Dated: April 03 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 03-39305
	)	
Michael L. Jones and Patty J. Jones,	)	Chapter 7
	)	
Debtors.	)	Adv. Pro. No. 05-3094
	)	
Patricia A. Kovacs, Trustee,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Ted Holifield and Oislee Holifield,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND SPECIFYING FACTS THAT APPEAR WITHOUT SUBSTANTIAL CONTROVERSY

Plaintiff Patricia A. Kovacs ("Trustee"), the trustee of the bankruptcy estate of Michael L. Jones and Patty J. Jones ("Debtors"), is before the court on the Plaintiff's Motion for Summary

Judgment and Memorandum in Support. The court will deny the motion, but specify facts deemed established for further proceedings under Fed. R. Civ. P. 56(f).

In June 2003, Debtors remitted a sum in excess of $2,000 to Ted Holifield and Oislee Holifield ("Defendants") in repayment of a loan that they had made to Debtors. (*See* Complaint ¶ 4; Amended Answer ¶ 4.) Defendants are the parents of Debtor Patty J. Jones. (Complaint ¶ 5; Amended Answer ¶ 5.)

On November 18, 2003, Debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. On March 22, 2005, Trustee filed the Complaint initiating this proceeding, seeking the avoidance and recovery of the payment(s) as a preferential transfer(s).[1] Defendants filed an Answer and an Amended Answer, admitting all the averments of the complaint that relate to the preference claim. The original answer did not put forward any affirmative defenses, but the amended answer asserted the "ordinary course of business" exception to preference avoidance and raised the defense of laches. The Trustee then filed the motion presently before the court. Defendants have not filed a response to the motion.

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and the general order of reference entered in this district, *see* 28 U.S.C. § 157(a). Proceedings to determine, avoid or recover preferences and fraudulent conveyances are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(1), (b)(2)(F) and (H).

Summary judgment is appropriate "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; Fed. R. Civ. P. 56(c). The Complaint states that Debtor Michael Jones made payments to Defendants in June 2003 and within one year of Debtors' bankruptcy filing in repayment of a loan, and follows with the conclusory allegation that the payment(s) in question is a "preferential payment" that Trustee may "reclaim." (Complaint, ¶¶ 4, 5.) These averments constitute, albeit barely, a legally sufficient pleading of a cause of action under 11 U.S.C. §§ 547(b)

[1] Debtors' Chapter 7 case and this adversary proceeding were commenced before the October 17, 2005, effective date of pertinent provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). All references to Bankruptcy Code sections in this decision are to the pre-BAPCPA statutory provisions, which will also apply at trial.

and 550(a).[2] Moreover, the Answer and Amended Answer admit the averments that the payment(s) constitutes an avoidable and recoverable preferential transfer. Rather than contest Trustee's prima facie case, Defendants choose to rely solely on their affirmative defenses of "ordinary course of business" and laches.[3] Defendants have the burden of proof on both affirmative defenses. 11 U.S.C. § 547(g)(burden of proof on ordinary course of business defense); *see, e.g.*, *In re Procaccianti*, 253 B.R. 590, 591 (Bankr. D.R.I. 2000)(burden of proof on laches).

"When a plaintiff uses a summary judgment motion, in part, to challenge the legal sufficiency of an affirmative defense--on which the defendant bears the burden of proof at trial--a plaintiff 'may satisfy its Rule 56 burden by showing "that there is an absence of evidence to support [an essential element of] the [non-moving party's] case."'" *Fed. Deposit Ins. Corp. v. Giammettei*, 34 F.3d 51, 54-55 (2d Cir. 1994) (citations omitted); *accord*, *e.g.*, *Adcox v. Teledyne, Inc.*, 810 F. Supp. 909, 914 (N.D. Ohio 1992), *aff'd*, 21 F.3d 1381 (6th Cir. 1994). Conversely, "[w]hen relying on an affirmative defense, a defendant who is faced with a summary judgment motion has the same burden as a plaintiff against whom a defendant seeks summary judgment. That burden requires that the non-moving party with the burden of proof on the issue in question produce sufficient evidence upon which a jury could return a verdict favorable to the nonmoving party." *Lawyers Title Ins. Corp. v. United Am. Bank*, 21 F. Supp. 2d 785, 790 (W.D. Tenn. 1998) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)).

As to the ordinary course of business under 11 U.S.C. § 547(c)(2), the Trustee bases her position that there is an absence of evidence to support it on the legal proposition that such a defense does not apply to long term loans. However, the United States Supreme Court held directly to the

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[2] *See* Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(6); *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005) ("'In practice, "a . . . complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory."'") (citations omitted), *petition for cert. filed*, No. 05-354, 74 U.S.L.W. 3162 (U.S. Sept. 5, 2005).

[3] The court finds that Defendants have effectively pleaded the affirmative defenses, despite the fact that they filed their Amended Answer without leave of court more than 20 days after serving their Answer. *See* Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(a). Plaintiff has not sought to strike or otherwise contest the filing of the Amended Answer and affirmative defenses, nor does the court find any prejudice to Plaintiff from the record.

contrary in *Union Bank v. Wolas*, 502 U.S. 151, 112 S.Ct. 527 (1991). Because of the erroneous legal proposition upon which the Trustee bases her argument, for purposes of summary judgment, only, the Trustee has failed to meet her initial burden of showing an absence of evidence to support the defense. As a result, Defendants' obligation to come forward with evidence sufficient to enable the finder of fact to rule in their favor on their ordinary course of business defense was not triggered. Plaintiff is therefore not entitled to summary judgment in her favor.[4]

As to the laches affirmative defense, the Trustee asserts and the court agrees that dates shown on the docket and record in the underlying Chapter 7 case demonstrate that there was no inexcusably long delay on her part in proceeding against Defendants. Mere delay is insufficient to establish a laches defense, and the Sixth Circuit adopts "a strong presumption that laches will not apply when the analogous statute of limitations has not run absent compelling reason." *Patton v. Bearden*, 8 F.3d 343, 347-48 (6th Cir. 1993). The court finds that the Trustee has shown with these facts an absence of evidence to support the elements of the affirmative defense of laches raised by the Amended Answer. Defendants in turn have not produced any evidence upon which the court as the finder of fact could find in their favor on the laches defense.

One other issue also precludes summary judgment in the Trustee's favor. The Trustee has not established the amount(s) of the transfer(s). The Complaint only alleges (and Defendants admit) that Debtors paid Defendants "a certain amount of cash in excess of Two Thousand Dollars ($2,000.00)." (Complaint ¶ 4.) Even the memorandum in support of Trustee's motion does not provide much clarification, alleging that "about six (6) payments had been made to the Defendants prior to the filing of bankruptcy on November 18, 2003, totaling between $2,000.00 and $3,000.00." Moreover, although relying on one of the Debtors' testimony at the § 341(a) meeting of creditors, Trustee has offered no transcript, affidavit, or other evidence regarding the amount paid to Defendants during the year preceding bankruptcy. *See* Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c). Thus, because "'the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even [though] no opposing evidentiary matter

[4] At trial, Plaintiff will have no such burden of going forward to show an absence of evidence to support any element of the defense. Defendants will have both the burden of going forward and the burden of proof on their ordinary course of business defense.

[has been] presented.'" *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60 (1970) (quoting Fed. R. Civ. P. 56 advisory committee's note on 1963 amendment); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Even though the court cannot grant the Trustee summary judgment in her favor, Rule 56(f) directs the court, if practicable, to ascertain what material facts exist without substantial controversy and what facts need to be determined through trial or further proceedings. Facts so specified by the court are deemed established for purposes of the further proceedings. Based on the pleadings and the record in the underlying Chapter 7 case, the following facts are hereby deemed by the court as established for purposes of trial:

1. Transfers made by Debtor Michael Jones to Defendants during the one year period before November 18, 2003, are avoided under 11 U.S.C. § 547(b).
2. Defendants were insiders at the time of the transfers.
3. The Trustee may recover the amount of the avoided transfers from Defendants as the initial transferees.
4. The Trustee did not unreasonably delay in the commencement of this adversary proceeding.

The factual issues remaining to be tried are the amount of the avoided transfers and all facts material to whether the transfers were made in the ordinary course of business under 11 U.S.C. § 547(c)(2).

THEREFORE, for the foregoing reasons,

IT IS ORDERED that the Plaintiff's Motion for Summary Judgment and Memorandum in Support [Doc. #18] is denied, without prejudice; and

IT IS FURTHER ORDERED that:

1. Trial of this adversary proceeding will proceed as set forth above on **May 24, 2006, at 9:30 o'clock a.m.** One hour is being set aside for trial.

2. The Pretrial Disclosures required by Fed. R. Civ. P. 26(a)(3) shall be filed on or before **May 10, 2006.** Any objections as specified in Fed. R. Civ. P. 26(a)(3) may be made and will be determined at trial.

3. Each party shall provide the court with the original and two copies of any exhibit to be introduced at trial. Exhibits are to be marked in accordance with Local Rule 9070-1. The original and two copies of the exhibits should be delivered to the courtroom deputy on or before **May 22, 2006**, by non-electronic means. A copy of the marked exhibits shall also be provided to opposing counsel by this deadline. If a party has 10 or more exhibits, then the exhibits should be assembled in three ring binders. Exhibits assembled in three ring binders shall be divided by tabs marked with the letter or number of each exhibit.