

**United States Bankruptcy Court
District of New Mexico**

Document Verification

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

LEO SIMS,
Debtor.

No. 7-96-14099 S

GARY OTTINGER, TRUSTEE,
Plaintiff,

v.

Adv. No. 97-1034 S

LEO VIVIAN SIMS,
Defendant.

And

ALINE SIMS, individually and as
personal representative of the
Estate of George P. Sims, Deceased,
Plaintiff in Intervention,

v.

LEO VIVIAN SIMS, TOM KENNANN, WINNIE KENNANN,
LEO V. SIMS, II and GEORGE L. SIMS,
Defendants in Intervention

and

BUSINESS MEN'S ASSURANCE COMPANY OF AMERICA,
Third party Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
MEMORANDUM OPINION ON CHAPTER 7 TRUSTEE'S
AND ALINE SIM'S MOTION FOR PARTIAL SUMMARY
JUDGMENT AGAINST TOM KENNANN AND WINNIE KENNANN
ON COUNTS I AND II OF THE AMENDED COMPLAINTS**

This matter is before the Court on the Motion for Partial
Summary Judgment against Tom Kennann and Winnie Kennann on Counts
I and II of the Amended Complaint in Intervention, filed January
6, 1999. Having considered the motion, the memorandum in support

thereof with the supporting documents (filed January 6, 1999), the response and supporting documents (filed February 25, 1999), the reply and its supporting documents (filed March 10, 1999), and the portions of the file referred to in the motions, and having reviewed the file in general, and being otherwise sufficiently informed and advised, the Court finds that the Motion is well taken and should be granted. These Findings of Fact and Conclusions of Law and Memorandum Opinion constitute the findings and conclusions required by Bankruptcy Rule 7052. This is a core proceeding by virtue of 28 U.S.C. § 157(b)(2)(H) and (K).

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is governed by Bankruptcy Rule 7056, which adopts Federal Rule of Civil Procedure 56. Section (c) provides:

Judgment shall be rendered forthwith 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 applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. Diamond Bar Cattle Company v. United States, 168 F3d. 1209, 1999WL88945, 2 (10th Cir. 1999) (citing Sundance Assocs., Inc. v. Reno, 139 F.3d 804, 807 (10th Cir. 1998)).

UNDISPUTED MATERIAL FACTS

The Court finds that the following material facts are not disputed:

- 1) Winnie Kennann is Leo V. Sim's sister. Thomas Kennann is the spouse of Winnie Kennann. (1stMemo¶2, 1stResp¶6.) (Memo¶14, Resp.3.) Leo V. Sims, George P. Sims and Winnie Lee Sims Kennann are the children of George W. Sims, who died on September 28, 1968, and Amanda E. (Bessie) Drinkard Sims, who died May 1, 1969. (AC¶6, Answer¶6.) George P. Sims died on November 2, 1977, as a result of an accident. Aline Sims is the widow of George P. Sims and is the duly appointed and acting Personal Representative of the Estate of George P. Sims, deceased (the "Sims estate"). (AC¶7, Answer¶7.)¹
- 2) Leo V. Sims, II and George Lynn Sims are Leo V. Sims's sons.

¹The Court will cite to portions of the record as follows: "MSJ¶" refers to specifically numbered paragraphs in the January 6, 1999 motion for partial summary judgment. "Memo¶" refers to the January 6, 1999 memorandum in support of that motion by specific paragraph number. "Resp.#" refers to the specific page number of the Kennann's February 25, 1999 response to that motion. "Reply#" and "Reply¶" refer respectively to page numbers or numbered paragraphs of movants' March 10, 1999 Reply. "1stMSJ¶" refers to specific paragraph numbers in the February 26, 1998 Motion for Partial Summary Judgment ("first motion") filed by Aline Sims. "1stMemo¶" refers to the specific paragraph of the memorandum submitted February 26, 1998 in support of the first motion. "1stResp.¶" refers to the specific paragraph in the Kennann's response to the first motion. "AC¶" refers to the Amended Complaint in Intervention filed January 22, 1998. "Answer¶" refers to the Kennann's Answer to Amended Complaint filed March 9, 1998.

