

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4688
Summary Calendar

IN THE MATTER OF: HOY COLGIN, JR. and JANE COLGIN,
Debtors.

RED RIVER VALLEY BANK,
Appellant,

versus

BARRY KUPERMAN, Trustee,
and GEORGIA EUNICE JOHNSON
COLGIN SUCCESSION,
Appellees.

Appeal from the United States District Court
For the Western District of Louisiana
(CA-92-0560)

(December 3, 1992)

Before POLITZ, Chief Judge, HIGGINBOTHAM and WIENER, Circuit
Judges.

POLITZ, Chief Judge:*

Before us is an appeal of a district court order affirming the

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

bankruptcy court's avoidance of a mortgage in favor of Red River Valley Bank. Finding no error, we affirm.

Background

Hoy Colgin, Jr. and Jane M. Colgin initiated a Chapter 11 bankruptcy proceeding on June 13, 1990. This was later converted to a Chapter 7 proceeding. The debtor, Hoy Colgin, and the succession of his first wife, Georgia Eunice Johnson Colgin, were makers of a hand note dated May 26, 1989 in the amount of \$158,208.56, payable to Red River Valley Bank of Bossier City, Louisiana. The hand note was secured by a mortgage on an undivided 61.75% interest in certain immovable property owned jointly by Colgin and the succession. Hoy Colgin later executed a hand note dated August 28, 1989 for \$40,000, also payable to Red River Valley Bank.

On December 15, 1989 Hoy Colgin and his second wife, Jane, pledged a collateral note and mortgage on their undivided 38.25% interest in the same real estate in favor of the Red River Valley Bank, to secure the existing debts of Hoy Colgin -- including the two hand notes. The Bank gave no new consideration for that security. The parties stipulate that the debtors and the succession were insolvent when the December 15 mortgage was granted.

The bankruptcy court found that the December 15 mortgage

created a voidable preference under section 547(b)¹ and section 550(a)² because the mortgage was a transfer which benefitted an "insider creditor" -- the succession. The succession has a contingent claim against Hoy Colgin based upon the solidary liability on the first note; the succession benefitted when the security on that note was increased by the December 15 mortgage. The bankruptcy court also found that the December 15 mortgage was voidable as a fraudulent transfer under section 548 because it was a transfer within one year of the bankruptcy petition and that the debtors "received less than a reasonable equivalent value in exchange." The Red River Valley Bank appealed the bankruptcy court's order to the district court. The district court affirmed the bankruptcy court's ruling under both section 547 and section 548. The Bank timely appealed.

¹ 11 U.S.C. § 547(b) provides in pertinent part:

[T]he trustee may avoid any transfer of an interest of the debtor in property --

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made -- . . . (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider[.]

² 11 U.S.C. § 550(a) provides that as to transfers avoided under section 547, the bankruptcy trustee may recover the property transferred for the benefit of the estate.

Analysis

Although this case poses interesting and complicated questions about the scope of section 547, we need not reach those issues today.³ The December 15 mortgage was clearly a voidable transfer under section 548(a)(2).

Section 548 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 --

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B) (i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer of obligation[.]

The Colgins granted the mortgage to Red River Valley Bank less than a year before they filed a bankruptcy petition. The parties stipulated to the following pertinent facts:

Prior to the granting of the mortgage of the 38.25% interest in the property on December 15, 1989, Red River Valley did not have a lien, mortgage, or claim of

³ In particular, whether a preference may be voidable because it confers an indirect benefit on an insider creditor is an issue which has not been conclusively decided in this circuit. In the past, courts treated this as two transfers -- a direct transfer to the primary creditor and an indirect transfer for the benefit of the insider; recovery was limited to voiding the preference accruing to the insider. The two-transfer theory has been rejected by three circuits and has not been addressed recently by this circuit. See **Levit v. Ingersoll Rand Financial Corp.**, 874 F.2d 1186 (7th Cir. 1989); **In re Robinson Bros. Drilling, Inc.**, 892 F.2d 850 (10th Cir. 1989); **In re C-L Cartage Co.**, 899 F.2d 1490 (6th Cir. 1990).

security on or against the 38.25% interest in the property.

No additional consideration was given to the debtors or the Succession estate of Georgia Colgin in connection with the granting of the mortgage interest on December 15, 1989.

The debtors were insolvent on December 15, 1989.

Accordingly, all the elements of a voidable transfer under section 548(a)(2) then existed.

The Bank attempts to argue that section 548 does not apply to transfers which secure antecedent debts because such transfers could be covered under the voidable preference rules of section 547. Section 548 contains no such exception.⁴ When within a year of filing a bankruptcy petition a debtor grants a security interest in his property to secure an antecedent debt and receives nothing in return, the transfer is a fraudulent conveyance under section 548(a)(2).⁵

Benefit conferred upon a third party also is not considered in

⁴ Voidability under section 548 is not mutually exclusive from other sections. For example, section 548(c) provides that a transferee in good faith and for value is protected to the extent that value was conferred "[e]xcept to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title."

⁵ See **In re Fox Hill Office Investors, Ltd.**, 101 B.R. 1007 (Bankr. W.D.Mo. 1989), affirmed, 926 F.2d 752 (8th Cir. 1991). In **Fox Hill**, a mortgage lender made a loan to a debtor and received a second mortgage on the debtor's property; the debtor did not receive the loan proceeds -- instead, the loan proceeds were received by a related entity. The lender's attempt to record the mortgage at a time within one year of the debtor's bankruptcy filing and while the debtor was insolvent was deemed a fraudulent conveyance under section 548(a)(2).

determining whether the debtor received "reasonably equivalent value" in exchange for the transfer.⁶ Thus, any benefit accruing to the succession because the mortgage provides additional security for the succession's obligation is irrelevant in determining whether the debtors received "reasonably equivalent value" in exchange for granting the December 15 mortgage. The mortgage did not reduce the amount owed on the first hand note, and it did not reduce Colgin's contingent obligation to the succession. As the parties stipulated, the December 15 mortgage provided the Bank with security which it did not previously have, and no reciprocal consideration was conferred upon the debtors. Accordingly, the December 15 mortgage was properly voided as a fraudulent conveyance.

For the foregoing reasons, we AFFIRM.

⁶ See In re Good Time Charley's, Inc., 54 B.R. 157 (Bankr. N.J. 1984).