

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
FRUEHAUF TRAILER CORPORATION,)	Case Nos. 96-01563 (PJW)
et al.)	through 96-01572 (PJW)
)	
)	Jointly Administered
Debtors.)	
_____)	
FRUEHAUF TRAILER CORPORATION,)	
)	
Plaintiff,)	
)	
vs.)	Adv. Proc. No. 98-485
)	
GENERAL BEARING CORPORATION,)	
)	
Defendant.)	

MEMORANDUM OPINION

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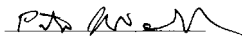
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Dated: March 27, 2008

WALSH, J. 

This is with respect to Plaintiff's motion (Doc. # 51) for partial summary judgment in this preference action. Pursuant to 11 U.S.C. § 547(b),¹ Plaintiff Fruehauf Trailer Corporation ("Fruehauf"), by its successor in interest, The End of the Road Trust ("the Trust"), seeks to recover an aggregate sum of \$199,159.92 in transfers Fruehauf made to Defendant, General Bearing Corporation ("General"), during the 90-day preference period prior to Fruehauf's filing for chapter 11 relief. Notwithstanding General's § 547(c) affirmative defenses, which General will have an opportunity to present at trial, the Trust asserts that there is no genuine issue of material fact as to whether \$74,018.32 of these transfers are, on their face, avoidable transfers under § 547(b). For the reasons set forth below, I deny the motion, but suggest a resolution for the § 547(b) elements as to some of the transfers.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56 (made applicable to this action by Federal Rule of Bankruptcy Procedure 7056) allows the Trust to move the Court "for a summary judgment in [the Trust's] favor upon all or any part" of its claims against General. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as

¹ 11 U.S.C. § 547 will be cited herein as "§ 547".

a matter of law. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56; see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); In re IT Group, Inc., 331 B.R. 597, 600 (Bankr. D. Del. 2005).

The moving party bears the burden of showing there are no genuine issues of material fact that would preclude summary judgment. Celotex, 477 U.S. at 325. Once the moving party has met this burden, however, the burden shifts to the non-moving party to show that a genuine issue of material fact does in fact exist. Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(e); see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp, 475 U.S. 574 (1986); In re IT Group, 331 B.R. at 600.

BACKGROUND

The aggregate of \$199,159.92 of transfers were made by 20 separate transactions. With respect to 15 of those transfers, totaling \$74,018.32, the Trust seeks to establish that those transfers satisfy the prima facie test of § 547(b).

The 15 transfers are identified in two documents: Ex. B to the affidavit of Sarah Doerr (counsel for the Trust) ("Doerr Ex. B") and Ex. B to the affidavit of Santa Cruz (a credit specialist employed by General) ("Cruz Ex. B"). Doerr Ex. B consist of 15 pages showing photocopies of 15 Fruehauf checks payable to General. As to 10 of those checks, the "stubs" for the checks show how the amounts of the checks were calculated and identifies the General invoices to which the payments were to be applied and as to a

number of payments it identifies pre-payments. The other five photographs of the checks are not accompanied by a stub showing the invoice(s) to which the payments were to be applied. As to the remaining five transfers, Ex. C to the affidavit of Sarah Doerr ("Doerr Ex. C") is a copy of one page from Fruehauf's Statement of Financial Affairs as filed in Fruehauf's chapter case. Those five payments are identified by check number, date, amount, and payee (General). There is no reference to any General invoices applicable to those five payments. With minor exceptions discussed below, General does not dispute what Doerr Exs. B and C show. Cruz Ex. B is a payment analysis, prepared by Mr. Cruz, showing the Fruehauf payments to General by check numbers, dates paid, amounts of payments, and invoice numbers to which the payments were applied. Each of the 15 checks identified in Doerr Ex. B are identified in Cruz Ex. B.

General argues that Doerr Ex. B is not admissible evidence because it has not been authenticated by a witness and it is hearsay.²

² Cruz Ex. B was offered by General through Mr. Cruz's affidavit that was filed as an appendix to General's answering brief. It was offered in response to a complaint in the Trust's opening brief that General had not properly responded to the Trust's discovery requests. Presumably, General is not objecting to the admissibility of Cruz Ex. B on the grounds it has asserted as to Doerr Ex. B. To the extent General may object to the admissibility of Cruz Ex. B as evidence, the position of the Court is set forth below as to the admissibility of Doerr Ex. B is equally applicable to Cruz Ex. B.

DISCUSSION

As to the General's authenticity objection, I believe Doerr Ex. B can easily be authenticated pursuant to Federal Rule of Evidence 901(a) that provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." The burden of proof for authenticity is slight. United States v. Riley, 33 F.3d 1396, 1404 (3d Cir. 1994).

There are two important facts here that support authentication based upon FRE 901(a). First, the information shown in Doerr Ex. B did not come from Fruehauf's files. It came from the General's files and they are being used to support Fruehauf's case. Second, Cruz Ex. B clearly reflects information found on the copies of checks and some of the stubs in Doerr Ex. B. Cruz Ex. B is a document that was prepared by Mr. Cruz at the request of the general counsel for General. (Doc. # 54, p. 7) It is obvious that, in examining General's records, he relied upon the information shown on the cancelled checks and some of the stubs and summarized that information in submitting a report to the general counsel. It seems apparent that he assumed the authenticity of the Fruehauf checks and stubs. Every one of the 15 checks reflected in Doerr Ex. B are addressed in Cruz Ex. B. Admittedly, as discussed below, there are some disparities between Doerr Ex. B and Cruz Ex.

B with respect to the identity of the antecedent invoices. It appears that with respect to a number of Fruehauf payments for antecedent debts General did not abide by Fruehauf's designation on the stubs as to the antecedent invoices being paid, but rather applied some payments to different antecedent invoices. However, the 15 checks addressed in Cruz Ex. B clearly reflect that, except as to prepayments (as to which there is no dispute), the payments made by Fruehauf were with respect to antecedent invoices.

The matter here is similar to that addressed by the court in In re Dougherty, 84 B.R. 653 (9th Cir. B.A.P. 1988). In that case, involving a non-dischargeability complaint, the bank offered into evidence its statement of the debtor's credit card account. The debtor objected that (1) the bank did not satisfy the requirements of FRE 901(a) regarding authentication and (2) the statements were hearsay and they did not qualify as business records under FRE 803 (6). At the trial, the debtor testified that he recognized the account statements; that he had received similar statements at his home; that the charges on the account and the balances due were, to the best of his knowledge, the same as he received at his home; and that he made all of the charges reflected in the statements. The debtor did, however, indicate some apparent inaccuracies or inconsistencies in the statements. Nevertheless, the court concluded that the statements offered into evidence by the bank were statements of the debtor's account and they were

accurate. Thus, the court authenticated the statements under FRE 901(a). The central question was whether a reasonable trier of fact could conclude that the evidence was what the proponents claim it was. The 9th Cir. B.A.P. concluded: "Dougherty's testimony provides sufficient evidence to support the trial judge's conclusion that the statements were what [the bank] said they were. Accordingly, we affirm the trial court's conclusion that the statements were properly authenticated." Id. at 655.

Of the numerous preference actions over which I have presided in this Court, I do not recall any instance where a defendant challenged the authenticity of copies of a debtor's payment checks. In many cases, particularly liquidation cases, where the trial is conducted several years after the transactions occurred, the person who wrote or directed the writing of the checks is not available and indeed sometimes could not even be identified. Furthermore, I have been unable to find any reported decisions where a bankruptcy court in a preference action has held that copies of a debtor's payment checks present an authentication or hearsay problem.

