

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)	Bankr. No. 97-40115
)	
VIKING GLASS, INC.)	Chapter 7
Tax I.D. No. 46-0306138)	
)	
Debtor.)	
)	
JOHN S. LOVALD, TRUSTEE)	Adv. No. 98-4011
Plaintiff,)	
-vs-)	MEMORANDUM OF DECISION
)	RE: PLAINTIFF'S MOTION
NEIL F. SCHMID, JR., a married)	FOR SUMMARY JUDGMENT
person)	AND DEFENDANT'S MOTION
Defendant.)	TO DISMISS

The matters before the Court are the Motion for Summary Judgment filed by Plaintiff-Trustee John S. Lovald on September 1, 1998 and the Motion to Dismiss filed by Defendant Neil F. Schmid, Jr., on September 28, 1998 and the responses and briefs related thereto. These are core proceedings under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Plaintiff-Trustee's motion for summary judgment will be granted on the issue of Debtor's insolvency at the time of Debtor's transfer of VG Air, Inc., to Defendant Schmid and will be denied on the issue of whether the transfer was for a reasonably equivalent value. Defendant Schmid's motion to dismiss will be denied since the pleading problems raised therein have been addressed.

I.

An involuntary Chapter 7 petition was filed against Viking Glass, Inc., (Debtor) on February 12, 1997. An Order for Relief was entered March 12, 1997. John S. Lovald (Trustee) was appointed

59

the case trustee. On February 13, 1998, Trustee commenced a fraudulent conveyance action against Neil F. Schmid, Jr. (Schmid) and Viking Aircraft Owners, L.L.C. Viking Aircraft Owners was later dismissed from the suit without prejudice. Trustee filed an amended complaint on July 24, 1998. Trustee alleges a transfer of VG Air, Inc., from Debtor to Schmid, an insider, for \$3,973.59 on February 25, 1996 was fraudulent under 11 U.S.C. § 548(a) or, alternatively, that the transfer was the product of Schmid's breach of fiduciary duty to Debtor.

At the time of the transfer, Schmid was the sole common shareholder,¹ officer, and director of Debtor and thus an insider of Debtor. VG Air, Inc., was a wholly owned subsidiary of Debtor. VG Air's primary asset was a Beechcraft A36 Bonanza airplane. Schmidt was the sole officer and director of VG Air. Near the time Debtor sold VG Air to Schmid, VG Air and others formed a limited partnership in which VG Air contributed its airplane for its partnership interest. That partnership was later transformed into a limited liability company now known as Viking Aircraft Owners, L.L.C., in which VG Air had a one-quarter interest. In mid 1996, VG Air was dissolved and Schmid stepped into VG Air's shoes as the holder of a one-quarter interest in Viking Aircraft Owners, L.L.C.

Schmid answered the Amended Complaint on July 29, 1998. He acknowledged that Debtor sold its interest in VG Air to him. He denied all other allegations or stated he was without sufficient knowledge to respond. Affirmatively, Schmid defended that the

¹ Schmid's mother owned all of Debtor's preferred stock.

transfer did not fall under any of the insolvency subsections of § 548(a)(2)(B) and that any sale was made in good faith for a reasonable price. Schmid further defended that Trustee failed to plead fraud with particularity as required by F.R.Civ.P. 9(b). He also stated that the sale was unanimously ratified by Debtor's "voting" shareholders and was approved by Debtor's principal lender, First National Bank. Finally, Schmid argued that any recovery by the Trustee must be limited to an avoidance of the sale, not a money judgment against him.

Trustee moved for summary judgment on September 1, 1998 alleging there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. Trustee states the purchase price Schmid paid for VG Air should have been around \$65,000.00 based on the price a Dr. Tim Zoellner paid for his one-quarter interest in Viking Aircraft Owners, L.L.C., which occurred about the same time that Schmid purchased VG Air. Trustee relied on the 2004 examinations of Schmid and Calvin Willemsen, a senior vice president with First National Bank, to set forth the various transactions, dates, and relevant figures involving VG Air, the limited partnership and limited liability company, and Zoellner. In his affidavit, Schmid acknowledged, and his February 20, 1996 purchase agreement with Debtor states, that he paid \$3,973.59 for VG Air based on the value of VG Air's one-quarter interest in the Viking Air limited partnership that preceded Viking Aircraft Owners, L.L.C. With his affidavit, Willemsen provided in-house documents that stated the Bank considered Debtor insolvent in

October 1995 and August 1996.

