

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

IN RE:)	
)	
THE CONSOLIDATED FGH LIQUIDATING TRUST)	
)	
f/k/a)	CASE NO. 01-52173 ERG
)	
FRIEDE GOLDMAN HALTER, INC. et al., Jointly Administered)	
)	
_____)	
)	
LIQUIDATING TRUSTEE FOR THE CONSOLIDATED FGH LIQUIDATING TRUST)	
Plaintiff)	
)	
V.)	ADV. PRO. NO. 03-5129 ERG
)	
VES, INC.)	
Defendant)	

OPINION

The matter before the court is the Motion for Partial Summary Judgment (Dkt. # 41) filed by the Liquidating Trustee for The Consolidated FGH Liquidating Trust as well as the opposition thereto filed by VES, Inc., the Defendant herein. Having considered the pleadings and memoranda, the court concludes that the Motion 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 Halter Marine, Inc. (“HMI”), 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 15, 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 VES, Inc., (“VES”) requesting relief pursuant to 11 U.S.C. § 547(b) and § 550(a).² The complaint alleges that preferential transfers were made to the defendant in the amount of \$433,536.73.

VES filed its Answer to the complaint that set forth affirmative defenses including failure to state a claim, setoff and/or recoupment, good faith, contemporaneous exchange for new value, ordinary course of business, new value, and statutory lien.

The Liquidating Trustee for The Consolidated FGH Liquidating Trust filed its Motion for Partial Summary Judgment in the adversary proceeding on May 8, 2008, seeking a determination that the Trustee has satisfied his burden of proof under 11 U.S.C. § 547(b) and § 550(a) with respect to transfers made to the Defendant. The Trustee also seeks partial summary judgment as to the amount of recoverable transfers that remain after application of subsequent new value under 11 U.S.C. § 547(b)(4).

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.

² The Liquidating Trustee for the Consolidated FGH Liquidating Trust was subsequently substituted as the proper party plaintiff in the adversary proceeding.

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 parties and the subject matter to this proceeding pursuant to 28 U.S.C. § 1334 and § 157.

The Trustee requests that the court enter partial summary judgment determining that the Trustee has satisfied the burden of proof under 11 U.S.C. § 547(b) and § 550(a), and provided prima facie evidence that transfers to VES in the amount of \$433,536.73 are avoidable preferential transfers. The Trustee further seeks partial summary judgment determining that after application of subsequent new value pursuant to 11 U.S.C. § 547(c)(4), there remains \$347,200.20 in recoverable preference payments.³ 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.

³ The Trustee's brief also uses the figure of \$317,918.78 regarding the amount remaining as avoidable after application of the subsequent new value defense.

11 U.S.C. § 547(b).⁴

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).

VES argues that there remain genuine issues of material fact which preclude partial summary judgment as requested. VES argues, specifically, that there is a genuine issue of material fact as to whether the transfers to VES enabled it to receive more than it would if the case were one under Chapter 7. VES argues that one or more of the contracts under which it was a subcontractor was assumed pursuant to prior orders of this court, and that payments are shielded from avoidance under 11 U.S.C. § 547(b).⁵ VES also argues that it provided goods and

⁴ 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.

⁵ On this argument, the court notes that in *In re ABC-Naco, Inc.*, 483 F.3d 470, 474 -475 (7th Cir. 2007), the court stated:

In *In re Superior Toy*, this court held that payments made on executory contracts that are assumed pursuant to 11 U.S.C. § 365 cannot also be avoidable preferences: “[s]ection 547 and § 365 are mutually exclusive avenues for a trustee.” *In re Superior Toy & Mfg. Co., Inc.*, 78 F.3d at 1174. Applying this principle, Softmart argues that since the purchase agreement was an executory contract assumed by Meridian, Softmart is entitled to retain the payments that were due prior to the assumption.

Id. at 474 -475.

services to HMI after receipt of the first transfer on February 5, 2001.

The court concludes based on the pleadings, memoranda and supporting documentation provided by the parties, that there are factual disputes sufficient to preclude summary judgment at this time and that the request 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 8th day of July, 2008.

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

ATTORNEYS FOR THE CONSOLIDATED LIQUIDATING FGH TRUST:

David A. Wheeler
Wheeler & Wheeler, PLLC
185 Main Street Biloxi, Mississippi 39530

Douglas S. Draper
Greta M. Brouphy
Heller, Draper, Hayden, Patrick & Horn, L.L.C.
650 Poydras Street, Suite 2500
New Orleans, Louisiana 70130

ATTORNEY FOR VES, INC.

Stewart F. Peck
Christopher T. Caplinger
Benjamin W. Kadden
601 Poydras Street, Suite 2775
New Orleans, Louisiana 70130