United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
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Lyle W. Cayce
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No. 19-31009

IN THE MATTER OF: LOUISIANA PELLETS, INC.; GERMAN PELLETS LOUISIANA, L.L.C.,

Debtors,

CRAIG JALBERT,

Appellant,

versus

WESSEL G M B H,

Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:19-CV-870

Before HIGGINBOTHAM, ELROD, and HAYNES, *Circuit Judges*.

PER CURIAM:*

This adversarial bankruptcy action involves contracts to construct a wood-pellet manufacturing plant in Louisiana. The Trustee for debtor

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

German Pellets Louisiana LLC (GPLA), the entity that was constructing and operating the plant, appeals the denial of his request to avoid transactions entered into by GPLA with Wessel GmbH Fordertechnik und Pelletierenlagen. We AFFIRM the denial.

I. Facts & Procedural History

Many of the underlying facts are undisputed. Louisiana Pellets Inc. owned property in Urania, Louisiana, intended for a solid-waste disposal and wood-pellet manufacturing facility. Louisiana Pellets engaged GPLA to oversee the construction and eventually operate the completed facility. The facility's construction was divided into Phase I (or Line A) and Phase II (or Line B). Before construction began, GPLA contracted Wessel to construct conveying and cooling equipment and to provide related services for both phases.

In February 2014, after GPLA encountered financial difficulties, GPLA and Wessel agreed to modify the contract through a First Change Order. This change order removed Phase II from the contract, limiting construction to Phase I only. It also relieved GPLA of its obligation to pay Wessel for equipment or services related to Line B and reduced the total contract price by nearly half. Nonetheless, Wessel continued to perform design and manufacturing work at the direction of GPLA's technical department with the understanding that it was a matter of when, not if, the second stage of construction would resume. Wessel sent GPLA two invoices that reflected this type of work, one on September 26, 2014 for €200,000 and another on December 9, 2014 for €400,000. In December 2014, for services indicated on the first invoice, Wessel received a payment of €200,000 from GPLA—the first of five disputed payments.

After Wessel completed its work for Phase I, the parties agreed to a Second Change Order in April 2015. The Second Change Order provided that a portion of the original Phase II would be reinstated, work that was

renamed Line B1. This order also implemented a payment milestone schedule, which scheduled delivery of the Line B1 equipment after roughly 90% of the €3,600,000 total had been paid. Shortly after executing the Second Change Order, GPLA's parent company paid Wessel €400,000 for services indicated on the second invoice—the second disputed payment.[1] The parent company issued three additional payments of €200,000 each between August and September 2015.

GPLA never obtained a completed Line B1, nor Phase II, because both GPLA and Louisiana Pellets filed for Chapter 11 bankruptcy in February 2016. Craig Jalbert was appointed Liquidating Trustee for GPLA, and he brought the adversary proceeding underlying this case in the U.S. Bankruptcy Court for the Western District of Louisiana in 2018. The Trustee in part sought to avoid and recover the five disputed payments in accordance with provisions in the Bankruptcy Code and the Louisiana Civil Code. In his complaint, he argued that the five payments were fraudulent transfers within the meaning of 11 U.S.C. § 548. Before trial, the Trustee conceded that the payments were not actual fraud but continued to argue that they were constructive fraud. The parties jointly stipulated that the court should also determine whether the Second Change Order was itself a constructive fraudulent transaction. The Trustee further brought a revocatory action under Louisiana Civil Code article 2036 via 11 U.S.C.

[1] Wessel argues that the transfers "cannot be avoided because the payments were made by a non-debtor foreign entity"—the parent company—and were therefore not paid with GPLA's assets. However, because both entities were controlled by the same person and the parent's funds were available to pay GPLA's creditors, these were assets of GPLA's estate. *See In re IFS Fin. Corp.*, 669 F.3d 255, 263 (5th Cir. 2012) (holding that "control is decisive," not legal title); *In re Southmark*, 49 F.3d 1111, 1116–17 (5th Cir. 1995) ("[T]he primary consideration in determining if funds are property of the debtor's estate is whether the payment of those funds diminished the resources from which the debtor's creditors could have sought payment.").

§ 544(b), arguing that the five payments were avoidable because they increased GPLA's insolvency.

After trial, the bankruptcy court issued a judgment in favor of Wessel. *In re La. Pellets, Inc.*, No. 16-80162, 2019 WL 2565670, at *2–4 (Bankr. W.D. La. June 20, 2019). On the issue of constructive fraud, the court concluded that a binding contract existed between the parties, that the five disputed payments made by GPLA to Wessel were for reasonably equivalent value because they were made to satisfy antecedent debt retroactively sanctioned by the Second Change Order, and that GPLA also obtained reasonably equivalent value from Wessel "in the form of the expected future benefit of Phase II . . . ." *Id.* at *4. It further held that the payments did not increase GPLA's insolvency under Louisiana law because they were payments on antecedent debt. *Id.* The court did not specifically address the Second Change Order as a separate transaction. *See id.* The Trustee appealed to the district court, which—sitting as an appellate court—affirmed from the bench the bankruptcy court's decision for the reasons stated therein. The Trustee then timely appealed to this court.

II. Standard of Review

"In reviewing the rulings of the bankruptcy court on direct appeal and the district court sitting in bankruptcy, we review findings of fact for clear error and conclusions of law *de novo*. We review mixed questions of law and fact *de novo*." *In re TMT Procurement Corp.*, 764 F.3d 512, 519 (5th Cir. 2014) (per curiam) (footnote omitted). Relevant here, whether a debtor received value at all is a question of law, but "[a] bankruptcy court's finding of reasonably equivalent value is a factual determination subject to a 'clearly erroneous' standard of review." *See In re TransTexas Gas Corp.*, 597 F.3d 298, 306 & n.2 (5th Cir. 2010); *see also In re Dunham*, 110 F.3d 286, 288–89 (5th Cir. 1997) (abrogating a line of prior cases that had reviewed reasonable-equivalency determinations de novo). Because the district court adopted the

reasoning of the bankruptcy court, we discuss only the bankruptcy court's opinion and judgment.

III. Discussion

Both 11 U.S.C. § 548(a)(1)(B) and Louisiana Civil Code article 2036 permit a bankruptcy trustee to avoid certain recent transfers made by a debtor. Section 548(a)(1)(B) addresses constructively fraudulent transfers, which are exchanges in which the debtor did not receive "reasonably equivalent value." *In re Gulf Fleet Holdings, Inc.*, 491 B.R. 747, 762, 766 (Bankr. W.D. La. 2013) (quoting 11 U.S.C. § 548(a)(1)(B)). The Louisiana statute is broader, allowing a trustee to "annul an act of the obligor, . . . made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency." La. Civ. Code Ann. art. 2036. This is referred to as a revocatory action. *See generally id.* ch. 12, sec. 1. The Bankruptcy Code permits a trustee to avoid transfers by the debtor that are "voidable under applicable law," 11 U.S.C. § 544(b), which includes article 2036, *Hays v. Jimmy Swaggart Ministries*, 263 B.R. 203, 213 (M.D. La. 1999).

A. Constructive Fraud

Under § 548(a)(1)(B), a bankruptcy trustee may avoid certain transfers made within two years of the bankruptcy filing if the debtor did not "receive reasonably equivalent value":

> 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 2 years 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[.]

Put simply, this section allows a trustee to nullify certain inflated transactions "to conserve the debtor's estate for the benefit of creditors." *In re Minn. Util. Contracting, Inc.*, 110 B.R. 414, 420 (Bankr. D. Minn. 1990). "Any significant disparity between the value received and the obligation assumed will have significantly harmed the innocent creditors of the debtor." *Id.* Unlike the provisions on actual fraud, the constructive fraud provision is not concerned with the debtor's intent, but rather the value the debtor received. *See* 11 U.S.C. § 548(a)(1).

Because the disputed payments occurred less than two years before the bankruptcy filing and the parties stipulated that GPLA was insolvent at all relevant times, the only question is whether GPLA received reasonably equivalent value in its transactions with Wessel. *See id.* § 548(a)(1)(B). The bankruptcy court concluded that all five payments "were made to satisfy an antecedent debt" and that GPLA "received 'reasonably equivalent value' in the form of the expected future benefit of Phase II." *La. Pellets*, 2019 WL 2565670, at *4.

Whether a debtor received reasonably equivalent value is a two-part inquiry: (1) whether the debtor received value, and (2) whether that value was reasonably equivalent. *In re Fruehauf Trailer Corp.*, 444 F.3d 203, 212–13 (3d Cir. 2006). Although *value* is defined in the Bankruptcy Code, *reasonably equivalent value* is not. *See* 11 U.S.C. § 548(d)(2)(A) (providing that "'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"). Instead, the determination of reasonable equivalency is left to courts, which "judge the consideration given for a transfer from the standpoint of creditors." *TransTexas*, 597 F.3d at 306. "The proper focus," we have said, "is on the net effect of the transfers on the debtor's estate, the funds available to the

unsecured creditors." *In re Hinsley*, 201 F.3d 638, 644 (5th Cir. 2000) (quotation omitted).

