

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\*  
CAPTIVA, INC., \*  
\* CASE NUMBER 01-43799  
\*  
Debtor. \*  
\*  
\*\*\*\*\*  
ANDREW W. SUHAR, TRUSTEE, \*  
\*  
Plaintiff, \*  
\*  
vs. \* ADVERSARY NUMBER 03-4010  
\*  
JAMES A. VITULLO, \*  
\*  
Defendant. \*  
\*

\*\*\*\*\*  
M E M O R A N D U M O P I N I O N  
\*\*\*\*\*

This cause is before the Court on the motion filed by Defendant, James A. Vitullo ("Defendant"), for summary judgment and memorandum in support ("Motion for Summary Judgment"). The Chapter 7 Trustee, Andrew W. Suhar ("Trustee"), filed a brief in opposition to Defendant's Motion for Summary Judgment ("Trustee's Reply"). Defendant filed a brief in response to Trustee's Reply ("Defendant's Response"). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (E), (F), (K) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

## F A C T S

Debtor, Captiva, Inc. ("Debtor"), filed a petition under Chapter 11 of Title 11, United States Code, on September 7, 2001.<sup>1</sup> On January 23, 2003, Trustee filed a complaint against Defendant to determine the validity, priority or extent of a lien or other interest in property, to avoid a preferential transfer, to recover money or property, to obtain a declaratory judgment relating to the foregoing and other relief ("Complaint"). The Complaint provides that on or about December 30, 2000, less than one year prior to filing a Chapter 11 petition, Debtor transferred One Hundred Ten Thousand Ninety Dollars (\$110,090.00) to Defendant, consisting of three checks of Fifty-Eight Thousand Dollars (\$58,000.00), Nineteen Thousand Dollars (\$19,000.00) and Eight Thousand Thirty-Nine Dollars (\$8,039.00), and the cancellation of a shareholder loan of Twenty-Five Thousand Fifty-One Dollars (\$25,051.00). On April 14, 2001, Debtor transferred to Defendant an additional Two Thousand Eight Hundred Nineteen and 42/100 Dollars (\$2,819.42). Finally, Debtor transferred Twenty-Four Thousand One Hundred Three and 08/100 Dollars (\$24,103.08) to Defendant, ostensibly as a "Shareholder Loan Write-Off," on April 16, 2001. (Compl. ¶¶ 7-9.)

Defendant is an officer and shareholder of Debtor, and, thus, falls within the meaning of insider set forth in 11 U.S.C.

---

<sup>1</sup>This case was converted to a Chapter 7 bankruptcy case on March 15, 2004.

§ 101(31).<sup>2</sup> The Complaint alleges that Defendant received a preferential payment pursuant to 11 U.S.C. § 547(b), that he received a fraudulent transfer pursuant to 11 U.S.C. § 548 and, under state law, that Defendant breached his fiduciary duty to Debtor. After Defendant filed an answer generally denying Plaintiff's allegations and specifically denying that he was a creditor of Debtor, Defendant filed this Motion for Summary Judgment.

#### S U M M A R Y J U D G M E N T S T A N D A R D

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part:

[t]he judgment sought shall be rendered forthwith if the 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 a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th

---

<sup>2</sup>In Defendant's answer, he admitted to being an officer of Debtor, but denied being an insider. Pursuant to § 101(31), Defendant's status as an officer of Debtor makes him *per se* an insider.

Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it

seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

## L E G A L   A N A L Y S I S

### A.   Preference Actions

Section 547 describes the components that must be present to enable the trustee to avoid a pre-petition payment as a preference action. Section 547(b) 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--

(A) on or within 90 days before the date of the filing or 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). Thus, to be avoidable as a preference action, the pertinent payment must have been made "for or on account of an antecedent debt owed by the debtor before such transfer was made."

