

**United States Bankruptcy Court  
District of New Mexico**

**Document Verification**

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**Case Number:** 01-01166  
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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW MEXICO

In re:  
David McCaughey Brown,  
Debtor.

No. 7-01-12228 SS

Yvette J. Gonzales,  
as Chapter 7 Trustee,  
Plaintiff,

vs.

Peoples Bank,  
Defendant

Adv. No. 01-1166 S

**MEMORANDUM OPINION ON  
MOTION TO DISMISS**

This matter came before the Court on the Motion to Dismiss filed by Defendant Peoples Bank, through its attorney Alexia Constantaras. Plaintiff is represented by James Askew. This is a core proceeding. 28 U.S.C. § 157(b)(2)(F). Plaintiff's complaint originally contained three counts; two counts have been dismissed by stipulation of the parties, leaving only a count for recovery of a preferential transfer under 11 U.S.C. § 547. Plaintiff asserts in the remaining count that the failure of Peoples Bank to have had in its possession the additional shares of Sun Microsystems stock prior to the ninety days immediately preceding the filing of the petition, or to have filed a financing statement, constitutes the preferential transfer.

Defendant has moved for dismissal under Federal Rule of Civil Procedure 12(b)(6), as incorporated into Bankruptcy Rule 7012(b).

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 335 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); see also McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980). In adjudicating a motion to dismiss pursuant to Fed.R.Bankr.P. 7012(b), which incorporates Fed.R.Civ.P. 12(b)(6), a bankruptcy court must assume all facts alleged in the complaint to be true. In re Garafano, 99 B.R. 624 (Bankr. E.D. Pa. 1989). Under this standard, dismissal is inappropriate unless plaintiff can prove no set of facts which would entitle him to relief. In re Kelpe, 98 B.R. 479, 480 (Bankr. W.D. Mo. 1989); In re Smurzynski, 72 B.R. 368, 370 (Bankr. N.D. Il. 1987).

Lawrence National Bank v. Edmonds (In re Edmonds), 924 F.2d 176, 180 (10<sup>th</sup> Cir. 1991).

To state a claim under 11 U.S.C. § 547, the Trustee must prove:

a transfer of an interest of the debtor in property

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- (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 -
  - (A) on or within 90 days before the date of the filing of the petition; or
  - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

- (5) that enables such creditor to receive more than such creditor would receive if -
- (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). The complaint in this case alleges a transfer of a stock certificate (Complaint ¶¶ 10, 11); to a creditor (¶¶ 5, 6, 7, 8); made while the debtor was insolvent<sup>1</sup> (¶ 13); made within 90 days before the date of the petition (¶¶ 2, 11); that enables defendant to receive more than it would otherwise receive in this case (¶ 14). Plaintiff has stated a claim for relief under section 547, so the Motion to Dismiss should be denied.

The certificate for the additional shares of stock in question was delivered to the Debtor at some point before February 1, 2001, and then delivered to Peoples Bank on February 27, 2001. The Debtor filed his petition on March 30, 2001. Defendant's argument focuses on the nature of the stock certificate and its transfer, claiming that because it represented a stock split, that is, a mere re-unitization of an ownership interest in Sun Microsystems, the transfer of the

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<sup>1</sup> Debtor is also presumed to be insolvent for the 90 days immediately preceding the petition by virtue of 11 U.S.C. § 547(f).

certificate to the Bank cannot be a preference as a matter of law. The Court disagrees.

Having a lien on a share of stock is an entirely different matter than being perfected in that share of stock by possession. The Court assumes, without ruling, that Defendant had a perfected lien on the original stock certificate and had a lien on the certificate representing the split shares. When the latter went to the Debtor, however, Defendant was not in control of that certificate and not perfected in it. See Section 55-9-115(4) NMSA 1978 (1997 Repl.<sup>2</sup>) ("Perfection of a security interest in investment property is governed by the following rules: (a) ... by control; (b) ... by filing.") The comments make it clear that either control or filing suffice to perfect the interest of the secured party. In this instance, however, the Bank had not "filed" a financing statement. Nor did it have possession ("control") of the certificate upon issuance or within ten days thereafter, meaning that the Bank's continuing perfection in the proceeds of the original certificate, that is, in the newly issued shares arising from the stock split, lapsed.

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<sup>2</sup> The Court has not applied the provisions of Revised Article 9, which became effective in New Mexico on July 1, 2001.

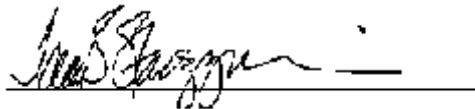
Defendant then became perfected within the preference period when it obtained possession of the certificate on February 27. This is precisely the type of situation in which section 547 applies. See Boberschmidt v. Society National Bank (In re Jones), 226 F.3d 917, 921-22 (7<sup>th</sup> Cir. 2000)(Payment of proceeds from a foreclosure of an unperfected security interest is a preferential transfer.); Matter of Vitreous Steel Products Company, 911 F.2d 1223, 1235 (7<sup>th</sup> Cir. 1990)("By taking the transfer of the goods not covered in the financing statement (i.e., by perfecting its security interest), the Bank improved its position by that increment."); FDIC v. W. Hugh Meyer & Associates, Inc., 864 F.2d 371, 375 (5<sup>th</sup> Cir. 1989)("[T]he relevant decisions do seem to assume that physical delivery is necessary to create a secured interest in certificated securities under the relevant provisions of Article 8.")(Applying Texas law, holding that Bank was not perfected in stock dividends on pledged stock that were paid to debtor. Id. at 372.)

The Code specifically mandates this result in §547, and therefore equity considerations do not override this conclusion. Depletion of the estate is not an explicit requirement for a cause of action under §547, although perhaps it may be incorporated indirectly into the provisions of

§547(b)(5); nevertheless, the estate as it existed on February 26 was depleted by the transfer that took place on February 27. And In re Whitaker is not apposite, since in that case the stock split took place after the petition had been filed, so that the F.D.I.C. was perfected on the date of the filing of the petition.

Defendant's motion to dismiss incorporates some factual matters outside the pleadings, which the Court has disregarded. It is inappropriate for a court to consider matters outside of the pleadings when ruling on a motion to dismiss, unless the Court converts the motion into one for summary judgment. See Fed.R.Civ.P. 12(b)(6); Edmonds, 924 F.2d at 180. The Court did not treat this motion as a motion for summary judgment.

For the above reasons, the Court will enter an Order Denying the Motion to Dismiss.

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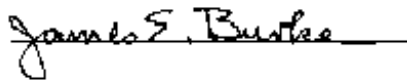
Honorable James S. Starzynski  
United States Bankruptcy Judge

I hereby certify that on November 14, 2001, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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A handwritten signature in cursive script that reads "James S. Burke". The signature is written in black ink and is positioned above a solid horizontal line.