

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
BAY CITY**

IN RE: Kevin W. Kulek

Chapter 7 Petition
16-21030-dob
Honorable Daniel Opperman

_____/

RANDALL L. FRANK, TRUSTEE,
Plaintiff,

Adversary Case Number
17-_____-dob
Honorable Daniel Opperman

V

AARON KLUMPP,
Defendant.

_____/

Keith M. Nathanson, P41633
Special Litigation Counsel to Randall L. Frank, Trustee
Attorney for Plaintiff
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_____/

COMPLAINT

NOW COMES Trustee, Randall L. Frank, by and through his Special Litigation Counsel, Keith M. Nathanson, PLLC, and for his Complaint for avoidance of fraudulent transfers to Defendant, AARON KLUMPP, states as follows:

JURISDICTION

1. This Honorable Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1334 and 157.
2. This is a core proceeding as defined by 28 U.S.C. §157(b).

3. Venue is proper in this district pursuant to 28 U.S.C. § 1409(a).
4. This adversary proceeding is brought pursuant to 11 U.S.C. § 548, the Federal Rules of Bankruptcy Procedure 7001.

FACTS AND GENERAL ALLEGATIONS

5. Subsequent to the filing of Debtor's Chapter 7 Petition, Randall Frank was appointed the duly qualified Trustee for the bankruptcy estate ("Trustee").
6. Defendant is located at 709 East Haley Street, Midland, MI 48640 and/or 1302 Springfield Road, Midland, MI 48642.
7. Debtor was actively doing business as "SkitB Pinball" (an assumed name of Debtor) from 2012 until at least mid-2015.
8. Debtor is believed to still be conducting business as SkitB Pinball.
9. That in 2012, Debtor did display and promote a "Predator" pinball machine at the Chicago Pinball Expo.
10. That in April, 2012, Debtor, along with Defendant and other parties, did advertise and announce that pre-orders would be taken for a limited run of 200-250 Predator™ pinball machines.
11. That Debtor, along with Defendant and other parties, began development of said machine in July, 2011.
12. That the likeness of the "Predator" characters, logos, and all other intellectual property belonging to and regarding the "Predator" movie, character, likeness, symbols and logos are the copyrighted and trademarked property of Twentieth Century Fox Licensing and Merchandising Corporation.

13. That at the time of the announcement of the “pre-orders”, Debtor did represent and warrant that they had the intellectual property (IP) rights to use the Predator™ assets of Twentieth Century Fox Licensing and Merchandising Corporation.
14. That in late June or early July, 2013, the website of “SkitB” Pinball was ‘scrubbed’ and all references to Predator™ or any characters, logos, and all other intellectual property belonging to and regarding the “Predator” movie, character, likeness, symbols and logos are the copyrighted and trademarked property of Twentieth Century Fox Licensing and Merchandising Corporation was removed from the website.
15. That on or about June 15, 2013, Debtor received a “cease and desist” letter (C&D) from Counsel for Twentieth Century Fox Licensing and Merchandising Corporation advising Defendants to immediate cease and desist in the use of any IP regarding the Predator™ franchise and name, as Debtor and Defendant, along with other parties, possessed no licenses for same.
16. That Debtor, along with other parties, never possessed the required licensing and IP agreements with Twentieth Century Fox Licensing and Merchandising Corporation for the manufacture and/or production of the Predator™ pinball machine, or use of any of the likenesses, symbols, logos and other trademarked and/or copyrighted property.
17. That notwithstanding Debtor, along with other parties’, lack of licensing, Debtor and Defendant, along with other parties, continued to disseminate information to the buyers of the Predator™ pinball machine that production was continuing.

18. That Debtor, along with Defendant and other parties, failed and/or refused to advise the approximately 250 buyers, that they failed to obtain any IP licensing from Twentieth Century Fox Licensing and Merchandising Corporation, and had no authority to reproduce any of the copyrighted and/or trademarked IP property of Twentieth Century Fox Licensing and Merchandising Corporation, which included the design and manufacture of the Predator™ pinball machine and any likenesses to the copyrighted and trademarked images owed by Twentieth Century Fox Licensing and Merchandising Corporation.
19. That Debtor along with Defendant and other parties, accepted “holding deposits” of \$250.00 from the approximately 250 buyers.
20. That on about February 26, 2014, Debtor, along with other parties, did email purchasers of the Predator™ pinball machine advising them that it was “mission complete” and that they were ready to manufacture the machine.
21. That on or about June 24, 2014, Debtor along with other parties, advised the buyers that their pinball machine would be delivered “in a matter of a few short months”, and requested the buyers to pay the remaining balance for the purchase of the machine, approximately \$4,500.00 per machine, from each of the 250 buyers.
22. That in March 2015, Debtor, along with other parties, admitted that no license was ever acquired from Twentieth Century Fox Licensing and Merchandising Corporation for any of the Predator™ intellectual property in an interview with Pinball News.

23. That Debtor along with other parties, abandoned the manufacture of the Predator™ pinball machine.
24. That from the time period commencing January 1, 2012 until Mid-2015, Debtor transferred to Defendant, what Plaintiff believes to be at a minimum, \$10,000.00 plus an unknown amount of cash and other transfers of deposit money from the “SkitB” account to Defendant.
25. Debtor has failed and/or refused to produce any records to show any invoices, services, contracts for Defendant.
26. Debtor has not produced a 1099 or W-2 to show that Defendant was an employee, and has testified he has no payroll records for Defendant.
27. Defendant was subpoenaed to testify and did not bring any documents to show that he was an actual employee of Debtor.
28. In the two years immediately preceding the filing of Debtor’s instant chapter 7, Debtor transferred what Trustee believes to be at a minimum, \$10,000.00 plus an unknown amount of cash and other transfers to Defendant for no value.

COUNT I – AVOIDANCE OF FRAUDULENT TRANSFER OF REAL PROPERTY
PURSUANT TO 11 U.S.C. §548(a)(1)(A) – ACTUAL INTENT

29. Plaintiff hereby repeats and restates the allegations contained in paragraphs one through thirty-one, as though fully set forth herein.
30. The transfer of an unknown amount of cash and other transfers by Debtor from the deposit money paid by purchasers of the Predator pinball machine for a home titled solely in Defendant’s name was made with the actual intent to hinder, delay, or defraud creditors.

31. Pursuant to 11 U.S.C. §544(b), the Trustee may avoid any transfer of an interest of the debtor in property that is voidable under applicable state law.

32. The applicable state law for avoiding transfer is Michigan's Uniform Fraudulent Transfer Act ("UFTA"), M.C.L. §566.34, *et seq*, which governs actual fraudulent transfers.

33. Debtor's transfer of deposit money for the purchase of a home in Defendant's name is avoidable by the Trustee pursuant to M.C.L. §566.34(1)(a), which states:

“A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation...with the actual intent to hinder, delay, or defraud any creditor of the debtor.

34. The Bankruptcy Code also provides a remedy to avoid actual fraudulent transfers under 11 U.S.C. §548(a)(1)(A), which states:

“The trustee may avoid any transfer...of an interest of the debtor in property...incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) Made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.”

11 U.S.C. § 548(a)(1)(A) (emphasis added).

35. Because acts of fraud are rarely overt, Courts rely on certain badges of fraud to prove actual intent.

36. The most frequently utilized badges of fraud have been codified in a non-exhaustive list in the UFTA, which include:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

M.C.L. §556.34(2).

37. Debtor had actual intent to “hinder, delay or defraud” creditors by transferring deposit money paid by Predator purchasers to Defendant, who is a friend and associate of Debtor.
38. The intent is evidenced by the presence of several badges of fraud, including, but not limited to:
- a. The transfer was concealed;
 - b. Debtor removed or concealed his assets in the name of Defendant;
 - c. Debtor had actual knowledge that he had no license from Fox to produce the pinball machines, having received two cease & desist letters and was under threat of suit by the Predator pinball purchasers;
 - d. Debtor transferred money to Defendant without there being any consideration for the transfer.
 - e. Defendant was never issued a W-2 or 1099 to evidence his alleged “employment” with Debtor.
 - f. Debtor received no consideration for the transfer, and any consideration which may have been paid, but is currently unknown, was not reasonably equivalent to the value of the money transferred by Debtor;
 - g. Debtor was insolvent or became insolvent shortly after the transfer was made, as Debtor has testified under oath that he has had no income and earned no money from 2013 to present, and was receiving unemployment benefits in 2012;
 - h. The transfer occurred shortly before or shortly after substantial debt was incurred.

i. Debtor continued to pay the utilities and taxes for the home, as well as repair and other expenses even after the purchase.

