IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GFI WISCONSIN, INC.,
f/k/a GREDE FOUNDRIES, INC.,

Appellant,

v.

REEDSBURG UTILITY COMMISSION,

Appellee.

OPINION and ORDER

11-cv-58-bbc

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On May 10, 2011, I reversed the bankruptcy court's decision dismissing appellant GFI Wisconsin, Inc.'s adversary proceeding against appellee Reedsburg Utility Commission for recovery of preferential transfers. In doing so, I concluded that Reedsburg could not satisfy the elements of a "new value" defense under 11 U.S.C. § 547(c)(4)(B) because the payment of its 11 U.S.C. § 503(b)(9) administrative priority claim is an "otherwise unavoidable transfer" that defeats the new value Reedsburg supplied to GFI's estate.

Now before the court is Reedsburg's motion for reconsideration, dkt. #8, in which it contends that it can satisfy the elements of a new value defense because there is no evidence that payment of its § 503(b)(9) claim will diminish GFI's estate. Because I conclude that

there is sufficient evidence in the record to establish that GFI Wisconsin's estate was diminished when it transferred its assets to a purchaser who assumed liability for Reedsburg's § 503(b)(9) claim, I will deny the motion.

DISCUSSION

Under 11 U.S.C. § 547, debtors such as GFI Wisconsin may "avoid," or recover "transfers" (often payments) that they made to creditors within the 90-day preference period before bankruptcy, unless the creditor can assert a successful defense to the debtor's claim. In this case, debtor GFI Wisconsin initiated an adversary proceeding in the bankruptcy court, seeking to avoid payments made to Reedsburg Utility Commission for the value of electricity Reedsburg supplied to it in the 90-day period before bankruptcy. In response, Reedsburg asserted a "new value" defense under § 547(c)(4), which provides that a trustee cannot avoid payments it made to a creditor "to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor." In other words, if the creditor enhances the debtor's estate by supplying it with goods or credit after the debtor submits payments to the creditor that would normally qualify as avoidable preferential transfers, the debtor cannot recover the payments.

However, as a general rule, a creditor cannot assert the new value defense if the estate repays the new value. 11 U.S.C. § 547(c)(4)(B) (creditor cannot assert new value defense

if debtor "make[s] an otherwise unavoidable transfer to or for the benefit of such creditor" on account of that new value). As I explained in the May 10 opinion, the new value defense is "limited to those situations in which the debtor's estate has actually been enhanced by the creditor's actions." Dkt. #6, at 19 (citing In re Kroh Brothers Development Co., 930 F.2d 648, 654 (8th Cir. 1991) ("The availability of the defense, then, depends on the ultimate effect on the estate."). Thus, if a creditor provides new value to the estate that the estate does not repay, the new value has enhanced the estate to the benefit of other creditors and the creditor should be allowed to assert a new value defense and retain preferential transfers. On the other hand, if the estate repays a creditor for new value, through payment of a § 503(b)(9) claim or otherwise, the new value has been defeated. When an estate repays new value, "preference retention [by the creditor] is to the detriment of other creditors." Kroh Bros., 930 F.2d at 654. See also In re Circuit City Stores, Inc., 2010 WL 4956022, *9 (Bankr. E.D. Va. Dec. 1, 2010) ("'Upon full payment to [supplier], the Debtor's estate is no longer enlarged by the delivery. Therefore, [supplier] has no new value for which it has yet to receive full credit and should not be entitled to the new value defense.'") (quoting In re TI Acquisition, LLC, 429 B.R. 377, 384 (Bankr. N.D. Ga. 2010)).

In the bankruptcy proceeding, GFI Wisconsin argued that Reedsburg could not assert a new value defense because GFI had indirectly repaid Reedsburg for some of the electricity it provided. Specifically, Reedsburg had filed a successful claim under 11 U.S.C. § 503(b)(9)

for payment for the value of electricity it supplied to GFI in the 20-day period before GFI filed for bankruptcy. GFI argued that because Reedsburg's § 503(b)(9) claim was allowed and is fully funded by a reserve that has been set aside specifically for payment of that claim, Reedsburg had been repaid and should not be allowed to use the value of those same goods to support a § 547(c)(4) new value defense.

The bankruptcy court rejected GFI Wisconsin's argument and allowed Reedsburg's new value defense. GFI appealed the bankruptcy court's decision, contending that the decision allowed Reedsburg double-recovery to the detriment of other creditors. I agreed with GFI and reversed the bankruptcy court's dismissal of GFI's adversary proceeding. I concluded that the payment of Reedsburg's § 503(b)(9) claim defeated the new value Reedsburg had supplied.

In its motion for reconsideration, Reedsburg contends that the court erred in concluding that payment of its § 503(b)(9) claim defeats its new value defense. In particular, Reedsburg contends that there is insufficient evidence in the record to establish that the § 503(b)(9) payment diminished GFI's estate and that unless the estate was diminished, the new value Reedsburg supplied had the overall affect of enhancing the estate.

First, Reedsburg points out that it is the purchaser of GFI's assets, not GFI itself, that will pay Reedsburg's § 503(b)(9) claim. Moreover, Reedsburg argues, this third party purchaser accepted liability for § 503(b)(9) claims before Reedsburg asserted its § 503(b)(9)

claim successfully and thus, there is no evidence that GFI's estate was diminished by the amount of the later-allowed claim. Essentially, Reedsburg is arguing that the purchaser agreed to assume liability for Reedsburg's claim (as well as other § 503(b)(9) claims) without any consideration via reduction in the purchase price for GFI Wisconsin's assets. If the purchaser agreed to pay for Reedsburg's § 503(b)(9) claim without a reduction in the purchase price, the purchaser's payment of the § 503(b)(9) claims does not decrease the estate.

Reedsburg's argument is not persuasive and is the same argument that I rejected previously. In the May 10 opinion, I noted that although Reedsburg's § 503(b)(9) claim will be paid by Grede LLC, the third party purchaser, the record contained facts sufficient to conclude that payment of the § 503(b)(9) claim reduced the value of the estate and the assets available to pay general, unsecured creditors. In particular, the record establishes that Grede LLC purchased GFI Wisconsin's assets and, in exchange for the transfer of assets and cash from the estate, agreed to assume certain liabilities, including liability for payment of allowed § 503(b)(9) claims. After GFI Wisconsin transferred assets and cash to Grede LLC, Grede LLC set up a separate reserve account at Bank of America exclusively for the benefit of Reedsburg, in the full amount of Reedsburg's § 503(b)(9) claim.

The purchase price was dictated by both the value of the assets acquired and the liabilities assumed. At the time the asset purchase agreement was approved by the

bankruptcy court, all § 503(b)(9) claims had been filed, the extent of GFI's potential § 503(b)(9) liability was known to Grede LLC and the § 503(b)(9) claims were listed specifically as part of the purchase price and were estimated on a schedule attached to the asset purchase agreement.

This evidence is sufficient to establish that the § 503(b)(9) liability Grede LLC assumed reduced the amount Grede LLC paid for the estate. In other words, if liability for the § 503(b)(9) claims had not been part of the bargain, the purchase price would have been incrementally greater, leaving more assets available to pay other creditors. Thus, although the payment of Reedsburg's § 503(b)(9) claim came ultimately from Grede LLC using funds it received from GFI, it reduced the value of the estate and the assets available to pay general, unsecured creditors.

It is true that the record does not establish whether the detriment to the estate from Grede LLC's assumption of liability for § 503(b)(9) claims was exactly equal to Reedsburg's § 503(b)(9) claim. However, Reedsburg has pointed to no controlling authority to support the proposition that detriment to the estate can be established only through evidence showing a specific dollar for dollar transfer from GFI's estate to Grede LLC in the amount of Reedsburg's § 503(b)(9) claim. As the party asserting the new value defense, Reedsburg has the burden of establishing that the new value it provided has not been repaid by the estate. It cannot meet this burden if "the new value was either directly or indirectly removed

from the estate." In re Formed Tubes, Inc.,46 B.R. 645, 647 (Bankr. E.D. Mich. 1985). Thus, "[i]f payment by a third party has the effect of removing from the estate the new value advanced, then the section 547(c)(4) exception is not and should not be available to the creditor." Id. at n.4. In this case, there has been no payment by GFI directly to Reedsburg. However, the transfer of assets and cash to Grede LLC, in exchange for Grede LLC's assumption of liability for Reedsburg's § 503(b)(9) claim, indirectly removed the new value from the estate. Thus, the ultimate effect on the estate was to reduce the funds available to pay general, unsecured creditors.

Finally, requiring GFI Wisconsin to show a specific transfer of funds to Grede LLC in the amount of Reedsburg's § 503(b)(9) claim would undermine one of the primary purposes of the new value defense which is to promote equal treatment among creditors. Essentially, Reedsburg is asking that it be allowed to double-count its 20-day invoices, to the detriment of the estate and other creditors, merely because it is being repaid by the third party purchaser of GFI's assets rather than GFI itself. Such a result does not promote equal treatment among creditors.

In sum, Reedsburg has not established the elements of a new value defense because it has not shown that it provided new value to GFI that ultimately enhanced the estate. Accordingly, I will deny Reedsburg Utility Commission's motion for reconsideration.

ORDER

IT IS ORDERED that appellee Reedsburg Utility Commission's motion for reconsideration, dkt. #8, is DENIED.

Entered this 30th day of June, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge