IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:	)	BK 83-736
YANO & SARAH FALCONE,	)	
Debtors.	)	
YANO & SARAH FALCONE and, LUCIA FALCONE (WEIR)	)	CV 84-0-722
	)	CV 84-0-751
Plaintiffs,	)	
vs.	)	MEMORANDUM AND ORDER
MERLE NICOLA,	)	
Defendant.	)	

These matters are before the Court on appeal from a judgment entered by the United States Bankruptcy Court for the District of Nebraska. Appellants Yano and Sarah Falcone filed a voluntary petition under Chapter 7 of the Bankruptcy Code on April 28, 1983. On June 21, 1983, appellee, the trustee, filed an adversary proceeding to set aside a conveyance of the debtors' residence to their daughter, appellant Lucia Falcone Weir, which transfer occurred on January 2, 1981. The Bankruptcy Court found that the transfer was a fraudulent conveyance under Nebraska law and ruled that the trustee could set aside the transfer under 11 U.S.C. § 544(b). The Bankruptcy Court also ruled that appellant Sarah Falcone had a 75 percent interest in the property.

Appellants make several arguments on appeal. First, they contend that because there was no creditor who could have avoided the transfer, the trustee could not gain the relief he sought. Second, they argue that the trustee did not prove that the

consideration for the transfer was inadequate. Finally, they claim that the issue of the debtor's interest in the property was not properly before the Bankruptcy Court, and because Louise Falcone was not a party, her interest could not be determined by the Bankruptcy Court.

Under 11 U.S.C. § 544(b), if an unsecured creditor is entitled, pursuant to any applicable law, to avoid a transfer of an interest of the debtor, the trustee is likewise entitled to avoid the transfer. In this case the trustee sought to avoid the transfer pursuant to the Nebraska Uniform Fraudulent Conveyance Act. The first question on appeal is whether there was an unsecured creditor so the trustee could seek to avoid the transfer.

The Bankruptcy Court found an unsecured debt in the form of Sarah Falcone's guarantee of a promissory note payable to Mid City Bank. Appellants argue that testimony at trial proved that Mid City Bank released Sarah Falcone's co-guarantors, and that her debt, therefore, was discharged. The Bankruptcy Court ruled that:

> There is, in fact, evidence before me testified to by Mr. Fitl with regard to certain conclusions that he has made with regard to whether or not other guarantors have been released. They are, in essence, legal conclusions in my view and not factual.
>
> There is nothing, as I understand the evidence, in writing to suggest that the other guarantors have been released. Mr. Fitl's legal conclusion that they have are not factually sufficient for me to conclude that anyone has been released from the guaranty. I therefore conclude that it continues as a viable debt of Sarah Falcone.

> Having concluded that it exists as a debt today, I conclude also that it existed as a debt of Sarah Falcone in January of 1981 at a time when the title to the real estate was conveyed by her to her daughter.

The Court finds no error in this ruling.

In addition, the uncontroverted facts section of the pre-trial order indicates that at the time of the conveyance appellants had not paid in full a promissory note given to the Ames Plaza Bank and secured by a mortgage on the property in question. Although Lucia Falcone Weir testified that this mortgage was paid off, appellants did not prove that this debt had been satisfied. The Bankruptcy Court did not err in finding that there were creditors in whose stead the trustee could avoid the transfer.

The Bankruptcy Court also did not err in concluding that the consideration for the transfer was inadequate. The parties stipulated that the value of the property on the date of the transfer was $75,000.00. There was an $8,000.00 mortgage, leaving the equity in the property at $67,000.00. The consideration given was $15,000.00 plus love and affection. Even if appellants are correct that only one half, and not three quarters of the property was transferred, the value of the transfer was approximately $33,500.00. The Bankruptcy Court did not err in finding this consideration inadequate.

Appellants final argument is that the Bankruptcy Court improperly determined that appellant Sarah Falcone has a 75 percent interest in the property. Appellants Yano and Sarah

Falcone purchased the property in question in October, 1964, as joint tenants. In 1966 Yano Falcone conveyed his interest in the house by deed to Sarah Falcone and Louise M. Falcone. The subject of this action is the transfer of Sarah Falcone's interest in the property. The Bankruptcy Court determined that Sarah Falcone has a 75 percent interest and, by inference, Louise Falcone a 25 percent interest. Appellants dispute this, claiming that their intent in 1966 was to convey to Louise Falcone a 50 percent interest, which would leave Sarah Falcone with a 50 percent interest.

Under Fed. R. Civ. P. 19(a), a party is indispensable if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . .." Such is the situation here. A decision as to what percentage of the property was transferred in 1966 is, of course, of vital concern to Louise Falcone. What was transferred to her then remains hers. The Bankruptcy Court in effect determined that the trustee controls 75 percent of the property. Louise Falcone is left without recourse to protect her alleged 50 percent interest.

The issue of an indispensable party can be raised for the first time on appeal. Fetzer v. Cities Service Oil Co., 572 F.2d 1250, 1253 n.6 (8th Cir. 1978). Therefore that part of the Bankruptcy Court's judgment determining that Sarah Falcone has a 75 percent interest in the property must be reversed. A

determination of this issue can only be made with Louise Falcone as a party. Of course, Louise Falcone is not an interested party as to the voidability of the transfer to Lucia Falcone Weir, so the remainder of the Bankruptcy Court's judgment should be affirmed.

Accordingly,

IT IS ORDERED that:

1. The Bankruptcy Court's ruling that appellee may set aside the transfer of the debtors' property to Lucia Falcone Weir is affirmed; and

2. The Bankruptcy Court's ruling that appellant Sarah Falcone has a 75 percent interest in the property is reversed and remanded to the Bankruptcy Court for such further proceedings as it deems proper and which are not inconsistent with this Memorandum and Order.

DATED this 29th day of May, 1985.

BY THE COURT:

C. Arlen Beam

C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE