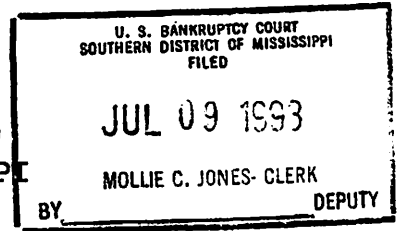


IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION



IN RE:  
JOHN NETHERO & ASSOCIATES, INC.

CASE NO. 90-01745JC

FRANK M. YOUNGBLOOD, TRUSTEE

PLAINTIFF

VS.

ADVERSARY NO. 91-00200

OMEGA DEVELOPMENT COMPANY, A  
MISSISSIPPI GENERAL PARTNERSHIP AND  
ITS GENERAL PARTNERS CONSISTING OF:  
MIKE P. STURDIVANT;  
YGONDINE W. STURDIVANT;  
MIKE P. STURDIVANT, JR.;  
J. WALKER STURDIVANT;  
B. SYKES STURDIVANT;  
GAINES P. STURDIVANT;  
YGONDINE G. STURDIVANT;  
EARLE F. JONES

DEFENDANTS

AND

WOODMOOR II, A MISSISSIPPI PARTNERSHIP  
AND ITS GENERAL PARTNERS CONSISTING OF:  
OMEGA DEVELOPMENT COMPANY, A  
MISSISSIPPI PARTNERSHIP;  
MIKE P. STURDIVANT;  
J. WALKER STURDIVANT;  
EARLE F. JONES;  
GAINES P. STURDIVANT

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

This matter is before the Court on the Defendants' Motion  
for Partial Summary Judgment. The Defendants seek an adjudication

by the Court that there exists no genuine issue of material fact relating to the solvency of the Debtor during the period of time from one year through 90 days prior to the commencement of the Debtor's case, i.e. the "insider period" under § 547 of the Bankruptcy Code<sup>1</sup>; that based on the material facts, the Plaintiff is unable to make a prima facie case that the Debtor was insolvent during the "insider period"; and that based on the foregoing the Defendants are entitled to summary judgment dismissing all claims relating to preferential transfers that took place during the "insider period."

Also before the Court is the Defendants' Motion to Strike Trustee's Response Exhibits, wherein the Defendants argue that the exhibits contained in the Trustee's response to the motion for partial summary judgment are inadmissible as evidence and should be stricken from the record. After considering the motions, responses and memorandum briefs filed by the parties, the Court holds that both the Motion to Strike Trustee's Response Exhibits and the Motion for Partial Summary Judgment are well taken and should be granted. In so holding the Court makes the following findings of fact and conclusions of law.

#### DISCUSSION

John W. Nethero & Associates, Inc. filed its petition for relief under Chapter 7 of the Bankruptcy Code on May 30, 1990, and

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<sup>1</sup> Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

Frank M. Youngblood was appointed Trustee for the chapter 7 estate. On September 11, 1991, Youngblood commenced this adversary proceeding against Omega Development Company and Woodmoor II, both of which are Mississippi partnerships, and also against their general partners. The complaint seeks to recover from the Defendants certain transfers made by the Debtor to the Defendants which the Trustee alleges were preferential transfers pursuant to § 547 of the Bankruptcy Code.

In his complaint, the Trustee alleges that certain of the preferential transfers occurred within 90 days before the date the Debtor filed its petition for relief. These transfers are not relevant to the Defendants' Motion for Partial Summary Judgment. The Trustee also alleges that certain transfers took place between 90 days and one year before the Debtor filed its petition for relief, and by virtue of the Defendants' status as insiders, the transfers were preferential. It is these transfers that allegedly took place during the "insider period" to which the Defendants' Motion for Partial Summary Judgment applies.

In support of their Motion for Partial Summary Judgment, the Defendants assert that the Debtor's insolvency at the time the transfers were made is an essential element of a § 547 action, upon which the Trustee bears the burden of proof. The Defendants also assert that there exists no genuine issue of material fact relating to the solvency of the Debtor during the "insider period," and that in light of the material facts, the Trustee is unable to make a prima facie showing that the Debtor was insolvent during the

"insider period." Therefore, they are entitled to summary judgment dismissing all claims regarding preferential transfers during the "insider period."

In response to the Defendants' Motion for Partial Summary Judgment, the Trustee submits that he intends to introduce oral testimony at trial showing the Debtor's insolvency during the "insider period," although no affidavits of witnesses were attached to the Trustee's response. Additionally, the Trustee attached as documentary proof unsigned copies of federal income tax returns for the Debtor for the years 1984, 1985 and 1986 along with copies of two pieces of correspondence, one from the Trustee to the attorney for the Defendants regarding the income tax returns and one from the Debtor's accountant to the Debtor regarding necessary filing procedures. Based on the foregoing, the Trustee contends that the Motion for Partial Summary Judgment should be denied.

The Defendants next filed their motion to strike the exhibits attached to the Trustee's response on the basis that the exhibits are irrelevant, unauthenticated, constitute hearsay, and therefore, are inadmissible as proof of the existence of a material fact with which the Trustee may show insolvency during the "insider period."

#### MOTION TO STRIKE

The Court will first consider the Defendants' motion to strike. The facts upon which the Trustee, as the nonmovant, relies to show the existence of a material fact must be admissible at

trial. Leonard v. Dixie Well Serv. & Supply, 828 F.2d 291, 295 (5th Cir. 1987). While the Defendants set forth several grounds for finding the exhibits inadmissible, this Court needs only to consider the relevancy of the documents. As previously stated, the Trustee attached as exhibits in support of his response to the Motion for Partial Summary Judgment copies of two pieces of correspondence and unsigned, unauthenticated federal income tax returns for the years 1984, 1985 and 1986.

The first letter attached as an exhibit to the Trustee's response is a letter dated August 10, 1992 from the attorney for the Trustee to the attorney for the Defendants. It appears to be a transmittal letter wherein the tax returns that are the subject of the present motion to strike were forwarded to the attorney for the Defendants. The letter also references an enclosed letter from the Debtor's accountant which also is the subject of the Defendants' motion to strike. This Court finds that the August 10, 1992 letter has no relevance to the issue of the Debtor's insolvency or financial condition during the "insider period" from May 31, 1989 through February 28, 1990.

The second letter attached to the Trustee's response is the letter from the Debtor's accountant referenced in the August 10, 1992 letter. It is dated September 4, 1990 and is addressed to John Nethero. The September 4, 1990 letter reflects that as a result of the bankruptcy, the accounting firm was not retained to prepare the corporate income tax returns for the years 1987, 1988 and 1989 and that the firm understood Nethero would file the

returns himself. The letter also references some enclosed forms that Nethero apparently had requested from the accountants. No substantive information regarding the net worth of John Nethero & Associates, Inc. is contained in the letter, and accordingly, the September 4, 1990 letter is irrelevant to the issue of the Debtor's insolvency.

Finally, the unsigned tax returns submitted by the Trustee are for fiscal years 1984, 1985 and 1986. As previously stated, John W. Nethero & Associates, Inc. filed its petition for relief on May 30, 1990. The "insider period," during which the Trustee must show insolvency was from May 31, 1989 through February 28, 1990. Since the tax returns for fiscal years 1984, 1985 and 1986 offer no information regarding the Debtor's financial situation during 1989 and 1990, this Court finds that the tax returns are also irrelevant, and are therefore inadmissible to show the existence of a material fact upon which the Trustee may make a prima facie showing of the Debtor's insolvency during the "insider period." Accordingly, the Defendants' motion to strike will be granted.

#### MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court will next consider the merits of the Defendants' Motion for Partial Summary Judgment. In accordance with Rule 18 of the Uniform Local Bankruptcy Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of

Mississippi<sup>2</sup>, the Defendants have listed the material facts which they contend constitute the Trustee's prima facie case.

The Defendants also contend that based on the material facts, the Trustee is unable to make a prima facie case of the Debtor's insolvency during the "insider period." Since proof of insolvency is crucial to the success of a preference action, and since the Trustee is unable to prove insolvency during the "insider period," they also agree that they are entitled to summary judgment dismissing all claims relating to transfers that took place during the "insider period."

The relevant portions of § 547 provide as follows:

11 USC § 547  
§ 547. Preferences.

....

(b) Except as provided in subsection (c) of this section, the trustee may avoid any

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**RULE 18. MOTION FOR SUMMARY JUDGMENT**

....

**II. IF MOVANT DOES NOT HAVE THE BURDEN OF  
PERSUASION ON THE ISSUE UPON WHICH  
SUMMARY JUDGMENT IS SOUGHT**

**A. Movant**

1. List the material facts that the movant contends constitute the non-moving party's prima facie case.

2. Designate which facts in the non-moving party's prima facie case the movant contends do not exist and (a) cite and attach the factual authorities the movant contends establish the non-existence of each designated fact and/or (b) assert that there is no evidence to support the existence of the designated fact.

**B. Respondent**

For each material fact designated by the movant as being part of the respondent's prima facie case and claimed by the movant that there is evidence of its non-existence and/or no evidence of its existence, the respondent should either (a) cite and attach any factual authorities supporting the existence of the fact or (b) deny that the respondent has the burden of persuasion to establish this fact as part of the respondent's prima facie case.

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.

....

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(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 ....

(emphasis added).

As set forth in subsection (g), the burden of proving each of the elements contained in subsection (b) lies with the Trustee. While the Trustee enjoys a presumption of insolvency during the 90 days preceding the filing of the petition, no such



presumption exists for the period between 90 days and one year before the filing of the petition.

John W. Nethero & Associates, Inc. filed its petition for relief on May 30, 1990. The Trustee has the benefit of a presumption that the Debtor was insolvent from March 1, 1990 through May 30, 1990. However, the Defendants' Motion for Partial Summary Judgment does not pertain to those transfers which occurred during the initial 90 day period. The period of time which is the subject of the Defendants' motion is the period of time for which the Trustee must prove insolvency without the benefit of a presumption in his favor, or the "insider period," from May 31, 1989 through February 28, 1990.

Discovery has been completed in this proceeding. In support of their motion for partial summary judgment the Defendants offer the complaint, the answer, the Trustee's responses to the Defendants' interrogatories, and the Defendants' responses to the Trustee's interrogatories. The Defendants specifically point out to the Court that in response to an interrogatory propounded by the Defendants requesting identification of all documents upon which the Trustee's claim of insolvency is based, the Trustee identified the Debtor's schedules of assets and liabilities filed with the Court, two exhibits pertaining to real property transfers attached to the Defendants' responses to interrogatories, and additional documentation as it becomes available to the Trustee. The Defendants claim that the foregoing is insufficient to make a prima facie showing of insolvency as none of the documentation contains

information regarding the Debtor's net worth during the "insider period."

After reviewing the documents upon which the Defendants' Motion for Partial Summary Judgment is based, the Court concludes that, in fact, the documents offered in support of the motion show an absence of evidence regarding the insolvency or financial condition of the Debtor during the "insider period." While the Trustee indicated in his discovery responses that he intends to rely upon the Debtor's schedules of assets and liabilities and also upon two exhibits provided to the Trustee by the Defendants in responding to discovery in order to prove the Debtor's insolvency, neither is sufficient to make a prima facie showing of insolvency. The Debtor's schedules of assets and liabilities relate to the Debtor's financial condition immediately prior to filing its petition for relief. The exhibits attached to the Defendants' responses to interrogatories are nothing more than a compilation identifying transfers of real property, the dates transferred, the purchase prices, and the dates and amounts of payment.

Since the Defendants have asserted that the Trustee has no evidence to support the claim of insolvency, the Trustee must come forward with evidence showing the existence of facts supporting his claim that the Debtor was insolvent during the "insider period." The Court has already found that the documents attached to the Trustee's response to the motion for partial summary judgment are irrelevant and should be stricken, and therefore, the Court will not consider them.

The Trustee also asserts in his response to the motion for partial summary judgment that he intends to present oral testimony to the Court which would show that the Debtor was, in fact, insolvent during the "insider period." However, the Trustee has attached neither affidavits nor deposition transcripts to support his claim. Rule 56 of the Federal Rules of Civil Procedure as made applicable by Rule 7056(e) of the Federal Rules of Bankruptcy Procedure provides in relevant part as follows:

Rule 56. Summary Judgment.

....  
(e) Form of Affidavits; Further Testimony; Defense Required. .... When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

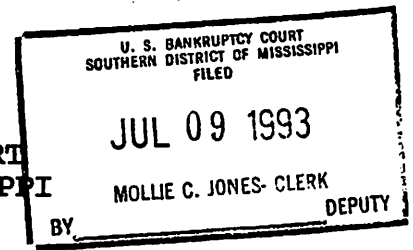
The Trustee has offered nothing upon which this Court may rely to deny the Defendants' Motion for Partial Summary Judgment. No admissible proof has been offered by the Trustee regarding the Debtor's financial condition during the "insider period." Accordingly, this Court finds that the Defendants have established the nonexistence of evidence showing that the Debtor was insolvent during the "insider period" as required by Rule 7056 of the Federal Rules of Bankruptcy Procedure and Rule 56 of the Federal Rules of Civil Procedure and that their Motion for Partial Summary Judgment should be granted.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 9<sup>th</sup> day of July, 1993.

  
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
JACKSON DIVISION



IN RE:  
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EARLE F. JONES;  
GAINES P. STURDIVANT

FINAL JUDGMENT

Consistent with the opinion dated contemporaneously herewith, this Court finds that the Defendants' Motion to Strike Trustee's Response Exhibits and Motion for Partial Summary Judgment are well taken and should be granted. It is therefore ordered and adjudged as follows:

1. The exhibits attached to the Trustee's response to the motion for partial summary judgment should be, and hereby are, stricken from the record; and

2. All claims contained in the Trustee's complaint relating to transfers between the Debtor and the Defendants which took place from May 31, 1989 through February 28, 1990 should be, and hereby are, dismissed with prejudice.

So ordered this the 9<sup>th</sup> day of July, 1993.

  
UNITED STATES BANKRUPTCY JUDGE