IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-32078

ZAFER ROBACK
CAROLYN ANN ROBACK
d/b/a MISS ANN'S GROUP HOME DAYCARE

Debtors

STERLING P. OWEN, IV, TRUSTEE

Plaintiff

v. Adv. Proc. No. 01-3149

FREMONT INVESTMENT & LOAN, INC. and
ARNOLD M. WEISS, SUBSTITUTE TRUSTEE

Defendants

MEMORANDUM ON MOTION FOR SUMMARY JUDGMENT

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

Sterling P. Owen, IV filed the present Complaint on September 20, 2001, as Trustee of the Debtors' Chapter 7 estate. The Trustee seeks to avoid, pursuant to 11 U.S.C.A. § 547(b) (West 1993), a Deed of Trust executed by Debtor Zafer Roback (Debtor). Defendant Fremont Investment & Loan, Inc. (Fremont) is the beneficiary of the Deed of Trust and Defendant Arnold M. Weiss is the substitute trustee.[1] On February 13, 2002, the Trustee filed a Motion for Summary Judgment which is now before the court.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(F) (West 1993).

I

On November 27, 2000, the Debtor executed an Adjustable Rate Note (Note) and Deed of Trust in favor of Fremont. The Debtor used the Note proceeds to purchase real property located at 2819 Wimpole Avenue in Knoxville, Tennessee. The Deed of Trust, which was not recorded until February 5, 2001, gives Fremont a lien on the Wimpole Avenue property. The Debtor and his wife subsequently filed a Voluntary Petition under Chapter 7 on April 25, 2001.

II

As noted, the Trustee seeks to avoid Fremont's lien as a preferential transfer pursuant to 11 U.S.C.A. § 547(b). That section provides:

[1] Accent Title, Inc. was originally named as trustee by the Deed of Trust.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C.A. § 547(b) (West 1993).

The court finds each element of § 547(b) satisfied by the facts of this proceeding. The security interest conveyed by the Deed of Trust was a transfer of an interest of the Debtor in property. *See* 11 U.S.C.A. § 101(54) (West Supp. 2001) (?‹transfer' means every mode . . . of disposing of or parting with . . . an interest in property . . . ."). The transfer benefitted Fremont which is a creditor of the Debtor by virtue of the simultaneously-executed Note. 11 U.S.C.A. § 547(b)(1).

Under § 547(e)(2), a transfer is deemed to have been made at the time it took effect between the parties if the transfer is then perfected within ten days or, in cases of purchase money security interests, perfected within twenty days after the debtor's acquisition of the subject enabling loan. *See* 11 U.S.C.A. § 547(e)(2)(A), (c)(3)(B) (West Supp. 2001). In this case, however, more than two months passed between the loan transaction and the subsequent perfection. Because perfection occurred outside § 547(e)(2)(A)'s twenty-day grace period for purchase money security interests, the Bankruptcy Code dates the present transfer as of the perfection date - February 5, 2001. The transfer was therefore made on account of an antecedent debt, as evidenced by the November 27, 2000 Note, *see* 5 KING, COLLIER ON BANKRUPTCY ¶ 547.03[4], at 547-33 (15th ed. rev. 2001) (A debt is antecedent if, before the transfer date, the debtor becomes legally bound to pay.); 11 U.S.C.A. § 547(b)(2), and occurred within ninety days of the Debtors' bankruptcy filing. 11 U.S.C.A. § 547(b)(4)(A).

Further, the transfer was made while the Debtor was insolvent. 11 U.S.C.A. § 547(b)(3). The Code sets a presumption of insolvency during the ninety-day period immediately preceding the bankruptcy. *See* 11 U.S.C.A. § 547(f) (West 1993). The Debtors scheduled $3,516,722.15 in total assets and $2,508,450.57 in total liabilities. However, the asset figure includes a $2,500,000.00 **?**Estimated Possible Claim" against two other bankrupt entities. By Affidavit, the Trustee states that, due to the financial outlook of the other entities' estates, he will receive no more than $22,795.00 on that claim. The Affidavit is uncontroverted by the Defendants. When the **?**Estimated Possible Claim" is deducted from the Debtors' scheduled assets, only $1,016,722.15 remains - far short of the Debtors' scheduled liabilities. The court is therefore satisfied that the

Debtor was insolvent on February 5, 2001. *See* 11 U.S.C.A. § 101(32)(A) (West 1993) (An entity is insolvent if "the sum of such entity's debts is greater than all of such entity's property, at a fair valuation . . . .").

Lastly, the lien transfer enabled Fremont to receive more than it would otherwise receive as an unsecured creditor in a case under Chapter 7. 11 U.S.C.A. § 547(b)(5). By Affidavit, the Trustee states that unsecured, nonpriority claimants will not receive a 100 percent distribution in the Debtors' Chapter 7 case. *See Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 465 (6th Cir. 1991) ("Unless the estate is sufficient to provide a 100% distribution, any unsecured creditor . . . who receives a payment during the preference period is in a position to receive more than it would have received under a Chapter 7 liquidation.").

III

Fremont raises two defenses to the Trustee's § 547(b)(2) powers. First, it cites the contemporaneous exchange defense of § 547(c)(1) which provides that a trustee may not avoid an otherwise preferential transfer:

> (1) to the extent that such transfer was—
>
> > (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
> >
> > (B) in fact a substantially contemporaneous exchange[.]

11 U.S.C.A. § 547(c)(1) (West 1993). This exception, however, is not applicable to purchase money security interests, which are instead defended under § 547(c)(3).[2] *See Waldschmidt v. Mid-State Homes, Inc. (In re Pitman)*, 843 F.2d 235, 241 n.2 (6th Cir. 1988). Fremont fails under § 547(c)(3), because the Deed of Trust was not perfected within twenty days of the loan distribution. *See* 11 U.S.C.A. § 547(c)(3)(B) (West Supp. 2001).

Also, alleging negligence, breach of fiduciary duty, and/or fraud on the part of Accent Title, Fremont urges the crafting of an equitable defense to § 547(b). Fremont cites no authority, nor is the court aware of any, in support of this position. Further, the court is unwilling to recognize a preference defense beyond those set forth by Congress in § 547(c). *See Katz v. Leonard P. Drabkin Irrevocable Trust (In re Van Dyck/Columbia Printing)*, 263 B.R. 167, 177 (Bankr. D. Conn. 2001) (**?**Where Congress has appreciated a problem, and has codified a specific statutory tool to address it, this Court's expansion of that remedy, even in the cause of equity,

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[2]

(c) The trustee may not avoid under this section a transfer—

. . . .

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property[.]

11 U.S.C.A. § 547(c)(3) (West 1993 & Supp. 2001).

would amount to an illicit act of legislation."); *Kelley v. Chevy Chase Bank (In re Smith)*, 236 B.R. 91, 99-100 (Bankr. M.D. Ga. 1999) (There is no equitable preference defense based on the untimely actions of another.).

In sum, the security interest conveyed by the Deed of Trust was a preferential transfer under § 547(b). The Trustee's Motion for Summary Judgment will therefore be granted. An order consistent with this Memorandum will be entered.

FILED: March 15, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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O R D E R

For the reasons stated in the Memorandum on Motion for Summary Judgment filed this date, the court directs the following:

1. The Motion for Summary Judgment filed by the Plaintiff Sterling P. Owen, IV, Trustee, on February 13, 2002, is GRANTED.

2. The lien of the Deed of Trust executed by the Debtor Zafer Roback on November 27, 2000, in favor of the Defendant Fremont Investment & Loan, Inc., encumbering property at 2819 Wimpole Street, Knoxville, Tennessee, recorded on February 5, 2001, of record in Instrument No.

200102050050444 in the office of the Register of Deeds for Knox County, Tennessee, is avoided as a preferential transfer pursuant to 11 U.S.C.A. § 547(b) (West 1993).

SO ORDERED.

ENTER: March 15, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE