

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
16-2073
Honorable Daniel Opperman

V

AMANDA LYNN KULEK,
ALSO KNOWN AS
AMANDA L. KULEK AND
AMANDA KULEK,
Defendant.

_____/

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**SUPPLEMENTAL BRIEF IN SUPPORT OF TRUSTEE'S POSITION TO
RECOVER TRANSFERRED HOME AS ASSET OF THE ESTATE**

Facts:

Trustee commenced this action to recover the home which was unequivocally purchased by assets transferred by Debtor to his wife.

As previously represented to this Court, Trustee has the original closing documents which listed Debtor & his spouse as purchasers of the home. One day prior to closing Debtor & Defendant signed an amendment to remove Debtor's name from the purchase.

Additionally, despite Defendant's position that she "paid" for the home, Trustee has the records from Debtor's PayPal account and Wildfire Credit Union (Debtor's sole account) which show:

- a) The week of closing, approximately three days before the home was purchased, Debtor transferred \$28,200 from his PayPal account (which exclusively held funds from the Predator Pinball machine depositors and for which Defendant has admitted never depositing any money into) to his Wildfire Credit Union Account (in the name of SkitB Pinball only);
- b) The day before closing, Debtor obtained a cashiers' check payable to Attorneys Title (the title company closing the transaction for the purchase of the home) in the exact amount of the balance due for the purchase of the home, which is further confirmed by Debtor's testimony that he did obtain the check and present it to Attorneys Title for the purchase of the home;
- c) But for the transfer of the money from the PayPal account to the Wildfire Credit Union Account, there would have not been sufficient funds to receive the cashiers' check referenced in b).

Defendant has admitted to having absolutely no records of the alleged deposits she made into the Skit-B account, nor any records of the money she allegedly received

from her grandmother. This is notwithstanding her sworn testimony that she and Debtor hid the money in the Skit-B account to evade disclosure and detection by Medicaid and the State of Michigan, so as to not affect receipt of their Medicaid benefits and assistance from the State of Michigan.

The Court has requested a brief from Trustee on the ability to recover the home, which was used with assets fraudulently conveyed by Debtor to his wife.

Law and Analysis:

A. The recovery for the estate is under 11 USC §550

11 USC §550 provides:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under [section 544, 545, 547, 548, 549, 553\(b\), or 724\(a\) of this title](#), the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under [section 547\(b\) of this title](#); and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

(d) The trustee is entitled to only a single satisfaction under [subsection \(a\) of this section](#).

(e)(1) A good faith transferee from whom the trustee may recover under [subsection \(a\) of this section](#) has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

- (A) physical additions or changes to the property transferred;
- (B) repairs to such property;
- (C) payment of any tax on such property;
- (D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and
- (E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

- (1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or
- (2) the time the case is closed or dismissed.

1. **Defendant is the initial transferee and an insider**

It is undisputed that the money was transferred for the purchase of the home in Defendant's name only. Defendant is Debtor's wife. Thus, this transfer meets the requirements of 11 USC §550(a)(1). While Debtor may have had the check written to Attorneys Title, the trajectory of the funds was clear. It is functionally insignificant that Debtor did not first convey the money to Defendant then Defendant used the funds for purposes of determining that Defendant is the initial transferee (although significant for purposes of ascertaining what the Estate should recover).

B. **The Estate is entitled to recover the asset purchased with the conveyance, and neither Debtor nor Defendant are entitled to receive the benefit of the transfer in the form of appreciation of the home.**

At least two courts have recognized that the trustee is entitled to recover the "greater of the value of the transferred property at the transfer date or the value

at the time of the recovery." Collier on Bankruptcy, ¶ 550.02[3]; see also *Langhorne v. Warmus (In re American Way Serv. Corp.)*, [229 B.R. 496](#), 530-31 (Bankr.S.D.Fla.1999) ("[W]hen the property has appreciated, the trustee is entitled to recover the property itself, or the value of the property at the time of judgment"); *Govaert v. B.R.E. Holding Co., Inc. (In re Blitstein)*, [105 B.R. 133](#), 137 (Bankr. S.D.Fla.1989) ("[T]he Trustee is entitled to at least a money judgment in the amount of the greater of the value at the time of the transfer; or the value at the time of recovery less the value of" improvements made.").

As noted by Collier, this result is consistent with the well-established purpose of § 550, to restore the estate to the position it would have occupied had the property not been transferred. See Collier on Bankruptcy, *supra*, ¶ 550.02[3]. As stated by the Courts, a trustee typically has the ability to recover the property transferred, which would allow the estate to benefit from any appreciation. Section 550(e) demonstrates the intent of Congress that any appreciation not attributable to the actions of a good faith transferee inure to the benefit of the estate. Pursuant to § 550(e), a good faith transferee is entitled to a lien to secure the lesser of the cost of any improvements, or an increase in value as a result of such improvements.^[7] See 11 U.S.C. § 550(e); see also Collier on Bankruptcy, *supra*, ¶ 550.02[3].

As is plain from its text, section 550(a)(1) holds initial transferees strictly liable for any fraudulent transfers they receive. See *Christy v. Alexander & Alexander of N.Y. Inc. (In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey)*, 130 F.3d 52, 57 (2d Cir.1997), *cert. denied*, 524 U.S.

912, 118 S.Ct. 2295, 141 L.Ed.2d 154 (1998). See *First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 974 F.2d 712, 722 (6th Cir.1992) (explaining that "[a]n initial transferee is one who receives money from a person or entity later in bankruptcy, and has dominion over the funds"); see also 5 COLLIER ON BANKRUPTCY ¶ 550.02[4][a], at 550-18 (15th ed.1996).

Some courts have found that the value of the property cannot readily be determined and that "the correct remedy is to return the property, not award and estimate of the value of the property." *In re Taylor*, 599 F.3d 880, 892 (9th Cir. 2010); see also *In re Trout*, 609 F.3d 1106, 1113, 64 Collier Bankr. Cas. 2d (MB) 257, Bankr. L. Rep. (CCH) P 81797 (10th Cir. 2010) ("the language of § 550(a) suggests that the default rule is the return of the property itself, whereas a monetary recovery is a more unusual remedy to be used only in the court's discretion"). Even if the property is amenable to valuation, "the choice of a § 550 remedy remains in the court's discretion." *Trout*, 609 F.3d at 1113.

C. **11 USC §550 contemplates restrictions on added value to the property due to actions of third parties, and the intent of §550 does not include the retention of appreciation of any asset transferred to remain with the Debtor or the Transferee**

As stated, *supra*, Congress' intent is clear to not allow the estate to benefit from any appreciation due to a **good-faith** transferee. However, there is no exception made for a transferee who is not a good-faith transferee. It would be wholly inequitable to allow a transferee, such as Defendant in this matter, to retain the benefit of the transfer by her

husband of monies to purchase the home solely in her name, in order that he could accumulate assets out of the reach of creditors

Clearly, if Congress' intent was to shield any appreciation in an asset acquired/transferred in the manner in which the instant home was, an exception would have been written into §550. It is not hard to surmise that Congress had no intent to shield wrongdoers and encourage fraudulent conveyances knowing that while the initial 'investment' might be subject to the reach of the Trustee into the Estate, that any appreciation could be retained by the Debtor and/or the Transferee

Conclusion and Relief Requested:

The Estate is entitled to recover the asset purchased with the wrongfully converted funds. The paper trail of the transaction is clear and no amount of explanation by Defendant can negate the clear and unequivocal transfer of funds by Debtor from PayPal to Wildfire Credit Union and from Wildfire Credit Union to Attorneys Title for the purchase of the home. Defendant has offered nothing and produced no evidence to show anything to the contrary. The home should be transferred back to the Estate for liquidation.

Respectfully submitted,

/s/ Keith M. Nathanson

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