IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE GREAT POINT INTERMODAL, LLC	:	
Debtor.	:	
NORFOLK SOUTHERN CORPORATION, AND NORFOLK SOUTHERN RAILWAY COMPANY,	:	**CIVIL ACTION**
Appellants	:	
v.	:	**NO. 04-2743**
GREAT POINT INTERMODAL, LLC,	:	
Appellee	:	

MEMORANDUM

Diamond, J. **December 27, 2004**

At issue in this appeal is whether the Bankruptcy Court correctly determined that Debtor's payment of over $83,000 to Appellants three days before Debtor's bankruptcy filing is an avoidable preference. I agree with the Bankruptcy Court's determination that Appellants must repay the money. I remand so that the Bankruptcy Court may address Debtor's claim for interest on the repaid amount.

I. Background and History

Debtor, Great Point Intermodal, LLC, trucked containers from its customers to those rail and shipyards with which GPI had storage agreements. In January 1999, GPI contracted with Appellants Norfolk Southern Corporation and Norfolk Southern Railway Company to use their railyards as a hub for container exchanges. The contract established a fee schedule for the use and storage of containers, and set the cost of replacing or repairing lost or damaged containers.

GPI had financial difficulties and fell behind in its contract payments, owing Appellants $83,976.75 by January 2003. The parties were unable to work out a payment arrangement, and on February 7, 2003, Appellants locked GPI out of their railyards. On February 10, 2003, fearing that other creditors would impose similar "lock outs," GPI paid $83,976.75 (the "Payment") to Appellants, who then reopened their railyards.

Three days later, on February 13, 2003, GPI filed for bankruptcy under Chapter 11. On March 6, 2003, the Trustee for GPI sued Appellants to recover the Payment as an impermissible preference. At the conclusion of trial, the Bankruptcy Court ruled that the Payment was an avoidable preference because it brought no "new value" to GPI. Accordingly, the Court ordered the full $83,976.75 repaid to GPI. The Court did not address whether GPI was entitled to interest on the repayment.

Appellants challenge the Bankruptcy Court's conclusion that GPI received no "new value" from the Payment. GPI has cross-appealed, seeking the award of pre and post-judgment interest.

II. Discussion

In this appeal, I must review questions of law *de novo* and questions of fact under a clearly erroneous standard. See In re Kumar Bavishi & Assoc., 906 F.2d 942, 943 (3d Cir. 1990); see also In re Main, Inc., CIV. No. 00-35, 2000 U.S. Dist. LEXIS 17652, *7 (E.D. Pa. November 28, 2000).

The determination of "new value" is "a mixed question of law and fact." See In re Spada, 903 F.2d 971, 975 (3d Cir. 1990); see also In re Adelphia Automatic Sprinkler Co., 184 B.R. 224, 227 (E.D. Pa. 1995). I must first review the legal question of whether GPI received "new value" for the Payment. If I agree that there was "new value" as a matter of law, I must then review the factual question of the "specific value" to GPI. See In re Adelphia Automatic Sprinkler Co., 184 B.R. at 227.

The Bankruptcy Court's determination of whether GPI is entitled to pre or post-judgment interest is a question of fact and therefore reviewed under the clearly erroneous standard. See In re Main, Inc., 2000 U.S. Dist. LEXIS 17652, *7.

New Value

Normally, courts would revoke the Payment as an unlawful preference because it was made only three days before GPI's bankruptcy filing. See Lease-A-Fleet, Inc. v. Morse Operations, Inc., 141 B.R. 853 (Bankr. E.D. Pa. 1992) (debtor's payment to a creditor within 90 days of bankruptcy filing prohibited as an avoidable preference). To the extent a creditor can establish that a such a payment brought "new value" to the debtor, however, the payment is not a preference. Because the estate has received new value, post-bankruptcy creditors obtain a benefit they would otherwise not have had if the

disputed payment had merely satisfied an "old" debt. Accordingly, to make out a new value defense, the creditor must show that the "new value" has a "specific value." See In re Spada, 903 F.3d 974-77; see also See In re Kumar Bavishi & Assoc., 906 F.2d at 943; In re Adelphia Automatic Sprinkler, 184 B.R. at 227; Lease-A-Fleet, Inc. v. Morse Operations, Inc., 141 B.R. at 864; In re TWA, 180 B.R. 389 (Bankr. D. Del. 1994). Once again, the rationale is compelling: absent a showing of specific value, there could be no certain determination of whether and to what extent the new value actually benefitted the estate. See 11 U.S.C. § 547(c)(4) (2004) (emphasis added); see also In re Spada, 903 F.2d at 976; In re R.M.L., Inc., 195 B.R. 602, 616 (Bankr. E.D. Pa. 1996); In re Adelphia Automatic Sprinkler, 184 B.R. at 227; In re Lease-A-Fleet, Inc., 1415 B.R. at 864.

A creditor may provide the debtor with new value by taking an action it is under no legal obligation to take, providing the action benefits the debtor. See In re Kumar Bavishi & Assoc., 906 F.2d at 943. Under its contract with Appellants, GPI's payment of overdue container storage fees did not obligate Appellants to grant GPI future access to their railyards. (R. 17 at Pl. Trial Ex. 2 at § 7.) The Bankruptcy Court thus correctly reasoned that in re-opening their yards, Appellants took a beneficial action that they were not legally required to take, and that the Payment thus provided new value to GPI as a matter of law. (R. 2 at 11.)

The Bankruptcy Court also concluded, however, that Appellants failed to meet their burden of proving the specific value provided by the reopening. Appellants admitted that their contract with GPI did not assign a value to railyard access. Rather, it sets out fees and charges only for the storage, repair, and replacement of containers. (R. 16 at 12, 39, 45; R. 17 at Pl. Trial Ex. 2.)

Appellants attempted to deduce a specific value for GPI's permission to enter their railyards, employing the yard access fee they charged other carriers pursuant to other contracts. (R. 16 at 66.) The Bankruptcy Court correctly concluded that the amounts Appellants paid to third parties did not establish the specific value of GPI's renewed access to Appellants' railyards. (R. 2 at 22.) Furthermore, the Record shows that Appellants' value calculation is inflated, as it would have caused GPI to lose money each time it gained access to Appellants' railyards. (R. 16 at 66-67.)

The case law Appellants offer is inapposite: the contracts at issue provided for goods or services at specific prices. See In re Lease-A-Fleet Inc., 141 B.R. 853 (Bankr. E.D. Pa. 1992) (a new value defense allowed creditor to retain debtor's payments under a pre-bankruptcy agreement because the contract specified lease payments to be made in return for use of vehicles); see also In re Discovery Zone, 300 B.R. 856 (D. Del. 2003) (creditor allowed to retain fees under the new value defense because the pre-bankruptcy agreement established a specific fee schedule for the use of licensed and trademarked property). Here, the storage contract did not include a fee provision for GPI's access to Appellants' railyards.

In these circumstances, the Bankruptcy Court was correct: Appellants did not prove the *specific* value renewed access to their yards brought to GPI. See In re Spada, 903 F.2d at 976 (creditor must prove the exact amount of the "new value provided"); see also In re Jet Florida Systems, Inc., 861 F.2d 1555, 1558-59 (11th Cir. 1988) (creditor must prove with specificity the actual and exact monetary value provided). Rather, Appellants provided the Bankruptcy Court with, at most, an educated guess as to the specific value renewed railyard access brought to GPI. Accordingly, I affirm the

Bankruptcy Court's ruling that Appellants have not proved their new value defense.

Pre and Post-Judgment Interest

In its cross-appeal, GPI contends that the Bankruptcy Court should have awarded pre and post-judgment interest on the Payment. GPI included an interest demand in its Complaint, Amended Complaint, and Post-Trial Brief. Significantly, however, at trial GPI did not even mention its claim for interest, and presented no evidence on the subject.

In light of GPI's omissions, it is hardly surprising that the Bankruptcy Court did not address the interest demand, which, in any event, GPI may have waived. See Waldorf v. Shuta, 142 F.3d 601, 629 (3d Cir. 1998) (arguments not supported with evidence are waived on appeal); see also In re Hennigway Transport, Inc., 993 F.2d 915, 935 (1st Cir. 1993) (failure to present evidence at the bankruptcy trial waives the right to raise the issue on appeal). I remand so that the Bankruptcy Court may address GPI's claim for interest, assuming that the Court concludes that GPI has preserved the claim.

BY THE COURT:

_____ _____

Date **Paul S. Diamond, J.**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: GREAT POINT INTERMODAL, LLC **Debtor.**	:	
NORFOLK SOUTHERN CORPORATION, AND NORFOLK SOUTHERN RAILWAY COMPANY, **Appellants** **v.** **GREAT POINT INTERMODAL, LLC,** **Appellee**	:	**CIVIL ACTION** **NO. 04-2743**

ORDER

AND NOW, this_____day of December, 2004, for the reasons given in the accompanying Memorandum Opinion, it is **ORDERED** that the decision of the Bankruptcy Court is **AFFIRMED** and the appeal of Norfolk Southern Corporation and Norfolk Southern Railway Company is **DENIED**.

IT IS FURTHER ORDERED that the Cross Appeal of Great Point Intermodal, LLC is **REMANDED** to the Bankruptcy Court for further proceedings consistent with this Opinion.

BY THE COURT

_____ _____

Date Paul S. Diamond, J.