UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

TERRY ENGEL AND HEIDI ENGEL BKY. NO. 98-34681

Debtors.

Mark C. Halverson, Trustee,

Plaintiff,

VS. ADV. NO. 99-3221

Haugen Feeds, Inc., **ORDER GRANTING SUMMARY JUDGMENT**

Defendant.

This matter came on for hearing on March 2, 2000, on Plaintiff Trustee Mark Halverson's motion for summary judgment. Appearances were as noted in the record of the proceedings. The Court, having heard arguments presented at the hearing, having reviewed the briefs submitted, and, being fully advised in the matter; now makes this **ORDER** pursuant to the Federal and Local rules of Bankruptcy Procedure.

I.

Prior to bankruptcy filing, Terry Engel and Heidi Engel were hog farmers. Defendant Haugen Feeds was the Debtors' feed supplier. The Debtors had a history of payment difficulties with Defendant regarding feed for their hogs, and in 1995 they entered into a debt adjustment agreement with Haugen Feeds whereby the Debtors agreed: to make amortized

payments on old debt; purchase feed exclusively from Haugen; and, regarding ongoing purchases, that "All additional accounts will be paid on a current basis and maintained as current." Debtors continued to have financial difficulties and, on August 7, 1998, they filed their petition for relief under 11 U.S.C. Chapter 7.

In the meantime, the Debtors became delinquent in payments to Defendant for ongoing feed deliveries. By May 9, 1998, (beginning of the 11 U.S.C. § 547 preference period) Debtors owed Haugen Feeds the approximate amount of $7,298.67 for past deliveries.[1] Between May 9 and the end of the month, additional charges were incurred in the amount of $2431.98 for current deliveries. By the end of May, the total outstanding amount owed by the Debtors for past deliveries of feed by Defendant was $9,730.65.

During June and July additional charges were incurred and additional payments were made. In each instance, the June and July deliveries were paid before credits were made against the old balance. As of the end of July, the total balance owing had been paid back down to $7,298.67. No more deliveries were made after July, and the entire balance was paid off by August 6.

Plaintiff Trustee has commenced this preference action seeking recovery from Defendant of $9,730.65, which Plaintiff claims was stale debt paid to Defendant during the ninety days immediately preceding the bankruptcy filing.

II.

Under 11 U.S.C. § 547(b), a trustee may avoid a transfer of any interest in property

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[1] The amount was disputed, but, apparently was later settled through mediation in June 1998 by agreement providing for full payment.

of a debtor that was made:

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. within ninety (90) days before the date of the filing of the petition;
   B. ...

5. that enables such creditor to receive more than such creditor would receive if-
   A. the case were a Chapter 7 case;
   B. the transfer had not been made; and
   C. ...

Dietz v. Hanson (In re Hanson Restaurants, Inc.), 155 B.R. 758 (Bankr. D.Minn. 1993). An "antecedent debt" is one that is incurred prior to a relevant transfer. *Southern Technical College, Inc. v. Graham Properties Partnership (In re Southern Technical College, Inc.)*, 199 B.R. 46 (Bankr. E.D.Ark. 1995). A debt is "incurred" on the date upon which the debtor becomes legally obligated to pay the same. Id.

11 U.S.C. § 547(c)(1), however, provides that a trustee may not avoid a transfer that was both: 1) intended by the debtor and creditor to be a contemporaneous exchange for new value given to the debtor; and, 2) in fact, was a substantially contemporaneous exchange. *Dorholt v. Lindquist (In re Dorholt, Inc.)*, 239 B.R. 521 (8th Cir. BAP 1999). That the parties intended a contemporaneous exchange for new value is not sufficient if such exchange is not actually, or in fact, substantially contemporaneous. Id. See also *Berquist v. fidelity Mortgage Decisions*

Corp. (In re Alexander), 219 B.R. 255 (Bankr. D.Minn. 1998).

Defendant raises the contemporaneous exchange defense here. Haugen Feeds cites the pre bankruptcy mediation as preventing the Defendant from actually receiving the payments contemporaneously with the feed deliveries, and argues that the question of contemporaneous exchange is a fact issue.

> ...the debtors filed for mediation under the Farmer Lender Mediation Act, Minnesota Statute §583.20 et seq. Upon filing for mediation the defendant was not allowed to collect for feed that was delivered and such payment was made subsequently pursuant to the agreement during mediation.
> *Defendant's Reply Memorandum, Feb. 28, 2000, page 1.*

The record does not disclose the nature, extent, or timing of the mediation. However, 11 U.S.C. § 547(c)(1) provides no allowance for transfers that might have been intended as contemporaneous exchanges, but where payments are interrupted by unforseen extraneous events. The payments must in fact be made substantially contemporaneously with incurrence of the debt in order for the defense to be viable. It is undisputed that the challenged payments made here were not in fact made substantially contemporaneously with incurrence of the debt. Accordingly, the defense is not viable, and there exists no question of fact to be resolved.

There being no other defense asserted by Haugen Feeds, plaintiff is entitled to summary judgment in the proceeding.

III.

Based on the forgoing, it is hereby **ORDERED**:

1. That Plaintiff's Motion for Summary Judgment is GRANTED.

2. That Plaintiff is awarded judgment against the Defendant in the amount of $9,730.65 representing amounts preferentially transferred by the debtors to the Defendants within 90 days prior to the debtors' bankruptcy filing.

3. That Plaintiff is awarded an additional amount of $924.41 representing accrued interest at a rate of 6% from August 7, 1998 to the present.

4. That the aggregate judgment awarded in favor of the Plaintiff and against the Defendant is $10,655.06.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 16, 2000

By the Court:

/e/ Dennis D. O'Brien
Hon. Dennis D. O'Brien
Chief Judge of Bankruptcy Court

NOTICE OF ELECTRONIC ENTRY AND FILING ORDER OR JUDGMENT
Filed and Docket Entry made on 03/16/00
Patrick G. De Wane, By SKM

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