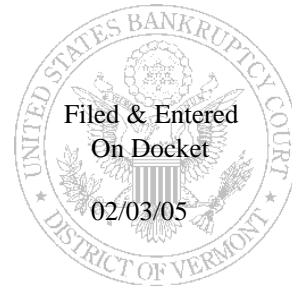


2005 WL 280436

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF VERMONT



In re:

LAUREN JO CHASE,  
Debtor

Chapter 13 Case  
# 02-10582

JAN M. SENSENICH et al,  
Plaintiff

v.

ROBERT MOLLEUR,  
Defendant.

Adversary Proceeding  
# 03-1058

Appearances: Jan M. Sensenich, Esq.  
White River Junction, Vt  
Trustee, Pro Se

Oliver Twombly, Esq.  
Barre, Vt  
For the Defendant

**MEMORANDUM OF DECISION**  
**DETERMINING VALUE OF THE SUBJECT PROPERTY**  
**AND SETTING SCHEDULING CONFERENCE**

The Plaintiffs seek to avoid the transfer of a dwelling located in West Danville, Vermont (the “Subject Property”), effected pursuant to the Vermont strict foreclosure process, as a fraudulent conveyance under 11 U.S.C. § 548 (a)(1) and 9 V.S.A. § 2289(a). This Court has determined as a matter of law that compliance with the Vermont strict foreclosure process does not create a presumption of “reasonably equivalent value” and that a transfer effectuated under the strict foreclosure process may be vulnerable to an avoidance action, based upon a case-by-case determination of reasonably equivalent value. Sensenich, et al. v. Molleur, No. 03-1058 (Bankr. Vt., January 27, 2005) (doc. # 35).

In its Order and Memorandum of Decision herein granting partial summary judgment for the Plaintiffs, the Court determined that, for purposes of the fraudulent conveyance statutes, the “transfer” occurred pre-petition on October 26, 2001 (the “Transfer Date”) (docs. ## 22-23). On January 28, 2005, the Court considered evidence as to the valuation of the transferred property and the amount of the debt due and owing as of the Transfer Date. At the trial, the Parties stipulated that the amount of the debt due and owing to the Defendant as of the Transfer Date was \$110,927.64. The Court has considered the Proposed Findings of Fact submitted by the Plaintiffs (doc. # 40) and the Post-trial Memorandum of Fact filed by the Defendant (doc. # 39). This Order constitutes the Court’s findings of fact with respect to the value of the Subject Property as of the Transfer Date.

The Debtor purchased the Subject Property in November of 1998 for \$84,000. At that time, the Subject Property was in very poor condition and needed substantial renovations in order to be used for the purpose the Debtor envisioned. The Debtor gave a mortgage to the Defendant, secured by the Subject Property, in consideration of the funds the Defendant advanced to the Debtor toward the cost of the purchase and renovation of the Subject Property.

Harold Dresser, a licensed real estate appraiser, first appraised the Subject Property on November 11, 1998, in connection with the Debtor's purchase of the Subject Property, prior to the initiation of any litigation between the Parties (the "1998 Dresser Appraisal")(Def. Ex. 7). The 1998 Dresser Appraisal estimates the fair market value of the Subject Property at that time to be \$135,000, subject to the conditions contained therein. (Id.). The primary condition underlying the valuation in the 1998 Dresser Appraisal is that certain renovations would be completed. In particular, the 1998 Dresser Appraisal assumed that the third floor attic space would be converted into three bedrooms and a bathroom. However, the renovations that the Debtor ultimately decided to do and did complete were different than she had in mind at the time of the 1998 Dresser Appraisal. For example, the 1998 Dresser Appraisal did not assume or contemplate the full extent of the renovations of the first and second floor and in particular, did not take into account the addition of a finished "mud room" and new bathroom on the first floor. The actual renovations of the Subject Property were completed in October, 1999, but the third floor bedrooms and bathroom were never constructed.

Mr. Dresser conducted a second appraisal of the property about two and a half years later, based upon a visit to the Subject Property on June 18, 2002.(the "2002 Dresser Appraisal")(Pl. Ex. B). By this time, the Parties were engaged in litigation over the Subject Property. This appraisal, Mr. Dresser estimates the fair market value of the Subject Property to be \$207,000, a 53% increase over his earlier appraisal. Mr. Dresser testified that the completed renovations he saw at this time were far more extensive and of a higher quality than were contemplated in the 1998 Dresser Appraisal. The 2002 Dresser Appraisal did not include the attic space in its computation of liveable square footage but did include the recently renovated three room apartment on the second floor; it listed the Subject Property to be in "good" condition.

Both the 1998 Dresser Appraisal and the 2002 Dresser Appraisal rely upon the sales comparison approach to determine value. However, the methodology of the latter appraisal is questionable. The 2002 Dresser Appraisal is based upon comparable sales of four parcels but fails to take into account the variations in value due to amount of land, view and location of those properties vis a vis the Subject Property. The comparable sales parcels range from 2 acres to 13 acres while the Subject Property contains 1.5 acres. Based upon the testimony, the Court finds two of the comparable sales were inadequately adjusted to account for superior locations and mountain views and, as a result of this failure to adjust comparables prudently, the 2002 Dresser Appraisal values the Subject Property higher than its actual fair market value.

The Defendant took possession of the property after the Petition Date in 2002. At that time, the Subject Property was leased to a tenant who the Defendant allowed to remain in the property. Shortly thereafter, the tenant vacated the premises without notice to the Defendant and as a result of the tenant's failure to have oil delivered, the furnace suffered irreparable damage, the pipes froze and there was damage to the property. The Defendant incurred the cost of a new furnace and repairs to the Subject Property. But, since this damage was sustained after the Transfer Date and is not relevant to the value of the Subject Property as of the Transfer Date.

Richard Kettinger, a licensed real estate appraiser who was retained by the Defendant to appraise the Subject Property, visited the Subject Property on January 13, 2003. As a result of his analysis of comparable sales and the condition of the Subject Property, Mr. Kettinger estimated the market value of the Subject Property to be \$135,000 (the "Kettinger Appraisal")(Def. Ex. 1). The Court also finds the methodology of this appraisal to be questionable. The Kettinger Appraisal describes the property to be in "average" condition and cites to "some repair to walls where pipe repair has been made." Based upon the testimony and exhibits presented, the Court finds it most likely that the repairs Mr. Kettinger referred to are those repairs undertaken by the Defendant after the Transfer Date. Based upon the text and photographs set forth in the 2002 Dresser Appraisal, the Court finds that the Kettinger Appraisal assesses the condition of the Subject Property too low. Additionally, the Kettinger Appraisal failed to include the three room apartment on the second floor in the calculation of the livable square footage of the Subject Property. Rather, the Kettinger Appraisal adjusted some of the comparable sales by \$20,000 to account for the Subject Property's apartment. As a result of the condition it assigned to the property and the treatment of the second floor space, the Court finds that the Kettinger appraisal values the Subject Property lower than its actual fair market value.

Mr. Dresser and Mr. Kettinger (collectively, the "Appraisers") testified that when appraisers select, evaluate and adjust comparable sales, they rely upon their own judgment; and further, that appraising is inherently subjective and not an exact science. The subjective nature of the appraisals especially calls into question the 2002 Dresser Appraisal and the Kettinger Appraisal because both of these appraisals were commissioned after litigation had commenced between the Parties and each appraiser knew that the opposing party had an appraisal that his client thought inaccurate. The credibility of both of these litigation-driven appraisals is further reduced by the fact that they reach such dramatically different valuation figures.

Based upon the facts presented, the evidence admitted and the demeanor of the witnesses, the Court finds the 1998 Dresser Appraisal to be the most credible. Although the 1998 Dresser Appraisal contemplates that the third floor attic would be renovated for living space, this issue can be addressed squarely based upon a computation both appraisers stated to be sound. The Appraisers agreed that approximately \$8,300 of the appraisal amount, based upon a square footage calculation, would be the proper amount to attribute to the

renovation of the third floor. Because it is uncontroverted that the third floor was never renovated, the Court could subtract \$8,300 from the \$135,000 appraisal and find value of the Subject Property to be \$126,700 as of the date of the 1998 Dresser Appraisal. However, this downward adjustment in value would not take into account Mr. Dresser's testimony that the renovations, as actually completed, surpassed the renovations he contemplated when he prepared the 1998 Dresser Appraisal. There was no direct testimony as to the exact value of the other renovations that were done but Mr. Dresser was clear in his testimony that the renovations he saw in 2002 exceeded the renovations that he was counting on as a condition of his valuation of the property at \$135,000. This testimony was consistent with the Debtor's description of the renovations made to the Subject Property. Accordingly, the Court finds it is conservative and reasonable to adopt the \$135,000 value reached in the 1998 Dresser Appraisal as a sound valuation of the Subject Property upon completion of the renovations. With this one clarification, the Court finds the methodology of the 1998 Dresser Appraisal to be solid.

The one issue that remains is if and how the 1998 Dresser Appraisal can be converted into an accurate reflection of the Subject Property's value as of the Date of Transfer. Both appraisers testified that there is enough data available and their experience proves that an adjustment may be made to any of the appraisals to accurately reflect the passage of time. Since the 1998 Dresser Appraisal was completed three years prior to the Transfer Date such a passage of time adjustment is necessary.

According to the Debtor's uncontroverted testimony, the renovations to the Subject Property were completed in October, 1999. Since the 1998 Dresser Appraisal valuation is dependent upon the renovations being completed, the Court finds that an adjustment for the passage of time should only be made as of the date the renovations were completed. The Appraisers agree that given the Vermont real estate market during the 1998 - 2003 time period, an increase of  $\frac{1}{2}\%$  per month, or 6% per year, is appropriate to bring any of the appraisals to the Date of Transfer. The renovations were completed almost exactly two years prior to the Transfer Date, so the Court finds that in order to ascertain the fair market value of the property on the Transfer Date the \$135,000 valuation must be increased by 12%. Applying this adjustment factor to the 1998 Dresser Appraisal, the Court finds that the value of the Subject Property as of the Transfer Date was \$151,200.

Interestingly, very near to the Transfer Date, the Subject Property was listed with a real estate broker at the direction of the Defendant and with the Debtor's consent for \$149,000. The listing was in place from April 30, 2001 until October 29, 2001. (Def. Ex. 8) Neither party submitted any evidence by the listing broker as to how this listing price was determined nor any admissible evidence as to why the Subject Property did not sell for this price during the listing period. Thus, the Court draws no inferences on these points. However, the Court does find it probative of value that the owner of the Subject Property and the mortgagee of the Subject Property, both of whom were intimately familiar with the Subject Property and all of the

renovations, chose to list the property for sale at this time, at this price. The Court also finds credible the Debtor's testimony that she was motivated to sell the Subject Property when she signed the listing agreement. Hence, the Court finds that the Debtor as owner of the property demonstrated that she believed that \$149,000 reflected the Subject Property's actual fair market value as of the Date of the Transfer, and that this is probative of its value. New Haven Radio, Inc. v. Meister (In re Martin-Trigona), 760 F.2d 1334, 1344 (2d Cir. 1985) (owner of property competent to testify to its value); see also, 12 V.S.A. § 1604 (owner of property competent witness to testify to property's value); Gazo v. Gazo, 166 Vt. 434, 446 (1997). In sum, though not determinative, the Court finds this is a good indicator of the value of the Subject Property as of the Transfer Date and is consistent with the Court's validation of the adjusted 1998 Dresser Appraisal.

### **CONCLUSION AS TO VALUE**

THE COURT FINDS that the outstanding debt as of the Transfer Date was \$110,927.64 and the value of the Subject Property as of the Transfer Date was \$151,200.

THE COURT FURTHER FINDS that the remaining issue in this adversary proceeding is a legal one, namely whether, under the circumstances of this case, the Debtor received reasonably equivalent value upon the transfer of the Subject Property for purposes of the fraudulent conveyance statutes.

### **SCHEDULING CONFERENCE**

The Court hereby sets a status conference in this matter, to be held on **February 10, 2005 at 3:30 p.m. in Burlington, Vermont**. At that conference, the Court will establish a briefing schedule, if the Parties wish to file memoranda of law, on the issue of which factors the Court should consider in making its determination of whether, under the circumstances of this case, the Debtor received reasonably equivalent value upon the transfer of the Subject Property. The Parties may participate in the conference by telephone, if they so desire and if they make arrangements with the Courtroom Deputy in advance.

February 3, 2005  
Rutland, Vermont



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Colleen A. Brown  
United States Bankruptcy Judge