

IT IS ORDERED as set forth below:



Date: June 21, 2007

**Paul W. Bonapfel
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF:	:	CASE NUMBER: A03-61285-PWB
	:	
VALUE MUSIC CONCEPTS, INC.,	:	
CENTRAL SOUTH MUSIC SALES, INC.,	:	
KAR, INC., RECORD CENTRAL, INC.,	:	
and MUSIC 4 LESS, INC.,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Debtors.	:	BANKRUPTCY CODE
	:	
	:	
WILLIAM KAYE, as Creditor	:	
Representative for Value Music Concepts,	:	ADVERSARY PROCEEDING
Inc., et al.,	:	NO. 04-6210
	:	
Plaintiff	:	
	:	
v.	:	
	:	
JUANITA BYNUM MINISTRIES, INC.,	:	JUDGE BONAPFEL
	:	
Defendant.	:	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

The Plaintiff, in his capacity as Creditor Representative for Value Music Concepts, Inc. et al. (the "Debtors"), seeks to avoid and recover preferential transfers totaling \$48,741.51 made

to the Defendant pursuant to 11 §§ U.S.C. 547 and 550. The Plaintiff contends that he is entitled to summary judgment because he has established all the elements of a preference under 11 U.S.C. § 547(b) and because none of the affirmative defenses raised by the Defendant has merit. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334.

On September 13, 2002, the Debtors entered into an Agreement and Plan of merger whereby the shareholders of Central South Music Sales, Inc. (the CS Shareholders), became the owners of 50% of the stock in Value Music Concepts (VMC) and VMC, through its wholly owned subsidiaries, became the owner of 100% of the stock in Central South Music Sales, Inc., KAR, Inc., Record Central, Inc., and Music 4 Less, Inc. (collectively, “Central South”). The CS Shareholders continued to operate Central South Gospel, Inc. and Central South Christian Distributors, Inc. (the CS Companies). Two CS Shareholders became officers and directors of VMC.

As part of the merger and agreement, VMC sold its gospel music inventory to the CS Companies for \$1.186 million (the Inventory Note) with half the purchase price to be paid in cash and the remaining balance (\$593,000) to be paid in cash, or if VMC consented, by assumption of the Debtors’ debts to the vendors who had sold it.

After the merger, a dispute arose over a \$3.6 million understatement of payables omitted from the Central South balance sheet at the time VMC acquired them. VMC claimed that the CS Shareholders were liable for the omitted payables as a breach of warranties and representations in the acquisition agreement.

In addition, the CS Companies requested to pay the balance of the Inventory Note by assuming more Inventory payables. VMC requested cash instead and also denied a CS Companies’ request to earmark cash to pay specific vendors that were also vendors of the CS Companies.

On January 10, 2003, VMC, its shareholders, the CS Companies, and the CS Shareholders entered into a Settlement Agreement to resolve all outstanding disputes. Pursuant to the Settlement Agreement, the CS Companies and three of the CS Shareholders agreed to assume \$1,343,454.92 of VMC's trade payables. Included among the total payables assumed was \$48,741.51 owed to the Defendant. The parties to the Settlement Agreement also exchanged releases of all claims except those arising out of the Settlement Agreement, including VMC's claims against the CS Shareholders for the omitted payables.

The Debtors filed their Chapter 11 cases on January 27, 2003. On November 18, 2003, the Court entered an Order confirming the Debtor's First Amended Joint Plan of Reorganization which provided for a Creditor Representative of the Debtor pursuant to § 1123(b)(3) to pursue certain causes of action of the Debtors, including preference actions, for the benefit of unsecured creditors.

The Plaintiff contends that this assumption of payables is an avoidable preference under § 547(b) because the assumption and payment by the CS Companies of \$48,741.51 to the Defendant (instead of the payment of that amount of cash to the Debtors for the inventory purchase price) was a transfer of the Debtors' property; to or for the benefit of the Defendant; made for or on account of an antecedent debt owed by one or more of the Debtors to the Defendant; made within 90 days of the petition date; made while the Debtors were insolvent; and which enabled the Defendant to receive more than it would have received if this were a case under chapter 7, if the transfer had not been made, and if the Defendant received payment on the debt in accordance with provisions of the Bankruptcy Code.

The Plaintiff contends that he is entitled to summary judgment because he has established all the elements of a preference under § 547(b) and because none of the affirmative

defenses raised by the Defendant has merit.¹ Once the plaintiff establishes the elements of a preference under § 547(b), the defendant carries the burden of establishing any affirmative defense to the preferential transfer's avoidance, whether such an affirmative defense is specifically provided for in § 547, such as § 547(c) (*see* § 547(g); *In re A.W. & Associates*, 136 F.3d 1439 (11th Cir. 1998)), or whether it is a general affirmative defense to the relief requested. Although the Defendant filed an answer to the complaint in which it set forth such affirmative defenses, it has not filed a response to the Plaintiff's motion for summary judgment.

Two of the affirmative defenses raised by the Defendant have been rejected by the Court. In an Order entered August 22, 2005, in *Kaye v. Word Entertainment*, Adversary Proceeding No. 04-6207,² the Court concluded that the plan's description of avoidance actions, including preference claims, as the type of causes of action of the estates to be retained and prosecuted by the Creditor Representative was sufficient to expressly reserve them from any possible *res judicata* effect of the confirmation order and to expressly identify them for postconfirmation prosecution under § 1123(b)(3) by the Creditor Representative. In addition, the Court concluded that the Settlement Agreement was not an executory contract and, therefore, the fact that assumption and payment may have been made pursuant to it does not provide a defense to the preference actions.

With respect to the other affirmative defenses raised by the Defendant, the Plaintiff has set forth arguments and facts in his Statement of Material Facts and Brief which negate the

¹In its answer to the complaint, the Defendant raised the following affirmative defenses to avoidance of the transfer: failure to state a claim; lack of standing; doctrines of estoppel, waiver, release, *res judicata*, collateral estoppel, claims preclusion or issue preclusion; the claims are barred by the terms of the confirmed plan because the contractual agreements were assumed; the transfers were contemporaneous exchanges for new value; the Defendant was an immediate or mediate transferee for value and in good faith; offset, setoff and recoupment; and unclean hands.

²This was the lead case for purposes of considering common issues in motions for summary judgment covering a number of similarly situated defendants, including this Defendant.

applicability of the affirmative defenses. The Defendant may not simply rest on his pleadings, but must show, by reference to affidavits or other evidence, that a material issue of fact remains. FED. R. CIV. 56 (made applicable by FED. R. BANKR. P. 7056). The Defendant has offered no response. Accordingly, the Plaintiff is entitled to summary judgment. It is

ORDERED that the Plaintiff's motion for summary judgment is granted. A separate judgment shall be entered contemporaneously herewith.

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