

**United States Bankruptcy Court
District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

ALLIED DISCOUNT CORPORATION,
Debtor.

No. 11-03-11697 SA

ALLIED DISCOUNT CORPORATION,
Plaintiff,
v.

Adv. No. 03-1248 S

TOM T. SANCHEZ, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER
GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Plaintiff Allied Discount Corporation's ("Allied") Motion for Summary Judgment (doc 27)("Motion"). The Motion seeks summary judgment on two counts: one for avoidance of a transcript of judgment as a preference under 11 U.S.C. § 547(b); and one for subordination of defendants' punitive damages award under 11 U.S.C. § 501(c)(1). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (F) and (O).

Pursuant to NM LBR 7056-1, "[a]ll material facts set forth in the statement of the movant shall be deemed admitted unless specifically controverted." Defendants did not file a response to the Motion within the time limits set out in the rule. The Court therefore adopts the Plaintiff's Statement of Undisputed Material Facts. Federal Rule of Civil Procedure 56(c) directs the Court to enter judgment forthwith if the moving party is entitled to a judgment as a matter of law. Therefore, the Court

must examine the established facts to determine if Allied is entitled to a judgment as a matter of law.

STATUTES

Section 547(b) provides as follows:

Except as provided in subsections (c) and (i) 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(f) provides:

For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

Section 510(c) provides:

Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may--
(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or ...

PREFERENCE CLAIM

The filing of the transcript of judgment was a "transfer". See, e.g., Carter v. HCL Leasing Corp. (In re Martin), 87 B.R. 394, 396 (Bankr. E.D. N.C. 1988) ("A judgment lien in favor of a creditor on real property of the debtor constitutes a transfer to of for the benefit of that creditor.") (Citation omitted.)

The transfer was to a creditor. Undisputed Fact 2.

The transfer was for an antecedent debt. Undisputed Facts 2, 13.

The transfer was made while the Debtor Allied was insolvent. 11 U.S.C. § 547(f)¹.

The transfer was made on or within 90 days before the date of the filing of the bankruptcy. Undisputed Facts 1, 3.

The transfer would enable Defendants to receive more than they would receive if the case were filed under chapter 7, the transfer had not occurred, and Defendants received payment of their debt to the extent provided by the provisions of Title 11. Namely, the Debtor had assets of \$310,321.02 (Undisputed Fact 6) and liabilities of at least \$483,439.00 (Undisputed Fact 7). See, e.g., Hunter v. Snap-On Credit Corp. (In re Fox), 229 B.R. 160, 166 (Bankr. N.D. Ohio 1998) ("[U]nless there are enough assets in the debtor's bankruptcy estate to enable all of the unsecured creditors to receive a 100% distribution, any

¹Defendants did not overcome the presumption of insolvency, so the Court need not review the undisputed facts that establish that insolvency.

prepetition payments made to an unsecured creditor will be preferential under § 547(b) as such payments will allow that creditor to receive more than it otherwise would have in a hypothetical Chapter 7 distribution.”)

Therefore, Allied has established that it is entitled to judgment as a matter of law on its preferential transfer complaint. The transcript of judgment should be avoided.

SUBORDINATION CLAIM

Defendant’s claim is evidenced by a judgment that consisted of \$150,000 in compensatory damages and \$150,000 in punitive damages, with interest to accrue at the rate of 15% per annum. Undisputed Fact 14.

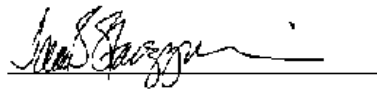
The majority view is that no inequitable conduct is required on the part of the claim holder to equitably subordinate a claim. In re Virtual Network Services Corp., 902 F.2d 1246, 1249 (7th Cir. 1990)(Collecting cases.) Sometimes a claim should be subordinated simply by its nature as being a penalty. In re Merwede, 84 B.R. 11, 14 (Bankr. D. Conn. 1988)(Citing legislative history.) Punitive damage claims are imposed not to afford redress but to deter future wrongful conduct. In re Colin, 44 B.R. 806, 810 (Bankr. S.D. N.Y. 1984). If punitive damages are not equitably subordinated, their purpose is not served by forcing innocent creditors sharing the debtor’s limited assets to pay for the debtor’s wrongdoings. Id. Therefore, this Court

joins the majority view that punitive damages should be equitably subordinated in Chapter 11 proceedings.

Therefore, Allied has established that it is entitled to judgment as a matter of law on its subordination claim. One half of Defendants' claim, representing the punitive damages and interest thereon, should be subordinated to the claims of all the unsecured creditors in this case.

ORDER

IT IS ORDERED that Allied submit a judgment in conformity with this Memorandum Opinion.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 13, 2006, 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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