

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION**

**IN RE: MICHAEL L. PENNEY AND
BELINDA S. PENNEY,**

**Case No. 4:19-bk-11746J
(Chapter 7)**

Debtors.

RICHARD L. COX, TRUSTEE

PLAINTIFF

AP Case No. 4:20-ap-01035

KRISTY NICOLE PENNEY

DEFENDANT

**ORDER GRANTING IN PART AND DENYING IN PART
MOTION FOR SUMMARY JUDGMENT**

Before the Court is the *Motion for Summary Judgment* (the “**Motion**”) (Doc. No. 32) filed by the Plaintiff, Richard L. Cox, Trustee (the “**Trustee**”), along with a brief in support of same (Doc. No. 33), and a *Statement of Undisputed Material Facts* (“**SUF**”) (Doc. No. 34). Also before the Court is the *Response to Motion for Summary Judgment* (the “**Response**”) (Doc. No. 36) filed by the Defendant, Kristy Nicole Penney (the “**Defendant**”), along with her brief in support of same (Doc. No. 37), and *Statement of Disputed Material Facts* (“**SDF**”) (Doc. No. 38). The Trustee also filed a reply in support of his motion (the “**Reply**”) (Doc. No. 39).¹

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(H). For the following reasons, the Court finds the Motion should be granted in part and denied in part. *See* FED. R. CIV. P. 56(a) (“The court should state on the record the reasons for granting or denying the motion.”).

¹ The Reply was untimely filed. Under this Court’s General Order No. 37, a movant has “fourteen (14) days to reply after the response is served.” Gen. Order No. 37, Bankr. E & W. Dist. of Ark.

II. Facts

The underlying bankruptcy case was filed on April 1, 2019, by Michael L. Penney (the “**Debtor**”) and Belinda S. Penney (the “**Joint Debtor**”) (collectively, the “**Debtors**”). The Trustee filed the adversary proceeding before the Court on June 19, 2020, seeking to avoid a transfer of approximately 2.48 acres of real estate commonly known as 15 Miller Point Road, Quitman, Arkansas (the “**Property**”). (Compl. Ex. 2). The Trustee also seeks authority to sell the Property and requests the Court to determine the allocation of the costs and expenses of the sale. (Compl. ¶¶ 35–42).

The Defendant is the Debtor’s daughter. (SUF ¶ 1). The Defendant does not dispute that on December 13, 2013, the Debtor, a married person, and the Defendant acquired title to the Property pursuant to a special warranty deed. (SUF ¶ 1; Compl. Ex. 1). The Defendant does not dispute that the Debtor paid all of the purchase price for the Property in the amount of \$42,014.70, and \$500.00 in earnest money. (Compl. ¶ 10; Answer ¶ 1). In addition, the Defendant does not dispute that on May 4, 2018, the Debtors, husband and wife, executed and delivered to the Defendant a warranty deed conveying their interest in the Property to the Defendant (the “**Transfer**”). (SUF ¶ 2; Compl. Ex. 2). Also undisputed is the fact that no consideration or value was exchanged for the Transfer. (SUF ¶ 3).

There is a single-family residence located on the Property and the residence and acreage are valued on the Cleburne County Tax Assessor’s records at \$134,070.00. (SUF ¶ 4). The Defendant currently resides on the Property. (SUF ¶ 6). There is currently no mortgage, lien, or encumbrance on the Property. (SUF ¶ 5).

In support of his Motion, the Trustee relies on his Complaint, the exhibits attached to the Complaint, the Defendant's Answer, his SUF, his brief, and the exhibits attached to the Motion. He attached the following four exhibits to his Motion:

(1) The Cleburne County real estate assessment for the Property dated February 12, 2021. (Mot. Ex. A). The Defendant is listed on the report as the property owner.

(2) An affidavit of the Trustee (the "Trustee's Affidavit"). (Mot. Ex. B). In the Trustee's Affidavit, the Trustee states that the bankruptcy schedules, statement of financial affairs, proofs of claim filed in the case, and a certain financial statement indicate that the Debtors were insolvent on May 4, 2018 (the "**Transfer Date**"). In support of this statement, the Trustee points to four guaranties executed by the Debtor guaranteeing certain debts of Mid-Ark Utilities & Rig Services, Inc. ("**Mid-Ark**"). He further points to a note executed by the Debtors in favor of Centennial Bank in the original principal amount of \$360,000.00. In his affidavit, the Trustee states that while a financial statement of the Debtors dated February 28, 2018 (the "**Financial Statement**") shows a net worth of \$720,497.00, the Financial Statement failed to include the guaranteed debts and the liability owed on the note to Centennial Bank. When included, the Trustee states the Debtors' assets were less than their liabilities on the Transfer Date. In support of his statements, the Trustee attached the following six exhibits to his affidavit:

- Proof of Claim of BMO Harris Bank N.A. (Mot. Ex. B, Ex. 1). The proof of claim filed by BMO Harris Bank N.A. ("**BMO Harris**") (Claim No. 1-1) in the Debtors' main bankruptcy case reflects an unsecured claim in the amount of \$135,933.66. The documents attached to the claim include a loan and security agreement executed by Mid-Ark and a continuing guaranty executed

by the Debtor in favor of BMO Harris guaranteeing the payment of the obligations.

