

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

In the matter of:)

BAR-B-QUE BILL'S, INC.)
(Chapter 11 Case 186-00273))

Debtor)

BAR-B-QUE BILL'S, INC.)

Plaintiff)

v.)

AUGUSTA MALL PARTNERSHIP)

Defendant)

Adversary Proceeding

Number 187-0011

MEMORANDUM AND ORDER

This Chapter 11 Debtor, as trustee, brought an action seeking to recover for the benefit of the estate a preferential transfer which allegedly occurred when Defendant, while holding an unsecured claim, disposed of certain collateral of the Debtor in the 90 days leading up to the date of filing and disbursed the proceeds in such a manner that Defendant received more than it would have in a Chapter 7 liquidation. Defendant denies that the disposition was preferential principally because

it claims to hold a perfected security interest in the collateral that was obtained outside the preferential period. After a trial held on August 27, 1987, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) The parties stipulate that:

- (a) Defendant is a creditor within the meaning of 11 U.S.C. §547(b)(1).
- (b) Defendant held an "antecedent debt" for unpaid rent owed by Plaintiff as contemplated by 11 U.S.C. §547(b)(2).
- (c) A transfer was made for the benefit of Defendant and other creditors when equipment in Plaintiff's restaurant was repossessed by Defendant and sold.
- (d) The equipment was worth \$15,000.00.

2) According to the schedules, tax and other priority claims owed by Plaintiff as of the date of filing totalled \$11,461.20. \$8,000.00 was owed to C&S Bank secured by the

equipment in question. Debtor owed unsecured claimants approximately \$26,000.00 (Exhibit P-8), including \$14,448.00 in back rent to Defendant.¹

3) Debtor's restaurant formerly operated on property leased from Defendant. It was closed on January 27, 1986. On January 30th Defendant took possession of the equipment on the premises. On February 27th Defendant obtained a default judgment for back rent against Debtor and recorded an execution on said judgment on March 14th. On March 18th the equipment was sold for \$15,000.00 to a third party. On March 24th Debtor's Chapter 11 case was filed. (Exhibits D-1, 5, 6 and 7).

4) Defendant took the \$15,000.00 proceeds of the equipment sale and paid the C&S Bank secured debt off. It then took the balance of \$6,984.90, applied those sums to its debt, and filed a claim in this case for the balance.

5) After December 1, 1985, Debtor was unable to timely meet his expenses for rent, payroll and so forth as they

¹ Exhibit P-8 shows approximately \$18,000.00 in general unsecured debt. However, only \$6,000.00 is scheduled as owed to Defendant which represents the net debt owed after disposition of the collateral.

came due.

6) Debtor owed the following unsecured priority claims on the date it filed for relief:

a) Back wages	\$1,741.00	(Exhibit P-4)
b) Ad valorem taxes	\$1,653.26	(Exhibit P-5)
c) State sales taxes	\$ 43.07	(Exhibit P-6)
d) Federal taxes	\$6,018.61	(Exhibit P-7)
e) State withholding	\$1,500.00	(Exhibit P-8)

CONCLUSIONS OF LAW

11 U.S.C. Section 547(b) and Section 1107 provide that a trustee or debtor-in-possession may avoid any transfer

- "(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
 - (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;

(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."

The parties have stipulated that subsections (1) and (2) have been satisfied.

The requirement that debtor was insolvent when the transfer was made has been established by 11 U.S.C. Section 547(f) which creates a presumption that the debtor was insolvent during the 90 days prior to the filing of its case. In this factual setting, debtor is therefore presumed insolvent after December 24, 1985. Defendant introduced no evidence to rebut this presumption and accordingly the requirements of subsection (3) have been established.

The fourth requirement necessary to establish a preference is that the transfer must have occurred within 90 days of the filing of debtor's case. In this case there are potentially two transfers to consider. One occurred when the Defendant repossessed the furnishings and equipment of Debtor on January 30, 1986. The other occurred when Defendant obtained its

state court judgment and recorded its execution which occurred on February 27th and March 14, 1986. All three events occurred within 90 days of March 24th when the Chapter 11 was filed and are therefore within the critical period, and are avoidable if they have the proscribed effect of enhancing a creditor's recovery on its claim.

The final element that Plaintiff must prove is that Defendant, as a result of the transfer, received more on its claim than it would have in a hypothetical Chapter 7 liquidation. In this case Defendant received \$6,984.90 of a claim for \$14,448.00 or 48.34%. In a hypothetical Chapter 7 liquidation the \$15,000.00 would have been applied as follows, unless Defendant's claim is entitled to secured status:

	<u>Claim Amount</u>	<u>Distributable</u>
C&S secured claim	\$ 8,000.00	\$8,000.00
Priority unsecured claims	\$10,955.94	\$7,000.00
Unsecured Claims (including Defendant)	\$26,000.00	0.00

Defendant contends that its claim should be classified, for the purposes of this analysis, as a secured claim rather than as an unsecured one in which event, its receipt of the proceeds would not constitute preference since Defendant would be entitled to the funds ahead of the priority unsecured claims. It is true that Section 7.4 of the lease (Exhibit D-1,

page 11) provides that Defendant holds a security interest in the fixtures and other personalty of Debtor on the premises. As between the parties a security agreement such as contained in the lease is "effective according to its terms". O.C.G.A. §11-9-201. Indeed, as to mere purchasers or creditors, the security agreement is sufficient to create a secured obligation. Id. see Continental American Life Ins. Co. v. Griffin, 251 Ga. 412 (1983). However, when a Chapter 7 trustee intervenes, the security agreement must be perfected under state law to defeat the rights of the trustee. 11 U.S.C. §544; O.C.G.A. §11-9-301(1)(b). Defendant admits that no financing statement was filed to perfect the security agreement contained in the lease as required by O.C.G.A. §11-9-302 and thus the trustee in a Chapter 7 liquidation would be entitled to classify Defendant's claim as unsecured and distribute the proceeds of sale as set forth above.

Defendant contends in the alternative that even absent proper perfection of its security interest by filing of a financing statement, its obtaining a judgment lien under state law on March 14th is sufficient to elevate its interest to secured status. However, the judgment and execution themselves constitute a "transfer" within the proscribed 90 day period and are avoidable (Bankruptcy Code §541(d)(6)). 4 Collier on Bankruptcy, ¶547.03[1][A] at 547-548. To the extent that Defendant claims a

status greater than that of a general unsecured creditor for the rent, the Trustee likewise could avoid any statutory lien under 11 U.S.C. Section 545(3) and (4).

Since Defendant's sale of the equipment and application of proceeds resulted in its recovery of nearly half its debt when in Chapter 7 it would receive nothing after the trustee exercised his avoiding powers, the transfer of the assets meets all the statutory criteria of a preference and is avoidable.

O R D E R

Based on the foregoing Findings of Fact and Conclusions of Law, judgment is entered in favor of Plaintiff and Defendant is ordered to pay to Plaintiff, as debtor-in-possession, the sum of \$6,984.90 for administration in this case.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 20th day of October, 1987.