United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURR'S SUPERMARKETS, INC.,
Debtor. No. 7-01-10779 SA

YVETTE J. GONZALES, TRUSTEE,
Plaintiff,
v. Adv. No. 03-1050 S

DICKER-WARMINGTON PROPERTIES,
Defendant.

MEMORANDUM OPINION

This matter came before the Court for trial on the merits of Plaintiff's complaint to avoid preferential transfer. Plaintiff appeared through her attorney Jacobvitz, Thuma & Walker, P.C. (Thomas D. Walker). Defendant appeared through its attorney Daniel J. Behles. This is a core proceeding. 28 U.S.C. § 157(b)(2)(F).

FACTS

The parties filed a Stipulation of Facts (doc 26). Defendant filed a Motion for Summary Judgment (doc 28), to which Plaintiff responded (doc 30). Defendant's reply was due after trial, so the parties stipulated to treat the summary judgment papers as trial briefs.

The parties stipulated to the following facts:

1. Furr's Supermarkets, Inc. ("Furrs") and Defendant Dicker Warmington Properties ("Defendant") were parties to a

Lease Agreement dated August 9, 2000 for certain premises located in Corrales Shopping Center, 10701 Coors Rd. NW, Albuquerque, NM (the "Lease"). The Lease was admitted into evidence as Exhibit A. The "First Addendum to Lease" included as part of Exhibit A was executed contemporaneously with the Lease.

2. Pursuant to the Lease, Furrs was obligated to pay to Defendant the minimum monthly rental amount of $27,500 commencing November 1, 2000 plus additional sums for common area maintenance, taxes, and insurance. The total minimum scheduled monthly payment was $32,542.80.

3. On November 13, 2000, the parties executed a letter agreement relating to payment of November and December rent due under the Lease. The letter agreement is Exhibit B.

4. Pursuant to Exhibit B, the November and December rent, plus interest was to be paid in three equal installments starting in January 2001. The minimum rent for the months of November and December 2000 ($32,542.80 x 2 = $65,085.60) was divided by three ($21,695.20). Interest on the November and December rent at the rate of ten percent (10%) per annum for ninety (90) days ($1,604.70), was also divided by three ($534.90), and added to the

November and December rent. The total of the November and December rent, plus interest was to be paid in three equal installments of $22,230.10, due together with the minimum rent due under the Lease for the months of January, February and March 2001. Thus the total Furrs was going to pay in the months of January, February and March 2001 was the minimum monthly rent due ($32,542.80) plus one-third of the November and December rent plus one-third of the interest ($22,230.10) which was equal to $54,772.90.

5. On December 15, 2000, as provided for in the Lease, Defendant billed Furrs in advance for the January 2001 minimum rent in the amount of $27,500.00, the CAM charges due for January 2001 in the amount of $5,042.80, the first installment of the November and December rent in the amount of $21,695.20, and the first installment of the interest on the November and December rent in the amount of $534.90, for a total in the amount of $54,772.90. Furrs paid the $54,772.90 by check dated December 26, 2000 in the amount of $54,772.90.

6. Defendant received and deposited the check on January *5,* 2001. That check is the subject matter of this

preference action. The check and the deposit ticket on which the check was deposited is Exhibit C.

7. Defendant billed Furrs in advance for February minimum rent, plus February CAM charges, the second installment of the November and December rent, and the second installment of interest on the November and December rent. Furrs tendered a check to pay these amounts, but the check was dishonored.

8. Furrs did not occupy the premises that were the subject of the Lease, either prepetition or post-petition. Furrs, as debtor-in-possession, ultimately rejected the Lease.

9. Furrs paid the scheduled monthly minimum rent for February 8-28, 2001 and for March 2001 and April 2001. Furrs paid no rent for February 1-7, 2001, or for May 2001. Furrs also did not pay in February and March 2001 the remaining installments of the November and December rent. The Lease was rejected by Court Order dated May 30, 2001.

10. Furr′s paid Defendant a total of $54,772.90 (the "Payment") in one check on the following date in the following amount (the "Check").

