NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 10-035

Bankruptcy Case No. 08-40238-MSH
Adversary Proceeding No. 09-04047-MSH

PRIME MORTGAGE FINANCIAL, INC.,
Debtor.

DAVID M. NICKLESS, Chapter 7 Trustee,
Plaintiff-Appellee,

v.

ARIS PAPPAS,
Defendant-Appellant.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal, U.S. Bankruptcy Judge)

Before
Haines, Lamoutte, and Deasy,
United States Bankruptcy Appellate Panel Judges.

Aris H. Pappas, Pro Se, on brief for Defendant-Appellant.

Susan H. Christ, Esq., on brief for Plaintiff-Appellee.

February 14, 2011

Deasy, U.S. Bankruptcy Appellate Panel Judge.

Aris H. Pappas ("Pappas") appeals pro se from the bankruptcy court's April 8, 2010 judgment against him in the amount of $19,649.30. The bankruptcy court concluded that certain vehicle lease payments made by Prime Mortgage Financial, Inc. (the "Debtor") on Pappas' behalf were fraudulent transfers under Mass. Gen. Laws ch. 109A, § 5, avoided all such payments, and entered judgment for the trustee. For the reasons set forth in this opinion, the Panel **AFFIRMS.**

I. BACKGROUND

A. Bankruptcy Proceedings

The Debtor filed a chapter 7 case in January 2008.[1] In March 2009, David M. Nickless (the "trustee") filed a six-count adversary complaint against Pappas alleging, among other things, claims for fraudulent conveyance under federal and state law.[2] The only count at issue in this appeal is Count III, wherein the trustee asserted that the Debtor fraudulently transferred $19,649.30 to Lexus Financial Services ("Lexus Financial") within the year preceding its bankruptcy filing in violation of Mass. Gen. Laws ch. 109A, §§ 5 & 6. In his answer to Count III, Pappas alleged that the Debtor made payments on the lease as part of his reasonable

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[1] Unless expressly stated otherwise, all references to "Bankruptcy Code" or to specific statutory sections shall be to the Bankruptcy Reform Act of 1978, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101, et seq. All references to "Rule" or "Bankruptcy Rule" shall be to the Federal Rules of Bankruptcy Procedure.

[2] In the complaint, the trustee alleged claims for preferential transfer under § 547 (Count I), fraudulent transfer under § 548 (Count II), fraudulent transfer pursuant to Mass. Gen. Laws ch. 109A, §§ 5 and 6 (Count III), breach of contract (Count IV), breach of implied covenant of good faith and fair dealing (Count V), and unjust enrichment (Count VI). The trustee also named Toyota Motor Corporation as a defendant, but after trial, the bankruptcy court dismissed the complaint as to Toyota, finding that it had not been properly served.

compensation. After trial, on April 8, 2010, the bankruptcy court issued an order: (1) ruling in favor of the trustee on Count III (Mass. Gen. Laws ch. 109A, § 5), avoiding $19,649.30 in lease payments by the Debtor, and entering judgment against Pappas in the amount of $19,649.30; and (2) ruling in favor of Pappas on the remaining counts. Pappas appealed.

B. Facts

Pappas was the president, treasurer, secretary, director and 50 percent shareholder of the Debtor. He oversaw all of the Debtor's operations and qualified as an insider as that term is defined by Mass. Gen. Laws ch. 109A.

In October 2006, Pappas, individually, entered into a vehicle lease (the "lease") with Lexus Financial, a division of Toyota Motor Corporation. Thereafter, the Debtor made payments totaling $19,649.30 directly to Lexus Financial in satisfaction of Pappas' obligations under the lease. The vehicle was used solely by Pappas, and the Debtor never held an interest in the vehicle. After the Debtor filed its bankruptcy petition, Pappas retained possession of the vehicle and, thereafter, made payments due on the lease from his own funds.

At trial,[3] Andrew Brown, the Debtor's Chief Financial Officer testified about the Debtor's financial circumstances in 2006 and 2007, and the extent of Pappas' knowledge of those circumstances. Brown testified that he presented monthly financial statements to Pappas which showed a trend for losses in 2005 and 2006 and that the Debtor's 2006 tax returns showed an operating loss of approximately $530,000.00. He testified that by the end of 2006, he had great concerns about the company's financial future and he discussed these concerns with

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[3] The adversary proceeding was consolidated for trial with the trustee's objection to Pappas' claim for wages in the amount of $105,000.00. The bankruptcy court sustained the objection and Pappas has not appealed that decision.

Pappas. In response to the operating losses, the Debtor closed a branch, consolidated some offices and laid off employees as cost-cutting measures. Brown also testified that the Debtor was not always paying bills in a timely manner in 2006, that the situation "worsened progressively," and the Debtor was "paying bills in later and later time periods" during 2007. The Debtor sometimes made payments on Pappas' vehicle lease before making payments to other creditors. Brown resigned in late August or September of 2007 because he believed the Debtor was no longer a going concern and that it should cease operations. Before his resignation, he discussed his concerns about the Debtor's financial condition with Pappas.

The bankruptcy court found Brown's testimony to be credible and uncontroverted. After consideration of Brown's testimony and weighing the evidence, the bankruptcy court ruled in favor of the trustee on Count III of the complaint.

II. JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); 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 considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," id. at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits." Id. (quoting In re

American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). The Panel has jurisdiction over this appeal from the bankruptcy court's final judgment against Pappas under Mass. Gen. Laws ch. 109A, § 5. See Braunstein v. Walsh (In re Rowanoak Corp.), 344 F.3d 126, 128 (1st Cir. 2003).

III. STANDARD OF REVIEW

A bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). Mixed questions of law and fact are reviewed under a clearly erroneous standard unless the bankruptcy court's decision was based on a mistaken view of the law. See Arch Wireless, Inc. v. Nationwide Paging, Inc. (In re Arch Wireless, Inc.), 534 F.3d 76, 82 n.2 (1st Cir. 2008). A bankruptcy court's finding that a debtor's transfers were fraudulent is one of fact, based on trial evidence and judgments about the credibility of witnesses, and will only be set aside if clearly erroneous. See In re High Voltage Eng'g Corp., 403 B.R. 163, 166 (D. Mass. 2009). Even greater deference is accorded to the trial court's factual determinations when they are based on the credibility of witnesses. Rodriguez-Morales v. Veterans Admin., 931 F.2d 980, 982 (1st Cir. 1991).

IV. DISCUSSION

A. Section 544(b)

Pursuant to § 544(b), a trustee is authorized to avoid any transfer of a debtor's property that is voidable by an unsecured creditor under applicable state law. 11 U.S.C. § 544(b). For purposes of § 544(b), "applicable state law" includes a state's fraudulent conveyance statute. See Richardson v. Preston (In re Antex, Inc.), 397 B.R. 168, 171 (B.A.P. 1st Cir. 2008). The

applicable state law in this case is the Massachusetts Uniform Fraudulent Transfer Act, Mass. Gen. Laws ch. 109A ("MUFTA"). See Sears Petroleum & Transp. Corp. v. Burgess Constr. Servs., Inc., 417 F. Supp. 2d 212, 220 (D. Mass. 2006).

As a preliminary matter, Pappas argues that the trustee cannot avoid the lease payments under § 544(b) because §§ 5 and 6 of MUFTA cannot be considered "applicable state law." He cites no authority for this argument and ignores the abundance of case law which provides that a state's fraudulent conveyance statute is applicable state law for purposes of § 544(b). See In re Antex, Inc., 397 B.R. at 171; Sears Petroleum, 417 F. Supp. 2d at 220 (citing cases). His argument has no merit, and is rejected.

Furthermore, Pappas argues that § 544(b)(1) limits the trustee's avoidance powers to transfers of property that are voidable by unsecured creditors under applicable state law, and that the trustee lacked standing to bring this action because the Debtor had no unsecured creditors at the time of the alleged transfer. At oral argument, however, Pappas' counsel conceded that the trustee had statutory standing.[4]

B. Section 5 of MUFTA

Section 5(a) of MUFTA provides, in relevant part, that a fraudulent transfer occurs when a debtor made the transfer or incurred the obligation:

> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; ***or***
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor: . . .
>
> > (ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

[4] Pappas appeared by counsel at oral argument.

Mass. Gen. Laws ch. 109A, § 5(a) (emphasis added).[5] This section covers both actual and constructive fraudulent transfers.

Pappas argues that the monthly lease payments cannot be avoided under § 5 of MUFTA because he did not intentionally hinder, delay, or defraud a creditor. As Pappas points out, liability under subsection (1) requires that the debtor have made the transfer with "actual intent" to defraud a creditor of the debtor. See Mass. Gen. Laws ch. 109A, § 5(a)(1). The bankruptcy court concluded that there was no showing of actual fraudulent intent, and Pappas spends a significant portion of his brief arguing that the trustee's failure to establish actual intent makes § 5 of MUFTA inapplicable. Pappas' argument is flawed, however, as the trustee also presented a claim for *constructive* fraudulent transfer under § 5(a)(2), which the bankruptcy court found to have merit. Actual intent is not a necessary element for establishing constructive fraud. See Silica Tech, LLC v. J-Fiber, GmbH, No. 06-10293-WGY, 2009 U.S. Dist. LEXIS 73700 (D. Mass. May 19, 2009).

C. Constructive Fraud

To establish a claim for constructive fraudulent transfer, the trustee has the burden of proof on the following elements: (1) that the Debtor made a transfer, (2) without receiving a reasonably equivalent value in exchange, and (3) the Debtor intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due. See Mass. Gen. Laws ch. 109A, § 5(a)(2). Although Pappas argues that bankruptcy court should have applied a "clear and convincing" standard when considering this issue, the appropriate standard of proof for establishing constructive fraud under § 5(a)(2) of

[5] Section 10 of MUFTA establishes a four-year look-back period for fraudulent transfer claims. It is undisputed that the subject payments were made during the applicable time period.

MUFTA is the "preponderance of the evidence" standard. See Lassman v. Reilly (In re Feeley), 429 B.R. 56, 62 (Bankr. D. Mass. 2010); see also Dahar v. Jackson (In re Jackson), 459 F.3d 117, 122 (1st Cir. 2006) (discussing standard for proof of constructive fraud under § 548(a)(2) and various state fraudulent transfer laws) (citations omitted).

1. The Debtor made a transfer.

The bankruptcy court found that the Debtor's lease payments to Lexus Financial constituted constructively fraudulent transfers under § 5(a)(2) of MUFTA. As to the first element, it was undisputed that between October 26, 2006 and the petition date, the Debtor made payments totaling $19,649.30 to Lexus Financial and that the payments were made for Pappas' benefit.

2. The Debtor did not receive reasonably equivalent value.

To determine whether a debtor received reasonably equivalent value, the court must consider all of the facts and circumstances of the case. See In re Reilly, 429 B.R. at 63 (citing Tri-Star Techs Co., Inc. v. Pitocchelli (In re Tri-Star Techs. Co., Inc.), 260 B.R. 319, 325-26 (Bankr. D. Mass. 2001)). The court should compare what was given with what was received, taking into account both direct and indirect benefits. Id. Although reasonably equivalent value does not require an exact exchange, the court "must keep the equitable purposes of the statute firmly in mind, recognizing that any significant disparity between the value received and the obligation assumed . . . will have significantly harmed . . . innocent creditors . . . ." Id.

Pappas argued before the bankruptcy court that the Debtor received reasonably equivalent value because it made the lease payments as part of his ordinary and reasonable compensation, which was supposed to be $30,000.00 per month (or $360,000.00 per year). To

support his compensation claims, Pappas proffered a Stock Purchase Agreement between the Debtor, Pappas and another party, which established that Pappas was entitled to a minimum of $240,000.00 a year in salary, subject to increases if certain conditions occurred. He also proffered spreadsheets of unknown origin for 2006 and 2007 showing that he accrued a monthly salary of $30,000.00, and an accounts payable aging summary from mid-January 2008, which provided, in different font at the bottom, that Pappas was owed $105,000.00 in accrued wages. Although he testified as to these documents, neither were included in the appellate record.

After weighing the evidence, the bankruptcy court found that Pappas was entitled to $240,000.00 per year based on the Stock Purchase Agreement, and that there was no evidence that he had satisfied any of the conditions that would trigger an increase in his salary. In reaching this decision, the bankruptcy court noted that the documentary evidence proffered by Pappas, purporting to show that he was accruing a monthly salary of $30,000.00 and that he was owed $105,000.00 in accrued wages, were unsubstantiated and gave them no weight. The bankruptcy court also gave Pappas' testimony little weight as it was "self-serving" and because he never explained why his salary allegedly increased from $240,000.00 to $360,000.00 per year. The bankruptcy court also rejected Pappas' testimony that he was entitled to additional compensation in the form of the lease payments, noting that there was no evidence that the car lease payments were authorized by the Debtor as an additional element of Pappas' compensation. As a result, the bankruptcy court concluded that the reasonable value of Pappas' services was the contracted amount of $240,000.00, that he had received all of the compensation due and owing to him, and that he was not entitled to additional compensation in the form of the Debtor's payment of his lease.

On appeal, Pappas has offered no argument that the bankruptcy court improperly discredited either the documentary evidence or his testimony. In fact, he has not even discussed the issue of compensation in this appeal. Rather, Pappas argues that fair consideration was given for the transfer because at the time he entered into the lease, the Debtor received the net of the residual value for the leased vehicle which constituted fair and adequate consideration. Pappas did not make this argument before the bankruptcy court, and therefore it is waived on appeal. See East Sav. Bank, FSB v. LaFata (In re LaFata), 483 F.3d 13, 22 (1st Cir. 2007) (noting that issues raised for the first time on appeal are deemed waived).

In light of the foregoing, Pappas has failed to establish that the bankruptcy court erred in finding that the Debtor made the lease payments without receiving reasonably equivalent value in exchange.

3. The Debtor reasonably should have believed that it would incur debts beyond its ability to pay as they became due.

Pappas also argues that the bankruptcy court erred in finding that the Debtor reasonably should have believed it was incurring or intending to incur debts beyond its ability to pay as they became due. According to Pappas, the Debtor was solvent and there was no indication that the lease would render the Debtor insolvent or unable to pay the monthly payments as they became due and payable.

As set forth above, at trial, the Debtor's former Chief Financial Officer, Andrew Brown, testified about the Debtor's financial circumstances in 2006 and 2007, and the extent of Pappas' knowledge of the Debtor's financial condition. He stated that he presented financial statements to Pappas each month which showed a trend for losses in 2005 and 2006, and that the Debtor's 2006 tax returns showed an operating loss of approximately $530,000. He also stated that the

Debtor was not always paying bills in a timely manner in 2006 and that the Debtor's financial status worsened progressively during 2007. According to Brown, Pappas was aware of the Debtor's declining financial condition. Further, Brown testified that throughout 2007, the Debtor paid Pappas' automobile lease sometimes at the expense of other creditors.

The bankruptcy court based its findings and conclusions on Brown's "credible and uncontroverted trial testimony," as well as the agreed upon facts and exhibits, and Pappas' own testimony. Giving the bankruptcy court's determinations the deference they deserve, see Rodriguez-Morales v. Veterans Admin., 931 F.2d at 982, the Panel cannot conclude that the bankruptcy court's findings were clearly erroneous.

D. Section 6 of MUFTA

Finally, Pappas argues that bankruptcy court erred as a matter of law and fact by finding that § 6 of MUFTA applies to the lease.[6] According to Pappas, the bankruptcy court incorrectly reviewed the elements of § 6. This argument lacks merit, however, because the bankruptcy court did not consider the elements of a fraudulent transfer claim under § 6. Having already determined that all of the lease payments could be avoided under § 5(a)(2) of MUFTA, the bankruptcy court concluded that there was no need for it to make further findings under § 6. The bankruptcy court did not err as a matter of law or fact.

V. CONCLUSION

For the reasons set forth above, the Panel **AFFIRMS** the bankruptcy court's judgment against Pappas.

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[6] Pursuant to § 6(a), the trustee also may avoid fraudulent transfers "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 became insolvent as a result of the transfer or obligation." Mass. Gen. Laws ch. 109A, § 6(a).