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JUDGE: M. A. Mahoney

PARTIES: One to One Communications, Inc., Scott A. Egstad, American Telecom Network Communications, Inc., ATN Communications, Inc.

CHAPTER: 11

ATTORNEYS: T. A. Borowski, Jr., C. K. Stanard

DATE: 11/26/97

KEY WORDS:

PUBLISHED: No

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ONE TO ONE COMMUNICATIONS, INC.

Case No. 95-12383-MAM-11

Debtor.

SCOTT A. EGSTAD, Examiner for
ONE TO ONE COMMUNICATIONS, INC.

Plaintiff,

v.

Adv. No. 97-1226

AMERICAN TELECOM NETWORK
COMMUNICATIONS, INC. and
ATN COMMUNICATIONS, INC.

Defendants.

ORDER AWARDING JUDGMENT TO DEBTOR AGAINST DEFENDANTS

T. A. Borowski, Jr., Pensacola, FL, for Plaintiff
Chandler Kite Stanard, Mobile, AL, for Defendants

This case came before the Court for trial on November 18, 1997. Appearances were as noted in the record. The Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This case is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court concludes that judgment in the amount of \$22,035.06 should be awarded to the Debtor against the defendants, American Telecom Network Communications, Inc. ("ATNC") and ATN Communications, Inc. ("ATN Communications").

FACTS

One to One Communications, Inc. is a telecommunications industry company. Prior to its bankruptcy filing on July 13, 1995, and until August 1995, it offered long distance telephone service to customers through use of switches it used or owned and contracts with network providers such as MCI, Sprint, U.S. West and IXC. Even after August 1995, One to One offered service to some customers through use of Sprint network contracts of other entities. Its Harris switches were usable until an October 9, 1995 cutoff.¹ Today, One to One is a "switchless reseller" of telephone services. It garners groups of customers for whom it obtains actual service through another provider, and, as a middleman, obtains a profit from the difference between what it charges its customers and the rates the provider charges.

From August 1995 through November 1995, ATN International, Inc. had network long distance services under a contract with Sprint, which One to One utilized for One to One's own customers. Sprint billed ATN International for the service monthly.² The network service charges were incurred through customer use of certain 800 telephone numbers. ATN International allocated to One to One the cost of the 800 numbers which One to One customers used.

The usage had to be billed to individual One to One customers. The call detail records of ATN International were converted to a format that could be sent to a billing company and the calls sorted out by customer, e.g., One to One or ATN. ATN International call detail reports,

¹The Court is unclear exactly what services the switches performed after MCI terminated its service.

²As the facts stated reflect, ATN International contracted with Sprint. ATNC contracted with ZPDI. ATN Communications and One to One actually had the customers who generated the revenues. Why the contracts and responsibilities were fragmented was not explained.

after conversion, were sent to Zero Plus Dialing, Inc. ("ZPDI") for billing. ZPDI was a factoring company as well as a billing service. ZPDI provided advances (loans) of 70% of eligible customer receivables after receiving the billing records but before actual payment was received from the telephone customer. All of the revenues from the calls (One to One's and others), were transferred by ZPDI to ATNC.³ ATNC transferred the funds to ATN Communications.⁴ After actual payments were received from telephone customers, ATNC and ZPDI would "true up" the account. The additional 30% of receivables owed to ATNC would be paid, less any charged off items. Payments made by ZPDI to ATNC or vice versa were called "tail payments."

ATNC was formed in June 1995. ATN Communications is a subsidiary of ATNC. It was formed in August 1995. Although connected by business to One to One, the Defendants are not affiliates of One to One. They are not subsidiaries or parent entities of American Telecom Network, which is One to One's parent. Mr. Nicholas Elliott, a principal in American Telecom Network is (or was) also the Chief Executive Officer of ATNC and ATN Communications. The exact nature of ATNC and ATN Communications' overall business was never explained. American Telecom Network and its subsidiaries, including One to One, operated through a series of intercompany accounts receivable and payable. See opinion of July 21, 1997. Although not related entities, Mr. Elliott operated One to One and ATNC/ATN Communications in the same fashion—as if they were sister corporations.

ATNC received the funds from ZPDI because it had a contract with ZPDI and that was the only party ZPDI would pay. The money was then transferred to ATN Communications

³ATNC received the funds because it had the billing contract with ZPDI.

⁴ATN Communications had the funds transferred to it because part of the funds ATNC received were ATN Communications' funds.

which paid bills of One to One directly rather than transferring funds to One to One. Ms. DeVito testified that One to One "had an agreement" with ATN Communications to handle the funds in this matter. Mr. Elliott made decisions for both entities, so the decision was solely his.

From October 12, 1995 through November 22, 1995, ATNC received \$74,664.46 from ZPDI on One to One customer receivables. Those sums were transferred to ATN Communications.

ATN Communications paid the following items which it alleges were paid for One to One's benefit:

9/18/95	Sprint 800 Network Invoice	\$ 15,266.14
10/18/95	Sprint 800 Network Invoice	12,376.30
11/18/95	Sprint 800 Network Invoice	901.64
12/18/95	Sprint 800 Network Invoice	339.72
1/18/96	Sprint 800 Network Invoice	142.96
7/95	ITN Validation Charge	1,684.71
	Tail payment to ZPDI	2,774.78
	Tail payment to ZPDI	6,187.30
10/23/95	Hawley Terminal Rent (for Oct '95)	2,872.80
10/23/95	PM Realty Rent (for Sept '95)	3,598.00
2/9/96	Munger & Munger Legal Fees	7,692.25

ATN Communications credited \$411 to One to One's account for a commissions advance. Both parties agreed with this credit. The above items are the only ones ever paid for One to One by ATN Communications.

The ITN validation charges were incurred during the period 7/1/95 through 7/31/95. There was no breakdown as to which were incurred before or after 7/13/95. Ms. DeVito testified that ITN was not used for Sprint validation because Sprint services commenced August 1995.

The Hawley Terminal and PM Realty payments were rent for switches in San Francisco, CA and Phoenix, AZ, respectively. The Hawley rent was for October 1995; the PM Realty rent

was for September 1995. The switches' usage was terminated October 9, 1995. The checks replaced One to One checks for which there were insufficient funds.

The Munger & Munger legal fees were paid to One to One's initial Chapter 11 bankruptcy counsel. Munger & Munger's fee application was not finally approved until November 28, 1995. No amounts were to be paid to Munger until confirmation or further order of the Court. Ms. DeVito testified that One to One did not ask ATN Communications to pay the Munger bill, "but somebody had to pay it."

The Sprint 800 network charges were for the period of 8/18/95 through 11/17/96. Except for limited calls, the bills were for usage in August and September 1995. This time period corresponds roughly to the period during which the Harris switches were operational. Charges after October 18, 1995 were minimal. In order to generate customer receivables, One to One had to have network service.

LAW

The Debtor alleges that the \$74,664.46 was diverted from it to ATNC and this transfer is avoidable under 11 U.S.C. § 549(a). To the extent that the monies were transferred from ATNC to ATN Communications, One to One alleges that recovery of the transfer can be made from ATN Communications. 11 U.S.C. § 550. *Poonja v. Charles Schwab & Co. (In re Dominion Corp.)*, 199 B.R. 410 (Bankr. 9th Cir. 1996); *Martino v. First Nat'l Bank (In re Garofalo's Finer Foods, Inc.)*, 164 B.R. 955 (Bankr. N.D. Ill. 1994).

Section 549(a) of the Bankruptcy Code states:

Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate —

- (1) that occurs after the commencement of the case; and

- (2) (A) that is authorized only under section 303(f) or 542(c) of this title; or
- (B) that is not authorized under this title or by the court.

Sections 549(b) and (c) were not alleged to apply to this case and they do not. Section 549(a)(2)(A) also was not alleged to apply to this case and it does not. Therefore, the focus of the Court is upon 11 U.S.C. § 549(a)(1) and (a)(2)(B).

The statute states that the "trustee" may avoid a section 549 transfer. A debtor in a Chapter 11 case has all of the rights, powers, and duties of a trustee. 11 U.S.C. § 1107. In this case, on February 22, 1996, the Court appointed Scott Egstad as the examiner with expansive powers. He could exercise all of the powers of a trustee except that the Court left the CEO of One to One in place and directed the Examiner to consult with him about decisions in the case. Therefore, the Examiner had the authority to sue parties for avoidable transfers just as the debtor in possession could pursuant to 11 U.S.C. § 1107. *In re V. Savino Oil & Heating Co.*, 91 B.R. 655 (Bankr. E.D.N.Y. 1988).

A "transfer" of property is defined at 11 U.S.C. § 101(54) as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary of disposing of or parting with property." *Braunstein v. Branch Group (In re Massachusetts Gas & Elec. Light Supply Co., Inc.)*, 200 B.R. 471 (Bankr. D. Mass. 1996). The retention of customer receivables by ATNC was a "transfer" because it kept property of One to One out of the Debtor's hands. It utilized the funds to pay debts of One to One which the Court did not authorize. It may even have paid a debt of ATN with One to One's money.

Section 549(a) avoidability requires that two conditions be met: (1) the transfer occur postpetition; and (2) it not be authorized by the Bankruptcy Code or Court. The first condition is

met. All of the \$74,664.46 was received after July 13, 1995, the date of One to One's bankruptcy filing. *Braunstein, supra.*

The second condition requires more consideration. Were the transfers authorized by the Bankruptcy Code or Court? The Court concludes that they were not.

