

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

In re:

Partitions Plus of Wilmington, Inc., dba
Partitions, Inc. dba Storm Protection Systems

Debtors

James B. Angell, Chapter 7 Trustee for
Partitions Plus of Wilmington, Inc., dba
Partitions, Inc. dba Storm Protection Systems

Plaintiff,

v.

United Rentals, Inc.

Defendant

Chapter 7

Case No. 04-06776-8-JRL

Adversary Proceeding
No. 06-00152-8-JRL

**DEFENDANT UNITED RENTALS,
INC.' S POST TRIAL
MEMORANDUM OF POINTS AND
AUTHORITIES**

COMES NOW the Defendant, United Rentals, Inc. ("United Rentals"), by counsel, and submits its Post Trial Memorandum of Points and Authorities, stating as follows:

The contemporaneous exchange in this case was the discharge by the Transfer payments received of multiple rights or causes of action owned by United Rentals. United Rentals owned property rights in the form of a direct security interest in property of the Debtor (Lien on Funds); a security interest in the Mayfaire real property (Lien on Real Property); and a cause of action against both payments bonds (Bond Claims). The allegedly preferential Transfers discharged or eliminated these property rights in United Rentals immediately as a matter of law, exchanging cash from the Debtor for property rights of United Rentals of equal value.

The most helpful analogy may be a mortgage lender. Each time a debtor sends a monthly payment to the mortgage company, the creditor's security interest in the mortgage property is correspondingly decreased immediately. No one would try to contend that such monthly mortgage payments would be preferential in the 90 days prior to a bankruptcy petition. No one would expect a mortgage company to prove that the mortgage company would have enforced its security interest

through foreclosure proceedings if the payments were not received.

It is respectfully submitted that it is irrelevant whether United Rentals would have begun perfection or enforcement proceedings in the absence of the Transfer payments in the instant case. It is irrelevant whether United Rentals was even aware that they possessed these security interests or causes of action. United Rentals had current ownership of property in the form of two different security interest and three causes of action, discharged or eliminated by the payments.

Some courts have struggled with the need to prove and the difficulty of proving that enforcement of mechanic's lien or bond rights would have occurred. As often noted, it is probably impossible to ever prove and is probably even objectionable as a line of questioning, because it is entirely hypothetical. *J.A. Jones* dealt with this in an illuminating public policy analysis. *In re Lockwood Greene Eng., Inc. v. Binsky & Snyder, Inc. (In re J.A. Jones, Inc.)*, 361 B.R. 94, 103 (Bankr. W.D.N.C. 2007). Public policy does not want suppliers of labor and material to enforce mechanic's lien or bond rights, *even after they have received payment for the labor and materials*. This would be the result of any rule requiring actual perfection or enforcement to safeguard against future preference claims. Labor and material suppliers would need to perfect and enforce mechanic's lien and bond rights, whether they expected timely payment or had even actually received payment, disrupting commerce and raising legal battles towards no end.

This public policy argument is absolutely correct, but misses the point to some extent. The Transfer payments automatically discharged currently possessed rights, security interests and causes of action in United Rentals of a value equal to the Transfer payments. That was the contemporaneous exchange. The bankruptcy estate was not diminished and the distribution to general unsecured creditors was not impaired.

The mortgage lender analogy is most readily applicable to United Rentals' Lien on Funds. As noted in *J.A. Jones*, United Rentals was currently a *secured lender* in property of the estate, since

North Carolina is a lien on funds state. *In re J.A. Jones, Inc.*, 361 B.R. at 101. It is also significant that the Trustee had the burden of proof in this instance. However, United Rentals presented competent evidence that *at the time* of the transfers, United Rentals was a secured lender in funds of the estate held by the general contractors and actually continued to be a secured lender of the Debtor for many months afterwards.

The lien rights of labor and material suppliers in North Carolina, as in most states, are “Inchoate”. This means that the security interest existed from the moment labor or materials were supplied. See *N.C. Gen. Stat. § 44A-22 Priority of Liens on Funds; Carolina Bldrs. Corp. v. Watson Elec. Constr. Co., (In Re Alexander-Scott Group Ltd.)*, 1996 U.S. Dist. LEXIS 10121 (Bankr. M.D.N.C. 1996); *Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 242 S.E.2d 785 (1978); *Miller v. Lemon Tree Inn of Roanoke Rapids, Inc.*, 32 N.C. App. 524, 233 S.E.2d 69 (1977). It is accurate to say that the lien rights are “lost” if not perfected and or enforced in a timely manner. However, the lien rights could not be “lost” if they were never possessed. The evidence showed that United Rentals lien rights had not expired at the time of the transfers and that United Rentals had a current security interest in the funds held by the general contractors at the time of the Transfers.

