IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 7
	)	
J. SILVER CLOTHING INC.,	)	Case No. 05-10522(PJW)
	)	
Debtor.	)	
______________________________________	)	
JEOFFREY L. BURTCH, CHAPTER 7 TRUSTEE,	)	Adv. Proc. No. 07-50814(KG)
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
CONNECTICUT COMMUNITY BANK, N.A. D/B/A THE GREENWICH BANK & TRUST COMPANY, a national banking association, AND JAMES J. FULD, JR., an individual,	)	
	)	
Defendants.	)	**Re Dkt No. 18**

ORDER DENYING SUMMARY JUDGMENT

The Court has fully considered the Defendants' motion for summary judgment (Docket No. 18)(the "Motion"), the Plaintiff's opposition thereto (Docket No. 24), and the Defendants' reply (Docket No. 27), and the supporting affidavits and documents. Oral argument is scheduled for October 23, 2008, but the Court does not think argument is necessary and, instead, wants the case to proceed without delay. For the following reasons, the Motion is DENIED.

The Chapter 7 Trustee (the "Plaintiff") filed the adversary proceeding on February 23, 2007 against Connecticut Community Bank, N.A. D/B/A The Greenwich Bank & Trust

Company ("GBT") and James J. Fuld, Jr., seeking to avoid transfers pursuant to 11 U.S.C. §§544, 547, 548 and to recover property transferred pursuant to 11 U.S.C. §550. The Defendants answered on June 9, 2008 and filed this joint Motion on August 5, 2008 seeking summary judgment on every count of the complaint.

Defendant GBT is a bank with which J. Silver Clothing, Inc. (the "Debtor") entered into a one million dollar revolving Loan and Security Agreement (the "Loan") on December 1, 2004. Pursuant to the Loan, the Debtor assigned, pledged and granted GBT a continuing security interest in the Debtor's collateral. Over the few days following the execution of the Loan, the Debtors drew on its revolving line of credit, borrowing approximately $482,920. In the following month, defendant GBT filed as many as three financing statements with the Delaware Secretary of State in an effort to perfect their security interest. On February 16, 2005, the Debtor repaid GBT for the full outstanding balance on the Loan with the proceeds from the sale of ten of their locations to Hoffman Acquisition Corp. Plaintiff contends that this repayment of the Loan was a preferential transfer pursuant to 11 U.S.C. §547 because GBT received more as a result of the transfer than it would have in a Chapter 7 liquidation. This contention is based on two theories (1) that GBT's interest was not properly perfected, thereby relegating it to a general unsecured creditor that would not receive full value of the debt in a liquidation; and (2) if GBT's interest was properly perfected, it was not fully secured, let alone over-secured, and therefore it would not have received full value of the debt in a liquidation. GBT alleges (1) that its interest was properly perfected, arguing that

while it failed to meet technical requirements for perfection, the intent of the parties was clear, and (2) that it was over-secured.

Defendant James J. Fuld, Jr. was the majority shareholder as well as the Chairman of the board of directors of the Debtor. He also owned 10% of the Senior Notes of the Debtor and 10% of the Senior Indebtedness Notes of the Debtor. In this capacity, he obtained the Loan, personally guaranteed it, pledged his personal assets, and subordinated repayment of his 10% Notes to GBT's senior position. Plaintiff contends that the motivation for the repayment of the Loan was to relieve defendant Fuld of his obligation to GBT as the Debtor entered bankruptcy. Plaintiff claims that the benefit to Fuld as a result of this transaction was both a fraudulent and preferential transfer under 11 U.S.C. §§544, 547, 548, as well as a breach of his fiduciary duty to the creditors of the Debtor because GBT's security interest was improperly perfected (Fuld and J. Silver were aware of this deficiency), in bankruptcy the claim would not have been paid in full, and GBT would have pursued Fuld in his personal capacity for the deficiency. Like GBT, Fuld also alleges that the GBT interest was properly perfected and over-secured, and therefore, the transfer is not avoidable.

