

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ADMIRAL'S WALK, INC.

Case No. 90-11401 K

Debtor

JACK L. GETMAN, Trustee in
Bankruptcy of ADMIRAL'S WALK, INC.

Plaintiff

-vs-

AP 91-1261 K

NORSTAR BANK, N.A.,
LAKESHORE MANAGEMENT, INC.
HENRY J. BALLING, JEFFREY J. DAVIS,
DONALD T. MAHARAN, JOHN J. EDWARDS,
THOMAS P. EDWARDS, WILLIAM F. EDWARDS,
ELIZABETH BRINKWORTH

Defendants

ORDER DENYING MOTIONS
FOR SUMMARY JUDGMENT

Defendant Norstar Bank, N.A. has moved for Summary Judgment against Jack Getman, Esq., Chapter 11 Trustee, on that Cause of the Trustee's Complaint which seeks to recover \$91,304.58 as a preferential transfer under 11 U.S.C. § 547. Co-defendant Donald T. Maharan has similarly moved, and co-defendant Jeffrey J. Davis has sought leave to do so in open court. Summary Judgment will be denied.

The transactions involved here arose out of the ill-fated finances of Admiral's Walk, Inc. ("AWI"). AWI has operated under a Chapter 11 Trustee since shortly after the Order for Relief was

entered on June 1, 1990, on which date it was in the process of constructing a ten-story residential condominium complex on the Buffalo waterfront. At that point in the construction process the uncompleted building was estimated to be worth less than \$6 million against construction loan advances greater than that amount, and against \$2 to \$4 million in unpaid mechanics' liens, among other debt. Post-petition super-priority lien borrowing was authorized in order to complete the structure, and the residential condominium units are now being sold by the Trustee. It is not expected that the sales will satisfy even the lien claims alone.

It is alleged that at all times pertinent to the current action Jeffrey J. Davis, Henry J. Balling, and Donald T. Maharan were stockholders, officers, and directors of the debtor, and John J. Edwards, Thomas P. Edwards and William F. Edwards were stockholders of the debtor, and all of these people were collectively in control of AWI. AWI was formed exclusively for the purpose of constructing that building.

However, for some years prior to the formation of AWI, there existed another corporation, Lakeshore Management, Inc. It is alleged that Jeffrey J. Davis, John J. Edwards, Thomas P. Edwards and William F. Edwards were officers and directors of Lakeshore Management, Inc. ("Lakeshore") and were collectively in control thereof.

It is clear that during the year preceding the Chapter 11

filing (this filing was commenced by an involuntary petition on May 10, 1990) some \$803,000 were transferred from Lakeshore to AWI, and that some \$91,300 of those funds were transferred from AWI back to Lakeshore, and the "same" \$91,300 were transferred yet again by Lakeshore to Norstar Bank. Beyond these simple facts there exists a zone of vigorous dispute. Documents which manifest debtor-creditor relationships between Norstar Bank and Lakeshore on the one hand and Lakeshore and AWI on the other, are challenged by the Trustee as not manifesting the true relationship among the parties.

The defendants' arguments and exhibits represent that Lakeshore borrowed more than \$1 million from Norstar Bank, guaranteed by Jeffrey J. Davis, John W. Edwards, Thomas P. Edwards, and William F. Edwards, and that Lakeshore then loaned a similar aggregate amount to AWI, guaranteed by Jeffrey J. Davis, Henry H. Balling, Jr., and Donald Maharan; that payments made by the Debtor AWI to Lakeshore were "ordinary course of business" payments and, furthermore, that "new value" was extended by Lakeshore subsequent to each payment (in the form of further "loan" advances).

On the defendants' motion for Summary Judgment, however, the facts alleged must be viewed in the light most favorable to the Trustee. He has offered a number of exhibits suggesting a different scenario. For example, in a State Court action by Norstar seeking to enforce Davis' guarantee of Lakeshore's debt to Norstar, Davis attests that John Edwards agreed to make a \$1.2

million capital contribution to AWI, and that this was to be made using Edwards' personal funds; but Edwards instead (and without Davis' knowledge, Davis says) caused Lakeshore to borrow the funds from Norstar in an ultra vires transaction, and to "loan" them to AWI, thus "channeling the loans" through Lakeshore (giving rise to Davis' liability on a guarantee he had previously made of Lakeshore's obligations to Norstar).

The Trustee also offers a letter from Norstar Bank, N.A. to Buffalo Urban Renewal Agency, dated May 11, 1988, representing that Norstar intended to make available a line of credit in the amount of \$1.2 million to John, William, and Tom Edwards and Jeffrey Davis with respect to the Admiral's Walk project, and specifically stating "We understand this line of credit will be used to satisfy the equity requirement for this project" .

The defendants argue that if, at trial, it were to be determined that indeed the monies advanced to AWI must be viewed as an equity contribution made by Edwards, then the \$91,000 paid by AWI to Lakeshore might be recoverable under some other theory, but not as a preference, for there must be a debtor-creditor relationship for a preference to exist. The defendants are correct in this latter regard.

However, the Trustee asks that the Court set aside the form of the transactions involved here, and disregard the documents manifesting the various alleged loan agreements; he asks that we

let the true nature of the arrangements among the parties be determined at trial.

The authority to do so, if the facts warrant, lies in *Pepper v. Litton*, 308 U.S. 295, 84 L.Ed. 281 (1939) and its progeny. It was said in that case that as courts of equity, Bankruptcy Courts

have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.

Thus it has been further said that:

Courts of Bankruptcy have from the beginning placed emphasis upon the purpose and effect of a given transaction irrespective of the manner in which it was accomplished - that is, regardless of whether such transfer was a direct or indirect transaction. The principle has been firmly established that a transfer which indirectly evades the provisions of the Bankruptcy Act by effecting an undue preference to a creditor is voidable.¹

At this stage of these proceedings it cannot be determined whether there are sound reasons to invoke such principles, but it seems clear that it would be premature to conclude that such reasons could not exist.

Such conclusion would be premature because a key purpose

¹*Steel Structures, Inc. v. Star Manufacturing Company*, 466 F.2d 207, 218 (6th Cir. 1972). See also *In re Stop-N-Go of Elmira, Inc.*, 30 B.R. 721 (Bkrtcy. W.D.N.Y. 1983), and other cases cited therein.

of F.R.Civ.P. Rule 56 is to avoid a useless trial. That purpose is not served where, as here, a trial upon the very same facts is highly likely, if not indeed unavoidable. This is because the Trustee has amended his Complaint to include two further causes of action not involved in the present motion for summary judgment. In one of those causes of action he asserts that more than \$500,000 (apparently including the \$91,304.58 in funds at issue presently) were transferred to or for the benefit of the individual defendants in violation of New York Business Corporation Law. In the other he alleges that more than \$300,000 (apparently including the monies currently at issue at bar) were transferred in violation of 11 U.S.C. § 548 or Article 10 of the New York Debtor and Creditor Law. These causes of action will necessarily require examination of the same allegations and transactions involved in the preference cause of action. In essence, the Trustee is seeking to recover the same monies and other monies, under the same facts, but under a number of alternative theories. Precluding one of those theories now would not avoid a trial.

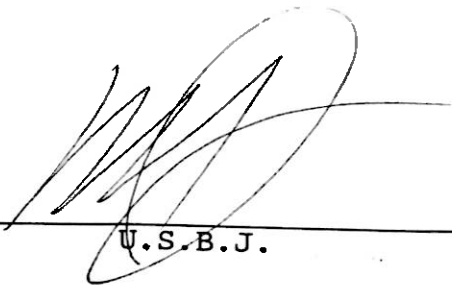
Furthermore, the Trustee reported at oral argument that John Edwards will not submit to examination by the Trustee in this adversary proceeding. Similarly, Jeffrey Davis' counsel has indicated that Davis might be willing to meet with the Trustee but that Davis would likely invoke the Fifth Amendment privilege against self-incrimination with regard to questions asked of him at

the present time. (Some persons have been indicted in the District Court of this District for purported Tax Law violations regarding transactions involving Lakeshore and other business entities with which these principals were allegedly involved.) Given the reticence of certain principals to be forthcoming, or to testify forthrightly, regarding these transactions at the present time it is premature to foreclose the Trustee from asserting any of his alternative theories.

The motion and cross-motions for summary judgment upon the section 547 cause of action are denied. This Adversary Proceeding is set for a further scheduling conference on Tuesday, July 21, 1992, at 9:00 a.m. in Chambers.

SO ORDERED.

Dated: Buffalo, New York
June 30, 1992



U.S.B.J.

FILED
JUL 1 1992
U.S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK
BUFFALO