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UNPUBLISHED OPINION

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re	)	
	)	
D-MART SERVICES, INC., dba BUY-IT-WHOLESALE, INC. and ESTATE REALTY, INC., dba FISCUS, INC.,	)	Bankruptcy Case No. 87C-06702 Bankruptcy Case No. 87C-06734 Chapter 7 (Consolidated)
Debtors.	)	
	)	
DUANE H. GILLMAN, TRUSTEE,	)	Adversary Proceeding No. 90PC-0524
Plaintiff,	)	
vs.	)	
SWIRE PACIFIC HOLDINGS, INC., dba COCA-COLA BOTTLING COMPANY OF SALT LAKE CITY, INC.,	)	
Defendant.	)	
	)	
DUANE H. GILLMAN, TRUSTEE,	)	Adversary Proceeding No. 90PC-0551
Plaintiff,	)	
vs.	)	
SPRECKELS SUGAR COMPANY, INC.,	)	
Defendant.	)	MEMORANDUM OPINION

The matters presently before the court involve the adversary proceedings styled Gillman v. Swire Pacific Holdings, Inc. (In re D-Mart Serv., Inc.), No. 90PC-0524, and Gillman v. Spreckels Sugar Co. (In re D-Mart Serv., Inc.), No. 90PC-0551. Both proceedings have been commenced by the Chapter 7 trustee, Duane H. Gillman, Esq. (trustee), in an attempt to recover certain monies pursuant to § 547(b) that D-Mart Services, Inc. (debtor)[1] allegedly transferred to the respective defendants. In the Swire matter, the trustee and the defendant have filed cross motions for summary judgment. The defendant in the Spreckels matter also has moved for summary judgment. A hearing on the Swire matter was had on May 8, 1991, and a hearing on the Spreckels matter was had on July 10, 1991. Janet A. Goldstein, Esq. appeared on behalf of the trustee at both hearings. Robert B. Lochhead, Esq. appeared on behalf of Swire. Mark F. James, Esq. appeared on behalf of Spreckels. Counsel presented argument at both hearings. The court took both matters under advisement to address the issue of whether the respective proceedings are time barred pursuant to 11 U.S.C. § 546(a).[2] Having made an independent review of the pleadings, the arguments of counsel, and

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[1]D-Mart's bankruptcy case was consolidated with the bankruptcy case filed by Estate Reality, Inc. Estate Reality was not a party to the transactions involved in these proceedings and, therefore, the court's reference to "the debtor" is to D-Mart only.

[2]All future statutory references are to title 11 of the United States Code unless specifically indicated otherwise.

other pertinent authorities, the court now renders the following decision, holding that the proceedings are not barred under § 546(a).

On December 29, 1987, the debtor filed for relief under Chapter 11 of the Bankruptcy Code. For approximately seven months thereafter the debtor operated its business as a debtor in possession until its case was converted to a case under Chapter 7 of the Code on July 12, 1988, and the trustee was appointed. On July 11, 1990, the trustee filed separate complaints against the defendants seeking to avoid several transfers that the debtor had allegedly made to them pursuant to § 547(b). The defendants have asserted that § 546(a)(1) bars the trustee from asserting his preference actions against them because they were commenced well past two years after the filing of the debtor's bankruptcy case. For the reasons stated herein, the court rejects the defendants' argument.

Section 546(a) states:

> An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—
>
> (1) two years after the appointment of a trustee under section 702, 1104, 1163, 1302, or 1202 of this title; or
>
> (2) the time the case is closed or dismissed.

While on its face this section appears to bar actions brought two years after the appointment of a trustee, the Tenth Circuit recently applied it to debtors in possession.

In Zilkha Energy Co. v. Leighton, 920 F.2d 1520, 1523 (10th Cir. 1990), the court stated that "Congress intended for the word 'trustee' to apply to a debtor in possession ...." and, therefore, held that a debtor in possession who did not initiate actions under § 544(a)(1) and 548 within two years of the commencement of the Chapter 11 case was barred under § 546(a) from so doing.

Asserting the rule in Zilkha, the defendants claim that a debtor in possession is required to initiate avoidance actions within two years after the filing of its case and, therefore, a subsequently appointed trustee is bound within that time period. The court disagrees with the defendants, finding that the holding in Zilkha is not that broad. The sole question in that case was "whether a debtor in possession [was] subject to the same two-year statute of limitations as an appointed trustee." Id. at 1524. The Tenth Circuit did not limit the ability of a subsequently appointed Chapter 7 trustee to commence avoidance actions two years after his appointment. In fact, the court specifically recognized that the appointment of a trustee is distinguishable from the debtor in possession scenario and reserved ruling on the issue. In particular, the court stated:

> We take no position on whether a subsequent appointment of a trustee in a chapter 11 case would change the analysis. See Boatman v. E.J. Davis Co., 49 B.R. 719 (Bankr. D.Conn. 1985). While we perceive that to be a distinguishable

> circumstance requiring a different analysis, we leave the issue for a case in which that situation arises.

Id. at 1524 n. 11 (emphasis added).

The circumstances that the Tenth Circuit recognizes as "distinguishable" were recognized by this court in Stuart v. Pingree (In re Afco Develop. Corp.), 65 B.R. 781 (Bankr. D.Utah 1986). In that case, the Chapter 11 debtor operated as a debtor in possession for approximately one month until a Chapter 11 trustee was appointed pursuant to § 1104. Approximately one year and three months later, the case was converted to a case under Chapter 7 of the Code and the Chapter 11 trustee was appointed as the Chapter 7 trustee. Just short of two years from his appointment as the Chapter 7 trustee, he filed an adversary proceeding pursuant to § 547 seeking to recover certain alleged voidable transfers from the defendants. The defendants moved to dismiss the trustee's complaint claiming that § 546(a)(1) barred the action inasmuch as the two year statute of limitations had begun to run when the Chapter 11 trustee was appointed.[3] Defending the timeliness of his complaint, the trustee in Afco claimed that the words "appointment of a trustee" in § 546(a)(1) were properly construed to

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[3]In Afco, this court did not consider the problem that was presented in Zilkha; namely, whether a debtor in possession would be barred from commencing a preference action if it did not do so within two years from its appointment, or, as was interpreted by that court, the commencement of the case. In dicta, the court in Afco, 65 B.R. at 785, stated that the § 546(a) limitation period applies only to actions by trustees, and not actions by "others such as debtors in possession in Chapter 11 cases who perform the duties and exercise the functions of a trustee under § 1107." Zilkha overrules that dicta. In striking that language from the Afco opinion, however, the logic of that opinion is in no way affected and, therefore, the rule from that case is still viable.

mean that the statute of limitations should run from the appointment of "each trustee," as opposed to the defendants' argument that it should run from the appointment of "any trustee." Id. at 783. Agreeing with the trustee, the court held that his complaint was not time barred because "the language, purpose and relevant legislative history of Section 546(a) provide each trustee appointed under the enumerated provisions two years within which to commence avoidance actions." Id. at 787 (footnote omitted). In light of Zilkha, the court believes that it would be helpful to reiterate the rationale stated in the Afco opinion.

In Afco, the court compiled a comprehensive analysis of the predecessors to § 546(a) under the Act. In particular, the court looked to Bankruptcy Act § 11(e), 11 U.S.C. § 29(e) (repealed), which provided a two-year statute of limitations for actions brought by a receiver or trustee. According to the court, the purpose of that section was "'to extend to the trustee a fixed period within which he might file all suits which he ... inherited from the debtor .... '" Id. at 783 (quoting McBride v. Farrington, 60 F.Supp 92, 95-96 (D.Ore. 1945), and citing H.R.Rep. N. 1409, 75th Cong., 1st Sess. 22 (1937); S.Rep. No. 1916, 75th Cong., 3d Sess. 13 (1938)). The court also pointed to Bankruptcy Act § 261, 11 U.S.C. § 661 (repealed), which tolled the two-year statute of limitations provided in § 11(e) during the pendency of a Chapter X reorganization. Under Chapter X of the Act, a disinterested trustee was appointed if the debtor's fixed

and non-contingent debt was more than $250,000.00. The court recognized that courts and commentators had recognized that the duties of a Chapter X trustee did not compel it to commence preference actions against creditors and that there was a good chance that such actions would not be commenced by a reorganizing trustee. Id. at 784 (citing Davis v. Security Nat'l Bank, 447 F.2d 1094, 1097-98 (9th Cir. 1971); 6A COLLIER ON BANKRUPTCY ¶ 15.01[1], at 824 (14th ed. 1977)). Thus, according to the court, § 261 "was designed for two purposes: (1) for the protection of creditors; and (2) to preserve any action which might be undertaken by a subsequent bankruptcy trustee." Id. (citing Davis, 447 F.2d at 1094). Drawing from these sections and their history, the court in Afco concluded that under the Bankruptcy Act every trustee that was appointed was afforded two years from the date of his appointment in which to commence certain actions. Because the legislative history of § 546(a)(1) is so sparse, the court went on to hold that the drafters of the Code had simply adopted the law as it existed under the Act.

The court's next point of analysis in Afco was that a subsequently appointed Chapter 7 trustee's ability to marshall the debtor's assets and fairly allocate them to the creditors would be significantly impaired if § 546(a) were to start the statute of limitations period to run from the time of the appointment of a Chapter 11 trustee. In particular the court noted that:

The essentially different objectives of Chapter 7, 11, and 13 support the view that a later trustee should not be barred from exercising avoiding powers due to inaction by an earlier trustee. The purpose of Chapter 11 is the salvage and rehabilitation of a financially distressed business, not necessarily to recover voidable transfers. See BANKRUPTCY LAW FUNDAMENTALS, [] § 10.01[2], at 10-5 [(1986)]. A Chapter 11 trustee may not have to litigate preference actions in every case. They may be dealt with in a plan of reorganization by offsetting the creditor's preference against the dividend paid under the plan, or may be compromised, settled, or abandoned. A trustee is most often appointed in Chapter 11 where there has been fraud, dishonesty, incompetence or gross mismanagement by the current management of the debtor in possession. ...

> In reorganization cases, the trustee's duties and powers give him a presence and a role to play in shaping the entire reorganization process. It is this role which involves experience, discretion, judgment, diplomacy and creativity which makes the chapter 11 trustee's position substantially different from that of a chapter 7 trustee.
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> In addition to the orthodox duties and powers to identify, locate, and possess property of the estate and the powers to compel turnover of such property, the powers to use, sell or lease property, and the avoiding powers, the chapter 11 trustee has the power to formulate and propose the plan of reorganization and the disclosure statement and in connection therewith, the obligation to negotiate with the creditors' committee relative to such plan.

COLLIER HANDBOOK FOR TRUSTEES AND DEBTORS IN POSSESSION, [] ¶ 16.01, at 16-1 [(1982)]. ...

> [W]hen a case is converted to Chapter 7, the Bankruptcy Code recognizes that the attempt to preserve the debtor's going-concern value and keep the assets of the estate working for the benefit of creditors has failed. ... The Chapter 7 trustee's principal duty is to collect and reduce to money the property of the estate and to close the estate as expeditiously as is compatible with the best interest of creditors. ... If the trustee fails in this duty to collect estate assets he may be charged with the value of the assets which never came into his possession. ...
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> In contrast, the basic purpose of Chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of that individual's debts over an extended period. ... Although the Chapter 13 trustee is the representative of the estate with the capacity to sue and be sued, and not a mere disbursing agent, experience has shown that Chapter 13 trustees seldom exercise avoiding powers for the estate.

Afco, 65 B.R. at 786-87 (footnotes omitted). See also Nichols v. Wood (In re Wood), 113 B.R. 253, 255 (S.D. Miss. 1990) (recognizing that "[a]lthough the courts are split on the issue, the weight of authority holds that the two-year limitation period commences anew when a Chapter 7 trustee is appointed after a conversion from another Chapter.")

The facts in the present case make the policy espoused in Afco even more convincing. In Afco the Chapter 11 trustee took over management of the case approximately one month after it had been commenced, and that same person was later appointed as the Chapter 7 trustee. As the court recognized, the trustee's focus while the case was in Chapter 11 was different than when it was in Chapter 7;

nevertheless, the same person was in control of the case from its inception. On the other hand, the debtor in this case operated its business as a debtor in possession for seven months whereupon the case was converted and the trustee was appointed. The trustee was required to familiarize himself with this rather large case, analyze claims, and file complaints all within a relatively short period of time. If the limitations period were to run from the time that the debtor had filed its petition, the trustee's duty to marshall the assets of the estate would have been extremely difficult and ultimately would have worked against the interests of creditors.

Accordingly, the court holds that when a trustee is appointed under Chapter 7 of the Code, it has two years from its appointment to initiate a cause of action under § 547(b) or any of the other sections enumerated in § 546(a). In holding that the present proceedings are not time barred, the court must consider the remaining arguments that were raised by the parties in their cross motions in the Swire matter.[4]

It is undisputed that the debtor made sixteen transfers totaling $165,485.35 to Swire during the ninety-day period preceding its filing bankruptcy. Exhibit A of the trustee's accountant's affidavit sets forth the transfers by the debtor to Swire:

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[4]In the Spreckles matter, the court disposed of the additional issues raised in the defendant's motion for summary judgment in a ruling from the bench.

CHECK NUMBER	CLEAR DATE	CHECK DATE	AMOUNT
* 9739	10/06/87	10/12/87	$10,000.00
* 9718	10/14/87	10/10/87	$10,000.00
* 8903	10/20/87	9/30/87	$10,000.00
10201	11/03/87	10/29/87	$8,167.50
* 9685	11/24/87	9/30/87	$10,000.00
* 1536	11/24/87	11/19/87	$10,000.00
* 1759	11/30/87	11/27/87	$10,000.00
1986	12/07/87	11/04/87	$7,980.00
* 1754	12/07/87	11/25/87	$15,000.00
2296	12/14/87	12/11/87	$11,474.00
* 2501	12/16/87	12/11/87	$15,000.00
2511	12/21/87	12/17/87	$7,675.00
* 2512	12/21/87	12/17/87	$7,000.00
3682	12/23/87	12/21/87	$14,428.40
2696	12/29/87	12/23/87	$6,899.75
2760	12/29/87	12/29/87	$11,860.70

(Comb's Affidavit at Exhibit A.) Both the trustee and Swire have moved for summary judgment. The trustee seeks summary judgment on the issue of whether the above-stated transfers that are (*) can be set aside as a matter of law. Swire asks that the court dismiss the trustee's complaint as it relates to the transfers which are not (*). The court will first address the trustee's motion.

The trustee contends that the (*) transfers in the even amounts of $7,000.00, $10,000.00, and $15,000.00 are avoidable pursuant to § 547(b) as a matter of law because Swire has admitted that they were preferential and because none of the defenses in § 547(c) are applicable. Swire contends that § 547(c)(2) and (4) bar the relief sought by the trustee.

In support of its claim under subsection (c)(2), Swire states that the transfers that the debtor made to it during the preference period are consistent with transfers between those entities during the period immediately preceding the 90-day preference period. In support of its argument, Swire has submitted the affidavit of its credit manager, Jay Olsen. According to the affidavit, Mr. Olsen met with the owner of the debtor in August 1987 at which time he "informed him that Swire intended to discontinue doing business with D-Mart because of D'Mart's [sic] large outstanding debt to Swire." (Second Affidavit at ¶ 6.) D-Mart requested at that time that it and Swire initiate a "new course of business" pursuant to which the debtor would make weekly lump sum payments to Swire until its past due accounts were brought current. (Id. at ¶ 7.) In addition, Mr. Olsen states that the debtor was required to make all payments to Swire for ongoing deliveries within a week to ten days of those deliveries. (Id.) Swire agreed to those terms, and "[p]ursuant to the agreed upon new course of business," the debtor made at least four lump sum payments prior to the commencement of the preference period. (Id. at ¶ 7-9.)

On the basis of the above-stated undisputed facts, the court will summarily deny the ordinary course of business defense. Lump sum transfers that were made pursuant to an agreement stating a "new course of business" between the debtor and Swire, entered into just one month prior to the commencement of the preference

period, are not transfers in the "ordinary course of business" within the terms of § 547(c)(2).

In addition to § 547(c)(2), Swire contends that the trustee's motion should be denied because it provided the debtor with "new value." Section 547(c)(4) states:

> 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[.]

"New value" is defined in relevant part in § 547(b)(a)(2) as " money or money's worth in goods, services or new credit, ... but does not include an obligation substituted for an existing obligation." The plain language of this section says that to the extent that the creditor gives new value to or for the benefit of the debtor on an unsecured basis after receiving a preferential transfer, the otherwise preferential payment will not be voidable. In this case, the lump sum payments were clearly made on behalf of an existing obligation. Swire did not extend new credit or product to the debtor after receiving a preferential transfer. To the contrary Swire's credit manager has stated that the lump sum transfers were on account of pre-existing debts. Section 547(c)(4) simply does not apply. Accordingly, the trustee's motion should be granted.

In its motion for summary judgment, Swire admits that the non-(*) transfers were preferential but claims that as a matter of law they are exempt from avoidance under § 547(c)(1), (2) and (4). The court concludes that Swire's motion should be granted pursuant to § 547(c)(1).

Section 547(c)(1) states:

> The trustee may not avoid under [§ 547(b)] a transfer—
>
> (1) 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[.]

It is uncontested that during the preference period Swire delivered $69,616.85 worth of Coca-Cola products to the debtor. (Olsen's First Affidavit.)[5] It is also uncontested that the transfers were made on the above-mentioned dates. (First Affidavit of Jay Olsen; Affidavit of Combs at Exhibit A.) The Third Affidavit of Mr. Olsen states that Swire intended for the transfers to be contemporaneous with the exchange of the Coca-Cola products to the debtor. (Affidavit at ¶ 8). On the basis of these facts, the court concludes that Swire's transfers are not avoidable under § 547(c)(1). Accordingly, Swire's motion for summary judgment will be granted.

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[5]Swire also argues that it provided the debtor with $18,060.85 worth of advertising credits. The court will not consider this issue because of the conflicting facts raised in the affidavits of the parties.

The court HEREBY ORDERS that the proceedings are not time barred under § 546(a). Furthermore, the trustee's motion for partial summary judgment is GRANTED. Finally, Swire's motion for partial summary judgment is GRANTED.

DATED this 13 day of August, 1991.

BY THE COURT:

GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT