

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

In re:

CUSTOM DOCK & REPAIR, INC.,

Case No. 03-2402-9P7

Debtor. _____/

DIANE L. JENSEN, Trustee,

Plaintiff,

v.

Adv. Proc. No. 04-122

KENNETH ORKNEY,

Defendant. _____/

DIANE L. JENSEN, Trustee,

Plaintiff,

v.

Adv. Proc. No. 04-123

LISA ORKNEY SMITH,

Defendant. _____/

**FINDINGS OF FACTS, CONCLUSIONS
OF LAW AND MEMORANDUM OPINION**

The matters under consideration in this Chapter 7 case of Custom Dock & Repair, Inc. (Debtor) are two adversary proceedings commenced by the Chapter 7 Trustee, Diane L. Jensen (Trustee). In Adversary Proceeding No. 04-122, the Trustee sued Kenneth Orkney (Orkney) and is seeking to recover certain payments made by the Debtor, which according to the Trustee, are avoidable preferences. In Adversary Proceeding No. 04-123, the Trustee sued Lisa

Orkney Smith (Smith) and is seeking to recover monies, which according to the Trustee, were voidable preferential payments.

Complaint Against Kenneth Orkney

In the Complaint, the Trustee alleges that within one year prior to the commencement of the Chapter 7 case of the Debtor, the Debtor transferred certain of its property to Orkney on account of an antecedent debt. In paragraph three of the Complaint, the Trustee sets forth the dates and amounts Orkney received totaling \$14,255. It is the contention of the Trustee that Orkney was the Vice President and 50 percent stockholder of the Debtor and, although it is not stated, it is evident what was intended to be stated was that Orkney was an insider of the Debtor. It is further the Trustee's contention that as a result of the transfers, Orkney received a greater return on his claim than he would have received in a Chapter 7 case [sic], i.e., he received more if he retains the payments than other creditors in the same class and that at the time of the transfers, the Debtor was insolvent.

In due course, Orkney filed his Answer to the Complaint and while admitting the receipt of the amount stated in the Trustee's complaint, he contends that these were distributions to pay for services rendered by Orkney to the Debtor corporation and therefore, it was compensation received for value.

Additionally, he asserts that the corporation was solvent at the time these payments were made.

The facts relevant to the resolution of the issues as established at the final evidentiary hearing may be summarized as follows. At the time relevant, the Debtor was engaged in the business of marine construction. Orkney was the Vice President and 50 percent stockholder of the Debtor. During the years of 2001 and 2002, the Debtor engaged a payroll service and all employees, with the exception of corporate officers including Orkney, were paid through the payroll service. This service paid all of the employees and handled all of the withholding and social security contributions for each employee.

Orkney was a recipient of different amounts on a regular basis, ranging from \$500 to \$1500 describing the same as “distribution for pay,” rather than wages subject to withholding. In response to the Trustee’s Request for Admissions, Orkney admitted that he had, in fact, received the distributions paid to him beginning April 6, 2002, up to and including December 19, 2002. He received six payments in the amount of \$750.00; five payments in the amount of \$500.00; and two payments in the amount of \$1,500. The last payments apparently represent two distributions in one lump sum of \$1,500.00. He also received three payments in the amount of \$1,250.00.

It is without dispute that during the relevant time, Orkney did not receive any compensation from any other source; that he was actually working for the Debtor corporation; and that he was in charge of running the crews. Although the payments were made with some exception in regular intervals, one item for \$505 was paid on April 16, 2002, and represented a reimbursement for purchases he made on behalf of the corporation.

In light of the fact that the alleged preferences occurred outside of the 90-day preference period, the threshold question is whether or not the recipient of these payments, Orkney was an insider for which a preference period is one year preceding the commencement of a case. Based on the facts in this case, this Court has no difficulty to conclude that he was, in fact, an insider.

This being the case, the fact that these payments were made outside of the 90-day preference period is of no consequence since it is admitted that they were paid during the one-year preference period provided for insider preferences. This being the case, the Trustee can no longer rely on the presumption of the insolvency as set forth in Section 547(f) of the Code. However, this record leaves no doubt that the Debtor at the time the payments were made was, in fact, insolvent. The Schedules filed by the Debtor indicate that the total assets were \$362,295 versus total liabilities in the amount of \$1,393,271.20. Based on these, this Court is satisfied and finds that the Debtor was, in fact, insolvent.

Orkney in his Answer failed to plead an exception to the claimed preference provided for by Section 547(c) of the Code but this Court will consider the articulated contention that it was, in fact, what Orkney was invoking by contending that these payments were made as payment for services rendered to the Debtor by Orkney. The payments are therefore for value and are a contemporaneous exchange, thus within the exception of Section 547(c)(1)(B) of the Code.

This leaves the last question which must be resolved: Whether or not these payments were made in lieu of salary for services rendered and, therefore, would come within the exception of Section 547(c)(1) of the Code because it was contemporaneous exchange for new value, was intended to be as such, and in fact was substantially contemporaneous exchange.

It appears from the admissions that even though the amounts were not the same, the sequence of the dates indicate that generally they were every two weeks and they were in the same amount of \$750 until it was reduced to \$500. Notwithstanding that the amount of payments were not completely uniform as to the amount or as to the date, the receipt of which have all been admitted by Orkney, this Court is satisfied that these payments were made on the date indicated and would be immunized from attack as a preference based on Section 547(c)(1)(B) of the Code.

This being the case, this Court is satisfied that the Trustee failed to establish with the requisite degree of proof that the payments received by Orkney from the Debtor during the relevant period were voidable as a preferential transfer and, therefore, the claim asserted in the Complaint shall be dismissed with prejudice.

Complaint Against Lisa Orkney Smith

In the Complaint against Smith, the Trustee alleges that during the relevant period of time, Smith was an insider and that between February 8, 2002, and November 8, 2002, she received payments in different amounts totaling \$10,957.40. It is the Trustee's contention that while these payments were made, the Debtor was insolvent and, therefore, she is entitled to a judgment recovering these payments from Smith as a preference.

Smith, in her Answer to the Complaint admitted to having received the following amounts: five payments in the amount of \$500; one payment in the amount of \$1,500; one payment in the amount of \$2,250; one payment in the amount of \$750; and one payment in the amount of \$400. She contends that these were payments for services rendered in lieu of salary and therefore, cannot be avoided as a preference. She also denied that the Debtor was insolvent when the payments were made and the transfers were not made to receive more than any creditor [sic].

The evidence presented at the final evidentiary hearing in her case also established that at the time these payments were made, the Debtor was insolvent and that she was an insider within the meaning of the term as defined by Section 101(31), having been a stockholder and officer of the corporation. This leaves for consideration only whether or not the payments received by her were payments for services rendered to the Debtor corporation or repayment of an antecedent obligation, which would render the payments a preference within the meaning of that term as defined by Section 547(b) of the Code.

Considering the applicability of the exception to a preference set forth in Section 547(c)(1)(B) of the Code, even a cursory perusal of her answers to the Request for Admissions propounded by the Trustee indicate that these were most likely payments for services rendered, but some are clearly not contemporaneous. It is clear for the most part, the payments received in the amounts of \$500, \$750 and \$1,500 were for payments of services rendered. However, the record is clear that Smith received no reimbursement for services whatsoever in the months of June, July or August. And, the amount of \$2,250 paid on November 8, 2002 even if it was paid for past due services, was not contemporaneous exchange. Clearly, this payment is not within the exception set forth in 547(c)(1). This being the case, unlike in the case of Orkney, this Court is constrained to reject the non-plead defense of contemporaneous

exchange and the Trustee has established with requisite degree of proof that the payment of \$2,250, which was made within one year preceding the commencement of the case of the Debtor is a preference payment.

Accordingly, it is

ORDERED, ADJUDGED, AND DECREED that the Complaint as against Orkney be, and the same is hereby, dismissed with prejudice. A separate final judgment shall be entered in accordance to the foregoing. It is further

ORDERED, ADJUDGED AND DECREED that the Trustee shall be entitled to a judgment in her favor and against Smith in the amount of \$2,250. A separate final judgment shall be entered in accordance to the foregoing.

DONE AND ORDERED at Tampa, Florida, on Sept 30, 2004.

/s/ Alexander L. Paskay
ALEXANDER L. PASKAY
U.S. Bankruptcy Judge