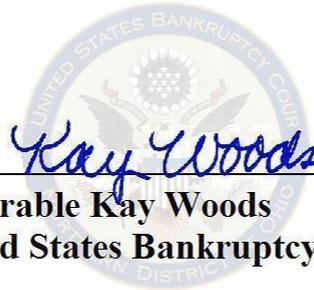


IT IS SO ORDERED.



Dated: January 05, 2007  
10:36:35 AM

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.

EARNEST J. ZAVORAL, SR.,  
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 Ronald E. Fricke's Motion for Summary Judgment With Respect to Plaintiff's Claims ("Motion") filed by Ronald E. Fricke ("Defendant") on October 2, 2006. The Motion was correctly filed in the instant adversary proceeding, but was

incorrectly captioned as "*Marc P. Gertz v. DLD Holdings*, Case No. 05-4021." Since Ronald E. Fricke is not a defendant in Case No. 05-4021, this Court assumes that the Motion was filed in the correct case but with the wrong caption and case number.<sup>1</sup> 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 Ronald E. Fricke'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 Ronald E. Fricke's Motion for Summary Judgment ("Response"), which contends there are genuine issues of material fact in dispute that preclude summary judgment.

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.

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<sup>1</sup> Counsel for this Defendant also represents Ernest J. Zavoral, Sr., another defendant in this case, and made the same error when counsel previously filed a motion for summary judgment on behalf of Mr. Zavoral. At that time, the Court did not make an issue of the error. This error is one of many that demonstrate counsel's lack of attention to detail in filing motions before this Court in the instant adversary proceeding

## 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 Debtor's accountant from July 21, 2001 through January 2002. (Declaration of Ronald E. Fricke, dated October 2, 2006 ("Defendant Decl.") ¶ 1.) Defendant argues that his only transaction with Debtor was one involving employment compensation (including reimbursement of moving expenses in the amount of \$25,000.00) and that this "transaction was part of [Debtor's] ordinary course of business." (Motion at 2.) Defendant argues that, as part of Defendant's "compensation package, in or around April 2001, [he] received \$25,000 from Infotopia to cover his moving expenses." (Defendant Decl. ¶ 5.) (The \$25,000.00 payment will be hereafter defined as the "Payment".) Defendant states that the Payment was to be amortized over a two (2) year period and, so long as Defendant was employed by Infotopia at the end of such two years, the Payment would be "forgiven in its entirety." (*Id.* ¶ 6.) Defendant avers in the Declaration that the Payment was made to him in April 2001 prior to his employment by

Debtor on July 21, 2001. (*Id.* ¶ 5.) Defendant concludes by averring, allegedly upon "personal knowledge," that the Payment "was not made with the intent to hinder, delay or fraud (sic) any entity to which Infotopia, Inc., (sic) was or became indebted." (*Id.* ¶ 7.)

Trustee argues that summary judgment is not appropriate because there are genuine issues of disputed facts. Trustee characterizes the Payment to Defendant as a "loan," (i) which was outside the ordinary scope of business and (ii) for which Debtor received less than reasonably equivalent value. (Response at 4 (unnumbered).) Trustee argues that Fricke's Declaration establishes that the Payment was only to be "forgiven" if Defendant worked for Debtor for two years, which Defendant acknowledges did not occur. (*Id.*) Trustee points out that Debtor did not receive reasonably equivalent value for the Payment because Defendant worked for Debtor for only six month rather than the full two years. As a result, Trustee argues that, at most, Defendant would be entitled to have 25% (\$6,250.00) of the Payment forgiven, thus leaving 75% (\$18,750.00) of the Payment as a voidable transfer. (Response at 4-7.) Trustee asserts the Payment was not part of Defendant's salary and was not made in the ordinary course of business. (Response at 6.) Trustee supports this contention by attaching a copy of Defendant's regular salary check in August 2001 in the amount of \$3,392.83, which was drawn on a bank account different from the account from which the Payment was made. (Response at 6; Exhibits B and C to Response.) Trustee further argues that the Payment was made on August 17, 2001, after Defendant started working for Debtor, rather than in April 2001 as alleged in Defendant's

Declaration. (Response at 4; Exhibit B to Response.)

Finally, Trustee contends that whether Debtor intended to hinder, delay or defraud any of its creditors is an issue of fact, which is in dispute. (Response at 3-8.)

(Declaration of Marc P. Gertz, Trustee, dated October 31, 2006 ("Gertz Decl.") ¶ 3.)

## 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>2</sup> The Case Management Order applicable to this adversary proceeding does, indeed, require that all motions for summary

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<sup>2</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.

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 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.

#### **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. Indeed, Defendant's Declaration alone establishes that there are genuine issues of material fact regarding (i) whether the Payment was actually compensation since the concept of "forgiveness" generally applies

to a loan rather than compensation; (ii) the date the Payment was made (April 2001 vs. August 2001); and (iii) Debtor's intent in making the Payment since, despite Defendant's statement that his Declaration is made on personal knowledge, there is no basis for Defendant to be able to know Debtor's intent in making the Payment three months prior to his employment by Debtor. (Defendant's Decl. ¶¶ 5 and 7.)

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 of record to establish the elements of this claim. [Defendant] accepted compensation paid to him in the ordinary course of business, and the Trustee can point to no evidence to suggest otherwise." (Motion at 8.) However, Defendant completely ignored the standard it cited in the Motion. *In re Gabor* is not based on an ordinary course of business analysis, but instead is based on a "reasonably equivalent value" analysis. Defendant fails to cite to any evidence that Debtor received reasonably equivalent value for the Payment. Trustee contends that Debtor did not receive equivalent value for the Payment because the Payment was only to be forgiven if Defendant worked for Debtor for two years, which Defendant concedes did not occur. (Defendant Decl. ¶ 2; Response at 6-7.) Since Defendant worked for Debtor for only six months rather than the full two

years, at best, only 25% (\$6,250.00) of the Payment was forgiven, thus leaving a minimum of 75% (\$18,750.00) still owing to Debtor as a fraudulent transfer. (Response at 6-7.)

Moreover, Defendant totally misses the mark because the defense of "ordinary course of business" applies to preferences, but is not applicable to transactions that are alleged to be fraudulent transfers. Even if, *arguendo*, the "ordinary course of business" defense was applicable here, Defendant has not demonstrated that the Payment was made in the ordinary course of Debtor's business. Defendant's own Declaration raises doubt about whether the Payment was part of his compensation package because he asserts that the Payment was to be "forgiven in its entirety" if Defendant worked two years for Debtor, which he concededly did not do. (Defendant Decl. ¶¶ 2 and 6.) Defendant chose the language in his Declaration; the concept of "forgiving" repayment supports Trustee's argument that the Payment was, in fact, a "loan" rather than compensation. (Response at 4, 6.) Additionally, since neither party provided the Court with a copy of an employment agreement between Debtor and Defendant or any other documentation to show Debtor's policies regarding compensation, the Court has no basis to conclude that the Payment was part of Defendant's compensation package.<sup>3</sup> At minimum, there is a genuine issue of material fact regarding the nature of the Payment and whether any or all of the Payment constitutes a fraudulent transfer.

There is also a genuine issue of material fact regarding the

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<sup>3</sup> The Motion states that it is undisputed that the Payment was part of Defendant's initial compensation package, but Trustee alleges that the \$25,000.00 payment was made outside the ordinary course of business, was not part of Defendant's salary package and was a loan. (Motion at 8; Response at 6.)

essential element of Debtor's intent in making the Payment to Defendant. As set forth above, Defendant attempts to state unequivocally that Debtor lacked intent to hinder, delay or defraud its creditors in making the Payment, but there is no basis to conclude that Defendant can make this statement based on personal knowledge. Indeed, Defendant's own Declaration states that (i) he was employed as an accountant by Debtor from July 2001 through January 2002; and (ii) the Payment was made by Debtor in April 2001 - three months prior to his employment. Defendant provides no information or basis about how he could know Debtor's intent at the time the Payment was made. As a consequence, Defendant's Declaration regarding Debtor's intent does not and cannot establish that there is no genuine issue of fact regarding this essential element.

Furthermore, Defendant offers no evidence whatsoever regarding Debtor's solvency at the time Debtor provided Defendant with the Payment. See O.R.C. § 1336.04(A)(2).

As a result, Summary Judgment is not appropriate and cannot be granted on Count III.

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, Fricke accepted \$25,000 as part of his initial compensation package to begin employment with [Debtor]. (Fricke Declaration, ¶ )(sic)." (Motion at 8.) As set forth above, there are genuine issues of

material fact regarding whether the Payment was part of Defendant's compensation package and whether the Payment was forgiven in its entirety. These issues preclude summary judgment on the conversion cause of action in Count IV.

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

Defendant's position with respect to Count V (Breach of Fiduciary Duty) is puzzling. Count V of the Complaint is directed only against officers of Infotopia and does not contain any allegations against Defendant. The prayer for relief in the Complaint regarding breach of fiduciary duty is also directed only against the Infotopia Officers. Defendant's Answer to the Complaint recognizes that the allegations in paragraphs 40 through 43 of the Complaint are not directed to him. As a consequence, it is not clear why Defendant moved for summary judgment on Count V. Because Count V is not directed to Defendant, the Court finds that the Defendant's motion for summary judgment regarding Count V is moot.

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 are: (i) Defendant was an accountant for Debtor; and (ii) Defendant received the Payment from Debtor. Inexplicably, Defendant claims that Trustee may avoid any transfer of an interest of the debtor in 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 disputed facts, the Payment was made to Defendant either in April 2001 or on August 17, 2001 -- both dates are more than one year before the order for relief, as well as more than one year prior to the date 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 "the only evidence of record is that the [Payment] . . . was made in the ordinary course of business as part of [Defendant's] compensation package. . . .

[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 5.) Defendant supports the argument that compensation to employees is not avoidable as a fraudulent transfer in bankruptcy by citing *In re Auto Specialties Mfg. Co.*, 153 B.R. 457 (Bankr. W.D. Mich. 1993), *Holahan v. Henderson*, 277 F.Supp. 890 (D.C. La. 1967) and *In re NMI Systems, Inc.*, 179 B.R. 357 (Bankr. D. Dist Col. 1995). However, as set forth above, there is a genuine issue of material fact concerning whether the Payment constitutes ordinary course compensation. Furthermore, Defendant fails to address (i) the solvency of Debtor at the time of the transaction and (ii) whether Debtor received equivalent value for the Payment. As a result, summary judgment as to Counts I and II is not appropriate and must be denied.

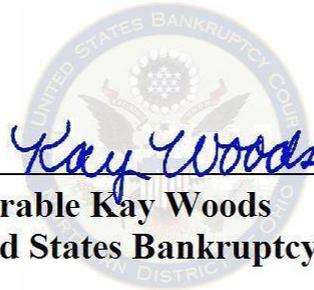
#### V. CONCLUSION

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, there are genuine issues of material fact that preclude summary judgment as to Counts I, II, III and IV. The motion is moot as to Count V. Accordingly, the Motion is denied with respect to Counts I - IV and deemed moot as to Count V.

An appropriate order will follow:

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IT IS SO ORDERED.



Dated: January 05, 2007  
10:36:35 AM

Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

INFOTOPIA, INC.,

Debtor.

CASE NUMBER 02-44356

MARC P. GERTZ, TRUSTEE,

Plaintiff,

vs.

ADVERSARY NUMBER 05-4026

EARNEST J. ZAVORAL, SR.,

et. al.,

Defendants.

ORDER

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court denies summary judgment on Counts I, II, III and IV and finds that summary judgment on Count V, which is not directed towards Defendant, is not applicable. Accordingly, Ronald E. Fricke's Motion for Summary Judgment With Respect to Plaintiff's Claims is denied.

IT IS SO ORDERED.

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