Trustee also relied on the June 12, 1998 affidavit of Dale E. Froehlich. Froehlich is the day-to-day manager of Daedalus, Inc., which is the sole owner of Viking Air, Inc. Viking Air, Inc., is the managing member of Viking Aircraft Owners, L.L.C. In this affidavit, Froehlich relayed many of the same transactions and dates as had Schmid. Exhibits attached to Froehlich's affidavit included organizational documents for the partnership and limited liability company, some financial statements and tax returns for them, and some correspondence and agreements related to Zoellner's interest. He stated arm's length negotiations between the Viking Air limited partnership and Zoellner began in 1995 and culminated on February 8, 1996 when Zoellner issued a check for \$65,000.00 to Viking Aircraft Owners, L.L.C. According to these exhibits, both Schmid and Froehlich orchestrated the deal with Zoellner. The several exhibits surrounding Zoellner's purchase also set forth the considerations the parties made in negotiating the \$65,000.00 price Zoellner paid for his interest.

Schmid responded to Trustee's summary judgment motion with a brief arguing Trustee had not properly pled under § 548(a)(2)(B), there was a genuine issue of fact regarding whether the sale was for "reasonably equivalent value," that Schmid as a shareholder of Debtor had no fiduciary obligation to Debtor, and that a factual question exists as to the appropriate remedy if a fraudulent transfer is established. In support, Schmid presented a second affidavit by Froehlich dated September 22, 1998 and affidavits by

Schmid and Paul T. East. Froehlich relayed how difficult it is to find a qualified, interested person to purchase a share in a limited liability company that is a flying entity and he set forth reasons why Zoellner paid \$65,000.00 for his one-quarter interest in Viking Aircraft Owners, L.L.C., while VG Air's one-quarter interest was valued by Schmid for much, much less.

Schmid acknowledged that: he owned all the common stock for Debtor but that his mother owned all the preferred stock; he purchased full ownership of VG Air from Debtor on February 25, 1996; VG Air became a limited partner in Viking Air Limited Partnership and later a minority shareholder in the successor entity, Viking Aircraft Owners, L.L.C.; and VG Air was later dissolved in 1996 and he became the shareholder in Viking Aircraft Owners, L.L.C. He opined about the value of VG Air and its interest in Viking Aircraft Owners, L.L.C., and he argued Debtor was "not insolvent" at the time he purchased VG Air.

East is a Certified Public Accountant of twenty years' experience. He opined the price Schmid paid for VG Air could not be equated to the price Zoellner paid for his interest in Viking Aircraft Owners, L.L.C., in February 1996 because Zoellner received a stepped-up tax basis and was not purchasing an interest in a closely held corporation or any existing members' share and because VG Air had a negative capital account in the L.L.C. in February 1996. He also relayed that Zoellner received some special "prior acquiescence and permission of the existing members" that VG Air

may not have received and that Zoellner may have incurred some federal income tax on the "recapture of his share of any accumulated depreciation" upon the sale of the L.L.C.'s aircraft.

On September 28, 1998, Schmid moved for dismissal of the adversary proceeding on the same grounds set forth in his brief in resistance to Trustee's motion for summary judgment.

Trustee filed a response on October 19, 1998, supported by the affidavit of C.P.A. Timothy D. Bergstrom. Bergstrom refuted many of Schmid's tax-related arguments regarding the value Schmid paid for VG Air and the value Zoellner paid for his interest in the limited liability company that had been set forth in the affidavit of Schmid, the September 22, 1998 affidavit of Froehlich, and the affidavit of East.

II.

Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein). The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992) (quoting therein *Matsushita Elec. Industrial Co. v.*

Zenith Radio, 475 U.S. 574, 587-88 (1986), and cites therein).

Further,

the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

Amerinet, 972 F.2d at 1490 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The movant meets this burden if he shows that the record does not contain a genuine issue of material fact and he points out that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273 (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970) (cite therein); *Handeen*, 112 F.3d at 1346. If the movant meets his burden, however, the non movant, to defeat the motion, "must advance specific facts to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734,

737 (8th Cir. 1995)).

III.

Trustee's MOTION FOR SUMMARY JUDGMENT

Upon consideration of the parties' respective briefs and supporting affidavits and exhibits, it appears there is one genuine issue of material fact to be tried: Whether Debtor's sale of VG Air to insider Schmid was for less than a "reasonably equivalent value."² The Court needs evidence on when Viking Aircraft Owners, L.L.C., began to operate and what impact, if any, that had on the value of VG Air when Debtor sold it to Schmid and the comparative values of VG Air's (later Schmid's) one-fourth interest in Viking Aircraft Owners, L.L.C., and Zoellner's one-fourth interest in Viking Aircraft Owners, L.L.C., which were obtained about the same time. The parties' experts can enlighten the Court about any tax implications that may have had an impact on the diverse prices Schmid and Zoellner paid for their interests in Viking Aircraft Owners, L.L.C. However, it appears that the starting point of evidentiary contention will be the February 20, 1996 purchase agreement Schmid signed for Debtor (Exhibit 1 to Schmid's 2004 examination transcript), which values VG Air based on the value of VG Air's interest in the Viking Air limited partnership.

² Trustee's alternative theory of recovery is Schmid's breach of fiduciary duty to Debtor. Both parties touched on it lightly in their briefs, mostly to agree that Schmid had no fiduciary duty to Debtor as a shareholder. Beyond that, the Court does not consider that this theory of recovery was addressed or disposed of by either parties' dispositive motion. It can be resolved at trial.

Trustee's summary judgment motion as it pertains to Debtor's insolvency at the time VG Air was sold to Schmid will be granted. Schmid's self-serving testimony that Debtor was solvent or adequately capitalized at the time of the transfer is weightless compared to First National Bank's assessments in October 1995 and August 1996 that Debtor was insolvent and Debtor's net losses in 1995 and 1996. While Schmid states the Bank continued Debtor's line of credit until the autumn of 1996, he has put forth no evidence that the Bank had changed its August 1996 assessment. Further, as Trustee states, under either insolvency standard (balance sheet versus going concern value, the latter which Schmid argued should apply), Schmid has offered no specific evidence under either standard to contradict the Bank's assessments and Debtor's 1995 and 1996 year-end positions.

Schmid's MOTION TO DISMISS

As to Schmid's motion to dismiss that focuses on deficiencies in Trustee's Amended Complaint, the Court is satisfied that all issues under § 548(a)(2)(B) have been sufficiently raised by Trustee and responded to by Schmid through the parties' briefs. Requiring Trustee to file a second amended complaint now to specifically allege the insolvency element of § 548(a)(2) would be a waste of time and paper. Further, Trustee has admitted that Schmid, as a shareholder of Debtor, owed no fiduciary duty to Debtor. An amended complaint to delete that contention is not warranted.

Form of Recovery

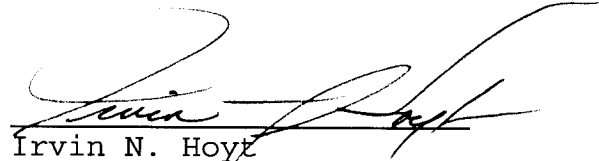
Finally, the Trustee's recovery under § 548(a), if any, will be governed by 11 U.S.C. § 550(a). Under that section it appears the estate may recover the property transferred or its monetary value from Schmid. Since VG Air no longer exists, it appears a monetary judgment against Schmid may be the better remedy if the Trustee is successful in showing that the transfer was not for a reasonably equivalent value. Trustee's point is well taken that Schmid cannot argue VG Air's (and now his) interest in Viking Aircraft Owners, L.L.C., is difficult to transfer for valuation purposes but easy to transfer for the purpose of undoing an alleged fraudulent transfer.

An order granting in part and denying in part Plaintiff-Trustee's summary judgment motion and denying Defendant-Schmid's dismissal motion shall be entered.

Counsel should confer and advise the Court as soon as possible when they can go to trial and how much time will be needed.

Dated this 16 day of November, 1998.

BY THE COURT:



Irvin N. Hoyt
Chief Bankruptcy Judge

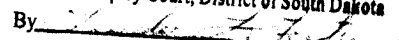
NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

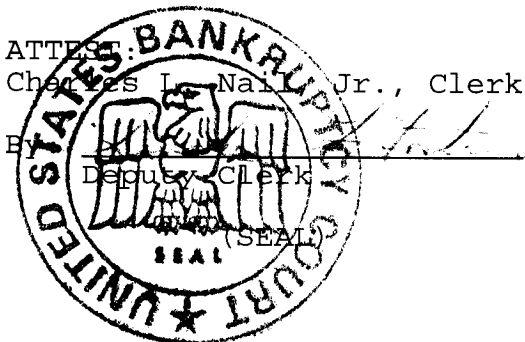
NOV 16 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

NOV 16 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By 



Case: 98-04011 Form id: 122 Ntc Date: 11/16/1998 Off: 4 Page : 1
Total notices mailed: 4

Plaintiff Lovald, John S. Box 66, Pierre, SD 57501
Aty Aman, Dawn M. PO Box 759, Aberdeen, SD 57402-0759
Aty Ronayne, Robert M. PO Box 759, Aberdeen, SD 57402-0759
Aty Damgaard, Roger W. PO Box 5027, Sioux Falls, SD 57117