

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

STEPHEN M. HYTJAN,

BKY 4-95-1093

Debtor.

JULIA A. CHRISTIANS, TRUSTEE

Plaintiff,

vs.

ADV 4-95-172

GAGE TRAVEL, INC.,

FINDINGS OF UNDISPUTED FACTS,
CONCLUSIONS OF LAW
& ORDER FOR JUDGMENT

Defendant.

At Minneapolis, Minnesota, November 15, 1995.

The above-entitled matter came before the Court by motion filed by the Chapter 7 Trustee, Julia A. Christians ("Trustee"), for summary judgment pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure. The matter came on for hearing before the undersigned on October 11, 1995. Appearances were noted in the record. The Court, having heard the arguments of counsel, studied the pleadings, and being duly advised in the premises, makes the following:

FINDINGS OF UNDISPUTED FACTS

1. The debtor, Stephen M. Hytjan ("Debtor"), was the president and 100% owner of the shares of a company called SporTravel, Inc. ("SporTravel"), a company whose operations consisted of selling travel to sporting events primarily to corporate groups.

2. Gage Travel, Inc. ("Gage Travel") is a retail travel agency which makes airline and hotel arrangements for both individual and corporate clients.

3. On September 30, 1995, Gage Travel, SporTravel, and

1995	Gage Travel	SporTravel	and
NOTICE OF ENTRY AND FILING ORDER FOR JUDGMENT			
Filed and Docket Entry made on		11/15/95	
By		kk	

a-1

Debtor entered into an Asset Purchase Agreement ("Agreement"). The Agreement, drafted by Gage Travel, contemplated the purchase and sale of specifically enumerated assets of SporTravel. The Agreement was quite extensive and outlined in detail the responsibilities and obligations of Gage Travel, as buyer, as well as SporTravel, as seller. The Agreement provided that, with the exception of a contemporaneously executed addendum, it was the entire agreement between the parties with respect to the sale and purchase and that it could not be supplemented, modified, waived, or amended without a writing executed by all parties.

4. Prior to the execution of the Agreement, SporTravel had sued PepsiCo in an action commenced in the Federal District Court for the District of Minnesota entitled SporTravel, Inc. v. PepsiCo, Inc. The Agreement itemized those assets which were subject to the purchase/sale and specifically provided that SporTravel, not Gage Travel, would "retain all interest" in the PepsiCo litigation:

1.5 It is agreed that [SporTravel] will retain all interest in that certain litigation entitled Sportravel, Inc. vs. Pepsico.

Debtor retained counsel and pursued this lawsuit against Pepsico. A settlement, negotiated by Debtor and his counsel, was eventually reached.

5. The Agreement provided in part that all accounts receivable, commissions, bonuses, and income arising from completed transactions prior to the closing date would remain the property of SporTravel. By contrast, those assets remaining after the closing date, which included all ongoing contracts, existing tours, reservations, and orders for trips or tours which were not completed, belonged to Gage Travel. Additionally, SporTravel was

obligated to pay Gage Travel an amount equal to all customer deposits received prior to the effective date of the Agreement.

6. Contemporaneously with the execution of the Agreement, the parties executed an Addendum. The Addendum delineated those customer deposits which SporTravel had received for trips that had not been completed and constituted amounts owing to Gage Travel. The net obligation to Gage Travel for these deposits amounted to \$110,411.00. Neither SporTravel nor the Debtor had the ability to make this payment on the closing date. Additionally, Debtor and SporTravel had additional obligations which needed to be satisfied. Consequently, Gage Travel agreed to loan Debtor \$110,000.00 over and above the \$110,411.00 that SporTravel was obligated to pay in exchange for signing a promissory note in the sum of \$220,411.00.

7. The Addendum further provided that Debtor and SporTravel agreed to immediately remit any payments received with respect to any outstanding "receivables" to Gage Travel in order to reduce the amount owing under the promissory note:

FURTHER, [Debtor] and SporTravel agree to immediately remit any payments received by them with respect to any outstanding receivables of SporTravel to the Buyer in satisfaction or partial satisfaction of such Promissory Note.

8. On or about February 18, 1994, Gage Travel commenced an action in state court against Debtor, asserting causes of action for breach of contract, conversion, fraud, and unjust enrichment arising from Debtor's transactions with Gage Travel. Pursuant to an agreement between the parties, a judgment was entered against Debtor on November 22, 1994, in the amount of \$328,840.17 plus interest.

9. Debtor received funds from PepsiCo which represented the

settlement of the PepsiCo litigation. Although Debtor apparently used some of the money he received for various purposes, he directed his counsel to remit \$20,000.00 of the proceeds from that litigation to Gage Travel. On or about December 5, 1994, counsel for the Debtor mailed a certified check to Gage Travel in the amount of \$20,000.00.

10. Gage Travel did not know the source of the funds or believe that it represented a payment from an account receivable or the proceeds from the PepsiCo litigation but, rather, assumed that the money came from Debtor's personal resources. See Affidavit of Robert H. Sondag, at ¶ 6.

11. Debtor filed for relief under Chapter 7 of the Bankruptcy Code on March 1, 1995. The shares of stock in SporTravel are property of the bankruptcy estate.

12. On May 23, 1995, the Trustee filed a Complaint and thereby seeks to avoid and recover for the benefit of the bankruptcy estate the \$20,000.00 transferred by Debtor to Gage Travel, Inc. pursuant to 11 U.S.C. §§ 547(b) and 550(a).

CONCLUSIONS OF LAW

A. Standards for Summary Judgment

Summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure 56 and made applicable to this adversary proceeding by Bankruptcy Rule 7056. Federal Rule 56 provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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). The moving party on summary judgment bears the initial burden of showing that there is an absence of evidence

to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party is the plaintiff, it carries the additional burden of presenting evidence that establishes all elements of the claim. United Mortgage Corp. v. Mathern (In re Mathern), 137 B.R. 311, 314 (Bankr. D. Minn. 1992), aff'd, 141 B.R. 667 (D. Minn. 1992). The burden then shifts to the nonmoving party to produce evidence that would support a finding in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-52 (1986). This responsive evidence must be probative, and must "do more than simply show that there is some metaphysical doubt as to the material fact." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

In considering the evidence, the court may address whether the respondent's theory on the facts is "implausible." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1480 (6th Cir. 1989). The court may also gauge the reasonableness of competing inferences asserted on the same basic evidence. Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985); Mathern, 137 B.R. at 322. The reasonableness of asserted inferences is measured against the viability of the legal theory which they are asserted to support, and is also controlled by the weight and probity of the evidence advanced to support them. Mathern, 137 B.R. at 322-23. The ultimate question is whether, after giving the nonmoving party the benefit of all favorable factual inferences, reasonable minds could differ as to the factual interpretation of the evidence of record. Id. at 323 (citing Liberty Lobby, 477 U.S. at 250-52).

B. Section 547(b)

The fundamental purpose of the Bankruptcy Code's avoidable

preference provision is to restore the bankruptcy estate to its condition prior to the preferential transfer. Halverson v. Le Sueur State Bank (In re Willaert), 944 F.2d 463, 464 (8th Cir. 1991). Section 547(b) thus furthers the prime bankruptcy policy of equality of distribution among similarly situated creditors. H.R. Rep. No. 595, 95th Cong., 1st Sess. 177-78, reprinted in 1978 U.S.C.C.A.N. 5963, 6138. In order to establish a prima facie case under § 547(b), and for a transfer to be subject to avoidance as a preference, it is incumbent upon the trustee to establish that:

- (1) There was a transfer of an interest of the debtor in property;
- (2) The transfer was made on account of an antecedent debt;
- (3) The transfer was made to or for the benefit of a creditor;
- (4) The transfer was made while the debtor was insolvent;
- (5) The transfer was made within ninety days prior to the commencement of the case; and
- (6) The transfer left the creditor in a better position than it would have been if the transfer had not been made and the creditor asserted its claim in a liquidation proceeding under Chapter 7.

See 11 U.S.C. § 547(b). See also Buckley v. Jeld-Wen, Inc. (In re Interior Wood Prods., Co.), 986 F.2d 228, 230 (8th Cir. 1993). Gage Travel, through its answer to the complaint and the admissions made in this case, concedes the existence of all of the aforementioned elements except for the first. Gage Travel asserts that Debtor had no interest in the \$20,000.00 payment made during the preference period. Gage Travel argues that the Addendum that was contemporaneously executed with the Agreement "significantly changed the treatment of accounts receivable, including the

SporTravel/PepsiCo Action receivable" as set forth in the Agreement. As such, Gage Travel contends that it acquired all legal right and interest to the proceeds from the PepsiCo litigation.

In order for a transfer to be subject to the trustee's avoidance powers under § 547(b), it is imperative that the debtor have an interest in the property transferred: Coral Petroleum, Inc. v. Bankque Paribas-London, 797 F.2d 1351, 1355-56 (5th Cir.), reh'g denied, 801 F.2d 398 (5th Cir. 1986). The transfer must deprive the bankruptcy estate of something of value which would otherwise be available to satisfy creditor claims. Continental & Commercial Trust & Sav. Bank v. Chicago Title & Trust Co., 299 U.S. 435, 443 (1913)(ruling that "[t]o constitute a preferential transfer . . . there must be a parting with the bankrupt's property for the benefit of a creditor and a consequent diminution of the bankrupt's estate."); Carlson v. Farmers Home Admin. (In re Newcomb), 744 F.2d 621, 626 (8th Cir. 1984). In order to determine whether the debtor has an interest in the property transferred, it is incumbent upon a court to look to state law. Kallen v. Ash, Anos, Freedman & Logan (In re Brass Kettle Restaurant, Inc.), 790 F.2d 574, 575 (7th Cir. 1986). See Griffel v. Murphy (In re Wegner), 839 F.2d 533, 538-39 (9th Cir. 1988)(concluding that the debtor no longer had a property interest in collateral transferred to creditor prior to the bankruptcy filing when both parties agreed to a cancellation of the executory contract and a return of the collateral). Generally, a transfer of money to a creditor that does not issue from property of the debtor is not avoidable as a preference. 4 Collier on Bankruptcy ¶ 547.03, at 547-26 (Lawrence

P. King. et al. eds., 15th ed. 1995).

The resolution of the dispute in this case hinges upon the critical issue of whether under the Agreement and Addendum, the Debtor retained an interest in the proceeds of the PepsiCo litigation or whether his interest therein passed to Gage Travel. It is hornbook contract law that where the written language of an agreement is clear, it is neither necessary nor appropriate when construing it to go beyond the wording of the contract itself. Telex Corp. v. Data Prods. Corp., 217 Minn. 288, 294-95, 135 N.W.2d 681, 686-87 (1965); Mutsch v. Rigi, 430 N.W.2d 201, 203 (Minn. Ct. App. 1988). A court should not speculate about the hidden and unexpressed intentions of the parties to the contract and such later-voiced, and frequently self-serving, intentions should not be used to alter the unequivocal language of the agreement. Indianhead Truck Line, Inc. v. Hvidsten Transp., Inc., 268 Minn. 176, 183-84, 128 N.W.2d 334, 340-41 (1964); Kuhlman v. Educational Publishers, 245 Minn. 171, 176-77, 71 N.W.2d 889, 893-94 (1955). When construing a contract, the proper administration of justice precludes an overzealous quest for subtle ambiguity in order to bring in parol evidence and destroy the expressed intentions of the parties when a court, despite some imperfection in expression, can reasonably ascertain those intentions by applying the words used, with all their reasonable implications, to the subject matter at hand. Hartung v. Billmeier, 243 Minn. 148, 150-51, 66 N.W.2d 784, 787-88 (1954).

When more than one instrument or writing is executed as part of a single transaction, those instruments must generally be construed together and its parts harmonized. See Anderson v.

Kammeier, 262 N.W.2d 366, 370-71 (Minn. 1977). This is especially the case if the two agreements are executed contemporaneously on the same day and it is apparent that the parties manifested an intention that the instruments should be treated as a single contract. Farrell v. Johnson, 442 N.W.2d 805, 806-07 (Minn. Ct. App. 1989). Therefore, a contract should be construed so as to give effect to every word and phrase, and any interpretation which renders a provision of a written instrument meaningless should be avoided on the assumption that the parties intended the language used to express their meaning to have some legally operative effect. Independent Sch. Dist. v. Loberg Plumbing & Heating Co., 266 Minn. 426, 435-36, 123 N.W.2d 793, 799-800 (1963); Casey v. Brotherhood of Locomotive Firemen & Enginemen, 197 Minn. 189, 193, 266 N.W. 737, 739 (1936). It should, however, be parenthetically noted that any ambiguity in a contract or inconsistency in a disputed provision will be resolved against the drafter. Current Technology Concepts, Inc. v. Irie Enters., Inc., 530 N.W.2d 539, 543 (Minn. 1995); Cherne Indus., Inc. v. Grounds & Assocs., 278 N.W.2d 81, 89 (Minn. 1979); Ecolab, Inc. v. Gartland, 537 N.W.2d 291, 295 (Minn. Ct. App. 1995).

The Agreement and Addendum in this case, both prepared by Gage Travel, were executed contemporaneously and were very specific in delineating what assets were and were not being sold to Gage Travel as part of the sale. The language used in paragraph 1.5 of the Agreement is unmistakably clear and its import unambiguous: SporTravel, not Gage Travel, retained "all interest" in the PepsiCo litigation and any eventual proceeds which flowed therefrom. The Addendum, which enumerated exactly which receivables emanating from

customer deposits for trips that had not been completed and obligated Debtor and SporTravel to remit any outstanding "receivables" to Gage Travel in partial satisfaction of the sums owing on the promissory notes, is not inconsistent with the Agreement. A reasonable construction of the Agreement as a whole with the Addendum leads this Court to the conclusion that Gage Travel purchased only those SporTravel receivables that arose from those transactions that could be considered to be ongoing contracts, existing tours, reservations and orders from trips or tours which were not completed. It is those assets in which Debtor no longer maintained an interest as of the date of closing. The express language of the Agreement clearly revealed that SporTravel was not divested of its interest in the PepsiCo litigation. Contrary to what Gage Travel, which finds itself faced with defending against a preference attack and the holder of a very large unsecured claim in this bankruptcy case, argues, there is nothing in the Addendum which abrogates the exclusionary language in the Agreement or divests SporTravel of its interest in the PepsiCo litigation. Although the Addendum obligated Debtor and SporTravel to remit "any" outstanding receivables of SporTravel to Gage Travel toward the satisfaction of amounts owing under the promissory note, it did not give Gage Travel any specifically identifiable interest in that individual asset at the time of the sale.

If, as Gage Travel contends, the parties actually intended the Addendum to abrogate paragraph 1.5 of the Agreement, which expressly allowed SporTravel to retain its entire interest in the PepsiCo and exempted it from the pool of assets being sold to Gage

Travel, it would have been a very simple matter to do so. First, the Addendum could have specifically referred to the PepsiCo litigation and provided that SporTravel was divesting itself of its interest in that litigation. The Addendum merely refers to receivables and at best represents an independent obligation to pay a debt from "receivables" rather than a transfer of a specifically identifiable asset. Second, if the parties had intended that paragraph 1.5 would no longer have any operative effect, they could have just crossed off or stricken that provision like they had done with other provisions in the Agreement.

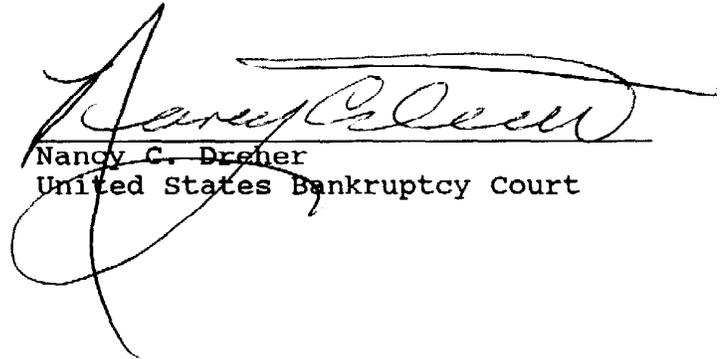
The Court's interpretation of the Agreement and Addendum is perfectly consistent with how the parties to the contract themselves interpreted their respective interests and obligations following the execution of the instruments which governed the sale. Gage Travel never received an express assignment of the PepsiCo claim and never sought to intervene in the continuing litigation. Debtor, not Gage Travel, retained counsel specifically to pursue the PepsiCo litigation on his own accord. Debtor and his legal representative successfully negotiated a settlement of the PepsiCo litigation. The proceeds of the settlement were made payable to Debtor or SporTravel and tendered to Debtor's counsel. Debtor remitted only a portion of the proceeds from the litigation, the disputed \$20,000.00, and used the remaining portion as he saw fit. These undisputed facts make it abundantly clear that Debtor and SporTravel were acting in accordance with their continuing ownership interest in the PepsiCo litigation as provided in the

Agreement.¹

ORDER FOR JUDGMENT

Accordingly, IT IS HEREBY ORDERED THAT there being no genuine issue of fact necessary to bar the entry of judgment on the pleadings, affidavits, and court files, the motion of the Trustee, Julia A. Christians, for summary judgment is GRANTED. IT IS FURTHER ORDERED THAT judgment be entered in favor of the plaintiff-trustee and against the defendant, Gage Travel, Inc., in the amount of \$20,000.00 together with accrued interest.

LET JUDGMENT BE ENTERED ACCORDINGLY.



Nancy C. Dreher
United States Bankruptcy Court

¹Since the bankruptcy estate was the owner of the SporTravel shares, it succeeds to any interest the Debtor or SporTravel maintained in the PepsiCo litigation.