

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	CASE NO. BK02-40210
	)	
STATE TITLE SERVICES, INC.,	)	A03-4107
	)	
Debtor(s).	)	CH. 7
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THOMAS D. STALNAKER, as Trustee of the Bankruptcy Estate of State Title Services, Inc.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
JULIUS MISLE and MIRIAM MISLE,	)	
	)	
Defendants.	)	
	)	
HJA, INC.,	)	
	)	
Intervenor-Defendant.	)	

ORDER

Trial was held in Lincoln, Nebraska, on October 6, 2005, on Filing No. 1, Complaint, filed by Thomas D. Stalnaker as Trustee of the Bankruptcy Estate of State Title Services, Inc. Ann M. Grottveit appeared for Thomas D. Stalnaker, James B. Cavanagh appeared for Julius and Miriam Misle, and Robert B. Creager appeared for HJA, Inc.

This is an action brought by the Chapter 7 Trustee to avoid an allegedly preferential transfer from the debtor to Julius and Miriam Misle just two days prior to filing of the bankruptcy case.

A. DECISION

The transfer of \$501,802.88 from the debtor to Misles is preferential and shall be avoided pursuant to 11 U.S.C. § 547. Interest at the federal judgment rate shall accrue from the date of this opinion.

B. JUDGMENT

1. This order is not a final appealable judgment.

2. HJA, Inc., intervenor-defendant, has entered into an agreement to indemnify Misles for any damages caused to Misles related to the transfer, including court costs and attorney fees. Those amounts have not been determined by this opinion.

3. By March 1, 2006, the parties are requested to file a status report with regard to the indemnification agreement. If the parties can agree on the amount due Misles pursuant to the indemnification agreement, that amount shall be included in the status report. If the parties cannot agree, a preliminary pretrial statement shall be filed in lieu of a status report. That statement should include all of the issues concerning the indemnification process, including any claim by the Trustee that the estate has a right to judgment against not only Misles, but HJA, Inc., on whatever theory, including third-party beneficiary.

### C. FINDINGS OF FACT

Julius and Miriam Misle ("Misles") and other members of the Misle extended family have been engaged in the sale and service of automobiles in Lincoln, Nebraska, since the 1950s, operating through a number of entities, including HJA, Inc. ("HJA"). HJA, through subsidiaries, acquired a number of new car franchises and substantial real estate located in the 48<sup>th</sup> Street and O Street area of Lincoln.

HJA was the primary corporation of the Misle family. After Henry Misle sold his interest to the shareholders of HJA, Julius and his brother Abram remained as the sole shareholders of HJA. In 1991, Julius sold his interest in HJA, consisting of ten thousand shares of stock of HJA, for approximately \$2,000,000, payable in monthly installments over ten years. The shares of stock were deposited in escrow with State Title Services, Inc. ("State Title") in 1991. To secure payments due to Julius under the Stock Redemption Agreement, mortgages on the real estate were executed.

Under the Redemption Agreement, Julius was to be paid in monthly installments and provided with other benefits. Subsequent to the death of Abram in May 1994, HJA ceased making the installment payments due to Julius.

In November 1997, Julius filed the initial lawsuit against HJA based on the Stock Redemption Agreement for the unpaid installments due at that time. Julius elected not to accelerate the balance due under the Redemption Agreement, but rather sued to recover the unpaid installment payments. While the initial lawsuit by Julius was pending, HJA filed a separate action in 1999 seeking a declaratory judgment. Other suits were filed between the family members. Collectively these are referred to as the "Misle Litigation." On November 8, 2000, the Lancaster County District Court entered an Order on the primary lawsuit (Filing #120). In part, the Court ordered that a constructive trust be imposed upon all of the O Street property with an undivided one-half interest for the benefit of Julius.

The Misle litigation was not resolved by this order. Disputes continued on numerous matters, including an accounting for monies received by HJA and a determination after the allocation of income and expenses between the parties (Filing No. 121).

In October 1999, during the pendency of the Misle litigation, HJA decided to refinance the real estate. The mortgage in favor of Julius was a first lien against all of the real estate. It was necessary to resolve the Misle mortgage. In an effort to resolve the matter, and perhaps for other strategic reasons related to the litigation, HJA and its subsidiaries entered into an Escrow Agreement with State Title dated October 15, 1999 (Filing No. 53).

On October 15, 1999, Gateway Community Bank wire-transferred loan proceeds of \$1,671,374.44 from the proceeds of refinancing for deposit into the State Title Escrow Closing

Account at Pinnacle Bank, Account No. 237992 (the "Escrow Closing Account") (Filing No. 54). After payment of other lien holders and obligations, \$501,802.88 was to be held in escrow until Misles satisfied the conditions of the Escrow Agreement (Filing No. 53), at which time the funds were to be released to Misles. Misles refused an early payoff and refused to release the mortgages. The District Court eventually determined that HJA could not require Misles to accept the monies as a pre-payment and the litigation continued, with the funds remaining with State Title.

State Title kept a record of the deposit of funds from HJA. The record purports to show the remaining \$501,802.88 was in the Escrow Closing Account from October 15, 1999, until a check for that amount was issued to Misles on January 24, 2002 (Filing No. 54). On cross-examination by counsel for Misles, the accountant retained by the Trustee, Stephen Bjorkman, testified that from the time of the deposit until the issuance of the check to Misles on January 24, 2002, the Escrow Closing Account statements showed a balance in excess of \$501,802.88 at the end of each month. However, a review of the bank records of the Escrow Closing Account reveals that the account did not hold in excess of \$501,802.88 at all times during the month of October 1999 from and after the 15<sup>th</sup> of the month.

The bank record for the Escrow Closing Account, Pinnacle Bank Account 237992, including Filing No. 56, the bank statement for the month of October 1999, does not reflect a wire transfer of \$1,671,374.44 on October 15, 1999. It does reflect deposits to the Escrow Closing Account, but the deposits are unidentified by depositor and are in three separate amounts, none of which individually or when added together equals \$1,671,374.44. Even if one assumes that the funds deposited on October 15, 1999, include the money delivered by HJA to be held in escrow, shortly thereafter the account balance fell far below \$501,802.88. Both on October 21, 1999, and October 27, 1999, the account balance was less than the amount due Misles, and less than the amount shown on the separate State Title record for the HJA-Misles Escrow.

I conclude from the above that the funds delivered by HJA which were to be deposited into an escrow account for the benefit of Misles were never deposited into such account. Alternatively, I conclude that even if the HJA funds were deposited initially into the Escrow Closing Account, they were spent for purposes other than payment to Misles and funds from other sources were deposited into the Escrow Account to keep it above \$501,802.88 from and after October 27, 1999.

In other words, the so-called Escrow Closing Account, Pinnacle Bank Account 237992, was not a protected, special account, but was an account used by State Title for the benefit of the business, including paying customers other than Misles and for its general operations.

The evidence presented by the Trustee makes it clear that State Title, except in very limited circumstances, did not honor its escrow obligations. It used several different bank accounts and deposited funds from various sources into each of the bank accounts, transferring funds from one bank account to another, including into the Escrow Closing Account when funds were necessary to meet closing obligations.

The commingling of money received from others than HJA with the initial deposit from HJA, and distributing such funds to others than Misles in October of 1999, destroyed the special escrow status of the funds in Pinnacle Account No. 237992. From the first date the funds in that account fell below \$501,802.88, October 21, 1999, Misles became creditors of State Title. HJA also became a creditor of State Title at that time because if the litigation between HJA and the Misles was not eventually settled, HJA had a right to a return of the net funds originally intended for the Misles.

D. CONCLUSIONS OF LAW and DISCUSSION

The Bankruptcy Code at 11 U.S.C. § 547(b) provides:

- [T]he trustee may avoid any transfer of an interest of the debtor in property —
- (1) to or for the benefit of a creditor;
  - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
  - (3) made while the debtor was insolvent;
  - (4) made —
    - (A) on or within 90 days before the date of the filing of the petition;
    - or
    - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
  - (5) that enables such creditor to receive more than such creditor would receive if —
    - (A) the case were a case under chapter 7 of this title;
    - (B) the transfer had not been made; and
    - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The trustee bears the burden of establishing these elements by a preponderance of the evidence. Stingley v. AlliedSignal, Inc. (In re Libby Int'l, Inc.), 247 B.R. 463, 466 (B.A.P. 8th Cir. 2000).

David Hunter, the president and main shareholder of State Title, committed suicide on January 22, 2002. Misles and HJA settled their litigation on the day of trial, January 24, 2002, and Misles demanded payment of the \$501,802.88. Upon receiving such demand, an employee of State Title consulted with legal counsel for State Title and determined that there was sufficient money in the account and that it did not appear there was any irregularity with regard to the operation of the account. State Title therefore issued a check to the Misles. The Misles immediately cashed the check at Pinnacle Bank.

The litigation, although settled in court on January 24, 2002, was not completely settled for several months thereafter. In completing the documentation for the settlement, the Misles and HJA entered into an agreement whereby HJA, acknowledging the bankruptcy case of State Title which was filed on January 26, 2002, indemnified Misles for any damages caused to the Misles, including attorney fees and court costs, as a result of any action taken by the Trustee of State Title with regard to the disbursement of funds to Misles on January 22, 2002.

The Trustee determined that the account records of State Title were inaccurate and that State Title's accounts were short millions of dollars with regard to its obligations to its various banks and to customers who participated in escrow account deposits. The Trustee concluded that the Pinnacle Bank Escrow Closing Account which is the subject matter of this litigation was in just as bad shape as most of the other accounts and that it had been used by Mr. Hunter in a gigantic fraud for his own benefit and the benefit of his family. The Trustee therefore brought numerous lawsuits, including this one, in an attempt to bring back into the estate assets which had been improperly transferred.

The Trustee has proven all of the elements necessary to avoid a preferential transfer. Because of the manner in which Pinnacle Account 237992 was handled, including the disbursement of funds which may have originally been deposited for the benefit of Misles and the inclusion of deposits from other sources, the funds in the account lost their identity as funds intended for Misles and became general operational assets of the debtor.

The Misles and HJA, on October 21, 1999, the date that the balance in the account was reduced to less than \$501,802.88, became general creditors of State Title.

When Misles received the disbursement of \$501,802.88 two days prior to the bankruptcy filing, they received a preferential transfer of property of the debtor which gave Misles more than they would have received had they not received the transfer of funds and participated in the distribution pursuant to the Chapter 7 statutory distribution scheme. Therefore, the transfer of \$501,802.88 to the Misles is avoided.

This order does not deal with the contractual arrangements between HJA and the Misles with regard to indemnification. That matter will be resolved either by stipulation of the parties or by another trial. Judgment will not be entered on this order until the indemnification matter is resolved. This is not a final order for appeal.

SO ORDERED.

DATED this 24<sup>th</sup> day of January, 2006.

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

\*Ann M. Grottveit  
James B. Cavanagh  
Robert B. Creager  
U.S. Trustee

Movant (\*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.