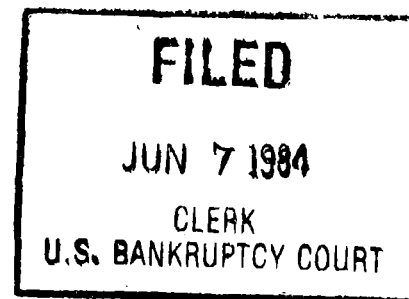


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

KEVIN PATRICK KOTH,

WF7-83-01337

Debtor.

FIRST FINANCIAL SAVINGS AND
LOAN ASSOCIATION, a Wisconsin
savings and loan corporation,

Adversary No.

Plaintiff,

vs.

83-0267-7

KEVIN PATRICK KOTH,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDERS (1) FOR JUDGMENT DISMISSING OBJECTION
(2) TAXING COSTS AND ATTORNEYS FEES

First Financial Savings and Loan Association, by Attorney David G. Shafton, having filed a Complaint Objecting to Discharge; and Debtor Kevin Patrick Koth, by Attorney William A. Wulf of Ament, Wulf & Dudley, having filed an Answer; and the matter being submitted on briefs; the Court having considered the briefs of counsel and the complete record and file herein, and being fully advised in the premises, FINDS THAT:

1. The parties' Pre-Trial Statement, in pertinent part, provides the following summary of facts:

Debtor filed his petition on August 22, 1983. The petition is dated August 19, 1983. On that date, debtor signed a Warranty Deed that severed the joint tenancy between debtor and his wife in their homestead and conveyed the property to his wife. The Warranty Deed provided that it was [tax] exempt pursuant to Sec. 77.25(8), Stats., which is the exemption [for transfers] between husband and wife for nominal or no consideration. Debtor's position indicated that the value of the homestead was \$48,000.00 and it was subject to two mortgages to Tomahawk Savings and Loan, one in the amount of \$3,991.78 and the other in the amount of \$37,928.83.

. . .the transfer from the debtor to his spouse appeared in the original bankruptcy Petition under Item 12 (b) of the Statement of Affairs. . . .

2. Under 11 U.S.C. sec. 727(a)(2) the court must grant a discharge unless "the debtor, with intent to hinder, delay or defraud a creditor or an officer of the estate. . . has transferred. . . property of the debtor within one year. . ."

3. In order to justify the refusal of a discharge, the transfer complained of must have reduced assets available to creditors. In re Harris, 8 B.R. 88, 90-91¹ (Bankr.M.D.Tenn. 1980) (defining sec. 727 (a)(2) property); 4 L. King, Collier on Bankruptcy para 727.02 (15th ed. 1984) (defining a sec. 727 (a)(2) transfer).

4. At the time of the transfer sub judice the Debtor and his wife had an equity position in the transferred homestead property of approximately \$6,100.

5. Assuming the Debtor was entitled to the entire ownership interest in the homestead, but see Jezo v. Jezo, 23 Wis.2d 399,

¹ Citations to, inter alia, three decisions of this Court under the Bankruptcy Act of 1898.

129 N.W.2d 195 (Sup. 1964) (presumption that joint tenants entitled to equal shares), said interest would have been exempt under federal or state homestead exemption statutes. 11 U.S.C. sec. 522(d)(1) (\$7,500 ceiling), Wis. Stats. sec. 815.20 (\$25,000 ceiling).

6. Accordingly, the transfer complained of did not reduce assets available to creditors. See 11 U.S.C. sec. 522(d).

7. Even if the law were that a transfer need not reduce assets available to creditors to fall within section 727(a)(2), the complainant must show that such a transfer was made with intent to hinder, delay or defraud. Bankruptcy Rule 4005, 11 U.S.C. sec. 727(a)(2).

8. Generally, "the fact that property 'has been gratuitously transferred raises a presumption [of] fraudulent intent. . .'" In re O'Connor, 32 B.R. 626, 628 (Bankr.E.D.Penn. 1983). This presumption arises because the "transaction could properly be viewed as designed for the sole purpose of placing the debtor's interest in the property beyond the reach of his creditors. . ."
See In re MacQuown, 717 F.2d 859, 863 (3rd Cir. 1983) (Act case) (emphasis added); In re Rubin, 12 B.R. 436, 442 (Bankr.S.D.N.Y. 1981) (Code case) (the "'law forbids all efforts to put property beyond the reach of creditors'").

9. However, in a case such as the one at bar, where the Debtor's interest was beyond the reach of creditors before the

transfer, the transaction can not be viewed as fraudulent and the presumption can not operate.

10. The purpose of the transfer sub judice could properly be viewed as designed to prevent a cloud on the title to the homestead. See generally 11 U.S.C. secs. 541(a) & 522 (exempt property passes through the bankruptcy estate).

11. The Complainant has not shown that the transaction at bar was carried out with an intent to hinder, delay or defraud.

12. This is an appropriate case for the taxation of costs and attorneys fees against the Complainant. See Bankruptcy Rule 7054(b) (costs), see generally McCandless v. Great Atlantic & Pac. Tea Co., Inc., 697 F.2d 198, 200-201 (7th Cir 1983) (attorneys fees); cf. 11 U.S.C. sec. 523(d) (costs and attorneys fees in Exception to Discharge proceedings).

CONCLUSIONS OF LAW

1. The Court must grant a discharge to the Debtor in the above captioned proceeding. 11 U.S.C. 727(a); see Albinak v. Kuhn, 149 F.2d 108, 109 (6th Cir. 1945) (Act case) (transfer from husband to wife of property not subject to levy on execution was "entirely immaterial" to granting of discharge).

2. An Order should be entered awarding costs and attorneys fees to the Debtor.

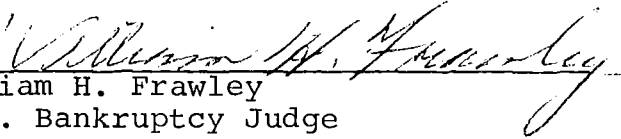
ORDER

IT IS ORDERED THAT Judgment may issue DISMISSING the Complaint Objecting to Discharge filed in this matter by First Financial Savings and Loan Association, see Bankruptcy Rule 9021 (a);

IT IS FURTHER ORDERED THAT the Attorney for the Debtor file a claim for costs and attorneys fees within five days, with copies of same to opposing counsel.

Dated: June 7, 1984.

BY THE COURT:



William H. Frawley
U. S. Bankruptcy Judge