

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
LISA A. BURGHART,)	Case No. 03-10291
)	Chapter 7
Debtor.)	
<hr/>		
)	
J. MICHAEL MORRIS, Trustee,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 03-5146
)	
VINCE M. BURGHART,)	
)	
)	
Defendant.)	
<hr/>		

**ORDER DENYING DEFENDANT’S MOTION TO DISMISS;
GRANTING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT;
AND SETTING REMAINDER OF MATTER FOR TRIAL**

Before the Court is the motion of Defendant Vince Burghart to dismiss Count I of the Trustee’s amended complaint for lack of subject matter jurisdiction and for summary judgment on Count II (the “Motion”), along with the Trustee’s Response and Burghart’s Reply. The Trustee’s amended complaint seeks alternative relief: (1) that the defendant non-debtor Burghart be required to “contribute” one-half of the funds paid by debtor, his wife, on their joint obligation secured by a motor vehicle; or (2) that the debtor’s payment on the joint obligation be construed as an indirect transfer made with actual intent to hinder, delay or defraud debtor’s creditors under the Kansas Uniform Fraudulent Transfer Act, KAN. STAT. ANN. § 33-204(a)(1) (2000).

The Trustee did not controvert any of the facts set out by Burghart in support of the motion for summary judgment; nor did the Trustee present any additional material facts.¹ Thus, the facts controlling this decision are as follows.

This bankruptcy case was filed on January 24, 2003.² Debtor Lisa Marie Ann Burghart and defendant Vince Burghart are, and were at the date of the commencement of this case, husband and wife. Mrs. Burghart received a year-end \$5,300 bonus from her employer on December 23, 2002 and deposited the bonus in her checking account. She in turn wrote a check to Conway Bank in a like amount for payment on a car loan on which she and Mr. Burghart were jointly liable.³ Mr. and Mrs. Burghart jointly owned the 2001 Chevrolet pickup that secured the loan. With this payment, the loan balance was reduced to approximately \$14,000. After the case was filed, Mrs. Burghart traded the 2001 pickup for a different vehicle, receiving a \$13,500 trade-in allowance on the pickup. Mrs. Burghart drove the 2001 pickup to and from work and claimed it as exempt.

The Trustee's initial complaint alleged a contribution claim against Mr. Burghart in the amount of one-half of the payment, reasoning that he had benefitted to some degree from his wife's payment on the jointly-owed obligation. Mr. Burghart moved to dismiss this complaint for lack of subject matter jurisdiction, arguing that the contribution claim was purely a creature of state or non-bankruptcy law and not a core proceeding. The Trustee then amended his complaint to add a second count for fraudulent transfer under KAN. STAT. ANN. § 33-204(a)(1). The second count clearly is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

¹ See D. Kan. Rule 56.1(b)(2).

² This adversary proceeding was commenced on or about May 1, 2003.

³ The car payment was made at the behest of Mrs. Burghart's attorney with whom she had begun consulting in October 2002 regarding possible bankruptcy.

Mr. Burghart persists in his motion to dismiss the contribution count. It seems to the Court that the contribution claim is based on state law and is, at best, a “related to” claim over which this Court may exercise jurisdiction when the parties consent under 28 U.S.C. § 157(b)(3) and (c)(2).⁴ Otherwise, this Court can only hear the “related to” claim under 28 U.S.C. § 157(c)(1) and make a report to the district court. Moreover, because the fraudulent transfer action is clearly within the ambit of 28 U.S.C. § 157 and should be tried in the bankruptcy court, no purpose would be served by requiring either party to litigate this matter twice, once here and once in an overburdened state court. Therefore, the Court declines to exercise permissive abstention and the defendant’s motion to dismiss the contribution claim for lack of jurisdiction is DENIED. The Court will proceed under 28 U.S.C. § 157(c)(1) and § 1334(c)(1).⁵

The Court now turns to defendant’s motion for summary judgment on the Trustee’s second count. In determining the motion for summary judgment, the Court must construe the record liberally in favor of the non-moving party. *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir. 1988). A total of five (5) briefs or memoranda were filed by the parties, including a Surreply filed by the Trustee and a Surreply filed by Mr. Burghart. Neither the Surreply nor the Surreply are authorized by the

⁴ The Court must abstain from hearing the contribution claim if the action could not have been commenced in federal court absent § 1334 jurisdiction and if such an action has been commenced and can be timely adjudicated in an appropriate State forum. Because nothing in the record indicates that such a state court action has been filed, the Court will not exercise mandatory abstention. *See* 28 U.S.C. § 1334(c)(2).

⁵ Although the Court will exercise “related to” jurisdiction over the contribution claim, the Court observes that its authority is limited to submitting “proposed findings of fact and conclusions of law to the district court.” Kansas law allows persons who would have been entitled to claim a right of contribution at equity to do so in an action at law under KAN. STAT. ANN. § 60-2413 (1994). Once a lender has obtained *entire* satisfaction of its claim from a co-maker, the co-maker may proceed in contribution against the maker of the note. *See Farmers State Bank of Ingalls v. Friesen*, 15 Kan. App. 2d 132, 136, 803 P.2d 1049 (1990), *rev. denied* 248 Kan. 995 (1991). The \$5,300 payment here did not *entirely* satisfy the bank’s note.

rules and neither party sought leave of court to file his additional brief.⁶ Accordingly, the Court will not consider either the Trustee's Surreponse or Mr. Burghart's Surreply. The Court will decide the summary judgment motion based upon the record and facts presented by defendant Burghart's opening memoranda, the Trustee's response or opposing memorandum,⁷ and Burghart's reply memorandum.

Here, the Trustee asserts that Mrs. Burghart's payment constituted an indirect transfer to Mr. Burghart, one that was made with actual intent to hinder, delay or defraud her other creditors in violation of the Kansas Uniform Fraudulent Transfer Act, specifically KAN. STAT. ANN. § 33-204(a)(1). To determine whether such a transfer has been made with the requisite intent, the Court may determine whether certain badges of fraud, including those enumerated in KAN. STAT. ANN. § 33-204(b) (2000), are present. The more badges that are present, the more likely it is that the transfer has been made with intent to hinder, delay or defraud creditors. Here, based upon the uncontroverted facts before the Court, only one badge is present -- that the transfer was made to an insider.⁸ Although one might infer that the debtor was insolvent after the transfer was made given the timing of the transfer and bankruptcy filing, this was not among the statements of uncontroverted fact presented to the Court.⁹ The Trustee did not come forward, as was his burden, with any additional material uncontroverted facts to show the presence of any other badges of fraud or Mrs. Burghart's fraudulent intent. *See McKibben v. Chubb, supra* at 1532 (Summary judgment is appropriate against a party who fails to

⁶ *See* D. Kan. Rule 7.1(c) and Rule 56.1 and D. Kan. LBR 9013.2(e).

⁷ In his opposing memorandum, the Trustee argued a different fraudulent transfer theory, § 33-204(a)(2), from the theory pled, § 33-204(a)(1). The Court will only consider the theory pled by the Trustee and will disregard any claim based upon § 33-204(a)(2).

⁸ *See* KAN. STAT. ANN. § 33-204(b)(1) and § 33-201(g)(1)(A).

⁹ KAN. STAT. ANN. § 33-204(b)(9) (2000). The party opposing summary judgment may not rest on conclusory allegations to establish an issue of fact. *McKibben v. Chubb, supra* at 1528.

make a showing to establish the existence of an element essential to that party's case and on which the party has the burden of proof at trial.). The Trustee's position appears to be that the existence of this single badge of fraud is sufficient to withstand summary judgment.

Reasoning from the only available facts in the record, Mrs. Burghart had a debt of some \$19,300 (\$5,300 plus \$14,000) secured by the 2001 pickup. This debt was jointly owed with Mr. Burghart. When she made the payment, she reduced the balance to \$14,000. When she traded her vehicle shortly thereafter, it brought a trade allowance of \$13,500. This suggests that the vehicle was worth considerably less than the \$19,300 and that Conway Bank was undersecured, exposing Mr. Burghart to deficiency liability in the event Conway Bank sought to collect the debt. As the \$5,300 payment essentially relieved him of that risk, Mr. Burghart may have benefitted from this transfer. Yet the fact that he was an insider, viewed alone, should not suffice to withstand summary judgment in the absence of any suggestion of other badges of fraud. This Court simply cannot conclude, in the absence of any other badges, that the transfer was made with actual intent to hinder, delay or defraud creditors. "The fact that the parties to the transfers of properties are related by blood or by marriage does not warrant a conclusion that the transactions were fraudulent as to creditors, but it does subject the transfers to closer scrutiny by the finder of fact." *Credit Union of America v. Myers*, 234 Kan. 773, 778, 676 P.2d 99 (1984).

Had the Trustee offered evidence of even one additional badge, this Court might be constrained to draw the inferences raised thereby in his favor. The lack of this evidence is, however, fatal to his claim. The record suggests that Mrs. Burghart made her payment to the Bank in an effort to reduce the indebtedness on her exempt means of conveyance and did so on the advice of counsel. Nearly 100 years ago, the Kansas Supreme Court held that the investment of non-exempt funds by a potential debtor in a homestead is not a fraud on her creditor where the creditor lacks a peculiar equity

or claim in the non-exempt asset. *See McConnell v. Wolcott*, 70 Kan. 375, 383, 78 Pac. 848 (1904).

This case remains good law today.

Defendant Burghart's motion for summary judgment on the fraudulent transfer claim is therefore GRANTED and a partial Judgment on Decision will issue this day.

The Trustee's contribution claim should proceed to trial. The parties will prepare and submit a pretrial order to the Court on the remaining contribution claim not later than 30 days from the date of the entry of this Order and the matter will be set for a two-hour trial immediately thereafter.

Dated this 15th day of January, 2004.

ROBERT E. NUGENT
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Order Denying Defendant's Motion to Dismiss and Granting Summary Judgment** was deposited in the United States mail, postage prepaid on this 15th day of January, 2004, to the following:

J. Michael Morris
Klenda, Mitchell, Austerman &
Zuercher, LLC
301 N. Main
Suite 1600
Wichita, KS 67202

Sarah Newell
Klenda, Mitchell, Austerman &
Zuercher, LLC
301 N. Main
Suite 1600
Wichita, KS 67202

U.S. Trustee's Office
500 Epic Center
301 N. Main
Wichita, KS 67202

W. Thomas Gilman
Redmond & Nazar, LLC
200 West Douglas, 9th Floor
Wichita, KS 67202-3089

Lisa A. Burghart
620 Atherton
Maize, KS 67101

Janet Swonger,
Judicial Assistant