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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION



Doc#: 0828818002 Fee: \$50.00
Eugene "Gene" Moore
Cook County Recorder of Deeds
Date: 10/14/2008 09:41 AM Pg: 1 of 8

Lester Munson and Judith Munson,

Plaintiffs,

v.

James P. Whitmer and Susan Rinke,

Defendants.

No. 94 CH 03838

MEMORANDUM IN FURTHER SUPPORT OF JUDGMENT

Plaintiffs Lester Munson and Judith Munson filed this suit to challenge a transfer of automobiles made by Defendant James Whitmer to Defendant Susan Rinke. The action was brought pursuant to the Uniform Fraudulent Transfer Act. Count I claims a violation of Section 5(a)(1) (Actual Fraud) and Count II claims a violation of Section 5(a)(2) (Constructive Fraud). A bench trial was held on the claims. On October 1, 2008, this court entered judgment for Plaintiffs on Count II of the Complaint. The reasons for that judgment were made orally at that time. At the request of Defendants, this Memorandum is entered in further support of the October 1, 2008 judgment.

FACTUAL BACKGROUND

On June 21, 1994, in *Whitmer v. Munson and Munson*, No. 94 CH 3766 (Whitmer Case”), Plaintiffs moved, pursuant to Illinois Supreme Court Rule 137, for sanctions against Whitmer seeking their fees and costs expended defending against his lawsuit. This motion was

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denied. On November 27, 2002, the Illinois Appellate Court, reversed the denial of the Munsons' Motion for Rule 137 Sanctions and ordered the trial court to impose sanctions against Whitmer.

On February 19, 2003, Whitmer transferred the titles of his Ford and Lincoln automobiles to Rinke. On February 19, 2003, Rinke wrote Whitmer checks, one for \$29,000.00 for the Lincoln and one for \$9,000 for the Ford. Whitmer and Rinke gave the autos their blue book values. On February 24, 2003, Rinke deposited a check in the amount of \$36,550.37 from her IRA account into her bank account at Fifth Third Bank to cover the two checks to Whitmer for the transfers of the Ford and the Lincoln.

Rinke testified that she later learned from the accountant that the withdrawal from her IRA might cause tax or penalty consequences. Whitmer then borrowed money from his home equity line at Northern Trust Bank so that Rinke could refund the IRA. On April 23, 2003, Rinke deposited a check in the amount of \$36,551.00 into her bank account at Fifth Third Bank. On April 28, 2003, Rinke purchased an annuity for \$36,550.37 to replace the IRA.

On October 14, 2003, Whitmer filed for relief under the U.S. Bankruptcy Code in a case entitled *In re James P. Whitmer*, 03 B 42061. The Defendants stipulated that at the time Whitmer filed his bankruptcy petition, Whitmer believed he would incur debts beyond his ability to pay them as the debts came due. On August 14, 2004, Judge Deborah Dooling entered judgment in favor of the Munsons' and against Whitmer in the amount of \$173,253.14 pursuant to the appellate court's order in the Whitmer case. Whitmer has not fully satisfied Plaintiffs' judgment. On April 28, 2005, in a case entitled *Munson and Munson v. Whitmer*, 03 A 04790, Judge Pamela Hollis of the U.S. Bankruptcy Court, granted the Munson judgment on their complaint for a declaration of nondischargeability of Whitmer's judgment debt on the Rule 137 sanctions.

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Whitmer and Rinke have been married for over ten years and have resided together at the same address since 1991. Whitmer purchased the Ford in 1994 and was the sole owner of the Ford from 1994 to February 19, 2003. Whitmer was the sole owner of the Lincoln from 1999 to February 19, 2003. After the transfers of titles on February 19, 2003, the Ford and the Lincoln remained in the carport at Defendants' home. Whitmer continued to have access to the automobiles.

Defendants claim that the \$36,551.00 check from Whitmer to Rinke was a "loan" from Whitmer to Rinke that was to be repaid by Rinke. Defendants executed a document entitled "Promissory Note", whereby Rinke promised to pay "incoming bills due to James Whitmer/Chicago Agency until the debt [of \$36,551.00] is paid in full during years 2003-2004." The "Promissory Note" was prepared and signed at the Defendants' residence with only Defendants present.

Reasons For Entry of Judgment on Count II- Constructive Fraud

To establish constructive fraud, a Plaintiff must show that the debtor transferred property for less than a reasonably equivalent value and thus is unable to meet his obligations at the time when a claim was pending. *In re Zeigler*, 320 B.R. 362, 374 (N.D. Ill. 362). In determining reasonable equivalent value, a court will consider all of the facts and circumstances surrounding the transfer, whether the transaction was done at arm's length, and the good faith of the transferee. *Id* at 375. In reviewing the evidence, the focus is on the overall effect of the transfer at issue on creditors. *Nostalgia Network v. Lockwood*, 315 F.3d 717, 719 (7th Cir. 2002). "Actual insolvency is not required, the test is whether the conveyance directly tended to or did impair the rights of creditors." *Falcon v. Thomas*, 258 Ill. App. 3d 900, 911 (4th Dist. 1994). The transfer is voidable even where there is no intent to hinder creditors. *Nostalgia Network*, 315 F 3d at 719.

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In assessing whether a transfer is fraudulent in law, "the law establishes certain presumptions. Where a husband makes a voluntary conveyance to his wife and afterward becomes insolvent, fraud is presumed and the burden of proof is on him to disprove the implication of fraud as to creditors at the time of making the conveyance." *People ex rel Hartigan v. Anderson*, 232 Ill. App. 3d 273, 276 (3rd Dist. 1992), citing *Robertson v. Robertson*, 123 Ill. App. 3d 323 (5th Dist. 1984).

The transfer of the automobiles was made shortly after the appellate court ruled that sanctions should be entered against Whitmer. On August 14, 2003, judgment on the motion for sanction was entered against Whitmer. Two months later, Whitmer filed bankruptcy. Thus, the transfers of the automobiles were made at a time when the Plaintiffs' claim was pending against Whitmer and at a time when Whitmer's bankruptcy was imminent.

In this case, Whitmer and Rinke are married and live together. Whitmer testified that he transferred the automobiles to Rinke because he wanted to stop driving due to health reasons and because Rinke needed the cars for her work. After the transfers, the autos were still accessible to Whitmer. There was no testimony as to the nature, extent, or frequency of Rinke's use of the automobiles or whether her use of the automobiles changed after the transfers. There was no testimony that Rinke's use of the automobiles was limited before the transfer. There was little specific evidence as to why Rinke needed the autos and no evidence why or if she needed both automobiles. Although Defendants offered reasons for the transfers other than to hinder Whitmer's creditors, these reasons were not well established and highly questionable based on all the evidence, including the relationship of the parties. Defendants have not overcome the presumption of fraud set forth in *Anderson*.

The Defendants' transaction did not simply end with the transfer of the autos. Rinke paid

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for the autos with money from her IRA. In an attempt to allegedly allow Rinke to keep the autos but not face any tax penalties for removing the money from her IRA, Whitmer increased his debts by borrowing money from his equity line of credit at Northern Trust Bank. Whitmer testified at trial that the money Rinke gave him was no longer available because he had used it to pay bills. Whitmer testified that he loaned the money from the equity credit line to Rinke so that she could refund her IRA. The Defendants did enter into a promissory note as to this loan. However, the record greatly diminishes the weight to be given the note in determining the good faith and arm's length nature of the transaction.

There were no witnesses to this note. Additionally, the note stated that the loan would be repaid by Rinke paying future bills of Whitmer or Chicago Agency, Whitmer's business. However, at trial, the evidence showed that what Rinke did was make payments to Northern Trust Bank to pay down the equity line. It was actually Whitmer, with Rinke's permission, who wrote the checks from Rinke's account to Northern Trust and with her permission, signed Rinke's name. The Defendants contend Rinke repaid the loan to Whitmer in this way. The overall affect of the transfer of the autos was that Whitmer spent the money Rinke gave him, then increased his debts by returning the same amount given by Rinke for the autos and made the autos unavailable to any creditors. Rinke's alleged repayment of the loan was made through Rinke's account, which Whitmer had permission to control. Rinke paid down the home equity loan and thus Whitmer did not receive any real value from Rinke's repayment of the loan. The evidence when viewed as a whole showed a lack of good faith in transferring the autos and establishes transactions which were not done at arm's length. The record shows that the transfers of the autos were not *bona fide* and in fact reduced assets available to Whitmer's creditors.

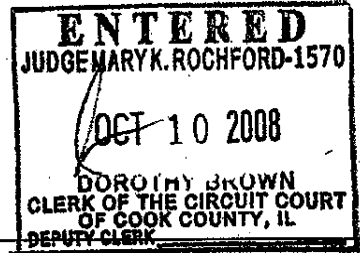
no consideration

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CONCLUSION

For these reasons and for the reasons stated in open court, Judgment was entered in favor of Plaintiffs on Count II as set forth in the order of October 1, 2008.

ENTER:



Judge Mary K. Rochford

DATED: _____

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Order

(2/24/05) CCG N002

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

MUNSON and MUNSON

v.

Whitmer and Rinke

No. 06 CH 03838

ORDER

This cause coming to be heard on Trial, the Court having considered all of the evidence, it is hereby ordered that judgment is entered in favor of plaintiffs Lester Munson and Judith Munson and against defendant Susan Rinke, in the amount of \$38,000.00, on Count II of the Complaint. There is no just reason to delay enforcement of this judgment. Overobjection of plaintiffs, enforcement of the judgment will be stayed for ten days.

Atty. No.: 91088

Name: B. AXEL / Totten, Slobin, Genden, Dragutinovich & Axel ENTERED:

Atty. for: Plaintiffs

Address: 105 W. Adams St 7th Fl

City/State/Zip: Chicago IL 60603

Telephone: 312-372-9282

Dated: [Stamp: ENTERED JUDGE MARY K. ROCHFORD 1570 OCT -1 2008 DOROTHY BROWN CLERK OF THE CIRCUIT COURT OF COOK COUNTY, IL DEPUTY CLERK] Judge's No.

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RP

"A."

PIN: 17-09-306-022-0000

part of the land, property and space of the parcel of land hereafter described, referred to as "The Tract", which lies:

(i) North of the vertical projection of a line which is perpendicular to said West line of Wharfing Lot 1 at a point 85.74 feet South of the Northwest corner thereof and South of the vertical projection of a line which is perpendicular to said West line of Wharfing Lot 1 at a point 37.10 feet South of the Northwest corner thereof, which part lies below a horizontal plane having an elevation of 12.89 feet above Chicago City Datum (and being the upper surface of the floor at the ground level of the existing (as of August 29, 1988) townhouse).

(ii) Above a horizontal plane having an elevation of 12.89 feet above Chicago City Datum (and being the upper surface of the floor at said ground level) and lying below a horizontal plane having an elevation of 21.3 feet above Chicago City Datum (and being the upper surface of the floor at the first floor level of said townhouse), said part lying North of the vertical projection of a line which is perpendicular to said West line of Wharfing Lot 1 at a point 85.74 feet South of the Northwest corner thereof and South of the vertical projection of the lines described as follows: Beginning on the West line of said Wharfing Lot 1, at said point 37.10 feet South of the Northwest corner thereof, and running thence along lines which are perpendicular to or parallel with said West line of Wharfing Lot 1, respectively, the following courses and distances: East 11.05 feet; South 1.87 feet; East 5.83 feet; North 3.72 feet; East 9.82 feet; South 1.85 feet; and East 8.93 feet to the Easterly line of The Tract.

(iii) North of the vertical projection of a line which is perpendicular to said West line of Wharfing Lot 1 at a point 86.25 feet South of the Northwest corner thereof and South of the vertical projection of a line which is perpendicular to said West line of Wharfing Lot 1 at a point 37.10 feet South of the Northwest corner thereof, which part lies above a horizontal plane having an elevation of 21.30 feet above Chicago City Datum (and being the upper surface of the floor at the first floor level of said townhouse).

THE TRACT

A parcel of land comprised of those parts of Wharfing Lots 1 and 2 in Block J in Original Town of Chicago, a Subdivision in Section 9, Township 39 North, Range 14 East of the Third Principal Meridian, in Cook County, Illinois, and of those parts of the lands East of and adjoining said Lots lying West of the North Branch of the Chicago River, which parcel of land is bounded and described as follows:

Beginning at the Northwest corner of said Wharfing Lot 1, and running thence East along the North line of said Wharfing Lot 1, and along an Eastward extension of said North line, a distance of 24.25 feet to an intersection with a Northward extension of the Easterly face of the wooden dock, as constructed as of August 7, 1979 (being the date of the deed from American National Bank and Trust Company of Chicago Trust No. 45799 to Frances Meehan recorded October 18, 1979 as Document No. 25,198,718) on the Westerly side of the North Branch of the Chicago River; thence Southwardly along said extended line, and along said Easterly face of said wooden dock, a distance of 85.66 feet to a point 49.47 feet, measured at right angles, East from the West line of said Wharfing Lot 1; thence Southwardly along the Easterly face of said wooden dock, a distance of 36.89 feet to a point 55.71 feet, measured at right angles, East from said West line of Wharfing Lot 1; thence Southwardly along the Easterly face of said wooden dock, a distance of 17.54 feet to an intersection with a line 25.00 feet, measured at right angles, Northerly from and parallel with the centerline of Chicago and North Western Railway Company spur track known as ICC Track No. 100 as said track was located as of April 7, 1971 (being the date of the deed from Chicago and Northwestern Railway Company to Harry Weese recorded July 15, 1971 as Document No. 21,546,968); thence Westwardly along said parallel line a distance of 54.82 feet to an intersection with the West line of said Wharfing Lot 2; and thence North along the West line of said Wharfing Lots 2 and 1 a distance of 133.15 feet to the point of beginning.