UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

BROSKIN ENTERPRISES, INC. Case No. 90-12562 K

Debtor

MARK S. WALLACH, TRUSTEE

Plaintiff

-vs- AP 94-1141 K

JANICE ALLOCO, as Executrix of the
Estate of Ralph Alloco, Deceased
JOHN G. WIHLEN, JOHN C. WIHLEN,
TERRY W. WIHLEN, SAMUEL SIMONE

Defendants

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This is a fraudulent transfer action by a Chapter 7 Trustee under 11 U.S.C. § 544

and state fraudulent transfer law. After two years of diligent discovery and conscientious attention by counsel, it has ripened to a point at which the number of defendants and issues may be reduced.

The Defendants' Motion to Dismiss the Complaint as to John G. Wihlen, John C. Wihlen and Terry W. Wihlen is granted, on consent of the Trustee. That leaves only the Alloco Estate and Mr. Simone as Defendants.

Rather than challenging individual transfers in individual causes of action, the Trustee's Complaint alleges a succession of transfers in close proximity which, he asserts, had "an aggregate value" in excess of "any indebtedness of the Debtor to the Defendants."

This approach by the Trustee was compelled by the fact that the consideration for the various transfers was, in large part, a number of prior loans. Apparently, no specific transfer by the Debtor can be shown to relate to any specific antecedent loan. To look back more than seven years and say that it was "this" transaction rather than "that" which was fraudulent would be fraught with peril.

By mutual accord, the dispute has boiled down to two questions. On the present record the Defendants will prevail as to one, but trial must be ordered as to the other.

As to the Bond and Mortgage, the Trustee's attention to who contributed what toward the total consideration for which the $350,000 mortgage was granted ($385,000 in loans, by the Trustee's reckoning, but $485,000 in loans according to the Defendants) is misplaced.

A simple hypothetical illustrates the point. If I loan you $10,000 but tell you to grant my son the note and mortgage, it cannot be a fraudulent transfer by you to my son simply

because he loaned nothing. (Of course, I pay any applicable taxes.) I have gifted him an interest to which I have the right, and you have suffered not a whit. It is the value of what has been transferred that is important and the statute cares not whether the fair consideration came from the transferee or from someone else.

Similarly, if a group of financiers loan me $385,000 and I give them a single mortgage for less than that amount as security to secure the single, consolidated obligation, it is none of my business what the relative contributions of each member was and what their agreement might be for the sharing of the benefits of the security. Hence, it is none of my creditors' or my bankruptcy trustee's business either. I only owe $385,000, and I have given up less than that.

If each of the group makes me a separate loan, but they ask me to issue the security to the group, does a different result appertain, so long as the mortgage is in an amount less than the aggregate loans? No, for two reasons.

Firstly, when the loans are maintained as separate loans secured by a single mortgage, the mortgage will only support each of the loans to the amount of the loan. If, for example, a bank makes a $1,000,000 loan and a $10,000 loan to the same borrower, and takes a $1,000,000 mortgage as security, the $10,000 loan can never be secured by more than the $10,000 that is owed, and the $1,010,000 debt can never be secured by more than $1,000,000. Similarly, if Joseph Alloco, the three Wihlens, and Sam Simone each make loans in varying amounts, secured by a single mortgage made collectively to the five as undivided mortgagees, the mortgage cannot support the note on which Sam Simone is obligee in excess of the amount of the

note or notes on which he is the obligee, and there can be no fraudulent transfer.

Secondly, if anything transpires among the members of the group by which they might transfer to Sam Simone a greater interest in the mortgage, they must (under New York law) also transfer the corresponding portions of what I owe them.

So long as the value I gave to the group does not exceed the value I received in the aggregate from its members, their internal allocation of the value of the collateral amongst themselves is their concern only. (So long as the underlying debt is also allocated and communicated to me so that I know who is owed what.)

All of this stands for the proposition that we need not concern ourselves with what Sam Simone's true ownership share of the mortgage actually is. It could be the "presumptive" 20%, the 4.8% that he argues, or 100%. Nothing that the lenders agree among themselves can change the facts that the Debtor gave to the Defendants collectively less than they collectively loaned it, and no single loan can be enforced against the mortgage in excess of the amount owing on that loan.

The Bond and Mortgage transaction was not a fraudulent transfer.

That takes us to the transaction pertaining to the Ischua Valley Estates.

Of themselves, the undisputed fair market values before and after the sale in question create an inference that the fair market value at the time was somewhere between $414,000 and $495,000. If the proofs offered by the Defendants were to suffice to overcome the inference, then the Trustee's failure to offer other evidence of the fair market value at the time of transfer would warrant judgment for the Defendants. It would not suffice for the Trustee to say

that he is entitled to trial on the grounds that the affidavits have created a triable issue of fact. It is the Defendants' motion, and if I were to find their tendered evidence to be strong enough to overcome the Trustee's inference, and then he were to fail in response to demonstrate a triable issue, he would lose. The Trustee's opportunity to argue against that result would have been before letting the Defendants' motion be submitted to the Court for decision.[1]

In this case the Trustee is fortunate, for the Defendants' affidavits and other supporting evidence fail to explain persuasively how, after the fair market value was so dramatically reduced by the Debtor's neglect, the value not only rose to $495,000 2-1/2 years later without the Defendants' accomplishing the required sewer remediation, but how the Defendants had concluded that the $445,000 offer received in the meantime was not enough. It is one thing to find a buyer who is willing to overpay. It is quite another to be so certain of finding such a buyer, that one might reject a fully fair offer along the way. That rejection not only undermines the suggestions that the later buyer "over"-paid, but also may reveal the sellers' state of mind at more than one relevant point in time.

The issue of personal property seems to be a red herring in light of the fact that tax

[1] Rule 56 practice is so misunderstood by so many of us that I will belabor the point a bit. The purpose of Rule 56 is to avoid unnecessary trials. The time to gain the right to go to trial by arguing the need to produce more evidence is before the motion is taken under submission. One must choose either to oppose a Rule 56 motion with facts and arguments, or insist that it be denied under Rule 56(f) for an insufficient opportunity to gather evidence. It does not suffice to say, "I submit the motion, but if I am lacking evidence, then I want the opportunity to gather it." The motion's opponent must not submit the matter without offering enough evidence to get to trial. It need not be all of the evidence he would introduce at trial, but it must be enough to demonstrate to the Court that a trial would be necessary.

stamps attribute the full $347,000 to real property. Furthermore, the Defendants cannot account for all the money they claim was spent on improvements; so improvements do not seem to be the complete answer. Also, the Defendants were not strangers who merely made a good bargain and thereby "defined" the market, nor were they bidders at auction or foreclosure. In a sense they had previously been co-adventurers with the Debtor, and in terms of their liability on the prior mortgages they had depended on the success of the Debtor. When they took title for $347,000 in undertakings (not cash),[2] it was to save their investment. Their self-serving affidavits that lack meaningful documentary support do not rebut the Trustee's presumptive evidence of a fair market value of $414,000 to $495,000. They have indeed only demonstrated the existence of a dispute, and have not burst the bubble of the Trustee's evidentiary inference.

The Court need not today lay down any general rules regarding how "fair consideration" relates to fair market value. It suffices to say that on the present record, $347,000 might or might not be fair consideration.

The Alloco estate and Simone insist that *United States v.* McCombs, 30 F.3d 310 (2d Cir. 1994) and Magistrate Judge Fisher's decision on remand, *United States v. McCombs*, 928 F.Supp. 261 (W.D.N.Y. 1995), entitle them to judgment. I reject the argument.

In my view, Magistrate Judge Fisher (now State Supreme Court Justice Fisher) was understandably confounded by the fact that the Second Circuit focused on "fair market

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[2] A $347,000 cash purchase would have satisfied that amount of debt on which the Debtor here was liable. It is not known to the Court whether $347,000 of the Debtor's obligations were eventually discharged. If not, then the "consideration" for the transfer was not $347,000.

value" but without explanation directed him to use "forced foreclosure value" as the dispositive reference mark. (The Circuit even denied a Motion to Reconsider that sought clarification of that and other points.)

Of course, Judge Fisher did as he was directed to do. But I believe the Second Circuit decision to have little effect as precedent. If it was the Circuit's intent that "forced foreclosure value" be the reference point for any and all fraudulent transfer claims involving real property, it failed to tell us that, and I will not so hold. Further, nothing that the Circuit said commands that "forced foreclosure value" be measured as a percentage of fair market price. And nothing that Judge Fisher said persuades me that a "forced foreclosure value" should always be so measured.

Rather, the Circuit expressly held that "fair consideration" is to be determined on a case-by-case basis, and therefore requires examination of the totality of circumstances.

It would be useful if this Court could find that the mathematical formula employed by Judge Fisher is required in all such instances. It would be easy to implement. He was ordered by the Circuit to use "forced foreclosure value," and he found that to be 80% of "fair market value" and then he found that the 84% of "forced foreclosure value" that was paid sufficed to constitute "fair consideration." Were the Defendants in the present case merely speculators, mere "bargain hunters," this writer would be more sanguine about a formulistic approach that borrows from the *McCombs* result.

But as co-obligors with the Debtor, this was an "insider" transaction, and close

scrutiny is required.[3] As to a private sale to an insider, no particular percentage of fair market value is per se "fair," or else no insider would ever pay more.[4]

This matter is set for the Calendar Call on March 19, 1997 at 11:30 a.m., for the selection of a trial date.

SO ORDERED.

Dated: Buffalo, New York
February 27, 1997

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Michael J. Kaplan, U.S.B.J.

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[3] *See Union Pacific Railroad Co. v. Durant*, 95 U.S. 576, 578 (1877).

[4] On the other hand, "fair consideration" does not require "fair market value." So even if this Court were to find a fair market value of, say, $450,000 for this property, that would not clearly command a $103,000 judgment. Rather, it may command reference to some other measure such as, perhaps, "forced foreclosure value." As noted above, the Circuit did not command that fair consideration be measured in all cases by reference to "forced foreclosure value," but its use of that phrase may have been intended to instruct us as to the measure against which a money judgment might enter in cases like this in which the transfer cannot be undone if it is found to be a fraudulent transfer, and which, consequently, will result only in a money judgment.