Check No.	Amount	Check Date	Date of Deposit	Date of Honor
25135551	$54,772.90	12/26/00	1/05/01	1/08/01

11. The Payment was a transfer of an interest of Furrs in property.

12. The Check was delivered to Defendant after the Check Date and before the Date of Honor.

13. The Payment was made while Furrs was insolvent.

14. On February 8, 2001 (the “Petition Date”), Furrs filed a voluntary petition in the United States Bankruptcy Court for the District of New Mexico under Chapter 11 of the Bankruptcy Code.

15. On December 19, 2001, the Chapter 11 case was converted to a case under Chapter 7.

16. Plaintiff Yvette Gonzales is the duly appointed Chapter 7 Trustee in the Furr′s Supermarkets, Inc. bankruptcy case.

17. The Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding under 28 U.S.C. § 157(b)(2). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

18. On January 30, 2003 (the “Commencement Date”) Plaintiff filed a complaint against Defendant initiating this

adversary proceeding. Plaintiff's complaint was timely filed.

19. Plaintiff filed an amended complaint on February 7, 2003. Plaintiff has sought permission of the Court to file a second amended complaint.

20. The Payment was made within ninety (90) days before the Petition Date.

21. The Payment was not made to satisfy a consumer debt.

The Court finds the following additional facts:

22. The check in Exhibit C has a remittance advice that states the check was for payment of 4 items: $27,500.00; $21,695.20; $5,042.80; and $534.90.

23. Exhibit K is a partial listing of rent payments prepared by Carolyn Norris, the Furrs real estate coordinator, on December 13, 2000 for rent payments to be made that month. It shows Defendant's four amounts that appear on the remittance advice.

24. Ms. Norris testified that the check involved in this case was the first payment on the new lease, and it consisted of four components: rent, "postponed rent", interest, and common area charges. She had earlier seen the lease and believed rent was to start November 1. Then she was instructed to start paying as of January 1.

Plaintiff's Case

To prevail, Plaintiff must prove all five elements of 11 U.S.C. § 547(b), which provides:

> Except as provided in subsection (c) of this section, the 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.

Section 547(b)(1)

Plaintiff was a creditor. Section 101(10)(A) defines a creditor as an entity that holds a claim against the debtor. Section 101(5)(A) defines claim as a including right to payment, whether or not matured. Defendant has a right to payment under the lease, and is a creditor.

Section 547(b)(2)

The Court finds that the lease payment was for an antecedent debt. The lease created an antecedent debt. The lease payment was due January 1, 2001. Defendant received and deposited the check on January 5, 2001.

Section 547(b)(3)

The parties stipulated to insolvency. Fact 13.

Section 547(b)(4)

The parties stipulated that the payment was within the preference period. Fact 20.

Section 547(b)(5)

At the conclusion of Plaintiff's case, Defendant made a motion to dismiss for failure of Plaintiff to prove Section 547(b)(5). The parties argued the motion and the Court made Findings of Fact and Conclusions of Law on the record and denied the motion.

Defendant presented no evidence in its case in chief on this element, and at closing reargued that Section 747(b)(5) was not established. The Court took this point under advisement.

Having received the evidence, the Court reaffirms its prior ruling, on the same grounds as stated at trial. Among other things the Court found and finds:

1. Exhibit BB, Debtor's unaudited financial statement as of January 27, 2001 and December 20, 2000, may have been accurate in the Generally Accepted Accounting Principles ("GAAP") sense. As a general rule a properly prepared balance sheet is only coincidentally related to the true value of a business. See, e.g., Peltz v. Hatten (In re USN Communications, Inc.), 279 B.R. 710, 743-44 (D. Del. 2002), aff'd, 60 Fed.Appx. 401 (3rd Cir. 2003)(Discussing GAAP statements and the adjustments that need to be made to determine whether a business is in fact insolvent.) Financial Statements are based on historical cash transactions and adjusted artificially for items such as depreciation and accrued expenses. There was no testimony that these financial statements reflected Debtor's true situation on the dates reflected. In fact, subsequent events in the Chapter 11 demonstrated that the values in Exhibit BB were not there.

2. The Plaintiff testified that had a chapter 7 been filed initially there would have been no cash available and no equity in any real or personal property. The Plaintiff testified that virtually all assets were fully secured to prepetition lenders. The course of the Chapter 11 reinforced this truth; the UCC diligently examined documentation and did not object to orders entered in the Chapter 11 on this ground.

Plaintiff testified that trustees do not administer undersecured assets for fully secured creditors. As to inventory on hand ($73 million on January 27, 2001), there is no breakdown as to perishables and nonperishables. The Plaintiff would have abandoned all perishables. She testified that nonperishables could expect to be sold for 5 to 10 cents on the dollar. Trustee testified that she would have 60 days to assume any lease that had value, assuming that with no money she could have even determined which of 70 lease in 2 states had value, and that the estate would have had no money with which to assume any valuable lease. Therefore, virtually all assets would have been abandoned.

3. As to preference actions, both the Trustee and Rachel Kefauver described the financial records which consisted of thousands of boxes of data. Had a Chapter 7 been filed, these records would not have been organized and the estate would not have had money to do the preference screen that was done during the course of the Chapter 11. Furthermore, in the Trustee’s experience, professionals are reluctant to or refuse to be employed on a contingency fee basis in chapter 7 cases with no funds.

4. In summary, the Court finds that these would have been no dividend to unsecured creditors if this case were filed as a Chapter 7 initially.

Conclusion

Having met all requirements of Section 547(b), the Court finds the Trustee has made a prima facie case. The burden now shifts to Defendant to prove an exception to the Trustee's case. See 11 U.S.C. § 547(g).

Defendant's Case

Defendant argues that the transfer is not avoidable under sections 547(c)(1), (c)(2) and (c)(4). These sections provide:

> The trustee may not avoid under this section a transfer--
> (1) to the extent that such transfer 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;
> (2) to the extent that such transfer was--
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> (C) made according to ordinary business terms;
> ...;
> (4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor--

(A) not secured by an otherwise unavoidable security interest; and
(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor.

Contemporaneous Exchange, Section 547(c)(1)

In Gonzales v. DPI Food Products Co. (In re Furrs Supermarkets, Inc.), 296 B.R. 33, 39 (Bankr. D. N.M. 2003), this Court stated the following:

> Section 547(c)(1) protects transfers from attack if (1) the preference defendant extended new value to the debtor, (2) both the defendant and the debtor intended the new value and reciprocal transfer by the debtor to be contemporaneous and (3) the exchange was in fact contemporaneous.
>
> > The purpose of the contemporaneous exchange exception ... is to encourage creditors to continue to deal with troubled debtors without fear that they will have to disgorge payments received for value given. If creditors continue to deal with a troubled debtor, it is possible that bankruptcy will be avoided altogether.
>
> 5 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy ¶ 547.04[1], at 547- 47-48 (15th ed. rev. 2003)(Footnotes omitted.) The parties' intent to make a contemporaneous transfer is an essential element of a section 547(c)(1) defense. Lowrey v. U.P.G. Inc. (In re Robinson Bros. Drilling, Inc.), 877 F.2d 32, 33 n.1 (10th Cir. 1989). See also Harrah's Tunica Corp. v. Meeks (In re Armstrong), 291 F.3d 517, 525 (8th Cir. 2002) (the parties' intent is the critical inquiry)(quoting Official Plan Comm. v. Expeditors Int'l of Washington, Inc. (In re Gateway Pacific Corp.), 153 F.3d 915, 918 (8th Cir. 1998)). The section protects transfers that do not result in diminution of the estate because unsecured creditors are not harmed by the transfer if the estate was replenished by an infusion of assets that are of roughly equal value to those transferred. Manchester v. First Bank &

Trust Co. (In re Moses), 256 B.R. 641, 652 (10th Cir. B.A.P. 2000).

In this case, the Court finds that the January rent payment and January common area charges payment meet this defense; and the delayed rent payment and interest payment do not.

First, the Court finds that the substance of the overall lease agreement was that rent was to start November 1, but that the parties later agreed, in essence, that Defendant would "lend" the November and December payments to Furrs, to be repaid, with interest, in 3 monthly installments starting January 2001. Defendant did "lend" for November and December and fulfilled all its landlord's duties for those months. As of December 31, 2000, Defendant fully expected and had the right to be repaid for those months. The payment in January for previously provided credit, services and interest is not "new value" as required by section 547(c)(1). The payment was for rents attributable to periods that had already ended, and therefore not "new". Sapir v. Eli Haddad Corp. (In re Coco), 67 B.R. 365, 371 (Bankr. S.D. N.Y. 1986). The payment in January for previously provided credit, services and interest is also not "substantially contemporaneous" as required by section 547(c)(1). Id.

