

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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MCGREGOR HARBOR INC.

Bankruptcy No. L-92-00234D

*Debtor(s)*

Chapter 7

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DOUGLAS M. HENRY Trustee

Adversary No. 92-2239LD

*Plaintiff(s)*

vs.

AMERICAN TRUST & SAVINGS BANK

*Defendant(s)*

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### ORDER

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This matter came before the Court by telephonic hearing on May 21, 1993 on Plaintiff's Motion to Amend Complaint and two Motions for Partial Summary Judgment filed by Defendant. Defendant American Trust & Savings Bank ("Bank") was represented by Chad C. Leitch. Douglas M. Henry appeared as Plaintiff, Trustee. Having considered the record and arguments and briefs of counsel, the Court makes the following ruling.

#### STATEMENT OF THE CASE

The Debtor is an Iowa corporation with its business location being McGregor, Iowa. It is in the business of selling boats, motors and trailers.

The Debtor corporation made two payments to the Bank pursuant to a real estate contract within one year of and more than 90 days before filing bankruptcy. The real estate contract was guaranteed by two officers of the Debtor, Mike Kluesner and Robert Myers. One payment was made on 11/14/91 in the amount of \$1,250. The Debtor also made a payment of \$2,500 on 8/19/91. The bankruptcy case was commenced 2/4/92.

The Trustee filed an adversary complaint seeking to recover these payments from the Bank as avoidable preferences under 11 U.S.C. § 547(b) and § 550(a). On April 22, 1993, the Trustee filed a motion to amend the complaint after discovering that the guarantors, not the Debtor, made the \$1,250 payment. The amended complaint seeks recovery of only the \$2,500 payment.

The Bank has not resisted the amendment. Prior to the motion to amend and for the same reason, the Bank had filed a Motion for Partial Summary Judgment as to the \$1,250 payment.

The Trustee's amended complaint asserts that the \$2,500 payment was made for the benefit of insider creditors, Kluesner and Myers, and may be avoided under § 547(b)(4) (B). The Bank's second Motion for Partial Summary Judgment requests a ruling that § 547(b) and § 550(a) do not authorize recovery

of the \$2,500 payment made outside the 90-day period of § 547(b)(4) (A) because the Bank is a non-insider creditor. The Trustee resists summary judgment.

## CONCLUSIONS

### 1. Motion to Amend Complaint

The Trustee's motion to amend complaint, which is unresisted, will be granted for the reasons stated therein.

### 2. Motion for Partial Summary Judgment (\$1,250 payment)

As the Trustee's amended complaint does not seek to recover the \$1,250 payment, the Bank's motion for summary judgment regarding that payment is moot.

### 3. Motion for Partial Summary Judgment (\$2,500 payment)

Rule 7056 of the Federal Rules of Bankruptcy Procedure adopts Fed. R. Civ. p. 56 which states that summary judgment may only be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The moving party has the burden of showing that there is no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986). This burden may be met by demonstrating that the evidence in the record falls short of establishing an essential element of the non-moving party's case. International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264 (5th Cir. 1991), cert. denied, 112 S. Ct. 936 (1992).

At issue here is the application of 11 U.S.C. § 547(b)(4) and 550(a) (1). § 547(b)(4) authorizes the Trustee to avoid a transfer of the Debtor's property "for the benefit of a creditor"

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days or one year before the date of the filing of the petition, if

such

creditor at the time of such transfer was an insider

§ 550(a)(1) states that the Trustee may recover such property from "the initial transferee of such transfer or the entity for whose benefit such transfer was made." Pursuant to these statutes, the trustee seeks to recover from the Bank, the initial transferee, the \$2,500 payment by the Debtor which benefitted the insider-guarantors, Kluesner and Myers.

The Bank argues that, even assuming the Trustee could prove the elements of a preferential transfer under § 547(b), it is entitled to summary judgment. It asserts that the Trustee is prohibited from recovering from the Bank, an outside creditor, because the \$2,500 payment was made outside the 90-day period of § 547(b) (4)(A). The Bank urges this Court to join district courts and bankruptcy courts which have rejected the rationale in Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989) (known as "Deprizio"). Deprizio held that the preference-recovery period for outside creditors is one year when the payment produces a benefit for an inside creditor, including a guarantor. Id. at 1200-1. The court based its holding on a textual argument and noted that it also avoids special problems posed by insiders. Id. at 1194-95.

A rejection of the Deprizio rule would prevent the Trustee from recovering the \$2,500 payment from the Bank. The Bank points out that Congress is currently considering code amendments which would limit the Deprizio ruling. It also argues the most recent case to consider the issue in the Eighth Circuit refused to follow the Deprizio rationale.

In resistance, the Trustee urges the Court to follow Deprizio as the only result permitted by the language of the statutes.

The Eighth Circuit Court of Appeals has not yet had occasion to address the Deprizio issue. The most recent case in the Eighth Circuit, In re the Midwestern Cos., Inc., 102 B.R. 169, 173 (W.D. Mo. 1989), held that payment to a noninsider more than 90 days prior to bankruptcy is not recoverable even where the payment is on a debt guaranteed by an insider. The court stated that the payment would instead be recoverable from the insider/guarantor. This result protects noninsiders and retains liability for the insiders.

In re Big Three Transp., Inc., 41 B.R. 16, 20 (Bankr. W.D. Ark. 1983), reached the opposite conclusion. That court stated that it refused to overlook the unambiguous language of § 550(a) (1) and allowed the trustee to recover from the outside creditor who was the initial transferee. Id. at 21. The payments were preferential transfers within § 547(b) because they were made for the benefit of insider/guarantors. Id. at 19. Thus, § 547(b) (4)(B) enlarges the preference period to between 90 days and one year prior to bankruptcy. Id. In more recent cases, bankruptcy courts in the Eighth Circuit failed to reach the Deprizio issue because of a lack of proof that the insider-guarantors benefitted by the debtor's payment to the outside creditor. See In re Gamest, Inc., 129 B.R. 179, 182 (Bankr. D. Minn. 1991); In re Kroh Bros. Dev. Co., 115 B.R. 1011, 1015 (Bankr. W.D. Mo. 1990).

This Court prefers to refrain from an in-depth discussion of the Deprizio case and its impact in other Federal Circuits. The issue has been analyzed in innumerable reported cases as well as law journals and law review articles. See e.g., In re Pine Springs Farm & Casino, Inc., 139 B.R. 90 (Bankr. N.D.N.Y. 1992); In re Marilyn Steinberg Ent., Inc., 141 B.R. 587, 600 (Bankr. E.D. Pa. 1992) (criticizing Midwestern Cos.). As this Court has no new or novel analysis to add to the mix, suffice it to say that the Court has ascertained that each circuit court which has considered the issue has adopted Deprizio's reasoning, while district courts and bankruptcy courts remain divided. Id. at 92; see In re C-L Cartage Co., 899 F.2d 1490, 1495 (6th Cir. 1990); In re Robinson Bros. Drilling, Inc., 892 F.2d 850 (10th Cir. 1989), cert.denied, 495 U.S. 948 (1990); cf. In re T.B. Westex Foods, Inc., 950 F.2d 1187, 1194 (5th Cir. 1992) (U.S. appeal pending) (used rationale of insider/guarantor cases to allow recovery from noninsider). District courts and bankruptcy courts tend to focus on equitable arguments or the two-transfer approach. Both were considered and rejected in Deprizio. See Deprizio, 874 F.2d at 1195-98; Pine Springs, 139 B.R. at 93-97.

The Eighth Circuit Court of Appeals has not specifically addressed this issue. The undersigned has considered the analysis contained in In re The Midwestern Cos., Inc., supra. See In re Ambassador Park Hotel, Inc., 61 B.R. 792, 796 (N.D. Tex. 1986).

The Court determines that the reasoning of Deprizio should be accepted. According to the plain meaning of the clear language of §547(b) and 550(a) (1), the trustee may recover from the outside creditor payments made by the debtor within one year before bankruptcy which benefit an insider. At present, noninsider-creditors with insider guarantees are vulnerable to the extended reach-back period. Marilyn Steinberg Ent., 141 B.R. at 600.

Assuming the trustee can prove all the elements of a preferential transfer including benefit to the insider-guarantors, he is authorized to reach back up to one year under § 547(b)(4)(B). He is further authorized by § 550(a) (1) to recover the preferential transfer from the Bank as the initial transferee. As a matter of law, the Bank is not entitled to the protection of the 90-day period of § 547(b) (4)(A). Summary judgment must be denied.

### **RULING**

IT IS THEREFORE ORDERED that Plaintiff's Motion to Amend Complaint is GRANTED.

IT IS FURTHER ORDERED that Defendant's Motion for Partial Summary Judgment (\$1,250 payment) is DENIED AS MOOT.

IT IS FURTHER ORDERED that Defendant's Motion for Partial Summary Judgment (\$2,500 payment) is DENIED.

SO ORDERED this 28th day of May, 1993.

Paul J. Kilburg, Judge  
U.S. Bankruptcy Court