United Rentals also owned a security interest in the Mayfaire real estate at the time of the transfers. See *N.C. Gen.Stat. § 44A-10 Effective date of claim of lien on real property; Carolina Bldrs. Corp. v. Watson Elec. Constr. Co., (In Re Alexander-Scott Group Ltd.)*, 1996 U.S. Dist. LEXIS 10121 (Bankr. M.D.N.C. 1996); *Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 242 S.E.2d 785 (1978); *Miller v. Lemon Tree Inn of Roanoke Rapids, Inc.*, 32 N.C. App. 524, 233 S.E.2d 69 (1977). The analogy of the mortgage lender is again applicable, but is more complicated from an evidentiary point of view. United Rentals now has the burden of proof *and* evidence on the status of accounts between the property owner and the general contractor becomes necessary. The security interest was not in property of the estate. Again, however, United Rentals presented competent

evidence that the owner was holding sufficient funds from the general contractor EMJ at the time of the Transfers, along with the evidence of sufficient funds held by EMJ against the Debtor, such that United Rentals was fully secured in the Mayfaire property at the time of the Transfers. It is accurate to say that if the Transfers were not received, United Rentals could have filed a mechanic's lien on the real property; that the owner could have and would have withheld an equal sum from the general contractors; that the general contractor could have and would have withheld an equal sum from the Debtor, with the result that the estate was not in any way diminished by the Transfers. *In re J.A. Jones, Inc.*, 361 B.R. at 103. While these are entirely accurate statements, these statements again miss the point to some extent. It is probably more accurate to say that United Rentals was the owner of a security interest in the Mayfaire property at the time of the transfers that was discharged as a matter of law by the transfers and that this was the contemporaneous exchange. This proper evidence of the "triangulation" of funds goes to prove that United Rentals exchanged property rights that *had a value* equal to the amount of the Transfers.

The evidence and analysis of United Rentals' bond claims is very similar. Again United Rentals has the burden of the proof. The only additional evidence necessary is the existence of the payment bond. Otherwise, the necessary evidence is identical to that for the Lien on Funds: sufficient funds of the Debtor in the hands of the general contractors on the Mayfaire and Doshier projects at the time of the Transfers. There is also one conceptual legal difference. United Rentals was not a secured lender in property of the estate or in the Mayfaire real property in this instance, United Rentals was the owner of a cause of action against the payment bond. The uncontroverted evidence showed that United Rentals currently had rights against the payment bond at the time of the transfers. Again, that property right of United Rentals against the payment bond had a value equal to the amount of the Transfers and the estate was in no manner diminished by this contemporaneous exchange and automatic discharge of United Rentals rights against the bond in exchange for the Transfers. United

Rentals “had a matured claim against the surety bond, the surety had an equitable lien on the contract amounts held by [Bovis and EMJ], and [Bovis and EMJ] could fully recoup the amount from retainage due [Debtors].” *In re GEM Constr. of Virginia*, 262 B.R. 638, 651-52 (Bankr. E.D. Va 2000); *See also In re E.R. Fegert, Inc.*, 887 F.2d 955, 959 (9th Cir. 1989); *See also In re Fuel Oil Supply & Terminaling, Inc.*, 837 F.2d 224, 229-30 (5th Cir. 1988).

The identical evidence presented by United Rentals for the Lien on Funds showed that the Mayfaire and Doshier general contractors were holding funds of the estate at the time of the Transfers in an amount that exceeded the Transfers. The bonding company had equitable lien subrogation rights against those funds at the same time. The transfers to United Rentals discharged their right against the payment bond, contemporaneously discharging the bonding company’s subrogation rights against the funds held by the general contractor and *increasing* the Debtor’s rights to those funds in an equal amount. Accordingly, on the evidence presented, the automatic discharge of United Rentals’ cause of action against the payment bond by the transfers was a contemporaneous exchange for *equal* value. Just like in the lien on funds and the lien on the real property, the estate was in no way diminished and the distribution to general unsecured creditors not impaired.

WHEREFORE, United Rentals respectfully prays that the complaint against it be dismissed, with prejudice.

This the 4th day of March, 2008.

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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendant United Rentals, Inc.'s Post Trial Memorandum of Points and Authorities was sent by U.S. Mail, postage prepaid, and via Facsimile on this the 4th day of March 2008 to:

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