

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

In re:)	
)	
HAN SWYTER)	Case No. 00-12759-SSM
)	Chapter 11
Debtor)	
)	
ARTHUR C. HERRINGTON, <i>et al.</i>)	
)	
Plaintiffs)	
vs.)	Adversary Proceeding No. 01-1012
)	
HAN SWYTER, <i>et al.</i>)	
)	
Defendants)	

MEMORANDUM OPINION

This is an action to avoid, as a fraudulent conveyance, certain transfers from the debtor either to his wife or to himself and his wife as tenants by the entirety. Both parties have moved for partial summary judgment. A hearing was held in open court on June 19, 2001, at which the plaintiff and the defendants were present by counsel. Upon review of the record, the argument of counsel, and the applicable law, and for the reasons stated in this opinion, the court concludes that material facts remain in dispute, thereby precluding summary judgment.

Background

The debtor, Han Swyter, is a Virginia resident and the general partner of several real estate limited partnerships including Heathrow Business Center, Red Branch Partners, Lockport Business Center, Guilford Partners, and Eastpoint Business Center (collectively, “the

partnerships”). The plaintiff, Arthur C. Herrington (“Herrington”) is a Maryland resident and a limited partner in those partnerships. After becoming convinced that the debtor was charging excessive management fees to the partnerships, Herrington and the Arthur C. Herrington Revocable Trust (the “Herrington trust”) instituted an arbitration proceeding against the debtor on or about June 30, 1995. In the arbitration, Herrington alleged (a) that the debtor had taken excessive management fees and improperly allocated costs among the partnerships in violation of the various partnership agreements, agreements among partners, and property management agreements; and (b) that the debtor had violated his fiduciary duties to the limited partners of the partnerships. An arbitration award was entered against the debtor finding that the debtor had willfully overcharged the partnerships for management fees. The arbitration award, subsequently amended, was subsequently confirmed by the Superior Court of the District of Columbia and was reduced to judgment on December 7, 1998. Among other things, the award prohibited the debtor from causing the partnerships to pay management fees to Van Es Associates, Inc. (“VEA”), a corporation established and controlled by the debtor, unless certain conditions were met. The debtor, however, simply formed a new corporation, WD99, Inc., that performed the same services as VEA, from the same offices as VEA, and with the same employees as VEA. Additionally, the debtor increased his salary to \$240,000 per year and transferred all of his assets, including his yearly salary, to either his spouse Judith Swyter, or to his spouse and himself as tenants by the entirety. At the time of each of these transfers, the debtor was insolvent or was rendered insolvent by the transfer. The debtor, however, maintained outward control of the transferred property through a power of attorney,

and did not disclose the transfers to any of his creditors. Further, Judith Swyter did not give value in exchange for the transfers.

After Herrington commenced efforts to enforce the judgment, the debtor filed a chapter 11 petition in this court on June 23, 2000.¹ The present complaint was filed on January 17, 2001,² alleging that the debtor's transfers to his spouse and to himself and his spouse are avoidable as fraudulent conveyances under § 548, Bankruptcy Code, and Va. Code Ann. §§ 55-80 and 55-81.³ The plaintiffs seek a judgment in the amount of \$815,374.32 plus pre-judgment interest, fees, and costs. In response, the defendants argue that (a) the one-year look-back period under § 548, Bankruptcy Code, excludes most of the transactions that the plaintiffs seek to avoid; (b) the payment of household expenses from the transferred assets makes the transfers immune to avoidance; (c) any potential recovery under Va. Code Ann. §§

¹ The debtor remains in possession of his estate, with the exception that an examiner with expanded powers was appointed to control the debtor's general partnership interests pending confirmation. The debtor has proposed several plans, the most recent of which is under advisement following a hearing on confirmation.

