UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

YOUNG TECHNOLOGIES GROUP, INC. Case No. 91-11910 K

Debtor

HAROLD P. BULAN, as Trustee of
Young Technologies Group, Inc.
d/b/a Young Fire Equipment Corp.

Plaintiff

-vs- AP 93-1074 K

204 CEMETERY ROAD ASSOCIATES a/k/a
204 CEMETERY ROAD ASSOCIATES and
ARDMORE, INC.

Defendants

Before the Court is the Trustee's Motion for Summary Judgment on less than all causes of action relating to preferences alleged in a multi-count complaint. The preferences are asserted against both 204 Cemetery Road Associates (204 Cemetery) and Ardmore, Inc. By this motion, the Trustee seeks to foreclose only one affirmative defense raised by 204 Cemetery in response to the complaint. The issue before the Court is whether a landlord's forbearance of its rights against a tenant-debtor in the face of a default can constitute "new value" under section 547(c)(4) of the Bankruptcy Code. The Trustee argues that as a matter of law, it cannot. For the reasons stated below, the Trustee's motion is denied.

An involuntary Chapter 7 petition was filed against the Debtor on May 24, 1991 and an Order for Relief was granted on June 17, 1991. For the one year period preceding the petition, the

Debtor made a total of $97,775 in payments to both defendants. Some of these payments were made during the 90 days prior to the filing. As to these payments, the Trustee is asserting a section 547 preference claim. (The Trustee contends that the remaining payments are recoverable under section 548, as the defendants are insiders to the Debtor.)

Defendant 204 Cemetery filed its answer, asserting, in part that it leased premises to the Debtor for the period starting on October 6, 1987 until September 1992. During that period, the Debtor failed to pay some of its rent obligations under the lease. Defendant 204 Cemetery continued to allow the Debtor to occupy the premises, despite its right to evict them. It is this forbearance from exercising its right to evict that Defendant 204 Cemetery asserts constitutes "new value" sufficient to defeat the Trustee's preference action, assuming that the challenged payments were in fact preferences under section 547(b).[1]

It is important to begin by noting that a motion for Summary Judgment can only be decided on the basis of facts not reasonably in dispute. Generally, this means that such motions may be granted only if the outcome turns on an issue of law or on the sufficiency of facts that are agreed or not reasonably in dispute. There is no such principle of law in favor of the Trustee's

[1]The parties agree that a genuine dispute exists as to the facts that would determine whether the payments were preferential under section 547(b).

arguments. Counsel for the Trustee has cited the Court to cases that stand for the proposition that forbearance is not new value. The holding of many of these cases is based on a Judge's findings of fact after trial. Upon careful reading, all that can be said as to those cases is that after a full hearing on the evidence, the trial judge found that forbearance was not new value on the facts presented. Therefore, those cases merely stand for the proposition that under some factual circumstances, forbearance might not be "new value". Put another way, these cases prove only that if it were the landlord seeking judgment here as a matter of law, the landlord's motion would have to be denied.

The case of *In re Trans Air, Inc.*, 78 B.R. 351 (Bankr. S.D. Fla 1987) is one such case. In that case, the Judge was persuaded by the evidence presented that an aircraft lessor's forbearing from repossessing its aircraft was not new value. An additional factor considered by the Judge in that case was that special protection was already afforded to aircraft lessors under section 1110 of the Code.

Another case cited to the Court is *In re Lario*, 36 B.R. 582 (Bankr. S.D. Ohio 1983). In that case, the Judge held, after a trial, that nothing new was given to the Debtor by the creditor's forbearance.

Finally, the case of *In re Duffy*, 3 B.R. 263, (Bankr. S.D.N.Y. 1980), another case decided after trial, dealt with a car rental agency forbearing from repossessing its collateral upon the

debtor's default. The Court found that "such forbearance was of no economic solace to the creditors of this estate." Perhaps, after a full trial on the facts, I will reach the same conclusion here, but the Trustee's motion for Summary Judgment is denied.

Dated: Buffalo, New York
May 20, 1994

/s/Michael J. Kaplan
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U.S.B.J.