UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In re:

RICHARD OWEN WATLAND,
aka/dba/asf, R.O. Watland Realty, Inc., and KAREN JOANN WATLAND,

ORDER RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Debtors.

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BRIAN F. LEONARD, Trustee,

BKY 3-91-2340

Plaintiff,

ADV 3-91-377

v.

NATIONWIDE REALTY, INC.,

Defendant.

****

At St. Paul, Minnesota, this 1st day of June, 1994.

This adversary proceeding came on before the Court on November 10, 1992, for hearing on the Plaintiff's motion for summary judgment. The Plaintiff appeared by his attorney, John T. Kelly. The Defendant appeared by its attorney, Loren M. Solfest. Upon the moving and responsive documents and the arguments of counsel, the Court makes the following order.

NATURE OF PROCEEDING

Debtor Richard Owen Watland ("the Debtor"), a licensed real estate agent, filed a voluntary petition for relief under Chapter 7 on April 25, 1991. The Plaintiff is the trustee of his bankruptcy estate. The Defendant is a Burnsville, Minnesota real estate agency. The Debtor was affiliated with the Defendant for more than a decade before his bankruptcy filing, and was a shareholder in it. On February 4, 1991, the Defendant redeemed the Debtor's 4,200 shares of stock.

In his amended complaint in this adversary proceeding, the Plaintiff requests the avoidance of that transfer, and a money judgment against the Defendant to effectuate that avoidance pursuant to 11 U.S.C. Section 550(a). He founds his request for avoidance on two different statutory theories: 11 U.S.C. Section 547(b), pertaining to preferential transfers, and 11 U.S.C. Section 548(a)(2), pertaining to fraudulent transfers.

In its answer, the Defendant denies the existence of several of the elements of both of the Plaintiff's

statutory theories of recovery, and pleads a number of affirmative defenses.

MOTION AT BAR

The Plaintiff now moves for summary judgment pursuant to Fed. R. Bankr. P. 7056.(FN1) For the purposes of this motion, he proceeds solely under his fraudulent-transfer theory of recovery.

In its response, the Defendant takes alternate positions. As its main line of defense, it argues that there are genuine issues of material fact going to one of the essential elements of the Plaintiff's theory of recovery. Assuming a contrary holding on that point, it then argues that the Plaintiff is not entitled to recover money on account of the avoided transfer. As the Defendant would have it, the Plaintiff cannot get anything more than in rem relief, a judgment restoring the bankruptcy estate to the ownership of the actual shares of stock that were redeemed.

UNDISPUTED FACTS

The historical backdrop to this adversary proceeding is uncontroverted as a matter of fact. This includes the execution of all of the relevant documents.

Before October, 1980, the Debtor was engaged in the real estate business through his own agency, ABC Watland Realty ("ABC"). The Debtor was the sole shareholder of this agency. During that month, ABC merged into the Defendant. As part of the transaction, the Defendant acquired ABC's "furnishings, equipment, licensed sales associates and their possible production." In consideration, the Defendant issued 4,200 shares of its common stock to the Debtor.

On December 4, 1980, the Defendant's shareholders executed a stock redemption agreement ("S.R.A."). The Debtor was a party to this agreement. The preamble to the S.R.A. contained a recitation that its parties entered into it to

> . . . ensure the continuity of harmonious management of the corporation by providing for the event of a party's death, incapacity, or if he wishes to sell his shares during his lifetime.

To carry out this goal, the agreement restricted the sale or other transfer of shares in the Defendant as follows: for thirty days after a shareholder elected to divest himself of his shares, the Defendant had the right to redeem them S.R.A., Article Two, Paragraph 1-2. The price was specified in the S.R.A. as $5.00 per share, subject to subsequent adjustment by "seventy-five (75%) percent affirmative action of the shares of common stock being voted by the stockholders yearly." S.R.A., Article Two, Paragraph 2 and Article Five, Paragraph 1. If the Defendant did not exercise this right, other shareholders had a right to purchase the shares for an additional thirty days. The selling shareholder had to divide his shares equally among all shareholder-purchasers who exercised this

option. S.R.A., Article Two, Paragraph 3. If no party elected either alternative, the selling shareholder was free to transfer his shares to any "qualified purchaser." S.R.A., Article Two, Paragraph 4. The S.R.A. does not define "qualified purchaser"; presumably, at minimum a purchaser had to be a licensed real estate agent, as he or she would be "entitled to be on the same commission compensation program as existing stockholders." Id.

After he merged ABC with the Defendant, the Debtor formed another corporation called R.O. Watland Realty, Inc. ("Watland Realty"). Watland Realty then undertook to perform work for the Defendant as an independent contractor. Over the ensuing years, the Defendant extended credit to Watland Realty on a revolving line, to afford Watland Realty funds to pay its own operating expenses. By November, 1990, the outstanding balance on this line of credit was $34,398.95. To consolidate and evidence the liability, Watland Realty executed a promissory note in that amount in favor of the Defendant on November 18, 1990.

Clearly, both the Debtor and the Defendant's other principals found the existence of this debt troublesome; they entered into negotiations to try to find a way of satisfying it. Ultimately, the Debtor agreed to surrender his shares into the Defendant's treasury, in exchange for a reduction in the outstanding balance of Watland Realty's debt to the Defendant. On February 4, 1991, the Defendant redeemed the shares for a credited amount of $27,300.00. The price this represented ($6.50 per share) was the book value of the Defendant's outstanding stock, as set by its shareholders on April 1, 1987, pursuant to its by-laws.

The Defendant then set off the deemed redemption price of the shares against the debt of Watland Realty as it carried it on its books. At that time, Kenneth O. Larson, the Defendant's President, concluded that the Defendant's rights against Watland Realty under the promissory note had little or no value.

DISCUSSION

I. STANDARDS FOR SUMMARY JUDGMENT

The threshold inquiry on any motion for summary judgment is whether there is a "genuine issue as to any material fact." Fed. R. Civ. P. 56(c). When a plaintiff is moving for summary judgment on its claim against the Defendant, it bears the initial burden on this issue. It carries it by mustering all of the evidence which establishes the elements of its claim, and then pointing out the lack of evidence denying those elements' existence. In re Mathern, 137 B.R. 311, 314 (Bankr. D. Minn. 1992), aff'd, 141 B.R. 667 (D. Minn. 1992). If the defendant has pleaded affirmative defenses, the Plaintiff moving for summary judgment must also point out, as a threshold matter, that there is an absence of evidence to support the defense(s). In re Johnson, 139 B.R. 208, 216-219 (Bankr. D. Minn. 1992).

To successfully resist a plaintiff's motion for summary judgment in its initial phase, the defendant must produce countering evidence that would support a jury verdict in its own favor on the plaintiff's claim or on its own affirmative defense. Anderson v. Liberty Lobby, Inc.,

477 U.S. 242, 250-252; Heideman v. PFL, Inc., 904 F.2d 1262, 1265 (8th Cir. 1990); In re Johnson, 139 B.R. at 214; In re Mathern, 137 B.R. at 314. Such evidence "must do more than simply show that there is some metaphysical doubt as to the material fact" in question, Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); it must be "significant" and "probative," Johnson v. Enron Corp., 906 F.2d 1234, 1237 (8th Cir. 1990), as well as "substantial," Krause v. Perryman, 827 F.2d 347, 350 (8th Cir. 1987). If the defendant's evidence meets these requirements, the record will present a triable issue or issues of fact and the plaintiff's motion must be denied. If, however, it does not, and if the moving party then chose that the law then requires judgment in its favor on the facts thus established, the court must grant the motion. Fed. R. Civ. P. 56(c), as incorporated by Fed. R. Bankr. P. 7056; Poller v. Columbia Broadcasting Co., 368 U.S. 464, 467 (1962).

II. 11 U.S.C. Section 548(a)(2): EXISTENCE OF FRAUDULENT TRANSFER

The Plaintiff relies on the "constructive-fraud" provision of the Bankruptcy Code's fraudulent-transfer statute, 11 U.S.C. Section 548(a)(2).(FN2) Under this provision, the Plaintiff has the burden of proving up the requisite elements by a preponderance of the evidence. In re Minnesota Utility Contracting Co., Inc., 110 B.R. 414, 417 (D. Minn. 1990); In re Olson, 66 B.R. 687, 694 (Bankr. D. Minn. 1986); In re Kjeldahl, 52 B.R. 926, 933 (Bankr. D. Minn. 1985). The statute establishes four basic elements.(FN3) The Defendant challenges the Plaintiff's record for this motion, however, as to only two of them, and makes a concerted argument as to only one.

