

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION**

| | | |
|--------------------------------------|---|----------------------------------|
| IN RE: |) | CASE NO. 04-03490-5-ATS |
| |) | |
| JACOBSEN CONSTRUCTION, INC., |) | CHAPTER 7 |
| Debtor. |) | |
| |) | |
| JOSEPH N. CALLAWAY, Chapter 7 |) | ADVERSARY PROCEEDING NO.: |
| Bankruptcy Trustee for |) | 06-00028-5-ATS |
| Jacobsen Construction, Inc., |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| KIDDCO, INC., |) | |
| Defendant. |) | |

**OBJECTION TO MOTION FOR PARTIAL SUMMARY JUDGMENT
WITH SUPPORTING MEMORANDUM OF LAW**

NOW COMES Defendant, by and through undersigned counsel, and hereby moves the Court for denial of Plaintiff's Motion for Partial Summary Judgment in this proceeding. In support thereof, the Defendant shows the Court that a review of the pleadings, discovery, affidavits and other materials on file with the Court show that there are genuine issues of material fact and that Plaintiff is not entitled to Judgment as a matter of law. More specifically, the materials on file show that, as a matter of law, the transfer at issue in this proceeding is not avoidable by Plaintiff pursuant to 11 U.S.C. §547(c)(1), §547(c)(2) and for equitable reasons.

DATED: January 8, 2007

s/ Pat A. Cook

Pat A. Cook
N.C. State Bar Number: 18955
WILLIAM M. BLACK, JR. ATTORNEYS
Attorney for Defendant
Post Office Box 19866
Raleigh, North Carolina 27619
(919) 782-6155 – telephone

CERTIFICATE OF SERVICE

I, Pat A. Cook, Attorney for Plaintiff in this action, hereby certify that on the 8th day of January, 2007, I served the documents to which this certificate is attached:

**OBJECTION TO MOTION FOR SUMMARY JUDGMENT
WITH SUPPORTING MEMORANDUM OF LAW**

by depositing a copy thereof postpaid in a post office or official depository under the exclusive care and custody of the United States Postal Service, in a wrapper, addressed to each of the following parties of interest in this action at the following last known addresses:

A. Scott McKellar
BATTLE, WINSLOW, SCOTT & WILEY, P.A.
Post Office Box 7100
Rocky Mount, NC 27804-0100

s/ Pat A. Cook

Pat A. Cook
N.C. State Bar Number: 18955
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| KIDDCO, INC., |) | |
| Defendant. |) | |

**MEMORANDUM OF LAW IN OBJECTION TO MOTION
FOR PARTIAL SUMMARY JUDGMENT**

NOW COMES Defendant, by and through undersigned counsel, and in objection to Plaintiff's Motion for Partial Summary Judgment, respectfully submits the following memorandum of law.

STATEMENT OF THE CASE AND PERTINENT FACTS

Jacobsen Construction, Inc. ("Debtor") filed a voluntary petition in bankruptcy under Chapter 7 of the United States Bankruptcy Code on September 24, 2004. Within 90 days of the commencement this bankruptcy case, Debtor transferred to Kiddco, Inc. ("Kiddco") a payment of \$55,625.27 by Check No. 15148, dated June 28, 2004 (the "Challenged Transfer"). The Trustee contends that the above payment was made on account of an antecedent debt (Answer, ¶7), and was incurred while Debtor was allegedly insolvent (Affidavit of Joseph N. Callaway).

The Trustee did not notify Kiddco of the Bankruptcy until letter of Trustee dated December 28, 2005 (see Exhibit 2). The Trustee commenced this adversary proceeding on

February 23, 2006 seeking to avoid the specified payment to Defendant pursuant to 11 U.S.C. §547 and, alternatively, pursuant to 11 U.S.C. §548. Defendant filed an Answer on March 23, 2006 asserting various defenses arising under 11 U.S.C. §547(c) among others. The parties have had sufficient time to conduct discovery and the discovery time period has closed.

