UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

LEE A. D'AMICO and
NORINE D'AMICO

Debtors.

CASE NO. 96-23724

DECISION & ORDER

DOUGLAS J. LUSTIG, TRUSTEE,

Plaintiff,

V.

AP #97-2230

LEE A. D'AMICO,

Defendant.

BACKGROUND

On December 9, 1996, Lee A. D'Amico ("D'Amico") filed a petition initiating a Chapter 7 case. The caption of the petition indicated that D'Amico was an officer and shareholder of Hebert Construction Company, Inc. ("Hebert Construction"), and was formerly an officer, director and shareholder of Brown's Race, Inc. ("Brown's Race"). In his schedules and statements, required to be filed by Section 521 and Rule 1007, D'Amico indicated that: (1) he was also a shareholder of Hebert Industrial Insulation, Inc. ("Hebert Insulation"); (2) he had a 401(K) Plan account with Hebert Construction that had a balance of approximately $40,000; (3) he owned no real property; (4) he was indebted to M&T Bank ("M&T") in the amount of $5,000 for a credit card account incurred in 1985; and (5) there were possible claims against him, which he disputed, by the International Association of Heat and Frost Insulators and Asbestos Removers and Asbestos Workers, Locals #26 ("Local 26")

and #202. In addition, on his Schedule J, D'Amico claimed that he had monthly expenses of approximately $1,200 for mortgage payments, utilities, maintenance and insurance on a residence, even though he owned no real property.

A minute report of the Section 341 meeting of creditors conducted by D'Amico's trustee (the "Trustee") on January 10, 1997, indicated that there were possible assets in the case, and that the Trustee would be investigating fraudulent transfers. On February 21, 1997, the National Labor Relations Board - Region Three (the "NLRB") filed a Notice of Appearance. On February 27, 1997, the same day that it filed a proof of claim (the "NLRB Claim"), the NLRB filed a motion (the "Extension Motion") that requested an order extending its time to file complaints objecting to D'Amico's discharge or to have the Court determine that any debt due to entities represented by the NLRB were nondischargeable.

From the Extension Motion and the responses on behalf of D'Amico, it appears that: (1) in 1991, Brown's Race was formed to engage in the asbestos insulation business; (2) D'Amico and the other shareholder of Hebert Construction and Hebert Insulation (collectively, the "Hebert Companies") became the majority shareholders in Brown's Race, and D'Amico became an officer and director of Brown's Race; (3) at the time Brown's Race was formed, Hebert Insulation, which also was engaged in the asbestos insulation business, was a party to a Collective Bargaining Agreement with Local 26, whereas Brown's Race was formed to conduct business as a "non-union shop"; (4) in September 1991, representatives of Local 26 began asking the Hebert Companies for the details of the ownership and operation of Brown's Race, because the union was concerned that Hebert Insulation and Brown's Race had an "Alter-Ego" relationship; (5) on January 1, 1992, Local 26 filed an unfair labor practice charge (the "Union Charge"), and on February 19, 1992, the NLRB

filed an unfair labor practice complaint (the "NLRB Complaint") for the alleged failure of the Hebert Companies to disclose all of the requested information; (6) in the October 31, 1995 Decision & Order by an Administrative Law Judge of the NLRB (the "NLRB Decision"), it was determined that Hebert Insulation and Brown's Race were "Alter-Egos", and that certain claimants, including some of the former employees of Brown's Race, were entitled to receive back pay and benefits to conform to the Collective Bargaining Agreements entered into by the Hebert Companies; (7) the total amounts due pursuant to the NLRB Decision could be in excess of $1,800,000; (8) the NLRB alleged that D'Amico's participation in the operation of the Hebert Companies and Brown's Race could render him potentially personally liable for the amounts due pursuant to the NLRB Decision; (9) in March 1993, D'Amico sold his interest in Brown's Race to another minority shareholder; (10) the Hebert Companies ceased doing business during 1995; and (11) as of the date the Extension Motion was filed, the NLRB had not taken any steps to obtain compliance with the terms of the NLRB Decision, or to fix the personal liability of D'Amico, if any, for all or a portion of the amounts due under the Decision.

On October 9, 1997, the Trustee commenced an adversary proceeding (the "Adversary Proceeding") against D'Amico and Norine D'Amico, his spouse. The Complaint in the Adversary Proceeding alleged that: (1) D'Amico had transferred to his spouse, Norine D'Amico, his interests in three parcels of real property by deeds dated May 15, 1992; and (2) pursuant to Section 544, the Trustee could avoid these transfers because they were avoidable fraudulent conveyances under Article 10 of the New York Debtor and Creditor Law.

The Complaint in the Adversary Proceeding indicated that D'Amico had transferred to Norine D'Amico his: (1) tenancy by the entirety interest in 5792 Yahn Road (the "Yahn Road

Property"), the former residence of D'Amico and his spouse; (2) tenancy by the entirety interest in 108 Harmony Beach Road (the "Harmony Beach Property"), property located on Seneca Lake in the Town of Geneva, New York, the current residence of D'Amico and his spouse; and (3) fee simple interest in an approximately forty-acre parcel of property on Beers Hollow Road (the "Beers Hollow Road Property"), used by D'Amico before and after his marriage to Norine D'Amico for hunting and recreation.

The Complaint in the Adversary Proceeding further alleged that: (1) the transfers to Norine D'Amico were made by D'Amico with the actual intent to hinder, delay and defraud creditors, and that they were also constructively fraudulent; (2) D'Amico received no consideration from Norine D'Amico when he made the transfers to her; (3) in October 1996, approximately two months before D'Amico filed his petition, the Yahn Road Property was sold to a third-party for approximately $134,000; and (4) a significant portion, if not all, of the net proceeds of the sale of the Yahn Road Property had been utilized to remodel and improve the Harmony Beach Road Property where D'Amico and his spouse currently resided.

By an Answer and a Notice to Admit, D'Amico contended that: (1) at the time he transferred his interests in the three parcels of real property to Norine D'Amico, he was solvent and was not rendered insolvent by the transfers; (2) during 1992, 1993, 1994, 1995, and until approximately thirty days before he filed his petition in 1996, he had paid all of his personal obligations as they became due; (3) his scheduled indebtedness to M&T of approximately $5,000 was paid post-petition by Norine D'Amico; (4) with the payment of M&T and his reaffirmation of a boat loan, none of the obligations which he had scheduled in his bankruptcy were in existence on May 15, 1992, when the transfers to Norine D'Amico were made; and (5) at no time before or after May 15, 1992, did he

engage in business as an individual; his only involvement in the operation of any business was as an employee or an officer of a corporation.

After the Court conducted a series of pretrial conferences and the parties unsuccessfully attempted to negotiate a global settlement with the affected labor unions and the NLRB, a trial in the Adversary Proceeding was conducted on September 3, 1998. D'Amico testified at the trial, and certain parts of the deposition testimony of Norine D'Amico were made a part of the record.

At trial, D'Amico testified that: (1) the Harmony Beach Road Property was acquired by him in 1988 or 1989 for $80,000, and until 1996 it was used by D'Amico's family as a summer residence; (2) prior to May 15, 1992, D'Amico paid all of the expenses related to the Yahn Road, Harmony Beach Road and Beers Hollow Road Properties; (3) prior to May 15, 1992, D'Amico: (a) had negotiated the Collective Bargaining Agreements on behalf of the Hebert Companies; and (b) was the labor superintendent for the Hebert Companies who interfaced regularly with the union representatives on labor related issues, including securing necessary union workers for jobs; (4) there were some customers of Brown's Race which had also been customers of Hebert Insulation (*See* Plaintiff's Exhibit 23 at trial); (5) he had transferred his interest in the Yahn Road Property to Norine D'Amico for no consideration, and afterwards he continued to live there and pay all of the ongoing expenses of the Yahn Road Property until it was sold in 1996; (6) when the Yahn Road Property was to be sold, he, together with Norine D'Amico, agreed to sell the property for a certain price, and to move to the Harmony Beach Road Property; (7) he had transferred his interest in the Harmony Beach Road Property to Norine D'Amico for no consideration, and afterwards he continued to use the property and pay all of the ongoing expenses of the Harmony Beach Road Property and in 1996, when he and Norine D'Amico made the Harmony Beach Road Property their permanent residence

after the sale of the Yahn Road Property, D'Amico continued to pay all of the expenses; (8) the net proceeds of the sale of the Yahn Road Property, after the payment of the existing mortgage on the property, were used, together with additional monies obtained through a home equity loan, to remodel and improve the Harmony Beach Road Property; (9) he had acted as the general contractor in connection with the improvements made to the Harmony Beach Road Property; (10) he was aware of the Union Charge and NLRB Complaint on May 15, 1992, when he transferred the properties to Norine D'Amico, and he was aware that the Hebert Companies had obtained counsel in connection with the Charge and Complaint; (11) on May 15, 1992, when he transferred his interests in the properties to Norine D'Amico, he thought that the Union Charge and NLRB Complaint were minor matters; (12) it was not until December 1995, that he first learned that there may be pass-through personal liability to him as a result of the NLRB Decision; (13) he believed that Brown's Race had been formed properly, with the advice of expert legal counsel, so that there would be no possibility of a "Double Breasting" or "Alter-Ego" finding; and (14) he understood that if Brown's Race had not been formed properly to avoid an "Alter-Ego" finding, there could be very serious consequences for him personally.

D'Amico also testified that: (1) he transferred his interests in the properties to Norine D'Amico on May 15, 1992 for estate planning reasons; (2) his father and uncle had died in their fifties and he saw the real estate which they owned tied up for a long time in probate proceedings, which was not in the best interests of their wives and children; (3) approximately three years before the transfers, he and Norine D'Amico started discussing the need to protect Norine and the children in case of his death, but it had taken several years for them to complete the transfers of the properties with the help of an attorney; (4) he had never discussed with Norine D'Amico any of his business

affairs or the affairs of the Hebert Companies or Brown's Race, and prior to the May 15, 1992 transfers, he never discussed the Union Charge or the NLRB Complaint with her; (5) he was not exactly sure what would have happened with regard to the properties had he not transferred them to Norine D'Amico before he passed away; (6) he was not exactly sure what problems they had solved by transferring his interests in the properties to Norine D'Amico on May 15, 1992; (7) at the time of his death, his father was the sole owner of a number of parcels of income property, which had been tied up in probate proceedings; (8) at the time of the transfers to Norine D'Amico, there was "Key Man" insurance in effect with the Hebert Companies, in the face amount of $1,000,000, which had been obtained to allow the Hebert Companies to repurchase his stock from his estate; (9) prior to May 15, 1992, he and Norine D'Amico had not done any other estate planning, they had just decided to have him transfer his interests in the properties to Norine D'Amico; (10) at the time of the transfers, neither he nor Norine D'Amico had a will, and they had not asked the attorney who prepared the deeds to help them prepare any wills; and (11) although they began a formal estate planning process at some time after the transfers, no wills had ever been executed by him or Norine D'Amico.

The testimony of Norine D'Amico, given at a February 23, 1998 examination before trial, was consistent with the testimony given by D'Amico at trial.

DISCUSSION

I. Avoidability Under Section 276 of the Debtor and Creditor Law

Since the transfers by D'Amico of his interests in the Yahn Road Property, the Harmony Beach Property, and the Beers Hollow Road Property (collectively, the "Property Transfers")

occurred more than one year prior to the filing of his bankruptcy petition, the Trustee is not able to avoid the Transfers as fraudulent conveyances pursuant to the provisions of Section 548. However, the Trustee may avoid the Property Transfers pursuant to the provisions of Section 544(b),[1] if the transfers are avoidable pursuant to the provisions of applicable state law, in this case Article 10 of the New York Debtor and Creditor Law, by an existing creditor of the debtor.

Based upon all of the facts and circumstances presented, the Court finds that the Property Transfers are avoidable by the Trustee as fraudulent conveyances pursuant to the provisions of Section 276 of the New York Debtor and Creditor Law,[2] because there is sufficient evidence to conclude that the Transfers were made by D'Amico with the actual intent to hinder, delay or defraud then-existing or future creditors, specifically employee and labor union related creditors due to his involvement in both the Hebert Companies and Brown Race.

The burden of proof to establish actual fraud under Debtor and Creditor Law Section 276 is upon the creditor who seeks to have the conveyance set aside, and the standard for such proof is clear and convincing. *In re Hickey*, 168 B.R. 840 (Bankr. W.D.N.Y. 1994); *Marine Midland v. Murkoff*, 120 A.D.2d 122, 126, 508 N.Y.S.2d 17 (1986), *appeal dismissed*, 69 N.Y.2d 875, 514 N.Y.S.2d

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[1] Section 544(b) provides that:

> The trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under Section 502 of this title or that is not allowable only under Section 502(e) of this title.

[2] Section 276 of the New York Debtor and Creditor Law provides:

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumes in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

1029, 507 N.E.2d 322 (1987). Fraudulent intent, by its very nature, is rarely susceptible to direct proof and must be established by inference from the circumstances surrounding the allegedly fraudulent act. *Marine Midland*, 120 A.D.2d at 128, 508 N.Y.S.2d 170.

Consideration of the following factors resulted in the Court's finding that the Property Transfers are avoidable fraudulent conveyances pursuant to the provisions of Section 276 of the New York Debtor and Creditor Law and Section 544(b) of the Bankruptcy Code:

1. The Property Transfers were made by D'Amico to his spouse for no consideration.
2. Subsequent to the Property Transfers, D'Amico: (a) continued to use and enjoy each of the properties in the same manner as he did prior to the Transfers; (b) continued to pay all of the expenses of the properties; and (c) and his spouse, Norine D'Amico, continued to treat the properties as if D'Amico still had the same legal and beneficial interest in them as prior to the Transfers. This is particularly evident from the participation of D'Amico in all of the decisions involving the sale of the Yahn Road Property.
3. The Property Transfers were made only a few months after the Union Charge and the NLRB Complaint were filed.[3] D'Amico, as he testified at trial, was well aware of the importance of structuring the formation and operation of Brown's Race correctly, and that the economic consequences and liabilities of the failure to do so could be significant. The evidence at trial also indicated that the Hebert Companies and

[3] If the Brown's Race business had been discontinued at the time of the Transfers and the Hebert Companies paid whatever resulting "Alter-Ego" liability they could, D'Amico may not have had to pay anything as the result of his potential personal liability. However, notwithstanding the Union Charge and the NLRB Complaint, the Hebert Companies and Brown's Race continued to be operated as before. This resulted in additional potential personal liability for D'Amico.

Brown's Race had retained attorneys in connection with the Union Charge and the NLRB Complaint, and that D'Amico was aware that the formation and operation of Brown's Race may not have been completed in a way sufficient to avoid an "Alter-Ego" finding.[4]

4. The explanation offered by D'Amico and Norine D'Amico for the Transfers, essentially that they were done for estate planning purposes, completely lacked credibility, for the following reasons:

   a. The Yahn Road Property and the Harmony Beach Property, which were owned by the D'Amicos as Tenants by the Entirety with a right of survivorship prior to the Property Transfers, would not have been probate assets in the event of D'Amico's death, the principal concern and reason the D'Amicos expressed for making the Transfers.

   b. The Beers Hollow Road Property, which was owned by D'Amico in fee simple prior to the Property Transfers, would have been a probate asset in the event of his death. However, it was non-income producing recreational property which his spouse and children could have continued to use during

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[4] Plaintiff's Exhibit 27, a copy of the NLRB Decision, set forth parts of the testimony of the Union Business Manager of Local 26, William Urquhart. At trial the parties stipulated that if Mr. Urquhart had been called as a witness, he would have testified identically with the testimony contained in the NLRB Decision, which included the following:

> "D'Amico replied that '[W]ell, we had to go back with Krause then and Krause told us we made three mistakes. One was using the same board of directors, officers, and owners. The second mistake was having the office in the same building. If we had it in Fairport or some place way out like that or further away from the center of Rochester, it would probably take you two years or more to make this connection.' D'Amico did not mention the third mistake."

and after the probate proceedings. Therefore, D'Amico's family would not have been impacted in any way by it being "tied up" in probate. In addition, in order to avoid it being a probate asset, the Property could simply have been deeded to the D'Amicos as Tenants by the Entirety.

c. The D'Amicos did not execute wills in connection with the Property Transfers, or even request that their attorney prepare a set of wills in connection with the Transfers. As a result, the Transfers of Yahn Road, Harmony Beach Road and Beers Hollow Road to Norine D'Amico presented immediate complications for D'Amico in the event that Norine predeceased him intestate. Under New York Law, her interests in those properties would pass not just to D'Amico, but to D'Amico and the D'Amicos' children.[5]

d. The Property Transfers were made with the participation of an attorney who must have questioned the propriety of the Transfers if the D'Amicos advised him that the Transfers were being made for the same estate planning purposes and to achieve the same estate planning goals that they testified to at trial. It would have been clear to their attorney, or any attorney, that the transfers of Yahn Road and Harmony Beach Road to Norine D'Amico, individually, were not necessary to accomplish those stated goals, and, furthermore, were counterproductive from an overall estate planning perspective without the execution of a will by Norine D'Amico devising the properties to D'Amico in the event that she predeceased him.

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[5] *See*, New York Est. Powers & Trusts §4-1.1.

e. D'Amico showed himself at trial to be an intelligent, thoughtful and thorough individual. He testified to having taken great care to research what was necessary in order to avoid an "Alter-Ego" finding in connection with the formation of Brown's Race, and to insure that counsel with special expertise was engaged in order to properly form the corporation and structure related operational matters. This demonstrated a pattern of behavior which is inconsistent with D'Amico executing the Property Transfers, with the involvement of an attorney, to accomplish the stated estate planning goals which: (1) were unnecessary; (2) could have been accomplished by other means; or (3) should never have been made without at least the execution of a will by Norine D'Amico in order to protect D'Amico's interests in the event she predeceased him.

f. The estate planning concerns that the D'Amicos testified to should have resulted in their taking title to the Harmony Beach Property, acquired in 1988 or 1989, in the sole name of Norine D'Amico, rather than as Tenants by the Entirety.

g. D'Amico testified at trial that he did not really know the overall estate planning implications of the Property Transfers.

5. The only reasonable explanation for the Property Transfers was that D'Amico was trying to put his real property interests outside the reach of those who might have claims against the Hebert Companies, Brown's Race and D'Amico because of the

formation, operation and continuing operation of Brown's Race. These entities included the employees of Brown's Race and Local 26.

II. Section 276-a of the New York Debtor and Creditor Law

The provisions of Section 276-a of the New York Debtor and Creditor Law require that the Court, having determined that the Property Transfers were made with intent to hinder, delay or defraud creditors, fix a reasonable attorney's fee award against D'Amico.[6]

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[6] Section 276-a of the New York Debtor and Creditor Law provides:

> In an action or special proceeding brought by a creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors to set aside a conveyance by a debtor, where such conveyance is found to have been made by the debtor and received by the transferee with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, in which action or special proceeding the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall recover judgment, the justice or surrogate presiding at the trial shall fix the reasonable attorney's fees of the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors in such action or special proceeding, and the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors shall have judgment therefor against the debtor and the transferee who are defendants in addition to the other relief granted by the judgment. The fee so fixed shall be without prejudice to any agreement, express or implied, between the creditor, receiver, trustee in bankruptcy, or assignee for the benefit of creditors and his attorney with respect to the compensation of such attorney.

III. Section 273 of the New York Debtor and Creditor Law

The Trustee has also alleged that the Property Transfers are avoidable pursuant to Section 273 of the New York Debtor and Creditor Law.[7]

With respect to the requirements of Section 273 of the New York Debtor and Creditor Law, the Trustee bears the burden of proving insolvency. *In re* Hickey, 168 B.R. 840 (Bankr. W.D.N.Y. 1994); American *Investment Bank, N.A. v. Marine Midland Bank, N.A.,* 191 A.D.2d 690, 692, 595 N.Y.S.2d 537 (1993). Based upon the evidence presented, the Court finds that the Trustee has not met his burden to show that D'Amico was insolvent when the Property Transfers were made in May and June of 1992.

IV. Sections 274 and 275 of the New York Debtor and Creditor Law

Since the Court has determined that the Property Transfers are avoidable fraudulent conveyances pursuant to the provisions of Section 544(b) and Section 276 of the New York Debtor and Creditor Law, which makes the Transfers avoidable by then-existing and future creditors, it is not necessary for the Court at this time to determine whether they are also avoidable fraudulent conveyances pursuant to the provisions of Section 274 and 275 of the New York Debtor and Creditor Law.

CONCLUSION

The Property Transfers are avoided pursuant to Section 544(b). The Trustee's request for attorneys' fees pursuant to the provisions of Section 276-a of the New York Debtor and Creditor Law is granted as to D'Amico in an amount to be set by the Court upon reviewing an application to

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[7] Section 273 of the New York Debtor and Creditor Law provides:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.

be submitted by the Trustee within thirty days from the entry of this Decision & Order. Should the Trustee determine that he wishes to pursue an award of attorneys' fees against Norine D'Amico pursuant to the provisions of Section 276-a of the New York Debtor and Creditor Law, he shall advise the Court in writing within thirty days from the entry of this Decision & Order, and a supplemental hearing will be scheduled by the Court. Norine D'Amico shall have prepared and delivered to the Trustee, within thirty days from the entry of this Decision & Order, deeds, in recordable form, reconveying Harmony Beach Road and Beers Hollow Road to the same state of title as prior to the Property Transfers, along with the necessary funds to record the deeds in the appropriate County Clerk's offices.

IT IS SO ORDERED.

____________/s/_________________
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: December 16, 1998