

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions

Will this opinion be published? No

Bankruptcy Caption: In re Intrastate Electrical Services, Inc.

Bankruptcy No. 95 B 20173

**Adversary Caption: THE OFFICIAL UNSECURED CREDITORS COMMITTEE OF
INTRASTATE ELECTRICAL SERVICES, INC. V. JOHN NASTAV**

Adversary No. 98 A 01924

Date of Issuance: December 1, 2000

Judge: Susan Pierson Sonderby

Appearance of Counsel:

Attorney for Movant or Plaintiff: Kevin T. Keating, Mark E. Shure

Attorney for Respondent or Defendant: Keevan D. Morgan, Rakesh Khanna

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	
)	Chapter 11
INTRASTATE ELECTRICAL)	No. 95 B 20173
SERVICES, INC.,)	
)	
Debtor.)	Hon. Susan Pierson Sonderby
_____)	
)	
THE OFFICIAL UNSECURED CREDITORS)	
COMMITTEE OF INTRASTATE ELECTRICAL)	
SERVICES, INC.,)	Adv. No. 98 A 1924
)	
Plaintiff,)	
v.)	
)	
JOHN NASTAV,)	
)	
Defendant.)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed copies of the attached **MEMORANDUM OPINION** and **ORDER** to the persons listed on the attached service list this 1st day of December, 2000.

Vina-Gail R. Springer
Secretary

SERVICE LIST

Keevan D. Morgan
Rakesh Khanna
Morgan & Bley
20 North Clark Street, Suite 444
Chicago, IL 60602

Kevin T. Keating
Mark E. Shure
Keating & Shure Ltd.
150 North Wacker Drive, Suite 1550
Chicago, IL 60606

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Plaintiff,)	
v.)	
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JOHN NASTAV,)	
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Defendant.)	
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MEMORANDUM OPINION

This matter is before the Court on the motion for summary judgment filed by Plaintiff The Official Unsecured Creditors Committee of Intrastate Electrical Services, Inc. (the “Committee”). For the reasons set forth below, the Committee’s motion is denied.

BACKGROUND

Debtor Intrastate Electrical Services, Inc. (the “Debtor”) is one of four corporations (collectively the “Affiliates) owned by Defendant John Nastav (“Nastav”) and members of his family. The other Affiliates are Intrastate Sheet Metal, Inc., Intrastate Millwright Services, Inc., and Intrastate Piping & Controls, Inc. (“Piping”). Nastav is the president of each company.

All four Affiliates operate out of a facility located at 16555 S. 108th Avenue, Orland Park,

Illinois (the “Premises”). Nastav and his wife (collectively “the Nastavs”) are beneficiaries of the land trust that holds title to the Premises.

Piping was the first to occupy the Premises, having been the earliest Affiliate formed. Under a written lease dated June 14, 1988 (the “Lease”), Piping was to pay monthly rent of \$7,300 to the Nastavs. The term of the Lease was one year, but paragraph 39 contained the following provision for automatic renewal:

Upon the expiration hereof, this lease shall automatically renew from year to year, on a 7/1 to 6/30 basis, upon all of the same terms and conditions as provided for herein unless at least 90 days prior to the end of the term, or any subsequent term hereunder, either party notifies the other, in writing, of its intention not to renew the lease, in which case the lease shall terminate at the end of the term for which such notice is applicable.

Paragraph 8 of the Lease provides that Piping may not sublet the Premises or assign rights under the Lease without Nastav’s advance written consent. The Lease contains no provision addressing modification of its terms.

At a deposition on September 23, 1999, Nastav stated that neither party had ever given the other a notice of nonrenewal and that the Lease remained in effect. Nastav further stated that Piping had orally subleased portions of the Premises to the Debtor and the other Affiliates. PX E at 32-33. However, Nastav’s testimony also suggested that the Affiliates have generally disregarded formalities that would evidence the existence of a sublease agreement. Thus, at page 36 of his deposition, Nastav testified that although there was a sublease from Piping, for tax reasons, the Debtor’s rent checks were made payable to him personally. Nastav further testified that he never gave consent in writing to a sublease from Piping to the Debtor.

As discussed below, the labels used by the Debtor to describe its lease arrangements have

changed as this bankruptcy case progressed. Initially, the Debtor stated that it occupied the Premises under an oral lease from the Nastavs. Based on subsequent references made to a sublease from Piping, the Committee contends that it is entitled to a judgment in its favor in this fraudulent conveyance action.

Pleadings in Connection with the Debtor's Lease of the Premises

After the Debtor filed its petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 et seq. (the "Code") on September 27, 1995, it moved to extend the time to assume or reject an oral lease of the Premises from the Nastavs. In that motion of December 19, 1995, the Debtor stated that it leased its office and warehouse facility from the Nastavs under a prepetition oral lease, and that other portions of the Premises were leased to other companies in which the Nastavas had an interest. The Debtor further stated that the Nastavs agreed to an extension of time to assume or reject the oral lease, provided that the Debtor continue to make monthly rental payments of \$1,500 and timely perform all its other lease obligations.

Creditor Rhone-Poulenc, Inc. opposed the Debtor's motion, arguing that once the Nastavs leased the Premises to Piping, only Piping could sublease the property to the Debtor. A sublease would have required written consent the Nastavs. Rhone-Poulenc alleged on information and belief that there had been no written consent to a sublease, and that the Lease was still in effect because neither party had canceled it. Based on those assumptions, Rhone-Poulenc took the position that Piping was obligated to pay the full amount of monthly rent to the Nastavs. Alternatively, Rhone-Poulenc argued that even if the alleged oral lease between the Debtor and the Nastavs existed, it was a scheme by Nastav to siphon off the Debtor's assets at the expense of its creditors and not in the best interests of the estate.

The Debtor withdrew its motion to assume the oral lease, only to file a motion on February

26, 1996 in which it sought authority to enter into a written sublease of a portion of the Premises from Piping. That motion stated that the Debtor's prepetition oral lease was "premised upon the terms and conditions of [the Lease]" between Piping and the Nastavs, and that gross monthly rent for the Premises was \$17,650. Of that amount, the Debtor paid \$3,000 per month, while other Affiliates paid the remainder. The proposed written sublease attached to the motion also referred to previous "amendments" to the Lease. As the Committee observes, on March 22, 1996, this Court granted the Debtor's motion to assume the sublease.

Committee's Adversary Proceeding

The Committee seeks to recover a series of monthly payments made by the Debtor to Nastav in the period between August 24, 1994 and August 24, 1995. Those payments, in amounts between \$1,000 and \$3,000 were all ostensibly for rent. Based on the Debtor's financial statements, it appears that most payments were made while the Debtor was insolvent. The Committee's theory is that the payments to Nastav were actually or constructively fraudulent. Here, the Committee seeks a judgment in its favor on the causes of action for constructive fraud in Counts II and V of its complaint. The Committee does not seek judgment on those counts in which it alleges that the payments to Nastav were actually fraudulent.

The cause of action for constructive fraud in Count II is brought under Code § 548(a)(1)(B). Under that section, transfers within the year preceding the Debtor's bankruptcy filing may be avoided if the Committee establishes that the Debtor "received less than a reasonably equivalent value in exchange for such transfer[s] . . ." and "was insolvent on the date that such transfer was made . . ." 11 U.S.C. § 548(a)(1)(B). Similarly, to prevail on its state law cause of action in Count V, the Committee will have to establish that the transfers were not for a reasonably equivalent value. See Liebowitz v. Parkway Bank & Trust Co. (In re Image Worldwide, Ltd.), 139 F.3d 574, 577 (7th

Cir. 1998).

The Committee contends that as a matter of law and undisputed fact, the Debtor's payments to Nastav were made in exchange for less than a reasonably equivalent value. As support for that premise, the Committee relies on two cases in which transfers in satisfaction of rent obligations were found to be fraudulent transfers. See Doyle v. Paolino (In re Energy Savings Center, Inc.), 61 B.R. 732 (E.D. Pa. 1986), aff'd, 810 F.2d 1162 (3d Cir. 1987); Ross v. Penny (In re Villa Roel, Inc.), 57 B.R. 879 (Bankr. D.D.C. 1985).

Both Energy Savings Center and Villa Roel were Chapter 7 cases where, in the months preceding its bankruptcy filing, a debtor's property had been transferred to a landlord in satisfaction of overdue rental obligations. In each case, there was a single transfer that significantly depleted the assets that would have been available to satisfy other creditor claims. Also, because the underlying leases in both cases predated the debtor's incorporation, the debtor's principal was personally liable on the lease. Although satisfaction of an antecedent debt may be "value" within the meaning of Code § 548, both courts found that the debt in question was that of the debtor's principal, rather than a debt of the debtor. Accordingly, they concluded that the transfers in question were not made in exchange for "value." Energy Savings Center, 61 B.R. at 736; Villa Roel, 57 B.R. at 883.

Taking the position that the Debtor's right to occupy the Premises arose under an oral sublease from Piping, and that the Debtor's payments to Nastav operated to relieve Piping of its obligations to Nastav under the Lease, the Committee contends that the result should be the same here.

Nastav has responded to the Committee's arguments by submitting an affidavit in which he denies that a sublease arrangement existed at those times relevant to this dispute. In that affidavit,

Nastav states that as each of the Affiliates was formed, the Lease was orally modified, with Piping relinquishing a portion of the Premises in return for a reduced rental obligation. According to Nastav, each new Affiliate subsequently entered into an oral agreement with the Nastavs to rent the relinquished space directly from them. Nastav attests that each Affiliate paid rent directly to him, and that he used the rental payments to make payments on the mortgage encumbering the Premises.

Obviously, the averments in Nastav's affidavit contradict his deposition testimony that there was a sublease. However, they are consistent with the Debtor's initial statements in this case concerning the Affiliates' lease arrangements.

DISCUSSION

Summary judgment is to be granted "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); Bellaver v. Quanex Corp., 200 F.3d 485, 491 (7th Cir. 2000); Feldman v. American Memorial Life Ins. Co., 196 F.3d 783, 789 (7th Cir. 1999). In ruling on a motion for summary judgment, the court reviews the record in the light most favorable to the nonmoving party and it draws all reasonable inferences therefrom in the nonmovant's favor. Schneiker v. Fortis Ins. Co., 200 F.3d 1055, 1057 (7th Cir. 2000). The burden is on the party moving for summary judgment to affirmatively demonstrate the absence of any genuine issue of material fact, indicating that judgment should be granted as a matter of law. Filipovic v. K & R Express Systems, Inc., 176 F.3d 390, 395 (7th Cir. 1999); Shintom America, Inc. v. Car Telephones, Inc., 45 F.3d 1107, 1109 (7th Cir. 1995).

Applying those principles here, the evidence of record suggests that during the pendency of this bankruptcy case, the Debtor and Nastav have used different labels to describe the nature of the Debtor's arrangements for lease of the Premises. Although it is undisputed that neither party to the

Lease ever gave the other a notice of cancellation, the increase in the amount of monthly gross rent due suggests that the terms of the Lease were modified by the parties before this bankruptcy case commenced. All changes were oral, and Nastav was at both ends of the Affiliates' agreements for lease of the Premises. Inconsistently with the existence of an oral sublease, the Debtor also paid rent directly to Nastav during the time period relevant to this dispute.

Drawing inferences in Nastav's favor, the Court concludes that the Committee has failed to establish as a matter of undisputed fact that the Debtor made the challenged transfers to Nastav at a time when it was obligated to make rental payments to Piping under an oral sublease of the Premises. Correspondingly, there is a question as to whether Nastav gave value in exchange for the payments to him. The Court therefore denies the Committee's motion for summary judgment.

CONCLUSION

For the reasons set forth above, the Committee's motion for summary judgment is denied.

ENTERED:

Dated: December 1, 2000

**Hon. Susan Pierson Sonderby
United States Bankruptcy Judge**

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ORDER

For the reasons set forth in its memorandum opinion entered on this date, the Court denies the motion for summary judgment filed by Plaintiff The Official Unsecured Creditors Committee of Intrastate Electrical Services, Inc. A status hearing in this matter will be held on January 16, 2001 at 10:30 a.m.

ENTERED:

Date: December 1, 2000

**Hon. Susan Pierson Sonderby
United States Bankruptcy Judge**