ISSUE

The sole issue before the Court is whether the Challenged Transfer in the amount of \$55,625.27 was preferential and thus avoidable by Plaintiff pursuant to 11 U.S.C. §547.

ARGUMENT

I. Standard for Relief.

The standard for summary judgment set forth in Bankruptcy Rule 7056 and Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment is proper only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Celotex Corp. v. Catrett, 447 U.S. 317,323-324, 106 S. Ct. 2548, 91 L.ED.2d 265 (1986). In response to a properly pled Motion for Summary Judgment, Defendant must set forth specific facts which show that there exist genuine issues for trial. In this proceeding, the pleadings, Affidavit of Tom Kidd, Discovery and other items competent for the Court’s consideration clearly demonstrate that there are genuine issues of material facts and that the Plaintiff is not entitled to judgment as a matter of law.

II. The Transfer is not Subject to Preference Recovery.

A. Facts:

Debtor as General Contractor subcontracted with Kiddco to perform grading and grading related work at Wake Technical College in Wake County (the “Project”) (see Affidavit of Tom

Kidd, ¶ 4). This is a public project under N.C.G.S. 44A – 25 et.seq., and Debtor was required to provide payment and performance bonds granting rights to Kiddco. The Subcontract, in the form of a letter proposal dated April 7, 2004, was signed on April 12, 2004. Invoices included the term Net 15 (Exhibit 5). Kiddco submitted its first invoice on the Project on May 7, 2004 in the amount of \$90,625.27 (Exhibit 5). A second invoice was issued on June 2, 2004 in the amount of \$102,366.70. Mr. Kidd and Kiddco’s Project Manager began to inquire about the first invoice on June 8, 2004, shortly after 30 days (Defendants Response to Interrogatories, No. 20). As a result, Debtor made a partial payment of the first invoice in the amount of \$35,000.00 (Exhibit 6). Mr. Kidd immediately spoke with Eric Jacobsen with regard to the failure to pay the invoice, and both Mr. Kidd and the Project Manager repeatedly contacted Mr. Jacobsen with regard to payment during the next two weeks. (Defendants Response to Interrogatories, No. 20). On June 25, 2004, Mr. Kidd informed Mr. Jacobsen that, due to Debtor’s breach of contract by failure to timely pay the invoices, Kiddco had begun demobilization and was preparing to leave the Project (Affidavit of Tom Kidd, ¶ 5). Mr. Jacobsen on June 29, 2004 hand-delivered a check for the balance of the first invoice, the transfer disputed here of \$55,625.27 (Affidavit of Tom Kidd, ¶ 6). At the time of this payment, the second invoice in the amount of \$102,366.70 also was unpaid and overdue (Affidavit of Tom Kidd, ¶ 9). Kiddco agreed to remain on the Project and continue work only as a result of the payment (Affidavit of Tom Kidd, ¶ 7). Debtor voluntarily defaulted on its contract and left the Project on August 5, 2004 (Exhibit 7).

B. The Transfer is not recoverable as a preference because it is a substantially contemporaneous exchange for new value.

Pursuant to Section 547(c)(1), the Trustee may not avoid a transfer “to the extent that such transfer was . . . intended by the debtor and the creditor . . . to be a contemporaneous

exchange for new value given to the debtor”. In this case, the Parties intended that, as a result of the payment, Kiddco would remain on the project and continue work (Affidavit of Tom Kidd, ¶ 7). The Bankruptcy Code does not provide an exact standard for determining what is “substantially contemporaneous”. In Re: William Glen Mason, 189 B.R. 932, 934 (1995). The Courts therefore look to the specifics of each transfer on a case-by-case basis. “New value” for the purpose of this section includes “money or money’s worth in goods, services or new credit” §547(a)(2). The parties here intended this as a contemporaneous exchange – if Debtor paid the remaining portion of the first invoice, Kiddco would continue to perform work on the Project. Kiddco did continue to perform on the Project (Affidavit of Tom Kidd, ¶ 8). Such an arrangement fits perfectly within the aim of §547(c)(1) “to encourage creditors to deal with troubled business in the hope of rehabilitation”. In Re: Kroh Bros. Dev. Co., 930 F.2d 648,651 (8th Circuit, 1991). Kiddco’s actions allowed Debtor to remain on the Project more than six weeks longer and benefited Debtor.