However, the January rent and common area charges were timely paid on January 5 for services to be provided in January, per the contract, and were substantially contemporaneous. See Bernstein v. RH Leasing (In re White River Corp.), 799 F.2d 631, 632-33 (10th Cir. 1986)(Lease obligations are due and payable as the lease term progresses.) The statute does not require the exchange be simultaneous. Grogan v. Laland Investment (In re Garrett Tool & Engineering, Inc.), 273 B.R. 123, 126 (E.D. Mich. 2002). See also Coco, 67 B.R. at 371 (Holding that rent payments 6 and 7 days late were contemporaneous exchanges because the new value was a right of occupancy for the whole month.); Armstrong v. General Growth Dev. Corp. (In re Clothes, Inc.), 35 B.R. 489, 491 (Bankr. D. N.D. 1983)(A lease is an executory contract; each month the lessee is obligated for that month's rent and the lessor is obligated to provide the leasehold for that month.)

This case may be unique in that the intent of the parties is crystal clear and supported by the documents and the testimony. This was a new contract. One bill was sent per the contract, and debtor paid that one bill. There is no confusion as to how the payment was to be applied or was applied. The remittance advice and testimony of Ms. Norris show the exact amount attributable to January rent, January

common area charges, prior rent and interest. The payments correspond to the communications of the parties. The Court finds that the intent of the parties was to pay as stated on the remittance advice attached to the check.

Plaintiff's strongest argument is that there was not new value given to the debtor as required by §547(c)(1)(A), citing Lowrey v. U.P.G. Inc. (In re Robinson Bros. Drilling, Inc.), 877 F.2d 32 (10th Cir. 1989) and Charisma Investment Co., N.V. v. Airport Systems, Inc. (In re Jet Florida System, Inc.), 841 F.2d 1082 (11th Cir. 1988). Lowrey holds that a Defendant is entitled to protection of the contemporaneous transfer defense only to the extent of value given. Lowrey, 877 F.2d at 34. Charisma Investment arguably stands for the proposition that mere availability of vacant leased premises is not "new value." Charisma Investment, 841 F.2nd at 1084.[1]

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[1]In Charisma Investment, the debtor had vacated its leased premises 19 months before its bankruptcy. 841 F.2d at 1082. Both the Bankruptcy Court and District Court found that Debtor had not made use of the property and new value had not been extended. The actual holding in Charisma Investment was not based on this, however. Rather, the Eleventh Circuit held that the landlord's forbearance to terminate the lease could not be new value, because in substance all that occurred was that the debtors' obligation to pay rent was replaced by an obligation to pay an antecedent debt. Substitution of one debt for another is excluded from the definition of "new value" in section 547(a)(2). Id. at 1084. The 11th Circuit stated however, that had the debtor stayed and used the property or found a sublesee, there may have been "new value".

(continued...)

The Court finds Charisma Investment factually distinguishable in this case. While in Charisma Investment, the debtor abandoned the property 19 months before bankruptcy, in this case Debtor had just leased the property and intended to occupy it. There is some evidence that during the fall of 2000 Furrs was taking steps to open the location as a store. As it turns out, Furrs was unable to open the store and never did occupy the premises. But, the evidence is uncontradicted that the space was Furrs' property and fully available to it throughout the relevant time period.

"New value" is to be determined at the time of the transfer, not later. Robinson 877 F.2d at 33:

> Specifically, we ruled [In re George Rodman, Inc., 792 F.2d 125 (10th Cir. 1986)] that valuation of the transfer from creditor to debtor, in the case of the release of a valid lien, was not required at the time of the adversary hearing under the plain terms of § 547(c)(1). Consequently, that the lien on the well may have had no value at the time of the adversary hearing was of no importance, so long as it had value at the time of the transfer. See also Jet Florida, Inc. v. American Airlines, Inc. (In re Jet Florida Sys., Inc.), 861 F.2d 1555, 1559 n. 5 (11th Cir. 1988).

