

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:07-CV-00262-F

KIDDCO, INC.,)
Appellant,)
)
v.)
)
JOSEPH N. CALLAWAY, Chapter 7)
Bankruptcy Trustee for)
Jacobsen Construction, Inc.,)
Appellee.)

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BASIS OF APPELLATE JURISDICTION

United States District Courts have jurisdiction to hear appeals from final judgments entered by bankruptcy courts pursuant to 28 U.S.C. §158(a).

STATEMENT OF THE ISSUE

Whether the United States Bankruptcy Court for the Eastern District of North Carolina properly held in its Order and Judgment entered respectively on March 26, 2007 and May 31, 2007 (Docket No. 1, Attachment Nos. 13 and 15) that Joseph N. Callaway, as Chapter 7 Trustee for the bankruptcy estate of Jacobsen Construction, Inc. (the “Trustee”), is entitled to avoid and recover \$55,625.27 preferentially transferred by the Debtor to Kiddco, Inc. (“Kiddco”) under Section 547 of the Bankruptcy Code.

STANDARD OF APPELLATE REVIEW

The District Court reviews the Bankruptcy Court’s granting of summary judgment *de novo*, applying the same standards as the trial court. See Sholdra v. Chilmark Financial, LLP, 249 F.3d 380 (5th Cir. 2001). 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 “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.” Chelates Corp. v. Citrate, 477 U.S. 317,323-324, 106 S. Ct. 2548, 91 LED.2d 265 (1986).

STATEMENT OF THE CASE

On February 23, 2006, the Trustee commenced an adversary proceeding versus Kiddco to avoid and recover transfers totaling \$111,270.34 as preferences pursuant to 11 U.S.C. §547 and, alternatively, as fraudulent transfers pursuant to 11 U.S.C. §548 (Docket No. 1, Attachment No. 3). On March 23, 2006, Kiddco filed an answer denying the relief sought by the Trustee and asserted the following statutory provisions as defenses: (a) 11 U.S.C. §547(c)(2), the ordinary course of business defense; (b) 11 U.S.C. §547(f) and (g), provisions addressing a debtor’s presumption of

insolvency and the relative burden of proofs arising under Section 547; (c) 11 U.S.C. 547(a)(2), the definition of “new value”; (d) 11 U.S.C. §547(c)(4), the subsequent new value defense; and (e) other unspecified defenses (Docket No. 1, Attachment No. 5).

On December 15, 2006, the Trustee moved for partial summary judgment and sought the avoidance and recovery of only one of the transfers at issue totaling \$55,625.27 as a preference pursuant to 11 U.S.C. §547 (Docket No. 1, Attachment No. 6). On January 8, 2007, Kiddco filed an objection to the Trustee’s motion (Docket No. 1, Attachment No. 10). After consideration of the parties’ memorandums of law and supporting materials (Docket No. 1, Attachment Nos. 10, 11, 22, 23, 24, and 25), an oral argument held on January 30, 2007 before the Honorable A. Thomas Small. On March 26, 2007, the Bankruptcy Court found and held that the \$55,625.27 at issue constituted a preference under 11 U.S.C. §547 and that the Trustee was entitled to avoid and recover the same from Kiddco as a matter of law (Docket No. 1, Attachment No. 13). On May 7, 2007, the Trustee moved for dismissal of the remaining claims pending in the suit versus Kiddco and for entry of a final judgment in the Trustee’s favor for the \$55,625.27 preference amount in accordance with the Bankruptcy Court’s March 26, 2007 ruling (Docket No. 1, Attachment No. 14). This motion was allowed on May 31, 2007, and the Trustee received a final judgment versus Kiddco for \$55,625.27 plus costs (Docket No. 1, Attachment No. 15).

On June 8, 2007, Kiddco filed a notice of appeal pursuant to 11 U.S.C. §158 (Docket No. 1) and thereafter filed its supporting brief on August 9, 2007 (Docket No. 4). On August 23, 2007, the Trustee received an extension of time to file his opposing brief up to and including September 26, 2007 (Docket No. 6). The Trustee now submits this Brief for the Court’s consideration.

