

11 USC 362
11 USC 547(b)
11 USC 547(c)
Agency
Interference with Contract

Marks v. Opti-Craft Civ. No. 89-1415-PA Adv. No. 88-0177-S7

In re Professional Eyecare Associates, No. 388-01280-S7

5/23/90 Judge Panner affirming Judge Sullivan's oral ruling

The district court affirmed Judge Sullivan's rulings that the defendant supplier did not tortiously interfere with contracts between the debtor and its members, violate the automatic stay or receive preferential transfers except to the extent of one partial payment from the debtor.

The debtor was an organization that provided group discounts to its members for eyecare products. The members placed orders directly with suppliers, the suppliers billed the debtor and the debtor billed the members. Shortly before the debtor filed chapter 11, OptiCraft sent a letter to the members directing them to pay OptiCraft for the previous month's orders. OptiCraft offered the same discount to the members that they would have received through the debtor. OptiCraft withheld the monthly statement from the debtor, so it could not bill the members.

The debtor was an agent of two disclosed principals, the buyers and OptiCraft, rather than a wholesaler. The members had an independent obligation to pay OptiCraft, so the payments directly to OptiCraft were not preferential even though they also satisfied the obligation from the debtor to OptiCraft.

OptiCraft did not tortiously interfere with the contracts between debtor and the members, because the debtor had already breached the contract with OptiCraft. The breach was legal justification for OptiCraft to collect directly from the members. OptiCraft did not violate the stay because all of its actions were prepetition.

The timely partial payment made by the debtor to OptiCraft one month before filing was recoverable as a preference. A partial payment was not the ordinary course of dealing between the parties, and OptiCraft was aware that the debtor had financial difficulties.

July 23 1988

MCC

J

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In re)
PROFESSIONAL EYECARE ASSOCIATES,)
INC., an Oregon corporation,)
Debtor.)

THOMAS G. MARKS, TRUSTEE,)
Plaintiff-Appellant,)
v.)
OPTI-CRAFT, INC.,)
an Oregon corporation,)
Defendant-Respondent.)

No. 388-01280-S7

Adv. No. 88-0177-S7

Civ 89-1415

OPINION

ERIC A. LINDENAUER
RICHARD BAROWAY
FRED M. GRANUM
Garvey, Schubert & Barer
Suite 2650
1211 SW Fifth avenue
Portland, OR 97204

Attorneys for Appellant/Cross Appellee
Thomas G. Marks, Trustee in Bankruptcy

///
///

1 - OPINION

FB

P90-37 (13)

1 ALBERT N. KENNEDY
2 TIMOTHY J. CONWAY
3 Tonkon, Torp, Galen,
4 Marmaduke & Booth
5 1800 Security Pacific Plaza
6 1001 SW Fifth Avenue
7 Portland, OR 97204-1162

8 Attorneys for Cross-Appellant
9 Opti-Craft, inc.

10 **PANNER, J.**

11 Bankruptcy Trustee Thomas G. Marks ("Trustee") appeals
12 the final judgment of the Bankruptcy Court that certain
13 payments made by members of debtor Professional Eyecare
14 Associates, Inc. ("PEA") to Opti-Craft, Inc. ("Opti-Craft")
15 were not voidable preferences under 11 U.S.C. § 547 (b), that
16 Opti-Craft did not tortiously interfere with the contracts
17 between PEA and its members, and that Opti-Craft did not
18 violate the automatic stay. Opti-Craft cross-appeals the
19 Bankruptcy Court's decision that a partial payment made by PEA
20 to Opti-Craft is a voidable preference as a payment not made
21 in the ordinary course of business, under 11 U.S.C. § 547 (c)
22 (2).

23 I affirm the Bankruptcy Court's decision.

24 FACTUAL BACKGROUND

25 PEA incorporated in Oregon in 1985 as a membership
26 organization of optometrists, ophthalmologists, and opticians.
PEA generated volume purchases and obtained discounts from
suppliers, so they were able to sell optical products to
members at reduced prices.