A. Reasonably Equivalent Value.

On the element of Section 548(a)(2)(A), the Plaintiff notes that the record shows only one way by which the Defendant parted with value in consideration for the Debtor's surrender of his stock: it satisfied the debt that Watland Realty owed to it, or at least significantly reduced it. The recipient of that value, of course, was an entity legally distinct from the Debtor. The Plaintiff points out that there is no evidence of record that the Debtor received anything by way of consideration for his shares in his own right. Thus, he argues, the record mandates a finding that the Debtor received no "value" within the meaning of 11 U.S.C. Section 548(d)(2)(A)(FN4), and a conclusion that he has satisfied Section 548(a)(2)(A).

In its response, the Defendant produces no new evidence going to the consideration it paid for the surrendered shares; it does not deny the evidence on which the Plaintiff relies, and it certainly does not produce any evidence that the Debtor received anything in his own right. To counter the Plaintiff's argument that there is no triable fact issue on Section 548(a)(2)(A), it relies on a rather involved, several-step argument: Watland Realty was greatly indebted to the Defendant as a result of the advances of credit it had received; the Debtor was Watland

Realty's sole shareholder; and, as such, the Debtor simply must have "received benefit dollar for dollar for each dollar credited against the debt owing from Watland Realty to" the Defendant.

This, however, is not enough. The Defendant has produced no credible, probative evidence that the Debtor had any derivative personal liability to it on account of the debt of Watland Realty.(FN5) Had it done so, of course, the Debtor's own antecedent liability would have been abated by offset against Watland Realty's debt to the Defendant on account of the stock redemption; this would have been "value" within the scope of Section 548(d)(2)(A); and the Defendant either would have made out a complete defense or, at least, shown a triable fact issue as to the reasonable equivalency of that benefit.

In the absence of such proof, however, the general rule must be applied: for the purposes of Section 548(a)(2)(A),

> [t]ransfers made or obligations incurred solely for the benefit of third parties do not furnish a reasonably equivalent value.

In re Minnesota Utility Contracting, Inc., 110 B.R. at 419 (citing In re Ear, Nose & Throat Surgeons of Worcester, Inc, 49 B.R. 316 (Bankr. D. Mass. 1985)). See also Ruben v. Manufacturers Hanover Trust Co., 661 F.2d 979, 991 (2d Cir. 1981); Klein v. Tabatchnik, 610 F.2d 1043, 1047 (2d Cir. 1979); Mayo v. Pioneer Bank & Trust Co., 270 F.2d 823, 829 (5th Cir. 1959) (all decided under Bankruptcy Act of 1898). To be sure, this rule is not absolute; bankruptcy law does recognize the possibility of an "indirect benefit" conferred on a debtor by the passage of consideration to a third party for a transfer of value from the debtor. In re Minnesota Utility Contracting, Inc., 110 B.R. at 419-420. See also Rubin v. Manufacturers Hanover Trust Co., 661 F.2d at 991. However, "the benefit must be fairly concrete." In re Minnesota Utility Contracting, Inc., 110 B.R. at 420. See also In re Grabill Corp., 121 B.R. 983, 995 (N.D. Ill. 1990); In re Burbank Generators, Inc., 48 B.R. 204, 206-207 (Bankr. C.D. Calif. 1985). More crucially for the matter at bar, once a trustee has demonstrated that all of the consideration for a debtor's transfer of assets went directly to a third party, the defendant seeking the shelter of the "indirect benefit" defense bears the burden of production as to the concreteness and reasonable equivalence of the value of that benefit. Id. at 417-419.

The Defendant has failed to carry this burden; it has produced no colorable evidence that even identifies the benefit that the Debtor received in his own right from the satisfaction of Watland Realty's debt, let alone any that affixes a value to that benefit. As the proponent on this issue, the Defendant bore the intermediate burden of meeting the Plaintiff's already-established prima facie case. In re Minnesota Utility Contracting, Inc., 110 B.R. at 419. The Defendant, then, has not demonstrated the existence of a triable fact issue under Section 548(a)(2)(A), and the Plaintiff is entitled to a finding in his favor on this element.

B. The Debtor's Insolvency.

As a requirement for the avoidance of a fraudulent transfer, Section 548(a)(2)(B) requires that the subject transfer have been made by a debtor that was, or became, financially straitened, as manifested in one of several specified ways. The Plaintiff relies on Section 548(a)(2)(B)(i), which requires a showing that the Debtor was insolvent on the date of the transfer, or became insolvent as a result of it.

"Insolvent" is a defined term under the Bankruptcy Code:

> (32) "insolvent" means --
>
> (A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of --
>
> (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
>
> (ii) property that may be exempted from property of the estate under [11 U.S.C. Section] 522 . . .

11 U.S.C. Section 101(32)(A).

This is a "balance sheet" test for insolvency. In re Bellanca Aircraft Corp., 56 B.R. 339, 385 (Bankr. D. Minn. 1985) (quoting American Nat'l Bank & Trust of Chicago v. Bone, 333 F.2d 984, 989 (8th Cir. 1964)). It requires an adjudication that is almost purely factual in nature. In re Muncrief, 900 F.2d 1220, 1224-1225 (8th Cir. 1990).

For the purposes of this motion, the Plaintiff does not rely on any direct evidence as to the status of the Debtor's assets and liabilities on February 4, 1991. Rather, he relies upon certain basic, background evidence: on the schedules that he executed for his bankruptcy filing on April 3, 1991, the Debtor recited values for his assets (exclusive of those he claimed as exempt) and outstanding balances on his secured and unsecured debts, such that the latter exceeded the former by $631,094.00. The Plaintiff urges that, "given the brief period of time between the Debtor's transfer of the stock and the compilation of [his] bankruptcy schedules," the Court should find that the same state of affairs obtained on the date of the stock redemption--or, at least, one not so different that the Debtor's balance sheet reflected solvency. He cites In re Wheeler, 34 B.R. 818, 822 (Bankr. N.D. Ala. 1983) for authority.

This argument, of course, requires the making of an inference.(FN6) Given such factors as the nature of the Debtor's business; the nature, number, and amounts of his scheduled debts; and the relatively large degree by which the balances on those debts exceeded the value of his scheduled assets, it is a reasonable one.(FN7) The Defendant

could have denied the Plaintiff the benefit of the inference, had it produced even a modest amount of probative evidence that tended to support a different factual conclusion. It did not do so, however; and it did not even attack the reasonableness of the inference. On the record as made, then, it has not shown a right to a trial on the element of Section 548(a)(2)(A)(i). See In re Mathern, 137 B.R. at 322-323 (where movant for summary judgment relies on fact inference based on substantial circumstantial evidence to make out key element of its case, it is entitled to finding on that issue if respondent does not produce substantial, probative evidence supporting contrary inference).

C. Conclusion, as to Section 548(a)(2).

The Plaintiff has demonstrated that there are no triable fact issues going to the avoidability of the Defendant's redemption of the Debtor's stock. The Defendant has raised no argument to deny that the established facts meet the elements of Section 548(a)(2). The Plaintiff, then, is entitled to relief against the Defendant in avoidance of that transfer.

III. 11 U.S.C. Section 550(a): THE PLAINTIFF'S REMEDY

A. Availability of Money Judgment as Remedy.

To effectuate the avoidance of the stock redemption, the Plaintiff requests that he be granted a money judgment against the Defendant pursuant to 11 U.S.C. Section 550(a)(1).(FN8). In response, the Defendant maintains that, at most, the Plaintiff is entitled to an equitable remedy--a judgment vesting the ownership of the redeemed shares in the bankruptcy estate. Citing numerous decisions from other jurisdictions, its counsel argues at great length that the entry of a money judgment would be a wholly inappropriate remedy under the circumstances.

As the Court noted at oral argument, however, the tenor of the Defendant's argument is largely blunted by binding caselaw precedent: In re Willaert, 944 F.2d 463 (8th Cir. 1991). In Willaert, the Eighth Circuit identified the remedies available to a trustee who proves up an avoidable preferential transfer under 11 U.S.C. Section 547(b):

> . . . once it is determined that a transfer is an avoidable preference under section 547(b), the court must fix the transferee's liability under section 550(a). . . . [T]he bankruptcy court has discretion under section 550(a) to remedy a preferential transfer by ordering either the property or its value returned to the bankruptcy estate... The fundamental purpose of section 547(b)'s avoidable preference provision is to restore the bankruptcy estate to its pre-preferential transfer condition. Section 550(a) is the vehicle that allows the trustee to accomplish this. Thus, when preferentially-transferred property cannot be recovered, the court must order its value returned to

the bankruptcy estate.

944 F.2d at 464. In Willaert, the trustee had sued under a substantive provision of the Code different from the one at bar; however, the prefatory language of Section 550(a) makes its remedies applicable to transfers avoided under seven enumerated sections of the Bankruptcy Code, including Section 548. Thus, the Eighth Circuit's holding applies with equal strength to the present matter.

To be sure, Willaert is not entirely on-point on its facts. There, the transfer subject to avoidance was the grant of a real estate mortgage; the underlying real estate had been sold, the mortgage satisfied, and the sale proceeds distributed to the preference recipient on account of its debt; and, indeed, the equity in the real estate itself was no longer subject to recovery by the Trustee. Here, the stock is still very much in existence in the Defendant's treasury. The Defendant believes that these differences distinguish Willaert. In arguing that it should be required to do no more than disgorge the shares, the Defendant relies on a number of published decisions that have opined that Section 550(a) favors such in rem relief unless it would be "inequitable" to grant it: In re Classic Drywall, Inc., 127 B.R. 874, 876 (D. Kan. 1991); In re Auxano, Inc., 96 B.R. 957, 965 (Bankr. W.D. Mo. 1989); In re General Industries, Inc., 79 B.R. 124, 135 (Bankr. D. Mass. 1987); In re Vedaa, 49 B.R. 409, 411 (Bankr. D. N.D. 1985).

None of these decisions, however, take cognizance of Willaert--which clearly suggests that the Bankruptcy Court has full discretion to order whatever form of relief is most efficacious for the bankruptcy estate. Other courts have paralleled the Eighth Circuit in giving a more expansive scope to the bankruptcy estate's options under Section 550(a). E.g., In re Classic Drywall, Inc., 127 B.R. at 877; In re Int'l Ski Service, Inc., 119 B.R. 654, 659 (Bankr. W.D. Wis. 1990).

One circumstance fully supports an exercise of that discretion in favor of the relief the Plaintiff requests: the S.R.A. bars any shareholder in the Defendant from selling "any part of his common share [sic] in the company, . . . without the written consent of the other shareholders." S.R.A., Article One, Paragraph 1. It also vests the Defendant and its other shareholders with the successive rights of first refusal that were described at pp. 3-4 supra. If the Plaintiff recovered the shares, he would be subject to these limitations on alienation. In re 2 B.R. 526, 530 (Bankr. D. Minn. 1986), aff'd, 835 F.2d 1222 (8th Cir. 1987) (contract rights and ownership interests in business entities are subject to same restrictions on alienation in hands of bankruptcy trustee that they were in the hands of debtor pre-petition). At least by its terms, the S.R.A. does not place the other shareholders under a duty not to unreasonably withhold consent for a sale by the Plaintiff; as a result, they might be able to stymie any act by him to liquidate the shares. Even if the Plaintiff were able to get the other shareholders to give a generalized consent to his sale of the shares, he would then have only three options to reduce them to cash: to sell the shares back to

the Defendant, if it were willing; to current shareholders, if they wanted them; or to a "qualified purchaser," if he could find one to the other shareholders' satisfaction.

None of these options presents the same prospect of ready recovery of real value that a money judgment does. In the context of the motion at bar, the Defendant has voiced no readiness to pay anything to the bankruptcy estate in a re-redemption; quite probably, it would offer little more than a pittance. The number of the Defendant's current shareholders is probably quite limited,(FN9) and no ready takers have come forward from that group. Neither has another "qualified purchaser" emerged.

If, as is entirely possible, the Plaintiff were unable to sell the shares as they are legally burdened, the estate would be left with a worthless asset and would abandon it. This would leave the Plaintiff with a gossamer victory here, but without actual realization. Beyond that, it would allow the Defendant to retain the benefit of a fraudulent transfer. This result, clearly, is inequitable. Accordingly, under the general thrust of Willaert, and under the refinement in Classic Drywall and Int'l Ski Service, the Plaintiff is entitled to a money judgment against the Defendant, in an amount corresponding to the value of the shares.

B. Amount of that Judgment.

The last issue is the amount of the judgment to which the Plaintiff is entitled. The Plaintiff argues that the amount of the credit given to Watland Realty on the balance of its outstanding debt to the Defendant conclusively establishes the value of the stock under Section 550(a)(1). He notes that the Debtor and the Defendant fixed this amount according to the book value of the stock, as last set by the Defendant's shareholders prior to the 1991 redemption--all as the S.R.A. provided.

In response, the Defendant produced two affidavits going to the issue of value.

In one of them, Kenneth O. Larson, the Defendant's President, recites that

> the arbitrary price listed in [the] Stock Redemption Agreement [of February 4, 1991] considered the value of the liability owing to [the Defendant], [the Defendant's] desire to consolidate stock ownership and above market value interest of [the Defendant] to purchase said stock.

He alleges that the Defendant's 1989 and 1990 financial statements "show that [the Defendant] was not profitable in . . . [those] calendar years . . . [,] resulting in income loss for those years." Larson then states that, in a redemption of another shareholder's stock in January 1992, the Defendant and that shareholder agreed to a value of less than $6.50 per share, when the shareholders' valuation at $6.50 per share still appeared on the Defendant's books. Noting that by the time of the latter redemption the Defendant had returned to profitability, he opines (with little more detail) that "the actual value of [the Debtor's] shares of stock at the time of transfer was . .

. believed to be significantly less than $3.50 per share."

The second affidavit is more significantly probative: it is by one Gerald G. Gray, who attests to his professional credentials as an appraiser of business enterprises and nearly 30 years' worth of experience as such. He states that, based upon his "preliminary analysis,"

> . . . the stated value of $6.50 per share for the redemption of the shares held by [the Debtor] is not a meaningful indicator of value of the shares because no cash was paid to [the Debtor] and that the cancellation of the stock was treated as an offset for the receivables owed by Watland Realty to [the Defendant]. Said receivable having apparently no value . . .

That analysis included Gray's adjustments in the book value of various components of the Defendant's asset structure. Gray essentially opines that the Defendant's remaining shareholders have been willing to pay a premium price in more recent redemptions, to receive the benefit of more consolidated control. Ultimately, he concludes that "the value of the [Defendant's] shares held by [the Debtor] at the time of transfer to [the Defendant] was not greater than but may be significantly less than $3.50 per share."

On this last fact issue, the Defendant has met its burden as a respondent under Rule 56. The Plaintiff is not completely ill-put to rely on the amount of the credit given against Watland Realty's debt, as at least some evidence of the shares' value. In re First Software Corp., 107 B.R. 417, 423 (D. Mass. 1989) (trustee's adducing of evidence of value assigned to transfer by recipient on its own books and records shifts burden of production to recipient to justify different valuation); In re Int'l Ski Serv., Inc., 119 B.R. at 659; In re Albers, 67 B.R. 530, 534 (Bankr. N.D. Ohio 1986). The Defendant, however, has properly countered the Plaintiff's evidence. While Larson's affidavit statements are imprecisely phrased and often impressionistic, they are at least marginally probative. Gray's averments are certainly pointed and substantial enough on their face that they could well support findings contrary to those urged by the Plaintiff, if the Plaintiff did not produce comparable evidence that preponderated. The span of the evidence of record could support a finding on the issue of value in favor of either party. There is, then, a triable fact dispute as to the amount of the Plaintiff's recovery.

IV. CONCLUSION

The Plaintiff, then, is not entitled to quite the full adjudication he has requested; he has established his right to receive a money judgment, but the amount of that judgment cannot be determined until after trial. In this posture, it would not be appropriate to order the entry of a final judgment as to the issues on which the Plaintiff does prevail. Such a disposition could be made "upon an express determination that there is no just reason for delay," Fed. R. Civ. P. 54(b), as incorporated by Fed. R.

Bankr. P. 7054(a), but this would offend a central goal of judicial administration: to minimize the chance of piecemeal appeals. See Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 806-807 (8th Cir. 1993). By operation of Fed. R. Civ. P. 56(d),(FN10) as incorporated by Fed. R. Bankr. P. 7056, however, the partial adjudications made in this order will settle all issues but that of the value of the avoided transfer, and those adjudications will be merged into the final judgment when rendered.

ORDER

Based upon the foregoing memorandum, then,
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the Defendant's redemption of 4,200 shares of its stock previously held by Debtor Richard Owen Watland, as effectuated on February 4, 1991, was a transfer of property avoidable under 11 U.S.C. Section 548(a)(2).

2. That the transfer identified in Term 1 hereof is avoided and, pursuant to 11 U.S.C. Section 551, that transfer is preserved for the benefit of the Debtors' bankruptcy estate.

3. That, pursuant to 11 U.S.C. Section 550(a)(1), the Plaintiff is entitled to receive a judgment against the Defendant in the amount of the value of the subject shares of stock, to effectuate the avoidance accomplished by Terms 1 and 2 hereof.

4. That, in all other respects, the Plaintiff's motion for summary judgment is denied.

BY THE COURT:

_____
GREGORY F. KISHEL
U.S. BANKRUPTCY JUDGE

(FN1) This rule makes Fed. R. Civ. P. 56 applicable to adversary proceedings in bankruptcy. In pertinent part, FED. R. CIV. P. 56(c) provides that, upon a motion for summary judgment,

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits [submitted in support of the motion], 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.

(FN2) With the alternative element on which the Plaintiff relies, this statute provides as follows:

> (a) The trustee may avoid any transfer of an interest of the debtor in property... that was made or incurred

> on or within one year before the date of the filing of the [debtor's bankruptcy] petition, if the debtor voluntarily or involuntarily --
>
> ...
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer...; and
>
> (B)(i) was insolvent on the date that such transfer was made or...was incurred, or became insolvent as a result of such transfer...;

(FN3) As gleaned by most courts, the elements are:

1. the transfer of an interest of the debtor in property,
2. made within one year before the date on which the debtor filed its bankruptcy petition,
3. for which the debtor received than a reasonably equivalent value in exchange for the transfer, and
4. on a date on which the debtor was insolvent.

In re Young, 152 B.R. 939, 945 (D. Minn. 1993), aff'g In re Young, 148 B.R. 886 (Bankr. D. Minn. 1992); In re Minnesota Utility Contracting Co., Inc., 110 B.R. at 417. See also, e.g., Butler v. Lomas and Nettleton Co., 862 F.2d 1015, 1017 (3d Cir. 1988); In re Ohio Corrugating Co., 91 B.R. 430, 435-436 (Bankr. N.D. Ohio 1988).

(FN4) This statute provides that, for the purposes of Section 548,

> "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor;

(FN5) The Defendant doggedly relies on the Debtor's purported testimony at the meeting of creditors in his bankruptcy case--the phrasing of which, it insists, amounts to an admission of personal liability. The Defendant is completely off-base in relying on this writing to make out a genuine issue of material fact. To prove up the testimony, it presents something that it represents as a partial transcript of the proceedings at the meeting. This document, however, was prepared by a secretary in the office of the attorneys who represented the Defendant. Obviously, she did not administer the original oath to the Debtor, and thus cannot attest to this key fact. In an accompanying affidavit, all she can attest to is that "the attached is a true and correct partial transcription of the audible portions of the Trustee's representative questioning of Debtor . . .", taken from an audiotape "supplied to our office by the U.S. Trustee's office in Response to Defendant's Request for Documents . . . " (emphasis added). In presenting this writing as "evidence," the Defendant's counsel ignores such elementary points as the limitation of his secretary's attestation to those parts of the record that she found "audible"; her lack of legal competence to provide an official

certification as to the accuracy and completeness of the transcription; the lack of such a certification by an individual with such competency; and the niceties of the hearsay rule--which, clearly, bar this writing from evidence absent a demonstration of one of the exceptions contemplated by Part VIII of the Federal Rules of Evidence. Besides this, the transcription contains a number of gaps, due to the transcriber's inability to fully understand the taped record. No court could take cognizance of this document as evidence for any substantive purpose. This is all not to say that there are not substantive problems as well. The wording of the Debtor's testimony is so vague as to be no more than marginally probative. Finally, any such undertaking by the Debtor just might run afoul of the Statute of Frauds. See Minn. Stat. Section 513.01(2) (making unenforceable "[e]very special promise to answer for the debt, default or doings of another . . . ," unless set forth in a signed writing).

(FN6) An inference is a fact or proposition that is deduced as a logical consequence from other, "basic" facts that are already proved or admitted. In re Mathern, 137 B.R. at 319.

(FN7) This could have consisted of anything showing that the Debtor accrued a large amount of debt or lost a large value in assets after the date of the stock redemption.

(FN8) In pertinent part, this statute provides:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under [11 U.S.C. Section] . . . 548, . . . the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made ...

(FN9) The S.R.A. identifies only three shareholders, including the Debtor. By the time of the transfer in question, there apparently were a total of six.

(FN10) This rule provides as follows:

> (d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon made an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and direct such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.