

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:)	
THE CONSOLIDATED FGH)	
LIQUIDATING TRUST)	
)	
f/k/a)	CASE NO. 01-52173 ERG
)	
FRIEDE GOLDMAN HALTER, INC.,)	
<i>et al., Jointly Administered</i>)	
_____)	
)	
LIQUIDATING TRUSTEE FOR THE)	
CONSOLIDATED FGH LIQUIDATING)	
TRUST)	
)	
Plaintiff)	
v.)	ADVERSARY NO. 03-5275 ERG
)	
HUBER, INC.)	
)	
Defendant)	

OPINION

The matter before the court is the Motion for Partial Summary Judgment filed by the Liquidating Trustee for the Consolidated FGH Liquidating Trust in the above styled adversary proceeding. Having considered the pleadings and supporting documentation and memorandum, and the opposition thereto, the court concludes that the Motion for Partial Summary Judgment should be denied.

I. FACTUAL BACKGROUND

Friede Goldman Halter, Inc. and certain affiliates commenced petitions for relief under Chapter 11 of Title 11 of the United States Code by filing voluntary petitions. Friede Goldman Delaware, Inc. filed a chapter 11 petition on April 16, 2001. Friede Goldman Halter, Inc. filed its chapter 11 petition on April 19, 2001. Each of the other debtors, including Friede &

Goldman, Ltd., filed their petitions on April 20, 2001, except Amcane International, Inc. and Sabre Personnel Associations, Inc., which filed petitions on June 1, 2001. The Chapter 11 cases were consolidated under Case No. 01-52173 SEG.¹

On April 18, 2003, an adversary complaint to avoid and recover preferential transfers was filed by Friede Goldman Halter, Inc. and its affiliated jointly administered debtors in possession and the Official Unsecured Creditors Committee of Friede Goldman Halter, Inc. against Huber, Inc. The complaint alleges that a preferential transfer was made to the defendant in the amount of \$47,477.52.

The Trustee filed a Motion for Partial Summary Judgment in the adversary proceeding seeking judgment in its favor determining that the Trustee has satisfied its burden of proof under 11 U.S.C. § 547(b) with respect to the transfer. The motion states that it does not seek summary judgment on any defenses asserted by Huber pursuant to 11 U.S.C. § 547(c)(1) and (c)(2).

The motion indicates that the payment upon which recovery is sought was made by Sphere Supply on behalf of Friede & Goldman, Ltd. (“FGL”), to Huber. The motion provides that Huber was a vendor supplying goods for a Mod II rack chock system being built by FGL for Sphere Supply. FGL was unable to pay vendors, and Sphere Supply reduced its contract payments to FGL by the amount of outstanding invoices for vendors to the project, including Huber’s invoice. The motion further states that FGL received less from Sphere Supply under the purchase order in direct portion to what Sphere Supply had paid Huber for materials, thereby reducing FGL’s accounts receivable and diminishing funds available to pay similarly situated

¹ A list of the entities constituting the consolidated debtors is contained in footnote 1 of the Liquidating Trustee’s Motion for Partial Summary Judgment.

creditors, while Huber received 100% payment.

The Trustee asserts that a prima facie case is made by material facts established by supporting exhibits, affidavit and Statement of Uncontested Material Facts, showing that the payment was made on behalf of FGL for the benefit of Huber in the amount of \$47,477.52, on account of an antecedent debt, that FGL is presumed involved under § 547(c)(3), that the payment was made on April 5, 2001, within 90 days before the petition date of April 20, 2001, and that Huber received 100% of the amount it was owed pursuant to relevant invoices.

II. CONCLUSIONS OF LAW

The matter before the court is a core proceeding pursuant to 28 U.S.C. § 157. The court has jurisdiction over the subject matter of this proceedings and the parties pursuant to 28 U.S.C. § 1334 and § 157.

The Trustee requests partial summary judgment determining that the transfer of \$47,477.52 is an avoidable preferential transfer under 11 U.S.C. § 547(b). Section 547(b) provides:

11 U.S.C. § 547. Preferences.

- (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
 - (1) to or for the benefit of a creditor;
 - (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
 - (3) made while the debtor was insolvent;
 - (4) made--
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
 - (5) that enables such creditor to receive more than such creditor would receive if--
 - (A) the case were a case under chapter 7 of this title;

- (B) the transfer had not been made; and
- (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).² That section also provides the following as to the burden of proof for establishing a preference or a defense thereto:

- (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 (c) of this section.

11 U.S.C. § 547(g).

Summary judgment is appropriate under Fed. R. Civ. P. 56, made applicable by Fed. R. Bankr. P. 56, where there are no genuine issues as to any material fact:

Summary judgment is proper under Fed.R.Civ.P. 56 “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.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). We review a grant of summary judgment de novo. *Freeman v. Texas Dep’t of Crim. Justice*, 369 F.3d 854, 860 (5th Cir.2004).

Sossamon v. Williams 2008 WL 724656, 1 (5th Cir. 2008). *See also, Cooper Industries, LLC v. American Intern. Specialty Lines Ins. Co.*, 2008 WL 900958, 2 (5th Cir. 2008). In *McLain v. Newhouse (In re McLain)*, 516 F.3d 301, 307 (5th Cir. 2008) the court provided that:

On a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Hockman v. Westward Commc’ns, L.L.C.*, 407 F.3d 317, 325 (5th Cir.2004). In reviewing the evidence, the court must therefore “refrain from making credibility determinations or weighing the evidence.” *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir.2007).

² Statutory recitations herein are to the 2001 version of the Code in effect at the time of the transfers and the filing of the petition.

Id. at 307. In *Gibson v. Potter*, 2008 WL 276309, 2 (5th Cir. 2008), the court provided that:

“Summary judgment is proper when there exists no genuine issue of material fact and the movant is entitled to judgment as matter of law.” *Id.* (citing Fed.R.Civ.P. 56(c)). “The evidence and inferences from the summary judgment record are viewed in the light most favorable to the nonmovant.” *Minter v. Great Am. Ins. Co. of N.Y.*, 423 F.3d 460, 465 (5th Cir.2005).

The moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] ... which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant meets this burden, the burden shifts to the nonmovant “to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.” *Id.* at 322. To survive a summary judgment motion, the nonmovant “need only present evidence from which a jury might return a verdict in his favor,” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), but mere allegations or denials will not defeat a well-supported motion for summary judgment. Fed.R.Civ.P. 56(e).

Gibson v. Potter, 2008 WL 276309, 2 (5th Cir. 2008)

In its Memorandum in Opposition to Motion for Partial Summary Judgment, Huber, Inc. asserts the following regarding the Trustee’s request that the court declare that the Trustee has established its burden of proof under 11 U.S.C. § 547(b) with respect to payment made to Huber by Sphere Supply during the preference period:

First, the Motion is factually flawed because the documents submitted in support of it do not show payment to Huber of the \$47,477.52 at issue. The invoice received by FGL contains a notation “Job #7396 Rig 136 OK for payment. M. Shear. March 20, 2001.” There is, however, no evidence that payment was actually made by Sphere. In none of the documents submitted is there direct evidence of a wire transfer or a cancelled check to Huber for the claimed amount. Although the Trustee suggests that this payment by Sphere Supply to Huber occurred on April 5, 2001 . . . not a single document is presented to the court corroborating the April 5, 2001 payment date nor the payment itself . . .

In sum, there is no evidence in the motion of payment on April 5, 2001 by Sphere Supply. In the absence of proof-positive through either a cancelled check

or evidence of a wire transfer, the motion should be denied . . .

Because the present partial motion for summary judgment is directed only at establishing the Trustee's fulfillment of the prima facie case for a preferential transfer, this Memorandum does not address substantive defenses such as "new value" or "earmarking" which Huber contends exist. Nonetheless, the failure by the Trustee to establish payment in a direct and positive manner by itself precludes the granting of the partial summary judgment sought by the Trustee.

Memorandum in Opposition to Motion for Partial Summary Judgment at 2-3.

In viewing the facts in the light most favorable to the non-moving party, the court agrees with the position of Huber, Inc., that the supporting documentation provided by the movant-plaintiff does not provide sufficient evidence to establish at this time that payment was made by Sphere Supply to Huber within the 90 day preferential period. The court concludes that the Trustee has not established a prima facie case under 11 U.S.C. § 547(b), and the Motion for Partial Summary Judgment should be denied.

An order will be entered consistent with these findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58. This opinion shall constitute findings and conclusions pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.

This the 13th day of May, 2008.

/s/ Edward R. Gaines
EDWARD R. GAINES
UNITED STATES BANKRUPTCY JUDGE

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