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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

LL MAY 27 1988

OKURA & CO. (AMERICA), INC.,)
)
Plaintiff,)
)
v.)
)
RUSSELL J. TOBEY, SR., et al.,)
)
Defendants.)

No. 85-2859-C (6)

EYVON MENDENHALL
U. S. DISTRICT COURT
E. DISTRICT OF MO.

A TRUE COPY OF THE ORIGINAL
Filed: May 27, 1988

Attest: EYVON MENDENHALL, CLERK

By: Michelle Kistner

Dated: June 3, 1988

MEMORANDUM AND ORDER

This matter is before the Court upon the plaintiff's motion for preliminary and permanent injunctions and to set aside a fraudulent conveyance. The hearing on the plaintiff's motion for preliminary injunction was held on May 19, 1988. The plaintiff appeared by counsel and defendant Russell J. Tobey, Sr. ("Tobey, Sr.") and defendant Terry Tobey appeared in person and by counsel. Based on the testimony and evidence adduced, the Court finds as follows:

(1) On January 12, 1988, this Court entered a judgment in favor of the plaintiff and against Tobey, Sr. in the amount of \$1,705,264.24. This judgment remains unsatisfied. On the same date, judgment was entered in plaintiff's favor against Terry Tobey, the wife of Tobey, Sr.

(2) On and after January 12, 1988, Tobey, Sr. was the owner of a 1979 Cessna R 182 airplane having the registration number N99RT and the serial number R18201064 (hereinafter referred to as "Plane 1"). Plane 1 was titled solely in the name of Tobey, Sr. Plane 1 was purchased by Tobey, Sr. in 1980 from

the proceeds of the sale of another airplane he then owned and a bank loan.

(3) In February 1988, Tobey, Sr. arranged for the sale of Plane 1 to a buyer in Michigan. The sale was consummated on February 25, 1988 when Tobey, Sr. delivered Plane 1 to the buyer in exchange for \$47,000. The purchase price was paid in the form of two cashier's checks, one in the amount of \$31,000 and one in the amount of \$16,000. Both cashier's checks were drawn payable to Tobey, Sr. alone.

(4) On February 25, 1988 Tobey, Sr. purchased a 1963 Beech 35-B33 airplane having the registration number N9742Y and the serial number CD-611 (hereinafter referred to as "Plane 2") from Kenneth E. Nielsen in Illinois. The purchase price of Plane 2 was \$31,000 which Tobey, Sr. paid by endorsing in blank the \$31,000 cashier's check which he had received from the sale of Plane 1.

(5) At the direction of defendant Tobey, Sr. the bill of sale for Plane 2 was prepared to identify the purchasers as "Russell and Terry Tobey."

(6) On February 23, 1988, Terry Tobey paid the plaintiff \$50,000 in satisfaction of the judgment entered against her on January 12, 1988. At the hearing, Tobey, Sr. and Terry Tobey testified that this \$50,000 had been borrowed by Terry Tobey from her son, Greg LaMear, in order to pay the judgment. However, during his deposition taken on March 14, 1988, Tobey, Sr. testified that he gave Terry Tobey the proceeds from the sale of Plane 1 and that she used these proceeds to pay the judgment. Tobey,

Sr. further testified that after paying the judgment, Terry Tobey then purchased Plane 2. Tobey, Sr. made no mention of the loan from Greg LaMear in his deposition and he testified that he did not know where Terry Tobey got the money to purchase Plane 2.

(7) After acquiring Plane 2, Tobey, Sr. testified that he flew it from Illinois to Bismarck, Missouri for repair work. He testified that he did not know what became of Plane 2 thereafter and that he does know the present whereabouts of Plane 2.

(8) Terry Tobey testified that she also does not know the present whereabouts of Plane 2. She testified that all matters pertaining to Plane 2 were handled by her son, Greg LaMear, whom she believes may have leased it to a pilot in Ohio. After being served with the temporary restraining order entered by this Court, Terry Tobey called LaMear in order to determine the whereabouts of Plane 2. However, she testified that LaMear told her that he, too, did not know where Plane 2 was located. Terry Tobey further testified that she made no further attempts to determine the location of Plane 2.

CONCLUSIONS OF LAW

The evidence presented by the parties and the post-hearing memorandum submitted by the defendants pertain to the motion to set aside the fraudulent conveyance as well as the application for a preliminary injunction. The parties having indicated to the Court that no further testimony or evidence is to be adduced, the trial on the merits of this action is advanced and consolidated with the hearing of the application. Fed. R. Civ. P. 65(a)(2).

Under Missouri law, a conveyance of property or of any interest therein that is made with intent to hinder, delay or defraud creditors is deemed null and void as against those creditors. Mo. Rev. Stat. §428.020 (1986). In this case, it is undisputed that Tobey, Sr. had not satisfied the judgment entered against him on January 12, 1988 at the time of the conveyance of Plane 2 and that he was at that time indebted to the plaintiff. However, the ultimate issue is whether Tobey Sr.'s conveyance of Plane 2 to himself and Terry Tobey was done with intent to defraud the plaintiff.

The evidence establishes that Tobey, Sr. was the owner of Plane 1, which was titled solely in his name, and that he used the proceeds from the sale of Plane 1 to purchase Plane 2 which he then conveyed to himself and to his wife. A voluntary transfer of property between a husband and wife to the prejudice of the creditors of either spouse is presumptively fraudulent and void as to those creditors. Cooper v. Freer, 385 S.W.2d 340 (Mo.App. 1965). However, when the property is held by a husband and wife as tenants by the entirety, a conveyance of the property cannot be held fraudulent as to the creditors of an individual spouse. Bostian v. Jones, 224 S.W.2d 1 (Mo. 1951).

In this case, the defendants assert that because Plane 1 and Plane 2 were acquired during their marriage, both are presumptively marital property. Hence, the transfer of either airplane cannot be deemed fraudulent as to Tobey, Sr.'s creditors. In support of their argument, the defendants rely on Mo. Rev. Stat. §452.330.2 (1986) which defines "marital property"

as property acquired by either spouse subsequent to the marriage.¹ The statutory definition of marital property, however, governs only in proceedings for dissolution of marriage and it is applicable only to the determination of the manner in which property acquired during marriage is to be divided between a husband and wife upon dissolution. Furthermore, marital property as defined in the statute is not necessarily equivalent to property owned by a husband and wife as tenants by the entirety. In fact, §452.330.3 provides that the term marital property includes property held by the spouses as joint tenants, tenants in common, tenants by the entirety and community property. Thus, the defendants' reliance on §452.330.2 is misplaced.

Tobey, Sr.'s testimony that he owned Plane 1 and that it was titled solely in his name precludes a finding that the airplane was owned by the defendants as tenants by the entirety. See, Morris v. Holland, 529 S.W.2d 948 (Mo.App. 1975). Furthermore, Tobey, Sr.'s testimony and the documentary evidence established that the proceeds from the sale of Plane 1 were paid to Tobey, Sr. alone and that these proceeds were used to purchase Plane 2. The defendant's subsequent conveyance of Plane 2 to himself and to his wife coupled with the lack of consideration therefor constitute badges of fraud from which a strong inference of fraudulent intent arises. See, Allison v. Mildred, 307 S.W.2d 447 (Mo. 1958); Lindell Trust Co. v. Commonwealth Land Title

^{1/} The statute also lists exceptions to the definition of marital property which are not relevant here.

Insurance Co., 611 S.W.2d 283 (Mo.App. 1980). Tobey, Sr. has not presented any credible evidence disputing the inference of fraudulent intent in the transfer of Plane 2 to himself and his wife. See, Cooper v. Freer, supra. His deposition testimony regarding the use of the proceeds from the sale of Plane 1 and the source of funds for the purchase of Plane 2 differs materially from his testimony on these issues at the hearing. Furthermore, his claimed lack of knowledge as to the whereabouts of Plane 2 since its acquisition suggests an effort to conceal.

Based on the facts and circumstances in evidence, the Court finds that Tobey, Sr.'s purchase of Plane 2 with the proceeds he received from the sale of Plane 1, and his identification of the purchasers of Plane 2 on the Bill of Sale as Russell and Terry Tobey, was done with the intent to hinder, delay and defraud plaintiff of its right to satisfy the judgment. Tobey, Sr.'s conveyance of Plane 2 to he and his wife, therefore, is void. Mo. Rev. Stat. §428.020 (1986). The Court further finds that the plaintiff is without an adequate remedy at law.

