

**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. 03-05287 ERG
)	
CADCO DESIGN, LTD.)	
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, and the opposition thereto filed by the defendant herein, Cadco Design, Limited. Having considered the pleadings and supporting documentation and the memoranda, the court concludes, as follows, 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 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, the above styled adversary complaint 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 Cadco Design, Ltd. (“Cadco”). The complaint alleges that within 90 days preceding commencement of the petition, Friede Goldman Offshore, Inc. (“FGO”) made transfers to the defendant totaling \$77,073.80 and that the payments should be avoided as preferential transfers pursuant to 11 U.S.C. §§ 547(b) and 550.²

The Liquidating Trustee for The Consolidated FGH Liquidating Trust (“Trustee”) filed its Motion for Partial Summary Judgment on September 19, 2007. The Trustee requests judgment in its favor to the extent that the burden of proof under 11 U.S.C. § 547(b) has been satisfied with respect to payments made to Cadco from January 20, 2001 to April 20, 2001. The Trustee requests a determination that it has established that the transfers are avoidable as transfers that benefitted Cadco, that were made on account of antecedent debts, that were made

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, including Friede Goldman Offshore, Inc.

² Transfers referenced in the complaint were made by check number 5009391 in the amount \$24,244.75, and check number 5009980 in the amount \$77,073.80. The Trustee’s Motion for Partial Summary Judgment states that check number 5009391 does not qualify as a preferential transfer and the Trustee is not seeking recovery of the payment.

while FGO was insolvent,³ that were made within 90 days before filing bankruptcy and that enabled Cadco to receive more than it would have if the case were a case under Chapter 7, the transfers had not been made or if the creditor received payment to the extent provided by the Bankruptcy Code. The motion does not request judgment on any defense asserted by Cadco pursuant to § 547(c)(1) and (c)(2).

In its opposition to the Motion for Summary Judgment, Cadco averred that the adversary proceeding should be dismissed because of dilatory service in violation of Rule 4 of the Federal Rules of Civil Procedure because the plaintiffs did not attempt to achieve service of process by requesting issuance of summons until April 2, 2004, almost a year after filing the complaint on April 18, 2003. Cadco further argued that the complaint was filed 2 days late, taking the position that the controlling date for filing adversary proceedings to avoid a preferential transfer pursuant to 11 U.S.C. § 546 is two years from the filing date of the earliest petition among the consolidated debtors, and that the earliest date was April 16, 2001. Cadco's opposition further argues that there is no presumption of insolvency because of a belief that an executive of the debtor has testified that the company was not insolvent, but suffered only from cash management shortfalls, and that if this is correct, there is no presumption of insolvency.

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 pursuant to 28 U.S.C. § 1334 and § 157.

³ The Motion sets out that FGO is presumed insolvent under 11 U.S.C. § 547(b)(3) for purposes of the Motion.

Section 547(b) of the Bankruptcy Code provides that the trustee may avoid a transfer of the debtor in property to or for the benefit of a creditor, for or on account of an antecedent debt, made while the debtor was insolvent, made within 90 days before the date of filing of the petition and that enables the creditor to receive more than such creditor would receive if the case were a case under chapter 7, the transfer had not been made and the creditor received payment of such debt to the extent provided by provision of the Code. *See*, 11 U.S.C. § 547(b). Section 547(f) provides that the debtor is presumed to have been insolvent during the 90 days immediately preceding the date of filing.

Summary judgment may be granted if the moving party establishes that there are no genuine issue as to any material fact upon which judgment is requested:

Rule 7056 of the Federal Rules of Bankruptcy Procedure governs summary judgment in an adversary proceeding in bankruptcy court. Rule 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure. Fed. R. Bank. P. 7056. Under Rule 56(c), summary judgment is appropriate only “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.” Fed. R. Civ. P. 56(c).

Whitaker Construction Company, Inc. v. Benton & Brown, Inc. (In re Whitaker Construction Company, Inc.), 411 F.3d 197, 201 (5th Cir. 2005). *See also, Peoples State Bank v. General Electric Capital Corp. (In re Ark-La-Tex Timber Co., Inc.)*, 482 F.3d 319, 328 -329 (5th Cir. 2007), *Baker Hughes Oilfield Operations, Inc. v. Cage (In re Ramba, Inc.)*, 416 F.3d 394, 403 (5th Cir. 2005).

The Trustee’s pleading and supporting documentation and affidavit clearly establish that transfers that benefitted Cadco were made by check to Cadco out of FGO’s property, that the transfers were made on account of antecedent debts owed to Cadco, and that the payments were

made within 90 days of the petition date.⁴ The Trustee further establishes that Cadco receive 100% of the amount it was owed by FGO pursuant to the relevant invoices, and that under the Confirmed Plan, the estimated recovery for general unsecured claims is 3.2% - 6.2%. Therefore, Cadco 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 Cadco's opposition to the Motion.

Cadco alleges dilatory service in violation of Rule 4 of the Federal Rules of Civil Procedure. As pointed out by the Trustee, orders were entered by the court allowing an extension of time to serve the Complaint to Avoid and Recover Preferential Transfers on the defendant Cadco Design, Inc. until August 19, 2004. The court file indicates a re-issued summons that was served April 19, 2004, well prior to the August deadline. The court concludes that the complaint was properly served.⁵

Cadco further alleges that the complaint was filed 2 days late based on the argument that because FGO's bankruptcy case was consolidated with other Friede entities, the two year bar date under 11 U.S.C. § 546 for filing preferential transfer actions begins to run not from the date of filing of FGO, but from the date of filing of the earliest of the consolidated debtors. The earliest case was filed by Friede Goldman Delaware, Inc., on April 16, 2001, 4 days prior to FGO's filing on April 20, 2001. Cadco has provided no statutory authority for its argument.

⁴ The Trustee indicates that the check in issue cleared the bank on February 1, 2001, within the 90 day preferential period. *See, Barnhill v. Johnson*, 503 U.S. 393, 112 S. Ct. 1386, 118 L.Ed. 2d 39 (1992)(checks are transferred on date honored by debtor's bank).

⁵ It is further noted that Cadco did not raise insufficient service of process in its responsive pleading as required by Federal Rule of Bankruptcy Procedure 7012.

The court concludes that the substantive consolidation ordered at confirmation in December of 2003, after the expiration of the two year limitation period, should not control or change the date of FGO's order for relief for purposes of determining the limitations period under § 546 for preference actions under the particular circumstances of this case.⁶

Cadco also argues that there is no presumption of insolvency on the basis of an executive's testimony. However, Cadco offers no supporting documentation regarding the testimony or the actual solvency of the debtor, but only the bare assertion that if the testimony were correct, there would be no presumption of insolvency. The court in *Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp.*, 158 F.3d 312 (5th Cir. 1998) stated the following regarding the statutory presumption of insolvency:

⁶ See also, *In re Gerardo Leasing, Inc.*, 173 B.R. 379, 387 (Bankr. N.D.Ill.1994)(court stated that it appears there is no authority or rationale supporting a suggestion that the start date for the statute of limitations applicable to the Trustee's pending avoiding actions is somehow effected by a subsequent order for substantive consolidation); *Schwinn Plan Committee v. AFS Cycle & Co., LTD (In re Schwinn Bicycle Co.)*, 205 B.R. 557, 571 (Bankr. N.D.Ill. 1997)(court held that the argument that an order of substantive consolidation can affect the manner in which the defendant and the debtors conducted business during the preference period was misplaced, stating that the Bankruptcy Code looks to events during the preference period, and has no room for metaphysical transmutation of the corporate nature of parties during that period by the stroke of a judicial pen after a bankruptcy case is filed); *Nickless v. Avnet Inc. (In re Century Electronics Manufacturing, Inc.)*, 310 B.R. 485 (Bankr. D. Mass. 2004)(noted that retroactive consolidation orders should be used sparingly and be tailored to the specific facts of a case); *Garden Ridge Corporation* (338 B.R. 627 Bankr. Del. 2006)(citing proposition that it would be a violation of due process if substantive consolidation order destroyed defenses and rights that existed prior to entry of the order); however, *cf.*, *Gray v. O'Neill Properties Group, L.P. (In re Dehon, Inc.)*, 2004 WL 2181669 (Bankr. D. Mass. 2004)(under particular facts of case court noted that substantive consolidation nunc pro tunc may be established at trial and if so, the adversary complaint will not have been filed untimely).

The party seeking to rebut the presumption must introduce some evidence to show that the debtor was solvent *at the time of the transfer*; mere speculative evidence of solvency is not enough. *See Sandoz v. Fred Wilson Drilling Co. (In the Matter of Emerald Oil Co.)*, 695 F.2d 833, 839 (5th Cir.1983) (emphasis added). Summary judgment in favor of the trustee is appropriate when the party seeking to rebut the presumption fails, *see id.* at 834-39 (affirming summary judgment in an avoidance of preference case based solely on the presumption), or when there is no genuine issue of material fact concerning insolvency and the trustee is entitled to judgment as a matter of law, *see R. Bankr.P. 7056; Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Id. at 315. The court concludes that Cadco has failed to rebut the presumption of insolvency provided in §547(f).

Based on the foregoing, the court concludes that the Motion for Partial Summary Judgment should be granted and that the Trustee is entitled to judgment as a matter of law to the extent that he the burden of proof has been met as to establishing a preferential transfer pursuant to 11 U.S.C. § 547(b) and § 547(g).

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 1st day of February, 2008.

/s/ Edward R. Gaines

EDWARD R. GAINES

UNITED STATES BANKRUPTCY JUDGE

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