NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE FURR'S SUPERMARKETS, INC., a Delaware Corporation, Debtor.	BAP No. NM-06-109
YVETTE J. GONZALES, Trustee, Plaintiff – Appellee, v. AMPLEX CORPORATION, Defendant – Appellant, and UNITED STATES POSTAL SERVICE, Defendant – Appellee, and STAMPS ON CONSIGNMENT, Defendant.	Bankr. No. 7-01-10779-SA Adv. No. 03-01065-S Chapter 7 ORDER AND JUDGMENT*
YVETTE J. GONZALES, Trustee, Plaintiff – Appellee, v. AMPLEX CORPORATION,	BAP No. NM-06-110 BAP No. NM-06-112 BAP No. NM-06-113

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Defendant – Appellant,

and

UNITED STATES POSTAL SERVICE

Defendant – Appellee.

IN RE FURR'S SUPERMARKETS, INC., a Delaware Corporation,

Debtor.

BAP Nos. NM-06-114
NM-06-115
NM-06-116

YVETTE J. GONZALES, Trustee,

Plaintiff – Appellee,

v.

UNITED STATES POSTAL SERVICE,

Defendant – Appellant,

and

AMPLEX CORPORATION,

Defendant – Appellee.

Bankr. No. 7-01-10779-SA
Adv. No. 03-01065-S
Chapter 7

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CLARK, CORNISH, and MICHAEL, Bankruptcy Judges.

CLARK, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P.

8012. The case is therefore ordered submitted without oral argument.

Appellants Amplex Corporation ("Amplex") and United States Postal Service ("USPS") appeal the bankruptcy court's rulings granting Trustee's motions for summary judgment and denying the defendants-appellants' joint and separate motions for summary judgment in this avoidance action.[1]

I. APPELLATE JURISDICTION

This Court has jurisdiction to hear timely-filed appeals from final judgments and orders of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[2] The Amplex notices of appeal were all timely filed on October 13, 2006, within ten days of the final orders sought to be appealed, and USPS's notices of appeal were all timely filed on October 30, 2006, within the extension of time for appeal granted by the bankruptcy court on October 19, 2006. No party to any of these appeals has elected to have an appeal heard by the district court. Therefore, this Court has appellate jurisdiction over these appeals.

II. STANDARD OF REVIEW

The applicable standard of review of orders granting summary judgment is *de novo*, and this Court is to apply the same legal standard as was used by the bankruptcy court to determine whether either party is entitled to judgment as a matter of law.[3] *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.[4] We review

---

[1] Amplex's appeals, consisting of NM-06-109, -110, -112, and -113, and USPS's appeals, consisting of 06-114, -115, and -116, respectively, have been companioned for appeal.

[2] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

[3] *Tillman ex rel. Estate of Tillman v. Camelot Music, Inc.*, 408 F.3d 1300, 1303 (10th Cir. 2005).

[4] *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

orders granting motions to amend a complaint or to extend the time for service of a complaint for abuse of discretion.[5] "Under the abuse of discretion standard[,] 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'"[6]

III. FACTUAL BACKGROUND

From 1993 to early 2001, appellant Amplex acted as an agent of USPS with respect to sales of postage stamps by banks and grocery stores. Under its contract with the USPS ("USPS Contract"), Amplex earned a fee for managing all postage stamp sales at locations other than U.S. post offices. Amplex's duties included such things as contracting with merchants, executing documentation, arranging stamp deliveries, and monitoring payments. The USPS Contract required that Amplex reimburse USPS for any failures to pay by the companies it contracted with.

In 1996, Amplex entered into a Stamp Consignment Agreement ("SCA") with Furr's Supermarkets, Inc. ("Furrs"), pursuant to which, Amplex agreed to supply postage stamps to Furrs for sale in its supermarkets to its customers. The SCA was a form document created by USPS, and its use was required by the USPS contract. Pursuant to the SCA, Furrs agreed to both pay and charge face value for the stamps, resulting in no profit on its stamp sales. Furrs also agreed to pay for stamps within thirty days of delivery, whether or not the stamps had been sold. Alternately, Furrs had the option to return unsold stamps. The SCA did not specifically require Furrs to segregate or to otherwise identify proceeds of stamp

---

[5] *In re Woodcock*, 45 F.3d 363, 368 (10th Cir. 1995); *Espinoza v. United States*, 52 F.3d 838, 840-41 (10th Cir. 1995).

[6] *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

sales.[7] The SCA required that payments for stamps be payable to "USPS - Stamps on Consignment" and sent to a lockbox controlled by USPS in Illinois. However, as a matter of practice, all of the payments Furrs sent to the lockbox were made payable simply to "Stamps on Consignment."

For several years prior to initiation of the bankruptcy case, Furrs and Amplex engaged in a fairly set pattern of commercial dealing. Amplex delivered stamps to Furrs on a roughly bi-weekly basis. Furrs sold those stamps to customers in its stores, and made payments approximately thirty days post-delivery to the USPS lockbox. In January 2001, Furrs received two stamp deliveries, each consisting of stamps having a total face value of $61,200. Since Furrs was not required to pay for stamps until thirty days after they were delivered, payment for both January deliveries was due in February 2001. Both invoices were unpaid when Furrs filed its bankruptcy petition.[8] None of the parties was able to accurately establish how many stamps Furrs had in its possession when the petition was filed. In fact, both Amplex and Trustee apparently conceded at the trial on Amplex's priority claim that such evidence could not be produced. Trustee offered evidence, based on Furrs' 2000 stamp sales history averaging $3,252.89 per day, that Furrs most likely had between $9,000 and $23,000 worth of stamps in its possession at the time of filing, depending on when the two January stamp shipments were actually received. However, no stamps were ever produced by Furrs, and the parties agreed that Furrs had no stamps in its possession by the time of trial. In addition, Furrs routinely commingled proceeds from its stamp sales with all other sales proceeds

---

[7] Both USPS and Amplex contend that the language of the SCA compels the conclusion that segregation of proceeds was required. That argument will be more fully discussed later.

[8] When Furrs filed its petition, one of the invoices was only three days overdue and the other was not due for another eleven days.

and, during the ninety days preceding filing, all cash proceeds from Furrs' stores were "swept" into a Wells Fargo bank account in Albuquerque, to which Furrs had no access, leaving a daily balance at or near $0 in local Furrs accounts.

IV. PROCEDURAL BACKGROUND

Furrs filed for Chapter 11 relief on February 8, 2001. Its bankruptcy case was converted to a Chapter 7 proceeding in December 2001, and Trustee was appointed. Amplex filed a proof of claim seeking recovery of $122,400, based on the two unpaid January invoices. Amplex subsequently requested treatment of its claim as an administrative expense, alleging that Furrs had "converted consigned collateral." Trustee objected, and trial was held on that claim, resulting in a memorandum opinion and order denying Amplex's request for priority treatment. Amplex's appeal of that ruling resulted in a decision by this Court affirming the bankruptcy court judgment.[9]

In January 2003, Trustee initiated an adversary proceeding against USPS and "Stamps on Consignment," pursuant to 11 U.S.C. § 547(b), seeking to avoid all stamp payments made by Furrs in the ninety-day preference period preceding filing. Trustee filed an amended complaint, which was served by mail on USPS on February 7, 2003.[10] The amended complaint was also served on "Stamps on Consignment" by mail addressed to the USPS lockbox. Amplex was not named in the amended complaint and did not receive the copy of it that was mailed to the lockbox. On March 26, 2003, USPS filed its Answer to the amended complaint, in which it denied conducting business with Furrs and stated, "USPS did business

---

[9] *See In re Furr's Supermarkets, Inc.*, BAP No. NM-06-99, 2007 WL 559766 (10th Cir. BAP February 22, 2007).

[10] Trustee initially sought to avoid $415,800 in payments made by Furrs, less any new value provided by defendants. Ultimately, Trustee conceded that defendants had supplied new value during the preference period that reduced the preference amount to $174,600. That amount, plus interest, was determined to be preferential by the bankruptcy court.

with Amplex Corporation and the Stamps on Consignment program." On June 30, 2003, Trustee obtained an alias summons that again listed the defendants as USPS and "Stamps on Consignment," which was served, along with the amended complaint, on July 1, 2003 by mail directed to "Amplex Corporation dba Stamps on Consignment" at Amplex's address. This service was 144 days after the filing of Trustee's original complaint. On July 30, 2003, Amplex moved to quash service and to dismiss Trustee's claims against it on the grounds that: 1) service had not been effected within 120 days of the initial complaint; 2) Amplex was not properly named as a defendant; and 3) the statute of limitations for preference actions had run.[11]

