UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

HELENE L. KROCHALIS,

Debtor(s).

CASE NO. 93-21162

DECISION & ORDER

BACKGROUND

On May 18, 1993, Helene L. Krochalis (the "Debtor") filed a petition initiating a Chapter 7 case.

On her Schedule F, the Debtor listed ten entities as creditors holding unsecured non-priority claims aggregating $80,004.27, including a claim held by Ignatius St. George ("St. George") which was: (1) scheduled in the amount of $61,697.27; (2) designated as being for money loaned; and (3) further designated as fixed and liquidated. However, on June 24, 1993, the Debtor filed an Amended Schedule F which designated the claim held by St. George as disputed.

On September 30, 1993, St. George filed an unsecured non-priority claim with the Bankruptcy Court (the "St. George Claim") in the amount of $58,697.27. The Claim indicated that the indebtedness was incurred on seven separate dates over the period from March 3, 1987 through December 15, 1988.

On October 20, 1993, an Objection to the St. George Claim was filed on behalf of the Debtor (the "Claim Objection"). After various submissions were made and discovery completed, an Evidentiary Hearing was conducted by the Court on January 26, 1994. At the time of the Evidentiary

Hearing, the Court: (1) granted a motion filed on January 21, 1994 by the attorneys for the Debtor to withdraw as her attorney for the non-payment of fees; and (2) based upon all of the evidence then before it and the presumption contained in Rule 3001(f) of the Rules of Bankruptcy Procedure, allowed the St. George Claim when the Debtor failed to go forward and present any additional evidence. The Court's Decision allowing the St. George Claim was vacated on appeal by the District Court and the case was remanded for further proceedings. On May 17, 1996, a further Evidentiary Hearing was conducted on the Claim Objection.

At the Evidentiary Hearing, the Court heard the testimony of the Debtor and St. George. In his testimony, St. George acknowledged that during the period from March 3, 1987 through December 15, 1988: (1) the Debtor was his best and most trusted friend; (2) he had made many gifts to the Debtor (in cash, by check or by payment to third parties) totally in excess of $12,000.00; (3) specifically on April 8, 1988, he had executed a new Last Will and Testament which after making several specific gifts totaling $6,500.00, left all the rest, residue and remainder of his estate to the Debtor; and (4) he had converted many of his bank and deposit accounts to accounts in his name and in trust for the Debtor, including a First Federal certificate of deposit issued on October 5, 1987 in the original principal amount of $20,000.00 and a Goldome certificate of deposit issued on August 22, 1988 in the original principal amount of $20,000.00.

However, in his testimony, St. George also indicated that he had made a number of loans to the Debtor during that period which she had understood were loans and which she had agreed she would pay back to him when she was financially able, including: (1) $12,000.00 representing two

checks which St. George used to pay off a second mortgage on the Debtor's residence, 81 Wyndham Road, Rochester, New York, held by Carl Voldman (the "Voldman Mortgage"); (2) $3,859.27 representing a check which St. George paid to GMAC on June 23, 1987 to pay off the Debtor's car loan (the "GMAC Loan"); and (3) $7,838.00 representing two checks which St. George paid to Eastway Lincoln Mercury in May, 1988 to purchase a 1988 Subaru automobile titled in the Debtor's name.

In addition, in his testimony, St. George indicated that by checks dated December 6, 1988 ($5,000.00), December 15, 1988 ($9,500.00) and December 15, 1988 ($20,500.00), he had agreed to invest with the Debtor in, or make a loan to her so that she could acquire, a Sylvan Learning Center franchise for the Naples, Florida area. He further testified that when the Debtor failed to obtain the franchise she failed to return the funds to St. George, even though he had demanded that they be returned.

At the Evidentiary Hearing, the Debtor testified that she: (1) had never requested that St. George pay off the Voldman Mortgage, pay off the GMAC Loan, or purchase the new Subaru for her; (2) had never agreed to repay the amounts which St. George voluntarily, and as gifts, expended to pay off the Voldman Mortgage, pay off the GMAC Loan and purchase the Subaru; (3) believed that the $35,000.00 which St. George had given her to acquire a Sylvan Learning Center franchise in Florida was also a gift, intended by St. George to obtain a school so as to provide her with a means of obtaining a stable income in expectation of their relationship continuing on a long-term basis; and (4) did not believe that if she did not obtain the Sylvan Learning Center franchise she had any

obligation to return the funds obtained from St. George or otherwise repay him, notwithstanding his immediate demand for repayment.

DISCUSSION

The law in the State of New York is clear that monies transferred from one party to another without clear proof as to the purpose of the transfer are presumed: (1) to be in repayment of an outstanding valid loan; (2) to be a loan; or (3) to be a gift. *See Nay v. Curley,* 113 N.Y. 575 (1889). Further, for a transfer to be a gift, it is necessary that there be a res, delivery, and donative intent (the intent to make a gift), and the burden of proving a gift by a fair preponderance of the evidence is on the proponent of the gift. *See Matter of Carroll*, 100 A.D.2d 337 (2d Dept. 1984).

