

OCT 01 2004

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

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In re:)	Chapter 7
NAOMI PUTMAN,)	No. 4:03-bk-01013-TUC-JMM
a.k.a. CAROL PUTMAN,)	Adv. No. 4:04-ap-00029-JMM
Debtor.)	
SHARON MAXWELL, Trustee,)	MEMORANDUM DECISION
Plaintiff,)	
v.)	
MISSION FINANCIAL,)	
Defendant.)	

On August 23, 2004, a Trial Check-In on Complaint was held. Matthew R.K. Waterman appeared on behalf of the Chapter 7 Trustee, Sharon Maxwell, and Paul M. Weich appeared on behalf of Defendant Mission Financial. After consideration of the arguments, the pleadings and the entire file, the court now rules.

FACTS

The following facts were stipulated to by the parties. Prior to the Petition Date, Naomi Putman ("Debtor") owned a 2000 Peterbilt tractor ("Tractor") and a 1997 Dorsey trailer ("Trailer"), together the "Truck." Prior to the Petition Date, Debtor and her late husband borrowed funds from Mission Financial ("Mission") in order to open their trucking company and for operating expenses relating thereto. Mission required collateralization of its loan to the Debtor and her late husband. The Debtor and her late husband agreed to permit Mission to record a lien against the Truck. Debtor sold the Trailer on December 2, 2002 for \$5,500 and the Tractor on December 7, 2002 for \$50,000, for an aggregate sale of \$55,500 for the Truck. On December 10, 2002, and therefore within the 90

1 day period immediately preceding the Petition Date, Debtor made a \$28,800.00 payment to Mission
2 in full satisfaction of Mission's unsecured¹ claim.

3 Debtor filed a chapter 7 bankruptcy petition on March 3, 2003. On March 5, 2004,
4 Chapter 7 Trustee Sharon Maxwell ("Trustee") filed a Complaint for Avoidance of Preferential
5 Transfer pursuant to 11 U.S.C. § 547(b) and Recovery Thereof pursuant to 11 U.S.C. § 550. In the
6 Complaint, the Trustee alleged that the \$28,800 payment to Mission was a preferential transfer
7 pursuant to § 547(b) and therefore could be avoided by the Trustee. The Trustee also alleged that the
8 Trustee could recover the property transferred, or the value thereof, from Mission.

9 On April 26, 2004, Mission filed an Answer denying it received a preferential payment
10 specifically because the Debtor was solvent at the time of the transfer. At the Trial Check-In on
11 Complaint, the court took the matter under advisement.

12 13 ISSUES

14
15 Whether the Debtor was insolvent at the time the payment was made to Mission?

16 17 DISCUSSION

18 19 Whether the Payment to Mission was a Preferential Transfer under § 547(b)

20
21 Section 547(b), in pertinent part, sets forth the elements of an avoidable preference as
22 "any transfer of an interest of the debtor in property"

23 (1) to or for the benefit of a creditor;

24
25 ¹ While the Trustee contends that Mission never recorded the lien against the Truck and
26 Mission contends that Debtor's pre-filing conduct was responsible for preventing the security interest
from being perfected, both parties nonetheless agree that Mission's claim is unsecured.

- 1 (2) for or on account of an antecedent debt owed by the debtor
2 before such transfer was made;
- 3 (3) made while the debtor was insolvent;
- 4 (4) made
- 5 (A) on or within 90 days before the date of the filing of the
6 petition;
- 7 (5) that enables such creditor to receive more than such creditor
8 would receive if -
- 9 (A) the case were a case under chapter 7 of this title;
- 10 (B) the transfer had not been made; and
- 11 © such creditor received payment of such debt to the extent
12 provided by the provisions of this title.

13 Unless the Trustee proves each and every one of these elements, a transfer is not
14 avoidable as a preference under § 547(b). *Danning v. Bozek (In re Bullion Reserve of N. Am.)*, 836
15 F.2d 1214, 1217 (9th Cir.), *cert. denied*, 486 U.S. 1056 (1998). The parties have stipulated that the
16 requirements of § 547(b)(1), (2), (4)(A), and (5) have been met. The only provision of § 547(b) in
17 dispute is whether or not the payment was “made while the debtor was insolvent,” thereby satisfying
18 the remaining requirement of § 547(b)(3). If the payment was made while the Debtor was insolvent,
19 then the payment is preferential and may be avoided by the Trustee.

20 **Whether the Debtor was Insolvent at the Time the Payment was Made to Mission**

21 For a transfer to be avoidable under § 547(b), it must be made while the Debtor was
22 insolvent. Section 101(32)(A) provides that “insolvent” means:

23 with reference to an entity other than a partnership, and a municipality,
24 financial condition such that the sum of such entity’s debts is greater
25 than all of such entity’s property, at a fair valuation, exclusive of -

- 26 (i) property transferred, concealed, or removed with the intent to
hinder, delay, or defraud such entity’s creditors; and

1 (ii) property that may be exempted from the property of the estate
2 under section 522 of this title.

3 Section 547(f) specifically provides that for the purposes of § 547, “the debtor is presumed to
4 have been insolvent on and during the 90 days immediately preceding the date . . . of the petition.”
5 The effect of this presumption is merely to shift the burden of going forward with evidence, and not
6 the burden of proof. *Sierra Steel, Inc. v. Totten Tubes, Inc. (In re Sierra Steel, Inc.)*, 96 B.R. 275, 277
7 (B.A.P. 9th Cir. 1989). Therefore, Mission must come forward with some evidence to rebut the
8 presumption, but the burden of proof remains on the Trustee to show insolvency at the time of the
9 transfer. *Akers v. Koubourlis (In re Koubourlis)*, 869 F.2d 1319, 1322 (9th Cir. 1989).

10 This leaves Mission with the necessity of rebutting the presumption that the Debtor is
11 insolvent on and during the 90 days immediately preceding the date of the petition. In Mission’s
12 Answer to Plaintiff’s Complaint, it states that “[w]hile there is a presumption that a payment made
13 within 90 days before the petition filing, that presumption is rebuttable. Debtor’s schedules -
14 showing \$223,000 in assets and only \$173,000 in liabilities - rebut that presumption and trustee will
15 have to show insolvency as of the date of the transfer.” Indeed, the Ninth Circuit holds that Debtor’s
16 own schedules showing solvency are sufficient to rebut the presumption. *Id.*

17 A rough “balance sheet” test determines insolvency; the debtor is insolvent when its
18 liabilities exceed the fair value of its nonexempt assets. 5 COLLIER ON BANKRUPTCY ¶ 547.03[5]
19 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.). *See also* H.R. Rep. No. 595, 95th Cong.,
20 1st Sess. 177, 312 (1977). While debtor’s schedules listing assets and liabilities show that debtor is
21 solvent, that alone does not end the inquiry. In an individual’s case, only *nonexempt* assets can be
22 considered in determining solvency. Debtor lists the following assets as exempt in her Schedule C:

23	Residence	\$21,000.00
24	Financial Accounts	\$ 150.00
25	Household Goods	\$ 1,000.00
26	Clothing	\$ 100.00

1	Jewelry	\$ 100.00
2	Retirement Plan	\$70,000.00
3	Vehicle	\$ 2,455.00
4	TOTAL:	\$94,805.00

5 Using Debtor's schedules, her liabilities are \$153,500 and her nonexempt assets are \$129,000
6 (\$223,805 in all assets minus \$94,805 in exempt assets). Since Debtor's liabilities were greater than
7 her assets at the time of filing her petition, debtor is deemed insolvent.

8 Since Mission has failed to rebut the presumption that debtor was for § 547(b)
9 purposes, insolvent on and during the 90 days immediately preceding the date of the petition, the
10 Trustee is entitled to rely upon the presumption of insolvency in her favor.

11 In the Trustee's Memorandum of Law in Support of Complaint, the Trustee
12 determines that the Debtor was insolvent at the time of the transfer relying on facts from a Witness
13 Declaration of Naomi C. Putman. However, at the August 23, 2004 hearing on Trial Check-In, Mr.
14 Waterman, counsel for the Trustee, stipulated that there would be no affidavit from the debtor. As
15 Mission notes in its Motion in Limine to Determine Witness Declaration of Naomi C. Putman
16 Inadmissible, "Rule 26(a)(3), Fed.R.Civ.P., requires pretrial disclosure of such evidence that may be
17 produced at trial and permits an objection to the admissibility of evidence that is not properly
18 disclosed." The Debtor's Witness Declaration was submitted well after the Discovery Deadline had
19 passed and after Trustee's counsel stipulated that there would be no affidavit from the Debtor.
20 Therefore, Mission's Motion in Limine is granted and all evidence in the Trustee's Memorandum of
21 Law that relates to the Debtor's Witness Declaration will not be considered.

22 However, even taking into account that the Debtor's affidavit cannot be used to prove
23 her insolvency at the time of the transfer, Mission failed to rebut the presumption of insolvency as
24 determined by reference to her schedules, and the Trustee is therefore allowed to rely upon such
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26

1 presumption. Thus, since the presumption stands, the requirement of § 547(b)(3) has been proven by
2 the trustee. Because the parties have stipulated that all other requirements of § 547(b) have been
3 satisfied, it is determined that Debtor's payment of \$28,800 to Mission on December 10, 2002 is a
4 preferential transfer under § 547(b).

5 Having determined that the Trustee has met her prima facie burden, should Mission
6 wish to submit evidence regarding its affirmative defense under § 547(c)(2), a one hour trial has been
7 scheduled for Tuesday, November 30, 2004 at 9:45 a.m.

8
9 **CONCLUSION**

10
11 Because Mission failed to provide adequate evidence to rebut the presumption of
12 insolvency, the Trustee is entitled to rely upon the presumption of insolvency. As the parties have
13 stipulated to the remaining requirements of § 547(b), this court holds that the Debtor's payment of
14 \$28,800 to Mission on December 10, 2002 is a preferential transfer under § 547(b).

15 Should Mission wish to submit evidence regarding its ordinary course of business
16 affirmative defense under § 547(c)(2), a one hour trial has been set for Tuesday, November 30, 2004
17 at 9:45 a.m. A separate order will be entered. *Bankr. R. 9021.*

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19 DATED: October 1, 2004

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21 
22 JAMES M. MARLAR
23 UNITED STATES BANKRUPTCY JUDGE
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1 COPIES served as indicated below this 1st
day of October, 2004, upon:

2 Matthew R.K. Waterman
3 Waterman & Waterman, P.C.
4 33 North Stone Avenue, Suite 2020
5 Tucson, AZ 85701
6 Email mrkw@watermanlaw.com
7 Attorneys for Sharon Maxwell, Chapter 7 Trustee

8 Paul M. Weich
9 LAW OFFICES OF PAUL WEICH
10 P.M.B. #24
11 3646 East Ray Road, Suite B16
12 Phoenix, Arizona 85044-7116
13 Email Paul.Weich@azbar.org
14 Attorneys for Mission Financial

15 Sharon Maxwell
16 177 N. Church Avenue, #625
17 Tucson, AZ 85701
18 Email smaxwell@epitrustee.com
19 Chapter 7 Trustee

20 Robert R. Teague
21 PHILLIPS & ASSOCIATES
22 3030 North 3rd Street, Suite 1101
23 Phoenix, Arizona 85012
24 Email robertt@phillipslaw.ws
25 Attorney for Debtor

26 Office of the United States Trustee
230 North First Avenue, Suite 204
Phoenix, Arizona 85003-1706
U.S. Mail

20 By MB Thompson
21 Judicial Assistant