

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE:

THE JULIEN COMPANY,

Debtor.

BK #90-20283-WHB

Chapter 11

JACK F. MARLOW, Trustee,

Plaintiff,

v.

Adversary Proceeding

No. 90-0162

WEST-HO ACQUISITION ONE, INC.
WEST-HO PARTNERS; JULIEN J.
HOHENBERG; SARAH J. HOHENBERG;
JULIET H. THOMPSON; LETITIA C.
HOHENBERG; ADAM E. HOHENBERG;
MARY M.G. HOHENBERG; and
BLANCHARD E. TUAL as Trustee for
JASON A.B. HOHENBERG '86 TRUST and
RACHEL J. HOHENBERG '86 TRUST,

Defendants.

**ORDER DENYING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT,
DENYING MOTION TO STRIKE AFFIDAVIT OF JACK F. MARLOW,
BIFURCATING ISSUES AND SETTING
ADVERSARY PROCEEDING FOR TRIAL**

On June 6, 1994, the Court heard oral argument of counsel on the Trustee's motion for summary judgment, the responses filed by the defendants, the motion of West-Ho Partners ("Partners") and West-Ho Acquisition One, Inc. ("Acquisition") to strike the affidavit of Jack F. Marlow, and the motions of other defendants in support of the motion to strike, after which time the Court has reviewed again the pleadings filed in reference these motions, and the Court has considered the entire adversary proceeding.

As discussed on June 6, 1994, with counsel, the Court has concluded that this adversary proceeding involves both core and non-core but otherwise related causes of action. The Trustee's complaint asserts causes of action based upon an action for debt due, a fraudulent conveyance pursuant to 11 U.S.C. §548, a fraudulent conveyance pursuant to Tennessee law and 11 U.S.C. §544(b), and turnover of assets of the bankruptcy estate. See pre-trial statement filed April 6, 1994. The fraudulent conveyance causes of action are core proceedings. 28 U.S.C. §157(b)(2)(H). The turnover cause of action may or may not be a core proceeding. See 28 U.S.C. §157(b)(2)(E). However, the action on debt due is a state law cause of action based upon pre-bankruptcy transactions between the debtor and other parties, including the defendants Acquisition and Partners. After review of the pleadings and arguments, including all of the pleadings filed in reference the Trustee's motion for summary judgment, the Court has concluded that the debt due cause of action is a non-core proceeding but is one that is otherwise related to this case filed under Title 11 of the United States Code. 28 U.S.C. §157(b)(3). The defendants have not consented to this Court hearing the related proceeding and entering a final judgment. As a result, this Court may hear the aspect of this proceeding that is a related cause of action but may not enter a final order. Rather, this Court must submit proposed findings of fact and conclusions of law to the United States District Court for *de novo* review of those matters to which any party timely and specifically objects. 28 U.S.C. §157(c)(1).

The Court has carefully considered the motion for summary judgment, affidavits filed in support and in response thereof, and the other documents, including depositions. It is clear that the Trustee's motion for summary judgment only addresses the action on debt due. It could be argued that the Court should make a recommended decision to deny the Trustee's motion for summary

judgment; however, the Court has concluded that this decision on the Trustee's summary judgment motion is not a final decision but rather leads to a trial on the merits from which a recommended decision to the District Court will then follow. As a result, this Court will enter this order denying the Trustee's present motion for summary judgment without making a recommended decision to the United States District Court at this time.

First addressing the motion to strike the affidavit of Jack F. Marlow, Trustee for The Julien Company, the Court notes that counsel for Acquisition and Partners conceded at the June 6, 1994, hearing that this motion had been rendered partially moot by a supplemental affidavit of Mr. Marlow. Based upon that concession, the supplemental affidavit of Mr. Marlow, and the response and objection to the motion to strike affidavit filed by Mr. Marlow's counsel on May 27, 1994, (docket entry no. 146) this Court denies the motion to strike the Trustee's affidavit. The Court is satisfied that the supplemental affidavit has cured any defects or concerns that the defendants might have with regard to Mr. Marlow's original affidavit. Moreover, the fact that the affidavit is considered admissible by the Court does not in and of itself determine the outcome of this summary judgment motion. The Court having determined that it would deny the Trustee's present motion for summary judgment, the Court would expect that Mr. Marlow and other witnesses will testify at trial, and if the affidavit of Mr. Marlow is offered in proof at trial, the Court will then further consider any objections to its admissibility.

Now addressing the Trustee's motion for summary judgment, the Court has determined that it will not recommend to the United States District Court that the motion be granted. Rather, the Court will deny the Trustee's motion for summary judgment at this time and will bifurcate the non-core cause of action for trial. Notwithstanding this result, the Court agrees with the supplemental

memorandum in support of the Trustee's motion for summary judgment, filed on June 9, 1994, (docket entry number 153), in which the Trustee's counsel contends that Mr. Hohenberg's affidavit does not raise a genuine issue of material fact because such an affidavit may not create a genuine issue of material fact when it is contradictory to other sworn evidence previously presented by the same witness. Although the Trustee has submitted a strong argument that there is evidence of an agreement between the debtor and Partners and Acquisition for the repayment of loans or advances made by the debtor on behalf of Partners and Acquisition, the Court is mindful that the party moving for summary judgment has the burden of showing an absence of any genuine issue of material fact and that any doubt concerning the existence of a material fact dispute must be resolved against the moving party. The defendants in this adversary proceeding are entitled at the summary judgment stage to the benefit of favorable inferences to be drawn from the evidence. To some extent the Trustee's motion would require the Court to weigh the evidence and to consider credibility of witnesses, and these are not appropriate judicial functions at the summary judgment stage.

The defendants have presented some evidence that there may be a dispute concerning the terms of repayment to the debtor, including the repayment of interest. Further, the defendants have presented some evidence that there may be a factual dispute as to whether Acquisition owes any principal sum to the debtor. The defendants have raised some legal defenses including statute of frauds and nominee loan. The Court is not persuaded that there are disputes of fact concerning these legal defenses, but the Court wishes to give the defendants every opportunity to establish any and all facts that would support their defenses.

Based upon its review of the pleadings and the statement of counsel on June 6, 1994, the Court is persuaded that it should *sua sponte* bifurcate these causes of action. The fraudulent conveyance causes of action will involve proof of the debtor's insolvency, and that will be an expensive element of proof and defense for all of the parties. It would appear more economic and in the best interest of the parties, as well as in the best interest of judicial economy, to try the non-core but related cause of action on debt due first. Counsel for the parties conceded that virtually all of the proof was prepared on that cause of action. In fact, the Trustee's counsel stated that the Trustee would be willing to submit that cause of action for trial on the same proof that the Trustee had submitted in support of his motion for summary judgment. The defendants Partners and Acquisition, on the other hand, contend that they will need further discovery before the trial of that cause of action. Specifically, counsel for those defendants stated that discovery of Mr. Andrew Halle, a former officer of Bankers Trust Company would be necessary. The Court is mindful that it bears some responsibility for a failure to dispose of this adversary proceeding earlier. However, there have been numerous adversary proceedings disposed of in The Julien Company Chapter 11 case, and this adversary proceeding has not received the highest priority by the Court. On the other hand, this adversary proceeding has been pending since 1990, and the Court is disappointed that counsel have not completed any and all discovery in this proceeding. The Court advised counsel on June 6, 1994, that in the event summary judgment was denied, this proceeding would be set for trial quickly and that a short window of opportunity for further discovery would be set. The Court notes that these defendants are insiders and have had sufficient opportunity to conduct discovery of any facts of which they lack personal knowledge. It appears that the primary defendants are West-Ho Acquisition One, Inc. and West-Ho Partners, entities over which Mr. Julien Hohenberg at one point

exercised dominant control. In view of the relationship between these defendants and the debtor, it does not appear unreasonable to establish August 31, 1994, as a final discovery deadline for all parties to conclude any and all discovery related to the action on debt due cause of action. The Court wishes to make it clear that this is not a discovery deadline for other causes of action, such as fraudulent conveyance, raised in the Trustee's complaint. If it is necessary to address those other causes of action after the disposition of the action on debt due, the Court will conduct a further pre-trial conference at an appropriate time and will set another appropriate discovery deadline.

The substantial discovery having been conducted and proof having been prepared in reference this summary judgment motion, the Court believes it is appropriate and reasonable to set a trial date on the bifurcated action on debt due cause of action, which trial will begin at 9:30 a.m. on September 29, 1994. The trial will continue on September 30, 1994 and thereafter from day to day until concluded. It would appear to the Court, based upon its review of the summary judgment pleadings and evidence, that this trial could be concluded in two days. Should counsel for any party have a serious and unresolvable conflict with these trial dates, counsel shall immediately contact other counsel in a telephonic conference call and confer concerning alternative dates. Moreover, it will be counsel's responsibility to contact Carol Smith, the courtroom deputy of this Court, to arrange any alternative trial dates. Counsel should be advised, however, that the Court will expect any request for a continuance to be based upon an affidavit of an unresolvable conflict in schedule. This adversary proceeding needs to be disposed of promptly.

IT IS THEREFORE ORDERED that the Trustee's motion for summary judgment is denied.

IT IS FURTHER ORDERED that the motion to strike the affidavit of Jack F. Marlow, Trustee, is denied.

IT IS FURTHER ORDERED that the Court *sua sponte* bifurcates the causes of action raised in the Trustee's complaint so as to permit the action on debt due to be tried first, after which the Court will make proposed findings of fact and proposed conclusion of law for submission to the United States District Court in this non-core but otherwise related cause of action.

IT IS FURTHER ORDERED that August 31, 1994, is a final discovery deadline for all parties to complete their discovery concerning the bifurcated action on debt due cause of action, and the trial of this bifurcated action on debt due is set for September 29 and September 30, 1994, beginning at 9:30 a.m. each day and continuing each day thereafter until the conclusion of this trial.

IT IS FURTHER ORDERED that in the event counsel or any party shall have a unresolvable conflict in schedule concerning these trial dates, it is required that counsel having the conflict immediately initiate a telephonic conference call with all other counsel in this adversary proceeding and with this Court's courtroom deputy for the purpose of arranging an alternative date. In such event, it shall be necessary for the counsel or party having an unresolvable conflict in schedule to file an affidavit setting out the basis for that unresolvable conflict.

IT IS FURTHER ORDERED that a final pre-trial conference is set for August 18, 1994, at 9:30 a.m., which conference may be conducted telephonically for the convenience of out of town counsel, the purpose of which final pre-trial conference will be to enter a final pre-trial order concerning the admission of documents, the exchange of witness list, exchange of exhibits and admissibility thereof and any and all other pre-trial issues. The Court will direct Mr. David Harris,

attorney for the Trustee, to be responsible for the preparation of a final pre-trial order, after consultation with other counsel.

SO ORDERED this 15th day of June, 1994.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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