

[Please Note: This Decision was Reversed On Appeal]

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE:	)	Case No. 94-51481
	)	
WILMA L. BUSHEY	)	Chapter 7
Debtor	)	
	)	Adversary No. 95-5005
	)	
KATHRYN A. BELFANCE, TRUSTEE	)	
Plaintiff	)	JUDGE MARILYN SHEA-STONUM
	)	
v.	)	
	)	
WILMA L. BUSHEY, ET AL.	)	<b><u>ORDER DENYING MOTIONS</u></b>
<b><u>FOR</u></b>	)	
Defendants	)	<b><u>SUMMARY JUDGMENT</u></b>

This matter is before the Court on cross-motions for summary judgment filed by Plaintiff-Trustee, Kathryn Belfance, and by Debtor-Defendant, Wilma Bushey.<sup>1</sup> This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to

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The other named Defendant in this adversary proceeding, Sharon Jones Nolan, has not responded to either the Complaint or the motions for summary judgment. Plaintiff-Trustee has moved for an entry of default judgment against Ms. Nolan, a matter that is currently pending before the Court.

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be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(E) and (H) over which this Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 157(a), and (b).

**I. PROCEDURAL BACKGROUND**

The Complaint in this matter alleges that Debtor-Defendant, Wilma Bushey, fraudulently conveyed certain property to Defendant, Sharon Jones Nolan, and that such transfer is avoidable by Plaintiff-Trustee. The Complaint also asserts that, because the Plaintiff-Trustee maintains that Defendant-Nolan only holds bare legal title to the property, a constructive trust should be established in favor of Plaintiff-Trustee for the benefit of Debtor-Defendant's creditors. Based upon these contentions, Plaintiff-Trustee filed a motion for summary judgment asserting that the facts established in the pleadings and the transcripts of the defendants' depositions present no genuine issues of material fact and that she is thereby entitled to judgment as a matter of law.

Debtor-Defendant also contends that there exist no genuine issues of material fact and that, therefore, she is entitled to judgment as a matter of law. As support for that contention, Debtor-Defendant states that the statute of limitations for causes of action involving fraudulent conveyances has passed, thus precluding Plaintiff-Trustee from asserting her claim, and that based upon the facts of this case, there existed no fraudulent conduct to support the imposition of a constructive trust.

**II. FACTUAL BACKGROUND**

On September 23, 1994, Debtor-Defendant, Wilma Bushey, filed a voluntary petition under chapter 7 of the Bankruptcy Code. On her schedules, Debtor-Defendant indicated that she owned no real property and that she

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resided at 888 Blanding Avenue, Akron, Ohio.

During the 11 U.S.C. §341 meeting, held on November 22, 1994, Plaintiff-Trustee learned that prior to April 8, 1986, Debtor-Defendant owned the property located at 888 Blanding Avenue. Plaintiff-Trustee also learned that on April 8, 1986, Debtor-Defendant quitclaimed her interest in that property to one of her four children, Defendant-Nolan. After quitclaiming the property, however, Debtor-Defendant continued to use 888 Blanding Avenue as her primary residence.

In both motions for summary judgment, the parties rely on deposition transcripts of Debtor-Defendant and Defendant-Nolan. To support her position that the conveyance should be set aside, Plaintiff-Trustee relies on the parties' indication that although the current fair market value of the property is between \$30,000.00 - \$40,000.00, only \$1.00 was exchanged for the property "to make [the transaction] legal." Plaintiff-Trustee also relies on the facts that no gift tax return was ever filed after the transaction took place, and that Debtor-Defendant has paid no rent to her daughter for use of the property. Further, Plaintiff-Trustee relies on the indication by the parties that Defendant-Nolan "would never do anything to put me out of [that] house or leave me without a home," and that upon the death of Debtor-Defendant, the property would be sold and divided equally among her four children pursuant to the terms of a 1957 will.

For support of her position that the conveyance should not be set aside, Debtor-Defendant relies on the facts that even though she continued to live in the residence without paying any rent, Defendant-Nolan maintained the premises and has paid all property taxes associated with the property.

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Debtor-Defendant further relies on her deposition testimony indicating that the reason the property was transferred to Defendant-Nolan was to ensure that her daughter and grand-daughter would have a place to live should anything happen to Debtor-Defendant and her husband.

At the time that the property was transferred, Debtor-Defendant's creditors included Citibank Visa, J.C. Penney, and O'Neils (nka Kaufmann's). Sometime during 1988, those existing debts were paid in full from life insurance proceeds received as a result of Debtor-Defendant's husband's death. However, between the time that those debts were paid in full and the time of her current bankruptcy petition Debtor-Defendant incurred additional debt with those same creditors that she is now seeking to discharge.

**III. DISCUSSION**

A court shall grant a party's motion for summary judgment "if ... there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A material fact is one that must be decided before there can be a resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Bachner v. State of Illinois (In re Bachner)*, 165 B.R. 875, 878 (Bankr. N.D. Ill. 1994). The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. V. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Searcy v. City of Dayton*, 38 F.3d 282, 285

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(6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 503 U.S. 939 (1992).

I. Whether the Allegation that the Transfer of the Property Constitutes a Fraudulent Conveyance and is Avoidable Pursuant to Ohio Law can be Decided by a Motion for Summary Judgment.

Section 544(b) of the Bankruptcy Code provides that a trustee may avoid any transfer of a debtor's interest in property that is voidable under applicable state or federal law. 11 U.S.C. §544(b). This "strong arm" provision allows the trustee to "step into the shoes" of a creditor to nullify transfers voidable under state fraudulent conveyances acts to benefit all unsecured creditors. See *N.L.R.B. v. Martin Arsham Sewing Co.*, 873 F.2d 884, 887 (6th Cir. 1989). To use this provision, however, there must be a creditor whose "shoes" the trustee can fill.<sup>2</sup>

Plaintiff-Trustee asserts that pursuant to §544(b) she can invoke Ohio Revised Code (O.R.C.) §§1336.03, 1336.05, and 1336.07, and avoid the transfer at issue because it was fraudulent. Debtor-Defendant asserts that pursuant to O.R.C. §1336.09, Plaintiff-Trustee's cause of action is barred by the statute of limitations. Both parties, however, rely upon O.R.C. sections which were substantially revised in 1990 and neither makes mention of the code

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Although not raised as an issue by Debtor-Defendant in her current motion, the Court has serious concerns as to whether there exist any creditors whose "shoes" the Plaintiff-Trustee can fill given that all of Debtor-Defendant's creditors that existed at the time of the allegedly fraudulent conveyance were paid in full in 1988. In the future, this Court will expect a plaintiff-trustee to identify the creditor or creditors whose circumstances support the trustee's pursuit of such action at the first pre-trial or explain such trustee's inability to do so.

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provisions that governed when the transaction took place.

(A) *The Controlling Law:*

On September 28, 1990, the Ohio legislature enacted the Ohio Uniform Fraudulent Transfer Act ("OUFTA"), O.R.C. §1336.01 *et seq.*. That legislation superseded the then existing Ohio Fraudulent Conveyances law and, because OUFTA is not to be given retroactive effect, any transfers occurring before its enactment are not governed by its provisions. See *Van Fosson v. Babcock & Wilcox Co.*, 522 N.E.2d 489, 491 (Ohio 1988); *Cresho v. Cresho*, 97 Ohio App. 3d 5, 8 (Ohio Ct. App. 1994); *In re Taubman*, 160 B.R. 964, 989 (Bankr. S.D. Ohio 1993); *Whittaker v. Carmean (In re Carmean)*, 153 B.R. 985, 989 (Bankr. S.D. Ohio 1993); *Scott v. Fifth Third Bank (In re Carrousel Motels, Inc.)*, 146 B.R. 733, 735 (Bankr. S.D. Ohio 1992). Therefore, given that the challenged transfer occurred in 1986, the O.R.C. provisions that were in effect prior to the passage of OUFTA would apply to this case.

Under the Ohio law that governed this transaction, the Ohio Revised Code sections under which Plaintiff-Trustee may advance her cause of action are §§1336.04, 1336.06, and 1336.07. The text of those provisions state:

**§1336.04 - Conveyances resulting in insolvency.** Every conveyance made ... by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made ... without a fair consideration.

**§1336.06 - Debts incurred beyond ability to pay.** Every conveyance made ... without fair consideration, when the person making the conveyance ... intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.

**§1336.07 - Intent to defraud.** Every conveyance made ... with

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actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present or future creditors.

See Ohio Rev. Code Ann. §§1336.04; 1336.06; 1336.07 (Anderson 1979).

*(B) Debtor-Defendant's Motion for Summary Judgment:*

Debtor-Defendant argues that Plaintiff-Trustee's cause of action is barred by the statute of limitations.<sup>3</sup> That argument, however, is without merit. A trustee in bankruptcy, who bases a cause of action on any Ohio Revised Code fraudulent conveyance provision, must bring such an action within 2 years after the entry of the bankruptcy order for relief. 11 U.S.C. §546(a); *Hunter v. Hansen (In re Hansen)*, 114 B.R. 927, 933-34 (Bankr. N.D. Ohio 1990); *Corzin v. Haugen (In re Flexible Artcraft Graphics Unlimited, Inc.)*, 74 B.R. 917, 920-21 (Bankr. N.D. Ohio 1987). The trustee can only advance that action, however, if the represented creditor's 4 year statute of limitations, as provided by Ohio law, has not yet expired. See Ohio Rev. Code Ann. §2305.09(C) (Anderson 1995); *Burr v. Bd. of County Comm'rs. of Stark County*, 491 N.E.2d 1101, 1108 (Ohio 1986); *Stivens v. Summers*, 67 N.E. 884, 884-85 (Ohio 1903).

In either situation, the statute of limitations does not begin to run until the

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Debtor-Defendant relies upon O.R.C. §1336.09 (OUFTA-as revised in 1990) which states that "[a] claim for relief with respect to a transfer ... that is fraudulent under section 1336.04 or 1336.05 of the Revised Code is extinguished unless an action is brought ... within four years after the transfer was made ... or, if later, within one year after the transfer ... was or reasonably could have been discovered by the claimant." However, as discussed previously, this statutory provision is not controlling in this case.

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Although the transfer at issue was properly recorded, allegations of fraud under these provisions of the Ohio Revised Code do not contemplate constructive discovery and a cause of action does not accrue

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fraud and wrongdoer are actually discovered.<sup>4</sup> *Stivens v. Summers*, 67 N.E. 884, 884-85 (Ohio 1903); *Burr v. Bd. of County Comm'rs. of Stark County*, 491 N.E.2d 1101, 1108 (Ohio 1986). In this case the allegedly fraudulent conduct was first discovered<sup>5</sup> during the November 22, 1994, §341 meeting and Plaintiff-Trustee's Complaint based upon that conduct was filed less than 3 months later on January 24, 1995. Therefore, this cause of action is not barred as it was brought well within the applicable statute of limitations and Debtor-Defendant's motion for summary judgment is denied.

(B) *Trustee-Plaintiff's Motion for Summary Judgment:*

Given that this case is not governed by OUFTA, the Plaintiff-Trustee, to succeed on her motion for summary judgment, must show that there exist no genuine issues of material fact under the O.R.C. provisions cited *supra* page 7.

**O.R.C. §1336.07:** Plaintiff-Trustee does not allege that Debtor-Defendant acted with actual intent to defraud her creditors when she transferred property to Defendant-Nolan. Plaintiff-Trustee does contend,

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when the fraudulent deed is filed for record, unless the plaintiff then receives actual notice of its execution and of the circumstances which render it fraudulent. *See Stivens v. Summers*, 67 N.E. 884, 885-86 (Ohio 1903).

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Discovery, for the purpose of starting the time for a statute of limitations for fraud is actual discovery, or what, by the exercise of due diligence, might have been discovered. *Copeland v. Delvaux*, 623 N.E.2d 569, 572 (Ohio Ct. App. 1993). Debtor-Defendant has not alleged any facts to suggest that the creditors, whose "shoes" the Plaintiff-Trustee must fill, should have discovered the allegedly fraudulent transaction prior to the §341 meeting.

