

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-10537-JMD  
Chapter 7

Bolivar Group, Inc.,  
Debtor

Edmond J. Ford, Trustee,  
Plaintiff

v.

Adv. No. 00-1074-JMD

Philip Andrew DeFoggi,  
Defendant

**MEMORANDUM OPINION AND ORDER**

**I. INTRODUCTION**

This matter came before the Court on a Motion for Partial Summary Judgment filed by the Plaintiff, Edmond Ford, Trustee (“Trustee”). A hearing was held on the motion at which time the court heard the statements of counsel for the Trustee. The Defendant, Philip Andrew DeFoggi, (“DeFoggi”), did not appear.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

**II. FACTS**

On August 14, 2000 the Trustee filed a Second Amended Complaint (“Complaint”), in which the Trustee asserted a preference claim under 11 U.S.C. § 547 in count VIII of the Complaint. On September 12, 2000 DeFoggi filed a response to the Complaint. On August 17, 2000 the Trustee filed a Motion for

Partial Summary Judgment (the “Motion”). On September 28, 2000 DeFoggi filed an objection to the Trustee’s Motion.

In the Motion the Trustee requested summary judgment as to count VIII of his Complaint. Count VIII seeks to avoid a \$24,158.08 payment made to DeFoggi on December 31, 1999 by the Debtor on the grounds that the payment is a preference under 11 U.S.C. § 547. The Trustee asserts that all of the elements of 11 U.S.C. § 547 have been proven by the September 12, 2000 response filed by DeFoggi.

### III. DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a summary judgment motion should be granted only when “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 a judgment as a matter of law.” “Genuine,” in the context of Rule 56(c), “means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party.” Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1<sup>st</sup> Cir. 1993)(quoting United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1<sup>st</sup> Cir. 1992)). “Material,” in the context of Rule 56(c), means that the fact has “the potential to affect the outcome of the suit under applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1<sup>st</sup> Cir. 1993). Courts faced with a motion for summary judgment should read the record “in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party’s favor.” Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1<sup>st</sup> Cir. 1994). In cases involving partial summary judgment the above standards are only applied to the particular count upon which summary judgment is sought.

11 U.S.C. § 547 allows the Trustee to avoid a transfer of the 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) on or within 90 days before the date of the filing of the petition; . . .
- (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.

11 U.S.C. § 547(b). Under 11 U.S.C. § 547(f) a debtor is presumed to be insolvent for the ninety days preceding the filing of the petition.

All of the elements of section 547 have been proven by the Trustee. The payment to DeFoggi was to a creditor because DeFoggi admits in number 61 of his answer that the payment was for wages owed to DeFoggi. The payment was for an antecedent debt, as DeFoggi admitted in number 61 of his response that the payment was for “back wages”. The payment was made while the Debtor was insolvent because there is a presumption under section 547(f) that the debtor is insolvent for the ninety days preceding the filing of the petition and no evidence was presented to the Court to rebut the presumption. The payment was made within ninety days of the filing of the petition, as DeFoggi admits in number 22 of his response that the payment was made by a check dated December 31, 2000, fifty-nine days prior to the filing of the Debtor’s Chapter 7 petition on February 29, 2000. Finally, the payment allows DeFoggi to receive more than he would have if the case was a Chapter 7 case because the Debtor’s schedules indicate that this would have been a no asset case, and as such, no creditors would have been paid.

#### **IV. CONCLUSION**

Accordingly, the Trustee’s Motion for Partial Summary Judgment with regards to count VIII of his complaint is granted. All remaining counts of the Trustee’s complaint remain to be resolved by settlement or at the trial set for January 26, 2001.

This opinion and order constitutes the Court’s findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

DATED this 5<sup>th</sup> day of October, 2000, at Manchester, New Hampshire.

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J. Michael Deasy  
Bankruptcy Judge