§ 547
Preferential Transfer
Ordinary Course

OPC Liquidation Corp. v. Hanjin Shipping Co., Ltd., Adversary No. 01-3242-elp
In re OPC Liquidation Corp., Case No. 300-34578-elp11
Appellate No. 02-1355-HA

05/06/03 Dist Ct. aff'g ELP Unpub

The District Court affirmed the bankruptcy court's entry of judgment after trial in favor of the debtor in this § 547 preferential transfer proceeding.

The district court first refused to consider several of the defendant's arguments, because they were not raised before the bankruptcy court during the trial.

The district court then rejected the defendant's argument that it was a secured creditor by virtue of language included in bills of lading. Citing Ninth Circuit precedent, the district court held that the bills of lading were insufficient to create a security interest, because it was not the intent that they do so.

Finally, the district court determined that the bankruptcy court did not err in rejecting the defendant's ordinary course defense under 547(c)(2). The district court determined that the defendant did not meet its burden of proving that the payments were made in the ordinary course of business or according to ordinary business terms.

P03-8(11)

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DISTRICT OF OREGON
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In Re:

OPC LIQUIDATION CORP., an Oregon corporation formerly known as Oregon Potato Company and also doing business as Washington Potato Company,
Debtor,

Bank. No. 300-34578-elp11

CIVIL NO. 02-1355-HA

OPC LIQUIDATION CORP., an Oregon corporation, acting by and through Glass & Associates, Inc., as Plan Agent,
Plaintiff-Appellee,

v.

HANJIN SHIPPING COMPANY, LTD.,
Defendant-Appellant.

OPINION AND ORDER

Adversary Proceeding
No. 01-03242-elp

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Certified to be a true and correct copy of original filed in my office.
Dated 5/6/03
Donald M. Cinnamond, Clerk
By _____ Deputy

(80)
P03-3(11)

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HAGGERTY, Chief Judge:

The matter before the court is an appeal from the final decision of the United States Bankruptcy Court for the District of Oregon entered on March 19, 2002. The district court acts as an appeals court from decisions of the bankruptcy court. This court exercises jurisdiction under 28 U.S.C. § 158(a)(1). The appeal may be heard by this court rather than the Bankruptcy Appeal Panel, *see* 28 U.S.C. § 157. The court acknowledges that oral argument was requested regarding this appeal. The court concludes that oral argument is unnecessary, and for the reasons below affirms the ruling by the United States Bankruptcy Court for the District of Oregon.

BACKGROUND

Appellee OPC Liquidation Corporation, formerly known as Oregon Potato Company and also formerly doing business as Washington Potato Company (hereinafter "plaintiff" or "OPC") is the debtor in this bankruptcy action. Appellant Hanjin Shipping Company (hereinafter "defendant" or "Hanjin") was a creditor that was owed payments from OPC for shipping services.

On May 12, 2000, OPC had its working capital credit facility terminated by Congress Financial Corporation (Northwest). As a result, OPC closed both of its plants on May 26, 2000, and filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on June 13, 2000 after securing financing from GE Capital under bankruptcy court protection.

Payments to vendors were strictly controlled, and only the most important and aggressive vendors were paid. In a Bankruptcy Court Order issued on June 27, 2000,

Hanjin was recognized as a pre-petition creditor that was owed ocean freight charges. The Order authorized OPC to pay Hanjin pre-petition claims for ocean freight charges.

The ninety-day preference period started on March 15, 2000, while OPC was in a severe cash flow crisis. In that period OPC made five payments for services rendered to Hanjin, and another "prepayment" for shipping services in the future. Hanjin received a total of $60,982.17 from OPC during the preference period. These payments are at the heart of the suit, as the estate for OPC has sued to recover them from Hanjin.

On July 10, 2001, OPC the Plan Agent and representative of OPC's estate brought suit against Hanjin seeking to "void alleged preferential payments" and thereby obtain judgment for return of the $60,982.17 in payments OPC made to Hanjin during the preference period.

Defendant responded to the complaint by asserting the affirmative defenses that (1) it was a secured creditor; (2) the "ordinary course of business" defense applied; (3) the "contemporaneous exchange for new value" defense applied; and (4) the "new value" defense applied.

On January 4, 2002, the Bankruptcy Court denied Hanjin's motions for summary judgment. A trial was conducted on March 7, 2002, and on March 19, 2002, Judgment was entered in favor of OPC and against Hanjin in the net amount of $54,581.17, the net amount of recoverable transfers after the court concluded that $6,401.00 of the transfers were paid from OPC to Hanjin within the "21-Day Credit Period" and constituted a transfer within the ordinary course of business. The remaining transfers were found to be outside the ordinary course of business or financial affairs of OPC and Hanjin, and therefore were recoverable by OPC's estate.

Hanjin's motion for a new trial was heard on April 15, 2002, and Hanjin asserted new legal theories as grounds in support of its motion. The Bankruptcy Court denied the

motion, ruling that Hanjin's failures to assert certain legal arguments during summary judgment or at trial did not compel granting the motion for a new trial.

Hanjin now appeals the Judgment, which is stayed.

STANDARDS

The Federal Rule of Bankruptcy Procedure 8013 provides that on appeal, the district court may affirm, modify or reverse a bankruptcy judge's judgment, order, or decree, or may remand with instructions for further proceedings. Findings of fact are set aside if clearly erroneous, and "due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." *See also Harmon v. Kobrin (In re Harmon)*, 250 F.3d 1240, 1245 (9th Cir. 2001); *Daniels-Head & Assocs. v. William M. Mercer, Inc. (In re Daniels-Head & Assocs.)*, 819 F.2d 914, 918 (9th Cir. 1987) (district court reviews the findings of fact of the Bankruptcy Court under a clearly erroneous standard, while the court's conclusions of law are reviewed *de novo*).

ARGUMENT

Under 11 U.S.C. § 547(b)(5) a trustee may avoid (reverse) the transfer of an interest of the debtor when the transfer results in the creditor receiving more than would have been received if the case were under Chapter 7, the transfer was not made, and instead the creditor received payment to the extent provided under Chapter 7. The bankruptcy court concluded that: (1) the payments were transfers made for the benefit of Hanjin; (2) they were made on account of antecedent debt that OPC owed Hanjin; (3) the transfers were made when OPC was insolvent, and (4) if validated, the transfers would result in Hanjin improperly receiving more than if Hanjin had instead received distribution from the estate pursuant to Chapter 7 of the Bankruptcy Code. Since these four conditions existed, and the transfer recipient was not a secured creditor, the court ordered the transfers to be returned pursuant to 11 U.S.C. § 547(b)(5). *See* Transcript on Appeal (hereinafter "Tr.") at 164-65.

If Hanjin were deemed a secured creditor, however, it would have been entitled to receive the value of its claim or the collateral (the cargo). At trial OPC stipulated that the cargo was worth more than the shipping charges. Accordingly, Hanjin argues on appeal that it was a secured creditor and that the transfers to Hanjin should not be construed as "preferential," because Hanjin did not receive more than it would have under Chapter 7 liquidation.

Hanjin also contends on appeal that it was improperly deprived of the "ordinary course of business" exception (i.e., the transfers should have been construed as having been made in the ordinary course of business and therefore not recoverable by plaintiff), and that it was improperly deprived of the "contemporaneous exchange" exception to preferential transfers, which recognizes that a substantially contemporaneous exchange for new value given are transfers that fall outside of the category of "preferential transfers." Essentially, Hanjin asserts that if OPC's transfers were not in the ordinary course of business, then they were a substantially contemporaneous exchange given for the new value of continued provision of shipping services.

Hanjin also contends that it was improperly deprived of the "subsequent new value" exception to preferential transfers and that OPC's suit should have been barred by the Bankruptcy Court's "first-day Order" that authorized payments to Hanjin.

ANALYSIS

a. <u>Issues Raised for the First Time on Appeal are Barred</u>

Plaintiff OPC argues that the "secured creditor" arguments, the "contemporaneous exchange for new value" defense, and the "subsequent new value" defense are all arguments Hanjin raises for the first time on appeal, and therefore should not be considered. *See Bolker v. Commissioner of the Internal Revenue Service*, 760 F.2d 1039, 1042 (9th Cir. 1985); *United States v. Greger*, 716 F.2d 1275, 1277 (9th Cir. 1983) (rule is

well settled that a reviewing court generally will not consider a matter not first raised in the trial court).

During oral argument presented by Hanjin's counsel in support of Hanjin's motion for a new trial, counsel asserted that his "argument regarding maritime is not the same argument that was made before. . . . I'm not arguing the same thing regarding the basis for secured party status. . . . * * * Yes, Judge, there is no doubt that it would have been prudent to have made those arguments [regarding the basis for Hanjin's claim it had a security interest] before. But they weren't, and the point is it's not the same argument as previously made either in summary judgment or at trial. *I have cited law regarding the general common law, federal admiralty maritime lien, and that argument has never been addressed by the court because I never made it before.*" Tr. 171-72 (emphasis provided).

In addition to this acknowledgment, Hanjin fails to refer to anywhere in the trial transcript where Hanjin introduced evidence regarding contemporaneous exchange or the new value exception. Instead, Hanjin acknowledges that it "did not primarily rely upon" either the contemporaneous exchange or the new value exception defenses at trial, but argues that they were pled in the Answer and that Hanjin never "knowingly and intentionally relinquish[ed]" them and so should not be construed as having waived them. Reply at 8-9. No authorities are cited for this proposition.

The contemporaneous exchange and the new value exception defenses were not raised by counsel before the trial court. The Ninth Circuit recognizes three exceptions to the rule precluding appellate consideration of issues not raised at trial: (1) the case is exceptional and review is necessary to avoid a miscarriage of justice; (2) a change in the law gives rise to a new issue; or (3) the issue is purely one of law and independent of the factual record developed by the trial court. *Bolker*, 760 F.2d at 1042 (citations omitted). These exceptions are inapplicable here.

There are no grounds for concluding that the case is "exceptional," or that there was a change in the law – and Hanjin does not attempt to present any. The third exception is inapplicable because Hanjin's contentions that the contemporaneous exchange or the new value defenses should apply are not purely legal issues that are independent of the factual record. The contemporaneous exchange defense requires a finding regarding the intent of the debtor and creditor, 11 U.S.C. § 547(C)(1), and requires the court to measure the value given to the creditor and the new value given to the debtor. *See In re Nucorp Energy*, 902 F.2d 729, 733 (9th Cir. 1990).

The new value defense requires a finding that the creditor gave new value to or for the benefit of the debtor, for which the debtor did not make an otherwise unavoidable transfer to or for the benefit of the creditor. 11 U.S.C. § 547(c)(4); *Mosier v. Ever-Fresh Food Co. (In re IRFM, Inc.)*, 52 F.3d 228, 232 (9th Cir. 1995).

Hanjin disputes OPC's contention that the "secured creditor" arguments were never raised at trial by referring to the transcript of the summary judgment argument, in which Hanjin's counsel responds to a query from the bankruptcy court as to why preemption might apply in the case. Counsel replied "Because it deals with not just interstate commerce but international shipping which is covered by the Federal Maritime Law, Title 46 of the U.S. Code." Tr. at 11. With this as its basis, Hanjin contends, "Thus. . . Hanjin has always taken the position that it has a valid, maritime lien, based either on statute or otherwise." Reply Brief at 4.

In light of the absence of any reference to a maritime lien at trial, or at any other time other than the obscure reference quoted above, and in light of the Hanjin counsel's assertions in support of his motion for a new trial (provided above) that "Yes, Judge, there is no doubt that it would have been prudent to have made those arguments [regarding the basis for Hanjin's claim it had a security interest] before. *But they weren't*, and the point is *it's not the same argument as previously made either in summary judgment or at trial. I*

have cited law regarding the general common law, federal admiralty maritime lien, and that argument has never been addressed by the court because I never made it before," (Tr. at 171-72 (emphasis provided), Hanjin's maritime lien argument is rejected by this court as not previously raised at trial.

b. <u>The Bills of Lading Do Not Grant Secured Creditor Status</u>

Hanjin attempted to argue at trial that it was a secured creditor because of preprinted language on the bills of lading. OPC did not sign the bills.

For this argument Hanjin relies at least in part upon *Expeditors Int'l of Washington, Inc. v. Wang Labs., Inc.*, No. Civ. A. 92-12630-MLW, 1995 WL 791935 (D. Mass. Nov. 14, 1995) (Opening Brief at pp. 13-16). In *Expeditors International of Washington, Inc. v. The Official Creditors Committee (In re CFLC, Inc.)*, 166 F.3d 1012, 1016 (9th Cir. 1999), a ruling is explicitly distinguished from *Wang Labs*, the Ninth Circuit ruled that "invoices alone are insufficient to form a security interest because pre-printed agreements used by a creditor do not create a security interest if the debtor never intended the collateral to be used for this purpose." *Id.* Although the Ninth Circuit in *Expeditors* was interpreting the California version of Article 9 of the Uniform Commercial Code, the relevant sections of the U.C.C. do not materially differ between California and Oregon.

The Ninth Circuit's decision in *Expeditors* is applicable here because the evidence at trial established that the parties here did not negotiate the terms of the agreement and never manifested any intent to create such an interest. As in the facts here, in *Expeditors* the creditor and debtor never discussed the terms on the invoices and never reached any agreements regarding a security interest, and no documents were executed by the debtor showing an intention to create a security interest. The creditor possessed debtor's property because it was providing freight forwarding services, not because the creditor was securing debtor's obligation through a general lien. On these facts, the Ninth Circuit ruled that requirement that both parties demonstrate an intent to create a security interest was not

been met, and the pre-printed invoice terms did not explicitly create a security interest. *Expeditors International (In re CFLC, Inc.)*, 166 F.3d at 1017.

Hanjin also argues that *Expeditors* is distinguishable because the creditor in that case relied upon invoices rather than bills of lading, and because "Hanjin does not rely primarily on the security agreement formed by the Bill of Lading. Rather, Hanjin, as an ocean freight carrier, has a maritime lien on the cargo. Such a lien does not require a written agreement executed by the debtor. . . ." Opening Appellate Brief at 16. In its Reply Brief Hanjin attempts to distinguish *Expeditors* by asserting that this case "involves a federal question of the validity of Hanjin's general, maritime lien in the bankruptcy context, not an Article 9 secured transaction." Reply Brief at 5. These statements render the authority for Hanjin's position unclear. Hanjin first references *Wang* before concluding that there is case law "standing for the proposition that invoices, and certainly bills of lading, can form a security agreement, in cases such as the one at bar." Opening Brief at 15. Immediately following this, however, Hanjin distinguishes its appeal because Hanjin has a maritime lien, which does not require a written agreement. *Id.* at 16. In its Reply Hanjin argues Article 9 of the UCC is inapplicable because the case involves the validity of Hanjin's maritime lien. Reply at p.5. Since the maritime lien argument is rejected as untimely, this court finds the Ninth Circuit's decision in *Expeditors* to be dispositive regarding Hanjin's bills of lading argument.

C. <u>The Ordinary Course of Business Exception is Inapplicable</u>

Finally, Hanjin argues that the Bankruptcy Court erred because the transfers in question were payments of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, were made in the ordinary course of business or financial affairs of the debtor and the transferee, and were made according to ordinary business terms. Under 11 U.S.C. § 547(c)(2), a trustee may not avoid a transfer that:

(1) was a payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee, and

(2) was made in the ordinary course of business or financial affairs of the debtor and the transferee, and

(3) was made pursuant to ordinary business terms.

The creditor or party in interest against whom recovery or avoidance is sought bears the burden of proving the nonavoidability of a transfer under 11 U.S.C. § 547(c). *See* 11 U.S.C. § 547(g).

The Bankruptcy Court concluded that while the debt being paid by the transfers was incurred in the ordinary course of business, satisfying the first prong of the defense, Hanjin failed to provide evidence regarding the remaining two prongs. Tr. at 167-69. The court found that except for four invoices totaling $6,401 that were paid within 21 days, Hanjin failed to prove that the payments were made in the ordinary course of business, or that they were made according to ordinary business terms. *Id.*

Hanjin contends this is error because in finding that the transfers were preferential, the Bankruptcy Court relied upon the fact that the payments were late. Opening Brief at 17, citing Tr. at 168. Hanjin argues that OPC routinely made late payments, and there is case authority that states under such circumstances untimely payments alone do not take the transfers out of the ordinary course of business exception to the preferential payment rule.

The court has examined the reasoning provided by the Bankruptcy court at Tr. 168-69, and rejects Hanjin's over-simplification of that court's analysis. Moreover, as noted above, the creditor or party in interest against whom recovery or avoidance must produce evidence at trial proving that the transfers at issue were made in "ordinary business terms." 11 U.S.C. § 547(c)(2)(C); 11 U.S.C. § 547(g). Hanjin's dispute on appeal regarding the Bankruptcy Court's findings regarding OPC's late payments and the effect of the

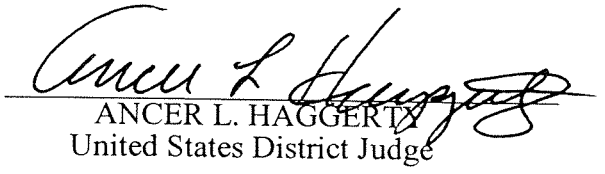
untimeliness falls far short of meeting Hanjin's burdens of proof on the question or of establishing grounds for reversing the Bankruptcy Court.

RULING OF THE COURT

For the reasons provided, Hanjin's appeal is denied. This court ADOPTS the decision of the Honorable Elizabeth Perris, United States Bankruptcy Judge. This court finds no clear error regarding the Bankruptcy Court's findings at trial in this case and the conclusions of law withstand a *de novo* review.

IT IS SO ORDERED.

DATED this 6 day of May, 2003.



ANCER L. HAGGERTY
United States District Judge