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Plaintiff-Trustee's argument was primarily based upon O.R.C. §1336.04(B) (OUFTA-as revised in 1990) which specifically states that in determining whether a conveyance was fraudulent consideration may be given to certain enumerated factors. However, as discussed previously, this statutory provision is not controlling in this case.



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however, that Debtor-Defendant's actions were "badges of fraud"<sup>6</sup> that evidenced such actual intent. However, while the proof of a sufficient number of "badges of fraud" may give rise to a rebuttable presumption that the alleged fraud exists, their mere existence does not mandate such a finding. See *In re Hansen*, 114 B.R. 927, 935 (Bankr. N.D. Ohio 1990); *Cardiovascular & Thoracic Surgery of Canton, Inc. v. DiMazzio*, 524 N.E.2d 915, 918 (Ohio Ct. App. 1987). Therefore, in viewing the facts in the light most favorable to Debtor-Defendant, any presumption raised by Plaintiff-Trustee could be rebutted. As such, genuine issues of material fact exist as to Debtor-Defendant's intent and Plaintiff-Trustee's motion for summary judgment must fail.

**O.R.C. §1336.06:** In this case it is undisputed that after the transfer took place, Debtor-Defendant paid her creditors in full. Therefore, even assuming that the transfer was made without fair consideration, Debtor-Defendant's 100% payment to the creditors whose claims Plaintiff-Trustee asserts, precludes Plaintiff-Trustee from proving that at the time of the transfer there was an inability to pay. See *McCall v. Pixley*, 27 N.E. 887 (Ohio 1891) (for the general proposition that if a debtor retains sufficient property to pay subsisting debts, a gratuitous transfer of property is not fraudulent, even though the debtor subsequently becomes insolvent and unable to pay new debt). Therefore,

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Plaintiff-Trustee's argument was primarily based upon O.R.C. §1336.04(B) (OUFTA-as revised in 1990) which specifically states that in determining whether a conveyance was fraudulent consideration may be given to certain enumerated factors. However, as discussed previously, this statutory provision is not controlling in this case.

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because Plaintiff-Trustee cannot advance a cause of action based upon O.R.C. §1336.06, her motion for summary judgment must fail.

**O.R.C. §1336.04:** Plaintiff-Trustee also argues that the property was transferred without fair consideration and that such a transfer rendered Debtor-Defendant insolvent.<sup>7</sup> Plaintiff-Trustee fails, however, to address Debtor-Defendant's contention that upkeep of the house and payment of property taxes by Defendant-Nolan constitutes fair consideration.<sup>8</sup> Plaintiff-Trustee also fails to provide any evaluation of the ratio between Debtor-Defendant's assets and liabilities at the time of the transfer. Consequently, because the burden to specifically show a lack of fair consideration and insolvency is borne by Plaintiff-Trustee, and because all facts must be viewed in the light most favorable to the non-moving party, a genuine issue exists as to both of these issues and Plaintiff-Trustee's motion for summary judgment must fail. *See In re Hansen*, 114 B.R. 927, 934 (Bankr. N.D. Ohio 1990); *In re Warner*, 65 B.R. 512, 520 (Bankr. S.D. Ohio 1986) (stating that "[t]raditionally, it has been held in bankruptcy courts that allegations of fraud which involve factual issues of intent and insolvency are not capable of resolution by the mechanism of summary judgment.")

II. Whether the Allegation that there Should be the Imposition of a

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For this argument Plaintiff-Trustee relies upon O.R.C. §1336.04(A)(2), as revised in 1990, which states that a transaction made without fair consideration is fraudulent to creditors whose claims arose either before or after the transfer took place. The code provision which is applicable in this case, however, only addresses fraud as to existing creditors so that any allegations of fraud as to the creditors whose claims arose after Debtor-Defendant paid her debts in full cannot be advanced as they are "future" creditors.

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The Ohio Fraudulent Conveyances law, O.R.C. §1336.03 (Ohio Rev. Code Ann. (Anderson 1979)), states that fair consideration is given for property:

- (A) When in exchange for such property ... as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied; or
- (B) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

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Constructive Trust in Favor of the Plaintiff-Trustee for the Benefit of the Unsecured Creditors can be Decided by a Motion for Summary Judgment.

