

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

In re:

Case No. 8:03-bk-17373-PMG  
Chapter 7

AERIAL FILMS, INC.,

Debtor.

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R. JAY HARPLEY, as Trustee,

Plaintiff,

vs.

Adv. No. 8:04-ap-255-PMG

BANK ONE, N.A.,

Defendant.

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**ORDER ON (1) DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT  
AND (2) TRUSTEE/PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT**

**THIS CASE** came before the Court for hearing to consider the Motion for Summary Judgment filed by the Defendant, JPMorgan Chase Bank, N.A., successor by merger to Bank One, N.A., and also to consider the Motion for Summary Judgment filed by the Plaintiff, R. Jay Harpley, as Chapter 7 Trustee.

The Plaintiff commenced this action by filing a Complaint to Avoid and Recover Preference Payment against Bank One. Essentially, the Plaintiff seeks to recover the sum of \$500,000.00 that was paid to Bank One, N.A. (Bank One) less than one month before Aerial Films, Inc. filed its bankruptcy petition. The Plaintiff contends that the payment constitutes a preferential transfer under §547 of the Bankruptcy Code.

In response, Bank One asserts that the payment is not avoidable as a preferential transfer because two critical elements required by §547(b) are not present in this case. Specifically, Bank One contends that (1) the payment was not a transfer "of an interest of the debtor in property," and also that (2) the payment did not enable

Bank One to receive more than it would have received in the Chapter 7 case if the transfer had not been made.

**Background**

Kenneth Sanborn (Sanborn) and Brian McMahon (McMahon) originally formed Aerial Films, Inc. in 1988 as a New Jersey corporation. The corporation was initially engaged in the business of aerial photography.

In 1994 or 1995, Aerial Films, Inc. began producing and marketing an aerial camera known as the "gyrocam" at its facility in New Jersey.

In 1998, Aerial Films, Inc. moved its operations to Florida and obtained authorization from the Secretary of State to do business in Florida.

On August 16, 2001, Aerial Films, Inc., as a New Jersey corporation, executed a Continuing Guaranty pursuant to which it guaranteed all of the indebtedness owed by McMahon Helicopter Services, Inc. to Bank One. McMahon Helicopter Services, Inc. was a separate business owned and operated by Brian McMahon. On the same date, August 16, 2001, Aerial Films, Inc. executed a Continuing Security Agreement pursuant to which it granted a security interest to Bank One to secure all of the liabilities of McMahon Helicopter Services to Bank One.

Approximately one week later, in late August of 2001, Aerial Films, Inc., the New Jersey corporation, withdrew its authorization to do business in Florida. At about the same time, a document was filed with Florida's Secretary of State to change the name of G-1 Air, Inc. to Aerial Films, Inc. G-1 Air, Inc. had been formed by Sanborn and McMahon as a separate Florida corporation in 2000, but had never conducted any business or owned any assets.

On April 1 or April 2, 2002, Bank One filed a UCC-1 Financing Statement in New Jersey.

On June 10 and June 18, 2003, Bank One filed two separate UCC-1 Financing Statements in Florida. On the Financing Statements, Bank One is identified as the secured party, Aerial Films, Inc. is identified as the debtor, and the collateral is identified as all present and future accounts, intangibles, inventory, and equipment of Aerial Films, Inc.

On July 30, 2003, Aerial Films, Inc. (the Seller), a Florida corporation, entered into an Asset Purchase Agreement with Gyrocam Systems, LLC (the Purchaser). Pursuant to the Agreement, Gyrocam Systems, LLC (Gyrocam) agreed to purchase "the assets owned by Seller or used by Seller on the Closing Date in the Business, of every kind and description, wherever

located, known or unknown, tangible or intangible," with certain specified exceptions. The total purchase price for the assets was divided as follows:

1. Payment by the Purchaser of an earnest money deposit in the amount of \$505,000.00, receipt of which was acknowledged by the Seller.

