In the United States Bankruptcy Court

for the Northern District of Iowa

STEVEN R. BEHR
Debtor(s).

Bankruptcy No. Y88-01976D
Chapter 7

DANIEL P. ERNST Trustee
Plaintiff(s)

and

EAST DUBUQUE SAVINGS BANK
Intervenor

vs.

SPAHN & ROSE LUMBER COMPANY
Defendant(s)

Adversary No. Y89-0182D

ORDER RE: MOTIONS FOR SUMMARY JUDGMENT

The matters before the court are the motions for summary judgment by plaintiff Daniel P. Ernst and defendant Spahn & Rose Lumber Company. Oral arguments took place by phone on March 28, 1990.

I.

Pursuant to F.R.C.P. 56, summary judgment may be granted Only where there "is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Barker v. Sac Osage Elec. Co-op, Inc., 857 F.2d 486, 487-8 (8th Cir. 1988). The facts "must be viewed in the light most favorable to the party opposing the motion, with the court giving that party the benefit of all reasonable inferences to be drawn from the facts." Id. at 488. The parties to this action agree that as to the preference issues now before the court there is no genuine issue of material fact. The following is a brief summary of facts relevant to the motions for summary judgment.

In September of 1988, Steven Behr, d/b/a Steven Behr Construction, Inc. (BEHR) had become indebted to Spahn & Rose Lumber Company (SPAHN & ROSE) for building materials furnished for a construction job being undertaken by Behr for Edna Blosch. The amount of this debt was $25,595.33 plus interest. Spahn & Rose completed its performance on September 26, 1988 (see mechanic's lien) and filed a mechanic's lien against the Blosch property on September 29, 1988.

On or about November 30, 1988, Behr entered into an agreement with Spahn & Rose whereby Behr agreed to pay the supplier one-half of the debt, $13,180.75, on the date of the agreement, :Ind to pay the remainder of the debt in quarterly installments. so long as the payments were made in accordance with the agreedupon payment schedule, Spahn & Rose would refrain from foreclosing its mechanic's lien on Edna Blosch's property. The agreement with Spahn & Rose was one of a number of agreements which Behr entered into with creditors on the Blosch job permitting him to pay the debts over time.

Behr's settlement effort was apparently precipitated by Losses to his business caused by an employee's dishonesty. successful negotiations with East Dubuque Savings Bank resulted Ln a bank loan which would finance a repayment plan with Behr's creditors. Creditors were informed by letter dated November 4, 1988 of the repayment proposal and

were each provided with a written settlement agreement setting out the terms of the repayment program. Spahn & Rose executed one of these agreements.

On November 30, 1988, Behr, having obtained the loan proceeds from the bank, Behr's accountant, Edward Fett, wrote a check to Spahn & Rose in the amount of $13,180.75 on the account of Steven Behr Construction, Inc. The check was negotiated by Spahn & Rose. Steven Behr filed his petition under chapter 11 on December 22, 1988. The case was subsequently converted to chapter 7.

In an affidavit in support of Spahn & Rose's motion for summary judgment, R. K. Guthrie, the corporation's Executive Vice President, stated that Spahn & Rose often entered into agreements such as the one with Behr. Guthrie added that Spahn & Rose was 'lot aware that Behr was contemplating bankruptcy nor that he was substantially indebted to others at the time the agreement was made. However, Spahn & Rose appeared to have been following the Loan arrangement between Behr and East Dubuque Savings Bank closely. In his affidavit, accountant Fett stated that a representative from Spahn & Rose had contacted him before the creditor had been told by Fett that the enabling loan had been made and only hours after the loan proceeds had been disbursed by the Lender. Fett added that an agent of Spahn & Rose arrived at his office shortly after the phone call to pick up the check.

Daniel Ernst, trustee, argues that the transfer of $13,180.75 to Spahn & Rose on November 30, 1988 was a preferential transfer pursuant to 11 U.S.C. § 547(b). In order to prove a preference under § 547(b), the trustee must show that the transfer was (1) to or for the benefit of a creditor, (2) for or Z)n account of an antecedent debt owed by the debtor before such transfer was made, (3) made while the debtor was insolvent, (4) made on or within 90 days before the date of the filing of the petition, (5) and which enabled the creditor to receive more than it would receive in a chapter 7 liquidation. 11 U.S.C. § 547(b).

