United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re H. King & Associates

Bankruptcy No. 99 B 17717

Adversary Caption: Gina B. Krol, Chapter 7 Trustee v. The Finishing Company

Adversary No. 01 A 00540

Date of Issuance: October 22, 2001

Judge: John H. Squires

Appearance of Counsel:

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Trustee or Other Attorneys: Gina B. Krol, Esq., Cohen & Krol, 105 West Madison Street, Suite 1100, Chicago, IL 60602

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
H. KING & ASSOCIATES,	)	Bankruptcy No. 99 B 17717
	)	Chapter 11
Debtor.	)	Judge John H. Squires
	)	
	)	
GINA B. KROL, Chapter 7 Trustee,	)	
	)	
Plaintiff,	)	
	)	
	)	
THE FINISHING COMPANY,	)	Adversary No. 01 A 00540
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the cross motion of Gina B. Krol, the Chapter 7 Trustee (the "Trustee") for H. King & Associates (the "Debtor") for summary judgment pursuant to Federal Rule of Civil Procedure 56 under the Trustee's complaint against The Finishing Company (the "Defendant") to recover certain alleged preferential transfers. For the reasons set forth herein, the Court grants the motion and holds that the transfers made by the Debtor to the Defendant in amount of $6,205.10 are avoidable preferences under 11 U.S.C. § 547(b) and the Trustee may recover that sum under 11 U.S.C. § 550.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District

of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (F) and (O).

II. APPLICABLE STANDARDS FOR SUMMARY JUDGMENT

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> [T]he 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. Civ. P. 56(c). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The primary purpose for granting a summary judgment motion is to avoid unnecessary trials when there is no genuine issue of material fact in dispute. Trautvetter v. Quick, 916 F.2d 1140, 1147 (7th Cir. 1990); Farries v. Stanadyne/Chicago Div., 832 F.2d 374, 378 (7th Cir. 1987) (quoting Wainwright Bank & Trust Co. v. Railroadmen's Federal Sav. & Loan Ass'n of Indianapolis, 806 F.2d 146, 149 (7th Cir. 1986)). Where the material facts are not in dispute, the sole issue is whether the moving party is entitled to a judgment as a matter of law. ANR Advance Transp. Co. v. International Bhd. of Teamsters, Local 710, 153 F.3d 774, 777 (7th Cir. 1998).

The United States Supreme Court decided a trilogy of cases which encourages the use of summary judgment as a means to dispose of factually unsupported claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Electric Indus. Co., Ltd. v. Zenith

Radio Corp., 475 U.S. 574 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The burden is on the moving party to show that no genuine issue of material fact is in dispute. Anderson, 477 U.S. at 248; Matsushita, 475 U.S. at 585-86; Celotex, 477 U.S. at 322.

All reasonable inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). The existence of a material factual dispute is sufficient only if the disputed fact is determinative of the outcome under applicable law. Anderson, 477 U.S. at 248; Frey v. Fraser Yachts, 29 F.3d 1153, 1156 (7th Cir. 1994). "Summary judgment is not an appropriate occasion for weighing the evidence; rather the inquiry is limited to determining if there is a genuine issue for trial." Lohorn v. Michal, 913 F.2d 327, 331 (7th Cir. 1990). The Seventh Circuit has noted that trial courts must remain sensitive to fact issues where they are actually demonstrated to warrant denial of summary judgment. Opp v. Wheaton, 231 F.3d 1060 (7th Cir. 2000); Szymanski v. Rite-way, 231 F.3d 360 (7th Cir. 2000).

Local Rule 402.M of the Bankruptcy Rules adopted for the Northern District of Illinois requires the party moving for summary judgment to file a detailed statement ("402.M statement") of material facts that the movant believes are uncontested. Local Bankr. R. 402.M. The 402.M statement "shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." Id.

The Trustee filed a 402.M statement that substantially complied with the requirements of Rule 402.M. It contained numbered paragraphs setting out uncontested facts with reference to the complaint.

The party opposing a summary judgment motion is required by Local Rule 402.N to respond ("402.N statement") to the movant's 402.M statement, paragraph by paragraph, and to set forth any material facts that would require denial of summary judgment, specifically referring to the record for support of each denial of fact. Local Bankr. R. 402.N. The opposing party is required to respond "to each numbered paragraph in the moving party's statement" and make "specific references to the affidavits, parts of the record, and other supporting materials relied upon." Local Bankr. R. 402.N(3)(a). Most importantly, "[a]ll material facts set forth in the [402.M] statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party." Local Bankr. R. 402.N(3)(b).

