

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

IN RE:	§	
	§	
T&L COMPUTERS, INC.,	§	CASE NO. 98-37139-SAF-7
DEBTOR.	§	(Jointly Administered Under
	§	Case No. 98-36032-SAF-7)
JEFFREY H. MIMS, TRUSTEE,	§	
PLAINTIFF,	§	
	§	
VS.	§	ADVERSARY NO. 00-3401
	§	
GATES ARROW DISTRIBUTING,	§	
et al.,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION AND ORDER

In this adversary proceeding, Jeffrey H. Mims, the Chapter 7 trustee of the bankruptcy estate of T & L Computers, Inc., seeks to avoid several transfers to Simon Liu under either 11 U.S.C. §547 or §548(a)(1)(B). The court has previously granted partial summary judgment for Liu dismissing the trustee's claim under §547. This memorandum opinion and order addresses the trustee's cross-motion for summary judgment on his claim under §548.

On May 10, 2001, Liu filed his motion for summary judgment. On May 25, 2001, the trustee filed his response and a cross-motion for summary judgment. At a hearing on June 7, 2001, the

court granted Liu's motion under §547 and set a schedule for consideration of the trustee's motion under §548. The schedule allowed the trustee to obtain an amended affidavit on the issue of insolvency and then set a briefing schedule on the cross-motion. The parties agreed that the court would decide the motion based on the additional summary judgment evidence and the written papers, without the need for a further hearing.

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. Inc., 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. Id. 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

323. 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, 586-87 (1986). The court applies the same standards to the cross-motion for partial summary judgment.

Under a stock purchase agreement, Evergreen Acquisition Corporation (EAC) agreed to purchase from Liu and his wife Lucia Liu the stock of T & L, Evergreen Micro, Inc., and Evergreen Technology of Missouri, Inc., for \$2,500,000. EAC executed a promissory note payable to Liu and his wife for \$750,000. T & L neither executed nor guaranteed the note. As part of the stock purchase agreement, Liu entered a non-compete agreement, committing not to compete with either T & L or the other related corporations.

Within one year before the date of the filing of T & L's bankruptcy petition, T & L transferred \$255,000 to Liu. The trustee contends that T & L paid the debt of EAC, even though Liu failed to provide T & L with reasonably equivalent value in exchange for those transfers. The trustee further contends that the transfers had been made while T & L had been insolvent, thereby making the transfers voidable under §548(a)(1)(B). Liu responds that he gave T & L reasonably equivalent value and that

the trustee's evidence fails to establish for summary judgment purposes that T & L had been insolvent at the time of the transfers.

Under §548(a)(1)(B), the trustee may avoid any transfer of an interest of the debtor in property, if the debtor either voluntarily or involuntarily received less than reasonably equivalent value in exchange for the transfer and was insolvent on the date of the transfer or became insolvent as a result of the transfer. 11 U.S.C. §§548(a)(1)(B)(i) and (ii)(I). The court first addresses the insolvency requirement.

Under §548(a)(1)(B)(ii)(I), on the date of the transfers, T & L must have been insolvent or become insolvent as a result of the transfers. In her supplemental affidavit filed June 18, 2001, Susan M. Smith, the trustee's accountant, opined that T & L was insolvent at all times during the five months prior to the bankruptcy petition on August 18, 1998, in that T & L's debts exceeded the fair value of its assets. The five months covers the transfers at issue in this adversary proceeding. Liu challenges Smith's conclusion, but offers no countervailing summary judgment evidence.

T & L's balance sheet reported the non-compete agreement as an asset with a book value of \$2,500,000, which could be amortized for tax purposes. It listed the EAC note as a current

liability of \$620,000. Smith opined that the non-compete agreement had no fair value. But, she kept the note as a liability. While T & L's management listed the note as a liability, T & L neither made nor guaranteed the note. Moreover, Liu concedes that he is not a creditor of T & L. The note, therefore, should not be included as a liability. Making that adjustment to Smith's analysis, T & L nevertheless is insolvent. There is no summary judgment evidence to the contrary.

Accordingly, there is no genuine issue of material fact that T & L was insolvent on the date of the transfers at issue in this adversary proceeding.

The court next addresses whether the debtor received less than a reasonably equivalent value in exchange for the transfers. 11 U.S.C. §548(a)(1)(B)(i). Under §548, "value" means "property, or satisfaction or securing of a present or antecedent debt of the debtor." 11 U.S.C. §548(d)(2)(A). The transfer did not satisfy, in whole or in part, either a present or an antecedent debt of T & L. Liu observes, however, that T & L carried the note balance as an obligation on its books. But, Liu has conceded in this adversary proceeding that he is not a creditor of T & L and that the transfers by T & L had not been made on account of an antecedent debt owed by T & L to Liu. Rather, Liu represented to the court that EAC had the obligation to pay the

note to Liu. Because of that concession, the court dismissed the trustee's claim against Liu under §547. Liu is now judicially estopped from asserting a contrary position. In re Coastal Plains, Inc., 179 F.3d 197, 205-06 (5th Cir. 1999) (determining that the doctrine of judicial estoppel prevents a party who has assumed one position before a court from assuming an inconsistent position).

Under the Bankruptcy Code, a "debt" is a liability on a claim, and a "claim" is a right to payment, with a "creditor" being the holder of a claim against the debtor. 11 U.S.C. §§101(5), (10), (12). T & L has no liability on a claim held by Liu.

Liu asserts that the non-compete agreement provided value to T & L. In effect, Liu must contend that the non-compete agreement constitutes "property" under the definition of "value" for purposes of §548. 11 U.S.C. §548(d)(2)(A). Under §548, if not satisfying or securing a present or antecedent debt of the debtor, the value must be property. The Bankruptcy Code employs an expansive approach to property. At the commencement of a bankruptcy case, all of the debtor's legal and equitable interests become property of the bankruptcy estate. 11 U.S.C. §541. For purposes of §548, an interest in property encompasses any interest of the debtor that, but for the alleged transfer,

would have been preserved for the benefit of the bankruptcy estate. In re Besing 981 F.2d 1488, 1493 (5th Cir. 1993). But, within this expansive approach to property, under §548, if the value is property, then the property interest must appear on the debtor's balance sheet and be marketable. In re Consol. Capital Equities Corp., 143 B.R. 80, 87 (Bankr. N.D. Tex 1992). The "property" requirement contemplates tangible property that may be liquidated by a debtor to provide money or money's worth for the benefit of its creditors. Intangible, non-economic benefits do not constitute reasonably equivalent value. See In re Hinsley, 201 F.3d 638, 643 (5th Cir. 2000) (interpreting "reasonably equivalent value" as found in the Texas Uniform Fraudulent Transfer Act which took the phrase from 11 U.S.C. §548(a)); In re Bargfrede, 117 F.3d 1078, 1080 (8th Cir. 1997) (interpreting reasonably equivalent value under the Bankruptcy Code); see also Zahra Spiritual Trust v. United States, 910 F.2d 240, 249 (5th Cir. 1990) (determining that spiritual fulfillment does not constitute reasonably equivalent value).

T & L's balance sheet lists the non-compete agreement as an asset with book value of \$2,500,000, which happens to have been the purchase price of the stock. Susan M. Smith, the trustee's accountant, compiled a balance sheet which attributed no fair value to the agreement. While Smith acknowledged that she had

little experience valuing non-compete agreements, she used a ten step accounting procedure to determine the fair value of the agreement. Smith testified at her deposition that management would attempt to attribute as much book value to the agreement as possible to allow for amortization for tax purposes. But, that book value does not translate into market value. Liu presented no contrary evidence of value.

Liu executed the non-compete agreement at the time of the stock purchase by EAC. At that time, T & L may have obtained an economic benefit by Liu's non-compete agreement with EAC. Consol. Capital Equities Corp., 143 B.R. at 87. But, at the time of the transfers by T & L, Liu argues, in effect, that he provided value by continuing to not compete. By its terms, the non-compete agreement could only be assigned to either a T & L affiliate or an entity that acquired "all or substantially all of the assets or capital stock of any of the Companies, or with which any of the Companies merges or consolidates." (First App., Ex. "E" to the Liu Aff. at 4 §11.) Thus, T & L could not assign the non-compete agreement as separate property. Consequently, continued performance by Liu under the non-compete agreement does not constitute tangible property that can, on its own, be transferred for economic value.

Although recorded on T & L's balance sheet, the non-compete

agreement could not be marketed. Consequently, there is no genuine issue of material fact that Liu's continued performance under the non-compete agreement does not constitute property that can be translated to money or money's worth for the debtor in the market.

To avoid a transfer under §548, the trustee must establish that the debtor was insolvent or became insolvent as a result of the transfer. If the debtor is not insolvent, then the transfer cannot be avoided. But, if the debtor is insolvent, then the transfer may be avoided if the debtor did not receive "reasonably equivalent value." Since the Bankruptcy Code does not define "reasonably equivalent value," courts have had to determine the scope of the term. See Besing, 981 F.2d at 1494. "Reasonably equivalent value for a transfer requires a comparison of the value of what went out with the value of what came in." In re Southmark Corp., 138 B.R. 820, 829 (Bankr. N.D. Tex. 1992).

When a court has to determine whether a debtor received reasonably equivalent value under §548, the appropriate test is whether the investment conferred an economic benefit on the debtor at the time that the investment was made. Hinsley, 201 F.3d at 644; In re Fairchild Aircraft Corp., 6 F.3d 1119, 1125-26 (5th Cir. 1993). Intangible, non-economic benefits do not constitute reasonably equivalent value. See Hinsley, 201 F.3d at

643. Liu's non-compete agreement could not be sold by T & L for money or money's worth in the market at the time of the transfers, a time when T & L was insolvent.

The court, therefore, concludes that the non-compete agreement does not constitute value under §548(a)(1)(B). Hence there is no genuine issue of material fact that T & L did not receive reasonably equivalent value in exchange for the transfers.

Based on the foregoing, the trustee is entitled to summary judgment avoiding the transfers under 11 U.S.C. §548(a)(1)(B).

IT IS THEREFORE ORDERED that the cross-motion of Jeffrey H. Mims for summary judgment is **GRANTED**.

The court shall conduct a status conference on **November 29, 2001, at 2:30 p.m.**, to determine if issues remain for adjudication against Liu.

Dated this _____ day of November, 2001.

Steven A. Felsenthal
United States Bankruptcy Judge