

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re Barthel Construction, Inc.,
2463

BKY 3-91-

Debtor.

Chapter 7

Michael J. Iannacone, Trustee

ADV 3-93-0132

Plaintiff,

vs.

MEMORANDUM ORDER

Daniel Barthel,

Defendant.

This matter came on for hearing on Wednesday, December 1, 1993, on motion for summary judgment by the defendant. Appearances are noted in the record. The Court, having received and considered arguments and memoranda of law of counsel, and being fully advised in the matter, now makes this MEMORANDUM ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

FACTS

Barthel Construction, Inc. ("Debtor") was in the business of building and developing residential and commercial properties. On May 1, 1991 an involuntary petition for relief under Chapter 11 of the United States Bankruptcy Code ("Code") was filed against the Debtor. The Debtor's case was subsequently converted to a Chapter 7 case under the Code on September 11, 1991. Michael J. Iannacone ("Trustee") was appointed the trustee of this case. The Trustee filed this action on June 24, 1993.

Defendant Daniel Barthel ("Barthel") is the son of the sole shareholder of the Debtor, Kenneth Barthel. Defendant Barthel was employed by the Debtor, and served as the corporate Secretary of the Debtor until his removal from that position by Kenneth Barthel in October, 1990.(FN1) See Kenneth Barthel Transcript, pages 3 and

4.

In the Spring of 1990, defendant Barthel executed a Purchase Agreement for a single-family residence owned by the Debtor, in Wright County, Minnesota ("Property"). Complaint, 6 7.

On December 10, 1990, the Debtor conveyed to defendant Barthel the Property by Warranty Deed. Complaint, 6 8. Defendant Barthel paid \$81,000 in consideration for the conveyance. Id.

The Trustee filed this fraudulent transfer action against the defendant asserting that the Debtor received less than reasonably equivalent value for the Property and that the value of the Property at the time of conveyance was in excess of \$125,000. The Trustee seeks to avoid the transfer and recover property pursuant

to 11 U.S.C. Sections 548 and 550.

a. Defendant Barthel's Summary Judgment Motion

Defendant Barthel filed this timely motion for summary judgment on November 2, 1993. Defendant Barthel argues that the Debtor received reasonably equivalent value for the Property, based upon: a pre-build independent appraisal; a 1991 Notice of Assessment by Wright County, Minnesota ("Notice of Assessment"); and, an affidavit by the defendant stating that he made improvements to the Property estimated to be \$25,000 in value.

On October 3, 1990, John C. Farrell, an independent appraiser, conducted a pre-build appraisal of the Property for the construction lender based upon the plans and specs of the home to be built. Mr. Farrell valued the Property at \$90,900. He came to that valuation after analyzing three comparable homes sold from the surrounding neighborhoods. See Exhibit A, attached to the Affidavit of Kenneth Barthel, filed November 2, 1993 ("First Affidavit of Kenneth Barthel"). However, the defendant argues that the pre-build appraisal should be reduced by \$8,400, the value of an attached garage. The attached garage was included in the original plan, but not subsequently built by the Debtor. See First Affidavit of Kenneth Barthel. The pre-build appraisal value then reduces to \$81,500(FN2) [actually \$82,500] when the value of the

garage

is deducted. The defendant argues that a difference of only \$500 [actually \$1,500] exists between the purchase price and the reduced appraisal value. Accordingly, the defendant believes that reasonably equivalent value was given for the Property.

As further evidence that reasonable equivalent value was given for the Property, the defendant points to a Notice of Assessment, in the amount of \$86,000. See Exhibit A, attached to the Affidavit of Daniel Barthel. The defendant asserts that the Notice of Assessment reflects certain improvements he made to the Property after it was conveyed to him. Namely, a garage, landscaping, painting and other refinements were completed by him, a value the defendant estimates at \$25,000. See Affidavit of Daniel Barthel. Even in light of the post-purchase improvements to the Property, the defendant argues that the Notice of Assessment reflects a value only \$5,000 more than the purchase price. Therefore, the defendant believes that the Debtor received reasonably equivalent value for the Property.

b. The Trustee's Response to Defendant's Summary Judgment Motion

The Trustee introduces several bases for denying defendant's summary judgment motion. The Debtor executed, on September 20, 1990, a Sworn Construction Statement to Sherburne County Abstract Company ("Sworn Construction Statement"). This was completed at the time of closing of the construction loan for the Property. The Sworn Construction Statement detailed a construction cost of \$107,500. See Exhibit A, attached to the Affidavit of Cathy McManus. Furthermore, according to Cathy McManus' Affidavit, the Sworn Construction Statement provides the title insurance company and its insured, the lender, the identities of all subcontractors furnishing labor and material to the property and the dollar amount of the materials and labor furnished. The Trustee argues that, based on the figures in the Sworn Construction Statement, the cost of constructing the home, along with the land, exceeds the purchase price by \$26,500.(FN3)

Additionally, the Trustee alleges that the pre-build appraisal has limited value since it was conducted prior to the construction of the home. Moreover, the Trustee focuses the Court's attention

to a statement in the appraisal where the appraiser states that "[t]he sale is an inter-family transaction below market."(FN4) The Trustee suggests that the appraiser's statement supports the Trustee's contention that the Debtor did not receive reasonably equivalent value for the Property.

Finally, the Trustee seeks to introduce the testimony of Kenneth Barthel regarding the Property in another proceeding to suggest that reasonably equivalent value was not received for the Property.(FN5) Kenneth Barthel testified that the value of the land alone is \$15,000 to \$20,000. See Kenneth Barthel Transcript, page 17.(FN6) The Trustee further states that "Kenneth Barthel has previously testified in another proceeding that he 'passed on to his son the good fortune that Barthel Construction enjoyed' in the transaction by selling the Property to him at lower than fair market value." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment and Sanctions, page 3. Additionally, the Trustee implies that since Kenneth Barthel is a licensed real estate agent, he should be familiar with the Property's value. The Trustee seems to suggest that those statements are indicative of the Debtor receiving less than reasonably equivalent value for the Property because of the familial relationship of the parties.

c. Defendant Barthel's Response to Evidence of the Sworn Construction Statement

Defendant Barthel filed a second affidavit by Kenneth Barthel on November 30, 1993 ("Second Affidavit of Kenneth Barthel") in response to the Sworn Construction Statement. Kenneth Barthel states that, "[i]n my opinion the Sworn Construction Statement is not indicative of the fair market value of the Property." See Second Affidavit of Kenneth Barthel. Kenneth Barthel further asserts the the actual cost of building the house, including the lot, was \$75,000. Some of the savings came from not building the garage, and from defendant Barthel completing a lot of the work needed. Furthermore, Kenneth Barthel states that only cost increases need be reported in the Sworn Construction Statement, not cost savings.

DISCUSSION

Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 56, as incorporated in the Federal Rules of Bankruptcy Procedure ("FRBP") 7056, outlines the standards for summary judgment. Fed. R. Civ. P. 56(c) states that:

...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

"...[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 256. The moving party has the burden of showing the absence of genuine issue to any material fact, and materials presented by the moving party must be viewed in light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

The only issue addressed in this fraudulent transfer action is whether the Debtor received reasonably equivalent value for the Property. Pursuant to Section 548 of the Code:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year

before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and ... (FN7)

The Trustee has pointed to several facts which arguably support his contention that the Debtor did not receive reasonably equivalent value for the Property. For instance, the Sworn Construction Statement suggests that the cost of constructing the Property alone was \$26,500 more than the purchase price paid by the defendant. While Kenneth Barthel's second affidavit states that the cost of building the house, including the lot did not exceed \$75,000, one must question the credibility of this affiant's statement. This is particularly so in light of previous statements, arguably assented to by Kenneth Barthel that defendant Barthel benefitted from the "good fortune" of the Debtor by purchasing the home for less than fair market value. At the very least, Kenneth Barthel must be subject to examination and cross-examination to test the credibility of his statements. This can only be accomplished through a trial, not on a summary judgment motion.

Furthermore, the purpose, use and industry standard related to the Sworn Construction Statement needs clarification. Kenneth Barthel's second affidavit alleges certain general understandings on the use of the Sworn Construction Statement. However, the Court cannot determine on this Record whether Kenneth Barthel's understanding is the generally accepted view in the industry, or simply Kenneth Barthel's view. And, once again, the accuracy of Kenneth Barthel's statements must be tested. This can only be accomplished in a trial setting. The Court also notes that pursuant to Section 101(31)(B)(vi), (FN8) defendant Barthel falls

within

the statutory definition of an insider. According to the Notes of Committee on the Judiciary, Senate Report No. 95-989, an insider has a sufficiently close relationship to debtor that his conduct is subject to closer scrutiny than those dealing at arms length with the debtor. Defendant Barthel is the son of the president and sole shareholder of the Debtor, Kenneth Barthel. Accordingly, this Court believes that a closer scrutiny of the transaction between the Debtor and Defendant Barthel is warranted.

In summary, defendant Barthel has not met its burden of showing the absence of genuine issue to any material fact. While the defendant has support for its position that reasonably equivalent value was paid for the Property, the Trustee has introduced evidence to the contrary. Based on the conflicting

evidence with respect to the value of the Property and the closer scrutiny that must attach to this transaction due to the insider status of the defendant, this Court can only conclude that there is a genuine issue for trial. Accordingly, summary judgment is inappropriate in this instance.

DISPOSITION

Based upon the foregoing, it is HEREBY ORDERED:
Defendant Barthel's motion for summary judgment is denied.

By the Court:

Dated

DENNIS D. O'BRIEN
U.S. BANKRUPTCY JUDGE

(FN1) Kenneth Barthel cited no specific reason for removing his son from the position of corporate secretary.

(FN2) Unfortunately, the defendant's calculation is incorrect. Using the defendant's numbers, when \$8,400 is subtracted from \$90,900, the pre-build appraisal reduces to \$82,500 not \$81,500. Therefore, the difference between the purchase price and the reduced appraisal value is \$1,500 not \$500.

(FN3) The Sworn Construction Statement listed a total cost of \$107,500 and subtracting the \$81,000 purchase price from that figure, a difference of \$26,500 exists between the total cost listed in the Sworn Construction Statement and the purchase price.

(FN4) The pre-build appraisal does not state the basis for this statement.

(FN5) G & L Drywall v. Daniel K. Barthel, and Scherer Bros. Lumber Co., Hennepin Cty. Dist. Ct., 10th Judicial Dist., Minn.

(FN6) In the Sworn Construction Statement, the land cost is listed at \$25,000.

(FN7) Section 548(a)(2)(A) is the only portion at issue here. The Trustee has the burden of proving the additional elements of Section 548.

(FN8) 101(31) "insider" includes--
(B) if the debtor is a corporation--
(vi) relative of a general partner, director, officer,
or
person in control of the debtor;

END FOOTNOTE