

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 98-23908

UNIFIED COMMERCIAL CAPITAL, INC.,

Debtors.

DECISION & ORDER

DOUGLAS J. LUSTIG, as Trustee,

Plaintiffs,

V.

AP #00-2205

SUSAN E. ANDERSON,

Defendants.

BACKGROUND

On March 29, 2001, in an adversary proceeding commenced by the Chapter 7 Trustee (the "Trustee") of Unified Commercial Capital, Inc. ("Unified Commercial"), this Court issued a Decision & Order (the "Weisz and Associates Decision & Order"), a copy of which is attached.¹

In the Weisz and Associates Decision & Order the Court determined that the reasonable contractual interest an innocent

¹See, *In re Unified Commercial Capital, Inc.*, 2001 WL 320849. The terms defined in the Weisz and Associates Decision & Order shall have the same meaning when used in this Decision & Order.

BK. 98-23908
AP. 00-2205

investor received from Unified Commercial more than 90 days prior to the filing of its bankruptcy petition could not be avoided by the Trustee as a constructive fraudulent transfer because Unified Commercial had received reasonably equivalent value within the meaning of Section 548 of the Bankruptcy Code and, provided that the innocent investor had at all times acted in good faith with respect to the transaction, fair consideration within the meaning of Article 10 of the New York Debtor and Creditor Law (the "DCL").²

On October 4, 2000, the Trustee commenced an adversary proceeding (the "Anderson Adversary Proceeding") against Susan E. Anderson ("Anderson") which requested a determination that the payment by Unified Commercial to Anderson of \$2,406.58, representing interest at 12 percent (12%) per annum on her \$20,000.00 investment, (the "Interest") could be avoided as a constructive fraudulent transfer.³

² The Court advised the Trustee that unless the issue is decided differently by the United States Court of Appeals for the Second Circuit or the United States District Court for the Western District of New York (the "District Court"), the Court will follow the decision of the Bankruptcy Appellate Panel for the Second Circuit in *Breeden v. Sprague Nat'l Bank (In re Bennett Funding Group, Inc.)*, 2000 Bankr. LEXIS 565, which held that under the DCL it is only the good faith of the transferee, not that of both the transferor and the transferee, which must be scrutinized.

³ As was the case with Weisz and Associates, Inc., Anderson was repaid her principal.

BK. 98-23908
AP. 00-2205

At an April 18, 2001 trial calendar call, the Court indicated to the attorney for the Trustee and Anderson that it would issue a Decision & Order reaffirming the Weisz and Associates Decision & Order.

DISCUSSION

The Trustee asserted that the District Court in its decision in *Merrill v. Abbott (In re Independent Clearing House Co.)*, 77 B.R. 843 (D. Utah 1987) (citations omitted) ("Independent Clearing"), and the decisions of the many courts which have agreed with that decision, have provided a road map that this Court should follow through the applicable fraudulent conveyance statutes to determine that the payment of the Interest to Anderson, an innocent investor victim of the alleged "Ponzi" scheme perpetuated by Yacono, can be avoided by the Trustee as a constructive fraudulent transfer. However, in order to follow the road map and complete the recommended journey, the Court would have to get past two major stumbling blocks by taking giant leaps of faith.

The first stumbling block is that, although the causes of action that investors have for rescission, because they were the innocent victims of a fraudulent scheme, are not unenforceable

BK. 98-23908
AP. 00-2205

for reasons of public policy,⁴ their causes of action for the payment of contractual interest at a reasonable rate is unenforceable for reasons of public policy.

The second stumbling block is a willingness by the Courts to afford a different treatment to non-investors and innocent investor victims when determining whether they have given value. Whether a non-investor, such as a trade creditor, gave value and fair consideration by providing property, goods or services is determined as a question of fact. However, whether innocent investor victims gave value when they allowed their principal investment to be used for a period of time is determined as a question of law.

I am unable to make these two leaps of faith.

I believe that only in rare and exceptional circumstances should Courts use public policy as a reason to prevent the enforcement of commercial contracts by innocent victims, especially when the integrity and underlying policies of important statutes such as the fraudulent conveyance statutes could be compromised. Specifically, I do not believe that Courts should resort to the use of public policy in order to

⁴ Having valid rescission claims enables the investors to retain any payments up to the amount of the principal they invested.

BK. 98-23908
AP. 00-2205

permit a trustee to recover the interest paid to innocent investor victims in the bankruptcy of a "Ponzi" schemer when Congress, which is charged with making public policy, has failed to address the issue in the Bankruptcy Code. This is not a sufficiently compelling and exceptional circumstance.

I also believe that only in rare and exceptional circumstances should Courts determine what appears to be a question of fact as though it were a question of law. Making such a finding simply to allow a trustee to recover the interest paid to innocent investor victims in the bankruptcy of a "Ponzi" schemer at the expense of the fraudulent conveyance statutes is not a sufficiently compelling and exceptional circumstance.⁵

CONCLUSION

For the reasons set forth in the Weisz and Associates Decision & Order, and in this Decision & Order, I find that Anderson gave Unified Commercial reasonably equivalent value and fair consideration, provided that she was at all times acting in

⁵ If the real concern is that investors received an unreasonable rate of interest, as I stated in the Weisz and Associates Decision & Order, I believe that the difference between a reasonable rate of interest and an unreasonable rate of interest can be avoided and recovered as a fraudulent transfer by analyzing value as a question of fact.

BK. 98-23908
AP. 00-2205

good faith, for the payment to her of the Interest in the amount of \$2,406.58.

The Trustee has filed a motion with the District Court requesting leave to appeal the interlocutory Weisz and Associates Decision & Order, in part because he has commenced approximately ten other adversary proceedings in the Unified Commercial case and the same issue of reasonably equivalent value and fair consideration must be determined in each of those adversary proceedings. I encourage the District Court, for reasons of judicial economy, to grant the Trustee's motion for leave to appeal.⁶

IT IS SO ORDERED.

HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: May 2, 2001

⁶ In his motion for leave to appeal, the Trustee represented that the issue involved was a legal issue on which there was a substantial difference of opinion. That was very kind of the Trustee, since at least with respect to the Section 548 cause of action, before the Weisz and Associates Decision & Order, I do not believe there was any difference of opinion.