

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

In Re:

Christian & Mabel Rasmussen,

CASE NO. 95-22275

Debtor(s).

Douglas J. Lustig, Trustee,

Plaintiff(s),

A.P. NO. 96-2072

vs.

DECISION & ORDER

Eugenia Rasmussen and Seth Petre,

Defendant(s).

BACKGROUND

On September 29, 1995, Christian Rasmussen and Mabel Sensenig Rasmussen (the “Debtors”) filed a petition initiating a Chapter 7 case. The Debtors’ schedules indicated that: (1) they owned no real property; (2) the National Bank of Geneva (“NBG”) had a perfected security interest in certain assets which had been used in a business conducted by Christian Rasmussen; (3) the Debtors had creditors holding unsecured non-priority claims in the amount of \$135,167.00; (4) the Debtors’ unsecured creditors included: (a) Ronnie Rasmussen (“R. Rasmussen”), who was scheduled as having a claim of \$13,500.00 for a 1994 loan; (b) Seneca Falls Savings Bank, which was scheduled as having a claim of \$4,000.00 for a 1994 business loan on which R. Rasmussen was a co-debtor; and (c) Seth Petre (“Petre”), Box 563, Everett, Pennsylvania, who was scheduled as

having a claim of \$25,000.00 for a 1994 loan (the “Yellow Tavern Road Loan”); and (5) the Debtors had no free and clear non-exempt assets for distribution to their creditors.

On October 17, 1995, Douglas J. Lustig (the “Trustee”) was appointed by the Office of the United States Trustee as the Debtors’ Chapter 7 Trustee.

On April 22, 1996, the Trustee commenced an adversary proceeding (the “Adversary Proceeding”) against Eugenia Rasmussen (“E. Rasmussen”) and Petre. The Trustee’s Complaint alleged that: (1) on or about June 21, 1994, the Debtors had purchased real property, commonly known as 1234 Yellow Tavern Road, Waterloo, New York (“Yellow Tavern Road”), for the sum of \$26,000.00 from a Barbara L. Arthur; (2) the Debtors had made this purchase with the proceeds of the Yellow Tavern Road Loan; (3) on or about June 20, 1995, within one year prior to the filing of their petition, the Debtors executed and delivered a deed of Yellow Tavern Road to E. Rasmussen which indicated that at the time the deed was recorded, no transfer tax was paid; (4) E. Rasmussen had advised the Trustee that subsequent to the transfer of Yellow Tavern Road, she had obtained a mortgage loan from NBG and used the proceeds to pay \$25,000.00 to defendant Petre; (5) Petre was a family friend of the Debtors, which is why he entered into an unsecured loan in an informal manner and under other than ordinary business terms with the Debtors; (6) as a result of Petre’s close relationship with the Debtors’ family, he had the ability to influence the Debtors, and, therefore, should be deemed to be an “insider” by the Court; (7) E. Rasmussen is Christian Rasmussen’s mother, and therefore, is an “insider”; (8) the Debtors were insolvent at the times of the transfer of Yellow Tavern Road to E. Rasmussen and the payment to Petre; (9) the transfer of Yellow Tavern

Road was avoidable as a fraudulent conveyance since it was made with the specific intent to hinder, delay or defraud creditors of the Debtors; and (9) the transfer of Yellow Tavern Road and the payment to Petre were avoidable as preferential transfers.

