

**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. 03-5134 ERG
)	
SEVIN, 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, the court concludes that the Motion for Partial Summary Judgment should be granted.

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 16, 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 Sevin, Inc. The complaint alleges that preferential transfers were made to the defendant in the amount of \$27,327.83, consisting of two checks, numbered 1022542 in the amount \$30.79, and check number 1023511 in the amount \$27,297.04.

The Trustee filed a Motion for Partial Summary Judgment in the adversary proceeding seeking judgment in its favor determining 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 avoidable, recoverable transfers that remain after application of the subsequent new value defense under § 547(c)(4), asserting that \$27,297.04 remains recoverable. The defendant, Sevin Inc., did not file a response to the Motion for Partial Summary Judgment.²

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.

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 An answer to the complaint was filed, however.

§ 1334 and § 157.

The Trustee requests partial summary judgment determining that the transfer of \$27,097.04 is an avoidable preferential transfer under 11 U.S.C. § 547(b), § 550(a) and § 547(c)(4). 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).³ 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:

³ 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.

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). Summary

judgment may not be granted by default:

Under summary judgment standards, the Court may not grant summary judgment by default when the non-movant fails to file a response, *Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir.1988); however, in such a situation, the Court may accept the movant's evidence as undisputed, *Id.*, and grant summary judgment if that undisputed evidence establishes a *prima facie* showing of movant's entitlement to that relief. *C.F. Dahlberg & Co. v. Chevron USA, Inc.*, 836 F.2d 915, 919 (5th Cir.1988) (Where non-movant failed to submit affidavits, discovery items, or even pleadings on dispositive matters, no genuine issue of material fact existed.)

Chao v. M & D, Inc., 2007 WL 1168664, 1 (S.D.Tex. 2007); *See also, Gordon v. City of*

Galveston, 2007 WL 294161, 1 (S.D.Tex. 2007); *In re Enron Corp.*, 2006 WL 1663383, 3 -4

(S.D.Tex. 2006).

The Trustee's pleading and memorandum, supporting documentation and Statement of Uncontested Material Facts clearly establish that transfers that benefitted Sevin, Inc. were made by check to Sevin, Inc. out of HMI's property,⁴ that the transfers were made on account of antecedent debts owed to Sevin, and that the payments were made within 90 days of the petition

⁴ Supporting documentation and Exhibit A to the Motion for Partial Summary Judgment provide that Halter Marine Inc. check number 1022543 in the amount of \$30.79 payable to Sevin, Inc. was reconciled on January 24, 2001, and that check number 1023511 in the amount of \$27,297.04 was reconciled on or about March 21, 2001.

date, while the debtor was insolvent.⁵ The Trustee further establishes that Sevin received 100% of the amount it was owed by HMI pursuant to the relevant invoices, and that under the Confirmed Plan, the estimated recovery for general unsecured claims is 3.2% - 6.2%. Therefore, Sevin received more than it would if the case were one under Chapter 7. These requirements for establishment of a preference pursuant to § 547(b) are not refuted by Sevin.

The Trustee further asserts that new value was given after the first check of \$30.79, but that no new value was given to HMI after the second check in the amount of \$27,297.04.⁶ Therefore, after applying a subsequent new value credit pursuant to 11 U.S.C. § 547(c)(4), there remains an avoidable transfer in the amount of \$27,297.04.⁷

Based on the pleadings and supporting documentation filed by the Trustee, the court concludes that the Trustee has established a prima facie case under 11 U.S.C. § 547(b) showing that the transfers made to Sevin, Inc. were preferential transfers that may be avoided. Therefore, the court concludes that the Motion for Partial Summary Judgment should be granted to the extent of determining that the Trustee has established the requisites necessary for an avoidable preferential transfer pursuant to the requirements of 11 U.S.C. § 547(b) and § 550(a). The court

⁵ The debtor is presumed insolvent pursuant to 11 U.S.C. § 547(f). To rebut the presumption, there must be some evidence to show that the debtor was solvent at the time of the transfer and mere speculative evidence is not sufficient. *See, Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp.*, 158 F. 3d 312, 315 (5th Cir. 1998); *Sandoz v. Fred Wilson Drilling Co. (In re Emerald Oil Co.)*, 695 F. 2d 833, 839 (5th Cir. 1983).

⁶ Exhibit C to the Motion for Partial Summary Judgment sets out dates of invoices constituting new value.

⁷ *See, Sommers v. Concrete Straightline Sawing, L.L.C. (In re Contractor Technology, LTD)*, 2007 WL 4206211 (Bankr. S.D. Tex. 2007)(Fifth Circuit applies a transfer by transfer approach in analyzing defenses asserted under § 547(c)(4)); *G.H. Leidenheimer Banking Company, Ltd. v. Sharp (In re SGSM Acquisition Company, LLC)*, 439 F. 3d 233 (5th Cir. 2006).

further concludes that the Trustee has established that after application of new value pursuant to 11 U.S.C. § 547(c)(4), there remains an avoidable transfer in the amount of \$27,297.04.

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.

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