With respect to the hearsay objection, I find that Doerr Ex. B constitute an exception under FRE 803(6) as records of regularly conducted activity. In Dougherty the court found that the account balance statements did not qualify under FRE 803(6). However, the court treated the statements as admissible because

they were admissions of a party opponent under FRE 801 (d) (2). The B.A.P. concluded:

Dougherty testified that he received statements similar to those admitted at trial and that he made all the charges on them. Dougherty claim[ed] he challenged the statements, but he only said that the balances appeared incorrect and he did not understand some notations on the statements. The charges, however, [were] the relevant information on the account statements. Dougherty never disputed that he made the charges or their accuracy. Therefore, we conclude that Dougherty has adopted the statements as true for purposes of FRE 801(d) (2) (B).

Id. at 655. As noted above, Cruz, in developing his analysis of the payments and their application to antecedent invoices, relied upon the checks and some of the stubs, and other information in General's possession, to report to general counsel. His affidavit to this effect is similar to the debtor's trial testimony in In re Dougherty. Thus, I find that Doerr Ex. B is admissible evidence of the transactions. I now turn to what that evidence shows.

Pursuant to § 547(b), the trustee may "avoid any transfer of an interest of [Fruehauf's]" to General so long as the transfer:

- (1) was made to or for the benefit of General;
- (2) was made for or on account of an antecedent debt owed by Fruehauf to General before the transfer was made;
- (3) was made while Fruehauf was insolvent;
- (4) was made on or within 90 days prior to Fruehauf's filing of its petition for chapter 11 relief; and

(5) enabled General to receive more than it would have had Fruehauf petitioned for liquidation under chapter 7 without making the transfer.

Of course, pursuant to § 547(g), the trustee has the burden of proof as to each element of § 547(b).

As reflected in Doerr Ex. B and C, the 20 transfers are the following:

<u>Transfer No.</u>	<u>Date of Transfer</u>	<u>Amount of Transfer</u>
1.	July 11, 1996	\$3,742.00
2.	July 17, 1996	\$7,480.80
3.	July 17, 1996	\$1,750.00
4.	July 17, 1996	\$26,026.95
5.	July 22, 1996	\$2,624.53
6.	July 24, 1996	\$29,923.64
7.	July 24, 1997	\$18,234.75
8.	July 24, 1996	\$7,480.90
9.	July 31, 1996	\$534.12
10.	August 2, 1996	\$26,026.95
11.	August 6, 1996	\$5,115.00
12.	August 8, 1996	\$14,961.60
13.	August 8, 1996	\$3,339.00
14.	August 14, 1996	\$5,984.64
15.	August 19, 1996	\$1,496.16
16.	August 21, 1996	\$2,994.00
17.	August 26, 1996	\$11,417.78
18.	August 28, 1996	\$7,480.80
19.	August 29, 1996	\$14,961.60
20.	September 16, 1996	<u>\$7,584.70</u>
		\$199,159.92

Photocopies of all but five of the checks corresponding to the transfers at issue are shown on Doerr Ex. B. With respect to the five checks written for transfer numbers 1, 11, 14, 15, and 16, Doerr Ex. C is a page from Fruehauf's Statement of Financial Affairs identifying each of these five transfers by payee (General), amount, date, and check number. (Doerr Aff. Ex. C.) However, Doerr Ex. C does not identify any General invoices to which the five Fruehauf payments pertain.

For all 20 of the transfers Fruehauf made to General during the preference period, the record leaves no genuine issue of material fact as to whether the transfers satisfy four of the five elements of § 547(b). For each of § 547(b)'s subparts (1), (3), (4), and (5), summary judgment in Fruehauf's favor is appropriate with respect to each of the preference period transfers. General does not contest this fact. As discussed below, for 15 of the 20 transfers, there remains the question as to whether the final element - § 547(b)(2) - is also satisfied for all or a part of 15 transfers, such that summary judgment in Fruehauf's favor is appropriate as to the prima facie avoidability of \$74,018.32 of those transfers.