The trustee has proven each of the above elements. The payment of $13,180.75 was to and for the benefit of Spahn & Rose. The payment was made to compensate it for materials furnished more than, two months earlier; the payment was made 22 days before Behr filed his bankruptcy petition.

Insolvency for the purposes of § 547 is presumed. Section 547(f). In addition, in their affidavits, Steven Behr and Edward Fett both stated their opinion that Behr was insolvent on November 30, 1988. Spahn & Rose has not directed the court's attention to any evidence which would overcome this presumption nor nas it shown that there is a dispute regarding debtor's insolvency on the date of the transfer.

The chapter 7 trustee shows by affidavit that the Behr estate is being treated as a no-asset case, and that there is currently less than $600 in the trustee's account for the estate. The trustee adds that he currently has no reason to believe additional money from which distribution can be made will be forthcoming. He does expect to receive a $4,000.00 settlement from other litigation but he also asserts his belief that payment of administrative expenses will consume all unencumbered assets of the estate. This testimony is not disputed by Spahn & Rose. Therefore, the court finds that the trustee has proven by a preponderance of the evidence each element of § 547(b).

III.

Spahn & Rose does not dispute the above facts. Rather, it asserts two affirmative defenses. First, Spahn & Rose contends that the transfer is not preferential because it was intended as a contemporaneous exchange for new value pursuant to § 547(c)(1).[(1)] Second, it asserts that the transfer was in the ordinary course of business pursuant to § 547 (c) (2) . The burden of proof is on Spahn & Rose to prove non-avoidability under § 547(c). 11 U.S. C. § 547(g). Both the trustee and Spahn & Rose seek summary judgment regarding these defenses.

The fact that each party in this case has moved for summary judgment does not mean that the court must grant summary judgment s a matter of law for one side or the other. Mingus Constructors, Inc. **v.** U.S., 812 F. 2d 1387, 1391 (Fed. Cir. 1987) ; Schwabenbauer v. Board of Educ. of City School Dist. of City of Olean, 667 F.2d 305, 313 (2nd Cir. 1981). Nor do cross motions by each party in any way modify the burden of proof each must meet to entitle them to summary judgment. Hawes Office Systems, Inc. v. Wang Laboratories, Inc.-, 537 F.Supp. 939, 943 (E.D. N.Y. 1982). Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences

against the party whose motion is under consideration. Mingus Constructors, Inc. v. U. S., 812 F.2d at 1391; Schwabenbauer v. Board of Educ. of City School Dist. of City of Olean, 667 F.2d at 314. The trustee is entitled to summary judgment in this case unless there exists a material factual issue relating to the defendant's § 547(c) defenses.

A.

Under § 547(c)(1), the trustee cannot avoid a transfer to the extent that the transfer was:

> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange.

The parties agree that the transfer between Behr and Spahn & Rose was intended to be a contemporaneous exchange. The parties also do not dispute any of the facts surrounding the transfer. However, Ernst contends that forbearance from foreclosing a mechanic's lien does not constitute "new value." "New value" is defined by § 547(a)(2) as:

> money or money's worth in goods, services or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation.

There is disagreement among the courts as to whether waiving a mechanic's lien or forbearing from perfecting an inchoate mechanic's lien on a third-party's property in return for payment from the debtor constitutes "new value" under § 547(a)(2).[(2)]

However, this case is unlike any of these mechanic's lien cases in that in this case the subcontractor did not relinquish its lien rights against the third-party owner of the property. Spahn & Rose perfected its mechanic's lien by filing its lien with the Clerk of the Dubuque County District Court on September 29, 1988. See Iowa Code § 527.8. In return for payment from Behr, it did not release the lien. It only agreed to forebear from foreclosure. As a result, Spahn & Rose may still file an action against the Blosch property to enforce its lien. Iowa ?ode § 527.27 (statute of limitations on bringing an action to enforce a mechanic's lien is two years from the expiration of 90 lays from the filing of a claim.) Because Spahn & Rose received payment from the debtor in return for forbearing from foreclosing its perfected mechanic's lien, the equitable concerns which have motivated some courts to consider a creditor's loss or waiver of lien rights in determining new value are not applicable in the case at bar.

Because Spahn & Rose's mechanic's lien is perfected and apparently enforceable against the Blosch property, no "new value" was received by the debtor as a result of its payment to Spahn & Rose. See Drabkin **v.** A. I. Credit Corp., 800 F.2d 1153, 1158-59 (D.C. Cir. 1986). To the extent that Blosch could withhold funds or retain payments due Behr, this exchange may have constituted new value. See In re Hatfield Electric Co., 91 B.R. at 786 ("the right of a third party to withhold or retain payment constructively released by the debtor's payment in exchange for waiver of creditor's inchoate lien would come within the term 'money' and the definition of 'new value.'") However, there is no evidence that payment from Behr to Spahn & Rose precipitated payment from Blosch to Behr.

Because the debtor's estate is one of minimal assets, Spahn & Rose received more from the debtor as a result of Behr's $13,180.75 payment than it would have received in a liquidation of Behr's bankruptcy estate had a transfer not occurred. Spahn & Rose's forbearance from foreclosing on its perfected lien against the Blosch property created no tangible benefit to the bankruptcy estate. Spahn & Rose retained the right under its agreement with Behr to foreclose on the lien if Behr failed to make monthly payments. In return, they received $13,180.75 from the debtor. Phis payment depleted the bankruptcy estate to the detriment of other creditors by enabling Spahn & Rose to receive more as a result of the transaction than they would have been entitled to under a chapter 7 liquidation.

An agreement by an undersecured creditor to forego on its -right to foreclose on collateral in exchange for compensation from the debtor cannot be treated as "new value" under § 547(a)(2) without unfairly prejudicing general creditors. American Bank of Martin County v. Leasing Service Corp. (In re Air Conditioning, Inc. of Stuart), 845 F. 2d 293, 298

(llth Cir. 1988) cert. denied sub nom. First Interstate Credit Alliance, Inc. v. American Bank of Martin County, 109 S.Ct. 557 (1988); Drabkin v. A. I. Credit Corp., 800 F.2d 1153, 1158 (D.C. Cir. 1986). As to Behr (although not Blosch), Spahn & Rose was an Unsecured creditor. Because the agreement between Spahn & Rose and Behr did not alter Spahn & Rose's ability to foreclose its mechanic's lien, forbearance from enforcing the lien so long as Spahn & Rose received payments from Behr did not constitute new value under 5 547(a) (2). As a result; the defendant is not entitled to summary judgment on this-issue.

B.

Spahn & Rose also argues that the transfer was not preferential because it was made in the ordinary course of business pursuant to § 547(c)(2). Section 547(c)(2) states that the trustee may not avoid a transfer under this section:

> 2. To the extent that such transfer was--
>
> A. in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> B. made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> C. made according to ordinary business terms.

Section 547(c)(2) protects "recurring, customary credit transactions that are incurred and paid in the ordinary course of business of the debtor and the debtor's transferee." In re Energy Co-op, Inc. , 832 F.2d 997, 1004 (7th Cir. 1987) (quoting Collier on Bankruptcy (15th Ed. 1987) 447.10, page 547-42).

In determining whether a payment satisfies the ordinary of business exception, the court should consider the prior course of dealing between the two parties. WJM, Inc. v. Massachusetts Dept. of Public Welfare, 840 F.2d 996, 1011 (1st Cir. 1988).

The court may focus on business practices which were unique to the particular parties under consideration, and not to practices generally prevailing in the industry of the parties. In re Fulghum Const. Corp., 872 P.2d 739, 743 (6th Cir. 1989). The fact that Behr was insolvent at the time of the transaction and that the loan was intended to relieve Behr of his cash flow problems do not necessarily preclude the transaction from being considered "ordinary" for the purposes of § 547(c)(2). Courtney v. Octoni, Inc. (In re Colonial Discount Corp.), 807 F.2d 594, 600 (7th Cir. 1986) cert. denied 481 U.S. 1029 (1987).

In determining whether this transaction was in the ordinary course of business between Behr and Spahn & Rose, it is unclear whether the court should concentrate solely on the business conduct between Behr and Spahn & Rose, or whether the court should instead focus on each businesses' ordinary business -conduct. However, the court need not adopt either standard in this case. Under either test, Spahn & Rose has failed to present evidence indicating the transaction with Spahn & Rose was in the ordinary course of Behr's business. The trustee supports his motion with evidence that it was not.

The parties do not dispute that the debt owed to Spahn & Rose was incurred in the ordinary course of business between Behr and Spahn & Rose. However, the only evidence produced by Spahn & Rose regarding ordinary course of business is an affidavit by R. K. Guthrie, the Executive Vice President of Spahn & Rose, which states as follows:

> In my experience as an executive with Spahn & Rose Company, I am aware that we often enter into agreements to finance part of an obligation for supplies while often all or part of the additional financing is obtained through a bank. Such was the case in the incident in question.

The fact that outstanding debts to Spahn & Rose are often refinanced through a bank does not go to the heart of the matter. A transaction need not occur often to be ordinary; transactions that occur only occasionally may be ordinary. Campbell v. Cannington (In re Economy Milling_Co.), 37 B.R. 914, 922 (D. S.C. 1983). In order to prevail, Spahn & Rose must show also that Behr paid Spahn & Rose in ways similar to previous transactions between the two parties, or

at least that payment was similar to previous transactions between Behr and other creditors. In re Energy Co-op, Inc., 832 F.2d at 1005. Spahn & Rose has presented no evidence to indicate that this was ordinary practice for Behr. The evidence is to the contrary. In his affidavit attached to the trustee's motion in support of summary judgment, Behr states that:

> I have never entered into an arrangement like the one entered into with East Dubuque Savings Bank and my creditors on the Edna Blosch housing project, and I do not consider the arrangement to be in the ordinary course of my business.

Behr's accountant, Edward Fett, states in his affidavit that after Spahn & Rose called him to confirm the enabling loan, a Spahn & Rose representative arrived to personally pick up the check. There is no evidence presented by Spahn & Rose indicating that such expedience was commonplace in transactions with Behr. The facts as a whole lead to the conclusion that this transaction was not ordinary. Behr's financial straits were apparently caused by the theft of funds from his business by his bookkeeper. Behr arranged a loan from East Dubuque Savings Bank in order to make partial payments on debts owed Spahn & Rose and others. At least six other creditors were informed by letter of the theft, and were told that while Behr was having trouble meeting his regular cash flow, he had worked out a proposed repayment plan with the bank by paying creditors of the Edna Blosch project half of their claims upon receipt of the loan proceeds, with the balance to be paid in monthly, interest-free installments. Remaining loans were to be paid out of Behr's cash flow. The agreements were made with the help of Behr's accountant. The letters stated that the bank sought cooperation from all creditors in order to proceed with the arrangement, and requested the creditors to approve the transaction in order to proceed with the loan. Spahn & Rose apparently called accountant Fett shortly after it received the loan receipts and sent an agent over the same day to personally pick up its payment. These Transactions do not resemble the ordinary course of business; they resemble extraordinary financial measures aimed at keeping a floundering business afloat. Consequently, the court concludes that Spahn & Rose has failed to prove that its transaction with Behr was in the ordinary course of business.

Having determined that Spahn & Rose has failed to meet its summary judgment burden, the court must now determine whether the trustee is entitled to summary judgment on Spahn & Rose's ordinary course of business defense. To prevail, the trustee must demonstrate that there is no genuine issue as to any material fact, and that he is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c).

As stated above, Spahn & Rose has the burden of proving nonavoidability of a transfer under § 547(c)(2). 11 U.S.C. § 547(g). Therefore, Spahn & Rose must show that the transfer was made in the ordinary course of business or financial affairs of the debtor as well as the transferee. Section 547(c)(2)(B). Although Spahn & Rose has presented an affidavit indicating that the transfer is in the ordinary course of their business, they have presented no evidence whatsoever addressing the issue of whether the transaction was in the ordinary course of Behr's business.

In Celotex Corp. v. Catrett, 477 U.S. 317 (1986) , the Supreme Court stated as follows:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex, 477 U. S. at 322-3. See Hegg v. U. S., 817 F.2d 1328, 1331 (8th Cir. 1987).

The Supreme Court likens the standard to that of a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Celotex, 477 U.S. at 323. In both instances, it is the duty of the judge to determine whether, under the governing law, there can be but one reasonable conclusion as to the verdict. Anderson, 477 U. S. at 250. Summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Id.

In seeking summary judgment, the trustee bears the initial responsibility of demonstrating the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. However, the trustee need not support his motion with affidavits or similar materials negatinq Spahn & Rose's claim. Id. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Id. at 323-4.

The court finds that by failing to present any evidence indicating that the transfer was made in the ordinary course of Behr's business, Spahn & Rose has not made a prima facie case for non-avoidability under § 547(c)(2)(B). Spahn & Rose shoulders the burden of proof on this element, and they have failed to provide evidence that would enable a reasonable jury to return a verdict in its favor. The affidavit presented by Spahn & Rose regarding its own business practices does not go to the issue of Behr's business practices. Therefore, the affidavit in no way counters the affidavit by Steven Behr asserting that the transaction was not in the ordinary course of his own business. Had Spahn & Rose presented evidence countering this affidavit, an issue of material fact would clearly exist as to whether the transaction actually was in the ordinary course of Behr's business, in which case summary judgment would be inappropriate. However, no such contradictory evidence has been presented to this court. Consequently, the trustee is entitled to summary judgment on Spahn & Rose's ordinary course of business defense.

CONCLUSION OF LAW

1. The payment of $13,180.75 to Spahn & Rose under their November 30, 1988 refinancing agreement was a preferential transfer pursuant to § 547(b).

2. Forbearance from foreclosing on its mechanic's lien so Long as Behr continued to make payments under the November 30, 1988 refinancing agreement did not constitute "new value" pursuant to § 547(c)(1).

3. The payment of $13,180.75 under the November 30, 1988 refinancing agreement was not made in the ordinary course of business pursuant to § 547(c)(2).

ORDER

IT IS THEREFORE ORDERED that plaintiff Daniel P. Ernst's motion for summary judgment is granted.

IT IS FURTHER ORDERED that defendant Spahn & Rose's motion for summary judgment is denied.

Judgment shall enter that the transfer of $13,180.75 from debtor to Spahn & Rose Lumber Co. is avoided and that the trustee shall recover $13,180.75 from defendant Spahn & Rose Lumber Co.

SO ORDERED THIS 11th DAY OF JULY, 1990.

William L. Edmonds
Chief Bankruptcy Judge

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1. This defense was asserted in defendant's amended answer. Defendant's motion to amend answer was granted at the summary judgment hearing and deemed filed instanter.

2. The following cases have held that waiving a mechanic's lien or forbearing from perfecting an inchoate mechanic's lien by a supplier or subcontractor holding the lien against a thirdparty's property in return for payment from the contractor/debtor constitutes new value under § 547(a)(2) and therefore is not referential: Lang v. Heieck Supply (Matter of Anderson Plumbing , **71** B.R. 19, 20 (Bankr. E.D. Cal. 1986); Cooley v. General Elevator Corp. (Matter of Advanced Contractors), 44 B.R. 239, 40-242 (Bankr. M.D. Fla. 1984); LaRose v. Crosby & Son Towing, Inc. (In re Dick Henley, Inc.1, 38 B.R. 210, 213-215 (Bankr. M.D. La. 1984).

The following cases have held that waiving a mechanic's lien Dr forbearing from perfecting an inchoate mechanic's lien by a supplier or subcontractor holding the lien against a thirdparty's property in return for payment from the contractor

does not constitute new value under § 547(a)(2) and therefore is Preferential: Simon v. Engineering Protection Systems, Inc. (In re Hatfield Electric Co.), 91 B.R. 782, 785 (Bankr. N.D. Ohio -1988); Ragsdale v. M & M Electric Supply Co., Inc. (Matter of Control Electric, Inc.), 66 B.R. 624, 626-27 (Bankr. N.D. Ga. 1986); Tidwell v. Bethlehem Steel Corp. (Matter of Georgia Steel Corp.), 56 B.R. 509, 522 (Bankr. M.D. Ga. 1985), rev'd. on other grounds 66 B.R. 932 (M.D. Ga. 1986).