

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

**IN RE:
THE CONSOLIDATED FGH LIQUIDATING
TRUST**

**CASE NO. 01-52173 SEG
CHAPTER 11**

f/k/a

**FRIEDE GOLDMAN HALTER, INC. et al.
Jointly Administered**

**OAKRIDGE CONSULTING, INC. AND
OCEAN RIDGE CAPITAL ADVISORS, L.L.C
AS LIQUIDATING TRUSTEE FOR THE
CONSOLIDATED FGH LIQUIDATING TRUST
PLAINTIFF**

VS.

ADV. PROC. NO. 03-05189

**MARK A. ROBICHEAUX, INC.
DEFENDANT**

OPINION

Before the court is the complaint to avoid and recover preferential transfers in the above styled proceeding against Mark A. Robicheaux, Inc. The matter having been submitted to the court for consideration on briefs, the court concludes that the relief requested in the complaint should be granted to the extent set out herein, and the transfers should be avoided pursuant to 11 U.S.C. § 547(b).

I. FACTUAL BACKGROUND

Halter Marine, Inc. entered a purchase order agreement with Mark A. Robicheaux (“Robicheaux”) for an interior furniture package for the debtor’s 94 foot expeditionary yacht in or about September 2000. Ten payments totaling \$237,000.75 were made under the purchase

order agreement to Robicheaux. Halter Marine, Inc. filed a petition for relief under Chapter 11 of Title 11 of the United States Code on April 20, 2001, that has been jointly administered under the above name. An adversary proceeding was commenced April 17, 2003, by the debtor for recovery of preferential transfers made by Halter Marine, Inc. to Mark A. Robicheaux, Inc. in the amount of \$170, 833.85 pursuant to 11 U.S.C. §547(b) and § 550(a). Oakridge Consulting, Inc. and Ocean Ridge Capital Advisors, L.L.C. as Liquidating Trustee for The Consolidated FGH Liquidating Trust were subsequently substituted as party plaintiff in the adversary proceeding.

The matter was set for trial and briefs were submitted. The parties subsequently requested the court to decide the matter on briefs and upon the Joint Trial Stipulations entered into by the parties. Although other defenses were previously asserted by the defendant, the only remaining defenses concern the defendant's claim that transfers were made for subsequent new value under 11 U.S.C. § 547(c)(4), and the claim for an administrative expense under 11 U.S.C. § 503(b)(3). It is not disputed that the payments qualify as preferential transfers under § 547(b).

The Joint Trial Stipulations entered by the parties are adopted by the court herein by reference thereto. Pursuant to the Stipulations, the debtor stipulated to an amount of new value that should be credited to Robicheaux in the amount of \$53,875.40, leaving \$116,958.45 subject to avoidance under the preference claim.

II. CONCLUSIONS OF LAW

The court has jurisdiction over the subject matter and the parties in this proceeding pursuant to 28 U.S.C. § 1334 and § 157. This matter is a core proceeding pursuant to 11 U.S.C. §157.

Section 547(c) of the Bankruptcy Code provides that:

(c). The trustee may not avoid under this section a transfer --

...

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

11 U.S.C. § 547(c). Section 547(a)(2) provides that:

(a) In this section –

...

(2) “new value” means money or money’s worth in goods, services, or new creditor, or release by a transferee or property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

11 U.S.C. § 547(a)(3).

Robicheaux argues that the liquidating trustee fails to properly allow new value credit to Robicheaux. Initially, Robicheaux argues that it should receive credit for invoices received by the debtor after the first allegedly preferential payment was received, and that that analysis alone reduces the amount of the allegedly preferential payment from \$170,833.85 to \$116,958.45. The trustee has agreed with this analysis via the Joint Trial Stipulations entered by the parties in which the trustee agrees that Robicheaux can reduce the preference payments by the value of the services provided by Robicheaux directly to the debtor during the preference period. The Stipulated amount of new value credit is \$53,875.40, leaving \$116,958.45 subject to the preference claim.

Robicheaux further argues, however, that new value was also provided by employees of Robicheaux that were paid on this project, and that new value was provided when Robicheaux

purchased furniture and other parts from third party vendors for inclusion in the final product. Robicheaux claims that his payments to vendors for materials and supplies used for the HMI contract constitutes new value for purposes of § 547. Robicheaux indicates that it is not arguing that it is entitled to new value credit simply because it paid third party vendors, but that it is using the payments to quantify and to provide a date on which certain valuable component parts were installed on the yacht. Robicheaux claims that when credit is properly allowed for invoices from Robicheaux, work performed by employees of Robicheaux and the value of furniture and other parts installed on the debtor's yacht, the liability of Robicheaux for the allegedly preferential transfer is reduced from \$170,833.85 to \$74,886.14.¹

The liquidating trustee cites *Gouveia v. The RDI Group, Inc. (In re Globe Building Materials, Inc.)*, 325 B.R. 253 (Bankr. N.D. Ind. 2005), stating that the court concluded that while value may be been provided to Globe by delivering certain components of a purchased machine subsequent to its receipt of preference payments, that there was nothing new about that value, and that it was a straight-up commercial transaction and that RDI would have breached its commercial transaction agreement with Globe had it not delivered the components. The Liquidating Trustee argues that Robicheaux provided nothing to HMI that it was not commercially required to provide under the terms of its contract and that the arrangement was a straight-up commercial transaction in which Robicheaux agreed to install furniture for HMI and HMI agreed to pay for the installation according to an installation payment schedule, and that the

¹ These figures indicate that after entering the Stipulation, the amount the parties disagreed on as to new value is the difference between \$116,958.45 (the stipulated amount subject to preference after reduction for new value) and \$74,886.14 (the amount to which Robicheaux argues liability is reduced) or \$42,072.31.

transaction was not a series of severable component purchases.

The trustee also argues that payments Robicheaux made to third party suppliers that were not in privity with the debtor may not qualify for new value credit under § 547(c)(4). The trustee argues that in the case of *Moltech Power Systems, Inc. V. Truelove & Maclean, Inc. (In re Moltech Power Systems, Inc.)*, 326 B.R. 179 (Bankr. N. D. Fla. 2005), cited for support by Robicheaux, the debtor actually owed debts to the third parties while no such liability exists in this case.

The court agrees with the arguments and authorities cited by the liquidating trustee and concludes that Robicheaux is not entitled to receive credit under the new value defense for the payments that were made to third parties and to whom the debtor was not obligated. The court concludes that Robicheaux has not met its burden and has not shown by a preponderance of the evidence that it is entitled to credit for new value under 11 U.S.C. § 547(c)(4).

Robicheaux further claims that in addition to the new value, it in good faith completed work postpetition for which it should be allowed an administrative expense claim pursuant to 11 U.S.C. § 503(b)(3)(D), arguing that items such as wall coverings and furniture installed post-petition represented a substantial contribution under § 503 and that the debtor would have been unable to deliver the yacht to the purchaser without these items, that the debtor was able to avoid a breach of contract claim and benefitted the estate for income received for the completed yacht. Robicheaux argues that a credit of \$61,840.71 for wallcoverings, furniture and labor should be offset against any amount awarded to the liquidating trustee.

The liquidating trustee argues that Robicheaux wants credit for amounts it invoiced the debtor plus credit for amounts Robicheaux paid to third parties, which are really the same costs.

The Trustee claims that Robicheaux's position is without merit and argues that Robicheaux would be getting new value credit twice for virtually the same materials and services. The Liquidating Trustee also indicates that Robicheaux cannot have an administrative claim for postpetition materials and services for the debtor because Robicheaux was already paid in full for all materials and services provided, and there are no facts on which to base an administrative claim. The Trustee asserts that Robicheaux must prove its claim arose from a post-petition transaction and that it provided some demonstrable benefit to the bankruptcy estate, citing *In re Jartran, Inc.* 732 F. 2d 584, 587 (7th Cir. 1984). Additionally, the Trustee asserts that the "substantial contribution" requirement of § 503 is more than an abidance of terms of a contract. Citing *In re Condere Corp.*, 251 B.R. 693, 695 (Bankr. S.D.Miss. 2000). Moreover, the trustee points out that the bar date for administrative claims in the Chapter 11 proceeding was August 27, 2003 and that Robicheaux has demonstrated no cause under § 503 for the untimely filing of an administrative proof of claim.

The court also agrees with the argument made by the trustee that the claim for administrative expense by Robicheaux was not timely made under the deadlines established in this case for submissions of administrative claims, and furthermore, that Robicheaux has not otherwise provided sufficient proof to establish entitlement to an administrative claim for the payments at issue.

Further, the trustee argues that there is no entitlement to setoff in that § 553 prohibits setoff where there is no mutuality of debt. The trustee notes that Robicheaux has asserted that if pre-petition transfers are avoided, Robicheaux is entitled to setoff this award by amounts Robicheaux paid postpetition to its creditors. The trustee argues that this type of triangular setoff

is not allowed, citing *In re Elcona Homes Corp.*, 863 F. 2d 483, 486 (7th Cir. 1988) and *Sherman v. First City Bank of Dallas (United Sciences of America, Inc.)*, 893 F. 2d 720, 723 (5th Cir. 1990). The court agrees with the trustee's arguments that Robicheaux is not entitled to setoff for amounts asserted.

The court concludes that the plaintiff is entitled to avoid those preferential transfers as set out in the Joint Stipulations in the amount of \$116,958.45 pursuant to 11 U.S.C. § 547(b) and that Robicheaux has not met its burden of proof to show that those payments should be shielded under § 547(c).

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.

DATED this the 31st day of August, 2006.

/s/ Edward R. Gaines

EDWARD R. GAINES

UNITED STATES BANKRUPTCY JUDGE

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