United States Bankruptcy Court
Eastern District of Michigan
Southern Division

In re:
Simplified Employment Services, Inc., Case No. 01-53172-R
Debtor. Chapter 11
_____/

Simplified Employment Services, Inc.,
Plaintiff,

v. Adv. No. 03-4671

Benefit Services, Inc., Ronald E. Bray,
John E. Bray and Dennis E. Lambka,
Defendants.
_____/

Opinion

Simplified Employment Services filed this complaint against Benefit Services, Inc., Ronald Bray, John Bray, and Dennis Lambka[1] on July 8, 2003. In the complaint, SES seeks to avoid a fraudulent transfer to BSI under 11 U.S.C. § 548 and a preferential transfer to Ronald Bray under § 547(b). SES also alleged conversion by Ronald Bray and John Bray, statutory conversion by BSI, and conspiracy as to Ronald Bray, John Bray and BSI.

The Court conducted a trial in July, 2005, and took the matter under advisement.

I.

In May and June of 2000, Ronald Bray delivered four checks to Robert Frazier, an officer of BSI,

1. SES entered into a settlement with Dennis Lambka and dismissed the claims against him.

totaling $1.3 million. Frazier deposited these checks into an account in California that he had opened as a BSI d/b/a. Shortly after Bray delivered each check to Frazier, Frazier wired funds back to Bray in nearly the exact same amount. The transfers are set forth in plaintiff's Exhibit 1, Robert Frazier's Bank of America Bank Statement, as follows:

Date	Transaction	Amount
5/9/01	deposit	$206,000
5/12/01	deposit	$356,000
5/17/01	wired to Bray	$205,900
5/19/01	wired to Bray	$355,000
5/23/01	deposit	$684,500
5/30/01	wired to Bray	$684,000
6/01/01	deposit	$53,500
6/12/01	wired to Bray	$53,500

From the period of May 9, 2000 through June 12, 2000, Bray issued checks totaling $1.3 million to Frazier and Frazier wired back to Bray $1,298,400.

On May 30, 2000, Robert Frazier prepared a letter on BSI letterhead, addressed to Ron Bray, in which he acknowledged receipt of $1.3 million from Bray and stated that BSI was going to apply the funds towards SES's health plan claim expenditures. (See plaintiff's Ex. 3.)

In December 2000, Ronald Bray issued the following seven checks, totaling $1.3 million, to BSI:

Date	Amount
12/26/00	$100,000
12/26/00	$400,000
12/26/00	$400,000
12/27/00	$100,000
12/28/00	$100,000
12/28/00	$100,000
12/28/00	$100,000

(See plaintiff's Ex. 34-39.)

BSI deposited the checks into its Copley Clearing Account.

On March 26, 2001, a $1.3 million check payable to BSI was drawn on an account at Franklin Bank in the name of Elite Leasing Group, Inc., one of the SES companies. (See plaintiff's Ex. 8.)

On March 27, 2001, BSI issued a check to Ronald Bray in the amount of $1.3 million. (See plaintiff's Ex. 12.)

II.

A.

SES was an employee leasing company, and contracted for BSI to pay the health claims of its clients' employees. BSI contends that SES's claims were underfunded in December 2000, which would affect SES's ability to renew its excess insurance policy. BSI asserts that Ronald Bray issued $1.3 million in checks to BSI as a loan to SES to cover the claims. BSI states that it deposited the checks into a trust account, the Copley Clearing Account, in order to keep the funds segregated. BSI contends that the funds were used to pay 6,400 claims totaling $1,300,298.45. BSI's exhibit J3 purports to be an itemized listing of the claims that were paid with the $1.3 million.

BSI asserts that in March, 2001, Bray contacted BSI and informed it that SES would be repaying the $1.3 million to Bray. BSI contends that Bray explained that the repayment had to pass through the Copley Clearing Account for Bray to avoid double taxation. Bray presented BSI with a $1.3 million check drawn on the Elite Leasing account. BSI contends that at its direction Bray presented it with an

acknowledgment, via fax, from Dennis Lambka confirming that BSI had been instructed to deposit the check into its account and issue a check back to Bray. (See plaintiff's Ex. 27.) BSI also asserts that Lambka made the same acknowledgment by phone to Connie Frazier.

Connie Frazier's testimony supports BSI's position that Bray loaned SES money in December, 2000, to pay claims so that SES could obtain reinsurance. With respect to the repayment of Bray's loan in March, 2001, Connie Frazier testified that she was uncomfortable with the repayment going through BSI, but Bray explained that if the payment came directly from SES, he would be taxed on it. She testified that she called Dennis Lambka to verify that the purpose of the check was to repay Bray's loan and Lambka confirmed that it was. She further testified that she wanted a written acknowledgment from Lambka before Bray cashed the check from BSI. She stated that she gave the check to Bray, with instructions not to cash it until an acknowledgment was received from Lambka. She stated that later that day, she received Lambka's acknowledgment by fax. She testified that there were never any commissions paid to anyone at SES. With respect to the May and June, 2000 transfers, Connie Frazier testified that she was unaware of the transfers and that BSI had nothing to do with them.

Robert Frazier stated in his deposition that he and Ronald Bray were trying to set up a workers' compensation fund, and that was the purpose of the May and June, 2000 transfers. Frazier stated that they were trying to come up with the right amount to fund the venture and that was the reason why Frazier kept wiring the funds back to Bray. Frazier testified that after a month of transferring funds back and forth, he and Bray determined that they were not prepared for the new venture and it was canceled. Frazier stated that he prepared the May, 2000 letter acknowledging receipt of the $1.3 million and stating that it was going to be used to fund claims because Bray told him that he was going to send the money to BSI in Ohio

to fund claims. He stated that he later learned that Bray did not do so until December, 2000. Frazier stated that he never sent a copy of the letter to Jerry Newbauer as the cc on the letter suggests. Further, he stated that no one at BSI, including Connie Frazier, knew of his venture attempt with Bray. Frazier stated that he was unaware of any secret commissions paid to Bray.

B.

SES contends that prior to the transfers in May and June, 2000, Ronald Bray had been secretly receiving commissions from insurance carriers. SES contends that Dennis Lambka discovered the commissions and told Bray that he had to pay the money back, totaling $1.3 million. SES contends that the transfers by Bray to Frazier in May and June, 2000 were designed to create a paper trail that would trick Lambka into believing that the commissions had been paid back to SES through checks issued to BSI ostensibly to pay claims of SES. SES contends that Frazier's letter stating that BSI had received $1.3 million from Bray and was going to use the funds to pay claims was part of the scheme. SES contends that Frazier opened the bank account in California under the d/b/a of BSI solely for the purpose of this scheme.

SES asserts that in December 2000 claims were underfunded by SES and this underfunding could have affected SES's ability to obtain a renewal of its excess loss coverage insurance policy. SES contends that the likely cause of the underfunding was due to the $1 to $3 million in improper commissions paid to Ronald Bray. SES argues that if it had known that its claims were underfunded, it would have discovered that Bray did not actually repay the commissions to SES in May and June of 2000. To conceal this fact, SES contends, Bray transferred $1.3 million to BSI to cover SES's claims. SES contends that the March, 2001 "repayment" to Bray was a fraudulent transfer because there was no evidence of a loan on the books

of SES and there are no documents evidencing a debt to Ronald Bray owed by SES.

SES further contends that even if the Court determines that there was a debt owed by SES to Ronald Bray, it did not receive reasonably equivalent value for the March, 2001, transfer because the transfer was not made in good faith - both BSI and Ronald Bray knew that SES was unable to fund claims at the time of the March 2001 transfer. SES also contends that there is no proof that the funds from Bray were used to pay SES claims. Further, SES contends that if a debt existed, Bray would have been an unsecured creditor and would have been entitled to far less than the $1.3 million he received. SES also asserts that it was not an arms length transaction.

Dennis Lambka stated in his deposition that after he learned that Ronald Bray was improperly receiving commissions from insurance companies, he demanded that Bray transfer control of his shares to Lambka until the money was paid back to SES. Lambka testified that the two entered into an agreement granting Lambka a proxy over Bray's shares of SES stock. Lambka stated that in June, 2000 Bray called a meeting of SES executives and produced 5 pink copies of checks totaling $1.3 million paid to BSI. Bray demanded the proxy be returned. To confirm the payment, Lambka stated that he talked to Jerry Newbauer who confirmed that the money had been paid to BSI and would be used to pay claims. Dennis Lambka stated that he was unaware of any loans from Bray to BSI or SES. Lambka also stated that he never authorized a payment to Bray of $1.3 million and that he did not sign the March 27, 2001 acknowledgment nor acknowledge the repayment to Connie Frazier over the phone.

SES contends that BSI is liable for treble damages under Michigan law for statutory conversion. SES argues that the March 2001 transfer was a conversion of SES funds from the Elite Leasing bank account to Ronald Bray, aided by BSI. SES asserts that BSI aided in the conversion by depositing the

Elite check into the Copley Clearing Account and issuing a check to Ronald Bray. SES contends that BSI knew that the March, 2001 transfer was inappropriate, noting Connie Frazier's testimony that that the transaction made her uncomfortable. SES asserts that BSI knew that the purpose of the March, 2001 transfers was to avoid revealing a preference payment and to assist Bray in avoiding his tax obligations.

III. The Fraudulent Conveyance Claim

A.

11 U.S.C. § 548(a)(1)(B) provides:

> 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--
>
> * * *
>
> (B)(i) received less than reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(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 or obligation[.]

11 U.S.C. § 548(a)(1)(B).

The plaintiff must prove by a preponderance of the evidence that the elements set out in § 548(a)(1)(B) have been met. *Wessinger v. Spivey,* (*In re Galbreath*), 286 B.R. 185, 197 (Bankr. S.D. Ga. 2002).

BSI asserts that the $1.3 million check to Ronald Bray in March, 2001 was in repayment of a loan. However, the Court must find that there is no credible evidence that there was a loan from Ronald Bray

to SES. In the usual course of business, such a loan would be recorded as a liability in the books and records of the borrowing business, especially for a $1.3 million loan. In this case, however, there was nothing in the books and records of SES to document the loan that BSI alleges.

Moreover, the explanation that the loan repayment was funneled through BSI in order to avoid tax consequences to Ronald Bray seems bizarre and disingenuous. Certainly nothing in the record justifies this view of the tax consequences.

Accordingly, the Court concludes that this transfer was not in repayment of a loan and that therefore, SES received less than reasonably equivalent value in exchange for the transfer.

The Court further concludes that the evidence establishes that SES was insolvent in March of 2001.

Accordingly, the Court finds that the $1.3 million payment to Ronald Bray was a fraudulent transfer under 11 U.S.C. § 548(a)(1)(B).

B.

11 U.S.C. § 550 provides as follows:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--
>
> > (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> > (2) any immediate or mediate transferee of such initial transferee.
>
> (b) The trustee may not recover under section (a)(2) of this section from--

> (1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or (2) any immediate or mediate good faith transferee of such transferee.

11 U.S.C. § 550(a) & (b).

"As is plain from its text, section 550(a)(1) holds initial transferees strictly liable for any fraudulent transfers they receive." *Taunt v. Hurtado* (*In re Hurtado*), 342 F.3d 528, 532-33 (6th Cir. 2003), citing *Christy v. Alexander & Alexander of N.Y. Inc.* (*In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*), 130 F.3d 52, 57 (2d Cir. 1997), *cert. denied*, 524 U.S. 912, 118 S. Ct. 2295 (1998).

BSI contends that it was not an initial transferee, but rather a mere conduit. "An initial transferee must have 'dominion' over the funds to be an 'initial transferee' under the statute." *Hurtado*, 342 F.3d at 533. In *Hurtado*, the court distinguished between the facts before it and the decisions in *Bonded Financial Services, Inc. v. European American Bank*, 838 F.2d 890 (7th Cir. 1988 and *First Nat'l Bank of Barnesville v. Rafoth* (*In re Baker & Getty Fin. Servs., Inc.*), 974 F.2d 712 (6th Cir. 1992):

> The results in *Baker & Getty* and *Bonded* turned on the distinction between mere possession and ownership. The parties found not to be initial transferees in both cases never had legal title to the funds; they merely possessed the funds and were acting as agents for the principals, who retained legal right to the funds. These cases stand for the proposition that a party is not to be considered an initial transferee if it is merely an agent who has no legal authority to stop the principal from doing what he or she likes with the funds at issue.

Id. at 534.

Here, the evidence establishes that BSI was not acting as an agent for or at the direction of SES. Rather, BSI was acting at the request of Ronald Bray, the ultimate recipient of the funds. BSI did not merely have possession of the funds, it had complete dominion and control over the funds. Accordingly, the Court concludes that BSI was the initial transferee and SES can therefore recover the transfer from BSI under 11 U.S.C. § 550(a).

IV. ERISA Preemption

BSI contends that SES's state law claims are preempted by ERISA. Congress enacted ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" by setting out substantive regulatory requirements for employee benefit plans and to "provid [e] for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b). The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive preemption provisions, *see* ERISA § 514, 29 U.S.C. § 1144, which are intended to ensure that employee benefit plan regulation would be "exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523, 101 S. Ct. 1895 (1981). Any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 143-145, 111 S. Ct. 478 (1990).

BSI contends that SES's conversion and conspiracy claims clearly "relate to" an ERISA plan because the claims against BSI concern Bray's loans to the SES plan and BSI's use of SES plan assets to repay Bray. However, because there is no evidence of a loan to the SES plan and thus no evidence of

repayment, the Court concludes that SES's state law claims do not "relate to" an ERISA plan and its claims are not preempted.

V. The Conversion Claim

SES contends that BSI is liable for statutory conversion, defined as a "person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted." M.C.L. § 600.2919(a). Michigan law provides for the recovery of treble damages, costs and attorney fees. *Id.*

BSI contends that Ohio law applies to SES's conversion claim. Under Ohio law, "[a] conversion is recognized as any exercise of dominion or control wrongfully exerted over the personal property of another in denial of or under a claim inconsistent with his rights." *Ohio Telephone Equip. & Sales, Inc. v. Hadler Realty Co.*, 493 N.E.2d at 292. Ohio law does not provide for treble damages.

The Court concludes that the evidence does not support a finding that BSI knew the funds were "stolen, embezzled or converted." Accordingly, it is not necessary for the Court to determine whether Ohio or Michigan law applies. This claim is dismissed.

VI. The Civil Conspiracy Claim

A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. A claim of civil conspiracy must be based on an underlying actionable tort. *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 670 N.W.2d 569 (2003).

Again the Court concludes that the evidence is insufficient to establish a civil conspiracy by BSI. Accordingly, this claim is dismissed.

VII. The Claims Against John Bray

SES has asserted claims against John Bray for civil conspiracy and conversion. The evidence is insufficient to support either claim. Accordingly, these claims are dismissed.

VIII. The Claims Against Ronald Bray

SES has asserted claims against Ronald Bray for a preferential transfer, civil conspiracy and conversion. Ronald Bray did not defend the action. However for the reasons stated herein, the Court concludes that the claims against Ronald Bray should be dismissed. Apparently, SES did not assert a claim against Ronald Bray under 11 U.S.C. §§ 548 & 550.

IX. Conclusion

For the foregoing reasons, BSI is liable to SES for a fraudulent transfer in the amount of $1.3 million. The remaining claims against BSI are dismissed. The claims against John Bray and Ronald Bray are dismissed.

The Court will enter an appropriate order.

Entered: November 17, 2005

/s/ Steven W. Rhodes
Steven W. Rhodes
Chief Bankruptcy Judge