michael Kaminski, Esq., on behalf of Defendant. Counsel each presented an opening statement and rebuttal argument. The parties chose to rely entirely on the stipulated facts and Exhibits; no witness testimony was presented. The Court admitted the Exhibits into the record.

At the Hearing, Plaintiff, by and through Mr. Sechler, represented the Transfers constitute fraudulent transfers pursuant to either § 548(a)(1)(A) or § 548(a)(1)(B) because (i) the Transfers were made with actual intent to hinder, delay, or defraud creditors of Debtor's bankruptcy estate; and (ii) Debtor received no value in exchange for the Vehicles and was insolvent when the Transfers were made. Plaintiff represented Debtor had stopped paying its ordinary course business debts in January 2006. Furthermore, there was no material change in Debtor's financial condition between the Transfer Date and the Petition Date, during which time Debtor was insolvent.

Plaintiff represented the Transfers were made on account of an alimony/spousal support obligation owed solely by Clayton Cline, and Debtor received no value for the Vehicles. Therefore, the only beneficiaries of the Transfers were Defendant and Clayton Cline. In addition, Plaintiff noted the Divorce Decree was not entered in

the Trumbull Court until March 8, 2006, which was more than two months after the Transfer Date. Plaintiff also noted Defendant and Debtor agreed the Vehicles had a combined sales value of $73,176.73 on the Transfer Date. Accordingly, Plaintiff asked the Court for judgement against Defendant in the amount of $73,176.73 – *i.e.*, the value of the Vehicles – as set forth in § 550(a).

At the Hearing, Defendant, by and through Mr. Kaminski, asserted Plaintiff may not recover the Vehicles or the value of the Vehicles because Defendant has the absolute defense of being an intermediate transferee who took for value, in good faith, and without knowledge of the voidability of the Transfers, as set forth in § 550(b)(1). Defendant represented she provided value for the Vehicles because Clayton Cline was absolved of his outstanding alimony/spousal support obligation, as evidenced by the Divorce Decree. Finally, Defendant asserted the appropriate recovery amount, if the Court were to rule against her, is the $55,000.00 in sales proceeds she received for the Vehicles.

In rebuttal, Plaintiff asserted Defendant was the initial transferee because the Vehicles were transferred directly from Debtor to Defendant, as evidenced by the deal jackets for the Transfers — *i.e.*, Plaintiff's Exhibits A and B. In rebuttal, Defendant asserted she cannot be the initial transferee because this Court previously held Clayton Cline embezzled Debtor's assets, including the Vehicles. *See General Motors Acceptance Corp. v. Cline*, Adv. No. 06-04141, Docs. 46, 47 (Bankr. N.D. Ohio Nov. 25,

2008), *aff'd*, 2010 Bankr. LEXIS 9 (B.A.P. 6th Cir. 2010). Defendant contended this Court's holding necessarily means Clayton Cline, rather than Defendant, was the initial transferee. Therefore, Plaintiff may not recover from Defendant pursuant to § 550(b)(1).

II. STANDARDS FOR REVIEW AND ANALYSES

A. Count One — Preferences Pursuant to § 547.

Plaintiff contends the Transfers constitute avoidable preferences pursuant to § 547(b). (Compl. ¶¶ 19-27.) Section 547(b) states, in pertinent part:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property—
>
> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made—
>
> (A) on or within 90 days before the date of the filing of the petition; or
>
> * * *
>
> (5) that enables such creditor to receive more than such creditor would receive if—
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547 (West 2010). Section 547(f) states, "For the purposes of this section, the debtor is presumed to have been

insolvent on and during the 90 days immediately preceding the date of the filing of the petition." *Id.* Although the Complaint asserts the Transfers qualify as preferences pursuant to § 547(b), Plaintiff did not present argument or evidence to this effect at the Hearing. In addition, the Complaint contains little more than conclusory statements that the Transfers are preferences.

The Stipulation establishes the Transfer Date fell within the 90-day preference period (Stip. ¶ 3), during which time Debtor is presumed to have been insolvent pursuant to § 547(f). However, the Stipulation states, "The Vehicles were transferred to [Defendant] to pay an outstanding alimony/spousal support obligation owed to [Defendant] by Clayton Cline personally . . . ." (*Id.* ¶ 4 (emphasis added).) Accordingly, the Transfers were neither: (i) "for or on account of an antecedent debt owed by the debtor," as required by § 547(b)(2); nor (ii) "to or for the benefit of a creditor,"[3] as required by § 547(b)(1). 11 U.S.C. § 547 (West 2010) (emphasis added). Defendant has not filed a proof of claim in Debtor's bankruptcy case, and there is no evidence in the record that suggests Defendant is a creditor of Debtor. Accordingly, the Court

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[3] 11 U.S.C. § 101(10) defines the term "creditor" as an:

> (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
>
> (B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or
>
> (C) entity that has a community claim.

11 U.S.C. § 101 (West 2010).

finds Defendant is not a creditor of Debtor.[4] Because the Transfers were not for or on account of an antecedent debt owed by Debtor and Defendant is not a creditor of Debtor, the Court finds the Transfers do not constitute preferences pursuant to § 547(b). Accordingly, the Court finds in favor of Defendant on Count One.

B. Count Two — Fraudulent Transfers Pursuant to § 548.

Plaintiff contends the Transfers constitute avoidable fraudulent transfers pursuant to § 548, which states, in pertinent part:

> (a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made . . . within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (A) made such transfer . . . with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made . . . , indebted; or
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer . . . ; and
>
> (ii)(I) was insolvent on the date that such transfer was made . . . , or became insolvent as a result of such transfer . . . .

11 U.S.C. § 548 (West 2010). Thus, the trustee may avoid a fraudulent transfer by establishing, *inter alia*, (i) the debtor transferred an interest of the debtor in property within 2 years before the date of the filing of the petition; (ii) the debtor received less than reasonably equivalent value in exchange for the

[4] The Transfers benefitted Clayton Cline by relieving him of his outstanding alimony/spousal support obligation to Defendant; however, there is no evidence in the record that suggests Clayton Cline is a creditor of Debtor.

transferred interest in property; and (iii) the debtor was insolvent on the date the transfer was made. *See* § 548(a)(1)(B).

Debtor transferred an interest of Debtor in property — *i.e.*, the Vehicles — to Defendant within the 2-year period preceding the Petition Date. (Stip. ¶¶ 3, 6.) Defendant did not pay Debtor for the Vehicles. (*Id.* ¶ 4.) Instead, the Vehicles were transferred to Defendant to satisfy a personal debt of Clayton Cline. (*Id.*) Thus, Debtor did not receive reasonably equivalent value for the Vehicles and, in fact, did not receive any value in exchange for the Vehicles. Finally, the Stipulation establishes Debtor was insolvent on the Transfer Date.[5] (*Id.* ¶ 6.) Accordingly, the Court finds the Transfers constitute fraudulent transfers pursuant to § 548(a)(1)(B)[6] and finds in favor of Plaintiff on Count Two.

C. Counts Three & Four — Fraudulent Transfers Pursuant to Ohio Law.

Plaintiff contends the Transfers constitute avoidable fraudulent transfers pursuant to O.R.C. §§ 1336 and 1313.56-1313.58. (Compl. ¶¶ 30-33.) O.R.C. § 1336.04(A), which is substantially similar to 11 U.S.C. § 548(a)(1)(B), states, in pertinent part:

> (A) A transfer made . . . by a debtor is fraudulent as to a creditor . . . if the debtor made the transfer . . . in either of the following ways:
>
> (1) With actual intent to hinder, delay, or

[5] The Stipulation establishes: (i) Debtor's financial condition did not materially change after January 1, 2006; and (ii) Debtor was insolvent on the February 27, 2006, Petition Date. (Stip. ¶ 6.) Accordingly, Debtor was insolvent on the Transfer Date.

[6] Because the Court finds the Transfers constitute fraudulent transfers pursuant to § 548(a)(1)(B), the Court need not and will not determine whether the Transfers also constitute fraudulent transfers pursuant to § 548(a)(1)(A).

defraud any creditor of the debtor;

(2) Without receiving a reasonably equivalent value in exchange for the transfer . . . , 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.

O.R.C. § 1336.04 (Westlaw 2010). As explained above, Debtor did not receive any value in exchange for the Vehicles and Debtor was insolvent on the Transfer Date. (*See supra* at 11; Stip. ¶ 6.) Because Debtor was insolvent on the Transfer Date, Debtor was necessarily engaged in a business for which the remaining assets of Debtor were unreasonably small in relation to the business, as set forth in O.R.C. § 1336.04(A)(2)(a). Accordingly, the Court finds the Transfers constitute avoidable[7] fraudulent transfers pursuant to O.R.C. § 1336.04(A)(2).[8] The Court finds in favor of Plaintiff on Count Three.

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[7] O.R.C. § 1336.07(A)(1) states, in pertinent part:

(A) In an action for relief arising out of a transfer . . . that is fraudulent under section 1336.04 . . . of the Revised Code, a creditor . . . , subject to the limitations in section 1336.08 of the Revised Code, may obtain one of the following:

(1) Avoidance of the transfer . . . to the extent necessary to satisfy the claim of the creditor[.]

O.R.C. § 1336.07 (Westlaw 2010).

[8] Because the Court finds the Transfers constitute fraudulent transfers pursuant to O.R.C. § 1336.04(A)(2), the Court need not and will not determine whether the Transfers also constitute fraudulent transfers pursuant to O.R.C. § 1336.04(A)(1).

O.R.C. § 1313.56 sets forth, *inter alia*, transfers by a debtor that are deemed void. O.R.C. §§ 1313.57 and 1313.58[9] establish, respectively, (i) a good faith defense to such transfers; and (ii) who may bring an action to have such transfers declared void. O.R.C. § 1313.56 states, in pertinent part, "A . . . transfer . . . made . . . by a debtor . . . with intent to hinder, delay, or defraud creditors, is void as to creditors of such debtor at the suit of any creditor." O.R.C. § 1313.56 (Westlaw 2010). However, O.R.C. § 1313.57 states, in pertinent part, "Section 1313.56 of the Revised Code does not apply unless the person to whom such . . . transfer . . . is made, knew of such fraudulent intent on the part of such debtor." O.R.C. § 1313.57 (Westlaw 2010).

In the Complaint, Plaintiff asserts the Transfers "were made by [D]ebtor with the actual intent to hinder, delay or defraud other creditors[, and] Defendant was aware of [D]ebtor's fraudulent intent in making the [Transfers] . . . ." (Comp. ¶¶ 11, 12.) However, the Complaint contains little more than conclusory statements to this effect and Plaintiff did not present any supporting argument or evidence for these allegations at the Hearing. As a result, the Court finds, even if, *arguendo*, Debtor made the transfers with intent to hinder, delay, or defraud creditors, the record does not

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[9] O.R.C. § 1313.58 states, in pertinent part:

> Any creditor as to whom any of the acts or things prohibited in sections 1313.56 and 1313.57 of the Revised Code are void . . . may commence an action in a court of competent jurisdiction to have such acts or things declared void.

O.R.C. § 1313.58 (Westlaw 2010).

support a finding that Defendant knew of Debtor's fraudulent intent, as required by O.R.C. § 1313.57. Accordingly, the Court finds the Transfers do not constitute void transfers pursuant to O.R.C. § 1313.56. The Court finds in favor of Defendant on Count Four.

D. Count Five — Trustee Avoidance Power Pursuant to § 550.

1. Trustee Recovery.

Plaintiff requests the Court, to the extent the Transfers are avoided, to award Plaintiff the value of the Vehicles with interest, pursuant to § 550(a).[10] Sections 550(a) and (b) state:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.
>
> (b) The trustee may not recover under section (a)(2) of this section from—
>
> (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or
>
> (2) any immediate or mediate good faith transferee of such transferee.

