

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 01-30528

ACUSA.com, INC.

Debtor

MAURICE K. GUINN, TRUSTEE

Plaintiff

v.

Adv. Proc. No. 03-3027

THE MARINO GROUP

Defendant

**MEMORANDUM ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

APPEARANCES: GENTRY, TIPTON, KIZER & McLEMORE, P.C.
E. Jerome Melson, Esq.
Danny P. Dyer, Esq.
Post Office Box 1990
Knoxville, Tennessee 37901
Attorneys for Plaintiff

BAKER, DONELSON, BEARMAN, CALDWELL
& BERKOWITZ, P.C.
Suzanne H. Bauknight, Esq.
Riverview Tower, Suite 2200
900 South Gay Street
Knoxville, Tennessee 37902
Attorneys for Defendant

**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

The Debtor filed the voluntary petition commencing its Chapter 7 bankruptcy case on February 5, 2001. On February 4, 2003, the Plaintiff, Maurice K. Guinn, Trustee, filed the Complaint initiating this adversary proceeding, seeking to avoid and recover nine transfers totaling \$34,587.50 paid to the Defendant, The Marino Group, between March 1999 and March 2000, pursuant to 11 U.S.C.A. §§ 544(b)(1) and 550(a)(1) (West 1993 & Supp. 2003) and Tennessee Code Annotated section 66-3-305 (1993).¹ Additionally, the Trustee seeks to avoid and recover one of these transfers, in the amount of \$4,000.00, occurring in March 2000 pursuant to 11 U.S.C.A. §§ 548(a)(1)(B) and 550(a)(1) (West 1993 & Supp. 2003). The Defendant filed its Answer on March 21, 2003, denying that the transfers are avoidable. Presently before the court is the Motion for Summary Judgment filed by the Defendant on July 28, 2003. The Plaintiff filed his Response to Defendant's Motion for Summary Judgment on August 18, 2003.²

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (B), (H), (O) (West 1993).

¹ The nature of the Plaintiff's action and the date and amount of the transfers are set forth in this Memorandum as pled by the Plaintiff in his Complaint. The transfers are admitted by the Defendant in its Answer filed March 21, 2003. However, the Pretrial Order prepared by the parties which was entered by the court on May 28, 2003, incorrectly recites that the Plaintiff's avoidance action arises exclusively under § 548. The parties will be directed to file an amended pretrial order to correctly set forth the Plaintiff's claim.

² On April 8, 2003, the Plaintiff filed an Objection to the Defendant's Proof of Claim in the amount of \$56,882.83 pursuant to 11 U.S.C.A. § 502(d) (West 1993). The Defendant filed an Amended Proof of Claim on July 21, 2003, in the amount of \$174,775.43, and the Plaintiff has filed an Objection to Amended Proof of Claim. The Plaintiff's Objection was consolidated with this adversary proceeding pursuant to the Pretrial Order entered by the court on May 28, 2003.

I

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c) (applicable to adversary proceedings pursuant to FED. R. BANKR. P. 7056).

When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter, but instead, simply determines whether a genuine issue for trial exists. *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact, thus entitling it to judgment as a matter of law. *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). The burden then shifts to the nonmoving party to produce specific facts showing a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986) (citing FED. R. CIV. P. 56(e)). The nonmoving party must cite specific evidence and may not merely rely upon allegations contained in the pleadings. *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000). The facts and all resulting inferences are viewed in a light most favorable to the nonmoving party, *Matsushita*, 106 S. Ct. at 1356, whereby the court will decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 106 S. Ct. at 2512.

II

The Plaintiff's first cause of action is based upon § 544(b), which allows a trustee to avoid a transfer of the debtor's property "that is voidable under applicable law." 11 U.S.C.A. § 544(b)(1). The applicable nonbankruptcy law, in this case, is Tennessee Code Annotated section 66-3-305, entitled "Conveyances by insolvent without fair consideration declared fraudulent," and which provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to such person's actual intent, if the conveyance is made or the obligation is incurred without a fair consideration." TENN. CODE ANN. § 66-3-305. "When a conveyance is made without a fair consideration by an insolvent debtor, the conveyance is fraudulent as a matter of law without regard to either the grantor's or grantee's intent." *Mid-So. Bank & Trust Co. v. Quandt Estate*, No. 01A01-9403-CH-00107, 1995 Tenn. App. LEXIS 682, at *18 (Tenn. Ct. App. Oct. 20, 1995). "Whether a transfer is fraudulent is determined by the facts and circumstances of each case." *Muller v. Lannom*, No. 02A01-9702-CH-00043, 1997 Tenn. App. LEXIS 904, at *9 (Tenn. Ct. App. Dec. 17, 1997).

The Defendant moves for summary judgment on the basis that the Plaintiff has not proved that the Debtor did not receive fair consideration in exchange for the \$34,587.50 paid to the Defendant. Additionally, the Defendant states that there is no proof that the Debtor was either insolvent at the time of the transfers to the Defendant or that it was rendered insolvent by the transfers.

