

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re
RICKEY Z. GRACE,

Debtor.

Case No. 99-02316-WRS
Chapter 7

MEMORANDUM DECISION

On January 9, 2004, this Court denied the application for professional fees which had been filed by E. Terry Brown (“counsel”) as counsel for the Trustee. (Docs. 46-48). Counsel timely moved to alter or amend the Court’s judgment. (Doc. 53). The motion was heard on February 3, 2004. Brown was present by counsel Lawrence B. Voit. A supporting memorandum was filed on March 10, 2004. (Doc. 56). For the reasons set forth below, the motion is DENIED.

I. Bad Faith

Counsel seeks compensation for bringing an adversary proceeding to set aside, as either a fraudulent conveyance or an unauthorized post petition transfer, a divorce decree which awarded the marital residence to Tammy Grace, the former spouse of the Debtor in this case, Rickey Grace.¹ The Court found that the Trustee, and his counsel, brought the action in bad faith. (Doc. 46, pp. 9-10). The Trustee repeatedly argued a factually false version of the facts. It was the Trustee’s, and the Trustee’s lawyer’s, refusal to deal with the facts as they were, which the Court finds is in bad faith.

¹ That Adversary Proceeding is styled Tom McGregor, Trustee v. Tammy L. Grace, Adversary Proceeding No. 99-132.

The Court has set forth the facts surrounding the divorce of Tammy and Rickey Grace on several previous occasions.² For purposes of the instant motion, it will suffice to say that Tammy and Rickey Grace were divorced. Tammy Grace was awarded the house and most of its contents. Rickey Grace was awarded his vehicle and his personal effects. It is beyond dispute that the property division was not equal.

The Trustee repeatedly has mischaracterized this sequence of events as a transaction whereby Tammy Grace was awarded the house and Rickey Grace got nothing.³ The problem presented by the underlying Adversary Proceeding is: how shall a bankruptcy court apply fraudulent conveyance law to a divorce decree in which the property division is not equal? This question is discussed at some length in memoranda previously handed down by this Court.⁴ At no time has the Trustee made any effort to grasp the central issue raised by his Adversary Proceeding. Shall every divorce decree in which the property division is not exactly equal be set aside as a fraudulent conveyance, if the party on the short end later files bankruptcy? It was the Trustee's steadfast refusal to deal with this problem which led to

² On June 22, 2000, the Court handed down a Memorandum Opinion entering summary judgment in favor of Tammy Grace. (Adv. Pro. No. 99-132, Doc. 22). On August 28, 2000, the Court denied the Trustee's Motion for Additional Findings of Facts. (Adv. Pro. No. 99-132, Doc. 27). On January 9, 2004, the Court denied Counsel's application for fees. (Case No. 99-2316, Doc. 46). The facts are discussed in detail in all three of these documents.

³ In his motion for summary judgment, the Trustee argues that "it is undisputed that the Debtor, Rickey Z. Grace, received no consideration whatsoever, much less reasonably equivalent value, in exchange for the transfer of the real property to the Defendant, Tammy L. Grace." (Adv. Pro. No. 99-132, Doc. 18, p. 3); see also (Doc. 18, p. 9). In his motion for additional findings, the Trustee moves the Court to make findings of fact which are demonstrably false. (Adv. Pro. No. 99-132, Doc. 26).

⁴ See the Memorandum Decision in the Adversary Proceeding (Adv. Pro. No. 99-132, Doc. 22); the Order denying the Trustee's Motion for Additional Findings (Adv. Pro. No. 99-132, Doc. 27); and the Memorandum Decision on Counsel's application for fees. (Case No. 99-2316, Doc. 46).

this Court's conclusion that the Adversary Proceeding was brought in bad faith. The transfer in question was one in which marital property was divided in an equitable, but not equal, fashion. The transfer was not, as the Trustee has claimed repeatedly, one in which Rickey Grace's interest was transferred to Tammy Grace for no consideration.

The Court will readily concede that the law in this area is not well settled. Under the law as it now stands, one could make a good faith argument that a transfer pursuant to a divorce decree may be set aside as a fraudulent conveyance. See Corzin v. Fordu (*In re Fordu*), 201 F.3d 693 (6th Cir. 1999) (transfer pursuant to an agreed divorce decree not preclusive in fraudulent conveyance action in subsequent bankruptcy proceeding filed by former husband). The problem in this case is that the Trustee never made a good faith argument. Rather, he stated repeatedly that the house was transferred for no consideration, failing to deal with the central issue in this adversary proceeding. Indeed, at no time did the Trustee contend that the division of property was not equitable.

As further evidence of the Trustee's bad faith, the Court cited the following argument which was made in the Trustee's Motion for Additional Findings: "[I]t is respectfully submitted that the Court's decision [granting Tammy Grace's motion for summary judgment] if this Court fails to grant Plaintiff's Motion, will represent an aberration in the law and will emasculate the Trustee's avoidance powers in this one district of a whole class of cases in which the Trustee and the innocent unsecured creditors he represents are treated less equitably than divorced debtors who, as in this case, both **violated their vows to their God** and each other, as well as their duties to pay their just debts."⁵

⁵ The Court cited this language in its January 9, 2004 Memorandum Decision denying the application for compensation filed by counsel for the Trustee. (Case No. 99-2316, Doc. 46, p. 9).

(Adv. Pro. No. 99-132, Doc. 24, p. 4) (bracketed matter and emphasis added). The Court criticized counsel's intemperate language, calling it "malicious and hateful" and "inappropriate." (Case No. 99-2316, Doc. 46, p. 9). Rather than apologize for what is clearly inappropriate language, counsel's lawyer criticized the Court at the February 3, 2004 hearing for overreacting to what he termed merely rhetoric.

The undersigned rejects counsel's criticism and will respond briefly with some of his own. It is unfortunate that the plane on which legal arguments are made has fallen so low that experienced counsel consider it their right to make such comments. Many people cherish their faith and find attacks such as that made by counsel to be deeply offensive. The undersigned will not withdraw his criticism of counsel.

II. Other Arguments

Counsel raised several other arguments in his brief and at the February 3, 2004 hearing, which the Court will address in the following order. First, the Court will address counsel's argument that the transfer of the home to Tammy Grace was avoidable as an unauthorized post petition transfer. Second, the Court will address a factual error in its January 9, 2004 Memorandum which counsel has raised. However, the factual error—concerning the cause of Tammy Grace's bankruptcy—does not change the Court's ultimate conclusion, the Counsel acted in bad faith. Third, the Court will address counsel's argument that the Court's approval of the compromise of the Trustee's claim precludes its finding of bad faith.

This language originally appeared in the Trustee's Motion for Additional Findings. (Adv. Pro. No. 99-132, Doc. 24, p. 4).

A. Post-Petition Transfer

The Circuit Court in Baldwin County, Alabama entered judgment in the Grace divorce proceeding on January 7, 1997. More than two years later, on May 10, 1999, Rickey Grace filed his petition in bankruptcy. This Court found that the transfer of the residence, which was ordered by the Circuit Judge pursuant to the divorce decree, was effective upon entry of the decree. Therefore, the residence was transferred more than two years prior to the filing of the petition in bankruptcy, and could not have been a post petition transfer avoidable pursuant to 11 U.S.C. § 549. As January 7, 1997 is plainly prior to May 10, 1999, the Court found the Trustee's claim that the transfer in question was a post petition transfer to be without merit.

The January 7, 1997 divorce decree contains a provision whereby Rickey Grace was required to execute a deed to the property. Had he timely done so, there would be no issue here. Unfortunately for Tammy Grace, Rickey Grace failed to execute the deed. As this Court has previously detailed on at least two prior occasions, the parting of the Graces was not amicable.⁶ Indeed, it was unusually acrimonious. Ultimately, the Clerk of the Circuit Court executed and recorded a deed, clarifying the chain of title because Rickey Grace did not do so. That Rickey Grace disobeyed a court order did not vest him with a property right, lost on January 7, 1997, when the divorce decree entered. That the Trustee would attempt to make an argument that the estate has a property interest in the house by virtue

⁶ After the divorce, Rickey Grace broke into the residence and destroyed property valued at over \$11,000.00. He was held in contempt and jailed. In addition, Tammy Grace brought an Adversary Proceeding seeking a determination that the debt due her was not dischargeable. See Grace v. Grace, Adv. Pro. No. 99-160; see also Order dated April 21, 1997, issued in proceedings styled Grace v. Grace, Case No. DR-96-304, Circuit Court for Baldwin County, Alabama. (A copy of that order may be found in this Court's record in Adv. Pro. No. 99-160).

of Rickey Grace's contemptuous, if not criminal, behavior is patently outrageous.

Counsel cites the case of In re Kelley, 304 B.R. 331 (Bankr. E.D. Tenn. 2003), in support of his proposition that this position had merit, stating that the facts of that case and the case at bar are "almost identical." (Doc. 56). Counsel ignores the most obvious, and determinative, difference between these two cases. The decision in Kelley involved a transfer of real property in Tennessee. Under Tennessee statutes, the failure to record a divorce decree makes the conveyance "null and void." Kelley, 304 B.R. at 336-37. In contrast, Alabama statutes have no corresponding requirement. Cf. TENN. CODE ANN. §§ 66-26-101, 103, with ALA. CODE § 8-9A-6 and ALA. CODE § 35-4-90. As Kelley was decided under Tennessee law and the case at bar was decided under Alabama law, with considerably different recording statutes, Kelley is not applicable.

B. The Factual Error

On page 7 of the Court's January 9, 2004 Memorandum Decision, it states that "these actions [referring to the filing of the adversary proceeding and the prosecution of the appeal] appear to have been calculated to cause, and in any event subsequently caused, Tammy Grace to file bankruptcy." At the February 3, 2004 hearing, counsel supplied documents indicating that Tammy Grace was financially distressed as a result of considerable debt which was unrelated to this litigation. Moreover, it was observed that statements on file indicated that her income was only \$14,000.00 per year. Counsel asserts that Tammy Grace would have ended up in bankruptcy in any event, which may well be true. The Court does not dispute that its statement set forth above was incorrect. Given the Court's admission of error regarding the statement set forth above, it does not follow that the Court's ultimate conclusion should be changed. The Trustee litigated the adversary proceeding against Tammy Grace in

bad faith.

C. Approval of the Compromise

The Trustee prosecuted an appeal to the District Court of this Court's judgment in favor of Tammy Grace in the Adversary Proceeding. Tammy Grace subsequently filed bankruptcy in the United States Bankruptcy Court for the Southern District of Alabama. At that point, Tammy Grace's interest in the house became property of her bankruptcy estate and the task of defending the appeal fell to her Trustee in bankruptcy. Tammy Grace's Trustee settled the matter with the Trustee in this case.

Bankruptcy Rule 9019 provides that when a trustee compromises a claim, he must have the Court's approval. FED. R. BANKR. P. 9019. Notice of the proposed compromise must be sent to all parties in interest. FED. R. BANKR. P. 2002(a)(3). These steps were taken in this case. (Adv. Pro. No. 99-132, Docs. 33-35). No objections were filed. This Court approved the settlement. (Adv. Pro. No. 99-132, Doc. 36). Counsel argues that by approving the compromise, the Court is now precluded from finding that the Trustee, and his counsel, acted in bad faith and should not be compensated. Counsel argues, somewhat facetiously it would seem, that it is inconsistent for the Court to accept the proceeds of this tainted litigation on the one hand and to refuse payment to the Trustee's lawyer on the other.

Upon closer examination it becomes apparent that there is no merit to this contention. Bankruptcy Rule 9019 is designed to provide a mechanism to prevent trustees in bankruptcy from settling disputed claims too cheaply. FED. R. BANKR. P. 9019; see e.g., Depoister v. Mary M. Holloway Found., 36 F.3d 582 (7th Cir. 1994). The Court is not aware of any authority for the

proposition that it may deny a motion to compromise because the estate is getting too much money.

Counsel has not cited any authority for that proposition.

III. CONCLUSION

The Court has considered carefully counsel's motion, brief and the arguments made at the February 3, 2004 hearing. The Court finds that the Trustee and his counsel litigated these proceedings in bad faith. The Court further finds that it is within its discretion to deny compensation because it is not necessary for the Trustee to bring suit in bad faith. See 11 U.S.C. § 330(a). For these reasons, the motion to alter and amend is DENIED.

Done this 22nd day of April, 2004.

/s/ William R. Sawyer
United States Bankruptcy Judge

c: Lawrence B. Voit, Esq.
E. Terry Brown and Daniel Feinstein, Attorneys for Trustee
Thomas C. McGregor, Trustee
Teresa R. Jacobs, Bankruptcy Administrator