Defendant filed an affidavit of Debtor's accountant, employed during the period of alleged preferential payments, who attested that, according to his review of the records, Defendant was never a creditor of Debtor nor did Debtor ever owe him money. Defendant also attested that he was not owed money by Debtor. (Mot. for Summ. J., Ex. 3.) However, an exhibit to the Trustee's Reply indicates the payment to Defendant on December 30, 2000, in the amount of One Hundred Ten Thousand Ninety Dollars (\$110,090.00), was for "IRS Income Taxes, State Income Taxes, **Shareholder Loan Write-Off and Other.**" (Trustee's Reply, Ex., emphasis added.) This documentation appears to be at odds with Defendant's assertion that he was not a creditor of Debtor. This disputed issue of fact is material because whether or not the payment was made on account of an antecedent debt will impact whether the payments were preferential transfers pursuant to 11 U.S.C. § 547. Thus, summary judgment is inappropriate.

#### **B. Fraudulent Transfers**

To be avoidable as a fraudulent transfer, § 548(a)(1)(B) requires the debtor to have received less than a reasonably equivalent value in exchange for a transfer of property. Section 548 provides:

(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 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 U.S.C. § 548(a)(1)(B).

Defendant attested in his affidavit that he was an officer and a shareholder of Debtor and all of the payments made by Debtor were in the form of salary or draws from the Debtor which were reported as income on Defendant's tax returns. If this statement is true, a reasonably equivalent value, Defendant's services, was provided to Debtor. However, the structure of the payments contradict such a conclusion. The payments were not regular in amount or periodic in timing. Thus, it is unclear whether they were, indeed, payments in the "form of salary and draw" from the Debtor. This issue is material because whether a reasonably equivalent value was provided will impact whether the payments were

fraudulent transfers pursuant to 11 U.S.C. § 548(a)(1)(B). Thus, summary judgment is inappropriate.

In addition, Defendant asserted that summary judgment is appropriate because The Home Savings and Loan Company of Youngstown, Ohio ("Home Savings"), a secured creditor, is the real party in interest. Because Home Savings has a pre-petition cause of action under state law against Defendant to recover the property at issue, the property is not property of the estate and may not be recovered by the Trustee.<sup>3</sup> Accordingly, the Defendant argues that the Trustee cannot maintain the fraudulent transfer action. Defendant, however, is incorrect on this point. Once Debtor filed its bankruptcy petition, any attempt to recover an alleged pre-petition fraudulent transfer must be on behalf of the estate. If Home Savings were to pursue such an action, it would not have standing to do so on behalf of itself. See *Wellman v. Wellman*, 933 F.2d 215, 217-18 (4th Cir. 1991) ("The district court ruled that John Wellman had no standing to maintain the § 548 action because it was not for the benefit of his bankruptcy estate. . . . We, likewise, agree with the district court that §§ 548 and 550 provide for avoidances of transfers and allow recovery of the transferred property or its value only if the recovery is for the benefit of the estate.").

---

<sup>3</sup>Defendant acknowledges in Defendant's Response that Home Savings does not have a lien on or a security interest in the estate's avoidance actions (see page 2 of Defendant's Response).

C O N C L U S I O N

For the foregoing reasons, the Court denies Defendant's Motion for Summary Judgment.

An appropriate order shall enter.

HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE  
UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

CAPTIVA, INC.,

Debtor.

ANDREW W. SUHAR, TRUSTEE,

Plaintiff,

vs.

JAMES A. VITULLO,

Defendant.

CASE NUMBER 01-43799

ADVERSARY NUMBER 03-4010

O R D E R

For the reasons set forth in this Court's memorandum opinion entered this date, Defendant's Motion for Summary Judgment against Plaintiff is denied.

IT IS SO ORDERED.

---

HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this \_\_\_\_\_ day of September, 2004, addressed to:

ANDREW W. SUHAR, ESQ., 1101 Metropolitan Tower,  
P. O. Box 1497, Youngstown, OH 44501.

FREDERIC P. SCHWIEG, ESQ., 2705 Gibson Drive,  
Rocky River, OH 44116.

RICHARD G. ZELLERS, ESQ., 3810 Starrs Centre  
Drive, Canfield, OH 44406.

SAUL EISEN, United States Trustee, BP America  
Building, 200 Public Square, 20th Floor, Suite  
3300, Cleveland, OH 44114.

\_\_\_\_\_  
JOANNA M. ARMSTRONG