2. Payment by the Purchaser of \$500,000.00 to Bank One "in respect to Seller's Guarantee in favor of Bank One N.A. for the loan from Bank One N.A. to McMahan Helicopter Services, Inc."

3. Payment by the Purchaser of \$777,285.30 to Flagship Bank, N.A. "in respect of Seller's obligations to Flagship Bank."

In conjunction with the sale, Gyrocama also entered into an Agreement with Brian McMahan and McMahan Helicopter Services, Inc. on July 30, 2003. Generally, McMahan agreed to provide consulting services to Gyrocama for a period of three years, and also agreed not to compete with Gyrocama for a period of five years, from the date of the Agreement. In exchange for these services and covenants, Gyrocama agreed to pay an "aggregate amount of not more than \$500,000 paid to Bank One N.A. Account No. 6780-53 on behalf of McMahan."

The parties agree that the sum of \$500,000.00 was paid by Gyrocama Systems, LLC to Bank One. (Doc. 10, Joint Pretrial Statement, p. 3).

Aerial Films, Inc. filed a petition under Chapter 11 of the Bankruptcy Code on August 21, 2003. The case was converted to a case under Chapter 7 of the Bankruptcy Code on February 2, 2004.

### Discussion

Section 547(b) of the Bankruptcy Code, as applicable to this case, provides:

#### 11 USC § 547. Preferences

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

11 U.S.C. §547(b)(Emphasis supplied). "Preference law under the Bankruptcy Code is aimed at insuring that all creditors receive an equal distribution from the available assets of the debtor." In re Martin, 184 B.R. 985, 990 (M.D. Ala. 1995).

"The elements of a preferential transfer are: (1) a transfer of the debtor's property, (2) to or for the benefit of a creditor, (3) for or on account of an antecedent debt owed by the debtor before such transfer was made, (4) made while the debtor was insolvent, (5) within 90 days before bankruptcy, (6) the effect of which transfer was to give the creditor more than he would otherwise have received in a Chapter 7 distribution." In re Flooring America, Inc., 302 B.R. 394, 398 (Bankr. N.D. Ga. 2003).

The plaintiff has the burden of proving the elements of a preferential transfer under §547(b). 11 U.S.C. §547(g).

#### A. An interest of the Debtor in property

In their Joint Pretrial Statement, the parties agreed that "Bank One was paid \$500,000 by Gyrocam," the purchaser under the Asset Purchase Agreement dated July 30, 2003. (Doc. 10, p. 3)(Emphasis supplied). The Debtor, Aerial Films, Inc., did not make a direct payment to Bank One.

Consequently, a primary issue in this case is whether the transfer involved "an interest of the debtor in property," as required by §547(b) of the Bankruptcy Code.

It appears that the \$500,000.00 payment may have constituted "an interest of the Debtor in property" if the payment represented the purchase price for assets that were owned by the Debtor. In that event, the Debtor would have been entitled either to collect the purchase price itself, or to direct the payment of the purchase price to a third party on its behalf. In re S.E.L. Maduro (Florida), Inc., 205 B.R. 987, 990-92 (Bankr. S.D. Fla. 1997).

Bank One contends, however, that the Plaintiff cannot show that the payment represented the transfer of an interest of the Debtor in property, because he cannot prove that the \$500,000.00 represented the purchase price solely for assets owned by the Debtor. According to Bank One, the property purchased by Gyrocam also included (1) assets belonging to Aerial Films, Inc., the New Jersey corporation, and (2) the covenant not to compete executed by McMahon individually.

Bank One asserts in its Motion for Summary Judgment, for example, that the "source of the assets and consideration from which the payment to Bank One was derived, is a pool of assets, some owned by debtor, and some contributed from non-debtor third parties, Aerial New Jersey and McMahon." (Doc. 28, p. 15). Further, Bank One argued at the hearing on the Motion for Summary Judgment that "the record makes it clear that a bundle of assets and other considerations went to Gyrocam. Some assets that may have been owned by Aerial Films Florida, but other assets that we say the record shows were owned by Aerial Films, Inc., same name but a New Jersey corp. And also valuable consideration and assets contributed by one of the two shareholders of both corporations, Brian McMahon, under a separate McMahon agreement." (Transcript of February 21, 2006, hearing, p. 6).

Consequently, Bank One concludes that the Plaintiff cannot satisfy its burden of proving that the

Debtor was entitled to receive or direct the payment of the \$500,000.00, because it cannot prove that the assets purchased by the \$500,000.00 belonged exclusively to the Debtor.

In response, the Plaintiff contends that the entire \$500,000.00 represented consideration paid by Gyrocam for the Debtor's assets, not for any third party's assets, and that the funds would have been paid to the Debtor if Bank One had not claimed a security interest in the Debtor's assets. According to the Plaintiff, the Asset Purchase Agreement expressly designated the Debtor as the "seller," and evidences the parties' intent that the "seller" would receive the purchase price. (Doc. 37, pp. 13-14).

Additionally, the Plaintiff contends that no portion of the \$500,000.00 represented consideration for the noncompete agreement executed by McMahon, because McMahon had no ability to compete with Gyrocam in any event, and the covenant therefore had no value. "So you have on the one hand the testimony that says all of the \$500,000.00 would have gone to the Debtor, and on the other hand Sanborn testifying as Gyrocam that we can't ascribe any value to the noncompete." (Transcript, p. 46).

Essentially, therefore, the Plaintiff asserts that the \$500,000.00 was attributed entirely to assets of the Debtor, and the "only reason" that the payment was made to Bank One was to obtain the release of Bank One's security interest. (Transcript, pp. 39, 48-49) If Bank One had not previously filed the Financing Statements, the Plaintiff contends, the \$500,000.00 would have been paid to the Debtor and therefore would have been available to creditors of the estate. (Transcript, pp. 39, 46, 49).

The Court finds that a genuine issue of material fact exists as to whether Gyrocam's payment of \$500,000.00 to Bank One constituted a transfer of "an interest of the debtor in property."

Issues of fact exist, for example, regarding whether the Asset Purchase Agreement allocates the \$500,000.00: (1) to "assets owned by Seller or used by Seller . . . in the Business," as set forth in Article I, section 1.1 of the Agreement; (2) to Seller's Guarantee in favor of Bank One for the loan from Bank One to McMahon Helicopter Services, Inc., as set forth in Article II(b) of the Agreement; or (3) to McMahon's promise to abide by the noncompete agreement set forth in the McMahon Agreement, which was a condition precedent to the Asset Purchase Agreement pursuant to Article VI, Section 6.9.

Additionally, issues exist regarding whether any assets sold to Gyrocam under the Asset Purchase Agreement were assets belonging to Aerial Films, Inc., a New Jersey corporation, as a separate entity from the Debtor. Bank One apparently contends that the two entities maintained their separate corporate identities, for example, whereas the Plaintiff contends that a "de facto merger" occurred in August of 2001 which effectively extinguished the New Jersey corporation and left the Debtor as the "successor surviving corporation." (Doc. 37, p. 20).

Because of these factual issues, the Court cannot determine whether the \$500,000.00 paid by Gyrocam to Bank One represented the purchase price for assets that were owned solely by the Debtor, and therefore whether the Debtor was entitled either to receive the payment or to control its distribution. Consequently, the Court cannot determine whether the payment by Gyrocam to Bank One constituted the transfer "of an interest of the debtor in property."

#### **B. More than in a Chapter 7 case**

As set forth above, a plaintiff in a preference action must prove that the effect of the transfer at issue was to give the creditor more than he would otherwise have received in a Chapter 7 distribution. In re Flooring America, Inc., 302 B.R. at 398. This element requires the Court to construct a hypothetical chapter 7 case as of the petition date and determine what the creditor would have received if the transfer had not been made, taking the secured or unsecured status of the creditor into account. Batlan v. Transamerica Commercial Finance Corporation, 237 B.R. 765, 770-71 (D. Ore. 1999).

In this case, Bank One asserts that it held a perfected security interest in the Debtor's assets, including the Debtor's Gyrocam trademark, as of the date of the sale, and that the value of its collateral exceeded the sum of \$500,000.00. Consequently, Bank One asserts that the Plaintiff cannot prove that the payment enabled it to receive more than it would have received in a hypothetical chapter 7 case. (Doc. 28, p. 16). In re Hagen, 922 F.2d 742, 746 (11<sup>th</sup> Cir. 1991)("A transfer to a secured creditor in the amount of its lien during the preference period does not constitute an avoidable preference.")

Specifically, Bank One contends that it perfected its security interest in the Debtor's trademark by filing a Financing Statement in New Jersey in April of 2002, and

that the security interest remained valid as of July 30, 2003, when the Debtor sold the trademark to Gyrocam. Bank One further asserts that "substantial value" must be allocated to the trademark, because the Debtor's physical assets had been valued at only \$496,422.00 for purposes of the sale. Accordingly, Bank One asserts that the balance of the purchase price (\$1,7782,285.03) is attributable to the trademark and other intangibles that served as Bank One's collateral. (Doc. 28, pp. 18-19, 21-22). Given the value of its security, therefore, Bank One concludes that the Plaintiff cannot prove that it would have received less than \$500,000.00 in a chapter 7 case.

In response, the Plaintiff takes the position that Bank One did not have a perfected security interest in the Debtor's trademark and other intangibles. According to the Plaintiff, "the April 2002 filings with the State of New Jersey were inadequate to perfect a security interest due to the previous 'converting' of the company into a Florida corporation and *de facto* merger." (Doc. 37, p. 18, n.11). Since Bank One did not have a properly perfected security interest in the Debtor's trademark and intangibles, the Plaintiff concludes that it "received more as a result of the recording of the Financing Statements [in June of 2003] and the payment of \$500,000 than Bank One would receive in this chapter 7 proceeding." (Doc. 37, p. 18).

The Court finds that a genuine issue of material fact exists as to whether the Financing Statements filed by Bank One in New Jersey in April of 2002 perfected Bank One's security interest in the Debtor's trademark and other intangibles. Specifically, the Court cannot determine whether Bank One's attempt to perfect its interest was affected by the Debtor's prior relocation of its business to Florida and its operation as a Florida corporation pursuant to the "name change" document filed with Florida's Secretary of State.

The Court also finds that an issue of fact exists concerning the value of the property that Bank One claimed as collateral. No specific evidence appears in the record regarding the value of the trademark, for example, and Bank One acknowledges that the appraisal of the property sold to Gyrocam related only to the Debtor's physical assets and not to its intangibles. (Doc. 28, p. 18).

Under these circumstances, the Court cannot determine whether the payment of \$500,000.00 to Bank One enabled it to receive more than it would have received in this chapter 7 case, as required by §547(b)(5) of the Bankruptcy Code.

### **Conclusion**

The cross-Motions for Summary Judgment filed by Bank One and by the Plaintiff should be denied. Issues of fact exist in this case regarding (1) whether the payment to Bank One constituted a transfer "of an interest of the debtor in property," and also (2) whether the payment enabled Bank One to receive more that it would have received in the Debtor's Chapter 7 case. Consequently, the entry of a summary judgment is inappropriate in this proceeding.

Accordingly:

**IT IS ORDERED** that:

1. The Motion for Summary Judgment filed by the Defendant, JPMorgan Chase Bank, N.A., successor by merger to Bank One, N.A., is denied.
2. The Motion for Summary Judgment filed by the Plaintiff, R. Jay Harley, as Chapter 7 Trustee, is denied.

**DATED** this 18<sup>th</sup> day of April, 2006.

**BY THE COURT**

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