On July 10, 1996, E. Rasmussen filed a Response (the "Rasmussen Response") in the Adversary Proceeding which advised the Court that: (1) she had never met Petre and had only spoken to him once on the telephone; (2) "I realize the time span from the title transfer to the filing of the bankruptcy are relatively [sic] close and just within the legal limitations (I learned this yesterday) so it would look like intent to hinder. I had no knowledge of my son's enormous debt or any clue that he would one day file bankruptcy. It was not even thought of as an option because it would mean excommunication from his church." (the Rasmussens and Petre are Mennonites); (3) Petre had lent her husband \$45,000.00 without security when their barn burned down; (4) when the Debtors wanted to purchase Yellow Tavern Road, her husband had called Petre to request that he lend them the money, which Petre did, without security; (5) a year later, she had learned that the Debtors had not paid Petre anything on the loan; (6) since she and her husband had asked Petre to lend the Debtors the money, they felt responsible to see that he was repaid; (7) she had the title to Yellow Tavern Road turned over to her for a dollar to use as collateral to secure a loan with NBG, the proceeds of which were used to pay Petre; (8) after having paid Petre the \$25,000.00 proceeds of the NBG loan, Petre contacted her and advised her that he had made another loan to Christian Rasmussen of \$22,000.00.

On July 8, 1996, Petre filed a Response (the "Petre Response") in the Adversary Proceeding

which advised the Court that: (1) on March 18, 1994, he had made the Yellow Tavern Road Loan which was evidenced by a Note and was to be repaid after one year or upon demand; (2) on July 15, 1994, the Debtors had obtained an additional loan from Petre of \$22,000.00, which was not evidenced by a Note and was to be repaid by March, 1995; (3) the Debtors had made some interest payments to Petre, but had made no payments towards the outstanding \$47,000.00 in principal; (4) prior to June, 1995, Petre had made demand on the Debtors for the repayment of the \$47,000.00 which he required to purchase a farm in Bedford County, Pennsylvania in the summer of 1995; (5) “The money we had saved from years of hard word I simply loaned to them because of the opportunity to help another as Jesus taught in the gospel. Our Mennonite Church fellowship makes a practise [sic] of Christ’s teaching of sharing with the needy and supporting one another and so living by the Holy Scriptures.”; (6) Petre was not in any way involved in the transfer of Yellow Tavern Road from the Debtors to E. Rasmussen; (7) the Debtors desired to sell Yellow Tavern Road to relieve themselves of the burden of debt, and E. Rasmussen agreed to buy it from them; (8) Petre received a cashier’s check of \$25,000.00 from a New York bank on July 4, 1995; (9) the agreed interest rate for the Yellow Tavern Road Loan was 4%; (10) although Petre was a friend of R. and E. Rasmussen, they had only been to his home once, although they had visited several times by telephone, and the terms “close relationship” and “family relationship” were hardly suitable to use to describe their type of contact; (11) “The terms ‘unsecured loan’, ‘informal manner’ and ‘other than ordinary business’ ask for some explanations as follows. The manner in which we entered into the loan is the ordinary custom of Mennonite brethren in our church group. This is our way to help

a young man get a start in providing for himself and his wife. It comes from brotherly love. We believe in being just and honest in our business dealings. We believe in paying in full all our obligations and debts even though it may be hard. We do not secure out loans or use the law to demand repayment.”; (12) “I did not know that my repayment was preferential. I know very little about the Bankruptcy Codes [sic]. I thought he intended to keep paying off debts as best he could until he was finally clear. I never looked at bankruptcy as a possibility because of the Mennonite belief that it is wrong for us to evade our debts and responsibilities. I feel it was a mistake for him to use bankruptcy as a method to relieve himself of the pressure of debt.”; and (13) Petre used the \$25,000.00 when repaid to him to purchase a farm in Everett, Pennsylvania for his wife and seven dependent children, ages two through fourteen years old.

On September 24, 1996, the Court conducted a pretrial conference (the “Pretrial Conference”) with the attorney for the Trustee, E. Rasmussen, her husband, R. Rasmussen, and Petre, who appeared by telephone. At the Conference, the Rasmussens made it clear that their arranging for the transfer of Yellow Tavern Road and a loan from NBG was done with the specific purpose of repaying Petre, while also giving the Debtors the ability at some point to buy back Yellow Tavern Road. At the conclusion of the Conference, the attorney for the Trustee indicated that the Trustee would be making a motion for summary judgment, and the Adversary Proceeding was adjourned to the December 18, 1996 Trial Calendar.

