

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

Ronald J. Friedman, as the trustee for
the SportCo Creditors' Liquidation Trust,

Plaintiff,

v.

Wellspring Capital Management, LLC,
Wellspring Capital Partners IV, L.P.,
WCM Genpar IV, L.P.,
WCM Genpar IV GP, LLC,
Alexander E. Carles, Bradley Johnson,
F. Hewitt Grant, Charles E. Walker, Jr.,
Todd Boehly, Bernard Ziomek, and
Andrew Kupchik,

Defendants.

Adversary Proceeding No. 19-80071-DD

**ORDER GRANTING MOTION TO
RECONSIDER AND ALTER OR
AMEND THE JUDGMENT**

This matter is before the Court on a motion to reconsider and alter or amend the judgment filed by the plaintiff Ronald J. Friedman, as the trustee for the SportCo Creditors' Liquidation Trust on September 8, 2020. The motion asks the Court to reconsider the portion of its order dismissing the first and second causes of action of this adversary proceeding. The basis of the motion is that the Court misstated South Carolina law regarding fraudulent conveyance causes of action based on South Carolina's Statute of Elizabeth, S.C. Code § 27-23-10. Objections to the motion to reconsider were filed by the defendants Wellspring Capital Management, LLC, Wellspring Capital Partners IV, L.P., WCM GenPar IV, L.P., WCM GenPar IV GP, LLC, Alexander Carles, F. Hewitt Grant, Todd Boehly, Andrew Kupchik, and Charles E. Walker, Jr. After careful consideration of the plaintiff's motion and the defendants' objections, for the reasons set forth below, the motion is granted.

Legal Standard

Federal Rule of Bankruptcy Procedure 9023 provides, in relevant part:

Except as provided in this rule and Rule 3008, Rule 59 F. R. Civ. P. applies in cases under the Code. A motion for a new trial or to alter or amend a judgment shall be filed, and a court may on its own order a new trial, no later than 14 days after entry of judgment.

Federal Rule of Civil Procedure 59 provides, in relevant part:

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

...

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

The Fourth Circuit has stated that a motion to alter or amend a judgment should only be granted “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002) (quoting *Collison v. International Chemical Workers Union*, 34 F.3d 233, 236 (4th Cir. 1994)).

Analysis

The plaintiff’s motion argues that the Court was incorrect in ruling that in order to establish a constructive fraudulent conveyance under the South Carolina Statute of Elizabeth, insolvency is required both at the time of the transfer and at the time the creditor seeks to collect its debt. The plaintiff cites several cases in support of his argument, relying mainly on *Penning v. Reid*, 167 S.C. 263, 166 S.E. 139 (1932). In *Penning*, the main question considered by the South Carolina Supreme Court was whether a nulla bona return is required before a fraudulent

conveyance action can be commenced. After affirming the circuit judge's decision on that point, the court stated:

With regard to the point made by counsel for appellants, that at the time of the execution of the deed in question, and for some time thereafter, the defendant R. W. Reid, as shown by the testimony, was solvent, in addition to what is said in Judge Johnson's decree, we may refer to *Cordery v. Zealy*, 2 Bailey, 205, to the effect that, subject to the qualification of slight indebtedness or debts inconsiderable in comparison with the value of the donor's estate, "it may be laid down as a settled rule of law, that one who is in debt, cannot make a voluntary conveyance, which will prevail against existing debts." The rule is thus stated in *Richardson v. Rhodus*, 14 Rich. 95 (we add italics): "The general rule is, that, as against creditors existing at the time of the conveyance, a voluntary conveyance is fraudulent in law and void. The test of the donor's legal capacity to give, as against existing creditors, depends upon his *final* solvency"- that is to say, not upon his solvency at the time the gift is made; if *in the final event* the property of the debtor is not sufficient to pay his debts existing at the time of his voluntary conveyance, then such conveyance is null and void as to such debts.

In *Buchanan v. McNinch*, 3 S. C. 498, the court, in considering the qualifications of the general rule thus stated, further observed: "We think, too, that another exception may be added, and which finds justification in the circumstances of this case. It is that where the donor makes a voluntary conveyance of an inconsiderable portion of his estate, leaving unincumbered a probable sufficiency for the payment of his existing debts, it shall prevail if his subsequent insolvency arises from the loss of his property by sudden and extraordinary events which he could not control or prevent.

Penning, 166 S.E. at 148. In reaching its decision, the court in *Penning* relied on the holdings in several older cases, including *Buchanan v. McNinch*, 3 S.C. 498 (1872), *Cordery v. Zealy*, 18 S.C.L. 205 (1831), and *Richardson v. Rhodus*, 48 S.C.L. 95 (Ct. App. 1866).

Subsequent cases do not directly discuss the timing of the insolvency requirement but, after careful review, it appears that they do not alter the holding in *Penning*. For example, in *Gardner v. Kirven*, 184 S.C. 37, 191 S.E. 814 (1937), the South Carolina Supreme Court stated, "Where a conveyance is made without an actual intent to defraud but without consideration, it is said that the conveyance will stand if the grantor reserves a sufficient amount of property to pay his creditors. But this means a sufficient amount of property not merely at the time of the

transfer, but an amount from which in the final analysis the creditors are able to collect their indebtedness in full.” *Gardner*, 191 S.E. at 816. The Supreme Court made similar statements in *Future Group, II v. Nationsbank*, 324 S.C. 89, 96, 478 S.E.2d 45, 48 (1996) and *Tuller v. Nantahala Park Co.*, 276 S.C. 667, 673, 281 S.E.2d 474, 477 (1981).

After a review of these cases, it appears that the Court erred in ruling that insolvency at both the time of the transfer and at the time the creditor seeks to collect its debt is required. Accordingly, the plaintiff’s motion is granted. The portion of the Court’s order entered August 27, 2020 dismissing the plaintiff’s first and second causes of action is vacated.

Having determined that the dismissal of the first and second causes of action on the basis of the failure to plead insolvency of the time of the transfer should be vacated, the Court must determine whether any other argument made by the defendants in their motions to dismiss constitutes grounds for dismissal of the adversary proceeding. In connection with that determination, the Court finds it necessary to certify a question to the South Carolina Supreme Court. The parties previously suggested a question for certification. An order certifying this question will follow.

AND IT IS SO ORDERED.

**FILED BY THE COURT
10/14/2020**



Entered: 10/14/2020

David R. Duncan
US Bankruptcy Judge
District of South Carolina

Notice Recipients

District/Off: 0420-3
Case: 19-80071-dd

User: admin
Form ID: pdf01

Date Created: 10/14/2020
Total: 29

Recipients submitted to the BNC (Bankruptcy Noticing Center) without an address:

dft Bernard Ziomek

TOTAL: 1

Recipients of Notice of Electronic Filing:

aty G. William McCarthy, Jr. bmccarthy@mccarthy-lawfirm.com
aty J W Nelson Chandler nelson@chandlerdudgeon.com
aty John S. Simmons jsimmons@simmonsfirm.com
aty Joshua Justin Bruckerhoff jbruckerhoff@rctlegal.com
aty Julio E. Mendoza, Jr. rmendoza@nexsenpruet.com
aty Keith Moss Babcock kmb@lewisbabcock.com
aty Mary M. Caskey mcaskey@hsblawfirm.com
aty Philip D. Anker philip.anker@wilmerhale.com
aty Phillip Jason Collins jcollins@rctlegal.com
aty R. William Metzger, Jr. bmetzger@robinsongray.com
aty Shaun C Blake sblake@rogerslewis.com
aty William Harrison Penn hpenn@mccarthy-lawfirm.com
aty William Tyler Perry tperry@rctlegal.com

TOTAL: 13

Recipients submitted to the BNC (Bankruptcy Noticing Center):

pla Ronald J Friedman SILVERMAN ACAMPORA LLP 100 Jericho Quadrangle Suite
300 Jericho, NY 11753
aty Daniel H Levi PAUL WEISS RIFKIND WHARTON GARRISON LLP 1285 Avenue of the
Americas New York, NY 10019-6064
aty Daniel H.R. Laguardia Shearman & Sterling LLP 535 Mission Street Floor 25 San Francisco,
CA 94105
aty Elizabeth R McColm Paul Weiss Rifkind Wharton Garrison LLP 1285 Avenue of the
Americas New York, NY 10019
aty George Bell Adams, III Shearman & Sterling LLP 535 Mission Street Floor 25 San Francisco,
CA 94105
aty Jacob A Adlerstein Paul Weiss Rifkind Wharton Garrison LLP 1285 Avenue of the Americas New
York, NY 10019
aty Jennifer P Rubin Paul Weiss Rifkind Wharton Garrison LLP 1285 Avenue of the Americas New
York, NY 10019-6064
aty Joshua Justin Bruckerhoff REID COLLINS & TSAI LLP 1301 S Capital of Texas
Hwy C-300 Austin, TX 78746
aty Lewis R Clayton Paul Weiss Rifkind Wharton Garrison LLP 1285 Avenue of the Americas New
York, NY 10019-6064
aty Lyle Roberts SHEARMAN & STERLING LLP 401 9th Street NW Suite 800 Washington,
DC 20004-2128
aty Philip David Anker Wilmer Cutler Pickering Hale & Dorr LLP 7 World Trade Center 250
Greenwich Street New York, NY 10007
aty Phillip Jason Collins REID COLLINS & TSAI LLP 1301 S Capital of Texas
Hwy C-300 Austin, TX 78746
aty William Tyler Perry REID COLLINS & TSAI LLP 1301 S Capital of Texas
Hwy C-300 Austin, TX 78746
ust John Timothy Stack Office of the United States Trustee 1835 Assembly Street Suite 953 Columbia,
SC 29201
ust US Trustee Strom Thurmond Federal Bldg 1835 Assembly Street Suite 953 Columbia, SC
29201

TOTAL: 15