

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

AAPEX SYSTEMS, INC.

Debtor.

CASE NO. 98-20728

DECISION & ORDER

LUCIEN A. MORIN, II, TRUSTEE
OF AAPEX SYSTEMS, INC.,

Plaintiff,

V.

AP #00-2073

HSBC BANK USA, f/k/a
Marine Midland Bank,

Defendant.

BACKGROUND

On February 27, 1998, an involuntary Chapter 7 petition was filed against AAPEX Systems, Inc. ("AAPEX"). An Order for Relief was entered on March 23, 1998, after AAPEX consented to the relief requested in the involuntary petition, and on April 1, 1998, Lucien A. Morin, II, Esq. was appointed as the Chapter 7 case trustee (the "Trustee").

AAPEX had been in the business of providing payroll and related services to clients.

After the Order for Relief was entered, former clients of AAPEX filed proofs of claim which asserted that they were owed in

excess of one million dollars from AAPEX because they remained liable for payroll taxes that AAPEX had failed to pay on their behalf pursuant to the Payroll Service Agreement, even though they had paid AAPEX the amount of money necessary to pay their tax liabilities. Some of the proofs of claim also asserted that AAPEX was liable for the penalties and interest that the taxing authorities had assessed against the claimants because AAPEX had failed to pay their payroll taxes when they were due.

Between February 4, 1999 and March 29, 1999, the Trustee commenced fifty-eight separate adversary proceedings against former clients of AAPEX. The Trustee alleged that various transfers made by AAPEX: (1) to the Internal Revenue Service (the "IRS") or state taxing authorities in order to pay past due payroll taxes or related penalties and interest for those clients; or (2) to the clients, so that they could pay their own past due payroll taxes which AAPEX had failed to pay, were avoidable preferential transfers under Section 547.¹

¹ Section 547(b) provides that:

(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

On March 13, 2003, the Trustee also commenced an Adversary Proceeding against HSBC Bank, USA ("HSBC"). The Complaint in the Adversary Proceeding alleged that: (1) prior to the filing of its bankruptcy petition, AAPEX maintained one or more deposit accounts with HSBC; (2) HSBC had received preferential transfers that were avoidable under Sections 547 and 550 of the Bankruptcy Code in the amount of approximately \$1,414,416.31 because it had made advances of unsecured credit to AAPEX that had been repaid within ninety (90) days of filing of the AAPEX bankruptcy petition; and (3) HSBC had received post-petition transfers that were avoidable under Sections 549 and 550 of the Bankruptcy Code in the amount of \$72,776.87.

On June 10, 2004, after HSBC had interposed an Answer denying his allegations, the Trustee filed a Motion for Summary Judgment (the "Motion for Summary Judgment") on his avoidable preference claim only. The Motion alleged that: (1) a more detailed analysis of the periodic statements provided to AAPEX by HSBC in connection

(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.

with Account Number 315-96039-6, designated as the "Core Account," (the "Account Statements") indicated that the avoidable preferential transfers HSBC received were only \$719,445.27; and (2) as set forth in a Statement of Uncontested Facts: (a) all of the deposits into the Core Account were by electronic transfer, so that when the funds were received they were immediately available; and (b) the Account Statements for the period from November 11, 1997 through March 9, 1998 showed that at the close of business on ten separate dates, the Core Account had a negative balance, and the aggregate of those negative balances was \$719,455.27.

In subsequent pleadings and at oral argument in support of the Motion for Summary Judgment, the Trustee alleged that: (1) HSBC had failed to return the checks presented against the Core Account which created the negative balances (the "NSF Checks"), honored them by advancing HSBC's own funds, and then repaid itself for those advances from subsequent deposits made to the Core Account, all within the ninety (90) days before the filing of the AAPEX petition; or (2) it was, nevertheless, an avoidable preferential transfer under Section 547(b) if HSBC merely honored the NSF Checks with deposits made to the Core Account after the NSF Checks were presented, which was the case with respect to \$280,579.54 of the Checks.

In its written responses and at oral arguments in opposition to the Motion for Summary Judgment, HSBC: (1) described in detail

its check cashing policies and procedures as they related to AAPEX and the Core Account; (2) categorically denied that HSBC had ever advanced the Bank's funds to honor any of the NSF Checks within the ninety (90) days prior to the filing of the AAPEX bankruptcy petition; (3) indicated that HSBC had returned any and all of the NSF Checks by midnight of the day following their presentment, unless they were able to be honored with funds then on deposit in the Core Account, all in accordance with the New York Uniform Commercial Code provisions commonly known as the "Midnight Deadline" provisions; (4) asserted that the negative balances at the close of business shown on the Account Statements did not indicate that all the checks that were presented that day were or would be honored, creating an overdraft loan, but only indicated an NSF position; and (5) asserted that the Trustee had provided no credible or other evidence to rebut the testimony of Mark J. Fife, the Elmira Branch Manager of HSBC who had responsibility for the Core Account relationship during the period in question, which was that no funds were ever advanced by HSBC to honor NSF checks presented on the Core Account.

DISCUSSION

I. Summary Judgment

_____ Fed.R.Civ.P. 56, incorporated by reference in Fed.R.Bankr.P. 7056, "provides that summary judgment shall be granted when there

is no genuine issue as to any material fact and the moving party is entitled, as a matter of law, to a judgment in its favor." *In re Bennett Funding Group, Inc.*, 220 B.R. 743 (Bankr. N.D.N.Y. 1997), citing *Federal Deposit Ins. Corp. v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991). The moving party has the initial burden of demonstrating that there is no genuine issue of material fact for trial. *In re Corcoran*, 246 B.R. 152, 158 (Bankr. E.D.N.Y. 2000), citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Once the moving party has met its initial burden, "the non-movant must then come forward with sufficient evidence on the elements essential to its case to support a verdict in its favor." *Corcoran*, 246 B.R. at 158, citing *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986).

In deciding to grant or deny summary judgment, "the trial court must resolve all ambiguities and draw inferences in favor of the party against whom summary judgment is sought." *Bennett Funding Group, Inc.*, 220 B.R. at 751, citing *LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 171 (2d Cir. 1995); *Corcoran*, 246 B.R. at 156, citing *Reyes v. Delta Dallas Alpha Corp.*, 199 F.3d 626, 627-28 (2d Cir. 1999). However, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475

U.S. at 586 (1986) (further citations omitted). Summary judgment is therefore inappropriate if any evidence exists in the record upon which a reasonable inference may be drawn in favor of the non-moving party. *Id.*, citing *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

II. Avoidable Preferential Transfer

For the Court to find that there has been an avoidable preferential transfer under Section 547(b), it must find under Section 547(b)(2) that the debtor made a transfer for or on account of an antecedent debt owed by the debtor.

In this case, the Trustee failed to provide any credible evidence that HSBC ever advanced its own funds to honor any NSF Checks presented on the Core Account maintained by AAPEX. To the contrary, the uncontroverted evidence indicates that HSBC, in compliance with the New York Uniform Commercial Code's "Midnight Deadline" provisions, returned any NSF Checks to the extent that there were no funds on deposit in the Core Account to cover them, whether those funds were on deposit at the time the Checks were presented or subsequently deposited by wire transfer in good funds before the "Midnight Deadline" of the subsequent day.

Since HSBC did not advance any funds to AAPEX, but only used funds on deposit in the Core Account to pay checks drawn on the Core Account, no antecedent debt was created that could satisfy the requirements of Section 547(b)(2).

The actions of HSBC in connection with the Core Account for the ninety (90) day period prior to the filing of the AAPEX bankruptcy petition, all in accordance with the New York Uniform Commercial Code and its own internal policies and procedures, bring it within the holding of *In re Apponline.com*, 296 B.R. 602 (Bankr. E.D.N.Y. 2003).

CONCLUSION

The Trustee's Motion for Summary Judgment is in all respects denied.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: December 14, 2004