

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**
Bankruptcy Judge Elizabeth E. Brown

In re:

THOMAS MICHAEL CLARK,

Debtor.

Bankruptcy Case No. 16-19949 EEB

Chapter 7

HARVEY SENDER, chapter 7 trustee,

Plaintiff,

v.

WENDY LEA DUTTON,

Defendant.

Adversary Proceeding No. 18-1297 EEB

**ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
DISMISSING PLAINTIFF'S COMPLAINT**

THIS MATTER is before the Court on Plaintiff's Motion for Summary Judgment and Defendant's Memorandum in Support of Defenses to Plaintiff's Complaint. Both parties request the Court to enter judgment in their favor based on the undisputed facts set forth in their Stipulation. In this adversary proceeding, the Plaintiff ("Trustee") seeks to avoid the Debtor's transfer of a one-half interest in his former marital home to the Defendant and to recover one-half of the home's non-exempt value. The Court hereby FINDS and CONCLUDES:

I. STIPULATED FACTS

The Debtor originally purchased a home in Littleton Colorado (the "Property") in his own name and he was the only obligor on the VA mortgage loan secured by the Property. During their marriage, the Debtor transferred title to the Property to himself and the Defendant in joint tenancy with right of survivorship. Both parties resided in the Property until they separated in August 2013, at which time the Debtor moved out.

On November 6, 2013, the Debtor and the Defendant signed a "Separation Agreement Memorandum of Understanding" (the "MOU"), providing for the division of their marital assets and liabilities. It reflected their intent that, after a period of time, the

Defendant would obtain full ownership of the Property and assume full responsibility for the mortgage loan. They agreed that “[f]ive years from the date this MOU is executed, [the Debtor] will begin the process of transferring and assigning the loan and all interest of the [Property] to [the Defendant].” The MOU also provided that the Debtor would pay the Defendant \$1,050 twice monthly until January 1, 2019, and that the Defendant would use those funds to pay the “ongoing financial responsibilities” of the parties, including their joint credit cards. Two months later, on January 7, 2014, the Debtor and the Defendant filed for divorce. On April 21, 2014, the state court entered a decree of dissolution that expressly incorporated the terms of the MOU.

After the divorce, the Debtor was unable to make all his \$1,050 bi-monthly payments to the Defendant. Following mediation, they entered into an Addendum to the MOU, modifying the timelines and allowing the Debtor to cure his defaults. In it, the Debtor also gave the Defendant permission to communicate with the VA and the mortgage lender directly. It also expressly provided that the Debtor “has no current or future, personal or financial interest in the marital home.” With these provisions, the Defendant was able to arrange a debt consolidation plan for the parties’ marital debts. She also contacted the mortgage lender to modify the loan, but the lender first required her to obtain a quitclaim deed from the Debtor. The Debtor executed the quitclaim deed on July 26, 2015. The Defendant recorded it on August 28, 2015. The Debtor was insolvent before and after he executed the quitclaim deed.

Unfortunately, the parties’ financial situation did not improve. On October 7, 2016, less than two years after he signed the quitclaim deed, the Debtor filed this bankruptcy case. On October 26, 2016, the Defendant filed her own bankruptcy case. She listed the property and claimed a homestead exemption in it. The Trustee did not administer the Property and, by operation of 11 U.S.C. § 554(c),¹ the Property was abandoned to her when the Court closed her case on August 23, 2017. On March 19, 2018, the Defendant sold the Property to a third party for \$405,035. She received \$82,837.27 in net proceeds from the sale.

The parties agreed that market value of the Property, the balance of the mortgage loan, and the equity in the Property on the following dates are as shown in the table below.

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¹ Unless specifically identified otherwise, all further references to “section” or “§” are to the Bankruptcy Code, Title 11, United States Code.

Date	Value	Mortgage	Equity
February 27, 2014 (date dissolution action filed)	\$280,000	\$280,540	-\$540
April 21, 2014 (date of decree of dissolution)	\$301,000	\$279,412	\$10,519
July 26, 2015 (date quit-claim deed executed)	\$339,000	\$270,802	\$48,510
March 9, 2018 (date Defendant sold Property)	\$405,035	\$293,383	\$111,617

The Trustee argues that the Debtor received no consideration when he quitclaimed his interest in the Property and that he was insolvent at the time. Therefore, he claims the quitclaim deed was a constructively fraudulent transfer that he can avoid under § 548(a)(1)(B). Pursuant to § 550(a), the Trustee requests the Court enter a judgment in his favor for the value of the property transferred, which he computes as one-half of the net proceeds from the sale of the Property (\$41,418.64), less one-half of the \$75,000 homestead exemption (\$37,500), or \$3,918.64.

II. DISCUSSION

A. Section 548(a)(1)(B)

The elements of a constructive fraudulent conveyance claim under § 548(a)(1)(B) are: (1) the debtor transferred an interest in property or incurred an obligation; (2) within two years of the filing of his bankruptcy petition; (3) while the debtor was insolvent or became insolvent by means of the transfer or obligation; and (4) the debtor received less than reasonably equivalent value in exchange for the transfer or obligation. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994) (“*BFP*”). In order to prevail, the Trustee must establish all four elements. *Weinman v. Walker (In re Adam Aircraft Industries, Inc.)*, 805 F.3d 888, 894 (10th Cir. 2015) (“*Adam Aircraft*”).

