IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE:	)	In Proceedings
	)	Under Chapter 7
WILLIAM A. WELLER and	)	
TAMARA KAY WELLER,	)	No. BK 88-40628
	)	
Debtor(s))		
	)	
CHARLES JONES, Trustee,	)	
	)	
Plaintiff,	)	
	)	
V.	)	ADVERSARY NO.
	)	88-0296
WILLIAM H. POE and IRENE POE,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Following trial on plaintiff's complaint to avoid preferential transfer on May 9, 1989, the Court found for plaintiff and against defendants and directed that a proposed written order be prepared awarding plaintiff the value of personal property and inventory received by defendants in the amount of $15,471. Both plaintiff and defendants filed motions for reconsideration of this ruling, and defendants subsequently amended their motion to have the case tried by a jury.

In their motion defendants note that this Court, sua sponte, struck defendants' jury demand on January 19, 1989. Trial was had on May 9, 1989, at which time the Court announced its findings and conclusions in open court. Defendants thereafter filed their proof of claim in debtors' bankruptcy proceeding on May 22, 1989.

On June 23, 1989, while the parties' motions for reconsideration were pending, the United States Supreme Court

issued its decision in Granfinanciera v. Nordberg, _____ U.S. _____, 1989 U.S. Lexis 3139 (June 23, 1989). In Granfinanciera, the Supreme Court held that the Seventh Amendment entitles a person who has not submitted a claim against a bankruptcy estate to a jury trial when sued by the bankruptcy trustee to recover monetary payments in a fraudulent transfer action. From the court's opinion, it is clear that the same rationale would apply to a preference action when such action is for recovery of monetary payments.

Defendants argue that the Granfinanciera decision requires that they now be allowed to have a jury trial of the trustee's preference action against them. In making this argument, defendants concede that the Court's denial of a jury trial was consistent with the weight of authority on the issue of the right to a jury trial in bankruptcy proceedings when the Court made its ruling in January 1989. Defendants argue, however, that the Granfinanciera decision should be given retroactive effect and that the Court's judgment in the preference action is void because of the failure to conduct a jury trial.

The Granfinanciera court did not indicate whether its decision was to be applied retroactively or prospectively only. In other cases in which the question of retroactivity has arisen, however, the Supreme Court has stated that a decision will be applied nonretroactively when it establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. See Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The Granfinanciera decision qualifies for such nonretroactive

application, as it was a ruling of first impression by the Supreme Court on the issue of the right to jury trial in cases under the Bankruptcy Code, an issue whose resolution had not been clearly foreshadowed and which had been subject to conflicting interpretations by lower courts.[1] The Court finds, therefore, that Granfinanciera should be applied nonretroactively to determine defendants' right to a jury trial at the present time.

In Granfinanciera, the court cited approvingly its decision of Katchen v. Landy, 382 U.S. 323, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966), in which it held that by submitting a claim against the bankruptcy estate, the creditor subjected himself to the court's equitable power to disallow that claim, even though the trustee's counterclaim--a preference action--was legal in nature and the Seventh Amendment would have entitled the creditor to a jury trial had he not tendered a claim against the estate. The court's opinion makes clear that once a creditor has filed a claim in a bankruptcy case, there is no right to jury trial in an action by the trustee against that creditor. As noted above, defendants in the instant case filed a claim in debtors' bankruptcy case on May 22, 1989, and under Granfinanciera, they no longer have a right to a jury trial in plaintiff's preference action.

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[1]Additional factors to be considered in making a determination of nonretroactive application--whether, in a specific case, retroactive application will further or retard the operation of the new rule and whether inequity will result from retroactive application (Chevron Oil Company v. Huson, 92 S.Ct. 349, 355)--are not as clearly evident in the instant case but arguably support nonretroactive application. The Granfinanciera decision was issued over a month after trial had been completed on plaintiff's complaint, and requiring another trial at this time would result in additional expense to the litigants as well as duplication of effort.

The Court, therefore, denies this portion of defendants' motion for reconsideration as moot.

Defendants additionally cite as error (1) the Court's ruling that the contract between debtors and defendants was unambiguous in its designation of certain enumerated items as personal property rather than fixtures, and (2) the Court's valuation of inventory found to be the subject of a preferential transfer from debtors to defendants. Plaintiff's objections likewise center on the question of valuation of the preference received by defendants.

