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U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
March 26, 2004
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE ALLEN WILLIAM KEFFER, Debtor.	BAP No. WY-03-071
TRACY LYNNE ZUBROD, Trustee, Plaintiff – Appellee, v. ALLEN WILLIAM KEFFER, and DIXIE J. KEFFER, Defendants – Appellants.	Bankr. No. 01-21574 Adv. No. 02-2053 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before MICHAEL, THURMAN, and WEAVER[1], Bankruptcy Judges.

WEAVER, Bankruptcy Judge.

Dixie J. Keffer and Allen William Keffer ("Appellants") appeal the judgment of the United States Bankruptcy Court for the District of Wyoming in favor of Tracy Lynne Zubrod, Chapter 7 Trustee ("Trustee"), on her adversary

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

[1] Honorable T.M. Weaver, United States Bankruptcy Judge, United States Bankruptcy Court for the Western District of Oklahoma, sitting by designation.

complaint to avoid fraudulent transfers pursuant to 11 U.S.C. § 548(a).[2] The bankruptcy court held that the Appellants' prepetition conveyance of jointly-owned property to themselves as tenants by the entireties constituted fraudulent transfers under § 548(a)(1)(B). For the reasons stated below, we affirm.

Appellate Jurisdiction

This Court has jurisdiction over this appeal. The bankruptcy court's judgment disposed of the adversary proceeding on the merits and is subject to appeal under 28 U.S.C. § 158(a)(1). *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). The Appellants' notice of appeal was timely under Fed. R. Bankr. P. 8002, and the parties have consented to this Court's jurisdiction by failing to elect to have the appeal heard by the United States District Court for the District of Wyoming. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1.

Standard of Review

"For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error) and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); Fed. R. Bankr. P. 8013. *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision. *Salve Regina College v. Russell*, 499 U.S. 225 (1991). A finding of fact is "clearly erroneous" "'when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

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[2] Unless otherwise specified, all references to sections herein are to the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

Background

The debtor, Allen William Keffer ("the debtor"), who had no health insurance, suffered a heart attack and incurred medical bills of over $90,000.00. He met with a bankruptcy attorney who advised him to marry his longtime girlfriend and convert his property,[3] at the time held with his girlfriend as tenants in common as found by the bankruptcy court, to property held as tenants by the entireties. The debtor got married, transferred the property, and then filed a Chapter 7 petition.

The Trustee filed an adversary proceeding seeking (1) an order revoking the debtor's discharge pursuant to § 727(d), and (2) to avoid the transfers of the debtor's interests in the properties as fraudulent transfers under § 548(a)(1). The Appellants filed a motion for summary judgment, which was denied by the bankruptcy court. After a trial on the merits on the Trustee's complaint, the bankruptcy court ruled in favor of the debtor on the Trustee's § 727 claim, and that ruling has not been appealed. But the court ruled in favor of the Trustee on her fraudulent transfer claim, finding that the debtor failed to receive reasonably equivalent value in exchange for the conveyances, and avoided the transfers under § 548(a)(1)(B). The court did not address the Trustee's "actual fraud" theory of the case under § 548(a)(1)(A).

Discussion

Appellants contend the following two issues are present in this appeal:

1. Did the bankruptcy court err by not granting the Appellants' motion for summary judgment?
2. Did the bankruptcy court err by applying § 548 to transfers

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[3] Debtor's property consisted of a vehicle, two certificates of deposit, and a home. Appellants did not appeal the ruling below regarding the transfer of the vehicle, which they admit was properly avoided. The property at issue on appeal are the two certificates of deposit and the home.

made to allow lawful exemption claims?

As to the first issue, the record on appeal shows that the bankruptcy court denied the Appellants' motion for summary judgment because there existed disputed issues of material fact. The Court of Appeals for the Tenth Circuit has held that the denial of a motion for summary judgment based on the existence of disputed material facts is not appealable. *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248 (10th Cir. 1992). This is so because "a denial of summary judgment is not a judgment but 'merely a judge's determination that genuine issues of material fact exist.'" *Id.* at 1251 (quoting *Glaros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 (Fed. Cir. 1986)). In addition, despite making vague references to alleged errors in the summary judgment procedure, Appellants fail to argue this issue in their brief. "'A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point.'" *Tran v. Trustees of the State Colleges*, 355 F.3d 1263, 1266 (10th Cir. 2004) (quoting *Phillips v. Calhoun*, 956 F.2d 949, 953-54 (10th Cir. 1992) (further quotation omitted)). *See Abercrombie v. City of Catoosa*, 896 F.2d 1228, 1231 (10th Cir. 1990) (an issue not argued in an appellate brief is waived). Therefore, Appellants' first contention is without merit.

As to the second issue, the bankruptcy court addressed the Trustee's fraudulent transfer claim only under the Bankruptcy Code's constructive fraud provision, which provides, in pertinent part:

> 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 . . . received less than a reasonably equivalent value in exchange for such transfer or obligation; and . . . was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation . . . .

11 U.S.C. § 548(a)(1)(B). Thus, under this section, the trustee has the burden to

prove (1) that the debtor had an interest in property; (2) that a transfer of that interest occurred within one year of the filing of the bankruptcy petition; (3) that the debtor was insolvent or was rendered insolvent as a result of the transfer; and (4) that the debtor received less than a reasonably equivalent value in exchange for the transfer. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994). If the trustee successfully establishes these four elements, a conclusive presumption of fraud arises. *Official Comm. of Unsecured Creditors v. Liberty Savings Bank, FSB (In re Toy King Distrib., Inc.)*, 256 B.R. 1, 141 (Bankr. M.D. Fla. 2000).

