

In the United States Bankruptcy Court

for the Northern District of Iowa

BREWER AUTOMOTIVE INC.
dba Hawkeye Automotive
Debtor(s).

Bankruptcy No. L-88-00089C

Chapter 7

THE MERCHANTS NATIONAL BANK
OF CEDAR RAPIDS IOWA and
DENNIS CURRELL Trustee
Plaintiff(s)

Adversary No. L-89-0164C

vs.

MIDWEST AUTOWIZE
Defendant(s)

Ruling Re Plaintiffs' Motion for Summary Judgment

This matter comes before the Court on the motion of Plaintiffs, The Merchants National Bank of Cedar Rapids, Iowa and Dennis Currell, Trustee, for summary judgment against Defendant, Midwest Autowize. The Plaintiffs seek summary Judgment on their Amended Complaint to Determine Preferential Transfers. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F). The following constitutes the Court's findings of fact and conclusions of law pursuant to F.R.Bankr.P. 7052.

Background

Debtor, Brewer Automotive ("Brewer"), formerly doing business as Hawkeye Automotive, filed for chapter 11 bankruptcy relief on January 19, 1988. Brewer and Defendant, Midwest Autowize ("Midwest") as a creditor of Brewer's business, engaged in a number of business transactions between October 20, 1987 and January 18, 1988, a period of 90 days prior to the bankruptcy filing. Brewer and Midwest continued to transact business after Brewer filed the chapter 11 petition. These transactions continued until July 11, 1988, when Brewer, as debtor-in-possession, voluntarily converted the case to a chapter 7 proceeding.

On May 14, 1990, the Merchants National Bank of Cedar Rapids, Iowa and the chapter 7 trustee, Dennis Currell ("Plaintiffs") filed their Amended Complaint to Determine Preferential Transfers against Midwest. The amended complaint alleged that the trustee could avoid the pre-petition transactions between Midwest and Brewer as preferences under 11 U.S.C. § 547 and that the trustee could avoid the post-petition transactions between Midwest and Brewer, as debtor-in-possession, under 11 U.S.C. §§ 549 and 544. On the same day, the Plaintiffs filed a motion for summary judgment against Midwest on the amended complaint. Midwest filed a resistance to Plaintiffs' motion attaching an affidavit of Kevin Freese, the Controller of Heartland Holdings, Inc., parent company for Midwest, and a supporting memorandum of law. The Court held a hearing on the Plaintiffs' motion on June 7, 1990. Through pleading, affidavit, and statements at the hearing Midwest has argued that both the pre-petition and post-petition transactions are excepted from the trustee's avoidance powers under the Code.

The motion for summary judgment before this Court presents three separate issues: (1) The Court must determine if Plaintiffs, as movants, are entitled to summary judgment on their complaint alleging that the pre-petition transfers from

Brewer to Midwest are voidable as preferences under 11 U.S.C. § 547(b); (2) The Court must determine whether the Plaintiffs, as movant, have demonstrated that they are entitled to summary judgment on their allegation that the post-petition transfers between Brewer and Midwest are voidable under 11 U.S.C. § 549; and (3) as an alternative to avoidance under § 549, whether they are entitled to summary judgment on the allegation that the post-petition transfers are voidable by virtue of the operation of 11 U.S.C. § 544.

Discussion

To prevail on a motion for summary judgment the Plaintiffs must satisfy Bankruptcy Rule 7056 which incorporates Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) states that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." This is a two-part test where the burden is on the moving party to demonstrate that (1) no genuine issues of material fact exist and, (2) the law entitles the movant to relief on such facts.

The United States Supreme Court, in Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505 (1986), noted that in determining which facts are material a court should look to the substantive law in the dispute to identify the facts which are critical to the outcome. Anderson, 106 S. Ct. at 2510. The Court also provided that a genuine issue of material fact exists, and summary judgment should be denied, when "the evidence is such that a reasonable [trier of fact] could return a [decision] for the non-moving party." Anderson, 106 S. Ct. at 2510. A court deciding a summary judgment motion may turn to the question of whether the movant is entitled to relief as a matter of law only after the moving party satisfies the Anderson standards.

A. Summary Judgment on the Complaint Under Section 547

The first allegation in Plaintiffs' complaint is that the transfers of property from Brewer to Midwest occurring between October 20, 1987 and January 18, 1988, are voidable preferences under 11 U.S.C. § 547(b). That section provides:

- b. Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
 1. to or for the benefit of a creditor;
 2. for or on account of 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; or
 - B. between ninety days and one year before the date of the filing of the petition, if such creditor at the time of the transfer was an insider; and
 5. that enables such 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.

11 U.S.C. § 547(b) (1988). Section 547 also specifically states that "the trustee has the burden of proving the avoidability under subsection (b)." 11 U.S.C. § 547(g). The trustee must be able to demonstrate that all five of the 547(b) requirements are satisfied to have a voidable preference. In the context of this summary judgment motion, then, the Plaintiffs must demonstrate that on the uncontroverted evidence presented no reasonable finder of fact could find for Midwest on any component of section 547(b). See Anderson, 106 S. Ct. at 2510.

The Plaintiffs have not satisfied that burden. The Court finds a dispute of material fact exists under the § 547(b)(5) requirement that the transfers enhance the creditor's position. The Plaintiffs have alleged that the pre-petition transfers allowed Midwest to obtain more of its debt than it would have in a chapter 17 liquidation. Midwest, on the other hand, points out that the pre-petition transfers actually increased the debt that Brewer owed by \$42,000. Midwest contends that by increasing the debt the transfers acted to deteriorate, rather than enhance the Midwest position in a chapter 7.

Applying the summary Judgment standards from Anderson here, the Court finds that on these disputed material facts a reasonable trier of fact could enter a decision for Midwest. Hence, under the standards in Anderson, this Court concludes that Plaintiffs' motion for summary judgment on their complaint that the pre-petition transfer are preferences under section 547 should be denied because it fails the tests set out in Rule 56(c).⁽¹⁾

B. Summary Judgment on the Complaint Under Section 549

The Plaintiffs next allege that the post-petition transfers of property from Brewer, as debtor-in-possession, to Midwest are voidable by the trustee under § 549 of the Bankruptcy Code. These transfers occurred between January 19, 1988, the date of the chapter 11 petition, and July 11, 1988, the date Brewer converted the case to chapter 7. Under § 549, a trustee has the power to avoid any post-petition transfer not otherwise authorized under the Code or by the court. 11 U.S.C. § 549(a) (1988). The Plaintiffs contend that since this Court did not authorize the transactions between Midwest and Brewer, acting as debtor-in-possession, the trustee may avoid the transactions and recover property of the estate from Midwest.

Midwest argues that the transfers occurred in the ordinary course of business as authorized under the Code and, therefore, the transfers are excepted from the trustee's avoiding powers. See 11 U.S.C. § 549(a)(2)(B) (1988). Section 549, however, does not specifically provide for an ordinary course of business exception. The exception arises instead through the operation of a number of Code sections. Under 11 U.S.C. § 1107(a) a debtor-in-possession has the powers of the trustee, subject to limitations not applicable here. Under 11 U.S.C. § 1108, the trustee, and therefore the debtor-in-possession, "may operate the debtor's business." Section 363 provides that:

(c)(1) If the business of the debtor is authorized to be operated under section . . . 1108 . . . the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1) (1988) (emphasis added). Reading these sections together, Midwest reasons that the Code authorizes postpetition ordinary course of business transactions and that such authorization under the Code makes these transactions an exception to section 549.

Here, the dispute has focussed on whether the transfers occurred "in the ordinary course of business." The phrase "in the ordinary course of business" is not defined in the Code or in the legislative history. Courts interpreting the phrase, however, have established helpful guidelines. In re Dant & Russel, 853 F.2d 700, 704 (9th Cir. 1988) (citations omitted). In Dant & Russel, a case involving a § 549 avoidance claim, the Ninth Circuit provided both a horizontal dimension test and a vertical dimension test to aid in determining whether post-petition transactions are in the ordinary course of business. Dant & Russel, 853 F.2d at 704-05. Under the horizontal dimension analysis, the court looks to "whether the postpetition transaction is of a type that other similar businesses would engage in as ordinary business." Id. at 704. (citing In re Waterfront Companies, Inc., 56 B.R. 31, 34 (Bankr. D. Minn. 1985) and In re Johns-Manville Corp., 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986)). Under this test, if the transaction is the type which occurs in the debtor's day-to-day operations, it is in the ordinary course of business. Dant & Russel, 853 F.2d at 704 (citation omitted). However, the Ninth Circuit noted that the transaction did not need to be common, and could even occur only occasionally and still be ordinary. Id. (citations omitted). The primary focus of this horizontal dimension test is on "an industry wide perspective in which the debtor's business is compared to other like businesses. Id.

Under the vertical dimension test, also called the creditor's expectation test, a court determines whether the post-petition transfer subjects a hypothetical creditor "to economic risks of a "nature different from those he accepted when he decided to extend credit." Dant & Russel, 853 F.2d at 705 (quoting Johns-Manville, 60 B.R. at 616). The court noted that "the touchstone of 'ordinariness' is . . . the interested parties' reasonable expectation of what transactions the debtor in possession is likely to enter in the course of its business." Dant & Russel, 853 F.2d at 705 (quoting In re James A. Phillips, Inc., 29 B.R. 391, 394 (S.D.N.Y. 1983)). The size and nature of the transactions, under this test, may also place them outside the ordinary course of business. Dant & Russel, 853 F.2d at 705 (citation omitted). In determining whether the transactions are of extraordinary size or nature "the debtor-in-possession's prepetition business activity [is] compared to its postpetition transactions." Id.

These tests provide the basis for the material facts which are critical to determining whether the post-petition transactions in this case are in the ordinary course of business. Under the horizontal test, the material facts include the practices of other businesses which are similar to Brewer, and whether the debtor's day-to-day operations encompass transfers similar to the one before the court. The material facts under the vertical test include a hypothetical creditors expectations in dealing with a particular type of debtor, the types of transactions the debtor is likely to the size and nature of the transactions, the proportion of the debtor's property that was transferred, and a comparison of lithe pre-petition and post-petition course of dealing between the debtor and the creditor that received the post-petition transfer.

The Plaintiffs and Midwest have failed to present any evidence on a number of these factors. Where they have presented evidence, they disagree substantially. For example, Midwest has offered evidence, in the form of an affidavit from Kevin Freese, Controller of Midwest's parent company, stating that the post-petition transfers were consistent with the pre-petition course of dealing between the parties. The Plaintiffs, on the other hand, have attempted to demonstrate through statistical breakdowns that the post-petition transactions were inconsistent with the pre-petition dealings. The parties also disagree on the size and nature of the transactions. Plaintiffs contend that these transfers composed of a major portion of the debtor's inventory and were in the nature of an attempt by Brewer to liquidate its assets. Conversely, Midwest contends that the transfers were reasonable and normal business dealings intended only to help Brewer continue to operate with a more saleable inventory and continue in business. The Court believes that given these disputes of material fact a reasonable trier of fact could find in favor of Midwest on the question of ordinary course of business. Therefore, under the principles provided in Anderson, this Court denies the Plaintiffs' motion for summary judgment on its allegation that the post-petition transfers between Brewer and Midwest may be avoided under § 549.

C. Summary Judgment on the Complaint Under Section 544

The Plaintiffs contend that 11 U.S.C. § 544 provides an additional basis for avoiding the post-petition transactions between Brewer and Midwest. Many courts, however, have cast doubt upon the use of § 544 to avoid post-petition transactions. The Eighth Circuit has noted, for example, that "[s]ection 544 gives the trustee the power to avoid transfers of, or liens and encumbrances on, the debtor's property that he would be unable to challenge under other sections of the Code, such as . . . (post-petition transfers)." In re Ozark Restaurant Equipment Co., Inc., 816 F.2d 1222, 1229 (8th Cir. 1987) (citations omitted). The court in In re Sattler's, Inc., 73 B.R. 780 (Bankr. S.D.N.Y. 1987) added that "given the breadth of section 549, we are compelled to conclude that [post-petition) transfers . . . were intended to be embraced by section 549 not by section 544.11 Id. at 791 (citing 4 L. King, Collier on Bankruptcy para. 544.03, at 544-16, n. 8 (15th ed. 1986). Yet another court concluded that "[t]he only means by which unauthorized post-petition transfers can be avoided is by virtue of section 549.11 In re Missouri River Sand & Gravel, 88 B.R. 1006, 1012 (Bankr. D.N.D. 1988) (emphasis added).

In light of the foregoing concerns, this Court concludes that there are considerable doubts about the propriety of using section 544 as a means of avoiding post-petition transfers. Even if the Court were to assume, without deciding, that there are no genuine issues of material fact, the Plaintiffs have not demonstrated that they would be "entitled to judgment as a matter of law" which is required under the second portion of the summary judgment test in Rule 56(c). The Plaintiffs, then, have failed their burden of demonstrating that summary judgment is appropriate here so the Court denies the motion. The Court, however, will allow Plaintiffs to attempt to demonstrate the applicability of section 544 to postpetition transfers as the case moves toward trial.

Conclusion

The Plaintiffs have failed their burden of proof on their motions for summary judgment on their complaints against Midwest. Therefore the Court concludes that all three motions should be denied and that the case should proceed towards trial for a more complete development of the facts.

ORDER

IT IS THEREFORE ORDERED that the Plaintiffs' Motion for Summary Judgment is denied.

DONE AND ORDERED this 19th day of September, 1990.

Michael J. Melloy
Chief Bankruptcy Judge

1. Midwest also has argued that the pre-petition transfers are excepted from the § 547 avoiding powers because Midwest gave "new value" to Brewer and because Brewer made the transfers "in the ordinary course of business." While, on their face, these arguments appear to present issue of material fact, the Court need not address these arguments here since the motion for summary judgment has already failed.