NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 07-061

Bankruptcy Case No. 04-20512-WCH
Adversary Proceeding No. 06-01199-WCH

BONNIE S. JOHNSON,
Debtor.

LYNNE F. RILEY, Chapter 7 Trustee,
Plaintiff-Appellee,

v.

WILLIAM H. H. JOHNSON, III, and GAYLE A. JOHNSON,
Defendants-Appellants.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman, U.S. Bankruptcy Judge)

Before
Vaughn, Carlo, and Kornreich,
United States Bankruptcy Appellate Panel Judges.

Ann Brennan, Esq., of Stephen E. Shamban Law Offices, P.C.,
on brief for Defendants-Appellants.

Lynne F. Riley, Esq., and Maria C. Furlong, Esq., of Altman Riley Esher LLP,
on brief for Plaintiff-Appellee.

June 13, 2008

Per curiam.

This case involves oral and written trusts under Massachusetts law and a Chapter 7 trustee's ability to recover property, pursuant to a Massachusetts' fraudulent transfer statute, Mass. Gen. Laws ch. 109A, and the Bankruptcy Code's preference section, 11 U.S.C. § 547. As to the fraudulent transfer, the bankruptcy court entered judgment in favor of the plaintiff in the amount of $131,020.91, and as to the preference, the bankruptcy court entered judgment in the amount of $2,300. For the reasons set forth below, the bankruptcy court's decision is affirmed.

BACKGROUND

The Debtor's father, William H. Johnson III ("Mr. Johnson"), worked as a salvage/junkyard operator, and on December 19, 1981, the Commonwealth of Massachusetts obtained a judgment against Mr. Johnson for the clean-up costs associated with 300 barrels of hazardous waste buried at his junkyard in Massachusetts. The state levied on several real properties owned by Mr. Johnson and he understood that the levy would attach to any property in Massachusetts owned by him for twenty years from the date of the judgment. As a consequence, for the next twenty years after the state's levy, any property in Massachusetts in which Mr. Johnson had an interest was titled in the name of another. Mr. Johnson had some prior experience with real estate trusts.

In 1999, Mr. Johnson became aware of a property for sale in Plympton, Massachusetts ("the Property"), consisting of an abandoned hunting cabin that required significant repairs. Mr. Johnson inspected the Property on various occasions and successfully offered $75,000 for it. Believing that he could not take title in his name because of the Commonwealth's lien, Mr. Johnson asked his daughter, Bonnie S. Johnson (the "Debtor"), if she would take title and a

mortgage in her name, which she agreed to do. Mr. Johnson deposited the down payment and paid the closing costs, for a total of $23,248. On October 27, 1999, the Debtor granted a mortgage on the Property in the principal amount of $60,000. Mr. Johnson made the monthly mortgage payments through March, 2003, through checks payable to the Debtor, which sometimes were annotated with the word "mortgage" and sometimes indicated "rent." The Debtor reported the Property on her tax returns as a "rental real estate property." She included the mortgage payments as rent and wrote off the depreciation.

On March 3, 2000, Mr. Johnson settled the Plympton Realty Trust, an irrevocable trust, for the consideration of less than $100, for the benefit of the beneficiaries. The Debtor deeded the Property to the trust and both Mr. Johnson and the Debtor were listed as trustees. There were also seven schedules of beneficiaries executed, all of which conflicted. Three established no beneficial interest in Mr. Johnson and five established a beneficial interest in the Debtor. The Debtor testified that the Property was put into trust to protect it. The Debtor also testified that she did not understand the trust documents, but that her understanding of a beneficial interest was that if something happened to her, the Property went to Mr. Johnson and if something happened to him, it would go to her and her two siblings.

The Property was taken out of trust in February 2002, in order for the Debtor to refinance the Property for the principal amount of $110,000 and then in March it was deeded back to the Plympton Realty Trust. The Debtor obtained $30,000 as a loan from Mr. Johnson as part of the refinancing. The Debtor made payments of $200 or $300 per month to her father on the loan.

Mr. Johnson moved into the Property immediately after purchasing it. While the Debtor visited a few times, she never lived on the Property. Mr. Johnson undertook significant repairs

and renovations of the Property, obtaining the municipal permits in his own name for the work performed. Pursuant to the oral agreement between Mr. Johnson and the Debtor, the Property belonged to Mr. Johnson and the Debtor merely held title and the mortgage in her name.

In early 2003, Mr. Johnson, who was then living on the Property with his girlfriend, and later fiancee Gayle Dubois ("Ms. Dubois"), decided that he wanted the Property transferred to himself and Ms. Dubois. On February 27, 2003, the Property was transferred out of trust to the Debtor, Mr. Johnson and Ms. Dubois as tenants in common for the reported consideration of $1. The Debtor testified that it was her understanding that as a tenant in common, her interest would pass to her heirs. On March 14, 2003, the Debtor transferred her interest to Mr. Johnson and Ms. Dubois for the stated consideration of $1. Mr. Johnson and Ms. Dubois (hereinafter "Mrs. Johnson") married in June, 2003. The Property was refinanced again by Mr. and Mrs. Johnson on March 1, 2004, and they received net proceeds of $49,191.86. On August 6, 2004, the Property was sold for $400,000, and Mr. and Mrs. Johnson realized net proceeds in the amount of $212,849.97.

The Debtor began to have financial difficulties sometime after 2000, and in the spring of 2003, the Debtor had approximately $30,000 in credit card debt (listed as $29,471.00 on her credit report from April, 2003), plus a first mortgage on her residence of $164,758.62, and a second mortgage of $35,931.18. She also owed $16,275 to St. Anne's Credit Union and had the $30,000 debt to her father, less payments made. A defamation claim was also pending against her in local court and the creditors in that suit had a disputed claim of $25,000. There was testimony that this creditor had offered to accept $5,000 in settlement. The Debtor testified that her residence was worth $250,000. The Debtor also owned a BMW worth $15,000 and a Harley

Davidson motorcycle worth $7,000. The Debtor testified that she had $15,068.14 in her checking/savings account. The Debtor was also personally liable for the $110,000 mortgage over the Property from February 2002, until the mortgage was paid.

The Debtor obtained a divorce from her husband in June, 2003, necessitating a payment to him in settlement of their financial assets in the amount of $45,000. In August, 2003, the Debtor had a baby that died unexpectedly several days later. The Debtor was unable to work and used her credit cards for her day to day expenses until the various companies declined to extend further credit. By December, 2004, or over the next sixteen months, the Debtor incurred an additional $70,000 in credit card debt and finally filed a voluntary petition under Chapter 7 on December 28, 2004.

The Debtor did not schedule the funds obtained from Mr. Johnson as a loan, nor did she schedule an interest in the Property. She did, however, disclose the arrangement that she had with her father at the § 341 meeting. The Debtor received her discharge on June 29, 2005. On March 27, 2006, the Chapter 7 trustee filed an adversary complaint against Mr. and Mrs. Johnson. Of relevance here, Count I of the complaint alleged that the transfer of the Property from the Debtor to Mr. and Mrs. Johnson was a fraudulent transfer pursuant to Mass. Gen. Laws ch. 109A, and Count IV alleged that the payments made by the Debtor to Mr. Johnson during the one year prior to the filing of the bankruptcy petition were a preference pursuant to 11 U.S.C. § 547.

The bankruptcy court held a trial on the adversary proceeding on May 1 and 2, 2007. At the conclusion of the trial, the bankruptcy judge ruled from the bench, granting judgment to the trustee in the amount of $1,500, related to preferential payments made by the Debtor to Mr.

Johnson, an insider, during the year proceeding the bankruptcy. The bankruptcy judge declined to find a transfer as between the Debtor and Mr. and Mrs. Johnson, concluding that pursuant to the oral trust, Mr. Johnson was always the owner of the Property. The bankruptcy court relied on Ward v. Grant, 401 N.E.2d 160 (Mass. App. Ct. 1980), and In re Gustie, 32 B.R. 466 (Bankr. D. Mass. 1983), to conclude that when a fraudulent dealing results in the acquisition of title by the "fraudster," that is not a transfer. The bankruptcy court reasoned that because the Debtor never had an interest in the Property, she could not have transferred it. Thus, without a transfer, the trustee had no fraudulent transfer claim under Massachusetts law. The court determined that while the arrangement was a fraud on the Commonwealth of Massachusetts, perpetrated by Mr. Johnson, it did not defraud the Debtor's creditors nor defeat the oral trust.

