NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-04-1068-MoSZ
REGCON, INC.,	Bk. No. 01-07559-PHX-CGC
Debtor.	Adv. No. 02-01195-CGC
UNITED RENTALS, INC.,	
Appellant,	**M E M O R A N D U M**[1]
v.	
ROBERT J. DAVIS, Chapter 7 Trustee,	
Appellee.	

Argued and Submitted on February 24, 2005
at Phoenix, Arizona

Filed - April 13, 2005

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Charles G. Case II, Bankruptcy Judge, Presiding.

Before: MONTALI, SMITH and ZIVE,[2] Bankruptcy Judges

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Gregg W. Zive, Chief Bankruptcy Judge for the District of Nevada, sitting by designation.

Preference defendant United Rentals, Inc. ("United") appeals from a summary judgment against it, arguing that there was no evidence that the pre-petition transfers at issue enabled it to receive more than it would have received had the transfers not been made and the estate liquidated pursuant to the provisions of Chapter 7.[3] We hold that Chapter 7 trustee Robert J. Davis ("Trustee") met his burden to establish this prima facie element of his preference claim because United admitted it, that United has not established a sufficient basis to be permitted to revisit this issue belatedly on this appeal, and that United's appeal is frivolous. Accordingly, we AFFIRM and will award sanctions.

I. FACTS

Debtor Regcon, Inc. ("Debtor") was in the business of installing pipelines and other underground utilities. United rented equipment to Debtor from 1996 on, including construction signs, trench shoring, air tanks, crossing plates, ladders, etc. In early 2001 Debtor was behind in its payments. United contacted Debtor and stated that it would have to file a mechanics and materialmen's lien unless Debtor agreed to a schedule of $10,000.00 catch up payments. Debtor agreed and made six payments in the total amount of $60,165.47 (the "Transfers") between March 9 and June 11, 2001, when it filed its voluntary Chapter 7 petition (the "Petition Date").

Trustee filed the complaint commencing this adversary proceeding against United on October 10, 2002. The complaint

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

alleged each of the elements of a preference including, in paragraph 6, that the Transfers "enabled [United] to receive more than it would have had the transfer not been made and [United] paid pursuant to the Bankruptcy Code." United's answer objected to the allegations in paragraph 6 "as statements of legal conclusions rather than facts" and denied each and every allegation in paragraph 6. United also asserted the "ordinary course" defense in Section 547(c)(2).[4]

On July 3, 2003, Trustee filed a motion for summary judgment ("MSJ") which states, in its own paragraph 6:

> 6. Greater payment than in a Chapter 7. [United] did in fact receive more than if paid pursuant to the Bankruptcy Code in a hypothetical Chapter 7 case which had been commenced on the [Petition Date]. Since [United] is not a secured creditor nor is it a priority creditor nor is it the only general unsecured creditor receiving a distribution nor does the estate have sufficient funds to pay all creditors a 100% dividend, mathematically receipt of the [Transfers] give it a greater share than it would receive in a hypothetical Chapter 7 case. . . .

Trustee filed a separate statement of facts and the affidavit

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[4] Section 547(c)(2) provides, in full:

> (c) The trustee may not avoid under this section a transfer --
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> * * *
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> (2) to the extent that such transfer was --
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> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
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> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
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> (C) made according to ordinary business terms.

11 U.S.C. § 547(c)(2).

of his counsel in support of the MSJ. The affidavit describes the Transfers by date, amount, and check number and attaches copies of each remittance advice showing which invoices were paid by each check. The affidavit does not offer any factual support for the allegations in paragraph 6 of the MSJ.

United filed an opposition to the MSJ which argued that the Transfers "were made in the ordinary course of the Debtor's business and were therefore not a preference." United also filed a statement of disputed and undisputed facts (the "Factual Statement") which quoted Trustee's allegation that the Transfers "enabled [United] to receive more than it would had the transfer not been made and [United] paid pursuant to the Bankruptcy Code" but did not identify that statement as either "disputed" or "undisputed."

The MSJ came on for hearing on November 24, 2003. At the outset, the bankruptcy court and counsel had the following exchange:

> THE COURT: . . . There really isn't any dispute about whether the 547(b) elements have been met by the Trustee. The question is whether or not these transfers were in the ordinary course of business. Isn't that basically what we're arguing about?
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> [COUNSEL FOR UNITED:] That's it.

Transcript (11/24/03) at p. 2:16-25.

