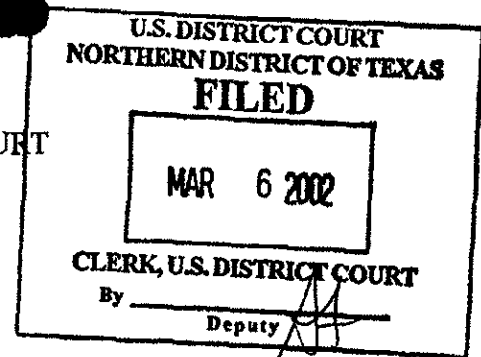


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ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



MICHAEL J. QUILLING, as Receiver
for Hammersmith Trust, LLC, Microfund,
LLC, and B. David Gilliland

Plaintiff,

VS.

MELODY WOLCOTT GILLILAND

Defendant.

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NO. 3-01-CV-1617-BD(M)



MEMORANDUM OPINION AND ORDER

Michael J. Quilling, as Receiver for Hammersmith Trust, LLC and related entities, has filed a motion for summary judgment in this case brought under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), TEX. BUS. & COMM. CODE ANN. § 24.001, *et seq.* For the reasons stated herein, the motion is granted.

I.

This case arises out of a lawsuit brought by the Securities and Exchange Commission against 16 defendants and 13 equity relief defendants involving the sale of non-existent "prime bank" securities. *Securities and Exchange Commission v. Funding Resource Group, et al.*, No. 3-98-CV-2689-M. In that case, the SEC alleges that defendants raised more than \$14 million from unwitting investors by making false representations about the use and safety of investor proceeds and the expected rate of return on their investment. As relief, the SEC seeks a permanent injunction, disgorgement, and civil penalties against the defendants who actively participated in the fraud.

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By order dated November 13, 1998, Michael J. Quilling was appointed as Receiver for all defendants and equity relief defendants in the *Funding Resource* case. The receivership was subsequently expanded to include Hammersmith Trust, LLC, Microfund, LLC, and B. David Gilliland. As Receiver, Quilling was authorized to:

take custody, possession and control of any and all assets, monies, securities and properties, real and personal, tangible and intangible, of whatever kind and description, and wherever situated, belonging to [the named defendants] (hereinafter referred to as "Receivership Assets"), as well as any documents relating to the Receivership Assets.

ORDER APP. TEMP. REC. ¶ B at 2-3 (Nov. 13, 1998). The Receiver was further empowered "to institute, prosecute, compromise or adjust such actions or proceedings in state or federal court as may in his judgment be necessary or proper for the collection, preservation and maintenance of the Receivership Assets." *Id.* ¶ L at 6-7.

On August 17, 2001, the Receiver filed this action against Melody Wolcott Gilliland, the former wife of B. David Gilliland, to recover \$266,790 in investor funds allegedly transferred to her between May 28, 1997 and May 14, 1999. Defendant admits receiving this money but contends that the payments were made pursuant to the provisions of their divorce decree and to satisfy "certain other obligations of David Gilliland to the Defendant." (Def. Ans. ¶ 10 at 2). The Receiver now moves for summary judgment on his fraudulent transfer claim. The issues have been briefed by the parties and the motion is ripe for determination.

II.

Summary judgment is proper when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A dispute is "genuine" if the

issue could be resolved in favor of either party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). A fact is "material" if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

A movant who has the burden of proof at trial must submit evidence to establish every essential element of its claim or affirmative defense. See *Richmond Capital Corp. v. Federal Express Corp.*, 29 F.Supp.2d 737, 738 (M.D. La. 1998). Conversely, a summary judgment movant who does not have the burden of proof need only point to the absence of a genuine fact issue. *Duffy v. Leading Edge Products, Inc.*, 44 F.3d 308, 312 (5th Cir. 1995). The burden then shifts to the nonmovant to show that summary judgment is not proper. *Richmond Capital*, 29 F.Supp.2d at 738-39. The parties may satisfy their respective burdens by tendering depositions, affidavits, and other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.), cert. denied, 113 S.Ct. 82 (1992). All the evidence must be viewed in the light most favorable to the party opposing the motion. *Rosado v. Deters*, 5 F.3d 119, 122 (5th Cir. 1993). However, conclusory statements, hearsay, and testimony based merely on conjecture or subjective belief are not competent summary judgment evidence. *Topalian*, 954 F.2d at 1131.

A.

The Receiver alleges that payments totaling \$266,790 made to defendant by her former husband constituted voidable transfers under TUFTA.¹ This statute provides, in relevant part:

- (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose within

¹ Defendant suggests that Michigan or Tennessee law, not Texas law, should apply in this case. However, both Michigan and Tennessee have adopted the Uniform Fraudulent Transfer Act. See MICH. COMP. LAWS § 566.31 (West 2002); TENN. CODE ANN. § 66-3-301 (West 2002). Therefore, the Court need not dwell on the choice of law issue.

a reasonable time before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor . . .

TEX. BUS. & COMM. CODE ANN. § 24.005(a) (Vernon 1987). Ordinarily, the creditor must prove that the challenged transfer was made with the intent to defraud. *See First Nat'l Bank of Seminole, Texas v. Hooper*, 48 S.W.3d 802, 806 (Tex. App.--El Paso 2001, pet. filed). However, in the case of a Ponzi scheme, courts have found that the debtor's intent to hinder, delay, or defraud is established by the mere existence of the Ponzi scheme. *SEC v. Cook*, 2001 WL 256172 at *3 (N.D. Tex. Mar. 8, 2001), *citing In re Independent Clearing House Co.*, 77 B.R. 843 (Bankr. D.Utah 1987) (finding requisite intent to defraud from fact that debtor must have known that Ponzi scheme would inevitably collapse and that later investors would lose their investment).

The summary judgment evidence conclusively establishes that the Hammersmith Trust and Microfund investment programs were nothing more than elaborate pyramid or Ponzi schemes run by B. David Gilliland. (Plf. App., Exh. 1 ¶ 3 at 4). During the life of these programs, Gilliland raised more than \$60 million from investors. (*Id.*). Approximately \$3.5 million of these funds were diverted to Covent Garden, LLC and Tactical Capital Placement, LLC, two entities owned and controlled by Gilliland. (*Id.*, Exh. 1 ¶ 4 at 4). Between May 28, 1997 and May 14, 1999, Gilliland made payments totaling \$266,790 to defendant from accounts held by Covent Garden, Tactical Capital Placement, and Hammersmith Trust. (*Id.*, Exh. 1 ¶ 5 at 4-5).² Gilliland states

² A spread sheet attached to Gilliland's Affidavit shows that defendant was paid: (1) \$14,000 from a Covent Garden account at Barnett Bank; (2) \$229,290 from a Covent Garden account at First American National Bank; (3) \$6,000 from a Covent Garden Account at Southtrust Bank; (4) \$12,900 from a Tactical Capital Placement account at First American National Bank; and (5) \$4,600 from a Hammersmith Trust account at First American National Bank. (Plf. App., Exh. 1 at 6-7).

that "[n]othing of value was ever given or paid by my former wife in exchange for any of the foregoing transfers to her." (*Id.*, Exh. 1 ¶ 5 at 5).

Defendant admits that she received these payments from her former husband. However, she questions "[w]hether or not these moneys came from defrauded investor funds or other investor funds." (Def. Resp. at 2). Other than her unsubstantiated suspicions, defendant offers nothing to controvert the statements made by Gilliland in his sworn affidavit. This does not create a genuine issue of material fact for trial.

Defendant further argues that the payments were made pursuant to her divorce decree and in satisfaction of certain other antecedent debts. TUFTA provides that a transfer or obligation is not voidable against a person "who took in good faith and for reasonably equivalent value." TEX. BUS. & COMM. CODE ANN. § 24.009(a). Defendant bears the burden of proof on this issue. *Hooper*, 48 S.W.3d at 806. In an attempt to meet this burden, defendant provides a copy of her Marital Dissolution Agreement which obligates Gilliland to pay \$500 per month in child support and \$1,000 per month in alimony for five years. (Resp. Exh. B ¶¶ B-1 & B-4 at 5). Defendant further explains:

The Agreement required David Gilliland to pay 75% of health care costs that are not covered by insurance. There were items in this category. The agreement also provided that David would pay existing indebtedness on the real estate in the total amount of \$165,000, which he did not pay directly but paid Melody after the property was sold, and those indebtednesses were paid out of the proceeds. Exhibit B to the Agreement dealing with joint debts lists two additional items totaling \$7,400 which David was to pay. In addition to the above amounts, there were loans from Melody's family to David, and it was the understanding between them that he would pay that money to Melody so that she could pay those obligations. The above obligations are the reasons that the money was transferred.

(*Id.* Exh A ¶ 1 at 1-2). Assuming *arguendo* that Gilliland paid this money to defendant in order to satisfy his obligations under the divorce decree, there is no evidence that defendant gave "reasonably equivalent value" for the transfers. Accordingly, defendant has failed to create a genuine issue of material fact as to this defense.³

B.

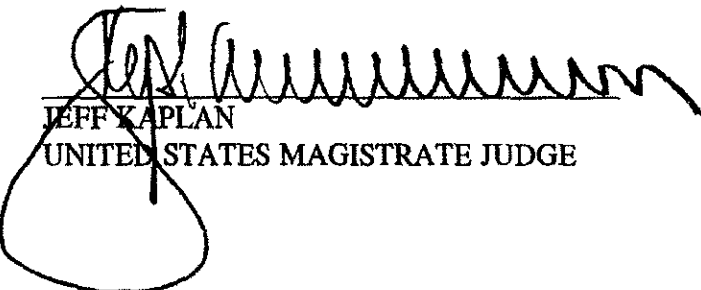
The Receiver also seeks attorney's fees in the amount of \$10,000. However, TUFTA does not authorize the recovery of such fees. In the absence of statutory authority, the Court cannot award attorney's fees.

CONCLUSION

The Receiver's motion for summary judgment is granted. The transfers from B. David Gilliland to defendant in the amount of \$266,790 are hereby voided and set aside. The Court will enter judgment against defendant in this amount by separate order.

SO ORDERED.

DATED: March 6, 2002.


JEFF KAPLAN
UNITED STATES MAGISTRATE JUDGE

³ The Court further notes that the transfers commenced in May 1997--nearly *two years* after the Gillilands were divorced. Moreover, the amount of the payments made to defendant greatly exceeded David Gilliland's monthly obligations under the Marital Dissolution Agreement.