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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	**CASE NUMBER 03-41957**
GIRTON, OAKES & BURGER, INC.,	*	**CHAPTER 7**
Debtor.	*	**HONORABLE KAY WOODS**

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MEMORANDUM OPINION REGARDING MOTION OF RONALD M. CREATORE TO COMPEL TRUSTEE TO RELEASE, ABANDON AND DISGORGE CASH RECEIVED FROM PREFERENCE ACTIONS

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This cause is before the Court on Motion for Immediate Order Compelling Trustee to Release, Abandon and Disgorge Cash Received from Preference Actions ("Motion to Compel") (Doc. # 256) filed by Ronald M. Creatore ("Creatore"), acting *pro se*, on November 13, 2008. On November 26, 2008, Chapter 7 Trustee Mark A. Beatrice ("Trustee") filed Memorandum in Opposition to Motion for Immediate Order Compelling Trustee to Release, Abandon and Disgorge Cash Receipt from Preference Actions ("Memo in Opposition") (Doc. # 262). On December 3, 2008, Creatore filed Sur-Reply [sic] to Trustee's

Memorandum in [sic] Response to Trustee's Opposition to Motion for Immediate Order Compelling Trustee to Release, Abandon and Disgorge Cash Received from Preference Actions ("Reply") (Doc. # 263).[1] The Court held a hearing on the Motion to Compel on December 4, 2008, at which Creatore and Trustee appeared and argued in favor of their respective positions. Based on the Motion to Compel, the Memo in Opposition, the Reply, the arguments at the hearing, and the entire record in this case, the Court finds that the Motion to Compel is not well taken and should be denied for the following reasons.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). 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), (E) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTUAL BACKGROUND

This case was commenced as an involuntary chapter 7 case against Debtor Girton, Oakes & Burger, Inc. ("Debtor") on April 23,

[1] Trustee questioned Creatore's standing to bring this Motion to Compel since the Settlement Agreement upon which Creatore relies transferred certain assets to PNH, Inc. rather than Creatore in his personal capacity. (Memo in Opp'n at 3, n.2.) Creatore owns 100% of PNH, Inc. Attached as Exhibit A to Creatore's Reply was a document entitled Assignment of Rights. Pursuant to the Assignment of Rights, which is dated September 1, 2003, PNH, Inc., by Creatore, assigned "all of the intangibles previously held by the debtor estate of Girton, Oakes & Berger, Inc." to Creatore for consideration of $1.00. PNH, Inc. can only assign whatever rights it received from Trustee. Assuming that the Assignment of Rights transfers the "intangibles" referenced in the Settlement Agreement, which were transferred to PNH, Inc., it appears that Creatore has succeeded to the rights of PNH, Inc. to such "intangibles" and, thus, has standing to bring the Motion to Compel.

2003. On May 1, 2003, the Court entered Order (Doc. # 10) granting the motion to appoint an interim trustee and authorizing the trustee to operate the business of the Debtor. The next day, Mark A. Beatrice was appointed interim chapter 7 trustee.

On May 29, 2003, Alfa Laval Inc. (one of the petitioning creditors) and Trustee filed Complaint ("Initial Adversary Proceeding") (Doc. # 26) against Creatore, Hevun Diversified Corporation, U.S. Sanitary Corporation, Diversified Process Components and PNH Corporation (collectively, "Defendants").[2]

On June 16, 2003, the Court entered Order for Relief in Involuntary Case and Converting Case to Chapter 7 (Doc. # 50), with Trustee having authority to operate the business under chapter 7 of the Bankruptcy Code as an operating chapter 7. On June 18, 2003, Trustee filed Motion for an Order Approving Settlement of Disputes Between Mark A. Beatrice, Interim Trustee, and Compromise Parties ("Motion to Approve Settlement") (Doc. # 58), which sought Court approval of a Settlement Agreement (as defined in and attached to the Motion to Approve Settlement). The Compromise Parties were defined as the Defendants plus Wolverine Holding Co., LLC. In response to the Motion to Approve Settlement, the following documents were filed on June 25, 2003: (i) Memorandum of PNH, Inc. in Support of Trustee's Motion to Compromise or, in the Alternative, for Motion for Relief from Stay Filed by PNH, Inc. (Doc. # 73); and (ii) Response of Petitioning Creditors to Motion for an Order

[2] It appears that "PNH Corporation" and "PNH, Inc." are the same entity.

