

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Submitted - March 16, 2007

ROBERT W. SCHMIDT, J.P.
WILLIAM F. MASTRO
EDWARD D. CARNI
THOMAS A. DICKERSON, JJ.

2006-05367

DECISION & ORDER

Marika Tolz, etc., appellant, v Richard
Valente, et al., respondents.

(Index No. 5112/99)

Pryor & Mandelup, LLP, Westbury, N.Y. (Anthony F. Giuliano of counsel), for
appellant.

Stim & Warmuth, P.C., Farmingville, N.Y. (Glenn P. Warmuth of counsel), for
respondents.

In an action pursuant to Debtor and Creditor Law article 10 to set aside a transfer as
fraudulent, the plaintiff, Marika Tolz, as Trustee for the Bankruptcy Estate of the defendant Richard
Valente, appeals from an order of the Supreme Court, Suffolk County (Spinner, J.), dated March 31,
2006, which granted the defendants' motion pursuant to CPLR 3124 to compel disclosure.

ORDERED that the order is reversed, on the law, with costs, and the motion to
compel disclosure is denied.

Judgment creditors Vincent Volpes and Mary Volpes commenced this action, inter
alia, to set aside a conveyance of real property from the defendant Richard Valente to his wife, the
defendant Cheryl Valente, as a fraudulent conveyance. Thereafter, Richard Valente filed for
bankruptcy relief pursuant to Chapter 7 of the United States Bankruptcy Code and Marika Tolz was
duly appointed Trustee. By order dated June 2, 2003, the Supreme Court ordered her substituted
as the plaintiff in this action. The defendants then moved pursuant to CPLR 3124 to compel the
plaintiff to respond to outstanding discovery demands, inter alia, for the Volpes' financial records and

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to compel them to appear for depositions. The Supreme Court granted the motion and directed the Trustee to provide the requested disclosure. We reverse.

The Supreme Court erred in directing the plaintiff Trustee to produce documents and witnesses over which she has no control. The Trustee was correctly “substituted as plaintiff in this action” since the Trustee is the only proper party to maintain the action and does so for the benefit of the estate as a whole (*see Matter of Daniele Laundries, Inc.*, 40 BR 404; *Matter of Dennis Pappas*, 239 BR 448). As a result, the Volpes were relegated to the status of general creditors of the estate (*see American Hardware Supply Co. v Rubin*, 70 AD2d 648; *Koch Refining v Farmers Union Credit Exch., Inc.*, 831 F2d 1339, *cert denied* 485 US 906) who are neither represented by the Trustee nor under her control. Accordingly, she cannot be compelled to produce or sanctioned for failing to produce information which she does not possess (*see Sagiv v Gamache*, 26 AD3d 368; *Gatz v Layburn*, 9 AD3d 348; *Corriel v Volkswagon of Am.*, 127 AD2d 729) or witnesses that she does not control (*see Moriates v Powertest Petroleum Co., Inc.*, 114 AD2d 888).

SCHMIDT, J.P., MASTRO, CARNI and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court