

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Sidney B. Brooks**

In re:)	
)	
VALLEY MORTGAGE, INC.)	Bankruptcy Case No. 10-19101-SBB
)	Chapter 11
Debtor.)	
_____)	
)	
VMI Liquidating Trust)	
Dated December 16, 2011)	
)	
Plaintiff,)	Adv. Proc. No. 12-01231-SBB
)	
v.)	
)	
The Harvey Maveal Trust,)	
)	
Defendant.)	
)	

**ORDER DENYING THE DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT**

I. BACKGROUND AND FACTS

THIS MATTER is before the Court on the Debtor’s Complaint (Docket No. 1) which seeks the recovery of alleged fraudulent transfers made to the Defendant, the Harvey Maveal Trust, during the time the Debtor was being used as means to carry on a Ponzi scheme perpetrated by Phillip R. Lochmiller. The Defendant filed an Answer (Docket No. 7) and now seeks an order granting its Motion for Summary Judgment (Docket No. 13), which is now before this Court.

At issue are transfers the Defendant received from the Debtor during the course of the Ponzi scheme. In 2003, the Defendant made its initial investment of \$100,000 with the Debtor. The next year, in 2004, the Defendant invested an additional \$50,000 with the Debtor. During the entire time the Debtor held the Defendant’s investment, the Debtor was being used to perpetrate a Ponzi scheme and the Defendant received regular payments from this scheme.

On April 1, 2007, the Defendant received its last payment from the scheme. In total, the Defendant allegedly received principal and interest payments of \$218,713.47

(hereinafter referred to as the “Total Transfers”). Given that the Total Transfers exceed the Defendant’s initial investment of \$150,000 by \$68,713.47 (hereinafter referred to as the “Net Winnings”), the Defendant is what is commonly referred to in Ponzi scheme cases as a “Net Winner.” By way of its Complaint, the Debtor now seeks to recover, at minimum, the Net Winnings under a theory that those funds were transferred to the Defendant with actual intent to hinder, delay, or defraud creditors.

In support of its Motion for Summary Judgment, the Defendant argues that it is entitled to keep the Total Transfers, including the Net Winnings, received from the Debtor because it received those transfers in good faith and for reasonably equivalent value. In addition, the Defendant argues that the Plaintiff’s claim under section 544 of the Code is untimely and barred by the applicable statute of limitations.

In response to the Defendant’s motion, the Debtor argues that its claim for recovery is timely and that the Defendant’s asserted defenses are unavailing under the prevailing and majority view of the law on Ponzi schemes.

For the reasons stated herein, the Court DENIES the Defendant’s Motion for Summary Judgment.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.¹ The moving party bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law.² In applying this standard, this Court examines the factual record and reasonable inferences therefrom in light most favorable to the non-moving party.³

III. ANALYSIS

A. Good Faith and Reasonably Equivalent Value

The Defendant argues that it is entitled to judgment as a matter of law because there is no genuine dispute that the Defendant took the Total Transfers in good faith or that the Defendant gave reasonably equivalent value for such transfers. However, in arguing its case for relief, the Defendant, admittedly, applies case law which represents a minority view on how cases such as the one before this Court should be decided.⁴ In

¹ FED.R.CIV.P. 56(d) made applicable to adversary proceedings by FED.R.BANKR.P. 7056.

² *Whitesel v. Sengenberger*, 222 F.3d 861, 867 (10th Cir. 2000).

³ *Schwartz v. Bhd. of Maint. of Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

⁴ Defendant Harvey Maveal Trust’s Motion and Brief in Support of Summary Judgment, pg. 9 (Docket No. 13).

contrast, with regard to Ponzi schemes, the prevailing and majority view on defenses based on good faith and reasonably equivalent value is that such defenses are unavailing. The general rule is that defendants must turnover to the trustee amounts they received from the Ponzi scheme which exceed their principal investment, regardless of good faith or reasonably equivalent value.⁵

The law applied by the Defendant differs substantially and materially from the majority and prevailing view. For that reason, the Court finds that the Defendant is not entitled to judgment as a matter of law and the Defendant's Motion for Summary Judgment is DENIED as to any issue regarding good faith and reasonably equivalent value.

B. Statute of Limitations Has Not Expired

Section 544 of the Code contains what are commonly referred to as the trustee's strong-arm powers. As detailed in this section of the Code, those powers include the ability "to avoid any transfer of an interest of the debtor in property... that is avoidable under applicable law[.]"⁶ Generally, "applicable law" is interpreted to include state law causes of action, such as here where the Debtor's claim for relief is predicated upon the Colorado Uniform Fraudulent Transfer Act (CUFTA).⁷

Under CUFTA, a transfer is fraudulent if the debtor made the transfer:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor;

(I) 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

(II) Intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.⁸

⁵ See *Donnell v. Kowell*, 533 F.3d 762, 771 (9th Cir. 2008)(citing *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 AM. BANKR. L. J. 157, 168-69 (1998)(surveying federal district court and bankruptcy cases)).

⁶ 11 U.S.C. § 544(b)(1).

⁷ *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996)("The trustee's powers under the section are predicated on non-bankruptcy law, usually state law, applicable to the transaction sought to be avoided."); 5 *Collier on Bankruptcy* ¶ 544.06[2] n.18 (Alan N. Resnick & Henry J. Somme reds., 16th ed.).

⁸ C.R.S.A. § 38-8-105.

The Debtor bases its theory of recovery on section (a), which addresses claims for actual fraud, as opposed to section (b), which addresses claims for constructive fraud. Under both theories of fraud, a claim is timely if the claim is brought within four years after the transfer. However, unlike claims for constructive fraud under section (b), a plaintiff may bring a claim for actual fraud under section (a) more than four years after the transfer if the claimant did not or could not have reasonably discovered the fraudulent transfer during those four years. In such cases, the claimant has one year after the transfer was or could have been discovered to bring the claim.⁹

Under section 546 of the Code, the statute of limitations for state law actions brought under section 544 may be extended for a period of time. Where a statute of limitations for a state law action has not run before the debtor files for bankruptcy, section 546 provides the trustee in bankruptcy with some additional time to determine which actions, predicated on state law, he or she would like to bring on behalf of the debtor. “Without this [breathing spell], a trustee who does not immediately determine what potential claims are available for the recovery of assets may forever be barred from asserting those claims if the statute of limitations expires early in the bankruptcy[.]”¹⁰

Under Section 546(a)(1), “An action under section 544 may not be commenced after... the later of:¹¹

- (A) 2 years after the entry of the order for relief; or
- (B) 1 year after the appointment.. of the first trustee[.]¹²,”

Reading both CUFTA and section 546 in conjunction, the debtor may bring a CUFTA action under 544 within two years following the debtor’s bankruptcy petition so long as CUFTA’s statute of limitations has not run prior to the filing of the debtor’s bankruptcy petition.

Here, the Debtor complied with the limitation stated in section 546 by filing its Complaint less than two years following the filing of its bankruptcy petition. Therefore, the Debtor may timely attempt to recover alleged fraudulent transfers under CUFTA.

Under CUFTA, the Debtor has alleged causes of action based on actual fraud. According to CUFTA’s statute of limitations, a debtor may seek to recover any fraudulent transfer, whether constructively or actually fraudulent, which occurred less

⁹ C.R.S.A. § 38-8-110.

¹⁰ *In re Dry Wall Supply, Inc.*, 111 B.R. 993, 937 (D.Colo. 1990).

¹¹ An analysis under § 546(a)(2) is inapplicable because the case has not been closed or dismissed; thus, (a)(1) is “earlier” than (a)(2), and, thus, applicable to the facts at hand.

¹² 11 U.S.C. § 546(a)(1).

than four years prior to the filing of the Debtor's bankruptcy petition. Since the Debtor filed for bankruptcy on April 19, 2010, four years prior is April 19, 2006. Thus, the Debtor may attempt to recover any alleged fraudulent transfer which occurred on or after April 19, 2006. The Court deems such recovery efforts to be within the statute of limitations and declines to grant summary judgment in favor of the Defendant for any alleged fraudulent transfers which occurred on or after April 19, 2006.

Further, as stated above, in cases of actual fraud, CUFTA allows a debtor to bring a fraudulent transfer claim more than four years after the transfer if the debtor did not or could not have reasonably discovered the transfer during those four years. In such cases, the debtor has one year after the transfer was or could have been discovered to bring the claim.¹³ A debtor's ability to discover a fraudulent transfer is a question of fact and, at this stage of the present case, the Court does not have enough information to determine that fact in favor of the Defendant. Therefore, the Court declines to grant summary judgment in favor of the Defendant for any alleged fraudulent transfers, conveyed with actual fraudulent intent, which occurred prior to April 19, 2006.

IV. ORDER

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment is DENIED.

Dated this 18th day of September, 2013.

BY THE COURT:



Sidney B. Brooks,
United States Bankruptcy Judge

¹³ C.R.S.A. § 38-8-110.