"Value is determined as of the date of transfer." *Id.* (citing *In re Viscount Air Servs.*, 232 B.R. 416, 437 (Bankr. D. Ariz. 1998) ("The value of the transferred assets is established as of the date that the transfers put the assets beyond the reach of creditors.")). For any such value to be reasonably equivalent, the debtor must receive "value that is substantially comparable to the worth of the transferred property." *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 548 (1994). "[T]he inquiry . . . is the same for all transfers." *Id.* Fair market value is usually a relevant measure for market transactions, but it is not always the most prudent one. *See id.* at 545 (holding that reasonably equivalent value will "ordinarily [bear] a meaning similar to fair market value" but that a property's foreclosure sale price was the appropriate measure of value). Because value is determined at the time of transfer, "[n]either subsequent depreciation in nor appreciation in value of the consideration affects the question whether reasonable equivalent value was given." *In re Chomakos*, 69 F.3d 769, 771 (6th Cir. 1995) (quoting *Collier on Bankruptcy* § 548.09 at p. 116 (15th ed. 1984)) (holding that a debtor who placed a bet received reasonably equivalent value in the form of a contractual right to payment if successful).

"Although the minimum quantum necessary to constitute reasonably equivalent is undecided, it is clear that the debtor need not collect a dollar-for-dollar equivalent to receive reasonably equivalent value." *In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1125–26 (5th Cir. 1993), *abrogated in part on other grounds by Dunham*, 110 F.3d at 288–89. When a debtor makes a monetary investment, we "consider the circumstances that existed at the time and determine if 'there was any chance that the investment would generate a positive return.'" *Hays*, 263 B.R. at 211 (quoting *In re R.M.L., Inc.*, 92 F.3d 139, 152 (3d Cir. 1996)). "[W]e cannot use hindsight to recalibrate the risk—

or the potential reward—of [the debtor's] investment." *Fairchild Aircraft*, 6 F.3d at 1126. This approach "appropriately balances a creditor's interest in estate preservation against a debtor's legitimate, pre-bankruptcy efforts to take risks that, if successful, could generate significant value and, possibly, avoid the need for protection under the [Bankruptcy] Code altogether." *R.M.L.*, 92 F.3d at 152.

When a debtor makes a payment on antecedent debt and receives a dollar-for-dollar reduction of that debt, however, the question is easy because the debtor by definition receives reasonably equivalent value—indeed, *exactly* equivalent value, assuming, of course that the debt itself was based upon value. *See Gulf Fleet Holdings*, 491 B.R. at 766 (collecting cases); *see also* 11 U.S.C. § 548(d)(2)(A) (defining "value" to include "satisfaction . . . of a present or antecedent debt").

1. The Second Change Order

As an initial matter, the Trustee argues that the bankruptcy court failed to determine whether the Second Change Order was itself constructive fraud. We conclude that the bankruptcy court implicitly held that the Second Change Order was not a constructive fraudulent transaction. This is because if the Second Change Order were fraudulent, it could not have been the source of the antecedent debt on which, as the court held, the disputed payments were made. *See La. Pellets*, 2019 WL 2565670, at *2–4; *see also TransTexas*, 597 F.3d at 307–08 (holding that there was no antecedent debt because the contract did not create an obligation to pay).

We also hold that it was not clear error to find that the Second Change Order was an exchange for reasonably equivalent value. The parties stipulated that it was an arm's-length transaction, which is relevant, though not dispositive. *See Barber v. Golden Seed Co.*, 129 F.3d 382, 387 (7th Cir. 1997). GPLA clearly received value in the form of Wessel's promise to perform work for Line B1, and the Trustee has not shown that GPLA's

obligation to pay was not commensurate with Wessel's promise. *See id.* (noting that the burden of proof for showing lack of reasonable equivalency lies with the bankruptcy trustee). Paying €3,600,000 for Line B1 compared to the original €4,940,000 for the full Phase II is not clearly unreasonable. Although GPLA was insolvent at the time, the Trustee has not shown that the agreement under the Second Change Order was almost certain to fall through—indeed, Phase I had just been completed successfully—so we will not second-guess the potential risk and reward of entering into it. *See Fairchild Aircraft*, 6 F.3d at 1126 ("[W]e cannot use hindsight to recalibrate the risk—or the potential reward—of [the debtor's] investment."); *cf. Hays*, 263 B.R. at 211 (finding no reasonable equivalency because "there was no chance" that the deal would have gone through). True, the contract eventually failed, but we do not consider the later failure or depreciation of an obligation in our examination of reasonable equivalency. *See In re Treasure Valley Opportunities, Inc.*, 166 B.R. 701, 704–05 (Bankr. D. Idaho 1994). Therefore, we AFFIRM the bankruptcy court's ruling that the Second Change Order was not a constructive fraudulent transaction.