The remaining element that must be satisfied in order for Fruehauf to make a prima facie showing of avoidability for the preference period transfers is that, pursuant to § 547(b)(2), each transfer was made "for or on account of an antecedent debt owed by the debtor before such transfer was made." A debt "is antecedent if it is incurred before the transfer." In re Contempri Homes, 269 B.R. 124, 127 (Bankr. M.D. Pa. 2001). This element requires an individualized analysis for each transfer.

For transfer numbers 3, 6, 17, and 19, it is clear from the check stubs produced by General that Fruehauf intended each of these payments to be applied to specific antecedent invoices. As to those four transfers, Doerr Ex. B shows the following:

<u>Transfer No.</u>	<u>Date</u>	<u>Amount</u>	<u>Check No.</u>
3.	7/17/96	\$1,750.00	95935
6.	7/24/96	\$29,923.64	96154
17.	8/26/96	\$11,417.78	33696
19.	8/29/96	<u>\$14,961.60</u>	97101
		\$58,053.02	

For these four transfers, then, each of the five elements of 11 U.S.C. § 547(b) appear to be satisfied for transfers totaling \$58,053.02.

The check stubs attached to the checks for transfer numbers 2, 4, 7, 8, and 18 indicate that a portion of each payment was to be applied to "old payables," while other portions of the payment was allocated as "cash in advance" for new purchase orders. As to these five transfers, Doerr Ex. B shows the following:

<u>Transfer No.</u>	<u>Date</u>	<u>Amount</u> (Antecedent <u>Debt Amount</u>)	<u>Check No.</u>
2.	7/17/96	\$7,480.80 (\$1,496.16)	31200
4.	7/17/96	\$26,026.95 (\$5,205.39)	30219
7.	7/24/96	\$18,234.75 (\$3,646.90)	30270
8.	7/24/96	\$7,480.90 (\$1,496.16)	31284
18.	8/28/96	\$7,480.90 <u>(\$1,496.16)</u>	31926
		\$66,704.30 (\$13,340.77)	

As to transfer numbers 2, 4, 7, 8, and 18, therefore, it is clear from the record that a portion of each transfer was made on account of an antecedent debt. For the portion of each of these transfers

designated as remittance for an antecedent debt or for "old payables," each of the five elements of 11 U.S.C. § 547(b) appear to be satisfied as to transfers totaling \$13,340.77. The combination of \$58,053.02 and \$13,340.77 amounts to \$71,393.79 of transfers applicable to antecedent debts.

There are a number of minor discrepancies in the Doerr Ex. B. For example:

(1) As to check number 33123 dated July 22, 1996 in the amount of \$2,624.53, I am not able to reconcile the stub's listing of invoices and a pre-payment with the amount of the check.

(2) In its opposition brief, General states that it produced in discovery an invoice dated September 4, 1996 which references a customer order no. "WGR 74723" in the amount of \$5,097.50. According to General, this information is inconsistent with check number 33696 in the amount of \$5,097.50 which according to General was invoiced at a date after the date of the check. At this point, without further inquiry, I would simply observe that the "invoice" identified as having been produced by General is not an invoice, it is a purchase order.

(3) General also complains that some of the referenced invoices are inconsistent, some of them referring to simply numbered invoices and others referring to invoices bearing letters and numbers. I question whether this constitutes a serious infirmity in the evidence presented by the Trust.

In any event, I make the following observations as to what Doerr Ex. B and Cruz Ex. B show. Doerr Ex. B identifies 15 checks and related stubs as to 10 of those checks. Cruz Ex. B identifies those same 15 checks and analyses the application of the payments to various invoices. However, with respect to a number of the analyses on Cruz Ex. B, the application of the payment to various invoices is different from that shown on Doerr Ex. B. As to each of the 15 checks the two documents together show:

(1) Doerr Ex. B shows check number 31200 dated July 17, 1996 in the amount of \$7,480.80 and the stub identifies two antecedent invoices and a prepayment amount. Cruz Ex. B shows the receipt of check number 31200 on July 18, 1996 but as being applied to two antecedent invoice numbers different from the two invoice numbers on the stub and to the same prepayment amount.

(2) Doerr Ex. B shows check number 95935 dated July 17, 1996 in the amount of \$1,750.00 and references a numbered and dated antecedent invoice. The information on Cruz Ex. B matches that on Doerr Ex. B as to the check number, the amount and the invoice number.

(3) Doerr Ex. B shows check number 30219 dated July 17, 1996 in the amount of \$26,026.95 being applicable to a numbered and dated antecedent invoice and to a prepayment. Cruz Ex. B as to check number 30219 matches Doerr Ex. B information.

(4) Doerr Ex. B shows check number 33123 dated July 22, 1996 in the amount of \$2,624.53 and identifies two antecedent invoices. Cruz Ex. B identifies check number 33123 and two antecedent invoices, one of which is the same the other of which is different from Doerr Ex. B.

(5) Doerr Ex. B shows check number 96154 dated July 24, 1996 in the amount of \$29,923.64 and the stub identifies four invoices. The copying produced an unreadable column for the invoice numbers. However, the invoice dates are 6/06/96, 6/10/96, 6/11/96, and 6/20/96. Cruz Ex. B identifies check number 96154 and the numbered invoices and the dates of same. It identifies four invoice dates that correspond to the four dates on the check stub.

(6) Doerr Ex. B shows check number 30270 dated July 24, 1996 in the amount of \$18,234.75 and identifies a cash advance and a "25% of old payables - 17619". Cruz Ex. B identifies check number 30270 and the invoice number 17619 and the prepayment in the amounts identified on the stub.

(7) Doerr Ex. B. shows check number 31284 dated July 24, 1996 in the amount of \$7,480.90 and on the stub a payment in advance and a partial payment on an invoice dated 04/08/96. Cruz Ex. B identifies check number 31284 but identifies two different antecedent invoice numbers and a prepayment in the same amount as indicated on the stub.

(8) Doerr Ex. B shows check number 33359 dated July 31, 1996 in the amount of \$534.12, but does not present a related stub. However, Cruz Ex. B identifies check number 33359 as being applied to a prepayment and to two antecedent invoices.

(9) Doerr Ex. B shows check number 30342 dated August 2, 1996 in the amount of \$26,026.95 but does not present a related stub. Cruz Ex. B shows check number 30342 as being applied partly as a prepayment and partly to an antecedent invoice.

(10) Doerr Ex. B shows check number 96663 dated August 8, 1996 in the amount of \$14,961.60 but does not present a related stub. Cruz Ex. B identifies check number 96663 as being applied to two antecedent invoices.

(11) Doerr Ex. B shows check number 33472 dated August 8, 1996 in the amount of \$3,339.00 but does not present a related stub. Cruz Ex. B identifies check number 33472 as being applied to two prepayments and one antecedent invoice.

(12) Doerr Ex. B shows check number 33696 dated August 26, 1996 in the amount of \$11,417.78. The stub identifies three invoices only two of which are readable but identifies invoice dates of 8/21/96, 8/21/96, and 3/26/96. Cruz Ex. B identifies check number 33696 as being applied to seven different numbered and dated antecedent invoices.

(13) Doerr Ex. B shows check number 31926 dated August 28, 1996 in the amount of \$7,480.80 and a stub reference to two items,

one a prepayment and the other a numbered invoice dated 05/08/96. Cruz Ex. B identifies check number 31926 as being applied to two separate numbered antecedent invoices with the invoice dates, neither of which matches the invoice shown on the stub.

(14) Doerr Ex. B shows check number 97101 dated August 29, 1996 in the amount of \$14,961.60. The stub identifies two antecedent invoices. Cruz Ex. B identifies check number 97101 as being applied to the same two invoices identified on the stub.

(15) Doerr Ex. B shows check number 97367 dated September 16, 1996 in the amount of \$7,584.70. No stub is identified. Cruz Ex. B identifies check number 97367 as being applied to a numbered and dated antecedent invoice.

Thus, a number of check applications shown on Doerr Ex. B do not match Cruz Ex. B. However, from the combination of the Doerr Ex. B and the Cruz Ex. B, it is readily apparent that the Doerr Ex. B and Cruz Ex. B present evidence sufficient to conclude that the following checks identify transfers from Fruehauf to General with respect to antecedent debts:

<u>Transfer No.</u> <u>(check no.)</u>	<u>Check Amount</u> <u>(Antecedent</u> <u>Debt Amount)</u>	<u>Antecedent Invoices identified</u> <u>on Doerr Ex. B or Cruz Ex. B or</u> <u>both</u>
2. (31200)	\$7,780.80 (\$1,496.80)	Both, but different invoice numbers
3. (95935)	\$1,750.00	Both
4. (30219)	\$26,026.95 (\$5,205.39)	Both, including prepayment amount
5. (33123)	\$2,624.53 (\$2,624.53)	Both

6. (96154)	\$29,923.64 (\$29,923.64)	Both
7. (30270)	\$18,234.75 (\$3,646.90)	Both, including prepayment amount
8. (31284)	\$7,480.90 (\$1,496.16)	Both, including prepayment amount
9. (33359)	\$534.12 (\$101.12)	Cruz Ex. B
10. (30342)	\$26,026.95 (\$2,205.39)	Cruz Ex. B, including prepayment amount
12. (96663)	\$14,967.60 (\$14,967.60)	Cruz Ex. B
13. (33472)	\$3,339.00 (\$667.80)	Cruz Ex. B including Prepayment amounts
17. (33696)	\$11,417.78 (\$11,417.78)	Both, but different invoice numbers
18. (31926)	\$7,480.80 (\$7,480.80)	Both, but different invoice numbers
19. (97101)	\$14,961.60 (\$14,961.60)	Both
20. (92367)	\$7,584.70 <u>(\$7,584.70)</u>	Cruz Ex. B
Total	(\$103,780.21)	

The transfers identified on Doerr Ex. C (transfer numbers 1, 11, 14, 15, and 16) do not identify any General invoices and Cruz Ex. B does not show those transfers either. Thus, those five transfers do not, on the record before me, satisfy the requirement of § 547(b)(2).

As noted above, there are a few items of confusion regarding several of the transfers (not transfer numbers 1, 4, 11, 14, and 15) that make summary judgment for the Trust problematic at this time. However, if no further evidence is produced at trial on the § 547(b)(2) issue, I believe the Court could in short order easily conclude that by a preponderance of the evidence the Trust

has satisfied all five of the § 547(b) elements with respect to \$103,780.21 of transfers.

CONCLUSION

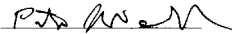
For the reasons set forth above, I will deny the motion for partial summary judgment but with the observation that, absent new conflicting evidence presented at trial by General, a finding for the Trust as to all the elements of § 547(b) applicable to \$103,780.21 of transfers seems highly likely.

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In re:)	Chapter 11
)	
FRUEHAUF TRAILER CORPORATION,)	Case Nos. 96-01563 (PJW)
et al.)	through 96-01572 (PJW)
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FRUEHAUF TRAILER CORPORATION,)	
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vs.)	Adv. Proc. No. 98-485
)	
GENERAL BEARING CORPORATION,)	
)	
Defendant.)	

ORDER

For the reasons set forth in the Court's memorandum opinion of this date, Plaintiff's motion (Doc. # 51) for partial summary judgment is denied.



Peter J. Walsh
United States Bankruptcy Judge

Dated: March 27, 2008