The Court finds no merit in defendants' first contention that the contract language referring to fixtures was ambiguous and so should be disregarded in determining the nature of the items in controversy. What constitutes a fixture is primarily a question of intent. 19 Ill. L. & Prac. Fixtures, 3 (1956). In the instant case, the plain language of the contract refers to the items of "personal property" as separate from and in addition to "buildings, fixtures, and improvements." The contract is not made ambiguous by the later clause requiring the buyer to obtain insurance on "improvements, fixtures, equipment, and all other property being transferred hereunder," as this language is consistent with the clause conveying the described "personal property" in addition to fixtures. While defendants assert that the parties' testimony renders the contract language ambiguous, there is no need to look outside the contract to determine intent when the contract is unambiguous on its face. See 12A Ill. L. & Prac. Contracts, 232, at 25 (1983); Publishers Resource, Inc. v. Walker-Davis Publications,

Inc., 692 F.2d 1143, aff'd after remand, 762 F.2d 557 (1982).[2]

Pursuant to the Court's ruling that the designated items were personal property rather than fixtures, the Court found that defendants had received a preference as to the personal property in the amount of $6,450. Plaintiff objects to this valuation to the extent that it was based on the testimony of Mr. Kennedy rather than on testimony derived from tax depreciation schedules and insurance policies. It is the Court's observation, as stated at trial, that valuations from such sources are often inflated and lack credibility. The Court, accordingly, rejects plaintiff's argument and affirms its ruling on the valuation of the personal property.

The second issue raised by both plaintiff and defendants concerns the Court's valuation of the inventory found to have been transferred to defendants as a preference.[3] The Court, noting the lack of certainty in such valuation questions (see Matter of Prescott, 805 F.2d 719, 726 (7th Cir. 1986)), first determined the wholesale cost of goods and then reduced this amount to reflect a lesser value if the goods were sold at auction or in bulk. Plaintiff argues that the correct valuation is

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[2]Defendants further assert that the contract should not be interpreted literally so as to yield absurd results. This rule, however, is one of construction and is to be applied to ambiguous provisions only. UAW v. Sundstrand Corp., 650 F.Supp. 83 (N.D. Ill. 1986). The contract language in question is unambiguous and should not be disregarded as leading to absurd results.

[3]While defendants argue in passing that the contract, interpreted literally, does not show that the store's inventory was conveyed to defendants, the contract amendment executed in April 1988 contained an express reference to "inventory." The contract and its amendment are to be read together as constituting a single instrument where they are part of the same transaction. See 12A Ill. L. & Prac. Contracts, 235 (1983).

that placed on the inventory by debtor ($22,000), while defendants argue that the value found by the Court should be reduced further to reflect the amount that could have been purchased by defendants from a dealer in surplus inventory.

The Bankruptcy Code does not prescribe any particular method of valuation to be used in preference actions but leaves such questions to be determined by the court on a case by case basis. See Matter of Clark Pipe & Supply Co., 870 F. 2d 1022 (5th Cir. 1989); In re Ebbler Furniture and Appliances, Inc., 804 F.2d 87 (7th Cir. 1986). Courts valuing collateral in similar cases have used a wholesale cost of goods value (Ebbler Furniture; In re Paige, 13 B.R. 713 (Bankr. S. D. Ohio 1981)), as well as a percentage of wholesale value (cf. Matter of Clark Pipe & Supply: inventory valued at 40 percent of cost or "liquidation" value); In re Joe Flynn Rare Coins, Inc., 81 B.R. 1009 (Bankr. D. Kan. 1988): inventory valued at bulk wholesale or what inventory would be worth if sold in bulk to another dealer). The method of valuation used by the Court in the instant case is thus consistent with that employed in similar cases, and, as it is supported by the evidence at trial, the Court finds no reason to alter it.

Upon review of the transcript, however, the Court has become aware of a mathematical error in its valuation of the inventory that must be corrected. The wholesale value found by the Court should be $16,035 ($26,910 retail value minus $4,875 profit from July to October and $6,000 paid by defendant for increased inventory) rather than $15,035. The Court's ruling that the wholesale value is to be reduced by 30 percent yields the amount of $11,224.50 as the value of the inventory

received by defendants. When this amount is added to $6,450--the value of the personal property--the total amount of the judgment should be $17,674.50 rather than $15,471 as originally stated.

Except as amended herein, the Court's findings and conclusions of law orally made following trial shall be incorporated in this order, and the Court will enter judgment for plaintiff and against defendants in the amount of $17,674.50.

IT IS ORDERED that the parties' motions for reconsideration are DENIED and that judgment be entered against defendants in the amount of $17,674.50.

_____ /s/ Kenneth J. Meyers
U.S. BANKRUPTCY JUDGE

ENTERED: August 3, 1989