

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: §
§
EVERGREEN MICRO ACQUISITION, § CASE NO. 98-36032-SAF-7
CORPORATION, a/k/a EVERGREEN §
ACQUISITION CORP., §
SUPREME COMPUTER COMPANY, § CASE NO. 98-37137-SAF-7
EVERGREEN TECHNOLOGY OF § CASE NO. 98-37140-SAF-7
MISSOURI, INC., §
EVERGREEN MICRO, INC., § CASE NO. 98-37138-SAF-7
T & L COMPUTERS, INC., d/b/a § CASE NO. 98-37139-SAF-7
EVERGREEN TECHNOLOGY, §
§ (Jointly Administered Under
D E B T O R S. § Case No. 98-36032-SAF-7)
§
JEFFREY H. MIMS, TRUSTEE OF THE §
ESTATE OF EVERGREEN MICRO, INC., §
PLAINTIFF, §
§
VS. § ADVERSARY NO. 00-3400
§
ASI, BITS TECHNICAL CORP., §
COMSTOR, DYNA MICRO, INC., EPOX §
INT'L, INC., GREENLEAF DISTRI- §
BUTION, INC., QUICKSHOT TECH- §
NOLOGY, INC., and UNITED PARCEL §
SERVICES, §
DEFENDANTS. §
§
JEFFREY H. MIMS, TRUSTEE OF THE §
ESTATE OF T & L COMPUTERS, INC., §
d/b/a EVERGREEN TECHNOLOGY, §
PLAINTIFF, §
§
VS. § ADVERSARY NO. 00-3402
§
ACER AMERICA CORP., AIRBORNE §
EXPRESS, All COMPONENTS, et al., §
DEFENDANTS §

MEMORANDUM OPINION AND ORDER

Bits Technical Corp. moves the court for summary judgment.

The plaintiff, Jeffrey H. Mims, the trustee of the bankruptcy estates of Evergreen Micro, Inc., and T & L Computers, Inc., opposes the motion and cross-moves for partial summary judgment. The court conducted a hearing on the motions on June 25, 2001. At the hearing, the parties agreed that the court need only consider under the 11 U.S.C. §547 portion of the motion the transfers of \$20,000 by T & L d/b/a Evergreen Technology and \$13,630 by T & L d/b/a Evergreen Technology.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250 (1986); Washington v. Armstrong World Indus., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under governing law. Anderson, 477 U.S. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at

322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The court applies the same standards to the cross-motion for partial summary judgment.

T & L made a series of transfers to Bits Technical Corp. for goods. The trustee could not determine whether T & L was the actual purchaser of the goods or if, instead, Bits sold the goods to an affiliated corporation. Consequently, the trustee filed an avoidance action under 11 U.S.C. §548 against Bits. Bits moves for summary judgment dismissing that cause of action.

Bits has provided summary judgment evidence that the affiliated corporations operated as a single corporation or business, out of a Dallas office. Bits had a longstanding relationship with the corporation dating back to prior owners. Bits shipped goods to Dallas, invoicing either Evergreen or Evergreen Supreme. Evergreen Technology paid for a substantial amount of the goods. Bits argues alter ego, but actually introduced summary judgment evidence that the corporations operated substantively as a consolidated entity.

The trustee concedes that if Bits provided goods to Evergreen Technology, the §548 claim by T & L should be dismissed. The trustee has alternatively challenged several of

the transfers by T & L to Bits as preferences under 11 U.S.C. §547. The trustee contends that if Bits provided goods to Evergreen Technology, then Bits was a creditor of T & L, subject to the provisions of §547. In response to requests for admissions, Bits could not admit that it was a creditor of T & L. Bits responded to the requests for admissions that it could not assess the transfers for which the trustee sought the admission. The trustee presented further summary judgment evidence of the invoices, which are addressed to Evergreen or Evergreen Supreme Computer System and not to Evergreen Technology.

The summary judgement evidence establishes that there is a genuine issue of material fact of whether Bits was a creditor of T & L on the transfers at issue. On the one hand, Bits provided goods to a business operation that appears to have been substantively consolidated but, on the other hand, Bits cannot admit to being a creditor of T & L and basically did not ship to nor invoice Evergreen Technology, T & L's business name.

Bits' motion must therefore be denied. The court must conduct a trial regarding 11 U.S.C. §548(a)(1)(B)(i).

With regard to the trustee's cross-motion for partial summary judgment, the trustee presented evidence of insolvency. Bits did not present any opposing evidence. Accordingly, the trustee shall have a partial summary judgment establishing 11 U.S.C. §548(a)(1)(B)(ii)(I).

If Bits was a creditor of T & L, the trustee seeks to avoid a transfer of \$20,000 and a transfer of \$13,630 to Bits as preferences under 11 U.S.C. §547. Bits contends that the trustee has not met his burden of presenting summary evidence on the elements of §547(b) and that Bits has established the defenses of §547(c)(1), (2) and (4). The trustee concedes that there is a genuine issue of material fact of whether Bits was a creditor of T & L, but otherwise moves for partial summary judgment on the remaining elements of §547(b). The trustee contends that there is a genuine issue of material fact concerning the affirmative defenses plead by Bits.

As discussed above, there is a genuine issue of whether Bits was a creditor of T & L. But, if at trial, the trustee establishes that Bits was a creditor of T & L, there is no genuine issue of material fact concerning the remaining elements of §547(b).

By letter dated June 4, 1998, Bits demanded of "Evergreen Supreme" that it pay \$20,000 of an outstanding debt of \$118,841 by overnight mail and then pay the remainder by a series of biweekly payments. Evergreen Technology issued a check for \$20,000 the next day, June 5, 1998.

By invoice dated April 15, 1998, Bits invoiced Evergreen Supreme Computer System for goods totaling \$13,630. By check dated May 15, 1998, and paid May 18, 1998, Evergreen Technology

paid that invoice.

If, at trial, the trustee establishes that Bits was a creditor of T & L, then there is no genuine issue of material fact regarding §547(b)(1) and (2).

The trustee produced summary judgment evidence of the Chapter 7 distributions and the debtor's insolvency, even though the debtor is presumed insolvent during the 90 days preceding the filing of the bankruptcy petition. Bits did not produce summary judgment evidence to counter that evidence.

Accordingly, if at trial the trustee establishes that Bits was a creditor of T & L, then there is no genuine issue of material fact regarding §547(b)(3), (4) and (5).

Bits asserts defenses under §547(c)(1), (2) and (4). Bits contends that transfers had been made cash on delivery in exchange for goods supplied by Bits, in the ordinary course of business and resulted in Bits providing subsequent new value. The \$20,000 and the \$13,630 transfers were not cash on delivery in exchange for goods supplied by Bits. Bits produced evidence that in the months preceding bankruptcy the parties ordinary course of business was on a cash on delivery basis. But the \$20,000 and the \$13,630 transfers were not made according to that practice. And the \$20,000 payment had been made after Bits sent a demand letter, which appears to be outside the ordinary course. The summary judgment record does not establish whether Bits gave

new value after these transfers within the meaning of §547(c)(4) because of the subsequent cash on delivery transactions.

The trustee correctly argues that each of these defenses requires a trial.

Based on the foregoing,

IT IS ORDERED that the motion of Bits Technical Corp. for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that the cross-motion of Jeffrey H. Mims for partial summary judgment is **GRANTED** as provided in the memorandum opinion.

Signed this _____ day of July, 2001.

Steven A. Felsenthal
United States Bankruptcy Judge