The parties stipulated that the Trustee has established both the first and third elements. They agree that, prior to his bankruptcy case, the Debtor owned a one-half interest in the Property that he transferred to the Defendant and that he was insolvent at all material times. They disagree on the second and fourth elements. The crux of their

dispute centers on the date of the transfer: whether it occurred when the divorce court entered the divorce decree (outside the two-year look back period) or when the Debtor executed the quitclaim deed (within the two-year period). However, the Court does not need to reach this issue. Regardless of which date governs, the Debtor received reasonably equivalent value in exchange for the transfer. Thus, the Trustee is unable to prevail because he cannot establish the fourth element. !

B. Reasonably Equivalent Value

To determine whether a debtor has received reasonably equivalent value in exchange for a transfer or obligation, the Court must consider “whether the debtor has received value that is substantially comparable to the worth of the transferred property.” *BFP*, 511 U.S. at 548. Reasonably equivalent means approximately or roughly equivalent. *Id.* at 538 n.4. For the purposes of § 548, the Bankruptcy Code defines “value” as “property, or satisfaction or securing of a present or antecedent debt of the debtor.” § 548(d)(2)(A). Unlike the law on preferential transfers, with fraudulent conveyances, repayment of an existing debt does not render the transfer avoidable. See *Sender v. Buchanan (In re Hedged-Investments Associates, Inc.)*, 84 F.3d 1286, 1289 (10th Cir. 1996). See also 5 *Collier on Bankruptcy* ¶ 548.03[5] (16th ed. 2020) (explaining that a dollar-for-dollar payment on a preexisting debt constitutes “full value” and is not avoidable as a constructively fraudulent transfer). Under this theory, a transfer in satisfaction of a pre-existing obligation does not prejudice creditors because, while the debtor no longer has the asset transferred, the transfer results in the proportionate reduction in the debtor’s liabilities. *Merrill v. Abbott (In re Independent Clearing House Co.)*, 77 B.R. 843, 859 (D. Utah 1987).

Here, the Debtor incurred an obligation to transfer his interest in the Property to the Defendant when he signed the MOU. Under Colorado law, the MOU constitutes an enforceable contract between spouses when it provides for maintenance and/or the division of property. Colo. Rev. Stat. § 14-10-112; *In re Marriage of Deines*, 608 P.2d 375, 377 (Colo. App. 1980). When the terms of the separation agreement are later incorporated into a divorce decree, as happened here, they merge into the decree. The decree does not change the force and effect of the separation agreement’s terms, but only the means by which the parties may enforce them. Colo. Rev. Stat. § 14-10-112(5); *Lay v. Lay*, 425 P.2d 704, 706 (Colo. 1967). Under Colorado law, the MOU and the divorce decree created a legally enforceable obligation on the Debtor’s part to transfer his entire interest in the Property to the Defendant. When he executed the quitclaim deed, the Debtor satisfied this pre-existing obligation. With the cancellation of this obligation, he received “reasonably equivalent value” in exchange for the transfer under § 548(d)(2).

This reasoning, however, does not insulate all transfers between divorcing spouses from avoidance. In *Adam Aircraft*, the Tenth Circuit opined that, when a debtor makes a transfer that satisfies a pre-existing obligation, a court considering a constructive fraudulent transfer claim under § 548(a)(1)(B) must evaluate not only the consideration the debtor received at the time of the transfer, but also the adequacy of

the consideration the debtor received in exchange for incurring the obligation in the first place. The court explained that:

The statute's language requires that a court look at two different series of dates (both the dates when the obligations were initially undertaken and the dates when the transfers were made) and answer two questions about each date: (1) did [the debtor] receive less than reasonably equivalent value?; and (2) was [the debtor] insolvent? [The trustee] can avoid a particular obligation or transfer if – on the date of the particular obligation or transfer – the answer to both questions is yes.

Adam Aircraft, 805 F.3d at 897.

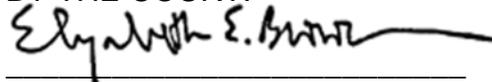
However, in the *Adam Aircraft* case, the debtor both incurred the obligation and made the transfer within the two-year look back period. That is not the case here. Only under a longer reach back period under a state fraudulent conveyance statute could the Trustee avoid the original obligation under the MOU. But even if the Trustee had brought such a claim in this case, it would not have changed the result. The parties stipulated that, on the date the Debtor and the Defendant filed their divorce case, the Property was worth less than the outstanding balance of the mortgage. At oral argument, the Trustee conceded that he had no evidence with which to establish the Property was worth more than the loan balance three to four months earlier when they signed the MOU. Thus, at the time he incurred the obligation to transfer his interest in the Property, the Defendant's agreement to assume sole responsibility for the mortgage debt had greater value than the Property's value. Essentially, the Debtor agreed to transfer an equity interest that was worthless or of negative value. As such, the Trustee could not show that the Debtor received less than reasonably equivalent value in exchange for the obligation he incurred under the MOU.

III. CONCLUSION

For the foregoing reasons, the Court ORDERS that Plaintiff's Motion for Summary Judgment is DENIED, and the Defendant is entitled to a judgment dismissing Plaintiff's claims with prejudice.

DATED this 20th day of July, 2020.

BY THE COURT:



Elizabeth E. Brown, Bankruptcy Judge