STATEMENT OF THE FACTS

I. General Background.

The Trustee submits the following excerpt from the Bankruptcy Court’s Order of March 26, 2007 allowing the Trustee partial summary judgment as an accurate general background of the events leading to the Debtor’s preferential payment of the \$55,625.27 at issue:

Jacobsen Construction, Inc. was the general contractor pursuant to a construction contract with Wake Technical Community College, dated January 27, 2003, to construct the Wake Tech Automotive and Heavy Equipment Technology Complex. Kiddco, Inc. was a subcontractor pursuant to a subcontract with Jacobsen, dated April 7, 2004, and signed on April 12, 2004, to perform grading and grading-related construction services at the project.

Kiddco performed grading work under the subcontract and issued its first invoice to Jacobsen in the amount of \$90,625.27 on May 7, 2004. Although the subcontract called for payment in 30 days, the invoice erroneously stated that the payment was due in 15 days. Jacobsen made a partial payment of \$35,000 on June 8, 2004, leaving an unpaid balance of \$55,625.27. **Kiddco was concerned that the full amount of the invoice was not paid and threatened to leave the job if it did not receive payment for the full amount of the invoice.** Jacobsen delivered a \$55,625.27 check to Kiddco on June 29, 2004, and although Kiddco had begun to “demobilize” on June 25, with the payment on June 29, Kiddco stayed on the job and was still on the job when Jacobsen stopped work on August 5, 2004. Kiddco issued 2 more invoices, one on June 2, 2004, in the amount of \$102,366.70 and one on July 28, 2004 in the amount of \$113,878.76, but Jacobsen made no other payments to Kiddco on the Wake Tech project. The bonding company, Developers Surety and Indemnity Company, completed the construction work for Wake Tech and employed Kiddco to do extra work not contemplated in the original contract. On October 11, 2004, Kiddco and the surety executed a ratification agreement that contained mutual releases, including a release by Kiddco to the surety for liability for the Kiddco invoices paid by Jacobsen.

(Docket No. 1, Attachment No. 13, at 2-3) (emphasis added).

II. Facts Relevant to the Preferential Transfer.

On September 24, 2004, Jacobsen Construction, Inc. filed a voluntary petition in bankruptcy under Chapter 7 of the United States Bankruptcy Code. Within ninety (90) days of the commencement the bankruptcy case, it is undisputed that the Debtor transferred to and Kiddco received the following three (3) payments totaling \$111,270.34:

- a. **\$55,625.27 by Check No. 15148, dated June 28, 2004, clearing on June 30, 2004 (the “Transfer”)¹;**
- b. \$50,080.56 by Check No. 15195, dated July 9, 2004, clearing on July 12, 2004; and
- c. \$5,564.51 by Check No. 15248, dated July 23, 2004, clearing on July 29, 2004.

¹ The Transfer was the only payment at issue before the Bankruptcy Court. The Trustee did not pursue avoidance and recovery of the other two (2) payments for summary judgment purposes. Accordingly, the instant appeal also only concerns the Trustee’s avoidance and recovery of the Transfer as a preference pursuant to 11 U.S.C. §547.

(Docket No. 1, Attachment No. 5, at 2; Docket No. 1, Attachment No. 25, at 3-4) (emphasis added). The Transfer was made on account of an antecedent debt (Docket No. 1, Attachment No. 5, at 2), incurred while the Debtor was insolvent under 11 U.S.C. §547(f), and caused Kiddco to receive more than it otherwise would in this Chapter 7 proceeding had the Transfer not been made (Docket No. 1, Attachment No. 24, at 3).

ARGUMENT

I. **The Transfer at Issue is a Preference under Section 547(b) of the Bankruptcy Code.**

Section 547(b) of the Bankruptcy Code sets forth the following elements of an avoidable preference:

Except as provided in subsection (c) of this section, the trustee may 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 filing of the petition; or
 - (B) between ninety days and one year before the date of the 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 –
 - (A) the case were a case under chapter 7 of this title;
 - (B) if 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.

11 U.S.C. §547(b); see also In re Strom, 46 B.R. 144 (Bankr. E.D.N.C. 1985).

In the instant case, and as properly found by the Bankruptcy Court, all the elements of a preference are present without condition regarding the Transfer for \$55,625.27. It is undisputed the Transfer made by Debtor to Kiddco was received, occurred within 90 days of the Chapter 7 filing date of September 24, 2004, and was made on account of an antecedent debt (Docket No. 1, Attachment No. 5, at 2; Docket No. 1, Attachment No. 25, at 3). Kiddco admits to receiving the payment. See id. Furthermore, a *prima facie* case for insolvency is established pursuant to 11 U.S.C. §547(f), which states that, “[f]or the purposes of [Section 547], the debtor is presumed to

have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.” As correctly noted in the Bankruptcy Court’s March 26, 2007 Order, Kiddco failed to produce any evidence to rebut this presumption of insolvency (Docket No. 1, Attachment No. 13, at 4). Accordingly, the Bankruptcy Court found that “it is not contested that the trustee has established the elements of a preferential transfer under [Section] 547(b)(1) through (4).” Id.

The record before this Court also conclusively establishes that the Transfer enabled Kiddco to receive more than it otherwise would in this Chapter 7 proceeding had the Transfer not been made, thereby satisfying the final requirement for a preference under Section 547(b)(5). The Trustee’s affidavit filed in support of his motion for partial summary judgment before the Bankruptcy Court confirmed the state of actual assets and liabilities of the Debtor, along with potential claims, administrative and other expenses to be paid and incurred in the bankruptcy case (Docket No. 1, Attachment No. 24). The affidavit further established that unsecured claims in the Debtor’s Chapter 7 case would not be paid in full. See id. Therefore, as pointed out by the Trustee, Kiddco’s receipt of the Transfer enabled it to receive more than it otherwise would in this Chapter 7 proceeding had the Transfer not been made. See id. As explained below, Kiddco has produced no evidence to the contrary.

The Bankruptcy Court concluded in its March 26, 2007 Order, Kiddco’s argument that the Section 547(b)(5) component has not been established is baseless (Docket No. 1, Attachment No. 13, at 5). The Bankruptcy Court’s analysis of the issue warrants careful attention.

Kiddco argues that had the payment not been made by Jacobsen, it would have been paid in full pursuant to the bond. According to Kiddco, its claim would have been satisfied whether or not it was paid by Jacobsen and whether or not Jacobsen was a debtor in chapter 7. First of all, it is by no means certain Kiddco would have been paid in full by the bonding company if it had made good its threat to leave the job. In fact, it received only partial payment from the bond for its two outstanding invoices.

The United States District Court for the Eastern District of North Carolina was confronted with a similar issue under [Section] 547(b)(5) in which a subcontractor, by accepting payment from a contractor, gave up its inchoate right to file a mechanics and materialman’s lien. In that case the subcontractor did not prevail. Precision Walls, Inc. v. Crampton, 196 B.R. 299 (E.D.N.C. 1996). Kiddco had no lien rights, inchoate or otherwise, with respect to property of the debtor and gave up

no lien rights by accepting payment. The bonding company would have had subrogation rights against Jacobsen **if** Kiddco had made a claim against the bonding company and **if** the bonding company had paid Kiddco, but those facts are even further removed from the circumstances that the court found did not support the subcontractor's contention under [Section] 547(b)(5) in Precision Walls.

From the perspective of the debtor's estate, the debtor was insolvent and had insufficient funds to pay **all creditors** in chapter 7. Kiddco, as already stated, had no specific claim to funds that Jacobsen received from Wake Tech, and, **absent the \$55,625.27 payment, there were not sufficient assets in the bankruptcy estate to pay that amount to Kiddco**. For purposes of applying [Section] 547(b)(5), the court must look to the availability of assets of the estate, not the assets of a bonding company or a third party guarantor. Accordingly, the trustee has meet all the requirements of [Section] 547(b).

Id. (emphasis added).

Based on the foregoing analysis, Kiddco's continued challenge of the Section 547(b)(5) requirement in its brief before this Court is without merit. Kiddco erroneously relies upon decisions such as In re J.A. Jones, Inc., 361 B.R. 94 (Bankr. W.D.N.C. 2007) for the proposition that, if a creditor could have filed a lien, and it would have been paid in full in a hypothetical bankruptcy, the payment is not a preference because it does not meet the requirements under Section 547(b)(5). As pointed out in repeatedly by the Bankruptcy Court in its March 26, 2007 Order, this line of reasoning would require a court to improperly make assumption upon assumption, all of which are not supported by a shred of evidence proffered by Kiddco.

[I]t is by no means certain that Kiddco would have been paid in full by the bonding company if it had made good its threat to leave the job. In fact, it received only partial payment form the bond for its two outstanding invoices. . . . In the adversary proceeding before this court, Kiddco has not shown that by giving up its claim, it would have been paid in full. In fact, as previously stated, Kiddco was not paid in full by the bonding company for all of the work it performed for Jacobsen. . . . In this case there is no evidence that Kiddco had even contacted the bonding company at the time of payment.

(Docket No. 1, Attachment No. 13, at 5-7).

Moreover, Kiddco conveniently ignores the Bankruptcy Court's finding that "the debtor was insolvent and had insufficient funds to pay **all** creditors in chapter 7." Id. at 5 (emphasis added). This would necessarily include any potential bond claimants subrogated to a claim of Kiddco or any

other subcontractor of the Debtor. The claim would not have gone away; the liabilities total would have remained the same.

The evidence conclusively establishes as a matter of law that Kiddco, or a hypothetical subrogated bond claimant, would not have been paid in full in this Chapter 7 case. Kiddco therefore received more than it otherwise would have had the Transfer not been made, and the Trustee has satisfied his burden under all of the elements of Section 547(b) to establish that the \$55,625.27 payment at issue constituted a preferential transfer.

II. The Transfer is Not Subject to Any Affirmative Defense Arising Under Section 547(c).

As previously noted, Kiddco's answer filed in this proceeding asserted the following statutory provisions as defenses: (a) 11 U.S.C. §547(c)(2), the ordinary course of business defense; (b) 11 U.S.C. §547(f) and (g), provisions addressing a debtor's presumption of insolvency and the relative burden of proofs arising under Section 547; (c) 11 U.S.C. 547(a)(2), the definition of "new value"; (d) 11 U.S.C. §547(c)(4), the subsequent new value defense; and (e) other unspecified defenses (Docket No. 1, Attachment No. 5).

Sections 547(f) and (g) are irrelevant as they pertain to Section 547(b) and the establishment of a *prima facie* preference claim. Section 547(a)(2) simply cites the definition of "new value" as contemplated under Section 547 and is not an affirmative defense in and of itself.

Kiddco's inclusion of other unspecified defenses (i.e., "other defenses to the preference action available to Defendant pursuant to 11 U.S.C. §547 *et seq.*") falls well short of the pleading requirements required under Bankruptcy Rule 7008 and Rule 8(c) of the Federal Rules of Civil Procedure and should be ignored. See 2 James Wm. Moore, Moore's Federal Practice §8.07[1] (3^d ed. 2007) (stating that a "defendant must specifically plead all affirmative defenses, whether enumerated in [Rule 8(c)], because affirmative defenses, if accepted by the court, will defeat an otherwise legitimate claim for relief. Therefore, affirmative defenses must be set forth to avoid surprise and give the opposing party an opportunity to respond."). No amendment to specify other defenses was ever sought by Kiddco in this case.

If “the trustee satisfies all of the elements of section 547(b) in attacking a transfer, the transfer may not be avoided if the defendant transferee can prove that it is entitled to rely on one of the exceptions listed in section 547(c).” 5 Lawrence P. King, Collier on Bankruptcy §547.04 (15th ed. revised 2007). The Court’s determination of whether the Transfer at issue constitutes an avoidable preferential transfer therefore depends upon the applicability of a Section 547(c) affirmative defense. The record competent for the Court’s review demonstrates that Kiddco’s attempts to avail itself of Section 547(c) are futile and that none of these defenses apply.

