United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Gleischman Sumner Company, designated person, Plaintiff, v.
The University of Maryland Foundation, Inc., Defendant

The University of Maryland Foundation, Inc., Third-party Plaintiff, v.
Chemical Bank and City Fair II Holding Corp., Third-party Defendants
(In re Carley Capital Group, Debtor)
Bankruptcy Case No. MM11-89-00587, Adv. Case No. 90-0236-11

United States Bankruptcy Court
W.D. Wisconsin

January 8, 1992

Susan V. Kelley, Murphy & Desmond, S.C., Madison, WI, for Gleischman Sumner Company.
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Patience D. Roggensack, Ross & Stevens, S.C., Madison, WI, and William J. McKenna, Hopkins & Sutter, Chicago, IL, for Chemical Bank and Cityfair II Holding Corp.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

Plaintiff, Gleischman Sumner Company ("GSC"), has sued The University of Maryland Foundation, Inc. ("UMF"), contending that it is entitled to relief under 11 USC §§ 365, 544, 547, and/or 548, or for the reason that the rule against perpetuities has been violated. UMF has moved to dismiss GSC's complaint pursuant to FRBP 7012(b) and FRCP 12(b)(6).

Taking the well-pleaded allegations of GSC's complaint as true,[(1)] it appears that as of January 1, 1988 UMF and Carley Capital Group ("CCG"), a Wisconsin general partnership, were owners as tenants-in-common of real property located in Bowie, Prince George's County, Maryland, known as the University of Maryland Science and Technology Center (the "Science Center"). A diagram of the "potential parcel plan" for the Science Center is found at Appendix A. Pursuant to the original deed, CCG held a 75% interest in the Science Center and UMF held the remaining 25% interest.

By agreement dated March 31, 1988, CCG and UMF restructured their ownership as tenants-in-common of the Science Center. CCG agreed to convey to UMF its 75% interest in a 55 acre parcel of land (denominated as "B-1" and containing "Pod 6" and "Parcel 5F" on the appended diagram), and 73 acres of flood plain known as "the Wetlands" (denominated as "B-2" on the appended diagram). UMF agreed to convey to CCG its 25% interest in an 81 acre parcel of land (denominated as "B-3" and containing "Pod 7" and "Pod 5", exclusive of "Parcel 5F"). The agreement provided that pending the parties' ability to lawfully subdivide the property, they would continue to hold the

entirety of the 55 and 81 acre parcels as tenants-in-common, and that at closing, declarations of trust and trust agreements would be executed which would indicate that CCG held its 75% interest in the 55 acre parcel as trustee for the benefit of UMF and that UMF held its 25% interest in the 81 acre parcel as trustee for the benefit of CCG. These declarations of trust and trust agreements were never executed. The March 31, 1988 agreement further provided that CCG was to pay to UMF $200,000.00 "in good funds," and to deliver to UMF its promissory note in the amount of $800,000.00.

The March 31, 1988 agreement was modified by way of a June 8, 1988 agreement which postponed closing under the March 31, 1988 agreement until June 8, 1988. Pursuant to the June 8, 1988 agreement, CCG and UMF sold Pod 5, exclusive of Parcel 5F, to D3J Associates for $1,969,582.00. UMF agreed that it would not receive any of the proceeds from the sale of its 25% interest in Pod 5.

The provisions of the March 31, 1988 agreement were amended by the June 8, 1988 agreement such that the $200,000.00 payment to be made by CCG to UMF at closing was reduced by the amount of $33,333.33 in order to satisfy a brokerage claim. Another $4,389.38 was deducted in order to make a real estate tax adjustment. On or about June 16, 1988 CCG tendered $162,277.29 to UMF. GSC and UMF dispute the total value of the consideration received by CCG and UMF with respect to the transfer. GSC alleges that:

the Debtor received 25% of parcels 5F and 7 for a total of $535,000 in value, while the Defendant received 75% of Pod 6 for a value of $2,625,000 and 75% of the value of the Wetlands. Additionally, the Debtor paid the Defendant $162,277.29 in cash and became obligated on an $800,000 promissory note to the Defendant.

UMF asserts that reasonably equivalent value was exchanged, and enumerates several items of consideration allegedly received by CCG from UMF which were not mentioned by GSC.

The June 8, 1988 agreement further provided that:

Notwithstanding the provisions of Section 3(a), (b) and (c) (first three sentences) of the CCG/UMF Agreement, CCG and UMF shall continue to hold those portions of Phase II not conveyed to D3J or CCG as tenants-in-common until such time as the Trumpet Interchange is located or such earlier time upon which they mutually agree, subject to all of the terms, conditions and restrictions of the CCG/UMF Agreement, as hereby amended. CCG, UMF and D3J further agree that they will seek to obtain all necessary approvals to and shall cause Pods 6 and 7 to be subdivided as separate parcels of real estate as promptly as possible in any lawful manner.

The Trumpet Interchange had not, as of the October 29, 1990 date of GSC's complaint, been located, nor had Pods 6 and 7 been "lawfully subdivided."

On December 18, 1988 CCG transferred its interest in the Science Center to Cityfair II Holding Corp., a subsidiary of Chemical Bank, executing a [warranty] "Deed," a "Quit-Claim Deed," and an "Assignment," each of which was promptly recorded on December 19, 1988. The Deed specifically states that it is:

SUBJECT TO THE OPERATION AND EFFECT AND TOGETHER WITH ALL RIGHTS AND BENEFITS of an Agreement, dated March 31, 1988, by and between the Grantor [CCG] and The University of Maryland Foundation, Inc., a Maryland non-profit corporation (the "Foundation") pursuant to which the Foundation has conveyed its 25% interest in Pod 7 to CCG and CCG has conveyed its 75% interest in Pod 6 and the Wetlands (described therein) to the Foundation[.]

Neither the Deed nor the Quit-Claim Deed refers to the June 8, 1988 agreement which modified the March 31, 1988 agreement. Furthermore, neither the legal description attached to the Deed nor that attached to the Quit-Claim Deed divides the Science Center into "Pods" or "Parcels."

The Quit-Claim Deed states that:

the Grantor [CCG] hereby grants and conveys to the Grantee [Cityfair II Holding Corp.], its heirs, personal representatives, successors and assigns, all of the Grantor's right, title and interest in and to all of that land, situate and lying in Prince George's County, Maryland, which is described in Exhibit A hereto[.]

On March 10, 1989 an involuntary petition under Title 11 of the United States Code was filed against CCG. On April 9, 1989, an order for relief was entered.

On January 22, 1990 an order was entered which authorized the creditors committee to bring action against UMF. On August 1, 1990 a chapter 11 plan was confirmed, which, among other things, provided for the selection of a designated person to act on behalf of all creditors by bringing avoidance actions and generally exercising the rights of a trustee under the Bankruptcy Code. GSC was appointed the designated person.

On October 29, 1990 GSC filed its complaint against UMF, requesting as relief either: entry of a money judgment in the amount of all the value of the property transferred by CCG to UMF in the year prior to March 10, 1989, plus prejudgment interest from the date of the complaint, and avoidance of the $800,000.00 obligation; or entry of an order authorizing the rejection of the March 31, 1988 and June 8, 1988 agreements as an executory contract and determining that the debtor's 75% interest in "Pod 6" and "the Wetlands" is property of the debtor's estate free and clear of UMF's claims or interests.

On December 10, 1990 UMF filed its third-party complaint against Chemical Bank and Cityfair II Holding Corporation, seeking, inter alia, indemnification and reimbursement of attorneys fees. On July 29, 1991 UMF filed its motion to dismiss GSC's complaint, and on August 19, 1991 GSC filed its motion for sanctions. On August 27, 1991 these motions were heard by the court and the matters addressed were taken under advisement to consider the following issues:

1. Whether the alleged violation of the rule against perpetuities renders the transfer effectuated by the March 31, 1988 and June 8, 1988 agreements void.

2. Whether the March 31, 1988 and June 8, 1988 agreements together constitute an executory contract which GSC may reject under Section 365(a).

3. Whether GSC may avoid the June 8, 1988 transfer under Section 544(a)(3).

4. Whether GSC may avoid the June 8, 1988 transfer under Section 547(b).

5. Whether GSC may avoid the June 8, 1988 transfer under Section 548(a)(2).

I.

GSC contends:

The transfer of the Debtor's interest in Pod 6 and the Wetlands to the Defendant is not enforceable by the Defendant against the Debtor, because the condition precedent for the transfer may not be performed within a life plus 21 years. Accordingly the transfer is void under Md. Est. & Trusts Code Ann. § 11-102 (1974).

Md Est & Trusts Code Ann § 11-102 preserves the common law rule against perpetuities, with several exceptions not herein relevant, and subject to Sections 4-409 (legacies for charitable uses) and 11-103 (limitations on application of the rule), neither of which is implicated by the facts of this case. "As a formulation of the Rule Against Perpetuities, Maryland courts have adopted Professor Gray's statement that 'no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.'" Stewart v Tuli, 82 Md App 726, 573 A2d 109, 112 (Md Ct Spec App 1990) (citation omitted).

GSC claims that the following provision of the June 8, 1988 agreement violates the rule against perpetuities:

CCG and UMF shall continue to hold those portions of Phase II not conveyed to D3J or CCG as tenants-in-common until such time as the Trumpet Interchange is located or such earlier time upon which they mutually agree . . .

The provision additionally states the parties "further agree that they will seek to obtain all necessary approvals to and shall cause Pods 6 and 7 to be subdivided as separate parcels of real estate as promptly as possible in any lawful manner."

GSC cites Dorado Ltd. Partnership v Broadneck Development Corp., 317 Md 148, 562 A2d 757 (Md App 1989), in support of its position that the above provision violates the rule against perpetuities. In Dorado, a contract for the sale of real property was made contingent upon the county's grant of sewer allocations for the subject lots. Because of a county moratorium on sewer allocations, the sale had never been consummated. The seller argued the contract was unenforceable because, among other things, it violated the rule against perpetuities. The court of appeals agreed, stating:

> We agree with the Supreme Court of Virginia that where the occurrence of the condition precedent to conveyance is beyond the control of the parties, a reasonable time for performance, less than the perpetuities period, cannot be implied. . . .
>
> In this case, Broadneck [the seller] has fulfilled its obligation under the contract. It has applied for a sewer allocation. Settlement is dependent, not on performance by Broadneck, but on the action of a third party, Anne Arundel County. Whether Anne Arundel County might grant a sewer allocation for the lots within the perpetuities period is unknown.
>
> We conclude, therefore, that the contract for the sale of the remaining lots is unenforceable because it violates the Rule Against Perpetuities.

Dorado, 562 A2d at 762.

Since Dorado was decided, the court of special appeals of Maryland has had two occasions to interpret and apply it. In Stewart v Tuli, 82 Md App 726, 573 A2d 109 (Md Ct Spec App 1990), an addendum to a contract for the sale of real property provided that "if Tuli [a previous prospective buyer] attempted to keep 'his contract alive,' the Stewarts [the new buyers] did not have to go to settlement until such time as clear title could be granted by the Novaks [the sellers]." Stewart, 573 A2d at 110. The sellers were obligated under the contract to remedy any title defects "by legal action within a reasonable time." Stewart, 573 A2d at 113. The court addressed Dorado, stating:

> Dorado is distinguishable. There, the court based its decision on the fact that the contract settlement was dependent not on performance by one of the parties, but on the action of a third party, Anne Arundel County. Thus, the occurrence of the condition precedent was beyond the control of the parties. In the case sub judice, the condition

precedent to conveyance is judicial determination of the validity of the Tuli contract.

Stewart, 573 A2d at 112. The court concluded the rule against perpetuities did not apply to the contract between the sellers and the new buyers, reasoning that "the parties contemplated and the contract mandated that any title clearing litigation be completed within a reasonable period of time. It would be ridiculous to suggest that a reasonable period of time would exceed a life in being and 21 years." Stewart, 573 A2d at 113. This conclusion is harmonious with Dorado, in which the court of appeals determined only that a reasonable time for performance could not be implied when the condition precedent to conveyance was beyond the control of the parties. Where, as in Stewart, the condition precedent was within the control of the parties, such a reasonable time period could be implied.

Finally, in Hays v Coe, 88 Md App 491, 585 A2d 484 (Md Ct of Spec App 1991), an addendum to a contract for the sale of real estate stated that "[b]ecause a title problem has arisen and a complete survey is necessary, we hereby extend this contract until a good and marketable title can be transferred." Hays, 585 A2d at 485. The court of special appeals of Maryland determined that the addendum did not violate the rule against perpetuities, stating:

We note that in Stewart there is language in the addendum specifically providing that if action had to be taken to clear title, that action "must be taken promptly," Stewart, 82 Md. App. at 735, 573 A.2d at 113, which is not present in this case. This clause, however, was not critical to our reasoning in Stewart and other courts have implied reasonable timeliness without such language. [citations omitted]. Accordingly, even without an express contractual directive that action to clear title "must be taken promptly," we believe that the Stewart rationale is applicable, and the addendum here does not violate the rule against perpetuities.

Hays, 585 A2d at 490-91.

GSC argues in the instant case that "[t]he transfer violates the Rule because the condition precedent, the location of the Trumpet Interchange, is beyond the control of the parties," and that under Dorado, the transfer is thus unenforceable. However, under the parties' June 8, 1988 agreement, CCG and UMF were to hold title as tenants-in-common until one of two things happened: either the Trumpet Interchange was located, or the parties earlier agreed. While the parties had no control over the location of the Trumpet Interchange, they certainly possessed the capacity to agree to terminate holding the property as tenants-in-common. The instant case it thus distinguishable from Dorado.

CCG, UMF, and D3J further agreed to "cause Pods 6 and 7 to be subdivided as separate parcels of real estate as promptly as possible in any lawful manner." Although Hays provides that no contractual directive that action within the control of the parties be taken promptly is required in order for a reasonable timeliness limitation to be implied, that the parties in the instant case affirmatively agreed to take prompt action toward subdividing Pods 6 and 7, which they could agree to subdivide even in the absence of the location of the Trumpet Interchange by a third party, is reason to imply reasonable timeliness limitation into the contract. GSC's contention that the June 8, 1988 contract provision violates the rule against perpetuities, thereby voiding the March 31, 1988 and June 8, 1988 agreements, cannot be sustained.

II.

GSC contends that because, as of the March 10, 1989 petition date, the Trumpet Interchange was not located and the parties had not earlier agreed to sever their tenancy-

in-common, the March 31, 1988 and June 8, 1988 agreements between CCG and UMF together constitute an executory contract capable of rejection by GSC under 11 USC § 365(a). Section 365(a) provides that "Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 USC § 365(d)(2) provides:

In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(emphasis supplied). See also NLRB v Bildisco and Bildisco, 465 US 513, 528 (1984) ("In a Chapter 11 reorganization, a debtor-in-possession has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract . . . 11 U.S.C. § 365(d)(2)."). A proceeding to reject an executory contract must be brought by motion. FRBP 6006(a); FRBP 9014. CCG, the debtor-in-possession did not bring a motion to reject the March 31, 1988 and June 8, 1988 contracts prior to the August 1, 1990 confirmation of the plan. Even assuming for the sake of argument that the contracts are executory, GSC cannot now, post-confirmation, do by way of adversary complaint what it possesses no authority to do by way of motion. The March 31, 1988 and June 8, 1988 agreements cannot be rejected.

III.

GSC alleges that:

The transfer of the Debtor's interest in Pod 6 and the Wetlands to the Defendant [UMF] was not effective against a bona fide purchaser as of March 10, 1989 [the petition date] because no deed to Pod 6 and the Wetlands from the Debtor to the Defendant was executed and recorded. Accordingly, the transfer is void under Md. Real Prop. Code Ann. § 3-101 (1986) and ineffective against the Designated Person under 11 U.S.C. § 544.[(2)]

UMF argues that notwithstanding its failure to record a deed with respect to Pod 6 and the Wetlands, "the Designated Person's claims under Code § 544(a) fail, as a matter of law, because the 'strong-arm' powers are inapplicable where property was not owned by the debtor as of the commencement of the case." UMF bases its conclusion that CCG had no legal or equitable interest in Pod 6 and the Wetlands as of March 10, 1989 on the Quit Claim Deed recorded December 19, 1988, pursuant to which CCG conveyed to Cityfair all of its "right, title and interest" in the Science Center.

GSC contends, however, that CCG transferred less than all its interest in the Science Center, stating that "the grant of the specific rights [presumably, in the Deed and Assignment] is going to control over this quit claim deed which seems to grant this [sic] kitchen sink general rights." GSC's contention must be rejected. "[A] general quitclaim deed from an individual sui juris presumptively, and in the absence of any legitimate evidence to qualify it, is deemed to convey every shred of interest in the land described which the grantor had." 23 Am Jur 2d Deeds § 339 at 299 (1983).

The [warranty] Deed and Assignment executed and recorded contemporaneously with the Quit Claim Deed, although "legitimate evidence," are insufficient to qualify the interest conveyed by the Quit Claim Deed. Assuming that either the language of the Deed or of the Assignment conflicts with the language of the Quit Claim Deed, GSC cannot avail itself of any ambiguity created thereby to limit the scope of that which was

conveyed by the Quit Claim Deed from CCG to Cityfair: "Most courts agree that if there is any ambiguity rendering a deed subject to alternative constructions, that construction will be adopted which is more favorable to the grantee than to the grantor, all doubts being resolved against the grantor." 23 Am Jur 2d Deeds § 229 at 231-32 (1983). The execution and subsequent recording of the Quit Claim Deed indeed transferred to Cityfair all of CCG's "right, title and interest" in the Science Center.

In re Minton Group, Inc., 27 BR 385 (Bankr SD NY 1983), aff'd, 46 BR 222 (SD NY 1985), involved a debtor corporation which was the sole general partner of a limited partnership. Prior to the filing of an involuntary petition against the debtor, a real estate vendor deeded property to, and received a purchase money mortgage from, the limited partnership. The deed and mortgage were recorded after the involuntary petition was filed, and the bankruptcy trustee sought apply Section 544 to avoid the post-petition recording of the mortgage.

The Minton court stated that "subsection [544](a)(3) contemplates successive transfers or obligations by the debtor where a later bona fide transferee, even if not in actual existence, could, under applicable law, cut off the rights of an earlier transferee of the debtor at the time the bankruptcy petition was filed." Minton Group, 27 BR at 388.[(3)] The Minton court noted that as of the petition date, "there was no way that any person could claim to be a bona fide transferee from the debtor." Id. This was so because:

the county recording office records where the debtor and the real estate were located, gave constructive notice to the world that De Paul Holding Corp. [the vendor] was still listed as the record owner of the property in question. A bona fide purchaser is one who would have checked the appropriate recording office for real estate transfers and who would not have learned of any impairment in the transferor's title.

Id., (citations omitted).[(4)] Because the limited partnership failed to record its deed until after the petition date, "the prospective bona fide purchaser would have been imputed with notice that the record owner was still De Paul Holding Corp." Id.

The Minton court continued to state that:

Even a bona fide purchaser may not ignore the fact that the debtor was not listed as the record owner when the Chapter 11 case was commenced. With such notice, a bona fide purchaser would be alerted if the debtor attempted to grant him a mortgage on property which the record reflects was not even owned by the debtor. The trustee, who claims to stand in the shoes of such a hypothetical purchaser, may not close his eyes to that which is imputed to him by constructive notice and assert greater rights than those of a bona fide purchaser, who is charged with notice as to the identity of the recorded owner of the real estate in question.

Id. The Minton court thus concluded that "the imputed notice to the trustee that the debtor, Minton Group, Inc. was not the record owner when the Chapter 11 case was commenced precludes him from qualifying as a hypothetical bona fide purchaser under Code § 544(a)(3)." Minton Group, 27 BR at 391. The reasoning of the Minton court seems persuasive.

As of the March 10, 1989 petition date in the instant case, CCG had no legal or equitable interest in the Science Center realty, as its interest had been transferred, by way of the properly recorded Quit Claim Deed, to Cityfair. As in Minton, a hypothetical bona fide purchaser in Maryland would be charged with notice that CCG was not the record owner of the Science Center. It is therefore irrelevant whether UMF's interest in the Science Center property is unperfected. GSC cannot utilize Section 544(a)(3) to void UMF's interest. As the real estate records reflected, CCG had no interest in the

realty as of the petition date, and therefore was incapable of transferring the property to a bona fide purchaser at that time.[5]

IV.

GSC asserts that the June 16, 1988 transfer of $162,277.29 from CCG to UMF qualifies as a preference to CCG's general partners, and may be avoided under 11 USC § 547(b).[6] Assuming the transfer indeed qualifies as a preference, GSC seeks, pursuant to 11 USC § 550(a), to collect the $162,277.29 from UMF as the initial transferee of the transfer.[7]

The parties do not appear to dispute that the elements contained in Section 547(b)(2), (3), and (5) have been met. With regard to Section 547(b)(1) and (4), GSC alleges that "[t]he transfer of the $162,277.29 was made within one year before the date of the filing of the petition against the Debtor, and the transfer was made for the benefit of insiders of the Debtor, the Debtor's general partners." The $162,277.29 transfer occurred on or about June 16, 1988 and the petition was filed on March 10, 1989, so GSC is correct in its assertion that the transfer occurred within one year before the filing of the petition. GSC and UMF dispute, however, whether the ninety day period specified in Section 547(b)(4)(A), or the one year period specified in Section 547(b)(4)(B), is applicable to the transfer.

GSC relies on Levit v Ingersoll Rand Financial Corp. (In re V.N. Deprizio Construction Co.), 874 F2d 1186 (7th Cir 1989), in support of its position that the one year period is applicable to the $162,277.29 transfer. In Deprizio, the court held that "insiders who may be liable on account of the firm's failure to pay taxes are not 'creditors' because they do not hold 'claims' against their firms." Deprizio, 886 F2d at 1200. GSC contends that unlike "responsible persons" under the Internal Revenue Code, the general partners in the instant case possess a statutory right of indemnity under Wis Stat § 178.15(2),[8] and are thus contingent "creditors" of the debtor, CCG. This contention appears to be correct.

However, before the one year period may be applied, Section 547(b)(4)(B) requires that the "creditors," here the general partners, must qualify as "insiders" at the time of the $162,277.29 transfer. 11 USC § 101(31)(C)(i) provides that if a debtor is a partnership, an "insider" includes a general partner in the debtor. The general partners of CCG at the time of the $162,277.29 transfer accordingly qualify as insiders, and the transfer itself, pursuant to Section 547(b)(4)(B), is subject to, and fits within, the one year reach-back period.

Before the $162,277.29 transfer may be avoided as a preference, it must be established that the transfer was "to or for the benefit of a creditor[s]," here, CCG's general partners, per the requirements of Section 547(b)(1).[9] What constitutes a "benefit" to a creditor is not defined by the Code, but the Deprizio court considered the meaning of the "benefit" referred to in Section 550(a), after having found that the prerequisite to Section 550(a)'s application, in that case, the existence of a preference under Section 547(b), had been satisfied. There is no reason to believe that scope of the "benefit" referred to in Section 547(b)(1) is any different from that referred to in Section 550(a).

In Deprizio the court held "that the preference-recovery period for outside creditors is one year when the payment produces a benefit for an inside creditor, including a guarantor." Deprizio, 874 F2d at 1200-01. In holding as it did, the Deprizio court was concerned not with just any benefit, but only with those benefits obtained by the insider creditor when favoring a particular creditor of the debtor. The Deprizio court stated that "[a] longer period when insiders reap benefits by preferring one outside creditor over

another facilitates the operation of bankruptcy as a collective process and ensures that each creditor will receive payment according to the Code's priorities and non-bankruptcy entitlements." Deprizio, 874 F2d at 1197.

In Wisconsin, general partners are personally liable for all debts of the partnership. See Wis Stat § 178.12.(10) While the payment of a partnership debt by the partnership reduces each partner's total exposure, the amount of that exposure is reduced by a fixed amount regardless of which of the partnership's creditors is paid. The general partners of a partner cannot "reap benefits by preferring one creditor over another," as the "benefit," here the amount by which each general partner's exposure is reduced, remains the same without regard to the identity of the partnership creditor paid. In a general partnership, the general partners' only incentive is to see that the partnership pays its debts, not to select which debts the partnership pays first.(11)

It is thus clear that the "benefit" obtained by CCG's general partners is not the type of "benefit" with which the court concerned itself in Deprizio. Nor should it have been. Except by reducing each partner's liability, the payment of any particular partnership debt does not affect the rights or position of any other creditors (unless, of course, there is collateral in which priorities are adjusted). Furthermore, in no event would the nonpayment of that debt enhance the estate, which would be burdened with a claim in an amount equal to the "augmentation" of the estate assets created by the failure to pay the debt. Most importantly, the payment of the same sum to any other creditor, or even pro rata among the creditors, would not permit greater recovery by any creditor class.

Were the scope of the "benefit" described by the Deprizio court expanded to include the situation where the only benefit received is the pro rata reduction in each insider-partner's total personal liability occasioned by the payment of a partnership debt, then all outside creditors of a partnership debtor would be subject to the one year preference period. Such an extended recovery period does not advance any of the functions of the Code, and is not supported by even the most liberal reading of Deprizio.

Because the general partners of CCG have not, by virtue of the payment from CCG to UMF, "reap[ed] benefits by preferring one outside creditor over another," the $162,277.29 transfer does not constitute one "to or for the benefit" of the general partners, and Section 547(b)(1) thus has not been satisfied. The transfer therefore does not qualify as a preference and is not avoidable by GSC.

V.

GSC alleges that "[t]he Debtor received less than a reasonably equivalent value in exchange for the transfer of Pod 6 and the Wetlands to the Defendant, and the Debtor was insolvent on the date that such transfer was made." GSC thus seeks to avoid the transfer pursuant to 11 USC § 548(a)(2).(12) GSC and UMF dispute the total value of the consideration received by CCG and UMF. GSC has stated a claim under Section 548, and UMF's motion to dismiss this fraudulent conveyance claim must accordingly be denied. Were the motion to be treated as one for summary judgment, see FRCP 12(b)(6), it would still have to be denied, as a factual issue exists with respect to the value of the consideration exchanged. See FRCP 56(c).

CONCLUSION

UMF's motion to dismiss for failure to state a claim is granted with respect to GSC's rule against perpetuities, executory contract, strong-arm, and preference causes of action. UMF's motion to dismiss GSC's fraudulent conveyance cause of action is denied. Because UMF's motion to dismiss is well grounded in fact, is warranted by existing law, and is not interposed for any improper purpose, GSC's motion for

sanctions also is denied. See FRCP 11.

END NOTES:

1. "While well-pleaded allegations of the complaint are taken as true for purposes of deciding a motion to dismiss, sweeping conclusions of law and unwarranted deductions of fact are not to be taken as true." Frederiksen v Poloway, 637 F2d 1147, 1150 n 1 (7th Cir 1981), cert denied 451 US 1017 (1981), citing Mitchell v Archibald & Kendall, Inc., 573 F2d 429, 432 (7th Cir 1978).

2. 11 USC § 544(a)(3) provides:

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligations incurred by the debtor that is voidable by-

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser at the time of the commencement of the case, whether or not such a purchaser exists [and has perfected such transfer].

3. See also Belisle v Plunkett, 877 F2d 512, 515 (7th Cir 1989), cert denied, 110 S Ct 241 (1989) ("Under most states' laws . . . the buyer in good faith of real property can obtain a position superior to that of the rightful owner, if the owner neglected to record his interest in the filing system. Section 544(a)(3) gives the trustee the same sort of position." (emphasis in original)).

4. The duty of inquiry required of a bona fide purchaser in Maryland is at least as broad, if not broader, than that required of a bona fide purchaser in New York:

> The law requires reasonable diligence in the purchaser of real property to ascertain any defect of title. When such defect is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny. When a purchaser has notice of a fact which casts doubt upon the validity of his title, the rights of innocent persons must not be prejudiced as a result of his negligence. A purchaser of land who is not a bona fide purchaser without notice takes the land subject to any prior equity and holds it as a constructive trustee in favor of a third person claiming it under a prior contract of sale. In determining whether a purchaser had notice of any prior equities or unrecorded interests, so as to preclude him from being entitled to protection as a bona fide purchaser, the rule is that if he had knowledge of circumstances which ought to have put a person of ordinary prudence on inquiry, he will be presumed to have made such inquiry and will be charged with notice of all facts which such an investigation would in all probability have disclosed if it had been properly pursued. In other words, a purchaser cannot fail to investigate when the propriety of the investigation is naturally suggested by circumstances known to him; and if he neglects to make such an inquiry, he will be held guilty of bad faith and must suffer from his neglect.

Kramer v Emche, 64 Md App 27, 43-44, 494 A2d 225, 234-34 (Md Ct Spec App 1985) (citations omitted).

5. See also In re Northern Acres, Inc., 52 BR 641, 648 (Bankr ED Mich 1985) ("[E]ven though the properties held by the debtor in possession are subject to unperfected liens, the debtor in possession may not use the lien avoidance powers of § 544(a) to set them aside because, on the facts of this case, the properties were not property of the estate as of the commencement of the case.").

6. Section 547(b) provides:

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 or 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 such creditor received payment of such debt to the extent provided by the provisions of this title.

7. Section 550(a) 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.

8. Wis Stat § 178.15(2) provides:

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(2) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

9. The identity of the "creditor" referred to in Section 547(b) does not change depending upon which element of a preference the trustee is seeking to satisfy. That this is so is made clear by the language of Section 547(b), which first refers to "a creditor," and each time thereafter refers to "such creditor," thus indicating that a single creditor is under consideration at any given time. The "creditor[s]" to whom GSC seeks to apply Section 547(b) are CCG's general partners, for it is only by applying the elements of Section 547(b) to them that the alleged preference qualifies for the one year reach-back period. UMF, although a "creditor" of CCG, is not an "insider" of CCG, and thus the alleged preference, as applied to UMF, would qualify only for the ninety day reach-back period provided under Section 547(b)(4)(A), thereby eliminating the $162,277.29 transfer from qualifying as a preference.

10. Pursuant to Wis Stat § 178.12, "All partners are liable: (a) Jointly and severally for everything chargeable to the partnership under ss. 178.10 [partnership liability for wrongful acts of a partner] and 178.11 [partnership liability on a partner's breach of trust]; (b) jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."

11. Pursuant to Wis Stat § 178.12, in the limited circumstances in which there exists a partnership debt for a partner's wrongful acts or breach of trust, a general partner will be jointly and severally liable for the payment of that debt. Because that partner is only jointly liable for the remaining partnership debts, the partner may prefer to have the partnership pay that debt upon which the partner is jointly and severally liable prior to paying those debts on which the partner is only jointly liable. The partner's right to contribution in the event that partner has been found severally liable diminishes the benefit to be obtained by such payment ordering. In any event, the $162,277.29 transfer to UMF was not related to a partner's wrongful acts or breach of trust, and thus was a debt for which the partners were jointly liable only. The partners had no incentive to favor payment of this partnership debt over any other partnership debt.

12. Section 548(a)(2) provides:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(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; or

(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.