

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
STEPHEN BELKEN and	§	Case No. 14-40463
MARY BELKEN,	§	(Chapter 7)
	§	
Debtors.	§	
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	§	
LINDA PAYNE, TRUSTEE,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. Proc. No. 14-4078
	§	
STEPHEN BELKEN and	§	
MARY BELKEN	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The chapter 7 trustee brought this adversary proceeding to avoid and recover from the defendants the cash surrender value of a whole life insurance policy on the grounds that the purchase of the policy was an actually fraudulent transfer. *See* 11 U.S.C. §§ 548 and 550. On June 25, 2015, the Court held a non-jury trial. After considering all of the evidence admitted and the arguments of counsel, the Court makes the following findings of fact and conclusions of law. *See* FED. R. BANKR. P. 7052. In the event any finding of fact can be construed as a conclusion of law, it shall be so treated. Likewise, in the event any conclusion of law can be construed as a finding of fact, it shall be so treated.

JURISDICTION AND VENUE

A proceeding to avoid and recover a fraudulent conveyance raises a core matter over which this Court has jurisdiction to enter a final order. *See* 28 U.S.C. §§

157(b)(2)(H) and 1334. Further, venue is proper in this Court. *See* 28 U.S.C. §§ 1408 and 1409.

FINDINGS OF FACT

On or about August 4, 2011, Stephen Belken rolled over his Interceramic 401k account to a Scottrade IRA account. On or about November 28, 2012, Mr. Belken withdrew \$239,980.66 from his Scottrade IRA account and deposited the funds into his personal account at Bank of America. On or about December 12, 2012, Mr. Belken withdrew \$210,000 in cash from his personal account at Bank of America.

From December 2012 to November 2013, Mr. Belken used the withdrawn cash for his business, Surface & Décor Outlets, LLC, and for personal living expenses. The business closed in October 2013. On or about November 1, 2013, Mr. Belken used \$120,000 of the remaining cash to purchase a whole life insurance policy.

On March 3, 2014, Stephen and Mary Belken, the debtors in the underlying bankruptcy case, jointly filed a petition for relief under chapter 7 of the Bankruptcy Code. The debtors listed the cash surrender value of the life insurance policy (\$110,000) on their bankruptcy schedules and claimed the entire value as exempt from their creditors. The chapter 7 trustee timely objected to the claimed exemption and initiated this adversary proceeding.

CONCLUSIONS OF LAW

Section 548(a)(1)(A) of the Bankruptcy Code, which governs actually fraudulent transfers, allows a trustee to avoid any transfer made or obligation incurred by a debtor with “actual intent to hinder, delay, or defraud” creditors. Because determining a debtor’s actual intent is difficult, courts routinely look to so-called “badges of fraud” as

circumstantial evidence of a debtor's subjective intent to defraud creditors. The Fifth Circuit also adopted the so-called “badges of fraud” test to determine whether a debtor had actual intent to delay, hinder, or defraud creditors. *See, e.g., Soza v. Hill (In re Soza)*, 542 F.3d 1060, 1067 (5th Cir. 2008).

The Fifth Circuit has articulated the following “badges of fraud” in connection with § 548 of the Bankruptcy Code: (1) the lack or inadequacy of consideration received by the debtor; (2) the family, friendship or close associate relationship between the parties; (3) the retention of possession, benefit or use of the property in question; (4) the financial condition of the debtor—both before and after the transaction in question; (5) the existence or cumulative effect of the pattern or series of transactions or course of conduct after the incurring of debt by the debtor; (6) onset of financial difficulties by the debtor; (7) pendency or threat of suits by creditors of the debtor; and (8) the general chronology of events and transactions under inquiry. *See Soza*, 542 F.3d at 1067 (supporting citations omitted).

Generally, more than one badge of fraud must be shown to establish actual fraudulent intent. *See, e.g., Dobin v. Hill (In re Hill)*, 342 B.R. 183, 198 (Bankr. D.N.J. 2006) (supporting citations omitted). Courts typically require the “confluence” of multiple badges of fraud to establish actual fraudulent intent. *See, e.g., Luker v. Eubanks (In re Eubanks)*, 444 B.R. 415, 422–23 (Bankr. E.D. Ark. 2010) (supporting citations omitted). But it is not necessary that all or any one of the badges of fraud be established to support a finding of actual fraudulent intent by the debtor. *See, e.g., Texas Rangers Baseball Partners*, 498 B.R. at 712 (supporting citations omitted); *ASARCO LLC v.*

Americas Mining Corp., 396 B.R. 278, 370 (S.D. Tex. 2008) (supporting citations omitted).

Here, Mr. Belken withdrew \$210,000 in cash from his Bank of America account in December 2012, conducted business in cash, purchased a whole life insurance policy in cash, filed for bankruptcy protection four months after purchasing the insurance policy, and claimed the entire amount of the insurance policy as exempt from his creditors. Mr. Belken was insolvent at the time he purchased the life insurance policy. These factors weigh in favor of a finding of actual fraud.

On the other hand, Mr. Belken was not insolvent when he withdrew approximately \$240,000 from his exempt IRA and deposited the funds into his personal account at Bank of America in November 2012. Mr. Belken intended to use the funds to purchase a life insurance policy. Mr. Belken also was not insolvent when he withdrew \$210,000 in cash from his personal account at Bank of America. Mr. Belken did not consult with bankruptcy counsel or an estate planning professional prior to the actual purchase of the life insurance policy at issue in this adversary proceeding. These factors weigh against a finding of actual fraud.

This is a close case. The Court, having carefully considered all of the evidence presented at trial, including the credible testimony of Mr. Belken, finds and concludes that Mr. Belken did not purchase the life insurance policy with the actual intent to hinder, delay or defraud creditors. The Court will enter a separate Judgment consistent with these Findings of Fact and Conclusions of Law.

Signed on 7/6/2015

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HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE