

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

ELECTRONIC TECHNOLOGY GROUP,
INC.,

BKY 95-42199

Debtor.

JAMES E. RAMETTE, TRUSTEE,

Plaintiff,

ADV 97-4047

-v.-

BCBSM, INC., d/b/a BlueCross
and BlueShield of Minnesota,

MEMORANDUM ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Defendant.

At Minneapolis, Minnesota, this 10th day of October, 1997.

The above-entitled matter came on for hearing before the undersigned on cross motions for summary judgment. Appearances were noted on the record. The court has heard the arguments of counsel and studied the papers and determined to grant the Defendant's motion and deny the Plaintiff's motion.

FINDINGS OF FACT¹

1. In October, 1993, Defendant, BCBSM, and Electronic Technology Group, Inc. ("Debtor") entered into a master group

¹ Only undisputed facts are recited.

1	NOTICE OF ENTRY AND FILING ORDER ON JUDGMENT
	Filed and Docket Entry made on <u>10/10/97</u>
	Patrick G. De Wane, Clerk, By <u>VK</u>

23-1

contract for employee health insurance. The BCBSM contract was effective on October 1, 1993 and was renewable on October 1st of each succeeding year. The BCBSM contract was renewed in 1994. The contract required monthly premium payments on the first of every month for that month of coverage.

2. The Debtor also entered into a master group dental contract with Delta Dental for employee dental insurance. Pursuant to a joint marketing arrangement between BCBSM and Delta Dental, the Debtor paid BCBSM the premiums due on both of the contracts and BCBSM paid Debtor premiums due it.

3. In late 1994 the Debtor became delinquent on its premium payments to BCBSM. On March 2, 1995, the Debtor paid \$17,603.23 to BCBSM to cure its defaults on the November and December, 1994, and the January, 1995 premiums. Shortly thereafter, on April 25, 1995, the Debtor filed its Chapter 11 bankruptcy petition.

4. Upon the commencement of the Debtor's Chapter 11 case, BCBSM was advised by the Debtor that, although the Debtor questioned whether certain premiums were calculated correctly, the Debtor intended to assume the contract.

5. Thereafter, the parties entered into negotiations for an assumption agreement, the correct amounts due and how the defaults would be cured upon assumption.

6. An Agreement Regarding Assumption of Executory Contract ("Agreement") stating the terms of assumption was signed by the Debtor on August 18th and by BCBSM on August 22, 1995.

7. A motion seeking the Court's approval of the Debtor's assumption of the contracts was served and filed on or about August 23, 1995 and the hearing was set for September 13, 1995. At the time of the hearing, the Debtor owed BCBSM in excess of \$15,554.27 for pre-petition premium payments due for the months of February, March and April, 1995, as well as a yet-to-be-determined amount for post-petition premiums due in June and July of 1995. Pursuant to the Agreement, the Debtor agreed to cure these defaults over time.

8. In its verified motion, the Debtor represented to the court that it could cure the pre-petition default and make future payments due under the terms of the contracts. The Debtor further represented that the assumption was in the best interest of the estate because the Debtor could not otherwise provide health care coverage for the time period covered by the contracts and because, without medical and dental coverage, the Debtor

would be unable to retain its employees thereby jeopardizing the Debtor's prospects for reorganization.

9. No objections were filed with respect to the Debtor's Motion for Approval of Assumption of Executory Contract.

10. On September 13, 1995, the court granted the Debtor's motion and approved the assumption of the contracts.

11. On October 19, 1995, the Debtor advised BCBSM that it had obtained its health care coverage from another source effective October 1, 1995. The Debtor continued its insurance coverage through Delta Dental under the dental insurance contract through the contract term.

12. On February 1, 1996, the Debtor's Chapter 11 case was converted to a case under Chapter 7 and the Plaintiff was appointed as trustee to administer the estate.

13. The Debtor defaulted on the obligation to cure arrearages when it failed to pay \$2,000 by February 1, 1996.

14. On account of the Debtor's default under the Agreement, on February 22, 1996, BCBSM obtained relief from the automatic stay to terminate the ongoing contract with the Debtor for dental insurance.

15. At the time of conversion, BCBSM was still owed \$8,554.26 under the Agreement for premiums due under the Contract.

16. On May 16, 1996, BCBSM filed an Amended Proof of Claim evidencing BCBSM administrative expense claim pursuant to 11 U.S.C. § 503(h) and the Agreement in the amount of \$8,554.26.

17. On February 12, 1997, the Trustee commenced this adversary proceeding to avoid an alleged \$17,603.23 preferential transfer. BCBSM filed its Answer denying certain allegations of the complaint and asserting three affirmative defenses: 1) that the preferential transfer was a condition of the court-approved assumption of the health insurance contract, 2) that the transfer was a contemporaneous exchange for new value, and 3) that BCBSM gave the Debtor subsequent new value.

CONCLUSIONS OF LAW

I. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is governed by Federal Rule of Civil Procedure 56, and is made applicable to this matter by Bankruptcy Rules 7056 and 9014. 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. Id. at 324; 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).

II. POSTPETITION ASSUMPTION PRECLUDES PREFERENCE RECOVERY

For a transfer to be avoided as a preference, the trustee must demonstrate that there was a transfer of an interest of the debtor in property, to or for the benefit of a creditor, for or on account of an antecedent debt, made while the debtor was

insolvent and on or within 90 days before the date of the filing of the petition, and that enables such creditor to receive more than such creditor would receive in a hypothetical Chapter 7 case.

BCBSM concedes all such elements except 1) that the debtor had an interest in all of the funds which were paid to BCBSM and 2) that it received more than it would have received if the case had been a case under Chapter 7 and the transfer had not been made. BCBSM refers the court to the analysis of the law in Matter of Superior Toy & Mfg. Co., Inc., 78 F.3d 1169 (7th Cir. 1996). In Superior Toy, the Seventh Circuit, referencing earlier analogous Circuit Court authority, held that no preference recovery was available where the Debtor had previously assumed the executory contract or unexpired lease upon which payments were made. The Seventh Circuit held this result dictated by a plain reading of §§ 365 and 547. As for § 547, the court held that in the case of an assumed contract, the creditor who has received an alleged preferential transfer does not receive more than the creditor would have received in a hypothetical Chapter 7 case. The court also held that challenges to the equities of the assumption itself cannot be made in a preference action but must

be made in the context of a challenge to the order approving assumption.

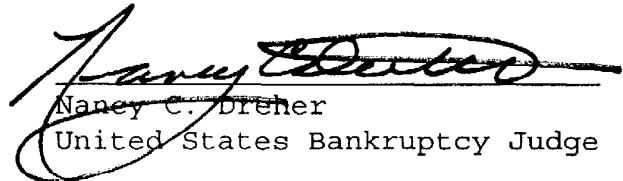
I agree with the reasoning of the Seventh Circuit in Superior Toy. The contract has been assumed and the alleged preferential payments made on that contract cannot be subjected to challenge under § 547. I do not see any relevant distinction between the situation in Superior Toy and the situation here.

This conclusion renders moot any further arguments, including the affirmative defenses of contemporaneous exchange for new value and subsequent new value, and other issues raised by the parties.

ACCORDINGLY, IT IS HEREBY ORDERED THAT:

1. The trustee's motion for summary judgment is DENIED.
2. The Defendant's motion for summary judgment is GRANTED.
3. Defendant shall have judgment in its favor and against the Plaintiff on all issues. This judgment shall be without prejudice to Plaintiff's right, if any, to challenge the order approving assumption.

LET JUDGMENT BE ENTERED ACCORDINGLY.


Nancy C. Dreher
United States Bankruptcy Judge