United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re marchFirst, Inc.

Bankruptcy No. 01 B 24742

Adversary Caption: Andrew J. Maxwell, Trustee v. Penn Media

Adversary No. 03 A 1141

Date of Issuance: October 14, 2010

Judge: A. Benjamin Goldgar

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 7
	)	
marchFIRST, INC., *et al.*,	)	No. 01 B 24742
	)	(substantively consolidated)
Debtors.	)	
	)	
	)	
ANDREW J. MAXWELL, Trustee,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 03 A 1141
	)	
PENN MEDIA,	)	
	)	
Defendant.	)	Judge Goldgar

MEMORANDUM OPINION

This matter is before the court for ruling on the motion of Penn Media ("Penn") for summary judgment on the complaint of Andrew J. Maxwell ("Maxwell"), chapter 7 trustee of the estate of debtor marchFirst, Inc. ("marchFirst"). Penn contracted with marchFirst to place advertisements on behalf of a marchFirst client, National Child Support ("NCS"). For the advertisements, the client paid marchFirst more than $1 million in advance, and marchFirst likewise agreed to pay Penn in advance. Penn received $126,000 from marchFirst and placed $58,230 worth of advertisements before marchFirst filed bankruptcy.

Maxwell filed an adversary proceeding to recover $58,230 of the $126,000 as a preference and the remaining $67,770 as a fraudulent transfer. Penn has moved for summary judgment on both claims in Maxwell's complaint. For the reasons that follow, Penn's motion will be granted on the preference claim but denied on the fraudulent transfer claim.

1. Jurisdiction

The court has subject matter jurisdiction over the action against Penn pursuant to 28 U.S.C. § 1334(b) and the district court's Internal Operating Procedure 15(a). This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (F), and (H).

2. Background

a. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2) (made applicable by Fed. R. Bankr. P. 7056). On a motion for summary judgment, "[t]he court has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (internal quotation omitted). A genuine issue of material fact is present when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Summary judgment is the "put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005) (internal quotation omitted). When a defendant moves for summary judgment, consequently, his burden is merely "to point out problems plaintiff would face in proving its claims." *Wisconsin Compressed Air Corp. v. Gardner Denver, Inc.*, 571 F. Supp. 2d 992, 1000 (W.D. Wis. 2008) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)). The plaintiff must then come up with facts sufficient for the trier of fact to find in its favor. *Id.* Failing that, summary judgment will be

granted to the defendant. *See, e.g., Brummet v. Sinclair Broad. Group, Inc.*, 414 F.3d 686, 694 (7th Cir. 2005).

b. Summary Judgment Procedure

The bankruptcy court's local rules set out a procedure for summary judgment motions – a procedure identical to the district court's procedure – designed to simplify the determination of whether a material fact is in dispute. *See* L.R. 7056-1, 7056-2. The movant must submit a statement of facts consisting of short numbered paragraphs with citations to evidentiary material supporting each statement. L.R. 7056-1(B). The nonmovant must then respond to each statement, admitting or denying it, and including, "in the case of any disagreement," references to supporting evidentiary material. L.R. 7056-2(A)(2)(a). The opposing party may also submit a statement offering any additional facts, again with citations to supporting material. L.R. 7056-2(A)(2)(b).

Responding to a statement of facts should be straightforward. A respondent can admit facts, deny facts (with citations to evidence supporting the denial), or suggest in accordance with Rule 56(f) that for specified reasons facts essential to his opposition cannot be presented. *Fischer Inv. Inc. v. Cohen (In re Cohen)*, 334 B.R. 392, 396 n.3 (Bankr. N.D. Ill. 2005), *aff'd*, No. 06 C 3190, 2006 WL 4991323 (N.D. Ill. Aug. 7, 2006), *aff'd*, 507 F.3d 610 (7th Cir. 2007). There are no other options. Facts not denied are admitted. L.R. 7056-1(C), L.R. 7056-2(B). Facts a party says it lacks sufficient knowledge either to admit or deny are admitted. *Bank One, NA v. Knopfler (In re Holstein)*, Nos. 00 B 18138, 03 A 638, 2004 WL 26516, at *1 n.1 (Bankr. N.D. Ill. Jan. 5, 2004). Facts to which a party offers some coy or clever response that is neither a direct admission nor a denial are admitted. *See Cohen*, 334 B.R. at 396 n.3. Facts denied

without evidence to support the denial are admitted. *Holstein*, 2004 WL 26516, at *1 n.1.

Evidence offered either to support or deny factual statements, moreover, must be admissible. *Tindle v. Pulte Home Corp.*, 607 F.3d 494, 496 (7th Cir. 2010); 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2727 at 496-97 (3d ed. 1998). So, for example, copies of documents cannot simply be slapped on the back of a party's statement of facts or its response with an assertion in the body that the copies are "true and correct." An affidavit must be supplied, one that lays the necessary foundation for the documents' admission. *Article II Gun Shop, Inc. v. Gonzalez*, 441 F.3d 492, 495 (7th Cir. 2006); *Scott v. Edinburg*, 346 F.3d 752, 759 & 760 n.7 (7th Cir. 2003); Wright, Miller & Kane, *supra*, § 2722 at 382-84 ("To be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence.").

In this case, the parties' compliance with these requirements – particularly Maxwell's compliance – comes up more than a little short. Maxwell, for example, responds to Penn's facts in several instances by failing to admit or deny them. (*See, e.g.*, Pl. L.R. 7056-2 Resp. ¶¶ 5, 6, 12, 18). In other instances, he ignores the facts asserted, neither admitting nor denying them, and instead tries to admit other facts more to his liking. (*See, e.g., id.* ¶¶ 10, 14). Each of the statements of fact to which Maxwell responds in this fashion will be deemed admitted. *See* L.R. 7056-2(B).

More important, in every instance but one Maxwell supports his denials with documents he simply attaches to his response. Sometimes he asserts these to be "true and correct" copies of the originals, sometimes not. But in no instance does he provide an affidavit containing the foundational information necessary to render the documents admissible. (*See* P. L.R. 7056-2

Resp. ¶¶ 11, 13-14, 16, 20).[1/] Maxwell likewise supports his statement of additional facts largely with documents for which he provides no foundation. (Pl. Stmt. of Add'l Facts ¶¶ 21-22, 27-31, 33-36). Penn understandably objects to several of these documents for lack of foundation. (*See* Def. Resp. to Pl. Stmt. of Add'l Facts ¶¶ 21-22, 29, 31, 33-36). Penn's objections are sustained. The facts in Penn's statement that Maxwell denies without the support of admissible evidence will be deemed admitted. The additional facts Maxwell offers without the support of admissible evidence will not be considered.[2/]

Of course, Penn itself is not entirely without sin in the summary judgment department. Like Maxwell, Penn responds to statements of fact by asserting it can neither admit nor deny them and then claiming they have been denied. (*See* Def. Resp. to Pl. Stmt. of Add'l Facts ¶ 21, 32-35). Some of the facts in Penn's supporting affidavits, and one of the attached documents, could also have stood a good bit more foundation to establish their admissibility.

But Penn's transgressions have no effect here. The statements of fact to which Penn has responded impermissibly will not be deemed admitted because Penn's objections to the evidence supporting those facts have been sustained. As for deficiencies in Penn's supporting materials, Maxwell has not objected to any of the affidavits or exhibits Penn offers. On summary

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[1/] With no affidavit providing the foundation for a hearsay exception, most of the documents are also inadmissible as hearsay. (*See* P. L.R. 7056-2 Resp. ¶¶ 11, 13, 14, 15, 16, 20).

[2/] One foundational objection from Penn will be overruled. Maxwell asserts that NCS does business as Innovative Collection Concepts, Inc. and in support he offers a screen shot from the web site of the Ohio Secretary of State. (Def. Resp. to Pl. Stmt. of Add'l Facts ¶ 32). The court can take judicial notice of information compiled on an official government web site. *See Denius v. Dunlap,* 330 F.3d 919, 926 (7th Cir. 2003). As Penn also notes, however, NCS's business name does not appear to be relevant to the issues here, especially given Penn's successful foundational objection to other documents concerning Innovative Collection Concepts, Inc. The relevance objection will be sustained.

judgment, as at trial, evidence will be admitted in the absence of objection. Fed. R. Evid. 103(a)(1); *see, e.g., Felton v. Teel Plastics, Inc.*, No. 09-cv-180-bbc, 2010 WL 3396805, at *5 (W.D. Wis. Aug. 26, 2010); *Hudgens v. Wexler & Wexler*, 391 F. Supp. 2d 634, 637 (N.D. Ill. 2005).

c. Facts

Once the procedural and evidentiary dust has settled, the following undisputed material facts remain.

In 2000 and 2001, marchFirst was in the business of providing technical services in the intellectual technology services industry. (Pl. L.R. 7056-2 Resp. ¶ 10). As part of its business, marchFirst provided advertising agency services to some of its clients. (*Id.*).

The advertising business of marchFirst was conducted on a prepayment basis. (*Id.* ¶ 11). That is, marchFirst would contract with a customer and would have the customer prepay for all advertising marchFirst would procure on the customer's behalf. (*Id.*). MarchFirst required its customers to prepay for media buys as a condition of providing advertising agency services because the entities that ran the advertising would not do so unless they, too, were prepaid. (*Id.*).

One of the customers with which marchFirst contracted to provide advertising services was NCS. (*Id.* ¶¶ 10, 12). In October 2000, NCS commissioned marchFirst to provide it with a marketing campaign for the national launch of its web site, NationalChildSupport.com. (*Id.* ¶ 12). To this end, NCS paid marchFirst a sum in excess of $1 million for the purchase of media buys from these third parties. (*Id.* ¶ 13). MarchFirst, in turn, agreed to obtain, and did in fact obtain, marketing and advertising services from various third parties on NCS's behalf. (*Id.*). The parties disagree on whether the NCS funds were "deposited" with marchFirst for this

purpose (*id.*) or whether they were deposited into marchFirst's operating accounts for general use (*id.* ¶ 16). But there is no question the funds were deposited before marchFirst obtained any advertising for NCS.

On December 26, 2000, marchFirst authorized an "insertion order proposal" with Penn, a digital media company that maintains its own media assets and contracts to place advertisements in the media assets of other companies. (*Id.* ¶¶ 6, 14). Under the insertion order proposal, Penn would place advertisements on behalf of NCS. (Def. L.R. 7056-1 Stmt., Ex. 3, ¶ 7). In accordance with industry practice, however, Penn would not provide any advertising services under the insertion order proposal unless those services were prepaid. (Pl. L.R. 7056-2 Resp. ¶ 15). The prepayment requirement was also consistent with the insertion order proposal itself. (*Id.*). The insertion order proposal – executed by a marchFirst account manager – set forth a weekly schedule for the insertion of advertising beginning January 2, 2001, listed the $12,940 cost associated with each week's insertions, and called for "[p]repayment in full by 12/31/00." (Def. L.R. 7056-1 Stmt., Ex. A to Ex. 3). The total amount to be prepaid was $163,220 ($168,220 minus a $5,000 credit the parties have not explained). (*Id.*).

For reasons the record does not disclose, marchFirst did not make the prepayment by the December 31 date. (*See* Pl. L.R. 7056-2 Resp. ¶ 17; Def. L.R. 7056-1 Stmt., Ex. 3, ¶ 9). MarchFirst at last began making payments to Penn on February 8, 2001, sending three $42,000 checks to Penn dated February 8, February 14, and March 9. (Pl. L.R. 7056-2 Resp. ¶ 17; *see also* Def. L.R. 7056-1(C) Resp. to Pl. Stmt. of Add'l Facts ¶ 27).

On receipt of the first payment, Penn began providing advertising services on NCS's behalf (Pl. L.R. 7056-2 Resp. ¶ 18), placing advertisements on February 14, February 21, February 28, and March 7, 2001 (*see* Def. L.R. 7056-1 Stmt., Ex. B. to Ex. 3). On May 3, 2001,

marchFirst executed a second insertion order proposal with Penn containing a revised schedule for advertising insertions. (*Id.*). The second insertion order proposal reflected the $126,000 marchFirst had prepaid and the advertising insertions Penn had made for NCS after receiving the payments. (*Id.*). At no time did Penn provide any services for which marchFirst had not prepaid Penn. (Pl. L.R. 7056-2 Resp. ¶ 20).

Meanwhile, on April 12, 2001, marchFirst and its subsidiaries and affiliates had filed petitions for relief under chapter 11. (*Id.* ¶ 1).[3/] The cases were converted to chapter 7 on April 26, 2001, and Maxwell was appointed trustee. (*Id.* ¶¶ 2, 4).

In 2003, Maxwell filed this adversary proceeding against Penn to recover the $126,000 marchFirst transferred to Penn. Maxwell's amended complaint has two counts. Count I is a claim to recover as a preference under section 547(b) of the Bankruptcy Code the $58,230 paid to Penn for the cost of advertising insertions actually made.[4/] Count II is a claim to recover as a fraudulent transfer under section 548(a)(1)(B) of the Code the $67,770 paid to Penn for advertising insertions never made.[5/] Penn answered the complaint and asserted affirmative defenses. Penn now moves for summary judgment on both counts.

[3/] The second insertion order proposal was executed in May 2001, after the bankruptcy had been filed. The marchFirst account manager who executed the second insertion order proposal claims to have been unaware of the bankruptcy. (*See* Def. L.R. 7056-1 Stmt., Ex. 4, ¶ 16).

[4/] The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") amended section 547 in several respects. Because the events relevant to this adversary proceeding all occurred before 2005, the pre-BAPCPA version of section 547 applies.

[5/] These dollar figures, $58,230 and $67,770, are slightly different from the amounts Maxwell requests in Counts I and II. The record on summary judgment supports these figures rather than the figures in the complaint.

3. Discussion

Penn's motion will be granted on Count I. As Penn correctly argues, the undisputed facts show that Maxwell cannot prove a critical element of his claim. No such problems attend Count II, however, and Penn's motion on that count will be denied.

a. Preference Claim

Penn is entitled to summary judgment on the preference claim in Count I. Section 547(b) allows a trustee to avoid a transfer of the debtor's property to a creditor if the transfer took place shortly before the bankruptcy and enabled the creditor to receive more than he would have received in the bankruptcy itself. 11 U.S.C. § 547(b); *Warsco v. Preferred Technical Group*, 258 F.3d 557, 563-64 (7th Cir. 2001); *In re Superior Toy & Mfg. Co.*, 78 F.3d 1169, 1171 (7th Cir. 1996). Section 547(b) furthers the central bankruptcy policy of equality of distribution: that "creditors of equal priority should receive pro rata shares of the debtor's property." *Begier v. I.R.S.*, 496 U.S. 53, 58 (1990). By preventing the debtor from favoring certain creditors over others, it also reduces "'the incentive to rush to dismember a financially unstable debtor.'" *Warsco*, 258 F.3d at 564 (quoting *In re Smith*, 966 F.2d 1527, 1535 (7th Cir. 1992)).

For a transfer to be preferential, it must have been a transfer of "an interest of the debtor in property." 11 U.S.C. § 547(b); *see Warsco*, 258 F.3d at 564. In addition, the transfer (1) must have been made to or for the benefit of a creditor; (2) must have been made for or on account of an antecedent debt; (3) must have been made while the debtor was insolvent; (4) must have been made on or within 90 days before the petition date (unless the creditor was an insider of the debtor); and (5) must have allowed the creditor to receive more than he otherwise would have received if the case were a case under chapter 7 and the transfer had not been made. 11 U.S.C. §

547(b); *see Warsco*, 258 F.3d at 564; *Superior Toy*, 78 F.3d at 1171; *Brown v. Job (In re Polo Builders, Inc.)*, 433 B.R. 700, 711 (Bankr. N.D. Ill. 2010). The trustee has the burden of proving each of these elements. *Warsco*, 258 F.3d at 564.

In this case, Penn argues that Maxwell cannot prove two of the necessary elements. First, Penn asserts there is no evidence that what was transferred constituted an "interest of the debtor in property." On the contrary, Penn says, the payments it received consisted, not of marchFirst funds, but of NCS funds given to marchFirst to pay for advertising Penn would place. Second, Penn asserts the payments it received were not made "for or on account of an antecedent debt." That is so, Penn contends, because the payments were prepayments, made before any services were rendered and so before any debt was incurred.

i. "An Interest of the Debtor in Property"

Penn is not entitled to summary judgment on the basis of its "interest of the debtor in property" argument. The sparse record at this stage of the case suggests that the payments were made with marchFirst's funds, not funds of NCS.

The phrase "an interest of the debtor in property" in section 547(b) means property that would have been "property of the estate" had it not been transferred. *Begier*, 496 U.S. at 58-59. Under section 541(a)(1), property of the estate encompasses "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). What constitutes property of the estate is a question of federal law, but state law determines whether a debtor has an interest in property in the first place. *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992); *Butner v. United States*, 440 U.S. 48, 54-55 (1979).

Illinois law recognizes the common law presumption that a party in possession of

personal property is the owner. *See Kondik v. Ebner (In re Standard Foundry Prods., Inc.)*, 208 B.R. 164, 167 (Bankr. N.D. Ill. 1997); *Almar Commc'ns, Ltd. v. Telesphere Commc'ns, Inc. (In re Telesphere Commc'ns, Inc.)*, 167 B.R. 495, 502 (Bankr. N.D. Ill. 1994), *rev'd on other grounds*, 205 B.R. 535 (N.D. Ill. 1997); *People v. Poindexter*, 18 Ill. App. 3d 436, 440, 305 N.E.2d 400, 403 (1st Dist. 1973). The presumption extends to money. *Telesphere*, 167 B.R. at 502. In this case, the evidence indisputably shows that marchFirst made the transfers to Penn and so had possession of the funds used to make the transfers before the transfers were made. The funds are therefore presumed to have belonged to marchFirst, not NCS.

The presumption of ownership can, of course, be overcome with proof that someone else is really the owner, *Standard Foundry Prods.*, 208 B.R. at 167; *Poindexter*, 18 Ill. App. 3d at 440, 305 N.E.2d at 403, and Penn tries to rebut the presumption by showing that marchFirst received the funds from NCS and held them only as NCS's agent. In Illinois, "agents generally do not own property transferred into their possession by or for the benefit of a principal." *Telesphere*, 167 B.R. at 502; *see also Greenfield Direct Response, Inc. v. Adco List Mgmt. (In re Greenfield Direct Response, Inc.)*, 171 B.R. 848, 857 (Bankr. N.D. Ill. 1994). An agent who takes possession of money on behalf of his principal does not become the owner. *Greenfield*, 171 B.R. at 857; *Telesphere*, 167 B.R. at 502. Proof of an agency relationship can therefore overcome the presumption of ownership by possession. *Telesphere*, 167 B.R. at 502.

But the burden of establishing an agency relationship rests with the party claiming it – in this case, Penn. *Id.*; *Doe v. Brouillette*, 389 Ill. App. 3d 595, 608, 906 N.E.2d 105, 118 (1st Dist. 2009). In Illinois, parties have an agency relationship "when the principal has the right to control the manner in which the agent performs his work and the agent has the ability to subject the principal to personal liability." *Santana v. State Bd. of Elections*, 371 Ill. App. 3d 1044,

1054-55, 864 N.E.2d 944, 952 (1st Dist. 2007); *Amigo's Inn, Inc. v. License Appeal Comm'n*, 354 Ill. App. 3d 959, 965, 822 N.E.2d 107, 113 (1st Dist. 2004). Whether an agency relationship exists is a question of fact. *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill. App. 3d 17, 32, 826 N.E.2d 1111, 1125 (1st Dist. 2005).

Penn has not met its burden of showing that marchFirst held the funds as NCS's agent. In support of its motion, Penn offers no description of the terms of the NCS-marchFirst arrangement, let alone an actual contract. Penn supplies only a short "status report" from October 5, 2000, stating that marchFirst had been "commissioned" to provide a "marketing campaign" for NCS's web site and describing (in about 12 lines of text) the scope of the work. (Def. L.R. 7056-1 Stmt., Ex. A to Ex. 4). The "status report" does not show either that NCS had the right to control marchFirst's work or that marchFirst had the ability to subject NCS to liability. Penn's statement of facts does assert that marchFirst acted as NCS's "agent" (*see id.* ¶ 13), as do Penn's supporting affidavits (*see id.*, Ex. 3, ¶¶ 6-7, 12; Ex. 4, ¶¶ 10-11). But the assertion of "agency" is a legal conclusion. *Caterpillar, Inc. v. Usinor Industeel*, 393 F. Supp. 2d 659, 670 (N.D. Ill. 2005). Although Maxwell has admitted virtually all of Penn's facts, he has not admitted its legal conclusions. *See Maksym v. Loesch*, 937 F.2d 1237, 1242-43 (7th Cir. 1991).

Penn also tries to rebut the presumption of marchFirst's ownership on the ground that marchFirst held the funds as a "bailee." As with the agency question, Illinois law governs whether the marchFirst-NCS relationship was a bailment. *Barnhill*, 503 U.S. at 398; *Butner v. United States*, 440 U.S. at 54-55. In Illinois, a bailment is "the delivery of property for some purpose upon a contract, express or implied, that after the purpose has been fulfilled, the property shall be redelivered to the bailor, or otherwise dealt with according to his directions, or

kept until he reclaims it." *American Ambassador Cas. Co. v. Jackson*, 295 Ill. App. 3d 485, 490, 692 N.E.2d 717, 721 (1st Dist. 1998) (internal quotation omitted). To establish a bailment, a party must show an express or implied agreement to create a bailment, delivery of the property in good condition, and acceptance of the property by the bailee. *Id.*; *see also Indemnity Ins. Co. v. Hanjin Shipping Co.*, 348 F.3d 628, 637 (7th Cir. 2003); 4A Illinois Law and Practice *Bailments* §§ 1, 6 (2007).

Penn has not established that marchFirst was NCS's bailee. There is some question about whether there can even be a bailment of money.[6/] But assuming there can, the record contains no express agreement between marchFirst and NCS – neither an actual contract nor a description of contractual terms – showing that marchFirst was obligated to segregate the NCS funds for use in the marketing campaign. And there is a question of fact as to whether there was an implied agreement. Penn submits an affidavit stating that NCS "deposited" the funds with marchFirst and marchFirst "held" them to pay for advertising on NCS's behalf. (*See* Def. L.R. 7056-1 Stmt. ¶¶ 13, 17). Maxwell responds with his own affidavit in which he asserts that marchFirst deposited the funds into its general operating accounts, as it did all funds received from customers. (*See* Pl. L.R. 7056-2 Resp. ¶ 16). Assuming again that money can be bailed,

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[6/] Penn relies heavily on *Lyon v. Contech Const. Prods., Inc. (In re Computrex, Inc.)*, 403 F.3d 807 (6th Cir. 2005), but the court in that case applied Kentucky law. Penn cites no decision from an Illinois state court directly addressing the bailment-of-money question, and there appears to be none. A number of Illinois decisions involving banks say that a customer's "special deposit" – the deposit of a specific sum of money to be returned intact on demand – creates a bailment. *See, e.g., Pope v. First of Am., N.A.*, 298 Ill. App. 3d 565, 569, 699 N.E.2d 178, 180 (3d Dist. 1998); *First Nat'l Bank of Blue Island v. Estate of Philp*, 106 Ill. App. 3d 360, 362, 436 N.E.2d 15, 16-17 (1st Dist. 1982); *Mid-City Nat'l Bank of Chi. v. Mar Bldg. Corp.*, 33 Ill. App. 3d 1083, 1089-90, 339 N.E.2d 497, 503 (1st Dist. 1975). In *L.P. Maun, M.D., Ltd. v. Salyapongse*, 105 B.R. 464, 469 (S.D. Ill. 1989), on the other hand, the court expressly held that under Illinois law there can be a bailment only of "goods," not of money.

commingling of the bailed funds with other funds will negate a bailment – at least in the absence of a direction to segregate the funds, for which there is no evidence here. *See Otis v. Gross*, 96 Ill. 612, 616 (1880); *Durkee v. Franklin Sav. Ass'n*, 17 Ill. App. 3d 978, 984, 309 N.E.2d 118, 122 (2d Dist. 1974).

Because the record raises a presumption that marchFirst owned the transferred funds and Penn has failed to rebut that presumption, summary judgment cannot be granted to Penn on the ground that the funds did not represent an "interest of the debtor in property."

ii. "For or on Account of an Antecedent Debt"

Penn fares better with its contention that Maxwell cannot prove the transfers were "for or on account of an antecedent debt." Penn has demonstrated the payments were prepayments, and Maxwell supplies no evidence to the contrary.

The Bankruptcy Code does not define the term "antecedent debt" as such. But "debt" is defined as "liability on a claim," 11 U.S.C. § 101(12), and "claim" means any "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). "Antecedent," in turn, is generally defined as "existing or occurring before in time or order often with consequential effects." *Webster's Third New International Dictionary* 91 (1981); *see also American Heritage Dictionary* 77 (3d ed. 1996) (defining "antecedent" as "[g]oing before; preceding.").

A debt is "antecedent" for purposes of section 547(b), then, "if it was incurred before the allegedly preferential transfer." *Peltz v. Edward C. Vancil, Inc. (In re Bridge Info. Sys., Inc.)*, 474 F.3d 1063, 1066-67 (8th Cir. 2007) (internal quotation omitted); 5 *Collier on Bankruptcy* ¶

547.03[4] at 547-33 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) (noting that "the debt must have preceded the transfer"). And a debt is incurred when the debtor becomes legally obligated to pay. *Bridge Info. Sys.*, 474 F.3d at 1067; *Southmark Corp. v. Marley (In re Southmark Corp.)*, 62 F.3d 104, 106 (5th Cir. 1995); *Sullivan v. Willock (In re Wey)*, 854 F.2d 196, 200 (7th Cir. 1988); *Peltz v. New Age Consulting Servs., Inc.*, 279 B.R. 99, 102 (Bankr. D. Del. 2002). The question of antecedence, in other words, is "purely a matter of timing." *Minchella v. Beaver (In re Beaver)*, Nos. 88 B 2075, 88 A 599, 1989 WL 85384, at *3 (Bankr. N.D. Ill. July 29, 1989).

There was no antecedent debt here. The undisputed facts show that all of marchFirst's transfers to Penn were prepayments, made before any services were rendered. The original insertion order proposal called for "[p]repayment in full by 12/31/00" and contained a schedule calling for placement of advertising only after payment had been made. (Def. L.R. 7056-1 Stmt., Ex. A to Ex. 3). When marchFirst failed to pay by the December 31 due date, Penn placed no advertisements. In February 2001, marchFirst began making payments to Penn, and only after receiving the payments did Penn begin placing advertisements.[7/] (*Id.*, Ex. B to Ex. 3; Ex. 4, ¶¶ 13-14). The parties subsequently executed a new insertion order proposal reflecting the "[p]ayment [a]mount [r]eceived ($126,000)" and providing for placement of advertising in only that amount, no more. (*Id.*, Ex. B to Ex. 3).

[7/] The timing of the specific payments and the advertising placements shows that all the payments were made before, not after, the advertising was placed. On February 8, 2001, marchFirst sent Penn $42,000. (Pl. L.R. 7056-2 Resp. ¶ 17). On February 14 and February 21, 2001, Penn placed advertisements with a total cost of $25,880. (Def. L.R. 7056-1 Stmt., Ex. B to Ex. 3). On February 14, 2001, marchFirst sent Penn another $42,000. (Pl. L.R. 7056-2 Resp. ¶ 17). On February 28 and March 7, 2001, Penn placed advertisements with a total cost of $32,350. (Def. L.R. 7056-1 Stmt., Ex. B to Ex. 3). At no time did the advertising placements precede payment.

Advance payments like those here are not payments "for or on account of an antecedent debt," at least when there is no contractual obligation to make them. *See Hechinger Inv. Co. of Del. v. Universal Forest Prods., Inc. (In re Hechinger Inv. Co. of Del.)*, Nos. 99-02261 (PJW), 01-3170 (PBL), 2004 WL 3113718, at *2 (Bankr. D. Del. Dec. 14, 2004) ("It is well established that advance payments are prima facie not preferences because the transfer from the debtor to the creditor is not for or on account of an antecedent debt."); *see, e.g., Charys Liquidating Trust v. Hades Advisors, LLC (In re Charys Holding Co.)*, Nos. 08-10289, 10-50211, 2010 WL 2788152, at *5 n.3 (Bankr. D. Del. July 14, 2010); *In re Middendorf*, 381 B.R. 774, 777 (Bankr. D. Kan. 2008); *Ledford v. Fort Hamilton Hughes Mem. Hosp. Ctr. (In re Mobley)*, 15 B.R. 573, 575 (Bankr. S.D. Ohio 1981). The evidence here does not show that marchFirst had any obligation to make payments to Penn, only that Penn would not place advertisements without first receiving payment.

Because none of the transfers from marchFirst to Penn was "for or on account of an antecedent debt" as section 547(b) requires, Penn's motion for summary judgment on Count I will be granted.[8/]

[8/] Because Penn has shown that Maxwell cannot prove a critical element of his preference claim, Penn's "ordinary course of business" defense need not be addressed. *See* 11 U.S.C. § 547(c)(2). Nevertheless, it may be worth noting that the defense is not particularly strong. The transaction between Penn and marchFirst was a one-shot deal; the companies had never before done business together. Although a history of dealing is not "absolutely necessary in every case," the Seventh Circuit has approved an "ordinary course" defense with isolated or one-time transactions only when adherence to the parties' agreement shows the transaction was ordinary as between them. *Kleven v. Household Bank, F.S.B.*, 334 F.3d 638, 643 (7th Cir. 2003) (stating that in some first-time transactions, "the ordinary course of business may be established by the terms of the parties' agreement, until that agreement is somehow or other modified by actual performance"). Here, the parties modified their agreement when marchFirst failed to comply with it. Moreover, the noncompliance consisted of late payments, and late payments are presumptively not ordinary, at least when the parties have no practice of allowing them. *In re Xonics Imaging, Inc.*, 837 F.2d 763, 767 (7th Cir. 1988); *see, e.g., Barber v. Murphy (In re*

b. Fraudulent Transfer Claim

On the other hand, Penn is not entitled to summary judgment on the fraudulent transfer claim in Count II.

Penn's argument for summary judgment on the fraudulent transfer claim is the same as its first argument on the preference claim: section 548, like section 547, applies only to the transfer of "an interest of the debtor in property," *see* 11 U.S.C. § 548(a)(1); *see also Golden v. The Guardian (In re Lenox Healthcare, Inc.)*, 343 B.R. 96, 100 (Bankr. D. Del. 2006) (noting that an exercise of avoidance powers, whether under sections 547, 548, or 549 requires "a transfer of property of the estate"), and there was no such transfer in this case because marchFirst made the payments to Penn with NCS funds it was holding as agent or bailee. As discussed above, however, the record on summary judgment presumptively shows marchFirst was the owner of the funds it transferred to Penn because marchFirst was in possession of them. Penn supplies no evidence of an agency relationship between NCS and marchFirst, and issues of fact preclude the conclusion there was a bailment.

Penn also argues that Maxwell cannot prove marchFirst received less than "reasonably equivalent value" for the transfers. *See* 11 U.S.C. § 548(a)(1)(B)(i). The record, however, suggests that marchFirst received nothing at all for most of the transfers in question – the $67,770 portion of the $126,000 marchFirst paid. There is no substantial evidence that Penn placed any advertisements after the final "insertions" on March 7, 2001, as reflected in the

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Patriot Seeds Inc.), Nos. 03-84217, 03-8290, 04-8206, 04-8363, 04-8373, 04-8375, 2010 WL 381620, at *15 (Bankr. C.D. Ill. Jan. 20, 2010) (finding the *Kleven* exception inapplicable where payments in a first-time transaction "were not made within the terms of the parties' contracts").

second insertion order proposal. (*See* Def. L.R. 7056-1 Stmt., Ex. B to Ex. 3).[9/] To receive nothing in exchange for something is to receive less than reasonably equivalent value. Peter A. Alces, *Law of Fraudulent Transactions* § 5:63 at 5-104 n.16 (2006); *see, e.g., Crews v. Wright (In re Medlock)*, 272 B.R. 360, 363 (Bankr. M.D. Fla. 2001). What Penn really means in contending that Maxwell cannot prove less than reasonably equivalent value is that the analysis "is simply inapplicable" – because the transfers, again, were made with NCS funds. (Penn Mem. at 12). But Penn has not rebutted the common law presumption to the contrary. Penn will have an opportunity to do so at trial.

Because the record reflects transfers of "an interest of the debtor in property" and Penn has failed to show otherwise, Penn's motion for summary judgment on Count II will be denied.

4. Conclusion

For these reasons, the motion of defendant Penn Media for summary judgment on the adversary complaint of plaintiff Andrew J. Maxwell, trustee, is granted in part and denied in part. On Count I of the complaint, the motion is granted. On Count II of the complaint, the motion is denied. A separate order will be entered in accordance with this opinion.

Dated: October 14, 2010

A. Benjamin Goldgar
United States Bankruptcy Judge

[9/] One of Penn's supporting affidavits does state that Penn continued to perform services under the second insertion order proposal "until approximately the end of May 2001 at which time the campaign was stopped." (*See id.*, Ex. 4, ¶ 18). But Penn offers no corroboration for the statement. And even if true, it would account only for another $25,880 (*see id.*, Ex. B to Ex. 3), leaving $41,820 paid to Penn for which marchFirst received nothing in return.