39. Pursuant to 11 U.S.C. §550, the Trustee may avoid the transfer and/or recover the value of the transferred property for the benefit of the estate from the initial transferee and any immediate transferee.

40. Defendant, Amanda Kulek, is the initial transferee.

41. The Trustee may avoid the transfer of the home located at 1301 Pine River Road, Midland, Michigan for the benefit of the estate from the Defendant.

WHEREFORE, Plaintiff, Randall L. Frank, Chapter 7 Trustee for the Estate of Kevin Kulek, prays this Honorable Court enter a Judgment in favor of the Chapter 7 Trustee as follows:

- a. The transfer of the money to Defendant be avoided pursuant to 11 U.S.C. §548(a)(1)(A);
- b. Pursuant to 11 U.S.C. §550, allow the Trustee to recover any money for the benefit of the estate, plus enter a Judgment against Defendant for \$10,000.00, the amount believed to have been transferred to Defendant in cash or equivalent transfer plus any other amounts as the Court deems just; together with costs and interest, which the Trustee may pursue using any and all remedies available under State and Federal Law, and the Judgment to accrue interest at the Federal Rate.

COUNT II – AVOIDANCE OF FRAUDULENT TRANSFER OF REAL PROPERTY

PURSUANT TO 11 U.S.C. §548(a)(1)(A) – CONSTRUCTIVE FRAUD

42. Plaintiff repeats and restates the allegations in paragraph one through forty-four, as through fully set forth herein.

43. In the alternative, the Debtor's transfer of the cash (or equivalent) to Defendant is constructive fraud, pursuant to 11 U.S.C. §548(a)(1)(B).

44. Where there is an act of constructive fraud, Debtors' intention is irrelevant to the transaction in question.

45. That for a transaction to be considered constructively fraudulent, the Debtor must have:

(i) Received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)

(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) Was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;

(III) Intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) Made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. §548(a)(1)(B)

46. The act of transferring cash or cash equivalents to Defendant by Debtor constitutes a “transfer” or “obligation” as contemplated by 11 U.S.C. §548 (“Transfer”).

47. The Transfers were made within two years before the filing of the petition.

48. The transfer of the money occurred as a continuing sequence of transfers, starting March, 2014, and running through 2/1/2015, at a minimum.

49. Debtor received less than a reasonably equivalent value in exchange for the Transfers, as:

- a. Defendant performed no work for Debtor;
- b. Defendant has not produced a single record to show he was actually an employee of Debtor;
- c. Debtor has no records of Defendant ever being an employee of Debtor or Debtor’s company.

50. Debtor was insolvent on the dates of the Transfers, or became insolvent as a result of the Transfers.

51. Debtor divested himself of assets to render himself uncollectible by his Creditors and to place the deposit money out of the reach of the purchasers of the Predator pinball machine, and left himself with an unreasonably small amount of capital.

52. Pursuant to 11 U.S.C. §550, the Trustee may avoid the transfer, and/or recover the value of the transferred property for the benefit of the Estate from the initial transferee and any immediate transferee.

53. Defendant is the initial transferee.

54. Defendant had no justification for the transfer of the money into his name, nor the transfer of Predator deposit money into his name.

WHEREFORE, Plaintiff, Randall L. Frank, Chapter 7 Trustee for the Estate of Kevin Kulek, prays this Honorable Court enter a Judgment in favor of the Chapter 7 Trustee as follows:

- c. The transfer of the money to Defendant be avoided pursuant to 11 U.S.C. §548(a)(1)(A);
- d. Pursuant to 11 U.S.C. §550, allow the Trustee to recover any money for the benefit of the estate, plus enter a Judgment against Defendant for \$10,000.00 plus any other amounts the Court deems just, the amount believed to have been transferred to Defendant in cash or equivalent transfer; together with costs and interest, which the Trustee may pursue using any and all remedies available under State and Federal Law, and the Judgment to accrue interest at the Federal Rate.

Respectfully submitted,

/s/ Keith M. Nathanson
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