

(ii) Defendant Latreese Hyshaw's Motion for Summary Judgment ("Defendant's Motion") (Doc. # 62) filed by Defendant Latreese Hyshaw ("Hyshaw") on February 28, 2011. On March 14, 2011, Hyshaw filed Defendant Latreese Hyshaw's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Response") (Doc. # 68). On March 18, 2011, Trustee filed Response to Defendant's Motion for Summary Judgment and Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment ("Trustee's Response") (Doc. # 69). On March 25, 2011, Hyshaw filed Affidavit of Latreese Hyshaw (Doc. # 70).

For the reasons that follow, the Court will grant the Trustee's Motion and deny the Defendant's Motion.

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.

I. FACTS

A. Main Case

Debtor/Defendant Cecil H. Miller¹ filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code ("Petition") (Main Case, Doc. # 1) on June 29, 2009 ("Petition Date"). On Schedule A,

¹Debtor Cecil H. Miller died on June 16, 2010. (Main Case, Doc. # 65.)

the Debtor represented that he had no real property assets. (Pet. at 8.) On November 12, 2009, the Debtor amended Schedules A and C, to list an ownership interest in real property located at "843 Cameron Avenue, Youngstown, Ohio 44502" ("Cameron Property"). (Main Case, Doc. # 34 at 1.) The Debtor valued the Cameron Property at \$19,000.00, and claimed the homestead exemption of \$20,200.00. (*Id.* at 2.) Since amending Schedule A on November 12, 2009, the Debtor has neither further amended his schedules nor otherwise disclosed any interest in other real property.

Along with the Petition, the Debtor filed Statement of Financial Affairs ("SOFA"). (Pet. at 32-42.) Question 7 of the SOFA instructs debtors to "List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than \$200 in value per individual family member and charitable contributions aggregating less than \$100 per recipient" (Pet. at 35.) In answering this question, the Debtor checked "None" indicating that he did not give any family member a gift in excess of \$200.00 in value. Debtor has not amended his SOFA to reflect any gift to a family member in excess of \$200.00.

B. Adversary Proceeding

The Trustee commenced the instant adversary proceeding on March 15, 2010, setting forth three counts: (i) request to sell the Cameron Property; (ii) determination of the validity, priority and

extent of the liens on the Cameron Property; and (iii) avoidance of fraudulent transfer under 11 U.S.C. § 548(A)(1)(A) and/or (A)(1)(B) ("Complaint") (Doc. # 1).

In Count I, the Trustee requests permission to sell the Cameron Property. He asserts, "The Debtor was the owner of real estate located at 843 Cameron Drive, Youngstown, Ohio which he transferred to the current deed holder, Latreese Hyshaw, while he was insolvent, and for no consideration, in February of 2009." (Compl. ¶ 4.) The Trustee further alleges, "The real estate appears to be currently subject to the mortgage indebtedness of the U.S. Small Business Administration in the amount of \$43,167.00. . . . This real estate was not listed by the Debtor until the Trustee discovered it." (*Id.* ¶¶ 6, 8.)

In Count II, the Trustee urges that he "is entitled to a declaration of the rights of the parties in and to the real property. . . . [and] a determination of the validity, priority, and extent of its [sic] lien on the real property." (*Id.* ¶¶ 14-15.)

Finally, in Count III, the Trustee asserts that the Cameron Property was transferred to Hyshaw by the Debtor "[w]ithin one year prior to the filing of the petition in bankruptcy At the time of such transfer, Latreese Hyshaw was, and still is, the daughter of Debtor, Cecil Miller." (*Id.* ¶¶ 17-18.) The Trustee alleges that the transfer from the Debtor to Hyshaw "was made by the Debtor with actual intent to hinder, delay, or defraud his then existing and future creditors." (*Id.* ¶ 20.)

On May 18, 2010, the Trustee filed Amended Adversary Complaint ("Amended Complaint") (Doc. # 23) in which he alleges that two additional properties - 349 Breaden Street, Youngstown, Ohio ("Breaden Property") and 749 Brentwood, Youngstown, Ohio ("Brentwood Property") - were also transferred by the Debtor to Hyshaw within one year prior to the Petition Date. (Amended Compl. ¶ 4.) The Trustee states (i) the Breaden Property is subject to a U.S. Small Business Administration ("SBA") mortgage in the amount of \$118,300.00 (*id.* ¶ 9); and (ii) the Brentwood Property is subject to an SBA mortgage in the amount of \$118,300.00. (*Id.* ¶ 10.) The Debtor did not disclose either the Breaden Property or the Brentwood Property on the Petition or the Amended Schedules.

C. Stipulated Facts

On February 22, 2011, the Trustee filed Stipulations of Material Fact ("Stipulations") as an exhibit to the Trustee's Motion. (Trustee's Mot., Ex. 2.) All three of the interested parties - the Trustee, Hyshaw and the SBA - signed the Stipulations, which detail the transfers of the Cameron, Breaden and Brentwood Properties (collectively, "the Properties"):

Debtor transferred the real estate located at 843 Cameron Drive, Youngstown, Ohio to Latreese Hyshaw for no monetary consideration on February 5, 2009.

The Debtor was the owner of real estate located at 349 Breaden Street, Youngstown, Ohio which he transferred to Latreese Hyshaw for no monetary consideration on February 5, 2009.

Debtor was the owner of real estate located at 749 Brentwood, Youngstown, Ohio which he transferred to Latreese Hyshaw for no monetary consideration on

February 5, 2009.

(Stip. at 2.) The Stipulations also provide that the SBA holds a mortgage and lien on each of the Properties.² (*Id.* at 3-4.)

II. LAW & ANALYSIS

A. Standard for Granting Summary Judgment

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(a), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a) (West 2011). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tennessee Dep't of Mental Health & Mental Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such

² The SBA liens continue to have the same validity, force and effect against the Properties that they had prior to the Debtor's transfer of the Properties to Hyshaw because (i) the Debtor transferred the Properties to Hyshaw for no consideration; and (ii) the SBA loans were not satisfied and paid in full.

that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

B. Fraudulent Transfer

Section 548(a)(1) of the Bankruptcy Code provides that a trustee may avoid a fraudulent transfer if he proves either (i) actual fraud (§ 548(a)(1)(A)) or (ii) constructive fraud (§ 548(a)(1)(B)). 11 U.S.C. § 548 (West 2010). The Trustee alleges

that the Debtor's transfers of the Properties to Hyshaw were made with actual intent to defraud the Debtor's creditors. Therefore, § 548(a)(1)(A), which deals with actual fraud, applies:

The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation . . . 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 -

(A) made such transfer or incurred such obligation 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 or such obligation was incurred, indebted

§ 548(a)(1)(A) (West 2010).

1. Elements of Actual Fraud Under Section 548(a)(1)(A).

To prevail on a claim under § 548(a)(1)(A), the trustee must show: (i) the debtor transferred an interest in property; (ii) the transfer occurred within two years before filing the bankruptcy petition; and (iii) the transfer was made with actual intent to hinder or defraud the debtor's creditors. *Id.*

Here, the Stipulations establish that the Debtor transferred the Properties to Hyshaw, his daughter, for no consideration on February 5, 2009. The Stipulations further provide that the Debtor amended Schedules A and C on November 12, 2009, to list the Cameron Property as (i) "property he owned" and (ii) "exempt property." (Stip. at 4.) The Stipulations address the Brearden and Brentwood Properties only to the extent that the Debtor transferred each Property to Hyshaw for no consideration on February 5, 2009, and that the SBA holds a mortgage on both Properties. (*Id.* at 3-5.)

The Stipulations, standing alone, satisfy the first two elements of a cause of action under § 548(a)(1)(A) - *i.e.*, that the Debtor transferred his interest in the Properties and that the transfers occurred within two years before the Petition Date. Therefore, the Court must only determine whether the Debtor transferred the Properties to Hyshaw with an actual intent to hinder, delay or defraud the Debtor's creditors.

2. The Debtor Acted with Actual Intent.

When a trustee seeks to avoid a transfer based on actual fraud, the trustee must prove, by clear and convincing evidence, that the fraud occurred. *See United States of America v. Berman*, 884 F.2d 916, 921-22 (6th Cir. 1989) (internal citations omitted). However, "[b]ecause of the difficulty of obtaining direct evidence of actual fraud, inferences can be drawn from the circumstances surrounding the transaction in order to prove actual fraud." *Id.* at 922 (internal citations omitted).

The surrounding circumstances may include so-called "badges of fraud," which, in Ohio, "'include inadequate consideration; transfer of the debtor's entire estate; the debtor's insolvency as a result of the transfer; the relationship of the parties to the transfer; the reservation of an interest in the transferred property;'" *Id.* (quoting *Cardiovascular & Thoracic Surgery v. DiMazzio*, 524 N.E.2d 915, 918 (Ohio Ct. App. 1987)). Ohio Revised Code § 1336.04(B) sets forth eleven "badges of fraud," which courts may utilize when determining whether a transfer was fraudulent.

Although the Court may, it is not required to, look to the badges of fraud when determining whether the Debtor made the transfers with actual intent to defraud.

In looking at the Debtor's Petition and Schedules in this case, the Court can only conclude that the Debtor transferred the Properties with actual intent to hinder, delay or defraud his creditors. First, the Debtor did not disclose either (i) his interest in the Properties or (ii) his liabilities to the SBA on his Petition and original Schedules. Further, with the exception of the Cameron Property, the Debtor did not disclose the Properties or the liabilities associated therewith on his Amended Schedules A and C. The Debtor totally failed to disclose his interest in and transfer of the Breaden and Brentwood Properties. Finally, the Debtor not only failed to disclose that he made transfers of the Properties within the months leading up to the Petition Date, he affirmatively indicated that there were no such transfers. Based on the foregoing, the Court finds that the Debtor deliberately concealed the Breaden Property and Brentwood Property by excluding them from his Petition and Schedules. Moreover, the Debtor concealed that the transfers of the Properties to Hyshaw, a family member, occurred mere months prior to the Petition Date. As a consequence, it is not necessary to analyze whether any badges of fraud, as set forth in O.R.C. § 1336.04(B), are present because actual intent to defraud can be inferred from the Debtor's omission of the Properties and the transfers from his filings.

3. The Fraudulent Transfer Doctrine Applies Even if the Debtor Had No Equity in the Properties.

In the Defendant's Motion, Hyshaw attempts to argue that, because there is "no positive equity" in the Properties, "Plaintiff[']s efforts to utilize § 548 to set aside the transfer must fail." (Def. Mot., Ex. 1 at 7.) Hyshaw argues, "[F]or purposes of Chapter 1336 [of the Ohio Revised Code], avoidance of transfers applies only to property of a debtor which has been found to be an 'asset.'" (Def. Mot., Ex. 1 at 6-7 (citing O.R.C. § 1336.01(B); *In re McFarland*, 170 B.R. 613 (Bankr. S.D. Ohio 1994).) This argument, however, is not supported by the statutory language in O.R.C. § 1336.04.

Pursuant to the Stipulations, the Properties have a combined value of \$20,500.00³ and are subject to liens of the SBA in excess of \$118,000.00. Section 1336.01(B) defines "Asset," for purposes of chapter 13 of the Ohio Revised Code, to exclude property to the extent it is encumbered by a valid lien. Based on these amounts, the Properties would not have constituted "assets" of the Debtor prior to their transfer.⁴ The statutory definition of asset in Ohio, however, is not relevant to whether the Trustee can avoid the fraudulent transfer of the Properties.

³ "The value of the property located at 843 Cameron Drive is \$7,500. The value of the property located at 349 Breaden Street is \$5,000. The value of the property located at 749 Brentwood Avenue is \$8,000." (Stip. at 2-3.)

⁴ Pursuant to this definition, the Properties are also not assets of Hyshaw because the Properties are still burdened by the SBA liens and the amount of such liens far exceeds the stipulated value of the Properties. Because the SBA loans were not satisfied prior to transfer of the Properties, the liens continue to have the same validity, force and effect that they had prior to the transfer.

The section of the Ohio Revised Code relevant in this case is § 1336.04(A), which does not mention or reference the term "asset."

This section provides:

(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 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(A) (Page's 2010). The issue in § 1336.04 is whether a "transfer" can be avoided; the statute does not concern itself with the value of the thing transferred. As a consequence, whether or not the Debtor had any equity in one or more of the Properties prior to transferring them to Hyshaw is wholly irrelevant. The focus, instead, is whether a "transfer" occurred.

When the Debtor transferred the Properties to Hyshaw in February 2009, the Debtor had a legal or equitable interest in each

of the Properties. (Stip. ¶ 2.) Because he transferred the Properties to Hyshaw for no consideration, he continued to have an equitable interest in the Properties after their transfer. Indeed, the Debtor specifically asserted in amending Schedules A and C that he had an interest in the Cameron Property as of the Petition Date. Pursuant to § 541(a)(1) of the Bankruptcy Code, the Debtor's bankruptcy estate is comprised of "wherever located and by whomever held: . . . all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541 (West 2010). As a consequence, the Properties constitute property of the bankruptcy estate pursuant to 11 U.S.C. § 541. Section 548(a)(1) of the Bankruptcy Code authorizes a trustee to avoid "any transfer . . . of an interest of the debtor in property, . . ." 11 U.S.C. § 548 (West 2010). Because the Properties constitute property of the Debtor's bankruptcy estate, the Trustee may seek to avoid the fraudulent transfer of the Properties.

III. CONCLUSION

Based on the foregoing, the Court finds that there are no genuine issues of material fact regarding the Debtor's fraudulent transfer of the Properties to Hyshaw. As a consequence, the Court will grant the Trustee's Motion and deny the Defendant's Motion.

Although the Amended Complaint alleges multiple counts, the cross motions for summary judgment, and thus this Memorandum Opinion deal only with Count III. However, based on the Stipulations, it appears that any potential sale of the Properties would provide no

benefit to the estate because the amount of the SBA liens far surpasses the combined value of the Properties. As a consequence, no purpose can be served by this Court determining the validity or priority of the liens against the Properties because the Properties will come back into the estate fully encumbered by the SBA liens. Accordingly, the Court finds that Counts I and II fail to state a claim upon which relief can be granted and hereby dismisses those two counts, without prejudice.

An appropriate order will follow.

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Judgment ("Trustee's Motion") (Doc. # 60) filed by Michael D. Buzulenica, Chapter 7 Trustee ("Trustee") on February 22, 2011 and (ii) Defendant Latreese Hyshaw's Motion for Summary Judgment ("Defendant's Motion") (Doc. # 62) filed by Defendant Latreese Hyshaw on February 28, 2011.

For the reasons set forth in this Court's Memorandum Opinion, entered on this date, the Court hereby: (i) grants the Trustee's Motion; (2) denies the Defendant's Motion; and (iii) dismisses Counts I and II of the Complaint (Doc. # 1), without prejudice.

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