

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

In re:

Case Number:

SUPERIOR AMERICAN HOMES, INC.,

WF7-82-01394

Debtor.

LEE A. BERNSTEEN, TRUSTEE,

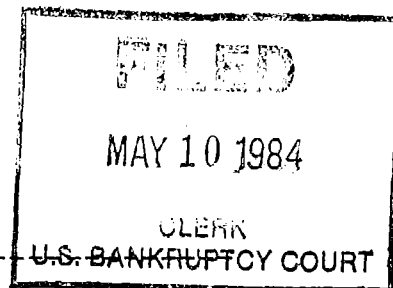
Plaintiff, Adversary Number:

vs.

83-281-7

FIRST NATIONAL BANK OF IRONWOOD,
ESTATE OF WILBERT J. KESKEY,
ROGER L. PUKALL, WAYNE BORSETH,
JOHN HANNAFORD, MARK BORSETH,
CARL F. FORSLUND, PAUL FORSLUND,
and EUGENE MODERSON,

Defendants.



FINDINGS OF FACT, CONCLUSIONS OF LAW
AND
ORDER DISMISSING COMPLAINT

Lee A. Bernstein, Trustee for Debtor Superior American Homes, Inc., by Attorney Richard W. Voss of Voss Law Office, having filed a Complaint to avoid a preferential transfer; and Defendant First National Bank of Ironwood, by Attorney David E. McDonald, Jr., of Jacobs, McDonald & Silc, P.C., having filed an Answer and Affirmative Defenses; and Defendants Roger L. Pukall, Wayne Borseth, John Hannaford, Mark Borseth, Carl F. Forslund, Paul Forslund and

Eugene Moderson, by Attorneys James A. Johnson and Ralph C. Anzivino of Korth, Rodd, Mouw, Johnson & Mustacci, S.C., having filed an Answer and Affirmative Defenses; and the matter being submitted on stipulated facts and legal briefs; the Court, having considered the briefs and reviewed the complete record and file herein, FINDS THAT:

1. On or about April 12, 1976, Debtor Superior American Homes, Inc. arranged a line of credit from the First National Bank of Ironwood. Also on such date, Wilbert J. Keskey, Roger L. Pukall, Wayne E. Borseth, John H. Hannaford, Mark Borseth, Carl F. Forslund, Paul Forslund and Eugene Moderson (Guarantors) signed Loan Guaranty Agreements on behalf of the Debtor in favor of the Bank, guaranteeing the payment of a \$200,000 loan.

2. On or about March 27, 1980, Debtor entered into a security agreement with the Bank, whereby the Bank was granted a security interest in presently due and hereafter acquired accounts receivable and certain unencumbered and encumbered equipment. A financing statement covering such collateral was filed on March 21, 1980, in Iron County and on April 7, 1980, with the Secretary of State's office in Madison, Wisconsin.

3. By January 11, 1982, the Debtor had borrowed the entire \$200,000 amount from the Bank. By letter dated January 11, 1982, Bank demanded payment from the Guarantors on the \$200,000 loan to Debtor.

4. The Guarantors caused the following checks to be issued:

<u>DATE</u>	<u>AMOUNT</u>	<u>DRAWER</u>	<u>PAYEE</u>
1/20/82	\$20,295.38	Ironwood Lumber Co., Inc.	Debtor and Bank
1/19/82	\$50,738.46	Forslund Building Supply, Inc.	Debtor and Bank
1/19/82	\$10,147.69	Land O'Lakes Lumber Co.	Debtor and Bank
1/19/82	\$101,476.91	Sugar Camp Lumber Co., Inc.	Debtor and Bank
1/19/82	\$20,295.38	Pukall Lumber Co., Inc.	Debtor and Bank

5. The checks were endorsed by Debtor, and delivered to the Bank. These checks were issued with the explicit understanding that they would be used only to pay the Bank to satisfy obligations owed by Debtor and guaranteed by Guarantors. The Debtor did have various accounts with the Bank, however, these checks were never deposited in any accounts of the Debtor. Instead, these amounts were deposited directly into the Bank's account.

6. Upon receipt of the aforesaid monies, the Bank released the Debtor of the indebtedness, released its security interest in the Debtor's assets, and released the Guarantors from their obligations under their guaranty agreements.

7. Contemporaneous with the issuance and delivery of the checks, the Debtor signed five promissory notes and related security agreements in favor of the drawer-lumber companies to evidence the monies paid to the Bank. The security agreements provided that the Debtor granted to the drawer-lumber companies a security interest in the assets released by the Bank. Financing statements covering such collateral were filed on January 21, 1982.

8. As of the date of the issuance of the checks, the following persons were members of the following Boards of Directors:

<u>Superior American Homes, Inc. (Debtor):</u>	Roger L. Pukall John Hannaford Eugene Moderson Mark Borseth Wayne Borseth Carl Forslund
<u>Land O'Lakes Lumber Company, Inc.:</u>	Roger L. Pukall
<u>Ironwood Lumber Company, Inc.:</u>	Roger L. Pukall Mark Borseth Wayne Borseth
<u>Pukall Lumber Company, Inc.:</u>	Roger L. Pukall
<u>Sugar Camp Lumber Company, Inc.:</u>	John Hannaford
<u>Forslund Building Supply, Inc.:</u>	Carl F. Forslund
<u>First National Bank of Ironwood (Bank):</u>	Carl F. Forslund

9. On October 11, 1983, the trustee, by letter notified the following various persons of the avoidance of a preference¹ in the following amounts:

<u>Recipient</u>	<u>Amount</u>
First National Bank of Ironwood	\$202,953.82
Estate of Wilbert J. Keskey	35,227.74
Roger L. Pukall	35,227.74
Wayne Borseth	35,227.74
John Hannaford	26,289.35
Mark Borseth	26,289.35
Carl F. Forslund	26,289.35
Eugene Moderson	13,144.68
Paul Forslund	5,257.87

10. On August 11, 1982, the Debtor filed for relief under Chapter 11 of the Code (the case was converted to Chapter 7 on September 17, 1982).

¹ This language is from the parties' stipulated facts. While a Trustee may notify a creditor of the Trustee's belief that a voidable preference has occurred, and while a creditor may voluntarily disgorge the property transferred, the power to avoid preferences lies with the Court, not with the Trustee. See generally Bankruptcy Rule 7001.

DISCUSSION

11. The Trustee's Complaint seeks the recovery of money damages from the Bank or, in the alternative, from the other named defendants.

12. Thus, while the facts set forth above suggest three arguably preferential transfers (money to the bank, release of guaranty to the other named defendants and security interest to the drawer corporations), only two (to the bank and to the guarantors) are before the Court.

13. Subject to the exceptions set forth at 11 U.S.C. sec. 547(c), a Trustee may avoid as a preference:

- A. A transfer
- B. of property of the debtor
- C. for the benefit of a creditor
- D. on account of an antecedent debt,
- E. made while the debtor was insolvent and
- F. within 90 days before the date of the petition or, if the creditor was an insider who had reasonable cause to believe the debtor insolvent, within a year and 90 days before the date of the petition;
- G. if the transfer enables the creditor to receive a greater portion of its debt than it would receive in a Chapter 7 distribution.

14. Bank. Whether viewed as a transfer of non-debtor property, see 4 L. King, Collier on Bankruptcy para. 547.25 (15th ed. 1984), a transfer not on account of an antecedent debt

see id. at para. 547.21, a transfer which does not enable the creditor to receive a greater portion of its debt than it would receive in a Chapter 7 distribution, see In re Hudson Valley Quality Meats, Inc., 29 B.R. 67, 78 (Bankr.N.D.N.Y. 1982) (Act case), or a transfer implicitly not in the nature of a preference, see Collier on Bankruptcy supra at paragraph 547.21, it is clear that a transfer that does not diminish the fund to which other creditors may look for the payment of their claims is not a voidable preference. See In re Moskowitz, 13 B.R. 357, 359-360 (Bankr.S.D.N.Y. 1981). See also First National Bank of Danville, Ill. v. Phalen, 62 F.2d 21 (7th Cir. 1932) (Act case).

15. Thus, the transfer to the Bank of funds which would not have been available to the Debtor for any other purpose was not a voidable preference. Cf. In re American Properties, Inc., 14 B.R. 637, 641-642 (Bankr. D.Kan. 1981).

16. Guarantors. The Trustee argues that, as Defendants Roger Pukall, John Hannaford, Eugene Moderson, Mark Borseth, Wayne Borseth and Carl Forslund were directors of the Debtor, their guarantees were not "gratuitous". Cf. Vandervest v. Kauffman Pizza, Inc., 60 Wis.2d 230, 208 N.W.2d 428 (Sup. 1973) (insiders not treated as gratuitous guarantors). Therefore, the Trustee reasons, the Debtor gave consideration for said guarantees and said guarantees were the property of the Debtor. (Apparently, the Trustee does not argue that the guarantees of

the non-director guarantors were property of the Debtor.)

17. Even assuming the Debtor gave consideration for the guarantees of its directors, the guarantees became the property of the Bank. See 38 Am.Jur.2d Guaranty sec. 5 (1968) ("the debtor is not a party to the guaranty"). In exchange for its "consideration" the Debtor received contemporaneous performance on the part of the directors, i.e., the making of promises to the Bank.

18. Thus, the release of the defendants' guarantees was a transfer of the property of the Bank--not of the Debtor.

CONCLUSIONS OF LAW

1. The transfer of \$202,953.82 to the First National Bank of Ironwood was not a voidable preference.

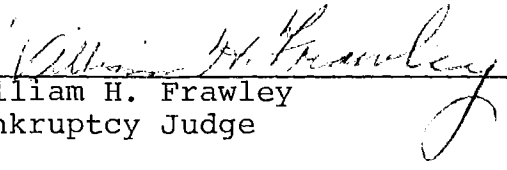
2. The release of the guarantees of the other named defendants was not a voidable preference.

ORDER

IT IS ORDERED THAT the above captioned matter be, and the same hereby is, DISMISSED, upon the merits without costs.

Dated: May 10, 1984.

BY THE COURT:



William H. Frawley
Bankruptcy Judge