(1stMemo¶3, 1stResp¶6.)(AC¶8, Answer¶8.)

- 3) The Kennanns are "insiders" as defined by 11 U.S.C. §101(31). (Memo¶16, Resp.3.)
- 4) In August, 1993, Leo V. Sims acquired from the Estate of Elizabeth Sims Daugherty, Deceased, a 1/9 interest in the surface of the Sims Bros Ranch and a 1/5 interest in the surface of the S & D Ranch (collectively the "Daugherty interest"). (Memo¶1, Resp.3.)
- 5) Leo V. Sims purchased the Daugherty interest for \$300,000 by borrowing the full amount of the purchase price from Lea County State Bank, Hobbs, New Mexico. (the "state bank note")(Memo¶2, Resp.3.)(Resp.¶21, Reply¶8.)
- 6) Leo V. Sims was unable to make any payments on either the principal or interest of the state bank note. (Memo¶3, Resp.3.)
- 7) The state bank note was in default, and the Lea County State Bank was threatening to foreclose on the mortgage which secured the note. (Memo¶4, Resp.3.) Winnie Kennann knew that Lea County State Bank was threatening to foreclose the mortgage. (Memo¶10, Resp.3.)
- 8) The Kennanns were co-plaintiffs with Leo V. Sims in Lea County District Court case CV 83-254 (the "Lea County case"). (Memo¶14, Resp.3.) This case was filed by Leo V. Sims, Winnie Kennan, Tom Kennann and Shane Spear against Aline Sims, individually and as personal representative of

the estate of George P. Sims, Deceased. (1stMSJ, Exhibit D page 1)(AC¶11, Answer¶11.)

9) The Lea County Case was tried to the Court from January 29, 1996 through February 7, 1996 on the issue of drips. The Court announced its oral decision on or about February 7, 1996. (AC¶10, Answer¶10.)

10) Among the issues litigated and decided in the Lea County Case was the ownership and the right to distribution of proceeds from certain contracts with various pipeline companies which permit the collection and sale of a liquid hydrocarbon product produced in association with natural gas, commonly referred to as "drips". (AC¶9, Answer¶9.)

11) On March 28, 1996, the Hon. James L. Shuler entered his "Court's Decision" in the Lea County case. This decision indicated that a substantial judgment would be entered against Leo V. Sims in favor of Aline Sims. (1stMemo¶20 and Exhibit D, 1stResp.¶12). Paragraph 42 of that Decision states "The Plaintiff, Leo V. Sims has wrongfully withheld the sum of \$4,602.651.43 from the estate" [of George P. Sims] and awards pre-judgment interest. (1stMSJ, Exhibit D pages 8 and 11). Leo V. Sims and the Kennanns were represented by the law firm of Hinkle, Cox, Eaton, Coffield and Hensley. (Id. Page 1.) The Court's Decision states that it was sent to this law firm. (Id. Page 12.) The state court subsequently entered an Amended Decision on September

20, 1996 and a Second Amended Decision on September 27, 1996 setting forth the amount of damages to which the Sims Estate is entitled. (AC¶12, Answer¶12.) Final judgment was entered against Leo Sims on April 14, 1997. (Id.)

- 12) Prior to the filing of the bankruptcy herein on September 19, 1996, judgment had not yet been entered in the Lea County case, but defendants were aware that there was to be an entry of judgment. (AW¶13 & 17, Answer¶13 & 17.)
- 13) On or about May 14, 1996, Winnie Kennann paid off Leo V. Sim's indebtedness to Lea County State Bank in order to prevent foreclosure and acquired the Daugherty Interest from Leo V. Sims for the amount of the principal and accrued interest of the past due loan. (Memo¶5, Resp.3.)
- 14) Lea County State Bank had a lien on all of Leo V. Sim's ranch interests, not just the Daugherty interest, to secure the loan used by the Debtor to purchase the Daugherty interest. Purchase of the Daugherty interest resulted in a release of those liens. (Resp.19, Reply¶6.)
- 15) On May 14, 1996, Leo V. Sims executed a series of quitclaim deeds by which he conveyed to Winnie Kennann certain interests in the Daugherty interest. These deeds were recorded on June 5, 1996. (1stMemo¶4, 1stResp¶6.)
- 16) On May 14, 1996, Leo V. Sims assigned to Winnie Kennann a proportionate share of state and BLM grazing leases associated with the Daugherty interest together with all of

- his interest in a 40 acre tract of real property in Lea County, New Mexico; these assignments and deeds were recorded on June 5, 1996. (1stMemo¶5, 1stResp.¶6.)
- 17) Leo V. Sims retained the possession and control of the transferred properties after the transfers. (AC¶28, Answer¶28.)
 - 18) On June 7, 1996, Aline Sims filed a Verified Motion for Preliminary Injunction in the Lea County case, seeking to enjoin Leo V. Sims from transferring any more property. The motion was set for hearing on June 28, 1996, at 9:00 a.m. (AC¶15, Answer ¶15.)
 - 19) On or about June 27, 1996, Tom and Winnie Kennann loaned the sum of \$400,000 to Leo V. Sims (the "Kennann loan"). In exchange, Leo V. Sims granted a mortgage to the Kennanns (the "Kennann mortgage") which encumbered most, if not all, of Leo V. Sim's real property, together with certain personal property described in the exhibits to the mortgage. (Memo¶6, Resp.3.)(1stMemo¶8 and ¶18, 1stResp.¶8 and ¶11.)
 - 20) This mortgage was recorded on June 28, 1996,(1stMemo¶9 and ¶19, 1stResp.¶8 and ¶11.), at 8:18 a.m. (AC¶33, Answer¶33.)
 - 21) The property encumbered by the \$400,000 mortgage had a value of at least \$1,800,000. (Memo¶7, Resp.3.)
 - 22) Leo V. Sims used the proceeds of the Kennann loan to purchase an annuity. (1stMemo¶21, 1stResp.¶12.)
 - 23) Tom and Winnie Kennann knew, prior to the acquisition of the

Daugherty interest, and prior to the \$400,000 Kennann mortgage transaction, that a substantial judgment would be entered against Leo V. Sims in the Lea County case.

(Memo¶11, Resp.3.)

24) Indeed, the Kennanns were judgment debtors with Leo V. Sims in a judgment entered in the Lea County case for Aline Sims as judgment creditor. (Memo¶15, Resp.3.)

25) On February 18, 1997, Leo V. Sims, as debtor-in-possession filed a Complaint to Avoid Fraudulent Transfers and Obligations Under 11 U.S.C. Section 548, and to Preserve the Property Transferred for the Benefit of the Estate Under 11 U.S.C. Section 550 (the "Complaint"). (1stMSJ¶3, 1stResp.¶2.)(MSJ¶1, Resp.2.) The Complaint initiated this adversary proceeding. Count 1 references the May, 1996 deeds and assignments to Winnie Kennann and states "the transfers ... were done with actual intent to hinder, defraud or delay payment to the Sims estate." Complaint ¶21. Count 2 references the Kennann mortgage and states "the creation of the ... mortgage was done with actual intent to hinder, defraud or delay payment to the Sims Estate." Complaint ¶26. Both Counts 1 and 2 claim that the debtor was insolvent or was rendered insolvent at the time of the transfers. Complaint ¶¶ 19 and 28.

26) Prior to Leo V. Sims filing the Complaint Aline Sims sought to bring the action herself. (Resp.¶20, Reply¶7.)

- 27) On March 11, 1997 the Bankruptcy Court entered an order allowing Aline Sims to intervene in the Complaint as a party plaintiff. (1stMSJ¶1, 1stResp.¶2.)(MSJ¶2, Resp.2.)
- 28) Aline Sims filed her original Complaint in Intervention on April 28, 1997, and an amended Complaint on January 22, 1998 (the "Complaint in intervention"). (1stMSJ¶2, 1stResp.¶2.)(MSJ¶3, Resp.2.)
- 29) At a February 25-26, 1997, hearing before the Hon. Judge Rose (the prior judge assigned to this case), Leo V. Sims testified that he read the February 17, 1997 Complaint before he filed it and that he agreed with its allegations. (1stMemo¶1, 1stResp.¶5)
- 30) At the close of testimony on February 26, 1997, Judge Rose found that Leo V. Sims "...admits and says that there is competent proof of his intent, which was to hinder, defraud or delay creditors by making these various transactions." (1stMemo¶22 and Exhibit E transcript, 1stResp.¶12; Resp. 6-7.)
- 31) On April 8, 1997, the Bankruptcy Court entered an order appointing a chapter 11 trustee. The original trustee resigned and a successor trustee was appointed by order entered May 5, 1997. (1stMSJ¶4, 1stResp.¶2.)(MSJ¶4, Resp.2.)
- 32) Leo V. Sims appealed the Bankruptcy Court order appointing the trustee; the United States Bankruptcy Appellate Panel of

the Tenth Circuit affirmed on December 30, 1997.

(1stMemo¶23 and Exhibit F BAP opinion, 1stResp.¶12.)

- 33) The successor trustee filed an Amended Complaint to Avoid Fraudulent Transfers and Obligations (the "Amended Complaint") on or about July 28, 1997. (1stMSJ¶5, 1stResp.¶2.)(MSJ¶5, Resp.2.)
- 34) On March 2, 1998, the case was converted to Chapter 7 by stipulated order. (MSJ¶6, Resp.2.)
- 35) On April 14, 1998, Gary Ottinger was elected Chapter 7 Trustee, and was substituted as the plaintiff in this adversary proceeding by order filed June 2, 1998. (MSJ¶7, Resp.2.)
- 36) On May 14, 1998, an Order Granting Summary Judgment was entered in this adversary case, and on October 14, 1998, an Amended Order Granting Partial Summary Judgment was entered. (MSJ¶8, Resp.2.)
- 37) The October 14, 1998 Amended Order Granting Partial Summary Judgment (the "Amended Order") avoided certain fraudulent transfers between Leo V. Sims and the Kennanns as to Counts I, II, and III of the Amended Complaint, but reserved the issue of whether the transferees (Kennanns) took the property transferred for value and in good faith or retained a lien or interest in the transferred property. (MSJ¶9, Resp.2.) Specifically, Paragraph 11 of the Amended Order, docket #66, states:

This partial Summary Judgment is entered without prejudice whether any party, transferee or obligee or a transfer or obligation voided by this Judgment that took the property transferred for value and in good faith has a lien on, or may retain any interest transferred, or may enforce any obligation incurred pursuant to 11 U.S.C. § 548(c) and/or § 550(e); and the Court reserves the question of the transferees' retention of a lien or interest in the property until trial on the merits.

- 38) The Kennanns filed a motion for stay pending appeal on October 23, 1998, and a notice of appeal of the Amended Order to the Bankruptcy Appellate Panel on the same date. The Court orally denied the motion for stay on November 13, 1998. On November 18, 1998 Aline Sims objected to the Bankruptcy Appellate Panel hearing the matter, and the appeal was transferred to the United States District Court. The Bankruptcy Court entered its order denying stay pending appeal on January 11, 1999.
- 39) On March 8, 1999, Magistrate Judge Smith entered his Proposed Findings and Recommended Disposition in the appeal, finding that the Court lacked "finality" jurisdiction over the appeal and that an interlocutory appeal was not warranted. His recommendation that the appeal be dismissed was adopted by the United States District Court for the District of New Mexico on April 7, 1999.

DISCUSSION

In their Motion for Partial Summary Judgment against Tom

Kennann and Winnie Kennann on Counts I and II of the Amended Complaint in Intervention the Trustee and Aline Sims seek judgment A) determining that the Kennanns are not good faith transferees under 11 U.S.C. § 548(c), B) setting aside the transfers identified in the Amended Complaint, preserving the property transferred for the benefit of the estate, C) determining that the Kennanns are not entitled to retain any interest in the property transferred and are not entitled to retain a lien on any of the property transferred or any proceeds of sale of such property, and D) avoiding the Kennann mortgage and declaring that it is not a valid lien on any of the property of the estate.

The starting point for resolution of this issue is the statute itself, which states:

[A] transferee ... that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer.

11 U.S.C. § 548(c)(emphasis added). The defense requires a showing of both "value" and "good faith"; failure to establish either one will be fatal to the defense. This summary judgment motion is directed only to the good faith requirement, so the Court does not address any issues related to the value received in relation to the properties transferred.

A defendant claiming the § 548(c) defense has the burden of

proof. Jobin v. McKay (In re M&L Business Machine Company, Inc.) 84 F.3d 1330, 1338 (10th Cir.) cert. denied 519 U.S. 1040 (1996). See also 4 Collier on Bankruptcy ¶548.04[1] at 548-24 (Lawrence P. King ed., 15th ed., rev. 1999). In the context of this summary judgment motion, this means that the Kennann's need to show a dispute as to any single material fact, or question of law, related to their claim of good faith. The Court finds none.

With the Jobin case, the Court of Appeals for the Tenth Circuit joined the majority of Courts in deciding that the objective standard for determining good faith is proper under 11 U.S.C. § 548(c). Jobin, 84 F.3d at 1338. "If the circumstances would place a reasonable person on inquiry of a debtor's fraudulent purpose, and a diligent inquiry would have discovered the fraudulent purpose, then the transfer is fraudulent." Id. quoting In re Agric. Research & Technology Group, 916 F.2d 528, 536 (9th Cir. 1990). See also Dean v. Davis, 242 S.Ct. 438, 444 (1917)("A transfer, the intent (or obviously necessary effect) of which is to deprive creditors of the benefits sought to be secured by the Bankruptcy Act, 'hinders, delays or defrauds creditors' within the meaning of § 67e." and allows avoidance of a mortgage given to secure a substantially contemporaneous advance.) Also compare McDougal v. Central Union Conference Ass'n of Seventh Day Adventists, 110 F.2d 939, 941 (10th Cir. 1940)(holding that if person has knowledge or notice of facts and

circumstances as would cause a person of reasonable prudence to make inquiry, and if such inquiry would lead to knowledge of the situation, he is chargeable with that knowledge (construing former Bankruptcy Act preference section making preferences voidable if creditor had reasonable cause to believe a transfer would be preferential.))

A determination of good faith is primarily factual. Jobin, 84 F.3d at 1338. From the factual record developed by the parties in this case, the Court can easily find that the circumstances would place a reasonable person on inquiry of Leo V. Sim's fraudulent purpose, and that a even a cursory inquiry would have discovered that fraudulent purpose.

The facts on which the Court relies are as follows:

- 1) Winnie Kennann is Leo V. Sim's sister.
- 2) Leo V. Sims had borrowed \$300,000 from Lea County State Bank to acquire certain properties, and was unable to make interest or principal payments on the note. Winnie Kennann had actual knowledge that the note was in default and that foreclosure was threatened.
- 3) The Kennann's were co-plaintiffs with Leo V. Sims in the Lea County case, which had been tried from January 29, 1996 to February 7, 1996. The Court made its oral ruling on February 7, 1996, and entered a decision on March 28, 1996 finding Leo V. Sims liable to defendant Aline Sims for an amount in excess of \$4.6 million. The Kennanns were

represented by counsel in this case.

- 4) On May 14, 1996, after the Lea County case ruling, Leo V. Sims conveyed the Daugherty interest to Winnie Kennann; she in turn paid off the mortgage and its accrued interest.²
- 5) After the May 14, 1996, conveyance Leo V. Sims retained possession and control of the properties.
- 6) On June 7, 1996, Aline Sims sought an injunction against further transfers of property. This motion was a document of public record in the Lea County case. Hearing was set for June 28, 1996.
- 7) The day before the injunction hearing, Leo V. Sims granted a mortgage on substantially all of his property to Winnie Kennan. The mortgage was recorded forty-two (42) minutes before the injunction hearing was to start.
- 8) Leo V. Sims used the proceeds of the mortgage to purchase an annuity.

Overall, the Court finds that being an insider relative having a)

²The Court notes that the record shows that the amount paid was simply a function of the mortgage balance. See Answer ¶¶ 54-57 (debt in excess of \$367,000; purchase price of \$366,772.90.) This transaction between insiders is suspect because there is no indication of what the property's actual value was. Insider transfers should be well documented to establish arms length dealing to escape suspicion of fraudulent intent. Although, as discussed above value is not at issue in this summary judgment motion. The purchase of the interests in an amount directly corresponding to the amount of indebtedness rather than at fair market value (whatever that might turn out to be following a reasonable investigation) is evidence of the lack of an arms-length transaction. Brown v. Third National Bank (In re Sherman), 67 F.3d 1348, 1356 (8th Cir. 1995).

actual knowledge of the status of the Lea County case (and, furthermore, being a party to the case) and b) actual knowledge of Leo V. Sim's bank difficulties, any reasonable person would have made further inquiry.

In support of this finding, the Court looks at the above facts in light of the "badges of fraud" discussed in many fraudulent transfer cases. See e.g., Brown v. Third National Bank (In re Sherman), 67 F.3d 1348, 1353-54 (8th Cir. 1995). The badges of fraud discussed in that case are whether:

- 1) The transfer or obligation was to an insider;
- 2) The debtor retained possession or control of the property transferred after the transfer;
- 3) The transfer or obligation was disclosed or concealed;
- 4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- 5) The transfer was of substantially all the debtor's assets.
- 6) The debtor absconded;
- 7) The debtor removed or concealed assets;
- 8) 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;
- 9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- 10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
- 11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Id. at 1354. In this case, badges 1, 2, 4, 5, 9 and 10 were at least implicated. Further inquiry would have shown that Leo V. Sims was insolvent, that he was transferring property out of his

name to avoid the previously announced judgment in favor of Aline Sims³, that there was a pending motion to prevent further transfers in the Lea County case, and that he was insolvent.

Kennanns' Arguments

1. In defense of their opposition to the motion for summary judgment, Winnie Kennann claims she had no knowledge of what Leo V. Sims intended to do with the loan proceeds, Resp.¶18, or that he was attempting to hinder or delay creditors, Resp.¶23. These statements are supported by an affidavit.⁴ Under the Tenth Circuit's objective standard, however, actual knowledge is not relevant. Jobin, 84 F.3d at 1338. Further, Winnie Kennan's duty to investigate did not go to the question of what Leo V. Sims intended to do with the loan proceeds; rather, she was on notice of a duty to investigate whether Leo V. Sims was attempting to transfer assets (which would have had the effect of hindering or

³Winnie Kennann's affidavit attached to the Response as Exhibit A states that she loaned the money to Leo V. Sims to avoid having any more partners in the ranch. If the bank had foreclosed, she could have purchased the property for the amount of the debt, which is what she paid Leo V. Sims for the property. The bank would never have been a "partner". A more logical conclusion derived from this statement is that either Leo V. Sims or she wanted to prevent Aline Sims from obtaining a judgment lien on the property. For the purposes of this motion, however, the Court takes the affidavit at face value. Under Jobin her intent is not dispositive or arguably even relevant; the issue is whether under the facts existing at the time she should have inquired into Leo V. Sim's intent.