For the purposes of this statute, fair consideration is defined as follows:

Fair consideration is given for property, or obligation:

(1) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied; or

(2) When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property or obligation obtained.

TENN. CODE ANN. § 66-3-304 (1993). “Whether a conveyance has been made for a fair consideration is generally a question of fact to be decided by the jury.” *Mid-So. Bank & Trust Co.*, 1995 Tenn. App. LEXIS 682, at *19.

Additionally, insolvency is defined as “[a] person is insolvent when the present fair salable value of the person's assets is less than the amount that will be required to pay the probable liability on such person's existing debts as they become absolute and matured.” TENN. CODE ANN. § 66-3-302 (1993). “The debts that enter into the test for insolvency are the ones in existence when the conveyance is made. They may become due and payable at a future date, but they must be in existence at the time.” *Crocker v. Ryan*, 914 S.W.2d 551, 553 (Tenn. Ct. App. 1995).

The parties do not dispute that the Defendant entered into a Services and Consulting Agreement dated May 1, 1999, with The Northland Group nor do they dispute that the Debtor made nine payments to the Defendant between March 1999 and March 2000 totaling \$34,587.50. However, there are genuine issues of material fact as to whether the Debtor obtained fair consideration from the Defendant in exchange for the transfers totaling \$34,587.50, particularly as they relate to the Agreement with The Northland Group, which the Defendant argues was for

the benefit of the Debtor. Taking the evidence presented in the light most favorable to the Plaintiff, as the nonmoving party, the court does not believe that the evidence is "so one-sided that [the Defendant] must prevail as a matter of law." *Anderson*, 106 S. Ct. at 2512.

III

The Plaintiff's second cause of action is based upon § 548(a), under which the Plaintiff is required to establish the following four elements:

(1) a transfer of property of the debtor; (2) an exchange for less than reasonably equivalent value; (3) the debtor must have been insolvent on the date the transfer was made or rendered insolvent as a result of the transfer; and (4) the transfer occurred within one year preceding the petition date.

Bailey v. Metzger, Shadyac & Schwarz (In re Butcher), 72 B.R. 447, 449 (Bankr. E.D. Tenn. 1987); *see* 11 U.S.C.A. § 548(a)(1)(B)(i), (ii)(I) (West 1993 & Supp. 2003). In this case, only one of the nine previously discussed transfers, in the amount of \$4,000.00, occurred within one year of the bankruptcy filing. The Defendant moved for summary judgment, arguing that the Debtor received a reasonably equivalent value from the Defendant, in the form of advertising services, in exchange for the \$4,000.00 payment received in March 2000. The other elements do not appear to be in dispute regarding this transfer.

"In assessing whether a challenged transfer is supported by reasonably equivalent value, courts generally compare the value of the property transferred with the value of that received in exchange for the transfer." *Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 707 (6th Cir. 1999). Clearly, "the contractual right to receive payment in the event that it turns out well is obviously worth something." *Allard v. Flamingo Hilton (In re Chomakos)*, 69 F.3d 769, 771 (6th Cir. 1995).

Nevertheless, "valuation considerations are inherently fact-laden, turning on the case-specific circumstances surrounding the debtor's decision to enter into the challenged transaction." *Lowe v. BRB Enters., Ltd. (In re Calvillo)*, 263 B.R. 214, 200 (W.D. Tex. 2000); *see also Anand v. Nat'l Republic Bank of Chicago*, 239 B.R. 511, 517 (N.D. Ill. 1999); *Ames Dep't Stores, Inc. v. Wertheim Schroder & Co., Inc. (In re Ames Dep't Stores, Inc.)*, 161 B.R. 87, 90 (Bankr. S.D.N.Y. 1993).

Having already found that genuine issues of material fact exist as to whether the Debtor received fair consideration under Tennessee's fraudulent conveyance statute, the court likewise finds that genuine issues of material fact exist regarding whether the Debtor received a reasonably equivalent value in exchange for the \$4,000.00 paid to the Defendant, and therefore, summary judgment is not appropriate.

Finally, because there are genuine issues to be addressed as to the Plaintiff's causes of action under § 544(b)(1) and § 548(a)(1)(B), summary judgment is also not appropriate as to the Plaintiff's Objection to the Defendant's Proof of Claim. Moreover, because the Defendant's Amended Proof of Claim reflects an amount greater than reflected by the supporting documentation, there exists a genuine issue of material fact as to the amount of the Defendant's Amended Proof of Claim.

An appropriate order denying the Defendant's Motion for Summary Judgment will be entered.

FILED: September 9, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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ORDER

For the reasons stated in the Memorandum on Defendant's Motion for Summary Judgment filed this date, the court directs the following:

1. The Motion for Summary Judgment filed by the Defendant on July 28, 2003, is DENIED.
2. The parties shall, within ten (10) days, tender an amended pretrial order correctly setting forth the Plaintiff's claims as pled in his Complaint.

SO ORDERED.

ENTER: September 9, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE