

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

| | | |
|------------------------------|---|-----------------------|
| In Re: |) | Case No. 01-35506 |
| |) | |
| Craig and Lois Rothgery, |) | Chapter 7 |
| |) | |
| Debtors. |) | Adv. Pro. No. 02-3041 |
| |) | |
| Patricia A. Kovacs, Trustee, |) | Hon. Mary Ann Whipple |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| Kenneth R. Resar, |) | |
| |) | |
| Defendant. |) | |

MEMORANDUM OF DECISION AND ORDER

This adversary proceeding is currently before the court upon Defendant, Kenneth R. Resar’s (“Defendant”) Motion for Summary Judgment (“Motion”) [Doc. # 9]. No response has been filed by Plaintiff-Trustee Patricia Kovacs (“Plaintiff”). The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334 and General Order 84-1, the general order of reference in this district. This is a core proceeding in which the court may enter final judgment pursuant to 28 U.S.C. § 157(b)(2)(F). This Memorandum constitutes the court’s findings of fact and conclusions of law under Fed.R.Civ. P. 52, made applicable to this adversary proceeding by Fed.R.Bankr.P. 7052. The court has reviewed the submitted materials and the entire record of the case. Based upon that review, and as discussed below, the court finds that Defendant’s Motion for Summary Judgment should be GRANTED.

Summary of Facts:

On September 4, 2001, Craig and Lois Rothgery (“Debtors”) filed a voluntary joint petition for chapter 7 bankruptcy relief [Case # 01-35506, Doc. # 1]. On February 22, 2002, Plaintiff filed a Complaint to Avoid Preferential Transfer [Doc. #1], commencing this action against the Defendant. The complaint alleges that the Defendant received \$1,767.00 from the Debtors as a preferential transfer, in payment for legal services performed in March 2001 through June 2001 and paid while the Debtors were insolvent. Defendant has attached to his Motion an affidavit and supporting documents which prove that the payments, alleged to be preferential transfers, were made to the Law Firm of Riley, Resar & Associates, P.L.L. (“firm”), shown by Defendant’s affidavit to be a separate entity from him. The Defendant is a principal partner in the law firm; however, he did not directly and individually receive any of the funds in issue from the Debtors. The services were rendered by the firm, the invoices were sent by the firm, and the debt was owed to and paid to the firm, not the Defendant.

Law and Analysis:

Under Fed.R. Civ. P. 56, made applicable to this proceeding by Fed.R.Bankr.P. 7056, a party will prevail on a motion for summary judgment when “[t]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, (1986); Fed.R.Civ.P. 56(c). In order to prevail, the movant must demonstrate all elements of the cause of action, but once that burden is established, the opposing party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, (1986). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475

U.S. 574, 586-88, (1986).

Plaintiff has the burden of proving all elements of the avoidability of a transfer under section 547 (b). 11 U.S.C. § 547(g). The Trustee has not filed a response; however, the court, even in viewing the facts in a light most favorable to the Plaintiff, finds that the Defendant has sufficiently demonstrated that no payment was made to him personally or individually. While there may arguably have been preferential transfers made to the law firm, it has not been named as a defendant in this action. Plaintiff has not met her burden of proving the section 547(b)(1) element of her preference claim, which requires a transfer to have been made to and for the benefit of creditor. There was no transfers made to Defendant with the payments to the firm. Therefore, the court finds that there are no genuine issues of material fact in dispute and no cause of action exists against the Defendant¹.

Conclusion:

At the summary judgment stage the court's function is to determine whether there is a genuine issue for trial. As stated above the court finds that no genuine issue of material fact exists, and Defendant is entitled to entry of judgment in his favor as a matter of law. In reaching its conclusions, the court has considered all of the submitted materials regardless of whether they are specifically referred to in this Memorandum of Decision and Order. A separate judgment will be entered consistent with this Memorandum of Decision and Order.

Accordingly, it is

ORDERED that the Motion for Summary Judgment [Doc. # 9] filed by Defendant Kenneth R. Resar, shall be, and is hereby, **GRANTED**.

¹

Defendant asserts additional affirmative defenses, which he has the burden of proving. 11 U.S.C. § 547(g). Based on the court's determination that Defendant was not a recipient of a preferential transfer, and that Plaintiff has not met her burden of proof, the court does not find it necessary to determine these defenses.

Dated:

MARY ANN WHIPPLE
UNITED STATES BANKRUPTCY JUDGE