State of New Hampshire
Supreme Court

NO. 2006-0793

2007 TERM

MARCH SESSION

Bil-Ray Home Improvements & Contracting, &a.

v.

Carol F. Aloe

RULE 7 APPEAL OF FINAL DECISION OF
BELKNAP COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT CAROL ALOE

By: Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

NEW HAMPSHIRE CASES

OTHER JURISDICTIONS' CASES

NEW HAMPSHIRE STATUTES

SECONDARY SOURCES

QUESTION PRESENTED

Did the court err in setting aside a transfer of real estate from Mark Aloe to his wife when the Bil-Ray plaintiffs failed to offer sufficient evidence of either insolvency, or of a fraudulent intent? (Preserved in the record *passim.)*

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The various plaintiffs, collectively Bil-Ray, were owed money by three debtors – Mark Aloe, a second person, and a corporate entity – stemming from the financing of a now-bankrupt home-improvement business. Bil-Ray sued the three in federal court in New York in November 2004. The parties reached a settlement agreement in December 2004, which was later reduced to a $1.5 million joint-and-several judgment. ORDER (Sept. 25, 2006), *appx.* at 17; JUDGMENT, ***Bil-Ray &a. v. America's Home Improvement Company, LLC, &a.***, Civ.No.04-4864 (E.D.N.Y. Aug. 16, 2005). Bil-Ray received regular installments including February, March, and April, 2005. The money due on May 15, 2005, however, was not paid. *Trn.* at 10.

At the time of the settlement agreement, Mr. Aloe and his wife, Carol, each held title to a one-half undivided interest in her home in Alton, New Hampshire. *Trn.* at 63. A few days before the unpaid May installment, Mark transferred to Carol his interest in the real estate, but reserved a life estate in the half interest he owned before the conveyance. ORDER, *appx.* at 17, 18; *Trn.* at 65; WARRANTY DEED (May 17, 2005), *appx.* at 26, 27 ("Reserving, however, a life estate to Grantor, Mark A. Aloe."). The transfer was a gift – Ms. Aloe paid no consideration, *id.* ("This conveyance is a non contractual transfer and is exempt from state revenue tax stamps.").

Bil-Ray commenced this action pursuant to the New Hampshire's Uniform Fraudulent Transfer Act (UFTA), seeking to undo the conveyance. The Belknap County Superior Court (*Smukler*, J.) set aside the transfer, and Carol Aloe appealed.

SUMMARY OF ARGUMENT

Carol Aloe acknowledges that conveyances may be set aside when in addition to other factors a debtor is insolvent, and that there are two possible measures of insolvency. She argues, however, that the Bil-Ray plaintiffs failed to offer evidence that her husband, Mark Aloe, was insolvent when he conveyed rights of ownership in their Alton house to her.

Ms. Aloe points out that although insolvency can be proved by showing debts exceed assets, Bil-Ray's accountant was not given a complete listing of Mr. Aloe's assets, and that even the accountant acknowledged that without such necessary information, insolvency cannot be established by this method. Ms. Aloe also points out that insolvency can be proved by showing that a debtor is generally not paying his bills as they become due, and that proof of "general" non-payment requires an overview of all or most of a debtor's bill-paying record. She argues, however, that because Bil-Ray made no attempt to give the court an overview, and that the only bill not paid was the one owed to the plaintiff, insolvency was not established by this method either.

Finally, Ms. Aloe acknowledges that conveyances can be set aside when the debtor had a fraudulent intent, and that the factors establishing such intent are suggested by the statute. One-by-one she lists the statutory factors and argues that they are either not applicable, or that Bil-Ray did not prove them.

Accordingly Ms. Aloe alleges that the lower court erroneously set aside the transfer of the Alton real estate.