/ / /

2 - OPINION

1 PEA had two divisions. One division stocked a general
2 inventory of eyecare products, purchased from various
3 suppliers. The other division was known as the buying group,
4 and provided prescription lenses for eyeglasses. The buying
5 group's transactions are the basis for this appeal.

6 The buying group functioned in the following manner. If
7 a PEA member needed some prescription lenses for a patient,
8 the member would place an order to a lab. The lab would grind
9 the lenses, ship them to the PEA member, and then bill PEA for
10 the purchase. PEA would pay the lab, and bill the member for
11 the lenses on a monthly statement. These statements included
12 all supplies ordered by the member, from every supplier.

13 One of PEA's major suppliers was Opti-Craft, an
14 ophthalmic laboratory. On May 5, 1985, PEA and Opti-Craft
15 entered a written agreement, which was revised on May 29,
16 1986. This agreement recognized Opti-Craft as the "preferred
17 laboratory" for PEA members, and PEA agreed not to make
18 available to any of its members any other ophthalmic labs in
19 Idaho, Washington, Alaska, or Oregon. The latter agreement
20 remained in effect until the parties ended their relationship
21 in March, 1988.

22 The May 1986 agreement provided a 15% discount on the
23 purchase price on all lenses purchased through PEA, provided
24 the dollar volume of PEA purchases always exceeded \$20,000.00
25 per month. Opti-Craft would send PEA a complete statement of
26 the prior month's purchases by the fifth day of the month.

3 - OPINION

1 PEA would then include this information on the monthly bills
2 it sent to its members. PEA would receive the full 15%
3 discount if it paid the balance by the 15th of the month, with
4 a smaller discount for payments made after that date. PEA
5 would then bill its members, offering them an 11% discount if
6 they made their payments by the 17th of the month.

7 PEA and Opti-Craft first began experiencing problems in
8 September, 1987. An initial PEA check for the August 1987
9 goods was returned for insufficient funds. PEA was then
10 negotiating either a sale or merger with Wellcorp., Inc., and
11 Wellcorp paid the September 1987 amount due on behalf of PEA
12 in two installments. Wellcorp also guaranteed PEA's October,
13 1987 payment, so Opti-Craft provided September's requested
14 supplies to PEA members. Although the September 1987 payment
15 was made after the 15th, and in two installments, Opti-Craft
16 still allowed the full 15% discount.

17 The negotiations with Wellcorp did not result in a sale
18 or merger. Opti-Craft began to worry about PEA's financial
19 difficulties. Opti-Craft suggested PEA post a letter of
20 credit for two months' purchases to protect Opti-Craft in case
21 of a default. PEA refused, and Opti-Craft did not pursue the
22 matter.

23 In January 1988, PEA sent Opti-Craft a check for
24 \$260,000.00 covering the balance of its members' December 1987
25 orders. PEA's president asked Opti-Craft to assure PEA's
26 other creditors that PEA was able to pay its bills.

1 In February, 1988, PEA owed Opti-Craft \$257,735.67 for
2 members January 1988 orders. PEA sent a \$100,000.00 check as
3 partial payment on February 16. A second check for
4 \$157,735.67 was sent to Opti-Craft, dated February 22, but PEA
5 lacked sufficient funds to cover the check. A third check was
6 sent, this time for \$100,000.00 and dated February 23. There
7 were insufficient funds to cover this check. No other payment
8 was made.

9 On March 1, 1988, Opti-Craft proposed a new agency
10 agreement with PEA. Under the new agreement, Opti-Craft would
11 be able to collect directly from PEA members, for all amounts
12 billed retroactive to February 1, 1988. PEA would then
13 receive a 4% commission for sales to PEA members. PEA refused
14 the new agreement, and offered instead to create a joint bank
15 account with Opti-Craft, into which all funds for Opti-Craft
16 services from PEA members would be placed. Opti-Craft refused
17 this alternative.

