

11 U.S.C. § 547(b)
11 U.S.C. § 550©
11 U.S.C. § 551
Lien avoidance

In Re Williams Case # 696-66577-aer7
Roost v. Associates Home Equity Services, Inc. Adv. #98-6195-aer
6/3/99 Radcliffe Published

Debtor and his spouse jointly purchased a manufactured home and real property and gave both the manufactured home and the land as security for a purchase money loan. The security interest in the manufactured home was not perfected until 52 days after the purchase. Debtor filed his Chapter 7 petition approximately 6 months after the purchase. The trustee sought to avoid the transfer of the security interest in Debtor's ownership interest in the manufactured home as an "insider preference" arguing that the Debtor's grant of the security interest was for the benefit of Debtor's wife. The Defendant/Creditor moved for judgment on the pleadings on the basis of § 550(c).

Holding: The Creditor's motion was denied.

The Court held that § 550© (the purportedly "anti-Deprizio" provision added to the Code by virtue of the 1994 amendments) was inapplicable. That section only concerns "recovery" after an avoided transfer.

Recognizing a split of authority as to whether § 550 must be used in conjunction with the Code's avoidance sections, the Court held it did not. Avoidance of a security interest under § 547(b) (and automatic preservation under § 551) affords the estate a sufficient remedy where the property subject to the security interest is already estate property and has not been transferred to the creditor or a third party prior to the bankruptcy.

The Court applied the plain meaning of the statutes involved and noted that if Congress had intended to protect a lien creditor from an "insider" preference in the situation at bar, it would have added another defense to § 547(c).

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:	)	Bankruptcy Case No.
	)	696-66577-aer7
TIMOTHY L. WILLIAMS,	)	
	)	
Debtor.	)	
	)	
ERIC R. T. ROOST, Trustee,	)	Adversary Proceeding
	)	No. 98-6195-aer
Plaintiff,	)	
	)	
v.	)	
	)	
ASSOCIATES HOME EQUITY	)	MEMORANDUM OPINION
SERVICES, INC.,	)	
	)	
Defendant.	)	

BACKGROUND

This matter comes before the court upon the defendant's Motion for Judgment on the Pleadings. Plaintiff (the trustee) brought this adversary proceeding to avoid, as a preferential transfer, the security interest of the defendant in the debtor's interest in a mobile home. The trustee's case is based upon the fact that the perfection of the defendant's security interest in the mobile home occurred more than 90 days, but within one year from the

1 Chapter 7 bankruptcy filing by the debtor, herein. The trustee
2 contends that the transfer was for the benefit of the debtor's wife,
3 an insider, therefore, the trustee may avoid the perfection of the
4 security interest under the Deprizio rationale.

5 The defendant contends that the 1994 Amendments to
6 11 U.S.C. § 550(c) deprive the trustee of any recovery, hence, this
7 adversary proceeding may be disposed of upon the defendant's Motion
8 for Judgment on the Pleadings.

9 Defendant's motion is based on FRCP 12(c) made applicable by
10 FRBP 7012(b). Under FRCP 12(c), a motion for judgment on the
11 pleadings will be granted when no material issue of fact remains to
12 be resolved and the moving party is entitled to judgment as a matter
13 of law. Yanez v. U.S., 63 F.3d 870 (9th Cir. 1995). For purposes
14 of the motion, all of the well pled factual allegations of the
15 complaint are assumed to be true and all of the contravening factual
16 allegations are deemed to be false. In Re Reynolds, 189 B.R. 199
17 (Bankr. D. Or. 1995) (internal citations omitted). In considering
18 the motion, the trial court is required to view the facts presented
19 in the pleadings and the inferences to be drawn therefrom in the
20 light most favorable to the nonmoving party. Id. However, the
21 court is not required to accept, as true, conclusions of law couched
22 as factual allegations. Naehu v. Provest, 80 A.F.T.R. 2d 97-6211,
23 1997 WL 1037947 (D. Hawai'i 1997); Jackson v. East Bay Hospital, 980
24 F. Supp. 1341 (N.D. Cal. 1997).

25 Here, there does not appear to be any dispute as to the
26 material facts. On June 7, 1996 the debtor and Tonja Williams, the

1 debtor's wife, incurred a debt to the defendant in the amount of
2 \$59,671 for the purchase of a 1994 Liberty Manufactured Home and
3 real property located at 675 Fourth Street, Riddle, Oregon.¹ On the
4 same date, the debtor and Tonja Williams entered into a security
5 agreement, pledging both the real property and the mobile home as
6 security for the payment of the debt. The security interest in the
7 mobile home was not perfected until July 29, 1996. The debtor filed
8 his Chapter 7 bankruptcy petition, herein, on December 12, 1996.
9 Thus, the perfection of the defendant's security interest in the
10 mobile home occurred more than 90 days, but less than one year prior
11 to the bankruptcy filing.

12 ISSUE

13 The sole issue raised by defendant's Motion for Judgment on
14 the pleadings is whether or not the trustee's claim is barred by the
15 1994 Amendments to 11 U.S.C. § 550.

16 DISCUSSION

17 This court had originally concluded that the perfection of
18 defendant's security interest was not for the benefit of Tonja
19 Williams in a letter opinion entered, herein, on February 17, 1999.
20 Since the entry of the letter opinion, however, the parties have
21 agreed that the perfection of defendant's security interest was at
22 least of some potential benefit to Tonja Williams, the insider,
23 hence, the issue described above requires a resolution. This
24 appears to be a matter of first impression in this District.

25
26 ¹The trustee-plaintiff makes no claim to the real property.

1 The trustee relies upon Deprizio and the line of cases
2 decided thereunder in order to prevail. Levit v. Ingersoll Rand
3 Financial Corp. (In re Deprizio Construction Co.), 874 F.2d 1186 (7th
4 Cir. 1989). Indeed, Deprizio has been followed by the Ninth
5 Circuit, See In re Suffolla, Inc., 2 F.3d 977 (9th Cir. 1993).

6 In the Deprizio case, Deprizio Construction Company made
7 payments to its lenders on debts that had been guaranteed by Richard
8 Deprizio and his brothers, controlling shareholders. After the
9 corporation filed bankruptcy, the trustee sued the lenders to
10 recover the payments as preferences pursuant to §§ 547 and 550.²
11 The Seventh Circuit agreed with the trustee, reasoning that even
12 though the payments were not made to the insiders, they were for the
13 benefit of insider creditors, by reducing their liability to the
14 lenders upon their guarantees.

15 In response to concerns raised by the lending community,
16 Congress, in 1994, amended § 550 of the Bankruptcy Code. Prior to
17 its amendment, § 550 provided in pertinent part:

18 (a) Except as otherwise provided in this section,
19 to the extent that a transfer is avoided under section
20 . . . 547 . . . of this title, the trustee may recover,
21 for the benefit of the estate, the property
22 transferred, or, if the court so orders, the value of
23 such property, from --

24 (1) the initial transferee of such transfer
25 or the entity for whose benefit such transfer was
26 made; or

 (2) any immediate or mediate transferee of
 such initial transferee.

²Unless otherwise noted, all statutory references are to Title 11 of the
United States Code.

1 The 1994 Amendment added subsection (c) which provides:

2 If a transfer made between 90 days and one year
3 before the filing of the petition --

4 (1) is avoided under section 547(b) of this
5 title; and

6 (2) was made for the benefit of a creditor
7 that at the time of such transfer was an insider;

8 the trustee may not recover under subsection (a) from
9 a transferee that is not an insider.

10 Since the defendant is a non-insider creditor, defendant
11 maintains that the 1994 Amendment to § 550 bars any recovery by the
12 trustee, hence, this adversary proceeding must fail.

13 The trustee concedes that the amendment to § 550 bars any
14 "recovery" by the trustee. He maintains, however, that no
15 "recovery" is necessary in this case. Rather, the security interest
16 of the defendant is avoided pursuant to § 547(b),³ after which the

17 ³Section 547(b) provides:

18 Except as provided in subsection (c) of this section, the
19 trustee may avoid any transfer of an interest of the debtor in
20 property--

21 (1) to or for the benefit of a creditor;

22 (2) for or on account of an antecedent debt owed by the debtor
23 before such transfer was made;

24 (3) made while the debtor was insolvent;

25 (4) made--

26 (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

(continued...)

1 lien of the defendant is preserved for the benefit of the estate
2 pursuant to § 551 which provides in pertinent part as follows:

3 Any transfer avoided under section . . . 547, . . . of
4 this title . . . is preserved for the benefit of the
5 estate but only with respect to property of the
6 estate.

7 The trustee points out that the debtor's interest in the
8 mobile home became property of the bankruptcy estate upon the filing
9 of the petition, herein, pursuant to § 541(a).⁴ The debtor and his
10 wife were in possession of the mobile home at that time and have
11 remained continuously in possession. Thus, the trustee maintains
12 that he need not "recover" anything pursuant to § 550.

13 The defendant argues that "recovery" under § 550 is necessary
14 to give the trustee an effective remedy, since the lien and its

15 ³(...continued)

16 (5) that enables such creditor to receive more than such
17 creditor would receive if—

18 (A) the case were a case under chapter
19 7 of this title;

20 (B) the transfer had not been made; and

21 (C) such creditor received payment of such
22 debt to the extent provided by the provisions
23 of this title.

24 ⁴Section 541(a) provides in pertinent part:

25 The commencement of a case under section 301, 302 or 303
26 of this title creates an estate. Such estate is comprised
of all the following property, wherever located and by
whomever held:

(1) Except as provided in subsections (b) and (c) (2) of
this section, all legal or equitable interests of the
debtor in property as of the commencement of the case.

1 value is the property that the trustee seeks to "recover". Since
2 recovery is barred, the trustee's claim must fail.

3 In his article, "The Deprizio Override", Richard C. Josephson
4 concludes that the position taken by the trustee is correct. He
5 notes: "If the Trustee prevails and avoids the security interest,
6 there is no need for the trustee to resort to Code § 550 for
7 recovery: The collateral is still in the possession of the estate
8 and the . . . secured creditor has no enforceable claim for
9 turnover." Richard C. Josephson, *The Deprizio Override*, 4-JUN Bus.
10 L. Today 40, ___ (1995).⁵

11 There appears to be a split of authority as to whether § 547
12 may afford a remedy separate and distinct from the ability to
13 "recover" pursuant to § 550. Compare In re McLaughlin, 183 B.R. 171
14 (Bankr. W.D. Wis. 1995) where the court indicated that where a
15 security interest is avoided pursuant to § 547 the appropriate
16 remedy is provided by § 550(a), with In re Congress Credit
17 Corporation, 186 B.R. 555 (D. Puerto Rico 1995) where the court
18 held:

19 When the property is subject to a creditor's lien or
20 other interest and has not yet been transferred to a
21 third party, an action for recovery is unnecessary. Through avoidance alone, the trustee holds the
22 property free of the lien or other interest. In contrast, if the trustee does not have control over
23 the property, the trustee must seek its recovery under
24 section 550 of the Code.

25 ⁵For a contrary viewpoint see, Adam A. Lewis, *Did it or Didn't it? The*
26 *Deprizio Dilemma*, 14-OCT Am. Bankr. Inst. J. 20 (1995).

1 Id. at 558 (internal citations omitted).⁶

2 The defendant contends that any such split should be resolved
3 by an examination of the legislative history to § 550. Indeed, the
4 Congressional record contains a statement by Senator Grassley as
5 follows:

6 Our legislation overrules the Deprizio line of
7 decisions and clarifies congressional intent that non-
8 insider transferees should not be subject to the
9 preference provisions of the Bankruptcy Code beyond
10 the 90-day statutory period. Our aim is to encourage
commercial lenders and landlords to extend credit to
smaller business entities. (140 Cong. Rec. S14461
(Oct. 6, 1994) (statement of Sen. Grassley)).

11 Thus, the defendant maintains that it was clearly the
12 Congressional intent to overrule the Deprizio line of cases. Mr.
13 Josephson notes, however, that: "It may well be that Congress
14 intended merely to fix the narrow problem of insider creditors
15 having to repay Deprizio-like preferences." Richard C. Josephson,
16 *The Deprizio Override*, 4-JUN Bus. L. Today 40, __ (1995).

17 The Supreme Court has made it clear that, in questions of
18 statutory interpretation, the plain meaning of the statute is to be
19 given effect. When a statute is clear (i.e., non-ambiguous)
20 recourse to the legislative history is not appropriate. See United
21 States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S. Ct. 1026,
22 103 L. Ed.2d 290 (1989); United States v. Alvarez, 522 U.S. 350, 114

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24 ⁶It is clear, however, that once a security interest is avoided, it is
25 preserved automatically for the benefit of the estate pursuant to § 551. See In
26 re Heintz, 198 B.R. 581 (9th Cir. BAP (N.D. Cal.) 1996) where the Ninth Circuit
Bankruptcy Appellate Panel held that the preserved lien was valid as against the
debtor's claim to exemptions.

1 S. Ct. 1599, 128 L. Ed.2d 319 (1994); Hughes Aircraft Company v.
2 Jacobson, ___ U.S. ___, 119 S. Ct. 755, 142 L. Ed.2d 881 (1999);
3 Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 119 S. Ct.
4 2589, 120 L. Ed.2d 379 (1992).

5 Here, it is noteworthy that Congress chose to amend § 550 of
6 the Code, the "recovery" statute. Had Congress intended to
7 completely overrule the Deprizio line of cases and to prevent any
8 adversary proceeding, such as the case at bar, the most effective
9 method would have been to add another defense or exception to
10 avoidance in § 547(c).⁷ It is also noteworthy that there is no
11 mention of § 550 in § 551.

12 This court is persuaded that the position taken by the court
13 in In re Congress Credit Corporation, supra, as more fully explained
14 in the article by Richard C. Josephson, has merit. The trustee
15 brings an avoidance action pursuant to § 547(b). If the trustee
16 succeeds in avoidance, § 550(a) allows "recovery" of the property
17 transferred if such recovery is necessary. In that event, the 1994
18 Amendment to § 550 protects a non-insider creditor, such as the
19 defendant in this case. Where, however, the property is already
20 property of the estate pursuant to § 541 and the property has not
21 been transferred to the creditor or some other third party prior to
22 the filing of the bankruptcy, the trustee has no need for
23 "recovery". In such a case, where the trustee seeks merely to avoid
24 a security interest, the security interest is avoided and

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26 ⁷Section 547(c) already contains a number of defenses or exceptions to a
trustee's avoidance action.

1 automatically preserved for the benefit of the estate pursuant to §
2 551.

3 **CONCLUSION**

4 Based upon the foregoing, this court concludes that the
5 defendant's Motion for Judgment on the Pleadings should be denied as
6 the defendant is not entitled to judgment as a matter of law on the
7 issues raised in defendant's motion; an appropriate order shall be
8 entered.

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11 ALBERT E. RADCLIFFE
12 Bankruptcy Judge
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