But for the transfer of One to One's funds initially to ATNC and then to ATN Communications, the \$74,664.46 would have been in One to One's hands. Section 550(a) of the Code states that the initial transferee of the \$74,664.46 may be held liable for the value (ATNC) as well as any "immediate . . . transferee . . . of such initial transferee" (ATN Communications). If either of the Defendants still held the funds, they could be returned to One to One. However, the funds were paid by ATN Communications on accounts the defendants allege were authorized by the Code or this Court. If the Court finds the funds were not so expended, then as transferees, even if not the ultimate transferees, they are liable for the funds.

Transactions may be authorized by court order; transactions may be authorized even without a court order, if they are "in the ordinary course of business." 11 U.S.C. § 363(b). This Court concludes that the proper test of "ordinariness" was set forth in *Martino v. First Nat'l Bank of Harvey (In re Garofalo's Finer Foods, Inc.)*, 186 B.R. 414 (N.D. Ill. 1995). Ordinary course, according to the *Garofalo* case, means that the transfers are ones routinely made by the debtor prior to Chapter 11 and creditor expectations would be that such transfers would continue.

The Court will examine the five different types of charges against the funds.

1. Sprint Network Charges - Prior to the bankruptcy filing of One to One, it incurred network charges. Sprint was one of its network carriers. One to One or ATN made the payments from One to One funds or intercompany accounts. When One to One's network

service was cut off by MCI, its main carrier, in August 1995, and it needed service, it then utilized service with Sprint under ATN International's name.

The Examiner alleges that the payment of Sprint was not ordinary because (1) the service was changed in August 1995 to run through ATN International, unlike prior network service; (2) ATN Communications had never paid One to One's bills before September 1995; and (3) the evidence did not establish that the charges are clearly allocable to One to One.

The service, although through a new entity, was like what One to One had utilized with MCI. In order to generate \$74,664.46 in revenue, One to One had to be using some network carrier and MCI had cut it off. The evidence was strong enough to support the Defendants' claim that network charges were incurred. The Sprint bills were broken down by 800 telephone numbers so that allocations were possible. The fact that the MIS Department did not know of the use of Sprint does not rebut the evidence that usage had occurred in order to generate fees. The payments were made monthly and routinely. They related to the relationship One to One had with ATNC and ATN Communications. The Court concludes the Sprint charges are ordinary course and not avoidable.

2. ITN Validation Charges - The ITN validation charges were incurred from 7/1/95 through 7/31/95. One to One filed its bankruptcy case on July 13, 1995. The Court cannot determine whether any of the \$1,684.71 in charges were incurred after July 13, 1995. Prepetition charges could not be paid prior to confirmation of a plan of reorganization without a court order. The defendants had the burden of proving that payment of the charges was appropriate. Therefore, since the burden was not met, the validation charges are avoidable transfers.

3. "Tail Payments" to ZPDI - One to One had used ZPDI as its billing company and factor prior to its bankruptcy. Prior to August 1995 it did not deal with ZPDI through ATNC's contract;⁵ however, the procedures used were similar. In general, therefore, tail payments were ordinary course reconciliation payments of One to One with ZPDI. The postpetition generated tail debits and credits would be routine and expected and ordinary. In this case, however, the Court notes that only one of the two tail payments was a payment on the HI or HS library codes under which One to One received postpetition advance payments from Sprint. The other code, "Q2," does not tie in to the One to One receivables advanced to ATNC. In fact, Exhibit 32 shows that the calls in question go back as far as 1994. Prepetition debt owed to ZPDI could not be paid prior to confirmation of a plan of reorganization without a court order. What amounts were related to prepetition payables and receivables was not presented in evidence. The burden of proof of the postpetition nature of the debt was on the defendants. The burden was not met. Therefore, the payment is avoidable.

4. Rent to Hawley Terminal and PM Realty - According to the evidence, the switches were cut off October 9, 1995. This would make payment of October 1995 rent on the switches inappropriate unless the value for the period was shown. At best, the amount should be prorated, but no proration was provided. Therefore, the Hawley Terminal rent was not proven to be a valid postpetition expense.

⁵According to the evidence, other One to One customer billings from MCI and Cherry Communications went to ZPDI. However, the evidence was not that those receivables were paid to ATNC. Therefore, the Sprint receivables are segregable.

The PM Realty rent was for September 1995 when the switches were still operational. However, the rent was paid on October 23, 1995 by ATN Communications because an earlier check of One to One was apparently unable to be paid.

As to both the PM Realty and Hawley Terminal checks, the payment by ATN Communications was hardly ordinary. In each case, the payment by ATN Communications was only made once—not monthly for August, September and October 1995. In each case, the payment was only made in this fashion due to an emergency. One to One had insufficient funds in its own account. Such payments are not routine or expected by creditors. The *Garofalo* standard has not been met. Creditors and the Bankruptcy Administrator would want to (and expect to) know if One to One had insufficient funds in its accounts to operate. This payment scheme would have required court approval.

5. Munger & Munger Legal Fees - No postpetition attorney's fees may be paid to Chapter 11 debtor's counsel until court approval of counsel's employment and court approval of the fees. After filing, an order was entered approving fees for Munger of \$39,000 and \$3,750.67 in costs. The order was entered on 11/28/95. The order stated:

2. Munger and Munger, P.L.C. is authorized to pay the \$15,000 presently held in its trust account toward the fees and costs and is required to credit the \$7,500 received from American Telecom Network, Inc. toward the fees and costs.

3. The remaining balance of \$20,250.67 of unpaid fees and costs will be paid at confirmation of a plan of reorganization or upon further order of the Court.

The fee application of Munger and Munger stated:

Additional payments have been received from American Telecom, Inc. ("ATN"), a parent corporation of Debtor. Those payments were to have totalled \$15,000.00 on August 11, 1995, Munger and Munger received payment of \$7,500 from ATN. On August 18, 1995, Munger and Munger received a second check in the amount of \$7,500 from ATN, which would have brought the total received

from ATN to the agreed \$15,000.00. However, a stop order was placed on this second \$7,500.00 check. After repeated demands upon ATN a replacement check in the amount of \$7,500.00 was sent to Munger and Munger, P.L.C. Again an order to stop payment was placed on this replacement check by ATN and Mr. Elliott, its President. An action for fraud against ATN and against Mr. Nicholas Elliott, President of ATN, is contemplated as a result of the stop payment orders by Mr. Elliott.

After that series of occurrences, One to One paid \$7,692.45 to Munger and Munger through ATN Communications. The check states it is for "Litigation on behalf of 1-2-1 Communications."

The amount matches no exact amount in any of Munger and Munger's fee application documents. The Munger firm knew it needed to request court approval of payments as the fee application evidences.

Based upon the court file and other evidence presented at the trial, the Court has no proof that the payment was according to a court order. In fact, it cannot be because no order allowing fees ever authorized payment.⁶

Even if the fees had been paid pursuant to court order, the payment was not "ordinary" because it was not routine for fees to be paid by ATN Communications for One to One. This was a single occurrence. Also, as Ms. DeVito testified, the transfer was not authorized by One to One but "somebody had to pay it." An unauthorized transfer is never ordinary or routine. *In re 222 Liberty Associates*, 110 B.R. 196 (Bankr. E.D. Pa. 1990); *In re Powers*, 93 B.R. 513 (Bankr. S.D. Tex. 1988).

⁶The Court strongly suspects that the payment was made to fulfill ATN's commitment to the Munger firm. Receipt of a check from an entity called "ATN Communications" would not alert the Munger firm that the funds were One to One's. Ms. DeVito stated, "somebody had to pay it," as if there was an outstanding bill which needed payment. The check also states it is for "Litigation on behalf of 1-2-1 Communications." It does not reference the Court approved billing.

CONCLUSION

The following transfers of One to One's funds were not authorized by the Bankruptcy Code or the Court and therefore the transfers may be recovered from ATNC or ATN Communications.

ITN Validation Charges	\$ 1,684.71
Hawley Terminal Rent	2,872.80
PM Realty Rent	3,598.00
Munger & Munger Fees	7,692.25
Tail Payment for Q2 Code	<u>6,187.30</u>
	\$ 22,035.06

THEREFORE, IT IS ORDERED AND ADJUDGED that One to One Communications, Inc. is awarded a judgment of \$22,035.06 against the defendants, American Telecom Network Communications, Inc. and ATN Communications, Inc.⁷

Dated: November 26, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE

⁷Only one recovery of the sum may be made from the Defendants, but it may be made from either or both of them.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ONE TO ONE COMMUNICATIONS, INC.

Case No. 95-12383-MAM-11

Debtor.

SCOTT A. EGSTAD, Examiner for
ONE TO ONE COMMUNICATIONS, INC.

Plaintiff,

v.

Adv. No. 97-1226

AMERICAN TELECOM NETWORK
COMMUNICATIONS, INC. and
ATN COMMUNICATIONS, INC.

Defendants.

JUDGMENT

Based upon the order awarding judgment to Debtor against Defendants,

IT IS ADJUDGED that Plaintiff, One to One Communications, Inc., is awarded a judgment in the amount of \$22,035.06 against American Telecom Network Communications, Inc. and ATN Communications, Inc., jointly and severally.

Dated: November 26, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE