Minutes of Proceedings

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Date: June 6, 2006		
In re AMES DEPARTMENT STORES, INC ., et al .,		
	Debtors.	Case No. 01- 42217(REG)
LFD OPERATING, INC .,		
	Plaintiff,	Adv. Pro. No. 01- 8153(AJG)
- against -		
GENERAL ELECTRIC CAPITAL CORPORATION,		
	Defendant.	

Present: Hon. Arthur J. Gonzalez, Bankruptcy Judge — Jacqueline De Pierola, Courtroom Deputy — _____, Court Reporter

Plaintiff: LFD Operating, Inc. — Counsel: Butler, Fitzgerald, Fiveson & McCarthy
By: David McCarthy, Esq.

Defendant: General Electric Capital Corp. — Counsel: Winston & Strawn LLP
By: J. David Reich, Esq.
By: Edward C. Wipper, Esq.

Proceeding: Opinion on Motion for Summary Judgment filed by Defendant GE Capital Corporation.

Order: For the reasons set forth in the opinion attached hereto as Exhibit A, the relief sought is

X Granted □ Denied

Further, the adversary proceeding is dismissed with prejudice. The Clerk of the Court is directed to enter judgment in favor of General Electric Capital Corporation.

FOR THE COURT: Kathleen Farrell, Clerk of the Court
BY THE COURT:

s/Arthur J. Gonzalez — 06/06/2006 — Jacqueline De Pierola
United States Bankruptcy Judge — Date — Courtroom Deputy

Exhibit A

FACTS

The issue before the Court is whether to grant the motion for summary judgment (the "Summary Judgment Motion") filed by General Electric Capital Corporation (the "Movant," alternatively "GE Capital") against LFD Operating, Inc. ("LFD") on collateral estoppel grounds based on this Court's March 8, 2002 memorandum decision (the "Memorandum Decision"), and the resulting March 19, 2002 Order and Judgment, which dismissed on the merits all of LFD's claims in an adversary proceeding commenced by LFD against Ames on September 6, 2001 (the "LFD-Ames Action").

As of March 2, 2001, Ames Department Stores, Inc. ("Ames") and various affiliated entities entered into a credit agreement (the "Revolver") with a syndicate of banks and financial institutions, including GE Capital as a lender and agent (collectively, the "Pre-Petition Lenders"). GE Capital was collateralized by, among other things, Ames's inventory and cash proceeds from all sources. However, at no time was GE Capital collateralized by LFD's inventory. One of the sources of the collateralization was the sale proceeds from Ames's operations. Sales proceeds from Ames's stores that were deposited in its accounts included monies from the sales of both LFD's merchandise and Ames's merchandise. Ames would transfer certain of these monies into lock box accounts (the "Lock Box Accounts") and then to certain blocked accounts (the "Blocked Accounts").

From at least February 2001, Ames's Pre-Petition Lenders would sweep all funds from the Blocked Accounts into a concentration account. GE Capital applied the funds it swept according to the terms of the Revolver. Upon Ames's request, Pre-Petition

Lenders would advance to Ames funds up to the limits of credit availability under the Revolver. Ames's Pre-Petition Lenders advanced funds to Ames by depositing such into a blocked Disbursement Account ("Disbursement Account") consisting of funds provided exclusively by GE Capital. The Disbursement Account was used to fund the continuing operations of Ames, including payroll, and operating expenses.

On August 20, 2001, Ames and certain affiliated entities filed voluntary Chapter 11 bankruptcy cases in the United States Bankruptcy Court for the Southern District of New York. The cases were assigned to the Honorable Robert E. Gerber. GE Capital, as agent, and other lenders (collectively, the "Post-Petition Lenders") provided a debtor-in-possession credit facility up to $700 million under that certain Debtor-In-Possession Credit Agreement dated August 20, 2001, and other agreements, instruments and documents related thereto (collectively, the "DIP Loan Documents"). As part of the court-approved DIP loan agreement, Ames agreed to abide by the terms and conditions of certain pre-petition loan agreements, among them an indemnification of GE Capital.

Ames continued to operate its business until it became clear in August 2002 that it could not successfully reorganize as an ongoing business and would have to be liquidated.

As stated previously, on September 6, 2001, LFD filed the LFD-Ames Action for declaratory and other relief against Ames. LFD was a licensee that sold footwear and other related merchandise in Ames's stores. LFD's complaint was premised on Ames's failure to pay monies allegedly held in trust by Ames and due LFD and which were instead paid over to Ames's lenders, including GE Capital. The payments at issue occurred when GE Capital swept funds according to the terms of the Revolver. LFD

alleged in its complaint that such proceeds were its property. LFD asserted that Ames was obligated to turn over the proceeds, minus certain expenses, to LFD and Ames had failed to do so. LFD referred to the net amount of monies due them as the "Proceeds." [1]

Also, on September 6, 2001, LFD filed an action, this one against GE Capital (the "LFD-GE Capital Action"), in the Supreme Court of the State of New York, County of New York. The LFD-GE Capital Action was predicated on the same set of facts and underlying legal theories. Specifically, LFD alleged that GE Capital's receipt of the proceeds from Ames under the terms of the Revolver was in fact the receipt of LFD's proceeds. In this action, LFD used the term "net proceeds." LFD in its complaint (the "Complaint) asserted three claims for relief (i) a cause of action for money had and received, (ii) a cause of action for an accounting, and (iii) a cause of action for conversion. All these causes of action were premised, either in law or equity, on the assertion that the net proceeds were property of LFD.

Further, the LFD-Ames Action was reassigned to the Court from Judge Gerber. The Court held hearings regarding LFD's request for a temporary restraining order on September 7, 2001 and September 24, 2001. The relief sought was, among other things, to require Ames to set aside approximately $9.0 million to ensure Ames's ability to satisfy LFD's demand for turnover of its alleged property if it were to prevail regarding the dispute over the property of the estate issue. The Court denied LFD's request on September 25, 2001. Thereafter, a discovery and trial schedule was agreed to and a trial was held on December 4, 2001.

[1] In the LFD-GE Capital Complaint, LFD makes reference to the same monies, with the only distinction being that they are referred to as the "net proceeds." In the Court's March 8, 2002 Memorandum Decision, the Court refers to the same monies as the "Net Sales Proceeds." The Court herein will refer to the monies as the "Proceeds," alternatively the Court will also refer to the monies generically as the funds.

By Notice of Removal dated October 4, 2001, GE Capital removed the LFD-GE Capital Action to this Court from state court pursuant to 28 U.S.C. §1452(a) and 28 U.S.C. §1441(a). The Notice of Removal asserted that LFD sought recovery of monies paid to GE Capital by Ames prepetition because LFD alleged the funds paid to GE Capital were really property of LFD. GE Capital asserted that the action was a core matter under 28 U.S.C. §157(b)(2)(A), (D), (E), (G), (K), and (O).

On October 11, 2001, in its Answer, GE Capital asserted four affirmative defenses, among other things, that as a result of the claims being adjudicated in the LFD-Ames proceeding, the LFD-GE Capital claim would, upon information and belief, become barred on the grounds of estoppel and/or res judicata. Further, GE Capital alleged that the LFD-GE Capital action was a core matter.

On October 15, 2001, LFD replied by denying GE Capital's allegations in its notice of removal, including that the action was a core proceeding. LFD, without waiving its right to seek remand on jurisdictional or any other grounds, asserted that upon removal, the action was at most a non-core proceeding and that LFD did not consent to final orders or judgments by the bankruptcy court.

By a motion dated October 16, 2001, LFD moved the Court to abstain from hearing the LFD-GE Capital Action, pursuant to 28 U.S.C. §1452 and 28 U.S.C. §1334(c)(2). In support of the abstention motion (the "Abstention Motion"), LFD's counsel asserted in an affidavit, also dated October 16, 2001, that this again was a non-core matter to which LFD did not consent to the bankruptcy court entering a judgment. Further, LFD asserted that it had not waived its right to a jury trial in this matter and argued that this matter could be adjudicated in a reasonable amount of time in state court.

Finally, LFD noted, if Ames became a liquidating bankruptcy, the adverse consequences of a LFD-GE dispute being heard in state court would not present a significant hindrance to the administration of the estate in that it would favor abstention under the timely adjudication analysis.

Each party submitted briefs and the Court heard oral arguments on November 1, 2001. The issues argued were the authority of a bankruptcy court to order mandatory abstention in a removed case and the traditional mandatory abstention analysis, specifically, whether or not the state court could timely adjudicate this matter.

As stated above, on December 4, 2001, the Court conducted a trial in the LFD-Ames matter.

On March 8, 2002, the Court issued its Memorandum Decision[2] finding that the Proceeds were not property of LFD, but were property of the Ames estate, and accordingly, the Court dismissed all of LFD's claims against Ames in the LFD-Ames Action. Further, the Court rejected LFD's allegations that Ames improperly managed funds that LFD contended should have been segregated by Ames for LFD's benefit. The Court further held that the course of dealing between LFD and Ames belied that interpretation of their contract.

Specifically, the Court noted that the parties' contract, which provided that any proceeds from the sale of LFD's merchandise would be sole property of the company, did not serve to remove the Proceeds from "property of the estate." Thus, the Court found the Proceeds were property of Ames rather than LFD.

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[2] *LFD Operating, Inc. v. Ames Dept Stores, Inc. (In re Ames Dept Stores)*, 274 B.R. 600 (Bankr. S.D.N.Y 2002).

The Court in its Memorandum Decision also held that while LFD may have exercised some control over aspects of the parties' relationship, it did not have a right to direct and control Ames's collection and handling of proceeds from the sale of the company's shoes, such that there was no agency relationship between the parties as to the Proceeds. The Court found it was permissible for Ames to deposit the Proceeds and commingle them with other monies as it saw fit, with Ames not being encumbered in its use of the Proceeds. In the context of an agency relationship, the court found, "LFD, therefore, has no control or right to control how the proceeds are processed by Ames and where the Net Sales Proceeds are ultimately deposited…. Because LFD had no right to alter or direct any aspect of this process under the *Agreement,* LFD had no control over the use of the Net Sales Proceeds once the funds were placed in Ames's cash management system." *In re Ames Dept. Stores, Inc.*, 274 B.R. 600, 620-621 (Bankr. S.D.N.Y. 2002).

Additionally, the Court found that no "fiduciary relationship" existed between Ames and LFD, such as might support imposing a constructive trust on the Proceeds. The Court also dealt with the issue of unjust enrichment, the key requirement for the imposition of a constructive trust. As a basis for a constructive trust, LFD argued that conversion of its property had occurred when Ames took and transferred the Proceeds. The Court, therefore, analyzed the requirements for conversion under New York law, specifically whether Ames exercised unauthorized control of the Proceeds, which interfered with a superior possessory right of another, LFD, in the property, the Proceeds. The Court noted that the conversion theory would fail, in part because the Court had already determined that the Proceeds were property of Ames and not LFD. The Court also noted that the agreement between Ames and LFD did not give LFD the right of

immediate superior possession. Furthermore, the funds LFD received as payment from the sale of its merchandise were not identical funds to the Proceeds.

The Court also found that since LFD's failure to satisfy the elements of conversion as a basis for the imposition of a constructive trust, Ames was not unjustly enriched. The Court considered the sophisticated level of negotiation that brought about the agreement, which had been in place for well over ten years, between Ames and LFD and its arms-length nature as an indication that unjust enrichment had not occurred. The Court also noted that "[u]nder the circumstances of this case and considering the sophistication of both Ames and LFD, the Court finds that it would be equitable for Ames to retain the benefits of the Net Sales Proceeds." *In re Ames Dept. Stores, Inc.*, 274 B.R. at 630.

The Court issued an order dated March 19, 2002 (the "March 19 Order") in accordance with its March 8, 2002 Decision. LFD appealed that order.

On April 1, 2002, GE Capital filed the Summary Judgment Motion seeking dismissal of all the causes of action brought against it in the LFD-GE Capital Action. In its moving papers, GE Capital contends that this Court's ruling in the LFD-Ames Action is collateral estoppel as to LFD's claims in the LFD-GE Capital Action due to the March 19 Order. More specifically, GE Capital contends that LFD cannot recover damages from GE Capital for money it had and received or conversion of proceeds where a final determination has already been made in the LFD-Ames Action that LFD did not own such monies. GE Capital also contends that LFD cannot seek an accounting where it has already been finally determined that there was no fiduciary relationship between LFD and Ames.

On April 19, 2002, LFD filed a motion for a stay of GE Capital's Summary Judgment Motion. GE Capital responded in opposition on May 3, 2002, requesting the Court deny LFD's request for a stay. However, if the Court were to exercise its discretion to grant a stay, GE Capital requested that the stay encompass all matters in that proceeding. LFD filed a reply to GE Capital's response on May 6, 2002. The matter was fully submitted at that time. Thereafter, the Court issued its order, dated July 1, 2002, (the "July 1 Order"), staying the LFD-GE Capital Action and stating that it would not determine the Abstention Motion until the District Court rendered a decision in the LFD-Ames appeal, and that the stay was also contingent pending further order of the Court. Following the September 1, 2004 decision of the District Court affirming the Memorandum Decision, LFD appealed to the Second Circuit.

The July 1 Order has never been appealed nor has there been any effort to modify or reconsider such order. The Court notes that neither party, at anytime, sought any relief from the July 1 Order, prior to the January 13, 2006 presentment order, discussed below, which Ames initially brought before the Court.

Regarding the Ames main case proceedings, on August 14, 2002, it announced that it would liquidate and close all of its then remaining stores. On August 16, 2002, Judge Gerber authorized going out of business sales (the "GOB Sales") at all then remaining stores and centers. On September 30, 2002, a stipulation was entered whereby Ames and the Credit Parties, as such term is defined therein, agreed to establish two reserves (i) one regarding a dispute over fees (the "Fee Disputes") to be established in the amount of $14 million, and (ii) one regarding the indemnification rights of Credit Parties regarding the LFD-GE Capital Action to be established in the amount of $11.5 million.

The total amount of the Fee and LFD Reserve to be established under the stipulation was $25.5 million. The reserve was to be funded from the proceeds of the GOB Sales. (Docket #1217). The amount Ames placed in escrow, as of November 2, 2002, was $31.5 million, pursuant to the stipulation dated September 30, 2002. (Docket #1802). Therefore, as of November 2002, the escrow fund was fully funded. However, the amount in escrow, as of December 31, 2005, was $16.5 million. (Docket #2945). Since no disbursement of the funds in escrow would have been made as a result of the LFD-GE Capital Action, the Court assumes that this reduction is attributable to a resolution or payment of the Fee Disputes and that the LFD litigation portion of the escrow is fully funded at $11.5 million. (Docket #1802).[3]

On November 21, 2003, Judge Gerber signed an order authorizing the debtor to purchase allowed but unpaid administrative claims at 50% of their value from trade vendors and landlords, and 40% of their value from employee wage claims. On February 26, 2004, in a decision issued by Judge Gerber in the Ames case, he referenced in a footnote the precarious state of Ames to pay its obligations to its creditors and further noted that the Ames estate stands in "material risk" of administrative insolvency. *In re Ames Dept. Stores, Inc.*, 306 B.R. 43, 47-48, 53 (Bankr. S.D.N.Y. 2004) "[T]hough it is possible that the estate's efforts to sell property and recover in avoidance actions could ultimately be sufficient to make some distribution to unsecured creditors. Since the time that this substantial risk of administrative insolvency has been recognized, the Court has considered only the *allowability* of administrative expense claims, and *payment* on allowed administrative expense claims has been deferred, to permit administrative

[3] The parties seem to be under a misconception that the amount of money held in escrow for the LFD-GE Capital Action is not public knowledge. However, the information is available by looking at the docket in the Ames case (01- 42217) at docket #'s 1217.

expense claims to be paid *pari passu*, if necessary." *In re Ames Dept. Stores, Inc.*, 306 B.R. at 53. In the December 31, 2005 Monthly Operating Report, Ames reports that it has $16.5 million in an escrow account and references the September 30, 2002 stipulation. Also, in the operation report, Ames indicates that it has approximately $13.5 million of cash. Docket #2945.

Regarding the LFD-Ames Action, as stated previously, by opinion and order dated September 1, 2004, the District Court affirmed the Court's March 19 Order and judgment. The Second Circuit affirmed the September 1, 2004 judgment of the District Court decision affirming the Memorandum Decision by Summary Order.

LFD did not seek any further review of the Memorandum Decision. Its appellate rights expired as of November 8, 2005. Following that date, neither LFD, nor GE Capital, notified the Court of the Second Circuit Summary Order, which upheld the findings of this Court's Memorandum Decision.

On December 12, 2005, the Court received a letter from special counsel to the Creditor's Committee for Ames. All the interested parties in this matter received a copy, including LFD and GE Capital. The letter gave a brief history of the matter and noted that LFD's time to seek appellate relief had expired. Furthermore, the letter noted that the matter was ripe for the Court to proceed with a decision on the Summary Judgment Motion.

Additionally, the letter further noted that special counsel to the Creditors' Committee, along with co-counsel for the debtor, had contacted GE Capital numerous times to request that they notify the Court of the outcome of the LFD-Ames appeal and/or that they take action to dismiss this matter. The letter noted that GE Capital was

unresponsive to these requests. Further, the letter indicated that the desire of the Creditor's Committee to recover the funds held in escrow so as to make further distributions to the administrative creditors and, hopefully, to soon be in a position to confirm a plan.

On January 13, 2006, the Court received a request from Ames in the form of a Notice of Presentment of Order seeking that the Court grant the Summary Judgment and dismiss with prejudice LFD's adversary proceeding against GE Capital on the grounds that the decision in the LFD-Ames matter barred LFD's claims against GE Capital in this action on the grounds of estoppel or res judicata.

On January 23, 2006, LFD, by letter, objected to the entry of an order granting GE Capital's Summary Judgment motion and requested that the Court decide its abstention/remand motion before any further proceedings were conducted in this action. LFD argued that the recent Second Circuit case *Mt. McKinley Ins. Co. v. Corning Inc.*, 399 F.3d 436 (2d. Cir. 2005) had mooted much of GE Capital's objections to the Abstention Motion. Also on January 23, 2006, LFD submitted by Notice of Presentment an order granting LFD's motion for remand of the adversary proceeding. A review of the Court's records indicates that this is the first communication to the Court by LFD since the May 6, 2002 response to the stay motion that resulted in the July 1 Order.

On January 25, 2006, GE Capital objected by letter to the assertions of LFD's January 23 letter. GE Capital noted that the issue of whether or not mandatory abstention can apply to removed cases, consistent with the language of section 1334(c)(2), was resolved in the affirmative by the Second Circuit in *Mt. McKinley*. However, GE Capital argued that even under the recent case law, LFD would still fail certain key elements of

the abstention analysis, namely, that mandatory abstention is not warranted unless the proceeding can be timely adjudicated in the state court. GE Capital argued that this Court was uniquely situated to resolve this matter and release the funds currently held in escrow for distribution to Ames's creditors.

Also, on January 25, 2006, this Court held a status conference regarding the presentment orders. During that conference, in reference to a question from the Court as to why this matter was still pending and the comment that it seemed to be a colossal waste of time to continue the process, LFD's counsel stated, that this Court and Second Circuit had resolved the property issues, but that it intended to seek leave to amend its complaint to assert a cause of action based on the tortious interference with the contract.

Also, at the January 25, 2006 status conference, Ames's counsel stated that the significant amount of money that had been posted in escrow to support any GE Capital indemnification claim would be immediately available for distribution to Ames's administrative creditors if judgment were entered against LFD. No one disputed that assertion.

Further, at the January 25, 2006 status conference, each side raised *Mt. McKinley* and its possible effects on the Abstention Motion. The Court ordered the parties to submit briefs on the issue of abstention limited to the *Mt. McKinley* issue.

On February 2, 2006, the Court *sua sponte* conducted a conference call and directed that, in light of the representations made by LFD's counsel regarding LFD's intention to amend its Complaint, it was appropriate that, in making its determination on the motion for abstention, the Court consider the full and actual complaint that would be presented to the state court if the motion were granted. The Court set a deadline of thirty

days from the date of the conference, March 3, 2006, for LFD to amend its Complaint. The Court stated that the failure of LFD to amend its Complaint would result in a bar of any further amendment, unless good cause was established for relief from such bar.

The Court's directions from the February 2, 2006 conference call were reflected in a February 16, 2006 order (the "February 16 Order"), which was entered over LFD's objections set forth in its letter to the Court dated February 8, 2006. The February 16 Order set forth that any motion for leave to amend the Complaint was to be filed by March 3, 2006. Furthermore, in the event a motion for leave to amend the Complaint were not filed by March 3, 2006, LFD would be barred from amending the Complaint, absent a further order finding good cause shown for relief from such bar. Additionally, any opposition to a timely motion for leave to amend the Complaint would have to be filed by March 17, 2006. Finally, the schedule for supplemental briefing in connection with LFD's Motion for Abstention, which was to relate only to the *McKinley* case, was to be amended. Any submission by LFD was required to be filed by March 24, 2006 and any submission by GE Capital was to be filed by April 3, 2006. On February 24, 2006, LFD filed with the bankruptcy clerk a notice of appeal and motion for leave to appeal from the February 16 Order. In addition, LFD has filed in the District Court a Petition for Mandamus seeking (i) a vacatur of the order which directs LFD to file and motion for leave to amend its Complaint by March 3, 2006 or be barred from amending its Complaint, and (ii) an order directing this Court to decide LFD's abstention motion before it engages in any further proceedings in this matter.

Also on February 24, 2006, LFD moved the bankruptcy court for a stay pending its disposition of the Abstention Motion and this Court's decision on LFD's motion to

appeal from, and the petition for mandamus in support of, the February 16 Order. The Court scheduled a hearing on LFD's request for March 15, 2006. At the hearing, the Court heard arguments of LFD, GE Capital, and those of the debtor, who joined GE Capital in opposition to the motion. Thereafter, following the argument, the Court denied the motion for, among other things, LFD's failure to establish irreparable harm to it if the stay were denied.

LFD did not seek leave from the Court to amend its Complaint by the March 3, 2006 deadline set by the February 16, 2006 Order. On April 3, 2006, briefing was completed by the parties on the *McKinley* case. Thereafter, the Court scheduled the date that it intended to render a decision as April 10, 2006 and subsequently adjourned to April 11, 2006, and again to, April 18, 2006.

On April 19, 2006, the Court issued an order denying the Abstention Motion and scheduled a hearing and briefing schedule on the Summary Judgment Motion.

On April 26, 2006, the District Court denied LFD's Petition for Mandamus and its application for interlocutory appeal.

On May 10, 2006, LFD filed its opposition to the Summary Judgment Motion on one count of the three causes of action asserted by LFD. LFD did not oppose the Summary Judgment Motion as it related to LFD's motion for conversion or accounting. LFD argued that collateral estoppel should not apply in the LFD-GE Capital Action from the Memorandum Decision issued in the LFD-Ames Action. LFD argued that the issues now before the Court are different from those decided in the LFD-Ames proceeding. LFD acknowledged the Court's finding that the Proceeds were property of Ames, but it also argued the Memorandum Decision found that LFD did have an unsecured claim.

LFD argued that in consideration of case law and the Court's Memorandum Decision that although the Memorandum Decision determined the Proceeds were property of Ames the monies in question still "belonged" to LFD for the purposes of a money had and received claim, and, thus, LFD held a superior claim as a creditor to that of GE Capital. LFD also argued that GE Capital knew of this superior claim because the Proceeds were meant to be set aside in what it claimed was a reverse fund for LFD.

In support of its claim for money had and received, LFD cited case law where the holder of a superior claim could recover from monies paid to a third party, even though the property was not the plaintiff's property.

On May 15, 2006, GE Capital filed its reply memorandum of law in support of the Summary Judgment Motion. GE Capital noted the concession of LFD as to the counts on accounting and conversion. GE Capital further argued that the issues decided in the Court's Memorandum Decision in the LFD-Ames Action would collaterally estop the remaining cause of action for money had and received.

GE Capital argued that the Proceeds cannot "belong to" LFD if it had no ownership or possessory interest in them. GE Capital also argued that collateral estoppel precludes the Court from finding that GE Capital's retention of any funds is a failure of the principles of equity or good conscience.

GE Capital also sought to distinguish the case law argued by LFD for its proposition that collateral estoppel does not apply. Additionally, GE Capital argued that the case authorities LFD relies, *Dechen v. Dechen,* 59 A.D. 166, 68 N.Y.S. 1043 (2d Dept. 1901) and *Schreiber v. Am. Employers Ins. Co.*, 265 A.D. 167, 38 N.Y.S.2d 250 (2d Dept. 1942), *aff d*, 49 N.E.2d 627, 290 N.Y. 673 (1943), do not support the

conclusion that LFD can proceed against GE Capital for money had and received. GE Capital distinguished the two cases by noting that in both cases a creditor was found to have stated a money had and received claim where the debtor paid the debt (which was the subject of the debtor-creditor relationship) to a third party not having title to a claim. Here, GE Capital argued, this Court has already determined that GE Capital was entitled to receive payments of the Proceeds from Ames, and that Ames was obligated to and did pay, LFD for the merchandise sold in Ames's stores from general funds made available by GE Capital through its lending arrangements. *In re Ames Dept. Stores, Inc.*, 274 B.R. at 617-31. GE Capital also argued that the more recent case law is at odds with LFD's contention, noting that recent case authorities dismissed claims where the plaintiff failed to present evidence it still had a possessory interest in the funds at issue.

On May 17, 2006, the Court conducted a hearing regarding the Summary Judgment Motion. During oral arguments, LFD argued, as it had in its memorandum of law opposing the Summary Judgment Motion, that collateral estoppel did not apply because the issues before the Court were different than those considered and resolved in the Court's Memorandum Decision in the LFD-Ames proceeding. LFD argued that the LFD-Ames dispute only resolved the issue of who owned the Proceeds, which it conceded was Ames and not LFD. However, LFD argued that such a determination does not resolve the money had and received claim currently before the Court. LFD argued that what it possessed was a right to the funds since they were due to them, but, instead, those funds were then transferred to a third party, GE Capital. LFD notes that GE Capital did arguably have a colorable right to receive the property, although it does not find this dispositive of its cause of action for money had and received.

LFD further argued that when courts have considered issues like those now before the Court, they have looked to which party had the greater right to the property. LFD argued that the money that was transferred to GE Capital was money to which it was entitled based on this Court's holding in the LFD-Ames dispute, where the Court had found that LFD was owed a debt by Ames.

LFD sought to distinguish itself from other creditors who were also owed monies, by arguing that, unlike other creditors, they enjoyed the benefit of a reserve fund that was set up to hold certain monies aside for what LFD argued was the exclusive benefit of LFD. LFD further argued that such a fund would have put GE Capital on notice of LFD's superior claim.

Also, during the oral argument, GE Capital responded to LFD's arguments and asserted that the Court's decision in the LFD-Ames dispute resolved the issues in the current case. GE Capital argued that any superior claim to the funds that was based on a reserve fund was a mischaracterization of the reserve fund's actual use and relevancy. GE Capital further argued that it is distinct as a secured creditor based on the monies it had paid as a secured lender. This superior status, GE Capital argued, stood in contrast to LFD status as an unsecured creditor. GE Capital also asserted that it would be irreconcilable to find that GE Capital had been unjustly enriched after the Court had already determined that Ames was not unjustly enriched in its Memorandum Decision.

GE Capital further argued that recent case law that was analogous to the present case, *Mia Shoes, Inc. v. Republic Factors Corp.* 1997 WL 525401, 3 (S.D.N.Y. 1997) and *Traffix, Inc. v. Herold, 269* F.Supp.2d 223, 229 (S.D.N.Y. 2003), involved situations where a vendor had contracted with another party to collect proceeds on behalf of the

vendor and in contractual arrangements gave that entity, which was collecting the proceeds from sales, ownership of the funds. In both cases, the courts held that the plaintiffs could not bring a claim for money had and received.

LFD countered that the cases GE Capital cited were distinguishable from the case at present and neither of the cases gave serious consideration to the issues involved in a cause of action for money had and received. LFD then argued it had made out a prima facie case for money had and received. It asserted the monies "belong" to LFD, regardless of any course of performance that would seem to suggest otherwise. Furthermore, LFD asserted that a claim for money had and received did not require a finding of impropriety, but rather, once a transfer is made, the Court was to consider who ultimately had the greater right. LFD argued that although it could not pursue a claim against Ames, it still had a viable claim against GE Capital.

DISCUSSION

The issue before the Court is whether, LFD is collaterally estopped from litigating issues that were determined in LFD-Ames Adversary Proceeding, as set forth in its March 8, 2002 Memorandum Decision and the March 19 Order, which determinations were affirmed on appeal.

Rule 56(c) incorporated into bankruptcy practice by Fed. R. Bankr. P. 7056 provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions of 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 judgment as a matter of law."

After the non-moving party to the summary judgment motion has been afforded a sufficient time for discovery, summary judgment must be entered against it where it fails to make a showing sufficient to establish the existence of an element essential to its case and on which it has the burden of proof at trial. *Celotex Corp. v. Catrett,* 477 U.S. 317,322 106 S.Ct. 2548, 2552 (1986). It is said that there is no genuine issue concerning any material fact because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. at 2552. The summary judgment standard is interpreted in a way to support its primary goal of "dispos[ing] of factually unsupported claims or defenses." *Celotex Corp.*, 477 U.S. at 323-24, 106 S.Ct. at 2553.

COLLATERAL ESTOPPEL

Collateral estoppel precludes relitigation of issues of fact or law actually litigated, determined by a valid and final judgment, and such determination is essential to the judgment. This issue-preclusion applies in subsequent actions between the parties regarding the same or a different claim. "[W]hen the issues sought to be precluded were decided by a federal court . . . the Bankruptcy Court must apply the theoretically uniform federal common law of collateral estoppel." *In re Wright*, 187 B.R. 826, 832 (Bankr. D.Conn. 1995) (citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324 n.12, 91 S.Ct. 1434, 1440 n.12, 28 L.Ed.2d 788 (1971)). Collateral estoppel bars relitigation of an issue if (1) the identical issue was raised in a previous proceeding, (2) the issue was actually litigated and decided in the previous proceeding, (3) the party had a full and fair opportunity to litigate the issue, and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

Dundon v. Komansky, 2001 WL 876904 at 2 (2d Cir. Aug. 03, 2001) (unpublished) (quoting *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998)). Collateral estoppel is an elastic doctrine and these elements should form a "framework," rather than a substitute, for analysis. *The State of New York v. Sokol (In re Sokol)*, 113 F.3d 303, 306 (2d Cir. 1997).

MONEY HAD AND RECEIVED

The Second Circuit considers three factors when evaluating a claim for money had and received. "The essential elements of a claim for money had and received are that '(1) defendant received money belonging to plaintiff; (2) defendant benefited from the receipt of money; and (3) under principles of equity and good conscience, defendant should not be permitted to keep the money.'" *Nordlicht v. New York Telephone Co.*, 799 F.2d 859, 865 (2d. Cir. 1986) (quoting *Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank*, 731 F.2d 112, 125 (2d Cir.1984)). Furthermore, courts within the Southern District of New York, in dealing with claims for money had and received, have applied the Second Circuit factors to circumstances similar to the instant matter. See *Traffix, Inc. v. Herold*, 269 F.Supp.2d 223, 229 (S.D.N.Y. 2003), *Mia Shoes, Inc. v. Republic Factors Corp.*, 1997 WL 525401, at 3 (S.D.N.Y. Aug. 21, 1997), *Grain Traders, Inc. v. Citibank, N.A.*, 960 F.Supp. 784, 793 (S.D.N.Y.1997).

The Court will concentrate its analysis on the first and third elements of the analysis. The second element that the defendant, GE Capital, benefited from the receipt of money, is not in dispute.

As to the first element, that the defendant received money belonging to the plaintiff, LFD advances the argument that although the monies here are not owned by

LFD they do belong to it. LFD argues that it has some "superior possessory" right to the monies over that of GE Capital.

In order to address the first prong of a prima facie cause of action for money had and received the Court considers what "belonging to" means.

In *Mia Shoes, Inc. v. Republic Factors Corp.*, the court found, for the purposes of a motion to dismiss, that where a contract existed between two parties to collect funds, that arose out of a factoring agreement, and where the party collecting the funds failed to turn over the monies to the party, the plaintiff could not seek relief for money had and received. *Mia Shoes, Inc.*, 1997 WL 525401 at 1-4. Despite the court in *Mia Shoes, Inc.*, noting that the plaintiff did appear to have some interest in the funds in question, specifically a contractual right to receive the funds, it did not find that the plaintiff held an ownership or immediate superior right to possession to the funds for the purposes of conversion. *Id.* at 3.

Thereafter, the court in *Mia Shoes, Inc.*, offered a brief explanation as to why the funds in question did not "belong" to the plaintiff for the purposes of money had and received. The court's analysis of whether the funds "belonged" to the plaintiff was dependant upon its finding that for the purposes of conversion the plaintiff did not own the property. *Mia Shoes, Inc.*, 1997 WL 525401 at 3. The court offered a short analysis of a claim for money had and received with a brief recitation of the elements. However, the court noted that since it had already found that the plaintiff did not own the funds for the purposes of conversion, it would dismiss the claim for money had and received. "As discussed above [as to the conversion claim], there is no allegation in the complaint that

[plaintiff] had an ownership interest in the receivables collected by [defendant]. For this reason, the claim for money had and received is dismissed." *Id.* at 3.

Similarly, in *Traffix, Inc. v. Herold*, a marketing company sued to recover damages from its billing and collection services provider for conversion of monies and for money had and received. *Traffix, Inc.*, 269 F.Supp.2d at 225. But the court found that where the collection provider systematically raided the accounts that held the monies collected, and the plaintiff may have an equitable right to the monies collected on its behalf and a contractual right to the monies based on the collection agreement, nevertheless, the plaintiffs did not have an action for conversion under New York law. *Id.* at 228. The court noted that "New York law recognizes an action for conversion of money, but requires the plaintiff to have 'ownership, possession or control of the money' before its conversion." *Id.* at 228 (citing *Aramony v. United Way of America*, 949 F.Supp. 1080, 1086 (S.D.N.Y.1996)).

The court, in *Traffix, Inc.*, like the court in *Mia Shoes, Inc.*, considered the claim for money had and received, after it had already resolved the issue of ownership for the purposes of the conversion claim. The court in *Traffix Inc.*, offered the same brief analysis as the court in *Mia Shoes, Inc.*, and noted that "[a]s discussed above, there is no indication that plaintiff had an ownership interest in the funds it claims defendant misappropriated. For this reason, the claim for money had and received is dismissed." *Traffix, Inc.*, 269 F.Supp.2d at 229.

Another court that dealt with the issues in the instant matter is *Grain Traders, Inc. v. Citibank, N.A.*, 960 F.Supp. 784, (S.D.N.Y. 1997). The court offered analysis of the common law claims of conversion and money had and received that were asserted. The

court noted that for the purposes of conversion there needed to be a finding that the plaintiff had an ownership interest or an immediate superior right to possession of the property. *Grain Traders, Inc.*, 960 F.Supp. at 793 (citing *Aaron Ferer & Sons Ltd.*, 731 F.2d at125). The court noted that for the purposes of a claim for money had and received under New York law, "the plaintiff must show that 'defendant received money *belonging* to plaintiff.'" *Id.* at 793. The court found a claim under either cause of action would fail because the plaintiff did not have title to the monies in question. The plaintiff lost title to the monies once they were deposited in the bank. "This is because a depositor loses title to money deposited in a general account at the moment those funds are deposited." *Id.* at 793 (citing *Peoples Westchester Savings Bank v. FDIC,* 961 F.2d 327, 330, 332 (2d Cir.1992); *Swan Brewery Co. Ltd. v. United States Trust Co.*, 832 F.Supp. 714, 718 (S.D.N.Y.1993)).

These cases finds a close correlation to the interest needed by the plaintiff to assert a claim under conversion and the interest needed to assert a claim for money had a received claim. Such case law also supports the conclusion that where a court has not initially found the "interest" needed to establish conversion, it does not then find an ownership interest for the purposes of money had and received.

In the instant matter, the Court in its Memorandum Decision has found, for the purposes of conversion, that the agreement between Ames and LFD gave LFD no superior right, nor a right of immediate possession of the Proceeds, and the agreement did not give LFD have an ownership interest in the Proceeds. *In re Ames Dept. Stores, Inc.*, 274 B.R. at 629. Rather the Proceeds were property of Ames. These two determinations collaterally estop the claim LFD asserts here. Although, this matter

involves a proceeding between LFD and GE Capital, rather than LFD and Ames, the issues to which LFD has already had an opportunity to litigate in its proceeding against Ames have determined that LFD did not have an ownership interest in the Proceeds nor a superior right to the same. Therefore, the Court finds that these determinations also are dispositive of the issue of whether the funds in question "belonged" to LFD. Ames enjoyed the benefit of being able to exercise its business judgment in conveying its property to satisfy the claim of another creditor. Furthermore, the Court specifically found that GE Capital had the right to receive the funds from Ames. Based on the Court's prior determination the funds were property of Ames, not LFD at the time of the payment to GE Capital and that LFD had no greater right to such funds. Therefore, based on the aforementioned case law, an action for money had and received is precluded by principles of collateral estoppel.

LFD argues that the aforementioned case law is too narrow in their interpretation of the term "belonging to" and such should be defined to include situations where there if no interest found in the property at issue. LFD puts forth case law that it asserts supports that proposition and should control the outcome here. The Court does not agree with LFD's assessment of the case law, and as stated above, finds that an interest in property must be established to prevail on a money had received cause of action. However, even if the cases cited by LFD for its definition of "belonging to" set forth the appropriate standard, LFD would still be precluded by collateral estoppel from proceeding on a money had and received cause of action.

LFD argues that a property interest is not necessary to establish the element of belonging to in a money had and received cause of action. LFD maintains that certain

case law supports the legal principle that a plaintiff can recover monies paid over to a third party even though the monies paid were not in fact the plaintiff's property, but nonetheless "belonged" to the plaintiff. LFD argues that the term "belonged to" does not mean the same as a property interest, but rather means a superior right, or claim, to the funds at issue. LFD argues that while the monies here were property of Ames to do as it wished, LFD nevertheless had a superior right to those who received the funds due to the debt owed to LFD for the sale of its merchandise. The two main cases LFD relies on are *Dechen v. Dechen,* 59 A.D. 166, 68 N.Y.S. 1043 (2d Dept. 1901) and *Schreiber v. Am. Employers Ins. Co.,* 265 A.D. 167, 38 N.Y.S.2d 250 (2d Dept. 1942), *aff d,* 49 N.E.2d 627, 290 N.Y. 673 (1943). The Court finds that even if the legal proposition as set forth by LFD were correct, the cases LFD relies upon are distinguishable from the instant matter and, as stated above, LFD cannot prevail on such cause of action.

Further, *Dechen* involved an appeal brought by the plaintiff, Gilbert Dechen, an infant, by Katie Dechen, his guardian ad litem, from a judgment of a lower court that dismissed a complaint that asserted a cause of action for money had and received. *Dechen,* 59 A.D. at 166-167. The lower court dismissed the matter upon the ground that it did not have jurisdiction of the subject matter of the action under applicable New York state law. *Id.* at 167.

In *Dechen* a loan and savings association paid monies held on deposit to an improper recipient, and the person, in whose favor the deposit had been made, could maintained an action for money had and received against the one who received the money. *Dechen,* 59 A.D. at 167-168. The cause of action for money had and received was brought to recover the sum of $147.86 deposited with the loan and savings

association by the uncle of the plaintiff for his (the nephew's) benefit. According to the court the evidence established that at the time of the deposit made by the uncle the monies "inured to the benefit of the plaintiff and vested in him the right to demand and receive the same." *Id.* at 167. The court found that the uncle intended that the nephew benefit from the deposit. The relation between the plaintiff and the loan and savings association at the time the transfer to the defendant was that of debtor and creditor. *Id.* at 167. The court further found that the person receiving money from loan association, which was due the plaintiff, could be held liable to the plaintiff. *Id.* at 168. The court reversed the finding of the lower court and found the action was properly brought; that the lower court did have jurisdiction over the matter, and the matter should proceed to trial. *Id.* at 168.

The court in *Dechen* essentially found that the funds due to the plaintiff were paid to the defendant instead of the plaintiff. The court found that plaintiff could have brought the action against the association "… while the plaintiff could have repudiated the payment made to the defendant, and recovered the amount thereof from the association, he also had the right to adopt and ratify the act of the association in making the payment, and bring this action for money had and received, and recover it from her." *Dechen,* 59 A.D. at 167 (citing *Fowler v Bowery Savings Bank,* 113 N.Y. 450 (N.Y. April 23, 1889)).

In *Schreiber,* the plaintiff, Carl Schreiber, an employee of a dairy company, sued a third person for injuries arising out of and in the course of his employment and recovered a judgment for $100.00. *Schreiber,* 265 A.D. at 168. The defendant, American Employers' Insurance Company, in this action filed a lien in connection with

the doctor's bill for medical services that it, as compensation insurance carrier, had incurred for medical attention furnished to the plaintiff. The liability insurance carrier of the negligent third party deducted the amount of its lien from the amount recovered by the plaintiff in his action against the third party, paid the amount of the lien to the defendant, and paid the balance of fifty-seven dollars to the plaintiff. As a result the plaintiff asserted a cause of action based upon an implied contract for money had and received. *Id.* at 167-168.

The court in *Schreiber* found that the defendant did not actually enjoy a lien against any amount awarded to the plaintiff in his action against the third party, and thus there was not colorable title to the monies transferred at the time of the transfer. *Schreiber,* 265 A.D. at 168. Furthermore, the court found that where the plaintiff could assert a claim against either the party that improperly paid out the funds or the improper third party recipient, it was up to the plaintiff to freely chose which party to assert a claim against. "There was no duty resting on the plaintiff to prosecute an action against the third party for the benefit of this defendant. The contention now made by the defendant that the amount received by it was not in payment of its claimed lien is contradicted by the documentary evidence, which evidence the defendant makes no effort to explain. The result follows that the defendant has received money from the plaintiff's debtor that belongs to the plaintiff. Under such circumstances the plaintiff may elect to sue either the party who has received from his debtor or the debtor." *Id.* at 168-169. The court in *Schreiber* also found that the ultimate third party recipient was not entitled to the property. *Id.* at 168. In another words, the payment to the third party was improper.

In contrast, in the instant case the Court has determined that LFD failed to establish that that it had title and ownership to the Proceeds. *In re Ames Dept. Stores, Inc.*, 274 B.R. at 617. Furthermore, the Court determined that LFD held no superior claim to the funds and that the payment to GE Capital was a proper use of Ames's funds. In *Dechen*, the court found that when the monies in question were deposited with the financial institution that made the transfer, it "vested in [the plaintiff] the right to demand and receive the same." *Dechen*, 59 A.D. at 167. Unlike *Dechen* the Court has determined that Ames did have the right to control the disposition of the funds and LFD does not have a legal or equitable interest in the Proceeds, but only a general unsecured claim against the Ames estate. LFD's demand for the funds at issue was denied by the Court in the LFD-Ames Action. In *Dechen* the court also found that the right to the funds "inured to the benefit of the plaintiff." *Id*. at 167. The Court here has also found the payment to GE Capital were a proper payment, and therefore, GE Capital was a proper third party recipient of the funds in question here.

Furthermore, in the instant case, the Court has determined that LFD cannot recover from Ames based upon the theory that LFD had a superior right to the Proceeds. This distinguishes the case here from *Dechen* and *Schreiber*, in that the courts in those cases found an action could be brought against either the wrongful recipient or the wrongful payor. The premise in each of these cases is that there was a wrongful payment from the debtor to the third party who was the defendant in the respective cases. In the present case there is no wrongful payor.

Further in each of the cases cited by LFD in support of its argument that a possessory interest is not necessary to establish the "belonging to" element of a cause of

action based upon money had and received, the debtor transferred the proceeds to the defendant that were intended for the benefit of the plaintiff and vested with the plaintiff the right to such proceeds. That vested right arose while the proceeds were in the possession of the debtor and continued in the proceeds after the transfer to the defendant. The same proceeds were then wrongfully transferred to the defendant. In each of the cases cited by LFD the court found that the plaintiff could recover from the debtor for a wrongful transfer or ratify the transfer and recover from the wrongful recipient based on a theory of implied contract directing payment to the plaintiff- the intended beneficiary of the proceeds at issue. LFD simply cannot prevail in the instant matter, even if the cases cited by LFD set forth the applicable standard to interpret the meaning of "belonging to" for purposes of a money had and received cause of action, as a matter of law under principles of collateral estoppel. The Court has found that there was no superior right in the proceeds that inured to the benefit of LFD and hence no such vested interest arose in the property at issue in the hands of Ames. Therefore, there can be no vested right of LFD that would follow the proceeds into the hands of GE Capital. As a result, there is no wrongful transfer and hence no wrongful receipt. It follows then that there can be no implied contract found based upon a wrongful receipt to require payment by the defendant, GE Capital.

Additionally, the Court notes that in September 2001, LFD filed two actions. The first action was brought against Ames, where LFD alleged, among other things, a wrongful payment to GE Capital. The Second, action was brought against GE Capital, in which LFD alleged, among other things, money had and received. Having failed to establish a wrongful payment, in the LFD-Ames Action, LFD is precluded under the case

law it cites from establishing a wrongful receipt. Although, the cases cited establish that you could bring either suit, a defense to an action based upon wrongful receipt would be that the payment at issue was proper. As such, LFD could not prevail as against GE Capital because the Court has already determined that there is no claim as a matter of law no claim for wrongful payment. Therefore, there is no wrongful receipt and, hence, no cause of action based upon under a money had and received cause of action could be maintained.

The Court next considers the third element that LFD needs to establish to make out a prima facie showing of a cause of action for money had and received. The third prong requires that plaintiff to show that "under principles of equity and good conscience, [the] defendant should not be permitted to keep the money.'" *Nordlicht*, 799 F.2d at 865 (quoting *Aaron Ferer & Sons, Ltd.*, 731 F.2d at 125).

For the Court to find at this stage of the proceedings that it would be inequitable for GE Capital to retain the monies it received from Ames would run counter to the findings of this Court in its Memorandum Decision. In its decision the Court found that the Proceeds were property of Ames. The Court also found that LFD did not have right to direct and control Ames's collection and handling of the Proceeds. "LFD, therefore, has no control or right to control how the proceeds are processed by Ames and where the Net Sales Proceeds are ultimately deposited… Because LFD had no right to alter or direct any aspect of this process under the *Agreement*, LFD had no control over the use of the Net Sales Proceeds once the funds were placed in Ames's cash management system." *In re Ames Dept. Stores, Inc.*, 274 B.R. at 620-621.

The Court also considered the sophisticated level of negotiation that brought about the agreement, which had been in place for well over ten years. The Court noted that the agreement between Ames and LFD, was an arms-length transaction and no unjust enrichment had not occurred to Ames. Similarly, the Court noted that "[u]nder the circumstances of this case and considering the sophistication of both Ames and LFD, the Court finds that it would be equitable for Ames to retain the benefits of the Net Sales Proceeds." *In re Ames Dept. Stores, Inc.*, 274 B.R. at 630.

The Court has already determined that the funds here were property of Ames, and that the monies here did not represent an unjust enrichment to Ames and furthermore that Ames was entitled to direct and control the use of the funds and to retain the benefit from the same. The disposition of such funds to pay creditors is in keeping with the rights Ames enjoyed. Nothing in the Court's Memorandum Decision would suggest that the payment to GE Capital by Ames was improper or that LFD would have a superior right to payment over any of Ames's other creditors. "[O]nce the Net Sales Proceeds were placed in Ames's depository accounts, LFD had no control where and how Ames directed and used those funds. It is undisputed that Ames used the proceeds from the sale of LFD merchandise to pay Ames's Secured Lenders by placing those funds in the Blocked Accounts that were swept by GECC. It is self-evident that Ames could just have easily used those funds for any other corporate purpose-such as purchasing inventory, paying salaries, etc." *In re Ames Dept. Stores, Inc.*, 274 B.R. at 621.

The issue as to whether it would be inequitable under a money had and received cause of action for GE Capital to retain the funds it received from Ames is collaterally estopped by the Court's prior holdings its Memorandum Decision.

LFD's argument also appears to incorporate prong one and three into one hybrid consideration for money had and received. LFD seems to argue that some inequity has occurred here that would allow LFD to stand ahead of the other creditors that had a claim against Ames. This however runs counter to the prior holdings of the Court. The funds that were paid to GE Capital were not the same funds that resulted from the sale of LFD's merchandise and no superior right inured to LFD regarding such funds. Rather, the monies at issue were property of Ames to which Ames could exercise its discretion to satisfy claims against it.

LFD also argues that the reserve account established that GE Capital was aware of LFD's superior right to the Proceeds that "belonged to" LFD. The Court disagrees with LFD based Court's observations, and ultimate findings, in its Memorandum Decision. The Court found in its earlier decision that the Reserve account involved no segregation of proceeds from the sale of LFD merchandise. Rather the Court found, "Ames's credit advances under the Revolver are subject to reserve amounts. A reserve amount reduces credit availability in the amount of the reserve. One of the reserve amounts under the Revolver was referred to as an ineligible shoe sales reserve (the 'Reserve'). The amount of the Reserve is based on a strict average of monthly historical payments that correspond to Ames's prior payments to Baker/LFD. [Submitted testimony] indicates that the Reserve involved no actual segregation of proceeds from LFD shoe sales." *In re Ames Dept. Stores, Inc.*, 274 B.R. at 612 (citations omitted). The reserve fund was not a reserve of LFD's funds, but rather a "reserve" against Ames's credit availability.

The Court has previously considered LFD's argument regarding the reserve account and ruled that there was no immediate right of LFD to the property and that Ames's was free to pay whatever debts it chose with such funds.

Collateral estoppel would bar the relitigation of the issues in the case at present. "The doctrine of collateral estoppel is premised on the basic concept of fairness. It protects parties from relitigating identical issues and promotes efficiency by impeding unnecessary litigation. Due process dictates that collateral estoppel cannot be used against a person who did not have a fair opportunity to litigate an issue decided in a previous proceeding. Therefore, two formal requirements must be met to invoke the doctrine of collateral estoppel. First, there must have been a full and fair opportunity to litigate the decision that now controls. Second, the issue in the prior action must be identical to and decisive of the issue in the instant action." *Zois v. Cooper,* 268 B.R. 890, 893 (S.D.N.Y. 2001) (internal citations omitted).

The issues here are the identical to and dependent upon the issues already raised and decided in the LFD-Ames proceeding. LFD has had a full and fair opportunity to litigate the issues already decided in the previous proceeding. Thus, based on the holdings of the Court in its Memorandum Decision, as affirmed on appeal, the Court will grant GE Capital's request for summary judgment as to count one of LFD's complaint, the cause of action for money had and received based upon collateral estoppel.

LFD has already conceded summary judgment as to count two, for an accounting, and count three, for conversion, of its complaint. Therefore, for the forgoing reasoning GE Capital's motion for summary judgment is granted as to all three causes of action and LFD's complaint is dismissed with prejudice.