On September 2, 2003, Trustee moved to again amend her complaint, seeking to change the name "Stamps on Consignment" to Amplex, and to extend the time period allowed for service of process by twenty-five days in order to encompass the July 1 service. On June 3, 2005, the bankruptcy court entered an order denying Amplex's motion to dismiss and granting Trustee's motion to amend.[12] On November 22, 2005, USPS and Amplex jointly moved for summary judgment on the single ground that they were "fully secured" and, therefore, there could be no preference. On January 10, 2006, Amplex separately moved for summary judgment on the sole ground that there was no preference because Amplex was not a "creditor" of Furrs. Trustee moved for summary judgment on February 24, 2006, on the ground that the uncontested facts proved a *prima facie* case of preference. Shortly thereafter, on March 2, 2006, USPS filed a separate motion for summary judgment on the dual grounds that 1) the Furrs payments

---

[11] Pursuant to 11 U.S.C. § 546(a)(1), the limitations period for the filing of such actions expired on February 8, 2003, two years after entry of the order for relief.

[12] Amplex's attempt to appeal this order at that time was denied as prematurely taken from a non-final order.

were not made from "property of its estate" because stamp proceeds were held in trust for USPS; and 2) that the allegedly preferential payments were made in the ordinary course of business.

Orders were entered on October 5, 2006: 1) denying defendants' joint motion; 2) denying Amplex's separate summary judgment motion; 3) denying USPS's separate summary judgment motion; and 4) granting Trustee's summary judgment motion. In the interim, Trustee had moved to amend her complaint to add a prayer for pre- and post-judgment interest. Defendants both objected to this motion but, after a hearing on the matter, the bankruptcy court granted Trustee's request. Thus, Amplex appeals the orders 1) granting Trustee's amendment of her complaint to name it as a party and denying Amplex's motion to dismiss; 2) denying defendants' joint motion; 3) denying Amplex's separate summary judgment motion; and 4) granting Trustee's summary judgment motion. USPS appeals the orders 1) denying defendants' joint motion; 2) denying USPS's separate summary judgment motion; and 3) granting Trustee's summary judgment motion.

V. DISCUSSION

A. Procedural Issues

1. Service of Process

Amplex moved to dismiss the Trustee's avoidance claims against it on the ground that Trustee failed to timely serve it with process under FRCP 4(m), which provides:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected with a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Rule 4(m) is made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7004(a). The Tenth Circuit has interpreted this rule, as

follows:

> If good cause is shown, the plaintiff is entitled to a mandatory extension of time. If the plaintiff fails to show good cause, the [trial] court must still consider whether a permissive extension of time may be warranted. At that point the [trial] court may in its discretion either dismiss the case without prejudice or extend the time for service.

Espinoza v. United States, 52 F.3d at 841. In this case, the bankruptcy court allowed Trustee a twenty-four day extension of time for service of process in order to encompass the July 1 service by alias summons. Amplex argues both that the July service was ineffective, because the complaint did not list Amplex as a defendant, and that the Trustee failed to show good cause for her failure to serve Amplex within the Rule 4(m) time period.

Trustee explained that Amplex was not initially named or served because her only information about the preference payments consisted of the named payee, "Stamps on Consignment," and the post office box to which payments were mailed. Amplex countered that Trustee should have known its identity, at the very latest, when USPS filed its answer to the preference complaint, in which USPS denied doing business with Furrs and stated that it "did business with Amplex Corporation and the Stamps on Consignment program."[13] Trustee asserted that this statement actually reinforced her belief that "Stamps on Consignment" was the proper defendant, and that she did not actually discover her error until she received the USPS contract on June 26, 2003. She then had Amplex served by alias summons within five days.[14]

---

[13] *Answer of the United States Postal Service to the Amended Complaint to Avoid Preferential Transfers* at 1, ¶ 3, *in* Appendix of Appellant Amplex Corp. ("App.") Book 1 at 40.

[14] Although neither the Amended Complaint nor the alias summons specifically named Amplex as a party defendant, both documents name "Stamps on Consignment" as a defendant and were served by mail sent to Amplex's address and directed to "Amplex Corporation dba Stamps on Consignment." Though not optimal, this service was sufficient to put Amplex on notice that

(continued...)

Trustee's explanation provides a somewhat questionable basis for a good cause extension of the time to serve Amplex. Nonetheless, whether or not Trustee established good cause for her failure to timely serve Amplex, the bankruptcy court still had discretion to allow her an extension. *Espinoza* states that "several factors" should be considered by courts deciding whether to grant an extension in the absence of good cause, but specifically lists only two: 1) whether refiling of the action would be barred by the statute of limitations, and 2) the complexity of the Rule 4 service requirements. *Espinoza v. United States*, 52 F.3d at 842. In this case, absent an extension, Trustee's claims would be barred by the limitations statute. Other jurisdictions have also recognized the statute of limitations bar as a significant factor to consider in connection with discretionary extensions, and have considered both whether the defendant would be prejudiced by an extension and whether the delay of service was substantial, as well. *See, e.g., Goodstein v. Bombadier Capital, Inc.*, 167 F.R.D. 662, 666 (D. Vt. 1996); and *Mejia v. Castle Hotel, Inc.*, 164 F.R.D. 343, 345-46 (S.D.N.Y. 1996). In the present case, the statute of limitations had run, the defendant was not prejudiced by the delay of service, and service was only delayed by twenty-four days. Under these circumstances, we hold that the bankruptcy court's allowance of an extension of the time for service does not constitute an abuse of discretion that gives rise to "a definite and firm conviction" by this Court that the decision involved "a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (internal quotation marks omitted).[15]

---

[14] (...continued)
claims were asserted against it in its capacity as an agent of USPS, as evidenced by its own filing, shortly thereafter, of motions to quash service and dismiss.

[15] In *Despain v. Salt Lake Area Metro Gang Unit*, 13 F.3d 1436, 1438-39 (10th Cir. 1994) the Court of Appeals for the Tenth Circuit, while first noting that (continued...)

2. Relation Back

Amplex also contends that Trustee's amendment of her complaint to specifically name it as a defendant should have been barred by the statute of limitations set forth in 11 U.S.C. § 546(a)(1). Pursuant to that statute, the limitations period for the filing of avoidance actions expired on February 8, 2003. Trustee did not move to amend her complaint until September 2, 2003, nearly seven months later, and the order granting her motion was entered on June 3, 2005. Federal Rule of Civil Procedure 15(c)(3) (made applicable by Federal Rule of Bankruptcy Procedure 7015) governs relation back of an amendment that "changes the party or the naming of the party against whom a claim is asserted." Under this Rule, the amendment of Trustee's complaint relates back to the date of the filing of the original complaint if the claim asserted by amendment arises out of the same conduct or occurrence that was alleged in the original pleading and, within the period provided by Rule 4(m) for service, Amplex received such notice of the action that amendment would not prejudice its defense, and Amplex knew or should have known that the failure to name it was a mistake.

Since the bankruptcy court extended the Rule 4(m) service time to encompass Trustee's service by alias summons, the notice, prejudice, and mistake factors must be considered within the context of Amplex's receipt of the complaint at that time.[16] That complaint put Amplex on notice of the exact claims

---

[15] (...continued)
the "good cause" provision should be read narrowly, held that defendant's actual notice, lack of prejudice, and the running of the statute of limitations were not sufficient to establish "good cause" for late service. However, in that case, the court was reviewing a denial of additional time for service for lack of good cause. Therefore, whether the same factors would be sufficient to uphold a trial court's discretionary allowance of extended service, in the absence of good cause, was not addressed.

[16] 6A Charles Alan Wright, Arthur R. Miller, & Mark Kay Kane, *Federal Practice and Procedure: Civil* § 1498 (2d ed. 2007) states that the notice requirement of Rule 15(c)(3) is linked to the 120 day service period "or any

(continued...)

against "Stamps on Consignment," and that Trustee had mistakenly used that name for Amplex. Moreover, Amplex did not even attempt to show prejudice, beyond the fact that the complaint against it would be time barred, absent an extension. However, such a result is precisely what Rule 15(c) is intended to avoid. *See AIG Managed Market Neutral Fund v. Askin Capital Mgmt., L.P.*, 197 F.R.D. 104, 111 (S.D.N.Y. 2000) (defendant's contention that not allowing it to take advantage of the statutory time-bar is itself prejudice is erroneous).

B. Preference

The basis for a trustee's avoidance of "preference" payments made by the debtor to its creditors is as follows:

> (b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property–
>
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made–
> (A) on or within 90 days before the date of the filing of the petition; or
> (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
> (5) that enables such creditor to receive more than such creditor would receive if –
> (A) the case were a case under chapter 7 of this title;
> (B) the transfer had not been made; and
> (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). Thus, the Trustee's burden in a preference action consists of:

> A *prima facie* case for an avoidable preference under 11 U.S.C. § 547(b) is made by showing the following: (1) a transfer, (2) of an interest of the debtor in property, (3) to or for the benefit of a creditor, (4) for or on account of an antecedent debt owed by the debtor before such transfer was made, (5) made while the debtor was insolvent, (6) if the creditor was not an insider, made on or within 90

---

[16] (...continued)
additional time resulting from a court-ordered extension."

