

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ERIC CHAMBERS

Case No. 94-10072 K

Debtor

JOHN H. RING, as Trustee of
ERIC CHAMBERS

Plaintiff

-vs-

AP 95-1141 K

MIRON WASIK

Defendant

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On January 11, 1994, Eric Chambers filed a bankruptcy petition seeking to reorganize under Chapter 11, Title 11 of the U.S.C. On October 14, 1994, Chambers' case was converted to Chapter 7 and a Trustee was appointed. The Trustee brought this Adversary Proceeding against the Defendant, Miron B. Wasik, seeking to avoid, under 11 U.S.C. § 544,

what the Trustee argues is Wasik's unperfected security interest in equipment of the Debtor.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157, and the General Order of Reference entered by the District Court on July 13, 1984 and the amendments thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2).

This matter was tried before the Court on February 27-28, 1997. After consultation with the parties and after obtaining their consent, this Court adopted the unusual procedural device of making findings of fact before addressing the legal issues presented by the case. This was done in the interest of economy because, in this case, a ruling on fact issues substantially limits the legal issues to be briefed by the parties. This Court will make further findings of fact if it becomes necessary based on subsequent legal arguments presented by the parties.

FINDINGS OF FACT

1. For many years prior to 1992 the Debtor, Eric Chambers ("Eric" or "Eric Chambers") was involved in a family business, Chambers Company, Inc. ("Chambers Co."), which bought and recycled scrap metal. Eric's father, Bud, and Bud's brother, John were the principals of the business. Bud Chambers died before 1992.
2. At some time prior to 1992, Eric became President of Chambers Co.
3. Early in 1992, the Chambers Co. faced financial difficulties. M&T was calling in about \$600,000 in loans to Chambers Co., on which Eric was a guarantor, and it was preparing to auction all of the Chambers Co. equipment in which it had a security interest. M&T employed R.W. Bronstein Corp. to appraise the equipment in preparation for the auction.
4. Around May 1992, Chambers Co. also faced foreclosure of a mortgage on the property on

which the business was located. (Eric's uncle, John, was the mortgagee.)

5. The Defendant, Miron Wasik ("Wasik") had had various business dealings with Chambers' father, Bud, and uncle, John, over the previous 20 years, but did not come to deal directly with Eric Chambers until early in 1992 when Eric approached Wasik for help dealing with the Chambers Co.'s financial difficulties.
6. It is unclear whether Eric Chambers and Wasik ever went to M&T together to discuss the foreclosing of the loans. It is clear that Wasik had a very good relationship with the people at M&T and spoke to the bank, independent of Chambers, to discuss M&T's loans to the Chambers Co.
7. On May 20, 1992, Chambers, on his own behalf and on behalf of the Chambers Co., executed a Bill of Sale to Wasik ("May 1992 Sale" - "Trial Exhibit" 9) whereby the Chambers Co. sold to Wasik "equipment as per attached two pages" - complete with title certificates and registration certificates purporting to transfer ownership to Miron B. Wasik Sales & Rental. The equipment list attached to the Bill of Sale was identical to the appraisal list prepared by Bronstein in preparing for the M&T auction. The equipment was sold "where is as per customers [sic] inspection," and the consideration recited was \$160,000 in cash. It was contemplated that Wasik would pay the \$160,000 to M&T in satisfaction of M&T's liens on the Chambers Co. equipment that it was preparing to foreclose. Wasik did not advance the \$160,000 to M&T until October 1992. (It is unclear whether the \$160,000 would discharge the full balance of the debts called in by M&T, but it is clear that \$160,000 would clear the equipment in question of liens.)
8. On May 21, 1992, Miron Wasik wrote a check for \$6,382.54 payable to "Eric Chambers & Marine Midland Bank" in order to release a different bank's lien, Marine's lien, on one of the pieces of equipment (a 1989 Mack Dump truck) sold under the May 1992 Bill of Sale (Trial Exhibit 13).
9. Also on May 21, 1992, Chambers, on behalf of the Chambers Co. signed over to Miron B. Wasik Sales & Rental title documents for eight vehicles which were on the equipment list (Trial Exhibit 10).
10. Although at the time of trial the two page list of equipment was not attached to the May 1992 Bill of Sale, there was attached to the Bill of Sale individual invoices from the Chambers Co. to Wasik for each piece of equipment sold.
11. A total of 54 invoices were attached to the May 1992 Bill of Sale, for equipment ranging from a Caterpillar excavator, to a Chevy pickup truck, to office computers and equipment.