- *Proof of Claim of Trans Lease, Inc.* (Mot. Ex. B, Ex. 2). The amended proof of claim filed by Trans Lease, Inc. (“**Trans Lease**”) (Claim No. 3-2) in the Debtors’ main bankruptcy case reflects an unsecured claim in the amount of \$294,418.00 based on a “Breach of Continuing Guaranty.” The documents attached to the claim include a vehicle lease executed by Mid-Ark and a continuing guaranty signed by the Debtor and Lonnie Keith Graham agreeing to be jointly and severally liable for payment of the obligations.
- *Proof of Claim 6-1 of VFS Leasing Co.* (Mot. Ex. B, Ex. 3). The proof of claim filed by VFS Leasing Co. (“**VFS Leasing**”) (Claim No. 6-1) in the Debtors’ main bankruptcy case reflects an unsecured claim in the amount of \$500,231.26 based on a “Deficiency Balance.” The documents attached to the claim include a lease agreement executed by Mid-Ark and a continuing guaranty signed by the Debtor and Lonnie Graham agreeing to be jointly and severally liable for payment of the obligations.
- *Proof of Claim 7-2 of VFS Leasing* (Mot. Ex. B, Ex. 4). The second proof of claim, as amended, filed by VFS Leasing (Claim No. 7-2) in the Debtors’ main bankruptcy case reflects an unsecured claim in the amount of \$18,077.16 based on a “Deficiency Balance.” The documents attached to the claim reference a lease agreement with Mid-Ark. Also attached is a continuing guaranty signed by the Debtor and Lonnie Graham agreeing to be jointly and severally liable for payment of certain obligations.

- Foreclosure and Replevin Complaint (Mot. Ex. B, Ex. 5). The Trustee also attached to his affidavit a foreclosure and replevin complaint filed on February 25, 2019, by Centennial Bank against Mid-Ark, the Debtors, Lonnie Graham, and others, involving two loans. The complaint alleges the first loan is secured by a mortgage granted to Centennial Bank by the Debtors, Lonnie Graham, and Tracy Graham on real property located at 2095 Goff Road, Quitman, Arkansas. The complaint alleges that \$341,621.14 was due on the first loan as of February 14, 2019. The complaint alleges the second loan is secured by a mortgage granted to Centennial Bank by the Debtors, Lonnie Graham, and Tracy Graham on real property located at 2075 Goff Road, Quitman, Arkansas. The complaint alleges that \$41,078.31 is due on the second loan as of February 14, 2019. The foreclosure action sought both *in rem* and *in personam* judgments.
- The Financial Statement (Mot. Ex. B, Ex. 6). The final exhibit attached to the Trustee's Affidavit is the Financial Statement. It is dated February 28, 2018, and was issued for the benefit of Heber Springs State Bank. The Financial Statement reflects total assets of \$998,793.00 and total liabilities of \$278,296.00, resulting in a net worth of \$720,497.00. The accuracy of the Financial Statement is disputed by both parties. (SUF ¶10, SDF ¶¶ 1-2).

(3) The Debtors' amended statement of financial affairs (the "Amended SOFA") filed on May 2, 2019. (Mot. Ex. C). The Amended SOFA disclosed the Transfer that is the subject of this adversary proceeding and states, "Debtor issued deed to daughter for the real property titled jointly in their names. Daughter lives in house and pays taxes and insurance. Debtor has no

equitable interest.” (Mot. Ex. C at 5). The Amended SOFA also states, “No value was exchanged. Debtor issued deed to Daughter to remove his name from the property as he has no equitable interest in the property. Home is valued at approximately \$125,000.00.” (Mot. Ex. C at 5). The Amended SOFA discloses numerous other transfers both to family members and to “bona fide purchaser[s].” (Mot. Ex. C at 5–6). A summary of those transfers is as follows:

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<u>Transferee And Relationship</u>	<u>Description and value of property</u>	<u>Property or payments received or debts paid in exchange</u>	<u>Date of Transfer</u>
Crain Kia of Conway None	2015 Jeep Cherokee Value \$11,460.00	US BANK lien in amount of \$10,523.91 paid off.	Dec 13, 2017
Kasey & Gary Carter Daughter & Son-in-law	2008 Jayce popup camper estimated value \$450	\$0	Feb 2018
Kasey & Gary Carter Daughter & Son-in-law	2005 Lake Sport Boat; value unknown. It had Broken lower unit in 2016 when traded for Bad Boy Buggy	Bad Boy Buggy. Estimated value of Bad Boy Buggy: \$300.00	Feb 2018
Kasey & Gary Carter Daughter & Son-in-law	5'10 Utility Trailer; Estimated value \$300.00	\$0	Feb 2018
Crain Kia of Conway None (bona fide purchaser)	Debtor was co-signer on mother 2014 Ford Fiesta.	Mother sold it 9/19/2018 for \$5,000.00. There was \$3,714.51 owed on lien. \$1,285.51 went to Debtor's mother.	Sept 19, 2018
Warron O. Justice and Mary Justice None (bona fide purchaser)	2190 Goff Road Quitman, AR Value \$420,000	Debtors sold home for \$420,000. \$220,000 paid off First Mortgage loan minus misc taxes and commissions debtors received \$167,956.20 at closing.	May 16, 2018
Warron O. Justice and Mary Justice None (bona fide purchaser)	33 acres located at Goff Road, Quitman, AR	Debtors sold the property for \$80,000 and received \$75,273.00 at closing	May 16, 2018
Casey J. Trawick & Kellie Trawick None (bona fide purchaser)	7 acres located at 2799 Rosebud Road, Quitman, AR Value \$16,800	Debtors received \$16,098.40 after closing costs	May 16, 2018
Vincent K Rhodes Joint Debtor's brother	1997 mobile home and approximately .18 acres. Value: \$3,000	Debtors and Vincent K Rhodes entered into a verbal land contract for purchase and sale of 1997 Mobile home and approximately .18 acres in July of 2015 for \$3,000.00. Vincent K Rhodes paid Debtors on verbal land contract until December of 2017 when payments were complete. Debtors by warranty deed transferred the property to Rhodes 2/5/2018. Debtor issued deed as they no longer had any interest in the property. Title to mobile home was also transferred.	Feb 5, 2018

(Mot. Ex. C at 6–7).

(4) The Debtors' original statement of financial affairs filed on April 1, 2019. (Mot. Ex. D). The Debtors' original statement of financial affairs also disclosed the Transfer. In addition, it disclosed other transfers, including a transfer of a 2015 Jeep Cherokee from the Debtor to the Defendant. This information, as well as information about other transfers, appears to have been updated by the Debtors' Amended SOFA.

The Trustee argues that the evidence is sufficient to prove that the Transfer of the Property from the Debtors to the Defendant is avoidable under Section 548(a)(1)(B) as a constructively fraudulent transfer or, alternatively, is avoidable under Section 548(a)(1)(A) as a transfer made with actual intent to hinder, delay, or defraud creditors. He requests that the Court avoid the Transfer, order the Debtors' interest in the Property be recovered for the estate, order the Trustee to sell the Property, and authorize the Trustee to charge the Defendant with her share of the costs and expenses of the sale.

In her Response and brief in support of same, the Defendant argues that summary judgment is inappropriate because genuine issues of material fact exist as to: (i) whether the Property was transferred for less than reasonably equivalent value; (ii) whether the Debtors were insolvent on the Transfer Date; and (iii) whether the Debtors made the transfer with actual intent to hinder, delay, or defraud creditors.

In support of her Response, the Defendant attached the following five exhibits:

(1) The affidavit of the Defendant. (Resp. Ex. A). In her affidavit, the Defendant states that she has made considerable renovations to the Property since acquiring it in 2013 and has lived at the Property since mid-2015. She also states that since the purchase of the Property in 2013 she has held herself out as the owner of the Property and that neither of the Debtors have

ever asserted any ownership interest in the Property or held themselves out as owners of the Property. She further states that she purchased a 2015 Jeep Cherokee from Crain Kia in Conway in December 2017. According to the affidavit, the Defendant's only source of income is Social Security Disability. In support of her statements, the Defendant attached two exhibits to her affidavit:

- March 2021 Loan Account Statement for the Jeep (Resp. Ex. A, Ex. 1). The March 2021, statement from Arkansas Federal Credit Union reflects a balance as of March 2, 2021, of \$4,880.40, indicating that the loan is ongoing.
- Retail Purchase Order for the Jeep (Resp. Ex. A, Ex. 2). Also attached to the affidavit is an unsigned copy of a purchase agreement for the Jeep dated December 8, 2017. It reflects the purchasers as Kasey Carter and Kristy Penney and the other party to the contract as Crain Kia of Conway.

(2) The Cleburne County real estate assessment dated March 12, 2021, for real property located at 2095 Goff Road, Quitman, Arkansas. (Resp. Ex. B). The report reflects a deed dated April 15, 2008, to "Penney, Mike L. & Graham" and a subsequent deed dated July 22, 2019, to "Pine Mountain Property." (Resp. Ex. B at 2). The current estimated market value of the property as reflected on the report is \$287,315.00.

(3) Corporate entity search for Penney Meadows Investments LLC. (Resp. Ex. C). The Defendant also attached the results of a corporate name search made on the Arkansas Secretary of State's website under the corporate name "Penney Meadows Investments LLC." The record reflects a filing date for this entity of August 2, 2016, and lists Mike Penney as an incorporator or organizer of the entity.

(4) The Debtors' bankruptcy Schedule A/B. (Resp. Ex. D). In Schedule A/B the Debtors listed real property at 107 North Road, Damascus, Arkansas (valued at \$165,000.00); real property on Bee Branch Road, Quitman, Arkansas (valued at \$10,000.00); real property at Branson's Nantucket, 2837 St. Hwy. 265, Branson, Missouri (valued at \$42,000.00); and real property at 2095 Goff Road, Quitman, Arkansas (valued at \$287,315.00). They also listed, among other assets, a 50% ownership interest in Mid-Ark.

(5) Real estate records for Mike & Belinda Penney. (Resp. Ex. E). The final exhibit to the Defendant's Response is a copy of a Van Buren County real estate search under the names "Mike & Belinda Penney." The Debtors are listed as the owners of a single-family residence located on 1.01 acres of real property at 107 North Road, Damascus, Arkansas. The report reflects that the Debtors were granted this interest by warranty deed filed of record on May 21, 2018, from Penney Meadows Investments LLC, grantor. The sales price is listed in the report as \$127,500.00.

The Defendant argues this evidence shows that genuine issues of material fact exist such that the Trustee's Motion must be denied. Specifically, the Defendant argues a genuine dispute exists as to whether the Debtors held more than bare legal title to the Property at the time of the Transfer and whether the Debtors were insolvent at the time of the Transfer. The Defendant raises questions about the accuracy of the Financial Statement and points to specific assets of the Debtors that were not included. The Defendant also points to discrepancies between the original and Amended SOFA and points to the inaccuracy of some of the information, including the purchase and sale of the Defendant's Jeep. The Defendant also argues several questions remain regarding the Debtors' intent in the Transfer of the Property. The Defendant concludes that factual disputes exist and summary judgment is inappropriate.

III. Discussion

Under Rule 56(a) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The movant has the burden “to establish the absence of a material fact issue by identifying portions of the pleadings, depositions, answers to interrogatories, admission on file, and affidavits.” *In re Harrold*, 257 B.R. 916, 917 (Bankr. W.D. Ark. 2000) (citing *Celotex*, 477 U.S. at 322–23). “Once the moving party has met this initial burden of proof, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial and may not rest on its pleadings” *Edwards v. City of Ferguson (In re Edwards)*, 601 B.R. 660, 662 (B.A.P. 8th Cir. 2019) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Bass v. SBC Commc'ns, Inc.*, 418 F.3d 870, 872–73 (8th Cir. 2005)).

In applying the summary judgment standard, “the court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence.” *Zaitz Trust, LLP v. Bremer Bank (In re Solberg)*, 604 B.R. 355, 358 (B.A.P. 8th Cir. 2019) (citing *Matsushita*, 475 U.S. at 588–89; *Tyler v. Harper*, 744 F.2d 653, 655 (8th Cir. 1984)). At the summary judgment stage, the court does not “weigh the evidence, make credibility determinations, or attempt to discern the truth of any factual issue.” *Thomas v. Corwin*, 483 F.3d 516, 526 (8th Cir. 2007).

In Count I, the Trustee seeks to avoid the Transfer of the Property as a constructively fraudulent transfer under 11 U.S.C. § 548(a)(1)(B). In Count II, the Trustee alleges,

alternatively, that the Transfer was made with the actual intent to hinder, delay, or defraud creditors and seeks to avoid the Transfer under 11 U.S.C. § 548(a)(1)(A). In Count III, the Trustee seeks an order authorizing the sale of the Property, and in Count IV he seeks to charge the Defendant with a portion of the costs and expenses of the sale. Each count will be discussed separately below.

A. Count I – Constructively Fraudulent Transfer

As stated above, the Trustee contends that the Transfer is avoidable as a constructively fraudulent transfer under 11 U.S.C. § 548(a)(1)(B). Section 548(a)(1)(B) provides in pertinent part:

(a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(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[.]

11 U.S.C. § 548(a)(1)(B).

To establish a claim for a constructively fraudulent transfer, the Trustee must show:

(1) an interest of the debtor in property; (2) was voluntarily or involuntarily transferred; (3) within two years of filing bankruptcy; (4) where the debtor received less than reasonably equivalent value; and (5) [the] debtor was insolvent at the time of the transfer or became insolvent as a result thereof.”²

Sullivan v. Welsh (In re Lumbar), 457 B.R. 748, 753 (B.A.P. 8th Cir. 2011) (quoting *Schnittjer v. Houston (In re Houston)*, 385 B.R. 268, 272 (Bankr. N.D. Iowa 2008)). The burden is on the

² Although the Trustee enumerated only three elements to be proven for a constructively fraudulent transfer action and the Defendant follows the Trustee’s lead, courts within the Eighth Circuit more consistently discuss the evidence requirements for a constructively fraudulent transfer action as having these five elements. *E.g.*, *Doeling v. O’Neill (In re O’Neill)*, 550 B.R. 482, 507–08 (Bankr. D.N.D. 2016).

Trustee to prove each of these elements by a preponderance of the evidence. *In re Lumbar*, 457 B.R. at 753. Each element will be discussed separately below.

(1) An interest of the debtors in property

As to the first element, the Court finds there is no genuine issue of material fact as to whether the Debtors held an interest in the Property. It is undisputed that on December 13, 2013, the Debtor, a married person, and Defendant acquired title to the Property by a special warranty deed. (SUF ¶ 1; Compl. Ex. 1). It is also undisputed that on May 4, 2018, the Debtors, husband and wife, executed and delivered a warranty deed conveying their interest in the Property to the Defendant. (SUF ¶ 2; Compl. Ex. 2). From these undisputed facts, the Court finds that the parties agree that the Debtors acquired an interest in the Property on December 13, 2013, and held an interest in the Property until the Transfer Date.³

The Court finds that there is no genuine dispute as to the material fact that the Debtors held an interest in the Property. Therefore, summary judgment is granted in favor of the Trustee as to the first element.

(2) The interest was voluntarily or involuntarily transferred

The Court also finds there is no genuine issue of material fact as to whether there was a voluntary or involuntary transfer of the Debtors' interest in the Property. The Bankruptcy Code defines "transfer" as, "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property."

11 U.S.C. § 101(54)(D). As discussed above, it is undisputed that there was a transfer of an

³ Although the parties do not dispute that the Debtors held an interest in the Property, as further discussed below, there is a dispute between the parties regarding the nature of the Debtors' interest and whether they held an equitable interest in the Property or only bare legal title at the time of the Transfer. *See Cowden v. Ramsay (In re Cowden)*, 154 B.R. 531, 534 (Bankr. E.D. Ark. 1993) (concluding "bare legal title . . . is property of the estate"); *see also* 11 U.S.C. § 541(d). As further explained below, this issue will remain for trial.

interest in the Property on May 4, 2018, when the Debtors executed a warranty deed, as husband and wife, conveying their interest in the Property to the Defendant. (SUF ¶ 2; Compl. Ex. 2).

For these reasons, the Court finds that there was a voluntary transfer of an interest of the Debtors in the Property. Therefore, summary judgment is granted in favor of the Trustee as to the second element.

(3) The transfer was within two years of the filing of bankruptcy

Again, there is no genuine issue of material fact as to the third element. The Defendant admits there is no dispute that the bankruptcy was filed on April 1, 2019, and that the Transfer occurred on May 4, 2018, within the two-year period required by Section 548(a)(1)(B). (SUF ¶¶ 2, 15; Def.'s Br. at 2). Therefore, summary judgment is granted in favor of the Trustee as to the third element.

(4) The debtors received less than reasonably equivalent value for the transfer

The fourth element is disputed. This element requires a finding that the Debtors received less than reasonably equivalent value for the Transfer. To make this determination, the Court must analyze “whether: (1) value was given; (2) it was given in exchange for the [Transfer]; and (3) what was transferred was reasonably equivalent to what was received.” *Pummill v. Greensfelder, Hemker & Gale (In re Richards & Conover Steel, Co.)*, 267 B.R. 602, 612 (B.A.P. 8th Cir. 2001).

It is undisputed that no consideration or value was exchanged for the Transfer. (SUF ¶ 3; Def.'s Br. at 2). The Defendant argues, however, that the Debtors held only “bare legal title to the Property” and therefore no value or consideration was required to be exchanged. (Def.'s Br. at 3). “Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate[,]” but “only to the extent of the

debtor's legal right to such property, . . . not to the extent of any equitable interest in such property that the debtor does not hold.” 11 U.S.C. § 541(d).

When a debtor holds only bare legal title to property, a trustee may not avoid the transfer of that interest under Section 548. *U.S. Tr. v. Beard (In re Beard)*, 595 B.R. 274, 288 (Bankr. E.D. Ark. 2018) (“Because bare legal title has no ‘tangible, economic value,’ a debtor’s transfer of bare legal title does not constitute a fraudulent transfer and cannot be avoided under § 548.” (quoting *Rodriquez v. Nelabovige (In re Kirst)*, 559 B.R. 757, 763 (Bankr. D. Colo. 2016))); *see also Luker v. McCall (In re McCall)*, 188 B.R. 402, 403 (Bankr. E.D. Ark. 1995) (concerning personal property). Therefore, to determine whether the Transfer was for less than reasonably equivalent value, the Court must determine the nature and value of the Debtors’ interest in the Property.

The parties dispute the nature and value of the Debtors’ interest in the Property. The Trustee argues the Transfer was of the Debtor’s “undivided one-half interest in the [P]roperty.” (Mot. ¶ 1). He supports his position by referencing the 2013 deed transferring the Property to the Debtor and Defendant and the 2018 deed transferring the Debtors’ interest in the Property to the Defendant. (Mot. ¶¶ 2–3). Both deeds are attached as exhibits to the Trustee’s Complaint. (Compl. Exs. 1–2). In addition, the Debtor paid the purchase price for the Property. The Defendant argues, however, that the Debtor held only “bare legal title to the Property.”⁴ (Def.’s Br. at 3). In support of her position, the Defendant states in her affidavit that she has lived at the Property since mid-2015 and has always held herself out as the sole owner of the Property. She

⁴ The Court acknowledges that in her brief in support of her Response, the Defendant states in the opening paragraph that the “case concerns an *alleged* fraudulent transfer of Debtor Michael Penney’s undivided one-half interest in [the Property].” (Def.’s Br. at 1) (emphasis added). In reviewing the Defendant’s position as a whole, and especially considering the use of the word “alleged” in the statement, the Court does not take this statement to be an admission by the Defendant that the Transfer was of an undivided one-half interest in the Property.

further states that the Debtors have never claimed an ownership interest in the Property. In addition, she states that she has “made considerable renovations to the Property since acquiring it in 2013.” (Resp. Ex. A ¶ 3).

To make a determination regarding the nature and value of the Debtors’ interest in the Property, including whether the Debtors held only bare legal title to the Property, the Court would be required to “weigh the evidence, make credibility determinations, or attempt to discern the truth of [a] factual issue.” *Thomas*, 483 F.3d at 526. The Court cannot do this at the summary judgment stage. For these reasons, the Court finds that there are genuine issues of material fact as to the extent of the Debtors’ interest in the Property and whether reasonably equivalent value was received. The Trustee’s request for summary judgment as to the fourth element must be denied.

(5) The debtors were insolvent at the time of the transfer or became insolvent as a result of the transfer

The fifth element is also disputed. This element requires a finding that the Debtors were insolvent at the time of the Transfer or became insolvent as a result of the Transfer. As to individuals, the Bankruptcy Code defines “insolvent” as a:

financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and (ii) property that may be exempted from property of the estate under section 522 of this title.

11 U.S.C § 101(32)(A).

This type of insolvency is often referred to as “‘balance sheet’ insolvency.” *Luker v. Eubanks (In re Eubanks)*, 444 B.R. 415, 426 (Bankr. E.D. Ark. 2010). Under this definition, courts must determine whether a debtor’s liabilities were greater than his or her assets on the date in question. *Id.*

Although the Trustee admits that it is not possible to determine the exact amount of the Debtors' liabilities on the Transfer Date, he argues that there is sufficient evidence for the Court to find that the Debtors' liabilities outweighed their assets on that date. In support of his argument, the Trustee relies heavily on the Financial Statement. The Financial Statement was dated February 28, 2018, about two months before the Transfer, and was provided to Heber Springs State Bank. The Financial Statement reflects total assets of \$998,793.00 and total liabilities of \$278,296.00, resulting in a net worth of \$720,497.00.

The Trustee argues that the statement is not an accurate representation of the Debtors' financial condition because it failed to include liabilities that have been listed in the current bankruptcy case. Among those liabilities are the personal guaranties the Debtor signed on behalf of Mid-Ark and a promissory note the Debtors executed and delivered to Centennial Bank.

