

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
DEMMA FRUIT COMPANY, LTD.,) CASE NO. BK00-81989
)
)
Debtor.) A01-8060
_____)
RICHARD D. MYERS, Ch. 7 Trustee,)
) CH. 7
Plaintiff,)
vs.)
)
FIRST SOURCE FINANCIAL, LLP,)
)
Defendant.)

MEMORANDUM

Hearing was held in Omaha, Nebraska, on May 14, 2002, on Defendant's Motion for Summary Judgment (Fil. #16) and Resistance by the Plaintiff/Trustee (Fil. #20), and on the Plaintiff/Trustee's Motion for Partial Summary Judgment (Fil. #18) and Response by Defendant (Fil. #22). Alan Pedersen appeared for the Chapter 7 Trustee, and Doug Quinn and Michael Molinaro appeared for First Source Financial. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(K).

First Source Financial's motion for summary judgment is denied. The Trustee's motion for partial summary judgment is granted as to Counts I and II of the adversary complaint.

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 court must view the facts in the light most favorable to the party opposing the motion and give that party the benefit of all reasonable inferences to be drawn from the record. Widoe v. District No. 111 Otoe County Sch., 147 F.3d 726, 728 (8th Cir. 1998); Ghane v. West, 148 F.3d 979, 981 (8th Cir. 1998).

Essentially, the test is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. at 251-52. Moreover, although under Federal Rule of Civil Procedure 56 due deference must be given to the rights of litigants to have their claims adjudicated by the appropriate finder of fact, equal deference must be given under Rule 56 to the rights of those defending against such claims to have a just, speedy and inexpensive determination of the action where the claims have no factual basis. Celotex Corp. v. Catrett, 477 U.S. at 327.

The court's role is simply to determine whether the evidence in the case presents a sufficient dispute to place before the jury.

At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. Rather, the court's function is to determine whether a dispute about a material fact is genuine. . . . If reasonable minds could differ as to the import of the evidence, summary judgment is inappropriate.

Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1376-77 (8th Cir. 1996) (internal citations omitted). See also Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999) (on summary judgment, court's function is not to weigh evidence to determine truth of any factual issue); Mathews v. Trilogy Communications, Inc., 143 F.3d 1160, 1163 (8th Cir. 1998) ("When evaluating a motion for summary judgment, we must . . . refrain from assessing credibility.").

A genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, meaning a reasonable jury could return a verdict for either party. RSBI Aerospace, Inc. v. Affiliated FM Ins. Co., 49 F.3d 399, 401 (8th

Cir. 1995).

Upon a motion for summary judgment, the initial burden of proof is allocated to the movant in the form of demonstrating "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. at 325; see Prudential Ins. Co. v. Hinkel, 121 F.3d 364, 366 (8th Cir. 1997), cert. denied sub nom. Hinkel v. Hinkel, 522 U.S. 1048 (1998); Nelson v. Kingsley (In re Kingsley), 208 B.R. 918, 920 (B.A.P. 8th Cir. 1997).

When the movant makes an appropriate showing, the burden then shifts to the nonmoving party "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(c), (e)).

To withstand a motion for summary judgment, the nonmoving party must submit "sufficient evidence supporting a material factual dispute that would require resolution by a trier of fact." Austin v. Minnesota Mining & Mfg. Co., 193 F.3d 992, 994 (8th Cir. 1999) (quoting Hase v. Missouri Div. of Employment Sec., 972 F.2d 893, 895 (8th Cir. 1992), cert. denied, 508 U.S. 906 (1993)). In this respect, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts; [it] must show there is sufficient evidence to support a jury verdict in [its] favor." Chism v. W.R. Grace & Co., 158 F.3d 988, 990 (8th Cir. 1998). "[T]he mere existence of a scintilla of evidence in favor of the nonmoving party's position is insufficient to create a genuine issue of material fact." Rabushka ex rel. United States v. Crane Co., 122 F.3d 559, 562 (8th Cir. 1997) (internal quotation marks omitted) (quoting In re Temporomandibular Joint (TMJ) Implants Prods. Liab. Litig., 113 F.3d 1484, 1492 (8th Cir. 1997)), cert. denied, 523 U.S. 1040 (1998).

"Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "We look to the substantive law to determine whether an element is essential to a case, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."

Williams v. Marlar (In re Marlar), 252 B.R. 743, 751 (B.A.P. 8th Cir. 2000) (quoting Ries v. Wintz Properties, Inc. (In re Wintz Cos.), 230 B.R. 848, 858 (B.A.P. 8th Cir. 1999)) (internal quotations omitted).

The issue is the validity of First Source Financial's lien rights to the proceeds of the Trustee's settlement of fraudulent transfer claims arising from the pre-petition Pisciotta transaction. First Source Financial claims a superior lien in the funds pursuant to its security interest in debtor's assets, including general intangibles and proceeds, and pursuant to an assignment of rights executed at the time of the Pisciotta purchase specifically granting First Source Financial a security interest in all claims against the Pisciotta family as a result of the transaction. The Trustee asserts that the \$375,000 in question are the proceeds of the settlement of his action against the Pisciotta family to avoid the fraudulent transfer and should inure to the benefit of all creditors, not only First Source Financial.

