

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:)	
Hechinger Investment Company of)	Chapter 11
Delaware, Inc., <i>et.al.</i> ,)	Case No. 99-02261 (PJW)
)	
Debtors.)	
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Hechinger Investment Company of)	
Delaware, Inc., et al., Debtors)	
in Possession,)	
)	Adversary Proceeding
Plaintiffs,)	No. 01-3170 (PBL)
)	
v.)	
)	Related Documents: 47, 54
Universal Forest Products, Inc.,)	
)	
Defendant.)	
)	

MEMORANDUM¹

Before the Court are Cross-Motions for Summary Judgment by Hechinger Investment Company of Delaware, Inc. (hereinafter referred to as "Hechinger" or "Debtor") and Universal Forest Products, Inc. (hereinafter referred to as "UFP" or "Defendant"). For the reasons set forth below, the motions are granted in part and denied in part.

¹ This Memorandum constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Rule 9014.

I. FACTUAL AND PROCEDURAL BACKGROUND

Hechinger Investment Company had operated a retail chain of “do-it-yourself” stores that sold a wide range of home improvement products including a variety of treated wood products. (Brief in Support of Universal Forest Products’ Motion for Summary Judgment, at 3) UFP was one of Hechinger’s top vendors and supplied Hechinger with treated wood products for over 15 years. (UFP’s Brief, at 4) Unfortunately, Hechinger’s business succumbed to the pressures of market competition and its Chapter 11 Bankruptcy Petition was filed on June 11, 1999.² (UFP’s Brief, at 3) Hechinger ceased operations of its business in September of 1999 and became a liquidating Chapter 11. Hechinger remained as Debtor in Possession and as such, was authorized to institute the above-captioned adversary proceeding.

This action was filed June 5, 2001 and seeks to avoid and recover thirty-four allegedly preferential transfers amounting to \$16,703,604.57, pursuant to §§ 547 and 550 of the Bankruptcy Code.³ Hechinger filed its First Amended Complaint on August 15, 2001 and UFP answered on January 8, 2002.

UFP filed its Motion for Summary Judgment on April 29, 2003 and Hechinger filed its Motion for Summary Judgment on June 13, 2003. Both parties filed extensive exhibits, depositions, and affidavits in support of their respective Motions. Notices of Completion of Briefing were subsequently filed with regard to the Motions in November, 2003.

In addition to the Cross-Motions for Summary Judgment, UFP filed a Motion in Limine

² Hence, the preference period, the 90 day period prior to the petition date, was between March 13, 1999 and June 11, 1999.

³ 11 U.S.C. §§ 101 et seq. Hereafter, references to statutory provisions by section number only will be to provisions of the Bankruptcy Code, unless the context requires otherwise.

(Spoliation of Evidence) on September 10, 2003, which the Court denied on October 12, 2004.⁴

The Cross-Motions for Summary Judgment are the only motions that remain before this adversary proceeding is readied for Trial.

II. JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1334 and 157(b)(1) and it is a core proceeding under 28 U.S.C. §157(b)(2), (A), (B), (F) and (O). Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1409.

III. STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c), made applicable to this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment should be granted 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.” *See also, Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding a motion for summary judgment, all factual inferences must be viewed in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 547, 587–588 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). After sufficient proof has been presented to support the motion, the burden shifts to the non-moving party to show that genuine issues of material fact still exist and that summary judgment is not appropriate. *Matsushita* at 587. A genuine issue of material fact is present when “the evidence is such that a reasonable jury could

⁴ This adversary proceeding was transferred to this Court from the Honorable Peter J. Walsh in May of 2004.

return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

IV. DISCUSSION

In its Motion for Summary Judgment, UFP asserts that of the \$16,500,445 at issue in this proceeding, summary judgment is appropriate as to \$13,125,822.00 because that amount of the allegedly preferential transfers were actually advance payments made by Hechinger to UFP.

(UFP’s Brief, at 23) UFP argues the remaining \$3,374,623 is protected by the ordinary course of business defense under §547(c)(2), the contemporaneous exchange for new value defense under §547(c)(1), or the new value defense under §547(c)(4). (UFP’s Brief, at 2)

Hechinger opposes Universal Forest Products’ Motion for Summary Judgment and in its Cross-Motion states that this is the quintessential preference action, in that, UFP engaged in a nefarious plot to deceive Hechinger and trick them into prepaying for goods during the preference period. (Hechinger’s Brief in Opposition to Universal Forest Products’ Motion for Summary Judgment, at 6–7) Hechinger asserts that the elements of a preferential transfer pursuant to §547(b)⁵ have been met as to many of the transfers and therefore, summary judgment

⁵ Under § 547(b), the trustee may seek to avoid, as a preference, “. . . 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 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.”

can be entered in favor of Hechinger in an amount not less than \$1,067,786.86.⁶

A. Hechinger's Cross-Motion for Summary Judgment

Hechinger states in its Cross-Motion for Summary Judgment that all of the elements of a preference have been satisfied under § 547(b) and that it is therefore entitled to judgment as to some of the transfers.

There is no dispute that Hechinger has proven several of the elements under § 547(b). Hechinger alleges, and UFP admits, that the transfers were within 90 days of the petition and made to UFP and that UFP was a creditor of the Debtor.⁷ Hechinger also contends that the transfers were made while the Debtor was insolvent⁸ and claims the statutory presumption of insolvency under § 547(f).⁹ UFP has not challenged this contention and has not produced evidence to rebut the presumption. Furthermore, UFP stated that it was aware of Hechinger's declining financial position and had known of it for many years prior to Debtor's bankruptcy. (UFP's Brief, at 33) Lastly, Hechinger has submitted the affidavit of Mr. James F. Iampicri, Hechinger's former Vice President of Merchandise Administration, who states that the estimated distribution to unsecured creditors in Hechinger's bankruptcy is between 6.5% and 9.7%. UFP has offered no evidence to place this testimony in doubt and therefore, Hechinger has established that the transfers enabled UFP to receive more than it would have received under a hypothetical

⁶ Hechinger contends that if the Court disallows UFP's new value defense, Hechinger is then entitled to recover \$9,923,913.58.

⁷ Section 547(b)(1).

⁸ Section 547(b)(3).

⁹ Section 547(g) states in material part, "the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition."

Chapter 7 case.¹⁰ The remaining element under § 547(b) is in dispute as to certain of the transfers.

Notwithstanding the other provisions of § 547(b), subsection (b)(2) provides that a trustee may avoid a transfer of an interest of the debtor in property "for or on account of an antecedent debt owed by the debtor before such transfer was made." It is well established that advance payments are prima facie not preferences because the transfer from the debtor to the creditor is not for or on account of an antecedent debt. Collier on Bankruptcy instructs: "[a]lthough 'antecedent debt' is not defined by the Code, a debt is 'antecedent' if it is incurred before the transfer: the debt must have preceded the transfer." 5 Collier on Bankruptcy ¶ 547.03[4] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.)

UFP contends that Hechinger is not entitled to recover \$13,125,822.00 as preferences because those monies were advance payments. Hechinger concedes in its Motion for Summary Judgment that at the end of the preference period it was prepaying for product that it thought it was purchasing on credit. (Hechinger's Brief in Support of its Cross-Motion for Summary Judgment, at 17) In fact, Hechinger admits that it was relegated to relying on UFP to tell it how much it owed at any particular time because of the acquisition and merger between Hechinger and Builders Square which caused administrative problems in its accounts payable department. (Hechinger's Brief in Support of its Cross-Motion, at 9) Regardless, Hechinger argues that based on its analysis, the correct amount of advances is \$6,576,603.36. (Hechinger's Brief in Support of its Cross-Motion, at 14)

The Court finds, and the parties are in agreement, that at least \$6,576,603.36 was paid in

¹⁰ Section 547(b)(5).

advance and therefore was not preferential. The Court will grant summary judgment as to that amount of advance payments in favor of Universal Forest Products. Hechinger's Cross-Motion for Summary Judgment is denied.

B. Universal Forest Products' Motion for Summary Judgment

UFP argues that even if the transfers in question were preferential, it is entitled to certain of the defenses enumerated in § 547(c). Specifically, UFP claims that the transfers were made in the ordinary course of business pursuant to §547(c)(2), were contemporaneous exchanges for new value pursuant to §547(c)(1), or that new value was given pursuant to §547(c)(4). Each of the claimed defenses will be discussed in turn.

1. Ordinary Course of Business

UFP argues that the transfers that were not paid in advance are protected by the ordinary course of business defense pursuant to §547(c)(2).¹¹ By UFP's calculations, of the \$16,500,446 it asserts is at issue, \$15,965,425.00 was paid in advance or within 8 days. UFP states that the \$15,965,425.00 was paid within terms and therefore is presumptively made within the ordinary course of business. Additionally, UFP states that it had not engaged in any aggressive collection activity whatever. UFP argues that the transactions between the parties during the preference

¹¹ Section 547(c)(2) provides:

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

...

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee;

(C) made according to ordinary business terms.

period were not very different from those that occurred during the pre-preference period. Hechinger chose to “fast pay” on its account both before and during the preference period. The only differences were that UFP shortened the payment terms on new sales and lowered Hechinger’s credit limit to assure faster payments for new shipments. (UFP’s Brief, at 32) UFP concedes that while the parties’ business terms were not identical during the preference period, the transfers were substantially similar to those throughout the parties business relationship that has spanned over 15 years. Therefore, the Court should find that the transfers are protected by the ordinary course of business defense under § 547(c)(2).

Hechinger asserts that UFP applied severe collection pressure by limiting Hechinger’s available credit, shortening the payment terms between the parties, and requiring Hechinger to use wire transfers to remain at or below their credit limit. Hechinger argues that the parties course of dealing during the preference period was very different than in years prior. Additionally, Hechinger claims that they had never previously paid in large even sum wire transfers, which then required reconciliation of the payment and the invoice to be thereafter completed. In this way, Hechinger disputes that the transfers were made in the ordinary course of business between the parties and opposes summary judgment being entered in favor of UFP on this issue.

The Court finds that there are genuine issues of material fact whether the transfers were made within the ordinary course of business, and that summary judgment on this issue is therefore not appropriate.

2. Contemporaneous Exchange for New Value

Section 547(c)(1) provides a complete defense to preference liability if the transfer was intended by the debtor and creditor to be a contemporaneous exchange for new value, and in fact was a substantially contemporaneous exchange.¹² According to *APS, Inc. v. ABX Enterprises, Inc. (In re APS Holding Corporation)*, 282 B.R. 795 (Bankr. Dcl. 2002), defendant must prove that it extended new value to the debtors, that the parties intended the new value and the transfers to be contemporaneous exchanges, and that the exchanges were, in fact, substantially contemporaneous. “The critical inquiry in determining whether there has been a contemporaneous exchange for new value is whether the parties intended such an exchange.” *Id.* at 800.

UFP asserts that because the parties were entering into the busy spring season where Debtor would be ordering hundreds of thousands of dollars of wood products per day from UFP, the parties agreed that ordinary checks were impractical considering the recent imposition of a credit limit on Hechinger’s account. Therefore, UFP required, and Hechinger reluctantly agreed, to instead use wire transfers to ensure that a sufficient volume of goods were shipped to Hechinger. (UFP’s Brief, at 41) UFP argues that Debtor’s records show that the wire transfers were made to cover goods ready for shipment and that it was Debtor’s intent that it make payments in this way. UFP further points to deposition testimony of Mr. Clifford Smith, Hechinger’s Marketing Manager during the preference period, and Mr. James F. Iampieri, who both admitted that Hechinger was paying for goods in advance or contemporaneously with

¹² Section 547(c)(1) provides that the trustee may not avoid a transfer “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.”

delivery. Because \$15,965,425.00 of the transfers was paid in advance or within 8 days, UFP contends that the payments were intended to be and were contemporaneous exchanges for new value. Therefore, UFP urges that it is entitled to summary judgment for this amount.

Conversely, Hechinger argues that UFP has put forth no evidence to prove that the transfers were contemporaneous exchanges and therefore has not carried its burden under § 547(c)(1). Hechinger states that Debtor never intended to pay in advance for goods and this is evident in the deposition testimony of Mr. Smith and Mr. Iampieri. (Hechinger's Brief in Support of its Cross-Motion, at 38) Therefore, since there was in fact no mutual intent by the parties that the transfers be contemporaneous exchanges for new value, Hechinger contends that the purported defense be stricken and summary judgment be entered in its favor.

The Court finds that there are genuine issues of material fact whether the payments were intended to be contemporaneous exchanges for new value and whether the exchanges were in fact, substantially contemporaneous. Summary judgment on this issue will be denied.

3. New Value

UFP lastly asserts that most of the transfers are protected by the new value defense pursuant to §547(c)(4).¹³ UFP urges this Court to follow the decision of *Check Reporting Services v. The Water Doctor (In re Check Reporting Services, Inc.)*, 140 B.R. 425 (Bankr. W.D.Mich. 1992), which held that the new value amounts must not "remain unpaid." UFP

¹³ Section 547(c)(4) provides that the trustee may not avoid a transfer that was "to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor."

contends that the case at bar is similar to the fact situation in *Check Reporting Services* because there are several payments at issue where new value was subsequently transferred to Hechinger by UFP. UFP argues based on the policy reasons of the Bankruptcy Code and the overwhelming trend of courts to reject the “remain unpaid” rule, that this Court should enter summary judgment in its favor.

Hechinger contests that UFP should receive the benefit of the new value defense because it has failed to provide credible evidence in support of the defense, and moreover, no amounts “remain unpaid.” Hechinger states that “[t]he Third Circuit has held that § 547(c)(4) requires UFP to prove that it received a transfer that is otherwise avoidable as a preference under § 547(b), UFP advanced “new value” to the debtor on an unsecured basis after receiving the preferential transfer, and Hechinger did not fully compensate UFP for the “new value” as of the date it filed its bankruptcy petition.” (Hechinger’s Brief in Support of its Cross-Motion, at 39)(emphasis in the original) Hechinger cites *In re New York City Shoes, Inc.*, 880 F.2d 679 (3rd Cir. 1989) for this proposition. However, Hechinger concedes that this is an issue of law and if this Court follows the holding of *Check Reporting Services*, then UFP has provided \$8,856,126.72 in new value to the Debtors. (Hechinger’s Brief in Opposition to Universal Forest Products’ Motion for Summary Judgment, at 19 – 20) If the Court follows the Third Circuit holding then Hechinger is entitled \$9,923,913.58.

In *Check Reporting Services*, the court undertook a detailed analysis of the relevant case law and more importantly the specific language of § 547(c)(4)(B) to conclude that the clear import of the statute would be defeated if it is held that the new value must remain unpaid. The court, in that case, looked to the complicated but unambiguous language of § 547(c)(4)(B), and

found that the statute requires but one result, and that the "net result rule" was not intended by Congress. *In re Check Reporting Services*, 140 B.R. 425, 437.

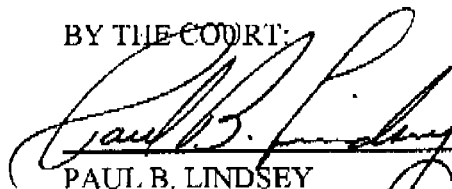
In this case, there are thirty-four allegedly preferential transfers at issue during the preference period and this case is more akin to the running account or rolling account analysis of *Check Reporting Services* than to *New York City Shoes*, which dealt with just one transfer at issue in the preference period. Based on language of §547(c)(4)(B) and the policy reasons of the code section, this Court finds that *New York City Shoes* is distinguishable on its facts and adopts the reasoning of *Check Reporting Services*. Thus, this Court is inclined to grant summary judgment in favor of UFP in the further amount of \$8,856,126.72. This Court, however, may not do so, absent a waiver of the other asserted defenses under § 547(c) or a stipulation by the parties as to that amount, because a calculation under § 547(c)(4) must be prefaced by a determination of whether the transfers made on account of new value are "otherwise avoidable." *See, Check Reporting Services*, 140 B.R. 425, 437-438.

V. CONCLUSION

As to UFP's Motion, summary judgment will be entered in favor of Universal Forest Products and against Hechinger Liquidation Trust as to transfers in the amount of \$6,576,603.36, and the Motion will be denied in all other respects. Hechinger Liquidation Trust's Motion for Summary Judgment will be denied in its entirety. An appropriate order follows.

Dated: December 14, 2004

BY THE COURT:



PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	
Hechinger Investment Company of)	Chapter 11
Delaware, Inc., <i>et al.</i> ,)	Case No. 99-02261 (PJW)
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Hechinger Investment Company of)	
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Plaintiffs,)	No. 01-3170 (PBI)
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v.)	
)	Related Documents: 47, 54
Universal Forest Products, Inc.,)	
)	
Defendant.)	
)	

ORDER GRANTING IN PART AND DENYING IN PART
CROSS-MOTIONS FOR SUMMARY JUDGMENT
AND SCHEDULING MATTER FOR TRIAL

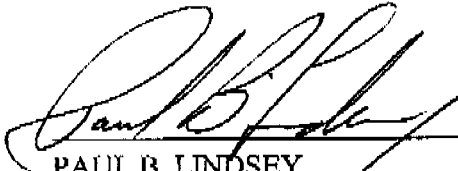
For the reasons set forth in the accompanying Memorandum of this date, **IT IS**
HEREBY ORDERED that Universal Forest Products' Motion for Summary Judgment will be granted in part, and Judgment is entered in favor of Universal Forest Products and against Hechinger Liquidation Trust for the transfers in the amount of \$6,576,603.36, and the Motion is denied in all other respects. Hechinger Liquidation Trust's Motion for Summary Judgment is denied in its entirety.

IT IS FURTHER ORDERED that trial in this adversary proceeding shall be held

on February 25, 2005 at 9:00 am, in the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 5th Floor, Wilmington, Delaware.

Dated: December 14, 2004

BY THE COURT:



PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE