AP Servs., LLC v. McKesson Corp. (In re CRC Parent Corp.)

United States Bankruptcy Court for the District of Delaware

May 16, 2013, Decided

Chapter 11, Case No. 10-11567 (MFW) Jointly Administered, Adv. No. 12-50701 (MFW)

Reporter
2013 Bankr. LEXIS 2006 *; 2013 WL 2149492

In re: CRC PARENT CORPORATION, et al. f/k/a CHEM RX CORPORATION, et al., Debtors.AP SERVICES, LLC, AS TRUSTEE OF THE CRC LITIGATION TRUST, Plaintiff, v. MCKESSON CORPORATION, Defendant.

Core Terms

wire transfer, invoices, Transfers, cleared, wire, antecedent debt, argues, column, summary judgment, material fact, delivery, asserts, genuine, summary judgment motion

Case Summary

Procedural Posture

Plaintiff trustee of sought to avoid transfers and recover property pursuant to *11 U.S.C.S. §§ 547*, *549* and to disallow defendant's claim pursuant to *11 U.S.C.S. § 502(d)*. Defendant filed a motion for summary judgment.

Overview

Debtors were pharmacies serving multiple institutions and long-term care facilities, including skilled nursing homes and group homes. The debtors provided drugs, intravenous medications, durable medical equipment, and surgical supplies for residents of institutions. Defendant was a wholesale distributor of pharmaceutical products and had an ongoing supply relationship with debtors. Defendant argued that the trustee could not satisfy each of the prima facie elements required under *11 U.S.C.S. § 547(b)* to establish that certain alleged payments were avoidable preferences. Specifically, defendant asserted that the transfers at issue were not made on account of an antecedent debt owed by the debtors. Under defendant's relationship with the debtors, the wire transfer payment was always received before the delivery of the product. Therefore, defendant contended that none of the wire transfers paid an antecedent debt. The court agreed with defendant based on evidence that payment was in advance for all deliveries. Therefore, the transfers were advance payments and did not satisfy antecedent debt. The trustee failed to satisfy the elements of the other causes.

Outcome

The court granted defendant's motion for summary judgment on all counts of the trustee's complaint.

LexisNexis® Headnotes

Bankruptcy Law > Procedural Matters > Adversary Proceedings > Judgments

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1 **Adversary Proceedings, Judgments**

The court should grant a motion for summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. *Fed. R. Bankr. P. 7056* incorporates *Fed. R. Civ. P. 56* in adversary proceedings.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN2 Summary Judgment, Evidentiary Considerations

In considering a motion for summary judgment under Fed. R. Civ. P. 56, the court must view the inferences from the record in the light most favorable to the non-moving party. If there does not appear to be a genuine issue as to any material fact and on such facts the movant is entitled to judgment as a matter of law, the court must enter judgment in the movant's favor.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN3 Burdens of Proof, Movant Persuasion & Proof

With respect to a motion for summary judgment, the movant bears the burden of establishing that no genuine issue of material fact exits. A fact is material when it could affect the outcome of the suit.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN4 Burdens of Proof, Movant Persuasion & Proof

With respect to a motion for summary judgment, once the moving party has established its prima facie case, the party opposing summary judgment must go beyond the pleadings and point to specific facts showing there is a genuine issue of fact for trial. If the moving party offers only speculation and conclusory allegations in support of its motion, its burden of proof is not satisfied.

Bankruptcy Law > ... > Preferential Transfers > Elements > General Overview

HN5 Preferential Transfers, Elements

11 U.S.C.S. § 547 allows the trustee or the debtor-in-possession to dismantle and avoid transactions between a debtor and its creditors that occurred within 90 days before the petition date. In order to avoid a pre-petition preferential transfer of a debtor's interest in property, the plaintiff must show that the transfer meets the requirements of 11 U.S.C.S. § 547(b).

Bankruptcy Law > ... > Preferential Transfers > Elements > General Overview

HN6 Preferential Transfers, Elements

See 11 U.S.C.S. § 547(b).

Bankruptcy Law > ... > Prepetition Transfers > Preferential Transfers > Evidence & Procedural Matters

HN7 Preferential Transfers, Evidence & Procedural Matters

Unless each and every one of these elements is proven, a transfer is not avoidable as a preference under 11 U.S.C.S. § 547(b).

Bankruptcy Law > ... > Preferential Transfers > Elements > Antecedent Debt

HN8 Elements, Antecedent Debt

11 U.S.C.S. § 547(b)(2) requires that the transfer be on account of an antecedent debt owed to the creditor. 11 U.S.C.S. § 547(b)(2). Although the term antecedent debt is not defined by the Bankruptcy Code, a debt is antecedent, when the debtor becomes legally bound to pay before the transfer is made.

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For CRC Parent Corporation, aka Paramount Acquisition Corp., fka Chem RX Corporation, Debtor (10-11567-MFW): Scott D. Cousins, Cousins Chipman & Brown, LLP, Wilmington, DE; Dennis A. Meloro, Greenberg Traurig, Wilmington, DE.

For Kurtzman Carson Consultants LLC, Claims Agent (10-11567-MFW): Albert Kass, Kurtzman Carson Consultants, LLC, El Segundo, CA.

For Offical Comittee of Unsecured Creditors, Creditor Committee (10-11567-MFW): L. John N. Bird, Jeffrey M. Schlerf, John H. Strock, Fox Rothschild LLP, Wilmington, DE; Samuel L. Closic, Etta Ren Wolfe, Potter Anderson & Corroon LLP, Wilmington, DE; Scott Greissman, White & Case LLP, New York, NY; Eric Michael Sutty, Elliott Greenleaf, Wilmington, De; Jason N. Zakia, WHITE & CASE LLP, Miami, FL.

Judges: Mary F. Walrath **[*2]** , United States Bankruptcy Judge.

Opinion by: Mary F. Walrath

Opinion

MEMORANDUM OPINION[1]

Before the Court is the Motion of McKesson Corporation ("McKesson") for Summary Judgment on the Complaint filed by AP Services, LLC, as Trustee of the CRC Litigation Trust (the "Trustee"). The Complaint seeks to avoid transfers and recover property pursuant to *sections 547*, *548*, *549*, and *550 of the Bankruptcy Code* and to disallow McKesson's claim pursuant to *section 502(d)*. For the reasons set forth below, the Court will grant the Motion for Summary Judgment.

I. BACKGROUND

CRC Parent Corporation and its affiliates (collectively, the "Debtors") were pharmacies serving multiple correctional institutions and long-term care facilities, including skilled nursing homes and group homes. The Debtors provided prescription and non-prescription drugs, intravenous medications, durable medical equipment, and surgical supplies for residents of institutions in New York, New Jersey, Pennsylvania, and Florida.

McKesson is a wholesale distributor of pharmaceutical products. **[*3]** Beginning in 2004, McKesson sold pharmaceutical products to the Debtors through a computerized and highly automated process that tracked orders, payments, and shipments. From February 10 through May 11, 2010, the Debtors made sixty-four wire transfers to McKesson in an aggregate amount of not less than $9,874,843.53 (the "Transfers").

As a result of being highly leveraged and lacking adequate liquidity to sustain operations, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on May 11, 2010 (the "Petition Date"). On April 11, 2011, the Court entered an Order confirming the Debtors' Second Amended Joint Plan of Liquidation (the "Plan"). (D.I. 900.)[2] Under the Plan, the Trustee is responsible for prosecuting causes of action for the benefit of creditors. (D.I. 873.)

On May 8, 2012, the Trustee commenced the instant adversary proceeding by filing a Complaint against McKesson in which it alleges, inter alia, that the Transfers constituted preferential transfers pursuant to *section 547* ("Count I"), fraudulent conveyances under *section 548* **[*4]** ("Count II"), or unauthorized post-petition transfers under *section 549* ("Count III"). Additionally, the Trustee seeks to recover the Transfers under *section 550(a)* ("Count IV") and to disallow McKesson's claims under *section 502(d)* ("Count V").

On February 14, 2013, McKesson filed its Motion for Summary Judgment on all counts in which it asserts that there are no triable issues of material fact. In its Response, the Trustee conceded summary judgment

[1] This Memorandum Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to *Rule 7052 of the Federal Rules of Bankruptcy Procedure*.

[2] Citations to pleadings in the bankruptcy case are "D.I. #" and to pleadings in the adversary proceeding are "Adv. D.I. #."

regarding its Count II fraudulent conveyance claim. Briefing has been completed on the other counts, and the matter is ripe for decision.

II. JURISDICTION

The Court has subject matter jurisdiction over this core proceeding. *28 U.S.C. § 1334(b)* & *§ 157(b)(2)(F)*.

III. DISCUSSION

A. Standard of Review

HN1 The court should grant a motion for summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*.[3]

HN2 In considering a motion **[*5]** for summary judgment under *Rule 56*, the court must view the inferences from the record in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Hollinger v. Wagner Mining Equip. Co.., 667 F.2d 402, 405 (3d Cir. 1981)*. If there does not appear to be a genuine issue as to any material fact and on such facts the movant is entitled to judgment as a matter of law, the court must enter judgment in the movant's favor. See, e.g., *Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Carlson v. Arnot-Ogden Mem'l Hosp., 918 F.2d 411, 413 (3d Cir. 1990)*.

HN3 The movant bears the burden of establishing that no genuine issue of material fact exits. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1985)*; *Integrated Water Res., Inc. v. Shaw Envtl., Inc. (In re IT Grp., Inc.), 377 B.R. 471, 475 (Bankr. D. Del. 2007)*. A fact is material when it could "affect the outcome of the suit." *Anderson, 477 U.S. at 248*.

HN4 Once the moving party has established its prima facie case, the party opposing summary judgment must go beyond the pleadings and point to specific facts showing there is a genuine issue of fact for trial. See, **[*6]** e.g., *id. at 252*; *Matsushita, 475 U.S. at 585-86*; *Michaels v. New Jersey, 222 F.3d 118, 121 (3d Cir. 2000)*; *Robeson Indus. Corp. v. Hartford Accident & Indem. Co., 178 F.3d 160, 164 (3d Cir. 1999)*. If the moving party offers only speculation and conclusory allegations in support of its motion, its burden of proof is not satisfied. See *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 252 (3d Cir. 1999)*.

B. Preferential Transfer Claim

HN5 *Section 547* allows the trustee or the debtor-in-possession to dismantle and avoid transactions between a debtor and its creditors that occurred within 90 days before the petition date. *Barnhill v. Johnson, 503 U.S. 393, 394, 112 S. Ct. 1386, 118 L. Ed. 2d 39 (1992)*. In order to avoid a pre-petition preferential transfer of a debtor's interest in property, the plaintiff must show that the transfer was:

> ***HN6*** (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; . . .
> (5) that enables such creditor to receive more than such creditor would receive if —
> (A) the case were a case under chapter 7 of **[*7]** this title;
> (B) the transfer had not been made; and
> (C) such creditor received payments of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

HN7 "Unless each and every one of these elements is proven, a transfer is not avoidable as a preference under *11 U.S.C. § 547(b)*." *Argus Mgmt. Grp. v. J-Von N.A. (In re CVEO Corp.), 327 B.R. 724, 728 (Bankr. D. Del. 2005)* (citations omitted). See also *11 U.S.C. § 547(g)* (placing the burden of proof on the trustee).

McKesson argues in this case that the Trustee cannot satisfy each of the prima facie elements required under *section 547(b)* to establish that the alleged payments are

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[3] *Rule 7056 of the Federal Rules of Bankruptcy Procedure* incorporates *Rule 56 of the Federal Rules of Civil Procedure* in adversary proceedings.

avoidable preferences. Specifically, McKesson asserts that the Transfers were not made on account of an antecedent debt owed by the Debtors.

HN8 *Section 547(b)(2)* requires that the transfer be "on account of an antecedent debt" owed to the creditor. *11 U.S.C. § 547(b)(2)*. "Although the term 'antecedent debt' is not defined by the Bankruptcy Code, a debt is 'antecedent,' when the debtor becomes legally bound to pay before the transfer is made." *The Fonda Grp., Inc. v. Marcus Travel (In re The Fonda Grp., Inc.), 108 B.R. 956, 959 (Bankr. D. N.J. 1989)* **[*8]** (internal citations omitted).

In support of its contention that the Transfers did not pay an antecedent debt, McKesson attached an affidavit from Raymond Carlisi, a McKesson Area Credit Manager (the "Carlisi Affidavit"). (Adv. D.I. 23.) Mr. Carlisi states that in 2009 the Debtors and McKesson instituted a daily ordering and payment process. (Id. at ¶ 8.) According to this process, the Debtors' pharmacies submitted orders electronically to McKesson's regional distribution centers which McKesson verified between 4:00 p.m. and 4:30 p.m. the same day. (Id.) McKesson would not deliver the goods ordered until the Debtors' payment for that day's purchases was made via wire transfer. (Id.)

In support, McKesson attached to the Carlisi Affidavit a copy of the McKesson accounting report which lists the order, billing and payment transactions during the preference period (the "Report"). (Adv. D.I. 23 at Ex. 1.) McKesson notes that the Report demonstrates which invoices were paid by which Transfers (all of the invoices paid by a particular wire transfer have the same Clearing Document Number as the payment).

McKesson argues that under its relationship with the Debtors, the wire transfer was always **[*9]** received before the delivery of the product. Therefore, it contends that none of the wire transfers paid an antecedent debt. See, e.g., *Hechinger Inv. Co. of Del., Inc. v. Universal Forest Prods. (In re Hechinger Inv. Co. of Del., Inc.), 489 F.3d 568, 572 (3d Cir. 2007)* (noting that payments made prior to the shipment of goods or provision of services "were advance payments and therefore, by definition, not recoverable under *§ 547* as payments for or on account of an antecedent debt").

The Trustee responds that in no instance on the Report does the clear date of a wire pre-date the delivery of the goods associated with corresponding invoices. The Trustee argues that the column designated as "Clearing Date" demonstrates that the wires did not clear until the day after the delivery of the product.