On May 14, 2007, the trustee filed a motion for reconsideration, which was subsequently amended with the assent of Mr. and Mrs. Johnson. Mr. and Mrs. Johnson opposed the motion for reconsideration. A hearing was held on July 11, 2007, and the matter was taken under advisement. On September 25, 2007, the bankruptcy court issued an order granting the motion for reconsideration, vacating the order of May 2, 2007 and issuing judgment in favor of the trustee in the amount of $131,020.91 on Count I of the complaint and in the amount of $2,300 on Count IV. The bankruptcy court concluded that the written trust superseded the original oral trust. Moreover, the bankruptcy court concluded that the Debtor likely had a 50% beneficial interest in the Property and that it was fraudulently transferred to Mr. and Mrs. Johnson since the Debtor was insolvent and did not receive reasonably equivalent value in exchange for the transfer. The bankruptcy court stated that:

> [a]ny concerns that this finding is either inequitable or inconsistent given my findings that the Defendants were the sole purchasers and occupants of the Property is alleviated given the role of [Mr.] Johnson and his scheme to defraud the Commonwealth in this case. As settlor of the Trust, [Mr.] Johnson was in a position to name the beneficiaries and determine their individual beneficial interests. It is hornbook law that a settlor need not receive consideration to exercise donative intent through creation of trust interests. [Mr.] Johnson may have given the Debtor a beneficial interest in the Trust to protect its corpus from the execution on the Judgment, and likely assumed that when the Judgment was no longer an issue, the Debtor could simply "give" her interest back to him. Had she not been insolvent at the time of the retransfer, that is exactly what could have happened. But the Debtor was insolvent and not in a position to gift back the interest for less than reasonably equivalent value. Though he did not appreciate it at the time, this was [the] chance [Mr.] Johnson took by involving the Debtor in his scheme. Unfortunately, he side stepped his own creditors only to run afoul of hers.

As to the preference claim, the bankruptcy court increased the award to the trustee by $800, based on previously presented evidence that the Debtor made payments of $200 to $300 per month. The court allowed $200 per month for the four months for which there was no paper trail.

On October 5, 2007, Mr. and Mrs. Johnson filed a timely notice of appeal. The primary issues on appeal are whether the bankruptcy judge erred in determining that the Debtor held a beneficial interest in the Property pursuant to the written trust instruments and whether the Debtor was insolvent at the time of the transfer. Mr. and Mrs. Johnson also raise issues as to: whether the standard was met for the bankruptcy court to reconsider its initial order; whether the trustee had standing to bring an action under 11 U.S.C. § 544(b)(1); the adequacy of the consideration for the transfer; and, the validity of the written trust.

JURISDICTION

A bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See In re George E. Bumpus, Jr. Constr. Co., 226 B.R. 724 (B.A.P. 1st Cir. 1998). A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (quoting Catlin v. U.S., 324 U.S. 229 (1945)). A final judgment in an adversary proceeding is a final order. MacPherson v. Johnson (In re MacPherson), 254 B.R. 302, 303 (B.A.P. 1st Cir. 2000) (reviewing default judgment in an adversary proceeding).

In the present case, the bankruptcy court entered a Memorandum of Decision granting the trustee's motion for reconsideration, vacating the court's previous order and directing that judgment be entered in favor of the trustee against Mr. and Mrs. Johnson in the amount of $131,020.91 on Count I of the complaint and in the amount of $2,300.00 on Count IV. The judgment is final and appealable.

STANDARD OF REVIEW

We generally review findings of fact for clear error and conclusions of law *de novo*. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719 n.8 (1st Cir. 1994).

Within ten days of entry of the judgment, the trustee sought amendment of the bankruptcy court's findings pursuant to Fed. R. Bankr. P. 7052, which makes Fed. R. Civ. P. 52 applicable. Rule 52, in turn, provides that "[o]n a party's motion filed not later than 10 days after entry of judgment, the court may amend its findings-or make additional findings-and may amend the judgment accordingly." Fed. R. Civ. P. 52(b). An appellate court reviews the trial court's factual amendments and reversal of its initial judgment under Fed. R. Civ. P. 52(b) for abuse of discretion. National Metal Finishing Co., Inc. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 125 (1st Cir. 1990).

The trustee also sought reconsideration pursuant to Fed. R. Civ. P. 59, as adopted by Fed. R. Bankr. P. 9023. Under Rule 59, the trustee sought amendment of the judgment within ten days of its entry. In order to prevail on a motion brought pursuant to Fed. R. Civ. P. 59(e), a litigant "must establish a manifest error of law or must present newly discovered evidence." F.D.I.C. v. World University Inc., 978 F.2d 10, 16 (1st Cir. 1992); Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 503 (B.A.P. 1st Cir. 2005). Usually, we review disposition of a Rule 59(e) motion for abuse of discretion. See Rio Mar Assocs., LP, SE v. UHS of Puerto Rico, 522 F.3d 159, 163 (1st Cir. 2008). However, where the disposition of a Rule 59(e) motion depends entirely on a question of law, our review is plenary. Id.

DISCUSSION

Before considering the issues related to fraudulent transfer and preference, Mr. and Mrs. Johnson have raised the preliminary issue of whether the trustee had standing to bring this action. The trustee's standing is questioned based on the alleged non-existence of unsecured creditors at the time of the alleged transfer. Section 544(b)(1) of the Bankruptcy Code limits a trustee's

avoidance powers to transfers of property that are voidable by unsecured creditors under applicable law. 11 U.S.C. § 544(b)(1). However, before the bankruptcy court, Mr. and Mrs. Johnson specifically admitted that the trustee had standing to bring the action in their answer to the complaint.

It is well established law in this circuit that arguments presented for the first time on appeal are deemed to have been waived. See, e.g., U.S. v. Winchenbach, 197 F.3d 548, 551 n.2 (1st Cir. 1999); Villafane-Neriz v. F.D.I.C., 75 F.3d 727, 734 (1st Cir. 1996); Ondine Shipping Corp. v. Cataldo, 24 F.3d 353, 355 (1st Cir. 1994). The only exception is where a gross miscarriage of justice would otherwise occur. Villafane-Neriz, 75 F.3d at 734; Commonwealth of Mass. v. Boston Regional Med. Ctr. (In re Boston Regional Med. Ctr.), 265 B.R. 838, 847 (B.A.P. 1st Cir. 2001). Mr. and Mrs. Johnson have not argued that there are extraordinary circumstances and thus, we conclude that they have waived this issue on appeal.

Notwithstanding a waiver, the Debtor has unsecured creditors. While the claim was disputed, the pending defamation suit would have granted creditor status to the plaintiffs in that action, see Hoult v. Hoult, 862 F. Supp. 644, 646 (D. Mass. 1994) (plaintiff, who had already filed tort action against defendant at the time of the alleged fraudulent conveyances, qualified as "creditor" of defendant, with standing to bring action under the Massachusetts Fraudulent Conveyance Act, Mass. Gen. Laws ch. 109A), and MBNA also appeared as an unsecured creditor in the Debtor's credit report of April, 2003, and was scheduled as an unsecured creditor in the Debtor's bankruptcy schedules. Thus, while we conclude that the argument as to the trustee's standing was waived, it is also apparent that there were unsecured creditors, which granted the trustee standing to bring the action.

I. Fraudulent Transfer

The law of Massachusetts provides that:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Mass Gen. Laws ch. 109A, § 6. As previously mentioned, a trustee in bankruptcy may avoid any transfer of property that is voidable by an unsecured creditor under applicable law. 11 U.S.C. § 544(b)(1).

A. Termination of the Oral Trust - Creation of the Written Trust

The bankruptcy court set aside its initial determination that a fraudulent transfer had not occurred based on the court's conclusion that it had made a "manifest error of law by giving effect to an oral trust where there was a subsequent express written trust." The bankruptcy court relied on Lipsitt v. Sweeney, 59 N.E.2d 465 (Mass. 1945), for the proposition that where the sole beneficiary under an oral trust (Mr. Johnson) entered into an agreement with the Debtor (as the sole trustee) to transfer the corpus of the oral trust (the Property) to a written trust, the oral trust was terminated. Once the Property was deeded to the written trust, the oral trust lacked a corpus and was therefore ripe for termination. The bankruptcy court also found that the limited purpose of the oral trust terminated in 2001 when the judgment expired. As a third point, the bankruptcy court considered that when the Property was conveyed out of the written trust, it included conveyance to Ms. Dubois, later Mrs. Johnson, who was not contemplated in the oral trust. The bankruptcy court distinguished the two cases that it relied on earlier regarding oral trusts, Ward

v. Grant, 401 N.E.2d 160 (Mass. App. Ct. 1980), and In re Gustie, 32 B.R. 466 (Bankr. D. Mass. 1983), on the basis that they did not involve an intervening written trust which contravenes the intent of the oral trust.

The bankruptcy court carefully analyzed and cogently concluded that the oral trust was terminated or superseded by the written trust. The bankruptcy court stated:

> An oral trust, like an express written trust, can be terminated or repudiated. See Feeney v. Feeney, 335 Mass. 534, 140 N.E.2d 642 (1957). A termination can be accomplished by subsequent acts which are inconsistent with the intent and purpose of the trust. See Thompson v. Stehle, 367 Mich. 284, 116 N.W.2d 900 (1962). In Lipsitt v. Sweeney, the Supreme Judicial Court of Massachusetts held that where beneficiaries of an original trust agreed among themselves with the trustee that instead of receiving a formal distribution they would instead create a subsequent trust in full satisfaction of their distributive shares, the subsequent trust terminated the original trust. The court reasoned that the conveyance of property to the second trust from the first was effectively a release of the beneficial interests in the first trust, leaving it without property to be administered and ripe for termination. Id.

We find no error in the bankruptcy court's legal analysis, nor in the application of the law to the facts of the present case. In the present case, the oral trust was superseded by the written trust. When the corpus of the oral trust was transferred to the written trust, the oral trust was terminated. Moreover, as the bankruptcy court opined, the oral trust would have terminated when the local court judgment against Mr. Johnson expired in 2001, or when the Property was conveyed out of the written trust, with an interest granted to Ms. Dubois, who was never contemplated as a beneficiary of the oral trust.

The arguments as to the validity of the written trust are raised for the first time in the appellants' reply brief. While Mr. and Mrs. Johnson have always argued that the oral trust was controlling and that the written documents were only intended to provide further protection to

Mr. Johnson, they now assert that the Plympton Realty Trust should fail for lack of a cognizable beneficiary. They base this on the seven conflicting schedules of beneficiaries and precedent indicating that a conveyance is a nullity and the trust never comes into existence for want of a beneficiary. See Arlington Trust Co. v. Caimi, 610 N.E. 2d 948 (Mass. 1993) (no written schedule of beneficiaries had been prepared for the trust).

This argument should likewise have been raised before the trial court as another theory to negate that the Debtor had a beneficial interest in the written trust. The fact that Mr. and Mrs. Johnson are only raising a new legal theory and not a new set of facts is irrelevant. See Villafane-Neriz, 75 F.3d at 734; Ondine Shipping Corp., 24 F.3d at 355; In re Boston Regional Medical Ctr., Inc., 265 B.R. at 847. We conclude that this theory was waived on appeal.

Nonetheless, the bankruptcy court also found that neither the Debtor nor Mr. and Mrs. Johnson adequately explained the existence of the conflicting schedules. And while Mr. Johnson claimed that he did not know what a schedule of beneficiaries was, the bankruptcy court found that this claim was somewhat dubious given his testimony regarding use of nominee trusts in the past. The bankruptcy court found the existence of these schedules perplexing; perhaps based on attorney negligence, uncertainty as to how the property should devolve or as part of a scheme to defraud.

The bankruptcy court ultimately found that the Debtor had a 50% beneficial interest in the trust based on the difficulty in determining the exact nature of her interest and her testimony that if something happened to her father, she believed that she would receive an interest in the property. The bankruptcy court also found that for the tax reporting period 1999 to 2003, "the Debtor reported the Property as 'rental real estate property' for tax purposes and reported the

mortgage payments she received from [Mr.] Johnson as 'rental income' which she offset against various deductions, including those for mortgage payments, utilities, and depreciation." Moreover, the bankruptcy court considered that "the Debtor reported losses ranging from approximately $2,000 to $6,000 related to the Property which she applied against her reported income." We conclude that on appeal, Mr. and Mrs. Johnson waived their argument that the written trust fails for lack of a cognizable beneficiary and that the bankruptcy court did not err in concluding that the Debtor had an interest in the Property based on the written trust.

