United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

Michael E. Kepler, Trustee, Plaintiff v. Geneva Auto Sales, Defendant
(In re David C. Larson and Valerie A. Larson, Debtors)
Bankruptcy Case No. 96-38200-7, Adv. Case No. 96-3256-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

August 19, 1997

Timothy J. Peyton, Kepler & Peyton, Madison, WI, for the plaintiff.
Hugh J. Hayes, Hayes, Van Camp & Schwartz, S.C., Madison, WI, for the defendant.

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

The debtor, David Larson, paid Geneva Auto Sales Co. (GASCO) $48,000 after Mr. Larson sold GASCO's 1965 Corvette on consignment. That payment was made within 90 days before the Larson involuntary bankruptcy was filed. The trustee brought a preference action to recover the money. Trial was held on June 6, 1997, and the parties stipulated to the following facts: Mr. Larson initially completed an owner information and consignment agreement to show the Corvette at the Barrett Jackson Classic Car Auction, but Barrett Jackson later altered the consignment agreement to show GASCO as owner of the car. Thereafter, the car was at all relevant times titled in GASCO's name. GASCO mailed the Corvette's certificate of title to Barrett Jackson prior to the auction in January of 1996, requesting that the title be returned to GASCO if the car wasn't sold. However, after the auction, title was mistakenly mailed to Capitol Corvette. With title in hand, Mr. Larson sold the Corvette to Courtesy Chevrolet for $50,000. Courtesy paid by check, and Mr. Larson deposited the

money in Capitol Corvette's account on March 5, 1997. Mr. Larson then paid GASCO $48,000 from the same account with a check dated April 8, 1996. GASCO cashed the check on April 13, 1996 - within 90 days of the filing of the involuntary bankruptcy. Plaintiff s Exhibits 11 - 13, which show activity in the Capitol Corvette account for March and April of 1996, are true and accurate records of M&I Bank. The creditors in the Larson bankruptcy are expected to receive between four and six cents on the dollar.

To prevail under §547(b),[1] the trustee had to show: a transfer of the property of the debtor, to or for the benefit of a creditor, for or on account of antecedent debt, while the debtor was insolvent, within 90 days preceding the petition, and the creditor received more than what the creditor would have received under Chapter 7. Matter of Smith, 966 F.2d 1527 (7th Cir. 1992). After the close of evidence, the court ruled from the bench that the trustee had satisfied the first four elements of §547(b). However, as to §547(b)(5) - whether the $48,000 gave GASCO more that it would have received in Chapter 7 had the transfer not been made - I gave the parties 20 days to submit supplementary

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[1]11 U.S.C. §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 of 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

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

evidence.

The center of the remaining controversy is GASCO's "constructive trust" defense to §547(b)(5). Arguing the court should impose a trust on the $48,000 because Mr. Larson sold the car to Courtesy Chevrolet without permission, GASCO contends it received the corpus of the trust and not funds which would have been available to general creditors. The trustee, however, argued a constructive trust is not a remedy available in bankruptcy. Even if the court were to impose a constructive trust, the trustee said the *res* of the trust should be limited to money traceable from the Corvette's sale proceeds to the $48,000 check under the "lowest intermediate balance" rule.

"[T]he proponent of [a] constructive trust must be able to trace a *res*, identifiable in its original or substituted form." In the Matter of Milwaukee Cheese Wisconsin. Inc., 164 B.R. 297 (Bankr. E.D. Wis. 1993). Under Wisconsin law, "when trust funds are commingled with other funds, the trust may be enforced against any part of the commingled fund which can be traced into the hands of a trustee." Simonson v. Mc Invaille, 42 Wis.2d 346, 352 (1969). In the present case, Mr. Larson deposited the Corvette's sale proceeds in the Capitol Corvette account on March 5, 1996 and wrote GASCO's $48,000 check on April 8, 1996 from the same account. Between March 5 and April 8, Mr. Larson withdrew money and made deposits many times. Where money is commingled in an account and the account is subsequently partially depleted and restored, the "lowest intermediate balance" rule governs tracing. Dan D. Dobbs, Dobbs Law of Remedies, vol.2 at 22 (2d ed. 1993). Thus, GASCO had to trace the Corvette sale proceeds – the *res* -- to the $48,000 check subject to the "lowest intermediate balance" rule.

The Seventh Circuit explained the "lowest intermediate balance" rule in First Wisconsin Financial Corp. v. Yamaguchi, 812 F.2d 370 (7th Cir. 1987). Although the parties in First did not

seek a constructive trust, they were in effect asking for the same remedy -- the return of fraudulently-obtained money. The court explained the "lowest intermediate balance" rule in 3 simple terms:

> If $100 is deposited in an account, and later transactions occur, how much of the "original" $100 is left? If subsequent transactions are $200 in, $150 out, and $100 in, the answer is $100, for that amount was always there; but if subsequent transactions are $100 in, $150 out, and $100 in (actual balance $150), the answer is only $50, for that was the lowest balance at any time.

Id.. at 375. In short, if the *res* of a constructive trust is commingled and subsequent withdrawals and deposits are made, the maximum traceable *res* is the "lowest intermediate balance."

The parties agreed the evidence showed that the lowest daily balance in the Capitol Corvette account between March 5 and April 8 was $8,843.09 on March 19. (Plaintiff s Exhibit 12). Thus, the issue before the court was whether a constructive trust is an appropriate remedy in bankruptcy. However, I noticed that the Capitol Corvette bank records showed that on March 19, Mr. Larson bounced two checks - #3908 for $1,000 and 93926 for $11,000. Without an explanation of M&I Bank's accounting procedures, it seemed appropriate to infer that the actual lowest balance between March 5 and April 8 was zero. In that case, under the "lowest intermediate balance" rule there would be no *res* on which a trust could be imposed, and there would be no need to reach the issue of whether constructive trusts are available in bankruptcy. It was for this reason alone that I gave the parties 20 days to prove the actual lowest balance in the Capitol Corvette account.

The trustee now submits the affidavit of Barbara Kleppe, an investigative specialist at M&I Madison Bank. Ms. Kleppe is familiar with bank accounting practices and procedures and reviewed Capitol Corvette's March bank statement. Based on her review, Ms. Kleppe "believes the balance of

said account was a negative [] $2,116.91 on March 19, 1996." (Affidavit of Barbara Kleppe). GASCO has not submitted evidence to contradict that testimony. Thus I must find that Mr. Larson overdrew his account. The actual lowest balance was zero, and the *res* of the alleged trust was lost. Funds paid to GASCO arose from subsequent deposits and would have been property of the bankruptcy estate if still on deposit on the date relief was ordered. The trustee has established the last element of §547(b). Judgment may be entered accordingly.