Dated: March 31 2010

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 06-33227
	)	
SAI Holdings, Limited, et al.,	)	Chapter 11
	)	
Debtors.	)	Adv. Pro. No. 08-3277
	)	
O'Keefe and Associates Consulting, LLC, Liquidating Agent for SAI Administrative Claims and Creditor Trust,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Toncee, Inc.,	)	
	)	
Defendant.		

MEMORANDUM OF DECISION AND ORDER

This adversary proceeding is before the court on Defendant's motion for summary judgment [Doc. ## 23, 24], Plaintiff's opposition and motion for partial summary judgment [Doc. # 26], and Defendant's reply [Doc. # 27]. Plaintiff is the liquidating agent for the SAI Administrative Claims and Creditor Trust ("the Trust"), which was established pursuant to the confirmed plan of reorganization in Debtors' underlying

Chapter 11 cases.[1] [*See* Case No. 06-33227, Doc. # 984, § 4.2.2 and Doc. # 1146]. Plaintiff is authorized under the confirmed plan of reorganization to commence this action on behalf of the Trust. [*Id.*, Doc. # 984, § 4.2.3]. Defendant is Toncee, Inc. ("Toncee") the alleged initial transferee of the transfers at issue in the Complaint.

In its complaint, Plaintiff seeks to recover, as preferential transfers under 11 U.S.C. § 547 or, in the alternative, as fraudulent transfers under 11 U.S.C. § 548, certain payments made to Toncee by Debtor Athol Manufacturing Corp. within ninety days before the date Debtor's Chapter 11 bankruptcy petition was filed. Plaintiff also seeks to recover alleged postpetition transfers under 11 U.S.C. § 549 and the disallowance of any claims of Defendant against Debtors' bankruptcy estates under 11 U.S.C. § 502(d) and (j). Defendant moves for summary judgment on each count of Plaintiff's complaint. In its opposition brief, Plaintiff seeks summary judgment in its favor as to its claims brought under § 547(b) and any affirmative defense asserted under § 547(c)(2).

The district court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334(b) as a civil proceeding arising in or related to a case under Title 11. Debtors' Chapter 11 cases and all proceedings arising under Title 11, arising in the Chapter 11 cases or related to the Chapter 11 cases, including this adversary proceeding, have been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. Proceedings to recover avoidable transfers are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(F) and (H). For the reasons that follow, Defendant's motion will be granted in part and denied in part, and Plaintiff's motion will be denied as untimely.

FACTUAL BACKGROUND

The following facts are undisputed. Debtors' Chapter 11 petitions were filed on November 8, 2006. For at least five years before the petitions were filed, Debtor Athol Manufacturing Corp. ("Athol") had a business relationship with Toncee. Athol purchased goods from Toncee and, until just weeks before the petition date, was required to pay for the goods it received within fifteen days of the date of delivery of the goods. Toncee also purchased goods from Athol and was required to pay for those goods within forty-five days.

[1] Debtors include SAI Holdings Limited, Athol Manufacturing Corp. and Sandusky Limited, whose cases are being jointly administered.

In October 2006, Toncee learned that Athol's financial condition had worsened and that efforts were being made to sell the business. As a result, Toncee notified Athol that, as of October 23, 2006, it was setting off the amount that it owed Athol for goods that Athol sold Toncee from the amounts that Athol owed Toncee. Toncee also notified Athol that it was changing its billing arrangement with Athol to require payment of all new invoices to be made "cash before delivery" by wire transfer to Toncee's billing account.

Athol made fifteen transfers of funds to Toncee in the total amount of $688,136.99 within ninety days of filing its petition that are at issue in this case, eleven by means of checks written on its account in the total amount of $389,253.49 ("Check Transfers") and four wire transfers in the total amount of $298,883.50 ("Wire Transfers").[2] None of the transfers at issue were made postpetition. [Toncee Ex. 3, Pl. Response to Interrogatories No. 11].

Plaintiff agrees that subsequent to Toncee's receipt of the Check Transfers and before its receipt of the Wire Transfers, Toncee gave value in the form of goods shipped to Athol in excess of the Check Transfers. [Distel Aff. ¶ 11]. And Plaintiff agrees that wire transfers made by it on October 30 and 31, 2006, in the amounts of $77,580.81 and $49,835.00, respectively, were not made on account of antecedent debt but, rather, were made in payment of goods shipped to Athol on the same day as the payment was made. [Distel Aff. ¶ 12 and attached Ex. 3]. Thus, Plaintiff concedes that neither the Check Transfers nor wire transfers made on October 30 and 31, 2006, are avoidable as preferential transfers.

The two remaining wire transfers at issue were made on October 27 and November 3, 2006, in the amounts of $32,059.07 and $139,408.62, respectively. With respect to the November 3 transfer, Plaintiff agrees that $68,862.02 of the total amount transferred was in payment of invoice numbers 27975 and 27976 for goods shipped to Athol after the payment was made. [*See id.* at ¶ 13; Davidow Aff. ¶ 7 and attached Ex. 4, pp. 14-17].

Debtors' Chapter 11 unsecured creditors will not receive a 100% distribution on their prepetition claims. [Distel Aff. ¶ 10]. Because Toncee continued to supply goods to Athol after the petition date, it has been granted an administrative expense claim in the amount of $280,497.37 for such goods supplied but for

[2] Exhibit A attached to the complaint set forth a total of twenty transfers within ninety days of the date of filing for a total amount of $1,019,083.56. However, certain of the transfers were inadvertently identified twice, [*see* Doc. # 26, Opposition, p. 3], and the parties are in agreement as to the transfers that are at issue in this case and that those transfers total $688,136.29 [*see* Doc. # 24, Motion, p. 4; Toncee Ex. 3, Pl. Response to Interrogatories No. 3].

which it has not been paid. [Case 06-33227, Doc. # 1294].[3]

LAW AND ANALYSIS

I. Summary Judgment Standard

Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, summary judgment is proper only where 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). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party "may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

II. Plaintiff's Request for Summary Judgment

In its reply brief, Toncee asks the court to strike as untimely Plaintiff's memorandum in opposition to the extent it seeks summary judgment because it was not filed until January 15, 2010. In this case, the court's scheduling order entered on October 14, 2009, required any motions for summary judgment to be filed on or before December 18, 2009. Thus, to the extent that Plaintiff's memorandum in opposition includes a motion for summary judgment, the motion will be denied as untimely filed.

III. Preferential Transfers under 11 U.S.C. § 547 (Count I)

As discussed above, Plaintiff seeks to avoid only the October 27, 2006, transfer in the amount of $32,059.07 and $70,546.60 of the November 3, 2006, transfer, for a total of $102,605.67 ("Transfers"), as preferences under 11 U.S.C. § 547(b). Section 547(b) provides as follows:

> Except as provided in subsection (c) and (i) of this section, the trustee may avoid any

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[3] The court takes judicial notice of the contents of its case docket. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); In re Calder, 907 F.2d 953, 955 n.2 (10th Cir. 1990); St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp., 605 F.2d 1169, 1171-72 (6th Cir. 1979) (stating that judicial notice is particularly applicable to the court's own records of litigation closely related to the case before it).

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.

While § 547(b) authorizes the avoidance of certain prepetition transfers, the Bankruptcy Code excepts from avoidance the types of transfers described in § 547(c). Plaintiff has the burden of proving all five of the elements making a transfer avoidable under § 547(b); however, the party against whom recovery or avoidance is sought has the burden of proving that a transfer is not avoidable under one of the affirmative defenses of § 547(c). 11 U.S.C. § 547(g).

The evidence in this case shows that Toncee is a creditor of Athol and that the Transfers were of an interest of Athol in property and were made within ninety days before the bankruptcy petitions were filed. Although Plaintiff must also prove that Athol made the Transfers while it was insolvent, there is a statutory presumption of insolvency during the ninety days immediately preceding the filing of bankruptcy. 11 U.S.C. § 547(f). Toncee offers no evidence to rebut that statutory presumption. *See In re Oakes*, 7 F.3d 234 (Table), 1993 WL 339725, *2 (6th Cir. Sept. 3, 1993) (citing *In re Sierra Steel, Inc.,* 96 B.R. 275, 277 (B.A.P. 9th Cir. 1989) and explaining that the presumption vanishes only after transferee comes forward with substantial evidence of solvency). Thus, there is no dispute that all the Transfers made to Toncee during the ninety days prior to the filing of the bankruptcy petition were made while Athol was insolvent.

However, the court finds a genuine issue of material fact exists regarding whether the Transfers were made on account of antecedent debts. Under Ohio law, "it is beyond dispute that when a debtor owes a creditor several debts, the debtor, when making a payment to the creditor, has the right to direct its application accordingly." *Reliance Universal, Inc. v. Deluth Constr. Co.*, 67 Ohio St. 2d 56, 64 (1981). However, if the debtor fails to direct application of the payment, the creditor is free to apply the payment to his best advantage. *Swisher v. McWhinney*, 64 Ohio St. 343, 350 (1901); *Ohio Valley Mall Co. v.*

Lemstone, Inc., No. 00-CA-130, 2002 WL 924634, *8, 2002 Ohio App. LEXIS 7309, **24-25 (March 28, 2002).

In this case, Toncee argues that there can be no question that the November 3, 2006, wire transfer was not payment on an antecedent debt. In support of this argument, it directs the court to the affidavit testimony of Tony Davidow, president of Toncee, that "Toncee delivered goods consistent with all of Athol's pre-petition and post petition purchase orders and first credited moneys it held in its possession as of the Petition Date to pay for the delivery of goods post petition." [Davidow Aff. ¶ 10]. However, the court finds this testimony ambiguous as to whether the funds transferred on November 3, 2006, were held by Toncee on November 8, 2006, the date of filing. And Toncee offers no evidence showing the particular invoices against which the November 3 payment was applied.

In support of its argument that the October 27, 2006, wire transfer was for payment of goods that were yet to be delivered, Toncee simply relies on evidence that it had notified Athol that, as of October 23, 2006, it was setting off the amount that it owed for product purchased by it from Athol against amounts that Athol owed Toncee and that it had notified Athol that it was changing its billing arrangement to require Athol to pay all new invoices by wire transfer before delivery. However, there is no evidence showing how much was owed by Athol at that time and no evidence as to which invoices owed by Athol were the subject of its set off. Furthermore, the fact that Athol was notified that all new invoices must be paid by wire transfer before delivery does not mean that all wire transfers made by Athol were necessarily for payment of new invoices rather than for invoices for goods previously shipped. Thus, this evidence fails to show that there is no genuine issue of material fact as to whether the Transfers were made on account of an antecedent debt.

Plaintiff, for its part, offers the affidavit of David Distel, a managing director of the liquidating agent of the SAI Administrative Claims and Creditor Trust. [Doc. # 26, Opposition, Ex. A]. Distel states that the Transfers were made on account of debt owed by Athol before the Transfers were made. [*Id.* at ¶¶ 8 & 13]. Toncee argues that the court should not consider the affidavit because Distel is not competent to testify since the statements in the affidavit are not based upon his personal knowledge. While the court agrees that portions of the affidavit testimony are not based upon personal knowledge, the court finds his testimony that exhibits 2 and 3 attached to his affidavit are true and accurate copies of Athol's Accounts Payable Check Register are admissible. These documents are documents that a liquidating agent charged with the duty of managing the liquidation of any remaining assets of the debtor and vested with the authority to pursue any

avoidance actions on behalf of the liquidating debtor, as is the case here, would typically have obtained from the debtor. In fact, Toncee relies on some of the same documents in support of its argument that the wire transfers made on October 30 and 31, 2006, were not on account of antecedent debt. [*Compare* Def. Ex. 5 & 6 *with* Distel Aff., Ex. 3]. Exhibit 2 shows that the October 27, 2006, wire transfer was made in the exact amount of the total invoices dated October 3 and 4, 2006, less a credit entered on October 1. Similarly, the exhibit also shows that the November 3, 2006, wire transfer was made in the exact amount of the balance owed by Athol on invoices dated October 10 through 26, 2006, plus a wire charge of $264.03 on October 31, 2006, plus invoice numbers 27975 and 27976 dated November 6 and 7, 2006.

Nevertheless, while these documents are evidence of the manner in which Athol applied the Transfers in its records, the issue is whether Athol directed Toncee to apply them in this manner. Absent such direction, Toncee was at liberty to apply the Transfers to payment of goods that had not yet been delivered rather than to antecedent debt. Although Plaintiff offers the affidavit testimony of Distel that Athol sent a facsimile to Toncee directing it to apply, at least in part, the November 3 wire transfer to invoices dating from October 10, 2006, to October 26, 2006, the court agrees, as argued by Toncee, that neither this testimony nor the facsimile attached to the affidavit as exhibit 4 is proper evidence that the court may consider. There is no basis for finding that Distel has personal knowledge of the fact that the attached facsimile was sent to Toncee. He does not state that he was an employee of Athol, but rather that he is an employee of the liquidating agent appointed after the facsimile was allegedly sent. Moreover, to the extent that the facsimile is directing application of the November 3 wire transfer, such direction is not clear to the court by simply examining the facsimile, which apparently also included an attachment that is not included as an exhibit.

In light of the foregoing, the court finds a material issue of fact exists as to whether the Transfers were made on account of antecedent debt. As such, Toncee is not entitled to summary judgment on this claim.

IV. Avoidance of Fraudulent Transfers Under § 548(a)(1)(B) & Postpetition Transfers under § 549 (Counts II and III)

In Count II of the complaint, Plaintiff alleges that one or more of the transfers at issue in the complaint are avoidable under § 548(a)(1)(B). In order to prevail, Plaintiff must show that Athol received less than a reasonably equivalent value in exchange for the transfers. The term "value" is defined as "property, or satisfaction or securing of a present or antecedent debt of the debtor. . . ." 11 U.S.C.

§ 548(d)(2)(A). Toncee argues that Plaintiff cannot meet its burden since no evidence exists showing that Toncee did not provide value consisting of goods shipped to Athol as part of the transactions alleged to be avoidable. To be sure, with respect to issues on which the nonmoving party bears the burden of proof, the burden on the moving party may be discharged by pointing out to the court that there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In this case, Plaintiff offers no evidence showing that Athol did not receive reasonably equivalent value for each of the transfers alleged to be avoidable. Toncee is, therefore, entitled to summary judgment on Plaintiff's § 548 claim.

In Count III of the complaint, Plaintiff alleges that it is entitled to avoid any unauthorized transfer made after the date Athol filed its bankruptcy petition pursuant to § 549 of the Bankruptcy Code. While unauthorized postpetition transfers may be avoided under § 549, all of the transfers alleged to be avoidable were made prepetition. As such, Toncee is also entitled to summary judgment on this claim.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Toncee's motion for summary judgment [Doc. # 23] be, and hereby is, **GRANTED** as to Counts II and III of the complaint and is otherwise **DENIED**; and

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment [Doc. # 26] be, and hereby is, **DENIED** as untimely filed.