

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re:

Robert W. Hickey,

BK. NO. 92-22292

Debtor.

Douglas J. Lustig, Trustee,

Plaintiff,

A.P. NO. 93-2133

vs.

**Robert W. Hickey, Margaret M. Hickey
and Gary E. Wood,**

DECISION & ORDER

Defendants.

BACKGROUND

On June 27, 1994, this Court filed a Decision & Order in the above adversary proceeding (the "Decision").¹

By motion (the "Motion for a New Trial") dated July 6, 1994 and returnable on August 17, 1994, the Trustee has moved for an order amending or supplementing this Court's findings of fact and conclusions of law or altering or amending the Decision, or for a new trial, on the grounds that the Court may have overlooked or misapprehended certain controlling facts or principles of law in the Decision.

By cross-motion (the "Cross-Motion for a New Trial") dated August 8, 1994, Wood has cross-moved for the same relief.

In this adversary proceeding and at trial, the Trustee alleged that the transfer by the Debtor of his interest in Pittsford-Palmyra Road to Margaret Hickey was an avoidable fraudulent

¹ The terms used in this Decision & Order will have the same meanings as defined in the Decision.

conveyance pursuant to the provisions of Sections 273 and 278 of the New York Debtor and Creditor Law. In the Decision, the Court found that the Trustee had not met his burden of proof to show that the Debtor was insolvent at the time of the transfer or was rendered insolvent by the transfer, and held that the transfer was therefore not avoidable pursuant to Section 273.

The Court made the determination of non-avoidability pursuant to Section 273 after it had already found that the transfer was avoidable by the Trustee pursuant to the provisions of Sections 276 and 278 of the New York Debtor & Creditor Law as a transfer made with the actual intent to hinder, delay or defraud creditors. Therefore, the Court's determination as to avoidability pursuant to Section 273 was not necessary to the Trustee's avoidance of the transfer.

In the Motion for a New Trial, the Trustee contends that he did meet his burden of proof to show that the Debtor was insolvent at the time of the transfer, because under relevant New York case law the Trustee was entitled to a presumption that the Debtor was insolvent once it was established that there was a transfer between husband and wife for no consideration while the transferor debtor had unpaid creditors. Acknowledging the distinction between a rebuttable presumption and a burden of proof, the Court believes, and believed at the time of the Decision, that there was sufficient evidence presented at trial, that evidence being the Debtor's May 11, 1988 Personal Financial Statement (Pl. Ex. 17) and his September 4, 1989 Personal Financial Statement (Pl. Ex. 18), for the Court to find that the Debtor was not insolvent at the time of the transfer or at least to rebut the asserted presumption and require the Trustee to present further evidence to support a finding that the Debtor was insolvent at the time of the transfer or was rendered insolvent by the transfer.²

² In the Decision the Court pointed out the unresolved issue as to when the transfer was perfected for purposes of Sections 273 and 278 of the New York Debtor & Creditor Law, acknowledging that perfection was sometime between the execution of the Assignment on December 1, 1988 and the recording of the Assignment on November 16, 1990.

These Financial Statements were introduced into evidence by the Trustee³ and on their face showed that the Debtor was solvent at the time of the execution of those Financial Statements. Even if the Debtor's interest in Pittsford-Palmyra Road was deleted from them, each of the Financial Statements still would have shown that the Debtor was solvent. Although evidence was introduced by the Trustee to show that the Debtor had other liabilities at the time, no evidence was presented which would indicate that the asset values set forth by the Debtor on the Financial Statements, other than the value of his interest in Pittsford-Palmyra Road, were overstated or otherwise incorrect.

In summary, the Court felt that this direct evidence of solvency during the relevant periods covered by the financial statements was sufficient for the Court to make a determination that the Trustee had not met his burden to prove that the Debtor was insolvent at the time of the transfer or rendered insolvent by the transfer, notwithstanding any rebuttable presumption that the Debtor might otherwise have been entitled to in the absence of such direct evidence.

Notwithstanding the Court's findings with respect to insolvency for purposes of the avoidability of the transfer of Pittsford-Palmyra Road from the Debtor to Margaret Hickey pursuant to Sections 273 and 278 of the New York Debtor and Creditor Law, the more important issue on the Trustee's Motion for a New Trial is whether the Trustee met his burden of proof under Section 550 of the Bankruptcy Code to show that Wood entered into the mortgage transaction in question with knowledge, actual or constructive, of the voidability of that transfer.

In the Decision, the Court determined that on all of the facts and circumstances presented, Wood had a duty to make a reasonable inquiry into the financial condition of the Debtor at the time of the transfer. For purposes of Section 550 of the Bankruptcy Code, whether the Debtor was or was not insolvent at the time of the transfer is not what the Court was required to determine. The issue

³ A review of the trial transcript, pages 44-46, indicated that they were not offered or accepted into evidence for a stated limited purpose.

for decision was what Wood or his representatives would have found if they had made the required reasonable inquiry into the financial condition of the Debtor at the time of the transfer to Margaret Hickey. A third party, such as Wood or his representatives, making a reasonable good faith inquiry in 1991 into the financial condition of the Debtor at the time of the transfer to Margaret Hickey, could reasonably and in good faith have determined that the Debtor was solvent and was not rendered insolvent by the transfer, even if the Debtor was in fact insolvent. A finding that the Debtor was insolvent for purposes of avoidability pursuant to Sections 273 and 278 of the New York Debtor & Creditor Law at the time of the transfer, made after a lengthy trial in 1994 where the Debtor's financial condition and perhaps relevant financial statements might be highly scrutinized, would not be inconsistent with Wood and his representatives concluding after a reasonable inquiry in 1991 that the Debtor was solvent at the time of the transfer.

Even though the Trustee may be entitled to an initial rebuttable presumption of insolvency for purposes of a determination of avoidability pursuant to Sections 273 and 278 of the New York Debtor & Creditor Law, he is not, in this Court's opinion, entitled to such a presumption for purposes of Section 550 of the Bankruptcy Code. Any such presumption under Article 10 of the New York Debtor & Creditor Law could never be the sole basis on which the Court would find that a defendant, such as Wood, in making a reasonable inquiry into the financial condition of a Debtor would have found the Debtor to be insolvent or otherwise be the basis to change the Trustee's burden of proof under Section 550.

Although the Trustee and his counsel may have been relying at trial on the belief that a rebuttable presumption of insolvency was sufficient for him to meet his burden of proof on the issue of insolvency for purposes of avoidability pursuant to Sections 273 and 278 of the New York Debtor and Creditor Law, notwithstanding the direct evidence of the Debtor's financial condition at times relevant to the transfer, there could not have been a reasonable belief that this would affect the Trustee's burden of proof to show what Wood or his representatives would have found if they made

the reasonable inquiry into the Debtor's financial condition which the Trustee asserted they were required to make. This assertion of this duty to make a reasonable inquiry was at the heart of the Trustee's case. However, the Trustee did not, in this Court's opinion, meet his burden of proof to show that Wood or his representatives would have found that the Debtor was insolvent after a reasonable inquiry into the Debtor's financial condition. Although the Court could in speculation set forth a multitude of possible conclusions that Wood and his representatives could have reached on a multitude of possible reasonable inquiries, clearly the Trustee did not prove to this trier of fact on the evidence presented that a reasonable inquiry by Wood and his representatives would have led them to conclude, in good faith, that the Debtor was insolvent at the time of the transfer of his interest in Pittsford-Palmyra Road to Margaret Hickey.

For the foregoing reasons and because the Court believes that the interests of justice are best served by the Decision, the Motion of the Trustee for an order amending or supplementing this Court's findings of fact and conclusions of law or altering or amending the Decision or for a new trial is in all respects denied.

The Cross-Motion for a New Trial contends that the Court, in its Decision & Order erred in finding that Wood and his representatives had a duty of inquiry into the financial condition of the Debtor at the time of the transfer of his interest in Pittsford-Palmyra Road to Margaret Hickey. Wood contends that the Court's finding of such a duty of inquiry was contrary to the decision of the United States Court of Appeals for the Second Circuit in *In re Locust Building Co.*, 299 F. 756 (2d Cir. 1924), *cert. denied sub nom*, 265 U.S. 560 (1924).

At page 9 of its Memorandum of Law in Support of the Cross-Motion, Wood asserts that in that case the Second Circuit held that:

Attorneys who are examining title for the purpose of certifying as to the validity of a mortgage are concerned with the record title, but have no occasion to inquire into the bona fides of the fee title of the mortgagor.

