NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

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| IN RE: | |
| BENJAMIN CHARLES LOPRESTI, Debtor. | CHAPTER 7<br>CASE NO. 03-48839 (GMB) |
| JOSEPH D. MARCHAND, Chapter 7 Trustee, Plaintiff, v. MARIA KING, Defendant. | ADVERSARY NO. 04-2351 (GMB)<br>MEMORANDUM OPINION |

APPEARANCES:

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Chapter 7 Trustee

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Before the Court is Defendant Maria King's motion for summary judgment as to the Chapter 7 Trustee's Adversary Complaint to Void Fraudulent Transfer. The Defendant requests this Court dismiss the Trustee's complaint because (1) Debtor's payment to Defendant cannot be avoided as a preference under § 547 because the payment was not made within 90 days immediately preceding the filing of Debtor's petition and Defendant is not an "insider" pursuant

to § 101(31); (2) Debtor's payment to the Defendant may not be avoided as an "actual" fraudulent transfer under 11 U.S.C. § 548(a)(1)(A) or N.J.S.A. 25:2-25(a) because there is no evidence that it was made with an actual intent to hinder, delay or defraud creditors; (3) Debtor's payment to the Defendant may not be avoided as a "constructive" fraudulent transfer under 11 U.S.C. § 548(a)(1)(B), N.J.S.A. 25:2-25(b) and/or N.J.S.A. 25:2-27(a) because Debtor received "value" in exchange for this transfer as that term is defined in 11 U.S.C. § 548(d)(2)(A) and N.J.S.A. 25:2-24; and (4) Debtor's payment to the Defendant may not be avoided as a fraudulent transfer under N.J.S.A. 25:2-27(b). A hearing was held regarding this matter on October 13, 2005, after which the Court took the matter under advisement.

## I. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a), and the Standing Order of the United States District Court for the District of New Jersey dated July 23, 1984, referring all bankruptcy cases to the bankruptcy court. Venue of this case is proper in the District of New Jersey pursuant to 28 U.S.C. §§ 1408 and 1409. The following shall constitute findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

## II. FACTUAL BACKGROUND

The Debtor, Benjamin Charles Lopresti, Sr., filed his chapter 7 bankruptcy case on December 2, 2003. Approximately seven (7) months earlier, the Debtor repaid Defendant Maria King $40,529.99 by a check dated May 1, 2003. The Trustee filed an adversary

proceeding seeking to avoid the May 1, 2003 payment. The Defendant filed her motion for summary judgment on April 14, 2005 with accompanying certifications by Defendant Maria King and the Debtor. On July 20, 2005, the Trustee filed a brief in opposition to King's motion.

A. Certification of the Defendant Maria King

The Defendant certifies the following facts:

1. Years before I loaned the Debtor, Mr. Lopresti, any money I was in an abusive relationship with my ex-husband. He was extremely abusive to me and my children. In December 1999, when the children were old enough to take care of themselves, and with their approval, I left my ex-husband even though I really had no place to go.

2. Close friends were no help and the little money I had saved would only take me so far. Mr. Lopresti was the only friend who offered to let me stay in his home until I could find a place to live on my own. Knowing that I had very little money, and knowing that my goal was to save enough money to live independently, Mr. Lopresti allowed me to clean his house and prepare meals for he and his brother Franklin in exchange for a safe place to sleep.

3. I stayed with Mr. Lopresti and his brother until July 13, 2001 when I made settlement on my condo. I was extremely grateful for Mr. Lopresti's kindness and vowed to always remember his selflessness.

4. In October or November 2001, a few months after I moved into my own place, Mr. Lopresti called me. He told me that his business was bad, he was short of money and needed help in paying his monthly bills.

5. Naturally, I was more than willing to help him, given what he had previously done to help me when my life was in shambles. Therefore, I agreed to lend him the money to assist him in paying his monthly bills until his financial circumstances turned around. Mr. Lopresti was grateful.

6. He provided me with his credit card statements, utility bills, and car loan statement and I paid them directly for him.