11 U.S.C. § 550 (West 2010). Due to the § 550(b) defenses, distinguishing whether a transferee is the initial transferee or a

[10] In the Complaint, Plaintiff asks the Court to order Defendant to turn over to Plaintiff the Vehicles or the value of the Vehicles. (Compl. ¶ 36.) However, at the Hearing, Plaintiff asked the Court to order Defendant to pay damages to Plaintiff equal to the value of the Vehicles.

subsequent transferee can dictate whether the trustee may recover the transferred property. In *First Nat'l Bank v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 974 F.2d 712 (6th Cir. 1992), the Sixth Circuit Court of Appeals explained:

> An initial transferee is one who receives money from a person or entity later in bankruptcy, and has dominion over the funds. A mediate or immediate transferee is simply one who takes in a later transfer down the chain of title or possession.
>
> Under § 550(b), a mediate or immediate transferee receives protection if it has taken for value in good faith without knowledge of the voidability of the transfer. However, an initial transferee receives no such protection.

Id. at 722 (emphasis added).

In *Taunt v. Hurtado (In re Hurtado)*, 342 F.3d 528 (6th Cir. 2003), the Sixth Circuit Court of Appeals reiterated that dominion and control, as opposed to mere possession, is the standard for determining who qualifies as the initial transferee pursuant to § 550. *Id.* at 533 ("An initial transferee must have 'dominion' over the funds to be an 'initial transferee' under [§ 550]."). In *Hurtado*, the chapter 7 debtors conveyed two checks to the mother of one of the debtors, who then deposited the checks into her savings account. The mother and her husband were the only signatories on the savings account and had exclusive control over account funds. However, the mother spent the funds only at the direction of the debtors and never spent any portion of the funds herself. The Sixth Circuit Court of Appeals concluded the mother was in fact the initial transferee because the mother "*was* given legal title to the

funds . . . [and] had legal authority to do what she liked with the funds[.]" *Id.* at 535 (emphasis in original). In *Wheeling Pittsburgh Steel v. Keystone Metals Trading (In re Wheeling Pittsburgh Steel)*, 360 B.R. 649 (Bankr. N.D. Ohio 2006), the Bankruptcy Court for the Northern District of Ohio explained:

> In *In re Hurtado*, the Court related that a determinative factor in the 'dominion-and-control' test "turned on the distinction between mere possession and ownership." The former, mere possession, and the 'raw power' to absconded [sic] with a debtor's property that results from possession, was insufficient to confer the status of "transferee" under § 550(a). Instead, <u>legal ownership of the transferred property was required</u>.

Id. at 652-53 (internal citations omitted) (emphasis added).

In *Ray v. City Bank & Trust Co. (In re C-L Cartage Co.)*, 899 F.2d 1490 (6th Cir. 1990), the Sixth Circuit Court of Appeals concluded § 550 equates transfer with payment made, rather than with benefit received. *Id.* at 1494-95. In *C-L Cartage*, the principal of the debtor and his mother obtained two personal loans from the lender to fund the debtor's business operations. During the year preceding the debtor's bankruptcy petition, the debtor made note payments directly to the lender on behalf of the principal and his mother. The Sixth Circuit Court of Appeals found the lender was the initial transferee of the note payments, rather than the principal and his mother, even though the payments were on account of personal debt owed by the principal and his mother. In reaching its conclusion, the Sixth Circuit Court of Appeals stated:

> Sections 547 and 550 both speak of a transfer being avoided; avoidability is an attribute of the transfer [debtor's payment] rather than of the creditor. While

> the lenders want to define transfer from the recipients' perspectives, the Code consistently defines it from the debtor's. A single payment therefore is one transfer, no matter how many persons gain thereby.

Id. at 1495 (quoting *Levit v. Ingersoll Rand Fin. Corp.*, 874 F.2d 1186, 1195-96 (7th Cir. 1989)) (emphasis added). The Sixth Circuit Court of Appeals further stated, "[C]reating two transfers from a single payment . . . adopts a 'tortured construction of [§ 550].'" *Id.* (quotation omitted).

In *Richardson v. Preston (In re Antex, Inc.)*, 397 B.R. 168 (B.A.P 1st Cir. 2008), the principal of the debtor wrote multiple checks to his ex-wife from the debtor's checking account in satisfaction of his spousal and child support obligations. The trustee sought to avoid the payments as fraudulent transfers and the bankruptcy court granted summary judgment in favor of the trustee. The Bankruptcy Appellate Panel for the First Circuit ("First Circuit B.A.P.") applied the dominion and control standard, which is the standard in the Sixth Circuit, and affirmed the bankruptcy court's holding. The First Circuit B.A.P. stated:

> [A]ll of the circuit courts addressing the issue [of whether the principal of a debtor corporation is the initial transferee of corporate funds used to satisfy a personal obligation] have concluded that a principal who directs a debtor corporation to issue a check to pay for a personal debt is not an initial transferee. *See. e.g., Schafer* [*v. Las Vegas Hilton Corp. (In re Video Depot, Ltd.)*], 127 F.3d [1195,] 1198-99 [9th Cir. 1997]; *Bowers v. Atlanta Motor Speedway, Inc.* (*In re Southeast Hotel Props. L.P.*), 99 F.3d 151 (4th Cir. 1996); *Rupp v. Markgraf*, 95 F.3d 936 (10th Cir. 1996); *Nordberg v. Arab Banking Corp.* (*In re Chase & Sanborn Corp.*), 904 F.2d 588 (11th Cir. 1990). These courts have held that a principal does not have "dominion and control" over funds unless he or she has "legal dominion and control," in

> other words, the "right to put those funds to one's own purpose." *Bowers*, 99 F.3d at 155 (emphasis in original); *see also Rupp*, 95 F.3d at 941. The mere power of a principal to direct the allocation of corporate resources does not amount to legal dominion and control. *Bowers*, 99 F.3d at 155.
>
> The undisputed facts show that [the principal] never had legal dominion and control over the funds. Although [the principal] controlled the Debtor's operations and arranged for the checks to be issued to [his ex-wife], the checks were direct transfers from the Debtor's accounts to [his ex-wife]. . . . [His ex-wife] would have us focus on the "economic realties" of the transactions rather than their form. However, in our view, [the principal]'s lack of legal dominion and control is a point of substance and an important element of the "economic realities."

Id. at 173 (emphasis added).

At the Hearing, Plaintiff asserted Defendant was the initial transferee of the Vehicles because the Vehicles were transferred directly from Debtor to Defendant, as stipulated by the parties and evidenced by the deal jackets for the Transfers. Defendant, on the other hand, asserted Clayton Cline was necessarily the initial transferee because this Court previously held Clayton Cline embezzled Debtor's assets, including the Vehicles. Defendant contended the act of embezzlement by Clayton Cline constituted the initial transfer and, thus, she was a subsequent transferee. Therefore, Defendant argued Plaintiff may not seek recovery from her because she took for value,[11] in good faith, and without knowledge of the voidability of the Transfers, as set forth in § 550(b)(1).

[11] As previously noted, Defendant did not take the Vehicles for value because Debtor received no value whatsoever in exchange for the vehicles. (*See supra* at 11.)

Much like the principal in *Antex*, Clayton Cline transferred Debtor property — *i.e.*, the Vehicles — to satisfy a personal obligation. Although Clayton Cline used his position as a principal of Debtor to transfer the Vehicles for personal gain, the Vehicles were transferred directly from Debtor to Defendant. (Stip. ¶ 3; Plaintiff's Exhibits A, B). Clayton Cline never exercised the necessary legal dominion and control over the Vehicles to qualify as the initial transferee under § 550(a). Any benefit Clayton Cline received from the Transfers is irrelevant. As stated by the Sixth Circuit Court of Appeals in *C-L Cartage*, a single transaction can have only one initial transferee, no matter how many parties benefit thereby.[12] In this instance, Defendant received legal title to the Vehicles directly from Debtor. Accordingly, the Court finds Defendant is the initial transferee of the Vehicles, as set forth in § 550(a).