Approving Settlement of Dispute Between Mark A. Beatrice, Interim Trustee, and "Compromise Parties" and Memorandum in Support (Doc. # 74) filed by Alfa Laval Inc., Kusel Equipment Company, and Alex C. Ferguson. The Court held a hearing on the Motion to Approve Settlement on June 26, 2003, and, thereafter, on July 25, 2003, entered Order Approving Settlement of Disputes Between Mark A. Beatrice, Interim Trustee and Compromise Parties ("Settlement Order") (Doc. # 105).

The First Meeting of Creditors pursuant to 11 U.S.C. § 341 was held on August 8, 2003, and the Minutes (Doc. # 117) of such meeting were filed by Trustee on August 13, 2003. Because the creditors did not elect a trustee, the status of Trustee as an interim trustee ceased and he became the trustee under 11 U.S.C. § 702.[3]

Trustee filed nine adversary proceedings seeking recovery of preferences paid by Debtor to the following creditors:[4] (i) Alfa Laval Flow (Case No. 05-4116); (ii) Ampco Pumps Company, L.P. (Case No. 05-4117); (iii) Feldmeier Equipment, Inc., (Case No. 05-4118);

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[3] Creatore accuses Trustee of acting "in violation of express federal statutory law" when Trustee "improperly authorized counsel for Alfa . . .to act as the legal representative of the debtor estate for the purpose of filing Adversary Proceeding 03-04129[.]" (Mot. to Compel ¶ 7.) Creatore fails to identify what federal law Trustee violated. As the Interim Trustee, Trustee was fully authorized to exercise the duties of trustee, as set forth in 11 U.S.C. § 704. *See* 11 U.S.C. §§ 701 and 702. In any event, it is too late to object to employment of counsel in an adversary proceeding that has been dismissed five years ago and closed for more than four years.

[4] Creatore confuses the nine adversary proceedings Trustee commenced to recover avoidable transfers with the Initial Adversary Proceeding. (*See* Reply at unnumbered 7-8.) The nine preference actions were all commenced in 2005, approximately two years after the Initial Adversary Proceeding was resolved. Trustee did not commence the preference actions for the "benefit of one unsecured creditor. . . Alfa Laval[,]" as alleged by Creatore. (Reply at unnumbered 7.) Indeed, one of the defendants in the preference actions was Alfa Laval.

(iv) Fristam Pumps, Inc. (Case No. 05-4119); (v) Pioneer Telecom, Inc., (Case No. 05-4120); (vi) Ridgeview Products, LLC (Case No. 05-4121); (vii) Santon Electric Company, Inc. (Case No. 05-4122); (viii) Topline Corp. (Case No. 05-4123); and (ix) Lincoln Suppliers, Inc. (Case No. 05-4124). Trustee compromised, with Court approval, certain of these preference claims, as follows: (i) Pioneer Telecom, Inc. for $722.08; (ii) Fristam Pumps, Inc. for $3,935.84; (iii) Santon Electric Company, Inc. for $3,486.37; (iv) Feldmeier Equipment, Inc. for $500.00; (v) Ampco Pumps Company, LP for $5,000.00; and (vi) Topline Corp. for $4,500.00. The total of these compromised preference amounts is $18,144.29. In addition, Trustee obtained a default judgment against Ridgeview Products, LLC in the amount of $8,379.23. The other cases were dismissed with prejudice.

II. ANALYSIS

The Motion to Compel is based upon Creatore's misreading of the Settlement Agreement and his misunderstanding of preference actions. Creatore's argument is based entirely upon his contention that, because the Settlement Agreement transferred "all of the intangible property of the Debtor. . ." (Settlement Agr. ¶ 1(C)), Trustee transferred the preference actions to PNH, Inc. Because the viability of Creatore's argument rests on paragraph 1(C) of the Settlement Agreement, the Court sets it forth in its entirety, as follows:

> (C) The Trustee agrees to release and return to PNH, Inc. and PNH, Inc. agrees to accept and credit the Loan Balances in the amount of $20,000.00 for all of the Debtor's property located at the Boardman, Ohio place of

> business of Debtor, which personal property was the subject of the Motion of the Trustee to Sell Personal Property and to <u>further transfer, and assign to PNH, Inc. or its assigns, all of the intangible property of the Debtor, including customer lists, marketing supplies, trade names, trademarks, websites, telephone numbers</u>.

(Settlement Agr. ¶ 1(C) (emphasis added).)

Creatore argues that the Sixth Circuit B.A.P. has previously held in this case that the "intangible property" referenced in paragraph 1(C) includes choses in action. (*See PNH, Inc. v. Sayavich* (*In re Girton, Oakes & Burger, Inc*.), (6th Cir. B.A.P. June 22, 2005) (hereinafter "B.A.P. Opinion"), attached to Trustee's Memo in Opp'n as Ex. B.)[5] The B.A.P. Opinion did not deal with whether preference actions came within the definition of "intangible property of the Debtor," but instead dealt with an entirely different kind of lawsuit as being encompassed within that concept. On December 8, 2003, Trustee filed a motion seeking approval of a proposed settlement agreement with William Sayavich. More than two years before the order for relief in this case, Sayavich had entered into an employment agreement with PNH, Inc., which included various non-compete, non-disclosure and non-solicitation covenants ("Employment Covenants"). On March 4, 2003, Sayavich was discharged from employment and, less than a month later, brought suit in state court against Debtor and Creatore, seeking declaratory and injunctive relief for tortious interference with contract, defamation, unfair competition, and civil conspiracy ("State Court

[5] Creatore states that this Opinion was attached to the Motion to Compel as Exhibit A, but there were no exhibits attached to such Motion.

Action"). (B.A.P. Op. at 4.) Part of Trustee's proposed settlement with Sayavich included Sayavich's dismissal of the State Court Action in exchange for Trustee releasing Sayavich from the Employment Covenants. PNH, Inc. objected to the proposed settlement on the grounds that Trustee could not release Sayavich from the Employment Covenants because Trustee had previously conveyed Debtor's interest in those Covenants pursuant to the Settlement Agreement. (*Id.*)

The B.A.P. Opinion gave the term "intangible property" its common meaning and held that "the Employment Covenants fall within every definition of the term 'intangible property.' They lack physical existence; they address the legally-recognized relationship between the debtor and Sayavich, enforceable in the courts; and they have no intrinsic value, but are merely representative of value." (*Id.* at 8.) The significant distinction between the facts considered by the B.A.P. and the facts currently before this Court is that a preference action – even if it may be intangible property – is not and never was "property of the Debtor," as set forth in paragraph 1(C) of the Settlement Agreement. Preference actions belong to the bankruptcy estate of the Debtor and not the Debtor itself.

The Court must read the contract as a whole, and not merely look at selective language of the Settlement Agreement.[6] Pursuant

[6] The B.A.P. Opinion held that the Settlement Agreement was clear and unambiguous (B.A.P. Op. at 11) and to be construed under the law of the state of Ohio (*Id.* at 6).

to the Settlement Agreement, the only intangible property transferred by Trustee to PNH, Inc. was "intangible property of the Debtor." Consequently, whether preference actions constitute choses in action or other intangible property, as Creatore argues, is immaterial if such preference actions were not also property of the Debtor. The operative provision – and, thus, the issue to be decided by this Court in ruling on the Motion to Compel – is whether or not the preference actions constituted "intangible property of the Debtor" transferred by Trustee.

Creatore argues, "Trustee has failed to cite to any case wherein a Court distinguished between the 'debtor' and the 'debtor estate' for the proposition that the right to pursue a preference action could not be a portion of 'all of the intangible property of the debtor' conveyed by a trustee within a compromised settlement agreement approved by a duly-empowered bankruptcy court." (Reply at numbered 6 (emphasis added).) Despite Creatore's arguments otherwise, Debtor and Debtor's estate are not one and the same; the dichotomy is applicable to preference actions.

The Bankruptcy Code has many sections that must be read in conjunction in order to understand what constitutes property of the debtor and what constitutes property of the estate. Section 101(13) defines "debtor" as the "person . . . concerning which a case under this title has been commenced." 11 U.S.C. § 101(13) (West 2005). Section 541 of the Bankruptcy Code provides:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is

comprised of all the following property, wherever located and by whomever held:

* * *

> (4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title[.]

11 U.S.C. § 541 (West 2005).

Section 551 provides, "Any transfer avoided under section . . . 547 . . . of this title . . . is preserved for the benefit of the estate but only with respect to property of the estate." 11 U.S.C. § 551 (West 2005).[7] Preference actions – the subject of this dispute – are covered by § 547 of the Bankruptcy Code. As specified above, § 541 provides that any interest preserved pursuant to § 547 constitutes property of the estate. Section 547 expressly grants the right to recover preferences only to the "trustee." Section 547 specifies the kind of transfers "the trustee may avoid," *see* § 547(b) and (d), and the kind of transfers "the trustee may not avoid," *see* § 547(c). The legislative history of this section refers explicitly to "authoriz[ing] the trustee to avoid a transfer if five conditions are met." 11 U.S.C.A. § 547, Legislative History (West 2005).

When read together, it is clear that the Bankruptcy Code

[7] The legislative history notes that the law changed in 1978, making it automatic that any avoided transfer was property of the estate "even though preservation may not benefit the estate in every instance. A preserved lien may be abandoned by the trustee under proposed 11 U.S.C. 554 if the preservation does not benefit the estate." 11 U.S.C.A. § 551, Legislative History (West 2005). Section 554 permits a trustee to abandon property only "after notice and hearing" when the property is "burdensome to the estate" or "of inconsequential value and benefit to the estate." 11 U.S.C. § 554 (West 2005).

creates a right for a trustee[8] to avoid certain preferential transfers for distribution to creditors even though such transfers would not have been avoidable pre-bankruptcy by a debtor. Creatore acknowledges this point, "The trustee may bring suit to reach property or choses in action belonging to the estate that will then be distributed to all creditors." (Reply at unnumbered 7, relying on *In re Del-Met Corp.*, 322 B.R. 781 (Bankr. M.D. Tenn. 2005).) Despite this express recognition by Creatore that preference actions "belong to the estate," Creatore tries to blur the distinction between property of the debtor and property of the estate in urging that the preference actions were transferred by the Settlement Agreement.[9]

In *In re Southeast Railroad Contractors, Inc.*, 235 B.R. 619, (Bankr. E.D. Tenn. 1996), the bankruptcy court held that a lien held by the Internal Revenue Service did not attach to preference recoveries. In so holding, the court stated:

> Preference recoveries, and the trustee's power to achieve them, are unique to bankruptcy. A recovery by the trustee is not for the benefit of the debtor, but rather is designated as a recovery "for the benefit of

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[8] A debtor in possession in a chapter 11 case has the same rights as a trustee, but since this is a chapter 7 case, the concept of debtor in possession is inapplicable. In addition, an individual debtor is authorized to avoid certain preferences under 11 U.S.C. § 522(h). The Debtor in this cases is a corporation rather than an individual, so the avoidance provisions in § 522 do not apply.

[9] Creatore asserts that Debtor was also a debtor-in-possession because the Bankruptcy Court approved the continued operation of Debtor's business after the date the involuntary petition was filed. (Reply at unnumbered 11.) Creatore is incorrect in this statement. Debtor was never authorized to operate its business. The interim Trustee was authorized, for a short period of time, to operate Debtor's business. The Debtor in the instant involuntary chapter 7 case was never a debtor-in-possession.

> the estate." ll U.S.C. § 550(a). In a Chapter 7 case, the debtor can neither bring a preference action itself nor force the trustee to do so. Moreover, the Chapter 7 debtor has no legal or equitable interest in preference recoveries, and it can expect no distribution from preference recoveries. . . . This means that a preference recovery by a trustee in a bankruptcy case can never be characterized as "belonging" to the debtor. At the time it comes into existence and first becomes anyone's property, it is property of the estate to be distributed only to the creditors in the case.

Id. at 622 (emphasis added).

Trustee relies on *Frank v. Michigan State Unemployment Agency* (*In re Thompson Boat Co*.), 252 F.3d. 852 (6th Cir. 2001), for the proposition that the Settlement Agreement could not have transferred preference actions to PNH, Inc. as part of the "intangible property of Debtor" because preference actions are never property of a debtor. The Sixth Circuit Court of Appeals "adopt[ed] Judge [Victoria] Roberts's opinion as [its] own[,]" reasoning that her opinion "thoroughly discusses and analyzes each issue presented in this case" and could not be "improve[d] upon[.]" *Id*. at 854. Judge Roberts held:

> The [Bankruptcy Court] reasoned that Debtor and the estate are separate entities. At the same time, the preference provisions allow only Trustee, not Debtor, to avoid certain transfers, and the proceeds are recovered on behalf of the estate, not Debtor. . . .
>
> The Court agrees that the estate/debtor dichotomy applies to the preference provisions, thereby barring attachment of the proceeds by pre-petition liens. The distinct nature of the two entities has been previously recognized.

Frank v. Michigan Unemployment Agency, 263 B.R. 538, 540 (E.D. Mich. 2000) (Emphasis added). Judge Roberts discussed the issue of "dual entity" of a debtor and debtor in possession, as set forth in *NLRB*

v. Bildisco & Bildisco, 465 U.S. 513 (1984), and concluded "there is no good reason to disturb the debtor/trustee dichotomy in this particular context," noting that the appellant had not shown that any court had ever rejected the application of the dichotomy "in the context of preference actions by a trustee." *Id*. at 541. In adopting Judge Roberts's opinion in its entirety, the Sixth Circuit endorsed this dichotomy without reservation.

As a consequence, Creatore's attempt to encompass the preference actions within the intangible property transferred by the Settlement Agreement fails because preference actions were not property of the Debtor. Since the preference actions were never conveyed to PNH, Inc., Creatore can assert no right in the preference recoveries and is not entitled to an order requiring Trustee to "release, abandon and disgorge" the preference recoveries.

III. CONCLUSION

The Motion to Compel is not well taken. Creatore's position is that Trustee conveyed the chapter 5 preference actions to PNH, Inc. by virtue of the Settlement Agreement's transfer of "intangible property of Debtor." Creatore's argument is flawed because preference actions do not and cannot constitute property of a debtor. The plain meaning of the language in the Settlement Agreement defeats Creatore's argument. Because Trustee did not transfer the preference actions to PNH, Inc., Creatore has no right to receive the recoveries Trustee obtained in settling the

preference lawsuits. As a consequence, the Motion to Compel will be denied. An appropriate order will follow.

# # #

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NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	**CASE NUMBER 03-41957**
GIRTON, OAKES & BURGER, INC.,	*	**CHAPTER 7**
Debtor.	*	**HONORABLE KAY WOODS**

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ORDER DENYING MOTION OF RONALD M. CREATORE TO COMPEL TRUSTEE TO RELEASE, ABANDON AND DISGORGE CASH RECEIVED FROM PREFERENCE ACTIONS

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For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby denies Motion for Immediate Order Compelling Trustee to Release, Abandon and Disgorge Cash Received from Preference Actions.

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