UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CHESTER J. DZIADOSZ and
JENNIFER A. DZIADOSZ — Case No. 97-11056 K
fka Jennifer A. Kotowski

Debtors

MARK S. WALLACH, Trustee in Bankruptcy
for Chester J. Dziadosz and Jennifer A.
Dziadosz

Plaintiff

-vs- — AP 98-1355 K

CHRISTINE A. KOTOWSKI

Defendant

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Attorney for Defendant

This matter was the subject of a trial on January 17, 2000. (After trial, the parties were given an opportunity to try to settle the matter, but it was thereafter reported to the Court that no settlement had been reached and that the matter would require decision.) This is an action by the Chapter 7 Trustee to recover monies that were transferred either as "loans" that remain unpaid, or that were fraudulent transfers under either 11 U.S.C. § 548 or state fraudulent transfer law, as incorporated by 11 U.S.C. § 544. The following constitutes the Court's findings of fact, conclusions of law and judgment.

Chapter 7 trustees sometimes have a near-impossible task in investigating transfers among family members. Here, the alleged fraudulent transfers or unrepaid loans were from Debtors Jennifer and Chester Dziadosz to Jennifer Dziadosz' mother, Christine Kotowski. The Chapter 7 Trustee could not have any personal knowledge of the events, unlike a true creditor who might have had personal dealings with the Debtor or the transferee or both at or around the time of the transfer. So the Trustee's quest for justice necessarily relies on the cooperation of parties who hope he fails.

In this case, over $40,000 was transferred by the Debtors to the Defendant over a period of approximately four years - - 1992 - 1996. The Trustee has stipulated that "credits" of about $30,000 should be allowed to the Defendant by virtue of either prior consideration or subsequent repayment. It is the remaining monies that are at issue, and the Defendant claims that every single penny of it was repaid or is supported by consideration.[1]

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[1]These transactions overlapped and then extended past a period when Jennifer Dziadosz had been embezzling several hundred thousand dollars from her employer. Much of those

The Court finds that under the unusual circumstances of this case, the Defendant had the burden of producing evidence of matters that were uniquely known to her, and that she failed to sustain that burden.

PLAINTIFF'S CASE-IN-CHIEF WAS STIPULATED

The parties stipulated that $40,247.26 had been transferred by one or the other of the Debtors to the Defendant over a period of approximately four years. They further stipulated that the Defendant should get a "credit" for $29,172.22, consisting of $20,000 repaid to Jennifer to go towards her criminal restitution payments, $3,000.00 in student loan payments that the Defendant made on the Debtors' behalf, two mortgage payments on the Debtors' house, two of the Debtors' insurance payments, some payments for day care for the Debtors' children, a payment to a bank of $1,370.00 on account of the Debtors, and another unspecified $1,170.23.

By further stipulation of the parties, the Plaintiff's case-in-chief was deemed "in" to the extent of the remaining $11,075.04.

The only evidence taken at trial was the Defendant's testimony and her exhibits as

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monies she spent freely and lavishly on herself and her husband, and other family. She served time in 1995 and 1996, and as part of her sentencing in 1995 was ordered to pay restitution in the amount of $389,155.92. There is no dispute about the fact that some $12,000 or more of the $40,000 was transferred to the Defendant after she learned of her daughter's embezzlement. (The facts regarding the Debtor's crimes came to the Court's attention in a *sua sponte* 11 U.S.C. § 707(b) proceeding early in this Chapter 7 case. A copy of the Court's Decision in that proceeding is attached hereto.)

her case-in-chief, and the cross examination by the Trustee. (There also was brief re-direct.)

THE EVIDENCE PRESENTED AND "FINDINGS OF FACT"

For reasons set forth later, the only Findings of Fact to be made here are that the Defendant testified as to many dozens of different transactions with or on behalf of the Debtors or other family members. The testimony is what it is. All of the implications that flow from that testimony are a mixed question of law and fact. And though the Court finds that the transfers and expenditures occurred, the Court rejects the Defendant's effort to explain how every penney she received from the Debtors was theretofore owed to her, or was somehow given back in kind later.

Apart from the testimony of the Defendant, the only evidence presented were documents she provided to the Trustee either directly (at a time that she represented herself *pro se*) or through her attorney. The documents contained lengthy, unsworn narrative statements written by the Defendant, as well as photocopies of various bank records, checks, and personal notes and records. The dozens of transactions between the Debtors and the Defendant, ranged from incidental monetary "favors" that one did for the other on an expectation of repayment, to transactions of thousands of dollars, such as transfers back or forth of $20,000, $4,000, $3,000, $6,000 or $7,500.

They are "undocumented" transactions in the sense that there never were any I.O.U.s, or exchanges or letters or receipts or joint-signature accounts as among the family

members. There are bank records, check stubs, blank checks, credit account statements. etc. And the Defendant claims to have maintained certain bank accounts, etc., exclusively for transactions with the Debtors, but that testimony was sometimes inconsistent. It sum, it is only the self-serving testimony of the Defendant that provides the alleged "nexus" between those documents and what can be learned about the financial relationship between the Defendant and the Debtors.

For example, there are dozens of instances of documents proving that the Defendant paid money to third parties such as grocery stores, car repairers and banks. On their face, these could well have been for Defendant's own benefit, and it is only from the Defendant's self-serving testimony that we learn that these were paid for the Debtors' benefit.

And there are major transactions that make little sense when described by the Defendant, but which have clear earmarks of fraud without such description. One example lies in (according to the Defendant's testimony) Jennifer Dziadosz having asked her mother to pay Jennifer's mother-in-law $4000 toward the Debtors' purchase of the mother-in-law's home, then the Debtors' paying her back. That reimbursement supposedly was part of the money eventually transferred by the Debtors to the Defendant. There is no explanation offered as to why this was done this way. For another example, during a ninety-day period in the summer of 1994, the Debtors "loaned" $20,000 to the Defendant (to use in buying a condo) through four checks, two of which were written on the same day. No explanation. These transactions, clearly involving embezzled funds or the fruits of embezzlement, suggest money laundering, whether or not it was

intended as such. (Apparently, the family thought she was merely "doing well" at work as an office manager.)

For reasons stated below, the Court rejects certain of the Defendant's testimony, and finds the rest of it insufficient to sustain her burden of production here. And it is important to note that the documents presented were not independent corroboration of the Defendant's story. Rather, it was the Defendant's testimony that sought to corroborate the documents that did not, of themselves, bespeak benefit to the Debtors.

DISCUSSION

Cash transfers are simply "purchases" when they have obvious consideration that changes hands, such as a car or a sofa. And they are simply "payments" if they satisfied an I.O.U., for example. Most of the matters contested here, on the other hand, involved hidden or latent consideration, if any at all. Within that category of transfers, a single transfer from a daughter and her husband to the mother of one of them can be viewed at least three ways at the same time, (1) a loan, (2) a transfer in trust, and consequently no "transfer" at all, or (3) a fraudulent transfer. Some of the monies that were transferred to the Defendant here are agreed to have been made in contemplation of her making ordinary payments on the Debtors' obligations or ordinary expenditures for their needs, while her daughter attended to her criminal prosecution and her jail time. These might be viewed as "loans" to be "repaid" by making such payments or

expenditures. In that event, they would be monies "owed" to the bankruptcy estate except to the extent that the Defendant sustains the burden of proving them "paid."

They also might be viewed as monies to be held "in trust" by the Defendant, in which she would now owe her fiduciary duty to the bankruptcy estate, except to the extent that she has sustained the burden of proving that her duty was discharged by making such payments or expenditures.

And they might be viewed as being *ipso facto* fraudulent transfers (whether in trust or not) - - transfers for which (1) a promise to provide future support cannot constitute good consideration, and (2) actual later expenditures or payments in support of the transferors cannot constitute new "value." See 11 U.S.C. § 548 (d)(2)(A) ("'value' does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor"). Under state law, this result flows logically from the more obvious holdings, such as *Young v. Heermans*, 66 N.Y. 374 (1876), where a man who was in debt transferred everything he owned to another, in trust for himself and for his own benefit during his life, and for payment of his debts, etc., only after his death. The Court of Appeals stated unequivocally: "Upon proof of an existing indebtedness, the fact that the grant was of all the property of the debtor in trust for himself and for his use would be conclusive evidence of fraud and it could not be overcome by any proof of innocent intention. . . . The direct and primary trust was for the use of the grantor during his life and the effect was necessarily to postpone the payment of debts and delay his creditors until after his death." *Young*, 66 N.Y. 374. Subsequent decisions extended this ruling to cases in which less than all

property was transferred, and the fraud was held proven as to"such an amount as will operate to hinder or delay existing creditors or prevent them from enforcing their just claims against him." *Borenstein v. Borenstein*, 11 N.Y.S.2d 888 (N.Y. Sup. Ct. 1939) ("An agreement for future support is not a sufficient consideration as against existing creditors for a conveyance . . . ").

Thus, the monies transferred to the Defendant in expectation of Jennifer's sentencing and possible prison term, were *ipso facto* fraudulent transfers. Whether the Defendant yet knew it, the Debtors knew that Jennifer owed hundreds of thousands of dollars to her employer at the same time that they transferred monies to the Defendant earmarked for specific future needs of the Debtors for support, NOT for restitution or for payment of all of their then-existing creditors.

Certainly by the time Jennifer confessed her crime, the Defendant here knew that by taking money to be expended for the daily needs of Chester and the children she (the Defendant) was assisting in placing those monies beyond the reach of the Debtors' creditors. Furthermore, although she claims to have maintained a detailed "log" of what she handled for the Debtors, she can't find it. So we are left with self-serving testimony about the significance of the various bank records, which on their face corroborate nothing. Were the contemporaneous log book to have been produced, then the bank records might have been corroboration.

The testimony itself was often vague, equivocal, and inconsistent. In the letters included in the stipulated Exhibits, the Defendant used such language as this, as to much of what she has sought to reconstruct.

- In Exhibit #2 - "$800 was, to the best of my knowledge, either to repay a debt or for a deposit on a wedding expense"

- "$300 . . . I think, in fact I'm pretty sure was monies to pay her mortgage to her mother-in-law"

- $603.88 . . . As I recollect I paid for repair of her Chrysler New Yorker, most likely because I owed her the money or she was going to pay me back."

- In Exhibit # 3 - "I cannot be absolutely positive [about a $580 payment] but I believe it was payment made to me for her bedroom set or for airfare I charged for a trip we took."

- $96 . . . based on the fact it was shortly before Christmas it was probably payment for items ordered on her behalf."

- "possibly reimbursement was made to me per the 2/23/93 check of $100.00."

- "check #3810 dated March 17, 1993 may have been my paying for her car repair $603.88 . . . but I can't say for sure, it just seems like something we'd do."

- "re: check # 115 [$4000] . . . to the best of my knowledge I recall writing this check as a loan, at the time, because other monies were tied up with the wedding. I, in fact, need to 'dig a little deeper' to determine if this money was ever repaid to me."

In Exhibit #4 - "$4000.00 deposit . . . unsure, possibly payment from Walker Information, Inc."

- "$7937.52 deposit . . . assume to be inheritance proceeds plus additional monies."

- "$5000.00 check #4505 . . . apparently paid to Bank of New York, unclear as to what notation in check register means."

- "$1577.00 deposit . . . not sure, entry not in this check register."

The Defendant emphasizes that she was endeavoring in those exhibits to recall events that were anywhere from 2 to 7 years past at the time she sought to describe them, and she claims to have recollection problems due to the "hectic" events of certain years, and due to certain undisclosed ailments that affect her powers of recollection, and due to the shock of her daughter's crimes. She claims that prior inconsistencies should be forgiven and her trial testimony only be considered, because, she claims, her memory gets better the more she thinks about a transaction. Well-settled principles of law exist precisely to address this problem. Someone who has been shown to have received a loan, has the burden of proving payment,[2] such as by getting a receipt from the lender (here the Debtors). Someone who acts as trustee must maintain adequate trust records.[3] Someone who knows that she is taking money from someone who has overwhelming debts cannot escape liability by claiming that she paid back "in kind" in the form of making purchases for the transferor's family, or paying certain specific debts but not others.[4] Vague, inconsistent, self-serving testimony about hidden or private consideration does not defeat the case-in-chief that was here stipulated "in."