According to the Trustee, the Debtor's liability on his personal guaranties was at least \$717,432.24 on the Transfer Date. (Trustee's Br. at 5). The Trustee further asserts that the balance due on the promissory note was at least \$341,621.14 on the Transfer Date. (Trustee's Br. at 5). When added to the liabilities already listed on the Financial Statement, the Trustee asserts that the Debtors' liabilities total \$1,337,349.38, while the Debtors' assets would still total \$998,793.00. On this basis, the Trustee argues that the Court should find that the Debtors were insolvent on the Transfer Date.

The Defendant disputes these assertions. She alleges that the Financial Statement did not include all the Debtors' assets. Among the assets allegedly not included is real property located at 2095 Goff Road, Quitman, Arkansas. The Defendant points out that records from the Cleburne County Assessor reflect the Debtors as owners of this property at the time of the Transfer and reflect a value of the property of \$287,315.00. The Defendant also asserts that the

Debtors had an interest in multiple entities, including Penney Meadows Investments LLC and Mid-Ark, and that those ownership interests were not included on the Financial Statement.

The Defendant asserts that adding the value of the assets not included on the Financial Statement results in the Debtors' assets totaling \$1,395,458.00. (Def.'s Br. at 4). This amount is greater than the liability calculation alleged by the Trustee. The Defendant argues this reflects that the Debtors were solvent on the Transfer Date.

The Court has reviewed the positions and evidence of both parties. As to the Trustee's position, when analyzing a debtor's "balance sheet insolvency," courts have traditionally considered contingent debt differently than non-contingent debt. "To properly value a contingent liability, 'it is necessary to discount it by the probability that the contingency will occur and the liability become real.'" *Hoffinger Indus., Inc. v. Bunch (In re Hoffinger Indus., Inc.)*, 313 B.R. 812, 819 (Bankr. E.D. Ark. 2004) (quoting *FDIC v. Bell*, 106 F.3d 258, 264 (8th Cir. 1997)).

The Trustee relies heavily on adding liabilities based on personal guaranties in his calculation for insolvency. While there is some evidence of deficiency balances owed on the claims attached to the Trustee's Affidavit, there is insufficient evidence before the Court to determine the value the contingent liability as of the Transfer Date. In addition, the Defendant has presented sufficient evidence of assets not included on the Financial Statement relied on by the Trustee to raise genuine issues of material facts as to the solvency of the Debtors on the Transfer Date.

Based on the foregoing, in reviewing the evidence before the Court in the light most favorable to the nonmoving party, the Court finds that the Trustee has not met his burden of proving that the Debtors' liabilities were greater than their assets on the Transfer Date. The

Court cannot make such a determination without weighing the evidence, which, as stated previously, the Court cannot do at the summary judgment stage. For these reasons, the Trustee's request for summary judgment as to the fifth element must be denied.

B. Count II – Actual Fraud

In the alternative, the Trustee seeks to avoid the Transfer as a transfer made with actual intent to hinder, delay, or defraud creditors under 11 U.S.C. § 548(a)(1)(A).

Section 548(a)(1)(A) provides in pertinent part that:

(a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer . . . 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 . . . indebted[.]

11 U.S.C. § 548(a)(1)(A).

To establish a claim of actual fraud, the Trustee must prove:

(1) the debtor had an interest in property, (2) the debtor voluntarily or involuntarily transferred that interest, (3) the transfer occurred on or within two years before the debtor filed for bankruptcy relief, and (4) the debtor made the transfer with actual intent to hinder, delay or defraud any creditor of the debtor on or after the date of the transfer.

Kaler v. Vasvick (In re Vasvick), 604 B.R. 810, 820 (Bankr. D.N.D. 2019). The burden is on the Trustee to prove each element by a preponderance of the evidence. *In re Eubanks*, 444 B.R. at 422 (citing *Dobienco, Inc. v. Brown (In re Brown)*, 265 B.R. 167, 171 (Bankr. E.D. Ark. 2001); *Kaler v. Craig (In re Craig)*, 144 F.3d 587, 590 (8th Cir. 1998); *Jacobson v. First State Bank of Benson (In re Jacobson)*, 48 B.R. 497, 501 (Bankr. D. Minn. 1985)).

“Because proof of actual intent to hinder, delay or defraud creditors may rarely be established by direct evidence, courts infer fraudulent intent from the circumstances surrounding

the transfer.” *Brown v. Third Nat’l Bank (In re Sherman)*, 67 F.3d. 1348, 1353 (8th Cir. 1995).

Courts within the Eighth Circuit often consider several “badges of fraud” to determine whether a transfer was made with fraudulent intent. These “badges of fraud” include:

(1) lack or inadequacy of consideration; (2) family, friendship or other close relationship between the transferor and transferee; (3) retention of possession, benefit or use of the property in question; (4) financial condition of the transferor prior to and after the transaction; (5) conveyance of all of the debtor's property; (6) secrecy of the conveyance; (7) existence of a trust or trust relationship; (8) existence or cumulative effect of pattern or series of transactions or course of conduct after the pendency or threat of suit; (9) instrument affecting the transfer suspiciously states it is bona fide; (10) debtor makes voluntary gift to family member; and (11) general chronology of events and transactions under inquiry.

In re Eubanks, 444 B.R. at 423 (quoting *Helena Chem. Co. v. Richmond (In re Richmond)*, 429 B.R. 263, 305 (Bankr. E.D. Ark. 2010)). Although the presence of a single badge of fraud is usually not enough to establish fraudulent intent, “where a ‘confluence’ of the ‘badges of fraud’ are found, a presumption of a fraudulent intent arises within the case.” *Id.* at 422–23 (quoting *Kelly v. Armstrong*, 206 F.3d 794, 798 (8th Cir. 2000)). “Where this presumption arises, the burden of production shifts to the defendant to provide a ‘legitimate supervening purpose’ for the transfer.” *Id.* at 423 (quoting *Kelly*, 206 F.3d at 798).

The first three elements of actual fraud are the same as the first three elements of constructive fraud. As discussed in Part III.A., above, the first three elements are met: the Debtors had an interest in the Property,⁵ the Debtors’ interest in the Property was voluntarily transferred, and the Transfer occurred within two years of the petition date. For the same reasons stated above, summary judgment will be granted in favor of the Trustee as to the first three elements of actual fraud.

⁵ Again, the Court recognizes the parties dispute the nature of the Debtors’ interest. This issue remains for trial.

Turning to the fourth element, the Court must determine whether a “confluence” of the badges of fraud have been established. The Court finds they have not. Although the Court notes that some of the badges of fraud are clearly present, such as the existence of a familial relationship between the transferor and transferee, there are genuine issues of material fact as to many of the other badges. For example, the parties dispute whether any consideration was required to be given in exchange for the Transfer, and the parties dispute the financial condition of the Debtors at the time of the Transfer. In addition, the Defendant asserts that the Debtors never retained possession or use of the Property, nor did they convey all of their property. Issues also exist regarding whether the conveyance of the Property occurred in secret and the general chronology of events and transactions.

Because genuine issues of material fact exist as to many of the badges of fraud, the Court finds summary judgment is inappropriate. For these reasons, the Trustee’s motion for summary judgment as to the fourth element of actual fraud must be denied.

C. Counts III and IV - Sale of Property and Division of Costs and Expenses of Sale

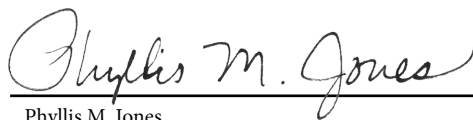
In Counts III and IV of the Complaint, the Trustee seeks an order authorizing the sale of the Property and authorizing the Trustee to charge the Defendant with her share of the costs and expenses of the sale. Because issues remain for trial on whether the Transfer may be avoided in the first place, any decision on whether to order the sale of the Property would be premature. The same is true regarding the costs and expenses of the sale. For these reasons, the Trustee’s request for summary judgment on Counts III and IV is denied and these issues shall remain for trial.

IV. Conclusion

For the reasons stated herein, the Trustee's Motion is granted in part and denied in part as follows:

- (1) Summary judgment is GRANTED as to the first three elements of Sections 548(a)(1)(B) and 548(a)(1)(A): the Debtors had an interest in the Property, the Debtors voluntarily transferred their interest in the Property, and the Transfer occurred within two years of the petition date.
- (2) Summary judgment is DENIED as to the fourth and fifth elements of Section 548(a)(1)(B): whether the Debtors received less than reasonably equivalent value for the Transfer and whether the Debtors were insolvent at the time of the Transfer or became insolvent as a result of the Transfer. These issues will proceed to trial.
- (3) Summary judgment is DENIED as to the fourth element of Section 548(a)(1)(A): whether the Debtors made the Transfer with actual intent to hinder, delay, or defraud any creditor of the Debtors on or after the date of the Transfer. This issue will proceed to trial.
- (4) Summary judgment is DENIED as to the Trustee's request to sell the Property and to charge the Defendant with a portion of the costs and expenses of the sale. These issues will proceed to trial.

IT IS SO ORDERED.



Phyllis M. Jones
United States Bankruptcy Judge
Dated: 09/22/2021