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U.S. BANKRUPTCY COURT
New Mexico

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03-01065-s Notice will be electronically mailed to:
Manuel Lucero manny.lucero@usdoj.gov, diana.contreras@usdoj.gov

Shay E Meagle smeagle@puccinilaw.com, pmlaw@puccinilaw.com

Chris W Pierce chriswpierce@hotmail.com, velardepc@hotmail.com

Louis Puccini pmlaw@puccinilaw.com

Stephanie L Schaeffer sschaeffer@jtwlawfirm.com

David T Thuma mhyman@jtwlawfirm.com

Thomas D Walker tdwalker@jtwlawfirm.com

03-01065-s Notice will not be electronically mailed to:
David C Iglesias
PO Box 607
Albuquerque, NM 87103-0607

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURR'S SUPERMARKETS, INC.,
Debtor. No. 7-01-10779 SA

YVETTE J. GONZALES, TRUSTEE,
Plaintiff,
v. Adv. No. 03-1065 S

UNITED STATES POSTAL SERVICE, et al.,
Defendants.

MEMORANDUM OPINION ON DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT (doc 88)

This matter is before the Court on the Joint Motion ("Motion") by Defendants United States Postal Service ("USPS") and Amplex Corporation ("Amplex") for Summary Judgment (doc 88), the Response thereto by Plaintiff (doc 90) and the Amended Response thereto by Plaintiff (doc 102). This adversary proceeding to recover preferential transfers is a core proceeding. 28 U.S.C. § 157(b)(2)(F)[1]. The parties representatives are listed in the service section below.

SUMMARY JUDGMENT STANDARDS

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056(c). In determining the facts for summary judgment purposes, the Court may rely on affidavits made with personal knowledge that set

[1]All statutory and rule references are to the Bankruptcy Code as it existed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

forth specific facts otherwise admissible in evidence and sworn or certified copies of papers attached to the affidavits. Fed.R.Civ.P. 56(e). When a motion for summary judgment is made and supported by affidavits or other evidence, an adverse party may not rest upon mere allegations or denials. Id. The court does not try the case on competing affidavits or depositions; the court's function is only to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

FACTS

The facts in this case are relatively undisputed[2]. The Court finds:

1. Amplex and Furr's Supermarkets, Inc. ("Furr's" or "Debtor") entered into a Stamp Consignment Agreement ("SCA") on March 1, 1996. A copy is attached to the Motion as Exhibit A.
2. On October 25, 1996, Furr's executed a Security Agreement ("SA") in favor of Amplex. A copy is attached to the Motion as Exhibit B.
3. Pursuant to the SCA, Furr's agreed to sell stamps on a consignment basis.
4. The SCA provided that Furr's was a "consignee."

[2]For the purposes of this Memorandum, the Court assumes that both Amplex and the USPS were both creditors holding security agreements. This issue is before the Court in other motions, and will be dealt with there.

5. The SCA provided that Amplex and Furr's understood that the agreement was for consignment sales and that neither party received title to the stamps.

6. The SCA provided that the "USPS will incur no liability at all to the consignee under this agreement."

7. Pursuant to the SA, Amplex was granted a security interest in all USPS stamps then or thereafter provided or consigned by Amplex to Furr's pursuant to the SCA and Furr's assigned all of its rights in and to the stamps to Amplex. The SA further provided that Amplex was granted a security interest in all substitutes for, replacements for, proceeds of, and returns of stamps.

8. The SA further provided that Furr's would not permit any other security interest or liens to be created or perfected against the stamps, and would keep the collateral free from any other liens or encumbrances.

9. Furr's executed and Amplex recorded a Financing Statement on November 25, 1996 perfecting Amplex's security interest in all United States Postal Service stamps now or hereafter provided on consignment by Amplex to Furr's and in/on all substitutes for, replacements for, proceeds of, and return or such stamps, pursuant to the March 1, 1996 SCA. A copy of the Financing Statement is attached to the Motion as Exhibit C.

10. As of the filing of the Furr's Chapter 11 bankruptcy on February 8, 2001, Amplex's UCC Financing Statement had not lapsed. This is really a legal conclusion, but the parties so stipulated.

11. Defendants claim that their status as a secured creditor is governed by the former UCC Article 9. Plaintiff denies this as a legal conclusion. The Court agrees it is a legal conclusion.

12. The USPS and Amplex entered into a contract on January 31-February 1, 1996, and entered into a number of subsequent amendments (together, the "USPS Contract"). A copy of the USPS Contract is attached to the Motion as Exhibit D.

13. Pursuant to the USPS Contract, the consignees of the contractor would be required to remit payment for consigned postage stamps to a USPS designated and provided lock box bank account.[3]

14. Pursuant to the USPS Contract, the stamps were to be consigned to the consignees (e.g., Furr's) by the "contractor" (i.e., Amplex).

15. Pursuant to the USPS Contract, Amplex was required to provide contractor support for the nationwide Stamps on Consignment ("SOC") program, which was designed by the USPS

[3]Plaintiff did not respond to this alleged undisputed fact, so it is deemed admitted by NM LBR 7056-1.

to place postage stamps into commercial retail outlets for sale to the general public.

16. Pursuant to the USPS Contract, consignment sales were to be accomplished through a Retailer Consignment Agreement between Amplex and the retailer/consignee (e.g., Furr's). Such Retailer Consignment Agreement form was provided by the USPS.

17. Exhibit A to Attachment No. 1 to the USPS Contract is a true and accurate copy of the USPS Retailer Consignment Agreement form and is the same form used for the SCA between Amplex and Furr's.

18. Pursuant to the USPS Contract, Amplex was fully responsible for the consigned stamp stock until proceeds were deposited by the consignee (Furr's) into the USPS lockbox account.

19. Pursuant to the USPS Contract, Amplex's responsibility was "co-extensive with that of a consignee retailer during the period such retailer has responsibility for the stock" and Amplex must pay the USPS if the consignee fails to pay.

20. Amplex did in fact pay to the USPS the $122,400.00 which was owed by Furr's upon the Petition date.

21. The USPS Contract provided that "stamps provided to the contractor are to be distributed to consignee retailers for sale to the public as consignment sales. The contractor understands that the USPS retains title to the stamps until

their sale to the public, and that neither it nor its employees are to be considered USPS employees for any purpose whatsoever."

22. The USPS Contract required that Amplex ensure that a Financing Statement (UCC-1) was filed with regard to USPS stock provided to each consignee.

23. Furr's knew about the USPS Contract and it was familiar with the pertinent terms of the USPS Contract. Plaintiff denied this proposed fact for lack of knowledge; this was insufficient to put the fact in doubt.[4] Rather, Plaintiff must point to specific evidence in the record to controvert the fact.

24. Plaintiff's Response to the Motion included the affidavit of Rachel Kefauver, which states in part:

> 8. I understand from accounting records provided by Amplex Corporation that Amplex shipped no stamps to Furr's in December, 2000.
> 9. Based on the past rate of stamp sales, Furr's likely ran out of stamps at some point in December, 2000.
> 10. Given the past sales rate, the stamps shipped in January, 2001 would have been almost completely sold by February 8, 2001.

The Response also included the affidavit of Sandra Dunlap, which states in part:

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[4] See Fireman's Ins. Co. of Newark, New Jersey v. DuFresne, 676 F.2d 965, 969 (3rd Cir. 1982).

3. After January 1, 2001, every business day, each Furr's grocery store deposited its daily receipts in a local bank account. This included any sales proceeds from the sale of postage stamps.
4. That night the daily deposits of each local bank account would be "swept" into a bank account in Albuquerque, New Mexico (the "Blocked Account").
5. While Furr's Supermarkets Inc. Was shown as the "owner" of the Blocked Account, Furr's had no access to the funds that were swept into the Blocked Account. Rather, such funds were wired every business day to Furr's secured lenders.

DISCUSSION

Defendant's motion is based upon 11 U.S.C. §§ 547(b)(5) and (g). Those sections provide:

> (b) Except as provided in subsections ©) and (I) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
> ...
> (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
> ©) such creditor received payment of such debt to the extent provided by the provisions of this title.
> ...
> (g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection ©) of this section.

Defendants argue that the Plaintiff cannot prove that they were undersecured creditors at any point during the preference period and cannot show that they were undersecured at the time of any specific transfer. Therefore, they argue the Plaintiff fails to

meet her burden of proof of establishing a prima facie case as required by Section 547(g).

It is generally true that a payment to a fully secured creditor is not preferential. Sloan v. Zions First Nat'l Bank (In re Castletons, Inc.), 990 F.2d 551, 554 (10th Cir. 1993); Committee of Creditors Holding Unsecured Claims v. Koch Oil Co. (In re Powerline Oil Co.), 59 F.3d 969, 972 (9th Cir. 1995), cert. denied, 516 U.S. 1140 (1996). The problem with Defendants' argument, however, is that the secured status of the creditor is measured on the day of the bankruptcy filing. Castletons, 990 F.2d at 554 ("[T]he petition date is the relevant date for purposes of the hypothetical creditor test under § 547(b)(5).") (Emphasis in original). See also Neuger v. United States (In re Tenna Corp.), 801 F.2d 819, 822 (6th Cir. 1986)(The preferential effect of a payment is to be tested as of the date the petition is filed.)

If a creditor is fully secured on the petition date, there is no preference. Alvarado v. Walsh (In re LCO Enterprises), 12 F.3d 938, 941 (9th Cir. 1993).

If a creditor is not fully secured on the petition date, there generally is a preference, even if the creditor was fully secured at the time it was paid. Official Unsecured Creditors Committee of Sufolla, Inc. V. U.S. Nat'l Bank of Oregon (In re Sufolla, Inc.), 2 F.3d 977, 985 (9th Cir. 1993). See also James

J. White and Daniel Israel, Preference Conundrums, 98 Com. L. J. 1, 11-15 (1993)(Acknowledging that the date of bankruptcy is the proper date to determine the creditor's secured status.) However, if an undersecured creditor was paid from its own collateral, there is no preference. See Krasfur v. Scurlock Permian Corp. (In re El Paso Refinery, L.P.), 171 F.3d 249, 253-54 (5th Cir. 1999):

> The greater percentage test is most easily understood in the context of an unsecured creditor that receives prepetition payments. In that case, if the unsecured creditor received more than he would have if the payments had been retained by the estate and then distributed to all the unsecured creditors after paying the secured creditors in a bankruptcy proceeding, the unsecured creditor impermissibly received a greater percentage by preference. In contrast, a fully secured creditor who receives a prepetition payment does not receive a greater percentage than he would have in a bankruptcy proceeding because as a fully secured creditor he would have recovered 100% payment in a bankruptcy proceeding. Accordingly, a creditor who recovers his own collateral is not deemed to have recovered a greater percentage than he would have in bankruptcy. Similarly, an undersecured creditor who receives prepetition payments does not receive a greater percentage recovery when the source of the payments is the creditor's own collateral.

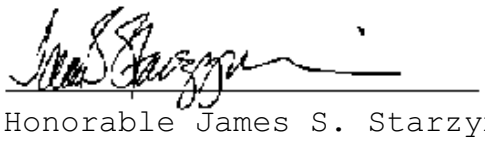
See also Rafael I. Pardo, On Proof of Preferential Effect, 55 Ala. L. Rev. 281, *6 (§ 3)(2004):

> The concern that arises with a prebankruptcy absolute transfer is that, by reducing the amount of debt owed to the transferee on the petition date, it potentially results in a corresponding decrease in the amount of any unsecured claim held by the transferee. To show the effect of such a transfer never having occurred, one merely adds the amount of the absolute transfer to the amount of debt owed to the transferee on the petition date and then proceeds with an analysis

> of the secured status of the claim. As a preliminary matter, absolute transfers of a transferee's own collateral do not have a preferential effect since a creditor is always entitled to its collateral. Explained in terms of the greater amount test, absent the transfer, the amount of debt owing to the transferee on the petition date would have increased by the amount of the transfer, but there also would have been a corresponding increase in the value of the transferee's interest in the collateral. The secured status of the transferee's claim remains unaltered by the transfer, and the transferee does not receive a greater amount by virtue thereof. Thus, as an initial matter, an absolute transfer will not have preferential effect unless it comes from a source other than the creditor's collateral (a "noncollateral source").

(Footnotes omitted.)

In this case, the Plaintiff established that there was a genuine issue of fact about whether the Defendants were fully secured on the petition date. The record at this point also fails to establish whether Defendants were paid from a noncollateral source. The Motion should be denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

copies to:

United States Trustee
PO Box 608
Albuquerque, NM 87103-0608

Shay E Meagle
Attorney for Amplex
PO Box 30707
Albuquerque, NM 87190-0707

David T Thuma
Attorney for Plaintiff
500 Marquette Ave NW Ste 650
Albuquerque, NM 87102-5309

Manuel Lucero
Assistant US Attorney
PO Box 607
Albuquerque, NM 87103-0607