The Trustee has now stipulated that $23,000 of the $40,247.26 in transfers are not assailable - - $20,000 because it was a loan proven to have been repaid (repayment was traced to restitution payments to the employer), and $3,000 to relieve the Defendant of a loan she took out

[2]See 60 Am. Jur.2d, Payment § 171 (1987).

[3]See76 Am. Jur.2d, Trusts § 405 (1992).

[4]See the *Young* and the *Borenstein* cases, discussed above.

for her daughter's education (the Trustee generously accepting, as true, the Defendant's claim that there existed an enforceable promise by which that loan was Jennifer's loan to pay even though the Defendant was the borrower). The Trustee also stipulated to "credits" of another $6,172.22, some of which credits are attributable to "support" items for which this Court would not have given credit, if the Court were ruling thereupon.

Of the $11,075.04 remaining in issue, it is conceivable that if the proper evidence had been provided, the Defendant could have established that some portions thereof had valid prior consideration. For example, it seems that the Defendant might well have incurred a few hundred dollars of expenses on Jennifer's behalf, later reimbursed by Jennifer within the challenged transfers, in connection with some wedding or bridal shower expenses as to which there was some testimony and some documents. Other testimony went to the small favors all families are familiar with, a few dollars here or there, perhaps even a hundred or two, balanced out later. But no other witnesses were called for the defense.

As to transactions for which prior consideration, rather than later consideration, is claimed, the two governing principles are: (1) transfers among close family members that operate to the detriment of the transferor's creditors are always scrutinized with the utmost care,[5] and (2) although the burden of proof is on the Plaintiff, the burden of going forward is on the transferee when the matters alleged to constitute prior consideration are exclusively within the transferee's

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[5]See, for example, *Chase Manhattan Bank v. Doktor*, 162 N.Y.S.2d 84, 86 (N.Y. Sup. Ct. 1957) (quoting *Hickock v. Cowperthwait*, 119 N.Y.S. 390, 391 (N.Y. App. Div. 1909); see also *ACLI Gov't. Sec., Inc. v. Rhoades*, 653 F.Supp. 1388, 1391 (S.D.N.Y. 1987).

control and knowledge.[6] Thus, even as to the garden-variety issue of whether there was good, prior consideration for the transfer, and even though the burden of proof that the transfer was a "fraudulent" transfer remains always on the Plaintiff, it is clear that when transfers among family members involve secret or clandestine consideration, and the burden of production has shifted to the transferee,[7] that burden is "heavier" than in a non-intra family circumstances.[8] The very number and complexity of the transactions at issue here, together with the absence of adequate records kept by either the Debtors or the Defendant, leads to the kinds of inconsistencies, surmises and guesses that have flawed the Defendant's self-serving testimony.

CONCLUSION

In all, although the vagueness and uncertainty, inconsistency and improbability of much of the Defendant's testimony seems to preclude a finding that she testified falsely, I find that the Defendant failed to present positive, consistent, clear and direct evidence,[9] that would sustain her burden of producing credible evidence that the remaining balance of the transfers

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[6]See, for example, *Gelbard v. Esses*, 465 N.Y.S.2d 264, 268 (N.Y. App. Div. 1983).

[7]See *U.S. v. McCombs*, 30 F.3d 310, 325 (2nd Cir. 1994); see also *Baker v. Power Securities Corp.*, 948 F. Supp. 266 (W.D.N.Y. 1996).

[8]See *ACLI Gov't Sec., Inc. v. Rhoades*, 653 F. Supp. at 1391; *Gray v. Fill (In re Fill)*, 82 B.R. 200, 216 (Bankr. S.D.N.Y. 1987).

[9]See 81 Am. Jur. 2d, Witnesses § 1033 (1992).

were loans that were repaid, or that they were trust funds properly expended, or that they were supported by valid prior consideration. Judgment will enter for $11,075.04 plus costs and interest from the date of the Complaint.

SO ORDERED.

Dated: Buffalo, New York
April 3, 2000

/s/ Michael J. Kaplan

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