UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

INRE:	)	
	)	
Nomus-North Carolina, Inc.,	)	
Debtor.	)	**Case No. 01-50373**
	)	
	)	
A. Vernon Osborne, Creditor	)	
Representative,	)	**Adversary No. 03-6020**
Plaintiff,	)	
v.	)	
Loftus Group, LLC,	)	
Defendant.	)	
	)	

ORDER GRANTING MOTION BY DEFENDANT FOR SUMMARY JUDGMENT

This matter came on for hearing on January 28, 2004 before the undersigned Bankruptcy Judge on the Motion by Defendant for Summary Judgment and the Response in Opposition to the Motion. Nathan B. Atkinson appeared on behalf of the Plaintiff and Neil Riemann appeared on behalf of the Defendants.

UNDISPUTED FACTS

Nomus-American, Inc. ("Nomus") is a holding company established on October 15, 1999 as a parent or holding company for Nomus-North Carolina, Inc. (the "Debtor") and American Retail Interiors, Inc. In turn, American Retail Interiors, Inc. is a holding company, established in April 1999, as a parent or holding company for Nomus-New York, Inc. and Nomus-Seattle, LLC. The Debtor, Nomus-New York and Nomus-Seattle were the operating companies but all three operating companies and the two holding companies were joint obligors on a debt in the

approximate amount of ten million, six hundred and twenty seven thousand dollars ($10,627,000.00) due to Fleet Bank.

In the year 2000, the Debtor defaulted on its loan agreement with Fleet Bank. A Forbearance Agreement was reached in May 2000 extending the loan to December 31, 2000. In December 2000, Nomus was able to negotiate an Amendment to the Forbearance Agreement which extended the due date of the loan from December 31, 2000 to January 10, 2001 if, among other covenants, Nomus complied with the following:

> On or before December 18, 2000, the Obligors shall retain and have onsite, and continue to retain during the term of this Agreement, a "crisis manager" acceptable to the Bank, to assist and direct the Obligors in the management of the Obligors' business.

On December 17, 2000, Tom Ramsey, as Chief Operating Officer of Nomus, entered into an Agreement whereby Nomus would retain the services of the Loftus Group, LLC ("Loftus Group") to provide crisis management for the Nomus companies. In connection with the services to be rendered, Nomus agreed to pay Loftus Group the following amounts: $2,400 per eight (8) hour day for each Managing Director billed in quarter hours and $1,200 per eight (8) hour day for each Vice President, billed in quarter hours. The Agreement also provided that the Loftus Group would render statements on a weekly basis, which were due and payable upon presentation thereof by wire transfer to Loftus Group's bank account as per wiring instructions included on the invoices. The Loftus Group was also to receive reimbursement of disbursements with each weekly invoice including, but not limited to, travel, lodging, meals, and telephone. The scope of the engagement was as follows:

> Loftus Group is retained by the Company [Nomus] as Crisis Manager with the following objectives:
> Specific near term projects to be supplied to Fleet Boston:

Rolling eight week cash flow
Business Plan detailing operations through February 28, 2001
Liquidation Plan
Operating issues impacting business viability pending debt repayment
Financial issues impacting business viability pending debt repayment
Timing, value and probability of debt repayment options.

The first day that members of the Loftus Group rendered services to the company was December 17, 2000. Members of the Loftus Group worked every week thereafter until February 3, 2001. The following chart details the invoice dates, invoice amounts, payment dates and amount and type of payment.

Invoice Date	Invoice Amount	Payment Made	Payment Received	Payment Amount	Payment Type
12/24/00	$39,441.77	12/28/00	12/28/00	$20,000	Wire Transfer
12/31/00	$22,718.09	1/9/01	1/9/01	$19,441.77	Check
1/8/01	$15,181.00	1/12/01	1/16/01	$22.718.09	Check
1/15/01	$23,414.34	1/19/01	1/22/01	$20,181.00	Check
1/22/01	$21,064.74	1/26/01	1/29/01	$18,414.34	Check
1/29/01	$21,342.05	Not Paid	Not Paid	Not Paid	Not Paid
2/5/01	$17,838.61	Not Paid	Not Paid	Not Paid	Not Paid

On January 3 1,200 1, Fleet made the decision not to extend the Forbearance Agreement. This action caused Nomus to file for Chapter 11 protection on that same date. Following a fifteen (15) day period during which the remaining Nomus entities and Fleet operated under a joint agreement allowing limited use of cash collateral, the remaining four entities, including the Debtor, tiled Chapter 11 petitions on February 15, 2001.

It is undisputed that the Loftus Group was paid the sum of $100,755.20 from December

28, 2000 to January 26, 2001. It is also undisputed that they invoiced, but were not paid $60,245.40 for services rendered between January 22, 2001 and February 3, 2001.

The Loftus Group was not listed as a scheduled creditor in the bankruptcy case of the Debtor, nor was it listed in any of the affiliated cases. The Loftus Group filed a proof of claim in the Debtor's case in the amount of $60,245.40. No objection has been tiled to the claim and the bar date to object to claims expired on June 12, 2001. Therefore, the Loftus Group has an allowed unsecured claim for $60,245.40 for services performed as a crisis manager. The Plaintiff contends that within 90 days before February 15, 2001, the Debtor, being then insolvent, made payments of its own funds to the Defendant, a creditor of the Debtor, on account of antecedent debts, in the total amount of $80,755.20 and that these payments are avoidable and recoverable by the Plaintiff under sections 547 and 550 of the Bankruptcy Code.

STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure, which applies in bankruptcy adversary proceedings by virtue of Federal Rules of Bankruptcy Procedure 7056, states in relevant part that the movant will prevail on a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on tile, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). See also Celotex Corp v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The movant has the initial burden of establishing that there is an absence of any genuine issue of material fact, and all reasonable inferences must be drawn in favor of the nonmoving party. Id. Once the moving party satisfies that burden, the burden shifts to the nonmoving party to present some evidence of a genuine issue of material fact. Id. To meet

its burden, the nonmoving party is required to present evidentiary support for every essential element of its case and upon which it bears the burden of proof at trial. Id. The nonmovant may not rely on the allegations or denials in its pleadings to establish a genuine issue of fact, but must come forward with an affirmative showing of evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In this adversary proceeding, the Plaintiff seeks to recover a preferential transfer under § 547 of the Bankruptcy Code. Pursuant to § 547(g), the Plaintiff, or the Trustee, bears the burden of proving the avoidability of a transfer under § 547(b). The transferee, or the Defendant, bears the burden of proving an exception to preferential transfer under § 547(c). For the purposes of the motion for summary judgment, the Defendant stipulates that the Plaintiff has carried its burden under § 547(b) but contends that as a matter of law, summary judgment is appropriate for the Defendant under § 547(c).

LEGAL ANALYSIS

An allegedly preferential payment cannot be recovered where the transfer in question was:

> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
> (B) in fact a substantially contemporaneous exchange.

11 U.S.C. § 547. Section 547 is intended to discourage creditors from coming in and picking apart a debtor prior to a bankruptcy, and to promote the concept of equal distribution among similarly situated creditors in a bankruptcy. Therefore, if a debtor makes payment to a creditor on account of an antecedent debt within 90 days of the filing of the bankruptcy petition while the

debtor was insolvent and the payment allows the creditor to receive more than it would have in a Chapter 7 proceeding, then a trustee can recover the monies paid. Section 547(c)(l) provides an exception to this general rule of preferential transfers. A payment that is a contemporaneous exchange for new value is not preferential, as the Bankruptcy Code wants to encourage creditors to continue doing business with financially struggling debtors, in the hope that they can avoid bankruptcy altogether. See 11 U.S.C. § 547(c)(l). Additionally, a contemporaneous exchange does not adversely affect other creditors as the debtor receives new value for the money it pays out. In re Jones Truck Lines, 130 F.3d 323,326 (8" Cir. 1997). Based on the foregoing undisputed facts, the court finds as a matter of law that the Plaintiff may not avoid the transfer of the payment of $80,755.20 as the payments to the Loftus Group were intended by the debtor and the creditor to be a contemporaneous exchange for new value given to the debtor and were in fact a substantially contemporaneous exchange.

In this case, the undisputed facts reflect that Fleet Bank required the Debtor to hire a crisis management team to oversee the operations and produce financial numbers upon which Fleet felt it could rely.' Members of Loftus Group were on the premises every business day from the date of the engagement until the date the parent company filed for Chapter 11 protection and Fleet made the decision not to extend the Forbearance Agreement. The Plaintiff argues that "once Nomus failed to immediately pay each invoice by wire, per the terms of the Agreement, Loftus Group [destroyed] the possibility of a contemporaneous exchange". The Plaintiff goes on to argue that "some value may have been provided to the Debtor by Loftus Group, there remains

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'Nomus-North Carolina has sued its prior accountants for producing financial information that the Debtor contends was inaccurate.

a question of fact regarding the true value of the services provided."

The above chart shows how quickly these invoices were paid. The members of Loftus Group continued to provide services to the Debtor and the Debtor was billed under an agreed employment contract. The first payment was by wire transfer with payment made on December 28, 2000 after an invoice date of December 24, 2000. The Plaintiff concedes that this payment does not constitute a preference. The next four payments were made by check rather than by wire transfer. Although now omitted, former Section 3-503(2)(a) of the Uniform Commercial Code provided that a transfer involving a check is "intended to be contemporaneous" if the check is presented for payment in the normal course of affairs, which under the UCC is thirty days. See White & Summers, Uniform Commercial Code § 32-5 (5th ed.).

The concept of contemporaneous exchange depends upon the factual situation in a particular case. In In re Dorholt. Inc., 224 F.3d 871 (8th Cir. 2000), the court found that perfection of a lien 16 days after the transaction was substantially contemporaneous. Under §547(c)(1), if the debtor and the transferee intend the transfer to be a contemporaneous exchange for new value given to the debtor and the exchange is in fact substantially contemporaneous, then the transfer is not an avoidable preference. Intent is a question of fact and is subjective, but intent can be gleamed by objective evidence. The agreement between the Debtor and the Defendant provided that the Loftus Group would render statements on a weekly basis which were due and payable upon presentation thereof, by wire transfer to a designated bank account. If the Debtor had made immediate payments, the Defendant would have been paid in full every seven (7) days. The facts show that the Defendant was not paid in full every seven days but as follows:

1/9/01: paid $19,44 1.77 toward the payment of the remainder of the 12/24/00 invoice.
1/12/01: paid $22,718.09 as payment in full of the 1213 1/00 invoice.
1/19/01: paid $20,181 as payment in full of 1/8/01 invoice and partial payment of 1/15/01 invoice.
1/26/01: paid $18,414.34 as payment of the balance of 1115101 invoice.

The Debtor made each of the pre-petition payments within sixteen days or less of the date the Loftus Group presented the invoice

New value is defined as "money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation." 11 U.S.C. § 547(a)(2). Members of the Loftus Group continued to provide services to the Debtor until it was clear that the Debtor could not reach an agreement with the bank. These services constituted new value. Value of an employee services is presumed to equal wages and benefits that an employer contracted to pay. In re Jones Truck Lines. Inc., 130 F.3d 323 (8th Cir. 1997).

Whether a transfer is substantially contemporaneous is determined by the facts and circumstances of each case. In re Amett, 731 F.2d 358 (6th Cir. 1984). The agreement between the Debtor and Loftus Group provided that the Debtor was to pay on a weekly basis upon presentation of invoices. The clear intent was that the Loftus Group would be paid as a contemporaneous exchange for working. See Kendall v Liauid Sugars, Inc., 227 B.R. 530,533 (N.D. Cal. 1998) (finding clear intent to make contemporaneous exchange based on parties' agreement to pay as they went). "Substantially contemporaneous" does not mean "simultaneous." See Matter of Anderson-Smith & Assocs.. Inc., 188 B.R. 679, 689 (N.D. Ala.

1995).

Representatives of the Loftus Group continued to work for the Debtor in the weeks leading up to the bankruptcy filing. They performed crisis management, and due to the unstable nature of the Debtor's continued operation, the Loftus Group required that the Debtor pay them on very short terms. The Loftus Group continued to provide services to the Debtor and they were paid promptly by the Debtor. Payments to the Loftus Group by the Debtor were intended to be a contemporaneous exchange for new value given to the Debtor and the payments were in fact substantially contemporaneous.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that the Loftus Group is entitled to summary judgment as 11 U.S.C. § 547(c)(l) and the Plaintiff is not entitled to recover any monies from the Defendant.

This the 2nd day of March, 2004.

Catharine R. Carruthers
United States Bankruptcy Judge