UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:	)	Bankr. No. 02-30015
	)	
CAHOY TRUCKING, INC.	)	Chapter 7
Tax I.D. No. 46-0448798	)	
Debtor.	)	
	)	
	)	
JOHN S. LOVALD, TRUSTEE	)	Adv. No. 02-3002
	)	
Plaintiff,	)	
	)	
-vs-	)	DECISION RE: DEFENDANT'S
	)	MOTION FOR SUMMARY JUDGMENT
F&M BANK, fka FIRST WESTERN BANK, N.A.	)	
	)	
	)	
Defendant.	)	

The matter before the Court is the Motion for Summary Judgment filed by Defendant F&M Bank and Plaintiff-Trustee John S. Lovald's response. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's interim findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that the Motion will be granted as to any relief under 11 U.S.C. § 547(b), and that Trustee Lovald will be directed to amend his Complaint to clarify under which alternative Code sections he seeks relief.

I.

Debtor Cahoy Trucking, Inc., filed a Chapter 7 petition in bankruptcy. Among its creditors, Debtor listed First Western

Bank, now known as F&M Bank ("Bank")[1] as a secured creditor holding collateral described as a "Wilkens Walking Floor Trailer" and "02-11-02; Invoice Factoring." Debtor stated the Bank's claim on the trailer was totally unsecured; it was unclear how Debtor characterized the Bank's claim on the "Invoice Factoring". Debtor did not schedule any co-debtors.

John S. Lovald was appointed as the case trustee. Trustee Lovald timely commenced this adversary proceeding against Bank. He sought to recover from the Bank certain funds that he alleged the Bank had received on a factoring arrangement in which the Bank had not properly perfected its security interest.

The Bank timely answered. It argued that it has a factoring arrangement with Larry Cahoy only, Debtor's principal, not with Debtor. The Bank also offered the defense that the transfers were excepted preferential transfers because they were either contemporaneous exchanges for new value under § 547(c)(1) or the transfers were made in the ordinary course of business under § 547(c)(2).

The Bank moved for summary judgment. It stated in its Motion that no material facts were in dispute and that it was entitled to summary judgment on whether a preferential transfer

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1 Due to an apparent typographical error, the original Complaint lists the Bank as FM Bank, rather than F&M Bank; the error was carried through on other pleadings as well.

occurred. In its brief, the Bank stated that a voidable preference under § 547(b) could not have occurred because "there was never a time when a debt was owed to [Bank] by the debtor. Instead, [Bank] advanced funds to debtor and later received payment by third parties."

Trustee Lovald provided more specific allegations in his response to the Bank's summary judgment motion. He alleged that in 1998 Larry Cahoy, who was then doing business as Cahoy Family Farm Trucking, entered into a factoring arrangement with the Bank.[2] The loan documents were perfected under Larry Cahoy's personal tax identification number. Shortly thereafter, Larry Cahoy incorporated his trucking business into Cahoy Trucking, Inc., and the corporation was assigned its own taxpayer identification number. Apparently, the incorporated trucking business continued to participate in the factoring agreement with the Bank by turning over receivables to the Bank, though the Bank did not have a perfected secured claim against the corporation. The incorporated trucking business, Debtor, filed bankruptcy. Trustee Lovald alleged that the Bank received payments, both pre and post-petition, on the factoring arrangement through a turnover of Debtor's accounts receivable, and he sought to recover these transfers. Trustee Lovald

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2 Larry Cahoy's wife, Diane Cahoy, also signed several of the documents referenced herein.

further alleged, and he says the deposition testimony supports, that the funds advanced by the Bank under the factoring arrangement did not go to Debtor, but were diverted to Larry Cahoy. Though Trustee Lovald essentially admitted that a voidable preference under § 547(b) did not occur, he said his complaint was broad enough to "cover any type of transfer not supported by a valid consideration as is present here."

In a deposition, Daniel L. Kramer, on officer from the Bank, described the factoring arrangement: The Cahoys would truck goods for someone, complete an invoice for these services, and then fax a copy of the invoice to the Bank. Upon receipt of the faxed invoice, the Bank would (1) credit 3% of the amount due on the invoice as the Bank's profit; (2) advance 10% in a savings account for the Cahoys, and (3) advance 87% back into the Cahoys' checking account for their trucking business. The Bank would then proceed to collect the amount due on the invoice from the person or entity for whom thc Cahoys provided trucking services.

II.

APPLICABLE LAW - SUMMARY JUDGMENT. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in

the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986)(cites therein)). The non moving party is entitled to all reasonable inferences that can be drawn from the evidence without resorting to speculation. *P.H. v. School District of Kansas City, Missouri*, 265 F.3d 653, 658 (8th Cir. 2001)(quoting therein *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001)(internal quotation omitted)). Only disputes over facts that might affect the outcome of the suit under the applicable law properly preclude the entry of summary judgment. *P.H. v. School District*, 265 F.3d at 658.

The movant meets his burden if he shows that the record does not contain a genuine issue of material fact and he identifies that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997)(quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273 (8th Cir. 1988)). No defense

to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970)(cite therein); *Handeen,* 112 F.3d at 1346. If the movant meets his burden, however, the non movant, to defeat the motion, "must advance *specific facts* to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (emphasis added)(quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The non movant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d at 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

APPLICABLE LAW - PREFERENTIAL TRANSFER. Under 11 U.S.C. § 547(b), a trustee may avoid a transfer to a creditor that occurred within ninety days before the petition date if the transfer was for a debt that preceded the transfer, the debtor was insolvent at the time of the transfer, and the transfer enabled the creditor to receive more than it would have under a Chapter 7 liquidation. *Buckley v. Jeld-Wen, Inc. (In re Interior Wood Products Co.)*, 986 F.2d 228, 230 (8th Cir. 1993). The trustee bears the burden of proof on each element of a preference under § 547(b). 11 U.S.C. § 547(g). The purpose of

§ 547(b) is to restore the bankruptcy estate to its pre-preferential transfer condition, *Halverson v. Le Sueur State Bank (In re Willaert)*, 944 F.2d 463, 464 (8th Cir. 1991), and to prevent the debtor from favoring one creditor over others by transferring property shortly before filing bankruptcy. *Begier v. IRS*, 496 U.S. 53, 58 (1990).

III.

The Bank's position is that the factoring arrangement, by its terms, did not create a debtor-creditor relationship between the Bank and the Cahoys or their business entities. Even assuming that the Bank's characterization of the factoring arrangement is accurate,[3] there also is no evidence in the record that Debtor itself ever entered into a factoring arrangement with the Bank. The arrangement was between Larry Cahoy and the Bank. For a transfer to be recoverable as a voidable preference under § 547(b), an antecedent debt must have been owed by Debtor. Since both sides apparently agree that such a debt did not exist, Trustee Lovald has not established how the subject transfers to the Bank are avoidable under § 547(b). Accordingly, the Bank's summary judgment motion will be granted to the extent that Trustee Lovald seeks

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3 The record does not identify any indemnity, recourse, or other type of guarantee with Debtor or another person or entity that the Bank may have had to secure the funds it advanced under the factoring arrangement.

relief under § 547(b).

Other Code sections may still allow Trustee Lovald to recover the accounts receivable that Debtor turned over to the Bank, both pre and post-petition. *See, e.g.*, 11 U.S.C. §§ 544, 548, and 549. Trustee Lovald, however, needs to promptly amend his Complaint to better identify those Code sections and to set forth with more specificity the facts and law on which he seeks recovery. Fed.Rs.Bankr.P. 7008 and 7009 and Fed.R.Civ.P. 9(b).

An order will be entered dismissing Trustee Lovald's counts under § 547(b).

Dated this 17 day of October, 2002.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: Deputy Clerk
(SEAL)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
OCT 17 2002
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.
OCT 17 2002
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By

John S. Lovald
Box 66
Pierre, SD 57501

Brent A. Wilbur
PO Box 160
Pierre, SD 57501-0160

Total labels: 2