2. The Disputed Payments

We now address the bankruptcy court's holding that all five disputed payments were made in exchange for reasonably equivalent value because they satisfied an antecedent debt. *See La. Pellets*, 2019 WL 2565670, at *2–4. The first two payments were invoiced before the Second Change Order was executed, and the latter three were invoiced afterward. However, when Wessel invoiced GPLA is not dispositive. For instance, GPLA received the second invoice for €400,000 in December 2014 but then waited until April 2015, after the second change order formally revived work on part of Phase II, to make this payment. This lends credence to the bankruptcy court's conclusion that the second payment was in fact tethered to GPLA's original obligation in the parties' 2013 contract that GPLA reassumed in the second

change order. *See In re Hinsley*, 201 F.3d at 644 ("[V]alue is determined as of the date of transfer.").

Likewise, the parties did not dispute that Wessel performed design and manufacturing work for Line B1 that was reflected in the first two invoices. Wessel did most, if not all, of the design and manufacturing work on Line B1 before the parties formally executed the second change order. Thus, the first two payments correspond with real, tangible work by Wessel, even if that work was undertaken before GPLA executed the second change order formalizing its renewed obligation to pay for such work. The value of Wessel's actual design and manufacturing on Line B1 of the plant is in addition to the somewhat less tangible value that GPLA received for these payments: keeping the construction project alive and preserving the expected future value of the completed pellet plant. *See In re Treasure Valley Opportunities, Inc.*, 166 B.R. at 705 ("In addition to being a tangible asset capable of being subject to levy by creditors, a wood pellet production plant would also appear to carry at least the potential of producing income.").

Without more information regarding the parties' pre-change-order discussions in the record, it is more difficult to determine whether the parties had concluded some sort of binding agreement before the second change order was executed in writing. This does put the first two payments on more tenuous footing because it leaves the question of a corresponding antecedent debt in some doubt. However, the record indicates that this was a good-faith exchange of payment for work, with GPLA receiving reasonably equivalent value in the form of Wessel's labor, preparations, and expertise. *See id.* ("NRR began performance of the contract in good faith, and there is no evidence the debtor made the payments in anything other than good faith."). GPLA's decision to make these payments between the first and second change orders can rationally be viewed as an effort to keep the project alive and preserve the possibility of future returns that a completed pellet plant

could provide. For these reasons, we hold that the first two payments were not constructively fraudulent and AFFIRM the bankruptcy court's ruling regarding these payments.

The latter three payments were made in accordance with the antecedent Second Change Order's payment schedule and were memorialized by lien waivers for the respective amounts. The dollar-for-dollar reduction of GPLA's obligation to pay Wessel under the Second Change Order was reasonably equivalent value for those three payments, so this holding was not clear error. *See La. Pellets*, 2019 WL 2565670, at *2–4. Separate from the antecedent debt, it was also not clear error to hold that GPLA received reasonably equivalent value in another form: These payments ensured that GPLA did not breach the contract, keeping alive "the expected future benefit" of Line B1, and potentially Phase II. *See id.* (citing *Treasure Valley*, 166 B.R. at 704 (recognizing "the continued vitality of [a] contract" as "an asset in a substantial sense")). We AFFIRM the bankruptcy court's ruling that these three payments were not constructive fraudulent transfers.

B. Louisiana Revocatory Action

The Louisiana revocation statute is broader than § 548, requiring only that the debtor-obligor do something after a creditor's rights accrue "that causes or increases the obligor's insolvency." LA. CIV. CODE ANN. art. 2036. Reasonable equivalence is not a consideration. *See id.* Payments on antecedent debt do not increase a debtor's insolvency because its balance sheet remains neutral. *See Gulf Fleet*, 491 B.R. at 766–77. The bankruptcy court held that none of the five disputed payments were avoidable under article 2036. *La. Pellets*, 2019 WL 2565670, at *4.

For the reasons discussed above in the previous section, all five disputed payments were on antecedent debt, so they did not increase

GPLA's insolvency. We therefore AFFIRM the bankruptcy court's ruling that the payments are not avoidable under article 2036.