B. Reasonably Equivalent Value in Exchange for Transfer

The bankruptcy court's finding that the Debtor did not receive reasonably equivalent value for her interest in the Property was based on the deed itself, which indicated that the Property was transferred for the consideration of $1. Mr. and Mrs. Johnson contend that the bankruptcy court failed to credit the mortgage payments and repairs and improvements made to the Property, some of which the court detailed in its opinion. Mr. and Mrs. Johnson argue that one-half of the value of these payments were for the benefit of the Debtor. Thus, if she had a 50% beneficial interest, $34,759.93 must be deducted from the Debtor's share.

The trustee argues that she only sought one-half of the value of the net proceeds from the March, 2004, refinancing and one-half of the net proceeds from the August, 2004, sale. She contends that her claim in recovery in effect recognizes that Mr. Johnson provided monetary and other consideration in the form of the deposit, maintenance and improvements with respect to the Property. Moreover, she contends that the bankruptcy court specifically found donative intent, which would not require any deductions.

The bankruptcy court's determination that Mr. Johnson had donative intent is not clearly erroneous. Moreover, it is apparent that the Debtor did not receive reasonably equivalent value for her interest in the Property based on the transfer of her interest in the Property for $1; a property which subsequently yielded $49,191.86 in a refinancing and sold for $400,000, realizing net proceeds from the sale of $212,849.97.

On a related note, Mr. and Mrs. Johnson argue that the trustee failed to prove the value of the Property at the time of the transfer and that the bankruptcy court's use of the value from the 2004 refinancing and sale is erroneous. Mr. and Mrs. Johnson argue that the Town of Plympton's assessed valuations were significantly lower. They indicate that on September 13, 2004, the Property was assessed for fiscal year 2005 at $265,400 and for fiscal year 2004 at $192,500.

Based on the Property's actual sale for $400,000 on August 6, 2004, we conclude that the sale price more accurately reflected the Property value than did the Town of Plympton's assessment. The refinancing and sale both occurred within a relatively short period of time after the transfers. Moreover, the bankruptcy court adopted the 2004 sales and refinancing prices as to the value of the Property because Mr. and Mrs. Johnson did not dispute that this accurately reflected the value as of the date of the transfers. This is another instance of Mr. and Mrs. Johnson attempting to litigate their case on appeal using arguments that were never presented to the bankruptcy court. We conclude that Mr. and Mrs. Johnson have waived their argument as to the valuation of the Property and that the valuation assigned by the bankruptcy court was not clearly erroneous.

C. Solvency

Pursuant to Massachusetts Law, "[a] debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation." Mass. Gen. Laws ch. 109A, § 3(a). The bankruptcy court stated that "[t]here is no question that at the time of the transfers the Debtor was insolvent." The bankruptcy court found that as of 2003, the Debtor had $421,000 in liabilities, including a $165,000 mortgage on her primary residence, a $110,000 mortgage on the Property, $16,000 owed to St. Anne's Credit Union, $30,000 in credit card debt, $30,000 owed to Mr. Johnson, $25,000 on the defamation claim and $45,000 related to her divorce settlement. Mr. and Mrs. Johnson also admit that as of April 24, 2003, the Debtor had a second mortgage on her residence in the amount of $35,931.18. Thus, we conclude that the Debtor's liabilities were approximately $457,000.

The bankruptcy court did not specifically calculate the Debtor's assets and the trustee's computations as to the Debtor's solvency do not include the Debtor's cash holdings on the assets side. Thus, the trustee found that the Debtor had assets of $272,000.00, which include a BMW, with a value of $15,000, a Harley Davidson with a value of $7,000 and the Debtor's residence, valued at $250,000. Mr. and Mrs. Johnson do not dispute the valuation of these assets. But, the Debtor also testified that she had $15,068.14 in her checking/savings account. If these funds are included, the Debtor's assets were approximately $287,000.

Mr. and Mrs. Johnson question the inclusion of the $45,000 debt to the Debtor's ex-husband, the $25,000 defamation claim and the $110,000 mortgage on the Plympton Property. While the settlement of $45,000 paid by the Debtor to her ex-husband in their divorce occurred in June, 2003, or three months after the transfer, the Debtor and her ex-husband had been

negotiating the terms for a long period of time. As to the defamation claim, it was valued at $25,000, although there was testimony that the disputed creditors had made an offer to accept $5,000 in settlement. The Debtor has denied owing them anything.

Case law suggests that for purposes of determining solvency, an asserted unliquidated claim must be valued at its "probable ultimate liability." See Campana v. Pilavis (In re Pilavis), 233 B.R. 1, 8 (Bankr. D. Mass. 1999). There were no findings as to the probable ultimate liability. But, the unliquidated debt to the Debtor's ex-husband was actually determined to be $45,000, which establishes the ultimate liability. Id. And even accepting the $5,000 settlement amount as the probable ultimate liability on the defamation claim, a $20,000 deduction in the Debtor's liabilities does not alter the outcome of the solvency analysis on a balance sheet basis.

The bankruptcy court included a mortgage on the Property in the amount of $110,000 as a liability of the Debtor. The Debtor testified on both days of trial that her mortgage on the Property was paid off at the time that the Property was transferred to Mr. and Mrs. Johnson, and that they took a mortgage in their own names. While the trustee initially disputed this, on the second day of trial, the Debtor testified based on her review of a HUD-1 with a settlement date of March 14, 2003, and funded on March 19, 2003. After the conclusion of the Debtor's testimony, the trustee stated that she now believed, based on the testimony, that the Property was refinanced in March and that the Debtor was no longer liable on the Plympton mortgage. The bankruptcy court included this debt, indicating that no evidence supporting the Debtor's claim that the Property was refinanced was admitted at trial. This finding does not coincide with what occurred during the trial and although the HUD-1 was not admitted, the Debtor testified as to the contents and the trustee reviewed it and accepted the testimony as true. Nonetheless, based on the

Debtor's testimony, the mortgage was paid on March 19, 2003, and the initial transfer occurred on February 27, 2003, when the Property was deeded out of trust to the Debtor and Mr. and Mrs. Johnson. Likewise, payment of the mortgage occurred five days after the second transfer, pursuant to which the Debtor transferred all interest in the Property to Mr. and Mrs. Johnson.

Ultimately, even if the $110,000 mortgage and $20,000 of the defamation claim were to be deducted from the Debtor's liabilities, she still owed approximately $327,000, and her assets, under a best case scenario, were approximately $287,000, which would still leave her insolvent at the time of the transfers. We cannot conclude that the bankruptcy court's determination that the Debtor was insolvent at the time of the transfers was clearly erroneous.

II. Preference

The Bankruptcy Code allows a trustee to avoid any transfer made to an insider within one year of the filing of the debtor's bankruptcy petition if the transfer is made on account of a prepetition debt, while the debtor is insolvent, and the transfer allows the creditor to receive more than the creditor would have received if the case were in Chapter 7. 11 U.S.C. § 547(b). Both the Debtor and Mr. Johnson testified that they considered the $30,000 that the Debtor received in the refinancing as a loan. Based on the Debtor's insolvency, the bankruptcy court concluded that the payments made by the Debtor to Mr. Johnson on the prepetition loan were a preference. The bankruptcy court's initial decision was based on six checks offered at trial in the amount of $200 each and one for $300, for a total of $1,500.00. Nonetheless, the Debtor's testimony was that she paid her father $200 to $300 per month. The bankruptcy court increased the amount recoverable by $800 to account for payments in the amount of $200 for January, February, March and April

of 2004, for which there were no cancelled checks. The bankruptcy court did not abuse its discretion in reconsidering the amount and increasing it by $800.

CONCLUSION

Various of the arguments raised by Mr. and Mrs. Johnson were waived on appeal. Of the arguments raised in the bankruptcy court, we conclude that the bankruptcy court properly reconsidered its determination that a fraudulent transfer had not occurred. The bankruptcy court appropriately determined that the written trust superseded the oral trust and that the Debtor had a 50% beneficial interest in the Property that she transferred, without receiving reasonably equivalent value, while she was insolvent. Accordingly, the bankruptcy court properly concluded that a fraudulent transfer occurred and that Mr. and Mrs. Johnson are liable to the estate in the amount of $131,020.91. As to the preference claim, the bankruptcy court did not abuse its discretion in determining that Mr. and Mrs. Johnson received $2,300 in preferential payments within a year of the Debtor's bankruptcy filing. Therefore, the decision of the bankruptcy court is **AFFIRMED.**