

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

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FILED

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In re

DONALD P. LOMAX,

Debtor.

C.L. AUSTIN, CLERK
Case No. 99-28332
Chapter 7
MULTIPLE WISCONSIN

BRUCE LANSEER AS TRUSTEE FOR THE
BANKRUPTCY ESTATE OF
DONALD P. LOMAX,

Plaintiff,

v.

Adversary No. 01-2496

FRANK BALISTRERI,

Defendant.

COURT'S DECISION ON REMAND

BACKGROUND

This matter came before the court upon the order of the district court remanding the case for further consideration consistent with its opinion. The district court pointed out that the trustee was required to prove, by clear and convincing evidence, that the debtor received less than reasonably equivalent value in exchange for the relevant transfers and was insolvent on the date that such transfers were made or became insolvent as a result of such transfers. This court previously determined that the trustee met his burden of proof by a preponderance of the evidence.

The district court left open the possibility of reopening the record for additional evidence. Upon a complete review of the evidence on record, this court finds additional evidence is not necessary.

DISCUSSION

Reasonably equivalent value. The record reflects, and this court finds based on clear and convincing evidence, that the debtor received less than reasonably equivalent value in exchange for each transfer at issue. The fair market value of the three properties in question were the actual purchase prices

shown on the closing statements, not the reduced amounts shown on the debtor's tax returns. The debtor testified that he never received the down payments indicated in the closing statements and the debtor's tax returns, and the debtor had no outstanding obligation to the defendant at the time of those transfers. Furthermore, subsequent sales soon after the transfer to the defendant support the inadequacy of the consideration received by the debtor.

Avoidability by actual creditor. The court previously found that with respect to the two Wilmont Drive properties transferred more than one year prior to filing, there was at least one actual creditor that could have set aside the transfer under state law. 11 U.S.C. § 544(b)(1). Since the defendant has not challenged this finding, the finding stands. The third property was transferred within a year of filing. 11 U.S.C. § 548(a)(1)(B).

Insolvency. Likewise, the record reflects, and this court finds based on clear and convincing evidence, the debtor was insolvent on the date that such transfers were made, as explained in further detail below. As all transfers subject to this litigation occurred within approximately a three month period, the court is satisfied from the debtor's testimony and the record as a whole, that the debtor's financial status was not changing markedly during that period, except for these three transfers. Therefore, findings related to the debtor's financial status as of July 1998, the time of the first transfer, also apply with respect to the other two transfers.

Computation Methodology. All assets and obligations as of the petition date were taken from the debtor's schedules, with the exception of the North Shore lien, which was listed on the petition twice. The court examined the testimony and exhibits to determine the assets and obligations of the debtor at the time of the transfers in question (see attachment for detail).

Assets in July 1998. Mr. Lomax testified regarding his assets one year prior to the petition date. He stated he owned the same real estate and personal property in 1998 as that listed on the schedules.

The court added the value of Mendocino Village, previously held to be worthless, as well as the three Wilmont Drive properties.

Valuation of Mendocino Village in July 1998. Mr. Lomax paid \$400,000 for the land in either 1995 or 1996, with an “insignificant” lien held by North Shore Bank. In 1996, North Shore Bank committed to lend \$3,700,000 for the construction of the first two buildings. By early 1998, North Shore Bank had released \$3,500,000, and refused to release more because of the dispute with the architect. Construction stopped at this point, the architect obtained a judgment, and in July through September of 1998, the debtor made the transfers that are the subject of this litigation in order to pay the judgment.

The dispute between the bank and the debtor was not resolved and foreclosure ensued, with the sheriff’s sale taking place in July 1999. The foreclosure resulted in a sale to an unrelated party for \$4,576,000 and a deficiency judgment against the debtor of around \$910,000. The bank had brought in another contractor and released more funds to complete and to upgrade the project – approximately \$1,300,000 to \$1,400,000 according to Mr. Balistreri, but apparently more according to the amount of the foreclosure judgment. It is not clear whether the construction was being completed before, during or after the bank foreclosed and the sale took place, but the amounts of the sale price and deficiency judgment support completion or near completion of the project before sale. Actually, the amount of this added expenditure is not critical to the court’s calculation, as it must be added to find the hypothetical value of the project if completed in 1998, but the same amount would have increased the bank’s claim against the debtor’s interest, for a net impact of zero.

The court computed the value of the completed project by adding the total amounts paid for the construction, plus the cost of the land, minus the bank’s deficiency at foreclosure. Mr. Balistreri’s lower estimate of the cost to complete is used to find what would have been the value of the debtor’s interest in the property in 1998, had it been completed. Then, since it was not completed, the court subtracted

the additional funds the bank had to infuse into the property in order to complete it. The result is the debtor's interest in the incomplete Mendocino property at the time of the transfers of the Wilmot Street parcels. Although the court originally stated that the debtor's interest in the Mendocino property was worth zero at the time of the transfers, it appears that the debtor actually had a negative equity of over \$500,000.

Value of Land	400,000
Funds Released for Improvements by 1998	+ 3,500,000
Additional Funds to Complete Project	+ <u>1,300,000</u>
Total Amounts Paid into Complete Project	5,200,000
Bank's Deficiency at Foreclosure	- <u>910,000</u>
Value of Completed Project	4,290,000
Additional Funds to Complete Project	- <u>1,300,000</u>
Value of Project in 1998	2,990,000

Even assuming a higher completed value of the project, based on the foreclosure sale price, the debtor's equity would still be negative at the time of the transfers.

Secured Debts in July 1998. The court subtracted the M&I Burlington debt and the Palmyra State Bank obligation because these were incurred after July 1998. The obligations on the Mendocino Village project and the three Wilmont Drive properties were added. Although likely as high as \$100,000, the court reduced the M&I Lake Country secured line of credit to \$0 due to the vagueness of the testimony, but this ultimately had no impact on the court's conclusion as to the debtor's insolvency.

Unsecured Debts in July 1998. Mr. Lomax was questioned regarding creditors listed on Scheduled F and whether there were creditors on that schedule whose rights arose after July 1998 (Transcript pp. 54-57). This would have reduced his liabilities at the time of the transfers and had a positive impact on his solvency. Mr. Lomax pointed out certain Mendocino construction liens which post-dated the 1998 transfers. Nevertheless, because 60 days notice is required from the time the labor and/or materials is furnished until the attachment of a construction lien, Wis. Stats. § 779.02(2), the debtor had already incurred the listed obligations at the time of the transfers. Those lien obligations

attaching to the property within 60 days after the subject transfers therefore were included in the 1998 calculation. Based upon the lack of credibility of the debtor's testimony, and the evidence of the prior Rockwood property sale paying Mr. Lomax' obligation to Mr. Balistreri, the court also decreased the obligation owed in 1998 to Mr. Balistreri to \$0. Mr. Lomax further noted only the unsecured debt to Whyte Hirschboeck was not in existence one year prior to the petition date, so that obligation was excluded from the list of unsecured debts at the time of the transfers. Since no other creditors were named by Mr. Lomax as not due and owing in July 1998, the creditors listed in the schedules are presumed to have existed at the time of the 1998 transactions, and are so noted.

Insolvency. At the time of the relevant transfers in 1998, the debtor's assets totaled \$7,788,639.58, and his liabilities totaled at least \$8,017,291.93 (not including the \$100,000 open line of credit). Subtracting the debtor's exempt assets of \$370,519.61 from the equation would reduce his total assets even further. *See* Wis. Stats. § 242.01(2)(b), (bm). Because the debtor's liabilities were greater than his assets, he was clearly and convincingly insolvent at the time of the transfers in question.


CONCLUSION

The evidence on the record supports, at the higher burden of proof, the court's previous findings in favor of the trustee. The prior order for judgment and judgment stand.

Based upon the above ruling, the defendant's motion for the return of proceeds is also denied.

Dated at Milwaukee, Wisconsin, March 18, 2004.

BY THE COURT:



Honorable Margaret Dee McGarity
Chief United States Bankruptcy Judge

This is to certify that copies of this document were mailed
this 19 day of Mar, 2004 to the following:

Atty. Clary E. James

By: Om

Debtor's Real Property

Petition Date August 27, 1999

Transaction Dates (7/29/98, 7/31/98, 9/1/98)

Industrial Building (Kiel)	300,000.00	Industrial Building (Kiel)	300,000.00
Homestead (co-owner)	335,000.00	Homestead (co-owner)	335,000.00
Commercial Building (co-owner)	227,500.00	Commercial Building (co-owner)	227,500.00
Commercial Building (fee owner)	100,000.00	Commercial Building (fee owner)	100,000.00
Condominium (vendor under land K)	95,000.00	Condominium (vendor under land K)	95,000.00
Condominiums (fee owner)	600,000.00	Condominiums (fee owner)	600,000.00
Duplex (fee owner)	229,000.00	Duplex (fee owner)	229,000.00
Duplex (vendor under land K)	205,000.00	Duplex (vendor under land K)	205,000.00
8-Family Apt. Building (fee owner)	429,000.00	8-Family Apt. Building (fee owner)	429,000.00
Lot 45 (vendor under land K)	145,000.00	Lot 45 (vendor under land K)	145,000.00
Lot 63 (vendor under land K)	35,000.00	Lot 63 (vendor under land K)	35,000.00
6 Indus. units (fee owner)	437,000.00	6 Indus. units (fee owner)	437,000.00
Vacant Building Lot (fee owner)	32,100.00	Vacant Building Lot (fee owner)	32,100.00
Vacant Building Lot (fee owner)	35,000.00	Vacant Building Lot (fee owner)	35,000.00
Vacant Building Lots (fee owner)	68,000.00	Vacant Building Lots (fee owner)	68,000.00
		308 Wilmont Drive	401,346.35
		(495,000 due seller - 93,653.65 credit buyer)	
		400 Wilmont Drive	401,869.26
		(495,000 due seller - 93,130.74 credit buyer)	
		401 Wilmont Drive	362,049.80
		(485,000 due seller - 122,950.20 credit buyer)	
		Mendocino Village	2,990,000.00
Total	<u>3,272,600.00</u>	Total	<u>7,427,865.41</u>

Debtor's Personal Property

<u>Petition Date</u> August 27, 1999		<u>Transaction Dates</u> (7/29/98, 7/31/98, 9/1/98)	
Bank One Business Checking	24.01	Bank One Business Checking	24.01
Garden Court Properties rents (subject to mortgagee's assignment)	6,326.98	Garden Court Properties rents (subject to mortgagee's assignment)	6,326.98
M&I Business Checking	1,338.03	M&I Business Checking	1,338.03
Household goods and furnishings	3,645.00	Household goods and furnishings	3,645.00
Day-to-day wearing apparel	300.00	Day-to-day wearing apparel	300.00
Wedding ring, watches	350.00	Wedding ring, watches	350.00
Bicycles, treadmill	250.00	Bicycles, treadmill	250.00
Term insurance policies	0.00	Term insurance policies	0.00
Baird SEP IRA	285,872.97	Baird SEP IRA	285,872.97
Equitable IRA	26,482.84	Equitable IRA	26,482.84
Kaufmann SEP IRA	4,856.76	Kaufmann SEP IRA	4,856.76
Gosa Accounts Receivable	6,634.11	Gosa Accounts Receivable	6,634.11
Nichols Med. Accounts Receivable	13,439.50	Nichols Med. Accounts Receivable	13,439.50
Wargo & Co. Accounts Receivable	3,853.97	Wargo & Co. Accounts Receivable	3,853.97
Potential claim for legal malpractice	unknown	Potential claim for legal malpractice	unknown
1984 Buick LeSabre	1,075.00	1984 Buick LeSabre	1,075.00
1992 Jeep Cherokee	5,425.00	1992 Jeep Cherokee	5,425.00
1997 Chevrolet Tahoe	0.00	1997 Chevrolet Tahoe	0.00
Office equipment	650.00	Office equipment	650.00
Tools and lawnmower	250.00	Tools and lawnmower	250.00
Total	<u>360,774.17</u>	Total	<u>360,774.17</u>

Debtor's Liabilities - Secured

<u>Petition Date</u>	August 27, 1999	<u>Transaction Dates</u>	(7/29/98, 7/31/98, 9/1/98)
Bank of America (11/94)	242,112.19	Bank of America (11/94)	242,112.19
Bank One (7/95)	48,646.81	Bank One (7/95)	48,646.81
Johnson Bank (5/97)	220,522.93	Johnson Bank (5/97)	220,522.93
M&I Burlington (10/98)	26,000.00	M&I Burlington	0.00
M&I Lake Country (l.o.c.)	89,120.00	M&I Lake Country (l.o.c.)	0.00
M&I Lake Country (8/95)	139,700.16	M&I Lake Country (8/95)	139,700.16
M&I Lake Country (11/95)	189,307.85	M&I Lake Country (11/95)	189,307.85
M&I Lake Country (9/97)	66,838.01	M&I Lake Country (9/97)	66,838.01
M&I Lake Country (10/96)	96,400.59	M&I Lake Country (10/96)	96,400.59
M&I Lake Country (11/95)	16,000.00	M&I Lake Country (11/95)	16,000.00
M&I Lake Country (2/97)	140,000.00	M&I Lake Country (2/97)	140,000.00
Milwaukee Western Bank (6/95)	519,716.53	Milwaukee Western Bank (6/95)	519,716.53
North Shore Bank (3/99) (judgment lien - also listed under unsecured)	-duplicate-	North Shore Bank	3,500,000.00
Palmyra State Bank (3/99)	54,660.00	Palmyra State Bank	0.00
Sam Johns	60,000.00	Sam Johns	60,000.00
St. Francis Savings (5/96)	308,025.86	St. Francis Savings (5/96)	308,025.86
Tom Schoenauer	19,000.00	Tom Schoenauer	19,000.00
Tri-City National Bank (2/98)	191,710.75	Tri-City National Bank (2/98)	191,710.75
Waukesha State Bank	26,808.29	Waukesha State Bank	26,808.29
Wauwatosa Savings Bank (1/96)	375,929.67	Wauwatosa Savings Bank (1/96)	375,929.67

Debtor's Liabilities - Secured Continued

Petition Date August 27, 1999

Transaction Dates (7/29/98, 7/31/98, 9/1/98)

		M & I Lake Country	365,039.92
		(mortgage on 308 Wilmont Drive	
		M&I Lake Country	344,376.33
		(mortgage on 400 Wilmont Drive)	
		M&I Lake Country	287,499.11
		(mortgage on 401 Wilmont Drive)	
Total	<u>2,830,499.64</u>	Total	<u>7,157,635.00</u>

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Debtor's Liabilities - Unsecured

Petition Date August 27, 1999

Transaction Dates (7/29/98, 7/31/98, 9/1/98)

ABC Supply Co., Inc. (9/1/98) 3,055.88
(construction lien on Mendocino Village)

ABC Supply Co., Inc. (9/1/98) 3,055.88
(construction lien on Mendocino Village)

Abel Electric Service, Inc. (6/98) 33,759.95
(construction lien on Mendocino Village)

Abel Electric Service, Inc. (6/98) 33,759.95
(construction lien on Mendocino Village)

All American Land Services 225.00

All American Land Services 225.00

All Lawns 798.76

All Lawns 798.76

Alpine Insulation Co., Inc. (10/97) 7,054.00
(construction lien on Mendocino Village)

Alpine Insulation Co., Inc. (10/97) 7,054.00
(construction lien on Mendocino Village)

Alpine Insulation Co., Inc. (2/98) 10,254.00
(construction lien on Mendocino Village)

Alpine Insulation Co., Inc. (2/98) 10,254.00
(construction lien on Mendocino Village)

Appliance World 895.00

Appliance World 895.00

Automated Building Components (7/98) 978.75
(construction lien on Mendocino Village)

Automated Building Components (7/98) 978.75
(construction lien on Mendocino Village)

B&N Drywall & Painting (8/24/98) 151,590.00
(construction lien on Mendocino Village)

B&N Drywall & Painting (8/24/98) 151,590.00
(construction lien on Mendocino Village)

Bank One, Wisconsin 4,614.84

Bank One, Wisconsin 4,614.84

Bend Industries (12/97) 18,653.81
(construction lien on Mendocino Village)

Bend Industries (12/97) 18,653.81
(construction lien on Mendocino Village)

Best Block Company (6/98) 1,003.31
(construction lien on Mendocino Village)

Best Block Company (6/98) 1,003.31
(construction lien on Mendocino Village)

Burlington Water Utility 73.27

Burlington Water Utility 73.27

Century Tel 0.00

Century Tel 0.00

City of Kiel Utilities 4,630.59

City of Kiel Utilities 4,630.59

City of Waukesha 120.86

City of Waukesha 120.86

Debtor's Liabilities - Unsecured Continued

<u>Petition Date</u> August 27, 1999		<u>Transaction Dates</u> (7/29/98, 7/31/98, 9/1/98)	
Culligan - Mermaid of Waukesha	0.00	Culligan - Mermaid of Waukesha	0.00
D&M Plumbing (4/98) (construction lien on Mendocino Village)	34,415.00	D&M Plumbing (4/98) (construction lien on Mendocino Village)	34,415.00
David Caruso	0.00	David Caruso	0.00
David O. Gass	0.00	David O. Gass	0.00
Denise Lomax	0.00	Denise Lomax	0.00
Elastizell of Wisconsin, Inc. (4/98) (construction lien on Mendocino Village)	22,724.00	Elastizell of Wisconsin, Inc. (4/98) (construction lien on Mendocino Village)	22,724.00
Frank Balistreri (7/5/96)	85,398.00	Frank Balistreri (Lomax testimony)	0.00
Fred Brengel	0.00	Fred Brengel	0.00
General Casualty Co. (5/98)	847.87	General Casualty Co. (5/98)	847.87
Groeschel Company	2,988.62	Groeschel Company	2,988.62
Gross Construction Co., Inc. (1/98) (construction lien on Mendocino Village)	10,137.50	Gross Construction Co., Inc. (1/98) (construction lien on Mendocino Village)	10,137.50
GTE North	16.07	GTE North	16.07
Heritage Carpet	1,655.44	Heritage Carpet	1,655.44
Heritage Insurance	130.00	Heritage Insurance	130.00
Hoida, Inc. (12/97) (construction lien on Mendocino Village)	80,568.68	Hoida, Inc. (12/97) (construction lien on Mendocino Village)	80,568.68
Hoida, Inc. (12/97) (construction lien on Mendocino Village)	41,774.46	Hoida, Inc. (12/97) (construction lien on Mendocino Village)	41,774.46
James H. Paterson	0.00	James H. Paterson	0.00
Jannsen & Company, S.C.	4,318.00	Jannsen & Company, S.C.	4,318.00

Debtor's Liabilities - Unsecured Continued

<u>Petition Date</u> August 27, 1999		<u>Transaction Dates</u> (7/29/98, 7/31/98, 9/1/98)	
JF Ahern Co. (6/98)	8,135.70	JF Ahern Co. (6/98)	8,135.70
John M. Heuer	0.00	John M. Heuer	0.00
Judson & Associates	0.00	Judson & Associates	0.00
MCI Worldcom	0.00	MCI Worldcom	0.00
Mike A Russell	0.00	Mike A Russell	0.00
North Shore Bank (3/99)	910,013.59	North Shore Bank (listed under secured)	0.00
Northwestern Elevator Co. (5/98) (construction lien on Mendocino Village)	68,580.00	Northwestern Elevator Co. (5/98) (construction lien on Mendocino Village)	68,580.00
Peyton Mobil Service	595.00	Peyton Mobil Service	595.00
R&R Insurance Services	17,844.74	R&R Insurance Services	17,844.74
Randall Crocker	0.00	Randall Crocker	0.00
Robert & Judy Fuerderer	30,000.00	Robert & Judy Fuerderer	30,000.00
RSI Construction	0.00	RSI Construction	0.00
Rupp Industries, Inc. (6/98) (construction lien on Mendocino Village)	4,517.72	Rupp Industries, Inc. (6/98) (construction lien on Mendocino Village)	4,517.72
Schvetz Nursery	3,749.60	Schvetz Nursery	3,749.60
Sheboygan Furniture & Carpet (8/98) (construction lien on Mendocino Village)	9,916.31	Sheboygan Furniture & Carpet (8/98) (construction lien on Mendocino Village)	9,916.31
Soft Water	0.00	Soft Water	0.00
Tylar Adair	0.00	Tylar Adair	0.00
Village of Sullivan	3,823.05	Village of Sullivan	3,823.05

Debtor's Liabilities - Unsecured Continued

Petition Date August 27, 1999

Transaction Dates (7/29/98, 7/31/98, 9/1/98)

Wagner Excavating Inc. (2/98) 22,729.00
(construction lien on Mendocino Village)

Wagner Excavating Inc. (2/98) 22,729.00
(construction lien on Mendocino Village)

Waste Management 455.56

Waste Management 455.56

Waukesha Water Utility 1,170.76

Waukesha Water Utility 1,170.76

Whyte Hirschboeck Dudek 46,712.78

Whyte Hirschboeck Dudek 0.00
(per Lomax testimony)

Wil-Kil Pest Control 78.00

Wil-Kil Pest Control 78.00

WI DWD 0.00

WI DWD 0.00

Wisc. Electric Company 184.76

Wisc. Electric Company 184.76

Wisconsin Gas Company 419.10

Wisconsin Gas Company 419.10

Wisconsin Public Service 173.97

Wisconsin Public Service 173.97

Architect Judgment 250,000.00

Total 1,651,781.30

Total 859,656.93