

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF GEORGIA  
VALDOSTA DIVISION

IN RE:

CASE NO. 92-70064-JTL

CODY'S OF LOWNDES COUNTY, INC.,  
EIN: 58-151-4067,

CHAPTER 7

Debtor.

WALTER W. KELLEY, Trustee,

ADVERSARY PROCEEDING

Plaintiff

NO. 94-7028-JTL

v.

STRASBURGER ENTERPRISES, INC.,  
f/d/b/a FUEL DISTRIBUTORS,

Defendant.

MEMORANDUM OPINION

Facts

Debtor filed bankruptcy on January 27, 1992. Trustee filed this Adversary Proceeding seeking to avoid payments made up to one year prepetition under § 547 of the Bankruptcy Code ("Code"). On December 21, 1995, the court granted partial summary judgment avoiding payments made on or after November 12, 1991. (Doc. no. 31.) On April 5, 1996, the court entered an order finding that Debtor was insolvent for the entire year prepetition. (Doc. no. 33.) On August 19, 1996, the court granted in part Trustee's second motion for summary judgment. (Doc. no. 38.) The order contained Trustee's stipulation that

he would not pursue at trial claims for transfers outside 90 days prepetition. Trustee made this stipulation based on his reasoning that the court's December 21, 1995 order avoiding the payments on or after November 12, 1991 created a new value defense as a matter of law for those payments.<sup>1</sup>

After trial in September 1996, the court entered judgment

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Section 547(c)(4) of the Code provides:

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

- . . .
- (4) 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.

11 U.S.C. § 547(c)(4). Professor Countryman has explained the basis for the new value defense under § 547(c)(4) of the Code as follows:

If the debtor has made payments for goods or services that the creditor supplied on unsecured credit after an earlier preference, and if these subsequent payments are themselves voidable as preferences (or on any other ground), then under section 547(c)(4)(B) the creditor should be able to invoke those unsecured credit extensions as a defense to the recovery of the earlier voidable preference.

Vern Countryman, The Concept of a Voidable Preference in Bankruptcy, 38 VAND. L. REV. 713, 788 (1985). This reasoning was adopted by the Fifth Circuit in Laker v. Vallette (Matter of Toyota of Jefferson, Inc.), 14 F.3d 1088, 1092 (5<sup>th</sup> Cir. 1994).

for the net preference amount of payments avoided by summary judgment and at trial. (Doc. no. 44.) On appeal, the District Court reversed the portion of the court's December 21, 1995 order that granted partial summary judgment, but affirmed the rest of the December 21, 1995 order as well as the August 19, 1996 order and the September 1996 order. (Doc. no. 63.) The Eleventh Circuit held that the District Court's order was not final and appealable. (Doc. no. 64.) The case is thus remanded to this court for trial.

The issue now before the court is whether Trustee is bound by his stipulation, as incorporated in the court's August 19, 1996 order, that he would not seek payments outside the 90-day period. After considering the parties' arguments from the hearing on February 11, 2000, the parties' briefs, and the applicable statutory and case law, the court will rule that Trustee is not bound by his stipulation incorporated in the court's August 1996 order.

#### Discussion

Federal Rule of Civil Procedure 60(b)(5) ("Rule 60 (b)(5)"), made applicable to this Adversary Proceeding by Federal Rule of Bankruptcy Procedure 9024, provides in part that the court may relieve a party from a final judgment, order, or proceeding if "a prior judgment upon which it is based has been reversed or otherwise vacated." In this case, the court's order of September 1996 made final its prior August

1996 interlocutory order granting Trustee's motion for partial summary judgment and incorporating the stipulation at issue.

Rule 60(b) seeks to balance the desire for finality of judgments with the desire to do justice. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5<sup>th</sup> Cir. Unit A Jan. 1981). Under Rule 60 (b)(5) in particular, the court is concerned with the reversal of a prior judgment in the same case that was a predicate to the later ruling rather than reversals of decisional law. Aldrich v. Belmore (In re Belmore), 226 B.R. 433, 435 (Bankr. D. Idaho 1998). See also Tomlin v. McDaniel, 865 F.2d 209, 210-11 (9<sup>th</sup> Cir. 1989). In other words, for a judgment to be subject to Rule 60(b)(5), "the prior judgment must be a necessary element of the decision, giving rise, for example, to the cause of action or a successful defense." Lubben v. Selective Service System Local Bd. No. 27, 453 F.2d 645 (1<sup>st</sup> Cir. 1972). The situation before the court fits within this reasoning.

The portion of the court's August 1996 order that incorporated Trustee's stipulation was based on the effect of the court's prior order of December 1995. Because the December 1995 order created a new value defense as a matter of law to the payments outside the 90-day period, Trustee stipulated he would not seek to recover those payments at trial. The District Court's reversal of that portion of the December 1995 order means the new value defense is no longer established as a

matter of law, although it may be established at trial. Therefore, the court finds that under Rule 60(b)(5), it is proper to relieve Trustee from the August 1996 order that memorializes his stipulation because the prior order upon which it was based has been reversed.

Furthermore, apart from relieving Trustee from the order memorializing his stipulation under Rule 60(b)(5), the court also finds it is proper to relieve Trustee from the effect of his stipulation under Eleventh Circuit case law. In Morrison v. Genuine Parts Co., 828 F.2d 708 (11<sup>th</sup> Cir. 1987), the court pointed out that a district court has broad discretion to relieve a party from its stipulation, particularly to avoid manifest injustice. This reasoning was also articulated in Central Distributors, Inc. v. M.E.T., Inc., 403 F.2d 943 (5<sup>th</sup> Cir. 1968). In that case, the court stated, "A stipulation of counsel originally designed to expedite a trial should not be rigidly adhered to when it becomes clear that it may inflict manifest injustice upon one of the subscribers thereto." Id. at 946.

The stipulation at issue was made in order to expedite the trial because Trustee reasoned that a new value defense existed as a matter of law for the payments outside the 90-day period. Now that the basis for that new value defense has been reversed, it would work an injustice to hold Trustee to his stipulation and thereby preclude his seeking the payments made

between 90 days and one year prepetition.

Conclusion

For the above stated reasons, the court will relieve Trustee of his stipulation regarding payments outside the 90-day preference period. Trustee will be allowed to seek to avoid payments up to one year prepetition at trial. An order in accordance with this Memorandum Opinion will be entered.

Dated this 31st day of March 2000.

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JOHN T. LANEY, III  
UNITED STATES BANKRUPTCY JUDGE