

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
BEST REFRIGERATED EXPRESS, INC.,	)	CASE NO. BK89-0169
	)	
DEBTOR	)	A92-8046
	)	
THOMAS F. HOARTY, Trustee,	)	
	)	CH. 11
Plaintiff	)	
vs.	)	
	)	
GERALD L. SCHUEMAN and	)	
G & D TRUCKING, INC.,	)	
	)	
Defendant	)	

MEMORANDUM

Trial was held on April 20, 1993. Final written arguments and briefs were submitted post-trial and the case was taken under advisement in June, 1993. Appearing on behalf of plaintiff was Roger L. Shiffermiller of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., Omaha, Nebraska. Appearing on behalf of the defendants was James R. Place of Place Law Office, Omaha, Nebraska. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(F).

This case was tried on the theory that the defendants, and each of them, received preferential transfers or fraudulent conveyances from debtor and that such transfers and conveyances should be avoided under 11 U.S.C. § 547 and 548.

At the end of the plaintiff's case and at the end of the trial, the defendants moved for dismissal. At the end of trial, counsel for the plaintiff conceded on the record that there was no evidence of either an avoidable preference or fraudulent conveyance as against Mr. Schueman and conceded that there was no evidence of fraudulent conveyance as against G & D Trucking, Inc., (G & D).

Therefore, the adversary complaint brought by the plaintiff/trustee against George L. Schueman is dismissed with prejudice. The claims contained in the adversary proceeding brought by the plaintiff/trustee against G & D concerning allegations of a fraudulent conveyance are dismissed with prejudice. Remaining for decision by the Court are the allegations of the avoidability of preferential transfers from the debtor, Best Refrigerated Express, Inc., (Best), to G & D within one year of the Best bankruptcy filing.

The debtor was an interstate trucking company which operated refrigerated tractor trailers hauling meat and meat products to and from various parts of the country. Gerald L. Schueman owned 100% of the common stock of Best and was a director of Best during the time involved with this matter.

G & D Trucking, Inc., was a trucking company located in Omaha, Nebraska, that performed short-haul services for various customers in the Omaha area. Best was not a customer of G & D and G & D was not a customer of Best.

On order of George L. Schueman, G & D used the computer services of Best for activities concerning collection of invoices. In other words, G & D would contract for a hauling service, perform the service and bill the customer with payments due from the customer within twenty-one days. When the customer paid G & D, however, the payment went to Best. The funds received by Best were commingled with monies which belonged to Best and were not segregated in any type of account for the benefit of G & D, nor were the funds segregated on the books of Best as representing monies owned by G & D, rather than Best.

The two companies operated in this manner from 1984 until the date of the bankruptcy filing of Best on February 7, 1989. In the year preceding the bankruptcy filing, the records of Best showed that Best paid to G & D approximately \$326,000.00. The records of Best do not reflect the date Best received the funds from customers of G & D. However, the records do reflect the date checks were written by Best listing G & D as payee. The checks and other evidence from the records of Best also show the date the checks were cashed by G & D.

More than \$300,000.00 paid from Best to G & D in the year prior to the Best bankruptcy are shown on the records as being paid by check by Best on a certain date, but deposited in the account of G & D on a date far in excess of thirty days after the issue date. Because of this fact, the Chapter 11 Trustee in Best has brought this preference action attempting to avoid all of the

transfers from Best to G & D within one year of the bankruptcy filing.

The Bankruptcy Code permits the trustee to avoid a transfer of an interest of the debtor in property to an insider creditor, on account of an antecedent debt, made while the debtor was insolvent, made between ninety days and one year before the date of the filing of the petition, if the transfer enables the creditor to receive more than the creditor would if the case were a Chapter 7 case, the transfer had not been made and the creditor received payment only through the distribution scheme of the Bankruptcy Code. 11 U.S.C. § 547(b).

In this case, the debtor is a corporation and, in order for the trustee to succeed against G & D for transfers made more than ninety days prior to the bankruptcy and during the year prior to the bankruptcy, G & D must be determined to be an insider. The Bankruptcy Code at 11 U.S.C. § 101(31)(E) provides that an affiliate of the debtor is considered to be an insider. The term "affiliate" is defined at 11 U.S.C. § 101(2)(B) as a corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor. George Schueman admitted during trial he owned G & D and Best. Therefore, G & D is an affiliate of Best and, under the "insider" definition, G & D is an insider. The trustee may look back one year prior to bankruptcy in an attempt to avoid preferential transfers.

The trustee must prove each of the elements of Section 547(b) to successfully avoid the transfers. Concerning each of the elements, the Court finds as follows:

1. Transfer of an interest of the debtor in property. The debtor received monies which G & D had a right to. The debtor commingled the monies of G & D with its own funds. The debtor used the monies of G & D as if they were the property of Best. The debtor did not deposit the G & D funds in segregated bank accounts and did not segregate the funds of G & D on its books. The debtor did not immediately pay over to G & D the funds it received on behalf of G & D. Instead, in the year prior to bankruptcy, the debtor paid G & D sporadically and frequently paid only when requested by management of G & D. The debtor cut checks for G & D on a regular basis but did not deliver those checks to G & D, sometimes for several months after the date of issuance.

The Eighth Circuit Court of Appeals has stated that property of the debtor may include monies deposited in the debtor's bank account that actually belonged to a third party. Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.), 850 F.2d 1275 (8th Cir. 1988). The court remanded the case to the bankruptcy court for a determination of the issue. The bankruptcy court found that funds of a third party in the debtor's bank account were property in which the debtor had an interest. Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.), 96 Bankr. 913, 915-17 (Bankr. D. Minn. 1989). Similarly, the Ninth Circuit has determined that if a third party's funds are commingled in the debtor's bank account, the funds are presumptively property of the estate because the funds could have been used to pay other creditors. Danning v. Bozek (In re Bullion Reserve of North America), 836 F.2d 1214, 1217 (9th Cir.), cert. denied, 486 U.S. 1056 (1988). See also Hargadon v. Cove State Bank (In re Jaggers), 48 Bankr. 33 (Bankr. W.D. Tex. 1985).

Based upon the above-cited legal authority and the manner in which the debtor used and controlled the funds of G & D, the Court finds that the commingled funds of G & D were property in which the debtor had an interest because the debtor was able to use the funds on an unrestricted basis and had those funds been in the bank account on the date the bankruptcy petition was filed, the funds could have been used to pay creditors, just as they were used to pay creditors other than G & D during the operation of Best's business. George Schueman testified that checks to G & D were issued and held because Best was short on money at various times. That testimony itself is sufficient to show that Best did use the commingled funds for its own operations and turned funds over to G & D only at the convenience of Best.

2. A Creditor. The procedure used by G & D and Best was that G & D performed services for third parties and billed for the services, and the money due from third parties to G & D was paid to Best. Best, according to the agreement between Best and G & D, was to process the funds through the computer system of Best to provide for a proper accounting and then to immediately transfer the G & D funds to G & D. Therefore, as soon as Best received the money, G & D had a right to be paid the money.

Under the Bankruptcy Code, at 11 U.S.C. § 101(5)(A), a right to payment is a "claim". A "debt" means liability on a claim. 11 U.S.C. § 101(12). A creditor is an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor. 11 U.S.C. § 101(10)(A).

Immediately upon receipt of the G & D funds by Best, G & D had a right to payment of the funds, causing, under the Bankruptcy Code, G & D to be a creditor of Best as soon as Best processed the funds. Although G & D witnesses made much of the fact that there was no contractual arrangement for services between G & D and Best which could result in a debt being owed by Best to G & D, the legal definition under the Bankruptcy Code of debt, claim and creditor contradict the position of G & D. In addition, notwithstanding the denial by G & D and former employees of Best that there was a debtor-creditor relationship, G & D filed a claim in the Best case and George Schueman testified that as of the petition date Best had not paid G & D all of the money it had a right to and G & D had not received all the money that was due it from Best. Therefore, the Court concludes that the transfers were to a creditor.

3. On Account of an Antecedent Debt. As mentioned above, as soon as Best received the G & D funds, it was obliged to turn the funds over to G & D. It did not do so, for the most part, and more than \$300,000.00 of the transfers in the year immediately preceding the bankruptcy petition filing date was represented by checks issued far more than thirty days prior to the date they were deposited in G & D's account. When a transfer is by check, the date of transfer for purposes of Section 547(b) is the date the check is honored by the debtor's bank. Barnhill v. Johnson, \_\_\_ U.S. \_\_\_, 112 S. Ct. 1386 (1992). Since the debt was incurred on the date the debtor obtained funds of G & D, any payment not in the ordinary course of business or made within a commercially reasonable time period, such as less than thirty days, is a payment on an antecedent debt.