A. Section 547(c)(1) – Contemporaneous Exchange for New Value Defense.

Kiddco’s primary argument relies upon Section 547(c)(1), which provides that a preferential transfer may not be avoided to the extent the transfer was “(A) 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 (B) in fact a substantially contemporaneous exchange.” 11 U.S.C. §547(c)(1). At the outset, the Trustee notes for the record that Kiddco failed to properly plead Section 547(c)(1) as an affirmative defense in its answer (Docket No. 1, Attachment No. 5). Accordingly, this defense is subject to being waived by this Court. See S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co., 353 F.3d 367, 372-73 (4th Cir. 2003). It is acknowledged, however, that in pleading a defense arising under Section 547(a)(2), Kiddco’s answer included that the transfers at issue “were made as contemporaneous exchange(s) for new value...” (Docket No. 1, Attachment No. 5). The Trustee will therefore address the substance of this defense.

The thrust of Kiddco’s Section 547(c)(1) argument, which relies exclusively upon non-4th Circuit case law, is that by accepting the Transfer for \$55,625.27, it relinquished its claim against the bonding company, thereby constituting, Kiddco argues, a contemporaneous exchange for new value under Section 547(c)(1). As the Bankruptcy Court further explained in its March 26, 2007 Order, “[a]ccording to Kiddco, if it had made a claim against the bonding company, the bonding company would have paid Kiddco and the bonding company would have had a claim against

Jacobsen's assets, including a claim by subrogation to all sums owing to Jacobsen by Wake Tech arising from the project." (Docket No. 1, Attachment No. 13, at 6).

Here again, the Bankruptcy Court's proper analysis of Kiddco's purported Section 547(c)(1) defense bears close scrutiny in repudiating Kiddco's position:

In the adversary proceeding before this court, Kiddco has not shown that by giving up its [bond] claim, it would have been paid in full. In fact, as previously stated, Kiddco was not paid in full by the bonding company for all of the work it performed for Jacobsen. . . . In this case there is no evidence that Kiddco had even contacted the bonding company at the time of payment.

In Perlman v. Reliance Insurance Co., 371 U.S. 132, 83 S.Ct. 232 (1962), the Supreme Court held that a bonding company that has paid claims of subcontractors is subrogated to funds due to the contractor by the owner of the project. In the adversary proceeding before this court, the funds from which the payments were made to Kiddco came from a payment made by the owner, Wake Tech, to Jacobsen. Kiddco's argument assumes that if had not been paid by Jacobsen it would have immediately made a claim against the bonding company and that the bonding company would have immediately paid the claim and become subrogated to funds, previously paid and to be paid to Jacobsen by Wake Tech, sufficient to pay the claims of Kiddco and the other project subcontractors. Those assumptions are entirely too speculative. The court will not speculate that Kiddco would have immediately made a claim, that the bonding company would immediately pay the claim, and that the bonding company would have been subrogated to sufficient assets, including past and future payments from Wake Tech, to pay Kiddco and the other subcontractors in full. For these reasons Kiddco has not presented facts that support its defense under [Section] 547(c)(1).

Id. at 7.

The Bankruptcy Court referred to its opinion in Precision Walls, Inc. v. Crampton (In re The Accord Group, Inc.), Case No. 93-01865-5-ATS (Bankr. E.D.N.C. June 28, 1995), in which it rejected a similar argument under Section 547(c)(1) where a subcontractor released inchoate lien rights by accepting payment from the contractor. This Court's decision in Precision Walls, Inc. v. Crampton, 196 B.R. 299 (E.D.N.C. 1996), refers to Judge Small's earlier holding but there was no appeal taken from the Section 547(c)(1) component of the ruling. See id.

Based on the foregoing analysis, it is clear that Kiddco has failed to establish the applicability of Section 547(c)(1) as a matter of law. The Transfer should therefore survive this defense.

B. Section 547(c)(6) – Fixing of a Statutory Lien Defense.

It appears from Kiddco's brief filed in the present appeal that the only remaining affirmative defense it is now asserting arises under Section 547(c)(6), which provides that a preferential transfer may not be avoided if it "is the fixing of a statutory lien that is not avoidable under section 545 of this title." 11 U.S.C. §547(c)(6). However, no evidence or authority has been proffered by Kiddco that would support this purported defense. Furthermore, Kiddco failed to plead Section 547(c)(6) as an affirmative defense in its answer and its assertion for the first time now on appeal is wholly improper. The Trustee respectfully requests that this defense be deemed waived. See S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co., 353 F.3d 367, 372-73 (4th Cir. 2003).

