

In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division

In the matter of:

JBN ENTERPRISES, INC.  
(Chapter 7 Case 95-20130)

*Debtor*

STEPHEN L. JACKSON,  
TRUSTEE

*Plaintiff*

v.

SOSSNER TAP & TOOL CORP.,  
AND WAYNE BENNETT

*Defendant*

Adversary Proceeding

Number 95-2030

FILED

at 9 O'clock & 38 min A M

Date 11-15-95

MARY C. BECTON, CLERK  
United States Bankruptcy Court  
Savannah, Georgia



**ORDER ON TRUSTEE'S COMPLAINT TO AVOID A  
PREFERENTIAL TRANSFER**

In the above case, Stephen L. Jackson (hereinafter "Trustee"), instituted an adversary proceeding to avoid the judgment lien of the Defendant, Sossner Tap &

Tool Corporation (hereinafter "Defendant") against the debtor, JBN Enterprise, Inc. (hereinafter "Debtor"), pursuant to 11 U.S.C. § 547. Trustee prays for a determination avoiding the transfer and requiring the turnover of all property of Debtor's estate currently in the possession of Defendant. Defendant responds that a portion of its judgment may not be avoided and requests a determination recognizing the lien's partial validity. The parties have briefed the issues and submitted a list of stipulated facts. Based on the parties' briefs, the record on file, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

The following facts are not in dispute. On March 2, 1994, Debtor, JBN Enterprises, Inc., entered into a written Lease Agreement with Defendant, Sossner Tap & Tool Corporation. The lease required monthly rental payments of \$5,000. In addition, the lease required Debtor to pay all real property taxes on the premises.

Debtor entered into possession of the premises and began operating a restaurant. Debtor eventually defaulted in the payment of monthly rental for the months of August, September, October, November, and December, 1994, totaling \$25,000.00. On January 1, 1995, the January rent became due as well as \$4,429.31 in property taxes. On January 4, 1995, Defendant, Sossner Tap & Tool Corporation

instituted a Dispossessory Petition in the Superior Court of Glynn County, Georgia.

On January 23, 1995, the Superior Court of Glynn County, Georgia issued a dispossessory warrant and awarded a money judgment in favor of Defendant against Debtor in the amount of \$34,429.31, plus an additional \$5,269.40 for costs and attorneys fees.<sup>1</sup> In accordance with the judgment, Defendant obtained a Writ of Fieri Facias which was issued by the Clerk of Glynn Superior Court on January 31, 1995 and recorded in the General Execution Docket of Glynn County on that same date.

After receiving the Writ of Fieri Facias, the Sheriff of Glynn County, Georgia levied upon and seized certain personal property of Debtor, placed the property in storage, and advertised the property for sale in accordance with the provisions of Georgia law. However, before the schedule date for the Sheriff's sale, Debtor filed for bankruptcy. The Sheriff of Glynn County, Georgia currently possesses all of the disputed property pending the outcome of this litigation.

As previously mentioned, Trustee asserts that Defendant has received a voidable preference and its judgment lien against Debtor should be avoided pursuant

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<sup>1</sup> The judgment of \$34,429.31 is comprised of the rental of \$5,000 per month for each of the months of August, September, October, November, and December, 1994, January, 1995, and property taxes of \$4,429.31 which were due in January, 1995.

to 11 U.S.C. § 547.

Defendant argues that only a portion of the debt included in the Judgment should be considered as antecedent under Section 547. In particular, Defendant acknowledges that the unpaid rent for the months from August 1994 through and including December 1994 are clearly antecedent. However, Defendant contends that the rent of \$5,000 for January 1995 and the taxes in the amount of \$4,429.31 were due during the month of January, 1995; consequently, a sum of \$9,429.31 was for current and not antecedent debt and therefore cannot be avoided.

#### CONCLUSIONS OF LAW

11 U.S.C. § 547 provides, in pertinent part,

(b) . . . the trustee may avoid any transfer of an interest of the debtor in property---

- (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 filing of the petition

(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;

(c) The trustee may not avoid under this section a transfer---

(1) to the extent that such transfer was---

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

11 U.S.C. § 547(b) permits a trustee to avoid transfers between a debtor and creditor within 90 days of the filing period that have the effect of allowing one creditor a greater recovery than he would normally receive under the bankruptcy disposition. The trustee has the burden of proving (1) a transfer (2) of debtor's property (3) to or for the benefit of a creditor (4) for or on account of an antecedent debt (5) made while the debtor was insolvent (6) within 90 days of the filing of bankruptcy (7) which enables a creditor to receive more than he would under Chapter 7 liquidation.

In the present case, Defendant, Sossner Tap & Tool instituted a dispossessory suit against Debtor, JBN Enterprises, Inc., on January 5, 1995. After receiving a monetary judgment and dispossessory order, Debtor recorded the judgment in the General Execution Docket of Glynn County, Georgia on January 31, 1995. This constituted a "transfer"<sup>2</sup> of an "interest"<sup>3</sup> in Debtor's property within the meaning of the Code and was effective on January 31, 1995.

It is undisputed that Defendant is a creditor of Debtor. Debtor, as the lessee of Defendant, accumulated an arrearage of at least \$25,000 owed to Defendant at the time the judgment proceedings were instituted. Section 101 broadly defines the term "creditor" and Defendant fits well within the scope of the definition.<sup>4</sup>

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<sup>2</sup> "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption. 11 U.S.C. § 101(54); "What constitutes a transfer and when it is complete" is a matter of federal law. McKenzie v. Irving Trust Co., 323 U.S. 365, 369-370, 65 S.Ct. 405, 407-408, 89 L.Ed. 305 (1945); "For purposes of § 547(b), the docketing of a judgment lien constitutes a transfer to or for the benefit of a creditor, which is subject to avoidance." In re Babiker, 180 B.R. 458, 460 (Bankr.E.D.Va. 1995).

<sup>3</sup> The fundamental inquiring when considering whether a creditor received an interest in the debtor generally asks whether the estate has been diminished or depleted. See e.g. Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351 (5th Cir.) *reh'g denied*, 801 F.2d 398 (5th Cir. 1986) ("For the preference to be voided under section 547, 'it is essential that the debtor have an interest in the property transferred so that the estate is thereby diminished'") quoting Genova v. Rivera Funeral Home (In re Castillo), 39 B.R. 45, 46 (Bankr.D. Colo. 1984). In the present case, it is clear that the seizure of Debtor's personal property depleted the estate.

<sup>4</sup> Section 101 provides, in pertinent part,

(10) "creditor" means---

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

As previously mentioned, Defendant contends that the rent and taxes due for January 1995 were for current and not antecedent debt and therefore cannot be avoided. Although it is true that payments of current rent do not constitute preferences<sup>5</sup>, in the present case, lease payments were never made by Debtor. Instead, Defendant received a judgment against Debtor for lease payments owed. This transfer of an interest in Debtor's property did not occur until January 31, 1995, thirty-one days after the January rent and taxes were due. Therefore, filing of the lien and the seizure of the property was on account of or for an antecedent debt.

Debtor asserts in the alternative that the transfer was a substantially "contemporaneous exchange" under Section 547(c)(1).<sup>6</sup> However, § 547(c)(1) requires a transfer *intended by the debtor*. This exception applies to transactions intended to occur simultaneously and actually occurring within a relatively short period of time.

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- (C) entity that has a community claim;
- (5) "claim" means---
- (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
  - (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;

<sup>5</sup> Lease payment obligations arise when they become due and payable because of lessee's possession, not when the lease is signed. In re White River Corporation, 799 F.2d 631 (10th Cir. 1986).

<sup>6</sup> 11 U.S.C. § 547(g) places the burden of proving a "contemporaneous exchange" on the creditor who asserts this exception.

In the landlord-tenant context, the "contemporaneous exchange" exception applies to debtors who intend to pay their rent in a timely manner, but actually make their payments a few days late.<sup>7</sup> Here, there is no evidence that Debtor intended to pay January's rent. Since Debtor had not made payments since July 1994, evidence exists to the contrary. Moreover, the securing of a state court judgment and subsequent seizure of the property demonstrates that this transaction was an involuntary transfer unintended by Debtor. Defendant has failed to carry its burden regarding this exception.

Section 547(f) provides that for purposes of section 547, "the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of filing of the petition." Defendant does not contest this presumption.

Debtor filed for protection of the Bankruptcy Code on February 24, 1995. As mentioned earlier, the transferred occurred on January, 31, 1995. Clearly, the transfer occurred on or within 90 days before the date of the filing of the petition.

Finally, 11 U.S.C. § 547 only voids preferences that enables a creditor

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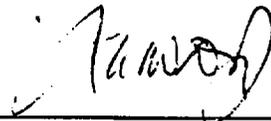
<sup>7</sup> See *In re Coco*, 67 B.R. 365 (Bankr.S.D.N.Y. 1986)(tenant's rent payments to escrow agent for benefit of landlord, which payments were six and seven days late, were substantially contemporaneous exchanges for new value).

to receive more than he would under a Chapter 7 liquidation. Neither side contests this requirement, and it is self-evident that Defendant will receive more if it retains this property than it would if the property is sold and the proceeds spread among all creditors.

Accordingly, all the elements of Section 547 are established.

ORDER

Pursuant to the above mentioned reasons, IT IS THE ORDER OF THIS COURT that the lien in favor of Defendant is hereby avoided and Trustee's title to the property levied upon is unencumbered by any lien held by Defendant.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 13<sup>th</sup> day of November, 1995.