The merits of First Source's arguments regarding the extent of its security interest post-petition, as well as the judicial estoppel and law of the case doctrines, need not be reached, based on the finding, explained below, that First Source did not acquire a security interest in the fraudulent transfer action or its proceeds in the first place.

The key to this determination is the debtor's rights, if any, in the fraudulent transfer action against the Pisciottas. The language of the two relevant documents - the security agreement with First Source and the assignment of rights to First Source - transfer only the rights owned or acquired by the debtor. The right to bring a fraudulent transfer action rests in the creditors, not in the debtor. See 740 Ill. Comp. Stat. Ann. 160/8 (West 2002) (creditor's action for relief under Illinois' Uniform Fraudulent Transfer Act) and Neb. Rev. Stat. § 36-708 (creditor's remedies under Nebraska's Uniform Fraudulent Transfer Act).¹ A debtor would have no standing to bring an action to set aside its own transaction as fraudulent.

¹The documents state that the applicable law governing both agreements is the law of Illinois. The Trustee brought this adversary proceeding pursuant to his avoidance powers under the Bankruptcy Code as well as the Nebraska Uniform Fraudulent Transfer Act, Neb. Rev. Stat. §§ 36-701 to -712.

The issue was discussed in Official Committee of Unsecured Creditors v. Chinery (In re Cybergenics Corp.), 226 F.3d 237 (3d Cir. 2000), in the context of the debtor's post-petition sale of all its assets. The creditors' committee wanted to pursue potential fraudulent transfer claims arising from the leveraged buyout that led to Cybergenics' bankruptcy filing, while the transferees asserted that any fraudulent transfer claim that existed had been sold to the third party who purchased the company's assets. The Third Circuit Court of Appeals ruled that fraudulent transfer actions do not belong to a debtor and cannot be considered an asset of the debtor or the debtor in possession, and therefore cannot be transferred or sold by a debtor.

[W]e reach the inescapable conclusion that the fraudulent transfer claims, which state law provided to Cybergenics' creditors, were never assets of Cybergenics, and this conclusion is not altered by the fact that a debtor in possession is empowered to pursue those fraudulent transfer claims for the benefit of all creditors. The avoidance power itself, which we have analogized to the power of a public official to carry out various responsibilities in a representative capacity, was likewise not an asset of Cybergenics, just as this authority would not have been a personal asset of a trustee, had one been appointed. Thus, we conclude that the fraudulent transfer claims asserted in the Committee's complaint were not sold in the 1996 asset sale.

226 F.3d at 245.

The same analysis applies to the facts of this case. The debtor granted First Source a lien "upon all of its right, title and interest in, to and under" certain property, "whether now owned by or owing to, or hereafter acquired by or arising in favor of" the debtor. Security Agreement, ¶ 2 (Ex. D to Aff. of James Cassady) (Fil. #23).

Likewise, the debtor assigned to First Source "all of [Demma's] right, title and interest, legal or equitable, and remedies with respect to any and all of the [Pisciotta family's] Representations, Warranties, Covenants and Indemnities", although First Source "shall not by virtue of this assignment obtain rights against the Pisciotta [family members] greater than the rights [Demma] has against the Pisciotta [family

members] with respect to the assigned rights." Assignment, ¶ 1 (Ex. G to Cassady Aff.) (Fil. #23). Demma also authorized First Source to assert "any claims [Demma] may, from time to time, have against the Pisciotta [family members] with respect to the [Pisciottas'] Representations, Warranties, Covenants and Indemnities . . . and to receive and collect any damages, awards and other monies resulting therefrom[.]" Id. ¶ 2.

The debtor did not own the right to pursue a fraudulent transfer action regarding the Pisciotta purchase, and therefore could not have encumbered or assigned that right to First Source. Therefore, First Source did not receive a lien on or assignment of that asset or the proceeds thereof, so First Source has no superior claim to the settlement proceeds in the Trustee's possession.

Accordingly, the Plaintiff/Trustee's Motion for Partial Summary Judgment (Fil. #18) is granted.

Separate Judgment to be entered.

DATED: May 28, 2002

BY THE COURT:

/s/Timothy J. Mahoney

Timothy J. Mahoney
Chief Judge

Notice given by the Court to:

*Alan Pedersen
*Douglas Quinn
*Michael Molinaro
United States Trustee

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

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RICHARD D. MYERS, Ch. 7 Trustee),
) CH. 7
Plaintiff,)
vs.)
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FIRST SOURCE FINANCIAL, LLP,)
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Defendant.)

JUDGMENT

Hearing was held in Omaha, Nebraska, on May 14, 2002, on Defendant's Motion for Summary Judgment (Fil. #16) and Resistance by the Plaintiff/Trustee (Fil. #20), and on the Plaintiff/Trustee's Motion for Partial Summary Judgment (Fil. #18) and Response by Defendant (Fil. #22). Alan Pedersen appeared for the Chapter 7 Trustee, and Doug Quinn and Michael Molinaro appeared for First Source Financial.

Judgment is hereby entered in favor of the Chapter 7 Trustee on Counts I and II of the adversary complaint. First Source did not receive a lien on or assignment of the fraudulent transfer action or the proceeds thereof, so First Source has no superior claim to the settlement proceeds in the Trustee's possession.

See Memorandum filed this date.

DATED: May 28, 2002

BY THE COURT:
/s/Timothy J. Mahoney

Timothy J. Mahoney
Chief Judge

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