



SO ORDERED.

SIGNED this 28 day of October, 2009.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

Opinion designated for on-line use but not for print publication

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:

**BRYAN K. MARSHALL and
JULIE M. MARSHALL,**

DEBTORS.

LINDA S. PARKS, Trustee,

PLAINTIFF,

v.

**FIA CARD SERVICES, N.A., successor
in interest to MBNA CORPORATION
and GE MONEY BANK/MONOGRAM
CREDIT CARD BANK OF GEORGIA,
D/B/A LOWE'S CREDIT CARD,**

DEFENDANTS.

**CASE NO. 05-18216
CHAPTER 7**

ADV. NO. 06-5181

**MEMORANDUM OPINION AND ORDER ON TRUSTEE'S REQUEST FOR
PREJUDGMENT AND POSTJUDGMENT INTEREST**

The matter before the Court is the Chapter 7 Trustee's position that she is entitled to

prejudgment and postjudgment interest on the \$38,000 payment that the Tenth Circuit Court of Appeals found to be a preferential transfer pursuant to 11 U.S.C. § 547(b). The plaintiff Chapter 7 Trustee, Linda S. Parks, appears by Gaye B. Tibbets of Hite, Fanning & Honeyman, L.L.P. The defendant FIA Card Services, N.A. (hereafter "FIA") appears by Lawrence G. Reinhold of Weinstein & Riley, P.S. FIA is the successor to MBNA Corporation, doing business as MBNA America (hereafter "MBNA"). There are no other appearances.

After carefully considering the memoranda submitted by the parties and conducting its own thorough research, the Court concludes that the Trustee is entitled to both prejudgment and postjudgment interest on the amount of the preferential transfer. Although there are no federal statutes dealing with the award of prejudgment interest and the award of such interest is said to be in the discretion of the Bankruptcy Court, the Court's research convinces it that the general rule is that interest is to be awarded in preference actions for recovery of a cash transfer where the amount of liability could have been determined without judicial intervention. "The discretion to award prejudgment interest is not 'authorization to decide who deserves the money more. Discretion must be exercised according to law, which means that prejudgment interest should be awarded unless there is a sound reason not to do so'"¹ "In bankruptcy proceedings, courts traditionally award prejudgment interest to a trustee who successfully avoids a preferential or fraudulent transfer from the time demand is made or an adversary proceeding is instituted, unless the contested amount was undetermined prior to the bankruptcy court's

¹ *Great Point Intermodal, LLC v. Norfolk Southern Corp (In re Great Point Intermodal, LLC)*, 334 B.R. 359, 363 (Bankr. E.D. Pa. 2005), quoting *Matter of Milwaukee Cheese Wisconsin, Inc.*, 112 F.3d 845, 849 (7th Cir. 1997).

judgment.”² “Prejudgment interest is awarded to compensate a debtor's estate for a creditor's use of those funds that were wrongfully withheld during the pendency of the suit, unless the award would otherwise be inequitable.”³ Delay in the entry of judgment is regarded as a reason to award prejudgment interest.⁴ “One of the risks of prolonged litigation is that the bankruptcy court may exercise its discretion to award prejudgment interest from the date of the trustee's initial demand for avoidance of the preference.”⁵

When opposing the award of prejudgment interest, MBNA argues that the Trustee waived her right to such recovery. The Court finds this argument unpersuasive. The following facts might support waiver. The Trustee’s complaint in this action pleaded for recovery of the funds alleged to have been preferentially transferred “plus interest at the judgment rate.”⁶ This prayer could reasonably be construed to seek an award of postjudgment interest but not prejudgment interest. There is no pretrial order, and prejudgment interest was not sought until after remand of this case from the Tenth Circuit Court of Appeals. Nevertheless, the Court cannot conclude that the Trustee waived the right to prejudgment interest. Bankruptcy Rule 7054 incorporates Federal Rule of Civil Procedure 54©, demand for judgment, which provides in part: “Except as

² *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 4 F.3d 1556, 1566 (10th Cir. 1993).

³ *Gonzales v. Conagra Grocery Prods. Co. (In re Furr's Supermarkets, Inc.)*, 373 B.R. 691, 709 (10th Cir. BAP 2007). The fact that the defendant litigated a defense in good faith is not considered such a circumstance. Although a few courts have held that a good faith defense mitigates against awarding prejudgment interest, that is not the majority approach. *Id.*, 373 B.R. at 709.

⁴ *Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 135 B.R. 659, 667-68 (Bankr. D. Colo. 1991), *aff'd* 161 B.R. 507 (D. Colo. 1992), *aff'd* 4 F.3d 1556 (10th Cir. 1993).

⁵ 4 Norton Bankruptcy Law & Practice 3d §66.41 (Thompson/West 2009).

⁶ Doc. 1.

to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Therefore no specific request for prejudgment interest is required and no waiver occurred based upon the timing of the Trustee's request.⁷

As stated above, prejudgment interest is generally awarded from the date of demand to the date of judgment. In this case, the Trustee made written demand to MBNA on December 22, 2005, and the judgment date will be the date that judgment is entered by this Court. Pursuant to 28 U.S.C. § 1961(a), the Trustee is also entitled to postjudgment interest from the date of the entry of judgment. Since the award of prejudgment interest is considered compensatory and is part of the judgment, the postjudgment interest shall be calculated based upon both the amount of the preferential transfer and the prejudgment interest on that amount.

The Trustee asserts that the prejudgment rate should be 10% per year, as specified by K.S.A. 16-201. The Court rejects this position. This case has no relation to Kansas law. The right to recover a preferential transfer is established by the Bankruptcy Code, and unlike some Trustee avoidance rights, such as avoidance of liens, bears no relation to state law. The applicable rate is therefore determined by 28 U.S.C. §1961, the federal interest statute.⁸ For the prepetition interest calculation, the rate is therefore the weekly average 1-year constant maturity Treasury yield as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding December 22, 2005.⁹ As to the postjudgment period, the rate shall be

⁷ *In re Great Point Intermodal, LLC*, 334 B.R. at 361.

⁸ *Id.*, 334 B.R. at 364 (applying 28 U.S.C. § 1961(b) rate to a preference judgment).

⁹ See www.federalreserve.gov/releases/h15.

similarly determined based upon the judgment date. Computations shall comply with 28 U.S.C. § 1961(b).

Counsel for the Trustee shall prepare a journal entry of judgment complying with this order.

IT ISO ORDERED.

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