> days before the date of the filing of the petition, (7) which enabled such creditor to receive more than he would have received if the transfer had not been made while the debtor continued into bankruptcy.

Kirtley v. Consol. Nutrition, L.C. (In re Freeny), 187 B.R. 711, 715 (Bankr. N.D. Okla. 1995).[17] Appellants admit that the payments at issue were transfers made while Furrs was insolvent, within ninety days of filing of the petition. However, appellants deny that: 1) Furrs had any interest in the transferred funds; 2) either appellant was a Furrs "creditor"; 3) the transfers were in payment of an antecedent debt, and 4) the payments exceeded what appellants would receive in a Chapter 7 liquidation. Appellants' principal reason for these denials is their characterization of the SCA as a "consignment." Thus, appellants argue, a consignee does not own consigned property but, rather, holds it in trust for the consignor.[18] In appellants' view, such a trust also extends to monetary proceeds from sales of consigned property and, therefore, Furrs never had an ownership interest in stamp sale proceeds.

The bankruptcy court rejected appellants' underlying premise, finding that the SCA "was a consignment only in name," principally because Furrs was

---

[17] A trustee's recovery of preferential payments must be "for the benefit of the estate." 11 U.S.C. § 550. USPS asserts that any monies recovered by the Trustee in this case will not benefit the estate because they will never reach the unsecured creditors. We reject the premise that recovered payments must benefit unsecured creditors in order to benefit "the estate," for the reasons set forth in this Court's decision in another Furrs bankruptcy appeal. *See Gonzales v. ConAgra Grocery Prods. Co. (In re Furr's Supermarkets, Inc.)*, NM-06-117, 2007 WL 2317546, at *3 (10th Cir. BAP August 15, 2007).

[18] In a previous appeal, Amplex similarly argued that the relationship between itself and Furrs was a consignment. Amplex asserted in that proceeding that its claim against the estate should receive priority treatment because Furrs had held consigned stamps, and their proceeds, in trust. Therefore, Amplex argued, stamp sales followed by dissipation of the proceeds were conversions of Amplex's property. The BAP affirmed the bankruptcy court's denial of priority treatment to Amplex's claim, but did so without reaching the consignment issue because Amplex failed to establish that Furrs either sold stamps or used stamp proceeds post-petition. Without such proof, there could be no "benefit to the estate," which is necessary for administrative priority. *In re Furr's Supermarkets, Inc.*, NM-06-99, 2007 WL 559766, at *3 (10th Cir. BAP February 22, 2007).

required to pay for stamps received regardless of whether or not they were sold. However, under New Mexico law and the facts of this case, such characterizations of the parties' agreement are not necessary. Whether the SCA gives rise to a consignment, a secured sale, or a "sale or return," appellants' inability to trace identifiable proceeds renders their arguments without merit, and their challenges to Trustee's prima facie case were therefore ineffective.

Article 9 (Secured Transactions) of the New Mexico Uniform Commercial Code ("UCC") is specifically applicable to consignments. N.M. Stat. Ann. § 55-9-109(a)(4). As such, Article 9 both includes consignors within its definition of secured parties, and provides that a "security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory." N.M. Stat. Ann. §§ 55-9-102(a)(71)(C) and 55-9-103(d). A security interest is defined as "an interest in personal property or fixtures that secures payment or performance of an obligation[,]" and a seller's interest in goods delivered to a buyer with an attempt to retain title is limited to reservation of a security interest. N.M. Stat. Ann. § 55-1-201(b)(35). New Mexico UCC Article 2 (Sales) similarly provides that "retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest." N.M. Stat. Ann. § 55-2-401(1).

Thus, under New Mexico law, consignments are treated as secured transactions. The significance of such treatment in this case is that a security interest in goods continues only into "identifiable proceeds" of collateral sales. N.M. Stat. Ann. § 55-9-315(a)(2). Commingled proceeds, such as the ones in this case, are considered identifiable "to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than [Article 9] with respect to commingled property of the type involved." N.M. Stat. Ann. § 55-9-315(b)(2). The "intermediate balance rule," use of which has been approved in a number of

published opinions on proceeds tracing and by the bankruptcy court in this case, is just such a tracing method. Under that rule, it is presumed that "proceeds of the disposition of collateral remain in a commingled account as long as the account balance is equal to or exceeds the amounts of the proceeds." *In re Oriental Rug Warehouse Club, Inc.*, 205 B.R. 407, 411-12 (Bankr. D. Minn. 1997).[19] Under this standard, the bankruptcy court determined that defendants had not, and could not, trace identifiable proceeds from stamp sales.[20] We agree.

As discussed above, appellants held a security interest in any stamps and identifiable proceeds of stamps in Furrs' possession. Had the payments at issue been made in the form of returned stamp inventory, this dispute likely never would have arisen. However, Furrs did not return stamps. Instead, it issued checks payable to "Stamps on Consignment." Likewise, had the checks either been issued from an account into which only stamp proceeds were deposited, or paid from an account in which the balance of funds never fell below $174,000, again there likely would be no serious disagreement. But the uncontroverted facts established that stamp proceeds were not segregated, and were commingled with all other Furrs sales proceeds that were nightly swept into an account to which Furrs had no access.[21] The funding for the payments came from advances on a

---

[19] Other tracing methods tend to be more burdensome to the tracing party, rather than less. *See, e.g., Morrison Steel Co. v. Gurtman*, 274 A.2d 306, 311 (N.J. Super. Ct. App. Div. 1971) (holding that once proceeds are commingled they may no longer be traced).

[20] Although the bankruptcy court's decision was on summary judgment, defendants conceded that the proceeds of stamp sales could not be traced. Indeed, since proceeds of all sales were "swept" into the Wells Fargo account on a daily basis, any proceed tracing would have been impossible.

[21] USPS contends that the SCA required Furrs to segregate stamp proceeds and to deposit those proceeds into the USPS lockbox account. USPS Br. in Chief at 14. However, the SCA does not support this contention. Under the SCA, Furrs was required to "remit payments for full face value of consigned stock within 30 calendar days from the date of the consignment's receipt[,]" and to make such payments to the USPS lockbox. *SCA* at ¶¶ 1.3 and 1.4, *in* App. Book 3 at 832.

(continued...)

line of credit Furrs had with Wells Fargo. Therefore, contrary to appellants' assertions, the transfers consisted neither of property "owned" by USPS nor of property on which appellants were fully secured. Appellants' contentions to that effect are without merit.

Appellants argue that their interest in both stamps and proceeds was "fully secured" and, therefore, the transfers were not preferential. The bankruptcy court acknowledged that "[i]t is generally true that a payment to a fully secured creditor is not preferential"[22] and also that, pursuant to the "greater percentage test," there is no preference "if an undersecured creditor was paid from its own collateral."[23] Again, appellants' inability to trace stamp proceeds precludes any assertion that their claims were "fully secured." [24] Alternately, Amplex contends that its claim was secured at least in the amount of $23,000, based on the bankruptcy court's finding that Furrs could have had as much as that amount in stamp inventory when it filed its bankruptcy petition.[25] However, even if appellants were thereby "undersecured," since the transfers did not consist of either stamp inventory or

---

[21] (...continued)
Conspicuously absent from the agreement is any provision requiring special handling of stamp proceeds. The provision requiring payments to be made within a specified time to a specified address cannot reasonably be construed as a requirement that stamp proceeds either be segregated or deposited directly into the lockbox account. That is particularly the case when, as here, payments were required to be made even if the stamps had not sold, which would make payment directly from proceeds impossible.

[22] *Memorandum Opinion on Defendants' Joint Motion for Summary Judgment (doc 88)* at 8, *in* App. Book 3 at 746 (citing *In re Castletons, Inc.*, 990 F.2d 551, 554 (10th Cir. 1993)).

[23] *Id.* at 8-9, *in* App. Book 3 at 746-47 (citing *In re El Paso Refinery, L P*, 171 F.3d 249, 253-53 (5th Cir. 1999)).

[24] Appellants' denial that the transfers were in excess of what would have been received in a Chapter 7 liquidation is also based on their contention that their interest in stamp proceeds was "fully secured." That argument is likewise without merit.

[25] *Memorandum Opinion on Plaintiff's Motion for Summary Judgment (doc 106)* at 17, ¶ 52, *in* App. Book 3 at 779.

identifiable proceeds of stamp inventory, they were not paid from appellants' collateral.

Finally, appellants contend that neither of them was a "creditor" of Furrs based on the consignment theory. In fact, USPS goes so far as to suggest that, because there was no privity of contract between it and Furrs, it not only was not a creditor of Furrs, but the bankruptcy court had no jurisdiction over it. Privity of contract is not required in order to be a creditor under § 547, however. A "creditor" is defined as anyone having a "claim" against the debtor, and a "claim" consists of a "right to payment." 11 U.S.C. § 101(10). Clearly, USPS had a right to be paid under the terms of the SCA, and Amplex had a right to demand that payment be made in accordance with its terms. In fact, Amplex filed a proof of claim in the Furrs bankruptcy case. In addition, under its contract with USPS, Amplex guaranteed payments that were required by the terms of the SCA. Therefore, payments Furrs made to USPS as the SCA obligee directly benefitted Amplex, the guarantor of those payments, and the payments were avoidable as to both. 5 *Collier on Bankruptcy* § 547.03[3] (Alan N. Resnick ed., 15th ed. rev. 2007).

Bankruptcy courts have subject matter jurisdiction over preference avoidance actions, which are "core proceedings." 28 U.S.C. §§1334 and 157(b)(2)(F). Although subject matter jurisdiction is a requirement of Article III of the United States Constitution, personal jurisdiction is not. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Thus, although subject matter jurisdiction cannot be waived by the parties, personal jurisdiction can be waived either intentionally or inadvertently. *Id.* at 703. *See also Williams v. Texaco, Inc.*, 165 B.R. 662, 669-70 (D. N.M. 1994). USPS did not pursue its personal jurisdiction defense in the bankruptcy court and,

accordingly, it has been waived.[26]

C. Interest Award

Defendants contend that pre-judgment interest was improperly awarded to Trustee because they had no real opportunity to oppose the award. Trustee did not include a prayer for interest in her original or amended complaints, but ultimately did move to amend her complaint to add a claim for interest. That motion to amend was filed after defendants had responded to Trustee's motion for summary judgment. Although defendants filed objections to the motion to amend, they contend that their objections addressed only whether amendment of the complaint was appropriate, and did not address the propriety of an interest award. Defendants asserted that amendment was inappropriate because the same bankruptcy judge (in a different bankruptcy case that involved the same Trustee and counsel) had ruled more than two years earlier that Trustee "must request prejudgment interest in her prayer for relief if she intends to seek it."[27] Based on that ruling, defendants claimed that Trustee's failure to seek interest in her complaint should have precluded her subsequent claim for interest.

A bankruptcy court's decision on a motion to amend is reviewed for abuse of discretion. In that respect, defendants essentially argue that the Judge's ruling in a different, previous case should have precluded the amendment. However, allowing Trustee to amend her complaint to add a prayer for interest is not inconsistent with a prior ruling stating that if interest is sought it must be requested in the complaint. Apparently, defendants interpreted the prior ruling as a requirement that interest be sought in the original complaint or not at all. This argument simply does not establish that the bankruptcy court abused its discretion

---

[26] Although we need not reach the merits of the personal jurisdiction claim, it seems unlikely that USPS would prevail on that issue. It conducted business in New Mexico and was duly served with process in this case.

[27] Amplex Reply Br. at 16.

by allowing amendment.[28]

D. "Ordinary Course of Business" Defense

USPS contends that the bankruptcy court erred in ruling against its ordinary course of business defense. Once a trustee makes a prima facie case of preference, the burden to prove defenses shifts to the party asserting them. *Clark v. Balcor Real Estate Fin., Inc. (In re Meridith Hoffman Partners)*, 12 F.3d 1549, 1553 (10th Cir. 1993). USPS essentially argues that its only contact with Furrs consisted of its receipt of lockbox payments, and that the allegedly preferential payments were not inconsistent with prior ones. Therefore, the payments were made in the ordinary course of the parties' dealings.

The ordinary course of business defense is set forth in 11 U.S.C. § 547(c)(2),[29] and is narrowly construed in the Tenth Circuit. *Jagow v. Grunwald (In re Allied Carriers' Exch.)*, 2007 WL 2473461, at *4 (10th Cir. BAP September 4, 2007); *Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.)*, 220 B.R. 1005, 1020 (10th Cir. BAP 1998), *aff'd*, 195 F.3d 568 (10th Cir. 1999). The defense has both a subjective (ordinary as between the parties) and an objective (ordinary in the industry) element.[30] Moreover, as noted by the

---

[28] Defendants contend that they were not given an opportunity to address the propriety of interest in this case before it was awarded. However, defendants could and should have argued this issue in their objection to the motion to amend, but chose not to do so. That choice operates as a waiver of other interest issues and precludes their current arguments that interest was inappropriate.

[29] All references herein to § 547(c)(2) are to the statute as it existed prior to amendment of the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005 since the petition in this case pre-dated those amendments.

[30] Prior to its amendment in 2005, § 547(c)(2) used the conjunctive "and" in reference to the subjective and objective elements, thereby requiring proof of both in order to establish the defense. In 2005, the elements were made disjunctive by substitution of "or" for "and" in this section. However, because the present case was commenced prior to the amendment it is governed by the prior law. Accordingly, an ordinary course of business defense in this case requires proof of *both* subjective and objective ordinariness. Therefore, since we agree with the

(continued...)

bankruptcy court, "[t]o be protected, a transfer must be ordinary both from the transferee's perspective and the debtor's perspective."[31] The bankruptcy court found that the evidence failed to satisfy either element in this case, and that USPS therefore had not established an ordinary course of business defense.[32]

The bankruptcy court found that, even though the payments at issue may not have been significantly later than previous ones, it was clear both that "Furr's was in total chaos during the period leading up to the bankruptcy," and that Amplex's actions (including the sending of three dunning letters in December 2000 and January 2001) indicated that it "was no longer willing to deal with Furr's if payments were not immediately brought current."[33] Uncontested statements of Furrs' employees established that in the time period leading up to the filing of its petition Furrs formed an ad hoc group of senior management personnel to decide which vendors were to be paid and when, and that virtually all checks payable to vendors were held until the ad hoc group made a decision to

---

[30] (...continued)
bankruptcy court's conclusion that the subjective element of the ordinary course of business defense was not established, we need not decide whether or not the objective element of the defense was satisfied.

[31] *Memorandum Opinion on Plaintiff's Motion for Summary Judgment (doc 106)* at 21, *in* App. Book 3 at 783 (citing *In re Milwaukee Cheese Wis., Inc.*, 112 F.3d 845, 848 (7th Cir. 1997)). *See also Meeks v. Harrah's Tunica Corp. (In re Armstrong)*, 231 B.R. 723, 730-31 (Bankr. E.D. Ark. 1999), *aff'd*, 291 F.3d 517 (8th Cir. 2002); *Hutson v. Branch Banking & Trust Co. (In re National Gas Distribs., LLC)*, 346 B.R. 394, 405 (Bankr. E.D.N.C. 2006); *Moran v. Hong Kong & Shanghai Banking Corp. (In re Deltacorp, Inc.)*, 179 B.R. 773, 781 (Bankr. S.D.N.Y. 1995).

[32] Although this ruling appears to involve findings of fact, which would be inappropriate on summary judgment, USPS asserted that this issue could be resolved as a matter of law when it filed its separate motion for summary judgment. *Memorandum in Support of the Postal Service's Second Motion for Summary Judgment* at § B, *in* Appendix of Appellant United States Postal Service Book 1 at 268-272. In so doing, USPS conceded that the issue could be resolved on the basis of the uncontested facts.

[33] *Memorandum Opinion on Plaintiff's Motion for Summary Judgment (doc 106)* at 29-30, *in* App. Book 3 at 791-92.

pay. At the time of payment, checks that had been held for a long period were voided and reissued with the current date. In fact, each of the checks at issue in this case was held and reissued by Furrs, and at least one of them was sent to USPS via Federal Express. Moreover, calls from vendors demanding payment increased dramatically during the time period leading up to the bankruptcy filing, and most vendors had restricted shipments to Furrs pending receipt of payment of a specified amount. In fact, Amplex sent three separate letters to Furrs in December 2000 and January 2001 threatening to suspend shipments until all outstanding amounts had been paid.

The situation Furrs found itself in during this period represented a significant departure from the manner in which it had done business in the past.[34] On the basis of these facts, we cannot conclude that the bankruptcy court's determination that an ordinary course of business defense could not be asserted was in error. Indeed, it appears that virtually nothing Furrs did in the latter half of 2000, up to the filing of its petition in February 2001, could be considered "ordinary" from its perspective. Because the ordinary course of business defense requires a showing of subjective ordinariness from both parties' perspectives, we agree that USPS could not establish the defense in this case.

VI. CONCLUSION

The bankruptcy court's orders determining that the disputed payments in this case were preferential under 11 U.S.C. § 547(b), and awarding pre- and post-judgment interest are affirmed. Likewise, the orders denying Amplex's motion to dismiss and granting Trustee's motions to amend and for additional time for service of the complaint are affirmed.

---

[34] *Affidavit of Sandra Dunlap*, *in* App. Book 3 at 604-08 and *Affidavit of Ken Fine*, *in* App. Book 3 at 609-11.