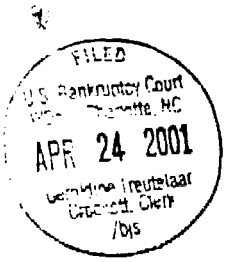

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

IN RE:	**Case No. 98-50517**
	Chapter 7
JOHN ROBERT MULLINS,	
Debtor.	JUDGEMENT ENTERED ON APR 2 4 2001
BARRETT L. CRAWFORD, Trustee	**Adversary Proceeding**
	No. 00-5013
Plaintiff,	
v.	
JOHN ROBERT MULLINS, et al.,	
Defendants.	

This matter is before the Court upon Defendant Gerald A. DeChow's ("DeChow") Motion to Dismiss. A hearing was held on March 22, 2001. Defendant was represented by Carolyn Johnston and the Chapter 7 Trustee/Plaintiff appeared through special counsel, Richard M. Mitchell and John W. Taylor.

In this action the Trustee seeks to recover against the members of the Chapter 7 Debtor's family, his businesses, and even the Debtor's former attorney. In short, the Trustee says the Debtor conveyed his assets to these other defendants in order to shield them from his creditors. While he advances 38 separate claims for relief against 36 named defendants, the suit boils down to three basic contentions. First, the Trustee says that the Debtor has fraudulently conveyed his property to the detriment of his creditors. Second, he says the individual defendants conspired with the Debtor in his efforts to defraud his creditors by taking

title to his assets or by willingly helping him transfer his assets. Third, he contends that the Defendants are alter egos of the Debtor. He seeks to recover the transferred assets or their value from each.

Focusing on the Movant DeChow, the Trustee maintains that the Debtor's former attorney conspired with him to form certain alter egos (the Defendant trusts and corporations) and assisted him in making these fraudulent transfers.[1] In his Twelfth Cause of Action, the Trustee avers:

> Gerald DeChow had actual knowledge of the Debtor's intent to hinder, delay and defraud his creditors and has aided and assisted and participated in the Debtor's fraud by acting his surrogate and figurehead, by accepting fraudulently transferred property, by allowing property to be fraudulently transferred and by allowing the Debtor to retain dominion and control over the fraudulently transferred property.

DeChow has moved to dismiss the complaint under FRCP 12. He did not argue, and the Court finds no merit to, his motions under FRCP 12(b)(1) (subject matter jurisdiction) and Rule 12(b)(2)(personal jurisdiction). However, his Rule 12(b)(6) standing argument is subtle and deserves discussion.

DeChow argues under Rule 12(b)(6) that the Trustee lacks Section 544 standing to bring this action. Section 544, the so-

[1]Stylistically, the complaint contains 126 paragraphs of general allegations pertinent to the parties and to the transfers. Thereafter, specific claims for relief are pled against named defendants. Most of these claims are termed "conspiracy to defraud creditors." These are followed by causes stated against the body of defendants, under fraudulent conveyance (Section 548), unauthorized postpetition transfer (Section 549), and alter ego theories.

called "strong arm power," gives a bankruptcy trustee the rights and powers of certain state law creditors, and the power to avoid transfers of property or obligations incurred by a debtor which such creditors could assert under state law. 11 U.S.C. 544.

DeChow points out that a claim of civil conspiracy is neither an avoidance of a transfer of a debtor's property nor a claim held by a debtor. Any such claims belong to creditors, he says, and may not be asserted by a trustee. DeChow supports his position with a recent case from this judicial district, In re Miller, 197 B.R. 810 (W.D.N.C. 1996).

At least factually, Miller looks a lot like this case. There, the Trustee had sued the debtor's former attorney under Section 544 and North Carolina law, alleging that the lawyer had aided the debtor in fraudulently conveying his property to the detriment of his creditors. The attorney moved to dismiss, arguing, as DeChow now does, that the cause of action was "owned" by his creditors and was not assertable under Section 544 by a bankruptcy trustee. Miller's trustee contended that because any recovery would benefit the body of creditors, he could bring the action.

Before deciding this question, the District Court undertook a review of the fractured case law pertaining to Section 544. This review revealed a bad split in the case law over the nature and extent of a Trustee's powers to sue under Section 544. After

looking at these cases, Judge Potter termed this a "perplexing question." Miller, 197 B.R. at 812.

This is very true. Some courts, like the Eight Circuit, have construed the Section 544 power narrowly, holding that a trustee lacks standing to assert claims belonging to creditors. In re Ozark Restaurant Equipment Co., Inc., 816 F.2d 1222 (8th Cir. 1987). Accord, Williams. v. California 1st Bank, 859 F.2d 664 (9th Cir. 1988)(Trustees lack standing to assert securities law claims on behalf of a group of investors); E.F. Hutton & Co., Inc. v. Hadley, 901 F.2d 979 (11th Cir.1990). (Trustees lack standing to bring claims against Hutton on behalf of customer/creditors of the debtor).

On the other hand, the Seventh Circuit has concluded in Koch Refining v. Farmers Union Cent. Exchg., Inc., 831 F.2d 1339 (7th Cir. 1987) that the Trustee is the representative of the creditor body and can bring claims on behalf of creditors, provided those claims are not personal to an individual creditor. Accord, St. Paul Fire v. Pepsico, Inc., 884 F.2d 688 (2d Cir. 1989). The Fourth Circuit has not ruled on this issue.

Perhaps due to the confusion in the case law, the Miller Court avoided this question entirely and elected to decide only the question specifically posed by the parties: "Can a trustee bring

an action under 544 simply because the recovery would benefit all creditors?[2]"

Given the way that the question was put, the answer was clear: " No." Standing to sue is not based upon simple benefit to a group of creditors. The motion to dismiss was granted.

Miller raises interesting questions about a trustee's powers under Section 544. However, the present case is not as limited as Miller and is determined under a different body of state law. As such, Miller does not control the outcome.

Miller involved an attempt by a trustee to assert creditors' rights which exist under North Carolina state law. Here, however, the Trustee is asserting Section 544 claims based upon Virginia's debtor/creditor laws. Additionally, and in contrast to Miller, in this case, the Trustee also contends that the debtor has made avoidable transfers under Sections 548 (fraudulent conveyances) and 549 (unauthorized postpetition transfers). He also asserts alter ego claims against the defendants.

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[2] Miller in several places declines to rule on issues, which while pertinent to a determination of the scope of Section 544 power, were not argued by the trustee. These issues include: (1) whether the claim was property of the bankruptcy estate (Miller, f.n. 1); (2) whether the claims were for the avoidance of a transfer of the debtor's property (f.n. 7), and even the general question of whether the trustee could assert claims which are "general" to the body of creditors, as by Koch.

In Miller, the District Court assumed that the claims were "personal," that belonged to an individual creditor. Since fraudulent conveyances made by an insolvent debtor are acts injurious to all creditors, a strong argument can be made that these are "general," not personal claims. For these reasons, it appears that the District Court did not intend that Miller serve as a general rule for all Section 544 cases.

Clearly, the bankruptcy trustee has standing to bring Bankruptcy Code avoidance actions under Sections 548 and 549. Those sections provide that he is the party entitled to do so. 11 USC 548, 549.

Second, as to the Section 544 causes of action, it is Virginia law, not North Carolina law, that governs. The Bankruptcy Code is federal law; however, it often defers to state substantive law to determine the parties' legal rights. This is the case with Section 544. This provision does not itself create creditor rights. It simply arms the Trustee with whatever rights certain enumerated creditors have under applicable state law. Miller, at 814.

Virginia law applies in this case because these transactions occurred in Virginia. The question then becomes, Who under Virginia law may assert (1) conspiracy to defraud creditors or (2) alter ego claims?

This Court has located no Virginia state law answering the question of who may maintain an action pertaining to a conspiracy to defraud creditors. However, the undersigned believes that the Koch and St. Paul rationale should apply. To the extent the fraud is based upon an individual creditor's dealings with a debtor, the cause is personal to that creditor, may not be asserted by other creditors, and therefore may not be asserted by a bankruptcy trustee. If, however, the fraud claim is based on conduct

affecting creditors as a group, the fraud is general, and it may be asserted by the Trustee.

In this case, it appears that this is a moot point. For what the Complaint terms a "conspiracy to defraud creditors" in the Complaint was explained at hearing to be a request for relief under Virginia fraudulent conveyance law. Under Virginia law, a transferee of fraudulently conveyed property is not generally liable on an in personam basis for the transfer. Usually he may only be sued for its return. Mills v. Miller Harness Co., Inc., 229 Va. 155, 326 S.E.2d 665 (1985); Cheatle v. Rudd's Swimming Pool Supply, 234 Va. 207, 360 S.E.2d 828 (1987).

An exception lies, however, where persons have joined in and assisted the debtor in hiding assets that a creditor otherwise would have reached. In such cases, the Virginia State Supreme Court has held that these persons may be sued in personam for damages as well. Price v Hawkins, 247 Va.32,439 SE.2d 382 (1994).

Since the Bankruptcy trustee has, under Section 544, the ability to bring state law transfer avoidance actions, it would appear that he also has standing to seek, under Virginia law, in personam recoveries as well.

Finally, the question is posed, whether a Trustee can bring an alter ego claim against the defendants. Here, again, Virginia law comes into play. It is clear under bankruptcy law that a claim owned by the debtor can be asserted by his trustee. This is

because Section 541 gives the Trustee control over all of a debtor's property. 11 USC 541. Consistent with this, the Fourth Circuit has ruled that under Virginia state law, an alter ego claim belongs to a debtor, not its creditors, and must be asserted by the Trustee. In Steyr-Daimler-Puch of America Corp.v. Pappas, 852 F.2d 132 (4th Cir. 1988).

Since Virginia state law controls in this case, the alter ego claims belong to the bankruptcy estate. Mullins' trustee has standing to assert them.

BASED upon the foregoing, DeChow's Motion to Dismiss is therefore DENIED.

SO ORDERED.

This the 23rd day of April, 2001.

United States Bankruptcy Judge