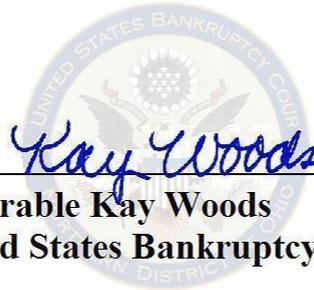


IT IS SO ORDERED.



Dated: July 30, 2007
03:45:49 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
OMEGA DOOR COMPANY, INC.,	*	
	*	CASE NUMBER 03-42905
Debtor.	*	
	*	
*****	*	
	*	
KATHRYN A. BELFANCE, Trustee of	*	
the Omega Door Company	*	
Liquidation Trust,	*	
	*	ADVERSARY NUMBER 05-4291
Plaintiff,	*	
	*	
vs.	*	
	*	
RICHARD BUONPANE, et al.,	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

M E M O R A N D U M O P I N I O N
(NOT INTENDED FOR NATIONAL PUBLICATION)

The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is

available for electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

This matter was before the Court for a trial on June 25, 2007. Plaintiff Kathryn A. Belfance, Trustee of the Omega Door Company Liquidation Trust¹ ("Trustee") was represented by Jessica Price, Esq. Defendants Richard Buonpane ("Buonpane") and Georgeanne Buonpane (collectively "the Buonpanes") were represented by Michael Moran, Esq. and Andrew Suhar, Esq. The Court accepted the testimony of Buonpane, Timothy Beaumont, and Carl Schroedel.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (F), and (K). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. Facts

On January 1, 1999 ("Purchase Date"), pursuant to a Purchase Agreement dated December 14, 1998, Buonpane sold all of the stock of Debtor Omega Door Company, Inc. ("Debtor" or "company") to John Thompson ("Thompson") for the purchase price of \$1,550,000.00. (Stipulation by the parties for the purposes of trial (Doc. # 64) hereafter "Stip." ¶ 3.)

¹Pursuant to Debtor's First Amended and Restated Plan of Reorganization, the Trust retained and is empowered to enforce any claim or interest belonging to Omega Door Company, Inc. or to its estate, including the power to avoid transfers under § 547 of the Bankruptcy Code and to recover, pursuant to § 550 of the Bankruptcy Code, property so transferred or the value thereof.

Buonpane received \$550,000.00 in cash, and a Commercial Secured Promissory Note ("Note") dated January 1, 1999 in the principal amount of \$1,000,000.00 executed and delivered by Thompson and his wife, Tina (collectively "the Thompsons"). (*Id.* ¶ 4.) To secure payment on the Note, Debtor executed and delivered a Guaranty on the same date in which Debtor guaranteed repayment of the obligations of the Thompsons under the Note. (*Id.* ¶¶ 5-6.)

The Purchase Agreement and the Note both contemplated the execution of a security agreement in favor of Buonpane. The Purchase Agreement reads, in pertinent part:

[Buonpane] shall have a security interest in all of the assets of Omega Doors [sic] Company, S&S Omega Garage Door Company, Inc., and Holzer-Omega Garage Door Company, and all of the stock certificates being sold and conveyed herein as further security for the performance of all obligations contained herein and for any amounts owed to [Buonpane] under the terms of any leases associated with this transaction. [The Thompsons] shall execute and deliver to [Buonpane] a duly executed UCC financing statement for the security interest held in all inventory, supplies, accounts receivable, office furnishings, equipment and personal property to perfect this security interest in [Buonpane].

(Purchase Agreement, Ex. 1, p. 5.) Similarly, the Note acknowledges that it is secured by, among other things, a security agreement, and that the Thompsons' failure to comply with such security agreement could result in the acceleration of the amount due and owing under the Note. (Note, Ex. 2, p. 2.)

Although no security agreement was ever executed between Debtor and Buonpane, a financing statement signed by both parties was duly recorded in the Mahoning County Recorders' Office. The financing statement covers the following property of Debtor: All inventory, supplies, accounts receivable, office furniture, equipment, personal property and the proceeds from the sale of any

of the above. (Financing Statement, Ex. 4.) Because Thompson did not file the financing statement with the Secretary of State, the security interest was never perfected under Ohio law. See OHIO REV. CODE ANN. § 1309.501 (West 2006).

To finance the operations of Debtor and certain of its non-debtor affiliated companies, Debtor entered into a series of loan documents with Mahoning National Bank, now known as SkyBank ("SkyBank") pursuant to which SkyBank provided financing to Debtor and the affiliates in the total amount of One Million Six Hundred Thousand Dollars ("the SkyBank loans"). (Stip. ¶ 7.) Pursuant to a Subordination Agreement, dated January 4, 1999, Debtor's obligations to Buonpane were subordinate to the claims of SkyBank. (*Id.* ¶ 9.)²

As of the Purchase Date, the Thompsons owned all of the stock of Debtor and its affiliates. (*Id.*) However, in the ninety day period prior to the Petition Date payments on the Note were made by checks drawn on Debtor's bank account. (*Id.* ¶ 10.) Although Buonpane accepted the checks drawn on the Debtor's account, Buonpane testified that he never called the Guaranty.

Cohen and Company, Debtor's accountants, initially recorded the payments on the Note as distributions to Thompson, and, then, at some point, began recording them as loans to Thompson in the Profit and Loss trial balance and supporting document. Schroedel explained that the information on the trial balance would flow up into Debtor's tax returns. He further explained that, for tax

²Carl Schroedel, a certified public accountant, testified that, on the Petition Date, the value of the Debtor's assets exceeded the value of the secured claims of SkyBank and Buonpane based upon the information in Debtor's schedules.

purposes, neither the distributions nor the loans triggered income to Thompson or deductions for the company, unless the loans remained unpaid.

Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code on June 10, 2003 ("Petition Date"). On February 6, 2004, the Buonpanes filed a proof of secured claim in the amount of \$743,389.90 based upon the Guaranty. (See Claim ## 55, 56, 57.) The Buonpanes consistently asserted the secured nature of their claim throughout the bankruptcy.

On April 10, 2005, Debtor filed an Objection to Claims and Motion to Subordinate Claim Nos. 55, 56, and 57 of Richard and Georgeanne Buonpane ("Objection to Claims").³ (Doc. # 205.) In the Objection to Claims, Debtor argued that the claims were unsecured because the Buonpanes' security interest was unperfected. Debtor further argued that Claim Nos. 55, 56, and 57 should be subordinated to the claims of unsecured creditors pursuant to 11 U.S.C. § 510(a).

Debtor's First Amended and Restated Plan of Reorganization ("Plan") was filed on August 16, 2005. The Objection to Claims was resolved through a Settlement Agreement, which was approved by this Court on August 29, 2005. Pursuant to the Settlement Agreement, the claim of the Buonpanes was treated in a separate class as a disputed secured claim, and their claim was to receive the same distribution as unsecured creditors under the Plan, provided that

³The Buonpanes divorced at some point following the execution of the Purchase Agreement but prior to the Petition Date. As a consequence of the divorce proceedings, Georgeanne Buonpane was awarded a percentage of money due and owing on the Note. The parties stipulate that "[s]ome of the transfers were directed by Buonpane to be made to [Georgeanne Buonpane] but were to and for the benefits of Buonpane." (Stip. ¶ 10.)

the Buonpanes would not be entitled to share in the proceeds of any recovery that the estate may have by way of settlement or litigation of any claim against them.

The above-captioned adversary proceeding was filed on December 7, 2005. The parties stipulate that, in the ninety days prior to the Petition Date, payments on the Note totaling \$20,142.50 were made to Buonpane on checks drawn from Debtor's account. (*Id.* ¶ 10.)

II. Law

Trustee contends that the pre-petition payments at issue constitute preferential transfers. 11 U.S.C. § 547, captioned "Preferences," reads, in pertinent part:

(b) Except as provided in subsection (c) and (i) 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

. . .

(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 (West 2007).

Subsection(c) provides exceptions to the general rule that a trustee may avoid pre-petition transfers:

(c) The trustee may not avoid under this section a transfer -

(1) to the extent that such transfer was -

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange; . . .

Id. "New value" is defined, for the purposes of this case, as "release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law." *Id.*

Payment to a fully secured creditor does not constitute a preference because that creditor is entitled to full payment in a chapter 7 bankruptcy. *First Tennessee Bank v. Stevenson (In re Cannon)*, 237 F.3d 716, 720 (6th Cir. 2001). "The underlying rationale for this rule is '.... that to the extent a secured creditor holding valuable collateral receives payment prior to bankruptcy, the amount of the secured claim is proportionately reduced.'" *Gilbert v. Gem City Savings Ass'n (In re Hale)*, 15 B.R. 565, 567 (Bankr. S.D. Ohio 1981)(*quoting In re Hawkins Mfg., Inc.*, 11 B.R. 512, 513 (Bankr. D. Colo. 1981)).

Buonpane contends that the payments on the Note do not constitute preferences because, with each payment, his security interest in Debtor's collateral was proportionately reduced. Revised Code § 1309.203(B) reads, in pertinent part:

(B) Except as otherwise provided in divisions (C) and (I) of this section, a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

(1) Value has been given;

(2) The debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and

(3) one of the following conditions is met:

(a) The debtor has authenticated a security agreement that provides a description of the collateral . . .

OHIO REV. CODE ANN. § 1309.203 (West 2006).

Where, as here, no duly signed and executed security agreement exists, a number of Ohio courts have adopted the "composite documents" approach. *Silver Creek Supply v. Powell*, 36 Ohio App.3d 140, 144, 521 N.E.2d 828, 832, n. 3 (Ohio App. 1987). "Pursuant to this approach, all documents executed between a debtor and creditor are considered in their totality in determining whether a valid security agreement exists." *Bavely v. Wandstrat (In re Harbour Lights Marina, Inc.)*, 146 B.R. 963, 968 (Bankr. S.D. Ohio 1992). Accordingly, "[a] security interest will be found to have been created where there is a *written document* which sufficiently evidences the parties' intent to create a security interest." *Silver Creek*, 36 Ohio App.3d at 144, 521 N.E.2d at 144 (emphasis in original).

III. Analysis

The parties have stipulated that Debtor was insolvent during the ninety days prior to the Petition Date, that the claims of creditors in this case will not be paid in full, and that the payments at issue were drawn on Debtor's account to and for the

benefit of Buonpane on account of an antecedent debt. (Stip. ¶ 10-12, 14.)

However, based upon Debtor's accounting records, Buonpane argues that the transfers at issue were made by Debtor to Thompson. According to Schroedel, the transfers were recorded as either distributions to Thompson or loans to Thompson. Buonpane further contends that, because the transfers to Thompson were not challenged by Trustee as preferential payments, they cannot be recovered by Trustee as immediate or mediate transfers under 11 U.S.C. § 550. Trustee counters that Buonpane cannot be a "good faith" transferee under § 550 because he knew that the payments on the Note were being made from Debtor's accounts.

Although Buonpane's argument has some facial appeal, as it was Thompson who directed that the payments to Buonpane come from Debtor's account, and it was Thompson who benefitted from the payments on the Note, the argument directly contradicts the stipulation of the parties that the transfers "were drawn on Debtor's account," and "were to and for the benefit of Buonpane." (*Id.* ¶ 10.)⁴

The Sixth Circuit has long recognized that "[s]tipulations voluntarily entered by the parties are binding, both on the [trial] court and [the appellate court]." *Federal Deposit Ins. Corp. v. St. Paul Fire and Marine Ins. Co.*, 942 F.2d 1032, 1038 (6th Cir. 1991)(internal citations omitted). Stipulations are binding for reasons of judicial economy and to avoid gamesmanship by the

⁴At trial, counsel for the Buonpanes underscored the fact that the Buonpanes did not stipulate that the payments came from the Debtor, only that they were drawn on Debtor's account. However, the Court believes that such a distinction is one of kind and not substance.

parties at trial. *Id.* ("If a trial judge can, as here, ignore a clear stipulation of the parties, the incentive to enter stipulations is eliminated. Worse yet, it offers a whole new ground for strategic behavior, as parties can try to get the trier of fact to pass on matters that have already been agreed to.")

Accordingly, because Buonpane stipulated that the transfers at issue were drawn on Debtor's account to and for the benefit of Buonpane, he cannot advance a legal argument at trial that is contrary to his earlier stipulation.⁵ Therefore, the Court finds that the parties have stipulated to all of the elements necessary to establish that the payments on the Note were avoidable preferences as that term is defined in 11 U.S.C. § 547(b). The only issue to be decided by the Court is whether the payments on the Note fall within one of the exceptions listed in subsection (c).

Next, Buonpane argues that Trustee may not avoid the transfers because they were intended as and resulted in a contemporaneous exchange for new value, that is, the release of collateral subject to the security interest created by the parties in favor of Buonpane. Buonpane relies on the composite document approach to establish the existence of a security agreement under Ohio law.

Trustee counters that (i) the documents upon which Buonpane relies were not signed by Debtor (i.e., the Purchase Agreement and

⁵Buonpane's first argument appeared on the eve of trial. Pursuant to the Court's Trial Order, the parties were required to identify the legal issues to be decided at trial as well as file any stipulations on or before June 11, 2006. Buonpane advanced only the following legal argument: "Did the documents executed by Richard Buonpane, Omega Door Company, John and Tina Thompson [sic] constitute a security agreement securing a debt owing to Richard Buonpane and accordingly resulting in a contemporaneous exchange for value occurring as each payment reduced the amount of the secured claim by the amount paid." (Defendants Richard and Georgeanne Buonpane's List of Legal Issues at 1.)

Note were signed by Thompson in his individual capacity) and, therefore, no security interest was created, and (ii) Thompson's failure to perfect the security interest makes the security interest avoidable, such that no new value was exchanged as a result of the payments to Buonpane.

Having reviewed the various documents admitted at trial, the Court agrees that the documents establish the parties' intent to create a security interest in Debtor's assets in favor of Buonpane. Both the Purchase Agreement and the Note, executed by Buonpane and Thompson, clearly demonstrate the intention of the parties to create a security interest. Likewise, based upon the detailed description of the security agreement in the Purchase Agreement and the fact that the amount due under the Note could be accelerated based upon a breach of the security agreement, the Court finds that the purchase price reflected the value given for the security interest. The financing statement contains a description of the collateral and it is signed by Buonpane and Debtor. Therefore, a sufficient written foundation has been established for the creation of a security interest.

The fact that the various documents relied upon by the Court are not all signed by Debtor is of no moment. The argument advanced by Trustee, that no security agreement exists because Debtor was not a signatory to the Purchase Agreement and the Note, would render the sale of a business and the contemporaneous creation of a security interest in the assets of that business a virtual impossibility. In other words, there is no way that Debtor could have executed the Purchase Agreement or the Note in this case because those documents memorialize the sale of Debtor to

Thompson. Furthermore, because there is no question that Thompson controlled the company from the moment that it was transferred, the Court finds that the documents signed by Thompson individually are sufficient to establish the intent of Buonpane and Debtor to create a security interest.

Buonpane concedes that the security interest is unperfected, but argues that Debtor's failure to avoid the unperfected lien makes the secured nature of the debt an affirmative defense to the preference claim. While it is true that Debtor never avoided the unperfected security interest, the statutory definition of "new value" is not so narrowly drawn. "New value" includes "release by a transferee of property previously transferred to such transferee in a transaction that is neither void *nor voidable* by the debtor or the trustee under any applicable law[.]" 11 U.S.C. § 547(a)(2) (emphasis added.) Because Buonpane's security interest was voidable on the Petition Date, there was no new value given for the payments on the Note.

The bankruptcy court for the Eastern District of Tennessee reached the same conclusion in *Ford Motor Credit Co. v. Ken Gardner Ford Sales, Inc. (In re Ken Gardner Ford Sales, Inc.)*, 10 B.R. 632 (Bankr. E.D. Tenn. 1981). In rejecting Ford Motor Company's argument that "new value" was given pursuant to 11 U.S.C. § 547(c) due to the release of collateral subject to an unperfected security agreement, the Court wrote:

When Ken Gardner sold a new car it used the proceeds to pay FMC the principal debt for the purchase money loan from FMC. If the car was subject to an unavoidable security interest which was released, there might be a contemporaneous exchange of new value. But that argument was settled against FMC by the court's earlier decisions. Since the debt over \$1,250,000 was secured by an

avoidable security interest, all that was released was an avoidable security interest. No new value was given.

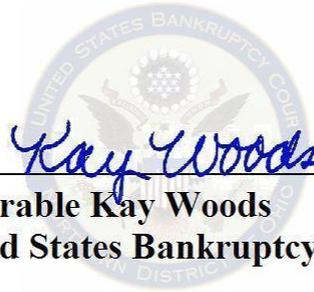
Id. at 646.

As a consequence, the Court finds that Buonpane received voidable preferential payments totaling \$20,142.50. Pursuant to 11 U.S.C. § 550, Buonpane is ordered to turn over \$20,142.50 to Trustee.

An appropriate Order will follow.

#

IT IS SO ORDERED.



Dated: July 30, 2007
03:45:49 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
OMEGA DOOR COMPANY, INC.,	*	
	*	CASE NUMBER 03-42905
Debtor.	*	
	*	
*****	*	
	*	
KATHRYN A. BELFANCE, Trustee of	*	
the Omega Door Company	*	
Liquidation Trust,	*	
	*	ADVERSARY NUMBER 05-4291
Plaintiff,	*	
	*	
vs.	*	
	*	
RICHARD BUONPANE, et al.,	*	
	*	THE HONORABLE KAY WOODS
Defendants.	*	
	*	

O R D E R

For the reasons stated in the Memorandum Opinion entered on this date, the Court finds that Defendant Richard Buonpane received voidable preferential payments totaling \$20,142.50. Pursuant to 11

U.S.C. § 550, Buonpane is ordered to turn over \$20,142.50 to Plaintiff Kathryn A. Belfance, Trustee of the Omega Door Company Liquidation Trust.