In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

ROBERT LIBOLT and LENORA LIBOLT *Debtor(s).*	Bankruptcy No. X88-00293S Chapter 7
DONALD H. MOLSTAD Trustee *Plaintiff(s)* vs. PROFESSIONAL TURF SPECIALTIES INC. *Defendant(s)*	Adversary No. X88-0132S

FINDINGS OF FACT, CONCLUSIONS AND LAW AND ORDER

Donald H. Molstad, trustee, seeks avoidance of cash transfers by debtor to defendant as preferences. Trial was held on April 27, 1990 in Sioux City, Iowa. The court now issues these findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F).

FINDINGS OF FACT

Robert Wayne Libolt (LIBOLT) filed his voluntary petition under chapter 7 on February 23, 1988. Libolt sold golf cars under the trade name "B & L Golf Cars." In mid-December, 1985, Libolt executed a "security agreement" in favor of Textron Financial Corporation (TEXTRON) located in Minneapolis, Minnesota. Defendant's exhibit B. Libolt granted Textron a security interest in all goods purchased from Textron including E-Z-GO Golf Cars and their related parts, accessories and proceeds. Libolt also granted Textron a security interest in the debtors' accounts, contract rights, chattel paper, instruments, documents and general intangibles. The security agreement was provided to Textron to secure Libolt's liabilities to it. Libolt also executed a UCC-1 financing statement for Textron; it was filed with the Iowa Secretary of State on December 30, 1985. It describes similar collateral. Defendant's exhibit C.

In the fall of 1986, Libolt entered into an "E-Z-Go" Dealership Agreement with Professional Turf Specialties, Inc. (PROFESSIONAL TURF). Defendant's exhibit A. According to the agreement, as an E-Z-GO dealer, Libolt could purchase products from Professional Turf and take advantage of a dealer floor plan program with Textron. For pre-season purchases made before February 1, 1987, dealers could obtain free floor planning until May 1, 1987 and could extend payment under the floor plan to September 1, 1987 by paying a 10% curtailment fee. Under the agreement, in-season purchases were

payable in full on September 1, 1987. The floor plan agreement required the dealer to pay immediately when it sold any items purchased under the floor plan.

In November, 1986, Professional Turf entered into a "vendor servicing agreement" with Textron. Defendant's exhibit D. By the agreement, Textron agreed to provide financial accommodations to Professional Turf customers so that the customers could acquire goods manufactured or distributed by Professional Turf. Under the agreement, Professional Turf would ship to purchasers and remit its invoices to Textron. Each submitted invoice would be marked "information copy only; this inventory is financed by TFC pursuant to finance plan no. ; pay TFC when due." **(Fn.1)**

(fn.1) An incomplete vendor servicing agreement was provided to the court as defendant's exhibit D. The reverse side was omitted in copying.

In February of 1987, Libolt placed an order for batteries with Professional Turf Specialties. Libolt's account for B & L Golf Car Sales was No. 65004. Defendant's exhibit F.

An aged trial balance of accounts receivable for Floyd Electric, Inc. was submitted into evidence as defendant's exhibit E. The exhibit, which aged monthly accounts receivable for the period January, 1987 through February 29, 1988, showed accounts receivable owed by B & L Golf Car Sales. The account debtor's customer number on the trial balance was 65004. The trial balance showed the following information:

> As of January 31, 1987, B & L owed "Under Current" status $268.04 to Floyd Electric, Inc. As of February 28, 1987, B & L owed current payments of $2,083.52 and $175.13 for invoices 30 days old. As of March 31, 1987 current accounts payable for B & L were $33,311.76. As of April 30, 1987, B & L's current accounts payable were $29,643.33 and 30-day accounts payable were $30,618.00. As of May 30, 1987, current accounts payable were $3,554.40, 30-day accounts payable were $22,859.27, and 60-day accounts payable were $15,309.00. As of June 30, 1987, current accounts payable were $6,257.31, 30-day accounts payable were $975.34, and 60-day accounts payable were $22,400.00. As of July 31, 1987, current accounts payable were $3,182.13, 30-day accounts payable were $6,257.31, 60-day accounts payable were $975.34, and 90-day accounts payable were $22,400.00. As of August 31, 1987 current accounts payable were $118.98. As of September 30, 1987, current accounts payable were $1.78, and 30-day accounts payable were $118.98. As of October 31, current accounts payable were $1.81, 30-day accounts payable were $1.78, 60-day accounts payable were $118.98. As of November 30, 1987 B & L owed accounts payable owing 31 to 60 days of $114.31 and 61 to 90 days of $241.5 (?). As of January 1, 1988, 30-day accounts payable were $7.22, 61-90 day accounts payable were $114.31, 91-120 day accounts payable were $241.58, and accounts payable of B & L over 120 days were $126.10. Accounts payable as of January 31, 1988 were current in the amount of $9.94, and those over 90 days were in the amount of $181.99. Accounts payable as of February 29, 1988 were current in the amount of $2.87, aged 30 days were in the amount of $9.94, and those over 90 days were in the amount of $181.99.

On August 31, 1987, Professional Turf's bank, Bank of Illinois in Champaign, charged Professional Turf's account in the amount of $10,000.00 because of a return item from B & L. The bank made a similar charge to Professional Turf's account on September 9, 1987 because of a $10,000.00 returned item. On September 11, 1987, the bank charged Professional Turf's account in the amount of $34,497.34 because of a returned item from B & L. A charge was also made on September 21, 1987 because of a $10,000.00 returned item from B & L. Defendant's exhibit G.

In March, 1988, Professional Turf paid Textron $6,100.00. Professional Turf paid Textron $64.37 in April, 1988 to be applied to B & L's account. In March, 1988, Professional Turf paid Textron $1,530.40 to be applied to B & L's account. Defendant's exhibit G.

The 90-day preference period for this debtor began November 25, 1987. On January, 16, 1988, Libolt wire transferred to Professional Turf $7,500.00. Plaintiff's exhibit 1. Another wire transfer was made by Libolt to Professional Turf on February 17, 1988 in the amount of $5,112.00. Plaintiff's exhibit 2. A check dated January 12, 1988 in the amount of $300.00 was transferred by debtor to Professional Turf and was negotiated by Professional Turf within approximately seven days. Plaintiff's exhibit 3.

Nearly all debtor's business assets were pledged to secured creditors and these have been abandoned by the trustee. The trustee presently has $1,721.64 in his trust account as a result of the recovery of preferential transfers made by Libolt to other creditors. The only remaining asset in the bankruptcy is the preference claim under consideration. The claims deadline passed on April 10, 1989; thirteen claims have been filed. The trustee testified that he will recommend allowance of unsecured claims in the amount of $139,966.72. Neither Professional Turf nor Textron have filed claims. Neither were listed as creditors in the debtor's schedules. Professional Turf had knowledge of the bankruptcy before the claims deadline passed.

DISCUSSION

The trustee contends that sufficient evidence has been presented to the court to prove by a preponderance of the evidence that payments by the debtor to Professional Turf constituted preferences under 11 U.S.C. § 547(b). Professional Turf argues that the trustee has failed to prove all the elements of a transfer required under § 547(b). In addition, Professional Turf asserts that the transfers to Professional Turf were contemporaneous exchanges for new value pursuant to 547(c)(1) and that the transfers were made in the ordinary course of business pursuant to § 547(c)(2). The trustee has not addressed either of these affirmative defenses.

I.

Section 547(b) states that

> the trustee may avoid a transfer of an interest of the debtor in a property--
>
> 1. to or for the account of a creditor;
> 2. for or on account of an antecedent debt owed by the debtor before such transfer was made;
> 3. made while the debtor was insolvent;
> 4. made--
>   A. on or within 90 days before the date of the filing of the petition . . .
> 5. that enables the creditor to receive more than such creditor would receive if--
>   A. the case were a case under chapter 7 of this title;
>   B. the transfer had not been made; and
>   C. such creditor received payment of such debt to the extent provided by the provisions of this title.

The bankruptcy trustee has the burden of proving each of the elements of a preferential transfer by a preponderance of the evidence. Brown v. First National Bank of Little Rock, Ark., 748 F.2d 490, 491 (8th Cir. 1984); Green v. A. G. Edwards & Sons, Inc., 582 F.2d 439, 443 (8th Cir. 1978).

Professional Turf argues that the trustee has not presented evidence to show that the transfers to Professional Turf were "for or on account of an antecedent debt owed by the debtor before such transfer was made." Section 547(b)(2). At trial, the trustee presented no testimonial evidence addressing the antecedent debt issue. Rather, the trustee offered into evidence one of Professional Turf's exhibits, defendant's exhibit G, which purportedly showed that three transfers by the debtor to Professional Turf were for antecedent debts. Professional Turf's attorney objected to the admission of exhibit G as part of the trustee's case in chief, arguing that while a copy of defendant's exhibit G was provided to the trustee out of courtesy prior to the hearing, it was not her intent to allow the trustee to use the exhibit to prove his case. The trustee concedes that absent defendant's exhibit G, he has failed to prove the antecedent debt element of the alleged preferences. The court reserved ruling on the matter.

Defendant's argument seems to be based on the premise that it should not be penalized by its courteous accommodations to the plaintiff. This argument has no merit. Local Bankruptcy Rule 12(D) requires litigants to exchange exhibits at least ten business days prior to a hearing or trial. The court can find no legal basis for the objection that a plaintiff is precluded from using a defense exhibit obtained by the plaintiff through exchange of exhibits between the parties prior to a trial. Evidence in a civil proceeding is generally admissible regardless of how the evidence was obtained. The defendant has shown no reason why the court should proscribe counsel's use of evidence brought to his attention through the exchange of exhibits, nor has the defendant presented a single statute, rule, case, or legitimate justification to prohibit the trustee from using evidence obtained through the pre-trial exchange of exhibits to prove his case in chief.

The court notes that Professional Turf's attorney may have been successful in objecting to the admission of defendant's exhibit G on authentication grounds. The trustee sought to admit exhibit G into evidence without presenting any evidence as to the authenticity of the exhibit. Fed.R.Evid. 901 (a). Had Professional Turf raised this objection, the trustee would have had no witnesses present to provide any foundation regarding the exhibit. However, an objection at trial does not entitle the objecting party to other grounds that were not stated in the trial objection. Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1333 (8th Cir. 1985).

In addition, the court does not believe that the admission of defendant's exhibit G absent any foundation constitutes "plain error" under Fed.R.Evid. 103(d). Plain error "is confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of the proceedings." Gregor v. International Jensen, Inc., 820 F.2d 937, 942 (8th Cir. 1987) (quoting Berry v. Battey, 666 F.2d 1183, 1187 (8th Cir. 1981)). The court finds no violation of substantial rights in this case. The evidence objected to would have been introduced by the objecting party in her case in chief, and had sufficient foundation been laid, it would have been admissible in the plaintiff's case in chief as well.

The court also notes that while Local Bankruptcy Rule 12(D) generally requires all trial exhibits to be exchanged by opposing counsel at least ten days prior to the date of trial, no such notice appears to have been received by the defendant regarding plaintiff's intended use of this exhibit. However, violation of this Rule is tempered by the fact that defendant also intended to use the exhibit, thereby negating the element of evidentiary surprise Rule 12(D) was intended to address. Furthermore, the court is not inclined to apply this rule in favor of the defendant given the defendant's failure to file a pre-trial statement or an exhibit list with the court prior to trial. Defendant's objection is overruled. Exhibit G is admitted into evidence to prove plaintiff's case in chief.

II.

Aside from the trustee's testimony regarding the current claims against the assets of the bankruptcy estate, the trustee introduced no live testimony regarding his case. To support his case, the trustee introduced six exhibits into evidence. They are as follows:

1. Plaintiff's exhibit 1 is a copy of a checking account debit showing a wire transfer to Professional Turf from Robert Libolt's account in the amount of $7,500.00 on January 26, 1988;
2. Plaintiff's exhibit 2 is a copy of a checking account debit showing a wire transfer to Professional Turf from Robert Libolt's account in the amount of $5,112.00 on February 17, 1988;
3. Plaintiff's exhibit 3 is a copy of check no. 231, signed by Robert Libolt and dated January 12, 1988 paying $300.00 to Professional Turf. The check has been stamped "PAID";
4. Plaintiff's exhibit 4 is a copy of a bank statement from the bankruptcy estate of Robert and Lenora Libolt. The statement lists the account balance as of March 20, 1990 as $1,721.64;
5. Plaintiff's exhibit 5 is a copy of the claims register for the Libolt bankruptcy estate. The register lists unsecured claims totaling $180,257.14. The trustee testified that allowed unsecured claims will total $139,966.72;
6. Exhibit G comprises copies of the following documents:

> Four bank notices to Professional Turf of B & L Golf Cars checks returned for insufficient funds. The notices are dated September 21, 1987 for $10,000.00; September 11, 1987 for $34,497.34; September 9, 1987 for $10,000.00; and August 31, 1987 for $10,000.00.
>
> Three copies of checks from Professional Turf to Textron dated March 9, 1988, April 23, 1988, and March 22, 1988. The checks, all of which appear to have been cashed, total $7,694.77. Attached to each check is a memo directing Textron to apply each payment to the account of B & L Golf Cars.
>
> The last document of the exhibit is a page with the following handwritten notations:
>
> B & L

Check # 94	dated 8-31		34,497.34 ret'd NSF
Check #133	dated 8-20		10,000.00 ret'd NSF
	9-23-88	transfer of $20,000.00	
Check #167	dated 11-2-87		7,500 ret'd NSF
Check #227	dated 12-29-87		7,500 ret'd NSF
	1-26-88	transfer of $ 7,500.00	

> Deposits

10-29-87	7,500.00	not entered in check book
11-5-87	7,500.00	marked 502.66 in book
12-31-87	7,500.00	not entered in book
12-1-87	7,500.00	not entered in book
1-14-88	300.00	

The court is uninformed as to the author of defendant's exhibit G, or whether the author was an employee or agent of Textron, Professional Turf, or B & L Golf Cars. There is no indication as to when the document was written or why it was written, nor is there any evidence to link the deposits at the bottom of the sheet directly to the returned payments at the top of the sheet.

These documents compose the entirety of the trustee's case. They have simply been placed before the court without exposition under the assumption that the court will be able to find by a preponderance of the evidence that a preference has taken place. The court finds that upon this evidence it is unable to find that preferential transfers took place.

"The trial judge . . . has the function of finding the facts, weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which he considers most reasonable. . . ." Penn-Texas Corp. v. Morse, 242 F.2d 243, 247 (7th Cir. 1957); In re De Los Angeles, 101 B.R. 722, 725 (Bankr. E.D. Okla. 1989). A finding of fact may be based on reasonable inferences fairly drawn from the facts in question. Uvezian v. Kojoyian (In re Kojoyian), 7 B.R. 719, 724 (Bankr. D. Mass. 1980). However, a plaintiff is not entitled to inferences which merely rest on speculation or conjecture. Mack v. Newton, 737 F.2d 1343, 1351 (5th Cir. 1984) reh'g. denied 750 F.2d 69 (5th Cir. 1984); Carlson v. American Safety Equipment Corp., 528 F.2d 384, 386 (1st Cir. 1976). A plaintiff who has the burden of proof must produce evidence sufficient to enable the court, as finder of fact, to reconstruct the events on which plaintiff basis his right to recover. Harrigan v. U.S., 408 F.Supp. 177, 189 (E.D. Pa. 1976).

The trustee has failed to show that the payments referenced by plaintiff's exhibits 1 through 3 were for or on account of an antecedent debt as required by § 547(b)(2). Although the trustee contends the transfers were applied to old debts that had gone unpaid as a result of previously returned checks, there is no evidence before the court indicating precisely what debts the transfers were being applied to. The court is unaware of when Professional Turf ceased supplying goods to B & L Cars. If the debtor was still receiving goods from Professional Turf at the time any payments were made, the transfers, or at least a portion of them, may not have been preferential. Perhaps the transfers were payments in advance. Defendant's exhibit G, upon which the trustee relies to show antecedent debt, merely lists returned checks and some subsequent payments. Aside from the fact that they are on the same sheet of paper, there is nothing in the record to link the deposits at the bottom of the page or the wired funds to debts created by returned checks at the top of the page.

Professional Turf argues that defendant's exhibit E, which is an aged trial balance for accounts receivable for "Floyd Electric, Inc." shows that B & L Golf Cars was receiving new advancements of merchandise from Professional Turf through the first two months of 1988. The court finds plaintiff's exhibit E to be inconclusive. There is no reference in the exhibit to Professional Turf or its relation to Floyd Electric. The curt explanation at trial by Professional Turf's attorney that Floyd Electric is Professional Turf's bookkeeping system is vague and Unsatisfactory. Even if the trial balance were assumed to be Professional Turf's, the defendant has failed to provide any guidance as to what any of the abbreviations or figures on the balance signify or how they aid in proving trustee's case. The court, therefore, finds it has insufficient information before it to interpret the trial balance in a way helpful to the trustee or the defendant.

The trustee has the burden of proof on each and every element of a preferential transfer, and in failing to present sufficient evidence to enable this court to determine that the allegedly preferential transfers were for an antecedent debt, much less which antecedent debts the transfers were intended to pay, this court is unwilling to infer that the payments were preferential.

The trustee may well be aware of facts imbedded within the record which would indicate a preferential transfer. However, the court is unable to discern any such inferences, and the trustee has not chosen to direct the court's attention to their existence. The trustee may also be aware of other facts outside the record which show the preferential elements lacking before the court; if so, it is unfortunate such direct or testimonial evidence was not presented to the court.

Because the trustee has failed to establish all the elements of a preference under § 547(b), the court need not address Professional Turf's affirmative defenses.

ORDER

IT IS THEREFORE ORDERED that plaintiff's complaint is dismissed. Judgment shall enter accordingly.

SO ORDERED ON THIS 7th DAY OF JUNE, 1990.

William L. Edmonds
Chief Bankruptcy Judge