12. Whether and when Wasik took possession of the equipment is hotly disputed. At the time of trial the invoices were separated into two stacks: one stack of invoices, identified in Wasik's handwriting on the top invoice as "Picked up - 33 items," representing equipment which Wasik claims to have picked up from the Chambers Co. yard shortly after the May 1992 Bill of Sale was executed; the other stack, identified in Wasik's handwriting on the top invoice as "Left in yard - 21 items," representing equipment which Wasik did not take because he believed it to be of inconsequential value. Wasik does not recall when he separated the invoices into the two stacks or when he labeled them as "picked up" or "left in yard." John Wasik (Miron Wasik's son) testified that John went to the Chambers Co. yard personally and picked up certain equipment shortly after the May 1992 Sale. He said that it took three men about ten days to pick up all of the equipment. Of the equipment which was in the "picked up" stack of invoices, John Wasik testified that he did *not* pick up: (1) one 1978 Chevy pick-up; (2) one 1979 Ford pick-up; (3) one hydraulic shear; (4) one shaker table pallet dumper; (4) one FMC street sweeper; (5) one 1954 Rogma 35' lowboy trailer; (6) one 1969 Ford dump truck single axle. John Wasik did not know why his father listed the above items as picked up when they were not. John Wasik testified that after this initial pick-up in May or June of 1992, he never went back to the Chambers Co. yard. An employee of Wasik's, David Becker, testified in detail as to work he did on two major pieces of Chambers Co. equipment at the Wasik shop for a six week period in June and July of 1992. Chambers claims that as of September 16, 1992, all of the equipment which was the subject of the May 1992 Sale was still in the Chambers Co. yard. Chambers claims that the bulk of the equipment in question was not removed by Wasik until after Chambers filed Chapter 11 on January 11, 1994. It is the finding of the Court that Wasik, in May or June of 1992, took possession of the items in the "Picked up" stack, except for those items that John Wasik said he did not pick up.¹
13. On September 16, 1992, Eric Chambers, individually, as Lessee, Miron Wasik, as Purchaser, and the Chambers Co., by Eric Chambers, as Seller, entered into an "Agreement" ("September Agreement" - Trial Exhibit A) prepared by Chambers' attorney, who appears to have been totally unaware of the May 1992 events.

¹ The Court found Becker's testimony as to work done on the excavator and loader to be forthright, and found John Wasik's responses to the Court's own questions (which led John to detail which pieces of equipment were taken to which of Wasik's various facilities) to be persuasive. Although Eric Chambers is otherwise a credible witness, the Court cannot reconcile his testimony with that of Wasik, Wasik's son, and Wasik's employee, and the Trustee failed to carry his burden of proof by, for example, offering as witnesses those equipment buyers that Eric Chambers claimed picked up the equipment they bought from Chambers' premises, rather than from Wasik's (See Finding #25).

14. Under the September Agreement, Wasik was to purchase from the Chambers Co., for \$160,000, the same equipment which was the subject of the May 1992 "sale," and then lease the equipment to Eric Chambers (see Schedule C of the September Agreement, "Rental Schedule" with amortization of payments under the lease) with an option to purchase the equipment for \$20,000 upon completion of lease payments. It seems that each of the twelve (12) month's lease payments consisted of one-twelfth (1/12) of \$160,000, plus interest on the balance at 9% per year.
15. The lease under the September Agreement was to commence on the date of closing (set for September 21, 1992) and terminate on September 30, 1993.
16. The purchase option under the September Agreement contemplated that "upon thirty days advance written notice, Lessee may purchase the Equipment by prepaying the total of all rent due . . . together with any and all interest as provided herein. Furthermore, if at the end of the term of the lease, Lessee wishes to purchase the Equipment, he may do so by providing advance written notice of his intent to purchase same and by paying Purchaser \$20,000 . . . promptly thereafter. . . "
17. For purposes of Uniform Commercial Code § 2-401(2), no evidence was presented of an express agreement between the parties that would have transferred title to the equipment back to Eric Chambers (for example, if the lease was construed as a capital lease) without a physical transfer of possession to him.
18. Under the lease, Lessee was responsible for providing liability insurance satisfactory to the Lessor with limits of "not less than \$160,000."
19. The September Agreement also contained a merger clause stating that "This Agreement . . . constitutes the entire agreement between the Parties regarding the subject matter contained herein and supersedes all prior and contemporaneous undertaking and agreements of the Parties . . . with respect to the subject matter herein."
20. Although all parties to the September Agreement signed it, the closing did not take place as planned.
21. By letter dated September 21, 1992, Chambers "terminated and canceled" the lease contemplated in the September Agreement because he could not get the proper insurance required under the lease (Trial Exhibit B).
22. All parties agree that, ultimately, the September Agreement was of no effect.

23. When asked why he signed a contract to buy equipment he already owned under the May 1992 Bill of Sale Wasik said that Damon & Morey, general counsel to Eric Chambers and the Chambers Co., prepared the documents so that Eric Chambers could get financing.
24. On September 29, 1992, Wasik sold a Caterpillar excavator (one of the pieces of equipment that was the subject of, and that he claims to have picked up from the Chambers Co. yard after, the May 1992 Sale) to Elam Sand & Gravel, "as is, where is, as per customer's inspection." The selling price was \$115,000. (Trial Exhibit C).
25. Eric Chambers claims that this equipment was in his possession around the time of the sale and that he was present when Joseph Spezio of Elam Sand & Gravel came, without Wasik, to look at the equipment at the Chambers Co. yard.
26. On October 9, 1992, Chambers, the Chambers Co. and Wasik entered into another "Agreement" ("October Agreement") identical to the September Agreement (see Findings # 13-19) except that the closing date was to be October 9, 1992 and the lease was to terminate on October 31, 1993 (Trial Exhibit D). (No evidence was offered as to why it was thought that Chambers could then perform the same contract that he could not perform a month earlier.)
27. Chambers testified that at the time of the October Agreement, all of the subject equipment, except the Caterpillar excavator which had been sold, was on Chambers Co. premises and was being used by Chambers Co. in the operation of its business. The Court, has, however, found otherwise. (See Finding # 12)
28. The October Agreement was signed by all parties and a closing did occur; Eric Chambers was present, but Wasik perhaps was not.
29. By a check dated October 9, 1992 Miron B. Wasik Sales & Rental paid M&T \$160,000. (Trial Exhibit 3).
30. On the tissue copy of the October 9 check to M&T is a notation that the check is "Re: closing Eric Chambers/Chambers Co."
31. It was Eric Chambers' belief that Wasik was buying out M&T's interest in the Chambers Co. equipment for \$160,000 and "taking the place of the bank" as a secured creditor. Chambers also testified that it was his belief that as pieces of the equipment were sold by Wasik, Chambers' indebtedness to Wasik would decrease in proportion to the sale price.²

²Later in his testimony, Chambers stated that it was his understanding that Wasik owned the equipment and that Chambers had an option to buy it back when all lease payments had been made.

32. By a letter dated October 13, 1992, signed by Eric Chambers addressed to Wasik, Chambers purported to terminate all transactions of equipment leasing between Chambers, the Chambers Co. and Wasik due to Chambers' failure to obtain "insurance & etc." (Trial Exhibit F).
33. Chambers does not remember who prepared that letter, nor does he remember delivering it to Wasik. He does not deny having signed it.
34. A document which appears on its face to be a statement of an account, dated March 25, 1993 and on Miron B. Wasik, Sales & Rental letterhead, "re: Chambers Inc.," recites a principal balance of \$160,000 (dated 10/15/92), interest of \$2,664.00 (dated 11/15/92), \$95,000 applied to principal (dated 12/15/92), leaving a principal balance on 12/15/92 of \$65,000. The document shows blank entries for 1/15/92, 2/15/92 and 3/15/92, and a \$2,705.00 interest entry on 4/15/92. The document shows principal plus interest to date equals \$70,366.00, and then adds an unidentified \$15,000 for a total of \$85,366.00. (Trial Exhibit G).
35. The document goes on to state, "Current will accept as payment in full \$85,000. If close out payment is made upon termination of lease, 8/15/93, will accept \$90,000."
36. The document is signed by both Miron Wasik and Eric Chambers and the signatures are dated 9/21/93. Wasik does not remember signing the document and testified that he did not recall ever having seen it before his deposition in this Adversary Proceeding.
37. Chambers testified that the document was prepared by Wasik at his request so that Chambers could know how much he owed Wasik, as deductions were being made as Wasik sold off equipment. Chambers claims that the \$95,000 applied to principal on 12/15/92 was for the Caterpillar excavator sold by Wasik on Sept. 29, 1992 (See Finding #24). Wasik claims to have spent \$20,000 fixing the excavator before it could be sold.
38. Wasik, representing that he believed that he owned the equipment outright under the May 1992 Sale, testified that the document (Trial Exhibit G) probably was just a price quote for some equipment that Chambers wanted to buy back from him. Wasik could not identify the equipment that the quote was for, nor did he know why the statement added interest if it was only a price quote. The Court finds, however, that in fact Wasik had at some point agreed that once Wasik had been repaid the \$160,000 with interest, Chambers could have back any remaining items.³

³It is undisputed that Chambers visited Wasik's yard several times a week during the period from late 1992 through early 1994, checking on the progress of particular sales of items,

39. Between May 14, 1993 and December 1, 1994, Wasik continued to sell pieces of the equipment to various buyers (See Trial Exhibits H, I, J, K, L and M).
40. With respect to equipment that was sold from May 14, 1993 up to his Chapter 11 filing, Eric Chambers "believes" that, or "does not recall whether," the property was in the Chambers Co. yard at the time of sale. All equipment that was sold after the Chapter 11 filing Chambers agrees was no longer in his possession because, according to Chambers, Wasik picked up any remaining equipment after the filing.
41. Eric Chambers, individually, filed Chapter 11 bankruptcy on January 11, 1994. His case was later converted to chapter 7. At the time, Eric listed Wasik in Schedule G (Executory Contracts & Expired Leases) as a creditor in the amount of \$90,000 (See Finding # 35 for possible explanation of that amount).
42. A "Statement" to Eric Chambers dated Feb. 7, 1994 on Wasik Sale & Rental letterhead and signed by Miron Wasik, recites that the "Amount owed to date - Principal & Interest" is \$96,400.00 (Trial Exhibit P).
43. Wasik also could not explain this document because it was his position that he owned the equipment outright under the May 1992 Sale and that Eric Chambers did not "owe" him anything.
44. A list was compiled, dated 11/29/94 and reported on Miron Wasik's letterhead, of "Miron B. Wasik's equipment located at Chambers Co. Inc. yard in Medina which was never removed." The list contains 28 items (Trial Exhibit T).
45. By Chambers' account, the list was prepared because he was trying to lease out the property and Wasik wanted to protect his interest in the property.
46. On June 9, 1995, the Chapter 7 Trustee commenced this action under 11 U.S.C. § 544 against Miron Wasik alleging that the lease and purchase option provisions under the October Agreement gave Wasik only a security interest in the equipment which was never perfected.

bringing proposed purchasers, and otherwise attempting to facilitate sales. This is entirely consistent with Chambers' belief that Wasik had "taken over the bank's position." (Finding #31). Wasik's explanation of trial Exhibits G and P is not believable. Rather, it is clear to the Court that Wasik had agreed that Chambers could have back anything left after the \$160,000 plus interest had been paid, and perhaps was willing to discount the balance.

DISCUSSION

Because the Court finds that Wasik did take delivery of twenty-seven (27) of the items from the “picked up” stack of invoices immediately after execution of the May 1992 Bill of Sale and supporting documents in May or June of 1992, a number of helpful inquiries and conclusions follow.

If the documents executed in May coupled with delivery to Wasik (but no present consideration, no MV-51's, etc.) sufficed to transfer ownership, then it becomes significant that there is no hint or suggestion of any *re*-delivery of any of that equipment to Chambers. Because there was no re-delivery, then if that property was Wasik's property, and because there was no express agreement to transfer title back to Chambers without delivery (see U.C.C. § 2-401(2)) then there is no theory upon which any relationship demonstrated by any post-October 9, 1992 evidence could possibly have been an effective conveyance to Chambers, or a loan secured by Chambers-owned property.

In other words, if Wasik “owned” all but six (6) items of the “Picked up” equipment as of June or July of 1992 at the latest (if execution of the documents coupled with taking possession transferred title), the collapse of the September and October Agreements left Wasik in title even if Trial Exhibits G and P signified an agreement to reconvey what remained to Chambers. From the Trustee's point of view, the most those documents could signify is a willingness on Wasik's part to treat the \$160,000 as a loan to Chambers. But if Wasik was in title, then there

can be no basis in the evidence for an argument that that loan was secured by property owned by Chambers.

On the other hand, if the May documents amounted to nothing, or if they served only as a taking of title as security only (which are questions of law, not fact), then it might be required (as a matter of law, not fact) that the actual agreement between the parties (if there was any meeting of the minds at all) be determined to be that bespoken by their conduct. In that event, further findings of facts from the evidence adduced at trial may or may not be required.

These Findings of Fact having been made, this is set for closing argument on May 21, 1997 at 2:00 p.m. At that time, the parties will limit their arguments to the facts as so found, without prejudice to the right to appeal the findings. Oral argument will be limited to the legal issues presented by the facts as found, and to the question of whether any further finding of facts (from the evidence already adduced; both sides have rested) are necessary.

Briefs in those regards only are required and shall be filed by May 12, 1997.

SO ORDERED.

Dated: Buffalo, New York
April 11, 1997

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