C. Section 547(c)(4) – Subsequent New Value Defense.

Kiddco's answer filed in this proceeding further raises the subsequent new value defense of Section 547(c)(4), which provides that a preferential transfer may not be avoided to the extent the transfer was:

to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

- (A) not secured by an otherwise unavoidable security interest; and
- (B) on account of which new value the debtor did not make an otherwise avoidable transfer to or for the benefit of such creditor[.]

11 U.S.C. §547(c)(4).

The record reflects that Kiddco has apparently abandoned this defense. It was not pursued in the Bankruptcy Court and is not addressed in Kiddco's appeal brief. Further, as succinctly noted in the Bankruptcy Court's March 26, 2007 Order, the record shows that "most if not all of the work that Kiddco performed for Jacobsen was done **prior** to the date of payment [of the Transfer]. Accordingly, Kiddco cannot prevail under [Section] 547(c)(4)." (Docket No. 1, Attachment No. 13, at 8) (emphasis added).

D. Section 547(c)(2) – Ordinary Course of Business Defense.

The final defense raised in Kiddco's answer is the ordinary course of business defense arising under Section 547(c)(2), which provides that a preferential transfer may not be avoided to the extent the transfer was:

- (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
- (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
- (C) made according to ordinary business terms[.]

11 U.S.C. §547(c)(2)².

Here again, it appears that Kiddco has abandoned this defense since the record shows that Kiddco engaged in non-ordinary collection activity to recover the Transfer from the Debtor.

With regard to . . . Check No. 15148, for \$55,625.27, this was the balance of invoice number 1159, which was partially paid. When the full amount of invoice 1159 was not received, Mr. Kidd demanded payment. When payment was not received, Mr. Kidd informed Mr. Jacobsen on Friday, June 25, 2004, that if payment was not made on Monday, June 28, 2004, Kiddco would demobilize, leave the job and demand payment from Jacobsen's Bonding Company.

(Docket No. 1, Attachment No. 25, at 16). The Transfer, dated June 28, 2004 and delivered to Kiddco the following day, was therefore non-ordinary and occurred only because of Kiddco's demands and threats to leave the job. The Bankruptcy Court likewise found that "Kiddco engaged in extraordinary conduct by threatening to leave the job if it was not paid by Jacobsen. Had the payment been made in the ordinary course of business it would not have made that threat. Kiddco may not prevail on its [Section] 547(c)(2) defense, because the payment was not in the ordinary course of its business." (Docket No. 1, Attachment No. 13, at 8).

The foregoing analysis conclusively demonstrates that Kiddco cannot avail itself of any affirmative defense arising under Section 547(c) and that the Debtor's preferential transfer of

² As the Chapter 7 filing date for Jacobsen Construction, Inc. was September 24, 2004, the version of Section 547(c)(2) cited above applies. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 implemented revisions to Section 547(c)(2), but the Act took effect on October 17, 2005 and does not apply to bankruptcy cases commenced prior to the effective date.

\$55,625.27 is properly subject to avoidance and recovery by the Trustee. Section 547 of the Bankruptcy Code is designed to facilitate the prime bankruptcy policy of equality of distribution among creditors of a debtor. In the instant case, it is clear that the Transfer was made only in response to Kiddco's demands for payment and threats to leave the job. The \$55,625.27 Kiddco received was more than it, or a hypothetical subrogated bond claimant, would receive in this Chapter 7 case. Kiddco was preferred to the detriment of other creditors of the Debtor. The Transfer must therefore be returned to the Trustee, on behalf of the Debtor's bankruptcy estate, as a matter of law.

CONCLUSION

For the foregoing reasons, the Transfer of \$55,625.27 received by Kiddco constitutes an avoidable preferential transfer under Section 547 of the Bankruptcy Code as a matter of law. The Trustee therefore prays that the Bankruptcy Court's decision be affirmed in its entirety.

Respectfully submitted, this the 26th day of September, 2007.

s/ A. Scott McKellar

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CERTIFICATE OF SERVICE

I, A. Scott McKellar, Attorney for Appellee in this action, hereby certify that on the 26th day of September, 2007, I served the documents to which this certificate is attached in accordance with Rule 5 of the Federal Rules of Civil Procedure:

APPELLEE'S BRIEF

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:

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