

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division**

In re GREENWOOD, LLC,) Case No. 07-62155-LYN-7
)
Debtor.)
)
)
_____)

ORDER

This matter comes before the court on a motion by Farm Credit of the Virginias, ACA (“Farm Credit”) to prosecute fraudulent conveyance actions on behalf of the estate.

Facts

On November 13, 2007, Greenwood, LLC, (“the Debtor”) filed a chapter 11 petition. The Debtor is a single asset real estate entity as defined under 11 U.S.C. § 101(51B). Paul Quinn is the sole member and 100% owner of the Debtor.¹ No unsecured creditors committee has been appointed in this case.

The Debtor scheduled real estate consisting of one parcel consisting of approximately 154 acres (“the 154-acres parcel”) and a second parcel consisting of approximately 40 acres

¹ Statement of Financial Affairs, Item 21.

(“the 40-acre parcel”) (together “the Real Property”). The Debtor valued the 154-acres parcel at \$3,859,500.00 and the 40-acres parcel at \$1,222,920.00. Farm Credit of the Virginias, ACA (“Farm Credit”) holds a first-priority claim against the Debtor secured by both parcels. The original amount of the loan was \$2,975,000.00 (“the Farm Credit Loan”). Farm Credit filed a proof of claim in the amount of \$3,208,488.35. Steven Demeter holds a second priority claim against the Debtor secured only by the 154-acre parcel. The original amount of the loan was \$550,000.00. He filed a proof of claim in the amount of \$2,007,063.26. The Debtor scheduled the total claims secured by the Real Property at \$3,666,037.05.

The only other assets scheduled by the Debtor are accounts (notes) receivable valued at \$980,938.00. Included in the notes receivable is a debt owed by the Renaissance Golf Club, LLC, in the amount of \$609,000.00.

On September 15, 2006, the Debtor conveyed a conservation easement (“the Easement”) to Virginia Outdoors Foundation by “Deed of Gift of Easement” in return for tax credits. The Debtor sold the tax credits to a third party for at least \$609,000.00.² Farm Credit asserts that the transfer of the Easement constituted a fraudulent conveyance under 11 U.S.C. § 548.

At the closing of the Farm Credit Loan, the Debtor received \$451,171.44. Farm Credit asserts, upon information and belief, that these funds were transferred to Paul Quinn and other entities controlled by him. Farm Credit further asserts that these transfers constituted fraudulent conveyances under 11 U.S.C. § 548.

Farm Credit also asserts that on January 4, 2007, the Debtor granted to Steven Demeter a deed of trust on the 154-acre parcel. Farm Credit asserts that the transfer of the security interest was for less than reasonably equivalent value and that as such it constituted a fraudulent

² Statement of Financial Affairs, Item 7.

conveyance under 11 U.S.C. § 548.

Farm Credit further asserts that Paul Quinn individually benefitted from transfers described in the preceding paragraphs and seeks permission to prosecute the fraudulent conveyance actions.

Discussion

Section 548 of the Bankruptcy Code grants trustees the authority to avoid fraudulent transfers and obligations. The Bankruptcy Code does not expressly grant creditors “derivative standing” to initiate avoidance actions. See In re Baltimore Emergency Services, II, Corp., 432 F.3d 557, 560 (4th Cir. 2005) (and cases cited therein). The Fourth Circuit Court of Appeals has twice declined to entertain whether creditors may prosecute avoidance actions. Id. (Citing Ford Motor Credit Co. v. Reynolds & Reynolds Co. (In re JKJ Cheverolet, Inc.), 26 F.3d 481, 485 n. 7 (4th Cir. 1994)) (Expressly withholding the question in the content of 11 U.S.C. § 506(c)) (And noting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 13 n. 5, 120 S.Ct. 1942, 147 L.Ed.2d (2000)) (Same.).

Some courts have adopted an implicit exception to this rule that allows derivative standing to a creditor under two circumstance. In each instance, the court required that, among other things, either the trustee or debtor-in-possession must unreasonably refuse to prosecute the action or the trustee or debtor-in-possession must give its permission. Id. (Citations omitted.)

In Baltimore Emergency Services, the Fourth Circuit entertained a dispute in which the parties presumed the doctrine of derivative standing existed, but disagreed over which rule was applicable. The Court declined to decide which rule, if either, was applicable.

It would be ill-advised to decide this important and difficult issue here. Despite the fact that this is an open question in our circuit, neither party has addressed it in either their written or oral submissions. Instead, the parties, like the district court, simply

presume that the doctrine exists in some form, and merely debate its proper contours. But even if we assume, purely for purposes of argument, that derivative standing is possible where a debtor-in-possession consents to a creditor's suit, it would nevertheless be inappropriate in this case.

Baltimore Emergency Services, 432 F.3d at 561.

The Court concluded that “even if we were to recognize derivative standing for creditors, plaintiffs were not proper parties to the request for preliminary injunctive relief.” Id. at 564.

The Fourth Circuit Court of Appeals has twice declined to entertain whether the doctrine of derivative standing exists, the last time on the grounds (partially at least) that the matter was not thoroughly briefed by the parties. In this case, Farm Credit has provided citations to five opinions, but has not discussed so much as the facts in any of those cases. In light of the absence of express support in the Bankruptcy Code and the absence of strong argument by the movant, the motion will be denied.

Additionally, this Court believes that the Debtor’s refusal to prosecute the avoidance actions are more properly considered in the context of confirmation of the plan of reorganization and the motion to appoint a chapter 11 trustee or convert the case to one under chapter 7.

ORDER

For the reasons stated above, the motion of Farm Credit of the Virginias, ACA, to prosecute fraudulent conveyance actions under 11 U.S.C. § 548 is denied.

So ORDERED.

Upon entry of this Order, the Clerk shall forward a copy to the United States trustee, W. Stephen Scott, Esq., counsel for the debtor, William E. Shmidheiser, III, Esq., counsel for Farm Credit of the Virginias, ACA, Steven C. Demeter, Paul Quinn, and Frank Ghergurovich.

Entered on this 14th day of March, 2008.



A handwritten signature in black ink, appearing to read "William E. Anderson", is written over a horizontal line. The signature is cursive and stylized.

William E. Anderson
United States Bankruptcy Judge