7. I again similarly assisted Mr. Lopresti with the direct payment of his monthly bills each month for many months thereafter.

8. I was able to financially assist Mr. Lopresti for this extended period of time because my father had given me a gift of money to help me reestablish my life after having finally gotten away from my abusive ex-husband. But, it was all I had to secure my own future. Mr. Lopresti was always aware that these monies would have to be repaid.

9. Mr. Lopresti always promised that he would repay me once he was able to reestablish his business.

10. We met in late June 2002 to further discuss the method and timing of his repayment to me. I reminded Mr. Lopresti that the money I was using to pay his bills was a gift from my father and I had nothing else to fall back on if he did not pay me back. Mr. Lopresti promised to pay me back in full in September of 2002, but he asked me to continue to help him until that time. I agreed to be patient and to continue assisting him.

11. I continued to directly pay Mr. Lopresti's monthly bills until April 2003. The total amount of money that I paid for Mr. Lopresti's bills from October 2001 through and including April 2003 was $44,416.69 (attached to certification is an itemized list of checks).

12. Mr. Lopresti finally repaid me on May 1, 2003 by way of a single check in the amount of $40,529.99. So he probably still owes me about $4,000.00.

13. In April 2004, about a year after he paid me, Mr. Lopresti needed a place to live. He told me that he was given about 15 days to vacate his home, which was being sold. He needed help in packing and getting the house ready to sell, so I helped him with these tasks.

14. While doing so I temporarily stayed as a guest at Mr. Lopresti's house to save myself some travel time between getting back and forth to work and helping him move.

15. While all of this was going on, Mr. Lopresti suffered a heart attack on April 30, 2004. He was in the hospital for 5 days. His older brother, Dr. Philip LoPresti, was there at his discharge and was worried about Mr. Lopresti's post-hospital living arrangements, because Mr. Lopresti would need assistance and supervision for several weeks while he recovered. I offered to let Mr. Lopresti stay with me temporarily since he was now without a home of his own. Mr. Lopresti stayed with me for only a few weeks, after which time he went back to stay with his brothers and several members of his family.

16. At no time prior to, during, or after the times we helped each other through our respective times of difficultly [sic], were Mr. Lopresti and I ever romantically involved with one another. We were only, and continue only to be, friends.

B. Certification of the Debtor Benjamin Charles Lopresti, Sr.

The Debtor certifies the following facts:

1. Before I filed this bankruptcy case, I was friends with Maria King. Ms. King was married but had a very abusive husband. All of her close friends, including me, knew it and we were helpless in doing anything about it. This hurt all of us deeply since Maria was always there helping her friends and family regardless of how small or great each task may have been.

2. The abuse for Maria was getting so bad that she was desperate for help when she came to me in December of 1999. She stated she could not take it any more and asked for help. I told her she could come and live with me and my cousin Franklin until she got on her feet.

3. Maria moved in on December 17, 1999. I knew that she had no money to speak of, and that she was trying to save money to get a place of her own. So, I didn't ask her to pay any rent while she lived in my house. Instead, she agreed to take care of cleaning the house, making meals and doing other odd-job type tasks, to "earn her keep". She stayed with us until July 13, 2001. On that date she made settlement on her own condo and moved out.

4. In November 2001, after Ms. King moved into her own place, I began having financial difficulties. My business was bad and my income was continually decreasing. At the same time, I was required to pay alimony of $450.00 per week and was having a hard time paying my monthly bills. It was then that I asked Maria if she could pay my November credit card bills and gas and electric and I would repay her in a few months.

5. Needless to say things got really bad for me financially and I had to ask Maria to keep helping me with the repayment of my bills. She continued to help me pay my credit cards, utilities, gas and electric, some car payments and even some of my alimony obligations. Maria did her part for me, by paying my bills from November 2001 through April 2003.

6. Maria spent a total of $40,529.99 from "nest egg" funds her father had given her to pay my monthly debts from November 2001 through April 2003. I repaid her this money on May 1, 2003.