IV. Conclusion

In sum, we AFFIRM the bankruptcy court's ruling that the Second Change Order and the five disputed payments were not constructive fraudulent transfers, and we AFFIRM the bankruptcy court's ruling that those payments are not avoidable under Louisiana law.

HAYNES, *Circuit Judge*, concurring in part, dissenting in part:

I respectfully dissent from the portion of the majority opinion affirming the bankruptcy court's ruling on the two disputed payments invoiced before the parties agreed to the Second Change Order.[1] Even the majority opinion concedes that the lack of a binding agreement at the time of the invoices puts these payments on "tenuous footing." That is actually an overstatement: those two are not on any footing. The payments do not correspond to any *antecedent* debt and were not otherwise for reasonably equivalent value. I would therefore hold that these two payments were constructively fraudulent and reverse the bankruptcy court's ruling regarding these payments.

The evidence demonstrates that these two payments were not made on an antecedent debt. GPLA made the payments in connection with Wessel's invoices for "Down payment[s]" on Line B1 of Phase II. But, at the time Wessel sent those invoices, the parties had already agreed to remove Phase II work from the contract and had not yet executed the Second Change Order to add Line B1 back in. The payments, in other words, were untethered to either the contract at the time of the First Change Order or the contract at the time of the Second Change Order. It appears, as the majority opinion suggests, that Wessel and GPLA may have been *discussing* adding Line B1 back in during that contractual interregnum. Yet there is no evidence that they actually came to a binding commitment on that front until they executed the Second Change Order months after the invoices were sent. The bottom line is that Wessel invoiced GPLA for Line B1 work *before* Wessel was entitled to do—or GPLA was required to pay—anything with respect to Line B1. GPLA's payments on those invoices therefore cannot relate to any

[1] I concur with the majority opinion in all other respects.

antecedent debt. *See In re Southmark Corp.*, 88 F.3d 311, 316 (5th Cir. 1996) ("A debt is antecedent if it is incurred *before* the transfer.").

Of course, the payments could still be permissible if GPLA nonetheless received something of reasonably equivalent value in exchange. *See* 11 U.S.C. § 548(a)(1)(B). But GPLA did not receive anything tangible from Wessel: Wessel did not deliver any equipment or perform any onsite services related to Line B1, let alone equipment or services reasonably equivalent to the €600,000 Wessel received in the two payments.[2]

Nor did GPLA receive anything else of reasonably equivalent value. In particular, the majority suggests that the payments are justified by "the somewhat less tangible value" of "keeping the construction project alive." I agree that the intangible (or, at least, hard to estimate) value of keeping a project afloat can, in rare circumstances, justify a payment. *See In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1126 (5th Cir. 1993), *abrogated in part on other grounds by In re Dunham*, 110 F.3d 286, 288–89 (5th Cir. 1997). But such intangible value is not reasonably equivalent, if, as here, there is a low possibility that the debtor could cash in on the project at all. *Cf. id.* (concluding that payments to keep the debtor marketable were reasonably equivalent in large part because the expected sale price and the likelihood of sale were "demonstrably high"). The value in keeping the project alive here was not reasonably equivalent to €600,000 because, even if the two payments helped the Line B1 project survive, Phase II would only be, in the language of the Second Change Order, "partly" complete. Whatever the expected future value of such a partially-completed, likely non-operational facility, the expected return or the likelihood of sale are not "demonstrably

[2] As the majority opinion notes, Wessel appears to have done some design and manufacturing work on Line B1 prior to the execution of the Second Change Order. But, even setting aside the fact that GPLA never actually received any of Wessel's Line B1 work, there is evidence that Wessel's work was worth considerably less than €600,000; in particular, for all of Line B1, Wessel constructed less than €265,000 in items.

high" on these facts. *Id.* Notably, the bankruptcy court did not even find any such facts; it simply treated all five payments the same way, concluding that they all concerned an antecedent debt and that all the payments would support the "future benefit of Phase II." *In re La. Pellets, Inc.*, No. 16-80162, 2019 WL 2565670, at *4 (Bankr. W.D. La. June 20, 2019); *see also id.* at *3 ("In other words, payments under a contract may constitute 'reasonably equivalent value' based on the expected future benefit, notwithstanding the fact that the Debtor may go into bankruptcy before that benefit is realized."). The court said nothing about the potential value of "keeping the construction project alive" while negotiating the Second Change Order.

I would, therefore, hold that the bankruptcy court clearly erred in treating these two payments the same as the other three and concluding that they were not constructively fraudulent. Accordingly, I respectfully dissent from Section III.A.2 of the majority opinion with respect to those payments.