2002 BNH 013 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 99-11122-JMD
Chapter 7

Big World Productions, Inc.,
Debtor

Michael S. Askenaizer,
Chapter 7 Trustee,
Plaintiff

v. Adv. No. 01-1135-JMD

Matthew Cutter,
Defendant

Marc W. McDonald, Esq.
FORD & WEAVER, P.A.
Attorney for Plaintiff

Karyn P. Forbes, Esq.
SHAHEEN & GORDON, P.A.
Attorney for Defendant

MEMORANDUM OPINION

I. INTRODUCTION

The Court conducted a trial on a complaint pursuant to 11 U.S.C. §§ 549 and 550 filed by Michael S. Askenaizer, Chapter 7 Trustee (the "Trustee") against Matthew Cutter ("Cutter") in which the Trustee sought to avoid an alleged postpetition transfer of $29,235.45 from Big World Productions, Inc. (the "Debtor") to Cutter on or about April 10, 1999. After hearing the testimony of two witnesses, Joseph Fletcher ("Fletcher"), the president of the Debtor, and Cutter as well as argument by counsel, the Court took the matter under advisement.

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

The facts are straightforward. The Debtor was engaged in the business of promoting and producing concerts. In early 1999, the Debtor was experiencing financial difficulties and was soliciting investors. Fletcher approached Cutter, who previously had invested money in the Debtor, to find out if he would be interested in investing in the Debtor again. Because Cutter had not received payment in full on his prior investments and/or loans, Cutter was not interested in investing money in the Debtor on the same terms. Rather, Cutter requested that he be assigned the rights to several concerts in return for which he would "advance" the Debtor the sum of $29,000.00. On March 29, 1999, an agreement between Fletcher and Beech Hill Productions ("Beech Hill"), a name under which Cutter was doing business, was signed, which provided that Beech Hill would forward $29,000.00 to Fletcher in exchange for eight concerts being transferred to Beech Hill. The concerts were scheduled to occur between April 7, 1999 and April 21, 1999. On March 30, 1999, Fletcher sent a letter to Cutter on the Debtor's letterhead (the "Assignment"), which stated:

> In exchange for an advance of $29,000 Big World Productions, Inc. is assigning all rights of the following Big World concerts to Beech Hill Productions: B.B. King in Lowell, B.B. King in Portland, Merle Haggard in Concord, Merle Haggard in Lowell and Ani DiFranco in Portland, Orono, Providence and Durham.
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> Big World is out of funds and can't complete promotion of these shows without this assistance; and that we would not be able to receive such funds unless we gave such assurances.

In accordance with the Assignment, Cutter, through one his corporations, wrote six checks on March 29 and 30, 1999, totaling exactly $29,000.00. Several of the checks were for the Debtor's past due bills, e.g., $250.00 to Bell Atlantic for telephone service. Several of the other checks may have been for

expenses associated with the future concerts that had been assigned to Cutter, e.g., $1,000.00 to WOKQ 97.5 for radio ads and $23,750.00 to LFS Touring Inc. fso Ani DiFranco.

Within a week of the Assignment, on April 6, 1999, the Debtor filed a Chapter 7 bankruptcy petition. Fletcher had not informed Cutter that he was contemplating filing bankruptcy for the Debtor at the time he executed the Assignment.

After the concert rights were assigned, Cutter hired Fletcher and at least one other employee of the Debtor as contractors to perform work associated with the assigned concerts. Cutter testified that he paid Fletcher $3,902.00 for such services during the period of April 1, 1999, through April 15, 1999.

On April 10, 1999, Ani DiFranco ("DiFranco") performed at the Providence Civic Center (the "PCC"). This was one of the concerts assigned to Cutter. DiFranco had previously entered into a contract with the Debtor on February 11, 1999 (the "DiFranco Contract"), which provided that DiFranco would perform at the PCC on April 10, 1999, in exchange for compensation in the amount of $30,000.00 or eighty-five percent of the gross door receipts, whichever was greater. Despite the apparent assignment of this concert to Cutter on March 30, 1999, there was no written assignment of the DiFranco Contract to Cutter.

Sometime on April 10, 1999, the PCC issued a check, in the amount of $29,235.45 made payable to "Big World Productions." The check was signed by Fletcher with an endorsement, "Pay to Beech Hill," and the funds were ultimately transferred to Cutter. It is the transfer of these funds that the Trustee seeks to avoid in this proceeding.

In connection with producing the DiFranco concert as well as the other seven concerts assigned to Cutter, Cutter and/or his corporations expended over $83,000.00, which sum includes the $29,000.00 Cutter's corporation expended in connection with the Assignment. The Debtor made no payment toward any concert obligations after March 30, 1999.

III. DISCUSSION

Section 549 of the Bankruptcy Code provides the Trustee with authority for avoiding unauthorized postpetition transfers of estate property.[1] The burden of proof in an action brought under section 549 is on the party seeking to uphold a transfer challenged under that section of the Bankruptcy Code. Fed. R. Bankr. P. 6001. "The purpose of section 549 is to allow the trustee to avoid those postpetition transfers which deplete the estate while providing limited protection to transferees who deal with the debtor." Lawrence P. King, Collier on Bankruptcy ¶ 549.02 (15th ed. rev. 2000). In order for a transfer to be voidable by the Trustee under section 549, the transfer must be of property of the estate. Section 541(a) of the Bankruptcy Code states that a debtor's bankruptcy estate is compromised of "all legal or equitable interests of the debtor as of the commencement of the case" wherever located and by whomever held. Section 541(d) provides that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." The Trustee argues that the Assignment was not bona fide and did not operate as an assignment of the Debtor's rights in the concerts. Cutter, on the other hand, argues that the Assignment was valid and that the Debtor's interests in the concerts were transferred to him prepetition.

