

In the United States Bankruptcy Court

for the Northern District of Iowa

ARMSTRONG'S INC.

Debtor(s)

Bankruptcy No. L-90-01908C

Chapter 11

ARMSTRONG'S INC.

Plaintiff(s)

Adversary No. 92-1201LC

vs.

GUESS? INC.

Defendant(s)

RULING ON MOTION FOR SUMMARY JUDGMENT

On July 20, 1993, the above-captioned matter came on for hearing on Defendant's Motion for Summary Judgment. Hearing was held by telephone conference call. Plaintiff, Armstrong's, Inc., appeared by Attorney Kate Corcoran. Defendant appeared by Attorney Matthew Gerdisch.

The parties presented briefs and oral arguments after which the Court took the matter under advisement.

The underlying complaint in this adversary proceeding was filed by Debtor-Plaintiff, Armstrong's, Inc., seeking to recover payments made to Guess?, Inc., pre-petition. Plaintiff asserts that these payments were preferences under 11 U.S.C. sec. 547. Defendant, Guess?, Inc., has denied that these are preferences and has filed a presently pending Motion for Summary Judgment asserting that the facts are not in controversy and that as a matter of law, Defendants affirmative defenses are valid. Defendant asserts that the payments were made in the ordinary course of business under 11 U.S.C. sec. 547(c)(2) or alternatively that the Defendant provided new value exceeding the amount of the payments under 11 U.S.C. sec. 547(c)(4).

Both the Plaintiff and the Defendant have filed substantial pleadings which relate to the facts. Defendant, Guess?, Inc., asserts strenuously that there are no facts in dispute which are material to a resolution of this controversy. Plaintiff asserts that many of the facts are in dispute and that the Defendant's Summary Judgment Motion must be denied since the Court cannot make the necessary determinations based upon the controverted facts. It is axiomatic that summary judgment may only be granted when there are no facts in controversy. Rule 7056 of the Federal Rules of Bankruptcy Procedure adopts Federal Rule of Civil Procedure 56 which establishes 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 fall 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).

As stated, Armstrong seeks recovery what it construes to be a preference under sec. 547. The Defendant states that the uncontested facts clearly establish that these payments were made in the ordinary course of business or were provided as new value exceeding the amount of the payments. The threshold issue is whether the facts are uncontroverted and whether the Court can make these determinations as a matter of law. It is clear to the Court that substantial facts are in controversy here which preclude any determination of the ultimate issues. Both the Plaintiff and the Defendant have provided summaries of payment schedules. Affidavits have been presented to the Court. From this substantial volume of material, the Court is asked to conclude that there are no substantial or material facts in controversy. A portion of the affirmative defense is raised by the Defendant in this case is that these payments were made in the ordinary course of business. The second defense is of new value. These are matters which require testimony as to business practices. These defenses also require explanations by way of testimony as to what precisely transpired in the business dealings between the Plaintiff and the Defendant. These defenses are fact specific and it is the conclusion of this Court that there are many facts which are in controversy which preclude summary judgment. Even uncontested facts do not necessarily form the basis for the granting of a summary judgment if different inferences and conclusions can be drawn from the uncontested facts.

Based on the foregoing, it is the conclusion of this Court that this matter is not in a posture where summary judgment may be granted as a matter of law under Rule 7056.

WHEREFORE, Defendant's Motion for Summary Judgment is denied. Further, this matter shall proceed to trial under the original scheduling order which was set in this case.

SO ORDERED this 21st day of July, 1993.

Paul J. Kilburg
U.S. Bankruptcy Judge