McKesson responds that the "Clearing Date" column does not represent the date that the wire transfer was actually received as the Trustee suggests. McKesson notes that the date the wire was received by McKesson is reflected in the column designated as "McKesson Invoice/Wire/Credit Number." According to this column, the wire date was always identical to the date of the invoice and delivery. McKesson **[*10]** contends that the "Clearing Date" is simply the date that McKesson's accounts receivable staff reviewed the transaction and credited the applicable payment on McKesson's internal accounting records, denoting the transaction as "cleared."

The Trustee also argues that the Report fails to indicate which invoices were paid by which Transfers. The Trustee disputes McKesson's assertion that the wire transfers and invoices were linked under the "Clearing Document" column because the amount of the wire transfers did not always correspond to the amount of the invoices cleared by them. The Trustee gives two examples where the wire transfer amount was less than the amount of the goods delivered: on February 21, 2010, McKesson received a wire transfer of $209,771.97 for goods delivered in the amount of $214,052.73 and on February 16, 2010, McKesson received a wire transfer of $160,135.65, for goods delivered in the amount of $163,403.51.

McKesson responds that the Trustee added the wrong column to arrive at the total amount of goods shipped. The Report includes a "Gross Invoice/Wire Amount" and a "Net Invoice/Payment Amount." McKesson notes that the sum of the column "Net Invoice/Payment Amount" **[*11]** always equaled the amount of the corresponding wire transfer.

Finally, the Trustee asserts that further discrepancies in the Report demonstrate that genuine issues of material fact remain as to the accuracy of the Report. The Trustee provides two additional examples: the February 10, 2010, wire transfer of $195,000 exceeded the amount of invoices totaling $174,251.75, and the next wire transfer on February 11, 2010, of $22,643.49 was

substantially less than the total invoices of $47,815.68.

McKesson again notes that when calculating the invoices under the net column, the total amount of invoices related to the $195,000 wire payment on February 10 actually equaled $170,767.12. The $22,643.49 wire transfer on February 11 relates to total invoices of $46,876.37. McKesson asserts that the Debtors overpaid McKesson by $24,232.88 with respect to the February 10, 2010, wire payment, then underpaid McKesson by that same amount the next day. McKesson argues that overpayments by the Debtors occurred occasionally and would be adjusted in the next payment. During the preference period, however, McKesson notes that the Debtors never underpaid the invoices, unless there was a corresponding prior overpayment. **[*12]** Therefore, McKesson argues no antecedent debt ever arose in that period.

The Court agrees with McKesson. According to the Report and the Carlisi Affidavit, the daily ordering/prepayment relationship of the parties resulted in payment in advance for all deliveries. The wire transfer always cleared before the delivery of McKesson's pharmaceutical product. Therefore, the Transfers were advance payments and did not satisfy antecedent debt. Thus, the Court will grant McKesson's Motion for Summary Judgment on Count I of the Complaint.

C. Post-Petition Transfer Claim

The Trustee argues that genuine issues of material fact exist as to whether McKesson received post-petition transfers under *section 549*. The Trustee asserts that the Debtors' last payment of $238,540.19 (the "Last Transfer") cleared McKesson's bank on the Petition Date. The Trustee argues that McKesson has provided no evidence that the wire cleared prior to the Petition Date.

Relying on the Carlisi Affidavit, McKesson asserts that the Report clearly evidences that the Last Transfer was made by the Debtors on May 10 not May 11, 2011. (Adv. D.I. 23 at ¶ 12.) McKesson also notes that the receipt date of the Last Transfer is also corroborated **[*13]** by the May 2010 account statement of McKesson's affiliate, which shows that the $238,640.19 wire transfer was received on May 10, 2010, at 5:11 p.m. Eastern Time. (Adv. D.I. 39 at Ex. 1.)

Based on the unrefuted evidence presented by McKesson, the Court finds that the Last Transfer cleared on May 10, 2010, the day before the Petition Date. Therefore, the Last Transfer does not constitute a post-petition transfer avoidable pursuant to *section 549*.

D. Other Claims

Because the Court grants summary judgment in favor of McKesson on the Trustee's avoidance claims, the related claims to recover the value of the Transfers under *section 550(a)* and to disallow McKesson's claim under *section 502(d)* also will be denied. As a result, the Court will grant McKesson's Motion for Summary Judgment on all counts of the Trustee's Complaint.

IV. CONCLUSION

For the foregoing reasons, the Court will grant McKesson's Motion for Summary Judgment.

An appropriate Order is attached.

Dated: May 16, 2013

BY THE COURT:

/s/ Mary F. Walrath

Mary F. Walrath

United States Bankruptcy Judge

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