

IN THE UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

UNITED SUNGRO SEEDS, INC.
f/k/a United Seeds, Inc.,

Case No. 87-3026-C
Chapter 11

Debtors.

UNITED SUNGRO SEEDS, INC.,
f/k/a United Seeds, Inc.,

Adv. No. 88-0030

Plaintiff,

v.

TOM KESLER and DIANE TOTT
Story County Clerk of Court,

Defendants.

FINDINGS AND CONCLUSIONS
AVOIDANCE OF TRANSFERS AND RETURN OF PROPERTY

On March 4, 1988, a trial was held on the complaint for the avoiding of preferential transfers pursuant to 11 U.S.C. §547. Barry J. Nadler appeared on behalf of the plaintiff-debtor, United Sungro Seeds, Inc. (hereinafter "United Sungro"), and Dennis J. Kirkwood appeared on behalf of the defendant-creditor, Tom Kesler (hereinafter "Kesler").

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(E) and (F). Having reviewed the premises, the court makes the following findings of fact and conclusions of law pursuant to R. BANKR.P. 7052.

FINDINGS OF FACT

1. United Sungro filed a voluntary Chapter 11 petition on December 14, 1987, and is the debtor in possession.

2. Defendant Kesler is a creditor of United Sungro.

3. Defendant Tott is the Clerk of the District Court, Story County, State of Iowa, and is an entity established pursuant to Iowa Code §602.1215 (1987).

4. The debt to Kesler arose when United Sungro was unable to pay Kesler for the production of corn during the year 1984 and 1985.

5. On November 23, 1987, Kesler obtained a judgment against United Sungro in the Iowa District Court for Story County in the amount of \$41,100.77 with interest from November 29, 1987, at the rate of 13% per annum, and the court costs in the amount of \$129.20.

6. Upon the entry of the judgment, Kesler levied upon seed corn, soy beans, a Schuster gooseneck trailer, and detasseler owned by United Sungro and stored at Ames Seed Farms.

7. Defendant Tott is holding the sum of \$4,178.00 by reason of a general execution levied on the First National Bank, as garnishee, on December 5, 1987.

8. United Sungro was financially unable to pay its debts as they came due during November and December, 1987.

9. United Sungro would not have been able to pay its creditors if it were liquidated during November and December, 1987, and Kesler would not have been paid the full amount of his claim.

10. Kesler did not have a lien on any of United Sungro's property before the judgment.

DISCUSSION

Bankruptcy Code section 547 allows a trustee to avoid any preferential transfers of a debtor's property interests. As a Chapter 11 debtor in possession, United Sungro is also entitled, pursuant to section 1107, to avoid preferences. To be avoided, a transfer of a debtor's property interest must be:

(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; ... and

(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 payments of such debt to the extent provided by the provisions of this title.

11 U.S.C. §547(b).

For the following reasons, Kesler's judgment and garnishment levies on execution are avoidable preferences under section 547(b). Initially, Kesler's levies on United Sungro's property were transfers because section 101(50) defines "transfer" as "every mode ... of parting with property," and said levies clearly resulted in United Sungro's parting with its property.

Concerning the five elements of a section 547(b) preference, Kesler's levies satisfy (b) (1) because they were for the benefit of creditor Kesler. The levies also meet (b) (2) because they were on account of a November 23, 1987, judgment against United Sungro, an antecedent debt owed by debtor United Sungro before transfer was made. Concerning (b) (3), United Sungro was insolvent at the time of levy because pursuant to section 547(f), United Sungro is presumed insolvent on and during the 90 days immediately preceding the date of the petition filing. Furthermore, the facts indicate United Sungro could not pay its debts as they became due during November and December of 1987. Said levies satisfy (b) (4) because they were made on or within 90 days before United Sungro filed its Chapter 11 petition.

Finally, Kesler's levies meet all three requirements of (b)(5). Under (b)(5)(A), Kesler clearly received more by levying than he would have if the case were under chapter 7 because United Sungro could not have paid its creditors if it had been liquidated during November and December. Under

(b)(5) (B), there is no doubt Kesler received more by levying than if the transfer had not been made because he is an unsecured creditor. Under (b) (5) (C), Kesler clearly received more by levying than he would under United Sungro's Chapter 11 plan because as one of the twenty-seven unsecured creditors, he will not receive 100% of his unsecured claim.

In conclusion, since Keslers levies meet all five elements of section 547(b) preference, the transfers are avoidable. As a result, United Sungro can recover all its property on which Kesler levied, including the garnishment held by Story County Clerk of Court Tott.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the court concludes that the lien of Tom Kesler, as plaintiff, in the Iowa District Court case, in the interest of United Sungro Seeds, Inc., f/k/a United Seeds, Inc., constitutes an avoidable preference and the property of the defendant-debtor in possession, United Sungro, may not be taken on attachment or execution issued against said debtor-in-possession.

IT IS ACCORDINGLY ORDERED that the levy on general execution pursuant to the judgment of November 23, 1987, upon the seed corn, soy beans, Schuster gooseneck trailer and detassler is avoided and said property is free and clear of the judgment in the Iowa District Court for Story County of November 23, 1987.

FURTHER, the levy on general execution by garnishment of the sum of \$4,178.00 is avoided and said monies shall be returned to the debtor in possession, United Sungro Seeds, Inc., f/k/a United Seeds, Inc.

Dated this **23rd** day of March, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY COURT