

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE:	)	CHAPTER 11
	)	CASE NOS. 03-40293 through
JOHNSTON INDUSTRIES, INC.,	)	03-40298
	)	Procedurally Consolidated Under
DEBTOR.	)	Case No. 03-40293
)	
RONALD L. GLASS, Liquidating Agent	)	ADVERSARY PROCEEDING
of Johnston Industries, Inc., et. al.	)	NO. 05-4164
)	
PLAINTIFF,)	
)	
VS.)	
)	
J & P ENTERPRISES, INC.,)	
)	
DEFENDANT.)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Plaintiff: C. Richard McQueen and
John D. Jones
Suite 1010, Park Central
2970 Clairmont Road
Atlanta, Georgia 30329

For Defendant: J&P Enterprises, Inc.
5640 Galligher Drive
Gastonia, North Carolina 28052

MEMORANDUM OPINION

This matter comes before the Court on Plaintiff's complaint to avoid and recover transfers of property and his motion for summary judgment. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(F). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Background

Debtor Johnston Industries filed a Chapter 11 petition on January 31, 2003. Plaintiff Ronald Glass was appointed as the liquidating agent. On November 23, 2004, Plaintiff notified Defendant J & P Enterprises, Inc., of a preference claim and demanded payment of the claim. After receiving no response from Defendant, Plaintiff filed an adversary complaint on January 25, 2005, contending that 37 transfers made by Debtor to Defendant J & P Enterprises, Inc., could be avoided and recovered as preferences.

Debtor made the transfers at issue between November 6, 2002, and January 15, 2003, for a total amount of \$23,126.88. Each payment corresponded to an invoice submitted by Defendant. Terms of the invoices required payment within 30 days. The actual time between invoice and payment for the 37 transfers ranged from 31 days to 109 days.

During discovery, Plaintiff determined that Defendant had provided Debtor with new value in the amount of \$11,234.22 during the 90 days prior to the petition date, leaving alleged preferential transfers in the amount of \$11,892.66. On August 16, 2005, Plaintiff filed a request for admissions with respect to the 37 transfers and new value provided.

Plaintiff sought admissions as to the dates of Debtor's payments to Defendant and of Defendant's invoices to Debtor. Plaintiff also sought an admission that the invoices at issue provided payment terms of "net 30 days" but were not paid for an average of 79 days, and that only 5 were paid within 60 days. Defendant did not respond to the request for admissions.

Plaintiff seeks a recovery of \$11,892.66, plus interest from the date of his first demand for payment and costs of \$150. Defendant has made no response to the motion for summary judgment. For the following reasons, the Court will deny the motion.

Conclusions of Law

Summary judgment is governed by Federal Rule of Civil Procedure 56, made applicable to adversary proceedings through Federal Rule of Bankruptcy Procedure 7056. Under Rule 56, a party is entitled to summary judgment when 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." Fed. R. Civ. P. 56(c); McCaleb v. A.O. Smith Corp., 200 F.3d 747, 750 (11th Cir. 2000).

Defendant has not contested any of the material facts in this case. Thus, the Court need only decide whether Plaintiff is entitled to judgment as a matter of law. The law in question is 11 U.S.C.A § 547(b) (West 2004), which sets forth the elements of a preference 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; 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
(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.

In this case, Plaintiff has alleged and Defendant has not refuted the first four elements of a preference. First, Debtor issued checks to Defendant to satisfy amounts due under invoices submitted by Defendant. Thus, Debtor transferred an interest it had in property for the benefit of a creditor. Second, Debtor issued every check more than 30 days after the date of the invoice. Thus, the transfer was made on account of antecedent debt. Third, pursuant to § 547(f), Debtor is presumed to have been insolvent during the 90 days prior to filing for bankruptcy.¹ Defendant made no effort to rebut this presumption. Fourth, Defendant has admitted that the transfers at issue were made during the 90 days preceding the bankruptcy filing.²

With respect to the fifth element, Plaintiff made no specific allegations.

¹ “For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.” 11 U.S.C.A. § 547(f).

² During discovery, Plaintiff requested such an admission from Defendant. Because Defendant failed to respond to the request, it is deemed admitted. Fed. R. Bankr. P. 7036; Fed. R. Civ. P. 36.

Nevertheless, the Court may take judicial notice of Debtor's bankruptcy case as a whole for purposes of analyzing this element of a preference claim. AFD Fund v. Transmed Foods, Inc. (In re AmeriServe Food Distrib., Inc.), 315 B.R. 24, 33 (Bankr. D. Del. 2004); SweetApple Plastics, Inc. v. Philip Shuman & Sons, Inc. (In re SweetApple Plastics, Inc.), 77 B.R. 304, 310 n.14 (Bankr. M.D. Ga. 1987). In doing so, the Court need only determine whether the creditor would receive less than 100 percent of its claim in a hypothetical Chapter 7 liquidation. AmeriServe Food Distrib., 315 B.R. at 33. However, in this case, Plaintiff made no request for judicial notice to which Defendant could respond. Furthermore, although the likelihood of unsecured creditors receiving a dividend of less than 100 percent in a hypothetical Chapter 7 is an easy assumption to make, it still is a matter of evidence—evidence that Plaintiff simply has not presented. Plaintiff should note that in a case of this complexity, the Court will not be persuaded by mere reference to the schedules via judicial notice. Sometimes Trustees recover assets not listed. Also, listed debts sometimes prove unenforceable. Some undisputed and admissible evidence must be proffered to satisfy the fifth element.

Plaintiff has failed to show he is entitled to judgment as a matter of law due to lack of evidence with respect to the fifth element of his preference claim. For that reason, the Court must deny Plaintiff's motion for summary judgment without prejudice. Plaintiff may refile the motion if he obtains additional evidence to support his position.

An Order in accordance with this Opinion will be entered on this date.

Dated this 27th day of January, 2006.

James D. Walker, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

IN RE:	)	CHAPTER 11
	)	CASE NOS. 03-40293 through
JOHNSTON INDUSTRIES, INC.,	)	03-40298
	)	Procedurally Consolidated Under
DEBTOR.	)	Case No. 03-40293
)	
RONALD L. GLASS, Liquidating Agent	)	ADVERSARY PROCEEDING
of Johnston Industries, Inc., et. al.	)	NO. 05-4164
)	
PLAINTIFF,)	
)	
VS.)	
)	
J & P ENTERPRISES, INC.,)	
)	
DEFENDANT.)	

ORDER

In accordance with the Memorandum Opinion entered on this date, the Court hereby denies Plaintiff Ronald L. Glass's motion for summary judgment without prejudice.

So ORDERED, this 27th day of January, 2006.

James D. Walker, Jr.
United States Bankruptcy Judge