

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In Re:	:	Chapter 11
	:	
FLEMING COMPANIES, <u>et al.</u> ,	:	Case No. 03-10945(MFW)
	:	
Debtor.	:	Jointly Administered
-----	:	:
PCT	:	
	:	
Plaintiff	:	
v.	:	
	:	
ROBERT WHOLEY & CO., INC.	:	
	:	
Defendant	:	Adversary No. 05-75117(KJC)

ORDER DENYING SUMMARY JUDGMENT

AND NOW, this 17th day of May, 2006, upon consideration of the Defendant’s Motion for Summary Judgment (Docket No. 46)(“Motion”), the Plaintiff’s Response thereto (Docket No. 55), the Defendant’s Reply (Docket No. 56), and after oral argument thereon, it is hereby

ORDERED and DECREED that the Motion is DENIED.¹

¹This adversary proceeding was filed on March 3, 2005 against Robert Wholey & Co., Inc. (“Defendant” or “Wholey”), seeking to avoid and recover approximately \$297,350.61 in allegedly preferential or fraudulent transfers pursuant to §§ 547, 548, and 550, and disallowance of claims under §502(d). The Defendant answered on April 1, 2005 and filed its Motion on January 26, 2006, addressing only the preference count of the Complaint.

Section 547(b) provides:
Except as provided in subsection (c) of this section, 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;

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- (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 90 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; and
 - (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 Defendant is a seafood and meat supplier who sells and delivers product mostly to grocery stores, or as the parties refer to them in their pleadings, “user stores.” The Defendant alleges that some of the user stores used the debtor, Fleming, to coordinate their invoices and payments to their various suppliers. Fleming would collect and consolidate the invoices for a particular store and the store would then pay Fleming. Fleming would then issue payment to the supplier, including Wholey. Wholey alleges that its product was always ordered by and delivered directly to the user stores, and Fleming was not required to extend credit to any store. Wholey also says that Fleming did not purchase any product from Wholey and Wholey did not sell anything to Fleming.

The Plaintiff, Post confirmation Trust (“PCT”), contends that the Defendant sold its goods to Fleming, who then resold the goods to the user stores with a mark-up, and the Defendant delivered the goods to the user stores. The PCT also asserts that the Defendant in actuality, is asserting that a constructive trust applies to the funds and that the burden is on the Defendant to prove that the monies held by Fleming were held in a constructive trust, and, that Fleming did not have an interest in the funds.

The Defendant seeks summary judgment in its favor on the grounds that the PCT cannot meet its burden of proof on two elements of § 547(b). Summary judgment is appropriate when “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 judgment as a matter of law.” Fed. R. Civ. P. 56(c), made applicable to this adversary proceeding by Fed. R. Bankr. P. 7056. In a motion for summary judgment, the moving party “always bears the initial responsibility of informing the...court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Once the moving party has made a proper motion for summary judgment, the burden shifts to the non-moving party, pursuant to Rule 56(e), which states, “[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.” Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.

Ct. 1348, 89 L. Ed. 2d 538 (1986). The party opposing the motion “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586.

Before a court will find that a dispute about a material fact is genuine, there must be sufficient evidence upon which a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The court must view the facts and draw inferences in a light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513-14. “[W]here the non-moving party’s evidence contradicts the movant’s, then the non-movant’s must be taken as true.” *Pastore v. Bell Tel. Co.*, 24 F.3d 508, 512 (3d Cir. 1994). It is not the role of the judge to weigh the evidence or to evaluate its credibility, but to determine “whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

Wholey argues in its Motion that the transfers were not part of the Debtor’s estate and therefore, were not interests of the debtor in property. Wholey also states that it was not a creditor of Fleming because Fleming did not owe Wholey a debt. In support, Wholey argues that Fleming was merely a disbursing or billing agent who collected and consolidated invoices for the user stores and then forwarded the amounts remitted to the supplier. Wholey argues that nothing was sold to Fleming and as such, no debt was incurred. Wholey submitted the affidavit of Ms. Bonnie Hafer, the Controller of Wholey, attesting to these facts. Wholey also submitted the affidavit of Mr. Mark Scozio, the President of the entities which operate Festival Foods grocery stores. Mr. Scozio states that Fleming was merely a billing agent and Festival Foods had a business relationship with Wholey for over 20 years. It was at Mr. enter into an agreement which required Fleming to extend credit or bear any credit risk.

PCT on the other hand, alleges that the goods were sold to Fleming, as reflected in invoices from Wholey to Fleming, then Fleming added a mark up when the goods were resold to the user stores. The PCT has submitted the affidavit of Mr. Stewart Terbush, formerly the Director of Accounting Operations for Fleming Companies, Inc., who states that there was a business relationship between Fleming and Wholey, in which Wholey sold the goods to Fleming and issued invoices for the products. Mr. Terbush also states that Fleming often paid the vendors for goods before receiving payment from the user stores.

In reply, Wholey disputes that there was any mark up on the invoices and has submitted an example of an account statement and corresponding invoices showing that no mark up was charged to the user store by Fleming. The Defendant also ardently resists the assertion that it is making a constructive trust argument.

I conclude that there remain genuine issues of material fact. There are competing affidavits as to whom the products were sold and who actually owed a debt to Wholey. The invoices indicate that the products were sold to Fleming, but Wholey argues that the products were sold directly to the user stores. No cancelled checks from any of the transactions or any written contracts have been submitted to substantiate the actual nature of the business relationship(s) have been submitted.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Kevin J. Carey". The signature is written in a cursive style with a large initial "K" and "C".

KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE