

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In re:

Harper Brush Works, Inc.

Case No. 12-01757-als7

Debtor(s)

Charles Smith, Trustee,

Adv. Pro. 14-30031-als

Plaintiff

v.

PGV Properties, LLC

Defendant.

**MEMORANDUM OF DECISION
(date entered on docket: August 19, 2016)**

Before the Court is the Plaintiff's Motion for Summary Judgment which is unopposed. A telephonic hearing was conducted on the pending Motion for counsel to address questions of the Court related to the documents filed in support of the request for summary judgment. The matter is now deemed fully submitted. The Court has jurisdiction of this matter under 28 U.S.C. §§ 157(b)(1) and 1334.

BACKGROUND

Prior to the bankruptcy filing Harper Brush Works, Inc. ("Harper Brush" or "Debtor") leased facilities in North Carolina from PGV Properties, LLC ("PGV") for its business operation. In the Spring of 2012 Harper Brush needed to secure additional financing for its business. In order to obtain the loan and in consideration for PGV taking a junior position behind the primary secured lender Harper Brush executed a promissory note in favor of PGV in the amount of \$301,622.34. On May 29, 2012 Harper Brush filed a voluntary chapter 11 petition. PGV filed a Proof of Claim in the Debtor's bankruptcy case in the amount of \$459,847.19 which was later amended and increased to \$898,223.49.

PGV asserted that its claim is secured based upon the following documents: a Promissory Note dated March 1, 2012, and signed April 12, 2012; a recorded copy of the Promissory Note; an unsigned, unrecorded memo entitled “PGV Second Mortgage Term Sheet dated December 21, 2011”; a UCC Financing Statement No. P12003419-8 which “purported” to cover all of the assets of Harper Brush; an Order from this Court approving Debtor’s use of cash collateral; and an unrecorded Deed of Trust signed by Barry Harper of PGV. When the Debtor was unable to obtain confirmation of its Plan of Reorganization, the case was converted to a chapter 7 proceeding.

The chapter 7 Trustee, Charles Smith, filed this pending adversary proceeding against PGV seeking avoidance of transfers between it and the Debtor, and requesting declaratory judgment on the validity, extent and priority of PGV’s secured claim. Counsel for PGV filed an answer on its behalf which generally denied the allegations contained in the complaint and raised affirmative defenses to the Trustee’s claims. PGV’s counsel later withdrew from the case. PGV did not respond to the discovery served upon it by the Trustee which has resulted in this Motion for Summary Judgment.

DISCUSSION

Federal Rule of Bankruptcy Procedure 7056 incorporates Federal Rule of Civil Procedure 56 for adversary proceedings which states that:

The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The Court should state on the record the reasons for granting or denying the motion.

Fed. R. Civ. P. 56(a). ““Summary judgment is appropriate when, viewing the facts in the light most favorable to the non-movant, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.”” *Northeast Bank v. Hanover Ins. Group*, 796 F.3d 929, 931 (8th Cir. 2015) (citing *J.E. Jones Constr. Co. v. Chubb & Sons, Inc.*, 486 F.3d 337, 340 (8th Cir. 2007)). A fact is considered “material” when it “might affect the outcome of the suit under the governing law.” *Johnson v. Crooks*, 326 F.3d 995, 1005 (8th Cir. 2003). While the court should “view the record in the

light most favorable to the nonmoving party and afford that party all reasonable inferences,” the nonmoving party must produce more than “a mere scintilla of evidence in support of its position.” *Paul v. Allred (In re Paul)*, 739 F.3d 1132, 1135 (8th Cir. 2014) (quotations omitted).

The complaint alleges that PGV has received preferential transfers totaling \$378,271.80. The trustee may avoid any transfer of an interest of the debtor in property –

- (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 within one year prior to the petition date if the creditor is an insider of the debtor;
- (5) that enables the creditor to receive more than such creditor would receive if –
 - (A) the case were a case under chapter 7
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided under Title 11.

See 11 U.S.C. § 547(b). The Trustee bears the burden of proof on each of these elements.

As to the secured status of PGV’s claim the Trustee argues alternative theories. First, he argues that the security interest is not valid under state law. Second, he contends that any security interest given by the Debtor to PGV was obtained within ninety (90) days of the bankruptcy filing and constitutes an avoidable preference.

The Trustee argues that due to PGV’s failure to respond to his requests for admissions, the essential facts required to meet his burden of proof under 11 U.S.C. § 547 are deemed admitted and therefore undisputed. Federal Rule of Bankruptcy Procedure 7036 incorporates Federal Rule of Civil Procedure 36 which provides:

A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.

Fed. R. Civ. P. 36(a)(3). The rule further states that, “[a] matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or

amended.” Fed. R. Civ. P. 36(b). “If the facts that are admitted under Rule 36 are ‘dispositive’ of the case, then it is proper for the district court to grant summary judgment.” *Quasius v. Schwan Food Co.*, 596 F.3d 947, 950-51 (8th Cir. 2010) (citation omitted).

Based upon the relevant Federal Rules and the record the Court concludes that the following material facts are undisputed:

1. PGV received payments from the Debtor in the total amount of \$378,271.80 during the time period of September 28, 2011 through May 4, 2012.
2. Debtor executed a Promissory Note within the ninety-day (90) period prior to the commencement of its bankruptcy case.
3. To the extent PGV obtained a security interest in any of the Debtor’s collateral, it was obtained within the ninety-day (90) period prior to the commencement of Debtor’s bankruptcy case.
4. The granting or perfection of a security interest in Debtor’s property is a transfer as defined in 11 U.S.C. § 101(54)(D).
5. PGV received all of the transfers described to at least partially satisfy amounts due and owing to it from the Debtor.
6. All of the transfers were made by the Debtor on account of antecedent debt owed by the Debtor to PGV.
7. The Debtor was insolvent at all times during the ninety-day (90) period before May 29, 2012.
8. The Debtor was insolvent at all times between ninety (90) days and one (1) year before May 29, 2012.
9. PGV was an insider of the Debtor.
10. The Debtor’s Chapter 7 bankruptcy case will not result in a bankruptcy estate of sufficient value to fund a 100% payoff to unsecured creditors.

Based upon the foregoing the Trustee is entitled to summary judgment in his action to avoid the preferential transfers from the Debtor to PGV under Counts IV and VII of the Complaint.

IT IS THEREFORE ORDERED that:

1. Summary Judgment is granted in favor of the Trustee against PGV on Counts IV and VII.
2. Judgment shall enter against the Defendant in the amount of \$378,271.80.
3. Judgment shall enter to avoid as a preferential transfer any security interest held by PGV for the amount stated in its amended proof of claim.

/s/ Anita L. Shodeen
Anita L. Shodeen
U.S. Bankruptcy Judge

Parties receiving this Memorandum of Decision from the Clerk of Court:
Electronic Filers in this Adversary Proceeding
Others: PGV Properties, LLC