UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

In the Matter of:	:	Chapter 11
	:	Case No. 11-31083-JPS
JAMES M. DONNAN, III,	:	
MARY W. DONNAN,	:	
Debtors	:	

WILLIAM M. FLATAU,	:	Adversary Proceeding
as Liquidating Trustee for the Estate of	:	No. 13-3001
James M. Donnan III and Mary W. Donnan,	:	
Plaintiff	:	
v.	:	
	:	
BARRY SWITZER FAMILY, LLC, and	:	
BARRY SWITZER,	:	
Defendants	:	

WILLIAM M. FLATAU,	:	Adversary Proceeding
as Liquidating Trustee for the Estate of	:	No. 13-3002
James M. Donnan III and Mary W. Donnan,	:	
Plaintiff	:	
v.	:	
	:	
HUNTER MILLER FAMILY, LLC, and	:	
HUNTER MILLER,	:	
Defendants	:	

BEFORE

James P. Smith
United States Bankruptcy Judge

APPEARANCE:

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PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In these related adversary proceedings, Plaintiff seeks to avoid and recover certain payments by Debtor James M. Donnan, III ("Donnan") to Defendants. Plaintiff has moved for summary judgment on Counts I and II of his complaints, while Defendants seek summary judgment on all counts asserted therein.

Under the Supreme Court's decisions in Stern v. Marshall, 564 U.S. __, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), Executive Benefits Ins. Agency v. Arkinson, 573 U.S. __, 134 S.Ct. 2165, 189 L.Ed.2d 83 (2014), and Wellness Int'l Network, Ltd. v. Sharif, __U.S.__, 135 S.Ct. 1932, 191 L.Ed.2d 911 (2015), these adversary proceedings present "Stern-core" matters which this Court may not finally decide without the consent of all parties.[1] Defendants have withheld their consent. Accordingly, this Court may only enter proposed findings of fact and conclusions of law, subject to de novo review by the district court. After considering the briefs filed by the parties, the depositions and affidavits, and the other evidence in the record, the Court now publishes its proposed findings of fact and conclusions of law.

INTRODUCTION

These adversary proceedings arise out of transactions between and among

[1] Stern-core matters include proceedings to determine, avoid or recover fraudulent or preferential transfers when the defendants, as in the cases at bar, have not filed proofs of claims. 1 Collier on Bankruptcy ¶ 3.02[3][b](16th ed. 2015).

Defendants, Donnan and GLC Limited ("GLC"). Defendant Barry Switzer ("Switzer") is the former head football coach of the University of Oklahoma and Dallas Cowboys. He is the manager of Defendant Barry Switzer Family, LLC ("BSF"). Defendant Hunter Miller ("Miller") is the manager of Defendant Hunter Miller Family, LLC ("HMF"). Switzer is Miller's father-in-law.

GLC was a retail liquidation company operated by Greg Crabtree. Crabtree and his wife were the sole owners of GLC. GLC's business model was to purchase excess inventory from major retailers and then resell the goods for substantial profits. As this Court found in the case of Fennell v. Donnan (In re Donnan)[2]:

> GLC, while initially conducting a legitimate inventory liquidation business, ultimately devolved into a Ponzi scheme. Between 2007 and 2010, approximately 103 individuals and entities...invested over $81 million in GLC for the supposed purchase of inventory by GLC. However, during that period of time, GLC purchased approximately $11 million in inventory and had gross sales of approximately $6 million. Nevertheless, during that time, GLC paid its investors over $70 million. Thus, it is clear that the principal source of funds for payment to the investors was the money other investors were putting into GLC, the classic Ponzi scheme model.

Id. at *1.[3]

This Court further found that while Donnan played a major role in raising funds for

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[2] 2013 WL 3992411 (Bankr. M.D. Ga. Aug. 1, 2013), aff'd, 2014 WL 231964 (M.D.Ga. Jan. 21, 2014).

[3] "The term 'Ponzi scheme' is derived from Charles Ponzi, a famous Boston swindler. With a capital of $150, Ponzi began to borrow money on his own promissory notes at a 50 % rate of interest payable in 90 days. Ponzi collected nearly $10 million in 8 months beginning in 1919, using the funds of new investors to pay off those whose notes had come due. Generically, a Ponzi scheme is a phony investment plan in which monies paid by later investors are used to pay artificially high returns to the initial investors, with the goal of attracting more investors." United States v. Silvestri, 409 F.3d 1311, 1317 n.6 (11th Cir. 2005) (quotations and citations omitted).

GLC, the evidence introduced at the trial of the Fennell case did "...not establish by a preponderance of the evidence that Donnan was aware of or knowingly participated in the GLC Ponzi scheme." Id. at *10.

In addition, on April 11, 2013, the United States charged Donnan and Crabtree with a combined 85 counts of fraud, conspiracy and money laundering regarding the Ponzi scheme activities of GLC in the United States District Court for the Middle District of Georgia, Athens Division. United States v. Crabtree, Crim. No. 3:13-CR-9(CAR)(M.D.Ga. Apr. 11, 2013). On May 16, 2014, after the trial of the criminal case against Donnan, the jury returned a "not guilty verdict" on all counts. United States v. Donnan, Crim. No. 3:13-CR-9(CAR), (Docket No. 78).

On February 28, 2011, GLC filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Ohio. In re GLC Limited, Chapter 11 Case No. 11-11090 (Bankr. S.D.Ohio). Donnan and his wife ("Debtors") filed their voluntary petition under Chapter 11 of the Bankruptcy Code in this Court on July 1, 2011. Their plan of liquidation was confirmed by the Court by order dated July 27, 2012. Plaintiff was appointed liquidating trustee under that plan. Under the plan and the confirmation order, Plaintiff is authorized to pursue these avoidance actions.

FINDINGS OF FACT

When Switzer was the head football coach at the University of Oklahoma, he hired

Donnan as his offensive coordinator from 1985 through 1988[4]. Thereafter, they would see each other two or three times a year at sports clinics and events. Donnan was a football commentator on ESPN and he and Switzer would occasionally call each other to discuss particular teams and games.

Sometime in 2009, their paths crossed at the Oklahoma City airport. Donnan told Switzer that he was involved in buying and selling inventory and was doing very well in the business. Later, Switzer mentioned this to Miller.

Miller and Switzer were part owners of a pay-day loan business and did many other business deals together. In their pay-day loan business, the business borrows money from individuals and then loans the money to customers. Switzer and Miller personally guaranty the money the business borrows. Switzer has raised about $5 million for the business which makes monthly interest payments to its creditors. Switzer told Miller that Donnan "is doing something like this, borrowing money, people loan him money and he's making the returns." Switzer Deposition, Docket No. 35, Exhibit 12, pp. 37-40.[5]

Defendants' business model was for Miller to do the due diligence into business opportunities. Consistent therewith, in early 2010, Miller contacted Donnan to inquire about Donnan's business. Donnan told Miller about the business and gave Miller a list of investors who were involved. Miller asked Donnan for financial information on the

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[4] Donnan coached at the University for one more year, 1989, after Switzer retired from Oklahoma.

[5] Identical briefs and exhibits were filed in both adversary proceedings. To avoid confusion, the Court will refer to the docket numbers and exhibits in Adversary Proceeding No. 13-3001.

business, such as profit and loss statements and tax returns. However, Donnan told Miller that Crabtree was unwilling to provide that type of financial information to third parties.

Donnan suggested that Switzer and Miller get involved through a profit sharing arrangement that would yield high rates of return. However, because he could not get the financial information on GLC, Miller advised Donnan that he and Switzer would only be interested in loaning money to GLC with Donnan and Crabtree guaranteeing the loans. Miller's primary concern was not to risk losing any money.[6] Donnan agreed to this arrangement but continued to offer the profit sharing arrangement as well, to which Defendants did not object.

On April 1, 2010, BSF and HMF each advanced GLC the sum of $250,000, evidenced by notes from GLC. Donnan and Crabtree signed a guaranty agreement for each note. Each note accrued interest at the rate of 6% per annum with principal and interest being due in one payment on April 1, 2011. In addition, BSF and HMF each signed a profit sharing agreement with GLC which provided for payments of $200,000 per year in quarterly payments of $50,000 due on July 1, 2010, October 1, 2010, January 1, 2011, and March 1, 2011[7].

BSF and HMF each received $50,000 payments from GLC on July 1, 2010, and again on October 1, 2010. Although these payment dates corresponded to the dates for payments under the profit sharing agreement, and although no payments were due at those

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[6] Miller Deposition, Docket No. 35, Exhibit 11, pp. 74, 88, 127.

[7] All of the documents were prepared by lawyers representing Defendants. Crabtree signed as president for GLC and Donnan signed as vice president, even though it is undisputed that Donnan was never an officer, owner, director, manager or employee of GLC.

times on the notes, BSF and HMF nevertheless treated the payments as payments on the notes. Miller testified that he assumed that Donnan and Crabtree were trying to pay the notes off early because they had guaranteed the notes and because Donnan knew that not losing any money was Miller's biggest concern.

In late 2010, Donnan and other investors in GLC became concerned about GLC's operations. They formed a committee to investigate the company's finances and hired counsel[8] and financial experts to attempt to restructure the company. They discovered that Crabtree had been using investor funds to make payments to other investors and that sales by the company were insufficient to make additional payments to investors.

In December 2010, Donnan advised Miller that GLC would be unable to make payments to BSF and HMF. Miller and Switzer advised Donnan that they wanted to get their money back and that they expected Donnan and Crabtree to honor their guaranties. Donnan asked Crabtree to contribute, but Crabtree was unable to do so.

Donnan felt obligated to honor his guaranty.[9] Donnan asked his attorney to structure the transaction in such a way that would allow him to recover his money if the restructure of GLC was successful and it was able to pay the notes. Donnan's attorney prepared a "Note Sale and Assignment Agreement" for each of the BSF and HMF notes whereby Donnan would pay the $150,000 balance due on each note and take back an assignment of the notes, profit sharing agreements and guaranties. Donnan also paid HMF an additional $25,000 for

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[8] In fact, the investors hired the law firm representing Plaintiff in these adversary proceedings.

[9] Donnan Deposition, Docket No. 36, Exhibit C, pp. 110-113.

interest, costs and other fees HMF had incurred throughout the relationship.[10] Donnan, using his personal funds, transferred $150,000 to BSF and $175,000 to HMF on January 14, 2011, and the documents evidencing the transaction were signed on or about January 18, 2011. GLC was not able to successfully restructure or make any payments on its notes now held by Donnan.

CONCLUSIONS OF LAW

Plaintiff's complaints against Defendants assert avoidance claims to recover the payments made by Donnan. Count I of the complaints assert fraudulent transfer claims under 11 U.S.C. §§ 548(a)(1)(B) and 550. Count II asserts similar state law claims under O.C.G.A. §§ 18-2-75(a), 18-2-77(a) and 18-2-78(b).[11] Count III asserts fraudulent transfer claims under 11 U.S.C. §§ 548(a)(1)(A) and 550. Count IV asserts similar state law claims under O.C.G.A. §§ 18-2-74(a), 18-2-77(a) and 18-2-78(b). Plaintiff's complaint against Switzer and BSF assert, in Count V, preferential transfer claims under 11 U.S.C. §§ 547 and 550. Count VI asserts similar state law claims under O.C.G.A. §§ 18-2-75(b), 18-2-77(a)

[10] Paragraph 7 of each of the guaranty agreements signed by Donnan provides, "The Guarantor agrees to pay all expenses incurred by Lender in connection with enforcement of its rights under this Guaranty, as well as court costs, collection charges and attorneys' fees and disbursements."

[11] The trustee is empowered to assert these state law claims pursuant to his "strong arm" powers under 11 U.S.C. § 544(b)(1). The applicable state law is the Georgia Uniform Fraudulent Transfer Act (UFTA), O.C.G.A. § 18-2-70. The UFTA was amended in 2015 in ways immaterial to these adversary proceedings.

and 18-2-78(b)[12]. As Defendants point out in their brief, the standards for recovery under and the standards for defenses to the Bankruptcy Code and state law avoidance statutes are the same. See In re Int'l Mgmt. Ass'n, 2009 WL 6506657 at *6 (Bankr. N.D. Ga., Dec. 1, 2009), aff'd 661 F.3d 623 (11th Cir. 2011). Accordingly, for the sake of brevity and to avoid redundancy, the Court will only address the claims asserted under the Bankruptcy Code on Counts I through IV, but will discuss both with respect to Counts V and VI.

Plaintiff seeks summary judgment on Counts I and II, and Defendants seek summary judgment on all counts. The filing of cross-motions for summary judgment does not establish that there is no material fact in dispute. The Court must make an independent evaluation of each party's motion and both motions must be denied if there is a genuine issue of material fact. Donovan v. Dist. Lodge No. 100, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO, 666 F.2d 883, 886 (5th Cir. Unit B, 1982); 10A Federal Practice and Procedure: Civil 3d § 2720, pp. 335-36.

When applicable substantive law requires the non-moving party to bear the burden on a particular issue, the moving party may rest on a demonstration that the records contains no evidence to support the non-moving party's position and require the non-moving party to submit evidentiary materials to show that a genuine issue of material facts exists. Summary judgment is mandated if a party fails to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial. Hays v. Farmers and Merchants Bank (In re Stewart Finance Co.), 2007 WL 1704423 (Bankr. M.D. Ga., June

[12] The claims under 11 U.S.C. §§ 548 and 547 and O.C.G.A. §§ 18-2-74, 18-2-75 and 18-2-77 are avoidance claims against BSF and HMF. The claims under 11 U.S.C. § 550 and O.C.G.A. § 18-2-78 are claims against Switzer and Miller as subsequent transferees.

8, 2007) (citations omitted).

"[T]he plain language of Rule 56(c) mandates the entry of summary judgement...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 322-23, 106 S.Ct. at 2552.

At trial, Plaintiff would bear the burden of proving each element of his avoidance claims by a preponderance of the evidence. Sikirica v. Wettach (In re Wettach), 811 F.3d 99, 107-08 (3rd Cir. 2016) (trustee has burden under § 548(a)(1)(B) and companion state law claim); Wallace v. McFarland (In re McFarland), 619 F.App'x 962, 967 (11th Cir. 2015) (unpublished); Boudreaux v. Holloway (In re Holloway), 2015 WL 1545376 at *7 (Bankr. S.D. Ga. Mar. 31, 2015); Howell v. Fulford (In re Southern Home and Ranch Supply, Inc.), 515 B.R. 699, 704 (Bankr. N.D. Ga. 2014) (trustee has burden under §§ 544(b), 548 and 550(a)(1)); Mann v. Brown (In re Knight), 473 B.R. 847, 849 (Bankr. N.D. Ga. 2012); Webster v. Cape (In re Lary), 338 B.R. 141, 147 (Bankr. M.D. Ga. 2006); 11 U.S.C. § 547(g). Defendants would bear the burden of proving their statutory defenses. Jimmy Swaggart Ministries v. Hayes (In re Hannover Corp.), 310 F.3d 796, 799 (5th Cir. 2002); 5 Collier on Bankruptcy ¶ 548.11[1][b](16th ed. 2015); 11 U.S.C. § 547(g).

Counts I and II.

Both Plaintiff and Defendants have requested summary judgment on Count I and its companion claim under state law in Count II. Count I seeks to avoid the payments to BSF

and HMF under 11 U.S.C. § 548(a)(1)(B)[13]. That section provides, in pertinent part:

> The trustee may avoid any transfer...of an interest of the debtor in property...if the debtor voluntarily or involuntarily-
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> ...
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer...

Defendants argue that, pursuant to 11 U.S.C. § 548(d)(2)(A), "value" for purposes of section 548 includes the satisfaction of an antecedent debt. They argue that, pursuant to his guaranties, Donnan was obligated to them on the notes and that Donnan received a dollar for dollar satisfaction of this debt in return for his payments to them. Tidwell v. AmSouth Bank, N.A. (In re Cavalier Homes, Inc.), 102 B.R. 878, 885-86 (Bankr. M.D. Ga. 1989) (payments that reduce a guaranty obligation constitute value under section 548(d)(2)(A)).

Plaintiff contends that BSF and HMF advanced the money to GLC, and that, since Donnan was not an owner, officer or employee of GLC, he received no benefits from the transactions. Accordingly, Plaintiff contends that the guaranties from Donnan were not supported by any consideration and were therefore not an enforceable obligation of Donnan.

However, Plaintiff misstates the law. The guaranties are governed by Oklahoma law. Docket No. 35, Exhibits 5 and 6, Guaranty Agreement, para. 15.3. As Defendants argue in their brief:

> Oklahoma law provides that '[w]here a guaranty is entered into at the same time with the original obligation, or with the acceptance of the latter by the guarantee, and forms, with that obligation, a part of the consideration to him, no other consideration need exist.' OKLA. STAT. TIT. 15, § 323. This statute makes it clear that when the [notes] and the [guaranties] were

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[13] Section 548(a)(1)(B) applies to transactions which the law deems constructively fraudulent rather than transactions involving an actual intent to defraud creditors. 5 Collier on Bankruptcy ¶ 548.05 (16th ed. 2015).

> executed and delivered at the same time, sufficient consideration was present to support the [guaranties]. See Yount v. Bank of Commerce, 1935 OK 504, 44 P.2d 874, 878 [1935]. There is no dispute that the [notes] and [guaranties] were executed at the same time...It follows then that under Oklahoma law, the [guaranties are] supported by sufficient consideration and [were] enforceable against...Donnan when he purchased the [notes]. By purchasing the [notes], ...Donnan extinguished his guarantor liabilities under the [guaranties] in the amount of $325,000 thereby receiving reasonably equivalent value. With...Donnan having received reasonably equivalent value, the [Plaintiff] cannot satisfy the threshold element under 11 U.S.C. § 548(a)(1)(B) and summary judgment is warranted.

Defendants' Reply Brief, Docket No. 44, pp. 4-5.

In Yount v. Bank of Commerce, 1935 OK 504, 44 P.2d 874 (1935), the Oklahoma Supreme Court held that the consideration for which a note is executed is sufficient consideration to support the guaranty by a third party when the note and guaranty are executed contemporaneously. Id. at 878.

Plaintiff argues that Georgia law should govern the guaranties because it is against the public policy of Georgia to enforce a guaranty executed in connection with an investment in a Ponzi scheme by a person who was not an officer, owner or employee of the entity running the Ponzi scheme. Plaintiff's Reply Brief, Docket No. 43, p. 3.

However, Georgia law, like Oklahoma law, provides that "consideration for a guarantor's signature is the extension of credit to his principal." Beard v. McDowell, 174 Ga.App. 793, 331 S.E. 2d 104, 106 (1985). See O.C.G.A. § 10-7-1; First Union Nat'l Bank v. Gurley, 208 Ga.App. 647, 431 S.E.2d 379, 382 (1993), cert. denied.[14]

Plaintiff also argues that the Court should look at the substance and outcome of the

[14] Both Georgia and Oklahoma law require new consideration if the guaranty is executed subsequent to the note. See Helton v. Jasper Banking Co., 311 Ga.App. 363, 715 S.E.2d 765, 767 (2011); OKLA. STAT. tit. 15 § 323.

transaction between the parties. Plaintiff contends that this Court should find that the notes and guaranty "...were nothing more than an attempt by Defendants to otherwise legitimize their investment in what they knew or should have known was a Ponzi scheme." Plaintiff's Summary Judgment Brief, Docket No. 35, p. 18. However, there is no evidence to support this contention.

Donnan, Switzer and Miller all testified that when Miller could not obtain financial information about GLC while conducting his due diligence, he decided that he would structure the investment in GLC in the form of loans guaranteed by Donnan. This is the same structure which Miller and Switzer used in borrowing money for their pay-day loan business. All three also testified that Donnan nevertheless wanted them to participate in any profits generated by GLC and neither Switzer nor Miller was opposed to this. While the payments made by GLC corresponded to the payment dates under the profit sharing agreements, Defendants treated those payments as payments under the notes, thinking that Donnan and Crabtree wanted to reduce their guaranty obligations as quickly as possible. These facts do not suggest that Defendants were aware of the Ponzi scheme or trying to disguise the transactions.

In addition, in the GLC bankruptcy case, GLC filed fraudulent conveyance actions against these same Defendants.[15] The reference of the actions was withdrawn to the district

[15] At this time, an independent party had been named Chief Restructuring Officer and was custodian of the company's records. Memorandum of Decision, Docket No. 35, Exhibit 16, p. 4 and footnote 3.

court pursuant to 28 U.S.C. § 157(d) to allow Defendants to obtain a jury trial[16]. See GLC Limited vs. Hunter Miller Family, LLC (In re GLC Limited), Case No. 1:15-CV-23 consolidated with Case No. 1:15-CV-26 (S.D.Ohio) (Docket No. 5). In the "JOINT STIPULATION OF DISMISSAL WITH PREJUDICE", filed in that case (Docket No. 14)[17], GLC stipulated that the promissory notes were not sham documents and that none of these Defendants knew or should have known that GLC operated a Ponzi scheme at the time the notes, guaranty agreements and profit sharing agreements were executed.

Plaintiff argues that he is not bound by the Joint Stipulation under the doctrines of collateral estoppel or issue preclusion because he was not a party to the GLC case and the Stipulation was not an "adjudication" by the Ohio district court. Plaintiff's Reply Brief, Docket 41, pp. 12-13. This Court agrees that Plaintiff, for the reasons argued, is not bound by the Joint Stipulation. Nevertheless, the Joint Stipulation is evidence.

Clearly, the Joint Stipulation is a statement against interest by GLC. Fed. R. Evid. 804(b)(3). While Defendants did not make the required showing that the declarant is unavailable as required by Rule 804(b)(3), the Court may nevertheless consider the Joint Stipulation because Plaintiff made no evidentiary objection to the Joint Stipulation. At trial, Defendants could either show that James Burritt, the chief restructuring officer of GLC, was unavailable or have him testify as a witness. As the Eleventh Circuit explained in Jones v. UPS Ground Freight, 683 F.3d 1283, 1294 n.37 (11th Cir. 2012), where inadmissible

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[16] The bankruptcy court had determined that it did not have authority to conduct a jury trial.

[17] The Joint Stipulation is Exhibit D, Defendants' Summary Judgment Brief, Docket No. 36.

evidence can be reduced to admissible evidence at trial, it is proper for the court to consider the evidence on summary judgment when no objection to its admission is made.

Thus, all the evidence in the record supports the proposition that the notes and guaranties were not sham documents.[18] Plaintiff, who has the burden, has introduced no evidence to the contrary to establish an issue of fact.[19]

Plaintiff further argues that the bankruptcy court in the GLC case made findings in summary judgment proceedings on GLC's avoidance actions against these Defendants that support Plaintiff's contention that the profit sharing agreements, and not the notes and guaranties, reflect the true nature of the transaction between the parties. Plaintiff argues:

> Defendants' position that the Notes were bona fide documents that reflect the true terms of Defendants' investment in GLC is at odds with the evidence. The Notes required a single payment of principal with 6% accrued interest in one year, on April 1, 2011. The Profit Sharing Agreements on the other hand, required $50,000 quarterly payments to BSF and HMF *forever* and GLC made payments to BSF and HMF of $50,000 each on July 1, 2010 and October 1, 2010, in the exact amounts and on the exact due dates required under the Profit Sharing Agreements. Thus, it is inescapable that the Profit Sharing Agreements reflected the true terms of Defendants' investment in GLC, which was a Ponzi scheme---and the United States Bankruptcy Court for the Southern District of Ohio so found---that the Notes were nothing more than an attempt to disguise the true terms of Defendants' investment.

Plaintiff's Reply Brief, Docket No. 41, pp. 2-3. Plaintiff further argues:

> In its order granting partial summary judgment to GLC against Defendants, the United States Bankruptcy Court for the Southern District of Ohio

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[18] The Court would reach the same conclusion even if it did not consider the Joint Stipulation.

[19] The Court rejects Plaintiff's argument that a single email from Defendants' banker to Miller after the loan was made relating to a New York Times article about a Ponzi scheme conducted by a Minnesota businessman put Defendants on notice before the transaction that GLC was a Ponzi scheme.

> concluded not only that GLC operated a Ponzi scheme, but that Defendants knew or should have known that "GLC was an extraordinary deal" and that it was not unreasonable to infer that GLC may have made the payments to BSF and HMF pursuant to the profit sharing agreements.

Plaintiff's Summary Judgment Brief, Docket No. 35, pp. 3-4. However, as Defendants show:

> The [Plaintiff] misstates the rulings handed down in the Ohio Litigation. The judge in the Ohio Litigation did not find that BSF, HMF,...Switzer, or [Miller] knew or should have known that GLC was an "extraordinary deal" and that it was not unreasonable to infer that GLC may have made payments to BSF and HMF under the Profit Sharing Agreement and not the...Notes. Rather, the court in the Ohio Litigation held that the determination of "good faith" is a fact-specific inquiry that is decided on a case-by-case basis...Further, the Court opined that a finding of "good faith" on summary judgment is inappropriate "if the record supports a reasonable inference of a lack of good faith" and all inferences are to be construed against the moving party...
>
> Under these rules, the court in the Ohio Litigation found that the evidence in the summary judgment record, when construed against BSF, HMF...Switzer and [Miller], "supports a reasonable inference that [BSF and HMF] knew or should have known that GLC was an "extraordinary deal" and a reasonable inference" that GLC may have made the two $50,000 payments to [BSF and HMF] pursuant to the terms of "Profit Sharing Agreement...The court concluded by stating "conflicting inferences preclude summary judgment, for either side, on any other basis."...The court made no finding of "good faith" and it made no finding of a "lack of good faith." The court simply concluded that there was an issue of fact as to whether "good faith" was present or not present.

Defendants' Reply Brief, Docket No. 42, pp. 19-20.

In summary, the GLC bankruptcy court did not make the findings that Plaintiff suggests. Rather, based on the record before him, the GLC bankruptcy judge ruled that there was a question of fact.[20] Nevertheless, based on the record before this Court, the evidence

[20] GLC Limited v. Hunter Miller Family, LLC (In re GLC Limited), Ch. 11 Case No. 11-11090 (Bankr. S.D. Ohio, Nov. 17, 2014). See Plaintiff's Summary Judgment Brief,

establishes that the notes and guaranties were not sham transactions.

Plaintiff also argues that:

> The Court may focus on the substance and the outcome of the transaction between GLC and Defendants and Donnan and Defendants and the outcome rather than the form of the parts of the overall transaction, thereby collapsing the note, profit sharing agreements, and guaranties.

Plaintiff's Summary Judgment Brief, Docket No. 35, p. 17. However, as held by the court in HBE Leasing Corp. v. Frank, 48 F.3d 623 (2nd Cir. 1995):

> It is well established that multilateral transactions may under appropriate circumstances be "collapsed" and treated as phases of a single transaction for analysis under the [Uniform Fraudulent Conveyance Act]. (Citation omitted). This approach finds its most frequent application to lenders who have financed leveraged buyouts of companies that subsequently become insolvent. (Citations omitted). The paradigmatic scheme is similar to that alleged here: one transferee gives fair value to the debtor in exchange for the debtor's property, and the debtor then gratuitously transfers the proceeds of the first exchange to a second transferee. The first transferee thereby receives the debtor's property, and the second transferee receives the consideration, while debtor retains nothing.
>
> Under these circumstances, the initial transfer of the debtor's property to the first transferee is constructively fraudulent if two conditions are satisfied. First, in accordance with the foregoing paradigm, the consideration received from the first transferee must be reconveyed by the debtor for less than fair consideration or with an actual intent to defraud creditors....
>
> Second,...the transferee in the leg of the transaction sought to be avoided must have actual or constructive knowledge of the entire scheme that renders her exchange with the debtor fraudulent.

Id. at 635. In this case, Donnan simply guaranteed loans made to GLC. He did not receive something and then gratuitously convey it to a third party. Accordingly, the "collapsing" doctrine is inapplicable.

Docket 35, Exhibits 16 and 17.

This Court finds that there are no genuine issues of material fact with respect to Counts I and II. Plaintiff cannot establish a prima facie case for recovery under 11 U.S.C. § 548(a)(1)(B) or O.C.G.A. § 18-2-75(a) because Donnan received reasonably equivalent value in exchange for his payments to Defendants.[21] Accordingly, Defendants' joint motion for summary judgment on Counts I and II should be granted and Plaintiff's motion should be denied.[22]

Counts III and IV.

Defendants also move for summary judgment on Count III and its state law companion in Count IV. In Count III, Plaintiff seeks to avoid the payments under 11 U.S.C. §§ 548(a)(1)(A). That Code provision provides:

> The trustee may avoid any transfer...of an interest of the debtor in property...if the debtor voluntarily or involuntarily-
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted...

As previously stated, in the Fennell case this Court found that Donnan had no prior knowledge of the GLC Ponzi scheme. In addition, Donnan was found not guilty on all

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[21] To the extent Plaintiff contends that the extra $25,000 which Donnan paid to HMF did not satisfy an antecedent debt, the facts established to the contrary. Miller testified that this was the amount he calculated as being due for interest, attorney's fees and other costs which HMF had incurred. These fees and costs were recoverable under paragraph 7 of each of the guaranty agreements.

[22] Having found that satisfaction of his guaranty debt provided Donnan with reasonably equivalent value, it is unnecessary to address Plaintiff's argument that the notes which Donnan purchased had no value. Further, since Plaintiff cannot establish a prima facie case, it is unnecessary for this Court to address the parties' arguments relating to defenses under 11 U.S.C. § 548(c).

criminal charges arising out of his connection with GLC.[23] Plaintiff has introduced no direct evidence to challenge these decisions.[24] Nor has Plaintiff introduced any direct evidence to show that Donnan made the subject payments with actual intent to defraud. Nevertheless, fraudulent intent may be inferred "from the circumstantial evidence and the surrounding circumstances of the transaction." Dionne v. Keating (In re XYZ Options, Inc.), 154 F.3d 1262, 1271 (11th Cir. 1998). In Dionne, the court listed certain "badges of fraud" that could provide circumstantial evidence of fraudulent intent, including:

> (1) The transfer was to an insider;
> (2) The debtor retained possession or control of the property transferred after the transfer;
> (3) The transfer was disclosed or concealed;
> (4) Before the transfer was made 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;
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the assets transferred;
> (9) Debtor was insolvent or became insolvent shortly after the transfer was made;
> (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.

Id. at 1271-72. The court further noted that:

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[23] As with the Joint Stipulation, these decisions are not binding on Plaintiff under the doctrines of collateral estoppel and issue preclusion. However, they do constitute evidence.

[24] In addition, in the "JOINT STIPULATION OF DISMISSAL WITH PREJUDICE" in GLC's fraudulent conveyance action against these same Defendants, GLC stipulated that these Defendants had no prior knowledge of the GLC Ponzi scheme when the notes, guaranties and profit sharing agreements were executed or when GLC made payments to these Defendants.

> Although the presence of one specific "badge" will not be sufficient to establish fraudulent intent, the "confluence of several can constitute conclusive evidence of an actual intent to defraud."

Id. at 1271, n.17, quoting Brown v. Third Nat'l Bank (In re Sherman), 67 F.3d 1348, 1354 (8th Cir. 1995).

Plaintiff has made no argument that Miller or HMF are insiders (item 1). As will be explained below in the discussion of the section 547 claim (Count V), neither Switzer nor BSF is an insider. There is no evidence to support the badges of fraud in items 2, 3, 4, 5, 6, 7, 10 or 11. The Court has held in the discussion on Count I above that Donnan received reasonably equivalent value by satisfaction of an antecedent debt in exchange for the payments (item 8). However, this weighs against an inference of fraud.

Plaintiff has introduced the affidavit of a CPA to show that Donnan was insolvent at the time of the payments (item 9). Donnan testified to the contrary. Defendants object to the Court considering the CPA's affidavit, contending that Plaintiff improperly failed to disclose the expert to them in discovery. The Court need not resolve this dispute because, even accepting the affidavit to establish insolvency, this one factor, standing alone, is insufficient to establish fraud, especially in light of the prior finding that Donnan paid a legitimate debt.

In summary, Plaintiff has failed to introduce any evidence to establish actual intent to defraud. Rather, the evidence establishes that when asked by Switzer and Miller to honor his legally enforceable guaranty, Donnan did so by paying to BSF and HMF the balance due on the notes. Accordingly, Defendants' motion for summary judgment on Counts III and IV should be granted.

Counts V and VI.

Counts V and VI are asserted against Switzer and BSF only. Count V asserts a preference claim under 11 U.S.C. § 547. Under section 547, the trustee may avoid a payment on an antecedent debt, made while the debtor is insolvent, that allows the creditor to receive more than the creditor would have received if the debtor had not made the payment and the creditor had received a distribution from the trustee after the debtor filed Chapter 7 bankruptcy. 11 U.S.C. § 547(b).[25] However, a trustee may not attack a transfer made more than 90 days before the debtor filed bankruptcy unless the creditor is an insider. If the creditor is an insider, the trustee can attack payments occurring up to one year before the filing of the bankruptcy. 11 U.S.C. § 547(b)(4)(B). Donnan's payment to BSF occurred approximately five and one half months before Donnan filed his bankruptcy case. Therefore, regardless of whether Donnan's payment meets the other elements of a preference, Plaintiff must establish that BSF and Switzer were insiders in order to sustain his claim.

In Count VI, Plaintiff seeks to recover under O.C.G.A. § 18-2-75(b), which provided at the relevant time:

> 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.

(Emphasis supplied). Therefore, regardless of his ability to establish any of the other elements of a claim under section 18-2-75(b), Plaintiff must establish that BSF and Switzer

[25] Plaintiff alleges that BSF (and subsequently Switzer) received 100% repayment of its debt while creditors in a Chapter 7 case by Donnan would have received much less.

were insiders in order to prevail.

11 U.S.C. § 101(31) provides, in part:

> The term "insider" includes-
>
> (A) if the debtor is an individual–
> (i) relative of the debtor or of a general partner of the debtor;
> (ii) partnership in which the debtor is a general partner;
> (iii) general partner of the debtor; or
> (iv) corporation of which the debtor is a director, officer, or person in control;

The definition of the term "insider" as used in O.C.G.A. § 18-2-75(b) is essentially identical. O.C.G.A. § 18-2-71(7). Under these definitions, neither Switzer nor BSF is an insider.

Relying on the case of Miami Police Relief & Pension Fund v. Tabas (In re Florida Fund of Coral Gables, Ltd.),[26] Plaintiff contends that there is a question of fact as to whether Switzer (and therefore BSF) is a non-statutory insider of Donnan. In Miami Police, the Eleventh Circuit held:

> As the Fifth Circuit concluded, 'The cases which have considered whether insider status exists generally have focused on two factors in making that determination: (1) the closeness of the relationship between the transferee and the debtor; and (2) whether the transactions between the transferee and the debtor were conducted at arm's length.'

Id. at 75, quoting Browning Interests v. Allison (In re Holloway), 955 F.2d 1008, 1011 (5th Cir. 1992). As the court held in Moskowitz v. N. Abuhab Participacoes S.A. (In re Moskowitz),[27] both of these factors are required. Id. at *4. In considering the closeness of

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[26] 144 F.App'x 72 (11th Cir. 2005) (unpublished).

[27] 2011 WL 6176210 (Bankr. N.D. Ga. Nov. 29, 2011).

the relationship, the court should consider:

> Whether the parties maintain "frequent" contact; testimony that demonstrated a close relationship; whether the parties had a personal friendship; whether the creditor had the ability to coerce the debtor to enter into transactions not in the debtor's interest; whether the parties shared the same office space; whether the creditor had actual control over the debtor; whether the parties were involved in a joint venture to share profits.

Id. at *5.

In this case, had these transactions occurred during the time when Donnan served as Switzer's offensive coordinator at the University of Oklahoma, Plaintiff would have a strong argument that Switzer was an insider of Donnan. However, that was over 26 years ago. Since that time, the evidence establishes that Donnan and Switzer have had nothing more than a casual and infrequent relationship. They reside in different states and do not share the same office space.[28] They have not regularly done business together, nor have they regularly seen each other, played golf together or engaged in other social activities. Rather, they have occasionally seen each other at football and other sporting events and occasionally talked on the phone in connection with Donnan's role as an ESPN commentator.

Further, there is no evidence to suggest that the transactions in question were other than at arm's length. Donnan did not coerce Switzer to enter into the original loan transaction with GLC, nor did Switzer coerce Donnan to allow his participation. Nor did Switzer coerce Donnan to make the payments to BSF. Donnan testified that Switzer put no pressure whatsoever on him.[29] Rather, Switzer simply requested that Donnan honor his

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[28] Donnan resides in Georgia and Switzer resides in Oklahoma.

[29] Donnan Deposition, Docket No. 36, Exhibit C, p. 109.

legally enforceable guaranty and Donnan did so. The payment transaction was structured, on the advice of Donnan's counsel, pursuant to the Note Sale and Assignment Agreement, in the hope that Donnan might subsequently recover some of his money if the GLC restructure was successful. Donnan paid no more than was owed on his guaranty.

This Court finds that there is no genuine issue of material fact as to whether Switzer and BSF were insiders of Donnan. Since Plaintiff cannot establish the insider relationship, Plaintiff cannot make a prima facie case under section 547(b)(4)(B) or O.C.G.A. § 18-2-75(b). Accordingly, Defendants' motion for summary judgment on Counts V and VI should be granted.

CONCLUSION

For the reasons stated above, Plaintiff's motion for summary judgment should be denied and Defendants' motion for summary judgment should be granted.

The Clerk of Court shall serve these proposed findings of fact and conclusions of law on all parties and make notation on the docket with respect thereto pursuant to Bankruptcy Rule 9033(a). The parties may make objections pursuant to Rule 9033(b).

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