United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]
[aff'd, No. 87-C-603-S (W.D. Wis. Dec. 23, 1987)]

Lawrence J. Kaiser, Trustee of the Estate of Arthur M. Lee and Caroline M. Lee, Plaintiff,
v.
Caroline M. Lee, a/k/a Carolyne M. Lee, Roger M. Lee, Constance M. Wolfgram, Individually and as Personal Representative of the Estate of Mabel A. Ormson, Linda Stapleton and Jason Lee, Defendants
(In re Arthur M. Lee, Caroline M. Lee, Debtors)
Bankruptcy Case No. 85-01206-7, Adv. Case. No. A86-0198-7

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

December 31, 1986

Jerome E. Lynch, for debtor Caroline M. Lee.
Roy L. Prange, Jr., for trustee.

Thomas S. Utschig, United States Bankruptcy Judge.

MEMORANDUM OPINION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The trustee, Lawrence J. Kaiser, appears by Roy L. Prange, Jr., and has initiated this adversary proceeding to recover property for the estate pursuant to 11 U.S.C. §§ 544(b) and 550(a). The debtor, Caroline M. Lee, appears by Jerome E. Lynch and contests the complaint. The trustee argues that a disclaimer executed by the debtor while she was insolvent was a fraudulent conveyance within the meaning of § 242 of the Wisconsin Statutes. Both parties have moved the court for summary judgment on this issue and have briefed their respective positions.

This proceeding is fundamentally a continuation of a state court action commenced by certain creditors against the debtor. The trustee assumed the right to continue the action upon the filing of the debtor's bankruptcy petition. The parties have agreed and stipulated that this matter should be determined by the Bankruptcy Court.

Mabel A. Ormson, the deceased, died on April 19, 1983. On June 7, 1983, the probate of the estate of the deceased was commenced. The debtor was named as a beneficiary in the will of the deceased. On July 1, 1983, the debtor executed a disclaimer in accordance with § 853.40 of the Wisconsin Statutes disclaiming any interest that she could receive by virtue of said will. It is not contested that the disclaimer complied with all of the provisions of § 853.40 of the Wisconsin Statutes.

Almost two years after the execution of the disclaimer, on June 18, 1985, the debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code.

There are basically two issues before the court for determination. The first is whether a disclaimer executed by a party who is insolvent is a fraudulent conveyance within the meaning of Wisconsin Statutes §§ 242.04 and/or 242.07. The second issue is whether the specific disclaimer involved herein was fraudulently executed because of improper inducement or collusion by which the disclaimant received an improper benefit. The former presents an issue that may be determined in the motion for summary judgment while the latter presents substantial issues of material fact which can only be determined by an evidentiary hearing on the matter.

Wisconsin Statutes § 242.04 provides:

> Contract producing insolvency, fraudulent. Every "conveyance" made and every obligation incurred 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 or the obligation is incurred without a fair consideration. (emphasis added)

Wisconsin Statutes § 242.07 provides:

> Fraud in fact. Every "conveyance" made and every obligation incurred with actual intent, as distinguished from an intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors. (emphasis added)

The debtor contends that a disclaimer does not constitute a "conveyance" within the meaning ascribed to that word in the Wisconsin Fraudulent Conveyances Act. Wis. Stat. § 242.13. A definition for the term "conveyance" is specifically provided in the statute.

> "Conveyance" includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance.

Wis. Stat. § 242.01(2).

It should be noted that the term "conveyance" has alternate definitions in other sections of the Wisconsin Statutes. See Wis. Stat. § 243.04. Neither disclaimer nor renunciation are listed within the definition of the term "conveyance" in § 242.01(2). The debtor argues that since a disclaimer is not listed within the definition of the term "conveyance" a disclaimer does not constitute a conveyance.

The trustee would have the court expand the definition of the term "conveyance" to include disclaimers and renunciations. The trustee asserts that "release" includes the word "conveyance." Initially, the trustee argues that the terms "release" and "disclaimer" are synonyms. The court disagrees. Disclaimer and release refer to two distinct and separate legal concepts. A release implies that the releasor has acquired an interest in property which, after acquiring, is given up. In Wisconsin a disclaimer is executed before any actual interest in property has vested. A disclaimant does not have dominion and control over the disclaimed property and does not exercise any independent control over the disposition of the property. Thus, an interest in property that is simply released may be fully subject to federal taxation while an interest that is properly disclaimed might not be subject to federal taxation. See Kennedy v. Commissioner, 804 F.2d 1332 (7th Cir. 1986).

The trustee next implicitly argues that even though the debtor has not acquired an actual vested interest in the property, she has at least acquired the power to accept or reject property. He argues that a disclaimer is a "release" of the power to accept the property. Hence, a disclaimer is a "release of tangible or intangible property" and constitutes a conveyance within the meaning of § 242.01(2) of the Wisconsin Statutes. The court disagrees.

Neither disclaimer nor renunciation were listed within the definition of conveyance provided in § 242.01(2). It must be presumed that this was not a mere oversight or accident on the part of the drafters. One of the fundamental principles of statutory interpretation is contained in the Latin expression expressio unius est exclusio alterius. A literal translation of this maxim is: If one thing is expressed then that which is not expressed is excluded. Hence, when certain things are specified in a statute an intention to exclude all others may be inferred. See Black's Law Dictionary 521 (5th ed. 1979). In § 242.01(2) payment, assignment, release, transfer, lease, mortgage, and pledge are all listed as within the definition of "conveyance." "Disclaim" is not listed within the definition. Thus, it can be inferred that there was an intention to exclude "disclaim" from the definition. The court also notes that § 853.51 of the Wisconsin Statutes lists "release" and "disclaim" separately. If disclaim was intended to be included within the term "conveyance", it would have been similarly specifically provided for.

It is not contested that the debtor's disclaimer was filed in accordance with and meets all the requirements of § 853.40 of the Wisconsin Statutes. In Wisconsin, a beneficiary under a will has a statutory right to disclaim any property or interest in property created under the will. Wis. Stat. § 853.40(2). The statute specifically sets forth three ways by which a person's right to disclaim may be barred.

> (7) Bar. (a) Method. A person's right to disclaim property or an interest in property is barred by the person's:
>
> 1. Assignment, conveyance, encumbrance, pledge or transfer of the property or interest or a contract therefor;
>
> 2. Written waiver of the right to disclaim; or
>
> 3. Acceptance of the property or interest or benefit of the property.

Wis. Stat. 853.40(7).

Insolvency is not listed as a bar to disclaiming property. A non-resident debtor is barred from exercising a disclaimer after an action to collect a debt from such a debtor has been commenced. Wis. Stat. § 853.40(b). No such limitation is provided respecting resident debtors. It is apparent that the debtor in the case sub judice was not barred from exercising her statutory right to disclaim. If the Legislature had intended to bar an insolvent debtor's right to disclaim property it would have placed such limitations within § 853.40. The fact that such limitations are only prescribed for non-resident debtors indicates that no similar restrictions to disclaiming property were intended for insolvent resident debtors.

A logical reading of §§ 242 and 853.40 of the Wisconsin Statutes indicates that the absence of the word "disclaim" in § 242 is not mere accident or oversight. Instead, the omission of the word "disclaim" in § 242 is fully consistent with the provisions of § 853.40. Any other interpretation of the two statutes would create needless conflict between the two statutes and such a construction should be

avoided. Raisanen v. City of Milwaukee, 35 Wis.2d 504, 516 (1967); Czaicki v. Czaicki, 73 Wis.2d 9, 17 (1976); State v. Surma, 263 Wis. 388, 394 (1953).

The above interpretation that would allow an insolvent debtor to disclaim an interest in property under a will is in accordance with the common law notion that creditors cannot prevent an insolvent debtor from disclaiming property absent some evidence of collusion with the beneficiary upon default.

> Although some courts take a seemingly contrary view, it is generally held that a debtor may renounce even a beneficial provision in his favor in a testamentary instrument despite any claims of his creditors, at least where he acts before a conclusive presumption of acceptance, or an estoppel to deny acceptance, has arisen.

80 Am.Jur.2d Wills § 1598 (1975).

> The true rule, founded upon principle, is that it is optionary with the devisee to accept the devise, however beneficial it may be to him; that when he elects to renounce, before any act on his part indicating an acceptance, his renunciation shall relate back, and will be held to have been made at the time of the gift, and will displace any levy of creditors that may in the meantime have been made....it is immaterial what his motives were, so long as there is no collusion with the remaindermen or residuary devisees, by which he fraudulently receives a benefit for his renunciation.

Schoonover v. Osborne, 193 Iowa 474, 187 N.W. 20, 22 (1922).

> Renunciation is not equivalent to a conveyance by the debtor, for the purpose of defeating the claims of creditors, nor is the motive that prompts it material in the absence of collusion or fraud. By renouncing the bequest, the beneficiary is deprived of any interest in the subject matter thereof, and nothing passes to him upon which an execution could be levied or made a lien. Creditors have no right, nor courts jurisdiction, to compel acceptance, or to prevent the beneficiary from renouncing or rejecting the gift.

Id.

The trustee cites two cases that seemingly take a contrary view. In Re Estate of Kalt, 16 Cal.2d 807 (1940); Stein v. Brown, 18 Ohio St. 3d 305 (1985). The court is not persuaded by the reasoning in these two cases. The court also notes that the creditors did not rely on the debtor's interest under the will in extending credit. Thus, the trustee is really requesting the court to order a windfall to the creditors. It is the opinion of the court that the disclaimer was not a fraudulent conveyance.

It is the conclusion of the court that the debtor's properly executed disclaimer was not a fraudulent conveyance under § 242 of the Wisconsin Statutes. The debtor executed the disclaimer before any interest in the property vested. A properly executed disclaimer in accordance with § 853.40 of the Wisconsin Statutes is not a conveyance within the definition of § 242.01(2) of the Wisconsin Statutes. If the trustee can present evidence indicating that the waiver was a result of improper inducement or collusion by which the debtor received an improper benefit, then the debtor's right to disclaim may have been barred. Wis. Stat. § 853.40(7). However, there is no evidence of any improper inducements. The mere fact that the devised property will ultimately vest in another family member does not constitute an improper benefit.

This opinion shall constitute findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052.