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United States District Court,
D. Delaware.

In re: Vaso Active Pharmaceuticals, Inc., Debtor.
John J. Masiz, Appellant,
v.
Jeoffrey L. Burtch, Avoidance Action Trustee, Appellee.

Bankr. Case No. 10–10855–CSS | Adv. Pro. No. 11–52005–CSS | Civ. No. 13–169–LPS, Civ. No. 13–1992–LPS | Signed September 9, 2015

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MEMORANDUM

HON. LEONARD P. STARK, UNITED STATES DISTRICT JUDGE

***1** Pending before the Court are John J. Masiz's ("Masiz") two appeals (D.I. 1; Civ. No. 13–1992, D.I. 1) [1] from (1) the Bankruptcy Court's December 19, 2012 Proposed Judgment (D.I. 1–1) and (2) the Bankruptcy Court's October 21, 2013 Final Judgment (Civ. No. 13–1992, D.I 1–1) awarding judgment of $741,842.45 in favor of the Avoidance Action Trustee ("the Trustee"). For the reasons discussed, the Court will affirm the Bankruptcy Court's October 21, 2013 Final Judgment and dismiss as moot Masiz's appeal from the Bankruptcy Court's December 19, 2012 Proposed Judgment.

1 The Court consolidated these two appeals and assigned Civ. No. 13–169 as the lead case. (D.I. 13) Unless otherwise noted, references to "D.I. _" will indicate the docket for Civ. No. 13–169.

I. BACKGROUND

Vaso Active Pharmaceuticals, Inc. ("the Debtor") filed a petition for chapter 11 bankruptcy relief in the United States Bankruptcy Court for the District of Delaware on March 11, 2010. (Bankr. Case No. 10–10855, D.I. 1) The Debtor filed a Second Amended Plan on October 2, 2011, which the Bankruptcy Court confirmed on November 12, 2010. (D.I. 14 at 4; D.I. 20 at 4) The Plan Confirmation Order appointed Jeoffrey L. Burtch as the Trustee, but whether that appointment has taken full effect remains a disputed matter in this appeal. (D.I. 14 at 4; D.I. 20 at 5) The Trustee initiated the underlying Adversary Proceeding by filing a complaint ("the Complaint") against John J. Masiz and Joseph F. Frattaroli, seeking to recover $1,099,190 ($776,363 from Masiz and $322,827 from Frattaroli) the Debtor had transferred to them prior to filing for bankruptcy relief. [2]

2 Frattaroli has filed a separate appeal in this Court. (*See* Civ. No. 13–170, D.I. 1)

Masiz founded the Debtor in 2001 and served as its CEO and a member of its board of directors until 2004. (D.I. 14 at 4) In 2004, the Securities and Exchange Commission sued Masiz and the Debtor, in connection with an initial public offering of the Debtor's equity. (*Id.* at 5) Pursuant to a settlement of that lawsuit, Masiz; agreed to resign as CEO and board member of the Debtor. (*Id.*) He did, however, continue to work for the Debtor as a "strategic consultant."

The Debtor filed a malpractice lawsuit against Robinson & Cole, LLP ("Robinson & Cole") in 2006, alleging that the firm had provided negligent legal representation in connection with the initial public offering. (*Id.* at 7) Kelley Drye & Warren, LLP ("Kelley Drye") agreed to represent the Debtor in the malpractice lawsuit in return for an hourly rate and a percentage of any recovery. (*Id.*) Around the same time, the Debtor's board of directors approved an arrangement whereby Masiz would work unpaid, but if the Debtor was successful in its lawsuit against Robinson & Cole, Masiz would be entitled to retroactive compensation for his prior unpaid work. (D.I. 14 at 6–7) The Debtor's board of directors determined that it would value Masiz's services at a $175,000 annual salary. (*Id.* at 6, n.3)

***2** Robinson & Cole settled the malpractice lawsuit with the Debtor for $2.5 million ("the Robinson & Cole Settlement"). (*Id.* at 7; D.I. 20 at 3) Shortly before the parties reached this settlement, the Debtor fired Kelley Drye. (D.I. 20 at 5) Once Robinson & Cole disbursed the settlement funds to the Debtor, Kelley Drye asserted an attorney's lien in the Robinson & Cole Settlement. (*Id.*) This prompted the Debtor and Kelley Drye to enter into a settlement ("the Kelley Drye Settlement") whereby Kelley Drye agreed to accept $595,000 in full satisfaction of its outstanding fees and further "acknowledged" that the Debtor intended to release $598,000 of the Robinson & Cole Settlement to Masiz in satisfaction of his accrued unpaid wages. (D.I. 14 at 8; D.I. 1–3 at 12) After that transfer, but before filing bankruptcy, the Debtor made an additional payment of $178,363 to Masiz on account of his continued employment. The Trustee alleged in the Complaint that the Debtor's transfers to Masiz of $598,000 of the Robinson & Cole Settlement and the additional payment to him constituted recoverable transfers, as either preference payments under 11 U.S.C. § 547 or fraudulent transfers under 11 U.S.C. § 548. (D.I. 15–1 at A130)

On October 9, 2012, the Bankruptcy Court entered an Opinion ("the First Opinion") [3] granting partial summary judgment in favor of the Trustee on some of the discrete elements of his § 548 claim. (D.I. 1–3) The Bankruptcy Court also determined that several issues of material fact remained in dispute, which precluded summary judgment on the overall § 548 claim. (*Id.* at 56–57) Subsequently, the Bankruptcy Court issued another Opinion on October 15, 2013 ("the Second Opinion") [4] granting summary judgment in the Trustee's favor on his entire § 547 claim. (D.I. 15–5 at A672) The Bankruptcy Court found that both transfers to Masiz qualified as preference payments, but credited Masiz for providing $34,520.55 in "new value" pursuant to 11 U.S.C. § 547(c)(4). (*Id.* at A690) The Bankruptcy Court entered final judgment against Masiz in the amount of $741,842.45. (Civ. No. 13–1992, D.I. 1–1) Masiz filed two timely notices of appeal in this Court from the Bankruptcy Court's Proposed Judgment and Final Judgment. (D.I. 1; Civ. No. 13–1992, D.I. 1) The Court has fully considered the parties' briefs and the entire record filed in this matter. [5] (*See* D.I. 14; D.I. 20; D.I. 21)

3 The Bankruptcy Court later memorialized this decision in its December 19, 2012 Proposed Judgment. (D.I. 1–1)

4 The Bankruptcy Court later memorialized this decision in its October 21, 2013 Final Judgment. (Civ. No. 13–1992, D.I. 1–1)

5 Pursuant to Fed. R. Bankr. P. 8019(b), the court finds that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

II. CONTENTIONS

Masiz alleges that the Bankruptcy Court erred in several regards. First, he claims that the Trustee's appointment has not yet taken effect, thus the Trustee lacks standing in this case. (D.I. 14 at 10) Second, he maintains that the Bankruptcy Court should have found that the "earmarking doctrine" excluded the transfers from the reach of the Trustee's §§ 547 and 548 avoidance powers. (*Id.* at 11) Third, he argues that the Bankruptcy Court decided several disputed issues of fact, which was improper at the summary judgment stage. (*Id.* at 18–22) Fourth, Masiz contends that although the Bankruptcy Court was correct to find that he had successfully raised a "new value" defense, the Bankruptcy Court erred in calculating the amount of that defense. (*Id.* at 20) Finally, Masiz asserts that the Bankruptcy Court should not have considered the Trustee's second Motion for Summary Judgment because it was untimely according to the Bankruptcy Court's scheduling order. (*Id.* at 24)

The Trustee counters that the Bankruptcy Court's Confirmation Order had immediately authorized him to pursue this Adversary Proceeding, thus there is no question as to his standing in this case. (D.I. 20 at 10) The Trustee further assets that Masiz has not highlighted any evidence in the record that creates a dispute as to any material fact. (*Id.*) Moreover, the Trustee notes that the Bankruptcy Court's findings regarding the § 548 claim are now moot, given that the Bankruptcy Court has granted final judgment against Masiz on the § 547 claim. (*Id.* at 19)

III. STANDARD OF REVIEW

***3** Appeals from the Bankruptcy Court to this Court are governed by 28 U.S.C. § 158. Pursuant to § 158(a), district courts have mandatory jurisdiction to hear appeals "from final judgments, orders, and decrees" and discretionary jurisdiction over appeals "from other interlocutory orders and decrees." 28 U.S.C. § 158(a)(1) and (3). In conducting its review of the issues on appeal, this Court reviews the Bankruptcy Court's findings of fact for clear error and exercises plenary review over questions of law. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.,* 197 F.3d 76, 80 (3d Cir.1999). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948). The Court must "break down mixed questions of law and fact, applying the appropriate standard to each component." *Meridian Bank v. Alten,* 958 F.2d 1226, 1229 (3d Cir.1992).

IV. DISCUSSION

A. Standing

Masiz first argues that the Trustee lacks standing to pursue the Complaint. (D.I. 14 at 11) In Masiz's view, the terms of the Confirmation Order provide that the Trustee's powers do not vest until the "Effective Date" of the Plan. (*Id.*) Masiz claims that the Plan states that the Effective Date is contingent upon the Debtor's successful merger with another entity. Because that merger never occurred, he argues that the Plan has not become effective and the Trustee's avoidance powers have not yet vested. (*Id.* at 13) Therefore, Masiz claims that the Bankruptcy Court erred as a matter of law by declining to dismiss this proceeding for lack of standing.

The Court disagrees. First, the Bankruptcy Court found that Masiz's Notice of Non-Occurrence—the purported indication that the merger had failed—was invalid because it was filed by Masiz and not by the Debtor's board of directors. (D.I. 15–1 at A781) Masiz does not dispute that finding. Second, and more importantly, the premise of Masiz's argument is flawed. The Confirmation Order on November 11, 2010 immediately vested the Trustee with the authority to prosecute the Adversary Proceeding:

> For the avoidance of doubt and ***notwithstanding anything to the contrary in the Plan or this Order,*** (i) the Avoidance Action Trustee is authorized to bring any Avoidance Action or other claims assigned ***immediately*** and prior to receipt by creditors of other distributions under the Plan and (ii) no injunctions (in Section 13.18 of the Plan or otherwise), exculpations or releases have or shall be granted to any party relating to any Avoidance Actions or other claims, all of which are preserved and may be pursued by the Avoidance Actions Trustee.

(D.I. 15–1 at A121) (emphasis added) The Trustee's authority did not depend upon the Effective Date of the Plan. The Court therefore rejects this argument and concludes that the Bankruptcy Court did not err in concluding that the Trustee has standing in this case.

B. Earmarking Doctrine

Masiz next argues that the Bankruptcy Court erred as a matter of law by finding that the earmarking doctrine did not apply to exculpate him from avoidance liability. (D.I. 14 at 15) The earmarking doctrine flows from the statutory requirement that a voidable preference first requires some interest of the debtor in property. *See In re Winstar Commc'ns, Inc.,* 554 F.3d 382, 400 (3d Cir.2009); *see also* 11 U.S.C. § 547(b). The doctrine provides that "[w]hen ... funds are provided by [a] new creditor to or for the benefit of the debtor for the purpose of paying the obligation owed to [an existing] creditor, the funds are said to be 'earmarked' and the payment is held not to be a voidable preference." *In re Winstar Commc'ns, Inc.,* 554 F.3d at 400 (internal quotation marks omitted).

***4** In order to invoke this doctrine, a party must demonstrate "(1) the existence of an agreement between the new lender and the debtor that the new funds will be used to pay a specified antecedent debt, (2) performance of that agreement according to its terms, and (3) the transaction viewed as a whole ... does not result in any diminution of the [debtor's] estate." *Id.* "The central inquiry is 'whether the debtor had the right to disburse the funds to whomever it wished, or whether the disbursement was limited to a particular old creditor or creditors under the agreement with the new creditor.' " *In re AmeriServe Food Distribution, Inc.,* 315 B.R. 24, 30 (Bankr.D.Del.2004) (quoting *In re Superior Stamp and Coin Co., Inc.,* 223 F.3d 1004, 1009 (9th Cir.2000)).

The Bankruptcy Court concluded that the earmarking doctrine did not apply because the Robinson & Cole Settlement did not direct any funds to Masiz. (D.I. 1–3 at 21) It explained:

> Robinson & Cole is not a party to the Kelly Drye Settlement Agreement. Thus, that agreement cannot be the basis for applying the earmarking doctrine. The only agreement between Robinson & Cole and Debtor is the Robinson & Cole Settlement Agreement resolving the Robinson & Cole Litigation. But, that agreement is silent regarding the disposition of the proceeds of the settlement. Indeed, it does not even mention the Kelly Drye Settlement Agreement. The sole provision of the Robinson & Cole Settlement Agreement relating to the disposition of the settlement proceeds provides that "[b]y no later than December 31, 2009, [Robinson & Cole] will cause $2,500,000 to be delivered by wire transfer to [Vaso], provided that [Robinson & Cole's] attorneys have received the executed Settlement Documents from [Vaso] by that time."

(*Id.* at 20) Masiz urges the Court to view the Kelley Drye Settlement as the operative agreement for the earmarking defense. In his view, the agreement with Robinson & Cole is not relevant, because Kelley Drye had an interest in the funds. (D.I. 14 at 17) In other words, Masiz asserts that Kelley Drye successfully "earmarked" the funds for Masiz through the Kelley Drye Settlement. (*Id.*)

The Court rejects this argument. It is true that Kelley Drye had an interest in the Robinson & Cole Settlement payment to the Debtor, insofar as Kelley Drye had a claim against those funds for its own attorney fees. Kelley Drye, however, did not have ***control*** over the funds. Robinson & Cole paid the $2.5 million settlement directly to the Debtor, and the Debtor had the ability to disburse those funds to whomever it wished. The language in the Kelley Drye Settlement belies Masiz's theory—Kelley Drye merely "acknowledged" that the Debtor intended to use a portion of the Robinson & Cole Settlement funds to pay Masiz's accrued wages. (*See* D.I. 1–3 at 12) Kelley Drye did not disburse any funds to the Debtor. The absence of that control forecloses the earmarking doctrine from applying to the Kelley Drye Settlement. *See In re AmeriServe Food Distribution, Inc.,* 315 B.R. at 31 (noting that, in order for earmarking doctrine to apply, party must both disburse funds and direct those funds). The Court concludes that the Bankruptcy Court did not err as a matter of law by denying Masiz's earmarking doctrine defense.

C. Findings of Fact under 11 U.S.C. § 547(b)(5)

Masiz next maintains that the Bankruptcy Court's decision to grant summary judgment in favor of the Trustee on his § 547 claim relied on improper findings of fact. (D.I. 14 at 18) Specifically, Masiz argues that whether § 547(b)(5) is satisfied is a disputed issue of fact. This element requires that the transfer in question:

> ***5** [E]nables 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.

11 U.S.C. § 547(b)(5). Masiz contends that whether the transfer payments provided him with a higher payout than a hypothetical chapter 7 liquidation is a disputed issue of fact. In his view, "[t]here is no proof as to how much could have been distributed to unsecured creditors in a liquidation under Chapter 7." (D.I. 14 at 19)

"To satisfy the requirements of § 547(b)(5), the trustee must establish that the transfer yielded the creditor a greater return on its debt than it would have received if the transfer had not taken place and it had received a distribution under a Chapter 7 liquidation." *In re Kiwi Int'l Air Lines, Inc.*, 344 F.3d 311, 317 (3d Cir.2003). The key inquiry is to "compare 'what the creditor actually received and what it would have received under the chapter 7 distribution provisions of the Code' in order to determine whether the creditor received more than its fair share." *Id.* (quoting 2 Collier on Bankruptcy ¶ 547.03[7][a] (15th rev. ed. 2003)). This hypothetical analysis occurs as of the time of the bankruptcy filing. *See Palmer Clay Products Co. v. Brown*, 297 U.S. 227, 229, 56 S.Ct. 450, 80 L.Ed. 655 (1936) ("Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results.").

Masiz's argument fails because the Trustee need only establish that Masiz would have received less than a 100% payout on his unsecured, nonpriority claim in a hypothetical chapter 7 liquidation. *See In re AmeriServe Food Distribution, Inc.*, 315 B.R. at 32; *see In re Tire Kings of Am., Inc.*, 164 B.R. 40, 41 (Bankr.M.D.Pa.1993). If the Trustee can make this showing, then any payment Masiz received from the Debtor on account of an outstanding debt would have necessarily increased his share of the recovery. *See In re AmeriServe Food Distribution, Inc.*, 315 B.R. at 32. Here, Masiz admits that he holds at least a partial unsecured non-priority claim. (D.I. 14 at 19) Unless the Debtor's estate could have paid all of its debts in full, a hypothetical liquidation would have only distributed to Masiz, at most, a pro-rata share of the assets of the estate. *See* 11 U.S.C. § 726(b). Any additional transfer made on an antecedent debt would have increased his share and, thus, satisfied § 547(b)(5).

The Debtor's bankruptcy petition, certified by its then-acting President, indicates that as of the filing date the Debtor had total assets of $645,000 and total debts of $10,187,112. (D.I. 15–1 at A4) The Debtor's disclosure statement further projects that a liquidation under chapter 7 would produce a minimal recovery for secured claims and no distribution on account of unsecured claims. (*Id.* at A98) The Court is persuaded that the Trustee, as the party bearing the burden of proof, made a prima facie showing under Federal Rule of Civil Procedure 56. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This "affirmative showing shifts the burden of production to the party opposing the motion and requires that party either to produce evidentiary materials that demonstrate the existence of a 'genuine issue' for trial or to submit an affidavit requesting additional time for discovery." *Id.* (quoting Fed. R. Civ. P. 56(e), (f)). Masiz has not pointed to any evidence in the record that suggests that the Debtor could have paid all unsecured claims in full in a hypothetical chapter 7 liquidation. Simply claiming that a disputed issue of fact exists, without more, is insufficient to rebut the Trustee's prima facie showing. *See id.* The only facts in the record indicate that the Debtor could not have made a 100% distribution on the unsecured claims and, hence, the transfers to Masiz necessarily increased his share of the recovery. The Court finds that the Bankruptcy Court did not err in granting summary judgment in the Trustee's favor on § 547(b)(5).

D. New Value Defense

***6** Masiz next disputes the method by which the Bankruptcy Court calculated his "new value" defense. (D.I. 14 at 20) Under the Bankruptcy Code, a trustee may not avoid any transfer:

[T]o 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). Masiz bears the burden of proving the new value defense. *Id.* § 547(g). The Bankruptcy Court found that Masiz met this burden by establishing that he had provided new value to the Debtor in the form of his employment services between December 30, 2009 and March 11, 2010. (D.I. 15–5 at A689) For those 72 days, the Bankruptcy Court calculated the value Masiz provided as the proportion of his annual $175,000 salary. (*Id.* at A690 n.80) This produced a new value defense of $34,520.55, which partially offset the countervailing preference payment. (*Id.* at 690)

Masiz argues that the Bankruptcy Court erred by making a finding of fact as to the amount of new value he provided the Debtor. (D.I. 14 at 20) He claims that "[t]he Trustee fail[ed] to account for any facts beyond the amount of Masiz's yearly salary in determining the amount of new value provided by Masiz." (*Id.*) Masiz bears the burden of proof on this issue at trial. 11 U.S.C. § 547(g). The Trustee, as the party who moved for summary judgment, but does not have the ultimate burden of proof, "satisf[ied] Rule 56's burden of production [if] ... [he] demonstrate[d] to the Court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Catrett,* 477 U.S. at 331, 106 S.Ct. 2548. There is no dispute that the Debtor valued Masiz's services at $175,000 annually and that the appropriate time-frame for his new value defense was 72 days. (D.I. 14 at 20) Here, Masiz does not suggest any method for how the Bankruptcy Court should have calculated the new value. (D.I. 21 at 4–5) Masiz also does not point to any facts in the record that suggest he provided additional value beyond his employment services to the Debtor. (*Id.*) Instead, he merely claims that the amount of new value he provided is a disputed material fact. (D.I. 14 at 20) This conclusory statement does not create a genuine dispute of a material fact. *See* Fed. R. Civ. P. 56(c), (e). Thus, the Court concludes that the Bankruptcy Court did not err in granting summary judgment on Masiz's new value defense in the amount of $34,520.55.

E. Findings of Fact under 11 U.S.C. § 548(a)(1)

Masiz claims that the Bankruptcy Court erred by improperly making two findings of fact at the summary judgment stage in its First Opinion. (D.I. 14 at 21–23) These two facts are: (1) that Masiz had the intent to hinder, delay or defraud the Debtor's creditors, and (2) that Masiz lacked good faith in connection with the settlement transfers, such that reasonably equivalent value was not exchanged. (*Id.*) As the Trustee correctly points out, these factual findings are now moot. (*See* D.I. 20 at 19) While these two findings are necessary elements of the § 548 claim, they are not relevant to the § 547 claim. *Compare* 11 U.S.C. § 547(b) *with* § 548(a)(1)(A)–(B). The Trustee's alternative claims under §§ 547 and 548 both sought to recover the same transferred funds. (*See* D.I. 15–1 at A130–31) The Bankruptcy Court's Final Judgment against Masiz pertains only to the § 547 claim. (D.I. 15–5 at A700; Civ. No. 13–1992, D.I. 1–1) Given that the Bankruptcy Court has found that the Trustee can recover the transfers to Masiz pursuant to § 547, its earlier findings in its First Opinion relating to partial summary judgment on the § 548 claim are now moot. *See, e.g., In re Cont'l Airlines,* 91 F.3d 553, 558 (3d Cir.1996) (explaining that appeal is moot when "events have taken place during the pendency of the appeal that make it impossible for the court to grant any effectual relief whatever").

F. Timeliness

***7** Finally, Masiz argues that the Bankruptcy Court erred by considering the Trustee's second Motion for Summary Judgment, which was untimely according to an earlier scheduling order. (D.I. 14 at 24) The Bankruptcy Court explained that although the Trustee did not file that motion within the timeframe allotted by the scheduling order, it was nevertheless timely according to Fed. R. Bankr. P. 7056. (D.I. 15–5 at A696) The Bankruptcy Court retains discretion to modify its own scheduling orders. *See United States v. Pearson,* 2012 WL 3249460, at *1 (D.Del. Aug. 7, 2012). The Court does not find that the Bankruptcy Court abused its discretion in modifying its own scheduling order to comply with the more lenient time limitations set forth in the Federal Rules of Bankruptcy Procedure.

V. CONCLUSION

Accordingly, and for the foregoing reasons, the Bankruptcy Court's October 21, 2013 Final Judgment and Order will be AFFIRMED. Masiz's appeal from the Bankruptcy Court's December 19, 2012 Proposed Judgment will be DISMISSED as moot. An appropriate Order follows.

ORDER

At Wilmington this 9th day of September, 2015;

For the reasons set forth in the accompanying Memorandum issued this date,

IT IS HEREBY ORDERED that:

1. The Bankruptcy Court's October 21, 2013 Final Judgment and Order (Civ. No. 13–1992, D.I. 1) is AFFIRMED;

2. John J. Masiz's appeal (Civ. No. 13–169, D.I. 1) from the Bankruptcy Court's December 19, 2012 Proposed Judgment and Order is DISMISSED as moot;

3. The Clerk of Court is directed to CLOSE both cases (Civ. No. 13–169; Civ. No. 13–1992).

All Citations

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United States District Court,
D. Delaware.

In re: AE Liquidation, Inc., et al., Debtors.
Prudential Real Estate and Relocation Services, Inc., and
Prudential Relocation, Inc., Appellants/Cross-Appellees,
v.
Jeoffrey L. Burtch, Chapter 7 Trustee, Appellee/Cross-Appellant.

Bankr. Case No. 08-13031-MFW | Civ. Nos. 13-1504-LPS, 13-1505-LPS | Adv. Pro. No. 10-55543-MFW | Signed September 10, 2015

MEMORANDUM

LEONARD P. STARK, District Judge

***1** Pending before the Court is the Prudential [1] Appellants' appeal (D.I.1) [2] and Jeoffrey L. Burtch's ("the Trustee") cross-appeal (Civ. No. 13–1505, D.I.1) from the July 17, 2013 Order and Opinion of the United States Bankruptcy Court for the District of Delaware (D.I.1–1). For the reasons that follow, the Court will affirm in part and remand in part for further consideration.

1 Prudential Real Estate and Relocation Services, Inc. and Prudential Relocation, Inc. will be collectively referred to as "Prudential."

2 Unless otherwise noted, the Court's reference to "D.I. __" will refer to the docket for Civ. No. 13–1504.

I. BACKGROUND

In May 2006, Eclipse Aviation Corporation ("the Debtor") engaged Prudential to perform various relocation services for its employees. (D.I. 17 at 3; D.I. 18 at 4) The agreement contemplated that the Debtor would pay Prudential for services within 30 days of receiving an invoice. (D.I. 17 at 3; D.I. 18 at 4) In a typical month, Prudential invoiced the Debtor for hundreds of thousands of dollars of services. (D.I. 18 at 4) During the first year and a half of the parties' agreement, the Debtor paid all invoices within the allotted time. (D.I. 17 at 4; D.I. 18 at 4) Toward the end of 2007, however, the Debtor fell behind on payments. (D.I. 17 at 4; D.I. 18 at 4) Prudential placed the Debtor on "billing review," which implemented the following conditions: (1) Prudential would not accept new employee transfers, (2) the Debtor would begin paying Prudential on a weekly, instead of monthly, basis, (3) the Debtor would pay a $900,000 lump sum to reduce the outstanding accounts receivable balance, and (4) Prudential would eventually terminate the agreement if the conditions were not satisfied. (D.I. 17 at 4; D.I. 18 at 4–5) The Bankruptcy Court refers to this period as the "First Payment Plan." (Adv. Pro. No. 10–55543, D.I. 49 at 2) [3] By January 18, 2008, the Debtor had complied with these terms and Prudential removed the Debtor from the First Payment Plan. (D.I. 17 at 4; D.I. 18 at 5)

3 The Court will hereinafter cite to the Bankruptcy Court's Opinion as "(Op. at ___)."

In August 2008, Prudential learned that the Debtor had terminated 650 of its employees in light of financial difficulties. (D.I. 17 at 6; D.I. 18 at 6–7) That same month, Prudential again placed the Debtor on billing review due to late payments ("the Second Payment Plan"). (D.I. 17 at 5; D.I. 18 at 5) The Second Payment Plan implemented the same conditions as the First Payment Plan, except for varying payment amounts. On November 25, 2008, the Debtor filed for chapter 7 bankruptcy relief in the United States Bankruptcy Court for the District of Delaware. (Bankr.Case No. 08–13031, D.I. 1)

In the 90 days prior to the petition date, the Debtor had made 12 payments to Prudential totaling $781,702.61. (D.I. 18 at 1) The Trustee filed a complaint against Prudential commencing an adversary proceeding (Adv.Pro. No. 10–55543), alleging that these transfers constituted recoverable preference transfers under 11 U.S.C. §§ 547 and 550. (*Id.*) Following trial, the Bankruptcy Court entered its Opinion and Order (D.I.1–1) awarding judgment in favor of the Trustee for $653,323.20. (Op. at 29) This figure represented $781,702.61 of preferential transfers, reduced by $128,379.40 of "new value" that Prudential had provided. (*Id.*; *see* 11 U.S.C. § 547(c)(4)) Both parties filed timely appeals to this Court. (D.I. 1; Civ. No. 13–1505, D.I. 1) After the parties failed to resolve their disputes through mediation, they completed briefing on all outstanding issues on June 10, 2015. [4] (D.I. 17; D.I. 18; D.I. 20; D.I. 21)

4 Pursuant to Fed. R. Bankr.P. 8019(b), the Court finds that oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral arguments.

II. CONTENTIONS

***2** Prudential argues that the Bankruptcy Court erred by rejecting its defense that the Debtor's transfers were not preferential because they occurred in the "ordinary course of business" between the two parties under 11 U.S.C. § 547(c)(2). (D.I. 17 at 1–2) If the Bankruptcy Court had properly applied the factors of the § 547(c)(2) test, Prudential claims, it would have correctly determined that the Debtor's payments were not recoverable as preferential transfers. (*Id.*) In response, the Trustee contends that the Bankruptcy Court did correctly apply these factors to conclude that the subject transfers were not in the ordinary course of business. (D.I. 18 at 2) Prudential requests that the Court reverse the Bankruptcy Court's judgment.

The Trustee cross-appeals on two alleged errors in the Bankruptcy Court's decision. (*Id.* at 3) First, he claims that the Bankruptcy Court miscalculated Prudential's "new value" defense under § 547(c)(4). (*Id.*) In the Trustee's view, the new services that Prudential provided after the Debtor's petition date do not count towards this defense; therefore, the amount of Prudential's new value defense should be $56,571.37 instead of $128,379.40. (*Id.*) Second, the Trustee contends that the Bankruptcy Court abused its discretion by not awarding prejudgment interest to his judgment, without a justification on the record. (*Id.*) The Trustee requests that this Court remand this matter to the Bankruptcy Court with instructions to enter judgment against Prudential in the increased amount of $725,131.24 (representing a decrease in the new value defense) and further consider awarding prejudgment interest. (*Id.*)

III. STANDARD OF REVIEW

Appeals from the Bankruptcy Court to this Court are governed by 28 U.S.C. § 158. Pursuant to § 158(a)(1), the Court has mandatory jurisdiction over this appeal, which is a final judgment of the Bankruptcy Court. 28 U.S.C. § 158(a)(l). This Court reviews the Bankruptcy Court's findings of fact for clear error and exercises plenary review over questions of law. *See Am. Flint Glass Workers Union v. Anchor Resolution Corp.,* 197 F.3d 76, 80 (3d Cir.1999). The Court must "break down mixed questions of law and fact, applying the appropriate standard to each component." *Meridian Bank v. Alien,* 958 F.2d 1226, 1229 (3d Cir.1992). "Whether or not a debtor made a particular payment in the ordinary course of business is a factual determination which a reviewing court should not set aside unless it is clearly erroneous." *J.P. Fyfe, Inc. of Florida v. Bradco Supply Corp.,* 891 F.2d 66, 70 (3d Cir.1989). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948).

IV. DISCUSSION

The Bankruptcy Code empowers the trustee to avoid certain pre-petition transfers of the debtor that are deemed preferential:

> **(b)** Except as provided in subsections (c) and (i) 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;

(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 ninety 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

***3** **(C)** such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547. On appeal, it is undisputed that all of the conditions for a preference are satisfied. (*See* D.I. 17 at 1; D.I. 18 at 12)

The Bankruptcy Code enumerates nine defenses that a transferee may raise to counteract liability for an otherwise avoidable preference. *See* 11 U.S.C. § 547(c)(1)-(9). Two of these are at issue here: the "ordinary course of business" defense and the "new value" defense.

A. Ordinary Course of Business Defense

"Even if a payment is considered a preference under Section 547(b), it may not be subject to avoidance if it was made in the ordinary course of business, as defined in 11 U.S.C. § 547(c)." *In re First Jersey Sec., Inc.,* 180 F.3d 504, 512 (3d Cir.1999). This exception seeks "to leave undisturbed normal financial relations between a debtor and its creditors, even as a company approaches bankruptcy." *Id.* This defense provides that:

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

(2) to the extent that such transfer was in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and such transfer was—

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

(B) made according to ordinary business terms;

11 U.S.C. § 547(c)(2). Prudential contends that the "ordinary course of business" defense under § 547(c)(2)(A) applies in this case as, in Prudential's view, the payments made to Prudential were "made in the ordinary course of business or financial affairs of the debtor and the transferee."

The Bankruptcy Code does not define the phrase "in the ordinary course of business." *See In re Hechinger Inv. Co. of Delaware, Inc.,* 489 F.3d 568, 576 (3d Cir.2007). Instead, courts have considered the following factors to assess if a transfer occurs in the ordinary course of business:

> (1) the length of time the parties engaged in the type of dealing at issue; (2) whether the subject transfers were in an amount more than usually paid; (3) whether the payments at issue were tendered in a manner

> different from previous payments; (4) whether there appears to be an unusual action by the debtor or creditor to collect on or pay the debt; and (5) whether the creditor did anything to gain an advantage (such as gain additional security) in light of the debtor's deteriorating financial condition.

*In re Forklift LP Corp.,*340 B.R. 735, 738–39 (D.Del.2006).

With respect to these factors, the Bankruptcy Court made the following findings. First, it found that the parties had engaged in a relationship of sufficient length to establish an ordinary course of dealing. (Op. at 13) For the second factor, the Bankruptcy Court emphasized the average length of time the Debtor took to pay Prudential during the preference period as compared to the period before the preference period. (*Id.* at 14) It determined that the Debtor had paid Prudential, on average, 17 days faster (roughly a 40% improvement) during the preference period as compared to the period before the preference period—a factor which weighed against the ordinary course of business defense. (*Id.* at 14—16) Third, the Bankruptcy Court found that the manner in which the Debtor tendered payment did not support an ordinary course defense. (*Id.* at 18) Fourth, the Bankruptcy Court reasoned that the Second Payment Plan reflected unusual collection efforts, which were not in the parties' ordinary course of business. (*Id.* at 19) Finally, the Bankruptcy Court found that Prudential had gained an advantage over the Debtor by implementing the Second Payment Plan after it had learned of the Debtor's financial instability. (*Id.* at 23) Prudential disputes some of these findings on appeal.

1. Timing of Payments

***4** Prudential maintains that the Bankruptcy Court erred by finding that the Debtor's faster payments during the preference period supported finding that these transfers were not in the ordinary course of business. (D.I. 17 at 8) In the July 17 Opinion, the Bankruptcy Court reasoned that the decrease in the payment time from an average of 45.3 days to 28 days was significant, especially when coupled with the fact that Prudential had insisted on faster payments. (Op. at 16) (citing Pl.Ex. 23) For this factor, "the Court must compare the transfers in the Historical Period to those in the Preference Period to determine if the transactions were sufficiently similar." *In re Archway Cookies,* 435 B.R. 234, 243 (Bankr.D.Del.2010) *aff'd sub nom. In re Archway Cookies LLC,* 511 B.R. 726 (D.Del.2013). "[S]mall deviations in the timing of payments may not be so significant as to defeat the ordinariness of such payments[,] [whereas] courts have held greater deviations in payment timing sufficiently significant to defeat the ordinariness of such payments." *Id.*

Prudential first argues that the Bankruptcy Court erred by rejecting its supporting case law, which provides instances where a court found that a slight deviation in the timing of the payment was not significant. (D.I. 17 at 8) Prudential claims that the Bankruptcy Court incorrectly distinguished those cases on the faulty premise that they all involved slower payment, whereas here, the Debtor paid Prudential faster. (*Id.*) (citing Op. at 15) Prudential points out that in one of its cited cases, *In re Global Tissue, L.L.C.,* 302 B.R. 808, 812 (D.Del.2003) ("*Global Tissue I* "), the court actually found that a debtor made faster payments which were nevertheless in the ordinary course of business. (*Id.*) Prudential states that the Bankruptcy Court's incorrect distinction warrants reversal.

The Court disagrees. First, the Bankruptcy Court does correctly recognize the facts of *Global Tissue I.* (*See* Op. at 14—15) (noting that debtor in *Global Tissue I* made payments slightly faster during preference period) Second, Prudential mischaracterizes the Bankruptcy Court's reasoning on this point. The Bankruptcy Court did not hold that the payments were outside of the ordinary course of business simply because they were made faster, and not slower, during the preference period. (*Id.* at 15) The Bankruptcy Court found that because the change in the payment timing was significant coupled with the fact that Prudential had "insisted on a quicker payment schedule," the change supported finding the transfers were not made in the ordinary course of business. (*Id.* at 16) The proper inquiry is whether the change in payment timing was significant, regardless of whether it was faster or slower. *See In re Archway Cookies,* 435 B.R. at 243. Here, the Bankruptcy Court found that the 40% increase in payment timing was significant. This was not clearly erroneous.

Prudential argues that the Bankruptcy Court did not take into account certain statistical anomalies in the underlying data. (D.I. 17 at 10) It claims that some extremely late payments in the pre-preference period skewed the average payment time upward during that period. (*Id.*) For support, Prudential relies on *In re Global Tissue L.L.C.,* 106 F. App'x 99, 102 (3d Cir.2004) ("*Global Tissue II* "). In that case, the Third Circuit rejected the trustee's reliance on the decrease in average payment times. The Court commented that "[t]he Trustee's reliance on the average payment time, as is often the case with statistics, does not portray the complete picture of Global Tissue's payment history." *Id.* The Court instead took a more holistic view of the payment history:

> During the first two months of Global Tissue's relationship with the Creditors, all of its payments were extremely late, often 80–98 days after invoice. Those late payments, concentrated primarily in the beginning of the relationship, skewed the average payment time upwards. After two months of significant delinquency, Global Tissue began making payments on a much more timely basis, establishing a history of more prompt payments continuing for the next year.

***5** *Id.*at 103. The Court does not find Prudential's comparison to that case persuasive. In *Global Tissue II,* the "skewed" payments represented two consistent months of extremely late payments, which then leveled off during the remainder of the transactions. *Id.* at 102–03. Here, Prudential points only to six invoices that allegedly skewed the data. (D.I. 20 at 4) The complete preference period, however, includes over 3,500 invoices. (D.I. 17 at 1) The six highlighted invoices fail to demonstrate a consistent pattern of extremely late payments during the pre-preference period, contrary to the facts of *Global Tissue II.*

Prudential also relies on *In re AE Liquidation, Inc.,* 2013 WL 5488476, at *1 (Bankr.D.Del. Oct. 2, 2013). In that case, [5] the Bankruptcy Court found that a preferential transfer was not in the ordinary course of business. *Id.* For the timing of payment factor, the Bankruptcy Court found that a 10 to 15% quicker payment during the preference period was not significant. *See id.* at *4. Prudential attempts to point out an inconsistency because, here, the Bankruptcy Court held that a 40% faster payment time was significant. (D.I. 17 at 11) The Court does not find that this establishes clear error. In fact, there is no inconsistency between finding that a 10–15% increase is insignificant, while a 40% increase is significant. This is especially true given the subjective nature of this determination and the unique facts of each case. *See In re Archway Cookies,* 435 B.R. at 243. The Court determines that the Bankruptcy Court did not err in finding that this factor indicates that the transfers occurred outside the ordinary course of business.

5 This case pertains to a different adversary proceeding within the Debtor's same bankruptcy.

2. Taking Advantage of the Debtor

For this factor, the Bankruptcy Court first found that Prudential had knowledge of the Debtor's financially deteriorating situation. (Op. at 23) The record supports this finding, *see* Pl.Ex. 23, and is not contested on appeal. [6] With this knowledge, the Bankruptcy Court concluded that Prudential gained an advantage over the Debtor by insisting on stricter repayment terms while the Debtor was undergoing financial difficulties. (Op. at 24) Prudential claims that when the Debtor began experiencing financial difficulties during the preference period, it instituted the "exact[ ] same four actions" that it had instituted earlier in their relationship. (D.I. 17 at 11) Thus, Prudential insists that it did not act any differently during the preference period than it had when the Debtor had previously fallen behind on payments. Prudential suggests that the Bankruptcy Court incorrectly focused on the degree to which Prudential implemented preference period collection actions; instead, the Court should only have considered if those actions were consistent with the parties' prior relationship. (*Id.*)

6 Prudential, however, argues that knowledge of the Debtor's deteriorating financial condition has no significance to this factor. The Court disagrees. *See J.P. Fyfe, Inc. of Florida,* 891 F.2d at 71 (finding significant that creditor had knowledge of debtor's deteriorating financial condition for purposes of ordinary course of business defense).

Simply because Prudential had imposed stricter payment terms at some earlier point in its relationship with the Debtor, however, does not dictate that these stricter terms were "ordinary." This conclusion is supported by the Third Circuit's decision in *In re*

Hechinger Inv. Co. of Delaware, Inc., 489 F.3d at 578. In that case, the creditor "argue[d] that [an] alteration in terms was not that significant because, previously, the parties had operated under an even more accelerated payment schedule and had used a wire transfer." *Id.* The Third Circuit rejected this argument because the prior alteration in terms was the "result of an unusual dispute regarding some past due invoices and w [as] not the terms employed by the parties during the rest of their fifteen year relationship." *Id.* Similarly, here the parties had established a baseline relationship. (*See* D.I. 17 at 3) These baseline terms continued from the inception of the relationship for more than 18 months. (*Id.* at 4) For several months during the end of 2007, the Debtor fell behind on payments and Prudential implemented the First Payment Plan. (*Id.*) Once the Debtor complied with these terms, Prudential reinstituted the baseline payment terms, which continued from January 2008 until August 2008. (*Id.* at 5) Even if Prudential had implemented stricter repayment terms for some months of the parties' relationship, these terms were not representative of the parties' normal, ordinary arrangement. [7] (Op. at 19–20) Hence, the Bankruptcy Court did not err by finding that this factor did not support an ordinary course of business defense.

7 Although Prudential argues that the Bankruptcy Court made an incorrect finding of fact under this element—i.e., that the Debtor's payments in the Second Payment Plan "had the effect of dramatically reducing Eclipse's AR balance"—this finding is not relevant to the Bankruptcy Court's reasoning or this Court's basis for affirming. (D.I. 17 at 13) (quoting Op. at 22)

***6** Overall, the Bankruptcy Court's conclusion regarding Prudential's ordinary course of business defense depended on the parties' length of engagement, the change in timing of the Debtor's payments, Prudential's collection efforts, and the advantage Prudential gained over the Debtor while the Debtor was financially deteriorating. The Court agrees that the record supports these findings; therefore, the Bankruptcy Court did not commit clear error by denying Prudential's § 547(c)(2) defense.

B. New Value Defense

The Trustee appeals from the July 17 Order to contest the Bankruptcy Court's finding that Prudential established a new value defense under § 547(c)(4) in the amount of $128,379.40. (D.I. 18 at 30) The parties agree that Prudential provided new value during the preference period, but dispute the exact amount. (Op. at 26; *see* D.I. 18 at 27) To determine whether a creditor provided new value, the Third Circuit has set forth the following framework:

> The three requirements of section 547(c)(4) are well established. First, the creditor must have received a transfer that is otherwise voidable as a preference under § 547(b). Second, *after* receiving the preferential transfer, the preferred creditor must advance "new value" to the debtor on an unsecured basis. Third, the debtor must not have fully compensated the creditor for the "new value" as of the date that it filed its bankruptcy petition.

In re New York City Shoes, Inc.,880 F.2d 679, 680 (3d Cir.1989). The Bankruptcy Court found, based on the testimony of Prudential's Director of Accounting, Rene Williams–Varner, that Prudential had carried its burden to prove that Prudential provided $128,379.40 in new value.

The Trustee specifically disputes that 21 invoices, representing $71,808.03 of Prudential's total $128,379.40 new value award, qualify for this defense. (D.I. 17 at 30) The Trustee argues that these services cannot constitute new value because Prudential provided them after the Debtors' petition date. (*Id.*) He contends that the petition date is the final cutoff point for calculating this defense. To support this proposition, the Trustee cites the third element of the applicable test: that "the debtor must not have fully compensated the creditor for the 'new value' ***as of the date that it filed its bankruptcy petition***." (*Id.*) (emphasis added) (quoting *Schubert v. Lucent Tech. Inc.* (*In re Winstar Commc'ns., Inc.*), 554 F.3d 382, 402 (3d Cir. 2009)). [8]

8 Prudential argues that the Trustee waived this argument by failing to raise it in the Bankruptcy Court. (D.I. 20 at 9) The Court disagrees. In its post-trial brief, the Trustee plainly argues that post-petition transfers cannot qualify as new value under § 547(c)(4). (*See* Adv. Case No. 10–55543, D.I. 48 at 19)

The Third Circuit has provided guidance on this issue. In *In re Friedman's Inc.*, 738 F.3d 547, 549 (3d Cir.2013), the Third Circuit analyzed whether a debtor's post-petition payment could reduce a creditor's new value under 11 U.S.C. § 547(c)(4)(B).

While § 547(c)(4) provides a "new value" exception that reduces a creditor's preference liability, § 547(c)(4)(B) provides a further exception that reduces the new value defense (and thus increases preference liability). *See* 11 U.S.C. § 547(c)(4)(B) (crediting transferee for new value only "on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor"). Although the holding in *In re Friedman's* pertained narrowly to § 547(c)(4)(B), the Court's reasoning is applicable to § 547 more generally.

***7** *In re Friedman's* established that the cutoff for assessing "an otherwise unavoidable transfer" under (c)(4)(B) is the debtor's petition date. *Id.* at 562. The Court relied on several observations regarding the statutory structure of 11 U.S.C. § 547 as a whole:

> First, as a general matter, § 547 is titled "Preferences," and therefore suggests that it concerns transactions occurring during the preference period, which is by definition pre-petition (i.e., the 90 days before the filing of the petition).
>
> *** * ***
>
> Second, Appellee urges that the fact that the preference test known as the "hypothetical liquidation test" must be performed as of the petition date points to that date as the cutoff for determining new value. We agree.
>
> *** * ***
>
> [Third,] [t]he fact that the statute of limitations for a preference avoidance action under § 547 generally begins on the petition date suggests that the calculation of preference liability should remain constant post-petition.
>
> *Id.*at 555–56. This logic applies as well to § 547(c)(4). Most importantly, the Third Circuit noted that "if we allow post-petition payments to affect the preference analysis, it would seem logical also to consider post-petition extensions of new value to be available as a defense. However, the vast majority of courts that have considered this issue have concluded that new value advanced after the petition date should not be considered in a creditor's new value defense." *Id.* at 557 (collecting cases). Although the Third Circuit did not directly hold that the cutoff date for new value is the petition date, its reasoning essentially accepted that premise in order to further support its conclusion regarding § 547(c)(4)(B). Therefore, the Court concludes that the Trustee is correct that only services provided prior to the petition date are included in the § 547(c)(4) new value defense.

In the July 17 Opinion, the Bankruptcy Court does not distinguish between pre-petition and post-petition payments for the purpose of calculating Prudential's new value defense. It is **j**possible that some of Prudential's new value award included credit for post-petition services:

> Ms. Williams–Varner testified that for household goods insurance, Prudential paid the invoice at the time of closing on the sale of the employee's home. *(Id.* at 106–07.) The invoice to Eclipse for those expenses would take one week after the closing to be generated. *(Id.* at 104.) Thus, Prudential argues that it satisfied its burden under section 547(c)(4) to establish the date of the services for household goods insurance, namely one week before the invoice date. The Court finds the testimony of Ms. Williams–Varner persuasive and uncontested and agrees with Prudential that it has carried its burden of proof regarding its new value defense for those invoices. The Chart lists a payment date of November 20, 2008, for the household goods insurance invoices at issue, which were performed approximately one week before March 5, 2009.

(Op.26–27) Services provided one week before March 5, 2009 would have occurred after the Debtor's petition date. Accordingly, the Bankruptcy Court's calculation of new value may have erroneously inflated the proper amount of Prudential's new value defense. This matter will be partially remanded for the Bankruptcy Court to reexamine those invoices to determine the appropriate amount of Prudential's new value defense.

C. Prejudgment Interest

***8** The Trustee further argues that the Bankruptcy Court erred by failing to consider his request for prejudgment interest. (D.I. 18 at 31) Denying prejudgment interest is a matter of the Bankruptcy Court's discretion. *See In re Hechinger Inv. Co. of Delaware, Inc.,* 489 F.3d at 574. The Trustee claims that Bankruptcy Court committed reversible error by offering no explanation for why it was not awarding prejudgment interest. (D.I. 18 at 33) Prudential, of course, disagrees. (D.I. 20 at 9–10) It maintains that the Bankruptcy Court has no obligation to state on the record why it is not awarding pre-judgment interest. (*Id.* at 9)

The Trustee relies primarily on *In re Hechinger Inv. Co.* to support its argument. In that case, the Third Circuit reviewed the District Court's affirmance of the Bankruptcy Court's order awarding a $1,004,216 judgment on a § 547 preference claim. *In re Hechinger Inv. Co. of Delaware, Inc.,* 489 F.3d at 571–73. The Bankruptcy Court denied the plaintiff's request for prejudgment interest, but without explanation. *Id.* at 580. The Third Circuit acknowledged that "[t]here is no reference to prejudgment interest in the Bankruptcy Code, but courts have relied on the word 'value' in § 550(a) as authorizing an interest award." *Id.* at 579. It determined that a bankruptcy court's discretion "must be exercised according to law, which means that prejudgment interest should be awarded unless there is a sound reason not to do so." *Id.* at 580. The Third Circuit concluded that because "the Bankruptcy Court gave no reason for its decision to deny [plaintiff's] motion for prejudgment interest[,][it] therefore c[ould] not determine from the record before [it] whether the Court had a 'sound reason' to deny Hechinger's request." *Id.* Accordingly, the Third Circuit vacated the order of the district court and remanded the case to the Bankruptcy Court to explain its reasons for denying plaintiff's prejudgment interest request.

The Court finds this reasoning directly applicable here and will follow suit. The Court will remand this issue for the Bankruptcy Court to explain its reasoning for denying the Trustee's request for prejudgment interest (i.e., identifying the "sound reason" for denial) or, alternatively, to award such interest.

V. CONCLUSION

Accordingly, and for the foregoing reasons, the Court will affirm the Bankruptcy Court's July 17 Order and Opinion in part, and remand in part, for further consideration not inconsistent with this Opinion. An appropriate Order follows.

ORDER

At Wilmington, this 10th day of September, 2015, for the reasons set forth in the accompanying Memorandum issued this same date;

IT IS HEREBY ORDERED that:

1. The Bankruptcy Court's July 17, 2013 Order (D.I.1–1) and Opinion (Adv.Pro. No. 10–55543, D.I.49) is AFFIRMED IN PART, with respect to its finding that Prudential had not established a § 547(c)(2) defense;

2. The Bankruptcy Court's Order and Opinion is REMANDED IN PART, in order for the Bankruptcy Court to recalculate the proper amount of Prudential's § 547(c)(4) defense and to state its basis for denying the Trustee's request for prejudgment interest or, alternatively, to award such interest.

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