United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **Yvette Gonzales v. Food Marketing Group**
Case Number: **02-01173**
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Filer Information

Submitted By: James E Burke

Comments: Order Denying Defendant's Motion for Partial Reconsideration of the Court's Order Dated October 15, 2004

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURR'S SUPERMARKETS, INC.,
Debtor. No. 7-01-10779 SA

YVETTE GONZALES, TRUSTEE,
Plaintiff,
v. Adv. No. 02-1173 S

FOOD MARKETING GROUP,
Defendant.

ORDER DENYING DEFENDANT'S
MOTION FOR PARTIAL RECONSIDERATION
OF THE COURT'S ORDER DATED OCTOBER 15, 2004

This matter comes before the Court on Defendant's motion for partial reconsideration of the Court's order dated October 15, 2004, (docket #65)("Motion"), Plaintiff's objection thereto (docket #67) and Defendant's reply (docket #69). Defendant appears through its attorneys Togut, Segal & Segal LLP (Neil Burger and Richard Milan) and Linda S. Bloom, P.A. (Linda S. Bloom). Plaintiff appears through her attorney Davis & Pierce, P.C. (Chris W. Pierce). This is a core proceeding under 28 USC § 157 (b) (2) (F) and (O).

Defendant seeks reconsideration of the October 14, 2004 order only to the extent of the Court's denial of Defendant's cross motion for summary judgment dismissing Plaintiff's preference claim. Motion, p.2. The Motion states that the Court's memorandum opinion does not discuss the merits of the

Defendant's cross-motion for summary judgment. The court disagrees. The memorandum opinion contains a section entitled "FMG's Ordinary Course of Business Defense" starting at page 7. The memorandum points out that to succeed on the OCB defense, a creditor must satisfy all 3 conditions of § 547(c)(2). The memorandum specifically identifies a material question of fact presented by the pleadings. It then states "Given the opposing affidavits, and even though the Court is skeptical of Mr. Bullock's 'clarifying' affidavit, no summary judgment can issue for Plaintiff on the § 547(c)(2)(C) defense". Memorandum, pg. 9. This sentence obviously contains a typographical error, it should read "no summary judgment can issue for Defendant on the § 547(c)(2)(C) defense". However, even as it reads, if there is a fact question on § 547 (c)(2)(C) issues, summary judgment will not be appropriate for either party. In other words, the court found there was a material question of fact about what was the ordinary practice in the industry.[1]

In the Motion, at paragraph 11, Defendant states that it need only show that its payment terms were within the broad range of business practices and arrangements that constitute

[1] Because the Court affirms its original decision not to grant Defendant summary judgment on its §547(c)(2)(C) defense, it will also not consider Defendant's §547(c)(2)(B) defense.

"ordinary business terms", and that only aberrant business practice should not be considered. However, in the memorandum the Court found a fact question of what were "ordinary business terms". Without that fact established, the court cannot find that the facts of this case fit within a range of those ordinary business terms. Defendant implicitly admits this in the motion, paragraph 18. Defendant states that Plaintiff's position is that the terms of the industry are "cash on delivery", but their affidavit shows a competitor states its terms are "from cash on delivery to payment between 2 and 30 days." The Court's function at summary judgment is not to weigh the evidence. If Plaintiff is correct and "ordinary" is "cash on delivery", then the competitors practices are not ordinary.[2] There is a material question of fact.

CONCLUSION

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[2]In § 23 of the Motion, defendant states that no matter what evidence plaintiff may present, its own terms are within the industry range. That is not the test, however. Any creditors' terms by definition will be within the range of the industry because its terms are part of what makes up the industry. The test is whether those terms are within the range of ordinary terms.

The Court has reviewed its memorandum opinion, finds that there is a material question of fact and that Defendants motion for summary judgment cannot be granted.

IT IS ORDERED that Defendant's Motion for Partial Reconsideration is denied.

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on April 15, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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