IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11121

IN THE MATTER OF: SOUTHMARK CORP.,

DEBTOR.

SOUTHMARK CORP.,

Appellant,

versus

JOHN E. RIDDLE, ET. AL.,

Appellees.

Appeal from the United States District Court
For the Northern District of Texas
(3:92-CV-452-J)

(September 29, 1995)

Before REAVLEY, JOLLY, and WIENER, Circuit Judges:

PER CURIAM*:

Southmark Corporation (Southmark), a Chapter 11 debtor, filed a complaint to recover a payment to John and Lynn Riddle, alleging

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

that the payment constituted an avoidable preferential transfer under § 547(b) of the Bankruptcy Code.[1] The Riddles moved to dismiss pursuant to FED. R. CIV. P. 12(b)(6) (Rule 12(b)(6)). The bankruptcy court converted the motion to a summary judgment motion and granted judgment to the Riddles. The district court upheld the bankruptcy court's opinion, and Southmark timely appealed to this court. Finding no error, we affirm.

I

FACTS AND PROCEEDINGS

For our purposes, the relationship among the parties began in 1985, when the Riddles sued Southmark and various Southmark subsidiaries, including Direct Mail Specialist (DMS), in California Superior Court for intentional interference with an employment contract, intentional infliction of emotional distress, and related intentional torts. The Riddles won handily: The jury awarded them more than $100,000,000. After the trial court denied the defendants' motion for a new trial, the Riddles accepted a remittitur of certain damages. The court assessed more than $18,000,000 against Southmark alone and held Southmark and its subsidiaries jointly and severally liable for more than $4,000,000.

When Southmark and its subsidiaries decided to appeal, they were required by California law to post a bond equal to 150 percent of the judgment to be stayed. In November 1988, an independent bonding company issued an appeal bond on their behalf; and Southmark transferred a security interest in certain marketable

[1] 11 U.S.C. § 547(b) (1994).

securities to back the bond. By July 1989, the Riddles agreed to accept close to $17,000,000 in exchange for the release of the judgment and a dismissal of the appeal. On July 10, 1989, the bonding company paid the Riddles the agreed amount. Four days later, Southmark filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code.

On July 12, 1991, Southmark commenced an adversary proceeding in bankruptcy court against the Riddles, alleging that the payment constituted an avoidable preference under Bankruptcy Code § 547(b).[2] The Riddles responded by moving to dismiss. After holding a hearing on the motion, the bankruptcy court issued an opinion in February 1992, in which it converted the dismissal motion to a motion for summary judgment and granted judgment to the Riddles. Southmark sought review by the district court, which affirmed. Southmark now appeals to this court.

II

ANALYSIS

Southmark raises only one real claim on appeal: The bankruptcy court should have given the parties notice of its intent to convert the dismissal motion to a summary judgment motion. Had

[2]Southmark initially filed a complaint against both the Riddles and DMS; however, they subsequently dismissed DMS from the adversary proceeding. Moreover, Southmark raised a number of issues in bankruptcy court which do not appear here. Specifically, it claimed that both the transfer to the bonding company and the payment to the Riddles amounted to fraudulent transfers; that the transfer to the bonding company constituted an avoidable preference; and that the initial transfer was not properly perfected. The bankruptcy judge rejected these claims, and Southmark did not pursue them on appeal.

the court provided proper notice, the argument goes, Southmark would have come forward with relevant evidence establishing that the payment constituted an avoidable preference. To evaluate Southmark's position fully, it is necessary to understand why the bankruptcy court concluded that the payment could not be avoided.

Pursuant to 11 U.S.C. § 547(b), a trustee may avoid a transfer of the debtor's interest 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--
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; 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 . . . .[3]

The bankruptcy court determined that Southmark's payment to the Riddles was made in November 1988, more than ninety days and less than one year before Southmark filed for bankruptcy. After applying § 547(b)(4)(B) and concluding that the payment must benefit an insider creditor in order to constitute an avoidable preference, the court found that the payment benefitted one insider: DMS.

The court then considered whether the payment benefitted DMS "for or on account of an antecedent debt," as required by § 547(b)(2). Relying on evidence then available to it, the court

[3]11 U.S.C. § 547(b).

concluded that Southmark owed DMS no related debt at the time of the transfer. Holding that any antecedent debt would have to arise from the California judgment in favor of the Riddles, the bankruptcy court found that no such debt existed, as under California law DMS was not entitled to contribution or indemnification (from Southmark) for damages resulting from the commission of intentional torts. Accordingly, the bankruptcy court concluded that the payment could not be avoided and granted the Riddles' motion to dismiss, expressly treating it as a motion for summary judgment.[4]

If the bankruptcy court had given proper notice of its intent to convert the motion to a summary judgment motion, argues Southmark, it would have come forward with further evidence establishing an antecedent debt to DMS arising from the California judgment. Southmark offers evidence of a contractual obligation which it allegedly undertook in the summer of 1988 to indemnify DMS for any costs it might incur as a result of litigation. Southmark

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[4]Southmark does not appeal many of the bankruptcy court's holdings, and we therefore do not review their validity. Specifically, Southmark does not challenge the court's conclusions that the transfer was made more than ninety days before the bankruptcy filing; that the payment needed to benefit an insider; that DMS alone was an insider; and that under California law DMS was not entitled to contribution or indemnification. Furthermore, although at the district court level Southmark challenged the bankruptcy court's holding that a connection must exist between the transfer and the antecedent debt owed DMS, Southmark does not renew the challenge on appeal.

Southmark does venture that we should ignore California law and find that, as DMS eventually filed for bankruptcy, it had an "equitable right" to seek contribution from Southmark. Southmark offers no legal authority for this proposition, and independent research has yielded nothing to support it.

maintains that if this evidence had been available to the bankruptcy court, the Riddles' motion would not have been granted.

Accordingly, we begin with a discussion of whether the bankruptcy court erred in converting the motion to dismiss to a motion for summary judgment. Rule 12(b) of the Federal Rules of Civil Procedure (Rule 12(b)) states in relevant part:

> If, on a [12(b)(6) motion], matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.[5]

We have interpreted Rule 12(b) to require that parties receive at least ten days notice that the court could treat a dismissal motion as a motion for summary judgment, not that it would in fact do so.[6] As Rule 12(b) directs the court to treat dismissal motions as motions for summary judgment once the court has accepted matters outside the pleadings for consideration, parties are considered to be on notice of a possible conversion from the date on which outside evidence is received.[7]

In the case at hand, both parties offered evidence outside the

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[5]FED. R. CIV. P. 12(b).

[6]See Washington v. Allstate Insurance Co., 901 F.2d 1281, 1284 (5th Cir. 1990); Isquith v. Middle South Utilities, Inc., 847 F.2d 186, 195-96 (5th Cir.), cert. denied, 488 U.S. 926 (1988); Clark v. Tarrant County, Texas, 798 F.2d 736, 746 (5th Cir. 1986), declined to follow on other grounds, Arkwright-Boston Mfrs. Mut. v. Aries Marine Corp., 932 F.2d 442, 444-45 (5th Cir. 1991) (overturning conclusion in Clark that district court can never enter summary judgment sua sponte).

[7]Washington, 901 F.2d at 1284.

pleadings long before the court rendered an opinion. In September and October 1991, Southmark itself submitted, inter alia, for the bankruptcy court's consideration, an affidavit together with copies of a forbearance agreement and a mutual release. Moreover, Southmark did not object when the Riddles offered a copy of a pledge agreement as early as August 1991. Given that the hearing on the motion did not take place until November 8, 1991, and that the bankruptcy court did not issue its opinion until February 11, 1992, Southmark was on notice for months that the motion might be converted to a summary judgment motion. Accordingly, if it wanted to present to the bankruptcy court the additional evidence it now offers as proof of a contractual obligation to DMS, it should have done so then or "forever held its peace."[8]

With Southmark's principal issue of notice behind us, we now examine briefly the propriety of the bankruptcy court's summary judgment in favor of the Riddles. When reviewing a grant of summary judgment, we view the facts and inferences in the light most favorable to the non-moving party;[9] and we apply the same

[8]Southmark suggests that it should have been given express notice of the conversion because the bankruptcy court suddenly altered an established legal standard for § 547(b) actions in its opinion. We need not address whether we might require express notice under such circumstances, as the record simply does not verify that they existed here. At least one month before the hearing, the parties began staking out their positions on whether Southmark would need to establish an antecedent debt owed to DMS and connected to the California judgment. Patently, neither party believed a firmly established standard existed on the issue; and Southmark had ample notice that it needed to present relevant evidence.

[9]See Cavallini v. State Farm Mutual Auto Ins. Co., 44 F.3d 256, 266 (5th Cir. 1995).

standards as those governing the lower court in its determination.[10] Summary judgment must be granted if a court determines "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."[11] If any element of the plaintiff's case lacks factual support, a defendant's motion for summary judgment should be granted.[12]

In the instant case, the bankruptcy court properly held that Southmark needed to prove the existence of an antecedent debt owed to DMS that was related to the transfer to the Riddles.[13] Southmark presented no viable summary judgment evidence of such a debt to the bankruptcy court, leaving an essential element of its claim wholly unsupported. Accordingly, we affirm the district court's decision upholding the bankruptcy court's grant of summary judgment.

AFFIRMED.

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[10]See Neff v. American Dairy Queen Corp., 58 F.3d 1063, 1065 (5th Cir. 1995).

[11]FED. R. CIV. P. 56(c).

[12]See Burden v. General Dynamics Corp., 60 F.3d 213, 216 (5th Cir. 1995).

[13]See Southmark Corp. v. Southmark Personal Storage (In re Southmark), 993 F.2d 117, 119-20 (5th Cir. 1993) (holding that Southmark could not rely on a debt that was unrelated to the transfer in question to establish the transfer as an avoidable preference).