Plaintiff-Trustee contends that because Defendant-Nolan characterized the transfer as "a gift for me to handle, to hold," and because Debtor-Defendant claimed that her daughter would never "put me out of the house or leave me without a home," the Debtor-Defendant clearly has an equitable interest in the property. Therefore, Plaintiff-Trustee argues, she is entitled to recover the property on behalf of the bankruptcy estate through the imposition of a constructive trust. Debtor-Defendant contends that no constructive trust should be imposed because, upon transfer of the property, Debtor-Defendant never expected to recover any interest in the property at a later time as the transfer was intended to ensure that her daughter and grand-daughter would have a place to live.

*(A) The Controlling Law:*

To determine whether or not it is appropriate to impose a constructive trust on property which may be a part of a debtor's estate, a court must look to the applicable state law. See *In re Rowland*, 140 B.R. 206, 208 (Bankr. S.D. Ohio 1992). In Ohio, a constructive trust is defined as:

[A] trust by operation of law which arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice.

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*Ferguson v. Owens*, 459 N.E.2d 1293, 1295 (Ohio 1984). It is necessary that the party seeking to impose a constructive trust present the required proof by clear and convincing evidence. *Spencer v. Spencer*, 89 N.E.2d 496, 499 (Ohio Ct. App. 1949); *Eckenroth v. Stone*, 158 N.E.2d 382, 385 (Ohio Ct. App. 1959); *Gertz v. Doria*, 578 N.E.2d 534, 535 (Ohio Ct. App. 1989). Clear and convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Lansdowne v. Beacon Journal Publishing Co.*, 512 N.E.2d 979, 984 (Ohio 1987).

(B) *Plaintiff-Trustee's Motion for Summary Judgment:*

In addition to Plaintiff-Trustee's contention that Defendant-Nolan held the property for the sole benefit of her mother, Plaintiff-Trustee also acknowledged Defendant-Nolan's statement that she has the absolute right to evict her mother from the premises. Given such a statement by Defendant-Nolan, there exists an issue as to what rights each party has to the property. As such, Plaintiff-Trustee has not shown by clear and convincing evidence that a constructive trust should be imposed, thus precluding relief via summary judgment.

Further, Plaintiff-Trustee did not address the presumption in Ohio law that a conveyance to an individual's own child, without fair consideration, is a gift. See *John Deere Indus. Equip. Co. v. Gentile*, 459 N.E.2d 611, 616 (Ohio Ct. App. 1983) (citing *Creed v. Lancaster Bank*, 1 Ohio St. 1, 9-10 (Ohio 1852)). To overcome such a presumption, a party must present evidence to show that the parent conveyed only the bare legal title and intended to retain equitable ownership. See *id.* By viewing the evidence in the light most favorable to Debtor-Defendant, this presumption cannot be overcome by Plaintiff-Trustee and

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therefore her motion for summary judgment must be denied.

*(C) Debtor-Defendant's Motion for Summary Judgment:*

Debtor-Defendant contends that she "transferred her property to [Defendant-Nolan] completely and without retaining any legal interest." This conclusory assertion, without any factual support, does not show that no genuine issues of material fact exist, and, therefore, Debtor-Defendant's motion for summary judgment must fail.

**IV. CONCLUSION**

"Although summary judgment is a useful and often efficient device for deciding cases, it must be used only with extreme caution for it operates to deny a litigant [her] day in court." *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir. 1979). Because the party moving for summary judgment must show conclusively that there exist no genuine issues of material fact, and because the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion, both parties motions for summary judgment in this case must fail.

Therefore, based upon the foregoing, it is determined that genuine issues of material fact exist as to the allegations in Plaintiff-Trustee's Complaint. As such, both parties' motions for summary judgment are hereby denied and this matter is set for a pre-trial conference on December 20, 1995, at 2:00 p.m., in Room 250 U.S. Courthouse, Federal Building, Akron, Ohio.

**IT IS SO ORDERED.**

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**MARILYN SHEA-STONUM**  
**Bankruptcy Judge**

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DATED: 12/7/95