18 On March 3, Opti-Craft demanded that PEA either enter the
19 agency agreement, or Opti-Craft would terminate their
20 relationship. When PEA refused, Opti-Craft sent a letter to
21 all PEA members directing them to pay Opti-Craft directly for
22 their February purchases. PEA did not authorize this letter.
23 Opti-Craft also did not send PEA a March statement for
24 February orders by PEA members. By withholding the statement,
25 Opti-Craft prevented PEA from billing and collecting from its
26 members for February purchases.

1 Opti-Craft offered incentives for PEA members to pay
2 Opti-Craft directly. Opti-Craft allowed the 11% discount the
3 member would have received had the payment been made to PEA
4 and paid on time. The member would not normally have earned
5 this volume discount had the member dealt directly with Opti-
6 Craft. Opti-Craft also sent a \$25.00 coupon to PEA members
7 which they could use in paying Opti-Craft for the member's
8 February invoice.

9 PEA filed for bankruptcy on March 16, 1988.

10 Opti-Craft collected at least \$312,408.00 from PEA
11 members for goods purchased through PEA and shipped between
12 February 1, 1988 and March 3, 1988. The trustee claimed that
13 amount is a voidable preference under 11 U.S.C. § 547(b).
14 Additionally, the trustee sought damages based on Opti-Craft's
15 conduct: \$8,500.00 for goods ordered by PEA members through
16 PEA before March 3, 1988, but shipped after that date;
17 \$7,575.00 for unauthorized credits given to PEA members in the
18 form of the \$25.00 coupons; and \$35,981.00 for unauthorized
19 discounts based upon Opti-Craft giving PEA's discount to
20 members. Finally, the trustee sought to void the February 16
21 partial payment, as it was within the preference period, and
22 not in the ordinary course of business.

23 The Bankruptcy Court ruled against the trustee, holding
24 that PEA members were directly liable to Opti-Craft for orders
25 placed through PEA. The relationship between PEA and Opti-
26 Craft was not "buyer and seller." Instead, PEA acted as a

1 dual agent between the members and Opti-Craft. Therefore, the
2 payments were not voidable preferences, and Opti-Craft did not
3 tortiously interfere with the contracts between PEA and its
4 members. However, the Bankruptcy Court did hold the February
5 16 payment was a voidable preference. Opti-Craft could not
6 show the payment was in the ordinary course of business, and
7 therefore excludable from the bankruptcy estate under 11
8 U.S.C. § 547(c)(2).

9 Trustee appeals the ruling on several grounds. Opti-
10 Craft cross-appeals, claiming the February 16 payment was not
11 voidable.

12 STANDARD OF REVIEW

13 This court must uphold the Bankruptcy Court's findings of
14 fact unless they are clearly erroneous. Conclusions of law
15 are reviewed de novo. Daniels-Head & Assoc. v. Mercer, Inc.
16 (In re Daniels-Head & Assoc.), 819 F.2d 914, 918 (9th Cir.
17 1987). The party seeking review of the Bankruptcy Court's
18 decision bears the burden of proof. In re Van Rhee, 80 Bankr.
19 844, 846 (W.D. Mich. 1987).

20 The parties cannot agree which are factual findings, and
21 which are legal conclusions. Opti-Craft argues the Bankruptcy
22 Judge's dismissal of the Trustee's claims were "factual
23 findings", based on the fact that PEA had an "agency"
24 relationship with its members. However, the Bankruptcy
25 Judge's decision that PEA's February payment was not "in the
26 / / /

1 ordinary course of business" under 11 U.S.C. § 547(c)(2), was
2 a legal conclusion, and therefore merits de novo review.

3 The Trustee argues that while the Bankruptcy Judge
4 referred to his conclusions as "findings", that label is not
5 controlling on this court. The Bankruptcy Judge's conclusions
6 were based on applying a legal framework to undisputed facts,
7 and therefore should be reviewed de novo. Trustee agrees that
8 Opti-Craft's claim under § 547(c)(2) is a purely legal
9 question, and merits de novo review.

10 I need not resolve this dispute, as I would affirm the
11 Bankruptcy Court's decision under either standard.

12 DISCUSSION

13 I. Trustee's Appeal

14 A. Payments by PEA members to Opti-Craft were not a preference
15 under § 547(b).

16 The bankruptcy trustee will void as preferential any
17 transfer of a debtor's property made within ninety days before
18 the petition is filled, unless specifically exempted by the
19 Bankruptcy Code. 11 U.S.C. § 547 (b). However, a transfer is
20 preferential only if the property or the interest in property
21 transferred belongs to the debtor. Payments made by a
22 contract debtor of a bankrupt to a creditor of the bankrupt do
23 not become part of the bankruptcy estate where there is an
24 independent obligation on the part of the debtor to pay the
25 creditor. In re Flooring, 37 Bankr. 957, 961 (Bankr. 9th Cir.
26 1984).

1 The agreement between PEA and its members described PEA
2 as "an organization which permits participants to purchase
3 supplies at reduced prices." The agreement also included the
4 following language: "The reduced prices are possible because
5 of the volume purchases by the participants of PEA" (emphasis
6 added). The individual doctors who were members of PEA
7 contacted Opti-Craft directly, and placed their orders for
8 lenses. Each lens shipment to a PEA member included an
9 invoice from Opti-Craft. Lens prices were set by Opti-Craft.
10 Opti-Craft also reserved the right to refuse shipment to any
11 PEA members, if it so desired. In light of the terms of this
12 agreement, the Bankruptcy Court concluded the individual PEA
13 members who purchased lenses from Opti-Craft were the
14 "buyers", and not PEA itself. That is correct.

15 The agreement between Opti-Craft, PEA, and the members
16 was not a contract for the sale of goods, as in the usual
17 manufacturer/wholesaler/retailer relationship. PEA was an
18 agent of both the buyer and seller; it had a dual agency role
19 to furnish buyers to Opti-Craft, and to furnish discounts to
20 buyers who placed orders with Opti-Craft. See Restatement
21 (Second) of Agency, § § 14 (j) and 14 (k). The members were
22 disclosed principals ordering through their agent, PEA,
23 leaving the members still directly liable to Opti-Craft. The
24 true sale was between Opti-Craft and the PEA member. PEA
25 members were contractually liable to Opti-Craft, independent
26 of their liability to PEA.

1 Nevertheless, the trustee asserts that the parties
2 intended for PEA to be considered a wholesaler, and argues
3 that the demands of the optical industry require this type of
4 arrangement. To compete with in-house labs providing one-
5 hour service, eyecare professionals need a quick turn-around
6 time on prescription lenses. Because each set of lenses must
7 conform not only to a unique prescription, but also to a
8 specific set of glass frames, PEA members had to deal directly
9 with Opti-Craft. Therefore, it is the demands of the
10 industry, not the intentions of the parties, that dictate this
11 form of operation.

12 This argument is irrelevant. If the eyecare market is as
13 the trustee portrays it, and only the type of financing
14 arrangement utilized by the parties in this case will work,
15 then only agency forms of financing can be utilized. There is
16 no applicable exception in the law of agency for the eyecare
17 industry. PEA had two divisions for a reason. General
18 eyecare products can be purchased, stored, and resold while
19 eyeglass lenses cannot. Therefore, PEA's buying division must
20 be construed as an agency relation between PEA members and
21 Opti-Craft.

22 Because PEA members were independently obligated to Opti-
23 Craft for the lenses they ordered, their direct payments to
24 Opti-Craft cannot be considered as taking anything away from
25 the bankruptcy estate. These payments were not preferential,
26 even though they satisfied a debt of PEA to Opti-Craft.

1 Members were also satisfying their own obligations to Opti-
2 Craft.

3 B. Opti-Craft did not tortiously interfere with the contracts
4 between PEA and PEA members.

5 Trustee also appeals the Bankruptcy Court's decision that
6 Opti-Craft did not tortiously interfere with PEA's contracts
7 with its members. Trustee argues PEA had an existing business
8 relationship with its members, Opti-Craft interfered with that
9 relationship with an improper motive, and used improper means,
10 causing PEA to suffer damages beyond the interference itself.
11 See Ron Tonkin Gran Turismo v. Wakehouse Motors, 46 Or. App.
12 199, 208, 611 P.2d 658 (1980). Trustee argues Opti-Craft used
13 the following improper means to interfere with contracts
14 between PEA and PEA members. First, Opti-Craft refused to
15 send PEA a statement of orders by PEA members, which made it
16 impossible for PEA to bill its members. Second, Opti-Craft
17 offered discounts and a \$25.00 coupon as inducements for PEA
18 members to pay Opti-Craft directly, depriving PEA of its
19 funds.

20 However, PEA had already breached their contract with
21 Opti-Craft. The breach was legal justification for Opti-
22 Craft to withdraw PEA's authority to collect the outstanding
23 accounts, and allow Opti-Craft to collect directly from the
24 members. See Daniels-Head, 819 F.2d at 919.

25 / / /

26 / / /

1 C. Opti-Craft Did Not Violate the Automatic Stay

2 Once a bankruptcy petition is filed, 11 U.S.C. § 362
3 operates as an automatic stay of most proceedings against the
4 bankrupt. Creditors are blocked from initiating or continuing
5 lawsuits, or any acts to obtain possession of the bankrupt's
6 property.

7 PEA filed for Bankruptcy on March 16, 1988. All disputed
8 actions by Opti-Craft took place before that date. Any moneys
9 from PEA members that Opti-Craft received after that date were
10 due to the pre-petition contacts.

11 II. Opti-Craft's Cross-Appeal

12 Opti-Craft claims that a timely partial payment is still
13 within the ordinary course of business, under 11 U.S.C
14 § 547(c)(2). Congress enacted § 547(c)(2) to prevent the
15 trustee from voiding debtor's payments "in the ordinary course
16 of business." This section recognizes that payments by
17 business and non-business debtors on open credit purchase
18 plans and to routine creditors such as utilities do not
19 violate the policies of § 547. However, any payment that
20 deviates substantially from the payment history of the debtor
21 is subject to question, particularly where the creditor is
22 aware of the debtor's deteriorating financial condition.
23 White & Summers, Uniform Commercial Code, § 23-5 (West, 3rd
24 Ed. 1988).

25 Opti-Craft has not shown that the \$100,000.00 payment in
26 February, 1988 was in the ordinary course of business, within

1 the meaning of § 547(c)(2). While the payment was made on the
2 customary date (allowing for the fact February 15, 1988 was a
3 holiday), it was only a partial payment. Such a payment was
4 outside the ordinary course of business of these parties, and
5 therefore preferential under § 547(b). In re Economy Milling
6 Co., Inc., 37 Bankr. 914 (D. S.C. 1983); Waldschmidt v. Rainer
7 (In re Fulghum Const. Corp.), 78 Bankr. 146, 152 (M.D. Tenn.
8 1987); In re Gull Air, Inc., 82 Bankr. 1 (Bankr. D. Mass.
9 1988).

10 CONCLUSION

11 PEA members were independently obligated to Opti-Craft
12 for the lenses the members ordered. Therefore, the members
13 payments directly to Opti-Craft do not constitute a preference
14 under § 547(b). Opti-Craft did not tortiously interfere with
15 PEA's contract with the PEA members. PEA had already breached
16 its contract with Opti-Craft, so Opti-Craft was entitled to
17 directly contact PEA members. Opti-Craft did not violate the
18 automatic stay. Finally, PEA's February 1988 partial payment
19 was not in the ordinary course of business under § 547(c)(2),
20 and therefore is a voidable preference.

21 The Bankruptcy Court's decision is affirmed.

22 DATED this 22 day of May, 1990.

23 

24 OWEN M. PANNER, United States
25 District Court Judge
26