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U.S. BANKRUPTCY COURT

New Mexico

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Case Number: [03-01065-s](#)

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Memorandum Opinion on Amplex's Second Motion for Summary Judgment (RE: related document(s)[96] Motion for Summary Judgment filed by Defendant Amplex Corporation) (jeb)

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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 AMPLEX'S
SECOND MOTION FOR SUMMARY JUDGMENT (doc 96)**

This matter is before the Court on Defendant Amplex Corporation's ("Amplex") Second Motion for Summary Judgment ("Motion") (doc 96), Plaintiff's Response (doc 105) and Amplex's Reply (doc 109). 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 forth specific facts otherwise admissible in evidence and sworn

¹All 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.

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 Court finds the following are undisputed:

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 Joint Motion for Summary Judgment (doc 88) 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 Joint Motion for Summary Judgment (doc 88) 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."
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 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.
7. 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.
8. 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."
9. Furr's knew about the USPS Contract and it was familiar with the pertinent items of the USPS Contract. Plaintiff denied this proposed fact for lack of knowledge; this was insufficient to put the fact in doubt. Rather, Plaintiff must point to specific evidence in the record to controvert the fact.
10. Furr's never paid any funds to Amplex. It only paid funds to the USPS.

11. Amplex's compensation was governed by the USPS Contract. Amplex was not given any part of any payments made to the USPS by any consignee, including Furr's.
12. Amplex's compensation from the USPS was not affected by whether or not the USPS was paid by Furr's.
13. Plaintiff's response to the Motion included excerpts from the deposition of Fred Hintenach, which included the following:
 - a. USPS's intent was to send the stamps to Amplex, retaining title and ownership, have Amplex send the stamps to retailers, and then have the retailers pay USPS for the stamps within 30 days of receipt.
 - b. USPS's intent was for Amplex to find retailers what would sell USPS postage stamps, and USPS would compensate Amplex for that, but Amplex would be responsible to determine whether the retailers were solvent. If the retailers failed to pay USPS for the stamps, Amplex had the responsibility to make up the difference.
14. The Court also finds that Exhibit D to the earlier Joint Motion for Summary Judgment (doc 88), contains a "Statement of Work", which states at ¶ 3.17:

Responsibility for Consigned Stock

The contractor shall be fully responsible for the consigned stock from the time it is delivered to the contractor until proceeds

from its sale are deposited by the consignee retailer into the USPS lockbox account, except that damaged or destroyed stock will be exchanged by the USPS at no cost in accordance with Domestic Mail Manual, Section P014, which reads ...

This responsibility is co-extensive with that of a consignee retailer during the period such retailer has responsibility for the stock (which is described in the attached model Retailer Consignment Agreement). The Contractor shall thus pay the USPS, 30 days after either a retailer's payment is due or a shortfall is deposited, for stock that is stolen or lost for any reason from the contractor or consignee retailer, or for any shortfalls in sales proceeds deposited into the USPS lockbox account due to a consignee retailer's bankruptcy, insolvency, or noncompliance with its Retailer Consignment Agreement for any reason, regardless of any rights or remedies the contractor may have against the consignee retailer.

DISCUSSION

Amplex's argument is that under the facts of this case they are not a "creditor", that Section 547 only allows avoidance of preferences paid to "creditors", and that therefore the case should be dismissed². The Court disagrees.

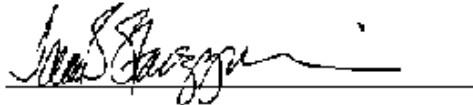
²Amplex also argues that the Plaintiff should be judicially estopped because in other contexts in this and the related bankruptcy case, the Trustee has asserted that Amplex is not a creditor. There are three requirements for judicial estoppel: 1) a party's later position must be "clearly inconsistent" with its earlier position, and the position to be estopped must be one of fact rather than one of law or legal theory, 2) the party must have succeeded in persuading a court to adopt the party's earlier position, and 3) the party seeking to assert the inconsistent position would derive an unfair advantage if not estopped. Johnson v. Lindon City Corp., 405 F.3d 1065, 1069 (10th Cir. 2005). In this case, the issue of whether Amplex is a creditor (continued...)

Bankruptcy Code section 101(10) states that the term "creditor" includes an entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor. Section 101(5) states that the term "claim" includes right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

In this case, each time Amplex made a delivery to Furr's, it became liable to USPS for the full amount of the delivery to Furr's in the event Furr's failed to pay the USPS within 30 days. Basically, Amplex became a guarantor of payment to the USPS. This guarantor liability resulted in Amplex having a contingent claim against Furr's for the full amounts of the deliveries. Contingent claims are claims, and therefore Amplex was a "creditor." Each payment made to USPS reduced Amplex's contingent liability to the USPS, which resulted in a benefit to Amplex. Therefore the challenged payments were "to or for the benefit of a creditor" as required by Section 547(b)(1). See, e.g., Clark v. Balcor Real Estate Finance, Inc. (In re Meridith Hoffman Partners), 12 F.3d 1549, 1554 (10th Cir. 1993) (Guarantors

²(...continued)
is a legal question, not a factual one. Furthermore, the Plaintiff has not obtained any ruling that Amplex is not a creditor. Therefore, Amplex fails to meet the first and second requirements for application of judicial estoppel.

receive more on their contingent claims than they would otherwise have received in a chapter 7 liquidation when preferential payments are made on the guaranteed debt.); Gosch v. Burns (In re Finn), 909 F.2d 903, 905 (6th Cir. 1990) (same). Of course, the Trustee can only obtain one satisfaction from the two defendants. See Bankruptcy Code Section 550(d). The motion for summary judgment should be denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

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