



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.
_____ /

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

v. **ADV. NO.: 14-01872-EPK**
RICHARD COHEN,
Defendant.
_____ /

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 Richard Cohen, 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 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, grants the Motion for Summary Judgment 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.

The Debtor retained Mr. Cohen in 2009 to serve as the company’s vice president for corporate and business development under a consulting agreement. Under the agreement, the Debtor paid Mr. Cohen a monthly base rate in addition to reimbursement of reasonable expenses. The monthly base rate for 2009 and 2010 was \$8,750.

Alda & Associates International, Inc. (“ALDA”) is a consulting company that was at all relevant times owned and controlled by David Fater, the Debtor’s CEO. 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.

ALDA did not always pay to the Debtor's employees the full amount of their base salary. In order to provide health benefits, ALDA only had to pay a minimum salary to maintain an individual's status as an employee. Accordingly, in 2009 and 2010 ALDA paid to Mr. Cohen only \$16,312.50. The Debtor paid directly to Mr. Cohen the remainder of the compensation due to Mr. Cohen during that period, \$177,874.22 in salary plus reimbursement for reasonable expenses.¹

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

¹ In the Response, the Trustee states that "[d]uring that same period [Mr. Cohen] received approximately \$203,141.80 in Transfers from Vicor." This statement is not supported by the evidence before the Court. It appears that the Trustee mistakenly aggregated payments from both ALDA and the Debtor to Mr. Cohen, attributing that entire sum to the Debtor. There is no genuine dispute as to the amounts paid to Mr. Cohen by ALDA and the Debtor, respectively.

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, 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 Mr. Cohen 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. These exhibits attest to each defendant's assertion that all payments by the Debtor to its officers and to ALDA were non-duplicative.

In the Response to the Motion for Summary Judgment, the Trustee attached only three exhibits: the Brodsky Report, the PEO agreement between the Debtor and ALDA, and an affidavit from Mr. Fater describing that 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, Mr. Cohen asserts that the amounts paid to him by the Debtor and ALDA equal, in the aggregate, the total amount owed to Mr. Cohen under his consulting agreement for the years 2009 and 2010. Mr. Cohen attaches as evidence in support of this assertion both his own affidavit and certain tax disclosures indicating amounts paid from each source.

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 Mr. Cohen 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 Mr. Cohen. 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 Mr. Cohen, including tax 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. None of the Trustee’s exhibits in any way supports the allegations in the complaint that the Debtor acted with actual fraudulent intent or otherwise controverts the evidence offered by Mr. Cohen 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 Mr. Cohen 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 Mr. Cohen. The payments were made pursuant to a consulting agreement. The evidence provided by Mr. Cohen supports his assertion that, when one combines the payments made to Mr. Cohen directly and via ALDA, the Debtor ultimately paid Mr. Cohen exactly what was due to him under his consulting agreement and the Debtor received the agreed-upon services in return. The Trustee does not offer any evidence to rebut Mr. Cohen's well-supported argument that the Debtor received full value for the payments made to Mr. Cohen directly and via ALDA.

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 Mr. Cohen's well supported assertions in dispute. The Court must conclude that the Debtor received reasonably equivalent value for the transfers to Mr. Cohen. 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.