

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

JUDGE PETER J. WALSH

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November 3, 2003

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Plaintiff

**Re: TWA Inc. Post Confirmation Estate v. Board of County
Commissioners of the County of Oklahoma in the State of
Oklahoma
Adv. Proc. No. 03-70106**

Dear Counsel:

This ruling is with respect to the motion (Doc. # 5) filed by the Board of County Commissioners of the County of Oklahoma in the State of Oklahoma ("the Defendant") to dismiss the preference complaint filed by the TWA Inc. Post Confirmation Estate ("TWA"). For the reasons discussed below, the Court will

deny the Defendant's motion.

Although there is no cited authority to the implicated rule (i.e., Federal Rule of Civil Procedure 12(b)(6)), to the extent the Defendant's motion, which was entitled "Answer/Motion to Dismiss," is intended as a motion to dismiss I find that it is deficient for two reasons. First, the defense grounded in section 11 U.S.C. § 547(c)(2)(B) is incomplete. The Defendant alleges that because the transfer was made "in the ordinary course of business" it should not be avoided. The Defendant, however, fails to properly apply § 547(c)(2)(B), which requires a **conjunctive** three part test. In order to have a valid defense under that section a defendant must establish that the transfer was (1) in payment of a debt incurred in the ordinary course of business; (2) made in the ordinary course of business; **AND** (3) made according to ordinary business terms. Thus, the § 547(c)(2) defense is inadequately stated.

Second, as correctly pointed out in TWA's response, the Defendant's motion to dismiss is deficient for a failure to satisfy its burden under Rule 12(b)(6) and its burden of proving a defense as required by § 547(g). Rule 12(b)(6) requires the court to "accept as true all of the allegations in the complaint . . . and view them in the light most favorable to the plaintiff." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906

(3d Cir. 1997) (citations omitted). Additionally, the Supreme Court has held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Defendant's allegation does not effectively address these legal propositions.

Moreover, according to § 547(g), "the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section." Therefore, even if the Defendant had properly discussed all of the elements of § 547(c)(2), it would still have the burden of presenting evidence establishing those elements. No such evidence has been presented. As a result, the Defendant's motion will be denied.

Very truly yours,

Peter J. Walsh

PJW:ipm

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:)	Chapter 11
)	
TWA INC. POST CONFIRMATION)	Case No. 01-0056(PJW)
ESTATE,)	
)	Jointly Administered
Debtor.)	
<hr style="border: 0.5px solid black;"/>		
)	
TWA INC. POST CONFIRMATION)	
ESTATE,)	
)	
Plaintiff,)	
)	
v.)	Adv. Proc. No. 03-70106(PJW)
)	
BOARD OF COUNTY COMMISSIONERS)	
OF THE COUNTY OF OKLAHOMA IN)	
THE STATE OF OKLAHOMA,)	
)	
Defendant.)	

ORDER

For the reasons stated in this Court's letter ruling of this date, the Defendant's motion to dismiss (Doc. # 5) is **DENIED**.

Peter J. Walsh
United States Bankruptcy Judge

Dated: November 3, 2003