Accordingly,

IT IS HEREBY ORDERED that defendants Russell J. Tobey, Sr. and Terry R. Tobey are permanently RESTRAINED AND ENJOINED from moving, concealing, encumbering, selling or otherwise transferring possession or ownership of Plane 2, a 1963 Beech 35-B33 airplane, registration number N9742Y, serial number CD-611.

IT IS FURTHER ORDERED that the conveyance of Plane 2 to defendants Russell J. Tobey, Sr. and Terry R. Tobey is set aside,


and this Court declares that defendant Russell J. Tobey, Sr. is the sole owner of Plane 2.

IT IS FURTHER ORDERED that defendant Russell J. Tobey, Sr. shall, within ten (10) days of the date of this Order, either: (1) pay \$31,000 to plaintiff, Okura & Co. (America), Inc., by delivering cash or a cashier's check in that amount to John W. Moticka, plaintiff's counsel, at 10 South Broadway, Suite 1800, St. Louis, Missouri 63102, or, at defendant Russell J. Tobey, Sr.'s option, (2) turn over Plane 2 to the United States Marshal, who shall sell Plane 2 at a public auction and pay the proceeds of the sale to plaintiff.

IT IS FURTHER ORDERED that within ten (10) days of the date of this Order defendant Russell J. Tobey, Sr. shall pay \$16,000 to plaintiff, Okura & Co. (America), Inc., by delivering cash or a cashier's check in that amount to John W. Moticka, 10 South Broadway, Suite 1800, St. Louis, Missouri 63102. This sum represents the excess proceeds received by defendant Russell J. Tobey, Sr. from the sale of Plane 1 and not used to purchase Plane 2.

IT IS FURTHER ORDERED that the Clerk of the Court shall mail copies of this Memorandum and Order to defendants Russell J. Tobey, Sr. and Terry Tobey, 12627 Bradford Woods Drive, St. Louis, Missouri 63127 and to all counsel of record in this case.

This Permanent Injunction was issued on May 27, 1988, at 12:30 PM.



CAROL E. JACKSON
UNITED STATES MAGISTRATE

Dated this 27th day of May, 1988.

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION - FEDERAL AVIATION ADMINISTRATION
CERTIFICATE OF AIRCRAFT REGISTRATION

This certificate must be in the aircraft when operated.

NATIONALITY AND REGISTRATION MARKS N 9742Y AIRCRAFT SERIAL NO. CD-611

MANUFACTURER AND MANUFACTURER'S DESIGNATION OF AIRCRAFT
BEECH 35-B33

ISSUED TO
ROBEY RUSSELL
TOBEY TERRY
PO BOX 1964
SEDALIA MO 65301

This certificate is issued for registration purposes only and is not a certificate of title. The Federal Aviation Administration does not determine rights of ownership as between private persons.

CO-OWNER

It is certified that the above described aircraft has been entered on the register of the Federal Aviation Administration, United States of America, in accordance with the Convention on International Civil Aviation dated December 7, 1944, and with the Federal Aviation Act of 1958, and regulations issued thereunder.

DATE OF ISSUE
MARCH 15, 1988

Alan Meditor
Administrator

US Department of Transportation
Federal Aviation Administration

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION - FEDERAL AVIATION ADMINISTRATION
CERTIFICATE OF AIRCRAFT REGISTRATION

This certificate must be in the aircraft when operated.

NATIONALITY AND REGISTRATION MARKS N 9742Y AIRCRAFT SERIAL NO. CD-611

MANUFACTURER AND MANUFACTURER'S DESIGNATION OF AIRCRAFT
BEECH 35-B33

ISSUED TO
NIELSEN KENNETH E
2509 OAKWOOD DRIVE
OLYMPIA FIELDS IL 60461

This certificate is issued for registration purposes only and is not a certificate of title. The Federal Aviation Administration does not determine rights of ownership as between private persons.

INDIVIDUAL

It is certified that the above described aircraft has been entered on the register of the Federal Aviation Administration, United States of America, in accordance with the Convention on International Civil Aviation dated December 7, 1944, and with the Federal Aviation Act of 1958, and regulations issued thereunder.

DATE OF ISSUE
NOV. 02, 1978

Loupane Bond
Administrator

US Department of Transportation
Federal Aviation Administration

AC Form 8050-3 (7/87) Supersedes previous edition

AC Form 8050-3 (5-77)

ASTRO INSTRUMENT INC. DET., MICH. 48213
PHONE: 313+839-9133

SCALE CORRECTIONS		
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DATE: 3-15-88 TESTED BY: *[Signature]*

6.833

Form FAA 1362B (5-59) GPO : 1959 OF - 508938

CERTIFICATE OF AIRWORTHINESS
UNITED STATES OF AMERICA
FEDERAL AVIATION AGENCY

1. NATIONALITY AND REGISTRATION MARKS N9742Y STANDARD

2. AIRCRAFT AIRWORTHINESS CLASSIFICATION

3. This Certificate of Airworthiness is issued pursuant to the Federal Aviation Act of 1958. The aircraft identified hereon is considered airworthy when maintained and operated in accordance with the provisions of Part 410. This Certificate will remain in effect as long as the aircraft is maintained in accordance with Part 43 of the Civil Air Regulations unless surrendered, suspended, revoked, or termination date is otherwise established by the Administrator of the Federal Aviation Agency.

5. DATE OF ISSUANCE March 6, 1983
6. FAA REPRESENTATIVE *[Signature]*
7. DESIGNATION NO. DMCR 3-2

8. Any alteration or misuse of this Certificate is punishable by a fine of not exceeding \$1,000 or imprisonment not exceeding 3 years, or both.

FEDERAL COMMUNICATIONS COMMISSION
AIRCRAFT RADIO STATION LICENSE

FREQUENCIES

FAA NUMBER OR FCC CONTROL NO.	NO. AIRCRAFT IN FLEET	ISSUE DATE	EXPIRATION DATE
N9742Y		DEC 6 71	DEC 6 71

PRIVATE AIRCRAFT (SECTION 97.211)

THIS AUTHORIZATION IS SUBJECT TO FURTHER CONDITIONS AS SET FORTH ON THE REVERSE SIDE.

MANUFACTURER
KING RADIO CORP
MOTOROLA INC
MOTOROLA INC

TYPE NUMBER
XX-140
350A
350B

**Not
Transferable**
(Must be posted aboard the aircraft)

Consistent with the frequencies authorized hereon, the licensee is authorized to use any transmitter type accepted by the Commission for use in aircraft stations on frequencies in the band 118-136 Mc/s or on 243 Mc/s. Any transmitter listed hereon may be replaced with a type accepted transmitter which operates on the same frequencies and performs the same function.

FREDERICK J ROSS JR
35 BERWIN DR
SNYDER N Y 14226

Ben F. Waple
SECRETARY





UNITED STATES MARSHALS SERVICE

Deborah Remstedt
314/425-4212

Eastern DISTRICT OF Missouri

SEIZED PROPERTY AND EVIDENCE CONTROL

RECEIVED FROM (Name and address)

John Moticka, Attorney, #10 S. Broadway, Suite 1800, St. Louis, MO 63102

CASE NO.

85-2859C(6)

CASE TITLE

OKURA & CO. vs RUSSELL J. TOBEY, SR., et al

SUBJECT (Name, address and identification data)

One (1) 1987 Audi and One (1) 1963 Beech Airplane

ITEM NO.	QTY.	DESCRIPTION OF ARTICLES (Include model, serial no., identifying marks, condition, value, etc.)	STORAGE LOCATION
1	1	1987 Audi 4000CS Quattro 4-door Sedan 5-speed manual transmission Mileage: 13,500 heated front seats power sunroof fully-powered accessories AM/FM stereo Value: \$12,000.00	Southside Towing 2911 Iowa St. Louis, MO
2	1	1963 Beech 35-B33 Airplane Registration # N9742Y Serial # CD-611 Value: \$30,000.00	St. Clair Airport St. Clair, MO
-----LAST ITEM-----			

I certify that I have received and held myself accountable for the articles listed above:

NAME & TITLE (Typed or printed) Kenneth J. Schaefer	AGENCY USMS	DATE 3/8/88	SIGNATURE <i>KJ Schaefer</i>
--	----------------	----------------	---------------------------------

CHAIN OF CUSTODY

ITEM NO.	DATE	RELINQUISHED BY	RECEIVED BY	PURPOSE
1	7/18/88	NAME & AGENCY <i>K.J. Schaefer USMS</i>	NAME & AGENCY <i>McMahon Ford Co.</i>	Sold per court order dated 4/29/88 for \$11,500.00
		SIGNATURE <i>KJ Schaefer</i>	SIGNATURE <i>Mark H. [unclear]</i>	Copy of Court Order attached.
2	7/18/88	NAME & AGENCY <i>Kenneth Schaefer, USMS</i>	NAME & AGENCY <i>Harrison Rentals</i>	Sold per court order dated 5/27/88 for \$25,000.00
		SIGNATURE <i>KJ Schaefer</i>	SIGNATURE <i>John Harrison</i>	Copy of Court Order attached.
		NAME & AGENCY	NAME & AGENCY	
		SIGNATURE	SIGNATURE	



UNITED STATES MARSHALS SERVICE

Eastern DISTRICT OF Missouri
SEIZED PROPERTY AND EVIDENCE CONTROL

RECEIVED FROM (Name and address)

John Moticka, Attorney, #10 S. Broadway, Suite 1800, St. Louis, MO 63102

CASE NO.

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2	1	1963 Beech 35-B33 Airplane Registration # N9742Y Serial # CD-611 Value: \$30,000.00	St. Clair Airport St. Clair, MO
-----LAST ITEM-----			

I certify that I have received and held myself accountable for the articles listed above:

NAME & TITLE (Typed or printed)	AGENCY	DATE	SIGNATURE
Kenneth J. Schaefer	USMS	3/8/88	<i>[Signature]</i>

CHAIN OF CUSTODY

ITEM NO.	DATE	RELINQUISHED BY	RECEIVED BY	PURPOSE
1	7/18/88	NAME & AGENCY <i>K.J. Schaefer USMS</i>	NAME & AGENCY <i>Metkay Ford Co.</i>	Sold per court order dated 4/29/88 for \$11,500.00
		SIGNATURE <i>[Signature]</i>	SIGNATURE <i>[Signature]</i>	Copy of Court Order attached
2	7/18/88	NAME & AGENCY <i>Kenneth Schaefer, USMS</i>	NAME & AGENCY <i>Harrison Rentals</i>	Sold per court order dated 5/27/88 for \$25,000.00
		SIGNATURE <i>[Signature]</i>	SIGNATURE <i>[Signature]</i>	Copy of Court Order attached
		NAME & AGENCY	NAME & AGENCY	
		SIGNATURE	SIGNATURE	

1963 Deed Deborah

(314) TWX 910-781-0410

Prod. Deed - Atty 725-9700

JOHN W. MOTICKA

ATTORNEY AT LAW

Sunset Hill

Russ

Tobey

12627 Bunker
wood

GREENSFELDER, HEMKER, WIESE

GALE & CHAPPELOW, P. C.

Sold 1 31,000

1800 EQUITABLE BUILDING

10 SOUTH BROADWAY

ST. LOUIS, MO. 63102

John. An

241-9090

UNITED STATES MARSHALS SERVICE

United States Marshal's Bill of Sale

KNOW ALL MEN BY THESE PRESENTS, That I, WILLIAM S. VAUGHN, Marshal of the United States of America for the Eastern District of Missouri by virtue of an order of sale issued out of the District Court of the United States for the Eastern District of Missouri dated May 27, 1988, have this day sold at Public Auction to Harrison Rentals & Investments in accordance with Section 939, R.S., U.S., the following-described property, to wit: One (1) 1963 Beech 35-B33 airplane, registration number N9742Y, Serial number CD-611.

RECORDED

Federal Aviation Administration

Date 8/19/88 Time 2:49 PM

Reference Number C 11328

By [Signature] Notary Public Examiner

NOW, THEREFORE, In accordance with the final decree, and in consideration of the payment to me in cash of the sum of \$25,000.00, the purchase price and best bid for said 1963 Beech 35-B33 airplane, I hereby sell, transfer, and convey to the said Harrison Rentals & Investments, the purchaser thereof, all right, title, and interest that I as Marshal of the United States am authorized to convey by virtue of said order of sale.

WITNESS, my hand and official seal, affixed at my office in the City of St. Louis, Missouri, this 18th day of July, A.D. 1988.

[Signature of William S. Vaughn] WILLIAM S. VAUGHN, United States Marshal Eastern District of Missouri

Witnesses:

[Signatures of witnesses]

By [Signature] Deputy United States Marshal.