IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SARAH O. VENABLES	)	
	)	CIVIL ACTION NUMBER
Plaintiff	)	
v.	)	02C-09-126-JOH
	)	
GEORGE B. SMITH, ESQUIRE and	)	
SMITH O'DONNELL PROCINO &	)	
BERL	)	
Defendants	)	

Submitted: December 6, 2002
Argued: December 12, 2002
Decided: March 14, 2003

MEMORANDUM OPINION

Upon Motion of Defendants to Dismiss - ***DENIED***

Kevin W. Gibson, Esq., Gibson & Perkins P.C., Media, Pennsylvania, attorney for plaintiff

Jeffrey M. Weiner, Esq., Wilmington, Delaware, attorney for defendants

HERLIHY, Judge

Defendants George B. Smith and his law firm move for summary judgment in this legal malpractice case. Plaintiff Sarah Venables has sued Smith for failing to timely record a deed transferring property into a Limited Liability Company before she declared bankruptcy, thereby allowing creditors to threaten partition and force settlement. Smith argues that even if he had timely deeded the property, the transfer would have been voidable by the creditors as a fraudulent transfer. The Court holds that genuine issues of material fact exist such that summary disposition is inappropriate. Defendants' motion for summary judgment is **DENIED.**

Facts

In October, 1999, Plaintiff Sarah Oliphant Venables ("Venables") and her two sisters, Lisa Oliphant Rogers and Susan Oliphant Phillips, owned as general partners two beach front properties in South Bethany Beach and a commercial warehouse in Laurel. In November, 1999, Venables and her sisters retained Defendant George B. Smith, an attorney with defendant law firm Smith, O'Donnell, Procino & Berl, to take steps to form a Limited Liability Company and transfer the property to the contemplated LLC. Although the parties' descriptions of the events differ, for the purposes of this motion, Venables' factual allegations must be taken as true and are therefore provided.

According to Venables' affidavit, she and her husband met with Smith in early 1997 for estate planning purposes. During this visit, Venables told Smith of the properties and that the properties were titled in the name of a general partnership. Since two of the properties were frequently rented out by the partnership to vacationers, Smith suggested that the partnership be changed to an LLC. That way, if a renter suffered any personal injury on a property, Venables and her sisters could not be sued individually. At the time, Smith was also representing Venables' husband's company, W.B. Venables and Sons, Inc., a construction firm, which was undergoing ownership transfers. According to Venables, these ownership transfers took priority over the creation of the LLC, such that it was "placed on the back burner."

About two years later, in October of 1999, Venables received new rental agreements for the properties, which she claims raised concerns for personal liability exposure and rekindled the issue of the need to have an LLC formed. Venables contacted Smith and instructed him to take whatever steps necessary to create such a company and to transfer to it the property from the partnership. In return for transferring her partnership interest in the property, Venables was to receive an equivalent interest in the newly formed entity.

Soon thereafter Smith successfully formed "Oliphant Sisters, LLC," but failed to prepare a deed transferring the properties to the newly formed entity. As of November, 1999, Venables states that she was current with respect to all of her financial obligations. Venables and her husband filed for Chapter 11 Bankruptcy on April 6, 2000. The bankruptcy came about because Venables' husband's construction business was experiencing severe financial difficulties and both she and her husband had guaranteed several of the company's loans. Venables' largest creditor, PNC Bank ("PNC"), sought

$200,000 from Venables for settlement purposes, which according to its estimation was the value of Venables' interest in the property. It was only at this point that Venables learned of Smith's failure to transfer title to the properties from the partnership to the LLC. After PNC threatened to partition the partnership property, a settlement was reached whereby PNC would settle the dispute in exchange for $75,000 which she has paid.

Venables filed suit on September 13, 2002, making claims against Smith for professional negligence and against Smith's law firm, Smith, O'Donnell, Procino & Berl, on the theory of respondeat superior. The defendants moved to dismiss, making two arguments. First, they argue that by December, 1999, the time at which Smith was engaged to transfer the property, Venables was already insolvent, such that any property transfer would have been voidable by her creditors as a fraudulent transfer. Second, defendants maintain that Venables' complaint fails to state a claim upon which relief can be granted because, according to the terms of the LLC agreement, her voluntary petition for bankruptcy would cause the LLC to be dissolved unless her sisters, the LLC's remaining members, took further steps to continue it. Because these steps were never taken, defendants maintain that even if Smith had properly deeded the partnership property, Venables' interest in the property would have been distributed to her bankruptcy estate, regardless.

Applicable Standard

Defendants filed a motion to dismiss and attached deposition testimony, various documents and other additional facts not previously presented in their pleadings. A motion to dismiss relying upon factual assertions outside the pleadings is considered under Superior Court Civil Rule 56 as a motion for summary judgment.[1] Therefore, the defendants' motion to dismiss has been converted into a motion for summary judgment. A motion for summary judgment may only be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[2] If a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts to clarify an application of law, summary judgment is improper.[3] If it appears that there is some reasonable theory or position under which the opponent might recover, the motion must be denied.[4] The Court must view the evidence in the light most favorable to the non-moving party.[5]

Discussion

Defendants' first argument involves the voidability of fraudulent transfers. The thrust of their reasoning is that even if Smith had recorded the deed to the property to the newly created LLC, PNC would still have been able to void the transaction because it

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[1] *Schultz v. Delaware Trust Co.*, 360 A.2d 576, 578 (Del. Super. Ct. 1976); *Rose v. Cadillac Fairview Shopping Ctr.*, 668 A.2d 782, 786 (Del. Super. 1995).

[2] *Schueler v. Martin*, 674 A.2d 882, 885 (Del. Super. 1996); *Pierce v. International Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

[3] *Kysor Indus. Corp. v. Margaux*, 674 A.2d 889, 894 (Del. Super. 1996).

[4] *Vanaman v. Milford Memorial Hosp., Inc.*, 272 A.2d 718, 720 (Del. 1970).

[5] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

would constitute a fraudulent transfer. Thus, in order for this argument to be successful defendants must prove, among other things, that as a matter of law the proposed transfer would, indeed, have been fraudulent under Chapter 13 of Title 6. Section 1304 provides:

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay or defraud any creditor of the debtor; or
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> b. Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.
>
> (b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:
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> (1) The transfer or obligation was to an insider;
>
> (2) The debtor retained possession or control of the property transferred after the transfer;
>
> (3) The transfer or obligation was disclosed or concealed;
>
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
>
> (5) The transfer was of substantially all the debtor's assets;
>
> (6) The debtor absconded;
>
> (7) The debtor removed or concealed assets;
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> (8) The value of the consideration received by the debtor was reasonable equivalent to the value of the asset transferred or the amount of the obligation incurred;
>
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
>
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

In other words, in order to prove that the proposed transfer would have been fraudulent, defendants must, at the very least, prove either that (1) Venables had the subjective intent to hinder, delay or defraud a creditor, or (2) she made the transfer without receiving anything of reasonably equivalent value in exchange for the transfer.[6]

With regard to the first, subjective prong, defendants have spent much of their briefing and argument attempting to establish that Venables was insolvent in December of 1999, the time that Smith was to have accomplished the transfer the property. However, even if the defendants have established Venables' insolvency, an issue this Court need not decide, that insolvency alone is insufficient to make the property transfer fraudulent or voidable. Insolvency is but one factor to be considered while determining actual intent under 6 *Del.C.* § 1304(a)(1). Defendants have presented evidence of other factors as well, including that Venables was being sued in late 1999 for debts owed and that she would have retained control over the property if the transfer went through.

However, for the summary judgment purposes, all factual allegations and reasonable inferences must be viewed in favor of the non-moving party, in this case Venables. According to Venables, her subjective intent was to avoid personal injury liability, not to

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[6] In the latter case, defendants would also have to show either that (a) Venables was engaged in a transaction for which her remaining assets would be unreasonably small in relation to the transaction, or (b) Venables reasonably should have believed that she would incur debts beyond her ability to pay as they became due.

hinder, delay or defraud. In short, Venables' subjective intent is a genuine issue of material fact, such that summary judgment is inappropriate. Further, she argues at the time Smith was instructed to proceed with the LLC formation and property transfer (in 1999), he was aware of the financial circumstances of Venables' husband's construction firm. Yet he proceeded.

With regard to the second prong, defendants maintain that Venables was to receive no reasonably equivalent value in exchange for the transfer. Venables, on the other hand, maintains that she was to receive an equivalent interest in the LLC in exchange for her partnership interest. At argument, defendants discussed the differences between corporate ownership through stock and partnership membership. In particular, they discussed the more limited rights of judgment creditors as to LLC property.[7] This fact, they seem to argue, diminishes the value of the LLC membership Venables was to receive in exchange for the transfer, making the value somehow inadequate. Title 6 *Del.C.* § 1303 provides:

> (a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.
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> (b) For the purposes of §§ 1304(a)(2) and 1305, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under the mortgage, deed of trust or security agreement.

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[7] *See* 6 *Del.C.* §18-703 (1999).

The Court finds impersuasive defendants' argument that the value Venables was to receive, LLC membership, is of legally inadequate value. The fact that the transfer of the property would make it more difficult for creditors to reach does not lessen the value of the LLC interest. If Venables were to receive a one-third interest in a LLC in exchange for her one-third interest in partnership property, that constitutes reasonably equivalent value. The Court says "if" because there appears to be a factual dispute as to whether that was indeed the parties' intention. Put simply, upon considering the evidence in a light favorable to Venables, defendants cannot meet their burden of showing the lack of genuine issues of material fact and that they are entitled to judgment as a matter of law.

Defendants' second argument is no more fruitful than their first. Their reasoning is as follows. The LLC agreement that Smith setup for Venables defines an "involuntary withdrawal" as the occurrence of any member filing a voluntary petition for bankruptcy. That same agreement provides that the LLC would be dissolved upon the occurrence of any involuntary withdrawal, unless the remaining members unanimously elect to continue the business of the company. Venables' sisters, the other members of the LLC, did not elect to continue. Therefore, even if Smith had carried out the deed transfer of the partnership property to the newly formed LLC, that company would have dissolved once Venables declared bankruptcy and Venables' interest in the company would have been distributed to her bankruptcy estate.

This line of reasoning has at least one fatal flaw. Once Smith failed to transfer the property and bankruptcy was declared, the LLC members had no reason to maintain it, because its principal and sole purpose, to control the property, was moot. Defendants' argument is premised on the assertion that Venables' sisters had a legal duty to maintain the LLC despite its sole purpose becoming moot. The law puts no such duty on the members. Once bankruptcy was declared with the property remaining with the partnership, the LLC became, for the most part, useless. Accordingly, the LLC's dissolution[8] has no bearing on the viability of Venables's claim.

Conclusion

For the foregoing reasons, defendants' motion for summary judgment is **DENIED.**

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J.

[8] Interestingly, there remains some confusion as to the status of the Limited Liability Company. Even Smith apparently acted under the belief that the company was still a viable entity when he belatedly filed a deed in June of 2002, years after Venables filed for bankruptcy.