2. Recovery Amount.

Pursuant to § 550(a), the trustee may recover "the property transferred, or, if the court so orders, the value of such property[.]" 11 U.S.C. § 550 (West 2010). At the Hearing, Plaintiff asked the Court to order Defendant to pay damages to

[12] The Court is aware of the Sixth Circuit Court of Appeals' statement, in dicta, that "[t]here is substantial support for the conclusion that when a corporate officer takes checks drawn from corporate funds to pay personal debts, the corporate officer, and not the payee on the check is the initial transferee." *I.R.S. v. Nordic Village, Inc. (In re Nordic Village, Inc.)*, 915 F.2d 1049, 1055 n.3 (6th Cir. 1990), *rev'd on other grounds*, 503 U.S. 30 (1992). However, this statement is contrary to the Sixth Circuit Court of Appeals' holding in *C-L Cartage*, which was issued only one month prior, as well as contrary to the holding of every other circuit court to have addressed this issue.

Plaintiff equal to the value of the Vehicles on the Transfer Date, which the parties stipulated was $73,176.73. (Stip. ¶ 3.) Defendant, on the other hand, contended the appropriate value of the Vehicles should be the amount Defendant was able to realize upon the sale of the Vehicles, which was $55,000.00.[13] (*Id.* ¶ 4.)

As stated above, § 550(b)(1) provides an absolute defense for a subsequent transferee who takes for value, in good faith, and without knowledge of the voidability of the transfer. *See* § 550(b)(1). The parties stipulated the subsequent transferee in this case — *i.e.*, Mr. Fuller — paid Defendant $55,000.00 for the Vehicles. (*Id.*) Furthermore, nothing in the record suggests Mr. Fuller bought the Vehicles in bad faith or with knowledge of the voidability of the Transfers. Because the Vehicles are not recoverable from Mr. Fuller pursuant to § 550(b)(1), the Trustee is limited to recovery of the value of the Vehicles. *See Hunter v. S.K. Austin Co. (In re Beck)*, 25 B.R. 947, 954 (Bankr. N.D. Ohio 1982) ("Consequently, the property being unrecoverable from defendant's transferee under § 550(b), the Trustee will be limited to recovery of 'the value of such property' under § 550(a).") Furthermore, depreciation of the transferred property and a readily determinable value of the transferred property weigh in favor of recovery of the value of the property, rather than recovery of the

[13] The parties stipulated: "[Defendant] subsequently [following the Transfers] sold the Vehicles to Scott Fuller and retained the $55,000.00 in sale proceeds as her own." (Stip. ¶ 4.) However, the record does not indicate when Mr. Fuller purchased the Vehicles or whether the sale of the Vehicles to Mr. Fuller was at arm's length and/or the result of honest negotiation.

property itself. *See Slone v. Lassiter (In re Grove-Merritt)*, 406 B.R. 778, 811-12 (Bankr. S.D. Ohio 2009).

The term "value" is not defined in the Bankruptcy Code, and § 550 does not provide guidance to determine the value of transferred property. However, "[t]he purpose of [§ 550(a)] is 'to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred.'" *Id.* at 811 (quoting *Hirsch v. Gersten (In re Centennial Textiles, Inc.)*, 220 B.R. 165, 176 (Bankr. S.D.N.Y. 1998)). In light of this purpose, "[c]ourts generally agree that the market value of the property at the time of transfer, less the consideration received, is the proper measure of recovery under § 550." *Hirsch v. Steinberg (In re Colonial Realty Co.)*, 226 B.R. 513, 525 (Bankr. D. Conn. 1998); *Comm. v. Agri Dairy Prods., Inc. (In re James B. Downing & Co.)*, 74 B.R. 906, 911 (Bankr. N.D. Ill. 1987) ("The market price at the time of transfer is the proper measure of damages because that is what the debtor would have been able to get for its [property] had it not been improperly transferred."); *In re Beck*, 25 B.R. at 954 (holding fair market value at the time of the transfer, as indicated by the value assigned to the property by the debtor and defendant when they negotiated at arm's length, is the value the trustee may recover).

The Court finds the reasoning of the aforementioned courts to be persuasive. Section 550 is intended to return the estate to the condition it would have enjoyed had the avoidable transfer not occurred. Market value at the time of the avoidable transfer is the

proper measure of "value," as set forth in § 550, because market value represents the amount the debtor (and, thus, the estate) could have realized had the debtor not improperly disposed of the transferred property. Therefore, the trustee is entitled to recover the market value of the transferred property at the time of the transfer.

In the instant case, both Defendant and Debtor ascribed a combined sales price, excluding taxes and fees, of $73,176.73 to the Vehicles. (Stip. ¶ 3.) Nothing in the record suggests this amount was not based on good faith and/or a result of arm's length negotiations. Accordingly, the Court finds the market value of the Vehicles at the time of the Transfers was $73,176.73, which represents the amount Debtor could have realized had the Transfers not occurred. Therefore, pursuant to § 550(a)(1), the Court will award Plaintiff damages equal to the cash value of the Vehicles in the amount of $73,176.73. The Court finds in favor of Plaintiff on Count Five.

E. Count Six — Objection to Proofs of Claims.

Plaintiff requests the Court to disallow and/or subordinate to all other claims of unsecured claimants any and all proofs of claim filed or to be filed by Defendant. (Compl. ¶ 38.) Defendant has not filed a proof of claim in Debtor's chapter 7 bankruptcy case and has never asserted she is a creditor of Debtor. Furthermore, pursuant to Federal Rule of Bankruptcy Procedure 3002, "In a chapter 7 liquidation . . . a proof of claim is timely filed if it is filed

not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code . . . ." FED. R. BANKR. P. 3002 (West 2010). The first date set for the meeting of creditors in Debtor's bankruptcy case was August 29, 2006. Accordingly, the period to file a proof of claim in Debtor's bankruptcy case has long since passed. In addition, nothing in the record suggests Defendant is or was a creditor of Debtor. Accordingly, the Court will dismiss Count Six for failure to state a cause of action.

F. Count Seven — Interest, Attorneys' Fees, and Other Relief.

Plaintiff requests the Court to order Defendant to pay (i) prejudgment interest; and (ii) costs and attorneys' fees in connection with this adversary proceeding. Due to equitable considerations, the Court finds Defendant should not be ordered to pay prejudgment interest and/or costs and attorneys' fees in this proceeding. The parties were asked to, and did in fact, stipulate to all material undisputed facts. None of the stipulated facts suggest Defendant committed any wrongdoing in this case or was in any way a bad actor. Rather, Defendant accepted the Vehicles in satisfaction of Clayton Cline's alimony and spousal support obligations. In fact, the Trumbull Court later issued the Divorce Decree, which expressly authorized Defendant to accept the Vehicles in satisfaction of such alimony and spousal support obligations. (Stip. ¶ 5; Defendant's Ex. 1.) Due to the circumstances of this case and equitable considerations, the Court will deny Plaintiff's

request for prejudgment interest, costs, and attorneys' fees. Accordingly, the Court finds in favor of Defendant on Count Seven.

III. CONCLUSION

Clayton Cline, a principal of Debtor, caused Debtor to transfer the Vehicles to Defendant in satisfaction of his personal alimony/spousal support obligation owed to Defendant. Defendant is not a creditor of Debtor. Thus, the Transfers were not made for or on account of an antecedent debt owed by Debtor, and the Transfers were not made to or for the benefit of a creditor. Accordingly, the Transfers are not preferences pursuant to § 547(b). The Court finds in favor of Defendant on Count One.

Debtor received no value in exchange for the Vehicles, which were property of Debtor. The only persons who benefitted as a result of the Transfers were Defendant and Clayton Cline. Furthermore, Debtor was insolvent on the Transfer Date, which was within the 2-year period preceding the Petition Date. Accordingly, the Transfers constitute fraudulent transfers pursuant to § 548(a)(1)(B) and O.R.C. § 1336.04(A)(2). The Court finds in favor of Plaintiff on Counts Two and Three.

Plaintiff presented no evidence and the record does not support a finding that Defendant was aware of any fraudulent intent on the part of Clayton Cline, if such fraudulent intent indeed existed. Accordingly, the Transfers do not constitute void transfers pursuant to O.R.C. § 1313.56. The Court finds in favor of Defendant on Count Four.

The Vehicles were transferred directly from Debtor to Defendant, and Plaintiff never exercised legal dominion and control over the Vehicles. Thus, Defendant is the initial transferee of the Vehicles, as set forth in § 550(a), and may not avail herself of the good faith defense in § 550(b). Nothing in the record suggests Mr. Fuller bought the Vehicles from Defendant in bad faith or with knowledge of the voidability of the Transfers, which limits Plaintiff's recovery to the value of the Vehicles. Consistent with the purpose of § 550(a), the Court finds market value at the time of the Transfers is the appropriate measure of value. Plaintiff and Debtor agreed the Vehicles had a combined sales price of $73,176.73 on the Transfer Date. Accordingly, Defendant will be ordered to pay Plaintiff the sum of $73,176.73. The Court finds in favor of Plaintiff on Count Five.

Defendant is not a creditor of Debtor and has not filed a proof of claim in Debtor's bankruptcy case. Accordingly, Count Six fails to state a cause of action. The Court will dismiss Count Six.

None of the stipulated facts suggest Defendant committed any wrongdoing in this case or was a bad actor. In fact, the Trumbull Court issued the Divorce Decree, which authorized Defendant to accept the Vehicles in satisfaction of Clayton Cline's alimony and spousal support obligations. Due to the circumstances of this case and equitable considerations, the Court will deny Plaintiff's request for prejudgment interest, costs, and attorneys' fees. The Court finds in favor of Defendant on Count Seven.

An appropriate order will follow.

# # #

IT IS SO ORDERED.

Kay Woods

Kay Woods
United States Bankruptcy Judge

Dated: May 21, 2010
02:00:58 PM

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	
MOUNTAIN CHEVROLET BUICK, INC.,	CASE NUMBER 06-40187
Debtor.	
* * * * * * * * * * * * * * * * * *	
MARK A. BEATRICE, CHAPTER 7 TRUSTEE,	ADVERSARY NUMBER 08-04031
Plaintiff,	
v.	
LEIGH CLINE,	HONORABLE KAY WOODS
Defendant.	

****
ORDER AWARDING MONEY DAMAGES TO PLAINTIFF EQUAL TO MARKET VALUE OF AVOIDED FRAUDULENT TRANSFERS
****

This cause is before the Court on Complaint to Avoid and Recover Voidable Transfers and for Damages (Doc. # 1) filed by

Plaintiff Mark A. Beatrice, Chapter 7 Trustee, on February 14, 2008. On April 13, 2009, Defendant Leigh Cox, f/k/a Leigh Cline, filed Answer (Doc. # 26). On March 4, 2010, Plaintiff and Defendant jointly filed Stipulation of Uncontested Material Facts (Doc. # 45). The Court held a hearing on the instant matter on March 8, 2010.

For the reasons set forth in this Court's Memorandum Opinion Regarding Complaint to Avoid and Recover Voidable Transfers and for Damages entered on this date:

1. The Court finds and holds in favor of Plaintiff on Counts Two, Three, and Five;
2. The Court finds and holds in favor of Defendant on Counts One, Four, and Seven;
3. Count Six is dismissed for failure to state a cause of action; and
4. Plaintiff is awarded damages from Defendant equal to the market value of the Vehicles on the Transfer Date – *i.e.*, $73,176.73.

IT IS SO ORDERED.

# # #