UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
RINE & RINE AUCTIONEERS, INC.,	)	CASE NO. BK92-80770
	)	
DEBTOR	)	A94-8040
	)	
RICHARD D. MYERS, TRUSTEE OF ESTATE,	)	
	)	CH. 7
Plaintiff	)	
vs.	)	
	)	
SECURITY NATIONAL BANK, A National Banking Corporation,	)	
	)	
Defendant	)	

ORDER

Background

This matter is before the Court on the motion for summary judgment filed by defendant.

Rine & Rine Auctioneers, Inc. (the debtor) filed a petition for relief under Chapter 7 of the Bankruptcy Code on April 27, 1992. The debtor was in the auction business. Richard D. Myers, the Chapter 7 Trustee (trustee), filed this adversary proceeding against Security National Bank (SNB), a National Banking Corporation doing business in Nebraska, to recover one alleged preference payment made by the debtor to SNB within ninety (90) days of the date of the petition. Such transfer is allegedly avoidable pursuant to 11 U.S.C. §§ 547 and 548. In addition, the complaint concerns three other alleged preferential transfers which occurred within one year but before ninety days of the petition date and are allegedly avoidable pursuant to 11 U.S.C. § 547(b)(4)(B). SNB's motion for summary judgment addresses only those transfers made between one year and ninety days before the petition date.

This adversary proceeding arose because of a series of loan transactions involving Thomas D. Rine, the sole shareholder, manager, and officer of the debtor; Lazier Kavich, a former

principal of All Makes Office Furniture (All Makes); and SNB. All Makes often bought and sold office furniture through the debtor's auctions, and through this relationship, Lazier Kavich and Mr. Rine developed a close friendship. In the mid-nineties, All Makes, at the behest of Lazier Kavich, extended credit to the debtor or Mr. Rine for inventory purchases. The business relationship between All Makes and the debtor ceased approximately one or two years prior to the bankruptcy petition because Lazier Kavich's cognitive abilities began to deteriorate and because Lazier Kavich's son, Lawrence Kavich, who succeeded his father as the President at All Makes, ceased doing business with the debtor and caused his father to cease extending credit from All Makes to the debtor or Mr. Rine.

Beginning in the late eighties, which is when the debtor began experiencing financial difficulties, Lazier Kavich arranged for Mr. Rine to obtain unsecured working capital loans from SNB. Prior to this time, the debtor did not have a banking relationship with SNB, but All Makes and Lazier Kavich were customers of SNB.

Nearly all of the loan agreements between SNB and Mr. Rine are the same. Thomas D. Rine signed each note individually, and Lazier Kavich co-signed most notes in his capacity as the Chairman of All Makes. See Exhibit 7 (Filing no. 31), Thomas D. Rine Deposition, Attached Exhibits 9, 11-14 [hereinafter Att. Exh. shall refer to the exhibits attached to Exhibit 7]. One note was, however, co-signed by Lazier Kavich individually. Att. Exh. 25. On each promissory note, the parties listed the purpose for each and every loan as "working capital" (or other similar term related to maintaining the debtor's auction inventory). The money received from each loan was deposited in the debtor's banking account and used exclusively for the debtor's operations.

Each of these promissory notes were repaid with the debtor's funds. The trustee alleges that four of the checks issued by the debtor to repay the debt owed to SNB were preferential payments under the Bankruptcy Code. The payments at issue are listed below according to when they occurred in relation to the petition date:

WITHIN NINETY DAYS--

Check No.	Date	Amount
15870	2/3/92	$531.87

BETWEEN NINETY DAYS AND ONE YEAR--

Check No.	Date	Amount
14744	6/3/91	$35,305.20
15262	9/30/91	2,403.16
15408	11/8/91	2,262.59

Each payment was stamped as a "COMMERCIAL LOAN." Att. Exh. 3, 4, 5 (copy of check from 2/3/92 not provided).

After the debtor repaid Check No. 14744 on June 3, 1991, SNB entered into a new loan agreement with Thomas D. Rine, personally, for the amount of $35,000 on June 19, 1991. Att. Exh. 25. The proceeds of this loan were deposited into the debtor's commercial account at American National Bank on June 21, 1991. Att. Exh. 2.

SNB filed a Motion for Summary Judgment for all transfers which occurred between ninety days and one year of the petition date on the basis that as a matter of law: (1) the debtor was not insolvent on the date of the transfers; (2) Lazier Kavich and/or All Makes are not "insiders" under the Bankruptcy Code; (3) SNB extended "subsequent new value" to the debtor under the Bankruptcy Code after the June 6, 1991 payment, and therefore, up to $35,000, which is the alleged amount of new value, is not avoidable.

Decision

Summary Judgment is granted in part and denied in part. Summary judgment is granted on the issue of whether Lazier Kavich or All Makes are insiders. Summary judgment is denied on all other issues.

Discussion

A. Standard for Summary Judgment

The standard for a Motion for Summary Judgment pursuant to Federal Bankruptcy Rule 7056(c) provides in part as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the 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.

FED. R. BANKR. P. 7056(c) (emphasis added).

The burden is on the moving party to show that no genuine dispute exists on a material fact, City of Mt. Pleasant v. Association Elec. Corp., 838 F.2d 268, 273 (8th Cir. 1988), and once this burden is met, the non-moving party must show that there is a genuine dispute over a material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S. Ct. 2548 (1986). However, in a case where the non-moving party carries the burden of proof, then the non-moving party must demonstrate that a genuine dispute as to

a material fact exists. Republic Nat'l Bank v. Eastern Airlines, Inc., 815 F.2d 232, 238 (2d Cir. 1987). When evaluating the motion, inferences drawn from the underlying facts are to be decided in the light most favorable to the non-moving party. United States v. Diebold, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1976).

B. Statutory Authority

The statute which sets forth what transactions are preferential transfers is Section 547 of the Bankruptcy Code. Section 547(b) provides that the trustee may avoid any transfer of an interest of the debtor in property that is:

> (1) to or for the benefit of a creditor;
>
> (2) for or on account of an 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 such 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).

The trustee bears the burden on each of these issues. 11 U.S.C. 547(g). Therefore, for the purpose of the summary judgment motion, the trustee must show that a material question of fact exists under each of these subsections.

1. Definition of Insolvency

Under SNB's first argument for summary judgment, SNB alleges that the trustee cannot show under Section 547(b)(3) that the debtor was insolvent at the time the transfers took place. The definition of "insolvent" is found in the Bankruptcy Code at Section 101(32), which provides that a corporation is insolvent when "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(32).

2. Definition of Insider

SNB's second argument for summary judgment is that under Section 547(b)(4)(B) the trustee can not show that either Lazier Kavich or All Makes was an insider of the debtor. The Bankruptcy Code defines the "insider" of a corporation as a:

> (i) director of the debtor;
>
> (ii) officer of the debtor;
>
> (iii) person in control of the debtor;
>
> (iv) partnership in which the debtor is a general partner;
>
> (v) general partner of the debtor; or
>
> (vi) relative of a general partner, director, officer, or person in control of the debtor.

11 U.S.C. § 101(31)(B).

3. New Value Defense

SNB's final ground for summary judgment addresses the "new value" defense listed at Section 547(c)(4), which states:

> (c) The trustee may not avoid under this section a transfer -- (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor -- (A) not secured by an otherwise unavoidable security interest; and (B) on account of which new value the debtor did not make an

> otherwise unavoidable transfer to or for the benefit of such creditor.

11 U.S.C. § 547(c)(4). "New value" means "money or money's worth in goods, services, or new credit, ..." 11 U.S.C. § 547(a)(2). The burden of proving the nonavoidability of any transfer under subsection (c) of Section 547 lies with the movant SNB. 11 U.S.C. § 547(g). Therefore, SNB bears the initial burden of showing that no material fact on this issue exists.

B. Findings of Facts and Conclusions of Law

1. Insolvency of Debtor

There is a material issue of fact regarding whether the debtor was insolvent within one year of the petition date. The most compelling evidence is the testimony of Mr. Rine that since 1988, the debtor used the proceeds from auctions, instead of segregating the funds into a trust account, to pay antecedent debts, and the debtor would pay the auction customers their "proceeds" with the proceeds raised at a subsequent auction, and so on. Exhibit 7, 33:13-35:13. The debtor operated in this manner for about three and one half years until a particular customer demanded its proceeds, and the debtor could not pay because the subsequent auctions did not generate enough income to satisfy the proceeds due to the customer in time to prevent the customer from exercising its legal remedies under state law. Ex. 7, 36:2-40:16.

The evidence of how Mr. Rine co-mingled the proceeds from the auctions into the debtor's accounts in order to pay creditors is sufficient to show an issue of material fact as to the insolvency issue. Further evidence that the debtor's liabilities exceeded the debtor's assets is located in the Trustee's Brief in Opposition to Security National Bank's Motion for Summary Judgment (Trustee's Brief). The Trustee's Brief charts the testimony of Thomas D. Rine regarding the values of the assets and liabilities of the debtor and concludes that the debtor had a negative balance sheet value of $537,991. Trustee's Brief at 7-8. The trustee's thorough analysis of Mr. Rine's testimony and the Bankruptcy Schedules raises a material question of fact regarding whether the debtor was insolvent.

2. Insider Status of All Makes and Lazier Kavich

SNB is definitely not an insider, and therefore, the trustee's avoidance action for those transactions which occurred between ninety days and one year before the petition date depends on the assumption that this Court will follow the Deprizio Doctrine, which holds that non-insiders are liable for preferential transfers made

within one year of the bankruptcy petition if the payment of the debt benefits an insider of the debtor whose liability is reduced by the transfer. Levit v. Ingersoll Rand Fin. Corp., 874 F.2d 1186 (7th Cir. 1989) [In re V.N. Deprizio Constr. Co.]. Even though the Court has not ruled on the applicability of the Deprizio Doctrine in the present case, it must presume for the limited purpose of this summary judgment motion that Deprizio does apply.[1]

Under the definition of "insider" quoted supra, the only possible definition of "insider" which could apply to All Makes and to Lazier Kavich is as a "person in control of the debtor" under Section 101(31)(iii) because neither entity has any interest in the debtor nor is an officer or director of the debtor. "Person" is defined in the Bankruptcy Code to include corporations, and therefore, All Makes is not disqualified from this definition because of its corporate status. 11 U.S.C. § 101(41).

The determination as to whether an entity is an insider of the debtor is a question of fact. Miller v. Schuman (In re Schuman), 81 B.R. 583, 586 (Bankr. 9th Cir. 1987) Sticka v. Anderson (In re Anderson), 165 B.R. 482, 485 (Bankr. D. Or. 1994); Lee's Place v. Helen, 1992 U.S. Dist. LEXIS 10147, *13 (C.D. Ill. June 26, 1992) (quoting Lingley v. Stuart Shaines, Inc. (In re Acme-Dunham, Inc.), 50 B.R. 734, 739 (D. Me. 1985)). The statute does not limit the definition of "insider," but instead, a court may use a flexible case-by-case approach to define whether a party is an insider. Schuman, 81 B.R. at 586; Anderson, 165 B.R. at 485; Acme-Dunham, 50 B.R. at 739.

Transactions executed within one year of the petition with insiders are subject to a higher level of scrutiny because:

> The one-year period is designed to inhibit insiders -- entities normally privy to insider financial information long before it becomes available to arm's-length creditors -- from influencing the insolvent debtor to deplete its remaining assets for the insider's benefit, to the detriment of non-insider creditors.

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[1] The Bankruptcy Reform Act of 1994 amended 11 U.S.C. § 550, which authorizes the trustee to recover avoidable transfers, by inserting a new subsection (c) which overturned the Deprizio Doctrine. Pub. L. No. 103-394 § 202, codified as amended 11 U.S.C. § 550(c) (1995). The new amendment does not retroactively apply to this cause of action. See, The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 § 702(b).

Travelers Ins. Co. v. Cambridge Meridian Group (In re Erin Food Servs., Inc., 980 F.2d 792, 796 (1st Cir. 1992); NMI Systems, Inc. v. Pillard (In re NMI Systems, Inc.), 1995 Bankr. LEXIS 188, *29 (Bankr. D.C. Jan. 20, 1995).

To determine, therefore, whether an entity is an insider of the debtor, two factors must be considered: (1) the closeness of the relationship between the transferee and the debtor; and (2) the degree to which the transferee is able to exert control or influence over the debtor and whether that control renders their transaction not arm's length. Browning Interests v. Allison (In re Holloway), 955 F.2d 1008, 1011 (5th Cir. 1992); Schuman, 81 B.R. at 586; Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 70 (Bankr. 9th Cir. 1991); In re NMI, Inc., 1995 Bankr. LEXIS 188, *31; Anderson, 165 B.R. at 486; Balaber-Strauss v. GTE Supply (In re Coin Phones, Inc.), 153 B.R. 135, 140 (Bankr. S.D.N.Y. 1993); Hunter v. Pool Pals Mfg. (In re Benson), 57 B.R. 226, 230 (Bankr. N.D. Ohio 1986); Kepler v. Schmalbach (In re Lemanski), 56 B.R. 981, 983 (Bankr. W.D. Wis. 1986); Loftis v. Minar (In re Montanino), 15 B.R. 307, 310 (Bankr. D.N.J. 1981).

Evidence of a close relationship between the debtor and the creditor is not, alone, sufficient to cause a true "insider" relationship to exist, unless there is also evidence that the creditor has control over the debtor's business. Friedman, 126 B.R. at 70 (citing Huizar v. Bank of Robstown (In re Huizar), 71 B.R. 826 (Bankr. W.D. Tex. 1987); Toledo Trust Co. v. Peoples Banking Co. (In re Hartley), 52 B.R. 679 (Bankr. N.D. Ohio 1985); In re Technology for Energy Corp., 56 B.R. 307 (Bankr. E.D. Tenn. 1985)). Under Section 101(31)(B), every listed definition of a corporate debtor insider, except for subparagraph (iii), either lists an official of the debtor or a relative of an official of an insider. Therefore, Section 101(31)(B)(iii) or a "person in control of the debtor" should be interpreted strictly to mean a person who actually exercises some control over and has knowledge of the policies or operations of the debtor.

Lazier Kavich and Thomas D. Rine did have a close relationship. Mr. Rine testified that Lazier Kavich often looked after him like a "father would to a son." Exhibit 7, 23:12 - 24:6. Initially, during the late eighties, Mr. Rine entered into the relationship with SNB based upon the advice of Lazier Kavich, and the working capital loans enabled the debtor to purchase inventory from All Makes, as well as other sources. Exhibit 7, 19:20 - 20:6. In fact, it appears that Lazier Kavich set up the loans with SNB for Mr. Rine. Exhibit 7, 27:20 - 29:2.

The trustee places great emphasis on the intimacy of the ongoing business relationships between the debtor, All Makes, Mr.

Rine and Lazier Kavich through the early nineties. However, there is no evidence that Lazier Kavich or All Makes controlled or influenced the debtor, especially within one year before the petition was filed.

Thomas D. Rine, James E. Landen, the President of SNB, Lazier Kavich, and Lawrence Kavich, who was the President and Chief Executive Officer of All Makes at the time the transfers occurred, all state that neither All Makes nor Lazier Kavich exercised any control over the debtor at the time the transfers were made. Exhibits 2, 3, 4, & 5. In fact, All Makes discontinued doing business with the debtor during 1991 because of Mr. Rine's growing influence over Lazier Kavich, who was suffering from dementia, a disease that is similar in effect to Alzheimer's, at the time of the alleged preferential transfers. Exhibit 1, 11:14-25.

The trustee presented evidence which shows that the debtor repaid Lazier Kavich for a personal loan to the debtor before other creditors were paid prepetition. The bankruptcy schedules support this claim because Lazier Kavich is listed as having been paid $246,222.21 within one year of the bankruptcy petition for a personal loan. Not many, if any, other creditors of the debtor received similar payment treatment. Statement of Financial Affairs, at 3. There doesn't appear to be any question as to whether Mr. Rine, acting as an officer of the debtor, preferred to pay Lazier Kavich over other corporate creditors. However, the fact that the debtor preferred to pay Lazier Kavich before other creditors does not require the conclusion that Lazier Kavich controlled the debtor.

Although it is clear that Lazier Kavich advised in favor of the SNB financing and made arrangements for that financing, there is no evidence that Lazier Kavich controlled Mr. Rine's ultimate decision to receive such financing or controlled how Mr. Rine spent and repaid that debt. Exhibit 7, 21:21 - 23:11; 23:22 -24:6; 27:20 -28:7. The loan approval documents from SNB show that SNB would not have extended any credit to Mr. Rine for working capital unless Lazier Kavich or All Makes co-signed the loan. Att. Exh. 32.

To succeed on allegations that Mr. Kavich or All Makes are insiders, the trustee must present evidence that Lazier Kavich and All Makes were "in control of the debtor," or caused the debtor to repay this debt so as to reduce their own liability on the SNB debt at the expense of other creditors. Providing advice concerning working capital and assuring arrangements for credit through SNB may have endeared Lazier Kavich to Mr. Rine, but such actions alone, without any evidence of actual control or evidence that the transaction was not arm's length, does not constitute being "in control of the debtor."

Lazier Kavich and All Makes are not "insiders" of the debtor. However, the complaint does not limit the allegations of insider to Mr. Kavich and All Makes. Mr. Rine is an insider who benefitted from payments by the corporate debtor to SNB. There is no evidence that either Lazier Kavich or All Makes controlled the debtor, and therefore, summary judgment in SNB's favor is appropriate on the issue regarding whether All Makes and Lazier Kavich were insiders of the debtor. However, since Thomas D. Rine was an insider of the debtor, the relief requested by SNB, which is prohibit the trustee from recovering any avoidable preferences from SNB which occurred between ninety days and one year before the petition date, is not granted by this ruling.

3. Subsequent New Value

The parties have stipulated that shortly after the debtor repaid SNB $35,305.20 on June 3, 1991 (Att. Exh. 5), SNB issued a check to "Tom Ryan" [Tom Rine] in the amount of $35,000 on June 21, 1991. Att. Exh. 2. In the Request to Loan Committee for the additional $35,000, SNB checked that the loan was for a "New Advance," instead of a "Renewal," "Problem," or "Line of Credit" loan, and the purpose of the loan was "Working capital to purchase inventory." Att. Exh. 32, 6/17/91 Meeting Date. The trustee does not dispute that the $35,000 was applied towards working capital for the debtor.

The problem here is that there has not yet been a finding of fact or law that the corporate debtor owed SNB any money. Before the defense of "subsequent new value" under 11 U.S.C. § 547(c)(4) can be considered, the trustee must prove all elements of a preferential transfer, which includes the requirement that the payment was "for or on account of an antecedent debt owed by the debtor" before the payment was made. The evidence on this issue is in dispute. All of the loan documents show a debt from Tom Rine to SNB. No documents show a debt from the corporate debtor to SNB. On the other hand, SNB has presented evidence that it was the intent of Tom Rine, SNB, Lazier Kavich and All Makes that the debtor would receive the funds and pay the debts.

The evidence is contradictory, both on a factual basis and on a legal basis. There is a question concerning whether, for the purpose of determining the existence of a corporate debt in the bankruptcy section 547 avoidance context, such statements are admissible or sufficient to overcome the documentary evidence.

Conclusion

A. There is a material issue of fact whether the debtor was insolvent within one year of the petition date.

B. Summary judgment is appropriate on the issue of whether Lazier Kavich or All Makes are insiders of the debtor.

C. Summary judgment is not appropriate on the issue of whether SNB extended new value to the debtor because there is an issue of fact and law as to whether the payment to SNB was a payment on a debt of the debtor.

Separate journal entry to be filed.

DATED: May 10, 1995

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
CURZON, CHRISTOPHER 493-7005
SWANSON, DONALD 390-9005

Copies mailed by the Court to:
United States Trustee

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

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
RINE & RINE AUCTIONEERS, INC.,	)	CASE NO. BK92-80770
	)	A94-8040
DEBTOR(S)	)	
	)	CH. 7
RICHARD D. MYERS, TRUSTEE	)	
OF ESTATE,	)	Filing No.
Plaintiff(s)	)	
vs.	)	JOURNAL ENTRY
SECURITY NATIONAL BANK, A	)	
National Banking Corporation,	)	
	)	DATE: May 10, 1995
Defendant(s)	)	HEARING DATE: Feb. 16, 1995

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for summary Judgment filed by Security National Bank and Resistance by Trustee.

APPEARANCES

Christopher Curzon, Attorney for Trustee
Donald Swanson, Attorney for Movant

IT IS ORDERED:

Summary judgment is granted to SNB n the issue of the insider status of Lazier Kavich and All Makes. Summary judgment is denied on all other issues.

See order entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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