C. The Transfer to Kiddco is not an Interest of the Debtor in Property and is Therefore not Recoverable as a Preference.

The transfer of money to Kiddco on this Project is not an interest of the Debtor, pursuant to North Carolina law, because funds paid to Debtor by the owner are held in trust for the benefit of subcontractors who hold unpaid invoices. Therefore, pursuant to Section 541(a)’s requirement that the preference claim be a transfer of property in which the debtor has an interest, the preference claim must fail.

Pursuant to N.C.G.S. §22C-4, the general contractor, here the Debtor, on a North Carolina construction project is required “to pay to his subcontractor . . . within seven days of receipt by contractor . . . of each periodic or final payment, the full amount received for such

subcontractor's work". Pursuant to N.C.G.S. §22 C-4, then, Debtor was simply a conduit for the money, and, based on the statute, title to the funds never vested with Debtor. The transfer which the Trustee calls a preference was never funds in which Debtor had an interest and therefore not a preference.

D. Kiddco's Release of the Payment Bond Surety's Equitable Lien on Contract Funds is a Contemporaneous Exchange for New Value.

The Wake Technical College project was a public project subject to the bonding requirements of N.C.G.S. 44A-25 *et. seq.* (Affidavit of Tom Kidd, ¶ 4) It is well established that sureties have an equitable lien on the proceeds of public construction contracts for which they have issued bonds. Pearlman v. Reliance Ins. Co., 371 U.S. 132,137 (1962). In this case, Mr. Kidd informed Debtor that if the alleged preferential payment was not made, Kiddco would seek payment from the bonding company (Affidavit of Tom Kidd ¶ 5). After Jacobsen left the Project, the Bonding Company requested that Kiddco complete the work of the subcontract. Kiddco signed a Ratification Agreement with the Bonding Company which acknowledged payment of the \$55,625.27 (Affidavit of Tom Kidd ¶) pursuant to which Kiddco agreed to "fully remise, release and acquit and forever discharge the Contractor [Debtor] . . . and the Surety . . . from any and all claims, liabilities, demands, . . . arising in connection with [Kiddco's] furnishing of labor, services and materials to [Debtor] . . . associated with the aforesaid Project." At the time Kiddco released these rights it had not been made aware of the Bankruptcy.

In *O'Rourke v. Coral Construction, Inc.* 88 B.R. 258 (9th Cir. 1988), *aff'd*, 887 F.2d 955 (9th Cir. 1989) the Court held that a transfer such as the subject transfer does not constitute an avoidable preference because the subcontractor released its unsecured claims against both the

debtor and the surety, which resulted in the release of the surety's equitable lien on the contract proceeds. See also Amest Surety Ins. Co., v. United States, 807 F. Sup 432 (D. Conn. 1994).

CONCLUSION

Based on the above and the record competent for the Court's consideration, it is clear that the Transfer of \$55,625.27 is not avoidable as a preference, and it is respectfully requested that Judgment be entered in Defendant's favor plus allowable interest and costs.

DATED: January 8, 2007

s/ Pat A. Cook

Pat A. Cook, Esquire
North Carolina Bar No. 18955
Attorney for Kiddco, Inc.
Post Office Box 19866
Raleigh, North Carolina 27619
(919) 782-6155

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I, Pat A. Cook, Attorney for Plaintiff in this action, hereby certify that on the 8th day of January, 2007, I served the documents to which this certificate is attached:

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