

FILED

2005 MAR 25 PM 12: 26

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

U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF  
OHIO, AKRON

IN RE:	)	CASE NO. 02-50761
	)	
SANTE FE TRUCKING, INC.,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
RICHARD A. WILSON, TRUSTEE,	)	ADVERSARY NO. 04-5038
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	MEMORANDUM OPINION RE:
	)	PLAINTIFF-TRUSTEE'S MOTION
THOMAS G. JONES, SR., ET AL.	)	FOR SUMMARY JUDGMENT
	)	[DOCKET #28] AND ORDER
DEFENDANT(S).	)	SETTING FILING DEADLINE

On February 25, 2004 the chapter 7 trustee for the estate of *In re Sante Fe Trucking, Inc.* filed a complaint seeking to avoid allegedly fraudulent and preferential transfers and named as defendants Thomas G. Jones, Sr.; Thomas G. Jones, Jr.; Empire Trucking and Todd C. Jones. Plaintiff-trustee subsequently dismissed the complaint as to defendant, Todd C. Jones, and defendant, Todd G. Jones, Sr. initiated his own personal bankruptcy proceeding on July 23, 2004 thus staying plaintiff-trustee from prosecuting this matter against him. Accordingly, the only remaining defendants in this proceeding are Thomas G. Jones, Jr. ("Jones Jr.") and Empire Trucking ("Empire").

Pursuant to an Order entered by the Court, plaintiff-trustee was granted leave to file a motion for summary judgment and each remaining defendant was granted leave to file a

response thereto [docket #27]. Plaintiff-trustee's motion for summary judgment [docket #28] was timely filed but neither remaining defendant has filed any response to that motion. After the expiration of the filing deadlines, the matter was taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (F) and (H) over which this Court has jurisdiction pursuant to 28 U.S.C. §§1334(b), 157(a) and 157(b).

A court shall grant a party's motion for summary judgment "if...there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056. The party moving for summary judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, all facts and inferences must be viewed in the light most favorable to the nonmoving party. *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991), *cert. denied*, 503 U.S. 939 (1992). However, the ultimate burden of demonstrating the existence of a genuine issue of material fact lies with the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Even though neither defendant filed a response to plaintiff-trustee's motion for summary judgment, that motion cannot be granted simply for defendants' failure to respond. *See The Huntington Nat'l Bank v. Parton (In re Parton)*, 137 B.R. 902, 905 (Bankr. S.D. Ohio 1991). Instead, this Court must review the motion for summary judgment to determine whether plaintiff-trustee has discharge his burden relative to that pleading. *Id.*

Plaintiff-trustee is seeking summary judgment against Jones Jr. as to Counts VII, VIII, X, XI and XII of his complaint and is seeking summary judgment against Empire as to Counts XIII, XIV, XVI, XVII and XVIII of his complaint. Each of those counts alleges that defendants received fraudulent transfers from debtor that are avoidable pursuant to 11 U.S.C. §§ 544 and 548 and Ohio Revised Code ("ORC") § 1336 *et seq.* and that plaintiff-trustee may recover those transfers pursuant to 11 U.S.C. §550.

The relevant portions of the Bankruptcy Code and the ORC being relied upon by plaintiff-trustee for relief are as follows:

**11 USC § 544. Trustee as lien creditor and as successor to certain creditors and purchasers**

\* \* \*

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title . . . .

**11 USC § 548. Fraudulent transfers and obligations**

(a) (1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily - -

\* \* \*

- (B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
- (ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

#### **11 USC §550. Liability of transferee of avoided transfer**

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section . . . 548 . . . of this title the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

- (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
- (2) any immediate or mediate transferee of such initial transferee.

#### **ORC §1336.04. When transfer or obligation incurred is fraudulent as to a creditor.**

(A) A transfer made of an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following ways:

- (1) With actual intent to hinder, delay, or defraud any creditor of the debtor;
- (2) Without receiving a reasonably equivalent valued in exchange for the transfer or obligation, and if either of the following applies:

- (a) The debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction;
- (b) The debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

See Mot. for S.J. at pgs. 6-7 [docket #28].

In his complaint, plaintiff-trustee sets forth detailed allegations regarding fraudulent transfers of \$11,193.59 from debtor to Jones Jr. (the "Jones Jr. Transfers") and fraudulent transfers of \$10,900.00 from debtor to Empire (the "Empire Transfers"). See Compl. at ¶¶ 36-44, 50-69 and 75-85. In support of his motion for summary judgment, plaintiff-trustee included an affidavit [exhibit A to docket #28] in which he sets forth facts that, if uncontroverted, would support a finding that the Jones Jr. Transfers and the Empire Transfers were fraudulent pursuant to 11 U.S.C. § 548 and ORC § 1336.04 and that plaintiff-trustee, pursuant to 11 U.S.C. § 550, is entitled to recover those transfers for the benefit of the bankruptcy estate of *In re Sante Fe Trucking, Inc.* See Affidavit at ¶¶ 3, 4, 6, and 7.

Although neither Jones Jr. nor Empire filed any response to the motion for summary judgment Jones Jr., *pro se*, filed an answer in which the entity Empire purported to join also on a *pro se* basis [docket #14].<sup>1</sup> That answer sets forth, in its entirety, the following:

---

<sup>1</sup> As to the status of Empire Trucking, plaintiff-trustee sets forth in his complaint and motion for summary judgment only that it is "a business established and operating under the laws of the State of Ohio." [Compl. at ¶ 5 and Mot. for S.J. at pg. 3]. Because it is not clear to the Court what type of business Empire is (*i.e.*, a d.b.a. (for which Jones Jr. could file an answer) or a separate legal entity like a corporation (which Jones Jr. could not represent) ) the Court will construe pleading #14 (which also does not address the status of Empire) as an answer by both Jones Jr. and Empire.

I Thomas G. Jones Jr. - Empire Trucking Co. submit a motion to all counts as invalid! I'll be at the pre-trial conference to show proof of all counts!

*See Jones Jr./Empire Answer [docket #14].* Such answer, even through the most liberal of interpretations and even when viewed in the light favorable to defendants, cannot be construed as demonstrating the existence of genuine issues of material fact as to the matters established by plaintiff-trustee in his complaint and affidavit.

Based upon the foregoing, the Court finds that no genuine issues of material fact exist as to whether the Jones Jr. Transfers and the Empire Transfers were fraudulent pursuant to 11 U.S.C. § 548 and ORC § 1336.04 and that plaintiff-trustee is entitled to recover those transfers pursuant to 11 U.S.C. §550. Accordingly, the Court finds that plaintiff-trustee is entitled to judgment in his favor, as a matter of law, as to Counts VII, VIII, X, XI, XII, XIII, XIV, XVI, XVII and XVIII of his complaint.

Plaintiff-trustee is seeking judgment against Jones Jr. in the amount of \$11,193.59, plus interest from the dates of the Jones Transfers, "plus costs" and judgment against Empire in the amount of \$10,900.00, plus interest from the dates of the Empire Transfers, "plus costs." *See Compl. at pg. 18-19 [docket #1] and Mot. for S.J. at pg. 8 [docket #28].* Pursuant to the "American Rule," parties to litigation bear their own costs and attorney fees unless a specific statute or contractual provision provides otherwise. *Riley v. Kurtz*, 361 F.3d 906, 912 (6th Cir. 2004). Nowhere does plaintiff-trustee set forth what "costs" he is seeking to have included in a judgment against defendants nor does he cite to any authority as an exception to the application of the American Rule in this proceeding. Accordingly, no costs of this action will be included in plaintiff-trustee's judgment against defendants.

Upon its review of the complaint the Court notes that plaintiff-trustee also set forth in Counts IX and XV that debtor made preferential transfers to Jones Jr. and Empire. Those counts were not addressed in plaintiff-trustee's motion for summary judgment and, to date, have not been dismissed. Accordingly, those two counts are still pending.

In an effort to manage this proceeding most efficiently and to ensure that all matters raised in plaintiff-trustee's complaint are fully addressed, plaintiff-trustee shall have until not later than April 8, 2005 to either dismiss Counts IX and XV or, if those counts are not dismissed, to file a statement of his intention as to those two remaining counts. If those counts are not dismissed or if plaintiff-trustee fails to file a statement of his intention relative to those two counts, they will be dismissed by the Court, without further notice or hearing, for plaintiff-trustee's failure to prosecute.

**IT IS SO ORDERED.**

  
MARILYN SHEA-STONUM  
U.S. Bankruptcy Court

**CERTIFICATE OF SERVICE**

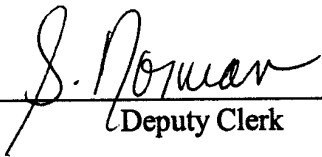
The undersigned hereby certifies that on this 25<sup>th</sup> day of MARCH 2005, the foregoing **MEMORANDUM OPINION RE: PLAINTIFF-TRUSTEE'S MOTION FOR SUMMARY JUDGMENT [DOCKET #28] AND ORDER SETTING FILING DEADLINE** was sent via regular U.S. Mail to:

**JEROME COX**  
Roetzel & Andress  
222 South Main Street  
Suite 400  
Akron, OH 44308  
*Counsel for Movant*

**THOMAS G. JONES, JR.**  
331 North Adams Street  
Akron, OH 44304

**THOMAS G. JONES, JR.**  
5040 Hudson Drive  
Stow, OH 44224

**EMPIRE TRUCKING**  
5040 Hudson Drive  
Stow, OH 44224

  
\_\_\_\_\_  
Deputy Clerk