

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY, SS

SUPERIOR COURT

Joseph Swan, Jr.

v.

Oscar C. Hickey and Reta Hickey

Docket No. 99-C-0231

ORDER

The plaintiff brings this action seeking to set aside as fraudulent the transfer of Oscar Hickey's interest in certain property to his ex-wife Reta Hickey. The court has entered a default judgment against defendant Oscar Hickey. Defendant Reta Hickey, who was awarded the home by decree of legal separation from defendant Oscar Hickey, objects. For the reasons stated in this order, the court finds the property was not fraudulently conveyed.

In May, 1989, defendant Oscar Hickey was arrested for sexually assaulting the plaintiff. He remained incarcerated pending trial and ultimately plead guilty on January 17, 1990. In July, 1989, the plaintiff's mother filed a civil action against the defendant as a result of the sexual assault. She obtained an attachment on the defendant's primary residence on July 12, 1989, in the amount of \$50,000. The plaintiff served the attachment upon the Strafford County Register of Deeds and upon the defendant

at the Coos County jail.

After defendant Oscar Hickey entered his plea, the parties in the civil matter settled the claim for \$15,000. On November 19, 1990, the plaintiff filed a Motion to Enter Final Judgment in which he agreed not to seek a writ of execution for the attachment until 6 months after the defendant's release from prison. The court granted the motion on December 28, 1990.

In the meantime, defendant Reta Hickey filed a petition for legal separation against defendant Oscar Hickey. Defendant Oscar Hickey defaulted and the domestic court awarded the residence to Reta Hickey on August 31, 1995. At the time of the separation, defendant Reta Hickey knew that the home was subject to the attachment and understood that her right to claim full ownership could not be realized until the attachment expired. The home was valued at \$85,000 and was subject to a mortgage in the amount of \$9,600 and the \$50,000 attachment. In accordance with the terms of the decree of legal separation, defendant Oscar Hickey signed a quitclaim deed transferring the residence to defendant Reta Hickey. The deed was recorded in the Strafford County Registry of Deeds on September 20, 1995.

Defendant Oscar Hickey was released from prison on April 8, 1996. The defendant's six month anniversary of his release from prison was October 8, 1996, yet he failed to make any payment toward the outstanding \$15,000 obligation. Notwithstanding this failure, the plaintiff waited until December 6, 1996, to attempt

to obtain a writ of execution.

Because the plaintiff did not properly follow the statutory procedure for obtaining a writ of attachment, the court was unable to issue the writ until June 3, 1997, after the attachment had expired. As a result, the Sheriff ultimately refused to proceed with the levy, execution and Sheriff's sale of the property.

The plaintiff now seeks to set aside as fraudulent the transfer of the residence to Reta Hickey as ordered in the decree of legal separation, and he seeks to obtain a valid attachment pursuant to RSA 545-A, the Uniform Fraudulent Transfer Act (the "Act"). The plaintiff makes this claim under several provisions of the Act. The court will consider each in turn.

Actual Intent to Hinder Delay, or Defraud

RSA 545-A:4 provides as follows:

I. 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:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; . . .

II. 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 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 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. (Emphasis added.)

Under the facts of this case, the court cannot find that Oscar Hickey transferred the marital home with the actual intent to hinder, delay or defraud the plaintiff.¹ The transfer in this case was not made to an "insider" since Reta Hickey was no longer Oscar Hickey's wife at the time of the transfer. The term "insider" as defined by statute anticipates a relationship where the parties are more willing than a bona fide purchaser to collude. Since Reta Hickey's interests were adverse to Oscar Hickey's at the time of transfer, she is not an "insider" as contemplated in the statute. Even if she were considered and "insider", the transfer here was made pursuant to an order of the domestic court, which is charged with the responsibility for dividing a marital estate equitably; the transfer was not made

¹ The court rejects the defendant's position that no transfer occurred because the marital home was not an "asset" at the time of transfer. Though the property was subject to the plaintiff's \$50,000 lien, the purpose behind the fraudulent conveyance act is to protect creditors. A lien the suing creditor places on the property cannot be considered in determining whether the property is an "asset" under the statute. To rule otherwise would render the protection afforded creditors meaningless.

voluntarily nor was it specifically designed to deplete Oscar Hickey's assets.

In addition, Oscar Hickey did not retain control over the residence nor did he conceal its transfer. Indeed, the transfer was properly recorded in the Strafford County Registry of deeds pursuant to law. The plaintiff claims the defendant failed to notify him personally of the marital action or of the resulting decree awarding her the marital home. No provision of law, however, required either Oscar or Reta Hickey to do so.