On October 1, 1996, the Trustee filed a Motion for Summary Judgment (the “Motion for Summary Judgment”), which alleged that: (1) in the Adversary Proceeding, the Trustee was seeking

to avoid the transfers of Yellow Tavern Road to E. Rasmussen and her subsequent payment of \$25,000.00 to Petre; (2) the Trustee was stipulating to the facts set forth in the Rasmussen Response, the Petre Response and as stated at the Pretrial Conference; (3) because of their perceived obligation to Petre, E. Rasmussen and R. Rasmussen, the parents of Christian Rasmussen, had caused the Debtors to transfer Yellow Tavern Road to E. Rasmussen, so that she could obtain a loan from NBG with the property as collateral, and then pay what they believed was all that was then due to Petre from the Debtors, \$25,000.00; (4) E. Rasmussen and R. Rasmussen must have known at the time about Christian Rasmussen's failed business, and at least knew of the \$13,500.00 due to R. Rasmussen, although at the Pretrial Conference, they indicated that they did not know about their son's other debts; (5) the relationship between the parties (the Debtors, Petre and E. Rasmussen and R. Rasmussen) created an overall relationship equivalent to that normally found by bankruptcy courts to be the kind of controlling relationship necessary to constitute Petre as an "insider"; (6) the relationship here was one of religious faith and belief, which imposed heavy burdens on the members of the faith; (7) at the Pretrial Conference, it was disclosed that the Debtors had been expelled from the faith due to their resort to bankruptcy; (8) the binding ties and duties of the parties' Mennonite faith are of a similar nature to the binding ties between family members where there is a degree and confidence that makes it possible to omit the protections normally found in arms length business dealings; (9) the Debtors had used the relationship of trust and confidence between adherents to their faith to obtain the loan, and likewise, E. Rasmussen and R. Rasmussen were motivated to act because of that trust and confidence; (10) Petre had relied upon and expected each of the Debtors

and E. Rasmussen and R. Rasmussen to conduct themselves in accordance with the tenets, understandings, trust and confidence that apply between adherents to the faith; (11) without the bonds of the Mennonite faith between the parties, the loans would never have been made.

On November 18, 1996, while the Motion for Summary Judgment was under advisement, the Court received a letter from Petre which: (1) requested a personal interview; (2) confirmed that R. Rasmussen had originally asked Petre for the \$25,000.00; and (3) stated, "To judge us to be insiders concerning a bankruptcy case would be far from the truth. Chris R. had to turn his back on any relationship binding there may have been in the common faith we had in God, to file a bankruptcy. Therefore even a premonition or an inkling that he might file bankruptcy is not a possibility in our thinking."

At the Court's December 18, 1996 Trial Calendar, the Court: (1) denied the Motion for Summary Judgment without prejudice to it being renewed by the Trustee after further facts and circumstances were developed through discovery; (2) indicated to the parties that it would issue a short written decision in connection with its denial of the Motion for Summary Judgment; (3) adjourned the matter to the January 22, 1997 Trial Calendar; (4) conducted an extensive pretrial with the Trustee, the attorney for the Trustee, and the defendants, at which the Court discussed in detail the facts and circumstances developed to date, as well as the applicable law, since the defendants continued to proceed pro se; (5) strongly encouraged the defendants to consider retaining counsel so that the facts and circumstances surrounding the transactions in question could be better developed and presented in a manner which would assist the Court in making its final determination

in the Adversary Proceeding; and (6) encouraged the parties to meet and discuss a possible negotiated settlement of the Adversary Proceeding.

DISCUSSION

I. INSIDER PREFERENCES

As this Court expressed in *In re Harris*, 195 B.R. 577 (Bankr. W.D.N.Y. 1995), Section 101(31) of the Bankruptcy Code sets forth a non-exclusive definition of “insider” for the purpose of determining whether there has been an avoidable preferential transfer under Section 547. Whether an individual is an insider within the meaning and intent of Section 101(31) and Section 547 is a question of fact to be determined on a case by case basis. The essential determination to be made in this case, where defendant Petre does not fall into a specific category enumerated in Section 101(31), is whether such an individual was in a position of influence and control over the Debtor to a degree beyond that of an ordinary, arms-length creditor by reason of a relationship which is similar at least in some respects to one of affinity. *See In re McIver*, 1995 WL 55284 (Bankr. N.D.Fla. 1995). On all of the facts and circumstances developed in this Adversary Proceeding to date, the Court cannot say with certainty that Petre could not be found to be an insider within the meaning of Section 101(31).

At this time, the Court believes that before it can make a final determination as to whether Petre is an insider, it would be helpful to know: (1) the details of any conversations which took place between R. Rasmussen and Petre or his representatives at the time the request was made for the

Yellow Tavern Road Loan; (2) the details of any conversations which took place between Petre or his representatives and Christian Rasmussen at the time the Yellow Tavern Road Loan was made; (3) the details of any conversations between Petre or his representatives and Christian Rasmussen when demand for repayment of the Yellow Tavern Road Loan was made; and (4) the details of any conversations between Christian Rasmussen, Petre or his representatives and E. Rasmussen or R. Rasmussen after demand for repayment of the Yellow Tavern Road Loan was made.

These additional critical facts and circumstances can be developed by the parties through additional discovery, or at trial.

II. FRAUDULENT TRANSFERS

_____This Court also held in *In re Harris*, 195 B.R. 577 (Bankr. W.D.N.Y. 1995) that even a transfer for consideration, including a transfer which might otherwise be deemed to be an ordinary preference, could also be found to be an avoidable fraudulent transfer if made with the actual intent to hinder, delay or defraud creditors or a particular creditor. On all of the facts and circumstances developed in this Adversary Proceeding to date, the Court cannot say with certainty that the transfer of Yellow Tavern Road to E. Rasmussen for the purpose of mortgaging it and paying the proceeds to Petre in repayment of the Yellow Tavern Road Loan could not be found to be made with the intent to hinder, delay or defraud creditors or a particular creditor. Clearly, the details of the conversations which must have taken place between the Debtors and E. Rasmussen and/or R. Rasmussen in connection with these transfers would be important information for the Court to have in making its

final determination; facts and circumstances which again can be developed by the parties through additional discovery, or at trial.

I note that R. Rasmussen had loaned the Debtors \$13,500.00 in connection with their business, co-signed a \$4,000.00 business loan with Seneca Savings Bank, admittedly arranged for the Yellow Tavern Road Loan and felt responsible for the repayment of the Yellow Tavern Road Loan. All of this evidenced an involvement with his son's business. However, when the summer of 1995 came, suddenly R. Rasmussen was no longer involved. It was E. Rasmussen who took a deed to Yellow Tavern Road, mortgaged it at NBG and used the proceeds to repay the Yellow Tavern Road Loan to Petre.

III. GENERAL

_____ Rule 56 of the Federal Rules of Civil Procedure, adopted by Rule 7056 of the Federal Rules of Bankruptcy Procedure, allows the Court in its discretion to deny summary judgment when it feels that the granting of summary judgment would be inappropriate. Even though the defendants did not specifically respond to the Motion for Summary Judgment, on all of the facts and circumstances developed in this Adversary Proceeding to date, I believe that justice requires that I deny the Motion for Summary Judgment without prejudice to it being renewed after additional discovery. This additional discovery would develop further relevant facts and circumstances which the Court believes it requires in order to make a final determination of the avoidability of the transfers in question.

CONCLUSION

The Motion for Summary Judgment is denied without prejudice to it being renewed in accordance with this Decision & Order. This Adversary Proceeding is adjourned to the Court's Trial Calendar on January 22, 1997.

IT IS SO ORDERED.

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

Dated: December 20, 1996