

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re)
) Bk.No. 08-10152-JMP
Quebecor World (USA), et al.) (Jointly Administered)
)
) Chapter 11
Debtors)
_____) Honorable James M. Peck
)
Eugene I. Davis, as Litigation Trustee for)
The Quebecor World Litigation Trust,)
)
Plaintiff,)
vs.)
)
S & L Factory Services, Incorporated,)
)
Defendant)
_____)

DEFENDANT’S REQUEST FOR PRE-MOTION CONFERENCE

Pursuant to Rule 7056-1, Defendant, S & L Factory Services, Incorporated (“S&L”), by counsel, requests that this Court schedule a pre-motion conference so that Defendant may file a Motion for Summary Judgment in this action. Defendants request Summary Judgment on the grounds that those funds transferred by Quebecor World (USA) Inc., et al (“the Debtor”) to S&L, by Plaintiff Eugene I. Davis, as Litigation Trustee for The Quebecor World Litigation Trust, in this adversary proceeding pursuant to 11 U.S.C. § 547 which seeks are not avoidable. The transfers made during the Preference Period were intended by the Debtor and the creditor to be a contemporaneous exchange for new value given and were in fact a substantially contemporaneous exchange. Furthermore, these transfers were made in the ordinary course of business of the Debtor and transferee and made according to ordinary business terms. Thus,

pursuant to 11 U.S.C.A. §547(c)(1) and (2), the bankruptcy trustee may not avoid these transfers and Defendant is entitled to Summary Judgment.

Dated: January 14, 2011

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Plaintiff,)
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S & L Factory Services, Incorporated,)
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Defendant)
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MATERIAL FACTS

1. Plaintiff Eugene I. Davis, as Litigation Trustee for The Quebecor World Litigation Trust, commenced this adversary proceeding pursuant to 11 U.S.C. § 547 against S&L seeking the avoidance and recovery of the funds transferred by Quebecor World (USA) Inc., et al (“the Debtor”) to S&L.

2. On July 21, 2009, the Quebecor World Litigation Trust was established to prosecute and settle the claims asserted in the adversary proceeding. *See* Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548, 549 and 502 and Recover Property Transferred Pursuant to 11 U.S.C. §550 at ¶ 6. On January 11, 2010, Plaintiff, as Trustee for Quebecor World Litigation Trust, commenced this action to recover for transfers of property made from the Debtors to S&L during the Preference Period, which is 90 days before the petition

date. *Id.* at ¶ 9. The terms of these transfers were consistent with all prior courses of business dealings between the parties.

3. S&L had a long-term business relationship with the Debtor in which S&L would provide labor and/or materials to the Debtor in exchange for monetary compensation in the ordinary course of business. This relationship began in 2005 and continued until present.

4. Pursuant to the ordinary business dealings, as labor was requested and completed, S&L would submit an invoice to the Debtor for the specific requested work which was performed. The Debtor would then pay S&L for that work by delivering a check to S&L for the invoice amount. Each invoice from S&L was prepared for the new value provided to the Debtor, not for an antecedent debt. See Affidavit of Linda Roach attached hereto.

5. These ordinary business dealings continued throughout the course of the business relationship between the two parties, including the statutory Preference Period.

6. Throughout the statutory Preference Period, each monetary transfer continued to be made in a manner consistent with the prior course of business dealings as normal business and financial affairs. See Defendant's Answer to the First Set of Interrogatories, Requests for Production, and Requests for Admission Propounded by Plaintiff, Requests for Admission Nos. 12 and 16, attached as Exhibit 2.

7. Throughout the statutory Preference Period, S&L continued to complete the requested work and continued to bill the Debtors via invoices. The Debtors, in turn, continued to pay the amount due; thus, new value was exchanged contemporaneously with each transfer.

8. Some checks for payment encompassed more than one invoice; however, the payments made by the Debtor were made for the labor and/or materials expended on the invoices – not for an antecedent debt.

9. The terms of this payment and these transactions were similar to those of other transactions between S&L and the Debtor and were consistent with the course of dealing routine to these parties in the years of 2005 to present.

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Debtors)	
_____)	Honorable James M. Peck
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Eugene I. Davis, as Litigation Trustee for)	
The Quebecor World Litigation Trust,)	
)	
Plaintiff,)	
vs.)	
)	
S & L Factory Services, Incorporated,)	
)	
Defendant)	
_____)	

DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

Defendant, S & L Factory Services (“S&L”), Incorporated, by counsel, moves this Court for Summary Judgment in this action. Plaintiff Eugene I. Davis, as Litigation Trustee for The Quebecor World Litigation Trust, commenced this adversary proceeding pursuant to 11 U.S.C. § 547 against S&L seeking the avoidance and recovery of the funds transferred by Quebecor World (USA) Inc., et al (“the Debtor”) to S&L. Because all relevant transfers were made in the ordinary course of business between the Debtor and S&L and were intended by the Debtor and S&L to be, and in fact were, a substantially contemporaneous exchange for new value given to the Debtor, the transfers are not avoidable pursuant to 11 U.S.C. §547(c)(2). These transfers are exempt, and therefore, summary judgment should be granted and this action should be removed from the active docket of this Court.

FACTUAL BACKGROUND

On January 21, 2008, Quebecor World (USA) Inc. (“the Debtor”) voluntarily petitioned this Court for relief under Chapter 11 of Title 11 of the United States Code. *See* Complaint to Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547, 548, 549 and 502 and Recover Property Transferred Pursuant to 11 U.S.C. §550, ¶5, attached as Exhibit 1. On July 21, 2009, the Quebecor World Litigation Trust was established to prosecute and settle the claims asserted in the adversary proceeding. *Id.* at ¶ 6. On January 11, 2010, Plaintiff, as Trustee for Quebecor World Litigation Trust, commenced this action to recover for transfers of property made from the Debtors to S&L during the Preference Period, which is 90 days before the petition date. *Id.* at ¶ 9. The terms of these transfers were consistent with all prior courses of business dealings between the parties.

S&L had a long term business relationship with the Debtor in which S&L would provide labor and/or materials to the Debtor in exchange for monetary compensation. The compensation was contemporaneously made with the labor and materials provided by S&L. This relationship began in 2005 and continued until present. During this time, the Debtor was a regular client of S&L’s and **used** S&L on multiple occasions. The type of work S&L provided varied, but the number of hours expended by S&L was chiefly consistent; S&L would provide labor and/or materials two to four weeks each month. Pursuant to their regular course of business dealings, as labor was requested and completed, S&L would submit an invoice to the Debtor for that specific work performed. *See* Invoices and Payments, attached as Exhibit 3. The Debtor would then pay for that work by delivering a check to S&L for that work. *Id.* Each invoice from S&L was prepared only for the new value provided to the Debtor.

This course of business dealings continued during the Preference Period: as new value was provided, the Debtor paid for that value. *See* Invoices and Payments, attached as Exhibit 3. Thus, each payment received, both before and during the Preference Period, was for the new labor/materials provided, not for an antecedent debt. As the attached undisputed records establish, each payment was made for the materials and/or labor provided, in a substantially contemporaneous exchange – not for a debt owed by the Debtor. There was no debt owed to S&L, the payments made were contemporaneously exchanged for the work performed and materials provided.

STANDARD

Pursuant to Rule 56, a summary judgment “shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. Proc. 56(c). The court’s responsibility is to “assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party.” *Knight v. United States Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986). To defeat a summary judgment motion, “the opponent must set forth the specific facts that place material issues in dispute.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An affidavit, made on personal knowledge by a competent affiant and setting out facts which would be admissible in evidence, may be used in support of the motion. Fed. R. Civ. Proc. 56(e). Here, there is no issue of material dispute because the transfers were in the ordinary course of business and the action must be dismissed.

ARGUMENT

Plaintiff cannot avoid the transfers made from the Debtor to S&L during the preference period because those transfers are statutorily exempted. After a bankruptcy is filed, the bankruptcy statute permits the bankruptcy trustee to “look back” at transfers which were made within the last 90 days, a preference period. This preference period was created to discourage “creditors...from racing to the courthouse to dismember the debtor during his slide into bankruptcy.” *Pereira v. United Jersey Bank*, 201 B.R. 644, 656 (S.D.N.Y. 1996). It solidifies “the prime bankruptcy policy of equality of distribution among creditors of the debtor.” *Id.* Preference plan recoveries “are creatures of bankruptcy, designed to benefit the estate-not the Debtors,-and ensure equality of distribution to creditors.” *In re Kmart Corp.*, 310 B.R. 107 (N.D.Ill., 2004).

In light of this underlying principle, pursuant to the bankruptcy statutes, the trustee is permitted to “‘avoid any transfer of an interest of the debtor in property’ [made within the preference period which is 90 days before the filing of the bankruptcy] if five conditions are satisfied and unless one of seven exceptions defined in subsection (c) is applicable.” *Union Bank v. Wolas*, 502 U.S. 151, 154 (1991) quoting Section 547. The bankruptcy trustee bears the burden of proving that the transfers were preferential and were in keeping with the statutory requirements. *Pereira v. United Jersey Bank*, 201 B.R. 644, 656 (S.D.N.Y. 1996).

However, Section 547 (c) provides that the trustee may not avoid a transfer if the transfer was “intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor and in fact a substantially contemporaneous exchange.” 11 U.S.C.A. §547(c)(1)(A)-(B). A trustee may also not avoid a transfer which was “in payment of a debt incurred by the debtor in the ordinary course of

business or financial affairs of the debtor and the transferee, and such transfer was made in the ordinary course of business or financial affairs of the debtor and the transferee; or made according to ordinary business terms.” 11 U.S.C.A. §547(c)(2)(A)-(B).

Here, the Plaintiff has not met, and cannot meet, his burden because the transfers of property which took place during the preference period fall clearly within two provided exceptions and therefore are not avoidable. It is clear that the transfers were made for payment for labor provided to Debtor in the ordinary course of business according to ordinary business terms and were paid substantially contemporaneously with the labor (new value) provided.

As the parties’ prior dealings established, during the Preference Period, as the Debtor requested labor, or new value, and the same was performed by S&L, monetary transfers were made between the two parties, the Debtor having made these transfers in a substantially contemporaneous exchange soon after the work was performed. As the business invoices and payments set forth above establish, the requested labor was billed and paid substantially contemporaneously. Furthermore, to the extent that a slight period of time (several weeks at most) occurred between the labor provided and the transfer, no interest was charged. Furthermore, the transfers were clearly performed in an ordinary course of business and pursuant to the parties’ regular dealings. During the Preference Period, the parties did not change their conditions of payment, their requests for labor, or when the payment would be made. The payments undisputedly continued as was established in their ordinary business terms. These transfers clearly are not for any antecedent debt as new work continued to be requested by the Debtor and performed by S&L.

Thus, Plaintiff may not seek to avoid these transfers. This is not a situation where a creditor rushed to get paid for a debt after the Debtor filed bankruptcy. Rather, S&L rendered

services to the Debtor upon the Debtor's requests and each transfer was for the new value given – not for an antecedent debt – and was made in the course of their ordinary business transactions.

CONCLUSION

WHEREFORE, Defendant S & L Factory Services, Incorporated respectfully requests that Plaintiff's Complaint be dismissed in its entirety. There is no dispute that the transfers are not avoidable pursuant to the statute, and Plaintiff cannot recover the funds transferred by Quebecor World (USA) Inc., et al ("the Debtor") to S&L.

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