4. Made While the Debtor was Insolvent. The trustee employed the services of a certified public accounting firm to analyze the question of solvency of the debtor in the year immediately preceding the bankruptcy petition. The accountant valued the debtor on a going-concern basis for the year immediately preceding the petition date. For bankruptcy purposes, "insolvent" means the debtor's financial condition is such that the sum of its debts is greater than all of its property, at a fair valuation. 11 U.S.C. § 101(32)(A). The accountant examined the books and records of the debtor, made particular assumptions and adjustments based upon approved practices in the accounting profession, and concluded that the debtor, when valued as a going concern, was insolvent at all times within the one-year preference period.

Courts that have been presented with going-concern valuations for a determination of insolvency have found that a debtor's business should generally be valued as a going concern

unless the business is so close to shutting its doors that the going-concern standard is unrealistic. In re Taxman Clothing Co. Inc., 905 F.2d 166, 170 (7th Cir. 1990); Bergquist v. Anderson-Greenwood Aviation Corp. (In re Bellanca Aircraft Corp.), 56 Bankr. 339, 386-87 (Bankr. D. Minn. 1985); Vadnais Lumber Supply, Inc. v. Byrne (In re Vadnais Lumber Supply, Inc.), 100 Bankr. 127, 131 (Bankr. D. Mass. 1989); Fryman v. Century Factors (In re Art Shirt Ltd., Inc.), 93 Bankr. 333, 341 (D.E.D. Pa. 1988). See also 1 Robert E. Ginsburg & Robert D. Martin, Bankruptcy: Text, Statutes, Rules § 8.02[e] (3d ed. 1992).

Neither the former officer of the debtor who testified nor the representative of G & D presented any evidence of solvency, other than their opinion that Best was solvent at all times prior to the petition date. That testimony was not detailed with regard to whether the witnesses came to such a conclusion by doing an analysis of the fair market value of the assets versus the amount of the debt, either on a going-concern basis or a liquidation basis. They simply concluded that they had no reason to believe the debtor was not solvent at all times pertinent.

In contrast, the accountant testified at length about the analysis that was conducted using the books and records of the debtor. Admittedly, not all of the information which was available in the computer system and the books and records of the debtor was used by the accountant in the analysis. No officers or employees of the debtor were interviewed and the data held in the computer system was not examined, although hard copies of monthly balance sheets were reviewed. It is possible that had there been an appraisal of the assets of the debtor during the year immediately preceding the petition, one could conclude that the liquidation value of the assets was in excess of the obligations of Best. However, there is no evidence to support such a conclusion. As in all preference cases, the investigation of the solvency of the debtor occurs months or years after the debtor has gone out of business. Appraisals are not available. The analyst must review the records that are available and make assumptions and come to conclusions about appropriate adjustments to make to the written record in order to determine a fair valuation of the assets.

In this case, the Court finds that the accountant did just that. The appropriate and available books and records were reviewed, adjustments were made based upon the experience of the accountant and the practice in the accounting profession, and a conclusion was reached. That conclusion is that Best, valued as a going concern, was not solvent at any time during the year immediately preceding the bankruptcy petition date. The Court finds as a fact that the conclusion reached by the accountant is

based upon a reasonable and thorough review of the records and the Court concludes that the debtor was insolvent at all times in the year immediately preceding the bankruptcy filing.

5. Transfer Made Between Ninety Days and One Year Before the Date of the Petition. There is no dispute that \$326,543.29 was transferred from the debtor to G & D in the year immediately preceding the petition.

6. Enables the Creditor to Receive More than in a Chapter 7 Case. This Chapter 11 case is being liquidated by a court-appointed trustee. The debtor operated for approximately one year after the petition date and then ceased operations. The unencumbered estate property is insufficient to pay the creditors more than a small percentage of their claims. G & D received more by these transfers than it would have received in a Chapter 7 case.

In conclusion, the Court finds that pursuant to 11 U.S.C. § 547(b), transfers in the amount of \$326,543.29 from Best to G & D are avoidable preferences which are hereby avoided. Judgment is entered in favor of the trustee/plaintiff and against G & D Trucking, Inc., on the avoidance issue with regard to the amount of \$326,543.29.

Separate judgment entry shall be entered.

DATED: July 20, 1993.

BY THE COURT:

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

cc:

Roger Shiffermiller, Attorney for plaintiff  
James Place, Attorney for defendants



