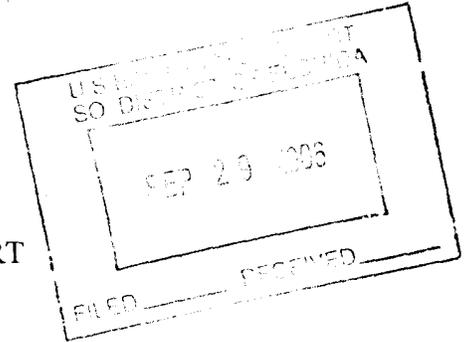


ORDERED in the Southern District of Florida on

Sept. 28, 2006



Laurel Myerson Isicoff
Laurel Myerson Isicoff, Judge
United States Bankruptcy Court



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

CASE NO. 04-11248-BKC-LMI

RX Cardiovascular Specialties, Inc.,

Chapter 7

Debtor.

Barry E. Mukamal, Chapter 7
Trustee of the Estate of RX Cardiovascular
Specialties, Inc.

Adv. Case. No.: 06-1041-BKC-LMI

Plaintiff,

v.

Sunrise X-Ray, INC., a Florida corporation

Defendant.

**MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF'S
PARTIAL MOTION FOR SUMMARY JUDGMENT AND
DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on the Plaintiff's Motion for Partial Summary Judgment (CP #17) and the Defendant's Response and Cross-Motion for Summary Judgment (CP #27). Because this Court's equitable powers cannot be used to contradict

express provisions of the Bankruptcy Code, the Plaintiff's Motion for Partial Summary Judgment is granted and the Defendant's Cross-Motion for Summary Judgment is denied.

FACTS

The Debtor, Rx Cardiovascular Specialties, Inc. (the "Debtor"), performed laboratory medical diagnostic tests on patients referred by hospitals and doctors, including, but not limited to, magnetic resonance imaging, chocardigrams, CT scans, stress thalium tests, and e-rays. The Debtor operated from various locations in Miami-Dade County, Florida.

Sunrise X-Ray, Inc. (the "Defendant") is in the business of supplying chemicals, film, and equipment for medical diagnostic centers, including the Debtor.

On February 17, 2004 (the "Petition Date"), the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. On or about August 19, 2004, the Court entered an Order authorizing appointment of a Chapter 11 Trustee. Barry Mukamal was appointed as the Chapter 11 Trustee. When the case was converted to a case under Chapter 7 on September 20, 2004, Barry Mukamal was appointed as the Chapter 7 Trustee (the "Plaintiff" or "Trustee").

Prior to the Petition Date, the Debtor delivered two checks to the Defendant – one in the amount of \$757.56 and one in the amount of \$7,550.00. The Debtor delivered a third check to the Defendant dated the Petition Date in the amount of \$1,551.50. Each of these three checks was for supplies delivered prior to the Petition Date. Each of these three checks was honored by the Debtor's bank after the Petition Date.

The Trustee filed this complaint seeking recovery of the proceeds of the checks (the "Payments"), pursuant to 11 U.S.C. §§ 547, 549 and 550. The Trustee subsequently

amended the Complaint seeking to avoid and recover the Payments as post-petition transfers pursuant to 11 U.S.C. §§ 549 and 550. The Defendant filed its Answer. Subsequently Plaintiff filed his Motion for Partial Summary Judgment and Defendant filed its Response and Cross-Motion for Summary Judgment.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a) and (b). This is a core proceeding which the Court may hear and determine pursuant to 28 U.S.C. §157(b)(2)(A).

DISCUSSION AND ANALYSIS

The Defendant does not dispute that the Payments constitute post-petition payments on account of pre-petition debt but argues first, that the Payments were authorized by virtue of the Court's interim and final orders approving the Debtor's use of cash collateral, which orders referenced a budget that included post-petition payments to the Defendant, and second, that it would be inequitable for the Defendant to return the Payments because the Debtor told Defendant it had critical vendor status and could be paid. The Defendant argues that since it was the Debtor's responsibility to get the Payments authorized, the Defendant should not be penalized because the Debtor was not truthful. Thus, the Defendant argues, the Trustee is estopped from asserting any claims under 11 U.S.C. §549.

In order to determine the merits of the motion and cross-motion, this Court must determine first, whether there is any material disputed fact that the cash collateral orders did or did not approve the post-petition transfers to Defendant, and second, and alternatively, whether Defendant has a right to seek equitable relief from the requirements of 11 U.S.C. §549.

The Cash Collateral Orders Did Not Authorize the Payments

The Defendant argues the Payments comply with the Bankruptcy Code because the Court approved a budget authorizing payment of up to \$8500 to the Defendant, and thus the Payments were “authorized” by the Court. However, the Defendant’s argument is directly contradicted by the pleadings. The Debtor’s initial Motion for Entry of Order Authorizing Use of Cash Collateral (CP #7) sought “authorization to use cash collateral in the ordinary course of business” The First Day Affidavit accompanying the Cash Collateral Motion (CP #9) stated the budget “is an accurate prediction of monthly expenditures” The Interim Order Authorizing Cash Collateral (CP #20) ordered that “Debtor may only use cash collateral in the ordinary course of its business as set forth in the . . . Budget.” The Final Order Approving Use of Cash Collateral also described the budget as reflecting “projected” expenses to be “incurred in the ordinary course of the Debtor’s business”

There is no question that a debtor’s payment of a pre-petition expense post-petition is NOT a payment in the ordinary course of a debtor’s business. Since the relevant pleadings are unambiguous, this Court can only interpret them to mean what they say. There is no interpretation of such pleadings and orders that would support the Defendant’s position.

**The Court Cannot Use Equity to Excuse Compliance With
the Requirements of Section 549**

The Defendant next argues that this Court must not narrowly construe the requirements of the Bankruptcy Code because to do so would allow the Plaintiff to engage in a game of “gotcha”. However the Defendant is asking the Court to rewrite the Bankruptcy Code, rather than interpret it. While the Court acknowledges that the

Defendant does appear to have been caught in a timing trap, as the Court has noted recently, in bankruptcy, timing is everything.

There is no question that the bankruptcy court is a court of equity with the authority to exercise that equitable jurisdiction under 11 U.S.C. §105.¹ However, the bankruptcy court's equitable powers are not unlimited. As the United States Supreme Court reminded in *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988), "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." This Court cannot use its equitable powers to overturn the express statutory mandate of Congress, no matter how "unfair" the situation may appear, where the statute does not contemplate the use of the court's equitable authority. *Welzel v. Advocate Realty Investments, LLC (In re Welzel)*, 275 F. 3d 1308, 1318 (11th Cir. 2001)("The statutory language of the Bankruptcy Code should not be trumped by generalized equitable pronouncements, especially when Congress has been explicit when it intends for courts to exercise equitable discretion in the bankruptcy arena."). *See also Kepler v. Olson (In re Musurlian)*, 97 B.R. 985(Bankr. W.D. Wisc. 1989). Accordingly, even if the Defendant could prove at trial that the Debtor told the Defendant it was a critical vendor and the payments would be approved, this fact would not be relevant to the Trustee's right to recover the Payments from the Defendant.

¹ There is some debate as to whether a bankruptcy court can exercise jurisdictional powers through the All Writs Power Act 28 U.S. §1651 or if section 105 powers are in lieu of the powers conferred on judges through the All Writs Act. Even if this Court does have authority under the All Writs Act, it would not authorize this Court to overrule legislation on the basis of equity.

CONCLUSION

For the reasons stated herein, the Plaintiff's motion is granted, and the Defendant's cross-motion denied. This opinion shall constitute the Court's conclusions of law under Fed. R. Bankr. P. 7052. A separate Partial Summary Judgment shall be entered in accordance with Fed. R. Bankr. P. 9021.

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