

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
EDWARD & SHIRLEY SCHMIDT,	)	
	)	CASE NO. BK02-41963
Debtor(s).	)	A03-4038
<hr/>	)	
EDWARD & SHIRLEY SCHMIDT and	)	
SCHMIDT MOTORS, INC.,	)	
	)	
Plaintiffs,	)	CH. 7
	)	
vs.	)	
	)	
PINNACLE BANK,	)	
	)	
Defendant.	)	

ORDER

This matter is before the court on the defendant's motion for partial summary judgment (Fil. #110), objection by the Chapter 7 trustee (Fil. #120), and resistance by Schmidt Motors (Fil. #121). James Nisley represents Schmidt Motors, Inc., Jerald Ostdiek represents the Chapter 7 trustee, and John O'Brien represents Pinnacle Bank. The motion was taken under advisement as submitted without oral arguments.

The motion will be denied.

The Schmidts owed money pre-petition to Pinnacle Bank as a result of debt guaranties executed on behalf of Schmidt Motors, Inc., and Big Mac Marine, and as a result of loans they obtained personally. The debtor Edward Schmidt owns real property in Monona County, Iowa, as tenant in common with his brother Lenard Schmidt. Both brothers and their wives mortgaged the property to Pinnacle Bank as security for a \$243,761 promissory note between Edward and Shirley Schmidt and the bank in July 2002, just a few days before the underlying bankruptcy case was filed. The trustee seeks to avoid the transfer as a preference under 11 U.S.C. § 547(b). The bank argues that it gave new value to the debtor contemporaneously with obtaining the mortgage, rendering it unavoidable. The bank seeks summary judgment in its favor on that portion of the complaint.

Generally, a trustee may avoid a transfer made to or for the benefit of a creditor for or on account of an antecedent debt if the transfer occurred within 90 days of the date of the bankruptcy filing, on the date of the transfer the debtor was insolvent or became insolvent as a result thereof, and the creditor received more

on account of such transfer than it would have received in a Chapter 7 liquidation. 11 U.S.C. § 547(b). There are exceptions to the trustee's authority in this regard, however, as § 547(c)(1) protects transfers "to the extent such 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[.]" As appellate courts have observed:

The purpose of the contemporaneous exchange for new value defense is to encourage creditors to continue to deal with financially-distressed debtors, as long as their transactions involve true exchanges of equally-valued consideration. Jones Truck Lines, Inc. v. Central States Pension Fund (In re Jones Truck Lines, Inc.), 130 F.3d 323, 326 (8th Cir. 1997). "Other creditors are not adversely affected by such an exchange because the debtor [] . . . has received new value." Lindquist v. Dorholt (In re Dorholt, Inc.), 224 F.3d 871, 873 (8th Cir. 2000).

Silverman Consulting, Inc. v. Canfor Wood Prod. Mktg. (In re Payless Cashways, Inc.), 306 B.R. 243, 249 (B.A.P. 8th Cir. 2004).

Reducing the defendant's burden to its essence, "a defendant makes its case under this provision by proving that the debtor received new value in exchange for the payment in question, and that both debtor and creditor intended such an exchange." Id. (quoting In re Nation-Wide Exchange Servs., Inc., 291 B.R. 131, 149-50 (Bankr. D. Minn. 2003)).

In opposing the motion, the trustee relies on Official Creditors Comm. v. Minden Exchange Bank & Trust Co. (In re Craig), 92 B.R. 394 (Bankr. D. Neb. 1988), in which a mortgage granted to obtain a loan to repay the lender on an unsecured guaranty obligation was found to be an avoidable preference, as no new value came into the estate as a result of the loan. The trustee argues that the same type of transaction occurred here, with the Schmidts converting purportedly unsecured guaranties into a secured obligation to the bank and using the amount of the promissory note to reduce Big Mac Marine's debt.

In response, the bank argues that it was adequately secured on Big Mac's debt at the time of the transaction at issue here, so this was not a matter of turning an unsecured obligation into a secured one.

Summary judgment is appropriate only if the record, when viewed in the light most favorable to the non-moving party, shows

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. Fed. R. Civ. P. 56(c) (made applicable to adversary proceedings in bankruptcy by Fed. R. Bankr. P. 7056); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Morgan v. Rabun, 128 F.3d 694, 696 (8th Cir. 1997), cert. denied, 523 U.S. 1124 (1998); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992); St. Paul Fire & Marine Ins. Co. v. FDIC, 968 F.2d 695, 699 (8th Cir. 1992). In ruling on a motion for summary judgment, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Anderson, 477 U.S. at 255.

I believe it unnecessary at this juncture to deal with the status of the bank's security position on the Big Mac debt. It is clear from the evidence that by July 2002, the bank officer in charge of the Schmidt entities' loan portfolios believed Big Mac to be in jeopardy and unlikely to be able to make certain note payments either coming due shortly or already past due. That bank officer specifically asked the debtors to pay approximately \$700,000 of delinquent Big Mac debt and offered to loan them the funds to do so in exchange for a mortgage on the Iowa farm. That is how the present situation came to be.

While the bank suggests it gave the Schmidts "new value" by making a \$243,000 loan in exchange for the Iowa mortgage and that the Schmidts chose to "invest" the money in Big Mac, that position simply does not describe the full picture, and is not supported by the evidence. If one "follows the money," one sees that it went into Ed Schmidt's bank account and right back out to pay off the Big Mac inventory note - at the bank's direction or suggestion.

It appears, from the uncontroverted evidence, that the Schmidts took out the loan because the bank asked them to, intimating dire consequences for Big Mac if the Schmidts did not come up with the money to pay the maturing or delinquent debt. One could reasonably believe the Schmidts felt they had no choice. They certainly did not borrow the money for their own use. The bank made it clear to them that the loan was to pay off Big Mac debt; the Schmidts could not have used the \$243,000 to buy property or to invest or to go on an around-the-world trip, for instance, without incurring the wrath of bank officials.

The new-value exception contemplates that the debtor is receiving an asset in exchange for incurring a liability, so the balance sheet in effect remains even. That is not the case here. The bank forced the Schmidts to incur a significant amount of debt to pay off the debts of another entity, creating a liability with no corresponding asset and thereby injuring the creditors of this

estate. There is no genuine issue of material fact in this regard, so the bank's motion must be denied. Moreover, because this motion was based on an affirmative defense to the trustee's complaint, the denial of the motion means the trustee prevails on this count. See Colsen v. United States (In re Colsen), 322 B.R. 118 (B.A.P. 8th Cir. 2005):

Summary judgment may be entered in favor of a party who has not requested summary judgment as long as the party against whom summary judgment is entered was given proper notice and an opportunity to respond before the entry of summary judgment. Celotex, 477 U.S. at 326, 106 S. Ct. 2548; Madewell v. Downs, 68 F.3d 1030, 1048-49 (8th Cir. 1995); Interco Inc. v. National Surety Corp., 900 F.2d 1264, 1268-69 (8th Cir. 1990). Consequently, the fact that the Debtor had not requested summary judgment did not preclude the bankruptcy court from entering summary judgment in his favor. By filing its motion for summary judgment, the United States was clearly aware that the issue would be considered by the court. Indeed, the United States expressly represented to the court that no material facts were in dispute and asked the court to reach a legal conclusion. The fact that the court reached the opposite legal conclusion than the one sought by the United States does not change the fact that the United States had ample opportunity to present its position prior to entry of the summary judgment.

322 B.R. at 121.

IT IS ORDERED: The defendant's motion for partial summary judgment (Fil. #110) is denied. Judgment will be entered in favor of the trustee on this claim for relief at the conclusion of the litigation on the other claims for relief.

DATED: July 14, 2005

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Notice given by the Court to:

James Nisley                      Jerald Ostdiek  
\*John O'Brien                    U.S. Trustee

Movant (\*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.