Having: (1) heard the testimony of the witnesses, observed their demeanor and evaluated their credibility; and (2) reviewed the documentation admitted into evidence at the Evidentiary Hearing, I find that the amounts expended by St. George to pay off the Voldman Mortgage, pay off the GMAC Loan and purchase the Subaru were gifts made by him to the Debtor. I do not find them to have been loans which were intended or agreed to be repaid at the time made. I believe the Debtor's testimony that these matters were voluntarily initiated by St. George (notwithstanding that she may have indirectly induced him to act by her expressions of concern about her finances) without any agreement on her part at the time to repay the amounts expended. I further believe that at the

time St. George expended these funds he had the necessary donative intent to warrant a finding that these expenditures were gifts and not loans.

However, based on the same evidence, I find that the Debtor has not met her burden to show that the amounts advanced to her to allow her to attempt to obtain a Sylvan Learning Center franchise in Florida were advanced by St. George with the necessary donative intent to find the transfers to be unconditional gifts. At best, the funds were advanced as conditional gifts or investments, in either case conditioned on the Debtor actually obtaining the franchise. I believe from the testimony at the Evidentiary Hearing that St. George had the reasonable expectation that if the franchise was not obtained, the funds advanced would be returned to him, or at least he would have been given the opportunity to consider and specifically decide what use was to be made of those funds at that time. In fact, when St. George finally learned that a franchise had not been obtained and the franchise deposits had been returned, he made an immediate demand on the Debtor for the return of the funds advanced. As a result, the Debtor had a legal obligation to return the funds to St. George when the franchise was not obtained.

St. George's testimony concerning the payoffs of the Voldman Mortgage and the GMAC Loan and the purchase of the Subaru was clearly less credible than the testimony of the Debtor concerning those transactions. On the other hand, the testimony of St. George concerning the advances to allow the Debtor to attempt to obtain a Sylvan Learning Center franchise was more credible than the Debtor's testimony concerning those advances. The testimony clearly demonstrated that St. George did not have the necessary donative intent for the Court to find the

advances made in connection with the franchise to have been unconditional gifts not dependent on the franchise being obtained. Furthermore, St. George's actions in immediately demanding that the advances be repaid to him when he learned the franchise was not obtained were consistent with the advances not having been intended as unconditional gifts, whereas his actions surrounding the expenditures on the Voldman mortgage, the GMAC loan and the purchase of the Subaru were consistent with them having been gifts.

With respect to the advances made to attempt to obtain a Sylvan Learning Center franchise, I note that: (1) St. George testified that the Debtor resisted his request to have his name included on the franchise application; (2) St. George testified that he asked the Debtor if he would get his money back if she did not obtain the franchise, to which she acknowledged he would; (3) St. George testified that he discovered after the demand for the return of the franchise fee deposit that the Debtor had applied in 1987 for a Sylvan Learning Center franchise, information which the Debtor never shared with him; (4) the Debtor never testified that she advised St. George when the Sylvan Learning Center determined that the Naples, Florida area could only support a B franchise rather than an A franchise, thus necessitating a total franchise fee deposit of only $25,000.00 rather than the $35,000.00 which he had advanced to her; (5) after the Debtor discovered that a total franchise fee deposit of only $25,000.00 was required for the Sylvan Learning Center B franchise, she did not keep St. George, who remained in Rochester, fully informed regarding all the of facts, circumstances and developments in the application and training process; (6) in her testimony the Debtor never explained why after she made the full deposit for a B franchise she did not give St. George the option

of taking back the excess $10,000.00 he advanced, or otherwise acknowledge that she could retain those funds, but simply deposited the excess into an individual account in her name; (7) in her testimony the Debtor did not explain why she did not immediately contact St. George to advise him of the return of the deposits when the franchise was denied her, but acknowledged that St. George had to find out that information on his own; and (8) in her testimony the Debtor had no satisfactory and credible explanation for why she did not return the funds advanced for the Sylvan Learning Center franchise to St. George when the franchise was not obtained (the Debtor's testimony that she felt that she could retain and use the $35,000.00 advanced for living expenses or to try to find an alternative school or gainful employment was simply not credible).

The attorney for the Debtor asserted that a finding that the $35,000.00 advanced by St. George was a gift was further supported by the facts that: (1) the $35,000.00 advanced from St. George was drawn out of accounts that were in his name in trust for the Debtor; and (2) to the extent that St. George considered the advances to be an investment in a Sylvan Learning Center franchise to be obtained by the Debtor, St. George was unclear as to the specifics of the nature and extent of the investment. I do not believe that reasonable inferences can be drawn from these facts that would, together with all of the other evidence presented, warrant the court finding that St. George had the necessary donative intent to make the advances, as the Debtor testified, just another one of his gifts.

CONCLUSION

The claim of Ignatius St. George in the amount of $58,697.27 is disallowed except to the extent of $35,000.00 together with interest from March 3, 1987, the date from which interest was requested in the State Court Action commenced by St. George for the recovery of alleged loans.

IT IS SO ORDERED.

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

Dated: July 11, 1996