⁴Tom Kennann filed no affidavit.

delaying creditors). That attempt to transfer is the "fraudulent scheme" or "fraudulent purpose" of which Winnie Kennann claims no knowledge, e.g. Resp.11, but of which Winnie Kennan was on notice to inquire about.

2. The Kennanns also argue that there is no factual basis for a finding of actual fraudulent intent underlying the transfer. This, however, is the issue on which Judge Rose granted partial summary judgment. See Amended Order. The Court will not review this order.
3. Next, the Kennanns argue that no assets were placed beyond the reach of creditors. This requirement is not an element of 11 U.S.C. § 548(a)(1). The subsection only requires a transfer made with an intent to hinder, delay or defraud creditors. There is no requirement that the estate be depleted thereby. See Brown 67 F.3d at 1355 n.6. See also Hayes v. Palm Seedlings Partners-A (In re Agricultural Research and Technology Group, Inc., 916 F.2d 528, 535 (9th Cir. 1990)("Even if the transferee gave reasonably equivalent value in exchange for the transfer avoided ..., the transferee may not recover such value if the exchange was not in good faith because good faith is 'indispensable' for the transferee who would recover any value given pursuant to 11 U.S.C. § 548(c).") The deeds and mortgage granted by the debtor hindered and delayed Aline Sims' and then the Trustee's collection efforts. The evil aimed at in

§ 548(a)(1) is merely the delaying and hindering. That is sufficient to state a cause of action under § 548(a)(1).

See Dean v. Davis, 242 S.Ct. 438, 444 (1917). Furthermore, this was already decided by Judge Rose in the Amended Order.

4. The Kennanns also argue that they acted in good faith because mere knowledge of debtor's financial distress is not sufficient to impute bad faith to them. This argument misconstrues the requirements of Jobin. The test is not actual bad faith, only a duty of prior investigation in suspicious circumstances.
5. Finally, the Kennanns claim that allowing relief on this complaint would be prohibited by 11 U.S.C. § 550(d), which allows a trustee only a single satisfaction. They cite 3 Norton Bankruptcy Law and Practice 2d, § 58:8 ("Norton"), for the proposition that if value is given there is "no reason for the trustee to challenge such a transfer because the estate will realize no benefit." While this may be true for bona fide purchasers, to which the treatise is referring with that statement, the treatise also points out:

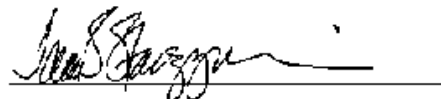
A transferee will receive no lien to the extent of value given if the value is not given in good faith and the transaction is avoidable under § 548. The transferee must return the property, and receives only an unsecured claim against the debtor's estate for the value given.

Id. (citations omitted).

This argument about double satisfaction fails for two

reasons: 1) it is premature, because the estate has not been awarded any other relief yet, and 2) the relief requested does not defeat the Kennann's claim for the money paid. See Brown 67 F.3d at 1358. The Kennanns can assert an unsecured claim in the bankruptcy for the amounts advanced. See also Norton §58:8.

For the reasons set forth above, the Court finds that the Motion for Partial Summary Judgment is well taken. The Kennanns are not transferees or obligees that took for value and in good faith. The Kennanns therefore have no lien on, nor may they retain, any interest transferred that was the subject of this adversary proceeding. A separate order will be entered granting the motion for summary judgment. Plaintiffs are directed to prepare a form of partial judgment in conformity with this opinion.



Hon. James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the following:

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PO Box 608
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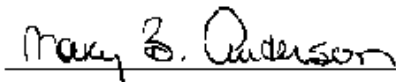
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