MIME-Version:1.0
From:cmecfdataquality@nmcourt.fed.us
To:cmecfdataquality@nmcourt.fed.us
Bcc: Jill_Peterson@nmcourt.fed.us, Mary_B_Anderson@nmcourt.fed.us, behles@jdbehles.com, cnovis@jtwlawfirm.com, sschaeffer@jtwlawfirm.com, tdwalker@jtwlawfirm.com, dan@behles.com, kathyf@behles.com, dbehles@swcp.com, pfish@modrall.com, rjacobvitz@jtwlawfirm.com, tammir@swcp.com, lawfirm@swcp.com, christineg@jdbehles.com
Message-Id:<809378@nmcourt.fed.us>
Subject:03-01149-s Opinion

Content-Type: text/html

*****NOTE TO PUBLIC ACCESS USERS*** There is no charge for viewing opinions.**

U.S. BANKRUPTCY COURT

New Mexico

Notice of Electronic Filing

The following transaction was received from jeb entered on 9/18/2006 at 10:46 AM MDT and filed on 9/18/2006
Case Name: Heller Financial, Inc. et al v. Joe G. Maloof & Co.
Case Number: 03-01149-s
Document Number: 29

Docket Text:
Memorandum Opinion on Defendants' Motions for Summary Judgment [25]. (jeb)

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:j:\ace\x.pdf
Electronic document Stamp:
[STAMP bkecfStamp_ID=1021991579 [Date=9/18/2006] [FileNumber=809377-0]
[09b8a2a6fd9c72c384768df847976d8fbc5c7a071558c2f516b434d6c1683aeebef19
03faf65aef1f3b4f5f98d5f1ad5d599b097d80920b5b9342561faedcc553]]

03-01149-s Notice will be electronically mailed to:

Daniel J Behles dan@behles.com, kathyf@behles.com;dbehles@swcp.com

Jennie D Behles behles@jdbehles.com, tammir@swcp.com;lawfirm@swcp.com;christineg@jdbehles.com

Paul M Fish pfish@modrall.com

Robert H Jacobvitz rjacobvitz@jtwlawfirm.com, cnovis@jtwlawfirm.com;sschaeffer@jtwlawfirm.com;tdwalker@jtwlawfirm.com

03-01149-s Notice will not be electronically mailed to:

Jonathan Alter
1 State St
Hartford, CT 06103-3178

David Heller
233 S Wacker Dr Ste 5800
Chicago, IL 60606-6306

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURR'S SUPERMARKETS, INC.,
Debtor. No. 7-01-10779 SA

HELLER FINANCIAL, INC., et al.,
Plaintiffs,
v. Adv. No. 03-1149 S

JOE G. MALOOF & CO.,
Defendant.

HELLER FINANCIAL, INC., et al.,
Plaintiffs,
v. Adv. No. 03-1152 S

National Distributing Co.,
Defendant.

MEMORANDUM OPINION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on Defendant Joe G. Maloof & Co.'s ("JGM's") Motion for Summary Judgment (doc 25) and Memorandum (doc 26) and Plaintiff's Response (doc 28), and on Defendant National Distributing Co.'s ("NDC's") Motion for Summary Judgment (doc 36) and Memorandum (doc 37), a Stipulation of Facts (doc 39; actually an attachment to doc 37) Plaintiff's Response (doc 41), two affidavits (docs 42 and 43), NDC's Reply (doc 45), and Supplement by Plaintiff (doc 46). Plaintiff is represented by her attorney Robert Jacobvitz. JGM is represented by its attorney Daniel Behles. NDC is represented by its attorney Michael Cadigan. These preference actions to recover

payments made to liquor wholesalers before Furrs filed its chapter 11 proceeding are core proceedings. 28 U.S.C. § 157(b)(2)(F)[1].

SUMMARY JUDGMENT

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). The movant must establish 1) the lack of a genuine disputed material fact, and 2) entitlement to judgment as a matter of law. The Court must also draw all legitimate inferences in the nonmovant's favor, and must not weigh the

[1]All statutory and rule references are to the Bankruptcy Code as it existed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

evidence. Bell v. FDIC (In re Collins Securities Corp.), 145 B.R. 277, 282 (Bankr. E.D. Ark. 1992).

FACTS

The parties stipulate to the following facts:

1. The New Mexico liquor licenses that Furr's Supermarkets, Inc. ("Furr's") owed on the date Furr's commenced its chapter 11 case (Case No. 11-01-10779 SA)(the "Petition Date") and subsequently sold by Furr's as debtor in possession or by the Trustee after conversion of the chapter 11 case to chapter 7 (together, the "Licenses"), had an aggregate value, as of the Petition Date, equal to or greater than the total amount of debt Furr's owed to all New Mexico liquor wholesalers collectively as of the Petition Date.
2. Except for New Mexico liquor license nos. 696, 774, 884 and 991, the remainder of the Licenses each had a value as of the Petition Date that was greater than the total amount of debt that Furr's owed as of the Petition Date with respect to each such license to all New Mexico liquor wholesalers collectively and to the Taxation & Revenue Department of the State of New Mexico ("TRD").
3. New Mexico liquor license nos. 696, 774, 884 and 991 that Furr's owned on the Petition Date, and subsequently sold by Furr's as debtor in possession or by the Trustee after

conversion of the chapter 11 case to chapter 7, each had a value as of the Petition Date that was less than the total amount of debt that Furr's owed as of the Petition Date with respect to each such license to all New Mexico liquor wholesalers collectively and TRD.

4. Before the Petition Date, Furr's Supermarkets, Inc. was the owner of each of the liquor licenses sold by the Furr's Debtor in possession or by the Trustee after the conversion of this case to chapter 7.

CONCLUSIONS OF LAW

1. Plaintiff seeks to recover payments under 11 U.S.C. § 547(b) which provides:

> Except as provided in subsections (c) and (i) 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--
> (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.

2. The parties' only disagreement is on element 5, i.e., whether Defendants received more than they would have had the transfer not been made and they recovered on their claim pursuant to a hypothetical chapter 7 case.

3. The applicable date for the hypothetical greater amount test is the petition date. Sloan v. Zions First National Bank (In re Castletons, Inc.), 990 F.2d 551, 554 (10th Cir. 1993)(citing In re Tenna Corp., 801 F.2d 819, 822 (6th Cir. 1986)).

4. Payments to a fully secured creditor are not preferential under 11 U.S.C. § 547(b)(5). Id.

5. The starting point in the "greater amount" analysis is identification of the class to which the creditor belongs. See In re Lewis W. Shurtleff, 778 F.2d at 1421. That classification is the crux of this appeal. In an ordinary case, the amount and priority of an unsecured creditor's claim is fixed on the date of the filing of the petition. Similarly, on the date of the filing, a secured creditor's claim is fixed in amount, the value of the security as of that date can be ascertained and the claim will be either fully or partially secured. The debtor's lessor, however, stands in a different position. Although the amount of the debtor's prepetition default under the lease may be fixed on the date of the filing, the status of the lessor's right to payment from the estate is not yet fixed. That is because the lessor's position relative to other creditors depends on whether the lease is assumed or rejected. If the lease is assumed, the lessor is entitled to prompt payment in full of any default under the lease, and the debtor is entitled to continued use of the property. 11 U.S.C. § 365(b). If the lease is rejected, the lessor is entitled to immediate possession of his property and holds an unsecured claim for the unpaid rent. See In re Elm Inn, Inc., 942 F.2d 630, 633-34 (9th Cir. 1991).

> More importantly, in this case the difference between assumption and rejection determines the outcome of the preference action. If the lease is assumed, the debtor must cure any default. 11 U.S.C. § 365(b). Thus, if rent payments had not been made prepetition, they had to be made at the time of assumption. LCO had to pay Lincoln the full amount of rent (or any lesser amount to which Lincoln agreed) either prepetition or at the time of assumption. For purposes of the "greater amount" test, Lincoln stands in a position similar to that of a secured creditor. If a creditor is fully secured, a prepetition transfer to him is not preferential because the secured creditor is entitled to 100% of his claim. See In re World Fin. Serv. Ctr., Inc., 78 B.R. 239, 241-42 (9th Cir. BAP 1987), aff'd, 860 F.2d 1089 (9th Cir. 1988); In re Ludford Fruit Prods., Inc., 99 B.R. 18, 22 (Bankr. C.D. Cal. 1989). On the other hand, if the lease is rejected, Lincoln would have possession of the property and hold an unsecured claim for unpaid rent. As long as the distribution to unsecured creditors is less than 100%, any rent paid to Lincoln within the preference period and outside the ordinary course of business would be preferential. See In re Lewis W. Shurtleff, 778 F.2d at 1421.

Alvarado v. Walsh (In re LCO Enter.), 12 F.3d 938, 941 (9th Cir. 1993).

6. Under state law, Defendants held liens on the liquor licenses to ensure payment of their claims. N.M.Stat.Ann. § 60-6B-3. To the extent they were secured, payments to them were not preferences. The parties have stipulated, however, that they were partially undersecured on some licenses. The balance of this opinion deals with the unsecured portions of Defendant's claims.

7. The Court finds that the statute does not cross-collateralize the licenses as argued by the Defendants.[2]

8. The liquor licenses in this case are more like executory contracts or leases, however, as opposed to ordinary collateral. The state statute prohibits transfer of the licenses until all defaults are cured. Once the Trustee or Debtor in Possession decided to sell the liquor licenses the defaults had to be cured. The creditors holding these rights against the liquor licenses were not ordinary unsecured creditors once the licenses were to be sold; they held additional rights to payment in full.

9. Plaintiff argues that had this case been filed as a chapter 7, the licenses would have been abandoned, so all payments are preferential. See Affidavit of Michael J. Caplan, ¶ 6 (doc 42 in Adv. 03-1152 S). While it is true that the hypothetical greater amount test takes place as if a chapter

---

[2] N.M.Stat.Ann. § 60-6B-3 provides:

> The transfer, assignment, sale or lease of any license shall not be approved until the director is satisfied that all wholesalers who are creditors of the licensee have been paid or that satisfactory arrangements have been made between the licensee and the wholesaler for the payment of such debts. Such debts shall constitute a lien on the license, and the lien shall be deemed to have arisen on the date when the debt was originally incurred.

(Emphasis added.) The Court reads the use of "the license" as not cross-collateralizing the claims. If the legislature intended to cross collateralize, it would have used the term "licensee's licenses."

7 had been filed originally, the Court does not necessarily construct that hypothetical case in a vacuum, but rather can consider events that actually took place during the Chapter 11 that allow that Court to value assets. LCO Enter., 12 F.3d at 942. See also Rosenthal, York and Coffey, The Impact of Post-Petition Events on Preference Liability, 24-Feb Am. Bankr. Inst. J. 28 (Feb. 2005). In this case, the Court cannot ignore the fact that the licenses were in fact "cured" and assigned[3]. In a sense, the cure of the defaults and the assumption of the licenses related back to the date of the filing of the petition and in effect made the claims of the creditors fully secured. Thus the debts were not "simple unsecured debts"; rather, "the defendants had more than a simple unsecured claim for a sum of money." Kimmelman v. Port Authority of New York and New Jersey (In re Kiwi Int'l Air Lines, Inc.), 344 F.3d 311, 318 (3rd Cir. 2003)(quoting LCO Enter. 12 F.3d at 942.) The legal effect of the estate's assumption and sale of the licenses is that the amounts paid to the Defendants during the preference

[3] Plaintiff's theory of recovery breaks down in the following example. Assume there were two liquor licenses, of equal value, with equal amounts of claims of wholesalers, and assume that prepetition Furr's paid all claims on one license but none on the other. If, during the chapter 11 Debtor sold both licenses, in each case the wholesalers would have been paid in full. Under Plaintiff's theory, one would have received a preferential transfer for the entire amount of their claim, and the other one would be immune from a preferential transfer claim.

period did not operate to improve their position. Section 547(b)(5) is not met. These adversary proceedings should be dismissed. See also In re Superior Toy & Mfg. Co., Inc., 78 F.3d 1169, 1174 (7th Cir. 1996); Unsecured Claims Estate Representative of Teligent, Inc. v. Cigna Healthcare, Inc. (In re Teligent, Inc.), 326 B.R. 219, 223 (S.D. N.Y. 2005)(Stating that it is a "well-settled" doctrine that a preference action may not be maintained for payments made in connection with an assumed executory contract.); Vision Metals, Inc. v. SMS Demag, Inc. (In re Vision Metals, Inc.), 325 B.R. 138, 142 (Bankr. D. Del. 2005)(Prepetition payments made to parties to contracts that are assumed are not recoverable as preferences.); Noble v. ADP, Inc. (In re Jazzland, Inc.), 2004 WL 4945990 at *2 (Bankr. E.D. La. 2004)(Same.)

10. Due to the Court's disposition above, it will not address the preclusion or estoppel arguments of the parties.

Honorable James S. Starzynski
United States Bankruptcy Judge

copies to:

Robert H Jacobvitz
500 Marquette NW Ste 650
Albuquerque, NM 87102-5309

Daniel J Behles
226-A Cynthia Loop NW
Albuquerque, NM 87114-1100

Michael J Cadigan
PO Box 7718
Albuquerque, NM 87194-7718