

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

**Howard D. White, Trustee, Plaintiff, v.
River Valley Bank, Defendant**

(In re: Perry V. Elsemore and Marcy A. Elsemore, Debtors)
Bankruptcy Case No. 10-15229-7
Adv. Case No. 11-57

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

March 20, 2012

Jerome R. Kerkman and Evan P. Schmit, Kerkman & Dunn, Milwaukee, WI, for plaintiff
Jeremy M. Welch and Kevin E. Wolf, Ruder Ware, L.L.S.C., Wausau, WI, for defendant

Thomas S. Utschig, United States Bankruptcy Judge

ORDER

This is an action to recover certain alleged preferential transfers related to certain patents previously owned by Perry Elsemore. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F) as a proceeding to determine, avoid, or recover a preferential transfer, and the Court has jurisdiction under 28 U.S.C. § 1334. The following shall constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

Last July the Court denied a motion for summary judgment filed by the plaintiff. The defendant recently filed its own motion for summary judgment, which the Court likewise finds cannot be granted at this time. The basic facts are as follows. Perry Elsemore was the president and owner of a company named Predator Trailcams, LLC, which manufactured and sold infrared trail cameras. Mr. Elsemore personally owned a variety of patents and patent applications for the products sold by Predator. River Valley Bank was the company's lender and had granted it two lines of credit, both of which were personally guaranteed by Mr. Elsemore. In early 2010, the bank obtained an assignment of Mr. Elsemore's patents as additional collateral for its claims. Mr. Elsemore then sold Predator's business assets to another entity called Outdoors Extreme Corporation. The purchase agreement allocated \$200,000.00 of the total price to the patents.

The bank received all of the cash from the sale. This bankruptcy case was filed on July 9, 2010. The trustee believes that the bank received a preferential

transfer under § 547 of the bankruptcy code because of the assignment of the patents, which acted as additional collateral for an antecedent debt. In denying the trustee's motion for summary judgment, the Court rejected the notion that the value of the patents could be conclusively determined simply by reference to the purchase agreement. Instead, the Court directed the parties to each produce expert testimony regarding the actual value of the patents in order to determine how much the bank might have actually received as a result of the alleged preference. Both parties have filed copies of the reports prepared by their designated experts. According to the trustee's expert, the fair market value of the patents as of April 15, 2010, was \$197,400.00, while the bank's expert submits that the patents were worth something in the range of \$11,000.00 to \$14,000.00. The bank also obtained the patents themselves from the bankruptcy estate of Outdoor Extreme, and has offered to return them to the trustee.

The bank's motion for summary judgment is premised upon the seemingly simple idea that it can short-circuit further litigation by tendering the patents back to the Elsomore estate. Under 11 U.S.C. § 550(a), in a preference action a trustee may recover "for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property." The bank's position is that the statutory language provides a hierarchy of remedies, with the "default" setting being the return of the actual property transferred while a monetary recovery should be considered an unusual (or extraordinary) form of relief. Since the bank now has the patents and is willing to return them, that should be the end of the matter.

The purpose of § 550(a) is to restore the bankruptcy estate to the financial condition it would have enjoyed if the challenged transfer had not occurred. Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.), 354 F.3d 1246, 1266 (10th Cir. 2004) (quoting Hirsch v. Steinberg (In re Colonial Realty Co.), 226 B.R. 513, 525 (Bankr. D. Conn. 1998)). It is true that this is "normally" achieved by allowing the trustee to recover the actual property transferred. Id. However, the statute also allows the Court the latitude to order a monetary recovery if the circumstances justify it. In this case, the trustee cites Gennrich v. Montana Sport U.S.A., Ltd. (In re International Ski Service, Inc.), 119 B.R. 654 (Bankr. W.D. Wis. 1990), for the proposition that this determination is within the Court's discretion, rather than statutorily circumscribed. In International Ski Service, the trustee sought to recover the value of certain equipment and supplies from a transferee. The transferee offered to return the goods (or comparable ones). After canvassing the relevant authorities, the court concluded that it was appropriate to enter a monetary judgment. Id. at 659.

The bank contends that the result in International Ski Service was predicated upon the fact that the parties essentially agreed to the value of the equipment, and that where value is difficult to ascertain, return of the transferred item is the preferred result. It is true that returning the transferred property may avoid unnecessary disputes over value. Id. at 657. But a valuation dispute may be

inevitable if the property has depreciated in value since the time of the transfer or if other reasons justify the inquiry. After all, the statute is designed to provide the bankruptcy court with “flexibility to fashion a remedy so as to return the estate to its pre-transfer position.” Rodriguez v. Drive Fin. Servs. L.P. (In re Trout), 609 F.3d 1106, 1111 (10th Cir. 2010).

In this case, the trustee’s contention is that through the combined sale of the Predator Trailcam assets and the patents, the challenged transfer benefitted the bank to the tune of almost \$200,000.00. The trustee also notes that given the two years since the transfer, the value of the patents has now diminished considerably and the return of the patents to the estate would fail to restore it to its pre-transfer position. While the bank disputes these contentions, the reality is that Mr. Elsemore’s bankruptcy estate lost not merely the patents but the monetary value of them as well, since they were soon sold to Outdoor Extreme and all of the cash proceeds were paid to the bank. The proper focus under § 550(a) is “not on what the transferee gained by the transaction, but rather on what the bankruptcy estate lost as a result of the transfer.” Colonial Realty, 226 B.R. at 525. An award of monetary relief, rather than return of the transferred property, may be justified in order to “avoid the inequity *to the bankruptcy estate* that would result if the court ordered the return of the actual property.” Integra Realty, 354 F.3d at 1267 (emphasis in original).

Summary judgment is appropriate where there are no disputed issues of material fact and the moving party is entitled to summary judgment as a matter of law. See Fed. R. Bankr. P. 7056, incorporating Fed. R. Civ. P. 56(c). Summary judgment is to be denied only if there is a “genuine issue of material fact.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether the return of the patents is sufficient to restore the bankruptcy estate to its pre-transfer position depends upon whether the patents are currently worth about as much as they were two years ago. The trustee submits that time and technological advancements have resulted in significant depreciation. In the context of a motion for summary judgment, the facts must be construed in favor of the non-moving party. As such, the trustee has raised a genuine issue of material fact that must be determined through an evidentiary hearing.

Accordingly, the Court declines to grant summary judgment to the bank at this time. The motion will be continued pending trial, at which time it may be renewed should circumstances warrant. An adjourned pretrial conference has been previously set for May 17, 2012, at 10:30 a.m. to establish a trial date.