

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

BKY No. 02-50275
ADV No. 03-5050

Donald D. Samborski and
Marjorie M. Samborski,

Debtors.

Terri A. Georgen, Trustee,

Plaintiff,

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

vs.

Trevor Samborski and Jared J. Samborski,

Defendants.

TO: Defendants and their attorney, Paul J. Sandelin, Sandelin Law Office, 30849 First Street,
P.O. Box 298, Pequot Lakes, MN 56472.

1. The Plaintiff herein moves the court for partial summary judgment and gives notice of hearing herewith.
2. The Court will hold a hearing on this motion at 2:00 p.m. on August 4, 2004, in Courtroom No. 2, U.S. Courthouse, 515 West First Street, Duluth, MN 55802.
3. Any response to this motion must be filed and delivered not later than July 28, 2004, 2004 which is 7 days before the date of the hearing (including Saturdays, Sundays and holidays), or filed and served by mail not later than July 23, 2004 which is 10 days before the date of the hearing (excluding Saturdays, Sundays and holidays). UNLESS A

RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this voluntary Chapter 7 case was filed on March 26, 2002. The case is now pending in this court.
5. The motion arises under Bankruptcy Rule 7056 and Fed. R. Civ. Proc. 56. This motion is filed under Bankruptcy Rule 9014 and Local Rules 9006-1 and 9013. Plaintiff seeks summary judgment against the Defendants as to all Counts of the Complaint in this matter.
6. This motion is based upon the Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, the Affidavit Roger B. Seaver and the Exhibits thereto, and all the files herein.

WHEREFORE, the Plaintiff seeks summary judgment against the Defendant as follows:

1. Avoiding, pursuant to 11 U.S.C. §548 the transfer, by the Debtors to the Defendants, of interests in real property legally described as follows:

Lot 1, Siesta Islands, according to the plat thereof on file and of record in the Office of the County Recorder, in and for Cass County, State of Minnesota.

and ordering the transfer recovered from the Defendants pursuant to 11 U.S.C. § 550.
2. Preserving the avoided transfer for the benefit of the estate pursuant to 11 U.S.C. § 551.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

BKY No. 02-50275
ADV No. 03-5050

Donald D. Samborski and
Marjorie M. Samborski,

Debtors.

Terri A. Georgen, Trustee,

Plaintiff,

AFFIDAVIT OF ROGER B. SEAVER

vs.

Trevor Samborski and Jared J. Samborski,

Defendants.

STATE OF MINNESOTA)
) ss.
COUNTY OF DAKOTA)

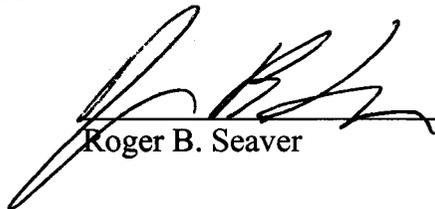
Roger B. Seaver, being first duly sworn, deposes and

states as follows:

1. I am one of the attorneys for the Trustee in the above matter and have personal knowledge of the facts contained herein.
2. Attached hereto as Exhibit 1 is a true and correct copy of the quit claim deed dated July 6, 2001 and recorded in the office of the Cass County Recorder as Document No. 437694 on July 9, 2001.
3. Attached hereto as Exhibit 2 is a true and correct copy of the Defendants' Responses to Plaintiff's first set of Interrogatories to Defendants.
4. Attached hereto as Exhibit 3 is a true and correct copy of the cover sheet and pages 6-8 of the transcript of the Rule 2004 Examination of Debtor Donald D. Samborski taken on June 21, 2002.

5. Attached hereto as Exhibit 4 is a true and correct copy of the cover sheet and pages 5-8 and 21-24 of the transcript of the Rule 2004 Examination of Debtor Donald D. Samborski taken on May 25, 2004.
6. Attached hereto as Exhibit 5 is a true and correct copy of a Stipulation of Insolvency wherein the Debtor concedes that he was insolvent as of July 1, 2001 and at all times thereafter.
7. Attached hereto as Exhibit 6 is a true and correct copy of the Notice of Meeting of Creditors in this Bankruptcy Case.
8. Attached hereto as Exhibit 7 is a true and correct copy of the cover sheet and pages 37-44 of the transcript of the Rule 2004 Examination of Debtor Donald D. Samborski taken on May 25, 2004.
9. Attached hereto as Exhibit 8 is a true and correct copy of Schedule C, filed with the Debtors' voluntary Chapter 7 Bankruptcy Petition.
10. Attached hereto as Exhibit 9 is a true and correct copy of this Court's order dated February 7, 2003 sustaining Trustee's Objection to Debtors' Claim of Homestead Exemption, In Part.

FURTHER YOUR AFFIANT SAYETH NOT.

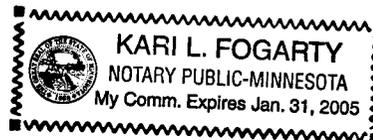


Roger B. Seaver

Subscribed and sworn to before me this
2nd day of July, 2004.



Notary Public



QUIT CLAIM DEED

Individual(s) to Joint Tenants

24-398-0105

No delinquent taxes and transfer entered; Certificate of Real Estate Value () filed (X) not required.
Certificate of Real Estate Value No. _____

July 9, 2001
(Date)

Sharon B. Anderson
County Auditor

by: Shari Fargen
Deputy

437694
OFFICE OF COUNTY RECORDER

State of Minnesota, County of Cass
I hereby certify that the within instrument was filed in this office for record on the 9th day of July A.D. 20 01 at 1:05 O'clock P. M and was duly recorded as Micro Doc. No. 437694

Kerby M. Norby
COUNTY RECORDER

(reserved for recording data)

DEED TAX DUE: \$ 1.65

Date: JULY 6 2001

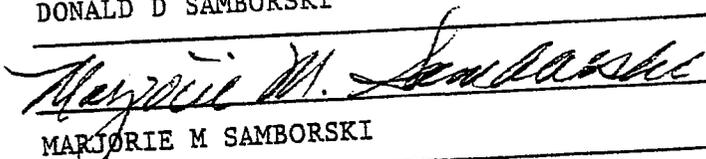
FOR VALUABLE CONSIDERATION, DONALD D SAMBORSKI AND MARJORIE M SAMBORSKI, HUSBAND AND WIFE, Grantor(s), hereby convey(s) and quitclaim(s) to MARJORIE M SAMBORSKI, TREVOR J SAMBORSKI, AND JARED J SAMBORSKI, Grantees, as joint tenants, real property in CASS County, Minnesota, described as follows:

LOT 1 SIESTA ISLANDS

together with all hereditaments and appurtenances.

- Check box if applicable:
- The Seller certifies that the seller does not know of any wells on the described real property.
 - A well disclosure certificate accompanies this document.
 - I am familiar with the property described in this instrument and I certify that the status and number of wells on the described real property have not changed since the last previously filed well disclosure certificate.

CASS COUNTY, MN # 1514
Deed tax \$ 1.65
Date 7/9/01 By cut ✓


DONALD D SAMBORSKI

MARJORIE M SAMBORSKI

STATE OF MINNESOTA }
COUNTY OF CROW WING } ss.

This instrument was acknowledged before me on JULY 6 2001
DONALD D SAMBORSKI AND MARJORIE M SAMBORSKI, HUSBAND AND WIFE

FOR VALUABLE CONSIDERATION, DONALD D SAMBORSKI AND MARJORIE M SAMBORSKI,
HUSBAND AND WIFE, Grantor(s),
hereby convey(s) and quitclaim(s) to MARJORIE M SAMBORSKI, TREVOR J SAMBORSKI, AND ^(GRANTEE STATUS)
JARED J SAMBORSKI, Grantees,
as joint tenants, real property in CASS County, Minnesota, described as follows:

LOT 1 SIESTA ISLANDS

together with all hereditaments and appurtenances.

Check box if applicable:

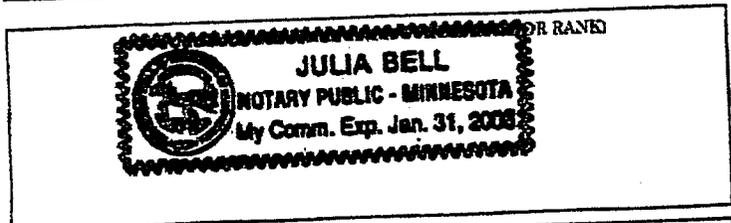
- The Seller certifies that the seller does not know of any wells on the described real property.
- A well disclosure certificate accompanies this document.
- I am familiar with the property described in this instrument and I certify that the status and number of wells on the described real property have not changed since the last previously filed well disclosure certificate.

CASS COUNTY, MN # 1514
Deed tax \$ 1.65
Date 7/9/01 By cut ✓

[Signature]
DONALD D SAMBORSKI
[Signature]
MARJORIE M SAMBORSKI

STATE OF MINNESOTA }
COUNTY OF CROW WING } ss.

This instrument was acknowledged before me on JULY 6 2001
by DONALD D SAMBORSKI AND MARJORIE M SAMBORSKI, HUSBAND AND WIFE
, Grantor(s).



[Signature]
SIGNATURE OF NOTARY PUBLIC OR OTHER OFFICIAL

Check here if part or all of the land is Registered (Torrens)

Tax Statements for the real property described in this instrument should be sent to (include name and address of Grantee):

THIS INSTRUMENT WAS DRAFTED BY (NAME & ADDRESS):
CYGNETURE TITLE & ABSTRACT
1401 EXCELSIOR RD
BAXTER MN 56425
01-21731

MARJORIE SAMBORSKI
13258 ABERDEEN ST NE
BLAINE MN 55449

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re: Donald D. Samborski and
Marjorie M. Samborski,

Bky Case No. 02-50275

Debtor(s).

Chapter 7

Terri A. Georgen, Trustee,

Adv. Pro. No. 03-5050

Plaintiff,

vs.

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S INTERROGATORIES**

Trevor Samborski and Jared J. Samborski,

Defendants.

TO: PLAINTIFF TERRI A. GEORGEN, TRUSTEE AND HER ATTORNEY,
RANDALL L. SEAVER, 12400 PORTLAND AVENUE SOUTH, SUITE 132,
BURNSVILLE, MINNESOTA 55337

Defendants, Trevor Samborski and Jared J. Samborski, for their Response to

Interrogatories, state as follows:

Interrogatory No. 1

Identify the person who answers these Interrogatories, and if more than one
person supplies information or answers to these Interrogatories, please state which person
answered which portion of each Interrogatory.

Response: Trevor Samborski and Jared J. Samborski provided the information
to respond to each Interrogatory.

Interrogatory No. 2

Identify each person you have consulted or you expect to call as a witness at the time of the trial in this action.

Response: Witnesses have yet to be identified, and this Interrogatory will be updated in the future. At this time, the anticipated witnesses include the Debtors and Defendants.

Interrogatory No. 3

Identify each person whom you expect to call as an expert at the trial of this matter, state the subject matter on which they are expected to testify, the substance of facts upon which they are expected to base their opinions, the substance of the opinions to which they are expected to testify, and a summary of the grounds for each such opinion.

Response: N/A

Interrogatory No. 4

State your understanding of the reason that the Debtors or either of the Debtors transferred an interest in the Property to you.

Response: My father transferred his interest in the homestead to myself, by brother and my mother because he was concerned for his health, as his brother had died from a sudden heart attack. He was concerned that he would suffer a similar heart attack and wanted to make sure the homestead remained in the family.

Interrogatory No. 5

State the amount that you paid to the Debtors or either of the Debtors in return for their transfer of an interest in the Property to you.

Response: We did not pay anything monetary to my mother and father the same as if the property were transferred to us upon their death.

Interrogatory No. 6

Describe any transfers of property of any type, including but not limited to, general intangibles, cash, gifts, real property or personal property, from you to the Debtors from March 26, 2001 to present.

Response: None.

Dated: 4/12/04

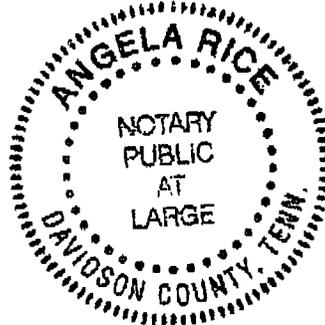
SANDELIN LAW OFFICE
By 
Paul J. Sandelin (#488359)
30849 First Street
P.O. Box 298
Pequot Lakes, MN 56472
218-568-8481
ATTORNEYS FOR DEFENDANTS

Dated: 3-29-2004


Trevor Samborski

Subscribed and sworn to before me
this 29th day of March, 2004.

Angela Rice
Notary Public



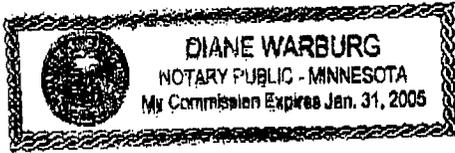
My Commission Expires MAR. 25, 2006

Dated: 4/1/04

Jared J. Samborski
Jared J. Samborski

Subscribed and sworn to before me
this 1st day of April, 2004.

Diane Warburg
Notary Public



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

Donald D. Samborski and
Marjorie M. Samborski,
Debtors,

COPY

BKY Case No. 02-50275-GFK

PARTIAL TRANSCRIPT
DEPOSITION OF
DONALD D. SAMBORSKI

Taken on June 21, 2002
Commencing at 10:15 A.M.

REPORTED BY: KARA E. SOLHEID, RPR

PARADIGM REPORTING & CAPTIONING INC.
1400 RAND TOWER
527 MARQUETTE AVENUE SOUTH
MINNEAPOLIS, MINNESOTA 55402
(612) 339-0545

1 A. I would assume, I'm thinking the beginning of
2 July. We were setting up, we were moving there,
3 we were setting up, you know.

4 Q. When were you staying there on a regular basis,
5 is what I'm asking? Do you know?

6 A. No, I don't.

7 TRUSTEE TERRI GEORGEN: Let me mark
8 this as Exhibit 4.

9 (Samborski Deposition Exhibit Number 4 was
10 marked for identification.)

11 Q. (By Ms. Georgen, continuing) Mr. Samborski, if
12 you could take a look at this document. It's a
13 quitclaim deed dated July 6, 2001; is that
14 correct?

15 A. Yes.

16 Q. Is this the document that you were talking about
17 you and your spouse transferred the 5335 Ox
18 Trail property into the name of your spouse,
19 Trevor Samborski, and Jared Samborski?

20 A. Yes.

21 Q. And Jared and Trevor are your children, your
22 sons, I assume?

23 A. Yes.

24 Q. How old are they?

25 A. Trevor is 28 and Jared is 23.

1 Q. Was any consideration paid by Marjorie, Trevor,
2 or Jared for that transaction?

3 A. No.

4 Q. Nothing was paid at all, you and your spouse
5 just transferred the property; is that your
6 testimony?

7 A. To them, yes.

8 Q. Has the property been appraised, Mr. Samborski?

9 A. No.

10 Q. Do you have a property tax statement for that
11 property?

12 A. Yes, I have one.

13 Q. What does that indicate the value of the
14 property is?

15 A. The tax market value is like 67,000.

16 Q. What's the market, estimated market value on the
17 property tax statement?

18 A. That's what I'm saying.

19 Q. That's what it is?

20 A. Yeah. I think it's 67,000.

21 Q. What do you think it's worth to put it on the
22 market today? What do you suppose you would get
23 for it?

24 A. Normally when you sell something, compared with
25 the tax --

- 1 MR. SOLEM: Don't say normally.
2 Tell her what you think it is worth. Don't try
3 to estimate based on disparaging values between
4 the tax form and what it's worth.
- 5 Q. (By Ms. Georgen, continuing) If you put it on
6 the market, I'm sure you know, Mr. Samborski,
7 what other properties around you are going for,
8 what would you estimate yours would go for?
- 9 A. Between 80 and 100,000. I don't know, 80,
10 90,000.
- 11 Q. You mentioned that you put some improvements
12 into the property over the last, what, five or
13 six years?
- 14 A. Actually, since I've owned it.
- 15 Q. Since you've owned it?
- 16 A. Yes.
- 17 Q. Where did those funds come from?
- 18 A. From wages and from -- the last was from savings
19 and a commercial building I sold in Blaine.
20 Some money there to put in the heating system
21 and all that.
- 22 Q. When was the commercial building sold in Blaine?
- 23 A. Toward the latter part of last year. I don't
24 remember the exact date.
- 25 Q. What was the value of that commercial property?

COPY

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:
Donald D. Samborski
and Marjorie M. Samborski,
Debtors

Terri A. Georgen, Trustee,
Plaintiff,

vs.

BKY No. 02-50275
ADV No. 03-5050

Trevor Samborski and
Jared J. Samborski,

Defendants.

DEPOSITION

of Donald D. Samborski, taken on the 25th day
of May, 2004, at the Sandelin Law Offices,
30849 First Street, Pequot Lakes, Minnesota,
before Robert A. Engen, a notary public in and
for the State of Minnesota.

COPY

ENGEN REPORTING SERVICE
(888) 249-1131

1 A From the back?
 2 Q Yes. I just want to verify that those are
 3 your signatures.
 4 A That's our signatures.
 5 Q Those are your signatures?
 6 A Yes.
 7 Q And the date is 3/25/2002?
 8 A Yes.
 9 Q And did you read the schedules through before
 10 you signed them?
 11 A Yes, yeah.
 12 Q So everything stated in the schedules is true?
 13 A Yes.
 14 Q Now, if you'll turn to the page that lists the
 15 Number 10, I believe it's two pages before
 16 that one, Transfers, it says "Other
 17 Transfers."
 18 A Okay.
 19 Q There you are.
 20 A Okay.
 21 Q We see hear that you've listed your former
 22 homestead at 13258 Aberdeen Street?
 23 A Yes.
 24 Q As being transferred; is that correct?
 25 A Yes.

1 Q Is that the only transfer that you made of any
 2 property in the year prior to filing?
 3 A I believe so, yes.
 4 Q Discounting the transfer or ignoring the
 5 transfer that we know about of Ox Trail, if we
 6 count Ox Trail and Aberdeen Street, was there
 7 any other real property that you transferred
 8 in the year prior to filing?
 9 A In the year, I don't think so. As far as --
 10 that's what we've got here.
 11 Q If we take it back to one year before filing,
 12 3/25/2001, did you own any other real
 13 property, other than Aberdeen Street at that
 14 point in time?
 15 A A year before?
 16 Q Yes.
 17 A I don't think so.
 18 Q Is that a yes or no?
 19 A No.
 20 Q So your answer is no, you didn't own any real
 21 property other than Aberdeen Street on
 22 3/25/2001?
 23 A Well, and I own the property up here on Ox
 24 Trail.
 25 Q So at the same time you owned Ox Trail and

1 Aberdeen, both on 3/25/2001?
 2 A Yes, I did.
 3 Q Did you own any other real property besides
 4 those two pieces?
 5 A No, not then.
 6 Q In the year prior to filing, did you sell or
 7 transfer in any way, any other property,
 8 personal property, things like ATVs or boats?
 9 A A year before that?
 10 Q In the year before that.
 11 A I don't think so, because I have -- no.
 12 Q You would have disclosed them on --
 13 A -- Oh, yeah. On there I would have, yes.
 14 Q Okay. So the answer is no, you transferred no
 15 other personal property. You disclosed
 16 no -- sorry; I'll withdraw question.
 17 You indicate on the schedules that
 18 you transferred no personal property in the
 19 year before filing; correct?
 20 A Right, yes.
 21 Q And is that true?
 22 A Yes.
 23 Q We're going to go to the portion in the
 24 schedules that indicate your assets, and I'll
 25 tell you what it'll say at the top. The very

1 first one will say at the top "Schedule A,
 2 Real Property," and we're still in Exhibit 1.
 3 A Okay.
 4 Q We're on the same page?
 5 A Yes.
 6 Q Good. Now, on here you indicate that your
 7 homestead is located at 5335 Ox Trail
 8 Southwest; correct?
 9 A Yes.
 10 Q And you have valued it at \$75,000; is that
 11 correct?
 12 A Yes.
 13 Q Were any appraisals done to determine that
 14 value?
 15 A No.
 16 Q How did you determine the value of \$75,000?
 17 A From tax, from taxes, you know, from tax --
 18 what do you call it? The bill.
 19 Q Was that the value that the assessor gave it?
 20 A No. It's less than that.
 21 Q It's less than the value that the assessor
 22 gave you?
 23 A Yes, at that time. Yes.
 24 Q Do you recall approximately what value the
 25 assessor put on it?

1 A Yes.
 2 Q I'm done with these for the moment. We may
 3 return to them. We'll move on to the first
 4 deed that's marked as Exhibit Number 4, and
 5 you produced this in response to my Document
 6 Request.
 7 Is this the deed by which you took
 8 title to 5335 Ox Trail?
 9 A Yes.
 10 Q Do you remember what you paid for the
 11 property?
 12 A \$10,000.
 13 Q You paid \$10,000 for the property?
 14 A Yes.
 15 Q Were there any buildings on it at the time?
 16 A No.
 17 Q And have you conveyed any portion of that
 18 property, other than the conveyance to
 19 Marjorie, Trevor and Jared?
 20 A I don't understand the question.
 21 Q I'm sorry. Have you sold any portion of that
 22 property?
 23 A No.
 24 Q I'm going to move on to what is Exhibit Number
 25 5. And this is a deed from Donald and

1 still have half.
 2 You'll have control of what to do
 3 with the property if something happen to me,
 4 then they still have ownership of the
 5 property.
 6 It's just assuring them that they
 7 would have our homestead if something happened
 8 to me.
 9 Q Do you have any other type of agreement or
 10 document indicating that you were taking part
 11 in estate planning at this time?
 12 A No.
 13 Q Is there any other agreement that you executed
 14 at the same time as this, indicating your
 15 intent or purpose in the transfer?
 16 A No.
 17 Q And have you received anything other than
 18 funds or money in return for this transfer?
 19 A No.
 20 Q Have any funds or property been transferred to
 21 any other entity on your behalf or for your
 22 benefit in return for this transfer?
 23 A No.
 24 Q Did your wife receive any money or property in
 25 return for this transfer?