² Herrington had filed an earlier complaint on August 15, 2001, seeking a number of forms of relief, including avoidance of the transfers at issue in this action. *Herrington v. Swyer*, A.P. No. 00-1177. The avoidance count was dismissed, however, because Herrington had not at that time been authorized to pursue such an action for the benefit of the bankruptcy estate. Herrington then brought a motion for leave to bring this action for the benefit of the bankruptcy estate. That motion was granted at a hearing held on January 12, 2001.

³ The two Virginia Code sections are misidentified in the complaint as §§ 50-80 and 50-81. The defendants have not made an issue of what appears to be a simple typographical error, and the court will give effect to the obvious intent of the pleadings. *See* Fed.R.Civ.P. 8(f) (mandating construction of pleadings to do "substantial justice"); *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 200, 58 S.Ct. 507, 509, 82 L.Ed. 745 (1938) (noting that pleadings should not raise barriers to fair and just settlements); *Monal Constr. Co. v. Brookside Ltd. P'ship*, 539 F.Supp. 478, 480 (W.D. Pa.1982) (considering removal action under proper Code section despite typographical error indicating different section).

55-80 and 55-81 is limited to a 5-year look-back period; and (d) Va. Code Ann. § 55-81 only applies to debts grounded in contract.

Discussion

I.

This court has subject-matter jurisdiction under 28 U.S.C. §§ 1334 and 157(a) and the general order of reference from the United States District Court for the Eastern District of Virginia dated August 15, 1984. Venue is proper in this district under 28 U.S.C. § 1409(a). This is a core proceeding in which a final judgment may be entered by a bankruptcy judge, subject to the right of appeal. 28 U.S.C. § 157(b)(2)(H). The defendants have been properly served and have appeared generally.

II.

Under Rule 56(c), Federal Rules of Civil Procedure, as incorporated by Federal Rule of Bankruptcy Procedure 7056, summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In ruling on a motion for summary judgment, a court should believe the evidence of the non-movant, and all justifiable inferences must be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 530 (1986). At the same time, the Supreme Court has instructed that summary judgment “is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to

secure the just, speedy and inexpensive determination of every action.’” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986). Additionally, not every dispute as to the facts will preclude the entry of summary judgment, but only those disputes over facts that might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248, 106 S.Ct. at 2510. Here, the issues to be decided on summary judgment are as follows:

1. Whether the debtor’s transfers to his spouse are fraudulent conveyances under § 548, Bankruptcy Code, and if so, whether (a) the one-year look-back period under § 548 excludes most of the transactions that the plaintiffs seek to avoid; and (b) the payment of household expenses using the transferred assets bars avoidance of the transfers.
2. Whether the debtor’s transfers to his spouse are fraudulent conveyances under Va. Code Ann. § 55-80, and if so, whether any potential recovery under § 55-80 is limited by a 5-year look-back period?
3. Whether the debtor’s transfers to his spouse are fraudulent conveyances under Va. Code Ann. § 55-81, and if so, whether § 55-81 only applies to creditors whose debts were “contracted” during a 5-year look-back period?

These issues will each be addressed in turn.

III.

Under § 548(a), Bankruptcy Code, a trustee or debtor in possession 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—

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(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[.]

Thus, the statute permits the avoidance of two conceptually distinct kinds of transactions: those entered into with actual intent to hinder, delay, or defraud creditors (regardless of the debtor's solvency), and those entered into without such intent but which nevertheless prejudice creditors because the debtor was, or thereby became, insolvent.

The only transfers that are alleged to have taken place within the one-year period prior to the filing of the chapter 11 petition are the debtor's deposit, into a bank account solely in his wife's name, of his \$20,000.00 per month salary from WD99, Inc. It is undisputed that the total amount deposited by the debtor in his wife's bank account during that period was \$240,000. *See* Defs.' Mem. in Supp. of Mot. for Partial Summ. J., at 5. There seems to be no dispute that the remaining transfers at issue in this adversary occurred outside the one-year window and cannot be avoided under § 548. *See* Pls.' Mem. in Opp'n to Defs.' Mot. for Partial Summ. J., at 4; Defs.' Mem. in Supp. of Mot. for Partial Summ. J., at 5.

