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IN RE: CHARLES S. TURNER, Debtor. C. BROOKS THURMOND, III, as Trustee, Plaintiff, v. EUNICE TURNER and CHARLES S. TURNER, Defendants. C. BROOKS THURMOND, III, as Trustee, Plaintiff, v. ROY TURNER, JR., DOROTHY T. ROSS, and JAMES ZO TURNER, Defendants. FRANK D. SMITH, et al., Plaintiffs, v. CHARLES S. TURNER and INDYMAC BANK, F.S.B., Defendants.

BANKRUPTCY CASE NO. 00-72597-PWB, CASE NUMBERS, ADVERSARY CASE NO. 02-6433, ADVERSARY CASE NO. 02-6435, ADVERSARY CASE NO. 05-9141

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

2006 Bankr. LEXIS 2745

September 19, 2006, Decided

COUNSEL: [*1] For Charles S. Turner, Debtor: Gaines C. Granade, Atlanta, GA.

For C. Brooks Thurmond, III, Trustee, Pro se, Atlanta, GA.

For C. Brooks Thurmond, III, Trustee for Charles S. Turner: C. Brooks Thurmond, III, Atlanta, GA.

For Roy Turner, Jr., James Zo Turner, Dorothy T. Ross, Defendants Gaines C. Granade, LEAD ATTORNEY, Atlanta, GA.

For Frank D. Smith, Elvira T Smith, Peter Mancuso, Plaintiffs: Kevin D. Fitzpatrick, LEAD ATTORNEY, Marietta St., N.W.

For IndyMac Bank, F.S.B., Defendant: Paul M. Baisier, Seyfarth Shaw LLP, Atlanta, GA.

JUDGES: PAUL W. BONAPFEL, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: PAUL W. BONAPFEL

OPINION

IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

ORDER

C. Brooks Thurmond, III, is the Chapter 7 Trustee (the "Trustee") in the bankruptcy case of Charles S. Turner (the "Debtor") filed on September 27, 2000. The Trustee seeks to set aside two conveyances of real property as fraudulent conveyances under former *O.C.G.A. § 18-2-22*. The former law applies to these transactions because they occurred prior to July 1, 2002, the effective date of the statute that revised Georgia's fraudulent transfer law by enacting the Uniform Fraudulent Transfer [*2] Act, 2002 Ga. Laws 141, now codified at *O.C.G.A. §§ 18-2-70 to 18-2-80*. *Chepstow v. Hunt*, 381 F.3d. 1077 (11th Cir. 2004). The Trustee has the right under 11 U.S.C. § 544(b) to avoid transfers by a debtor that are fraudulent under state law.

In December 1996, the Debtor owned interests in two parcels of real estate. First, he owned an undivided

one-half interest in a residence in Dekalb County, Georgia, with his wife, Eunice Turner. Second, he owned an undivided two-thirds interest in 40 acres in Greene County, Georgia, with two of his brothers, Roy Lee Turner, Sr. and James Zo Turner. The Debtor's transfers of these interests and his later bankruptcy filing have resulted in three lawsuits, the first two filed by the Trustee and a third filed by creditors holding a judgment lien.

The first action, No. 02-6433, involves the Debtor's transfer of his one-half interest in the residence to Mrs. Turner by quitclaim deed dated January 2, 1997 and recorded on January 15, 1997. The Trustee seeks to avoid this transfer and recover the one-half interest. The defendants in this action are the Debtor and Mrs. Turner. After the [*3] complaint was filed, Mrs. Turner conveyed the residence to the Debtor and herself by quitclaim deed dated May 10, 2004 and recorded on May 24, 2004, and they jointly executed a security deed in favor of Indymac Bank, F.S.B. ("Indymac") to secure a loan of \$ 75,000. In addition to seeking to avoid the prepetition transfer and to recover the Debtor's one-half interest, the Trustee seeks to recover the loss of equity in that interest resulting from the encumbrance in favor of Indymac. The Trustee does not challenge Indymac's security deed, but the judgment creditors in their adversary proceeding, discussed later, contend that their lien has priority over Indymac's security deed in the one-half interest the Debtor acquired postpetition.

The Trustee's second lawsuit, No. 02-6435, seeks to avoid the Debtor's transfer of his interest in the Greene County property to the co-owners (his brothers, Roy Lee Turner, Sr., and James Zo Turner) by warranty deed dated December 21, 1998, and recorded on January 5, 1999. Upon the death of Roy Lee Turner, Sr., in 2000, his children, Roy Lee Turner, Jr., and Dorothy Ross, acquired their father's interest in the Greene County property by executor's deed. [*4] The defendants in this proceeding are James Zo Turner and the two children of Roy Lee Turner, Sr., who now hold the title he received in the transfer, Roy Lee Turner, Jr. and Dorothy Ross.

The first two adversaries are related because they involve the common questions of the Debtor's intent and financial condition at the time of the transfers. The third adversary proceeding, No. 05-9141, includes a judgment obtained by Frank D. Smith and Elvira T. Smith ¹ in a lawsuit filed after the 1997 transfer to Mrs. Turner. The

Smiths contend that their recorded judgment lien attached to the interest the Debtor acquired from Mrs. Turner in the postpetition transfer in 2004 and is superior to Indymac's later security deed. The original defendants in the creditors' lawsuit were the Debtor and Indymac, but the Debtor and the Trustee have an interest in the issues it raises.

1 The judgment was obtained by Frank D. Smith and Elvira T. Smith on May 25, 1999 and recorded on August 12, 1999, in Dekalb County. Frank Smith assigned 20 percent of his interest in the judgment to Peter Mancuso on October 30, 2001. The assignment is immaterial to the issues considered here, and this Order for simplicity refers to the Smiths as the judgment creditors.

[*5] The Court consolidated the three adversary proceedings so that all issues could be resolved in one proceeding. Determining that the best way to proceed was to try the Trustee's fraudulent transfer claims before addressing other issues whose resolution might differ based on that outcome, the Court scheduled a trial on the issues in the two adversary proceedings brought by the Trustee, Nos. 02-6433 and 02-6435, to set aside the two transfers. After hearing the evidence, the Court announced its findings of fact and conclusions of law, a summary of which follows.

The Trustee seeks to avoid the two transfers under former *O.C.G.A.* § 18-2-22. As applicable here, it provides:

The following acts by debtors shall be fraudulent in law against creditors and others and as to them shall be null and void:

...;

(2) Every conveyance of real or personal estate, by writing or otherwise, and every bond, suit, judgment and execution, or contract of any description had or made with intention to delay or defraud creditors, where such intention is known to the taking party; a bona fide transaction on a valuable consideration, where the taking party is without notice or ground for reasonable suspicion [*6] of said intent of the debtor, shall be valid;

and

(3) Every voluntary deed or conveyance, not for a valuable consideration, made by a debtor who is insolvent at the time of the conveyance.

The Trustee asserts that each transfer is avoidable under both *subsections* (2) and (3). Thus, he contends that the Debtor made each transfer with the actual intent to delay or defraud creditors, such that each should be set aside under *O.C.G.A. § 18-2-22(2)*. Alternatively, the Trustee asserts that each transfer is avoidable under *O.C.G.A. § 18-2-22(3)* because each was a voluntary conveyance, not for a valuable consideration, that the Debtor made while insolvent.

The Court found that the Debtor transferred the Greene County property in 1998 to his brothers for legitimate family reasons and not with the actual intent of defrauding creditors, that he received no valuable consideration for it, and that the transfer rendered the Debtor insolvent. (Tr. 194-95).² Consequently, the Court ruled that this transfer is avoidable under *subsection* (3) of *O.C.G.A. § 18-2-22* but not *subsection* (2).

² The Court determined that the transfer of the Greene County property rendered the Debtor insolvent without regard to the validity of the default judgment claim of the Smiths, discussed below.

[*7] The Court ruled that the Debtor's conveyance of his one-half interest in the residence to his wife could not be set aside as actually fraudulent under *O.C.G.A. § 18-2-22(2)* because she did not have the requisite notice of the Debtor's intent to defraud a potential automobile accident plaintiff and because the Debtor had no intent to defraud any other creditor. The Court further ruled, however, that the transfer to her was a voluntary conveyance not for a valuable consideration and that it would be avoidable under *O.C.G.A. § 18-2-22(3)* if it rendered the Debtor insolvent. (Tr. 190-91).

Whether the transfer to Mrs. Turner rendered the Debtor insolvent depends on an assessment of the Debtor's liability to Frank and Elvira Smith at the time of the transfer to her in 1997. The Smiths sued the Debtor in March 1997 (about two months after the transfer) and obtained a judgment by default in August 1999 against

the Debtor in the amount of approximately \$ 61,500. The Debtor's liability to the Smiths at the time of the transfer is critical because, at that time, the Debtor still owned the Greene County property that was worth more than all [*8] of the Debtor's debts *except* any liability to the Smiths. (Tr. 188-89, 191-92). Thus, under the "balance sheet" test of insolvency applicable under Georgia's (and other states') fraudulent transfer law, the Debtor was insolvent only if his liabilities at that time included liability to the Smiths.

To prove the Debtor's liability to the Smiths, the Trustee relies solely on the judgment. The Debtor, however, testified that he owed nothing to them. (Tr. 190, 193). In this regard, the evidence is that Mr. Smith contracted for the Debtor to do extensive work on the Smiths' residence. Disputes arose which, according to the Debtor's testimony, culminated in an incident in which Mr. Smith threatened the Debtor with a two by four (resulting in Mr. Smith's arrest) and eventually refused to let the Debtor complete the job. (Tr. 186-87). The Debtor asserts that he was never paid for his work and that he did not owe the Smiths anything. (Tr. 190, 193). The Smiths sued the Debtor in March 1997 for damages due to the Debtor's failure to do the work properly and obtained a default judgment in August 1999.

The controlling legal question is whether the default judgment in a lawsuit filed *after* [*9] the transfer proves the Debtor's liability to the Smiths *at the time of* the transfer for purposes of the Trustee's claim against Mrs. Turner. The Court reserved ruling on this issue and directed the parties to file post-trial briefs.

The preclusive effect of a state court judgment in later litigation in a federal court is determined in the first instance by the state's law. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 105 S. Ct. 1327, 84 L. Ed. 2d 274 (1985). The Smiths' default judgment indisputably binds the Debtor as a determination of his personal liability and established a valid lien on the Debtor's property, effective in some instances against third parties, both as of the date of its rendition. For example, a timely and properly recorded judgment lien on real estate is effective against subsequent purchasers. As a judicial determination of a debtor's liability, a default judgment may also determine the allowability of the claim in a bankruptcy case for purposes of distribution, absent some basis for its avoidance.

But the effects of the judgment on the Debtor and of the lien on subsequent transferees of the Debtor's property are not the issues here. The Trustee seeks [*10] relief against the Debtor's wife, not the Debtor, on account of a transfer that occurred prior to the rendition of judgment or even the filing of the lawsuit. Thus, the Court must determine whether a default judgment in a lawsuit in which Mrs. Turner was not a party and in which she did not have the opportunity to litigate the issue of the Debtor's liability is conclusive in establishing the Debtor's insolvency at the time of the transfer in this lawsuit against her.

It is axiomatic that one not a party to a lawsuit is not bound by a judgment rendered in it. Thus, under Georgia law, a prior judgment is conclusive in later litigation only if, among other things, the later litigation is between the same parties or their privies. *O.C.G.A. §§ 9-12-40, 24-4-42*; see, e.g., *Kent v. Kent*, 265 Ga. 211, 452 S.E.2d 764, 766 (1995) ("[C]ollateral estoppel applies where an issue of fact or law is actually litigated and determined by a valid judgment, and the determination is essential to the judgment. That determination is then conclusive in a subsequent action between the same parties."); *Coleman v. Grimes*, 250 Ga.App. 880, 887, 553 S.E.2d 185, 190 (2001) [*11] (Neither res judicata nor collateral estoppel is applicable unless subsequent suit is between same parties or their privies).

The Georgia Court of Appeals summarized privity rules in *Pinkard v. Morris*, 215 Ga.App. 297, 298, 450 S.E.2d 330, 331 (1994) (citations omitted):

Generally speaking, privies are those legally represented at trial. Privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right; and where this identity is found to exist, all are alike concluded and bound by the judgment. Before privity can be established, the interests of the party must fully "represent" the interests of the privy and be fully congruent with those interests.

Under these principles, a wife, by that fact alone, is not in privity with her husband so as to be bound by a judgment against him. *Coleman v. Grimes*, 250 Ga.App. 880,553

S.E.2d 185 (2001); *Aycock v. Calk*, 228 Ga.App. 172, 491 S.E.2d 383 (1997).

The Smiths did not sue Mrs. Turner or obtain a judgment against her, nor does privity between the Debtor and [*12] Mrs. Turner exist as required to make the judgment binding on her. She had no duty to seek to intervene in the lawsuit and no known reason to do so. Nothing suggests that she had any relationship to the dispute between the Debtor and the Smiths or any involvement in the transactions that gave rise to it. Thus, she and the Debtor could not have had an identity of interest in the litigation such that he represented any of her legal rights.

Contrary to the Trustee's assertion, the privity that arose between the Debtor and Mrs. Turner by virtue of the quitclaim deed transferring his interest to her does not supply the privity required to bind her to the results of unrelated issues in which she was not involved. The privity rule requires that the party to the judgment fully represent the interests of the privy and that their interests be fully congruent. To meet this requirement, the relationship between the party (the Debtor) and the non-party (Mrs. Turner) asserted as the basis for their privity must relate to the issues in the litigation. Contractual privity wholly unrelated to the issues in the litigation does not meet this test.

Mrs. Turner was not a party to the lawsuit and was [*13] not in privity with the Debtor. She did not have the opportunity to contest the Debtor's liability to the Smiths. Consequently, the default judgment does not determine, as a matter of fact or law, the Debtor's liability to the Smiths for purposes of the fraudulent transfer claim against her, an essential element of which is the insolvency of the Debtor.

Because the Court concludes that the Trustee may not rely on the default judgment to establish the liability of the Debtor to the Smiths at the time of the transfer that occurred prior to its rendition, the Trustee has thus failed to carry his burden of proof on the insolvency issue. The Court is unwilling, however, to resolve this issue on the current record. The Court will, therefore, reopen the evidence to permit the parties to introduce additional evidence on the question of the Debtor's insolvency at the time of the transfer to Mrs. Turner.

The Court will conduct a status conference in Courtroom 1401, U.S. Courthouse, 75 Spring Street,

S.W., Atlanta, Georgia at **11:00 o'clock a.m.** on the **17th day of October, 2006**, and then schedule a time to continue the trial.

2006.

PAUL [*14] W. BONAPFEL

IT IS SO ORDERED this 19 day of September,

UNITED STATES BANKRUPTCY JUDGE