UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	
	)	
Homelife Corporation, *et al.*,	)	Chapter 11
	)	Case No. 01-2412 (RB)
Debtors.	)	Jointly Administered
	)	
	)	
Patrick Regan, Plan Administrator of the Post-Confirmation Estate of Homelife Corporation, HLC 1, LLC, and Furniture Holding, LLC	)	Adversary Proceeding
	)	No. 03-54267 (PBL)
Plaintiff,	)	
	)	
v.	)	
	)	
Chicago Tribune Company,	)	Related Documents: 19, 20, 21, 22
	)	
Defendant.	)	
	)	

OPINION

The motion before the Court is the Motion for Summary Judgment (the "Motion"), filed by the defendant, Chicago Tribune Company on March 28, 2005. For the reasons set forth below, the Motion will be granted in its entirety.

I. Background

This adversary proceeding was filed on July 9, 2003 by Patrick Regan, the Plan Administrator of Homelife Corporation (the "Plaintiff"), seeking to avoid and recover certain

allegedly preferential transfers paid to Chicago Tribune Company ("Defendant") in the amount of $37,234.84 pursuant to § 547(b) of the Bankruptcy Code[1], and disallowance of any claims until the preference is repaid pursuant to § 502(d). Defendant filed its Answer on August 7, 2003, and the parties commenced discovery. This adversary proceeding was scheduled for trial on June 13, 2005 but was adjourned by Order of this Court, dated May 16, 2005, due to the pendency of this Motion.

II. Jurisdiction and Venue

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§1334 and 157(b)(1), and it is a core proceeding under 28 U.S.C. §157(b)(2), (A), (B), (F) and (O). Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1409.

III. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c), made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment should be granted 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." Fed. R. Civ. P. 56(c). *See also, Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In deciding a motion for summary judgment, all factual inferences must be viewed in the light most favorable to the non-moving

[1] 11 U.S.C. §§ 101 *et seq*. Hereinafter, references to statutory provisions by section number alone will be to provisions of the Bankruptcy Code unless otherwise noted.

party. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–588 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–248 (1986) (emphasis in original). After sufficient proof has been presented to support the motion, the burden shifts to the non-moving party to show that genuine issues of material fact still exist and that summary judgment is not appropriate. *Matsushita*, 475 U.S. at 587. A genuine issue of material fact is present when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The non-moving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

IV. Discussion

The facts in this case are essentially undisputed. Defendant provided advertising space in its newspaper for Homelife Corporation ("Homelife") for several years. This continued throughout the preference period and it is undisputed that Defendant provided new value to Homelife subsequent to and in excess of the payments that Homelife made to Defendant which are the subject of this action. Defendant sold its claim against Homelife to Sears, Roebuck & Co. ("Sears") after Homelife filed its Chapter 11 petition on July 16, 2001, and the parties evidenced the sale by a written agreement (the "Sears Agreement"). The parties concur that the transfers in

question meet the requirements of § 547(b)[2] for avoidance and that the transfers may be recovered under § 550 [3] unless Defendant can successfully assert its new value defense. Thus, there are no genuine issues of material fact, and the remaining issue is purely a question of law. The crux of the argument is whether Defendant may successfully assert a new value defense under § 547(c)(4)[4] after Defendant has sold its claim for the amount of the new value to a third party or whether that sale and assignment of the claim constitutes a waiver of that defense.

Defendant contends that it may assert the defense regardless of the fact that it sold its claim because there is no prohibition against doing so within the Bankruptcy Code itself or in the law of this jurisdiction.[5] (Defendant's Opening Brief in Support of its Motion for Summary

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[2] Under § 547(b), the trustee may seek to avoid, as a preference,
". . . 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 —
(A) on or within 90 days before the date of the filing of the petition; or
(B) between 90 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;
(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."

[3] Under § 550(a), the value of a transfer avoided under, *inter alia*, § 547 may be recovered for the benefit of the estate.

[4] Section 547(c)(4) provides that the trustee may not avoid a transfer that was "to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –
(A) not secured by an otherwise unavoidable security interest; and
(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor."

[5] Defendant also argues that the policy considerations behind § 547(c)(4) are that when a creditor supplies new value, it is replenishing the estate to the extent of the new value, and that the

Judgment, at 8)

Plaintiff argues that Defendant is barred from asserting its new value defense because Defendant assigned its claim against Homelife to a third party. According to the Sears Agreement, the Defendant agreed not to "assert any right, to payment or otherwise, in connection with the claim against Homelife." (Plaintiff's Answering Brief in Opposition to the Motion by [Defendant] for Summary Judgment, Exhibit C) Plaintiff asserts that "once an assignment is made, all interests and rights of the assignor are transferred to the assignee." *Postal Instant Press v. Jackson*, 658 F.Supp. 739, 741 (D.Colo., 1987). Thus, Plaintiff urges that Defendant cannot assert a new value defense because the sale of its claim constitutes a waiver of the bundle of rights associated with the claim, including the right to assert a new value defense. Defendant has the better argument.

It is true that in the Sears Agreement, Defendant divested itself of an otherwise presumably allowable claim for the amount of the new value given to Plaintiff, and that the Sears Agreement effected a transfer of all of Defendants interest and rights with regard to that claim. That action did not, however, change the fact that the new value was given by Defendant to Plaintiff after the otherwise preferential transfer was made, thus more than replenishing the estate. That fact, in this Court's opinion, sustains Defendant's argument, and its affirmative defense under § 547(b)(4). What happened to the claim thereafter is immaterial.

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transfer of new value should therefore not be avoidable. Defendant cites to *In re Login Bros. Book Co., Inc.*, 294 B.R. 297, 299-300 (Bankr.N.D.Ill. 2003), where the court determined that new value is determined by looking at the net effect on the debtor's estate. Plaintiff however has indicated that it is not contesting this issue. The issue before the Court, therefore, is limited to the question of the scope of the Sears Agreement.

IV. Conclusion

Since the Chicago Tribute has sustained its burden of proving the nonavoidability of the transfers in question under § 547(c)(4), this Court finds and holds that summary judgment should be rendered in favor of Defendant and against Plaintiff and that Plaintiff shall take nothing by reason of its Complaint herein. An appropriate judgment follows.

Dated: August 15, 2005
Wilmington, DE

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

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Homelife Corporation, *et al.*,	Chapter 11
	Case No. 01-2412 (RB)
Debtors.	Jointly Administered
Patrick Regan, Plan Administrator of the Post-Confirmation Estate of Homelife Corporation, HLC 1, LLC, and Furniture Holding, LLC	Adversary Proceeding No. 03-54267 (PBL)
Plaintiff,	
v.	
Chicago Tribune Company,	Related Documents: 19, 20, 21, 22
Defendant.	

SUMMARY JUDGMENT

In accordance with the Opinion of this Court entered of even date herewith, Defendant is hereby granted judgment in its favor against Plaintiff and Plaintiff shall take nothing by reason of its Complaint herein.

Dated this **15th** day of **August, 2005**.

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE