



IT IS ORDERED as set forth below:

Date: October 28, 2008

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NOS. 04-78434 through 04-78436
(Jointly Administered)

Rhodes, Inc., et al.,

CHAPTER 11

Debtors.

JUDGE MASSEY

Joel H. Dugan, as Liquidating Agent for the
Bankruptcy Estates of Rhodes, Inc., et. al.,

Plaintiff,

v.

ADVERSARY NO. 06-6478

Golden Chair, Inc.,

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On October 31, 2006, Plaintiff filed the complaint initiating this adversary proceeding against Defendant, seeking to avoid and recover from Defendant preferences and/or fraudulent

transfers totaling \$436,038.01, pre-judgment interest and costs. Defendant answered, and Plaintiff obtained discovery from Defendant. On August 6, 2008, Plaintiff moved for summary judgment, supported by the affidavit of Plaintiff, who in turn relied in part on Defendant's responses to discovery requests. Plaintiff contends that there is no disputed material fact and that all of the targeted transfers are avoidable.

Pursuant to Fed. R. Civ. P. 56(c), made applicable by Fed. R. Bankr. P. 7056, a party moving for summary judgment is entitled to prevail if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material for the purposes of summary judgment only if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party bears the initial burden to establish that no genuine factual issue exists. *Celotex*, 477 U.S. at 323; *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). The movant must point to the pleadings, discovery responses or supporting affidavits that tend to show the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The court must construe this evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525 (11th Cir. 1987).

"When a moving party has discharged its burden, the non-moving party must then 'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593-94 (11th Cir.1995) (citing *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548). If there is a conflict between the parties' allegations or evidence, the non-moving party's evidence is presumed to be

true and all reasonable inferences must be drawn in the non-moving party's favor. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1164 (11th Cir.2003).

Allen v. Board of Public Educ. for Bibb County, 495 F.3d 1306, 1314 (11th Cir. 2007).

Defendant has not responded to the motion for summary judgment. On October 27, 2008 the Court heard oral argument on the issue identified in an Order entered on September 16, 2008 concerning whether Defendant received the benefit of certain of the transfers at issue. Plaintiff filed a supplemental brief in support of his position that all of the transfers at issue are avoidable.

The first element of a claim to avoid a preferential transfer is a showing that the transfer was made to or for the benefit of the creditor. 11 U.S.C. § 547(b)(1). It is here that Plaintiff's motion for summary judgment partially runs aground. There is no dispute of material fact concerning any of the other elements of a preferential transfer. Hence, to the extent that Plaintiff has shown that certain of the transfers were for the benefit of Defendant, he is entitled to partial summary judgment avoiding those transfers and providing for their recovery in the form of a money judgment. 11 U.S.C. §§ 547(b) and 550(a).

Plaintiff supported his motion for summary judgment with his affidavit. See Document no. 17. In his affidavit, Mr. Dugan states in paragraph 13 on page 2 that "Defendant admitted that each Transfer was made to or for the benefit of Defendant and/or Capital Factors as creditors of the Debtor. *See Exhibit 1, Defendant's Admission Response Nos. 4 and 5.*" (Emphasis added as to the phrase "Defendant and/or Capital Factors.") Plaintiff's statement acknowledges that all of the transfers may have been payable to or for the sole benefit of Capital Factors, which is not named as a defendant. Plaintiff also relies on the checks constituting the transfers alleged to be avoidable, copies of the fronts and backs of which are attached as Exhibit 2 to his affidavit. See Document 17, part 3. But these checks, with two exceptions, do not show that they were cashed

by Defendant or were cashed for its benefit. In his supplemental brief, Plaintiff asserts that “All of the checks were made payable to both Defendant and Capital Factors and thus to or for the benefit of both Defendant and Capital Factors.” (Emphasis added.) This statement is factually inaccurate and as argument begs the question.

The checks in question were made payable not to “Defendant and/or Capital Factors” and not to “Defendant and Capital Factors” but to “Golden Chair/Capital Factors.” Construing the evidence most favorably to Defendant, the Court must read the slash as meaning “or.” Plaintiff has produced no evidence proving that Defendant directly cashed, negotiated or deposited any of the checks at issue. Two of the checks, nos. 684397 and 684398, were endorsed by Capital Factors as the agent of Defendant and were apparently deposited into its bank account. See Exhibit 2 to Mr. Dugan’s Affidavit, Document 17, Part 3, pp. 3-4. Except for admissions of Defendant, Plaintiff has offered no evidence, other than the two checks endorsed by Capital Factors, that any of the transfers were made for the benefit of Defendant.

