

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
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LEO TOBIN FARMS, INC., ) CASE NO. BK85-2806  
 )  
DEBTOR ) A85-353  
 )  
LEO TOBIN FARMS, INC., )  
 )  
Plaintiff )  
 )  
vs. )  
 )  
FIRST NATIONAL BANK OF TEKAMAH, )  
 )  
Defendant )

MEMORANDUM OPINION

An evidentiary hearing was held in Omaha, Nebraska, on November 13, 1987. Appearing on behalf of the plaintiff, Leo Tobin Farms, Inc., was Michael Helms of Omaha, Nebraska. Appearing on behalf of defendant, the Federal Deposit Insurance Corporation ("FDIC"), successor in interest to the First National Bank of Tekamah ("Bank"), was Gerald D. Buechler, Jr., of Omaha, Nebraska.

Findings of Fact and Conclusions of Law

Background

Leo Tobin Farms, Inc., ("Farms") is owned and controlled by Paul Tobin and his three sisters. Farms owns fifty percent of the stock of Tobin Ranch, and Tobin Ranch owns fifty percent of the stock of T & W Farms. Each entity owns separate parcels of land.

Bank and its successor in interest, the FDIC, have been and are creditors of both Farms and Tobin Ranch. In 1984, Tobin Ranch became delinquent in its \$316,500<sup>1</sup> loan from Bank. To pay this loan, Tobin Ranch commenced liquidation of its assets but could not find a buyer. Bank agreed to extend Tobin Ranch's loan for 4 1/2 months if Farms would mortgage its property as additional

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<sup>1</sup>With accruing unpaid interest, the total sum is approximately \$359,000. Farms' Trial Brief at 2.

security for the Tobin Ranch loan. Farms agreed, and on August 29, 1984, this transaction took place. On December 3, 1985, Farms filed for Chapter 11 relief.

Farms brings this action requesting the Court to avoid the promissory note and the mortgage on Farms' land now held by the FDIC. The mortgage was executed more than one year before Farms filed for Chapter 11 relief. However, Farms claims that the mortgage and the underlying obligation violated the Nebraska Fraudulent Conveyance Act Sections 36-601, et seq. (Reissue 1984), and thus can be avoided under 11 U.S.C. Section 544 (1987). Farms asserts that the transaction rendered it insolvent and that the obligation was incurred without fair consideration. Alternately, Farms argues that the inadequacy of consideration was so great that the mortgage can be held invalid for that reason alone.

The FDIC contends that Farms was not rendered insolvent following the transaction and that Bank's forbearance from foreclosure on the Tobin Ranch mortgage until January 15, 1985, was fair consideration. Both Farms and the FDIC agree this Court may enter final judgment pursuant to 28 U.S.C. Section 157(b) (1987).

#### Analysis

I. Neb. Rev. Stat. Section 36-604 (Reissue 1984) provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his or her actual intent if their conveyance is made or the obligation is incurred without a fair consideration." Thus, the instant transaction will be fraudulent if the Court finds from the evidence that (1) Farms became insolvent as a result of the transaction; (2) no fair consideration was given by Bank to Farms in exchange for Farms' note and mortgage; and (3) one or more unsecured creditors of Farms existed at the time of the transaction.

If the evidence satisfies these three elements required under Section 36-604, the Court need not address whether the transaction was fraudulent under Section 36-605 (property remaining following the transaction must be an unreasonably small capital); Section 36-606 (obligor believes or intends that he or she will incur debts beyond his or her ability to pay as they mature); or 36-607 (actual intent to defraud).

Insolvency is defined in Neb. Rev. Stat. Section 36-602 (Reissue 1984) as occurring when "the present fair saleable value of his or her assets is less than the amount that will be required to pay his or her probable liability on his or her existing debts as they become absolute and matured." In other words, if Farms' total liabilities were greater than its total assets at the time

of or following the transaction, Farms was insolvent. In re Polle, 15 Bankr. 422 (Bankr. N.D. Ohio 1981) (interpreting an Ohio fraudulent statute very similar to Nebraska's). Id. at 429.

In determining whether Farms was insolvent immediately before or after the August 29, 1984, transaction, the Court finds as follows:

1. The land value of Farms on August 29, 1984, was \$592,000, which is the market value total proposed in Farms' appraisal, Farm Exhibit No. 11. The Court finds that the appraisal prepared and submitted by Farms the more credible and accurate. For example, the FDIC appraisal, FDIC Exhibit No. 16, inaccurately calculates the 1984 value of Parcel No. 3 owned by Farms. Parcel No. 3 was sold in February, 1985, for \$232,000, yet the FDIC appraisal assigns a value of \$326,400 on August 29, 1984. The Court does not believe that a decline of \$94,400 in five months is reasonable. The FDIC appraisal utilizes five comparable sales over the period May 1982 to August 1984. Farms' appraisal utilizes thirteen comparable sales between the period January 1984 to June 1985.<sup>2</sup>

2. The value of Farms' assets, not including land value, as of August 29, 1984, was \$83,054. This figure was reached in the following manner: The reconstructed balance sheet as of August 29, 1984, of Farms, prepared by Farms, Farms Exhibit No. 16, shows Farms' assets, not including land, of \$40,159. The reconstructed balance sheet of Farms on that same date, prepared by FDIC, FDIC Exhibit No. 10, shows Farms' assets, not including land, of \$196,778. The major difference between the balance sheets of the Farms and FDIC Exhibits is whether the Tobin Ranch stock has any value. Farms Exhibit No. 16 shows no value; FDIC Exhibit No. 10 shows a value of \$147,219.

The Tobin Ranch Financial Statement, FDIC Exhibit No. 6, indicates that the net worth of Tobin Ranch on August 1, 1984, was \$12,865 which amount does not include the value of Tobin Ranch's fifty percent ownership interest in T & W Farms. The statement does include the principal and interest owed to Bank by Tobin Ranch. Because Tobin Ranch's fifty percent interest in T & W Farms is included in Tobin Ranch's financial statement dated February 2, 1984, FDIC Exhibit No. 5, and in Tobin Ranch's financial statement dated January 24, 1985, FDIC Exhibit No. 9, the Court finds this fifty percent interest should be included in Tobin Ranch's August 1, 1984, financial statement. Therefore, fifty percent of the net worth of T & W Farms from its financial statement dated January 24, 1985, FDIC Exhibit No. 9, is \$72,924.

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<sup>2</sup>Farms' comparables include Parcel No. 3 sold in February 1985.

To reconstruct Tobin Ranch's net worth at the time of the challenged transaction, this \$72,924 is added to Tobin Ranch's net worth of \$12,865 on August 1, 1984, FDIC Exhibit No. 6, to create a net worth of Tobin Ranch of \$85,789 on August 1, 1984. Because fifty percent of Tobin Ranch is owned by Farms, fifty percent of Tobin Ranch's net worth of \$85,789 should be added to the assets of Farms. Adding this fifty percent net worth of Tobin Ranch, which is \$42,895, to the assets of Farms shown on Farms' balance sheet as of August 29, 1984, Farms Exhibit No. 16, of \$40,159 totals \$83,054, not including land.

3. By adding the land value of \$592,000, supra paragraph 1, to the other assets value of \$83,054, supra paragraph 2, the total value of Farms' assets in August 1984 was \$675,054.

4. The total amount of Farms' liabilities on August 29, 1984, was approximately \$765,000. This amount includes Bank's loan.<sup>3</sup> Farms' and FDIC's exhibits do not vary substantially. See Farms Exhibit No. 16 showing total liabilities of \$765,360.86 and FDIC Exhibit No. 10 showing total liabilities of \$767,360.54.

5. Farms' total assets of \$675,047, supra paragraph 3, less its total liabilities of \$765,000, supra paragraph 4, produce a net worth on August 29, 1984, of (\$89,946). Prior to the contested transaction, Farms' total liabilities would have been approximately \$406,000, placing Farms in a solvent position with a net worth of approximately \$269,047.

Therefore, the additional debt incurred by Farms when it mortgaged its land to Bank, which debt is included in the above net worth calculation, rendered Farms insolvent.

II. Turning to the question of fair consideration, Neb. Rev. Stat. Section 36-603 (Reissue 1984) reads:

Fair consideration is given for property,  
or obligation,

(a) When in exchange for such property,  
or obligation, as a fair equivalent therefor,  
and in good faith, property is conveyed or an  
antecedent debt is satisfied, or

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<sup>3</sup>The Court recognizes that FDIC Exhibit No. 11 reconstructs Farms' balance sheet as of August 29, 1984, without including the Bank debt. However Tobin Ranch, as well as Farms, were both totally liable for the entire debt, and the FDIC may look to each of the entities for repayment. No arguments claiming a piercing of the corporation were presented at the hearing.

(b) When such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

Thus, subsection (a) speaks to the need for the consideration to be "a fair equivalent," and subsection (b) requires consideration to be an "amount not disproportionately small as compared with the value of the property." The only potential consideration in evidence was Bank's forbearance in foreclosing Tobin Ranch's mortgage from the transaction date of August 29, 1984, to January 15, 1985. No evidence was presented quantifying this 4 1/2 month delay. Nor did the evidence show a benefit accruing to Farms from the 4 1/2 month delay. Moreover, the Court finds the FDIC's position contradictory in that it argues the value of Bank's forbearance yet Bank took no action on the acknowledged default until it initiated foreclosure on July 15, 1985. Further, the 1984 value of Farms' lands, \$592,000, greatly exceeded the \$359,000 debt owed to Bank. Consequently, the Court finds that no fair consideration was given. In addition, if the forbearance were accepted as consideration, it was disproportionately small compared to the value of Farms' property.

III. The Court is satisfied from the evidence and the testimony of Paul Tobin that at least one unsecured and unmatured creditor existed prior to the August 29, 1984, transaction. Several years prior to this action, Marjorie Gramke, a relative of Paul Tobin, sold her interest in Tobin Farms back to Farms on an installment basis. Until the Chapter petition, Farms was paying this debt. This debt appeared on Farms' financial statements, see FDIC Exhibit No. 3, so the FDIC and its predecessor Bank had knowledge of this debt's existence. Additionally, both Farms' and FDIC's reconstructed balance sheets of Farms, Farms Exhibit No. 16 and FDIC Exhibit No. 10, include among Farms' liabilities an unsecured debt of \$10,048 as well as Marjorie Gramke's debt.

Because the Court finds that Farms was insolvent immediately after the August 29, 1984, transaction, that fair consideration was not given and that an unsecured creditor of Farms was present prior to the transaction date, the transaction was fraudulent. Neb. Uniform Fraudulent Conveyance Act, § 36-604 (Reissue 1984).

IV. The avoidance power of Section 544(b) of Title 11 provides that "[t]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title ... ." In clarifying the trustee's powers under this section, Colliers explains:

Like Prometheus bound, the trustee is chained to the rights of creditors in the case under title 11. If there are not creditors within the terms of section 544(b) against whom the transfer is voidable under the applicable law, the trustee is powerless to act so far as section 544(b) is concerned. It is not necessary however, that there be more than one such creditor. Nor is it requisite that the creditor whose rights the trustee seeks to assert has reduced its claim against the debtor to a judgment, or has issued execution and had it returned unsatisfied.

....

... [T]he entire transfer is avoided to the extent necessary to benefit the estate. Since the recovery is for the benefit of the estate, all creditors holding unsecured claims share in the recovery, not merely those creditors whose rights are asserted.

....

... Voidability, therefore, is not automatic but must be asserted, and is to be determined wholly by the applicable law, federal or state. ... The transfer is voidable in its entirety to the extent necessary to benefit the estate and the recovery is for the benefit of all creditors holding unsecured claims.

4 Collier on Bankruptcy, ¶ 544.03 (15th Ed. 1987) (footnotes omitted) (emphasis added).

Consequently, because an unsecured creditor did exist at the time of the challenged transaction, the trustee has the power under Section 544(b) to avoid a transaction that would be voidable under applicable state law notwithstanding the bankruptcy petition.

#### Summary

Based on the evidence, the Court finds as follows:

- 1) Farms was insolvent following the contested transaction;

- 2) Fair consideration was not given;
- 3) The consideration was disproportionately small compared to the value of Farms' property;
- 4) An unsecured creditor with an unmatured claim existed at the time of the transaction;
- 5) The transaction was fraudulent under the Nebraska Uniform Fraudulent Conveyance Act;
- 6) Section 544 of the Bankruptcy Code permits the invocation by the trustee of the Act.

Section 36-610 of the Uniform Fraudulent Conveyance Act permits the Court to:

- (a) Restrain the defendant from disposing of his or her property,
- (b) Appoint a receiver to take charge of the property,
- (c) Set aside the conveyance or annul the obligation, or
- (d) Make any order which the circumstances of the case may require.

Neb. Rev. Stat. § 36-610 (Reissue 1984).

The remedy requested by Farms is to annul the entire transaction. However, FDIC suggests such remedy is not appropriate. The Court needs more legal analysis from the parties regarding the remedies permitted under Section 36-610 of the Uniform Fraudulent Conveyance Act. Farms to brief the issue within thirty days. FDIC to respond in thirty days and Farms reply, if any, within fifteen days.

DATED: January 8, 1988.

BY THE COURT:

  
U.S. Bankruptcy Judge

THE NEXT PAGE IS 88:15