

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 08-11955)
)
DFI PROCEEDS, INC.)
)
Debtor)
)
DRIGGS FARMS OF INDIANA, INC. by the)
UNSECURED CREDITORS' COMMITTEE)
)
Plaintiff)
)
vs.) PROC. NO. 08-1226
)
DRIGGS FARMS INVESTORS, LLC;)
HOWARD DRIGGS, JR; AND)
ENTERPRISE TITLE AGENCY, INC.)
)
Defendants)

DECISION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

At Fort Wayne, Indiana, on August 21, 2009.

By this adversary proceeding the unsecured creditors' committee seeks to avoid, as a transfer made for less than reasonably equivalent value, what it believes to be a disproportionate allocation of proceeds of the sale of the debtor's assets. See, 11 U.S.C. § 548(a)(1)(B). The defendants have filed a motion for partial summary judgment as to Counts I and III of the plaintiff's complaint based upon the proposition that there was no transfer. It is that motion which is presently before the court.

Summary judgment is appropriate where there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." See, Fed. R. Civ. P. Rule 56(c); Fed. R. Bankr. P. Rule 7056. The moving party must initially identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986). Once it does so, the non-moving party must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact requiring trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct 1348, 1356 (1986). In ruling on the motion, the court accepts the non-moving party’s evidence as true, draws all inferences in favor of the non-moving party, and does not weigh the evidence and credibility of the witnesses. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986).

Prior to the petition, the defendant, Howard Driggs, negotiated with a third party, Fieldbrook, for the sale of property belonging to the debtor, as well as property owned by another entity operated by Mr. Driggs, together with an agreement that Mr. Driggs would act as a consultant to the purchaser for a specified time. The total price was to be allocated between the two properties. Prior to closing, however, the debtor filed a petition for relief under Chapter 11 and the debtor’s property was later sold at auction to an entity other than Fieldbrook.

The crux of the defendants’ motion is that there was no transfer – only an agreement to transfer property – and, if there was no transfer, there is nothing to avoid. In this, they are correct. There was no transfer of property prior to the date of the petition. There was, at best, only an agreement to transfer multiple properties owned by different, but related, entities and to allocate the purchase price between the debtor and the other owner. A transfer is defined as the creation of a lien, retention of a security interest, foreclosure of equity of redemption, the disposal of or parting with an interest in property. 11 U.S.C. § 101(54). An agreement to sell, which is never consummated, does not dispose of anything, even if it does purport to allocate value between the various properties

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to be sold. While that agreement may have formed the starting point for a sale procedure which took place after the date of the petition – a sale procedure which was approved by the court following notice to all creditors and parties in interest – it does not establish a transfer for the purpose of § 548.

As to counts I and III of the plaintiff's complaint, there are no genuine issues of material facts and the defendants' partial motion for summary judgment is granted.

SO ORDERED.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court