The Defendant has not complied with this Rule. The Seventh Circuit has upheld strict application of local rules regarding motions for summary judgment. See Dade v. Sherwin-Williams Co., 128 F.3d 1135, 1140 (7th Cir. 1997); Feliberty v. Kemper Corp., 98 F.3d 274, 277-78 (7th Cir. 1996); Bourne Co. v. Hunter Country Club, Inc., 990 F.2d 934, 938 (7th Cir.), cert. denied, 510 U.S. 916 (1993); Schulz v. Serfilco, Ltd., 965 F.2d 516, 519 (7th Cir. 1992); Maksym v. Loesch, 937 F.2d 1237, 1240-41 (7th Cir. 1991).

Local Bankruptcy Rules 402.M and 402.N are patterned after and substantially similar to Local District Court Rules 56.1(a) and 56.1(b). The precedents decided about the latter are

instructive and applicable to the former. Compliance with Local Rules 402.M and 402.N is not a mere technicality. Courts rely greatly upon the information presented in these statements in separating the facts about which there is a genuine dispute from those about which there is none. American Ins. Co. v. Meyer Steel Drum, Inc., 1990 WL 92882 at *7 (N.D. Ill. June 27, 1990). The statements required by Rule 402 are not merely superfluous abstracts of evidence. Rather, they "are intended to alert the court to precisely what factual questions are in dispute and point the court to specific evidence in the record that supports a party's position on each of these questions. They are, in short, roadmaps, and without them the court should not have to proceed further, regardless of how readily it might be able to distill the relevant information on its own." Waldridge v. American Hoechst Corp., 24 F.3d 918, 921 (7th Cir. 1994). Because the Defendant failed to comply with Rule 402.N, all material facts set forth in the Trustee's 402.M statement are hereby deemed admitted.

III. FACTS AND BACKGROUND

Many of the facts and background were taken from a prior Opinion in this adversary proceeding. See Krol v. The Finishing Co. (In re H. King & Assocs.), Bankr. No. 99 B 17717, Adv. No. 01 A 00540, 2001 WL 987823 (Bankr. N.D. Ill. Aug. 27, 2001). The Debtor was in the business of designing and building retail displays for various retail chains. The normal business of the Debtor was the design and sale of point of purchase displays to manufacturers of products who market those products in the retail environment. The focus of the Debtor's business was point of purchase displays for cigarette manufacturers.

The Defendant has been engaged in business since 1964 in various aspects of metal finishing, and is a member of the National Association of Metal Finishers. One of the processes commonly used by the Defendant is powder coating. The Defendant is regularly engaged in the normal course of its business in performing powder coating. Powder coating is a paint process that eliminates the need for solvents and eliminates drying time, making the finished product ready for immediate shipment.

In approximately Spring 1999, the Debtor shipped products to the Defendant for powder coating. The products were parts for R. J. Reynolds' cigarette points of sale displays. The Defendant performed powder coating on all parts received from the Debtor and shipped the parts back. On March 19, 1999, the Defendant sent its invoices numbered 9027 and 9028 to the Debtor for the powder coating of those various parts. These invoices included customary and usual payment terms of "2% 10 net 30 days." The Debtor paid both of these invoices on April 23, 1999 with a check in the sum of $1,340.50.

Thereafter, the Defendant sent additional invoices to the Debtor for powder coating of R. J. Reynolds' point of sale materials. These invoices also included the customary and usual payment terms of "2% 10 net 30 days." The Debtor paid these invoices with a check in the sum of $4,864.60 on May 28, 1999. A discount of $32.76 was given to the Debtor based upon a count discrepancy in the number of parts shipped.

Prior to the above transactions, the Defendant performed similar work on the same payment terms for the Debtor for approximately two years. On each occasion, the Debtor sent in parts to the Defendant for powder coating. The Defendant performed the requested services

and shipped the parts to the Debtor, and then invoiced the Debtor, with such invoices on each occasion containing the payment terms of "2% 10 net 30 days." The Debtor customarily paid such invoices by issuing checks to the Defendant within 40-45 days of the date of the invoice.

The Debtor transferred the respective sums of $1,340.50 and $4,864.60 to the Defendant on account of antecedent debts owing from the Debtor to the Defendant when the Debtor was insolvent. The transfers enabled the Defendant to receive more than it would have received if the Debtor had subsequently filed a Chapter 7 bankruptcy petition and the transfers had not been made. The Defendant has refused to repay these sums.

On June 1, 2001, the Trustee filed a complaint in which she asserts that the two pre-petition transfers in the sum of $6,205.10 made by the Debtor to the Defendant are avoidable preferential payments under 11 U.S.C. § 547(b). She seeks to recover that sum under 11 U.S.C. § 550. The Defendant filed an answer to the complaint wherein it denied that the Debtor was insolvent at the time of the transfers and that the transfers enabled it to receive more than it would have received if the bankruptcy case had been filed under Chapter 7 and if the transfers had not been made.

