

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

In re:

Case No. 8:03-bk-22394-PMG
Chapter 11

ESTHER WEISMAN ENTERPRISES, INC.,
d/b/a Southern Estate Buyers & Appraisers
of Tampa,

Debtor.

ANGELA WELCH ESPOSITO, as Chapter 11
Trustee of Esther Weisman Enterprises, Inc.,

Plaintiff,

vs.

Adv. No. 8:05-ap-805-PMG

TIM LAZZARA,

Defendant.

**ORDER ON (1) MOTION FOR
SUMMARY JUDGMENT AND
(2) MOTION TO COMPEL DEFENDANT TO
IMMEDIATELY PRODUCE DOCUMENTS
AND RESPOND TO INTERROGATORIES**

THIS CASE came before the Court for hearing to consider the Motion for Summary Judgment filed by the Defendant, Tim Lazzara, and also to consider the Motion to Compel Defendant to Immediately Produce Documents and Respond to Interrogatories filed by the Plaintiff, Angela Welch Esposito, as Chapter 11 Trustee of Esther Weisman Enterprises, Inc.

The Plaintiff commenced this adversary proceeding by filing a Complaint to avoid and recover preferential transfers allegedly made to the Defendant, Tim Lazzara, pursuant to §547(b) of the Bankruptcy Code. In response, the Defendant contends that the Plaintiff cannot establish all of the elements required for a cause of action under §547(b), because the transfers were not made on account of an antecedent debt.

Background

The Debtor, Esther Weisman Enterprises, Inc., was previously engaged in the business of buying, selling, and appraising jewelry.

The Debtor filed a petition under Chapter 11 of the Bankruptcy Code on October 28, 2003. It has not operated its business since the commencement of the bankruptcy case.

On May 7, 2004, the Court entered an Order appointing Angela Welch Esposito as the Chapter 11 Trustee (the Trustee) in the case.

On October 27, 2005, the Trustee filed a Complaint to avoid and recover the sum of \$113,135.00 from the Defendant pursuant to §547(b) of the Bankruptcy Code. (Doc. 1). In the Complaint, the Trustee lists a series of fifteen checks that were paid to the Defendant between August 20, 2003, and September 15, 2003. The checks range in amount from \$4,000.00 to \$13,000.00. The Trustee alleges that the payments are avoidable because they satisfy all of the elements of a preferential transfer under §547(b).

The Defendant answered the Complaint and denied all of the material allegations made by the Trustee. (Doc. 7).

The Defendant subsequently filed the Motion for Summary Judgment that is currently at issue. (Doc. 19). In the Motion, the Defendant asserts that the payments identified in the Complaint were not made on account of an antecedent debt, and therefore are not avoidable under §547(b) of the Bankruptcy Code.

The Motion for Summary Judgment is accompanied by an Affidavit of the Defendant. (Doc. 20). In the Affidavit, the Defendant attests as follows:

1. He is the manager of a liquor store. (¶ 2).
2. The Debtor brought checks to the liquor store, and the checks were cashed either by the Defendant or another store employee. (¶ 2).

3. The Debtor never owed an antecedent debt either to the liquor store or to the Defendant individually. (¶ 3).

4. The checks "were cashed for green U.S. Currency each and every time." (¶ 4).

5. The Debtor never purchased any goods or services from the liquor store, and never had an open account with the store. (¶¶ 5, 6).

The Defendant further states that several checks had been returned for insufficient funds at the time that the Chapter 11 case filed, and that those checks have not been paid. (¶ 7).

The Trustee filed an Affidavit in Opposition to the Defendant's Motion for Summary Judgment. (Doc. 29).

In the Affidavit, the Trustee first asserts that the Motion for Summary Judgment is premature because she has not been able to complete discovery in this case.

Second, the Trustee asserts that genuine issues of material fact exist regarding the checks identified in her Complaint. The Trustee contends, for example, that the Debtor's records show that it had issued checks to the Defendant that were returned for insufficient funds, "such that some later payments made by the Debtor to the Defendant were made on account of the NSF checks." (¶ 8).

Additionally, the Trustee contends that the Debtor's records show that the Defendant had made a loan to the Debtor prior to June of 2003, and that certain payments "made by the Debtor to the Defendant were made on account of that loan." (Doc. 29, ¶ 9). Copies of fourteen checks are attached to the Trustee's Affidavit. One of the attached checks is made payable to the Defendant in the amount of \$50,000.00, and is dated June 13, 2003. The notation, "loan," is handwritten on the check. A second check is made payable to the Defendant in the amount of \$15,200.00, and is dated June 18, 2003. The notation, "repay loan," is handwritten on the June 18 check.

Shortly after filing her Affidavit, the Trustee filed the Motion to Compel Defendant to Immediately Produce Documents and Respond to Interrogatories that is also before the Court. (Doc. 39). In the Motion, the Trustee asserts that she had served a Request for Production of

Documents and First Set of Interrogatories on the Defendant on August 9, 2006, and that responses to the discovery were due on August 26, 2006, pursuant to an Order entered by the Court.

The Trustee contends that she has not received any documents from the Defendant in response to her discovery requests.

Discussion

This is an action to avoid certain transfers as preferential payments pursuant to §547(b) of the Bankruptcy Code.

In order to prevail under §547(b), the Trustee must show that the transfer: (1) was "of an interest of the Debtor in property," (2) was to or for the benefit of a creditor, (3) was for or on account of an antecedent debt owed by the debtor, (4) was made while the debtor was insolvent, (5) was made within ninety days before the bankruptcy petition was filed, and (6) enabled the creditor to receive more than he would have received in a Chapter 7 case. 11 U.S.C. §547(b).

The Defendant essentially asserts that he was not a creditor of the Debtor at the time that the payments were made, and that the checks were not issued on account of an antecedent debt. The Defendant further asserts that there is no genuine issue as to any material fact, and that he is entitled to the entry of a summary judgment in his favor as a matter of law. Fed.R.Civ.P. 56(c).

The Court finds that the Defendant's Motion for Summary Judgment should be denied without prejudice, and that the Defendant should be required to provide certain information to the Trustee that is relevant to the resolution of this action.

The Court recognizes, of course, that the Trustee initially filed this proceeding in October of 2005, and that the Trustee did not serve her discovery requests on the Defendant until the case had been pending for approximately nine months. The Court also recognizes that the Defendant is an individual who will be exposed to additional expense by the continuation of this litigation.

Further, the Court recognizes that the Trustee has received certain documentation from the Defendant's

accountant, and that the documents produced by the accountant did not establish the existence of a debtor/creditor relationship between the Debtor and the Defendant. (Transcript, p. 27).

The Court has reviewed the copies of the checks attached to the Trustee's affidavit, however, and notes that two checks issued by the Debtor to the Defendant refer to a "loan" or the repayment of a loan. The two checks are dated June 13, 2003, and June 18, 2003, respectively, and were therefore written prior to the ninety-day "preference period" prescribed by §547(b) of the Bankruptcy Code.

Nevertheless, the Court finds that the two checks raise an issue of fact regarding the existence of a business arrangement between the Defendant and the Debtor, and also raise an issue of fact regarding the existence of an antecedent debt within the meaning of §547(b). The checks were issued less than five months before the bankruptcy petition was filed, and therefore are not remote in time from the transactions that are identified in the Trustee's Complaint.

In view of the foregoing, the Defendant should be required to produce relevant documentation to the Trustee so that these issues can be resolved on the basis of a fully-developed factual record. The documentation that the Defendant must produce, however, should be limited to the categories of documents that were described in the Order on the Defendant's Motion for Protective Order that was previously entered in this case with respect to the Defendant's accountant. (Doc. 27).

Conclusion

The Plaintiff's Motion to Compel Defendant to Immediately Produce Documents and Respond to Interrogatories should be granted in part and denied in part, as set forth more specifically below.

The Defendant's Motion for Summary Judgment should be denied, without prejudice to the Defendant's right to renew his motion at an appropriate time. See Jordan v. Rothschild, 1995 WL 141465, at 3 (E.D. Pa.) ("The court believes that the most appropriate course is to allow plaintiff to conclude further discovery and then to address any motion for summary judgment in its entirety."); and In re Fishman, 215 B.R. 733, 736 (Bankr. E.D. Ark. 1997) (The "better course in this particular case is to permit the debtor an opportunity to conclude his

discovery and thereafter submit his evidence in rebuttal to this motion.")

Accordingly:

IT IS ORDERED that:

1. The Motion to Compel Defendant to Immediately Produce Documents and Respond to Interrogatories filed by the Plaintiff, Angela Welch Esposito, as Chapter 11 Trustee, is granted in part and denied in part as set forth in this Order.

2. Within thirty (30) days of the date of this Order, the Defendant, Tim Lazzara, shall produce the following documents to the Trustee:

A. All documents concerning and relating to all income tax records for the 2003 tax year, including all attachments, schedules, amendments and drafts of returns prepared or filed by or on behalf of Tim Lazzara.

B. All documents concerning or relating to all financial statements for 2003, including but not limited to balance sheets, cash flow statements, income statements, or projections prepared by or on behalf of Tim Lazzara.

C. All documents concerning or relating to all bank account reconciliations for 2003, prepared by or on behalf of Tim Lazzara.

D. All documents concerning or relating to loans by or to Tim Lazzara, to the extent that they concern Esther Weisman Enterprises, Inc. Should other documents exist as to loans from or to parties other than Esther Weisman Enterprises, Inc., Tim Lazzara shall give an affirmative response that the documents exist but do not concern any loans to or from Esther Weisman Enterprises, Inc., but shall not be required to produce the records as to the unrelated entities.

E. All documents concerning or relating to any business transactions between Esther Weisman Enterprises, Inc. and Tim Lazzara, from January 1, 1998, to the present.

3. The Motion for Summary Judgment filed by the Defendant, Tim Lazzara, is denied without prejudice to his right to renew the Motion for Summary Judgment at an appropriate time.

DATED this 8th day of February, 2007.

BY THE COURT

/s/ Paul M. Glenn
PAUL M. GLENN
Chief Bankruptcy Judge