1 Marjorie Samborski to Marjorie Samborski,
 2 Trevor Samborski and Jared Samborski, dated
 3 July 6th, 2001.
 4 On the bottom there are two
 5 signatures; is one of those yours?
 6 A Yes.
 7 Q And what did you receive as consideration or
 8 payment for this transfer?
 9 A Nothing.
 10 Q What was the purpose of this transfer?
 11 A To -- well, I had two friends, a relative that
 12 had, the parents had property, had a home.
 13 One of the parents died, and the other one
 14 remarried.
 15 In all three instances, because of
 16 marriage and other children and that, the
 17 original children lost the homestead. They
 18 didn't get any of the home. It went to the
 19 remarriage. It went to the other family.
 20 Q Okay.
 21 A In this situation, I'm said I'm going to talk
 22 it over with my wife. I says, I'm going to
 23 take my half of the property, put it in Trevor
 24 and Jared's name. You'll still have half.
 25 That was my reasoning at the time, you'll

1 A No.
 2 Q At the time that you transferred 5335 Ox
 3 Trail, which is indicated or identified on
 4 this deed as Lot 1 Siesta Islands,
 5 did you have any appraisals done on the
 6 property?
 7 A No.
 8 Q Was there a closing at a real estate company
 9 or a title company?
 10 A We went to the title company to get the
 11 application to do the transfer.
 12 Q Okay. And what title company did you use?
 13 A It's right in Brainerd. I can't remember the
 14 name, it's right in Brainerd. I can't
 15 remember the name.
 16 Q Okay.
 17 A Here it is.
 18 Q Would it have been Signature Title?
 19 A Yes.
 20 Q Was there a settlement statement or you may
 21 know it as a HUD 1 prepared for this transfer?
 22 A No, I don't think so.
 23 Q Were there any other documents executed by any
 24 or all of the parties to this transfer, at the
 25 time of this transfer?

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY No. 02-50275
ADV No. 03-5050

Donald D. Samborski and Marjorie M.
Samborski,

Debtor(s).

Terri A. Georgen, Trustee,

Plaintiff,

vs.

STIPULATION

Trevor Samborski and Jared J. Samborski,

Defendants.

WHEREAS, the attorneys for the parties to the above referenced adversary proceeding, after reviewing evidence relating thereto, agree that the Debtors named above were insolvent, as insolvency is defined in 11 U.S.C. 101 on July 1, 2001 and at all times thereafter.

NOW, THEREFORE, the undersigned attorneys for the parties to above referenced adversary proceeding hereby stipulate that the Debtors were insolvent as insolvency is defined in 11 U.S.C. 101 on July 1, 2001 and at all times thereafter.

FULLER, SEAVER & RAMETTE, P.A.

Dated: May 25, 2004

By: 
Roger B. Seaver 251227
Randall L. Seaver 152882
12400 Portland Avenue South, Suite 132
Burnsville, MN 55337
(952) 890-0888

Attorneys for Plaintiff

SANDELIN LAW OFFICE

Dated: May 25, 2004

By: 
Paul J. Sandelin 188359
30849 First Street
P.O. Box 298
Pequot Lakes, MN 56472
(218) 568-8481

Attorneys Defendants

5-25-04

 5/25/04

UNITED STATES BANKRUPTCY COURT

District of Minnesota

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on 03/26/02.

You may be a creditor of the debtor. This notice lists important deadlines. You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected by accessing the court's web site at www.mnb.uscourts.gov or at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):

DONALD D SAMBORSKI
DON D SAMBORSKI
TAILORED SYSTEMS INC

MARJORIE M SAMBORSKI
MARGE SAMBORSKI
TAILORED SYSTEMS MID MINNESOTA INC

5335 OX TRAIL SW
PILLAGER, MN 56473

Case Number:
02 - 50275 - GFK

Social Security/Taxpayer ID Nos.:
477-38-6131
477-46-9789

Attorney for Debtor(s) (name and address):

BRIAN L SOLEM
295 MARIE AVE E
W ST PAUL, MN 55118
Telephone number: 612-455-0099

Bankruptcy Trustee (name and address):

TERRI A GEORGEN
ONE W WATER ST STE 275
ST PAUL, MN 55107
Telephone number: 651-699-6980

Meeting of Creditors:

Date: May 2, 2002 Time: 09:00 am Location: B-26 FEDERAL BLDG
720 ST GERMAIN ST
ST CLOUD, MN 56301

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts:
07/01/02

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office:

U S BANKRUPTCY COURT
U S COURTHOUSE RM 416
515 W 1ST ST
DULUTH, MN 55802

Web address: www.mnb.uscourts.gov

For the Court:

Clerk of the Bankruptcy Court:
PATRICK G. DE WANE

Hours Open: Monday - Friday 8:00 AM - 5:00 PM

Date: 03/27/02

Filed on 3-27-02
Patrick G. De Wane, Clerk
By [Signature] Deputy Clerk

3-1

COPY

UNITED STATES BANKRUPTCY COURT

DISTRICT OF MINNESOTA

In Re:
Donald D. Samborski
and Marjorie M. Samborski,
Debtors

Terri A. Georgen, Trustee,
Plaintiff,

vs.

BKY No. 02-50275
ADV No. 03-5050

Trevor Samborski and
Jared J. Samborski,

Defendants.

DEPOSITION

of Donald D. Samborski, taken on the 25th day
of May, 2004, at the Sandelin Law Offices,
30849 First Street, Pequot Lakes, Minnesota,
before Robert A. Engen, a notary public in and
for the State of Minnesota.

COPY

ENGEN REPORTING SERVICE
(888) 249-1131

1 Q Some of the other questions, Mr. Samborski,
2 related to the transfer of the Pillager
3 property. And that property is referenced by,
4 Exhibits 4 and 5 relate to property which is
5 legally described as Lot 1, Siesta Islands,
6 and that property is located in Pillager?
7 A Yes.
8 Q And that's your homestead property?
9 A Yes.
10 Q And Exhibit 5 consists of, this is a Quit
11 Claim Deed from Donald Samborski and Marjorie
12 Samborski, husband and wife, to Marjorie
13 Samborski, Trevor Samborski and Jared
14 Samborski as joint tenants?
15 A Yes.
16 Q That's a conveyance of your interest and your
17 spouse's interest to those three parties of
18 potentially your homestead property in
19 Pillager?
20 A Yes.
21 Q And some of the questions related to why you
22 did that, and can you explain in more detail
23 the circumstances surrounding why that was
24 done?
25 A At the time we had -- like I had mentioned,

1 Q Okay.
2 A His, one of his parents died and then the
3 other one remarried, and there was a homestead
4 property situation, it was the same situation,
5 that went to the other spouse's children.
6 Q Okay. You found out about that through?
7 A Through them as friends, and they had talked
8 about it, and, you know, made an issue of it.
9 And there was one more. I can't remember -- I
10 know there was one more and I can't remember
11 the name.
12 Q Was that a friend?
13 A It was a friend, an associate. I can't recall
14 who it was.
15 Q When did you have these discussions with the
16 Johnsons and the Koprowskis?
17 A It was well before, I mean, I don't remember
18 the years. It could have been probably three,
19 four, five years before that, before we did
20 the transfer of our property.
21 Q Okay. All right. Now, on Schedule 1 or --
22 strike that --
23 Exhibit 1, which is your bankruptcy
24 schedules.
25 A Yes.

1 some friends, specifically my wife's
2 brother-in-law, or her sister's husband.
3 Q And what are their names?
4 A Paul and Dorothy Johnson. Specifically Paul,
5 his father died and his wife remarried. I
6 want to say, one of them died. One of his
7 parents died and then remarried.
8 Q Okay.
9 A And then that parent died, and all the
10 property and everything went to the spouse's
11 children. As far as the homestead or
12 anything, he got nothing.
13 Q Okay. How did you find out about that?
14 A He told us. He was upset about it, you know.
15 Q Okay.
16 A Some friends of ours in Rochester, Norb and
17 Geri Koprowski.
18 Q What was the first name?
19 A Norb, Norbert.
20 Q Oh, Norbert?
21 A Yeah.
22 Q And Geri?
23 A Geri, yeah. His wife is Geri Koprowski.
24 Q Do you know how to spell that?
25 A K-O-P-R-O-W-S-K-I.

1 Q Schedule A is a list of your interests in real
2 estate?
3 A (No response).
4 Q Correct?
5 A Yes.
6 Q And in your bankruptcy schedules, this is a
7 joint filing between you and your spouse,
8 Marjorie, you have listed an interest in the
9 Pillager homestead?
10 A Yes.
11 Q Why did you list that in there?
12 A Well, that was our home, that was our
13 homestead and we both -- we were homesteading
14 it and she owned it and that, you know,
15 still. So it was our property. I didn't feel
16 there was...
17 Q Your spouse had an interest at the very least
18 in that property?
19 A Well, yes. Because she was filing, too,
20 also. It was our homestead, it was our home,
21 I just looked at it as that.
22 Q What was your health situation at the time or
23 preceding the deed which is referenced as
24 Exhibit 5?
25 A My health was actually pretty good. I was

Page 41

1 under a lot of stress and I had felt, you know
 2 -- I hadn't had like heart attacks or chest
 3 pain -- I had some stress, and it wasn't, I
 4 was -- I guess from the point of transferring
 5 the property, I didn't do it as an eminent
 6 danger that I was dying next week or shortly.
 7 I did it for something down in the
 8 future. I guess I could say that if I would
 9 have known that it was a problem, I could have
 10 waited. It was not an emergency situation.
 11 Q Okay. Prior to executing the deed which is
 12 referenced as Exhibit 5, had you -- did you
 13 have a will?
 14 A Yes.
 15 Q And that's identified as Exhibit 10, Will of
 16 Donald D. Samborski?
 17 A Yes.
 18 Q Are you familiar with that document?
 19 A Yes.
 20 Q And this Will was executed, let's see here,
 21 February 5, 1998?
 22 A Yes.
 23 Q And without having read through the Will, just
 24 in your own words, what was the idea behind
 25 the Will, what were you trying to accomplish?

Page 42

1 A Well, with my business and our home and
 2 everything, if something happened, that would
 3 either go to my wife, or if something happened
 4 to both my wife and I, the property would go
 5 to my sons.
 6 Q Okay.
 7 A My assets, all our assets, actually.
 8 Q Is it fair to say that based upon the Will,
 9 which is referenced as Exhibit 10, that your
 10 sons ultimately would receive any property
 11 that you owned, which would also include the
 12 property described in Exhibit 5?
 13 A Yes.
 14 Q Okay. And were you attempting to accomplish
 15 your estate plan set forth in your Will, which
 16 is Exhibit 10, through the deed which is
 17 described as Exhibit 5?
 18 A I guess so, yeah.
 19 Q Okay. Now, you're also aware that if you
 20 predeceased your spouse, that is, you passed
 21 away before your spouse, Marjorie, that your
 22 Will provided that all of your property would
 23 go to Marjorie?
 24 A Yes.
 25 Q And she could, she would have the ability, if

Page 43

1 she wanted to, to execute a different Will and
 2 her own Will?
 3 A The whole situation. So that's why with the
 4 property transferred, no matter what, they
 5 would still get half, they would still have
 6 ownership in the property.
 7 Q She was comfortable with that arrangement?
 8 A Yes. Matter of fact, we talked about that and
 9 the situation with the brother-in-law. And I
 10 said, this way, either way, whatever happens,
 11 they'll still have ownership in the property,
 12 and she was fine with that.
 13 Q Okay.
 14 MR. SANDELIN: Okay.
 15 MR. SEAVER: I have no further
 16 questions. Do you want to explain to him
 17 about reading and signing?
 18 MR. SANDELIN: Yes. Don, you have
 19 the right to waive the reading and signing of
 20 the deposition transcript.
 21 When we're done here, the court
 22 reporter will provide a transcript of all the
 23 answers and questions today.
 24 THE WITNESS: Yes.
 25 MR. SANDELIN: You've got the right

Page 44

1 to review that and make any corrections. You
 2 can't make changes to answers, but you can
 3 make corrections of typographical errors.
 4 What I would suggest is that you
 5 take the opportunity to at least read through
 6 that before you sign that.
 7 THE WITNESS: Okay.
 8 MR. SEAVER: So as I understand it,
 9 the witness did not waive?
 10 MR. SANDELIN: He's not waiving that
 11 right, just to clarify that.
 12
 13 ...
 14
 15 (Whereupon, the deposition
 16 terminated at 11:30 a.m.)
 17
 18
 19
 20
 21
 22
 23
 24
 25

Debtor(s)

SCHEDULE C - PROPERTY CLAIMED AS EXEMPT

Debtor elects the exemptions to which debtor is entitled under:

(Check one box)

11 U.S.C. § 522(b)(1): Exemptions provided in 11 U.S.C. § 522(d). NOTE: These exemptions are available only in certain states.

11 U.S.C. § 522(b)(2): Exemptions available under applicable nonbankruptcy federal laws, state or local law where the debtor's domicile has been located for 180 days immediately preceding the filing of the petition, or for a longer portion of the 180-day period than in any other place, and the debtor's interest as a tenant by the entirety or joint tenant to the extent the interest is exempt from process under applicable nonbankruptcy law.

DESCRIPTION OF PROPERTY	SPECIFY LAW PROVIDING EACH EXEMPTION	VALUE OF CLAIMED EXEMPTION	CURRENT MARKET VALUE OF PROPERTY WITHOUT DEDUCTING EXEMPTIONS
SCHEDULE A - REAL PROPERTY			
Petitioners' homestead located at 5335 Ox Trail SW, County of Cass, Pillager, MN 56473 and legally described as follows: Lot One (1), Siesta Islands, according to the plat thereof on file and of record in the offices of the County Recorder in and for Cass County, State of Minnesota, subject to reservations, restrictions and easements of record, if any.	MSA §§ 510.01, 510.02	75,000.00	75,000.00
SCHEDULE B - PERSONAL PROPERTY			
Routine household goods, furnitures, including audio, video and computer equipment plus two watches located at Petitioners' home.	MSA § 550.37 subd.4(b)	6,000.00	6,000.00
Marjorie M. Samborski has an IRA held by American Express, Client No. 1719 040 8 001, group No. 071 3821 4 001 with a value of \$6,663.85 as of January 7, 2002.	MSA § 550.37 subd. 24	6,663.85	6,663.85
1974 Chevrolet Camaro	MSA § 550.37 subd. 12a	1,200.00	1,200.00
1998 Chevrolet pickup truck purchased by Tailored Systems, Inc. and Donald Samborski which is 3 months in arrears or \$1,068.09 with a balance owed of approximately \$13,700.00	MSA § 550.37 subd. 12a	13,700.00	13,700.00
1999 Chevrolet Blazer owned by Donald Samborski and Tailored Systems, Inc. and purchased through GMAC Finance and the balance owed on the vehicle is approximately \$15,800.00	MSA § 550.37 subd. 12a	15,800.00	15,800.00

© 1993-2001 EZ-Filing, Inc. [1-800-998-2424] - Forms Software Only

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

In re:

DONALD D. SAMBORSKI and
MARJORIE M. SAMBORSKI,

Debtors.

ORDER SUSTAINING TRUSTEE'S
OBJECTION TO DEBTORS' CLAIM
OF HOMESTEAD EXEMPTION,
IN PART

BKY 02-50275

At Duluth, Minnesota, this 7th day of February, 2003.

This Chapter 7 case came on before the Court on August 14, 2002, for a hearing on the Trustee's objection to the Debtors' claim of exemption in certain real estate located in Cass County, Minnesota. Terri A. Georgen appeared as Trustee and counsel to the bankruptcy estate. The Debtors appeared by their attorney, Barbara J. May. Upon the objection, the Debtors' response, and the arguments of counsel, the Court took the matter under advisement. On February 6, 2003, the Court memorialized its decision by reading findings of fact and conclusions of law on the record at a hearing conducted via telephonic conference call, pursuant to Fed. R. Civ. P. 52(a) and Fed. R. Bankr. P. 9014. Upon the record thus made,

IT IS HEREBY DETERMINED AND ORDERED:

1. Via a quit claim deed executed on July 6, 2001, and filed for record on July 9, 2001, in the office of the Cass County Recorder as Document No. 437694, the Debtors transferred undivided one-third interests in the following real estate in Cass County, Minnesota:

28E

NOTICE OF ELECTRONIC ENTRY AND
FILING ORDER OR JUDGMENT
Filed and Docket Entry made on 2/7/03
Patrick G. De Wane, Clerk, By jrb

Lot One (1), Siesta Islands

to Trevor J. Samborski and Jared J. Samborski, and an undivided one-third interest in that real estate back to Debtor Marjorie M. Samborski.

2. Because the ownership and record title to that real estate remained in that status on March 26, 2002, the date that the Debtors filed the voluntary petition that commenced this case under Chapter 7, the Debtors lacked ownership in any interest in the real estate other than the undivided one-third interest then held by Debtor Marjorie M. Samborski. Hence, the Debtors could not claim an exemption in the remaining two-thirds interest pursuant to 11 U.S.C. §522(b)(2)(A).

3. As a result, the Trustee's objection to the Debtors' claim of exemption in a full fee interest in the real estate is sustained; Debtor Marjorie M. Samborski's claim of exemption in the real estate is allowed, to the extent of her undivided one-third interest but in no more than that.

4. This adjudication does not address the issue of whether the transfer identified in Term 1 is avoidable at the Trustee's instance, under any provision of Chapter 5 of the Bankruptcy Code or any other remedy available to the Trustee. All such issues will be reached and decided in any proceeding for such relief that the Trustee may bring.

BY THE COURT:

1E1 Gregory F. Kishel

GREGORY F. KISHEL
CHIEF UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

BKY No. 02-50275
ADV No. 03-5050

Donald D. Samborski and
Marjorie M. Samborski,

Debtors.

Terri A. Georgen, Trustee,

Plaintiff,

**MEMORANDUM IN SUPPORT OF PLAINTIFF'S
SUMMARY JUDGMENT MOTION**

vs.

Trevor Samborski and Jared J. Samborski,

Defendants.

FACTUAL BACKGROUND

Within one year prior to filing their Bankruptcy Petition, the Debtors in this case transferred a parcel of real estate, held in the names of the Debtors to Marjorie Samborski, who is one of the Debtors, Trevor Samborski and Jared Samborski, who are the Debtors' sons. At the time of filing both of the Debtors were residing at the property and in their Bankruptcy Schedules, ignored the fact that they only retained a 1/3 interest in the property and listed what they perceived to be the entire value of the property as exempt. The Trustee discovered the transfer and commenced this adversary proceeding to recover the 2/3 interest in the property that was transferred. The Trustee now brings this Summary Judgment motion seeking an order that the transfer was fraudulent and ordering recovery of the transfer.

UNDISPUTED FACTS

The following facts are established through public records or the testimony of one of the Debtors and, therefore, are not in dispute:

1. On or about July 6, 2001, the Debtors executed a deed (“Transfer”) which transferred their fee interest in a developed parcel of real estate to Marjorie Samborski, who is one of the debtors, Trevor Samborski and Jared Samborski, the Debtors’ sons and the Defendants in this Adversary Proceeding. The property transferred is commonly referred to as 5335 Ox Trail SW, city of Pillager, state of Minnesota, is located in Cass County, Minnesota, and is legally described as:

Lot 1, Siesta Islands, County of Cass, State of Minnesota

 (“Property”).
2. The July 6, 2001 deed evidencing the Transfer was recorded in the Office of the Cass County Recorder on July 9, 2001 as Document No. 437694.
3. The Debtors did not receive reasonably equivalent value in return for the Transfer. In fact, they received nothing in return for the Transfer.
4. The Debtors were insolvent at the time of the Transfer.
5. Donald Samborski was in good health at the time of the Transfer.
6. Of the 3 transferees, one, Marjorie, is a co-debtor and the remaining two are the Debtors’ sons.
7. On March 26, 2002, the Debtors filed their voluntary Chapter 7 Bankruptcy petition.
8. At the time of filing, the Debtors were residing at the Property.

9. As a result of the Transfer Donald Samborski had no interest in the Property and Marjorie Samborski held only 1/3 interest in the Property at the time the Debtors filed their petition.
10. In their bankruptcy schedules, the Debtors listed the entire Property as an asset and indicated that it was jointly owned by the Debtors in fee simple.
11. In their bankruptcy schedules, the Debtors claimed the entire Property as exempt.
12. This Court, in its order dated February 7, 2003, limited the Debtors' homestead exemption to the 1/3 interest in the Property held by Marjorie Samborski and stated that "the Debtors could not claim an exemption in the remaining two-thirds interest... ."

LEGAL ARGUMENT

A. Standard for Summary Judgment.

Summary judgment is properly regarded, not as a disfavored procedural shortcut, but an integral part of the Federal Rules, designed to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. V. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Summary judgment will be granted if there is no issue to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment must be entered if, after adequate discovery time, the party against whom relief is sought fails to make a sufficient showing to establish the existence of an element essential to its case upon which it will bear the burden of proof in trial. *Celotex Corp. V. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 56.01).

The moving party must advise the court of all evidence which it believes demonstrates the absence of a genuine issue of material fact, and that it is entitled to judgment as a matter of law.

Celotex, supra, *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Once the movant has made its showing the burden shifts to the non-moving party who must establish by its own affidavits, or other admissible evidence, that there are specific and genuine issues of material fact warranting a trial. *Celotex*, at 324. The non-moving party must present specific, significant, and probative evidence supporting its case. *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990).

B. Fraudulent Transfer.

The Trustee seeks to avoid, as a fraudulent transfer, the Debtors' transfer to the Defendants of 2/3 of the Debtors' interest in the Property.

A fraudulent transfer is defined by 11 U.S.C. § 548(a)(1)(B) as “any transfer of an interest of the debtor in property. . . that was made or incurred on or within one year of the date of the filing of the petition” in return for which “the debtor received less than reasonably equivalent value” . . . and “was insolvent on the date that such transfer was made.”

I. There was a transfer of an interest in the Property of the Debtor.

The Debtors executed a deed on July 6, 2001 wherein they transferred their joint fee interest in the Property to Marjorie Samborski, who is one of the co-debtors, and Trevor Samborski and Jared Samborski, the Defendants, as tenants in common. Because the transfer resulted in only one-third of the Property becoming an asset of one of the co-debtors, the effect of the transfer was to fraudulently transfer 2/3 of the Property to the defendants. If, arguendo, it is assumed that the value for the entire Property set forth in the Debtors' schedules, \$75,000.00 is accurate, the Debtors fraudulently transferred an asset worth \$50,000.00 to the Defendants.

II. The Debtors did not receive “reasonably equivalent value” for the Transfer.

The Debtors did not receive any value, let alone reasonably equivalent value, for the Transfer. An examination of the Defendants’ discovery responses and the testimony of Donald Samborski evidences this. The relevant portions of said discovery responses and testimony are as follows:

a) Defendants’ Response to Discovery:

Plaintiff’s Interrogatory No. 5 - State the amount that you paid to the Debtors or either of the Debtors in return for their transfer of an interest in the Property to you.

Response: We did not pay anything monetary to my mother and father the same as if the property were transferred to us upon their death.

b) Testimony of Debtor Donald D. Samborski in his Rule 2004 Examination taken on June 21, 2002. The transaction referred to is the Transfer as that term is used herein. Questions (Q) are posed by the Trustee, Terri A. Georgen and the Answers (A) are the testimony of Donald D. Samborski:

Q. Was any consideration paid by Marjorie, Trevor or Jared for that transaction?

A. No.

Q. Nothing was paid at all, you and your spouse just transferred the property; is that your testimony?

A. To them, yes.

- c) Testimony of Debtor Donald D. Samborski in his Rule 2004 examination taken on May 21, 2004. The transaction referred to is the Transfer as that term is used herein. Questions (Q) are posed by the Trustee's Attorney, Roger B. Seaver and the Answers (A) are the testimony of Donald D. Samborski:

Page 23, Line 7 Q. And what did you receive as consideration or payment for this transfer?

A. Nothing

Page 24, Line 17 Q. And have you received anything other than funds or money in return for this transfer?

A. No.

Q. Have any funds or property been transferred to any other entity on your behalf or for your benefit in return for this transfer?

A. No.

Q. Did your wife receive any money or property in return for this transfer?

A. No.

III. The Transfer occurred within one year of filing.

The Debtors filed their petition on March 26, 2002. The deed evidencing the Transfer was executed on July 6, 2001 and was recorded on July 9, 2001, both dates fall within one year prior to filing.

C. Anticipated Defenses

The Plaintiff anticipates that the Defendants will put forward at least two defenses to this motion. They are each discussed separately under the following headings.

I. No harm, No Foul -

It is anticipated that the Defendants, will attempt to rely upon dicta in the case of *In re Miera*, 104 B.R. 989 (BKY D. Minn 1989) and will assert what is referred to as the “no harm, no foul” concept. In *Miera*, the Debtor transferred title to his unencumbered homestead from his name solely to joint tenancy with his sister. The Trustee brought an action seeking to avoid the transfer under 11 U.S.C. 548 and to deny Debtor’s discharge under 11 U.S.C. 727, due to the Debtor’s alleged intent to hinder, delay or defraud creditors through the effective alienation of one-half of an unencumbered asset, his homestead.

The *Miera* defendants moved for summary judgement with two alternative arguments. First, they argued that the transfer was of an asset that, had it remained solely in the name of the Debtor, could have been claimed as exempt by the Debtor and, as such, would have been as unreachable to creditors as it was post-transfer, meaning that, given the “no harm” to creditors there was “no foul” and essentially no transfer of property. Second, the defendants argued in the alternative that, assuming the transfer were actionable under 11 U.S.C. 548(a)(1) and 727(a)(2) the Trustee had not put forward any evidence of Debtor’s intent, a necessary element of an action based upon the Debtor’s intent to hinder, delay or defraud creditors. After analysis, the Court denied the Defendant’s summary judgment motion stating, with regards to Defendant’s first argument that “[f]or the purposes of Plaintiff’s causes of action, there was a “transfer of property”

actionable under §§ 548(a)(1) and 727(a)(2)(A)... .” As to the Defendant’s second argument, the Court held that the Defendant’s intent presented a triable issue of fact.

This Court made reference, in dicta, to a “no harm, no foul” rule in *Miera*. However, such a rule has no application in avoidance cases as made clear by a recent 8th Circuit BAP decision which directly holds that a Bankruptcy Trustee has the authority to avoid and preserve, for the benefit of the estate, a transfer of an interest in exempt property. *In Re Arzt*, 252 B.R. 138, 142 (8th Cir. BAP 2000). The *Arzt* case dealt with a Trustee’s avoidance of a voluntary transfer of an interest in property which would have been exempt in the absence of the transfer. The *Arzt* defendant asserted the “no harm, no foul” defense in form, if not in name. In *Arzt*, the Trustee sought to avoid consensual transfers, in the form of mortgages encumbering the Debtors’ exempt homestead. The transferees conceded that the transfers were preferential but relied on the “no harm, no foul” defense by asserting that the Trustee could not avoid the transfers because they were of exempt property that creditors could not otherwise reach. The *Arzt* court, in applying 11 U.S.C. § 522(g), looked to a Supreme Court decision, *Hartford Underwriters v. Union Planters Bank, N.A. (In re Hen House Interstate, Inc.)*, 530 U.S. 1, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000), which analyzed pre-code practice and other legal conclusions that conflict with the language of the Bankruptcy Code and determined that where the code is clear and unambiguous, the text of the code prevails. With regards to the voluntary transfers of otherwise exempt property, the *Arzt* court held that:

“It may be true that creditors cannot reach a debtor’s exempt interest in property, but it is also true that debtors are free to voluntarily encumber that interest. That is what happened in this case, and since that voluntary transfer was preferential, the Trustee’s recovery of the transfer is for the benefit of the estate, not the debtors.”

Arzt, 252 B.R. at 142.

The Ninth Circuit BAP has also considered this issue in a case very much like the case at bar. In the case of *In re Trujillo*, 215 B.R. 200 (9th Cir.BAP (Nev.),1997) the debtor fraudulently transferred a house and vehicles that would otherwise have been exempt and not reachable by creditors. In addition to not receiving reasonably equivalent value for the transfers, the Debtors retained possession and control of the property. The Trustee brought an action seeking to avoid the transfers, deny the Debtors' exemptions in those avoided transfers and denial of discharge. The Bankruptcy Court found in favor of the Trustee on all counts but the denial of discharge. The debtors and the transferees appealed. The Ninth Circuit BAP affirmed. The Debtors did not appeal the denial of their exemptions but, rather, argued that even if the transfers were fraudulent, they should not be avoided under the "no harm, no foul" concept. Before holding that the Bankruptcy Court's decision on the matter was final due to the Debtors' failure to appeal the exemption denial, the Trujillo court stated that the "no harm, no foul" concept was directly contradicted by 11 U.S.C. § 522(g). In this case, just as in Trujillo, the Debtors transferred the Property, but carried on as if the Transfer had never taken place. In this case, applying 11 U.S.C. §§ 522(g) and 548(a)(1)(B), with facts similar to *Trujillo*, the results are the same - the transfers are avoided.

II. Estate Planning

It is also anticipated that the Defendants will assert the "defense" that the Debtors were merely pursuing a plan to maximize their children's share in the event of the death of one or both of the Debtors and that they did not intend any fraudulent transfer. This issue might be pertinent to the case at bar if the Trustee were alleging that the Debtors transferred the Property with the intent to hinder, delay or defraud creditors. However, in this case the

Trustee is asserting that the Transfer was fraudulent on the basis that the Debtors did not receive reasonably equivalent value for the Transfer under 11 U.S.C. 548(a)(1)(B). As such, “the debtor's intent [is] irrelevant... .” *In Re Bob’s Sea Ray Boats, Inc.*, 144 B.R. 451, 457 (Bkr. N.D. 1992).

CONCLUSION

The Trustee has shown, through testimony and through public records, that the Debtors in this case, within one year prior to filing, voluntarily transferred an asset for which they did not receive reasonably equivalent value. The Trustee has also shown that, pursuant to recent case law, the anticipated “no harm, no foul” defense is inapplicable to this case. The Debtors voluntarily transferred the Property. Had they not transferred the Property, they may have been able to claim its entire value as exempt. However, because the transfer was voluntary, once the Trustee avoids the Transfer as a fraudulent transfer, the avoided interest is preserved for the benefit of the estate. The Debtors’ intent in making the Transfer is irrelevant. For these reasons this Court should grant the Trustee summary judgment on all counts of her Complaint.

FULLER, SEAVER & RAMETTE, P.A.

Dated: July __2__, 2004

By: __/e/ Roger B. Seaver _____

Roger B. Seaver 251227

Randall L. Seaver 152882

12400 Portland Avenue South, Suite 132
Burnsville, MN 55337

(952) 890-0888

Attorneys for Plaintiff

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

BKY No. 02-50275
ADV No. 03-5050

Donald D. Samborski and
Marjorie M. Samborski,

Debtors.

Terri A. Georgen, Trustee,

Plaintiff,

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER JUDGMENT**

vs.

Trevor Samborski and Jared J. Samborski,

Defendants.

The above matter came before the court on the Plaintiff's motion for summary judgment. Appearances were as noted upon the record. Based upon all the files, records and pleadings herein, and the court being fully advised in the premises, the court makes the following:

FINDINGS OF FACT:

1. On or about July 6, 2001, the Debtors executed a deed ("Transfer") which transferred their fee interest in a developed parcel of real estate to Marjorie Samborski, who is one of the debtors, Trevor Samborski and Jared Samborski, the Debtors' sons and the Defendants in this Adversary Proceeding. The property transferred is commonly referred to as 5335 Ox Trail SW, city of Pillager, state of Minnesota, is located in Cass County, Minnesota, and is legally described as:

Lot 1, Siesta Islands, County of Cass, State of Minnesota

("Property").

2. The July 6, 2001 deed evidencing the Transfer was recorded in the Office of the Cass County Recorder on July 9, 2001 as Document No. 437694.
3. The Debtors received nothing in return for the Transfer.
4. The Debtors were insolvent at the time of the Transfer.
5. Donald Samborski was in good health at the time of the Transfer.
6. Of the 3 transferees, one, Marjorie, is a co-debtor and the remaining two are the Debtors' sons.
7. On March 26, 2002, the Debtors filed their voluntary Chapter 7 Bankruptcy petition.
8. At the time of filing, the Debtors were residing at the Property.
9. As a result of the Transfer Donald Samborski had no interest in the Property and Marjorie Samborski held only 1/3 interest in the Property at the time the Debtors filed their petition.
10. In their bankruptcy schedules, the Debtors listed the entire Property as an asset and indicated that it was jointly owned by the Debtors in fee simple.
11. In their bankruptcy schedules, the Debtors claimed the entire Property as exempt.
12. The Trustee in this action seeks to recover the transfer of 2/3 of the Property for the benefit of the estate.

CONCLUSIONS OF LAW

1. The Transfer was a fraudulent transfer, pursuant to 11 U.S.C. §547 because
 - a. The Transfer was a transfer of an interest in the Debtors' property;
 - b. For which the Debtors did not receive "reasonably equivalent value";
 - c. And which occurred within one year prior to filing.
2. All of the Defendant's affirmative defenses are without merit.

3. The transfer by the Debtors to the Defendants of an undivided 2/3 interest in that property legally described as:

Lot 1, Siesta Islands, Cass County, Minnesota

is avoided, and the transfer of that property interest is recovered from the Defendants pursuant to 11 U.S.C. § 550, and the avoided transfer is automatically preserved for the estate pursuant to 11 U.S.C. § 551.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

Dated: _____, 2004

Gregory F. Kishel
Chief U.S. Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

BKY No. 02-50275
ADV No. 03-5050

Donald D. Samborski and
Marjorie M. Samborski,

Debtors.

Terri A. Georgen, Trustee,

Plaintiff,

vs.

Trevor Samborski and Jared J. Samborski,

Defendants.

UNSWORN CERTIFICATE OF SERVICE

I, Roger B. Seaver, declare under penalty of perjury that on July 3, 2004, I mailed a copy of **Plaintiff's Notice of Motion and Motion for Summary Judgment, Memorandum in Support of Plaintiff's Motion for Summary Judgment, Affidavit of Roger B. Seaver and the Proposed Order** along with all exhibits thereto first class mail, postage prepaid to each entity named below at the address stated below for each entity:

Paul J. Sandelin
SANDELIN LAW OFFICE
30849 First St.
PO Box 298
Pequot Lakes, MN 56472

Office of the United States Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Jared J. Samborski
1005 South 6th Street, Apt. 3
Brainerd, MN 56401

Trevor Samborski
1213 Jacksondowns Boulevard
Nashville, TN 37214

Donald Samborski and Marjorie Samborski
5335 Ox Trail SW
Pillager, MN 56473

FULLER, SEAVER & RAMETTE, P.A.

Dated: July 3, 2004

By: _____/e/ Roger Seaver _____
Roger B. Seaver 251227
12400 Portland Avenue South, Suite 132
Burnsville, MN 55337
(952) 890-0888