On August 27, 2001, the Court denied the Defendant's motion for summary judgment under 11 U.S.C. § 547(c)(2), one of the statutory defenses to a preference action. The Defendant argued that the transfers fell under the ordinary course of business exception. The Court held, however, that the Defendant failed to prove all requisite elements of this defense. The Trustee filed her motion for summary judgment on August 16, 2001. The Court set a briefing schedule and took the matter under advisement. The Defendant failed to respond.

IV. DISCUSSION

A trustee may avoid certain preferential transfers made from the debtor's estate before the debtor filed a bankruptcy petition. See 11 U.S.C. § 547(b). The trustee's power to avoid preferential transfers is designed to further the Bankruptcy Code's central policy of equality of distribution: "creditors of equal priority should receive pro rata shares of the debtor's property." Begier v. IRS, 496 U.S. 53, 58 (1990). Additionally, by preventing the debtor from favoring certain creditors over others and by ensuring an equal distribution, the preference provision helps reduce "the incentive to rush to dismember a financially unstable debtor." In re Smith, 966 F.2d 1527, 1535 (7th Cir.) (citations omitted), cert. dismissed, Baker & Schultz v. Boyer, 506 U.S. 1030 (1992). "The purpose of allowing preferential transfers to be set aside is to prevent debtors who are tottering toward bankruptcy from playing favorites among their creditors, trying to keep alive a little longer by placating the most importunate ones." In re Freedom Group, Inc., 50 F.3d 408, 410 (7th Cir. 1995).

Section 547(b) provides that a trustee may avoid any transfer of an interest of the debtor in property if the transfer meets five requirements: (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 on or within 90 days before the date of the filing of the petition; and (5) enables the creditor to receive more than such creditor would if the case were a case under Chapter 7, the transfer had not been made, and the

creditor received payment of such debt to the extent provided by the provisions of the Code. See 11 U.S.C. § 547(b); Warsco v. Preferred Technical Group, 258 F.3d 557 (7th Cir. 2001); In re Superior Toy & Mfg. Co., 78 F.3d 1169, 1171 (7th Cir. 1996).

The trustee has the burden of proof to establish all elements of § 547(b) by a preponderance of the evidence. 11 U.S.C. § 547(g); In re Jones, 226 F.3d 917, 921 (7th Cir. 2000); In re Badger Lines, Inc., 140 F.3d 691, 698 (7th Cir. 1998); In re Prescott, 805 F.2d 719, 726 (7th Cir. 1986). The Bankruptcy Code presumes a debtor to be insolvent, as a matter of law, during the 90 days prior to the bankruptcy petition filing date. 11 U.S.C. § 547(f); see also Barash v. Public Fin. Corp., 658 F.2d 504, 507 (7th Cir. 1981). This presumption requires the defendant to present evidence to rebut the presumption, but it does not relieve the trustee of the ultimate burden of proof on this third element to establish a prima facie case under § 547(b). See In re Taxman Clothing Co., Inc., 905 F.2d 166, 168 (7th Cir. 1990); Schwinn Plan Comm. v. AFS Cycle & Co., Ltd. (In re Schwinn Bicycle Co.), 192 B.R. 477, 485 (Bankr. N.D. Ill. 1996).

After review of the Defendant's answer to the complaint, it appears that the only elements it was contesting were elements three (transfers made while the debtor was insolvent) and five (same enabled the creditor to receive more than such creditor would if the case were a case under Chapter 7, the transfer had not been made, and the creditor received payment of such debt to the extent provided by the provisions of the Code). The Defendant's failure to file its 402.N statement, however, results in the Court deeming admitted all assertions made in the Trustee's 402.M statement, including these two elements. Therefore, there are no material

issues of fact. Moreover, the Trustee is entitled to summary judgment as a matter of law. Hence, the Court grants the motion and holds that the pre-petition transfers are avoidable preferences under § 547(b) and the Trustee is entitled to recover the sum of $6,205.10 under § 550.

V. CONCLUSION

For the foregoing reasons, the Court grants the Trustee's motion for summary judgment and holds that the pre-petition transfers made by the Debtor to the Defendant in the amount of $6,205.10 are avoidable preferences and the Trustee may recover that sum.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
H. KING & ASSOCIATES,	)	Bankruptcy No. 99 B 17717
	)	Chapter 11
Debtor.	)	Judge John H. Squires
	)	
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GINA B. KROL, Chapter 7 Trustee,	)	
	)	
Plaintiff,	)	
	)	
	)	
THE FINISHING COMPANY,	)	Adversary No. 01 A 00540
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 22nd day of October, 2001, the Court grants the motion of Gina B. Krol, the Chapter 7 Trustee, for summary judgment. The Court holds that the transfers made by H. King & Associates to The Finishing Company in amount of $6,205.10 are avoidable preferences under 11 U.S.C. § 547(b) and the Trustee may recover that sum under 11 U.S.C. § 550.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List