

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

**Gross Common Carrier, Inc., Debtor, and Official Unsecured Creditors'
Committee of Gross Common Carrier, Inc., Intervenor, Plaintiffs,
v.**

**GSG Holdings, a Wisconsin general partnership, Lou-Ques Corporation, a
Wisconsin corporation, Lori Gross, an individual, Michael Gross, an individual,
Betty L. Soe, an individual, Robert L. Gross, an individual, and Donald J. Soe,
an individual, jointly and severally, Defendants**

(In re Gross Common Carrier, Inc., Debtor)

Bankruptcy Case No. 91-52860-11, Adv. Case. No. A92-5033-11

United States Bankruptcy Court
W.D. Wisconsin, Eau Claire Division

December 23, 1992

James D. Sweet and Catherine Furay, for the debtor.
Elizabeth Roberto, for the unsecured creditors' committee.
William Duffin, for all defendants except Lou-Ques Corporation.

Thomas S. Utschig, United States Bankruptcy Judge.

**MEMORANDUM OPINION, FINDINGS OF FACT,
AND CONCLUSIONS OF LAW**

This matter comes before the Court on summary judgment motions filed by both the plaintiff and the defendants. The plaintiff is the debtor in the underlying bankruptcy -- Gross Common Carrier, Inc. The Official Unsecured Creditors' Committee in the debtor's bankruptcy is an intervening plaintiff. The defendants are GSG Holdings, a Wisconsin general partnership; Lou-Ques Corporation, a Wisconsin corporation; Lori Gross; Michael Gross; Betty Soe; Robert Gross; and Donald Soe. The debtor is represented by James D. Sweet and Catherine Furay; Elizabeth Roberto is representing the unsecured creditors' committee. The defendants, with the exception of Lou-Ques Corporation, are represented by William Duffin.

Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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. Additionally, summary judgment "[i]s designed to eliminate unnecessary trials and is a determination that the parties have not been able to present a triable issue." Kasbaum v. Lucia, 127 Wis. 2d 15, 24, 377 N.W. 2d 183 (Ct. App. 1985), citing with approval Maynard v. Port Publications, Inc., 98 Wis. 2d 555, 562, 297 N.W. 2d 500, 504 (1980).

Two summary judgment motions are before the Court. The plaintiff has moved for summary judgment as to count I of its complaint -- the claim arising under § 180.385 of the Wisconsin Statutes -- part of the Wisconsin Business Corporations Act. The

defendants have moved for summary judgment as to each and every count of the plaintiff's complaint. The Court will consider the defendants' motions first.

In count II of the plaintiff's complaint, it alleges that the imposition of mortgages on its property to secure the debt of its parent was an ultra vires act and the mortgages are thus invalid. The Court has examined the evidence and arguments of the parties and decides to grant the defendants' summary judgment motion as to this claim. As noted by the defendants in their reply brief, WIS. STAT. § 180.0304 -- the ultra vires provision -- provides that only the corporation itself, shareholders, or the attorney general can bring an action based on that provision. The plaintiff here -- as further asserted by the defendants -- is a subsidiary and a creditor of Lou-Ques Corporation and it therefore lacks standing to bring an action based on § 180.0304 of the Wisconsin Statutes. Even if the plaintiff had standing, moreover, the defendants have conclusively established that the stock redemption at issue here was within the corporate powers of Lou-Ques Corporation. Paragraph 9(a) of the Articles of Incorporation of the Gross Corporation (the name of which was changed to "Lou-Ques Corporation" on December 31, 1985) provides that "[t]he corporation, by action of the Board of Directors, shall have the right to purchase, take, receive, or otherwise acquire, hold, own, borrow, pledge, transfer, or otherwise deal in or dispose of [the shares of Gross Corporation]." See Supplemental Affidavit of Donald Soe in Support of the Motion for Summary Judgment filed by GSG Holdings and its Partners, Exhibit E at 3. The defendants have also submitted documentation that the stock redemption agreement was approved by the shareholders of Lou-Ques Corporation and that the imposition of the mortgages at issue was approved by all of the directors of the debtor. See Supplemental Affidavit of Robert L. Gross, Exhibits 2, 5. On the basis of the evidence, therefore, the Court determines that a grant of the defendants' motion for summary judgment as to count II of the plaintiff's complaint is appropriate.

In count III of its complaint, the plaintiff alleges that certain transfers from the debtor to the defendants constituted a fraudulent conveyance pursuant to 11 U.S.C. § 548. That provision provides in relevant part:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily--

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts

matured.

11 U.S.C. § 548 (West 1992).

To succeed in a claim under this section, a debtor must establish four elements. These are: (1) the debtor had an interest in the property transferred; (2) the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer; (3) the transfer occurred within one year of the filing of the bankruptcy petition; and (4) the transfer was for less than a "reasonably equivalent value." See Bundles v. Baker (In re Bundles), 856 F.2d 815, 816-17 (7th Cir. 1988).

The Court has examined the evidence and arguments submitted by the parties and finds that granting the defendants' motion for summary judgment on this claim is warranted. The debtor has not alleged sufficient facts to overcome the defendants' summary judgment motion. As noted repeatedly by the defendants in their reply brief in support of their motion, "[s]peculation, conclusory allegations and mere denials are not enough to raise genuine issues of material fact to preclude entry of summary judgment." See, e.g., Securities and Exchange Comm'n v. American Bd. of Trade, Inc., 750 F. Supp. 100, 103 (S.D.N.Y. 1990). Specifically, the debtor has failed to sufficiently establish that any transfers were made by it to the defendants within one year of the bankruptcy filing. The bankruptcy filing occurred on August 21, 1991; any relevant transfers, therefore, would have to have occurred after August 21, 1990. In their initial brief, the defendants assert that the debtor made no transfers to the redeeming shareholders during the relevant time period. In its response brief, the debtor alleges that the defendants "[a]cknowledge that Gross made transfers within a one-year period of time to Lou-Ques." In their reply brief, the defendants unequivocally deny making such an acknowledgement and note that the debtor offers no evidence to support it.

In support of its assertions, the debtor merely states that it had a single depository clearing account with Lou-Ques Corporation and the other subsidiaries. It alleges that it made deposits into this account and that Lou-Ques Corporation made withdrawals from it to make payments to the redeeming shareholders. Given such generalized allegations, the debtor has failed to establish any specific transfers it made to either Lou-Ques Corporation or the redeeming shareholders within the one-year period prior to the bankruptcy filing. Such a showing is an essential prerequisite to succeeding on a claim under § 548. The debtor's conclusory allegations as to the existence of such transfers are insufficient to defeat the defendants' summary judgment motion. The defendants' motion as to this claim is therefore granted.

Addressing the plaintiff's sixth claim for relief, it alleges that transfers made by it to the defendants constituted a voidable preference pursuant to 11 U.S.C. § 547. That provision provides in relevant part:

(b) Except as provided in subsection (c) of this section, the trustee may avoid 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 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;

(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.

11 U.S.C. § 547(b) (West 1992).

To be successful in a claim under § 547, therefore, it must be shown that the transfer: (1) was to or for the benefit of a creditor; (2) was for or on account of an antecedent debt; (3) was made while the debtor was insolvent; (4) was made on or within 90 days [or one year for insiders] before the debtor filed his bankruptcy petition; and (5) enabled the creditor to receive more than the creditor would have received if the debtor had not made the transfer. See Energy Coop. Inc. v. SOCAP Int'l, Ltd. (In re Energy Coop, Inc.), 832 F.2d 997, 999-1000 (7th Cir. 1987).

Since some of the defendants were officers and directors of the debtor corporation, the one-year time limitation for insiders is applicable here. See 11 U.S.C. § 101(31) (West 1992).

Having examined the evidence and arguments forwarded by the parties, the Court decides to grant the defendants' motion for summary judgment as to this claim as well. The Court's reasoning on this issue closely parallels its reasoning under the § 548 claim. Namely, the plaintiff has submitted no evidence sufficient to show specific transfers from it to the redeeming shareholders or to Lou-Ques Corporation within one year of its bankruptcy filing. The plaintiff merely alleges that such transfers to Lou-Ques Corporation did occur within that time period and that they were preferential. As noted previously, "[s]peculation, conclusory allegations and mere denials are not enough to raise genuine issues of material fact to preclude entry of summary judgment." Securities and Exchange Comm'n v. American Board of Trade, Inc., 750 F. Supp. 100, 103 (S.D.N.Y. 1990). The existence of transfers to the defendants within one year of the bankruptcy filing is an essential element of a § 547 claim. Having failed to adequately show that such transfers occurred, the plaintiff's allegations are insufficient to overcome the defendants' summary judgment motion as to this claim. The defendants' motion is therefore granted.

The plaintiff's final count of its complaint alleges that the defendants' claims against it should be equitably subordinated to the claims of the general unsecured creditors. This count is based on 11 U.S.C. § 510(c), which provides in relevant part:

(c) Notwithstanding subsections (a) and (b) of this section, after notice and a hearing, the court may--

(1) under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of

another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

(2) order that any lien securing such a subordinated claim be transferred to the estate.

11 U.S.C. § 510(c) (West 1992). In its responsive brief to the defendants' summary judgment motion, the plaintiff cites a Fifth Circuit case which sets forth the elements of an equitable subordination claim.

[T]hree conditions must be satisfied before exercise of the power of equitable subordination is appropriate: (i) the claimant must have engaged in some type of inequitable conduct; (ii) the misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; (iii) equitable subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act.

Benjamin v. Diamond (In re Mobile Steel Co.), 563 F.2d 692, 699-700 (5th Cir. 1977)

The plaintiff then further cites a case from the Western District of Wisconsin for the proposition that once the allegations of impropriety are supported with a substantial factual showing, the burden shifts to the insider claimant to prove the good faith and inherent fairness of the transaction. See Bank of New Richmond v. Production Credit Ass'n of River Falls (In re Osborne), 42 B.R. 988, 996 (W.D. Wis. 1984), citing with approval In re Mobile Steel Co., 563 F.2d 692, 699-700 (5th Cir. 1977).

Although facially convincing, the defendants in their reply brief point out that the plaintiff has failed to allege any specific acts of inequitable conduct on the part of the defendant redeeming shareholders. As noted by the defendants,

[t]he only "evidence" offered on this element is the following [statement]: Gross has alleged, and the evidence supports, the allegation that the Defendants engaged in inequitable conduct. Furthermore, the evidence supports the allegations that the misconduct resulted in an injury to the debtor's creditors as well as an unfair advantage for the Severing Shareholders.

See Defendants' Reply Brief at 28-29.

Aside from such bald assertions, the debtor has posited no evidence of specific acts of inequitable conduct on the part of the defendants that would be actionable under § 510(c). The debtor has therefore failed to support its allegations with the requisite "substantial factual showing" and it has thus not succeeded in shifting the burden of proof to the defendants to show the good faith of the transaction at issue. See In re Osborne, 42 B.R. 988, 996 (W.D. Wis. 1984). As repeatedly noted here "[s]peculation, conclusory allegations and mere denials are not enough to raise genuine issues of material fact to preclude entry of summary judgment." See, e.g., Securities and Exchange Comm'n v. American Bd. of Trade, 750 F. Supp. 100, 103 (S.D.N.Y. 1990).

Contrary to the plaintiff's unsupported allegations, the Court finds sufficient evidence in the record to note that the stock redemption agreement had many of the characteristics of a good-faith, arms'-length transaction between the parties. The agreement was arrived at after lengthy negotiations between all of the shareholders, the value of the stock was established by appraisal, and the shareholders

unanimously approved the redemption agreement and the subsequent granting of mortgages by the debtor on its property to secure the promissory note of its parent corporation. Legitimate reasons which show why the redemption agreement was necessary in the first place have been posited -- the bitter and unresolvable disputes which had apparently developed between two groups of shareholders. Legitimate reasons for the corporate structure involved here -- specifically the establishment of Lou-Ques Corporation in 1985 as the parent of the various subsidiaries -- have also been asserted. These include the desire by the debtor and its affiliates to circumvent various union labor requirements.

In light of such considerations, the plaintiff's unsubstantiated claims of inequitable conduct by the defendants become even less credible. Having shown no evidence of such conduct, the defendants' summary judgment motion on the plaintiff's § 510(c) claim must be granted.

Finally, the Court dismisses those allegations contained in the debtor's responsive brief which seek to challenge the validity of the mortgages at issue under various common law theories. As correctly noted by the defendants, "[t]his argument is tied to none of the counts in the complaint and, accordingly, should be disregarded." See Defendants' Reply Brief at 25-26. Since this claim was not included in the plaintiff's original complaint, the Court declines to consider it.

The defendants' summary judgment motion as to counts I, IV and V of the plaintiff's complaint is taken under advisement pending further order of this Court or trial. The plaintiff's motion for summary judgment is likewise taken under advisement pending further order of this Court or trial.

This decision shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Rule 52 of the Federal Rules of Civil Procedure.