



**ORDERED in the Southern District of Florida on October 29, 2015.**

Erik P. Kimball, Judge  
United States Bankruptcy Court

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH DIVISION**

**In re:**

**CASE NO.: 12-39329-EPK**

**VICOR TECHNOLOGIES, INC.**

**CHAPTER 7**

**Debtors.**

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**MARGARET J. SMITH, Trustee in  
Bankruptcy for Vicor Technologies, Inc.,**

**Plaintiff,**

**v.**

**ADV. NO.: 14-01867-EPK**

**ALDA & ASSOCIATES  
INTERNATIONAL, INC.,**

**Defendant.**

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**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

**THIS MATTER** came before the Court upon the *Defendant's Motion for Summary Judgment* (the "Motion for Summary Judgment") [ECF No. 13] filed by Alda & Associates International, Inc. ("ALDA"), and upon the *Plaintiff's Response to Defendant's Motion for Summary Judgment* (the "Response") [ECF No. 18] filed by Margaret J. Smith, Trustee (the "Trustee") and the *Defendant's Reply Memorandum in Support of Motion for Summary Judgment [D.E. 13]* [ECF No. 19] (the "Reply") filed by ALDA. The Court has considered the Motion for Summary Judgment, the Response, the Reply, the record in this adversary proceeding, and the record in the underlying Chapter 7 case number 12-39329-EPK, and being otherwise fully advised in the premises, grants the Motion for Summary Judgment [ECF No. 13] for the reasons stated below.

I. Background

The following facts are not in dispute.

Vicor Technologies, Inc. (the "Debtor") was formed in 2000 for the purpose of developing and marketing medical diagnostic products. It raised significant capital over the next 11 years for research, development, manufacturing, marketing, and other purposes.

ALDA is a consulting company that was at all relevant times owned and controlled by the Debtor's CEO, David Fater. On January 1, 2007, the Debtor entered into a Professional Employer Organization ("PEO") service agreement with ALDA. Under the terms of that agreement, a number of the Debtor's employees became employees of ALDA. In exchange for ALDA's payment of salaries and benefits to the Debtor's employees, the

Debtor paid to ALDA the actual costs of payroll, insurance, and other benefits incurred by the latter. ALDA leased the employees back to the Debtor, received no fees from the Debtor, and did not realize any profits from the arrangement. The ostensible purpose of this arrangement was to allow the Debtor to save on employee health benefits, among other costs, by taking advantage of ALDA's greater economy of scale.

In addition to paying its officers' salary and benefits via the PEO arrangement with ALDA, the Debtor paid certain officers directly under independent consulting and employment agreements. The Debtor's officers negotiated these agreements separately from the employment contracts held by ALDA and leased back to the Debtor.

ALDA was never officially licensed as a PEO by the state of Florida. However, licensing is not strictly required under Florida law.

The Debtor also reimbursed officers directly for expenses incurred on behalf of the company, as contemplated in the officers' employment agreements.

The Debtor and ALDA also made various payments for non-payroll items. For instance, at one time the Debtor paid health insurance premiums for a some-time consultant and friend of Mr. Fater, Joseph Pivinski. ALDA provided Mr. Pivinski with a W-2 form, apparently in order to enable him to join ALDA's group health insurance contract. There is no evidence to suggest that Mr. Pivinski was ever a salaried employee of the Debtor or ALDA. Likewise, contrary to an unsupported assertion of the Trustee in the Response, there is no evidence that the Debtor paid any money to ALDA on behalf of Mr. Pivinski. Rather, it appears that Mr. Fater manipulated the records of both companies in an attempt to provide Mr. Pivinski with inexpensive health insurance. Mr. Pivinski is not a party to this or any other current avoidance action brought by the Trustee.

By late 2010, litigation and potential insolvency threatened the Debtor's operations. In December of that year, the Debtor's board of directors formed a special committee to investigate alleged mismanagement by the Debtor's officers. The committee hired Richard E. Brodsky to investigate the Debtor and its officers, including their relationship to ALDA. Meanwhile, on December 31, 2010, the Debtor's PEO agreement with ALDA terminated.

On April 26, 2011, Mr. Brodsky produced a report (the "Brodsky Report"). With regard to ALDA, Mr. Brodsky described his task as follows:

[to determine] (a) Whether the aggregate amount paid to ALDA by Vicor for salaries, health insurance, workmen's compensation insurance and taxes equaled the amount paid by ALDA for these items. (b) Whether the individuals paid compensation by Vicor were being compensated for work that directly benefitted Vicor as opposed to some other entity.

Brodsky Report at 13-14.

Mr. Brodsky concluded that "the documentation and control procedures surrounding the payroll process were inadequate," but that "within acceptable limits of materiality, the amount of money paid by Vicor to ALDA for compensation and other payroll related expenses . . . equaled the amounts expended by ALDA for these purposes." Brodsky Report at 14. Mr. Brodsky noted that the "original rationale for leasing employees from ALDA (to save on health care costs) appears to have become substantially less valid as time went on." *Id.* at 15. "As of 2009 . . . there were no economies of scale whereby, by numbers alone, Vicor could 'leverage' the payroll of ALDA to realize health care savings." *Id.* Nevertheless, Mr. Brodsky found no significant wrongdoing in the continuation of the PEO arrangement. Specifically, Mr. Brodsky found "no extrinsic evidence" that the Debtor had paid to ALDA any funds due for services not benefitting the Debtor. *Id.* at 15-16.

In the course of Mr. Brodsky's investigation into the ALDA arrangement, he noted that "approximately \$1,000,000 in non-salary payments were made by [the Debtor] to certain officers and directors." Brodsky Report at 17. In this regard, Mr. Brodsky stated:

We did no investigation of the propriety of the payments or the accounting for them because it was not within the scope of the investigation and we were aware of no information indicating any impropriety. Nevertheless, in light of the amount of the expenses and the fact that some of these individuals were listed as ALDA consultants, the Committee may wish to recommend to the Audit Committee to inquire . . . as to the extent of audit procedures directed to these expenses.

*Id.* at 17-18. While Mr. Brodsky suggested that the Debtor's board of directors might investigate this concern further, he specifically stated that he was not aware of any impropriety. Importantly for purposes of this case, there is nothing in the Brodsky Report to suggest that the separate payments made by the Debtor to certain of the same persons who were covered by the ALDA PEO arrangement were not appropriate.

In May, 2011 the Debtor ran out of cash. In December, 2011 the Debtor's management resigned due to pending litigation and disagreements with the company's board of directors. For the following year there was little activity of record within the entity. On December 7, 2012, 13 creditors, including members of the aforementioned management team, filed an involuntary bankruptcy petition. The Debtor contested the petition. This Court granted summary judgment in favor of the petitioners and, on April 8, 2013, the Court entered an order for relief in the above-captioned main case.

On December 5, 2015, the Trustee filed complaints against ALDA and three former officers of the Debtor [Case Nos. 14-01867-EPK, 14-01868-EPK, 14-01872-EPK, 14-01874EPK] (collectively, the "ALDA Cases"). In each of the ALDA Cases, the Trustee alleged both actual and constructively fraudulent transfers by the Debtor. In this case, in

short, the Trustee argues that various payments made to ALDA were made with the actual intent to hinder, delay or defraud creditors, or that the Debtor did not receive reasonably equivalent value for such payments and the Debtor was insolvent at the time of the payments.

In August, 2015, each Defendant in the ALDA Cases moved for summary judgment on the grounds that there was no evidence whatsoever to support a finding of actual fraud and that the Debtor received reasonably equivalent value for all of the allegedly fraudulent transfers. In support of each summary judgment motion, the defendants attached copies of the various service agreements between themselves and the Debtor, as well as affidavits and accounting records. *See, e.g.*, Exhs. A-D to the Motion for Summary Judgment.

In the Response to the Motion for Summary Judgment, the Trustee attached only one exhibit, the Brodsky Report. The Trustee cites the Brodsky Report to support her theory that the existence of multiple payment streams to certain of the Debtor's officers implies that the payment streams were duplicative. Accordingly, the Trustee argues that the Debtor did not receive reasonably equivalent value for either or both payment streams.

In the Reply filed in this case and in similar filings in each of the ALDA Cases, each defendant rebutted the Trustee's un-supported assertions. The exhibits attached to the Reply in each case attest to each defendant's assertion that all payments by the Debtor to its officers and to ALDA were non-duplicative.

## II. Summary Judgment Standard

Federal Rule of Civil Procedure 56, made applicable to this matter by Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment is appropriate if the Court

determines that the “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). The movant supports its assertion that a fact cannot be disputed by citing to the record, “including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.” Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the burden of meeting this standard. *Imaging Bus. Machs., LLC v. BancTec, Inc.*, 459 F.3d 1186, 1192 (11th Cir. 2006). “An issue of fact is ‘material’ if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case.” *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). In considering a motion for summary judgment, the Court must construe all facts and draw all reasonable inferences in the light most favorable to the non-moving party. *In re Pony Express Delivery Services, Inc.*, 440 F.3d 1296, 1300 (11<sup>th</sup> Cir. 2006).

### III. Analysis

The Trustee pled two counts of actual fraud. Count I, brought under 11 U.S.C. § 548(a)(1)(A), and also under 11 U.S.C. § 544(b) and Florida Statutes §§ 726.105(1)(a) and 726.108(1), concerns transfers made by the Debtor to ALDA within a 2-year period preceding the filing of the bankruptcy petition. Count II, brought under 11 U.S.C. §§ 544(b)(1) and Florida Statutes §§ 726.105(1)(a) and 726.108(1), concerns similar transfers made within a 4-year period preceding the petition date. Counts I and II both require the Trustee to prove “actual intent to hinder, delay, or defraud.” 11 U.S.C. § 548(a)(1)(A); FS §

126.105(1)(a).

With regard to the claims based in actual fraud, the Trustee offered neither a detailed rebuttal to the Motion for Summary Judgment nor any evidence to support Counts I and II of the complaint. Thus, it appears the Trustee conceded that the allegations in the complaint do not support a finding of actual fraudulent intent by the Debtor.

In any case, there is no genuine dispute as to whether the Debtor intended to defraud any party in connection with its payments to ALDA. To begin with, the complaint here presents only bald assertions that the payments by the Debtor to the defendant were made with fraudulent intent. There are no specific allegations in the complaint which, if proven, would support such a finding. In contrast, the evidence provided by the defendant, including a copy of the PEO agreement, disclosure records, and affidavits of officers of both ALDA and the Debtor, is more than sufficient to negate any potential suggestion of actual fraudulent intent here.

Once a party seeking summary judgment offers evidence in support of its motion, the objecting party must come forward with contradictory evidence so that the Court may conclude a material fact is in dispute. On the claims based in actual fraud, the Trustee offered no evidence in rebuttal. Indeed, the sum total of evidence offered by the Trustee in opposition to the Motion for Summary Judgment as a whole consists of the Brodsky Report and a schedule of transfers evidencing that the Debtor did in fact pay ALDA pursuant to the terms of its PEO agreement. Neither exhibit in any way supports the allegations in the complaint that the Debtor acted with actual fraudulent intent or otherwise controverts the evidence offered by ALDA on this issue. Accordingly, the Court will grant the Motion for Summary Judgment as to Counts I and II.

The Trustee also pled two counts of constructive fraud. Count III, brought under 11 U.S.C. §§ 548(a)(1)(B), concerns transfers made by the Debtor to ALDA within a 2-year period preceding the filing of the bankruptcy petition. Count IV, brought under 11 U.S.C. §§ 548(b)(1) and Florida Statutes §§ 726.105(1)(a), 726.106(1) and 726.108(1)(a), concerns similar transfers made within a 4-year period preceding the petition date. Counts III and IV each require the Trustee to prove that the Debtor did not receive reasonably equivalent value in exchange for the transfers.

There is no genuine dispute as to whether the Debtor received reasonably equivalent value in exchange for the payments made to ALDA. The payments were made pursuant to a PEO service agreement. The evidence provided by ALDA supports its assertion that the Debtor paid ALDA amounts essentially equal to ALDA's actual out-of-pocket expenses in satisfying the Debtor's own obligations to its employees.

The Trustee does not offer any evidence to rebut ALDA's well-supported argument that the Debtor received full value for the payments made to ALDA. In fact, the Brodsky Report, the sole piece of evidence cited by the Trustee, appears to directly controvert the Trustee's own argument. It states: "within acceptable limits of materiality, the amount of money paid by Vicor to ALDA for compensation and other payroll related expenses . . . equaled the amounts expended by ALDA for these purposes." Brodsky Report, 14.

In the absence of evidence of impropriety, the Trustee hangs her hat on the bald assertion that because the Debtor made direct payments to certain of its officers in addition to payment of salary and benefits via ALDA the Court must conclude that the payments to ALDA were to some extent duplicative and the Debtor did not receive reasonably equivalent value for payments to its officers through the PEO agreement. This argument is not

supported by any evidence offered by the Trustee. Indeed, the Trustee's own evidence contradicts the suggestion that the payments made to ALDA and directly to the Debtor's officers were duplicative. Mr. Brodsky actually considered the separate payments made to officers and stated that he was "aware of no information indicating any impropriety." Brodsky Report at 17.

The respondent to a summary judgment motion is "required to go beyond the pleadings in [its] own case and present competent evidence in the form of affidavits, depositions, admissions, and the like to show a genuine issue for trial." *Wright v. Farouk Systems, Inc.*, 701 F.3d907, fn. 8 (11th Cir. 2012) (citing *Celotex*, 477 U.S. at 324); cf. *In re Delco Oil, Inc.*, 599 F.3d 1255, 1258 (11th Cir. 2010). Nothing offered by the Trustee places ALDA's assertions in dispute. The Court must conclude that the Debtor received reasonably equivalent value for the transfers to ALDA. Accordingly, the Court will grant the Motion for Summary Judgment as to Counts III and IV.

Finally, in Count V of her complaint the Trustee seeks relief under 11 U.S.C. § 550. Section 550 permits the Trustee to recover the amount or value of avoided transfers from the defendants. As the Court has determined to grant summary judgment on Counts I-IV, there is no longer a legal basis for Count V. The Court will dismiss Count V.

IV. Conclusion

For the reasons stated above, and being otherwise fully advised in the premises, it is ORDERED and ADJUDGED that the Motion for Summary Judgment [ECF No. 13] is GRANTED. The Court will enter a separate final judgment in favor of the defendant.

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Copies Furnished To:

Nathan Mancuso, Esq.

*Nathan Mancuso, Esq. is directed to serve a conformed copy of this Order on all appropriate parties and file a certificate of service with the Court.*