

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
DANIEL P. WENZ,	§	CASE NO. 00-32505-SAF-7
DEBTOR.	§	
	§	
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CADLEWAY PROPERTIES, INC.,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 00-3363
	§	
DANIEL P. WENZ,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

Daniel P. Wenz, the debtor, moves for summary judgment dismissing Cadleway Properties, Inc.'s adversary proceeding objecting to his discharge pursuant to 11 U.S.C. § 727(a)(2)(A). Cadleway opposes the motion. The court held a hearing on the motion on July 18, 2001.

An objection to the granting of a discharge constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§157(b)(2)(J), 1334.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Anderson, 477 U.S. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 323. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

Cadleway objects to Wenz's discharge, pursuant to 11 U.S.C. § 727(a)(2)(A), which provides, in pertinent part:

- (a) The court shall grant the debtor a discharge, unless-
 - (2) the debtor, with intent to hinder, delay, or defraud a creditor . . .

has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed-

(A) property of the debtor, within one year before the date of the filing of the petition[.]

See id. Wenz contends that he disclosed to Cadleway, or to related entities, transfers of his property more than one year before the filing of the bankruptcy petition, thereby precluding an action under §727(a)(2)(A). Cadleway invokes the doctrine of continuing concealment which provides that concealment of property of the debtor which continues into the year before the bankruptcy constitutes a form of concealment that occurs within one year before the filing of the bankruptcy. Thibodeaux v. Oliver (In re Oliver), 819 F.2d 550, 554-55 (5th Cir. 1987); FDIC v. Sullivan (In re Sullivan), 204 B.R. 919, 939 (Bankr. N.D. Tex. 1997). Cadleway alleges a pattern of continuing concealment, culminating with the execution of a trust instrument by the debtor's father in 1999, which grants Wenz powers and interests in a trust which contains, among other assets, interests in Lone Source Realty Group, Inc. and Croeseus, Inc., entities the debtor previously transferred to his father. Cadleway maintains that genuine issues of material fact, including the issue of fraudulent intent on the part of the debtor, preclude disposition of the adversary proceeding by summary judgment.

Wenz moves for summary judgment on the basis that he

disclosed his financial affairs to The Cadle Company II in connection with the settlement of a note acquired by the Cadle Company II, and as part of the disclosure, provided Cadleway with information concerning the operations of Lone Source and Croeseus Inc.¹ Wenz denies having an interest in Lone Source or Croeseus following the transfer of his stock in these entities to his father.

On July 6, 1990, the FDIC, in its capacity as receiver for Search National Bank, assigned to The Cadle Company II, Inc., a note payable by Wenz for the principal balance of \$26,324.18. In 1995 Wenz settled his obligation on the note with The Cadle Company II. Wenz agreed to monthly payments and to provide Cadleway with a percentage of the net leasing and brokerage commissions received by Wenz for managing Collin Creek Business Park II, a Cadleway property that Wenz had been negotiating leases for since 1994.

The Search National Bank note is not the basis of Cadleway's claim in the underlying bankruptcy case. Rather, Cadleway's claim for \$10,000,000 is based on a judgment it acquired in 1998, issued in October 1992, in a state court proceeding styled

¹Cadleway Properties, Inc., and The Cadle Company II are separate legal entities. Wenz refers to Cadle entities in his brief as the Cadle Company. The plaintiff does not distinguish among the Cadle entities, i.e. in terms of which company was assigned the note or the judgment against Wenz, which company's property Wenz managed, which company Wenz made disclosures to, etc. For purposes of this motion, the court accepts this general reference.

American Federal Bank v. Daniel P. Wenz. However, the settlement of the note indebtedness is relevant to this adversary proceeding because Wenz presents summary judgment evidence concerning disclosures of his financial affairs which he provided to Randall Lindley, the attorney at Bell, Nunnally & Martin, who negotiated settlements with Wenz of both the note and the judgment. The disclosures indicate that Wenz was working for Lone Source, a d/b/a of Croeseus, and document his income from these entities and other assets.

Cadleway does not deny that disclosures were made in connection with the 1995 settlement of the note. Cadleway invokes Thibodeaux v. Oliver (In re Oliver), 819 F.2d 550 (5th Cir. 1987) for the proposition that it is not the concealment of the transfer that subjects a transaction to § 727, but rather the debtor's continuing concealment of a beneficial ownership interest in the property transferred.

Cadleway provides summary judgment evidence chronicling a series of transactions between Wenz and his father, William Wenz, which Cadleway argues demonstrates Wenz's intent to hinder, delay and defraud his creditors.

On January 10, 1992, Wenz transferred 500 shares of Croeseus, representing 50% of the stock of Croeseus, to his father. On January 8, 1993, Wenz transferred 500 shares of Lone Source, representing 25% of the stock of Lone Source, to his

father. The father paid book value for the stock.

Cadleway argues that, in spite of the transfer, Wenz retained the use, possession, and benefit of the property up to and after the filing of the debtor's bankruptcy. Cadleway presents summary judgment evidence that Wenz has been the president of Lone Source from its incorporation in 1988 until the present, as well as evidence that Wenz served as the president of Croeseus until last year. Wenz has check-writing authorities for these corporations. He has also received loans from Croesus and has received salary, bonuses, and expense reimbursements from Lone Source. In October 1995 Wenz signed a personal guarantee relating to Croesus and another entity. Lone Source provides Wenz with various benefits, including tickets to sporting events and an insured Lexus. While Wenz's tax records reflect he has earned substantial sums from Lone Source and Croeseus, Wenz acknowledged in his June 8, 2001 deposition, that his father, the ostensible owner of the stock, has received a salary of less than \$50,000 a year from the companies and no distribution.

In February 1999 Cadleway sought the post-judgment deposition of the debtor, in its efforts to collect on the American Federal Bank judgment that it obtained in 1998. Four days before the deposition, the debtor's father transferred 2,000 shares in Lone Source, 1,000 shares in Croeseus, and shares in various other entities to St. Joseph Holding Company, Inc., an

entity incorporated in February 1999. Two days later, and two days before the deposition, the debtor's father transferred 95% of the stock of St. Joseph Holding Company to the William R. & Dorothy M. Wenz Trust.

Wenz represents that his interest in the trust is worthless. But the trust allows the trustees, in their uncontrolled discretion, to distribute any portion of the trust to Wenz, makes Wenz the "primary and most important beneficiary of the Trust during his lifetime," and gives Wenz the power to remove any trustee without cause. Whenever Wenz and his wife resolve their financial difficulties, Wenz may become co-trustee or sole trustee of the trust.

In support of his motion for summary judgment, Wenz refers to his affidavit, with attachments, and to the deposition testimony of his father, William Wenz, positing that the stock transfers were a way for William Wenz to control Lone Source and Croesus, which made him more comfortable about continuing to invest in the entities, while allowing him to enjoy certain advantageous tax consequences. At oral argument, counsel for Wenz asserted that the trust was merely a financial planning tool. The competing summary judgment evidence concerning transfers to the trust and the provisions of the trust require resolution at trial.

Cadleyway moves to strike certain portions of Wenz's

affidavit, based on Fed. R. Civ. P. 56(e), made applicable by Bankruptcy Rule 7056. Cadleway argues that certain portions of the affidavit contain conclusory, self-serving statements through which Wenz denies having secret dealings with his father, which are unsupported by facts. The court declines to rule on the objection because even if the debtor's affidavit is taken into consideration in its entirety, it only serves to create genuine issues of material fact which preclude summary judgment in favor of Wenz.

Cadleway has established that the transfers to the trust and the provisions of the trust document raise genuine issues of material fact requiring trial.

Based on the foregoing,

IT IS ORDERED that the motion of Daniel Wenz for summary judgment dismissing the adversary proceeding is **DENIED**.

Signed this _____ day of August, 2001.

Steven A. Felsenthal
United States Bankruptcy Judge