After hearing counsel's arguments the bankruptcy court ruled that although United had presented evidence that catch up agreements such as the one between Debtor and United were common in the construction business it had presented no evidence that the particular Transfers at issue were made in the ordinary course of business or financial affairs of Debtor and United, as required by

Section 547(c)(2)(B). The bankruptcy court also ruled that there is no "presumption or assumption" that this element of the ordinary course defense is satisfied because United has the burden of proof. Id. at pp. 6:22 - 7:6. United's counsel stated, "I would move to keep this hearing open and ask for leave to file a supplemental declaration on that issue," and the bankruptcy court responded:

> Well, that speaking request will be denied. . . . [W]hen we get to a hearing on summary judgment, we gotta deal with the record that we have, otherwise we'll never resolve anything.

Id. at p. 8:7-13.

The bankruptcy court took the matter under advisement and on January 20, 2004, it issued a decision (the "Preference Decision") stating in part:

> . . . The only issue before the Court on [Trustee's MSJ] is whether the payments were made in the ordinary course of business.
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> * * *
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> . . . [United] contends that [the] catch up payment plan is a common practice in the construction industry. . . . [United] fails to address whether [the] catch up payment plan was ordinary vis a vis this particular Debtor and [United], however, thereby completely failing to address a crucial prong of the ordinary course of business test. For this reason, [United's] defense fails and summary judgment is granted for [Trustee].

On January 31, 2004, the bankruptcy court issued an order granting the MSJ (the "Judgment") with interest from the date of each transfer. United filed a motion to alter or amend the Judgment (the "Reconsideration Motion") asking that the court exercise its discretion to eliminate prejudgment interest or, alternatively, award it from the date the complaint was filed at

the earliest. Trustee filed an opposition. The bankruptcy court issued a memorandum decision (the "Interest Decision") ruling that prejudgment interest would be awarded from the date the complaint was filed. A Corrected Judgment was filed on February 24, 2004, and entered on March 16, 2004. United timely appealed.[5]

United changes course on this appeal. Instead of addressing

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[5] Before filing the Reconsideration Motion United filed a notice of appeal. That attempted appeal did not create any jurisdictional problems for the bankruptcy court because under Rule 8002(b) the effect of a timely motion for reconsideration is that the earlier notice of appeal is simply "ineffective to appeal" from the judgment at issue "until the entry of the order disposing of" the motion for reconsideration. See Fed. R. Bankr. P. 8002(b). See also Resolution Trust Corp. v. Keating, 186 F.3d 1110, 1114 n.1 (9th Cir. 1999) (effect of timely motion for reconsideration under parallel provisions of Fed. R. Civ. P. is that the earlier appeal "simply self-destructs") (citations omitted).

Trustee's opposition to the Reconsideration Motion asserted that the Reconsideration Motion was not timely, but that assertion was based on the date the Judgment was filed rather than the date it was entered on the bankruptcy court's docket. The latter date is controlling as to motions for reconsideration under Rules 9023 and 9024. See Fed. R. Bankr. P. 9023 and 9024 (incorporating by reference Fed. R. Civ. P. 59 and 60). The Judgment was entered on February 2, 2004, and United's Reconsideration Motion was filed less than ten days later on February 11, 2004.

Therefore, United's Reconsideration Motion was timely, its earlier appeal notice of appeal was rendered ineffective (until entry of an order disposing of its Reconsideration Motion), and the bankruptcy court had jurisdiction to act upon the Reconsideration Motion and enter the Corrected Judgment.

United timely filed a second notice of appeal from the Corrected Judgment on March 4, 2004. This was after the bankruptcy court filed its Interest Decision and Corrected Judgment (on February 24, 2004) but before those documents were entered on the bankruptcy court's docket (on March 3 and 16, 2004, respectively). Such an anticipatory filing of a notice of appeal is permitted by Rule 8002(a). Fed. R. Bankr. P. 8002(a) ("A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof.")

On June 30, 2004, the Clerk of the Bankruptcy Appellate Panel ("BAP") issued a Clerk's Notice which observed that two notices of appeal had been filed and stated that unless any party filed an objection within ten days this matter would proceed under a single appeal. No response was received and this single appeal is now properly before us.

the ordinary course defense it argues in its opening brief that Trustee made "no evidentiary showing that the [Transfers] enabled United to receive more than it would have received" if the Transfers had not been made and Debtor's estate were liquidated pursuant to the provisions of Chapter 7 (the "Greater Amount Test"). Trustee responds that this issue was waived. United replies that the issue of whether Trustee made his prima facie showing as to the Greater Amount Test is purely a question of law that may be considered on this appeal.

United also initially argued before us that the bankruptcy court erred by not reducing the amount of interest awarded to Trustee. United argued that interest should run only from the time the complaint was filed. Trustee's brief pointed out that this was exactly what the Corrected Judgement did. United's reply said nothing on the issue and its counsel conceded the issue at oral argument.

Trustee has filed a separate motion with us asserting that United's appeal is frivolous and seeking sanctions (the "Sanctions Motion"). See Fed. R. Bankr. P. 8020. United has filed an opposition and Trustee has filed a reply.

II. ISSUES

1. Did Trustee meet his prima facie burden to satisfy the Greater Amount Test?

2. If so, has United established a sufficient basis to dispute this issue belatedly, on this appeal?

3. Should Trustee's Sanctions Motion be granted?[6]

III. STANDARD OF REVIEW

We review de novo the bankruptcy court's decision to grant a motion for summary judgment. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995).

IV. DISCUSSION

1. Trustee established the prima facie elements of his claim

"To avoid a transfer under 11 U.S.C. § 547(b), the trustee must prove by a preponderance that the transfer was (1) made to or for the benefit of a creditor, (2) on account of an antecedent debt, (3) made while the debtor was insolvent, and (4) made within [90 days] of the petition [for non-insiders], and (5) enabled the creditor to receive more than it would have had the transfer not been made and the case liquidated pursuant to the provisions of chapter 7 of the bankruptcy code." Ganis Credit Corp. v. Anderson (In re Jan Weilert RV, Inc.), 315 F.3d 1192, 1197, as amended, 326 F.3d 1028 (9th Cir. 2003) (quoting earlier decision, citation omitted). The last of these elements, the Greater Amount Test, is set forth in Section 547(b)(5):

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an

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[6] United also argues that we should deny Trustee's Motion to Amend Record to Include Additional Items, filed with the BAP on September 13, 2004, which asks us to consider documents that apparently were not presented to the bankruptcy court: Trustee's first request for admissions and United's response. The BAP Clerk has already issued an order, on October 22, 2004, requiring Trustee to respond within fourteen days to demonstrate either that the documents were before the bankruptcy court or that there is some other legally adequate reason for the panel to consider the documents. Trustee has not responded to that order and in any event the documents are irrelevant to our disposition of this appeal and the motion is therefore moot. For both reasons the motion is hereby denied.

> interest of the debtor in property --
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> * * *
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> (5) that enables such creditor to receive more than such creditor would receive if --
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> (A) the case were a case under chapter 7 of this title;
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> (B) the transfer had not been made; and
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> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b)(5).

Rule 56 of the Federal Rules of Civil Procedure, incorporated by Rule 7056, provides that the judgment sought "shall be rendered forthwith 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." Fed. R. Civ. P. 56(c) (incorporated by Fed. R. Bankr. P. 7056) (emphasis added). Although a motion "normally is not made or opposed on the basis of the pleadings alone," a party moving for summary judgment on its complaint need not file any affidavits and can rely solely on one or more allegations in its complaint; and although the party opposing such a motion can rely on its answer and any denial therein, that denial can be superseded by any "admissions on file." Wright, Miller & Kane, Fed. Pract. & Proc.: Civil 3d ("Wright & Miller") § 2722, text accompanying nn. 1 - 3.

> The quoted words ["admissions on file"] make it clear that the admissions need not be pursuant to [Fed. R. Civ. P.] Rule 36; they may have emerged at the pretrial conference, have occurred during oral argument on the motion, have been made in connection

> with one of the other discovery procedures, or have their roots in a joint statement or stipulation by counsel.

Wright & Miller § 2722, text accompanying nn. 19 - 26 (footnotes omitted) (emphasis added). Compare id. at § 2723, text accompanying nn. 7 - 13 (although allegations in moving party's brief are inadequate basis to grant summary judgment, even if uncontroverted, nevertheless admissions in opposing party's briefs are "functionally equivalent to 'admissions on file' that can support a grant of summary judgment).

That is what happened here. Trustee's complaint alleged that the Greater Amount Test was satisfied. United's answer denied that allegation but later, in response to the MSJ, United's Factual Statement did not challenge Trustee's factual allegation that mathematically the Transfers satisfied the Greater Amount Test. United's counsel then conceded at the start of the MSJ hearing on November 24, 2003, that the only issue was whether United qualified for the ordinary course defense provided by Section 547(c)(2). Such a concession, occurring during oral argument, is an admission, and United never sought relief from it before the bankruptcy court. Therefore, the complaint together with the "admissions on file" established Trustee's prima facie claim that the Greater Amount Test was satisfied. Wright & Miller § 2722 at nn. 20 - 26 and accompanying text (citing inter alia L&E Co. v. USA ex rel. Kaiser Gypsum Co., 351 F.2d 880, 882 (9th Cir. 1965) (no genuine issue of material fact where issue was admitted in pretrial order)).

