



BCDC's promisory note matured in September of 1982 with a balance due of over \$4,000,000. However, BCDC, Herbert, and the note's other guarantors were unable to repay the loan. Therefore, the parties involved entered into workout negotiations which resulted in a contract of accord in April of 1984. Under this agreement, BCDC, Herbert and the other guarantors obligated themselves jointly and severally to pay the Bank \$3,300,000 by June 15, 1984. Herbert and the others defaulted under the contract of accord, and the Bank moved to foreclose against BCDC's assets. However, these proceedings were stayed in August of 1984 when BCDC filed for bankruptcy.

Thereafter, the Bank sought to recover its outstanding debt from the individual guarantors of the loan. On November 29, 1984 the Bank filed suit against Herbert and the others involved. This Court entered judgment for the Bank against Herbert in the amount of \$3,303,509.82 on June 28, 1988. This judgment, in the case of The Bank of New York v. Herbert L. Finley, C.A. 84-0659 L, was introduced into evidence at trial as plaintiff's exhibit 4.

In early 1985, the Bank instituted the instant suit. On March 15, 1985, the Bank filed an amended three-count complaint through which it seeks to reach the proceeds of two real estate sales. Herbert once held an interest in these two parcels of land and transferred interests in them to his wife Jeanne during 1984.

The first property (which is the subject matter of Count I) is located in Newport, Rhode Island and was the Finleys' family home. Prior to October 31, 1984, Herbert and Jeanne owned this real estate as tenants by the entirety. On October 31, 1984 the Finleys transferred their interests in the property to Jeanne as sole owner. The Bank alleges that this conveyance was made without valuable consideration and for the purpose of defrauding the Bank and hindering its collection of the debt owed to it by Herbert.

Among other things, in Count I of the amended complaint, the Bank sought a determination that Jeanne held the Newport property as a constructive trustee for the Bank, and also prayed for the issuance of a writ of attachment on the real estate. Moreover, the Bank filed a notice of lis pendens against the record title of the Newport residence in January of 1985 when it first commenced this action. However, since Jeanne was on the verge of selling the Newport residence in February of 1985, the Bank and the Finleys entered into an escrow agreement whereby one half of the proceeds from the sale, representing that portion the Bank claims belongs to Herbert, would be put in an escrow account. For its part, the Bank agreed to release its lis pendens in order to facilitate the pending sale. In this way the Finleys were able to sell their home and the Bank's claim to half of their equity in the property was protected. The escrow agreement, introduced into evidence as

plaintiff's exhibit 7, states that \$39,389.00 represents the sum that the Bank claims is due it from the sale.

The second Finley property (which is the subject matter of Count II of the complaint and which the Bank alleges Herbert fraudulently transferred) is a commercial parcel located in Hyannis, Massachusetts. This real estate (used for a boat yard business) had been owned solely by Herbert prior to September 21, 1984, but on that date he deeded the property to Jeanne and himself as tenants by the entirety. The deed, introduced into evidence as plaintiff's exhibit 9, recites that this conveyance was for "nominal non-monetary" consideration. On November 30, 1984, in the civil action captioned C.A. 84-0659 S, this Court (Selya, J.) issued an order restraining Herbert and persons acting in concert with him from transferring his real property. This restraining order was introduced into evidence as plaintiff's exhibit 10. Notwithstanding the existence of this order, the Finleys conveyed title to the Hyannis property to Deep Water Realty Trust on December 27, 1984. In Count II, the Bank, among other things, requests an attachment of the proceeds from this Hyannis sale.

Finally, Count III concerns the Finleys' current home in Sandwich, Massachusetts. The Bank maintains that \$39,219.19, constituting the net proceeds of the Hyannis sale, was improperly used by Jeanne to purchase the Sandwich

residence. Therefore, the Bank asks the Court to impose a constructive trust and an equitable lien upon the Sandwich property for its benefit to the extent of \$39,219.19 plus interest and costs. At trial, the Bank reduced this figure by roughly \$10,000.

For their part, the Finleys claim that the two transfers of property from Herbert to Jeanne were for valid and valuable consideration, and were not designed to defraud the Bank. As to the Newport residence, the Finleys maintain that the consideration took the form of an agreement on the part of Jeanne to marital reconciliation with Herbert. As to the Hyannis property, defendants assert that the consideration also took the form of an agreement by Jeanne to marital reconciliation plus an agreement by Jeanne to pledge a \$50,000 certificate of deposit for a line of credit for Herbert to pursue the operation of a boat business owned by him and operated on the Hyannis premises.

Both sides agree that this matter is governed by former Rhode Island General Laws, Section 6-16-1 (1956) - known as the Statute of Elizabeth. While the Rhode Island General Assembly replaced the statute of Elizabeth with the Uniform Fraudulent Transfer Act in 1986, the former statute is controlling here. References in this opinion, therefore, are to the former § 6-16-1. Section 6-16-1 reads in relevant part:

Every . . . conveyance of lands . . . had or made and contrived of fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just demands of what nature soever . . . shall be henceforth deemed . . . to be clearly and utterly void.

The most recent Rhode Island Supreme Court decision concerning a suit brought pursuant to former § 6-16-1 to set aside an allegedly fraudulent conveyance between a husband and wife is Oury v. Annotti, 113 R.I. 506, 324 A.2d 325 (1974). In that case, the Court set forth the Rhode Island common law gloss embellishing the Statute of Elizabeth. The Court wrote:

In this state, a determination that a conveyance made without consideration is fraudulent as to creditors does not require proof of actual fraud, but depends upon whether the debtor on the critical date of conveyance was so situated that the making of the gift hindered or delayed his creditors in the enforcement of their rights. Proof, however, that a conveyance to a wife was of all her husband's property and was for a nominal consideration, makes out a prima facie case that it was made with the intent or purpose to hinder, delay or defraud creditors.

Id. at 508 n.2, 324 A.2d at 327 n.2 (citations omitted).

During a one day non-jury trial held on April 3, 1989, the parties brought the relevant facts concerning the 1984 Finley transactions before this Court. Having heard the testimony and studied the exhibits admitted into

evidence at trial, this Court now makes the following determinations.

In the Fall of 1984, Herbert owed the Bank over 3.3 million dollars and was hopelessly insolvent. During this time, he transferred interests in the Finleys' Newport home and in his Hyannis business real estate to Jeanne. Eventually, these properties were sold to third parties and portions of the net proceeds from such transactions were used by Jeanne to purchase a home in Sandwich, Massachusetts where she and her husband now live. The case boils down to this: if the transfers of property interests in the Newport and Hyannis parcels from Herbert to Jeanne lacked valuable consideration, they constitute fraudulent conveyances under former § 6-16-1 of the Rhode Island General Laws.

The Court concludes that Herbert's conveyance of his one-half interest in the Newport real estate to his wife was made without valuable consideration and thus the Bank is entitled to the sale proceeds now held in escrow.

On October 31, 1984, Herbert and Jeanne as tenants by the entirety transferred their interest in the Newport property to Jeanne as sole owner. The Finleys claim that Jeanne's consideration to Herbert for getting sole ownership in this real estate was that she had assented to an oral marital reconciliation agreement with Herbert in early 1984 and had withdrawn her divorce action. Even if true, such

consideration does not constitute valuable consideration for purposes of the fraudulent conveyances statute, because it gives nothing of value to Herbert which can be viewed as valuable to his creditors. An insolvent debtor who transfers property violates the Statute of Elizabeth unless his conveyance is made for valuable consideration. Dufresne v. Regency Realty, Inc., 295 S.C. 1, 366 S.E.2d 256 (1987); Oury v. Annotti, 113 R.I. at 508 n.2, 324 A.2d at 327 n.2. As one court recently observed:

In the contemplation of the statute [of Elizabeth], a valuable consideration is the fair equivalent for the property conveyed. . . . Although the statute itself does not use the words "valuable consideration," the courts early held that a mere legal consideration was not enough.

Dufresne, 295 S.C. at \_\_\_ n.1, 366 S.E.2d at 257 n.1 (citations omitted); see also Tanner v. Whitney, 52 R.I. 391, 394 (1932) ("The validity of the conveyance is to be determined not by the debtor's intention, even if honest, but by the effect on the creditor's right of recovery."). Since Jeanne's marital reconciliation agreement is of no value to a creditor, the conveyance from Herbert to Jeanne of October 31, 1984 is void and the Bank is entitled to Herbert's interest in the property.

Jeanne received \$78,777.98 at the closing of the sale of the Newport home on January 29, 1985, according to the settlement statement entered into evidence at trial as

plaintiff's exhibit 6. Half of this money was put into an escrow account in order to secure the Bank's release of its *lis pendens* on the title of the Newport house. This money represents the amount that the Bank alleges actually belongs to Herbert as a tenant by the entirety of the home. According to a bank statement dated February 28, 1989, the escrow account on that date had a balance of \$49,189.81. Plaintiff's exhibit 8. Since the Court finds that the transfer of Herbert's interest in the Newport property to Jeanne was invalid under § 6-16-1, the Bank is entitled to the escrow money in toto.

A \$12,100.00 deposit was also made on the Newport property by the purchaser and this amount was part of the purchase price. Herbert as a tenant by the entirety, was entitled to half this sum. The evidence at trial, however, indicated that Jeanne received all of the \$12,100 deposit and spent it on household and other living expenses. The Bank presented no evidence that Jeanne used any of this deposit money to purchase the Sandwich home. The Bank is not entitled to any portion of the deposit since it was used to defray Finley family expenses which were the obligations of Herbert.

The circumstances surrounding the transfer of Herbert's property interest in the Hyannis real estate are slightly different. Prior to the Fall of 1984, title to the

Hyannis property stood in Herbert's name alone. Then on September 21, 1984, he granted title to this real estate to himself and Jeanne as tenants by the entirety. On December 27, 1984, the Finleys sold their Hyannis holdings to Robert H. Goodwin as trustee of Deep Water Realty Trust. The net proceeds at closing from this sale totalled \$29,219.19; however, further adjustments to this sum were made. The parties now agree that the Finleys received a total of \$26,900 from this sale as a result of the closing. Through its pretrial memorandum, incorporated in its closing argument at trial, the Bank reduced its initial claim for proceeds derived from the Hyannis sale from \$39,389 to \$26,900. This difference is largely due to the Bank's abandonment of its attempt to recover a \$10,000 deposit initially made on the property.

Although Jeanne was only a one-half owner of the Hyannis realty, she received the entire \$26,900 and used it to purchase a home in Sandwich, Massachusetts for the Finley family on January 24, 1985. The Bank alleges that the conveyance from Herbert to himself and his wife was fraudulent and seeks to have this Court impose a constructive trust on the Sandwich home in its favor in order to recover the \$26,900.

The Finleys claim that a valuable consideration ran from Jeanne to Herbert for this interest in the Hyannis

property. According to the testimony of Jeanne, in early 1984 she pledged her \$50,000 certificate of deposit to a bank to enable Herbert's boat business to secure a line of credit. This was done by Jeanne in consideration for receiving a one-half interest in the Hyannis property.

Two aspects of the Hyannis conveyance from Herbert to Jeanne are troubling. The first is that the conveying deed states that the grant is for "non-monetary" consideration. The second problem is that the transfer of title did not occur until long after the pledge of the \$50,000 certificate of deposit. When questioned about the time lag at trial, Jeanne testified that it was due to the procrastination of her husband and his tendency to put family matters behind other concerns. The Court finds Jeanne to be credible concerning the Hyannis conveyance and believes that she pledged her \$50,000 certificate of deposit as consideration for receiving a one-half interest in the Hyannis property. The deed's recitation that transfer was made for non-monetary consideration is technically accurate since a purchase price was not paid by Jeanne for that interest. The consideration was valuable to creditors however, because her pledge permitted the boat business to prosper to some extent and allowed the property to appreciate in value.

Although Jeanne's certificate of deposit was returned to her unencumbered when the Hyannis property was

sold; it still constituted valuable consideration since it allowed Herbert's boat business to secure a line of credit. In fact, the effect of Jeanne's pledge was to allow Herbert, with the new line of credit, to build up equity in the Hyannis business and related commercial property. Half of this equity belonged to Herbert and it is now available to satisfy a portion of his debt to the Bank as a direct result of Jeanne's pledge. Therefore, Jeanne's consideration was certainly valuable and has, in fact, benefited the bank.

Though Herbert did not convey title until September of 1984, a time when he was already insolvent, his pre-existing obligation to Jeanne prevents the conveyance from being fraudulent under former § 6-16-1. See Ducharme v. Champagne, 110 R.I. 270, 273, 292 A.2d 224, 225 (1972) (A valid antecedent debt prevents a conveyance to a prior creditor from violating § 6-16-1.). Therefore, Jeanne received a valid half interest in the Hyannis real estate and was entitled to half of the \$26,900 proceeds from its sale.

As previously noted, Jeanne received the entire proceeds from the sale of the Hyannis real estate and used all of it to purchase the Sandwich home, including money due to her husband. \$13,450 of the proceeds from the Hyannis sale belonged to Herbert. Since this money was put into the Finleys' Sandwich home, the Bank is entitled to a constructive trust and equitable lien on the Sandwich

property in the amount of \$13,450 plus interest from January 24, 1985 (the date of that purchase).

In summary, the Bank is entitled to half the proceeds from the sale of the Finleys' Newport home plus the interest presently accrued in the escrow account. This amount is now in excess of \$49,189.81. However, the Bank is not entitled to half of the \$12,100 deposit initially placed on the Newport home. Finally, a constructive trust and equitable lien to the extent of \$13,450 plus interest from January 24, 1985 shall be placed on the Sandwich real estate for the Bank's benefit.

Plaintiff shall present a form of Judgment to the Court within 10 days. If the parties cannot agree on the applicable rate of interest to be included therein, the Court will hear arguments thereon.

It is so Ordered.

  
Ronald R. Lagueux  
United States District Judge

6/26/89  
Date