

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

FILED
U.S. BANKRUPTCY COURT
WESTERN DISTRICT OF NC

MAY 09 1995

J. BARON GRESHAM
BY: 
Deputy Clerk

In Re:

FABRICATING AND PRODUCTION
MACHINERY, INC.,

Debtor.

JAMES T. WARD, Examiner for the
Estate of Fabricating &
Production Machinery, Inc.,

Plaintiff,

v.

PACIFIC PRESS & SHEAR, INC.,

Defendant.

JUDGEMENT ENTERED ON MAY 09 1995

Adversary Proceeding

No. 94-3114

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND GRANTING SUMMARY JUDGMENT FOR PLAINTIFF

This cause is before the undersigned United States Bankruptcy Judge on the Defendant's Motion for Summary Judgment and Plaintiff's Response and Motion In Limine. Plaintiff brought an action to avoid a post-petition transfer and the Defendant has moved for Summary Judgment. For the reasons stated below, the court has determined that it cannot grant the Defendant's motion, and that the Plaintiff is entitled to Summary Judgment pursuant to Rule 7056 of the Bankruptcy Code.

The Defendant, Pacific Press & Shear, Inc. is a manufacturer of industrial machinery, and the debtor, Fabricating & Production Machinery, Inc., was an authorized distributor of Pacific machin-

ery. Prior to September 1992, the debtor and Pacific entered into negotiations with Inco Alloys International, Inc. regarding the purchase of some Pacific machinery. On September 2, 1992, Inco orally agreed to purchase a shear from Pacific for \$800,000-.00. Within two days of the order, Pacific and the debtor agreed that the amount of commission earned by the debtor was \$116,490-.00, and that this amount would be partially set off against \$75,278.20 that the debtor owed Pacific. On September 11, 1992, the debtor filed a Chapter 11 petition. On September 25, 1992, Pacific paid the debtor \$41,211.10, representing the \$116,490.00 commission due, less the pre-petition obligation the debtor owed Pacific in the amount of \$75,278.20. James T. Ward, Examiner, brought this avoidance action pursuant to 11 U.S.C. §549 to recover the unpaid portion of the commission.

As a preliminary matter, Pacific asserts that it is entitled to Summary Judgment because the examiner lacks standing to bring an avoidance action. The court finds this argument to be without merit and determines that the examiner has standing. See, In re: Franklin-Lee Homes, Inc., 102 B.R. 477 (E.D.N.C. 1989).

Pacific's main argument in support of its motion for Summary Judgment is that it is entitled to set off the commission owed to the debtor against the amount owed to it by the debtor pursuant to §553. Pacific argues that the commission arose pre-petition, that Pacific had a pre-petition claim against the debtor and that there is mutuality of obligations.

Section 553 of the Bankruptcy Code does not create a right to set off, rather, it recognizes a right as created either by statute or common law. The right is unaffected by the bankruptcy code except to the extent that the creditor's claim is disallowed, the creditor acquired (other than from the debtor) the claim during the 90 days preceding the bankruptcy while the debtor was insolvent, the debt being offset was incurred for the purpose of obtaining a right of set off, while the debtor was insolvent and during the 90-day period pre-bankruptcy, or the creditor improved his position in the 90-day period before the bankruptcy. 11 U.S.C. §553(a).

To offset a debt pursuant to §553(a), the creditor must prove the following:

- (1) That a debt exists from the creditor to the debtor which arose prior to the commencement of the bankruptcy case;
- (2) That the creditor has a claim against the debtor which arose prior to the commencement of the bankruptcy case;
- (3) That the debt and the claim are mutual obligations.

In re: Ruiz, 146 B.R. 877, 879 (Bankr.S.D. Fla. 1992).

The second element is the only one in dispute here. In this case, the commission that Pacific retained was generated from a pre-petition sale of machinery to a third party, Inco. Pacific contends that Inco, Pacific and the debtor all entered into a valid binding contract on September 2, 1992, and that this simultaneously gave rise to Pacific's obligation to pay the debtor a commission in the amount of \$116,490.00. However, the

evidence shows that pursuant to the commission arrangement between the debtor and Pacific, the debtor was to be paid in full from the down payment check received from Inco. At the time of the debtor's Chapter 11 petition, Inco had not paid a down payment on the machinery it had ordered from Pacific, and consequently, Pacific did not yet owe the debtor the commission.

Section 553 only provides for set off of mutual pre-petition debts. A creditor may not collect a pre-petition debt by withholding payment of a post-petition debt owed to the debtor. Ruiz at 879; In re: Sluss, 107 B.R. 599, 601 (Bankr.E.D. Tenn. 1989). "For set off purposes, a debt arises when all transactions necessary for liability occur. . . . " United States Through Agr. Stabilization and Conservation Service v. Gerth, 991 F.2d 1428, 1433 (8th Cir. 1993). In the instant case, when the debtor filed its petition, Pacific did not yet owe a commission to the debtor. Assuming *arguendo*, that a contract for the sale of the machinery was formed on September 2, 1992 when the parties orally agreed, Pacific's obligation to pay the debtor a commission did not arise until a down payment was received from Inco. Quite simply, all of the transactions necessary for liability did not occur prior to the filing of the debtor's petition.

In sum, the court finds that Pacific's obligation to the debtor for post-petition commissions is post-petition debt, and as such, Pacific has no right of set off. The Defendant improperly set off these funds post-petition, and the transfer is avoidable by the examiner pursuant to 11 U.S.C. §549.

Based on the foregoing, it is ordered that:

1. the Defendant's Motion for Summary Judgment is denied;
2. Summary Judgment for the Examiner is granted;
3. The above described transfer is avoided; and
4. The Defendant is ordered to pay to the Examiner the sum of \$75,278.20 plus the costs of this suit.

This the 8th day of May, 1995.



George R. Hodges
United States Bankruptcy Judge