2. United has not established a sufficient basis to revisit the Greater Amount Test on this appeal

In general, arguments not properly raised in trial courts cannot be raised on appeal. O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989). In the Ninth Circuit appellate courts may permit issues to be raised for the first time on appeal in "exceptional circumstances," including where "the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." Briggs v. Kent (In re Prof'l Inv. Properties of Am.), 955 F.2d 623, 625 (9th Cir. 1992) (issue also may be raised on appeal where necessary to prevent miscarriage of justice or where law has changed while appeal is pending) (citation and quotation marks omitted).

United claims that this appeal presents such exceptional circumstances. We disagree.

Trustee prepared for and argued his MSJ based on the issues in dispute, which did not include the Greater Amount Test. United should have raised this issue in time to take any necessary discovery and determine if this actually would be a genuine issue of material fact.

Even now United makes only a conclusory allegation that the Greater Amount Test might not be satisfied. Both United and Trustee ask that we consider the bankruptcy court's electronic claims register, which may have changed between the time that United and Trustee checked it. We do not address this factual issue, which should have been timely raised before the bankruptcy court, although we note that United's proffered evidence of claims filed does not contradict Debtor's bankruptcy schedules, which show that Debtor was insolvent as of the Petition Date, and

Section 547(f), which provides that Debtor is rebuttably "presumed to have been insolvent on and during the 90 days immediately preceding the [Petition Date]." 11 U.S.C. § 547(f).

When United filed its Reconsideration Motion it still did not raise the Greater Amount Test, but if it had done so we have no doubt that United's lack of evidence and lack of excuse for belatedly raising the issue would have been fatal. See U.S. v. Stribling Flying Serv., Inc., 734 F.2d 221, 224 (5th Cir. 1984) (trial court did not err in denying motion to vacate summary judgment simply because of movant's inadvertent omission to attach uncontested documents to the motion, noting that documents were attached to complaint and Fed. R. Civ. P. 56 permits summary judgment if pleadings and other materials on file show lack of genuine issue of material fact).

United also has not established that it will suffer any great prejudice if we deny relief. United can file a claim within 30 days after the Corrected Judgment becomes final. See 11 U.S.C. §§ 501(d) and 502(h) and Fed. R. Bankr. P. 3002(c)(3). If the estate is solvent or nearly solvent, as United suggests, and if the costs of administration (including any unreimbursed attorneys' fees and costs for Trustee to prosecute this preference action) do not materially affect the dividend to creditors, then United eventually should receive a substantial portion of what it is owed. On the other hand, if the ongoing costs of administration are materially affecting the dividend then perhaps United would have been well advised to turn over the Transfers when Trustee made his demand.

In sum, United cannot turn its failure to contest a factual

assertion into a question of law to convince us to address the issue for the first time on appeal. The issue of the Greater Amount Test is not "purely one of law," the pertinent factual record has not been "fully developed," the statutory presumption and available evidence contradict United's allegations, United will suffer no great prejudice, and it has shown no exceptional circumstances whatsoever. Prof'l Inv. Properties, 955 F.2d at 625. We reject United's belated attempt to revisit the Greater Amount Test.

3. Trustee's Sanctions Motion

By separate order we will grant Trustee's Sanctions Motion and award reasonable attorneys' fees and costs (we decline to award double costs as requested by Trustee). That order will provide procedures for determining the amount of fees and costs which will not delay entry of our judgment.

United admitted before the bankruptcy court that Trustee had established all the prima facie elements of his preference claim and it offers no reason why it should be allowed to raise the Greater Amount Test on this appeal, without even having mentioned that issue in its statement of issues to be presented on appeal. See Fed. R. Bankr. P. 8006. United's argument regarding prejudgment interest, asking for relief that the Corrected Judgment already gave it, was likewise a complete waste of Trustee's and our time. United's appeal is frivolous. See generally First Fed. Bank of Cal. v. Weinstein (In re Weinstein), 227 B.R. 284, 297 (9th Cir. BAP 1998) (appeal is frivolous if result is obvious or appellant's arguments are wholly without merit).

V. CONCLUSION

Trustee carried his initial burden to establish the prima facie elements of his preference claim against United. The allegations in the complaint and United's admissions during the course of this adversary proceeding established that the Greater Amount Test was satisfied. United did not dispute that issue before the bankruptcy court and has offered no exceptional circumstances that would justify revisiting that issue on this appeal. Its appeal is frivolous. The Corrected Judgment is AFFIRMED and the Sanctions Motion will be GRANTED by separate order.