

Watson v. Ragen, Tremaine Adv. No. 90-3351-S

In re Atkins 389-30300-S7

2/7/91      DDS      Unpublished  
7/10/91     J. Panner Affirming J.Sullivan

The trustee sued to recover payments made to a law firm within 90 days of the debtor's chapter 7 as preferential transfers. Judge Sullivan granted the defendants' motion for summary judgment. Judge Panner affirmed the bankruptcy court using similar reasoning.

The payments were made by a non debtor corporation, which was owned by the debtors. There was no evidence that the transfers diminished the bankruptcy estate since they came from a third party. The trustee did not present any material facts to support his claim that the debtors had such control over the corporation that a transfer of the corporation's assets should be considered a transfer of the debtor's assets for preference purposes.

FILED

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CLERK OF DISTRICT COURT  
DISTRICT OF OREGON

BY \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

In re:	)	USDC No. CV-91-433-PA
ROGER M. ATKINS and	)	
JOYCE J. ATKINS,	)	Bankruptcy Case No.
	)	389-30300-S7
Debtors.	)	
	)	Adv. Proc. No. 90-3351
RONALD A. WATSON, as Trustee	)	
of the Estate of ROGER M.	)	
ATKINS and JOYCE J. ATKINS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
RAGEN, TREMAINE, KRIEGER,	)	OPINION
SCHMEER & NEILL, an Oregon	)	
Partnership, and	)	
DAVIS WRIGHT TREMAINE, an	)	
Oregon Partnership,	)	
	)	
Defendants.	)	

DAVID W. STAUFFER  
Suite 440  
621 SW Morrison  
Portland, OR 97205

Attorney for Plaintiff Ronald A. Watson

/ / /  
/ / /

1 - OPINION

91-3611

28

1 A. GREGORY POWELL  
Davis, Wright, Tremaine  
2 1300 SW Fifth Avenue  
2300 First Interstate Tower  
3 Portland, OR 97210

4 Attorneys for Defendant Davis Wright Tremaine

5 PANNER, J.

6 Ronald A. Watson, plaintiff and trustee of the estate of  
7 Roger M. and Joyce J. Atkins, debtors, appeals the bankruptcy  
8 court's order granting summary judgment for defendant, Ragen,  
9 Tremaine, Krieger, Schmeer, & Neill, an Oregon partnership. I  
10 have jurisdiction under 28 U.S.C. § 158(a). I affirm.

11 BACKGROUND

12 Prior to filing their Chapter 7 bankruptcy petition,  
13 debtors transferred their interest in the insurance business  
14 which they owned, to Atkins & Associates Inc. ("Atkins Inc."),  
15 a corporation in which debtors were the sole shareholders and  
16 managers. In exchange, Atkins Inc. agreed to pay debtors'  
17 legal costs of defending a breach of contract suit involving  
18 their purchase of the insurance business. Atkins Inc. also  
19 agreed to pay to debtors an additional reasonable sum to be  
20 determined later. Debtors retained defendant as their legal  
21 counsel in the breach of contract suit.

22 During the ninety days prior to debtors' bankruptcy  
23 filing, Atkins Inc. made payments totalling \$36,046.94 to  
24 defendant for legal fees incurred by debtors. The trustee  
25 sought to avoid Atkins Inc.'s payment to defendant under 11  
26 U.S.C. § 547(b). Both the trustee and defendant moved for

1 summary judgment. The bankruptcy court denied the trustee's  
2 motion and granted defendant's motion.

### 3 STANDARD OF REVIEW

4 The district court acts as an appellate court when  
5 reviewing a bankruptcy court judgment. Daniels-Head & Assoc.  
6 v. William M. Mercer, Inc. (In re Daniels-Head & Assoc.), 819  
7 F.2d 914, 919 (9th Cir. 1987). Conclusions of law are  
8 reviewed de novo. Id.

### 9 DISCUSSION

10 The bankruptcy court found that the \$36,046.94 in  
11 payments to defendant were not preferential transfers because  
12 the payments were the property of Atkins Inc., not the  
13 property of debtors. As authority, the bankruptcy court cites  
14 Continental & Commercial Trust & Savings Bank v. Chicago Title  
15 & Trust Co., 229 U.S. 435 (1913), which teaches that

16 [t]o constitute a preferential transfer ... there  
17 must be a parting with the bankrupt's property for  
18 the benefit of the creditor and a consequent  
19 diminution of the bankrupt's estate.

20 Id. at 443.

21 The prohibition against preferential transfers is  
22 designed to insure equitable distribution of the debtor's  
23 property amongst all creditors and to prevent the debtor from  
24 favoring one creditor over another. Begier v. Internal  
25 Revenue Service, 110 S. Ct. 2258, 2262-63 (1990). A transfer  
26 is preferential, and thus avoidable, only if it involved "an  
interest of the debtor in property." Section 547(b). An  
interest of the debtor in property

1 subject to the preferential transfer provision is  
2 best understood as that property that would have  
3 been part of the estate had it not been transferred  
4 before the commencement of bankruptcy proceedings.

5 Begier, 110 S. Ct. at 2263. The subject property includes all  
6 of the debtor's legal and equitable interests in property.

7 Id.

8 Generally, property belongs to the debtor for  
9 purposes of § 547 if its transfer will deprive the  
10 bankruptcy estate of something which could otherwise  
11 be used to satisfy the claims of creditors.

12 Danning v. Bozek (In re Bullion Reserve of North America), 836  
13 F.2d 1214, 1217 (9th Cir.), cert. denied, 486 U.S. 1056  
14 (1988).

15 Although defendant rendered services to debtors, it  
16 billed Atkins Inc., looked to Atkins Inc. for payment, and in  
17 fact received payment from Atkins Inc. Watson (Trustee) v.  
18 Ragen, Tremaine, Krieger, Schmeer, & Neill (In re Roger M.  
19 Atkins and Joyce J. Atkins), No. 90-3351-S, Exhs. H, I  
20 (Account Statements, Cancelled Checks) (Bankr. D. Or. 1991).  
21 As a corporation, Atkins Inc. possesses a separate legal  
22 existence from its shareholders. Atkins Inc. maintained  
23 accounts, paid taxes, and received income from its insurance  
24 business. The accounts of debtors and Atkins Inc. were not  
25 co-mingled. Nor is there any indication that Atkins Inc. and  
26 debtors in any way amalgamated their separate property. The  
property transferred by Atkins Inc. was its own and not that  
of debtors.

/ / /

1           The trustee contends that control is a surrogate for  
2 ownership. He argues that debtors "controlled" Atkins Inc.,  
3 and therefore "owned" its assets. In support of this  
4 proposition the trustee cites Howdeshell of Fort Myers v.  
5 Dunham-Bush Inc. (In re Howdeshell of Fort Myers), 55 B.R. 470  
6 (Bankr. M.D. Fl. 1985). The trustee contends that the case  
7 law in Howdeshell is controlling, and cites:

8           When a creditor is paid from the funds of a third  
9 party, the Court must look to the source of control  
10 over the disposition of the funds to determine  
11 whether the payment is an avoidable preference.

12 55 B.R. at 474.

13           The trustee's argument is unpersuasive. Debtors did not  
14 control the disposition of the funds paid to defendant.  
15 Atkins Inc. owned and controlled the funds which were paid to  
16 defendant. While acting as Atkins Inc.'s officers, debtors  
17 were obligated to discharge their duties in accordance with  
18 their fiduciary duties and in the interest of the corporation.  
19 Or. Rev. Stat. § 60.377(1). These duties included making  
20 payment to Atkins Inc.'s creditors. When debtors paid  
21 defendant from Atkins' Inc.'s account, they were under the  
22 corporation's control and acting on its behalf and not their  
23 own.

24           The transfers made by Atkins Inc. to defendant were not  
25 preferential and thus avoidable, because they did not involve  
26 "an interest of the debtor in property." Even without the  
transfer the money would not have been part of the debtors'

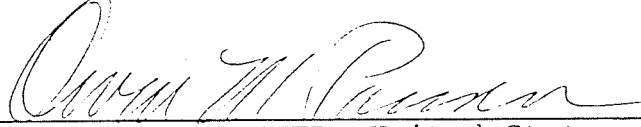
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1 estate. Therefore, a preferential transfer did not take  
2 place.

3 CONCLUSION

4 I affirm the Bankruptcy Judge's grant of summary judgment  
5 for defendant.

6 DATED this 9 day of July, 1991.

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OWEN M. PANNER, United States  
District Court Judge

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	389-30300-S7
ROGER M. ATKINS and	)	
JOYCE J. ATKINS,	)	Adversary Proceeding No.
	)	90-3351-S
Debtors,	)	
	)	MEMORANDUM GRANTING SUMMARY
RONALD A. WATSON, as	)	JUDGMENT IN FAVOR OF DEFENDANT
Trustee of the Estate	)	
of Roger M. Atkins and	)	
Joyce J. Atkins, Debtors,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
RAGEN, TREMAINE,	)	
KRIEGER, SCHMEER &	)	
NEILL, an Oregon	)	
partnership, and DAVIS,	)	
WRIGHT & TREMAINE, an	)	
Oregon partnership,	)	
	)	
Defendants.	)	

The trustee sued Ragen, Tremaine to recover \$36,046.94 as a preferential transfer. Ragen, Tremaine admits it received the payments for legal fees within the 90 days before the debtors filed bankruptcy, but claims that the payments were

PAGE 1 - MEMORANDUM GRANTING SUMMARY JUDGMENT TO DEFENDANT



1 made by a corporation which is not a party to this action.  
2 The parties filed cross motions for summary judgment. For the  
3 following reasons, judgment should be entered in favor of the  
4 defendant and against the trustee.

5 The trustee has not presented evidence of any material  
6 facts which would require a trial in this case. The trustee  
7 filed an affidavit to supply business records which included  
8 the facts upon which he relied to prove his case. Copies of  
9 the checks used to pay Ragen, Tremaine's legal fees are  
10 attached to the trustee's points and authorities as Ex. I.  
11 The checks were drawn on the account of Atkins & Associates,  
12 Inc., and were each signed by one of the debtors.

13 The trustee may avoid a transfer of an interest of the  
14 debtor in property which fulfills the requirements of 11  
15 U.S.C. §547(b). The trustee has the burden of proving the  
16 avoidability of the transfer. 11 U.S.C. §547(g). The  
17 initial element which the trustee must prove is that the  
18 property transferred belonged to the debtor, and the transfer  
19 diminished the bankruptcy estate. Continental & Commercial  
20 Trust & Sav. Bank v. Chicago Title & Trust Co., 229 U.S. 435,  
21 57 L.Ed. 1268, 33 S.Ct. 829 (1913). The checks which evidence  
22 the transfers at issue were from Atkins & Associates, Inc.,  
23 and not from the debtors. The trustee claims that the debtors  
24 controlled the corporation, and that control is a sufficient  
25 substitute for an ownership interest in the property  
26 transferred.

PAGE 2 - MEMORANDUM GRANTING SUMMARY JUDGMENT TO DEFENDANT

1 To support his theory, the trustee cites In re Jaggars,  
2 48 Bankr. 33 (Bankr. W.D. Tex. 1985), and its progeny. The  
3 passage upon which the trustee relies states:

4 When a debtor uses the funds of a third  
5 party to pay an obligation of the debtor the Court  
6 must look to the source of the control over the  
7 disposition of the funds in order to determine  
8 whether a preference exists. If the debtor  
9 controls the disposition of the funds and  
10 designates the creditor to whom the monies will be  
11 paid independent of the third party whose funds are  
12 being used in partial payment of the debt, then the  
13 payments made by the debtor to the creditor  
14 constitute a preferential transfer. Hence, if the  
15 funds are available for payment to the creditors of  
16 the debtor generally the funds are an asset of the  
17 estate and payment thereof constitutes a diminution  
18 of the estate.