Defendants seek summary judgment in their favor on the grounds that the value of the Debtor's collateral exceeded GBT's unavoidable security interest. Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c), made applicable to this

adversary proceeding by Fed. R. Bankr. P. 7056. In a motion for summary judgment, the moving party "always bears the initial responsibility of informing the. . . court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories and admission on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L. Ed.2d 265 (1986).

Once the moving party has made a proper motion for summary judgment, the burden shifts to the non-moving party, pursuant to Rule 56(e), which states,

> [w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denies in its own pleading; rather, its response must - by affidavits or as other wise provided in this rule - set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."

Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1349, 89 L. Ed.2d 538 (1986). The party opposing the motion "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586.

Before a court will find that a dispute about a material fact is genuine, there must be sufficient evidence upon which a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2205, 91 L. Ed.2d 202 (1986). The court must view the facts and draw inferences in a light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255. "[W]here the non-moving party's evidence

contradicts the movant's, then the non-movant's must be taken as true." *Pastore v. Bell Tel. Co.*, 24 F.3d 508, 512 (3d Cir. 1994). It is not the role of the judge to weigh the evidence or to evaluate its credibility, but to determine "whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

Defendants argue in their Motion that GBT properly perfected its security interest despite the fact that it did not file the financing statement within the allotted time that the Code provides for a contemporaneous exchange. Their contention is that even though there was a lapse in the timing, the intention of the parties was that the granting of the security interest would be a contemporaneous exchange with the execution of the Loan. Further, they contend that the amount owed did not exceed the value of the collateral in which GBT held a security interest. Therefore, by paying the Loan in full prior to the bankruptcy, this actually spared the estate interest and administrative expenses that inevitably would have accrued. To support this contention, the Defendants offered affidavits of Robert S. Bland, the former CEO of the Debtor, Richard A. Muskus, Jr., the Senior Vice President of GBT, and Scott Gerard, an attorney representing GBT.

Plaintiff alleges that material facts do exist regarding the intent of the parties with respect to the security interest and whether GBT was fully secured. Specifically, Plaintiff contends that because of the way that GBT proceeded with filing the financing statement, they were not necessarily concerned about the security interest because they had Fuld's guarantee. Further, Plaintiff discussed his discomfort with the valuation of the Debtor's

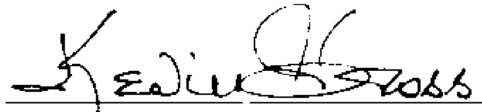
assets at the time that the loan was paid and questioned whether there would have been enough value for GBT to qualify as over-secured given the fact that the proceeds of the Hoffman sale included the purchase of the leases, property in which GBT did not hold an interest. To support its allegations, the Plaintiff offered copies of various agreements, board meeting minutes, and other documentation that seem to suggest that the issues of intent and valuation are both material and in dispute.

In reply, the Defendants offered no additional evidence. Instead, they simply maintained that both the intent of the parties and the valuation of the GBT collateral were clear from the undisputed facts.

The Court concludes that there remain two genuine issues of material fact. On the issue of intent, while the Plaintiff's evidence is somewhat circumstantial, it still raises a material factual question about whether the parties did intend for a contemporaneous exchange or if they deemed the Fuld guarantee as the primary protection. As for the issue of valuation, the affidavits submitted by the Defendants themselves seem to support different valuations of Debtor at the time the payment was made. Further, the Defendants did not sufficiently address the issue of the value of the leases in the sale to Hoffman Acquisitions and the impact that had on the overall financial outlook of J. Silver. Therefore, given the particularly high standard for summary judgment set out in this Circuit, the Defendant's motion must be denied.

The parties are directed to obtain a trial date from Chambers and thereafter to submit a scheduling order. The parties shall include in the scheduling order completion dates for discovery, if needed, a date at least two weeks before trial for submission of a pretrial order, a pretrial conference date and a trial date. If necessary, the Court will hold a teleconference to resolve any disputes or to assist with the scheduling order. The oral argument scheduled for October 23, 2008 at 1:30 p.m. is hereby cancelled.

SO ORDERED.



Dated: October 15, 2008

KEVIN GROSS, U.S.B.J.