IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

RICHARD ROPER, RECEIVER	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 7:11-cv-034-O**
	§	
ATLANTA NORTHSIDE AVIATION, INC.,	§	
	§	
Defendant.	§	
	§	

ORDER

Before the Court are Receiver Richard Roper's (the "Receiver") Motion for Summary Judgment, with brief and appendix in support (ECF Nos. 19-21); Defendant Atlanta Northside Aviation, Inc.'s ("ANA") response thereto (ECF No. 24); and the Receiver's reply, with appendix in support (ECF Nos. 25 and 26). Also before the Court are Defendant's Motion for Summary Judgment, with brief in support and statement of undisputed facts (ECF Nos. 22 and 23); the Receiver's response thereto, with appendix in support (ECF Nos. 25 and 26); and Defendant's reply (ECF No. 27).

Having considered the pleadings, the evidence, and the applicable law, the Courts finds that the Receiver's Motion for Summary Judgment (ECF No. 19) should be and is hereby **GRANTED in part** and that ANA's Motion for Summary Judgment (ECF No. 22) should be and is hereby **DENIED**.

I. FACTUAL & PROCEDURAL BACKGROUND

This case arises out of the United States Securities and Exchange Commission's ("SEC") securities fraud action against William Wise, his associates, and various entities under Wise's

control ("Millennium"). *See generally* Compl., SEC v. Millennium Bank, No. 7:09-CV-050-O (N.D. Tex. Mar. 26, 2009), ECF No. 1. Millennium purported to operate as a bank and represented to the public that it provided high-yield Certificates of Deposit ("CD"). Millennium, however, operated as a Ponzi scheme[1] by taking funds from later investors to re-pay earlier investors and by appropriating investor funds for personal use. As part of that litigation, this Court appointed the Receiver and authorized him to commence any actions necessary to recover assets of the Receivership Estate. *See generally* Am. Order Appointing Receiver, SEC v. Millennium Bank, No. 7:09-CV-050-O (N.D. Tex. June 22, 2009), ECF No. 47. Pursuant to those powers, the Receiver filed this action to recover funds that Millennium transferred to ANA. *See generally* Compl., ECF No. 1.

ANA is an aviation services company located in Cobb County, Georgia. *See* Def.'s Mem. Supp. Mot. Summ. J. 2, ECF No. 22-1. ANA provided aviation services to Millennium, including airplane hangar rental, fuel, maintenance, ice, and lavatory service. *See id.*; Def.'s Statement 3, ECF No. 23. Additionally, ANA agreed to construct a new airplane hangar at Cobb County-McCollom Field for Millennium. *See* Def.'s Statement 4-5, ECF No. 23. Pursuant to this agreement, Millennium initially transferred $200,000 to ANA in February 2008, and then made a second transfer of $100,000 in October 2008. *See* Receiver's App. Supp. Mot. Summ. J. (Millennium Bank R.), at App. 10-11, ECF No. 21. These transactions were memorialized by a single promissory note executed in December 2008. *See id.* (First Loan Agreement), at App. 2-3, ECF No. 21. Under the terms of this agreement, the note matured on December 16, 2009, and required ANA to pay 12% interest per annum. *See id.* In March 2009, the parties entered into a second agreement whereby

[1] "A Ponzi scheme is a scheme whereby a corporation operates and continues to operate at a loss. The corporation gives the appearance of being profitable by obtaining new investors and using those investments to pay for the high premiums promised to earlier investors." *Janvey v. Alguire*, 647 F.3d 585, 597 (5th Cir. 2011).

Millennium loaned ANA an additional $500,000,but withheld $10,000 as an up-front fee. *See id.* (Second Loan Agreement), at App. 5, ECF No. 21; *id.* (ANA Bank R.), at App. 7, ECF No. 21. This transaction was memorialized by a second promissory note that matured on May 23, 2009, two months after its execution, and called for an interest rate of 1% per month. *See id.* (Second Loan Agreement), at App. 5, ECF No. 21. ANA repaid a total of $345,000 to Millennium, leaving an outstanding balance of $445,000. *See* Def.'s Mem. Supp. Mot. Summ. J. 3, ECF No. 22-1. The Receiver now seeks to recover the remaining funds from ANA. *See* Receiver's Mot. Summ. J. 2, ECF No. 19.

The Receiver argues that the funds transferred to ANA constitute fraudulent conveyances. *See* Receiver's Br. Supp. Mot. Summ. J. 2, ECF No. 20. The Receiver alleges that transfers made pursuant to a Ponzi scheme are fraudulent and thus, constitute actual fraud, constructive fraud, and unjust enrichment. *See id.* As such, the Receiver argues that the transfers are voidable under the Georgia Uniform Fraudulent Transfer Act (the "Georgia UFTA") and that he is entitled to recover the $445,000 for the benefit of the receivership estate. *See id.* The Receiver additionally requests that a constructive trust be imposed on the funds. *See id.* ANA argues that the Receiver cannot establish that the transfers were fraudulent, and regardless, the transfers are not voidable because ANA took in good faith and gave reasonably equivalent value. *See generally* Def.'s Mem. Supp. Mot. Summ. J., ECF No. 22-1. ANA supports its argument by claiming that the promissory notes are valid and that Receiver's appropriate remedy is to sue on the promissory notes.[2] *See id.* at 15. ANA further contends that it is entitled to an offset for unpaid services provided to Millennium. *See* Def.'s Answer 2, ECF No. 4; Def.'s Resp. Receiver's Mot. Summ. J. 11, ECF No. 24.

[2] ANA does not appear to seriously pursue the argument that Roper is limited to asserting a suit on the promissory notes. Assuming arguendo that it does, under Georgia law, there appears to be no bar to asserting a fraudulent conveyance claim when one could also assert a breach of contract claim. *See Akanthos Capital Mgmt.,LLC v. CompuCredit Holdings Corp.*, 770 F. Supp. 2d 1315, 1324-25 (N.D. Ga. 2011).

Both parties agree that Georgia law applies to this case.[3] Neither party has disputed that Millennium operated as a Ponzi scheme. Because both motions for summary judgment are based on the same set of facts and seek mutually exclusive results, the Court will address them simultaneously in this Order.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the pleadings and evidence on file show "that 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). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The movant makes a showing that there is no genuine issue of material fact by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); Fed. R. Civ. P. 56(c).

When reviewing the evidence on a motion for summary judgment, the court must decide all reasonable doubts and inferences in the light most favorable to the non-movant. *See Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). The court cannot make a credibility determination in light of conflicting evidence or competing inferences. *Anderson*, 477 U.S. at 255. As long as there appears to be some support for the disputed allegations such that "reasonable minds could differ as to the import of the evidence," the motion for summary judgment must be denied. *Id.* at 250.

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[3] Since neither party has raised choice of law issues, the Court need not address this. *See Tobin v. AMR Corp.*, 637 F. Supp. 2d 406, 412 (N.D. Tex. 2009) ("The court need not sua sponte analyze choice of law issues unless raised by the parties.").

III. ANALYSIS

A. Fraudulent Transfers

Because neither party has cited to Georgia Supreme Court authority addressing its determination of whether transfers from an entity operated as a Ponzi scheme are fraudulent as a matter of law, the Court is required to make an *Erie*-guess as to how it would ultimately rule. *See Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 406 (5th Cir. 2004).

In this case, the Receiver contends that Millennium's transfers to ANA were fraudulent and voidable pursuant to the Georgia UFTA and therefore, seeks to recover the $445,000 in remaining funds. *See* Ga. Code Ann. § 18-2-74; *see generally* Receiver's Br. Supp. Mot. Summ. J., ECF No. 20. ANA argues that Receiver's claims fail, as a matter of law, because there is no evidence that the transfers were made with fraudulent intent, an essential element of the Georgia UFTA. *See* Def.'s Mem. Supp. Mot. Summ. J. 6, ECF No. 22-1.

In relevant part, the Georgia UFTA provides that

> [a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation . . . [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor . . .

Ga. Code Ann § 18-2-74(a)(1). The Georgia UFTA further provides that a creditor can avoid a fraudulent transfer to the extent necessary to satisfy the creditor's claims. *See* Ga. Code Ann. § 18-2-77(a)(1). Georgia modeled its fraudulent transfer statutes on the Uniform Fraudulent Transfer Act ("UFTA"), which was promulgated by the National Conference of Commissioners on Uniform State Laws and adopted in various forms by 43 states and the District of Columbia. *See Bishop v. Patton*, 706 S.E.2d 634, 639 (Ga. 2011). In addition to being modeled on the UFTA, these provisions are also similar to the fraudulent avoidance authority granted to a bankruptcy trustee under 11 U.S.C. § 548. *Compare* Ga. Code Ann. § 18-2-74(a)(1), *and* Ga. Code Ann. § 18-2-77(a)(1), *with* 11 U.S.C.

§ 548 (granting the trustee authority to "avoid any transfer . . . incurred by the debtor . . . if the debtor voluntarily or involuntarily. . . made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted.") Therefore, cases interpreting § 548, and other codifications of the UFTA, provide guidance when interpreting the Georgia UFTA. *See In re Christou*, No. 06-6825-MHM, 2010 WL 4008167, at *3 (Bankr. N.D. Ga. Sept. 24, 2010) (finding that "[Ga. Code Ann.] § 18-2-74 is virtually identical to the corresponding provision of the Bankruptcy Code, 11 U.S.C. § 548," and "may be analyzed contemporaneously"); *see also* Peter Conti-Brown, *Elective Shareholder Liability*, 64 Stan. L. Rev. 409, 467 (2012) (noting that the basic structure in § 548 and the UFTA is "effectively the same").

When reviewing fraudulent transfer allegations, most courts hold that transfers made during the course of a Ponzi scheme are, as a matter of law, made with the intent to defraud under the UFTA or § 548. *See, e.g.*, *Perkins v. Haines*, 661 F.3d 623, 626 (11th Cir. 2011); *Donell v. Kowell*, 533 F.3d 762, 774 (9th Cir. 2008); *Conroy v. Shott*, 363 F.2d 90, 92 (6th Cir. 1966); *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006); *In re Int'l Mgmt. Assocs., LLC*, No. A06-62966-PWB, 2009 WL 6506657, at *6 (Bankr. N.D. Ga. Dec. 1, 2009). A federal district court in Georgia applying, in part, the Georgia UFTA found the same. *See In re Christou*, 2010 WL 4008167, at *3 ("Any transfers made during the course of a Ponzi scheme are presumptively made with intent to defraud."). Based on the foregoing, the Court concludes that Georgia would hold that transfers made by an entity operated as a Ponzi scheme are fraudulent as a matter of law.

In this case, it is undisputed that Wise operated Millennium as a Ponzi scheme. A business operated as a Ponzi scheme is, by its very nature, insolvent from its inception. *Warfield*, 436 F.3d at 558. ANA's argument that the Receiver must establish the statutory badges of fraud in order to show fraudulent intent does not apply when transfers are made from a Ponzi scheme. *See*

Kipperman v. Onex Corp., 411 B.R. 805, 829 (Bankr. N.D. Ga. 2009) (plaintiff may show fraud through direct evidence *or* through statutory badges of fraud). Accordingly, ANA's argument that there is no evidence that these transfers were made with the actual intent to defraud fails and the Receiver has established, as a matter of law, that Millennium's transfers of $790,000 to ANA were fraudulent.

Because the Court finds that the Receiver can establish actual fraud, there is no need to evaluate the Receiver's claims that the transfers constitute constructive fraud or unjust enrichment.

B. Good Faith Defense

Next, ANA argues that Receiver's claims fail because ANA received the transfers in good faith and provided reasonably equivalent value in exchange. Def.'s Mem. Supp. Mot. Summ. J. 7, 12-15, ECF No. 22-1. ANA contends that this defense rebuts any presumption of fraud established by the operation of a Ponzi scheme. *See id.* at 12. Georgia UFTA § 18-2-78 provides a defense against voidable, fraudulent transfers for a transferee "who took in good faith" and "for a reasonably equivalent value." Ga. Code Ann. § 18-2-78 (a). To take advantage of this defense, ANA must not only show that it took the loan in good faith, but that it also provided reasonably equivalent value in exchange for the transfer. This is an affirmative defense requiring ANA to carry the burden of proof. *See In re Christou*, No. 06-68251-MHM, 2009 WL 6498175, at *3 (Bankr. N.D. Ga. Sept. 29, 2009).

1. Good Faith

ANA argues that it entered into the loans in good faith because (1) the loans were made in what appeared to be the normal course of business for a bank, (2) the loans were documented with promissory notes, (3) ANA made payments on the loans, and (4) ANA is not a Millennium insider. Def.'s Mem. Supp. Mot. Summ. J. 10-15, ECF No. 22-1. Reviewing ANA's argument that it took

the loan proceeds in good faith, the Court finds that ANA has not carried its burden. "The term 'good faith' does not merely mean the opposite of the phrase 'actual intent to defraud.'" *In re Greenbrook Carpet Co., Inc.*, 22 B.R. 86, 90 (Bankr. N.D. Ga. 1982). As such, "an absence of fraudulent intent does not mean that the transaction was necessarily entered into in good faith," rather, the lack of good faith "imports a failure to deal honestly, fairly and openly." *Id.* Determining whether a transferee took with good faith requires an "objective consideration of what the transferee knew or should have known." *In re Christou*, No. 06-68251-MHM, 2010 WL 4008191, at *3 (Bankr. N.D. Ga. Sept. 24, 2010). A finding of good faith is inappropriate when the circumstances would place a reasonable person on notice of the improper nature of the transaction or where a diligent inquiry would have discovered the fraudulent nature. *See id*; *In re Lockwood Auto Group, Inc.*, 428 B.R. 629, 636 (Bankr. W.D. Pa. 2010) (applying bankruptcy avoidance authority and Pennsylvania's version of the UFTA to find that "a transferee is not automatically protected by the good faith defense merely because it had no actual knowledge that a fraud was being perpetrated").

The summary judgment evidence shows that ANA and Millennium structured these two agreements to look like loans when they were, in reality, not loans. ANA's president, Thomas Huff ("Huff"), testified that the transactions were structured as loans only because Wise represented that Millennium, a purported bank, could not advance the funds needed for the hangar construction unless they could be characterized as loans. *See* Receiver's App. Supp. Reply (Dep. Huff), at App. 22, ECF No. 26. Huff testified that even though the notes provided for interest payments and a maturity date, he was never going to repay them. *See id.* Instead, Huff testified these transactions represented prepaid rent for a long-term lease, or payment towards the ultimate purchase, of the new hangar by Millennium. *See id.* at App. 22-24. Moreover, Huff admitted that he found the structure of the transactions "bizarre." *See id.* It is hard to reconcile ANA's assertion that it took the *loan* in

good faith when its president testified that it was never intended to be a *loan.* Given the misleading and disguised structure of these transactions, the loans do not represent open or honest transactions. Accordingly, the Court finds that ANA either knew or should have known, through diligent inquiry, of the improper nature of the transactions.

Additionally, to the extent ANA argues its lack of knowledge of the Millennium Ponzi scheme defeats Receiver's claim, this contention fails because it is irrelevant. *See Warfield*, 436 F.3d at 559 (applying Washington's UFTA); *In re World Vision Entm't Inc.*, 275 B.R. 641, 658-59 (Bankr. M.D. Fla. 2002) (applying 11 U.S.C § 548(c)). As a result, ANA's claim that it entered into these loans in good faith fails.

2. Reasonably Equivalent Value

Even if the loans were entered into in good faith, there is no evidence that ANA provided Millennium reasonably equivalent value in exchange for the $790,000. As discussed above, in order to prevail on its defense, ANA bears the burden of presenting evidence that it gave reasonably equivalent value in exchange for the transfers. *See* Ga. Code Ann. § 18-2-78(a). Under the Georgia UFTA, value is given when "property is transferred or an antecedent debt is secured or satisfied." Ga. Code Ann. § 18-2-73(a). Here, ANA simply asserts that the promissory notes executed in favor of Millennium, which represented the full value of the loan plus interest, constitute reasonably equivalent value for the funds received by ANA. *See* Def.'s Mem. Supp. Mot. Summ. J. 14-15, ECF No. 22-1. As stated above, however, ANA's president testified that there was never any intent that the loans would be repaid. *See* Receiver's App. Supp. Reply (Dep. Huff), at App. 22, ECF No. 26. Instead, Huff and Wise agreed that even though the transfers would be structured as loans, ANA would either enter into a long-term lease agreement with, or would sell the hangar to, Millennium. *See id.* The promissory notes were illusory because they secured a transaction disguised as a loan

to accommodate Millennium, rather than securing an obligation to repay the loan. Therefore, it cannot be said that the two promissory notes represented reasonably equivalent value when they were executed.

Apart from this, ANA has not come forward with any evidence to establish that the proposed long-term lease, or option to purchase, provided to Millennium was substantially equivalent to $790,000. ANA's president has further testified that a hangar was never constructed for Millennium and that ANA used the funds, in part, to build other hangars that are currently being leased to other individuals or entities. *See* Receiver's App. Supp. Mot. Summ. J. (Dep. Huff), at App. 28, ECF No. 21. "The purpose of voiding transfers unsupported by 'reasonably equivalent value' is to protect creditors against the depletion of a bankrupt's estate." *Kipperman*, 411 B.R. at 837. Without more, ANA's unfounded assertion that it transferred reasonably equivalent value in exchange for the $790,000 is without merit and, in fact, aided in the depletion of Millennium estate. Accordingly, the Receiver is entitled to have the transfers voided as a matter of law and to recover the funds for the benefit of the Receivership Estate.

C. Offset

ANA argues, in the alternative, that it is entitled to an offset for amounts owed to ANA for unpaid services provided to Millennium. *See* Answer 2, ECF No. 4; Def.'s Resp. Receiver's Mot. Summ. J. 11-12, ECF No. 24. ANA alleges that equity and fairness require that ANA be able to retain funds in the amount of Millennium's indebtedness to ANA. *See id.* The Receiver contends that any money owed for unpaid services represents separate transactions for which ANA is a general unsecured creditor and thus, is not entitled to offset this amount in the context of voidable fraudulent transfers. *See* Receiver's Br. Supp. Mot. Summ. J. 10, ECF No. 20. The Receiver further argues that Wise and Huff never contemplated that the loans be used to satisfy such a debt. ANA has failed to

produce sufficient evidence of any debt owed to ANA by Millennium.

The Court agrees with the Receiver that ANA is merely an unsecured creditor with regard to its claim for unpaid services. An offset for voidable fraudulent transfers is not the proper method for ANA to assert its claim against Millennium. *See Kipperman*, 411 B.R. at 837 (noting that the purpose of voiding fraudulent transfers is to protect creditors from the depletion of the debtor's estate). Accordingly, ANA is not entitled to an offset of the voided transfers for alleged amounts owed by Millennium.

D. Constructive Trust

The Receiver also seeks to impose a constructive trust on the $445,000, or on any property that can be traced to the Millennium transfers. *See* Receiver's Br. Supp. Mot. Summ. J. 8-9, ECF No. 20. "A constructive trust is a remedy created by a court in equity to prevent unjust enrichment." *St. Paul Mercury Ins. Co. v. Meeks*, 508 S.E.2d 646, 648 (Georgia 1998). A constructive trust is "implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." Ga. Code Ann. § 53-12-132(a). The Receiver, however, has not provided enough information to permit the Court to specifically identify property to encumber by a constructive trust.

Accordingly, the request to impose a constructive trust as a matter of law is **DENIED** without prejudice.

IV. CONCLUSION

Based on the foregoing, the Receiver's Motion for Summary Judgement (ECF No. 19) is **GRANTED in part** and **DENIED in part**. It is further **ORDERED** that ANA's Motion for Summary Judgment (ECF No. 22) is **DENIED**. Accordingly, Receiver is entitled to recover

$445,000, which represents the outstanding amount owed from the original $790,000 transfers.

Signed on this **3rd day** of **April, 2012**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE