



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

Erik P. Kimball, Judge
United States Bankruptcy Court

**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.: 14-01868-EPK**

**THOMAS BOHANNON and
T.J. BOHANNON, INC.**
Defendants.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court upon the *Defendants' Motion for Summary Judgment* (the "Motion for Summary Judgment") [ECF No. 13] filed by Thomas Bohannon

and T.J. Bohannon, Inc. (the “Defendants”), 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”). The Court, having considered the Motion, the Response, the Reply, the record in this adversary proceeding, and the record in the underlying Chapter 7 case number 12-39329-EPK, 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.

Defendant Thomas Bohannon (“Mr. Bohannon”) is the principal of defendant T.J. Bohannon, Inc. (“TJB”). The Debtor retained TJB in December, 2008 to serve as the company’s chief accounting officer under a consulting agreement. The Debtor and TJB renewed the agreement annually, with non-material changes, until TJB resigned in December, 2011. On one occasion, the Debtor mistakenly paid \$3,609.25 to Mr. Bohannon instead of TJB. Mr. Bohannon deposited the payment into TJB’s bank account.

ALDA & Associates International, Inc. (“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. These employees initially included Mr. Fater, Vice President Jerry M. Anchin, and Executive Assistant Eileen Galvin. The agreement allowed for the list of covered employees to be modified. There is no evidence to suggest that the list was ever modified to include either of the Defendants.

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.

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

In addition to paying officers' salary and benefits via the PEO arrangement with ALDA, the Debtor paid certain officers directly under independent consulting and employment agreements. The Debtor paid TJB under such a direct arrangement.

Mr. Bohannon has served as a consultant to ALDA. As such, he has appeared on ALDA's website and been paid by ALDA for services. However, there is no evidence to suggest that he ever received payments from ALDA pursuant to ALDA's PEO agreement with the Debtor.

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. Again, there is no evidence that either of the present Defendants received payments under the ALDA PEO arrangement.

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, 2014, the Trustee filed complaints against ALDA and three former officers of the Debtor [Case Nos. 14-01867-EPK, 14-01868-EPK, 14-01872-EPK, 14-01874-EPK] (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 or for the benefit of the Defendants 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 in the ALDA Cases 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. These exhibits attest to each defendant's assertion that all payments by the Debtor to its officers, whether through ALDA or directly, were made under distinct, non-duplicative agreements.

In the Response to the Motion for Summary Judgment, the Trustee attached only three exhibits: the Brodsky Report, an affidavit by Mr. Fater describing the ALDA PEO arrangement, and a copy of the PEO agreement. 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, the Defendants in this case argue that neither Mr. Bohannon nor TJB were ever paid under the ALDA PEO arrangement. Accordingly, no payments to either Defendant could be duplicative of payments under the PEO arrangement. The Defendants offer affidavits of Mr. Bohannon and Mr. Fater in support of their argument.

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 (11th 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 or for the benefit of the Defendants 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. 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 the Defendants. The complaint here presents only bald assertions that the payments by the Debtor to the Defendants were made with fraudulent intent. There are no specific allegations in the complaint which, if proven, would support such a finding.

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 material 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 copy of a PEO agreement. The Brodsky Report does not in any way support the bald allegations in the complaint that the Debtor acted with actual fraudulent intent nor does it otherwise controvert the evidence offered by the Defendants on this issue.

Neither of the Defendants is even a party to the PEO agreement. 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 or for the benefit of the Defendants 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 the Defendants. The payments were made pursuant to a consulting agreement. There is no evidence the Defendants were paid other amounts by the Debtor under any other agreement, either directly or indirectly.

In the absence of evidence of impropriety, the Trustee hangs her hat on the assertion that because the Debtor made payments to *some* of its officers via ALDA as well as directly, the Court must conclude that the payments to ALDA were carried through to *all* of the Debtor's officers, including the Defendants, that the payments were to some extent duplicative, and that the Debtor did not receive reasonably equivalent value for payments to the Defendants. This theory, which is addressed only in the Response and not in the complaint itself, is not supported by any evidence offered by the Trustee. There is simply no evidence that the Defendants here received any payment from ALDA and so there is no possibility of duplicative payments.

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 the Defendants’ assertions in dispute. The Court must conclude that the Debtor received reasonably equivalent value for the transfers to or for the benefit of the Defendants. 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 Defendants.

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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.