

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
NICKERSON & NICKERSON, INC.,	)	CASE NO. BK85-1713
	)	
DEBTOR	)	A86-225
	)	
NICOLA,	)	
	)	
Plaintiff	)	
	)	
vs.	)	
	)	
TRAVEL FAIRE,	)	
	)	
Defendant	)	

MEMORANDUM OPINION

An evidentiary hearing has been held on an action brought by the trustee to avoid a preference. Christopher J. Connolly of Omaha, Nebraska, appeared on behalf of the trustee and Thomas Young of Omaha, Nebraska, appeared on behalf of the defendant.

Facts

On or about August 12, 1985, an involuntary petition in bankruptcy was brought against the debtor. Eventually, an order for relief was entered against the debtor. Within 90 days prior to the petition, the debtor made certain payments to the defendant which the trustee desires to set aside as preferences pursuant to 11 U.S.C. Section 547.

The trustee has proved all of the elements necessary under Section 547(b) to avoid the transfer except there remains a question concerning the requirement under Section 547(b)(3) that the debtor be insolvent at the time of the transfer.

The trustee has proved that at the time of the transfer the debtor was generally not paying its debts as they became due. Proof that the debts are not being paid as they become due is the "insolvency" test under Section 303 which enables the court, upon such a finding to enter an order for relief. However, the general definition of insolvency used in Chapter 11 is found at 11 U.S.C.

Section 101(31)(A), which is a "balance sheet" test. Under the balance sheet test the question is whether or not assets exceed liabilities.

#### Issue

Can a trustee acting pursuant to an order of relief entered following the filing of an involuntary petition set aside a preference by proving that at the time the alleged preferential transfer was made the debtor met the Section 303(h)(1) test of generally not paying debts as they become due or, must the trustee prove that at the time of the transfer the debtor was "balance sheet" insolvent pursuant to Section 101(31)(A)?

#### Decision

The definition of "insolvent" used in 11 U.S.C. Section 547 is limited to that provided in 11 U.S.C. Section 101(31)(A). Therefore, the trustee has failed to meet his burden of proof and judgment entered for the defendant.

#### Discussion and Conclusions of Law

The purpose of the Section 303(h)(1) test is to permit creditors a speedy determination of debtor's financial situation. For a balance sheet insolvency test, a comprehensive study of a debtor's financial condition is necessary, which would delay a creditor's ability to initiate an involuntary case in a timely fashion. 2 Collier's on Bankruptcy, ¶ 303.12 at 303-49 (15th Ed. 1985). The test does not look at debtor's ability to pay but only at whether debtor is not paying his debts. Id. at 303-48.

Section 547(b)(3) requires that a debtor be insolvent before a preference can be avoided. Section 101(31), formerly Section 101(29), defines "insolvent" as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation. . . ." 11 U.S.C. § 101(31)(A).

In In re Storage Technology Corp., 48 Bankr. 862 (D. Colo. 1985), the court considered whether the term "insolvent" used in Section 546(c) refers to the bankruptcy definition found in Section 101(31) or Section 1-201(23) of the U.C.C. definition, requiring not paying debts as they become due.

The court relied on general principles of statutory construction in determining that the term insolvent is limited to the Section 101(31) definition. Id. at 866. Statutory definitions control the meaning of words, and a presumption exists that identical words used in different parts of the same act are intended to have the same meaning. Id. at 865.

The court went on to say that:

[t]he term "insolvent" is used throughout the Bankruptcy Code. . . . Congress has specifically incorporated additional definitions for the term where it has deemed them appropriate. See e.g. . . . § 303(h). The definition of "insolvent". . . is limiting, rather than inclusive. . . . Thus, the structure of the Code indicates that the term "insolvent" is limited to the definition found at Section 101(29) (now 101(31)) absent an express provision expanding that definition in a particular Code provision."

Id. at 865-66, (citations omitted).

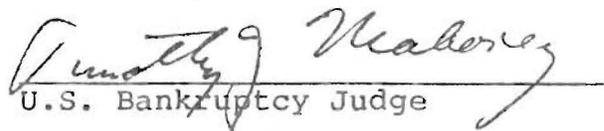
Conclusions

Although this Court has found no involuntary case addressing this issue, the reasoning of the court in In re Storage Technology Corp., seems applicable to the question presented. The definition of "insolvent" used in Section 547 should be limited to that provided in Section 101(31).

Separate Journal Entry to be filed.

DATED: April 1, 1987.

BY THE COURT:

  
U.S. Bankruptcy Judge

Copies to:

Christopher J. Connolly, Attorney, 200 Century Building, 11213 Davenport Street, Omaha, NE 68154-2627

Thomas Young, Attorney, 6910 Pacific St., Suite 320, Omaha, NE 68106