Defendant’s Responses to discovery served by Plaintiff are attached as Exhibit 1 to Mr. Dugan’s affidavit in support of the motion. Document 17, Part 2. The answers to Interrogatories were made under oath. See Document 17, Part 2, p. 22. In its responses to Interrogatories 7 and 8, Defendant asserts that it received none of the transfers at issue and that only those transfers marked “GC” in the fifth column (labeled “Risk of Loss CG or CF”) of Exhibit 1 to the Answers to Interrogatories were for its benefit. It further averred in those answers that only Capital Factors received the benefit of the transfers marked “CF” in the fifth column of Exhibit 1 to the Answers to Interrogatories. It confirmed its admissions in its Responses 4 and 5 to Plaintiff’s Requests for Admissions. See Exhibit 1 to Affidavit of Mr. Dugan, Document 17, Part 2, pp. 4-5, 9 and 24-32.

The aggregate amount of transfers made for the benefit of Defendant as to which there is no dispute of material fact is \$290,358.92. These transfers were effected by the cashing of checks numbers 682693, 684397, 684398, 683072, 683662, 678882, 679145 and 681911 (the “Proven Preferential Transfers”). Exhibit 1 to Affidavit of Joe Dugan, Document 17, Part 3, pp. 2-9. Plaintiff will be entitled to entry of a judgment as to those transfers. Plaintiff has not shown that the balance of the transfers at issue totaling \$145,679.09 were made to Defendant or for its benefit.

In the complaint, Plaintiff demanded pre-judgment interest on avoided preferential transfers but gave no details concerning how interest would be computed. In his motion for summary judgment, Plaintiff seeks prejudgment interest from the date of the transfers, as opposed to the date of the demand. The certificate of service (document no. 5) states that the summons and complaint were served by U.S. Mail on November 9, 2006. Hence, allowing three days for service by mail, the earliest date of demand was November 12, 2006.

The Bankruptcy Code does not specifically provide for an award of pre-judgment interest on the value of avoided preferential transfers. *In re Investment Bankers, Inc.*, 136 B.R. 1008, 1023 (Bankr. D. Colo. 1989). The decision to award pre-judgment interest in a preferential transfer action is therefore left to the sound discretion of the bankruptcy court. *In re Art Shirt Ltd., Inc.*, 93 B.R. 333, 342 (Bankr. E.D. Pa.1988). *Lowrey v. Mfrs. Hanover Leasing Corp. (In re Robinson Bros. Drilling, Inc.)*, 1992 WL 535954 (W.D. Okla. 1992). In this instance, an award of interest is appropriate because Defendant has not prosecuted any defense to the claim. Defendant could have tendered those transfers when it received the complaint or paid the amount of allegedly avoidable transfers into the Court’s Registry without giving up any right or defense.

"Prejudgment interest is recoverable in a preference action from the date of demand for its return by the trustee or, if there is no demand, from the date of commencement of the adversary proceeding." *Ellenberg v. Mercer (In re The Home Co.)*, 108 B.R. 357, 360 (Bankr. N.D. Ga. 1989) (Cotton, J.). Most courts concur with this conclusion. *See, e.g., Sigmon v. Royal Cake Co. (In re Cybermech, Inc.)*, 13 F.3d 818, 822-23 (4th Cir. 1994); *McLemore v. Third Nat'l Bank in Nashville (In re Montgomery)*, 983 F.2d 1389, 1396 (6th Cir. 1993). Courts have used several bench marks as the proper interest rate, including the state legal interest rate, the prime rate and the rate under 28 U.S.C. § 1961.

This court adopts the approach of Judge Cotton in the *Home Co.* case in adopting the rate prescribed by 28 U.S.C. § 1961. "Although section 1961 only provides for post-judgment interest, most courts have concluded that the statute also applies to pre-judgment interest in a case involving a federal question in which there is no express statutory provision for such interest." *In re Home Co.*, 108 B.R. at 360. Section 1961 fixes the rate "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment." The Court notes that the federal rate under section 1961 for the week preceding November 9, 2006 was 5.03%. Attached to this Order is a copy of the web page of the Federal Reserve showing the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System for the week ending November 10, 2006. The Internet address for that page is <http://www.federalreserve.gov/releases/h15/20061113/>. This rate is lower than Georgia's legal rate of 7%. GA. CODE ANN. § 7-4-2 ("The legal rate of interest shall be 7 percent per annum simple interest where the rate percent is not established by written contract.") Plaintiff is also entitled to recover as costs the filing fee of \$250.00.

On this basis, Plaintiff's motion for summary judgment is GRANTED in part and DENIED in part. The Proven Preferential Transfers totaling \$290,358.92 are avoided pursuant to 11 U.S.C. § 547(b) and Plaintiff will be entitled to a judgment for the value of those transfers in the same amount pursuant to 11 U.S.C. § 550(a), pre-judgment interest on that amount from November 12, 2006 at the rate of 5.03% per annum and costs of 250.00.

