UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

IN RE: IN BANKRUPTCY NO.:

PIRKLE REFRIGERATED FREIGHT LINES, INC., MM7-91-00043

Debtor. IN ADVERSARY PROCEEDING NO.:

WILLIAM J. RAMEKER, Trustee, 91-0042-7

Plaintiff,

v. STATEMENT OF REASONS:

VALLEY BANK, MADISON and CONTINENTAL BANK, N.A.,

Defendants.

On December 16, 1991 this court heard the motion of Valley Bank, Madison and Continental Bank, N.A., (the "Banks"), for partial summary judgment on the trustee's equitable subordination, agency/instrumentality, and preference causes of action. Under FRCP 56(c), summary judgment is proper "if 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 a judgment as a matter of law."

The Banks contend that the trustee lacks standing to bring both the equitable subordination and the agency/instrumentality causes of action. It is clear that in the Seventh Circuit, at least, a trustee does possess standing to bring an equitable subordination claim. Matter of Vitreous Steel Products Co., 911 F2d 1223, 1231 (7th Cir 1990), involved a complaint brought jointly by the trustee and one of the debtor's creditors. The complaint asserted preference, fraudulent conveyance, equitable subordination, and conversion causes of action, among others. The

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court of appeals, in dicta, clearly stated that "[t]he Trustee is the proper party to press the estate's claims." Equitable subordination is one of several ways in which the order of claims payment from the estate is determined. The trustee's central function is to liquidate the assets of the estate and pay claims in the priority to which they are entitled. The trustee is always a proper party to bring an equitable subordination claim. The Banks' motion for summary judgment on the equitable subordination claim must therefore be denied.

The trustee seeks, with respect to his agency/instrumentality cause of action, an order determining the amount of the debtor's unpaid obligations during the Banks' alleged period of control, and entry of judgment in that amount in favor of the trustee, "to the use and benefit of the unpaid creditors." The Banks assert that the trustee lacks standing to bring such a claim. Addressing standing, the court of appeals in Koch Refining v Farmers Union Central Exchange, Inc., 831 F2d 1339 (7th Cir 1987), stated:

> [T]he trustee has no standing to bring personal claims of creditors. A cause of action is "personal" if the claimant himself is harmed and no other claimant or creditor has an interest in the cause. But allegations that could be asserted by any creditor could be brought by the trustee as a representative of all creditors.

Id., 831 F2d at 1348 (emphasis in original). The court continued:

> A trustee may maintain only a general claim. His right to bring a claim "depends on whether the action vests in the trustee as an assignee for the benefit of creditors or, on the other hand, accrues to specific creditors." [citation omitted].
>
> . . .
>
> To determine whether an action accrues individually to a claimant or generally to the corporation, a court must look to the injury for which relief is sought and

> consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors.

Id., 831 F2d at 1349 (emphasis in original). See also In re Ahead By A Length, Inc., 100 BR 157, 173 (Bankr SD NY 1989) ("the trustee, unless she is exercising her statutory avoidance powers, stands in the shoes of the debtor and may only institute whatever actions the debtor could have brought itself." (citations omitted)).

The "injury" in this case arises from the Banks' actions in allegedly "taking control" of the debtor for ten days preceding the filing of the debtor's chapter 7 petition in bankruptcy. The creditors alleged to be injured include the debtor's employees, drivers, owner/operators, and those who provided goods and services in relation to the delivery of 158 truckloads during the time period in question. That the agency/instrumentality cause of action is personal to these specific creditors of the debtor rather than to all of the debtor's general creditors is clear even from the recovery sought by the trustee under this count of the complaint. The trustee seeks recovery "to the use and benefit of the unpaid creditors," not for the creditor body as a whole, and the claim thus cannot be said to be "general" in nature. This is not an action to enforce a statutory avoiding power nor an action that the debtor could have brought itself. The Banks' motion for summary judgment on the agency/instrumentality cause of action must therefore be granted.

The Banks further contend that there is no genuine issue of material fact with respect to the trustee's preference cause of

action and that they are entitled to summary judgment as a matter of law. With regard to summary judgment, the Supreme Court has stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has filed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v Catrett, 477 US 317, 322-23 (1986).

In the instant case, "the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section [11 USC § 547(b)]." 11 USC § 547(g). The Banks contend that there is no genuine issue with respect to the trustee's inability to prove that the transfers to the Banks during the applicable preference period enabled the Banks to receive more than they would in a chapter 7 liquidation. Such a showing is an essential element of a preference claim, required by Section 547(b)(5). Banks contend that all payments to them were made from the debtor's one-and-only operating account, into which all accounts receivable and inventory proceeds, (in which Banks possessed a properly perfected security interest), must necessarily have been placed. They further contend that these payments thus qualify as payments from cash collateral, and therefore did not enable them to receive more than they would have received in a chapter 7 liquidation.

The trustee has submitted the affidavit of Michael L. Murphy,

the debtor's former vice president of administration and finance. This affidavit indicates that during the preference period, the debtor's bank account contained funds other than proceeds of accounts receivable and inventory, such as subrogation claim proceeds. These latter proceeds were not subject to the Banks' security interest, and payment of them to the Banks would potentially enable the Banks to receive more than they would in a chapter 7 liquidation.

The Banks contend that in order to defeat their motion for summary judgment, the trustee must present evidence not only that the account contained funds to which the Banks' security interest did not attach, but also that the payments to the Banks were made from those same funds (as opposed to those funds which were proceeds of inventory and accounts receivable). I do not agree. The trustee has shown that the payments <u>may</u> have been made from funds as to which the Banks possessed no security interest, and there thus has been no "complete failure of proof" concerning the identity of the funds used to pay the Bank. A material issue of fact exists with respect to whether the payments were made from cash, non-cash collateral, or other sources, and the trustee is entitled to prove its case at trial. The Banks' motion for summary judgment on the preference claim accordingly must be denied.

Dated December 17, 1991.

ROBERT D. MARTIN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

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Debtor. IN ADVERSARY PROCEEDING NO.:

WILLIAM J. RAMEKER, Trustee, 91-0042-7

Plaintiff,

v. ORDER:

VALLEY BANK, MADISON and CONTINENTAL BANK, N.A.,

Defendants.

The court having this day entered its statement of reasons in the above-entitled matter,

IT IS HEREBY ORDERED that the motion of Valley Bank, Madison and Continental Bank, N.A. (the "Banks") for partial summary judgment is granted with respect to the agency/instrumentality cause of action; and

IT IS FURTHER ORDERED that the Banks' motion for partial summary judgment is denied with respect to the equitable subordination and preference causes of action.

Dated December 17, 1991.

ROBERT D. MARTIN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF WISCONSIN

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VALLEY BANK, MADISON and
CONTINENTAL BANK, N.A.,

Defendants.

Copies of this Statement of Reasons and Order were sent to the following parties on December 17, 1991:

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