Accordingly, for the purposes of § 548 analysis, and with these parameters in mind, the Court need only concern itself with the \$240,000.00 in transfers that took place within the year prior to the debtor's filing in this case, asking: (a); and (b) whether the transfers prejudiced creditors because the debtor was, or became, insolvent as a result of such transfers.

A. § 548(a)(1), Bankruptcy Code

The first issue for decision, then, is whether the undisputed evidence shows that debtor's deposit of his salary into his wife's bank account (over which he had a power of attorney and could write checks) was done with actual intent to hinder, delay, or defraud his creditors. As stated in *Hyman v. Porter (In re Porter)*, 37 B.R. 56, 60-61 (Bankr. E.D. Va. 1984), "[w]here a transfer is between related parties, the transfer is subject to close scrutiny and gives rise to a presumption of actual fraudulent intent where the transfer is without adequate consideration.... Moreover, courts have held consistently that love and affection does not constitute value for the purposes of § 548." Because it is rare that a transferor will admit that his or her purpose was to hinder, delay, or defraud creditors, it is often necessary to prove such intent by means of circumstantial evidence. *Id.* at 63. In particular, "courts have relied historically upon presumptions of fraud, known also as 'badges of fraud,' which consist of facts and circumstances which the law admits to be the signs of fraud; and from which ... fraudulent intent may be inferred." *Id.* These "badges of fraud" include:

1. retention of an interest in the transferred property by the transferor;
2. transfer between family members for allegedly antecedent debt;
3. pursuit of the transferor or threat of litigation by his creditors at the time of the transfer;
4. lack of or gross inadequacy of consideration for the conveyance;
5. retention or possession of the property by transferor; and
6. fraudulent incurrence of indebtedness after the conveyance.

Id.

In the present case, it is undisputed that the debtor deposited his \$20,000 monthly salary – \$240,000 in the aggregate – into his spouse’s checking account between June 23, 1999, and June 23, 2000. *See* Defs.’ Mem. in Supp. of Mot. for Partial Summ. J., at 4, 5; and April 6, 2001 Dep. Tr. of Han Swyter, at 36-37. Further, the transfers from the debtor to his spouse were only supported by “kisses,” “love,” and general marital affection. *See* April 6, 2001 Dep. Tr. of Han Swyter, at 43; and August 3, 2000 § 341 Exam. Tr. of Han Swyter, at 36. Such consideration is clearly not recognized for the purposes of § 548. *See In re Porter*, 37 B.R. at 61. Additionally, the debtor retained control of the funds, notwithstanding that they were nominally titled in his wife’s name, because he had signature authority over the account by means of a power of attorney. Thus, for the purposes of § 548(a)(1), the plaintiffs have established a presumption of actual fraudulent intent on the part of the debtor in this case.

The defendants, argue, however, that there is no evidence that the funds deposited into the wife’s account were used other than to pay reasonable and necessary family expenses. In the absence of such evidence, they argue, the mere depositing of the debtor’s paycheck into his wife’s bank account creates no presumption of fraudulent intent. *See* Defs.’ Mem. in Supp. of Mot. for Partial Summ. J., at 6. In support of this position, the defendants rely on *Reitmeyer v. Meinen (In re Meinen)*, 232 B.R. 827, 842 (Bankr. W.D. Pa. 1999), for the proposition that “an insolvent debtor’s deposits of his or her own funds into an entireties account are not fraudulent as to said debtor’s creditors to the extent that said funds are then used to satisfy reasonable and necessary expenses for the maintenance of said debtor’s family.” *Id.*

Meinen, however, was not decided under § 548, Bankruptcy Code, but under the Pennsylvania Uniform Fraudulent Transfer Act. *See Id.*, at 39-43. Indeed, the two cases upon

which *Meinen* relies for the “reasonable-and-necessary-family-expense” defense – *Welker v. Strohmeyer*, 45 Berks 21 (C.P. Berks County 1952); and *Watters v. DeMilio*, 16 Pa. D. & C. 2d 747 (C.P. Carbon County 1957) – both set forth that defense within the context of the Pennsylvania Uniform Fraudulent Transfer Act. No case has been cited to the court -- and the court’s own research has discovered none -- applying the “reasonable-and-necessary-family-expense” defense to an action under § 548(a)(1), Bankruptcy Code. Of course, to the extent the transferred funds were used solely to pay such expenses, the presumption of fraud that would otherwise result may be weakened.⁴ However, the court is unable to conclude that a transfer which is actually motivated by a purpose to hinder, delay, or defraud creditors is absolutely immunized from avoidance under § 548(a)(1) simply because the transferred funds are then used to pay reasonable and necessary family expenses.

arising from the for such purpose, , this Court concludes that the reasonable and necessary family expense defense set forth in *Meinen* must fail.

Thus, while the reasonable and necessary family expense defense set forth in *Meinen* does not apply to the case at hand, the duty of support set forth in *Bundy* does. Along these lines, this Court believes that a hearing is required to answer the limited question of whether

⁴ Indeed, the Court notes that under Virginia law a husband has both a legal and a moral duty to provide adequate support and maintenance for his spouse during marriage. *See Bundy v. Bundy*, 197 Va. 795, 91 S.E.2d 412 (1956). *See also* Va. Ann. Code § 20-61 (making it a misdemeanor to fail to support one’s spouse or children). Thus, to the extent the funds deposited in the wife’s bank account were used for her support, thereby satisfying the debtor’s legal duty, sufficient consideration may exist to negate an presumption of fraudulent intent.

any of the \$240,000 transferred from the debtor into his spouse's checking account between June 23, 1999, and June 23, 2000, was used by the debtor to provide adequate support and maintenance for his spouse. Accordingly, with respect to the § 548(a)(1) portion of the plaintiffs' complaint, summary judgment is not appropriate at this time.

B. § 548(a)(2), Bankruptcy Code

Notwithstanding the above, the plaintiffs also seek to avoid the \$240,000 transfer based on § 548(a)(2), Bankruptcy Code. As previously stated, the general marital affection cited by the debtor as consideration for the transfers in question is a form of consideration not recognized under § 548. *In re Porter*, 37 B.R. at 61. Therefore, for the purposes of § 548(a)(2), this Court must ask whether the debtor was insolvent at the time of the transfers in question, or became insolvent as a result of the transfers in question; for if that is the case, such transfers may properly be avoided.

As stated in *In re Porter*, 37 B.R. at 56, “[c]ourts have often relied upon the Bankruptcy Code definition of insolvency for purposes of § 548(a)(2) analysis.” Along these lines, the term “insolvent” is defined in § 101(32), Bankruptcy Code as:

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

the term “debt” is defined in § 101(12), Bankruptcy Code as a “liability on a claim;” and the term “claim” is defined in § 101(5), Bankruptcy Code, as being either:

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

Additionally, “[w]hen the definitions of 11 U.S.C. § 101 are applied to the insolvency provisions of § 548, the inescapable conclusion is that all liabilities contingent or otherwise must be considered in determining whether a debtor was insolvent at the time of the transfer in question.” *In re Porter*, 37 B.R. at 61.

In the present case, the debtor listed assets on his schedules totaling \$145,480.00.⁵ From that, \$952,475.32 – representing the total amount of the debtor’s claimed exemptions in this case and the property allegedly transferred in fraud of creditors in this case – must be deducted.⁶ That leaves a negative total balance (or -\$806,995.32) with respect to the amount of the debtor's total assets relevant to a solvency determination. Accordingly, if the debtor's

⁵ This number does not include a number of assets valued at an “indeterminate amount.” *See* Debtor’s Amended Schedules filed on August 3, 2000.

⁶ While this number does not include a number of exemptions valued at an “indeterminate amount,” *see* Debtor’s Amended Schedules filed on January 11, 2001, it does include the \$815,374.32 allegedly transferred in fraud of creditors in this case.

liabilities total at least \$1.00, the debtor is considered to be “insolvent” for the purposes of § 101(32), Bankruptcy Code.

Having reviewed the numbers, the debtor’s schedules reveal liabilities totaling \$403,051.06. Therefore, for the purposes of § 101(32) the debtor must be considered insolvent with respect to the transfer period in question. That being said, there appears to be no genuine issue of material fact that the debtor received less than reasonably equivalent value for the \$240,000 transferred to his spouse’s bank account, and that he was insolvent or became insolvent on the date that such transfers occurred. *See* Va. Ann. Code § 548(a)(2).

Nevertheless, as previously discussed, there remains a question as to whether any of the \$240,000 transferred from the debtor into his spouse’s checking account between June 23, 1999, and June 23, 2000, was used by the debtor to provide adequate support and maintenance for his spouse. *See Bundy*, 197 Va. at 795, 91 S.E.2d at 412. Accordingly, because this limited factual question remains at issue, summary judgment with respect to the § 548(a)(2) portion of the plaintiffs’ complaint is not appropriate at this time.

IV.

Under § 544(b), Bankruptcy Code, a trustee or debtor in possession⁷ may avoid, in addition to those transactions that may be avoided under § 548, Bankruptcy Code, "any transfer of an interest of the debtor in property or any obligation incurred by the debtor" that could have been avoided under state law by a creditor holding an allowed unsecured claim. In

⁷ As stated previously, the plaintiffs were been allowed to bring the present adversary proceeding on behalf of the debtor in possession based on an oral ruling made by this Court on January 12, 2001.

this connection, Virginia law allows creditors to attack transactions entered into with actual intent to hinder, delay, and defraud creditors,⁸ as well as transactions not supported by "consideration deemed valuable in law" by a debtor insolvent at the time of the transaction or who was made insolvent thereby.⁹ Here, the plaintiffs assert violations of both § 55-80 and § 55-81 in their complaint. Accordingly the Court will take up each statutory section in turn.

A. Va. Code Ann. § 55-80

“Under [§ 55-80] of the [Virginia] Code, a conveyance or assignment may be made with intent to hinder or delay, *without any intent absolutely to defraud.*” *Darden v. George G. Lee Co.*, 204 Va. 108, 112, 129 S.E.2d 897, 900 (1963)(Emphasis added). Thus, as used in § 55-80, the terms hinder, delay, and defraud are clearly written in the disjunctive. *See*

⁸ Va. Code Ann. § 55-80 states in relevant part:

Every gift, conveyance, assignment or transfer of, or charge upon, any estate, real or personal, ... and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons ... be void.

⁹ Va. Code. Ann. § 55-81 states in relevant part:

Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, by an insolvent transferor, or by a transferor who is thereby rendered insolvent, shall be void as to creditors whose debts shall have been contracted at the time it was made, but shall not, on that account merely, be void as to creditors whose debts shall have been contracted or as to purchasers who shall have purchased after it was made.

Delmarva Properties, Inc. v. Todds Tavern Joint Venture, 1992 WL 884528, *3 (Va. Cir. Ct. 1992).

As to the first two terms set forth in § 55-80 – hinder and delay – the Court finds that while the evidence *strongly* supports the conclusion that the defendants engaged in a calculated pattern to hinder and delay the debtor’s creditors, the evidence is not so strong as to support a finding of summary judgment in favor of the plaintiffs in this case. Here, parts of both the debtor’s and Judith Swyter’s testimony support the contention that the debtor transferred various economic interests to his spouse in order to protect those interests from creditors. *See* April 6, 2001, Dep. Tr. of Han Swyter, at 28, 35, and 68; and April 25, 2001, Dep. Tr. of Judith Swyter, at 20-21. At the same time, however, other parts of the very same testimony provide different explanations for the transfers. *See* April 6, 2001, Dep. Tr. of Han Swyter, at 29; and April 25, 2001, Dep. Tr. of Judith Swyter, at 19-20. Accordingly, because a genuine issue of material fact remains as to whether the debtor attempted to hinder and delay his creditors in this case, and because this Court “may not make credibility determinations” at the summary judgment stage, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000), summary judgment is clearly not appropriate under § 55-80 unless the plaintiffs can demonstrate that no factual issues exist with respect to whether the transfers in question were fraudulent. *See Darden v. George G. Lee Co.*, 204 Va. at 112, 129 S.E.2d at 900; *Delmarva Properties, Inc. v. Todds Tavern Joint Venture*, 1992 WL 884528, at *3.

Along these lines, while proving that a transfer was made with the actual intent to defraud creditors requires a subjective inquiry into the transferor’s state of mind at the time the

transfer was made, <badges of fraud> Here, the debtor maintained outward control of much of the transferred property through a power of attorney. *See* Pls.’ Mem. in Supp. of Mot. for Partial Summ. J., at Ex.’s “A” through “I”; Defs.’ Mem. in Supp. of Mot. for Partial Summ. J., at Ex.’s “A” through “C”, and “F”. Further, there is no dispute that inter-familial transfers took place between the debtor and his spouse at various times since 1982. *See* Pls.’ Mem. in Supp. of Mot. for Partial Summ. J., at Ex.’s “A” through “I”; Defs.’ Mem. in Supp. of Mot. for Partial Summ. J., at 5, Ex.’s “A” through “C”, and “F”; Pls.’ Mem. in Opp’n to Defs.’ Mot. for Partial Summ. J., at 4. There is also no evidence before the Court of an exchange of consideration for any of these transfers other than that which could be deemed general marital affection. *See* April 6, 2001 Dep. Tr. of Han Swyter, at 43; and August 3, 2000 § 341 Exam. Tr. of Han Swyter, at 36. Finally, some of the transfers in question took place while Herrington was attempting to collect on his December 7, 1998, D.C. Superior Court judgment. *See* Pls.’ Mem. in Opp’n to Defs.’ Mot. for Partial Summ. J., at 4; Defs.’ Mem. in Supp. of Mot. for Partial Summ. J., at 5. Accordingly, taking into consideration all of the above, it appears that the plaintiffs have demonstrated a presumption of fraud with respect to at least some of the transfers alleged to have taken place.¹⁰

¹⁰ Exactly how far back in time the plaintiffs may go under § 55-80 to avoid the transfers alleged to have taken place is an issue addressed by both parties in their pleadings. Suffice it to say that this Court has previously held that, “[t]here is no statute of limitations on an action under Va. Code Ann. § 55-80 to avoid a transfer made with actual intent to hinder, delay, or defraud creditors....” *In re Massey*, 225 B.R. 887, 890 (Bankr. E.D. Va. 1998)(citing *Flook v. Armentrout's Adm'r*, 100 Va. 638, 42 S.E. 686 (1902); *Atkinson v. Solenberger*, 112 Va. 667, 72 S.E. 727 (1911)).

A § 55-80 inquiry, however, does not end with the plaintiffs demonstration of a presumption of fraud. Rather, as stated in *In re Springfield Furniture, Inc.*, 145 B.R. 520, 535 (Bankr. E.D. Va. 1992), the final provision of § 55-80¹¹ “has led some courts to conclude that a transfer cannot be set aside under [§] 55-80 unless it is proved that the *grantee* had knowledge of the grantor's fraudulent intent.” Here, the plaintiffs have failed to do that by “clear, cogent and convincing” evidence. *Id.*, at 533 (citing *Colonial Inv. Co. v. Cherrydale Cement Block Co.*, 194 Va. 454, 459, 73 S.E.2d 419, 422 (1952)). Rather, while the debtor’s spouse has acknowledged that she knew of a general plan on the part of the debtor to transfer assets as “part of a longstanding asset protection plan,” see April 25, 2001, Dep. Tr. of Judith Swyter, at 19-21; it is not clear that the grantee in this case – the debtor’s spouse – had any knowledge of a link between such a plan and any fraudulent intent on the part of the debtor. Indeed, any plans set forth to protect the debtor’s assets were clearly laid decades ago, and it has been suggested by Judith Swyter that one of the reasons for such a plan may have been for estate planning purposes. See April 25, 2001, Dep. Tr. of Judith Swyter, at 19-20. This being the case, whether the debtor’s spouse knew of the debtor’s fraudulent intent appears to be a fact that remains at issue in this case, and as such, summary judgment with respect to the § 55-80 portion of the plaintiffs’ complaint is clearly not appropriate at this time.

B. Va. Code Ann. § 55-81

¹¹ The final sentence of § 55-80 provides that its provisions “shall not affect the title of a purchaser for valuable consideration, unless it appear[s] that he had notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor.” Va. Code Ann. § 55-80.

As to the § 55-81 portion of the plaintiff's complaint, it seems clear that transfers from the debtor to his spouse took place within the year prior to the debtor's filing for bankruptcy in this case. *See* Pls.' Mem. in Opp'n to Defs.' Mot. for Partial Summ. J., at 4; Defs.' Mem. in Supp. of Mot. for Partial Summ. J., at 5. Additionally, various other transfers from the debtor to his spouse appear to have taken place prior to that point in time. *See* Pls.' Mem. in Supp. of Mot. for Partial Summ. J., at Ex.'s "A" through "H". Finally, such transfers clearly took place "in consideration of marriage." *See* April 6, 2001 Dep. Tr. of Han Swyter, at 43; and August 3, 2000 § 341 Exam. Tr. of Han Swyter, at 36. Thus, it appears that if the debtor was insolvent, or was rendered insolvent when these transfers took place,¹² such transfers should be avoidable under Va. Ann Code. § 55-81.

That being said, the defendants submit that the application of § 55-81 is limited in scope to debts "contracted for" within five years of the filing of the § 55-81 complaint. *See* Defs.' Mem. in Supp. of Mot. for Partial Summ. J., at 7-10. Along these lines, the defendants cite to the plain language of § 55-81, which states that:

Every gift, conveyance, assignment, transfer or charge which is not upon consideration deemed valuable in law, or which is upon consideration of marriage, by an insolvent transferor, or by a transferor who is thereby rendered insolvent, *shall be void as to creditors whose debts shall have been contracted at the time it was made...*[:]

and to the plain language of Va. Ann. Code § 8.01-253, which limits a complaint filed under § 55-81 to a five year statute of limitations period. In response, the plaintiffs contend that the

¹² As discussed previously, this Court has concluded that the debtor was insolvent at least during the year preceding his bankruptcy filing. *See supra*, at III(B).

application of § 55-81 is not limited to strictly contractually based debts, *see* Pls.’ Mem. in Opp’n to Defs.’ Mot. for Partial Summ. J., at 4; and that the five year statute of limitations period under Va. Ann. Code § 8.01-253 may be extended if the plaintiffs could not have discovered the transfers in question through the exercise of due diligence. *See* Pls.’ Mem. in Opp’n to Defs.’ Mot. for Partial Summ. J., at 5.

With respect to the “contracted for” language of § 55-81, this Court looks to *Cummings v. Fulghum*, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001), which states that “[w]hen the language in a statute is clear and unambiguous, [a court is] bound by the plain meaning of that language.” Here, § 55-81 is clear and unambiguous in that it limits avoidance actions to debts that have been “contracted for.” Va. Ann. Code § 55-81; *see also Cramer v. Senger & Turner*, 107 Va. 400, 59 S.E. 375 (1907)(discussing, without expressly mentioning § 55-81, the avoidance of inter-spousal conveyances and asking whether debts were “contracted for” at the time of conveyance). Nevertheless, plaintiffs, citing *In re Porter*, 37 B.R. at 56, argue that a broad interpretation of the term “creditors” under § 55-81 is necessary to “fully effect the purpose of the statute.” *See* Pls.’ Mem. in Opp. To Defs.’ Mot. for Partial Summ. J., at 7. The Court, however, having reviewed *Porter*, notes that in defining the term “creditors” the *Porter* Court looked to *Wallace v. Brooks*, 194 Okla. 137, 147 P.2d 784, 789 (1944), which states:

The term ‘creditors,’ as employed by the statute, has been construed liberally, and not in a narrow, strict, or technical sense. Whoever has a right, claim, or demand, *founded on contract*, whether contingent or absolute, for the performance of a duty, or for the payment of damages if the contract should not be fully performed has been regarded as a creditor, within the meaning of the statute, against whom a voluntary conveyance will not be

supported, though no breach of the contract, furnishing a cause of action, may occur until after the execution of the conveyance.

In re Porter, 37 B.R. at 67, n.10 (internal citations omitted)(Emphasis added). Therefore, because *Cummings* requires this Court to look to the plain meaning of § 55-81, and because *Porter* expressly cites to *Wallace v. Brooks* in defining the term “creditors”, this Court is satisfied that the application of § 55-81 is limited in scope to *contractually based* debts.

Here, such debts clearly arose from the partnership agreements. *See e.g.*, Pls.’ Mem. in Supp. of Mot. for Partial Summ. J., at Ex. “Q”. As noted in *Porter*, a debt to one partner arising out of a partnership obligation by his co-partner makes the former an existing creditor of the latter. *In re Porter*, 37 B.R. at 67 (citing *Johnson v. Murchison*, 1 Winst. 292, 60 N.C. 286 (1864)). Nonetheless, a § 55-81 inquiry does not end simply with a plaintiffs demonstration of both an inter-spousal transfer and a contractually based debt. Rather, a plaintiff must also show that the debtor was insolvent, or was rendered insolvent when the transfers at issue took place. *See* Va. Ann. Code § 55-81.

In the present case, such an inquiry requires this Court to determine how far back in time the statute of limitations allows the plaintiffs to go to avoid the debtor’s inter-spousal transfers. While the plaintiffs are correct that the five year statute of limitations period may be extended if the plaintiffs could not have discovered the transfers in question through due diligence, *see* Va. Ann. Code § 8.01-253, there is a notable lack of evidence in the record showing exactly which transfers the plaintiffs could, or could not have discovered beyond the five year statute of limitations period. More importantly, however, other than the year

preceding his bankruptcy,¹³ there is a complete lack of *any* evidence with respect to whether the debtor was insolvent, or was rendered insolvent, in connection with the inter-spousal transfers in question. While it is entirely possible that the debtor was insolvent, or was rendered insolvent during this time period, § 55-81 clearly requires a demonstration of such insolvency. *See* Va. Ann. Code § 55-81; *Cummings v. Fulghum*, 261 Va. at 77, 540 S.E.2d at 496. Accordingly, because issues remain with respect to: (a) how far the statute of limitations period might run under this portion of the complaint, and (b) whether the debtor was insolvent *prior* to the year preceding his bankruptcy filing, the Court declines to grant summary judgment at this time with respect to the § 55-81 portion of the plaintiffs' complaint.

CONCLUSION

For the reasons stated above, the Court declines to grant summary judgment in favor of either party in this case. A separate order will be entered reflecting this Court's ruling.

Date: September 12, 2001

Alexandria, Virginia

/s/ Stephen S. Mitchell

Stephen S. Mitchell

United States Bankruptcy Judge

¹³ This Court has previously concluded that the debtor was insolvent during the year preceding his bankruptcy filing. *See supra*, at III(B).

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