(Emphasis in original).

The fact that ultimately the space was not used is not determinative of its earlier value. At the time of the

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[1](...continued)
Id.

transfer Furrs intended to occupy the space. As to value, this case may also be unique in that value is relatively clear. There is no evidence that the lease in this case was not a fully negotiated arms length transaction between sophisticated parties. The lease was new, and this was the first payment. The Court presumes the negotiation process resulted in a fair market value determination for the rent, and finds that the estate was in fact replenished by that value for the period of Debtor's control.

This finding is also suggested by 11 U.S.C. § 365(d)(3). That section requires a trustee to perform the obligations of a debtor under an unexpired lease of nonresidential rental property until the lease is assumed or rejected, "notwithstanding section 503(b)(1)." In other words, lessors are granted a claim that has a priority similar to an administrative expense without being required to establish value or prove a benefit to the estate. El Paso Properties Corp. v. Gonzales (In re Furr's Supermarkets, Inc.), 283 B.R. 60, 65 (10th Cir. BAP 2002). Section 365(d)(3) was added to the Bankruptcy Code in 1984, to remedy what lessors perceived as a serious problems caused by prior law. Id. at 66 (quoting 130 Cong. Rec. S8887, 8895 (daily ed. June 29, 1874)(statement of Sen. Hatch)). One of those problems was that often when a

debtor vacated space without deciding whether to assume or reject the lease, the debtor or trustee would stop paying rent. Id. However, the landlord was forced to provide current services (use of its property, utilities, security, other services) without current payments. Id. The law was changed to require debtor-tenants to pay their rent, common area, and other charges on time pending assumption or rejection. Id.

Debtor filed its Chapter 11 petition on February 8, 2001. On March 1, 2001 it moved for an extension of time to assume or reject unexpired leases of nonresidential property. (Doc 157). It alleges that while some leases may not be necessary for operations, they may prove to be "below market" leases that may be valuable to assume and assign. (Id. ¶ 5). The Court granted this motion, finding "The Unexpired Leases constitute a major asset of the Debtor's estate and are critical to the Debtor's reorganization efforts" and "The Debtor has announced that it has commenced efforts to sell the business. It would be premature to require the Debtor to decide whether to assume or reject the Unexpired Leases until its sale efforts have progressed further." (Doc. 326). On May 17, 2001, Debtor moved to reject this lease (doc. 469) and the Court ordered it rejected on May 30, 2001 (doc. 524).

This series of pleadings demonstrates that the Debtor considered the lease potentially valuable until May 17, 2001, and had taken steps to market it to third parties.

Ordinary Course of Business, Section 547(c)(2)

The Court finds that Defendant did not meet its burden of proof for this defense. See generally DPI Food Products Co., 296 B.R. at 41-46 (discussing state of ordinary course of business defense in 10th Circuit).

Specifically, "To summarize, § 547(c)(2)(C) requires that [defendant] successfully raise and prove that the payments it defends were or are consistent with the (presumably broad) range of arrangements that take place between creditors and healthy debtors in the applicable segment of the industry." Id. at 46. At trial Defendant presented its limited dealings with Furrs which only took place shortly before and during the preference period. Under Clark v. Balcor Real Estate Finance, Inc. (In re Meridith Hoffman Partners), 12 F.3d 1549, 1553 (10th Cir. 1993), cert. denied, 512 U.S. 1206 (1994), ordinary business terms are defined as those that occur with "healthy" debtors. Therefore, Defendant's history with Furrs does not establish what is ordinary. Defendant's only other evidence of ordinary business terms was anecdotal testimony that Defendant had sometimes given extensions to other new tenants.

Defendant did not establish what is normal in the industry. This defense should be overruled.

Subsequent New Value, Section 547(c)(4)

For the reasons set out above, the Court finds that Defendant gave "new value" for the period of February 1 through February 8 in the amount of one-quarter of the February rent and common charges of $32,542.80, or $8,135.20.

INTEREST AND ATTORNEY FEES

In her Amended Complaint (see doc 27) Plaintiff sought pre- and post-judgment interest at the highest lawful rate from the date the complaint was filed, January 30, 2003, until the judgment was paid in full. It also sought attorney fees and costs. In Defendant's Amended Counterclaim (see Id.) it also sought attorney fees and costs.

In Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.), 4 F.3d 1556, 1566 (10th Cir. 1993), cert. denied, 510 U.S. 1114 (1994), the Tenth Circuit discussed prejudgment interest:

> The current bankruptcy code does not specify whether the bankruptcy court may award prejudgment interest to a prevailing trustee. In re Indep. Clearing House Co., 41 B.R. 985, 1014 (Bankr. D. Utah 1984) aff'd and rev'd on other grounds, en banc, 77 B.R. 843 (D. Utah 1987). In the absence of a statutory provision to the contrary, prejudgment interest may generally be awarded if 1) the award of prejudgment interest would serve to compensate the injured party, and 2) the award of prejudgment

> interest is otherwise equitable. Anixter v. Home-Stake Production Co., 977 F.2d 1549, 1554 (10th Cir. 1992); FDIC v. Rocket Oil Co., 865 F.2d 1158, 1160 (10th Cir. 1989). In bankruptcy proceedings, the courts have traditionally awarded prejudgment interest to a trustee who successfully avoids a preferential or fraudulent transfer from the time demand is made or an adversary proceeding is instituted unless the amount of the contested payment was undetermined prior to the bankruptcy court's judgment. See In re Bellanca Aircraft Corp., 850 F.2d at 1281; In re Indep. Clearing House Co., 41 B.R. at 1015.
>
> In the instant case, the award of prejudgment interest to the trustee would unquestionably serve a compensatory purpose. An award of prejudgment interest would serve to compensate the debtor's estate for appellants' use of those funds that were wrongfully withheld from the debtor's estate during the pendency of the current suit. See In re Chase & Sanborn Corp., 127 B.R. 903, 907-10 (Bankr. S.D. Fla. 1991); In re Suburban Motor Freight, Inc., 124 B.R. 984, 1005-06 (Bankr. S.D. Ohio 1990); In re H.P. King Co., 64 B.R. 487, 488-89 (Bankr. E.D. N.C. 1986). Additionally, an award of prejudgment interest would appear to be consistent with the balance of equities.

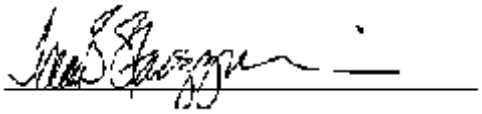
More recent cases, although none in the Tenth Circuit, have found that even if the amount is unliquidated, prejudgment interest can be awarded. See, e.g., Phoenix American Life Ins. Co. v. Devan (In re Merry-Go-Round Enter., Inc.), 308 B.R. 237, 242-43 (D. Md. 2004)(Citing cases.) Because the purpose of prejudgment interest is compensatory rather than punitive, the Court agrees with these cases. Therefore, the Court will award Plaintiff prejudgment interest.

As to the rate of interest, the Court finds the Bankruptcy Court's opinion in Investment Bankers, Inc., 135 B.R. 659, 669-70 (Bankr. D. Co. 1991), aff'd. 161 B.R. 507 (D. Co. 1992), aff'd. 4 F.3d 1556 (10th Cir. 1993), cert. denied, 510 U.S. 1114 (1994) persuasive. Therefore, the prejudgment rate of interest shall be the rate in effect under 28 U.S.C. § 1961 on January 30, 2003. The postjudgment rate of interest shall be the rate in effect under 28 U.S.C. § 1961 on April 15, 2005.

Both parties requests for attorney fees should be denied. See Tuloil, Inc. v. Shahid (In re Shahid), 254 B.R. 40, 43 (10th Cir. BAP 2000).

SUMMARY

Plaintiff established a prima facie case that the transfer to Defendant was a preference, in the amount of $54,772.90. Defendant sustained its burden of proof to show that the January rent and common area charges were a substantially contemporaneous exchange for new value in the amount of $27,500.00 (rent) plus $5,042.80 (common charges), and gave subsequent value in the amount of $8,135.20. Therefore, Plaintiff is entitled to a judgment of $14,094.90 plus prejudgment interest. No attorney fees are awarded to either side. Judgment will enter separately.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on April 15, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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