7. In April of 2004, Maria King and my nieces and nephews helped me to move out of my home. I only had 15 days to do so because the Burlington County Court ordered me to pay the arrears of my alimony and lawyer fees of $44,500.00.

8. During the 15 days that it took to help pack and move, Maria stayed at my house as my guest rather than drive an hour to go home. This allowed her to go to work directly from my house during this 2 week period and also allowed her to come back to my house directly after work without having to drive to her house in between these 2 trips. It saved her a lot of time, expense and gas.

9. Then on April 30, 2004 while I was living with my brother I had a heart attack. When they put the stint in the left side of my heart, they ruptured my artery wall and put a secondary hole in my artery. I was bleeding for 5 days inside until they stopped the bleeding.

10. When I left the hospital Maria volunteered to have me live with her for two weeks with the okay from my brother. Maria's condo has everything on one floor and she was able to keep an eye on me. The day nurses would come daily cleaning my wound and bandages and washing me.

11. After that two week period I moved back with my brothers in Mt. Laurel and Marlton. At this time I spent a few days with each brother and my nephews and nieces not to over stay my welcome.

12. Maria King is a very good friend of mine. She has helped me in my financial needs, she is a very caring person and I would like the court to know we have never been anything other than friends.

C. The Parties' Arguments

The Defendant presents the following arguments:

1. The Debtor's payment to the Defendant may not be avoided as a preference under 11 U.S.C. §547. The payment was not made within the 90 days immediately preceding the filing of the Debtor's petition as required by 11 U.S.C. § 547(b)(4)(A). Additionally, the Defendant is not an "insider" as that term is defined in 11 U.S.C. § 101(31) so as to permit the trustee to avoid the payment as one made within the year immediately preceding the filing of Debtor's petition.

2. The Debtor's payment to the Defendant may not be avoided as a fraudulent transfer under 11 U.S.C. § 548(a)(1)(A) or N.J.S.A. 25:2-25(a) because there is no

evidence that it was made with an actual intent to hinder, delay or defraud creditors;

3. Debtor's payment to the Defendant may not be avoided as a "constructive" fraudulent transfer under 11 U.S.C. § 548(a)(1)(B), N.J.S.A. 25:2-25(b) and/or N.J.S.A. 25:2-27(a) because Debtor received "value" in exchange for this transfer as that term is defined in 11 U.S.C. § 548(d)(2)(A) and N.J.S.A. 25:2-24; and

4. The Debtor's payment to the Defendant may not be avoided as a fraudulent transfer under N.J.S.A. 25:2-27(b). That section of the New Jersey Uniform Fraudulent Transfer Act permits avoidance of a transfer to satisfy the antecedent debt of an "insider". Defendant is not an "insider" as that term is defined in N.J.S.A. 25:2-22(a).

The Trustee opposes the Defendant's motion and presents the following arguments:

1. The Defendant is an insider because the definition of insider under 11 U.S.C. § 101(31) is not an exhaustive list and the facts support a finding that Defendant is an insider;

2. The Debtor was insolvent at the time of the transfer as shown by the attached report;

3. The May 1, 2003 transfer was fraudulent under 11 U.S.C. § 548 and or N.J.S.A. 25:2-25; and (4) the May 1, 2003 transfer is fraudulent under N.J.S.A. 25:2-27(b);

4. It is undisputed that on or about May 1, 2003, Debtor paid Maria King $40,529.99 by check;

5. There are sufficient indicia or "badges of fraud" to warrant a finding of fraud;

## III. LEGAL DISCUSSION

### A. Summary Judgment Standard

Pursuant to Bankruptcy Rule 7056, Rule 56 of the Federal Rules of Civil Procedure is applicable to adversary proceedings in bankruptcy. Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. Under Rule 56, the Court should grant summary judgment for a movant if the movant shows

there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

To meet these requirements, the movant is allowed to rely on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Id. To defeat a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Bank. P. 7056(e). In determining whether any genuine issues of material fact exist, the Court must view all factually drawn inferences "in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When the movant bears the burden of proof at trial and does not establish the absence of a genuine factual issue, a court should deny summary judgment regardless of whether a party has presented opposing evidence. Rosen v. Bezner, 996 F.2d 1527, 1530 (3d Cir. 1993).

A fact is "material" for the purpose of summary judgment and precludes the grant of summary judgment if proof of that fact would have effect of establishing or refuting one of the essential elements of a cause of action or defense one of the parties asserts, and would necessarily affect application of appropriate principles of law to the rights and obligations of the parties. See Celotex Corp. v. Catrett, 477 U.S. 317, 322–4 (1986).

Courts have often held that "insider" status is a question of fact. In re Holloway, 955 F.2d 1008, 1014 (5th Cir. 1992) (citing Matter of Missionary Baptist Foundation of America, 712 F.2d 206, 210 (5th Cir.1983); In re Friedman, 126 Bankr. 63, 67 (9th Cir. B.A.P. 1991); In re Hydraulic Industrial Products Co., 101 Bankr. 107, 109 (Bankr. E.D. Mo. 1989)). However, on a summary judgment motion where the underlying facts are resolved or undisputed, the

determination of insider status is a question of law for the Court to determine. In re Holloway, 955 F.2d at 1014 (citing In re Schuman, 81 B.R. 583, 586 n.1 (Bankr. Fed. App. 1987)).

B. Burdens of Proof

1. Preferential Transfers

The plaintiff has the burden of proof to show by a preponderance of the evidence that there was a preferential transfer under § 547(b). 11 U.S.C. § 547(g) (2005). If the Defendant establishes the lack of a single element in Trustee's complaint, under 11 U.S.C. § 547(b)(1) through (5), Defendant's motion for summary judgment should be granted.

2. Fraudulent Transfer Actions under Federal Law (11 U.S.C. §548) and New Jersey State Law (N.J.S.A. 25:2-20 *et seq*.)

The burden of proof with respect to a claim of a fraudulent transfer under 11 U.S.C. § 548 is on the party seeking to set aside the transfer. Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 648 (3d Cir. 1991). Similarly, the movant seeking to set aside a conveyance under the New Jersey Uniform Fraudulent Transfer Act, N.J.S.A. 25:2-20 *et seq*. ("UFTA"), bears the burden of proof on all elements of the alleged cause of action.

C. Preferential Transfers under 11 U.S.C. § 547

Determining whether a transfer was preferential under § 547(b) consists of two steps. Initially, the trustee or debtor-in-possession must establish, by a preponderance of the evidence, the five elements of a preferential transfer set forth in 11 U.S.C. § 547(b). In re Forman Enters.,

Inc., 293 B.R. 848, 855 (Bankr. W.D. Pa. 2003); 11 U.S.C. § 547(g) (2005). If the trustee establishes these elements, the transferee may defeat the trustee's claim by establishing that the transfer is not avoidable, pursuant to 11 U.S.C. § 547(c).

Section 547(b) provides that a trustee or debtor-in-possession may avoid a transfer of an interest in a debtor's property provided it was:

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
>
> (3) made while the debtor was insolvent;
>
> (4) made–
>
> > (A) on or within 90 days before the date of the filing of the petition; or
> >
> > (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enables such creditor to receive more than such creditor would receive if--
>
> > (A) the case were a case under chapter 7 of this title;
> >
> > (B) the transfer had not been made; and
> >
> > (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b) (2005).

As this is the Defendant's motion for summary judgment, she has the burden to show that at least one of the above elements does not exist in each cause of action. The Defendant's argument challenges the fourth element. The Defendant argues that summary judgment in her favor is proper because, first, under § 547(b)(4)(A), the transfer was not made within ninety days and, second, under § 547(b)(4)(B), the Defendant is not an insider.

Thus, the critical issue to be decided in this motion is whether Maria King was an "insider" at the time the payment was made. "Insider" is a term defined within the Code:

> The term "insider" includes:
>
> (A) if the debtor is an individual
>
> (i) relative of the debtor or of a general partner of the debtor;
>
> (ii) partnership in which the debtor is a general partner;
>
> (iii) general partner of the debtor; or
>
> (iv) corporation of which the debtor is a director, officer, or person in control;

11 U.S.C. § 101(31) (2005).

This is not an exhaustive list. An insider can be an individual whose close relationship to the debtor subjects transactions to heavier scrutiny. COLLIER ON BANKRUPTCY P 101.31 (15th ed. rev. 2005). The legislative history of § 101(31) describes an insider as an individual or entity that has "a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arm's length with the debtor." S. REP. NO. 95-989, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5810. Cases considering the definition of an insider have focused on two factors: (1) the closeness of the

relationship of the debtor and individual who received the payment; and (2) whether the transaction was conducted at arm's length. In re Holloway, 955 F.2d 1008, 1011 (5th Cir. 1992) (citations omitted).

In examining the closeness of the relationship, the mere existence of a friendship is not enough to make a transferee an insider. However, a close and caring relationship between a male and female can satisfy the closeness requirements for an insider, even though platonic. In re Kucharek, 79 B.R. 393, 395 (Bankr. D. Wis. 1987). No romantic involvement is necessary.

The Fifth Circuit in Holloway engaged in an "insider" analysis on facts similar to those in this proceeding. In Holloway, the court found that the closeness of the relationship between the debtor required "careful scrutiny." In re Holloway, 955 F.2d at 1011. The relationship between the debtor and transferee was found to be close because: (1) despite both debtor and transferee both being remarried twice since their divorce, they engaged in "generous and casual loan transactions" and (2) they maintained frequent contacts by telephone. In re Holloway, 955 F.2d at 1012.

After finding that the debtor and transferee had a close relationship, the court in Holloway applied careful scrutiny to the loan transactions. The court found that the transactions were not conducted at arm's length because, (1) the loans were unsecured by any collateral; (2) the transferee knew that the debtor was insolvent, both at the times the loans were made and at the time the payments were received; (3) the loans had no commercial motivation; (4) there was no reason for the debtor to become involved in a priority dispute between the transferee and other claimants. In re Holloway, 955 F.2d at 1012.

Other factual issues to consider when determining if a transferee is an insider are: (1) whether the loans were documented by a note or other writing, In re Montanino, 15 B.R. 307 (Bankr. D.N.J. 1981); (2) a desire to treat the transferee differently from all other general unsecured creditors. Id.; (3) the number of loans made by the transferee to the debtor, In re Strickland, 230 B.R. 276 (Bankr. D. Va. 1999) (holding that a single loan is not sufficient to show "insider" status); (4) whether the transferee had the ability to exert control over the debtor and (5) whether there was a personal, business or professional relationship that allowed the transferee to gain an advantage by virtue of affinity. In re McIver, 177 B.R. 366 (Bankr. D. Fla. 1995).

After considering the closeness of King's relationship with the Debtor and whether the transactions were conducted at arm's length, the Court finds that Defendant Maria King was an "insider" for the following reasons: the Debtor and Defendant had/have a close relationship that requires more scrutiny, which is conceded by Defendant. Brief of Defendant at 6. Evidence of this close relationship can be taken straight from the Defendant and Debtor's certifications in support of the motion. The Defendant states in her certification that she and the Debtor were at the time of the transfer, and remain, friends. Certification of Maria King, ¶ 13. The Defendant and the Debtor "helped each other through our respective times of difficulty." Certification of Maria King, ¶ 13. The Defendant stayed at the Debtor's home for a period of one and a half years while she saved money for her own housing. The Debtor was there to help Defendant and provide her with a place to stay. When "close friends were of no help Mr. Lopresti was the only friend who offered to let [her] stay in his home until [she] could find a place of [her] own." Certification of Maria King, ¶ 3.

Similarly, when Debtor fell on hard times, the Defendant was there to help him. When Debtor suffered a heart attack, Defendant "offered to let Mr. Lopresti stay with [her] temporarily since he was now without a home of his own. Mr. Lopresti stayed with [her] for only a few weeks, after which time he went back to stay with his brothers and several members of his family." Certification of Maria King, ¶ 12. It should be noted that the Debtor went to stay with the Defendant even before he stayed with relatives after hospitalization for a very serious illness.

The Defendant concedes she was there to help Debtor when "his business was bad . . . he was short of money and needed help in paying his monthly bills." Certification of Maria King, ¶ 5. In total, the Defendant paid over $40,000 of Debtor's expenses out of money given to her by her father, despite the fact that she "had nothing else to fall back on if he [Debtor] did not pay [her] back." Certification of Maria King, ¶ 7.

Although the Debtor and Defendant are not related and did not share a romantic relationship at the time of the transfer, they share a relationship of the type that the Code and the relevant case law intended to classify as an insider relationship. It was that relationship which motivated the transfer that the Trustee alleges is preferential and fraudulent. The Defendant and the Debtor shared a close personal relationship and were more than mere friends. They were close friends who shared an intimate, though platonic, relationship, which is readily discernible on the face of the certifications of both Debtor and Defendant. The Defendant was given preferential treatment because of her status and relationship with the Debtor.

After the finding that the Defendant and Debtor had a close personal relationship that existed beyond the bounds of mere friendship, the Court examined whether the transactions were made at arm's length. The Court has determined that the transaction was not conducted at arm's

length by the undisputed facts listed in the Defendant's papers. There was no commercial reason for Defendant to make the loans to Debtor. There was no collateral to support or documents to memorialize the loan transactions. There were numerous loans made over a substantial period of time, as evidenced by the Defendant's itemized list of checks. The sole basis for that series of transactions was the close personal relationship between the parties. Accordingly, the Court finds that Defendant Maria King was an "insider" under the meaning of § 547(b)(4)(B), and the Defendant's motion for summary judgment as to the preference count is denied.

D. N.J.S.A. 25:2-27(b) - Transfers Fraudulent as to Present Creditors

Fraudulent transfers as to present creditors are actionable in New Jersey pursuant to the Uniform Fraudulent Transfer Act, which states that:

> a. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.
>
> b. A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

N.J.S.A. § 25:2-27 (2005).

The definition of an "insider" under the Uniform Fraudulent Transfer Act is similar to that under the Code:

"Insider" includes:

a. If the debtor is an individual,

(1) A relative of the debtor or of a general partner of the debtor;

(2) A partnership in which the debtor is a general partner;

(3) A general partner in a partnership described in paragraph (2) of subsection a. of this definition.

N.J.S.A. § 25:2-22 (2005).

Although specifically defined in N.J.S.A. 25:2-22(a), courts look to the intent and purpose of the "insider" factor in determining whether the transferee was an "insider." Gilchinsky v. Nat'l Westminster Bank N.J., 159 N.J. 463, 478 (1999) (Although defendant "technically" did not fall within the definition of "insider" contained in N.J.S.A. 25:2-22(a), because the transfer was to herself, from and ERISA-protected account to a New Jersey IRA account, an analysis of the purpose underlying the "insider" factor and fraudulent conveyance law in general undoubtedly supports the conclusion that she qualifie[d] as an "insider.") Common among the enumerated persons in the definition of insider is that they stand in such close relation to the debtor as to give rise to the inference that they have the ability to influence or control the debtor's actions. Gilchinsky, 159 N.J. at 478.

The Court finds that the Defendant has not met her burden to show that she was not an "insider" under the Uniform Fraudulent Transfer Act. For the same reasons cited above, the Court finds that the Defendant was an "insider" for purposes of the Uniform Fraudulent Transfer Act. The Defendant was in a position to influence the Debtor's actions and it was because of the

nature of their close relationship that the Defendant was paid over other creditors. Accordingly, the Court denies the Defendant's motion for summary judgment as to fraudulent transfer under the Uniform Fraudulent Transfer Act.

E. "Constructive Fraud" under § 548(a)(1)(B) and N.J.S.A. 25:2-25(b)

The Trustee's complaint alleges that the transfer constitutes a fraudulent transfer violating §548 of the Bankruptcy Code and N.J.S.A. 25:2-25. To establish a claim under § 548(a)(1)(B), the Debtor must have:

> received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (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;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
>
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1)(B) (2005).

For the purposes of § 548, value is defined as "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor." 11 U.S.C. § 548(d)(2)(A).

Constructive fraud under N.J.S.A. 25:2-25(b) is defined by a transfer that was made:

> Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due.

N.J.S.A. 25:2-25(b) (2005).

> Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

N.J.S.A. 25:2-24 (2005).

In determining whether reasonably equivalent value was received, courts generally look to the "totality of the circumstances," including: (1) the "fair market value" of the benefit received as a result of the transfer, (2) the existence of an arms-length relationship between the debtor and the transferee, and (3) the transferee's good faith. In re Fruehauf Trailer Corp., 444 F.3d 203, 212–3 (3d Cir. 2006) (citations omitted). "The value of the consideration received must be compared to the value given by the debtor." Id.

Under the undisputed facts in the record, the Debtor received reasonably equivalent value because the payment by the Debtor, in the form of a check in the amount of $40,529.00, was in satisfaction of an antecedent debt for living expenses paid by Maria King for Mr. Lopresti during the time period from October 2001-April 2003. See Exhibit to Defendant's Motion for Summary

Judgment; Expert Report of Donna Miller, Brief in Opposition, Exhibit A. Because Defendant-movant has negated the "received less than reasonably equivalent value" element, Defendant's summary judgment motion is granted as to constructive fraud under § 548(a)(1)(B) and N.J.S.A. 25:2-24.

F. Actual Fraud under § 548(a)(1)(A) and N.J.S.A. 25:2-25(a)

Under the Code, a transfer may be set aside because of actual fraud when the transfer was:

> made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily–
>
> (A) 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 such obligation was incurred, indebted.

11 U.S.C. §548(a)(1)(A)(2005).

A payment may also be set aside as an "actual" fraudulent transfer under N.J.S.A. 25:2-25(a), where there was:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> a. With actual intent to hinder, delay, or defraud any creditor of the debtor.

N.J.S.A. 25:2-25(a) (2005).

It is often difficult and/or impracticable to prove the actual intent to hinder delay defraud creditor. Accordingly, courts turn to the common law of fraudulent conveyances and consider the "badges of fraud" in considering whether actual fraud is present. In re Victor Int'l Inc., 278 B.R. 67, 82 (Bankr. D.N.J. 2002).

N.J.S.A. 25:2-26 lists various "badges of fraud" used as factors to help determine fraudulent intent:

a. The transfer or obligation was to an insider;

b. The debtor retained possession or control of the property transferred after the transfer;

c. The transfer or obligation was disclosed or concealed;

d. Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

e. The transfer was of substantially all the debtor's assets;

f. The debtor absconded;

g. The debtor removed or concealed assets;

h. The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

i. The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

j. The transfer occurred shortly before or shortly after a substantial debt was incurred; and

k. The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

N.J.S.A. 25:2-26 (2005).

Movant has failed to satisfy her burden of proof with respect to disproving the actual fraud count. The Trustee has brought forth evidence which shows that more than a few of the badges of fraud are present in this case. The payment was made to an insider. The transfer was made when the Debtor was sued or threatened with suit. The Debtor was insolvent or became insolvent shortly after the transfer. These represent a number of undisputed "badges of fraud." Accordingly, the Defendant's motion for summary judgment is denied as to the fraudulent transfer claim under § 548(a)(1)(A) and N.J.S.A. 25:2-25(a).

## IV. CONCLUSION

The Defendant's motion for summary judgment as to the alleged preference claim arising under § 547 is DENIED. The Defendant's motion for summary judgment as to the alleged fraudulent transfer under N.J.S.A. 25:2-27(b) is DENIED. The Defendant's motion for summary judgment as to allegations of "constructive fraud" under both § 548(a)(1)(B) and N.J.S.A. 25:2-25 is GRANTED. The Defendant's motion as to allegations of "actual fraud" under § 548(a)(1)(A) and N.J.S.A. 25:2-25(a) is DENIED.

BY THE COURT:

GLORIA M. BURNS
United States Bankruptcy Judge