Generally the existence and scope of a debtor's interest in a given asset is determined by state law. Sticka v. Mellon Bank Nat'l Assoc. (In re Martin), 167 B.R. 609, 612 (Bankr. D. Or. 1994) (citing Butner v. United States, 440 U.S. 48, 55 (1979)). The right of assignment arises under state law. Id. Traditionally

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[1] It provides in relevant part:

> [T]he trustee may avoid a transfer of property of the estate–
> (1) that occurs after the commencement of the case; and
> (2) (A) that is authorized only under section 303(f) or 542(c) of this title; or
> (B) that is not authorized under this title or by the court.

11 U.S.C. § 549(a).

an assignment passes all of the assignor's vested right, title, and interest to the assignee at the time of the assignment. Id. at 615. To effect an assignment no particular words are required. See In re Dodge-Freedman Poultry Co., 148 F. Supp. 647, 650 (D.N.H. 1956), aff'd, Dodge-Freedman Poultry Co. v. Delaware Mills, Inc., 244 F.3d 314 (1st Cir. 1957). Rather, the ultimate test is the intention of the assignor to give and the assignee to receive the property assigned. See id.; Front Row Seating, Inc. v. New England Concerts, Ltd., 602 N.E.2d 1103, 1105 (Mass. App. Ct. 1992) (stating that whether a transaction creates a security interest under Massachusetts law depends upon the intent of the parties) (citing Dahar v. Raytheon Co. (In re Navigation Tech. Corp.), 880 F.2d 1491, 1493 (1st Cir. 1989) (holding that the trial court was not clearly erroneous in determining that the assignment was a security interest based upon the parties' intent, notwithstanding that the assignment was absolute on its face)).

Here, the Trustee argues that the Assignment was not effective because: (1) it was not signed by the Debtor; (2) it was not supported by adequate consideration in that Cutter did not pay $29,000.00 toward old debt but rather the majority of the funds he advanced were used to produce one or more of the concerts allegedly assigned to Cutter; and (3) after the Assignment, the parties took actions that were inconsistent with the concerts having been assigned. Cutter argues that the totality of the circumstances, surrounding the Assignment and the actual concert event, lead to a conclusion that the Assignment is valid. For that reason, the check was not property of the Debtor's estate and no transfer of estate property occurred postpetition that could be avoided under section 549.

As outlined above, the Debtor was in financial straits in late March 1999. It had previously contracted with various artists and venues to put on several concerts in April 1999; however, the Debtor did not have enough funds to produce these concerts. In order to ensure that the concerts were produced, the Debtor and Cutter entered into an arrangement whereby, in exchange for an "advance" of $29,000.00, the Debtor would assign its rights in the concerts to Cutter. Two written documents outlined this agreement, one was signed on March 29, 1999, and the other was signed on March 30, 1999. Consistent with the parties' intentions, Cutter, through his corporation, wrote checks on March 29 and 30, 1999, totaling exactly

$29,000.00 made payable to the Debtor and the Debtor's creditors. After March 30, 1999, the Debtor did not pay any expenses related to the promotion and production of the concerts. Cutter, on the other hand, spent over $83,000.00 on these expenses. Cutter hired Fletcher and another employee of the Debtor to perform services related to the promotion and production of the concerts. Cutter testified that after March 30, 1999, he believed that he assumed all risk associated with promoting and producing the concerts.

While it is true that the Assignment was not signed by Fletcher in his corporate capacity in that his office is not listed under his signature, the Assignment was written on the Debtor's letterhead, and both Fletcher and Cutter testified that it was the Debtor which was assigning its rights in the concerts. While there was some indication at trial that Fletcher or the Debtor may have taken out some insurance after the date of the Assignment to insure against liability associated with the DiFranco concert, no documentary evidence was admitted which would have provided relevant information surrounding the nature and scope of the insurance. The Trustee noted, in addition, that the Debtor's rights in the DiFranco Contract were not formally assigned to Cutter and the PCC rental permit, executed the day of the DiFranco concert, was not signed by Cutter but allegedly by the Debtor. Although such evidence might support an inference that the concerts were not assigned, the Court finds such evidence insufficient to outweigh the evidence of the intent of the parties to assign all of the Debtor's rights and liabilities to specific concerts. Accordingly the Court finds that the Assignment was valid.

Because under federal bankruptcy law an estate may take no greater interest in property than that held by the debtor on the petition date, Martin, 167 B.R. at 617 (citing In re Farmers Markets, Inc., 792 F.2d 1400, 1403 (9th Cir. 1986)), and because the Assignment was dated prepetition, the Court finds that the concert rights were not property of the estate at the time of the Debtor's bankruptcy filing. For that reason, there was no transfer of property of the estate within the meaning of sections 541(a) and 549(a) of the Bankruptcy Code at the time the check was signed by the Debtor and endorsed in favor Beech Hill. The Debtor had no legal or equitable interest in the check on April 10, 1999. Accordingly, there was no postpetition transfer of estate property to be avoided.

IV. CONCLUSION

Because there was no transfer of property of the estate within the meaning of sections 541(a) and 549(a) of the Bankruptcy Code, the Trustee's complaint must be denied. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate judgment consistent with this opinion.

DATED this 22nd day of April, 2002, at Manchester, New Hampshire.

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge