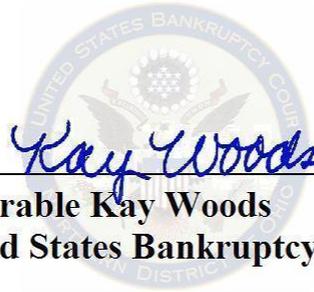


IT IS SO ORDERED.



Dated: December 13, 2006  
01:42:38 PM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

INFOTOPIA, INC.,

Debtor.

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MARC P. GERTZ, TRUSTEE,

Plaintiff,

vs.

INFOTOPIA, INC., et. al.,

Defendants.

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CASE NUMBER 02-44356

ADVERSARY NUMBER 05-4026

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MEMORANDUM OPINION

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Before the Court is Ernest J. Zavoral Sr.'s Motion for Summary Judgment With Respect to Plaintiff's Claims ("Motion") filed by Ernest J. Zavoral Sr. (sic) ("Defendant") on October 2, 2006. The Motion seeks judgment alleging there is no evidence of record to

establish the elements of the causes of action in the Complaint. On October 31, 2006, Marc P. Gertz ("Trustee") filed Objection of Marc P. Gertz, Infotopia, Inc. Bankruptcy Trustee to the Filing of Defendant Ernest J. Zavoral's Motion for Summary Judgment Without a Joint Stipulation of Facts as Required Under the Case Management Order ("Objection"). The Objection requests that the Court deny or dismiss the Motion because Defendant failed to (i) seek leave of Court prior to filing the Motion and (ii) file a joint stipulation of facts. On November 1, 2006, Trustee also filed Response of Marc P. Gertz, Infotopia, Inc. Bankruptcy Trustee to Defendant Ernest J. Zavoral's Motion for Summary Judgment ("Response"), which contends there are material facts in dispute.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (B) and (H). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B) and (H). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

#### **I. FACTS**

On September 30, 2002, Bowne of New York, LLC, a creditor of Infotopia, Inc. ("Debtor"), filed an involuntary petition against Debtor for relief under Chapter 11 of the Bankruptcy Code. Subsequently, on February 4, 2003, the Court entered an order for relief against Debtor and converted the case to a Chapter 7 proceeding. Marc P. Gertz was subsequently appointed trustee.

On February 4, 2005, Trustee filed a five-count complaint against Debtor, Defendant, and various other parties alleging voidable fraudulent transfers pursuant to 11 U.S.C. § 548(a)(1)(A)

and (B) and O.R.C. § 1336, *et. seq.* (Counts I-III), conversion (Count IV) and breach of fiduciary duty (Count V).

Defendant was employed as the president of Debtor from April 2000 through January 2002. (Declaration of Ernest J. Zavoral, Jr. (sic) dated October 2, 2006 ("Defendant Decl.") ¶ 2.) On April 11, 2001, Defendant signed a loan agreement with Debtor for the purpose of exercising 11,106,780 options for common stock of Debtor ("Loan Agreement"). (Defendant Decl. ¶ 3; Complaint ¶ 33.) The loan amount was \$694,174.00 ("Loan Amount") and the value of the stock was \$0.0625 a share. (*Id.*) Within 90 days of the execution of the Loan Agreement, Defendant was required to either (i) repay the Loan Amount in cash to Debtor or (ii) return to Debtor's treasury common stock valued at the Loan Amount. (*Id.* ¶ 5.)

Defendant argues that he returned common shares of stock to Debtor's treasury within 30 days of signing the Loan Agreement. (*Id.* ¶ 6.) As a result, Defendant contends that he has fully repaid the Loan Amount pursuant to the terms of the Loan Agreement. (*Id.*) However, the Declaration fails to address the value of the common shares Defendant returned to Debtor. (*Id.*) In addition, Defendant broadly states that the Loan Agreement was not executed with the intent to hinder, delay or defraud any of Debtor's creditors. (*Id.* ¶ 7.)

Trustee contends that Defendant did not repay the amount due under the Loan Agreement, as demonstrated by: (i) execution of a guaranty on the Loan Agreement by Defendant's wife on November 2, 2002, which was after the 90-day repayment period; and (ii) testimony of Daniel J. Hoyng, CEO of Debtor, that the loan is still listed on Debtor's accounting records. (Response Ex. B.; Daniel J.

Hoyng 2004 Examination dated September 26, 2003 ("Hoyng Dep."); Declaration of Marc P. Gertz, Trustee dated October 31, 2006 ("Trustee Decl.") Trustee also argues that Defendant, as president of Debtor, was knowledgeable about the financial affairs of Debtor before it became insolvent, when Debtor transferred approximately \$750,000.00 in assets outside the ordinary course of business to individuals working for Debtor. (Response at 5 (unnumbered).) Trustee further argues that Defendant personally gained from stock purchases and short swing sales. (*Id.* at 5-6.) Trustee maintains that Debtor's intent to hinder, delay, and defraud creditors is demonstrated by Debtor's financial disclosures, which did not properly disclose proceeds of sales of stock by insiders. (*Id.* at 6.) Generally, Trustee argues that Defendant's intent is an issue of fact while maintaining that Defendant acted with intent to hinder, delay or defraud creditors. (*Id.* at 4.)

## II. STANDARD

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:

The 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 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); *Tennessee Department 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 Structurelite 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. 242, 248 (1986).

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.

### III. REQUIREMENT OF JOINT STIPULATION OF FACTS

Trustee argues that Defendant is in violation of this Court's Case Management Order because he did not seek leave of the Court before filing the Motion and he did not file a joint stipulation of facts.<sup>1</sup> The Case Management Order applicable to this adversary proceeding does, indeed, require that all motions for summary judgment be "accompanied by a joint stipulation of facts demonstrating that there are no genuine issues of material facts." (Case Management Order at 5.) Subsequent to the commencement of this case, the Court has revised its standard case management order to require parties to obtain leave before filing motions for summary judgment, but that provision is not included in the Case Management Order applicable to this case.

Based on Defendant's failure to file a joint stipulation of facts, this Court could deny the Motion. Under the circumstances and in the interest of judicial economy, the Court will not summarily deny the Motion because both parties have already filed their respective briefs. The Court notes, however, that the quality of the arguments in the Motion no doubt suffered because of Defendant's failure to follow the court-ordered process. If the parties had discussed the facts and had reached agreement about whether there was an issue with respect to any relevant fact, the Motion most likely would not have been filed in its present form.

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<sup>1</sup> Neither party addresses whether an attempt was made to stipulate to any facts. Based on the record, this Court assumes that Defendant's failure to file the joint stipulation was his fault, alone, rather than as a result of unsuccessful efforts to obtain Trustee's cooperation in stipulating to undisputed facts.

#### IV. ANALYSIS

Defendant, as movant, has the burden to prove that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. Defendant's Motion is based entirely on the position that there is "no evidence of record to create a genuine issue of material fact with respect to any of the counts asserted" by Trustee against Defendant. (Motion at 1.) A review of the pleadings belies this assertion.

The Court will deal with the various counts in the Complaint out of order for reasons that will become evident. With respect to Count III (Fraudulent Transfer Under O.R.C. § 1336), Defendant cites *In re Gabor*, 280 B.R. 149 (Bankr. N.D. Ohio 2002), for the standard a trustee must meet to establish a cause of action for fraudulent transfer under Ohio law. After quoting this case, however, Defendant merely contends - without any analysis or factual support - that "there is no evidence or record to show that the loan between [Defendant] and [Debtor] meets any of the criteria necessary to serve as the basis for a claim of fraudulent transfer under Ohio law. . . ." (Motion at 6.) Furthermore, Defendant offers no evidence whatsoever regarding Debtor's solvency at the time Debtor made the loan to Defendant. Defendant goes on to quote a definition of "transfer" for purposes of Ohio law, which is broad enough to cover the loan to Defendant. Additionally, there is a genuine dispute regarding whether Debtor intended to hinder, delay and/or defraud its creditors, which is a required element of this cause of action. Defendant maintains rather obliquely that the "loan transaction was not made with the intent to hinder, delay or defraud any entity of [Debtor]." (Defendant Decl. ¶ 4.) However,

it is not clear if Defendant is making this statement on behalf of himself, as the transferee, or as the President and an insider in control of the transferor. It is Debtor's intent that is relevant to an alleged fraudulent transfer. Trustee counters that intent is an issue of fact and "[i]t is not enough for [Defendant] to suggest that he had no intent to hinder, delay or defraud any entity. If Debtor made such transfers to [Defendant] during a period of time that it knew it was insolvent and would be soon shutting down operations, the transfer is deemed to be a fraudulent transfer. . . ." (Response at 7.) Where, as here, Defendant is on both sides of the transfer, an ambiguous passive-voice statement in his Declaration is insufficient to establish the absence of a genuine issue of material fact regarding intent.

Regarding Count IV (Conversion), Defendant cites *City of Findlay v. Hotels.Com, L.P.*, 441 F.Supp.2d 885 (N.D. Ohio 2006), for the elements that one must prove in Ohio to prevail on a claim for conversion. However, Defendant does not address how the undisputed facts demonstrate that these elements have not been established. Defendant merely states: "In this case, Zavoral accepted the proceeds of a loan that was fully repaid. (Zavoral Declaration, ¶ )(sic)." (Motion at 7.) Defendant fails to cite to any paragraph in the Declaration that supports this argument. Even if the Court gives Defendant the benefit of the doubt and assumes that the missing information was supposed to refer to paragraph 6 of Defendant's Declaration, as set forth above, the Declaration is devoid of sufficient facts to establish that the loan was repaid. (See p. 3, *supra*.) Moreover, Trustee has countered with genuine

issues of material fact concerning the repayment of the loan.<sup>2</sup> (Trustee Declaration ¶¶ 4 and 5.) Thus, the parties do not agree on whether Defendant repaid the Loan Amount, which constitutes a genuine issue of material fact.

Defendant's position with respect to Count V (Breach of Fiduciary Duty) is equally unavailing. Again, Defendant cites to an Ohio case - this time *Lutz v. Chitwood*, 337 B.R. 160 (S.D. Ohio 2005) - but he fails to show why, utilizing this standard, Trustee cannot prevail on this cause of action. Defendant does not address the issue of whether his status as an officer and director of Debtor gives rise to any fiduciary duty. Defendant's entire argument is "mere acceptance of loan proceeds and subsequent satisfaction of the loan itself does not constitute a breach of fiduciary duty." (Motion at 7.) As set forth in the previous paragraph, it is not "undisputed" that Defendant repaid the loan.

Consequently, because there are genuine issues of material fact with respect to each of Counts III, IV and V, summary judgment in favor of Defendant is not appropriate on these counts and will be denied.

The Court will now turn to Counts I and II, which are based on 11 U.S.C. § 548(a)(1)(A) and (B). The only two undisputed facts that are clear to this Court are: (i) the date of the order for relief in this case, which is February 4, 2003; and (ii) the date of the loan Debtor made to Defendant, *i.e.*, April 11, 2001 (Complaint, ¶ 33; Motion at 1.). Inexplicably, Defendant claims that Trustee may avoid any transfer of an interest of the debtor in

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<sup>2</sup> Although Hoyng's testimony is convoluted and contradictory, he does state that Defendant's loan balance is still outstanding. (Hoyng Decl. 243, 247-8.)

property to or for the benefit of an insider "that was made or incurred on or within 2 years before the date of the filing of the petition." (Motion at 4.) However, the two year period, cited by Defendant, appears in the Bankruptcy Abuse and Consumer Protection Act ("BAPCPA"), which is not applicable to this proceeding because Debtor's bankruptcy case was filed in 2002. The correct time period under section 548 in this proceeding is one year. Section 548 states in pertinent part:

(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 --

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(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 result of such transfer or obligation . . .

11 U.S.C. § 548 (Westlaw 2005)(emphasis added).

Based on the undisputed facts, the loan to Defendant was made more than one year before the order for relief. Indeed, the loan was made nearly 22 months before the order for relief and more than 17 months before the involuntary petition was filed. Thus, summary judgment on Counts I and II in favor of Defendant appears to be appropriate, but Defendant failed to raise this basis in the Motion. Defendant's argument for summary judgment on Counts I and

II rests entirely on his assertion that he "accepted the proceeds of a loan and repaid the loan in full . . . [without] evidence to even remotely suggest that it was entered into with the intent (sic) hinder, delay, or defraud any entity to which [Debtor] was or became . . . indebted." (Motion at 4.) As set forth above, there are disputes of fact regarding both the issue of repayment and intent; accordingly, summary judgment on Counts I and II is also not appropriate.

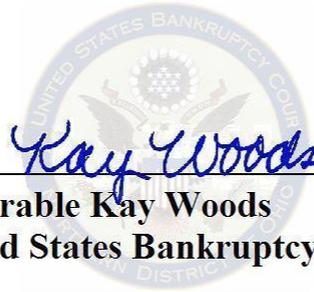
#### V. CONCLUSION

Although Defendant failed to file a joint stipulation of facts, as required by the Case Management Order, the Court has considered the Motion. As set forth above, Defendant failed to establish with respect to any count of Trustee's Complaint that there is no genuine issue of material fact. Accordingly, the Motion is denied in its entirety.

An appropriate order will follow:

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IT IS SO ORDERED.



Dated: December 13, 2006  
01:42:38 PM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

INFOTOPIA, INC.,

Debtor.

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MARC P. GERTZ, TRUSTEE,

Plaintiff,

vs.

INFOTOPIA, INC., et. al.,

Defendants.

CASE NUMBER 02-44356

ADVERSARY NUMBER 05-4026

\*\*\*\*\*  
ORDER  
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For the reasons in this Court's Memorandum Opinion entered on this date, the Court denies Ernest J. Zavoral Sr.'s (sic) Motion for Summary Judgment With Respect to Plaintiff's Claims filed by Ernest J. Zavoral Sr. on October 2, 2006. Furthermore, hereafter no party may move for summary judgment without prior leave of Court.

IT IS SO ORDERED.

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