Though the plaintiff had sued Oscar Hickey before he transferred the home, the transfer occurred nearly six years after the court entered judgment in favor of the plaintiff, a factor weighing against a finding of actual intent to hinder. In addition, Oscar Hickey never absconded from the jurisdiction, nor did he remove or conceal assets.

Finally, the court finds that the value of the consideration Oscar Hickey received was reasonably equivalent to the value of the asset transferred. At the time of the decree, the equity in the marital home was \$75,400. Half of the equity belonged each to Oscar and Reta Hickey. Thus, the value transferred from Oscar Hickey to Reta Hickey equalled \$37,700. In return for the award of Oscar Hickey's equity in the marital home, Reta Hickey assumed the entire mortgage and the responsibility for paying all property taxes. In addition, she assumed responsibility for all marital debt including Oscar Hickey's personal income taxes. In light of

the significant personal debt that Oscar Hickey was relieved from paying, the court finds the parties exchanged reasonably equivalent consideration.

Accordingly, the court finds that the transfer was not fraudulent pursuant to RSA 545-A:4, I(a).

Inadequate Consideration

RSA-A:4 also provides that a fraudulent transfer occurs under the following circumstances:

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(1) 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

(2) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Because the court has already found that Oscar Hickey received reasonably equivalent value in exchange for the transfer, no fraudulent conveyance occurred pursuant to RSA-A:4, I(b). Even if he had not received such equivalent value, section (1) is inapplicable since there was no evidence presented that Oscar Hickey was about to engage in a business or other transaction at the time of the transfer.

In addition, pursuant to section (2) Oscar Hickey could not have intended to incur, or believed or reasonably should have believed that he would incur debts beyond his ability to pay since he knew the attachment was in effect at the time of the transfer.

Instead, the evidence demonstrates that Oscar Hickey reasonably believed the Sheriff would execute the writ of attachment if the \$15,000 judgment were not satisfied. Indeed, the Sheriff would have executed the writ had the attachment been properly extended.

Accordingly, the court finds that the transfer was not fraudulent pursuant to RSA 545-A:4, I(b).

Transfers Fraudulent as to Present Creditors

RSA 545-A:5 provides as follows:

I. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

II. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

Since the court has previously determined that reasonably equivalent consideration supported the transfer, no fraudulent transfer occurred pursuant to RSA 545-A, I. In addition, no evidence was presented that the transfer was made for an antecedent debt. Oscar Hickey was not attempting to satisfy an antecedent debt owed to Reta Hickey, but rather accepted a proper division of marital assets in the context of a legal separation. Thus, no fraudulent conveyance occurred pursuant to RSA 545-A, II.

Finally, since the attachment continued to remain valid even

after the transfer, and since Reta Hickey obtained the home subject to the attachment, the transfer did not extinguish any rights in the plaintiff to collect his judgment. Unlike a case where a debtor transfers an asset of value beyond the reach of his creditors, Oscar Hickey in this case did nothing to diminish the plaintiff's legitimate judgment when the home was transferred. Had the plaintiff properly extended the duration of the attachment once he learned of the defendant's release from prison, nothing would have prevented him from collecting his judgment today. See RSA 511-A:3.

Requests for Findings of Fact and Rulings of Law

Plaintiff's Requests for Findings of Fact:

GRANTED: 1-5, 7-9, 11-14

DENIED: 18-21

NOT RULED ON (as irrelevant to a determination of the issues, already covered in this court's order, too broadly worded, or insufficient evidence presented): 6, 10, 15-17

Plaintiff's Requests for Rulings of Law:

GRANTED: 1-5, 7-9

NOT RULED ON (as irrelevant to a determination of the issues, already covered in this court's order, too broadly worded, or insufficient evidence presented): 6, 10, 11

Defendant's Requests for Findings of Fact:

GRANTED: 1-24, 26, 28-32

DENIED: 25

NOT RULED ON (as irrelevant to a determination of the issues, already covered in this court's order, too broadly worded, or insufficient evidence presented): 27

Defendant's Requests for Rulings of Law:

GRANTED: A-H, J-O, Q

DENIED: P

NOT RULED ON (as irrelevant to a determination of the issues, already covered in this court's order, too broadly worded, or insufficient evidence presented): I

SO ORDERED.

Date: November 17, 2000

Tina L. Nadeau
Presiding Justice