

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

LARRY DAN DARNELL and
JEANNIE C. DARNELL,

Debtors.

No. 95-20712
Chapter 7

L. KIRK WYSS, TRUSTEE,

Plaintiff,

v.

FIRST TENNESSEE BANK,

Defendant.

Adv. Pro. No. 95-2055

M E M O R A N D U M

APPEARANCES:

L. KIRK WYSS, ESQ.
Post Office Box 1778
Morristown, TN 37816-1778
Attorney for L. Kirk Wyss, Trustee

FREDERICK L. CONRAD, JR., ESQ.
STEPHEN K. GARRETT, ESQ.
AMBROSE, WILSON, GRIMM & DURAND
Post Office Box 2466
Knoxville, TN 37901-2466
Attorneys for First Tennessee Bank

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This is an action by the chapter 7 trustee, L. Kirk Wyss (the "Trustee"), seeking the avoidance and recovery of an alleged preferential transfer to the defendant, First Tennessee Bank ("First Tennessee"). Previously, on January 3, 1996, the Trustee moved for summary judgment, and as support, filed the affidavits of the debtor Larry Darnell and Kathy Trent-Mullins, the clerk of the Hamblen County, Tennessee general sessions court. That motion was denied without prejudice by order entered February 1, 1996, because it was served prior to the parties' initial disclosures being made as required by Fed. R. Civ. P. 26(a), the parties' discovery meeting as required by subsection (f) of that rule, and the court's scheduling conference as required by Fed. R. Civ. P. 16(b). On March 5, 1996, the Trustee renewed the motion for summary judgment, asserting that there are no genuine issues of material fact in dispute and that he is entitled to judgment as a matter of law in the amount of \$7,927.71, plus prejudgment interest. Thereafter, First Tennessee filed its motion for summary judgment on March 8, 1996, relying on the affidavit of attorney Frederick L. Conrad, Jr., one of the attorneys representing First Tennessee in this action. In that motion, First Tennessee concedes that the only issue in controversy is whether the Trustee can establish that the transfer to First Tennessee

enabled First Tennessee to receive more than it otherwise would receive as a dividend from the debtors' bankruptcy estate. See 11 U.S.C. § 547(b)(5). As discussed below, the Trustee having established all the elements of his *prima facie* case and there being no genuine issue of material fact in dispute, the court will grant the Trustee's motion for summary judgment and correspondingly deny the motion of First Tennessee. This is a core proceeding. 11 U.S.C. § 157(b)(2)(E).

I.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the inference to be drawn from the underlying facts contained in the record must be viewed in a light most favorable to the party opposing the motion. See *Schilling v. Jackson Oil Co. (In re Transport Associates, Inc.)*, 171 B.R. 232, 234 (Bankr. W.D. Ky. 1994), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986). See also *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir.

1989), *rehearing denied* (1990).

II.

The following facts are not in dispute. The underlying chapter 7 bankruptcy case was filed by the debtors on May 16, 1995. Prior to the bankruptcy filing, on February 10, 1995, First Tennessee filed two civil warrants in the Hamblen County general sessions court, no. 64649 which sought to recover the sum of \$4,678.74 from the debtors for a deficiency balance after sale of collateral which had secured an installment loan, and no. 64650 which sought to recover \$518.44 from the debtor Larry Darnell for default on a promissory note, together with attorneys fees and interest.* The debtors were served with process on or about February 20, 1995, and the two matters were scheduled for trial on March 17, 1995. On that date, within the ninety days preceding the bankruptcy filing, the debtor Larry Darnell paid into the treasury of the Hamblen County general sessions court the total sum of \$7,927.71, which consisted of a payment in the amount of \$7,096.33 for civil warrant no. 64649

*The two actions were respectively styled *First Tennessee Bank c/o Ambrose, Wilson, Grimm & Durand v. Danny Darnell a/k/a Larry D. Darnell and Jeanie Darnell*, and *First Tennessee Bank c/o Ambrose, Wilson, Grimm & Durand v. Danny Darnell a/k/a Larry D. Darnell*.

and a payment in the amount of \$831.38 for civil warrant no. 64650. The source of those funds was a final payment on a building contract from one of Larry Darnell's customers, Paul Zimmerman. Mr. Darnell states in his affidavit that those amounts were what he was advised would be necessary to satisfy both cases. Those amounts presumably included attorney fees and costs in the respective amounts of \$2,602.71 and \$119.50. See answer of First Tennessee at ¶ 7. On March 22, 1995, the clerk issued checks in the amounts of \$7,096.33 and \$831.38 to Ambrose, Wilson, Grimm & Durand.

III.

11 U.S.C. § 547(b) provides in pertinent part as follows:

[t]he trustee may avoid any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made—
 - (A) on or within 90 days before the date of the filing of the petition; ... and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Since First Tennessee has not affirmatively challenged the

insolvency of the debtor within the ninety days preceding the bankruptcy filing, the presumption of insolvency during that period of time is conclusive and subsection (3) is deemed established. See 11 U.S.C. § 547(f). Of course, the remaining burden of proving the avoidability of a transfer under § 547(b) lies with the Trustee. See 11 U.S.C. § 547(g). In this regard, First Tennessee does not dispute that the Trustee has established the elements required by subsections (1), (2) and (4) of § 547(b). Indeed, it is obvious from the facts in this case that property of either the debtor Larry Darnell or of both debtors in the amount of \$7,927.71 was transferred to the creditor First Tennessee Bank, in care of its attorneys, within ninety days prior to the debtors' bankruptcy filing on account of antecedent debts owed by the debtors to First Tennessee.

The only remaining element of § 547(b) which must be established is whether the transfer to First Tennessee allowed it to receive more than it would receive under chapter 7 if the transfer had not been made. In this regard, the Trustee states in his motion that including the recovery of the alleged preferential transfer at issue herein, "less than \$15,000 will be available in total to satisfy nearly \$71,000 of unsecured debt such that unsecured creditors may reasonably expect, after administrative expenses, less than 20¢ on the dollar." First

Tennessee does not dispute this assertion.

Rather, First Tennessee takes the position that if the monies had not been paid into court, First Tennessee would have pursued and obtained a judgment against the debtors and thereafter, would have recorded that judgment in the Hamblen County Register of Deeds office thereby creating a judgment lien on the real estate belonging to the debtors. Since the Trustee sold the debtors' home, with the debtors waiving their homestead exemption, and the estate received a net amount from that sale of \$7,286.63, First Tennessee contends that it would have been secured to that amount.

Such an assumption has several flaws. First, the court cannot assume that the debtors would have waived their homestead exemption if First Tennessee had in fact obtained a judgment lien. Second, as the Trustee points out, if First Tennessee had obtained a judgment on March 17, 1995, the judgment lien would have nonetheless been subject to avoidance by the Trustee as a preference. See, e.g., *Orth-O-Vision, Inc. v. Wometco Home Theatre, Inc. (In re Orth-O-Vision, Inc.)*, 49 B.R. 943 (Bankr. E.D.N.Y. 1985)(judicial lien obtained by unsecured creditor during preference period against debtor who cannot fully repay his unsecured creditors may be avoided as a preference under § 547(b)).

In any event, First Tennessee's argument as to what it might have done to secure payment had the alleged preferential transfer not been made is irrelevant. Section 547(a)(5) requires a comparison of the actual transfer that was made with what the creditor will receive in the liquidation case had the transfer not been made. See *Cocolat, Inc. v. Fisher Development, Inc. (In re Cocolat, Inc.)*, 176 B.R. 540, 546 (Bankr. N.D. Cal. 1995)(fact that creditor would have placed a mechanic's lien on real property and thereafter been paid by real property owner had challenged transfer not been made by debtor contractor is not relevant to § 547(b)(5) determination). See also *Babitzke v. Mantelli (In re Mantelli)*, 149 B.R. 154, 157 (9th Cir. BAP 1993)(irrelevant to § 547(b)(5) that if alleged preferential payment had not been made, creditor could have compelled full payment from debtor due to nondischargeable nature of debt); *Smith v. Creative Financial Management, Inc. (In re Virginia-Carolina Financial Corp.)*, 954 F.2d 193, 199 (4th Cir. 1992)(not a defense to preference action that creditor could have received payment in full from another source). Unless the estate is sufficient to provide a 100% distribution to unsecured creditors, any payment to an unsecured creditor during the preference period will enable the creditor to receive more than it would have received under a chapter 7 liquidation.

See *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 465 (6th Cir. 1991); *Whittaker v. Citra Trading Corp. (In re International Diamond Exchange Jewelers, Inc.)*, 177 B.R. 265, 270 (Bankr. S.D. Ohio 1995), *reconsideration denied*, 188 B.R. 386 (1995). Because the unrefuted evidence is that First Tennessee would have received only 20% of its claim in this liquidation case had the transfer of \$7,927.71 not been made to it, the last element of § 547(b) is satisfied and all the requirements of a preferential transfer have been met.

The only remaining issue to address is the entitlement of the Trustee to prejudgment interest. It has long been the rule in this circuit that "where the action is to recover the pecuniary value of the property transferred, that is, damages, interest should be computed from the date of the demand; lacking such demand, interest may be computed from the commencement of the action." *DuVoisin v. Anderson (In re Southern Industrial Banking Corporation)*, 87 B.R. 518, 521 (Bankr. E.D. Tenn. 1988), quoting *White Co. v. Wells*, 42 F.2d 460 (6th Cir. 1930). The Trustee avers that he sent a demand letter to First Tennessee on June 15, 1995. Although First Tennessee argues that the Trustee did not timely respond to its attorneys' request for additional information concerning the transfers after the demand was made,

in light of the fact that this was not a complex transaction and First Tennessee has asserted no real defense to the avoidance and recovery of the transfer, prejudgment interest from the receipt of the demand letter, which the court will presume was June 18, 1995, since the demand letter was mailed, is appropriate.

IV.

For the foregoing reasons, the Trustee's motion for summary judgment will be granted and First Tennessee's motion will be denied. An order will be entered contemporaneously with the filing of this memorandum opinion avoiding the transfer of \$7,927.71 to First Tennessee within the ninety days preceding the bankruptcy filing as a preferential transfer pursuant to 11 U.S.C. § 547(b) and awarding judgment against First Tennessee in the amount of \$7,927.71, representing the proceeds received by First Tennessee as a result of the preferential transfer, together with prejudgment interest from and after June 18, 1995.

FILED: April 8, 1996

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE