

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:)	
)	Chapter 11
THE IT GROUP, INC., <i>et al.</i> ,)	
)	Case No. 02-10118 (MFW)
Debtors.)	Jointly Administered
_____)	
)	
Official Committee of Unsecured Creditors)	
of the IT Group, Inc., <i>et al.</i> , On behalf of)	
The Estate of The IT Group, Inc., <i>et al.</i> ,)	
)	
Plaintiffs,)	Adversary Proceeding No.
v.)	A 04-50931 (PBL)
)	
Towill, Inc.,)	Related Documents:28, 34, 35, 37
)	
Defendant.)	

MEMORANDUM OPINION

The matter before the Court is the Motion for Summary Judgment (“the Motion”) filed by the Defendant in this adversary proceeding, Towill, Inc. For the reasons stated below, the Motion will be granted in part, and denied in part.

I. BACKGROUND

The Debtors, The IT Group, Inc., *et al.*, (hereinafter referred to as “Debtors”), each filed their respective petitions under Chapter 11 of the Bankruptcy Code¹ on January 16, 2002. The

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.

Debtors and The Shaw Group, Inc. entered into an Asset Purchase Agreement, whereby The Shaw Group would acquire substantially all of the Debtors' assets and assume certain of the Debtors' liabilities. The transaction was approved by Order of this Court dated April 25, 2002.

The Official Committee of Unsecured Creditors (hereinafter referred to as "Plaintiff") was granted standing and authority by Order dated November 6, 2003 to prosecute the Debtors' avoidance actions arising under Chapter 5 of the Bankruptcy Code. This adversary proceeding was commenced on January 10, 2004 seeking to avoid and recover pursuant to §§ 547(b) and 550 of the Bankruptcy Code,² three allegedly preferential transfers totaling \$101,090.40.

<u>Date</u>	<u>Payment Number</u>	<u>Payment Amount</u>
11/28/2001	4076558	\$14,455.00
12/3/2001	4079031	\$53,014.50
12/11/2001	4096817	\$33,620.90

Defendant filed this Motion for Summary Judgment on January 26, 2005. Briefing has

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."

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

been completed and the Motion is therefore, ripe for disposition.

II. JURISDICTION

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 adversary 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 judgment as a matter of law.” *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 party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 547, 587–588 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). 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* 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 v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

IV. DISCUSSION AND DECISION

In its Motion, Defendant argues that it is entitled to summary judgment because the allegedly preferential transfers that Plaintiff seeks to avoid and recover are transfers made pursuant to an executory contract which was assumed and assigned by Debtors. Defendants correctly cite *In re Kiwi International Airlines, Inc.*, 344 F.3d 311 (3rd Cir. 2003), for this proposition.

Defendant first contends that The IT Group and Defendant entered into a contract on June 19, 2000, whereby Defendant provided surveying, mapping, and geographic information services for the Camp Pendleton Project No. N62474-98-2076, and that as of Debtors' petition date, the contract was not fully performed. (Defendant's Brief in Support of the Motion for Summary Judgment, at 2) Defendant was still required to perform services and The IT Group had not yet made full payment on the contract. (Defendant's Brief, at 2) Defendant argues therefore, that the contract was executory in nature. Defendant also contends that the payment from The IT Group, in the amount of \$33,620.90, was not received until March 20, 2002. Because the transfer was made and received after the petition date, Defendant argues that Plaintiff cannot satisfy the requirement of § 547(b)(4) that the transfer was made on or within ninety days of the petition date.

Defendant then states that it entered into a work agreement with The Shaw Group, Inc. on July 2, 2002 to perform services on the same Camp Pendleton Project. Based upon these facts, Defendant asserts that its contract with The IT Group was assumed and subsequently assigned to The Shaw Group.

Conversely, Plaintiff denies that the contract between The IT Group and Defendant was

assumed by Debtors' and then assigned to The Shaw Group. In support of its position, Plaintiff states that there is no evidence on the record, or otherwise, that Defendant's contract with The IT Group was assumed. Plaintiff asserts that The IT Group contract terminated on June 19, 2001 and was expired well before the petition date; therefore, the contract was not an executory contract that Debtors' could assume. Furthermore, Plaintiff argues that Defendant entered into a new contract with The Shaw Group on July 2, 2002 which was separate and distinct from expired The IT Group contract.

As is noted above, Defendant asserts that the third of the three transfers claimed by Plaintiff to have been preferential, Payment No. 4096817 dated December 11, 2001, in the amount of \$33,620.90, was not received by Defendant until March 20, 2002, well after the January 16, 2002 petition date, and that such transfer, having not been made within the preference period, may not be found to be preferential.

In support of this assertion, Defendant provides the declaration of Janis Loucks, its Vice President of Finance and Administration. Copies of the check and bank statement in support of Defendant's contention are attached to the declaration, marked Exhibit "D" (although designated Exhibit "A" in the body of the declaration). A deposit slip dated March 27, 2002, in the amount of \$115,014.20, includes a \$33,620.90 deposit. A copy of the check reveals that it is Check Number 4116340 (not 4096817), dated 03/20/02 (not 12/11/01), drawn by IT Corporation in favor of Defendant, in the amount of \$33,620.90.

In its objection to Defendant's Motion for Summary Judgment, Plaintiff devotes itself entirely to Defendant's contention with regard to the alleged assumption and assignment of a contract, does not attempt to controvert, and in fact makes no mention whatever of Defendant's

assertions with regard to the \$33,620.90 payment. It is noteworthy, however, that in support of its opposition to Defendant's motion, Plaintiff provides the affidavit of Harry J. Soose, Jr., its Senior Vice President and Chief Financial Officer. In his affidavit, Mr. Soose notes that Plaintiff caused two payments to be made during the preference period, the first two of the three payments described in Plaintiff's complaint. The affidavit makes no mention whatever of the third, \$33,620.90, payment.

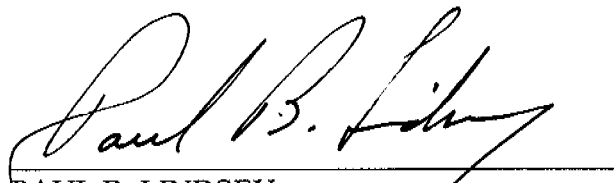
Although Defendant states that it received "Payment No. 4096817" in the amount of \$33,620.90, on March 20, 2002, it clearly appears that the payment actually received on that date and in that amount was Check No. 4116340, dated March 20, 2002. It appears equally clear that Plaintiff is not contesting Defendant's assertions with regard to the timing of this payment, as it fails to controvert, or even to mention Defendant's contentions with regard to this payment in its objection to the motion, and its Senior Vice President and Chief Financial Officer makes no mention of the payment of that amount at any time, during the preference period in December 2001 or at any other time.

THEREFORE THE COURT FINDS that the March 20, 2002 payment in the amount of \$33,620.90 from The IT Group to Defendant was not made on or within ninety days of Debtors' bankruptcy petition. Plaintiff cannot prove by a preponderance of the evidence that the March 20, 2002 transfer was preferential, and the Court finds that it was not.

THE COURT FURTHER FINDS with respect to the remaining two transfers, that there remain genuine issues of material fact, including but not limited to, whether the alleged contract between the parties was executory in nature, and whether the alleged contract had been assumed and assigned by the Debtor, The IT Group.

Summary Judgment will be granted in favor of Defendant, Towill, Inc. and against Plaintiff, the Official Committee of Unsecured Creditors as to Payment No. 4116340, dated March 20, 2002, in the amount of \$33,620.90. Defendant's Motion for Summary Judgment will be denied in all other respects. An appropriate order follows.

Dated: March 1, 2005
Wilmington, DE



PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

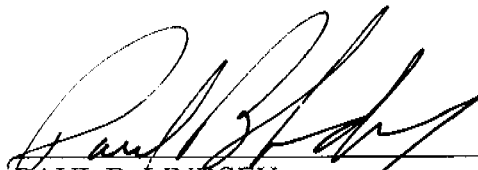
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**ORDER GRANTING IN PART, AND DENYING IN PART,
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

For the reasons set forth in the Memorandum Opinion of even date herewith, it is hereby ordered that Summary Judgment is **GRANTED** in favor of Defendant, Towill, Inc. and against Plaintiff, the Official Committee of Unsecured Creditors as to Payment No. 4116340, dated March 20, 2002, in the amount of \$33,620.90. Defendant's Motion for Summary Judgment is **DENIED** in all other respects.

Dated: March 1, 2005
Wilmington, DE



 PAUL B. LINDSEY
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