The Court indicated at the hearing that it would enter a partial judgment, but on further reflection, the Court seeks a short brief and any response on whether it may do so under Civil Rule 54(b), made applicable by Bankruptcy Rule 7054. Plaintiff may wish to consider whether he desires to pursue the balance of the demand. Discovery with respect to the remaining transfers is extended through December 31, 2008. The Court will shortly set a date in early 2009 for trial of the remaining issues.

END OF ORDER

Federal Reserve Statistical Release



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H.15

Selected Interest Rates

Release Date: November 13, 2006

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FEDERAL RESERVE STATISTICAL RELEASE

H.15 (519) SELECTED INTEREST RATES

For use at 2:30 p.m. Eastern Time

Yields in percent per annum

November 13, 2006

Instruments	2006 Nov 6	2006 Nov 7	2006 Nov 8	2006 Nov 9	2006 Nov 10	Week Ending Nov 10	Nov 3	2006 Oct
Federal funds (effective) 1 2 3	5.24	5.22	5.22	5.23	5.23	5.24	5.25	5.25
Commercial Paper 3 4 5								
Nonfinancial								
1-month	5.20	5.21	5.19	5.21	5.22	5.21	5.20	5.20
2-month	n.a.	5.18	n.a.	n.a.	5.17	5.18	n.a.	5.18
3-month	n.a.	5.16	n.a.	n.a.	5.15	5.16	n.a.	5.19
Financial								
1-month	5.21	5.23	5.25	5.24	5.23	5.23	5.23	5.23
2-month	5.24	5.24	5.24	5.24	5.23	5.24	5.23	5.23
3-month	5.24	5.22	5.26	5.24	5.25	5.24	5.23	5.24
CDs (secondary market) 3 6								
1-month	5.29	5.29	5.28	5.29	5.28	5.29	5.28	5.28
3-month	5.33	5.33	5.32	5.32	5.32	5.32	5.33	5.33
6-month	5.36	5.36	5.33	5.35	5.34	5.35	5.33	5.35
Eurodollar deposits (London) 3 7								
1-month	5.29	5.32	5.32	5.29	5.29	5.30	5.32	5.32
3-month	5.36	5.37	5.37	5.34	5.35	5.36	5.37	5.36
6-month	5.39	5.39	5.38	5.37	5.37	5.38	5.38	5.38
Bank prime loan 2 3 8	8.25	8.25	8.25	8.25	8.25	8.25	8.25	8.25
Discount window primary credit 2 9	6.25	6.25	6.25	6.25	6.25	6.25	6.25	6.25
U.S. government securities								
Treasury bills (secondary market) 3 4								
4-week	5.10	5.11	5.11	5.11	5.12	5.11	5.09	4.88
3-month	4.96	4.95	4.97	4.96	4.97	4.96	4.95	4.92
6-month	4.98	4.96	4.96	4.96	4.96	4.96	4.94	4.92
Treasury constant maturities								
Nominal 10								
1-month	5.17	5.20	5.20	5.19	5.20	5.19	5.18	4.97
3-month	5.09	5.08	5.10	5.09	5.10	5.09	5.08	5.05
6-month	5.18	5.16	5.16	5.16	5.16	5.16	5.14	5.12
1-year	5.06	5.03	5.02	5.02	5.01	5.03	5.00	5.01
2-year	4.82	4.77	4.75	4.75	4.73	4.76	4.73	4.80
3-year	4.74	4.69	4.65	4.66	4.63	4.67	4.64	4.72
5-year	4.69	4.63	4.61	4.60	4.57	4.62	4.60	4.69
7-year	4.69	4.63	4.61	4.60	4.57	4.62	4.60	4.69
10-year	4.71	4.66	4.64	4.62	4.59	4.64	4.64	4.73
20-year	4.89	4.85	4.82	4.82	4.78	4.83	4.83	4.94
30-year	4.79	4.76	4.73	4.73	4.69	4.74	4.74	4.85
Inflation indexed 11								
5-year	2.48	2.44	2.41	2.41	2.37	2.42	2.47	2.51
7-year	2.41	2.37	2.34	2.34	2.31	2.35	2.40	2.45
10-year	2.36	2.32	2.29	2.28	2.25	2.30	2.35	2.41
20-year	2.29	2.26	2.22	2.23	2.19	2.24	2.30	2.38
Inflation-indexed long-term average 12	2.25	2.21	2.18	2.18	2.15	2.19	2.25	2.34
Interest rate swaps 13								
1-year	5.39	5.35	5.35	5.32	5.30	5.34	5.31	5.37
2-year	5.22	5.14	5.16	5.12	5.09	5.14	5.11	5.19
3-year	5.18	5.09	5.10	5.06	5.02	5.09	5.05	5.15
4-year	5.17	5.08	5.09	5.05	5.01	5.08	5.05	5.15
5-year	5.19	5.09	5.10	5.06	5.02	5.09	5.07	5.16