

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

Document Verification

Case Title: Yvette Gonzales v. Bunzl Distribution, Inc.
Case Number: 02-01208
Nature of Suit:
Judge Code: S
Reference Number: 02-01208 - S

Document Information			
Number:	102		
Description:	Memorandum Opinion re: [68-1] Motion For Partial Summary Judgment on Pltf's Prima Facie Case Under 11USC Sec. 547(b) and Defendant's Defense Under 11USC Sec. 547(c)(4) by Yvette Gonzales .		
Size:	8 pages (22k)		
Date Received:	03/13/2006 10:22:46 AM	Date Filed:	03/13/2006
		Date Entered On Docket:	03/13/2006
Court Digital Signature			View History
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

FURRS SUPERMARKETS, INC.,
Debtor.

No. 01-10779 SA

YVETTE GONZALES, TRUSTEE,
Plaintiff,

v.

Adv. No. 02-1208 S

BUNZL DISTRIBUTION, INC.,
Defendant.

**MEMORANDUM OPINION ON PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment on Plaintiff's Prima Facie Case under 11 U.S.C. § 547(b) and Defendant's Defense under 11 U.S.C. § 547(c)(4) (doc. 68). This is a core proceeding. 28 U.S.C. § 157(b)(2)(F).

This matter concerns the Trustee/Plaintiff's attempt to recover as preferential some of the funds transferred in nine checks issued by the Debtor to Bunzl Distribution, Inc. ("Bunzl") in the 90 days before the Debtor filed its bankruptcy proceeding. The relevant statute¹ provides:

- (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
- (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--

¹Statutory references are to the 2001 version of the Bankruptcy Code.

- (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.
- (c) The trustee may not avoid under this section a transfer--
- ...
- (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--
- (A) not secured by an otherwise unavoidable security interest; and
 - (B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;
- ...
- (f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.
- (g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

11 U.S.C. § 547. Plaintiff seeks summary judgment on her prima facie case, as well as summary judgment on Bunzl's § 547(c)(4) defense.²

²Bunzl raised a variety of other affirmative defenses. Those defenses are not the subject of Plaintiff's current motion and Bunzl did not file its own motion, so the Court will not
(continued...)

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056(c). In determining the facts for summary judgment purposes, the Court may rely on affidavits made with personal knowledge that set forth specific facts otherwise admissible in evidence and sworn or certified copies of papers attached to the affidavits. Fed.R.Civ.P. 56(e). When a motion for summary judgment is made and supported by affidavits or other evidence, an adverse party may not rest upon mere allegations or denials. Id. The court does not try the case on competing affidavits or depositions; the court's function is only to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

Section 547(b)(1)

Defendant does not dispute it was a creditor. See Answer to First Amended Complaint ("Answer"), doc 81, ¶5.

Section 547(b)(2)

Defendant does not dispute that the payments it received were on account of antecedent debts owed before the transfers were made. Id. ¶7.

Section 547(b)(3)

²(...continued)
address those defenses.

Defendant disputes that the Debtor was insolvent at the time of each transfer. Section 547(f) gives Plaintiff a presumption that the Debtor was insolvent during the 90 day preference period. The Court finds that Bunzl has not overcome this presumption.

Plaintiff attached affidavits and balance sheets to her motion for summary judgment that purport to establish insolvency at various times leading up to the bankruptcy petition. Bunzl disputes the admissibility of those documents, and questions whether they establish insolvency. However, because Bunzl did not otherwise overcome the presumption of insolvency the Court did not need to and did not consider Plaintiff's materials on this issue. While the burden is on Plaintiff to establish all elements of her case, 11 U.S.C. § 547(g), the burden is on the preference defendant to rebut the § 547(f) presumption of insolvency, Lawson v. Ford Motor Co, (In re Roblin Indus., Inc.), 78 F.3d 30, 34 (2nd Cir. 1996). This Bunzl did not do.

First, Bunzl argues that based on Plaintiff's materials, there is a material fact question about insolvency. However, insolvency is presumed unless Bunzl overcomes that presumption. Bunzl also questions the Trustee's accountings and methods used to determine that Furrs was insolvent. But, simply questioning accounting methods is insufficient to overcome the presumption.

Whitaker v. Citra Rading Corp. (In re Int'l Diamond Exchange Jewelers, Inc.), 177 B.R. 265, 269 (Bankr. S.D. Ohio 1995).

Bunzl argues that all payments made during the 90 days preceding the bankruptcy must be added back to the Debtor's assets to establish true solvency or insolvency. Therefore, Bunzl claims that approximately \$83 million should be added back to the Debtor's assets, and suggests that this would render the debtor solvent based on the documents provided by the Trustee. But, if \$83 million of payments had not been made, Debtor's liabilities would have increased by a corresponding \$83 million. Under the definition of insolvency found in 11 U.S.C. § 101(32), one is insolvent when debts exceed assets. Adding back both assets and liabilities has no impact on the result.³

Bunzl supplied two affidavits of Matt Wenthold, the Controller of Bunzl, one of which states:

Based on the information provided by the Trustee, as attached to the Motion for Partial Summary Judgment, it is, in my opinion, impossible to ascertain whether Furr's was solvent or insolvent during the preference period...

³By way of example, imagine a company with \$3 million in cash, no other assets, and \$5 million in debt. Obviously it is insolvent under § 101(32). If, during the next 90 days the company made \$3 million in preferential payments and then filed for bankruptcy, it would have no assets and \$2 million of debt. Under Bunzl's theory, one would then add back the \$3 million of payments. The \$3 million of payments would exceed the \$2 million remaining debt, so the company would not have been insolvent and no payments would be recoverable as a preference. This is not the correct application of section 547.

(Doc 72, exhibit A). This affidavit does not create a material fact question or overcome the presumption of insolvency. See Sanyo Electric, Inc. v. Taxel (In re World Financial Services Center, Inc.), 78 B.R. 239, 241 (9th Cir. B.A.P. 1987), aff'd, 860 F.2d 1090 (9th Cir. 1988)(A creditor's speculation on debtor's solvency does not overcome the presumption of insolvency.)

As part of its materials, Bunzl also attached transcripts of voicemails from a Furr's official that, arguably, paint a bright financial status and demonstrate an ability to pay ongoing expenses. However, these voicemails are not authenticated or otherwise admissible, do not establish a genuine fact question and are hearsay. Furthermore, the test for insolvency does not include an ability to pay debts on a current basis; insolvency is a balance sheet test. See Carlson v. Rose (In re Rose), 86 B.R. 193, 195 (Bankr. W.D. Mo. 1988). Similarly, the press articles that Bunzl attached are hearsay and do not indicate that Furrs was solvent on a balance sheet basis. See Lids Corp. v. Marathon Investment Partners, L.P. (In re Lids), 281 B.R. 535, 547 (Bankr. D. Del. 2002)(Solvency is an objective test; subjective beliefs of others are not probative.) Cf. Roblin Indus., 78 F.3d at 38 ("Whenever possible, a determination of insolvency should be based on reasonable appraisals or expert testimony.")

In summary, the Court finds that Bunzl did not demonstrate the existence of any fact that would overcome the presumption of insolvency.

Section 547(b)(4)

Defendant does not dispute that the transfers were made on or within 90 days of the filing of Debtor's bankruptcy petition. See Answer, ¶9.

Section 547(b)(5)

Defendant disputes that the payments it received enabled it to receive more than it would have had the case been originally filed under chapter 7, the payments had not been made, and it received payment pursuant to the chapter 7 case. The affidavit of the Trustee Yvette J. Gonzales (doc 68, exhibit 4) states that general unsecured creditors will not receive any distribution in this case. This fact was not disputed by Bunzl. To the extent Bunzl received anything on its unsecured claims, it was preferred. See Porter v. Yukon Nat'l Bank, 866 F.2d 355, 359 (10th Cir. 1989); Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.), 930 F.2d 458, 465 (6th Cir. 1991).

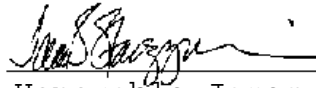
Section 547(c)(4)

The Court finds that there is a material question of fact regarding Bunzl's § 547(c)(4) defense. Compare Wenthold affidavit ¶¶ 4-6 (doc 72, exhibit A) and Wenthold affidavit ¶¶ 6-

7 (doc 93, exhibit A) with Supplemental Affidavit of Rachel Kefauver (attached to doc 70).

CONCLUSION

The Court finds that Plaintiff's Motion for Partial Summary Judgment is well taken in part and will be granted to the extent that Plaintiff has proven her prima facie case. Summary Judgment will be denied on Bunzl's Section 547(c)(4) defense.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 13, 2006, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

Chris W Pierce
PO Box 6
Albuquerque, NM 87103-0006

Louis Puccini, Jr
PO Box 30707
Albuquerque, NM 87190-0707