ARGUMENT

The Uniform Fraudulent Transfer Act, adopted by New Hampshire and many other states, is somewhat confusingly drafted, as it attempts to reconcile 16th Century "badges of fraud," *see e.g., Twyne's Case*, 3 Coke 80, 76 Eng.Rep. 809 (Star Chamber 1601), the common law of England stemming from the Statute of 13 Elizabeth (1570); *see* Unif. Fraudulent Transfer Act, *prefatory note*, 7A Pt. II U.L.A. 4 (1999), the common law adopted in the United States, *see e.g., Everett v. Read*, 3 N.H. 55 (1824), federal bankruptcy law with which fraudulent conveyances are often coupled, Unif. Fraudulent Transfer Act, *prefatory note,* 7A Pt. II U.L.A. 4 (1999), and the realities of modern commercial finance. *See e.g.*, Robert Rosenberg, *Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware*, 125 U.PA.L.REV. 235 (1976).

Nonetheless, it is possible to discern in the statute five possible analytical avenues for setting aside a conveyance. Although two of them are arguably relevant here[1] – insolvency coupled with other factors, or a fraudulent intent – the plaintiff failed to present sufficient evidence of either.

[1]The other three plainly do not apply and have not been alleged: RSA 545-A:4, I(b)(1) (not relevant because no allegation of a transfer of a commercial asset); RSA 545-A:4, I(b)(2) (not relevant because no allegation that transfer resulted in incurring debt); RSA 545-A:5, II (not relevant because no allegation of antecedent debt, and facts suggest Carol Aloe had no reason to believe Mark Aloe was insolvent).

I. Bil-Ray Failed to Prove Mark Aloe was Insolvent at the Time of the Transfer

A. Insolvency Means Debts Exceed Assets, or Generally Not Paying Bills

New Hampshire law provides that a transfer is fraudulent, and can therefore be set aside, "if the debtor made the transfer … without receiving a reasonably equivalent value in exchange for the transfer … and the debtor was insolvent at that time…." RSA 545-A:5, I.

In this case, as the transfer of Mark Aloe's interest in the Alton real estate to Carol Aloe was a gift, the value prong is conceded.

As to a debtor's insolvency, however, the party seeking to set aside the transfer bears the burden to prove it by "clear, convincing, and direct evidence." *See Chagnon Lumber Co., Inc. v. DeMulder* 121 N.H. 173 (1981); *but see In re Jackson*, 459 F.3d 117, 121-23 (1st Cir. 2006) (applying preponderance standard to non-intent objective insolvency determination).

The statute defines insolvency in two ways. "A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets." RSA 545-A:2, I. Alternatively, a debtor is "presumed to be insolvent" "who is generally not paying his debts as they become due." RSA 545-A:2, II. To prove insolvency, Bil-Ray thus must show either that Mark Aloe's debts exceeded his assets, or that he was generally not timely paying his bills. In this case, Bil-Ray neglected to introduce evidence of either type of insolvency, and accordingly failed to prove them.

B. Bil-Ray Failed to Show that Mr. Aloe's Debts Exceeded His Assets

During trial Bil-Ray proffered the expert opinion of a certified public accountant, who submitted a report and testified. LETTER FROM CHRISTOPHER TIERNEY TO WILLIAM PHILPOT (June 29, 2005) ["Accountant's Report"], *appx.* at 22; *Trn.* at 26 *et seq.*

In his Report, the accountant acknowledged that "[t]o make a final determination of

insolvency … would *require* review of a completed Personal Financial Statement (or Statement of Net Worth) of the individual in question listing assets at fair value and liabilities owed." ACCOUNTANT'S REPORT, *appx.* at 22, 24 (emphasis added). During his testimony, the accountant reiterated this requirement, *Trn.* at 32, 49-51, and lamented that he nonetheless had no comprehensive statement of Mr. Aloe's assets and liabilities.

The accountant testified that the only information he had on which to base his estimate of Mr. Aloe's assets was the couple's 2003 and 2004 tax returns and whatever was available on the internet. The accountant conceded that tax returns do not provide the information necessary, *Trn.* at 39-41, 60-61, that Mr. Aloe might own any number of assets not included in the accounting analysis, *Trn.* at 57-58, that the accountant did not conduct a comprehensive investigation of other possible assets such as real estate or stocks which Mr. Aloe might own, *Trn.* at 60-61, and that were an investigation to reveal such assets his expert opinion would change. *Trn.* at 59.

Accordingly, on cross-examination, the accountant was asked: "[D]id you have sufficient information with regards to Mark Aloe to make a determination as to whether his debts exceeded his assets?" The answer: "No." *Trn.* at 52.

The party seeking to set aside a conveyance must adduce absolute facts of assets and liabilities, not estimates:

> As framed by the statute, the only question is whether the debtor was insolvent on the transfer date …. To the extent [a party] would have the Court read reasonable estimation of liabilities into [UFTA] section 5,[2] such an argument would be contrary to one of the most fundamental and universally accepted notions of

[2]UFTA section 5 is identical to RSA 545-A:5.

> statutory construction. Section 4[3] explicitly invokes reasonableness. Section 5 does not. If one limits one's consideration to the literal terms of the statute, the omission of reasonableness from the solvency prong of section 5 must be given effect. The clear implication of the text of the two sections is that solvency under section 5 is to be based upon the objective reality of whether "the debtor was insolvent at that time" and not by reference to what [a party] may have reasonably estimated its liabilities to be.

In re W.R. Grace & Co., 281 B.R. 852 (D.Del. 2002). Thus, even if it can be surmised that the accountant's estimate was reasonable, it is still an *estimate* lacking the basic "objective reality" – a list of assets and debts – necessary for a reliable determination.

Courts that have found insolvency under UFTA have generally had much more, and much more reliable, evidence on which to base their determinations. *See e.g., Wilder v. Miller*, 17 P.3d 883, 887-88 (Idaho App. 2000) (determination of insolvency based on complete picture of debtor's relatively simple financial situation); *Boardwalk Regency Corp. v. Burd*; 620 A.2d 448, 449 (N.J.Super. 1993) (debtor himself testified "his debts far exceeded his assets "); *Nisenzon v. Sadowski*, 689 A.2d 1037, 1044 (R.I. 1997) (admissions contained in letter by debtor's attorney established debtor's insolvency).

Finally, while it may be convenient to blame Mark Aloe for the holes in the information available to Bil-Ray's accountant, Mr. Aloe was not made a party to this action. A debtor is not a necessary party to a fraudulent conveyance action, *Town of Nottingham v. Bonser*, 146 N.H. 418, 429 (2001); *Tsiatsios v. Tsiatsios*, 144 N.H. 438, 444 (1999), but Bil-Ray was free to sue him in addition to his wife. *See e.g., Merchants Nat. Bank v. Sullivan*, 96 N.H. 430 (1951) (both husband and wife named parties). The court credited Carol Aloe's statement that she was ignorant of her husband's finances. ORDER, *appx.* at 17, 20. She testified that her "participation

[3]UFTA section 4 is identical to RSA 545-A:4.

in his business affairs was to entertain clients, bankers' wives, so on, take them out to dinner. That was my extent of Mark Aloe's business affairs." *Trn.* at 68. Had the Bil-Ray plaintiffs named Mr. Aloe and conducted discovery of his financial condition, or even just called him as a witness, they might have had the benefit of the materials necessary for their expert accountant to make an informed opinion. The court noted in this regard that "his absence is significant." ORDER, *appx.* at 17, 20.

In any event, the accountant's opinion was limited by the dearth of information Bil-Ray provided him, and the plaintiffs offered no additional evidence of assets in which Mr. Aloe might have had an interest. Accordingly, Bil-Ray did not prove that Mr. Aloe's debts exceeded his assets, and thus failed to prove insolvency.

C. Bil-Ray Failed to Show Mr. Aloe Was Generally Not Paying Bills as They Became Due

It is understandably difficult for a creditor to assemble a comprehensive picture of a debtor's financial situation in order to prove debts-exceed-assets insolvency. The problem is heightened where the debtor's financial situation is unusually complicated or involves large commercial transactions, *see Peterson v. Reilly*, 105 N.H. 340 (1964) (insolvency in context of on-going business); *see generally*, Louis Levit, *The Archaic Concept of Balance-Sheet Insolvency*, 47 AM.BANKR.L.J. 215 (1973), if the debtor is especially uncooperative, or, as here, the creditor neglected to name the debtor and procure discovery from him. Accordingly the UFTA includes a presumption – that a "debtor who is generally not paying his debts as they become due is presumed to be insolvent." RSA 545-A:2, II.

The word "generally" in the statute has content, however, and means that the court must

look not only to whether the debtor has neglected to pay the plaintiff-creditor, but whether the debtor has also not paid all or some significant portion of his *other* debts.

> In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged.

Unif. Fraudulent Transfer Act §2 *Comment*, 7A Pt. II U.L.A. 38 (1999), *citing, Hill v. Cargill, Inc.*, 8 B.R. 779 (Bk. D.C. Minn. 1981) (nonpayment of three largest debts constitute general nonpayment, although small debts were being paid); *In re All Media Properties, Inc.*, 5 B.R. 126 (Bk.S.D.Tex. 1980) (missing significant number of payments or regularly missing payments significant in amount constitutes general nonpayment); *In re Kreidler Import Corp.*, 4 B.R. 256 (Bk.D.Md. 1980) (nonpayment of one debt constituting 97% of debtor's total indebtedness constitutes general nonpayment).

In this case, Bil-Ray made no attempt to show that Mark Aloe was not "generally" paying his bills. The only missed payment of any debt that was brought to the trial court's attention was the May 15, 2005 installment to Bil-Ray. All previous installments had been paid, and there was no mention of any other debts or bills, the proportion of those paid or unpaid, how timely or tardy such payments might be, Mr. Aloe's history of timely bill payment before or after the transfer of the Alton property, or the billing and payment practices in his industry.

Bil-Ray neglected to introduce any evidence to prove general non-payment, and the record simply does not contain sufficient evidence on which to make a determination of the matter.

Moreover, the court merely found it would be "difficult" for Mr. Aloe to pay his debts as they became due. ORDER, *appx.* at 17, 20. Even if so, difficulty does not rise to the level of proof required by the statute.

D. Insufficient Facts to Support Finding of Insolvency Requires Reversal

Because Bil-Ray neglected to adduce evidence of insolvency based on either debts-exceed-assets, or general non-bill-paying, the court did not have sufficient facts on which to base its finding of insolvency. ORDER, *appx.* at 17. Accordingly, the trial court erred, and this Court should reverse its order.

II. Mark Aloe had no Actual Intent to Hinder, Delay, or Defraud Bil-Ray

A. Evidence Does Not Establish Fraudulent Intent by Mark Aloe

The UFTA allows a conveyance to be set aside when it is made "[w]ith actual intent to hinder, delay, or defraud" the creditor. The law is settled that "[t]he plaintiff has the burden of proving by clear, convincing and direct evidence the existence of a fraudulent intent." *Chagnon Lumber Co., Inc. v. DeMulder*, 121 N.H. 173, 176 (1981); *see also In re Jackson*, 459 F.3d 117, 122 (1st Cir. 2006) (heightened burden applies because "the stigma that attaches to a finding of *intentionally* fraudulent conduct"). The statute provides that "[i]n determining actual intent … consideration may be given, among other factors," to a list of 11 considerations[4] that represent several hundred years of judicial experience with the phenomenon. *Twyne's Case*, 3 Coke 80, 76 Eng.Rep. 809 (Star Chamber 1601).

Several of the factors are plainly irrelevant to this case. Others, cited as grounds for the court's finding of fraudulent intent, are without sufficient support in the record. In addition, although the statutory list is non-exclusive, no other badges of fraud were alleged or found.

---

[4]RSA 545-A:4, II provides:

> In determining actual intent under subparagraph I(a), consideration may be given, among other factors, to whether:
> (a) The transfer or obligation was to an insider;
> (b) The debtor retained possession or control of the property transferred after the transfer;
> (c) The transfer or obligation was disclosed or concealed;
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (e) The transfer was of substantially all the debtor's assets;
> (f) The debtor absconded;
> (g) The debtor removed or concealed assets;
> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (I) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (j) The transfer occurred shortly before or after a substantial debt was incurred; and
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

(a) Insider

It is conceded that the transfer was made to an insider, Ms. Aloe.

(b) Control of the property

The trial court correctly noted that "Mr. Aloe reserved a life estate," but erred in concluding that "[t]hus he retained a measure of control."

As noted by the court, the deed Mr. Aloe granted to his wife recited that "[t]his conveyance is a non contractual transfer and is exempt from state revenue tax stamps pursuant to RSA 78-B:2, IX." WARRANTY DEED (May 17, 2005), *appx.* at 26.

RSA 78-B creates a tax "imposed upon the sale, granting and transfer of real estate." The provision referenced in the deed exempts from the tax "noncontractual transfers," which the statute defines as a conveyance "which satisfies the 3 elements of a gift transfer: (a) Donative intent; (b) Actual delivery; and (c) *Immediate relinquishment of control*." RSA 78-B:1-a, III (emphasis added). "Immediate relinquishment of control" is a legal condition of the transfer. Regardless of those rights a life tenant might retain against a remainderman in the abstract, here Mr. Aloe explicitly relinquished control of the property. Carol Aloe testified that the only connection Mr. Aloe maintains to the house was that he goes there occasionally, *Trn.* at 66, and Bil-Ray neglected to proffer any other indicia of control. Thus the trial court was in error in suggesting that Mr. Aloe "retained a measure of control."

(c) Concealment of transfer

There is no allegation or evidence that the conveyance was concealed; it was recorded in the normal course. *Trn.* at 13; WARRANTY DEED (May 17, 2005), *appx.* at 26 (containing Registry of Deeds' "Received" stamp and assignment of book and page). Bil-Ray's principal testified he learned about it just by looking. *Trn.* at 12.

(d) Debtor sued

The lawsuit in the federal court in New York was commenced in November 2004, and essentially concluded in December when the parties reached a settlement agreement. The conveyance didn't occur until in May 2005, many months later. Regular installments had been paid in the interim. For these reasons the trial court properly ignored this consideration.

(e) All assets

There is no allegation or evidence that the conveyance of Mark Aloe's half-interest in his wife's home was a significant portion of his assets.

(f) Abscond

There is no allegation or evidence that Mr. Aloe absconded.

(g) Remove or conceal assets

There is no allegation or evidence that Mr. Aloe removed or concealed assets.

(h) Consideration

It is conceded that Ms. Aloe paid no consideration for her interest in her home.

(I) Insolvency

As detailed above, Bil-Ray did not offer evidence to show whether Mr. Aloe's debts exceeded his assets, nor whether he was generally paying his bills as they became due. Thus the court's finding that Mr. Aloe was insolvent is not grounded with sufficient facts.

(j) Time debt incurred

Mr. Aloe's debt to Bil-Ray was incurred in February 2004. *Trn*. at 6. The conveyance to Ms. Aloe occurred in May 2005, over a year later. Thus there was no allegation that the two were close in time.

(k) Essential business assets

This case does not concern business assets, a lienor, or a mesne conveyance. For these reasons the trial court properly ignored this consideration.

B. Gift was not Motivated by a Fraudulent Intent

In summary, the only factors allegedly evidencing a fraudulent intent were that Mr. Aloe gave some of his half-interest to his wife in her own home. He retained no control, and made the transfer at a time long after he had acknowledged his debt to Bil-Ray. He made no attempt to hide the conveyance or himself, and the evidence cannot sustain insolvency. *Gass v. Comreal Miami Inc.*, 653 So.2d 1069 (Fla.App. 1995) (not fraudulent intent where no-consideration transfer to wife unconnected to creditor's interest, and insufficient evidence of insolvency). No other evidence of fraudulent intent was offered. Accordingly, the court was in error in finding fraudulent intent, and in setting aside the transfer. This Court should reverse.

CONCLUSION

For the foregoing reasons, Carol Aloe respectfully requests this Court reverse the trial court's order which set aside the transfer of real estate to her.

Respectfully submitted,

Carol F. Aloe
By her Attorney,

Law Office of Joshua L. Gordon

Dated: March 7, 2007

Joshua L. Gordon, Esq.
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Carol F. Aloe requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument.

I hereby certify that on March 7, 2007, copies of the foregoing will be forwarded to William Philpot Jr., Esq.

Dated: March 7, 2007

Joshua L. Gordon, Esq.
Law Office of Joshua L. Gordon
26 S. Main St., #175
Concord, NH 03301
(603) 226-4225

APPENDIX