U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
PROMEDCO OF NEW ENGLAND, INC.	§	**CASE NO. 01-43345-BJH-7**
	§	
	§	
Debtor.	§	
	§	
SHAWN K. BROWN, CHAPTER 7 TRUSTEE FOR PROMEDCO OF NEW ENGLAND, INC. and PMC MEDICAL MANAGEMENT, INC.	§	
Plaintiff,	§	**ADV. PRO. 02-4187-BJH-7**
- against -	§	
	§	
ROBERT M. SONTHEIMER,	§	
Defendant.	§	

MEMORANDUM OPINION

Before the Court is the Defendant's motion for partial summary judgment on the Trustee's preference claim. Because the parties agree that the transfers at issue were made more than 90 days prior to the bankruptcy filings, the Trustee must show that the Defendant was an insider of the Debtors at the time of the transfers in order to prevail. *See* 11 U.S.C. § 547(b)(4)(B).

Defendant concedes that "in determining whether a person is an 'insider,' courts focus on the person's closeness to the debtor, the degree to which the individual was able to exert control or influence over the debtor, and whether the transactions at issue between the individual and the debtor were conducted at arm's length." Defendant's Brief in Support of Motion for Partial Summary Judgment, p. 5. Defendant contends, however, that the Trustee has failed to raise a genuine issue of material fact regarding his status as an insider of the Debtors, and, as a result, that he is entitled to a summary judgment disposing of the preference claim.

The Trustee agrees that he must raise a genuine issue of material fact regarding the Defendant's status as an "insider" of the Debtors to survive the Defendant's motion for partial summary judgment. But, the Trustee contends that he has raised such a fact issue because (i) of the "closeness of the relationship of [Defendant] to the Debtors," (ii) Defendant "exercised considerable influence over the Debtors," and (iii) there is no evidence in the motion "that the Consulting Agreement was negotiated on an arms length basis." Trustee's Brief in Opposition to Motion for

Summary Judgment, pp. 10-11.

The Court must therefore decide if there is sufficient evidence in the summary judgment record from which the Court could find that the Defendant exercised sufficient control over the Debtors at the time the transfers were made to cause him to be an insider of the Debtors.

The Court has core jurisdiction over the adversary complaint and the motion pursuant to 28 U.S.C. §§ 1334 and 157.

Undisputed Facts

Defendant resigned as an officer of ProMedCo Management Company ("PMC") and PMC Medical Management, Inc. (PMC Medical) on June 29, 2000. Between June 29 and October 5, 2000, Defendant was a non-officer employee of PMC and PMC Medical. Effective October 5, 2000, Defendant became a consultant to PMC pursuant to a written consulting agreement. In consideration for his consulting services, Defendant received the following payments from PMC through PMC Medical or ProMedCo New England, Inc. ("ProMedCo New England"): (i) $210,500 in October 2000, (ii) $210,500 in November 2000, (iii) $204,500 in December 2000 (which was repaid to PMC on December 28, 2000), (iv) $5,000 on December 21, 2000, and (v) 204,500 in January, 2001. Defendant was never an officer or employee of PMC New England.

PMC Medical and PMC New England (hereinafter collectively referred to as the "Debtors") filed their respective voluntary petitions under chapter 7 of the Bankruptcy Code on May 4, 2001. Shawn K. Brown was appointed chapter 7 trustee for each of the Debtors (the "Trustee"). The Trustee is responsible for liquidating the assets of the Debtors and distributing the proceeds to creditors of each Debtor in accordance with the absolute priority rule. Included in the assets to be liquidated by the Trustee for the benefit of creditors are the preference and fraudulent transfer claims asserted against Defendant in this action.

PMC is the parent company of the Debtors. PMC filed its voluntary petition under chapter 11 of the Bankruptcy Code on April 4, 2001, along with numerous of its other affiliates. Those chapter 11 cases were jointly administered with Promedco of Las Cruces, Inc., under Case No. 00-46863-BJH-11. A chapter 11 plan of reorganization was confirmed in the jointly administered chapter 11 cases on April 30, 2002. In summary, that plan effected a substantive consolidation of all of the assets and liabilities of the affiliated chapter 11 debtors, which assets will be liquidated pursuant to that plan and distributed to creditors in accordance with that plan.

Legal Analysis

In his brief, the Trustee articulates the facts he has presented in the summary judgment record that he contends precludes the issuance of a partial summary judgment in the Defendant's favor. However, in articulating these facts, the Trustee is imprecise. That imprecision is strategic.

But, a proper preference analysis requires precision. The Court will analyze the Trustee's

preference claim against the Defendant with the precision it believes the Bankruptcy Code requires.

The Trustee has no standing to assert claims on behalf of PMC. The Trustee can only bring the Debtors' claims. As a result, even if the Defendant exercised control over PMC at the time of the Debtors' transfers to him, the technical requirements of the section 547 of the Bankruptcy Code would not be met. To find the transfers at issue here to be an avoidable preference at trial, the Trustee must prove that the Debtors transferred their 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 –***
> (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.

11 U.S.C. § 547(b).

The Defendant's motion focuses solely on the Trustee's alleged failure to raise a genuine issue of material fact regarding the Defendant's status as an insider of the Debtors. In short, the Defendant alleges that the Trustee has failed to show the requisite control of the Debtors that is required by section 547(b)(4)(B) of the Bankruptcy Code to avoid the Debtors' aggregate payments of $630,500 to the Defendant between 90 days and one year of the Debtors' bankruptcy filings.

The Court agrees. While the Trustee has raised a genuine issue of material fact regarding the Defendant's status as an insider of PMC, the Trustee has failed to do so regarding the Debtors. For purposes of a proper preference analysis, the Defendant must have been an insider of PMC Medical and/or ProMedCo New England at the time the payments at issue here (October, 2000 – January, 2001) were made to him. On the basis of summary judgment record currently before the Court, the Court could not find that the Defendant exercised any control over the Debtors. In fact, he had no relationship with either of the Debtors at the time of the payments at issue here.[1] Rather, during that time period, the Defendant was a consultant to the Debtors' affiliate, PMC, pursuant to a written consulting agreement. The Debtors were neither parties to that agreement, nor obligated to pay for any consulting services. Rather, it was PMC who was obligated by contract to pay the Defendant

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[1] It is undisputed that the Defendant resigned as an officer of PMC Medical on June 29, 2000. He continued as an employee until October 5, 2000. On that date, he began his consulting services for PMC alone, and all of the payments called for by the consulting agreement occurred after October 5, 2000.

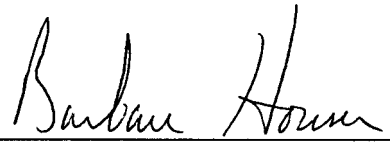
for his consulting services. Stated simply, the Defendant had no relationship, contractual or otherwise, with the Debtors at the time of the payments in question, and the Defendant was not a creditor of the Debtors when they paid him $630,500 on behalf of their affiliate PMC.

Conclusion

While the Trustee may have a fraudulent transfer claim against the Defendant for the monies paid by the Debtors on behalf of PMC, he has not come forward with sufficient evidence to create a genuine issue of material fact regarding the Defendant's status as an insider of either PMC Medical and/or ProMedCo New England at the time of the payments at issue here. Thus, a partial summary judgment disposing of the Trustee's preference claim is proper.[2]

An Order consistent with this Memorandum Opinion will be entered separately.

SIGNED: October 6, 2003.



Barbara J. Houser
United States Bankruptcy Judge

[2]Although not a part of the summary judgment motion, it appears that the Trustee would not be able to satisfy the creditor or antecedent debt requirements of section 547(b)(1) and (2) at trial either. As strangers to the consulting agreement, the Debtors did not owe the Defendant any monies before the payments were made to him.