UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.	CASE NO. 96-61376 Chapter 11
Debtors	Substantively Consolidated

RICHARD C. BREEDEN, TRUSTEE FOR THE BENNETT FUNDING GROUP, INC., et al.

Plaintiff

vs. ADV. PRO. NO. 96-70280A

L.I. BRIDGE FUND L.L.C., and
EUROPEAN AMERICAN BANK

Defendants

APPEARANCES:

SIMPSON, THACHER & BARTLETT Attorneys for Trustee 425 Lexington Avenue New York, New York 10017	JONATHAN ROSENBERG, ESQ. Of Counsel
BERKMAN, HENOCH, PETERSON & PEDDY Attorneys for Defendants 777 Zeckendorf Boulevard Garden City, New York 11530	RONALD TERENZI, ESQ. Of Counsel
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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,

CONCLUSIONS OF LAW AND ORDER

Before the Court is the motion (the "Motion") filed on February 13, 1997 by the chapter 11 trustee (the "Trustee") of the jointly administered and substantively consolidated estates of The Bennett Funding Group, Inc. ("BFG") and Bennett Management & Development Corporation ("BMDC") for partial summary judgment on the Trustee's claim that the March 6, 1996 payment by BFG of approximately $1.2 million to L.I. Bridge Fund, L.L.P. ("L.I. Bridge Fund") constituted a recoverable preference pursuant to §§ 547 and 550 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330. The Court heard oral argument on the Motion on March 27, 1997, and the matter was submitted for decision that same day.[1]

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(F) and (H).

FACTS

BFG and L.I. Bridge entered into a Line of Credit Loan Agreement dated February 20, 1996 (the "Loan Agreement"), pursuant to which L.I. Bridge Fund extended to BFG a $5 million

[1] The Motion also seeks summary judgment on the Trustee's claim that the March 21, 1996 sale by BMDC to L.I. Bridge of a warrant to purchase 320,000 shares of common stock in AmeriData Technologies, Inc. constituted a fraudulent transfer pursuant to Code § 548. At the Hearing, the Court denied the Trustee's Motion as it relates to the Code § 548 cause of action.

line of credit, as evidenced by a demand promissory note (the "Note") of even date therewith in the maximum principal amount of $5 million. The Loan Agreement enabled BFG to borrow a maximum principal amount of $5 million at an annual interest rate of 12%. The principal amount of any advances, plus all accrued interest, were to be repaid to L.I. Bridge Fund upon 60 days written notice to BFG.

Pursuant to the Loan Agreement, L.I. Bridge Fund wired $1.2 million to BFG on February 27, 1996 (together with accrued interest, the "Loan"). On March 6, 1996, BFG repaid this amount, plus $3,550.68 in accrued interest, by tendering two checks to L.I. Bridge, in the respective amounts of $1.2 million and $3,550.68. The Trustee argues that such payments constitute avoidable preferences pursuant to Code §§ 547 and 550.

Summary judgment is appropriate in cases in which no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Bankr.P. 7056; Fed.R.Civ.P. 56(c). The parties agree that the only issue in dispute arises under Code § 547(b)(2), and that Trustee is entitled to summary judgment on his preference claim if he can establish that such payment was "for or on account of an antecedent debt owed by the debtor before such transfer was made," within the meaning of that section.[2] L.I. Bridge Fund asserts

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[2] Code § 547(b) allows a trustee to avoid any transfer of an interest of the debtor in property-

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made--

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if --

that, nothwithstanding the 60 day notice provision in the Note and Loan Agreement, BFG agreed to pay the Loan on March 6, 1996. Thus, L.I. Bridge Fund opposes the Trustee's Motion by arguing that because the March 6, 1996 payment was made on its due date, such Payment was not "for or on account of an antecedent debt owed by the debtor before such transfer was made."

DISCUSSION

Cases generally hold that a debt is "antecedent" for purposes of Code § 547(b)(2) if it was incurred prior to the alleged transfer. *See, e.g., Southmark Corp. v. Marley (Matter of Southmark Corp.)*, 62 F.3d 104, 106 (5th Cir. 1995), cert. denied, __ U.S.)__, 116 S.Ct. 815, 133 L.Ed.2d 760, (199); *Pereira v. Lehigh Savings Bank, SLA (In re Artha Management, Inc.)*, 174 B.R. 671, 678 (Bankr. S.D.N.Y. 1994); *Friedman v. Ginsburg (In re David Jones Builder, Inc.)*, 129 B.R. 682, 688 (Bankr. S.D. Fla. 1991) (citing 4 King, COLLIER ON BANKRUPTCY, ¶ 547.05 (15th ed.)). "A debt is incurred when the debtor first becomes legally obligated to pay." *Mendelsohn v. Louis Frey Co., Inc. (In re Moran)*, 188 B.R. 492, 497 (Bankr. E.D.N.Y. 1995) (citing *In re Pan Trading Corp., S.A.*, 125 B.R. 869, 875 (Bankr. S.D.N.Y. 1991) and *In re Western World Funding, Inc.*, 54 B.R. 470, 477 (Bankr. D. Nev. 1985)); *see also, e.g., Matter of Southmark Corp.*, 62 F.3d at 106 (citing, *inter alia*, *In re Emerald Oil Co.*, 695 F.2d 833, 837 (5th Cir. 1983)); *Upstairs Gallery, Inc. v. Macklowe West Development Co., L.P. (In re Upstairs Gallery,*

(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Inc.), 167 B.R. 915, 918 (9th Cir. BAP 1994) (citing *CHG v. Barclays Bank (Matter of CHG Int'l, Inc.)*, 897 F.2d 1479, 1486 (9th Cir. 1990)).

Generally, a debtor has a legal obligation to pay a debt when it acquires a property interest in the consideration exchanged giving rise to the debt. *See Barash v. Public Finance Corp.*, 658 F.2d 504, 509 (7th Cir. 1981). "This occurs 'upon performance, delivery, or its equivalent--not when payment is due.'" *In re Western World Funding, Inc.*, 54 B.R. at 477 (quoting *Morton Shoe Cos. v. Herbert & Boghosian, Inc. (In re Morton Shoe Cos.))*, 36 B.R. 14, 16 (Bankr. D. Mass. 1983) (other citations omitted)); *see In re Bernstein v. Sukolsky-Brunelle Photographics (In re Kahn & Assocs., Inc.)*, 135 B.R. 251, 253 (Bankr. W.D. Pa. 1991) (stating that "[t]he legal obligation to pay arises when a particular service is performed or when goods are received by the debtor."); *accord Smith v. Creative Financial Management, Inc. (In re Virginia-Carolina Financial Corp.)*, 954 F.2d 193, 197 (4th Cir. 1992) (indicating that loan payment is on account of an antecedent debt if, but for the payment, the creditor could legitimately assert claim against estate for the amount of the payment).

In support of its position, L.I. Bridge Fund cites *In re Child World, Inc*., 173 B.R. 473 (Bankr. S.D.N.Y. 1994), in which it was held that a real property rental payment tendered on its due date was not on account of an antecedent debt. *See id.* at 476-77. The *Child World* court's conclusion was based on the fact that an "obligation to pay rent is deemed to arise on the due dates provided in the lease and not when the lease is signed," *id*. at 476 (citing, *inter alia*, *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986)), because "rent payments 'rest upon current consideration, i.e., a grant of possession for the rent period.'" *Id*. at 477 (quoting *In re Upstairs Gallery, Inc.*, 167 B.R. at 918). Contrary to L.I. Bridge's

argument, the *Child World* case cannot be read as standing for the broad proposition that payment of an obligation on or before its due date is not on account of an antecedent debt. The *Child World* court simply held that because payment had preceded performance by the lessor, no debt existed at the time the payment was made and such payment was therefore not on account of an antecedent debt. *See id*. at 477.

The *Child World* case does not alter the well settled caselaw holding that principal paid under the terms of an installment loan is payment on account of an antecedent debt for purposes of Code § 547(b)(2). *See Intercontinental Publications, Inc. v. Perry (In re Intercontinental Publications, Inc.)*, 131 B.R. 544, 549 (D. Conn. 1991) (citations omitted); *In re Pan Trading Corp., S.A.*, 125 B.R. at 875; *In re Western World Funding, Inc.,* 54 B.R. at 476-77*; see also Futoran v. Rush (In re Futoran)*, 76 F.3d 265, 267 (9th Cir. 1996) (citing *In re Pippin*, 46 B.R. 281, 283 (Bankr. W.D. La. 1984) and *In re Anders*, 20 B.R. 468, 469 (Bankr. M.D. Fla. 1982)). This is true even where such payment is made at or before the time it is due under the terms of the loan agreement. *See, e.g., In re Western World Funding, Inc.*, 54 B.R. at 476-77. L.I. Bridge Fund's argument that a different result should obtain with respect to principal payments of a demand loan is unsupportable, because a debtor obtains a property interest in borrowed funds at the time it receives such funds, regardless of when payment is due. *See Whitaker v. BancOhio Nat'l Bank (In re Lamons)*, 121 B.R. 748, 751 (Bankr. S.D. Ohio 1990). "A creditor always has the option of waiving or postponing his debtor's obligation to pay; this does not mean that the obligation has not previously been created, but merely that payment is not yet required." *In re Western World Funding, Inc.*, 54 B.R. at 477 (citing *Keydata Corp. v. Boston Edison Co. (In re Keydata Corp.)*, 37 B.R. 324, 327 (Bankr. D. Mass. 1983)). The Court therefore concludes that

BFG's payment of the $1.2 million principal portion of the Loan was on account of an antecedent debt.

Interest payments can present a somewhat different problem. At least one court has held that prepayments of interest under an installment note allowing for prepayment without penalty were not on account of an antecedent debt because the interest had not yet accrued under the terms of the note. *See In re David Jones Builder, Inc.* at 688-89; *see also In re Iowa Premium Service Co., Inc.*, 695 F.2d 1109, 1111-12 (8th Cir. 1982) (holding that a debt for interest is incurred daily as interest accrues for purposes of determining when debt is incurred under Code § 547(c)(2)). Other courts have, for varying reasons, held that interest indebtedness under a note which does not contain a prepayment option is incurred when the debtor receives the principal funds. *See Matter of CHG Int'l, Inc.*, 897 F.2d at 1486-87 (9th Cir. 1990); *In re Western World Funding, Inc*., 54 B.R. at 480; *see also In re Artha Management, Inc.*, 174 B.R. at 678 (finding that, while interest may have been payable monthly, the debtor became legally obligated to pay all interest obligations under note as of date loan agreement was entered into, presumably because pre-payment was prohibited).

In this case, the interest payment of $3,550.68 on March 6, 1996 was a payment of interest which had accrued under the terms of the demand Note. Such payment was, therefore, not a prepayment, but rather payment on account of an antecedent debt, because a fixed obligation to pay interest arises, at the latest, after every day the debtor retains the use of principal money. *See Matter of CHG Int'l, Inc.*, 897 F.2d at 1487 (citing *In re Iowa Premium Service Co., Inc.*, 695 F.2d at 1111-12).

L.I. Bridge Fund urges the Court to adopt the reasoning set forth in *In re Brennan*, 187

B.R. 135 (Bankr. D.N.J. 1995), in which the court stated that "if possible the courts should construe the clause 'owed by the debtor before such transfer was made' in section 547(b)(2) as adding some meaning to the prior words 'antecedent debt.'" *Id.* at 153. The *Brennan* court thus concluded that "a debt is not 'owed' within the meaning of section 547(b)(2) until payment is past due, even if the debt is admittedly antecedent." *Id.* at 153. The *Brennan* court's reasoning, however, is at variance with the caselaw, cited above, concerning the point at which a borrower becomes obligated to repay loan principal and interest. The caselaw indicates that, if a debt exists, it has necessarily been incurred and is owed. An antecedent debt must be owed before a transfer, i.e, payment of that debt, is made. The Court therefore concludes that the term "antecedent debt" is conceptually synonymous with the phrase "owed . . . before the transfer was made." If the second clause of Code § 547(b)(2) must be given meaning separate from the that of the term "antecedent debt," then it may be that the debt must be "owed *by the debtor* before the transfer was made," as opposed to some other party. *Cf. In re Virginia-Carolina Financial Corp.*, 954 F.2d at 196-98 (concluding that debt fell within Code § 547(b)(2) definition because, *inter alia*, it was owed by the debtors, despite the fact that another party executed note).

Based upon the foregoing, the Court concludes that BFG's payments to L.I. Bridge Fund of $1.2 million and $3,550.68, respectively, on March 6, 1996 were each on account of an antecedent debt owed by BFG before payment was made. Each of those payments may therefore be avoided by the Trustee pursuant to Code § 547(b) and recovered from L.I. Bridge Fund pursuant to Code § 550(a)(1).

The Trustee requests an award of interest on the $1,203,550.68 at issue, from the March 6, 1996 date of payment. The issue of entitlement to interest in a federal question case such as

this is governed by federal law. *See Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.)*, 135 B.R. 659, 665 (Bankr. D. Colo. 1991) (citations omitted), *aff'd*, 161 B.R. 507 (D. Colo. 1992), *aff'd*, 4 F.3d 1556 (10th Cir. 1993). An award of prejudgment interest on a preferential transfer is discretionary, but " the majority rule favors prejudgment interest in preference actions," especially where the amount of recovery is liquidated or readily ascertainable. *Barber v. Lebo (In re Industrial & Municipal Engineering, Inc.)*, 127 B.R. 848, 851 (Bankr. C.D. Ill. 1990) (citations omitted).

The Trustee's claim in this case was at all times liquidated, and the Court therefore finds that he is entitled to interest on his $1,203,550.68 recovery. However,

> "[i]nterest does not run from the date of the preferential transfer, because the transfer is not improper in any respect at the time it occurs. The determination of a preference and the recovery of the transfer under section 550 are based upon a subsequent event--the transferor's bankruptcy filing--and upon a [sic] analysis of the debtor's bankruptcy (i.e., that the transferee would receive more if it retained the transfer than if the debtor's assets were liquidated). Because the transfer is initially proper, and because there must be some affirmative decision made, supported by section 547(b), to recover the transfer, the consensus position is that prejudgment interest does not begin to accrue until some affirmative demand is made of the transferee to return the transfer."

Id. at 851 (quoting In re Nelson Co., 117 B.R. 813, 818 (Bankr. E.D. Pa. 1990)). "Absent proof of demand prior to the filing of the adversary proceeding, interest will accrue on the date the action is filed." *Id.* at 851 (citing *In re Advertising Associates, Inc.*, 95 B.R. 849 (Bankr. S.D. Fla. 1989); *accord In re Investment Bankers, Inc.*, 4 F.3d at 1566. The Trustee is therefore entitled to interest from September 27, 1996, the date he filed his original complaint.

Courts have reached differing conclusions concerning the rate at which prejudgment

interest should accrue. *See Boyer v. Davis (In re U.S.A. Diversified Products, Inc.)*, 193 B.R. 868, 882 (Bankr. N.D. Ind. 1995) (collecting cases), *aff'd sub nom. Boyer v. Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.*, 196 B.R. 801 (N.D. Ind. 1996), *aff'd*, 100 F.3d 53 (7th Cir. 1996). "[T]he Second Circuit has not expressly endorsed any one particular prejudgment interest rate, [but] the trend is to apply 28 U.S.C. § 1961(a) . . . which mandates that postjudgment interest . . . be calculated based upon the Treasury bill rate . . ." *McClean v. Continental Casualty Co.*, 1997 WL 566117 *2 (S.D.N.Y. 1997). *See Rao v. New York City Health and Hospitals Corp.*, 882 F. Supp. 321, 327, 28 (S.D.N.Y. 1995) (citing *Frank v. Relin*, 851 F. Supp. 87 (W.D.N.Y. 1994) for the proposition that "[b]ecause there is no reason that a greater or lesser interest rate should be used to calculate prejudgment interest than to calculate postjudgment interest, the Treasury bill rate is a reasonable rate to use for an award of prejudgment interest."), *motion for judgment as matter of law denied*, 905 F. Supp. 1236 (S.D.N.Y. 199). Hence, the Court concludes that the Trustee is entitled to interest at the average United States treasury bill rate in effect from September 27, 1996 through the date of this Order. *See McIntosh v. Irving Trust Co.*, 873 F. Supp. 872, 883 (S.D.N.Y. 1995).

There being no just reason for delay, it is therefore

ORDERED that the Trustee's Motion is granted as it relates to the Code §§ 547 and 550 causes of action; and it is further

ORDERED that, pursuant to Fed.R.Civ.P. 54(b), final judgment be entered in favor of the Trustee and against L.I. Bridge Fund in the amount of $1,203,550.68, plus interest at the average

United States treasury bill rate in effect from September 27, 1996 through the date of this Order;[3] and it is further

ORDERED that L.I. Bridge Fund shall have an unsecured claim in the amount of $1,203,550.68, pursuant to Code § 502(h).

Dated at Utica, New York

this 30th day of October 1997

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge

[3] The Trustee's preference claim against L.I. Bridge Fund seeks recovery of a transfer made by BFG, while his Code § 548 cause of action seeks recovery of a transfer made by BMDC. The two claims involve transfers of different property, separate legal and factual issues, and may be enforced separately. As a result, there is no just reason to delay entry of a final judgment on the Trustee's preference claim. *See General Accident Ins. Co. v. J.K. Chrysler Plymouth Corp.*, 139 F.R.D. 585, 587 (E.D.N.Y. 1991) (citation omitted).