12 In re Jaggars, 48 Bankr. at 36 - 37.

14 The trustee contends that the debtors controlled Atkins &  
15 Associates, Inc. The evidence he relies on to prove this  
16 contention is that the debtors owned 100% of the stock of the  
17 corporation, they were a quorum of the officers and directors,  
18 they worked full time for the corporation and they signed the  
19 checks. The trustee also points to Ex. G, the minutes of a  
20 special meeting of the debtors as the shareholders and  
21 directors of Atkins & Associates, Inc., which was held on  
22 October 12, 1987. At that meeting, the debtors transferred  
23 their interest in the Corbett-Smith insurance business to the  
24 corporation in exchange for the corporation assuming all  
25 defense costs and for other consideration to be determined  
26 later. The transfer of the Smith-Corbett business has not

PAGE 3 - MEMORANDUM GRANTING SUMMARY JUDGMENT TO DEFENDANT

1 been attacked in this lawsuit and occurred over a year before  
2 the debtors filed chapter 7.

3 There are several reasons why the trustee's reliance on  
4 the Jaggers case is not persuasive. The facts of Jaggers were  
5 quite different from those involved in this case. The  
6 accounts from which the debtor in Jaggers made the payments  
7 contained funds of the debtor commingled with corporate funds,  
8 the debtor used the accounts to pay personal bills, and the  
9 debtor's salary ledger was charged with the payments made to  
10 the defendant creditor. In this case, the trustee submitted  
11 no evidence that the debtors commingled their personal funds  
12 with the corporate funds or used corporate funds to pay  
13 personal debts.

14 The broad language of Jaggers cited by the trustee must  
15 be limited to the issue of whether the debtor controlled the  
16 property to the extent that he owned it so that the transfer  
17 diminished the estate. In re Hartley, 825 F.2d 1067, 1070  
18 (6th Cir. 1987).

19 The business documents submitted with the cross motions  
20 for summary judgment all establish that the transfers to  
21 Ragen, Tremaine were of property of Atkins & Associates, and  
22 that Atkins was a corporation with its own creditors. When  
23 the debtors transferred their interest in Corbett-Smith to the  
24 corporation, the corporation undertook the obligation to pay  
25 the legal fees to Ragen, Tremaine. Payment by the corporation  
26 of its own debt is not preferential and does not diminish this

PAGE 4 - MEMORANDUM GRANTING SUMMARY JUDGMENT TO DEFENDANT

1 bankruptcy estate. Brown v. First Nat. Bank, 748 F.2d 490  
2 (8th Cir. 1984).

3 The corporate checks, corporate tax returns, and  
4 corporate minutes all establish that Atkins & Associates was a  
5 separate entity that was paying its own obligation, and that  
6 the transfers at issue did not diminish the assets of the  
7 estate. The trustee has not submitted anything in response  
8 to defendant's motion for summary judgment which demonstrates  
9 there is a material issue of fact which should be tried. Mr.  
10 Stauffer's allegations of fraud made during oral argument on  
11 these cross motions are unsubstantiated and are not a basis to  
12 deny defendant's motion for summary judgment. T.W. Electrical  
13 Service, Inc. v. Pacific Electrical Contractors Assn., 809  
14 F.2d 626, 630 (9th Cir. 1987).

15 A separate judgment will be entered.

16 DATED this 7th day of February, 1991.

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19 DONAL D. SULLIVAN  
Bankruptcy Judge

20 cc: David W. Stauffer  
21 A. Gregory Powell  
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