UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

MARK W. RASMUSSEN, RECEIVER FOR ARISEBANK Plaintiff,	§	
v.	§	Case No. 3:18-CV-1034
RICHARD SMITH, JR., and KURT F. MATTHEW, JR.	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants SMITH and MATTHEW hereby file their response to the Plaintiff's summary judgment motion, and would show the Court:

I. PLAINTIFF'S ALLEGATIONS, AND FACTS

The plaintiff in the Complaint alleges that the Defendants obtained subject PIVX coins and converted them for their own benefit, thereby creating an unjust enrichment, making fraudulent transfers of monies in doing so, and with no value given per the Texas Uniform Fraudulent Transfer Act (TUFTA).

Defendant SMITH did receive 95,000 PVIX coins, which are off-market crypto currency-type coins, and the amount that he received for them when he converted them to money was significantly lower than the Plaintiff alleges as the value. Jared Rice was named in the U.S. Securities and Exchange Commission's suit in regard to AriseBank, Northern District of Texas, Case No. 3:18-CV-186, which alleged fraud concerning Rice and another person. SMITH was

not named in this suit. Rice sent SMITH the subject coins as a payment on a contract toward the purchase a bank, a company, and SMITH'S trading system access (see Term Sheet, Ex. 2, Motion for Summary Judgment). The purchase contract/term sheet was provided in initial disclosures of discovery, and is referred to as the Term Sheet. It is also Exhibit 2 of the plaintiff's Motion for Summary Judgment.

One of the uses of these coins by SMITH was that he paid Defendant MATTHEW, converting them for the then-value of $200,000.00, of which was paid MATTHEW $123,000.00 (one hundred twenty-three thousand dollars) regarding MATTHEW'S involvement. This payment was made in exchange for the purchase of the bank, and also for consulting / investing advice from SMITH and other items. See Term Sheet.

II. STANDARD

"Judgment as a matter of law is proper only when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *Janvey v. Dillon Gage*, 856 F.3d 377, 384 (5th Cir. 2017)(quoting: *Abraham v. Alpha Chi Omega*, 708 F.3d 614, 620 (5th Cir. 2013) (quoting Fed. R. Civ. P. 50(a)). "This will only occur if the facts and inferences point so strongly and overwhelmingly in the movant's favor that jurors could not reasonably have reached a contrary verdict." *Id*. (quoting *Brown v. Sudduth*, 675 F.3d 472, 477 (5th Cir. 2012)). "In evaluating such a motion, the court must consider all of the evidence in the light most favorable to the nonmovant, drawing all factual inferences in favor of the non-moving party, and leaving credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts to the jury." *Price v. Marathon Cheese Corp*., 119 F.3d 330, 333 (5th Cir. 1997)." See also Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548,

2552, 91 L.Ed.2d 265 (1986); *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (en banc); *Bozé v. Branstetter,* 912 F.2d 801, 804 (5th Cir.1990).

The facts are to be reviewed with all inferences drawn in favor of the party opposing the motion. *Bozé,* 912 F.2d at 804 (citing *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir.1986)).

III. NO FRAUDULENT TRANSFERS

The Plaintiff claims that the transfers of monies were made to hide monies from creditors and hinder creditors from collection. "Each of the transfers was made with the intent to hinder, delay, or defraud the Creditors of the Receivership Entities." (Complaint, para. 28)
This transfer of the subject PIVX coins from Rice to SMITH was not hidden, nor was the subsequent conversation to monies or the payment to MATTHEW hidden or concealed. There was no attempt to do so. The transfer of coins and conversions for value are of record. Even if Rice, who was sued by the U.S. Securities and Exchange Commission regarding AriseBank and allegations of fraud, intended to hinder, delay, or defraud, SMITH did not make a transfer to hinder or defraud anyone. The transfer of monies from SMITH to MATTHEW was done openly, in the normal course of a business transaction, and it is of record.

"Courts will generally look past the form of a transaction to its substance. 'Thus an allegedly fraudulent conveyance must be evaluated in context; where a transfer is only a step in a general plan, the plan must be viewed as a whole with all its composite implications.' " *Official Comm. Unsecured Creditors of Grand Eagle Cos. v. ASEA Brown Boverie, Inc.,* 313 B.R. 219, 229 (N.D.Ohio 2004) (quoting *Orr v. Kinderhill Corp.,* 991 F.2d 31, 35 (2d Cir.1993)).

Furthermore, there was no order that the Defendants are alleged to have violated for the

subject transactions of monies. There was no transfer to hinder, delay, or defraud anyone.

Here, the subject transfer began with Jared Rice, who transferred the 95,000 PIVX coins to SMITH. See Term Sheet. SMITH was not a listed part of the fraudulent scheme laid out in the AriseBank suit, which named Rice. SMITH was not a part of the AriseBank fraud, and SMITH relied on Rice and Rice's representations concerning payment for the subject bank, company, and services purchase within the Term Sheet. SMITH received the coins for payment of the contract for purchase.

IV. VALUE GIVEN AUTHORITIES

In *Bowman v. El Paso CGP Company, LLC*, 431 S.W. 3d 781, a creditor brought an action under the Texas Uniform Fraudulent Transfer Act, asserting that the debtor made fraudulent transfers of money to a shareholder. In part of the court's holding, it quoted the following: "To determine whether value is reasonably equivalent, "[c]ourts examine all the circumstances surrounding a transaction, looking to whether there is a reasonable and fair proportion between what the debtor surrendered and what the debtor received in return." *In re Pace,* 456 B.R. 253, 270 (Bankr.W.D.Tex.2011) (quotation omitted); *see also In re Pawlak,* 483 B.R. 169, 185 (Bankr.W.D.Wis.2012) ("[T]he reasonableness of the value must be determined by the facts and circumstances of the particular case.")

Bowman also quoted: unperformed promise may provide value. *See In re Treasure Valley Opportunities, Inc.,* 166 B.R. 701, 705 (Bankr.D.Idaho 1994) (citing Unif. Fraudulent Transfer Act § 3 cmt. 4); *see also In re Gardner,* 218 B.R. 338, 346–47 (Bankr.E.D.Pa.1998) ("[T]he general rule is that an unperformed promise may constitute

value, and the amount of value to be ascribed to an unperformed promise in a particular case is a factual question." (quotation omitted)).

The value given was the contract / Term Sheet for the purchase. Additionally, this transfer to SMITH was clearly intended for a business transaction, and thus was an unperformed promise, or one that was not fully performed at that time.

In *Janvey v. Golf Channel, Inc., et al.*, 834 F.3d 570, 572 (5th Cir. 2016), the Court, in granting Golf Channel's summary judgment motion, held that Golf Channel's advertising for Stanford had objective value at the time of the transaction. The transfer must have conferred some economic benefit, directly or indirectly, to debtor; that is, the Golf Channel agreed to market for Stanford. The parties' solvency or insolvency was not a factor.

Here, Rice transferred to SMITH, and the value was the intended purchase of the bank, company, and trading access. The transfer from SMITH to MATTHEW, was for the same purpose. There was, for the same reasons, there is no unjust enrichment.

Defendants are correct that they do not need to prove a dollar-for-dollar exchange in order to show that TMHI received "reasonably equivalent value" in the transfers. *See Matter of Fairchild Aircraft Corp.,* 6 F.3d 1119, 1125–26 (5th Cir.1993). See also *Weaver v. Kellogg*, 216 B.R. 563, 574 (1997).

V. FACTS RELATED TO THE TRANSACTIONS AND VALUE GIVEN

A. Agreement / Business Transaction

There was a contract in place pursuant to the Term Sheet, which was provided in initial disclosures, and was Exhibit #4 to SMITH'S deposition. Even though the Term Sheet is not a

final contract regarding the purchase of a bank, bank holding company, and trading program access, it is a contract. This Term Sheet clearly lists as part of its terms, what was offered, and pricing terms. Additionally, SMITH testified that there was an agreement(s) for a down payment (Depo. pp. 47, 50)

B. Exchange of Value

In addition to the Term Sheet, which set forth the terms of a sale, and items offered, SMITH testified at his deposition in the SEC suit (Ex. 15 of Motion for Summary Judgment) that:

1. Jared Rice paid SMITH a down payment for the purchase of items, and in exchange, SMITH sent Rice the subject trading software by email (p. 47);
2. SMITH sent MATTHEW his one percent (1%) down payment (p. 47);
3. SMITH had advertised his high-frequency trading software for $10MM, but no one had paid him that amount for it (p.49);
4. The 95,000 PIVX was a down payment for a license for his software and compiled access, and also it was a down payment to secure the bank (p. 50);
5. If the sale as per the Term Sheet regarding the bank was not completed, SMITH did not expect a refund from MATTHEW; rather he expected maybe to obtain another funder (p. 75);
6. SMITH still hoped to complete the transaction with MATTHEW (p. 76).

Additionally, MATTHEW testified at his deposition in the SEC suit (Ex. 17 of the Motion for Summary Judgment) that:

1. MATTHEW advised SMITH in general and assisted SMITH with writing a business plan (p. 32);

2. MATTHEW had discussions with SMITH before AriseBank was involved (p. 39);

3. There were a whole lot of products and services that they would receive from Mr. Smith (p. 40);

4. MATTHEW did not know what would happen if they could not verify buyer's funds. MATTHEW can't admit that a sale couldn't go forward.

C. Value of Subject Coins in Question

SMITH testified at his deposition that:

1. He received approximately $200,000.00 (two hundred thousand dollars) for the 95,000 PIVX that he sold. From the $200,000.00, SMITH paid MATTHEW $123,000.00 (one hundred twenty-three thousand dollars) (p. 31);

2. The market for PIVX / coins was tanking (near the time of receiving the 95,000 PIVX) (p. 32).

VI. VALUE OF COINS

The Defendants request that the Court accept the value of the subject 95,000 PIVX that Rice sent to SMITH as $200,000.00 (two hundred thousand dollars), the value received by SMITH upon converting to monies. Additionally, the fact that the market was in flux, and the fact that this market is still lower than the alleged $1.3 million value, are factors to consider.

Alternatively, if the Court desires additional information as to the value / current value of the PIVX, the Defendants will so provide.

VII. GENUINE ISSUES OF FACT REMAIN

(T)he Court agrees with Plaintiff that the issue of whether TMHI received reasonably equivalent value in exchange for the alleged transfers is, in this case, a question of fact not

suitable for determination in this case on a motion for summary judgment. *Fairchild Aircraft Corp*. at 574.

The issue of an intent to hinder, delay, or defraud is an issue that is not appropriate for summary judgment, except in limited circumstances, because intent, like knowledge, is a question of fact generally reserved for the jury. *Wohlstein v. Aliezer*, 321 S.W.3d 765, 777 (2010) (quoting *Hahn v. Love*, 321 S.W.3d 517, 525-29 (Tex.App.-Houston [1st Dist.] 2009, pet. denied (the evidence shows that this case is no exception to the rule that fraudulent transfer status are generally questions for the trier of fact that are inappropriate for summary judgment); *Coleman Cattle Co. v. Carpentier*, 10 S.W.3d 430, 433-34 (Tex.App.-Beaumont 2000, no pet.).

WHEREFORE, the Defendants pray that the Court deny the Plaintiff's Motion for Summary Judgment, as there are issues presented that are not appropriate for summary judgment, and material facts concerning allegations of fraudulent transfer, equivalent value or value given, along with unjust enrichment, that are still in genuine dispute.

Respectfully Submitted,

/s/ John Teakell
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Defendants' Response to Plaintiff's Motion for Summary Judgment was served upon the counsel of record on April 8, 2019.

/s/ John Teakell
John Teakell