With respect to these elements, the bankruptcy court first noted that Appellants conceded that the debtor had an interest in property, that he was insolvent at the time of the conveyances and that the transfer occurred within the prepetition year. The court further observed that it appeared that Appellants were not contesting whether a transfer had in fact occurred, although they had initially contested this fact. In any event, the court concluded that the change in ownership of the property constituted a transfer of property under § 548(a). Appellants fail to challenge this finding on appeal.

The bankruptcy court then addressed what it concluded was the ultimate issue – whether debtor received reasonably equivalent value in exchange for the conveyances. Citing *Zubrod v. Kelsey (In re Kelsey)*, 270 B.R. 776 (10th Cir. BAP 2001), the court reviewed the conveyances from the "objective, economic perspective of the creditors" and determined that the conveyances were made without any quantifiable exchange of consideration. Consequently, the court found that debtor did not receive reasonably equivalent value in exchange for the conveyances. Inasmuch as Trustee successfully established all four elements supporting an avoidance action for constructive fraud, the court granted judgment in favor of Trustee on her claim pursuant to § 548(a)(1)(B).

On appeal, Appellants fail adequately to challenge the court's finding regarding the non-existence of reasonably equivalent value. A determination in

this regard is a question of fact reviewable for clear error. *Stillwater Nat'l Bank v. Kirtley (In re Solomon)*, 299 B.R. 626, 632 (10th Cir. BAP 2003) (citing *Clark v. Security Pac. Bus. Credit, Inc. (In re Wes Dor, Inc.)*, 996 F.2d 237, 242 (10th Cir. 1993)). *See also Pummill v. Greensfelder, Hemker & Gale (In re Richards & Conover Steel Co.)*, 267 B.R. 602, 609 (8th Cir. BAP 2001). Appellants failed to include the trial transcript in their appendix to the court. Such failure is fatal to Appellants' appeal inasmuch as failure to include a transcript prevents this Court from reviewing the bankruptcy court's findings of fact, and therefore, we are compelled to affirm. *Travelers Indem. Co. v. Accurate Autobody, Inc*., 340 F.3d 1118, 1120 (10th Cir. 2003) ("We are unwilling to reverse the decision of the [trial] court based on a guess . . . . The party appealing . . . has the burden to relieve us of such guesswork by providing the necessary documents," and its failure to do so is grounds for summary affirmance). *See Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979 (10th Cir. 1992). Thus, this Court cannot review the factual finding that debtor failed to receive reasonably equivalent value in exchange for the conveyances under § 548(a)(1)(B), as determined by the bankruptcy court. Further, Appellants fail specifically to challenge the bankruptcy court's application of § 548(a)(1)(B) in this case. Rather, Appellants contend generally that the Bankruptcy Code permits prepetition exemption planning, and the bankruptcy court erred in holding that such planning constituted fraudulent transfers. Essentially, Appellants' argument is that exemption planning prior to filing bankruptcy is permitted under *Marine Midland Business Loans, Inc. v. Carey (In re Carey)*, 938 F.2d 1073 (10th Cir. 1991), and thus the bankruptcy court should have applied the *Carey* rule, which states that for purposes of § 727 denial of discharge cases: "'[T]he conversion of non-exempt to exempt property for the purpose of placing the property out of the reach of creditors, *without more*, will not deprive the debtor of the exemption to which he otherwise would be entitled.'" *Id*. at 1076 (emphasis added) (quoting *Norwest*

Bank Neb., N.A. v. Tveten, 848 F.2d 871, 873-74 (8th Cir. 1988)). Appellants argued at trial and on appeal that the Trustee failed to establish the requisite misconduct or fraudulent intent required in *Carey*.[4]

But, rather than applying § 548(a)(1)(A), which requires a finding of fraudulent intent in order to avoid an allegedly fraudulent transfer, the bankruptcy court avoided the transfers under the constructive fraud theory of § 548(a)(1)(B). The statutory language requires that no particular intent be established. Indeed, Appellants fail to address the constructive fraud issue and merely argue generally that actual fraud must be shown in order to avoid a transfer as a fraudulent transfer under § 548(a). Such argument ignores the language of the statute and the considerable authority interpreting § 548(a)(1)(B), under which fraudulent intent is presumed upon the requisite showing. The Appellants, therefore, having failed to address any legal error in the judgment against them under § 548(a)(1)(B), have waived this point on appeal, and we are compelled to affirm the bankruptcy court's judgment. *See*, e.g., *Brownlee v. Lear Siegler Mgmt. Servs. Corp*. 15 F.3d 976, 977-78 (10th Cir. 1994) (short reference to court error without sufficient citation to authority "is not adequate appellate argument"); *Rapid Transit Lines, Inc. v. Wichita Developers, Inc*., 435 F.2d 850, 852 (10th Cir. 1970) (trial court's order will be summarily affirmed if appeal is based on unsupported arguments).

In sum, then, the language of § 548(a)(1)(B) sets forth four elements a trustee must establish to be entitled to avoidance of a fraudulent transfer for constructive fraud. Intent is not one of the elements. The bankruptcy court found

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[4] Section 727 authorizes denial of a debtor's discharge when "the debtor, *with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title*, has transferred . . . or permitted to be transferred . . . property of the debtor . . . or property of the estate . . . ." 11 U.S.C. § 727(a)(2)(A) & (B)(emphasis added). Thus, both Bankruptcy Code sections 548(a)(1)(A) and 727(a)(2) require a showing of actual intent.

that the Trustee had shown her entitlement to avoidance by satisfying all four elements, and absent a record to review or arguments that challenge the legal conclusion under §548(a)(1)(B), its judgment must be affirmed.

Conclusion

For the reasons set forth above, the judgment is AFFIRMED.