

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
PITTSBURGH-CANFIELD CORPORATION	*	CASE NUMBER 00-43394
<i>et al.</i> ,	*	
	*	
Debtors.	*	
	*	

	*	
WHEELING PITTSBURGH STEEL	*	
CORPORATION,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	ADVERSARY NUMBER 02-4342
	*	
GLEN HOLLISTER and HOLLISTER	*	
TRUCKING,	*	
	*	
Defendants.	*	

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

This matter came before the Court on the Motion for Sum-mary Judgment (the "Motion") filed by Plaintiff Wheeling Pittsburgh Steel Corporation ("Plaintiff"). Defendants Glen Hollister and Hollister Trucking ("Defendants") failed to reply to the Motion. 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)(E). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

S T A N D A R D O F R E V I E W

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 that,

[t]he judgment sought shall be rendered forth-with 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 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 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.

D I S C U S S I O N

Facts

On November 13, 2002, Plaintiff filed a complaint to avoid preferential transfers under 11 U.S.C. § 547(b), and in the alternative, to avoid transfers without consideration, to recover avoided transfers, and to disallow claims (the "Complaint"). In the Complaint, Plaintiff seeks to recover the Forty-Six Thousand One Hundred Ninety-Seven and 69/100 Dollars (\$46,197.69) of payments made to Defendants in the 90-day period prior to the filing of Plaintiff's voluntary petition under Chapter 11 of the

Bankruptcy Code, as detailed in Exhibit A of Plaintiff's Complaint. On June 13, 2003, Defendants filed an answer in which they asserted the affirmative defense of ordinary course of business pursuant to 11 U.S.C. § 537(c). Plaintiff submitted an Adversary Status Report on November 8, 2004.

The Case Management and Discovery Order, entered on November 22, 2004, provided that all discovery was to be completed by January 18, 2005, all dispositive motions were to be filed no later than February 28, 2005, and if such a motion was filed, the nonmoving party would have fourteen (14) calendar days to oppose such motion. On or about December 10, 2004, Plaintiff served consolidated discovery on Defendants. Included in the discovery requests was Debtor's First Set of Requests for Admissions ("Requests for Admissions"). The Requests for Admissions asked Defendants to admit: (1) that they received the transfers identified in Exhibit A to the Complaint; (2) that they received those transfers during the preference period in satisfaction of an antecedent debt or debts that Plaintiff owed Defendants; (3) that the transfers were made for Defendants' benefit as a creditor of Plaintiff; (4) that Plaintiff was insolvent when the transfers were made; (5) that the transfers enabled Defendants to receive more than they would have received had Plaintiff been liquidated under Chapter 7; and (6) that Defendants did not have a perfected security interest in

Plaintiff's assets, which were satisfied (in whole or part) by the transfers. (Pl.'s Mot. for Summ. J., Ex. A, at Nos. 1-9.) The Requests for Admissions further asked Defendants to admit facts that defeated any affirmative defenses under 11 U.S.C. § 547(c), including that the transfers were not intended to be made contemporaneously in exchange for new value and were not actually so exchanged. (Id., Ex. A, No. 11.)

Pursuant to FED. R. BANKR. P. 7036, Defendants' responses to the Requests for Admissions were due within 30 days after service, i.e. early January. In addition, pursuant to the Case Management and Discovery Order, the parties were required to complete all discovery no later than January 18, 2005. However, to date, Defendants have not answered or otherwise responded to Plaintiff's Requests for Admissions.

Legal Analysis

Section 547(b) of the Bankruptcy Code provides:

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 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 in 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). The unopposed facts presented by Plaintiff's Motion satisfy the elements of a preferential transfer, as provided by 11 U.S.C. § 547(b), with respect to each transfer identified in Exhibit A to the Complaint.

In its Requests for Admissions, Plaintiff asked Defendants to admit facts that establish all of the elements needed to avoid a preferential transfer. Defendants failed to respond. Federal Rule of Civil Procedure 36, made applicable by operation of Bankruptcy Rule 7036, provides that,

[t]he matter [for which an admission is requested] is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

FED. R. CIV. P. 36(a). Accordingly, by their failure to respond,

Defendants admitted every proposed fact in Plaintiff's Requests for Admissions. Defendants' admissions establish all elements of a prima facie preference claim with respect to each transfer listed in Exhibit A of the Complaint. In addition, Defendants have failed to respond to the Motion and assert any affirmative defenses. As a consequence, this Court grants Plaintiff's Motion for Summary Judgment.

An appropriate order shall enter.

**HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE**

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O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, Plaintiff's Motion for Summary Judgment is granted.

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 May, 2005, addressed to:

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